Waqf, Hajr and Wasaya according to the Five Schools of Islamic Law

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al-Islam.org

Sub Title:

Volume 8 of 8

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Publisher(s):

Islamic Culture and Relations Organisation [2]

This work on the Shariah or Islamic Law offers a comparative study of the Divine Law that, according to authentic Islamic doctrines, embodies the Will of God in society. In the Islamic world view, God is the ultimate legislator. The five major schools that are used in the comparison are: Hanafi, Hanbali, Shafi'i, Maliki and Jaf'ari. The present book, volume 8 of 8, is dedicated to the issues of waqf, hajr and wasaya. How they occur, what are the rules, what invalidates them and so on, all presented from the viewpoints of the five Schools of thought.

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Waqf

'*Wuquf*' and '*awqaf*' are the plurals of '*waqf*' and its verb is '*waqafa*', though '*awqafa*' is also rarely used, as in *al-Tadhkirah* of al-Allamah al-Hilli. The word *'waqf'* literally means 'to detain' and 'to prevent', as in '*wuqiftu 'an sayri*', i.e. 'I was prevented from making my journey.'

In the context of the Shari'ah it implies a form of gift in which the corpus is detained and the usufruct is set free. The meaning of 'detention' of the corpus is its prevention from being inherited, sold, gifted, mortgaged, rented, lent, etc. As to dedication of the usufruct, it means its devotion to the purpose mentioned by the *waqif* (donor) without any pecuniary return.

Some legists consider *waqf* to be illegal in the Islamic Shari'ah and regard it as contradictory to its basic principles except where it concerns a mosque. But this view has been abandoned by all the schools of

fiqh.

Perpetuity and Continuity

All schools, excepting the Maliki, concur that a *waqf* is valid only when the *waqif* intends the *waqf* to be perpetual and continuous, and therefore it is considered a lasting charity. Hence if the *waqif* limits its period of operation (such as when he makes *waqf* for 10 years or until an unspecified time when he would revoke it at his own pleasure, or for as long as he or his children are not in need of it, etc.) it will not be considered a *waqf* in its true sense.

Many Imami legists hold that such a condition nullifies the *waqf*, though it will be considered as valid *habs* (detention)[1] if the owner of the property intends *habs*. But if he intends it to be a *waqf*, it will be void both as *waqf* as well as *habs*. By a valid *habs* is meant that the usufruct donated by the owner for a particular object will be so applied during the period mentioned and return to him after the expiry of that period.

However, this is not something which contradicts the provisions of perpetuity and continuity in *waqf*, although al-Shaykh Abu Zuhrah has made a confusion here due to his inability to appreciate the difference between *waqf* and *habs* in Imami *fiqh*. Consequently he has ascribed to them the view that perpetual and temporary *waqf* are both valid. This is incorrect, because according to the Imamiyyah a *waqf* can only be perpetual.

The Malikis say: Perpetuity is not necessary in *waqf* and it is valid and binding even if its duration is fixed, and after the expiry of the stipulated period the property will return to the owner.
Similarly, if the *waqif* makes a provision entitling himself or the beneficiary to sell the *wuquf* property, the *waqf* is valid and the provision will be acted upon (*Sharh al-Zarqani*, vol. 7, 'bab al-waqf').[2]

If a *waqf* is made for an object which is liable to expiry (such as a *waqf* made for one's living children, or others who are bound to cease existing) will it be valid? Moreover, presuming its validity, upon whom will it devolve after the expiry of its object?

The Hanafis observe: Such a *waqf* is valid and it will be applied after the expiry of its original object to the benefit of the poor.

The Hanbalis say: It is valid and will thereafter be spent for the benefit of the nearest relation of the *waqif*. This is also one of two opinions of the Shafi'is.

The Malikis are of the opinion that it is valid and will devolve on the nearest poor relation of the *waqif*, and if all of them are wealthy, then on their poor relatives (*al-Mughni*, *al-Zarqani*, and *al-Muhadhdhab*).

The Imamiyyah state: The *waqf* is valid and will devolve on the heirs of the *waqif* (*al-Jawahir*).

Delivery of Possession

Delivery of possession implies the owner's relinquishment of his authority over the property and its transfer to the purpose for which it has been donated. According to the Imamiyyah, delivery is a necessary condition for the deed of *waqf* to become binding, though not for its validity. Therefore, if a *waqif* dedicates his property by way of *waqf* without delivering possession, he is entitled to revoke it.

If a *waqif* makes a *waqf* for public benefit (e.g. a mosque or a shrine or for the poor), the *waqf* will not become binding until the custodian (*mutawalli*) or the *hakim al-shar'* takes possession of the donated property, or until someone is buried in the donated plot of land, in the case of a graveyard, or prayers are offered in it, if it is a mosque, or until a poor person uses it with the permission of the *waqif*, in a *waqf* for the benefit of the poor. If delivery is not effected in any of the above-mentioned forms it is valid for a *waqif* to revoke the *waqf*.

If a *waqf* is made for a private purpose, such as for the benefit of the *waqif'* s children, if the children have attained majority, it will not become binding unless they take possession of it with his permission, and if they are minors the need for giving permission does not arise because the *waqif's* possession of it as their guardian amounts to their having taken possession.

If the *waqif* dies before possession has been taken, the *waqf* becomes void and the property assigned for *waqf* will be considered his heritage. For example, if he makes the charitable *waqf* of a shop and dies while it is still in his use, it will return to the heirs.

The Malikis say: Sole taking possession does not suffice and it is necessary that the donated property remain in the possession of the beneficiary or the *mutawalli* for one complete year. Only after the completion of one year will the *waqf* become binding and incapable of being annulled in any manner.

The Shafi'is and Ibn Hanbal in one of his opinions, state: A *waqf* is completed even without delivering possession; rather, the ownership of the *waqf* will cease on the pronouncement of *waqf* (Abu Zuhrah, *Kitab al-waqf*).

Ownership of the Waqf Property

There is no doubt that prior to donation the *waqf* property is owned by the *waqif*, because a person cannot make *waqf* of a property that he does not own. The question is whether, after the completion of the *waqf*, the ownership of the property remains with the *waqif*, with the difference that his control over its usufruct will cease, or if it is transferred to the beneficiaries. Or does the property become ownerless, being released from ownership?

The legists hold different opinions in this regard. The Malikis consider it to remain in the ownership of the *waqif*, though he is prohibited from using it.

The Hanafis observe: A *waqf* property has no owner at all, and this is the more reliable opinion according to the Shafi'i school.3 (*Fath al-Qadir*, vol.5, 'bab al-waqf'; Abu Zuhrah, *Kitab al-waqf*)

The Hanbalis say: The ownership of the *waqf* property will be transferred to the beneficiaries.

Al-Shaykh Abu Zuhrah (1959, p.49) has ascribed to the Imamiyyah the view that the ownership of the *waqf* property remains with the *waqif*. He then observes (p.106): This is the preponderant view of the Imamiyyah.

Abu Zuhrah does not mention the source relied upon by him for ascribing this view, and I do not know from where he has extracted it, for it has been mentioned in *al-Jawahir*, which is the most important and authentic source of Imami fiqh. According to most legists, when a *waqf* is completed, the ownership of the *waqif* ceases; rather, it is the preponderant view and the authors of *al-Ghunyah* and *al-Saria'ir* have even reported an *ijma'* on this view.

Though all or most Imami legists concur that the ownership of the *waqif* ceases, they differ as to whether the *waqf* property totally loses the characteristic of being owned (in a manner that it is neither the property of the *waqif*, nor of the beneficiaries. and, as the legists would say, is released from ownership) or if it is transferred from the *waqif* to the beneficiaries.

A group among them differentiates between a public *waqf* (e.g. mosques, schools, sanatoriums, etc.) and a private *waqf* (e.g. a *waqf* for the benefit of one's descendants). The former is considered as involving a release from ownership and the latter a transfer of ownership from the *waqif* to the beneficiary.

The difference of opinion regarding the ownership of *waqf* property has practical significance in determining whether the sale of such property is valid or not, and in the case where a *waqf* is made for a limited period or for a terminable purpose. According to the Maliki view that the *waqf* remains the *waqif's* property, its sale is valid and the corpus will return to the *waqif* on expiry of the period of *waqf* or when the object for which the *waqf* was made terminates. But according to the view which totally negates the ownership of *waqf* property, its sale will not be valid, because only owned property can be sold, and a *waqf* for a limited period will also be invalid.

According to the view which considers the ownership of *waqf* property as transferred to the beneficiaries, the property will not return to the *waqif*. The consequences of this difference will be more obvious from the issues to be discussed below. It is necessary to understand this divergence of viewpoints because it affects many issues of *waqf*.

The Essentials of Waqf

There are four *arkan* (essentials) of *waqf:* (1) the declaration (*al-sighah*) (2) the *waqif* (3) the property given as *waqf* (*al-mawqufah*) (4) the beneficiary (*al-mawquf 'alayh*).

The Declaration

There is a consensus among all the schools that a *waqf* is created by using the word '*waqaftu'* (I have made a *waqf*), because it explicitly signifies the intention of *waqf* without needing any further clarification. They differ regarding the creation of *waqf* by the use of such words as '*habastu'* (I have detained), '*sabbaltu'* (I have donated as charity), '*abbadtu'* (I have perpetually settled) etc., and go into needless details.

The correct view is that a *waqf* is created and completed by using any word which is capable of proving the intention of creating a *waqf*, even if it belongs to another language, because here words are means of expressing one's intention, not an end in themselves.4

Al-Mu'atat (The creation of Waqf without the Sighah)

Is a *waqf* completed by an act (such as when someone makes a mosque and calls the people to pray in it, or allows burials to take place in a piece of land with an intention of making it a *waqf* for a graveyard) without one uttering *'waqaftu'* or '*habastu'* or similar words, or is it necessary that the declaration take place, the act by itself being insufficient?

The Hanafi, Maliki and Hanbali schools say: An act by itself is sufficient and the property becomes, consequent to the act, a *waqf* (Ibn Qudamah's *al-Mughni*, vol.5, 'bab al-waqf'; *Sharh al-Zarqani 'ala Mukhtasar Abi Diya'*, vol.7, 'bab al-waqf').

A group of major Imami scholars also holds this view, including al-Sayyid al-Yazdi in his work *Mulhaqat al-'Urwah*, al-Sayyid Abu al-Hasan al-Isfahani in *Wasilat al-najat* and al-Sayyid al-Hakim in *Minhaj al-Salihin*. Al-Shahid al-Awwal and Ibn Idris have also been reported to hold this view.

The Shafi'is observe: A *waqf* is completed only by the recital of the *sighah* (*al-Mughni*, vol.5).

Acceptance

Does *waqf* require acceptance or is its declaration as *waqf* (by the *waqif*) sufficient? In other words, is *waqf* created by a single decision, or is it necessary that there be two concurrent decisions?

In this context the legists have divided *waqf*s into public (in which the *waqif* has no specific beneficiary in his mind, e.g. *waqf*s made for the poor and *waqf*s of mosques and shrines) and private *waqf*s (e.g. a *waqf* made for the benefit of one's children).

The four Sunni schools concur that a public *waqf* requires no acceptance, and according to the Malikis and most Hanafi legists a private *waqf*, like a public one, requires no acceptance.

The Shafi'is incline towards the necessity of acceptance (al-Hisni al-Shafi'i, *Kifayat al-akhyar*, vol.1, 'bab al-waqf'; Abu Zuhrah, *Kitab al-waqf*, p. 65, 1959 ed.).

The Imami legists differ among themselves, holding one of the following three opinions:

1. Necessity of acceptance in both public and private *waqf*s.
2. Absence of such necessity in both kinds of *waqf*s.
3. A distinction is made between a public and private *waqf*, and acceptance is necessary only in the latter. This is the same view which the Shafi'is have favoured, and is also the correct one.[5]

Al-Tanjiz

The Malikis observe: It is valid for a *waqf* to depend upon a contingency. Therefore, if the owner says: "When such and such a time comes, my house will become a *waqf*," it is valid and the *waqf* is completed (*Sharh al-Zarqani 'ala Mukhtasar Abi Diya'*, vol. 7, 'bab al-waqf').

The Hanafi and the Shafi'i schools state: It is not valid to make a *waqf* contingent on the occurrence of an event; rather, it is *wajib* that *waqf* be unconditional, and if it is made to depend upon a contingency, as in the above-mentioned example, it will remain the property of the owner (Shirbini's *al-'Iqna'*, vol. 2, 'bab al-waqf'; *Fath al-Qadir*, vol. 5, 'kitab al-waqf').

I don't know how these two schools allow divorce to depend upon a contingency, while they disallow similar dependence in other spheres of *fiqh*, despite the fact that caution and stringency are more necessary in marital issues when compared to other issues.

The Hanbalis say: A *waqf* can be made contingent on the occurrence of death. Apart from this, dependence on any other contingency is invalid (*Ghayat al-muntaha*, vol. 2, 'bab al-waqf').

Most Imami legists consider *tanjiz* (its being unconditionally operational) as *wajib* and do not permit its being made contingent on a future event. (al-'Allamah al-Hilli, *al-Tadhkirah*, vol. 2; *al-Jawahir*, vol. 4; and *Mulhaqat al-'Urwah*, 'bab al-waqf').[6] Therefore, if a person says: "When I die, this property will become a *waqf*," it will not become a *waqf* after his death. But if he says: "After my death, make this property a *waqf*," it will be considered a will for creating a *waqf* and the executor of the will will be responsible for creating the *waqf*.

Al-Waqif

The schools concur that sanity is a necessary condition for the creation of a *waqf*. Therefore, a *waqf* created by an insane person is not valid, because the Shari'ah does not burden him with any duty and does not attach any significance to his decisions, words or deeds.

The schools also concur upon maturity as a necessary condition. This implies that a *waqf* created by a child, irrespective of his being discerning or not, is invalid, and neither is the guardian entitled to create a *waqf* on his behalf, nor the *waqif* empowered to act as a guardian in this regard or to allow the creation of such a *waqf*. Some Imami legists consider a *waqf* created by a child over ten years as valid, but most

of them oppose this view.

An idiot is also incapable of creating a *waqf*, for it is a disposition of property and an idiot is not authorized to carry out acts of such a nature.[7] The Hanafis say: It is valid for an idiot to bequeath one-third of his wealth provided that the bequest is for charitable purposes, irrespective of whether it is in the form of a *waqf* or otherwise (*al-Fiqh 'ala-madhahib al-'arba'ah*, vol.2, 'bab mabhath al-hajr 'ala al-safih').

Niyyat al-Qurbah

There is no doubt that the intention of creating a *waqf* is necessary for its creation. Hence if a declaration signifying the creation of *waqf* is made by a person who is intoxicated, unconscious, or asleep, or is made in jest, the recital will be void, because of the principle of unchanged status of the ownership of the property.

The schools differ on the question as to whether *niyyat al-qurbah* (the intention to seek God's good-pleasure) is a necessary condition like sanity and puberty (so that if a *waqif* makes a *waqf* for a worldly motive it would fail to be operative) or if it becomes operative without it.

The Hanafis say: *Qurbah* is a necessary condition and requires to be fulfilled, either presently or ultimately; i.e. the property donated should necessarily be used for charitable purposes, either from the time of creation of the *waqf* or at a later date; e.g. when one makes a *waqf* for the benefit of some wealthy people presently alive, and after them, for the benefit of their destitute descendants (*Fath al-Qadir*).[8]

Malik and the Shafii'is observe: *Niyyat al-qurbah* is not necessary in a *waqf* (Abu Zuhrah, *Kitab al-waqf*, p.92 ff.).

The Hanbalis state: It is necessary that *waqf* be made for a pious, spiritual purpose (e.g. for the poor or for mosques, bridges, books, for relatives, etc.,) because the Shari'ah has created the institution of *waqf* for acquiring spiritual reward, otherwise the purpose for which it was incorporated in the Shari'ah is not achieved (Ibn Dawayan, *Manar al-sabil*, p.6, 1st ed.).

From among the Imamiyyah, the authors of *al-Jawahir* and *Mulhaqat al-'Urwah* observe: *Qurbah* is not a condition for the validity of *waqf*, or for taking its possession, rather it is essential for acquiring its spiritual reward. Therefore a *waqf* is completed without the presence of a spiritual motive.

Death Illness

An illness resulting in death or generally capable of causing it is called death illness (*marad al-mawt*).

All the schools concur that if a person in such an illness makes a *waqf* of his property, it will be valid and will be created from the bequeathable third, and if it exceeds this limit the consent of the heirs is

necessary regarding the excess.

Summarily, all those conditions required of a seller (e.g. sanity, puberty [*bulugh*], maturity [*rushd*], ownership, absence of a legal disability, such as insolvency or idiocy) are also necessary for a *waqif*.

Al-Mawquf

The schools concur that a *mawquf* property should fulfil all the conditions required of a saleable commodity, that it should be a determinate article owned by the *waqif*. Therefore the *waqf* of a receivable debt or an unspecified property (such a when the owner says 'a field from my property' or 'a part of it') or that which cannot be owned by a Muslim (e.g. swine) is not valid. The schools also concur that the *mawquf* should have a usufruct and must not be perishable. Hence that which cannot be utilized except by consuming it (e.g. eatables) will not be valid as a *waqf*. To this class also belongs the *waqf* of usufruct; therefore, if a tenant makes a *waqf* of the usufruct of a house or land which he has rented for a specific period, it will not be valid, because the notion of *waqf* as something in which the property is detained and its usufruct dedicated for a charitable purpose is not fulfilled here.

There is consensus as well regarding the validity of *waqf* of immovable property, e.g. land, building, orchard, etc.

All the schools, excepting the Hanafis, concur on the validity of *waqf* of movable property, such as animals, implements and utensils, for they can be utilized without being consumed.

According to Abu Hanifah, the *waqf* of movable property is not valid. But of his two pupils, Abu Yusuf and Muhammad, the former accepts the *waqf* of movable property provided it is attached to an immovable property (for instance, cattle and implements attached to an agricultural land) and the latter limits its validity to the weapons and horses used in war (*Fath al-Qadir*, vol.5, and *Sharh al-Zarqani*, vol.7).

The schools further concur that it is valid to make *waqf* of an inseparate share (*musha'*) in a property (e.g. an undivided half or one-fourth or one-third) except where it is a mosque[9] or graveyard, because these two are incapable of being jointly owned (al-'Allamah al-Hilli, in *al-Tadhkirah*; al-Shi'rani in *al-Mizan*; Muhammad Salam Madkur in *al-Waqf*).

According to the author of *Mulhaqat al-'Urwah*, a work on Imami *fiqh*, the *waqf* of the following forms of property is not valid: 1) mortgaged property; (2) property whose possession cannot be delivered (for instance, a bird in the sky and a fish in water, even if they are owned by the *waqif*); (3) a stray animal; (4) usurped property which the *waqif* or the beneficiary are unable to recover; but if this property is made a *waqf* for the benefit of the usurper the *waqf* is valid because the condition of possession is achieved.

The Beneficiary (al-Mawquf 'Alayh)

Al-mawquf 'alayh is the person entitled to the proceeds of the *waqf* property and its usufruct. The following requirements must be fulfilled by the beneficiary:

1. He should exist at the time of the creation of the *waqf*. If he does not (as when a *waqf* is created for a child to be born later), the Imami, Shafi'i and Hanbali schools consider the *waqf* as invalid, while the Maliki school regards it as valid. It is stated in *Sharh al-Zarqani 'ala' Mukhtasar Abi Diya'*: A *waqf* in favour of a child to be born in the near future is valid, though it will become binding only on its birth. Therefore, if it is not conceived or miscarries, the *waqf* will become void.

According to all the schools, when the beneficiary ceases to exist after having existed at the time of the creation of *waqf*, the *waqf* is valid (as when a person creates a *waqf* for his existing children and their future descendants). Regarding a *waqf* in favour of a foetus, the Shafi'i, Imami and Hanbali schools consider it invalid, because a foetus is incapable of owning property until it is born alive. This principle is not negated by the allocation of a share in inheritance for an unborn child in anticipation of its birth and by the validity of a bequest in its favour, because these two instances have specific proofs for their validity. Furthermore, the allocation of a share in inheritance for an unborn child is meant to safeguard its right and to avoid the complications which would arise as a result of redistribution.

2. He should be capable of owning property. Hence it is neither valid to create a *waqf* nor to make a bequest in favour of an animal, as done by Westerners, especially women, who bequeath part of their wealth to dogs. Regarding the *waqf* of mosques, schools, sanatoriums etc., it is actually a *waqf* in favour of the people who benefit from them.

3. The purpose of the *waqf* should not be sinful (as it would be when made for a brothel, or a gambling club, pub or for highwaymen). As to a *waqf* made in favour of a non-Muslim, such as a *dhimmi*, there is consensus about its validity, in accordance with this declaration of God Almighty:

لاَ يَنْهَاكُمْ اللَّهُ عَنْ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ انَّ اللهَ يُحِبُّ المُقسِطين

God does not forbid you respecting those who have not waged war against you on account of your religion and have not driven you forth from your homes, that you show them kindness and deal with them justly. Verily, Allah loves the doers of justice. (***60:8***)

The Imami legist al-Sayyid Kazim al-Yazdi observes in the chapter on *waqf* of his book *Mulhaqat al-'Urwah*: "...Rather, it is also valid to create a *waqf* in favour of a *harbi* and to show kindness to him in order to encourage him to righteous conduct."

Al-Shahid al-Thani, in *al-Lum'ah al-Dimashqiyyah*, *bab al-waqf*, states: "A *waqf* in favour of *dhimmis* is

valid, because it is not sin and also because they are creatures of God and a part of humanity which has been honoured by Him." He adds: "It is not valid to create a *waqf* in favour of any of the Khawarij or Ghulat,[10] because the former charge Amir al-Mu'minin 'Ali ('a) with unbelief and the latter ascribe divinity to him, while the middle path is the right one, as mentioned by 'Ali ('a) himself:

هلك فيَّ اثنان: مبغض قالٍ، ومحبٌّ غال

Two kinds of people will perish concerning me: the one who hates me and the other who goes to the extreme in his love for me.

4. The beneficiary should be specifically known. Thus a *waqf* created in favour of an unidentified man or woman will be void.

The Malikis say: A *waqf* is valid even if the *waqif* does not mention the purpose of the *waqf*. Hence if he says: "I dedicate this house of mine as *waqf*, without adding anything else, the *waqf* will be valid and its usufruct will be spent for charitable purposes (*Sharh al-Zarqani 'ala Abi Diya'*).

The Imami, Shafi and Maliki schools observe: It is not valid for a *waqif* to create a *waqf* for the benefit of his own person or to include himself among its beneficiaries, because there is no sense in a person transferring his property to himself. But if, for instance, he makes a *waqf* in favour of the poor and later becomes poor himself, he will be considered one of them, and similarly if he creates a *waqf* in favour of students and later becomes a student himself.

The Hanafi and Hanbali schools, however, permit such a *waqf* (*al-Mughni*; Abu Zuhrah, al-Shi'rani's *al-Mizan*; *Mulhaqat al-'Urwah*).

A Waqf for prayers (al-waqf 'ala al-salat)

The invalidity of a *waqf* created for the *waqif's* benefit reveals the invalidity of a large number of such *waqf*s in the villages of Jabal (Lebanon) which have been created by their *waqif*s to meet the expenses of the prayers to be offered posthumously on their behalf. This is so even if we accept the validity of a proxy reciting *mustahabb salat* on behalf of the dead – aside from its validity with respect to the *wajib salat* – because it is in fact a *waqf* in one's own favour.

Doubts Concerning Waqf

The Imami author of *al-Mulhaqat* observes: If a doubt arises as to which among two persons is the beneficiary, or which among two purposes is the intended object of the *waqf*, the solution is effected by drawing lots or by effecting a 'compulsory compromise.' (*al-sulh al-qahri*). 'Compulsory compromise' means distribution of the usufruct among the two parties or purposes.

If the purpose of the *waqf* is unknown and we do not know whether it is for a mosque or for the poor or

for some other purpose, the *waqf* will be applied to charitable purposes.

If a doubt arises as to which of two properties is subject of *waqf* (such as where we know the existence of a *waqf*, but are not certain whether it relates to the *waqif*'s house or shop) resort will be made to drawing lots or to a compulsory compromise; i.e. a half of both the house and the shop will be treated as *waqf*.

Conditions of a Waqif and His Pronouncement

The Waqif's Intention

If a *waqf* is a gift and a charity, the *waqif* is the giver of that gift and charity, and it is obvious that any sane and mature adult free of financial disability is free to grant from his property whatever he wishes to anyone in any manner he chooses. It is stated in the hadith:

الناس مسلّطون على أموالهم

People have been given full authority over their properties, and one of the Imams ('a) has said:

للوقوف بحسب ما يقفها أهلها

*Waqf*s are to be managed in a manner provided by their *waqif*s.

Accordingly, the legists say: The conditions laid down by the *waqif* are like the words of the Lawgiver, and his pronouncements are like His pronouncements as regards the obligation of following them. Similar is the case of a *nadhir*, *halif*, *musi* and *muqirr*.[11]

Consequently, if the intention of the *waqif* is known (that he had a specific intention and none else), it will be followed even if it is against the commonly understood meaning of his words. For instance, if we know that he intends by the words 'my brother' a particular friend of his the *waqf* will be given to the friend, not to his brother. This is because usage is valid as a means of determining one's intention, and where we already know the intention, the usage loses its significance. But if we are unaware of the intention, the usage is followed, and if there is no particular usage concerning it and nothing special is understood from the words of the *waqif*, the literal meaning will be resorted to, exactly like the procedure applied regarding the words of the Qur'an and the Sunnah.

The Permissible Conditions

We had observed that a *waqif* meeting all the conditions is entitled to lay down conditions of his choice. Here we mention the following exceptions.

1. A condition is binding and enforceable when it is contiguous to the creation of *waqf* and occurs along with it. Thus, if the *waqif* mentions it after completing the deed, it will be null and void, because the *waqif* has no authority over the *waqf* property after its ownership has passed on from him.

2. He may not lay down a condition which contradicts the nature of the contract (for instance, the condition that the ownership of the *waqf* property will be retained by him, so that he could pass it on as inheritance to his heirs, or sell it, or gift it or rent it or lend it if he so intends). The presence of such a condition implies that it is and is not a *waqf* at the same time. Because the presence of such a condition abrogates the deed creating the *waqf*, the *waqf* will be left without a deed, while the presumption is that it is not executed without a deed. In other words, such a *waqif* is similar to the seller who declares: "I sell this to you on the condition that its ownership will not be transferred to you and that its consideration will not be transferred to me." This is the reason why the legists have concurred that every condition contrary to the contract, apart from being void, also nullifies the contract.

But the famous legist al-Sinhuri mentions in his compilation of select laws from Islamic *fiqh* that the Hanafis exclude mosques from the above rule. Hence a void condition does not nullify its *waqf*, while in *waqf*s other than for mosques such a condition is void and also nullifies the *waqf* (Madkur's *al-Waqf*).

3. The condition should not oppose any rule of the Islamic Shari'ah. For instance, it should not require the performance of a prohibited or the omission of an obligatory act. It is mentioned in the hadith:

مَن اشترط شرطاً سوى كتاب الله عزّ وجلّ فلا يجوز ذلك له ولا عليه

He who lays down a condition contradicting the Book of God Almighty, it will neither be valid for him nor against him.

One of the Imams (A) states:

المسلمون عند شروطهم، إلاّ شرطاً حَرَّم حلالاً أو أحلّ حراماً

Muslims are bound by the conditions that they lay down, except those which prohibit a *halal* or permit a *haram*.

Excepting the above-mentioned kind, all other conditions mentioned at the time of the deed that neither contradict its spirit nor any rule of the Book and the Sunnah are valid and their fulfilment is *wajib* by consensus (for instance if the *waqif* lays down the condition that a home is to be built for the poor from the agricultural produce of the *waqf* or if it is to be spent on the scholars, etc). Summarily, the *waqif*, like anyone else, is required to base all his dispensations on the principles of logic and the Shari'ah, irrespective of whether they pertain to *waqf* or matters of diet, travel. etc. Therefore, if his act is in accordance with the Shari'ah and reason, it is *wajib* to respect it, not otherwise.

The Contract and This Condition

There is no doubt that a void condition, whatever its form, does not require to be fulfilled. It is also evident that a void condition which is contrary to the spirit of a contract nullifies the contract itself. Hence there is consensus regarding its being void in itself and its nullifying effect extending beyond itself, without there being any difference between *waqf* and other forms of contract in this regard.

The schools differ regarding a condition which is contrary to the Book and the Sunnah without going against the spirit of the contract (for instance, when a person makes his house a *waqf* in favour of Zayd on condition that he perform *haram* acts in it or abstain from performing *wajib* duties), as to whether the invalidity of this condition necessitates the annulment of the contract as well (so that the carrying out of the contract is not necessary, in the same way as fulfilment of the condition is not necessary), or if the invalidity would be limited to the condition.

According to the Hanafis, as mentioned by Abu Zuhrah in *Kitab al-waqf*, p.162: The conditions which contradict the regulations of the Shari'ah are void, while the *waqf* is valid. It does not become void due to their invalidity, because a *waqf* is a charity and charities are not invalidated by void conditions.

The Imamiyyah differ among themselves. Some among them observe that the presence of a void condition does not necessitate the annulment of the contract while others consider that necessary. A third group abstains from expressing any view (*al-Jawahir* and al-Ansari's *al-Makasib*).

Our view here is that the invalidity of a condition which contradicts the precepts of the Book and the Sunnah does in no manner entail the invalidity of the contract. The reason is that a contract possesses certain essentials (*arkan*) and conditions, such as, the offer, its acceptance, the contracting party's sanity, maturity, and ownership of the subject of transaction, and its transferability. When these aspects of the contract are fulfilled, the contract is undoubtedly valid. As to the presence of void conditions, which have no bearing, immediate or remote, on the essentials and conditions of the contract but exist only marginally, their invalidity does not extend to the contract. Even if it is presumed that the invalidity of a condition creates a discrepancy in the contract – such as an uncertainty resulting in risk in a transaction of sale – the contract will be void in such a situation as a result of the uncertainty, not because the condition is void.

The author of *al-Jawahir* also holds this opinion. With his singular acumen and precision, he observes: "'The claim that an invalid condition if considered restrictive entails the invalidity of the contract and if considered hortative does not lead to its invalidity, is sophistic and fruitless."

Such a distinction is obviously sophistic and nonsensical, because in practice there is no recognizable difference between the two conditions, and it is evident that the regulations of the Shari'ah have been framed on the basis of the general level of understanding of the people and not on the basis of subtle logical distinctions.

We have mentioned that the legists divide the conditions into valid and invalid ones, and regard the fulfilment of the former as obligatory. They have also divided invalid conditions into those which contradict the spirit of the contract and those which do not, yet contradict the rules of the Shari'ah. They concur that the first kind is both invalid and invalidating, and differ concerning the second, some considering it as invalid without being invalidating, while others consider it both invalid and invalidating.

The legists then differ regarding many particular cases and issues as to whether they belong to the class of invalid conditions, and supposing that they do, as to whether they are invalidating as well. Here we shall mention a few of such cases.

The Option to revoke (al-Khayar)

According to the Shafi'i, Imami and Hanbali schools if a *waqif* lays down a condition giving himself the option for a known period to either confirm the *waqf* or revoke it, the condition is void along with the *waqf*, because this condition is contrary to the spirit of the contract.
According to the Hanafis both are valid (*Fath al-Qadir*, *al-Mughni* and *al-Tadhkirah*).

Inclusion and Exclusion (al-Idkhal wa al-Ikhraj)

According to the Hanbalis and the preponderant Shafi'i opinion, if a *waqif* lays down a condition entitling him to exclude from the beneficiaries of the *waqf* whomever he wishes and to include others as beneficiaries, the condition is not valid and the *waqf* is void, because the condition is contrary to the spirit of the contract and invalidates it (*al-Mughni and al-Tadhkirah*).

The Hanafis and the Malikis consider the condition valid (*Sharh al-Zarqani* and Abu Zuhrah).

The Imamiyyah make a distinction between the right to include and the right to exclude. They state: If he lays down a condition stipulating an option to exclude whomever he wishes from the beneficiaries, the *waqf* is void, and if the condition is that he may include those who would be born in the future among the beneficiaries, it is valid, irrespective of whether the *waqf* is in the favour of his own children or those of someone else (*al-Tadhkirah*).

Waqif's Maintenance and the Payment of his Debts

The Imami and the Shafi'i schools say: If one creates a *waqf* in favour of someone and includes a condition requiring the payment of his debts and the provision of his maintenance from the proceeds of the *waqf*, the *waqf* and the condition are both void (*al-Jawahir* and *al-Muhadhdhab*).

A Note

In view of the mention above of the condition of option (*shart al-khayar*) and the cases of *waqf* which are limited by a condition, it will be appropriate here to point out the difference between the following terms commonly used by Imami legists: *khayar al-shart* and *shart al-khayar*, *mutlaq al-'aqd* and *al-'aqd al-*

mutlaq.

Shart al-khayar is involved where the executor of a contract makes an explicit mention of the word *khayar* (option) while executing the contract and thereby reserves for himself the right to use it. For instance, he may say: "I sell this article to you and I shall have the option to annul the sale and revoke it within such and such a period." As to *khayar al-shart*, which is more properly an option that results from the non-fulfilment of a condition, the party executing the contract makes no mention of it in the contract; rather, it is implicit in some condition that he lays down; such as where .the seller says to the customer, "I sell this thing to you on the understanding that you are a scholar" and later on the buyer turns out to be illiterate. The non-fulfilment of the condition gives the seller the option to avoid the sale and revoke it; he may either confirm the sale if he wishes or revoke it. The difference between the meanings of the two terms is obviously great.

The difference between *al-'aqd al-mutlaq* and *mutlaq al-'aqd* will become clear when we understand the different forms of the contract. The kind of contract in which no conditions are stipulated is called *al-'aqd al-mutlaq*. Another kind is a conditional contract (*al-'aqd al-muqayyad*), which may contain either positive or negative conditions. A contract in general, irrespective of inclusion of any positive or negative conditions, is *mutlaq al-'aqd*, a term which includes both *al-'aqd al-mutlaq* and *al-'aqd al-muqayyad*. Accordingly, *al-'aqd al-mutlaq* and *al-'aqd al-muqayyad* differ from each other, yet are two kinds that fall under *mutlaq al-'aqd* (like 'man' and 'woman' with reference to 'human being'). 12

Sons and Daughters

If a *waqf* is created in favour of sons, it will not include daughters, and vice versa. If it is created in favour of children, both are included and will equally share the benefit. If the *waqif* states: "The male will receive twice the female's share" or "they will both share equally" or "the female will receive twice the male's share," or states, "the woman that I have married will not have a share in it," all these provisions are valid, considering that they are conditions laid down by the *waqif*. I did not find among the books of the five schools of *fiqh* that have been accessible to me any view which differs from what has been mentioned, excepting the one which Abu Zuhrah narrates on page 245 of *Kitab al-waqf* from the Malikis. There it is stated: Consensus prevails among the Malikis that it is a sin to create a *waqf* in favour of sons to the exclusion of daughters, and to entitle someone to its benefit on condition of his abstinence from marriage; and some of them consider its sinful character the cause of its invalidity.

I believe that the opinion holding the invalidity of the above conditions, as well as the opinion which includes daughters in the *waqf* when it has been created solely in favour of sons, have both been abandoned and carry no weight among the Malikis. Though I have with me more than five works of the Malikis, including their voluminous as well as shorter works, despite my search I have not found in them any reference to this view.

On the contrary, they contain the following observation: The words of the *waqif* will be understood

according to the common usage and they are like the words of the Lawgiver with respect to the obligation of their observance. Indeed, it has been narrated from 'Umar ibn 'Abd al-'Aziz that he made an effort to include daughters in *waqf*s made in favour of sons, but he was not a Maliki. Apart from this, if his efforts prove anything, they prove his compassionate and humanitarian disposition.

The Grandchildren

In the same way as the legists differ concerning the validity of some conditions, as to whether the invalid ones are just void or are void as well as invalidating, they also differ concerning the meaning of certain words, and among such instances is the case where the *waqif* says: "This *waqf* is in favour of my children (*awladi*)," without making any further clarification. Here the question arises a to whether the words 'my children' includes grandchildren as well, and if they do, whether they include both the sons' and the daughters' children or the sons' children only.

The preponderant (*mashhur*) Imami view is that the words 'my children' do not include grandchildren, although al-Sayyid al-Isfahani states in *Wasilat al-Najat*: "The word 'children' (*awlad*) includes both male and female grandchildren," and this is the correct view because that is what it means in customary usage, which is the criterion in this regard.

The author of *al-Mughni* has narrated from Ibn Hanbal that the word 'child' (*walad*) applies to one's sons and daughters and to the son's children, not to the daughter's children.

The Shafi'is observe: The word' child' (*walad*) includes both sons and daughters, but it does not generally include grandchildren. But the words *walad al-walad* (grandchild), according to them as well as the Hanafis, include both the sexes (*Fath al-Qadir* and *al-Muhadhdhab*).

The Malikis say: Females are covered by the word *awlad*, but not by the phrase *awlad al-awlad* (children's children) (al-Zarqani).

This view of the Malikis is self-contradictory, because both the word *awlad* and the phrase *awlad al-awlad* are derived from the same root, *w.l.d*. How can it include both the sexes when used singly and only males when used in a construct phrase?

The Management of Waqf (al-Wilayah 'ala al-Waqf)

The *wilayah* over *waqf* is the authority granted to someone for managing, developing and utilizing the *waqf* and for applying its yield for its specified purpose. This *wilayah* is of two kinds: general and particular. The general *wilayah* is enjoyed by the *wali al-'amr*, and the particular one by any person appointed by the *waqif* at the time of the creation of *waqf* or by *hakim al-shar'*.

The schools concur that the *mutawalli* should be an adult, sane, mature and trustworthy person. Rather, the Shafi'i and some Imami legists include tbe condition of *'adalah* as well. In fact, trustworthiness and

reliability (*wathaqah*), along with the ability to fully administer the *waqf*, suffice.

The schools concur that the *mutawalli* is a trustee and is not liable except in the event of breach of trust and misfeasance.

The schools, except the Maliki, also concur that the *waqif* is entitled to grant himself the authority of administering the *waqf*, either alone or along with another person, for life or for a fixed period. He is also entitled to give this authority to someone else.

According to *Fath al-Bari*, Malik has stated: It is not valid for a *waqif* to grant himself the *wilayah*, for then it may become a *waqf* in one's own favour, or the passage of time may lead to the fact of its being a *waqf* being forgotten, or the *waqif* may become insolvent and apply it for his own benefit, or he may die and his heirs may apply it for their own benefit. But if there is no fear of any of these conditions arising, it does not matter if he keeps its administration in his own hands.

The schools differ where the *waqif* does not grant anyone this authority to himself or someone else. The Hanbalis and the Malikis observe: The authority of managing the *waqf* will rest with the beneficiaries provided they are known and limited, otherwise the *hakim* will exercise it (*al-Tanqih* and *Sharh al-Zarqani*).

The Hanafis state: The *wilayah* will remain with the *waqif* even if he does not explicitly mention it (*Fath al-Qadir*).

The Shafi'is differ among themselves, holding three opinions. The first opinion is that the *wilayah* will rest with the *waqif*, the second that it will rest with the beneficiaries, and the third that it will be exercised by the *hakim* (*al-Muhadhdhab*).

The preponderant view among the Imamiyyah is that when the *waqif* does not name the *mutawalli* the *wilayah* belongs to the *hakim*, which he may exercise personally or appoint someone to it. Al-Sayyid Kazim, in *al-Mulhaqat*, and al-Sayyid al-Isfahani, in *al-Wasilah*, observe: This is correct in respect of public *waqf*s, but as to private *waqf*s it is for the beneficiaries to safeguard, improve, rent the *waqf* and realize its income without the *hakim's* permission, and this has been the practice.

The Imamiyyah say: If the *waqif* retains the *wilayah* over the *waqf* for himself and is not trustworthy, or gives it to a person of known impiety (*fisq*), the *hakim* is not empowered to annul the *wilayah* of either the *waqif* or the person appointed by him. This is mentioned in al-'Allamah al-Hilli's *al-Tadhkirah*. Rather the author of al-*Mulhaqat* observes: If the *waqif* provides that the *hakim* should have no say in the affairs of his *waqf*, it is valid, and if the person appointed by the *hakim* to administer the *waqf* dies, this power will rest with the beneficiaries or *'adil* individuals from among Muslims.

The Hanafi author of *Fath al-Qadir* (vol.5, p.61) states: If the *waqif* retains the *wilayah* with himself, in the event of his being untrustworthy the *qadi* is bound to abrogate his authority. Similarly, if he provides

that the ruler and the *qadi* are not empowered to abrogate his authority and hand it over to another, the condition is void because it opposes the rule of the Shari'ah.

I do not know how this view could be reconciled with what Abu Zuhrah has narrated in *Kitab al-waqf*, p. 372, from *al-Bahr*, that a *qadi* is not to be removed on grounds of impiety; for in such a circumstance the *mutawalli* is better entitled to remain, because the administration of justice is a more elevated and sensitive job.

When the *waqif* or *hakim* has appointed a *mutawalli*, no one has any authority over him as long as he is fulfilling his *wajib* duty. But if he falls short of his duty or breaches the trust reposed in him, so that his remaining would be harmful, the *hakim* is empowered to replace him, though it is better that he appoint, as observed by the Hanbalis, a trustworthy and energetic person alongside the former.

If the person appointed by the *waqif* dies, or becomes insane, or is affected by any other disability which renders him incapable, the *wilayah* will not return to the *waqif* unless he had so stipulated at the time of executing the *waqf* contract.

The Malikis permit its return to the *waqif*, and he is also empowered to remove the *mutawalli* at his pleasure.

The Imamiyyah and the Hanbalis state: If the *wilayah* is granted to two persons, they will act independently if so stipulated by the *waqif*, and if one of them dies or becomes incapable of performing his duty, the other will singly perform the task. But if the *waqif* provides that they act jointly and not individually, it is not valid for any one of them to act individually. Where there is no explicit provision in this regard, the *waqif* will be understood to have meant that they should not act individually, and hence the *hakim* will appoint another person and make him join the existing one (*al-Mulhaqat* and *al-Tanqih*).

It has been narrated in *Fath al-Qadir* from Qadi Khan al-Hanafi: Where the *waqif* grants the *wilayah* to two persons, if one of them provides in his will that his companion is entitled to exercise his *wilayah* over the *waqf*, after he dies it becomes valid for the person alive to exercise *wilayah* over the whole *waqf*.

The author of al-*Mulhaqat* observes: If the *waqif* provides a part of the benefits of the *waqf* for the *mutawalli*, the same will hold good irrespective of whether it is a large or a small amount, and if nothing is provided, he will be entitled to the compensation for a comparable job (*ujrat al-mithl*). This is in concurrence with what *Madkur* narrates in *Kitab al-waqf* regarding the Egyptian law.

The schools concur that the *mutawalli* appointed by the *waqif* or the *hakim* is entitled to appoint an agent for the achievement of any purpose of the *waqf*, irrespective of whether the appointing authority explicitly provides for it or not, except where it insists on his performing it personally.

The schools also concur that the *mutawalli* is not empowered to transfer the *wilayah* after him to another person where the original *wali* prohibits it. Similarly, they concur upon the validity of his delegating the

wilayah to someone else where he has been authorized to do so. But where the *wali* has made no mention of this issue, either affirmatively or negatively, the Hanafis hold that he is entitled to do so, while the Imami, Hanbali, Shafi'i and Maliki schools consider that he is not so entitled, and if he does delegate it, his act is null and void.

The Children of 'Ulama' and Awqaf

There exist in our times *'ulama'* whose greed for mundane things equals Imam 'Ali's love for his faith. Hence, they give the *wilayah* over the *waqf* in their hands to their children and then to their grandchildren and so on till the day of resurrection. They hide their intention by using the words "...the most capable in order of capability from this lineage."

I do not intend to criticize this innovation – or tradition – by quoting verses and traditions. But I will raise some questions here. Is the intention of such an *'alim*, while transferring this authority to his progeny, the betterment of the *waqf* and society, or is it only for securing the private advantage of his descendants? Does the motivation of this idea come from moral sense, continence, piety and self-denial for the cause of the faith, or is it motivated by a wish to provide some booty for his descendants by selling and exploiting one's religion? Does such a person have knowledge of the future through which he knows that the most capable among his descendants would be better for the cause of Islam and Muslims than the most capable individual from someone else's descent?

Consequently, why doesn't this *'alim* take a lesson from the rift he has observed and witnessed between the children of the *'ulama'* and the people of the place where the *waqf* exists, as well as between the children themselves in determining 'the most capable', and their eventually concurring over the distribution of *waqf* as if it were inherited property?

The Sale of Waqf

Do there actually exist causes which justify the sale of *waqf* property? What are these causes if they exist? And if such a sale is valid and takes place, what is the rule concerning the proceeds? May we replace it (the original *waqf* property) with something capable of fulfilling the objectives of the *waqf*, so that a new property takes the place of the old one and is governed by the rules applicable to it?

Al-Makasib and al-Jawahir

We will discuss the opinions of the different schools in detail and this discussion will make clear the replies to these as well as some other questions. I haven't come across anyone among the legists of the five schools who has dealt with this issue in such detail as the two Imami legists al-Shaykh al-Ansari, in *al-Makasib*, and al-Shaykh Muhammad Hasan, in *al-Jawahir*, 'bab al-tijarah'. The two have examined the issue from all the angles, together with its numerous sub-issues, and have sifted the various opinions expressed in this regard. We will present a summary of the important issues dealt with in these

two incomparable books on which we have relied more than any other work in presenting the Imami viewpoint.

In this regard it may be pointed out that al-Shaykh al-Ansari and the author of *al-Jawahir*, in what they have left of their works, do not save the reader from toil and effort; rather, they require from him application, patience, intelligence and a substantial educational background. Without these it is not possible to follow these two authors or even to trace the path they have taken. Rather, they leave him lost and unable to find safe passage.

But one who has a firm educational base is bestowed upon by them the most precious of gems (*jawahir*) and the most profitable of earnings (*makasib*), provided he possesses patience and persistence. I am not aware of any other Imami legist from among the earlier or later generations who has bestowed Ja'fari *fiqh* and its principles life and originality to the extent given to it by the mighty pen of these two.

I apologize for this digression which I was compelled to make by my sense of gratitude as a pupil of these two great figures, or more correctly of their works.

The Present Question

Numerous views have been expressed in this regard and the clash of opinions visible here is not to be seen in any other issue of *fiqh*, or at least in the chapter on *waqf*. The author of *al-Jawahir* has dealt with the medley of conflicting opinions and we mention here a collection of his observations:

The legists differ regarding the sale of *waqf* in a manner the like of which we do not generally encounter in any other issue of *waqf*. Some of them absolutely prohibit the sale of *waqf,* some others allow it under certain circumstances, while a group among them refrains from giving any opinion. Rather, the number of opinions expressed is so large that each legist has his own specific view, and there are instances where a single legist has expressed contradictory views in the same book; for example, the view expressed by him in the chapter on sale contradicts his opinion in the chapter on *waqf*. Sometimes contradictory ideas have been expressed in a single argument, so that that which is observed in the beginning differs from the observations at the time of conclusion. The author of *al-Jawahir* has recorded twelve different opinions and the reader will learn about the most important among them from the issues discussed below.

Mosques

The rule applicable to a mosque, in all the schools of Islamic law, differs from the rules applicable to other forms of *waqf* in a number of ways. Hence all the schools, except the Hanbali, concur that it is not permissible to sell a mosque irrespective of what the circumstances may be, even if it lies in ruins or the people of the village or locality where it is located have migrated and the road to it is cut in such a manner that it is certain that not a single person will pray in it. Despite all this, it is *wajib* that it remain in the same state without any change. The reason given for this is that the *waqf* of a mosque severs all

links between it and the *waqif* as well as everyone else except God Almighty, and, therefore, it is at times termed *fakk al-milk* (release from ownership) and at times *tahrir al-milk* (liberation from ownership). That is, earlier it was confined, while now it has become free from all constraints. Now when it is not anyone's property, how can its sale be valid when it is known that sale cannot take place without ownership?

Consequently, if a usurper utilizes a mosque by residing in it or cultivating it (when it is a piece of land), though he be considered a sinner, he is not liable for any damages, because it is not owned by anyone.

It is noteworthy that its ceasing to be anyone's property precludes its ownership through sale or purchase, but this prohibition does not apply if its ownership is acquired through *al-hiyazah* (acquisition), like all other forms of natural bounties (*al-mubahat al-'ammah*).

The Hanbalis say: If the residents of a village migrate from the locale of the mosque and it stands in a place where no one prays in it, or if it is too small for the number of people praying in it and its extension or building a part of it is also not feasible without selling a part of it, its sale is valid, and if it is not possible to draw any benefit from it except through sale, it may be sold (*al-Mughni*, vol.5, 'bab al-waqf').

The opinion of the Hanbalis is similar in some aspects to the view expressed by the Imami legist al-Sayyid Kazim, who observes in *Mulhaqat al-'Urwah* that there is no difference between the *waqf* of a mosque and its other forms.

Thus dilapidation, which justifies the sale of other forms of *waqf* property, will also justify the sale of a mosque. As to the 'release from ownership', it does not hinder its sale in his view so long as the property has value. The correct view, in our opinion is that it is not valid to own a mosque through a contract of sale, though it is valid to do so through *al-hiyazah*.

That which gives strength to the view expressed by this great legist, that there is no difference (between the various kinds of *waqf*), is that those who permit the sale of a *waqf* which is not a mosque if it is in a dilapidated condition, do so because in a dilapidated state the structure is either unable to fulfill the purpose for which it was endowed or loses the quality made by the *waqif* as the subject of the *waqf* (such as where he endows an orchard because it is an orchard and not because it is a piece of land). This logic applies exactly in the case of a mosque as well, because the condition that it should be used as a place of prayer was what caused it to be made a *waqf*. Now when this condition is not being fulfilled, the property ceases in its use as a mosque. In such a situation, the rule applicable to a non-mosque *waqf* will also be applied here. In that it can be owned through any of the forms of acquisition of ownership, even if it be through *al-hiyazah*.

Properties Belonging to Mosques

Generally mosques have assets in the form of *waqf*s of shops, houses, trees or land, whose profits are utilized for the repairs and carpeting of mosques and for paying its attendants. Obviously, these forms of

property do not enjoy the sanctity of a mosque and its merit as a place of worship, because there is a difference between a thing and the properties subject to it.

The two also differ with respect to the rules applicable to their sale. Therefore those who prohibit the sale of a mosque allow the sale of a mosque's assets because there is no causal *shar'i* or non-*shar'i* relationship between them, considering that a mosque is used for worship, a purely spiritual activity, while the waqf of a shop (owned by a mosque) is destined for material benefit. Hence a mosque belongs to the category of public *waqf*s – or rather it is one of the most prominent of its forms – while the properties owned by it are private *waqf*s belonging specifically to it. Consequently, it is doubtlessly valid to sell *waqf* properties belonging to mosques, cemeteries and schools, even if we accept the invalidity of the sale of a school or a graveyard.

But is it valid to sell the properties subject to a *waqf* unconditionally, even if there is no justifying cause – such as its being in a dilapidated condition or dwindling returns – or is it necessary that there exist a justifying cause so as to be treated exactly like a *waqf* in favour of one's descendants and other forms of private *waqf*?

These properties are of two types. The first type is one where the *mutawalli* buys the property from the proceeds of the *waqf*, such as where a mosque has an orchard which the *mutawalli* rents out, or buys or builds a shop from its proceeds for the *waqf*'s benefit, or obtains a shop from charitable donations received. In such a situation, both sale and exchange are valid if beneficial, irrespective of whether there exists any justifying cause mentioned by the legists, because, these properties are not *waqf* but only the proceeds or assets belonging to the *waqf*. Hence the *mutawalli* is free to deal with them in the interest of the *waqf*, exactly like he deals with the fruits of an orchard endowed for the benefit of a mosque,[13] except where the religious judge (*hakim al-shar'*) supervises the creation of the *waqf* of a real estate bought by the *mutawalli* in which case the real estate will not be sold unless there exists a cause justifying its sale. But where the *mutawalli* creates a *waqf*, it has no effect without the *hakim's* permission, because the *mutawalli* is appointed for managing the *waqf* and its utilization, not for creating *waqfs*.

The second type of property is one where the benefactors endow it as a *waqf* for the benefit of a mosque or school (as when a person provides in his will that his house, shop or land be made a *waqf* for the benefit of a mosque or school, or he himself makes a *waqf* of it). This kind of property is considered a private *waqf* and its sale is valid if the justifying causes, such as dilapidation or dwindling returns amounting to almost nothing, exist. But if they do not exist, it is not valid. I haven't come across in any work of the four Sunni schools in my possession anyone making this distinction.

This is what I have inferred from what al-Shaykh al-Ansari mentions in *al-Makasib* while discussing the rule applicable to a mosque's mat. He says: "A difference has been made between what is 'free' property (e.g. a mat purchased from the income of a mosque: in this case it is valid for a *mutawalli* to sell it if it is beneficial, if it has fallen into disuse or even if it is still new and unused) and between what is part of a

waqf in favour of the mosque (e.g. a mat which a person buys and puts in the mosque, or the cloth used to cover the Ka'bah; the like of these are the public property of Muslims and it is not valid for them to alter their condition except in cases where the sale of *waqf* is valid)."

Thus when it is valid for a *mutawalli* to sell a new mat of the mosque which he has purchased from its funds, it is without doubt valid for him to sell other such items. and that which indicates an absence of difference (between a mat and something else) is the Shaykh's own observation soon after the above quotation. There he states: "The rule applicable to baths and shops which have been built for income through letting them and the like, is different from the rule applicable to mosques, cemeteries and shrines."

Exactly similar is the following view of al-Na'ini mentioned in al-Khwansari's *Taqrirat:* "Where a mosque is ruined or forsaken, in a manner that it is no longer in need of the income from its *waqf*s and other sources, the income from *waqfs* pertaining to it will be spent in worthy causes, though it is better that it be spent on another mosque." Similarly, if the *waqf* is in favour of a certain school or hospital which lies in ruins, its income will be used for charitable purposes or for another institution of its kind.

Waqfs which are not Mosques

We have referred to the opinions held by the different school concerning mosques, and pointed out that the Imami, Shafi'i, Hanafi and Maliki schools are opposed therein to the Hanbalis. But concerning *waqf*s other than mosques, the Imamiyyah have their own specific stand regarding their sale. We will first mention the views of the four Sunni schools and then deal separately with the opinion of the Imamiyyah.

Since the Hanbali have allowed the sale of a mosque on the existence of a justifying cause, it is more in order for them to allow the sale and exchange of a *waqf* which is not a mosque, provided a justifying cause exists.

As to the Shafi'is, they absolutely prohibit its sale and exchange even if it is a private *waqf* (e.g.in favour of one's progeny) and even if a thousand and one causes exist, though they allow the beneficiaries to use up the private *waqf* themselves in case of necessity (e.g. using a dried fruit tree as fuel, though its sale or replacement is not valid for them).

The Malikis, as mentioned in *Sharh al-Zarqani 'ala Abi Diya'*, permit the sale of a *waqf* in the following three situations. First, where the *waqif* stipulates its sale at the time of creation of *waqf*; here his condition will be followed. Second, where the *waqf* is a movable property and is considered unfit for its prescribed purpose; here it will be sold and the amount realized will be used to replace it. Third, an immovable property will be sold for the expansion of a mosque, road or cemetery. Apart from these its sale is not valid, even if it lies in ruins and is not being utilized for any purpose.

As to the Hanafi's, according to Abu Zuhrah in *Kitab al-waqf*, they allow the replacement of public and private *waqf*s of all kinds except mosques. They have mentioned the following three situations in this

regard:

1. That the *waqif* should have specified it at the time of creation of *waqf*.

2. The *waqf* should fall in a condition of disuse.

3. Where replacement is more profitable and there is an increase in its returns, and there exists no condition set by the *waqif* prohibiting its sale.

This was a brief account of the views of the four schools regarding a *waqf* which is not a mosque, and, as noticed, they, as against the Imamiyyah, do not differentiate between private and public *waqf*s – excepting mosques – from the point of view of their sale.

Public and Private Waqfs

The Imamiyyah divide *waqf*s into two categories and specify the rules applicable to each one of them as well as their consequences.

Private Waqf

It is a *waqf* which is the property of the beneficiaries, i.e. those who are entitled to utilize it and its profits. To this category belong *waqf*s in favour of one's progeny, *'ulama'*, or the needy, the *waqfs* of immovable property for the benefit of mosques, cemeteries, schools, etc. It is regarding this category that there is a difference of opinion between the legists as to whether its sale is valid when the justifying causes are present or if it is totally invalid even if a thousand and one causes exist.

Public Waqf

It is a *waqf* for the common benefit of people in general, not for a specific group or class among them. To this category belong schools, hospitals, mosques, shrines, cemeteries, bridges, caravansaries of the past, springs and trees dedicated for the use of passers–by, because they are not meant for any specific Muslim individual or group to the exclusion of other individuals or groups.

The Imamiyyah concur that these public *waqf*s cannot be sold or replaced in any situation even if they are in ruins or about to be destroyed and fall into disuse, because, according to them, or most of them, they are released from ownership, i.e. gone out of the ownership of the earlier owner without becoming anyone's property. Thus on becoming *waqf* such a property becomes exactly like the free gifts of nature, and it is obvious that there can be no sale except where there is ownership. This is in contrast to private *waqf*s which involve the transfer of ownership of the *waqif* to the beneficiaries in some particular manner. Hence (in the case of public *waqf*s), if the purpose of a *waqf* becomes totally impossible to achieve (such as a school which has no students and consequently no lessons can be held in it) it is valid to transform it into a public library or a conference hall.

We have already pointed out in the discussion on mosques that though they are precluded from being owned through sale, it is valid to own them through *al-hiyazah*. We also said that the author of *Mulhaqat al-'Urwah* has criticized the legists on the basis that there is no difference between public and private *waqfs* and that the reason justifying the sale of a private *waqf* also justifies the sale of a public *waqf*. He does not concede that a public *waqf* involves release and freedom from ownership, and there is no impediment to sale in his opinion even if it is accepted to be such, because, according to him, the factor justifying a thing's sale is that it should possess value.

However, we have some remarks to make about the opinion of the legists as well as that of the author of *al-Mulhaqat*. We reject the position of the legists on the ground that though the absence of ownership prevents ownership of a *waqf* through a contract of sale, it does not prevent its ownership through *al-hiyazah*.

Similarly, ownership by itself does not validate sale, because mortgaged property which is certainly owned (by the mortgagor), cannot validly be sold without the consent of the mortgagee.

We reject the position of the author of *al-Mulhaqat* because possession of value by itself is not sufficient, for the unowned gifts of nature, (such as the fishes in the water or the birds in the sky), though they possess value, cannot be sold (in that state). Therefore, as observed earlier, the only way of ownership is through *al-hiyazah*.

Cemeteries

We have already mentioned that cemeteries are public *waqf*s like mosques and that the Imamiyyah do not consider their sale valid in any situation, even if they are in ruins and their signs have been wiped out. I consider it useful to specifically discuss cemeteries in this chapter for the following two reasons.

1. The necessity of mentioning the rules in this regard because there are numerous Muslim cemeteries which have been forsaken and are used for other purposes.

2. Usually there is a difference between cemeteries and other forms of *waqf*s. This difference will become clear in the following discussion.

If we know about a cemetery that a person had donated his land for that purpose and it was used for burial, the rule applicable to public *waqf*s will apply to it, and it will be reckoned among *waqf*s whose sale is invalid even if its signs have disappeared and the bones of the buried have decayed.

But if we know that the cemetery was previously an unused land not owned by anyone and the people of the village used it as a cemetery – as is usually the case – then it is not a *waqf* ab initio, neither public nor private; rather it will remain the common property of all (*al-musha'*) and its *hiyazah* is valid for anyone who takes the initiative. But if a corpse is buried in a part of it, both the opening of the grave and using it in a desecrating manner are not valid. But anyone can personally utilize any part of this land by

either cultivating it or building upon it if it is without graves or there are old graves whose occupants' bones have decayed.

Using this land is valid for him, exactly like it is valid for him to use abandoned land or land whose original user has migrated and it has reverted to its previous state.

Where we are unaware of the history of a piece of land which is being used as a cemetery – i.e. as to whether it was an owned land which was endowed by the owner, so that it would be considered a *waqf* and governed by its rules, or if it was an ownerless land which the villagers later used for burying their dead – it will not be considered a *waqf* because the presumption is the absence of a *waqf* unless its existence is proved according to the Shari'ah.

Here one might say: A *waqf* is proved if it is popularly known to be such; therefore why cannot the *waqf* of a cemetery be similarly proved?

Our reply is that if it is popularly known that a certain cemetery is a *waqf* and it has been narrated generation after generation that a particular person had endowed it for a cemetery, we would definitely confirm it as a *waqf*. But if all that is widely held is that it is a cemetery, the sole knowledge of its being a cemetery is not sufficient to prove that it is a *waqf*. It could have been common land.

A Sub-Issue

If a person digs a grave for himself to be buried in it at the time of his death, it is valid for others to bury in it another corpse even if there is extra space in the cemetery. But it is better to leave it for him, refraining from troubling a believer.

Causes Justifying the Sale of Waqf Property

We have already mentioned that Imami legists concur that the sale of public *waqf*s, like mosques and cemeteries, etc., is not valid. But regarding private *waqf*s (e.g. the *waqf*s made in favour of one's progeny, scholars, or the needy) there is a difference of opinion between them where there exists a cause justifying their sale. The following causes justifying the sale of private *waqf*s have been mentioned by these legists.

1. Where there remains no benefit of any kind in the property from the viewpoint of the purpose for which it was endowed (e.g. a dried branch not yielding fruit, a torn mat fit only for being burnt, a slaughtered animal which can only be eaten), there is no doubt that this cause justifies sale.

2. Al-Sayyid Abu al-Hasan al-Isfahani observes in *Wasilat al-najat*: "The articles, carpets, cloth coverings of tombs, and similar items cannot be sold if they can be utilized in their present state. But if they are not required in the location any longer, and their being there would only damage and destroy them, they should be utilized in a similar alternative place, and if such a place does not exist or exists

but does not need them, they will be used for public benefit. But where no benefit can be derived from them except by selling them and their retention amounts to their damage and destruction, they will be sold and the proceeds used for the same place if it is in need of it. Otherwise, it will be used in any other similar place if possible or for public benefit.

3. If a *waqf* is in ruins (such as a dilapidated house or an orchard which is not productive) or its benefit is so little as to be reckoned nonexistent, if its repair is possible it will be repaired, even if it entails its being rented out for years; otherwise, its sale will become permissible, provided its proceeds are applied for replacing the former property as mentioned below.

4. If the *waqif* provides for the sale of *waqf* property in case of dispute between the beneficiaries, or dwindling profits, or any other reason which does not make a *haram halal* and vice versa, his desire will be carried out.

5. Where dispute occurs between the beneficiaries of a *waqf* threatening loss of life and property and there is no way of ending it except through its sale, the sale is permissible and the amount realized will be distributed among the beneficiaries.

This is what the legists say, though I do not know the basis of their opinion except what they have mentioned regarding the countering of a greater by a lesser harm. But it is obvious that it is not valid to remove harm from one person by shifting it to another, and the sale of the *waqf* entails loss to the succeeding generations of beneficiaries.

6. If it is possible to sell part of a dilapidated *waqf* property and repair the remaining part with the proceeds of the sale, such a sale is permissible.

7. If a mosque is ruined, its stones, beams, doors, etc. will neither be treated in accordance with the rules applicable to the mosque itself, nor the rules applicable to fixed property endowed for the benefit of a mosque which forbid its sale except on the presence of a justifying cause. Rather, the rules applicable to them will be those which apply to the income of the mosque and its *waqf*s (such as the rent of a shop belonging to or endowed in favour of the mosque). In this regard the *mutawalli* is free to utilize it in any manner beneficial for the mosque.

The Sale Proceeds of a Waqf

Where a *waqf* is sold on the presence of a justifying cause, how will the sale proceeds be used? Will they be distributed among the beneficiaries exactly like the income generated by the *waqf*, or is it necessary, if possible, to buy with these sale proceeds a similar property to replace the one sold?

Al-Shaykh al-Ansari, as well as many other *mujtahids* observe: The rule applicable to the sale proceeds is the rule applicable to the *waqf* sold, in that it is the property of the succeeding generations. Therefore, if the sale proceeds are in the form of immovable property, it will take the place of the *waqf* sold; if it is

cash, we will buy with it the most suitable replacement. The replacement does not require the reciting of a *sighah* for making it a *waqf*, because the fact that it is a replacement naturally implies that the latter is exactly like the former. Hence al-Shahid states in *Ghayat al-murad*: 'The replacement is owned on the basis of the ownership of the replaced property, and it is impossible that it be owned separately.'

Then al-Ansari observes in *al-Makasib*, at the conclusion of the discussion on the first cause validating the sale of a *waqf*: "If it is not possible to buy immovable property from the sale proceeds, the money will be kept in the custody of a trustworthy person awaiting a future opportunity. If deemed beneficial, it is also permissible to do business with it, though the profits will not be distributed among the beneficiaries, as is done in the case of the income generated from the *waqf*; rather the rule applicable here will be the rule applicable to the *waqf* itself because it is part of the property sold and not a true increase."

This is what al-Ansari has said and he, may God be pleased with him, is better aware of his true intent. But I do not perceive any difference between the profits of the sale proceeds of a *waqf* and the income generated from the *waqf* itself. Therefore, as the income of the *waqf* is distributed among the beneficiaries, it is appropriate that the profits (from the sale proceeds invested) be similarly distributed, though it may be said that the income from the *waqf's* immovable property does not belong to the class of the *waqf* property itself but is separate from it, whereas the profits from business are in the form of money which does not differ from it, and where there is a difference, the rule applicable will also differ. Whatever the case, if the mind is set to work, it finds a solution for every difficulty and doubt from a theoretical point of view. But, obviously, practice should be the criterion, and the tangible reality is that usage does not distinguish between the two situations, and therefore it should be resorted to.

Al-Shaykh al-Na'ini observes in al-Khwansari's *Taqrirat*: If another property is purchased from the sale proceeds of the first property, the latter will neither take the place of the former nor will it be considered a *waqf* similar to the former; rather it is exactly like the income generated from a *waqf* .and it is permissible to sell it without any justifying cause if the *mutawalli* considers its sale to be beneficial.

The correct opinion is the one mentioned by al-Ansari, al-Shahid and other researchers that there is no difference between the replacement and the property replaced.

Some Curious Waqfs

I did not intend to add anything about *waqf* after having finished discussing it and having mentioned the positions of the schools. But incidentally at the time when I had finished the chapter on *waqf* to go on to the chapter on *Hajr* (legal disability), I read a curious and interesting account regarding Egyptian *waqf*s during the eras of the Mamluks and earlier 'Uthmanis. I had received two magazines, the Lebanese *Lisan al-Hal* and the Egyptian *al-Akhbar* dated 7th July 1964, and I set aside my pen and started perusing them so to know about the current developments and to relieve myself of monotony.

By chance I happened to read in the magazine *al-Akhbar* that in the Directorate of *Waqf*, Egypt, is an

iron vault that had remained locked for hundreds of years. The Directorate decided to open it to find out its contents. When the doors of this vault were opened, thousands of deeds and agreements covered with dust and piled upon one another were found. Twenty persons were appointed to study them. When they started this work they came across curious and amazing things: 300 deeds written with gold water, a deed executed a thousand years ago, and so on. It made an interesting and enjoyable reading either because it was actually so or due to my immersion in related research and writing. I mention a part of these contents hoping that the reader too would also enjoy reading them:

An immovable property was endowed for providing grass for the mule ridden by the Shaykh of al-Azhar at that time.

A woman created a *waqf* of 3000 feddans (1 Egyptian feddan = 4200.833 sq. metre) for the benefit of the *'ulama'* who followed Abu Hanifah.

Some *pasha* endowed 10,000 feddans for covering the graves of his relatives with branches of palm and myrtle.

A person endowed parts of his wealth for the water-carriers of the city mosque.

Another created a *waqf* for the reciter of the Friday sermon.

A lady created a *waqf* for providing ropes for pails used for supplying water to a mosque.

A *waqf* for providing caftans and outer garments for old persons.

A *waqf* for incensing study sessions.

I remember having read in the past about a *waqf* in Syria whose income is used to buy new plates to replace those broken by maid-servants to save them from the censure of their mistresses.

I have heard that in Homs there is a *waqf* for those who sight the new moon of the *'Id* of Ramadan. For this reason there is a multitude of claims of having sighted it in that region. There are also present *waqf*s in some villages of Jabal 'Amil for providing shrouds for the dead.

These *waqf*s, if they reveal anything, show the thinking prevailing at that time, the mode of living and habits of the society in which the *waqif* lived, and that there were a large number of families who could not even provide their dead with a shroud.

1. The difference between waqf and habs is that in the former the ownership of the waqif is completely ended, and this prevents the property from being inherited or disposed of in any other manner. In the latter case, the ownership of the habis is preserved, and the habs property may be inherited, sold, etc. This difference was not noticed by al-Shaykh Abu Zuhrah and he, as will be noticed, has ascribed to the Imamiyyah that which they do not hold.
2. This issue of perpetuity in waqf is intimately linked with the question concerning ownership of waqf property, which has been discussed separately in this chapter.
3. Abu Zuhrah has rejected this view (p.50), on the basis that the concept of the ownership of God is meaningless in this

context, for God Almighty owns everything. But it will be noticed that the meaning of God's owning the waqf is not that it becomes a free natural bounty (like air and water); rather His ownership of it is like His ownership of khums al-ghanimah, as mentioned the Qur'anic verse:

وَاعْلَمُوا أَنَّمَا غَنِمْتُمْ مِنْ شَيْءٍ فَأَنَّ لِلَّهِ خُمُسَهُ
And know that whatever you acquire as ghanimah, a fifth of it is for God... (8:41)

4. As to those who say that waqf may be created only by using specific words, the gist of their argument is based on the presumption of the continuity of the ownership of the property by the owner. That is, the property was the owner's before the execution of the contract; following it, we will come to entertain a doubt (due to his failure to make his intent explicit through specific words) regarding the transfer of its ownership from him. Accordingly, we will presume the existing situation - which is the continuity of the owner's ownership - to continue.

It will be noticed that this argument holds where there is doubt as to whether the owner intended the creation of a waqf or not, or where despite the knowledge of his intention of creating a waqf there is doubt as to whether he has executed the contract and created the cause for its existence. But where we have knowledge of both his intention to create a waqf as well as his having fulfilled what is required to prove its existence, there remains no ground for doubt. Now, if a doubt arises, it will be considered a mere fancy and will have no effect, unless the doubt concerns the validity of the form of recital (al-sighah) as the cause creating the waqf and its effect from the point of view of the Shari'ah.

5. The distinction has been accepted by a group of leading Imami scholars, such as the author of al-Shara'i, al-Shahidayn (al-Shahid al-Awwal and al-Shahid al-Thani), al-'Allamah al-Hilli, and others. According to it, a private waqf is a contract ('aqd) and requires both an offer and an acceptance, and there is no legal and logical obstacle in a waqf being (bilateral) contract ('aqd) in certain circumstances and a (unilateral) declaration (iqa') in others, although the author of al-Jawahir has opposed it.
6. There is no proof based on the Qur'an, Sunnah or 'aql (reason) concerning the invalidity of contingency (ta'liq) in 'aqd and iqa', and those who have considered it void have done so on the basis of ijma'. But it is obvious that ijma' is authority only when we cannot identify the basis on which it is based; but if its basis is known, its authority will disappear, and the basis on which the mujtami'un (those who take part in the ijma') have relied will itself be weighed to ascertain its authority. In this case the mujtami'un have relied on the assumption that the meaning of insha' implies its immediate presence, and the meaning of being contingent on a future event is that the insha' is not present, and this entails the presence and absence of insha' at the same time.
This argument stands refuted on the ground that insha' is present in actuality and is not contingent upon anything; only its effects will take place in the future on the realization of the contingency, exactly like a will, which becomes operational on death, and a vow that is contingent upon the fulfillment of a condition.
7. The schools differ concerning the disability of an idiot, as to whether it begins at the commencement of idiocy when the qadi has not yet made a declaration of his disability or if it begins after the declaration has been made. We will discuss it in detail in the chapter on wardship ('bab al-hajr').
8. By 'Fath al-Qadir' we mean the book which has become popular by this name, although we know it to be a collection of four books, one of which is Fath al-Qadir.
9. Al-Sayyid Kazim observes in al-Mulhaqat: If a person has a share in a house, he can make a waqf of it for a mosque, and those who come for prayers will take the permission of the other owners. I don't understand what benefit lies in such a waqf.
10. For ascertaining the religious beliefs of a group, there is nothing more authentic than its religious texts – especially those on fiqh and law. Al-Shahid al-Thani, one of the greatest juristic authorities of the Imami Shi'is, has stated explicitly that the followers of other religions are better than the Ghulat and that they are honoured creatures of God. In view of this, is it possible to ascribe ghuluww to the Imamiyyah?
11. Nadhir means one who takes a vow (nadhr); halif means one who takes an oath (half); musi means one who makes a will (wasiyyah); and muqirr means one who makes a confession. (Trans.)
12. Of such pithy expressions common among the theological students of Najaf are: bi-shart shay', bi shart la and la bi-

shart. They mean by bi-shart shay', 'on condition that; laying down a positive condition, such as when one says: "I will give it to you if you do such and such a thing." Bi-shart la implies stipulation of a negative condition, such as when one says: "I will give it to you if you don't do such a thing."

La bi-shart means regardless of any positive or negative conditions that may be involved (as when one says: "I will give it to you," without mentioning any positive or negative condition). It is obvious that la bi-shart includes both bi-shart shay' and bi-shart la.

13. The difference between property purchased from the income of the waqf and property purchased from the sale proceeds of a dilapidated waqf is noteworthy. In the former case, the property purchased will take the place of the waqf sold, while the property purchased from the waqf's income will not take the position of a waqf.

Hajr (Legal Disability)

Hajr literally means *man'* (to prohibit, refuse, prevent, deprive, detain), and this meaning is also evident from the Qur'anic verse:

وَيَقُولُونَ حِجْراً مَحْجُوراً

(***Upon the day that they see the angels, no good tidings that day for sinners: they--i.e. the angels--shall say***), ***'A ban forbidden.'*** (***25:22***)

Legally it implies prohibiting the dispositions of a person with respect to all or some of his property. The causes of disability, which we will discuss here, are four: (1) insanity (*al-junun*); (2) minority (*al-sighar*); (3) idiocy (*al-safah*), (4) insolvency (*al-'iflas*).1

1. Insanity

In accordance with explicit traditions as well as consensus, an insane person is prohibited from all dispositions, irrespective of whether his insanity is permanent or recurring. But if a person suffering from recurring insanity manages his property during the period he is free from it, his dispositions are binding. Further, where it is uncertain whether a particular disposition belongs to the period of sanity, it will not become binding. Because sanity is a condition for the validity of an agreement and an uncertainty regarding it amounts to an uncertainty concerning the existence of the contract itself, not its validity, consequently its very basis is negated. In other words, where there is uncertainty about the validity of a contract due to uncertainty concerning the presence of sanity at the time of its conclusion, we will presume that the situation before the contract continues to exist and will leave it at that.

The rule applicable to an insane person is also applied to a person in a state of unconsciousness and intoxication.

If an insane person cohabits with a woman and she becomes pregnant, the child will be considered his, exactly like in the case of 'intercourse by mistake.'

2. Minority

A minor is considered legally incapable by consensus, and there is a difference of opinion regarding some dispositions of a child of discerning age, as will be mentioned later. When a minor matures mentally and attains puberty he becomes an adult and all his dispositions become enforceable.

The Imami and the Shafi'i schools observe: When a child reaches the age of ten, his will shall be considered valid in regard to matters of charity and benevolence. More than one Imami legist, relying on some traditions, has said: His divorce is also valid.

The reader may refer to the chapter on marriage, the section entitled "Capacity to enter into a Marriage Contract," regarding the age of puberty and its signs.

Liability (al-Daman)

If an insane person or a child destroys another person's property without his permission, they are considered liable, because liability pertains to *al-'ahkam al-wad'iyyah* in which mental maturity and puberty are not considered as conditions.[2] Therefore, if they have any property that is being administered by their guardian, compensation will be claimed from this property; otherwise, the person entitled to the compensation will wait until the insane person regains sanity and the child attains puberty and then claim from them his dues.

A Discerning Child

A discerning child (*mumayyiz*) is one who can in general distinguish between that which is harmful and beneficial, and who understands the difference between contracts of sale and rent and between a profitable bargain and one entailing loss.

The Hanafis say: The dispositions of a discerning child without his guardian's permission are valid provided they involve sheer benefit, e.g. the acceptance of gifts, bequests and *waqf*s without giving anything in return. But the dispositions in which the possibility of profit and loss exists - such as transactions of sale, mortgage, rent and bailment - are not valid except by the permission of the guardian.

As to a non-discerning child, none of his dispositions are valid, irrespective of the permission of the guardian, and regardless of the thing involved being of petty or considerable worth.

The Hanbalis observe: A discerning child's dispositions are valid with the permission of the guardian; so are those of a non-discerning child, even without the guardian's permission, if the thing involved is of

petty worth, e.g. where he buys from a confectioner what children usually purchase, or buys a bird from someone in order to set it free. (*al-Tanqih* and *al-Tadhkirah*)

The Imami and the Shafi'i schools state: A transaction by a child whether discerning or not, is altogether illegal, irrespective of whether he acts as an agent or for himself, irrespective of whether he gives or takes delivery, even if the object transacted is trivial and insignificant, and whether it involves a vow (*nadhr*) or a confession (*iqrar*). Al-Shaykh al-Ansari observes in *al-Makasib*: "The basis for invalidating a child's transaction is a narrated consensus (*al-'ijma' al-mahki*) strengthened by an unusual preponderance (*al-shuhrat al-'azimah*). The criterion is to act in accordance with the preponderance."

The Imami legists have mentioned in this regard a number of subtle sub-issues which al-'Allamah al-Hilli has recorded in *al-Tadhkirah*. Among these are the following:

1. If one owes something to a person, and he tells one: "Give what you owe me to my son." when his son is legally incapable, and one does so on the basis of the father's behest, and by chance the child loses it, in such a situation one's liability concerning the debt does not cease and the creditor is still entitled to demand it from one, although it was he who asked one to deliver it to his son. Similarly, the child will not be responsible for the thing he has lost, and one is neither entitled to claim it from his guardian nor from him on his attaining majority.

As to one's remaining liable for the debt, this is because the debt is not cleared unless it is validly delivered, and it is presumed that neither the creditor nor his authorized representative has taken delivery. As to the delivery taken by the child, its occurrence and non-occurrence are equal, presuming his incapacity for taking and giving delivery. As to the father's permission to deliver to the child, it is exactly like someone telling one: "Throw what you owe me into the sea," and one does as he tells one. Here, one's liability for the debt is not cast off.

The reason for not considering the child liable for the thing delivered to him is that it is the deliverer who has destroyed it by improperly using his discretion and giving it to someone whose possession has no effect, even if it is by the permission and order of the child's guardian.

2. Where one has in one's possession something belonging to a child and his guardian tells one to give it to him, and one gives it to the child who destroys it, one will be liable for it because one is not entitled to act negligently regarding the property of someone legally incapable even if his guardian permits it.

3. If a child gives one a *dinar* to see whether it is genuine or counterfeit, or gives one an article for pricing it or selling it or for some other purpose, it is not valid for one, after it has come into one's hands, to return it to him; rather one must return it to his guardian.

4. If two children buy and sell between themselves and each takes delivery from the other and then both destroy what they have received, their guardians will be liable if they had permitted the transaction; if not, the liability will be borne from the property of each child.

This is what the Imami legists have observed, but what we consider appropriate is this: If we know doubtlessly that a particular disposition of a discerning child is cent per cent to his benefit, it is obligatory for his guardian to accept it and he cannot annul it, especially if his annulling it entails a loss for the child.

As to the general proofs which indicate that a child's disposition is void, they either do not include this situation or it is exempted from these general proofs. This is so because we are sure that the purpose of the Shari'ah is benefit, and when we are certain that it exists, we are bound to accept it exactly like our acceptance of a self-evident notion or a valid syllogism. And this is not *ijtihad* contradicting *nass* (an explicit Qur'anic verse or tradition); rather, it amounts to acting in accordance with *nass* for the knowledge of the aim of the Shari'ah is exactly like the knowledge of a *nass*, if not a *nass* itself.

If we were to accept the view of the Imami and the Shafi'i schools, a prize – for instance, a watch - given by the school to the best student would be something out of place, and if a child under the age of majority were to receive it he would not own it. This is something unnatural and goes against the practice of rational beings, creeds and religions.

A Child's Intentional Act is a Mistake

If a child kills a person or injures him or severs any part of his body, he will not be subject to retribution. He will be dealt exactly like an insane person, because he is not capable of being punished, neither in this world nor in the Hereafter. A tradition states:

عمد الصبي خطأ

A child's intentional act is a mistake.
There- no difference of opinion among the schools concerning this. As to the compensation given to the victim, it will be borne by the paternal relatives (*al-'aqilah*).

In some circumstances where beating a child is permissible, it is only for reforming him, not as retribution (*qisas*) or punishment (*ta'zir*).

3. Idiocy (al-Safah)

An 'idot' differs from a child due to majority and from an insane person on account of sanity. Thus idiocy as such is accompanied with the capacity to comprehend and distinguish. An 'idiot' is one who cannot manage and expend his property properly, irrespective of whether he has all the qualities necessary for its proper management but is negligent and does not apply them, or lacks these qualities. In short, he is negligent and extravagant, in that he repeatedly performs acts of negligence and extravagance. The acts of extravagance may be such as donation by him of all or a major part of his wealth, or building a mosque, school or hospital which a person of his social and monetary status would not build, so that it is

detrimental to his own interests and those of his dependants, and the people view him as having strayed from the practice of rational persons in the management of property.

Declaration of Legal Disability (al-Tahjir)

The schools – with the exception of Abu Hanifah – concur that the idiot's legal disability is confined to his financial dispositions, and excepting where his guardian permits him, his position in this regard is that of a child and an insane person. He is totally free regarding his other activities that are not closely or remotely connected with property. An idiot's disability continues until he attains mental maturity, in accordance with the following verse:

وَلاَ تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمْ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَاماً وَارْزُقُوهُمْ فِيهَا وَاكْسُوهُمْ وَقُولُوا لَهُمْ قَوْلاً مَعْرُوفًا وَابْتَلُوا الْيَتَامَى حَتَّى إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْداً فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ

And do not give to fools your property which Allah has assigned to you to manage; provide for them and clothe them out of it, and speak to them words of honest advice. And test the orphans until they reach the age of marrying; then if you find in them mental maturity, deliver to them their property; (***4:5-6***)[3]

This is the view of the Imami, Shafi'i, Maliki and the Hanbali schools, as well as that of Abu Yusuf and Muhammad, the two disciples of Abu Hanifah.

Abu Hanifah observes: Mental maturity is neither a condition for delivering property to its owners nor for the validity of their monetary dispositions. Thus if a person attains puberty in a state of mental maturity and then becomes an idiot, his dispositions are valid and it is not valid to consider him legally incapable even if his age is less than 25 years. Similarly, one who attains puberty in a state of idiocy so that his childhood and idiocy are concomitant, he will not be considered legally incapable in any manner after attaining maturity at 25 years (*Fath al-Qadir* and Ibn 'Abidin).

This contradicts the explicit *ijma'* of the entire ummah, or rather it contradicts the obvious teaching of the faith as well as the unambiguous text of the Qur'an:

وَلاَ تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمْ

The Judge's Order

Imami legal authorities state: The criterion for considering the dispositions of an idiot as void is appearance of idiocy, not the order of a judge declaring him legally incapable. Thus every disposition of his during the state of idiocy is void, irrespective of whether a judge declares him incapable or not, and regardless of whether his idiocy continues from childhood or occurs after puberty. Hence, if an idiot

acquires mental maturity, his disability will be removed, returning only on the return of idiocy and disappearing with its disappearance (al-Sayyid al-Isfahani, *Wasilat al-najat*). This opinion is very close to the one expressed by the Shafi'i school.

The Hanafi and the Hanbali schools observe: An idiot will not be considered legally incapable without the judge's declaration. Therefore, the dispositions prior to the declaration of his legal disability are valid even if they were improper: after the declaration his dispositions are not enforceable even if appropriate.

This opinion cannot be substantiated unless we accept that the declaration of the judge alters the actual fact. This view is confined to the Hanafis only. As to the Shafi'i, Maliki and the Hanbali schools, they concur with the Imamiyyah in holding that the judge's order has no bearing, close or remote, on the actual fact, because it is only a means and not an end in itself. We have dealt with this issue in detail in our book *Usul al-ithbat*.

The Malikis say: When a person, man or woman, comes to be characterized with idiocy he becomes liable to be declared legally incapable. But if idiocy occurs after a short period, say a year after his attaining puberty, the right to declare his legal incapacity lies with his father, because the time of its occurrence is close to the period of his attaining puberty. But if it occurs after a period exceeding a year after puberty, his disability can be only declared by a judge (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 2, 'bab al-hajr').

The Malikis also observe: A woman, even if she becomes mentally mature, is not entitled to dispose her property unless she has married and the marriage has been consummated. After the consummation of marriage, her right to donate is limited to one-third of the property, and for the remainder she requires the permission of the husband until her old age (al-Zarqani).

But all the other schools do not differentiate between the sexes, in accordance with the general import of the Qur'anic verse (4:6):

وَلاَ تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمْ

The Idiot's Confession, Oath and Vow

If an idiot is permitted to dispose his property and he does so, the schools concur that it is valid. As to non-financial acts, such as his acknowledgement of lineage (*nasab*) or his taking an oath or a vow to perform, or abstain from, a certain act that does not involve property, these acts are valid even if the guardian has not permitted them.

If he confesses to having committed theft, it will be accepted only for the purpose of amputation and not for financial liability, i.e. his confession will have effect vis-a-vis the right of God (*haqq Allah*) and not vis-a-vis the rights of other human beings (*haqq al-nas*),

The Hanafis state: His confession will be given credence in regard to those of his assets which have been realized after his disability and not from what he owned at its advent. Also, his will is valid to an extent of one-third in matters of charity and benevolence.

The Imamiyyah state: There is no difference between the former and the latter properties. Rather, they say, it is not valid for an idiot to hire himself for any work even if advantageous without his guardian's permission. They also observe: If a person deposits something with an idiot with the knowledge of his idiocy and the idiot personally destroys it, either voluntarily or by mistake, he will be liable. But if the deposited thing is not destroyed personally by the idiot but as a consequence of his negligence in preserving it, he will not be liable, because in this situation the depositor himself has been negligent and at fault. As to the liability of the idiot where he personally destroys the deposit, it has its basis in the dictum:

مَن أتلف مال غيره فهو له ضامن

'He who destroys another's property is liable for it.' (*Wasilat al-najat*)

The Idiot's Marriage and Divorce

The Shafi'i, Hanbali and Imami schools say: The idiot's marriage is not valid, and his divorce (*talaq* or *khul'*) is valid. But the Hanbalis allow his marriage where it is a necessity.

The Hanafis observe: His marriage, divorce, and freeing a slave are valid, because these three are valid even when performed in jest, and with greater reason in a state of idiocy. But if he marries for more than *mahr al-mithl*, the *mahr* will be valid only to the extent of *mahr al-mithl*.

The Proof of Mental Maturity

The schools concur that mental maturity (*rushd*) is ascertainable through testing, in accordance with the words of God Almighty:

وَابْتَلُوا ...فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا

But the modes of testing are not specific, though the legists mention as examples such methods as handing over to a child the management of his property, or relying upon him to buy or sell for fulfilling some of his needs, and the like.

If he shows good sense in these activities, he will be considered mentally mature. As to a girl, she will be given domestic responsibilities to ascertain her mental maturity or the lack of it.

As per consensus, mental maturity in both the sexes is proved by the testimony of two male witnesses because the testimony of two male witnesses is a principle. The Imamiyyah say: It is also proved in the case of women by the testimony of a man and two women, or that of four women. But in the case of men, it is only proved by the testimony of men (*al-Tadhkirah*).

The Guardian

A Minor's Guardian

We have discussed the legal disability of the minor, the insane person and the idiot. It is obvious that every legally incapable person needs a guardian or an executor to attend to the things concerning which his disability has been declared, and to manage them as his representative. Now, who is this guardian or executor? It is worth pointing out at the outset that the discussion in this chapter is limited to guardianship over property. As to guardianship concerning marriage, it has already been discussed in the related chapter.

The schools concur that the guardian of a minor is his father; the mother has no right in this regard except in the opinion of some Shafi'i legists. The schools differ concerning the guardianship of others apart from the father. The Hanbali and the Maliki schools state: The right to guardianship after the father is enjoyed by the executor of his will, and if there is no executor, by the judge (*hakim al-shar'*). The paternal grandfather has no right to guardianship whatsoever, because, according to them, he does not take the father's place in anything. When this is the state of the paternal grandfather, such is the case of the maternal grandfather with greater reason.

The Hanafis say: After the father the guardianship will belong to his executor, then to the paternal grandfather, and then to his executor. If none are present it will belong to the judge.

The Shafi'is observe: It will lie with the paternal grandfather after the father, and after him with the father's executor, followed by the executor of the paternal grandfather, and then the judge.

The Imamiyyah state: The guardianship belongs to the father and the paternal grandfather simultaneously in a manner that each is entitled to act independently of the other, though the act of whoever precedes acquires legality, in view of that which is necessary. If both act simultaneously in a contrary fashion, the act of the paternal grandfather will prevail. If both are absent, the executor of any of them will be the guardian. The grandfather's executor's acts will prevail over those of the father's executor. When there is no father or paternal grandfather nor their executors, the guardianship will be exercised by the judge.

The Guardian of an Insane Person

An insane person is exactly like a minor in this regard, and the views of the schools are similar for both

the cases, irrespective of whether the child has attained puberty while continuing to be insane or has attained puberty in a state of mental maturity to become insane later. Only a group of Imami legists differ here by differentiating between insanity continuing from minority and that which occurs after puberty and mental maturity. They say: The father and the paternal grandfather have a right to guardianship over the former. As to the latter, the *hakim al-shar'* will act as his guardian despite the presence of both of them. This view is in consonance with *qiyas* (analogical reasoning) practised by the Hanafis, because the guardianship of both the father and the paternal grandfather had ended (on the child's attaining puberty and mental maturity), and that which ends does not return. But the Hanafis have acted here against *qiyas* and have opted for *istihsan*.

The Imami author of *al-Jawahir* says: It is in accordance with caution (*ihtiyat*) that the paternal grandfather, the father and the judge act in consonance, i.e. the property of an insane person between whose insanity and childhood there is a time gap, will be managed by mutual consultation among the three. Al-Sayyid al-Isfahani remarks in *al-Wasilah*: Caution will not be forsaken if they act by mutual consent.

In my opinion there is no doubt that caution is a good thing, but here it is only desirable and not obligatory, because the proofs establishing the guardianship of the father and the paternal grandfather do not differ in the two situations. Accordingly, the father and the paternal grandfather will always be preferred to the judge, because the applicability or inapplicability of a particular rule revolves around its subject, and the generality of the proofs proving the guardianship of the father and the paternal grandfather enjoy precedence over the generality of the proofs proving the judge's guardianship.

Apart from this, the sympathy of the judge or someone else cannot equal that of the father and the grandfather, and what rational person would approve the appointment by the judge of a stranger as a guardian over a legally incapable person whose father or paternal grandfather are present and fulfil all the necessary conditions and qualifications?

The Guardian of an Idiot

The Imami, Hanbali and Hanafi schools concur that if a child attains puberty in a state of mental maturity and then becomes an idiot, his guardianship will lie with the judge to the exclusion of the father and paternal grandfather, and, with greater reason, to the exclusion of the executors of their wills.

That which was observed concerning an insane person holds true here as well, that no rational person would approve that a judge appoint a stranger as guardian in the presence of the father and the paternal grandfather. Hence, as a measure of caution, it is better that the judge choose the father or the paternal grandfather as the guardian of their child. However, if the idiocy has continued from childhood and the subject has attained puberty in that state, the opinion of the three above-mentioned schools is similar to their opinion concerning a minor (*al-Mughni*, *al-Fiqh 'ala al-madhahib al-'arba'ah*, Abu Zuhrah and *al-Jawahir*). 4

The Shafi'is neither differentiate between the guardianship of a minor, an insane person and an idiot, nor between idiocy occurring after puberty and one continuing from childhood.

The Qualifications of a Guardian

The schools concur that a guardian and an executor require to be mentally mature adults sharing a common religion. Many jurists have also considered *'adalah* (justice) as a requirement even if the guardian is the father or the grandfather.

There is no doubt that this condition (‘*adalah*) seals the door of guardianship firmly with reinforced concrete and not merely with stones and mud. Apart from this, *'adalah* is a means for safeguarding and promoting welfare, not an end in itself. The inclusion of *'adalah* as a condition, if it proves anything, proves that *'adalah* was not something rare in the society in which those who consider it necessary lived.

There is consensus among the schools that those dispositions of a guardian which are for the good and advantage of the ward are valid, and those which are detrimental are invalid. The schools differ concerning those dispositions which are neither advantageous nor detrimental. A group of Imami legists observe: They are only valid if the guardian is the father or the paternal grandfather, because the condition for their dispositions is the absence of harm, not the presence of an advantage. But where a judge or an executor is involved, their dispositions are valid only when advantageous. Rather, some of them observe: The dispositions of a father are valid even if they are disadvantageous and entail a loss for the child. 5

Other non-Imami schools state: There is no difference between the father, the paternal grandfather, the judge and the executor in that the dispositions of all of them are invalid unless they are advantageous and entail benefit. This is also the opinion of a large number of Imami legists.

On this basis, it is valid for the guardian to trade with the wealth of his ward – be he a child, an insane person or an idiot – or to give it to another to trade with it, to buy with it real estate for his ward, and to sell and lend from what belongs to him, provided all this is done for benefit and with good intention, and the surety of benefit in lending is limited to where there is a fear of the property being destroyed.

It is beneficial here to mention some sub-issues mentioned by the great Imami legist al-‘Allamah al-Hilli in *al-Tadhkirah*, ‘bab al-hajr’.

1. Pardon and Compromise (al-'Afw and al-$ulh)

Some Imami scholars have said: A child's guardian can neither demand *qisas* (retaliation), a right to which his ward is entitled, because the child may opt for pardon, nor can he pardon, because the child may opt for the execution of the sentence for his own satisfaction. Al-'Allamah al-Hilli has then opined that a guardian can demand the execution of the sentence, or pardon, or conclude a compromise regarding a part of the child's property, provided it is advantageous.

2. Divorce and Pre-emption (al-Talaq and al-Shuf'ah)

A guardian is not entitled to divorce the wife of his ward, irrespective of whether it is with or without any monetary compensation.

If there is along with the child a co-sharer in a property and the co-sharer sells his share to a stranger, the guardian of the child is entitled to opt for pre-emption or to forgo it, depending on the child's interest. This is the more *sahih* of the two opinions subscribed to by the Shafi'is.

3. Deduction of Claims (Ikhraj al-Huquq)

It is obligatory upon the guardian to deduct from the property of his ward those claims whose payment is compulsory, e.g. debts, criminal damages, zakat, even if they have not been claimed from him. As to the maintenance of those relatives whose maintenance is *wajib* upon the child, the guardian will not pay it to the person entitled unless it is demanded.

4. Spending Upon the Ward

It is obligatory upon the guardian to spend towards his ward's welfare and it is not permissible for him to act either niggardly or extravagantly. He is expected to act moderately, keeping in mind the standard of those similar to the ward.

The guardian and the executor are trustees and are not liable unless breach of trust or negligence is proved. Hence, when a child attains puberty and claims breach of trust or negligence on behalf of the guardian, the burden of proof lies on him, and the guardian is only liable to take an oath, because he is a trustee and the dictum, 'The trustee is liable to nothing except an oath' (وما على الأمين إلاّ اليمين.) will apply.

A Guardian's Sale to Himself

The Shafi'is as well as some Imami legists observe: It is not valid for a guardian or an executor to sell himself any property belonging to his ward or to sell his own property to the ward. Al-'Allamah al-Hilli himself has considered it permissible, making no distinction between the guardian and a stranger, provided such a deal is advantageous (for the ward) and no blame is involved. Similarly it is also permissible for a guardian appointed by the judge to sell to the judge an orphan's property whose sale is valid. This also applies to an executor, even if he has been appointed by the judge to act as a guardian. As to the judge selling his property to the orphan, Abu Hanifah has prohibited it on the basis that it amounts to the judge's pronouncing a decision concerning himself, and such a judgment is void. Al-'Allamah al-Hilli says: "There is nothing objectionable in it," i.e. the opinion of Abu Hanifah.

As may be noted, there is more to it than mere objectionability, because this act is neither the same as pronouncing judgment nor related to it, closely or remotely. Therefore, if it is valid for a judge to buy from the property of an orphan provided it is advantageous, it is also valid for him to sell to the orphan if

advantageous, and the distinction is arbitrary.

The Guardian's or Executor's Agent

The guardian and the executor are entitled to appoint others as their agents for those activities which they are not capable of performing personally, as well as for those activities which they are capable of performing personally but do not consider it appropriate on the basis of custom to perform them personally. But where they consider it appropriate, the opinion prohibiting it is preferable.

It is evident here that acting personally or through an agent is a means for securing the ward's advantage and for fulfilling what is *wajib*. So wherever this end is achieved, the act is valid, irrespective of whether it is performed by the guardian or his agent: otherwise, the act is not valid even if performed by the guardian himself.

4. The Insolvent Person (al-Muflis)

'Muflis', literally, means someone who has neither money nor a job to meet his needs. In legal terminology it means someone who has been declared legally incapable by the judge because his liabilities exceed his assets.

The schools concur that an insolvent person may not be prohibited from disposing his wealth, regardless of the extent of his liabilities, unless he has been declared legally incapable by the judge. Hence, if he has disposed of all his wealth before being declared incapable, his dispositions will be considered valid and his creditor, or anyone else, is not empowered to stop him from doing so, provided these dispositions are not with an intent to elude the creditors, especially where there is no reasonable hope of his wealth returning.

A judge will not declare a person insolvent unless the following conditions exist:

1. Where he is indebted and the debt is proven in accordance with the Shari'ah.

2. Where his assets are less than his liabilities. There is consensus among the schools regarding these two conditions.

The schools also concur on the validity of the declaration of disability where the assets are less than the liabilities. They differ where the liabilities are equal to the assets. The Imami, the Hanbali and the Shafi'i schools state: He will not be declared legally incapable (*al-Jawahir*, *al-Tanqih* and *al-Fiqh 'ala al-madhahib al-'arba'ah*). The two disciples of Abu Hanifah, Muhammad and Abu Yusuf, observe: He will be declared legally incapable. The Hanbalis have followed these two in their fatwa. But Abu Hanifah has basically rejected the idea of considering an insolvent person as legally incapable even if his liabilities exceed his assets because legal disability entails the waste of his capabilities and human qualities. However, Abu Hanlfah says: If his creditors demand payment, he will be imprisoned until he sells his

property and clears his debts.

This form of imprisonment is reasonable – as we will point out later – where the debtor has some known property. But Abu Hanifah has permitted his detention even if no property is known to exist in his name. The following text has been narrated from him in *Fath al-Qadir* (vol.7, p.229, 'bab al-hajr bi sabab al-dayn'): If no property is known to be owned by the insolvent person, and his creditors demand his detention while he says: "I have nothing." the judge will detain him for debts accruing from contractual obligations, e.g. *mahr* and *kifalah*.

This is contrary to the explicit Qur'anic verse:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ

...if the debtor is in straitened circumstances, then let there be postponement until they are eased. (***2:280***)

Moreover, there is consensus on the issue among all the legal schools of the Ummah: the Shafi'i, the Imami, the Hanbali, the Maliki, as well as Muhammad and Abu Yusuf (*Fath al-Qadir*, Ibn 'Abidin, *al-Fiqh 'ala al-madhahib al-'arba'ah*, and al-Sanhuri in *Masadir al-haqq*, vol. 5)

3. The debt should be payable presently, not in the future, in accordance with the opinion of the Imami, Shafi'i, Maliki and Hanbali schools. But if part of it is to be paid presently and part of it in the future, it will be seen whether the assets suffice for clearing the present debts; if they do, he will not be declared legally incapable; if not, he will be declared so. If he is declared legally incapable for debts presently payable, the debts payable in the future will remain till the time of their payment arrives (*al-Tadhkirah* and *al-Fiqh 'ala al-madhahib al-'arba'ah*).

4. That the creditors, all or some of them, demand the declaration of his legal disability.

When all these conditions are present, the judge will declare him legally incapable and stop him from disposing his property by selling, renting, mortgaging, lending, and so on, being detrimental to the interests of the creditors.

The judge will sell the assets of the insolvent person and distribute the proceeds among his creditors. If they suffice for repaying all the debts, they will be so applied. In the event of their falling short, a proportionate distribution will be affected.

On the completion of the distribution, the disability will automatically end, because its purpose was to safeguard the interests of the creditors and this has been achieved.

Exceptions:
Al-'Allamah al-Hilli observes in *al-Tadhkirah*, 'bab al-taflis': From among the assets of the insolvent

person, the house where he resides, his slave, and the horse which he rides will not be sold. This is the view held by the Imamiyyah, Abu Hanifah and Ibn Hanbal. Al-Shafi'i and Malik state: All of these will be sold.

A day's provision will also be left for him and his family on the day of distribution, and if he dies before the distribution, the cost of his shroud and burial will be met from his own assets, because funeral expenses have precedence over debts.

In fact all that which is immediately necessary will be left for him, e.g. clothes, a day's provision or more, in accordance with the circumstances, books that are essential for someone like him, the tools of his trade by which he earns his living, the necessary household goods such as mattresses, blankets, pillows, cooking pots, plates, pitchers, and all other things which one requires for his immediate needs.

A Particular Thing and Its Owner

If an owner (from among the creditors) finds a particular thing which the insolvent person had purchased from him on credit, that thing will belong to him in preference to all other creditors even if there exists nothing else besides it. This is the opinion of the Imami, Maliki, Shafi'i and the Hanbali schools.

The Hanafis observe: He is not entitled to it but will have a joint interest in it with the other creditors (*al-Tadhkirah* and *Fath al-Qadir*).

Wealth Accruing after Insolvency

If after legal disability any wealth accrues to an insolvent person, will his disability extend to it exactly like the wealth existing at the time of the disability, or not? Will the insolvent person be completely free in his dispositions concerning it?

The Hanbalis say: There is no difference between the wealth acquired after insolvency and the wealth present at the time of it.

The Shafi'is hold two opinions, and so do the Imamiyyah. Al-'Allamah al-Hilli states: That which is more likely is that the disability extends to it as well, because the purpose of the disability is to give those entitled their claims, and this right is not limited to the wealth existing at the time of the declaration.

The Hanafis observe: The disability does not extend to it and his dispositions as well as acknowledgement (of debt) are valid in regard to it (*Fath al-Qadir*, *al-Tadhkirah*, and *al-Fiqh 'ala al-madhahib al-'arba'ah*).

If a crime has been committed against an insolvent person, if it is unintentional and requires the payment of damages, the insolvent person cannot pardon the crime because the right of the creditors extends to it, and if it is intentional and entails *qisas*, the insolvent person is entitled either to take *qisas* or to opt for damages, and the creditors are not entitled to force him to take damages and forsake *qisas* (*al-Jawahir*).

The Acknowledgement of an Insolvent Person

If after being declared legally incapable an insolvent person acknowledges being indebted to some person, will his word be accepted and that person included among the creditors at the time of distribution of the property?

The Shafi'i, the Hanafi and the Hanbali schools observe: His acceptance will not be valid in respect to his property present at the time of declaration of his insolvency.

The Imami legists differ among themselves, with the author of *al-Jawahir* and a large number of other authorities subscribing to the view of the Hanbali, Shafi'i and Hanafi schools.

Marriage

The Hanafis say: If an insolvent person marries after his being declared legally incapable, his marriage is valid and his wife is entitled to be included among the creditors to the extent of *mahr al-mithl*, and that which exceeds it remains a claim against him.

The Shafi'i and the Imami schools observe: The marriage is valid but the entire *mahr* will be considered a claim against him and the wife will not be entitled to anything along with the creditors.

Imprisonment

The Imamiyyah say: It is not valid to detain a person in financial straits despite the disclosure of his insolvency because the Qur'anic verse says:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ

And if the debtor is in straitened circumstances, then let there be postponement until they have eased (***2:280***).

If he is found to possess any known asset, the judge will order him to surrender it, and if he refuses to comply, the judge is entitled either to sell it and clear the debts – because the judge is the guardian (*wali*) of the uncompliant – or to imprison the debtor until he clears his debts himself, in accordance with the tradition:

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It is legitimate to punish and humiliate (as when the creditor calls his debtor 'injust', 'a delayer', etc.) a debtor who possesses (financial capability).

Abu Hanifah observes: The judge is not entitled to sell his property against his will, but he can imprison him.

Al-Shafi'i and Ibn Hanbal state: The judge is empowered to sell and clear the debts (*al-Tadhkirah* and *al-Jawahir*).

Prohibition on Travelling

There is no doubt that if it is permissible to punish a debtor by imprisonment it is also valid to prohibit him from travelling provided the necessary conditions exist. These conditions are: the debt be proven as per the Shari'ah; the debtor be capable of repaying it, and he procrastinate and keep on postponing payment. Apart from this, the interests of the creditors should be feared to be in jeopardy if he travels, such as where the journey is long and dangerous. Hence if the debt is not proved, or is proved but the debtor's circumstances are straitened and he is unable to repay, or he has an agent or surety, or there is no fear of the creditors' interests being hurt if he travels, in all these circumstances it is in no way permissible to prohibit him from travelling.

From here it becomes clear that the measures taken by the courts in Lebanon for stopping a defendant from travelling simply on the initiation of proceedings against him have no basis in the Islamic Shari'ah but in positive law.

1. Last illness (marad al-mawt) is also one of the causes, considering that it leads the person in last illness to being prohibited from dispositions exceeding one-third of his property. We have already discussed this in the chapter on wills under the title, 'Dispensations of a critically ill person.' Please refer.
2. Every moral duty that is a duty vis-à-vis God Almighty is conditional on mental maturity ('aql) and puberty (bulugh), whereas every economic duty vis-à-vis people is not conditional to mental maturity and puberty.
3. At first the Qur'anic verse mentions the property of the legally incapable while relating it to the second person (kaf al-mukhatab in اموالكم) and the second time to the third person (ha' al-gha'ib in اموالهم), alluding thereby that everything owned by an individual has two aspects: firstly, his personal authority over it, and secondly, that he apply it in a manner profitable to himself and the society, or, at the worst, in a manner unharmful to the two.
4. The author of al-Jawahir observes in the 'bab al-hajr': "There is ijma' among the Imamiyyah that if idiocy occurs after the attainment of puberty, the guardianship will be exercised by the judge, and if it continues from childhood, the ijma' has been narrated that it belongs to the father and the paternal grandfather. But the truth is that there is a difference of opinion in the latter case, and a group of scholars has explicitly mentioned that the guardianship belongs to the two.
5. Al-Na'ini, in al-Khwansari's Taqrirat (1357 H., vol.1, p.324) states: "The truth is that the guardianship of the father is a proven fact, even if it entails disadvantage or loss for the child." But the complier of this work narrates from his teacher, al-Na'ini, that he retracted from this opinion after having been emphatic about it earlier.

Will and Bequest (Wasaya)

The five schools concur regarding the legality of making a will (*wasiyyah*) and its permissibility in the

Islamic Shari'ah. *Wasiyyah* is a gift of property or its benefit subject to the death of the testator. A will is valid irrespective of its being made in a state of health or during the last illness, and in both cases the rules applicable are the same according to all the schools.

A will requires a testator (*musi*), a legatee (*musa lahu*), the bequeathed property (*musa bihi*), and the pronouncement (*sighah*) of bequest.

The Pronouncement

No specific wording is essential for making a will. Hence any statement conveying the intention of gratuitous transfer (of property or its benefit) after the death of the testator is valid. Thus if a testator says: "I make a will in favour of so and so," the words indicate testamentary intention, without needing the condition 'after death' to be specified. But if he says (addressing the executor): "Give it" or "Hand it over to so and so", or when he says, "I make so and so the owner of such and such a thing" it is necessary to specify the condition, 'after death', because without this consideration his words do not prove the intention of making a will.

The Imami, the Shafi'i and the Maliki schools observe: It is valid for a sick person who cannot speak to make a will by comprehensible gestures. Al-Shi'rani, in *al-Mizan*, narrates from Abu Hanifah and Ahmad the invalidity of making a will in this condition. In *al-Fiqh 'ala al-madhahib al-'arba'ah* (vol. 3, 'bab al-wasiyyah') this opinion is ascribed to Hanafis and Hanbalis: If a person suffers loss of speech due to illness, it is not valid for him to make a will (by gestures), unless it continues for a long period of time and he becomes dumb, settling down to communicating in familiar gestures. In that case, his gestures and writing will be considered equivalent to his speech.

Al-Shi'rani ascribes this opinion to Abu Hanifah, al-Shafi'i and Malik: If a person writes his own will and it is known that it is in his hand, it will not be acted upon unless he has it attested. This implies that if a will written in his hand is found which he neither got attested nor made known its contents to people, the will will not be probated even if it is known to have been made by him.

Ahmad says: It will be acted upon, unless he is known to have revoked it. Researchers among the Imami legists observe: Writing proves a will, because the apparent import of a person's acts is similar to the import of his spoken statements, and writing is the sister of speech in the sense that both make known his intent; rather, writing is the superior of the two in this regard, and is preferable to all other evidence that proves intent.[1]

The Testator

There is consensus among all the schools that the will of a lunatic in the state of insanity and the will of an undiscerning child (*ghayr mumayyiz*) are not valid.

The schools differ regarding the will of a discerning child; the Malikis, the Hanbalis, and al-Shafi'i in one of his two opinions, observe: The will of a child of ten complete years is valid because the Caliph 'Umar probated it. The Hanafis say: It is not valid except where the will concerns his funeral arrangements and burial. And it is well-known that these things do not require a will. The Imamiyyah are of the opinion that the will of a discerning child is valid if it is for a good and benevolent cause and not otherwise, because al-Imam al-Sadiq considered it executable only in such cases. (*al-Jawahir* and Abu Zuhrah's *al-Ahwal al-shakhsiyyah*)

According to the Hanafis, if a sane adult makes a will and then turns insane, his will is void if his insanity is complete and continues for six months; otherwise, it is valid. If he makes a will in sound mind and then develops a condition of delusion leading to mental derangement lasting until death, his will will be void (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol.3, 'bab al-wasiyyah'). The Imami, the Maliki and the Hanbali schools are of the opinion that subsequent insanity does not nullify a will even if it continues till death, because subsequent factors do not nullify preceding decisions.

The Hanafis, the Shafi'is and the Malikis consider the will of an idiot as valid. The Hanbalis observe: It is valid in regard to his property and invalid regarding his children. Therefore, if he appoints an executor over them, his will will not be acted upon (*al-Ahwal al-shakhsiyyah* of Abu Zuhrah and *al-Fiqh 'ala al-madhahib al-'arba'ah*). The Imamiyyah state: The will of an idiot is not valid concerning his property and valid in other matters. Thus if he appoints an executor over his children, his will is valid, but if he wills the bequest of something from his property, it is void.

The Imamiyyah are unique in their opinion that if a person inflicts injury upon himself with an intention of suicide and then makes a will and dies, his will is void. But if he first makes a will and then commits suicide, his will is valid.

The Maliki and the Hanbali schools regard the will of an intoxicated person as invalid. The Shafi'is say: The will of a person in a swoon is not valid. But the will of a person who has intoxicated himself voluntarily is valid.

The Hanafi school is of the opinion that a will made in jest or by mistake or under coercion is not valid (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 3, 'bab al-wasiyyah')

The Imamiyyah observe: A will is not valid if made in a state of intoxication or stupor, in jest, by mistake, or under coercion.

The Legatee

The four Sunni schools concur that a will in favour of an heir is not valid unless permitted by other heirs.

The Imamiyyah observe: It is valid in favour of an heir as well as a non-heir, and its validity does not depend upon the permission of the heirs as long as it does not exceed a third of the estate. The courts

in Egypt earlier used to apply the opinion of the Sunni schools, but then switched over to the Imami view. The Lebanese Sunni Shari'ah courts continue to consider a will in favour of an heir as invalid. But since some years their judges have inclined towards the other view and have brought a bill to the government authorizing wills in favour of heirs.

All the schools concur that it is valid for a *dhimmi* (a non-Muslim living under the protection of an Islamic State) to make a will in favour of another *dhimmi* or a Muslim, and for a Muslim to make a will in favour of a *dhimmi* or another Muslim, in consonance with the verse:

لاَ يَنْهَاكُمْ اللَّهُ عَنْ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ * إِنَّمَا يَنْهَاكُمْ اللَّهُ عَنْ الَّذِينَ قَاتَلُوكُمْ فِي الدِّينِ وَأَخْرَجُوكُمْ مِنْ دِيَارِكُمْ وَظَاهَرُوا عَلَى إِخْرَاجِكُمْ أَنْ تَوَلَّوْهُمْ وَمَنْ يَتَوَلَّهُمْ فَأُوْلَئِكَ هُمْ الظَّالِمُونَ

God does not forbid you respecting those who have not made war against you on account of your religion, and have not expelled you from your homes, that you show kindness to them and deal with them justly; surely God loves the just. God only forbids you respecting those who made war with you on account of your religion, and expelled you from your homes and assisted in your expulsion, that you befriend them. And whosoever takes them for friends - they are the evildoers. (***60: 8--9***)

The schools differ regarding the validity of a will made by a Muslim in favour of a *harbi*.2 The Malikis, the Hanbalis and most of the Shafi'is consider it valid.

According to the Hanafi and most Imami legists, it is not valid. (*al-Mughni*, vol.6, *al-Jawahir*, vol. 5, 'bab al-wasiyyah')

The schools concur regarding the validity of a will made in favour of a foetus, provided it is born alive. Bequest is similar to inheritance, and there is *ijma'* that afterbom children inherit; hence their capacity to own bequests as well.

The schools differ as to whether it is necessary for the foetus to exist at the time of making the will. The Imami, the Hanafi and the Hanbali schools, as well as al-Shafi'i in the more authentic of his two opinions, say: It is necessary, and a foetus will not inherit unless it is known to exist at the time of making the will. The knowledge of its existence is acquired if its mother has a husband capable of intercourse with her and it is born alive within a period of less than six months from the date of the bequest. But it it is born after six months or more it will not receive anything from the legacy, because of the possibility of its being conceived after the time of the bequest. This opinion is based on the invalidity of a bequest in favour of one not in existence.

The Malikis state that bequest in favour of existing foetus as well as one to be conceived in the future is valid, for that they regard a bequest in favour of someone non-existent as valid.3 (al-'Allamah al-Hilli's

Tadhkirah; *al-Fiqh 'ala al-madhahib al-'arba'ah*; *al-'Uddah fi fiqh al-Hanabilah*, 'bab al-wasiyyah')

If a person makes a will in favour of a foetus and then twins, a boy and a girl, are born, the legacy will be distributed among them equally because a bequest is a gift, not an inheritance: thus it resembles his giving them a gift after their birth.

The schools concur that it is valid to make a will for public benefit, such as for the poor and destitute, for students, for mosques and schools. Abu Hanifah excludes bequest in favour of a mosque or something of the kind because a mosque does not have the capacity to transfer ownership. Muhammad ibn al-Hasan, his pupil, considers it valid, the income of the legacy being spent for the mosque. This has been the custom among the Muslims in the east and the west, in the past and at the present.[4]

The schools differ where the legatee is a specific person, as to whether his acceptance is necessary or if the absence of rejection on his part is sufficient.

The Imami and the Hanafi schools observe: His not rejecting the bequest is sufficient. Therefore, if the legatee is silent and does not decline the bequest, he will become the owner of the legacy after the testator's death.

The Imamiyyah are of the opinion that if a legatee accepts the bequest during the life of the testator, he is entitled to decline it after his death; also if he refuses the bequest during the testator's life, he is entitled to accept it after his death, because his acceptance and refusal have no effect during the life of the testator, for ownership does not materialize during such time. According to the Hanafi school, if he refuses during the testator's life, he is entitled to accept after his death; but if he accepts during his life, he cannot reject it thereafter.

The Shafi'i and the Maliki schools state: It is necessary that the legatee accept the bequest after the death of the testator, and his silence and non-refusal do not suffice. (al-'Allamah al-Hilli's *Tadhkirah*, *al-Fiqh 'ala al-madhahib al-'arba'ah*)

The four Sunni schools observe: If the legatee dies before the testator, the will becomes void because the bequest then becomes a gift to a dead person, and this causes it to become void. (*al-Mughni*, vol.6, 'bab al-wasiyyah')

The Imamiyyah say: If the legatee dies before the testator and the testator does not revoke the will, the heirs of the legatee will take his place and play his role in accepting or rejecting the bequest. Thus if they do not reject the bequest, the legacy will be solely their property, which they will distribute between themselves in the form of an inheritance, without it being incumbent upon them to pay from this bequest the debts of the decedent or to comply with his will in regard to the bequest. They argue that acceptance of the bequest was the decedent's right, which is transferred to his heirs, like the option to reject (*khayar al-radd*). They also cite the traditions of the Ahl al-Bayt[5] as another basis for their argument.

According to Malik, and al-Shafi'i in one of his two opinions, a bequest in favour of the murderer (of the testator) is valid regardless of its being an intentional or unintentional homicide. The Hanafis validate the bequest if permitted by the testator's heirs.

The Hanbalis observe: The bequest is valid if it is made after the injury causing death, and is void if murder takes place after the bequest. (Abu Zuhrah's *al-Ahwal al-shakhsiyyah*, 'bab al-wasiyyah')

The Imamiyyah say: A bequest is valid in favour of a murderer, because the proofs regarding the validity of a will are general. The verse:

مِنْ بَعْدِ وَصِيَّةٍ يُوصَى بِهَا أَوْ دَيْنٍ

includes a murderer as well as others, and to limit it to a non-murderer requires proof.

The Legacy

The schools concur that it is necessary that the bequest be capable of being owned, such as property, house and the benefits ensuing from them. Therefore, the bequest of a thing which cannot be owned customarily (e.g. insects) or legally (e.g. wine, where the testator is a Muslim) is not valid, because transfer of ownership is implicit in the concept of bequest and when it is not present there remains no subject for the bequest.

There is consensus among the schools regarding the validity of the bequest of the produce of a garden, perpetually or for a specific number of years.

The Imamiyyah extend the meaning of bequest to its utmost limit, permitting therein that which they don't permit in a sale and other transactions. They consider as valid a bequest of something non-existent with a probability of future existence, or something which the testator is incapable of delivering (e.g. a bird in the sky or a straying animal), or something which is indeterminate (e.g. the bequest of a dress or animal without mentioning what dress and which animal). They further observe: It is valid for the testator to be vague to the utmost extent (he may say: 'I promise to give something', 'a little', or 'a large quantity', ' a part', or 'a share', or 'a portion',[6] to a certain person).

None of these forms is valid in a transaction of sale, though valid in a bequest. The author of *al-Jawahir* says: "Perhaps the validity of all these forms is due to the general nature of the proofs validating wills, which include all these forms and all interests that are capable of being transferred.... Perhaps the rule in bequests is that all things can be bequeathed except those that are known to be nonbequeathable, "i.e. those which have been excluded by a canonical proof (e.g. wine, swine, *waqf*, the right to *qisas*, the punishment for *qadhf*, etc.). Some of them have stated that it is not valid to sell an elephant, though it can be validly bequeathed.

Al-Shaykh Muhammad Abu Zuhrah, in *al-Ahwal al-shakhsiyyah*, 'bab al-wasiyyah', says: The fuqaha' have extended the scope of the rules of bequest and have permitted in it that which they don't permit in other forms of transfer, e.g. the bequest of something indeterminate. Thus if you make a will using the words, 'a share', 'a piece', 'something', 'a little', etc., the will will be valid .... and the heirs will have to give any quantity they desire from among the prohable quantities understood from that word.

This observation is in concurrence with the view of the Imamiyyah, and, accordingly, there is an agreement concerning this issue.

The Extent of Testamentary Rights

A gratuitous bequest is operative only up to one-third of the testator's estate in the event of having heir, irrespective of the bequest being made in illness or good health. As per consensus, any excess over one-third requires the permission of the heirs. Therefore, if all of them permit it, the will is valid, and if they refuse permission, it becomes void. If some heirs give permission and others refuse, the will will be executed by disposition of the excess over one-third from the share of the willing heirs. The permission of an heir will not be effective unless he be a sane and mature adult.

The Imamiyyah observe: Once the heirs give permission, they are not entitled to withdraw it, regardless of whether the permission was given during the life of the testator or later.

The Hanafi, the Shafi'i and the Hanbali schools say: The permission given by the heirs or their refusal to do so will have no consequences except after the testator's death. Thus if they give permission during his lifetime and then change their minds and decline permission after his death, it is valid, irrespective of the permission having been given during the health of the testator or during his illness. (*al-Mughni*)

The Malikis are of the opinion that if the heirs give permission during the illness of the testator, they are entitled to withdraw it, and if they permit while he is healthy, the will will be executed from their share of the legacy, without their having a right to revoke the permission.

The Imami, the Hanafi and the Maliki schools state: When permission is granted by the heir for that which exceeds one-third of the legacy, it is considered approval of the testator's act and the operationality of the bequest, not as a gift from the heir to the legatee. Accordingly, it neither requires possession, nor other rules applicable to a gift apply to it.

The schools differ concerning a testator who has bequeathed all his wealth and does not have any specific heir. Malik observes: The bequest is only valid up to one-third of the legacy. Abu Hanifah states: It is permissible for the whole legacy. Al-Shafi'i and Ahmad have two opinions, and so do the Imamiyyah, the more reliable of them being the one declaring its validity. (*al-Bidayah wa al-nihayah*; *al-Tadhkirah*, 'bab al-wasiyyah')

There is consensus among the schools that inheritance and bequest are operational only after the

payment of the debt of the decedent or his release from it. Therefore, the one-third from which the will is executed is a third of what remains after the payment of debt. They differ concerning the time at which the one-third will be determined: Is it a third at the time of death or at the time of the distribution of the estate?

The Hanafis say: The one-third will be determined at the time of distributing the estate. Any increase or decrease in the estate will be shared by the heirs and the legatees. Some Hanbali and Maliki legists concur with this opinion.

The Shafi'is observe: The one-third will be determined at the time of the testator's death. (Abu Zuhrah)

The Imamiyyah state: That which the decedent comes to own after his death will be included in his estate (e.g. the reparation for unintentional homicide and for intentional murder, where the heirs compromise over reparation, and as when the decedent had during his life set up a net and birds or fish are trapped in it after his death; all these will be included in the estate and from it a third will be excluded). This observation of the Imamiyyah is close to the Hanafi view.

The Imami, the Shafi'i and the Hanbali schools state: If the decedent is liable for payment of *zakat* or any *wajib* expiation (*kaffarah*) or to perform the compulsory *hajj* or other *wajib* duties of monetary nature, these will be taken from his whole estate, not from a third of it, irrespective of his having willed to this effect or not, because these duties are related directly to God (*haqq Allah*), and as mentioned in the traditions have a greater right to be fulfilled. If the decedent has made a provision for their fulfilment in his will and has determined their expenses from a third of his estate, his word will be acted upon, in consideration of the heirs.

The Hanafis and the Malikis observe: If he has provided for his unfulfilled duties in the will, their expenses will be taken from a third of his estate and not the whole, and if he makes no provision for them in his will they will annul on his death (*al-Mughni*, *al-Tadhkirah, al-Bidayah wa al-nihayah*)

The schools concur that a will for performing *mustahabb* acts of worship will be executed from a third of the estate.

Clashing Wills

If the bequeathable third is insufficient for meeting all the provisions of a will (such as where the testator has made a bequest of one thousand for Zayd, two thousand for the poor, and three thousand for a mosque, while his bequeathable third is five thousand, and the heirs do not permit the excess to be met from their share), what is the rule here?

The Maliki, the Hanbali and the Shafi'i schools say: The bequeathable third will be distributed among them in proportion to their amounts; i.e. the deficit will affect every legatee in proportion to his share in the will. (*al-Mughni*)

The Imamiyyah state: If the testator makes many wills exceeding his bequeathable third, and the heirs do not permit the excess on the wills being conflicting to one another (such as when he says: "One-third of my estate is for Zayd," and says later,"One-third is for Khalid") the later will will be acted upon, and the former ignored. And if the wills include *wajib* and non-*wajib* provisions, the *wajib* provisions will be given precedence. If the wills are of equal weight, then if the testator has included them in a single statement and said: "Give Jamal and Ahmad 1000," while his bequeathable third is 500, this amount will be distributed among the two, each receiving 250. But if the testator gives precedence to one of them and says: "Give Jamal 500. and Ahmad 500", the whole amount will be given to the first and the second will will be considered void because the first will has completely exhausted the bequeathable third and no subject remains for the second.

The four Sunni schools observe: If a testator bequeaths a specific thing in favour of a person, and then bequeaths the same thing in favour of another, that thing will be equally distributed between them (thus, if he says: "Give this car to Zayd after my death," and says later: "Give it to Khalid," it will become the joint property of both).

The Imamiyyah say: It belongs to the second, because the second will implies abandonment of the earlier one.

According to the Imamiyyah, if a testator bequeaths a specific thing to every heir equal to each heir's share of the legacy, the will is valid (e.g. if he says: "The garden is for my son Ibrahim, and the house is for his brother, Hasan"), and the will will be executed if there is no favouritism involved, because there is no clash of interests of the heirs. Some Shafi'i legists and some Hanbalis concur with this view.

There is consensus among the schools that the thing bequeathed, regardless of its being an undifferentiated part (e.g. one-third or one-fourth of the whole estate) or something specific, the legatee will become its owner on the testator's death, regardless of the legacy's presence. Thus he takes his share along with the heirs if the subject of legacy is present, and similarly when the subject of legacy, not present earlier, appears.

When the subject of legacy is something distinct, independent and determinate, the Imami and the Hanafi schools say: The legatee will not become its owner unless the heirs possess twice its value (as their share of the testator's estate). But if the testator has assets not present or debts (receivable), and the subject of bequest is more than one-third in value of what the heirs possess, the heirs are entitled to resist the legatee and stop him from taking more than a third of the total estate into possession, especially where the assets not present are in danger of perishing or when it is infeasible to reclaim them. When the thing not present earlier turns up, the legatee is entitled to the remaining part of the bequest to the extent of a third of the entire present assets. But if nothing turns up, the rest of the legacy is for the heirs.

Revocation of Will

There is consensus among the schools that a will is not binding on the testator or the legatee. Thus it is valid for the former to revoke it, regardless of its being the bequest of an asset, or benefit (*manfa'ah*) or guardianship (*wilayah*). Discussion regarding the second point will follow shortly.

A revocation by the testator may take place by word or deed (e.g. his bequeathing an article and then consuming, gifting or selling it). The Hanafis are said to hold that selling is not considered a revocation, and the legatee is entitled to receive its price.

Bequest of Benefits

The schools concur regarding the validity of a bequest of benefit (e.g. the lease of a house, the right to reside in it, an orchard's produce, a goat's milk, and other such benefits which accrue in course of time) irrespective of the testator's restricting the benefit to a specific period or his bequeathing it perpetually.

The schools differ concerning the method of deriving the benefit from the bequeathable third. The Hanafis observe: The value of the bequeathed benefit will be estimated from the subject of the benefit, irrespective of whether the bequest of the benefit is temporary or perpetual. Thus, if a testator bequeaths the right to reside in a house for a year or more, the value of the whole house will be estimated, and if its value covers a third of the legacy, the will will be operational; otherwise it will be inoperational and void.

The Shafi'i and the Hanbali schools say: The value of the benefits will be estimated in separation from the property. If a third of the property covers the value of the benefit, the bequest will be fully operational, if not, to the extent covered by a third of the property. (Abu Zuhrah)

Researchers among the Imamiyyah state: If the bequest of the benefit is not perpetual, the calculation of its value is easy because the article or property will retain its own value after subtracting the value of the benefit. Therefore, if a testator bequeaths the benefit of an orchard for a period of five years, the value of the whole orchard will be initially estimated. Supposing its estimate is 10,000, it will be re-estimated after deducting from it the benefit of five years. Supposing the re-estimated value is 5000, the difference of 5000 will be deducted from a third of the estate if it can bear it; otherwise, the legatee will be entitled to the benefit to the extent of a third of the legacy, be it the benefit of a year or more.

But if the bequest of the benefit is perpetual, the value of the orchard along with its benefit will be estimated initially, and then the procedure followed in a temporary bequest will follow. If one asks: "How and in what way can we estimate the value of a property devoid of benefit, for that which has no benefit has no value?" The reply is that there are some benefits that have value even if little. Thus, in an orchard, the broken branches and dry wood can be utilized by the heir; if a tree dries up due to some reason, the land it covered can be of use; if a house falls into ruins and the legatee undertakes no repairs, the heirs may benefit from its stones and land; the meat and hide of a goat can be used after it is slaughtered; and in all situations a property is not devoid of benefits apart from the bequeathed

benefit.

The Dispositional Rights of an Ailing Person

Here, by an 'ailing person' is meant one whose death follows his illness, in a manner that the illness creates apprehensions in the minds of people that his life is at an end. Therefore, a toothache, eye pain, a slight headache, and the like are not considered alarming forms of illness. Thus, gifts made by a person suffering from an alarming sickness, who may recover from it and die after his recovery, will be considered valid.

Powers of Disposition of a Healthy Person

There is no doubt nor disagreement between the schools that when a healthy person disposes of his wealth, completely and unconditionally – i.e. without making it contingent upon his death – his disposition is operative from his property, irrespective of the disposition being *wajib* (e.g. the payment of a debt) or an act of favour (e.g. giving a gift, or creating a *waqf*).

But if a healthy person makes the disposition of his property contingent upon his death, it becomes a bequest, as mentioned. Therefore, if it is a non–monetary *wajib* (e.g. prayer, Hajj, etc.), it will be executed from a third of his legacy, and if it is a debt, it will be paid from the undivided estate, according to the Imami, the Shafi'i and the Hanbali schools, and from a third, according to the Hanafi and the Maliki schools.

The Powers of Disposition of an Ill Person

Those dipositions of an ill person that are contingent upon his death are bequests, and the rules applicable to them are those mentioned above concerning valid wills, because there is no difference between a will made during a state of health or illness, provided the ill person is mentally sound and completely conscious and aware.

If an ill person disposes his wealth without making it contingent upon his death, it will be seen whether his disposition is for his own use, such as his buying an expensive dress, enjoying food and drink, spending on medicine and for improving his health, travelling for comfort and enjoyment, etc. All these dispositions are valid and no one, including heirs, may object.

And if he disposes it impartially, such as when he sells, rents or exchanges his possessions for a real consideration, these transactions of his are enforceable from his estate and the heirs are not entitled to dispute it, because they don't lose anything as its consequence.

If he disposes in a complete form without making it contingent upon his death, and his dispositions include acts of favour (such as when he gives a gift or alms, or relinquishes a debt, or pardons a crime entailing damages, or sells for less than its actual price or buys at a higher price, or makes other such

dispositions which entail a financial loss for the heirs), such dispositions will be operational from a third of his estate.[7] The meaning of its being from a third of his estate is that its enforcement is delayed until his death. Thus if he dies in his illness and a third of his estate covers his completed gratuitous acts, it is clear that they are enforceable from the very beginning, and if the third falls short of them, such dispositions in excess of the third are invalid without the heirs' permission.

Wills and 'Completed Dispositions' During Illness

The difference between a will and dispositions (*munjazat*) during illness is that the will is made contingent upon death, whereas dispositions during illness are not made contingent upon death, irrespective of their being incontingent perpetually or being contingent upon some event capable of conditionality (such as when he makes a vow during illness to sacrifice a particulat ram if he is granted a son and then a son is born to him posthumously; such an act will be considered among dispositions during disease).

According to *al-Mughni* (a Hanbali legal text) and *al-Tadhkirah* (a book on Imami fiqh), there are five similarities and six differences between dispositions during illness and a will, and the similar wording of the two texts shows that al-'Allamah al-Hilli, the author of *al-Tadhkirah* (d.726/1326), has taken it from Ibn Qudamah, the author of *al-Mughni* (d.620/1223).[8] It is useful to give a summary here of their views.

The five similarities between dispositions during illness and a will are the following:

1. Both depend for their execution on a third of the estate, or the consent of the heirs.
2. Dispositions during illness are valid in favour of an heir, exactly like a will, according to the Imamiyyah; according to the other four schools, they are not valid in favour of an heir, as in the case of a will.
3. Both of them have a lesser reward with God compared to charity given during health.
4. Dispositions contest with wills, within the one-third of the estate (from which both are to be enforced).
5. Both will be enforced from the one-third of the estate only at the time of death, neither before nor after it.

The six differences between a will and dispositions during illness are:

1. It is valid for a testator to revoke his will, while it is not valid for a donor during ailment to revoke his gift after its acceptance by the donee and his taking its possession. The secret here is that a will is a bequest conditional to death, and, consequently, as long as the condition is not fulfilled, it is valid to recant it, whereas a gift during illness is unrestricted and unconditional.

2. Dispositions are required to be accepted or rejected immediately and during the life of the donor, whereas a will is not required to be accepted or rejected until the death of the testator.

3. Dispositions require the fulfilment of certain conditions, such as knowledge of the gift and absence of harm: a will is not bound by these conditions.

4. Dispositions enjoy precedence over a will if one-third of the estate falls short of meeting both of them together, except when the will involves the setting free of a slave, in which case a will takes precedence over completed gifts. This is the view of the Imami, the Hanafi and the Shafi'i schools (*al-Tadhkirah*, 'bab al-wasiyyah').

5. If one-third of the estate is not sufficient to enforce all the dispositions, then, according to the Shafi'is and Hanbalis, the first among them will be enforced first, and so on. But if the one-third is not sufficient to fulfil several wills, the deficit will affect all of them, as pointed out while discussing clashing wills. The Imamiyyah enforce both wills and dispositions on a first-come-first basis.

6. If a donor during his last illness dies before the donee has taken possession of the gift, the option lies with the heirs: if they desire they may grant it. But a will has to be compulsorily acccepted after the death of the testator, without requiring the consent of the heirs.

The sixth difference has been mentioned by the author of *al-Mughni*, while the author of *al-Tadhkirah* does not mention it. It is better not to mention this difference, as done by al-'Allamah al-Hilli, because dispositions during sickness have many forms such as gift (*hibah*), the relinquishing of a debt, favouritism in sale or purchase, etc. Hence, when dispositions are not limited to gifts, it is not appropriate, firstly, to say "If a donor during his last illness dies before the donee has taken possession ....".

Secondly, if a donor during his last illness makes a gift and dies before the donee has taken its possession, according to the Hanbali, the Shafi'i, the Imami and the Hanafi schools, the gift is void because taking possession is a condition for its completion, and if the donee takes possession before the death of the donor the gift is concluded and will be accounted for in the third of the estate, like a will, and will not depend for its execution on the consent of the heirs, provided it does not exceed a third of the estate.

Hence it is not in fact a disposition without taking possession and after the death of the donor, for it to be said that it differs from or is similar to a will. After taking possession, the rules concerning wills will apply to it. From this it is clear that the mention of the sixth difference is out of place.

Acknowledgment during Sickness

The four Sunni schools concur that if during last illness a person acknowledges the debt of a non-heir, his acknowledgment is enforceable from the undivided estate, exactly like his acknowledgment during health. They differ where he acknowledges the debt of an heir; the Hanafi and the Hanbali schools observe: The other heirs are not bound by this acknowledgment and it will be considered void unless that heir brings a valid proof to establish his claim.

The Malikis say: The acknowledgment is valid if the decedent is not accused of partiality, and is void if so accused (e.g. when a person having a daughter and a cousin brother acknowledges a debt of his

daughter, it will not be accepted, and if he acknowledges in favour of his cousin, it will be accepted, because he cannot be accused here of depriving his daughter and transferring the wealth to his cousin). The reason for rejecting the acknowledgment is accusation, and therefore it is limited to those instances where there is an accusation. (*al-Mughni*, vol.5, 'bab al-iqrar')

The Imamiyyah state: If he makes an acknowledgment during last illness (*marad al-mawt*) for an heir or a stranger, concerning a property or a debt claim, it will be seen: If there are any indications raising the suspicion that he is not sincere in his acknowledgment, so that it seems, going by ordinary factors, far-fetched that the thing acknowledged should belong to the person to whom it has been acknowledged to belong and that the sick person intends to impress this on others for some reason, the rule applicable to such an acknowledgment is the one applicable to a will: It will be executed from a third. But if the ill person is secure from suspicion in his acknowledgment, so that there is no indication to prove that he has lied (such as when there has been between him and the person in whose favour he has made the acknowledgment, earlier dealings which ordinarily explain such an acknowledgment), the acknowledgment will be enforced from the original estate, whatever its value.

This is when the condition of the person acknowledging is known; what if it is not known?

If the heir says that the decedent was not honest in his acknowledgment, then the burden of proof rests on the person in whose favour the acknowledgment has been made, to prove that he owns the thing which the decedent acknowledged as his during his last illness. If he proves this by bringing two just witnesses (*al-bayyinah*), the acknowledgment will be enforced from the original estate; otherwise, the heir will take an oath that he does not know that the thing acknowledged by the decedent belongs to that person; then the acknowledgment will be enforced from a third of the estate. The Imamiyyah have based their argument on traditions narrated from the Ahl al-Bayt ('a) such as the tradition narrated by Abu Basir:

إذا كان مصدقاً يجوز

(When his verity is established, it is valid) and other traditions; and as اذا is used in a conditional clause, it implies that the enforcement is made conditional to his trustworthiness and the establishment of his verity. 9

Appointment of Executor (al-Wisayah)

Al-wisayah is an undertaking by a person to execute the will of another after his death, such as clearing his debts, pursuing his debtors, the care and maintenance of his children, and other such functions. Responsibility for these functions is called *al-wilayah* or *al-wasiyyat al-ahdiyyah*, and the person charged with performing it called *al-wasi al-mukhtar* (an authorized executor).

Requirements for a Wasi

1. He should be a *mukallaf*, i.e. a sane adult, because a lunatic and a minor do not have authority over themselves; so there is no question of their exercising authority over the affairs of others. However, the Imamiyyah observe in this regard: It is not valid for a child to act as an executor individually, though valid if he acts together with an adult. Then the adult will execute the will individually till the minor attains majority, and then he will join him in its execution.

The Hanafis state: If a minor is appointed as *wasi* (executor), the judge will replace him with another, and if the minor has executed the will before being removed by the judge, his acts of execution of the will are valid and enforceable. Similarly, if he attains majority before being removed, he will continue with the execution of the will (*al-Fiqh 'ala al-madhahib al-'arba'ah* and al-'Allamah al-Hilli's *al-Tadhkirah*).

2. The *wasi's* nomination must be determinate; thus if the testator appoints one of two persons without determining which one of them is to be the executor, the appointment of both is void.

3. The specification of the subject of will (*musa bihi*). Thus if the testator makes a will without specifying it (as when he says: "So and so is my *wasi*", and does not mention the thing over which he is to exercise this authority), the appointment is void according to the Imami, the Hanafi, the Shafi'i and the Hanbali schools. It has been narrated from Malik that such a *wasi* will have authority over the whole estate.

4. That the *wasi* be a Muslim: Thus it is not valid, as per consensus, for a Muslim to appoint a non-Muslim executor. But the Hanafis state: If a Muslim appoints a non-Muslim, it is for the judge to replace him with a Muslim, though the appointment itself will be considered valid. Hence if the non-Muslim *wasi* executes the will before his removal by the judge, or becomes a Muslim, he will remain a *wasi*, as in the case of a minor.

5. The Shafi'i school observes: It is *wajib* that the *wasi* be an *'adil* person.
The Maliki, the Hanafi and researchers among the Imamiyyah state: It is sufficient that he be trustworthy and truthful, because *'adalah* is a means here and not an end, and when the *wasi* strives to fulfil the provisions of the will - as is *wajib* for him - the purpose is achieved. 10

The Hanbalis say: If the *wasi* is dishonest, the judge will appoint a trustworthy person as a co-executor. This opinion is in consonance with the opinion of al-Sayyid al-Hakim in *Minhaj al-salihin* (vol.2) where he observes: If a dishonest act is committed by the *wasi*, a trustworthy person will be appointed alongside him to stop him from doing so. If this is not possible, he will be replaced by another.

6. As reported in the third volume of *al-Fiqh 'ala al-madhahib al-'arba'ah*, 'bab al-wasiyyah', the Hanafi, the Maliki and the Shafi'i schools require the *wasi* to be capable of executing the provisions of the will.

Al-'Allamah al-Hilli has stated in *al-Tadhkirah*: Apparently, the view taken by our 'ulama', i.e. the Imamiyyah, is that it is valid to appoint an executor incapable of executing the will, and his incapacity will

be compensated by the supervision of the *hakim*; i.e. the judge himself will supervise his dispositions, or appoint a capable, trustworthy person to cooperate with the executor.

Refusal to Act as Executor

The testator is entitled to revoke the appointment of an executor, and the executor is entitled to reject his appointment by announcing his refusal, because *al-wasiyyat al-ahdiyyah* in this situation is not binding, as per consensus.

The schools differ regarding the validity of a rejection to act as executor by an executor without informing the testator. The Imami and the Hanafi schools say: It is not valid in any situation for an executor to reject his appointment after the death of the testator, and it is not valid during his life without informing him.

The Shafi'i and the Hanbali schools observe: It is valid for a *wasi* to reject his appointment at the beginning as well as during its course, without any restraint or condition. Therefore, he can reject before acceptance and after it, during the testator's life, by announcing it or without doing so, as well as after his death (*al-Mughni*, vol.6, 'bab al-wasiyyah')

Appointment of Two Executors

There is consensus among the schools that a testator is entitled to appoint two or more executors. If he categorically mentions that each one of them is independent in his dispositions, his word will be acted upon. Similarly, if he categorically mentions that both should act together, then neither of them will have independence of individual action. The schools differ where the testator does not specify anything concerning their acting individually or jointly. The Imami, the Shafi'i, the Maliki, and the Hanbali schools observe: Both have no power to act individually. So if they quarrel and disagree, the judge will compel them to agreement, and if he is unable to do so, he will replace both of them.

The Hanafis say: Each of the two executors is free to act individually concerning seven things: Shrouding of the deceased, payment of his debt, recovering of his will, returning of articles held in trust by the decedent, buying necessary food and clothing for the minor heirs, acceptance of a gift on their behalf, and pursual of legal proceedings initiated for or against the decedent. This is because agreement in such things is difficult and delays are harmful. Therefore, to act individually is valid in them. (al-Sayyid Abu al-Hasan's *Wasilat al-najat* on Imami fiqh, and *al-Mughni*, vol.6, 'bab al-wasiyyah')

Al-Sayyid Abu al-Hasan has remarked in *al-Wasilah*: If one of the two executors dies or turns insane or anything occurs to him which annuls his appointment as an executor, the second will become independent in the execution of the will, and there is no need to appoint a new co-executor.

Ibn Qudamah states in *al-Mughni*: The *qadi* will appoint a trustworthy person as his counterpart, because the testator was not satisfied with the individual supervision of the surviving executor, and no

difference of opinion has been narrated in this issue except from the Shafi'is.

If both the executors die or their condition changes in a manner annulling their appointment, should the judge appoint two new executors or one will suffice? Here the schools differ. The correct view is that the judge will pay attention to expediency. Consequently, if it is expedient to appoint two executors, he will do so; otherwise it will be adequate to appoint one, because what is important is the will's execution, and the reason for the multiplicity of executors is usually the concern and affection of the executor for the legally disable heir or his friendship with the testator. In any case, there is no doubt that when one or more executors (as the case may be) die, it is as if there was no executor from the very beginning.

The Imamiyyah, the Shafi'is, and the Hanbalis in the more preponderant of the two narrations from Ahmad, state: An executor is not entitled to hand over the job of executing the will to another without the prior permission of the testator.

The Hanafi and the Maliki schools observe: It is valid for an executor to appoint by will another person to fulfil the duties for which he was appointed executor.

Appointing an Executor for Marriage

The schools differ as to whether anyone having authority (*wilayah*) concerning marriage (of a ward) is entitled to transfer it to another through a will (for instance, when a father authorizes the executor of his will concerning the marriage of his daughter or son).

Malik considers if valid. Ahmad observes: if the father mentioned the name of the specific person to whom his child should be married, it is valid to appoint an executor for marriage, not otherwise. Al-Shaykh Abu Zuhrah in *al-Ahwal al-shakhsiyyah*, 'bab al-wilayah', narrates from a multitude of *fuqaha'* that it is not valid to appoint an executor for marriage; the Imamiyyah hold the same opinion.

A Wasi's Acknowledgment

If a *wasi* makes an acknowledgment of the decedent's liability regarding some property or debt, his acknowledgment is not executable against the heirs, minor or major, because it is an acknowledgment regarding another's dues. If the issue is raised in the court, the *wasi* will be considered a witness, provided he is not himself a party to the case.

If an executor gives evidence in favour of minor heirs or the decedent, his testimony will not be accepted because his testimony affirms his own right of disposal in regard to the subject of his evidence.

Liability of a Wasi

If anything suffers damage at the hands of the *wasi*, he is not liable for it unless he has violated or neglected his duty. If a minor heir on attaining majority accuses the *wasi* of breach of trust or negligence,

the burden of proof will rest on the heir, and the *wasi* shall take an oath, because the *wasi* is a trustee, and in accordance with the hadith:

ليس على الأمين إلاّ اليمين

A trustee is liable for nothing except an oath.

Anyone accusing a *wasi* of breach of trust or negligence is entitled to proceed against him legally, provided that he is sincere in his intent and by doing so seeks the pleasure of God. But if it is known that he has no aim except harassment and defamation of the *wasi*, due to some enmity between them, then his plea will not be heard.

If a person dies intestate, and it is not possible to refer to a *qadi*, a reliable and trustworthy person from among Muslims may take charge of the affairs of his estate, taking care to do what is good and beneficial, especially in matters which may not be delayed. It is the judge's duty to later on endorse these dispositions, and he may not invalidate them.

Probating a Will

The schools concur that a will concerning property or its benefit is proved by the testimony of two males, or a male along with two female, witnesses from among '*adil* Muslims, in accordance with the verse:

وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنْ الشُّهَدَاءِ

And call in to two witnesses from among your men, or if they are not two men, then one man and two women, such witnesses as you approve of... (***2:282***)

The schools differ concerning the acceptability of the testimony of '*adil* witness from Ahl al-Kitab in the particular case of proving a will. The Imamiyyah and the Hanbalis observe: The testimony of Ahl al-Kitab is valid in the case of will, only during a journey when none else is available, in accordance with the verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمْ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِنْكُمْ أَوْ آخَرَانِ مِنْ غَيْرِكُمْ إِنْ أَنْتُمْ ضَرَبْتُمْ فِي الأَرْضِ فَأَصَابَتْكُمْ مُصِيبَةُ الْمَوْتِ

O believers, the testimony between you when any of you is visited by death, at the time of making a will, shall be two 'adil men from among you, or two others from another folk, if you are journeying in the land and the affliction of death befalls you. (***5:106***)

The Hanafi, the Shafi'i and the Maliki schools observe: The testimony of a non-Muslim will not be accepted in any condition. neither in case of a will nor in anything else. They add: The meaning of the words: مِنْ غَيْرِكُمْ in the verse is, 'from among those who are not your relatives', and not 'from those who do not belong to your religion'. (*al-Mughni*, vol.9, 'bab al-shahadah')

The Imami, the Hanbali and the Shafi'i schools say: Ownership of a property is proved by the evidence of one witness along with an oath. The Hanafis observe: A judgment will not be given on the basis of a single witness and an oath. (*al-Mughni,* vol.9, 'bab al-shahadah', and *al-Jawahir*, 'bab al-shahadah')

The Imamiyyah state: The right to one-fourth of a bequeathed property is proved by the evidence of a single woman; to a half by the evidence of two women: to three-fourths by the evidence of three women, and to the whole property by four women witnesses, *'adalah* being essential in all the cases. This opinion is particular to the Imamiyyah to the exclusion of other schools, because of authentic traditions from the Ahl al-Bayt ('a) in this regard.

This was as regards the bequest of property or its benefit. Concerning the nomination of an executor, it is not proved except by the evidence of two male '*adil* Muslims. Hence, as per consensus, the evidence of Ahl al-Kitab or women, both individually and jointly with men, or a single male witness along with an oath, will not be accepted.

1. Al-Jawahir, 'bab al-wasiyyah'.
2. A dhimmi is a person who pays jizyah to Muslims, while a harbi, according to the Imamiyyah, is one who does not pay jizyah although he may not be at war with them. According to the other schools, harbi is one who takes up arms and attacks travellers on public highways (Ibn Rushd's al-Bidayah wa al-nihayah, vol.2, 'bab al-harabah'). Al-Shahid al-Thani in his book al-Masalik, 'bab al-wasiyyah', has said: A bequest in favour of anyone who does not fight us due to our religion, irrespective of his being dhimmi or harbi, is valid, in accordance with the verse: 60:8,9) لاَ يَنْهَاكُمْ اللَّهُ), as well as the tradition from al-Imam al-Sadiq (A): Give the bequest to the legatee even if he is a Jew or Christian, for surely God has said:

فَمَنْ بَدَّلَهُ بَعْدَمَا سَمِعَهُ فَإِنَّمَا إِثْمُهُ عَلَى الَّذِينَ يُبَدِّلُونَهُ

Then he who alters after having heard it, its sin is on those who have altered it. (2:181)
Here no difference has been made between a harbi and others.

3. From among the Imami fuqaha', al-Shaykh Ahmad Kashif al-Ghita' favours the Maliki view that it is valid to bequeath in favour of a person not in existence; he remarks in Wasilat al-najat, 'bab al-wasiyyah': "There is no hindrance in a testator's making the ownership of a bequest conditional to the coming into existence of the legatee. Thus the legatee will not own it unless after his coming into being, as is the rule in waqf." But the author has given this view on the condition that there be no ijma' opposing it.
4. The meaning of the word 'property' (al-milk) differs in relation to the owner. Thus, in relation to a person, it means the power and right of disposal over it in any manner the owner desires; in relation to a mosque, it implies the allocation of its income to its use. Consequently, the observation that 'a mosque or something similar has a legal personality capable of holding property and transferring it,' is meaningless.
5. The Imamiyyah consider it necessary that if the legatee rejects the bequest during the life of the testator and dies later, and after him the testator also dies, the right of accepting the will is transferred to the heirs of the legatee, because, they say: Accepting or rejecting a will has no effect during the life of the testator.
6. It is stated in al-Shara'i', al-Masalik and al-Jawahir that if a testator uses vague words in his will for which the law has

no interpretation, his heirs will be referred to to determine their meaning. Thus, if he says: “Give him a share from my property,” or “a part” or “a portion of it,” or “a little of it”, or “much of it,” or similar terms which do not denote any fixed quantity either lexically, or legally or customarily, the heirs will give anything considered as having value.
7. The four Sunni schools concur on these dispositions being enforceable from a third of the estate, and the Imamiyyah differ among themselves. Most of their earlier fuqaha’ considered it enforceable from the original estate, while most of the latter legists from a third. Those among them who favour its enforceability from a third are al-‘Allamah al-Hilli, al-Shahid al-Awwal, al-Shahid al-Thani and the authors of al-Jawahir and al-Shara’i, in accordance with the tradition narrated by Abu Basir from Imam al-Sadiq (A):

للرجل عند موته ثلث ماله

A person is entitled to a third of his wealth at the time of his death,
as well as an authentic tradition narrated by Ibn Yaqtin:

للرجل عند موته الثلث والثلث كثير

A person is entitled to a third at the time of his death, and a third is a lot.
These traditions do not differentiate between a bequest and dispositions. According to a tradition narrated by ‘Ali ibn ‘Uqabah concerning a person freeing his slave, the slave will be freed to the extent of one-third.
Had the Imam said: بعد موته (after his death) instead of عند موته (at the time of his death), it would have been appropriate to take his words to mean a will.

8. Often al-‘Allamah al-Hilli quotes al-Mughni verbatim et literatim, and relies on it to explain the views of the schools. It has become clear to me as a result of enquiry and research that scientific cooperation between Sunnis and Shi’is was much greater in the past than it is today. Al-‘Allamah al-Hilli quotes in al-Tadhkirah the opinions of the four schools, the Zahiriyyah, as well as other Sunni schools, and Zayn al-Din al-‘Amili, known as al-Shahid al-Thani, used to teach fiqh in accordance with five schools in Ba’labak (Lebanon) in 953/1546, apart from teaching in Damascus and at al-Azhar. Similarly, al-Shaykh ‘Ali ibn ‘Abd al-Al, known as al-Muhaqqiq al-Thani (d. 940/1533), taught in Syria and al-Azhar. If this proves anything, it proves the unbiased nature of the Imami ‘ulama’ and their pursuit of knowledge for knowledge’s sake, in accordance with the tradition:

الحكمة ضالة المؤمن يأخذها أنّى وجدها

Wisdom is the lost property of a believer; he acquires it from wherever he finds it.
Similarly, it proves at the same time the unity of Islamic jurisprudence (usul al-fiqh) and its sources amongst all the schools.

9. Al-Sayyid Kazim al-Yazdi, Mulhaq Hashiyat al-Makasib.
10. The Imamiyyah legists differ as to whether ‘adalah is a condition for a wasi. The prevalent (mashhur) view among them is that ‘adalah is necessary, while researchers consider his being trustworthy and reliable as sufficient. There is a third opinion which says that he should not be a known fasiq. The second view is correct, keeping in mind the general nature of the proofs, which include ‘adil and non-‘adil persons, as well as the exclusion by these proofs of an untrustworthy person because his dispositions do not fulfill the testator’s purpose and harm the legally disable beneficiaries.

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