## GIFTS MADE DURING DEATH ILLNESS UNDER ISLAMIC LAW

Under the Islamic Law, property is regarded as a trust given by God to mankind to be used and expended in ways which are lawful and in accordance with the teachings of God. In his lifetime a person has power to deal with his property as he deems fit. The only restraint upon a Muslim in the matter of alienating his property is that which relates to wills and death bed gifts. The validity of gifts is usually based on the saying of the Prophet (s.a.w) "send presents to each other for the increase of your love."[1]

The three essentials of a valid gift under Muslim Law are (i) declaration of gift by the donor; (ii) express or implied acceptance of the gift by the donee; (iii) the delivery of possession of the gift by the donor to the donee. Ameer Ali in his Mohamadan Law[2] states that a gift requires for its validity three conditions (a) a manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly and (c) the taking possession of the subject matter of the gift by the donee either actually or constructively. Ameer Ali based his views on the *Hedaya* of Al-Marghinani, the standard text of the Hanafi school. It is stated in the Hedaya -[3]

> "Gifts are rendered valid by tender, acceptance and seisin. Tender and acceptance are necessary, because a gift is a contract and tender and acceptance are requisite in the formation of all contracts; and a seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract without seisin. Malik alleges that the right of property is established in a gift prior to seisin, because

[1]See Musnah Abu Yala and Jami Saghir vol I p. 454; quoted in Marghinani, Hedaya, translated by Charles Hamilton, p. 482.
[2]Ameer Ali, Mohammedan Law vol I Calcutta, 1912, adopted and approved by the Privy Council in *Mohammad Abdul Ghani* v *Fakhr Jahan Begum* (1922) 49 I.A 195, 209 and *Amjed Khan* v *Ashraf Khan* (1929) 56 I.A 213, 218-219.
[3]Marghinani, Hedaya, *op.cit*, p. 482. The Hedaya is one of the most celebrated treatises in the Hanafi school. It was composed by Burhan-ud-din Ali bin Abu Bakr al-Marghinani (died AH 493 - AH 1196). It was translated into Persian from Arabic and was subsequently rendered into English from the Persian translation by Charles Hamilton.

> of its analogous resemblance to sale. The arguments of our doctors on this point are two fold. First the Prophet (s.a.w) has said "a gift is not valid without seisin" (meaning that the right of property is not established in a gift until after seisin). Secondly gifts are voluntary deeds; and if the right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily engaged for it. It is otherwise with respect to wills because the time of establishment of a right of property in a legacy is at the death of the testator; and he in then is a situation which precludes the possibility of anything binding upon himself".

The view of Ameer Ali was adopted and approved in the Privy Council cases of *Mohamed Abdul Ghani* v *Fakhr Johan Begum*[4] and *Amjad Khan* v *Ashraf Khan*[5].

In *Roberts* v *Ummi Kalthom*[6] Raja Azlan Shah J (as he then was) stated -

> "Under Muslim law a man may lawfully make a gift of his property during his lifetime provided that the following three conditions are fulfilled (i) manifestation of the wish to give on the part of the donor; (ii) the acceptance of the donee whether impliedly or expressly; (iii) the taking possession of the subject-matter of the gift by the donee whether actually or constructively. See Outlines of Mohammadan Law by Fyzee at p. 187 and Principles of Mohammadan Law by Mulla 15th Edition at page 130."

It is related by Aishah that her father the Caliph Abu Bakar made a gift to her of an amount of dates that had not been plucked from the trees. The time of death of Abu Bakar approached him and he said to Aishah "If you had taken possession of the dates they would have been yours. Now you shall distribute them in accordance with the law of inheritance among all the heirs."[7]

In the case of a gift a man intends to make a transfer of property

[4][1922] 49 I.A 195, 209.
[5][1929] 56 I.A 213, 218-219.
[6][1966] 1 MLJ 163.
[7]Malik al-Muwatta Kitab al Rahn trans. by Muhammad Rahimuddin New Delhi 1981 p. 325; Al-Sarakshi Al-Mabsut Cairo 1324 vol xii p. 48.

which will be effective as soon as the donee takes possession of the property. In the case of *Rabia Khatoon* v *Azizuddin Biswas*[8] the Supreme Court of Pakistan held that

> "It is well established that under the Muhammadan Law to perfect a gift it is essential to deliver possession of the corpus of the gift to the donee as evidence of complete divestation on the part of the donor".

Where a person is in death illness and he makes a gift, he in fact intends the gift to take effect after his death. If he had intended to make a gift he could have made it when he was well. The fact that he made it when he was suffering from death illness shows that he in fact intends to make the gift effective after his death. This is why it has been stated that in order to constitute death illness the following three conditions are necessary —

(i) the ilness must cause the death of the deceased;
(ii) the illness must cause apprehension of death in the mind of the deceased;
(iii) there must be some external indicia of a severe illness.

This statement of the law given by Fyzee[9] is based on Tyabji[10] and Mulla.[11] Tyabji sates in his book on Muslim Law -[12]

> "To establish the existence of marz-ul-maut or death illness there must be present at least four conditions (a) the illness must have caused death, but not necessary to show that the disease was the immediate cause of death; (b) there must have been proximate danger of death, so that there was preponderance of apprehension of death (that is that at the given time death was more probable then life); (c) some degree of subjective apprehension of death in the mind of the sick person; (d) some external indicia, chief among which is the inability to attend to ordinary avocations.

Tyabji quotes from the Hedaya and its commentary -[13]

> "Paralytic, gouty or consumptive persons when their disorder has con-

[8] PLD 1964 S.C 143.
[9] Asaf A.A Fyzee Outlines of Muhammadan Law, Oxford, 1974, p. 370.
[10] Tyabji on Muslim Law, Bombay, 1968, paragraph 367, Commentary p. 322-324.
[11] Mulla Principles of Mahomedan Law, Bombay, 1968, paragraph 135, Commentary.
[12] Tyabji *op. cit* p. 322 note, 25.
[13] Tyabji *op. cit* p. 323-324.

tinued for a length of time (the length of continuance is to be measured by one year and the meaning of fear is that which takes hold of the mind, not the cause of it) and they are in no immediate danger of death do not fall under the description of sick; hence deeds of gift executed by such take effect to the extent of the whole property; hence when a long time has elapsed, the patient has became familiarised to his disease, which is then not death illness. The reason being that which brings on a change in the matter of management is the sickness of death viz. such an illness as is generally fatal; and an illness cannot be so considered except when the patient is in a condition which increases (in virulence) from stage to stage until it ends in death. Where however it has become chronic, and such that it does not increase, and there is no fear of death from it, then it cannot be the cause of death as blindness and the like. This cannot be regarded as death illness in the beginning of his illness; and a consumptive man until he becomes bedridden cannot be regarded as mariz (sick) because a man is seldom free from illness. Hence so long as he can go out for his necessary purposes and is not bedridden, he cannot be popularly considered to be in his death illness. So Kazi Khan says"

The above is a literal tradition of the passage in the Hedaya and the words in brackets are from the commentary on the Hedaya — see note 31 at p. 328 of Tyabji.

In Neil B.E Baillie's Digest of Moohammadan Law (compiled and translated from the original Arabic sources), which is based on the great Digest of Moohammadan Law prepared by the command of the Emperor Aurungzeb Alamgir and known as the Fatwa Alamgir it is stated at p. 552 -[14]

"As to the definition of a death illness it has been said and this is approved by the fatwa, that when the illness is such that it is highly probable that death will result, it is a death bed illness whether she has taken to her bed or not — Abu Leeth has said that it is when a man cannot pray standing and we adopt this — the most valid definition of death illness is that it is one which is highly probable will issue fatally, whether in the case of the man it disables him from getting up for necessary avocations, out of his house or not, such as for instance where he is a fakih or lawyer from going to the mosque or place of worship; and when he is a merchant from going to his shop; and whether in the case of a woman it does or does not disable her from necessary

[14]Neil B.E Baillie, A Digest of Moohummadan Law, Lahore, 1965, p. 552. Baillie's Digest of Moohummadan Law is based on the Fatawai Alamgiri, a digest of cases compiled under the Emperor Auranzeb Alamgir. It is a work of comprehensive nature and is of great authority in India.

avocations within doors. The lame, the paralytic, the consumptive and the person having a withered or palsied hand when the malady is of long continuance and there is no immediate apprehension of death may make gifts of the whole of their property.

In Ameer Ali's Mohammadan Law vol I it is stated -[15]

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

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

As the operativeness of dispositions made by a person suffering from a mortal illness depends on the sufferer's state of mind, the Mussulman lawyers have indicated certain tests, more or less of an empirical character, for the purpose of determining whether at the time of the dealings in question he was labouring under the fear of death. This was the only course possible, as a learned Indian Judge observes, in *Sarabai's case*,[16] before the science of diagnosis had attained the perfection of modern times. Symptoms and conditions were indicated from which one might infer whether the malady was such as would be likely to

[15] Ameer Ali *op. cit* pp. 56-60 and 62-63.
[16] (1905) I.L.R 30 Bom. 537.

create or, in fact, created that fear in the sufferer's mind. But those tests were in no sense to be regarded as conclusive either with respect to the disease or to the mental conditon. "The gift of a person suffering from paralysis, palsy and phthisis", says the Durr-ul-Mukhtar,[17] "is valid as to the whole when the disease has lasted over a year and there is no fear of death from it but if it has not extended for a year and there is fear of death (on his part) the gift will take effect in respect of a third". The reason of this principle is thus stated in the Durrar; when a person suffers from a malady which is ordinarily mortal for over a year, it ceases to have any apprehensive influence on his mind as it has become part of his nature. "Some have said that marz-ul-mout is an illness that disables a person from attending (lit. going out) for his personal necessities. (But) the approved doctrine is that marz-ul-mout is a malady in which there is a preponderant fear of death although the sufferer may not have taken to his bed; this is as stated by Kahastani."

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

The statement that if an illness has lasted over a year it ceases to be regarded as a marz-ul-mout does not lay down a rule of law; it only gives expression to the general doctrine that a long continued illness unattended with any circumstances of aggravation as is likely to cause an apprehension of death, is not to be treated in its effects as a "fatal malady". Where, however, the disease is long-standing but becomes suddenly aggravated and the patient becomes confined to his bed "it would be like a new illness," that is, it would be taken as likely to create a fear of death in the mind of the sufferer, and his acts in that state would, therefore, in case of death from the illness, take effect with respect to a third.[18]

[17]Muhammad Ala-ul-Din Haskafi Durr-ul-Mukhtar Hoogly Edition, p. 821. See translation by B.M Dayal, Lahore, p. 206. The Durr-ul-Mukhtar is a commentary on the Tanwir-ul-Absar of Ghazzi (d. 999 AH) and was written by Mohamed Aala ud-din bin Shaik Ali al-Haskafi and is full of important decisions.

[18]Radd-ul-Muhtar vol. 5 p. 648. The Radd-ul-Muhtar is a commentary on the Durr-ul-Muhtar by Mohammed Amin, a Syrian. The Radd-ul-Muhtar is widely esteemed as the best authority on Hanafi Law. It contains a critical resume of previous decisons, the opinions of the most important earlier jurists, with a full account of the recognised and accepted principles.

The Fatawai Kazi Khan dealing with the right of the wife divorced by a man suffering from a mortal malady says, "if a man has become so debilitated from an illness that he is bed-ridden and rendered incapable of managing his outside affairs, and the illness is increasing day by day, then the right of the second party (the wife) attaches to his property, because the probability from his condition is death; and if the man in such a condition divorces his wife he is declared to be a farr (or evader)". "But a person who, though ill, is able to attend to his daily avocations, although the illness may eventually cause his death, is not regarded as one suffering from a mortal illness (marz-ul-mout)". Similarly one struck with paralysis, phthisis or palsy is accounted "sick" whilst the disease is on the increase; but when the illness has lasted a long time and is not becoming worse, the sufferer "is as one in health". "Some lawyers have laid down that if a disease, however mortal, lasts for or over a year, it should not be regarded as such, because the man becomes so accustomed to it as to lose all apprehension as to his own condition."

The same test is given in the Durr-ul-Mukhtar. It says on the authority of the Bazazia "when a person is in imminent fear of death whether from disease or any other cause, so that in the case of an illness the man is so broken (or weakened) by it as to be incapacitated from conducting his ordinary avocations outside his house; for example, a fakih (a jurist) from going to the mosque, a tradesman to his shop, a woman from attending to her indoor occupations," it is a marz-ul-mout. And it adds from the Mujtaba that "when the illness has become so severe as to make it permissible for the sufferer to offer his prayers without standing up (lit. in a sitting posture) it must be regarded as an illness of death."[19]

"The author of the Mansuma was asked", says the Radd-ul-Muhtar, "as to the definition of (the term) marz-ul-mout and he answered there were many." The Hanafi doctors generally have proceeded on the doctrine laid down by Fazli, viz. that "when a man is incapacitated from leaving his house (dar) for his personal needs, or a woman from attending to her avocation showing difficulty in getting up and down, that is an indication of marz-ul-mout."[20]

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

[19]Durr-ul-Mukhtar, translated by B.M Dayal, Lahore p. 205.
[20]Radd-ul-Muhtar vol 5 p. 649.

In the chapter in the Fatawai Alamgiri[21] dealing with "the gift of the sick" the principles are set forth at some length. In the first place it is stated from the Asal that neither a gift nor a sadakah by a mariz — a person suffering from marz-ul-mout of which the definition is given later on — is effective without possession; and if possession is taken, it is valid in respect of a third. If the donor were to die before delivery (taslim) the whole disposition would be invalid. "It is therefore, necessary to understand that a gift by a mariz is a contract and not a wasiat, and the right of disposition is restricted to a third on account of the right of the heirs which attaches to the property of the mariz. And as it is an act of bounty it is effective so far only as the law allows and that is a third. And being a contractual disposition it is subject to the conditions relating to gifts, among them the taking of possession by the donee before the death of the donor; so in the Muhit. If a person (suffering from marz-ul-mout) were to die after making a gift of a house and delivering possession thereof to the donee, and it were found that there was no other property belonging to him, the gift would be valid in respect of a third of the house, and the remaining two-thirds would be returned to the heirs. And this principle applies to all subjects whether they be partible or not; so in the Mabsut."

"If a mariz makes a gift of a property which cannot come out of a third, the donee must return the excess over a third in respect of which the donor has no power".-[22a]

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

In *Hassarat Bibi* v *Golam Jaffar*,[22] where the validity of a gift was impugned on the ground that it was made in death illness, the High Court of Calcutta indicated the questions which require to be considered in determining whether the disease comes within the category of a marz-ul-mout illness; viz, (i) was the donor suffering at the time of the gift from a disease which was the immediate cause of his death; (ii) was the disease of such a nature or character as to induce in the person suffering the belief that death would be cause thereby, or to engender in him the apprehension of death; (iii) was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death; (iv) had the illness continued for such a length of time as to remove or lessen the apprehension of immediate

[21] Fatawai Alamgiri vol IV p. 559 Book on Gifts chapter X.
[22a] 10 W.N 449.
[22] [1898] 3 Cal. W.N 57.

fatality or to accustom the sufferer to the malady? And it was added that "the limit of one year mention in the law-books does not, in our opinion, lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness."

"The view expressed in this case was followed in *Fatima Bibee* v *Ahmad Baksh*,[23] where it was held further that "whilst the lawyers have suggested that certain physical incapacities indicated a dangerous illness, they did not lay down positively that these incapacities are conclusive." In the case of *Sarabai* v *Rabiabai*,[24] the learned Judge pointed out that in order to establish marz-ul-mout there must be at least the following conditions:- "(a) proximate danger of death so that there is, as it is paraphrased, a preponderance (ghaliba) of Khauf or apprehension, that is, at the given time death must be more probable than life; (b) there must be some degree of subjective apprehension in the mind of the sick person: (c) there must be some external indicia, chief among which I would place the inability to attend to ordinary avocations."

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

In Wilson's Muhammadan Law, revised by A. Yusuf Ali, it is stated -[25]

"A gift is said to have been made in mortal sickness, only if it was at the time and seemed to the donor himself highly probable that the malady would soon end fatally and if it did in fact so end. The donor's state of mind which is the real ground of the rule, may be, but is not necessarily to be, presumed from the gravity of the symptoms. On the other hand, no evidence of actual appprehension of death will suffice in the absence of external indicia of danger, chief among which is inability to attend to ordinary avocations." The authorities quoted are Baillie p. 543 and the decisions of the Courts.[26]

[23][1903] I.L.R 31 Cal. 319. Affirmed by the Judicial Committee of the Privy Council, 35 I.A 57.

[24][1906] I.L.R 30 Bom 819. In this case the question for determination was whether a talak pronounced by a deceased Hanafi Muslim deprived or not the divorced wife of her share in his inheritance. This case was followed in *Rashid* v *Sherbanoo* [1907] I.L.R 31 Bom. 264.

[25]Sir Roland Knyvet Wilson Muhammadan Law revised by A. Yusuf Ali, 1926. Lahore, p. 313.

[26]The cases referred to are *Labbi Bibi* [1874] 6 N.W 159; *Muhammad Gulshere Khan* (1881)3 All 731; *Karimanessa Bibi* (1925) 90 I.C 218; *Ibrahim Golam Ariff* (1907) 35 Cal. 1; *Fatima Bibi* (1903) 31 Cal. 319; 37 Cal 271; *Sarabai* (1905) 30 Bom. 537; *Rashid* v *Sherbanoo* (1907) 31 Bom 264. He also refers to the views of Abdul Rahim, Muham-madan Jurisprudence.

In Mohamad Yusoff's Mohamadan Law relating to Marriage, Divorce etc (Tagore Law Lectures)[27] it is stated -

> "And it is necessary to lay down a rule (for Murz-ul-maut) which shall be universal. The learned lawyers have held that if the sick man is a man who has become thin from sickness, so that he becomes bed-ridden and is rendered incapable of maintaining organization in (or managing) outside affairs, and his sickness is every day increasing, then the right of the other party (that is, the wife) accrues to (or comes to be connected with) his property; because the probability from his condition is dissolution; and then if such a man, in such a condition, divorces his wife, he is said to be a *Farr* (i.e. literally one who is running away, that is, a run-away with his estate, or one who is trying to prevent his wife from inheriting to him).
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> And if a woman is sick, then some of the learned lawyers have said that if she is not able to say her prayers standing, and is unable to go to the privy (or *mukhruj*) without assistance she is held to be bed-ridden *(Saheb-i-Firash)*. And regard is to be had in her case to inability to manage inside (or internal domestic) affairs; and in the case of a man, regard is to be had to incapacity to manage outside affairs.
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> But a person who is able to go about to meet his wants, but gets fever every day, is like a man in health. But a person who is decrepid *(Mook'ad* or cripple) and one who is suffering from paralysis, whose complaint does not go on increasing every day, is like one in health. So also one who is wounded or is suffering from pain, but who is not by such wound or pain rendered bed-ridden, is like one in health.
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> And if a man, who is bed-ridden, divorces his wife, and is afterwards killed, or dies during that sickness from a cause other than that sickness from which he was suffering, that man shall be held to be a *Farr*."

In the Mejelle, the Islamic Civil Code produced in Turkey between 1869 and 1876 it is stated[28] -

> "Marz-ul-Maut (mortal sickness) is the kind of sickness, such that in the condition of the sick person there has generally been fear of death

[27]Moulvi Mahomed Yusoof Khan Bahadur, Mahomedan Law relating to Marriage, Dower, Divorce etc. Calcutta, 1898, vol III p. 392. Moulvi Mohamed Yusoof's work is based on the Fatawai Kadi Khan, a collection of fatwa of Imam Fakhr-ul-Din Hassan Mansur al-Uzjandi al-Farghanani commonly called Kazi Khan who dies in AH 692 (AC 1196), a work held in the highest esteem in India.

[28]The Mejelle translated by C.R Tyser, D.G Demetriades and Ismail Haqqi Effendi, Lahore, 1980, Article 1595, page 269. The Mejelle was compiled between 1869 and

for him, and the sick person being unable to attend to his business, if he is a man, his business outside the house, if she is a woman, her business inside the house, has died before a year has passed on account of his condition, whether the person has been confined to his bed or not. And if when the illness of a sick person is prolonged, one year passes, while he is always in one state, unless the illness of the sick person gets worse and his state is changed, he is like a man who is well, and his transactions are like the transactions of a man who is well.

But if his illness gets worse and his state changes and he dies before a year passes, his state until he dies, calculating from the time of change, is mortal sickness."

In another translation the passage in the Majelle reads[29] -

"A mortal sickness is that sickness which on the one hand brings with it for the most part the fear of death and on the other part hinders the sick person, if he be a man from seeing to his business outside the house and if she be a woman the business inside the house and ends in death before a whole year has passed after the sick man come to this state.

It is not to be taken into consideration whether a sick person is confined to his bed or not; but if the condition of the sick person extend for more than a year, continuing always the same, the sick person is considered as in health so long as his sickness does not change for the worse and all his acts are considered as those of a healthy man. If however, his sickness change for the worse, and the sick man die before a whole year has elapsed, the condition in which he continued to be from the day on which his sickness began to get worse until his death is considered as a death sickness."

Coulson in his book on *Succession in the Family Law*[30] states

"According to traditional Sharia doctrine therefore the test of whether an ailment or condition gives rise to an apprehension of death is a purely objective one which is based on the gravity of the condition itself and ignores any evidence of the personal state of mind of the sufferer."

1876 as a part of the legislative purpose of Turkey. It is the work of a Commission of jurists headed by Ahmad Djevdet, the Minister of Justice. It was translated into Malay and applied in Johore in 1914.

[29] The Medjelle translated by W.E Grisby, London 1895, p. 342.

[30] N.J Coulson, Succession in the Family Law, Cambridge, 1971, p. 264.

Unfortunately Coulson states no authority for his view and it is not possible to check his source. It would appear that Coulson has developed his argument from considering the rationale of the doctrine. He says -[31]

> "Although a dying person may in terms of sanity and prudent judgment, be perfectly competent to engage in transactions, he is placed under interdiction in order to protect the interests of his creditors and his heirs, to the extent basically that any transaction which offends their interests will be effective only if they ratify it. The law aims only to protect mature interests, that is to say, in the case of an heir, when his right to succeed to part of the estate has crystallised, and in the case of a creditor when his right has become attached to the estate. These rights are held to be so mature not only with death itself but with the advent of the immediate and effective cause of death, be it a physical disease or some other fatal circumstance. In other words the law antedates the maturity of the heirs' and creditors' rights to the time at which it can be established that the process of dying had irrevocably begun.
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> It must be emphasised therefore that determination of the initial issue as to whether or not a person is a dying person for the purposes of the ultra vires doctrine is essentially an objective process which has little to do with the state of mind of the person concerned or the possible motives that might have inspired his transactions. Unless and until the law is satisfied that a person is in fact dying he is not subject to any form of restraint in his dealings with his property, however clear it may be that he was acting in contemplation of death or with the manifest intention of circumventing the laws of succession and however closely death in fact followed his transactions. On the other hand, once the law is satisfied that a person is dying, then he is subject to interdiction, however proper the motives behind his transaction might be and however convinced he may personally have been that he was not dying. In short, it is the physical fact of impending death and not the mental contemplation of it is that is the basis of the interdiction. The purpose of the law is primarily to control the acts of dying persons rather than acts in contemplation of death."

Coulson appears to be stating his view as to the rationale of the doctrine and quotes no authority. He does not seem to rely on any Hanafi authority. He quotes the Maliki jurist al-Sawi and refers to the Hambali jurist Ibn Qudama.[32]

[31] Ibid, p 259 f.
[32] Ibid, p. 262 and 263.

In quoting al-Sawi he says -[33]

"The Maliki jurist al-Sawi speaks for most authorities when he describes death-sickness, basically as 'circumstances in which death comes as no surprise'. In more detail the text runs:
Interdiction falls upon the person sick with a disease which normally, though not necessarily, causes death, such as one suffering from consumption or colic or raging fever, or a woman who is six months or more pregnant, or a person who is imprisoned for murder, or a soldier in the fighting ranks of battle. But there is no interdiction in case of minor ailments such as ophthalmia or the scab . . . however afraid of death the sufferer may be.

The requirement that there should be apparent and reasonable grounds for apprehending death is clearly the result of the combination of the objective and subjective elements of the doctrine. If it were solely a case of establishing when the praepositus became a dying person, the existence or otherwise of obvious grounds for apprehending death would be immaterial. If, on the other hand, the doctrine were a purely subjective one going only to the state of mind of the praepositus, the only requirement would be that the praepositus in fact apprehended death, whatever the grounds of such apprehension might be. The necessity, therefore, that the circumstances should be such as give rise to a reasonable apprehension of death (and in fact cause death) serves two purposes. First, it provides clear evidence to the world at large that the praepositus was a dying person; second, it enables the conclusion to be drawn that the praepositus must have known that he was a dying person and was acting in contemplation of his death."

Coulson says[34] that for a person to be *marid*, therefore four conditions must be met. He does not state what they are but deals with them in the subsequent pages. They appear to be —

(1) Reasonable grounds for apprehending death.[35] It is in this connection that he says that the existence or otherwise of a reasonable apprehension of death is a question of fact for each individual case. It is in this context that he says that the test of whether an ailment or condition gives rise to an apprehension of death is a purely objective one, which is based on the gravity of the

[33]Ibid, p. 262.
[34]Ibid. p. 262.
[35]Ibid p. 262-264.

condition itself and ignores any evidence of the personal state of mind of the sufferer.

In this connection too he refers to the judicial practice in India and Pakistan which he says has laid down an additional requirement to the Sharia doctrine — that the victim did in fact believe that his death was imminent.[36]

He gives an example "where for example a person is informed after medical tests that he has a fatal form of heart disease, but nevertheless demonstrates an absolute conviction in his eventual recovery, he will be a dying person according to the Sharia doctrine but not according to Anglo-Muhammadan Law."[37] Again he quotes no authority and seems to be giving his own view.

(2) Apprehension of impending death — the apprehension must be of imminent death. He says[38] —

> "In any theory of causation, the decision as to whether given circumstances constitute either a proximate or a too remote cause must inevitably be to some degree arbitrary. In the event Shariah doctrine settled upon the period of one year as fulfilling the necessary criterion of imminence. An ailment or condition, therefore, may only be deemed, retrospectively, to give rise to an apprehension of impending death if it in fact resulted in death within the outside limit of one year. This means that protracted diseases, however serious at their inception and however strong the apprehension of impending death at that time, will only rank as death-sickness in their terminal stages and never for longer than one year prior to death. Here it is clear that it was objective considerations of causation, rather than subjective considerations of the praepositus' state of mind, which conditioned the thought of the jurists and determined the scope of the ultra vires doctrine."

It is submitted that Coulson is wrong here for the Hanafi jurists speak of the sick person having got used to his illness and therefore no longer expecting imminent death.

(3) Settled apprehension of death. In this respect Coulson says[39]-

[36] Ibid p. 264. He does not refer to the specific cases.
[37] Ibid p. 264.
[38] Ibid p. 265.
[39] Ibid p. 265-266.

"The apprehension of death must be settled in the sense that it must continue uninterrupted until the time of death. In fixing, retrospectively, the time at which the process of dying may be said to have irrevocably begun, the law will not go back beyond any time when there was a reasonably prospect of survival, even if there had been good cause before this to apprehend death. The strict notion of death-sickness in Sharia doctrine is that of a progressive decline and steady deterioration in the dying person's condition. Accordingly, any improvement in the condition of a sick person which is substantial enough to remove the appprehension of imminent death means that the person will not be *marid*, in the eyes of the law for the period prior to this recovery, even if a subsequent relapse results in his death. He will be *marid* only from the time of the relapse."

(4) Death from cause anticipated.[40]

Coulson summarises his views thus[41] on the four criteria of death-sickness. A court which is asked to declare an act of the praepositus ultra vires because it was the act of a dying person must be able to answer the following question in the affirmative. Can it be established that (i) at the time of the relevant act there was good and obvious reason to conclude that the death of the praepositus was imminent, and (ii) nothing subsequently occurred, such as recovery, survival for more than a year or death by some other intervening cause, to affect the validity of that conclusion?"

Again he quotes no authority to support his view.

Abdul Rahim, who was a judge in Madras, India, in his book on "Muhammadan jurisprudence", first published in 1911, said[42] -

"There has been much discussion in our courts as to what constitutes death-illness. The Muhammadan law, however, does not seem to present any difficulty as to the principle upon which it is to be ascertained, nor is there any substantial difference of opinion among the jurists on this question. Death-illness is defined as illness from which death is ordinarily apprehended in most cases, provided in the particular case in question, it has actually ended in death. But if the disease be of long standing and does not so increase from day to day that death may be apprehended from it or does not ultimately end in death, it will not be regarded as death-illness.

[40]Ibid p. 266.
[41]Ibid p. 266.
[42]Abdul Rahim Principles of Muhammadan Jurisprudence, London 1911, p. 254-256.

It will, however, be reckoned as death-illness from the date when the patient became bed-ridden thereby, provided he dies within a year of it.[43] The compilers of Al-Majallah lay it down that death-illness is that from which death is to be apprehended in most cases, and which disables the patient from looking after his affairs outside his house if he be a male and if a female the affairs within her house, provided the patient dies in that condition before a year has expired, whether he has been bed-ridden or not. If the illness protracts itself into a chronic condition and lasts like that for a year, the patient will be regarded as if he was in health, and his dispositions will be treated like those of a healthy person, so long as his illness does not increase and his condition does not change. But if such chronic illness increases and his condition changes so that he dies of it, then such illness from the date of the change in his condition if the change be of the nature above described will be regarded as death-illness.[44]
The definitions as given by the Shafii and Hanbali jurists are also to the same effect, namely, that death-illness is illness dangerous to life, that is, which mostly ends in death provided the patient actually dies of it. Instances are mentioned in the books as to what illnesses are regarded as dangerous, but it is laid down that it is to be left to the judgement of competent doctors to say what diseases would come within the category.[45]

It is stated in *Fatima Bibi* v *Ahmad Baksh*,[46] that no particular incapacities of a sick person can be said to be infallible signs of death-illness. This may perhaps be granted. The real question, however, in all the cases is whether the illness was of such a character that death would be apprehended from it in a majority of cases, and as laid down by jurists of the Shafii and Hanbali schools of law, this question is one to be ordinarily determined by medical experts, or by the fact that the patient is incapacitated by the illness from attending to his usual avocations. But as suggested in *Kulsum Bibi* v *Golam Hossain Cassim Ariff*[47] the test laid down in the case of *Fatima Bibi*, namely, a subjective apprehension on the part of the patient himself cannot, it is submitted, be decisive of the inquiry and is hardly of much importance. It is a cardinal principle of Muhammadan jurisprudence that the law takes note only of perceptible facts. The original authorities do not lay down that the fears entertained by the sick man himself form any criterion of death-illness. In fact, it is an event of nature, the character of which cannot depend upon what

[43]He quotes Hedaya vol ix p. 389 (see Note 13 above); Kifaya vol ix p. 389; Inaya vol ix p. 389.
[44]See notes (28) and (29) above.
[45]He quotes Al-Wajiz p. 272; Tuhfatul Minhaj vol III p. 36 et seq; and Nailu'l Maarib vol II p. 11-12.
[46](1903) I.L.R 31 Cal. 319 p. 327. See note (51) below.
[47]10 Cal W.N 449 p. 478.

the patient might think of it. The law in placing an embargo on a sick person's juristic acts puts it on the ground of illness, and not on the apprehension of death by the sick man. The reason or motive underlying the law is that illness weakens a man's physical and mental powers, and he is likely, therefore, as experience shows, to act under such circumstances to the detriment of his spiritual interests by disappointing his heirs in their just expectations. But this is a general presumption on which the law on the point is founded and according to the principles of Muhammadan jurisprudence, it is not to be proved as a fact in each particular case. The proposition enunciated in 31 Cal., 319 p. 327 has, however, been confirmed by the Judicial Committee of the Privy Council[48] when the case went up to them in appeal."

In *Hassarat Bibi* v *Golam Jaffar*[49] it appeared that the deed of gift was executed by one Ehsan Ali a few weeks before his death when he was suffering from fever, cold, and asthma of which he ultimately died.

The learned District Judge held that it was a case of marz-ul-maut on the ruling in *Muhammad Golshore Khan* v *Marian Begum*[50] which he said shows that the rule does not apply in the case of a lingering illness which has lasted more than a year and the evidence in the case did not show that this ruling applied.

On appeal it was held (Ameer Ali J. and Pratt J) that the judgment must be set aside. The Court said -

"A careful study of the principles enunciated in the most authoritative Hanafi works would show that in determining whether the donation of a person suffering from a mortal disease comes within the doctrine applicable to marz-ul-maut gifts several questions have to be considered viz. (1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of death? (2) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create on the mind of the sufferer an apprehension of death (4) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatility or to accustom the sufferer to the malady? The limit of one year mentioned in the law books does not, in our opinion, lay down any hard and fast rule

[48] I.L.R 35 Cal 271. See also *Ibrahim Gulam Ariff* v *Saiboo* 35 Cal 1; 34 I.A 167.
[49] (1898) 3 C.W N 57.
[50] (1881) I.L.R 3 All 731.

regarding the character of the illness. It only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness - - It will be seen therefore that the doctrine of marz-ul-maut, as understood by Mohamedan lawyers is of a technical character and requires to be considered from various points of view."

On the facts it was held that the District Court had not considered a number of matters relevant to his decision and the case was sent back to the court.

In the case of *Fatima Bibi* v *Ahmad Baksh*[51] the facts were that one Dader Baksh suffered from diabetes for years and then got albuminoria from which he suffered for more than a year before he died. He was on sick leave from May 1897 and was under treatment. On 21st May 1897 he and his wife made a gift of their properties in favour of his son, the plaintiff. Six days later the deceased died. The deceased also left six daughters and some of the daughters, through their husbands, claimed shares in the estate of the deceased. The plaintiff then brought a suit to declare that the gift was valid. The subordinate Judge gave judgement for the plaintiff. On appeal an interesting argument was brought by counsel for the appellants, that is Maulvi Mohamed Yusof and Maulvi Serajul Islam. It was submitted that every command of the Sharia was characterised by its *illat* or reason or principle which is a mental idea and its *sabab* or the cause or the way leading to it, which has an external and physical existence. Thus *illat* creates an obligation, of which the *sabab* in the external manifestation; so that the *sabab* is the way which one must adopt and go by to reach the command and obligation and perceive and realise it. These principles must be borne in mind in deciding what constitutes marz-ul-maut.

The right of the heirs in marz-ul-maut exists, because by death the late owner ceased to have any need of property. Hence absence of need is the reason, which exists not only on actual death, but a little before, when all hope of life is cut off and there is every fear or lifelihood of death taking place. In other words, the fear of death is the *illat* for the inchoate right of heirs, which imposes prohibition upon the right of transfer. But how is the principle to

[51](1903) I.L.R 31 Cal 319.

be practically applied? The principle exists only in the mind - fear of death is a mental condition - there must be something external capable of being perceived by the senses, about which there should be no chance of mistake and which should be an infallible guide; this is the *sabab*. When the *sabab* is clear it cannot be controlled by *illat* and the two must be read consistently. Hence in all authorities on Mohamedan Law, the *sabab* or causes of marz-ul-maut are pointed out in detail and the manifestations, indications and signs are most clearly set; the *illat* is also at the same time indicated.

Thus in the Fatwai Kazee Khan, marz-ul-mout is first defined from the point of view of an *illat*: see M. Yusoff, Tagore Law Lectures vol III paragraph 2919; and then the same is defined as a *sabab* in the shape of physical and external manifestations see paragraphs 2920 - 2924 and 2947 of the same book. Hope or no hope, fear or no fear, that is declared to be the *sahab*, cannot be controlled by absence of fear. So in Baillie's Mohamedan Law, 1st Ed. p. 280, both the *illat* and the *sabab* of marz-ul-maut are indicated. The external indications are conclusive and when they are laid down as such, they cannot be controlled by the doctor's opinion - see Baillie's Mahomedan Law 1st Ed. pp 280, 281, 543; and also Hamilton's Hedaya vol 1 p. 283 vol IV pp 469, 506. With reference to the last paragraph it is submitted that, although as to the *illat* or the immediate danger of death opinion may vary, the limit of one year is a *sabab* which is conclusive of the question; and being "bed-ridden" is not conditional on apprehension of death and is determined by the lexicographical and descriptive meaning of the word: see M. Yusoff, Tagore Law Lectures vol III para 2945, 2946.

It was submitted that it is clear from the authorities cited and the passage translated in the case of ***Labbi Beebee* v *Bibbon Beebee***[52] that if the increase of illness takes place within a year, then it is a case of marz-ul-maut, and also if the increase takes place beyond a year, even then it is a case of marz-ul-maut, whatever might be the doctor's opinion. The limit of one year is in itself conclusive that a hard and fast condition is preferred to a doubtful rule depending upon a mental condition like fear.

For the respondent it was argued that it was absolutely necessary to constitute marz-ul-maut that there should be fear and apprehen-

[52](1874) 6 All H.C 159.

sion of death; without such fear there would be only *marz* and not *marz-ul-maut*. If there is increase of illness after a year, it is no doubt counts for a new sickness but this new sickness must be accompanied by apprehension of death. Mere physical symptoms or incapacity do not conclude the matter. The question of fear or apprehension of death must be decided upon evidence in each case.

The Court dismissed the appeal. In its judgment the Court said-

> "The principal discussion under this issue has been whether the deed is valid with reference to the Mohamaden Law regarding gifts made during *marz-ul-maut* or death illness; for such gifts are declared invalid. The law on this matter has been cited from Baillie's Muhamadan Law, Book VIII, Chapter VIII; Mr. Justice Amir Ali's Mohamedan Law 2nd Ed. vol I p. 53; Maulvi Mohamed Yusoof's Tagore Law Lectures vol 3 p. 392, para 2920 and page 402 para 2946; Sir Roland Wilson's Anglo-Mohamadan Law 1st Ed. pp 233 and 234 and the authorities quoted in the case of *Labbi Beebee* v *Bibbon Beebee*[53]. In the first two works the Fatwa-i-Alamgiri is quoted as chief authority and has been treated as such before us. Put briefly it declares thus - "A death illness is one which it is highly probable will end fatally whether the sick person has taken to his bed or not; or whether in the case of a man, it disables him from rising up for necessary avocations out of the house or not, such as for instance, when he is a fakih or a lawyer, from going to the masjid or place of worship and when he is a merchant from going to his shop; or whether in the case of a woman it does or does not disable her from necessary avocations within doors". But the illness is to be considered death illness when a man cannot pray standing --".

The parties contended for two different contentions of the passages cited above. These passages mention three matters (i) illness (ii) expectation of a fatal issue and (iii) certain physical incapacities which indicate the degree of illness. The learned vakil for the defendants contends that the meaning of this in that if the 1st and 3rd exist, then the 2nd must necessarily be presumed, namely that there is an expectation of death. The learned vakil for the plaintiff contends on the other hand that there is no such necessary presumption, that the matters of the 3rd class are only evidence; and that the Court must decide from that and other evidence the second actually exists, that is, whether there is expectation of death. The latter appears to be the correct view; for the passage in the Fatawai Alamgiri distinctly states twice that the definition of death illness is illness in which death is highly probable, whether the incapacities exist or not. These incapacities are therefore not infallible

[53](1893) 3 C.W.N 57. See note (49).

signs of death illness. Only one symptom is mentioned as conclusive, namely that the man cannot stand praying. The explanation appears to be this - at the time when this law was laid down, little medical knowledge existed. It was necessary however to decide when an illness was a death illness; and that can only be done by simple rules dealing with certain symptoms which all persons could notice and comprehend. Yet it appears from these passages that even while the lawyers suggested that certain physical incapacities indicated dangerous illness, they did not lay down positively that these incapacities are conclusive, as contended for by the learned wakil for the defendants; for it was no part of their definition of death-illness, whether the incapacities mentioned existed or not. It is only with regard to the extreme case, where a man cannot stand up to perform the primary and simple obligation of saying his prayers, that they declared the illness should be deemed a deathillness.

For these reasons we agree with the remark made in *Hassarat Bibi's Case*[53] that too narrow a view must not be taken of the doctrine of death-illness; and our view is in agreement with the way in which the doctrine is stated in that case namely "was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender an apprehension of death?" and "Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death?"

On further appeal to the Privy Council, the judgments of the lower courts were affirmed. Lord Collins in giving the judgment of the Privy Council said -[54]

"The only point which the appellants have argued in this occasion was that which no doubt goes to the root of the matter viz. whether the gift was invalid under the law of marz-ul-maut. The test which was treated as decisive of this point in both (the lower) courts was, was the deed of gift executed by Dader Baksh under apprehension of death? This which appears to their Lordships to be the right question, is essentially one of fact, and of the weight and credibility of evidence upon which a court of review can never be in quite as good a position to form an opinion as the court of first instance, and it would be probably be enough to prevent this Board from interfering if it should appear that there was evidence as might justify either view however clearly of opinion that the reasons given both by the subordinate Judge and the High Court, which they will not repeat, establish a large preponderance of probability in favour of the conclusion at which they both arrived."

[54]ILR 35 Cal 271.

*Kalsom Bibee* v *Golam Hossein Cassim Ariff*[54a] was a suit for setting aside wakafs on the grounds that the trusts were illusory and that there had been no substantial dedication to religious and charitable trusts. The wakafs dealt with portions of the estate, some were made inter vivos, some by will. One of the grounds on which one of the wakafs made inter vivos was attacked was that it could not in any event operate to the extent of more than one-third of the property as it was alleged to have been executed during mortal illness. It appeared that the settlor suffered from paralysis in addition to diabetes. He was not actually confind to his bed until probably three weeks or so before his death. The evidence generally as to his health was somewhat vague owing to the fact that no qualified medical men who attended on him had been called as they have since died or left Calcutta. The learned Judge held that the wakaf in question was not executed in mortal illness so as to be subject to the doctrine of marz-ul-maut. He held that the circumstances of the case did not rise beyond the level of suspicion. The evidence on behalf of the Plaintiff was too vague and was not in the absence of reliable medical testimony sufficient to enable the court to find that the doctrine of marz-ul-maut applied particularly having regard to the evidence which was also given that dysentery was the immediate cause of death.

Earlier in his judgment the learned Judge Woodroffe J. said-"It has been further urged that the terms of the second deed which stipulated that whilst Cassim Ariff was alive he alone should have the control of the expenditure, indicate that he did not himself think he was going to die. This argument assumes that the existence of subjective apprehension of death, that is apprehension by the person who is ill as distinguished from the apprehension produced in the mind of third parties by the symptoms and course of illness is a necessary element of the rule of marz-ul-maut. I have some doubt if this be so and whether marz-ul-maut is not such whether the sick man thinks the sickness to be so or not. These terms may, however, in any event be inserted to meet the contingency of recovery and are not necessarily inconsistent with a condition of health of such an assertive character that death might within a short period reasonably be expected to occur as it did in fact occur."

[54a](1905) 10 C.W.N. 449

In *Sarabai* v ***Rabiabai***[55] one Haji Sidek had divorced his wife. He died soon after and the question was whether the talak was valid. It appeared that the divorce was pronounced by the deceased when he was in health, although at that time he was an old man of 63 who looked his age. In the course of his judgment Batchelor J. said -

"First then what is meant in Mohamadan Law by this sickness or marz-ul-maut. Baillie in discussing the subject under the head of divorce says "It is correct to say that when a man is unable to go out of his house for his necessary avocations, he is sick, whether he can stand up in the house or not". This is developed in later passages, but since they depend upon an underlying legal principle, I must pause to explain what that principle is, so far as I can collect it from the approved authorities. For in such a matter it appears to me my only course is to abide by accepted authorities, adhering to whatever clear principles may be discernible. In this particular instance both the principle and the reason upon which it is grounded seem to be unmistakeable. They will be found generally in discussions upon the opinions of Shafii, of whom Hamilton writes that "his decisions in civil and criminal jurisprudence are seldom quoted by the doctors of Persia or India but with a view to be refuted or rejected (Hamilton vol I p. xxviii). -- Shafii who maintained what may be called the common law position in these matters, held that whether a man's death took place before or after the expiration of iddat, his divorced wife was left without any right of inheritance, because the conjugal relation was cancelled by the supervening divorce. But this view was rejected on what approximates to the equitable principle that the cause of the wife's right to inherit is in the death illness and as the husband designs to defeat it, his device ought to return to himself by postponing the effect of his act until the expiration of iddat, to prevent the injury which would otherwise fall upon her. (Baillie p. 278). So repudiation by a man in the last illness is always referred to as repudiation by a *farr* or evader and the principle appears to be the perfectly intelligible doctrine that a wife's slowly accrued rights shall not be suddenly defeated by the caprice of the husband while labouring under such mental infirmity as usually accompanies the approach of death. ---- the same subject occurs again in Baillie's chapter on gifts, where I see no reason to suppose that the death illness discussed differs from the death illness in case of repudiation. And here we read that "the most valid definition of death illness is that it is one which it is highly probable will issue fatally, whether in the case of a man it disables him from getting up for necessary avocations out of his house or not

[55] (1905) ILR 30 Bom 537.

as for instance - when he is a merchant from going to his shop." This appears to be the definition in the Fatawa-i-Alamgiri and I may say briefly that other relevant authorities appear to follow the same lines. It would follow that what is meant by death illness in Mohamadan Law is an illness which does in fact cause death, which disables the sufferer at the given time from pursuing his ordinary avocations, and which raises in his mind some apprehension of the probability of death. So where the illness is of long duration, but there is no immediate probability or apprehension of death, it is laid down that that is not a death illness but is to be regarded rather as an indication merely of altered constitution or habit. Indeed upon examining the books I seem to find that the only certain test of death illness laid down is that a man shall not be able to stand praying — no doubt rather a rough test adopted in days when medical diagnosis was itself rough, but indicating pretty clearly the rigorous meaning which the Mahomedan jurists attached to the phrase *marz-ul-maut*.

The Hedaya contains what is called a rule for ascertaining a death illness and this will be found in Book LII Chapter II of Hamilton vol IV p. 506. Whatever may be the case in the original Arabic, it must be confessed that in the translation the passage is encumbered with much confusion, the particular being confounded with the general and the sentence being further darkened by parenthesis. But so far as any plain meaning is to be wrung from the words it would seem that the test is "immediate danger of death" and "apprehension of death" and this conforms to the principle which has already been deduced. The same test is to be gathered from the treatise by Maulvi Mohamad Yusoff, the passage being at pages 392-3 of the third volume, paragraphs 2920-2924 --

I admit that this question is not to be decided merely upon medical principles as now ascertained among Western peoples; but any examination of the authorities lead me to the conclusion that in order to establish *marz-ul-maut* there must be present at least these conditions -

(a) proximate danger of death, so that there is, as it is phrased, a preponderance *(ghaliba)* of *Khauf* or apprehension, that is, that at the given time death must be more probable than life;

(b) there must be some degree of subjective apprehension of death in the mind of the sick person;

(c) there must be some external indicia, chief among which I would place the inability to attend to ordinary avocations.

These, then, are the incidents of death-illness which as it seems to me are to be gathered from the authorities; and that they have commended

themselves also to our British Court may I think be seen on reference to *Fatima Bibee* v *Ahmad Baksh*[56] and the cases there cited."

In the case of *Ibrahim Goolam Ariff* v *Saiboo*[57] the deceased had made gifts of his property in Rangoon to his three minor sons. The appellant *interalia* alleged that the gift was invalid as at the time of the execution the deceased was in his death-illness. The trial judge (Chitty J) held that the gifts were not void as being death-bed gifts. He held that the law applicable to the case was the Mohamadan law as to gifts. He referred to various ancient and modern authorities on Mohamadan Law as to the legal signification and essential elements of death illness and in particular cited the passage from the judgment of the High Court in Calcutta in *Hassorat Bibi* v *Golam Jaafar*[58] "A careful study of the principles enunciated in the most authoritative Hanafi works would show that in determining whether the duration of a person suffering from a mortal illness comes within the doctrine applicable to marz-ul-maut (or death bed) gifts several questions have to be considered namely (1) was the donor suffering at the time of the gift from a disease which was the immediate cause of his death? (2) was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death? (3) was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers — a circumstance which might create in the mind of the sufferer an apprehension of death? (4) Had the illness continued for such length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady? The limit of one year mentioned in the law books does not in our opinion lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness." Applying the law to the facts, the learned Judge held that the evidence in the case left no doubt that death was sudden and unexpected and therefore the gifts could not be said to have been made when the deceased was

[56] (1903)31 Cal. 319. See note (51) above.
[57] (1907) I.A 167.
[58] (1898) 3 C.W.N 57. See Note (49) above.

suffering from death-illness. The appeal was dismissed in the Chief Court and also on further appeal to the Privy Council. Lord Robertson in the Privy Council said that the question was one of fact. The two courts have concurred and each judgment is supported by careful and elaborate reasoning. The law applicable is not in controversy; the invalidity alleged arises where the gift is made under pressure of the sense of imminence of death.

In the case of *Safia Begum* v *Abdul Razak*[59] Lokre J. after referring to the earlier cases said - "By now it may be taken as settled by the Privy Council that the crucial test of marz-ul-maut is the subjective apprehension of death in the mind of the donor, that is to say, the apprehension derived from his own consciousness as distinguished from the apprehension caused in the minds of others, and the other symptoms like physical incapacities are only the indicia but not infallible signs or a sine qua non of marz-ul-maut."

This case was followed in the recent case of *Abdul Hafiz* v *Sahebbi.*[60] In that case Masodkar J referred to the view of Abdul Rahim in "Principles of Mahomadan Jurisprudence" but said that his view does not appear to have found clear support in the judicial pronouncements. After referring to the earlier cases including the decisions of the Privy Council and the Supreme Court of Pakistan, the learned Judge said "Therefore what is required to be proved upon the preponderance of probabilities is whether the gift was made by the ailing person while under the apprehension of the death and further whether in such ailing he met his death."

Masodkar J said -

> "It is true that mere apprehension on the part of an old man who is not afflicted by any malady would not be sufficient to answer the doctrine. Mere accident of death which is a fact certain in human life does not afford good reason to invalidate the dispositions. The basic juridical thinking and the pronouncement of the Courts upon the instant doctrine clearly spell out that the English phrase "death-illness" is not sufficient, adequate or complete connotation of the term marz-ul-maut, for that doctrine appears to comprehend an affliction or malady leading unto death or involving the death of the person concerned. Because of that with the proof of death, its causation and the condition of person have

[59]AIR 1945 Bom. 438.
[60]AIR 1975 Bom 165.

its own and clear significance. Death is the certain and central fact. Proximate danger of death is an illness. It is common experience, casts ominous elongated shadows discernible along the lines of conduct of the person who is subject to the process of dissolution of life. In that there is all the apprehension of withering away of human faculties and rational capacities. Such process may set in and become pronounced as the journey's end comes near. Mind under such condition would get seized by the fright of the final full-stop and all winged and animated spirits involving free will, clarity and reasonable and purposeful action may be clipped and caught in the mesh of progressing paralysis. The apprehension that the curtain is wringing down on the life in such a state would easily grasp all the consciousness as the physical malady surely affects every faculty clouding the will and reason of human being. It is no doubt that when such preponderance of an onset of physical and psychological atrophy operating over the field of free and balanced will can be inferred, the dispositions cannot be validated. The light of reason at such moment is not expected to burn bright as the flame of life itself flickers drawing ghastly shadows on the cold, deadly wall of the inevitable. It is conceivable, therefore, that the pragmatic philosophy of Mohamedan Law thought it wise to put under eclipse the acts and dispositions done upon the promptings of a psychosis indicated apprehension or clear fear of death either induced by or during the last suffering or illness of the person dying. Law assumes that apart from the dominant danger of loss of free will, such person may clearly lose touch with his spiritual dictates and may hasten even against the need of his clear obligations and interests to do the things which he might not have normally and in times of health, done. Once the subjective apparehension of death, its possibility or preponderance is established and there is evidence of accelerated disssipation of the life itself leading unto death due to malady or affliction the dispositions made by such person are treated as if it were an outcry against the demonic fear of death itself and thus basically a non-juristic action.

Therefore, it is clear that all the circumstance surrounding the disposition itself, the physical and psychical condition of the person afflicted, the nature of the malady and the proximity of death to the actual act of disposition and further the fact of death are all the matters which should furnish to the Court as a feedback to find out as to whether the disposition is within the mischief of this doctrine. Once probabilities hold out that there was even some degree of subjective apprehension of death in the mind of the sick person who eventually died suffering from his last illness the subjective test implicit in the doctrine is satisfied both on principle and policy. To find that with the growth of medical and psychological sciences in the modern times several indicia would be easily available. However, it is not necessary to have any static approach or to put up any given praxis in that regard. Obviously it is all a matter of eminent and entire appreciation of facts and circumstances involved in

a given case wherein the ultimate crisis of the drama of life leading unto death will have to be properly scanned and constructed.

Therefore, once there is evidence to support the findings reached by the Court of facts either coming from those who were near the deceased during the relevant period or as may be disclosed by the documentary evidence throwing light on that period, the matter is not open to investigation in second appeal for the provisions of Section 100 Civil .C. do not permit such a challenge unless the appreciation of evidence can itself be shown to be perverse or against record. Merely because medical evidence is not put forth, the principle does not change. Adequacy of evidence and its fullness are still the matters in the ken of considerations that satisfy the conscience of the Court which is required to find facts. By that no question of law is raised. The usual submission based on the principle of onus of proof would be irrelevant once the matter had been understood by the parties and they were obliged to lead evidence on the relevant facets of the doctrine. No doubt, the initial burden to prove the requirements of marz-ul-maut is on the person who sets up such a plea as affecting the disposition of a dead person; that can be discharged by the proof of the facts and circumstances in which such person met his death and the attendant events preceding and succeeding the disposition itself. Once the possibility of a subjective apprehension of death in the mind of suffering person who made the gift is raised, clearly the burden shifts to that party who takes under the disposition or sets up the title on its basis. Such party may prove the facts and circumstances which would enable the Court to hold that the disposition itself was not made while the suffering person was under the apprehension of death for as I said earlier, there may be several answers to the problem and mere accident of death of the person making the disposition would not be enough. An old man meeting a natural death may be well disposed to see that the matters are settled in his lifetime and such dispositions would be perfectly valid and would not answer marz-ul-maut. It is, therefore, necessary for the party setting up the disposition to rebut the proof that may be indicative that the disposition is within the mischief of marz-ul-maut. That cannot be done by merely relying on the abstract doctrine of onus of proof or insisting upon the evidence of medical experts not tendered by the opposite party. In a given case such evidence may not be at all available."

In the Pakistan Supreme Court case of *Shamshad Ali Shah* v *Hassan Shah*[61] one of the questions that arose for decision was whether the gift was made when the donor was suffering from death illness. Fazle Akbar J said - "It is now well-settled that in

[61]PLD 1964 S.C 143.

determining whether the donation of a person suffering from illness comes within the doctrine applicable to marz-ul-maut gift, the court should consider the following facts -

(i) was the donor suffering at the time of the gift from a disease which was the immediate cause of his death?

(ii) was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death?

(iii) was the illness such as to incapacitate him from the pursuit of his ordinary avocations - a circumstance which might create in the mind of the sufferer an apprehension of death?

(iv) had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady. (see *Ibrahim Goolam Ariff* v *Saiboo*[62] 34 I.A 167)

In short the court has to see whether the gift in question is made "under the pressure of the sense of the imminence of death". The Supreme Court held that on the facts, evidence and circumstances it could be safely said that the deceased was suffering at the time of making the gift from a disease which induced in her the belief that death would be caused thereby and that it actually caused her death within a few hours of the registration of the instrument.

Kaikaus J. in the same case said - "So far as the legal aspect of marz-ul-maut is concerned what is really needed is, as pointed out in *Ibrahim Goolam Ariff* v *Saiboo and others* that the gift should be made "under pressure of the sense of imminence of death." The rest of the matters which are generally stated in commentaries on Muslim Law as matters requiring investigation in a case of marz-ul-maut are really matters relating to evidence. If the gift had in fact been made "on account of pressure of the sense of imminence of death" the gift would be affected by the doctrine

[62] 31 I.A 167.

of marz-ul-maut. There is one point which may be clarified here. It is stated in some commentaries and judgments that death should in fact result from a disease if the doctrine of marz-ul-maut is to be involved. I am unable to agree with this proposition. If a person were suffering from galloping tuberculosis and was therefore under apprehension of death when he made the gift, but he was shot dead by some person or died of an accident or of cholera or some other epidemic a short time after the gift I do not see why the doctrine of marz-ul-maut should not be applicable. Truly speaking even the fact that a person survives and does not die at all should not validate a gift which he made under apprehension of death. The validity of the gift is to be determined with reference to the circumstances as they exist at the time of making the gift. Subsequent failure to die cannot have a retrospective effect so as to validate an invalid transaction. The true reason for the invalidity of the gift is the state of mind of the donor who believes that he is going to die. As he believes that he is going to die he has no intention of making a transfer *inter viros* and his only intention is to make a transfer which will take effect after his death. A transfer takes effect according to the intention of the transferor. If the transferor has no intention of making a gift during his lifetime no such gift will result."

In that case the deceased was a Shia but the Supreme Court held that the Shia Law was not different in this respect from the Hanafi Law.

In *Chanan Bibi* v *Mohd Shafti*[63] the facts were that one Rajawali owned some land. His son Fazil predeceased him leaving him surviving his widow and two daughters (3rd, 4th and 5th appellants). Rajawali also had two daughters, the first and 2nd appellants. By a deed on 1.9.1955 he gifted the land to the five appellants. He died on 12.9.1955, that is, twelve days later. His sister, Ghulam Fatima sued to recover her legal share in the estate. She pleaded *interalia* that the gift was made by Rajawali during marz-ul-maut. The learned trial judge found that as Rajawali was suffering from paralysis and died within 12 days of making the gift, the inference was that the gift was made during marz-ul-maut.

He held the gift took effect as a will and was valid as to 1/3 in

[63]PLD 1977 S.C 28, 34-36.

favour of the appellants 3-5 but the balance of 2/3 would devolve under the Muslim Law of inheritance. On appeal, the decision of the trial judge was upheld. The appellants appealed to the Supreme Court, which allowed the appeal. Muhammad Gul J. in giving the judgment of the Supreme Court said -

> "The law applicable to the case is not in controversy. If the gift by Rajawali was made under, what the Privy Council described in *Ibrahim Gulam Ariff* v *Saiboo*[64] as "pressure of the sense of imminent death" then the gift would be hit by the doctrine of marz-ul-maut. The same criteria was accepted by this court in the case of *Shamshad Ali Shah*.[65] Both these precedent cases referred to set out the following facts which the court should consider to sustain the conclusion that the impugned transaction was made under such pressure -
>
> (i) Was the donor suffering at the time of the gift from a disease which was the immediate cause of death?
>
> (ii) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death?
>
> (iii) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations - a circumstance which might create in the mind of the sufferer an apprehension of death?
>
> (iv) Had the illness continued for such length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady .
>
> The first is essentially a question of fact and the best evidence could be that of a medical attendant who treated the deceased at the relevant time. It is noteworthy that in various cases cited at the Bar some doctor or Hakim had appeared to testify to the condition of the patient at or about the time the impugned instrument was executed. Evidence of laymen particularly of relatives may be relevant. But it cannot be conclusive particularly when it is partisan and exaggerated. In the instant case,

[64] 34 I.A 167.
[65] PLD 1964 S.C 143.

it was admitted by Ghulam Fatima plaintiff that though Rajawali remained under the treatment of a Hakim at Bhera but he was not examined. I consider this as a serious drawback in the plaintiff's case. The burden of proof of issue relating to Marz-ul-maut lay heavily on the plaintiff, and the oral evidence did not inspire the confidence of the trial judge. Therefore what remains of the evidence produced by the plaintiff is the death entry Exh. P.W. 6/4 according to which Rajawali died of paralysis. I will presently advert to the evidential value of this entry for the relevant purpose.

The second fact is germane to the state of mind of the donor at the time of execution of the impugned instrument. This is not capable of direct proof by any objective standard as is the case of a height of person: it is a matter of inference to be raised from proved or admitted facts. Whether or not an inference has been rightly raised is always a matter of law or at any rate a mixed question of law and fact and not purely of fact as contended by the respondent's learned counsel. Again the mental condition of a deceased person at a given point of time is a subtle problem more so as in the instant case where the deceased has been suffering for a long time and the ambient circumstances are equivocal.

On the third point the evidence in this case is contradictory or at any rate it is deficient. Even if it may be assumed that Rajawali was bed-ridden and rendered immobile that would not necessarily import death-bed illness. When spinal cord gets affected at lumbar region then only limbs are affected. In such paralysis, as will be seen presently, it is not fatal.

As to the fourth condition each case has to be decided on its own facts and no hard and fast rule can be laid as to when the relevant state of mind can be inferred. Rather it has been observed in some cases that if the illness has lasted for a long time it often becomes part of the patient's constitution and the pressure of the sense of imminence of death recedes and it becomes his habit to live with it. . .

The above discussion leads me to the conclusion that it was not satisfactorily proved that the impugned deed of gift was executed by Rajawali during marz-ul-maut. In reaching that conclusion, I have been influenced by the fact that the onus of proof on the third issue in the case relating to the alleged execution of the deed of gift by Rajawali during marz-ul-maut lay on the respondent which in my opinion they have not been able to discharge. In the cases relied upon by the respondent's learned counsel, the donor was either suffering from a malady which ordinarily was much more dangerous to human life than paralysis or the donor died within much shorter time than in the instant case."

The cases in India and Pakistan deal with the law and practice of the Hanafi and Shiah Schools which are followed in those countries. By contrast the school of Law which is followed in Malaysia

is the Shafii School. The Shafii school generally prefers the objective approach rather than the subjective. Thus in the Minhaj-et-Talibin the subject of marz-ul-maut in relation to gifts is stated thus[66] -

> "A person who becomes so ill as to be in danger of death may no longer dispose of his property for anything to a greater amount than one third; but should he against all hope recover, these dispositions cannot be invalidated. A sick person, not in any danger, may freely dispose of his property; and even if he unexpectedly dies during this sickness, his dispositions have all the same their full legal effect. This is not the case where death is caused by the malady in question, even though the latter may not be regarded as of a dangerous nature, for then it is manifested to be really dangerous. In case of uncertainty as to the character of the malady, it should be ascertained by two doctors, free men of irreproachable character.
>
> The following are considered by the law to be dangerous maladies -colic, pleurisy, constant flow of blood from the nose, chronic diarrhoea, phthisis, commencement of paralysis even where merely partial, vomiting out of food in an unchanged condition, and even vomiting in general if very violent and accompanied by pain or effusion of blood, and also continuous or intermittent fever, but not quartan fever. The following circumstances are by our school regarded as analogous to a dangerous malady - being made a prisoner of war by infidels who do not usually give quarter; being in a desperate battle between two armies of equal force; being condemned to death by the law of talion, or to be stoned to death; being in a ship in the middle of a tempest or a rough sea; a woman in grievous pangs of childbirth, before or after confinement, so long as the foetus has not broken the membrane."

The difference between the attitudes of the two schools of law can be illustrated by the example of whether the slight impurity (hadath kecil) is caused by contact between a man and a woman. The rule is thus stated in the Minhaj-et-Talibin -[67]
"[Impurity is caused by]

Contact between a man and a woman except when marriage between them would be prohibited on account of relationship etc.

[66]Nawawi Minhaj-et-Talibin translated by E.C Howard Lahore,.p. 262.
[67]Ibid. p. 3.

The impurity affects the person touching as much as the person touched. Contact with a girl under age and in general a very slight touch as of hair, teeth or nails causes no impurity."

In contrast in the Hanafi school, contact between a man and woman does not cause a minor impurity, unless there is evil intention and it gives rise to sexual desires. As is well known this view of the Hanafi school is sometimes followed when a Shafii man or woman goes on pilgrimage.

In the recent case of *Abdul Majid bin Dato Haji Abdul Rahim Gulam Rasool Shaik* v *Shariabibi*[68] the facts were that Dato Haji Abdul Rahim Gulam Rasool Shaik (since deceased) transferred shares in a match factory belonging to him to his sons, four of the defendants, at an undervalue. At the time of the transfer the deceased was suffering from acute lung cancer and in an action brought by the plaintiffs, who were the beneficiaries of the estate of the deceased, it was alleged that the transfers were void under the doctrine of marz-ul-maut. The deceased in this case was a Muslim belonging to the Hanafi school of law. The learned trial judge held that on the evidence in the case the deceased having known that he had lung cancer and being aware that that cancer was a very serious illness, believed that his death was imminent and in contemplation of his death he had taken action to transfer 298 of his 300 shares in the Kelantan Match factory to four of his sons without the consent of the other heirs to the estate. It was also held that on the evidence there was no improvement in the health of the deceased. His health continued to deteriorate until his death. The deceased was therefore under apprehension of imminent death and nothing had happened to him that would interrupt such apprehension from his mind until he died. The transfers of the shares to the four defendants were therefore void under the doctrine of mard-al-maut and judgment was given for the plaintiffs. Although a number of Indian authorities were cited in argument, the learned trial judge in his judgment relied on the statement of the law in N.J Coulson's Succession in the Muslim Family law (pages 259-279).

[68][1986] 2 MLJ 211.

The defendants appealed to the Supreme Court, which allowed the appeal.[69] Syed Agil Barakbah S.C.J in giving the judgment of the Supreme Court, referred to the principles of the Hanafi Law as stated in the cases from India and Pakistan. On the facts it was held that the deceased was not under the apprehension of imminent death at the time he made the gifts to his four children, the illness from which he suffered did not incapacitate him for the pursuit of his ordinary avocations and although the illness lasted for less than a year, the facts and circumstances formed sufficient length of time to remove or lessen from his mind the apprehension of immediate death. The gift by transfer of shares to the four children was not caught by the doctrine of marz-ul-maut and was therefore valid under the Shariah Laws.

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[69] [1987] 2 MLJ 449.