PART SIX

ANIMALS
SALE "ACCORDING TO THE CUSTOM RELATING TO HORSES" (1947)

Introduction

Contrary to the usual contracts of sale that are based almost entirely on the *shari'a* as codified in the Mejelle, this contract of sale is based purely on customary law.¹ The document needs some reorganization to facilitate orientation. The parties to the sale of the mare are as follows: The Seller is 'Abd al-Hādī Ḥusayn; the Purchaser is 'Abd al-Ḥājj Khalīl 'Atwa who shares the mare with his partner (*sharīk*) Ahmād Muḥammad; the latter receives the mare from the seller and keeps her in his possession.

The Purchaser, 'Abd Khalīl, buys 8 out of 24 qīrāt (one-third) in the mare; the Seller, 'Abd al-Hādī, ensures for himself 16 qīrāt (two-thirds) in the mare and, in addition, an option to regain the remaining one-third from the Purchaser in the future: If the Purchaser is compelled to sell his share he will have to offer it first to the Seller, 'Abd al-Hādī, for the same price the Purchaser paid for it, and only if the Seller declines to exploit his option, will the purchaser be at liberty to sell his share to someone else. This procedure is tantamount to the concept of of the right of pre-emption (see below)

The essence of the joint ownership between the parties to the sale of the mare is explained in the detailed conditions presented in the second part of the document. The customary sale of horses is based on the concept that the mare’s fertility and the fertility of her female issue should be taken into account in the transaction. Thus it is agreed between the parties that the first and the second [female] fillies born to the mare are due to the Seller, and they actually constitute the aforementioned sixteen qīrāt, the Seller’s share in the mare. Implicitly, the [male] foals, in addition to the mare herself, constitute the Purchaser’s share of one-third in the mare. If the Purchaser fails to provide the fillies to the Seller he will be liable to compensate the Seller for the infringement of the contract.

One would expect a sale "according to the custom relating to horses" to be based on a three-party contract to ensure the execution of the contract; yet surprisingly, no sureties are mentioned in this contract. One may wonder whether this was due to negligence or to implicit reliance by the parties on the civil court to deal with the matter in the event that either party infringed the agreement.²

Needless to say, the contract of sale relating to horses does not seem to derive any inspiration from the *shari'a*, though the latter recognizes the principle anchored in partnership in property to the effect that for the matter of ownership, the offspring of a pregnant mare (or any other animal) belong with the mare, that is, are due to the mare’s owner.³ Moreover, the customary sale of horses is in glaring contradiction to the *shari'a*, since the full extent of the object of sale is unknown at the time of the conclusion of the contract, it being dependent on the fertility of the mare, i.e., on hazard (*gharar*), which is prohibited under the *shari'a*.⁴ It is noteworthy that the customary sale of horses recognizes the concept of the right of

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¹ On the main features of a tribal customary sale, see al-Qusūs, 39–40; cf. Henninger, "Das Eigentumsrecht," 27.
² Cf. doc. 58 below.
³ See Mejelle, art. 1074; Bāz, 601.