## CHAPTER II.

## FORMALITIES RELATIVE TO GIFTS.

### SECTION I.

### WORDS OF CONSTITUTION.

Formalities relative to a gift.

GIFTS, under the Mahommedan Law, are not subject to any formality, or any special publicity; they can be made either verbally or in writing. But, when a gift of immovable property is made in writing in India, the provisions of the Indian Stamp and Registration Acts have to be complied with.

In order to create a gift, it is not necessary to make use of any express terms. Even where the declaration and acceptance are not expressed in words, so long as the intention is evidenced by conduct it would be sufficient.

"In the *Khazânat-ul-Fatâwa* it is stated that when a person makes over a thing to his son who deals with it, it still remains the property of the father, unless there is an indication that he made the son its owner (*i.e.*, transferred the ownership to him). I say, that the inference from this is that it is not a condition to use express words of declaration and acceptance, but that circumstances ( قرايين ) indicating the intention to transfer ownership are sufficient. For example, a man gives a thing to a *fakîr* (a beggar), and he takes it, and neither of them use a word [it is enough]; similarly is the case with presents and such like."(1)

If the gift is made in writing or verbally, any word by which it may be presumed that the donor intended to give the substance

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(1) و في خزانة الفتاوي اذا دفع لابنه مالا فتصرف فيه الابن يكون للاب الا اذا دلت دلالة التمليک ..... قلت فقد افاد ان التلفظ بالايجاب و القبول لا يشترط بل تكفي القرائن الدالة على التمليک كمن دفع لفقير شئيا و قبضه ولم يتلفظ واحد من هما بشيء و كذا يقع في الهدية و نحوها *

*Radd-ul-Muhtâr*, IV, p. 777.

of the thing, would convey the property in the thing itself. Intention, as gathered from attendant circumstances, must, in cases of doubt, furnish the governing principle. In short, if from the word used it can be inferred that the proprietary right in the *substance* of any object was intended to be conveyed that would be a gift. If, however, it should appear that what the donor intended to give was only the *munâf'aa* or the usufruct for a limited period, under the Hanafî Law, it would be an *'aâriat* (commodate loan).(1)

"The words," says the *Fatâwai Alamgiri*, "by which a gift can be effectuated are of three kinds; *first*, those by which a gift is expressly constituted; *second*, by which it is constituted by implication or custom (عرفا كناية); and *third*, which convey the meaning equally of gift or loan." After giving examples of the different kinds of expression, it goes on to add—"the principle in all these cases is that when words are employed implying the transfer of the right of property in the substance (or corpus) of the thing, it is a gift; but where it has reference to the transfer of the ownership in the profits (*tamlîk-ul-manf'at*) it amounts to a loan; and if it is susceptible of either meaning, reference must be made to intention."(2)

The examples of express words by which a gift is constituted depend chiefly on the *nuance* of the language; and it is difficult to render in the English tongue the shades of meaning the different phrases convey. But some illustrations of a general character may throw light on the juridical conceptions on the subject. For instance, it is stated that "if a man were to say 'all my property' or all that I own is for so and so," that would amount to a *hiba*, but it will not be complete without possession....or "if he were to say 'all the property known to be mine or ascribed to me is for so and so,' that would be an acknowledgment according to the *Fatâwai Kâzi Khan*."(3)

"Where the father of an infant child plants a tree and says 'I have made it my child's', it is a *hiba*, and it would be the same if he said 'I have constituted it in my child's name.' This is the approved doctrine and most of our doctors have adopted it, so in the *Ghiâsia*."...."And if a man said 'all the properties I own

(1) *Fatâwai Alamgiri*, IV, p. 521.
(2) *Ibid.*
(3) *Ibid*, p. 522.

belong to this infant or child,' it would be an act of bounty (*karâmat*) and not a gift, unless he specified what he had given, when it would be a gift ; [for example], if he said, 'this shop of which I am the owner, or this house of mine is for my infant son,' it would be a gift, and it would become complete [immediately] if [at the time] in the hands of the father; so in the *Kinia*. And if he were to say 'this is for my son so and so' it would be a gift, and if he were to say, 'this thing is for any infant child of so and so' it would be valid ; and it will become complete without acceptance [by the donee]; so in the *Tâtâr-Khanièh*."

"If a man were to give *dinârs* to his wife to spend on clothes to wear before him, and she employs them in trade, the profit arising therefrom as well as the money itself would be her property.(1) Clothes for children become their property, but not those made for apprentices or servants."

**Conditions necessary for the validity of a gift.**

The following are the conditions necessary for the validity of the act of gift :—

(1) Declaration expressed in any language which conveys the meaning, or expressed by conduct.

(2) Acceptance, expressed or implied.(2)

(3) And seisin by the donee of the subject of the gift, *i.e.*, if the property is not already in the hands of the donee.

Under the Mâliki Law the right of property is established in the subject of the gift before seisin, in other words possession is not necessary to complete a gift.(3)

In the case of *Nunda Singh* v. *Meer Jaffer Shah*,(4) which was decided under the Hanafi Law, it was held that a gift depends upon tender and acceptance, but seisin is necessary to make it complete.

To some extent the later decisions have overlooked the exact bearing of the question of seisin on the validity of a gift under the Mahommedan Law. It has been supposed that actual delivery or transfer of possession is intended by the rule which makes deli-

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(1) *Fatâwai Alamgiri*, Vol. IV, p. 522.

(2) If a man give a thing to another, saying, "I give this to thee," and the donee take possession of it without saying a word, it is valid ; *Radd-ul-Muhtâr*, IV, p. 781.

(3) *Hed.*, III, p. 291.

(4) 1 Sel. Reports, p. 5.

very of seisin a condition to the validity of a gift.(1) In this view it becomes necessary to ascertain the exact meaning of the term *ikbâz* or seisin under the Mahommedan Law. It must be admitted that unless *ikbâz* (constructive or actual) can be presumed in the donee after the gift, it will not be operative. But a full consideration of the dicta on the subject shows that actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor, would not affect the validity of the gift. He may continue to retain the possession of the property as a trustee or depositary, and such possession will not affect the legality of the transfer.(2) Similarly, if the thing given be in the hands of the donee in virtue of a trust, the gift is in that case complete, although there be no formal seisin, since the actual article is already in the donee's hands, whence his seisin is not requisite. "It is otherwise where a depositor sells the deposit to his trustee, for in this case the original seisin does not suffice, because seisin in virtue of purchase is a seisin inducing responsibility, and therefore cannot be substituted by a seisin in virtue of a trust, but seisin in virtue of a gift on the contrary, as not being a seisin inducing responsibility, may be substituted by a seisin in virtue of a trust." The law in cases of gifts to minors looks to the intention of the donor. When there is on the part of a father or other guardian a real *bonâ fide* intention to make a gift, transmutation of possession is not necessary, the subsequent holding of the property by the donor being considered to be on behalf of the minor. This principle was laid down with considerable distinctness in the case of *Abedunnissa Khatoon* v. *Ameerunnissa Khatoon*, where the Privy Council dealing with the question held that, under the Mahommedan Law, when there is on the part of a father or other guardian a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor donee.(3)

Meaning of *ikbâz* or seisin.

According to Kâzi Khân, the ability of the donee, if adult, or of his guardian if a minor, to take possession of the gift,—in

Ability to take possession is suffi-

(1) *Obedur Reza* v. *Mahomed Muneer* [1871], 16 W. R., 188; *Meherali* v. *Tajudin* [1888], I. L., 13 Bom., 156.

(2) *Radd-ul-Muhtâr*, Vol. IV, p. 785; *Majm'aa-ul-Anhar*; *Hed.* III, p. 295.

(3) *Ameerunnissa Khatoon* v. *Abedoonnissa Khatoon* [1875], L. R., 2 I. A., 87; s. c., 15 B. L. R., 67.

cient in many instances to validate the act of donation.

other words, to exercise the right of property over it, is sufficient to validate the act of donation. Accordingly, where a gift is made, and a direction is given to the donees to take possession of the subject of the gift and partition it among themselves, such a gift is held to be valid.(1) Power to take possession is equivalent in certain instances to actual delivery of possession. The meaning of this is, where the donor places the donee in a position to exercise the right of property over the subject of the gift, it is tantamount to delivery of seisin. For example, if *A* make a gift of his horse which is in his stables to *B* and give to *B* the key of the place, and authorise him to take possession of it, the seisin is sufficient in law.(2)

Thus a gift of immovable property in the occupation of tenants will be complete either by the delivery of the title-deeds or by requisition to the tenants to attorn to the donee,(3) and of zemindari rights by mutation of names in the Collector's Register.(4) So a valid gift may be made of property attached by the Collector for arrears of revenue by the *donor transferring such interest as he possesses at the time.*(5) In other words, a gift is completed if the donor does all he can to perfect the contemplated gift either by delivering actual possession of the property or placing the donee in a position to take possession of it.(6)

Possession must be with the permission of the donor.

But the possession of the donee must be with the permission of the donor. "If the donee," says the *Hedâya,*(7) "take possession of the gift in the meeting of the contract of gift without the order of the giver, it is lawful upon a favourable construction. If, on the contrary, he should take possession of the gift after the breaking up of the meeting, it is not lawful unless he have had the consent of the giver so to do. Analogy would suggest that the seisin is not valid in either case, as it is an act with respect to

(1) *Fatâwai Kâzi Khân*, Vol. II. p. 282.

(2) *Majm'aa-ul-Anhar, in loco.*

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

(4) *Sajjad Ahmed Khan* v. *Kadri Begum* [1895], I. L., 18 All., 1.

(5) *Anwari Begum* v. *Nizamuddin Shah* [1898], I. L., 21 All., 165.

(6) *Mahomed Bukhsh* v. *Hosseini Bibi* [1888], L. R., 15 I. A., 81; s. c., I. L., 15 Cal., 684. In *Mogul Shah* v. *Muhamad Saheb* [1887], I. L., 11 Bom., 507; and *Ismal* v. *Ramji* [1888], I. L., 23 Bom., 682, the Bombay High Court has held that registration of the deed was not sufficient to cure the want of delivery of possession. These rulings, however, are subject to the principles set forth in the text.

(7) *Hed.* (Hamilton's) III, p. 292.

what is still the property of the giver, for as his right of property continues in force until seisin, that is consequently invalid without his consent. The reason for a more favourable construction of the law in the instance in question is that seisin in a case of gift is similar to acceptance in sale, on this consideration that in the one the effect of the deed (that is, the establishment of a right of property) rests upon the seisin and in the other upon the acceptance. As, moreover, the object of a gift is the establishment of a right of property, *it follows that the tender of the giver is virtually an empowerment of the donee to take possession.* It is otherwise where the seisin is made after the breaking-up of the meeting, because our doctors do not admit of the establishment of the power over the thing, but when seisin is immediately conjoined with acceptance, and as the validity of acceptance is particularly restricted to the place of the meeting, so also is the thing which is conjoined with it. It is also otherwise where the giver prohibits the donee from taking possession at the place of meeting, for in that case the seisin of the donee at the place of the meeting would be invalid, as arguments of implied intention cannot be put in competition with express declaration."

In fact, the legal effect of a gift is not complete until transmutation of possession, actual or constructive, has taken place, and in this respect a stranger and the child of the donor are on the same footing when the child is adult.

Permission need not be express.

Although the possession of the donee must be with the permission of the donor, it is not necessary that such permission should be express. If the permission, or, in other words, the consent of the donor to the taking of possession, can be inferred by his conduct, it is sufficient. If the possession is taken immediately after the gift there can be no question as to the validity of the gift, but if after the gift the donor prohibits the donee to take possession, and if the donee nevertheless takes possession, it is not valid. Where a gift is made to two persons in succession, and is followed by possession to the second, the second gift is valid.

*Amina Bibi v. Khatija Bibi.*

But the question of possession has such a practical importance in the discussion of cases arising under the Mahommedan Law relating to disposition of property, that an elucidation of the meaning attached to the word 'seisin', or its Arabic equivalent *kabz*, is of the

*Amina Bibi* v. *Khatija Bibi*— (contd.).

utmost importance. The question came up for decision in the Bombay High Court in the case of *Amina Bibi* v. *Khatija Bibi*.(1)

In that case a husband had made a gift of his house and certain tenanted out-offices, &c., to his wife. He had made over the keys to his wife, left the house for a few days (to accentuate the fact of delivering possession), but had returned afterwards and lived with her in the same house until his death. During his lifetime he had collected the rents of the out-offices presumably on behalf of the wife. In a suit by his heirs against the widow to set aside the *hiba* on the ground that no possession had passed, Sausse, C. J., said as follows :—

" The acts essential for giving validity to a *hiba* or gift according to Mahommedan Law are tender, acceptance and seisin, but the manner in which seisin is to be effected must be considerably modified to suit the peculiar relations recognised as existing between husband and wife in the Mahommedan Law. The property of each is separate and independent of the other; either can make, and both are encouraged by law to make gifts to the other in order to promote mutual affection; and so strongly is this principle inculcated that retractation of such a gift is not allowed, although in many other cases it is lawful. A wife can make to her husband a valid gift of the house in which both are residing, although it contain her separate property, and though both continue to reside in it afterwards. Upon principle, I do not see why a husband should not equally be at liberty to bestow upon his wife the house in which both are living and in which they afterwards continue to reside, provided he have power to make the gift, and do make it *bonâ fide*, and not in contemplation of fraud upon creditors or others. The only difficulty is to comply with the exigency of the law, which requires ' seisin ' or exclusive possession to be given. If a husband, with full power to give, executes a deed of gift, and in accordance with its provisions hands over symbolical possession of a house or property by keys, &c., and also, to mark more strongly the *bonâ fides* of the intention, actually goes out of the house before witnesses in order to leave it and all within it, in the full and exclusive possession of his wife, I do not see what further

(1) [1864], 1 Bom. H. C. R., 157.

I give the judgment *in extenso*, as it is in every respect one of the most valuable decisions concerning the question of possession under Mahommedan Law.

act he could do to give effect to that gift consistently with exercising his other legal rights as a husband. The wife had at that time the power afforded to her of taking and keeping exclusive possession of the gift, and of continuing to reside in the house, but the Mahommedan Law gives the husband the right, and moreover makes it his duty, to reside with his wife. If, then such a clear expression of intention as is contained in the present *hiba*, accompanied by such an unequivocal act before the witnesses, be not held to give that seisin which is required by Mahommedan Law, it would amount to introducing a restriction as to the object of 'gift,' which is not found, so far as I have been able to learn, in any Mahommedan Law-book. The husband has a general power of making a gift to his wife, but were the present *hiba* to be held to be invalid, it would amount to declaring that a husband shall not under any circumstance make a gift to his wife of the house in which they are at the time residing, and in which they continue to reside down to his death. If such a restriction be unknown to Mahommedan Law, there must be some legal mode of effecting the gift of such a property of the husband's. The circumstance of possession once given being subsequently continued does not appear to be a necessary condition of a *complete seisin*, or its non-continuance to invalidate the *hiba*; see the case of *Jaffer Khan* v. *Hubshee Beebee*, 1 S. D. A. Rep. of Bengal, p. 12, referred to in Morley's Digest, Title 'Gift,' s. 55."

*Amina Bibi* v. *Khatija Bibi*— (contd.).

"The 'seisin' of the Mahommedan Law appears to be analogous to our livery of 'seisin' as formerly existing in England, and to have been effected much in the same way as by delivery of a sod or twig of the land, or the ring or hasp of a door, in the name of 'seisin.' In Coke on Littleton, 57*a*, it is laid down—"If the deed be delivered in the name of 'seisin' of the land, or if the feoffor (or donor) saith to the feoffee (or donee) take and enjoy this land according to the deed, or enter into this land and God give you joy," these words do amount to a livery of 'seisin.'"

"Two passages from the *Tohfa*, Vol. IV, pp. 59 and 335, have been relied upon by the defendant to show that a delivery and acceptance of keys of a house is a sufficient seisin, or giving of possession in a case of sale and purchase, and also that gifts are in that respect to be treated as sales :—'The giving of the possession of immovable property to the purchaser depends upon the words

expressed by the seller conveying the meaning that (the house) has been vacated, and in handing over the keys of the house,' *Tohfa*, Vol. IV, p. 59; and 'The thing of which a gift has been made does not become the property (of the donee) without possession, as in the case with things that are sold, and the declaration of a donor to the effect that he has given possession is sufficient to denote (real) possession;' *ib.*, p. 335."

"In the present case the deed of gift was delivered, and with it the keys of the houses and furniture mentioned in the *hiba*, which included the house in which the husband and wife were then living. No words can be stronger than those contained in this *hiba* to indicate the intention of the donor to complete the gift according to law;—'And I, having given up my possession, have given them (the houses and *chal*) into the possession of the above-mentioned woman (his wife), in whose favour the gift is made, and all the conditions respecting a gift, *viz.*, the mutual consent and taking possession in every way, together with the vacating of them, have been performed by me and the above-mentioned woman in whose favour the gift is made;' and again, "In future I have no claim to the property, nor can any of my heirs demand anything out of the above-mentioned property by way of inheritance."

"In my opinion, the relation of husband and wife, and his legal right to reside with her and to manage her property, rebut the inference, which, in the case of parties standing in a different relation, would arise from a continued residence in the house after the making of the *hiba*, and in the husband generally receiving the rents of the *chal* annexed to that house. It is also worthy of remark, that the husband mentioned to some tenants that he was receiving rent on account of his wife, to whom he had made a *hiba*."

"This is not a case of creditors claiming against a *hiba* set up to defeat their claims, but it is that of heirs or next-of-kin claiming in derogation of the gift of the person through whom they claim."

*Azimunnissa* v. *Clement Dale.*

The same principle was laid down in *H. H. Azimunnissa* v. *Clement Dale.*(1) In that case it appeared that the Nawab of Carnatic had made a gift of certain houses and gardens to his Begum (H. H. Azimunnissa), but had continued to reside in the houses as before, and to deal with the property as his own. Bittle-

(1) [1868], 6 Mad. H. C. R., 458.

ston, J., held that the gifts were valid and conveyed a good title to the donee.

So in *Emma Bai and others* v. *Hajira Bai*(1), Sargent, C. J., following the views expressed by Sausse, C. J., in *Amina Bibi* v. *Khatija Bibi*, held that where a gift was made by a husband to his wife, it would not be invalid even if he continued in reception of the rents and profits after the date of gift, if it could be inferred that he was doing so as his wife's manager.

In the case of *Jaffer Khan* v. *Habshi Bibi*(2), it was held that where the technical requirement of delivery of seisin is complied with, continued possession is not necessary.

The question whether for the purpose of completing a gift of immovable property by delivery and possession, a formal entry or actual physical taking of possession is necessary, was also discussed before West and Nanabhai Haridas, JJ., in the case of *Shaikh Ibrahim* v. *Shaikh Suleman.*(3) Mr. Justice West laid down the principle of the Mahommedan Law on the question of seisin with considerable distinctness. The learned Judge said :—

"As to the law of the case, the Courts below are to bear in mind that when land is occupied by tenants a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete a proposed gift. Such a possession would, according to the case of *Khajooroonissa* v. *Rowshun Jehan*, be sufficient. As to the delivery of the house, the principle is to be borne in mind that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies a certain part, and this occupation becoming actual possession by the will of the parties extends to the whole, which is in immediate connection with such part where the possession is rightfully, though not where it is wrongfully taken, *Ex parte Fletcher.* An appropriate intention where two are present on the same premises, may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given as far as

(1) [1868], I. L., 13 Bom., 352.

(2) 1 Sel. Reports, p. 12; *Mir Azmatullah Saheb* v. *Boyapato Nagayya* [1906], I. L., 30 Mad., 519, seems to have been decided from a rather narrow point of view. Besides it lays down no principles.

(3) [1884], I. L., 9 Bom., 146, wherein the cases bearing on this point are referred to.

possible to the purpose of an owner whose intention to transfer has been unequivocally manifested."(1) This is in accordance with the principle stated in the *Majm'aa-ul-Anhar.*

*Humera Bibi* v. *Najm-un-nissa Bibi.*

In the case of *Humera Bibi* v. *Najm-un-nissa Bibi*(2) the plaintiff (Humera Bibi) had formally conveyed a house and other immovable property by a registered document to her nephew (the husband of the defendant) who lived with her. After the execution of the deed of gift, mutation of names in the Collector's records in favour of the donee was effected at the instance of the donor, and rent-receipts given to the tenants were thenceforth in the donee's name. But the plaintiff all along continued to live in the house included in the gift, and was practically maintained by the donee out of the rents and issues of the immovable property.

On the death of the donee the plaintiff brought a suit against his widow to have it declared that the deed of gift was invalid inasmuch as there had been no delivery of possession within the meaning of the Mahommedan Law and that the donor had not vacated the premises at the time of the gift and removed with her effects therefrom. The High Court of Allahabad, in a careful judgment, expressed themselves in the following terms :—"We are not prepared to hold that in a case such as the present actual physical departure of the donor from a house which is the subject of a gift evidenced by a written instrument is necessary in order to complete the gift by delivery and possession. On the contrary, we think

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(1) In a case among Hindus, *Kalidas Mullick* v. *Kanhyalal Pundit* [1884], I. L., 11 Cal., 121, the Privy Council had occasion to refer to the principle, which, it is submitted, ought to be carefully borne in mind in dealing with the subject of gifts among Mahommedans. Dealing first with the question what interest is conveyed to the donee when the terms of the gift are indefinite, their Lordships said : "It appears to their Lordships that the indefinite words of a gift must be limited by the purpose of the gift, and it was Romasunderi's intention that Ruttonmoni should take the property only for her life."

With reference to the validity or invalidity of the gift on the basis of non-possession, their Lordships used the following language :—"A gift where the donor supports it, the person who disputes it claiming adversely to both donor and donee is not invalid, for the mere reason that the donor has not delivered possession, and that where a donee or vendee is under the terms of the gift or sale entitled to possession, there is no reason why such gift or sale though not accompanied by possession, whether of movable or immovable property (where the gift or sale is not of such a nature as would make the giving effect to it contrary to public policy) should not operate to give the donee or vendee a right to obtain possession." This principle is applicable also to cases arising under the Mahommedan Law.

(2) [1905], I. L., 28 All., 147.

that if the parties are present in the premises, it is sufficient that an intention on the part of the donor to transfer the possession has been unequivocally manifested."

In *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan*(1), the donor (Bibi Begam Jan) a member of the Usuli division of the Shiah Sect had conveyed by way of gift to the defendant Bibi Rukhia Sultan (her widowed daughter-in-law) and to Rukhia Sultan's children the house in which she was residing with other property ; after the execution of the document she had removed from the house leaving behind some of her effects ; two days after she had returned and resided there as before the gift. It appeared also that at her instance some of the tenants who resided on a part of the premises attorned to Bibi Rukhia Sultan. On a suit by the plaintiff, a daughter of Bibi Begam Jan, to set aside the gift on the ground that the requirements of the Mahommedan Law regarding delivery of possession had not been complied with, the Bombay High Court held that the execution of a deed of gift of immovable property accompanied by a temporary abandonment of possession by the donor in favour of the transferee, and the attornment of the tenants to the transferee is a sufficient delivery of possession to make the gift valid under the Mussulman Law. In *Kandanath Veettil Bava* v. *Musalian Veettil Pakrakutti*(2), the Madras High Court laid down the obvious doctrine that the residence of the donor with the donee after the gift did not make the gift invalid.

When possession is already with the donee it need not be renewed ; no formal transfer, therefore, is necessary, when the gift is to a depositary, bailee or trustee " or even a person who has obtained it by fraud (*ghasab*)" and who is already in possession of the property which forms the subject-matter of the gift.(3) In the case of *Vilayet Hussain* v. *Maniran*(4), the Calcutta High Court held, that when the subject of the gift has been in the hands of the donee as manager or agent of the donor, such possession by the donee was not sufficient to make it unnecessary to the validity of the gift, that

*Vilayet Hussain* v. *Maniram* wrongly decided.

(1) 1905], I. L., 29 Bom., 46. The fact that the parties were Shiahs makes no difference in the principle, as the doctrine of seisin is the same in both schools.

(2) [1907], I. L., 30 Mad., 305.

(3) *Hed.* (Hamilton's) III, 295 ; *Radd-ul-Muhtâr*, IV, p. 783 ; *Durr-ul-Mukhtâr*, p. 635.

(4) [1879], 5 Cal. L. R., 91.

there should be actual or formal delivery of possession of the property. In this case the gift was made in death-illness. This case is clearly opposed to the Mahommedan Law.

In short, in considering the question of transmutation or delivery of possession, the relationship of the parties must be kept in view. The residence of the husband in a house of which he has made a gift to his wife, or the realisation by him of the rents and profits of a property he has given to her, is explainable by the relationship of the donor and the donee.(1) Similarly, if a father were to make a gift of his business to his minor son and continue to manage it for him, or an uncle were to give some property to a nephew and continue to be supported by the donee, the gift would not be invalid on that account.

As I have already pointed out, if the gift is made to a person, who is *sui juris*, the donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee, by placing the latter in a position to enjoy it beneficially or to make use of it consistently with its purpose. This, however, in the majority of cases, is a question of fact. In the case of *Agha Mohammed Jaffer Bindamin* v. *Kolsoom Beebee*(2), already referred to, the Judicial Committee considered that there was evidence of an intention to make a transfer but that the gift was incomplete. It would have been different if the notes had been endorsed over by the transferor.

The Bombay High Court has held that whether a property is conveyed directly to the donee or whether it is assigned to trustees for his benefit, transmutation of possession "actual, symbolical or constructive" is necessary for the validity of the disposition. As Mr. Justice Tyabji pointed out in this case, "ramifications of trusts" are to be found almost through every branch of Mahommedan Law; and it is therefore important to bear in mind that when a disposition is purported to be made by means of trustees for the benefit of a third person some indication of a transfer of possession is requisite to make the transaction complete.(3)

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(1) *Amina Bibi* v. *Khatija Bibi*, supra; *Azim-un-Nissa* v. *Dale*, supra.
(2) [1897], I. L., 25 Cal., 9.
(3) *Moosabhai* v. *Yacoobbhai* [1904], I. L., 29 Bom., 267.

## SECTION II.

### GIFTS TO MINORS.

Gifts to minors.

IN the case of a gift by a father to his minor child, no acceptance is necessary. "The gift is completed by the contract, and it makes no difference whether the subject of the gift is in the hands of the father or in that of a depositary" [on behalf of the father]. When a father makes a gift of something to his infant son, the infant, by virtue of the gift, becomes proprietor of the same, provided the thing given be at the time in the possession either of the father or of any person who stands in the position of a trustee for the father, because the possession of the father is tantamount to the possession of the infant by virtue of the gift, and the possession of the trustee is equivalent to that of the father.

With regard to the validity of gifts to minors of property in the occupation of tenants the subject has already been discussed in a previous chapter.(1) And it has been shown that a father may make a gift to his minor child of immovable property in the occupation of tenants or in the possession of a lessee or mortgagee without any change of possession on the part of the persons directly holding the subject-matter of the gift. Nor, to make the gift complete, is any acceptance on the part of the donee necessary. The gift once made and the intention to convey the property unequivocally expressed, the donation is complete so far as the donor is concerned, though he may continue to hold the property in his own name in the same manner as before the gift.

The same rule applies to a gift by a mother to her infant child, whom she maintains and whose father is dead and there is no constituted guardian; and so also with respect to the gift of any person maintaining a child under similar circumstances.

"The law with respect to seisin in cases of *sadakah* or pious gifts is similar to that of gifts." This means that "a gift by way of a pious offering" stands in the same position as a simple gift or voluntary settlement so far as the question of seisin is concerned. Among Mussulmans, it is very frequent, or, perhaps, more correctly speaking it used to be so, to make donations to children and relations by way of a pious offering or *sadakah* "to obtain the nearness of God"—to deserve the Almighty's reward.

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(1) See *ante*, p. 66. Comp. *Nawazish Ali* v. *Mihrban*, 1 Sel. R., 41 [1865].

This recompense is regarded in the Mussulman Law as a meritorious consideration and bars the claims of creditors. But when a gift of this kind was made, delivery of seisin was to be effected in the same way as in the case of a gratuitous gift. If the donee was in possession of the subject-matter of the gift from before the donation, he became proprietor thereof " without the necessity of a new seisin." In the same way, if the father made a pious gift to his infant child of a thing in his possession or of somebody on his behalf, it is valid without actual delivery of seisin or change of possession.

Where a gift is made to an infant by a person other than the father " the gift is rendered complete by the seisin of the father of the infant. "

When the father is dead, the possession of the person primarily entitled to the guardianship of the child is sufficient; the primary guardians after him being his executor, the grandfather, and the executor appointed by the grandfather.

" Where a *hîba* is made by an *ajnabi* " (a stranger) (1), says the *Fatâwai Kâzi Khân*, the right to take possession and accept [the donation on the child's behalf] belongs to the father, and in case he is dead or absent at a precluding distance(2), the right appertains to his executor for he is in the position of the father (بمنزلة الاب). He (the executor of the father) takes precedence of the grandfather. When there is neither the father nor his executor, the right of possession appertains to the grandfather, *viz.*, the father's father, and after him to his executor. Excepting these four the possession of any other person would not be valid unless the child is in his charge. Consequently some have said(3) that if the child is in the lap and charge of its uncle, and he makes a gift and takes possession when there is an executor of the father as he is *in loco parentis* such possession is not valid, and if the brother or uncle or mother were to take possession, when the child is in charge of a stranger, it would not be valid, but the

Gift to a child by a non-relation.

(1) Meaning a non-relative.

(2) *Ghîbat-ul-munkat'aa*, a distance which precludes his expressing his assent or dissent in time.

(3) قيل, showing that it is not accepted. The correct doctrine is stated a little beyond; comp. *Wajeed Ali* v. *Abdool Ali* [1864], W. R., Suppl. Vol., 121; *Gyazooâdeen* v. *Fatima* [1866], 1 Agra H. C. R., 238; *Husain* v. *Mira* [1870], 7 Bom. H. C. R., 27; *Husain Khan Bahadoor* v. *Native Srinivasa* [1871], 6 Mad. H. C. R., 356.

possession of such stranger in whose charge it is would be valid. And when a minor girl is in the house of her husband, and a gift is made to her by an *ajnabi* (a stranger) [meaning a non-relative], the possession of the husband would be valid even though the father be present [*i.e.*, not dead or at a "precluding distance], and if the father were to take possession it would be similarly valid although she be in her husband's house."

"And when the child is in the charge of the grandfather, brother, mother or uncle, and a gift is made to the child [by any of them or some other person] and the person in charge of the child were to take possession whilst the father is present, the learned (the *Mashâikh*) have differed on its validity; some have said it would not be valid. But the correct doctrine is that it would be valid, similar to the case of a gift to a minor girl when the possession of the husband is valid even though the father is present ....." And if a child is in charge of an *ajnabi* (a stranger or non-relative), he would be entitled to take possession on behalf of the minor."

The *Radd-ul-Muhtâr* after stating the various views expressed by different jurists concludes thus—"if a person, in whose charge the child is, takes possession on its behalf of a gift made to the child, whilst the father is present, some have said it is not valid, whilst others have declared it is valid, and on this is the *fatwa* as is stated in the *Mushtamal-ul-Ahkâm*; and according to the correct doctrine it is valid as in the case of the husband taking possession [of a gift to a minor wife] in the presence of the father, as is stated in the *Khânieh*(1), and the *fatwa* is with respect to its validity. And this is the view (also) of Astarûshni."...."You know that the *Hedâya* and the *Jouhara* have considered it correct to hold that the possession of the person in charge of a child is not valid whilst the father is not absent, which the author of the *Badâya* has followed. But Kâzi Khân and others among the Masters of decisions(2), (*Ashâb-ul-Fatâwa*) have upheld the contrary doctrine that it is valid."

"Among the doctrines stated that declared to be correct by Kâzi Khân should not be departed from, for he is a jurist of the first order (*fakîh-un-nafs*—'jurist by spirit') especially as it is for the

(1) *Fatâwai Kâzi Khân*, Vol. IV, p. 191 (Cal., 1835).
(2) Jurisconsulti.

benefit of the child. So consider this at the time of pronouncing decree (*fatwa*). And I have mentioned these various doctrines as they occur in the law-books." "A gift to an infant by a person in whom is vested the complete guardianship(1) [of the child], that is a person in whose charge the infant is, in which category are included a father and an uncle in the absence of the father provided he is in their charge—becomes completed by the mere declaration (*i.e.*, without acceptance of the donee and without possession) if the subject of the gift is *known*(2) [specified] and is in the hands of the donor or his depositary, for the possession of the guardian is equivalent to the minor's possession....."(3)

"And if a gift be made to the infant by an *ajnabi* (non-relative), in such a case it is completed by the possession of its *walî* (guardian); and he (the guardian) is one of four persons, first the father, then his executor, then the grandfather, then his executor; even though the infant is not actually in their *lap* (actual custody); and in their absence, the gift becomes completed by the possession of any one in whose charge the child is [that is, who takes care of him] as an uncle. And the gift by an *ajnabi* becomes completed [operative] by the possession of the mother or of a stranger or a *Multakit* (who has picked up a child) if it is in their *lap* not otherwise.... And it is completed also by the possession of the infant himself if he is possessed of discretion ( ممیزاً ) and understands the acquisition of property"(4), "and the gift is to his advantage and not otherwise" (5).

The author of the *Durr-ul-Mukhtâr* goes on to add—"I say, in *Barjandi* it is stated that there is a difference of opinion [as to the validity] if possession is taken [of the gift for the child] by the person in whose charge it is whilst the father is present; *some have said* it is not valid but the correct doctrine is that it is valid; and Kahastâni has clearly preferred its validity, and he has ascribed it [the doctrine of validity] to the Fakhr-ul-Islâm contrary to the view on which the author [of the *Tanwîr-ul-Absâr*] has

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(1) ولایت فی الجملة

(2) لو للموهوب معلوم

(3) *Radd-ul-Muhtâr*, Vol. IV, p. 784.

(4) *Durr-ul-Mukhtâr*, p. 635.

(5) Tahtâwi; the authorities referred to are Kahastâni, *Muzmirât*, *Fatâwai Sughra*, and *Fatâwai Alamgiri*.

relied in his commentary which he has ascribed to the *Khulâsa*. But the text of the author is open to the construction of validity for the qualifying phrase 'notwithstanding the father is present' is applicable to all cases." This is explained by Tahtâwi thus :— "As the author has stated that if the donee, though under age, can validly take possession of the gift notwithstanding the father is present, it is clear that the father's presence makes no difference if the child is in the charge of the mother or a stranger and either she or the stranger were to take possession of the gift."

"And the possession of a person in charge of the child is valid even though the father be present—and this is the accepted doctrine."(1)

"If the donee," says the *Fatâwai Alamgiri*(2), "is competent to take possession (*ahl-ul-kabz*) in that case he is entitled to take possession of the gift; but if he be a minor or insane (*majnûn*), then the right to possession belongs to his *walî* (guardian). And his *walî* is his father, and the father's executor, then the father's father and then the executor of his (the father's) executor(3), then the Kâzi and then any one appointed by the Kâzi whether the minor is in the charge of any one of them or not; so in the *Sharh-ut-Tahtâwi*."

"So if the father or his executor or the father's father or his executor are absent at a precluding distance the seisin of one appointed to his guardianship would be valid according to the *Khulâsa*." (This shows that an appointment may be made specifically for the purpose of taking possession on behalf of the minor of the subject of the gift.)

"But persons other than the father and father's father like the brother, the uncle or the mother and all kinsfolk are entitled on a liberal interpretation [of the law] to take possession of the gift if the child be in their charge (lit. in their family). Similarly their executor [would be entitled] on a liberal interpretation if the child be in his charge; and so also it is valid for any

Possession may be taken by the person in whose charge the child is.

(1) Kahastâni in the *Jâm'au-ur-Ramûz*.

(2) Vol. IV, p. 547.

Executor of *his* executor, evidently meaning the executor of the father's executor, but immediately after comes a statement which indicates that after the grandfather comes *his* executor.

(3) ثم وصي وصيه

stranger who has charge of the orphan when he has no one else [to look after him] to take possession of the gift. And these principles apply equally whether the child is intelligent enough to take possession or not. All this refers to cases where the father is either dead or is at a *precluding distance*. But when he is alive and present, and the child is in the charge of any of the others, in such a case whether the possession of the latter would be valid there is no authoritative statement in the books, except with regard to a stranger that if a child is in his charge and it has no one else, the possession of that stranger on its behalf is valid. From this it follows that the possession of the others [*i.e.*, the kinsfolk] is not valid if the father is present. And it is also stated that the grandfather cannot take possession when the father of the child is alive; nor has any distinction been made whether the child is in his charge or not; so it is necessary to make the rule general that it is not valid in any case; so in the *Zakhira*."(1)

This statement, however, is qualified and placed on a reasonable basis a little later.

"So if the minor is in the *lap* and in the charge of his uncle, and he makes a gift to the infant whilst the father's executor is present, and the uncle takes possession of the gift for the infant, *some have said*(2) that his possession is not valid. And if the brother, uncle or mother were to take possession whilst the minor is in the charge of a stranger (*ajnabi*) it would not be valid; and if the stranger himself in whose charge the child is were to take possession it would be valid; so in the *Fatâwai Kâzi Khân*."

**Gift to a married girl.**

"If a married minor girl who has attained nubility is in the charge of her husband, either she herself or the husband on her behalf can validly take possession [of any gift made to her]... With reference to a girl who has not attained nubility some of our jurists (*ashâb*) have said the possession of the husband would not be valid, but the correct doctrine is that if she is in the husband's charge he can validly take possession of a gift made to her, but if the wife has not taken up her abode in the husband's home he is not authorised to do so, rather her guardian would be entitled to

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(1) P. 548.

(2) قيل showing that the authority is weak and not accepted.

take possession on her behalf, as is stated in the *Zakhira*. And if the minor girl is in the charge of the grandfather, brother, mother or uncle, and any one of them make a gift to her, the possession of the husband is valid; so it is stated in the *Tâtâr Khanièh*. And when she has attained majority neither the father nor the husband is entitled to take possession except with her consent (*izn*); so in the *Jouharat-un-Nayyirèh*. If a minor girl is in the charge of a stranger with the consent of the father, and the father is absent, the stranger's possession is valid (*sahîh*, correct) and not of the brother, so in the *Sirâjia*.

"And if an infant is in the charge of the grandfather, or brother, or mother or uncle, and a gift is made to the child, and the person in whose charge it is, takes possession whilst the father is present (*hâzir*), our masters (*mashâikh*) have differed respecting it. But the correct doctrine is that it is valid as is stated in the *Fatâwai Kâzi Khán*, and the *fatwa* (decree) is pronounced according to it, as [is laid down] in the *Fatâwai as-Sughra*." Recognised principle.

"And if the youth himself takes possession and he has discretion (intelligence, *'akl*) it is valid, though the father may be alive, according to the *Wajîz l'il-kurdi*; and this is the opinion of one-third of our jurists according to the *Zakhîra*, but if he is not possessed of intelligence it is not lawful, according to the *Sirâj-ul-Wahâj*. Acceptance on the part of a youth is valid when the gift is for his benefit, but not if it is likely to damnify him."

"When a father makes a gift of a house to his minor child and the donor's things are in it, the gift is valid—and this doctrine is adopted and on this is the *fatwa*; so in the *Fatâwai-'l-'Itâbia*. And in the *Moonteka* it is stated from Mohammed (may the peace, etc.) that if a person were to make a gift of his house to his infant child and continue to live in it as a tenant paying rent it would not be valid, but if the donor lived in it *without paying rent* it would be valid "(1)

The invalidity in the first case is due to the dual character in which the donor places himself by becoming a tenant in the house he gives to his infant child; for, as the guardian of the child, the posses- Gifts to minors.

(1) Abû Yusuf differs from his fellow-disciple as to the validity in either case, but Mohammed's rule is the accepted doctrine. But where a father makes a pious gift (*Sadakah*) of the house and continues to live in it, it is valid according to Abû Yusuf.

sion of the house vests in him, and if he continues to occupy it paying rent he becomes his own tenant. It is on the basis of such reasoning Imâm Mohammed holds that, although the father may validly continue to live in a house which he has given to his infant child, he may not do so as a tenant. But this objection would not apply if the subject of the gift be transferred to trustees, and the father were to rent the house from them. Nor would it apply where a gift is made by a person other than the guardian in whose charge the child happens to be.

If a fatherless child be under the charge of its mother, and she were to take possession of a gift made to him, it would be valid, because she has an authority for the preservation of him and his property, "and the seisin of a gift made to him is in the nature of a preservation of himself since a child cannot subsist without property." The same rule obtains with respect to the validity of the seisin of a non-relative who has the charge of an orphan. Thus where a gift is made to an orphan who is living in the guardianship of a stranger, if possession is taken by such guardian it is sufficient in law. In other words, the possession of a *de facto* guardian or of a guardian appointed by the Court, even where the father is alive, is sufficient.

Possession of a discreet minor.

If a person under age, who is able to understand what is to his advantage, were himself to take possession of a gift, it would be valid, provided it is a benefit to him. An example of an "injurious" gift is mentioned thus:—"If a man were to give to a youth a *blind* slave his acceptance would not be valid." The reason is obvious, for whilst the donee would be burdened with the slave's maintenance, he would not be able to derive any benefit from his services.

Gift to a minor wife.

As already stated, the possession of the husband of a gift made to his wife under age is valid, provided she has been sent from her father's house to his; and he is authorised to do so even though the father be living, because the father after sending the girl to her husband's house is held by implication to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not supposed to have resigned the management of her concerns.

Where the father is alive and on the spot, the mother may not take possession, but as is abundantly clear from the passages quoted

from the *Fatâwai Alamgiri* and other works it does not follow from this, that if she does, the gift is invalid.(1)

When a gift is made to an infant by a father or any other person in whose charge the child is, it is not necessary that the donor should divest himself of all interest in the subject-matter of the gift. For example, where a house is bestowed it is not necessary that the donor should not reside therein, or if it contains his effects, that he should remove them from it.(2)

Gift by the mother of her dower-debt to her infant child.

"When a woman has her dower-debt owing from her husband and she makes a gift of it to her infant child by the same husband, the correct doctrine is that it will not be valid unless she invests the child at the same time with the power to realise it, and he (the child) will become the owner on realisation, so in the *Fatâwai Kâzi Khân*."(3) This evidently implies that at the time of the gift the mother should place the child in a position to recover the amount from the father, either by making over the dower-deed to some one on behalf of the child, or authorising him to make the demand on the child's behalf.

The above principles may be formulated as follows:—

If a stranger makes a gift to an infant, the right of acceptance and possession on behalf of the infant appertains, in the first place, to the father. If the father is dead, or is at such a distance as to preclude the possibility of his presence, in that case the executor of the father takes the place of the father. If there is no executor of the father, then comes the grandfather, and in his absence the grandfather's executor. Besides these, who may be regarded as guardians *de jure*, any person who happens to be the *de facto* guardian of the infant, that is, in whose custody the child is, may take possession of the subject-matter of the gift.

*Musst. Banoo Bibi* v. *Fakhr-ooddeen Hassan.*

In the case of *Musst. Banoo Bibi* v. *Fakhrooddeen Hassan*,(4) the Sudder Court held correctly on principle that a deed of gift by a female to a minor, whom she had received into her family as an adopted son, of property of which possession was not delivered at the time of the gift or during the lifetime of the donor, she having retained possession of it on behalf of the minor, was valid and complete in law notwithstanding that the father of the minor was alive.

(1) *Fatâwai Alamgiri*, Vol. IV, p. 546.
(2) *Ibid*, p. 547; Comp. cases cited *ante*.
(3) *Ibid*.
(4) Sel. Reports, II, p. 180.

If a minor girl be living with her husband after her marriage a gift of which possession is taken by the father or the husband is equally good.

But before the minor wife has been sent to the husband's house, or after she has attained her majority, the husband is not entitled to take possession. The guardianship in respect of a minor wife vests in the husband when she comes to his house.(1) As long as she has not been sent to his house, he has no right to take possession on her behalf of any gift made to her; when she has come to live with him he becomes her *walî*.

If the father is alive or present, but the child is being brought up by the uncle, grandfather or mother, their possession is sufficient.

If the minor is possessed of understanding, he may take possession of the gift, but in order to prevent any dispute, the Kâzi is authorised to appoint a curator for the same. When the donee is insane, the right to take possession belongs to his guardian.

If a gift is made to a *latîk* (foundling), the possession of one who brings up the child, or that of the Judge is sufficient.

An infant who has attained discretion has a right to reject as well as to accept.

It is lawful for parents in case of necessity (and where it can be shown that it was the intention of the grantor that they should do so), to make use of a gift made to the child but not to consume it.

Presents given to a bride follow the same rule, that is, if they are made by the relations of the husband they become the husband's property, unless they are distinctly mentioned to be given to the wife.

Things given in *jahâz* (by way of paraphernalia) to a bride taken to the house of the husband belong to her, unless the father says they were given by way of *'aâriat* (commodate loan), the *onus* being on him to prove his statement; usage will have to be considered in connection with the position of the father.(2)

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(1) The custody of a minor wife does not belong to the husband, *in re Khatija Bibi* [1870], 5 B. L. R., O. C., p. 517, but it is not illegal, *in re Mahin Bibi* [1874], 13 B. L. R., O. C., p. 160.

(2) *Radd-ul-Muhtâr*, Vol. IV, p. 781. In the case of *Umes Chunder Sircar* v. *Mussamat Zuhoor Fatima* [1889], L. R., 17 I. A., 201, a Mahommedan husband had granted by a deed of settlement certain lands to his wife on condition

Nobody can make a gift of his child's property even for a consideration. This is a natural corollary of the principle which debars guardians from selling the property of a minor, unless under exceptional circumstances.

Presents given to a child at circumcision if suited for him become gifts to him. If not suited for him they become the property of the parents, according as they are made by the friends or relatives of the father or mother. But if the giver of the present distinctly specifies at the time that it is for the child, it will become his property.

A youth who has attained discretion but not puberty, and is able to understand what is to his advantage may accept a gift even after his *walî* has rejected it.

In the *Fatâwai Kâzi Khân* it is stated that if a person give a house to his minor child and subsequently purchase or acquire another house with the proceeds of the house of which gift has been made, this latter house will be the property of the child. According to the *Radd-ul-Muhtâr* this is the accepted doctrine. The doctrine, however, when analysed would seem to express in other words the principle that when a gift has been made by a father to his child, it becomes the property of the minor though it continues to remain in the possession and disposal of the father. And, accordingly, any dealing with the property by the father *dehors* the right of the infant would not change the character of the gift or destroy the right of the infant.

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## SECTION III.

### GIFTS WITH CONDITIONS.

Contingent gifts and gifts with conditions.

THERE is great difference between *contingent gifts* and *gifts with conditions attached to them*. The former are gifts which are made dependent for their operation upon the occurrence of certain contingencies, and are void according to all the schools.(1) Whilst

that if she had a child by him the grant should be taken as a perpetual *mokurrari* and in case of no child being born as a life *mokurrari* with remainder to the settlor's two sons. It was held by the Judicial Committee that the two sons took definite interests under the deed similar to vested remainders, though liable to be displaced by the birth of a child to the wife.

(1) *Roushan Jahan* v. *Enaet Hassan* [1864], Weekly Rep., 3, and L. R., 4 I. A., p. 291; *Eusuf Ali* v. *The Collector of Tipperah* [1882], I. L., 9 Cal., 138; *Chekkone Kutti* v. *Ahmud* [1886], I. L., 10 Mad., 196.

with regard to gifts with conditions attached to them, there exists a certain divergence between the Shiahs and the Hanafîs. According to the Hanafî Law, any derogation from the completeness of the gift is null; and if the intention to give to the donee the entire subject-matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the right would be null and void.(1)

Hanafî Law.

Accordingly, under the Hanafî Law, *whilst the gift is valid, the condition is void.* Under the Shiah Law, if the condition is subsidiary to the gift both the gift and the condition are valid. For example, if a man were to say, "I give you the debt due to me by *A*, on condition that you give to *B*, the interest thereon;" under the Hanafî Law the condition is void, but the gift valid.

Shiah Law.

Under the Shiah Law, if the gift depends on the condition attached, the entire gift is bad. If it does not and the condition is only subsidiary, then both the gift and the condition are valid.

Gifts dependant on condition.

In practice (*'urf*) there is no difference whether the gift depends on the condition attached, or whether the condition is only subsidiary. In both cases both gift and condition are valid.

Hanafî Law.

Under the Hanafî Law when it is clear that the intention is to make to *A* a gift of the *corpus* of a thing, and it is conditioned that he should take a limited interest in it or take it only for his life the condition would be void, and the gift would take effect absolutely. Similarly, if a man were to give a piece of land to another on the condition that he should give to him in *perpetuity* the whole produce of the land, the condition would be bad; for, in these cases, the condition defeats the object of the gift; in other words, although it purports to transfer the property to the donee, in one case it cuts down his interest, and in the other burdens him with a perpetual trust.

But even under the Hanafî Law only such conditions are invalid as render the gift nugatory or defeat its very purpose. The illustrations given in the *Fatâwai Alamgiri*, which are in accord with the social conditions of the times, leave no room for doubt as to the meaning of the jurists. "All our masters have declared that when a gift is made and an invalid condition is attached, the gift will be valid and the condition will be void. For example, if a person were to make a gift of a slave-girl to another and impose a con-

(1) Comp. *Nizam-ud-din* v. *Abdul Gafur* [1888], I. L., 13 Bom., 264; s. c. on app., I. L., 17 Bom., 1.

dition on him that he should never sell her or that he should make her the mother of his children," *i.e.*, he should have children by her which would have the effect of emancipating her, "or that he should sell her to so and so, or that he should return her to the donor after a month—in all these cases the gift is valid and the condition void, as is stated in the *Sirâj-ul-Wahâj*."

Examples of gift with nugatory conditions

In the instances given the condition makes the donation absolutely nugatory; in fact it is opposed to the very purpose of the gift; it is a restriction on the rights purported to be transferred to the donee. And it is, therefore, held to be void. The other examples which follow further amplify the meaning of the jurists. "If a house is given to another on the condition that a part of *it* should be given back to the donor or that the donee should give something in return for it,(1) the gift would be valid and the condition void; so it is stated in the *Kâfi*. The rule in all these cases is that in contracts where [complete] seisin is a condition, nugatory provisions do not avoid the contracts but are themselves rendered void, such as gift or pledge, as is stated in the *Sirâj-ul-Wahâj*. Contracts which are avoided by nugatory conditions are thirteen in number, such as sale, partition, lease, discharge of a debt; contracts which are not avoided by such conditions are twenty-six, *viz.*, divorce...pledge, loan, *hiba*, *sadakah*, wills....; contracts which can be referred to a future time are fourteen in number ....and those which cannot be so referred are nine, *viz.*, sale, partition, partnership, *hiba*... A man makes a gift to another of a piece of land on the condition that whatever is produced thereon the donee should give the donor; Abu'l Kâsim Saffâr says if there are vines or other trees on the land the gift would be valid and the condition void; but if the land is unproductive the gift would be void; so in the *Fatâwai Kâzi Khân*. Similarly if a man were to give a vine to another, and were to condition that the donee should give him the crop thereof, the gift would be valid and the condition void; so in the *Muhît-us-Sarakhsi*. And Asbijâni says if a person were to make a gift to or *sadakah* for another of something and condition that the latter should return a third or fourth of the same.....the gift would be valid, and the donee would make no return....so in the *Tâtâr-Khâniêh*."(2)

(1) This must not be confused with gifts for *consideration*.
(2) Vol. IV, pp. 553-4.

It will be noticed that in all these illustrations, the condition imposed on the donee is such as to defeat the whole purpose of the gift, for although the transaction purports to be a complete transfer of the *entire* thing, the right is so limited that it renders its enjoyment in some cases nugatory, in others only gives the *corpus* in part. And, therefore, effect is given to what is supposed to be the primary object, *viz.*, the gift is held to be valid whilst the condition is avoided.

This, in substance, is the meaning of the jurists.

**Examples of valid conditions.**

It is otherwise with a gift by *A* to *B* of a certain property without any restriction on the power of disposition, but subject to the condition that *B* should pay periodically to *A*, or to *A* and his heirs, a *part of the usufruct of the property*. In such a case both the gift and the condition would be valid. And if *B* should alienate the property, the assignee would take it subject to the condition.

In these cases the reason is obvious, for the reservation of an interest by the donor for himself, or for himself and his heirs, does not interfere with the right of property vesting in the transferee by the act of transfer.

An analytical examination of the principles with due regard to the main purpose of the Mussulman Law, shows that where the intention is clear to transfer the entire right of property in the *corpus* (*'ain*) of the gift, a mere reservation of interest in its rents and issues, or any profit accruing therefrom or a subordinate share in its enjoyment does not affect the validity. And this view is not restricted to the case of a minor donee.

*Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum.*

In *Nawab Umjad Ally Khan* v. *Mussumat Mohumdee Begum*,(1) the Judicial Committee of the Privy Council deal with this principle with great amplitude and lucidity, and lay down, it is submitted, the correct doctrine applicable to such cases.

It is necessary to examine in some detail the legal aspects of this case.

The father of the appellant (Nawab Umjad Ally Khan) some years before his death transferred and endorsed a considerable number of Government Promissory Notes which then stood in his name into the name of his son. But the income of the notes was all along remitted to the father under the directions of the appellant.

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

Later the father conveyed to the son for a nominal consideration certain landed property reserving to himself only the use of the same during his life.

On the death of the father the respondent (one of the daughters) put forward a claim that, as regards the Government Promissory Notes, the late Nawab was the real owner and that the appellant was only a "nominal holder."

Their Lordships dealing with this part of the case said as follows:—"The first in order of these matters involves an important point of Mahommedan Law relating to gifts *inter vivos*.... Before the validity of this gift, as one *inter vivos* is determined, it must first be considered by their Lordships what the real nature of the transfer was. The legal title in the Promissory Notes was undoubtedly in the appellant in his father's lifetime, by virtue of an act of the father. But 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 where no intention exists, to transfer the beneficial ownership, either present or future. The facts relating to the gift have been most carefully investigated by Mr. Fraser, the Civil Judge.... Mr. Fraser's observations as to the mode of dealing amongst natives living amongst themselves as a family, in a state of family union, and dealing in this state with the proceeds of property standing in the names of separate members of the family, to whom it has been transferred by the parent and head of the family and to the deference to his wishes and arrangements, and acquiescence in them commonly exhibited, are forcible arguments to exclude the notion of fraudulent concealment of design in a transaction circumstanced as the present. They strengthen the probability of an intended transfer of property in the life-time of the donor, with a reservation of the use or proceeds of the money transferred during the life-time of the donor only."

"It remains to be considered whether a real transfer of property by a donor in his life-time 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 the right to the recurring produce during his life-time is an incomplete gift by the Mahommedan Law. 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*, 'Gifts,' Vol. III, Book XXX, p. 294, where the objection being raised that a participation of property in the thing given invalidates a 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.' 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*, 'Gifts,' Vol. III, Book XXX, p. 307. But as this arrangement between the father and the son is founded on a valid consideration, the son's undertaking is valid and could be enforced against him in the Courts of India as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated. The contention of the parties therefore is not found to violate any provision of the *Hedâya*, and the transfer is complete."

This decision may, at first sight, seem to be in conflict with the doctrine of the Hanafî lawyer Abu'l Kâsim as-Saffâr(1), but it must be borne in mind that, in the Hanafî Law, much of the voidableness of conditions arises from the character of the Arabic expressions. As a general rule, it may be stated that, where the intention to make an absolute transfer *in præsenti* of all proprietary right is clear, any condition which derogates from the *immediate* completeness of the gift is regarded as void. Where the condition, however, may be given effect to without in any way interfering with or detracting from the immediate completeness of the gift, or rather the immediate transfer of the right in the substance of the gift, *the condition as well as the gift are valid.* If a man were to give absolutely his property to another and place the donee in possession thereof, so far as *its* nature admits, to use the language of the *Majm'aa-ul-Anhar*, with the condition that the whole or a portion of the income should be given to him, the donor, or to any body else *during his life-time*, such a reservation or condition would not prevent the property vesting immediately in the donee. The condition, therefore, would be valid. So also, if a person were to make a gift subject to the donee paying the

(1) *ante*, p. 135.

donor's debts, and place the donee in possession of the subject-matter of the gift, the condition would be valid. Or, if a donor were to make a condition that the donee should give a *part* of the income or pay an annuity to his heirs in perpetuity, and give effect to the donation by transferring the subject thereof to the dominion of the donee, as the condition in no wise interferes with the completeness of the gift, both the gift and the condition would become operative in law. In this view, the decision of their Lordships in the Privy Council seems to be in absolute accordance with the Hanafî Law.(1)

But where the donor continues to exercise rights of ownership over the property inconsistent with the transfer of proprietary interest, the gift has been held not to be operative.(2)

Gifts dependent upon contingencies are void, as stated before, according to both the schools. For example, a condition for the avoidance of a debt in words like the following :—" When to-morrow comes and thou happenest to die, then thou art discharged from my debt," is null and void. Or " shouldst thou die of this disease, this house is thine," in all these cases the gift is absolutely void. But a condition implying an immediate operation of the gift would be valid; for example, if a man were to say to another, " if you owe me any money, I absolve you of it," or " you will be absolved of my debt when I die."(3) (In the last case it becomes a legacy). Contingent gift.

When a person says to another, " that house is for thee; if thou diest before me it is mine, and if I die before thee it is thine," it is technically called a *rukba*. According to Abû Hanîfa and Mohammed, says Tahtâwi, such a transaction is void; according to Abû Yusuf, it takes effect as a gift. " But the former doctrine is correct. " Hanafî doctrines.

When a property is made over to another by way of a *rukba*, it will be held as an *'aâriat*, that is, the donee shall have the loan of the thing without any disposing power over it, subject to the option of the donor to resume his gift or loan at any time.

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(1) In this case the parties were Shiahs, and their Lordships could have maintained the gift as well as the condition on the basis of the Shiah Law without reference to the *Hedâya* which is a work on Hanafî Law.

(2) *Nawab Ibrahim Ali Khan* v. *Ummat-ul-Zuhra* [1896], L. R., 24 I. A., 1.

(3) *Radd-ul-Muhtâr*, IV, p. 794.

Under the Hanafî Law, a life-grant or *'umra*, if made in terms which imply an absolute gift, takes effect as a *hiba*, the condition limiting the gift being held void. A gift to *A* for life and remainder to *B* takes effect as an absolute gift to *A*,—to use an English expression, gives him an estate in fee.(1)

A mere grant of the usufruct of a thing however, is, in the eye of the law, simple *'aâriat* or commodate loan which implies on the part of the donee the obligation of returning the self-same thing.(2)

The gift of a thing, which has been lost, when "recovered," is bad, according to Abû Yusuf. For example, if a man were to say to another, "I give thee the pearl which I have lost, recover it and take it." It would be a void gift, being the gift of a mere speculation. Zuffar, on the other hand, holds it to be valid and his rule appears to be the law.(3)

But the gift of an enforceable right is valid by *consensus*. For example, *A* may be entitled to a property which is in the possession of *B*. A gift by *A* to *C* of the property or rather the right to the property is valid.

A gift of a building without the land on which it is situated is valid.(4)

If the gift is made with an option to the donee to accept it or not, the option must be exercised at the place where the offer is made or when it comes to his knowledge.

If the donor make a gift reserving an option to himself to recall it at his pleasure, the gift is good and the option void.

A gift not void for an invalid condition.

A gift does not become void on account of an invalid condition. Accordingly, when an arrangement is entered into between a husband and wife in regard to their respective rights, and property is conveyed thereunder by one to the other, it takes effect as a gift and does not become void for any invalid condition. "But sale, mortgage, and lease," adds Kâzi Khân, "would be void for invalid conditions."

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(1) Ahmed bin Hanbal and others, says the *Durr-ul-Mukhtâr*, have held a *rukba* to be invalid and an *'umra* to be valid on the authority of a tradition of the Prophet who declared that when a grant is made for another's life he takes it for his life.

(2) "A mere grant of usufruct is an *'aâriat* in a thing which can be used without being destroyed, but things which must be consumed in use, imply gift except in the case of money;" *Fatâwai Kâzi Khân*, IV, p. 230.

(3) *Radd-ul-Mukhtâr*, Vol. IV, 795.

(4) *Durr-ul-Mukhtâr*, p. 236.

Where a man purchases a house and after obtaining possession thereof makes a gift of it, and subsequent to the gift another person obtains possession of a moiety on the ground of pre-emption, the gift as to the remainder is invalidated so far as the dònee is concerned. In other words, he may return the remaining portion of the gift or keep it.(1)

An acknowledgment of *hiba* implies an acknowledgment that all the necessary formalities were complied with. If a man were to say, " I have made a gift of a certain property to Zaid," *such acknowledgment will be effectual also as to possession ;* (2) in other words, that he had delivered possession according to law. In this view, where a gift is made in writing, and the donor acknowledges at the time the deed is registered under the Indian Registration Act, that he had complied with all the requirements of the law, it would imply that possession had been duly parted with. If this view be correct, then the ruling in *Mogul Shah* v. *Mohammed Saheb*,(3) can hardly be said to be in conformity with the Mahommedan Law.

An acknowledgment of *hiba* is effectual as to possession.

At the same time, it must be noted that such an acknowledgment raises merely a presumption and is not a conclusive proof that seisin had been delivered. In this connection, however, two matters must be borne in mind ; *first*, the relation of the donee to the donor, and *secondly*, the ability of the donor to give possession within the meaning of the Mahommedan Law. For example, if the donee is an infant to all intents and purposes under the guardianship of the donor, delivery of seisin will not be required. Again, if the subject-matter of the gift is landed property and the donor is too ill to send for the tenants to make them attorn to the donee, his mere handing over of the title-deeds together with the deed of gift ought to amount to a sufficient authorisation to take possession of the property.

If a man direct his partner to give his share of the partnership assets to his adult son, and at the same time authorise the son to receive the same, it would take effect as a complete gift.

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(1) *Durr-ul-Mukhtâr*, p. 236 (2) *Nawâdir.*
(3) [1887] I. L., 11 Bom., 517.

## SECTION IV.

### SHIAH DOCTRINES—LIMITED ESTATES.

Shiah Law.

THE Shiah Law recognises, to the fullest extent, the validity of limited estates and deals with the subject under a special chapter.

For example, if a grant is made by *A* to *B* for *B's* life, *B* would take, under such a grant, an estate for life ; and on *B's* death the property would revert to the donor or his heirs. Similarly, a grant to *B* for life and then to *C*, absolutely : or a life-estate to *B* and then to *C* for life, and thereafter to *D* absolutely, is valid under the Shiah Law. So also a grant may validly be made to *A* for his life and thereafter to *A's* children absolutely. In other words, an estate for life or for several lives in succession is valid under the Shiah Law.

Commenting on the passage in the *Sharâya-ul-Islâm*, "and if one say 'I have given this house to you and to your descendants by way of *'umra*, the same is "*umra*," the *Jawâhir-ul-Kalâm* says "the same (*i.e.*, the *'umra* or life-estate) shall, therefore, continue to be binding so long as the descendants may be existing, and on their extinction the benefit shall revert to the donor. But as regards the house itself, the same remains (always) the property of the owner."(1)

Shiah doctrines—life-estates.

It is a matter for consideration how far the principle of the *Tagore Case*(2) will apply to these provisions of the Shiah Law, which does not require that the ultimate donees should be actually or constructively in existence at the time of the gift. So long as the first "taker" is in existence at the time the gift is made, the disposition becomes operative under the Shiah Law ; the subsequent donees being required to be in being only when the intermediate estates come to an end. And the delivery or transmutation of possession *in præsenti* effected in his favour enures to the benefit of the persons entitled to "take" after him, for the reason, as is stated, that the change in the character of the possession once made fixes upon the grant the indicia of a *bonâ fide* transaction.

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(1) According to the *Jawâhir* there is no difference so far as the legal effect is concerned between an *'umra, sukna* or *rukba*.

(2) 9 B. L. R., Supp. 377 ; L. R., I. A., 47.

Temporary grants or limited estates receive different names according to the object with which such grants are made or such estates are created.(1)

Tempo-rary grants or limited estates under the Shiah Law.

(*a*) *Hubs* signifies literally the tying-up of property; technically it means settlements or grants limited to a certain time. *Hubs* is an act by which the proprietor confers on another person "gratuitously," that is, without any consideration, the enjoyment of the use or usufruct of a thing with a reservation of the owner's right of property in it. The reciprocal consent of the contracting parties, expressed or implied, with transmutation of possession, suffices to render the contract valid. This is analogous to the *'aâriat* of the Hanafî Law.

(*b*) "The enjoyment of the use or usufruct created for life," —in other words, a life-estate, is called *al-'umra.*

(*c*) The enjoyment of the use of a house, without any right of property in it, is called *as-sukna*, "right of habitation."

(*d*) The enjoyment of the use or usufruct of a thing for a fixed and determinate period is called *ar-rukba.* This word literally signifies *servitude* and is applicable to the condition, which derogates from the completeness of the gift and cuts down an absolute gift to a limited estate.(2)

There is no special formula for effecting such a contract, but it may be made in the following words, such as, "I have granted to such a one the enjoyment of such a house or such a land for his life or for such a time," or in any other words, which express the intention of the proprietor. When it is for the life of the grantee, it is also called an *'umra.* The execution of the contract becomes obligatory after the delivery of the property. The contract by which the enjoyment and use of a house or habitation is conferred upon any one is put an end to by the death of the grantor, unless there is any other period fixed for it.

When a grant is made in these terms, "when you die it will revert to me," the reversion will take effect by the death of the donee.

When the grant of the usufruct is made for a limited and determinate period of time, the contract becomes obligatory at the

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(1) *Jawâhir-ul-Kalâm*, chapter on *Sukna*, p. 619; Comp. *Banoo Begam* v. *Mir Abid Ali* [1907], I. L., 32 Bom., 172.

(2) See the example given in the *Mabsût, the Ghunia, Jâm'aa-ush-Shittât*, &c.

moment of the delivery of possession, and the proprietor cannot resume the subject-matter of the grant until after the expiration of the term fixed. A grant made for the life-time of the donor does not terminate upon the death of the donee; the right passes to his heirs who enjoy the same until the death of the grantor.

A grant of the usufruct without determination of period might be revoked at any time at the will of the grantor.

Shiah doctrines-limited estates.

A limited estate, or the grant of the usufruct of some property for a determinate period, does not terminate by the sale of the *substance* of the thing; the grantee has the right of holding possession of the thing given and enjoying the usufruct until after the expiration of the term of the grant. "Of every thing of which a *wakf* is valid, the *'umra* or granting for life is valid also, and the grant is not invalidated by the sale of the thing, *for the purchaser must fulfil to the life-tenant whatever was conditioned on his behalf.*"(1)

(1) See also the *Kifâyet-ul-Ahkâm*, the *Hadâik-un-Nâdirèh* and the *Tâzkiret-ul-Fukaha*. In the *Hadâik*, Vol. V, p. 514, occurs the following passage:—

"It is well known among Jurists that *sukna*, *'umra* and *rukba* do not become null and void by sale."

"Since you know that the sale [of the property] is valid in these cases, as the benefit accruing therefrom has already been granted to another [the person enjoying the *sukna* or *'umra*], the purchaser, if he be aware of the fact, has no option [to put an end to the grant] because of his having purchased a thing the profit of which has already been disposed of. It is therefore obligatory on him to wait till the expiration of the period or [the termination of] the life-interest, after which the benefit will revert [to him]. But it is lawful for him, pending the period and during the subsistence of the life-interest, to derive benefit out of the property by sale, gift, emancipation and such other acts as do not interfere with that particular interest of *sukna or 'umra*."

In the *Tazkirat-ul-Fukaha*, Vol. II (Chapter on *Wakf*), the same rule is thus stated:—

"If Zaid makes a gift of his house to 'Amr by way of a *sukna*, *'umra* or *rukba*, it does not cease to be his property; and it is lawful for him to sell the house. In such case the *sukna* or *'umra* does not become null and void; nay the *sâkin* (person enjoying the *sukna*) is entitled to the right of residence, which is already made over to him; consequently, if the purchaser were aware of the fact, he has no option to annul the contract, but if he was not aware, it is optional for him to cancel the sale or to confirm it at the full price with a view to derive any other benefit from the property.

The same doctrine is enunciated in the *Kifâyat-ul-Ahkâm*:—

"And whatever can be given away as *wakf* is lawful to be given away as *'umra* or *rukba*. An estate so settled does not become null and void by sale—nay the fulfilment of what is stipulated is obligatory and the purchaser shall wait till the expiration of the period or [termination of] the life-interest, after which the profit reverts to him."

In the *Jâm'aa-i-Abbâsi*, the rule is stated in the following terms:—

"If a person were to say to another 'reside in this house so long as you are alive,' then there are three conditions necessary for the same. *First*, proposal such

The right of *sukna* or habitation granted in general terms empowers the grantee to live in the house with his relatives and children; but he cannot transfer the right to any other person unless there is a special condition to that effect.

A grant of a *sukna* to *A* and his children will give to the grantee and his children, or the survivors, the right of residing in the house until the death of the last surviving child.

A grant limited to the donee and his *wâ-mundagân*(1) (those whom he leaves surviving), confers a life-estate on the donee and the persons existing at the time of his death, and reverts to the grantor or his heirs upon the death of the last surviving member of the grantee's family.

The passage in the *Sharâya*, that a grant to *A* and his *'akab* only takes effect as a life-estate, as if the word *'akab* was not mentioned, refers to the case of an *'umra*, the author of the *Sharâya* being of opinion that the mention of the word *'akab* (which signifies literally 'a person coming after') is not like the mention of descendants(2) and therefore does not convey an absolute estate.

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as, 'I have given you room in such and such a house' or 'I have given you a life-interest [in such and such an estate]' or 'I have given you such and such a thing for such and such a time' and such other expressions as may be in keeping with the above; *secondly*, acceptance; *thirdly*, possession. And if the act of causing one to reside in a house is made contingent on his (the grantor's) own life or to that of the resident or if no time is fixed, it (the contract) becomes binding on his (the *sâkin's*) taking possession [of the house], and the same reverts to the owner after the death of any of them as stipulated. Hence, if one says 'you are to reside in this house so long as you are living, the same reverts to the owner on the death of the grantee [*lit. sâkin*, resident)]. And as to this case, if the owner dies it shall not be lawful for the heirs of the owner to eject the *sâkin*. And if one says 'reside in this house till the time of my death', then the *sâkin* should vacate the same on the death of the owner. But if the *sâkin* dies before the owner, it shall not be lawful for the owner to eject the heirs of the resident during his own lifetime. If the contract is not made contingent on death, he can eject the *sâkin* whenever he likes. And whatever may lawfully be given by gift may be given in *sukna* and *'umra*. The contract of *sukna* is absolute, and the *sâkin* is entitled to reside in it with his family (only) unless is stipulated for other people besides them in which case it is lawful for them [also to live there]."

In these excerpts, mention is made of one donee only for the purpose of illustrating the doctrine enunciated. But the principle is clearly applicable to several donees taking limited interests one after the other; See the *Jawâhir-ul-Kalâm*, Chap. on Gift.

(1) *Wâ-mundagan* includes such persons as the deceased leaves him surviving in his family, whether an heir or not, *e.g.*, a son and the son of a pre-deceased son, widows, daughters, children's children, &c.

(2) *Jawâhir-ul-Kalam*, Chap. on Gift.

Limited estates, contd.

An *'umra* and *rukba*, for one life and for a limited period to his *wâ-mundagân* (those whom he leaves surviving), is valid; so also an *'umra* for several lives in succession.

A *rukba* for an *intermediate* period is valid, but is resumable at the will of the donor. A sale of the subject of the grant would put an end to the grant.

The grantee cannot let a house or mansion given to him for habitation without the special permission of the grantor.

All grants constituted in favour of definite individuals, *without specification of time*, terminate by the decease of the proprietor or grantor, and become a portion of his inheritance. A grant to *A* in these terms, "if you die before me, the property will revert to me; if I die before you, it will become yours," will take effect according to some, in case the donor predeceases the donee, as an *'umra* in favour of the latter; according to others, as an absolute gift (provided there is no other limitation.)

According to Makki, the Shaikh and others, a succession of life-estates is valid and lawful.(1)

Where a grant is to *A*, and *his children*, "generation after generation," or where a grant is made to *A*, with the addition of the usual expression which implies a perpetual descent in the grantee's line, *e.g.*, ***naslan b'aad nasl batnan b'aad bain***, the grant conveys to the grantee an absolute estate, the terms used implying perpetuity of the grant. In fact, a grant to the donee and his descendants gives to the donee an estate in fee subject to no restraint of any kind upon alienation or otherwise.

*Nasir Husain* v. *Sughra Begum*.

In the case of *Nasir Husain* v. *Sughra Begum* (2) it appeared that the plaintiff's father, Zulfikar Husain, executed, on the 23rd of November 1868, a deed of gift, in respect of a certain house belonging to him, to his cousins, Ali Muhammud Muzaffar Husain and the defendant Abdul Muzaffar, and by another deed of gift duly registered and executed on the 14th of December 1872, he assigned his proprietary right in the same house to the plaintiff Nasir Husain. The right of Ali Muhammad, one of the above-named transferees under the deed, dated the 23rd of November 1868, was attached in execution of a decree against him held by the defendant Sughra Begum. The plaintiff objected in the execution depart-

(1) See *post*, p. 111.
(2) [1883] I. L., 5 All., p. 505.

ment, but as his objections were disallowed, he brought a suit to establish his right to the house in dispute and for a declaration that on the death of Ali Muhammad all his right in the property ceased and terminated. The main point for determination in the case, therefore, was whether under the terms of the instrument of transfer, dated the 23rd of November 1868, the proprietary right in the house had passed to the transferees. The material portion of that instrument was as follows :—

"I have of my own accord and free will given the house to my brothers Ali Muhammad Muzaffar Husain and Abdul Muzaffar for their residence and that of their heirs, generation after generation. I or my heirs neither have nor shall have any claim regarding the house in question, but if the said brothers or their heirs attempt to sell or mortgage the house, I or my heirs shall have a claim to the house; so long as a sale or mortgage is not effected, I or my heirs shall have no connection or concern with the house."

The Court of First Instance held that the right of Ali Muhammad, one of the donees, was heritable and transferable, and dismissed the suit. The plaintiff appealed to the High Court, contending *inter alia* that the parties to the suit being Shiahs were not governed by the texts of Mahommedan Law relied upon by the Lower Court which were applicable to Sunnis.

The High Court of Allahabad in affirming the judgment of the First Court made the following remarks :—

"We are of opinion that the Subordinate Judge has come to a right conclusion in this case, and that the house, the subject of the suit, was taken by the defendants not merely for the purpose of residence but absolutely. The operative words in the deed of gift are very clear and strong." (After stating these words the learned Judges continued as follows) :—"Now the meaning of such a conveyance is perfectly clear. The purpose and inducement of the gift of the house is residence, but the gift itself is to the donees and 'their heirs, generation after generation,' and what follows is merely in the nature of recommendation, and has not in law the effect of limiting the estate in the house itself. This is the construction of such an instrument under all systems of law, European or Indian. It is clearly conformable to the law of England, and the Subordinate Judge shows that it is in accordance with Mahommedan Law."

"It was argued at the hearing on behalf of the appellant that the parties in the present case are Shiahs, and that the text of the Mahommedan Law and of the other authorities referred to related

*Nasir Husain* v. *Sughra Begum.*

to the more numerous Moslem sect, the Sunnis. The parties in the present case are undoubtedly Shiahs, and if their Imameea Law had contained any precept or provision inconsistent with the Sunni Law referred to by the Subordinate Judge, it would have been our duty to have given effect to such a state of things. But the careful examination which we have given to the doctrines of the Imameea Code as expounded by Mr. Baillie, 1869, page 226, *et seq.*, has convinced us that there is no difference on this subject between the two systems of Mahommedan Law. In fact, while the Sunni Law is very distinct, the Shiah or Imameea Law is silent on the subject; the intention in the latter system evidently being the adoption and application of the Sunni rule to Shiahs(1), where their own Imameea Law does not speak, the only cases of gifts of this nature alluded to in the latter being gifts plainly limited to a life-interest."

"There is a passage in Baillie's Imameea Law, pp. 226-227, which, if expressing undoubted Shiah doctrine, perhaps deserves some notice. The passage is this:—If one should say, 'I have given this mansion to thee for life, and to thy successor,' it would only be an *'umra* for his own life, and there would be no transfer to the life-holder according to the most approved opinion, just as if he had not said 'to thy successor.' If such is the Imameea Law, it is difficult to understand and still more difficult to appreciate a limitation of interest which necessitates the striking out from the words of gift its distinctly expressed 'extension to a successor.' The author does not explain what he is pleased to call 'the most approved opinion.' It is at least a most arbitrary construction of the gift confessing as it appears to do that it could not stand if the terms 'to thy successor' also remained part of the gift. In the present case, however, the estate given by the gift is conveyed in much larger terms giving the house to the donees 'for their residence and that of their heirs, generation after generation, I or my heirs neither have nor shall have any claim regarding the house in question,' words which, if they are capable of any legal meaning, clearly and distinctly bestow the right to the thing given absolutely."

(1) This view is founded on a clear misapprehension of the Shiah Law.

## CHAPTER III.

## THE REVOCATION OF GIFTS.

REGARDING the power of the donor to revoke a simple *hiba* or a gratuitous gift, there is considerable divergence between the schools. Revocation—Shâfeï and Mâliki Law.

According to the Shâfeïs and Mâlikis, no gift (excepting such as have been made by parents to their children) can be revoked, whether change of possession has taken place or not. This, of course, is independent of the ground of coercion or want of comprehension.

The parents, however, may revoke gifts made by themselves to their children. But this right of revocation is not absolute. When the gift is in the nature of a *sadakah* (a grant or donation made with the object of securing happiness in future life, or for deserving the reward of God), the gift is irrevocable.

The parents are also precluded from revoking their donations to their children under the following circumstances :—

(1) When the subject-matter of the gift does not retain its original form, or has disappeared *in toto* or in part, or has been sold or exchanged; mere increase or decrease in the value, from a fluctuation of the market, does not come under this head.

(2) When the donee has contracted a marriage and that marriage has taken place in consideration of the thing given.

(3) When the donee has died and the property has passed to his heirs.

According to the Shiah Law, "after possession has been taken of a gift, it cannot be lawfully retracted when made in favour of parents (according to general consensus), nor even when the donee is any other relative, by consanguinity, of the donor, though on this point there is some difference of opinion, which, however, is not approved." Nor can a gift made to the wife by the husband or to the husband by the wife be revoked according to the Shaikh (the author of the *Mabsût*) and an influential body of lawyers, if transmutation of possession has taken place. They hold that Shiah Law. Revocation of a gift.

husband and wife stand on the same footing in respect of their mutual gifts as kindred by consanguinity. These Shiah lawyers are in accord with the Hanafîs, who, as will be seen afterwards, hold that the marriage-relation prevents the revocation of gifts.

The author of the *Sharâya*, however, though he declares it to be abominable for a wife to revoke a gift made to the husband and for a husband to revoke a gift made to the wife, does not apparently consider it illegal. Considering, however, how much of the moral, or rather ecclesiastical, is mixed up in the *Sharâya* with the legal, I am inclined to think in the result he agrees with the Shaikh.

Gift to a stranger may be revoked.

A gift to a stranger may be revoked at any time so long as the substance of the thing given is in existence. After it has perished or changed ownership there can be no revocation. In like manner, a gift cannot be revoked if anything has been received in exchange, though the exchange should be of little value. Mere use by the donee of the thing given is not sufficient to preclude the donor from revoking, unless in the use by the donee the subject of the gift has substantially changed its character. A question, however, arises whether when transmutation of possession has taken place, the donor can revoke the gift without the consent of the donee.

Hanafi Law.

According to the Hanafî Law, though the revocation of a gift is worthy of reprobation from a moral point of view, yet it is not illegal. The revocation of a gift, says the *Fatâwai-Alamgiri*, "is abominable under any circumstance, but is valid nevertheless." The consequence of this principle is that in every instance a gift may be revoked before delivery of possession, but after transmutation of possession has been effected, certain kinds of gifts cannot be revoked, whilst the others may be revoked under the decree of the Judge or with the consent of the donee.

When a gift is irrevocable.

When a gift is made to a blood-relation within the prohibited degrees *and delivery of possession has taken place*, the donor has no right of revocation.(1) In order to make a gift irrevocable, it will be seen that not only must it be to a blood-relation but such relation must be within the prohibited degrees. A gift to a cousin is not irrevocable, inasmuch as a cousin is not within the prohibited degrees. Similarly, a gift to the mother of one's wife is revocable as she, though within the prohibited degrees, is not a relation.

(1) See *Enaet Hossein* v. *Khoobunnissa* [1869], 11 W. R., 320.

In the case of gifts to persons other than relations within the prohibited degrees, *previous to delivery* the donor can revoke the gift of his own motion either in whole or in part. After delivery, he must obtain either the consent of the donee or the decree of the Judge to validate the revocation. *E.G.*, where a gift has been completed by delivery of the property to the donee, and the donor seeks to revoke it on grounds apart from fraud, misrepresentation or undue influence, such revocation can only be effectuated by the decree of the Court, unless the donee consents to return it to the donor without recourse to the Judge. Gifts obtained by fraud or compulsion are voidable in all cases. Hanafi Law—Revocation of gifts.

All the jurists are agreed in holding that a revocation under a Judge's decree is a cancellation of the original gift, but there is some difference of opinion whether revocation by mutual consent is tantamount to cancellation. The tendency of precedents, however, is in favour of its being a cancellation. Thus, when one person has given a thing to another, who gives it to a third party and then revokes the gift, the power of revocation becomes re-vested in the first donor; but this would not be the case if the second donee was to return the thing to *his* donor by way of a gift; "for the second revocation being a cancellation, it follows that the thing given returns to the former state of property, and that the donor becomes again the proprietor without any necessity for taking possession anew." After revocation the subject of the gift constitutes an *amânat* or trust in the hands of the donee, so that if it should perish he is not responsible for the loss. But when the revocation is neither by a Judge's decree nor by mutual consent, and the donee gives back the subject of the gift to the donor who accepts it, he does not again become the proprietor of it till he has taken possession. When the donor does obtain possession, the gift by the donee takes effect as a revocation by the Judge's decree or by mutual consent, and the donee has no power to revoke it.

Abû Yusuf is reported to have held that, until an order has been passed by a Judge for cancelling a gift, the donee may use and dispose of the subject of it; but any such use or disposal, after the Judge has made his order, is unlawful; and the opinions of Abû Hanîfa and Mohammed are to the same effect. If the subject of the gift should perish in the hands of the donee, after the passing of the Kâzi's order and previous to the donor's retaking posses- Power of revocation.

sion, the donee is not responsible for the loss, unless possession had been demanded of him and he had refused to give it. If, after a gift has been revoked but before any decree, the donee should give the subject-matter of the gift to the donor who takes possession, it would take effect as a revocation by order of the Judge.

Suppose the donor expressly foregoes the power of revocation, it still remains intact and does not "drop." But if the right of revocation is compounded by the donor for something given to him by the donee, the composition is valid and the thing becomes an exchange which extinguishes the right of revocation.

Revocation must be in express words.

The revocation must be effected in appropriate terms, such as, "I have revoked the gift," or "restored it to my own property," or "I have cancelled or dissolved it."

If without using any such expression, the donor contracts to sell the subject-matter of the gift or to give it in pledge, such act would not amount to a revocation. And if the revocation is conditional, it is ineffective. For example, if he should say, "I will revoke," or "this gift will stand revoked when such an event happens," or "on such a date," it would not be valid, because revocation can neither be suspended on a condition nor referred to a future time.(1)

Circumstances under which a gift is not revocable.

A gift is not revocable under the following circumstances :—

(*a*) When the subject-matter of the gift has passed out of the possession of the donee by gift, sale, or any other form of alienation by which the right of property is transferred ;

(*b*) When the donee is dead and the subject-matter of the gift has devolved on his or her heirs ;

(*c*) When the donor is dead—in other words, his heirs have not the power of revocation, the option of revocation being a personal right in the donor ;

(*d*) When the thing given is lost ;

(*e*) When the gift is for a consideration ;

(*f*) When the subject-matter of the gift has altered in substance in the possession of the donee ;

(*g*) When an increase or accretion has taken place in the thing given, and such increment or accretion is of such a nature as to be united with or inseparable from it. And it makes no difference in the irrevocability of the gift whether the increase be in

(1) *Fatâwai-Alamgiri*, IV, p. 537.

consequence of an act of the donee or without such act, and whether it has issued from the thing itself (such as fruit on trees) or be an accession to it (such as accretion by growth). But it must be incorporated with or form part of the body of the subject-matter of the gift and imply an addition to or enhancement in its value. Dyeing, sewing, porterage, &c., are considered as causes which extinguish the power of revocation ;

Mere transfer from one place to another, when it adds to the value and has occasioned expense, is sufficient to prevent revocation. A separate increase does not prevent the revocation of a gift nor any loss or damage sustained by the subject of the gift ;

(*h*) When the donor and donee stand to each other in the marital relationship. But such a gift in order to be irrevocable must be made during the subsistence of the relationship. For example, a gift made prior to marriage may be revoked. But when a gift is made during marriage and the relationship is afterwards dissolved, the gift cannot be revoked. Difference in the creed of the married parties makes no difference in the irrevocability of the gift. Hanafi Law—Marital relationship bars revocation.

(*i*) Relationship of blood within the prohibited degrees is a bar to revocation, without any restriction as to the creed of the donor or the donee.(1)

(*j*) The natural growth of the subject-matter of the gift also debars the donor from revoking.

Where the power of revocation exists, it may be exercised either with reference to the whole or a part.

(1) *E. g.*, Parents and grandparents how high soever and children and their descendants how low soever ; sisters and brothers and their descendants, paternal and maternal uncles and aunts ; *Radd-ul-Muhtâr.*

" If a person make a gift of anything to his relation within the prohibited degrees, it is not lawful for him to resume it ; *Hedâya.*

Where an alien who has obtained the protection of a Moslem State, while living in the country of Islâm, makes a gift to his Moslem brother, and then goes away leaving permission to the donee to take possession which is done, it is valid in law ; but if the gift was made by the Moslem to the alien brother and he went to the *Dâr-ul-Harb* before acceptance, the gift would become void ; *Mabsût.* Where a gift is made to the mandatory of a brother, it cannot be revoked. And if the gift is rejected by the mandatory and accepted by the principal, it is valid ; *Kinia.*

See s. 126 of the Transfer of Property Act. But under s. 129, nothing in Chapter VII (Chapter relating to gifts) " shall be deemed to affect any rule of Mahommedan Law."

When a gift is revoked, the donor can exercise his proprietary rights from the time the subject of the gift comes into his possession ; but he can give no antecedent effect to them. Thus, when a man has made a gift of a house and delivered it to the donee, and a house adjacent to it is sold, after which he revokes the gift, he has no right of pre-emption in regard to the second house.

**No revocation in the case of a discharge of a debt.**

When a debtor has been discharged from his liability, the donor or creditor has no power of revocation in regard to the debt so discharged.

According to the *Khazânat-ul-Muftîn*, relationship arising from fosterage or affinity does not bar revocation.

Where one person makes to another the gift of a horse, and the donee has it trained, there is no power of revocation on the part of the donor. Approximate accompaniments acquired after the gift debar the right of revocation.(1)

The removal of the subject-matter of the gift from one place to another at expense or with labour bars revocation. If a man were to make a gift of clothes to another who has them washed by a washerman, the right is barred.

If a person make a gift of some dirhems to another, and then borrow them from the donee, the right of revocation is lost, the character of the subject having changed.

As after delivery of possession revocation does not take effect without the decree of the Judge or the donee's consent, if a person were to make a gift and deliver possession thereof to the donee, and after that were to take it back without the donee's consent, or the order of a Judge, and the thing be lost, the donor is liable for damages.

"If a woman make a gift to her husband and then allege that it was extorted from her by force or threats, her claim should be received."(2)

When a gift is made simultaneously or jointly to a relative within the prohibited degrees and to a person not so related, the gift to the latter may be revoked.

***Sadakah* not revocable—**

(*a*) A *sadakah* or gift by way of a pious offering completed by possession cannot be revoked.

(1) *Fatâwai Kâzi Khân in loco.*

(2) Probably when supported by *primâ facie* evidence—See *Moomshee Buzlur Rahim* v. *Shamsunnissa* [1865], 11 Moo. Ind. App., p. 310.

Its *raison d'être.*

Any gift made with a view to recompense in future life is a *sadakah* and irrevocable. A *sadakah* may be made in favour of any individual, rich or poor, a relation or a stranger. The difference between *hiba* and *sadakah* consists in the object with which the donation is made, *viz.*, in the case of *hiba*, the desire is to increase the mutual affection of the parties or to evidence esteem(1); in the case of *sadakah* the object is, as the *Hedâya* puts it, "to acquire merit in the sight of the Lord." Vows for almsgivings, when actually carried out, take effect as *sadakah* and are governed by the same rules. "*Sadakah* requires seisin of the subject of the gift. Like gift, it is not valid unless attended by seisin, as it is gratuitous in the same manner as a gift. Neither is a *sadakah* lawful where it consists of an undivided part of a thing capable of division. Retractation of a *sadakah* is not lawful; because the object in making a *sadakah* is merit in the sight of God, and that has been obtained. If also a person make a pious offering to a rich man, it is not lawful to retract therefrom on a favourable construction of the law, because to acquire merit in the sight of God may sometimes be the object in making a pious donation to the rich. In the same manner also, if a person make a gift of anything to a poor man, it is not lawful to retract it, because the object in such gift is merit and that has been obtained."

Summary of rules as to revocation.

(*b*) Before delivery of possession, a gift may be revoked without the order of the Kâzi or the consent of the donee.

(*c*) If possession has been given to the donee, he is entitled to retain the gift and use its profits until the Kâzi has made his order.

(*d*) If a person were to make a gift of a house to another, and the donee subsequently has it painted or plants trees in or about it or in any way alters it, the gift is irrevocable.(2)

(*e*) When a portion of the gift is destroyed the remaining portion may be revoked.

(*f*) When a gift is made to two *ghair-mahram*(3) the portion of any one of them may be revoked, the gift as to the other remaining good.

(*g*) If a gift is made by two persons to one donee, any one of them may exercise the right of revocation in respect of his share without the consent of the other.

(1) *Mishkât; Fatâwai Kâzi Khân* and *Sharáya-al-Islâm in loco.* For the meaning of the word *Sadakah*, see *post.*

(2) Comp. *Nunda Singh* v. *Meer Jaffer Shah*, 1 Sel. R. 6 note.

(3) A relation *not* within the prohibited degrees.

(*h*) Express withdrawal of the power of revocation does not destroy it.

Discharge of a debt cannot be revoked.

(*i*) There is no power of revocation in the case of a gift of a debt to a debtor. The debt becomes satisfied or cancelled by the gift and therefore does not exist to be revoked.

(*j*) If a person were to make a gift to another of a piece of land, which is unoccupied at the time and destitute of buildings and plantations, and the donee were to plant trees or erect buildings on it, the donor would not be entitled to revoke his gift. A small temporary erection, such as a shed, does not operate as a bar to revocation. Any actual and substantial improvement is sufficient to prevent the donor from exercising the right.

Acceptance of consideration a bar to revocation.

(*k*) The acceptance by the donor of a consideration or *ewaz*, *however small*, is a bar to revocation; and though the *ewaz* for the gift may have been made voluntarily by a third person on behalf of the donee, its acceptance by the donor would deprive him of his right of revocation.

(*l*) If the donee has given anything in exchange for the gift and a portion of the gift proves to be the property of some other person who recovers it from the donee, in that case the donee is entitled to receive from the donor a proportionate share of the exchange given by him. If, on the contrary, any portion of the consideration form the property of another person, the donor in such a case would not be entitled to resume a proportionate share of the gift, but he may return to the donee the remainder of the consideration or exchange in his hands and then resume his gift.

(*m*) When a person revokes his gift either by virtue of a decree of the Kâzi or with the consent of the donee, it is in effect a cancellation of the original gift and not a gift *de novo* on the part of the donee and therefore seisin by the donor is not, in such a case, a requisite condition.

(*n*) Revocation is lawful with respect to an undivided portion. If a revocation amounted to a gift *de novo* from the donee to the donor, seisin, say the Hanafî lawyers, would be a requisite condition, and consequently revocation with respect to an undivided portion would not be lawful.

The principles dealing with the power of a donor to revoke a gift are of importance in considering the question how far a transfer subsequent to a valid donation is effective or otherwise. For

example, if a person were to make a gift to his child and then purport to sell it to another, such sale, though for a *bonâ fide* consideration, would not be valid. Similarly, if the gift were to a relative *not* within the prohibited degrees, who was put in possession of the property and who subsequent to the gift made some alteration or improvement in the same, a sale thereof by the donor would not be valid, for in both these cases the right of the donor had become extinguished and it was no more his to convey to another. The Transfer of Property Act (IV of 1882) leaves untouched the provisions of the Mahommedan Law on this point : (See *s.* 2, *cl. d.*)

## CHAPTER IV.

## RULES REGARDING CONSIDERATION OR *EWAZ*.

### SECTION I.

### THE DIFFERENT KINDS OF EWAZ.

*Ewaz* or consideration for a gift.

WE have so far dealt with gratuitous gifts; grants or donations for a consideration stand on a different footing. According to the original conception, which in itself was a development of the earlier rules, "*ewaz* or consideration was of two kinds; one which was subsequent to the contract (of gift), the other which was conditioned in it."(1) In other words, in the first case the consideration was delivered to the donor after his gift, and the transaction was treated as a case of mutual gift. There was no stipulation regarding the giving of *ewaz*, but the moment it was received by the donor his right of revocation dropped.

*Hiba-b'il-ewaz.*

This evidently was the earliest form of a gift for a consideration. The *Hiba-b'il-ewaz* of later times is clearly a development of this kind of gift.

*Hiba-ba-shart-ul-ewaz.*

In the other kind, the consideration was expressly stipulated in the contract, and when once it was received the transaction acquired the legal character of a sale. The modern *hiba-ba-shart-ul-ewaz* has unquestionably sprung from the above.

Dealing with the first kind of *ewaz*—a consideration which comes after the contract of gift—the *Fatâwai Alamgiri* says "that an *ewaz* of that kind requires discussion from two points of view, *viz.*, *first*, what are the conditions necessary for the validity of such consideration and when the thing [as *ewaz*] becomes such, and *second* what is its nature." It then proceeds to state the conditions. Summarised they amount to this—in the first place, it must be distinctly specified that the consideration is in lieu of the gift, and that the consideration should not form a portion of the subject-matter of the gift. If the consideration be a portion of the gift, it would not be valid

(1) *Fatâwai Alamgiri*, Vol. IV, p. 549.

and there would be no *ewaz*. But if such a change has taken place in the thing given, as would prevent revocation of the gift, part of it may be constituted a consideration or *ewaz* for the remainder. If two things are given by two different contracts, one of them may be given in exchange for the other. It is also a condition that the consideration must be secured to the grantor. If the grantor has to make over the consideration to anybody else, or if a right is established to the whole of it in anybody else then there is no exchange and the gift may be revoked. But if a portion of the *ewaz* becomes lost the remainder is a good consideration for the entire gift.(1)

As regards its "nature," the consideration which is given after the "contract" is regarded as a gift *ab initio*. But though the subject of the exchange is regarded as a gift, the giver (the original donee) has no power to revoke it after giving it. And after possession has been taken of the *ewaz* by the donor of the original gift, the donee's power to revoke the gift ceases absolutely. So that whether the *ewaz* was given by the donee or by a stranger, with or without his direction, neither the donor nor the donee can reclaim from the other what he has become possessed of. "All the conditions of gift are applicable to the *ewaz;* and the transaction does not come within the meaning of a contract of *m'uâwizat*, or mutual exchange, either in its inception or completion. Hence, it is not subject to *shufâ'a* [or the right of pre-emption]; nor can the thing given be rejected on either side on account of defect; so in the *Muhît us-Sarakhsi*."

*Hiba-bashart-ul-ewaz* or gift with a condition of exchange.

"The second kind of *ewaz*," says the *Fatâwai-Alamgiri*, "is what is stipulated in the contract." "When a gift is made on the condition that something should be given in lieu thereof, the conditions which apply to gifts shall apply to it, at its inception, so that an *ewaz* of property which is subject to the rule of *mushâ'a*, or anything that admits of partition, is not valid. Property is not established in the subject *before possession*, and each of the parties may refuse delivery. But after mutual possession has been taken, the effect is that of sale; and the donor cannot revoke his gift nor the donee the *ewaz*. *Shufâ'a* (right of pre-emption) is established by the transaction; and each of the parties may return the thing of which he

(1) Comp. Baillie's Dig., 2nd Ed., p. 541.

took possession for any defect." "According to *kyâs* (analogy),' says the *Fatâwai-Kâzi Khân*, "a gift on condition of an exchange ought to be a sale in its inception as well as in its completion." "When a man gives a mansion to two men on condition that they should pay an *ewaz*, or exchange of a thousand dirhems, the *transaction amounts to a lawful sale after mutual delivery of possession*; so it is stated in the *Kinia*."(1)

*Hiba-b'il-ewaz* not revocable.

Where a person gives an *ewaz* for the whole of a gift, it bars revocation, *whatever the amount of the consideration may be*; if the *ewaz* be for a part of the gift, the part for which there is no *ewaz* may be revoked, but not that part for which the *ewaz* was given.(2) It is not necessary that the donee himself should give the consideration, for an *ewaz* given by a stranger is lawful, whether by the direction of the donee or not. Where a person other than the donee gives the *ewaz*, he cannot recover it from the donee unless he (the donee) made himself specifically liable for it.

"The general principle in cases of this kind is," says the *Fatâwai-Kâzi Khân*, "that when anything is demandable of a person *in specie*, and is obligatory upon him, his direction to another to pay it is a cause of recourse against himself without any condition of responsibility, and that when a thing is not demandable from a person *in specie* and is not obligatory on him, his direction to another to pay it is not a cause of recourse against him, unless his responsibility is made a condition of the payment."

Circumstances under which a revocation may be made even when *ewaz* has been given.

If the father of an infant were to grant to another, by way of a gift, some property belonging to his child and receive from that person something in exchange, he may revoke the gift, or the donee may revoke his consideration, at any time they like. And when a person has given something to a minor, and his father makes an *ewaz* for it out of the minor's property, the exchange is not lawful though the gift were made on condition of an *ewaz*. The reason of both the above principles is obvious, for the father has no right to deal with the property of the minor, except for certain specific purposes.

Where a man, suffering from an illness to which he eventually succumbs, makes to another a gift of property of the value of a thousand dirhems, having no other property besides, and the donee gives an *ewaz* for the gift, of which the donor takes possession

(1) *Fatâwai Alamgiri*, Vol. IV, p 551
(2) *Sharh-i-Tahtâwi*.

and then dies, the *ewaz* being in his possession at the time of his death, if the *ewaz* be equal in value to two-thirds or more of the property given, the gift is valid, but if the *ewaz* be less than two-thirds of the value thereof, the heirs would be entitled to recover from the donee the difference between the value of the two-thirds of the subject-matter of the gift and the actual value of the exchange. For example, if the subject of the gift was worth 1,000 *dirhems* and the *ewaz* only 500 *dirhems*, the heirs of the donor would be entitled from the donee to one-sixth of 1,000 *dirhems*, " though the *ewaz* might have been stipulated for in the original gift." The donee, however, may, if he likes, return the whole gift taking back his *ewaz*, or restore a sixth of the gift and keep the remainder.

A condition for an exchange (*ewaz*) is valid if the subject of the exchange is sufficiently specified and not *majhûl* (unknown).(1) In other words, where a property is conveyed to another or a grant is purported to be made in lieu of a consideration moving from the transferee to the transferor, the consideration should be distinctly specified and must not be indeterminate.

The following examples taken from the *Fatâwai Kâzi Khân* will not be without value on this subject.

" Anything given in exchange for a gift bars revocation. Nor can the gift of an *ewaz* be revoked; it must be clear, however, that the consideration was given in exchange for the gift."

" Any person other than the donee, whether with or without the consent of the donee, may give an *ewaz* for a gift, thus destroying the right of the donor to revoke the gift, that is, if he has accepted the consideration."

" If the consideration is given by a person other than the donee, he may revoke the same unless the donee has made a bargain with such person that the consideration will be paid back to him."

"Even should there be any defect found by the donor in the thing given by way of an exchange, he cannot revoke his gift."

" When a gift is made to two people and one of them gives an *ewaz* for the share given to him, the donor may revoke as to the other share."

(1) *Radd ul-Muhtâr*, IV, p. 779.

"If a gift is made to a minor, and the father or his executors were to give an *ewaz* out of the property of the minor, such grant is not valid, and consequently the donor can revoke."

"If a person were to set up a claim to an *ewaz* and recover the same, the donor can revoke, but if he were to recover only a portion and there remained yet a portion thereof in the hands of the donor, he cannot revoke, *for the smallest consideration is sufficient to destroy the power of revocation.*"

"If the subject-matter of the gift is recovered by another person legally entitled to it, the donee may recover the whole of the *ewaz*; if a portion only is recovered by the rightful claimant, the donee can recover only a proportionate share of his *ewaz*."

"If the donee were to convert a portion of the gift into another substance and give it in exchange it would be a good *ewaz*. If a person were to make a gift of one thousand dirhems to *A* who gives in exchange *out of the same* one dirhem, this is not a good *ewaz* according to 'us,' though Zuffar differs."

"If a Christian were to make a gift to a Moslem and the latter were to give in exchange any prohibited article the exchange is not good."

Where a gift is made by a minor to *A* who gives an exchange, the gift is null and inoperative nor does the *ewaz* vest in the minor.

*Hiba-bi'l-waz.*

In all these cases the consideration is not a part of the contract. And the rules stated above do not, therefore, apply to what in modern times is called a *hiba-bi'l-ewaz*, which is a transaction of quite a different nature, and partakes to a certain extent of the second kind of *ewaz* mentioned in the *Fatâwai Alamgiri*, *viz.*, where it is stipulated in the contract. In this kind of *hiba-bi'l-ewaz* the consideration is directly opposed to the object of the gift both being *in esse;* there is no suggestion of one being subsequent to the contract. The grant and the consideration are parts of one transaction. A *hiba-bi'l-ewaz*, therefore, is a sale in all its legal incidents. In sale, mutual seisin is not requisite to render the contract valid and the terms in which a contract of this kind is entered into imply, "that the articles opposed to each other are present," and that there is no danger of either party suffering from the other's fraud. "I have given you this for that" implies that the consideration is present, and that the person will take care to receive it before parting with his property, and the law therefore annexes

to it the quality of a sale both with regard to the condition and the effect.

Seisin not requisite in *hiba-bi'l-ewaz*.

Suppose, for example, a person in making a gift expressed himself to this effect, that he had made a gift to and conferred upon another the proprietary right in his entire property in exchange of something given by the donee,—this is not a gift in consideration of an exchange to be prospectively given, but it is a contract of mutual transfer or sale both as to the condition and the effect. In such a case, seisin is declared not to be a requisite condition.(1)

*Hiba-ba-shart-ul-ewaz*.

A *hiba-ba-shart-ul-ewaz* is a contract of a different description from a *hiba-bi'l-ewaz*. The terms used in the constitution of such a *hiba* imply a contingency. Thus :—"I have given you this *on condition* of your giving me such a thing." Now, it will be observed that in this contract, its legal operation depends upon the fulfilment of the condition, being the delivery and seisin of the *ewaz* or consideration ; otherwise, if it were valid and binding without such condition, the consideration might be withheld, and it might thereby become, as it were, a *nudum pactum*. As to the effect, this contract is declared to have the property of a sale, after the condition is fulfilled, that is to say, *after mutual delivery of seisin it becomes in effect a sale.*

*Hiba-ba-shart-ul-ewaz*—contd.

For example, if a person were to declare that he had made a gift to, and conferred on another, the proprietary right to his entire property on condition that the donee should give to him something in exchange for the gift, and the donee were to accept the condition, it would be a gift *ba-shart-ul-ewaz or a gift on condition of an exchange*. So long as the condition is unfulfilled, it is a gift revocable at the will of the donor under the same circumstances as a *simple* gift. And for the same reason delivery of seisin is necessary. But once the condition is fulfilled the contract becomes a sale. It is therefore stated in the *Sharh-i-Chalpi* that a *hiba-ba-shart-ul-ewaz* "technically, as regards the *shart*, is considered in the light of a gift, and sale as to the effect. Seisin is requisite to its validity and the gift cannot be said to be established until the parties shall have delivered seisin to each other, but the property conferred remains as formerly at the disposal of the donor."

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(1) See *Meer Nujeeboolla* v. *Musst. Kuseema* [1795], 1 Sel. R., 10, where it was held that to give validity to a *hiba-bi'l-ewaz* or gift for consideration, seisin is not requisite in Mahommedan Law ; also *Chaudhri Mehdi Hassan* v. *Muhammed Hassan* [1906], 10 Cal. W. N., 706.

*Ewaz* may be of any kind and need not be in specie.

The stipulated consideration may take any shape or be of any kind. An *ewaz*, however small, is sufficient to make the gift effective. The examples given in the *Fatâwai Alamgiri* and other works show that it need not be of a specific character. For example, a woman may give her dower-debt to her husband, *i.e.*, [illegible], on condition that he should not ill-treat her. If he fulfils the stipulation, the gift takes effect; if not the right to the dower reverts to or re-vests in her. Or, she may release her dower on condition that he does not neglect her; in case of a breach of the stipulation the title to the *mahr* reverts to her.

Similarly, a man may make a gift on the condition that a certain payment should be made to him periodically by the donee; or that the donee should in lieu of the gift render some service to the donor at stated intervals.

The effect of a *shart* (condition) attached to a gift.

Where a gift is made with a condition attached to it, which condition is not a mere problematical contingency, but capable of being fulfilled by the donee, or of itself in the natural course of things, the condition is valid and so also the gift. Some examples of this are given in the *Sharh-i-Chalpi*:—It says, "in the *Bakâli* it is stated from Abû Yusuf that if a man were to tell another 'this thing is for thee if thou likest,' and make it over to him, and the person addressed reply, 'I like' or 'accept,'—the condition (*shart*) is good. So also it is reported from Mohammed, if a date-tree begins to bear fruit and the owner of the tree says to another, 'these dates are for thee, if they get ripe,' or 'if to-morrow comes,' it is lawful. But if he were to say, 'these dates will be thine, if Zaid enters his house,' it will not be valid."

Gift and release do not admit of the option of stipulation.

When a gift is made subject to a condition that the donee shall have an option for three days within which to accept or reject, the gift is valid if the acceptance be expressed before the separation of the parties; but if not accepted by him till after they have separated, it is not lawful. But when a gift is made on a condition that the donor shall have an option for three days, the gift is valid, and the option void; "because gift is a binding contract, and therefore does not admit of the option of stipulation." "When a person says to another, 'I have released thee from my right against thee, on condition that I have an option,' the release is lawful, and the option void."

"A man to whom a thousand *dirhems* are due by another, says to him, 'When to-morrow comes the thousand is thine'; or 'thou art free from it,' or 'when thou hast paid one-half of the property then thou art free from the remaining half,' 'or the remaining half is thine,' the gift is void. But if he should say, 'I have released you on condition that you emancipate your slave,' or 'Thou art released on condition of thy emancipating him by my releasing thee,' and he should say, 'I have accepted,' or 'have emancipated him,' he would be released from the debt." Distinction between a conditional gift and a gift with a condition.

The subject of vitiating conditions attached to gifts primarily intended to take absolute effect, has already been discussed.(1) The principle is stated thus in the *Sirâj-ul-Wahâj*. "All our jurists agree in holding that when a gift is made, and a vitiating condition is attached to it, the gift in that case would be valid and the condition void. For example, if a person were to *give* something to another and stipulate that he should not sell it, the gift would be valid, and the condition void. It is a general rule with regard to contracts, in which seisin is necessary, such as *hiba* and *rahn* (pledge), that a condition *dehors* the absoluteness of the contract, would not avoid the contract, but drop itself." In other words, where a person intends to give *absolutely* and expresses his intention by the use of words which convey the meaning of an *absolute* gift, he cannot impose limitations on the enjoyment or devolution of the subject-matter of the gift so as to render the grant itself nugatory. But where the "condition" has not that effect, where it forms, in fact, the "consideration" for the grant, and the gift is made on the express stipulation that the donee should do something or abstain from doing something or should give something in return for the gift the contract is valid in its entirety. For example, if *A* were to convey to *B* a property in consideration of *B* maintaining him during his lifetime, or of paying him, and after his death, to his heirs a fixed allowance, there is absolutely nothing illegal in the contract as the condition does not make the contract nugatory; and if the grantee obtains possession of the property upon that contract, the grantor or his heirs would have the right to enforce the performance of the covenant relating to the consideration against the grantee and all persons deriving title under him.(2) In fact, once the transfer is given Hanafi Law —an absolute gift cannot be subject to limitation.

(1) *Ante*, p. 133.

(2) See *Mozaffur Hoesain Shaha* v. *Abdur Rahim Shaha*, App. from Original Decree, No. 197 of 1896, decided on 27th August, 1897.

effect to, the grantee takes the property subject to the trust. And any one taking the property from the grantee by sale, gift or inheritance, takes it burdened with the *trust* in consideration of which the grant was originally made. From the examples given in the *Radd ul-Muhtâr* it will be seen that a *hiba-ba-shart-ul-ewaz* is in the nature of an executory gift and the "grant" and "condition" are dependent upon each other; so that the moment the transfer is made the performance of the condition becomes obligatory, and if the consideration fails, the contract becomes voided.

Gift of the dower-debt by a woman to the husband.

"When a woman makes a gift of her dower on certain conditions which are not fulfilled, the gift is null. For example, if the dower-debt is released in consideration of the husband taking her on a *hajj*, or not treating her with cruelty, or not preventing her visiting her relations; and the condition or conditions are not fulfilled, there is no abandonment of the dower."(1)

"When a woman makes a gift of her dower on condition that the husband should give her something in return every year, and the husband fails to fulfil his part of the agreement, the gift fails also, for the gift in this case is a *hiba-ba-shart-ul-ewaz*, (that is an executory gift which is not completed and rendered perfect until the condition as to the *ewaz* is performed.) And consequently when the *ewaz* is not obtained the gift fails."

"A woman makes a gift of her dower on the condition that her husband divorces her, and the husband accepts the gift subject to the condition, but does not divorce her, he is not absolved from the dower-debt."(2)

The performance of the condition (*shart*) in a *hiba-ba-shart-ul-ewaz* may not be restricted to the actual donee or assignee; for the transaction may take the shape of a conveyance of the subject-matter to trustees for the benefit of a particular individual, subject to trusts in favour of others. For example, *A* may convey a property to *B* and *C* as trustees for *D* burdened with the condition of paying *E* and *F* certain allowances during their lives, or to them for their lives and to their descendants in perpetuity; in such case the beneficial title of *D* is subject to the performance of the condition by the trustees. Once it has been given effect to by delivery of seisin to the trustees it is a completed contract and enforcible by the persons acquiring interest under it.

(1) *Fatâwai Kâzi Khân* in loco.
(2) *Radd ul-Muhtâr*, throughout.

Gifts dependent upon the happening of a *contingency* are, however, void.

Examples of contingent gifts.

If a woman were to say to her sick husband, 'if you die of this sickness, you are released from my dower, or my dower is on you as *sadakah*,'—this is void because it is a contingent gift.(1) Or if a sick woman were to say to her husband, "if I die of this my disease, my dower is to thee as *sadakah*," or "you are released of my dower," and she does die of the disease the gift is void, and the dower remains due by the husband.(2) Similarly, if a person were to say to another who owes him money "if you do not pay me what you owe me till you die you are released" this is void according to the *Bahr ur-Râik*. But if he should say, "when I die, thou art released," it would be lawful, says Kâzi Khân. While if he were to say, "if I die, thou art free from this," there is no release, for this is contingent. Similarly, if he were to say, "if thou enterest the house, thou art free from what I have against thee."(3)

Illegal considerations for the discharge of a liability are wholly ineffective in making the discharge operative, *e.g.*, if a person were to say to another, "I would release you from my debt if you would settle an important matter for me with the Sultan,—he is not released, for this is a bribe."(4)

As already mentioned, an *ewaz* or consideration under the Mahommedan Law to constitute a *hiba-bi'l-ewaz* or to impart to a gift or a conveyance the characteristics of a "gift for a consideration," may take any form or consist of any kind of gratuity, corporeal or incorporeal. For example, in *Muhammadun-nissa Begum* v. *Batchelor*(5) the High Court of Bombay has held that the relinquishment by the uncle of his share in the property of a deceased Mahommedan to facilitate the action of the Collector to obtain a certificate of guardianship in respect of the minor niece's property under the Guardian and Wards' Act, was a good consideration under the Mussulman Law. Similarly, where a father and grandmother jointly executed a deed of gift in favour of the minor children relinquishing their shares in the grandfather's property, it has been

(1) *Fatâwai Alamgiri*, Gift of a debt, Vol. IV, p. 535.
(2) *Ibid* after the *Zahîria*.
(3) *Ibid* after the *Khazânat ul-Muftiîn*
(4) *Ibid* after the *Kinia*.
(5) [1905] I. L., 29 Bom., 428.

held that the document was not a voluntary settlement, but was a transaction supported by valuable consideration inasmuch as the relinquishment by one was the consideration for the relinquishment by the other.(1)

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## SECTION II.

### GIFT OF A DEBT.

**The gift of a debt.**

"The gift of a debt to the person from whom it is due," says the *Fatâwai Alamgiri*, "is valid both according to analogy (*kyâs*) and liberal interpretation (*istehsân*); and to any person other than the debtor, it is valid according to liberal interpretation, when he is authorised to take possession of it."(2)

"When a gift is made of the debt to the debtor and he is discharged therefrom it becomes complete without his acceptance; but should he reject it, the gift does not take effect, according to the generality of the jurists and this is the accepted doctrine according to the *Jawâhir-ul-Akhlâti*."

The above principle is applicable to a case where the debt is not cash. If it is, then it is dependent upon the debtor's acceptance. If he accepts it, he is discharged; but if he does not, he remains liable. This is not the case with other debts, which are discharged whether the debtor [expressly] accepts the release or not; but gift and discharge as regards other debts also become ineffective by rejection.

With reference to the donation of the debt to the surety, the matter stands upon a different footing from the discharge of the suretyship. The principle seems to be this:—The gift of the debt to the surety is not valid without his acceptance, and would be liable to a reversal on rejection; but a discharge is valid without acceptance and would not be reversed on rejection.

"When a *hiba* is made of a debt to the principal debtor who dies before rejecting the gift, he would (nevertheless) be discharged. Similarly, if the discharge is given after the debtor's death. But his heirs can reject such a discharge and the debt would be paid; this is according to Abû Yusuf. Mohammed, however, differs,

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(1) *Ashid Bai* v. *Abdulla Haji Mohammed* [1906], I. L., 31 Bom., 271.

(2) *Fatâwai Alamgiri*, Vol. IV, p. 535. The authority cited is the *Tâ'dr Khâniéh*, but there is absolute consensus on this point.

and holds that the rejection would not be effective, for the past discharge operates as to the present, so in the *Zakhîra.*"(1)

If a creditor were to discharge the principal debtor, and he accepts, then both he and the surety are discharged. But neither he nor the surety would be discharged if he should not accept.(2)

" If a man who is in debt to another were to die before payment, and the creditor were to make a gift of the debt *to the heir* of the debtor it would be valid whether the inheritance is immersed in the debt or not; so in the *Fatâwai Kâzi Khân.*"(3)

" If a gift be made to some of the heirs of the debtor, it will be for all of them; similarly will a discharge to the heirs, so in the *Wajiz-l'il-Kurdi.*"

" And in the *Fatâwai-Ahoo* it is stated that if the creditor discharges one of the heirs [of the debtor] from the debt, it is valid in respect of his share." This evidently refers to a discharge or release after partition of the debtor's estate when the share of each heir has been ascertained.

' And in the *Khazâna*(4) it is stated that in the matter of the gift of a debt, the death of either the creditor or debtor is tantamount to acceptance."

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If the creditor dies leaving several heirs and one of them, before the partition of the deceased's estate, releases the debtor in respect of his share of the debt, the release is valid. The principle is thus stated in the *Kinia.* " One of the heirs of a creditor gives up his share in a debt to the debtor before partition, and in the deceased's estate there are both money and goods, the gift is valid in law, like a composition."(5)

There occurs the following passage in the *Fatâwai Alamgiri* as taken from the *Tâtâr-Khânieh* :—" The gift of a debt to the infant son of the debtor is not valid." The meaning of this doctrine is that as the validity of the gift of a debt to a third person depends on the express direction to him by the creditor to recover the debt,

(1) This is the received doctrine according to all the Jurists (*Mashâikh*). *awâhir-ul-Akhlâti.*

(2) *Fatâwai Alamgiri*, Vol. IV, p. 535.

(3) *Ibid.*

(4) *Ibid.*

(5) *Fatâwai Alamgiri*, Vol. IV, p. 535.

and as the infant child of the debtor cannot be so authorised either personally or by its natural guardian (being the debtor himself), the gift cannot take effect. But this does not involve the conclusion that where a debtor is dead and the creditor chooses to make a gift of the debt to his child or to discharge him of any liability thereunder, it would be invalid. On the other hand, according to all the authorities, such a gift or discharge is absolutely valid. That the doctrine of the *Tâtâr-Khânièh* given in the *Fatâwai Alamgiri* must be taken with qualification is clear from the rule which declares that a woman may validly make a gift of her dower-debt to her infant child by the husband from whom it is due, provided she places the child in a position to recover it. From this it follows that the objection to a gift of the debt to the *minor* child of the debtor springs from the apprehension that in such a case the donee being an infant the debtor would become, as the guardian of the child, entitled to recover the debt from himself. But as the mother can place her infant child in a position to recover her dower from the father, there is no reason why any other creditor may not adopt the same course by the appointment of a trustee or some person to recover the debt for the child.

In the case of *Tyani Begam* v. *Umrai Begam*(1) the Bombay High Court held, in accordance with the rules of Mahommedan Law, that the widow of a deceased Mahommedan may remit the dower-debt even without the acceptance of his heirs.

Gift of a debt.

"In the *Fatâwai-Astarûshni*,"(2) says the *Fatâwai Alamgiri*, "it is stated that where a woman sells a piece of stuff to her husband, and gives the consideration to her infant child by way of reward and gift, and the child dies thereafter, the whole consideration will be the property of the woman, and will not be treated as the inheritance of the child."(3)

When the gift of a debt is validly made to a debtor, he is entitled to recover from the creditor any property hypothecated for the debt.

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"A creditor makes a gift of his debt to his debtor, who neither accepts nor rejects it at the meeting, and then comes after the

(1) [1908], I. L., 32 Bom., 612.

(2) *Fatâwai* Abi'l Fath Mohammad bin al-Mahmûd bin al-Hussain al-Astarûshni.

(3) *Fatâwai Alamgiri*, Vol. IV, p. 565.

lapse of some days and rejects the gift; there is some difference of opinion on the point, but the sound doctrine is that the gift is not reversed."

"When a debt is due to two persons, and one of them gives up his share to the debtor, the gift or release is valid."(1)

In other words when there are two creditors and one debtor, any one of them may discharge the debtor in respect of his share of the debt, or, to use the phraseology of the Mussulmen lawyers, may make a gift of his share of the debt to the debtor.

A release suspended upon the happening of a contingency is invalid. But where it is made dependent upon a condition which is immediately fulfilled, it is valid; for example, if a man were to say to another, "if thou owest me any debt, I absolve thee from it;" such a gift would be valid if the debt was existing at the time. So also if he were to say "when I die, thou wilt be discharged from my debt" it will be valid, the discharge taking effect as a bequest.(2)

In the case of a release from a liability, delivery of seisin is not possible, and therefore, it is laid down that "the gift of a debt to the debtor and his discharge from the liability takes effect without his acceptance, for the discharge of a debt is equivalent to its cancellation and therefore acceptance and possession on the part of the donee are not necessary."

Gift of a debt to a person other than the debtor —meaning of the word *hawâlât*.

The gift of a debt to a person other than the debtor is valid under the following circumstances(3):—

(*a*) When it is made by way of *hawâlât*, that is, the person to whom the assignment is made is constituted an agent for the creditor;(4)

(*b*) When it is bequeathed by way of a legacy;

(*c*) When the assignee is placed in a position to recover the debt.

As the assignment of a debt implies that the assignor vests the assignee (the donee of the Mahommedan Law) with the power to recover the debt—the required condition may be regarded as a legal refinement laid down *ex abundante cautela*.

(1) *Fatâwai Alamgiri*, Vol. IV, p. 565.
(2) *Fatâwai Kâzi Khân* in loco.
(3) *Hed.* III, p. 309.
(4) *Hed.* III, p. 606.

In fact, where a person places another in a position to realise the debt due to him, it amounts to a sufficient delivery of possession. But the mere handing over of deposit notes, signed by the Agent of a Bank, acknowledging the receipt of sums of money as deposit bearing interest and not in a form which would entitle the bearer of the notes to the debts created thereby as transferee thereof, has been held not to amount to a transfer of the debts so as to give the person to whom they were made over any dominion over them or to enable him to recover the money secured by the notes.(1)

Where a person is discharged or released from a liability upon any specified condition, the infraction of the condition revives the liability, *e.g.*, if a woman absolve her husband from her dower-debt upon any condition which is afterwards infringed by him, the liability would re-attach and he would continue liable for such debt.(2) "If she were to say to her husband, 'I absolve you from my debt *on condition* that you do not marry another woman,' and he were to accept the discharge and were subsequently to take a second wife, he would continue liable for her. *viz.*, the first wife's dower."

But, as already pointed out, when the discharge is made dependent upon a wholly uncertain contingency, it is inoperative: *e.g.*, if a man were to say to his debtor, "if I do not demand my debt from you until my death, it is yours." this is invalid.

A gift of a debt cannot be retracted if the debtor has once consented to the discharge.

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## SECTION III.

### FURTHER RULES AS TO THE LAW RELATING TO GIFTS.

**Gifts by parents and *de facto* guardians to their children and wards.**

As already stated a father may, in health, give his entire property to any one of his children.(3) It would be sinful, but if the gift is not invalid or void for other reasons, it would be legal.(4)

(1) *Aga Mahomed Jaffer Bindamin* v. *Kolsoom Beebee* [1888], I. L., 25 Cal., 9; see also *Mumtaz-un-nissa* v. *Tufail Ahmed* [1905], I. L., 28 All., 234. In *Vahazullah Sahib* v. *Boyapati Nagayya* [1906], I. L., 30 Mad., 519, it appeared that the donor exercised rights of ownership over the property after the death of the donee.

(2) Comp. *Moonshee Buzlur Raheem* v. *Shamsunnissa Begum* [1869], 11 M. I. A., 511.

(3) See *ante*, p. 49; *Fatâwai Kâzi Khân*, Vol. IV, p. 188.

(4) *Ibid.* See also the *Durr-ul-Mukhtâr*, p. 636.

In the case of *Kandath Veetil Bava* v. *Musaliam Veetil Pakru-kutti*,(1) where a mother had made a gift (*sridhanam*) to her daughter of certain property consisting of a house and lands, which was evidenced by a petition to the Revenue authorities by the donor and donee for the purpose of effecting a mutation of names, and the donor had continued to reside with the donee, the learned Judges of the Madras High Court held that *that* fact did not vitiate the gift.

"A gift by a father of a house, in which he lives or has his property, is good according to Abû Yusuf and the *Fatwa* is with him;" that is decrees are passed according to his opinion.

A gift by a person *in loco parentis* to a child in his custody is completed by the simple declaration; in such cases no transfer is necessary: "If a father," says the *Sharh-i-Vikâya*, "make a gift of something to his infant son, the infant in virtue of the gift becomes proprietor of the same. The same rule holds when a mother gives something to her infant son, whom she maintains and whose father is dead and no guardian is provided and so also with respect to the gift of any other person maintaining a child under these circumstances."

"If a stranger were to make a gift of a thing to an infant, the gift is rendered complete by the seisin of his father."

"Where the child is an orphan the possession on his behalf by his guardian, being either the executor appointed by his father or his grandfather, is sufficient. If a fatherless child be in the charge of his mother, and she were to take possession of a gift made to him, it would be valid. The same rule holds with respect to a stranger [*i.e.*, a non-relative] who has the charge of an orphan. If an infant should himself take possession of a thing given to him it would be valid provided he be endowed with reason."(2)

In the case of a gift by a parent to a minor child, no acceptance is necessary; "the gift is completed by the contract and it makes no difference whether the subject of the gift is in the father's hands or in that of a depositary:" Nor is transmutation of possession necessary, for the possession of the parent is tantamount to that of the child.(3)

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(1) (1907), I. L., 30 Mad., 305.
(2) See *ante*, p. 133.
(3) See *ante*, p. 123 *et seq.*

If a father makes clothes for his infant son with the express intention that they are for the child, he cannot give the clothes to another.

Gift by a wife of her dower.

A gift of dower obtained by the husband by force or misrepresentation is invalid,(1) *i.e.*, where a husband by force or misrepresentation induces his wife to release him from the dower-debt, such release or discharge is not valid.(2)

Gift of a debt.

In the *Bahr ur-Râik* it is laid down that "a person to whom there are debts outstanding can lawfully make them over by gift to another who is not indebted to him, directing the donee to realise such debts, and take them for his own use—and such gift is valid." And in the *Fatâwai Kâzi Khân*, as a consequence of the above principle, it is stated, that "a woman is entitled to convey her dower-debt to her infant child, and the child would be entitled to claim the same from the father on attaining majority. Similarly, a married woman has the power to compound her dower-debt with her husband and accept in lieu thereof anything else."

*Bye-Mukâsa.*

In India a conveyance between the married parties by which the husband conveys some property to his wife in lieu or satisfaction of her dower-debt is called a *bye-mukâsa*. A *bye-mukâsa* is a *hiba-bi'l-ewaz* and in its effect is tantamount to a sale in consideration of the dower.(3)

"If a woman compromise her dower for anything which has not been seen by her before delivery, and she subsequently become aware that it is defective, she is entitled to repudiate the contract, and her right to the dower remains intact."

"A woman may release her dower to her deceased husband," that is, the widow is entitled to exonerate or discharge the estate of her deceased husband from the liability for her dower-debt.

"When a woman who is ill makes a gift of her dower to her husband, the gift would be valid if she were to recover from her illness, and even though she should die of that illness, yet if it were not a death-illness the answer would be the same, but if it were a death-illness the gift would not be valid without the sanction of the heirs."

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(1) *Fatâwai Kâzi Khân*, Vol. IV, p. 185.

(2) See *Moonshee Buzlur Rahim* v. *Shumsunnissa Begum* [1867], 11 Moo. I. A., p. 551.

(3) See *Suba Bibi* v. *Balgobind Das* [1886], I. L., 8 All., 178; *Mahamed Esuph* v. *Pattama Ammal* [1889], I. L., 23 Mad., 70.

A gift by way of a *rukba* is invalid according to all the Sunni schools, being a gift dependent on a contingency of a nature both uncertain and involving as it were a wager on one's life. A *rukba* is constituted by a person declaring "If I die before thee, this house of mine is thine, if thou diest before me it is mine." *Rukba.*

But when a *rukba* is made and the grantee is put in possession of the subject of the grant, it would amount to an *'aâriat* or commodate loan returnable to the grantor whenever he likes.

If a person is the proprietor of a building as well as of the land upon which it is situated, he may make a gift of the building without the land and it will be valid.(1) Gift of building without the land.

(1) *Radd-ul-Muktâr*, IV, p. 780.