CHAPTER I.

THE LAW RELATING TO GIFTS.

SECTION I.

GENERAL OBSERVATIONS.

UNDER the Mahommedan Law, there is no distinction between ancestral and self-acquired property. The owner for the time being has absolute dominion over all property in his possession, whether he has acquired it himself or whether it has devolved upon him by inheritance. He can sell or dispose of it in any way he likes, provided operation is given to the transaction in his lifetime. It is only with regard to dispositions intended to take effect after the owner's death or made when he is suffering from a malady which creates in his mind the fear of death that his power of disposition is limited by the right of his heirs and restricted to a third.

This restriction on the disposing powers of a Mahommedan is referred to in the following terms by the Privy Council in the case of *Rani Khujoor-unnissa* v. *Mussamut Roushan Jehan.*(1)

Rani Khujoor-unnissa v. Mussamut Roushan Jehan.

"The policy of the Mahommedan Law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms."

This restriction, which is not without analogy in certain European systems,(2) is surrounded with conditions which require great attention in the study of the Mussulman Law.

Dispositions of property divide themselves under two heads, *viz.* :—

(1) Dispositions *inter vivos*.

(1) [1871] L. R., 3 Ind. App., 291 ; s. c. I. L., 2 Cal., 184.

(2) See Peterson's English and Scotch Law (1860), pp. 223-224.

(2) Dispositions which are in their nature testamentary, and which are not intended to operate until after the death of the person disposing.

A disposition, however, made at a time when the disposer was suffering from a disease, which is technically called "death-illness" (*marz-ul-mout*,) is treated as a testamentary disposition. But we shall discuss this in detail in due course.

Dispositions of property.

The dispositions *inter vivos* with which we have principally to concern ourselves are *Hiba* and *Wakf*.

(1) HIBA.—A *hiba* is a grant, and is, generally speaking, divisible under three heads :

(*a*) A *hiba*, pure and simple.

(*b*) A *hiba b'il ewaz* (a grant or gift for a consideration) which is more in the nature of an exchange than a gift.

(*c*) A *hiba ba-shart-ul-ewaz*, or a grant made on the condition that the donee or transferee should pay to the donor at some future time or periodically some determinate thing in return for the grant.

(2) WAKF.—A *wakf* is the settlement in perpetuity of the usufruct of any property for the benefit of individuals or for a religious or charitable purpose.

A *hiba*, pure and simple, is the voluntary transfer, without consideration, of some specific property (whether existing in substance or as a *chose in action*). This definition will be more fully explained later.(1)

In the Sunni Law, the grant of the usufruct for a limited time, without consideration and resumable at will, is called an *'aâriat* (*commodatum*).(2) The distinction between *hiba* and *'aâriat*, between the gift of the *corpus* or substance of a thing, and of the mere income for a limited time, was discussed at considerable length by the learned Subordinate Judge of Aligarh in the case of *Muhammad Faiz Ahmad Khan* v. *Ghulam Ahmad Khan*,(3) whose judg-

Muhammad Faiz Ahmad Khan v. Ghulam Ahmad Khan.

(1) In the Transfer of Property Act, a gift is defined thus :—" Gift is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person called the donor, to another called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

(2) For the Shiah rule, see *post*.

(3) [1881] I. L., 3 All., 490.

ment was subsequently affirmed and adopted by both the High Court and the Privy Council. The judgment is so exhaustive and thorough, that I cannot do better than transcribe a portion to illustrate my meaning :—

"To make a person the owner of the substance of a thing without consideration is a *hiba* (gift), while to make him the owner of the profits only without consideration is an *'aâriat* or *commodatum ; 'Aariat.* (vide *Durr-ul-Mukhtâr, Kitâb-ul-hiba*). In a gift it is essential that the donor should be sane, owner and of age, that the thing given be not undivided (*mushâa*), and be in possession of the donor, and that there be proposal and acceptance. A gift is not void for invalid conditions ; on the contrary, the conditions are void.

"For example, if a slave be made a gift of, with the condition that the donee should set him free, the condition is void but the gift is valid (*Durr-ul-Mukhtâr, Kitâb-ul-hiba*). In an *'aâriat*, it is not necessary that the donor should be of age, nor that the thing given should be divided, nor is acceptance after proposal a condition (*Alamgiri*). In the *Imâdia*, it is explained that the *'aâriat* of a joint property is valid, and so are its deposit and sale (*Durr-ul-Mukhtâr, Kitâb-ul-'aâriat*). The words by which an *'aâriat* is constituted have a special chapter assigned to them in the *Alamgiri*, and I shall copy it in this place to show what words are used in giving a thing in *'aâriat*, and of what signification :—(Second Chapter, *Kitâb-ul-'aâriat, Alamgiri.*) If he said, 'I have made thee owner of the profits of this house for a month,' or, without saying 'a month,' 'without a consideration,' it will be an *'aâriat*. This is in the *Fatâwa* of Kazi Khan. And it is valid by the words :—'I lent thee this robe, thou mayest wear it for a day,' or 'I lent thee this house, thou mayest live therein for a year' (*Tatarkhania*). If he said, 'I make this house of mine thy residence for one month' or, if he said, 'thy residence for my lifetime,' this will be an *'aâriat ;* (this is in the *Zahiria*). ..... And if he said, 'my house is for thee a gift by way of residence,' or 'a residence by way of gift,' it is an *'aâriat ;* this is so in the *Hedâya*. And if he said, 'my house is for thee given by way of a residence,' or 'a residence by way of *sadkah* (alms),' or 'a *sadkah* by way of *'aâriat*,' or 'a loan (*'aâriat*) by way of gift,' all this is *'aâriat ;* this is so in the *Kâfi*. And if he said, 'my house is for thee, if thou survivest

me, and for me if I survive thee,' or 'for thee a *wakf*,' it is an *'aâriat* according to Abû Hanîfa and Mohammed, but a gift according to Abû Yusûf, and the words '*rakba*' and '*habas*' are void; this is so in the *Badâia*. If he said, 'my house is for thee, if thou outlivest me, and for me, if I outlive thee,' or 'a *wakf* for thee,' it will be an *'aâriat* according to all; this is so in *Yanabia*. 'I made over this ass to thee, so that thou mayest use it and feed him with grass at thy own cost,' this will be an *'aâriat*. This is so in *Kunia*. If he said, 'I have given thee this tree for eating the fruit thereof, it is an '*aâriat*, unless he intends a gift by it. This is so in *Tamar Tashi*."

Muhammad Faiz Ahmad Khan v. *Ghulam Ahmad Khan*— (contd.)

"These are the words from which an *'aâriat* is construed, and it will also appear from looking at all of them that the word '*wahabto*' (I made a gift) is not found anywhere among them. The words '*hibatan suknah*' or '*suknah hibatan*,' which are used above, do not mean a gift of the substance of the thing. They are only an elucidation of '*dari laka*,' so that the meaning is that the house which is given is for residence. I shall now give those words which constitute a gift, and they are of three kinds :—*First*, those which are specially made (adapted) for a gift; *secondly*, those which denote a gift, metaphorically or by implication; and, *thirdly*, those which import *hiba* or *'aâriat* equally. I copy the following from the *Alamgiri*, *Kitâb-ul-hiba*, Chapter I. "The words by which gift is made are of three kinds :—*First*, those which are specially adapted or made for *hiba*; *secondly*, those which denote *hiba* by implication or metaphorically; and *thirdly*, those which may import *hiba* or *'aâriat* equally. Of the first kind there are such as these :—'I made a gift of this thing to thee,' or 'I made thee owner of it,' or 'I made it for thee,' or 'this is for thee,' or 'I bestowed upon thee or gave thee this.' All this is *hiba*. Of the second description are such as these :—'I clothed thee in this garment,' or 'I gave thee this house for thy lifetime.' This is a gift. In the same way, if he said 'this house is for thee for my age,' or 'for thy age' or 'for my lifetime' or 'for thy lifetime, so that when thou art dead it will revert to me,' then the gift will be valid and the condition void. But the third kind are such as these :—Should he say 'this house is for thee,' or 'for me if I survive thee,' or 'a *wakf* for thee, and make it over to him, it is an *'aâriat*, according

to the two, Abû Hanîfa and Mohammed, and a *hiba* (gift) according to Abû Yusûf. The above question shows that the word '*wahab-to*,' the meaning of which is 'I made a gift of,' is a word specially adapted for gift (*hiba*), and is not used to denote a loan. And this is the word which has been used in the document entitled *hibanâmah* (deed of gift). None of the doubtful words have been used in this document, and the words used after it are by way of advice (*mashwara*). There is an example in the law-books eminently applicable to the present case, which makes it clear that the transaction in dispute was one of *hiba* and not of *'aâriat*. This example is to be found in all the books, in the *Hedâya*, in the *Durr-ul-Mukhtâr*, and in the *Alamgiri* :—'*dari laka hibatan taskunahu*,'—'My house is for thee by way of gift that thou mayest live in it.' It is a rule in Arabic that a verb sentence is never used as explicative (*tafsir*) of a noun sentence ; '*dari laka hibatan*' is a noun sentence and '*taskunahu*' a verb sentence ; '*taskunahu*' cannot therefore be explicative of the preceding sentence. On the contrary, the donor, by way of advice, counsels the donee to live in it ; and the latter is free to adopt the counsel or not. Among the sentences by which a valid gift may be made the following appears in the law-books :—*Durr-ul-Mukhtâr*, 'my house is for thee that thou mayest live in it. Because the words 'that thou mayest live' (*taskunahu*) are an advice and not an explanation, for a verb is not adapted to be explicative of a noun. So then he counsels him in the mode of his proprietorship by telling him to live in it. So if he likes, he can accept the advice, or he may not accept it. But if it be said, '*dari laka hibatan suknah*' or '*suknah hibatan*' as mentioned in the words used to describe an '*aâriat*, there '*hibatan suknah*' is a *tafsir* or explanation of ownership, contrary to '*dari laka hibatan taskunahu*' where it is not a *tafsir*. *Hedâya* :—If he said 'by way of gift, that thou mayest live in it,' then it is a gift, for his saying '*taskunahu*' 'that thou mayest live in it,' is an advice, and not an explanation and it is an index of the object, unlike his saying '*hibatan suknah*,' for it is *tafsir* to it. In the deed of gift, the words, 'made a gift of' and 'put her in possession,' are followed by the direction that the sister-in-law may manage the villages and apply their income to meet her necessary expenses and to pay the Government revenue ; this is all by way of advice and the transaction of gift concluded with the preceding words. The words *hiba kiya* '(made a gift of),' de-

Distinction between *'aâriat* and *hiba*.

Distinction between *'aâriat* and *hiba*— (contd.)

note their real meaning and are made use of with reference to the two villages. It is a rule in every language that a word is always understood to be used in its literal meaning, though of course when the literal meaning is not applicable the metaphorical one may be understood. It is not necessary to refer to Arabic books alone for further corroboration of this fact. The word 'gift' is perfectly applicable in its literal sense in the document, where these words are used. The donor was not a minor, nor the subject of gift *mushâa* (undivided). There is no reason why the word *hiba* should be held to mean an *'aâriat* (loan), and why, when it is clearly stated that the mouzas of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mouzas, Kamalabad and Sahauli were given as *'aâriat*. On a perusal of the whole document, it clearly appears that Faiz Ahmad Khan never even thought of effecting an *'aâriat*. He has used sufficient words by which nothing but a gift could be intended. The whole manner is that of a gift, and there is not even the trace of an *'aâriat*. The value of the property was fixed, the full stamp-duty was paid, and lest the property should be suspected to be *mushâa*, or undivided, and the gift vitiated on that account, he stated that 'both villages are owned by me without the partnership of any one else.' Then using the word *'hiba,'* he declared that he had made a gift and confirmed it, so far as to write that neither he nor his heirs shall have any claim. At the conclusion, he expressed the nature of the document by saying that he had written it by way of a deed of gift. He also stated in the document that he had made over the possession to the Mussamât, which is the completion of the gift (but which is not necessary in an *'aâriat* or loan). He made the Mussamât execute a document in the way of *kabuliat* (acceptance) which was necessary for the validity of the gift (not necessary in an *'aâriat*). After the conclusion of the words of the document and writing *'fakat'* (end), the words headed 'P. S. I promise,' used by the defendant, further elucidated the nature of the gift and show that it was a *hiba-bil-ewaz* (gift for consideration). There is no reason why all the words should not be understood in their literal sense, and why the transaction should be considered as *'aâriat* (*commodatum*), about which there is no word at all in the whole document. The transaction cannot be considered to be an *'aâriat*, unless all the words be construed in a sense other

than literal: but for this there must be a very strong reason, which the Court thinks does not exist."(1)

The result of the ruling of the Privy Council in this case appears to me to be this, that "where there is an absolute gift words describing its objects do not limit or cut down its operation." The distinction between *hiba* and *'aâriat* may be stated in a very few words. In one case the transferee acquires a right to the property; in the other, he only obtains its use or beneficial enjoyment for a limited time; the property does not pass to him.

SECTION II.

'HIBA' OR GIFT SIMPLE.

Principle.

HIBA OR GIFT SIMPLE.—Among Mahommedans, the law relating to the subject of *hiba* possesses special importance. The principle of exclusion which prevails in all the schools and the absence of the right of representation, cause much hardship. For example, if a man has three sons, one of whom dies in the lifetime of his father leaving children, these children are excluded from the inheritance of their grandfather by their uncles. Females under the Mahommedan Law take smaller shares than sons. Under the Sunni Law especially, owing to the principle of agnacy, (*t'asîb*), considerable injustice is frequently occasioned which it is often the endeavour of owners of property to avert in their lifetime. The children of a daughter are excluded from inheritance in favour of brother's sons. To remedy these evils, it has become frequent among Mussulman families in India, as elsewhere, to have recourse to *hibas*, whereby it is not only endeavoured to correct any such injustice as I have indicated, but oftentimes to give a larger share to one heir than the other. The lawfulness of giving a larger share to one heir by a disposition *inter vivos* is specially recognised.

The *Durr-ul-Mukhtâr*, quoting the *Fatâwai Kâzi Khan* under its usual designation of *Khânîêh*, says—"There is no objection to being more fond of one child than another for it is an act of the heart; similarly in the matter of gifts so long as there is no intention of injury to the others; and if there is an intention to de-

(1) I have given this judgment *in extenso* to throw into strong relief, the distinction between *hiba* and *'aâriat* so clearly pointed out by the Subordinate Judge in this case.

tract (*i.e.*, to reduce their shares) then he should make their shares equal, that is, give to a daughter, the same as to a son. This is according to the second [Abû Yusuf] and on this is the *Fatwa*. And if a man were to give in health all his property to one child it would be operative, but he would be incurring a sin."(1)

The same rule is given in the *Fatâwai Alamgiri* :—

"If a man in health makes a gift to his children and desires to prefer some to others, there is no tradition with reference to this in the *Asl* from our masters. But it is stated from Abû Hanîfa that he may give more to the child, who is superior to the others in religion, but when it is not so it is reprehensible. And it is stated in *al-M'ualla* from Abû Yusûf, that an unequal distribution may lawfully be made when there is no intention of injuring [any of the children] and as much should be given to a daughter as to a son. And on this is the *fatwâ*, so in the *Fatâwai Kâzi Khan* and it is the approved doctrine according to the *Zahîria*."

" A man in health gives the whole of his property to one child, it is *lawful judicially*, though he is sinful for so doing according to the *Fatâwai Kâzi Khan*."(2)

The same rule is given in the *Durr-ul-Mukhtâr*

The frequency with which *hibas* are made in India makes it necessary that we should examine carefully the provisions of the law on this subject.

DEFINITION OF HIBA.—In the *Durr-ul-Mukhtâr*, a *hiba* is defined as the transfer of the right of property in the substance (*tamlîk-ul-'ain*) by one person to another without consideration (*'ewaz*) but the absence of consideration is not a condition in it. In other words a *hiba* is a voluntary gift without consideration of property or the substance of a thing by one person to another

(1) *Durr-ul-Mukhtâr*, p. 636.

(2) *Fatâwai Alamgiri*, IV, p. 545. In the case of *Chaudri Mehdi Hasan* v. *Muhamad Hasan*, [1905] L. R., 33 I. A., 68, the Judicial Committee stated somewhat broadly the principles of the Mahommedan Law relating to gifts. " By Mahommedan Law the holder of property may alien by deed of gift accompanied by delivery of the thing given so far as it is capable of delivery; or by deed of gift coupled with consideration in which case although delivery of possession is unnecessary yet actual payment of the consideration must be proved and also a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property and to confer it on the donee." This statement of the law, however, is subject to qualifications as will be shown later on.

so as to constitute the donee, the proprietor of the subject-matter of the gift. It requires for its validity three conditions: (*a*) a manifestation of the wish to give on the part of the donor; (*b*) the acceptance of the donee, either impliedly or expressly; and (*c*) the taking possession of the subject-matter of the gift by the donee either actually or constructively.(1)

The Hanafî lawyers define *hiba* as an act of bounty (تبرع) by which a right of property is conferred in something specific without an exchange. In order to distinguish a *hiba* or gift, from a *wasiat* or bequest, Ibni Kamâl (the author of the *Fath-ul-Kadîr*) defines it as an *immediate* (*fi'l hâl*) conferment of the right of property.(2) Similarly Sîdi Khalîl (the Mâliki lawyer) defines it as an act of liberality by which the proprietor bestows a thing without the intention of receiving anything in exchange.(3)

The Shiah lawyers, on the other hand, declare it to be an obligation (*akd*) by which the property in a specific object is transferred immediately and unconditionally without any exchange and free from any pious or religious purpose on the part of the donor.(4)

A verbal gift

A gift may be made verbally or by writing. The Transfer of Property Act (IV of 1882) leaves this provision of the Mahommedan Law untouched. And the Privy Council in the case of *Kamar-un-nissa Bibi* v. *Hussaini Bibi*(5) upheld a verbal gift when it appeared to be supported by all the circumstances.

Kamar-un-nissa Bibi v. *Hussaini Bibi.*

Sadakah or pious gift.

There is another species of donation in vogue among the Mussulmans, which is pious in its character and made in view of the future life. This is called *Sadakah*.(6) It takes its origin from the directions contained in the Koran, notably in Sura II, verse 211, "the goods that you give shall be known to God." This species of gift is irrevocable according to all the schools, but we shall deal with it in the order in which it occurs.

Technically the donor or grantor is called *Wâhib*, the donee *Mouhoob-lèh* and the subject-matter of the gift *Mouhoob*.

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(1) *Nunda Singh* v. *Meer Jaffer Shah*, 2 Sel. Rep., 5.
(2) If an exchange is obtained, the character of the gift is changed.
(3) *Jâmaa-ur-Ramûz.*
(4) *Mabsût; Irshâd-ul-Azhân; Sharâya-ul-Islâm*, p. 241.
(5) [1880] I. L., 3 All., 266.
(6) Pious offerings made with the object of obtaining divine approbation.

SECTION III.

CAPACITY FOR MAKING A GIFT.

CAPACITY TO MAKE A HIBA OR GIFT.—The qualities necessary for making a valid *hiba*, in other words, *the capacity for making a donation*, or what might be called a voluntary settlement, are the same as those required for the validity of any other contract. Every act which, in the Mahommedan Law, would be treated under the head of *tasurrufât-i-shariyêh* (legal transactions) presupposes a certain amount of free volition. "Consent," as has been well remarked, "is an act of reason accompanied with deliberation, the mind weighing as in a balance the good and evil on both sides." Every legal act under the Mahommedan Law is regarded as an *akd* or obligation (*aakd*), and the validity of every obligation depends on the faculty or capacity of the person doing the act to consider freely and rationally the consequences resulting therefrom. If the person is, by virtue of an inherent or super-imposed and accidental disqualification, incapable of exercising his volition in a rational manner and with perfect reasoning, any obligation entered into by him is null and void.

The conditions, therefore, necessary for the validity of any disposition are the following :—

(1) Majority.
(2) Understanding.
(3) Freedom.
(4) Ownership of the subject-matter of the disposition.

These conditions are not restricted to gifts alone; they apply to all dispositions of property.

MINORITY.—Persons under the age of puberty are deemed infants (*sughîr*), and are treated as having no capacity to bind themselves for want of sufficient discernment and understanding. Ordinarily minority ceases on the completion of the 15th year, when it is presumed, in the case of the youth of both sexes, that discretion is attained.(1) And, therefore, before the passing of Act IX of 1875, a Mahommedan, who had attained the 15th year, was qualified to make a valid disposition of his property. Since Act IX has come into force, there are three ages of majority recognised

(1) The subject is fully discussed in Vol. II, pp. 581-5.

by law. Section 3 of Act IX of 1875 saves the Mahommedan Law of majority in questions relating to marriage, dower and divorce. "In respect of all other acts, the age of majority of persons who are wards of Courts or for whom a guardian has been appointed by a Court of Justice, is 21, for others, it is 18." In the first case, a person would not be able to make a gift under the Mahommedan Law unless he has completed his 21st year, and, in the latter case, his 18th year. Owing to this peculiarity in the Majority Act, serious difficulties might arise concerning the capacity of one and the same individual in respect of different acts. For example, though a person on the completion of his 15th year, may enter into a contract of marriage for any dower, would he have the power of commuting the dower by a *bai-mukâsa* (*i.e.*, the sale of a property for the dower)? Similarly, would a woman over 15, but under the age of majority fixed by the Act, have the power of making a gift of her dower or remitting it to her husband.

NON COMPOTES MENTIS.—Obligations entered into by idiots, lunatics and other persons *non compotes mentis* are null and void; but when a person, afflicted by lunacy, has lucid intervals, any act committed during such interval would be valid, subject to certain restrictions.

"The causes of inhibition,"(1) says the *Hedáya*, "are three, *viz.*, infancy, slavery and *junûn* (insanity)."(2) Though the law-books use the term *junûn*, as the only cause of "inhibition," it may safely be taken from the examples cited, that the classes of persons around whom the law throws its safeguards, are not confined simply to the persons who are afflicted with lunacy or insanity, in some form or other, but also to those who, from accidental circumstances, lose for the time being their power of understanding. Story has adopted the enumeration of Lord Coke of the different classes of persons who are deemed in law to be *non compotes mentis*, and this enumeration may be taken as a safe guide to the principle upon which the Mahommedan Law proceeds in holding the acts of persons not *'aâkil* as invalid in law. Causes of inhibition.

(1) "Inhibition" (*hijr*) is a proceeding under the Mussulman Law by which a person is judicially declared by the Court (the Kâzi) to be incompetent to deal with his property or to contract any obligation. A person against whom such a declaration is made is called a *maãjûr*.

(2) *Hed.*, III (English translation), p. 468.

Non compotes mentis.

"Lord Coke has enumerated four different classes of persons who are deemed in law to be *non compotes mentis*. The first is an idiot or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus qui gaudet lucidis intervallis* and sometimes is of a good and sound memory and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard. In respect to the last class of persons, although it is regularly true that drunkenness doth not extenuate any act or offence committed by any person against the laws but it rather aggravates it, and he shall gain no privilege thereby, and although in strictness of law the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*, yet Courts of Equity will relieve against acts done and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party. For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of Courts of Equity against his own grossly immoral and fraudulent conduct."

Drunkenness.

"But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case, there can, in no just sense, be said to be a serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature. If there be not that degree of excessive drunkenness, then Courts of Equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him. For in general, Courts of Equity, as a matter of public policy, do not incline, on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law unless there is some fraudulent contrivance or some imposition practised." * * *

"In regard to drunkenness, the writers upon natural and public law adopt it, as a general principle, that contracts made by persons in liquor, even though their drunkenness be voluntary, are utterly void, because they are incapable of any deliberate consent, in like manner, as persons who are insane or *non compotes mentis*. The rule is so laid down by Heineccius and Pufendorf. It is adopted by Pothier, one of the purest of jurists, as an axiom which requires no illustration. Heineccius in discussing the subject has made some sensible observations. Either, says he, the drunkenness of the party entering into a contract is excessive, or moderate. If moderate, and it did not quite so much obscure his understanding as that he was ignorant with whom or for what he had contracted, the contract ought to bind him. But if his drunkenness was excessive, that could not fail to be perceived, and therefore the party dealing with him must have been engaged in a manifest fraud, or that at least he ought to impute it to his own fault, that he had dealt with a person in such a situation. The Scottish Law seems to have adopted this distinction, for by that law persons in a state of absolute drunkenness, and consequently deprived of reason, cannot bind themselves by any contract. But a lesser degree of drunkenness which only darkens reason has not the effect of annulling contracts."

"Closely allied to the foregoing are cases where a person although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises, whether from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear or constitutional despondency or overwhelming calamities. For it has been well remarked, that, although there is no direct proof that a man is *non compos* or delirious, yet if he is a man of weak understanding and is harassed and uneasy at the time, or if the deed is executed by him *in extremis*, or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might be very easily imposed upon."(1) Imbecility.

(1) Story's *Equity Jurisprudence*, I, §§ 230—234.

Mere imbecility or *safâhat* is no ground of "inhibition."(1) The acts therefore of a person who, without being positively *non compos* or insane, is yet of a weak mind are valid, unless they are stamped with the indicia of fraud. In the consideration of cases falling under this head, it will be as well to bear in mind the words of Mr. Justice Story, as explaining the principles upon which the Courts of Chancery in England would avoid the acts of persons, who are suffering from such extreme weakness of mind as to be unable to guard themselves against imposition, or to resist importunity or undue influence.

HURRIYET.—*Hurriyet* or freedom is another necessary condition for the validity of a contract. A bondsman labours equally under the inhibition which applies to the acts of infants and *non compotes mentis*. But there is this difference between the case of a bondsman and those suffering from insanity, that whereas the act of a bondsman may be ratified by his master as the act of an infant may in some cases be ratified by his guardian, the acts of a lunatic are absolutely null and void.(2) The reason of the inhibition upon the acts of the bondsman is given at great length in the *Hedâya*.

Since slavery, however, does not exist in British India, even in the mild form in which it is recognised under the Mahommedan Law, the question has little more than a mere antiquarian interest as throwing light upon a state of manners rapidly passing away, in the full light of modern civilisation and owing to a more correct reading of the laws of the Arabian Prophet.

The doctrine of *Ikrâh* or compulsion.

COMPULSION.—The incapacity resulting from bondage is attached to the status of the bondsman, who stands, in the eye of the law, in the position of a minor, and is not treated as *sui juris*. But temporary loss of liberty, or rather freedom of volition, by the exercise of constraint, duress or undue influence, as it does not affect the status, is not a ground of "inhibition," and consequently contracts entered into under undue influence or coercion are valid, if ratified by the person contracting after the constraint or undue influence

(1) In the case of *Kamar-un-nissa Bibi* v. *Hussaini Bibi*, [1880] I. L., 3 All., 206, the Judicial Committee of the Privy Council had to deal with a similar question, and they held on a review of all the circumstances that the donor was able to comprehend the transaction though apparently a person of weak intellect, and that the gift could not be impugned on that ground.

(2) *Hedâya*, III, p. 473.

has ceased. In the Mahommedan law-books a special chapter under the head of *Ikrâh* is devoted to the doctrines applicable to questions referred to in this place, but though some of the principles seem at first sight to fall short of the rules recognised by the English Courts of Equity with reference to cases of undue influence, in general the principles are analogous.(1) The doctrine, that in order to avoid a contract entered into by a free, sane and adult person, on the ground of *ikrâh* or compulsion, it must be shown that the "compeller" was in a position to carry out any threat held out by him, and that the threat itself was such as would influence the conduct of a reasonable person, only represents in another form the rule of equity, that the undue influence was such as would give rise to the presumption, that it might *bonâ fide* stop the exercise of free volition on the part of the person affected thereby. Any circumstance which so entirely overcomes the free agency of the party and exposes him to a fraudulent advantage or imposition would justify the Kâzi to set aside the contract. "*Ikrâh* or compulsion," says the *Hedâya*,(2) "applies to a case where the compeller has it in his power to execute what he threatens whether he (the compeller) be the Sultan or any other person, as a thief (for instance). The reason of this is that compulsion implies an act, which men exercise upon others, and in consequence of which the will of the other is set at naught at the same time that his power of action still remains. Now this characteristic does not exist unless the other (namely, the person compelled) be put in fear, and apprehend that if he do not perform what the compeller desires, the threatened evil will fall upon him, and this fear and apprehension cannot take place unless the compeller be possessed of powers to carry his menace into execution; but provided this power does exist, it is of no importance whether it exist in the Sultan or in any other person. With respect to what is recorded from Abû Hanîfa, that compulsion cannot proceed from any except the Sultan, the learned remark that this difference originates merely in the difference of times and not in any difference of argument, for in his time none possessed power except the Sultan, but afterwards changes took place with respect to the customs of mankind. It is to be observed

Ikrâh or compulsion

(1) Compare *De Montmorency* v. *Devereux*, 7 Cl. & Fin., p. 118; and the provisions of the Indian Contract Act (IX of 1872), ss. 14, 15 & 16.

(2) *Hedâya*, III, p. 452.

that in the same manner as it is essential to the establishment of compulsion, that the compeller be able to carry his menace into execution, so likewise it is requisite that the person compelled be in fear that the thing threatened will actually take place, and this fear is not supposed, except it appears most probable to the person compelled, that the compeller will execute what he has threatened, so as to force and constrain him to the performance of the act which the compeller requires of him."

Ikrâh or compulsion —(contd.)

"A person forced into a contract may afterwards dissolve it. If a person exercise compulsion upon another by cutting, beating, or imprisonment, with a view to make him sell his property, or to purchase merchandise, or acknowledge a debt of one thousand dirhems to a particular person, or let his house on hire, and this other accordingly sell his property, purchase merchandise or so forth, he has it afterwards at his option either to adhere to the contract into which he has been so compelled, or to dissolve it and take back or restore the article purchased or sold, because one essential to the validity of any of these contracts is, that it has the consent of both parties which is not the case here as the compulsion by blows, or other means rather occasions a dissent, and the contract is therefore invalid, unless the means of compulsion be trifling. (This rule, however, does not hold where the compulsion consists only of a single blow or of imprisonment for a single day, since fear is not usually excited by this degree of beating or confinement.) Compulsion therefore is not established by a single blow or a single day's imprisonment, unless the compelled be a person of rank,(1) to whom such a degree of beating or confinement would appear detrimental or disgraceful; for with respect to such a person compulsion is established by this degree of violence, as by it his volition is destroyed."

Fraud and undue influence.

These principles are stated in almost identical terms in the *Durr-ul-Mukhtâr*, where it is stated that there are four conditions which constitute complete *ikrâh*, *viz.*: (*a*) that the person compelling—whether sovereign or any other like a robber has the power to carry out his threat; (*b*) that the person compelled (*mukrah*) is under the fear that the threat will be carried out; (*c*) that the

(1) *Az-jâh*; *Durr-ul-Mukhtâr*.

threat is of such a nature as would really over-power free volition and (*d*) that the compelled would not have committed the act in question except for the compulsion or threat.(1)

Ikrâh or compulsion—(contd.)

Any act done under such circumstances, such as buying or selling or acknowledging or leasing is liable to be set aside by the compelled on the compulsion being withdrawn. And this right does not cease with the death of the compeller or compelled, or [if the sale is to a third person] of the vendee or by the fact that a separable accretion has taken place to the property sold.(2) And it will be restored even if it has passed through several hands. But the *compelled* has a right to ratify the contract, and such ratification may be by word (that is expressly) or by conduct, such as by accepting the price.(3)

As in the English Law, compulsion is not confined to actual duress or restraint or even threats. It extends to all class of cases where the person has no free will, but stands in *vinculo juris* in consequence of extreme terror or apprehension for himself or any other individual. Extreme necessity or distress, gross misapprehension as to the nature of the relationship between the contracting parties, circumvention or the influence of one mind over another, all come within the doctrine of compulsion. The Mahommedan Law contains no specific rules relating to the obligations imposed on persons standing in a fiduciary relationship to the donor, but generally the doctrines recognised by the English Courts of Equity are applicable to such cases. The Bombay High Court has gone so far as to hold a gift invalid which contravened the principles recognised by English Courts of Equity with regard to persons standing in a fiduciary relationship to the donor, though the donor, who was a Mahommedan lady, apparently possessed the capacity requisite under the Mahommedan Law to make a valid *hiba*.(4) And the same principle was enunciated and enforced by the Judicial Committee of the Privy Council in the case of *Tacoordeen Tewary* v. *Nawab Syed Ali Hussain Khan*.(5)

Tacoordeen Tewary v. *Nawab Syed Ali Hussain Khan.*

(1) Threats of this nature are technically called *Ikrâh-ul-mulji*.

(2) The commentator adds the right is *à fortiori* not lost if the accretion is inseparable.

(3) *Durr-ul-Mukhtâr*, p. 677.

(4) *Rujabai* v. *Ismail Ahmed* [1870], 7 Bom. H. C. R., O. C., 27.

(5) (1874) L. R., 1 Ind. App., p. 192.

SUBJECT-MATTER MUST BE THE PROPERTY OF THE DONOR.—It is also a condition to the validity of a gift that the subject-matter should be the property of the donor, otherwise the gift is *ipso facto* void.

The *Fatâwai Alamgiri* goes on to add that "another (4th) condition is that the subject of the gift must be property, for what is merely *mubâh* (common property) can not be given, and it is impossible to constitute another person the owner of what is not property," in other words over which no right of property can be acquired, such as the wind, *feræ naturæ*, the water in the ocean. "And a further condition is that it should be the property of the donor, for the donor can not make another the owner of something which belongs to a third person without his consent, so in the *Badâia*."(1)

And a gift takes effect in two ways, (*lit* 'is of two sorts"), either by transfer of a right of property (*tamlik*),(2) or by cancellation or discharge (*iskât*). The gift of a debt to the debtor comes under the latter category. In the *Durr-ul-Mukhtâr* the same principles are given but more concisely.

"The conditions for the validity of a gift on the part of the donor are discretion and puberty (majority) and that he should possess the right of property; accordingly the gift of a minor or a bondsman even though a *mukâtib*(3) is not valid." * * * "And the subject of the gift (*mouhoob*) should be capable of being possessed without confusion [with the donor's property] and distinct [from the same] and not contained [in anything belonging to him].(4) Its pillars are declaration and acceptance, and its legal effect is that it vests the right of property in the donee [but] not absolutely."(5) In other words, subject to certain exceptions, the donor may revoke the gift.

Voluntary settlement by a person in insolvent circumstances.

INSOLVENT DONOR.—Whether a person in insolvent circumstances, or extremely involved in debt, can make a voluntary settlement, is a question answered in two different ways by the Mâlikis and Hanafis, though in the result the two schools seem to coincide.

(1) See *Hedâya* III, Eng. (translation), p. 484.
(2) From *milk*, property.
(3) A bondsman conditionally enfranchised.
(4) مقبوض غير مشاع ممیزا غير مشغول
(5) P. 633.

Among the Mâlikis a person in insolvent circumstances or extremely involved (مستغرق) is under an "inhibition" (حجر) regarding any dealing of a gratuitous character with his property. A gift by a person so situated is, according to the Mâliki doctrines, inoperative. According to the Hanafîs there is no such incapacity, but the Kâzi may avoid the act at the instance of the creditors if the gift was intended to defraud them. This principle is analogous to the rule of English Law according to which voluntary settlements in fraud of creditors are held to be voidable. The English cases under 13 Eliz., cap. VI, s. 6, which is reproduced in s. 53 of the Indian Transfer of Property Act (IV of 1882), serve to illustrate the principle of the Hanafî Law.

Fraudulent intent.

Mere indebtedness or the fact that the donor was in embarrassed circumstances is not a sufficient ground for invalidating a voluntary settlement or for inferring a fraudulent intent, the real basis on which such gratuitous transfers can be avoided.(1) But it must be shown that there were unpaid debts *existing at the time when the gift was made*, and the settlor was, if not necessarily insolvent, so largely indebted as to impel the Court to believe that the intention was to defraud persons who, at the time of the transfer, were creditors of the donor.(2)

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(1) *Azimmunessa Begum* v. *Dale*, [1868] 6 Mad. H. C. Rep., p. 468; *Ramtonoo Mookerjea* v. *Bibi Jeenut*, Fulton's Reports, p. 154. In the former case Mr. Justice Bittleston says as follows:—"First was the gift to the plaintiff altogether void as being in fraud of creditors. I will assume that according to Mahommedan Law it might be impeached on that ground, though the mere existence of debts due by the donor at the time of the gift would not be sufficient to establish such fraud" [see p. 441 of App. to Mr. Sloan's Edn. of Macnaughten, citing a case from Morris' Cases, S. D. A., Bom., Vol. II, p. 103]. At page 154 of Fulton's Reports, Sir L. Peel, in the case already referred to says, "There is no evidence before us that the donor (who was a trader) was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency, or with a view to defraud creditors, but it is not to be inferred from these words that if he had been shown to be in debt, the gift would, on that account, have been held invalid."

(2) See the remarks of V. C. Wood in *Holmes* v. *Penny*, 3 K. & J., p. 90; also *Thompson* v. *Webster*, 4 Drew., p. 628; *Lush* v. *Wilkinson*, 5 Ves., p. 384; *Martyn* v. *Macnamara*, 4 D. & W., p. 427.

Story, I, § 367; *Dundas* v. *Dutens*, 1 Ves. Jr., p. 196.

Ramtonoo Mookerjea v. *Bibi Jeenut*, Fulton's Reports, p. 154; *Chunder Madhub Dass* v. *Ameer Ali* and others, 25 W. R., p. 119. In *Skarf* v. *Soulby* (1 M. & G., p. 344), the bill alleged "that at the time of executing a voluntary settlement, the settlor was in insolvent or in embarrassed circumstances, or indebted to divers persons." It was held that "in the absence of any proof of actual insolvency, the mere fact of the settlor then owing some debts was not sufficient

Extent of indebtedness fatal to a voluntary conveyance.

The extent of the indebtedness fatal to a voluntary conveyance as against *existing* creditors may shortly be stated as that from which it *must* be presumed that the intention of the donor was not to provide honestly for the donees, and to put the property out of his own reach, but to do so at the expense of the just claims against him. But the existence of property at the time of the settlement not included in it, ample for the payment of debts then due, would negative the fraudulent intention.(1)

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to invalidate the settlement." The judgment in *Bibi Jeenut's* case is too important not to be given *in extenso* :—

PEEL, C. J.—"The passage cited from Macnaughten, p. 222, for the lessor of the plaintiff is not applicable, as that relates to a gift of money for money, and there possession is necessary. In this case, the lessor of the plaintiff claims under Jumeat Khan, and as such, is estopped by the recitals in this deed of gift, which is of a prior date. This is not a case in which the assignee is disputing the validity of the deed for the benefit of creditors. There is no doubt the deed is genuine, and as to the time of execution, no evidence having been given to the contrary, we must presume that it was executed at the time it purports to be dated. The deed has been proved in the usual manner by calling one of the attesting witnesses, and it was not necessary to go further. The Kâzi, however, before whose predecessor it was registered, in confirmation of this presumption, states that, in his opinion and from the practice of his office, the seal of the Kâzi, who registered the deed, was affixed about the time at which it is alleged to have been affixed. This, however, is merely in confirmation and strengthens the presumption. This deed then being of a prior date, the subsequent purchaser must impeach it for fraud. All those grounds on which a deed is generally impeached are, however, wanting in this case. There is no evidence before us that the donor was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency or with a view to defraud creditors. This, moreover, is not the case of a simple and voluntary gift, but of a gift for a consideration. The lessor of the plaintiff is in no better position than the donor. The prior conveyance or marriage settlement and recital of possession rendered are evidence against the donor, and so against the lessor of the plaintiff who comes in under him. The evidence thus clearly shows that possession was given, but none of the authorities even in cases of gift show that possession must be continuous, indeed it would be absurd to suppose the necessity of the husband's never occupying those premises which he has given to his wife. Now, though the validity of a gift depends upon the seisin, the validity of a sale is derived not from the seisin but from the contract, and the passage cited from Macnaughten, p. 221, clearly shows that this deed must be construed according to the rules affecting the laws of sale. Under this gift, the wife may have a good title when the other donees would not from failure of consideration. As the defendant has taken defence to the whole of the premises, and has only proved the title to a portion, the verdict must be for the lessor of the plaintiff, but execution will be limited to that portion of the premises not given to the wife in this deed of gift. We will, however, reserve the liberty to Mr. Leith to move to enter a verdict for the lessor of the plaintiff for the whole, should he upon consideration think that by the principles of Mahommedan Law he is entitled to such a verdict."

(1) *Skarf* v. *Soulby*, 1 Mac. & G., p. 344 ; *Holloway* v. *Millard*, 1 Mad., p. 414 ; *Kent* v. *Reilly*, L. R., 14 Eq., p. 190 ; *White* v. *Witt*, 24 W. R., p. 727.

Under the Mahommedan Law future creditors have no right to question a voluntary conveyance by a person *not* indebted at the time.

Family settlements—*Tamlîknamahs.*

Settlements which are honest family arrangements are regarded with favour by Courts of Equity in England and are not within the Statute of Elizabeth, although not founded on actual valuable consideration, unless the rights of existing creditors are thereby directly interfered with.(1) Among the Mahommedans of India, it is not infrequently the case for owners of property, with the object of preventing future disputes, to make, during their lifetime, a division or distribution of their property. Such dispositions are in the nature of family arrangements, and the deeds by which the dispositions are made are called *Tamlîknâmahs* or *Taksîmnâmahs*. Sometimes the donor reserves a small interest in the properties disposed of for his support and maintenance. Often the transferees, if likely to be the heirs of the donor, take smaller shares than they would in case of his dying intestate. Such dispositions, it is submitted, will be treated as settlements in the nature of family arrangements.

Under the Mahommedan Law, when there is consideration, however small, the character of the gift changes. It is not merely a *hiba* or donation pure and simple, requiring some evidence of parting of title on the part of the donor ; it is a transfer for a consideration, in which no delivery of possession is requisite. How far such transfers can be impeached by creditors on the ground of fraud we shall consider later.

A *bonâ fide* voluntary conveyance in which possession has been transferred is effective against a subsequent purchaser for value. 27 Eliz. cap. IV had no application in this country (beyond the Presidency Towns) before the Transfer of Property Act. Section 53 of this Act, however, embodies the principle contained in 27 Eliz. cap. IV, but clause (*d*) of Section 2 expressly declares that, " nothing in the second chapter of this Act shall be deemed to affect any rule of Mahommedan Law. "

Dispositions by a married woman.

A married woman is not debarred by the status of marriage from making any disposition during the subsistence of marriage. She can deal with her property as if she were a *femme sole*. Nor

(1) *Penhall* v. *Elwin*, 1 Sm. & G., p. 258.

is the widow's right to deal with any property she has inherited from her deceased husband limited by the rights of his heirs, as under the Hindu Law. She can give away her property to whomsoever she pleases, so long as this is done in "health."(1)

SECTION IV.

GIFTS BY PERSONS SUFFERING FROM MARZ-UL-MOUT.

Marz-ul-Mout.

ACTS of bounty by persons suffering from a mortal sickness are treated differently by the several schools. According to the Mâliki doctrines a disposition made under such circumstances is inoperative.

According to the *Jâmaa-ush-Shittât*, which is a work of authority among the Shiahs, a gift made by a person suffering from a mortal illness which ends fatally, is valid with reference to the entire disposition, provided delivery takes place before the death of the donor, and provided the donor is in perfect possession of his senses.

The proposition is stated thus :—

"A man makes a gift during the 'illness of death' (*marz-ul-mout*) of all his property to another whilst in possession of his senses; is this gift valid with reference to the whole property or only to one-third? Is possession of the donee necessary for the validity of this gift? Is possession of only a portion effectual with reference to the whole? If the donee takes possession of the subject-matter of the gift, locks it up in a case and leaves it with the donor, or in the case of a gift of a house, if the donor being sick sleeps in it, whilst the donee is in possession thereof, is his possession sufficient in law?" These involved questions are answered in this way :—

"Yes, the gift is valid with reference to the entire property and is not restricted to a third."

"Possession of the whole is necessary; without possession it is not valid."

"If the donor dies before possession, the gift is void, unless the donee is an infant and the donor is his guardian, for the possession of the guardian is tantamount to the possession of the minor and separate possession is not necessary. Possession of a portion is not effectual with reference to the whole;

(1) See *Lutufunnissa* v. *Rajaoor Rahman*, [1869] 8 W. R., 84.

" If possession is actually taken of a moveable thing it is sufficient, though it may be left in the house of the donor. As regards a house, if it is sufficiently clear possession has been taken by the donee, the mere fact of the donor dwelling in it according to custom or owing to illness will not affect the validity of the gift."(1) *Marz-ul-mout.*

سوال

چه میفرمایند در این مسئله که هرگاه شخصی در مرض الموت هبه و بخشش نماید کل مال خود را بشخصی در حال صحت عقل ایا این هبه معتبر و صحیح است از اصل مال یا از ثلث و ایا در لزوم این موهبه شرط است تصرف متهب در مال یا نه بر فرض اشتراط ایا تصرف در بعض در حکم تصرف در کل است یا نه و هرگاه واهب موهوب را بتصرف متهب بدهد و متهب اورا در اطاق واهب در دولابه گذاشته و کلیدان دولابه را خود متهب بر دارد ایا این را تصرف معتبر در شرع میگویند یا نه و هر گاه واهب یورتے را بمتهب هبه نموده باشد و رفع موانع از تصرف متهب نموده باین معنے که متهب دران یورت آمد و شد کند و واهب مانع او نشود و لیکن واهب بجهته ناخوشي و بیماري دران یورت خوابیده باشد ایا این را تصرف متهب میگیرند یا نه *

جواب

بلے هبه صحیح است و اظهر است این که در تمام مال صحیح است و منحصر در ثلث نیست و تصرف و قبض در مطلق هبه شرط است و بدون ان لزومي ندارد و اگر قبل از اقباض بمیرد هبه باطل میشود مگر آنکه متهب صغیر باشد و واهب ولي باشد که قبض ولی قبض صغیر است و ضرور بقبض علیحده نیست و قبض بعض

(1) *Jâmaa-ush-Shittât*, Chapter on *Hiba*.

در لزوم کل کافي نیست و در منقولات همان اخذ باید بخصوص باین نحو که در جای مظبوط کند کافیست هر چند در خانه واهب باشد و هم چنین در اقباض یورت تخلیه بار رفع مانع از تصرفات کافیست هرگاه بقصد اقباض بوده و خوابیدن خود را درانجا مانع از تخلیه نمیدانیست و ظاهر اینست که هرگاه بگوید خانه از تو و تصرف کن و بیا و برو لیکن من هم چند روزے در اینجا هستم چون بیمارم یا انکه در عرف و عادت مضایقه از بودن ان دران مکان نمیشده رمیگفته اند که بتصرف او داده کافیست و شاید که این از باب اقباض صندوق باشد باوجو آنکه متاع واهب دران باشد *

Shiah doctrines—the *Sharâya-ul-Islâm.*

In the *Sharâya,* the principle is laid down thus—" When a person has made a gift being dangerously ill at the time, but afterwards recovers, the gift is valid. If, however, he should die of the disease, and the heirs refuse their assent to the gift, it is valid only to the extent of a third of his estate, according to the best traditional authority." This evidently assumes that possession was delivered to the donee before the donor's death, for in another place, it is stated that if the donor dies after the *'akd* (*i.e.*, the contract of gift) but before delivery of possession, the property falls into the inheritance.

Hanafi doctrines.

Under the Hanafi Law, any disposition by a person suffering from an illness which, in the ordinary course, is fatal and from which he eventually dies, takes effect only partially, if at the time he was under the apprehension of death, or if the circumstances and condition of his illness were such as were likely to create in him the apprehension of death. As the author of the *Radd-ul-Muhtâr* observes, it is not merely the fact that the disease is ordinarily fatal that requires consideration, but the effect it is likely to have on the mind of the sufferer which is the chief determining element. A malady of such a nature is called *marz-ul-mout* or the " illness of death." But when a person has suffered from an illness for a long time so that it has become, as it were, " a part of his constitution," or where the progress of the disease is so imperceptible as to cause no apprehension to him, it does not come within the definition of *marz-ul-mout.*

The policy of the law with respect to the dispositions of a person stricken by a mortal malady proceeds on the assumption that dealings with property, especially "acts of bounty," in such circumstances might not improbably spring from a wish to deprive the lawful heirs of their legal rights, and that such dealings should, therefore, be restricted by those rights—and not be allowed to take effect beyond the limit of testamentary dispositions. Accordingly a gift made when the person is suffering from an "illness of death" (*marz-ul-mout*) takes effect when made in favour of a non-heir, in respect of a third of his estate unless assented to by the heirs; when made to an heir, it is altogether inoperative unless it is assented to by the other heirs.(1)

Gifts made in *marz-ul-mout.*

As the operativeness of dispositions made by a person suffering from a mortal illness depends on the sufferer's state of mind, the Mussulman lawyers have indicated certain tests, more or less of an empirical character, for the purpose of determining whether at the time of the dealings in question he was labouring under the fear (خوف) of death. This was the only course possible, as a learned Indian Judge observes,(2) before the science of diagnosis had attained the perfection of modern times. Symptoms and conditions were indicated from which one might infer whether the malady was such as would be likely to create or, in fact, created that fear in the sufferer's mind. But those tests were in no sense to be regarded as conclusive either with respect to the disease or to the mental condition. "The gift of a person suffering from paralysis, palsy and phthisis," says the *Durr-ul-Mukhtâr*, "is valid as to the whole when the disease has lasted over a year(3) and there is no fear of death from it but if it has not extended for a year and there is fear of death [on his part] the gift will take effect in respect of a third."(4) The reason of this principle is thus stated in the *Durrar*; when a person suffers from a malady which is ordinarily mortal for over a year, it ceases to have any apprehensive

(1) Comp. *Wazir Jan* v. *Saiyyad Altaf Ali*, [1887] I. L., 9 All., 357; see also *Ashrufunnissa* v. *Azeemun*, [1864] 1 W. R., 17; *Kurreemun* v. *Mullick Enaet Hossein*, [1864] W. R., 1865; on appeal [1865], 3 W. R., 40.

(2) In *Sarabai* v. *Rabiabai*, post.

(3) The dictum was not, it is submitted, correctly apprehended in *Labbi Beebee* v. *Bibbun Beebee*, [1874] 6 N.-W. P. H. C. R., 159; see also *Muhammad Gulshere Khan* v. *Mariam Begum*, [1881] I. L., 3 All., 931.

(4) *Durr-ul-Mukhtâr*, Hooghly Ed., p. 821.

influence on his mind as it has become part of his nature. "Some have said that *marz-ul-mout* is an illness that disables a person from attending [lit. going out] for his personal necessities (حوائج نفسه)..[But] the approved doctrine is that *marz-ul-mout* is a malady in which there is a preponderant fear of death, although the sufferer may not have taken to his bed; this is as stated by Kahastâni."(1)

"When an illness does not go on increasing from day to day, it becomes a part of the sufferer's nature as in the case of a cripple or a blind man there is no apprehension of death....for a *marz-ul-mout* is a disease from which there is a probability of death, and that happens when it gets worse from day to day until death ensues." But when it is stationary and death is not apprehended from it, "as in the case of a blind man," and treatment is therefore not resorted to, it does not come within the category of "the illness of death."

The statement that if an illness has lasted over a year it ceases to be regarded as a *marz-ul-mout* does not lay down a rule of law; it only gives expression to the general doctrine that a long continued illness unattended with any circumstances of aggravation as is likely to cause an apprehension of death, is not to be treated in its effects as a "fatal malady." Where, however, the disease is long-standing but becomes suddenly aggravated and the patient becomes confined to his bed, "it would be like a new illness," that is, it would be taken as likely to create a fear of death in the mind of the sufferer, and his acts in that state would, therefore, in case of death from the illness, take effect with respect to a third.(2)

Divorce by a person suffering from a mortal malady.

The *Fatâwai Kázi Khân* dealing with the right of the wife divorced by a man suffering from a mortal malady, says, "if a man has become so debilitated from an illness that he is bed-ridden and rendered incapable of managing his outside affairs, and the illness is increasing day by day, then the right of the second party [the wife] attaches to his property, because the probability from his condition is death; and if the man in such a condition divorces his wife he is declared to be a *farr* (or evader)." "But a person who, though ill, is able to attend to his daily avocations, although

(1) *Durr-ul-Mukhtâr*, Hooghly Edn., p. 821; Comp. the *Fatâwai Alamgiri*, Vol. IV, p. 561; see *post*.

(2) *Radd-ul-Muhtâr*, Vol. V, p. 648.

the illness may eventually cause his death, is not regarded as one suffering from a mortal illness (*marz-ul-mout*)." Similarly one struck with paralysis, phthisis or palsy is accounted "sick" whilst the disease is on the increase; but when the illness has lasted a long time and is not becoming worse, the sufferer "is as one in health." "Some lawyers have laid down that if a disease, however mortal, lasts for or over a year, it should not be regarded as such, because the man becomes so accustomed to it as to lose all apprehension as to his own condition." *Marz-ul-mout.*

The same test is given in the *Durr-ul-Mukhtâr*. It says on the authority of the *Bazâzia* "when a person is in imminent fear of death whether from disease or any other cause, so that in the case of an illness the man is so broken [or weakened] by it as to be incapacitated from conducting his ordinary avocations outside his house; for example, a *fakîh* (a jurist) from going to the mosque, a tradesman to his shop, a woman from attending to her indoor occupations," it is a *marz-ul-mout*. And it adds from the *Mujtaba* that "when the illness has become so severe as to make it permissible for the sufferer to offer his prayers without standing up [lit. in a sitting posture] it must be regarded as an illness of death."

"The author of the *Manzûma* was asked," says the *Radd-ul-Muhtâr*, "as to the definition of (the term) *marz-ul-mout* and he answered there were many." The Hanafî doctors generally have proceeded on the doctrine laid down by Fazli, *viz.*, that "when a man is incapacitated from leaving his house (*dâr*)(1) for his personal needs, or a woman from attending to her avocation sowing to difficulty in getting up and down, that is an indication of *marz-ul-mout*."(2)

The rule of *marz-ul-mout* is applicable not only to dispositions of property but also to divorce (*talâk*). For example, if a man suffering from an "illness of death" were to pronounce a definitive divorce against his wife, she would not lose her right to inherit from him for the period of her *iddat* (probation).(3)

In the chapter in the *Fatâwai Alamgiri*(4) dealing with "the gift of the sick" the principles are set forth at some length. In the first place it is stated from the *Asal* that neither a gift nor a *sadakah*(4) Dispositions in *marz-ul-mout.*

(1) It may also mean room.
(2) *Radd-ul-Muhtâr*, Vol. V, p. 649.
(3) Mahommedan Law, Vol. II, p. 542.
(4) *Fatâwai Alamgiri*, Vol. IV, p. 559, Bk. on Gifts, Chap. X.

by a *marîz*—a person suffering from *marz-ul-mout* of which the definition is given later on—is effective without possession ; and if possession is taken, it is valid in respect of a third.(1) If the donor were to die before delivery (*taslîm*) the whole disposition would be invalid.(2) "It is, therefore, necessary to understand that a gift by a *marîz* is a contract and not a *wasîat*, and the right of disposition is restricted to a third on account of the right of the heirs which attaches to the property of the *marîz*. And as it is an act of bounty it is effective so far only as the law allows and that is a third. And being a contractual disposition it is subject to the conditions relating to gifts, among them the taking of possession by the donee before the death of the donor ; so in the *Muhît*. If a person [suffering from *marz-ul-mout*] were to die after making a gift of a house and delivering possession thereof to the donee, and it were found that there was no other property belonging to him, the gift would be valid in respect of a third of the house, and the remaining two-thirds would be returned to the heirs. And this principle applies to all subjects whether they be partible or not ; so in the *Mabsut*."

"If a *mariz* makes a gift of a property which cannot come out of a third, the donee must return the excess over a third in respect of which the donor has no power."(3)

"A sick woman (مريضة) makes a gift of her dower (*sadâk*) to her husband, if she recovers from her illness, it is valid ; and even if she dies from that illness the answer would be the same, if it was not *marz-ul-mout* ; but if it was an illness of death the gift would not be valid except with the assent of the heirs. And it has been said with regard to the definition of *marz-ul-mout* (في حد مرض الموت), and this is accepted for passing decisions, that when the probability is preponderant that death will ensue from that disease it is *marz-ul-mout*, although she may or may not be confined to her bed ; so in the *Muzmirât*. Abû Lais has said that it is so [*i.e.*, it is an illness of death] if a man cannot pray standing, and we adopt this ; so in the *Jouharat-un-Nayyirèh*."(4)

(1) Comp. *Shurifa Bibi* v. *Gulam Mahomed*, [1892] I. L., 16 Mad., 43.

(2) *Valayet Hossein* v. *Maniran*, [1879] 5 C. L. R., 91 ; in this case possession as manager during the lifetime of the donor was not considered sufficient.

(3) *Fatawai Alâmgiri*, Vol. IV, p. 561.

(4) *Ibid*, pp. 561—62.

"A *marîzeh* (sick woman) dies after making a gift of her dower (*mahr*) to her husband, the Jurist Abû Jaafar has stated that if at the time of the *hiba* she was able to stand up for her personal needs (حاجتها) and raise herself without help, she should be regarded as in the position of one in health and the gift would be valid; so in the *Fatâwai Kâzi Khân*. And a cripple or a person struck with paralysis or suffering from consumption or palsy if the disease is long continued and there is no (immediate) apprehension of death therefrom, may make a gift of the whole of the property; so in the *Tabiïn* in 'The Book on Wills.' Dispositions in *mazr-ul-mout*—(contd.)

"The dispositions of a (pregnant) woman in labour is valid in respect of a third of her property; but they become operative as to the whole on her recovery; so in the *Jouharat-un-Nayyirèh*. And if a (pregnant) woman makes a gift of her dower to her husband whilst suffering from the pains of labour, and dies during the *nifâs*(1) the gift is not valid; so in the *Sirâjia*. A woman suffering from *marz-ul-mout* gives her dower to her husband who dies before her, she has no claim, for the gift is valid until her decease, and if she were to die of that illness, her heirs can claim her dower; so in the *Kinia*.... the gift of a dower to a dead husband is valid by *istehsân* (*i.e.* according to a liberal interpretation of the law); so in the *Sirajia*.(2) An act of bounty (تبرع) by a pregnant woman in labour takes effect in respect of a third of her estate. Similarly when two bodies of men (*at-tâifatân*) meet in deadly fight and they are equally balanced(3) or one body is over-powered by the other, in such circumstances the rule of *marz-ul-mout* applies." In other words the act of any member of those two bodies will take effect like a bequest in respect of a third. But so long as they do not engage in actual combat it would not be so.

"And a person travelling on the ocean (*râkib-ul-bahrain*) when it is quiet has no apprehension; but when he is overtaken by storm and waves there is fear of death. A person who is imprisoned for a crime punishable with death also suffers from the same *khauf* (fear)."(4)

(1) The prescribed period for purification after child-birth, usually forty days.
(2) *Ibid*, p. 563.
(3) Lit. when they are all equal to one another.
(4) *Radd-ul-Muhtâr*, Vol. V. p. 649.

Marz-ul-mout.

These principles are better set forth in the chapter dealing with the *talâk* of people suffering from *marz-ul-mout*. It is not merely disease which may induce apprehension of death in a person. If a man advances to engage in actual fight with an enemy or is being led out to execution and in either situation divorces his wife, she would not lose her right of inheritance. Similarly, "if he is on board a ship which is wrecked and if he finds himself on a plank in imminent risk of drowning, a *talâk* pronounced by him does not destroy the wife's right. But when a divorce is given [or a disposition made] before he has advanced from the ranks of a fighting force, or when in prison though condemned to death, or before the ship is actually wrecked, the *talâk* [or the gift] is effective—for in these situations there is still a hope of escape.(1)

Although in the earlier cases the law on the subject of *marz-ul-mout* or the "illness of death" had to a certain extent been misapprehended, recent decisions in the Calcutta and Bombay High Courts have placed the doctrines on their proper basis.

In *Hassarat Bibi* v. *Golam Jaffar*,(2) where the validity of a gift was impugned on the ground that it was made in death-illness, the High Court of Calcutta indicated the questions which require to be considered in determining whether the disease comes within the category of a *marz-ul-mout* illness; *viz.*, (*i*) was the donor suffering at the time of the gift from a disease which was the immediate cause of his death; (*ii*) was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death; (*iii*) was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death; (*iv*) had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady? And it was added that, "the limit of one year mentioned in the law-books does not, in our opinion, lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance

(1) *Fatâwai Kâzi Khân*, Chapter on the Divorce by the Sick; *Durr-ul-Mukhtâr*, p. 246; *Radd-ul-Muhtâr*, Vol. III, p. 855.

(2) [1898] 3 Cal. W. N., 57.

of the malady for that length of time may be regarded as taking it out of the category of a mortal illness."

The view expressed in this case was followed in *Fatima Bibee* v. *Ahmad Baksh*,(1) where it was held further that "whilst the lawyers have suggested that certain physical incapacities indicated a dangerous illness, they did not lay down positively that these incapacities are conclusive." In the case of *Sarabai* v. *Rabiabai*, the learned Judge pointed out that in order to establish *marz-ul-mout* there must be at least the following conditions :—"(*a*) proximate danger of death so that there is, as it is paraphrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, at the given time death must be more probable than life ; (*b*) there must be some degree of subjective apprehension in the mind of the sick person ; (*c*) there must be some external indicia, chief among which I would place the inability to attend to ordinary avocations."

Fatima Bibee v. *Ahmad Bakhoh.*

Sarabai v. *Rabiabai.*

It must be noted, however, that the last element which seems to have been regarded as a condition is merely a test.(2)

In the case of *Ghulam Mustafa* v. *Hurmut*,(3) the Allahabad High Court held that the provisions of the Mahommedan Law applicable to gifts, made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt, which is really in the nature of a sale.

Ghulam Mustafa v. *Hurmut.*

But this view seems to be in conflict with the Mahommedan Law which declares that even a sale by a person labouring under a fatal illness is valid only to the extent of one-third of his estate.(4)

SECTION V.

THE MOUHUB-LEH OR DONEE.

ANY person may receive a gift, without distinction of sex or age or creed, but under the Hanafi Law the donee must be legally

The *Mouhûb-lèh* or Donee—Hanafi Law.

(1) [1903] I. L., 31 Cal., 319 ; affirmed by the Judicial Committee, [1908] L. R., 35 I. A., 67.

(2) [1906] I. L., 30 Bom., 519; in this case the question for determination was whether a *talâk* pronounced by a deceased Hanafi Mahommedan deprived or not the divorced wife of her share in his inheritance ; this case was followed in *Rashid* v. *Sherbanoo*, [1907] I. L., 31 Bom., 264.

(3) [1850] I. L., 2 All., p. 854, *per* Pearson and Oldfield, JJ.

(4) With regard to the Shiah Law on the subject of a divorce in *marz-ul-mout*, see Mahomedan Law, Vol. II, p. 541.

in existence at the time of the gift. A gift, therefore, to an unborn person, one not *in esse*, either actually or presumably, is invalid.

Child *en ventre sa mere.*

A gift, however, to a child *en ventre sa mère* is valid, if the child is born within six months from the date of the gift, because in that case it is presumed that the child was actually existing as a distinct entity in the womb of its mother.

Shiah doctrines.

It is different, however, under the Shiah Law, where an estate may be devised to an unborn person if the commencement is made with a person *in esse*.

If a gift is made to *A* for life—under the Hanafi Law, the condition limiting the estate to the donee's life would be invalid and the gift would take effect as an absolute gift. Under the Shiah Law, *A* would take a life-estate, and upon *A's* death the property would revert to the donor or his heirs. If the gift is to *A* for life and then to *B* for life, under the Shiah Law, both the life-estates would take effect, and upon the death of *B*, the property would revert to the donor or his heirs. A gift to *A* for life and then to *B* and his descendants would give a life-estate to *A* and an estate in fee to *B*.(1)

Under both the systems, a gift to *A* and his children or descendants generally, or to his descendants "line after line," or any gift coupled with such terms as necessarily imply that the property is bestowed without any limitation, would take effect as an absolute gift to *A*.

SECTION VI.

THE MOUHOOB.—THE SUBJECT-MATTER OF THE GIFT.

The *Mouhoob.*

ANYTHING over which dominion or the right of property may be exercised, or anything which can be reduced into possession or which exists as a specific entity or as an enforceable right, or anything, in fact, which comes within the meaning of the word *mâl*, may form the subject of gift. *Choses in action* and incorporeal rights may form the subject of gift equally with corporeal property. "A debt" says the *Kifâya*, "considered with reference to the prospect of payment is *mâl* or corporeal property (so much so that *zâkat*(2) is obligatory on it); and it is susceptible of *tamlîk*. Considered with

(1) *Jawâhir-ul-Kalâm*; see *post*.
(2) Religious tithes.

reference to its present state, it is a *wasf* or a *quality*, [*i.e.*, indebtedness] and is susceptible of *iskât* or extinction. Hence, a gift of it to the debtor, which is an extinction, is valid both by analogy and on a liberal interpretation [of the law], but a gift of it to another which is *tamlîk* (transfer of property) is valid on the latter ground."(1) Similarly, it is stated in the *Radd-ul-Muhtâr* that a gift of a debt to a person other than a debtor is valid because although it is not *'ain* in the present, it is capable of becoming property in the future.(2)

The argument, therefore, which was endeavoured to be raised in the case of *Mullick Abdul Gufoor* v *Musst. Maleka*(3) has no foundation whatsoever. On the contrary, the Hanafî Law, as given in the *Kifâya*, expressly recognises the legality of gifts of incorporeal rights and *choses in action*. And custom (*'urf*), to which Mahommedan lawyers have always attached considerable force in deciding questions on the ground of *istehsân* (" favourable construction " or " liberal interpretation"), to make the law harmonise with social progress, has accepted the rule and carried it into practice in different directions. Hence the gift of Government securities, which

Mullick Abdul Gufoor v. *Musst. Maleka.*

(1) *Kifâya* (published with the *Hedâya*, Cal. Ed., Vol. III, p. 698. Comp. *Durr-ul-Mukhtâr*, p. 641 and *Fatâwai Alamgiri*, Vol. V, p. 234.

Under the Transfer of Property Act (IV of 1882) actionable claims are transferable, but under s. 135 the debtor is entitled to a discharge upon paying the transferee the price actually paid by him with incidental expenses and interest. This provision does not apply to gifts, but whether it would apply to a *hiba-bi'l-ewaz* is a question not unattended with difficulty. A *hiba-bi'l-ewaz*, where not in reality a *hiba simple* is, in its legal incidents, equivalent to a sale, and yet is subject in most of its aspects to the rules governing *hiba simple*. Would s. 135 then apply to the case of a *hiba-bi'l-ewaz*, where some consideration is proved, bearing in mind the provisions of s. 129? The Calcutta High Court has held that s. 135 applies also to a mortgage (I. L., 21 Cal., 568) The correctness of this view is open to question.

In case I, Macnaughten's Mahommedan Law, Precedents of Wills, it is declared, that " the term *tamlik* is one of general import, and may be applied to a gift, whether unconditional or conditional, to a sale or to a will. But the term *hiba* (gift) signifies the immediate transfer of property to another without consideration. Thus the difference between an assignment of proprietary right and gift is, that the one is general and the other particular."

Again, there is this passage in the *Ashbâh-wan-Nazâir* :—"The circumstances which constitute *tamlîk* are interchange of property ; dower, compensation by a wife to her husband for divorce from him, inheritance, gift, charity, bequest, endowment or appropriation, plunder, or conquest over lawful things and animals, finding of waifs, and amends to a person killed and subsequently inherited by his heir are all *tamlik*."

(2) *Radd-ul-Muhtâr*, Vol. IV, p. 776.

(3) [1884] I. L., 10 Cal., 1112.

only carry the right of drawing the interest on them,(1) the grant of *malikana* rights, which confers on the donee the right of obtaining from Government the proprietor's share in the income of an estate, and the like, form frequent subjects of gift. Similarly, under the Mahommedan sovereigns, assignments of revenue, which were called *Suyurghûl* grants, were often transferred by the grantees.

Thus a gift of property in the occupation of tenants is lawful for this implies the grant of the right to receive the rent from the occupying tenant or lessee.(2) So is a gift of property in the hands of a mortgagee,(3) or under attachment,(4) of an undistributed share inherited by the donor of which he has not obtained possession,(5) of the *malikana* interest or the right to receive from Government the proprietor's share of the assets of landed property which has been settled with another *zemindar* or *malguzar*.(6)

Gift of property in the occupation of tenants.

When property is held by another under a lease or *ijara*, it cannot be given so as to convey the actual possessory right to the donee, or to enable him to obtain direct, or what is called in the legal language of Upper India, *khas* possession of the subject-matter of the gift, as it would be inconsistent with, and in contravention of, the contract between the donor and his lessee. But there is no rule to prevent the assignment or gift of the right to receive the rent reserved under the lease. A gift, therefore, of property in the occupation of tenants is lawful, for this implies the grant of the right to receive the rents from the occupying tenants or lessees.

The passage in the *Fatâwai-Alamgiri*,(7) "but if it be in the hands of an usurper or of a pledgee, or of a *mustâjir* (hirer or

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(1) *Nawab Amjad Ally Khan* v. *Mahomdi Begum* [1867], 11 M. I. A., 517; s. c., 10 W. R., 25, P. C.; *Dorab Ally Khan* v. *Suliman Kadr*, I. L., 8 Cal., 1.

(2) *Ibrahim* v. *Suleman* [1884], I. L., 9 Bom., 146.

(3) *Rahim Buksh* v. *Muhammad Hassan* [1888], I. L., 11 All., 1. In *Mohinudin* v. *Manchershah* [1882], I. L., 6 Bom., 650, and *Ismal* v. *Ramje* [1899], I. L., 23 Bom., 682, the Bombay High Court has, it is respectfully submitted, misconceived the Mahommedan Law.

(4) *Anwari Begam* v. *Nizam-ud-din* [1898], I. L., 21 All., 165.

(5) *Mahomed Buksh* v. *Hossaini Bibi* [1888], L. R., 15 I. A., 81; s. c., I. L., 15 Cal., 684.

(6) *Mullick Abdul Gufoor* v. *Mussummat Maleka*, supra.

(7) Vol. III, p. 521.

lessee),(1) the gift is not lawful for want of possession," has been wholly misunderstood. It occurs in the chapter dealing with the subject of gifts to minors or infants (*saghîr*), (2) who cannot themselves take possession of the subject of a gift, and in which case the requisite of seisin, which will be discussed later on, is fulfilled by the possession of the father or the person standing for the time being *in loco parentis*. And it is therefore declared that "a gift by a father to his infant child is completed by the [mere] *'akd* (declaration or contract)(3) whether the property be in his own hands or in the hands of his depositary;" in other words whether his possession is real or constructive—for the depositary's possession is his own possession.

But this is not the case when the property is in the hands of somebody else who is claiming to hold *direct* possession of it by some title either derived from or independently of the donor. For example, a *mustâjir* (a lessee) and a mortgagee in possession claim the right to hold the property under an act of the donor himself; an usurper has it in his hands under an adverse title. In neither of such cases the possession is with the donor that he can transfer the possessory right or vest it by a mere declaration, as is the case when the property is in his own hands or in the hands of his depositary, for he can at any time resume possession. For the completion of a gift of property in the hands of a pledgee or a person holding possession under an invalid sale or an adverse title, something more is needed than a "mere declaration," *viz.*, an *authority* to receive the income or to take possession on the expiration of the lease or mortgage, or to sue for recovery. That the gift itself is not *inoperative* is clear from the following statement of the law:—"And Saijâni has stated that a gift by a father of property in the hands of a pledgee, or a usurper, or a vendee under an invalid sale, will take effect when the pledge or lease expires or the sale is set

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(1) The term "*ijara*" or lease, from which *mustâjir* is derived, under the Mahommedan law, is not restricted to a lease of lands or immovable property. It comprehends various classes of contracts which come under the head of Bailment, with the exception of pledge and deposits, which are treated separately under the head of *Rahn* and *Wadia't* respectively; *Majm'aa-ul-Anhar* (Constantinople Ed.), p. 343, Chapter on Gifts.

(2) *Fatâwai Alamgiri*, Vol. IV, p. 544.

(3) The father's declaration that he has given such a thing to his infant child forms the contract, for no assent is required from the donee.

aside or the thing usurped has been recovered."(1) Although the word *mustâjir* has, apparently by analogy, been introduced in the *Fatâwai-Alamgiri* it does not occur in the *Hedâya*.

The passage in the *Hedâya* (Arabic) runs thus :—

ما اذا كان في يده او في يد مودعه لان يده كيده بخلاف ما اذا كان مرهونا او مغصوبا او مبيعا بيعا فاسدا لانه في يد غيره او في ملك غيره و الصدقة في هذا مثل الهبة *

The gift is valid—"when it [the subject of the gift] is in his [the donor's] hands or in the hands of his depositary for being in the latter's hands is like being in his own, which is contrary to its being pledged, or usurped or sold under an invalid sale, for it is in such cases in the hands of another or in his property; and a *sadakah* under such circumstances is like a *hiba*."

The gloss of the *Kifâya* on the above is the following :—

بخلاف ما اذا كان مرهونا او مغصوبا الى اخره يعني اذا كان مال الاب مغصوبا او كذا و كذا لم يتم الهبة بالعقد لانه في يد غيره في الرهن و الغصب او في ملك غيره في البيع الفاسد فان قيل ينبغي ان لا يتم الهبة اذا كان في يد مودعه لاشتراط الكمال في القبض و كون هذا القبض حكميا وهو نقص من القبض حقيقة قلنا القبض حكما كاف لاتمام الهبة *

"'Contrary to its being pledged or usurped, etc.' that is when the property of the father has been usurped or the like [pledged or sold under an invalid sale] the gift is not completed by the *contract*, for it is in the hands of another when pledged or usurped, and in the property of another when sold under an invalid sale. Then if it is objected that complete seisin being conditioned, a gift of property in the hands of a depositary cannot take effect, and seisin in such a case is merely constructive falling short of real seisin, then I say [with reference to this objection] that constructive seisin is sufficient for the completion of the gift."

Nor does the word *mustâjir* occur in the *Majm'aa-ul-Anhar*, the restriction apparently as in the *Hedâya* being confined to pro-

(1) *Radd-ul-Muhtâr*, Vol. IV, p. 785.

perties in the hands of a pledgee or a *ghâsib* (usurper) and properties transferred under an invalid sale (*ba'i-fâsid*).

Hypothecation.

To understand the restriction it is necessary to bear in mind that under the Hanafî Law there is no hypothecation without seisin.(1) Consequently, when a property is in the hands of a mortgagee or a bailee, the interest of the mortgagor or bailor, *viz.*, the reversionary right, can only be conveyed by gift to the donee, and not the actual possessory right, which by the fact of bailment or mortgage has been transferred to the mortgagee in possession, or the bailee. So where immovable property is in the occupation of a lessee or a tenant, the right of receipt to the rents alone can be granted by the donor. The Bombay High Court, in the case of *Mohinudin* v. *Manchershah*,(2) has decided that lands in the possession of a mortgagee cannot form the subject of *hiba* under the Mahommedan Law. This view, it is respectfully submitted, is founded upon an erroneous apprehension of the Hanafî Law under which seisin is requisite for hypothecation. Under the Mâliki Law. seisin is not necessary. But, according to the correct view of the Hanafî doctrine on the subject, there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. On the contrary, under the law relating to *hawâlât*,(3) the debtor may transfer his liability to another. And, as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment of the debt. But, when the property is not in the hands of the mortgagee, as is usually the custom in India and is only burdened with certain debts, which are secured upon it, the mortgagor is unquestionably entitled to make a disposition thereof.

Mohinudin v. *Manchershah*, erroneously decided.

Property in the hands of a usurper.

The gift of a property in the hands of a usurper probably stands on a different footing. The right of the donor to such property is a mere inchoate right, *viz.*, to sue for recovery of possession, and it is possible that, in early times, the gift of a mere speculative right of suit without express authority to take action was regarded with disfavour. But there seems to be no sufficient ground for holding that where a property, to which a person is rightfully

(1) *Hedâya*, III, p. 189.
(2) [1881], I. L., 6 Bom., 650.
(3) *Hedâya*, II, p. 606.

entitled, happens to be in the hands of another claiming adversely to him, the rightful owner may not make a gift of the same to a third person. In the case of *Mohammed Bukhsh Khan* v. *Hossaini Bibi*,(1) the Privy Council laid down the principle, that where a gift is public and authorises the donee to take possession which is in fact taken subsequently, the gift is not invalid on the ground that the donor was not, at the time, in possession of the subject of the gift. This view is in conformity with the rule of the Mahommedan Law.

In the case of *Mohinudin* v. *Manchershah*,(2) the Bombay High Court has held that the sale of property of which the vendor is out of possession is valid. Consequently, a *hiba-bi'l-ewaz* thereof, which is equivalent to a sale in its legal incidents, would without question be valid.

Mullick Abdul Gufoor v. *Musst. Maleka.*

Regarding the validity of a gift of lands and tenements in the occupation of tenants, the judgment in the case of *Mullick Abdul Gufoor* v. *Musst. Maleka*(3) has settled the question beyond any room for doubt. The Chief Justice dealing with the arguments urged against the validity of the gift said :—

"The question, therefore, in this Court, so far as this deed is concerned, has been, whether having regard to the subject-matter of the gift, and the fact of there having been no actual partition made of it, at the time when the deed was executed, as between the two donees, the transaction is valid in law as against the plaintiffs."

"This question has been argued before us at some length, and we are much indebted to the learned Counsel on both sides for the pains which they have taken to refer us to all the authorities upon the subject. But having heard the matter fully argued, we are satisfied that the gift is valid, and that the conclusion at which the Lower Court arrived is just."

"The property, which is the subject of the gift, consists of several zemindaries, and shares in zemindaries, let out to tenants and ryots, as such estates usually are ; a good many lakheraj properties also let out to tenants ; several *malikana* rights of some

(1) [1888], L. R., 15 I. A., 81.
(2) [1882], I. L., 6 Bom., 650.
(3) [1884], I. L., 10 Cal., 1112.

value, and a variety of house-property in Patna, and elsewhere, consisting of houses, sheds, roads, gardens, &c.''

''There is no satisfactory evidence as to how this latter property was occupied or utilized at the time when the gift was made.''

''The arguments on the part of the plaintiff resolve themselves into three main points :—''

''1*st*, That by Mahommedan Law, a gift cannot be made of lands which are not in the possession of the donor, nor of incorporeal properties, such as rents, *malikana* rights and the like; 2*nd*, that an undivided share of a house or a zemindari cannot be made the subject of a gift; and 3*rd*, that a gift to two persons without previous division and separation is invalid.''

''In dealing with these points, we must not forget that the Mahommedan Law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Baghdad, and other Mahommedan countries, under a very different state of laws and society from that which now prevails in India; and that, although, we do our best here in suits between Mahommedans to follow the rules of Mahommedan Law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the great expounders of the Mahommedan Law ordinarily current in India, namely, Abû Hanîfa and his two disciples.''

''We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded, and to administer it with a due regard to the rules of equity and good conscience, as well as to the laws, and the state of society and circumstances which now prevail in this country.''

''Having premised thus far, we think that the first of the above point, although it has occupied some time in argument, may be very readily disposed of. In fact it appears to us to have been already settled.''

''We have been referred to several authorities, and, amongst others, to the *Durr-ul-Mukhtâr*, *Book on Gifts*, p. 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus, when land is in the possession of a *usurper (or wrong-doer), or of a lessee or mortgagee, it cannot be given away;* because in these

Mullick Abdul Gufoor v. *Musst. Maleka*—contd.

cases the donor has not possession of the thing which he purports to give."(1)

"But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away *the possessory interest* in the land itself, and not merely a reversionary right in it; of course an actual seisin or possession cannot be transferred, except by him who has it for the time being."

"It is possible, too, that these texts may be explained by what we are informed was the law in Baghdad in early times with reference to land let on lease; we are told that an *ijara* lease, which in this country means generally a farming lease of ryoti holdings, meant, according to the law of Baghdad, a lease of the land itself or its usufruct; and that the owner of the land having made such a lease, could not by law transfer his reversionary interest, so as to give the transferee a right to receive the rent from the *ijaradar* (see *Fatâwa-i-Alamgiri*, Vol. III, *Book on Gifts*, p. 521)."

"Whether this is the real meaning of the authorities may be doubtful; but it is certain that such a state of the law in this country would render the transfer by gift of a zemindari and other landlords' interest simply impossible: lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the zemindar and the occupying ryot. What is usually called *possession* in this country is *not actual or khas possession*, but the receipt of the rents and profits; and, if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again, of zemindari properties would be invalidated. If we were disposed to agree with this novel view of Mahommedan Law (which we are not), we think we should be doing a great wrong to the Mahommedan community, by placing them under disabilities with regard to the transfer of property, which they have never hitherto experienced in this country. Such a view of the law is quite inconsistent with several cases decided by the Sudder Dewany Adalut (under the advice of the *Kâzis*), and also by this Court (see 1 Select Reports, 5, 12, and 115 note; 1 Bombay High Court Reports, 157; 16 W. R., 88; and 12 W. R., 498); and it is

(1) The learned Chief Justice's attention was not called to the fact that the passage in question occurs in the chapter dealing with gifts to infants.

directly opposed to the case of *Amirunnissa* v. *Abedunnissa*(1) decided by their Lordships of the Privy Council."

Mullick Abdul Guffoor v. *Musst. Maleka*—concld.

"In that case a gift of large zemindaries was held to be valid, although it is clear that they consisted, as such estates generally do, of tenures and interests of all kinds; no objection was then taken to the gift upon the ground that has been urged before us here, and indeed, so far as it appears, that point has now been taken for the first time."

"Similarly, as regards the *malikana* rights, we are not aware of any reason, why rights of this description should not be made the subject of a gift, in the same way as rents or other incorporeal property of that nature. We have already decided that reversionary interests, carrying with them the right to receive rents, may be thus transferred; and it is clear that debts and Government notes and other *choses in action*, which give the parties entitled to them the right to receive money from the Government or third persons, may be made the subject of a gift."

"A *malikana* right is the right to receive from the Government a sum of money, which represents the *malik's* share of the profits of the revenue-paying estate, when from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into *khas* possession of Government, or transferred to some other person, who is willing to pay the rate assessed. There is nothing in principle, so far as we can see, to distinguish a *malikana* right from a right to receive rents, or the dividend payable upon Government paper."

Gift of a debt under the Shiah Law

Regarding the assignment of a *chose in action*, there are two divergent opinions in force among the Shiahs. The Mohakkik states in the *Sharâya-ul-Islâm*, "that the donation of a debt, or what rests on the obligation of another, is not valid to any other than the debtor or the person by whom it is due, according to the generally received doctrine, by reason of the condition already mentioned that it requires possession to complete it, whereas if made to the debtor himself, it is quite valid and operates as a release of the debt,"(2) whilst the great author of the *Mabsût* and other eminent Shiah jurists agree with the Hanafi lawyers in holding that, according to a liberal interpretation, the transfer or

(1) [1875], L. R., 2 I. A., 87; s. c., 15 B. L. R., 67; 23 W. R., 208.
(2) *Sharâya-ul-Islâm*, p. 242.

assignment of a debt to a third person by the creditor is lawful. And even the *Jâm'aa-ush-Shittât*, which often adopts the opinion of the Mohakkik, says that the gift of a debt to a third person is valid according to *'urf* (custom). The doctrine laid down in the *Mabsût* has been so generally approved by *'urf* or custom, which is the embodiment in practice of the general consensus of a progressive community, that the rule mentioned by the author of the *Sharâya* may be regarded as entirely exploded.

Doctrine of the *Mabsût* recognised in practice.

Under the Hanafî Law the release of a debt to the debtor is valid without his consent, but becomes inoperative, if the debtor refuses to accept the release.

Hanafî Law.

Here, again, there is a conflict of opinion among the Shiah jurists. The author of the *Mabsût* declares the release of a debt (*ibrâ*) to a debtor is not valid or operative without the debtor's express or implied consent. According to the author of the *Sharâya* such a release is valid without acceptance,(1) and though he does not say what the result would be, if the debtor rejects it, his meaning probably is that it would be effective. In the *Zakhîra-i-M'aâd*, Shaikh Zain-ul-'aâbidîn, late Mujtahid of Tehera, adopts the opinion of the *Mabsût*, and in the *Jâm'aa-ush-Shittat*, a case is given from which it would appear that under the Shiah Law, as under the Sunni Law, when a creditor discharges the debtor, he cannot again enforce the liability, but the debtor may insist upon his performing any obligation which rests on the creditor, or even force him to accept the debt.

Shiah Law.

"Release of a debt."

A gift of property which is not in existence at the time of the donation and whose existence at some future time is problematical, is invalid.

With regard to the invalidity of the gift of things absolutely non-existent, the *Durrar-ul-Akkâm* gives the following explanation :— " The secret (reason) of the invalidity of such objects as flour in the wheat, &c., consists in the fact that they change completely their character in the process of making, and a new thing altogether comes into being after the *istehâla* (استحالة)."(2)

A gift of non-existent objects.

In the *Durr-ul-Mukhtâr* the principle is stated thus :—" The gift of flour in the wheat, of oil in the sesame, or the butter which is in the milk is altogether invalid as it is non-existent (*m'aadûm*),

(1) *Sharâya-ul-Islâm*, p. 242.

(2) *Istehâla* means practically transmutation.

so that right of property cannot be acquired in any of those things, without a new *'akd* (declaration or contract),'' (1) in contradistinction to the case of a gift of '' milk in the udder, or of fleece on the sheep, or of palm-trees in the ground, or of fruit on the trees, which although invalid on the ground of *mushâ'a* or confusion(2) becomes operative if the subject of the gift is separated and made over to the donee.'' And then the question is formulated—''Is the separation by the donee with the permission of the donor sufficient to constitute a valid gift?(3) According to the approved doctrine (*zâhir-ur-rawâyet*) it is.''

Speaking of the subject-matter of gifts, *viz.*, what may or may not form the subject of *hiba*, the *Fatâwai-Alamgiri* has the following :—

What may or may not form the subject of *hiba*.

''Among the conditions which are required in the case of the subject of the gift there are several, one of these being that it must be in existence at the time of the gift; thus a gift of something which is not in existence at the time of the *'akd* (contract) will not be valid. For example, if one were to give the fruit that may be produced by his tree in the course of the year,....or what is in the womb of this sheep, or in its udder, the gift is unlawful though power be given to take possession at the time of production, as of birth, or of milking; so is invalid the gift of the butter in milk, the oil in sesame, or the flour in wheat, though the donee be empowered to take possession on production, for they are non-existent at present and are therefore not fitting subjects for the *'akd* (contract) to take effect: and this is correct, so in the *Jawâhir-ul-Akhlâti*.''

Where, however, a person has a subsisting recurring right in something which is neither variable nor uncertain, there is no reason in principle why its gift should not be valid. Thus an assignment of the ascertained rents and issues of any particular property movable or immovable may validly be effected. The Bombay High Court in the case of *Amtul Nissa Begam* v. *Mir Nurudin Hussein Khan*(4) seems to have missed, it is submitted, the real principle under which a gift of something not in existence at the time is invalid, *viz.*, the uncertainty

(1) *Durr-ul-Mukhtâr*, p. 635.
(2) See *post*.
(3) *Durr-ul-Mukhtâr*, p. 636.
(4) [1896], I. L., 22 Bom., 489.

relating to the subject-matter of the gift, not merely the inability to give possession.

The subject of gift must have legal value.

"Another condition is that the subject of the gift must have legal value, so that anything in which there can be no right of property, such as carrion, pork, or in which the right of property has been abandoned as an emancipated slave, or what has no value at all as wine, cannot be the subject of gift."

"The third condition is that possession must be taken of it to establish in it the right of the donee, and if it is in its nature divisible, t must be divided and distinguished from, and not joined to, or occupied with anything else that is not given. Hence the gift of land without the crop then standing on it, which belongs to the donor, or of a palm-tree in bearing without its fruit, and *vice versâ*, is invalid. So also of a house or vessel in which there is something belonging to the donor without its contents, thus in the *Nihâya*."(1)

Mushâ'a. Divergence between the schools.

As regards the latter principle, there is considerable difference between the Hanafîs on one side and the Shâfeïs and the Shiahs on the other. Under the Hanafî Law, if the subject is in its nature divisible, or forms part of a thing which is capable of physical partition or division, the gift is not valid until it is divided off, or separated from the other property of the donor which is not given. But where it forms part of an indivisible thing, or of a thing which cannot be divided without considerable damage to the entire property, the gift is valid though there is no partition.

The Hanafî doctrine.

The Shiah and Shâfeï doctrines.

The Shiahs and Shâfeïs differ *in toto* from the Hanafîs regarding this principle. They maintain that the gift is valid in either case, because a gift is a *tamlîk* and valid as such in respect of all things, whether they form portions of a divisible or indivisible thing. The Shiahs, however, insist that there must not be a complete ignorance as to the substance of the gift, *i.e.*, that the subject should be sufficiently indicated in order to leave no room for doubt as to what is given. Indefiniteness or ignorance as to the very subject-matter of the gift would avoid the grant, but not mere ambiguity which can be explained by other circumstances. According to the Shâfeïs, mere indefiniteness does not render a gift void, for an undefined but known share may be as much the subject of proprietary right as a definite specific share.

Shiah doctrine.

Shâfeï doctrine.

(1) *Fatâwai Alamgiri*, Vol. IV, p. 521.

The *Fatâwai Alamgiri* devotes a special chapter to what may and what may not validly form the subject of gift.(1)

Impartible *mushâ'a*. The rule of Hanafi Law.

"The *hiba* of a thing of which possession can be taken(2) and which has been separated from the property of the donor and his rights is valid. So is the gift of a *mushâ'a* that is incapable of partition, or is of such a nature that some kind of benefit or advantage that can be derived from it while whole or undivided cannot be derived from it after partition, as for instance, a small house (*bait-us-saghîr*) or a small bath. But the gift of a *mushâ'a* in a thing that admits of partition, preserving the benefit which was derivable from it before partition, is not valid. So it is stated in the *Kâfi*. *What is required* is *that the thing given be partitioned and capable of being taken possession of at the seisin, not at the time of the 'akd* (contract)."

"An illustration of this is furnished by a case where a man makes a gift of an undivided half of a house to one person but does not deliver possession until he has made a gift of the other half to another; if he were then to give seisin of both at one and the same time, it would be valid according to the *Zahîria*. But if he were to make a gift of a moiety to one and deliver possession and a gift of the other moiety to a third person and similarly deliver possession, it would not be valid and both gifts would be *fâsid* (invalid) according to the *Nihâya*."

* * * * * *

Possession of *mushâ'a* establishes right of property.

"The gift of a *mushâ'a* which does not admit of partition is valid to a partner or to a stranger, according to the *Fusûl-i-'Imâdia*. The gift of a *mushâ'a* in what does admit of partition is not valid whether it be to a partner or one who is not a partner, and if possession is taken of it, Hisâm-ud-din has stated in the *Kitâb-ul-Wâk'iât* that it would not avail to establish property in the donee, but he has said in another place that it would avail to establish it *invalidly, and decisions are passed accordingly; so in the Sirâjia.*"(3)

The subject of *mushâ'a* has furnished a fruitful source of discussion in the Indian law-courts and the difficulties with which

(1) P. 524.

(2) Mr. Baillie has translated *Muhawwaz* as separated. I think *Mufaragh* conveys the idea of separation.

(3) *Fatâwai Alamgiri*, Vol. IV, p. 526.

it is surrounded render it necessary, that the meaning of the doctrine, its *raison d'être* and the legal principles which govern it, should be considered with some degree of care.

Mushâ'a—its *raison d'être.*

Mushâ'a has been defined by Freytag as meaning "pluribus communis." Every joint undivided property subject to the right of more than one individual is a *mushâ'a.* The word *mushâ'a* is derived from *shuyû'u* which means confusion. Where several persons own a particular property joint and undivided, no one of them can predicate that his interest is attached to any specific portion. The gift by one of the co-sharers of his share in such a property is likely to create confusion in its enjoyment by all the co-sharers. It will be seen, therefore, that the doctrine of *mushâ'a*, which implies a prohibition against the *hîba* of joint undivided properties that are partible in their nature, owes its origin among the Hanafîs to a rather nervous dread on the part of some of their principal lawyers, notably Abû Hanîfa, that unless divisible things were divided off, it would give rise to disputes and complications in the enjoyment of such subjects.

Mushâ'a.

Abû Hanîfa carries his objection to "indefiniteness," in other words, to the gift of a share in joint undivided property which is capable of partition, to the utmost limit. But there is a marked difference between him and his disciples on the point in question. Generally speaking, their views are more in accord with the requirements of a progressive community and less casuistical than those of Abû Hanîfa. The following passage from the *Fatâwai Alamgiri* will bring into prominent relief, not only the views entertained by the early writers on the subject, but also the nature of the divergence between the master and disciples, though the principles laid down there must be taken subject to the enunciations of later authorities.

"With regard to the validity of the gift of a *mushâ'a* (undivided part of a property) which does not admit of partition, it is a condition that its quantity should be known, as if a person were to give to another a share in a bondsman, and the share is not known [not specified], the gift would not be valid, for the want of specification [*lit.* ignorance of the share] would cause disputes; so in the *Bahr-ur-Râik.* When the share of the donor is known to the donee in such a case the gift, according to Abû Hanîfa, ought to be

valid, but not so according to t' other two [Abû Yusuf and Mohammed]; so in the *Muhît-as-Sa[illegible]hi.*' (1)

"The gift of a *mushâ'a*, that admits of partition, to two men or to a group, is valid according to the two disciples, and invalid according to Abû Hanîfa. But it is not *bâtil* (void), so that it avails to establish [the right of] property by possession. This is according to the *Jawâhir-ul-Akhlâti.* Sadr-ush-Shahîd(2) has stated that when a person has given what admits of partition to two men, so that the gift is invalid according to him [Abû Hanîfa], and possession is afterwards taken of it, *the right of property is established in them invalidly and* that the *fatwa* (decree) is passed according to this doctrine; so in the *Fatâwai 'Itâbia.*" Possession.

"And the right of property is not established in the donee until he takes possession [of the subject-matter of the gift], and this is the approved doctrine; so in the *Fusûl 'Imâdia.*"

As Mr. Baillie(3) points out, a gift of *mushâ'a* may be made in three different ways. *First*, a person being the owner of the whole may give an undivided and unspecified share to another. In this case there is *shuyû'u* or confusion on both sides, and the gift is invalid by *consensus*. *Second*, a person being the owner of the entire subject of the gift gives the whole to two or more persons "undividedly," *i.e.*, without partition or apportionment. Here there is confusion on the side of the donees only; and the gift would be valid according to Abû Yusuf and Mohammed though not according to Abû Hanîfa. The third case is where two or more persons own a property jointly in undivided shares and they combine in making a gift of the whole to one single person. In such a case the confusion is on the side of the donors and the gift is valid *bi'l ijmâ'a* (by consensus).

These principles are formulated thus in the *Fatâwai Alamgiri.* "Confusion on both sides in property capable of partition prevents the validity of gift *bi'l ijmâ'a* (by consensus), but when the confusion is only on the side of the donee, it prevents the validity of the gift, according to Abû Hanîfa, in opposition to the other two [Abû Yusuf and Mohammed] so in the *Zakhîra.* And if one should make a gift to two persons who are poor, it would be

(1) *Fatâwai Alamgiri*, Vol. IV, p. 526.
(2) A great jurist of Khorasan who flourished in the 13th century.
(3) Baillie's Dig., 2nd Ed., p. 525.

lawful by consensus, as a *sadakah* (a pious offering). But if they are rich, and the gift is made to each of them in halves, or if it is made vaguely, by saying, 'I have given to you both,' or with an excess in favour of one, as by saying, 'to this one a third of it, and to this one two-thirds of it,' it is invalid in the three cases according to Abû Hanîfa; while, according to Mohammed, it is valid in them all; and according to Abû Yusuf, it is lawful in the two cases where the gift is made to both indefinitely, or in halves, but it is not lawful with any excess in favour of one of them. And Karkhi reports from Ibn Samâ'a that Abû Yusuf has declared, when a man says to two men 'I have made a gift of this mansion to you two, and the half is for one and the other half for the other,' it would be valid, for he has made a gift of the whole and explained its effect."

The extreme technicality of the doctrine is, however, apparent from the following statement:—"If he (the donor) were to say 'I give a half of this mansion to you and the other half to him,' the gift would not be valid for the contract (*'akd*) itself is affected with *shuyû'u*." "If a person were to say 'I have made a gift of this mansion to you two, two-thirds for one and one-third for the other,' the gift would not be valid according to Abû Hanîfa and Abû Yusuf, but would be valid according to Mohammed." Abû Hanîfa and Abû Yusuf differ, however, in their reasons for holding the gift to be invalid; whilst Abû Hanîfa thinks the contract (*'akd*) is vitiated by confusion, Abû Yusuf considers that as the shares are different, the gift is separable into two contracts, and as possession is a necessary condition to the validity of a gift, it is hardly possible under the circumstances.(1) "When two [persons] make a gift of a house to another, it is valid by consensus, so in the *Muzmirât*."

"Original confusion," *viz.*, such as was existing at the time of the gift, "alone vitiates the contract, but not one which came into existence subsequently (*shuyû'u at-târi*). For example, if one were to give to another the whole of something, and afterwards were to rescind the gift in respect of an undivided part, or if an adverse right was established in respect of a similar part, that circumstance would not invalidate the gift, which is different from the case of a

(1) *Fatâwai Alamgiri*, Vol. IV, pp. 526-7.

pledge which is invalidated by a supervenient confusion; so in the *Sharh-ul-Vikâyah.*"

"If a person were to make a gift of an undivided part of some thing which admits of division, and were afterwards to divide it and deliver the share to the donee, it would be valid as is stated in the *Sirâj-ul-Wahâj.*"

"If he were to make a gift of a moiety and deliver the whole, it would not be valid,(1) but if he were to give the whole and deliver possession in part, it would be valid; so it is stated in the *Tâtâr-Khânieh.*"

"It has been said that if a person were to make a gift of an undivided moiety of a house to one person and deliver it to him, and were afterwards to give the other moiety to another, neither of the two would be valid; but if he had not delivered possession to the first donee and then made the second gift and thereafter delivered possession to both, in that case the gift would be valid in favour of them both, according to Abû Yusuf and Mohammed, for such a gift is tantamount to a gift of the *whole* house to the two donees; so in the *Mabsût.*" * * * *

This authority, although occasionally cited by the compilers of the *Fatâwai Alamgiri*, is not nowadays extant in India. Anyhow the view expressed in the *Wajîz-l'il-kurdi* is in direct conflict with the statement of the law given in the *Durr-ul-Mukhtâr* as the one "on which decrees are passed." After stating the opinion held by some writers that when a person makes a gift of an undivided part of a thing and delivers to the donee possession of the same, the latter does not acquire a right of property over it so as to entitle him to deal with it, and if he does so he incurs a liability (for compensation), whilst the donor retains his power of disposition, the author proceeds to add —"but in the *Durrar* [*ul-Ahkâm*] it is stated from the *Fusûl* that an invalid gift (*hibat-ul-fâsid*) avails to establish the right of property by possession, and on this doctrine is the *fatwa* (*wa-bihi-iftâ*). And similarly it is laid down in the *Bazâziah.* This is contrary to what the *'Imâdia* states as correct. But the word *fatwa* is stronger (أصل) than the word *sahîh* as the author has stated in detail when dealing with the remaining rules relating to *mushâ'a.* And whether

(1) There is no reason given for this doctrine.

an invalid gift to a kinsman(1) can be revoked—in the *Durrar*, it is stated, it can. But this is objected to by Sharnibilâlièh, who has laid down that such a revocation is against the approved doctrine based on the rule on which decrees are made that in an invalid gift possession avails in vesting right of property, so this must be remembered."(2)

The same principle is given by Shibli from Itqâni "that a gift of *mushâ'a* is only invalid or *incompletely* valid (*sahîh ghair tâm*) "which is borne out by the statements in the *Bahr-ur-Râik*."

The *Kifâyah* states the principle still more clearly—"and the gift of a *mushâ'a* which is capable of division is not valid either to a partner or stranger, but 'Usam (may the peace, etc.) has declared that if possession is taken it will avail to establish the right of property."(3)

"The sale of a *mushâ'a*, whether it admits of partition or not, is valid; so its lease to the partner, though not to a stranger, and on this is the *fatwa*. But a lease of an undivided share to a stranger is only invalid....A loan of an undivided part (*mushâ'a*) is valid to the partner, but to a stranger only if the share is delivered *dividedly*. The mortgage (*rahn*) of *mushâ'a* is invalid whether it admits of partition or not, and whether it is made to a partner or stranger."(4)

The following passages in the *Fatâwa-i-Alamgiri* show still more clearly how technical the doctrine of *mushâ'a* is.

"If a person were to make a gift of a share of a partition wall or a way or a bath and were to specify the same and were to empower the donee to take possession, it would be valid as is the case of a house given to another with all its rights and boundaries which is taken possession of by the donee separately and dividedly, but the right of egress and ingress thereto is common between them; such a gift is valid according to the *Jawâhir-ul-Akhlâti*.* * *

"It is reported in the *Asl*(5) that if half a mansion is given undividedly to a person, and delivered to him, and he were to sell it, the sale would not be valid, and it is expressly stated in some *Fatâwa* that this is approved; so in the *Wajiz l'il Kurdi*."

(1) See *post*, Chapter on Revocation.
(2) *Durr-ul-Mukhtâr*, p. 634.
(3) *Kifâyah*, Vol. III, p. 680.
(4) Tahtâwi. For the *wakf* of *mushâ'a*, see *post*.
(5) Another name for the *Mabsût* of Imâm Mohammed.

"If a man were to make a gift of a mansion in which there are some effects belonging to him, and should deliver the mansion to the donee, or deliver it with the effects, the gift would not be valid. But there is a device (حيلة) [by which a valid gift can be made]; it is first to make a deposit of the effects with the donee, and then to vacate them for him, and then make delivery of the mansion. In the opposite case, if he should make a gift of the effects without the mansion, and vacate them for the donee, and then make delivery of the mansion, or if he should make a gift of the mansion and effects together, and vacate them both for the donee, the gift would be valid in all these cases according to the *Jouharat-un-Nayyirèh.*"(1)

"If a separation is made in the delivery, as by giving one of the two and delivering it, and then by giving the other and delivering it, and a beginning is made with the mansion, the gift of the mansion is not valid, but that of the effects is valid, while, if a beginning were made with the effects, the gift of both would be valid, so in the *Jouharat-un-Nayyirèh.*"

"And if one should give land without the growing crop, or the crop without the land or trees without their fruit, or fruit without the trees, and vacate them for the donee, the gift would not be valid in either case; for they are so connected as to form parts of one another, and the gift is like that of a *mushâ'a* in a thing susceptible of partition. But if he should give each of them separately, as, for instance, the crop and then the land, or the land and then the crop, and deliver them together, the gift would be lawful as to both; while, if he separate them in delivery, it is valid as to neither whichever he may begin with, so in the *Siraj-ul-Wahâj.*"

"If a person were to make a gift of a mansion and not deliver it till he gives the effects also, and then delivers them together, the gift is lawful; in the same manner as when one gives a bag and corn-sacks, and does not deliver them until he makes a gift of the corn contained in them, and then delivers both, the gift is lawful as to the whole; so in the *Muḥît.* If at the time of gift the house is empty, but at the time of delivery it is occupied, it is not valid; nor would his saying, 'Take possession,' or 'I have delivered,' be

(1) Comp. *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan* [1905], I. L., 29 Bom., *post.*

valid when the donor, or his people, or goods are in the mansion; so in the *Tâtâr-Khânièh.*"(1)

Gift of things occupying and occupied.

"The gift of a thing which occupies another (*shâghil*) is lawful, but the gift of the thing occupied (*mashgûl*), is invalid. The principle in this class (*jins*) of cases is that the thing given being contained in [or mixed with] the property of the donor prevents the completion of the gift, because seisin is necessary, but when the thing given holds the property of the donor it does not prevent the completion (effectuation) of the *hiba.* ..... *If a man were to make a gift of the crop on his land, or the fruit on his tree, or the scabbard on his sword, or the structure of a building or a measure of corn from a heap, and direct the donee to reap or to gather it, or to draw it or to remove it or to measure it, and he should do so, the gift would be lawful on a favourable construction (istehsân);* but if he is not permitted to take possession and does so, he is responsible; so in the *Kâfi.*"

"A gift by a wife to her husband of her house when they are both residing in it, is valid, as stated in the *Wajiz-l'il Kurdi.*"(2)

A gift rendered void by a right being established in part of it.

"If a man holds a house on lease and the lessor were to make him a gift of the building, it would be valid according to the *Tâtâr-Khânièh.* If a person were to make a gift of a house with its furniture and deliver them both and a right is subsequently established in respect of the furniture, the gift of the house is valid according to the *Kâfi.*"

With regard to the question "whether the fact that the thing given is contained in the property of a person other than the donor prevents the completion of the gift, the author of the *Muhît* has stated in the first chapter of his treatise on the gift of increments that it does not. For, he has said if a person were to lend another a house, and the bailee (*must'aîr*) were to misappropriate some property and put it in the house, and after that the bailor was to make a gift of the house to the bailee, it would be valid: similarly if the goods were stolen by the bailor himself and deposited in the house .....If a person were to entrust another with a house and furniture, and afterwards to make a gift of the house to the depositary, the gift would be valid; and if the furniture becomes destroyed whilst in the hands of the donee, the person entitled to it

(1) *Fatâwai Alamgiri*, Vol. IV, p. 529.

(2) Comp. *Amina Bibi* v. *Khatija Bibi* (1864), 1 Bom. H. C. R., 157.

will have recourse to the donee for compensation. Ibni Rustam has stated this to be Mohammed's doctrine, although Abû Yusuf thinks that in case of a person entitled to either coming forward the gift of the house would be invalid; so in the *Tâtâr-Khândièh.*"

"If one should give sacks with goods in them, or a bag with food in it, and deliver them to the donee, and a right is subsequently established to the contents, in either case the gift remains complete as to the sacks and the bag; so in the *Muhît.* And if a man were to make a gift of a bag with its contents, and a claim is established as to the bag, the gift would be established in respect of the contents; so in the *Fatâwai Kâzi Khân.*"

"If a person were to make a gift of a house which has furniture in it, and were to deliver possession of both; and subsequently another were to establish his right to the furniture, the gift of the house will not be invalidated. And if the furniture is destroyed before the person rightfully entitled has appeared, whether the furniture was made over [expressly] or not to the donee, the rightful owner can recover compensation from the donor or the donee. Some have said this is the doctrine of Mohammed, but all our masters are agreed that until the thing is removed, there is no liability for compensation; others have said this is the doctrine of all our masters and it is *correct*, as is stated in the *Muhît-i-Sarakshi.*"

"If one should give a mansion, of which possession is taken, and a right is then established in a part of it, the gift is void according to the *Yenâbiah.* And if one should give land with the crop upon it, or a date-tree with the fruit on it, and make delivery of both, and a right should then be established in the crop or the fruit, the gift in the land or trees is void; so it is stated in the *Muhît.* A person makes a gift of his land with the crop on it, and cuts and delivers the crop, after which a right is established in one of them, the gift is void as to the other; so in the *Muhît-i-Sarakhshi.*"

"If a man is the owner of a house and part owner of another and were to say to a person 'I give thee these two houses' it would not be valid as to either, but if he were to say 'I give thee this one and my share in the other' it would be valid (in respect of both) as is stated in the *Khazânat-ul-Muftiîn.* It is stated in the *Fatâwai-ul-'Itâbiah* that if a man were to make a gift of his house in favour of his wife and of what is in her womb (*i.e.*, unborn child), or were

to bestow it on them in charity, it would not be valid; but if he were to make a gift in favour of a living person and another who is dead or a non-living thing like a wall, the whole gift would be valid in favour of the living; so in the *Tâtâr Khânièh*."

"A man loses a pearl and then makes a gift of it to another and empowers him to demand it and take possession when recovered. Abû Yusuf declares such a gift to be invalid as it is a mere contingency; this is according to the *Zahîria*."

"When a man makes a gift to his partner (*muzârib*) of the property of the business, part being due from people and part being in the partner's hands, the gift is valid as to what is in his hands, but with regard to what is due from others, if he says 'realise same,' then it is valid; but with regard to any part which is unaccrued profit (*rabah*), it would not be valid; so in the *Muhît*."

Gift by one partner to another of a share in the profits not unlawful.

"When one of two partners says to the other 'I have given thee my share of the profit,' it has been said that if the property itself be in existence, the gift is not valid, by reason of its being *mushâ'a* in what admits of partition; but if the partner has lost the property, the gift is valid by reason of its being an *iskât*, or extinction of right, so in the *Zahîria*."

Doctrine of *Mushâ'a*.

These doctrines are more simply stated in the *Durr-ul-Mukhtâr*. "The rule is that if the thing given contains something belonging to the donor (which is not given) it prevents the completion of the gift, but not if it is contained in something belonging to the donor not given, (thus) when a man gives to another a bag which contains the food of the donor, or his house which contains his furniture or the animal on which is his saddle, and delivers them, the gift is not valid; but in the reverse case the gift is valid, for example, if he were to give the food, the furniture or the saddle, it would take effect..."(1) "The fact that the thing given contains the property of somebody other than the donor does not prevent the completion of the gift." This is explained thus by Tahtâwi; for example, a man makes a gift of a house with the furniture in it, and delivers possession of the same to the donee; subsequent thereto it is established that the furniture was the property of a third person, the gift is operative in respect of the house alone; for at the time of the gift, the house and furniture were both in fact in the possession of the donor and the delivery thereof was valid; the subse-

(1) *Durr-ul-Mukhtâr*, p. 634.

quent establishment of the right of another to the furniture will not invalidate the gift of the house...." According to the *Ashbâh* the gift of a containing thing is valid when the gift is by a father to his minor child."

"And the gift by a wife to her husband *containing things* is valid according to the approved doctrine for the wife and her property are in the hands of the husband, and consequently the delivery of the same to him is operative. So when a wife makes a gift to her husband of a house in which they both live and she has her effects in it, the gift is valid, and this is the correct doctrine." "In the *Jouhara*(1) a device is given for validating the gift of a thing containing [the donor's property], *viz.*, first to place the latter in the donee's hands by way of deposit and then deliver to him the subject of the gift, that is, the thing *containing* such as a house, in such a case the gift would be valid, for the furniture or effects of the donor being already in the hands of the donee as depositary, it would not interfere with the completion of the gift."(2)

The objection of *mushâ'a* does not apply to things "which do not retain their usefulness after division, such as a small house (*bait*) or a small bath." It is only with regard to objects that are capable of partition without losing their usefulness or deteriorating in their purpose that a division is required to complete the gift. According to the *Bahr-ur-Râik*, "the rule as to what is partible and what is not depends on the fact whether the Kâzi can legally compel one partner who refuses whilst the other seeks partition, to divide the property." The objection of *Mushâ'a* how far applicable.

The objection on the ground of *mushâ'a* (confusion) applies whether the donee is a partner or a stranger, "but others have said that such a gift is valid in the case of the partner and this is the approved doctrine."(3)

"And it is stated in the *Durrar*(4) if the donor divides the property given and delivers possession the gift is valid, for the objection is removed. But if he delivers possession whilst it is mixed [with his other property], the donee does not acquire an absolute right over it, nor can he deal with it without liability attaching to In invalid gifts possession avails to establish right of property.

(1) *Jouharat-un-Nayyirèh.*

(2) *Durr-ul-Mukhtâr*, p. 634.

(3) وقيل يجوز لشريكه و هو المختار

(4) *Durrar-ul-Aḥkâm.*

him, and the donor's right of disposition remains intact. But it adds from the *Fusûl* that *an invalid gift* (*hibat-ul-fâsida*) avails to establish the right of property by possession and on this is the *fatwa*, and similarly it is stated in the *Bazâzia* contrary to what is mentioned as correct in the *'Imâdia*, that the word *al-fatwa* is stronger than *as-sahîh* (correct) as the author has discussed in detail in dealing with the rest of the rules relating to *mushâ'a*."

"The *shuyû'u* (confusion) which stands in the way of the completion of a gift is one existing at the time (*makârin*) and not one which supervenes afterwards (*târi*)."(1)

The extreme technicality of the doctrine of *mushâ'a* is illustrated by the difference of opinion regarding the validity of the gift of a piece of land with crops standing thereon. "Some lawyers have held that if a right is established by a third person in the crops, it amounts to an original confusion (*shuyû'u makârin*), and therefore vitiates the gift of the land; whilst others, among them the Sadr-ush-shariyèh and Ibn-i-Kamâl(2) have declared that it is only supervenient *shuyû'u* and does not affect the validity of the gift of the land."(3)

The accepted doctrine.

According to the *Moontika*, Abû Yusuf seems to have thought that neither of the married parties can make a valid gift to the other of the house in which they are both residing. But the recognised doctrine is opposed to his view, and it is now settled by judicial decision that such a gift is valid in either case.(4)

"According to Abû Hanîfa, if a person makes a gift of his house to two people it is not valid and (this is his view) regarding all objects which are capable of division, but according to the two disciples the gift is valid."(5) Nor is it valid according to Abû Hanîfa, if the donor defines the shares. But the accepted rule is directly contrary to his view. "If a man make a gift of a moiety of his house in favour of one person and of the other half in favour of another person, and deliver the same to both simultaneously (مشاع) it is a valid gift. But if the delivery to one is before the

(1) An example of *supervenient shuyû'u* is furnished by the gift of a *whole* house in which the donor subsequently revokes a part.

(2) The author of the *Fath-ul-Kadîr*.

(3) *Durr-ul-Mukhtâr*, 635; *Radd-ul-Muhtâr*, Vol. IV., p. 781.

(4) *Amina Bibi* v. *Khatija Bibi*, supra.

(5) *Fatâwai Kâzi Khân* (Cal. Ed. II), p. 282.

other, it would not be valid, although Abû Hanîfa says it is not valid in either case."

A *hiba-bi'l-mushâ'a* or a gift of an undivided joint property is not void but only invalid, and possession remedies the defect.(1) Possession perfects an invalid gift.

The *Majm'aa-ul-Anhar*(2) says "and Y'aakûb Pasha has held, that if a person make a gift to two persons of a thing which is capable of division, that is an invalid *hiba*, but it is not void (*bâtil*) according to Imâm Abû Hanîfa, so if the donees take possession, it establishes property in them according to his saying and the *fatwa* is according to it." This view is in exact accordance with what Sadr-ush-Shahîd holds. That a right of property in a share of a joint undivided property comes into existence upon possession being taken of it, is clear from the following passage in the *Majm'aa-ul-Anhar* :—"In the *Jâm'aa-ul-Fusûlain* and *Bazâziah* it is stated that a *hibat-ul-fasid* is perfected by possession, and the *fatwa* is according to this, though some have said the other is correct, *but the word 'fatwa' is stronger than 'correct'* " Regarding the words of the author that *mushâ'a* prevents the completeness of a gift, the commentator says, "the reason is that seisin is necessary, so it is mentioned in the *Fusûlain*, but Zailye has held that the gift of such a thing in which the right of the donor is attached is invalid, and in the *'Imâdia* it is stated that the gift is only incomplete; and Hamawi has stated in his commentary on the *Ashbâh* that this doctrine is subject to two sayings, owing to which difference has arisen regarding such *mushâ'a*, which is capable of division, that is, whether such *hiba* is void or only incomplete. *but it is more correct that it is incomplete as is stated in the Bazâziah.* And in the *Durrar-ul-Ahkâm* it is stated that an invalid *hiba* (gift) confers the right of property by possession and the *fatwa* is upon this, so in the *Fusûlain*." Fatwa.

The *Durr-ul-Mukhtâr* also quotes the passage in the *Durrar*, "in the *Durrar* it is stated from the *Fusûlain* that possession under an invalid gift avails to establish the right of property and the *fatwa* is in accordance with this. And so also it is stated in the *Bazâziah*, which is contrary to what is mentioned as correct

(1) Comp. *Mohibullah* v. *Abdul Khalik* [1908], I. L., 30 Cal., 256 *post*.
(2) *Majm'aa-ul-Anhar*, p. 345.

in the *'Imâdia*, but the word *fatwa* is stronger than the word *correct*, &c.''(1)

Section VII.

The doctrine of seisin.

Bearing in mind the principle, that *possession validates an imperfect or incomplete gift*, the author of the *Majm'aa-ul-Anhar*(2) defines thus the term *kabz-ul-kâmil* (complete possession.)—'' And the meaning of *kabz-ul-kâmil* (complete seisin) with reference to movables depends upon their nature, and with reference to immovable property as is suitable to its nature, as the taking of the key of a house, which is equivalent to its seisin.''

Authority to take possession sufficient.

Actual possession, however, does not seem to be necessary to complete the *hiba*. According to the *Durr-ul-Mukhtâr* '' to be in a position to take possession is tantamount to taking possession,'' in other words, to place the donee in a position to take possession is equivalent to delivery of possession. Similarly investing with authority for that purpose is equally sufficient.

'' In the *Himâdia* it is stated from the *Jâm'aa-ul-Fatâwa* that if a person make a gift of the crop which is standing on the land, or of the dates which are hanging on the trees, or of the scabbard which is on the scimitar, or of a building, or of *dinârs* which are owing from another person, or of anything which may be measured, and authorise (the donee) to reap it, or to take it down, or to take it off, or to take possession thereof, or to measure it, *and (the donee) has done it*, it is valid by a liberal interpretation.''(3) And again, '' If the donor himself or his deputy makes a division, or if the donor authorises the donee to make the division with his partner, this makes the gift complete (*kâmil*).''(4) And this opinion is still further enforced by reference to the *Fatâwai Kâzi Khân*. '' If a

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(1) لكن فيها (اى في الذرر) عن الفصولين الهبة الفاسدة تفيد الملك بالقبض و به يفتى و مثله في البزازية على خلاف ما صحيحه في العمادية لكن لفظ الفتوى آكد من لفظ يصح * p. 634.

(2) P. 342.

(3) *Radd-ul-Muhtâr*, Vol. IV, p. 782.

(4) *Ibid*, p. 780.

gift be made to a man, and he appoint two persons to take possession on his behalf, and they both take possession, that is lawful as is stated in the *Fatâwai Kâzi Khân.*''(1)

Doctrine of *Mushâ'a* not applicable to zemindaris.

From the examples given in the Arabian law-works, it can easily be inferred that the doctrine of *mushâ'a* was applicable only to small plots of lands and houses; it does not seem to have been contemplated by the Arabian jurists, that the doctrine should be applicable to specific shares in large estates or what are called in India, zemindaris. At the time when this doctrine was first enunciated among the Hanafîs, there does not appear, from contemporaneous records, to have existed large estates such as are known to us in India. The Arab conquest had broken up the landed proprietary of ancient Persia, and the *Dehkân*, who was a zemindar under the Sassanides, became a mere yeoman or farmer. Under the Arab rule, the land of the country was distributed either among the Arab colonists, or allowed to remain in the hands of the old proprietors on a scale which would prevent their forming combinations to destroy the new government; such seems to have been the economic condition of society about the beginning of the Hanafî Law, and the time when the early jurists of that school flourished. The wealth of the people was chiefly derived from common trade, immense flocks of sheep and goats, large groves and plantations. Apparently, therefore, the doctrine of *mushâ'a* was not intended to apply to large landed estates such as came into existence in later times.

Abedoonnissa v. *Ameeroonnissa.*

The Judicial Committee of the Privy Council, in the case of *Abedoonnissa* v. *Ameeroonnissa*,(2) discussed the question whether the objection of invalidity to a gift on the ground of *mushâ'a* was applicable to shares in a zemindary which themselves paid revenue separately.

''A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of *mushâ'a*, or an undivided part in property capable of partition, was, by Mahommedan Law, invalid. This point appears to have been taken for

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(1) فان قسمه الواهب بنفسه او نائبه او امر الموهوب له بان يقسم مع شريكه كل ذلك تتم به الهبة * و كل الموهوب له رجلين يقبض الدار فقبضها جاز — خانيه *

Delivery of possession (*taslîm*) is presumed.*

(2) Supra.

the first time in the High Court, and was argued at this Bar. That a rule of this kind does exist in Mahommedan Law with regard to some subjects of gift is plain. The *Hedâya* gives the two reasons on which it is founded: *First*, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, *secondly*, because it would throw a burden on the donor, he had not engaged for, *viz.*, to make a division. (See Book XXX, c. i, 3 vol., 293). Instances are given by the writers of undivided things which cannot be given, such as fruit unplucked from the tree, and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow."

"In the present case the subjects of the gifts are definite shares in certain zemindaris, the nature of the right in them being defined and regulated by the public Acts of the British Government."

"The High Court, after stating that the shares were, for revenue purposes, distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue, and further that the proprietor collected a definite share of the rents from the ryots, and had a right to this definite share and no more, held that the rule of the Mahommedan Law did not apply to property of that description."

"In their Lordship's opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zemindaris, which are in their nature separate estates with separate and defined rents. It was insisted by Mr. Leith that the land itself being undivided, and the owners of the shares entitled to require partition of it, the property remained *mushâ'a*. But although this right may exist, the shares in zemindaris appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging

to them, and therefore not falling within the principle and reason of the law relating to *mushâ'a.*'' And the same principle was enunciated in the case of *Shaikh Mohammad Mumtaz Ahmad* v. *Zubaida Jan.*(1)

When a gift *bi'l-mushâ'a* is made of property that does not admit of partition, it is a condition of the gift that the quantity be known or specified,(2) for if one were to give his share, the share being unknown, the gift would not be lawful as ignorance of the share might lead to disputes.(3) In the case of *Jaffar Khan* v. *Hubshee Bibi,*(4) it was held by the Sudder Court, that a gift of land forming a part of joint property, to be valid, must be distinct, and the boundaries and extent of the property given be known. The older rulings of the Sudder Court, however, it must be admitted, gave effect to the objection based on the ground of *mushâ'a* to an extent perhaps not warranted by the recognised rules of the Mahommedan Law.(5) But the more recent decisions of the High Courts of Calcutta and Allahabad have taken a broader view of the question, and more in accordance with the principles enunciated in modern works like the *Durr-ul-Mukhtâr*, the *Majm'aa-ul-Anhar* and the *Radd-ul-Muhtâr*. In the case of *Jewan Buksh* v. *Imtiaz Begum,*(6) the daughter of a deceased Mahommedan sued to set aside a gift of her father's estate made by him during his lifetime to the defendant his eldest son, and for possession of her share. It appeared that the gift to the defendant by the father comprised, amongst other properties, one-third share in certain joint and undivided zemindary villages. As the holder of these shares, the defendant's father was entitled to a one-third share of the profits of the villages after payment of the Government revenue, village expenses and costs of collection. The plaintiff contended that the gift of these shares was invalid on the ground of *mushâ'a.* The High Court held, that the gift of a defined share of landed estates was not open to the objection of *mushâ'a*, a defined share in a landed estate being separate property.

Jaffar Khan v. *Hubshee Bibi.*

Jewan Buksh v. *Imtiaz Begum.*

(1) [1887], L. R., 16 I. A., p. 205; s. c., I. L., 11 All., 460.

(2) *Sahiba Begum* v. *Atchamaun and others*, 4 Mad. Reports, 115.

(3) *Fatâwai-Alamgiri*, IV, p. 523.

(4) 1 Sel. Reports, 12.

(5) *Meer Abdul Kureem* v. *Musst. Fuckrunnissa Begum*, 3 Sel. Reports, 44 note; *Syud Shah Basit Ally* v. *Syed Shah Imam-ud-din*, 3 Sel. Reports, 176, *Musst. Khanum Jaun* v. *Musst. Jaun Bibee*, 4 Sel. Reports, 210.

(6) [1882] I. L., 2 All., 93.

Kasim Hussain and another v. *Sharif-unnissa.*

In *Kasim Hussain and another* v. *Sharif-un-nissa*,(1) in which the gift was by one person to two donees, the *hiba-náma* was in the following terms :—

"I, Bechi, do hereby declare that one-twelfth *muafi* share, and a dwelling-house containing a room facing north and east, and five yards of land in front thereof, two halls (*dalan*) facing the east, a door, a privy, a court-yard and a staircase constitute my ancestral property, and are held by me under a partition deed. I have made *Kasim Hussain* and *Nazim Hussain* (defendants) absolute owners of the above property together with all its boundaries, '*asli*' and '*dakhili*' rights, whether large or small, and appertaining to it. The property is free from the right of any one else and unincumbered by hypothecation, charge, gift, sale or mortgage. There is nothing to prevent the validity of the transfer, and the property is in my exclusive possession up to this day, and I have placed them in proprietary possession thereof. Neither I nor my heirs have any right or interest left in it. I have substituted (*Kasim Hussain* and *Nazim Hussain*) on the following terms :—During my lifetime the income of the property shall remain under my control; after my death they shall become absolute proprietors thereof in equal shares, and apply its income to meet their necessary expenses; they shall not have power at any time to transfer or create a charge upon the property; should they directly or indirectly transfer the property, such transfer shall be invalid in Court in face of this instrument."

Upon a suit by one of her heirs, two grounds were taken to set aside the deed : *first*, that it was a will, and therefore invalid as regards two-thirds, being without the consent of heirs; *second*, that the gift was bad on account of *mushâ'a*. With reference to the *first* objection, the learned Judges held as follows :—

"The deed purports to transfer the title in the donor's share in the *muafi* estate to the defendants and constitutes them proprietors but reserves to the donor the income for life. A gift of specific shares is not open to the objection under Mahommedan Law, and the gift is not otherwise void by reason of the condition for reserving to the donor the profits either for want of the seisin required by Mahommedan Law of the property given, or in consequence of the

(1) [1883] I. L., 5 All., 285.

condition vitiating the gift. It was held by the Privy Council in *Nawab Umjad Ally Khan* v. *Mohumdee Begum*,(1) that though the transfer of a legal title will satisfy that provision of the Mahommedan Law which relates to the point of seisin in its legal and technical sense, yet that alone will not suffice when no intention exists to transfer the beneficial ownership, either present or future, but when there is real transfer of property by a donor in his lifetime under the Mahommedan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for, and obtaining a right to the recurring produce during his lifetime, there will be a complete gift by Mahommedan Law. Their Lordships observe :—.

'The text of the *Hedâya* seems to include the very proposition and to negative it. The thing to be returned is not identical but something different. See *Hedâya*, Chap. Gifts, Vol. III, Book XXX, p. 294, where the objection being raised that a participation of property in the thing given invalidates the gift, the answer is, the donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use of the whole indivisible article, for his gift related to the substance of the article not to the use of it.'

"In that case the subject of the gift was Government Promissory Notes, the interest of which had been reserved by the donor, and their Lordships go on to say :—'Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee—here the Mahommedan Law defeats not the grant but the condition, *Hedâya*, Chap. Gifts, Vol. III, Book XXX, p. 307.' The mere reservation of the income of the estate will not therefore vitiate the gift, and the Subordinate Judge's finding in this respect is erroneous. The deed contained a condition against alienation, but that will not vitiate the gift."

With reference to the second ground of objection the learned Judge said as follows :—

" The appellant's objection as to the finding in respect of the stair-case, door and privy is also valid. This portion of the gift has been disallowed, because the above things are undivided."

(1) [1867] 11 M. I. A., 517.

"On this subject, the *Hedâya* on 'Gifts,' Book XXX, Ch. I is as follows :—'A gift of part of a thing which is capable of division is not valid, unless the said part be divided off, and separated from the property of the donor, but the gift of part of an indivisible thing is valid.' The things referred to appear to be common to the occupants of the premises which in other respects were divided, and are incapable of division, and the donor gave all her interest in them to the donees, the gift is not, in consequence, invalid. It is obviously absurd to give effect to the gift in respect of a house, and disallow all means of ingress and egress."

Doctrine of *Mushâ'a*—confusion.

In the case of *Mullick Abdul Guffoor* v. *Musst. Maleka*,(1) the Chief Justice, dealing with the argument urged on behalf of the appellant that the gift was bad on the ground of *mushâ'a*, held as follows :—"It is urged : (*a*) that a gift of an undivided share in any property is invalid because of *mushâ'a*, or confusion, on the part of the *donor;* and (*b*) that a gift of property to two donees without first separating and dividing their shares is bad, because of confusion on the part of the *donees*."

"But it must be borne in mind that this rule applies only to those subjects of gift, which are capable of partition. See the *Hedâya*, Vol. III, *Book on Gifts*, p. 293, where the rule laid down is to the effect that—'A gift is not valid of *what admits of division* unless separated and divided.' See also *Baillie's Mahommedan Law*, 2nd Ed., p. 520; *Fatâwa-i-Alamgiri*, *Book on Gifts*, p. 521; *Macnaughten's Mahommedan Law*, p. 201."

"The rule, therefore, applies only to gifts of such property as is capable of division; whereas, reversionary interests or *malikana* or other *choses in action*, are not capable of division."

"It is said that one main reason for this rule, which applies only to gifts, and not to sales, is to protect a man's heirs against gifts made in defeasance of their rights. We were referred to certain texts which apparently favoured that view; and it is also probable that another reason for the rule was to protect creditors against fraudulent gifts made by debtors, it being a well-known test of the *bonâ fides* of a gift, whether possession of the thing given has passed to the donee."

"It has been urged upon us, very strongly, that, according to this rule of *mushâ'a*, the gift, which was made to the defendants in

(1) Supra.

this case, is wholly void, because, the gift being of lands, no partition of such lands was made; and even supposing the gift to be valid, as regards the zemindari properties which were let out on lease, it would still be invalid as regards the house-property, gardens, sheds, &c., which are not shown to have been let out on lease, and which were capable therefore of actual partition."

"We think, however, that this objection is not well-founded as regards any part of the property in question."

"As regards the zemindaris, the estate of the donor, as we have seen, was an interest in reversion, and the property which was transferred by the gift of these zemindaries was merely that sort of estate which entitled the donees to receive the rents and profits. We find from the evidence of the defendants (which was so clear upon this point that the Judge in the Court below desired to hear no more than that of the first two witnesses), that during Kaniz Fatima's lifetime, she and Muleka were in separate collection of the rents, and that immediately upon the gift being made the possession was transferred, in the only way in which it could be transferred, to the two donees."

Declaration that possession had been given binding on heirs.

A formal and solemn declaration by the donor that he had complied with all the requirements of the law in perfecting the gift would be binding evidence of delivery of possession.

This principle was accepted in the case of *Shaikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan*(1) where their Lordships of the Privy Council held that a declaration by the donor in the deed of gift that possession had been given bound his heirs.

When two persons own a property jointly, either sharer may, under the Hanafi Law, give his share to the other, without the formality of a delivery of possession or any objection founded on the ground of *mushâ'a*. In the case of *Mahomed Bukhsh Khan* v. *Hosseini Bibi*(2), the Judicial Committee of the Privy Council held that where a property is held by several co-sharers any one of them may give his share to any one of the other co-

(1) [1887] L. R., 16 I. A., 205, supra. See also *Mohib-ullah* v. *Abdul Khalik* [1908] I. L., 30 All., 250, where it was held that the gift of *mushâ'a* or joint undivided property is valid if the donee obtains possession.

(2) [1887] L. R., 16 I. A., 81.

sharers, and that such a gift would not be open to the objection of *mushâ'a*.

To the same fear that confusion in the enjoyment of undivided property may lead to disputes among joint owners, is due the formulation by the ancient jurists of the doctrine that "if a father were to make a gift of a house to two of his sons, one of whom is a minor in his charge, it would be an invalid *hiba* although if they were both adults, and he delivered possession to both of them it would be valid, for there would be no confusion either at the time of the contract or at the time of possession, for when one is a minor the father himself becomes entitled to the possession of the share given to the infant, consequently there will arise *shuyû'u* at the time of possession."(1)

In the section on the "*hiba* of *mushâ'a*" in the *Fatâwai Kâzi Khan* the principle relating to gifts by one person to two or more donees is thus stated :—"If a man were to give to another who is not a partner his share in something which is partible, such as a house, land or which is capable of being measured or weighed, in such a case the gift is not valid according to all [the Imâms] but when he makes the gift to his partner it is not valid according to us, but is valid according to Abû Laila (may the peace, &c.). And if he were to make a gift of his house to two people, it is not valid according to Abû Hanîfa (may the peace, &c.), and so with reference to all things partible, *but it is valid according to his disciples* (may the peace, &c.); and if he mortgages a house with two men it is valid according to all; and similarly if he leases it to two people. And if he gives half of his house to one person and half to another and delivers the same to both *together* (معا) the gift is valid; but if he were to deliver to one first and then to the other it would not be valid—although Abû Hanîfa says it would not be valid in either case (2) ..... Tahâwi and 'Ussâm (may the peace, &c.) have laid down that possession establishes the right of property in invalid gifts, and this doctrine has been adopted by several of our doctors (may the peace, &c.)"(3)

Gift to two persons conjointly.

(1) *Fatâwai Kâzi Khan* (Cal. Ed., 1835), Vol. IV, p. 177.
(2) *Ibid*, p. 172.
(3) *Ibid*, p. 174.

"Mere *emptying*(1) is not sufficient possession in an invalid gift, as it is in an invalid sale, although in a valid gift it is according to Mohammed."

"When the thing given is not present, the authority to take possession is sufficient."

This doctrine is stated more widely in the *Durr-ul-Mukhtâr* :— "I [*i.e.*, the author](2) have limited [the validity of the gift by one person to two] to two adults because if the donor were to make a gift to an adult person and to a minor who is in the charge of this adult person or to his (the donor's) minor and adult sons the gift would not be valid by consensus."

In the *Bahr-ur-Râik* and the *Manah-ul-Ghuffâr* the passage bearing on the subject runs thus :—"When a person makes a gift to an adult and an infant (*saghîr*) and the *saghîr* is in his charge,"(3) "and in both the works," says Tahtâwi, "the reason of the doctrine, as stated in the *Muhît*, is mentioned to be that at the time of the gift the donor takes seisin of the minor's share, thus the other part becomes confused with it; this proves that the pronoun 'his' applies to the donor, contrary to what the commentator [the author of the *Durr-ul-Mukhtâr*] has stated."

The author of the *Radd-ul-Muhtâr* takes the same view regarding the applicability of the pronoun "his." "And the correct principle is that the minor is in the charge of the donor as is proved by the statements in the *Bahr*, etc."(4)

After referring to the statement in the *Durr-ul-Mukhtâr* he goes on to add, "and the approved doctrine is, if the donees are both minors in the charge of the donor, the gift is valid according to the Disciples [Abû Yusuf and Mohammed], and what is stated in the *Bazâzia* establishes it. And I say that it would have been preferable not to impose this limitation,(5) for according to

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(1) *Takhlièh, retirement* or *emptying* means, in this connection, merely removing the obstruction to taking possession, *e.g.*, a man makes a gift of a house and vacates it, that amounts to *takhlièh*; but if he does not place the donee in actual possession it is not regarded as sufficient *complete* possession in the case of an invalid gift.

(2) In the commentaries he himself is called the commentator, for he was commenting on the *Tanwîr-ul-Absâr*.

(3) والصغير في عياله

(4) *Radd-ul-Muhtâr*, Vol. IV, p. 785.

(5) Limiting the validity of a gift to two adults.

Abû Hanîfa there is no difference between two adults, or two minors or an adult and a minor; and he holds that the objection(1) is applicable to all. It follows, therefore, that there is no difference in the donees being both adults or both minors, or an adult and a minor. And the Disciples have differed from him regarding the first two (cases) as is stated in Ramli.''(2)

Gift to an adult and a minor conjointly.

Then, after quoting the passage already given from the *Fatâwai Kâzi Khan*, the author of the *Radd-ul-Muhtâr* resumes his comment on the *Durr-ul-Mukhtâr*, '' His saying, ' that it would not be valid '—the device (*al-hîla*) to cure this is to make over the house to the adult, and then make a gift to both, and this is what is stated in the *Bazâziah*....and a gift to two minors would be valid as there is no reason for preference whether one obtains possession before the other, for the guardian of both is one, so that at the time of possession there is no *shuyû'u*. And the statement in the *Khânièh* (*Fatâwai Kâzi Khan*) supports this view, and it is ' if a person were to say this house of mine is for my infant children it would be invalid for he does not mention the children.' The inference from this is that if he had indicated the children the gift would have been valid. And I have seen in the *Ankarawièh*(3) stated from the *Bazâziah* that in the case of a gift to an adult and a minor jointly the device [to make it valid] is to entrust the house to the adult and then to make a gift of the whole to both.''(4)

It is clear, therefore, that according to the doctrines actually in force the original strictness of the technical rule relating to *mushâ'a* has been considerably cut down.

E.G.: (*a*) Although a gift of property capable of division or partition to two or more persons is not valid, yet if they take possession under the authority of the donor it vests in them the right of property.

(*b*) Authority to take possession or placing the donees in a position to take possession is equivalent to delivery of possession.

(*c*) Partition by the donees themselves after possession is sufficient to validate the gift.

(*d*) A gift to two persons one of whom is a minor in charge of the donor is valid.

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(1) *Shuyû'u.*
(2) *Radd-ul-Muhtâr*, Vol. IV, p. 785.
(3) *Fatâwai-Ankarawièh.*
(4) *Radd-ul-Muhtâr*, Vol. IV, p. 786.

The Allahabad High Court appears to have misapprehended the principle relating to a joint gift to an adult and a minor in the case of *Nizam-ud-din* v. *Zabida Bibi.*(1)

Nizam-ud-din v. *Zabida Bibi.*

In this case it appeared that one Sheikh Kadir Buksh devised certain property amounting to a one-fourth share of his estate to his eldest son Zahir-ud-din, subject, however, to the reservation, that a portion of the property situate on the north side of the River Ravi, and consisting of "lakheraj lands should pass on the testator's death to Zahir-ud-din, but that the remainder situate on the south of the river should be held and possessed by the testator's youngest son Aman-ullah for the purpose of collecting and paying the revenue due on both portions without any rendition of accounts, until such time as a competent son should be born to Zahir-ud-din," the reason assigned being that Zahir-ud-din was unfit to look after the lands paying revenue to Government. On the death of their father, Zahir-ud-din and Aman-ullah held and possessed the property above-mentioned in accordance with the will of the testator. On the 1st of September 1864, Zahir-ud-din executed a deed of gift of the one-fifth share devised to him in favour of two of his sons, Nizam-ud-din and Sadr-ud-din, a minor. No mention was made in the deed as to the respective shares of the brothers, or as to the manner in which the property was to be held or divided. The deed was duly registered, and mutation of names was effected in respect of the lands on the north of the River Ravi, in the same year. Zahir-ud-din died in 1869, leaving several daughters and a minor son, born after the execution of the deed of gift in favour of Nizam-ud-din and Sadr-ud-din, never having held possession of the property on the south side of the Ravi, which had remained in the possession of Aman-ullah and his son, who rendered no accounts of profits to Zahir-ud-din, and it was not till the year 1871 that the donees obtained possession. With regard to the property on the north bank of the Ravi, it appeared that the donees had been put into immediate possession. Upon a suit instituted by Zabida Bibi, one of Zahir-ud-din's daughters, to recover the share of the property left by her father to which she was entitled under the Mahommedan Law, by the cancelment of the deed of gift, the First Court held that the deed was valid, the property given being therein

(1) 6 N.-W. P., H. C. Reports, p. 538.

Nizam-ud-din v. *Zabida Bibi*—(contd.)

defined and specified. The Lower Appellate Court reversed the decree and remanded the case for the determination of the amount of the mesne profits due to the plaintiff, holding that the deed was, under Mahommedan Law, invalid, as the gift had been made without division or specification of the respective shares of the donees and as the donees had not obtained possession of a portion of the property, *viz.*, that situate on the south of the River Ravi, till after the decease of the donor. The Court, however, did not distinctly determine whether the deed had operated immediately in respect of the portion lying on the north of the river. It found that there were no good reasons for thinking the donor insane, or even a simpleton, although his father had refused to allow him to manage lands paying revenue. In special appeal, the principal grounds were to the effect that the deed of gift was *not* invalid under the Mahommedan Law, as the donees had received such possession as the donor could grant of the lands on the south of the Ravi and had received actual possession of those on the north, and, *although a gift of undivided property was contrary to that law, yet, as the donees had obtained possession, the gift was not invalid.*

The High Court held as follows :—

"In this case the claim of the plaintiff to a daughter's share in the estate left by her father, Zahir-ud-din, is resisted on the ground of a deed of gift executed by him, a somewhat weak person, in favour of the appellants, his sons, in 1864. Another son was born to him after that date, so that the effect of the deed is to exclude from inheritance, for no sufficient apparent cause, the younger son as well as several daughters. The Court of First Instance, holding the deed to be valid, dismissed the claim. The Lower Appellate Court considered the deed to be invalid for three reasons : (1) that the property, the subject of the gift, being capable of partition, had not been divided between the two donees ; (2) that part of it was not at the time of the execution of the deed in the possession of the donor himself ; and (3) could not therefore be transferred by him to them. As to the other portion of the property, which was admittedly in his possession at that time, the Lower Courts have not enquired or found, so carefully as they should have done, whether the deed took effect before Zahir-ud-din's death. If it operated immediately in respect of the property on the north side of the River Ravi, and the opinion

Nizam-ud-din v. *Zabida Bibi*—(concld.)

of the Lower Courts seems to lean to this view, which is also supported by good *primâ facie* evidence we should not be able to allow that it had failed to operate in respect of the property on the south side of the same river. The latter portion of the property was in the charge of a trustee, who was bound to pay out of its profits the whole of the revenue assessed on both portions. The person or persons in possession of the northern portion could scarcely be deemed to be out of possession of, and not to derive any benefit from, the other portion which paid the revenue due from him or them. At all events the donor gave to the donees such possession as he himself had, and could give, of the southern portion. But, although the soundness of the 2nd and 3rd reasons of the Judge's decision may be doubted, we are not prepared to say that his first reason is wrong. The general rule of the Mahommedan Law is that anything which is capable of division, when given to two persons, should be divided by the donor at the time of the gift, or immediately subsequent thereto and prior to the delivery to the donees, in order that the objection of confusion may be avoided and full and complete seisin obtained. But it is contended on behalf of the appellants that, although the gift of undivided property is contrary to law, it is not, if the donees have obtained possession of it, absolutely invalid. This contention is supported by the opinion of the two disciples, whilst it is opposed to that of Hanîfa. But it appears from a passage in the *Durr-ul-Mukhtâr* and a passage in the *Fatâwai-Alamgiri*, that in a special case like the present in which one of two donees is an adult, and the other an infant son, a gift of undivided property is absolutely invalid, not merely *fâsid* but *bâtil*. The reason of this rule is explained, and although the rule may, it is intimated be evaded by a particular device, which is not quite clearly intelligible, there is no pretence that such device was employed by the parties to the deed in question in this case."

"The weight of authority appears then to be in favour of the conclusion at which the Lower Appellate Court has arrived, and that conclusion may be upheld upon the basis of Mahommedan Law. Had it been otherwise, it might have been our duty to consider whether we were bound strictly to apply Mahommedan Law to the case, or to deal with, and dispose of it according to the principles of equity, justice, and good conscience. Without entering upon such a discussion, we may content ourselves with remarking that, as the deed is found to be invalid under Mahom-

medan Law, justice, equity and good conscience do not, under the circumstances to which we have adverted, require us to maintain it. Twelve years have not elapsed since it was executed, and the heirs of Zahir-ud-din, who might, were he still alive, set it aside as not binding on himself, are fully competent to impugn its validity."

It is somewhat difficult to follow the reasoning in the latter portion of the judgment, and it would seem that the reason upon which the archaic Hanafî doctrine is founded, has been, to a considerable extent, missed. There can be no question that the principle owed its origin, as has already been pointed out, to the fear displayed by Hanafî lawyers regarding the enjoyment of a joint undivided property.

Regarding the validity, according to the Disciples, of a gift to two donees, one of whom is an adult and the other a minor, *but who is not in the guardianship of the donor*, there is no dispute. For in such a case the right to the possession of the minor donee's share devolves on a person other than the donor, and according to Abû Yusuf and Mohammed the defect of "confusion" does not arise. It is only when the minor donee is in the charge of the donor himself that the difficulty is supposed to arise.

Gift to an infant and an adult jointly.

For example, when a gift is made jointly to an infant and an adult son, the father would, *quâ* guardian, remain in possession of the infant son's share, whereas the adult son would take possession of the share given to him. It was supposed that under such circumstances the enjoyment of the property by the two donees would be likely to create confusion, not only among themselves, but also among them and the donor. And this confusion and difficulty would be enhanced, in case there happened to be creditors of the father, who alleged that the gift was in fraud of them. Looked at from this point of view, it would appear extremely probable the principle was originally framed, partly with the object of protecting creditors and partly with the object of avoiding all questions, on the part of the donor or his representatives, as to the completeness of the transaction. The donee takes under an act of bounty or mere *tabarr'u* (تبرع). As a mere volunteer, his title to the gift is not perfected, until the donor has completely manifested his intention to vest the property in him.(1) This intention

(1) Comp. *Kekewich* v. *Manning*, 1 De G. M. & G., p. 176.

is evidenced by his placing the donee in possession of the subject of the gift or by authorising him to take possession of it, and by so differentiating it from his other properties or those belonging to his co-sharers, as to leave no room for confusion. Until this is done there is no *kabz-ul-kâmil*, and the gift is a mere inchoate act of bounty. If the donee is an infant, the necessary possession should be delivered to his guardian.(1) This apparently was the reasoning on which the early lawyers based their views.

Mode of making a valid gift to an adult and a minor.

The Hanafi rule on this point appears to have undergone two modifications. Its extreme rigidity came to be recognised as early as the 14th century of the Christian era when the *Bazâzia* was compiled, and a procedure was laid down for avoiding the objection of "confusion," *viz.*, that *the entire property should be consigned to the adult, and then a gift of it made to both. In such a case, the adult donee would become a trustee for the minor, and possession being already vested in him as depositary, the objection of shuyû'u would not apply as to the gift of the share of the minor.*

The opinions of the legists developed still further, and by the time the *Radd-ul-Muhtâr* was compiled in the 17th century, it was plainly declared that "there was no difference between a gift to two adults or to two minors or to an adult and a minor jointly."(2)

It will thus be seen that even in its inception the rule did not regard there was any inherent illegality to a joint gift to a minor and an adult; the objection had its origin in a desire to prevent disputes. Where the interests of the two were sufficiently specified, and there could be no apprehension of confusion, the doctrine against *shuyû'u* did not apply.

Considering that in India the law regarding registration and mutation of names in respect of dispositions of immovable property coupled with other statutory provisions for evidencing *bonâ fide* transfers affords a sufficient guarantee against apprehensions of conflict in its enjoyment, the reason of the old rule seems to be non-existent.

The objection of *shuyû'u* only renders the gift invalid, but not void.

The objection of shuyû'u only renders the gift invalid, but not void. There is considerable difference between a *hiba* which is *bâtil*, that is, null and void, and a *hiba* which is *fâsid* or *ghair mu-*

(1) In the case of *Wajit Ali* v. *Abdool Ali* (Weekly Rep. 1864, p. 121), the Calcutta High Court held that the rule of *mushâ'a* does not apply to a gift by a father to a minor son.

(2) See *ante*, p. 100.

kammal, which is not complete or merely invalid. "According to the *Bazâzia*, an invalid gift is validated by possession and *decisions are passed according to this doctrine, and not the doctrine in the 'Imâdia.*" Accordingly, if a gift is to two individuals, possession taken by both removes its invalidity. In a gift of *mushâ'u* which is partible, if division is effected by the donees subsequent to the donation, it is valid.(1)

A gift of moiety of a house (which otherwise would be bad for *mushâ'a*) may validly be effected in this way (according to the *Bazâzia*), that is, the donor should sell it first at a fixed price, and then absolve the debtor of the debt, that is, the price.(2)

As already stated *shuyû'u* or confusion, in order to render a gift invalid, must exist at the time of the gift, and not be supervenient, and it must be such as is recognised by the law.(3)

The objection of indefiniteness carried to an extreme would often prevent the donee or donees from availing themselves of the power to take possession of the property, and thereby imparting to the act of gift that validity which was wanting to it initially. In order to obviate the difficulty arising from such a contingency, the Arabian lawyers have devised the doctrine of *tahlîl*, which literally means "rendering lawful," but which, with reference to the subject under review, means the *legalisation* on the part of the donor, of the enjoyment of the subject-matter of the gift by the donee and thus rendering it a valid donation. The following examples will throw sufficient light on this branch of the law relating to gifts.(4)

The doctrine of *Tahlîl.*

"If a person were to say to another, 'Whatever of my property thou eatest, it is lawful for thee,' it would be lawful for the latter to eat thereof, but should there be any indication of dispute, he should not do so; so it is stated in the *Multeka.*"

"If a person were to say to another, 'Whoever has eaten out of my property, it is lawful for him,' the *Fatwa* is that it is lawful; so in the *Sirâjia.*"

"In a tradition reported by Ibn Makâtil, it is declared to be lawful for every person, whether rich or poor, to eat of the fruit

(1) *Radd-ul-Muhtâr*, Vol. IV, p. 783.
(2) *Ibid.*
(3) *Ibid.*
(4) *Fatâwai Alamgiri*, IV, p. 531.

of a tree, when the owner has said, 'it is lawful for all persons to eat of my tree;' so in the *Fatâwa-ul-'Itâbia.*"

Doctrine of *tahlîl* or legalisation —(contd.)

"If a person were to say to another, 'Make it lawful for me all the rights which thou possessest against me,' and he does so and discharges the speaker, in that case, if the owner was aware of his rights, then the speaker will be legally and conscientiously discharged. If, however, the *Sâhib-ul-hakk* (the owner of the rights) was not aware of his rights, the speaker will be discharged only legally. But Abû Yusuf holds that he will be discharged in conscience also, and the *Fatwa* is on this; so in the *Khulâsa.*"

"Where something belonging to one person was in the hands of another, who mixed it with his own goods, and believing fully that he would not be able to distinguish it from them, he asks the owner of the thing to make it lawful to him and he does so, it is lawful. But if he subsequently finds it, he must return it; so in the *Kinia.*"

"If a person were to say to another, 'It is lawful for thee to take from my property whatever thou findest and whatever thou likest;' according to Abû Yusuf this is restricted to *dirhems* and *dinârs*. Therefore it will not be lawful for him to take lands or trees or almonds or cow or goat; so in the *Bahîria* and *Khulâsa.*"

"If a person were to declare that he had made it lawful for another to eat of his *mâl*; and the latter person does not know it, —in such a case, if he were to eat of it, it would not be lawful, and it is stated in the *Muhît-i-Sarakhsi* and the *Tâtâr Khânieh*, that it is not lawful for him to eat thereof, until he knew of the permission."

"One man is a debtor of another, who is not aware of the amount of the debt: and the debtor says to him 'discharge me from what I owe thee'; and he replies, 'I discharge thee in both worlds'; the jurist Nasîr says that the debtor will be discharged only to the extent of the amount which the creditor believed the debtor owed him. But Mohammed ibn Sulma says that he will be discharged to the full extent of his debt: and the Jurist Abu'l Lais and others say that what Ibn Sulma has said is the decision of the Kâzi, and the saying of Nasîr has reference to the future world; so in the *Zakhîra.*"

"If a man were to say to another, 'It is lawful for thee what thou hast eaten of my property, or taken or given,' in such a

case, the eating is lawful, but not the taking or giving; so in the *Sirâj-ul-Wâhâj.*"

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"If a person turn loose a sick animal, saying, that whoever should take and use it, it would become his, and another man does take and use the beast, it would become lawfully his property. This is the *dictum* of Abu'l Kâsim."

"If a domesticated bird is let loose, it is in the position of a sick animal."

"If a person were to usurp a piece of property and the rightful owner were to say, 'I have made all my rights *halâl* to him,' the jurists of Balkh hold, that in this case the usurper is absolved from the liability for damages and not from the restoration of the specific property; so in the *Kinia.* It is, however, reported from Mohammed, that if one is liable to another for some property, and the owner says, 'I have made it *halâl* for thee,' it is a *hiba;* but if he had said *tahlîl*, it would be a discharge; so in the *Zakhîra.*"

"If a person were to say, 'I have made lawful (my debts) to all my debtors' this will be a discharge to the debtors, but not to a lessee; so in the *Khulâsa.*'"

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"If a man were to say to his agent (*wakîl*), it is lawful for thee to 'eat' of my property from one dirhem to a hundred dirhems, it will not be lawful to the *wakîl* to take at once a hundred or fifty dirhems, but only so much as is reasonably necessary for his maintenance; so in the *Multeka.*"

Objection of *mushâ'a* not applicable to property devolving by inheritance.

It must be noted that the technical doctrine of *mushâ'a*, which owed its origin to a somewhat strained conception of the law relating to seizin and the undisturbed enjoyment of property, does not apply to property devolving by right of inheritance. But evidently a contention of that nature appears to have been raised before the Judicial Committee in *Ibrahim Golam Ariff* v. *Saiboo*.(1) In this case their Lordships say "assuming the law of *mushâ'a* which prohibits gifts of undivided shares of divisible property, applies to the succession of Mahommedans who reside in Rangoon, it does not apply to a gift by will of undivided shares in freehold land and of shares in Companies."

(1) [1907] L. R., 34 I. A., 167.

With reference to the view expressed in this case it is to be observed that the rule of *mushâ'a* does not amount to a prohibition of such gifts; it only declares that they are invalid. which only means that the donor may at any time revoke the donation until possession has been taken by the donee. As "seisin perfects an invalid gift." the right of the donor's heirs to question the validity of a gift of an undivided share of a divisible property of which possession was delivered and taken does not seem to have been in the contemplation of any Mussulman jurist. Besides, shares in Companies hardly come within the category of divisible property in Mussulman Law.

Customary law among the Mahommedans of Southern India.

In Southern India a large number of the converts to Islâm have preserved many of their customs and institutions—especially the *tarwad* which is principally a joint family system based on the matriarchate. Among these people the Mussulman Law has been subjected to considerable modification. For example, in a gift made by a Mussulman governed by the *Maruma-Kattayan* (customary) law in favour of his wife and daughter and their female descendants, the condition excluding males has been held to be invalid.(1)

Similarly, where a gift is made by a Mussulman husband governed by the *Maruma-Kattayan* law to his wife, who is governed by the same law, and to her children, it has been held that the property becomes the exclusive property of the donees with the incidents of property subject to the *Maruma-Kattayan* law and that on the death of the mother it does not pass to her heirs under the Mahommedan Law, although the donation does not of itself constitute the mother and her children a separate *tarwad*.(2)

The marked divergence between the customary and the personal law is easily observable.

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(1) *Mooriyat* v. *Kunhambi* [1908], I. L., 31 Mad., 315.

(2) *Pathumma* v. *Abdulla Haji* [1907], I. L., 31 Mad., 228.