
(1910) 06 AHC CK 0035
In the Allahabad High Court

Ata Muhammad Chaudhry

APPELLANT

Vs

Musammat Saiqul Bibi and Another

RESPONDENT

Date of Decision : 21-06-1910

Acts Referred:

Citation : 7 Ind. Cas. 820

Hon'ble Judges : Karamat Husain, J

Bench : Single Bench

Judgement

Karamat Husain, J.—This was a suit by two daughters of Musammat Rakima by Hashmat Ullah for their share in the property left by Hash matullah. The defence was that they were illegitimate. The first Court decreed the claim and that decree was upheld by the lower appellate Court. The defendants prefer a second appeal. It is argued on their behalf that the plaintiffs are illegitimate. It appears that Musammat Rakima, while a minor, was first given in marriage to a minor, Shafi. After a week, she was given in marriage to another minor, Zakaria. After a time, a divorce was pronounced either by the minor husbands, Shafi and Zakaria or by their fathers. Musammat Rakima after being divorced was married to Hashmatullah and gave birth to the plaintiffs by him during the life-time of Shaf and Zakaria. The above facts are admitted on both sides, and it has been found by the lower appellate Court, in answer to the issues remitted, that Hashmatullah when he married Musammat Rakima was familiar with the marriages and divorces of his cousin, Musammat Rakima.

2. On the above facts, two points arise for decision:

(a) Can a minor or his guardian validly divorce his (minor's) wife?

(b) Is the issue of a minor's wife, divorced either by him or by his guardian, by a second husband, who marries her with the knowledge that she is the wife of the minor and divorced by him or by his guardian, legitimate?

3. The Hanafi lawyers are agreed that a guardian has no power to divorce the wife of his ward. They are also agreed that a minor during his minority has no

power to do so. The first portion of the rule has been expressly stated by the author of the Radd-ul-muhtar In commenting on a text of the Durr-ul-mukhtar (1), he has said so (2). The source of the above rule is a tradition (3).

4. The second portion of the rule is stated in the Hidayah by Grady (4).

5. Abdul Rahman in his Institutes of Musalman Law has stated the rule in the following terms:

The father cannot validly repudiate the wife of his minor son nor can the minor pronounce a valid repudiation " p. 126.

6. In the face of the well-settled rule of law that a guardian has no power to divorce the wife of his ward, the reasoning that if a guardian can give a minor in marriage, he can also pronounce a valid divorce on his behalf, is a dangerous analogy and cannot be a legitimate source of innovations in the Hanafi Law.

7. The second question is very important. Upon it rests the legal status of the children of a section of the community. The law of legitimacy is simple enough, in its nature, but the mode, in which it has been treated by the Hanafi Lawyers, has introduced complications. In the first place they do not apply the maxim, "Ignorantia juris non excusat," to all the cases of mistake in sexual intercourse. Secondly, they mix up the law of whoredom, which is one of the foulest crimes in Islam, with the law of legitimacy which forms part of the law of the family.

8. Thirdly, many of them ignore the inherent distinction between void (batil) and invalid, (fasid) marriages and base the legal consequences of a marriage on the application of the term batil or fasid to it, without regard to the objective condition which determines its character. In these circumstances, some remarks on the above three points are necessary.

9. Although in exceptional cases under the Hanafi Law the ignorance of law is as much excusable as the ignorance of fact, yet, as a rule, the presumption is that a Hanafi brought up in a Muhammadan country (dar-ul-islam) knows the laws that govern him (5-a to c).

10. Coming to the next point, I may say that the confusion of the law of whoredom with that of legitimacy is due to the common element of sexual intercourse. That intercourse may be lawful or unlawful or it may be doubtful whether in a particular case it is lawful or unlawful. Punishment is only inflicted when the act is positively unlawful. If the man accused of whoredom is doubtful, punishment is averted; because the Prophet has said "Avert ye punishments by doubts." The saying is one of the forms of the principle which entitles an accused person to the benefit of doubt in the mind of the Judge (7) who tries him and is akin to the maxim of the English law; "It is better that ten guilty men should escape than that an innocent man should suffer ," [Hallroyd, J. in Sarah Hobson's case Lewin C.C. 261].

11. The Hanafis, however, in their zeal to give the benefit of doubt to a man

accused of whoredom, enumerate the cases, in which the accused himself, irrespective of the mental state of the Judge, may feel doubtful whether the sexual intercourse of which he is being tried, is lawful or unlawful. They seem to think that if there are circumstances, which may create a doubt in the mind of the accused, the Judge ought to hold that the corpus delicti of whoredom is not complete and to acquit him. On this basis they classify the circumstances which, from, the point of view, may create a doubt in a man as to a particular sexual intercourse. In the translation of the Hidayah the term "doubt" is rendered as "error" but I prefer to use the term "doubt" which is the correct translation "shubhat". A doubt may be

(a) A doubt in the act,

(b) A doubt in the woman (8).

In the first class of doubt the woman is certainly prohibited by law; but the man labouring under a fallacy supposes that sexual intercourse with her is lawful. One of the examples given is that the services of the slave girl of a wife are lawful to her husband and he may suppose that sexual connexion is one of her services and, therefore, lawful (9).

12. In this class of doubt the punishment is only remitted when the accused pleads that by a fallacious reasoning he inferred that the sexual connexion was lawful. If he admits that he knew it to be unlawful he is punishable. It is to be noticed that as the Woman in this class is certainly prohibited by law, sexual connexion with her is whoredom and to say that a man may wrongly infer that sexual intercourse with her is lawful is incorrect; but in consequence of the ignorance of law being excusable in some cases, the Hanafis say that, in spite of the woman being certainly prohibited by law, a man may through a fallacious reasoning infer that sexual intercourse with her is lawful. According to the maxim, "Ignorantia juris non excusat" such erroneous reasoning can be of no avail.

13. In the second class the prohibition of the woman herself by virtue of some authority is said to be lawful (10-a). A man accused of whoredom with such a woman is not punishable even when he knows that sexual intercourse with her is prohibited. The reason advanced by the Hanafis for this rule is that the prohibition against the woman, owing to some authority, being doubtful, carnal connexion with her is not whoredom (zina) and his knowledge or ignorance that carnal connexion with her is prohibited is, therefore, immaterial.

14. A careful comparison of the two classes reveals that the distinction sought to be drawn between them turns upon the prohibition of the woman by law. If she is certainly prohibited by law the doubt is in the act of sexual intercourse; but if the prohibition of the woman, in consequence of some authority, is doubtful, the doubt is in the woman. Juristically the basis of the distinction is imaginary. Under the Hanafi law all the women in the world, with reference to each man, are:

(a) Those with whom sexual connection is prohibited by law.

(b) Those with whom sexual connexion is not prohibited by law. A woman with whom sexual connection is doubtful in law is an impossibility. It is the man who may be doubtful but the law cannot. "Doubtful" is a mental state of human being and cannot be an attribute of a rule of law which must always be certain. What the Hanafis seem to mean, by drawing the distinction between the two classes, is that the state of the law on the subject is such that in the case of "a doubt in the act" no ordinary man, with ordinary care, can be doubtful as to the certainty of the prohibition of the woman and that in the case of a doubt in the woman, an ordinary man with ordinary care can be doubtful. They have, however, choose to state the rule in their own way and one in administering the Hanafi law is bound to take tailings as one finds them and cannot view them in the light of one's own apprehension in Jurisprudence. The law," as the Earl of Halsbury, L.C. rightly observed, "is not always logical," [Quinn v. Leathern (1901) A.C. 495 : 70 L.J.P.C. 76 : 85 L.T. 289 : 50 W.R. 139 : 65 J.P. 703 : 17 T.L.R. 749 because human affairs are to a great extent governed by feelings (present or representative) and not by pure reason. I, therefore, take it for granted that under the Hanafi law all the women in respect to each man are divisible into three classes:

(a) Women that are prohibited.

(b) Women that are unprohibited.

(c) Women whose prohibition is doubtful.

15. I have predicated the terms "prohibited" and "unprohibited" of "women", inasmuch as the proposition "A woman is prohibited" has an important significance in the Hanafi Jurisprudence.

16. Instances of the women as to which the prohibition is doubtful are given in the Hidaya (11).

17. In consequence of the common element of sexual intercourse, the law of whoredom and the law of legitimacy being connected in the minds of the Hanafis, they discuss the effect of doubt in sexual intercourse on legitimacy, immediately after discussing its effects on punishment for whoredom. They say that some kinds of doubt in sexual connexion, which are sufficient to entitle a man accused of whoredom to the benefit of doubt, are also sufficient to establish legitimacy and lay down that if the doubt is "in the act," and not in the woman", the issue is illegitimate and that if the doubt is "in the woman," the issue is legitimate (12--a to e).

18. The reason of the rule given by the Hanafis is that when the woman is certainly prohibited, sexual intercourse with her is whoredom and that when the prohibition is doubtful sexual intercourse is not whoredom.

19. In addition to the two classes of doubt, already stated there is a third class,

which also makes the constitution of the corpus delicti of whoredom doubtful. It is marriage. In the case before me, I am concerned with this class. I, therefore, discuss the following points relating to it:

(A). According to some Hanafis, the contract of marriage is not a distinct class (13-a).

In order to save complication, I shall treat the contract of marriage as a distinct class.

(B) According to Abu Hanifa the contract of marriage is sufficient to avert punishment and the facts that the woman is not a "fitting subject of marriage," and that the husband knows the marriage to be unlawful are immaterial. According to the two disciples, the contract of marriage is sufficient to avert punishment only when the woman is a fitting subject of marriage" and the husband is ignorant of the unlawfulness of the marriage (14-a to e).

Hanafis are divided in opinion as to disciples is to be inflicted in a marriage with whether punishment according to the two any woman who is certainly prohibited or whether it is to be inflicted only when he marries one of such women as are permanently prohibited (15-a). On principle, I see no reason for such a distinction. Prohibition against a woman, as I shall show later on, takes away from her the character of being a "fitting subject" of marriage and renders the contract of marriage with her void. In these circumstances, there can be no ground for any distinction between the so called temporarily and permanently prohibited women.

(C) The contract of marriage, in the opinion of Abu Hanifa, creates a doubt in the woman" and hence as soon as a marriage takes place, sexual intercourse with her ceases to be whoredom and punishment for it drops, in spite of the fact that the man knows the woman to be certainly prohibited, and the marriage to be unlawful. In the opinion of the two disciples, it creates a "doubt in the act" and sexual intercourse with her, therefore, ceases to be whoredom only when the woman is a fitting subject of marriage" (16).

The conflict of opinion between Abu Hanifa and his two disciples turns upon the meaning to be assigned to the expression a fitting subject of marriage.

According to Abu Hanifa, the legal fitness of a woman for marriage with some body is sufficient to create a doubt in the corpus delicti of whoredom. According to the two disciples, the legal fitness of the woman for marriage with the man in question is essential (17-a).

(D) The rule, according to the two disciples, as already stated, is that if the man knows that the marriage is unlawful, he is punishable for whoredom. This implies, as has been stated by some, that if a man is ignorant of the unlawfulness of the marriage, he is not punishable. His ignorance of the unlawfulness of the marriage may be due to the ignorance of the fact that the woman belongs to one of the nine classes which are prohibited under the Hanafi

law, or it may be due to the ignorance of the law that a marriage with the woman is unlawful, though the fact that the woman belong seen prohibited class is known. The Hanafis, in consequence of excusing the ignorance of law in some cases, have taken no notice of this important distinction. The language, in which the view of the two disciples, on this point, has been couched by Kazi Khan and others, leaves, however, no room for doubt that it is the ignorance of the fact that the woman belongs to a prohibited class, and not the ignorance of the law on the subject, which averts punishment (18?a and b).

Kazi Khan, in stating the rule as to a marriage with another's wife, uses the language which clearly shows that the distinction turns upon the mistake of fact, See No. 40c.

The reason why the rule is laid down in affirmative form is to cover the case of a new convert to islam, who may be excused for the ignorance of law as well as for the ignorance of fact.

(E) One of the results of the conflict of view on this point, between Abu Hanifa and his two disciples, is the diversity of opinion in Hanafi lawyers some hold that the fatwa, in punishing a man for whoredom, is to be according to the view of Abu Hanifah and others hold that is to be according to the view of the two disciples. See No. 14 a. if the consequences of the diversity of opinion between Abu Hanifa and his two disciples were confined to the administration of the law of crimes, it would be unnecessary for me to state that preference is to be given to the view of the two disciples, but as it affects the law of legitimacy, I have to point out that according to the practice of the Courts in British India, the view of the two disciples is to be preferred in this case (19)

In addition to the settled practice, (the view of Abu Hanifa, with all humility to the great founder of the Hanafi School, is based on unsound reasoning. In trying a man accused of whoredom, a Judge is to look to the fact whether the woman with whom he had sexual connexion is or is not prohibited to him. He cannot go into the question that the woman is not prohibited to some other man. That fact is quite irrelevant and can have no possible bearing on the guilt of the accused. Further the "fitness for the ends of marriage, i.e., procreation" (see 60 a) is simply a physical fitness and the Judge has to confine himself to a legal fitness in respect of the accused before him.

(F) A corollary of the two disciples' view-is that a marriage with a woman certainly prohibited by law does not take sexual intercourse with her out of the category of whoredom and is not, therefore, sufficient to legitimize its issue. This is expressly stated in the Alamgiri, the Ruddul Muhtar and the notes by the author of Ruddul Muhtar on the Bahr-i-Raiq (20-a and b).

20. The texts quoted in note (20) include the corollary of Abu Hanifa's view and I feel constrained to remark that it cannot be accepted as good law. The proposition that a farce of marriage with one's own mother, sister, or daughter, or with the wife of one's own neighbour, with a perfect certainty in the mind of

the man that the woman is undoubtedly prohibited by law, and that the marriage is clearly unlawful, establishes legitimacy, is against the purity of the family life and the decency of sexual relations. Mohammadans will be startled to learn that such is the rule of their Divine Law of Marriage. Moreover, the complicated relations, by blood and by marriage", will render the law of inheritance a mass of confusion.

21. It follows from the above discussion, that if the farce of marriage with a woman, certainly prohibited by law, is to be designated by the sacred term "marriage," it must be called a batil (void) marriage i.e., a marriage which is nugatory and creates no legal results (21-a and b).

22. This leads me to the third position i.e., that there is a distinction between a batil (void) and a fasid (invalid) marriage (22). The term batil when applied, by the Hanafis, to a secular legal transaction, denotes that no legal results flow from it, while the term fasid denotes that the transaction is not absolutely devoid of legal effects (23).

23. The Hanafis have lost sight of the distinction and have applied the terms batil and fasid to defective marriages indiscriminately (24?a). Some Hanafis have gone the length of stating that there is no distinction between void (batil) and invalid (fasid) marriages. (25?a and b). The interpretation put by Chalpi on the use of the terms batil and fasid in the Hidaya, is more satisfactory than the one put upon it in the Fatahul Qadir (26).

24. In the Bahr, a distinction between a batil and a fasid marriage is noticed (27) and the author of the Raddul Muhtar has seen the necessity of drawing" a distinction between them (28).

25. The view that there is a distinction between a batil and a fasid marriage is undoubtedly correct; because a marriage under the Hanafi law is a Civil contract, (29) and as such is necessarily divisible into valid (sahih) and defective (ghair sahih), which is sub-divisible into void (batil) and invalid (fasid.)

26. The proposition that there is no distinction between batil and fasid marriages admits of two interpretations.

(a) According to Abu Hanifa, all defective marriages are fasid without distinction between batil and fasid. See Nos. 20 and 20 a.

(b) According to the two disciples, there is no distinction between a batil and a fasid marriage for dropping punishment; but there is a distinction between them as to their legal incidents of a civil nature.

27. This is evident from the fact that the Hanafis, in spite of the indiscriminate application of the terms batil and fasid to defective marriages, are agreed that according to the two disciples, the issue of a batil marriage is illegitimate (30a).

28. As I adopt the view of the two disciples, it becomes necessary for me to state the objective condition which differentiates a batil (void) from a fasid (invalid)

marriage. The requisites of a valid marriage are set out in Ballie (31).

29. The text simply states in an affirmative form that the presence of certain conditions is essential for the validity of a marriage. It does not lay down the consequences of the absence of those conditions on a marriage, and does not, therefore, draw a distinction between the conditions of constitution and the condition of validity. With reference to the effect of their absence on a marriage, a distinction is to be drawn and they are to be grouped as follows:?

(a) Fitting subject of a lawful marriage.

(b) Certain formalities.

30. The first is a condition of constitution and its absence makes a marriage bilil (void). Others are the conditions of validity and their absence makes it invalid. (32)

31. A. woman is a fitting subject of a valid marriage when she does not belong to any of the nine prohibited classes. (33) It is important to note that the Hanafis draw a distinction between the first three classes and the remaining classes and call the former ""permanently prohibited," and the latter ""temporarily prohibited". (3:1)

32. The distinction is drawn to give prominence to the fact that in the three classes the physical conditions on which prohibition rests are permanent i.e. last as long as the woman lives, and that in the other classes they are temporary, i.e., subsequent events can put an end to the physical conditions of prohibition. The advantage of exiling attention to this distinction is to show that in one case a man, who has set his heart upon marrying a woman, has a chance of lawfully marrying her if he waits, and that in the other case he has no such chance. The distinction is not and cannot be intended to imply that the legal result of the prohibition in the three classes is different from its legal result in the other classes; for it is the prohibition by the law-giver and not the duration of the physical conditions, on which the prohibition rests, that makes the prohibited act illegal and void. In a majority of cases, legal prohibitions are based on physical conditions that change, and a possible change in them cannot alter the consequence of the prohibitions. This will mean that the violation of the law has the effect of changing the law. Under the law of British India, a contract by a minor is void (see *Mohon Bibee v. Dhurnnodas* 30 I.A. 114 : 5 Bom. L.R. 421 : 30 C. 539 : 7 C.W.N. 441 and no one can say that the possibility of his attaining majority converts his void contract into a contract which is not void.

33. Lunacy may be temporary or permanent and it is absurd to say that a contract entered into during a temporary madness stands on a different footing from the one formed during a permanent madness. In determining the nature of a legal transaction, one has to look to the time at which it is entered into and not to any subsequent time.

34. If the temporary character of the physical conditions, on which the

prohibition to marry a woman is based, were sufficient to make such a marriage anything other than void, startling absurdities would follow. The issue of an admittedly unlawful intercourse, which is positive whoredom, by reason of a possibility of a marriage between the parents of the issue, would be sufficient to legitimize the issue. This is opposed to the Hanafi law. The relation of sexes under that system is too pure to admit of such a result. The Hanafis, in order to safeguard the purity of the relation of sexes, have gone the length of ruling that if a man commits whoredom on a free woman and then marries her, such marriage cannot save him from punishment for the previous whoredom (35): hence it cannot a fortiori be sufficient to establish legitimacy of the issue of the whoredom.

35. If a subsequent marriage is not sufficient to legitimize the issue of an antecedent whoredom, the mere possibility of a marriage cannot do so. This shows that the issue of a batil (void) marriage, which does not take sexual intercourse out of a category of whoredom, cannot be legitimised by a possibility of change in the physical conditions on which the prohibition of the woman rests.

36. According to Abu Hanifa, a marriage with a woman permanently prohibited is invalid and not void and this conclusively establishes that the permanency of the physical conditions on which the prohibition is based does not determine the character of a defective marriage. What makes a marriage void is that the woman is undoubtedly prohibited by law.

37. The fact that the term "prohibited" is predicated of the women that are permanently prohibited such as mothers etc. and of "others" wives" in the one and the same verse of the Quran, in the one and the same mode of prohibition, is a conclusive proof of the rule that, in respect of the" certainty of prohibition, ""another"s wife" stands on the same footing as one"s own mother, (see N. 39).

38. The author of the Mujtaba arrives at the same conclusion in a different way. He says that co-habitation in a marriage, in the validity of which the learned differ, necessitates iddat, but in a marriage with another"s wife during her iddat does not necessitate it; because no one holds that such a marriage is lawful and, therefore, it is not formed at all.

39. The consensus of the learned on the unlawfulness of a marriage and not the temporary character of the physical conditions on which the unlawfulness rests, according to the author of the Mujtaba, is the criterion which renders a marriage void. If the learned are not agreed, as in the case of a marriage without witnesses, it is invalid. This is another form of the proposition that a marriage with an undoubtedly prohibited woman, be the prohibition based on temporary or on permanent physical conditions, is void and that a marriage with any other woman in the absence of some condition of validity is invalid. The above proposition, being in harmony with the principles of the Hanafi law of marriage, coincides with the corollary of the two disciples" view regarding the punishment

of a man accused of whoredom (see p.33a.F.).

40. It only remains to state the effect of an error of fact or of law, in a marriage, on the legitimacy of its issue. To err is human, and a man through the ignorance of fact that the woman belongs to a prohibited class, or through the ignorance of law, that marriage with her is unlawful, may marry her. In the first case the marriage is invalid and in the second void. The marriage in the first case is deemed to be invalid because of the extreme tenderness of the Hanafi law to children which will not declare them to be illegitimate so long as it is possible to make them legitimate(3G). The English translation quoted from Grady in note (38) does not convey the real sense of the Arabic text which is that for the preservation of the issue, legitimacy is deemed to be established in a fasid marriage. In other words the desire to preserve the issue from death is the motive for regarding it legitimate, although the marriage of which it is the fruit is fasid.

41. The reason given for regarding the issue of a fasid marriage to be legitimate is open to criticism in many ways. In the first place, the character of a marriage which precedes conception, ought to determine the legal status of its issue." legitimacy can depend upon marriage; but the character of a marriage cannot depend upon the legitimacy or illegitimacy of its issue, inasmuch as an effect cannot determine the legal character of a cause. In the second place, the issue is not the only thing to be considered in determining the character of a marriage. A marriage gives rise to many rights and duties, and many duties are cast on third parties with reference to the married couple. The nature of such rights and duties necessarily depends on the character of the marriage, which is to be determined as soon as it takes place, and the determination of which cannot be postponed until the birth of a child. What is intended to be stated perhaps, is: out of the category of defective marriages as large a number of them as is possible, is included in the category of fasid marriages. The motive for this is the desire to make legitimate as large a number of children as impossible; but this amounts to the statement of a subjective motive and is not the statement of the objective factor which makes a marriage void. To the third place, if the preservation of" the issue is the only reason for regarding an unlawful marriage as invalid, a void marriage should also be regarded, invalid. The issue of a void marriage stands as much in need of preservation as the issue of an invalid marriage. In the fourth place, the preservation of the issue of a sexual intercourse can easily be secured by casting a duty upon its natural father to bring it up without conferring upon it the status of legitimacy.

42. The reason given is no reason at all for determining the character of a marriage, inasmuch as there is no necessary connection between the legitimacy of a child and its preservation. Manifestly the biological parentage has been fixed up with the legal parentage and a reason which appeals to feelings has been put forward. Had I been free to express my own view as a servant of the Hanafi Law, I would without the least hesitation, have laid down that the issue of a valid

marriage only is legitimate and that the issue of a void as well, as of an invalid marriage is illegitimate. To lay down the requisites of a valid marriage marriage. The reason of the view I take is simple enough. Under the Hanafi Law, sexual intercourse between a man and a woman, who is neither his wife nor his slave, is unlawful and prohibited absolutely. (Ballie, p. 1.) For the legality of intercourse a valid marriage is a condition precedent and in its absence no legal result (one of which is the legitimacy of the issue) can follow. I, however, cannot expound the Hanafi Law as I find it, and cannot decide any case with, reference to my own view on the subject.

43. The propositions, which, have already been established, make it almost a truism that a marriage with another's wife, with, the knowledge that she has a husband, is batil (void), and that the issue of such, a marriage is illegitimate ; but this is not a matter of inference only. A verse of the Quran, in. unequivocal terms, makes the wives of others prohibited to a man

44. And not only all the Hanafi lawyers; but all the Muhammadan lawyers of all the. schools, are agreed that a marriage with the wife of another is undoubtedly prohibited by the Quran. Such a marriage is, therefore, void and its issue illegitimate. The passages given in the note (38) are express and clear authority on the point.

45. In order to appreciate the passages quoted in note (38), it must be borne in mind that iddat is not observed in a batil marriage and that there is no iddat when parentage is not established. (39)

46. In *Liaqat Ali v. Karimunnissa* 15 A. 396, it was held that a Muhammadan could not, by acknowledging him as his son, render legitimate a child whose mother at the time of his birth he could not have married by reason of her being the wife of another man. The ruling rightly takes it for granted that such a marriage is void and that, therefore, its issue is illegitimate.

47. As the question is very important, I touch upon it from the stand point of Hanafi Jurisprudence (Usul Fiqali). One of the principles of their Usul Fiqali is that when a law-giver makes a substance (ain) prohibited, it is not some act relating to that substance which is prohibited, but the substance itself in reality, is prohibited (40). This must seem strange to a modern jurist but under the Hanafi Usuli Fiqali it is so.

48. Another principle is that a prohibition by a law-giver in respect of legal transactions makes them haran (unlawful) and void (41).

49. Applying these two principles to a marriage with one's own maharam, they lay down that as the term "prohibited" is predicated of them in the Quran(42), it is not only that sexual intercourse with them is unlawful but that the quality of being a "fitting subject of marriage" is taken away from them and, therefore, a marriage with them is not only invalid but batil like a marriage between man and man (43).

50. The Harmfis, I may observe, have chosen the case of a marriage with one's own maharim as a, typical case only; but the principles which make marriage with them void, and take them out of a category of being fitting subjects of marriage, are applicable to all the women of whom the term prohibited" is predicated, irrespective of the fact that, the physical conditions, on the ground of which they are prohibited, are permanent or temporary. It follows that as the term "prohibited" is predicated in the Quran of "the wives of others" (Almohsinat), they cease to be fitting subjects of marriage so long as they are wives, and that a marriage with them is void, like a marriage between two men. The above two principles made the author of the Tonzih to hold that a marriage without witness is not invalid but void. (44)

51. In this connection, I have to examine the inference drawn by Mr. Baillie and two cases (one of the Calcutta High Court and the other of the Punjab Chief Court).

52. Mr. Baillie in his Digest of the Hanafi Law page 150 comes to the conclusion that a marriage with, a woman permanently prohibited is invalid. He possibly has been misled by the indiscriminate application of the term fasid to some marriages which are really batil. It is, however, elementary that the mere application of the term fasid or batil cannot determine the character of a marriage. It is the objective condition, that the woman is prohibited by law, which makes the marriage void. The basis of the distinction in his opinion is that the disqualification in a woman permanently prohibited is inherent, and cannot be removed; while in the case of a woman temporarily prohibited, it is not inherent but removable. The terms permanent and temporary qualify the physical conditions on which the prohibition rests. The possibility of a change in those conditions, therefore, cannot alter the legal effect of the prohibition. The rule of the Scotch Law that a subsequent marriage legitimizes the issue of an antecedent illicit intercourse might have helped Mr. Baillie in drawing the inference.

53. In Azimun-nissa Khatoon v. Karimunnss Khatoon it is laid down that under Muhammadan Law marriage with the sister of a wife who is legally married is void, and that the children of such marriage are illegitimate and cannot inherit. Such a marriage, it is to be noticed, is not void in all cases. It is void only if the man, at the time of marrying the sister of his legally married wife who is alive, knows that the second wife is the sister of the first wife. If he is ignorant of that fact, the marriage is only invalid. Of course, if a man marries a sister of his legally married wife, during her life-time knowing the fact that she is a sister, but not knowing the law that she is prohibited, the marriage is void.

54. In Khurshed Jan v. Abdul Hanid Khan 6 P.R. 1908, it is held that according to Muhammadan Law the marriage with a fifth wife in presence of four living wives, is invalid, but not void, and consequently the children of such marriage are legitimate and entitled to succeed as the lawful heirs to their father. The rule laid down by the learned Judges, with due respect to them, is not the rule of the

Hanafi Law. It is the outcome of the distinction attempted to be drawn by Mr. Baillie between a void and an invalid marriage. A fifth wife is expressly prohibited to a man whose four legally married wives are alive. There is consensus of all the Muhammadan lawyers on this point. Such a marriage is, therefore, certainly void, and the mere fact that one of the four wives may die or may be divorced, cannot possibly alter its character. In determining that character one has to look to the time at which it is contracted, and not to the events that may subsequently happen. There is no connection between a change in the physical conditions on which a legal prohibition rests and a change in the consequence of that prohibition. The former may happen by the operation of the forces of nature beyond human power; but the latter can never happen without an order of a law-giver which is not forthcoming in this case. Lal Chand, J., at p. 52 of this judgment says:--It is clear that in case of five consecutive marriages, the word used is "La yajuzi" i.e., the fifth is not valid or is invalid. The meaning put upon La yajuzo, with due respect, is incorrect. The word only means it is not permissible or lawful", and is applicable to both an, invalid or a void marriage (45).

55. Lal Chand, J., on p. 40 regarding the text from Kazi Khan, cited on that page, observed:-- The extract also shows that a distinction between a batil (void) and a fasid (invalid) marriage is observed throughout." With due respect, there is no mention of the distinction in the text. Referring to a text quoted at p. 46, Lal Chand, J. at p. 52 says:--"The question of paternity is dealt with by the author in the paragraph 343 of his work (paragraph 1242 of the Lectures); and there it is distinctly pointed out, as quoted already, that if a man marries a woman by invalid (fasid) marriage, and has intercourse with her, then the descent of the child shall (according to Abu Hanifa and Abu Yusuf) be established from him. The only point of difference between these two and Mohammad being whether six months should be counted from the date of marriage or the date of intercourse. This is as clear an authority as could be demanded and establishes beyond all doubt that fifth marriage is merely invalid and that the issue of such marriage is legitimate according to the unanimous authority of Abu Hanifa and his two disciples." The text, with due respect to the learned Judge, simply lays down that the parentage of a child born of a fasid marriage at six months is established. It has no bearing on the question that marriage with a fifth wife is void or invalid. The result is that:

(a) Another's wife is not "a fitting subject of marriage."

(b) A marriage with another's wife, with the knowledge of the fact that she is the wife of another, is void.

(c) The issue of a marriage with another's wife, with the knowledge that she is another's wife, is illegitimate.

56. In the case before me, there is nothing to show that Hishmatullah is a new convert to Islam, or that he is not a resident of British India where the Hanafi

Law of Marriage is applicable to Hanatis. He must, therefore, be presumed to know the laws that govern him, and cannot be allowed to plead the ignorance of the law that Musammāt Rakima's divorce was invalid. That being so, his position is that he married Rakima, with the knowledge of the fact that she was another's wife. His marriage, therefore, with her is void, and the plaintiffs who were begotten of a void marriage are illegitimate. For the above reasons, I allow the appeal, set aside the decrees of the Courts below and dismissed the plaintiffs' claim with costs.

(1) The subject of divorce is a married wife and the person competent to divorce is a husband who is of sound mind, of age and who is awake. Radd-ul-muhtar on the margin of Durr-ul-mukhtar, Vol. II, page 428.

(2) By using the term husband, the author implies that the master of a slave or the father of a minor has no power to divorce the wife of the slave or of the son. Radd-u.l-Mahtar, Vol. II, page 428.

(3) Divorce is the privilege of the husband, (lit: the one who holds the leg) Lubab, Vol. I. page 385.

(4) The divorce of every husband is effective if ho be of sound understanding, and mature ago, but that of a boy or a lunatic or one talking in his sleep is not effective for two reasons. First, because the Prophet has said "Every divorce is lawful excepting that of a boy or a lunatic"; secondly, because a man's competency to act depends upon his possession of a sound judgment which is not the case with infants or lunatics and one talking in his sleep is the same in this point as a boy or a lunatic since his words in this case are not the result of a deliberate option, page 75. Hidayah Vol II. page 338.

(5) In the same way if an alien (Hurbi) embraces Islam, enters our country, drinks wine and says: "I did not know that it was forbidden", he is not punished. It is different when ho commits whoredom. The case of a zimme (a non-Muhammadan subject of a Muhammadan State) who embraces Islam, drinks wine and says: "I did not know that it was forbidden," is also different, for he will be punished on the principle we have set out. Usul Bazdawa, on the margin of Kashf, Vol. IV, page 346".

(5a) Similarly, i.e., as a son is not punished when he co-habits with the slave girl of his father, without knowing that the co-habitation is forbidden, and as his ignorance creates a doubt (which is sufficient) for dropping punishment, so is the ignorance of an alien (Hurbi) (who) is not punishable when he embraces Islam, enters our country and drinks wine, provided he is ignorant of the unlawfulness of drinking wine. His ignorance also creates a doubt, which is sufficient for dropping punishment. The case is different, when he commits whoredom thinking that it is not forbidden. The case of a zimme who embraces Islam and

drinks wine is also different. Both are punishable. The basis of the distinction between an alien and a zimme when they drink wine is the principle which we have stated. It is that ignorance in cases, in which a doubt is possible, is sufficient to avert punishment, but in cases, in which a doubt is impossible, ignorance cannot create a doubt which averts punishment. The ignorance by the alien of the unlawfulness of drinking wine is possible, for such unlawfulness is the result of prohibition by the law-giver, which is uncommunicated to aliens, whose country is the country of ignorance and of carelessness towards the law. His ignorance of the law that wine is forbidden, is fit to create a doubt; but whoredom is forbidden in all religious and, therefore, he cannot be presumed to be ignorant on this point; for the knowledge of the rule (relating to whoredom) does not depend on its promulgation by the law of Islam. Similarly the ignorance of a zimme who accepts Islam is no excuse; for he inhabits the country of peace (Dar-ul-Islam) and the prohibition against wine is commonly known therein. His ignorance does not, therefore, create a doubt inasmuch as it is not fit to create one and his doubt is due to his negligence, which is not excusable. Kashf, Vol. IV, pp. 345.46.

(5b) When the law is promulgated in the country of peace (Dar-ul-Islam) the mission of the messenger is complete and a person who is ignorant of law after that, is ignorant owing to his own negligence and not to the con-publicity of the law and hence his ignorance is not excusable. Usul on the margin of Kashf, page 346, Vol. IV.

(5c) It follows from what we have stated that the legal consequences of a command do not take effect in the case of a person to whom the command is addressed, prior to his knowledge of it; for it is not in his power to obey before he knows (the command) and he is, therefore, excusable. But when the command becomes well-known throughout the country of peace (Darul Islam), the mission of the messenger is complete, because it is not in his power to convey (Divine commands) to every one, what is in his power is to promulgate them. Usul, on the margin of Kasht, page 347, Vol. IV.

(6) The carnal conjunction which occasions punishment is zina, or whoredom; and this, both in its primitive sense, and also in its legal acceptation, signifies the carnal conjunction of a man with a woman who is not his property, either by right of marriage, or of bondage, and in whom he has no erroneous property, because zina is the denomination of an unlawful conjunction of the sexes, and this illegality is universally understood where such conjunction takes place devoid of property, either actual or erroneously supposed. The saying of the prophet "Avert ye punishment by doubts" supports this. The Hidayah, Grady, page 182.

This last sentence is not in the Grady but its original is to be found in the Hidayah in

Arabic.

(7) But there is strong and marked difference as to the effect of evidence in Civil

and

Criminal proceedings. "The circumstances of the particular case" must determine whether a prudent man ought to act upon the supposition that the facts exist from which liability is to be inferred. What circumstances will amount to proof can never be a matter of general definition. But with regard to the proof required in Civil and Criminal proceedings there is this difference that in the former a mere preponderance of probability is sufficient, but in the latter (owing to serious consequences of an erroneous condemnation both to the accused and society), the persuasion of guilt must amount to "such a moral certainty as convinces the minds of tribunal, as reasonable men, beyond all reasonable doubt." It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the minds of the Jury, but the doubt to the benefit of which the accused is entitled must be such as rational thinking, sensible men may fairly and reasonably entertain: not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. They must be doubts which men may honestly and conscientiously entertain." Law of Evidence, Amir Ali and Woodrofe, 4th Ed. page 17.

(8) Error in carnal conjunction is of two kinds, the first, error in respect to the act, which is termed Shubhat-Ishtibah, "or error of misconception" the second, error in respect to the subject, which is termed "Shoobha Hookmee," error by effect or Shuhba Milk (erroneous property). The first of these distinctions of error is not established, nor understood but with respect to a man who mistakes an illegal carnal conjunction for legal, because Ishtibah signifies the man having carnal intercourse with a woman, under the supposition of the same being lawful to him, in consequence of his supposing something other than that which is necessary to constitute legality as affording an argument of such legality; it is, therefore, necessary that this mistake should have operated in his mind in order to establish Ishtibah, or misconception, and hence this species of error is not understood, except in the case of a person who is under such misapprehension. The second species of error is established, where the argument of the legality of carnal conjunction exists in itself but yet practice cannot take place upon it, because of some obstacle; and this does not depend upon the apprehension or belief of the person who commits the unlawful act; whence this species of error is regarded in respect to all men that is to say, men who so conceive and also those who do not. And punishment drops in consequence of the existence of either of these two species of error, on account of the well-known tradition. Hidayah Grady, page 182.

Error in respect to the act exists in eight several situations, namely, with:

- I. The female slave of a man's mother.
- II. The female slave of his father.
- III. The female slave of his wife.

IV. A wife repudiated by three divorces, who is in her Iddat.

V. A wife completely divorced for a compensation, and in her Iddit.

VI. An Umm-i-Walid, who is in her Iddat after emancipation with respect to her master.

VII. The female slave of a master, with respect to his male slave.

VIII. A female slave, delivered as a pledge, with respect to the receiver of such pledge (according to the Rauayat-Sahih in treating of punishment), and it is to be observed that a borrower, in this point, stands in the same predicament with the receiver of a pedge. The Hidayah, Grady, page 182.

And in all these situations the person who has carnal conjunction does not incur punishment, provided he declare "I conceived that this woman was lawful to me," but if he should acknowledge his consciousness that the woman was unlawful to him, he incurs punishment.

(9) That is the case of one who is doubtful whether sexual intercourse in a particular instance is lawful or unlawful, while there is no authority in the sources of law (Alsamaa) which supports lawfulness ; because he mistakes what is no authority for an authority, for instance when he supposes that sexual intercourse with the slave girl of his wife is lawful, because he supposes it to be one of her services which are lawful to him. In this class of cases the existence of doubt in his mind is essential.

If there is no doubt and the man is certain of the unlawfulness, there is no mistake inasmuch as there is no authority in the sources of law to establish a doubt in reality. Hence as there is no mistaken supposition in him that the act is lawful, there exists no doubt at all.

Fatahud-Qadir, Vol. V., page 33.

*This is not in the Hidayah (Arabic).

(10) A doubt in the woman (Shubhat Hukmia) takes place when there is an authority which, negatives unlawfulness like the saying of the Prophet: "You and your property are for your father." In this case it is immaterial whether he thinks the act to be lawful or knows it to be unlawful, because the doubt owing to the authority exists in reality, be it known to some one or be it unknown. Fathaul-Qadir, Vol. V, page 33.

(10a) When a doubt is in the woman, the unlawfulness of sexual intercourse with her (lit: ownership) in a sense is established and sexual intercourse with her ceases to be whoredom under all circumstances (i.e., whether the man knows it to be unlawful or is ignorant of its unlawfulness). This is consequence of the existence of the authority which negatives its unlawfulness, independently of the doubt of the man accused of it and of his conviction.

Balu-Raiq, Volume V, page 12.

(11) Error in respect to the subject exists in six situations; namely with

1. The female slave of man's son.
2. A wife completely repudiated by an implied divorce.
3. A female slave sold, with respect to the seller, before the delivery of her to the purchaser.
4. A female slave Mamhoora (that is, a slave stipulated to be given in dower to a wife) with respect to the husband, before season of her being made wife.
5. A female slave held in partnership with respect to any of the partner.
6. A female slave delivered in pledge with respect to the receiver of such pledge, according to the Book of Pawnage. And in all those situations a person who has carnal connexion does not incur punishment even though he should confess his consciousness of such woman being unlawful to him. Grady, page 183.

(12) In a case of error of the second species, the parentage of the child is established in the man who has had such connexion, if he claim such child; but in a case of error of the first species the parentage of the child is not to be established in the man, notwithstanding his claim ; because in a case where the error is of the first species, the act of generation is positive whoredom, although punishment be not incurred, on account of a circumstance which has reference to the man committing such act (namely, that of the illegality of the act being misconceived by him according to his apprehension of it); but the act of generation, in a case of error of the second species, is not positive whoredom.

Hamilton's Hidayah by Grady, page 182.

(12a) The first takes place in the case of a man who is in doubt, that is, a man who is in doubt whether sexual intercourse is or is not lawful, while there is no authority which makes it lawful. He simply mistakes what is no authority for lawfulness for authority for lawfulness. For example he may infer from the lawfulness of the services of the slave girl of his wife the lawfulness of sexual intercourse with her. In this class a doubt in the mind of the man is necessary and there is no error in the absence of doubt in his mind ; because there is no authority which may create a doubt independently of his mental state. Consequently if he is certain as to the unlawfulness of the act there is no error and the second class which is shubhathukniya takes place owing to the existence of an authority which negatives the unlawfulness of the woman like the saying of the Prophet: ""You and your property are for your father." In this class of doubt it is immaterial whether the man supposes sexual connection to be lawful or knows it to be unlawful, inasmuch as a doubt, in consequence of the authority, exists in reality, irrespective of the fact that any one knows it or does not know it, (and punishment drops in both cases) because the tradition is general and includes both) i.e.,, the saying of the Prophet "Avert punishments by doubts." (And parentage is established in the second) i.e.,, in the case of doubt

in the woman (when he claims the child) and is not established in the first class though he claims it, for the act is positive whoredom ; because there is no doubt as to the unlawfulness of intercourse with the woman, (lit. of ownership), but punishment is dropped by the mercy of God who forgives the error of the man. It is not dropped in consequence of the woman being unprohibited who is undoubtedly prohibited, and as the woman is undoubtedly prohibited parentage is not established, and for the same reason probation is not incumbent, inasmuch as there is no probation from whoredom.

Fatahul Qadir; Vol. V. p. 34.

(12b). There is no punishment when there is a "doubt in the act" provided the man is under

the impression that sexual intercourse is lawful. The reason why such an impression is necessary is that the ownership of and the lawfulness of sexual intercourse with the woman are absent in this class, Bahr, Vol. V. page 13.

(12c) (Because it is purely whoredom) inasmuch as there is no doubt as to the unlawfulness of sexual intercourse with the woman, and punishment drops by the mercy of God which has reference to the accused and not to the woman. And as there is no doubt in the unlawfulness of (sexual intercourse with) the woman, parentage is not established and probation is also not incumbent-, for there is no probation from whoredom. Rad. Vol. III page 157.

(12d) Parentage is established in cases of doubt in the woman provided the natural father claims it and is not established in cases of doubt in the act though he claims it, inasmuch as the act in the latter is whoredom pure and simple, although punishment drops for a fact which has reference to the man i.e., a doubt in his mind. The act is not whoredom in the former inasmuch as there is "doubt in the woman." Bhar, Vol. V. p. .15.

(12e) The doubt called shubhat-ishtibal is effective in dropping punishment, when the accused is actually in doubt. For instance if a party at a dinner is made to take wine such of them as know it to be wine are punishable, but those who do not know are not. Such doubt, however, is not sufficient to establish parentage, even when the natural father claims it and, to render probation incumbent; because the sexual intercourse is positively whoredom and bars the establishment of parentage and the incumbency of probation although the punishment is dropped. The case of a doubt in the woman (shubha hnkmiyah) is different; in which as punishment drops, so parentage is established and probation is incumbent, for the act is not positively whoredom; because there is an authority which favours its lawfulness and makes the knowledge or ignorance on the part of the man immaterial. Kashj, Vol. I. page 345.

(13) Our doctors have divided "doubt" into two classes:

(a) A doubt in the act which is also called shubhat ishtbah and shubhat

mushabahal. It is an excusable error for a man who is actually in doubt, through a fallacious reasoning, but not for a man who is not actually in doubt.

(b) A doubt in the woman which is also called shubhat hukmiyah and shubhat mill: It exists in consequence of some authority which makes the woman unprohibited.

Fatahul Qadir Vol. Vp. 33.

(13 a) And it (i.e., doubt) is of two kinds. This division is adopted by the authors of the Wiqayah and the Kanz, but in the Islah and other works "doubt" is divided into three kinds.

(a) In the woman.

(b) In the act.

(c) Due to the contract of marriage.

The third kind of doubt cannot be included in the second in which parentage is established and the culprit is not punished, though he confesses the knowledge of its unlawfulness.

(14) According to Abu Hanifa, a contract of marriage is a sufficient ground of error, although the illegality of such marriage be universally allowed, and the man entering into such contract be sensible of this illegality. With our other doctors, on the contrary, a contract of marriage is not admitted as legal ground of error, if the man be sensible of the illegality. The effect of this difference of opinion appears in a case where a man marries a woman related to him within the prohibited degrees, as shall be hereafter explained, Grady, p. 183.

(14 a) If a man marry a woman whom it is not lawful for him to marry, and afterwards have carnal connexion with her, he does not incur punishment, according to Abu Hanifa, but if he be at the time aware of illegality, he is to be corrected by a Tazcer, or discretionary correction. The two disciples and Shafai have said that he is liable to punishment, when he marries the woman being aware of illegality because as the contract has not been effected in regard to its proper subject, it is, of course, void, for here, the woman is not a proper subject of marriage, because the proper subject of marriage, or of any other deed, is a thing which is a proper subject of the effects of such deeds; now one of the effects of marriage is the legalizing of the generation but as the woman is among those who are prohibited to the man, the contract of marriage with her is consequently nugatory, In the same manner as a contract of marriage between man and man. The argument of Abu Hanifa is that the contract has taken place in regard to its proper subject, as the woman is a proper subject of marriage, because the proper subject of any deed is a thing which admits of the ends intended being obtained from it; now the end of marriage is the procreation of children, and to this every daughter of Adam is competent; the ease, therefore, admits of the contract being engaged in with respect of all its effects, and of all

its effects being obtained from it, but on account of the prohibition in the sacred text, the legalization of the generation is not obtained, and such being the case, error is occasioned, as error is a thing which is the appearance of a proof and not the substance of one, and as, in the present case, the man has perpetrated an offence for which the stated punishment or hudd is not appointed, Tazecr or discretionary correction must be inflicted. The Hidagah, Grady p. 184.

(14b) It is stated in the Muhit that doubt is of three kinds: ?

(a) Doubt in the act.

(b) Doubt in the woman.

(c) Doubt duo to the contract of marriage, for when a contract of marriage is entered into, punishment drops according to Abu Hanifa, whether the marriage is lawful or unlawful, and whether there is a consensus of opinion on its unlawfulness or there is not and whether the man knows it to be unlawful or is ignorant thereof. According to the two disciples, when a man contracts a marriage which is unlawful according to all, there exists no doubt and ho is punished if he knows the unlawfulness. (sic), p. 497.

(14c) The co-habitation which causes punishment is whoredom.

(Kafi). If it is absolutely unlawful, punishment is necessary and if a doubt as to its unlawfulness is possible, punishment is not necessary (Kazi Khan). A doubt is that which makes some fact look like a real fact while in reality it is not. Doubt is of various kinds:

(a) A doubt in the act which is also callod shubal ishtibah. It happens when a man mistakes what is no authority (to prove lawfulness) for an authority for it. A man who is really in doubt may take advantage of his doubt. If he pleads that ho thought that the act was lawful, he will not be liable to punishment, but if he does not plead so, ho will be punished.

(b) A doubt in the woman which is also called a shnbhat (veo). It happens when there is some authority to prove that the woman is unprohibited, but which authority for some reason cannot be acted upon. An accused man can take advantage of such a doubt independently of his knowledge or ignorance of the unlawfulness. Punishment drops in both classes of doubt and parentage is established in the second class if he claims the child, but not in the first, although ho claims it and a proper dower is to be paid,

(c) A doubt duo to marriage. When a contract of marriage takes place, punishment according to Abu Hanifa drops, be the contract lawful or unlawful, or be it unlawful according to all or according to some. It is also immaterial that the man knows it to be unlawful or does not know it to be so. According to them (the two disciples), if the marriage is unlawful in the opinion of all the lawyers, there can be no doubt and the man is liable to punishment, if he knows it to be unlawful; otherwise not. (veo), p. 147.

(14d) Third, semblance in the contract, or shoobh (sic) and wherever a contract of marriage has taken place, whether it be lawful or unlawful, and whether the illegality be one on which all are agreed, or with respect to which there is some difference of opinion, and whether the party be aware of the illegality or not, he is not liable to the hudd, according to Abu Hanifa, but according to his two disciples, when the marriage is one that is generally admitted to be unlawful, there is no shubha or semblance of right, and the party is liable to the hudd, if he was aware there is none, though otherwise he would be exempted. It follows, therefore, that in the opinion of Abu Hanifa connection under any contract of marriage is not zina, and that in the opinion of his disciples, whenever a contract of marriage is universally allowed to be unlawful, connection under it is zina. Baillie p. 2.

(14e) There is also no punishment by a doubt due to the contract i.e., the contract of marriage according to him (i.e., Abu Hanifa", for example in sexual intercourse with a mahram that a man marries. The disciples hold that if he knows unlawfulness he shall be punished. The fatwa as stated in the khulasa is according to the opinion of the two disciples, but in all the commentaries preference is given to the opinion of Abu Hanifah as said by Qasim in his Tashaihi, and, therefore, it is better to give fatwa, according to his opinion. It is stated in the Qnhistani from the Muzamarat that the fatwa should be according to the opinion of the two disciples. The view of the author of the Fatah is that the doubt due to the contract of marriage falls under the category of the doubt in the woman in which parentage is established. Rudd-ul-Muhtar on the margin of Dur-ul-Mukhtar, Vol. V. p. 158.

(15) It is stated in some commentaries that by the marriage of one with whom marriage is unlawful, is meant the marriage with one of the maharim, with the wife divorced three times, with the wife of another, with the wife of another while she is observing iddat, with the fifth wife, with the sister of the wife who is observing iddat, with a Majuiyah, with a slave girl on a free woman (the rule as to the marriage of a slave girl without the permission of her master is the same or with a. Avoman without witnesses to the marriage. In all the above cases, punishment is not to be inflicted according to Abu Hanifa, although the accused admit that he knew that the woman was prohibited to him. According to them, he is punished if he knows the unlawfulness; otherwise not. After this, the commentator says: The two disciples hold that when the woman is not permanently prohibited, there is no punishment. "This shows that there are two conflicting reports regarding the view" of the two disciples. According to the Kafi, when a man marries a slave girl on a free woman, or marries a Majnsiyahj, or a slave girl without the permission of her master (the rule is the same when a. slave marries without the permission of his master), all are agreed that punishment drops. According to the commentator alluded to, there is a difference of opinion in the above cases between the two disciples and Abu Hanifa, their view according to him being that the accused is to be punished. The commentator has also added what you have heard. The absence of carefulness in

the language (in which he has stated the law) is evident. It is to be noticed that the reason (that a doubt which averts punishment disappears according to them only when all the lawyers are agreed that the woman is permanently prohibited), given in the Kafi by ITafiz-ud-din for the dropping of punishment, when a man marries a (veo)..... or others mentioned along with her, shows that if he marries the wife of another or any other woman mentioned along with her, he is not punished, inasmuch as a prohibition regarding the wife of another is limited to the continuance of her marriage with her husband, including the probation period just as the prohibition of a Majusiyah lasts so long as her religion lasts and it disappears when she accepts Islam (sic) in the same way the wife of another if divorced is not prohibited after the passing of the probation period. The reasoning also shows that there is no punishment according to them save when one marries one's own maharim. Probably this latter is the view of the two disciples. Those who can be relied on in their reports and writings like Ian Munzir, have stated the same. Palatini Qadir Vol. V, p. 41.

(15a) The author implies that if a, man marries the wife of another, or his wife while observing probation, or his own wife whom he divorced three times, or a slave girl on a free woman, or marries a Majusiyah, or a slave girl without the permission of her master, (the law is the same when a slave marries without his master's permission), or marries five women in one contract, or marries two sisters in one contract and co-habits with both, or with the one married last (when the contracts of marriage are successive), there is no punishment for sexual intercourse with the one married first, there is no punishment according to all. The reason according to Abu Hanifa is evident. The reason according to two disciples is that the doubt is negative only in those cases in which all the lawyers are agreed that the woman is prohibited permanently. Bahr, Vol. V, p. 17.

(16) The legal result of the doubt due to marriage, according to the Imam,(Aba Hanifa), is that of the doubt in the woman, and according to them that of the doubt in the act, Radd, Vol. III, p. 159.

(17) The basis on which the conflict (between Abu Hanifa and his two disciples) rests is whether the marriage does or does not create a doubt. in their (the two disciples and others) opinion it creates no doubt as has already been stated. In the opinion of Abu Hanifa, Sufyan and Kufar, it does create a doubt. The genesis of doubt depends upon the woman being or not being "a fitting subject of marriage". In their opinion she is not a fitting subject of marriage, for a fitting subject of marriage means a woman he can lawfully marry and the woman in question is one of his maharim, a marriage with whom under all circumstances is a marriage inform only and with one, who is not "a fitting subject of marriage" and that marriage is like n, marriage between man and man. In his opinion, the woman is "a fitting subject of marriage", because that means not a fitness for a lawful marriage, but a fitness for the ends of a marriage i.e., procreation and such a fitness exists owing to which some one else may marry her. Fatah, Vol. V, p. 42.

(17a) That is, there is no punishment, according to Abu Hanifa, when a man marries a woman, prohibited to him and co-habits with her, and they (the two disciples) say he is punished, when he knows that (i.e., unlawfulness), because the marriage is one which had not taken place with a woman who is a fitting subject of marriage, and hence if is no marriage at all, and is like a marriage between two males. This is due to the fact that sexual intercourse can only be lawful when the woman is legally "a fitting subject of marriage" and the legal effect of a marriage is the lawfulness of sexual intercourse, and as the "woman is one of those who are prohibited, a marriage with her cannot make sexual intercourse with her lawful. The reason for Abu Hanifa's view is that the contract of marriage is formed with a woman who is a fitting subject of marriage", which expression means that she is ""a fitting subject for the ends of marriage", and every daughter of Adam is fit for procreation, which is the end of marriage. That being so, in a marriage with a woman, who is prohibited, all the legal result of a valid marriage should follow and though owing to the prohibition by the law it falls short of making sexual intercourse lawful, yet it creates a doubt, because a doubt makes something appear to be another while that is not so in reality. The basis of the conflict is:- Does such a marriage create a doubt or does it not The answer depends on:- Is the marriage contracted with a woman who is a "fitting subject of marriage" or with, one who is not? In the opinion of Imam (Abu Hanifa), the marriage is contracted with a woman who is a "fitting subject of marriage, for the fitness does not mean that a marriage; with her makes sexual intercourse lawful, but means that the woman is fit for the end of marriage, i.e., procreation and such a fitness does exist. Hence some other man may lawfully marry her. In their opinion the marriage is contracted with a woman who is not a "fitting subject of marriage" "because" "a fitting subject of marriage" means a woman with whom sexual intercourse becomes lawful by marriage. This does not happen in a marriage with a prohibited woman who is prohibited under all circumstances. What happens in marrying her is the form of marriage and not a real one. Some reflection will show that in dealing with fitness for marriage they look at it from, different points of view. Those who say she is not "a fitting" subject of marriage!" mean that she is not so with reference to the husband in question, i.e., she is not a fitting subject of marriage with this particular man. It is for this reason that they say that she cannot become lawful by marriage to the; man in question, there being no doubt that she may become lawful to some one else by a marriage. The Imam Abu Hanifa, in calling her a "fitting subject of marriage", intended to say that she was a fitting subject of marriage in the abstract, and not with reference to the man in question. It is for this reason that he says that she is fit for the end of marriage, i.e., procreation. This is not inconsistent with the view of jurists that prohibition against marriage with maharin means that they are not fitting subjects of marriage, nor with the view of the lawyers that a woman as one of the daughters of Adam who is not prohibited is a fitting subject of marriage, for the jurists mean that a fitness for marriage with a particular man is negated. You know that Abu Hanifa only says that she is a fitting subject of marriage in the abstract, and not with, reference to

the particular man. The lawyer, Abu Laith, follows the view of the two disciples. He says in the Waqiat?"We too followed their view", it is stated in the Khulasah that the fatwa is according to their view, and the reason for the preference is that a doubt is possible only when the lawfulness of sexual intercourse is possible in any way, because the doubt is as to whether sexual intercourse is or is not lawful, but the lawfulness of intercourse with her is not proved in any way. Had she been unprohibited in any way, co-habitation with her would have established addat and legitimacy. Bhar, Vol. V, pp. 16, 17.

(18) When a man marries a woman related to him by blood, who is prohibited to him such as mother, daughter, sister, paternal or maternal aunt, or marries the wife of his father or his son and co-habits with her, he is not liable to punishment according to Abu Hanifa and has to pay her dower whatsoever it maybe. Abu Yusuf, Mohammad and Shafai say that if he knows that she is a prohibited blood relation, he is punished, and has to pay no dower, but if he . does not know that she is a prohibited blood relation, he has to pay her dower but there is no punishment. Kazi Khan, p. 383.

(18a.) If a man marries a woman so related to him by blood as is prohibited to him, such as mother, daughter, sister paternal or maternal aunt, or marries the wife of his father or of his son and co-habits with her, he is not liable to punishment, according to Abu Hanifa and has to pay her dower whatsoever it may be. Abu Yusuf, Mohammed and Shafai say that if he knows her to be such blood relation of his as is prohibited, he is liable to punishment, but litis not to pay her dower, and if he does not know that she is such a blood relation of his as is prohibited, he has to pay her dower, but there is no punishment. Anqarri. Vol. II, p. 151.

(18b) When a man marries a woman related to him by blood who is prohibited, such as mother, daughter, sister, paternal or maternal aunt, or marries the wife of his father or of his son, and co-habits with her, ho is not liable to punishment, in the opinion of Abu Hanifa but has to pay her dower whatsoever that may be. Abu Yusuf, Mohammed and Shafai say: "If he knows that she is such a blood relation as is prohibited, ho is liable to punishment, but there is no dower. If he does not know (that she is such a blood relation), he has to pay her dower and there is no punishment". Palahl Mu-in, Vol. II, p. 361.

(19) It is a general rule for the interpretation of the Muhammadar. Law that, in cases of difference of opinion among the jurisconsults, .Imam Abu Hanifa and his two disciples, Kazi Abu Yusuf and Imam Mohammad, the opinion of the majority must be followed, and in application of legal principles to temporal matters the opinion of Qazi Abu Yusuf is entitled to the greatest weight. Abdul Kudir v. Salma 8 A. 148.

(20) Al-Ramli in the chapter on dower reports from Al-Aini: "According to him (Abu Hanifa), parentage is established. (When one marries one's own Mahanin) and it is stated, in the Majmaul Fatawa :?"If a man marries a thrice divorced wife

of his, while he and she know that the marriage is fasid and she gives birth to a child, he is not, as is stated in Hari, liable to punishment, according to Abu Hanifa and parentage is established. The two disciples hold a contrary view. The case is the same if he marries his own Maharim. Bahr on the margin, Vol. V, page 172.

(20a) If a Mohammadan marries his own Maharim and they give birth to children, parentage is established according to Abu Hanifa, they taking a contrary view. This is based on the fact that the marriage according to Abu Hanifa is fasid while according to them it is batil. Alamgiri, Vol. I, page 510.

(20b) This is supported by what is reported by Al-Ramli in the Chapter on Dower from Al-Aini and the Majmaul Fatawa that parentage is established according to him (Abu Hanifa) they (the two disciples) holding a contrary opinion, Ruddul Muhtar, Vol. III, page 159.

(21). The term "bahil" means a marriage the existence and non-existence of which are alike and hence a marriage with the maharim does not establish parentage and Iddat. Radd. Vol. II, page 359

(21a) It will be stated in the Chapter on iddat that there is no iddat in a void marriage. Radd Vol II page 359.

(21b) There is no iddat in a batil marriage Radd "Vol. II, page 359. "

(22) The meaning of the term "void", when applied to devotional matter abadat is that the act abadat is not sufficient to exonerate the man from doing it again. When applied to secular transactions it means that no juristic results follow from void transaction and that they are not causes of legal incidents like a valid transaction. The term fasid is synonymous with batil according to Shafais and both of them mean the same thing. According, to our doctors fasid is a third class distinct from void (batil) as well as from valid (sahih) and means that which is lawful in essence and unlawful as to its quality. Kashf, Vol. I, pp. 358-359.

(23) Sometimes the term valid (sahih) is used in contradistinction to batil. When we call a thing valid (sahih,) we mean that it is lawful both in its essence as well as it is in quality; the case being otherwise with batil which is unlawful both in its essence and in its quality and with fasid which is lawful in its essence and unlawful in its quality Kashf, Vol. I, page 359.

(24) And nothing becomes payable as dower, be one fixed or not, without cohabitation in a fasid (invalid) contract of marriage, that is, in a batil (void) contract for the reasons, which have already been stated, for example a marriage with women who are prohibited permanently or temporarily, or with a woman who compels him to marry, or a marriage without witnesses or with a slave girl on a free woman, or with a woman who is observing iddat. Lubab, Vol. II, page 355.

(24a) And nothing i.e., the fixed dower or the proper dower, or the present,

(mutat), or iddat, or maintenance is duo without co-habitation in a fasid marriage, like the marriage with those who are prohibited permanently or temporarily, or with a woman who compels him to marry her, or a marriage without witnesses, or with a slave girl on a free woman, or with one who is observing iddat. Majinaul Anhar, Vol. II, page 355.

(25) In a former place he stated fasid, and there is no difference between a batil and a fasid marriage contrary to sale. Fatah d Qadir Vol. III, page 147.

(25a) He stated fasid in the past two cases and batil here although the term fasid here means batil. Fatalul (Qadir Vol. II, page 147.

(25b) The terms bulil and fasid in devotional matters are synonymous as well as in marriage. They, however, say that a marriage with the maharim is fasid according to Abu Hanifa, and hence there is no punishment, and it is raid according to them and hence he is punished. Regarding a marriage with maharim, it is stated in the Jamiul Fusailan that it is void (batil) according to some and that punishment drops, by reason of a doubt in the act, and that it is fasid according to others, and that punishment drops by reason of a doubt due to marriage. Ashbah, page 256.

(26) The author prefers the view that a marriage without witnesses is void ; because it is stated in the Nehayal,, a commentary of the Hidayah, that Fakhrul Islam mentioned in his Muhsoot that when a contract of marriage is said to be fasid, the- meaning is that it is batil. If you say, why does the author of the Hidayah call some marriages, as marriage with the prisoner of war, or with a woman who is pregnant from whoredom "fasid" and others, as marriage with an Omm-i-ualad, who is pregnant, "batil" ?

I reply that the language used in the Nihaya indicates that a marriage, regarding which there is a difference of opinion as to whether it is valid or batil and which in the opinion of the author of the Hidayah is batil, has been called fasid, such as marriage with a woman pregnant from whoredom, which, according to the report of the Nauazil, is valid, or as marriage with a prisoner of war, which, according to the report of Hasan from Abu Hlanifa, is valid. Every marriage regarding which there is no report that it is valid has been called by the author of the Hidaya to be void. He has done this to show the distinction between the two classes of marriage. It is stated in the Fusul Aslronhani that there is a difference of opinion as to marriage with one's own maharim. It is said by some to be fasid, and hence some of the legal results of marriage follow. It is said by others to be void and hence no legal results follow. The above statement shows that just as there is a distinction between a void and an invalid sale, so there is a distinction between a void and an invalid marriage. Chalpi, page 297.

(27) It is stated in the Mujtaba that co-habitation in every marriage, regarding the validity of which there is a difference of opinion amongst the learned, like a marriage without witness, causes iddat but that there is no iddat in a marriage with another's wife, or his divorced wife who is observing iddat, if he knows her

to be such, for no one holds that marriage with her is lawful, and hence it is not formed at all. it follows that there is a distinction between a batil and a fasid marriage for the puposes of iddat, and hence punishment is necessary if the man knows it to be unlawful. (Qaniyah), Bahr., Vol. IV, page 156.

(28) The expression, "e.g. witnesses," and similar to it, is the marrying two sisters at once, and marrying a sister during the iddat of another sister, and marrying a woman who is observing her iddat, and (marrying) a fifth wife during the iddat of the fourth wife, and (marrying) a female slave upon a free. woman and the Muhit(giving an instasnce of an invalid marriage) says: "A. zimmi marries a Mnslima woman ; separation shall be effected between them, because the marriage is an invalid or fasid marriage." ?The apparent inference from the language in the Muhit is that they shall not be subjected to punishment (or hadd): and that nasab is also established from that marriage ; and that iddat will also be established if he has had intercourse.

I (that is, the author of the Raddul Muhtar) say that the commentator (that is, the author of ,) who has written the commentary on the "I"anwirul-Absar shall presently state towards the end of the section dealing with the establishment of nasab, whilst quoting from the Majmaul Eatawa, that "If a Kafir marries a Muslema woman, and the woman gives birth to a child by him, the nasab shall not be established from him, and iddat shall not be obligatory on her because the marriage is void (or batil.) ; and this is au express statement, and, therefore, is to be preferred to an inference (from the above quotation from the Muhit). This thou shouldst understand.

And the object (of the author of the Durrul Mukhtar in citing the passage from the Mujmal Fatawa) is to show the difference between a fasid and a batil marriage. But in the Fatah, just previous to his disquisition on the Mutah marriage, it is laid down that "there is no difference between them in marriage but there is in sale. Yes, in the Bazzaziah, two views are reported on the question whether the Nikah of the maharim is fasid or batil."

And it is clear that the meaning of batil is a marriage, the existence of which is like its nonexistence, and for this reason nasab is not established, nor iddat in the marriage with the maharim, as will be known in what is to come in (the chapter of hudd (or Punishments) and in this place (that is, in the place where nikah fasid is dealt with) the Koshistani has explained fasid by batil, and he has brought forward as an instance of it the marriage with maharim and compulsory marriage on behalf of the woman and a marriage without witnesses; and as regards the compulsion being conditioned on behalf of the woman. I have already written a disquisition on it in the early portion of the (book on) marriage, a little before the expression of the author (of Durrul Muhktar on Tanwiraul Absar) and it is a condition that two witnesses should be present.

And it will presently come in the Chapter on iddat, there is no iddat in a marriage which is batil. And it is stated in this place in the Bahr (that is, Bahrul Raiq) from

the Mujtaba that "Sexual intercourse in every nikah as regards the validity of which the learned have differed as, for instance, a marriage without witness, makes iddat obligatory. But in the marriage with a woman, who is already the wife of another, or who is in the iddat of a different man sexual intercourse does not make iddat obligatory if the husband knows that the woman is the wife of another or is in the iddat of a different man, because no lawyer has held such a marriage to be valid, and therefore, the marriage shall not be deemed to have been contacte at all. and he (the author of the Bahr) says, it is, therefore, that a distinction must be observed between a fasid and a batil marriage in the matter of (the observance of) the iddat, and it is for this reason that punishment (hadd) is inflicted if the husband is aware of the unlawfulness, because sexual intercourse in such a marriage is zina, as is laid down in the Quniyah and other books."

And the result is, that there is no difference between a fasid and a batil marriage in matters other than of iddat; but as regards the iddat the difference is clear, and, therefore, to the expression used by the Bahr "and the marriage with a woman who is observing her iddat from another man" should be added the condition "when the husband does not know that she is motadda."

But what is in the Mujtaba, "as for instance, by the marriage of two sisters," at once makes the rule laid down by the Bahr open to an objection; because it is quit clear that no lawyer holds such a marriage to be valid. But you must consider the reason of the condition at once (in the Mnjtaba). And it is clear that bringing together is in the contract and not in the ownerships of enjoyment; because if (in the case of marriage of two sisters) one contract follows the other contract, then the subsequent contract is batil absolutely. Raddul-Muhtar, Vol. II, pages 359-360.

(29) Marriage is a contract, that is to say, is effected and legally confirmed by means of declaration and consent both expressed in the preterite. "The Hidayah by Grady page 25."

"Marriage is a contract; ...The pillars of marriage as of other contracts are Ejab-o-Kobool, or declaration and acceptance." Baille, page 4. The same proposition has been set forth in Abdul Kadir v. Salima. (i)

(30) If an infidel marries a Mohammadan woman and she gives birth (to children) by him parentage is not established for the marriage is void. Radd-ul-Muhtar, Vol II page 650.

(30a) If a Muslim marries his own naharim and thee give birth to children, nasab is established in him according to Abu Hanifa, they holding a contrary view. The reason of the conflict is that such a marriage is fasid in the opinion of Abu Hanifa While it is and in their opinion. Alamgiri, VoI. I, page 540.

(31). There are several conditions or requisites of contract of marriage; among" which are the following :?

1. Understanding, puberty, and freedom in the contracting parties ; (a) with this difference between the conditions, that the first of them is essential), for marriage cannot be contracted by an insane person, or a boy (b) without understanding; but the other, two are required only to give operation to the contract, for the marriage contracted by a boy of understanding is valid though dependent for its operation on the consent of his guardian and that by a slave is so also, but dependent on the consent of his master. (I).

(2). A fitting subject; that is, a woman who may be lawfully contracted to the man. (II).

3. The hearing by each of the parties of the words spoken by the other (III). And if they should contract by means of an expression which they do not understand to signify marriage, still, according to the approved opinion, the contract would be effected. (IV)

4. Shuhadut, or the presence of witnesses, which all learned are agreed is requisite to the legality of marriage. (V). This condition is peculiar to marriage which is not contracted without the presence of witness, contrary to the ease of other con-tracts, where their presence is required, not for contracting but only with a view to manifestation before the Judge. (VI).

(a) Whether the persons to be united, or guardians or agents acting on their behalf.

(b) Subu. A youth under puberty, which is majority according to Muhammadan Law.

(I). Fut. Al., Vol. I, page 467. In the contract of sale there are four kinds of conditions viz., of constitution, of operation, of validity, and of obligation (M.L.S.P.I.). In marriage, the conditions appear to be all of the three first kinds; the fourth in sale depending on options, which have no place in marriage. See post, page 21.

(II). With regard to this condition, including the description of a "fitting subject," there was some difference of opinion between Abu Hanifah and his disciples., See post, chapter of invalid marriages.

(III). This is a condition of constitution in sale, and apparently so in marriage.

(IV) As if by the mere force of the expression, it is so in sale. The expressions must, of course, be those appropriate to the occasion.

(V). The text seems to point to a distinction between legality and constitution ; for Malik, the lthe Dur-rul Muhtreader of the second of the orthodox sects, required publication, only, and not Shuhadut as a condition. Hidayah Vol. I page 74.

(VI). Inayah, Vol. II, page I. The author of the Hidayah says that shuhadut is a condition in marriage by reason of the saying of the Prophet: "There is no marriage without witnesses", but the words "an essential condition," which are found in the English translation, do not appear in the printed original, and notwithstanding the absolute terms of the prophet's saying the condition seems to have become one of validity only, and not of constitution. See post, Chapter of Invalid Marriages.

(32) It may lie, said for Samarqandi that in the expression "a woman married by a fasid marriage," fasid means a marriage in which some condition of validity is wanting; but in which the woman is a fitting subject of marriage; for instance, a temporary marriage or marriage without witness. Another's wife is not a fitting subject of marriage, because two (exclusive) ownerships at one time in one thing cannot co-exist (i.e., a woman cannot be the wife of two husbands at the one and the same time); hence the second marriage creates no right of enjoyment of a fasid, nature. It simply creates a doubt (for the dropping of punishment. Radd. Vol. II, page 624.

(33) The causes of prohibition are various :--(1) consanguinity (that is karabat; (2) affinity (or musaharat; (3) fosterage; (4) joining together; (5) ownership; (6) shirk or infidelism; (7) bringing of a slave girl over a free woman. These are the seven kinds which the author has mentioned in this order. There remain (two more, viz.) (8) The triple divorce, and (9) the existence of the right of another man in consequence of marriage or iddat. Darriell Mukhtar, Vol. II, page 284.

(34) The unlawfulness of a marriage is of two kinds:

(a) permanent; and (b) temporary. A permanent; unlawfulness is established by "consanguinity", foster-age and affinity. Kazi Khan on the margin of Alam-giri, Vol. page 360.

(34a) By the permanency of unlawfulness is meant an unlawfulness which rests upon a quality that lasts, and hence a Majusiyyah is permanently prohibited; but if a man says to his wife: "Thou art for me like the back of a Mujitsiyah", a zihar will not take place. The reason of the rule given in the Fulaḥul Qadir is that the prohibition is permanent; but that such is not the case with a Majusiyyah who may embrace Islam. The case is otherwise with being a mother or a sister; for those qualities cannot cease to exist. In the Bahr it is stated that the correct view is that the unlawfulness of a Majusiyyah is not permanent, Falaḥul Main, page 188.

(35) If a man commits whoredom on a slave girl and then purchases her, he is punished in the opinion of all according to the authentic report. It is reported from Abu Yusuf, which is not the report of Usul, that punishment drops. The rule is the same when a man commits whoredom on a free woman and then marries

her.

Anqurivi, Vol. II, p. 151;

(35a) It is stated in Jami Kazi Khan :? If a man commits whoredom on a, free woman and then marries her, punishment is not dropped according to all. Bhar, Vol. V, p. 21.

(35b) Towards the end of the Chapter, the author will cite from the Jami of Kazi Khan:-"If a man commits whoredom on a free woman and then marries her, punishment is not dropped according to all." Bhar, Vol. V, p. .13.

(35c.) When a man commits whoredom on a slave girl and then purchases her, the authentic report is that he is punishable according to all. Similarly if he commits whoredom on a free woman and then marries her. This is stated by Shaikhul Islam in the commentary on the Book on Punishment. Alamgiri, Vol. II, 151.

(36) The want of a child born of a woman enjoyed in an illegal marriage is established (in the reputed father), because in this, regard is had to the child's preservation, since if the descent were not to be established, the child might perish for want of care, Grady, p. 53.

(37) Ye arc also forbidden to take to wife free women who are married except those women whom, your right hands shall possess as slaves.

According to this passage it is not lawful to marry a free woman, that is already married be she a Muhammadan or not, unlass she be legally parted from her husband by divorce

(38) If a man married the wife of another knowing (that she is another's wife) and co-habits, iddat is not necessary nor does sexual intercourse with, her become unlawful to her former husband. The Juliet, is given according" to this view because sexual intercourse with her for the man is whoredom and a woman on whom whoredom is committed does not become prohibited to her husband. The case is different if he does not know her to be the wife of another.. It is stated in the Zakhira and Khaniyah, from the Bhar-i-Raiq on iddat that if a man marries another's wife and co-habits, iddat is necessary ; but mainten-ance not, provided he knows that she is the wife of another. If he does not know (her to be another's-wife), there is no iddat. In a marriage without witnesses there is iddat, under all circumstances if ho co-habits. Anqani, Vol. I, p. 97.

(38a.)If a man marries another's wife and co-habits,. iddat is necessary ; when he does not know her to be another's wife, and she becomes prohibited to her former husband during the iddat. If the man knows that she is another's wife, there is no iddat and she is not prohibited to her former husband ; for in such a case sexual intercourse of the man is purely whoredom. Jaoharah Vol. II, p. 102.

(38 b) Punishment drops for sexual intercourse with a maharim when a man marries her. This is the doubt duo to the contract of marriage. According to Aim

Hanifa it is immaterial whether he knows the unlawfulness or does not know it. If lie knows the unlawfulness, tazir (discretionary correction) shall be inflicted. According to Abu Yusuf, Muhammad and Shafai, if ho knows the unlawfulness, lie shall be punished in the case of a woman who is permanently prohibited or who has a husband because the prohibition against them is established by conclusive (qalai) authority and a marriage with them is like marriage between man and man and takes place with one who is not a fitting subject of marriage, and is, therefore, nugatory, for a fitting subject for the exercise of the right of sexual intercourse means a woman with whom intercourse can be lawful, and she being one of those, who are prohibited, intercourse with her is whoredom in reality ; because ownership and right of intercourse both are wanting and the mere form of marriage with a woman who is not a fitting subject of marriage is of no avail. Zalai, Vol. III, p. 180.

(38 c) It is not lawful for a man to marry another's wife. If he marries while he knows her to be another's wife and co-habits, iddat, is necessary. If ho does not know that she is another's wife, iddat is not necessary and intercourse with her is not prohibited to her former husband. Kazi Khan on the margin of Alamgiri, p. 280, Vol. J.

(38 d) Another's wife and his divorced wife arid the wife divorced three times before she marries another are like mahram. if the marriage is one as to which there is a difference of opinion, like a marriage without witnesses or without a guardian, there is no punishment, for in these cases a doubt is possible according to all. Alamgiri, Vol. III, pp. 148-149,

(38 e) It is cited in the Bahr from the Mujtaha that co-habitation in a marriage, as to which there is a conflict regarding its validity among the learned, necessitates iddat, but co-habitation in a marriage with, another's wife, or with his divorced wife who is observing iddat, does not necessitate iddat, when lie knows her to be another's wife, for no one holds that such a marriage is lawful, and hence it is not formed at all. It follows that there is a distinction between a batil and a fasid marriage, so far as iddat goes. It is for this reason that the man is punished, when ho knows the unlawfulness of the marriage ; for sexual intercourse, in such a case, is whoredom (Quniah and others). 1 say that according to the view already stated there is some difficulty in determining the character of a marriage with the miahrim with the knowledge that the marriage is unlawful; for such a marriage is deemed to be fasid as you know notwithstanding the fact that no Mohammadan considers it lawful and it has been stated in the Chapter on dower that co-habitation in a fasid marriage makes iddat necessary and establishes parentage. Raddul Muktar Vol. II, p. 623.

(38f) There is a conflict of view among the learned, as whether the presence marriage, is or is not necessary; but there is no difference regarding the woman who is married to another man. Raddul Muktar Vol. II, p. 624.

(38g) It is not lawful to marry the wife of another, who is observing iddat

according to all. If a man marries the wife of another while he is ignorant of the fact that she is another's wife and co-habits, iddat becomes necessary. If he is ignorant of the fact and co-habits (after marriage), iddat is not necessary; intercourse with her and she does not become prohibited to her former husband. Kazi Khan on the margin of Alamgiri, Vol. T, p. 366.

(38h) If a man marries another's wife and co-habits knowing (her to be another's wife), iddat is not necessary and sexual intercourse with her is not unlawful for her former husband ; because the intercourse of the man is whoredom and the woman on whom whoredom is committed does not thereby become prohibited to her husband. The case is different when he does not know. This is stated in the Zakhira and the Quniah. Bahr-i-Raiq, Vol. IV, p. 151.

(38i) Sixth? A woman prohibited because of the right of another (in her), such as the married (wife) of another, or his wife who is observing iddat, or a woman who is pregnant by some other known person. Bahr. Vol. III, 98.

(39) There is no doubt in the woman and hence the parentage of the issue of such an intercourse is not established, for the same reason iddat is not necessary; because there is no iddat from whoredom. Chalpi, Vol. II, page 178.

(39a) This is an express authority for the establishment of parentage in this case and the incumbency of iddat follows it. Radd. Vol. II. p. 623.

(39b) There is no iddat in a batil marriage. Fathul Main 216. Vol. II.

(39c) There is no iddat on a woman, guilty of whoredom. This is the opinion of Abu Hanifa and Muhammad may peace be upon them (Sharrah Havi), Alamgiri, page 526.

(39d) Parentage is not established except when lawfulness of intercourse in some way is proved. But when there is no doubt at all (in unlawfulness), parentage is not established. Bahr, on the margin, page 15, Vol. V.

(39e) A doubt can exist only where unlawfulness of intercourse in some way can exist; for a doubt means a doubt as to lawfulness; but lawfulness of intercourse with her (mahrim) does not exist in any sense. Had there been such lawfulness, iddat would have been necessary and parentage would have been established. Bahr, Vol. V, pp. 16-17.

(39f) That is an express authority for the establishment of parentage in this case and the incumbency of iddat follows it. Bahr-i-Raiq Vol. IV, page 152

(39g) When parentage is not established, iddat is not incumbent. Bahr-i-Raiq, page 156. Vol. IV.

(39h) The language used implies that there is no probation for a woman upon whom whoredom is contracted. Majmaul Anhar, 473.

(39i) Children born of a concubine, who was the slave of the other and to whom the father was not (sic) property and the reason is that being the fruit of

fornication, their parentage cannot be established in that person. Mac. M.L. page 322.

(39j) Under the circumstances stated, if a marriage is not proved to have taken place between the deceased and the dancing woman in question, and if it be evident that her children are the fruit of fornication, their parentage will not be established in the deceased, according to the saying of the Prophet:?

"Offspring belongs to such as have concerts, but fornicators are prohibited from laying claim." Consequently the parentage not being established and there being no will, no part of the property of the deceased belongs to the illegitimate children; but the whole will go to those born in wedlock. It is laid down in the Kaji:?"The offspring of fornication and the offspring of repudiation by Lian or implication take the maternal estate only but not the paternal nor can the father inherit from them. The father of such offspring cannot be considered as standing any degree of relation to them and their relation to the father being cut off, they are consequently excluded from claiming relation with his family. It is laid down in the Hamidia that the parentage of the fruit of fornication is not established in the father. Mac. M.L. page 91.

(40) The jurists differ as to whether to predicate "unlawful" of a substance is real or metaphorical, the real prohibition being predicated of some act relating to the substance. They prefer to hold that "unlawful" may be a predicate of a substance in reality.

(40a) .imists differ in attributing "unlawfulness" to substances and it is said that the predication is a metaphor of the kind in which a quality is said to be of a thing while it is of some act touching the thing. They prefer to hold that such a predication is not a metaphor but is literally true. Majmaul Anhar, Vol. II, page 323,

(41) The prohibition necessitates unlawfulness and hence the contract of marriage (without witnesses) becomes void. Kashf. Vol. I, page 282.

(41a) The prohibition against marriage makes it void; because there is no difference (of opinion among the jurists) that the prohibition (nahi) against a thing causes unlawfulness (hurmut) of that thing, and as marriage is prescribed for making sexual intercourse lawful, and as in consequence of prohibition lawfulness is taken away, the marriage becomes void. Tauzih, page 297, printed Lucknow.

(42) "Prohibited to ye are your mothers and your daughters, and your sisters, and your aunts both paternal and maternal, and your brother's daughters and your sister's daughters and your mothers who have given you suck, and your foster sisters, and your wife's mothers, and your daughters-in-law, which are under your tuition, born of your wives unto whom you have gone in, but if you have not gone unto them it will not be sin in you to marry them, and the wives of your sons who proceed out of your loins, and (prohibited to ye is) to take to wife

two sisters, except what is already passed; for God is gracious and merciful, and (prohibited to ye are) free women (that are married to others), except those women whom your right hand shall possess as slaves." Quran. Sarah Nissa page 94, printed Lucknow.

(43) Similarly a marriage with one's own maharim is negated, inasmuch as a "fitting subject of marriage" is absent. That being so, the term nahi (prohibition in God's command):?"Do not marry those women who were married by your fathers," is a metaphor for negation (Nafi). Kashf Vol I. page 283.

(43a) That is the nahi (prohibition in the verse of the Quran) is taken to mean a nafi (negation), inasmuch as "a fitting subject (of marriage) does not exist; because the express command makes the woman herself unlawful; and when "unlawful" is predicated of a substance, such predication excludes that substance from being a fitting subject for a lawful act. This is due to the fact that lawfulness and unlawfulness cannot co-exist in the subject (at one and the same time) ; and hence when unlawfulness is predicated of a substance, it is not a mere prohibition against that substance but negatives its fitness for acts relating thereto.

(43b) And if it is admitted that the marriage is prohibited, it follows that prohibition renders it void; because all are agreed that the effect of a prohibition is unlawfulness (hurmat); and as marriage is a contract prescribed for making sexual intercourse lawful, and as lawfulness is taken away (by the prohibition), it becomes batil (void). To-uzih "Tahech, page 297.

(43c) Jurists have stated that prohibition against marriage with maharim is a metaphor for negation (nafi) and prohibition, therefore, renders the marriage nugatory owing to (the absence of a fitting subject of marriage. Many of the lawyers have also expressly stated that maharims are not fitting subject of marriage and the author of the (Chauatul Bayan is certain on it. It is, however, difficult to reconcile this view with the view of Abu Hanifa that co-habitation with a mahram with whom marriage takes place does not necessitate punishment; for if she is not a fitting subject of marriage, a doubt due to marriage cannot arise. The answer is that she does not cease to be a fitting subject of marriage in the abstract; for some one else who is not a mahram to her may lawfully marry her. This shows that Abu Hanifa looks to her fitness in the abstract and they to her fitness with reference to the particular man. Bahr, Vol. III, page 83.

(44) Similarly a marriage without witnesses; for it is rendered nugatory by the saying of the Prophet:?"There is no marriage without witness" that is, a marriage without witness is batil; for it has been made nugatory and has not been forbidden, Touzeeh, page 297.

(45) Unlawfulness (hurmat) may be taken to mean either batil (the state of being batil) or fasad (the state of being fasid), for there is no difference between them in a marriage, as has been stated in a majority of reliable works, and hence the statement made in the Imadi that they differ as to a marriage with the

maharim, some holding it to be batil and others holding it to be, fasid, is not free from difficulty. Majmaul Anhar, Vol. I, page 323.

(46a) Unlawfulness (hurmat) may be taken to mean either Indian (being batil) or fasad (being fasid) for they are synonymous. It is for this reason that an agency for a fasid marriage is not valid and that there can be neither a divorce nor a zihar in a fluid marriage, as is stated in the Quhisitani. The statement in the Imadi that there is difference of opinion regarding a marriage with maharim, some holding it to be fasid and others batil, is not free from difficulty. Lubab, Vol. I, page 323.