

Kitab as Siyar as Sagheer

Muhammad ibn al-Hasan ash-Shaybani

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(TRADITIONS RELATING TO THE CONDUCT OF WAR)

1. Abu Sulayman (al-Juziani) from Muhammad b. al-Hasan (al-Shaybani) from Abu Hanifa (Abu Hanifa al-Nu'man b. Thabit (d. 150/758). See pp. 25-26, passim, above.) from 'Alqma b. Marthad from 'Abd-Allah b. Burayda from his father (Burayda b. al-Husayb al-Aslami), who said: Whenever the Apostle of God sent forth an army or a detachment, (Muslim publicists distinguish between jaysh, a large armed force, and sariya, a small detachement. The latter due to its small numerical strength, was ordinarily employed for surprise attacks at night, and was to retire to hiding during the day. See Sarakhi, Mabsut, Vol. X, p.4, and Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, p.33.) he charged its commander personally to fear God, the Most High, and he enjoined the Muslims who were with him to do good (i.e., to conduct themselves properly). (This order, as pointed out by Sarakhsi, was intended to inspire confidence in the army and respect for its commander. See Sarakhsi, Mabusut, Vol. X, p.5.)

And (the Apostle) said:

Fight in the name of God and in the "path of God" (i.e., truth). (This is intended to show the religious purpose of war and that fighting should begin by invoking the name of God. See Sarakshi, Mabsut, Vol. X, p. 5; and Khadduri, War and Peace in the Law of Islam, pp. 94-95.) Combat (only) those who disbelive in god. Do not cheat or commit treachery, nor should you mutilate anyone or kill children. (IN another versioin of the Tradition, the Prophet prohibited the killing of women, children and aged men (paragraphs 28-30, below).See Bukhari ,sahih Vol II p. 251; Sarakhshi,Mabsut Vol X p.5 Khadduri, War and Peace in the Law of Islam, pp. 103-4.) Whenever you meet your polytheist enemies, invite them (first) to adopt Islam. (this is based, as Muslim publicists assert, on the Quranic injunction: "We never punished anyone until we first sent them an Apostle" (Q. XVII, 16); and on other Traditions from the Prophet. See Sarakhsi, Mabsut, Vol. X, p. 6; and Khadduri, War and Peace in the Law of Islam, pp. 96-98.) If they do so, accept it, and let them alone. YOu should then invite them to move from their territory to the territory of the emigres (Madina). If they do so, accept it and let them alone. (Muslims who migrated from Makka to Madina, where the Prophet Muhammad established his seat of government, were called al-Muhajiru, or emigries; those in Madina who became Muslims were called al-Ansar,or supporters before Mekka fell into Muslim hands everyone who became a Muslim was ordinarily ordered to emigrate to Madina; but after Makka was taken by Muhammad (8/630), the migration order was repealed. See Sarakshi, Mabsut, Vol. X, pp. 6-7.) Otherwise, they should be informed that they would be (treated) like the MUSlim nomads (Bedouins) (who take no part in the war) in that they are subject to God's orders as (other) Muslims, but that they will receive no share in either the ghanima (spoil of war) (See p. 106, below.) or in the fay'. (See pp. 48-49, above.) If they refuse (to accept Islam), then call upon them to pay the jizya (poll tax); if they do, accept it and leave them alone. (The jizya (poll tax) was imposed only on the "People of the Book," as we stated before; Sarakhsi points out that its general meaning in this statement was intended to apply specifically to the People of the Book (Sarakhsi, Mabsut, Vol. X, p.7.). If you besiege the inhabitants of a fortress or a town

and they try to get you to let them surrender on the basis of God's judgment, do not do so, since you do not know what God's judgement is but make them surrender to your judgment and then decide their case according to your own views. (Abu Yusuf held that divine legislation and the Prophet's decrees have dealt with such situations. Shaybani, however, who disagreed with his master on this point, held that the ruling was still binding. See Sarakhsi, *Mabsut*, Vol. X, p.7.) But if the besieged inhabitants of a fortress or a town asked you to give them a pledge [of security] in God's name or in the name of His Apostle, you should not do so, but give the pledge in your names or in the names of your fathers; for, if you should ever break it, (This order was obviously not intended to imply encouragement to break pledges, but was meant as a warning not to involve the names of God and his Apostle in making pledges to the enemy (see Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, ed. Munajjid, Vol. I, pp. 38-39; and his *Mabsut*, Vol. X, p.8). it would be an easier matter if it were in the names of you or your fathers. (See *Muslim*, *Sahih*, Vol. XII, pp. 37-40; Ibn Maja, *Sunan*, Vol. II, pp. 953-54; Abu Hanifa al-Nu'man b. Thabit, *Kitab al-Musnad*, ed. Safwart al-Saqqa (Aleppo, 1382/1962), pp. 153-54; Abu Yusuf, *Kitab al-Athar*, pp. 192-93; Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, ed. Munajjid, Vol. I, pp. 38-39.)

2. Muhammad (b. al-Hasan) from Abu Yusuf (Ya'qub b. Ibrahim al-Ansari, better known as Abu Yusuf. See pp. 25, *passim*, above.) from (Muhammad b. al-Sa'ib) al-Kalbi from Abu Salih (al-Samman) from ('Abd-Allah) b. 'Abbas (who said):

The one-fifth (share of the spoil) was divided in the time of the Apostle of God into five parts: one for God and the Apostle, one for the near of kin, one for the poor, one for the orphans, and one for the wayfarer. (This was known as the share of the Prophet, orphans, and the poor, based on divine legislation as provided in a Quranic communication (Q. VIII, 42). It was in effect the share of the state to be distributed among the poor. For the division of this share, see Chap. III, below.)

He (Ibn 'Abbas) said that (the Caliphs) Abu Bakr, 'Umar, 'Uthman, and 'Ali divided (the one-fifth share) into three parts; one for the orphans, one for the poor, and one for the wayfarer.

3. Muhammad (b. al-Hasan) from Abu Yusuf and Muhammad b. Ishaq, from Abu Ja'far (Muhammad b. 'Ali b. al-Husayn) (from Yazid b. Hurmuz), who said: (The chain of authorities for this Tradition seems to be incomplete, for Abu Ja'far did not relate the Tradition directly from Ibn 'Abbas, but from Yazid b. Hurmuz. See paragraph 49, below.)

I asked (Ibn 'Abbas): "What was (the Caliph) 'Ali b. Abi Talib's opinion concerning the one-fifth (share)?" He (Ibn 'Abbas) replied: "His ('Ali's) opinion was like the opinion of his House (the House of the Prophet Muhammad), but he disliked to disagree with Abu Bakr and 'Umar (on the subject)." (Abu Yusuf, *Kitab al-Kharaj*, p. 20; Darimi, *Sunan*, Vol. II, p. 225; Sarakhsi, *Mabsut*, Vol. X, pp. 10.11.)

4. Muhammad (b. al-Hasan) from Abu Yusuf from Abut Ishaq from Isma'il b. Abi Umayya from 'Ata' b. Abi Rabah, from ('Abd- Allah) b. 'Abbas, who said:

(The Caliph) 'Umar offered to defray the expenses of marriage for (the unmarried members of) our House and to pay our debts (from the one-fifth share). When we insisted that (the share) instead should be handed over to us (in toto), he refused. (Abu Yusuf, *Kitab al-Kharaj*, pp. 19-20. The Caliph Abu Bakar, followed by his successors, made a decision against giving the one-fifth share to the Prophet's house after the Prophet's death on the strength of a Tradition from the Prophet to the effect that his share, not considered to be his private property, could not be inherited. See *Muslim*, *Sahih*, vol. XII, pp. 74-82; and Sarakhsi, *Mabsut*, Vol. XII, p. 11.)

5. Muhammad (b. al-Hasan) from Abu Yusuf from Muhammad b. Ishaq from (Muhammad b. Shihab) al-Zuhri from Sa'id b. al-Musayyib, who said:

The Apostle of God, in dividing up the one-fifth (share) of the spoil after the campaign of Khaybar, (Khaybar, a Jewish settlement about eighty miles northeast of Madina, was brought under Muslim domination in 7/628. See Abu Muhammad 'Abd al-Malik Ibn Hisham, *Kitab Sirat Sayyidina Muhammad Rasul Allah*, ed. Ferdinand Wusteneld (Gotteingen, 1858-60), Vol. II, pp. 755 ff.; Eng. trans. A. Guillaume, *The Life of Muhammad* (London, 1955), pp. 510ff.) divided between the Banu Hashim and the Banu al-Muttalib the part assigned to the near kin. (The house of the Banu Hashim and the house of the Banu al-Muttalib were descendants of 'Abd Manaf. 'Abd Manaf, a son of Qusayy, belonged to the tribe of Quraysh. Hashim and Muttalib were brothers. 'Uthman descended from 'Abd Shams and Jubayr from Nawfal, but all the four (Hashim, Muttalib, Nawfal, and 'Abd Shams) were brothers. See Mus'ab b. 'Abd-Allah al-Zubayri, *Kitab Nasab Quraysh*, ed. E. Levi-Provencal (Cairo, 1953), pp. 14-17, 17-20, 15-91.) Thereupon, 'Uthman b. 'Affan and Jubayr b. Mut'im asked the Apostle to treat them on equal footing on the ground that they were as closely related to him as Banu al-Muttalib. The Apostle replied: "We and the Banu al-Muttalib have stood together in (the days of) both al-Jahiliya (Al-Jahiliya, or the Days of Ignorance, is a term traditionally used for the pre-Islamic or pagan period.) and of Islam." (This Tradition concerning the part of the one-fifth share given to the near of kin was interpreted to mean that the share was given to the near of kin who supported the cause of Islam, not to all the near of kin. See Bukhari, *Sahih*, Vol. II, p. 286; Ibn Maja, *Sunan*, Vol. II, p. 961; Sarakshi, *Mabsut*, pp. 12-13; Abu 'Ubayd al-Qasim Ibn Sallam, *Kitab al-Amwal*, ed. M. Hamid al-Fiqqi (Cairo, 1353/1954), p. 331.)

6. Muhammad (b. al-Hasan) from Abu Yusuf from al-Ash'ath b. Sawwar from Abu al-Zubayr (Muhammad b. Muslim) from Jabir (b. 'Abd-Allah), who said:

He (the Prophet) used to assign the one-fifth to "the path of God" (i.e., religious purposes) and out of it he gave to some members of the community, ("Na'ibat al-Qawm" has been interpreted to mean either the near of kin (dhawu al-Qurba)- which is more likely-or the warriors (al-ghuzat) who took part in the fighting. See Sarakshi, *Mabsut*, Vol. X, p. 14. Cf. Bukhari *Sahih*, Vol. II, p. 283.) but when the revenue increased, he included others. (In his *Kitab al-Kharaj*, p. 20, Abu Yusuf cites the latter part of the Tradition to read: "But when the share increased in quantity, he included the orphans, the poor, and the wayfarer.")

7. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hasan b. 'Umara from 'Abd al-Malik b. Maysara from Tawus (b. Kaysan) from ('Abd-Allah) b. 'Abbas (who said):

A man once found in the spoil (taken from the enemy) a camel of his that the unbelievers had captured, and he asked the Apostle (whether he could take it back). He (The Prophet) replied: "If you found it before the spoil was divided, it is yours; but if you found it after it was divided, you can take it by paying its price, if you so desire." (In either case, the Tradition recognizes the principle that the unbelievers had owned the camel by capture and that its recapture by the believers rendered it part of the spoil that belonged to the community of Islam. Since its capture by the unbeliever constituted a loss to one individual believer, he could take it back free of charge before the division of the spoil on the basis of the right of postliminium; but after the division, the original owner could recover it only by paying its price. See Abu Yusuf, *Kitab al-Kharaj*, p. 200, and *Kitab al-Athar*, p. 195; Sarakshi, *Mabsut*, Vol. X, pp. 14-15.)

8. Muhammad (b. al-Hasan) from Abu Yusuf from 'Abd-Allah b. 'Umar from Nafi' (Freed slave of Ibn 'Umar) from 'Abd-Allah b. 'Umar (who said):

A runaway slave who belonged to him (Ibn 'Umar) went over to the enemy (the unbelievers) and his horse was captured by them. When Khalid b. al-Walid (the commander of a Muslim force) defeated them, he returned the slave and the horse to Ibn 'Umar in the time of the Apostle of God. (Abu Yusuf, *Kitab al-Kharaj*, p. 200; Bukhari, *Sahih*, Vol. II, p. 265. Khalid's

campaign may have taken place either during the iconoclastic expedition at the time of the conquest of Makka or the expedition against Najran commanded by Khalid.)

9. Muhammad (b. al-Hasan) from Abu Yusuf from 'Abd-Allah b. 'Umar, who said:

A slave belonging to Ibn 'Umar was captured by the Rum (Byzantines), but Khalid b. al-Walid ransomed him by releasing two Byzantine (prisoners) and returned him to Ibn 'Umar. (In 'Atif MS, the latter part of the Tradition reads: "two Byzantine female (prisoners)." Cf. Abu Yusuf, Kitab al-Kharaj, p. 200.)

10. Muhammad (b. al-Hasan) from Abu Yusuf from al-Mujalid b. Sa'id from ('Amir b. Sharashil) al-Sha'bi (who said):

(The Caliph) 'Umar b. al-Khattab decreed that the inhabitants of (the territory of) al-Sawad (Southern Iraq. It was called al-Sawad (the black) because it was covered with dark green vegetation. See Mutarrazi, al-Mughrib, Vol. I, p. 267.) would be regarded as Dhimmis. (See Abu Yusuf, Kitab al-Kharaj, p. 28; Sarakhsi, Mabsut, Vol. X, pp. 15-16. The Dhimmis were the People of the Book, or scripturaries (see note 16 and Chap. V).

11. Muhammad (b. al-Hasan) from Abu Yusuf, from Hisham b. Sa'id from MUhammad b. Zayd from al-Muhajir (b. 'Umayra) from 'Umayr, freed slave of Abi al-Lahm, who said:

When I was a slave, I came to the Apostle and asked him to give me something (from the spoil) while he was dividing the spil of the battle of Khaybar. He said: "Hold this sword," which I did , and I dragged it over the ground (as an evidence of my strength). Thereupon, he gave me something of no great value. (It is held that 'Umayr, either because he was a minor or a slave, was not entitled to a regular share of the spoil, but the Prophet gave him compensation. See Abu Yusuf, Kitab al-Kharaj, p. 198; and Kitab al-Radd, p. 120; Ibn Sa'd, Tabaqat, Vol. II, p.114; Darimi, Sunan, Vol, II, p. 226; Sarakshi, Mabsut, Vol. X. p.26.)

12. Muhammad (b. al-Hasan) from abu Yusuf from Muhammad b. Ishaq from Isma'il b. Umayya from 'Ata' b. Abi Rabah from 'Abd- Allah b. 'Abbas (who said):

(Nadja b. 'Amir) (Najda b. 'Amir, follower of the Khariji sect, wrote Ibn 'Abbas requesting his opinion about a number of controversial legal questions. See Abu Yusuf, Kitab al-Kharaj, pp. 20.21; and Kitab al-Radd, pp. 38, 43.) wrote to him requesting his opinion (about the following questions):

"Is the slave entitled to a share of the spoil?

"Did women ever participate in war in the time of the Apostle of God?

"When is a minor entitled to a share of the spoil?

"(What is the status of) the share of the near of kin?" Ibn 'Abbas replied:

"The slave is not entitled to a share of the spoil, but he should be given a little something (as compensation).

"Women used to accompany the Apostle (in his campaigns) in order to take care of the wounded and were given something (in compensation).

"The minor is not entitled to a share of the spoil until he attains puberty.

"As to the share belonging to the near of kin, (See paragraph 2, above.) 'Umar (b al-Khattab) offered to pay from it the marriage expenses of the members of our family and to pay our debts. We demanded that the (whole) share should be given to us, but he refused to do so." (Muslim, Sahih, Vol. XII, pp. 190-91; Sarakshi, Mabsut, Vol X, pp.16-17.)

13. Muhammad (b. al-Hasan) from abu Yusuf from (Muhammad b. al-Sa'ib) al-Kalbi and Muhammad b. Ishaq (both of whom said):

The Apostle of God (once) gave a woman, who belonged to (the tribe of) Aslam, a necklace from the spoil taken at the campaign of Khaybar. (The woman's name was Ghifar. See Ibn Hisham, Kitab Sirat Rasul Allah, Vol. II, p. 768.)

14. MUhammad (b. al-Hasan) from Abu Yusuf from al-Hajjaj b. Artat from 'Amr b. Shu'ayb from Sa'id b. al-Musayyib, who said:

'Umar (b. al-Khattab) held that the slave had no right (to a share) in the spoil. (The slave has no right to a full share of the spoil, but he is entitled to compensation if he takes part in war by permission of his master. If he does not obtain permission, he is not entitled to compensation and would be held liable for not obtaining such permission. See Sarakshi, Mabusut, Vol. X, p. 17.)

15. Muhammad (b. al-Hasan) said: "As to the division of the spoil in enemy territory," Abu Yusuf related from (Muhammad b. al-Sa'ib) al-Kalbi and Muhammad b. Ishaq, both of whom said:

The Apostle of God himself (established the precedent that the spoil should be divided in the territory of Islam) by dividing the spoil (of the battle of) Badr after his return to Madina. (There was a controversy among jurists as to whether the spoil of war should be divided after the return of the army from enemy territory or whether it could be divided while the army was still in enemy territory. The Hanafi school held that the spoil should be divided after the return of the army from enemy territory; but others, like Awza'i, held that the spiol might be divided while the army was still in enemy territory. See Abu Yusuf, Kitab al-Radd, pp. 1-15; Shafi'i, Umm, Vol. VII, pp. 303- 4. See also paragraph 17, below, and p. 52, above.) 'Uthman (b. 'Affan) requested (the Prophet) to assign for him from that spoil and he gave him a share. Talha b. 'Abd-Allah (likewise) requested a share and was given one, although neither 'Uthman nor Talha had taken part (in the battle of) Badr. 'Uthman was ordered by the Apostle to stay behind (in order to take care of) Ruqayya (wife of 'Uthman and daughter of the Prophet), who was sick and died before the Apostle returned from Badr. Talha was (then) in Syria. (It is held that 'Uthman was entitled to a share because he stayed behind by an order of the Prophet to take care of his wife (also daughter of the Prophet), and Talha was dispatched to Syria to obtain intelligence on the movement of the enemy before the battle of Badr took place. See Abu Yusuf, Kitab al-Kharaj, p. 196; Sarakhsi, Mabsut, Vol. X, pp. 17-18; Bakhari, Sahih, Vol. II, pp. 282-83; Vol. III, p. 114.)

16. Muhammad (b. al-Hasan) from Abu Yusuf from (Muhammad b. al-Sa'ib) al-Kalbi and Muhammad b. Ishaq from Usama b. Zayd, who said:

Zayd b. Haritha (father of Usama b. Zayd) returned (to Madina) announcing the good news of the victory (in the battle) of Badr when we had just finished putting the (sundried) bricks in place over (the grave of) Ruqayya, daughter of the Apostle of God. And (Zayd) said that 'Utab b. Rabi'a, Shayba b. Rabi'a, Abu Jahl b. Hisham, and Umayya b. Khalaf had been killed (in the battle). He (Usama) asked his father (Zayd): "Is that right, father?" (Zayd) replied: "Yes-by God- (it was), my son." (Abu Yusuf, Kitab al-Kharaj, p. 196; Sarakhsi, Mabsut, Vol. X, pp. 17-18.)

17. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hasan b. 'Umara from al-Hakam (b. 'Utayba) from Miqsam (b. Bujra) from ('Abd-Allah) b. 'Abbas (who said):

The Apostle of God divided the spoil (of the campaign of Hunayn) at al-Ji'rana after his return from al-Ta'if. (Al- Ji'rana, a suburb of Makka, was in the territory under Islamic rule and the Prophet, having passed out of enemy territory, divided the spoil there. See Bukhari, Sahih, Vol. III, pp. 150- 55; Sarakshi, Mabsut, Vol. X, p. 18.) As to Khayba, (the Prophet) conquered it and his rule prevailed over it. So the Apostle of God divided up the spoil there before he left the town. He also divided the spoil of (the tribes of) Banu al- Mustaliq in their land after he had conquered it. (Bukhari, Sahih, Vol. III, pp. 128-30.)

18. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hasan b. 'Umara from al-Hakam (b. 'Utayba) from Miqsam (b. Bujra) from ('Abd-Allah) b. 'Abbas (who said):

The Apostle of God assigned two shares (of the spoil) to the horse-rider and one to the foot-warrior in (the battle of) Badr. (Abu Yusuf, Kitab al-Kharaj, p. 18; Kitab al-radd, p. 17; MUslim, Sahih, Vol. XII, p. 83; Sarakhsi, Mabsut, Vol. X, p. 19.)

19. Muhammad (b. al-Hasan) said that Abu Yusuf said that the same tradition was related by Muhammad b. Ishaq and by (Muhammad b. al-Sa'ib) al-Kalbi. (Abu Yusuf, Kitab al-Kharaj, pp. 18-19; cf. Bukhari, Sahih, Vol. III, p. 114.)

20. Muhammad (b. al-Hasan) from Abu Yusuf from al-Juwaybir (Jabir b. 'Abd-Allah) from al-Dahhak b. Muzahim (who said):

(The Caliph) Abu Bakr sought the advice of the Muslims as to what should be done with the share of the near of kin (which reverted to the treasury after the Prophet's death), and they held (IN another version "they agreed" (Abu Yusuf, Kitab al- Kharaj, p.21). that it should be expended in (providing) horses and weapons. (Ibid., p.21.)

21. Muhammad (b. al-Hasan) from Abu Yusuf from Abu Ishaq from al-Hasan b. 'Umara from al-Hakam (b. 'Utayba) from Ibrahim (b. Yazid al-Nakha'i) (who said):

While he (Ibrahim) was residing in a fortified post (on the frontier), he (and his company) were called upon to take part in an expedition; (Ibrahim) hired someone and paid scutage (instead). ("Al-Ju'l" is a scutage or contributeion to the war effort in lieu of fighting, especially if the contribution were in the form of weapons which enable unarmed men to participate in war. See Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, pp. 138-44, and Mabsut, Vol. X, pp. 19-20; Mutarrazi, al- Mughrib, Vol. I, pp. 86, 259; N. P. Aghnides, Modammedan Theories of Finance (New York, 1916), Part II, Chap. 4.)

22. (Muhammad b. al-Hasan from) (Not in the Arabic MSS.) Abu Yusuf from (Abu) Salih (al-Samman) from a Shaykh from Abu Ishaq al-Sabi'i from someone who told it from ('Abd-Allah) b. 'Abbas (who said):

A man once asked me: "We are obligated to provide a fighting force; out of every ten (men), five, six, or seven are under obligation to go and those who stay behind (should) give contribution to those who go. But," he asked, "what should the one who stays behind contribute to those who go, for some contribute (something that would be expended in providing) horses and weapons while others contribute horse provisions or servants (which would be used in the war)."

Ibn 'Abbas replied:

Contributitons which would be expended for horses and weapons are satisfactory, but house provisions are unsatisfactory. (Bukhari, Sahih, Vol. II, p. 241; Sarakshi, Mabsut, Vol. X, p. 20, and Sharah Kitab al-Siyar al-Kabir, ed. Munajjid, Vol I, p. 138.)

23. Muhammad (b. al-Hasan) from Abu Yusuf from someone (Perhaps Abu Hanifa.) who related from Hammad (b. Abi Sulayman) from Ibrahim (b. Yazid al-Nakha'i), who said; Scutage (as a substitute for fighting) is all right. (Sarakshi, Mabsut, Vol. X, p. 20.)

24. Muhammad (b. al-Hasan) from Abu Yusuf from 'Asim (b. Sulayman) al-Ahwal from Abu 'Uthaman al-Nahdi (who said):

'Umar b. al-Khattab made unmarried men go to war instead of the married ones and he used to give the warrior the horse of him who stayed behind. (Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munazjjid, Vol. I, p. 138. In commenting on 'Umar's decision, Sarakhsi states that some authorities held that 'Umar asked those who stayed behind to contribute horses as a voluntary act, for, if those who stayed behind failed to contribute, the warriors were supplied by the state. See Sarakhsi, Mabsut, Vol. X, p.20).

25. Muhammad (b. al-Hasan) from Abu Yusuf from a shaykh from Maymun b. Mihran, who said:

Contribution (as a substitute for fighting) is all right, but it is objectionable to me to take a contribution and hire another person (to fight) for an amount less than that contribution. (Sarakshi, *Sharh Kitab al-Siyar al-Kabir*, ed. Munajjid, Vol. I, p. 139.)

26. Muhammad (b. al-Hasan) from Abu Yusuf from 'Abd al-Rahman b. 'Abd-Allah from someone who related to him from Jarir b. 'Abd-Allah al-Bajali (who said):

(The Caliph) Mu'awiya b. Abi Sufyan ordered the inhabitants of Kufa to raise an army but he exempted Jarir (b. 'Abd-Allah) and his son. (Jarir, a companion of the Prophet Muhammad who settled in Kufa, was exempted by Mu'awiya on the ground of respect and veneration for one of the Prophet's Companions.) Jarir said: "We would not accept (the exemption) but would give to the warrior a contribution from our property." (Sarakshi, *Mabsut*, Vol. X, pp. 20-21, and *Sharh Kitab al-Siyar al-Kabir*, ed. Munajjid, Vol. I, p. 139.)

27. Muhammad (b. al-Hasan) from Abu Yusuf from Muhammad b. Ishaq from Yazid b. Abi Habib from Abu Marzuq from one of the Prophet's Companions, (His name is Hanash al-San'ani.) who said that upon his capture of a town in al-Maghrib, (The name of the town is Jirab, an island near Qabis. Al-Maghrib was the name applied to the whole North African sector from Tunisia to Morocco, but more specifically to the latter in modern times.) he stood up and made a speech to his company assuring them that he would not transmit to them save what he had heard the Apostle of God say in the battle of Khaybar. I heard him say:

He who believes in God and in the Last Day should not go into a woman (taken as a spoil) who is pregnant, nor should he sell (a part of) the spoil before it is divided. He should not ride an animal belonging to the Muslims (i.e., before the spoil is divided) until it is emaciated and then bring it back to them, nor should he wear a garment belonging to the Muslims' booty and return it worn out. (Ibn Hisham, *Kitab Sirat Rasul Allah*, Vol. II, pp. 758-59 (Guillaume's translation, p. 512). See also Darimi, *Sunan*, Vol. II, p. 227; Sarakshi, *Mabsut*, Vol. X, pp. 21-22.)

28. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hajjaj b. Artat from Abu al-Zubayr (Muhammad b. Muslim) from someone who took part in battle, said:

I heard the Apostle of God in the campaign against Banu Qurayza saying: "He (of the enemy) who has reached puberty (This was regarded as evidence for minors who have come of age.) should be killed, but he who has not should be spared."

He who related this Tradition to Abu al-Zubayr, said that he had not reached puberty, so he was spared. (Sarakshi, *Mabsut*, Vol. X, p. 27. For a different chain of transmitters, but essentially the same Tradition, see Abu Hanifa, *Musnad*, pp. 154-55.)

29. Muhammad (b. al-Hasan) from Abu Yusuf from 'Asim b. Sulayman (al-Ahwal) from al-Hasan (b. al-Hasan al-Basri) said:

The Apostle of God prohibited the killing of women. (For different chains of transmitters, see Abu Yusuf, *Kitab al-Kharaj*, p. 195 (related on the authority of Ibn 'Abbas); Bukhari, *Shih*, Vol. II, p. 251; Muslim, *Sahih*, Vol XII, p. 48.)

30. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hajjaj (b. Artat) from Qatada (b. Du'ama al-Sadusi) from al-Hasan (b. al-Hasan al-Basri), who said:

The Apostle of God said: "You may kill the adults of the unbelievers, but spare their minors-the youth." (See Abu Yusuf, *Kitab al-Kharaj*, p. 195 (related on the authority of Ibn 'Abbas and Mujahid).

31. Muhammad (b. al-Hasan) from Abu Yusuf from Yahya b. Abi Unaysa from 'Alqama b. Marthad from ('Abd-Allah) b. Burayda from his father (Burayda b. al-Husayb al-Aslami), who

related from the Apostle of God a Tradition similar to that of Abu Hanifa (on the prohibition of killing women). (Ibid., p. 195.)

32. Muhammad (b. al-Hasan) from Abu Yusuf from Ash'ath b. Sawwar from (Muhammad) b. Sirin, who said:

The Apostle of God used to assign to himself a choice article from the spoil before it was divided, such as a sword, a horse, an armor, or any other article. (Ibid., pp. 22. 23.)

33. Muhammad (B. al-Hasan) from Abu Yusuf from Muhammad b. Ishaq and (Muhammad b. al-Sa'ib) al-Kalbi, who said:

The share of the Apostle of God from the spoil of the battle of Khaybar was included in the lot of 'Asim b. 'Adi. (The Prophet was entitled to three categories of shares: (1) the choice article before the division of the spoil; (2) his part of the one-fifth share; and (3) his share as a participant in war with other warriors, and this was ordinarily assigned to him and to one of the warriors. See Abu Yusuf, Kitab al-Kharaj, p. 23; Ibn Sallam, Kitab al-Amwal, p. 7; Tabari, Kitab Ikhtilaf, p. 140; Sarakshi, Mabsut, Vol. X, p. 27.)

34. Muhammad (b. al-Hasan) from Abu Yusuf from (Muhammad b. al-Sa'ib) al-Kalbi and Abu Ishaq, both of whom said that the Apostle of God once said:

"By God it is not lawful for me to take anything from the booty (before it is divided), not even this tuft of hair"-and he picked up a tuft of hair from the hump of a camel- "save (my part of) the one-fifth (share), and that one-fifth (too) will be returned to you. You should (therefore) return (even) the thread and needle (that you may have taken), for treachery would be a shame and a disgrace on the Day of Resurrection to those who had committed it." Thereupon, a man from the Ansar (helpers). (The Ansar were the supporters of the Prophet in the city of Madina; those who migrated with him from Makka were the Muhajirun (e'migre's). who had taken a bundle of (camel hair) thread, came (to the Prophet) and said: "I took this ball to repair the saddle of a camel of mine." The Apostle replied: "You may have my own share of it!" Thereupon, (the man) said: "If the matter has reached this point, I have no need of it." (Malik, al-Muwatta', Vol. II, pp. 20.21; Abu Yusuf, Kitab al-Radd, p. 48; Darimi, Sunan, Vol. II, p. 230; Sarakshi, Mabsut, Vol. X, p. 27.)

35. Muhammad (b. al-Hasan) from Abu Yusuf from Muhammad b. 'Abd al-Rahman b. Abi Layla from al-Hakam (b. 'Utayba) from Miqsam (b. Bujra) from ('Abd-Allah) b. 'Abbas (who said):

An unbeliever fell into the trench (of the believers) and died. The Muslims were given money in exchange for the corpse. When the Apostle was consulted on the matter, he prohibited this (deal). (Abu Hanifa, Musnad, p. 155; Abu Yusuf, Kitab al-Kharaj, p. 199; Sarakshi, Mabsut, Vol. X, p. 22.)

36. Muhammad (b. al-Hasan) from Abu Yusuf from 'Abd-Allah b. Abi Humayd from Abu Mulayh from Abu Usama (Zayd b. Hazritha) who related that the Apostle said in the last Pilgrimage: ("Hujjat al-Wida' " is a term applied to the last pilgrimage performed by the Prophet in the year 10/632 and in which, according to traditional reports, he made his last testament. For an account of this pilgrimage, see Ibn Hisham, Kitab Sirat Rasul Allah, Vol. II, pp. 66ff. (Guillaume's translation, pp. 649ff.), and Ibn Hazm, Hujjat al-Wida', ed. M. Zaki (Damascus, 1956).

All the usury (of the Days) of Ignorance (Al-Jahiliya. See note 27, above.) (Still payable) is canceled and the first usury to be canceled is the usury of 'Abbas b. 'Abd al-Muttalib (all the blood shed in the Days of Ignorance is to be left unavenged). (Full text in Ibn Hisham, Kitab Sirat Rasul Allah, Vol. II, p. 968 (Guillaume's translation, p. 651). This Tradition indicates that

the Prophet decreed that the law of the pre-Islamic period was no longer valid in matters of usury and bloodshed under Islam (see Sarakshi, Mabsut, Vol. X. p. 28).

37. Muhammad (b. al-Hasan) from Abu Yusuf from Muhammad b. 'Abd-Allah from al-Hakam (b. 'Utayba) from Miqsam (b. Bujra) from ('Abd-Allah) b. 'Abbas, who related a similar Tradition.

38. Muhammad (b. al-Hasan) from Abu Yusuf from Muhammad b. Sa'id from ('Amir b. Sharahi) al-Sha'bi and Ziyad b. 'Ilaqa(who said) that (the Caliph) 'Umar b. al-Khattab wrote to Sa'd. Abi Waqqas (saying):

I have sent you reinforcements from the people of Syria; whoever of them arrives before the dead (bodies) disintegrate should be included (among the recipients of) the spoil. (Abu Yusuf, Kitab al-Radd, pp. 6-7, 35-36; Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Manajjid, Vol. III, p. 1007, and Mabsut, vol. X, p.22.)

39. Muhammad (b. al-Hasan) from Abu Yusuf from Muhammad b. Ishaq from Yazid b. 'Abd-Allah b. Qasit (who said):

(The Caliph) Abu Bakr dispatched 'Ikrima b. Abi Jahl with 500 men to the Yaman to reinforce the men with Ziyad b. Labid al-Bayadi and Muhajir b. Umayya al-Makhzumi. These arrived when (the town of) al-Najayra was captured and they were included (among the recipients of) the spoil. (Abu Yusuf, Kitab al-Radd, p. 36; Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Manajjid, Vol. III, p. 1005, and Mabsut, Vol. X, p. 23.) The prime (of encouragement) offered was one-fourth (of the spoil) at the onward journey (of the expedition) and one-third during the return journey. (The prime, or additional shares of the spoil, was promised to raise the morale of the army. The practice of giving additional shares was called tanfil (supereorgatory shares). See Sarakshi, Mabsut, Vol. X, p. 28.)

40. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hasan b. 'Umara from al-Hakam (b. 'Utayba) from Miqsam (b. Bujra) from ('Abd-Allah) b. 'Abbas (who said):

The Apostle of God sought the assistance of the Jews of the tribe of the Banu Qaynuqa' against the (Jews of) Banu Qurayza, but he gave them nothing from the booty. (Sarakshi, Mabsut, Vol. X, p. 23.)

41 Muhammad (b. al-Hasan) from Abu Yusuf from Juwaybir (Jabir b. Zayd) from al-Dahhak (b. Muzahim) (who said):

The Apostle of God (while on his way to the battle of Uhud in 3/625) encountered a goodly company of men. He asked: "What are these?" He was told that they were such-and-such (a company, i.e., unbelievers). Thereupon he said: "We do not seek an assistance from the unbelievers." (Muslim, Sahih, vol. XII, p. 198; Darimi, Sunan, Vol. II, p. 233; Sarakshi, Mabsut, Vol. X, p. 24.)

42. Muhammad (b. al-Hasan) from Abu Yusuf from (Muhammad b. saib al-Kalbi (who said):

Two unbelievers went forth with the Apostle of God (while once on an expedition). The Apostle of God told them: "Nobody would be allowed to take part in the fighting along with us who is not follower of our religion " "Thereupon they became Muslims(see Abd-Allah b,Umar al-Waqidi kitab al-Maghazi ed. A.von Kremer (Calcutta 1856) pp.40-41 Sarakash Mabsut Vol X p. 23

43. Muhammad (b.al-Hakam) from Abu Yusuf from al-Hajjaj b. Artat from al-Hakam (b. 'Utayab from Miqsam b. Bujra, who said): (The chain of transmitters is not complete in the Arabic MSS.)

(A commander) wrote to (the Caliph) Abu Bakr inquiring whether a prisoner of war taken from the Rum (the Byzantines) (might be ransomed). He replied that he should not be

ransomed, even at the price of two mudds of gold, (Literally: "Even if paid by two mudds of gold," a large measure of gold. See Mutarrazi, al-Mughrib, Vol. II, p. 180.) but that he should be either killed or become a Muslim. (Sarakshi, Mabsut, Vol. X, p. 24, states that Abu Bakr was consulted about two prisoners of war taken from the Rum (Byzantines).

44. Muhammad (b. al-Hasan) from Abu Yusuf from Ash'ath b. Sawwar from al-Hasan (b. al-Hasan al-Basri) an 'Ata' b. Abi Rabah, both of whom said:

The prisoner of war should not be killed, but he may be ransomed or set free by grace. (This is based on Q. XLVII, 5. See Sarakhsi, Mabsut, Vol. X, p. 24.)

However, Abu Yusuf held that the opinions of al-Hasan and 'Ata' did not count for anything (on this matter). (Abu Yusuf held that the decision concerning the fate of prisoners of war should be left to the Imam to decide whether they should be killed or ransomed on the basis of the interests of Muslims (see Abu Yusuf, Kitab al-Kharaj, pp. 195-96).

45. Muhammad (b. al-Hasan) from Abu Yusuf from Abu Bakr b. 'Abd-Allah from (Muhammad b. Muslim) al-Zuhri, who said:

the Apostle of God prohibited the hamstringing of horses in enemy territory. (Abu Yusuf, Kitab al-Radd, pp. 88-89.)

46. Muhammad (b. al-Hasan) from Abu Yusuf from Ash'ath b. Sawwar from Muhammad b. Mujalid, who said:

I asked 'Abd-Allah b. Abi Awfi: "Was the food captured at Khaybar divided into five shares?" He replied: "No, because it was too little, but if any one of us needed anything he took enough to satisfy his need." (Sarakshi, Mabsut, Vol. X, p. 25.)

47. Muhammad (b. al-Hasan) from Abu Yusuf from Juwaybir (Jabir b. 'Abd-Allah) from al-Dahhak (b. Muzahim), who said:

Whenever the Apostle of God sent forth a detachment he said to it: "Do not cheat or commit treachery, nor should you mutilate or kill children, women, or old men." (This is part of the Tradition related on the authority of Burayda. See paragraph 1, above.)

48. Muhammad (b. al-Hasan) from Abu Yusuf from 'Abd-Allah b. 'Umar from Nafi' (freed-slave of Ibn 'Umar) from ('Abd-Allah) b. 'Umar (who said):

He (Ibn 'Umar) prohibited the entry of the Book (the Qur'an) into enemy territory. (Bukhari, Sahih, vol. II, p. 245; Muslim, Sahih, Vol. XIII, p. 13. Abu Dawud gives the authorities of this Tradition as follows: 'Abd-Allah b. Maslama al-Qa'nabi from Malik (b. Anas) from Nafi' from 'Abd-Allah b. 'Umar (Abu Dawud, Sunan, Vol. III, p. 36). See Sarakshi, Mabsut, Vol. X, p. 29; and Tahawi, Mushkil al-Athar (Hyderabad, 1333/1914), Vol. II, pp. 368-70.)

49. Muhammad (b. al-Hasan) from Abu Yusuf from Muhammad b. Ishaq from Abu Ja'far (Muhammad b. 'Ali b. al-Husayn) and (Muhammad b. Muslim) al-Zuhri and Isma'il b. Umayya from Yazid b. Hurmuz, who said:

I am (the man) who wrote the replies of Ibn 'Abbas to Najda's (questions). You wrote to Ibn 'Abbas asking about the killing of children in battle and cited the case of the learned (guide) of Moses who had killed a child, whereas the Apostle of God prohibited the killing of children. (Ibn 'Abbas replied) "Had you known concerning children what the learned (guide) of Moses knew, you would be in a position to do so." (For Quranic citations concerning the guide of Moses, see Q. XVIII, 59-81. The Kharijis kill enemy children, including Muslims whom they consider as unbelievers and apostates, on the basis of the Quranic verse concerning the guide of Moses. Ibn 'Abbas rejected this argument on the basis of the precedent of the guide of Moses.) You also wrote inquiring whether women used to participate in war long with the Apostle of God and whether they were assigned a share or were merely given a portion as compensation. "They did participate in war with the Apostle and received a portion as compensation" (Ibn

'Abbas replied). Isma'il b. Umayya added to the Tradition: "You wrote inquiring whether the slaves participated in war along with the Apostle of God and whether they were assigned a share (of the spoil)." I (Secretary to Ibn 'Abbas) wrote in reply an opinion about the slaves similar to that I had written concerning women (namely, that they were not entitled to a share, but merely to a portion of it as compensation). You also asked: "When does an orphan cease to be regarded as such (i.e., a monor)?" (Ibn 'Abbas) replied that when the orphan attains puberty he ceases to be regarded as such, and he is entitled to a share (of the spoil, if he regarded as such, and he is entitled to a share (of the spoil, if he takes part in war). (Najda seems to have often written Ibn 'Abbas requestin his opinion on a variety of legal questions. Some of these questions were grouped togetehr in one narrative by Hurmuz (Sarakshi, Mbsut, Vol. X, pp. 16-17, 29-30). for a different narrative, see Abu Yusuf, Kitab al-Kharaj, p. 198, and Kitab al-Radd, p. 38; Sarakshi, Mabsut, Vol. XII, pp. 190-94.)

50. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hajjaj b. Artat from 'Amr b. Shu'ayb from his father (The name of 'Amr b. Shu'ayb is incorrectly cited in the Arabic MS as 'Umar b. Shu'ayb, and the latter related Traditions from the Prophet on the au thority of his grandfather 'Amr b. al-As rather than from his father (see Abu al-Wafa's comments in Abu Yusuf, Kitab al-Athar, p.12,n.4). from the Prophet, who said: (The order of words of the Tradition is slightly changed to conform to other tranmissions. See Abu Yusuf, Kitab al-Radd, pp. 59-61; Sarakshi, Mabsut, Vol. X, pp. 25-26.)

Muslims should support one another against the outsider; the blood of all Muslims is of equal value, and the one lowest in status (i.e., a slave) can bind (all) the others if he gives a pledge (of Security). The vanguard can make a treaty binding on them all, and the rearguard makes available its caputred booty also. (Abu Yusuf, Kitab al-Radd, pp.60-61, and his Kitab al- Kharaj, p. 205.)

51. (The same Tradition is reproduced as in pragraph 7.) (This may have been a mistake of the copyist, for the Tradition is repeated verbatim.)

52. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hasan b. 'Umara from al-Hakam (b. 'Utayba) from Miqsam (b. Bujra) from ('Abd-Allah) b. 'Abbas, who said:

The Apostle of God launched a campaign against al-Ta'if at the beginning of (the sacred month of) Muharram and continued it for forty days until he captured the city in (the month of) Safar. (Sarakshi, Mabsut, Vol. X, p. 26.)

53. Muhammad (b. al-Hasan) from Abu Yusuf from al-Hasan b. 'Umara from Ibn Abi Najih (Yasar) from Mujahid (b. Jabir), who said:

The Prohibition of fighting during the sacred months (Singular in the Qur'an (Q. II, 214) and in the Arabic MS. The sacred months are Shawwal, Dhu al-Qi'da, Dhu al-Hijja, and Muharram.) (as laid down in the Qur'an (Q. II, 214: "They will ask you about the sacred month and fighting in it. Say, fighting in it is a heinous thing.")) was abrogated by God, the Most High (in another text of the Qur'an) which says: "Slay the polytheists wherever you may find them." (Q. IX, 5. It is held that this divine legislation was provided after the other and therefore it abrogated it. See Sarakhsi, Mabsut, Vol. X, p. 26, and Sharh Kitab Siyar al-Kabir, ed. Munajjid, Vol. I, p. 93; Tabari, Tafsir (Cario, 1374/1955), Vol. IV, pp. 299-316; and Vol. XIV, pp. 133- 37. Cf. Abu al-Khayr Nasir al-Din al-Baydawi, Anwar al-Tanzil wa Asrar al-Ta'wil (Cairo, 1305/1887), pp.46 (margin), 247 (margin).) Abu Yusuf added: This is also the opinion of Abu Hanifa. However, (Muhammad b. al-Saib) al-Kalbi, according to Abu Yusuf, held that the prohibition (of fighting during the sacred months) was not abrogated. But according to Muhammad b. al_Hasan, Abu Yusuf held that al_kalbi's opinion was not to be followed.

54. Muhammad (b.al-Hassan) from Abu Yusuf from al-Hajjaj b. Artat from Makhul (Abu Abd-Allah, who said):

The Apostle of God, in dividing the spoil of Khaybar, gave the horse-rider two shares and the foot warrior one share. But God Knows best. (Bukhari, Sahih, Vol. III, p.114; cf. Abu Yusuf, Kitab al-Kharaj, p.19)

CHAPTER II.

ON THE CONDUCT OF THE ARMY IN ENEMY TERRITORY

(Literally: "A chapter on the army whenever it attacks the territory of war.")

(General Rules)

55. If the army (of Islam) attacks the territory of war and it is a territory that has received in invitation to accept Islam, it is commendable if the army renews the invitation, but if it fails to do so it is not wrong. (It is agreed among jurists that an invitation to accept Islam before battle is obligatory, but a second invitation is commendable only to Maliki and Hanafi jurists. See paragraph 1; Abu Yusuf, Kitab al-Kharaj, p.191; Tabari, Kitab Ikhtilaf, pp.2-3; Sarakhsi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol-I, pp. 75-80, and Mabsat, Vol. X, p.30. This practice, equivalent to a declaration of war, existed from antiquity (See Deut. XX. 10-12; and Phillipson, International Law and Custom of Ancient Greece and Rome, Vol. I, pp.96-97); but its adoption by Mulim jurists is said to have been based on the Quran which states; "We never punished any people until we first sent them an Apostle" (Q.XVII,16), and on a Tradition from the Prophet, which states: "I have been ordered to fight the polytheists until they say there is no god at all but Allah; if they say it, they are secured in their blood and property (Bukhari, Sahih, Vol. II. p.236). Like the jus fetiale of ancient Rome which required that a set of rules must be followed so that would be lawful, the jihad was regarded as lawful only if it were preceded by an invitation to adopt Islam. If the enemy refused (or if they were People of the Book and refused to pay the poll tax), fighting would become lawful for the Muslims. See Hamidullah, Muslim Conduct of state, pp. 190-92; Khadduri, War and Peace in the Law of Islam, pp. 96-98.) The army may launch the attack (on the enemy) by night or by day and it is permissible to burn (the enemy) fortifications with fire or to inundate them with Water. (Abu Yusuf, Kitab al-Kharaj, pp.192, 194; Tabari, Kitab Ikhtilaf, p.3; Sarakhsi, Mabsut, Vol. X, pp. 30-31.) If (the army) captures any spoil of war,it should not be divided up in enemy territory until (the MUslims) have brought it to a place of security and removed it to the territory of Islam. (See paragraphs 15 and 17; Abu Yusuf, Kitab al-Kharaj, p. 196, and Kitab al-Radd, pp. 1-12; Sarakshi, Kitab Sharh al-Siyar al- Kabir (Hyderabad), Vol. II, p. 254, and Mabsut, Vol. X, pp. 32- 34. However, al-Awza'i and Shafi'i held that the Prophet's practice was in favor of dividing it up in the territory of war. See Tabar, Kitab Ikhtilaf, pp. 129-30; Shafi'i; Umm, Vol. VII, p. 303.)

56. Abu Yusuf said: I asked Abu Hanifa (his opinion) concerning the food and fodder that may be found in the spoil and whether a warrior in need may take from that spoil (before division) any of the food for himself and fodder for his mount.

57. He (Abu Hanif) replied: There is no harm in all that. (Cf. paragraph 34 and see Abu Yusuf, Kitab al-Kharaj, p. 197, and Kitab al-Radd, p. 16; Sarakshi, Mabsut, Vol. X, p. 34. For opinions of Awza'i, Malik, and Shafi'i, see Tabari, Kitab Ikhitaf, pp. 86-93.)

58. I asked: If there were weapons among the spoil, (do you hold that it would be permissible) for a Muslim (warrior) who needed a weapon with which to fight to take one without the permission of the Imam?

59. He replied: There is no harm in it, but he should return the weapons to the spoil after the battle is over. (Abu Yusuf, Kitab al-Radd, pp. 13-16; Tabari, Kitab Ikhtilaf, p. 102; Sarakshi, Mabsat, Vol. X, pp. 34-35.)

60. I asked: Why have you held that it is permissible (for the warrior) to take food and fodder (from the spoil)?

61. He replied: Because a narrative from the Apostle of God has come to my knowledge to the effect that in (the campaign of) Khaybar the believers captured some food and ate from it before it was divided. Fodder falls in the same category as food, for both provide the strength necessary for the warrior (while fighting against the enemy). (See paragraph 46. Abu Hanifa used analogical reasoning on the strength of a Tradition giving general permission, within the context of which Abu Hanifa gave his own opinion. Cf. opinions of Awza'i, Malik, and Shafi'in Tabari, Kitab Ikhtilaf, pp. 99-101.)

62. I asked: Why do you hold that it is permissible (for the warrior) to take a weapon with which to fight?

63. He replied: Do you think that it would be objectionable if the unbelievers shot an arrow at one of the believers and the latter shot it back at the enemy, or if one of the unbelievers attacked a believer with a sword and the latter snatched it from him and struck him with it?

64. I said: No.

65. He said: The latter situation is similar to the former. (See Sarakshi, Mabsut, Vol. X, p. 35.)

66. I asked: Do you think that it is objectionable for a person to take clothings and goods from the spoil for his own use before it is divided?

67. He replied: I disapprove of that for him. (See paragraph 34 and Sarakshi, Mabsut, Vol. X, p. 35.)

68. I asked: If the believers were in need of clothing, animals, and goods, would it be incumbent on the Imam to divide the spoil among them before they returned to the territory of Islam (dar al-Islam)?

69. He replied: If they were (really) in need, it would be all right to divide it among them, but if they were not in need I should disapprove of dividing it.

70. I asked: Why?

71. He replied: Because (the believers) had not yet taken (the spoil) to a secure place so long as they remained in the territory of war (dar al-harab). Besides, do you not think that if another (Muslim) army entered the territory of war (and took part in the fighting) it would be entitled to participate in that spoil? (Tabari, Kitab Ikhtilaf, p. 130.)

72. I asked: Do you think that the Imam should divide up the captives before the believers returned to the territory of Islam, if the believers need them?

73. He replied: No. (Ibid., p. 131.)

74. I asked: What should the Imam do with the captives, if the believers do not need them? Should he sell them?

75. He replied: If I held that it would be permissible for the Imam to sell them (before the believers returned to the territory of Islam), I should hold that it would be permissible for him to divide them up (there). (Cf. Opinions of Awaza'i and Shafi'i, *ibid.*, pp. 129-30.)

76. I asked: What should (the Imam) do about transporting them?

77. He replied: If (the Imam) possesses surplus means of transport he should use it to carry (the captives); if there is none he should see if there is any surplus means among the Muslims. If he finds such means he should get them to carry it with them of their own free will. (*Ibid.*, p. 133.)

78. I asked: If neither the Imam nor the Muslims possess surplus means of transport but some (private) individuals among them (have their own means), should the Imam cause the spoil to be transported on the animals belonging to those particular persons?

79. He replied: Yes, provided those persons are willing to do so. Otherwise, the Imam should hire means of transport rather than force the owners of private means to carry the spoil. As to the captives, the Imam should oblige them to go on foot if they are able to do so. (*Ibid.*; Sarakshi, *Mabsut*, Vol. X, p. 36.)

80. I asked: And if they are unable to walk?

81. He replied: He (the Imam) should kill the men and spare the women and children, for whom he should hire means for carrying them. (For opinions of other jurists, see *ibid.*, pp. 131-33.)

82. I asked: If the believers in the territory of war capture spoil in which there are (animals such as) sheep, riding animals, and cows which resist them and they are unable to drive them to the territory of Islam, or weapons which they are unable to carry away, what should they do (with them)?

83. He replied: As to weapons and goods they should be burned, but riding animals and sheep should be slaughtered and then burned. (Abu Yusuf, *Kitab al-Radd*, pp. 88-89; Tabari, *Kitab Ikhtilaf*, p. 107; Sarakshi, *Mabsut*, Vol. X, pp. 36-37.)

84. I asked: Why should not (the animals) be hamstrung?

85. He replied: Because that is mutilation, which they should not do because it was prohibited by the Apostle of God. However, they should not leave anything that the inhabitants of the territory of war could make use of. (Abu Yusuf, *Kitab al-Radd*, pp. 88-89; Tabari, *Kitab Ikhtilaf*, p. 110; Sarakshi, *Mabsut*, Vol. X, p. 37.)

86. I asked: Do you think that they should do the same with whatever (other) animals refuse to be driven away or with whatever weapons and goods are too heavy to carry?

87. He replied: Yes. (Tabari, *Kitab Ikhtilaf*, p. 110.)

88. I asked: Do you think that it is objectionable for the believers to destroy whatever towns of the territory of war that they may encounter?

89. He replied: No. Rather do I hold that this would be commendable. For do you not think that it is in accordance with God's saying, in His Book: "Whatever palm trees you have cut down or left standing upon their roots, has been by God's permission, in order that the ungodly ones might be humiliated." (Q. LIX, 5.) So, I am in favor of whatever they did to deceive and anger the enemy. (Tabari, p. 107.)

90. I asked: If the Imam attacked an enemy territory and took possession of it, do you think that he should divide the land (among the warriors) as he divides the spoil of war?

91. He replied: The Imam is free either to divide the land into five shares, distributing the four-fifths among the warriors who participated in conquering it, or not to divide it up (i.e., hold it as state-owned land) as (the Caliph) 'Umar did in (the case of) the land of al-Sawad (of

southern Iraq). (Agricultural lands in the occupied territories of Syria and Egypt were divided among the believers, while the lands of southern Iraq became state lands subject to annual tribute. See Abu Yusuf, Kitab al-Kharaj, pp. 28-39, 39-41; Shaybani, Kitab al-Jami' al-Saghir, p. 88; Sarakhsi, Mabsut, Vol. X, p. 37; Ibn Sallam, Kitab al-Amwal, pp. 143 ff.)

92. I asked: Should (the Imam) leave it (immobilized) while its inhabitants paid the Kharaj?

93. He replied: Yes. So it was related to us that 'Umar b. al-Khattab did. But God knows best! (On the land policy of 'Umar, see Abu Yusuf, Kitab al-Kharaj, pp. 35-39.)

The Killing of Captives and the Destruction of Enemy Fortifications

(This section, falling more appropriately under the general subject of the conduct of the army in enemy territory, has been moved from the chapter on the intercourse between the dar al-Islam and the dar al-harb (Chap. IV), as it appears in the Arabic MSS.)

94. I asked: If male captives of war were taken from the territory of war, do you think that the Imam should kill them all or divide them as slaves among the Muslims?

95. He replied: The Imam is entitled to a choice between taking them to the territory of Islam to be divided (among the warriors) and killing them (while in the territory of war). (Abu Yusuf, Kitab al-Kharaj, pp. 196, 202; Sarakhsi, Mabsut, Vol. X, p.37.)

96. I asked: Which is preferable?

97. He replied: (The Imam) should examine the situation and decide whatever he deems to be advantageous to the Muslims. (Tabari, Kitab Ikhtilaf, p. 144.) 98. I asked: If killing them were advantageous to the Muslims, (do you think that the Imam) should order their Killing?

99. He replied: Yes. (Ibid., p. 144.)

100. I asked: If all of them became Muslims, would he be entitled to kill them?

101. He replied: He should not kill them if they became Muslims: they should be regarded as booty to be divided among the Muslims. (Ibid., pp. 40,144.)

102. I asked: If they did not become Muslims, but they claimed that they had been given a safe-conduct and a few Muslims declared that they had given such a pledge to them, would such a claim be accepted?

103. He replied: no. (Abu Yusuf, Kitab al-Radd, p. 63, and Kitab al-Kharaj, pp. 202-3.)

104. I asked: Why?

105. He replied: Because both (merely) stated their own claim.

106. I asked: If a group of Muslims known to be of just character testified that a safe-conduct had been given by a party of warriors to the prisoners of war who were still capable of resistance (in a fortification before their surrender), would that testimony be valid?

107. He replied: Yes. (Tabari, Kitab Ikhtilaf, pp. 40,43.)

108. I asked: Would the prisoners of war be set free?

109. He replied: Yes.

110. I asked: Do you think that the blind, the crippled, the helpless insane, if taken as prisoners of war or captured by the warriors in a surprise attack, would be killed?

111. He replied: (No), they should not be killed. (Ibid., p. 144; Tahawi, Mukhtasar, p. 283; Sarakhsi, Mabsut, Vol. X, p.64.)

112. I asked would it be permissible to inundate a city in the territory of war with water to burn it with fire or to attack (its people) with Mangonels even though there may be slaves women, old men and children in it.

113. He applied: Yes, I would approve of doing all of that to them. (Abu Yusuf, Kitab al-Kharaj, pp. 194-95; Tabari, Kitab Ikhtilaf, pp. 6-7; Sarakshi, Mabsut, Vol. X, p.65.)

114. I asked: Would the same be true if those people have among them MUslim prisoners of war or Muslim merchants?

115. He replied: Yes, even if they had among them (Muslims), there would be no harm to do all of that to them. (Tabari, Kitab Ikhtilaf, p. 6; Sarakshi, Mabsut, Vol. X, p. 65.)

116. I asked: Why?

117. He replied: If the Muslims stopped attacking the inhabitants of the territory of war for any of the reasons that you have stated, they would be unable to go to war at all, for there is no city in the territory of war in which there is no one at all of these you have mentioned.

118. I asked: If the Muslims besieged a city, and its people (in their defense) from behind the walls shielded themselves with Muslim children, would it be permissible for the Muslim (warriors) to attack them with arrows and mangonels?

119. He replied: Yes, but the warrios should aim at the inhabitants of the territory of war and not the Muslim children. (Abu Yusuf, Kitab al-Radd, p. 65; Tabari, Kitab Ikhtilaf, p. 7.)

120 I asked: Would it be permissible for the Muslims to attack them with swords and lances if the children were not intentionally aimed at?

121. He replied: Yes.

122. I asked: If the Muslim (warriors) attack (a place) with mangonels and arrows, flood it with water, and burn it with fire, thereby killing or wounding Muslim children or men, or enemy women, old men, blind, crippled, or lunatic persons, would the (Muslim warriors) be liable for the diya (blood money) or the kaffara (expiation or atonement)?

123. He replied: They would be liable neither for the diya nor for the kaffara. (Abu Yusuf, Kitab al-Radd, p. 7; Tahawi, Mukhtasar, p. 284; Sarakshi, Mabsut, Vol. X, p. 65.)

Penalties in the Territory of War and the Shortening of Prayer

(This section has been moved from the chapter on the intercourse between the dar al-Islam and the dar al-harb (Chap. IV), as it appears in the Arabic MSS.)

124. I asked: If a (Muslim) army entered the territory of war led by a commander, do you think he would be (competent) to enforce the religious penalties (hudud) (Hudud (plural of hadd) are fixed penalties for certain crimes as specified in the Qur'an. Hudud cases can be heard only by higher authorities. See Law in the Middle East, ed. Khadduri and Liebesny (Washington, 1955), Vol. 1, pp. 227-29.) in his army camp?

125. He replied: No. (Abu Yusuf, Kitab al-Radd, p. 7; Shafi'i, Umm, Vol. VII, p. 332; Sarakshi, Mabsut, Vol. X, p. 75.)

126. I asked: If the governor of a city or a province, such as al-Sham or 'Iraq, entered the territory of war at the head of an army, would he be (competent) to impose religious penalties or retaliation in his army camp?

127. He replied: Yes. (Abu Ysuf, Kitab al-Radd, p. 80: Sarakshi, Mabsut, Vol. X, p. 75.)

128. I asked: Would he be (competent) to order the cutting off of the hand for theft and enforce the penalty for false accusation (qadhf)? (Qadhf is a false accusation of unchastity and illegitimacy such as zina (adultery).

129. He replied: Yes.

130. I asked: And (also) to enforce the penalties for zina (adultery or fornication) and (the drinking of) wine?

131. He replied. Yes. (Sarakshi, Mabsut, Vol. X, p. 75.)

132. I asked: If there was at the head of the army a commander-not the governor of al-Sham or 'Iraq-and (the army) was four or five thousand strong, would he be (competent) to enforce any of the (religious penalties) stated above?

133. He replied: No. (Ibid., p. 75.)

134. I asked: Would the same be true for the commanders of detachments, that they are (incompetent) to enforce penalties?

135. He replied: Yes (that is right).

136. I asked: If the governor of al-Sham or 'Iraq were at the head of a large army laying siege to a city for over a month, should he celebrate (the conquest) in the Friday prayer or perform them in their complete form?

137. He replied: He is (under obligation) neither to celebrate Friday prayer nor to perform them completely, because he is on travel status. (Ibid., p. 76. When on travel, one is authorized to pray only three times daily instead of five times, combining the second and the third, the fourth and the fifth. In this instance, it seems, the combination of prayers include the Friday congregations of prayer. See Sarakhsi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. III, pp. 251-52.)

138. I asked: If a group of Muslims desired to attack the territory of war but did not have the (sufficient) force or the finances to do so, do you not think that it would be lawful for them to help each other and the ones who would not go forth to battle to contribute (supplies) to those whos take the field?

139. He replied: It would be lawful to do so in such a situation; but if the Imam had the wherewithal and the Muslim had the forces, I would neither approve of if nor should I permit it. However, if the Imam lacked the means, it would be lawful (for some to contribute to others who take the field). (Sarakshi, Mabsut, Vol. X, p. 76.)

140. I asked: Which (act) is more commendable to you: guarding (i.e., to act as sentinel) or performing a supererogatory prayer?

141. He replied: If sentineling were sufficiently provided for, performance of the (supererogatory) prayer would be the more commendable to me; but if those who act as sentinels were not sufficient, then the performance of guarding would be the more commendable (Abu Yusuf, Kitab al-Radd, p. 89; Shafi'i, Umm, Vol. VII, p. 324; Sarakshi, Mabsut, Vol. X, p. 76.)

142. I asked: If a (Muslim) warrior is run through by a lance, would you disapprove if he advances-though the lance be piercing him-in order to kill his adversary with the sword?

143. He replied: No. (Sarakshi, Mabsut, Vol. X, p. 77.)

144. I asked: Do you not think that he helped against his own life by so doing (i.e., that he committed suicide, which is forbidden)?

145. He replied: No. (Ibid., p. 77.)

146. I asked: If a group were on board a ship that was set on fire, do you think that it would be more commendable if they resigned themselves to being burned to death or if they threw themselves into the sea?

147. He replied: Either one of the two (courses) would be permissible. (Tahawi, Mukhtasar, p. 293; Sarakshi, Mabsut, Vol. X, p. 77.)

Chapter III

(ON THE SPOIL OF WAR)

Division of the Spoil

(Literally: "Division of the one-fifth (share) and the (warrior's) shares and those who are not entitled to a share."

148. I asked: What do you think about the one-fifth (state share)? How should the Imam divide it and among whom should he distribute it?

149. He replied: He should divide it among those named by God in His Book (the Qur'an). (Q. VIII, 42.) It has been related to us that (the Caliphs) Abu Bakr and 'Umar (b. al-Khattab) used to divide the one-fifth (share) into three parts: (one) for the orphans, (another) for the poor, and (the third for) the wayfarer. (Abu Yusuf, Kitab al-Kharaj, pp. 20-21; Ibn Sallam, Kitab al-Amwal, pp. 303-8; Kasani, Bada'i' al-Sana'i, Vol. VII, pp. 125-26.)

150. I asked: In dividing the spoil, how much, do you think, should be given to the horse-rider and how much to the foot-warrior?

151. He replied: The horse-rider should be given two shares (one for the mount and one for himself) and the foot-warrior one. (Abu Yusuf, Kitab al-Kharaj, p. 19; Kitab al-Radd, p. 17; Kitab al-Athar, p. 171; Sarakshi, Mabsut, Vol. X, p. 41; Tahawi, Mukhtasar, p. 258.)

152. I asked: (Do you think), therefore, that (riders of) mules and foot-warriors are equal?

153. He replied: yes. (Abu Hanifa, contrary to the opinion of other jurists, held that the horse (or any other animal) should not be assigned more, than what a man would receive. See Abu Yusuf, Kitab al-Kharaj, p. 19. and Kitab al-Radd, p. 40. For opinions of other jurists, who allot as much as three shares to the horse-rider, see Tabari, Kitab Ikhtilaf, pp. 80-81; Shafi'i, Umm, Vol. IV, p. 74; Sarakshi, Mabsut, Vol. X, pp. 41- 42.)

154. I asked: (Do you think that) the jade-rider (Birdhawn: "A horse of mean breed or of coarse make-a jade." See Arabic- English Lexicon, ed. E.W. Lane (Edinburgh, 1863), Vol. I, p. 186.) and horse-rider are equal?

155. He replied: Yes, the jade-rider should be given two shares and the horse-rider two. (Abu Yusuf, Kitab al-Radd, p. 19; Tabari, Kitab Ikhtilaf, p. 82; Sarakshi, Kitab Sharah al-Siyar al-Kabir (Hyderabad), Vol. II, pp. 175-83.)

156. I asked: Why do you think that the horse-rider should be given two shares and the foot-warrior one?

157. He replied: Because it has been related to us that this was the practice of (the Caliph) 'Umar b. al-Khattab. This is also the opinion of Abu Hanifa. (Abu Yusuf, Kitab al-Kharaj, p. 19, and Kitab al-Athar, p. 171.)

However, Abu Yusuf and Muhammad (b. al-Hasan) held that the horse-rider should be given three shares, two for the mount and one for himself. The foot-warrior receives (only) one share. (Abu Yusuf, Kitab al-Kharaj, p. 18; Tabari, Kitab Ikhtilaf, p. 81; Tahawi, Mukhtasar, p. 285.)

158. I asked: If a man entered the territory of war as a mounted warrior with the army and if his horse died of exhaustion or was hamstrung, so that when the spoil was taken to a place of security (i.e., to the dar al-Islam) he was a foot-warrior- through it was recorded in the diwan (army list) that he had a horse-or if he had brought a horse before entering the territory of war and it died of exhaustion in the dar (al-Islam), should he be allotted the share of a horse-rider?

159. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 85; Sarakshi, Mabsut, Vol. X, pp. 42-44.)

160. I asked: What would be your opinion if his name was entered in the diwan as a foot-warrior and he entered the territory of war as such, but thereafter he bought a horse and took

part in the fighting as a horse-rider and he was as such when the spoil was taken to a place of security?

161. He replied: I should not allot him save the share of a foot-warrior. (Abu Yusuf, Kitab al-Radd, p. 22; Tabari, Kitab Ikhtilaf, p. 85; Sarakshi, Mabsut, Vol. X, p. 44; Tahawi, Mukhtasar, p. 285.)

162. I asked: If a group (of believers), consisting of horseiders and foot-warriors, undsertook an expedition by sea, carrying horses (on board the ship), and took possesison of spoil, how many shares do you think that the horse-rider and the foot-warrior should receive?

163. He replied: The horse-rider should be given two shares and the foot-warrior one.

164. I asked: Why, since the foot-warrior and the horserider on the (high) seas would be on an equal footing?

165. He replied: If they (the foot-warriors and the horseriders) were in a camp in the territory of war and the men went forth and took possession of spoils, would you not allot the horse-rider two shares and the foot-warrior one?

166. I said: Yes.

167. He said: This situation and the other are alike. (Abu Hanifa, on the basis of qiyas, considering the status of the horse-rider on board ship to be the same as on land, held that he should receive the same amount of compensation from the spoil. See Tabari, Kitab Ikhtilaf, pp. 86 ff.; Sarakshi, Mabsut, Vol. X, p. 44.)

168. I asked: If a man died or was killed in the territory of war after the spoil was taken (from the enemy), but before (the Muslims) carried it to a place of security in the territory of Islam, do you think that his share could be inherited?

169. He replied: No.

170. I asked: Why?

171. He replied: Because he died before the spoil was (owned and) taken to the territory of Islam. (Shaybani, al-Jami' al- Saghir, p. 92; Abu Yusuf, Kitab al-Radd, p. 23; Tabari, Kitab Ikhtilaf, p. 77.)

172. I asked: If he died after (the spoil) was taken to the territory of Islam, do you think that his share could be inherited?

173. He replied: Yes (because the spoil was then carried to a place of security and owned). (The guiding principle, as Abu Hanifa pointed out, is that placing in security occurs only after the spoil is taken to the territory of Islam. Since the warrior died after the spoil was owned, his shares would be inherited by his heirs. See Shaybani, al-Jami' al-Saghir, p. 92; Sarakshi, Mabsut, Vol.X, p.44.)

174. I asked: If an army attacked a territory of war and took spoil, but before taking the spoil to the territory of Islam it was joined by another army (of believers) but (neither) encountered the enemy on the way back until the spoil was carried to the territory of Islam, do you think that the (second) army is entitled to participate in the spoil?

175. He replied: Yes (because the spoil was not yet carried to a place of security before the second army arrived). (Abu Yusuf, Kitab al-Radd, p. 34; Tabari, Kitab Ikhtilaf, p. 70.)

176. I asked: If a slave took part in the war with his master against the enemy, do you think that he would be entitled to a share?

177. He replied: No, but he would be entitled to compensation, and so would a mukatab. (A mukatab is a slave who has made a contract with his master to purchase his freedom by installments. Sarakhsi, Mabsut, Vol. X, p. 45; Tahawi, Mukhtasar, pp. 285-86.)

178. I asked: If a Dhimmi took part in the fighting on the side of the Muslims at their request, do you think that he would be entitled to a share of the spoil?

179. He replied: No, but he would be entitled to compensation. (Abu Yusuf, Kitab al-Radd, pp. 39-40; Sarakshi, Mabsut, Vol. X, p. 45.)

180 I asked: If a woman took care of the sick and wounded and was useful to the men (in the war), do you think that she would be entitled to a share of the spoil?

181. He replied: No, but she would be entitled to compensation. (Abu Yusuf, Kitab al-Radd, p. 37; Sarakshi, Mabsut, Vol. X, p. 45; Tahawi, Mukhtasar, p. 286.)

182. I asked: Do you think that merchants in the (Muslim) army camp are entitled to a share of the spoil or to compensation?

183. He replied: I hold that they are entitled to neither a share nor compensation, unless they take part in the fighting. Those of them who do so are entitled to a share. (Abu Yusuf, Kitab al-Radd, p. 44; Sarakshi, Mabsut, Vol. X, p. 45.)

184. I asked: Would the slave who serves his master (when the latter is taking part in war) be entitled to compensation?

185. He replied: No (because the slave is not participating in the fighting). (Sarakshi, Mabsut, Vol. X, p. 45.)

186 I asked: If a warrior takes two horses (into the battle), how many shares do you think he would be entitled to?

187. He replied: I hold that he would be entitled to no more than the share of one horse-rider, for if he would be entitled to the shares of two horses he should likewise be entitled to the shares of three or more, and I disapprove of putting the animal on the same footing as a Muslim. This is the opinion of Abu Hanifa and Muhammad b. al-Hasan. (Abu Yusuf, Kitab al-Radd, p. 40; Tabari, Kitab Ikhtilaf, p. 83.)

However, Abu Yusuf held that a man (with two horses) would be entitled to the shares of two horse-riders, but no more (for any additional horse). (Abu Yusuf, Kitab al-Kharaj, p. 18; Tabari, Kitab Ikhtilaf, p. 83; Tahawi, Mukhtasar, p. 285.)

188. I asked: Do you think that a minor is entitled to a share of the spoil?

189. He replied: No. (Abu Yusuf, Kitab al-Radd, p. 42; Sarakshi, Mabsut, Vol. 8, p. 45.)

190. I asked: Do you think that the helpless insane person is entitled to a share?

191. He replied: No.

192. I asked: If a man, having taken part in the fighting, comes out of it wounded and remains sick until the Muslims are victorious and take possession of the spoil and carry it to the territory of Islam, do you think that he would be entitled to a share?

193. He replied: Yes. (Sarakshi, Mabsut, Vol. X, p. 46.)

194. I asked: If a detachment was sent forth by the Imam from a camp to fight, and both those who remained in the camp as well as the detachment took possession of spoil, do you think that each group would be entitled to share in the other's?

195. He replied: Yes, all the spoil would be gathered together, one-fifth would be taken out and the rest divided among those in the camp and the detachment. (Ibid., p. 46.)

196. I asked: If a man is taken prisoner and afterward the Muslims capture some spoil, but then he (escapes and) comes back, and he and the army return to the territory of Islam with the spoil without further fighting, do you think that he would be entitled to participate in the division of the spoil?

197. He replied: Yes, he would be entitled to his share. (Ibid.)

198. I asked: Do you hold the same opinion concerning an unbeliever who became a Muslim and joined the Muslims' camp?

199. He replied: I hold that he would not be entitled unless he participated with the Muslims in a subsequent battle. (Abu Yusuf, Kitab al-Radd, p. 43.)

200. I asked: In what respect is this latter situation different from the former?

201. He replied: In the former situation the man was a Muslim and was fighting (alongside the Muslims) against the enemy until he was taken prisoner. If he were a slave who had committed an unintentional tort or had destroyed property which made him liable to debt and then were taken prisoner by the unbelievers who subsequently were converted to Islam, the slave would be lawfully owned by them and the tort would be waived, but the debt would have to be paid by them. If they were not converted to Islam and the slave was either purchased by one of them or taken back by the Muslims as part of the spoil, the tort would be waived but the debt would have to be paid by the purchaser. If the (original) master should purchase the slave at the (real) value or market price, he would be liable to both the tort and the debt. Likewise, if someone obtained the slave as a gift from the inhabitants of the territory of war or if he had purchased him from them, the tort would be waived but he would be liable for the debt. BUt if the crime were intentional killing, it would not be waived in any case. (Sarakshi, Mabsut, Vol. X, pp. 46-47.)

202. I asked: If a Muslim merchant were in the territory of war and he and another man who had become a Muslim joined the camp of the Muslims, do you think that those two would each be entitled to a share of a spoil previously taken?

203. He replied: no.

204. I asked: If the Muslims were engaged in battle and these two men fought along with them, would they be entitled to a share in the spoil of that battle as well as in the spoil previously taken?

205. He replied: Yes (Abu Yusuf, Kitab al-Radd, p. 44.) 206. I asked: Would the treatment of traders in the army camp be the same as that of the two men in the cases I have mentioned?

207. He replied: Yes.

208. I asked: Would (the ruling) be the same concerning a believer, who, having apostatized and gone to the territory of war, repented later and returned to Islam and joined the camp of the Muslim army?

209. He replied: Yes.(Sarakshi, Mabsut, Vol. X, p. 47.)

Distribution of "Additional Shares"

(Literally: "Nafal and part of the spoil imported while still collectively owned (by Muslims)." Nafal is the additional or supererogatory portion of the spoil given to a warrior. For meaning of the term, see Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. II, pp. 593-94; Khadduri, War and Peace in the Law of Islam, pp. 123- 24.)

210. I asked: If a believer killed an unbeliever and took his salab (prime), (Salab (prime) consists of the clothing and weapons carried by the warrior in battle. See Mawardi, Kitab al-Ahkam, p. 241; Mutarrazi, al-Mughrib. Vol. I, p. 258.) do you think that the Imam should give (the killer) that property?

211. He replied: The Imam has no right to give primes to anybody after the property has been captured.

212. I asked: Why?

213. He replied: Because (the property) has become part of the spoil. which belongs to the Muslim (warriors), and the Imam should not give extra primes from the spoil.(Abu Yusuf, Kitab al-Radd, p. 45; Tabari, Kitab Ikhtilaf, pp. 116-17; Sarakshi, Mabsut, vol. X, p. 47; Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. II, p. 596.)

214. I asked: Why?

215. He replied: Because the property has become fay' for the Muslims, and the nafal (extra shares) may be promised only before the spoil was taken. (Additional shares were promised before the spoil was taken for encouraging men to take the field and for raising the morale of the army. See Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. II, p. 594, and Mabsut, Vol. X, p. 47.)

216. I asked: How is the nafal promised?

217. He replied: Extra shares are promised if the Imam says that "whoever kills (an unbeliever in a single combat) will be entitled to his salab (prime), and he who captures anything may take it for himself." (Bukhari, Sahih, Vol. II, pp. 286, 287; Tabari, Kitab Ikhtilaf, p. 117, 127-28; Shafi'i, Umm, Vol, VII, p. 313; Ibn Sallam, Kitab al-Amwal, p.309.) Such (promises) were commendable as an encouragement (for warriors) to fight. This narrative has been transmitted by Muhammad (b. al-Hasan) from Abu Hanifa from Hammad (b. Abi Sulayman) from Ibrahim (al-Nakhai), (Abu Yusuf, Kitab al-Radd, pp. 46-47.)

218. I asked: If a warrior has taken fodder from the spoil and part of it remains (unconsumed) after he has returned to the territory of Islam, what do you think he should do with it?

219. He replied: If the spoil has not yet been divided (the fodder) should be returned; if it has been divided (the fodder) should be sold and (the price) given to the poor. (Abu Yusuf, Kitab al-Radd, p. 47; Tabari, Kitab Ikhtilaf, p. 93; Sarakshi, Mabsut, Vol. X, p. 50.)

220. I asked: If he had lent it to another warrior who was in the territory of war?

221. He replied: He should not take any of it back for himself. (Tabari, Kitab Ikhtilaf, pp. 93-94; Sarakshi, Mabsut, Vol. X, p.50.)

Manumission of Women and Children Prisoners of War

(Women and children, taken as prisoners of war, are called sabi and are divided among the warriors who take part in the fighting. See Mawardi, Kitab al-Ahkam, pp. 232-37.)

222. I asked: If a warrior set free a slave boy or a slave girl from the spoil, do you think that this manumission would be lawful?

223. He replied: No.

224. I asked: Why, since he is entitled to a share of this (spoil)?

225. He replied: Because he does not know what his share is going to be. (Contrary to other jurists who permit manumission by the warrior on the ground that the sabi had become Muslim property, Abu Hanifa does not permit the individual warrior to act on behalf of the group. Tabari, Kitab Ikhtilaf, pp. 163-65; and Sarakshi, Mabsut, Vol. X, p. 50.)

226. I asked: If a warrior had sexual intercourse with a slave girl (before the spoil was divided) and she became pregnant and he claimed (parentage of) her child?

227. He replied: Punishment (for zina, or fornication) would be waived, but (the warrior) would have to pay the 'uqr (The 'uqr (nuptial gift) is the compensation for intercourse with the slave girl.) and the slave girl and her child remain as part of the spoil until it is divide among the warriors. the parentage of the child would not be established. (Abu Yusuf, Kitab al-Radd,

p. 49: Sarakshi, Mabsut, Vol. X, p. 50. The parentage remains unconfirmed because the warrior had intercourse with a woman before clearance of pregnancy was certain. Abu Yusuf, Kitab al- Radd, pp. 50-51.)

228. I asked: If the warrior steals (something) from the spoil, do you think that his hand should be cut off?

229. He replied: No.

230. I asked: Why?

231. He replied: Because he is entitled to a share (of the stolen spoil). (Abu Yusuf, Kitab al-Radd, p. 121; Sarakshi, Mabsut, Vol. X, p. 50.)

232. I asked: Would you hold the same opinion in a case where the warrior stole from the spoil a slave who had served him when he was in the army?

233. He replied: Yes. In this case also (the warrior's hand) would not be cut off. (Abu Yusuf, Kitab al-Radd, p. 121; Sarakshi, Mabsut, Vol. X, pp. 50-51.)

234. I asked: Would you hold the same opinion if the warrior's father or mother or son or wife or brother or any of the near of kin-who is lawful to him (to marry)- (stole from the spoil)?

235. He replied: Yes. Nobody will have (his hand) cut off.

236. I asked: If a captive male or female slave, after the spoil was divided, fell in the collective lot of 10 or 100 warriors (A'raf (plural of 'arif, or decurion) a group commanded by a decurion.) (and individual distribution has not yet taken place) and one (of the warriors) (Raya (banner). Each battalion of a hundred men has its banner.) set him free, do you think that this manumission would be lawful?

237. He replied: Yes, if (the party of Muslims who set them free) were 100 men or less, and I do not set a time limit on this matter. (This opinion seems to have been based on the assumption that the group can act separately from the community, having possessed the spoil after division. See Sarakshi, Mabsut, Vol. X, p.51.)

238. I asked: Would this (emancipated slave) be like a slave owned by partners, some of whom had set him free?

239. He replied: Yes. (Ibid., p. 51.)

240. I asked: Would the situation be different from the first case, where the slave was set free before the division of the spoil and where (you held) that the emancipation would not be permissible?

241. He replied: The two situations are analogically the same, but in the first I would prefer to abandon the analogy and follow istihsan (juristic preference) (A discretionary opinion in breach of analogical deduction. See Khadduri, Islamic Jurisprudence, Chap. XIV.) and hold that the emancipation before the division of the spoil is not permissible.

242. I asked: If the army captured a (married) woman a day or so before her husband, do you think that marital status between the two would remain valid?

243. He replied: Yes. (Abu Yusuf, Kitab al-Radd, p. 53.)

244. I asked: If the span between their respective captures was either equivalent to three menstrual periods or if (the wife) had actually experienced three menstruations and had adopted Islam, but before the army had left the territory of war her husband was (also) captured and became a Muslim, do you think that their marital status would remain valid?

245. He replied: Yes.

246. I asked: Why?

247. He replied: Since they had not yet been taken to the territory of Islam their (marital) status would be regarded as if they had been captured together. (Tahawi, Mukhtasar, p. 286.)

248. I asked: If the husband were captured before the wife and she after him, do you think that their (marital) status would remain unchanged as you have described it?

249. He replied: Yes.

250. I asked: If one of the two-husband or wife-were captured and taken to the territory of Islam and the other were captured later?

251. He replied: Their marital stauts would no longer be valid. (Abu Yusuf, Kitab al-Radd, p. 55.)

252. I asked: Why?

253. He replied: If one of the two (spouses) were taken to the territory of Islam before the other, the wedlock would be broken. (The marriage contract between husband and wife is terminated because of the separation of husband and wife, one being in the territory of Islam and the other in the territory of war, not because of capture. Differences in residence beteen the two constitute cancellation of the marriage contract even if the period of separation is short. See Sarakshi, Mabsut, Vol. V, pp. 50-51.)

254. I asked: Why is that so?

255. He replied: If the wife had been allotted to the share of one (of the Muslims) and she became a Muslim, do you not think that he would have the right to have intercourse with her or to marry her if he so desired?

256. I said: Yes indeed.

257. He said: Do you not think that her wedlock was dissolved? If her husband, who was in the territory of war, had still preserved the marital bond with her and her wedlock with him were not terminated, the (Muslim) would have no right to have sexual intercourse with her or to marry her, but she would be lawful to the latter if her wedlock with her (former) husband had been broken. It has been related to us that (God's saying, "Do not marry . . . married women, except those whom your right hand possesses (i.e., slave women)," (Q. IV, 28.) Was revealed in connection with a woman who had a husband, was taken as a captive, and whose (new) master had intercourse with her, after waiting one menstrual period (to be sure that she was not pregnant). And it has been related to us from the Prophet that he prohibited (men) from intercourse with pregnant women taken as fay' until they have been delivered and he prohibited (men) from having intercourse even with women who are not pregnant until their clearance from pregnancy is established by one menstrual period. (Abu Yusuf, Kitab al-Radd, pp. 54-55, and Kitab al-Athar, p. 240.)

258. I asked: If a man found in the spoil goods (of daily usage) or clothing or an animal or weapons which the unbelievers had previously captured (from him), do you think (that he would have the right of postliminium)?

259. He replied: If the owner finds them before the spoil is divided, he may take them without paying anything; if the spoil has been divided, he has the right to take them by paying their price. (Abu Yusuf, Kitab al-Athar, p. 195; Sarakshi, Mabsut, Vol. X, p. 54.)

260. I asked: If he (merely) laid claim to something, would his claim be accepted?

261. He replied: No, unless he produces evidence.

262. I asked: If (the thing) which had been captured from him consisted of (gold) dinars and (silver) dirhams and (copper) coins, and evidence in his favor had been established?

263. He replied: If he finds them before division (of the spoil), he may take them; if he finds them afterwards, he has no right to them. (Sarakshi, Mabsut, Vol. X, p. 54; Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, pp. 374-77.)

264. I asked: Why?

265. He replied: Because these are gold (dinars), silver (dirhams), and (copper) coins and he could take them only by paying their like. Thus, that which he would take would be the same as that which he would give.

266. I asked: If a slave ran away to (enemy) territory and the Muslims captured him and having taken him to a place of security, (the original owner) found him in the spoil of war either before or after it had been divided?

267. He replied: Whether found by his master before or after division (of the spoil), a runaway slave could be recovered by his master without payment of the slave's value or anything else.

268. I asked: Why?

269. He replied: Because the unbelievers had not validly placed the slave in a place of security (i.e., they had not legally possessed him), for (the status of) a slave who escapes to them is different from that of one whom they have captured and taken to a place of security. (Abu Yusuf, Kitab al-Radd, p. 56; Sarakshi, Mabsut, Vol. X, p. 55; Tahawi, Mukhtasar, p. 286.)

270. I asked: If (the owner) found his runaway slave in the possession of a man who had taken him as part of his share of the spoil, should (the latter) be compensated if the slave were taken from him?

271. He replied: Yes, he should be compensated by the Imam, who pays the slave's value from the public treasury. (Shaybani, al-Jami' al-Kabir, p. 229; Sarakshi, Mabsut, Vol. X, p. 56.)

272. I asked: If the owner did not find his runaway slave in the possession of a man who had taken him from the spoil (as his share), but in the possession of a man who had bought him from a purchase from the inhabitants of the territory of war?

273. He replied: If he were a runaway slave, (the original owner) could take him from the purchaser without paying anything wherever he may find him, because (the slave) was not taken to (a valid) place of security by the inhabitants of the territory of war. A runaway slave is not (regarded as) legally capable of being taken to a place of security (by anybody), and he is different (in status) from a slave taken by capture. If the slave were captured by the unbelievers as a prisoner (of war) and (the original owner) found him in the possession of a man who had purchased him from the inhabitants of the territory of war, he would have prior right to take him back by paying the price, if he wished. This is the opinion of Abu Hanifa.

However, Abu Yusuf and Muhammad (b. al-Hasan) held that if a slave were to run away and thereafter were taken as a prisoner (by the enemy) in their territory, (the original owner) could recover him by paying the price in either case (whether recaptured by the Muslims or taken from one who had purchased him in the territory of war). (Sarakshi, Mabsut, Vol. X, pp. 56-57; Tahawi, Mukhtasar, p. 286.)

274. I asked: If the inhabitants of the territory of war had taken the (runaway) slave as a prisoner and had given him as a gift to a man in whose hands the (original) owner found him?

275. He replied: (The original owner) could take him back from the man to whom he was given as a gift by paying the price. (Shaybani, al-Jami' al-Saghir, p.89; Sarakshi, Mabsut, Vol. X, p. 57; Tahawi, Mukhtasar, pp. 286-87.)

276. I asked: If the man with whom the (original) owner found his slave had purchased the slave from the inhabitants of the territory of war by means of goods or by measurable or weighting commodities, and the owner found (the slave) in his possession, how much would he have to pay for him?

277. He replied: (The owner) may take (the slave) back by paying the price of the goods given in exchange.

278. I asked: If (the slave) was purchased with goods measured or weighed out?

279. He replied: He may take (the slave) back by an equivalent measure or weight (of the goods).

280. I asked: If this possessor has sold the slave to someone else, could (his original owner) take him back?

281. He replied: The (original) owner has the choice of recovering the slave (by paying the price) or of leaving him.

282. I asked: Should the owner take an oath that he had purchased (the slave) for the specified (price)?

283. He replied: Yes.

284. I asked: If the original owner adduced evidence that (the man) who purchased the slave had paid less (than what he claimed)?

285. He replied: The evidence of the original owner should be accepted.

286. I asked: If a slave was captured by the unbelievers, who sold him to a Muslim for 1,000 dirhams, but the slave was again captured by them and they sold him to another (Muslim) for 500 dirhams, and then the two owners found him jointly (in postliminium), which owner do you think would be more entitled to take back the slave?

287. He replied: The (first) purchaser who had paid 1,000 dirhams for the slave has the greater claim (than the original owner) to recover the slave (in postliminium) by paying 500 dirhams (to the second purchaser). If he takes him the original owner should be told that if he wishes he can take him back by paying 1,500 dirhams or leave him. (Shaybani, *al-Jami' al-Saghir*, p. 89, and *al-Jami' al-Kabir*, p. 361.)

288. I asked: Why is this so, while the second has greater claim than the first?

289. He replied: Since the latter had paid 1,000 dirhams, he has the greater claim; for if we had rendered the decision in favour of the original owner for only 500 dirhams, the other who had paid 1,000 dirhams would have lost his money.

290. I asked: If the original owner found the slave in the possession of the one who had paid 1,000 dirhams, do you think that he could claim (the slave)?

291. He replied: No.

292. I asked: Why?

293. He replied: Do you not think that if the two purchasers came together, the one who paid 1,000 dirhams has greater claim if he paid 500 (to the second purchaser) to recover the slave; the original owner can recover (the slave) if he paid 1,500 dirhams, if he so wishes.

Abu Yusuf and Muhammad (b. al-Hasan) added that if the slave unintentionally committed a tort or destroyed property or was indebted and was captured by the enemy who accepted Islam, the tort would be waived but the debt would have to be paid (by the owner of the slave). (Sarakshi, *Mabsut*, Vol. X, p. 58.) 294. I asked: If the enemy (did not) (Not in Murad Mulla MS, but in 'Atif and Fayd-Allah MSS.) accept Islam, but the slave was either purchased by a Muslim or was found by the Muslims among the spoil?

295. He replied: The tort would be waived but the debt would have to be paid (by the owner).

296. (I asked:) (Not in Arabic MSS.) If the original owner had recovered (the slave) by paying his value or his (market) price?

297. He replied: He would be liable for both the tort and the damages.

298. I asked: If the delict were intentional Killing?

299. He replied: The delict would not be waived in any of these situations.

300. I asked: If the enemy captured a believer's slave or some (other) property belonging to him but these were (later) taken as spoil by the Muslims and allotted to one of them as his share; and if the Muslim who received the slave emancipated him (if male) immediately or on terms (to take effect on the owner's death). (Tadbir is an arrangement by which the slave becomes free at the owner's death.) or, if the slave were female, caused her to become pregnant; or suppose that the postliminium consisted of property destroyed (by someone who received it as a share of the spoil), do you think that the (original) owner would have the right to claim anything?

301. He replied: No, but if he saw it in person he (the original owner) would have the right to claim the property before it is consumed by paying its price, if he wishes.

302. I asked: If he found that the (new) owner of the slave woman had given her in marriage to another man, do you think that the original owner could take her back by paying the price of her?

303. He replied: Yes. (Sarankshi, Mabsut, Vol. X, pp. 58- 59.)

304. I asked: Would she be separated from her husband?

305. He replied: No; she (and her husband) remain married, and (the original owner) would have no right to claim even the 'uqr (nuptial gift).

306. I asked: If the slave woman had given birth to a child to her husband, do you think that he (the original owner) has the right to take her back together with her child?

307. He replied: Yes.

308. I asked: Why?

309. He replied: Because (the child came) from her provenance and it (the child) is existint in person.

310. I asked: If the (new) master had emancipated the child or had sold it and spent it price, or had kept it as a slave but expended his earnings?

311. He replied: The (original) owner has the right to take back the slave girl by paying the price (that had been paid by the new owner), if he so desires, or to renounce her, if he so wishes.

312. I asked. If the slave woman's master had married her off and taken her 'uqr or her hand had been cut off and her owner took possession of the arsh (The arsh is a penalty for certain wounds.) paid for her hand, would (the original owner) have the right to recover anything from the 'uqr or the arsh (collected by the new master)?

313. He replied: No.

314. I asked: Why?

315. He replied: Because if (the original owner) had the right to recover the 'uqr or the arsh, he would have (the right) to take her back with a defect-the equivalent of which would be deducted from the price- but this is unlawful, and nothing should be deducted.

316. I asked: If the (second) owner had purchased (the slave woman) from the enemy for 1,000 dirhams, and she subsequently became blind or acquired some other defect which decreased her value by half, would the original owner haver either to pay the full price (in order to be able) to take her back or leave her?

317. He replied: Yes he has no other alternative. (Sarakshi, Mabsut, Vol. X, pp. 59-60.)

318. I asked: If the (second) owner emancipated her, do you think that she would be (lawfully) emancipated?

319. He replied: Yes.

320. I asked: Why would you allow her emancipation while she belongs to another (owner)?

321. He replied: The slave woman belongs to the (second) owner and to no one else, but the original owner has only the prior right to take her, if he pays her price.

322. I asked: Would it be lawful for the (second) owner to have sexual intercourse with the slave woman, if he knows her situation?

323. He replied: Yes.

324. I asked: If a slave girl, whose owner was a minor orphan, was captured by the enemy and purchased by another man, do you think that the executor of the (minor) orphan has the right to take her back by paying the price?

325. He replied: Yes.

326. I asked: Has the executor the right to take her for himself?

327. He replied: No, not for himself, but for the (minor) orphan.

328. I asked: Would you hold the same (opinion) if a father purchased a slave girl for his minor son?

329. He replied: Yes.

330. I asked: If a slave girl who had been pledged as security for 1,000 dirhams-equivalent to her price-were captured by the enemy and purchased by another man for 1,000 dirhams, do you think that the original owner would have the prior right to (recover) her by refunding the price?

331. He replied: Yes.

332. I asked: If the (first) owner takes possession of her, would she remain in her former status as a pledge (for the debt of the 1,000 dirhams)?

333. He replied: No. Do you not think that the (first) owner has redeemed her by paying 1,000 dirhams? Her situation is the same as if she had committed an offense and the person who held her as security refused to pay the indemnity due for the offense, and the indemnity was paid by the original owner who had given her as security (for his debt). However, the person who held her as security could if he paid to the original owner the price by which the latter has redeemed her-if this (price) were less than the debt-and recover the slave woman; in such a case she remains as a pledge to the holder, but he has the choice to take or leave her as he wishes.

334. I asked: If a man holds a male or female slave as a deposit or on hire or on loan, but (he or she) is captured by the enemy and taken to a place of security, and then purchased by another man, do you think that the person who held (the slave) on loan or as a deposit or on hire has the right to redeem (the slave)?

335. He replied: He has no such right.

Slave Girl Captured by a Single Warrior Starting from the Muslim Camp and Making an Incursion in the Territory of War.

(This section, dealing with the distribution of booty, has been transposed from Chap. IV.)

336. I asked: If the Imam promised a prime to his companions (in arms) by saying: "He who captures anything from the enemy would be for him," and made (the entire capture) a prime for them; and if one of the Muslims captured a slave girl, do you think that (the warrior) would be entitled to have sexual intercourse with her in the territory of war, provided he waited for her clearance by one menstrual period?

337. He replied: (No) he would not have the right to do so. (Sarakshi, Mabsut, Vol. X, p. 72.)

338. I asked: If the slave girl were a scripturary?
339. He replied: Even if she were a scripturary.
340. I asked: Would this be true until he had taken her to a place of security and carried her to the dar al-Islam?
341. He replied: Yes.
342. I asked: Would he (even) have no (right) to sell her until he takes her to the territory of Islam?
343. He replied: Yes.
344. I asked: If a group (of warriors) went out from a fortified post or camp and captured spoil and captives from the enemy, do you think that the one-fifth share should be taken out of the spoil and the rest divided among the group and the army (of which it formed a part)?
345. He replied: Yes.
346. I asked: Would the ruling be the same if the party considered of only one warrior?
347. He replied: Yes. (Abu Yusuf, Kitab al-Radd, p. 76; Sarakhsi, Mabsut, Vol. X, p. 73.)
348. I asked: If (the party) had gone out of the camp without the permission of the Imam?
349. He replied: Even so, the (spoil) acquired would be subject to the (extraction of the) one-fifth (share). (Tahawi, Mukhtasar, p. 292.)
350. I asked: Why is that so?
351. He replied: Since the fortified post and (the army in) the camp provide a support for them, the people of the fortified post would participate in whatever they captured.
352. I asked: If (the warriors) went out from a big city like al-Massisa (Modern Missis, near Adana, in Turkey.) or Malatiya (In Turkey now.) and the Imam sent (them) forth as a detachment and if they captured spoil (from the enemy), do you think that the inhabitants of the city (from which they went out) should participate in the spoil?
353. He said: No.
354. I asked: Why?
355. He replied: These cities are like any other large cities of al-Sham (Syria). (Sarakshi, Mabsut, Vol. X, p. 73; cf. Tabari, Kitab Ikhilaf, pp. 71-73.)
356. I asked: If one or two men went out to the territory of war from a town or a city and captured spoil, do you think that the one-fifth (state) share should be taken out of their spoil?
357. He replied: The one-fifth share would not be taken out of their spoil because the statuses of these two men would be equivalent to that of adventurers who had taken possession of what (they had plundered). The spoil belongs to them. (Sarakshi, Mabsut, Vol. X, p. 74; Tahawi, Mukhtasar, p. 292.)
358. I asked: If the Imam dispatched a man in advance of the army as scout and he captured spoil, do you think that the one-fifth (share) should be taken out of the spoil and the residue divided among the rest of the army?
359. He replied: Yes. (Tahawi, Mukhtasar, p. 292.)
360. I asked: How is the latter (situation) different from the status of the two adventurers?
361. He replied: The latter was sent forth from the army by the Imam and the army provided him with the support, whereas the two men (in the former case) did not go forth from the army, but went voluntarily out on their own initiative from a city without the Imam's permission.
362. I asked: If the two adventures captured a slave girl and one of them purchased the share of the other, do you think that he would have the right to have intercourse with her if he still were in the territory of war?
368. He replied: No. (Abu Yusuf, Kitab al-Radd, p. 79; Sarakshi, Mabsut, Vol. X, p. 74.)

364. I asked: Why? As long as she is not subject to the one- fifth (share) and he became owner of her?

365. He replied: Because he had not yet taken her to a place of security and he had not carried her to the territory of Islam.

366. I asked: If a Muslim entered the territory of war under an Imam and purchased a Christian slave woman and waited one menstrual period to be sure she was clear of pregnancy, do you think that he would have the right to have intercourse with her?

367. He replied: Yes, if he so desired. (Sarakshi, Mabsut, Vol. X, p. 74.)

368. I asked: In what respect is the latter (situation) different from the former?

369. He replied: The two are not alike. The latter enjoys an aman (in the dar al-harb) and can buy and sell, whereas the other did not enjoy the aman. Do you not think that if a Muslim army entered the territory of war and encountered wthose two men who were in possession of the slave girl which they have captured, the army wiould be entitled to participate in the distribution as booty both of this slave girl and the other spoil which they too may have captured; whereas, if the army encountered the Muslim (merchant) who purchased the slave girl, they would not be entitled to participate in what he had purchased and would have nothing to do against what was in his possession. However, I disapprove for a Muslim to have sexual intercoruse with (either) his wife or his slave woman in the terrotory of war for fear that he might have offsprings (born there).

370. I asked: If a man, who is entitled to a regular share of the spoil, has a very old father in need of support or a son, do you think that his parents or his son would be entitled to receive a portion of the one-fifth (share)?

371. He replied: Yes.

372. I asked: Would the one-fifth (share) be distributed on the same basis as the rest of the spoil?

373. He replied: No, the one-fifth (share) should be distributed among the beneficiaries of the sadaqa, not among nthose who receive the spoil. (Beneficiaries of Sadaqa (i.e. tax collected from Muslims only) are those prescribed in the Qur'an IX, 60-61; the beneficiaries of the ghanima (captured from the enemy in war) are those stated in the Qur'an VIII, 41. See also *ibid.*, pp. 74-75.)

Chapter IV

(ON THE INTERCOURSE BETWEEN THE TERRITORY OF ISLAM (DAR AL-ISLAM) AND THE TERRITORY OF WAR (DAR AL-HARB))

(The two terms "dar al-Islam" and "dar al-harb," which Muslim jurists apply to the territories under Islamic rule and to territories outside Islamic rule, are not used by Shaybani consistently;

he either uses the terms "ahl al-harb" (people of(the territoryof) war) and "dar al-harab" (territory of war) interchangeably, or uses "ahl al-Islam" or merely "al-dar" in place of dar al-Islam (territory of Islam) or even enemy territory. See Translator's Introduction, pp. 11-14, above, and Khadduri, *War and Peace in the Law of Islam*, pp. 52-53, 155-57, 170-71.)

Trade between the Territory of Islam and the Territory of War

(Literally: "purchase and sale in the territories of Islam and of war.")

374. I asked: If a slave girl were captured by the enemy after her master had given her in marriage and thereafter she were purchased by a Muslim who took her back to the territory of Islam without her changing her religion, do you think that she and her husband would be regarded as (still) married?

375. He replied: Yes. (Sarakshi, Mabsut, Vol. X, pp. 60-61.)

376. I asked: And the capture (by the enemy) would not have a stronger effect in invalidating (her marriage contract) than her sale by her master would?

377. (He replied): (No), for if her master sold her to another man, her marriage (contract) would remain valid.

378. I asked: If a Muslim merchant were in the territory of war and the unbelievers captured from the Muslim spoil that included the slave and the other objects, do you think that it would be lawful for the (Muslim) merchant to buy from among those slaves a slave girl with whom to have sexual intercourse, an animal to ride, or food to eat, knowing (that these had been captured from the Muslims)?

379. He replied: Yes, but I disapprove of his having intercourse with her before taking her (to the territory of Islam). (Abu Yusuf, Kitab al-Radd, p. 126; Tabari, Kitab Ikhtilaf, p. 194. Awza'i and Shafi'i held that the owner may have sexual intercourse with the slave girl if it is clear that she is not pregnant. See Shafi'i, Umm, Vol. VII, p. 333; Tabari, Kitab Ikhtilaf, pp. 192, 193-94.)

380. I asked: Why, since what the believers had done was unlawful?

381. He replied: Because (the unbelievers) took (the slaves) to a place of security and thus became their (lawful) owners. Do you not think that if they (the unbelievers) had become Muslims while in possession (of the slaves) or had made a treaty of peace and had become Dhimmis, they would be acknowledged as the lawful owners of them?

382. I asked: If (the unbelievers) captured a freedman, an umm walad, (An "umm walad" is a slave woman who has given birth to a child to her owner. Right of legal possession of the female slave entitles the owner to have sexual intercourse with her.) mudabbar, (A mudabbar is a male slave who has been declared to become free at the time of the death of the owner.) or mukatab, (A mukatab is a male slave who has concluded a contract of manumission on the assumption that he pays the price of his freedom by installments.) and they took him to a place of security and thereafter they either became Muslims while possessing him or made a treaty of peace (by virtue of which) they became Dhimmis, (what would be his legal status)?

383. He replied: Each would maintain the status quo ante: the freedman would be a freedman, the mudabbar would retain his mudabbarship, the umm walad would remain as umm walad, and the mukatab, as a mukatab. (Tabari, Kitab Ikhtilaf, pp. 190-91; Sarakshi, Mabsut, Vol. X, p. 61. Malik agrees with the Hanafi doctrine, but Shafi'i disagrees. See Tabari, Kitab Ikhtilaf, pp. 189-90.)

384. I asked: Would the same be true if (the owners) became Muslims or if (the slave) were sold?

385. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 190; Sarakshi, Mabsut, Vol. X, p. 61.)

386. I asked: Would each be returned to his own people without any compensation?

387. He replied: Yes. (Ibid.)

388. I asked: If a man (i.e., a Muslim merchant) purchased from the inhabitants of the territory of war either a mukatab who had been captured by them or a freedman who had asked the merchant to buy him, and thereafter that merchant entered the territory of Islam with that person, do you think that the man who had asked that merchant to buy him would become a

freedman as before, and that the mukatab, would remain a mukatab, so that the merchant thereby would lose the money (he had paid)?

389. He replied: No. The money paid by the merchant would have to be made good to him both by the mukatab and the freedman since they asked him to buy them; otherwise each would maintain his former status. (Tabari, Kitab Ikhtilaf, p. 191; Sarakshi, Mabsut, Vol. X. pp. 61-62.)

390. I asked: If (the merchant) had purchased them without their consent?

391. He replied: He would have no claim against them.

392. I asked: If a slave belonging to the Muslims was captured by the inhabitants of the territory of war and their ruler sold him to a man of that territory, (do you think that) his manumission would be lawful if (the purchaser) emancipated him?

393. He replied: Yes.

394. I asked: Why?

395. He replied: Do you not think that if (the ruler) had sold the slave to a Muslim-who in turn set the slave free-his manumission would be lawful, and that if they (the inhabitants of the territory of war) became Muslims while in possession (of the slave), the slave would be legally theirs? (Sarakshi, Mabsut, Vol. X, pp.61-62.)

396. I asked: If the slave was purchased by (another) man from the territory of war who became a Muslim and went over to us with this (slave) and with his family and possessions, would the slave remain his property?

397. He replied: Yes.

398. I asked: Would his (former) owner be entitled to recover him by paying the (slave's) price?

399. He replied: No.

400. I asked: Why?

401. He replied: (Because) the (slave's) status would be the same as if he had been in the possession of (unbelievers) who became Muslims and who would be entitled to retain whatever they had in their possession at the time of their conversion (and the annexation of their territory by Islam). (Abu Yusuf, Kitab al- Radd, p. 126: Shafi'i, Umm, Vol. VII, p. 334.)

402. I asked: If the slave's owner entered the territory of Islam under an aman (safe-conduct) and did not become a Muslim but wanted to sell the slave, would the former owner have prior claim to purchase the slave by paying his price?

403. He replied: No.

404. I asked: Why?

405. He replied: Do you not think that if the inhabitants of the territory of war entered into a peace agreement (with the Muslims) and became Dhimmi, they would be entitled to keep what they possessed at the time they did so?

406. (I asked: Would the ruling be the same concerning Dhimmi and musta'min?) (Not in Arabic MSS, but supplemented.)

407. He replied: Yes, they and those who were given an aman (safe-conduct) would be treated alike, but (I hold that) they (the Dhimmi) should be compelled to sell whatever Muslim male or female slaves they might have in their possession. (Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, pp. 236-37, 239, and Mabsut, Vol. X, p. 62.)

Prisoners of War Entitled to Funeral Prayer

408. I asked: If the (Muslim) warriors divided the spoil of war among themselves after they had brought it to the territory of Islam and one of them came into the possession (as part of his share) of a male or female child who did not attain the age of understanding Islam (I.e., Professing Islam.) up to the time of its death, would the child be entitled to the funeral prayer (as a Muslim) if it died?

409. He replied: If the child enters (the territory of Islam) with one of both of its unbelieving parents, it would retain its religion, and it would not be entitled to (the Islamic funeral) prayer. If one or both of its parents became a Muslim (after entering the territory of Islam), the child would be entitled to (the funeral) prayer. If the (non-Muslim) father and the son enter the territory of Islam together, but from two different directions, the child would not be entitled to (the Islamic funeral) prayer if it dies. If the father enters the territory (the funeral) prayer (if it died), because it (would be regarded as having)entered with an unbelieving father. But if the child is brought before the father, it would be entitled to (the funeral) prayer. Thus, I should consider the manner in which (the child) enters (the territory of Islam) and nothing else. If the parents remained in the territory of war and the child died in the territory of Islam before attaining the age of understanding Islam, it would be entitled to (the funeral) prayer. (Abu Yusuf, Kitab al-Radd, pp.121-22; Shafi'i, Umm, Vol. VII, p. 332; Sarakshi, Mabsut, Vol. X, p. 62; Kasani, Bada'i' al- Sana'i, Vol. VII, p. 104.)

410. I asked: If the parents were taken captives and came into the possession of a Muslim as part of his share and the child died while the father was (still) an unbeliever, would the child be entitled to the (Islamic funeral) prayer?

411. He replied: (No), it would not be entitled to the prayer.

412. I asked: If the father died as an unbeliever before his son, would the boy be entitled to (the funeral) prayer?

413. He replied: No.

414. I asked: Why?

415. He replied: Because (the boy) follows his father's religion, unless he has declared himself a Muslim or professed it.(Abu Yusuf, Kitab al-Radd, pp. 121-22; Tahawi, Mukhtasar, p. 289.)

416. I asked: If the parents were in the territory of war and the child died (after he entered the territory of Islam) before he became a Muslim, would he be entitled to (the Islamic funeral) prayer?

417. He replied: Yes.

418. I asked: Why?

419. He replied: Because (the child) came into the possession of the Muslims and was carried to the dar al-Islam; he, therefore, attained the status of a Muslim. For this reason he would be entitled to (the funeral) prayer.

420. I asked: If the captive were a slave girl, mature enough to be lawful for cohabitation, would her master be entitled to have intercourse with her?

421. He replied: Yes. 422. I asked: Why is this so? If she did not accept Islam or profess it, (why do you think that) she would be lawful (to men) and entitled to (the Islamic funeral) prayer?

423. He replied: Because she had come into the possession of the Muslims. Do you not think that I disapprove of Muslims who would sell her to the Dhimmis?

424. I asked: If the slave girl or the boy were an adult and neither had become a Muslim or professed Islam, would either one be entitled to (the funeral) prayer?

425. He replied: No.

426. I asked: And the slave girl would not be lawful (to her master)?

427. He replied: She would not be lawful unless she were a scripturary.

428. I asked: Do you think that it is objectionable to sell the unbelieving prisoner of war-men and woman-to the Dhimmis, if these prisoners of war have been invited to become Muslims and have refused?

429. He replied: I do not disapprove of that, even if they have not been invited (to become Muslims), but it would be preferable to me if such (a sale) were not made.

430. I asked: Would it be objectionable if they were sold to the inhabitants of the territory of war>

431. He replied: Yes.

432. I asked: Why?

433. He replied: Because they entered the territory of Islam and became Dhimmis, and I disapprove of their being carried off to the territory of war, whereby they would strengthen the inhabitants of the territory of war against the Muslims. (Sarakshi, Sharh al-Siyar, Vol. IV, pp. 1-5, 107, 369-74; Mabsut, Vol. X, pp. 62-63.)

Muslim Merchants in the Territory of War Seeking to Recover Their Women or Property
(Literally: "A man enters dar al-harb as a merchant who steals his slave woman or usurps her and others or recovers his property by force.")

434. I asked: If the slave woman of a Muslim was captured by the enemy and her master entered the territory of war as merchant or under an aman (safe-conduct), do you think that it would be lawful for him to usurp her?

435. He replied: I disapprove of his doing so. (Tabari, Kitab Ikhtilaf, p. 194.)

436. I asked: Would you disapprove of his having intercourse with her?

437. He replied: Yes, I disapprove of his doing so. (It would be objectionable to Abu Hanifa even if the merchant purchased her. See Abu Yusuf, Kitab al-Radd, p. 126. Cf. Shafi'i, Umm, Vol. VII, p. 333.)

438. I asked: Why?

439. He replied: Because (the enemy) had taken her to a place of security.

440. I asked: If the woman was a freedwoman, umm walad, mudabbara, or his own wife, whether free or mukataba (what would be your ruling)?

441. He replied: Anyone of these means would be permissible for him: he may steal or usurp (the slave) from them. He (also) has the right to have intercourse with his umm walad, mudabbara, or wife, if she is a freedwoman. Do you not think that if (the enemy) accepted Islam while in possession of the slave woman, she would be lawfully theirs and the (original)owner would not be entitled to recover her, whereas if (the captive) were the mudabbara, the freedwoman, the umm walad, or the mukataba, she should be returned to her people? (The merchant) would have no right to have intercourse with the mukataba, if she were not his wife. Do you not think that if the Muslims recaptured her and the (original) owner found her in the share of another, he would have the right either to recover her by paying her value or leave her, but, if the owner found his mudabbara, umm walad, or mukataba, (in the shares of others) he would be entitled to recover them without any payment? (Nor) would he have right to have intercourse with the mudabbara, the mukataba, the freedwoman, and the umm walad. Only the slave woman is capable of (ownership by) sale or capture. (Abu Yusuf, Kitab al-Radd, pp. 124-26; cf. opinions of Awza'i and Shafi'i in Shafi'is Umm, Vol. VII, pp. 332-33. See also Tabari, Kitab Ikhtilaf, pp. 192-94.)

442. I asked: If a man and his slave woman were taken as prisoners of war, would it be lawful (for the man) to recover his slave woman by stealth?

443. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 194.)

444. I asked: Why is it so, since if the same man enters the territory of war under an aman it is not lawful for him to have intercourse with her.

445. He replied: Because if the man enters under an aman, he should not violate the pledge he has given (to the inhabitants of the territory of war) or the agreement he has made with them, nor should he break faith with them. He should rather fulfill (all his obligations) to them as they would fulfill them to him. But, if he were a prisoner in their hands and not the possessor of an aman, it would be lawful for him to kill those of them whom he could or steal what he could of their property. (Abu Yusuf, Kitab al-Radd, p. 126; Shaybani, al-Jami' al-Saghir, p. 91; Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, pp. 236-37, and Mabsut, Vol. X, p. 66. Cf. opinions of Awza'i and Shafi'i in Shafi'i's Umm, Vol. VII, p. 334.)

(Status of) the Man in the Territory of War Who becomes a muslim While in the Possession of His Property, His Land, His Family, and His Children, after Which the Territory of War Falls under Muslim Rule

446. I asked: If a man from the inhabitants of the territory of war became a Muslim and then the territory fell under Muslim rule, what property or children of his would the Muslims (lawfully) let him keep?

447. He replied: He would be entitled to keep his (movable) property, goods of daily usage, slaves, and all his minor children who follow his religion. (The latter) would not be reduced to slavery, but his adult children would be reduced to slavery and become fay'. (Abu Yusuf, Kitab al-Radd, pp. 126-27; Sarakshi, Mabsut, Vol. X, p. 66; Kasani, Bada'i' al-Sana'i', Vol. VII, pp. 105-6.)

448. I asked: What about (the status of) his land and houses?

449. He replied: They would become fay' for the Muslims.

450. I asked: Why is the land treated differently from (the movable) property?

451. He replied: Because movable property can be moved from the territory of war (to the territory of Islam), while land cannot.

452. I asked: What would be the status of the (man's) unbelieving wife who is pregnant.

453. He replied: She and the unborn child would be fay' for the Muslims. (Sarakshi, Mabsut, Vol. X, p. 67.)

454. I asked: Would the unborn child have the same status as she?

455. He replied: Yes.

456. I asked: Why is it so, since his father is a believer?

457. He replied: Because his mother is an unbeliever and has become fay', so her (unborn) child who is (still) in her womb would have the same status. (Shaybani, al-Jami' al-Saghir, p. 91; Sarakshi, Mabsut, (Vol.X, p. 67.)

458. I asked: If a man from the territory of war entered the territory of Islam under an aman and became a Muslim, after which the territory of war (from which he had come) fell under Muslim rule, what would be the status of his family and movable property and dependents?

459. He replied: All would become fay'. (Sarakshi, Mabsut, Vol. X, p. 68.)

460. I asked: Why?

461. He replied: Because (the man) became a Muslim in the territory of Islam.

462. I asked: If he became a Muslim before he entered the territory of Islam under an aman, what would be the status of his family and dependents and movable property if the territory of war (from which he had come) then fell under Muslim rule?

463. He replied: All would become fay' except the minor children, who would be (regarded as) Muslims and not liable to capture. (Ibid., p. 68f.)

464. I asked: If (the man) had deposited some of his movable property with another man belonging to the territory of war, what would be the status of that property?

465. He replied: It would be regarded as fay' for the Muslims.

466. He asked: If he had deposited (his property) with a Dhimmi who had gone to the territory of war as a merchant or with a Muslim, what would be the status of that property?

476. He replied: It would be given back to its owner.

468. I asked: Why is the case of these two (the Muslim and the Dhimmi just referred to) different from that of the harbi (A harbi is an unbeliever of the inhabitants of the territory of war. See *War and Peace in the Law of Islam*, p. 163.) previously mentioned?

469. He replied: If the property were deposited with (another) Muslims or with a Dhimmi, it would have the same status as it would if it were in the possession of its owner in the territory of war; but if it were deposited with one of the inhabitants of the territory of war, it would have the same status as it would have if the owner had departed from the territory of war and left it there, and he had not brought it to the place of security (i.e., dar al-Islam).

470. I asked: If a Muslim or Dhimmi entered the territory of war under an aman and was engaged in trade that resulted in his acquiring movable property, slaves, land, and houses, movable as well as immovable property, what would be the status of the goods in his possession as well as slaves and movable property?

471. He replied: He would retain his goods, slaves and movable property, but all the house and land would become fay'. (Also) whatever he might have deposited with a harbi or anyone else would be regarded as fay' and would not belong to him. (Sarakshi, *Kitab Sharh al-Siyar al-Kabir* (Hyderabad), Vol. IV, p. 238.)

472. I asked: If adult slave took part in the fighting against the Muslims, do you think that they would become fay'(if captured)?

473. He replied: Yes.

474. I asked: If a Muslim entered the territory of war under an aman and purchased a minor male or female slave whom he emancipated and, after his return to the territory of Islam, left them behind as unbelievers, do you think that they would become fay' if the territory of war (in which they resided) fell under Muslim rule.?

475. He replied: Yes.

476. I asked: Would not the fact that the Muslim emancipated them have the effect of taking them to a place of security (in the dar al-Islam)?

477. He replied: No.

478. I asked: Why?

479. He replied: Because manumission of a slave by a Muslim in the territory of war has no effect. (Ibid, Vol. II, p. 300, and Vol IV, p. 203.)

CHAPTER V

ON PEACE TREATIES

(Since a state of war was the normal relationship between the daral-Islam and dar al-harb, conditions of peace were created only by peace treaties which were to last, according to the most liberal opinions (Hanafi and shafii), no more than ten years. Thus, peace treaties were necessarily of temporary duration, even though the period might not be stated, during which hostile relations were suspended between Islam and enemy territory; they were signed to achieve certain specific purposes. See Abu Yusuf, Kitab al-Kharaj, pp.207 ff.; Sarakhsi, Kitab Sharh al-Siyar al- Kabir (Hyderabad), Vol. IV, pp. 60 ff.; Shafii, Umm, Vol. IV, pp. 109 ff.; Tabari, Kitab Ikhtilaf, pp. 14 ff.

Agreements with the Scripturaries

(Agreements with the People of the Book or scripturaries (people who have scriptures, such as Jews, Christians, Sabians, etc.) were of a somewhat different nature from other peace treaties because they were in the form of permanent covenants or pacts by virtue of which the scripturaries were to become naturalized subjects of the Imam and treated as tolerated religious communities. These agreements may therefore be regarded as constitutional charters. See my War and Peace in the Law of Islam, pp. 177-82, 193-95, 213-15.

480. I asked: If a group (of scripturaries) made peace (with the Muslims) and became Dhimmis, (Scripturaries who entered into a peace treaty with Muslims and became subjects of the Islamic state were called Dhimmis. This term implies that the scripturaries were in a compact with Islam. See my War and Peace in the Law of Islam, pp. 176-77.) do you think that a kharaj (the term "kharaj" had the double meaning of land tax or poll tax in early Islam before it was used specifically for land tax. See Chap X.) should be levied on the men or on the land according to their capacity to pay?

481. He replied: Yes. (Abu Yusuf, Kitab al-Kharaj, p. 122; Tabari, Kitab Ikhtilaf, p. 199; Sarakhsi, Mabsut, Vol. X, p.77.)

482. I asked: Has any narrative been transmitted to you concerning the kharaj (imposed) on the Dhimmis?

483. He replied: Yes, it has been related to us that (the Caliph) `Umar b. al-Khattab imposed on every jarib (The jarib is a measure of surface containing 100 square qasaba, or 1,952 square meters. See Chap. X.) of cultivable land (a tax of) 1 dirham (The dirham is the silver unit of coinage (Mawardi, Kitab al-Ahkam, p. 267) derived from the Greek drachma via Sasanian Iran. See G.C. Miles, "Dirham," Encyclopaedia of Islam (2nd ed.). Vol II, pp. 319-20.) (of silver) and a qafiz (A qafiz is a measure of grain. See Chap. X, n.5.) (of grain). He imposed on every jarib (of land) planted with grapevines 10 dirhams and on that planted with perishable fruits, 5. It has (likewise) been related to us that he imposed on every man (either) 12,24, or 48 dirhams.(Abu Yusuf, Kitab al-Kharaj, p. 36; Tabari, Kitab Ikhtilaf, pp. 210-11; Sarakhsi, Mabsut, Vol. X, p. 78.)

484. I asked: Therefore, the poor man who owns no property but earns his living by manual labour should pay 12 dirhams, the one who owns (some) property should pay 24, and the rich man should pay 48?

485. He replied: Yes. (Abu Yusuf, Kitab al-Kharaj, p. 122. For views of other schools of law, see Tabari, Kitab Ikhtilaf, pp. 208-11.)

486. I asked: Should we collect anything from the woman and children?

487. He replied: No. (Abu Yusuf, Kitab al-Kharaj, p. 123; Tabari Kitab Ikhtilaf, p. 206; Sarakshi, Mabsut, Vol.X, p. 79; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 112.)

488. I asked: Should we collect anything from the blind, the old and very aged, the insane, the crippled, the helpless, and the poor who possess nothing and are incapable of work? 489. He replied: None of them is under obligation to pay (In the 'Atif MS there is the additional statment: "Nor are their owners under obligation to pay anything," on the assumption that some of the Dhimmis may be in a state of slavery.) the poll tax. (Abu Yusuf, Kitab al-Kharaj, p. 122; Tabari, Kitab Ikhtilaf, p. 207; Sarakshi, Mabsut, Vol. X, pp. 79-80.)

490. I asked: Would the same hold true to slaves, the mukatab, the mudabbar, and the umm walad?

491. He replied: Yes, none of them is under obligation to pay a poll tax nor are their masters to pay anything. (Tabari, Kitab Ikhtilaf, p. 207; Sarakshi, Mabsut, Vol. X, p. 80.)

492. I asked: Would the property of Dhimmis, such as flock of sheep, cattle camels, and horses, as well as inanimate property, be subject to the kharaj?

493. He replied: No. (Abu Yusuf, Kitab al-Kharaj, p.123; Tabari, Kitab Ikhtilaf, p. 218.)

494. I asked: Would the land belonging to Dhimmis who are minors, women, or mukatabs be subject to the kharaj?

495. He replied: Yes, they would have to pay the kharaj just as any adult, healthy, male Dhimmi would.

496. I asked: If a male Dhimmi becomes a Muslim at the end of the year or after the expiration of the year before the pol tax was collected from him, do you think that (the tax) would be collected from him after he had become Muslim?

497. He replied: No. (Abu Yusuf, Kitab al-Kharaj, p.122; Tabari, Kitab Ikhtilaf, p. 207; Sarakshi, Mabsut, Vol. X, p. 80.)

498. I asked: Why?

499. He replied: Because this (tax) is not a debt which he is liable to pay but a poll tax which should be canceled when he becomes a Muslim, and nothing would be collected from him.

500. I asked: If (the Dhimmi) died as an unbeliever and left an estate, do you think that the poll tax would be taken out of his estate?

501. He replied: No.

502. I asked: Why?

503. He replied: Because (the poll tax) is not a debt which he is liable to pay. (Tabari, Kitab Ikhtilaf, p. 212; Sarakshi, Mabsut, Vol. X, pp. 81-82.)

504. I asked: If the Dhimmi was in debt, do you think that the (unpaid) kharaj would be shared proportionately by his creditors?

505. He replied: No. ("They should not be beaten," says Abu Yusuf, "if they fail to pay the jizya, nor should they be required to stay under the sun . . . but they should be imprisoned until they pay it" (Abu Yusuf, Kitab ak-Kharaj, p. 123).)

506. I asked: And (the poll tax) would be waived and no longer due?

507. (He replied: Yes.) (Not in Arabic MSS. See Sarakshi, Mabsut, Vol. X, p. 82.)

508. I asked: If a (number of) years passed and (the Dhimmi) failed to pay the poll tax, do you think that he would be liable for the poll taxes of all those years?

509. He replied: No, only the tax for the current year would be collected, because (the poll tax) is by no means a debt the payment of which is obligatory fr him.

This is Abu Hanifa's opinion; but Abu Yusuf and Muhammad (b. al-Hasan) held that he would be liable to pay for all past years, unless his failure to pay was due to sickness or some other (justifying) excuse. (Tabari, *Kitab Ikhtilaf*, p. 232; Sarakshi, *Mabsut*, Vol. X, p. 82.)

510. I asked: If a piece of land is cultivated with wheat or some other crop twice or three times a year, do you think that the owner would be under obligation to pay the kharaj on all (crops)?

511. He replied: (No), the owner is under obligation to pay only one kharaj consisting of 1 dirham and 1 qafiz (on each jarib). (Tabari, *Kitab Ikhtilaf*, p. 223; Sarakshi, *Mabsut*, Vol. X, p. 82.)

512. I asked: (If) a piece of land is planted with many trees do you think that its kharaj should be levied on the basis of its productive capacity?

513. He replied: Yes. (Abu Yusuf, *Kitab al-Kharaj*, pp. 84- 85.)

514. I asked: If a man at the beginning of the year cultivates wheat or some other crops, do you think that he would be under obligation to pay the kharaj on the whole crop?

515. He replied: No, he pays only one kharaj consisting of 1 dirham and 1 qafiz on every jarib of land.

516. I asked: If the crop on a piece of land is completely destroyed by flood or is hit by a blight, do you think that the owner would be under obligation to pay the kharaj on the land?

517. He replied: No, because of the damage that has befallen it. (Tabari, *Kitab Ikhtilaf*, pp. 225-26; Sarakshi, *Mabsut*, Vol. X, p. 83.)

518. I asked: If (the owner) neglected his land and did not cultivate it?

519. He replied: He still would have to pay the kharaj on it. (Ibid.)

520. I asked: Why is there a difference between the two cases?

521. He replied: If he cultivated the land and the crop was struck with a blight he would have an excuse (for not paying), but if the land lay idle and he failed to cultivate it, he would have to pay the kharaj on it, because this would be his own doing. Thus the two (situations) are different.

522. I asked: If a Dhimmi who possesses kharaj land becomes a Muslim, do you think that he would have to pay the kharaj as before?

523. He replied: Yes. (Tabari, *Kitab Ikhtilaf*, p. 226; Sarakshi, *Mabsut*, Vol. X, p. 83.)

524. I asked: If a Muslim purchased land from an unbeliever, would he be under obligation to continue to pay the kharaj on it?

525. He replied: Yes. (Abu Yusuf, *Kitab al-Kharaj*, pp. 59- 60; Tabari, *Kitab Ikhtilaf*, p. 224; Sarakshi, *Mabsut*, Vol. X, p. 83.)

526. I asked: Is it not objectionable that a Muslim should pay the kharaj on the land?

527. He replied: No, because it has been related to us that "Abad-Allah b. Mas'ud and Shurayh (b. al-Harith) and others have owned in the Sawad (of southern Iraq) lands, the kharaj of which was recorded in the state registry. The same has been reported to use concerning al-Hasan b. 'Ali b. Abi Talib. (Abu Yusuf, *Kitab al-Kharaj*, p. 62; Sarakshi, *Mabsut*, Vol. X, p. 83.)

528. I asked: Would this not be regarded as a humiliation (to the believer)?

529. He replied: No, the humiliation is (the payment of) the poll tax. (The idea that payment of the jizya (poll tax) by the unbeliever implies humiliation is based on the Quranic injunction: "Fight against those to whom the Scriptures have been given . . . until they pay the jizya out of hand, and they may be humbled" (Q. IV, 29). See Sarakshi, *Mabsut*, Vol. X, pp. 77-78, 82,83. Humiliation, however, was not implied in early Muslim compacts with the Dhimmis. See my

War and Peace in the Law of Islam, Chapter XVII; C. D. Dennett, Conversion and the Poll Tax in Early Islam (Cambridge, Mass., 1950).

530. I asked: Would it not be objectionable to you if a Muslim purchases (kharaj) land from a Dhimmi?

531. He replied: No, that is permissible.

532. I asked: If a group (of scripturaries) made a peace agreement (with the Muslims) on the basis of their becoming Dhimmis, but later one or all of them accepted Islam, would you not cancel the kharaj from the land and make it 'ushr land (tithe land)? ('Ushr land is land the original owners of which become Muslims, such as that in the Arabian Peninsula, or it may be land occupied by Muslims and distributed among the warriors. The tax imposed on such land was 'ushr, i.e., tithe. See A. W. Poliak, "Classification of Lands in Islamic Law and its Technical Terms," American Journal of Semitic Languages and Literatures, Vol. LVII (1940), pp. 50-62; Lokkegaard, Islamic Taxation in the Classic Period (Copenhagen, 1950), Chap. III.)

533. He replied: No, because (the Dhimmi) who owned the land became a Muslim after the land had become a kharaj land.

534. I asked: If a Dhimmi purchased a piece of land which was 'ushr land, ('Atif MS.) do you think that it would become subject to the kharaj?

535. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 227; Sarakshi, Mabsut, Vol. X, p. 84.)

536. I asked: Why, since it was not originally subject to the kharaj?

537. He replied: It would have the same status as residential land transformed into an orchard, thereby becoming subject to the kharaj, whereas no kharaj was paid for it before.

This is the opinion of Abu Hanifa. However, Abu Yusuf held that the 'ushr tax should be doubled and regarded as a (category of) kharaj. Muhammad (b. al-Hasan) held that the 'ushr should be retained as before and (the land) would be regarded as (in the category of) the zakat land, (Zakat and sadaqa are often used interchangeably to mean the tax to be paid by Muslims. See Mawardi, Kitab al-Ahkam, pp. 208-9.) because the 'ushr is imposed on land, not on persons. Do you not think that the land of the minor and the mukatab is subject to the 'ushr and (also) the land of the Christians of (the tribe of) Banu Taghlib and that the (principle of) shuf'a (justractum) is applicable to it? (Abu Yusuf, Kitab al-Kharaj, p. 69; Tabari, Kitab Ikhtilaf, pp. 226, 227.)

538. I asked: If a Christian from the (tribe of) Banu Taghlib purchased some kharaj land, do you think that it would be subject to the kharaj?

539. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 227.)

540. I asked: If he purchased some 'user land, would it become subject to the kharaj?

541. He replied: No, but the 'ushr would be doubled just as the tax would be doubled on their (i.e., the Taghlibis) property. (Abu Yusuf, Kitab al-Kharaj, p. 121; Tabari, Kitab Ikhtilaf, p. 228.)

542. I asked: If a Christian woman from (the tribe of) the Banu Taghlib purchased some 'ushr or kharaj land?

543. He replied: She would have to pay the kharaj for the kharaj land, but if she purchases 'ushr land, she would have to double the 'ushr. She would have the same status as a man (in this respect).

544. I asked: Would the same (ruling) apply to a boy if his father or guardian purchased land for him?

545. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 228.)

Muhammad (b. al-Hasan) held that if a land is 'ushr land, it remains so permanently and is unaffected by the ownership of whomever may purchase it. If the land is kharaj land, it also

remains permanently as kharaj land. If (the status of) 'ushr land were to be changed on the basis of the ownership of the purchaser, it would change if the land of a mukatab, a Muslim minor, or an insane person were purchased by a Dhimmi or a Taghlibi. Do you think that if land in the sanctuary of Makka were purchased by a Dhimmi or a Christian Taghlibi, (its status) would be changed from that of zakat and 'ushr land? This cannot happen; it retains its former status as 'ushr land. (ibid p.227)

546. I asked if a freed slave of the Banu Taghlib freed by that (tribe), purchased some kharaj or ushr land what (kind of tax) would he have to pay?

547. He replied: Their freed slave would pay the kharaj regardless of whether it were ushr or kharaj land. The Christian freed slave of Banu Taghlib should not be in a better position than a Christian freed by a Muslim. If the latter purchases ushr or kharaj; he would have to pay the kharaj on either one of them. On ushr land he would not have to pay the zakat, but the kharaj according to Abu Hanifa, but Abu Yusuf held that he would have to pay double the ushr (Abu Yusuf Kitab al-kharaj p 121)

548. I asked: If a Dhimmi of the Banu Taghlib purchased some 'ushr land and a Muslim pre-empted it (from him), would the Muslim have to pay the kharaj or the 'ushr?

549. He replied: The Muslim would have to pay the 'ushr because he had taken the land by pre-emption (shuf'a or jus retractum).

550. I asked: Similarly, if the Dhimmi had bought the land (from the Muslim) by means of a vicious transaction and then returned the land to him, would the Muslim have to pay the 'ushr as before and not the kharaj?

551. He replied: Yes.

552. I asked: If some of the inhabitants of the territory of war became Muslims in their home and their territory (became part of the dar al-Islam), would the kharaj be imposed upon them?

553. He replied: No. Rather, I should impose the 'ushr on their land. (Tabari, Kitab Ikhtilaf, pp. 228-29.)

554. I asked: If a Muslim purchased some of their land?

555. He replied: It would be subject to the 'ushr as before.

556. I asked: If a Taghlibi purchased it?

557. He replied: He would have to pay double the 'ushr.

558. I asked: If the Taghlibi sold it to a Muslim or became a Muslim while he owned the land?

559. He replied: It would be subject to double the 'ushr, because when the Christian of the Banu Taghlib bought it, its status changed from the original one of 'ushr land to that of double-'ushr land. Thus it became like kharaj land. Do you not agree that I should take (the same tax) from land belonging to a minor? This is the opinion of Abu Hanifa based on analogical deduction. (Ibid., p. 226.)

560. I asked: If a man acquires on rent some kharaj land and cultivates it, or cultivates it on the basis of a jointcultivation arrangement, who would have to pay the kharaj?

561. He replied: The owner of the land who rented the land to the cultivator. (Ibid.)

562. I asked: Would the same be true if the owner let the cultivator cultivate the land without paying rent?

563. He replied: Yes.

564. I asked: If the kharaj land belonged to a slave or a mukatab, should we impose the kharaj on it?

565. He replied: Yes. (Ibid., p. 228.)

566. I asked: If (an unbeliever) enters the dar al-Islam to trade under an aman (safe-conduct), would he be subject to the poll tax?

567. He replied: No. (Sarakshi, Mabsut, Vol. X, p. 84.)

568. I asked: Why?

569. He replied: Because he was given an aman to trade, not to become a Dhimmi.

570. I asked: If he came to us with an aman to trade, but married a (Dhimmi) woman who he divorced and then desired to return (to the territory of war), should we refuse to let him go?

571. He replied: No. (Ibid.)

572. I asked: If he prolonged his stay and settled down?

573. He replied: If he did so, I should impose the poll tax (al-Kharaj) on him. (The term "kharaj" is used as equivalent to jizya. Abu Yusuf, Kitab al-Kharaj, p. 19; Sarakshi, Mabsut, Vol. X, p. 84.)

574. I asked: If he did not stay long, but purchased some land which he cultivated, should we collect the land kharaj from him?

575. He replied: Yes, I should collect from him the land tax and the poll tax, because if he stays in the territory of Islam and cultivates the land, he has settled down there (as a permanent) resident. (Sarakshi, Mabsut, Vol. X, p. 84.)

576. I asked: If a woman came to us from the territory of war under an aman for trade and married, and later she desired to return (to the territory of war) but her husband refused and wanted to detain her?

577. He replied: She could not leave if she were married, since she had settled down and had become a Dhimmi, for a woman in this situation is not like a man. Do you not think that the woman may not leave (her home) except with her husband's permission, and that unlike her, he does not have to consult and take permission of his spouse if he wants to leave?

Abu Yusuf held that if a Dhimmi purchases 'ushr land, the 'ushr on it is doubled. (Tabari, Kitab Ikhtilaf, p. 227.)

Peace Treaties with Rulers (of the Unbelievers)

578. I asked: If one of the rulers of the inhabitants of the territory of war owns extensive lands upon which are living some of the people of his realm who are his slaves and whom he sells and deals with as he sees fit, would they (indeed) be the slaves of his?

579. He replied: Yes. (Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad) Vol. IV, p. 115, and Mabsut, Vol. X, p. 84.)

580. I asked: If these (slaves) were captured by some enemy, and later recaptured by the Muslims, from whom (the original owner) obtained them on payment of ransom, would (the slaves) be returned to the previous ownership?

581. He replied: Yes. (Sarakshi Mabsut Vol. X p. 85)

582. I asked: If the ruler found that (the slaves) had been divided up (among the Muslims), would he be entitled to take them back by paying their value?

583. He replied: Yes. (Ibid.)

584. I asked: If that ruler became a Muslim or he and his people became Dhimmi, would his people remain his slaves in that case also?

585. He replied: Yes. (Ibid.)

586. I asked: If he did not become a Muslim nor was given the benefit of a peace treaty, nor did he become a Dhimmi, but he proposed to the Muslims (a peace treaty) on condition that he

be a protected person and pay the Muslims a tribute (kharaj), on condition that he be allowed to exercise over the people of his realm such powers as he wished, such as those of beheading or crucifying, or the like, which are not proper that he should exercise in the territory of Islam, (would such an agreement be made)?

587. He replied: It would not be right for the Muslims to make any peace agreement with him on such conditions. (Sarakshi, *Kitab Sharh al-Siyar al-Kabir* (Hyderabad), Vol. IV, p. 239.)

588. I asked: If (the Muslims) did so and entered into such an agreement with him on such terms and he became a protected person of theirs, (what would be the ruling)?

589. He replied: (The Muslims) would look into those terms of the agreements that were illegal and improper; they would abrogate them and would observe those of the terms that were proper. If the ruler accepted, (well and good); if not, he and his followers would be allowed to return to their place of safety. (Ibid., pp. 85-86.)

590. I asked: If after having entered into an agreement and having become a protected person of theirs, (the ruler) began to inform the unbelievers of the weak spots in the Muslim defenses, or provide them with guides and give refuge to their spies, would these acts constitute a violation of his pact?

591. He replied: No, but the Muslims should punish him for so doing and throw him into prison. (Ibid., p. 86; Tabari, *Kitab Ikhtilaf*, pp. 24-25.)

592. I asked: If he or (one of) the people of his land continued to kill Muslims by surprise attack, would this act constitute a violation of his pact?

593. He replied: No, but (the Muslims) would investigate which one of them committed it; if evidence is established against him, they would behead him in retaliation. But if no evidence were adduced, there could be no case against him.

594. I asked: If they did not know precisely who the murderer (of the Muslim) was, but found him murdered in one of the (ruler's) villages?

595. He replied: He (the ruler) would be held responsible for the diya (blood-money) after having sworn by God fifty times that neither he, himself, killed him, nor did he know the killer. Thereafter, he would have to pay the diya.

596. I asked: Why would the people of his village not have to swear with him?

597. He replied: Because they are his slaves and slaves neither have to take oaths of innocence nor pay the diya.

598. I asked: If the inhabitants of the village were freedmen?

599. He replied: Then they would have to take the oaths of innocence and pay the diya.

600. I asked: Then they would have the same status as the ruler?

601. He replied: Yes. But God knows best. (Sarakshi, *Kitab Sharh al-Siyar al-Kabir* (Hyderabad), Vol. IV, p. 226, and Mabsut, Vol. x, p. 86.)

Peace Treaties with the Inhabitants of the Territory of War

602. I asked: If some of the inhabitants of the territory of war asked the Muslims to make peace with them for a specified number of years without paying tribute (jizya), do you think that the Muslims should grant the request?

603. He replied: Yes, provided the Imam has considered the situation and has found that the inhabitants of the territory of war are too strong from the Muslims to prevail against them and it would be better for the Muslims to make peace with them. (Sarakshi, Mabsut, Vol. X, p. 86.)

604. I asked: If (the Imam) made peace with them and found upon reconsideration it was disadvantageous for the Muslims since it was made without any tribute being paid to him, can he give them notice, abrogate the peace agreement, and attack them?

605. He replied: Yes (Ibid.)

606. I asked: If the Muslims were in a city besieged by the enemy and the enemy asked them to enter into a peace agreement for a period of years whereby they would pay the enemy a fixed annual tribute, do you think that it would be lawful for the Muslims to enter into such an agreement and pay the tribute to the unbelievers, if they were afraid of destruction and realized that an agreement would be better for them? 607. He replied: Yes, that would be permissible in such circumstances. (Tabari, Kitab Ikhtilaf, p. 17; Sarakshi, Mabsut, Vol. X, p. 86.)

608. I asked: If some of the inhabitants of the territory of was wished the Muslims to enter into a peace agreement with them for a specified number of years on condition that they would pay a fixed annual tribute to the Muslims, provided that the Muslims abstain from entering their territory or enforce their jurisdiction on them, do you think that the Muslims should make a peace agreement with them on such terms?

609. He replied: No, unless it were better for the Muslims to do so. (Tabari, Kitab Ikhtilaf, p. 17; Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV , p. 2 and Mabsut, Vol. X, p. 86.)

610. I asked : And if it were better for the Muslims to do so?

611. (He replied: It would be permissible.). (Not in Arabic MSS.)

612. I asked: If it were better for the Muslims to do so and there was signed an agreement that provided that 100 heads (of slaves) were to be delivered annually, do you think that it would be proper for the Muslims to make peace on such terms?

613. He replied: If the 100 heads were taken from among the inhabitants (of the territory of war) or their children, a peace on such terms would not be advantageous and it would be incumbent on Muslims not to slay any of them or their offspring since they had given them a pledge of security. Do you not think that if one of the inhabitants of the territory of war sold his son or his father to a Muslim, the sale would not be valid? For the peace treaty applies to these (persons), and their children enjoy the same status as themselves.(Tabari, Kitab Ikhtilaf, pp. 17, 19; Sarakshi, Mabsut, Vol. X p. 87.)

614. I asked: If an agreement were made with them whereby 100 predetermined persons would be delivered to the Muslims in the first year (of the coming of the agreement into force), and if they asked in return for a peace agreement for a year, and offered to deliver those predetermined persons and (added): "We continue the peace agreement for another term of three years on condition that we shall deliver every year 100 heads from among our slaves."

615. He replied: It would be permissible.(Tabari, Kitab Ikhtilaf, p.20)

616. I asked: If after the agreement were made a Muslim stole a slave girl or some goods from them, do you think that it would be proper (for a muslim) to purchase (from him) the slave girl or the goods?

617. He replied: No(Ibid)

618. I asked: If (some other) inhabitants of the territory of war attacked them and captured some of them and enslaved them, do you think that it would be proper (for the Muslims) to purchase from them those slaves?

619. He replied: Yes, because they were not captured by the Muslims, but by (other) inhabitants of the territory of war.

620. I asked: Should (Muslim) merchants be prevented from exporting anything to them?

621. He replied: No, nothing should be prohibited except the kura (ungulate animals), weapons, iron, and the like.

622. I asked: Why should the kura' be prohibited (from exportation)?

623. He replied: Because the inhabitants of the territory of war in question are not Dhimmis, but people having (only) a peace agreement (with the Muslims).

624. I asked: If one of them entered the territory of Islam as a merchant without an aman, except the peace agreement they had made (with the Muslims, what would be the ruling)?

625. He replied: He would enjoy an aman by virtue of that agreement.

626. I asked: Should a one-fifth (share) be taken from the tribute paid by them under the peace agreement?

627. He replied: No. This is tribute (kharaj) and tribute is not subject to the one-fifth (share). (Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, p.12, 24, and Mabsut, Vol. X, pp. 87-88.)

Chapter VI

(ON AMAN (SAFE-CONDUCT))

(Persons who belong to the dar al-harb are individually and collectively in a state of war with Muslims. If anyone of them encounters a Muslim, he is liable to be killed; but he might enter the dar al-Islam without molestation if he obtains a special permission called the aman (safe-conduct), which permits him, along with his family and property, to travel or reside in the dar al-Islam for a limited period. See Khadduri, War and Peace in the Law of Islam, Chapter 15; Julius Hatschek, Der Musta'mim (Berlin, 1920); and Schacht, "Aman," Encyclopaedia of Islam (2nd ed.), Vol. I, pp. 429-30.)

The Granting of the Aman by a Muslim to the Inhabitants of the Territory of War

628. I asked: If a (Muslim) merchant or a (Muslim) captive in the territory of war grants an aman (to an enemy), do you think that (the granting of) such an aman would be valid?

629. He replied: No.

630. I asked: Why?

631. He replied: Because they are living undefended in the territory of war. (Abu Yusuf, Kitab al-Kharaj, p. 204; Tabari, Kitab Ikhtilaf, p. 28; Tahawi, Mukhtasar, p. 292; Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, p. 286, and Mabsut, Vol. X, p. 69; Kasani, Bada'i al-Sana'i', Vol. VII, p. 107.)

632. I asked: Similarly, if a man from the territory of war becomes a Muslim and grants an aman to an enemy, would his aman be null and void?

633. He replied: Yes.

634. I asked: If a Muslim army besieged a city whose inhabitants were well defended and one of the Muslim (warriors) granted an aman to the inhabitants of that city, do you think that his aman would be valid?

635. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 28; Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, pp. 283, 288, 289, 294, 295, and Mabsut, Vol. X, p.69; Kasani, Bada'i' al-Sana'i' Vol. VII, p. 107.)

636. I asked: What would be said to the inhabitants of the city?

637. He replied: Islam should (first) be offered to them; if they accept it they are entitled to the same rights and obligations as Muslims. If they refuse they should be asked to pay the jizya; if they agree it should be accepted and they should be left to themselves. If they refuse (to pay the jizya) they should be allowed to return to a place of security and fighting would be resumed. (Abu Yusuf, Kitab al-Kharaj, p. 202; Tabari, Kitab Ikhtilaf, p. 28.)

638. I asked: Would the same hold true if a Muslim woman had granted them the aman?

639. He replied: Yes. (Tabari, Kitab Ikhtilaf, pp. 29-30; Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, p. 253, and Mabsut, Vol. X, p. 69; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 106.)

640. I asked: Has any narrative come to your knowledge concerning the granting of the aman by a man or a woman?

641. He replied: Yes. It has been related to us that Zaynab, daughter of the Apostle of God, granted an aman to Abu al-'As b. al-Rabi'-her husband-and her aman was carried out by the Apostle. It has also been related to us that (the Prophet) said: "Muslims should support one another against the outsider . . . and the one lowest in status (i.e., the slave) may bind the others, etc. . ." (Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, pp. 252, 253-54, and Mabsut, Vol. X, pp. 69-70. See paragraph 50, above.)

642. I asked: If a slave grants an aman, do you think that his aman would be as valid as that granted by a (free) man or woman?

643. He replied: If the slave were fighting along with his master, his aman would be valid: if he were not fighting along with his master, he would (not be regarded as a warrior) but merely as a servant serving his master and his aman would be void. (Abu Yusuf, Kitab al-Radd, p. 68; Sarakshi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, p. 255. Awza'i and Shafi'i held that the aman granted by a slave is valid regardless whether he was fighting or not. Shafi'i, Umm, Vol. VII, p. 319.)

However, Muhammad b. al-Hasan held that the slave's aman would be valid in both cases. (Abu Yusuf, Kitab al-Kharaj, p. 205, and Kitab al-Radd, p. 68; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 106.)

644. I asked: If the Dhimmis who take part in the fighting in support of Muslims (grant an aman), do you think that their aman would be valid?

645. He replied: No, their aman should be null and void. (Abu Yusuf, Kitab al-Kharaj, p. 204; Tabari, Kitab Ikhtilaf, p. 30; Sarakshi, Sharh Kitab al-Si al-Kabir, ed. Munajjid, Vol. I, p. 257, and Mabsut, Vol. X, p. 70. Other schools agree with the Hanafies on this point. See Shafi'i, Um, Vol. IV, p. 196.)

646. I asked: Has there come to your knowledge any narrative concerning the granting of the aman by a slave?

647. He replied: Yes, it has been related to us that a slave once shot an arrow carrying an aman to some people who were besieged and the (Caliph) 'Umar (b. al-Khattab) carried out his aman. (Abu Yusuf, Kitab al-Radd, pp. 68-69; Sarakhsi, Sharh Kitab al-Siyar al-Kabir, ed. Munajjid, Vol. I, p. 256, and Mabsut, Vol. X, pp. 70-71.)

The Musta'min from the Territory of War

(Enters the Territory of Islam) (The musta'min is the person who enjoys the privilege of aman, whether he is a Muslim in the dar al-harb or a non-Muslim in the dar al-Islam. See note 1, above.)

648. I asked: If a musta'min from among the inhabitants of the territory of war enters the territory of Islam under an aman to trade and purchases a Muslim slave and thereafter returns with the slave to the territory of war, what would the status of the slave be?

649. He replied: He would be free from the moment (his master) entered with him into the territory of war. (Shaybani, al-Jami' al-Saghir, p. 89; Sarakshi, Mabsut, Vol. X, pp. 89-90.)

650. I asked: Why?

651. He replied: Because (the slave) is a Muslim purchased in the territory of Islam. Do you not think that if the slave killed his master, took his property, and returned to the territory of Islam, everything that he had taken from his master, whether property of slaves, would be regarded as belonging to him and he would be a freedman and nothing would be held against him. (This is based on Abu Hanifa's doctrine that Muslim rulings are not binding on Muslims in the dar al-harb, nor are decisions made in the dar al-harb binding on persons when they enter the dar al-Islam. See Tabari, Kitab Ikhtilaf, pp. 62-63. Awza'i and Shari'i held that Muslim rulings are binding wherever the believer happens to be. See Shafi'i, Umm, Vol. IV, pp. 162-63; Tabari, Kitab Ikhtilaf, p. 61.)

652. I asked: Would it be lawful for this slave to kill his master?

653. He replied: Yes.

654. I asked: Would you not think that the sale contract (by virtue of which the unbeliever owned the Muslim slave) created a (state of) security (aman) between them?

655. He replied: No. This is Abu Hanifa's opinion. However, Abu Yusuf and Muhammad (b. al-Hasan) held that the slave would not become free (immediately after his entry into the territory of war) until the Muslims had taken him back by capture or he had returned to the territory of Islam against his master's will. Only in one of these two ways would the slave become free. (Shaybani, al-Jami' al-Saghir, p. 89; Tahawi, Mukhtasar, p. 291; Sarakshi, Mabsut, Vol. X, p. 90.)

656. I asked: If a slave who had accompanied his master to the territory of war become a Muslim and thereafter the slave was either purchased from his master by a Muslim or was captured by some Muslims in a raid (on the territory of war), do you think that he would remain in a state of slavery and become fay', subject to division (as spoil)?

657. He replied: No. I hold that, if his case were as you stated, he should be free and nothing would be held against him. (Tabari, Kitab Ikhtilaf, p. 47; Shafi'i, Umm, Vol. IV, p. 188; Sarakshi, Mabsut, Vol. X, p. 90.)

658. I asked: Would the same hold true if a slave from the territory of war become a Muslim while in the possession of his master but then was captured by the Muslims?

659. He replied: He would be free and not regarded as fay'. (Shaybani, al-Jami' al-Saghir, p. 89; Sarakshi, Mabsut, Vol. X, p. 90.)

660. I asked: If the master became a Muslim before the Muslims captured the slave, what would (the status of) the slave be?

661. He replied: He would remain a slave belonging to his master, and would not become free. (Tabari, Kitab Ikhtilaf, p. 49; Sarakshi, Mabsut, Vol. X, p. 90.)

662. I asked: Why?

663. He replied: Because the slave neither came to the dar al-Islam nor did he fall into Muslim hands before his master became a Muslim.

However, Abu Yusuf and Muhammad (b. al-Hasan) held that if the inhabitants of the territory of war became Muslims and then (the master) sold (his slave) to a Muslim, the slave would remain a slave and would not become free; if the slave were not sold but were captured by Muslims, he would become free.

If a man from the dar al-harb entered the dar al-Islam without an aman and were captured by a man (from the dar al-Islam), he would become a slave of that man, subject to the one-fifth (rule); but if he had become a Muslim before being captured, he would be free and nothing would be held against him. This is the opinion of Abu Yusuf and Muhammad (b. al-Hasan). Abu Hanifa, however, held that if (the man from the dar al-harb) were captured by a Muslim, he would be a fay' for the community (of Muslims), and that even if he became a Muslim and were captured thereafter he would belong to the community and not to any single man.

According to Abu Yusuf and Muhammad (b. al-Hasan), if (the slave) entered the sanctuary (of Makka) before he was captured, he would not be molested or liable to capture, but he should not be given food or water nor be subject to sale. If he left (the sanctuary) and were captured by a man, he would become the slave of that man. Likewise, if a man captured him in the sanctuary and took him out of its precincts, he would become the slave of that man, but this would be an evil act (on the part of the Muslim). According to Abu Hanifa's analogical deduction, the slave's status does not change; he should not be given food, water, or asylum; but if he leaves (the sanctuary) and is seized he becomes fay' for the community of Muslims. (Shaybani, *al-Jami' al-Saghira*, p. 91; Tabari, *Kitab Ikhtilaf*, pp. 49-50; Sarakshi, *Mabsut*, Vol. X, pp. 93-94.)

664. I asked: If a man from among the inhabitants of the territory of war entered the dar al-Islam under an aman and he either purchased a Muslim slave or the slave that may have accompanied him (to the dar al-Islam) became a Muslim, do you think that the man would be permitted to return to the dar al-harb with his slave (in either case)? 665. He replied: No. (Cf. paragraph 648, above. See Tabari, *Kitab Ikhtilaf*, p. 47; Sarakshi, *Mabsut*, Vol. X, p. 94.)

666. I asked: What should the ruling be concerning the man and the two (Muslim slaves)?

667. He replied: He should be compelled to sell the slaves (in either case) and not be permitted to take them out. (Tabari, *Kitab Ikhtilaf*, p. 47.)

668. I asked: If the harbi (enemy person) becomes a Muslim in the dar al-Islam while in possession of the two slaves?

669. He replied: They retain their status (as slaves). (Other schools of law agree with the Hanafi school on this point. See Tabari, *Kitab Ikhtilaf*, p. 48.)

670. I asked: What would you think if (the harbi) becomes a Dhimmi rather than a Muslim?

671. He replied: He should be compelled to sell those (Muslim slaves) and should not be permitted to return with them to the dar al-harb. (Tabari, *Kitab Ikhtilaf*, pp. 47-48; Sarakshi, *Mabsut*, Vol. X, pp. 94-95.)

672. I asked: If a slave left the dar al-harb with his master (for the dar al-Islam) without becoming a Muslim, but the master set him free after he had brought him (to the dar al-Islam, but later revoked the manumission) and the slave brought action against his master, do you think that the slave would be set free?

673. He replied: Yes. Sarakshi, *Mabsut*, Vol. X, p. 95.)

674. I asked: If the slave's master set him free in the dar al-harb (and then revoked the manumission), would the slave thereby be (lawfully) free?

675. He replied: No.

676. I asked: Why?

677. He replied: Because (his master's) manumission in the dar al-harb is of no consequence. (Ibid.)

678. I asked: (Do you hold, then, that) if the master sets (the slave) free after entering the dar al-Islam (and later revokes the manumission), his manumission is valid and (the slave) is

free, but that if he sets him free in the dar al-harb (and later revokes the manumission), his manumission is not valid and not worthy of consideration?

679. He replied: Yes.

680. I asked: Why is his manumission in the dar al-harb not valid?

681. He replied: Because his manumission in the dar al-harb is of no consequence. Do you not think that if a man (from the dar al-harb) captured another and held him by force, he could sell that man and the Muslims could purchase him if he had brought that (enslaved person) to them by force while he was in his captor's possession, even though he was originally a free man like his captor? (See note 13, above, and Sarakshi, *Kitah Sharh al-Siyar al-Kabir* (Hyderabad), Vol. IV, pp. 33, 39-40.)

682. I asked: What would you think if a harbi entered (the dar al-Islam) with slave girls from among the people of the dar al-harb, some of which were in the status of mudabbaras in the dar al-harb and others umm walads (and later revoked their status as mudabbaras and umm walads)?

683. He replied: He would be entitled to sell his mudabbaras, but not the umm walads.

684. I asked: Why would the status of mudabbaras be different from that of the umm walads?

685. He replied: Because the umm walad has the same status as that of her child, and (the harbi) has no right to sell his child, nor should the Muslim ever purchase (the child) of a man to whom they have given a safe-conduct. The child enjoys the same status as his father. As to the mudabbara, she would be regarded as a slave woman and (her master's) mudabbara arrangement with her in the dar al-harb would be invalid. Therefore, he has the right to sell her if he so wishes. But God knows best! (Tabari, *Kitab Ikhtilaf*, p. 58.)

Property Left behind by the Musta'min Who Returns to the Dar al- Harb or Dies in the Dar al-Islam

686. I asked: What would you think if a musta'min returned to the dar al-harb, having left in the dar al-Islam money lent out to (Muslims), or slaves, property, and the like which he had deposited (with somebody)? And suppose that he had granted to some of the slaves the status of mudabbar in the dar al-harb while to others had granted it in the dar al-Islam. Now suppose that the harbi (i.e., the musta'min who returned to the dar al- harb) was killed and the Muslims took possession of the territory (of war) to which he had returned. What would be the ruling concerning the disposal of his property, i.e., his slaves, his goods, his loan, and whatever else he had on deposit in the dar al-Islam?

687. He replied: As to the money given on loan by him, it would be waived; the debtors would not be obliged to repay any of it. However, (all) the property on deposit would become fay' for the Muslim (community), save the slaves with whom he had entered into a mudabbar relationship in the dar al-Islam; they would become free-nothing would be held against them because he set them free in a place where Muslim jurisdiction was operative on him and on them. (Shaybani, *al-Jami' al-Saghir*, p. 91; Tabari, *Kitab Ikhtilaf*, pp. 49-50.)

688. I asked: Why have you canceled (the debt owing him) and did not declare it fay'?

689. He replied: The said loan cannot be regarded as fay' because it was no longer in the possession (of the debtor), but consumed.

690. I asked: If the owner of the deposited property were taken as a prisoner of war rather than killed, what would be the status of his slaves, deposits, the loan, the property and mudabbaras?

691. He replied: If the Muslims took possession of the territory (of war) the ruling would be the same, whether the owner was killed or taken as a prisoner of war.

692. I asked: What would you think if a harbi entered the dar al-Islam under an aman and purchased some Muslim and some Dhimmi slaves whom he left behind in the dar al-Islam and returned to the dar al-harb, but thereafter he was taken a prisoner of war (by the Muslims). Would the slaves become fay'?

693. He replied: Yes. (Tabari, Kitab Ikhtilaf, p. 52.) 694. I asked: If he left umm walads in the dar al-Islam, what would be their status?

695. He replied: All of them would be free and nothing would be held against them. (Ibid.)

696. I asked: If the musta'min died in the dar al-Islam, leaving property there, while his heirs were in the dar al-harb, what should be done with his property?

697. He replied: It should be held in custody until his heirs arrive. (Ibid., pp. 52-53.)

698. I asked: If the heirs arrive (i.e. entered the dar al-Islam) under an aman, should the Imam accept their word or should they be asked to produce evidence to (prove) their claim to the inheritance?

699. He replied: They should be asked to provide evidence.

700. I asked: If the evidence were provided by the Dhimmis, should their testimony be accepted?

701. He replied: I should say no on the basis of analogy, but on the basis of juristic preference (Istihsan. See p. 46, above.) their testimony should be accepted and property that has been left should be handed over to the heirs, if they attest that they do not know of any other heirs of his.

702. I asked: Should a guarantor be required for the property delivered?

703. He replied: Yes.

704. I asked: What would you think if (the heirs) produced a letter from the ruler of the territory from which they came, saying that they were the heirs; should it be accepted from them?

705. He replied: I should not accept it. (Tabari, Kitab Ikhtilaf, pp. 53-54.)

706. I asked: If it was written in the letter that witnesses had testified to the ruler that (the bearers of the letter) were the heirs?

707. He replied: I should not accept that either.

708. I asked: If some Muslims had testified both to the truth of the claim (before the enemy ruler) and to the genuineness of the seal (before the Muslim court)?

709. He replied: Even so, I should not accept it.

710. I asked: If evidence that they were the heirs were produced in the dar al-Islam and the property (of the deceased) were delivered to them, do you think that they would be entitled to collect the debt due to them?

711. He replied: Yes. (Ibid., p. 54.)

What the Musta'min May (Lawfully) Take with Him into the Dar al-Harb

712. I asked: If a musta'min wanted to return from the dar al-Islam to the dar al-harb, do you think that he should be allowed to take with him any kura', (Kura' is a collective term applied to beasts of burden of the category of ungulate animals such as horses, mules, and donkeys. See Mutarrazi, al-Mughrib, Vol. II, p. 148.) weapons, or slaves that he might have purchased from the Muslims or the unbelievers in the dar al-Islam?

713. He replied: (No.) He should not be allowed to take back anything of this kind, save whatever kura' and weapons he might have brought with him (from the dar al-harb). (Other schools of law agree with the Hanafi school on this point. See Abu Yusuf, Kitab al-Kharaj, p. 188; Tabari, Kitab Ikhtilaf, p. 51; Sarakhsi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. III, pp. 177-78, 273-74.)

714. I asked: Apart from that, would he be allowed to take back garments?

715. He replied: yes. (Abu Yusuf, Kitab al-Kharaj, p. 188; Tabari, Kitab Ikhtilaf, p. 50.)

716. I asked: Would he be allowed to take back iron?

717. He replied: No.

718. I asked: Why?

719. He replied: Because weapons are made of iron.

720. I asked: If (the musta'min) brought with him a sword which he sold (in the dar al-Islam) and purchased instead a bow or a lance, do you think that he would be allowed to take these back in lieu of the sword?

721. He replied: No, I would not allow him to take back any weapons in lieu of anything. Do you not think that I should allow him to take back only (the weapons) that he had brought with him? (Tabari, Kitab Ikhtilaf, p. 51.)

722. I asked: If (the musta'min) exchanged his sword with another sharper than his, do you think that it would be left to him or should he be allowed to take it back with him?

723. He replied: Yes, if he gave another in exchange for it.

724. I asked: If he wanted to take back with him something other than kura' and weapons, do you think that he would be allowed to do so?

725. He replied: (Yes), if they were not kura', weapons, iron, and the like; but any slaves which he might have purchased in the dar al-Islam, he would not be allowed to take back anything of this sort. (Ibid.)

726. I asked: If the harbi died in the dar al-Islam, do you think that his heirs would have the same status as his in the matters that I have mentioned to you?

727. He replied: Yes. (Shaybani, al-Jami' al-Saghir, p. 91; Tabari, Kitab Ikhtilaf, p. 52.)

728. I asked: Is the same true of the Muslim who wants to go to the dar al-harb for trade, namely, that he should not be allowed to take with him kura' and weapons?

729. He replied: Yes. (Abu Yusuf goes so far as to advise the Imam to set up guard posts on the frontiers to inspect Muslims crossing to the dar al-harb and prevent them from carrying weapons, slaves, and other contraband into it. See Abu Yusuf, Kitab al-Kharaj, p. 190.)

730. I asked: If a man from among the inhabitants of the territory of war sent a slave of his to the dar al-Islam under an aman for trade and the slave obtained an aman for his master but thereafter the slave became a Muslim, what would you think should be done (with him)?

731. He replied: He should be sold and the price received should go to his master. (Tabari, Kitab Ikhtilaf, pp. 44-45.) But God knows best! ('Atif MS.)

Persons from (the Territory of) War Who Are Apprehended in the Dar al-Islam

732. I asked: What would you think if a man from the inhabitants of the territory of war were apprehended in the dar al-Islam and claimed that he was an emissary and produced a letter from his ruler (to prove it)?

733. He replied: If it were established that the letter was from the ruler, the emissary would be entitled to an aman until he delivered his message and returned; if the letter turned out to be

not from the ruler, (the emissary) and everything with him would become fay'. (Abu Yusuf, Kitab al-Kharaj, pp. 187-88; Tabari, kitab Ikhtilaf, p.33.)

734. I asked: If a man from the inhabitants of the territory of war were seized in the dar al-Islam and claimed that he entered under an aman, do you think that he should be believed?

735. He replied: No. He and whatever was with him would become fay'. (Awza'i and Shari'i held that they would be regarded as musta'mins. See Abu Yusuf, Kitab al-Radd, pp. 53-64; Shafi'i, Umm, VII, p. 317; Trabari, Kitab Ikhtilaf, p. 43.)

736. I asked: If some of the inhabitants of the territory of war entered (the dar al-Islam) to visit some of their relatives from among the Dhimmis and the Muslims, having been informed of their arrival, went to the village and were told that they were all Dhimmis, do you think that any one (of the inhabitants of the village) would be held liable to prosecution?

737. He replied: No, not unless one of the inhabitants of the territory of war were personally to be identified, in which case he would be apprehended.

Application of Hudud Penalties

738. I asked: If some of the inhabitants of the territory of war entered (the da al-Islam) under an aman for trade and some of them were indebted to others, do you think that an one of them would be held liable for a debt contracted in the dar al-harb?

739. He replied: No. (Shaybani, al-Jami' al-Saghir, p. 90; Tabari, Kitab Ikhtilaf, p. 61.)

740. I asked: Why?

741. He replied: Because they entered (the da al-Islam) under an aman, and any arrangement that they may have entered into in the dar al-harb is none of our concern.

742. I asked: What would you think if some of them became indebted to others in the dar al-Islam, or becamae indebted to a Muslim, or a Muslim became indebted to them?

743. He replied: I should hold them liable for everything and I should hold others liable (who were indebted to them). (Shaybani, al-Jami' al-Saghir, p. 90.)

744. I asked: Would they also be held liable if they became indebted to Muslims or Dhimmis?

745. He replied: Yes. (Ibid.)

746. I asked: If either a Muslim had become indebted to them or they had become indebted to him in the territory of war or he had usurped their property or they had usurped his property do you think that we should concern ourselves with any such matters?

747. He replied: I hold that we should not concern ourselves with such matters and that we should not pass judgment on them. (Tabari, Kitab Ikhtilaf, p. 62.)

748. I asked: Would the same be true of any acts of murder or wounds committed in the dar al-harb?

749. He replied: Yes. All such thing would be regarded as null and void.

750. I asked: Why?

751. He replied : Because they were committed (in a territory) where Muslim rulings are not applicable to them. (Ibid. Awzai and Shafii held an opposing view on this point. See ibid., pp. 60-61)

752. I asked: If one (of the mustamins) commits fornication or theft in the dar al-Islam, do you think that we should apply the hudud penalties to him?

753. He replied : No.

754. I asked: Why?

755. He replied: Because they (the persons from the dar al-harb) had made neither a peace treaty (with us) nor had they become Dhimmis. Thus, Muslim rulings would not apply to them. However, I should make them responsible for any property they might steal, but I should not impose on them the penalty of amputation (of the hand for theft). (Abu Yusuf, Kitab al-Kharaj, p.189; Tabari, Kitab Ikhtilaf, p.56; cf. Awazai and Shafii in Tabari, Kitab Ikhtilaf pp.54-55)

756. I asked: If one of them killed a Muslim or a Dhimmi - intentionally or unintentionally-would his case be judged (by the Muslim qadi)?

757. He replied : Yes (Abu Yusuf, Kitab al-Kharaj, p.189; Tabari, Kitab Ikhtilaf, p.56.)

758. I asked: How do the hudud penalties differ from the latter penalties?

759. He replied: The hudud penalties are prescribed for (the right of) God, whereas the case in question involves the rights of Muslims and Dhimmis; therefore they should be procured in their favour.

760. I asked: If a Muslim cut off the hand of a mustamin or killed him intentionally, do you think that he would be liable to retaliation (lex talionis) for such an intentional offense?

761. He replied : I hold that he would not be liable for punishment under lex talionis (Ibid)

762. I asked: Why (do you hold that) the mustamin should not have the same status as the Dhimmi, since you hold that a Muslim would be liable to retaliation for offenses against a Dhimmi, whether for murder or other matters?

763. He replied: (The mustamin) does not enjoy the status of the Dhimmi because he is an enemy person. Do you think that I apply to him (Muslim) rulings and hudud penalties? So any offense committed against him by a Dhimmi or a Muslim, such as cutting off the hand or killing, whether intentional or accidental, would not be punished under lex talionis but would be liable to the diya for (the killing) whether intentional or accidental to the extent of the diya paid for the murder of a free Muslim. (Abu Yusuf, expressing the Hanafi doctrine, says that the mustamin who enters the dar al-Islam is not to be treated as a Dhimmi (Abu Yusuf, Kitab al-Kharaj, p.189)

764. I asked: If a Muslim entered into a transaction with a harbi involving usury (riba), wine, or corpses (dead animals), do you think that such a transaction would be rejected as null and void?

765. He replied: Yes, if it took place in the dar al-Islam. If it were in the dar al-harb, it should not be regarded as null and void, according to the opinions of Abu Hanifa and Muhammad (b. al-Hassan). (Ibid.; Tabari, Kitab Ikhtilaf, p.56; cf. Awzai and Shafii, in Tabari, Kitab Ikhtilaf, p.54-55.)

766. I asked: Why? You have said that if a Muslim enters the dar al-harb, it would be permissible for him to sell corpses and take 2 dirhams in exchange for 1.

767. He replied: Yes, it would be quite all right to do so in their land, but no- as in the former situation- in the dar al-Islam, where Muslim rulings are binding on them and where it would not be lawful to do save what is lawful among Muslims. If (on the other hand) the Muslim were in the dar al-harb under an aman, it would be lawful for him to acquire property from them in accordance (with their law) by their own consent, since Muslim rulings would not be binding on them there. This is the opinion of Abu Hanifa and Muhammad (b. al-Hasan). However, Abu Yusuf held that he would not approve of (a Muslim being involved in) a transaction in the dar al-harb involving riba, wine, or dead animals, and that he rejects it. But God knows best! (Abu Yusuf, Kitab al-Kharaj, pp.188-89)

The Tithe Duties Imposed on the Inhabitants of the Territory of War

768. I asked: If a mustamin from the inhabitants of the territory of war entered the dar al-Islam under an aman and paid the tithe to the tithe collector, but then returned to the dar al-harb and stayed (only) a few days there and entered (the dar al-Islam) again under an aman, do you think that the tithe collector should collect the tithe for a second time?

769. He replied: Yes. (Ibid., p. 133)

770. I asked: Why?

771. He replied: Because when he returned to the dar al-harb Muslim jurisdiction ceased to apply to him, so if he came again (to the dar al-Islam) he would have to pay the tithe again since his prior payment would not be counted because Muslim jurisdiction had been interrupted.

772. I asked : Should the tithe be collected each time (the mustamin) comes to us?

773. He replied: Yes.

774. I asked: If the authorities of his land collect from Muslim merchants a duty of one-fifth?

775. He replied: In that case, I should collect a duty of one-fifth from them also.

776. I asked: Should the customs collector examine how much the authorities of the (mustamin's) land collect from Muslim merchants and then collect from their (merchants) similar duties?

777. He replied: Yes. I should collect from each one (who enters the dar al-Islam) what his authorities collect from Muslim merchants: if they collect more than the tithe, I should collect more; if they collect less, I should collect less. It should be collected from them as much as they collect from Muslim merchants. (Ibid., pp. 133-35)

778. I asked: If one of the (unbelievers) children or mukatabs, or slaves or women came before the Muslim tithe collector and (it is known that) they collect duties from Muslim merchants even if they were women, mukatabs, and others, do you think that we should also collect from them?

779. He replied: Yes.

780. I asked: If they do not collect (duties) from those that I have mentioned?

781. He replied: I should not collect from them either, but if they do, I should do so also. (Sarakhsi, Kitab Sharh al-Siyar al-Kabir (Hyderabad)IV p.67)

782. I asked: If a harbi enters (the dar al-Islam) carrying with him (merchandise worth) less than 200 dirhams, do you think that we should collect anything from him?

783. He replied: No. (Abu Yusuf, Kitab al-Kharaj, p.133)

784. I asked: If (the authorities of the dar al-harb) collect duties from Muslim merchants carrying (merchandise worth) less than 200 dirhams, should we also collect from them?

785. He replied: Yes. If they collect (duty for merchandise worth) less than 200 dirhams, I should collect from them on the same basis.

786. I asked: What would you think if one of their men enters (the dar al-Islam) with camels, cattle, sheep, or cloth material and claims that he owes (them as) a debt, or that they are not for trade?

787. He replied: No attention should be paid to what he says; the tithe should be collected on whatever he has with him.

788. I asked: What would you think about any slaves that he might have with him?

789. He replied: I should collect the tithe on them also.

790. I asked: If he says that one of them was his father or his mother, or the slave-mother of one of his children, should the tithe be collected on them?

791. He replied: No.

792. I asked: If you do not know how much duty the authorities of the land of the man (who enters the dar al-Islam) levy on the property of Muslim merchants, what would you think you should collect?

793. He replied: If I do not know how much they collect from our merchants, I should collect the tithe.

794. I asked: Has any narrative come to your knowledge (on the subject)?

795. He replied: Yes. It has been related to us that (the Caliph) `Umar b. al-Khattab once asked how much the authorities of the territory of war collected from Muslim merchants, and he was told that they collected the tithe. Thereupon `Umar decreed that merchants (from the dar al-harb) should pay the tithe. (Ibid., p.135)

796. I asked: Have you heard any narrative concerning your opinion that no kura or weapons should be exported (to the dar al-harb)?

797. He replied: Yes. Muhammad b. al-Hasan said that Abu Hanifa related to us from Hammad (b. Sulayman) from Ibrahim (al- Nakhi) who said, "It is (lawful) to export to them (the inhabitants of the dar al-harb) everything except the kura, weapons, and slaves". But Ibrahim said that he preferred that nothing should be exported (to the dar al-harb). (Abu Yusuf, Kitab al-Athar, p.195)

The Mustamin's Umm Walad, Mudabbar, Wife, and Freedmen (Who Enter the Dar al-Islam)

798. I asked: If a harbi enters the dar al-Islam under an aman with an umm walad of his who (the umm walad) later becomes a Muslim, what do you think would be her status?

799. He replied: She should endeavour to (earn and) repay her value to her master and gain her freedom. (Tabari, Kitab Ikhtilaf, pp. 57-58; Shafii, Umm, Vol., IV, p. 191)

800. I asked: What would you think if (the master) made one of his slaves a mudabbar in the dar al-Islam and the slave accepted Islam?

801. He replied: He and the umm walad should be treated alike; the mudabbar should endeavor to repay his value and become free.

802. I asked: What would you think if the master made the slave a mudabbar in the dar al-harb and thereafter entered the dar al-Islam along with this slave and the slave accepted Islam?

803. He replied: In this case the master would be obliged to sell him. However, this situation is different from the previous one, because the master's making the slave a mudabbar was null and void. It will not be taken into consideration if it was done in the dar al-harb. (Tabari, Kitab Ikhtilaf, p.58)

804. I asked: If the mustamin-the master- himself became a Muslim in all the (different) situations previously mentioned either before or after (his slaves) accepted Islam, do you think that he would be obliged to sell any of them or that any of them would be required to earn enough to purchase his freedom?

805. He replied: No. Their status vis-a-vis their (master) would remain as it was before (the owner had become a Muslim).

806. I asked: If (the owner) became a Muslim after the judge decided that his umm walad and his mudabbar should be required to earn and purchase their freedom and they either had paid in part or had not paid anything?

807. He replied: They (the slaves) should continue to pay the installments until they obtain their freedom; he (the master) can no longer turn them into ordinary slaves once the judge passes his judgement; but if they are unable to earn and reply, they revert to their status of slavery as before.

808. I asked: If the mukatab became a Muslim and the master did not, what do you think would be the status (of the mukatab)?

809. He replied: The mukatab will continue to be a mukatab; if he pays his value, he becomes free; if he fails to pay, he reverts to slavery and his master is obliged to sell him.

810. I asked: If the Umm Walad, the mudabbar, or the mukatab or a Dhimmi accepted Islam, would the situation be the same as in the case of the herbi?

811. He replied: Yes. (Ibid)

812. I asked: If a slave became a Muslim in the dar al-harb and entered the dar al-Islam leaving his master in the dar al- harb, do you think that the slave would become free?

813. He replied: Yes.

814. I asked: If the master entered the dar al-Islam before his slave and became a Muslim, and thereafter the slave followed him?

815. He replied: He would remain in slavery and would not become free.

816. I asked: If the owner, accompanied by other slaves, entered (the dar al_islam) after the said slave for trade and thereafter became a Muslim, what would be the status of the slave?

817. He replied: The slave would remain (the property of) the owner.

818. I asked: If the owner entered the dar al-Islam, but did not become a Muslim, what do you think would be the status of the slave?

819. He replied: I should compel the owner to sell the slave.

820. I asked: If his umm walad became a Muslim and entered dar al-Islam, would she likewise enjoy the status of a freed woman?

821. He replied: Yes.

822. I asked: Would she have the right to get married at once, if she wished to?

823. He replied: (If she were pregnant, she would) not until she were delivered. (Abu Yusuf, Kitab al-Radd, pp.98-99)

824. I asked: Would she have to observe the idda (waiting period)?

825. He replied: No. (Awzai and Shafii held that she would not be lawful until the expiration of the waiting period (idda). See Shafii, Umm, Vol. VII, p.326)

826. I asked: If she were pregnant by her owner and she got married?

827. He replied: The marriage would be void. Abu Yusuf and Muhammad (b. al-Hasan) held that the umm walad would have to observe the idda, that she would have to wait three menstrual periods, if she were not pregnant.

828. I asked: If she married before the expiration of the idda?

829. He replied: We should invalidate the marriage. (According to Hanafi doctrine she should first be delivered before marriage. Shafii held that clearance would be established after one menstrual period. Shafii, Umm, Vol. VII. p. 326)

The Woman of the Inhabitants of (the Territory of) War Who Becomes a Muslim and Enters the territory of Islam

830. I asked: If a woman from the inhabitants of the territory of war become a Muslim and thereafter entered the dar al-Islam, leaving her husband behind, do you think that she would have the right to get married immediately?

831. He replied: Yes. (Abu Yusuf, Kitab al-Radd, pp. 99-100. Awza'i and Shafi'i held that she could not be lawful for remarriage before the expiration of the 'idda. See Shafi'i, Umm, Vol. VII, pp. 326-27.)

832. I asked: Should she not observe the 'idda?

833. He replied: No. Do you not think that if her husband divorced her, the divorce would not be effective? (Abu Yusuf, Kitab al-Radd, pp. 99-100. Cf. Shafi'i, Umm, Vol. VII, p.327.)

However, Abu Yusuf and Muhammad (b. al-Hasan) held that she as well as the umm walad should observe the 'idda; each should wait for three menstrual periods. If she married before the expiration of the 'idda, the marriage would be void. The same ruling should apply if she were pregnant: the marriage would be invalid so long as she were not delivered. (Abu Yusuf, Kitba al- Radd, pp. 100-2; Tahawi, Mukhtasar, p. 289.)

834. I asked: If she were pregnant and got married?

835. He replied: The marriage would be invalid; she has no right to get married until she is delivered. (Abu Yusuf, Kitab al-Radd, p. 103; Shafi'i, Umm, Vol. VII, p. 327.)

836. I asked: If her husband became a Muslim and entered (the dar al-Islam) after her either before or after she got married?

837. He replied: In either case he would have no claim against her, because the wedlock between them was dissolved when she entered the dar al-Islam.

838. I asked: If the husband become a Muslim before her and entered the dar al-Islam, would the wedlock between them continue?

839. He replied: No. Nor would she have to observe the 'idda. (Abu Yusuf, Kitab al-Radd, p. 103; Shafi'i, Umm, VII, p. 328.)

840. I asked: Would her husband have the right to marry four (woman) other than her?

841. He replied: Yes.

842. I asked: Would he have the right to marry her sister, if he so wished? 843. He replied: Yes.

844. I asked: Why is this so?

845. He replied: When the husband become a Muslim and entered the dar al-Islam, the wedlock between them was dissolved, because Muslim rulings are not binding in the dar al-harb. Do you not think that if the husband divorced her, the divorce would not be effective, and if he pronounced the ila' (The husband's oath of abstinence from intercourse with his wife. See Tahawi, Mukhtasar, p. 207; Kasani, Bada'i; al-Sana'i, Vol. III, p. 170.) or zihar, (Repudiation of the wife by the husband by saying to her: "You are for me as untouchable as the back (i.e., the body) of my mother." See Q. LVIII, 3-4; Tahawi, Mukhtasar, p. 212; Kasani, Bada'i' al-Sana'i' Vol. III, p. 229.) these would not be binding on her?

846. I asked: Why do you hold that his ila' and zihar would not be binding on her, though she become a Muslim and entered the dar al-Islam?

847. He replied: Because the wedlock between them had been dissolved when he left her behind in the dar al-harb, where Muslim jurisdiction is not operative. so his pronouncements of divorce and zihar would not be binding on her, unless he remarried her for the future.

848. I asked: What would you think if a harbi accompanied by his wife entered the dar al-Islam under an aman and they stayed in the dar al-Islam as two musta'mins, and if one of them became (first) a Muslim and the other did so a day later?

849. He replied: Their marriage would remain valid.

850. I asked: If they were in the dar al-harb and one of them became a Muslim a day or a month before the other?

851. He replied: Their marriage would remain valid.

852. I asked: If the woman became a Muslim, how much time would have to pass before the marriage was broken?

853. He replied: If the woman became a Muslim and three menstrual periods passed before her husband became a Muslim, the wedlock would no longer exist between them.(Shafi' hold the marriage valid if the husband becomes a Muslim, regardless of the expiration of the 'idda. See Shafi'i,Umm, Vol.IV,p.185.

854. I asked: Would the same hold true if the husband became a Muslim and three menstrual periods passed before she became a Muslim?

855. He replied: Yes, unless his wife were a scriptuary, for then the marriage remains valid as long as the husband does not depart from the al-harb and leave her behind.

856. I asked: Would the case be the same regardless whether or not he had consummated his marriage with her?

857. He replied: Yes.

858. I asked: If a man from the inhabitants of the territory of war either pronounced the threefold divorce against his wife or died, after which she became a Muslim and entered the dar al-Islam, do you think that she would be under the obligation to observe the 'idda?

859. He replied: No.

860. I asked: Why?

861. He replied: Because the woman who has a husband and enters [the dar al-Islam] would be in a more difficult situation than [the woman who has no husband] and she [the former] is under no obligation to observe the 'idda. Neither one would be under the obligation of the 'idda because Muslim jurisdiction is not operative in the dar al-harb. (Cf. *ibid.*)

862. I asked: If a man and his wife from among the inhabitants of the territory of war became Muslims, but were married without witness, do you think that they should be separated?

863. He replied: No, their marriage would subsist.

864. I asked: Why, since such a marriage is invalid?

865. He replied: Because such a marriage was lawful among them. If I were to declare this and similar marriages invalid, I should also have to declare the marriage invalid even if it had taken place in the presence of witnesses, because it is unlawful for a Muslim to marry an unbelieving woman unless she is a scripturary. For if I were to declare valid or invalid for them all that is respectively valid or invalid for Muslims, none of their marriages would be valid, even if they were made in the presence of witnesses. Such marriages are not lawful [to Muslims], but we accept whatever is regarded as marriage according to their religion. (Abu Yusuf, *Kitab al-Radd*, pp. 103-7; Shafi', *Umm*, Vol. VII, p. 328.)

866. I asked: If [the harbi] married a woman who was still observing the 'idda after the death of her husband or her divorce and both became Muslims, would she be regarded as his wife and would their marriage be lawful?

867. He replied: Yes.

868. I asked: If he divorced his wife with three pronouncements, and thereafter remarried her and both became Muslims, do you think that they should be separated?

869. He replied: Yes.

870. I asked: Why?

871. He replied: Because she would not be lawful for him unless [in the meantime] she had married another man [and then divorced] (See Q. II, 230.)

872. I asked: Why is this case different from the former?

873. He replied: In the former case she would not be unlawful to him unless she were a Muslim married to a Muslim and observing the 'idda, whereas in the present case she would be permanently unlawful to him until she had married another man [and had thereafter been divorced], just as if a man's wife had died after their marriage had been consummated and he married her mother or her daughter [from an earlier marriage]; they would have to be separated, because either one [the mother or daughter of the former wife] would be unlawful to him in any case.

874. I asked: What would you think if a man from the inhabitants of the territory of war were married to five wives in one or more marriage contracts and thereafter he and they became Muslims?

875. He replied: If [the five wives] were married [to him] by one contract, all should be separated from him; if they were married in more than one marriage contract, the marriage of the first four wives would be lawful and valid, but the marriage to the fifth would be unlawful and she should be separated from him. (Abu Yusuf, kitab al-Radd, p. 103. Awzai and shafi' held that only the fifth (or more) would be divorced in any case. See Shafi'i, Umm, Vol VII, p. 328.)

876. I asked: Would the same hold true if he married two sisters in one marriage contract or in two different ones?

877. He replied: Yes.

878. I asked: Is it, therefore, your opinion that if he married a woman and her daughter in one marriage contract they should be separated from him; but that if he married them in two separate marriages, the one he married first would be his wife and the other one should be separated from him?

879. [He replied: Yes] (Abu Yusuf, Kitab al-Radd, p. 105; Shafi'i, Umm, Vol. IV, p. 187.)

880. I asked: If he had consummated the marriage in both marriage contracts?

881. He replied: He should be separated from both of them.

882. I asked: If he had married a woman and her sister's daughter either in one or in two separate marriage contracts and the marriage was either consummated or not consummated?

883. He replied: Their situation would be the same as that of the two sisters in the case mentioned before. (Sarakhsi, Mabsut, Vol. V, p. 53; Tahawi, Mukhtasar, p. 180.)

884. I asked: If he had unlawful intercourse with a woman or kissed her or touched her lustfully or saw her naked (In arabic MSS; Farj (vulva). The general sense being that if the man sees a private area of the woman's body when she is naked. See Shafi'i's Risala, pp. 349, 351-

52(Khadduris's translation, pp. 176- 77).and then married her mother and her daughter and thereafter all became Muslims?

885. He replied: He should be separated from both, because neither one would be lawful to him in any case.

886. I asked: If a man [from the inhabitants of the daral-harb] married a woman of them for whom he had paid a bride-price consisting of a corpse,blood,swine,or wine,and after their marriage was consummated they became Muslims and entered the dar al-Islam, what do you think would be marital status and the bride-price?

887. He replied: The marriage would be regarded as valid and he would have to pay no [further] bride-price; whatever he had given her would be valid and binding.

888. I asked: Why?

889. He replied: Because they had come to an agreement on something in the dar al-harb and he had given it to her, so she has no further right.

890. I asked: What would you think if he married her without specifying a bride-price at all-a marriage which is lawful in accordance with their religion-and the marriage was consummated, but they became Muslims and entered the dar al-Islam?

891. He replied: The marriage would be regarded as valid and he would have to pay no bride-price.

892. I asked: If he married her on the basis of a specified bride-price and thereafter both became Muslims and entered the dar al-Islam, would she be entitled to demand the bride-price from him.

893. He replied: Yes.

894. I asked: If a woman from the inhabitants of the territory of war married a man while she had another husband, and she and her second husband entered the dar al-Islam and became Muslims, do you think that their marriage would be valid?

895. He replied: No.

896. I asked: Why?

897. He replied: Because (the second husband) married her while she had another husband. It is not lawful in any circumstance for a man to marry a woman who has another husband.

898. I asked: If he made a future marriage contract with her (to be effective) in the dar al-Islam, would such a marriage be lawful for the future?

899. He replied: Yes.

900. I asked: If a man from the inhabitants of the territory of war entered the dar al-Islam under an aman and settled there and became a Dhimmi, while his wife remained in the dar al-harb, what do you think would be the status of his wife?

901. He replied: The wedlock would have been dissolved when the man became a Dhimmi.

902. I asked: Would the situation be the same if a woman entered the dar al-Islam under an aman and settled there, leaving her husband behind, and became a Dhimmi?

903. He replied: Yes, indeed.

Abu Yusuf and Muhammad (b. al-Hasan) held that if a woman from the inhabitants of the territory of war becomes a Muslim and enters the dar al-Islam, leaving her husband behind, and she is not pregnant, she cannot marry until she waits for three menstrual periods and the expiration of the 'idda. If she marries before that, her marriage would be vicious. Such a woman should not be considered the same as a prisoner of war. If a harbi married to four wives were taken as a prisoner of war, the marital state between him and them would cease to exist; if two of the wives died before his capture, his marriage to the other two would be regarded as valid, according to Abut Hanifa. (Tahawi, Mukhtasar, pp. 178-82.)

Muslims Entering the Dar al-Harb under an Aman for Trade

904. I asked: What would you think if a Muslim entered the territory of war under an aman and becomes married to a scripturary woman from among the inhabitants of that territory?

905. He replied: I should disapprove his doing so.

906. I asked: But if he married, would such a marriage be valid?

907. He replied: Yes. (Shaybani, al-Jami' al-Saghir, p. 92.)

908. I asked: Then, why did you disapprove of that?

909. He replied: Because I disapprove of his living in it. (Abu Yusuf, Kitba al-Radd, p. 116; Shafi'i, Umm, Vol. IV, p.181.)

910. I asked: Do you disapprove of (eating) animals slaughtered by the People of the Book (scripturaries)?

911. He replied: It is all right to do so if they are People of the Book. For God, the Most High, made lawful the animals slaughtered by the People of the Book. (See Q.V,8.) It has been related to us that (the Caliph) 'Ali b. Abi Talib was once asked about marriage with scripturaries of the territory of war, and he disapproved of it; but when asked about animals slaughtered by them, he saw nothing wrong (in eating them.). (Sarakshi, Kitab Sharh al-Siwar al-Kabir (Hyderabad), Vol. I, p. 101.)

912. I asked: Do you hold, then that if (the inhabitants of the territory of war) are not scripturaries, it is not lawful (for a Muslim) to eat animals slaughtered by them and to marry their woman?

913. He replied: Yes, it is not lawful for him to do so. (Abu Yusuf, Kitab al-Radd, p. 116; Shari'i, Umm, Vol. IV, pp. 186- 87.)

914. I asked: If he purchased a slave woman of their religion, would it be lawful for him to have intercourse with her?

915. He replied: No.

916. I asked: If he took her back with him to the dar al-Islam and she was nubile but young and had not yet known anything (of her religion) and had not declared her admission to it, could he have intercourse with her?

917. He replied: Yes, if he so wishes.

918. I asked: Should he perform the (funeral) prayer, if she were to die?

919. He replied: Yes.

920. I asked: Would an animal slaughtered by her be lawful to eat?

921. He replied: Yes.

922. I asked: If a Muslim married a scripturary woman from among the inhabitants of the territory of war and she bore him a child, but the Muslims captured her and her child when she was pregnant, what do you think would be the status of her, her child, and her unborn child?

923. He replied: Her children would be regarded as free Muslims and nothing would be done against them, but the woman and her unborn child would become fay' because the unborn child possesses the same status as its mother.

924. I asked: What would you think if a man entered the dar al- Islam as a Muslim, leaving his Christian wife behind in the dar al-harb?

925. He replied: Her wedlock would be dissolved (from the moment) he entered the dar al-Islam.

926. I asked: Would his divorce of her, or his ila', or his zihar not be effective on her?

927. He replied: No.

928. I asked: If she came to the dar al-Islam for trade, would her husband (lawfully) have intercourse with her on the strength of (the previous) marriage?

929. He replied: No.

930. I asked: If, when he married her in the dar al-harb, she was a scripturary and he was a Muslim and she kept her religion (and her husband came later to the dar al-Islam), would their marriage remain valid?

931. He replied: Yes.

932. I asked: Would the same hold true if they were residing in the dar al-harb and its inhabitants made peace (with the Muslims) and because Dhimmis?

933. He replied: Yes. (Shafi'i, Umm, Vol. IV, p. 183.)

Slaves Purchased by Muslims in the Territory of War

934. I asked: If a Muslim purchased slaves, houses, or land in the territory of war, what would the status of these things be if the Muslims took possession of them?

935. He replied: The land and the house would become fay' for the Muslims, but the movable property and the slaves would remain his. (Shaybani, al-Jami' al-Saghir, p. 91.)

936. I asked: Would the same hold true of anything that may have been given him as a gift or purchased by him?

937. He replied: Yes.

938. I asked: Why are the houses and lands treated differently from the slaves and the movable property?

939. He replied: Because he is able to move the slaves and the property to the dar al-Islam, whereas he cannot move the house and the land.

940. I asked: If a Muslim entered the dar al-harb and deposited his property with a man of that territory or with a Dhimmi, but then it was captured by the Muslims, do you think the Muslims would have to return the property to its owner?

941. He replied: Yes.

942. I asked: If the property were divided among them, do you think that (the owner) would have the right to take it back without paying the value for it?

943. He replied: Yes.

944. I asked: Why?

945. He replied: Because it was the property of a Muslim which the unbelievers (had captured but) had not yet taken to a place of security.
946. I asked: If the unbelievers killed that Muslim while he was in their territory and seized his property, after which the Muslims captured them and the property and the (deceased's) heirs found the property before it was divided?
947. He replied: They (the heirs) would have first claim on it.
948. I asked: If the property had already been divided up?
949. He replied: If it were gold and silver, the heirs would have no claim to it; otherwise, they would have first claim on it (and could take it back) by paying the value for it, if they so wished.
950. I asked: Why would they have to get back in the latter situation by paying the value for it, while in the former case they would not have to pay the value?
951. He replied: Because in the latter situation the unbelievers had placed the property in security when they killed its owner; in the former, they had not placed it in security (by taking possession of it).
952. I said: If the unbelievers, when they killed the Muslim, themselves became Muslims or entered into a peace agreement (with the Muslims) and became Dhimmi, do you think that they would be liable for the (Muslim's) blood or property?
953. He replied: No. (Abu Yusuf, Kitab al-Radd, p. 107. Awza'i and Shafi'i held that all the property and slaves remain in the possession of the Muslim. See Shafi'i, Umm, Vol. VII, p. 329.)
954. I asked: Why?
955. He replied: Because they captured it in the dar al-harb.
956. I asked: If (a Muslim) who entered the territory of war under an aman killed one of their men or seized some property or slaves and took it to the dar al-Islam, and thereafter the inhabitants of the territory of war became Muslims or Dhimmi, would you return to them and of the property which (the Muslim) had taken, or would he be held liable for the property or the blood-money (of the unbelievers whom he killed)?
957. He replied: No. (Shafi'i, Umm, Vol. VII, p. 329.)
958. I asked: Why?
959. He replied: Because (the Muslims) did it in the dar al-harb, where Muslim jurisdiction was not operative.

960. I asked: Would you disapprove of (the Muslim's) committing such acts?

961. He replied: Yes, on the ground of his religion, I disapprove of his dealing treacherously with them.

962. I asked: If he dealt treacherously with them and acquired property and slaves which he carried to the dar al-Islam and a Muslim purchased some of the slaves from him, do you think that this would be permissible?

963. He replied: Yes, all of that would be permissible. (Tabari, Kitab Ikhtilaf, p. 62.)

964. I asked: Would you disapprove of a man's purchasing some of those things, if he knew that the other (man) had committed treachery (against the enemy) and had acquired the property treacherously?

965. He replied: Yes, I should disapprove of that for him. But if (someone) purchased them, I should regard it as permissible; but if he purchased (a slave woman), I should disapprove of the purchaser's intercourse with her.

966. I asked: If (the Muslim) who entered (the dar al-harb) under an aman was therein when its inhabitants captured prisoners from another (enemy) of the rterritory of war, do you think that it would be lawful for him to purchase some of those captives?

967. He replied: Yes.

968. I asked: Similarly, if (some of) the inhabitants of the territory in which he was residing had been taken as captives (by some enemy of theirs), would it be permissible for him to purchase some of them?

969. He replied: Yes.

970. I asked: ("Similarly" omitted.) If the Muslims entered into a peace treaty with some of the inhabitants of the territory of war and these were attacked by some persons of (another territory of) war who took captives with them, would it be lawful for that Muslim to purchase any of these captives?

971. He replied: Yes.

972. I asked: I f the captors were a group of Muslims who had treacherously attacked the people with whom (the Muslims) had entered into a peace treaty, would it be lawful for the Muslims to purchase any of the captives?

973. He replied: They should not purchase any of them, and if they did I would order them to send them back. This situation would be different from that in which (a single Muslim) entered (the dar al-harb) under an aman (and acted treacherously).

974. I asked: Why?

975. He replied: Because those (in treaty relations with the Muslims) were enjoying an aman and (Muslims) should never attack them treacherously. For a narrative has been related to us from the Apostle of God, in which he said: "The one lowest in status can bind others if he gives a pledge (of security)." (See note 6, above.) If (the inhabitants of the dar al-harb) were attacked by others of the territory of war, their captives would be in the hands of people with whom there was not peace treaty (with Muslims). If those (in peace agreement with the Muslims) were attacked (by their enemy) and captives were taken from them, there would be no harm (if the Muslims purchased their slaves.) (Tabari, Kitab Ikhtilaf, pp. 62-63.)

Muslims as Musta'mins in the Dar al-Harb

976. I asked: If some Muslims were in the dar al-harb under an aman and that territory were attacked by (some) people of another territory of war, do you think that it would be lawful for those Muslims to fight on their side?

977. He replied: No.

978. I asked: Why?

979. He replied: Because the jurisdiction of the unbelievers prevail there and the Muslims cannot enforce Muslim rulings.

980. I asked: If the Muslims were fearful of their own persons from the enemy, should they fight in defense of themselves?

981. He replied: If the situation were thus, there would be no harm to fight in defense of themselves.

982. I asked: If the inhabitants of the territory of war, among whom there were Muslims under an aman, attacked the dar al-Islam and captured much property and some captives from among free Muslims whom they took over to the dar al-harb, and if they passed by the Muslims who were in that territory under an aman, do you think that those Muslims should denounce their pledge of security (aman) and fight to free the children and women of the Muslims?

982a. He replied: Yes. They would have no choice to do otherwise, if they were able to fight.

983. I asked: If a group of Kharijis conquered one of the Muslim cities and ruled it in accordance with (their doctrine of) the untruth, but thereafter they were attacked by some unbelievers who captured some woman and children of those Kharijis and carried them over to the dar al-harb, do you think that the Muslims in the dar al-harb under an aman should denounce their pledge of security and fight to liberate those women and children?

983a. He replied: Yes.

984. I asked: If there was a group of non-Kharaji Muslims in the city (which was in the hands of the Kharijis) when it was attacked by the inhabitants of the territory of war, would it be incumbent upon the Muslims to fight alongside the Kharijis in defense of the Muslim community and its inviolable territory?

984a. He replied: Yes. They would have no choice to do otherwise.(Shaybani, al-Jami' al-Saghir, p.90.)

Chapter VII

(ON APOSTASY)

General Rules (Literally: "Rulings concerning apostasy from Islam.")

985. I asked: If a Muslim apostatizes (irtadda) (Literally: "Irtadda" means reverted, but legally it applies to Muslims who revert to polytheism or adopt any other religion. See Baghdadi, Kitab Usul al-Din (Istanbul, 1928), Vol. I, pp. 328-29; Shafi'i, Umm, Vol. VI, p. 145; Kasani, Bada'i al-Sana'i, Vol. VII, p. 134; Samuel Zwemer, Law of Apostasy in Islam (London, 1924), Chap. 2; Khadduri, War and Peace in the Law of Islam, pp. 149-52.) from Islam, what do you think would be the ruling concerning him?

986. He replied: Islam would be offered to him; he has either to accept it or be killed at once, unless he asked for deferment. This would be given him and its (maximum) duration would be three days. (Abu Yusuf, Kitab al-Kharaj, pp. 179, 180; Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, p 162; Kasani, Bada'i al-Sana'i, Vol. VII, pp. 134, 135. Malik and Shafi'i, however, held that the apostate should not be executed before being given three days of grace to afford him time to repent. See Malik, Muwatt', Vol. II, p. 737; Shafi'i, Umm, Vol. VI, pp. 145,156-57.)

987. I asked: Has any narrative come to your knowledge about this matter?

988. He replied: Yes, It has been related to us from the Prophet (a Tradition) to this effect as well as (narratives) from (the Caliph) 'Ali b. Abi Talib, 'Abd-Allah b. Mas'ud, and Mu'adh b. Jabal. Thus, this ruling is based on the sunna. (While Quranic injunctions do not specifically state the punishment for apostasy should be death (See Q. II, 214; V, 59; XVI, 108), only one, which states: "why are ye two parties on the subject of the hypocrites... If they turn back, then seize them, and slay them wherever ye find them..." (Q. IV, 90-91) refers generally to those who revert and oppose Islam, not necessarily as reversion from the Islamic religion. The practice of the Prophet Muhammad, as shown in the Hudaibiya to return to Makka and join the polytheists were allowed to do so (see translation, p. 504.) However, Tradition have been later ascribed to the Prophet ordering the execution of apostates. For the narratives on the authorities of 'Ali b. Abi Talib, 'Abd-Allah b. Mas'ud, and Mu'adh b. Jabal, see Abu Yusuf, Kitab al-Kharaj, p. 179; for other authorities, see Abu Dawud, Sunan, Vol. II, p. 848.)

989. I asked: If (the apostate) refused to become a Muslim and the Imam ordered his execution, would his estate be divide among his heirs in accordance with God's commands (concerning the distribution of inheritance)? (Q. IV, 12-15.)

990. He replied: Yes. (Abu Yusuf ascribes such a practice to Caliph 'Umar, but Sarakshi, follows Shaybani. See Abu Yusuf, Kitab al-Kharaj, pp. 111-12; Sarakshi, Mabsut, Vol. X, p. 100; Kasani, Bada'i al-Sana'i, Vol. VII, p. 138. Shafi'i held that the apostate's estate should become fay' and taken over by the state on the strength of the Tradition that a believer cannot inherit from an unbeliever and vice versa. See Shafi'i, Umm, Vol. VI, pp. 151-52.)

991. I asked: Has any narrative come to your knowledge concerning this matter?

992. He replied: Yes. It has been related to us from (the Caliph) 'Ali b. Abi Talib that he ordered the execution of an apostate and he divided his estate among his heirs in accordance with God's commands. It has also been related to us similar (narratives) from (the Caliph) 'Ali and 'Abd-Allah b. Mas'ud. (Abu Yusuf, Kitab al-Kharaj, p. 111; Sarakshi, Kitab Sharh al- Siyar al-Kabir (Hyderabad), Vol. X, p. 100; Kasani, Bada'i al- Sana'i, Vol. VII, p.138.)

993. I asked: If a man who apostatizes from Islam while he is still in the territory (of Islam) and has not (yet) been executed, would his estate be divided among his heirs?

994. He replied: No. (Sarakshi, Mabsut, Vol. X, p. 101.)

995. I asked: If he had gone over to the territory of war and the matter was reffered to the Imam, would his estate be divided among his heirs?

996. He replied: Yes. (Abu Yusuf, Kitab al-Kharaj, p. 181; Tahawi, Mukhtasar, p. 258; cf. Kasani, Bada'i al-Sana'i', Vol. VII, p. 138. Shafi'i held that the estate should be held in custody until the apostate's ultimate end is known, whether he died in the territory of war or returned to the territory of Islam and repented. If he dies in the territory of war the estate becomes fray'; if he returns to the territory of Islam and repents, his estate should be returned to him. See Shafi'i, Umm, Vol. VI, p. 151.)

997. I asked: Would you regard (his escape) as equivalent to his death?

998. He replied: Yes. (Ab Yusuf, Kitab al-Kharaj, p. 181; Sarakshi, Mabstut, Vol. X, p. 103.)

999. I asked: If (the apostate) who went over to the dar al-harb was indebted and left behind mudabbars and umm walads, and the matter was referred to the Imam?

1000. He replied: The umm walads and mudabbars would be set free (and their prices) deducted from one-third of the estate and the debt would be paid from the residue. (This is on the ground that a will is valid for up to one third of the deceased's estate and has priority over debts. The umm walad and the mudabbars would become immeditately free after their master's death. Their manumission takes place in consequence of the will.) If the estate is not enough to pay for the debt, the mudabbars would have to earn and pay the balance of the debt up to two-thirds (of their value). (Abu Yusuf, Kitab al-Kharaj, pp. 181, 182; Kasani, Bada'il al-Sana'i', Vol. VII, pp. 139-39;l cf. Shafi'i, Umm, Vol. VI, p. 151.)

1001. I asked: If (the apostate) was indebted and (the debt) should be paid at a fixed term, would it have to be paid at once?

1002. He replied: Yes. (Tahawi, Mukhtasar, p. 258. Shafi'i agreed in principle that the debt should be paid, but held that it should be paid at its specified term. See Shafi'i, Umm, Vol. VI, p. 154.)

1003. I asked: If (the apostate) had made a testament (a will) while he was still a Muslim before he apostatized, would it be executed?

1004. He replied: No, I would not execute it. (Abu Yusuf, Kitab al-Kharaj, p. 181; cf. Tahawi, Mukhtasar, p. 258.)

1005. I asked: Why is the ruling concerning the will different from that of tadbir (for the manumission of slaves)?

1006. He replied: Just as one is entitled to rescind one's own will, so apostasy to me is equivalent to rescission. Do you not think that (the apostate) no longer possesses his estate if he apostatizes and can no longer withdraw the tadbir (of his slaves)? (Sarakshi, Mabsut, Vol. X, p. 103.)

1007. I asked: Would you allow his wife to inherit from (the apostate's estate)?

1008. He replied: If he were executed or went over to the dar al-harb while the wife was during the 'idda (the threemonth waiting period), I would allow her to inherit from him; but if he were executed after the expiration of the 'idda, I would not allow her to inherit anything from him. (Abu Yusuf, Kitab al-Kharaj, p. 181; Sarakshi, Mabsut, Vol. X, p. 103.)

1009. I asked: If (the apostate's) marriage was not consummated, would she have no right of inheritance and be under no 'idda (obligation)?

1010. He replied: That is right. (In MS: "Yes" because in Arabic it is used to confirm the negative answer stated in the question. See Abu Yusuf, Kitab al-Kharaj, p. 181.)

1011. I asked: Why is (the status of) the woman during the 'idda different from the one whose waiting period has expired?

1012. He replied: It is lawful for (the woman) whose waiting period has expired to remarry. Do you not think that (such a woman) could remarry, if she so wishes? How could she, therefore, inherit from her first husband while she is the wife of another? But if she were during the waiting period she would inherit and she would not have the right to remarry until the expiration of that period. (Sarakshi, Mabsut, Vol. X, p. 103.)

1013. I asked: If an apostate who had gone over to the territory of war returned repenting, while the governor (during the apostate's absence) set free his umm walads and mudabbars, and

paid his debt and divided his estate among the heirs, do you think that he would be entitled to take back anything?

1014. He replied: Nothing would be given back to him save the inheritance; if anything were to be found intact in the hands of the heirs, he would recuperate it. (Abu Yusuf, Kitab al-Kharaj, p. 182; Sarakshi, Mabsut, Vol. X, pp. 103-4.)

1015. I asked: What would you think if the Imam did not set free the umm walads nor the mudabbars nor paid the debt (of the apostate) upon his return to the dar al-Islam from the dar al-harb and his repenting?

1016. He replied: The umm walads and the mudabbars remain in their status, the estate and the slaves would be returned to him, and the debt would have to be paid at its specified term. (Abu Yusuf, Kitab al-Kharaj, p. 182; Sarakshi, Mabsut, Vol. X, 9.104.)

1017. I asked: If a man apostatized and thereafter entered into sale-purchase transactions, gave a gift, set free a slave made a tadbir contract with a slave, made a contract with a slave woman (to be a mukataba), and later had sexual intercourse with her (who became pregnant and whose child he claimed as his), made a contract with a slave to be a mukatab or set him free against some monetary advantage, and thereafter he returned to Islam, do you think that all of these acts would be regarded as valid?

1018. He replied: Yes. (Not all that the apostate may do would be lawful. As indicated in paragraph 1003, the transactions, manumission of slaves, and gifts would be unlawful, but intercourse with a slave woman resulting in her giving birth to a child entitles the child to belong to the father and the slave woman to become an umm walad. See Saakshi, Mabsut, Vol. VI, p. 104; Kasani, Bada'i' al-Sana'i, Vol. VII, pp. 138-39. Cf. Shari'i, Umm, Vol. VI, p.155.)

1019. I asked: If (the apostate) were either executed or went over to the territory of war and his estate were divided, would his sale-purchase transactions, his manumission, his gifts, and his tadbir and mukataba arrangements (which were made during apostasy) be valid?

1020. He replied: None of these would be regarded as valid, except his claim to the child, which I would confirm. (Sarakshi, Mabsut, Vol. X, p.104.)

1021. I asked: Would you give the child the right of inheritance along with (other) heirs?

1022. He replied: Yes. (Ibid., p. 164; Shafi'i, Umm, Vol. VI, p. 153.)

1023. I asked: If the apostate has set free a slave and the (apostate's) only son also set free the same slave and the apostate was later executed, do you think that the manumission of the slave (by the apostate) or his son's manumission would be regarded as valid?

1024. He replied: Neither (one would be regarded as valid).

1025. I asked: Why?

1026. He replied: Because the son did not own (the slave) nor was the apostate's manumission lawful. Do you not think that if the son dies before his father's (execution) or before his father had gone over to the dar al-harb, the slave belongs to someone else? If (the apostate) became a Muslim, he (the slave) no longer belongs to (the son). Do you not think that (the son) has never been the owner (of the slave)? (Sarakshi, Mabsut, Vol. X, p. 106.)

1027. I asked: What would you think if the son died when he was in apostasy and thereafter the father was executed for his apostasy. To whom would the father's estate belong, if both the father and the son had freed slaves, provided that the son's freed slave was other than the freed slave of the father? (As a rule the father inherits from the son; but the father, having apostatized, would be precluded from inheritance.)

1028. He replied: The inheritance belongs to the father's freed slave; the son's freed slave would not be entitled to anything.

1029. I asked: If a man apostatized from Islam and earned some property during his apostasy, do you think that the heirs would be entitled to inherit that property?

1030. He replied: No, it would be regarded as fay', belonging to the state treasury.

1031. I asked: Why?

1032. He replied: Because he would earn it while in the state of apostasy, and the effusion of his blood would be lawful, just as (any person) from among the territory of war. However, Abu Yusuf and Muhammad (b. al-Hasan) held that whatever (the apostate) earns during apostasy would (also) be inherited by his heirs. They also held that the manumission of slaves during apostasy would be valid and that whatever (the apostate) may earn in the dar al-Islam would not be regarded as fay'. However, Muhammad (b. al-Hasan) held that any manumission of slaves or any sale- purchase transaction (made by the apostate) would be regarded as (acts) equivalent to one who is in a state of sickness. (In such a state of sickness, which leads to death, acts of legal consequences are invalidated. Tahawi, Mukhtasar, p. 261; Sarakshi, Mabsut, Vol. X, pp. 106-7.)

1033. I asked: Would you think that the apostate's slaughtered animal would be lawful to eat?

1034. He replied: No. (Abu Yusuf, Kitab al-Radd, p. 115; Kasani, Bada'i' al-Sana'i', Vol. VII, p.135.)

1035. I asked: Even if he had become a Christian (by apostasy)?

1036. He replied: Even if he had (apostatized to Christianity), because he would not enjoy the status of a Jew or a Christian. Do you think that he would be permitted to remain in the religion (he had adopted)? He would have to become a Muslim or else be executed. (Abu Yusuf, Kitab al-Radd, p. 116; Shafi'i, Umm, Vol. VI, p. 155.)

1037. I asked: If he marries (during apostasy) a Muslim, a Dhimmi, or an apostate woman, would his marriage (contract) be vicious?

1038. He replied: Yes. (Shafi'i, Umm, Vol. VI, p. 155.)

1039. I asked: If he has an issue from her, would you confirm his parentage?

1040. He replied: Yes. But God knows best! (Sarakshi, Mabsut, Vol. X, p. 106; Kasani, Bada'i' al-Sana'i, Vol. VII, p. 136.)

The Apostate's Offenses

1041. I asked: If an apostate commits a tort intentionally or unintentionally, do you think that the 'aqila (The 'aqila consists of the members of the tribe to whom the offender belongs and is responsible for paying the blood money.) would have to bear the responsibility of the damages?

1042. He replied: No. (Tahawi, Makhtasar, p. 261.)

1043. I asked: Why?

1044. He replied: Because his blood would be as lawful to shed as that of the inhabitants of the territory of war. (Sarakshi, Mabsut, Vol. X, p. 107. Cf. Shafi'i, Umm, Vol. VI, p. 153.)

1045. I asked: What would be the status of such a tort?

1046. He replied: He (the culprit) must pay the arsh (damages) out of his property.

1047. I asked: Would the ruling be the same for whatever he has usurped or damaged?

1048. He replied: Yes.

1049. I asked: Would you so decide (i.e., payment of these damages), before (the distribution of) inheritance?

1050. He replied: Yes. (Sarakshi, Mabsut, Vol. X, p. 107.)

1051. I asked: If he did not have any property save what he earned after his apostasy, would (the damages) be paid from that property?

1052. He replied: Yes.

1053. I asked: If a man has apostatized from Islam and (another) man cut off his hand or destroyed-intentionally or unintentionally-his eye or committed against him any other tort, intentionally or unintentionally, would this (other) man be held liable for anything?

1054. He replied: No.

1055. I asked: Why?

1056. He replied: Since his blood is lawful to shed nobody would be liable for any tort against him, whether cutting off his hand or foot or committing a tort or an injury (would) against him. (Ibid., Shafi'i, Umm, Vol. VI, p. 154.)

1057. I asked: Would (the ruling) be the same if he accepts Islam and then dies of the wound?

1058. He replied: A person who has committed (the said tort) would not be liable for anything.

1059. I asked: What would you think if a Muslim cut off the hand of another, intentionally or unintentionally, but the victim apostatized from Islam and either went over to the dar al-harb and died there from the injury inflicted upon him or died before he went over or if he returned to Islam and died subsequently?

1060. He replied: The offender would have to pay the diya of the hand in all these cases. If the offense were intentional, the damages would be paid out of his personal property; if it were unintentional, they would be paid by the 'aqila. Only in one particular case, namely if the man's hand were cut off while a Muslim, then he apostatized and returned to Islam and died subsequently of the same wound, the offender would be liable for the full diya (blood-money), whether the offense was intentional or unintentional, provided the diya would be paid by him if the offense were intentional and by the 'aqila if unintentional. This is the opinion of Abu Hanifa and Abu Yusuf. Zufar and Muhammad (b. al-Hasan) held that even in such a case the offender would not be held liable, except for the payment of the arsh as compensation for (the cutting off of) the hand, because when the victim's blood became lawful to shed (for apostasy), whatever offense was committed against him would be lawful, regardless whether (the apostate) returned to Islam or not. (Sarakshi, Mabsut, Vol. X, pp. 107-8; Kasani, Bada'i al-Sana'i, Vol. VII, p. 137.)

1061. I asked: If (the man) who cut off the hand is the one who apostatized from Islam and the one whose hand is cut off were a Muslim, and the offense were intentional, but he who had cut off the hand were punished with death and the injured person either died of the wound or recovered, what do you think would be the ruling?

1062. He replied: If the cutting off (of the hand) were intentional, nothing would be paid to the injured person; if it were unintentional, the diya of the hand would be paid by the 'aqila. If the injured person dies, the 'aqila of the (person) who cut off (the hand) would have to pay the full diya for the loss of life.

1063. I asked: Why should the diya be paid by the 'aqila, if the offender were an apostate?

1064. He replied: Since he committed the offense when he was a Muslim, the 'aqila would have to pay (the diya).

1065. I asked: What would you think if he committed the offense when he was an apostate in the same circumstances as before, and if he were executed for his apostasy?

1066. He replied: If the offense were intentional, nothing would be paid (as damages) to the man whose hand was cut off; if the offense were unintentional, the offender would have to pay the diya of the hand out of his property; but if the man whose hand was cut off died, the offender would pay (the full) diya for homicide out of his personal property.

1067. I asked: If the offender did not own property save what he earned during apostasy, would he be liable to pay from it?

1068. He replied: Yes, indeed. (Tahawi, Mukhtasar, p. 261; Sarakshi, Mabsut, Vol. X, p. 108; Shafi'i, Umm, Vol. VI, p. 154.)

Female Apostasy (Literally: "The woman apostatizes from Islam.")

1069. I asked: If a woman apostatized from Islam, what would be the ruling about her?

1070. He replied: Abu Hanifa held that she would not be executed, but imprisoned indefinitely until she returns to Islam. (Abu Yusuf, Kitab al-Kharaj, pp. 179-80; Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, p. 162; Kasani, Bada'i' al-Sana'i' Vol. VII, p. 134.)

1071. I asked: Would you not execute women at all?

1072. He replied: No. (Shafi'i held that if an apostate woman refuse to return to Islam she should be killed. Shafi'i, Umm, Vol. VI, pp. 159-61.)

1073. I asked: Why?

1074. He replied: It has been related to us from 'Abd-Allah b. 'Abbas, who said: "If a woman apostatizes from Islam, she should be imprisoned not killed." (Abu Yusuf, Kitab al-Kharaj, pp. 180- 81; cf. Kitab al-Athar, p. 161.) It has also been related to us from the Apostle of God that he prohibited the killing of unbelieving women in war. We have therefore waived such (a penalty). (Sarakshi, Mabsut, Vol. X, pp. 108-10; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 134.)

1075. I asked: What would you do with her property?

1076. He replied: It belongs to her.

1077. I asked: If she died in prison or went over to the territory of war, what would be the ruling about her estate?

1078. He replied: Her property would be divided among her heirs in accordance with God's commands (concerning inheritance). (Q.IV,12-15.)

1079. I asked: Would the same be true concerning whatever she may have earned during her apostasy?

1080. He replied: Yes.

1081. I asked: Would her husband be entitled to inherit from her?

1082. He replied: No.

1083. I asked: Why?

1084. He replied: Because she would be (immediately) divorced from him if she apostatized.

1085. I asked: Why have you given the wife the right to inherit from the husband if he apostatizes while you did not give him the right to inherit from her?

1086. He replied: Do you not think that if the man divorces his wife thrice in his sickness, she would still inherit from him if he died while she were in her waiting period ('idd); but if she died, he would not inherit from her? So the apostate's status is equivalent to the man who divorces (his wife) in (the last) sickness. (Sarakshi, Mabsut, Vol. X, p. 112; Shafi'i, Umm, Vol. VI, pp. 161-62.)

1087. I asked: If a woman apostatized when she was sick and died during her waiting period, do you think that her husband would be entitled to inherit from her?

1088. He replied: Yes, if she died during her waiting period.

1089. I asked: Why is her apostasy in sickness different from her apostasy when she is not?

1090. He replied: If she apostatized in sickness she would be in my opinion in the same status as a woman who renounces (the right of) inheritance. So if the waiting period expired before her death, he would not be entitled to inherit from her.

1091. I asked: If she goes over to the territory of war, would her husband have the right to marry four women before the expiration of her waiting period?

1092. He replied: Yes.

1093. I asked: Why?

1094. He replied: Because her apostasy and her flight to the territory of war would be equivalent to her death.

1095. I asked: Would he have the right to marry her sister, if he so wishes?

1096. He replied: Yes.

1097. I asked: If she were taken (by Muslims) as a captive from the territory of war, would she be executed?

1098. He replied: No, she would be (enslaved and) divided as part of the spoil and obliged to accept Islam.

1099. I asked: Would this (capture) have any effect on her (former) husband's (marriage to the) woman he married after her?

1100. He replied: No.

1101. I asked: If she were not taken as a captive, but she became a Muslim and returned to the territory of Islam, do you think that this would vitiate any of her (former) husband's (subsequent) marriages?

1102. He replied: No.

1103. I asked: Would she have the right to remarry immediately, if she so wishes?

1104. He replied: Yes.

1105. I asked: Would she be under no (obligation of the) 'idda?

1106. He replied: No.

1107. I asked: If she did not adopt Islam, but she gave birth to a child in the territory of war and both (she and her child) were later captured (by Muslims), do you think that they would become fay'?

1108. He replied: Yes.

1109. I asked: If (the apostate woman) went to the territory of war, leaving behind a mudabbar and the matter was brought up to the Imam, do you think that he would set him free?

1110. He replied: Yes.

1111. I asked: If she were indebted and (the debt) had to be paid at a specified term, would (the debt) have to be paid immediately (from her estate)?

1112. He replied: Yes.

1113. I asked: If she had entered into sale-purchase transactions during her apostasy, would those transactions be regarded as valid by the Imam?

1114. He replied: Yes.

1115. I asked: Would her manumission (of slaves), her gifts, and her sale-purchase transactions be regarded as valid?

1116. He replied: Yes.

1117. I asked: Would she not be regarded in (all) such matters in the same status as the man?

1118. He replied: She would not be in the same status as the man (because) the man would be liable to be executed (for apostasy), while she would be imprisoned.

1119. I asked: What would you think if (a woman) apostatized from Islam, but when she was brought before the Imam is no god but God and that Muhammad is the Apostle of God." Would this (declaration) constitute repentance?

1120. He replied: Yes.

1121. I asked: Would the same be true if the man (said so)?

1122. He replied: Yes.

1123. I asked: If a woman apostatized from Islam and was married during her apostasy either to a Muslim, to an unbeliever apostate, do a Dhimmi, or to any other, do you think that such a marriage would be valid?

1124. He replied: No.

1125. I asked: Would the same hold true if the man (so acted)?

1126. He replied: Yes.

1127. I asked: Would it is lawful to eat an animal slaughtered by a male or female apostate?

1128. He replied: No

1129. I asked: Not even if (the apostate) became a Jew or a Christian?

1130. He replied: Even if they became (Jews or Christians). Do you not think that I should not allow the man to remain in apostasy, for he must return to Islam or otherwise be executed? I would not accept him to pay the poll tax as Dhimmis do, but I should imprison the woman until she returns to Islam. However, Abu Yusuf and Muhammad (b. al-Hasan) held that the apostate woman would be liable to execution unless she returns to Islam. But Hanifa held that she would be in the same category as a very old man. (Sarakshi, Mabsut, Vol. X, pp. 112-13.)

Apostasy of (Male) Slaves, Mukatabs, and Female Slaves

(Questions relating to male and female slaves are discussed in Sarakshi, Mabsut, Vol. X, pp. 114-16; Kasani, Bada'i' al-Sana'i, Vol. VII, p. 135.)

1131. I asked: If a slave apostatizes from Islam, what would be the ruling concerning his (action)?

1132. He replied: Islam would be offered to him; he must accept it or else be executed. The same would hold true for the mudabbar, the mukabta, and the slave who is partially freed and is required to earn and pay the rest of his value.

1133. I asked: Would these be able to enjoy the status of a free Muslim?

1134. He replied: Yes.

1135. I asked: What would be the ruling concerning the slave woman, umm walad, the mudabbara, the mukataba, and the slave woman who is partially freed and is required to earn and pay the balance of her value, if any one of them apostatizes?

1136. He replied: Islam would be offered to her; if she accepts it, that would be satisfactory; if she refuses, she should be imprisoned until she returns to Islam, but no one of them should be executed.

1137. I asked: If (she) were a servant (whose earning) was essential for the family, would she be imprisoned?

1138. He replied: No. If she were in such a situation, Islam would be offered to her; if she refuses, she should be given to her family so as to compel her to return to Islam.

1139. I asked: If a male or a female slave, an umm walad, or a mudabbar earned property during apostasy, to whom would you think the property belongs?

1140. He replied: It belongs to the master.

1141. I asked: Would the same be true if the slave and the mudabbar were executed for their apostasy; would their property belong to the master?

1142. He replied: Yes.

1143. I asked: Similarly, if the mukatab earned property during his apostasy and was executed for his apostasy, what would be the ruling concerning what the mukatab has earned?

1144. He replied: Whatever he has earned up to the amount equivalent to the contract price (of manumission) would belong to the owner, but the residue, if any, would become an inheritance to the heirs.

1145. I asked: If what he earned was not sufficient to pay for the contracted price?

1146. He replied: It all belongs to the master.

1147. I asked: If the slave commits a tort during apostasy or a tort is committed against him, what would be the ruling?

1148. He replied: In the case of his committing a tort, the ruling would be the same as before he apostatized; but if the tort were committed against him during his apostasy, the offender would not be liable for anything.

1149. I asked: If (the slave) were punished with death while in apostasy and committed a tort before his master could compel him (to return to Islam), would the master be liable for anything?

1150. He replied: No.

1151. I asked: Why have you annulled (the liability) if the tort is committed against (a slave) during his apostasy?

1152. He replied: Do you not think that if a free Muslim apostatizes and a tort was committed against him, the offender would not be liable for anything?

1153. I asked: Similarly, if an offense were committed against the (apostate) mukabta and the mudabbar, the offender would not be liable for anything?

1154. He replied: Yes.

1155. I asked: If a mukabta committed a tort while in apostasy and was thereafter executed, would (the compensation) be paid out of (the mukabat's) property?

1156. He replied: The (compensation for) offense and the value (of the mukatab) would be compared and (the mukatab) would be held liable for the lesser of the two.

1157. I asked: If a slave woman apostatized and committed a tort?

1158. He replied: Her master will either have to hand her over (to the victim) or pay ransom for her.

1159. I asked: If a tort were committed against (the slave woman) in apostasy, would the offender be held liable for anything?

1160. He replied: No.

1161. I asked: Why, if you do not approve of the execution of women?

1162. He replied: Since some of the jurists hold that apostate women should be executed, I hold that a tort committed against them would not render (the offender) liable.

1163. I asked: Would the same hold true if a free woman apostatized and a man killed her or committed a tort against her- he would not be held liable?

1164. He replied: Yes, he would not be held liable for anything.

Sale of the Male and Female Slave Apostates

(Abu Yusuf, Kitab al-Kharaj, pp. 182-83; Tahawi, Mukhtasar, p. 261; Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, pp. 190-92; Kasani, Bada'i, al-Sana'i, Vol. VII, p.137.)

1165. I asked: If a slave woman apostatized from Islam and her master sold her to another man and concealed (the fact of) her apostasy from him, do you think that this would be (regarded as) a defect for which she could be returned (to the vendor)?

1166. He replied: Yes.

1167. I asked: If the vendor told (the purchaser) about her (apostasy) for which he would no longer be responsible, would (the sale) be valid?

1168. He replied: Yes.

1169. I asked: If he were a male slave, would you (first) offer Islam to him in (the presence of) the purchaser so that he had either to accept Islam or be executed?

1170. He replied: Yes.

1171. I asked: If he refused to accept Islam and went over to the da al-harb, but thereafter he was captured (by Muslims) and either died or returned to Islam, would the slave belong to the master as he was (before apostasy)?

1172. He replied: Yes.

1173. I asked: If he had earned some property while in the territory of the enemy and he were captured (by Muslims) along with his property and thereafter he returned to Islam, would all his property be given to the master?

1174. He replied: Yes.

1175. I asked: If he refused to return to Islam and was executed, would his property be given to the master?

1176. He replied: Yes.

1177. I asked: Would the same be true if a mukatab apostatized and went over to the dar al-harb, was captured (by Muslims), refused to return to Islam, and was executed-his property would be given to his master?

1178. He replied: Yes.

1179. I asked: If he adopts Islam, would the property in his possession belong to him?

1180. He replied: Yes.

1181. I asked: Would the same be true if a slave is set free up to half (of his price) and is required to earn and pay the balance of the value (in installments)?

1182. He replied: Yes.

1183. I asked: What would you think if a slave woman, a mukataba, an umm walad or a mudabbara apostatized and went over to the territory of war but later was taken as a captive by the Muslims?

1184. He replied: She would be imprisoned until she returns to Islam, but she should not be executed, and she belongs to her master as was before.

1185. I asked: If her master (whether she were a slave woman, a mudabbara, or an umm walad) died in the territory of Islam when she was in the territory of war and was later captured (by the Muslims) but refused to return to Islam, what would be the ruling concerning her?

1186. He replied: She would become fay'.

The Apostasy of a (Free) Man and His Slave

(See abu Yusuf, Kitab al-Kharaj, p. 182; Shafi'i, Umm, Vol. IV, p. 203; Tahawi, Mukhtasar, p. 261; Sarakshi, Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, pp. 194-205.)

1187. I asked: If both a man and his slave apostatized and went over to the territory of war, but the master died there and the slave was captured (by the Muslims), do you think that (the slave) would become fay'?

1188. He replied: Yes.

1189. I asked: If the slave refuses to return to Islam, would he be executed?

1190. He replied: Yes.

1191. I asked: Why would he become fay' in such a situation?

1192. He replied: Since his master went over to the territory of war along with him, anything taken by him to the territory of war and (later) captured (by Muslims) would become fay'.

1193. I asked: If the master came to us from the dar alharb in a raid and took back with him (from the dar al-islam) some of the property which had been divided among the heirs and returned to the territory of war where he was executed for his disbelief, but the property which had been taken by him was captured (by the Muslims), would it become fay'?

1194. He replied: No, because the property which he had taken belonged to the heirs and they would have the right to take it back if they found it before the division of the spoil. If they found it after it was divided up, they would have the right to take it by paying its value.

1195. I asked: If a slave apostatized from Islam and went over to the territory of war taking with him some of his master's property, but thereafter he was killed and his property was captured (by Muslims), do you think that the property would become fay'?

1196. He replied: No, it would be returned to his master.

1197. I asked: If a slave apostatized from Islam and his master sold him to another man but concealed (the fact of his) apostasy from the purchaser, do you think that this would constitute a defect for which the slave could be returned (to the vendor)? (See paragraph 1165.)

1198. He replied: Yes.

1199. I asked: If he were executed while in the possession of the purchaser, after Islam had been offered to him and he had refused to accept it, would the vendor have to return the price to the purchaser?

1200. He replied: Yes, according to Abu Hanifa. However, Abu Yusuf and Muhammad (b. al-Hasan) held that the (two) values of the slave- when he was in immunity and when it was lawful to shed his blood-would be estimated, and (the purchaser) would be entitled to recuperate the difference (from the vendor).

1201. I asked: If a group (of Muslims), including their wives and children, apostatized and attacked the Muslims and captured one of their cities in the territory of war and no Muslim remained in that city (but) the apostates went on fighting until the Muslims conquered it, captured (apostate) women and children, and killed some (of their) men, do you think that all (the captives) would become fay'?

1202. He replied: Yes, and they would be (also) subject to the one-fifth (share of the state).

1203. I asked: Would women be compelled to return to Islam?

1204. He replied: Yes.

1205. I asked: If women refused to return to Islam would they be executed?

1206. He replied: No.

1207. I asked: If a woman refused to return to Islam and she either fell in the share of one of the Muslims or was purchased by him, do you think that it would be lawful for him to have intercourse with her?

1208. He replied: No.

1209. I asked: Even if she had become a Jewess or a Christian?

1210. He replied: Even so. Do you not think that she should be obliged to return to Islam?

1211. I asked: If she returned to Islam, would her master have the right to have intercourse with her by right of ownership?

1212. He replied: Yes.

1213. I asked: If she were indebted in the dar al-Islam?

1214. He replied: The debt becomes void; it is canceled by capture.

1215. I asked: If some Muslims captured (an apostate) who refused to return to Islam, do you think that he would become a slave?

1216. He replied: No, he should be executed.

1217. I asked: Why?

1218. He replied: Because he had apostatized from Islam, and no Muslim who apostatizes should be permitted to reside in the dar al-Islam, for he should either return to Islam or be executed.

1219. I asked: If he returned to Islam, would he become fay'?

1220. He replied: No, he becomes a free man.

1221. I asked: Why?

1222. He replied: No (Muslim) Arab should become fay', and whoever refuses to return to Islam should be executed. But whoever becomes a Muslim would be free and not liable to anything.

1223. I asked: Would their (apostate) women and children become subject to capture if they were in the territory of war?

1224. He replied: Yes.

1225. I asked: If the men and women of a Muslim city apostatized and took control of the city-except some Muslims who remained in it in security-and the city was later captured by the Muslims, what do you think would be the ruling concerning the women and children?

1226. He replied: All of them would be regarded as free men, but they should be compelled to return to Islam.

1227. I asked: Why?

1228. He replied: Because there were with them a group of Muslims.

1229. I asked: If there were no Muslims with them, and the women did not apostatize, would the children become slaves?

1230. He replied: No.

1231. I asked: Why?

1232. He replied: Because they would be regarded as Muslims, following the religion of their mothers.

1233. I asked: If they and their women apostatized and captured the city, but immediately afterwards (the Muslims) recaptured it, do you think that the women and children would become slaves?

1234. He replied: No, they would not become slaves.

1235. I asked: Would the women be compelled to return to Islam?

1236. He replied: Yes.

1237. I asked: Would the men be invited to return to Islam so that if they returned that would be acceptable; if they refused, they would be executed?

1238. He replied: Yes:

1239. I asked: If a man and his wife apostatized from Islam and went over to the territory of war with a small child, but thereafter the man was killed and the woman and the child were captured (by the Muslims), do you think that they would become fay'?

1240. He replied: Yes, she and the child would become fay'.

1241. I asked: If a man apostatized and went over to the dar al- harb taking with him a small child, leaving behind in the dar al- Islam his wife who remained a Muslim, but thereafter the man was killed and the child was captured by (Muslims), would the child become fay'?

1242. He replied: No, he would be returned to his mother.

1243. I asked: Why, if the father had taken him to the territory of war?

1244. He replied: Because his mother is a Muslim and the child follows its mother's religion.

1245. I asked: If the mother died before the father apostatized, would the child become fay'?

1246. He replied: No, he would not become fay' because the mother died as a Muslim before the father had apostatized (and the child would follow her religion).

1247. I asked: Would the same hold true if the mother were a Christian or one of the People of the Book or a Dhimmi?

1248. He replied Yes, since this and the foregoing situation would be the same.

1249. I asked: If a man and his wife apostatized and went over to the territory of war where children were born to them, but thereafter the father and mother died and the children grew up as unbelievers and gave birth to other children who were captured by the Muslims, would (the grandchildren) become fay' (if captured)?

1250. He replied: Yes.

1251. I asked: Would they not be compelled to become Muslims?

1252. He replied: No.

1253. I asked: Why, since they have been the descendants of apostates?

1254. He replied: The apostate himself or his immediate child would be compelled to return to Islam, but not their grandchildren.

1255. I asked: Why?

1256. He replied: If some of the captives had a Muslim grandfather or a grandmother, do you think that I should oblige them to accept Islam? If I did, then anyone even taken as a captive should be obliged to accept Islam, since all men are the descendants of Adam and Eve, (Murad Mulla MS: north; but in 'Atif and Fayd-Allah MSS: Eve.) peace be upon them.

Breach of Dhimmis' Agreement (with the Muslims)

(See Tahawi, Mukhtasar, p. 261; Sarakshi, Mabsut, Vol. X, pp. 116-17.)

1257. I asked: If a group of Dhimmis violated their covenant (with Islam) and fought the Muslims and took control of their (Dhimmi) city and their rule was established there, but some Muslims remained there in security and thereafter (Muslim rule) was re-established, do you think that (the Dhimmis) would become captives?

1258. He replied: No.

1259. I asked: Why?

1260. He replied: Because the territory did not become (a part of the) dar al-harb. Do you not think that the Muslims lived there in security and the territory continued to be a dar al-Islam as it was (before the violation of the agreement)?

1261. I asked: If (the Dhimmis) killed the Muslims who were in the city and took their children as captives and ruled the city for a very long time maintaining their domination and enforcing the rulings of unbelievers so that no Muslim could live there in security and there was no Muslim population between them and the inhabitants of the territory of war, but later Muslim rule prevailed and killed (all) their combatants, would their women and children be taken as captives?

1262. He replied: Yes.

1263. I asked: If the Dhimmis violated their covenant and fought the Muslims, do you think that their status would be equivalent to that of the apostates who go over to the dar al-harb?

1264. He replied: Yes.

1265. I asked: Would their women and children be taken as captives?

1266. He replied: Yes.

1267. I asked: Would the men also be taken as captives?

1268. He replied: yes, because these should be treated differently from male apostates.

1269. I asked: If they asked for peace and became Dhimmis again after they had violated their covenant, and if some of them had committed bodily injuries and seized property before they violated their covenant, would they be held responsible (for all previous acts)?

1270. He replied: Yes.

1271. I asked: Would they receive retaliation for any tort where lex talionis is possible?

1272. He replied: Yes.

1273. I asked: Do you think that they would be held responsible for any property that they may have destroyed during their fighting (with the Muslims) or any blood that they may have shed?

1274. He replied: No.

1275. I asked: Why is the latter situation different from the former?

1276. He replied: As to a tort that they may have committed in the dar al-Islam when they observed the covenant and were in peace with Muslims, they would be held liable for such acts, and the existence of the covenant would not render them null and void; but as to the offenses committed during the fighting they would be unavenged because (the state of) war is different from that of peace.

1277. I asked: If (the rebels) made no peace agreement, but (the Muslims) attained victory over them and took them as fay' (i.e., slaves), would they be held liable for offenses committed in the dar al-Islam?

1278. He replied: No, because those would be waived by their becoming captives.

1279. I asked: Would the apostates and these be treated alike?

1280. He replied: Yes.

1281. I asked: If a Dhimmi violated his covenant (with Islam) and went over to the dar al-harb with his young children, but thereafter he was killed and his children taken as captives, do you think that they would become fay' if their Dhimmi mother were residing in the dar al-Islam?

1282. He replied: No, they would not become fay' if their mother were in the dar al-islam, but they would be given back to their mother and their status would be the same as their mother's.

1283. I asked: Would the same hold true if the mother had died in the dar al-Islam before the father violated the covenant (with the Muslims)?

1284. He replied: Yes.

1285. I asked: If both the father and mother violated the covenant and went over to the territory of Islam, leaving behind them a little boy in the dar al-Islam, would he become fay'?

1286. He replied: No, he continues to enjoy the same status as before.

1287. I asked: If the parents had taken with them another young son to the dar al-harb and thereafter the son was taken as captive, would he become fay'?

1288. He replied: Yes.

1289. I asked: Why?

1290. He replied: Because they took him with them to the dar al- harb and he would have the same status as that of the people (of that territory).

1291. I asked: If the Dhimmi in question entered again into a peace agreement (with the Muslims) and he had destroyed (Muslim) property and shed (Muslim) blood while he was fighting them, do you think that he would be held liable for anything?

1292. He replied: No.

1293. I asked: If he had left behind in the dar al-Islam a Dhimmi wife and then made a peace agreement with the Muslims, would his marriage with her remain valid?

1294. He replied: His marriage with the wife he had left in the dar al-Islam remains no longer valid, but his marriage with the wife who violated the agreement along with him would be valid if she made peace and returned along with him (to the dar al-Islam).

1295. I asked: Why is her situation different from the other?

1296. He replied: Because when he went over to the territory of war, where Muslim rulings are not binding on him, the wedlock bond between him and his wife (who remained in the dar al-Islam) was dissolved.

1297. I asked: Would the same be true in the case of the apostate?

1298. He replied: Yes.

1299. I asked: If the wife of the apostate apostatized and went along with him to the territory of war, and later both returned to Islam, would their marriage remain valid?

1300. He replied: yes.

1301. I asked: If he left his apostatizing wife in the dar al- Islam and after his return (to dar al-Islam) both adopted Islam, (would their marriage remain valid)?

1302. He replied: Marital relations between them would be discontinued because when he went over to the territory of war, leaving her behind in the territory of Islam, the wedlock was dissolved.

Apostate Ascendancy in Their Territory

(See Sarakshi, Kitab Sharh al-Siyar al-Kabir (Hyderabad), Vol. IV, pp. 164-69.)

1303. I asked: If a group (of Muslims) apostatized from Islam and-possessng resisting power-established their ascendancy in the territory in which they were living and no Muslim or Dhimmi remained there with them and the territory became a territory of unbelievers and an adjunct part of the territory of war, (It becomes a separate territory having the same status as the territory of war.) and they acquired there property belonging to Muslilms and Dhimmis, and acquired also captives from the territory of war, but thereafter they returned to Islam while in possession of what they had acquired, do you think that they would have the right to keep all what they acquired (during apostasy)?

1304. He replied: Yes.

1305. I asked: If they had in their possession persons whom they had captured from Muslims or Dhimmis, or if they had captured an umm walad or a mudabbar or a mukatab?

1306. He replied: They all would have to be returned to their people.

1307. I asked: If the Muslims had captured from the belligerents (of the territory of war) some of there children, property slaves, and booty which they divided up as spoil, and these (belligerents) later returned to Islam, would anything (of the slaves or property) acquired be returned to them?

1308. He replied: No.

1309. I asked: Why?

1310. He replied: Because at the time Muslims captured these objects it was lawful for them to divide whatever they had taken as spoil.

1311. I asked: What would you think if the apostates asked the Muslims to treat them as Dhimmis and said they would pay the poll tax?

1312. He replied: They should not be allowed to do so.

1313. I asked: Would the Muslims be allowed to make a peaceful agreement with them for a year so that (the apostates) might consider their position?

1314. He replied: If this were advantageous to the Muslims or if the Muslims were unable to defend themselves (against their attack), there would be no harm in making a peace agreement with them; but if Muslims were capable of prevailing over them and war (seemed) to be more advantageous than peace, no agreement should be made with them but they should be captured.

1315. I asked: Would (the Muslims) collect the tribute (kharaj) if they made an agreement with them?

1316. He replied: I disapprove of that, but if they ever did I would regard it as lawful. But God knows best!

Arab Polytheists (See Sarakshi, *Kitab Sharh al-Siyar al-Kabir* (Hyderabad), Vol. IV, pp. 192-94, and *Mabsut*, Vol. X, pp. 117- 19.)

1317. Muhammad b. al-Hasan from al-Hasan b. 'Umara from al-Hakam (b. 'Utayba) from Miqsam (b. Bujra) from ('Abd-Allah) b. 'Abbas, who said:

The Apostle of God gave Arab polytheists no alternative than conversion to Islam or execution. Abu Hanifa, Abut Yusuf, and Muhammad (b. al-Hasan) accepted this ruling.

1318. I asked: If the Arab polytheists refused to adopt Islam, do you think that they would be allowed to make peace with the Muslims and become Dhimmis?

1319. He replied: They should never be allowed to do so, but they would be invited to accept Islam. If they became Muslims, that would be acceptable on their part; otherwise, they should be forced to surrender because it has been related to us that such was the ruling and they should not (be treated) like other unbelievers. (In Arabic MSS: Like other Muslims is an error.)

1320. (I asked:) If the Muslims attacked them and took their women and children as captives and their men as prisoners of war, what would be the ruling concerning them?

1321. He replied: The women and children would become fay' and divided up as spoil, out of which the one-fifth (share) would be taken; but of the men, those who adopt Islam would be free (and nothing would be done against them), but those who refuse to adopt Islam would have to be executed.

1322. I asked: What is the ruling concerning the scripturaries of Arabia?

1323. He replied: The ruling concerning them is the same as that of other unbelievers. (I.e., like the scripturaries of any other country.)

The Group of Muslim in the Territory of War Who Apostatize

(See Sarakshi, Mabsut, Vol. X, pp. 119-20.)

1324. I asked: If (the Muslims) attacked the territory of war and some of them apostatized and left the army and fought separately the unbelievers, and both they and the Muslims captured spoil, but thereafter the apostates repented and returned to Islam before they left the dar al-harb, do you think that they would be entitled to participate along with the Muslims in the spoil of war?

1325. He replied: No.

1326. I asked: Would they be allowed to keep what they had acquired?

1327. He replied: Yes.

1328. I asked: But if they encountered the enemy later (after their return to Islam) and fought along (with the Muslims), would they participate in the division of the spoil?

1329. He replied: yes.

Apostate Liable To Be Executed (See *ibid.*, pp. 121-22.)

1330. I asked: If a group (of Muslims) apostatized from Islam and were attacked by (other) Muslims without (first) having been invited to adopt Islam, do you think that those (who attacked) would be liable for anything?

1331. He replied: No.

1332. I asked: Why? According to the sunna they should be invited (to adopt Islam) before being fought.

1333. He replied: Even so, they would not be liable for anything.

1334. I asked: Would the same be true if a single man apostatized from Islam and was killed by another before he was invited (to return) to Islam?

1335. He replied: Yes.

1336. I asked: Would the same (ruling) apply to a woman?

1337. He replied: Yes.

1338. I asked: Would the same (ruling) apply to a male or a female slave?

1339. He replied: Yes.

1340. I asked: Why?

1341. He replied: Men (who apostatize) would be liable to be executed, regardless whether they were slaves or free.

1342. I asked: But what about women, although you do not (approve) killing them?

1343. He replied: Because some jurists hold that they should be executed if they left Islam.

1344. I asked: If a lad apostatized from Islam before he reached puberty, do you think that he would be executed?

1345. He replied: No.

1346. I asked: Would the same hold true if he had come of age while still an unbeliever?

1347. He replied: I would order his imprisonment rather than execution, because he had never professed Islam after he had come of age.

1348. I asked: If the lad who apostatized from Islam was capable of understanding but had not yet reached puberty, do you think that he would have the right to inherit from his father and be entitled to (the Islamic funeral) prayer if he died?

1349. He replied: I would say yes on the strength of analogical reasoning, but I would rather abandon analogy in this case because it is too ugly (to apply analogy), so I would neither eat from his slaughtered animal, nor say the (funeral) prayer for him, nor allow him to inherit.

1350. I asked: If a Magian lad has grown up and become capable of understanding but he has not yet reached puberty and adopted Islam, would you eat from his slaughtered animal and would you say the (funeral) prayer for him?

1351. He replied: Yes.

1352. I asked: Would he have the right to inherit from his Magian father or could his father or mother inherit from him?

1353. He replied: No (neither one would have the right to inherit from the other). This is the opinion of Abu Hanifa, Muhammad (b. al-Hasan), and the former opinion of Abu Yusuf. However, Abu Yusuf later held that if the lad were capable of understanding, he would regard his Islam as (a veritable) Islam, but would not regard the disbelief of such (an adolescent) as a (veritable) disbelief.

1354. I asked: If a man who apostatized from Islam repented and returned to Islam, and then apostatized again to repent later and repeated this act several times, do you think that (his repentance) would be acceptable?

1355. He replied: Yes.

1356. I asked: Even if this has been repeated on his part?

1357. He replied: (Yes), even if it were repeated. But God knows best!

Apostasay of the Intoxicated Person (Tahawi, Mukhtasar, p. 259; Sarakshi, Mabsut, Vol. X, p. 123; Kasani, Bada'i' al-Sana'i, Vol. VII, p. 134.)

1358. I asked: If a man drank (heavily) until he was intoxicated and lost his reasoning power and while in such a state he apostatized from Islam but thereafter he recovered and observed (the rules of) Islam, do you think that his wife would be separated from him?

1359. He replied: I would say yes on the strength of analogical reasoning, but I should rather abandon analogy and follow juristic preference (on the strength of which) I hold that the intoxicated person who loses his reasoning ability would be treated in this case like the insane; therefore his wife would not be separated from him.

1360. I asked: If the ruler of the unbelievers forces a Muslims to abandon Islam and the man reverted, but when he was released he returned to his wife, do you think that the wife would be separated from him if he had (apostatized) under duress?

1361. He replied: I would say yes on the strength of analogical reasoning because we do not know what the inward felling (of the man) had been, but I should abandon analogy (in such a situation) and would not separate the wife from him.

1362. I asked: If a man apostatized from Islam, but when asked to repent he said that he had never apostatized?

1363. He replied: His declaration would be regarded as repentance and I should accept it on his part.

1364. I asked: If a man apostatized from Islam and acquired property during his apostasy, and his heirs claimed that before his death he had returned to Islam and that his property belonged to them as an inheritance, what would be the ruling in this case?

1365. He replied: The property would be regarded as fay', unless the heirs produce evidence that he had returned to Islam before his death.

1366. I asked: If the Dhimmi breaks the covenant (with the Muslims), fights the Muslims, and goes over to the territory of war, leaving behind (in the dar al-Islam) property and children, what would be done with his property? Should it be confiscated or left to his children?

1367. He replied: It would be treated like the property of a Muslim who apostatized from Islam and went over to the territory of war, i.e., it would be divided among the heirs in accordance with God's commands (concerning the distribution of inheritance). (Q. IV, 12-15/)

1368. I asked: If he had a debt to be paid at a specified term, would it have to be declared payable immediately and charged as such (having priority over heirs)?

1369. He replied: Yes.

1370. I asked: If he had mudabbars and umm walads, would they be set free?

1371. He replied: Yes.

However, Abu Yusuf and Muhammad (b. al-Hasan) held that whatever the apostate earns during apostasy would have the same status as his former property and should not be regarded as fay'. Likewise, all his sale-purchase transactions, his manumission of slaves, and his gifts would be regarded as valid. (Shafi'i, Umm, Vol. VI, p. 148; Sarakshi, Mabsut, Vol. X, p. 123.)

Chapter VIII

(ON DISSENSION AND HIGHWAY ROBBERY)

Kharijis (Dissenters) and Baghis (Rebels)

(Whoever departs from the "truth" (al-'adl), or the generally accepted sunna, and follows a heterodox creed would be regarded as belonging to the party of Baghi or dissenters. If the dissenters do not renounce the authority of the Imam, they would not be denied residence in the territory of Islam; but if they denounce their authority of the Imam and resort to arms they would be subject to the jihad and liable to be killed. Those who took arms and fought the Caliph 'Ali b. Abi Talib (called the Kharijis) were crushed in the battle of al-Nahrawan (36/658). For a discussion of their creed see Abu al-Hamid al-Ash'ari, Maqalat al-Islamiyyin, ed. M. Muhi al-Din 'Abd al-Hamid (Cario, 1950), Vol. I, pp. 156-96; Abu al-Fath al-Sharastani, al-Milal wa al-Nihal, ed. Ahmad Fahmi Muhammad (Cario, 1948), Vol. I, pp. 170-96; Ibn Hazm, al-Fasl Fi al-Milal wa al-Ahwa' wa al-Nihal, ed. 'Abd al-Rahman Khalifa (Cario, 1347/1928), Vol. III, p. 119-26; J. Wellhausen, Die Religios-politischen Oppositionen parteiim im alten Islam (Gottingen, 1901), and The Arab Kingdom and its Fall (Calcutta, 1927).

1372. (Abu Sulayman al-Juzjani) said: Muhammad b. al-Hasan told us from al-Ajlah b. 'Abd-Allah from Salama b. Kuhayl from Kathir b. Tamr al-Hadrami, (Tabari cites the name as Kathir b. Bahzal- Hadrami, See Tabari, Ta'rikh al-Rusul wa al-Rusul wa al-Muluk, ed. M. Abu al-Fadl Ibrahim (Cario, 1963), who said:

I entered the Mosque of Kufa through the Kinda gates where I met five men cursing (the Caliph), 'Ali (b. Abi Talib). One of them, covered with a burnus, (Anglicized as burnouse or burnouse, a cloak with a hood.) said: "I have made a covenant with God that I shall kill him." Whereupon, I kept close (to this man) while his companions dispersed, and I took him to 'Ali

and said: "I heard this man saying that he has made a covenant with God that he will kill you." "Bring him nearer (to me)," said ('Ali) and added: "woe to you, who are you?" "I am Sawwar al-Manquri," replied the man. "Let him go," said 'Ali. Thereupon, I said: "Shall I let him go, though (he said that) he made a covenant with God to kill you?" "Shall I kill him even though he has not (yet) killed me?" replied 'Ali. "He has cursed you," (said I). "You should then curse him or leave him," said 'Ali.

It has been related to us that while (the Caliph) 'Ali b. Abi Talib was once making a sermon on Friday, (some) Kharajis, from one side of the Mosque, pronounced the formula: "Judgment belongs to none save God." "A word of Truth to which is given a false meaning," (This statement was made in condemnation of 'Ali's acceptance of arbitration as a means to settle his dispute with Mu'awiya, Governor of Syria, when 'Ali refused to resume fighting after the battle of Siffin (37/658). said 'Ali (and he added): "we shall not prohibit you from entering our mosques to mention His (God's) name; we shall not deny you (your share of) the fay', so long as you join hands with us; nor shall we fight you until you attack us." (Tabari, Ta'rikh al-Rusul, Vol. V, pp. 73-74; Shafi'i, Umm, Vol. IV, p. 136; Mawardi, Kitab al-Ahkam, p. 96; Sarakshi, Mabsut, Vol. X, pp. 124-25.) Then he resumed his (Friday) sermon.

It has also been related to us that (the Caliph) 'Ali b. Abi Talib said in the Battle of the Camel: "Whoever flees (from us) shall not be chased, no (Muslim) prisoner of war shall be killed, no wounded in battle shall be dispatched, no enslavement (of women and children) shall be allowed, and no property (of a Muslim) shall be confiscated. (Abu Yusuf, Kitab al-Kharaj, pp. 214, 215; Sarakshi, Mabsut, Vol. X, p. 126. The rule that rebels are liable to be fought if they refuse to submit is based on a Quranic injunction which runs as follows: "If two parties of the believers fight, put things right between them, and if one of the two parties oppresses the other, fight the one which is oppressive until it returns to God's command. If it returns, set things right between them justly and act fairly. Verily God loves those who act fairly" (Q. XLIX, p). The jurists advised calling the rebels to submission before attacking them on the strength of this Quranic communication. See Shafi'i, Umm, Vol. IV, pp. 133-34.)

1373. I asked: If there were two parties of believers, one of them is rebellious (party of baghi) and the other loyal (party of justice), ("Ahl al-'adl" is the Party of Justice or Party of the Truth, i.e., the loyalists (see Mawardi, Kitab al-Ahkam, p. 96). and the former was defeated by the latter, would not the loyal party have the right to chase the fugitives (of the other party), kill their prisoners, and dispatch the wounded?

1374. He replied: No, it should never be allowed to do so if none of the rebels has survived and no group remained with whom refuge might be taken; but if a group of them has survived with whom refuge might be taken, then their prisoners could be killed, their fugitives pursued, and their wounded dispatched. (Sarakshi, Mabsut, Vol. X, p. 126. Shafi'i, however, held that the fighting of rebels was based on a Quranic injunction and Caliph 'Ali's precedent; accordingly, he disagreed with the Hanafi doctrine that only those who were supported with others should be fought and killed. See Shafi'i, Umm, Vol. IV, pp. 137. 142-43.)

1375. I asked: If the loyal (army) acquired weapons, kura', and other materials from the rebels, what would be done with them?

1376. He replied: If anyone of the rebels has survived, there would be no harm for the loyal army to use the weapons and kura' against him; but when the war comes to an end, everything

should be returned to its (original) owners. However, anything acquired, other than weapons and kura', should be returned to them (even) before the war comes to an end. If none of the rebels has survived, the weapons, kura', and other material should be returned to their (rightful) owners. (For) it has been related to us from (the Caliph) 'Ali b. Abi Talib that he deposited everything he had acquired (at the battle) of nahrawan on the plain so that anyone who recognized something that belonged to him could take it back. Thus the last person who had recognized an iron pan belonging to him took it. (Sarakshi Mabsut, Vol. X, pp. 126-27. Shafi'i held that it was more appropriate to take possession of the property and weapons of the rebels if they were liable to be fought and killed. See Shafi'i, Umm, Vol. IV, pp. 143-44.)

1377. I asked: If a group of the rebels prevailed over a country where it was residing and dominated its people and collected from them the taxes (sadaqat), such as camels, cows, and sheep as well as the poll tax from the Dhimmis, but thereafter the loyal army reconquered the land, do you think that the latter should collect (again) the poll tax from the Dhimmis and the taxes due on the camels, cows, and sheep, not taking into account what the rebels have collected from them?

1378. He replied: They should not collect anything from them (for the period in which the rebels had ruled) because these (tax payers) were neither protected from the rebels nor did the rulings (of the lawful authorities) apply to them, but they would be held liable for payment of all dues in the future. (Shafi'i, Umm, Vol. IV, p. 139.)

1379. I asked: If a woman took part in the fighting along with the rebels and was taken as a prisoner, do you think that she would be liable to be executed if the rebel army (preserving its forces) were still fighting?

1380. He replied: She should not be executed, but imprisoned. (Abu Yusuf, Kitab al-Kharaj, p. 214; Shafi'i, Umm, Vol. IV, pp. 137-38; Sarakshi, Mabsut, Vol. X, p. 127; Kasani, Bada'i al-Sana'i, Vol. VII, p. 141.)

1381. I asked: What would you think if a freeman and a slave who was fighting along with the rebels were taken prisoners while the rebel army, preserving its forces, was still fighting the loyal army?

1382. He replied: Whoever of those (two) categories is captured could be executed.

1383. I asked: If a noncombatant slave in the service of his (combatant) master and a combatant woman were taken prisoners, would they be liable to be executed?

1384. He replied: No, but they would be imprisoned.

1385. I asked: How long should such a woman or such a slave remain in prison?

1386. He replied: Until no one of the rebels remains fighting (Sarakhsi, Mabsut, Vol. X, p. 127; Kasani, Bada'i al-Sana'i, Vol. VII, p. 141.)

1387. I asked: ("Similary" is omitted.) What is the status of the kura and weapons which [loyal] Muslims may capture and for which they have no need?

1388. He replied: The kura' may be sold and its prices retained, but the weapons should be returned to its owners after the war is over. (Cf. Shafi'i, Umm, Vol. IV, pp. 143-44.)

1389. I asked: If the rebels want to enter into a peace agreement with the lawful authorities (the loyalists) for aspecified number of days or for a month until they reconsider their position, would it be lawful to do so?

1390. He replied: Yes, if this were advantageous to the loyalists. (Sarakshi, Mabsut, Vol. X, p.12)

1391. I asked: If (the loyalists) asked (the rebels) to pay a specified amount of property (as a quid pro quo for peace), do you think that this would be lawful to accept from them?

1392. He replied: No.

1393. I asked: Why?

1394. He replied: Because (the rebels) are Muslims; therefore, nothing should be taken from their property, for this would amount to kharaj. (Ibid.)

1395. I asked: If the rebels repented and joined the loyalists, do you think that they should be held liable for whatever property or life they destroyed during the war?

1396. He replied: No, unless something tangible remained which should be returned to its owners.(Abu Yusuf, Kitab al-Kharaj, p. 215; Sarakhsi, Mabsut, Vol. X, pp. 127-28.)

1397. I asked: Would the same hold true for whatever property the loyalists had captured and consumed and would any blood they had shed be left unavenged-they would not be liable for that?

1398. He replied: Yes (they would not).

1399. I asked: What do you think concerning the wounds inflicted (on the loyalists) by the rebels and the property usurped from them?

1400. He replied: These also would be waived, unless some (of the proeprty) remained unconsumed, which should be returned to its owners.

1401. I asked: If the rebels sought the assistance of a group of Dhimmis, who took part in the fighting along with them, do you think that (the Dhimmis' participation in the fighting) would be regarded as a violation of their agreement (with the Muslims)?

1402. He repled: No.

1403. I asked: Why?

1404. He replied: Because they were in the company of a group of Muslims. (Sarakshi, Mabsut, Vol. X, p. 128. Cf. Shafi'i, Umm, Vol. IV, p. 138.)

1405. I asked: Would the killing or wounds or destruction of property inflicted (on the loyalists) by the Dhimmis be treated in the same way as those by the rebels?

1406. He replied: Yes.

1407. I asked: Why should not the rebels be held liable for whatever of those things that they have committed?

1408. He replied: Because (loyal Muslim) rulings do not apply to them (in their territory) and they would be regarded as having been separated (from the Muslims) like the inhabitants of the territory of war. (Sarakshi, Mabsut, Vol. X, p. 128.)

1409. I asked: Why should not the loyalists be held liable for whatever (injuries) they inflicted on the rebels, if these (the rebels) repented?

1410. He replied: Because it had become lawful for the loyalists to fight (the rebels) and therefore they would not be held liable.

1411. I asked: Would the loyalists have to invite the rebels to accept the Just ("al-'adl," i.e., "right path" or the truth.) if they meet them?

1412. He replied: Yes. (Abu Yusuf, Kitab al-Kharaj, p. 214; Shafi'i, Umm, Vol. IV, p. 133; Kasani, Bada'i al-Sana'i, Vol. VII, p. 140.)

1413. I asked: If (the loyalists) fought them without such an invitation, would they be held liable?

1414. He replied: No.

1415. I asked: Why?

1416. He replied: Because they (the rebels) had known what the invitation would be, although an invitation would be commendable, for they might yet return (to the truth). (Sarakshi, Mabsut, Vol. X, p. 128; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 140.)

1417. I asked: Would it be objectionable to you if the loyalists shot (the rebels) with arrows, inundated (their positions) with water, attacked them with manjaniqs (mangonels), and burned them with fire?

1418. He replied: No harm in doing anything of this sort.

1419. I asked: Would a sudden attack at night be objectionable to you?

1420. He replied: No harm in it. (Sarakshi, Mabsut, Vol. X, pp. 128-129; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 141; Mawardi, Kitab al-Ahkam, pp. 97-99.)

1421. I asked: If the loyalists made a peace (agreement) with the rebels for a month, allowing them to reconsider their position, and each party (agreed) to send hostages to the other so that if either one attacked the other (the execution of) his hostages would be lawful, to the other, and if the rebels attacked (first) and killed the hostages in their hands, do you think that the loyalists should execute the hostages in their hands?

1422. He replied: No.

1423. I asked: What should they do with them?

1424. He replied: They should be imprisoned until all the rebels perished and returned (to the truth) or repented. (Shafi'i, Umm, Vol. IV, p. 140; Mawardi, Kitab al-Ahkam, p. 99; Sarakshi, Mabsut, Vol. X, p. 129.)

1425. I asked: Would the same hold true if such an agreement were made between the Muslims and the unbelievers and it was the latter who committed treachery and killed the Muslim hostages in their hands? Should the Muslims kill the hostages (of the unbelievers) in their hands?

1426. He replied: No. They should be imprisoned permanently unless they become Muslims or Dhimmis, whereupon they would be released.

1427. I asked: If one of the loyalists gave an aman to a rebel, do you think that such an aman would be valid until (the recipient of aman) returned to his place of security?

1428. He replied: Yes. (Sarakshi, Mabsut, Vol. X, pp. 129-30.)

1429. I asked: ("Similarly" is omitted.) Would the aman be valid if (the man who granted it) said: "No harm"?

1430. He replied: Yes.

1431. I asked: Would the same hold true if he said, "No harm to you," in Persian or in the Nabatean language?

1432. He replied: Yes.

1433. I asked: Would the same hold true if a woman of the loyalists said the same to one of the rebels?

1434. He replied: Yes.

1435. I asked: Would the same hold true if a slave (granted an aman)?

1436. He replied: No, (it would not be so) if he were not fighting along with his master, but if he were fighting his aman would be valid. This is the opinion of Abu Hanifa. (Sarakshi, Mabsut, Vol. X, p. 130.)

1437. I asked: If a Dhimmi were fighting along with the loyalists and gave an aman to one of the rebels?

1438. He replied: Both the slave who does not fight and Dhimmi who fights are alike and are not entitled to give aman; but if the slave takes part in the fighting and he is a Muslim, his aman to the unbelievers and to the rebels would be valid.

1439. I asked: In accordance with what you said, would it be valid if a male or female gave an aman to an unbeliever from the inhabitants of the territory of war?

1440. He replied: Yes.

1441. I asked: If the loyalists captured kura and weapons from the rebels and were in need of them, do you think that it would be lawful for the imam to divide it up among them, giving the horse-rider two shares and the foot-warrior one, after deducting the one-fifth [share]?

1442. He replied: No. This [property] should not be regarded as spoil taken from the unbelievers, but the Imam may give out of it to each according to his need; when the war would be over, the whole [property] should be returned to the original owners. (see paragraph 1337, above; mawardi, kitab al-ahkam, pp. 99-100.)

1443. I asked: If women were fighting along with the rebels against the loyalists, do you think that it would be lawful for the loyalists to kill them?

1444. He replied: Yes, it is (In Arabic MSS: "it is not"-an error. See Sarakshi, Mabsut, Vol. X, p. 127.) lawful to kill them. (Kasani, Badai al Sanai, Vol. VII, P. 141.)

1445. I asked: If a prisoner of the loyalists fell in the hands of the rebels, or loyal merchants went to the rebel camp and one of the merchants killed another merchant or cut off his hand and thereafter the loyalists reconquered [the land], do you think that one [of the two merchants] would be liable for retaliation for the offense committed against the other?

1446. He replied: no.

1447. I asked: Would the same be true if one of the prisoners committed that against the other?

1448. He replied: Yes.

1449. I asked: Why?

1450. He replied: Because they committed the offenses in a place where Muslim rulings were not binding on them; we have thus waived [the penalties] Sarakhasi,Mabsut,Vol,X,p.130;Kasani,Badai al-sanai,Vol.VII,p.141.

1451. I asked: If the judge of the rebels wrote a letter to the judge of the loyalists confirming the [property] right of a man of the rebels, based on the witnesses of the rebels and confided a man from the loyalists [to transmit], do you think that the judge of the loyalists should regard the letter and the testimony of his witnesses as valid?

1452. He replied: No,for if [the judge of the loyalists] accepts the validity of the letter of the judge of the rebels, the rebels would then be able to take away all the property of the loyalists.(Sarakhsi,Mabsut,Vol.X,p.130;Kasani,Badai alSanai,Vol.VII,p.141.)

1453.I asked: If the rebels took control of one of the cities and appointed as judge one of them of that city who was not a rebel and who wrote a letter confirming the [property] right of man in that city, or even a rebel ,certified by the witnesses from the people of that province, do you think that the judge of the loyalists should accept the validity [of that letter] if the agent of that man appeared before the judge and the witnesses certified him [to be the agent]?

1454. He replied: If the judge who received the letter knew the witnesses who gave evidence before the other judge and that judge was not a rebel, i hold that the letter should be accepted, but if the judge [of the loyalists] did not know [the witnesses], I hold that the letter should not be accepted. (Shafi,Umm,Vol,IV,p.140; Sarakhsi,Mabsut,Vol.X,p.130.)

1455. I asked: If a man in the said city under the rule of the rebels cut off the hand of another or killed him intentionally and the matter was brought to the judge, would he be entitled to pass judgement as the judge of the loyalists?

1456. He replied: Yes.

1457. I asked: Would he be competent to impose the hudud penalties even as the judge of the loyalists?

1458. He replied: Yes, because it would not be possible for him to do otherwise.

1459. I asked: If it were a qisas (retaliation) or an arsh (damage), would he have to carry them out?

1460. He replied: Yes.

1461. I asked: Would the judge impose the hudud in that city just as the judge of the loyalists does?

1462. He replied: Yes.(Sarakhsi, Mabsut, Vol. X, pp. 130-31; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 141.)

1463. I asked: If the rebels captured property or committed offenses before starting rebellion or before they engaged in fighting, and the Imam thereafter made peace with them after they had rebelled on condition that he waive [all the said unlawful acts], do you think that this would be lawful?

1464. He replied: No, it would not be lawful for the Imam to make peace with them on such [conditions]; on the contrary, they should be held liable for them.

1465. I asked: [Do you hold, therefore, that] for whatever involves the qisaa (retaliation), they should be held liable for it; for whatever involves unintentional killing, [the bloodmoney] should be paid by the 'aquila; for whatever involves quasi-intentional tort to body falling short of life, qisas should be imposed; for whatever involves loss of life, the highest diya should be paid by the 'aquila of the offender, and for whatever property is destroyed, damages should be paid/

1466. He replied: Yes.

1467. I asked: Why is that so?

1468. He replied: Because they committed all of the said [acts] before they went to war [with the loyalists] and muslim rulings were binding on them at that moment just as upon all other Muslims. (Shafi'i, Umm, Vol. IV, p. 140; Sarakhsi, Mabsut, Vol. X, pp. 130- 31; Mawardi, Kitab al-Ahkam, pp. 99-101.)

1469. I asked: If one of the loyalists were killed in the camp of the rebels, do you think he would be entitled to be treated as a martyr?

1470. He replied: Yes.

1471. I asked: If the loyalists prevail over the rebels (In Arabic MSS: "And thier dead.") would those [from among the rebels] who were killed be entitled to [funeral] prayer?

1472. He replied: No.

1473. I asked: Why? Are they not Muslims?

1474. He replied: Yes. Even though they are Muslims, I would give that up for them.

1475. I asked: Would you order that [their dead] be buried?

1476. He replied: Yes. (Abu Yusuf, Kitab al-Kharaj, p. 214; Sarakhsi, Mabsut, Vol. X, p. 131. Shafi'i, however held that they would be entitled to prayer and to be buried. See Shafi'i, Umm, Vol. IV, pp. 140-41.)

1477. I asked: Would you disapprove of carrying the heads [of their killed persons] to the Imam?

1478. He replied: Yes, I disapprove of that because it amounts to mutilation. Nothing has been related to us from [the Caliph] 'Ali b. Abi Talib that he ever did so in any of his wars, nor did he order any head to be carried [at the point of the lance].(Shafi'i,Umm,Vol.IV,pp.140-41.

1479. I asked: What do you think if one of the loyalists killed his father or a brother participating in the war;(Literally: "Among the people of war.") would he be entitled to inherit from him?

1480. He replied: Yes.

1481. I asked: Why?

1482. He replied: Because such killings was right.

1483. I asked: what do you think if a warrior of the party of the Baghi kills his father or his grandfather; would he be entitled to inherit from him?

1484. He replied: Yes,because he killed him in accordance with his own interpretation [of the law]. This is the opinion of Abu Hanifa and Mohammad {b.al-Hassan],but Abu Yusuf held that he would not be entitled to inherit.(Abu Yusuf,Kitab al- Kharaj,p.214; Sarakhsi,Mabsut,Vol.X,p.132.

1485. I asked: Would you disapprove of a man of the loyalists killing his father or brother from among the rebels?

1486. He replied: Yes, but it would be commendable if someone else did so in his place.

1487. I asked: Would the same hold true if the father were an unbeliever while fighting [against Muslims]?

1488. He replied : Yes.

1489. I asked: Would you disapprove if he were to kill a brother,paternal or maternal uncle, if they were unbelievers?

1490. He replied: No harm in that.(Shafi'i, Umm,Vol.IV,p.141; Sarakhsi,Mabsut,Vol.X,p.132.)

1491. I asked: If the father as an unbelieving warrior, wanted to kill his son,do you think it would be lawful for the son to fight his father self-defense?

1492. He repld: Yes.

1493. I asked: If the father did not directly intend[to kill]his son,would you disapprove of the son's taking the initiative against the father?

1494. He replied: Yes.

1495. I asked: If one of the loyalists happened to be in the ranks of the rebels and was killed by [loyal] Muslim, do you think that the latter would be liable for the diya?

1496. He replied: No.

1497. I asked: Why?

1498. He replied: Because it is lawful for him to kill anyone who happened to be in the ranks of the rebels.

1499. I asked: If one of the rebels entered the camp of the loyalists under an aman and was killed by one of the loyalists, do you think that [the latter] would be liable for the diya?

1500. He replied: Yes. (Sarakhsi, Mabsut, Vol. X, pp. 132-33; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 141.)

1501. I asked: Why?

1502. He replied: Because [the victim] had entered under an aman.

1503. I asked: Would the same hold true if a warrior of the unbelievers entered [the dar al-Islam] under an aman and was killed by a Muslim?

1504. He replied: Yes.

1505. I asked: If the loyalists encountered the rebels and fighting takes place and one of the loyalists attacks a rebel, but the latter says that he repents and lays down his arms, do you think that the former should refrain [from attacking him]?

1506. He replied: Yes.

1507. I asked: Would the same hold true if the man said: "refrain from me until I reconsider my position; maybe I would follow you," and he laid down his arms?

1508. He replied: Yes. (Abu Yusuf, Kitab al-Kharaj, p. 215.)

1509. I asked: If he said: "I follow your religion," but he did not lay down his arms?

1510. He replied: He is right in what he said and he is of the same religion, yet one need not refrain [just for his saying so].

1511. I asked: If one of the rebels takes to flight, do you think that the loyalists should kill him?

1512. He replied: Yes, if there were a group [of rebels] with whom he might take refuge. (Shafi'i, Umm, Vol. IV, p. 141; Sarakhsi, Mabsut, Vol. X, p. 133.)

1513. I asked: If a group of rebels captured a city and took control of it, but [later] they were attacked and defeated by another group of rebels who sought to take [Muslim] women and children as captives, would it be lawful for the [Muslim] inhabitants of the city to fight in the defense of the women and children?

1514. He replied: Yes. they have no choice but to do so. (Sarakhsi, Mabsut, Vol. X, p. 133.)

1515. I asked: If the rebel combatants make a peace agreement with a group of the unbelievers of the territory of war for a specified number of days, but later the rebels committed a treachery and took them as captives and killed their men would it be [lawful] for the loyalists to purchase any one of the captives?

1516. He replied: No.

1517. I asked: Why? For the peace concluded by the rebels and the aman given by them were not correct [i.e., not binding on the loyalists].

1518. He replied: Indeed, those who made the peace agreement with them were Muslims, and a narrative from the Apostle of God has reached us in which he said: "The person least in status can give a binding oath on behalf of other [Muslims]." (Ibid., pp. 133-34, and paragraph 50, above.)

1519. I asked: If the rebels defeat some of the loyalists and force them to escape into the territory of the unbelievers, would it be lawful for them to join in an attack launched by unbelievers against other unbelievers?

1520. He replied: No.

1521. I asked: Why?

1522. He replied: Because the jurisdiction of unbelievers prevails there [over the Muslims].

1523. I asked: Would it be lawful for the said group of the loyalists [who had entered the territory of the unbelievers] to seek the support of the unbelievers against Muslim rebels where the jurisdiction of unbelievers prevails?

1524. He replied: No, they should never do so.

1525. I asked: Why?

1526. He replied: Because the jurisdiction of unbelievers prevails there. Do you not think that the loyalists had entered the territory [of the unbelievers] under an aman? I disapprove of Muslims fighting along with unbelievers against unbelievers; it is even worse if they fight along with unbelievers against Muslims [i.e., the rebels] (Shafi'i, Umm, Vol. IV, p. 138; Sarakhsi, Mabsut, Vol. X, pp. 133-34.)

1527. I asked: If a group of unbelievers attacked the territory where [the group of Muslim refugees] is residing and took captives from them, but the Muslims who obtained an aman became afraid for their lives, would it be lawful for them to fight in self-defense?

1528. He replied: Yes. There is no harm in fighting in such circumstances.

1529. I asked: Similarly, if those who attacked were [Muslim] rebels who defeated the unbelievers and took some of them as captives, and later turned on the loyal Muslims who were [residing there] as mustamins and tried to attack them, do you think that it would be lawful [for the loyalists] to defend themselves?

1530. He replied: Yes. There is no harm to fight in such a state of affairs.

1531. I asked: If the unbelievers defeated the [Muslim] rebels and took their women and children and those of the Dhimmis as captives, and then passed along with those [captives] by the [Muslims] mustamins, do you think that these [Muslims] should refrain from attacking them, even if they were strong enough to fight?

1532. He replied: No, they could not afford [to refrain]; on the contrary, they should fight to rescue the women and children from their hands.

1533. I asked: Would they have to denounce the peace agreement that was between them and the inhabitants of the territory of war?

1534. He replied : Yes. It would not be lawful to make a pact [to the country]

1535. I asked: If the rebels were in [control of] a city in which a group of the loyalists were under subjugation, but [the city] attacked by unbelievers from the territory of war who defeated the rebels and tried to take the women and children as captives, would you think that the Muslims are under obligation to fight in defense of the women and children of the rebels?

1536. He replied: Yes, they could afford to do nothing but fight against the unbelievers to defend Muslim women and children.

1537. I asked: If the loyalists were afraid that the rebels might attack them, do you think that it would be lawful for them to seek the support of Dhimmis, provided that the loyalists would be in command?

1538. He replied: Yes. There is no harm in so doing.

1539. I asked: Would it be all right for them to seek the support of one group of Muslim rebels against another?

1540. He replied: Yes, provided the loyal Muslims would be in command over the rebels and their rule prevails over them. No harm in such a case, if they seek their support.

1541. I asked: If two groups of the rebels were fighting one another and a [third] loyalist group was not involved in that fighting, do you think that the latter could take sides and fight with

one against the other if the command were in rebel hands? Moreover, provided it was possible for [the loyal Muslim] to separate from them if they received some reinforcement.

1542. He replied: It would not be lawful for them to fight in such conditions.

1543. I asked: Would it be lawful for them to remain idle, if they were not strong enough to fight against the rebels?

1544. He replied: Yes.(Shafi'i, umm, Vol,pp.138-39; Sarakhsi, Mabsut, Vol. X,pp.133-134)

(Status of) Highway Robbers, Adventurers, and Muta'awwils

("The Muta'awwil" is he who follows his opinion or interpretation of a doctrine. See Sharif 'Ali al-Juriani, Kitab al-Ta'rifat, ed. G. Flugel (Leipzig, 1845), pp. 206-7; Mawardi, Kitab al-Ahkam, pp. 101-2.)

1545. I asked: If one or two men rebel against a city as muta'awwils and fight and kill, but thereafter asked for an aman, do you think they would be liable for anything they have done?

1546. He replied: Yes.(Abu Yusuf,Kitab al-Radd,pp.76- 78;Sarkhsi,Mabsut,Vol.X,p.134.)

1547. I asked: Why?

1548. He replied: Because they did not constitute a fighting force [as warriors] but would be regarded as highway robbers.

1549. I asked: In a case of killing, or wounds, where retaliation is possible, would you order lex talionis against them; and where wounds cannot be retaliated would you order damages to be paid?(Structure of sentence is slightly changed for clarity)

1550. He replied: Yes.

1551. I asked: If the two men attacked a group and menaced them by brandishing arms and the latter resisted and fought self-defence, do you think that [the latter group] would be liable for anything?

1552. He replied: No.

1553. I asked: Why?

1554. He replied: Because it is lawful for them to defend themselves against such persons.

1555. I asked: If they went so far as to kill [the two men]

1556. He replied: Yes [it would be unlawful for them to do so]

1557. I asked: If a man in a city brandished against another a stick or stone, do you think that it would be lawful for the menaced [person] to kill him,?

1558. He replied: This case does not resemble the other.

1559. I asked: Why?

1560. He replied: Because [the two men] brandished arms, while this man did not brandish any arms.

1561. I asked : Do you think that if the menaced [person] killed by a stick the man who menaced by brandishing something (other than arms), it is the aqila who would have to pay compensation, but if he did that by an iron instrument, he should be punished with death?

1562. He replied Yes.

1563. I asked: Would the ruling be the same if the menancing (person) menaced someone by pretending that he was brandishing something, but in fact had nothing in hand?

1564. He replied: Yes [the homicide would be liable]. This is the opinion of Abu Hanifa. However, Abu Yusuf and Muhammed (b. al- Hasan) held that if the menancing person menaced someone by brandishing something (such as a stick) or by an iron instrument, and the menaced person killed him, the shedding of later's blood would be left unavenged; indeed the menaced person would have the right to kill (the menancing one) (Sarakhsi, Mabsut, Vol. X, pp. 134-35; Kasani, Badda' al-sana'i, vol. VII, p. 141).

1565. I asked: If a man attacked another in his house at night in order to steal his property and menaced him by means of arms or a stick but the owner of the house killed him, and produced evidence to establish his case, do you think that (the owner of the house) would be liable for anything?

1566. He replied: No.

1567. I asked: Why?

1568. He replied: Because the one menaced the other at night.

1569. I asked: If [the thief] menaced him during the day with a weapon or something else and was killed by the owner of the house?

1570. He replied: If (the thief) had menaced him during the day with a weapon, the owner of the house would not be liable for anything, but if he had menaced him by brandishing something other than a weapon and the owner killed him with a stick, the aqila (of the owner of the house) would have to pay the diya.

1571. (I asked:) If the (menaced person) killed the other by means of weapon, would he have to be punished with death?

1572. He replied: Yes.

1573. I asked: Would be the same hold true if (the attacking person) were a slave in all (the foregoing situations)?

1574. He replied: Yes (the ruling would be the same)

1575. I asked: If a group of men intercepted travellers on the highways and menaced them with other than arms, do you think that it would be lawful or the Muslims to fight them in order to defend themselves?

1576. He replied: Yes.

1577. He asked: If one of the thieves were killed, would they be liable for anything?

1578. He replied No.

1579. I asked: If a man were attacked (by another) in the city with other than arms and the attacking man was killed, would the killer be liable for the diya if he killed him with other than arms; and if he killed him intentionally, would the killer be liable to be executed?

1580. He replied: Yes.

1581. I asked: Why is this case different from the other?

1582. He replied: Because those who intercept (travellers) on the highway and menace (them) are unlike those who do so in the city during the day; the victims of the latter are in a position to call people and to seek support against these [culprits], while those in the highway would be unable to call people and to seek the support of others against them.

1583. I asked: If the man were menaced in his house at night and (the attacking person) was killed, do you think that the blood (of the attacking person) would be unavenged and that his case would be like the one (engaged) in highway robbery?

1584. He replied: Yes (that is right).

1585. I asked: If a group of men were not muta'aswwils but adventurers or the like who occupy a region and kill some of its (Muslim) inhabitants and capture their property and consume it, and thereafter (the forces of) the lawful authorities captured them, do you think that you would make a decision in favour of the owners of the property and those whose blood was shed against them?

1586. He replied: Yes.

1587. I asked : Why?

1588. He replied: Because these are not regarded as muta'awwils but as marauding adventurers.

1589. I asked: If a group of rebels takes control of a city and appoints a judge who makes decisions relating to (such matters as) marriage, manumission of slaves, divorce, extortion, and (the enforcement of) penalties in *lex talionis*, but thereafter the loyal forces re-establish their rule over that city and the men against whom the judge of the rebels made the decision take up the case to the judge of the lawful authorities, but the defendants, in whose favor the judge (of the rebels) made the decision, produce evidence in support (of the judgement), would the judge (of the lawful authorities) confirm and carry out such a judgement if it were just; or declare it null and void, if it were unjust; or would he carry it out if it were in accordance with the opinion (even) of the jurists?

1590. (He replied : Yes, he would do so) (Sarakhsi, *Mabsut* Vol X, p.135. Kasani *Badai al-sanai* Vol VII, p.142; Marwardi, *Kitab al- Ahkam* pp.102-7)

If the Rebels Fight along with the Muslims against the unbelievers

(The problems discussed in this section are summed up in SDarakhsi, Mabsut, pp.135-36: and Kasani, Dada'i' al-Sana'i', vol. VII, p.142.)

1591. I asked: (SEE 'Atif and Fayd-Allah MSS.) If the rebels take control of a city and then attack the territory of war when the loyalists are engaged in attacking the (the same) territory of war and the two armies meet and fight together the unbelievers and capture spoil of war, what would be the ruling concerning the spoil and would be entitled to participate in it?

1592. He replied: Yes.

1593. I asked: Would it be divided among them?

1594. He replied: Yes.

1595. I asked: Who would be entitled to the one-fifth (share)?

1596. He replied: The lawful authorities who would distribute it among those entitled to it.

1597. I asked: If the rebels refuse and ask to be given their portion of the one-fifth (share) to divide it among whomever they wanted?

1598. He replied: They should be given (such a portion of the one-fifth share).

1599. I asked: ("Similarlr" is omitted.) If an Imam entered the territory of war at the head of Muslim army and died there, but opinion in the army was divided as to who would be the successor and they came into armed conflict with each other but later encountered unbelievers whom they fought and from whom they captured spoil, would such be subject to the one-fifth share and would they participate in the division (of the four-fifth shares)?

1600. He replied: Yes.

1601. I asked: Similarly, if one of the two groups captured spoil and the other did not, but thereafter they (settled their differences) and followed the truth while in the territory of war, would the spoil be subject to the one-fifth (share) and would it be divided up among them (all)?

1602. He replied: Yes.

1603. I asked: If a group of warriors went out of a (Muslim) city to fight without the permission of the Imam and captured spoil, would the spoil be the subject to the one-fifth (share) and would the residue be divided up among them?

1604. He replied: Yes, because such (an attack) would be different from a raid by one or two men who go out from a city to plunder.

1605. I asked: In the above-mentioned case of the rebels and loyalists, if the loyal forces captured spoil and the two groups were later reconciled (to one another), would the rebels be entitled to participate in the spoil?

1606. He replied: Yes.

1607. I asked: If the rebels made a peace agreement with some people of the territory of war, do you think that the loyalists should (ever) attack them?

1608. He replied: No, they should not do so, since it is some Muslims who have made peace with them, for the Apostle of God in accordance with a narrative from him said that "the person least in status can give a binding oath on behalf of other (Muslims)." (See note 46, above).

1609. I asked: If a group of the loyalists made a peace treaty with the inhabitants of the territory of war, but those people were attacked by a party of (Muslim) rebels who captured from them women and children as captives, do you think that it would be lawful for the loyalists to purchase any of those captives?

1610. He replied: No.

1611. I asked: Why?

1612. He replied: Because they had made a peace treaty with them and it was not lawful for the rebels to attack them when the loyalists had made peace with them.

1613. I asked: Similarly, if the rebels made peace with some people of the territory of war and thereafter they violated (agreement) and attacked them and captured prisoners from them, could not the loyalists purchase any (of the captives)?

1614. He replied: No, because it is a group of Muslims who has made peace with them.

1615. I asked: If the rebels attacked some people of the territory of war and penetrated into their territory and took captives from them, although the loyalists had made peace agreement

for a specified number of years, but thereafter the rebels repented and reconciled (their differences with the loyalists) while the captives remained in their possession, should the loyal authorities return the captives to the inhabitants of the territory of war?

1616. He replied: Yes.

1617. I asked: If a group of the rebels sought the support of some of the inhabitants of the territory of war in their fighting with the loyalists, but the latter attained victory over them, would the people of the territory of war who supported the rebels be liable to be taken as captives?

1618. He replied: Yes.

1619. I asked: Do you not think that the support sought by the rebels constitutes an aman to them?

1620. He replied: No.

1621. I asked: Similarly, if the rebels made peace agreement with some people of the territory of war, and the latter attacked the loyalists, who fought and attained victory over them (the unbelievers), would it be lawful (for the loyalists) to take captives from them?

1622. He replied: Yes.

1623. I asked: If one of the loyal warriors went over to the rebels and fought against the loyalists, would his property be divided among his heirs?

1624. He replied: No.

1625. I asked: Why would he not be regarded as an apostate if he goes over to the territory of war?

1626. He replied: DO you not think that the wife (of such person) is still in valid marriage (with him) and she inherits from him if he dies just as he inherits from her if she dies. So how could he be an apostate, so long as he is a Muslim, save he is a rebel?

Chapter IX

SUPPLEMENT TO THE KITAB AL_SIYAR

(Literally: "what Muhammad (b.al-Hasan) has added by way of a supplement at the end of the Kitab al-Siyar." This chapter is in the main a summary of Hanafi doctrines discussed in Chap.II-IV, above, to which Shaybani added a few more hypothetical situations. It is deemed unnecessary to reproduce the annotations provided in earlier chapters.

1627. Muhammad b. al-Hasan said that Abu Yusuf said:

I asked Abu Hanifa(his opinion) concerning the spoil taken by the Muslims from the unbelievers in the territory of war, and how they should divide it, whether("he said" is omitted.) its division should take place in the territory of war or in the territory of Islam after they have taken it there. Also what would be assign to the horse-rider and the foot-warrior, and whether he would give preference to certain kinds of horses over others? How would he divide up the one-fifth(share)? Would the slaves be entitled to any share of the spoil? Would the women be entitled to any share of the spoil? What would be the status of the territory conquered by the Muslims; would it be regarded as household property(to be divided as spoil among the warriors)or not?

1628. Abu Hanifa replied: If the Muslims captured any spoil,it should never be divided in the territory of war because they would not have yet taken it to a place of security. Its security would be achieved after they take it to the dar-al-Islam. But if they ever divided it in the territory of war, it would be permissible,although it would be more commendable if they divided it after they have taken it to the dar-al-Islam. So also held Abu Yusuf and Muhammad(b.al-Hassan). However,Abu Yusuf held that if the Imam could not find transport to carry it(to the dar al-Islam),he may divide it in the dar al-harb.

Abu Hanifa held that the slave is not entitled to a share of the spoil,but if he participated in the fighting he would be entitled to compensation,not to a share. He held the same opinion concerning women and mukastabs. Abu Yusuf and Muhammed(b.al_Hassan) held similar opinions.

Abu Hanifa held that the volunteer who joins an army and the warrior whose name(is registered)in the diwan(of the permanent army)receive equal(shares).But("He said" is omitted)(Muslim) merchants who enter (the enemy territory) in pursuit of their trade and find themselves in the Muslim army would not be entitled to anything in the spoil.

Abu Hanifa held that the horse is entitled to one share and the footwarrior one share because, he said, he would disapprove of rating the animal higher than an individual muslim. But Abu Yusuf and Mohammed(b.al-Hassan)held that the horse should be given two shares asnd the footwarrior one on the strength of the hadith and the sunna.

Abu Hanifa held that two or more horses (i.e.owned by one warrior) would not be entitled to more(than the share of horse) because, he said if two horses were to be given {two separate shares , then three horses or more should be given,too. So also held Muhammed(b.al-Hassan)but Abu Yusuf held that he was in favor of giving (separate)shares to two horses,but not to more.

Abu Hanifa held that a thoroughbred horse, a hybrid, and a jade would dbe enmtitled to equal shares, making no distinction between one and the other on the strength of Gods command in His Book(the Quran), in which no preference is given (to the horse)over other(riding animals).(SEE Q.XVI,8"And horses,and mulkes,and asses(he created)for you to ride.."see also Q.LIX.6.) So also held Abu Yusuf and Muhammed(b.al_HAsan).

Abu Hanifa held that if the Imam conquered a territory of the unbelievers he would have the choice to do whatever appeared to be more advantageous and acceptable to the Muslims. If he decides to take out of the land and property the one-fifth (state share) and divide the four-fifths among the warriors who captured it, he may do so. The one-fifth would be (then) divided into three parts: one for the poor, one for the orphans, and one for the wayfarer. But, Abu Hanifa said, if the Imam decides to immobilize the land and leave it to its people as Dhimmi who would be obliged to pay for themselves and their land (the poll tax and) the kharaj, as (the Caliph) `Umar b. al-Khattab had decreed for the Sawad (territory), he may do so.

1629. Abu Yusuf said: I asked Abu Hanifa (his opinion) concerning men who would be called to take part in an expedition and those who do not take part in it but instead would contribute (i.e., pay scutage) to those who take the field.

1630. (Abu Hanifa) replied: If the Muslims were short in spoil or fay', no harm is there if they help each other. But if the Muslims had sufficient fay', I would disapprove of giving it.

1631. I said: I asked Abu Hanifa (his opinion) about (the Muslim) who takes an animal from the fay' for a ride or wears a garment, whether he disapproves of that and prohibits it.

1632. He replied: If (the Muslim) were wounded and was afraid of its (effect) on his life, it would be all right to take the animal for a ride or use the clothing, if he were in need of them.

1633. I said: I asked (Abu Hanifa his opinion) about the man who takes weapons from the fay' to fight with them.

1634. (He replied): It would be objectionable for him (to do so).

1635. I asked: If he were in need of them?

1636. (He replied): No harm then if he were in need and could not find any other (weapons).

1637. I asked: If an enemy shoots (the Muslim) with an arrow and the latter shot it back to him or snatched a sword from the hand of the enemy and struck them with it, do you think that there would be any harm in that?

1638. He replied: There is no harm in it.

1639. I asked: If a man hamstringed his own animal and, fearful of any enemy (attacking) him, found an animal belonging to the enemy on which he rode and returned to his people, do you think that there would be any harm in that?

1640. He replied: No harm in it, if he were frightened, or hungry, or in need (of the animal), or (was afraid) of treachery.

1641. I said: I asked (Abu Hanifa) his opinion) about the killing of women and children and very old men chronically ill and capable of fighting?

1642. (He replied: He said) he would prohibit (such killing) and he disapproves of it.

1643. I asked: If (a Muslim) captures a prisoner of war, would it be lawful to kill him or should he be brought to the Imam?

1644. He replied: Whatever he did would be all right. Abu Yusuf and Muhammed(B> al_Hasan) held that he should do whatever he deems good or advantageous to the Muslims.

1645. I said: I asked (Abu Hanifa his opinion) about the corpse of an enemy killed by the Muslims. whether(it would be all right) to sell it to the unbelievers.

1646. He replied: No harm in doing so in the dar al-harb, i.e., outside the army camp of the Muslims. Do you not think that it is lawful for the Muslims to take away the property(of the enemy)? So, if such (property) were taken in lieu of there corpses, it would be all right . However Abu Yusuf disapproved of such (an act) and prohibited it. He held that it is unlawful for the MUslims to sell corpses, to transact with interest, to sell swine,whether to the inhabitants of the territory of war or others.

1647. I said: I asked(Abu Hanifa his opinion) about an army if he attacks the territory of war and takes spoil and thereafter another Muslim army which had not taken part in the fighting would join it before the spoil is taken to the dar al-Islam and before it is divided up.

1648. He replied: (Teh second army) would be entitled to participate in the spoil, because the first had not yet taken it to a place of security and was still in the dar al-harb.

1649. (Isaid:) I asked(Abu Hanifa his opinion) about the commander of an army who attacks the territory of war, whether he has right to promise primes before the taking of spoil by saying , "He who captures anything may have for hismself such-and such(a portion of it)."

1650. (He replied: AS to that, I would say "yes") but as to the offering primes after the spoil has already been captured, he(the commander) should not do it.

1651. (Isaid:) I asked (Abu Hanifa his opinion) whether there is any harm for the Muslims in seeking the assistance of unbelievers (in a war) against the inhabitants of the territory of war and whether they would be entitled to any(regular) share of the (capture)spoil).

1652. He replied: There is no harm in seeking their assistance, provided the command is in the hands of the Muslims, but if the command were in the hands of the unbeleivers, the Muslims should not participate in the fighting along with unbeleivers, unless they were fearful of their safety-(in such a case it would be all right to fight with them) in self defense. But("He said" omitted.(if the unbeleivers participate with the Muslims) they would not be entitled to any share, save to compensation.

1653. I said: I asked(Abu Hanifa his opinion) about the prisoner of war, whether he would be killed, or released onransom, or divided(as spoil)?

1654. He replied: He should not be released on ransom; he should be killed or takes as fay'. The Imam can make a choice and do whatever he deems advantageous to the Muslims.

1655.(I said:) I asked (Abu Hanifa): Would it be lawful to exchange Muslim prisoners for prisoners of the unbelievers?

1656. He replied: There is no harm in it, but I disapprove of ransoming prisoners of the unbelievers with property.

1657. I said: I asked (Abu Hanifa his opinion) about men who take spoil consisting of camels, horses, and sheep and we are unable to drive them or about any of the animals belonging to the Muslims that resist being driven.

1658. He replied: I disapprove of hamstringing or mutilating them, but there is no harm in slaughtering them and burning them so that enemy would not get any benefit of them.

1659. Abu Hanifa said: If the unbelievers captured a slave or a riding animal or clothing (from the Muslims) and the Muslim recaptured (any of) them as spoil and the owner found it before the spoil was divided, he may take it by paying its value, unless it were gold or silver or anything to be weighed or measured; then, Abu Hanifa added, the owner would not have to take it if he found it after the spoil was divided, for he would have to take something by paying as much in weight or measure.

1660. Abu Hanifa said: If a slave ran away to the enemy and was taken (by one of them) and thereafter was recaptured by the Muslim, his master may take him back without paying anything, whether before or after the spoil was divided, because the runaway slave is unlike the prisoner of war or the property captured and taken to a place of security.

1661. Abu Hanifa said: If a riding animal escaped (to the territory of war) and was recaptured (by the unbelievers), and thereafter recaptured by the Muslims, the owner may take it back without paying anything if he found it before the spoil was divided. Thus the runaway slave is treated differently from the riding animal which ran away.

However, Abu Yusuf and Muhammed (b.al-Hasan) held that these cases should be treated, regardless whether (the captive) were a runaway slave, an expelled person, or a prisoner of war. If the owner found him before the spoil is divided, he may take him without paying anything; if he found him after the division, he must pay its value. Abu Hanifa held that if an unbeliever entered the dar al-Islam under an aman along with the said slave and sold him there, nobody would have the right to claim ownership (of the slave), according to the opinion of all (the jurists), except in the case of the runaway slave, whose master, according to Abu Hanifa, has the right to take him wherever he may find him without paying anything.

1662. Abu Hanifa said: If a Muslim slave is captured by the unbelievers and a Muslim purchases this slave from them, his master has the right to take him back by paying the value, if he so wished. But if he did not take him back and the unbelievers recaptured him and (the slave) was purchased by another man, Abu Hanifa held that (the first) owner would have the right to take him back until purchased by the second owner who takes him back by paying the price of the second sale; thereafter the first owner takes back on payment of both prices. Abu Yusuf and Muhammed (b.al-Hasan) held the same opinion.

1663. Abu Yusuf and Muhammed(b.al-Hasan) said: If a slave girl became blind in the hand of the purchaser or suffered a defect and her(first)master wanted to take her back, deducting from her price a portion equivalent to the(value of the)defect, it would not be lawful for him to do so. He should either take her by paying the full price or leave her. This is also the opinion of Abu Hanifa, as far as Abu Yusuf knows. Do you not think that if a man sold a slave to another and the slave became blind while in the possession of the vendor, the purchaser would be told that he can take the slave by paying the full price or leave him?

1664. If a man cuts off the hand of the slave girl and her master collects the arsh(damages)and the (first)owner from whom the unbelievers had captured the slave girl wanted to take her backand demanded to deduct from her price a portion equal (to the value of the defect), it would not be lawful for him to do so; if he wants to take her back, he has either to pay the full price or leave her. (For) do you think that if(the owner), in whole hand was the slave girl, caused the loss of her eye, he can deduct anything from her price? If this (case) were like another sale transaction, deduction from the price (equivalent to the value of the defect) would be lawful. If it were also like the shuf'a(jus retractum) sale,deduction from the price would be lawful. And (also)like the purchase(of a house),if part of it destroyed, a portion of the price equal(to the value of that part) would be deducted from the price to be paid by the pre-empting purchaser.

1665. Do you not think that if (the person) who has purchased (the slave girl) from the enemy had intercourse with her, nothing would be deducted from her price and the first(owner)could take her back(only)by paying the full(price),and the intercourse with her would be lawful? If she gave birth to a child and the owner in whose hand was(the child) set him free and the *first)owner took the slave girl back by paying full price,nothing would be deducted from her price. If the child were killed and arsh were paid (to the owner), the (first) owner could (still)take the mother by paying the full price or could leave her.

1666. If (the mother)gave birth to a child and the mother were set free (by the owner) and the first owner wanted the child, he should either pay the full price (off the mother)or leave him. Such a purchase is neither like (an ordinary) sale nor the shuf'a sale, for (in this situation) the man (the first owner) has a priority right of purchasing the thing by paying the (full) price in the condition in which it is found, regardless of changes over which he had no control, and he must pay the full price(if he wishes to take it back).

1667. If the price could proportionately be divided between the mother and the arsh(paid) for the injury of the child, or if it could be divided between the mother and the defect caused to her, then the price could be proportionately divided between her and the defect caused to her when(for instance she is blinded by her possessor. Similarly, one could divide the price between her and the nuptial gift due to her, if her possessor had intercourse with her, provided he has to pay damages to her, not being the owner of her entire person,(abd)if any accident takes place, the price would be diminished proportionately. If such were the case it would not be lawful(for the owner) to set her free. Do you not think that the pre-empting purchaser(shafi") would be entitled to purchase a house by the shuf'a right from the vendor and annual the payment of price on the part of the (frustrated)purchaser? But if the owner of the slave girl set her free,his manumission would be lawful,and if he sold her,his sale would be lawful; if the

(first)owner wishes to take her back, he would have to pay the price offered by the second purchaser. But if she were given as a gift(to another man), the first owner would be entitled to take her back by paying her value to the person to whom she was given as a gift. Such (a transfer) is at any rate neither like (an ordinary) sale nor the shuf'a sale. Do you not think that if a man sold a slave woman, it would not be lawful for him to resell her or set her free or give her as a gift,after his first sale [to another man] is achieved, while the latter [owner] would have the right to sell her or give her as a gift and if he had intercourse with her,the intercourse would be lawful,and if she gave birth to a child, she would become an umm walad for him? But if the vendor had intercourse with her(after selling her),the intercourse would be unlawful, and if she gave birth to a child for him, she would not become an umm walad for him, in case the purchaser wanted to taaake her as well as well as her child. Thus, such(a transaction) would be neither like shuf'a, nor a sale, nor a gift.

1668. If a man gave a(female) servant as a gift to another man and her value increased by him, he who gave her as a gift has no right to take her back. If a man gave a gift to a member of his near of kinwho is unlawful to him(in marriage) and (the beneficiary)obtained possession, he who hgave the gift has no right to take it back. If the female slave were captured by the unbelievers(and sold to the near of kin)< the (first)owner would have the right to take her back vrom the near of kin or any other, whether her worth has increased or not-together with her children-but the person who gave her as gift would not have the right to take the child if the child were born when she was in possession of the receiver of the gift.

1669. If a mukataba were mortgaged with a man and was (thereafter) captured by the unbelievers as a prisoner from Muslim hands and purchased by another man from them(the unbelievers),the (original) owner would not have the right to take her back until the man in whose hand she was mortgaged would pay her price and from whom owner would take her by paying the debt and the price. Such (a transaction) is neither like a sale,nor gift,nor shuf'a.

1670. If a man sold a slave woman but,before the purchaser obtained possession and paid the price, the inhabitaants of the territory of war captured her and another man purchased her(from them),the (first) purchaser would not have the right to claim her until the original vendor had recovered her from the one who had purchased her from the enemy by paying her price. If he obtains her on paying the price, then the (first) purchaser would have the right to take her by paying the original price with which he had purchased her and the other price which the (original) owner had paid to redeem her.

1671. If a slave, liable both to a debt and a tort, were captured by the unbelievers and purchased (later by a Muslim) from them, the latter would be liable for the debt (of the slave) but not for the tort. If the (original) owner took him back by paying the price, he would be liable for (both) the debt and the tort. If (the slave) returned to the first owner, he would be liable to the tort and the debt; if hedid not return to the first owner, the tort would be waived, but he would remain liable for the debt. (for) do you not think that if a slave in debt were sold by his master, the debt remains binding on him but the tort would be waived if he goes out of fthe ownership of the master, but not if he were set free?(and) do you think that the debt for which a slave was mortgaged would be disregarded until(the original mortgage) takes the (the mortgage slave) back on paying (the purchaser) the price and thus receives his mortgage, and thereafter the original owner could redeem him by paying the debt?

1672. If the inhabitants of the territory of war captured a male or female slave or any property from the Muslims and thereafter became Muslims while still in possession of these objects, then the slave would become their property, (so much so) that the (original) owner would not have the right to take him back; if the slave were in debt, (the new owner) would remain liable for debt; if he were liable to a tort, (the new owner) would not be liable for it. If (the captured) property were a mortgage, it would not revert to the charge of mortgage, and the debt for which (the property) was given in mortgage would be waived, if the value of the (mortgaged property) were equal to the debt.

1673. If a free man were captured by the inhabitants of the territory of war and those people while in possession (of free man) became Muslims, the free man would remain free and would never become a slave. The same would hold true in the case of mudabbar, the umm walad, and the mukatab, who revert to their original status and do not become slaves (of the captor). This applies to any property which is not lawful to be sold and which the people of the territory of war capture—those people would not have the right to own it if they capture it.

1674. If a free man asked another man to purchase (him from the unbelievers) he would remain, a free man and the merchant who purchased him would have the right to recuperate from him (i.e., the prisoner) the price (paid to the enemy). Likewise if a mukataba, an umm walad, and a mudabbara (were made prisoners and purchased at their demand from the enemy), the purchaser will have the right to recuperate from (the mukataba, etc) the price paid (to the enemy) after these (mukataba, etc) obtain their freedom.

1675. If a free man asked another to purchase for him a named free man (a prisoner in the hands of the enemy) from the dar al-harb and if the other purchased him, the free man who has been purchased would not have to pay the price at all, but the commanded person has the right (to recuperate the price) from the man whom gave the order, provided he had guaranteed the price, or had said, "Purchase (him) for me".

On the other hand, if he said: "Purchase him for yourself and consider it a charity", he would not be liable (to reimbursing).

1676. If a man purchased a slave from the unbelievers (in the dar al-harb), who had captured him from the Muslims and the (new) purchaser mortgaged him, and if the original (Muslims) owner arrived later, he would not have the right to redeem (the slave) until he paid the debt (for which the slave was mortgaged) and separated the different charges. Thereafter, the (original Muslim) owner can recuperate him on payment of the price (paid to the enemy). If the owner wanted to pay the debt to the mortgagee and also the price and if (the mortgage) voluntarily renounced the debt, he might do that; but the (original) owner would not constrain him to redeem until he takes him back with payment of the debt.

If (the slave) were hired (while in the hands of the purchaser), the hiring would be permissible and the (original) owner may take back (the slave) and cancel the hiring for the remaining period (if he wishes to do so). The hiring is different from the amount of mortgage. For do you not think that the hiring is a divisible thing, if it is made for a number (of days, for instance)? The present case is likewise (divisible), But God Knows best!

The kings Prerogatives in His Realm and who Are To Be Considered as His Slaves from among His Subjects

1677. Muhammed b.al-Hasan said:

If a group of the inhabitants of the territory of war conquered another group equally at war (with the Muslims) and captured them as slaves on behalf of their ruler and thereafter the ruler and the inhabitants of his country became Muslims while in possession of those slaves, the warriors who fought (with the ruler) would be regarded as free men, with nothing to do against them. Those who were captured and reduced to slavery would be the slaves of the ruler, who would have the right to sell or give as a gift any of them as he wished, before or after he became a Muslim or a Dhimmi. The warriors who fought with the ruler would be free and not subject to slavery.

1678. If the ruler designated his property and gave it in inheritance to some of his children to the exclusion of others and the ruler made such an arrangement before he became a Muslim, or a Dhimmi and thereafter the children became Muslims the inheritance would be valid as arranged by the ruler. But if the arrangement were made after the ruler became a Dhimmi or a Muslim, it would not be regarded as valid and all his male and female slaves whom he had acquired through conquest would be inherited by all the heirs in accordance with God's commands (in the Quran)(Q.IV,12- 15.) If the arrangement were made when (the ruler) was at peace with the Muslims, who require the payment of an annual tribute to them, and the Muslim rulings were not binding on him, whatever arrangement he had made would be regarded as valid.

1679. If the ruler divides his lands among his children at his deathbed, assigning to each one a particular province of his realm and all the male and female slaves in it, such an arrangement would be regarded as valid if he made it while he was at peace with the Muslims) before he became a Muslim or a Dhimmi. If he made the arrangement after he became a Muslim or a Dhimmi, but on the deathbed, it would be regarded as null and void and all the male and female slaves would be inherited by his heirs.

1680. If the (ruler) bequeathed (his estate) to one of his children to the exclusion of others while he was at peace (with the Muslims) and another son inherited from him after his death and he either killed his brother or exiled him to the Islamic territory or any other territory and took possession of all his property, and thereafter all (children) became Muslims or Dhimmis, all that the usurping son had done would be regarded as valid and all the male and female slaves would be his property. If the usurping son had made (his usurpation) after the deprived son became a Muslim or a Dhimmi, anything which was taken from him would be returned to him and (the usurping son) would be ousted. If the usurping brother made (his usurpation) when he was in a state of war with the Muslims, his action would be regarded as valid if (later on) he became a Muslim or a Dhimmi.

1681. If the Muslims captured any of the said male and female slaves (of the ruler), the first son would have the right to take them back without paying anything if he found them before the division of the spoil, he would have the right to take them back by paying their value, if he so wishes.

1682. If the Muslim merchants went to the second son(i.e.,the surper) and purchased from him some of those male and female slaves, it would be lawful for them to do so. But if they took them to the dar al-Islam, the first son, the victim of usurpation, would have the choice of recovering them by either paying the price or leaving them,if he so wishes. If the usurping son takes (possession of the inheritance) while he is a Muslim or a Dhimmi and his brother, victim of usurpation, was(also) a Muslim or aDhimmi, ther Muslim (merchats) should not purchase any one of the sold slaves, and if they ever did and tok them to the dar al-Islam (he would have the right to recover them) paying neither their price nor their value.

1683. If the deprived son were a Muslim or a Dhimmi whwn his brother did so to him and the brother were(also) a Muslim or a Dhimmi, amd thereafter the usurping son apostatized from Islam or renounced his status as Dhimmi and fought the Muslims in defense of his land and enforced the rulings of the unbelievers there, but thereafter either the land was captured(by Muslims) or some of the female slaves were taken by them as captives , deprived son would have the right to recover them without paying anything if he found them before the spoil were divided. If he found them after the spoil were divided, he would dddhave the right to recover them by paying their value, if he so wishes. But God Knows best!

Chapter X

KITAB AL-KHARAJ (THE BOOK OF TAXATION)

(A great portion of this book is reproduced verbaton by Tabari in his Kitab Ikhtilaf,pp223-25,226-27,228- 29,232,236,238,240-41.)

Kharaj land

1684. Muhammad b.al-Hassan said that the entire lands of al- Sawad(of Southern Iraq),the mountainous lands, and the lands watered by the Tigris and the Euphrates are(in the catagory Of) Kharaj land.(The term "Kharaj" which is specifically applied by many a classical writer to the land tax, was used in the early Islamic period in the broader sense of tax or taxation. In the present text, Shaybani uses the term in the dual sense of land tax and poll tax(jizya). For a discussion on the meanings of Kharaj and jizya, see my war and peace in the law of Islam,pp.187-93; Dennett,Conversion and Poll Tax in the early Islama;Lkkegaard,Islamic Taxation in the Classic Period). Indeed, any land that was conquered by the Muslims is Khiraj land.(Abu Yusuf, Kital al-Kharaj,pp.28 ff; Yahya b.Adam,Kitab al-Knharaj (cairo, 1347/1928),pp.22ff;Ibn Sallam,Kitab al_Amwal,pp.57- 59;cf.Shafi'i Umm,Vol IV, pp.192-93.

1685. All the Kharaj land, low and high("Ghamir and 'amir" means land which is accessible to tidal water and highland which is not.) that has access to water and is cultivable, whether it is cultivated or not , pays a tax of 1 qafiz(ofgrain)The qafiz is measure of grain and was known at the time of the Prophet as al-sa'. It is equivalent to 12 manns. See Mawardi, Kitaab al-Ahkam,p.265;walther Hinz Islamische Mase und Gewichte(Leiden,1955),p.48.) and a dirham(of silver)(A silver unit of coinage. See Chap.V,n.7.) on each jarib (the jarib is a

measure of land equivalent to 100 square qassabs or 1592 square meters. See Mawardi, Kitab al-Ahkam, p. 265; Hinz, Islamische Masse und Gewichte, pp. 38, 65.) per year, regardless of whether its owner raises one crop on it per year, or more than that, or whether it is all cultivated simultaneously. Each year, 1 qafiz and a dirham must be paid on every jarib of land. The qafiz (in question) is that of the Hijaz; it is one-fourth of the hashimi-like the sa' which was current in the time of the Prophet, and is equal to 8 ritls. (See Mutarrazi, al-Mughrib, Vol. II, p. 48; Mawardi, Kitab al-Ahkam, p. 257.) This is equivalent to the measure that is used for wheat and barley today, plus 2 handfuls. This (tax) is imposed on every jarib (of land sown to) wheat or barely. (Abu Yusuf, Kitab al-Kharaj, pp. 36, 38, and Kitab al-Athar, p. 194; Yahya b. Adam, Kitab al-Kharaj, pp. 23, 55, 72; Ibn Sallam, Kitab al-Amwal, pp. 59, 71. For view of Awza'i, Malik, and Shafi'i, see Tabari, Kitab Ikhtilaf, pp. 218-22.)

1686. All land sown to graminiferous crops, like rice, srame, vegetables, perfumed herbs, and other cultivated crops except lucerne and vines and all cultivable kharaj land that is (deliberately) not cultivated by its owner pays (a tax of) 1 qafiz of wheat and 1 dirham per jarib. But if the owner has planted the land and (the crops) have been totally destroyed by hail, fire, flood, or anything else, he does not pay any tax for that year. If most of the crop has been ruined but the value of what remains is equivalent to 2 dirhams and 2 qafizs or more per jarib, then (a tax of) 1 qafiz and a dirham per jarib should be collected. If the value per jarib of the remaining crop is less than 2 qafizs and 2 dirhams, only half (of the remaining crop) is due. (Abu Yusuf, Kitab al-Kharaj, p. 52.)

1687. No (tax) is imposed on date palms and (other) trees. But for every jarib of grapevines 10 dirhams are due, and for every jarib of lucerne, 5 dirhams. If the crop is blighted and the owner has no benefit from it, no tax is due. If the value of the remaining grapevines is equivalent to 20 (dirhams) or more per jarib, 10 dirhams are due. If the value is less than 20, the value of half (of the harvest) is due. If the value of the lucerne left in every jarib is 10 dirhams or more, 5 dirhams per jarib are due. If the value is less, half of that is due. (Abu Yusuf, Kitab al-Kharaj, pp. 36, 38, and Kitab al-Athar, p. 194.)

1688. With regard to land containing dense stands of date palms or (other) trees under which no other crops can be cultivated, (the tax) per jarib should be levied according to the capacity of the land, and this on the same basis as in the case of grapevines, namely, 10 dirhams on every jarib. (Abu Yusuf, Kitab al-Kharaj, pp. 36-37.)

1689. (Shaybani) said: The jarib is 60 by 60 royal cubits. The royal cubit is divided into 7 masabiq, which is the same as 7 hand-width (qasabat). This (cubit) exceeds the common cubit by 1 hand-width. The dirham is the one that 10 pieces are minted from 7 mithqals (of silver) as is commonly known today. The dirhams which people use today for purchases are the basis of 7 mithqals. (Mutarrazi, al-Mughrib, Vol. 1, pp. 78-79; Mawardi, Kitab al-Ahkam, p. 265.)

1690. (Shaybani) said: If a man possesses a kharaj land, part of which is salinated (sabkha) and uncultivable and not supplied with water, (this part) is not subject to the kharaj. But if water is available and it could be reclaimed and cultivated, a kharaj of 1 qafiz and 1 dirham is due on every jarib. (Mawardi, Kitab al-Akham, p. 263.)

1691. (Shaybani) said: If a man plants 100 jaribs of land with grapevines sufficient for only 60 jaribs, the annual kharaj would be 1 qafiz and 1 dirham (on every jarib) until they matured; after they have developed and yielded ripe fruit, the kharaj would be 10 dirhams on each jarib. But if the (value of the) produce of each jarib were less than 20 dirhams, (the kharaj) on each jarib would be half (of the harvest). If the (value of the) produce of each jarib were 20 dirhams or more, (the kharaj) would be 10 dirhams (per jarib, not more.) If the (value of the) produce were either more or less than 1 qafiz and 1 dirham, (the kharaj) would be 1 qafiz and 1 dirham.

1692. (Shaybani) said: Likewise, if a man cultivates lucerne on kharaj land and it matures but the plants are scattered and the produce is so meager that (the value) per jarib is less than 10 dirhams, (the kharaj) is levied on (only) half of the produce. However, if the value of the remaining half is more ("Less", in Arabic MSS, obviously an error.) than 1 qafiz and 1 dirham, (the kharaj) is 1 qafiz and 1 dirham.

1693. If a man plants his kharaj land thickly with palms or other trees so that no other crops can be cultivated between them and the fruits do not ripen, (the kharaj) per jarib is (only) 10 dirhams, like that for grapevines. But if the produce is so meager that each palm produces (only) 1 or 2 clusters or so and the value of the dates produced per jarib is 20 dirhams or more, (the kharaj) on each jarib is 10 dirhams. If the value of the dates (per jarib) is less than 20 dirhams, (the kharaj) would be levied on only half of the value, unless this half of the value were less than 1 qafiz and 1 dirham, in which case (the kharaj) would be 1 qafiz and 1 dirham on each jarib. (The Imam may lower the tax if there is sufficient ground to believe that the produce is less than the regular annual produce. See Abu Yusuf, Kitab al- Kharaj, pp. 85-86; Mawaradi, Kitab al-Ahkam, pp. 260-61.)

1694. As to cultivation other than that of date palms and other trees, such as wheat, barely, rice, and other grains, and such crops as vegetables, sweet basil, saffron (za'faran), safflower ('usfur), and the like (the kharaj) of each jarib is 1 qafiz and 1 dirham, regardless of whether the value (of the purchase) is greater or lesser. (Abu Yusuf, Kitab al-Kharaj, pp. 36,50; Mawaridi, Kitab al-Ahkam, pp. 256-57.)

1695. If a man possesses a thicket on a kharaj land where game is abundant, no kharaj is due on the game. But if the land produces reeds (qasab)-whether in abundance or not-tamarisks (tarfa), plane-tree (dulb), half (alfa or esparto grass), stone pines, or the like that can be cut or sold, (the kharaj) is 1 qafiz and 1 dirham on each jarib, if the value of the produce of each jarib, is 2 dirhams and 1 qafiz or more. If the value is less, (the kharaj) is levied on half of the value of the produce of each jarib . (Abu Yusuf, Kitab al-Kharaj, pp. 56,71.)

1696. (Shaybani) said: If the Kharaj land produces salt, regardless of whether it is much or little, or if it produces bitumen (qir) or naphtha, or if it contains bees and honey and the like, and the land is cultivable but water is not available, then (no kharaj) is due. But if the land is cultivable and water is available, (the kharaj) is 1 qafiz and 1 dirham on each jarib. This is the opinion that we follow. (Ibid., pp. 55,56, 70.)

The Status of Kharaj Land If Its Owners Become Muslims or Unable to Work on It or Abandon It

(Literally: "Rulings concerning kharaj land if its tenants become Muslims or (either) neglect it or abandon it."

1697. (Shaybani) said: In the Sawad, whoever owns kharaj, land, whether he is a Muslim, a Dhimmi, a mukatab, or a slave, or is in debt or not must pay the kharaj. If he owns kharaj land, he must pay, like others in similar circumstances, on every cultivable jarib 1 qafiz and 1 dirham. On every jarib of grapevines (the kharaj) is 10 (dirhams); on every jarib of lucerne 5 (dirhams); no distinction is made between date palms and other trees. If the date palms or other trees are thickly planted, the kharaj is levied according to what we have already explained. (Abu Yusuf, Kitab al-Kharaj, pp. 59-60; Yahya b. Adam, Kitab al-Kharaj, p. 54; Ibn Sallam, Kitab al-Amwal, pp. 87-88; Mawaradi, Kitab al-Ahkam, pp. 261-62.)

1698. (Shaybani) said: If a Dhimmi who owns kharaj land becomes a Muslim, the status of his land remains unchanged; he continues to pay the kharaj on the land, but he is relieved of the kharaj on his head (i.e., the poll tax). If a Muslim rents out his kharaj land (to a Dhimmi) or becomes his partner in cultivating it (muzara'a), the owner of the land pays the kharaj. Also if he puts someone in charge of the land to improve it, the owner pays the kharaj, unless it is cultivated with grapevines, vegetables, or thick trees and thick palm groves. But if the tenant or the borrower plants the land with grapevines and lucerne, he would have to pay the kharaj at the rate of 10 dirhams on every jarib of grapevines and 5 on every jarib of lucerne. If a renter or a borrower plants the land thickly with date palms or other trees so that nothing else can be grown between them, the borrower pays the kharaj. If (the owner) sells the land, gives it as a gift, or gives it as charity either to his minor son or to a stranger, the purchaser (respectively, the beneficiary of gifts, etc.), be he minor or major, pays the kharaj on the date palms and other trees. (Shaybani) said: If he has sold it or given it in charity before the kharaj is collected, the kharaj would be due from the purchaser or the beneficiary of the charity. If the date palms and other trees are thickly planted the kharaj is as we have described. (Abu Yusuf, Kitab al-Kharaj, p. 86; Yahya b. Adam, Kitab al-Kharaj, pp. 21-25, 61; Ibn Sallam, Kitab al-Amwal, pp. 80,87,91, Mawardi, Kitab al-Ahkam, p. 263.)

1699. (Shaybani) said: If the owner of kharaj land is unable (to cultivate it) or neglects it or abandons it, the Imam has the right to take it from him and give it to whoever is willing to cultivate it. If he does not find anyone who will take it and pay the kharaj, he may give it to anyone who is willing to cultivate it in return for a third or a fourth or less of the produce, depending on the capacity of the land and the capability of him who receives it. The same arrangement applies to date palms and other trees that might be on the land; payment (of the kharaj) would be on the basis of one-half or one-third or less of the produce, depending on the capacity of the land and the capability of whoever is found to work on the land. So (the Imam) would give out that land as he deems fit. (Abu Yusuf, Kitab al-Kharaj, pp. 85-86; Mawaradi, Kitab al-Ahkam, p. 264.)

1700. If (a Christian) from the tribe of Tathlib or Najran purchases kharaj land, he must pay the kharaj just as Muslims must. If kharaj land becomes the property of a minor, an orphan, a woman, or a Dhimmi, they also must pay the kharaj just as Muslims must. This is the opinion that we follow. (Abu Yusuf, Kitab al-Kharaj, p. 121; cf. Yahya b. Adam, Kitab al-Kharaj, p.29.)

The Kharaj and the Jizya on the Heads of Adult Males

(Literally: "(Rulings) concerning the kharaj on the heads and the jizya on the heads; how much should be and how it should be imposed on the basis of narratives and opinion.")

1701. (Shaybani) said: All adult Dhimmi males of the people of the Sawad, including the inhabitants of al-Hira and other cities- whether they are Jews, Christians, Magians, or idolaters- must pay the jizya (poll tax), except the Christians of (the tribes of) Banu Taghlib and those of Najran. The jizya is to be paid annully only by the male population. (Abu Yusuf, Kitab al-Kharaj, pp. 122ff.; Tabari, Kitab Ikhtilaf, pp. 199-200; Yahya b. Adam Kitab al-Kharaj, pp. 71-77. For a discussion of the use of the term "jizya" and the forms of its application to the people of the occupied territory outside Arabin Peninsula, see my War and Peace in the Law of Islam, pp. 176-77, 177-87.)

1702. The rich are to pay 48 dirhams, those who have a medium (income) pay 24 dirhams, and the artisans and the needy pay 12 dirhams. This (tax) is to be collected annully, and if they are unable to pay it in any other way (i.e., in cash) and offer to pay it in kind, it should be accepted, provided it equals the amount due. But neither swine nor wine nor dead animals are acceptable for the jizya. (The jizya varied from one province to another, for it was left to the governor to fix its amount. In 'Iraq it was fixed as reported by Abu Yusuf and Shaybani, representing the Hanafi viewpoint. See Abu Yufuf, Kitab al- Kharaj, p. 122. For the amount fixed in Arabia and Syria (i.e., one dinar), see Yahya b. Adam, Kitab al-Kharaj, pp. 70,72, 73. For various other rates, see Tabari, Kitab Ikhtilaf, pp. 208-11.)

1703. If a portion of the jizya is deferred, the balance should be collected in the following year. But if one of them dies and part of his jizya has not been paid, it should not be deducted from his estate nor should it be collected from his heirs, because the jizya is not considered a debt. If any of them becomes a Muslim and part of his jizya has not been paid, the unpaid part would be waived and he would no longer be responsible for it. Nor shall he be responsible for any future payment, if he becomes a Muslim. Likewise, if anyone becomes blind or poor and is no longer able to pay the remainder of his jizya, it is waived and he is no longer obliged to pay it. (Abu Yusuf, Kitab al-Kharaj, pp. 122-123; Tabari, Kitab Ihktilaf, pp. 206-7; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 112.)

1704. Dhimmi women and children do not have to pay the jizya, nor do those of them who are blind, crippled, helplessly insane, chronically ill, too old to work, or who are too poor to be able to pay. Priests, monks, and abbots are to pay if they own property. But Dhimmi slaves, mudabbars, and mukatabs do not have to pay the jizya. If a Dhimmi minor reaches the age of puberty at the beginning of the year, before the jizya is levied on adult males, provided he is of a well-to-do family, he would have to pay the jizya for that year. But if he reaches puberty towards the end of the year, after the jizya has been levied on adult males, he would not have to pay it for that year, but would pay in the following year. (Abu Yusuf, Kitab al-Kharaj, pp. 122-123; Tabari, Kitab Ikhtilaf, pp. 206-8; Yahya b. Adam, Kitab al- Kharaj, pp. 72-73; Kasani, Bada'i' al-Sana'i', Vol. VII, p. 112.)

1705. Likewise, if a Dhimmi slave who is an artisan is set free at the beginning of the year before the jizya is levied on (free) men, the jizya is levid on him also; but if he is set free at the

end of the year after the jizya has been levied on other men, the jizya is not to be levied on him for that year but for the following year. If a poor Dhimmi who is not an artisan comes into the possession of property at the beginning or the end of the year, the jizya is levied on him for that year. If some people of the territory of war become Dhimmis at the beginning of the year before the jizya is levied on those who are to pay it that year, it is to be levied on them the following year and thereafter. (Tabari, Kitab Ikhtilaf, p. 207; Sarakshi, Mabsut, Vol. X, p. 80.)

1706. Shaybani said: As to the blind, the crippled, the chronically ill, and the insane the jizya is not to be levied on them, even if they are rich. If a person remains ill for several years and does not recover, we should not levy the jizya on him; if he recovers at the beginning of the year before the jizya is levied, it is not to be levied on him. If he completely recovers, the jizya is to be levied on him the following year and thereafter. As to the Christians of (the tribe of) the Banu Taghlib. the jizya is not to be imposed on them, because peace was made with them (by the Muslims) on the basis that (the tax) collected on their land would be double that collected from the Muslims. Nor is the jizya to be collected from the Christians of Najran. These are under obligation to pay in garments (instead of in cash) on their heads which (the Caliph) 'Umar imposed on their heads and on their land. (Literally: "(Rules) concerning the people of the Dhimma: that they are not allowed to wear clothes similar to Muslims or ride (on horses), based on narratives and opinions.")

1708. (Dhimmis) should be allowed to build neither new synagogues nor churches but only (to repair) those already in existence when they became Dhimmis and located in cities other than those inhabited by Muslims. Nor should Dhimmis be permitted to reside in cities inhabited by Muslims, for (as stated in a Tradition) the Apostle expelled them from Madina, and it is related concerning (the Caliph) 'Ali (b. Abi Talib) that he expelled them from Kufa. If anyone of them possesses a house in a Muslim city, he should be compelled to sell it; if he purchases a house in such a city, the purchase is (legally) valid, but he should be compelled to sell it. However, there is no harm for them to live outside of a (Muslim) city and resort to it to buy and sell by day, returning to their houses (at night). (Abu Yusuf, Kitab al- Kharaj, p. 127; Kasani, Bada'i al-Sana'i, Vol. VII, pp. 113-14.)

1709. (Shaybani) said: (The Dhimmis) should be permitted to build neither a synagogue nor a church nor a fire temple in a Muslim city or in any other city in the lands of the Muslims. But if they have retained a synagogue or a church or a fire temple in cities other than those resided in by Muslims, and conceded to them under the peace agreement, they may keep it, and if it should be destroyed they should be permitted to rebuild it. But if the Muslims establish a city (for themselves) in that place, they should take and tear down the synagogues and churches there, but the Dhimmis should be allowed to build similar ones outside that city. This is the opinion that we follow. (Abu Yusuf, Kitab al-Kharaj, pp. 127, 138; Tabari, Kitab Ikhtilaf, p.238.)

Pacts of the Prophet and His companions Concerning the People of Najran and the Tribes of Banu Taghlib

(Literally: "What has been provided by the Prophet, peace be upon him, and his Companions concerning the people of Najran and Banu Taghlib, and the rulings concerning them and (their) produce."

1710. (Muhammads's Pact with the People of Najran:) In the name of God, the Compassionate, the Merciful. This is the pact which has been issued by the Prophet Muhammad, peace be upon him, to the People of Najran, to whom his rulings shall extend-their fruit, their gold and silver money and their slaves. All these are left to them except the payment of 2,000 garments (hula al- awaqi), of which 1,000 are to be paid (each year) in the month of Rajab and 1,000 in the month of Safar; the value of each is an ounce of silver. If the value exceeds or becomes less than the (prescribed) kharaj (the tribute), it should be taken account of. If the people of Najran pay the tax in the form of coats of mails, horses, camels, and other objects, that would be acceptable and the value should be in proportion to the prescribed tribute. they must also entertain and provide supplies for my messengers for a maximum period of twenty days, but these must not be kept with them more than a month. If there is war or trouble in al-Yaman, they must lend thirty coats of mails, (thirty horses), (Abu Yusuf, Kitab al-Kharajl p. 72.) thirty arcs, and thirty camels. If some of what was lent to my messengers is destroyed or perished, in the form of coats of mails and horses, it remains in charge of my messengers and (the people of Najran) shall be compensated. They shall have the protection of God and the guarantee of Muhammad, the Apostle of God, that they shall be secured their lives, property, lands, creed, those absent and those present, their buildings and their churches. No bishop or monk shall be displaced from his parish or monastery and no priest shall be forced to abandon his priestly life. All their belongings, little or much, remain theirs. No hardships or humiliation shall be imposed on them nor shall they be pressed for pre-Islamic bloodshed. They shall not be called for military service, nor shall they pay tithe nor their land be traversed by (our) army. Those who seek justice shall have it: there will be no oppressors nor oppressed at Najran. Those who practice usury in the future shall have no protection from me. No one shall be subject to reprisal for the fault of another. For the continuation of this compact, the guarantee of God and the assurance of Muhammad, Apostle of God, sanction what has been written until God manifests his authority so long as the people of Najran remain faithful and act in accordance with their obligations, giving no support to oppression. Witnessed by Abu Sufyan b. Harb, Ghaylan b. 'Amr, Malik b. 'Awf of (the tribe of) the Banu Nasr, al-Aqra' b. Habis al-Hanzali, and al-Mughira b. Shu'ba; Abu Bakr acted as secretary. (See Abu Yusuf, Kitab al-Kharaj, pp. 72-73; Abu al- 'Abbas Ahmad b. Yahya b. Jabir al-Baladuri, Kitab Futush al- Buldan, ed. M.J. de Goeje (Leiden, 1866), p. 65; Ibn Sallam, Kitab al-Amwal, p. 188; Hamidullah, Majmu'at al-Watha'iq al- Siyasiya (Cairo, 1958), pp. 111-13; and my War and Peace in the Law of Islam, pp. 179-80.)

1711. (Abu Bakar's Renewal of the Pact:)

(The people of najran approached the Caliph 'Abu Bakr after the Prophet's death in 10/632, and he confirmed the principles embodied in the pact as follows:)

In the name of God, the Compassionate, the Merciful. This is the pact which the servant of God Abu Bakr, successor to the Prophet Muhammad, issued to the people of Najran. They shall have the protection of God and the guarantee of Muhammad, Apostle of God, for their persons and their lands, creed, property, dependents, buildings, those absent and those present, and their bishops and monks, churches, and all that they possess, whether it be much or little. No conscription or tithe shall be imposed on them, nor shall any bishop or monk be displaced from his office, in accordance with the promises given in this document. May ever be on this document so long as (the people of Najran) remain faithful and act in accordance with their rightful obligation. Witnessed by al-Mustawried (b. 'Amr); by 'amr, the freed slave of Abu

Bakr, by Rashid B. Hadhifa; and by al-Mughira (b. Shu'ba). (See Abu Yusuf, Kitab al-Kharaj, p. 73.

1712. ('Umar's Renewal of the Pact:)

(The people of Najran approached the Caliph 'Umar b. al-Khattab, after having been obliged to emigrate from Arabia to southern Iraq, who wrote to them:)

In the name of God, the Compassionate, the Merciful. This is what was written by the servant of God 'Umar, (In Arabic MSS: 'Uthman, obviously an error.) Commander of the Believers, for the people of Najran. Whoever emigrates shall have God's security and no harm shall befall him from any Muslim; the pact issued to them by the Prophet Muhammad and (the Caliph) Abu Bakar shall be fulfilled.

Wherever (the people of Najran) may settle, whether under the jurisdiction of the Amir of Iraq or under that of the Amir of al-Sham (Syria), let them be permitted to till the soil. And whatever they may build there shall be theirs and their children's as charity for God's sake, in lieu of their lands (from which they departed) and no one shall bother or hinder them.

Whoever of the Muslim (officials) may be present among them shall support them against whoever may do them injustice, for they are a people who have been granted the status of Dhimmis. their jizya is waived for twenty-four months after they have arrived (at their new home) and they shall not be obligated to pay it until after they have settled down, nor shall any injustice be done to them, nor shall they be oppressed. Witnessed and written by 'Uthman (b. 'Affan) and Mu'ayqib. (See Abu Yusuf, Kitab al-Kharaj, pp. 73-74; cf. Ibn Sallam, Kitab al-Amwal, p. 99.)

1713. (Shaybani) said: (The people of) Najran, for their persons and the tilled lands of Najran (in Iraq), are under obligation to pay (only) the garments (al-hulal al-Najraniya), each year 2,000 garments, the minimum value of each being 50 dirhams. No garments shall be accepted if its value is less than 50 (dirhams). One thousand are to be paid in (the months of) safar and another 1,000 in (the month of) Rajab. The payment of this number is to be divided among those men who have not yet become Muslims as a poll tax and as a tax on their lands in Najran. If some of them sell their land to a Muslim or a Dhimmi or a Taghlibi, the payment of the 2,000 garments would be estimated on the basis of the quantity of their land and number of those men among them who did not become Muslims. The tax in garments levied on the lands shall be divided among all the lands of Najran, and the tax on the men shall be levied according to the number of men. But whoever becomes a Muslim will no longer be subject to the poll tax, and the tax paid in garments will be redivided among the remaining men and land.

1714. (Shaybani) said: If a man of Najran buys a piece of land in Najran, he must pay kharaj of 1 qafiz and 1 dirham (per jarib), but he does not have to pay proportionately any of the tax of 2,000 garments due on the land of Najran, regardless of whether the purchaser is a slave, a free man, a mukatab, a Dhimmi, a minor, or a woman.

1715. (Shaybani) said: The people of Najran are no longer under obligation to entertain or provide supplies for anyone, including any messenger that may come to them or any governor appointed over them. It was in the time of the Apostle of God, when he sent his messengers to Najran in the neighborhood of al-Yaman, that such obligations were imposed. But today (when they reside elsewhere), they are no longer under any such obligation; rather, they should be treated kindly and well and the covenant which the Prophet Muhammad issued regarding

them should be observed. whoever violates the covenant commits evil and sin and acts wrongfully.

1716. (Shaybani) said: The decree that God issued to them through the Prophet Muhammad should be fulfilled. Neither their old men nor their boys are subject to the poll tax (jizya), whether in the form of garments or otherwise, nor should they be prevented from building chapels, monasteries, or churches in their lands. They should be subject to neither conscription nor the , tithe and someone should be sent to collect the tax from them (rather than their being required to come and pay it). If anyone is unable to cultivate his land and abandons it, the Imam may give the land to someone else who, he believes, will work on it on the basis of receiving one-half or one-third or more or less. The Imam also may hand over date palms and other trees to whoever will take care of them and lend them on the basis of receiving one-third or one-quarter (of the produce) or more or less, according to his capability. If the Imam should decide to give it to someone instead on the basis of his paying the (normal) land tax or on the basis of a share of the produce, he may do so. (Ibn Sallam, Kitab al-Amwal, pp. 531-40.)

1717. (Shaybani) said: The (tribes of) Banu Taghlib are under obligation to pay on their land double the tax that is paid by the Muslims. If they possess a kharaj land, they must pay the kharaj on it. If one of them sells his land to a Muslim or to a Dhimmi, the Muslim or the Dhimmi would have to pay double the tithe on the land, just as the Taghlibi did.

1718. (Shaybani) said: If the clients (of freed slaves) of Banu Taghlib are Christians, the jizya is levied on them just as it is levied on the Dhimmis. (The kharaj) is also levied on their lands just as in the case of the Dhimmis. This is the opinion that we follow. (For rights and duties of the tribe of Banu Taghlib, see Abu Yusuf, Kitab al-Kharaj, pp. 120-21; Baladhuri, Kitab Futush al-Buldan, pp. 181-83; Ibn Sallam, Kitab al-Amwal, pp. 540-42. The Christians of Banu Tanukh were accorded similar status by the Caliph 'Umar b. al-Khattab. See my War and Peace in the Law of Islam, pp. 198-99.)

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The Regime of the Kharaj

(Literally: "(Rules) concerning the collector of the kharaj how he should act, who are subject to the kharaj, and other (rulings based on narratives and opinion.)")

1719. (Shaybani) said: The governor (of a provide) should appoint as collector of the kharaj a man who must treat the inhabitants kindly and justly. He should collect the kharaj from them when the crop has been harvested and according to the size of the crop so that their kharaj may be paid by the end of the year. The rate of the kharaj is 5 dirhams on each jarib of cultivable land whether high or low land. On every jarib of grapevines (the kharaj) it is 10 dirhams, and on every jarib of lucerne, 5 dirhams. If they fail to pay any part of the kharaj, no harm should be done to them nor should their property be seized or should they be persecuted, but (the collector) may withhold the crops from them until the kharaj is fully paid. If a blight befalls the crop of anyone after the end of the year, he should be excused (from the tax) owing to the blight. This is the opinion that we follow. (Abu Yusuf, Kitab al-Kharaj, pp. 124-25; Tabari, Kitab khtilaf, p. 232; Mawardi, Kitab al-Ahkam, p. 264.)

The Enfeoffment of Uncultivated and Waste Lands

(Literally: "(Rules) concerning the enfeoffment of land: the lawful enfeoffment of 'ushr (tithe) and mawat (waste) lands.")

1720. (Shaybani) said: Uncultivated or waste lands for which water is not available, whether such lands be in the Sawad or Kufa or mountain country or elsewhere, may be allotted by the Imam to whoever is willing to cultivate it and improve it or pay the tithe on it. And whatever is developed or created on such lands without the permission of the Imam shall belong to the person who cultivates the land, and he pays the tithe on it. Similarly, whoever finds a spring or digs a well in a waterless desert in the kharaj land category is entitled to develop and to improve that land, and he pays the tithe on it. Also, whoever brings in a flowing well in a desert or wasteland is the owner of the well and an appertinent area of 500 (square) cubits around it. No one else is allowed to dig a flowing well within that area and the owner may exploit it for himself. And whoever rents a main irrigation canal or takes over a branch canal and brings water from the Euphrates or the Tigris or another source to wasteland is entitled to an area of 500 (square) cubits on each side (of the main or branch canal) and no one else is allowed to use it.

1721. (Shaybani) said: Whoever digs a well and pulls up water from it (by means of) camels, and the land (in which the well is located) is in open country, a desert, a steppe, or any unowned land, is entitled to an appertinent area of 60 (square) cubits around it which he may exploit and develop and do with it as he pleases. If he digs a well for his animals in order to water camels, cattle and sheep. the appertinent area around it to which he is entitled is 40 (square) cubits. He is entitled to do whatever he wants with it to the exclusion of anyone else. This is the opinion that we follow. (Abu Yusuf, Kitab al-Kharaj, pp. 51-53; yahya b. Adam, Kitab al-Kharaj, pp. 115-23.)

Tithe Land and the Right and Duties of Those Who Cultivate It

(Literally: "(Rulings) concerning the 'ushr land and (the right and duties) of whoever repairs it or two whom it is enfeoffed.")

1722. (Shaybani) said: Any 'ushr land watered by waterwheels, buckets, or camels is subject to half the tithe, but the land watered by flowing water, rivers, wadis (temporary rivers), or rain is subject to the (whole) tithe. On the produce of tithe land, such as wheat, barley, rice, dates unripe dates, raisins, all kinds of vegetables, sweet basil, and all kinds of trees which yield fruit

by God's will, whether in a bundance or scarcity, the tithe is due, regardless of whether they are watered by streams or by rain. If (the land) is watered by waterwheels or buckets, it is subject to half the tithe. Likewise, on the (crops) given by God's will such as fruits, safflower seeds, beans broadbeans, flax, cotton, saffron safflower, or anything else, whether produced in abundance or in scarcity, the tithe is due whether watered by a stream or by rain. But if it is watered by buckets or waterwheels, it is subject to half the tithe. If the produce is a handful of vegetables or sweet basil, it is subject either to the (whole) tithe or to half the tithe. No tithe is due on straw, date palms, firewood, or grass, nor on palm leaves, reeds, tamarisk, leeks, stone pines, half (alfa), or any kind of fuel wood. (Abu Yusuf, Kitab al-Kharaj, pp. 51-52.)

1723. (Shaybani) said: If the tithe land is used for trade or partnership or if it is in the hands of hired agent, an orphan, a mukatab, a slave, or a mudabbar, it is subject to the (whole) tithe or to half the tithe. But if the land has been rented out by the owner, the tenant has to pay the tithe. (Ibid., p. 134.)

1724. (Shaybani) said: The tax on whatever is produced by the land of Banu Taghlib is double that paid by the Muslims. Thus the produce (of a land) watered by streams or rain is 20 (dirhams), that is one-fifth (khums), and (the tax) on the produce (of a land) watered by buckets or waterwheels would be the regular (tax). All minors, women, men, mukatabs, insane persons, and slaves belongs to the Banu Taghlib must pay (the tax) on any 'ushr land they own, as is paid by their adult men, regardless of whether they are in debt or not in all the cases that we have described.

1725. (Shaybani) said: If a piece of 'ushr land owned by a Taghlibi were purchased by a Muslim, he would have to pay single tithe. But if the Taghlibi purchased a piece of 'ushr land from a Muslim, the former would have to pay double the tithe. If a Taghlibi purchased a piece of kharaj land from a Christian, or a Christian purchased a piece of 'ushr land from a Taghlibi, the purchaser would have to pay double the tithe. Likewise, if a piece of 'ushr land were purchased by a Christian from a Muslim, the tithe would be double. If a Muslim purchased a piece of 'ushr land from a Christian or a Taghlibi, (only) one tithe would be paid by him, whether it were watered by a stream or by rain. But it would pay half the tithe if it were watered by buckets or waterwheels.

1726. (Shaybani) said: Christian clients of the Banu Taghlib who (own land) are to be treated like other Christians of the Dhimmis (community) in the matter of the payment of the tax. (Likewise, if these Christians were clients of a Muslim, they would be treated like other Dhimmis with regard to the land tax. If a Taghlibi becomes a Muslim, he pays on his land only the tithe (like other Muslims). This is the opinion that we follow. (Abu Yusuf, Kitab al-Kharaj, pp. 66, 120-21, 134-35; Yahya b. Adam, Kitab al-Kharaj, pp. 68-70; Tabari, Kitab Ikhtilaf, pp. 224, 227, 228-29; Ibn Sallam, Kitab al-Amwal, pp. 540-46.)

1727. (Shaybani) said: If a Muslim owns a piece of 'ushr land, he must neither conceal nor hide any (of the produce) before the 'ushr is levied on it. He should not pay (the tithe) by means of bad produce, but by good produce. If some of the produce subject to the 'ushr is over looked (by the assessor) or if the owner has concealed some of it and it has not been discovered, the owner should—since the matter is between him and God—give it away as a charity because it is not permissible for him to consume it; he must give it in charity. The same is true of the land

of kharaj: if the tax is neglected or if he conceals it, or if he flees from the governor who is unable to find him out, it is necessary that the land owner make a charity (of the unpaid tax), and it is not permissible for him to consume it, but he must pay it as kharaj tax. (Tabari, Kitab Ikhtilaf, pp. 231-32.)

1728. (Shaybani) said: If a man owns a village containing a market place, houses, and villas situated on his kharaj land, no kharaj is due on the land, whether the buildings are rented out or not. Likewise, if a man owns 'ushr land and a village is situated on it, no tithe is due on the land or the village whether they are rented out or not.

1729. (Shaybani) said: If a man owns a villa in a town situated on land planned for urban use, and the owner established an orchard on the land belonging to that villa or plants date palms producing dates, no tithe or kharaj would be due either on the date palms or the other trees. But if he turns the entire land originally designed for urban use into a garden, the tithe is due. This is the opinion that we follow. (Abu Yusuf, Kitab al- Kharaj, pp. 102ff.; Mawaradi, Kitab al-Ahkam, p. 263.)

1730. (Shaybani) said: If a man owns 'ushr land used as a place for fishing, hunting gazelles, or for any similar purpose, neither the tithe nor the kharaj is due on it, even if it is a kharaj land. If the land contains a source of salt, asphalt, pitch, or naphtha, or if it contains beehives, neither the tithe nor the kharaj is due on any of it. This is the opinion that we follow. (Abu Yusuf, Kitab al-Kharaj, pp. 87-88; Yahya b. Adam, Kitab al-Kharaj, p. 32.)

Chapter XI

BOOK ON 'USHR (TITHE) ACCORDING TO DAWUD B. RUSHAYD

(For a brief account of Ibn Rushayd, see pp. 55-56, above. It is deemed unnecessary to reproduce the references used in the previous chapter, since the subject matter is essentially the same. For general source material on the subject, the reader is referred to Abu Yusuf, Kitab al-Kharaj, pp. 47-57, 63-76, 69-71, 76-79, 88- 93, 94-105; Ibn Sallam Kitab al-Amwal, pp. 468-525; Mawardi, Kitab al-Ahkam, pp. 194-216, 308-22. See also article "'ushr," Shorter Encyclopaedia of Islam, ed. H.A.R. Gibb and J.H. Kramers (Leiden and London, 1953), pp.610-11; Lokkegaard, Islamic Taxation in the Classic Period, Chap. 3; Agnides, Mohammedan Theories of Finance, Part II, Chap. 2-3.)

1731. Dawud b. Rushyad said: I heard Muhammad b. al-Hasan say that Abu Hanifa said:

On all green produce that 'ushr land produces, whether in abundance or in scarcity, and whether it bears permanent fruit or not, a tithe is due, regardless of whether it is watered fruit or not, a tithe is due, regardless of whether it is watered by streams or by rain. On those (crops that) have been watered by buckets or waterwheels (only) half of the tithe is due. But no tithe at all is due on (such product) as firewood, grass, and straw. (Abu Hanifa) held this (opinion) on the strength (of a narrative) transmitted by Ibrahim al-Nakha'i, who maintained that (only) half the tithe is due on what I have just described. This narrative was transmitted by Majahid (b. Jubayr) who, however, said that he did not subscribe to it.

1732. It is well known that the Apostle of God said: "No tax shall be taken from a dhawd (herd) of camels numbering less than five, nor from anything weighing less than 5 ounces." The other Tradition, also well known, says that the Prophet sent Mu'adh b. Jabal to al-Janad (in South Arabia) and ordered him not to collect the tax on green produce. By green produce we mean that which does not produce permanent fruit such as vegetables, lucerne, melons cucumbers, snake cucumbers, onions, garlic, and the like, and all kinds of flowers such as myrtle, roses, dye plants, and the like, for which no tax is due if they are grown on 'ushr lands. The same applies to all seeds that are of no use except as seeds, such as the seeds of lucerne, vegetables, melons, and the like; no taxes are due on them, neither tithe nor anything else, whether they are produced in abundance or in scarcity.

1733. If 'ushr land produces plants bearing permanent fruit such as wheat, barley, figs, raisin, rice millet, and shilb, as well as walnuts, almonds, pistachios, hazel nuts, habba khadra, and the like, a tithe would be due. But nothing is due if the produce amounts to less than 5 wasqs. The wasq is equivalent to 60 sa's, according to the sa' that existed in the time of the Apostle of God. Our sa' of today is equivalent to 8 'Iraqi ritls, according to Abu Yusuf; and 5 1/3 'Irawi ritls according to the jurists of the Hijaz. Thus, on every 5 wasqs of the abovementioned produce, the whole tithe is due if it was not watered by streams or rain; half the tithe is due if it was watered by buckets or waterwheels. Likewise, on produce of permanent fruit that is measured by any measure, no tithe is due if the amount is less than 5 wasqs-each wasq as I have stated is equal to 60 sa's-and the tithe would be on the quantity of the produce, not on the oil (contained in it, for example). Thus, if olives amounted to 5 wasqs, a tithe would be due; if they were less, no tithe would be due. If the produce consisted of 2 wasqs of dates, 2 of wheat, and 2 or raisins, they should not be lumped together; if each were less than 5 wasqs, no tithe would be due, since neither the dates nor the raisins nor the wheat amount to 5 wasqs by themselves. Likewise, all pulses such as lentils, beans, broad beans, Indian pease, and the like should not be lumped together, unless each one amounts separately to at least 5 wasqs. If the produce (is of the same species), but some is white and some is black, the two can be lumped together. If the produce consisted of 5 wasqs of dried dates or raisins, a tithe would be due on it. If (the produce) were to be sold as fresh dates, fresh grapes, or unripe dates, (the tithe) would be estimated on the same basis as if they were dry dates or raisins. If the quantity is estimated to be 5 wasqs, a tithe would be due; if not, nothing would be due.

1734. If the produce of the tithe land were saffron and wars (a dye plant) or anything calculated by weight in ritls and manns, rather than by measure of capacity, in calculating the tithe the largest unit of weight should be adopted, and the largest unit of weight for honey is the farq. Just as we have previously stated that no sadaqa is due on any quantity less than 5 wasqs, so no sadaqa is due on honey if it amounts to less than 5 farqs. Likewise, the largest unit of weight used for saffron and wars is the mann. If a quantity of saffron or wars amounts to less than 5 manns, no tax is due on it, but if it amounts to 5 himls, no sadaqa is due. The himl is equivalent to 30 farqs.

1735. Safflower and flax produce seeds which are measured according to capacity. If the safflower produces 5 wasqs of seeds, the tithe is due on all the seeds as well as on the safflower that produces them, but only half tithe is due if the seeds have not been separated from the safflower. If the produce is less than 5 wasqs of seeds, nothing is due, and there is no tax due on the safflower itself. Also, if flax produces seeds amounting to 5 wasqs, the tithe would be

due on both the seeds and the flax. But if the produce were less than 5 wasqs, nothing would be due on either the seeds or the flax. As to hemp, if the amount of seeds produced were 5 wasqs, the tithe would be due; if the amount produced were less than that nothing would be due. But no tax at all is due on the hemp itself, because it is similar to wood, and no tax is due on wood and (unproductive) date palms. (For) do you not think that we levy the tax on wheat, but not on straw? Similarly, wood, and the tar which is expected from it, and pitch, do not pay anything. Indeed, anything produced from wood is free. If the produce of the stone pine amounts to 5 wasqs, the tax is due on it; but if it were less, the same is due. No tax at all is due on the wood of the stone pine. The tithe and the halftithe are due only on plants brought forth by the soil (i.e. that are cultivated).

1736. Nothing is due on salt or on bitumen, naphtha, or any similar liquid. Only in the nonperishable fruit of plants which people and animals eat is subject to the tithe or the half-tithe. Sugar cane that does not yield sugar does not pay anything, but sugar juice is subject to the tithe, if it amounts to 5 farqs. The farq is equivalent to 36 'Iraqi ritls. But no tax is due on any amount less than 5 farqs.

1737. Sadaqa is due on any quantity of caraway, cumin, coriander, and mustard that amounts to (at least) 5 wasqs. But nakhwa, mustard, thyme, savin shunir (black seeds), and the like do not pay anything, because they are used as medicine, even though the first named is usually used as food and the last named is used in place of coriander. The marshmallow, the cypress, ushnan (saltwort), and the like do not pay anything, because they are poisonous; if they were useful, they would be regarded as in the same category as vegetables, but they are all alike. Pomegranate seeds that are sold dry are subject to the tithe on every 5 wasqs, but if the seeds are not permanent and are not stored up, no (tithe is due) and they are regarded in the same category as dates; if the amount is 5 wasqs the tax is due. The same applies to the jujube. But peaches, pears, apples, nabq (lotus jujube), apricots, and mulberries do not pay anything, either on the leaves or the fruit, because most of them are not storable or capable of being dried. The same applies to bananas, myrobalan, carobs, fenugreeks, capers, and dye plants.

If a man owns two parcels of land, each situated on a different irrigation canal, and together they produce 5 wasqs of produce of the kind that is subject to the tax the tithe is also due on it. If the two parcels of land are widely separated and are located in two different regions or if there are a number of parcels of land, the produce should be lumped together. If it totals 5 wasqs of produce of the kind that is subject to the sadaqa, the sadaqa is collected on it. If there is only one owner, it makes no difference if his lands are scattered and are located in different regions.

If a piece of land is owned in common by two different men and it produces only 5 wasqs of produce of the type subject to the tax, tax is not due until the share of each one amounts to 5 wasqs.

1738. On whatever is produced from mountains in the way of gold, silver, copper, lead, iron, and mercury, whether in abundance or in scarcity, (a tax of) one-fifth (of its value) is due. But no tithe is due on (such minerals as) arsenic, kuhl (antimony), bizm (bismuth), zaj (green vitriol), and the like. also, no (tithe is) due on (such precious stones as) corundum, chrystole, and turquoise that are extracted from the mountains. They all belong to whoever finds them. (For) it has been related to us from the Prophet that he said, "No taxes are due on stones," and we follow this ruling.

1739. Likewise, whatever is taken from the sea, such as ambergris, pearls, fish, etc., are not subject to the tax. These all belong to whoever obtains them.

Dawud b. Rushayd said: Muhammad b. al-Hasan related to me from Sufyan b. 'Uyayna from 'Amr b. Dinar from his father (Dinar al-Jumahi) from ('Abd-Allah) Ibn 'Abbas that he was once asked whether a one-fifth (sadaqa) is due on ambergris. (Ibn 'Abbas) replied, "It is something thrown up by the sea." We also hold that nothing is due on it, as does Abu Hanifa. Abu Yusuf for a long time was of the same opinion, but later held that pearls and ambergris taken from the sea were subject to the one-fifth (tax). Nothing is due on fish, because it is not a plant. He also held that nothing is due on al-dawra or its stalk, for they are in the category of +flowers and scents. We also follow the same (ruling) based on analogical deduction from the opinions of Abu Hanifa and Abu Yusuf, as I have already described.

Muhammad b. al-Hasan was once asked whether ambergris were subject (to tax). He replied, "Yes," He was asked, "Do you hold that the tithes are due regardless of whether it is owned by anyone or not?" "Yes," he replied. Praises be to God, the Most High, the Guide to Truth. End of the Book of Tithes. Peace be upon His Prophet and (the Prophet's) family and Companions.

TRANSMITTERS OF TRADITIONS AND NARRATIVES

'Abd-Allah b. 'Abbas

Companion; traditionist and jurist; Makka; d. 68/687

'Abd-Allah b. Abi Humayd

Traditionist (obscure); Basra; n.d.

'Abd-Allah b. Abi Awfi

Companion (last surviving); traditionist; Madina and Kufa; d. 86 or 87/705

'Abd-Allah b. Abi Najih

Traditionist; Makka; d. 132/750

'Abd-Allah b. Burayda b. al-Husayb

Traditionist; judge of Merv; Madina and Merv; d. 115/733

'Abd-Allah b. 'Umar

Companion (son of Caliph 'Umar); traditionist; Madina; d. 74/693

'Abd al-Malik b. Abi Sulayman b. Maysara

Traditionist; Madina; d. 145/762

'Abd al-Rahman b. 'Abd-Allah b. Mas'ud

Son of Companion Ibn Mas'ud; traditionist; Kufa; 165/781

Abu 'Abd-Allah Makhul

Traditionist; Damascus (Syria); d. 113/731

Abu 'Abd-Allah Nafi'

Freed slave of, and transmitter from, Ibn 'Umar; Madina; d. 120/737

Abu Bakr 'Abd-Allah b. Abi Quhafa

Companion (first caliph); Makka and Madina; d. 12/634

Abu Bakr b. 'Abd-Allah

Traditionist and judge; Madina and Baghdad; d. 162/778

Abu Hanifa (See Nu'man b. Thabit)

Abu Ishaq (See Sulayman b. Abi Sulayman)

Abu Ja'far (See Muhammad b. 'Ali b. al-Husayn)

Abu Salih (See Dhakwan al-Samman)

Abu Sulayman al-Juzjani

Jurist (Shaybani's disciple and transmitter of his writings); Baghdad; d. ca.200/815.