# PRINCIPLES OF
# MAHOMEDAN LAW

## CHAPTER I

### INTRODUCTION OF MAHOMEDAN LAW INTO INDIA

**1. Administration of Mahomedan Law.**—The Mahomedan law is applied by Courts in India to Mahomedans not in all, but in some matters only. The power of Courts to apply Mahomedan law to Mahomedans is derived from and regulated partly by Statutes of the Imperial Parliament read with art. 225 of the Constitution of India but mostly by Indian legislation *(a)*.

For Statutes, see sec. 7; for Acts, see secs. 6, and 8 to 17.

**2. Extent of application.**—As regards India, the rules of Mahomedan law fall under three divisions, namely:—

(i) those which have been *expressly* directed by the Legislature to be applied to Mahomedans, such as rules of Succession and Inheritance;

(ii) those which are applied to Mahomedans as a matter of *justice, equity and good conscience,* such as the rules of the Mahomedan law of Pre-emption;

(iii) those which are not applied at all, though the parties are Mahomedans such as the Mahomedan Criminal Law, and the Mahomedan law of Evidence.

The only parts of Mahomedan law that are applied by Courts in India to Mahomedans are those mentioned in cls. (i) and (ii). In other respects, the Mahomedans in India are governed by the general law of India.

**3. Matters expressly enumerated.**—The rules of Mahomedan law that have been *expressly* directed to be applied to Mahomedans are to be applied except in so far as they have been altered or abolished by legislative enactment.

Thus the rules of the Mahomedan law of Inheritance are expressly directed to be applied to Mahomedans. One of those rules is that a Mahomedan renouncing the Mahomedan religion is to be excluded from inheritance. But this rule was abolished by the Freedom of Religion Act XXI of 1850.

In cases of Hindu or Mahomedan law, it is the duty of the Courts to interpret the law and not to depend upon the opinion of experts however learned *(b)*.

**4. Matters not expressly enumerated.**—No rules of Mahomedan law that have not been expressly directed to be applied to Mahomedans can be applied if they have been excluded either expressly or by implication by legislative enactment.

*(a) Sheikh Kudratulla* v. *Mahini Mohan* (1869) 4. B.L.R. 134, 169; *Ibrahim* v. *Muni* (1870) 6 M.H.C. 26, 31; *Braja Kishor* v. *Kirti Chandra* (1871) 7 B.L.R.19, 25.

*(b) Shahidganj* v. *Gurdwara Parbandhak Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.PC. 116; observations of Sulaiman, J., in *Aziz Banu* v. *Muhammad Ibrahim* ('25) A.A. 720; (1925) 47 All. 823 approved.

Thus the rules of the Mahomedan law of Pre-emption are nowhere expressly directed to be applied to Mahomedans. In places where those rules are applied to Mahomedans, they are applied on the ground of justice, equity and good conscience (sec. 227). They are not applied, for example, to Mahomedans in Oudh and in East and West Punjab, for there are *Special Acts* relating to pre-emption for Oudh and East and West Punjab, and those Acts apply to Mahomedans also (sec.228).

Again, the rules of the Mahomedans Criminal Law are nowhere expressly directed to be applied to Mahomedans. But there are *legislative enactments* relating to criminal law in India such as the Indian Penal Code and the Code of Criminal Procedure. Hence those rules cannot be applied on grounds of justice, equity and good conscience. The result is that Mahomedans in India are governed by the criminal law of India.

The Courts in India are governed by their own law as to procedure and Mahomedan law dealing with matters purely of procedure is not applicable: *Sabir Hussain v. Ferzhand Hasan* (1938) 65 I.A. 119, (1938) All. 314, 173 I.C. 1, ('38) A.P.C. 80. *Mohd. Sulaiman* v. *Mohd. Ismail* (1966) 1 S.C.R. 937.

**5. Justice, equity and good conscience.**—The rules referred to in sec. 2, cl.(ii) may not be applied if they are in the opinion of the Court opposed to justice, equity and good conscience. But the rules referred to in cl. (i) of that section, that is, rules that have been *expressly* directed by the Legislature to be applied to Mahomedans, must be applied though they may not in the opinion of the Court conform with justice, equity and good conscience. See sec. 38.

Thus the rules of the Mahomedan law of Pre-emption come under sec.2, cl.(ii), and they have not been applied by Courts in the Madras State on the ground that they are *opposed* to justice, equity and good conscience, inasmuch as the law of Pre-emption places restrictions upon the liberty of transfer of property by requiring the owner to sell it in the first instance to his neighbour. The High Courts of Bombay and Allahabad, on the other hand, have applied the Mahomedan law of Pre-emption to Mahomedans, with this remarkable result that the notion of "justice, equity and good conscience"— held by those Courts differs from that held by the Madras High Court *(c)*. See sec. 227, below.

In the undermentioned case *(d)* it was *inter alia* held by a single judge of the Calcutta High Court that the rule of the Mahomedan law that, where one of two spouses embraces the Islamic faith, if the other, on its being presented to him does not adopt it, the parties are to be separated, was obsolete and opposed to public policy. See sec. 20(4) "Conversion to Mahomedanism and marital rights."

As regards rules which the Courts have been *expressly* directed apply to Mahomedans, they must of course be applied regardless of considerations of justice, equity and good conscience. Thus the rules of the Mahomedan law of Marriage have been expressly directed to be applied to Mahomedans in Bengal, the former United Provinces and Assam (sec.8). One of those rules is that a divorce pronounced by a husband is valid, though pronounced under compulsion (sec. 315). Hence the Courts of India will not be justified in refusing to recognize such a divorce, though it may be opposed to their notions of justice, equity and good conscience *(e)*.

Where a rule of Mahomedan law is well-settled in the view of the ancient expositors thereof, it is not open to the Court to disregard or reject it on the ground that it is illogical or unsound, provided of course, it is not contrary to justice, equity and good conscience, on which ground alone the right is enforced at the present day *(f)*.

**6. Shariat Act, 1937.**—(1)From the 7th October 1937 section 2 of Act XXVI of 1937, in cases where the parties are Muslims, applies the Muslim Personal Law in a number of important matters. The Act operates throughout India. The section is as follows:—

"2. Notwithstanding any custom or usage to the contrary, in all questions

*(c) Ibrahim Muni* (1870) 6 M.H.C. 26.

*(d) Noor Jehan* v. *Eugene Tischenko* (1941) 45 C.W.N. 1047, 74 C.L.J. 212, ('41) A.C. 582.

*(e) Ibrahim* v. *Enayetur* (1869) 4 B.L.R., A.C. 13.

*(f) Mohd. Ismail* v. *Abdul Rashid* (1956) 1 All. 143, 154, (F.B).

(save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula and Mubara'at(g)*, maintenance, dower, guardianship, gifts, trust and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (shariat)."

It is not considered that the Act has the effect of repealing expressly or impliedly any enactment other than those specified in sec.6. The scope and purpose of sec.2 is to abrogate custom and usage in so far as these have displaced the rules of Mahomedan law *(h)*. Customary law as it obtains in East and West Punjab and elsewhere has been objected to on the ground of uncertainty of the expense of ascertaining it and also in that the rights granted to women thereunder are inadequate and in marked contrast the fuller rights recognized by the Mahomedan law. That a custom or usage has been recognized by the Courts will not save it; unless it has been embodied in an enactment, it will cease to have effect in respect of the matters mentioned in the section. The word *Shariat (i)* is used in the Act as a synonym for the Mahomedan Personal Law and the use of the word is not thought to import any variation; in particular, the Mahomedan law appropriate to each sect will be applied as mentioned in sec.30 (*infra*). The exclusion from the subject-matters specified in sec.2 of the Act, of agricultural land, charities, charitable institutions and charitable and religious endowments is explained by the fact that these subjects are within the competence of the State legislatures. The exception of agricultural land is very important as only a small proportion of the land in India can be excluded from this category, and the law as it stood before the passing of the Act must continue to be applied thereto. The exception is so expressed as to cut down the effect of all the subsequent words, e.g., if the question relates to agricultural land the Mahomedan law is not made the rule of decision in a question regarding gifts. The phrase "where the parties are Muslims" has been taken from the Civil Courts Acts — see *infra*. It may be noted as regards the provinces of Bengal, Agra and Assam that the Act (XII of 1887) made no provision for giving effect to custom in modification of the Mahomedan law and the Allahabad High Court refused to permit custom to be set up in variation of the revealed law *(j)* until in 1912 it was overruled on the point by the Judicial Committee *(k)*.

The Act does not purport to disturb settled transactions or to dispossess persons who lawfully obtained possession in the past. Whether it would be applied in cases which were pending at the commencement of the Act is doubtful *(l)*.

*Intestate succession.*—Customs altering the Mahomedan law of intestate succession seem to be the chief grievance which the Act is designed to redress. The general rule of customary law is agnatic succession which excludes all females except a widow and daughter and these are allowed only a life interest or merely bare maintenance. This custom has the added inconvenience of being subject to many exception: *Beg* v. *Alla Ditta* (1917) 44 Cal. 749, 44 I.A. 89, 38 I.C. 354, 19 Bom. L.R. 388. The custom of agnatic succession among Muslims prevails chiefly in Northern India, but in Western India the Act will abolish the customary law of succession according to Hindu law for Khojas, Cutchi Memons, Halai Memons and Sunni Bohras and Molasalam Girasias. In the case succession to a *tarwad* in Malabar, where the deceased belonged to a joint family which followed

*(g)* See Ch. XVI *infra*.

*(h) Mahomed Aslam Khan* v. *Khalilul Rehman* (1947) 51 C.WN. 832, 231 I.C. 55, ('47) A.PC. 97.

*(i)* The verb means literally begun, led, ordained, instituted, prescribed. Hence meaning of the noun include the way to the watering place, the path to be followed, code, divine law. It might be rendered in English as "The Way". It is a doctrine of duties and has a wider scope than the word " law' suggests. The word *Fiqh* which literally means "intelligence" is used to indicate the science of Muslim law. Both words carry a distinct religious implication. According to the Shafi jurists' definition *Shariat*, which may be translated as the Islamic Code, means " matters which would not have been known but for the communications made to us by the lawgiver". (Sir Abdur Rahim in Muhammadan Jurisprudence, p. 50).

*(j) Jammya* v. *Diwan* (1900) 23 All. 20.

*(k) Muhammad Ismail* v. *Lala Sheomukh* (1912) 17 Cal. W.N. 97, 15 Bom. L.R. 76, 18 I.C. 57 P.C.

*(l)* See, However, *Syed Unnisa* v. *Rahimuthunissa* ('53) A.M. 445.

the custom of Hindu law in spite of being Muslims, it was held that if the custom was established there would be no property left by the deceased which could devolve as on intestate succession and there would be no scope for the application of the Shariat Act; but if there is property which could be the subject of intestate succession then any custom in derogation of the rules of Muslim Shariat Law, such as a custom which merely excludes females from inheritance and succession cannot be pleaded *(m)*. In Southern India it will abolish the law of succession of Moplas *(n)*, many of whom follow the Marumakhatayam law of matriarchal succession. On the other hand as the Act does not by implication repeal any Act not specified in sec. 6, it will not affect the rule of succession by primogeniture enacted for some talukdari and zemindari estates. Nor will the Act affect the custom of succession to the office of Mutawalli of a wakf or *Sajjadanishin* of a *khanka*, for charitable and religious institutions are excluded from its scope, nor will it affect the operation of the provisions of S.488 of the Code of Criminal Procedure with regard to maintenance *(o)*.

*Special Property of females.*—This probably refers to and abolishes a custom whereby property received by a female by inheritance or gift is not her special property but reverts to the heirs of the last male owner: *Muhammad* v. *Amir* (1889) P.R.31; *Karm Din* v. *Umar Baksh* (1888) P.R.3.

*Marriage.*—The customary law of the East and West Punjab does not recognize the Mahomedan law as to *iddat: Bhagwat Singh* v. *Mt.Santi* (1919) P.R. 102, 50 I.C.654. This custom is abolished.

*Dissolution of marriage, maintenance, dower.*—These subjects seem to have been included *ex majori cautela* or because they are specified in sec. 5 of the Punjab Laws Act, 1872. The right of a Muslim wife to obtain a decree for the dissolution of her marriage is now governed by the Dissolution of Muslim Marriages Act, 1939 (see secs. 323 to 332).

*Guardianship.*—The Act will not affect the provisions of the Indian Majority Act, 1875 , or of the Guardian and Wards Act, 1890.

*Gifts, trusts and trust properties and wakfs.*—Gifts may have been included to abolish customs which restrict the power to make gifts to non-agnates. For the same reason trusts and wakfs by way of family settlements are also included. It has been held that the effect of sec. 2 is to make the Mussalman law expressly applicable to wakfs and the subjects enumerated therein which under the terms of previous Acts and Regulations had to be decided on principles of equity and good conscience. But there is nothing in the Shariat Act to affect the decisions of the Privy Council before the Wakf Validating Act of 1930 as those decisions expressly interpreted the Mussalman law in respect of wakfs *(p)*. But it is believed that gifts and family settlements of agricultural land will continue to be subject to customary law where that law has hitherto applied. However it has been held by the Patna High Court that after the Shariat Act of1937, the Mahomedan law of gifts applies to non-agricultural property on account of s. 2 of that Act and to the agricultural land on the ground of justice, equity and good conscience: *Bibi Maniran v. Mohd. Ishaque* (1963) A.P. 229. In cases not affected by the exception to sec.2 of the Act the Mahomedan law of gifts is now applicable as such and not as the rule of justice, equity and good conscience. This will obviate the difficulty which was felt in the undernoted case *(q)* as regards applying sec.129 of the Transfer of Property Act. Public endowments are the subject of a number of enactments. See sec. 225, *infra*.

(2) Sec.3 (1) of the Shariat Act is as follows:—

"Any person who satisfies the prescribed authority—

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, and

(c) that he is a resident of India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of the

*(m) Mohammad Sandhukhan* v. *Ramam* ('58) A.M. 144.

*(n) Puthiya Purayil Abdurahiman* v. *Thayath Kancheentavida* (1956) 1 M.L.J. 119.

*(o) Badruddin* v. *Aisha Begum* (1957) All. L.J. 300.

*(p) Mohiuddin Ahmed* v. *Sofia Khatun* (1940) 2 Cal. 464, 44 C.W.N. 974, 192 I.C. 693. ('40) A.C.501.

*(q) Ma Asha* v. *B.K. Haldar* (1936) 14 Rang. 439 164 I.C. ('36) A.R. 430.

provisions of this section *(r)*, and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified."

*Section 3 refers to adoption, wills and legacies.*—These cases depend not on the religion "of the parties" but on that of the individual whose family law is in question i.e. the testator. Customs on these subjects which contravene the Mahomedan law are not invalidated; but any person affected may abandon the custom and adopt the Mahomedan law. Adoption is not recognized by Mahomedan law but there is a custom of a sort of adoption in East and West Punjab which is said to be the nomination of an heir: *Nur Muhammad* v. *Bhawan Shah* (1936) 17 Lah. 96, 162 I.C. 854, ('36) A.L. 465. Again in Sind a custom of adoption was set up by a tribe which was originally Hindu: *Usman* v. *Asat* ('25) A.S. 209. There is a custom in derogation of the Mahomedan law as to wills in East and West Punjab: *Rahim Baksh* v. *Umar Din* (1915) P.R. 9. In Bombay the Khojas can under their customary law dispose of the whole of their property by will. Until the passing of the Cutchi Memons Act X of 1938 the Cutchi Memons also could dispose of the whole of their property by will. Now however, even with regard to testate succession they are governed by Mahomedan law (see sec. 22). Section 2 of the Shariat Act is said to be "coercive" while section 3 is said to be "persuasive." The power given by this section will in some cases meet the difficulty illustrated by the case *(s)* where an attempt to give up custom in favour of Mahomedan law was held to fail.

(3) Section 5 of the Shariat Act which has been repealed by section 6 of the Dissolution of Muslim Marriages Act, 1939, was as follows:—

"5. The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim Personal Law (Shariat)."

Section 5 of the Shariat Act in effect overruled the decision of the Calcutta High Court in *Burhan Mirda* v. *Mt. Khodeja Bibi* (1937) 2 Cal. 79, 41 Cal. W.N. 314, 65 Cal. L.J.21, 168 I.C. 639('37) A.C. 189, that a suit for dissolution of marriage should be filed before a Munsiff or the Court of the lowest jurisdiction competent to try it, and confirmed the practice to file such suits in the District Court. Now that section 5 has been repealed by section 6 of the Dissolution of Muslim Marriages Act, 1939, the authority of this case has been revived, and a suit for dissolution will have to be filed under the provisions of the Civil Procedure Code, 1908, that is, in the Court of the lowest jurisdiction competent to try it. For the provisions of the Dissolution of Muslim Marriages Act VIII of 1939 see secs. 323 to 333.

(4) Section 6 of the Shariat Act is as follows:—

"The undermentioned provisions *(t)* of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely:—

(1) Section 26 of the Bombay Regulation IV of 1827;

(2) Section 1 of the Madras Civil Courts Act, 1873;

(3) For the purpose of reviving the operation of section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, entry (3) has been omitted by section 3 of the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943;

(4) Section 3 of the Oudh Laws Act, 1876;

(5) Section 5 of the Punjab Laws Act, 1872;

(6) Section 5 of the Central Provinces Laws Act, 1875; and

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*(r)* Amended by sec. 2 of the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943.

*(s)* *Sardar Bibi* v. *Haq Nawaz Khan* (1934) 15 Lah. 425, 149 I.C. 575, ('34) A.L. 371.

*(t)* Amended by sec. 3 of the Muslim Personal Law (Shariat) Application (Ahmedabad) Act, 1943.

(7) Section 4 of the Ajmere Laws Regulation, 1877."

*Section 6.*—It will be noticed that the Civil Courts Acts or their equivalent in the various States are only repealed *sub modo*—in effect only in so far as they permit custom to override the Mahomedan law in cases where the parties are Muslims and the question is one regarding the matters specified in secs. 2 and 3 of the Act. It is, therefore, still necessary to consider the various Acts in detail.

**7. Mahomedan law in Presidency-towns**— (1) As to the Presidency-towns of Calcutta, Madras and Bombay, sec. 223 of the Government of India Act, 1935 (26 Geo. V.c.2) enacts that the law to be administered shall be the same as before the commencement of Part III of the Act *(u)*. That is the law in sec. 112 of the Government of India Act, 1915 (5 & 6 Geo. V. *c.*61 ) which is as follows:—

"The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and, when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject."

The effect of this section is that the law to be applied in the matters aforesaid is the Mahomedan law if both parties are Mahomedans. Similarly, when a dealing takes place between two parties of whom one is a Hindu and the other a Mahomedan, and a suit is brought in respect of that dealing by the Hindu against the Mahomedan, the dispute between them is to be decided according to the Mahomedan law *(v)*. But that law cannot be applied in either case if it has been altered or abolished by legislative enactment [see notes below].

(2) The law to be applied by the Presidency Small Causes Courts is the same as that administered for the time being by the High Courts in the exercise of their ordinary original civil jurisdiction; see Presidency Small Cause Courts Act XV of 1882, sec. 16.

*Custom.*—Most customs have been abolished by the Shariat Act, 1937.

*Earlier Statutes.*—Provisions similar to those in sub- sec. (I) were contained in the East India Company Act, 1780, sec. 17[21 Geo.3, ch.70], which applied to the Supreme Court at Calcutta, and the East India Act, 1797, sec.13[37 Geo.3, ch.142], which applied to the Recorder's Courts at Madras and Bombay. These Acts as well as the High Courts Acts of 1861, 1865 and 1911 have been repealed and re-enacted by the Government of India Act of 1915. But the repeal does not affect the validity of any charter or letters patent under those Acts [Government of India Act,1915, sec. 130]. See now art. 225 of the Constitution of India.

*Law to be administered in cases of inheritance, succession, contract and dealing between party and party.* The law as enacted in sec.112 of the Government of India Act, was subject to alteration by the Indian Legislature. This was so enacted in sec. 131 of that Act (replacing sec. 22 of the India Councils Act, 1861) and was enacted in sec. 223 of the Government of India Act, 1935. In fact the Mahomedan law of contract has been almost entirely superseded by the Indian Contract Act, 1872, and other enactments, and this was done in the exercise of the power given to the Governor General in Council by the India Councils Act, 1861. The latter Act has been repealed and to a large extent re- enacted by the Government of India Act of 1915 *(w)*. As regards interest, it is doubtful whether the Mussalman rule prohibiting usury has been repealed by the Usury Laws Repeal Act 28 of

*(u)* See now art. 225 of the Constitution of India.

*(v) Azim Un-Nissa* v. *Dale* (1871) 6 Mad. H.C. 455, 475; West and Buhler's Digest of Hindu Law, p.6.

*(w)* See *Madhub Chunder* v. *Rajcoomar* (1874) 14 B.L.R. 76; *Nobin Chunder* v. *Romesh Chunder* (1887) 14 Cal. 781.

1855 *(x)*. The point arose in a Privy Council case, but it was not decided *(y)*. See sec.65 of the Government of India Act of 1915, and cls. 19 and 44 of the letters patent of the High Courts for Calcutta, Madras and Bombay.

*Law to which the defendant is subject.*—It is provided by the latter portion of sec. 112 of the Government of India Act of 1915, that when the parties are subject to different personal laws, the dispute between them is to be decided according to the law to which the defendant is subject. But these words do not mean this, that where a Hindu purchases land from a European which is subject to his wife's claim for dower, and a suit is brought by the wife against the Hindu purchaser to enforce her right, the Hindu purchaser can resist her claim on the ground that the Hindu law does not recognize dower. The Hindu purchaser is in no better position than a European purchaser would be, simply because the Hindu law recognizes no rule of dower.*(z)*.

**8. In West Bengal, Bihar, Agra and Assam.**— As to these territories except such portions of those territories as for the time being are not subject to the ordinary civil jurisdiction of the High Courts, it is enacted that the Civil Courts of those States shall decide all questions relating to "succession, inheritance, marriage or any religious usage or institution," by the Mahomedan law in cases where the parties are Mahomedans, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not mentioned above nor provided for by any other law for the time being in force the decision is to be according to justice, equity and good conscience.

This is the substance of the Bengal, Agra and Assam Civil Courts Act XII of 1887, sec.37, as read with the Bengal and Assam Laws Act, 1905, secs.2 and 3.

*Law after the Shariat Act, 1937.*—The Shariat Act, 1937, which invalidates customs in derogation of the Mahomedan law had by sec. 6(3) repealed this section so far as it was inconsistent with its provisions. The section makes no reference to custom, but it had been construed by the Privy Council as subject to proof of family custom at variance with the Mahomedan law *(a)*. This construction of the section is no longer admissible except as to customs (e.g., affecting agricultural land) to which the Act does not apply. Section 37 of the Bengal, Agra and Assam Civil Courts Act is in no way inconsistent with the provisions of the Shariat Act, and therefore sub-sec. (3) of sec. 6 of that Act was not necessary. Sub-sec. (3) has, therefore, been omitted by the Amending Act XVI of 1943. See sec.6 *supra*.

*Law before the Shariat Act, 1937.*—The section makes no reference to custom and in an old Allahabad case it was construed as excluding evidence of custom *(b)*. But since the decision of the Privy Council referred to in the last paragraph it was construed as subject to proof of family custom in suppersession of the Mahomedan law *(c)*. The custom must be ancient and reasonable and the burden of proof lies upon the party who set up the custom*(d)*. It may be proved by instances or by the wajib-ul-arz or riwaz-i-am but cannot be enlarged by parity of reasoning *(e)*. As to the evidentiary value of a wajib-ul-arz *(f)* or riwaz-i- am *(g)* see the undermentioned cases.

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*(x) Ram Lal* v. *Haran Chandra* (1869) 3 B.L.R. (O.C.) 130, 134 [not abrogated]; *Mia Khan* v. *Bibijan* (1870) 5 B.L.R. 500 [abrogated].

*(y) Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I.A. 294, 300, 38 All. 581, 587-588, 36 I.C. 87.

*(z) Sarkies* v. *Prosonomyee* (1881) 6 Cal. 794, 805-806 [21 Geo. 3, Ch. 70, s. 17] See also *Azim Un-Nissa* v. *Dale*, (1871) 6. Mad. H.C. 455, 474-475 [37 Geo 3, Ch. 142, s. 13]; *Lakshmandas* v. *Dasrat* (1880) 6 Bom. 168, 183-184; *Mahomed* v. *Narayan* (1916) 40 Bom. 358, 363, 368, 32 I.C. 939.

*(a) Muhammad Ismail* v. *Lala Sheomukh* (1913) 15 Bom. L.R. 76, 17 Cal. W.N. 97, 18 I.C. 571 P.C.

*(b) Jammya* v. *Diwan* (1900) 23 All. 20.

*(c) Ali Asghar* v. *Collector of Bulandshahr* (1917) 30 All. 574, 40 I.C. 753; *Mt. Jaffro* v. *Chatta* (1936) All. L.J. 493, 163 I.C. 650, ('56) A.A. 443; *Roshan Ali Khan* v. *Chaudhri Asghar Ali* (1930) 57 I.A. 29, 5 Luck. 70, 121 I.C. 517, ('30) A. PC.35 (an Oudh case.).

*(d) Abdul Hussein* v. *Sona Dero* (1918) 45 I.A. 10, 45 Cal. 450, 43 I.C. 306 approving *Daya Ram* v. *Sohel Singh* (1906) P.R. 110.

*(e) Muharram Ali* v. *Barkat Ali* (1931) 12 Lah. 286, 125 I.C. 886, ('30) A.L. 695.

*(f) Uman Parshad* v. *Gandharp Singh* (1887) 14 I.A. 127; *Balgobind* v. *Badri Prasad* (1923) 50 I.A. 196, 45 All. 413, 74 I.C. 449, ('23) A.PC. 70; *Roshan Ali Khan* v. *Chaudhri Asghar Ali, supra.*

*(g) Beg* v. *Allah Ditta* (1914) 44 I.A. 89, 44 Cal. 749, 38 I.C. 354; *Ahmad Khan* v. *Channi Bibi* (1925) 52 I.A. 379, 6 Lah. 502, 91 I.C. 455, ('25) A.PC. 267; *Vaishno Ditti* v. *Rameshri* (1928) 55 I.A. 407, 10 Lah.

*Justice, equity and good conscience.*—For the previous history of this provision cf. Field's Regulations of the Bengal Code, pp. 109-117.

On a question whether a Hindu talukdar was bound to pay a debt contracted by his guardian on his account it was said by Lord Hobhouse:—

"In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India" *(h)*. In the case of a Muslim lady's transfer for consideration with a partial restraint on alienation Sir George Lowndes referred to this passage and held the restraint was valid though not in exclusive reliance upon English law *(i)*. On the other hand the Mahomedan law is applied in cases of pre-emption as the rule of justice, equity and good conscience—see Chapter XIII below. Again in cases of gifts in States where the Legislature has not expressly applied the Mahomedan law to gifts that law has been restored to as regards gifts made by Muslims both before *(j)* and after *(k)* the Transfer of Property Act took effect. This application of Mahomedan law can only be put on the ground of justice, equity and good conscience *(l)*; though at one time a contrary opinion was entertained by individual judges *(m)*.

**9. In the Mufassal of Madras.**—As to the Mufassal of Madras, it is enacted by the Madras Civil Courts Act III of 1873, sec. 16, that all questions regarding "succession, inheritance, marriage,... or any religious usage or institution" shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law or by *custom* having the force of law, and in cases where no specific rule exists, the Courts shall act according to justice, equity and good conscience.

*Law after the Shariat Act, 1937.*—The provisions of this section as to custom have been repealed by the Shariat Act, 1937, so far as they are inconsistent with that Act. By Act 18 of 1949 the Madras State has made the Shariat Act applicable to agricultural land. Consequently, the widow of a member of a *Tarwad* is entitled to inherit under Muslim law the share of her husband in the *Tarwad* property *(n)*.

*Law before the Shariat Act, 1937.*—Before the Shariat Act the section was applied in a Madras case in which a custom excluding females of the Lubbai Mahomedans of Coimbatore was held not proved *(o)*.

*Justice, equity and good conscience.*—See notes to sec. 8 above.

**10. In the Mufassal of Bombay.**—As to the Mufassal of Bombay, it is enacted by Regulation IV of 1827, sec. 26, that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone".

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86, 113 I.C. 1, 49 C.L.J. 38, ('28) A.P.C. 294; *Kunwar Basant Singh* v. *Kunwar Brij Raj Saran Singh* (1935) 62 I.A. 180, 193, 57 All. 494, 156 I.C. 864, ('35) A.P.C. 132.

*(h) Waghela* v. *Sheikh Masludin* (1887) 11 Bom. 551, 561, 14 I.A. 89, 96.

*(i) Muhammad Raza* v. *Abbas Bandi Bibi* (1932) 59 I.A. 236; 137 I.C. 321, ('32) A.P.C. 138.

*(j) Kamar-Un-Nissa Bibi* v. *Hussaini Bibi* (1880) 3 All. 266; *Mogulsha* v. *Mahammad Sahib* (1887) 11 Bom. 517; *Mahomed Buksh Khan* v. *Hosseini Bibi* (1888) 15 Cal. 684.

*(k) Karan Ilahi* v. *Sharf-ud-din* (1916) 38 All 212, 35 I.C. 14; *Bava Sahib* v. *Mahomed* (1896) 19 Mad. 343; *Vahazullah Sahib* v. *Boyapati Nagayya* (1907) 30 Mad. 519; *Nasib Ali* v. *Wajed Ali* (1927) 44 Cal. L.J. 490, 100 I.C. 296 ('27) A.C. 197; *Sultan Miya* v. *Ajibakhatoon Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497.

*(l) Alabi Koya* v. *Mussa Koya* (1901), 24 Mad. 513 and *Vahazullah Sahib* v. *Boyapati Nagayya* (1907) 30 Mad. 519 where the principle was fully discussed though with different results.

*(m) Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775.

*(n) Ayisumma* v. *Mayomoothy Umma* (1952) 2 Mad. L.J. 933, ('53) A.M. 425.

*(o) Muhammad* v. *Shaikh Ibrahim* (1922) 49 I.A. 119, 45 Mad. 308, 67 I.C. 115, ('22) A.P.C. 59.

Not a single topic of Mahomedan law is expressly mentioned in this section. The Mahomedan law that is applied to Mahomedans by Courts in the Mufassal of Bombay is applied presumably as the law of the defendant *(p)*.

*Law after the Shariat Act 1937.*— The provisions of this section of the Regulation have been repealed so far as inconsistent with that Act by the Shariat Act, 1937. Evidence of usage of the country is therefore inadmissible to prove a custom contrary to the Mahomedan law, unless in respect of agricultural land or other matter outside the Act, See sec. 6.

*Law before the Shariat Act, 1937.*— Before the Shariat Act it was held that though usage is mentioned in the Regulation before the law of the defendant, there is no presumption in favour of custom. It must be proved that the matter is governed by custom and not by personal law. Evidence may be given under this section of a custom excluding women from any share in the inheritance of a paternal relation *(q)*. The High Court of Bombay gave effect to a usage prevailing in the State of performing rites and ceremonies at the graves of deceased Mahomedans, and granted an injunction at the suit of the Mahomedan residents of Dharwar restraining the purchaser of a graveyard from obstructing them in performing religious ceremonies at the graveyard *(r)*.

**11. In the East Punjab.**— As to the East Punjab it is enacted by the Punjab Laws Act IV of 1872, secs. 5 and 6, as follows:—

"5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be—

(1) any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;

(2) the Mahomedan law, in cases where the parties are Mahomedans,... except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of the Act, or has been modified by any such *custom* as is above referred to.

"6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

*Law after the Shariat Act, 1937.*— The Shariat Act repeals sec. 5 of the Punjab Laws Act, 1872, in so far as it is inconsistent with its provisions. Evidence of custom contrary to the Mahomedan law is therefore not admissible on questions of succession, special property of females, marriage, divorce, dower, adoption, guardianship and gifts. As to agricultural land the law remains as declared in the Punjab Act. See sec. 6. In the matter of wills and legacies a Mahomedan is given by sec. 3 of the Shariat Act the option of remaining under the customary law or of adopting the Mahomedan Law. The Shariat Act is retrospective *(s)*.

*Law before the Shariat Act, 1937.*— Before the Shariat Act evidence was admissible to prove a custom contrary to the Mahomedan law. This will appear from the four following paragraphs:

*Custom.*—This subject was considered by the Judicial Committee under these enactments in *Abdul Hussein* v. *Sona Dero(t)* and *Vaishno Ditti* v. *Rameshri (u)*. In the later case it was said: "In putting custom in the forefront, as the rule of succession, whilst leaving the particular custom to be established, as it necessarily must be, the Legislature intended to recognise the fact that in this part of India inheritance and other matters mentioned in the section are largely regulated by a

*(p)* See *Musa Miya* v. *Kadar Bux* (1928) 55 I.A. 171, 52 Bom. 316, 109 I.C. 31, ('28) A.PC. 108 explained in *Ma Asha* v. *B.K. Haldar* (1936) 14 Rang. 439. 164 I.C. 984, ('36) A.R. 430.

*(q) Abdul Hussein* v. *Sona Dero* (1918) 45 Cal. 450, 45 I.A. 10, 43 I.C. 306.

*(r) Ramrao* v. *Rastumkhan* (1901) 26 Bom. 198.

*(s) Ata Mohammad* v. *Mohammad Shafi* (1944) 217 I.C. 17, ('44) A.L. 121.

*(t)* (1917) 45 I.A. 10, 45 Cal. 450, 43 I.C. 306.

*(u)* (1928) 55 I.A. 407, 421, 10 Lah. 86, 113 I.C. 1, 49 Cal. L.J. 38, ('28) A.PC. 294.

variety of customs which depart from the ordinary rules of Hindu and Mahomedan law. In these circumstances it has been rightly held in the Lahore Court [ *Daya Ram* v. *Sohel Singh* (1906) P.R. 110] that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom".

*Abrogation of custom.*— The abrogation of custom in favour of Mahomedan law may be inferred from a continuous course of conduct. But an individual cannot by a mere declaration abolish a long established custom*(v)*.

*Invalid custom*—" As regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws". Accordingly the Chief Court of the Punjab refused to recognize a custom of the Kanchans which aimed at the continuance of prostitution as a family business, and the decision was upheld by the Privy Council on appeal *(w)*. See notes to sec. 8 above.

*Custom of Succession.*— The ordinary rules of Mahomedan law may be varied by proof that succession in a particular family is regulated by the custom of *stribant(x)* according to which the sons of each wife fall into a separate group taking an equal share. But this does not necessarily involve that in cases of collateral succession arising in respect of a property so obtained from a common ancestor the full blood excludes the half blood, nor that the sons of each wife and their descendants are constituted separate stocks for purposes of inheritance, and in any case the custom of *stribant* has no application to a case where the choice of heirs lies between persons of different degrees. The general law must apply except in so far as the custom alters it *(y)*.

But in East and West Punjab customary law there is a distinction between the *Pagwand* and *Chundawand (z)* customs: under the former the division among sons is *per capita* and each son takes an equal share: under the latter the sons of each wife divide an equal share (as in the *stribant* custom above-mentioned). In these customs however is involved the principle that the portion allotted to a group should belong as an entirety to the members who for the time being form or represent the group until the group is extinct. This means in effect that the half blood cannot compete with the whole blood. Even if the property of the common ancestor was distributed on the *Pagwand* system, separate possession of a specific portion having been held by the sons of one wife, the *Pagwand* rule though it applies is to be applied within the family of that wife's children *(a)*.

*Justice equity and good conscience:*— See notes to sec. 8 above.

**12. In Ajmer-Merwara.**— The provisions of the Ajmer-Merwara Laws, Regulation III of 1877, secs. 4 and 5, are almost to the same effect as the Punjab Laws Act IV of 1872 [sec. 10 above]

*Shariat Act, 1937.*— The Shariat Act repeals sec. 4 of of the Ajmere Laws Regulation, 1877, in so far as it is inconsistent with its provisions. It affects the law under the Regulation in the same way as in the East Punjab. See sec. 10, *supra*.

**13. In Oudh.**— The provisions of the Oudh Laws Act XVIII of 1876, sec. 3, as regards the law to be administered in the case of Mahomedans are the same as in the East Punjab.

*Shariat Act, 1937.*— The Shariat Act repeals sec. 3 of the Oudh Laws Act in so far as it is inconsistent with its provisions. It affects the law in Oudh in the same way as in the East Punjab. See sec. 11 *supra*. A case decided under section 3 before the Shariat Act is *Roshan Ali Khan* v. *Chaudhri Asghar Ali (b)*.

**14. In Madhya Pradesh.**— As to Madhya Pradesh, it is enacted by the Central Provinces Laws Act XX of 1875, sec. 5, as follows: —

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*(v) Sardar Bibi* v. *Haq Nawaz Khan* (1934) 15 Lah. 425, 149 I.C. 575, ('34) A.L. 371; *Rajkishen Singh* v. *Ramjoy Mazoomdar* (1872) 1 Cal. 186 P.C.

*(w) Ghasiti* v. *Umrao Jan* (1893) 21 Cal. 149, 156, 20 I.A 193.

*(x)* From *stri*, a woman.

*(y) Karamat Ali* v. *Sadat Ali* (1933) 8 Luck. 228, 141 I.C. 27, (33) A.O. 4.

*(z)* From *chunda* the knot of hair on a woman's head.

*(a) Nabi Baksh* v. *Ahmed Khan* (1924) 51 I.A., 199, 5 Luck. 278, 80 I.C. 158, ('24) A.P.C. 117.

*(b)* (1930) 57 I.A. 29, 5 Luck. 70, 121 I.C. 517, ('30) A.P.C. 35.

"In questions regarding inheritance,... betrothal, marriage, dower,... guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be the Mahomedan law in cases where the parties are Mahomedans... except in so far as such law has been by legislative enactment altered or abolished, or is opposed to the provisions of this Act:

"Provided that, when among any class or body of persons or among the members of any family any *custom* prevails which is inconsistent with the law applicable between such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding such custom shall, notwithstanding anything herein contained, be given effect to.

" In cases not provided for [by the above clause], or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.".

*Shariat Act, 1937.*— The Shariat Act, 1937, repeals sec. 5 of the Central Provinces Laws Act, 1875, in so far as its provisions are inconsistent with it. It affects the law in Madhya Pradesh in the same way as in the Punjab. See sec. 11.

*Custom.*—. Among the Mewatis of former Madhya Bharat a custom of exclusion of females from inheritance will be applied if it can be proved. *(c)*.

*Justice, equity and good conscience.*— See notes to sec. 8 above. See also secs. 5 and 50.

**15. In Sind and Orissa.**— By section 289 of the Government of India Act, 1935, establishing Sind and Orissa as new provinces it was provided [sub-sec, 2 (c)] that an order in Council might contain (*inter alia*): —

(c) such provisions with respect to the laws which subject to amendment or repeal by the Provincial, or as the case may be, the Federal Legislature, are to be in force in, or in any part of, Sind or Orissa respectively, as His Majesty may deem necessary or proper.

The Orders in Council (dated 3rd March 1936 and numbered 1936 No. 164 and No. 165) do not effect any change as regards Mahomedan law.

Before the creation of this province by the Government of India Act, 1935, Bombay Regulation IV of 1827 applied to Sind and the Bengal, Agra and Assam Civil Courts Act, 1887, to Orissa. The new province became subject to the Shariat Act, 1937.

**16. In Hyderabad.**— In the former Hyderabad State area it is not open to a Mahomedan to set up and lead evidence of a custom which is at variance with, or against the principles of Mahomedan law. There is no exception to this rule in respect of any kind of property, such as *atiyat* or *Jagirs (d)*.

It was held by the Supreme Court in *Noorbanu v. Dep. Custodian General, E.P.* ('65) A.S.C. 1937 that where Khojas had migrated to Hyderabad from an area in which they were governed by custom by Hindu law, after migration to Hyderabad it was incompetent to them to plead a custom which was at variance with Mahomedan law.

All the principles of Mahomedan law relating to succession apply to *atiyat* (grant) property as well; the only departure being that contained in Regulation 6 (8) of the Hyderabad Abolition of Jagirs Regulation (No. LXIX of 1358F)*(e)*.

**17. Applicability of Mahomedan law to gifts.**— Apart from the Shariat Acts, the effect of the enactments summarized above is to apply the

*(c) Hooriya* v. *Munna* ('56) A. Madh. Bh. 56.
*(d) Jahandaranuisa Begum* v. *Mohd. Mohiuddin* (1953) Hyd. 78. ('53) A.H. 117.
*(e) Mushtaq Husain* v. *Syed Husain* (1959) 2 Andh. W.R. 487.

Mahomedan law expressly to gift in East and West Punjab, Madhya Pradesh, the N.-W. Province, Ajmer-Merwara and Oudh. It is also applied as the law of the parties or of the defendant in the Presidency-towns the Courts of Rangoon and the Mufassal of Bombay. But it has not been applied to gifts in Bengal, Bihar, Agra, Madras, Assam or Burma. Nevertheless as above mentioned *(f)*. the Courts of certain of these States have, notwithstanding sec. 123 of the Transfer of Property Act, applied the Mahomedan law to gifts *(g)* as the rule of justice, equity and good conscience, on the view that sec. 129 of the Transfer of Property Act rendered the provisions of sec. 123 inapplicable. A Full Bench of the Rangoon High Court have held that this is an erroneous assumption. The reason for this decision is as follows:— Mahomedan law was applied to gifts in Burma not as a rule of Mahomedan law but as a rule of justice, equity and good conscience; there was therefore no rule of Mahomedan law to be saved by sec. 129; that section does not operate to save a rule of justice, equity and good conscience; therefore sec. 123 applies to gifts in Burma *(h)*. It may be contended in support of the older view ( and of titles dependent thereon) that the Rangoon High Court has taken too narrowly the words of sec. 129 "affect any rule of Mahomedan law"; and that the statute was not intended to operate differently from State to State upon the Mahomedan law according as that law was applied as being, e.g., the law of the parties or as the rule of conscience applicable to the case. As to the effect of the Shariat Act, see sec. 6.

Before the Transfer of Property Act was applied to Burma a notification was issued applying in a district of Burma sec. 123 of the Transfer of Property Act alone without also applying sec. 129. The Privy Council assumed that the Mahomedan law applied to gifts in Burma and held that though sec. 129 was not applied that law was not abrogated by the application of sec. 123. The effect attributed to the notification was to super-impose the requirements of sec. 123 as to deed registered and attested upon the Mahomedan law requirement as to delivery of possession *(i)*. The notification was superseded by subsequent notifications applying the whole Act to Burma.

**18.** Before the merger of Cooch-Behar and before it became as a result of such merger one of the districts of West Bengal, the Mahomedan subjects of Cooch Behar State were being governed by the Hindu Law, in matters of inheritance. According to the provisions of the Mahomedan Inheritance Act (II of 1897) which came into force on 1st April, 1897, any Mahomedan subject to Cooch-Behar State desiring to be governed by the Mahomedan Law was required to make a declaration in the manner provided in that Act that he desired to be governed by the Mahomedan Law in matters of inheritance. On such declaration being made, in the manner prescribed the declarant would thenceforth continue to be governed by the Mahomedan Law of inheritance and would cease to be governed by the Hindu Law of inheritance,

*(f)* See note "Justice, equity and good conscience" under sec. 5, *supra*.

*(g) Karam Illahi* v. *Sharaf-ud-din* (1916) 38 All. 212, 35 I.C. 14; *Bava Sahib* v. *Mohamed* (1896) 19 Mad. 343; *Vahazullah Sahib* v. *Boyapati Nagayya* (1907) 30 Mad. 519; *Nasib Ali* v. *Wajed Ali* (1927) 44 Cal. L.J. 490. 100 I.C. 296, ('27) A.C. 197; *Sultan Miya* v. *Ajibakhatoon Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497.

*(h) Ma Asha* v. *B. K. Haldar* (1936) 14 Rang. 439, 164 I.C. 984, ('36) A.R. 430.

*(i) Ma Mi* v. *Kallandar Ammal* (1927) 54 I.A. 23, 5 Rang. 7, 100 I.C. 32, ('27) A.PC. 22, *N.B.*—In this case there was a registered deed and no question arose as to compliance with sec. 123. But it is thought that the effect of the decision is as stated in the text, though that was doubted by Mosley, J., in 14 Rang. 439, *supra* at p. 445, where the words in brackets ("or rather tried to effect") appear to have been added to the Privy Council judgment by mistake.

notwithstanding any custom to the contrary. If there was no such declaration under the provisions of the Act II of 1897 the Mahomedan who was a subject of the State of Cooch-Behar or the estate left by him did not come to be governed by the Mahomedan Law of inheritance.

**Held** that, on 26th February, 1978, on which date the Mahomedan subject of Cooch-Behar died, the deceased continued to be governed by the Hindu Law, and in a suit filed by him, the question of substitution in his place on his death pending suit was to be determined in accordance with the Hindu Law of inheritance inasmuch as the deceased had not made a declaration as required under the provisions of the Mahomedan Inheritance Act (1897) to the effect that he desired to be governed by the Mahomedan Law in matters of inheritance.

**Held**, further, that despite the provisions of sub-s.(1) of S. 3 of the Cooch-Behar (Assimilation of Laws) Act, 1950 (Act LXVII of 1950) which came into force on 1st January, 1951, the Muslim Personal Law (Shariat) Application Act, 1937, also did not apply to the Mahomedan subjects of Cooch-Behar district till 1st July, 1980 which was the date appointed by the State Government by a Notification under sub-S.(2) of S. 3 of the Act (LXVII of 1950) on which date the Mahomedan Inheritance Act, 1897, ceased to be in force and the Muslim Personal Law. (Shariat) Application Act, 1937 came into force in Cooch-Behar [D.C. Chakravorti, J.] *Anisur Rahaman* v. *Jalilar Rahaman.* A.I.R.1981 Cal. 48.

**18A.** Where the question was whether the parties who belong to Kamboj community are primarily agricultural tribe or not.

**Held**, that there is no legal and acceptable evidence on the record to prove that Kambojs of Malerkotla State are not an agricultural community. It is proved that Kambojs are pre-dominantly an agricultural tribe are governed by custom in the matter of inheritance. [J.V. Gupta, J.] *Babu* v. *Mst. Halima* (1983) 85 Punj. L.R. 335.

# CHAPTER II

## CONVERSION TO MAHOMEDANISM

**19. Who is a Mahomedan.**— Any person who professes the Mahomedan religion, that is, acknowledges (1) that there is but one God, and (2) that Mahomed is His Prophet, is a Mahomedan *(a)*. Such a person may be a Mahomedan by birth or he may be a Mahomedan by conversion *(b)*. It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief*(c)*. It is sufficient if he professes the Mahomedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed.

"If one of the parents of an infant be a believer, the construction of law is in favour of the Islam of the infant"; Baillie, II, 265 (Shia law); *Hedaya* , 64 (Sunni law), But this presumption may be rebutted by general conduct and surrounding circumstances. Thus an illegitimate son of a Hindu by a Mahomedan woman, who is brought up as a Hindu and married to a Hindu girl in the Hindu form of marriage, may well be regarded as a Hindu, though his mother was a Mahomedan *(d)*.

A person born a Mahomedan remains a Mahomedan until he renounces the Mahomedan religion *(e)*. The mere adoption of some Hindu forms of worship does not amount to such a renunciation *(f)*.

**20. Conversion to Mahomedanism and marital rights.**— (1) The conversion of a Hindu wife to Mahomedanism does not *ipso facto* dissolve her marriage with her husband. She cannot, therefore, during his lifetime, enter into a valid contract of marriage with any other person. Thus if she, after conversion to Mahomedanism, goes through a ceremony of marriage with a Mahomedan, she will be guilty of bigamy under sec. 494 of the Indian Penal Code *(g)*.

(2) In *Skinner* v. *Orde (h)*, a Christian man, married to a Christian wife, declared himself a Mahomedan, and went through a ceremony of marriage with another woman. The Privy Council agreed with the High Court in thinking that the marriage was of doubtful validity. The Calcutta High Court has held that where an Indian Christian domiciled in India and married to an Indian Christian also domiciled in India embraces the Islamic faith, he may enter into a valid contract of marriage with a Mahomedan woman, though the first marriage with the Christian wife subsists *(i)*.

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*(a) Narantakat* v. *Prakkal* (1922) 45 Mad. 986, 71 I.C. 65, ('23) A.M. 171 [Ahmadees are not apostates from Islamism]; *Hakim Khalil* v. *Malik Israfi* (1917) 2 Pat. L.J. 108, 37 I.C. 302 [Ahmadees are not apostates from Islamism]: Ahmadiyas are only a reformed sect of Mahomedans. Although they regard Mirza Gulam Ahmad as a Prophet they are not apostates only because they do not accept that Mahomed was the 'last' Prophet. Since they believe in the oneness of God and the prophethood of Mahomed, they must be regarded as Mahomedans. *Shihabuddin Imbichi Koya Thangal* v. *Ahammed Koya.* ('71) A.K. 206; *Queen-Empress* v. *Ramzan* (1885) 7 All. 461; *Ata-Ullah* v. *Azim-Ullah* (1890) 12 All. 494; *Jiwan Khan* v. *Habib* (1933) 14 Lah. 518, 144 I.C. 658, ('33) A.L. 759. Pakistan: *Atia Waris* v. *Sultan Ahmad Khan* ('59) P. Lah. 205.

*(b) Abraham* v. *Abraham* (1863) 9 Moo. I.A. 199, 243.

*(c) Abdool Razack v. Aga Mahomed* (1894) 21 I.A. 56, 64.

*(d) Bhaiya Sher Bahadur* v. *Bhaiya Ganga Bakhsh Singh* (1914) 41 I.A. 1, 36 All. 101, 22 I.C. 293.

*(e) Bhagwan Bakhsh* v. *Drigbijai* (1931) 6 Luck. 487, 132 I.C. 779, ('31) A.O. 301.

*(f) Azima Bibi* v. *Munshi Samalanand* (1912) 17 C.W.N. 121, 40 Cal. 378, 17 I.C. 758.

*(g) Government of Bombay* v. *Ganga* (1880) 4 Bom. 330; *In the Matter of Ram Kumari* (1891)18 Cal. 264; *Mst. Nandi* v. *The Crown* (1920) 1 Lah. 440, 59 I.C. 33.

*(h)* (1871) 14 Moo. I.A. 309.

*(i) John Jiban Chandra* v. *Abinash* (1939) 2 Cal. 12, 183 I.C. 75, ('39) A.C. 417.

(3) In *Khambatta* v. *Khambatta (j)* a Mahomedan married a Christian woman in Christian form. The wife became a convert to the Mahomedan religion and the husband divorced her by talak. The Bombay High Court held that on the wife renouncing Christianity the *lex domicilii* applied the law of their religion and that the divorce was valid.

See sec. 321, " Apostasy from Islam".

(4) According to Muslim law a distinction is made between conversion to Islam of one of the spouses when such conversion takes place.

(1) in a country subject to Muslim law, and

(2) in a country where the Law of Islam is not the law of the land.

In the first case, when one of the parties embraces Islam, he or she should offer Islam to the other spouse, and if the latter refuses the marriage can be dissolved. In the second case the marriage is automatically dissolved after the lapse of a period of three months after the adoption of Islam by one of the spouses. This, however, is not the law in India. In India the spouse who has embraced Islam cannot file a suit for divorce or for a declaration that the marriage is dissolved against the spouse who refuses to embrace Islam *(k)*.

It is well settled that even in International Law, a wife on her marriage, acquires the nationality of her husband, unless the Municipal law prevents such an acquisition. In this case the petitioner who was originally a Hindu embraced Islam and married a Muslim. By reason of such marriage which is recognised by Muslim Law, she became a Muslim. In practice and in reality, at any rate in this part of the country, Muslims are classified on the basis of the community.

That is obvious from the list of the backward classes prepared by the Government of Tamil Nadu containing the name of Labbai, which is a community of Muslims. On the same principle it stands to reason that a wife must belong not only to the religion to which her husband belongs but to the community as well. If therefore, this statutory principle is adopted that by marriage from one community into another within the same religion or in the Hindu Religion or from one religion to another the husband's community alone is to prevail. The revised view of the Government that by marriage alone a forward community person could not be considered as a backward community candidate and that by changing religion the petitioner in the instant case,who was a member of a forward community, had become a Muslim had not because a Labbai Muslim, a backward class and she was not entitled to the benefit given to backward classes, was wrong. Of course, if the case on hand happens to be the reverse it would be different. The golden rule appears to be, it is the community or the religion to which the husband belongs that should matter. [S. Mohan, J.] *K. S. Ameena Shafir* v. *The State of Tamil Nadu*, represented by its Secretary, Social Welfare Department. (1984) 1 M.L.J. 237.

**21. Conversion to Mahomedanism and right of inheritance.**— In the absence of a custom to the contrary [see secs. 22 and 26], succession to the estate of a convert to Mahomedanism is governed by the Mahomedan law *(l)*.

According to the Mahomedan law, a Hindu cannot succeed to the estate of a Mahomedan. Therefore, if a Hindu, who has a Hindu wife and children, embraces Mahomedanism, and marries a Mahomedan wife and has children by her, his property will pass on his death to his Mahomedan

*(j)* (1935) 59 Bom. 278, 36 Bom. L.R. 1021, 154 I.C. 1075, ('35) A.B. 5 affirming 36 Bom. L.R. 11, 149 I.C. 1232, ('34) A.B. 93.

*(k)Robasa Khanum* v. *Khodadad Bomanji* (1946) 48 Bom. L.R. 864. ('47) A.B. 272; *Norr Jehan* v. *Eugene Tischence* (1941) 45 C.W.N. 1047, 74 Cal. L.J. 212, ('41) A.C. 582; *Sayad Khatoon.* v. *M. Obadiah* (1945) 49 C.W.N. 745; *Budansa Fatma Bi* (1914) 26 Mad. L.J 260, 22 I.C. 697; contra *Mt. Ayesha Bibi* v. *Subodh Chakravarty* (1945) 49 C.W.N. 439.

*(l) Mitra Sen Singh* v. *Maqbul Hasan Khan* (1930) 57 I.A.313, 35 C.W.N. 89, 128 I.C. 268, ('30) A.P.C. 251; *Chedambaram* v. *Ma Nyein Me* (1928) 6. Rang. 243. 111 I.C. 2, ('28) A.R. 179; *Bhagwan Bakhsh* v. *Drigbijai* (1931) 6 Luck. 487, 132 I.C. 779, ('31) A.O. 301; *John Jiban Chandra* v. *Abinash* (1939) 2 Cal. 12, 183 I.C. 75, ('39) A.C. 417.

wife and children, and not to his Hindu wife or children *(m)*.

Mahomedan Law applies not only to persons who are Mahomedans by birth but by religion also *(n)*; a convert changes not only his religion but his personal law also *(o)*. These rigid logical rules may apply to individual conversions, but in a case of a community conversion the converts may retain a portion of their personal law according to their social habits and surroundings. They retain their personal law unless they consciously adopt another*(p)*.

**22. Khojas and Cutchi Memons..**— In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay State were governed in matters of succession and inheritance, not by the Mahomedan, but by the Hindu Law *(q)*. But this customary law has been to a great extent abolished by the Shariat Act, 1937.

*Law after the Shariat Act, 1937.*— The effect of the Shariat Act is to abolish (except as to agricultural land and other matters to which the Act does not apply) the customary law of succession of Khojas and Cutchi Memons and to make them subject to the Mahomedan law.

*Law before the Shariat Act, 1937.*— Khojas and Cutchi Memons were originally Hindus. They became converts to Mahomedanism about 400 years ago, but retained their Hindu law of inheritance and succession as a customary law. Hence the Hindu law of inheritance and succession is applied to them on the ground of custom. The application of the rules of Hindu law by custom was limited to rules of inheritance and succession and did not extend to the rules relating to joint property *(r)*. This custom was so well established among them that if any member of either of these communities set up a usage of succession opposed to the Hindu law of succession, the burden lay upon him to prove such usage *(s)*. Where, however, Cutchi Memons migrate from India and *settle among Mahomedans* as in Mombasa, the presumption that they have adopted the Mahomedan custom of succession should be readily made *(t)*. In matrimonial matters Cutchi Memons are governed by Mahomedan law and in such matters a Cutchi Memon girl is a free agent*(u)*.

*Cutchi Memons Act.* — It was provided by sec. 2 of the Cutchi Memons Act XLVI of 1920 and the Cutchi Memons (Amendment) Act XXXIV of 1923, that any person who satisfies the prescribed authority—

(a) that he is a Cutchi Memon and is the person whom he represents himself to be;

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872; and

(c) that he is resident in India;

may by declaration in the prescribed form and filed before the prescribed (authority declare that

*(m)* (1928) 6 Rang. 243, 111 I.C. 2, ('28) A.R. 179, *supra; Chandrasekharappa* v. *Government of Mysore* (1935) Mys. 621; *Poniah Nadar* v. *Essaki Devania* ('55) A. Trav.-Co. 180.

*(n) Jowala Buksh* v. *Dharun Singh* (1866) 10 M.I.A. 511.

*(o) Mittar Sen Singh* v. *Maqbul Hasan Khan* (1930) 57 I.A. 313.

*(p) Fidahusein* v. *Monghibai* (1936) 38 Bom. L.R. 397, 400.

*(q) Khojas and Memons Case* (1847) Perry's O.C. 110; *Hirbai* v. *Gorbai* (1875) 12 Bom. H.C. 294 [Khojas]; *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158 [Cutchi Memons]; *Mahomed Sidick.* v. *Haji Ahmed* (1885) 10 Bom. 1[Cutchi Memons] *Moosa Haji Joonas* v. *Haji Abdul Rahim* (1905) 30 Bom. 197; *Saboo Sidick* v. *Ally Mahomed* (1904) 30 Bom. 270; *Jan Mahomed* v. *Dattu* (1914) 38 Bom. 449, 22 I.C. 195; *Mangaldas* v. *Abdul* (1914) 16 Bom. L.R. 224, 23 I.C. 565; *Fidahusein* v. *Monghibai* (1936) 38 Bom. L.R. 397, 164 I.C. 533, ('36) A.B. 257. See however: *Noorbanu* v. *Dep. Custodian General,E.P.*, ('65) A.S.C. 1937, and Sec. 17 *supra*.

*(r) Haji Oosman* v. *Haroon Saleh Mahomed* (1923) 47 Bom. 369, 68 I.C. 862, ('23) A.B. 148; *Jan Mahomed* v. *Dattu supra; Fidahusein* . v. *Monghibai supra*

*(s) Abdulrahim* v. *Halimabai* . (1915) 43 I.A. 35, 39, 18 Bom. L.R. 635, 639, 32 I.C. 413; *Hirbai* v. *Gorbai* (1875) 12 B.H.C. 294, 305; *Rahimatbai* v. *Hirbai* (1877) 3 Bom. 34 *In re Haji Ismail* (1880) 6 Bom.452; *Ashabai* v. *Haji Tyeb* (1882) 9 Bom. 115; *Mahomed Sidick* v. *Haji Ahmed* (1885) 10 Bom. 1; *In the goods of Mulbai* (1866) 2 B.H.C. 276. The Hindu law as to joint family property does not apply to Cutchi Memons; *Haji Oosman* v. *Haroon* (1923) 47 Bom. 369, 68 I.C. 862, ('23) A.B. 148; *Allyarkhan* v. *Rambhau* (1947) 49 Bom. L.R. 793, ('48) A.B. 162.

*(t)* (1915) 43 I.A. 35, 18 Bom. L.R. 635, 32 I.C. 413, *supra.*

*(u) Abdul Razak* v. *Adam Usman* (1935) 37 Bom. L.R. 603, 159 I.C. 650, ('35) A.B. 367.

he) desires to obtain the benefit of this Act, and thereafter the declarant and all his minor children and their descendants will in matters of succession and inheritance be governed by the Mahomedan law. The Act, however, governed the succession to the estate of the declarant and did not affect the right of the declarant himself to succeed as a Cutchi Memon to the property of another Cutchi Memon who has signed no such declaration *(v)*.

The Cutchi Memons Act of 1920 is now repealed by the Cutchi Memons Act X of 1938, which came into force on the 1st day of November, 1938. The Act is as follows:—

1. (1) This Act may be called the Cutchi Memons Act, 1938.

(2) It shall come into force on the 1st day of November, 1938.

2. Subject to the provisions of sec. 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Muhammadan law.

3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

In *Bayabai* v. *Bayabai (w)* it was held by a single judge of the Bombay High Court that the Act applies not only to wills made by a Cutchi Memon after the passing of the Act but also to those made before the Act, was passed, provided the testator dies after the passing of the Act and such wills have to be construed and looked at from the point of view of Mahomedan law. The law as to succession and inheritance in the case of Cutchi Memons, therefore, is as follows:—Prior to 1920 a Cutchi Memon was governed by Hindu law in matters of succession and inheritance. Under Act XLVI of 1920 he had the option to declare himself to be governed by Mahomedan law and on his exercising the option, not only he but his minor children and their descendants would be governed by the Mahomedan law in this respect. Thereafter under the Shariat Act of 1937 he was governed by Mahomedan law in the matter of intestate succession, and as to testate succession he would be subject to that law if he made the necessary declaration under sec.3 of the Act. Now under the Cutchi Memons Act, 1938, a Cutchi Memon is governed by Mahomedan law in all matters of succession and inheritance.

*Effect of repeal of the Cutchi Memons Act, 1920.*—It is submitted that it was not within the competence of the Indian Legislature to repeal this Act so far as it affects agricultural land in the Governors' Provinces. The powers of the Central Legislature to repeal and alter laws are made precisely co- extensive with their powers of direct legislation *(x)*. By their decision *(y)* the Federal Court of India held that the Hindu Women's Right to Property Act, 1937, was beyond the competence of the Indian Legislature so far as its operation might affect agricultural land in the Governors' Provinces. It would thus seem that the repeal of the Act of 1920 so far as it operates to affect succession to agricultural land in the Governors' Provinces was *ultra vires* the Indian Legislature. The result then is that succession to such land is still governed by the Cutchi Memons Act, 1920, and in this respect the position is not altered by the subsequent repeal of the repealing section (sec.4) by the Cutchi Memons (Amendment) Act, XXV of 1942.

*Property of Khoja community.*—If Khojas ceased to be Aga Khanis they could be debarred from places of Aga Khani worship. As to secular property, the dissident members could be debarred from enjoying it, if their beliefs were such that they were repugnant to the Aga Khani Khojas *(z)*, but this power has been largely taken away by the Bombay Prevention of Excommunication Act, (Bom. Act XLII of 1949).

**23. Testamentary power of Cutchi Memons.**— (1) A Mahomedan cannot by will dispose of more than one-third of his property without the consent of his heirs [sec.118]. But a Cutchi Memon could dispose of the whole of his property by will; this was founded on custom *(a)*. The Cutchi Memons Act, 1920,

*(v) Abdulsakur* v. *Abubakkar* (1930) 54 Bom. 358, 362, 127 I.C. 401, ('30) A.B. 191.

*(w)* (1942) 44 Bom. L.R. 792, ('42) A.B. 328.

*(x)* Section 292 of the Government of India Act, 1935. See *Dobie* v. *Temporalities Board* (1881) 7 App. Cas. 136.

*(y) In re Hindu Women's Right to Property Act* (1941) F.C.R. 12, ('41) A.FC. 72.

*(z) Ladha Danani* v. *Hasam Ismail* ('49) A. Kutch 17.

*(a) Advocate-General* v. *Jimbabai* (1915) 41 Bom. 181, 31 I.C. 106; *Advocate-General* v. *Karmali* (1903) 29 Bom. 133, 148-149; *Sattar Ismail* v. *Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

however, gave a Cutchi Memon the option, by making a statutory declaration, to subject himself and all his descendants in matters of succession and inheritance to the Mahomedan law. But in the absence of such a declaration, he was subject to the Hindu law.

The Shariat Act, 1937, applied the Mahomedan law to the Cutchi Memons in respect of intestate succession but left the position unaltered so far as testamentary power was concerned.

Finally, the Cutchi Memons Act, 1938, applied Mahomedan law to the Cutchi Memons as regards (both testate and intestate) succession, thus making their position the same as that of all other Mahomedans in all respects.

(2) A Cutchi Memon will was construed by the rules of Hindu law relating to wills *(b)*. But this rule will not apply in cases governed by the Mahomedan law under the Cutchi Memons Act, 1938.

*Sub-sec. (2).*—If a Cutchi Memon will contains a contingent bequest, the bequest will be void if the will is to be construed by the Mahomedan law, but valid if it is to be construed by the Hindu law. It has been held that trusts in a will are governed by Mahomedan Law, and therefore a contingent bequest is invalid *(c)*.

(3) A Cutchi Memon is governed by the Mahomedan law so far as it relates to the execution and revocation of his will *(d)*. See sec. 116.

**24.Testamentary power of Khojas.**—A Khoja may dispose of the whole of his property by will *(e)*. But the effect of the Shariat Act, 1937, is that a Khoja may restrict his testamentary power under the "one-third rule" of Mahomedan Law (sec.118, below) by making the statutory declaration provided for by sec. 3, of the Shariat Act, 1937.

The making and revocation of Khoja wills and the validity of trusts and wakfs created thereby are all governed by the Mahomedan law, but apart from trusts and wakfs, the construction of a Khoja will is still governed by Hindu Law *(f)*.

**25. Halai Memons.**—Halai Memons domiciled in Bombay are governed in all respects by the Mahomedan law *(g)*.

Halai Memons of Porbandar in Kathiawar follow in matters of succession and inheritance Hindu law and not Mahomedan law, differing in that respect from Halai Memons of Bombay. It was so held in the undermentioned case upon evidence of custom among Halai Memons in Porbandar *(h)*.

**25-A. Daoodi and Sulaimani Bohras.**—Daoodi and Sulaimani Bohras are Shia Ismailis, being adherents of the Western Branch of the Ismailis *(i)*. They have always been governed by Mahomedan (Shia) law. (See note under sec. 29).

**26. Sunni Bohras of Gujarat: Molesalam Girasias of Broach.**—The Sunni

*(b) Abdulsakur* v. *Abubakkar* (1930) 54 Bom. 358, 362, 127 I.C. 401, ('30) A.B. 191, dissenting from *dicta* to the contrary in *Advocate-General* v. *Jimbabai, supra, Ashraf Alli* v. *Mahomed Alli* (1946) 48 Bom. L.R. 642; ('47) A.B. 122 *Adambhai* v. *Allarakhia* (1935) 37 Bom. L.R. 686, 159 I.C. 199, ('35) A.B. 417.

*(c) Ashraf Alli* v. *Mahomed Alli* (1946) 48 Bom. L.R. 642; ('47) A.B. 122.

*(d) Abdul Hameed* v. *Mahomed Yoonus* (1940) 1 M.L.J. 273, 187 I.C. 414, ('40) A.M. 153; *Sarabhai Amibai* v. *Mahomed Cassum* (1919) 6 A.B. 80, (1919) 43 Bom. 641, approved.

*(e) Fidahusein* v. *Monghibai* (1936) 38 Bom. L.R. 397, 164 I.C. 533, ('36) A.B. 257; *Allyarkhan* v. *Rambhau* (1947) 49 Bom. L.R. 793, ('48) A.B. 162.

*(f) Ashraf Alli* v. *Mahomed Alli* (1946) 48 Bom. L.R. 642, ('47) A.B. 122.

*(g) Khojas and Memons' Case* (1847) Perry's O.C. 110, 115; *Khatubai* v. *Mahomed Haji Abu* (1923) 50 I.A. 108, 47 Bom. 72, I.C. 202, ('22) A.P.C. 414, affirming *Mahomed Haji* v. *Khatubai* (1918) 43 Bom. 647, 51 I.C. 513.

*(h)* (1923) 50 I.A. 108, 47 Bom. 146, 72 I.C. 202, ('22) A.P.C. 414, *supra.*

*(i)* See Introduction.

## Bohra Mahomedans of Gujarat *(j)*, and the Molesalam Girasias of Broach *(k)*, are governed by custom in certain matters.

The Sunni Bohra Mahomedans of Gujarat and the Molesalam Girasias of Broach were originally Hindus, and became subsequently converts of Mahomedanism. They are governed by the Shariat Act, same as the Khojas. They are, however, governed by custom if no declaration has been made under s.3 of the Shariat Act by an individual. They are not to be confused with the Bohras of Bombay who are Shias. (s.29) (There has been some misunderstanding of the commentary in the 17th ed. The comment and the text of the section was changed from the 16th. ed. It was not noticed that the Shariat Act does not operate *proprio vigore* in those spheres where a declaration under s.3 is necessary before custom can be changed to Shariat.)

*(j) Bai Baiji* v. *Bai Santok* (1894) 20 Bom. 53; *Nurbai* v. *Abhram Mahomed* (1939) 41 Bom. L.R. 825, ('39) A.B. 449.

*(k) Fatesangji* v. *Harisangji* (1894) 20 Bom. 181.

# CHAPTER III

## MAHOMEDAN SECTS AND SUB-SECTS

**27. Sunnis and Shias.**—The Mahomedans are divided into two sects, namely, the Sunnis and the Shias.

There is another class of Mahomedans called Motazilas. It is not clear whether they form an independent sect, or are an offshoot of the Shia sect.

Qadianis also follow the Sunni law and so do the Ahl-e-Hadith. The Cutchi Memons of Bombay and Halai Memons belong to the Sunni sect. See secs. 22, 23 and 25 above.

**28. Sunni sub-sects.**—The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis.

The Sunni Mahomedans of India belong principally to the Hanafi School.

*Presumption as to Sunnism.*—The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis, unless it is shown that the parties belong to the Shia sect *(a)*. But the Shia law is not foreign law. It is part of the law of the land, and so no expert evidence can be led to prove it as in the case of foreign law *(b)*.

As most Sunnis are Hanafis the presumption is that a Sunni is governed by Hanafi law *(c)*.

The Wahhabis are an off-shoot of the Hanbalis. Considerable groups of Mahomedans in the South of India, such as Kerala and Malabar, are Shafeis.

**29. Shia sub-sects.**—The Shias are divided into three main sub-sects, namely, the Athna-Asharias, the Ismailyas and the Zaidyas.

These three sub-sects are shown in the Table annexed to the Introduction.

There are two divisions of Athna-Asharias, namely, (1) Akhbari, and (2) Usuli.

As most Shias are Athna-Asharias the presumption is that a Shia is governed by the Athna-Asharia exposition of the law *(d)*.

The Khojas and the Bohras of Bombay belong to the Ismailya sub- sect, see secs. 22, 25-A and 26.

The Aga Khan is the spiritual head of the Ismaili Khojas and he was once regarded as having the sole right of determining who shall or shall not remain a member of the community, but this right has been curtailed by the Bombay Prevention of Excommunication Act (XLII of 1949). All the offerings are the Aga Khan's absolute property and are not subject to any trust for the benefit of the community *(e)*.

The Mullaji is the spiritual head of the Daoodi Bohras *(f)* and in regard to properties vested in him and to offerings received by him for the benefit of the community it has been held in one case that he is a trustee *(g)*. In another case the constitutional validity of the Bombay Prevention of Excommunication Act (XLII of 1949) has been upheld and an order of excommunication given

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*(a) Bafatum* v. *Bilaiti Khanum* (1903) 30 Cal. 683, 686; *Mt. Iqbal Begum* v. *Mt. Syed Begum* (1933) 140 I.C. 829. ('33) A.L. 80; *Akbarally* v. *Mahomedally* (1932) 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356; *Moosa Seethi* v. *Mariakutty* (1954) Trav.-Co. 690, ('54) A. Trav.-Co. 432.

*(b) Aziz Bano* v. *Muhammad* (1925) 47 All. 823. 89 I.C. 690, ('25) A.A. 720.

*(c) Akbarally* v. *Mahomedally* (1932) 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356; *Abdullah Beary* v. *Alikunhi Beary* (1957) Ker. L.J. 731, Presumption removed— Shafei law applied. *Sardar Bibi* v. *Muhammad Bakhsh* P.L.D. 1954 (W.P.) Lah 481. *Mst. Sahib Bibi* v. *Muhammad and ors.* P.L.D. 1961 (W.P.) Lah. 1036; *Khan Muhammad* v. *Gohar Banu* P.L.D. 1965 (W.P.) Lah. 46.

*Kuttialikutty Marakkar* v. *Kandankutty* ('67) A. Ker. 78.

*(d)* 34 Bom. L.R. 655 *supra.*

*(e) The Advocate-General ex relations Daya Muhammad* v. *Muhammad Husein* (1879) 12 Bom. H.C. 323; *Haji Bibi* v. *H.H. Sir Sultan Mahomed Shah, The Aga Khan* (1909) 11 Bom. L.R. 409, 2 I.C. 874.

*(f) Hasanali* v. *Mansoorali* (1949) 76 I.A. 1, ('48) A.P.C. 66.

*(g) Advocate-General of Bombay* v. *Yusufally Ebrahim* (1922) 24 Bom. L.R. 1060, 84 I.C. 759, ('21) A.B. 338.

by the Head Priest of the Daoodi Bohras set aside *(h)*. But see *Saifuddin Sahib* v. *Govt. of Bombay*, 1962 A.S.C. 854.

The Sulaimani Bohras follow their own religious leaders. Their secession from the Daoodis is mentioned in *Mansoorally* v. *Taiyabally (i)*.

**30. Each sect governed by its law.**—The Mahomedan law applicable to each sect or sub-sect is to prevail as to litigants of that sect or sub-sect *(j)*.

The Sunni law will therefore apply to Sunnis, and the Shia law to Shias, and the law peculiar to each sub-sect will apply to persons belonging to that sub-sect.

**31. Change of sect.**—A Mahomedan male or female who has attained the age of puberty, may renounce the doctrines of the sect or sub-sect to which he or she belongs, and adopt the tenets of the other sect or any other sub-sect, and he or she will thenceforth be subject to the law of the new sect or sub-sect *(k)*.

**32. Marriage between Shia male and Sunni female—wife's status not affected.**—A Sunni woman contracting marriage with a Shia does not thereby become subject to the Shia law *(l)*.

The same proposition, it would appear, holds good in the case of marriage of a Shia female with a Sunni male. See sec. 258.

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*(h) Sardar Syedna Saifuddin* v. *Tyebhai* (1953) 55 Bom. L.R. 1.

*(i)* ('35) A.N. 156.

*(j) Deedar Hossein* v. *Zuhoor-oon-Nissa* (1841) 2 M.I.A. 441, 477.

*(k) Hayat-un-Nissa* v. *Muhammad* (1890) 12 All. 290, 17 I.A. 73 (change of sect); *Muhammad* v. *Gulam* (1864) 1 B.H.C. 236 (change from Shafeiism to Hanafism).

*(l) Nasrat* v. *Hamidan* (1882) 4 All. 205.

# CHAPTER IV

## SOURCES AND INTERPRETATION OF MAHOMEDAN LAW

**33. Sources of Mahomedan Law.**—There are four sources of Mahomedan law, namely, (1) the Koran; (2) *Hadis*, that is, precepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by authorized persons; (3) *Ijmaa*, that is, a concurrence of opinion of the companions of Mahomed and his disciples; and (4) *Qiyas*, being analogical deductions derived from a comparison of the first three sources when they did not apply to the particular case *(a)*.

*Qiyas* is reasoning by analogy. Abu Hanifa, the founder of the Hanafi sect of Sunnis, frequently preferred it to traditions of single authority. The founders of the other Sunni sects, however, seldom resorted to it *(b)*.

See: The Introduction.

**34. Interpretation of the Koran.**—The Courts, in administering Mahomedan law, should not, as a rule, attempt to put their own construction on the Koran in opposition to the express ruling of Mahomedan commentators of great antiquity and high authority.

Thus where a passage of the Koran (Sura ii, vv. 241-242) was interpreted in a particular way both in the *Hedaya* (a work on the Sunni law) and in the *Imamia* (a work on the Shia law), it was held by their Lordships of the Privy Council that it was not open to a Judge to construe it in a different manner *(c)*.

**35. Precepts of the Prophet.**—Neither the ancient texts not the precepts of the Prophet Mahomed should be taken literally so as to deduce from them *new* rules of law, especially when such proposed rules do not conduce to substantial justice *(d)*.

The words of the section are taken from the judgment of their Lordships of the Privy Council in *Baqar Ali* v. *Anjuman (e)*.

It is a rule of Mahomedan law that a gift in perpetuity is not valid unless it is a gift to *charity*. Is a gift by a Mahomedan to his own *children and their descendants* a gift to charity? No—was the answer given by a majority of the Full Bench of the Calcutta High Court in *Bikani Mia* v. *Shuk Lal(f)* Yes—was the answer given by Ameer Ali, J., in a dissenting judgment, relying on the following precept of the Prophet Mahomed: "A pious offering to one's *family* to provide against their getting into want is more pious than giving alms to the beggars. The most excellent form of *Sadakah* (charity) is that which a man bestows upon his own family." Referring to the judgment of Ameer Ali, J., their Lordships of the Privy Council observed in a later case *(g)*, that it was not safe in determining what was the rule of Mahomedan law on a particular subject to rely upon abstract precepts taken from the mouth of the Prophet without knowing the context in which those precepts were uttered. Their Lordships further observed that the rule of Mahomedan law on the subject was that which was laid down by the majority of the Full Bench, and that the new rule of law sought to be deduced from the precept of the Prophet by Ameer Ali, J., was not one that would conduce to justice. A wakf in favour of children and descendants is now declared to be legal by the Mussalman Wakf Validating Act VI of 1913, provided there is an ultimate gift to charity. See secs. 196-198 below.

**36. Ancient texts.**— New rules of law are not to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however

*(a) Morley*, Digest of Indian Cases, Introd. ccxxvii.

*(b) Ib.* p. ccxxxvii.

*(c) Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 18, 24 I.A. 196, 204.

*(d) Maulabux* v. *Charuk* ('52) P. Sind 54.

*(e)* (1902) 25 All. 236, 254, 30 I.A. 94.

*(f)* (1893) 20 Cal. 116.

*(g) Abdul Fata* v. *Russomoy* (1894) 22 Cal. 619, 631, 632, 22 I.A. 76, 86, on appeal from *Russomoy* v. *Abdul Fata* (1891) 18 Cal. 399.

authoritative, when the ancient doctors of the law have not themselves drawn those conclusions*(h)*.

**37. General rules of interpretation of Hanafi law.**—The three great exponents of the Hanafi-Sunni law are Abu Hanifa, the founder of the Hanafi school, and his two disciples, Abu Yusuf and Imam Muhammad.

It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails *(i)*. Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf*(j)*. When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred *(k)*. But these rules are not inflexible; they are to be regarded as rules of preference adopted by ancient jurists for their own guidance, but the subsequent history of opinion and practice will generally be of greater importance *(l)*.

Where there is a conflict of opinion, and no specific rule to guide the Court, the Court ought to follow that opinion which is most in accordance with justice, equity and good conscience *(m)*.

**38. Rules of equity.**—The rules of equity and equitable considerations commonly recognized in Courts of Equity in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases under that system *(n)*.

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*(h) Baqar Ali* v. *Anjuman* (1902) 25 All. 236, 254, 30 I.A. 111; dissenting from *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 448.

*(i) Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 448; *Abdul Kadir* v. *Salima* (1886) 8 All. 149, 166-167.

*(j)* (1886) 8 All. 149, p. 162, *supra; Kutti Umma* v. *Negungadi Bank, Ltd.* (1938) Mad. 148, 173 I.C. 699, ('37) A.M. 731.

*(k) Kulsom Bibee* v. *Golam Hoosein* (1905) 10 C.W.N. 449, 488; *Khajah Hoosein* v. *Shahazadee* (1869) 12 W.R. 344, 346, Affmd. in *Shahazadee* v. *Khaja Hossein* (1869) 12 W.R. 498; *Kutti Umma* v. *Nedungadi Bank, Ltd.* (1938) Mad. 148, 173 I.C. 699, ('37) A.M. 731. See also sec. 151 below. In *Muhammad* v. *The Legal Remembrancer* (1893) 15 All. 321, 323, it was held that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf, the Court thinking (though erroneously) that it was so laid down by the Full Bench in *Bikani Mia* v. *Shuk Lal* (1893) 20 Cal. 116.

*(l) Anis Begun* v. *Muhammad Istafa* (1933) 55 All. 743, 148 I.C. 26, ('33) A.A. 634; *Siddiq Ahmed* v. *Syed Ahmed* (1945) 49 C.W.N. 311, ('45) A.C. 418; *Mohamed Yasin* v. *Rahmat Ilahi* ('47) A.A. 201 F.B.

*(m) Aziz Bano* v. *Muhammad* (1925) 47 All. 823, 837, 89 I.C. 690, ('25) A.A. 720 (difference in Shia authorities); *Ebrahim Allibhai* v. *Bai Asi* (1933) 58 Bom. 254, 149 I.C. 225, ('34) A.B. 21 (difference in Sunni authorities); *Haji Mohd.* v. *Abdul Ghafoor* ('55) A.A. 688.

*(n) Hamira Bibi* v. *Zubaida Bibi* (1915) 43 I.A. 294, 301-302, 38 All. 581, 582, 36 I.C. 87, See *Hedayas,* Book XX, p. 334, "Of the Duties of the Kazee."

# CHAPTER V

## SUCCESSION AND ADMINISTRATION

[Before the Indian Succession Act, 1925, the two principal Acts in force in British India relating to the administration of the estate of deceased persons were the Indian Succession Act 1865 and the Probate and Administration Act, 1881. The Indian Succession Act, 1865, applied to Europeans, Parsis, East Indians and to all Natives of India other than Hindus, Mahomedans and Buddhists. The probate and Administration Act applied to Hindus, Mahomedans and Buddhists. Both these Acts have been repealed by the Indian Succession Act, 1925, and their provisions re-enacted in the Act.]

**39. Administration of the estate of a deceased Mahomedan.**—The estate of a deceased Mahomedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges; (2) expenses of obtaining probate, letters of administration, or succession certificate; (3) wages due for service rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant; (4) other debts of the deceased according to their respective priorities (if any); and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his death*(a)*, and the heir has a right of contribution against his co-heirs, if by the action of the judgment creditor under a decree under sec.52 of the Civil Procedure Code against all the heirs, he was left with less than his proper share of the net estate of the deceased *(b)*. Under Mahomedan law, the payment of the debts of the deceased takes precedence over the legacies *(c)*.

The order set forth above is in accordance with the provisions of the Indian Succession Act, 1925, secs. 320-323 and sec. 325. Item No. (1) funeral and death-bed charges do not include monies spent in ceremonies for securing the peace of the soul of the deceased *(d)*. As regards item No. (5), it is to be noted that a Mahomedan cannot by *will* dispose of more than one-third of what remains of his property after payment of his funeral expenses and debts, unless the heirs consent thereto [s.118]. The residue available for distribution is the residue of the partible estate. If the inheritance includes both partible and impartible estate, and the debts of the deceased have been paid out of the partible estate, there is no right of contribution against the heir who has succeeded to the impartible estate *(e)*.

If the deceased was a Sunni at the time of his death, his property would be distributed among his heirs according to the Sunni law, and if he was a Shia, it would be distributed according to the Shia law. In other words, succession to the estate of a deceased Mahomedan is governed by the law of the sect to which he belonged at the time of his death, and not by the law of the sect to which the persons claiming the estate as his heirs belong *(f)*. A deceased Mahomedan is presumed to have been a Sunni and the onus is on the person alleging him to have been a Shia *(g)*.

The person primarily entitled to administer the estate of a deceased Mahomedan, that is, to apply it in the manner set forth in the section, is the *executor* appointed under his will. If the deceased left no will, the person entitled to administer his estate would be the person to whom letters of administration are granted. Such a person is called *administrator*. The persons primarily

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*(a) Hayat-un-Nissa* v. *Muhammad* (1890) 12 All. 290, 17 I.A. 73.

*(b) Mahomed Kazim Ali Khan* v. *Sadiq Ali Khan* (1938) (65) I.A. 218, 13 Luck. 494, 174 I.C. 977 ('38) A.PC. 169.

*(c) Abdul Aziz* v. *Dharamsey Jetha & Co.* ('40) A.L. 348.

*(d) Sajjad Hussain* v. *Muhammad Sayid Hasan* (1934) 154 I.C. 434, ('34) A.A. 71.

*(e) Nawab Mirza Mahomed Sadiq Ali Khan* v. *Nawab Fakir Jahan Begum* (1934) 9 Luck. 701, 148 I.C. 1052, ('34) A.O. 307.

*(f) Hayat-un-Nissa* v. *Mohammad* (1890) 12 All. 290, 17 I.A. 73.

*(g) Mt. Iqbal Begum* v. *Mt. Syed Begum* (1933) 140 I.C. 829, ('33) A.L. 80.

entitled to letters of administration are the *heirs* of the deceased: Indian Succession Act, 1925, sec.218. In the absence of an executor or administrator, the persons entitled to administer the estate are the *heirs* of the deceased.

**40. Vesting of estate in executor and administrator.**—The executor or administrator, as the case may be, of a deceased Mahomedan, is, under the provisions of the Indian Succession Act, 1925, sec. 211, his legal representative for all purposes, and all the property of the deceased vests in him as such. The estate vests in the executor, though no probate has been obtained by him *(h)*.

But since a Mahomedan cannot dispose of by will more than one- third of what remains of his property after payment of his funeral expenses and debts, and since the remaining two-thirds must go to his heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor, when he has realized the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts, one is created by the Act and the probate irrespective of the will, the other by the will established by the probate *(i)*.

The first paragraph is a reproduction of the provisions of sec.211 of the Indian Succession Act, 1925. An executor under the Mahomedan law is called *wasi,* derived from the same root as *wasiyyat* which means a will. But though the Mahomedan law recognised a *wasi,* it did not recognise an administrator, there being nothing analogous in that law to "letters of administration". A *wasi* or *executor* under the Mahomedan law was merely a *manager* of the estate, and no part of the estate of the deceased *vested* in him as such. As a *manager* all that he was entitled to do was to pay the debts and distribute the estate as directed by the will. He had no power to sell or mortgage the property of the deceased, not even for the payment of his debts. The first time this power was conferred upon him was by the Probate and Administration Act, 1881. Under sec.4 of that Act, the whole of the property of a Mahomedan testator vested in his executor, and it does so now under sec.211 of the Indian Succession Act, 1925. The property vests in the executor *even if no probate has been obtained.* As a result of the *vesting* of the estate in the executor, he has the power to dispose of the property vested in him in due course of administration, a power which he did not possess before the Probate and Administration Act, 1881; see sec. 90 of that Act, now sec. 307 of the Indian Succession Act, 1925. The will may provide for the remuneration of the executor, but if the executor is an heir the provision is not valid unless the other heirs consent *(j)*.

**41. Devolution of inheritance.**—Subject to the provisions of secs. 39 and 40, the whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (s.118), devolves on his heirs *at the moment of his death,* and the devolution is not suspended by reason merely of debts being due from the deceased *(k)*. The heirs succeed to the estate as tenants-in-common in specific shares *(l)*.

*(h) Venkata Subbamma* v. *Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A.P.C. 92 (a case of a Hindu will, which applies also to a Mahomedan will); *Shemail* v. *Ahmed Omer* (1931) 33 Bom. L.R. 1056, 135 I.C. 817, ('31) A.B. 533; *Mahomed Usuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392; *Sakina Bibee* v. *Mohomed Ishak* (1910) 37 Cal. 839, 8 I.C. 655, is no longer good law. *Mohammadi Begum* v. *Nawaz Jung* (1955) Hyd. 743; *Hakim Rehman* v. *Mohammad Mahmud Hasan* ('57) A.P. 559; *Hasan Bokhari* v. *Venkayya* ('55) A. Andh. 87, (1957) Andh. W.R. 638.

*(i) Kurrutulain* v. *Nuzhat-ud-dowla* (1905) 33 Cal. 116, 128, 32 I.A. 244, 257.

*(j) Mahomed Hussain* v. *Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84 (a Sunni case).

*(k) Jafri Begum* v. *Amir Muhammad* (1885) 7 All. 822; *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716; *Biland Khan* v. *Mt. Begum Noor* ('43) A.Pesh. 62; *Faizulla Khan* v. *Abdul Jabbar* ('43) A.Pesh. 65; *Ebrahim Aboobaker* v. *Tek Chanf* ('53) A.S.C. 298.

*(l) Abul Khader.* v. *Chidambaram* (1909) 32 Mad. 276, 278, 3 I.C. 876; *Abdul Majeeth* v. *Krishnamchariar* (1917) 40 Mad. 243, 245, 40 I.C. 210; *Khatun Bai* v. *Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M 306; *Mt. Fardosiahan Begum* v. *Kazi Shafiuddin* (1942) N.L.J. 261, ('42) A.N. 75; *Mohammad Sohail* v. *Ghulam Rasul* (1941) Lah. 308, ('41) A.L. 152 (F.B); *Mahomedally Tyebally* v. *Safiabai* (1940) 67 I.A. 406, 191 I.C. 113, ('40) A.P.C. 215. See also cases cited in footnote *(r)* below.

Unlike Hindu Law, estate of a deceased Mahomedan if he has died instestate, devolves on his heirs at the moment of his death. Under the Mahomedan Law, birth right is not recognised. The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor. *Imamul Hassan* v. *State of Bihar*, A.I.R. 1982 Patna 89.

There is no joint tenancy in Mahomedan law and the heirs are only tenants-in-common. Therefore an heir can claim partition in respect of one of the properties held in common without seeking partition of all the properties *(m)*.

Possession of a co-sharer or co-heir is presumed to be that of other co-sharers or co-heirs. To start adverse possession there must be clear and complete evidence of an ouster *(n)*.

*Representation of deceased's estate.*—The theory of representation is not known to the Mahomedan law. Under its provisions the estate of a deceased person devolves upon his *heirs at the moment of his death.* The estate vests immediately in each heir in proportion to the share ordained by Mahomedan law. As the interest of each heir is separate and distinct, one of a number of heirs cannot be treated as representing the others *(o)*. But an heir in possession of assets of an estate can be sued by a creditor of the deceased upon principles discussed in secs. 43 and 46 *infra.* There is no intermediate vesting in any one, such as an executor or administrator, as under the Indian Succession Act *(p)*.

A suit for partition of his share by one of the heirs is maintainable even if the heirs who are not in possession are not impleaded since the shares of Mahomedan heirs are definite and specific. *Mohd. Subhan v. Misbahuddin Ahmad* ('71) A. Raj 274.

A muslim woman acquired property at a time when her husband's estate was owned in common by her along with other heirs, her children. The properties were managed by her father. She was adult but the children were minors. Under Muslim Law she was not the guardian of the property of the minors, nor was her father. *Held*:—There is no presumption that acquisitions are made for the benefit of the family jointly. On the death of a Muslim his property devolves on the heirs in specific shares and they take the estate as tenants-in-common. There is no principle of representation and the interest of each heir is separate and distinct *(q)*.

*Limitations for suit by an heir for recovery of his share.*—As stated above, the heirs succeed to the estate as tenants-in-common in specific shares. When the heirs continue to hold the estate as tenants-in-common without dividing it and one of them subsequently brings a suit for recovery of his share, the period of limitation for the suit does not run against him from the date of the death of the deceased, but from the date of express ouster or denial of title; in other words, it is art. 144 of Sch. I to the Limitation Act, 1908 that applies, and not art. 123 *(r)*. In the undermentioned case, the Privy Council has held that a suit for administration of the estate of a Mahomedan is governed as regards immovable property by art. 144 and as regards movables by art. 120 *(s)*.

One of several co-sharers can be in possession and enjoyment of the common property to the exclusion of the other co-sharers without affecting their interest in the property and unless the co-sharer in possession does something which operates as an ouster of the interests of the other co-sharers, the latter's right cannot be destroyed. An alienee from the co-sharer is in no better

*(m) Mt. Haluman.* v. *Md Manir* (1971) A. Pat. 386 (D.B.)

*(n) Sabura Ammal* v. *Ali Mohammad Nachiar* ('70) A.Mad. 411.

*(o) Sakina Begum* v. *Shahar Banoo* (1935) 10 Luck. 433 at 458, 152 I.C. 42, ('35) A.O. 62, 67; *Manni Gir* v. *Amar Jati* (1936) 58 All. 594, 160 I.C. 1030, ('36) A.A. 94.

*(p) Amir Dulhin* v. *Bhaij Nath* (1894) 21 Cal. 311, 315.

*(q) Maimun Bivi* v. *O. A. Khaja Mohideen* (1970) I.M.L.J. 266, ('70) A. Mad. 200.

*(r) Ghulam Mohammad* v. *Ghulam Hussain* (1932) 59 I.A.,-74, 54 All. 98, 136 I.C. 454, ('32) A.P.C. 81; *Kallangowda* v. *Bibishaya* (1920) 44 Bom. 943, 58 I.C. 42; *Nurdin* v. *Bu Umrao* (1921) 45 Bom. 519, 59 I.C. 780, ('21) A.B. 56; *Bai Jivi* v. *Bai Bibanboo* (1929) 31 Bom. L.R. 199, 118 I.C. 785, ('29) A.B. 141; *Mussammat Jano* v. *Narasingh Das* (1930) 11 Lah. 29, 117 I.C. 803, ('29) A.L. 549; *Ma Bi* v. *Ma Khatoon* (1929) 7 Rang. 744, 121 I.C. 785, ('30) A.R. 72; *Rustam Khan* v. *Janki* (1929) 51 All. 101, 111 I.C. 809, ('28) A.A. 467; *Ahmad Dar* v. *Mt. Mukhti*, ('51) A.J. & K. 21. See also *Mohd. Kaliba* v. *Md. Abdullah* ('63) A.M. 84.

*(s) Mahomedally Tyebally* v. *Safibai* (1940) 67 I.A. 406, 191 I.C. 113, ('40) A.P.C. 215.

position. The cumulative effect of circumstances will show that there has been an ouster. There may not be demand by one co-owner and denial by the other, but any evidence of an unmistakable indication of intention to hold adversely to others may suffice.

The Public Wakfs Extension of Limitation Act is of a very limited application. It is to be read as laid down in the statute *(t)*.

*Parties to the suit by an heir.*— In a suit by an heir for the recovery of his share the co-heirs are proper parties; but as the interests of the heirs are distinct, the omission to join a co-heir is not a good reason for dismissing the suit *(u)*. In other words the co-heir is not a necessary party, i.e., a party in whose absence no decree can be passed. A co-owner suing a trespasser and not joining the other co-owners can get a decree only for his share in the property. The plea of *just tertii* is available to the defendant unless the suit is framed as a representative suit. *Jamaluddin* v. *Mosque Mashakganj* ('73) A.All. 328

*Partial partition*:—The doctrine of partial partition is applicable only to a Hindu co-parcenary where the co-parceners are joint in estate, and not to Muslims, who are only tenants-in- common. Under the Mahomedan law the heirs of a deceased Muslim succeed to a definite fraction of every part of his estate. Muslim sharers are not obliged to sue for partition of all the properties in which they are interested. There is nothing to preclude one of them from seeking a partition of some of the items of the properties *(v)*.

Renunciation or relinquishment need not be expressly stated in the document. It can be inferred from the conduct of the parties. If a suit for partition in a Mohammedan family is brought after 12 years and the plaintiff fails to explain his or her inaction, renunciation can be inferred. If renunciation is pleaded in the document and renunciation is accepted by the parties in that case he or she must be estopped from claiming partition, as it is a part of family arrangement. Strictly speaking such renunciation will not forbid her from claiming partition, but in order to maintain harmony and peace in the family renunciation should be treated as estoppel to the party concerned. [B.P.Jha, J.]. *Mt. Hashihan* v. *Jalaluddin* 1982 B.L.J.R. 410: (1982) Pat. L.J.R. 463: A.I.R.1982 Pat.226.

The relinquishment of a contingent right of inheritance by a Muslim heir is generally void under the Mahomedan Law, but if it is supported by consideration and forms part of a valid family settlement it is valid.

Where the mother claimed a share during the partition among her sons and herself and was allotted certain properties, a condition that she has to relinquish her share beyond her life time becomes void, where she has not done so for consideration. She gets the properties absolutely and could alienate the properties. [G.N. Sabhahit, J.] *Huchu Sab* v. *Sahajabi* (1983) 1 Karn. L.J. 170.

*Administration suit.*— Any heir or creditor of the deceased may bring a suit for the administration of the estate: he is not bound to bring a suit for partition *(w)*. In an ordinary partition suit, the Court may, in working out its preliminary decree, instead of making an actual division of all the property, give one heir a charge over the share of another for any difference in favour of the former and any such charge imposed will bind the alienee *pendente lite* from that heir *(x)*.

*Interim maintenance:*— In a suit brought by a Mahomedan widow for the administration of her deceased husband's estate and the payment to her of her 1/8th share the Court can order interim maintenance *(y)*.

**42. Alienation by an heir of his share before payment of debts.**— (1) Any heir may even before distribution of the estate, transfer his own share [see sec. 47], and pass a good title to a *bona fide* transferee for value, notwithstanding any debts that might be due from the deceased *(z)* [ills. (a) and (c)].

*(t) T. Abdullah* v. *N. Abdul Samad Sahib* (1970) II M.L.J. 510.

*(u) Zebaishi Begum* v. *Naziruddin Khan* (1935) 57 All. 445, 152 I.C. 1008, ('35) A.A. 110.

*(v) Khazir Bhat* v. *Ahmad Dar* ('60) A.J. & K. 57; *Mohd. Abdullah* v. *Mohd. Rahiman* ('64) A.M. 234 (See sec. 49.)

*(w) Essafally* v. *Abdeali* (1921) 45 Bom. 75, 59 I.C. 396, ('21) A.B. 424; *Atorjan Bibi* v. *Sikandar Ali* ('60) A.Ass. 183. See also *Abdul Razack* v. *Mohd. Shah* ('62) A.M. 346.

*(x) Khatun Bibi* v. *Abdul Wahib Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M. 306.

*(y) Bahadurkhanji* v. *Begum Mehrunnissa* ('55) A. Sau. 72.

*(z) Bazayet Hossein* v. *Dooli Chund* (1878) 5 I.A.

The transfer must be one for value, that is, for a consideration, e.g., a sale or a mortgage, as distinguished from a gift. If partition has not been effected the heir can only sell his undivided share and cannot sell a particular plot *(a)*.

The property of a common ancestor on his death devolves in well-defined shares upon his heirs. The presence of minor among the heirs does not bar the major heirs from transferring their share. *Imambandi* v. *Mutsaddi* 45 I.A. 73 applied. (One Habibullah entered into an agreement to sell property to defendant No. 1, but before receipt of consideration and execution of the sale-deed he died. The heirs served notices on defendant No. 1 to complete the transaction *(b)*.

(2) A *sale* of the share of an heir in execution of a decree passed against him at the suit of his creditor amounts to a "transfer" within the meaning of sub-sec. (1), and will pass a good title to the purchaser in execution [ill. (b)].

(3) If the share transferred by an heir is a share in *immovable property* forming part of the estate of the deceased, and the transfer is made *during the pendency of a suit* by the widow of the deceased for her dower, in which a decree is passed creating a *charge* on the estate for the dower debt, the transferee will take the share of the heir *subject to the charge (c)*, but if the widow's decree is a simple money decree the transferee will not be affected *(d)* [ill. (d)]. Where a charge is created in favour of an heir in an administration suit on the share of another heir and the latter transfers his share *pendente lite*, the transferee will take the share subject to the charge *(e)*. See Transfer of Property Act, 1882, sec. 52, and sec. 295 below.

*Illustrations*

(a) A Mahomedan dies leaving several heirs. After his death *the whole body of heirs* sell the whole of his estate without paying his debts. *After the sale*, a creditor of the deceased obtains a decree against the heirs for his debt, and applies for execution of the decree by an attachment and sale of the property in the hands of the purchaser. He is not entitled to do so. The reason is that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona fide* purchaser for value: *Land Mortgage Bank* v. *Bidyadhari* (1880) 7 Cal. L. R. 460 (with facts somewhat altered).

(b) A Mahomedan dies leaving two sisters as his only heirs. After his death, *C*, a creditor of the deceased, obtains a decree against the sisters for his debt. Subsequently a creditor *of the sisters* obtains a decree against them for his debt, and the property of the deceased come to their hands is sold in execution of his decree to *P*. In this case *C* is not entitled to attach the property in the hands of *P* in execution of his decree. *Wahidunnissa* v. *Shubrattun* (1870) 6 Beng. L. R. 54 (with facts slightly altered).

*Note.*— In the case in ill. (a), the sale was by private treaty. In the case in ill. (b), it was in execution of a decree. Both these sales stand on the same footing. In both the cases the purchaser was a *bona fide* purchaser for value.

(c) A Mahomedan dies leaving a widow and a son. A large sum of money is due to the widow for her dower. [Dower is a debt, and the widow is to that extent a creditor of the estate of her deceased husband. She is not, however, a secured creditor (s. 295)]. The son mortgages his share in the estate to *M*, without paying the dower debt. *After the mortgage*, the widow obtains a decree against the son, who is in possession of the whole estate for the dower debt, and attaches the son's share in execution of the decree. The mortgagee then obtains a decree against the son on the mortgage for sale of the son's share mortgaged to him. The share is sold in execution of the decree,

211, 4 Cal. 402; *Wahidunnissa* v. *Shubrattun* (1870) 6. Beng. L.R. 54; *Land Mortgage Bank* v. *Bidyadhari* (1880) 7 Cal. L.R. 460; *Khatun Bibi* v. *Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778. ('39) A.M. 306; *Hasan Bokhari* v. *Venkayya* ('55) A. Andh. 87.

*(a) Mansab Ali* v. *Mt. Nabirunnissa* (1934) 150 I.C. 443, ('34) A.A. 702.

*(b) Bhimadev Taria* v. *Radhakrishna Agarwalla* ('68) A. Ori. 230.

*(c) Mahomed Wajid* v. *Bazayet Hossein* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

*(d) Bhola Nath* v. *Maqbul-un-Nissa* (1903) 26 All. 28; *Abdul Rahman* v. *Inayati Bibi* ('31) A.O. 63, 130 I.C. 113; *Hasan Bokhari* v. *Venkayya* ('55) A. Andh. 87, (1957) Andh. W.R. 638.

*(e) Khatun Bibi* v. *Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M. 306.

and purchased by *P*. The mortgage having been made before the attachment, *P*. is entitled to recover the son's share free from the attachment: *Bazayet Hossein* v. *Dooli Chund* (1878) 5 I.A. 211, 4 Cal. 402.

*Note.*— In the cases in ills. (a) and (b), the sale was by all the heirs of their shares. In the case in ill. (c), the sale is only by one of the heirs.

(d) A Mahomedan died leaving three widows and a son. He left considerable property both movable and immovable. After his death, the widows brought a suit against the son, who was in possession of the whole estate, for an administration of the estate of the deceased, and for payment of the dower debt out of the estate. A decree was passed in the suit directing the son to render an account of the properties of the deceased come to his hands, and providing for payment of the dower *out of the properties*. (This was not a *simple money decree*, but a decree creating a *charge* on the properties for the dower debt.) The widows then applied for execution of the decree. *Pending execution* (which is the same thing as *pending the suit*), the son mortgaged his share to *M. M.* sued the son on the mortgage, and obtained a decree for sale of the share mortgaged to him. The share was sold in execution of the decree to *P*, who purchased with notice of the decree. Upon these facts the Privy Council held that *P* took the share *subject to the decree* in favour of the widows: *Mahomed Wajid* v. *Bazayet Hossein* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

*Note.*— If the mortgage had been effected *before* the suit, it would not have been affected by the decree: *Bazayet Hossein* v. *Dooli Chund* (1878) 5 I. A. 211, 4. Cal. 402.

**43. Extent of liability of heirs for debts.**— Each heir is liable for the debts of the deceased to the extent only of a share of the debts proportionate to his share of the estate *(f)*.

[A Mahomedan, who is indebted to *C* in the sum of Rs. 3,200, dies leaving a widow, a son and two daughters. The heirs divide the estate without paying the debt, the widow taking 1/8, the son taking 7/16, and each daughter 7/32. *C* then sues the widow and the son for the *whole* of the debt due to him from the deceased. The widow is liable to pay only (1/8 x 3,200) = Rs. 400, and the son (7/16 x 3,200) = Rs. 1,400; they are not liable for the whole debt: *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361.].

A co-heir who is not a guardian of a minor; has no power to alienate the minor's share in the property even to pay the debts of the deceased from whom they inherit. This is so even if there be a decree against the minor and the alienation is done to discharge the decree. The transaction is void and not merely voidable. *Patel Parshottamdas Narasihbhai* v. *Bai Dhabu* ('73) A. Guj. 88.

This section should be read subject to section 46 *infra*.

**44. Distribution of estate.**— Since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts.

Where some of the co-sharers have paid the debts of the deceased, allowance should be made in regard to these payments at the time of partition. *Sk. Aftab Husain* v. *Smt. Tayebba Begum* ('73) A. All. 54.

It was stated in two Allahabad cases *(g)*, and also in a Calcutta case *(h)*, relying on some passages in the *Heddya* that the estate could not be distributed, if it was insolvent. In a later Allahabad case *(i)*, however, Mahmood, J., observed that the translation of the said passage was only a loose paraphrase of the original Arabic, and expressed the opinion that the estate may be distributed even if it is insolvent.

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*(f) Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361; *Ambashankar* v. *Sayad Ali* (1894) 19 Bom. 273; *Bassunteram* v. *Kamaluddin* (1885) 11 Cal. 421, 428; *Abbas Naskar* v. *Chairman, District Board, 24-Parganas* (1932) 59 Cal. 691, 141. I.C. 871, ('33) A.C. 81; *Ramcharan* v. *Hanifa Khatun* (1932) 54 All. 796, 138 I.C. 746, ('32) A.A. 591; *Hakim Rehman* v. *Mohammad Mahmud Hasan* ('57) A.P. 559; *Imperial Bank, Gaya* v. *Bibi Sayeedan* ('60) A.P. 132.

*(g) Hamir Singh* v. *Zakia* (1875) 1 All. 57, 59 (F.B.); *Pirthi Pal Singh* v. *Hussaini Jan* (1882) 4 All. 361, 366.

*(h) Bassunteram* v. *Kamaluddin* (1885) 11 Cal. 421, 428.

*(i) Jafri Begum* v. *Amir Muhammad* (1885) 7 All. 822, 838.

**45. Suit by creditor against executor or administrator.**— If the estate is represented by an executor or administrator, a suit by a creditor of the deceased should be instituted against the executor or administrator, as the case may be.

**46. Suit by creditor against heirs.**—If there be no executor or administrator, the creditor may proceed against the *heirs* of the deceased, and where the estate of the deceased has not been distributed between the heirs, he is entitled to execute the decree against the property as a whole without regard to the extent of the liability of the heirs *inter se (j)*

There is, however, a conflict of opinion as to whether a decree obtained by a creditor against some of the heirs of the deceased is binding on the other heirs.

According to the decisions of the High Court of Calcutta, any creditor of the deceased may sue any one of the heirs who is in possession of the *whole or any part* of the estate, without joining the other heirs as defendants, to recover the *entire* debt, and the Court may in such a suit pass a decree for the sale, not only of the share of that particular heir in the estate, but of all the assets of the deceased that are in his possession. Where such a decree is passed, and a sale is effected in execution of the decree, the sale will pass to the purchaser not only the interest of that particular heir in the property, but the interests of the other heirs also (including minors) thought they were not parties to the suit *(k)*, unless the decree was obtained by fraud, or was taken by consent *(l)* [ills. (a) and (b)]. These decisions proceed on the view that the proper principle was to treat the creditors' suit as an administration suit and as such an heir in possession is bound to account for any assets that may have come into his hands and to that extent he is liable to pay the creditors before the residue, if any, is divided among the heirs. In a later case, however, the same High Court held that the above decisions could not apply if the heir who was sued was in possession of the estate on behalf of the other heirs, *i.e.*, was in possession of more than his share of the inheritance, but not if he only held his own share of the inheritance *(m)*.

The High Court of Bombay in some cases *(n)* took the same view as the Calcutta High Court did in its earlier decision, though on different grounds, but with this difference that a decree against an heir in possession bound the other heirs only if he was in possession of the *whole* estate [ills. (c) and (d)]. But this view has been disapproved in later cases, and it has been held that a sale in execution of a decree passed against an heir in possession in a creditor's suit does not pass to the purchaser the interest of those heirs in the estate who were not parties to the suit even if the heir against whom the decree was passed was in possession of the *whole* estate *(o)* [ill. (c)]. This coincides with the view taken by the High Court of Allahabad.

In *Pathummabi* v. *Vittil (p)*, the High Court of Madras followed the earlier rulings of the Bombay High Court, but this decision was subsequently dissented from if not expressly overruled by a Full Bench in *Abdul Majeeth* v. *Krishnamachariar (q)*, adopting the view taken by the Allahabad High Court.

According to the rulings of the Allahabad High Court, a decree relative to his debts passed in a contentious or non-contentious suit against such heirs only of a deceased Mahomedan debtor as are in possession of the whole or part of his estate, binds each defendant to the extent of his share in the estate *(r)*, but it does not bind the other heirs who, by reason of absence or any other cause,

*(j) Mamraj Maniram* v. *Muhamad Hashim* (1941) 194 I.C. 727, ('41) A.C. 245.

*(k) Mutyjan* v. *Ahmad Ally* (1882) 8 Cal. 370; *Amir Dulkin* v. *Baij Nath* (1894) 21 Cal. 311.

*(l) Assamathem* v. *Roy Lutchmeeput Singh* (1878) 4 Cal. 142, 155.

*(m) Abbas Naskar* v. *Chairman District Board, 24 Parganas* (1932) 59 Cal. 691, 141 I.C. 871, ('33) A.C. 81.

*(n) Khurshetbibi* v. *Keso Vinayek* (1887) 12 Bom. 101; *Davalava* v. *Bhimaji* (1895) 20 Bom. 338, followed in *Virchand* v. *Kondu* (1915) 39 Bom. 729, 31 I.C. 180 [mortgage-decree].

*(o) Bhagirthibai* v. *Roshanbi* (1919) 43 Bom. 412, 51 I.C. 18, dissenting from 12 Bom. 101 and 20 Bom. 338, *supra Shahasaheb* v. *Sadashiv* (1919) 43 Bom. 575, 581, 51 I.C. 223 [mortgage suit], dissenting from (1915) 39 Bom. 729, 31 I.C. 180, *supra; Lala Miya* v. *Manubibi* (1923) 47 Bom. 712, 73 I.C. 246, ('23) A.B. 411; *Veerbhadrappa Shilwant* v. *Shekabai* (1939) Bom. 232, 41 Bom. L.R. 249, 182 I.C. 539, ('39) A.B. 188.

*(p)* (1902) 26 Mad. 734, 738.

*(q)* (1917) 40 Mad. 243, 255, 257, 40 I.C. 210.

*(r) Dallu Mal* v. *Hari Das* (1901) 23 All. 263, 265.

are out of possession, so as to convey to the purchaser, in execution of such a decree, the interests of such heirs as were not parties to the decree. This is because under Mahomedan law each heir inherits a separate and definite share and as he has no interest in the share inherited by another heir he cannot be said to represent the estate that has devolved upon the other heirs *(s)*. But if they sue for a declaration that the sale is not binding on them, and it is proved that the debts have been paid out of the proceeds of the sale, they ought to be put on terms as a matter of equity, and required to pay their proportionate share of the debt before they are granted the declaration sued for *(t)* [ills. (f) and (g)].

The High Court of Nagpur *(u)* and the Chief Court of Oudh *(v)* took the same view as that taken by the Allahabad High Court. The Lahore decisions were not consistent; one Judge of that High Court agreed with the Calcutta view *(w)*, while another followed the later Bombay decisions*(x)*. The Hyderabad High Court in the case of *Mohd. Sulaiman* v. *Mohd. Ismail (y)* followed the Calcutta view.

However the Supreme Court has recently attempted to resolve this conflict in the manner described below.

In the Allahabad case of *Jafri Begum* v. *Amir Mohammad Khan*, Mahmood, J., had observed that "upon the death of a Mahomedan owner, his property ... immediately devolves upon his heirs in specific shares, and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure and must be regulated according to the law which governs the action of the Court". The learned Judge therefore went on to hold that though in certain circumstances under the rules of the Mahomedan law of procedure, a decree could be binding on an absent heir, such rules did not apply in India; and that in accordance with the principles which governed the procedure in Indian courts, a decree obtained by a creditor would be ineffective as regards the share of those who were not parties to the litigation.

The observation quoted above was cited with approval by the Privy Council in its judgment in the case of *Mohd. Kazim Ali Khan* v. *Sadiq Ali Khan (y)* and the principle embodied in it has also been approved by the Supreme Court in its recent judgment in the appeal from the Hyderabad case of *Mohd Sulaiman* v. *Mohd. Ismail (z)*. However, the Supreme Court has now held that though ordinarily the court does not regard a decree binding on a person who is not impleaded *eo nomine* in an action, there are certain recognized exceptions to this rule: and one of these is that where certain persons are impleaded after diligent and *bona fide* enquiry in the genuine belief that they are the only persons interested in the estate, the whole estate of the deceased will be duly represented by the persons who are brought on the record or impleaded, and the decree will be binding on the entire estate. But this rule will not apply to cases where there has been fraud or collusion between the creditor and the heir impleaded or where there are other circumstances which indicate that there has not been a fair or real trial, or that the absent heir had a special defence which was not and could not be tried in the earlier proceeding. [ill. (i)].

It may be noted here that with regard to the view taken in the earlier Calcutta cases, the Supreme Court also observed *(a)* that though a suit by a creditor may in appropriate cases, where the procedure prescribed in that behalf is followed, be treated as an administration action, every action instituted by a creditor of a deceased debtor to recover a debt due out of his estate in the hands of some or all the heirs cannot be regarded as an administration action.

(*N.B.* See the Preface to the 16th Edition).

*(s)* *Manni Gir* v. *Amar Jati* (1936) 58 All. 594, 160 I.C. 1030, ('36) A.A. 94.

*(t)* *Jafri Begum* v. *Amir Muhammad Khan* (1885) 7 All. 822; *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716; *Hamir Singh* v. *Zakia* (1875) 1 All. 57. See also *Mahomad Alladad* v. *Muhammad Ismail* (1888) 10 All. 239; and *Chandu Lal* v. *Khatemunceesa* (1942) 2 Cal. 299, 205 I.C. 344, ('43) A.C. 76.

*(u)* *Suleman* v. *Abdul Shakoor* (1939) N.L.J. 577, 188 I.C. 292, ('40) A.N. 99; *Laxminarayan* v. *Sadatali* (1944) Nag. 97, 212 I.C. 161, ('44) A.N. 99.

*(v)* *Amir Jahan* v. *Khadim Husain* ('31) A.O. 253, 132 I.C. 75. See also *Sakina Begum* v. *Shahar Banoo Begum* (1935) 10 Luck. 443, 152 I.C. 42, ('35) A.O. 62, 67; *Firm Bishambar Nath Gopi Nath* v. *Hashmi Begam* (1949) 23 Luck. 3, ('49) A.O. 56.

*(w)* *Mt. Amir Begum* v. *Dr. Ahmad Jalal Din* ('35) A.L. 273.

*(x)* *Balak Ram* v. *Ineyat Begum* (1935) 160 I.C. 217, ('35) A.L. 940.

*(y)* (1938) 65 I.A. 219; ('38) A.P.C. 169.

*(z)* *Mohd. Sulaiman* v. *Mohd. Ismail and Ors.* (1966) 1 S.C.R. 937. Following *Daya Ram* v. *Shyam Sundari* ('65) A.S.C. 1049.

*(a)* At p. 944.

*Illustrations*

(a) A Mahomedan dies leaving a widow, a daughter, and two sisters. After his death a suit is brought by a creditor of the deceased against the widow and the daughter who alone are in possession of the *whole* estate, and a decree is passed "against the assets of" the deceased. The decree and the sale in execution of the property left by the deceased are binding on the sisters though they were not parties to the suit: *Muttyjan* v. *Ahmed Ally* (1882) 8 Cal. 370. See note to ill. (b) below.

(b) A Mahomedan dies leaving a widow and other heirs. A suit is brought by a creditor of the deceased against the widow alone who is in possession of *part* of the estate. The other heirs are not necessary parties, and the creditor is entitled to a decree not only against the share of the widow in the estate, but the entire assets which have come into her hands and which have not been applied in the discharge of the liabilities to which the estate may be subject at her husband's death: *Amir Dulhin* v. *Baij Nath* (1894) 21 Cal. 311.

*Note.*— As to the cases cited in ills. (a) and (b), it was pointed out by the High Court of Calcutta that the defendants in those cases were in possession of the estate on behalf of all the heirs; otherwise the only decree that the creditor would be entitled to would be a decree for a *proportionate* share of the debt: *Abbas Naskar* v. *Chairman, District Board, 24-Parganas* (1932) 59 Cal. 691, 141 I.C. 871, ('33) A.C. 81.

(c) A Mahomedan woman, Khatiza, dies leaving a minor son and a daughter. After her death a suit is brought by a creditor of the deceased "against Khatiza, deceased, represented by her minor son represented by his guardian" *(b)*, and a decree is passed in that form. The deceased was entitled to a share in a *Khoti Vatan* and "the right, title, and interest of Khatiza" in that share is sold in execution of the decree. The purchaser acquires a title unimpeachable by the daughter, though she was not a party to the suit or to the subsequent proceedings in execution: *Khurshet Bibi* v. *Keso Vinayak* (1887) 12 Bom. 101 *(c)*. [No reference was made in the judgment to the Calcutta cases cited above nor to the Allahabad cases cited in ill. (f)].

(d) A Mahomedan dies leaving a widow, a minor son, and two daughters. After his death a suit is brought by a mortgagee from the deceased against the son as represented by his guardian and mother, claiming possession of the land mortgaged to him as owner under a *gahan lahan* clause in the mortgage. The widow is in possession of the estate and a decree *ex-parte* is passed directing her to deliver possession of the land to the mortgagee, and he is accordingly put in possession. The decree binds the daughters though they were not parties to the suit, and they are not entitled to redeem the mortgage as against the mortgagee or a purchaser from him: *Davalava* v. *Bhimaji* (1895) 20 Bom. 238.

(e) A Mahomedan dies leaving a widow and a daughter. After his death *C*, a creditor of the deceased, sues the widow for the recovery of a debt due to him and a decree is passed in his favour for Rs. 327 to be recovered out of the estate of the deceased. In execution of the decree, the right, title and interest of the deceased in a house is sold and it is purchased by *P*. The daughter, who was not a party to the suit, subsequently sues *P* to recover by partition her share in the house. *Held,* disapproving the cases cited in ills. (c) and (d), that the daughter, *not being a party to C's suit,* was not bound by the decree passed in the suit, and that the sale did not pass her interest in the house to *P*, and that she was entitled to recover her share in the house: *Bhagirthibai* v. *Roshanbi* (1919) 43 Bom. 412, 51 I.C. 18. [In this case the widow against whom the decree was obtained was in possession of the whole house; see p. 427 of the report, lines 27-28].

(f) A creditor of a deceased Mahomedan obtains a decree upon a hypothecation bond "for recovery of his debt by enforcement of lien" against one of the heirs of the deceased in possession of the estate. The whole estate is sold in execution of the decree, and it is purchased by the decree-holder. Subsequently another heir of the deceased, who was not a party to these proceedings, sues the decree-holder as purchaser for recovery of his share in the estate. According

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*(b)* This form of suit, which was at one time common in the Mofussil of Bombay, has been disapproved of by the Bombay High Court. *See Rampratab* v. *Gavrishankar* (1923) 25 Bom. L.R. 7, 85 I.C. 464. ('24) A.B. 109.

*(c)* Note that in this case "no part of the *Khoti* was in actual possession of either of the heirs of the deceased."

to the Allahabad High Court, he is entitled to possession of his share on payment of his proportionate share of the debts, if the sale proceeds were applied in payment of the debt: *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716, following *Jafri Begam* v. *Amir Muhammad* (1885) 7 All. 822.

(g) A creditor of a deceased Mahomedan obtains a money decree against an heir of the deceased in possession of the estate, and attaches certain immovable property forming part of the estate in execution of the decree. The value of the immovable property exceeds the share of the defendant. According to the Allahabad High Court, the defendant is entitled to object to the attachment and sale of the right and interest of the other heirs who were not parties to the suit, upon the ground that as regards them he is in possession of the property as trustee: *Dallu Mal* v. *Hari Das* (1901) 23 All. 263.

(h) A creditor of a deceased Mahomedan filed a suit against his widow, without making his daughters parties to the suit. He obtained a decree and attached an immovable property which was in the joint possession of the widow and the two daughters. The daughters filed a suit for a declaration that the decree was not binding on their shares. It was held that the decree was not binding on their shares, and as there was no sale of the property, they could not be called upon to pay the proportionate share of the debt of the deceased before the grant of the declaration: *Firm Bishambhar Nath Gopi Nath* v. *Hashim Begam* (1947) 23 Luck. 3, ('49) A.O. 56.

(i) *M*, *K* and *L* mortgaged certain immovable properties in favour of *R*. A few years later, after *M* had died, *R* commenced an action for enforcement of the mortgage against *K*, *L* and three widows and a daughter of *M*. In execution of the decree passed in the action the properties were sold at a Court auction and purchased by *R*, who then transferred them to others. Thereafter, the plaintiff, claiming that he was the son of *M*, sued for a decree for partition of the mortgaged properties "by metes and bounds" and in the alternative for a declaration that he was entitled to redeem the mortgage or a portion thereof equal to his share in the mortgaged properties. The plaintiff's suit was resisted by *R* and the other alienees of the properties mainly on the ground that the decree obtained by *R* was binding on the plaintiff as the estate of *M* was fully represented in the suit by those who were in possession at the time; and that *R* had made full and *bona fide* enquiry and had learnt that the three widows and the daughter of *M* were the only surviving members of the latter's family. It was held that the plaintiff was bound by the decree of 1940 as the estate of *M* was fully represented in the suit: *Muhd. Sulaiman* v. *Mohd. Ismail* (1966) 1 S.C.R. 937. See the Preface to the 16th Edition).

**47. Alienation by one of several heirs for payment of debts.**— One of several heirs of the deceased Mahomedan, though he may be in possession of the whole estate of the deceased, has no power to alienate the shares of his co-heirs, not even for the purpose of discharging the debts of the deceased. If he sells or mortgages any property in his possession forming part of the estate of the deceased, though it may be for payment of the debts of the deceased, such sale or mortgage operates as a transfer only of his interest in the property. It is not binding on the other heirs or the other creditors of the deceased *(d)*. The transferor, of course, is, in his turn, entitled to obtain contribution from his co-heirs.

It has been so held by a Full Bench of the Madras High Court overruling *Pathummabi* v. *Vittil (e)*, an earlier decision of the same High Court, and dissenting from the Allahabad decision in *Hasan Ali* v. *Mehdi Husain (f)*. The Madras Full Bench decision has been followed by the

*(d) Abdul Majeeth* v. *Krishnamachariar* (1917) 40 Mad. 243, 40 I.C. 210 (F.B.) *Sukur* v. *Asmat* (1923) 50 Cal. 978, 79 I.C. 491. ('24) A.C. 384; *Phul Chand* v. *Mantia* (1938) All. 167, 174 I.C. 651, ('38) A.A. 182; *Mt. Zubida Bibi* v. *Mt. Zenab Bibi* (1942) 199 I.C. 604, ('42) A.L. 65; *Ramachandrayya* v. *Abdul Kadar* ('48) A.M. 37, dissenting from *V.M.R.V. Chettiar Firm* v. *Asha Bibi* (1929) 118 I.C. 407, ('29) A.R. 107. See *Gulam Gose* v. *Shriram* (1919) 43 Bom. 487, 51 I.C. 79 (sale of equity of redemption by one of the heirs—suit for redemption by other heirs—limitation); *Jan Mohammad* v. *Karm Chand* (1947) Lah. 399, 49 Bom. L.R. 577, ('47) A.P.C. 99.

*(e)* (1902) 26 Mad. 734.

*(f)* (1877) 1 All. 533.

Bombay High Court *(g)* and approved by the Privy Council *(h)*. In the undermentioned case, a single Judge of the Lahore High Court has held that if an heir who is in possession of the property seeks a declaration that the alienation effected in respect of that property without joining him in the transaction is illegal, he cannot be called upon to pay a proportionate share of the debts of the deceased as a condition precedent to the suit being decreed *(i)*.

As to ostensible ownership, see *Mubarak-un-Nissa* v. *Muhammad (j)*, a case under section 41 of the Transfer of Property Act, 1882.

**48. Recovery through Court of debts due to the deceased.**— No Court shall pass a decree against a debtor of a deceased Mahomedan for payment of his debts to a person claiming on succession to be entitled to the effects of the deceased or to any part thereof, or proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under sec. 31 or sec. 32 of the Administrator-General's Act, 1913, and having the debt mentioned therein, or a succession certificate granted under Part X of the Indian Succession Act, 1925, and having the debt specified therein, or a certificate granted under the Succession Certificate Act, 1889, or a certificate granted under Bombay Regulation VIII of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.

*Explanation.*— The word "debt" in this section includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

The section reproduces the provisions of sec. 214 of the Indian Succession Act, 1925.

*Probate and Letters of Administration.*— It is not necessary in the case of a Mahomedan will that the executor should obtain probate of the will to establish his right as such in a Court of Justice [Indian Succession Act, 1925, sec. 213(2)] *(k)*. Nor is it necessary, where a Mahomedan has died intestate that his heirs should obtain letters of administration to establish their right to any part of the property of the deceased in a Court of Justice [Indian Succession Act, 1925, sec. 212(2)]. But where a suit is brought to recover a *debt* due to the deceased, the Court shall not pass a decree except on production of probate or of letters of administration or a certificate.

*Recovery of debts through Court.*— It must be observed that the rule laid down in the present section applies only where a debt due to the deceased is sought to be recovered *through a Court*. A debtor of a deceased person may pay his debt to the executor, though he may not have obtained probate, or, where he has died intestate, to his heirs even if they had not taken out letters of administration or a certificate and such payment will operate as a discharge to the debtor. But payment of a debt by a debtor to one of several heirs does not discharge the debt as to all *(l)*.

It may also be noted that where a debt is sought to be recovered by *legal proceedings*, it is not necessary that the plaintiff should have obtained either probate or letters of administration or a certificate *before the date of the institution of the suit*. It is enough if he produces the grant *before the passing of the decree (m)*.

*Debt.*— A suit by one member of a family to recover his share of the family property from the other members is not a suit to recover a "debt" *(n)*. A suit asking for a personal decree against the

*(g) Alisaheb* v. *Sesho Govind* (1931) 33 Bom. L.R. 1238, 135 I.C. 489, ('31) A.B. 545.

*(h) Jan Mahommad* v. *Karm Chand* (1947) Lah. 399, 49 Bom. L.R. 577, ('47) A.P.C. 99.

*(i) Mt. Zubida Bibi* v. *Mt. Zenab Bibi* (1942) 199 I.C. 604. ('42) A.L. 65.

*(j)* (1924) 46 All. 377, 79 I.C. 174, ('24) A.A. 384.

*(k) Venkata Subamma* v. *Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A.P.C. 92; *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255.

*(l) Pathummabi* v. *Vitil* (1902) 26 Mad. 734, 739. Cf. *Sitaram* v. *Shridhar* (1903) 27 Bom. 292. See also *Ahinsa Bibi* v. *Abdul Kader* (1901) 25 Mad. 26, 39.

*(m) Chandra Kishore* v. *Prasanna Kumari* (1910) 38 Cal. 327, 38 I.A. 7, 9 I.C. 122; *Veerbhadrappa* v. *Shekabai* (1939) Bom. 232, 41 Bom. L.R. 249, 182 I.C. 539, ('39) A.B. 188.

*(n) Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255.

mortgagor in respect of a mortgage is a suit for a "debt." But there is a conflict of opinion as to whether a suit for sale of the mortgaged property is a suit for a "debt." The High Court of Allahabad has held that it is *(o)*. The High Courts of Calcutta *(p)*, Bombay *(q)*, and Madras *(r)* have held that it is not.

**49. Alienation by co-sharer before partition.**— Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share *(s)*.

The Chief Court of Sind has held that a co-sharer may file a suit for partial partition. Where a co-sharer alienates a part only of the property without authority from the other co-sharers, the purchaser is not entitled to adjustment of equities in respect of other properties held in co-ownership, which have not been alienated to the purchaser. If, however, a co-sharer, who has alienated specific property without the consent of the other co-sharers, files a suit for general partition, the question of adjustment of equities between the purchaser and the co-sharers may arise, but a purchaser cannot compel the co-sharer, who had alienated specific property, to file a suit for general partition *(t)*. This may be explained as follows. *A, B* and *C* are co-sharers of properties *X, Y* and *Z*. *A* without the consent of *B* and *C*, alienates property *X*. *B* and *C* may ask for the partition of property *X* only. They are not bound to ask for partition of properties *X, Y* and *Z*. If only property *X* is being partitioned, the purchaser will get only the share of *A* in the property. If, however, there is a suit for the partition of all the properties, the Court may allot property *X* to *A*'s share, if this is equitable to the other co-sharers. The purchaser cannot compel *A* to file a suit for properties *X, Y* and *Z*, as the purchaser has no legal interest in properties *Y* and *Z*.

However, a Single Bench of the Madhya Pradesh High Court has held that when a co-owner has the right of claiming general partition of all the properties, the same right ought not to be denied to an alienee of the specific item of property from some of the co-owners. The alienee obtains a personal right which he is equitably entitled to enforce against the share of his vendors which can only be done by a general partition of the entire property *(u)*.

**50. Enactment relating to administration.**— In matters not hereinbefore specifically mentioned, the administration of the estate of a deceased Mahomedan is governed by the provisions of the following Acts to the extent to which they are applicable to the case of Mahomedans, namely:—

(1) The Indian Succession Act, 1925;

(2) The Administrator-General's Act, 1913; and

(3) Bombay Regulation VIII of 1827.

Such of the provisions of the Administrator-General's Act as apply to Mahomedans come into operation when a Mahomedan dies leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court of Calcutta, Madras or Bombay. In such a case, the Court may, upon the application of any person interested in the assets, direct the Administrator-General to apply for letters of administration of the effects of the deceased, if the application satisfies the Court that such grant is necessary for the protection of the assets (see sec. 10 of the Act, and also section 13).

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*(o) Fateh Chand* v. *Muhammad* (1894) 16 All. 259.

*(p) Mahomed Yusuf* v. *Abdur Rahim* (1900) 26 Cal. 839.

*(q) Nanchand* v. *Yenawa* (1904) 28 Bom. 630.

*(r) Palaniyandi* v. *Veerammal* (1905) 29 Mad. 77.

*(s) Mahammad Afzal Khan* v. *Abdul Rahman* (1932) 59 I.A. 405, ('32) A.P.C. 235.

*(t) Ghumanmal Lakumal* v. *Faiz Muhammad Haji Khan* ('48) A.S. 83.

*(u) Abdul Rahaman* v. *Hamid Ali* ('59) A.M.P. 190, relying on *Pakkiri Kanni* v. *Manjoor Saheb* ('24) A.M. 124.

# CHAPTER VI

## INHERITANCE — GENERAL RULES

**51. Heritable property.**— There is no distinction in the Mahomedan law of inheritance between movable and immovable property or between ancestral and self-acquired property.

There is no such thing as a joint Mahomedan family nor does the law recognize a tenancy in common in a Mahomedan family *(a)*. In a Mahomedan family there is a presumption that the cash and household furniture belong to the husband *(b)*.

In *Sahul Hamid* v. *Sulthan* it was held by Rajmannar J. (as he then was): " The Mahomedan Law does not recognise a joint family as a legal entity. In fact according to the rules of Mahomedan Law of Succession, heirship does not necessarily go with membership of the family. There are several males and females who have no interest in the heritage but may be members of the family. On the other hand there are several heirs like, for example, married daughters of a deceased male owner who take an interest in the estate but are no part of the family." *Sahul Hamid v. Sulthan* ('47) A. Mad. 287. See also *Maimoona Bivi* v. *D.A. Khaja Mohinuddin* ('70) A. Mad. 200.

However, if a custom of the family establishing joint holding as is common among Hindus is proved, it will be given effect. Additions to the joint estate by the managing member of a Mahomedan family will be presumed to have been made from the joint estate and will be for the benefit of all the members. But acquisition of property not attributable to the family assets will not be for the family.

However, if all the members of the family live in commensality and are in joint possession of family properties, it will be for the person claiming property as his own to show that the source of the property was his own. *Mohammad Ibrahim* v. *Mohammad Abubakker* ('76) A. Mad. 84.

The personal law of Muslims does not recognise a system of joint holding as is common amongst Hindus. There may be cases, however, where a custom may be set up in the matter of the holding of such properties by some of the members of a Muslim family, whereby it could be established that such possession and title in some of the members is customarily to be interpreted and understood as possession on behalf of all the members.

Acquisition of property independently by a member cannot automatically be said to be for the benefit of the family. If there is conclusive evidence that a member of the Muslim family, who acquired such properties gained an advantage to himself and caused prejudice to others and if such acquisition is traceable to surplus family assets or funds from and out of which the property could have been purchased, then matters would be different. Again it is also necessary to prove that the members were living jointly and enjoying the property jointly and in common.

*Mohammed Ibrahim* v. *Syed Mohammad Abubakker* A.I.R. 1976 Mad. 84 L.W. 43. in *Mohd. Ismail* v. *Khadirsa Rowther* A.I.R. (1983) Mad. 123.

"It was stated that where some of the members of the Muslim joint family who were in possession of certain property made subsequent acquisitions, additional acquisitions would belong to all the members of the joint family in view of section 90 unless and until it is proved that the subsequent acquisitions were made by members in possession out of their independent income. In this view there is no necessity for other co-owners whatever to show that the income from the family properties yielded a surplus so as to enable the co-owners in possession to purchase the subsequent additional property".

Renunciation or relinquishment need not be expressly stated in. the document. It can be inferred from the conduct of the parties. If a suit for partition in a Mohamedan family is brought after 12 years and the plaintiff fails to explain his or her inaction, renunciation can be inferred. If renunciation is pleaded in the document and renunciation is accepted by the parties in that case, he or she must be estopped from claiming partition, as it is a part of family arrangement. Strictly speaking such renunciation will not forbid her from claiming partition, but in order to maintain harmony and peace in the family renunciation should be treated as estoppel to the party concerned.

*(a)* See *Abdul Rashid* v. *Sirajuddin* (1933) 145 I.C. 461, ('33) A.A. 206, 209. *(b) Ma Khatun* v. *Ma Bibi* ('33) A.R. 393, 149 I.C. 654.

*Mt. Hashihan* v. *Jalaluddin*, A.I.R. 1982 Patna 226.

This case is strictly not of inheritance but this seems the appropriate place to consider it. (Editor).

**52. Birth-right not recognised.**— The right of an heir-apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor *(c)*.

*A*, who has a son *B*, makes a gift of his property to *C*. *B*, alleging that the gift was procured by undue influence, sues *C* in *A*'s *lifetime* on the strength of his right to succeed to *A*'s property on *A*'s death. The suit must be dismissed for *B* has no cause of action against *C*. *B* has no cause of action, for he is not entitled to any interest in *A*'s property *during A*'s *lifetime: Hasan Ali* v. *Nazo* (1889) 11 All. 456, 458. But the gift would be liable to be set aside if the suit was brought after *A*'s death, provided it was brought within the period of limitation: *Kurratulain* v. *Nuzhat-ud-dowla* (1905) 33 Cal. 116, 32 I.A. 244.

Such a right as that claimed by *B* in the above illustration is a mere *spes successions*, that is, an expectation or hope of succeeding to *A*'s property if *B* survived *A (d)*. The Mahomedan law "does not recognize any... interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir in the person entitled to it according to the rules of succession, he possesses no right at all" *(e)*.

**53. Principle of representation.**— According to the Sunni Law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will *(f)*. According to the Shia law, it does pass by succession in the cases specified in sec. 93 below.

*A*, a Sunni Mahomedan, has two sons, *B* and *C*, *B* dies in the lifetime of *A*, leaving a son *D*. *A* then dies leaving *C*, his son, and *D*, his grandson. The whole of *A*'s property will pass to *C* to the entire exclusion of *D*. It is not open to *D* to contend that he is entitled to *B*'s share as representing *B*: *Moola Cassim* v. *Moolla Abdul* (1905) 33 Cal. 173, 32 I.A. 177.

In the case cited above their Lordships of the Privy Council observed: "It is a well-known principle of Mahomedan law that if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grand-children are entirely excluded from the inheritance by their uncles and their aunts." The son of a predeceased son is therefore not an heir *(g)*.

If in the above case, *B* bequeathed any portion of his expectant share in *A*'s property to *X*, the latter would take nothing under the will. "*A* mere possibility such as the expectant right of an heir-apparent, is not regarded as present or vested interest, and cannot pass by succession, bequest or transfer so long as the right has not actually come into existence by the death of the present owner." *(h)*.

**54. Transfer of spes successionis: Renunciation of chance of succession.**— The chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release *(i)*.

*Illustrations*

*A* has a son *B* and a daughter *C*. *A* pays Rs. 1,000 to *C*, and obtains from her a writing whereby

*(c) Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I.A. 91; *Humeeda* v. *Budlum* (1872) 17 W.R. 525; *Hasan Ali* v. *Nazo* (1889) 11 All. 456; *Abdool* v. *Goolam* (1905) 30 Bom. 304.

*(d) Abdool* v. *Goolam* (1905) 30 Bom. 304.

*(e) Hasan Ali* v. *Nazo* (1889) 11 All. 456, 458.

*(f) Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 607, 12 I.A. 91. Macnaghten, p. 1, s. 9.

*(g) Abdul Bari* v. *Nasir Ahmed* ('33) A.O 142, 150 I.C. 330.

*(h) Abdul Wahid* v. *Nurun Bibi* (1885) 11 Cal. 597, 12 I.A. 91.

*(i) Khanum Jan* v. *Jan Beebee* (1827) 4. Beng. S.D.A.210; *Sumsuddin* v. *Abdul Huscin* (1906) 31 Bom. 165; *Asa Beevi* v. *Karuppan* (1918) 41 Mad. 365, 46 I.C. 35, dissenting from *Kunhi* v. *Kunhi* (1896) 19 Mad. 176. See also *Hurmut-ool-Nissa Begum* v. *Allahdia Khan* (1871) 17 W.R. 108 (P.C.); *Sulaiman Sahib* v. *Kader Ibrahim* (1952) 2 Mad. L.J. 104, ('53) A.M. 161.

in consideration of Rs, 1,000 received by her from *A*, she renounces her right to inherit *A*'s property. *A* then dies, and *C* sues *B* for her share (one-third) of the property left by *A*. *B* sets up in defence the re;ease passed by *C* to her father. The release is no defence to the suit, and *C* is entitled to her share of the inheritance, as the transfer by her was a transfer merely of a *spes successionis*, and as such, inoperative. But *C* is bound to bring into account the amount received by her from her father: *Sumsuddin v. Abdul Hussein* (1906) 31 Bom. 165; *Banoo Begum* v. *Mir Abed Ali* (1908) 32 Bom. 172, 174-175.

The rule of Mahomedan law that an heir cannot renounce his right to inherit is not different from the law under the Transfer of Property Act, 1882, sec. 6(a). That section provides that "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

It has been held by the Allahabad and Travancore-Cochin High Courts that a Mahomedan heir may by is conduct be estopped from claiming the inheritance he has agreed to relinquish if the release was part of a compromise or family settlement and if he has benefited by the transaction*(j)*. But this view has been expressly dissented from by the Madras and Kerala High Courts on the ground that not only can such a view not be justified in Mahomedan Law, but is also contrary to s.6(a) of the Transfer of Property Act and s. 23 of the Contract Act *(k)*.

The conflict between the Madras and Kerala view on the one hand and the Allahabad and Travancore view on the other was resolved by approving the Allahabad view. It was observed "... a bare renunciation of an expectation to inherit cannot bind the expectant heir's conduct in the future. But if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property, inter vivos, the expectant heir should be debarred from setting up his right when it does unquestionably vest in him. In other words the principle of estoppel remains untouched by this statement.

The question that arose were:

(1) A mere expectancy to succeed cannot be subject of transfer and such a transfer is void;

(2) Can such an expectancy be removed after receiving consideration?

(3) Will such a conduct create an estoppel in the future?

(4) Can a right be renounced even before it was vested?

These question may now be taken to have been settled. *Gulam Abbas* v. *Haji Kayyam Ali* ('73) A.S.C. 554.

A husband gives immovable property to his wife in lieu of her dower, and agrees not to claim any share of it as her heir on her death. Is the agreement valid and binding on the husband? The High Court of Allahabad has held that it is binding on the husband *(l)*.

**55. Life-estate and vested remainder.**— (1) *Sunni Law.*— The Judicial Committee in *Humeeda* v. *Budlun* (1872) 17 W.R. 525 observed that "the creation of (such) a life estate does not seem to be consistent with Mahomedan usage and there ought to be very clear proof of so unusual a transaction"; and in *Abdul Gafur* v. *Nizamuddin* (1892) 19 I.A. 170 referred to " life-rents" as a kind of estate which does not appear to be known to Mahomedan law". The difficulty arises out of the Mahomedan law of gift and does not appear to extend beyond cases of pure *hiba* whether *inter vivos* or by will. As explained in Chapter XI (cf. s. 164 below), if a gift be made subject to a condition which derogates from the grant, the condition is void, e.g., a partial restraint on alienation; but a condition which does not affect the corpus of the thing given is not within the rule, e.g. when there is a reservation of income to the donor or a gift of usufruct to another donee. In the Hedaya (489) the principle is applied to *amrees* (gift for life). The Prophet approved of *amrees* but held the condition annexed to

*(j) Latafat Husain* v. *Hidayet Husain* (1936) All. L.J. 342, 161 I.C. 851, ('36) A.A. 573; *Kochunni Kochu* v. *Kunju Pillai* (1956) A. Trav.-C. 276.

*(k) Abdul Kaffor* v. *Abdul Razak* ('59) A.M. 131; *Kunhi Avulla* v. *Kunhi Avulla* ('64) A. Ker. 201.

*(l) Nasir-ul-Haq* v. *Faiyaz-ul-Rahman* (1911) 33 All. 457, 9 I.C. 530.

them by the grantor to be void. "... the meaning of *amree* moreover is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition". Accordingly it was held in certain cases that a gift for life operates as an absolute gift *(m)*.

The assumption underlying this doctrine however is that what is given is the corporeal thing itself; and as the refusal to permit gifts of life interests produces serious inconvenience and gives rise to some unprofitable distinctions, the assumption has not gone without challenge. Can it not be held that what is given is not (e.g.) the land but an interest therein; and that this is given unconditionally there being no intention to make a gift of the corpus? In *Nawazish Ali Khan* v. *Ali Raza Khan (n)* which was a Shia case the Privy Council stated that there was no difference between the several schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools. The duty of the Court is to construe the gift. If "it is a gift of the corpus," their Lordships said, "then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if upon construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest".

In *Amjad Khan* v. *Ashraf Khan (o)* this question was raised in an acute form. The deed described the transaction as a gift without consideration. It recited that the donee and the heirs of the donor had consented. By it the donor gave to his wife his entire property as to one-third with power to alienate and "as to the rest she shall not possess any power of alienation but she shall remain in possession thereof for her lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals." On the question whether the interest given in the one-third was an absolute interest or was only a life interest plus a power to alienate, the Judicial Committee took the latter view. Their Lordships decided the case by asking, as matter of construction of the deed, what was the subject matter of the gift? Was it merely a life interest in the property together with a power of alienation over one-third thereof? Or was it an absolute interest in the property coupled with an inconsistent condition? Holding on the construction of the deed that the subject-matter of the gift was a life interest only (together with the power of alienation as to one-third) they dismissed the appeal of the donee's heir: the gift of a life-estate was not given the effect of an absolute estate. On the argument that a life-estate could not be created by gift *inter vivos* their Lordships expressed no opinion, holding that, if right, it would only mean that the donee took nothing by the gift— a result which would carry no benefit to her heir.

It is not possible to read this decision as proceeding upon the ground that the case was not one of *hiba* pure and simple. It is direct authority against regarding a life interest as enlarged by the doctrine which invalidates a condition restrictive of a gift and the decision to that effect abovenoted *(p)* must be treated

*(m) Nizamuddin* v. *Abdul Gufur* (1888) 13 Bom. 264; *Abdoola* v. *Mahomed* (1948) 75 I.A 62, ('48) A.P.C. 134. (1905) 7 Bom. L.R. 306.

*(n)* (1948) 75 I.A. 62, ('48) A.P.C. 134.

*(o)* (1929) 56 I.A. 213, 4 Luck. 305, 116 I.C. 405, ('29) A.P.C. 149 affirming (1925) 87 I.C. 445, ('25) A.O. 568.

*(p) Nizamudin* v. *Abdul Gufur* (1888) 13 Bom. 264; *Abdoola* v. *Mahomed* (1905) 7 Bom. L.R. 306.

as overruled by it. Subsequent decisions have so interpreted the Board's judgment *(q)*.

Both as regards life-estates and remainders there is considerable uncertainty as to the consequences of this decision. It does not decide that in Sunni law a life interest can be validly created by way of gift, but the doubt hitherto cast upon the matter has had reference to the validity of the limit in cases of gift. The validity of the grant was very old authority: the Hedaya discloses the tradition that the Prophet approved of *amrees* just as he disapproved of *rikba* (e.g., if I die before you then this house is yours). A life interest is not illegal: admittedly a Mahomedan can create such an interest by contract.

The Calcutta, Bombay, Nagpur and Travancore-Cochin High Courts have held that a gift of a life interest is valid *(r)*. The Chief Court of Oudh has held that the bequest of a life interest by will is valid *(s)*. In *Nawazish Ali Khan* v. *Ali Raza Khan (t)*, although a Shia case, the Privy Council have made observations which are sufficiently ample to cover Sunni cases. The effect of the decision is that a life estate as known to English law cannot be created by *hiba* whether *inter vivos* or by will. The question is always one of construction. In a case of gift to *A* for life and thereafter to *B*, the courts will presumably construe the gift as a gift of the corpus to *B* absolutely and of the usufruct of *A* for life. The gift, however, to *A* for life would be constructed as a gift of a interest to *A*, and the corpus would vest in the heirs.

It remains to consider whether under Sunni law a gift of a life-estate to *A* with remainder to *B* is a good gift to *B* and whether it amounts to a vested remainder so as to take effect even if *B* dies before *A*. By English law in such a a case *B* takes a vested interest and can dispose of his interest by transfer *inter vivos* or by will. On his death intestate his interest will pass to his heirs even if he predeceases *A*. In *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (1885) 12 I.A. 91, 11 Cal. 597 [illustration (a)] the Judicial Committee held that such an interest as a vested remainder did not seem to be recognized by Mahomedan law, and this case has been accepted as an authority for the proposition that the remainderman cannot take unless he survives the tenant for life *(u)*. The case of *Umes Chunder Sircar* v. *Mt. Zahoor Fatima* (1890) 17 I.A. 201 II Cal. 164 [illustration (b)] cannot be regarded as invalidating this conclusion since the point was not taken and the principles of Mahomedan law do not appear to have been discussed. The facts of the case sufficiently account for the omission, but they do not enable the case to be distinguished from *Abdul Wahid Khan* v. *Nuran Bidi* in point of law; neither was a case of *hiba* pure and simple.

In *Abdul Wahid Khan's* case the principle applied was as follows: "The

*(q) Abdul Khaleque* v. *Bepin Behari* ('36) A.C. 456; *Bai Saroobai* v. *Hussein Somji* (1936) 38 Bom. L.R. 903, 165 I.C. 34, ('36) A.B. 330; *Mt. Subhanbi* v. *Mt. Umraobi* (1936) 161 I.C. 719, ('36) A.N. 113, *dissenting from Abdul* v. *Abdul* (1929) 131 I.C. 35, ('29) A.N. 313; *Nawazish Ali Khan* v. *Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

*(r) Bai Saroobai* v. *Hissein Somji* (1936) 38 Bom. L.R. 903, 165 I.C. 34, ('36) A.B. 330; *Mt. Subhanbi* v. *Mt. Umraobi* (1936) 161 I.C. 719, ('36) A.N. 113; *Achiruddin Ahmad* v. *Sakina Bewa* (1946) 50 C.W.N. 59, 222 I.C. 585 ('46) A.C. 288; *Maitheen Bivi Umma* v. *Ithappiri Varkey* (1956) Trav-C. 292, ('56) A. Trav.-C. 268; *Anjumanara Begum* v. *Nawab Asif Kadar* (1955) 2 Cal. 109.

*(s) Naziruddin* v. *Khariat Ali* (1938) 172 I.C. 384, ('38) A.O. 51.

*(t) Nawazish Ali Khan* v. *Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

*(u) Abdul Karim Khan* v. *Abdul Qayum Khan* (1906) 28 All. 342; *Harpal Singh* v. *Lekraj Kunwar* (1908) 30 All. 406, 420; *Abdool Husein* v. *Goolam Hoosein* (1905) 30 Bom. 304, 317; *Rasoolbibi* v. *Usuf Ajam* (1933) 57 Bom. 737, 148 I.C. 82, ('33) A.B. 324.

arrangement contained in the compromise would be called by the Mahomedan lawyers 'a tauris' or 'making some stranger and heir' and cannot be regarded as creating a present or vested interest". (12 I.A. at p. 101).

The above authorities must now be read subject to the Privy Council decision in *Nawazish Ali Khan* v. *Ali Raza Khan (v)*. Although this was, as stated above, a Shia case, the observations made apply to all schools of Muslim law. Referring to the expression "life estate" and "vested remainder" their Lordships stated as follows:- "In their Lordships' opinion this view of the matter introduces into Muslim law legal terms and conceptions of ownership, familiar enough in English law, but wholly alien to Muslim law. In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law, whether the Hedaya, or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognizes the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim law does recognize and insists upon, is the distinction between the corpus of the property itself (*ayn*) and the usufruct in the property (*manafi*). Over the corpus of property the law recognizes only absolute dominion, heritable, and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property, and the dominion over the corpus takes effect subject to any such limited interests.... This distinction runs through all the Muslim law of gifts—gifts of the corpus (*hiba*), gifts of the usufruct (*ariyat*) and usufructuary bequests. No doubt where the use of a house is given to a man for his life he may, not inaptly, be termed a tenant for life, and the owner of the house, waiting to enjoy it until the termination of the limited interest, may be said, not inaccurately, to possess a vested remainder. But though the same terms may be used in English and Muslim law, to describe much the same things, the two systems of law are based on quite different conceptions of ownership. English law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration, but recognizes interests of limited duration in the use of property. .....Their Lordships think that there is no difference between the several schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools. Their Lordships feel no doubt that in dealing with a gift under Muslim law, the first duty of the court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if upon construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest."

(2) *Family settlement.*— A life-estate may be created by an agreement in the nature of a family settlement, whether such agreement is preceded by litigation or not, but "the creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction" [*Humeeda* v. *Budlun* (1872) 17 W.R. 525]. Such an agreement is from its very nature a transaction for a consideration, and it must

*(v)* (1948) 75 I.A. 62, ('48) A.P.C. 134.

be distinguished from a pure *hiba* or gift mentioned in sub-sec. (1) above. [*Umjad Alli Khan* v. *Mohumdee Begum* (1867) 11 M.I.A. 517 at 548; *Khwajeh Solehman* v. *Nawab Sir Salimullah* (1922) 49 I.A. 153. 49 Cal. 820, 69 I.C. 138. ('22) A.PC. 107; *Jagdish Narain* v. *Bande Ali Mian* (1939) 20 P.L.T. 328, 183 I.C. 467, ('39) A.P. 406.]

(3) *Hiba-bil iwaz.*— The rule stated in sub-sec. (1) above does not apply to a *hiba-bil-iwaz.* As to *hiba-bil-iwaz,* see sec. 168 below.

(4) *Shia law.*— It was at one time thought that the Shia law allowed the creation of a life-estate and a vested remainder, as held by Jenkins, C.J., and Heaton, J., in *Banoo Begum's* case [illustration (f)]. In two other cases however Beaman, J., expressed the opinion that the Arabic texts there relied upon did not support the conclusion reached, and observed that an estate for life and a vested remainder were known to the Shia law as much as to the Sunni law *(w).* In *Nawazish Ali Khan* v. *Ali Raza Khan (x)* the Privy Council took the view that a life-estate as known in English law is alien to Mahomedan law but if on the construction of a *hiba*, the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.

(5) *Wakf.*— Both under the Sunni and the Shia law life-estates may be created by wakf: see sec. 197.

*Illustrations*

(a) One of two persons claiming to be the sons of Mouzzam Khan, a Sunni, sued Gauhar Bibi, his widow, who was in possession of the suit lands in Oudh under a Kabulyat and in pursuance of a summary settlement made by Government in 1858. The plaintiff claimed that Mouzzam Khan had made the estate over to him and his brother. The suit was compromised in terms contained in two petitions to the Court, namely, that the widow should during her life-time continue as before to possess and be mistress of the *Talooka*, but should not alienate so as to deprive the plaintiff of his right and that after her death the plaintiff and his brother should possess and enjoy it , "should become successors to and proprietors of the said talooka". The widow survived both. *Held.* that neither of them acquired any such right as would under Mahomedan law form the subject of inheritance. "Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest as in *Abdul Rahman* and *Abdul Subhan* which passed to their heirs on their death in the life-time of *Gauhar Bibi*". Also: " To give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognized by the Mahomedan law": *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (1885) 12 I.A. 91, 102, 100, 11 Cal. 597.

(b) By a deed of settlement in 1871 a Sunni leased lands to his second wife, Amani Begum at a fixed rent of one rupee on condition that if she had a child by him the grant should be taken as a perpetual mokurruri: if no such child was born then it was only to be a life mokurruri and after her death the property was to go to the two sons of the settlor, Farzund and Farhut. Appellant and respondent both claimed to have taken title to one-half of the property as purchasers of Farzund's right, title and interest at execution sales. Appellant's sale was in 1879 and respondent's in 1881. At the time of appellants' attachment the settlor, his wife and sons were all alive but before the sale in 1897 the settlor had died . At all material times the widow and Farzund were alive. (Both were respondents to the Privy Council appeal: the latter died pending the hearing thereof in 1887). It could not have been contended at the trial in 1883 or in the High Court in 1885, and it was not contended in the Privy Council that the gift to Farzund had failed. Both auction purchasers had

*(w) Jainabai* v. *Sethna* (1901) 34 Bom. 604, 612-3, 6 I.C. 513; *Cassamally* v. *Currimbhoy* (1911) 36 Bom. 214, 253-4, 12 I.C. 225.

*(x)* (1948) 75 I.A. 62, ('48) A.PC. 134.

the same title save that (a) the appellant was first in time, (b) his attachment had been in the settlor's life-time. Respondent's argument concentrated on (b): during the settlor's life the birth of a child to him was a contingency: this contingency no longer remained in 1881. This is the only argument dealt with in the judgment on this part of the case: it was held on the construction of the deed of 1871 that the wife's estate was enlarged and the sons' interest defeated on the birth of a child: not that the son's interest failed to arise until either husband or wife had died. As presented to the Judicial Committee by the rival auction purchasers the case raised no point of Mahomedan law. The contention advanced in *Rasoolbibi* v. *Usuf Ajam* (1933) 57 Bom. 737 at 766, 148 I.C. 82, ('33) A.B. 324 for the appellant with reference to this case cannot be accepted. There were two elements of contingency (a) the birth of a child, and (b) the widow surviving Farzund. The former was relied on by the respondent: neither sought to profit by the latter: *Umes Chunder Sircar* v. *Zahoor Fatima* (1890) 17 I.A. 201.

(c) A Sunni lady, Bai Aishabai, by her will left two properties to her daughter, Hafizabibi, for life without power of alienation and after her death to Ajam (testatrix's step-son) and his descendants as absolute owners. Aishabai died in 1897. Hafizabibi enjoyed the properties till her death in 1926. Ajam died in 1919. The plaintiff was a daughter of Ajam suing for administration of his estate. *Held,* that in the events which had happened Ajam took no interest under the will. *Held further* by Mirza, J., and Beaumont, C.J., (Rangnekar. J., dissenting) that Hafizabibi did not take an absolute estate: *Rasoolbibi v. Usuf Ajam* (1933) 57 Bom. 737, 148 I.C. 82, ('33) A.B. 324.

(d) One Nasiruddin, a Sunni, did having by his will left three villages to his wife, Mariambi, and declared that after the death of Mariambi, Abdul Kadar should become the owner thereof. Abdul Kadar died in 1899 and Mariambi in 1904. The plaintiff was a daughter of Abdul Kadar and the defendants were her mother and sister. If an absolute interest was created in favour of Mariambi the plaintiff's suit failed: if on her death the property went to Abdul Kadar's heirs the plaintiff was entitled to a seven annas share thereof subject to a question whether Abdul Kadar had validly made a gift to his wife in lieu of dower. *Held* on reference to a Bench that Mariambi took a life-estate only. Thereafter the appeal was disposed of on the footing that Abdul Kadar's heirs took the reversionary interest. *Mt. Subhanbi* v. *Mt. Umraobi* (1936) 161 I.C. 719, ('36) A.N. 113.

(e) By a deed of settlement the plaintiff's mother conveyed two properties to a trustee upon trust to pay taxes and repairs and out of the net rents and profits to pay to the settlor during her life such moneys as she should require and the balance as therein directed: on the settlor's death the net rents of one property were to be paid to the plaintiff: on the death of the survivor of the settlor and the plaintiff the property was to be held in trust for the plaintiff's son or sons and in default of sons for her daughters, with a gift over in the event of the plaintiff dying without issue. *Held* that assuming that the gift to the plaintiff was of a life interest in the property it did not by Sunni law confer an absolute estate upon her: *Bai Saroobai v. Hussein Somji* (1936) 38 Bom. L.R. 903, 165 I.C. 34, ('36) A.B. 330.

(f) It was provided by a consent decree in a suit to which the parties were Shia Mahomedans that a certain house should be held and enjoyed by *A* for her life, and that after her death it should be sold and the sale proceeds divided among her step-sons. It was held that *A* took a life interest in the house, and the step-sons took a definite interest like what is called in English law a vested remainder: *Banoo Begum* v. *Mir Abed Ali* (1908) 32 Bom. 172: *Siraj Hussin* v. *Mushaf Hussin* (1921) 21 O.C. 321, 49 I.C. 58. The question whether a vested remainder is recognized by the Shia law was raised in *Muhammad Raza* v. *Abbas Bandi Bibi* (1932) 59 I.A. 236, 7 Luck 257, 137 I.C. 321 ('32) A.PC. 158, but it was not decided as the document to be construed in that case was a compromise of a suit, and therefore one for a consideration.

(g) A Shia Mahomedan by his will purported to give an estate for life to *A* and thereafter to *B* for life, with a power to nominate his successor. It was held that *A* and *B* took a life interest and that the power of appointment was invalid under Mahomedan law. *A* and *B* had a life-interest in the usufruct and the testator's heirs were the owners of the property. Their Lordships said: " No doubt where the use of a house is given in a man for his life he may, not inaptly, be termed a tenant for life and the owner of the house, waiting to enjoy it until the termination of the limited interest, may be said, not inaccurately to possess a vested remainder. But though the same terms may be used in English and Muslim law, to describe much the same things, the two systems of law are

based on quite different conceptions of ownerships. English law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration but recognises interests of limited duration in the use of property" *Nawazish Ali Khan* v. *Ali Raza Khan* (1948) 75 I.A. 62. ('48) A.PC. 134.]

(h) *A* makes a bequest in favour of *B* of certain land and provides that *B* shall have no right to transfer the property, but his male issue shall have the right to transfer the property. It was held that the corpus and not merely the usufruct was bequeathed to *B* and the condition that he should not transfer the property was void. *B* therefore took an absolute estate: *Siddiq Ahmed* v. *Wilayat Ahmed*. ('52) A.A. 1.

(i) A Sunni Mahomedan settled property in favour of certain persons reserving a usufruct for himself for life. it was held that the deed of settlement was valid and the question whether the settlor reserved to himself a life-interest did not arise: *Mahomed* v. *Kairum* ('54) A. Mad.769. See also *Shaikh Khatun Bibi* v. *Mohd. Zahina Bi* (1956) An. W.R. 771; *Khadija Beevi* v. *Maria Ummal* ('58) A.Ker. 264; *Sk. Kabir* v. *Narayandas* (1954) Cut. 513; *Krishnamurthy Setty* v. *Adbul Khader* ('56) A.Mys. 14.

(j) A Sunni Mahomedan made a settlement in the following terms, " I have settled upon you (my wife) for your maintenance the undermentioned *Nanja* land worth Rs. 2,000/-. Therefore this is a settlement deed executed by me consenting that you should enjoy for your life-time the income alone from the said *nanja* land, that you should not make any gift, sale or hypothecation etc. of the said land, that if you should hereafter have issue by me, the said issue should enjoy the said land hereditarily, and that if you should not have such issue the said property after your life-time shall go to me and to my heirs". It was held that only the usufruct was given to the wife: *Nagoor Ammal* v. *M.K. Meeran*. ('54) A. Mad. 770.

**56. Vested inheritance**— A " vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death *(y)*. See sec. 41 above.

[*A* dies leaving a son *B*, and a daughter *C*. *B* dies before the estate of *A* is distributed leaving a son *D*. In this case, on the death of *A*, two-thirds of the inheritance vests in *B*, and one-third vests in *C*. On distribution of *A*'s estate, after *B*'s death the two-thirds which vested in *B* must be allotted to his son *D*.]

See Macnaghten, " Principles and Precedents". p. 27, sec. 96; Rumsey's Mahomedan Law of Inheritance, ch. ix; Rumsey's *Al Sirajiyyah*, 43-44.

**57. Joint family and joint family business.**— (1) When the members of a Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu Law*(z)*. Further, in the Mahomedan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family *(a)*. But if during the continuance of the family properties are acquired in the name of the managing member of the family, and it is proved that they are possessed by all the members jointly, the presumption is that they are the properties of the family, and not the separate properties of

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*(y) Mst. Jawai* v. *Hussain Baksh* (1922) 3 Lah. 80, 67 I.C. 154, ('22) A.L. 298.

*(z) Hakim Khan* v. *Gool Khan* (1882) 8 Cal. 826; *Suddurtonnessa* v. *Majada Khatoon* (1878) 3 Cal. 694; *Abdool Adood* v. *Mahomed Makmil* (1884) 10 Cal. 562; *Abdul Khader* v. *Chidambaram* (1908) 32 Mad. 276; *Abdul Samad* v. *Bibijan* (1925) 49 Mad. L.J. 675, 91 I.C. 618, ('25) A.M. 1149; *Abdul Rashid* v. *Sirajuddin* (1933) 145 I.C. 461, ('33) A.A. 206; *Sahul Hamid* v. *Sulthan* (1947) 1 Mad. L.J. 20, ('47) A.M. 287.

*(a) Abdul Kadar* v. *Bapubhai* (1898) 23 Bom. 188; *Mahamad Amin* v. *Hasan* (1906) 31 Bom. 143; *Mohideen Bee* v. *Syed Meer* (1915) 38 Mad. 1099, 1101, 32 I.C. 1102, See also *Isap Ahmed* v. *Abramji* (1917) 41 Bom. 588, 612-613, 41 I.C. 761; *Safir Mohd.* v. *Bashir Mohd.* ('61) A. Or. 92. *Md. Zafir* v. *Amiruddin* ('63) A.P. 108.

the member in whose name they stand *(b)*.

(2) If after the death of a Mahomedan his adult sons continue their father's business, and retain his assets in the business, they will be deemed to stand in a fiduciary relation to the other heirs of the deceased, and liable to account as such for the profit made by them in the business *(c)*. If after the death of the sons the business is continued by their sons or by other heirs, they also will be liable to account on the same footing *(d)*.

(3) Members of a Mahomedan family carrying on business jointly do not constitute a joint family firm in the sense in which that expression is used in the Hindu law so as to attract the legal incidents of such a firm *(e)*. Sons assisting a father in business are presumably his agents and not his partners unless an agreement of partnership is proved *(f)*. A minor may be entitled to a benefit in the business, but this will not make him liable on a mortgage executed by him along with his adult brothers in the course of the business carried on by the latter. The managers of such a business in a Mahomedan family have no right to impose any liability on the minor members of the family *(g)*.

There is no provision of Mahomedan Law recognising a joint family. In Andhra Pradesh muslim families live together and do business together. Such business may be carried on for the benefit of the family including minors and females. Such arrangements have been upheld by Courts. In such a case the adult member or members stand in a fiduciary capacity and the Trust Act is applicable. When the co-owner dies his heirs take his place *(h)*.

The burden of establishing that a property held by a member in Mahomedan family is his self-acquired property would arise only if the property is held commonly by the other members of the family and the entire family lives in commensality possessing the family property in common.

*Mohammed Ibrahim* v. *Syed Muhammad Abbubakker* A.I.R. 1976 Mad. 84 L.W. 43.

As the theory of representation is unknown to Mahomedan law, and as there is no presumption that acquisition of one or more of the properties of the family are to be presumed to be for the benefit of the family. Unless there is proof to the contrary and as children in a Mahomedan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another. A.I.R. 1970 Mad. 200, Followed Case-law discussed.

*Mohammed Ibrahim* v. *Syed Muhammad Abbubakker* A.I.R. 1976 Mad. L.W. 43.

**58. Homicide.**— (1) Under the Sunni law, a person who has caused the death of another, whether intentionally, or by mistake, negligence, or accident, is debarred from succeeding to the estate of that other.

(2) Homicide under the Shia law is not a bar to succession unless the death was caused intentionally.

[Rumsey's *Al Sirajiyyah*, 14, Ballie, 266, 369]

*Impediments to inheritance.*— The *Sirajiyyah* sets out four grounds of exclusion from inheritance, namely (1) Homicide, (2) slavery, (3) difference of religion, and (4) difference of allegiance. Homicide, as an impediment to succession, is dealt with in the present section. The second impediment was removed by the enactment of Act V of 1843 abolishing slavery *(i)*, and

*(b) Aminaddin* v. *Tajjadin* (1932) 59 Cal. 541, 138 I.C. 761, ('32) A.C. 538; *Mst. Bibi Fatma* v. *Aftab Ahmed* ('63) A.P. 128.

*(c) Soudagar* v. *Soudagar* (1931) 54 Mad. 543, 135 I.C. 357, ('31) A.M. 553; *Durga Abdul Rawoof Sahib* v. *Quresha Bi Saheba* (1959) 2 An. W.R. 557.

*(d) Shukrull* v. *Mt. Zuhra* (1932) 54 All. 916, 143 I.C. 230, ('32) A.A. 512.

*(e)* See *Solema Bibi* v. *Hafez Mahammad* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.C. 836; *Durg Abdul Rawoof Sahib* v. *Quresha Bi Saheba* (1959) 2 An. W.R. 557.

*(f) Tarachand* v. *Mohideen* (1935) 37 Bom. L.R. 654, 158 I.C. 701, ('35) A.B. 401.

*(g) Ahmed Ibrahim Saheb* v. *Meyyappa Chettiar* (1939) M.W.N. 976, (1940) Mad. 285, ('40) A.M. 285, [*Abdul Rahim* v. *Abdul Hakim* ('32) A.M. 553; (1931) 54 Mad. 543, explained.]

*(h) D. Raja Ahmed* v. *Pacha Bai* (1969) 1 An. W.R. 255.

*(i) Ujmudin Khan* v. *Zia-ul-Nissa* (1879) 6 I.A. 137, 3 Bom. 422.

the third by the provisions of Act XXI of 1850 which abolished so much of any law or usage as affected any right of inheritance of any person by reason of his renouncing his religion. The bar of difference of allegiance disappeared with the subversion of the Mahomedan supremacy.

A person incapable of inheriting by reason of any of the above disqualifications is considered as not existing, and the estate is divided accordingly. According to the *Sirajiyyah* he does not exclude others from inheritance (Sir 22-28). Thus if *A* dies leaving a son *B*, a grandson *C* by *B*, and a brother *D* and if *B* has caused the death of *A*, *B* is totally excluded from inheritance, but he does not exclude his son *C*. The inheritance will devolve as if *B* were dead, so that *C*, the grandson, will succeed to the whole estate, *D* being a remote heir. In the undermentioned case, a single Judge of the Lahore High Court, has expressed the view that the rule of public policy would exclude a murderer and his descendants from succession *(j)*.

**59. Exclusion of daughters from inheritance by custom or by statute.**— Where daughters are excluded from inheritance either by custom *(k)* or by statute *(l)*, they should be treated as non-existent, and the shares of the other heirs should be calculated as they would be in default of daughters.

There is no custom that daughter can inherit her father's property only as Khananishia daughter or not at all—Such custom has to be pleaded and proved by cogent evidence. AIR 1963 J & K 4, Foll.) *Ghulam Hassan* v. *Mst. Saja,* A.I.R. 1984 Jammu & Kashmir 26.

*Watan Act, 1886 (Bombay).*— If a Mahomedan *watandar* dies leaving a widow, a daughter, and a paternal uncle, the daughter is not entitled under the Act to any interest in the *watan* lands, she being postponed in the order of succession. The lands are divisible between the widow and the paternal uncle as if the daughter were non-existent so that the widow will take 1/4, and the uncle the residue, 3/4. The widow will take only a life-interest in her share. If the daughter were not excluded, she would have taken 1/2, the widow 1/8, and the uncle the residue, 3/8. The rule of Mahomedan law stated in the note to ill. (3) to sec. 63 does not apply to such case.

*Custom in Kashmir.*— Among the Gujars and Bakkerwals of Nunar the custom is that daughters do not inherit even if they remain at home. In default of agnates only, they can succeed to the property. Agnates mean grandfather's descendants in the male line *(m)*.

**60. Taluqdars of Oudh.**— A special rule of succession by primogeniture is enacted for the taluqdars of Oudh by the Oudh Estates Act I of 1869 and the Oudh Estates Amendment Act III of 1910. Succession is to the nearest male agnate according to the rules of lineal primogeniture. A daughter's son is not a male agnate and is therefore not entitled to succeed *(n)*. As the Oudh Estates Act has laid down specific rules for devolution of taluqdari property and has in this respect displaced the Mahomedan law, such property should not be taken into consideration in determining the bequeathable one-third share of the entire assests of a Mahomedan testator *(o)*.

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*(j) Khan Gul Khan* v. *Karam Nishan* ('40) A.L. 172.

*(k) Muhammad Kamil* v. *Imtiaz Fatima* (1908) 36 I.A. 210, 31 All. 557, 4. I.C. 457.

*(l) Aminabi* v. *Abasaheb* (1931) 55 Bom. 401, 132 I.C. 892, ('31) A.B. 266.

*(m) Aziz Dar* v. *Mst. Fazli* ('60) A.J. & K. 53.

*(n) Adbul Latif Khan* v. *Mt. Abadi Begum* (1934) 61 I.A. 322, 9 Luck. 421, 150 I.C. 810, ('34) A.PC. 188.

*(o) Mohammad Zia-Ullah* v. *Rafiq Mohammad* (1939) O.W.N. 581, 182 I.C. 190, ('39) A.O. 213.

# CHAPTER VII

## HANAFI LAW OF INHERITANCE

Works of authority: Al Sirajiyyah and Al Sharifiyyah.— The principal works of authority on the Hanafi Law of inheritance are the *Sirajiyyah,* composed by Shaikh Sirajuddin, and the *Sharifiyyah,* which is a commentary of the *Sirajiyyah* written by Sayyad Shariff. The *Sairjiyyah* is referred to in this and subsequent chapters by the abbrevation *Sir*, and the references are to the pages of Mr. Rumsey's edition of the translation of that work by Sir William Jones, as that edition is easily procurable. See also Sale's Translation of the Koran, *Sura IV.*

### *A.—Three Classes of Heirs*

**61. Classes of heirs.**— There are three classses of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred:

(1) "Sharers" are those who are entitled to a prescribed share of the inheritance;

(2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;

(3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries *(a)*.

*Sir, 12-13.* The first step in the distribution of the estate of a deceased Mahomedan, after payment of his funeral expenses, debts, and legacies, is to allot their respective shares *to such of the relations as belong to the class of sharers and are entitled to a share.* The next step is to divide the residue (if any) among *such of the residuaries as are entitled to the residue.* If there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among *such of the distant kindred as are entitled to succeed thereto.* The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased. Thus if a Mahomedan dies leaving a wife *and* distant kindred, the wife as sharer will take her share which is 1/4 and the remaining three-fourths will go to the distant kindred. And if a Mahomedan female dies leaving a husband *and* distant kindred, the husband as sharer will take his 1/2 share, and the other half will go to the distant kindred. To take a simple case: *A* dies leaving a mother, a son and a daughter's son. The mother as *sharer* will take her share 1/6 and the son as *residuary* will take the residue 5/6. The daughter's son, being one of the class of *distant kindred*, is not entitled to any share of the inheritance.

The question as to which of the relations belonging to the class of sharers, residuaries, or distant kindred, are entitled to succeed to the inheritance depends, on the circumstances of each case. Thus if the surviving relations be a father and a father's father, the father alone will succeed to the whole inheritance to the entire exclusion of the grandfather, though both of them belong to the class of sharers. And if the surviving relations be a son and a son's son, the son alone will inherit the estate, and the son's son will not be entitled to any share of the inheritance, though both belong to the class of residuaries. Similarly, if the surviving relations belong to the class of distant kindred, *e.g.*, a daughter's son and a daughter's son's son, the former will succeed to the whole inheritance, it being one of the rules of succession that the nearer relation excludes the more remote.

**62. Definitions—**

(a) "True grandfather" means a male ancestor between whom and the deceased no female intervenes.

Thus the father's father, father's father's father and his father how highsoever are all true grandfathers.

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*(a) Abdul Sarang* v. *Putee Bibi* (1902) 29 Cal. 738: *Sk. Akbar Ali* v. *Sk. Lokman* ('73) A. Orissa 129.

(b) "False grandfather" means a male ancestor between whom and the deceased a female intervenes.

Thus the mother's father, mother's mother's father, mother's father's father, father's mother's father, are all false grandfathers.

(c) "True grandmother" means a female ancestor between whom and the deceased no false grandfather intervenes.

Thus the father's mother, mother's mother, father's mother's mother, father's father's mother, mother's mother's mother, are all true grandmothers.

(d) "False grandmother" means a female ancestor between whom and the deceased a false grandfather intervenes.

Thus the mother's father's mother is a false grandmother. False grandfathers and false grandmothers belong to the class of distant kindred.

(e) "Son's son how lowsoever" includes son's son, son's son's son, and the son of a son how lowsoever.

(f) "Son's daughter how lowsoever" includes son's daughter, son's son's daughter and the daughter of a son how lowsoever.

In *S. M. Dawood Bibi* v. *A. B. Pulavar* ('72) A. Mad. 228 a rule of evidence was considered. Evidence was found of ancestry in the recital of names in funeral prayers.

## * *B.—Sharers*

**63. Sharers.—** After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying table (p. 48A) contains a list of Sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.

*Illustrations*

*Note.*— The italics in the following and other illustrations in this chapter indicate the surviving relations. It will be observed that the sum total of the shares in all the following illustrations equals unity i.e. exhausts the inheritance:—

FATHER, HUSBAND AND WIFE

| | | | | |
|---|---|---|---|---|
| (a) | *Father* | .. .. | *1/6* | (as *sharer*, because there are daughters) |
| | *Father's father* | .. .. | .. | (excluded by father) |
| | *Mother* | .. .. | 1/6 | (because there are daughters) |
| | *Mother's mother* | .. .. | .. | (excluded by mother) |
| | *Two daughters* | .. .. | 2/3 | |
| | *Son's daughter* | .. .. | .. | (excluded by daughters) |
| (b) | *Husband* | .. .. | 1/2 | |
| | *Father* | .. .. | 1/2 | (as residuary) |
| (c) | *Four widows* | .. .. | 1/4 | (each taking 1/16) |
| | *Father* | .. .. | 3/4 | (as residuary) |

## MOTHER

| | | | | | |
|---|---|---|---|---|---|
| (d) | *Mother* | .. | .. | 1/3 | |
| | *Father* | .. | .. | 2/3 | (as residuary) |
| (e) | *Mother* | .. | .. | 1/6 | (because there are two sisters) |
| | *Two sisters* | .. | .. | .. | (excluded by father) |
| | *Father* | .. | .. | 5/6 | (as residuary) |

*Note.*— It is important to note that though the sisters do not inherit at all, they affect the share of the mother and prevent her from taking 1/3. This proceeds upon the principle that a person, though excluded from inheritance, may exclude others wholly or partially (*Sir* 28). In the present case the exclusion is partial, that is, the share of the mother is reduced, she taking 1/6 instead of 1/3, which latter share she would have taken if the deceased had not left sisters. In ill. (g) also, the exclusion of the mother is partial. Ill. (q) is a case of total exclusion.

It is stated in the *Sirajiyyah* (p. 28) that "A person excluded may, as all the learned agree, exclude others, as, if there be two brothers or sisters or more, on whichever side they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a sixth". This instance is split into ills. (e) and (g). Ill. (q) is another instance of the same rule. It is taken from Baillie's Digest Part 1, p. 706. The above rule does not apply where a particular heir is excluded by custom or statute. Thus if the daughter is excluded by the Watan Act the wife's share is not reduced from 1/4 to 1/8 *(e)*. See sec. 59 above.

| | | | | | |
|---|---|---|---|---|---|
| (f) | *Mother* | .. | .. | 1/3 | |
| | *Sister* | .. | .. | .. | (excluded by father) |
| | *Father* | .. | .. | 2/3 | (as residuary) |
| (g) | *Mother* | .. | .. | 1/6 | (because there is a brother and also a sister) |
| | *Brother* (f., c., or u.) | .. | .. | .. | (excluded by father) |
| | *Sister* (f., c., or u.) | .. | .. | .. | (excluded by father) |
| | *Father* | .. | .. | 5/6 | (as residuary) |

*Note.*— The mother takes 1/6, and not 1/3, where there are two or more brothers or two or more sisters, or *one brother and one sister*; or two or more brothers and sisters. The brother and sister, though they are excluded from inheritance by the father, prevent the mother from taking the larger share 1/3. See note to ill. (3).

| | | | | | |
|---|---|---|---|---|---|
| (h) | *Husband* | .. | .. | 1/2 | |
| | *Mother* | .. | .. | 1/6 | (=1/3 of 1/2) |
| | *Father* | .. | .. | 1/3 | (as residuary) |

*Note.*— But for the *husband and father*, the mother in this case would have taken 1/3, as there are neither children not brothers nor sisters. As the deceased has left a husband *and* father, the mother is entitled only to one-third of what remains after the husband's share is allotted to him. The husband's share is 1/2, and what remains is 1/2, and 1/3 of 1/2 is 1/6. The reason of the rule is clear, for if the mother took 1/3, the residue for the father would only be 1—(1/2+1/3) = 1/6, that is, half the share of the mother, while as a general rule, the share of a male is twice that of a female of parallel grade (*Sir.* 22). For the case where deceased leaves a *widow and father*, see ill. *(j)* below.

| | | | | | |
|---|---|---|---|---|---|
| (i) | *Husband* | .. | .. | 1/2 | |
| | *Mother* | .. | .. | 1/3 | |
| | *Father's father* | .. | .. | 1/6 | (as residuary) |

*Note.*— The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the husband's share.

| | | | | | |
|---|---|---|---|---|---|
| (j) | *Widow* | .. | .. | 1/4 | |
| | *Mother* | .. | .. | 1/4 | (=1/3 of 3/4) |
| | *Father* | .. | .. | 1/2 | (as residuary) |

*Note.*— In this case, the mother would have taken 1/3 but for the *widow and father*, for there

*(e) Aminabi* v. *Abasaheb* (1931) 55 Bom. 401, 131 I.C. 892, ('31) A.B. 266.

are neither children nor brothers nor sisters. As the widow *and* father are among the surviving heirs, the mother is entitled to one-third of the remainder after deducting the widow's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4, that is, 1/4. See ill. (h) above and the note thereto.

| | | | |
|---|---|---|---|
| (k) | *Widow* .. .. | 1/4 | |
| | *Mother* .. .. | 1/3 | |
| | *Father's father* .. .. | 5/12 | (as residuary) |

*Note.*— The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the widow's share.

## TRUE GRANDFATHER AND TRUE GRANDMOTHER

| | | | |
|---|---|---|---|
| (l) | *Father's mother* .. .. .. | | (being a true *pat*, grandmother, is excluded by father) |
| | *Mother's mother* .. .. | 1/6 | (being a true *mat*, grandmother, is not excluded by father) |
| | *Father* .. .. | 5/6 | (as residuary) |
| | *Father's mother* .. ) | 1/6 | (each taking 1/12) |
| | *Mother's mother* .. ) | | |
| | *Father's father* .. .. | 5/6 | (as residuary) |

*Note.*— The father's mother is not excluded by the father's father, for the latter is not an *intermediate,* but an *equal,* true grandfather.

| | | | |
|---|---|---|---|
| (n) | *Father's father's mother* .. .. .. | | (excluded by father's father) |
| | *Father's father* .. .. .. | | (takes the whole as residuary) |

*Note.*— The father's father's mother is excluded by the father's father for he is an intermediate, true grandfather, the father's father's mother being related to the deceased *through* him.

| | | | |
|---|---|---|---|
| (o) | *Father's mother's mother* .. .. | 1/6 | |
| | *Father's father* .. .. | 5/6/ | (as residuary) |

*Note.*— The father's mother's mother (who is a true *pat*, grandmother) is not excluded by the father's father (who is a true grandfather), for though he is nearer in degree, he is *not* in relation to her an *intermediate* true grandfather, as the father's mother is *not related to the deceased through him,* but through the father.

| | | | |
|---|---|---|---|
| (p) | *Father's mother* .. .. | 1/6 | |
| | *Mother's mother's mother* .. ... | | (excluded by father's mother who is nearer true grandmother) |
| | *Father's father* .. .. | 5/6 | (as residuary) |
| (q) | *Father's mother* .. .. .. | | (excluded by father) |
| | *Mother's mother's mother* .. .. | | excluded by father's mother who is a nearer true grandmother) |
| | *Father* .. .. .. | | takes the whole as residuary |

*Note.*— This illustration is taken from Baillie, 706. The father's mother, though she is excluded by the father, excludes the mother's mother's mother. This proceeds upon the rule that one who is excluded may himself exclude others wholly or partially. See note to ill. (e): in that case the exclusion of the mother by the sister was partial, for she did take a share, namely, 1/6. In the present case, however, the exclusion of the mother's mother's mother is entire. It need hardly be stated that if the deceased had not left the father's mother, the mother's mother's mother would have taken 1/6, for being a true *maternal* grandmother, she is not excluded by the father.

## DAUGHTERS AND SON'S DAUGHTERS h.1.s.

| | | | |
|---|---|---|---|
| (r) | *Father* .. .. | 1/6 | (as sharer) |
| | *Mother* .. | 1/6 | |

| | | | |
|---|---|---|---|
| *3 son's daughters*, of whom one is by one son and the other two by another son | .. | 2/3 | (each taking 2.9) |

*Note.*— The son's daughters take *per capita* and not *per stirpes*. The two-thirds is not therefore divided into parts, one for the son's daughter by one son, and the other for the other two by another son, but it is divided into as many parts as there are son's daughters irrespective of the number of sons through whom they are related to the deceased. The reason is that the Sunni Mahomedan law does not recognize any right of representation (see s. 3), and the son's daughters do not inherit as representing their respective fathers, but in their own right as grand-daughters of the deceased. The same principle applies to the case of son's sons, brother's sons, uncles' sons, etc. See Table of Residuaries.

| | | | | |
|---|---|---|---|---|
| (s) | *Father* | .. .. | 1/6 | (as sharer) |
| | *Mother* | .. .. | 1/6 | |
| | *Daughter* | .. .. | 1/2 | |
| | *4 son's daughters* | .. .. | 1/6 | (each taking 1/24) |

*Note.*— There being only one daughter, the son's daughters are not entirely excluded from inheritance, but they take 1/6, which together with the daughter's 1/2, makes up 2/3, the full portion of daughters.

| | | | | |
|---|---|---|---|---|
| (t) | *Father* | .. .. | 1/6 | (as sharer) |
| | *Mother* | .. .. | 1/6 | |
| | *2 sons' daughters* | .. .. | 2/3 | |
| | *Son's son's daughter* | .. .. | .. | (excluded by son's daughters) |
| (u) | *Father* | .. .. | 1/6 | (as sharer) |
| | *Mother* | .. .. | 1/6 | |
| | *Son's daughter* | .. .. | 1/2 | |
| | *Son's son's daughter* | .. .. | 1/6 | |

*Note.*— The rule of succession as between daughters and son's daughters applies, in the absence of daughters, as between higher son's daughters and lower son's daughters (*Sir.* 18). There being only one son's daughter in the present illustration, the son's son's daughter is not entirely excluded from inheritance, but she inherits 1/6, which together with the son's daughter's 1/2, makes up 2/3, the full share of son's daughters in the absence of daughters.

## SISTERS

| | | | | |
|---|---|---|---|---|
| (v) | *Mother* | .. .. | 1/6 | |
| | *2 Full sisters* | .. .. | 2/3 | (each taking 1/3) |
| | *C.* sister | .. .. | .. | (excluded by full sisters) |
| | *U. sister (or* u. brother) | .. .. | 1/6 | |
| (w) | *2 full sisters* (or c. sisters) | .. | 2/3 | (each taking 1/3) |
| | *2 u. sisters (or u.* brothers) | .. | 1/3 | (each taking 1/6) |
| (x) | *Full sister* | .. .. | 1/2 | |
| | *2 c. sisters* | .. .. | 1/6 | (each taking 1/12) |
| | *U. brother* .. *U. sister* | .. | 1/3 | (each taking 1/6) |

*Note.*— There being only one full sister, the consanguine sisters are not excluded from inheritance, but they inherit 1/6 which, together with the sister's 1/2, makes up 2/3, the collective share of full sisters in the inheritance (*Sir. 21*).

*Sir.* 14-23.— The principal point involved in the Table of Sharers are explained in their proper places in the notes appended to the illustrations. The illustrations must be carefully studied, as it is very difficult to understand the rules of succession without them. The principles underlying the rules of succession are set out in the notes on sec. 65 below. It will be observed that the illustrations

are so framed that the sum total of the shares does not exceed unity. For cases in which the total of the shares exceeds unity, see the next section.

The sharers are twelve in number. Of these there are six that inherit under certain circumstances as residuaries, namely, the father, the true grandfather, the daughter, the son's daughter, the full sister, and the consanguine sister. See the list of Residuaries given in sec. 65 below, and the notes on that section.

**64. Increase** (*Aul.*)— If it be found on assigning their respective shares to the Sharers that the total of the shares exceeds unity the share of each Sharer is proportionately diminished by reducing the fractional share to a common denominator, and *increasing* the denominator so as to make it equal to the sum of the numerators.

*Illustrations*

| | | | | |
|---|---|---|---|---|
| (a) | *Husband* .. .. .. .. | 1/2=3/6 | reduced to | 3/7 |
| | 2 full sisters .. .. .. .. | 2/3=4/6 | " | 4/7 |
| | | 7/6 | | 1 |

*Note.*— The sum total of 1/2 and 2/3 exceeds unity. The fractions are therefore reduced to a common denominator, which, in this case, is 6. The sum of the numerators is 7, and the process consists in substituting 7 for 6 as the denominator of the fraction 3/6 and 4/6. By so doing the total of the shares equals unity. The doctrine of "Increase" is so called because it is by *increasing* the denominator from 6 to 7 that the sum total of the shares is made equal to unity.

| | | | | |
|---|---|---|---|---|
| (b) | *Husband* .. .. .. .. | 1/2=3/6 | reduced to | 3/7 |
| | *Full sister* .. .. .. .. | 1/2=3/6 | " | 3/7 |
| | *C. Sister* .. .. .. .. | 1/6=1/6 | " | 1/7 |
| | | 7/6 | | 1 |
| (c) | *2 full sisters* .. .. .. .. | 2/3=4/6 | reduced to | 4/7 |
| | *2 u. brothers* (each taking 1/6) .. .. .. | 1/2=2/6 | " | 2/7 |
| | *Mother* .. .. .. .. | 1/6=1/6 | " | 1/7 |
| | | 7/6 | | 1 |
| (d) | *Husband* .. .. .. .. | 1/2=3/6 | reduced to | 3/8 |
| | *2 full sisters* .. .. .. .. | 2/3=4/6 | " | 4/8 |
| | *Mother* .. .. .. .. | 1/6=1/6 | " | 1/8 |
| | | 8/6 | | 1 |
| (e) | *Husband* .. .. .. .. | 1/2=3/6 | reduced to | 3/8 |
| | *Full sister* .. .. .. .. | 1/2=3/6 | " | 3/8 |
| | *3 u. sister* (each taking 1/9) .. .. .. | 1/3=2/6 | " | 2/8 |
| | | 8/6 | | 1 |
| (f) | *Husband* .. .. .. .. | 1/2=3/6 | reduced to | 2/9 |
| | *2 full sisters* .. .. .. .. | 2/3=4/6 | " | 4/9 |
| | *2 u. sisters and 1 u. brother* (each taking 1/9) .. .. .. | 1/3=2/6 | " | 2/9 |
| | | 9/6 | | 1 |
| (g) | *Husband* .. .. .. .. | 1/2=3/6 | reduced to | 3/9 |
| | *Full sister* .. .. .. .. | 1/2=3/6 | " | 3/9 |
| | *2 u. sisters and 2 u. brothers* (each 1/12) .. .. .. | 1/3=2/6 | " | 2/9 |
| | *Mother* .. .. .. .. | 1/6=1/6 | " | 1/9 |
| | | 9/6 | | 1 |

| | | | | |
|---|---|---|---|---|
| (h) | *Husband* .. .. .. .. | 1/2=3/6 | reduced to | 3/10 |
| | *2 full sisters* .. .. .. .. | 1/3=4/6 | " | 4/10 |
| | *3 u. sisters and 5 u. brothers* (each 1/24) .. .. .. .. | 1/3=2/6 | " | 2/10 |
| | *Mother* .. .. .. .. | 1/6=1/6 | " | 1/10 |
| | | 10/6 | | 1 |
| (i) | *Widow* .. .. .. .. | 1/4=3/12 | reduced to | 3/13 |
| | *2 c. sisters* .. .. .. .. | 2/3=8/12 | " | 8/13 |
| | *Mother* .. .. .. .. | 1/6=2/12 | " | 2/13 |
| | | 13/12 | | 1 |
| (j) | *Husband* .. .. .. .. | 1/4=3/12 | reduced to | 3/13 |
| | *Mother* .. .. .. .. | 1/6=2/12 | " | 2/13 |
| | *2 daughters* .. .. .. .. | 2/3=8/12 | " | 8/13 |
| | | 13/12 | | 1 |
| (k) | *Husband* .. .. .. .. | 1/4=3/12 | reduced to | 3/13 |
| | *Mother* .. .. .. .. | 1/6=2/12 | " | 2/13 |
| | *Daughter* .. .. .. .. | 1/2=6/12 | " | 6/13 |
| | *Son's daughter* .. .. .. .. | 1/6=2/12 | " | 2/13 |
| | | 13/12 | | 1 |
| (l) | *Widow* .. .. .. .. | 1/4=3/12 | reduced to | 3/13 |
| | *Mother* .. .. .. .. | 1/3=5/12 | " | 4/13 |
| | *Full sister* .. .. .. .. | 1/2=6/12 | " | 6/13 |
| | | 13/12 | | 1 |
| (m) | *Widow* .. .. .. .. | 1/4=3/12 | reduced to | 5/15 |
| | *2 full sisters* .. .. .. .. | 2/3=8/12 | " | 8/15 |
| | *2 u. sisters* .. .. .. .. | 1/3=4/12 | " | 4/15 |
| | | 15/12 | | 1 |
| (n) | *Widow* .. .. .. .. | 1/4=3/12 | reduced to | 3/15 |
| | *2 full sisters* .. .. .. .. | 2/3=8/12 | " | 8/15 |
| | *U. sister* .. .. .. .. | 1/6=2/12 | " | 2/15 |
| | *Mother* .. .. .. .. | 1/6=2/12 | " | 2/15 |
| | .. .. .. .. | 15/12 | | 1 |
| (o) | *Husband* .. .. .. .. | 1/4=3/12 | reduced to | 3/15 |
| | *Father* .. .. .. .. | 1/6=2/12 | " | 2/15 |
| | *Mother* .. .. .. .. | 1/6=2/12 | " | 2/15 |
| | *3 daughters* .. .. .. .. | 2/3=8/12 | " | 8/15 |
| | | 15/12 | | 1 |
| (p) | *Widow* .. .. .. .. | 1/4=3/12 | reduced to | 3/17 |
| | *2 full sisters* .. .. .. .. | 2/3=8/12 | " | 8/17 |
| | *2 u. sisters* .. .. .. .. | 1/3=4/12 | " | 4/17 |
| | *Mother* .. .. .. .. | 1/6=2/12 | " | 2/17 |
| | | 17/12 | | 1 |
| (q) | *Wife* .. .. .. .. | 1/8=3/24 | reduced to | 3/27 |
| | *2 daughters* .. .. .. .. | 2/3=16/24 | " | 16/27 |
| | *Father* .. .. .. .. | 1/6=4/24 | " | 4/27 |
| | *Mother* .. .. .. .. | 1/6=4/24 | " | 4/27 |
| | | 27/24 | | 1 |

*Sir.* 29-30.— For cases in which the total of the shares is less than unity, see sec. 66 below.

*C. – Residuaries*

**65. Residuaries.**— If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 54A).

*Illustrations*

[*Note.*— The residue remaining after satisfying the sharers' claims is indicated in the following illustrations thus.]

**No. 1.— Sons and Daughters**

(a) *Son* .. 2/3 ) (as residuaries)
*Daughter* .. 1/3 )

*Note.*— The daughter cannot inherit as a sharer when there is a son. But if the heirs be a daughter and a son's son, the daughter as a *sharer* will take 1/2, and the son's son as a residuary will take the remaining 1/2.

(b) *2 sons* .. .. 4/7 (as residuaries, each son taking 2/7)
*3 daughters* .. .. 3/7 (as residuaries, each daughter taking 1/7)

* (c) *Widow* .. .. 1/8 (as sharer)
*Son* 2/3 of (7/8)=7/12 .. ) (as residuaries)
*Daughter* 1/3 of (7/8)=7/24 .. )

*Note.*—The residue after payment of the widow's share is 7/8.

(d) *Husband* .. .. 1/4 (as sharer)
*Mother* .. .. 1/6 (as sharer)
*Son* 2/3 of (7/12)=7/18 ) (as residuaries)
*Daughter* 1/3 of (7/12)=7/36 )

*Note.*— The residue in the above case is 1—(1/4+1/6)=7/12. If there were two sons and three daughters, each son would take 2/7 of 7/12=1/6, and each daughter 1/7 of 7/12=1/12.

**No. 2—Son's Sons h.l.s. and Son's Daughters h.l.s.**

(e) *Son's son* .. 2/3 ) (as residuaries)
*Son's daughter* 1/3 )

*Note.*— Where there is a son's son, the son's daughter cannot inherit as a sharer but she inherits as a residuary with him. Similarly, a son's son's daughter cannot inherit except as a residuary when there is a son's son's son.

* (f) *2 daughters* .. .. 2/3 (as sharers)
*Son's son* .. .. 1/3 (as residuary)
*Son's son's son* .. .. (excluded by son's son)
*Son's son's daughter* .. .. (excluded both by daughters and son's son. See Tab. of Sh., No.8)

(g) *2 daughters* .. .. 2/3 (as sharers)
*Son's son* 2/3 of (1/3)=2/9 ) (as residuaries)
*Son's daughter* 1/3 of (1/3)=1/9 )

(h) *Daughter* .. .. 1/2 (as sharer)
*Son's son* 2/3 of (1/2)=1/3 ) (as residuaries)
*Son's daughter* 1/3 of (1/2)=1/6 )

*Note.*— There being only one daughter, the son's daughter would have taken 1/6 as *sharer* (see Tab. of Sh., No. 8), if the deceased had not left a son's son. But as the son's son is one of the heirs, the son's daughter can inherit only as a *residuary* with the son's son.

(i) *Son's daughter* .. .. 1/2 (as sharer)
*Son's son's son* .. .. 1/2 (as residuary)

*Note.*— In this case the son's daughter is not precluded from inheriting as a *sharer* for there is no relation who would preclude her from succeeding as a sharer (see Tab. of Sh., No 8 3rd column). And it will be seen on referring to the Table of Residuaries that the only case in which the son's daughter inherits as a residuary with the son's son's son (who is a *lower* son's son) is where she is precluded from succeeding as a sharer [see ill. (k) below].

(j) *Daughter* .. .. 1/2 (as sharer)
*Son's daughter* .. .. 1/6 (as sharer see Tab. of sh., No. 8)
*Son's son's son* 2/3 of (1/3)=2/9 ) (as residuaries)
*Son's son's daughter* 1/3 of (1/3)=1/9 )

*Note.*— There being only one daughter, the son's daughter is entitled to 1/6 as a sharer. Since she is not precluded from inheriting as a sharer, she does not become a residuary with the son's son's son (who is a *lower* son's son).

(k) *2 daughters* .. .. 2/3 (as sharers)
*Son's daughters* 1/3 of (1/3)=1/9 ) (as residuaries)
*Son's son's son* 2/3 of (1/3)=2/9 )

*Note.*— There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a *lower* son's son).

(l) *2 son's daughter* .. .. 2/3 (as sharers)
*Son's son's son* 2/3 of (1/3)=2/9 ) (as residuaries)
*Son's son's daughter* 1/3 of (1/3)=1/9 )

*Note.*— The son's daughters in this case do not inherit as residuaries with the son's son's son, for they are not precluded from inheriting as sharers.

(m) *2 daughters* .. .. 2/3 (as sharers)
*Son's son's son* 2/4 of (1/3)=1/6 )
*Son's daughter* 1/4 of (1/3)=1/12 ) (as residuary)
*Son's son's daughter* 1/4 of (1/3)=1/2 )

*Note.*— There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a lower son's son). The son's son's daughter is entitled to inherit as a residuary with the son's son's son who is an *equal* son's son in relation to her. Both these female relations inherit therefore as residuaries with the son's son's son, each taking 1/12. This illustration presents two peculiar features. The one is that the son's son's daughter, though remoter in degree, shares with the son's daughter. The other is that the son's daughter succeeds as a residuary with a *lower* son's son. If this were not so, the son's son's daughter would inherit to the exclusion of the son's daughter, as result directly opposed to the principle that the nearest of blood must take first (*Sir.* 18-19).

**No 3—Father**

(n) *Father* .. .. 1/6 (as sharer)
*Son (or son's son h.l.s.)* .. .. 5/6 (as residuary)

*Note.*— Here the father inherits as a sharer. See Table of Sh., No. 1.

(o) *Mother* .. .. 1/3 (as sharer)
*Father* .. .. 2/3 (as residuary)

*Note.*— Here the father inherits as a residuary, as there is no child or child of a son h.l.s. See Table of Sh., No. 1.

(p) *Daughter* .. .. 1/2 (as sharer)
*Father* .. .. 1/2 (1/6 as sharer + 1/3 as residuary)

*Note.*— Here the father inherits both as a sharer and residuary. He inherits as a sharer, for there is a daughter, and he inherits the residue 1/3 as a residuary, for there are neither sons nor son's sons h.l.s. The father may inherit *both* as a sharer and residuary. He inherits simply as a sharer

when there is a son or son's son h.l.s [see ill. (n) above]. He inherits simply as a residuary when there are neither children nor children of sons h.l.s [see ill. (o) above]. He is both a sharer and a residuary when there are only daughters or son's daughters (h.l.s), but no sons or son's sons h.l.s. as in the present illustration. The same remarks apply to the true grandfather h.h.s. In fact the father and the true grandfather are the only relatives who can inherit in *both* capacities *simultaneously.*

**No. 4—True Grandfather h.h.s.**

*Note.*— Substitute "true grandfather" for "father" in ills. (n), (o) and (p). The true grandfather will succeed in the same capacity and will take the same share as the father in those illustrations.

**.. 5 & 7—Brothers and Sisters**

| | | | | |
|---|---|---|---|---|
| (q) | *Husband* | .. .. | 1/2 | (as sharer) |
| | *Mother* | .. .. | 1/6 | (as sharer) |
| | *Brother* | 2/3 of (1/3)=2/9 | ) | (as residuaries) |
| | *Sister* | 1/3 of (1/3)=1/9 | ) | |

*Note.*— The sister cannot inherit as a sharer when there is a brother, but she takes the residue with him.

| | | | | |
|---|---|---|---|---|
| | *Full brother (f)* | .. .. | 2/3 | (as residuary) |
| | *Full sister* | .. .. | 1/3 | (as residuary) |
| | *Con. sister* | .. .. .. | | (excluded by full brother) |

The fact of the mutation of the name of the son cannot be conclusive on the point that his sister had lost her right and interest in the property coming down from their father. It is still possible for the sister to contend that the name of the brother had been mutated in a representative capacity, but this fact had to be established by her by cogent evidence; otherwise the fact of the plots having been exclusively mutated in the name of the brother would be strong evidence that the brother get exclusive possession of the property on the death of the father and that the sister did not get such possession and hence lost her rights. 1978 A.W.C. 577, Referred to, [M.P. Mehrotra. J] *Hasan Imdad* v. *Additional Civil Judge*, Azamgarh. 1979 A.W.C. 201.

**No. 6—Full Sisters with Daughters and Son's Daughters**

| | | | | |
|---|---|---|---|---|
| (r) | *Daughter (or* son's daughter h.l.s.) | .. .. | 1/2 | (as sharer) |
| | *Full sister* | .. .. | 1/2 | (as residuary No. 6) |
| | *Brother's son* | .. .. .. | | (excluded by full sister who is a nearer residuary) |

*Note.*— The full sister inherits in *three* different capacitites: (1) as a sharer under the circumstances set out in the Table of Shares; (2) as a residuary with full brother when there is a brother; and, failing to inherit in either of these two capacities (3) as a residuary with daughters, or son's daughters h.l.s. or one daughter and a son's daughter h.l.s. provided there is no nearer residuary. Thus in the present illustration, the sister cannot inherit as a sharer, because there is a daughter (or son's daughter h.l.s). And as there is no brother, she cannot inherit in the second of the three capacities enumerated above. She therefore takes the residue 1/2 as a residuary with the daughter (or son's daughter), for there is no residuary nearer in degree. If this were not so, the brother's son, who is a more remote relation, would succeed in preference to her.

| | | | | |
|---|---|---|---|---|
| (s) | *2 daughters (or* son's daughters h.l.s.) | .. .. | 2/3 | (as sharers) |
| | *Full sister* | .. .. | 1/3 | (as residuary No. 6) |
| (t) | *2 daughters (g)* | .. .. | 2/3 | (as sharers) |
| | *Husband* | .. .. | 1/4 | (as sharer) |
| | *Full sister* | .. .. | 1/12 | (as residuary No. 6) |

*(f) Abdul Karim* v. *Mst. Amat-ul-Habib* (1922) 3 Lah. 391, 70 I.C. 205, ('23) A.L. 121.

*(g) Meherjan* v. *Shajadi* (1899) 24 Bom. 112.

| | | | | |
|---|---|---|---|---|
| | *Father's pat. uncle's son* | .. | .. | (excluded by full sister who is a nearer residuary) |
| (u) | *Daughter* | .. | 1/2 | (as sharer) |
| | *Son's daughter* | .. | 1/6 | (as sharer) |
| | *Full sister* | .. | 1/3 | (as residuary No.6) |
| (v) | *Daughter* | .. | 1/2 | (as sharer) |
| | *Son's daughter* | .. | 1/6 | (as sharer) |
| | *Mother* | .. | 1/6 | (as sharer) |
| | *Full sister* | .. | 1/6 | (as residuary No. 6) |
| (w) | *Daughter* | .. | 1/2 | (as sharer) |
| | *Son's daughter* | .. | 1/6 | (as sharer) |
| | *Husband* | .. | 1/4 | (as sharer) |
| | *Full sister* | .. | 1/12 | (as residuary No. 6) |
| (x) | *Daughter* | .. | 1/2 | (as sharer)=6/12 reduced to 6/13 |
| | *Son's daughter* | .. | 1/6 | (as sharer)=2/12 " 2/13 |
| | *Husband* | .. | 1/4 | (as sharer)=3/12 " 3/13 |
| | *Mother* | .. | 1/6 | (as sharer)=2/12 " 2/13 |
| | *Full sister* | | ____ | (excluded) |
| | | | 13/12 | 1 |

*Note.*— Here the only capacity in which the full sister could inherit is that of a residuary with the daughter and son's daughter. But the residuary succeeds to the residue, *if any*, after the claims of the sharers are satisfied, and in the present case there is no residue. The sum total of the sharers exceeds unity, and the case is one of "Increase."

**No. 8—Consanguine Sisters with Daughters and Son's Daughters h.l.s.**

*Note.*— Consanguine sisters inherit as residuaries with daughters and son's daughters in the absence of full sisters. Substitute "consanguine sister" for "full sister" in ills. (r) to (x), and the shares of the several heirs will remain the same, the consanguine sister taking the place of the full sister. Substitute also in the note to ill. (r) "consanguine brother" for "full brother."

Consanguine brothers and brothers' sons are both residuaries but a consanguine brother excludes a brother's son being a higher residuary. When this happens a consanguine sister gets a share with the consanguine brother as a residuary and the daughter gets 1/2 share as a sharer. *Smt. Kulsumunnissa* v. *Smt. Ahmadi Begum* ('72) A. All. 219.

**Other Residuaries**

| | | | | |
|---|---|---|---|---|
| (y) | *Full sister* | .. | 1/2 | (as sharer) |
| | *C. sister* | .. | 1/6 | (as sharer) |
| | *Mother* | .. | 1/6 | (as sharer) |
| | *Brother's son* | .. | 1/6 | (as residuary) |
| (z) | *Widow* | .. | 1/4 | (as sharer) |
| | *Mother* | .. | 1/3 | (as sharer) |
| | *Pat. uncle* | .. | 5/12 | (as residuary) |
| (aa) | *Full sister (h)* | .. | 1/2 | (as sharer) |
| | *Pat. uncle's sons* | .. | 1/2 | (as residuaries) |

*Sir.* 18-21 and 23-26. Some of the important point involved in the Table of Residuaries are explained in the notes appended to the illustrations.

**Classification of Residuaries.**— All residuaries are related to the deceased *through a male.* The uterine brother and sister are related to the deceased through a female, that is, the mother, and they do not therefore find a place in the List of Residuaries. The *Sirajiyyah* divides residuaries into three classes, *viz.*, (1) residuaries *in their own right:* these are all males comprised in the List

*(h) Mst. Ghulam* v. *Nur Hasan* (1922) 3 Lah. 278. 69 I.C. 1000. ('22) A.L. 406.

of Residuaries; (2) residuaries *in the right of another:* these are the four female residuaries, namely, the daughter as a residuary in the right of the son, the son's daughter h.l.s. as a residuary in the right of the son's son h.l.s., the full sister in the right of the full brother, and the consanguine sister in the right of the consanguine brother; and (3) residuaries *with* others, namely, the full sister and consanguine sister, when they inherit as residuaries *with* daughters and sons' daughter h.l.s. But if regard is to be had to the *order* of succession, residuaries may be divided into four classes, the first class comprising descendants of the deceased, the second class his ascendants, the third the descendants of the deceased's father, and the fourth the descendants of the deceased's true grandfather h.h.s. This classification has been adopted in the Table of Residuaries. The division of Distant Kindred into four classes proceeds upon the same basis.

**Residuaries that are primarily Sharers.**— It will be noticed on referring to the Table of Sharers and Residuaries that there are six sharers who inherit under certain circumstances as residuaries. These are the father and true grandfather h.h.s., the daughter and son's daughter h.l.s., and the full sister and consanguine sister. Of these, only the father and true grandfather inherit in certain events both as sharers and residuaries [see ill. (p) above, and the note thereto]. In fact they are the only relations who can inherit at the same time in a double capacity. The other four, who are all females, inherit either as sharers or residuaries. The circumstances under which they inherit as sharers are set out in the Table of Sharers. They succeed as residuaries and can succeed in the capacity alone, when they are combined with male relations of a parallel grade. Thus the daughter inherits as a *sharer* when there is no son. But when there is a son, she inherits as a *residuary,* and can inherit in that capacity alone; not that when there is a son she is excluded from inheritance, but that in that event she succeeds as a residuary, the presence of the son merely altering the character of her heirship. Similarly, the son's daughter h.l.s. inherits as a residuary when there is an *equal* son's son. And in like manner, the full sister and consanguine sister succeed as residuaries when they co-exist with the full brother and consanguine brother respectively. The curious reader may ask why it is that the said four female relations are precluded from inheriting as *sharers* when they exist with males of parallel grade? The answer appears to be this, that if they were allowed to inherit as sharers under those circumstances, it might be that no residue would remain for the corresponding males (all of whom are residuaries only), that is to say, though the females would have a share of the inheritance, the corresponding males, though of an equal grade, might have no share of the inheritance at all. To take an example: *A* dies leaving a husband, a father, a mother, a daughter, and a son. The husband will take 1/4, the father 1/6. and the mother 1/6. If the daughter were allowed to inherit as a sharer, her share would be 1/2, and the total of the shares would then be 13/12, so that no residue would remain for the son. It is, it seems, to maintain a residue for the males that the said females are precluded from inheriting as sharers when they co-exist with corresponding male relations.

The principle which regulates the successions of full and consanguine sisters as residuaries which daughters and son's daughter h.l.s. is explained in the notes appended to ill. (r).

**Female residuaries.**—There are two more points to be noted in connection with female residuaries, which are stated below.

(1) The female residuaries are four in number of whom two are descendants of the deceased, namely, the daughter and son's daughter h.l.s., and the other two are descendants of the deceased's father, namely, the full sister and consanguine sister. *No other female can inherit as a residuary.*

(2) All the four females inherit as residuaries with corresponding males of a *parallel* grade. But none of these except the son's daughter h.l.s. can succeed as a residuary with the male *lower* in degree than herself. Thus the daughter cannot succeed as a residuary with the son's son, nor the sister with the brother's son; but the son's daughter may inherit as a residuary not only with the son's son but with the son's son's son or other lower son's son: see ill. (m) and the note thereto.

**Principles of succession among Sharers and Residuaries.**— It will be seen from the Table of Sharers and Residuaries that certain relations entirely exclude others from inheritance. This proceeds upon the following principles laid down in the *Sirajiyyah* in the part headed "Of Exclusion":—

(1) *"Whoever is related to the deceased through any person shall not inherit while that person is living"* (*Sir.* 27). Thus the father excludes brothers and sisters. And since uterine brothers and

sisters are related to the deceased through the mother, it must follow that they should be excluded by the mother. A reference, however, to the Table of Shares will show that these relations are not excluded by the mother. The reason is that the mother, when she stands alone, is not entitled to the whole inheritance in one and the *same capacity* as the father would be if he stood alone, but partly as a sharer and partly by "Return" (*Sir.* 27; *Sharifiyyah,* 49). Thus if the father be the sole surviving heir he will succeed to the whole inheritance as a *residuary.* But if the mother be the sole heir she will take 1/3 as *sharer,* and the remaining 2/3 by *Return* (see sec. 53 below). For this reason the mother does not exclude the uterine brother and sister from inheriting with her.

(2) *"The nearest of blood must take"* (*Sir.* 27), that is, the nearer in degree exclude the more remote. The exclusion of the true grandfather by the father, of the true grandmother by the mother, of the son's son by the son, etc., rests upon this principle. These cases may also be referred to the first principle set out above.

It will have been seen that the daughter, though she is nearer in degree, does not exclude the brother's son or his son. Thus if the surviving relations be a daughter and a brother's son, the daughter takes 1/2, and the brother's son takes the residue. The reason is that the daughter in this case inherits as a *sharer,* and the brother's son as a *residuary,* and the principle laid down above applies only as *between relations belonging to the same class of heirs.* The above principle may, therefore, be read thus: *"Within the limits of each class of heirs,* the nearer in degree excludes the more remote."

Again, it will have been seen that the father, though nearer in degree, does not exclude the mother's mother or her mother; nor does the mother exclude the father's father or his father. The reason is that the above principle is to be read with further limitations, which we shall proceed to enumerate. These limitations are nowhere stated in the *Sirajiyyah* or in any other work of authority, but they appear to have been tacitly recognized in the rules governing succession among Sharers and Residuaries.

(3) After stating the two principles mentioned above, the *Sirajiyyah* (p. 28) goes on to say that "a person excluded may, as all the learned agree, exclude others." See ills. (e), (g) and (q) to sec. 50 above, and the note to ill. (e).

There are five heirs that are *always* entitled to some share of the inheritance, and they are in no case liable to exclusion. These are (1) the child, *i.e.,* son or daughter, (2) father, (3) mother, (4) husband, and (5) wife (*Sir.* 27). These are the most favoured heirs, and we shall call them, for brevity's sake, Primary Heirs. Next to these, there are three, namely, (1) child of a son, h.l.s., (2) true grandfather h.h.s. and (3) true grandmother h.h.s. These three are the *Substitutes* of the corresponding primary heirs. The husband or wife can have no substitute. The following two lines indicate at a glance the primary heirs and their substitutes:—

| | | | |
|---|---|---|---|
| *Primary heirs* | Child | Father | Mother |
| *Substitutes* | Child of a son h.l.s. | Tr. G.F. | Tr. G.M. |

The right of succession of the substitutes is governed by the following rules:—

(1) No substitute is entitled to succeed so long as there is the corresponding primary heir. To this there is an exception, and that is when there is no son, but a daughter and a son's daughter in which case the daughter takes 1/2, and the son's daughter (though a substitute) takes 1/6: see Tab. of Sh., No. 8.

(2) The child of a son h.l.s. is always entitled to succeed, when there is no child.

(3) The Tr. G.F. is always entitled to succeed, when there is no father.

(4) The mother's mother is always entitled to succeed, when there is no mother. The father's mother is always entitled to succeed, if there be no mother and no father.

(5) All relations who are excluded by primary heirs are also excluded by their substitutes. Thus full and consanguine sisters and uterine brothers and sisters are excluded by the *child* and the *father.* They are also excluded therefore by the *child of son h.l.s.* and by the true *grandfather (i).*

*(i)* It may here be stated that though, according to the opinion of Abu Hanifa, the true grandfather excludes brothers and sisters whether full or consanguine, he does not exclude them according to the view of Abu Yusuf and Muhammad, but is put to the election as between certain shares (*Sir.* 40-42). But the latter view is not generally adopted, and it is unnecessary to set it out here.

**Residue.**— The son, being a residuary, is entitled to the *residue* left after satisfying the claims of sharers. At the same time it must have been seen that a son is *always* entitled to some share of the inheritance. To enable the son to participate in the inheritance *in every case,* it is necessary that some residue must always be left when the son is one of the surviving heirs, and this, in fact, is always so; for the shares are so arranged and the rules of succession are so framed that when the son is one of the heirs some residue invariably remains. And since in the absence of the father the true grandfather h.h.s. is entitled to some participation in the inheritance, it will be found that in every case where he is one of the surviving heirs some residue is always left. No case of "increase" can therefore take place when these residuaries are amongst the surviving heirs.

**66. Return** *(Radd.)*— If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called "Return" or *Radd.*

*Exception.*— Neither the husband nor the wife is entitled to the *Return* so long as there is any other heir, whether he be a Sharer of a Distant Kinsman. But if there be no other heir, the residue will go to the husband or the wife, as the case may be, by *Return.*

*Illustrations*

(a) A Mahomedan dies leaving a widow as his sole heir. The widow will take 1/4 as sharer, and the remaining 3/4 by *Return. The surplus 3/4 does not escheat to the Crown: Mahomed Arshad* v. *Sajida Banoo (j); Bafatun* v. *Bilaiti Khanum (k); Mir Isub* v. *Isab (l).*

| | | | | |
|---|---|---|---|---|
| (b) | *Husband* | .. | 1/2 | |
| | *Mother* | .. | 1/2 | (1/3 as sharer and 1/6 by Return) |

*Note.*— The husband is not entitled to the *Return,* as there is another sharer, the mother. The surplus 1/6 will therefore go to the mother by *Return.*

| | | | | |
|---|---|---|---|---|
| (c) | *Husband* | .. | 1/4 | |
| | *Daughter* | .. | 3/4 | (1/2 as sharer and 1/4 by Return) |
| (d) | *Wife* | .. | 1/4 | |
| | *Sister* (f. or c.) | .. | 3/4 | (1/2 as sharer and 1/4 by Return) |
| (e) | *Wife* | .. | 1/8 | |
| | *Son's daughter* | .. | 7/8 | (1/2 as sharer and 3/8 by Return) |
| (f) | *Mother* | .. | 1/6 | increased to 1/4 |
| | *Son's daughter* | .. | 1/2 = | 3/6 " 3/4 |
| | | | | 4/6 1 |

*Note.*— In this and in illustrations (g) to (k) it will be observed that neither the husband nor the wife is among the surviving heirs. The rule in such a case is to reduce the fractional shares to a common denominator, and to decrease the denominator of those shares so as to make it equal to the sum of the numerators. Thus in the present illustration, the original shares, when reduced to a common denominator, are 1/6 and 3/6. The total of the numerators is 1+3=4, and the ultimate shares will therefore be 1/4 and 3/4 respectively.

| | | | | | |
|---|---|---|---|---|---|
| (g) | *Father's mother*<br>*Mother's mother* | 1/6 | increased to | 1/5 | (each taking 1/10) |
| | *2 daughters* | 2/3=4/6 | " | 4/5 | |
| | | 5/6 | | 1 | |
| (h) | *Mother* .. | 1/6 | increased to | 1/5 | |
| | *Daughter* | 1/2=3/6 | " | 3/5 | |
| | *Son's daughter* | 1/6 | " | 1/5 | |
| | | 5/6 | | 1 | |

*(j)* (1878) 3 Cal. 702.
*(k)* (1903) 30 Cal. 683.
*(l)* (1920) 44 Bom. 947, 58 I.C. 48.

| | | | | | |
|---|---|---|---|---|---|
| (i) | *Father's mother* | 1/6 | increased to | 1/5 | |
| | *Mother's mother* | | | | |
| | *Full sister* | 1/2=3/6 | " | 3/5 | |
| | *C. sister* | 1/6 | " | 1/5 | |
| | | 5/6 | | 1 | |
| (j) | *Full sister* | 1/2=3/6 | increased to | 3/5 | |
| | *C. sister* | 1/6 | " | 1/5 | |
| | *U. sister* | 1/6 | " | 1/5 | |
| | | 5/6 | | 1 | |
| (k) | *Mother* | 1/6 | increased to | 1/5 | |
| | *Full sister* | 1/2=3/6 | " | 3/5 | |
| | *U. brother* | 1/6 | " | 1/5 | |
| | | 5/6 | | 1 | |
| (l) | *Husband* | 1/4 | | | =4/16 |
| | *Mother* | 1/6 | increased to | 1/4 | of (3/4)=3/16 |
| | *Daughter* | 1/2=3/6 | " | 3/4 | of (3/4)=9/16 |
| | | 11/12 | | | 1 |

*Note:*— In this and in ills. (m) to (r), it will be observed that either the husband or the wife is one of the surviving heirs. Since neither the husband nor the wife is entitled to the Return when there are other sharers, his or her share will remain the same, and the shares of the others will be increased by reducing them to a common denominator, and then decreasing the denominator of the original fractional share so as to make it equal to the sum of the numerators, and multiplying the new fractional shares thus obtained by the residue after deducting the husband's or wife's share. Thus in the present illustration the shares of the mother and daughter, when reduced to a common denominator, are 1/6 and 3/6 respectively. The total of the numerators is 1+3=4, and the new fractional shares will thus be 1/4, and 3/4 respectively. The residue after deducting the husband's share is 3/4, and the ultimate shares of the mother and daughter will therefore be 1/4 of 3/4=3/16 and 3/4 of 3/4=9/16 respectively.

| | | | | | |
|---|---|---|---|---|---|
| (m) | *Wife* | 1/8 | | | =4/32 |
| | *Mother* | 1/6 | increased to | 1/4 | of (7/8)=7/32 |
| | *Daughter* | 1/2=3/6 | " | 3/4 | of (7/8)=21/32 |
| | | 19/24 | | | 1 |
| (n) | *Wife* | 1/8 | | | =5/40 |
| | *Mother* | 1/6 | increased to | 1/5 | of (7/8) = 7/40 |
| | *2 son's daughters* | 4/6 | " | 4/5 | of (7/8)=28/40 |
| | | 23/24 | | | 1 |
| (o) | *Husband* | 1/2 | | | =2/4 |
| | *U.brother* | 1/6 | increased to | 1/2 | of (1/2)=1/4 |
| | *U. sister* | 1/6 | " | 1/2 | of (1/2)=1/4 |
| | | 5/6 | | | 1 |
| (p) | *Wife* | 1/4 | | | =2/8 |
| | *U. brother* | 1/6 | increased to | 1/2 | of (3/4)=3/8 |
| | *U. sister* | 1/6 | " | 1/2 | of (3/4)=3/8 |
| | | 7/12 | | | 1 |
| (q) | *Wife* | 1/4 | | | =4/16 |
| | *Full sister* | 1/2=3/6 | increased to | 3/4 | of (3/4)=9/16 |
| | *C. sister* | 1/6 | " | 1/4 | of (3/4)=3/16 |
| | | 11/12 | | | 1 |
| (r) | *Wife* | 1/4 | | | 1/4 |

| | | | | | |
|---|---|---|---|---|---|
| | *U. brother* | 1/6 | increased to | 1/3 | of (3/4)=1/4 |
| | *U. sister* | 1/6 | " | 1/3 | of (3/4)=1/4 |
| | *Mother* | 1/6 | " | 1/3 | of (3/4)=1/4 |
| | | 9/12 | | | 1 |
| (s) | *Husband* | 1/2 | | | |
| | *Daughter's son* | 1/2 | | | |

*Note:*— The daughter's son belongs to the class of distant kindred. The husband is not therefore entitled to the surplus by Return and the same will go to the daughter's son as a distant kinsman.

| | | |
|---|---|---|
| (t) | *Wife* | 1/4 |
| | *Brother's daughter* | 3/4 |

*Note.*— The brother's daughter belongs to the class of distant kindred. The surplus will therefore go to her, as the wife is not entitled to the Return *(m)*.

*Sir.* 37-40.

*Residuaries for special cause.*— A residuary for special cause is a person who inherits from a freed man by reason of the manumission of the latter *(n)*. According to Mahomedan law proper, if a manumitted slave dies without leaving any residuary heir by religion, the manumitter is entitled to succeed to the residue in preference to the right of the sharers to take the residue by Return (*Sir.* 25-26). But residuaries for special cause have no place in Mahomedan law as administered by the Courts of India since the abolition of slavery in 1843.

*Husband and wife.*— The rule of law as stated in the exception as regards the right of the husband and wife to Return is different from that set out in the *Sirajiyyah.* According to the latter authority, neither the husband nor the wife is entitled to the Return *in any case,* not even if there be no other heir, and the surplus goes to the Public Treasury (*Sir.* 37). "But although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred," and this practice has been adopted by our Courts. See the cases cited in ill. (a) above.

Husband or wife can inherit as sharers and also as distant kindred. But 'return' is not possible as sharers in their case. They are, however, not excluded from the 'return' in their other capacity as distant kindred.

In this case the husband inherited his share as a sharer and the residue in his capacity as a distant kindred by way of 'return'. Baillie's *Digest of Mohammedan Law* p. 287, Babu Ram Verma's *Mahommedan Law,* Tyabji's *Muhammadan Law* p. 892 referred to.

A person capable of inheriting in two capacities is entitled to inherit in both capacities. *Mazirannessa* v. *Khondkar Golam Kibria* ('70) A. Cal. 387.

When a Hanafi Mohammedan dies leaving a husband or wife and there are no residuaries the husband or the wife, as the case may be take their full share and the residue is divided among distant kindred. There is no 'return' for them. (Paragraph 66 of Mulla's *Mahomedan Law* approved).

If there are no other heirs (including distant kindred) the husband or the widow, as the case may be takes the whole estate and the residue does not go to the *bait-ul-mal* (state treasury): *Mst. Soobhanee* v. *Bhetun* Sel. Rep. SDA 346 and *Mahomed Arsad Choudhury* v. *Sajida Banoo* I.L.R. (1878) 3 Cal. 702 referred to. (See Para 67). *Ali Sahib* v. *Hajra Begum* ('68) A. Mys. 351.

*"Return" distinguished from "Increase".*— Return is the converse of Increase. The case of Return takes place when the total of the shares is *less* than unity; the case of Increase, when the total is greater than unity. In the former case the shares undergo a rateable increase; in the latter a rateable decrease.

*Father and true grandfather.*— When there is only one sharer, he succeeds to the whole inheritance, to his legal share as sharer, and to the surplus by Return. When the father is the sole surviving heir, he succeeds to the whole inheritance as a *residuary,* for he cannot inherit as a sharer

*(m)* See *Koonari* v. *Dalim* (1884) 1 Cal. 14. 164.

*(n)* Rumsey's Moohummudan Law of Inheritance,

when there is no child or child of a son h.l.s. (see Table of Sh., No.1). The same remarks apply to the case of the true grandfather when he is the sole surviving heir.

## *D. – Distant Kindred*

**67. Distant Kindred.**— (1) If there be no shares or Residuaries, the inheritance is divided amongst Distant Kindred.

(2) If the only sharer be a husband or wife, and there be no relation belonging to the class of Residuaries, the husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred.

*Sir.* 13. It will have been seen from the preceding section that a husband or wife, though a sharer, does not exclude distant kindred from inheritance when he or she is the sole surviving heir. See sec. 66 and ills. (s) and (t) to that section.

In proceedings for substitution of legal representatives, a residuary has preference over distant kindred. *Sk. Akbar Ali* v. *Smt. Lokman* (1972) 2 C.W.R. 1969.

**68. Four Classes.**— (*1*) Distant Kindred are divided into four classes, namely, (1) descendants of the deceased other than sharers and residuaries; (2) ascendants of the deceased other than sharers and residuaries; (3) descendants of parents other than sharers and residuaries; (4) descendants of ascendants how highsoever other than residuaries. The descendants of the deceased succeed in priority to the ascendants, the ascendants of the deceased in priority to the descendants of parents, and the descendants of parents in preference to the descendants of ascendants.

(*2*) The following is a list of Distant Kindred comprised in each of the four classes:—

I. Descendants of the deceased:—
1. Daughter's children and their descendants.
2. Children of son's daughters h.l.s. and their descendants.

II. Ascendants of the deceased:—
1. False grandfathers h.h.s.
2. False grandmothers h.h.s.

III. Descendants of parents:—
1. Full brothers' daughters and their descendants.
2. Con. brothers' daughters and their descendants.
3. Uterine brothers' children and their descendants.
4. Daughters of full brothers' sons h.l.s. and their descendants.
5. Daughters of con. brothers' sons h.l.s. and their descendants.
6. Sisters' (f., c., or ut.) children and their descendants.

IV. Descendants of *immediate* grandparents (true or false):—
1. Full pat. uncles' daughters and their descendants.
2. Con. pat. uncles' daughters and their descendants.
3. Uterine pat. uncles and their children and their descendants.
4. Daughters of full pat. uncles' son h.l.s and their descendants.
5. Daughters of con. pat. uncles' son h.l.s and their descendants.
6. Pat. aunts (f., c., or ut.) and their children and their descendants.
7. Mat. uncles and aunts and their children and their descendants.

and

descendants of *remoter ancestors* h.h.s. (true or false).

(3) The order of precedence among Distant Kindred in each class and the rules by which such order is determined are given in secs., 69 to 79. They are not given here in order of succession.

*Sir.* 44-46. The *Sirajiyyah* does not enumerate all relations belonging to the class of Distant Kindred, but mentions only some of them. Hence it was thought at one time that "distant kindred" were restricted to the specific relations mentioned in the *Sirajiyyah.* But this view has long since been rejected as erroneous, and it is now firmly established that all relations who are neither sharers nor residuaries are distant kindred *(o)*.

## *Class I of Distant Kindred*

*Difference between doctrines of Imam Muhammad and Abu Yusuf.*— When we come to Distant Kindred, we find that there are two sets of rules for each class, one for determining the order of succession, and the other for determining the shares. In each class we have first to determine which of the relations are entitled to succeed; this is done by applying certain rules which are called Rules of Exclusion. After so doing, we have to assign shares to these relations; this is done with the help of certain other rules.

It is when we come to the class of Distant Kindred that we find a remarkable difference of opinion between Abu Yusuf and Imam Muhammad, the two great disciples of Abu Hanifa. The doctrine of Abu Yusuf is very simple, but unhappily it has not been accepted by the Hanafi Sunnis in India. It is the doctrine of Imam Muhammad that is followed in India and this doctrine is much too complicated *(p)*. Moreover, the doctrine of Imam Muhammad is followed by the author of the *Sirajiyyah,* and apparently by the author of the *Sharifiyyah (q). The Fatawa Alamgiri* does not express any preference either way *(r)*. The High Court of Calcutta has also expressed its preference for the opinion of Imam Muhammad *(s)*. Since the opinion of Abu Yusuf is not followed in India, we have confined ourselves in the following sections to the doctrine of Imam Muhammad, and the difference between the two systems is pointed out in the notes. It must not, however, be supposed that the two systems differ in all respects and at all stages. So long as the intermediate ancestors do not differ in their sexes or blood, there is no difference at all between the two systems. The difference comes in only in those cases where the intermediate ancestors are—

(i) of *different sexes* as where some are males and others in the same generation are females; or where they are

(ii) of *different blood,* as where some are of whole blood and others in the same generation are of half blood.

Abu Yusuf declines to take any notice of the sex or blood of *intermediate ancestors* or, as they are called "roots." According to him, regard should be had to the sex and blood of the *actual claimants,* or, as they are called, "branches." The result is that according to his doctrine, the property is to be divided in the same manner as is done among son's sons and son's daughter as residuaries, that is to say, *per capita,* each male claimant taking a share double that of each female claimant.

According to Imam Muhammad, regard should be had not only to the sex and blood of the actual claimants, but also of the intermediate ancestors.

Where the intermediate ancestors differ in their *sexes*, the two systems differ as to the *shares* to be allotted to the claimants. This difference in the shares manifests itself when claimants are descendants where they be descendants of the deceased as in class I or of brothers and sisters as in class III, or of uncles and aunts as in class IV.

Where the intermediate ancestors differ in *blood,* the two systems differ as to the *order* of succession. This difference in the order of succession manifests itself in class III when the surviving relations happen to be the descendants some of full or consanguine brothers or sisters, and some of uterine brothers or sisters. It cannot manifest itself in class I and class II, for there can be no difference of blood among the intermediate ancestors in those classes. Nor can it manifest itself in

*(o) Abdul Serang* v. *Putee Bibi* (1902) 29 Cal. 738.

*(p) Macnaghten*, p. 9 (*foot-note*); Baillie's Moohummudan Law of Inheritance, p. 92; Rumsey's Moohummadun Law of Inheritance, p. 65; Ameer ali, Vol. II, (5th Ed.), p. 59.

*(q) Sir* 49-50; *Shar.* 95.

*(r)* Baillie, 716, 717.

*(s) Akbar Ali* v. *Adar Bibi* (1931) 58 Cal. 366, 130 I.C. 873, ('31) A.C. 155.

class IV, where the claimants are the descendants of uncles and aunts.

Before we proceed further, we may observe that among *Residuaries* there cannot be any difference of blood or sex among intermediate ancestors as may happen among *Distant Kindred.*

**69. Rules of exclusion.**— The first class of Distant Kindred comprises such of the descendants of the deceased as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following two rules in order [*Sir.* 47]:—

*Rule* (1).— The nearer in degree excludes the more remote.

The fundamental rule of Mohammadan Law regarding succession is that the nearer in degree excludes the more remote. The distribution between the paternal side and the maternal side in the ratio of 2/3 and 1/3 to each side comes into the picture only when the heirs are ascertained and such heirs happen to fall on both the sides but in the task of ascertaining the heirs the fundamental rule is that the nearer in degree excludes the more remote. This makes it clear that children of the uncles and aunts and their grand-children cannot succeed together. [M.P. Mehrotra, J.] *Mohd. Haseeb* v. *Smt Mehrunnissa*, 1978 All. L.J. 558.

*Sir.* 7. Thus a daughter's son or a daughter's daughter is preferred to a son's daughter's daughter. The daughter's son and the daughter's daughter are the nearest distant kindred, and they exclude all other distant kindred.

*Rule* (2).— Among claimants in the same degree of relationship, the children of Sharers and Residuaries are preferred to those of Distant Kindred.

*Sir.* 47. Thus a son's daughter's son, being a child of a sharer (son's daughter) succeeds in preference to a daughter's daughter's son, who is the child of a distant kinswoman (daughter's daughter).

**70. Order of succession.**— The rules set forth in section 69 lead to the following order of succession among Distant Kindred of the first class:—

(1) Daughter's children.
(2) Son's daughters' children.
(3) Daughters' grandchildren.
(4) Sons' sons' daughters' children.
(5) Daughters' great-grandchildren and sons' daughters' grandchildren.
(6) *Other descendants of the deceased in like order.*

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Note that No. (1) belongs to the second generation, Nos. (2) and (3) to the third generation, and Nos (4) and (5) to the fourth generation. No. (2) excludes No.3 by reason of sec. 69, rule (2). For the same reason No. (4) excludes No. (5).

**71. Allotment of Shares.**— After ascertaining which of the descendants of the deceased are entitled to succeed, the next step is to distribute the estate among them. The distribution in this class is governed by the following rules:—

*Rule* (1).— If the intermediate ancestors *do not differ* in their sexes, the estate is to be divided among the claimants *per capita* according to the rule of double share to the male [*Sir.* 47].

*Illustrations*

| | | | |
|---|---|---|---|
| (a) | Daughter's son .. .. | 2/3 | |
| | Daughter's daughter .. .. | 1/3 | |
| (b) | Daughter's son's son .. .. | 2/3 | |
| | Daughter's son's daughter .. | 1/3 | |
| (c) | 2 sons of daughter *A* .. .. | 4/5 | (each taking 2/5) |
| | 1 daughter of daughter *B* .. | 1/5 | |

*Note.*— To divide the estate *per stirpes* is to assign 1/2 to the two sons, and 1/2 to the daughter, that being the portion of their respective parents, *A* and *B*.

(d) 2 sons of a daughter's daughter *A* .. .. 4/6 (each 2/6 or 1/3)
2 daughters of a daughter's daughter *B* .. .. 2/6 (each 1/6)

*Note.*— To divide the estate *per stirpes* is to assign 1/2 to the two sons and 1/2 to the two daughters.

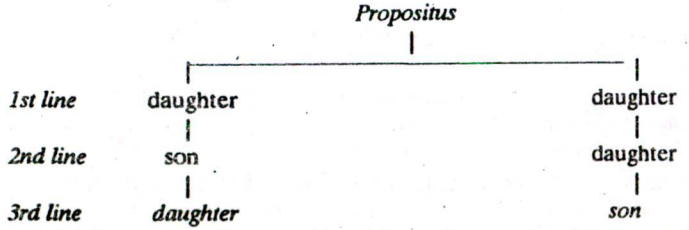
*Doctrine of Abu Yusuf.*— The distribution will be the same according also to Abu Yusuf. In each of the above cases it will be seen that the sexes of the intermediate ancestors are the same. But if the claimants be a daughter's *daughter's* son and a daughter's *son's* daughter, the case is one in which the intermediate ancestors difer in their sexes. In such a case also, according to Abu Yusuf, the rule to be followed is Rule (1), so that the former, being a male, will take 2/3 and the latter, being a female, will take 1/3; the reason being that according to Abu Yusuf regard is to be had solely to the sexes of the *claimants* (see "Difference between doctrines of Imam Muhammad and Abu Yusuf", p.86), According to Imam Muhammad, regard should be had also to the sexes of the *intermediate ancestors,* and the distribution is to be made according to rule (2) below, which, it will be seen, is a distribution *per stirpes.* though not entirely such as in the Shia law.

*Rule* (2).— If the intermediate ancestors *differ* in their sexes, the estate is to be distributed according to the following rules [*Sir.* 48-50]:

(a) The simplest case is where there are only two claimants, the one claiming through one line of ancestors, and the other claiming through another line. In such a case, the rule is to stop at the first line of descent in which the sexes of the intermediate ancestors differ, and to assign to the male ancestor a portion double that of the female ancestor. The share of a male ancestor will descend to the claimant who claims through him, and the share of the female ancestor will descend to the claimant who claims through her, irrespective of the sexes of the claimants.

*Illustrations*

A Mahomedan dies leaving a daughter's son's daughter and daughter's daughter's son, as shown in the following table:—




In this case, the ancestors first differ in their sexes in the second line of descent, and it is at this point that the rule of a double portion to the male is to be applied. This is done by assigning 2/3 to the daughter's son and 1/3 to the daughter's daughter. The 2/3 of the daughter's son will go to his daughter, and the 1/3 of the daughter's daughter will go to her son. Thus we have

daughter's son's daughter .. .. 2/3
daughter's daughter's son .. .. 1/3

According to Abu Yusuf, the shares will be 1/3 and 2/3 respectively.

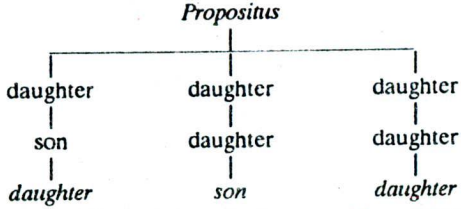
*Note.*— Where the deceased leaves descendants in the *fourth or remoter* generation the rule of the double share to the male is to be applied in *every successive line* in which the intermediate ancestors differ in their sexes. See ill. (b) to sub-rule (c) below.

(b) The next case is where there are three or more claimants, each claiming

through a different line of ancestors. Here again, the rule is to stop at the first line in which the sexes of the intermediate ancestors differ, and to assign to each male ancestor a portion double that of each female ancestor. But in this case the individual share of each ancestor does not descend to his or her descendants as in the preceding case, but the collective share of all the male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants, according to the rule, as between claimants in the same group, of a double portion to the male.

*Illustrations*

(a) A Mahomedan dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table:—




In this case, the ancestors differ in their sex in the second line of descent. In that line we have one male and two females. The rule of the double share to the male is to be applied, first, in this line of descent, so that we have

| | | | |
|---|---|---|---|
| daughter's son | .. | 1/2 | |
| daughter's daughter | .. | 1/4 | 1/2 (collective share of female ancestors). |
| daughter's daughter | .. | 1/4 | |

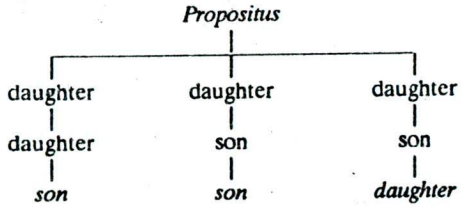
The daughter's son stands alone, and therefore his share descends to his daughter. The two female ancestors, namely the daughter's daughters, from a group, and their collective share is 1/2, which will be divided between their descendants, that is, the daughter's daughter's son and daughter's daughter's daughter in the proportion again of two to one, the former taking 2/3 x 1/2 = 1/3 and the latter 1/3 x 1/2 = 1/6.

Thus we have

| | | |
|---|---|---|
| daughter's son's daughter | .. .. .. .. .. .. | 1/2=3/6 |
| daughter's daughter's son | .. .. .. .. .. .. | 1/3=2/6 |
| daughter's daughter's daughter | .. .. .. .. .. | 1/6=1/6 |

According to Abu Yusuf, the shares will be 1/4, 1/2 and 1/4 respectively.

(b) A Mahomedan dies leaving a daughter's daughter's son, a daughter's son's son and a daughter's son's daughter, as shown in the following table:—




[In the preceding illustration we had one male and two females in the first line in which the sexes differed. In the present case, we have one female and two males in that line.]

First ascertain what is the line of descent in which the sexes first differ. That line is the second line of descent.

Next, assume the relations in that line to be so many children of the deceased and determine

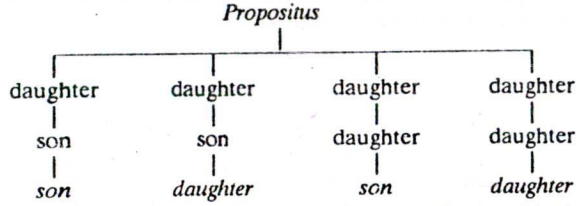
their shares upon that footing. The shares therefore will be, daughter's daughter 1/5, and each daughter's son 2/5, the collective share of the two daughters' sons being 4/5. Assign the 1/5 of daughter's daughter to her son.

Lastly, divide the 4/5 of the two male ancestors between their descendants as if they were children of one ancestor, assigning a double portion to the male descendant. Thus, the daughter's son's son takes 2/3 x 4/5 = 8/15, and the daughter's son's daughter 1/3 x 4/5 = 4/15. Thus we have

| | |
|---|---|
| daughter's daughter's son .. .. .. .. .. .. | 1/5=3/15 |
| daughter's son's son .. .. .. .. .. .. .. | 8/15 |
| daughter's son's daughter .. .. .. .. .. .. | 4/15 |

According to Abu Yusuf, the shares will be 2/5, 2/5 and 1/5 respectively.

(c) A Mahomedan dies leaving a daughter's son's son, a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table:—




Here the ancestors first differ in their sexes in the second line, and in that line we have two males and two females. The collective share of the two males is 4/6, and that of the two females is 2/6. The 4/6 of the daughters' sons will be divided between the daughter's son's son and the daughter's son's daughter, the former taking 2/3 x 4/6 = 8/18, and the latter 1/3 x 4/6 = 4/18. The 2/6 of the daughter's daughters will be divided between the daughter's daughter's son and the daughter's daughter's daughter, the former taking 2/3 x 2/6 = 4/18, and the latter 1/3 x 2/6 = 2/18. Thus we have

| | |
|---|---|
| daughter's son's son .. .. .. .. .. .. .. | 8/18 |
| daughter's son's daughter .. .. .. .. .. .. | 4/18 |
| daughter's daughter's son .. .. .. .. .. .. | 4/18 |
| daughter's daughter's daughter .. .. .. .. .. | 2/18 |

According to Abu Yusuf the shares will be 2/6, 1/6, 2/6 and 1/6 respectively.

*Note.*— When a person dies leaving descendants in the *fourth or remoter* generation, "the course indicated in the [above rule] as to the first line in which the sexes differ is to be followed equally in any lower line; but the descendants of any individual or group, once separated must be kept separate throughout, in other words they must not be united in a group with those of any other individual or group" *(t)*. See ill. (b) to sub-rule (c).

(c) The last case is when there are two or more claimants claiming through the same intermediate ancestor. In such a case, there is this further rule to be applied, namely, to count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants.

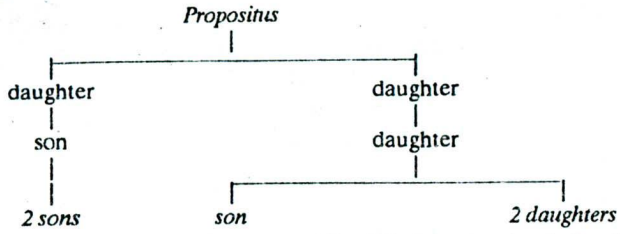
*Illustrations*

(a) A Mahomedan dies leaving 5 great-grandchildren as shown in the diagram on page 69.

Here the ancestors first differ in their sex in the second line, and in that line we have one male and one female. The daughter's son will count as two *males* by reason of his having two descendants among the claimants, and the daughter's daughter will count as *three females* by reason of her having three descendants. Thus we have

| | |
|---|---|
| daughter's son .. .. .. .. .. .. .. | 4/7 |
| daughter's daughter .. .. .. .. .. .. .. | 3/7 |

*(t)* Rumsey's Moohummudan Law of Inheritance, pp. 68-69.




The 4/7 of the daughter's son will go to his two sons. The 3/7 of the daughter's daughter will go to her descendants, the son taking 2/4 x 3/7 = 6/28 and each daughter taking 1/4 x 3/7 = 3/28. Thus we have

| | | |
|---|---|---|
| daughter's son's son .. .. .. .. | 4/7 = 16/28 | (each 8/28) |
| daughter's daughter's son .. .. .. | 6/28 | |
| daughter's daughter's daughter .. .. | 6/28 | (each 3/28) |

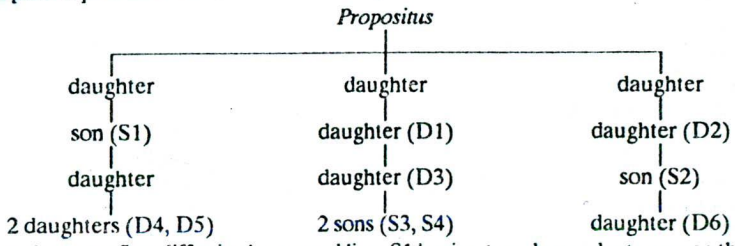
According to Abu Yusuf, the shares will be as follows:—

| | |
|---|---|
| each daughter's son's *son* .. .. .. .. .. .. | 2/8 |
| daughter's daughter's *son* .. .. .. .. .. .. | 2/8 |
| each daughter's daughter's *daughter* .. .. .. .. | 1/8 |

*Note.*— When the deceased leaves descendants in the *fourth* or *remoter* generation, the process indicated in the above rule is to be applied as often as there may be occasion to group the sexes. See the next illustration.

(b) *Note.*— The following cases taken from the *Sirajiyyah* illustrate the combined operation of sub-rules (a), (b) and (c), when the claimants belong to the *fourth* generation. See notes at the end of sub-rule (a) and sub-rule (b), and the note at the end of ill. (a) above.

A Mahomedan dies leaving 5 decendants in the fourth generation as shown in the following diagram [*Sir.* 49]:—




Here the sexes first differ in the second line. S1 having two descendants among the claimants will count as two males or four females. D1 having two such descendants will count as two females. D2 having one such descendant only will count as one female. The estate will therefore be divided into 7 parts as follows:—

S1 = 4/7;
D1 = 2/7
D2 = 1/7 } 3/7 (collective share of female ancestors).

S1 being by himself, his share 4/7 will pass to his two descendants D4 and D5 in equal moieties, each taking 2/7.

The collective share 3/7 of D1 and D2 will descend to their *immediate* descendants D3 and S2; and here D3 having two descendants among the claimants will count as two females, and S2 having one such descendant only will count as one male, or two females. Hence the collective share 3/7 will be divided into 4 parts as follows:—

D3 = 2/4 x 3/7 = 3/14;
S2 = 2/4 x 3/7 = 3/14.

The share of D3 will pass to her two descendants S3 and S4, each taking 3/28. The share of S2 will pass to his descendant D6. The ultimate will therefore be—

D4=8/28; D5=8/28; S3=3/28; S4=3/28; D6=6/28.

According to Abu Yusuf, the shares will be as follows:—

D4=1/7; D5=1/7; S3=2/7; S4=2/7; and D6=1/7.

## *Class II of Distant Kindred*

**72. Order of succession.**— (1) If there be no distant kindred of the first class, the whole estate will devolve upon the mother's father as being the nearest relation among Distant Kindred of the second class [see rule (1) below].

(2) If there be no mother's father the estate will devolve upon such of the false ancestors in the third degree as are connected with the deceased through sharers, namely, the father's mother's father and the mother's mother's father, and these two, the former, as belonging to the paternal side, will take 2/3, and the later, as belonging to the maternal side, will take 1/3 [see rules (2) and (3) below].

Note that the father's mother and the mother's mother are sharers.

(3) If there be none of these, the estate will devolve upon the remaining false ancestors in the third degree, namely, the mother's father's father and the mother's father's mother. And as these two belong to the same (maternal) side, and as the sexes also of the intermediate ancestors are the same, the former, being a male, will take 2/3, and the latter, being a female, will take 1/3 according to sec. 71, rule (1) [*Sir.* 51-52].

Note that the two ancestors mentioned in sub-sec. (3), are both related to the deceased through a distant kinsman, namely, mother's father.

Rules of succession.— Succession among Distant Kindred of the second class is governed by the following rules:—

*Rule* (1).— The nearer in degree excludes the more remote.

*Rule* (2).— Among claimants in the same degree, those connected with the deceased through shares are preferred to those connected through distant kindred.

*Rule* (3).— If there are claimants on the paternal side as well as claimants on the maternal side, assign 2/3 to the paternal side, and 1/3 to the maternal side. Then divide the portion assigned to the paternal side among the ancestors of the father, and the portion assigned to the maternal side among the ancestors of the mother, in each case according to the rules contained in sec. 71.

*Doctrine of Abu Yusuf.*— It is not clear whether when the sexes of the intermediate ancestors differ, there is the same difference of opinion between the two disciples as there is in class I. Anyhow, no such difference can arise until ancestors in the fourth degree are reached.

## *Class III of Distant Kindred*

**73. Rules of exclusion.**— If there be no Distant Kindred of the first or second class, the estate devolves upon Distant Kindred of the third class. This class comprises such of the descendants of brothers and sisters as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following three rules in order [*Sir.* 52-54]:—

*Rule* (1).— The nearer in degree excludes the more remote.

Thus the children of brothers and sisters exclude the grandchildren of brothers and sisters. A sister's son excludes a brother's son's daughter *(u)*.

*(u) Agha Walayat* v. *Mt. Mahbub* ('42) A. Pesh. 83.

*Rule* (2).— Among claimants in the same degree of relationship, the children of Residuaries are preferred to those of Distant Kindred.

Thus a full brother's son's daughter, being the child of a Residuary (full brother's son), is preferred to a full sister's daughter's son who is the child of a distant kinswoman (full sister's daughter). For the same reason, a consanguine brother's son's daughter is preferred to a full sister's daughter's son, though the former is of half blood and the latter of whole blood.

*Rule* (3).— Among claimants in the same degree of relationship, and not excluded by reason of Rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters.

But the descendants of full sisters do not exclude the descendants of consanguine brothers or sisters, and the latter take the residue, if there be any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters.

The descendants of uterine brothers and sisters are not excluded by descendants either of full or consanguine brothers or sisters, but they inherit with them.

Note particularly that the *test of blood* laid down in Rule (3) is not to be applied until after you have applied the test laid down in Rule (2). Among descendants of uncles and aunts these tests are to be applied in the reverse order: See notes to sec. 78 under the head "Rules of succession among descendants" [rules (3) and (4)].

**74. Order of succession.**— The above rules lead to the following order of succession among Distant Kindred of the third class:—

(1) Full brother's daughters, full sisters' children and children of uterine brothers and sisters.

(2) Full sisters' children, children of uterine brothers and sisters, consanguine brothers' daughters and consanguine sisters' children, the consanguine group taking the residue (if any).

(3) Consanguine brothers' daughter, consanguine sisters' children, and children of uterine brothers and sisters.

(4) Full brothers' sons' daughters (children of Residuaries).

(5) Connsanguine brothers' sons' daughters (children of Residuaries).

(6) Full brothers' daughters' children, full sisters' grandchildren, and grandchildren of uterine brothers and sisters.

(7) Full sisters' grandchildren, grandchildren of uterine brothers and sisters, consanguine brothers' daughters' children and consanguine sisters' grandchildren, the consanguine group taking the residue (if any).

(8) Consanguine brothers' daughters' children, consanguine sisters' grandchildren, and grandchildren of uterine brothers and sisters.

(9) *Remoter descendants of brothers and sisters in like order.*

Of the above group each in turn must be exhausted before any member of the next group can succeed.

Among the descendants mentioned above, Nos. (1) to (3) are nephews and nieces, and Nos. (4) to (8) are grandnephews and grandnieces. Note particularly that a full brother's son and a consanguine brother's son are Residuaries; hence it is that they do not find any place in the above list.

*Doctrine of Abu Yusuf.*— According to Abu Yusuf also, there are three rles of exclusion, of which the first two are the same as those laid down in the preceding section. The third rule of Abu Yusuf, which also is to be applied after applying the first two rules, is that descendants of full brothers and sisters exclude those of consanguine brothers and sisters, and the descendants of consanguine brothers and sisters exclude the descendants of uterine brothers and sisters. This

difference arises from the fact that Abu Yusuf would have regard to the "blood" of the *claimants* while Imam Muhammad looks to the "blood" of the *Roots*. The result is that the order of succession according to Abu Yusuf is different from that according to Imam Muhammad.

**75. Allotment of shares.**— After ascertaining which of the descendants of brothers and sisters are entitled to succeed, the next step is to distribute the estate among them, and this is to be done by applying the following rules in order [*Sir.* 53-54]:—

*Rule* (1).— First, divide the estate among the *Roots*, that is to say, among the brothers and sisters (as if they were living) and in so doing treat each brother who has two or more claimants descended from him as so many brothers, and each sister who has two or more claimants descended from her as so many sisters. If there is a residue left after assigning their shares to the *Roots* but there are no Residuaries among the *Roots* [that is, neither a full nor consanguine brother], apply the doctrine of Return as described in section 66. The hypothetical claimants being brothers and sisters, no case of Increase is possible at all [s. 64].

The relations constituting Distant Kindred of the third class are descendants of brothers and sisters, full, consanguine and uterine. The brothers and sisters are therefore the *Roots*. Of these, uterine brothers and sisters always inherit as sharers, and taking 1/6, and two or more 1/3. Full and consanguine brothers always inherit as residuaries. Full sisters inherit as sharers, if there are no full brothers, one taking 1/2, and two or more 2/3; but if there are full brothers, full sisters inherit as residuaries with them. The same remarks apply to consanguine sisters. See Tab. of Sh., Nos. 9 to 12; Tab. of Res, Nos. 5-7.

If the claimants be a uterine brother and a full brother, the former takes 1/6, and the latter the residue 5/6. But if the claimants be two or more descendants of a utering brother, and two or more descendants of a full brother, the hypothetical share of the uterine brother will be 1/3, that being the share of two or more uterine brothers, and the hypothetical share of the full brother will be the residue 2/3.

If the claimants be a uterine sister and a full sister, the former will take 1/6, and the latter 1/2, and the residue 1/3 will go to them by Return, the former taking 1/4 and the latter 3/4. But if the claimants be 5 descendants of a uterine sister, and of descendants of a full sister, the hypothetical share of the uterine sister will be 1/3 that being the share of two or more uterine sisters, and that of the full sister will be 2/3, that being the share of two or more full sisters [see ill. (b) to Rule (3) below].

If the claimants be a full brother and a full sister, they will inherit as Residuaries, the former taking 2/3, and the latter 1/3. But if the claimants be 3 descendants of a full brother, and 4 descendants of a full sister, the full brother will count as three males, that is, 6 females and the full sister will count as 4 females. The property will then be divided into 10 parts, the hypothetical share of the full brother being 6/10, and that of the full sister 4/10 [compare ill. (a) to Rule (3) below]. The position of a consanguine brother and a consanguine sister is similar to that of a full brother and a full sister [compare ill (e) to Rule (3) below].

As to the application of the doctrine of Return to the *Roots*, see ill. (d) to Rule (3) below.

*Rule* (2).— After determining the hypothetical shares of the *Roots*, the next step is to assign its shares to the uterine group. If there be only one claimant in that group, assign 1/6 to him, that being the hypothetical share of his parent. But if there be two or more claimants in that group, whether descended from a single uterine brother, or a single uterine sister, or two or more uterine brothers or sisters, assign 1/3 to them, that being the hypothetical share of their parent or parents, and divide it *equally* among them without distinction of sex.

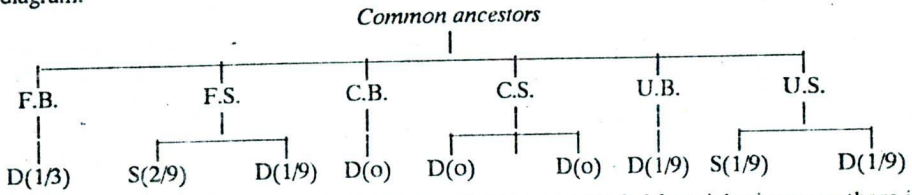
*Rule* (3).— Lastly, divide the hypothetical shares of the full and consanguine brothers and sisters among their respective descendants as among Distant Kindred of the first class [see s. 71].

*Doctrine of Abu Yusuf.*— According to Abu Yusuf, the estate is to be divided among the

claimants *per capita* according to the rule of the double share to the male.

*Illustrations*

(a) A Sunni Mahomedan dies leaving a daughter of a full brother, a son and a daughter of a full sister, a daughter of a consanguine brother, a son and a daughter of a consanguine sister, a daughter of a uterine brother, and a son and a daughter of a uterine sister, as shown in the following diagram:—




The children of the consanguine brother and sister are excluded from inheritance as there is a full brother's daughter [see s. 73, rule (3)]. The estate has therefore to be divided among the children of the full and uterine brothers and sisters.

As there are three claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided among their three descendants equally without distinction of sex, each taking 1/9.

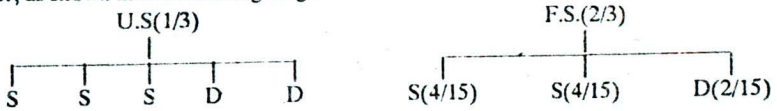
This leaves a residue of 2/3, and this is to be divided in the first instance between the full brother and the full sister as Residuaries, according to the number of claimants descended from each of them. The full brother, having only one descendant counts as one male or two females. The full sister, having two descendants, counts as two females. The residue will therefore be divided into four parts, the full brother taking 2/4 x 2/3 = 1/3, and the full sister also 2/4 x 1/3 = 1/9.

The full brother's share 1/3 will go to his descendant. The full sister's share 1/3 will be divided between her two children according to the rule of the double share to the male as in class I of Distant Kindred, the son taking 2/3 x 1/3 = 2/9, and the daughter taking 1/3 x 1/3 = 1/9.

*Note.*— On failure of children of full brother and sister, the residue will be divided in like manner among the children of consanguine brother and sister.

(According to Abu Yusuf, the whole estate will be divided among the children of the *full* brother and sister according to the rule of the double share to the male, so that the full brother's daughter will take 1/4, the full sister's son 1/2, and her daughter 1/4. On failure of children of the full brother and sister, the estate will be divided in like manner among the children of *consanguine* brother and sister. And on failure of them, it will be distributed in like manner among the children of the *uterine* brother and sister.)

(b) A Sunni Mahomedan dies leaving five children of a uterine sister, and three children of a full sister, as shown in the following diagram:—



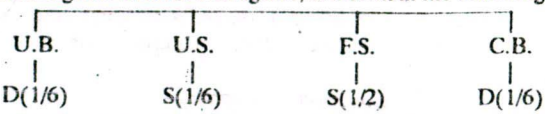

As there are five claimants in the uterine group, the share of the uterine sister is 1/3, and this will be divided among her five children equally without distinction of sex, each taking 1/5 x 1/3 = 1/15.

The full sister, having three descendants, will count as three sisters, and she will take 2/3, that being the share of two or more full sisters [see Tab. of Sh., No. 11]. This will then be divided among her three children according to the rule of the double share to the male as among Distant Kindred of the first class, so that each son will take 2/5 x 2/3 = 4/15, and the daughter will take 1/5 x 2/3 = 2/15.

[According to Abu Yusuf, the whole estate will be divided among the children of the *full* sister according to the rule of the double share to the male, so that each son will take 2/5, and the daughter

will take 1/5].

(c) A Sunni Mahomedan dies leaving a uterine brother's daughter, a uterine sister's son, a full sister's son, and a consanguine brother's daughter, as shown in the following diagram:—




Here there is no descendant of a full brother; therefore the consanguine brother's daughter is not excluded from inheritance, and she will take what remains after the estate is divided among the other claimants.

As there are two descendants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided equally between their children without distinction of sex, each taking 1/6.

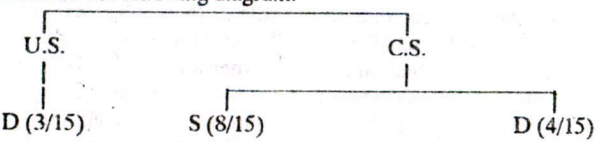
The full sister, having only one descendant, counts as one full sister, and her share therefore is 1/2. This will descend to her son.

This leaves a residue of 1/6 which will go to the consanguine brother as a Residuary. This will descend to his daughter.

[According to Abu Yusuf, the whole estate will go to the *full* sister's son.]

(d) A Sunni Mahomedan dies leaving 2 widows, 4 children of a full sister, and two daughters of a consanguine brother. The High Court of Calcutta held that the shares should be determined according to the system of Imam Muhammad. Following that system, they held that the widows were entitled to 1/4, the full sister's children were entitled to 2/3, and that the residue, that is 1/12, belonged to the consanguine brother's daughters *(v)*.

(e) A Sunni Mahomedan dies leaving a uterine sister's daughter, and a son and a daughter of a consanguine sister, as shown in the following diagram:—




The uterine sister has only one descendant: her share therefore is 1/6. The consanguine sister, having two descendants, counts as two consanguine sisters, and her share therefore is 2/3 [Tab. of Sh., No. 12]. This leaves the residue 1/6, and since there is no Residuary among the *Roots*, the residue will go to the uterine sister and consanguine sister by Return. The hypothetical shares will therefore be—

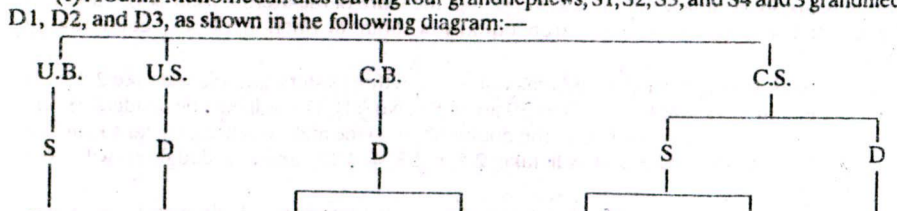
| | | | |
|---|---|---|---|
| uterine sister .. .. .. .. | 1/6=1/6 | increased to | 1/5 |
| consanguine sister .. .. .. .. | 2/3=4/6 | " " | 4/5 |

The uterine sister's share 1/5 will pass to her daughter.

The consanguine sister's share 4/5 will be divided between her son and daughter, the son taking 2/3 x 4/5 = 8/15, and the daughter 1/3 x 4/5 = 4/15.

[According to Abu Yusuf, the whole estate will go to the children of the *consanguine* sister, the son taking 2/3, and the daughter 1/3].

(f) A Sunni Mahomedan dies leaving four grandnephews, S1, S2, S3, and S4 and 3 grandnieces, D1, D2, and D3, as shown in the following diagram:—




*(v) Akbar Ali* v. *Adar Bibi* (1931) 58 Cal. 366, 130 I.C. 873, ('31) A.C. 155.

As there are two claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will pass to D1 and S1, each taking 1/6.

This leaves a residue 2/3, and this is to be divided in the first instance between the consanguine brother and sister as Residuaries according to the number of claimants descended from each of them.

The consanguine brother, having two claimants descended from him, counts as two males or four females. The consanguine sister, having three claimants descended from her, counts as 3 females. The residue will therefore be divided into seven parts, the consanguine brother taking 4/7 x 2/3 = 8/21, and the consanguine sister taking 3/7 x 2/3 = 6/21.

The consanguine brother's share 8/21 will be divided between his two descendants S2 and D2, S2 being a male taking 2/3 x 8/21 = 16/63, and D2 being a female taking 1/3 x 8/21 = 8/63.

The consanguine sister's share 6/21 is to be divided in the first instance between her son and her daughter. The son, having two claimants descended from him, counts as two males or four females. The daughter, having only one claimant descended from her, counts as one female. The son will therefore take 4/5 x 6/21 = 8/35, and the daughter will take 1/5 x 6/21 = 2/35.

The son's share 8/35 will be divided between his two children S3 and D3 according to the rule of the double share to the male, S3 taking 2/3 x 8/35 = 16/105, and D3 taking 1/3 x 8/35 = 8/105.

The daughter's share 2/35 will pass to her son S4.

The shares will therefore be—

D1=1/6; S1=1/6; S2=16/63; D2=8/63; S3=16/105; D3=8/105; and S4=2/35. The total of these shares is unity.

[According to Abu Yusuf, the whole property will be divided among the consanguine groups to the entire exclusion of the uterines so that S2, S3 and S4 will each take 2/8 or 1/4, and D2 and D3 will take 1/8.]

## *Class IV of Distant Kindred*

**76. Order of succession.**— (1) If there are no Distant Kindred of the first, second, or third class, the estate will devolve upon Distant Kindred of the fourth class in the order given below [*Sir.* 56-58].—

(a) Paternal and maternal uncles and aunts *of the deceased*, other than his full and consanguine paternal uncles who are Residuaries.

(b) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the deceased, other than sons h.l.s. of his full and consanguine paternal uncles (they being Residuaries), the nearer excluding the more remote.

(c) Paternal and maternal uncles and aunts *of the parents*, other than the full and consanguine paternal uncles of the father who are Residuaries.

(d) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the parents, other than sons h.l.s. of the full and consanguine paternal uncles of the father (they being Residuaries), the nearer excluding the more remote.

(e) Paternal and maternal uncles and aunts *of the grand-parents*, other than the full and consanguine paternal uncles of the father's father who are Residuaries.

(f) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the grandparents, other than sons h.l.s. of the full and consanguine paternal uncles of the father's father (they being Residuaries), the nearer excluding the more remote.

(g) *Remoter uncles and aunts* and their descendants in like manner and order.

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

*Doctrine of Abu Yusuf.*— The only difference between the two disciples as regards succession of the Distant Kindred of the fourth class is as to the allotment of *shares* among the descendants. See sec. 78 below.

**77. Uncles and aunts.**— To distribute the estate among the uncles and aunts of the deceased, proceed as follows:—

(1) *First,* assign 2/3 to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next.* divide the portion assigned to the paternal side, that is 2/3 of the estate among

(a) full paternal aunts in equal shares; failing them, among
(b) consanguine paternal aunts in equal shares; and, failing them, among
(c) uterine paternal uncles and aunts, according to the rule of the double share to the male.

(3) *Lastly,* divide the portion assigned to the maternal side, that is, 1/3 of the estate, among

(a) full maternal uncles and aunts; failing them, among
(b) consanguine maternal uncles and aunts; and failing them, among
(c) uterine maternal uncles and aunts; according to the rule, in *each* case, of the double share to the male.

(4) If there be no uncle or aunt on the paternal side, the maternal side will take the whole. Similarly, if there be no uncle or aunt on the maternal side, the paternal side will take the whole.

*Sir.* 55-56.

Note that no claimant on the paternal side excludes any claimant on the maternal side, and no claimant on the maternal side excludes any claimant on the paternal side.

Note particularly that full paternal uncles and consanguine paternal uncles are *Residuaries*. Hence we are not concerned with them here.

*Doctrine of Abu Yusuf.*— There is no difference between the two disciples as regards the *succession* of uncles and aunts.

*Illustrations.*

| | | | | |
|---|---|---|---|---|
| (a) | 2/3 | *full paternal aunt* | 2/3=6/9 | |
| | | *Cons. paternal aunt* | | (excluded by *full* paternal aunt) |
| | 1/3 | *Full maternal uncle* | 2/3 x1/3 = 2/9 | |
| | | *Full maternal aunt* | 1/3 x 1/3 = 1/9 | |
| | | *Cons. maternal uncle* | .. .. .. | (excluded by *full* maternal uncle and aunt) |
| (b) | 2/3 | *Cons. paternal aunt* | 2/3 | |
| | | *Ut. paternal uncle* | .. .. .. | (excluded by cons. paternal aunt) |
| | 1/3 | *Full maternal aunt* | | 1/3 |
| (c) | 2/3 | *Ut. paternal uncle* | 2/3 x 2/3 = 4/9 | |
| | | *Ut. paternal aunt* | 1/3 x 2/3 = 2/9 | |
| | 1/3 | *Full maternal uncle* | 2/3 x1/3 = 2/9 | |
| | | *Full maternal aunt* | 1/3 x 1/3 = 1/9 | |

*Note.*— The result would be the same if the deceased left a *uterine* maternal uncle and aunt instead of a *full* maternal uncle and aunt.

(d) 2/3 *Ut. paternal aunt* 2/3 = 6/9
1/3 ( *Cons. maternal uncle* 2/3 x 1/3 = 2/9
*Cons. maternal aunt* 1/3 x 1/3 = 1/9

*Rules of succession.*— The present section is based upon the following rules:—

(1) If there are claimants on the paternal side, together with claimants on the maternal side, the former will take collectively 2/3, and the latter 1/3, and *each side* will then divide its own collective share according to the rule of the double share to the male.

(2) Among claimants on *the same side,* those of the full blood are preferred to those of the half blood, and the consanguine relations are preferred to uterine relations.

*Order of priority.*— The uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together,* and no claimant on either side excludes any claimant on the other side. The order of succession among the uncles and aunts of the deceased is explained in the Table on p. 79.

**78. Descendants of uncles and aunts.**— If there are no uncles or aunts of the deceased, the estate will devolve upon the descendants of uncles and aunts, other than sons how lowsoever of full paternal uncles and consanguine paternal uncles who are Residuaries. To distribute the estate among these relations, proceed as follows (*Sir.* 56-58):—

(1) *First,* assign 2/3 to the paternal side, that is, to descendants of paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to descendants of maternal uncles and aunts, even if there be only one such.

(2) *Next,* divide the portion assigned to the paternal side, that is, 2/3 of the estate, among—

(a) full paternal uncles' daughters; failing them, among
(b) full paternal aunts' children; failing them among
(c) consanguine paternal uncles' daughters; failing them, among
(d) consanguine paternal aunt's children; and failing them, among
(e) children of uterine paternal uncles and aunts, the division among the members of each of the five groups above to be made as among Distant Kindred of the first class [sec s. 71]

Note that (a) excludes (b), the reason being that (a) are children of Residuaries (full paternal uncles), while (b) are children of Distant Kindred (full paternal aunts).

Note also that a full paternal uncle's son and a consanguine paternal uncle's son are Residuaries; hence they do not find any place in the above list.

(3) *Lastly,* divide the portion assigned to the maternal side, that is, 1/3 of the estate, among—

(a) children of full maternal uncles and aunts; failing them, among
(b) children of consanguine maternal uncles and aunts; failing them, among
(c) children of uterine maternal uncles and aunts,

the division among the members of each of the three groups above to be made as among Distant Kindred of the first class [see s. 71].

(4) If there be no children of paternal uncles and aunts, the children of maternal uncles and aunts will take the whole. Similarly, if there be no children of maternal uncles and aunts, the children of paternal uncles and aunts will take

the whole.

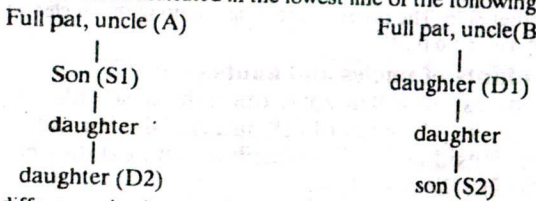
(5) If there be no children either of paternal uncles or aunts or of maternal uncles or aunts, the estate will be divided among their grandchildren on the same principle. Failing grandchildren, it will be divided among remoter descendants, the nearer in degree excluding the more remote.

The order of succession on each side is based on certain rules which are set forth below immediately after the illustrations.

*Doctrine of Abu Yusuf.*— The only difference between the two disciples as to the succession of descendants of uncles and aunts is that, according to Abu Yusuf, the portion assigned to each side is to be divided among the claimants *per capita* according to the rule of the double share to the male.

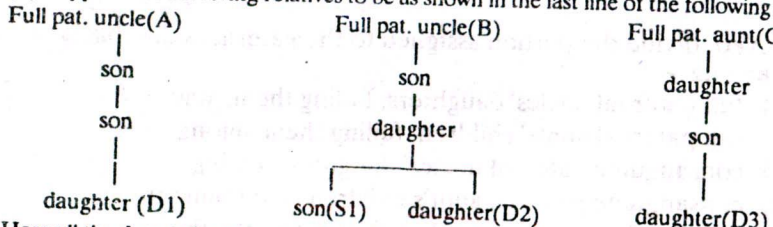
*Illustrations*

(a) The claimants are those indicated in the lowest line of the following diagram:—




Here the first difference in the sex of the ancestors occurs in the second line of descent. Therefore S1 takes 2/3, and D1 takes 1/3. Therefore, the share of D/2 is 2/3 and that of S2 is 1/3. According to Abu Yusuf, D2 being a female will take 1/3, and S2 being a male will take 2/3.

(b) Suppose the surviving relatives to be as shown in the last line of the following diagram:—




Here all the descendants are *equal in degree;* and they are also the same in blood, that is, they are all descendants of uncles and aunts of the *full blood.* But D1 is a child of a Residuary (full paternal uncle's son's son), while S1, D2, and D3 are children of Distant Kindred. Therefore D1 excludes S1, D2, and D3, and she will take the whole estate [see below "Rules of Succession"].

Suppose now that the surviving relations are S1, D2, and D3. In that case the distribution will be as follows:—

Here the sexes differ in the first line. As B has two claimants descended from him, he will count as two males or four females. C, having only one claimant descended from her, will count as one female. The estate will therefore be divided into five parts of which B will take 4/5 and C1/5.

B's share 4/5 will be divided among his two descendants S1 and D2 according to the rule of the double portion to the male, so that S1 will take 2/3 x 4/5 = 8/15, and D2 will take 1/3 x 4/5 = 4/15. C's share 1/5 will descend to D3. Hence S1 = 8/15; D2 = 4/15 and D3 = 1/5 =3/15.

[According to Abu Yusuf, the shares will be 1/2, 1/4 and 1/4 respectively.]

*Rules of Succession Among Descendants.*— To distribute the estate among descendants of uncles and aunts, apply the following rules *in the order in which they are given below:*—

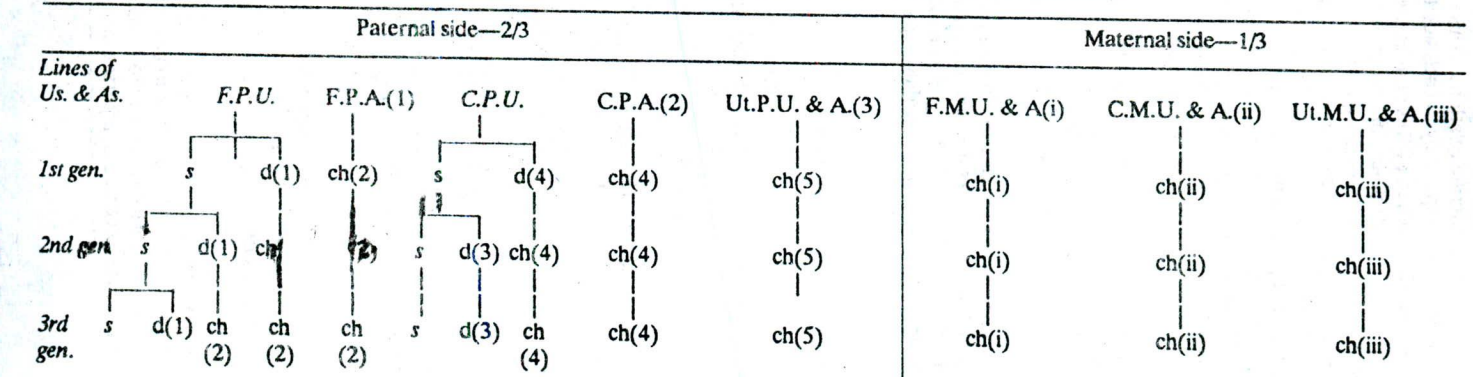
*Rule*(1):— The nearer degree excludes the more remote.

*Rule*(2).— If both the paternal and maternal sides are represented, two-thirds are assigned to the paternal side and one-third to the maternal side.

*Rule*(3).— Among claimants on the same side, those of the whole blood are preferred to those

*Table of uncles and aunts of the deceased and their descendants up to the third generation*

In the following Table F stands for 'full,' C for 'consanguine,' and Ut for 'uterine.' P stands for 'paternal' and M for 'maternal.' U stands for 'uncle' and A for 'aunt.' The small letter *s* stands for 'son,' d stands for 'daughter,' and ch. for 'children.' The italics indicate Residuaries; the rest are Distant Kindred. Note that the maternal side is not excluded by the paternal sides, but succeeds with members of that side:—




*Line of uncles and aunts.*— In this line *F.P.U.* and *C.P.U.* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the case of paternal uncles and aunts, by the Arabic numerals (1), (2) and (3), and in the case of maternal uncles and aunts by the Roman figures (i), (ii), and (iii), see sec. 77.

*1st generation.*— If there be no uncles or aunts, the estate devolves upon their children. Of these, *F.P.U.s* and *C.P.U.s* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown, in the case of children of paternal uncles and aunts, by the Arabic numerals (1), (2), (3), (4) and (5), and in the case of maternal uncles and aunts by the Roman figures (i), (ii) and (iii). No. (1), being the child of a residuary, is preferred to No. 2, though they are both of full blood. For the same reason, No. (3) is preferred to No. (4), though they are both consanguine relations. See sec. 78.

*2nd generation.*— If there be no children of uncles and aunts, whether paternal or maternal, the estate devolves upon the grandchildren of uncles and aunts. Of these, *F.P.U.s* and *C.P.U.s* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the same manner as in the first generation. No. (1), being the child of a residuary, is preferred to the group constituted by No. (2) and No. (2), they being children of Distant Kindred, though they are all of full blood. For the same reason No. (3) is preferred to the group constituted by No. (4) and No. (4), though they are all consanguine relations. Failing No. (1), No. (2) and No. (2) inherit together. Failing No. (3), No. 4 and No. (4) inherit together. Failing these No. (5) succeeds.

*3rd generation.*— This does not require any further explanation. All that requires to be noted is that No. (1) excludes the group constituted by No. (2), No. (2), and No. (2) and No. (3) excludes the group constituted by No. (4), No. (4) and No. (5).

of the half blood, and consanguine relations are preferred to uterine relations. [This rule applies both to the paternal and maternal sides, and it is to be applied separately to each side.]

*Rule*(4).— Among claimants on the paternal side, the children of Residuaries are preferred to those of Distant Kindred. [Thus a full paternal uncle is a Residuary; his daughters, therefore, would be the children of a residuary, and they would be preferred to the daughters of a full paternal aunt who is a Distant Kinswoman. Similarly, a consanguine paternal uncle is a Residuary; his daughters therefore would be daughters of a Residuary, and they would be preferred to the daughters of a consanguine paternal aunt. Again, a full paternal uncle's son is a Residuary; his daughters therefore would be children of a Residuary, and they would be preferred to the daughters of a full paternal uncle's daughter. Upon the same principle the daughters of a consanguine paternal uncle's son would be preferred to the daughters of a consanguine paternal uncle's daughter. This rule cannot apply to relations on the maternal side, because none of the maternal uncles is a Residuary.]

*Rule*(5).— After ascertaining which of the relations are entitled to succeed, the portion assigned to the paternal side is to be distributed among the members of that side as among Distant Kindred of the first class [sec. 71]. The portion assigned to the maternal side is also to be distributed according to the same principle [sec. 71].

The whole of sec. 78 is based on the above rules.

*Order of priority among descendants.*— The descendants of uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together,* and no claimant on either side excludes any claimant on the other side. The Table given on the previous page shows at a glance all uncles and aunts of the deceased and their descendants up to the third generation.

**79. Other Distant Kindred of the fourth class.**— If there are no descendants of uncles and aunts, the estate will devolve upon other Distant Kindred of the fourth class in the order of succession given in sec. 76 above, the distribution among higher uncles and aunts being governed by the principles stated in sec. 77, and that among their descendants by those stated in sec. 78 [*Sir.* 58].

## *E. — Successors unrelated in blood*

**80. Successor by contract.**— In default of Sharers, Residuaries, and Distant Kindred, the inheritance devolves upon the "Successor by contract," that is, a person who derives his right of succession under a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom to which the deceased may become liable.

*Sir.* 13; *Hedaya,* 517. The right of inheritance by reason of *Wala* dealt with in this section is taken away by the Slavery Act, 1843.

**81. Acknowledged kinsman.**— Next in succession is the "Acknowledged Kinsman," that is, a person of unknown descent in whose favour the deceased has made an acknowledgement of kinship, not through himself, but through another.

Such an acknowledgement confers upon the "Acknowledged Kinsman" the right of succession to the property of the deceased, subject to bequests to the extent of the bequeathable third, but it does not invest the person acknowledged with all the rights of an actual kinsman.

*Sir.* 13. The kinship acknowledged must be kinship *through another*, that is, through the deceased's father or his grandfather. Thus a person may acknowledge another to be his brother, for that is kinship through the *father (w)*. But he may not acknowledge another to be his son, for that is kinship through *himself.* The acknowledgement by the deceased of a person as his son or

*(w)* Tagore Law Lectures, 1873, pp. 92-93.

daughter stands upon a different footing altogether and it is dealt with in the chapter on "Parentage".

**82. Universal legatee.**— The next successor is the "Universal Legatee," that is, a person to whom the deceased has left the whole of his property by will.

*Sir.* 13. It is to be noted that the prohibition against bequeathing more than one-third of the net assets exists only for the benefit of the heirs. Hence a bequest of the whole will take effect if the deceased has left no known heir *(x)*.

**83. Escheat.**— On failure of all the heirs and successors above specified, the property of a deceased Sunni Mahomedan escheats to the Government.

*Sir.* 13. The rule of pure Mahomedan law in this respect is different, for according to that rule the property does not devolve upon Government by way of inheritance as *ultimus haeres*, but falls into the *bait-ul-mal* (public treasury) *for the benefit of Mussalmans.*

## *F.— Miscellaneous*

**84. Step-children.**— Step-children do not inherit from step-parents, nor do step-parents inherit from step-children.

See Macnaghten, p. 99. Precedents of Inheritance No. XXI.

**85. Bastard.**— An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and its relations, and they inherit from such child *(y)*. But it has been held that an illegitimate son cannot inherit from the legitimate son of the same mother *(z)*.

*Illustrations*

[A Mahomedan female of the Sunni sect dies leaving a husband and an illegitimate son of her sister. The husband will take 1/2 and the sister's son, though illegitimate, will take the other 1/2 as a distant kinsman, being related to the deceased through his *mother: Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683.]

An illegitimate child does not inherit from its putative father or his relations, nor do they inherit from such child. In *Rahmat Ullah* v. *Maqsood Ahmad (a)* it was held that the "mother's relations" did not include her relations by a subsequent marriage".

**86. Missing persons.**— When the question is whether a Mahomedan is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Under the Hanafi law, a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth. But it has been held by a Full Bench of the Allahabad High Court that this rule is only a rule of *evidence*, and not one of *succession*, and it must therefore be taken as superseded by the provisions of the Indian Evidence Act *(b)*. The present section reproduces, with some verbal alterations, the provisions of sec. 108 of the Indian Evidence Act.

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*(x)* Baillie's Mahomedan Law of Inheritance, p. 19.

*(y)* Tagore Law Lectures, 1873, p. 123.

*(z)* *Rehmat Ullah* v. *Maqsood Ahmad* ('52) A.A. 640.

*(a)* ('52) A.A. 640.

*(b)* *Mazhar Ali* v. *Budh Singh* (1884) 7 All. 297; *Mairaj* v. *Abdul Wahid* (1921) 43 All. 673, 63 I.C. 286, ('21) A.A. 175. See Also *Moola Cassim* v. *Moola Abdul* (1905) 33 Cal. 173, 178, 32 I.A. 177; *Azizul Hasan* v. *Mohammad Faruq* (1934) 9 Luck. 401, 147 I.C. 973, ('34) A.O. 41.

# CHAPTER VIII

## SHIA LAW OF INHERITANCE

*Work of highest authority: Sharaya-ul-Islam.*—The most authoritative text book of the Shia law is *Sharaya-ul- Islam(a)*, the whole of which has been translated into French by M.Query under the title *Droit Musulman.*

**87. Division of heirs.**—The Shias divide heirs into two groups, namely, (1) heirs by consanguinity, that is, blood relations, and (2) heirs by marriage, that is, husband and wife.

**88. Three classes of heirs by consanguinity.**—(1) Heirs by consanguinity are divided into three classes, and each class is subdivided into two sections. These classes are respectively composed as follows:—

I. (i) Parents;
   (ii) children and other lineal descendants h.l.s.
II. (i) Grandparents h.h.s. (true as well as false);
   (ii) brothers and sisters and their descendants h.l.s.
III. (i) Paternal, and (ii) maternal, uncles and aunts, of the deceased, and of his parents and grandparents h.h.s., and their descendants h.l.s.

(2) Of these three classes of heirs, the first excludes the second from inheritance, and the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section [Baillie, II, 276, 280, 285].

As to the distribution of estate among the heirs, see sec. 96 et seq.

*Illustrations*

(a) A Shia Mahomedan dies leaving a daughter's son, a father 's mother, and a full brother.

[In Hanafi law the father's mother as a Sharer will take 1/6, and the full brother as a Residuary will take 5/6; the daughter's son, being a Distant Kinsman, will be entirely excluded from inheritance.]

By Shia law the daughter's son, being an heir of the first class, will succeed to the whole inheritance in preference to the father's mother and the full brother, both of whom belong to the second class of heirs.

(b) A Shia Mahomedan dies leaving a brother's daughter and a full paternal uncle.

[In Hanafi law the full paternal uncle, being a Residuary, will take the whole property to the exclusion of the brother's daughter who is a Distant Kinswoman.]

By Shia law the brother's daughter, being an heir of the second class, will succeed in preference to the full paternal uncle who belongs to the third class of heirs.

(c) A Shia Mahomedan dies leaving a full paternal uncle's son and a mother's father.

[In Hanafi law the full paternal uncle's son, being a Residuary, will succeed to the whole estate to the entire exclusion of the mother's father who is a Distant Kinsman.]

By Shia law the mother's father, being an heir of the second class, will succeed in preference to the full paternal uncle's son, who belongs to the third class of heirs.

(d) A Shia Mahomedan dies leaving (1) a father, (2) a mother, (3) a daughter, (4) a son's son, (5) a brother, and (6) a paternal uncle. Which of these relations are entitled to succeed?

Here the first four relations, belong to the first class of heirs, the fifth belongs to the second class, and the sixth belongs to the third class. The fifth and sixth are therefore excluded from

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*(a) Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 450; *Baker Ali Khan* v. *Anjuman Ara Begum* (1902) 30 I.A. 94, 112, 25 All. 236; *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540, 558; *Aziz Bano* v. *Muhammad Ibrahim* (1925) 47 All. 823, 828, 829, 836, 89 I.C. 690, ('25) A.A. 720.

inheritance. The father and mother belong to the first section of Class 1, and they are both equal in degree. The daughter and son's son belong to the second section, and of these two the daughter, being nearer in degree, excludes the son's son. The only persons therefore entitled to inherit are the father, the mother, and the daughter.

(e) The surviving relations are (1) a grandfather, (2) a grandmother, (3) a great-grandfather, (4) a brother, and (5) a brother's son. Here all the relations belong to the second class of heirs, the first three belonging to the first section of that class and the last two to the second section. The grandfather and grandmother exclude the great-grandfather by reason of the rule that the nearer in each section excludes the more remote. For the same reason the brother excludes the brother's son. The only persons therefore entitled to inherit are the grandfather, the grandmother and the brother.

Note that parents do not exclude children, but inherit with them. If there be no children, parents inherit with grandchildren. Similarly, in the second class, brothers and sisters do not exclude grandparents, but inherit with them. If there be no brothers or sisters, the grandparents inherit with the children of brothers and sisters. In the same way in the third class paternal uncles and aunts do not exclude maternal uncles and aunts, but inherit with them.

The above illustrations exemplify the fundamental distinction between the Sunni and the Shia Law of Inheritance. Under the Sunni law, Distant Kindred are postponed to Sharers and Residuaries (s. 67); under the Shia law, they inherit with them. The Sunnis prefer agnates to cognates: the Shias prefer the nearest kinsman, whether they be agnates or cognates. In fact, the Shia law does not recognize any separate class of heirs corresponding to the "Distant Kindred" of Sunni law. All heirs under the Shia law are either Sharers or Residuaries (s. 90).

**89. Husband and wife.**—The husband or wife is never excluded from succession, but inherits together with the nearest heirs by consanguinity, the husband taking 1/4 or 1/2, and the wife taking 1/8 or 1/4 under the conditions mentioned in the Table of Sharers on page 84.

As to the disability of a childless widow to succeed to her husband's immovable property, see sec. 113 below.

**90. Table of Sharers—Shia Law.**—(1) For the purpose of determining the shares of heirs, the Shias divide heirs into two classes, namely, Sharers and Residuaries. There is no separate class of heirs corresponding to the "Distant Kindred" of Sunni law.

(2) The sharers are nine in number. The Table on page 84 gives a list of Sharers together with the shares assigned to them in Shia law.

(3) The descendants h.l.s. of Sharers are also Sharers.

Of the nine sharers mentioned in the Table, the first two are heirs by affinity. The next three belong to the first class of heirs by consanguinity [s.88], and the remaining four belong to the second class. There are no Sharers in the third class of heirs.

Note that the true grandfather h.h.s., the true grandmother h.h.s., and the son's daughter h.l.s., who are Sharers according to Sunni law, are not Sharers, but Residuaries, according to Shia law.

It is very important to note that the descendants of Sharers are also Sharers. This refers, of course, to the descendants of the (1) daughter, (2) uterine brother, (3) uterine sister, (4) full sister, and (5) consanguine sister. It does not refer to the descendants, if they can be called descendants at all, of the husband, wife, father or mother. The Shia jurists are not concerned with the descendants of these four relations.

**91. Residuaries.**—(1) All heirs other than Sharers are Residuaries.

(2) The descendants h.l.s. of Residuaries are also Residuaries.

Thus sons, brothers, uncles and aunts are all Residuaries. Their descendants, therefore, are also Residuaries. For example, a son's daughter, being a descendant of a Residuary (son), is also a Residuary.

## TABLE OF SHARERS – SHIA LAW [Sec. 90.]

(Baillie, II, 271-276, 381.)

| Sharers | Normal share | | conditions under which the share is inherited | Share as varied by special circumstances |
|---|---|---|---|---|
| | of one | of two or more collectively | | |
| 1. Husband | 1/4 | .. | When there is a lineal descendant. | 1/2 when no such descendant. |
| 2. Wife | 1/8 | 1/8 | When there is a lineal descendant. | 1/4 when no such descendant. |
| 3. Father *(b)* | 1/6 | .. | When there is a lineal descendant. | [If there be no lineal descendant, the father inherits as a residuary.] |
| 4. Mother | 1/6 | .. | (a) When there is a lineal descendant; or<br>(b) When there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father. | 1/3 in other cases. |
| 5. Daughter | 1/2 | 2/3 | When no son. | [With the son she takes as a residuary.] |
| 6. Uterine brother<br>7. *or* siste | 1/6 | 1/3 | When no parent, or lineal descendant. [see s. 88] | |
| 8. Full sister | 1/2 | 2/3 | When no parent, or lineal descendant, or full brother, or father's father. [see ss. 88, 101] | [The full sister takes as a residuary, with the full brother and also with the father's father: see s. 101.] |
| 9. Consanguine sister | 1/2 | 2/3 | When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father. [see ss. 88, 101] | [The consanguine sister takes as a residuary with the consanguine brother and also with the father's father: see s. 101.] |

*Note.*— **The descendants h.l.s. of sharers are also sharers. [sec. 90]**

*(b)* As to the father's *extra* rights as Sharer, see secs. 108 and 110.

Of the nine Sharers mentioned in the Table of Sharers, there are four who inherit sometimes as Sharers, and sometimes as Residuaries. These are the (1) father, (2) daughter, (3) full sister, and (4) consanguine sister. As to the last three, it is to be observed that where any one of them would have, if living, inherited as a Sharer, her descendants would inherit as Sharers, and if she would have inherited as a Residuary, her descendants would inherit as Residuaries (s.95).

**92. Distribution of property.**—(1) If the deceased left only one heir, the whole property would devolve upon that heir, except in the case of a wife. If the only heir be a wife, the older view is that she is entitled to no more than her Koranic share (one-fourth) and the residue (three-fourths) escheats to the Government.

Baillie, II, 262. The reason of the exception in the case of a wife is that she is not entitled to the surplus by *Return*, not even if there be no other heir. If she is the sole heir, she takes 1/4, and the surplus passes to the Imam, now to the Government of India. Ameer Ali is of opinion that there being no machinery now to take charge of the Imam's share, the surplus should pass to the wife [Ameer Ali, 5th ed., Vol. II, p. 123, f.n. (3)]. This opinion has been followed by the Oudh Court *(c)*.

If the only heir be a sharer, e.g., a husband, he takes his Koranic share (one-half) as a Sharer, and the residue by Return. If the only heir be a Residuary, e.g., a brother, he takes the whole estate as a Residuary. As to Sunni law, see sec.66.

(2) If the deceased left two or more heirs, the first step in the distribution of the estate is to assign his or her share to the husband or wife. The next step is to ascertain which of the surviving relations are entitled to succeed, and this is to be done with the help of the rules laid down in sec. 88. The estate (*minus* the share of the husband or wife, if any) is then to be divided among those entitled to succeed according to the rules of distribution applicable to the class to which they belong (ss. 96-110).

Note that the husband or wife, as the case may be, is always entitled to succeed whatever be the class to which the other claimants belong. The husband and wife always inherit as Sharers, their shares being respectively 1/4 and 1/8 when there is a lineal descendant, and 1/2 and 1/4 when there is no lineal descendant. Since there are no lineal descendants either in the second or third class of heirs, it follows that when the husband or wife succeeds with the heirs of the second or third class, he or she takes his or her full share, that is, the husband takes 1/2, and the wife takes 1/4.

**93. Representation.**—(1) The principle of representation has more than one meaning. It may be applied for the purpose of deciding

(a) what persons are entitled to inherit, or

(b) the quantum of the share of any given person on the footing that he is entitled to inherit *(d)*.

(2) Where for purpose (a) the rule of exclusion applies (i.e., the nearer in degree excludes the more remote) it is true both of Sunnis and Shias that the principle of representation is not recognized as qualifying the rule of exclusion. Thus if *A* dies leaving him surviving a son and grandsons by a predeceased son, the grandsons are excluded from inheritance by their uncle. They do not take in their father's stead though he would have been an heir had he survived his father.

(3) But if both sons predeceased the propositus who died leaving three grandsons by one son and two by the other then all the grandsons are heirs. In that case, is the principle of representation to be applied for purpose (b), that is for ascertaining the share of each grandson? This is a further and different

*(c) Abdul Hamid Khan* v. *Peare Mirza* (1935) 10 Luck, 550, 153 I.C. 379, ('35) A.O. 78.

*(d) Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540, 547, 548, 558.

question. If the principle is applied, the grandsons of one branch will have to divide into three what the grandsons of the other branch divide in half.

In the case supposed, Sunni law would not proceed upon any principle of representation in calculating the grandson's shares [see rule (1) in sec.71 *supra*]. The grandsons would each take the same share, i.e., a share ascertained without recourse to the representation principle. The division among them would be *per capita* and not *per stirpes*. As explained in sec.71, however, recognition of the principle of representation for the purpose of calculating shares is not altogether absent from the Sunni law. Rules (2) and (3) therein formulated disclose the influence of the principle in ascertaining the share of each heir in cases to which these rules are applicable.

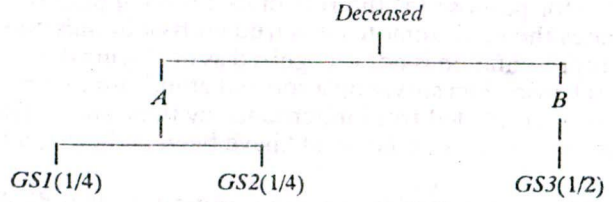
(4) For the limited purpose of calculating the share of each heir—as distinct from the purpose of ascertaining the heirs—the Shia law accepts the principle of representation as a cardinal principle throughout. According to that principle the descendants of a deceased son, if they are heirs, take the portion which he if living would have taken and in that sense represent the son. In the same limited sense, the descendants of a deceased daughter represent the daughter: if they inherit, they take the portion which the daughter if living would have taken. The principle is applicable in the same way to the descendants of a deceased brother, sister or aunt.

(5) The principle of representation is not confined in its operation to descendants only. It applies in the ascending as well as in the descending line. Thus great-grandparents take the portion which the grandparents, if living, would have taken: and the father's uncles and aunts take the portion which the deceased's uncles and aunts if living would have taken.

*When the rule of exclusion applies.*—The rule that the nearer in degree excludes the more remote is a rule applied within the limits of each class of heirs. In Sunni law (see sec. 65 *supra*) it is not without other limitations (see note "Principles of succession among sharers and residuaries" at pp. 58-59 *supra*). But among Shias it applies within each section in all cases without distinction of class or sex. [See sec. 88(2) *supra* and Baillie II, 270]. As the classification of heirs is different in the two systems, the application of the doctrine has different results as regards the persons entitled to inherit. The extent of this divergence is not the subject matter of the present section which is concerned only with the ascertainment of shares under the Shia law, for which purposes the principle of representation is fundamental.

**94. Stirpital succession.**—Succession among descendants in each of the three classes of heirs (s.88) is *per stirpes,* and not *per capita (d1).*

This is repeating in other words the principle of representation described in the last section. Thus suppose a Shia dies leaving two grandsons *GS*1 and *GS*2 by a predeceased son *A* and a grandson *GS*3 by another predeceased son *B*, as shown in the following diagram:—




By Shia law the estate is to be notionally divided first among the two sons *A* and *B*, so that each takes 1/2, *A*'s share 1/2 descends to his two sons *GS*1 and *GS*2, each taking 1/4, *B*'s share 1/2 passes to his son *GS*3. The division, in other words, is according to the stocks, and not according to the *claimants.* By Sunni law *GS*1, *GS*2 and *GS*3 take *per capita,* that is, each takes 1/3 without

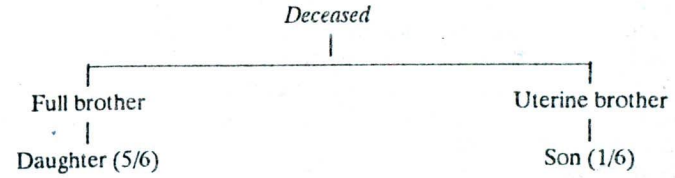
(*d*1) *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540.

reference to the shares which their respective fathers, if living, would have taken. Under the Shia law *A*'s two sons *represent A* and stand in his place, and *B*'s son *represents B* and stands in his place. Under the Sunni law there is no such representation (s.53).

The above is an example of succession *per stirpes* among the descendants of sons. The descendants of daughters, brothers, sisters, uncles, aunts, granduncles and grandaunts also succeed *per stirpes:* see secs. 96, 100, 104 and 105.

**95. Succession among descendants.**—The descendants of a person who, if living, would have taken as a Sharer, succeed as Sharers. The descendants of a person who, if living, would have taken as a Residuary, succeed as Residuaries.

This follows necessarily from the principle of representation described in sec.93. Thus suppose a Shia dies leaving a full brother's daughter and a uterine brother's son as shown in the following diagram:—




The uterine brother, had he survived, would have taken as a Sharer his Koranic share 1/6 [see Table of Sh., No. 6]. The full brother, had he survived, would have taken 5/6 as a residuary. The uterine brother's son, being the descendant of a Sharer, will succeed as a sharer, and *representing* as he does his father, take his father's share 1/6. The full brother's daughter, being the descendant of a Residuary, will succeed also as a Residuary, and *representing* as she does her father, takes her father's portion 5/6. Under the Sunni law, both a full brother's daughter and a uterine brother's son are Distant Kindred of the third class. According to Imam Muhammad, the former would take 5/6 and the latter 1/6 exactly as in Shia law [see s. 75]. According to Abu Yusuf, the former entirely excludes the latter [see notes to sec. 74], "Doctrine of Abu Yusuf".

Having described the mode of distribution in sec. 92, and having explained the principle of representation in sec.93, and its two corollaries in secs. 94 and 95, we proceed to enumerate the special rules by which succession in each of the three classes of heirs mentioned in sec.88 is governed.

## *Distribution among Heirs of the First Class*

**96. Rules of succession among heirs of the first class.**—The persons who are first entitled to succeed to the estate of a deceased Shia Mahomedan are the heirs of the first class *along with* the husband or wife, if any [s.92(2)]. The first class of heirs comprises parents, children, grandchildren, and remoter lineal descendants of the deceased. The parents inherit together with children, and, failing children, with grandchildren, and failing grandchildren,with remoter lineal descendants of the deceased, the nearer excluding the more remote [s.88]. Succession in this class is governed by the following rules:—

(1) *Father.*—The father takes 1/6 as a Sharer if there is a lineal descendant; as a Residuary, if there be no lineal descendant [see Tab. of Sh., No.3].

(2) *Mother.*—The mother is always a Sharer, and her share is 1/6 or 1/3 [see Tab. of Sh., No.4].

(3) *Son.*— The son always takes as a Residuary.

(4) *Daughter.*—The daughter inherits as a Sharer, unless there is a son in which case she takes as a Residuary with him according to the rule of the double share to the male [see Tab. of Sh., No.5].

(5) *Grandchildren.*—On failure of children, the grandchildren stand in the place of their respective parents, and they inherit according to the principle of representation described in secs. 93, 94 and 95, that is to say —

(i) the children of each son take the portion which their father, if living, would have taken as a Residuary and divide it among them according to the rule of the double share to the male;

(ii) the children of each daughter take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary and divide it among them also according to the rule of the double share to the male

(6) *Remoter lineal descendants.*—Succession among remoter lineal descendants is governed by the same principle of representation, that is to say, great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them according to the rule of the double share to the male, and great-great-grand-children take the portion which their respective parents, if living, would have taken, and divide it among them also according to the same rule.

Baillie, II, 276-279.

*Mode of distribution among husband or wife and heirs of the first class—*

*first*, assign his or her share to the husband or wife [see Tab. of Sh., Nos. 1-2];

*next*, assign their shares to such of the claimants as can inherit as Sharers only;

*next*, divide the residue, if any, among the residuaries;

*lastly*, if there be no Residuary, and the sum total of the shares is *less* than unity, apply the Doctrine of Return as stated in secs. 106 to 109 and if the sum total exceeds unity, proceed as stated in sec. 110.

*Illustrations*

(a)

| | | | |
|---|---|---|---|
| *Husband* | .. .. | 1/2 | (as sharer) |
| *Mother* | .. .. | 1/3 | (as sharer) |
| *Father* | .. .. | 1/6 | (as residuary) |

*Note.*—Under the Sunni law, the mother takes 1/3 x 1/2 = 1/6, and the father 1/3 as a residuary [see Tab. of Sh., Sunni law, No.5].

(b)

| | | | |
|---|---|---|---|
| *Wife* | .. .. | 1/4 | (as sharer) |
| *Mother* | .. .. | 1/3 | (as sharer) |
| *Father* | .. .. | 5/12 | (as residuary) |

*Note.*— Under the Sunni law, the mother takes 1/3 x 3/4 = 1/4, and the father 1/2 as a residuary [see Tab. of Sh., Sunni law, No.5].

(c)

| | | | |
|---|---|---|---|
| *Father* | .. .. | 1/6 | (as sharer) |
| *Mother* | .. .. | 1/6 | (as sharer) |
| *Son* | .. .. | 2/3 | (as residuary) |

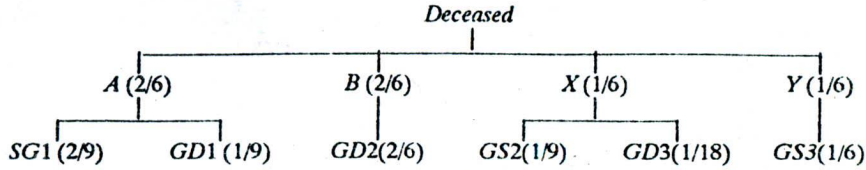
*Note.*— If instead of a son, there was a son's daughter, she would have taken 2/3 as representing her father.

(d)

| | | | |
|---|---|---|---|
| Father | .. .. | 1/6 | (as sharer, because there are daughters) |
| Mother | .. .. | 1/6 | (as sharer) |
| 2 daughters | .. .. | 2/3 | (as sharers) |

*Note.*— The shares would be the same if we substitute daughters' sons or daughters' daughters for daughters.

(e) A Shia dies leaving a grandson *GS*1 and a granddaughter *GD*1 by a predeceased son *A*, a granddaughter *GD*2 by another predeceased son *B*, a grandson *GS*2 and a granddaughter *GD*3 by a predeceased daughter *X*, and a grandson *GS*3 by another predeceased daughter *Y*, as shown in the following diagram:—




Here the two daughters *X* and *Y*, if living, would have taken as residuaries with the two sons *A* and *B* according to the rule of the double share to the male, so that *A* and *B* would each have taken 2/6, and *X* and *Y* would each have taken 1/6.

*A*'s share 2/6 will pass to his son and daughter according to the rule of the double share to the male, so that *GS*1 will take 2/3 x 2/6 = 2/9 and *GD*1 will take 1/3 x 2/6 = 1/9.

*B*'s share 2/6 will pass to his daughter *GD*2.

*X*'s share 1/6 will be divided between her son and her daughter according to the rule of the double share to the male, so that *GS*2 will take 2/3 x 1/6 = 1/9, and *GD*3 will take 1/3 x 1/6 = 1/18.

*Y*'s share 1/6 will pass to her son *GS*3.

The shares will thus be 2/9 + 1/9 + 2/6 + 1/9 + 1/18 + 1/6 = 1.

According to the Hanafi law *GS*1 and *GD*1 and *GD*2 are Residuaries and they exclude *GS*2, *GD*3, and *GS*3 who are Distant Kindred. *GS*1 will take 1/2, and *GD*1 and *GS*2 will each take 1/4.

If in the above case, the deceased left also a wife, the wife will first take her share 1/8, and the remaining 7/8 will be divided among the six grandchildren in the same proportions.

## *Distribution among Heirs of the Second Class*

**97. Rules of succession among heirs of the second class.**—If there are no heirs of the first class, the estate (*minus* the share of the husband or wife, if any) devolves upon the heirs of the second class. The second class of heirs comprises grandparents h.h.s. and brothers and sisters and their descendants h.1.s. [s.88]. The rules of succession among the heirs of this class are different according as the surviving relations are —

(1) grandparents h.h.s., *without* brothers or sisters or their descendants;

(2) brothers and sisters or their descendants, *without* grandparents or remoter ancestors;

(3) grandparents h.h.s., *with* brothers and sisters or their descendants.

The first case is dealt with in sec. 98. The second case is dealt with in secs. 99 and 100. The third case is dealt with in sec.101.

**98. Grandparents h.h.s. without brothers or sisters or their descendants.**—If there are no brothers or sisters, or descendants of brothers or sisters, the estate (*minus* the share of the husband or wife, if any) is to be distributed among grandparents according to the following rules:—

(1) If the deceased left all his four grandparents surviving, the paternal grandparents take two-thirds, and divide it between them according to the rule of the double share to the male, and the maternal grandparents take 1/3, and divide it *equally* between them, as shown below:—

| | | |
|---|---|---|
| 2/3 | Father's father .. .. .. | 2/3 x 2/3=4/9=8/18 |
| | Father's mother .. .. .. | 1/3 x 2/3=2/9=4/18 |
| 1/3 | Mother's father .. .. .. | 1/2 x 1/3=1/6=3/18 |
| | Mother's mother .. .. .. | 1/2 x 1/3=1/6=3/18 |

(2) If there is only one grandparent on the paternal side, he or she takes the entire 2/3. Similarly, if there is only one grandparent on the maternal side, he or she takes the entire 1/3, as shown below:—

| | | | |
|---|---|---|---|
| (a) | Father's father | .. .. | 2/3 |
| | Mother's father | .. .. | 1/3 (each taking 1/6) |
| | Mother's mother | .. .. | |
| (b) | Father's father | 2/3 | 2/3 x 2/3=4/9 |
| | Father's mother | | 1/3 x 2/3=2/9 |
| | Mother's mother | 1/3 | =3/9 |
| (c) | Father's father | .. .. .. | 2/3 |
| | Mother's mother | .. .. .. | 1/3 |

(3) If there are no grandparents, the property will devolve according to the same rules upon remoter ancestors of the deceased, the nearer excluding the more remote.

Baillie, II, 281, 283.

**99. Brothers and sisters, without any ancestor.**— If the deceased left no ancestors, but brothers and sisters of various kinds, the estate (*minus* the share of the husband or wife, if any) will be distributed among them according to the same rules as those in Hanafi law. The said rules are as follows:—

(i) Brothers and sisters of the full blood exclude consanguine brothers and sisters.

(ii) Uterine brothers and sisters are not excluded by brothers or sisters either full or consanguine, but they inherit with them, their share being 1/3 or 1/6 according to their number [see Tab. of Sh., Nos. 6 and 7].

(iii) Full brothers take as Residuaries, so do consanguine brothers.

(iv) Full sisters take as Sharers [see Tab. of Sh., No. 8], unless there be a full brother in which case they take as Residuaries with him according to the rule of the double share to the male. Consanguine sisters also take as Sharers [see Tab. of Sh., No.9] unless there be a consanguine brother with them in which case they take as Residuaries with him according to the same rule.

Baillie, II, 280.

*Illustrations*

*Note.*—The shares of the several heirs in the following illustrations are the same both in Sunni and Shia law. The illustrations are given to familiarize the student with combinations of heirs that are common in Shia law:—

| | | | | |
|---|---|---|---|---|
| (a) | *Husband* | .. .. | 1/2 | (as sharer) |
| | *Full (or con.) sister* | .. .. | 1/2 | (as sharer) |
| (b) | *Wife* | .. .. | 1/4 | (as sharer) |
| | *Full brother* | .. .. | 3/4 | (as residuary) |
| (c) | *Husband* | .. .. | 1/2 | (as sharer) |
| | *Full brother* | .. .. | 2/3x(1/2)=1/3 | (as residuaries) |
| | *Full sister* | .. .. | 1/3x(1/2)=1/6 | |
| (d) | *Wife* | .. .. | 1/4 | (as sharer) |
| | *Ut. brother* | .. .. | 1/6 | (as sharer) |
| | *Cons. brother* | .. .. | 2/3 x (7/12) = 7/18 | (as residuaries) |
| | *Cons. sister* | .. .. | 1/3 x(7/12) =7/36 | |

**100. Descendants of brothers and sisters, without any ancestor.**—If there are no brothers or sisters of any kind, and no ancestors, but there are children of bothers and of sisters, the estate (*minus* the share of the husband or wife, if any) will devolve upon them according to the principle of representation described in secs. 93, 94 and 95, that is to say—

(1) The children of each full or consanguine brother will take the portion which their father, if living, would have taken as a Residuary, and they will divide it among them according to the rule of the double share to the male; and the children of each full or consanguine sister will take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary, and they will divide it among them according

also to the rule of the double share to the male.

(2) The children of each uterine brother will take the portion which their father, if living, would have taken as a Sharer, and they will divide it *equally* among them; and so will the children of each urterine sister.

(3) If there are no children of brothers or sisters, the estate will devolve upon the grandchildren of brothers and sisters according to the principle of representation, that is to say, the grandchildren of full or consanguine brothers and sisters take the portion which their *respective* parents, if living would have taken and divide it among them according to the rule of the double share to the male, and the grandchildren of uterine brothers and sisters take the portion which their *respective* parents, if living, would have taken, and divide it equally among them without distinction of sex.

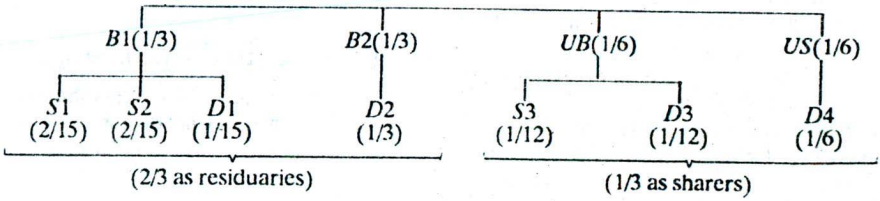
Baillie, II, 284.

*Illustrations*

| | | | | |
|---|---|---|---|---|
| (a) | *Husband* | .. .. | 1/2 | (as sharer) |
| | *Ut. brother's daughter* | .. .. | 1/3 | (as sharer, being her father's portion) |
| | *Full brother's daughter* | .. .. | 1/6 | (as residuary, being her father's portion) |
| | *Cons. brother's son* | .. .. | | (excluded by *full* brother's daughter) |

(b) Suppose the claimants to be as shown in the second line of the following diagram, that is o say, —

two sons and a daughter of a full brother, *B*1;
a daughter of another full brother, *B*2;
a son and a daughter of a uterine brother, *UB*;
a daughter of a uterine sister, *US;*




First, assign their respective shares to the brothers and sisters thus:—

| | | | |
|---|---|---|---|
| *UB* and *US* | .. .. | 1/3 | (as sharers), each taking 1/6; |
| *B*1 and *B*2 | .. .. | 2/3 | (as residuaries), each taking 1/3; |

Next assign portions to their children thus:—

*US*'s share 1/6 will go to her daughter *D*4;
*UB*'s share 1/6 will be divided *equally* between *S*3 and *D*3, each taking 1/12;
*B*2's share 1/3 will go to his daughter *D*2;
*B*1's share 1/3 will be divided among his two sons and his daughter according to the rule of the double share to the male, so that *S*1 will take 2/5x1/3 = 2/15, *S*2 will also take 2/15, and *D*1 will take 1/5 x 1/3 = 1/15.

The shares will thus be 2/15+2/15+1/15+1/3+1/12+1/12+1/6 =1.

Suppose that in the above case the children of the brothers and sisters had all predeceased the propositus, and that *S*1 had left a son and a daughter, that *S*3 also had left a son and a daughter, and the remaining five nephews and nieces had each left a son. In that case the share of *S*1, that is, 2/15, would be divided between his son and his daughter according to the rule of the double share to the male, the son taking 2/3 x 2/15 = 4/45, and the daughter 1/3 x 2/15 = 2/45. The share of *S*3, that is, 1/12, would be divided *equally* between his son and daughter, they being descendants of a *uterine* brother, so that each would take 1/24. The sons of *S*2, *D*1, *D*2, *D*3, and *D*4, would take their respective parents' portion.

**101. Grandparents and remoter ancestors with brothers and sisters or their descendants.**—(1) If the deceased left grandparents and also brothers or sisters, the estate (minus the share of the husband or wife, if any) is to be distributed among grandparents and brothers and sisters, according to the following rules:—

(a) A paternal grandfather counts as a full or consanguine brother, and a paternal grandmother counts as a full or consanguine sister.

(b) A maternal grandfather counts as a uterine brother, and a maternal grandmother counts as a uterine sister.

(2) On failure of grandparents, the remoter ancestors of the deceased stand in the place of the grandparents through whom they are respectively connected with the deceased. On failure of brothers or sisters, their descendants stand in the place of their respective parents.

Baillie, II, 281, 391-392; Wilson, Anglo-Muhammadan Law, sec 468.

The effect of the above rules is that when among heirs of the second class you find a single brother or sister, full, consanguine or uterine, what you have to do is to substitute for grandparents so many brothers and sisters according to the above rules, and then assign shares to grandparents as if they were so many brothers and sisters, as is done in the following illustrations:—

| | | | |
|---|---|---|---|
| (a) | *Paternal grandfather* (=full brother) | 2/3 | |
| | *2 Full sisters* | 1/3 | |

*Note.*—Here the full sister takes as a residuary with the paternal grandfather, the latter being counted as a full brother.

| | | | |
|---|---|---|---|
| (b) | *Paternal grandfather* (= consanguine brother) | 2/3 | |
| | *Consanguine sister* | 1/3 | |

*Note.*—Here the consanguine sister takes as a residuary with the paternal grandfather, the latter being counted as a consanguine brother.

| | | | |
|---|---|---|---|
| (c) | *Uterine brother* | 1/3 | (each taking 1/6) |
| | Maternal grandmother (=ut. sister) | | |
| | *2 Full sisters* | 2/3 | (as sharers) |

*Note.*—Here the maternal grandmother counts as a uterine sister, so that the case is the same as if we had a uterine brother and a uterine sister; these take 1/3 between them as sharers.

| | | | | |
|---|---|---|---|---|
| (d) | *Full brother* | | 4/18 | 2/3 as residuaries. |
| | *Full sister* | | 2/18 | |
| | *Father's father* | (=full brother) | 4/18 | |
| | *Father's mother* | (=full sister) | 2/18 | |
| | *Mother's father* | (=ut. sister) | 1/6 | 1/3 as sharers. |
| | *Mother's mother* | (=ut. sister) | 1/6 | |

*Note.*— First substitute brothers and sisters for grandparents, so that we have 2 full brothers, 2 full sisters, one uterine brother and one uterine sister. The uterine brother and sister take 1/3 between them as sharers. The residue 2/3 is to be divided between full brothers and 2 full sisters as residuaries according to the rule of the double share to the male. Each brother therefore takes 2/6 x 2/3 = 4/18, and each sister 1/6 x 2/3 = 2/18. The result would be the same if instead of a full brother and a full sister in the above case, there were a consanguine brother and a consanguine sister.

| | | | | |
|---|---|---|---|---|
| (c) | *Uterine brother* | = | 1/9 | 1/3 as sharers. |
| | *Uterine sister* | = | 1/9 | |
| | *Mother's mother* | (=uterine sister) = | 1/9 | |
| | Father's father | (=con. brother) = | 1/3 | 2/3 as residuaries. |
| | Father's mother | (=con. sister) = | 1/6 | |
| | Con. sister | = | 1/6 | |

*Note.*— Substitute "uterine sister" for "mother's mother," so that we have one uterine brother

and two uterine sisters. Next as there is a *consanguine* sister, substitute "consanguine brother" for "father's father" and " consanguine sister" for " father's mother." The uterine brother and the two uterine sisters take collectively 1/3 as sharers. The residue 2/3 is to be divided between one consanguine brother and two consanguine sisters as residuaries according to the rule of the double share to the male. The brother therefore takes 2/4 x 2/3 = 1/3, and each sister takes 1/4 x 2/3-1/6.

| | | | |
|---|---|---|---|
| (f) | *Husband* .. .. | 1/2 | |
| | *Father's father* (=full brother) / *Full brother* | 1/2 | as residuaries, each taking 1/4 |
| (g) | *Wife* .. .. | 1/4 | |
| | *Uterine sister* .. .. / *Uterine brother* .. .. / *Maternal grandfather* .. .. (=ut. brother) .. .. | 1/3 | as sharers, each taking 1/9 |
| | *Paternal grandfather* .. .. | 5/12 | (as residuary) |

*Note.*—In the above case, it is all the same whether you count the paternal grandfather as a full brother or as a consanguine brother; in either case he takes as a residuary.

| | | | |
|---|---|---|---|
| (h) | *Full brother's son* .. .. | 1/2 | (being his father's share) |
| | *Father's father* (=full brother) | 1/2 | |

*Note.*—The above illustration is taken from Baillie, II, pp. 327-328, 392.

## *Distribution among Heirs of the Third Class*

**102. Order of succession among heirs of the third class.**—(1) If there are no heirs of the first or second class, the estate (*minus* the share of the husband or wife, if any ) devolves upon the heirs of the third class in the order given below:—

(1) Paternal and maternal uncles and aunts of the deceased.

(2) Their descendants h.l.s., the nearer in degree excluding the more remote.

(3) Paternal and maternal uncles and aunts of the parents.

(4) Their descendants h.l.s., the nearer in degree excluding the more remote.

(5) Paternal and maternal uncles and aunts of the grandparents.

(6) Their descendants h.l.s., the nearer in degree excluding the more remote.

(7) Remoter uncles and aunts and their descendants in like order.

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

*Exception.*—If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former though he belongs to group (2), excludes the latter who is nearer and belongs to group (1).

Baillie, II, 285-286, 329-332.

*Exception to sub-sec.* (2). —The Shias are the followers of Ali. Ali was a cousin of the Prophet. He was also the son-in-law of the Prophet, having been married to his favourite daughter Fatima. The Shias maintain that on the death of the Prophet the Caliphat (successorship to the Prophet ) ought to have gone first to Ali, on the ground that he was the *nearest male heir* of the Prophet. But the Prophet had also left a consanguine paternal uncle (named Abbas), and Ali was but a cousin of the Prophet, being the son of a full paternal uncle (Abu Talib) of the Prophet. Ali therefore could not be the *nearest* male heir, unless the son of a full paternal uncle was entitled to succeed in preference to a consanguine uncle. To uphold, however, the claim of Ali and that of the lineal descendants of the Prophet through Fatima, the Shias had to hold that the son of a full paternal uncle was entitled to succeed in preference to a consanguine paternal uncle, and this accounts for

the exception to sub-sec. (2) above.

*No sharers in the third class of heirs.*—The heirs of the third class are all Residuaries. There is no sharer among them as will be seen on referring to the Table of Sharers given above.

**103. Uncles and aunts.**—To distribute the estate among uncles and aunts proceed as follows:—

(1) *First*, assign 2/3 of the estate to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side (that is 2/3 of the estate) among the paternal uncles and aunts exactly as if they were brothers and sisters of the deceased, that is to say:—

(i) assign to uterine paternal uncles and aunts—

(a) if there be two or more of them, 1/3 to be *equally* divided among them;

(b) if there be only one of them, 1/6;

(ii) divide the remainder among full paternal uncles and aunts according to the rule of the double share to the male, and, *failing them*, among consanguine paternal uncles and aunts according to the same rule.

(3) *Lastly*, divide the portion assigned to the maternal side, among the maternal uncles and aunts as follows:—

(i) assign to uterine maternal uncles and aunts—

(a) if there be two or more of them, 1/3 to be *equally* divided among them;

(b) if there be only one of them, 1/6;

(ii) divide the remainder *equally* among full maternal uncles and aunts, and, *failing them*, among consanguine maternal uncles and aunts.

(4) If there be no uncle or aunt on the maternal side, the paternal side takes the whole. Similarly, if there be no uncle or aunt on the paternal side, the maternal side takes the whole.

Baillie, II, 285, 286, 329.

*Note.*—In working out examples, proceed in the order given in this section.

| | | | | | |
|---|---|---|---|---|---|
| (a) | 2/3 | *Full pat. uncle* | .. | 5/6 x 2/3 = 5/9 | |
| | | *Cons. pat .uncle* | .. | =0 | (excluded by *full* pat. uncle) |
| | | *Ut. pat. uncle* | .. | 1/6 x 2/3 = 1/9 | |
| | 1/3 | *Full mat.uncle* | .. | 5/6 x 1/3 = 5/18 | |
| | | *Cons. mat.uncle* | .. | =0 | (excluded by *full* pat. uncle) |
| | | *Ut. mat. uncle* | .. | 1/6 x 1/3 = 1/18 | |
| (b) | 2/3 | *Full pat.aunt* | . | 2/3 | |
| | | *Cons. pat.uncle* | .. | | (excluded by *full* pat. aunt) |
| | 1/3 | *Ut. mat. aunt* | .. | 1/3 | |
| (c) | | *Full pat. uncle* | .. .. | 2/3 | (takes a double share, being a male) |
| | | *Full pat. aunt* | .. .. | 1/3 | |
| (d) | | *Full mat. uncle* | .. .. | 5/6 | |
| | | *Ut. mat. uncle* | .. .. | 1/6 | (being only one) |
| (e) | 2/3 | *Cons. pat. uncle* | .. | 5/6 x 2/3 =5/9 | |
| | | *Ut. pat. uncle* | .. | 1/6 x 2/3 = 1/9 | |
| | 1/3 | *Ut. mat. aunt* | .. .. | 1/3 | |

(f)

| | | | |
|---|---|---|---|
| 2/3 | *Full pat. uncle* .. | 2/3 x 2/3 = 4/9 | 2/3 x 4/9 = 8/27 |
| | *Full pat. aunt* .. | | 1/3 x 4/9 = 4/27 |
| | *4 Ut. pat. uncles* .. | 1/3 x 2/3 = 2/9 | 1/6 x 2/9 = 1/27 |
| | *2 Ut. pat. aunts* .. | each taking | |
| 1/3 | *1 Ut. mat. uncle* | | 1/2 x 1/3 = 1/6 |
| | *1 Ut. mat. aunt* | | 1/2 x 1/3 = 1/6 |

8/27+4/27+2/9+1/6+1/6=1

(g)

| | |
|---|---|
| *Full mat. uncle* .. | 1/2 |
| *Full mat. aunt* .. | 1/2 |

*Note.*—Maternal uncles and aunts take equally without distinction of sex.

(h)

| | |
|---|---|
| *Ut. mat. uncle*, *Ut. mat. aunt* | 1/3, each taking 1/6 |
| *Full mat. uncle*, *Full mat. aunt* | 2/3, each taking 1/3 |

*Note.*— The above result is in accordance with rule (3) above, namely, that the full maternal uncles and aunts take equally without distinction of sex. This proposition, however, is not free from doubt. There is another possible view, namely, that full maternal uncles and aunts take equally only if there are no uterine maternal uncles and aunts [as in ill. (g)], and that if there be any such uncles or aunts (as in the above illustration), they take according to the rule of the double share to the male. According to this view the full maternal uncle in the above illustration is entitled to 2/3 x2/3 = 4/9, and the full maternal aunts to 1/3 x 2/3 = 2/9. The same remarks apply to consanguine maternal uncles and aunts. See Baillie, II, pp. 285, 286, and Querry's Translation of the *Sharaya-ul-Islam*, ss.214-219; Ameer Ali, 5th ed., Vol.II, pp. 119-120.

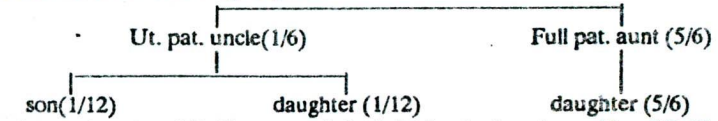
**104. Descendants of uncles and aunts.**—If there are no uncles or aunts of any kind, children of deceased uncles and aunts take the portion of their respective parents according to the principle of representation described in secs.80,81, and 82 the children of each full or consanguine paternal uncle or aunt dividing their parents' share among them according to the rule of the double share to the male, and the children of each of the remaining uncles and aunts, that is, of uterine paternal uncles and aunts, and of maternal uncles and aunts, whether full, consanguine or uterine, dividing their parents' share *equally* among them.

If there are no children of uncles or aunts, the grandchildren of uncles and aunts take the portion of their respective parents according to the same principles.

Baillie, II, 287

*Note.*—In working out examples, first ascertain the hypothetical shares of uncles and aunts.

(a) The surviving relations are—
a son and a daughter of a uterine paternal uncle, and a daughter of a full paternal aunt, as shown in the following diagram:—



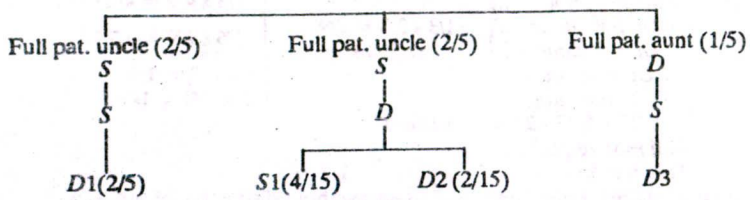

The uterine uncle takes 1/6. The aunt of the full blood takes the residue 5/6. The uterine uncle's share 1/6 is to be divided *equally* between his son and daughter. The aunt's share 5/6 goes to her daughter.

(b) *Paternal uncle's son* .. 2/3 (the portion of the *paternal side*)
*Maternal aunt's son* .. 1/3 (the portion of the *maternal side*)

(c) The surviving relations are *(e)*—
a great-granddaughter of a full paternal uncle, *D*1;

*(e) Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 450.

a great-grandson and a great-granddaughter of another such uncle, *S*1 and *D*2;
a great-granddaughter of a full paternal aunt, *D*3;




The two uncles take each twice as much as the aunt, so that each uncle takes 2/5 and the aunt takes 1/5. The first uncle's share 2/5 goes to his descendant *D*1.

The second uncle's share 2/5 is to be divided between his two descendants *S*1 and *D*2 according to the rule of the double share to the male, so that *S*1 takes 2/3 x 2/5 = 4/15 and *D*2 takes 1/3 x 2/5 = 2/15

The aunt's share 1/5 passes to her descendant *D*3.

According to Hanafi law, the shares will be as stated in ill. (b) to sec. 65 above.

**105. Other heirs of the third class.**—If there are no descendants of uncles or aunts, the estate will devolve upon the other heirs of the third class in the order of succession given in sec.102, the distribution among higher uncles and aunts being governed by the principles stated in sec. 103, and that among their descendants being governed by the principles states in sec. 104.

Baillie, II, 287, 331, 332.

## *The "Return" and the "Increase"*

**106. Doctrine of "Return".**—If there is a residue left after satisfying the claims of Sharers, but there are no Residuaries *in the class to which the sharers belong,* the residue reverts, subject to the three exceptions noted in secs.107, 108 and 109, to the Sharers in the proportion of their respective shares.

Baillie, II, 262.

*Note.*—In working out examples, follow the rules given in the notes appended to ill. (f) and ill. (l) to sec. 66.

| | | | | |
|---|---|---|---|---|
| (a) | *Mother* .. | 1/6 | Increased to 1/4 |
| | *Daughter* .. | 1/2 =3/6 | Increased to 3/4 |
| | *Brother* .. | 0 | (excluded, as being an heir of the second class) |

*Note.*—By Hanafi law, the brother would have taken the residue 1/3.

| | | | | |
|---|---|---|---|---|
| (b) | *Mother* .. .. | 1/6 | Increased to 1/5 |
| | *Father* .. .. | 1/6 | Increased to 1/5 |
| | *Daughter* .. .. | 1/2 = 3/6 | Increased to 3/5 |

*Note.*—By Hanafi law, the father would have taken the residue 1/6 as a Residuary.

| | | | | |
|---|---|---|---|---|
| (c) | *Ut. sister* .. .. | 1/6 | increased to 1/4 |
| | *Con. sister* .. .. | 1/2 = 3/6 | increased to 3/4 |

Baillie, II, 335-336.

*Note.*—If there was a full sister instead of a consanguine sister, the uterine sister would have been excluded from participating in the *Return.* See sec. 109 below.

**107. Husband and wife and "Return".**—Neither the husband nor the wife is entitled to the *Return* if there is any other heir. If the deceased left a husband but no other heir, the surplus will pass to the husband by *Return.* If the deceased left a wife, but no other heir, the older view was that the wife will take her share 1/4, and the surplus will escheat to the Crown; in other words, that the surplus

never reverts to a wife. But in *Abdul Hamid Khan* v. *Peare Mirza (f)* the Oudh Court followed the opinion of Ameer Ali (Mahomedan Law, Vol. II, 5th Ed., at p. 1254) and held that the rule now in force is that the widow is entitled to take by return.

Baillie, II, p. 262. See sec. 92 and the notes thereto.

| | | | | | | |
|---|---|---|---|---|---|---|
| (a) | *Wife* | .. | .. | 1/8 | | = 5/40 |
| | *Father* | .. | .. | 1/8 | increased to 1/5 x (7/8) | = 7/40 |
| | *Mother* | .. | .. | 1/6 | increased 1/5 x (7/8) | = 7/40 |
| | *Daughter* | .. | 1/2 | =3/6 | increased to 3/5 x (7/8) | = 21/40 |

*Note.*—By Hanafi law, the residue 1/24 would go to the father as a Residuary.

| | | | | | | |
|---|---|---|---|---|---|---|
| (b) | *Husband* | .. | .. | 1/4 | | = 4/16 |
| | *Father* | .. | .. | 1/6 | increased to 1/4 x(3/4) | = 3/16 |
| | *Daughter* | .. | 1/2 | = 3/6 | increased to 3/4x(3/4) | = 9/16 |

*Note.*—By Hanafi law, the residue 1/12 would go to the father as a Residuary.

**108. Mother when excluded from "Return".**—If the deceased left a mother, a father, and one daughter, and also —

(a) two or more full or consanguine brothers, *or*

(b) one such brother and two such sisters, *or*

(c) four such sisters,

the brothers and sisters, though themselves excluded from inheritance as being heirs of the second class, prevent the mother from participating in the *Return*, and the surplus reverts to the father and the daughter in the proportion of their respective shares. This is the only case in which the mother is excluded from the *Return*.

Baillie, II, 272, 317-318, 365, 386.

| | | | | | |
|---|---|---|---|---|---|
| *Mother* | .. | .. | 1/6 | | = 4/24 |
| *Father* | .. | .. | 1/6 | increased to 1/4 x (5/6) | = 5/24 |
| *Daughter* | .. | 1/2 | =3/6 | increased to 3/4 x (5/6) | = 15/24 |
| *2 full brothers* | .. | .. | 0 | (excluded) | |

**109. Uterine brothers and sisters when excluded from "Return".**—If there are uterine brothers or sisters, and also full sisters, the uterine brothers and sisters are not entitled to participate in the *Return*, and the residue goes entirely to the full sisters. This rule does not apply to consanguine sisters. Consanguine sisters and uterine brothers and sisters divide the *Return* in proportion to their shares.

Baillie, II, 335-336.

| | | | | | | |
|---|---|---|---|---|---|---|
| (a) | *Uterine brother* | .. | .. | | | = 1/6 |
| | *Full sister* | .. | .. | 1/2 | (as sharer) + 1/3 (by Return) | = 5/6 |
| (b) | *Uterine brother* | .. | ) | 1/3 | each taking 1/6 | |
| | *Uterine sister* | .. | ) | | | |
| | *Full sister* | .. | .. | 1/2 | (as sharer) + 1/6 (by Return) | = 2/3 |
| (c) | *Wife* | .. | .. | 1/4 = 3/12 | | |
| | *Uterine sister* | .. | | 1/6 = 2/12 | | |
| | *Full sister* | .. | .. | 1/2 | (as sharer) + 1/12 (by Return) | = 7/12 |

*Note.*—The wife in case (c) is not entitled to the "Return"as there are other heirs of the deceased (s.107). The uterine sister is excluded from the "Return" by the full sister, and the latter takes the whole "Return."

*Consanguine sister.*—There is a conflict of opinion whether a consanguine sister is entitled to the whole "Return" in the absence of a full sister. The author of the *Sharaya-ul-Islam* is of opinion that she is not. The author of the *Kafi* is of opinion that she is. See sec. 106, ill.(c).

*(f)* (1935) 10 Luck. 550, 153 I.C. 379, ('35) A.O. 78. *(g) Mussammat Khursaidi* v. *Secretary of State*

**110. Doctrine of "Increase".**—The Sunni doctrine of *Increase* is not recognized in the Shia law. According to the Shia law, if the sum total of the shares exceeds unity, the fraction in excess of the unity is deducted invariably from the share of —

(a) the daughter or daughters; or

(b) full or consanguine sister or sisters.

Baillie, II, 263, 396.

| | | | | | |
|---|---|---|---|---|---|
| (a) | *Husband* .. | 1/4 =3/12 | | | = 3/12 |
| | *Daughter* .. | 1/2 = 6/12 | reduced to (6/12-1/2) | | = 5/12 |
| | *Father* .. | 1/6 = 2/12 | | | = 2/12 |
| | *Mother* .. | 1/6 = 2/12 | | | = 2/12 |
| | | 13/12 | | | 1 |
| (b) | *Husband* | 1/4 =3/12 | | | = 3/12 |
| | *2 daughters* | 2/3 =8/12 | reduced to (8/12 -3/12 | = 5/12 | (each 5/24) |
| | *Father* | 1/6 = 2/12 | | | =2/12 |
| | *Mother* | 1/6 = 2/12 | | | = 2/12 |
| | | 15/12 | | | 1 |
| (c) | *Husband* | 1/2 = 3/6 | | | =3/6= 1/2 |
| | *2 full (or cons.) sister* | 2/3 = 4/6 | reduced to (4/6-1/6) | | = 3/6 = 1/2 (each 1/4) |
| | | 7/6 | | | 1 |
| (d) | *Husband* | 1/2 | | | |
| | *Uterine sister or brother* | 1/6 | | | |
| | *Full (or cons. ) sister* | 1/2 | reduced to (1/2 -1/6) = 1/3 | | |
| | | 7/6 | | | |

*Note.*—Here the excess over unity is 1/12, and this is to be deducted from the daughter's share.

*Reason of the rule.*—The reason of the rule laid down in this section is stated to be that since a full sister, whether co-existing with uterines, gets the full benefit of the "Return" (s.106), it is but fair that when the sum total of the shares exceeds unity, she should bear the deficit. But what then of the *consanguine sister?* According to the *Sharaya-ul-Islam.* a *consanguine* sister is not entitled to the whole "Return" when she co-exists with uterines. Why then should *she* bear the deficit?

**111. Escheat.**—On failure of all natural heirs, the estate of a deceased Shia Mahomedan escheats to the Government *(g)*.

Baillie, II, 301, 362-363. See sec. 92.

## *Miscellaneous*

**112. Eldest son**—The eldest son, if of sound mind, is exclusively entitled to the wearing apparel of the father, and to his Koran, sword and ring, provided the deceased has left property besides those articles.

Baillie, II, 279.

**113. Childless widow.**—A childless widow takes no share in her husband's lands, but she is entitled to her one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise.

Baillie, II, 295; *Mir Alli* v. *Sajuda Begum (h); Umardaraz Ali Khan* v. *Wilayat Ali Khan (i); Muzaffar Ali* v. *Parbati (j); Aga Mahomed Jaffer* v. *Koolsom Beebee (k); Durga Das* v. *Nawab Ali Khan (l), Syed Ali* v. *Syed Muhammad (m).*

(1926) 5 Pat. 539, 94 I.C. 433, ('26) A.P. 321.
*(h)* (1897) 21 Mad. 27.
*(i)* (1896) 19 All. 169.
*(j)* (1907) 29 All. 640.
*(k)* (1897) 25 Cal. 9 P.C.
*(l)* (1926) 48 All. 557, 95 I.C. 19, ('26) A.A. 522.
*(m)* (1928) 7 Pat. 426, 116 I.C. 525, ('28) A.P. 441.
*(n)* (1897) 25 Cal. 9 P.C. *supra.*

The expression "lands" in this section is not confined to *agricultural* land only, it includes lands forming the site of building *(n)*. But a childless widow in the absence of other heirs, was held entitled to inherit in addition to her one-fourth all the remainder of her husband's property, including a house by virtue of the doctrine of "return"*(o)*.

**114. Illegitimate child.**—An illegitimate child does not inherit at all, not even from his mother or her relations, nor do they inherit from him.

Baillie, II, 305; *Sahebzadee Begum* v. *Himmut Bahadur (p)*.

*(o) Abdul Hamid Khan* v. *Peare Mirza* (1925) 10 W.R. 125. Luck. 550, 153 I.C. 379, ('35) A.O. 78.

*(p)* (1869) 12 W.R. 512, S.C. on review (1870) 14

# CHAPTER IX

## WILLS

**Works of authority: Hedaya, Fatawa Alamgiri and Baillie.**— The leading authority on the subject of wills is the *Hedaya* (Guide), which was translated from the original Arabic by four Maulvis or Mahomedan lawyers and from Persian into English by Charles Hamilton, by order of Warren Hastings, when he was Governor-General of India. The *Hedaya* was composed by Shaikh Burhan-ud-Din Ali who flourished in the twelfth century. The author of the *Hedaya* belonged to the Hanafi School, and it is the doctrines of that school that he has principally recorded in that work. The *Fatawa Alamgiri* is another work of authority, and it has been accepted by the Courts in India as well as by the Privy Council as of greater authority than the *Hedaya.* It was compiled in the seventeenth century by command of the emperor Aurangzeb Alamgir. It is "a collection of the most authoritative *futwas* or expositions of law on all points that had been decided up to the time of its preparation." The law there expounded is again the law of the Hanafi sect, as the Mahomedan sovereigns of India all belonged to that sect. The first volume of Baillie's Digest of Mahomedan law is founded chiefly on that work. Both the *Hedaya* and *Fatawa Alamgiri* deal with almost all topics of Mahomedan law, except that the law of Inheritance is not dealt with in the *Hedaya.* The references to the *Hedaya* in this and subsequent chapters are given to the pages of Mr.Grady's Edition of Hamilton's *Hedaya.* The first volume of Baillie's Digest is referred to as "Baillie." The leading work on Shia law is *Sharaya-ul-Islam,* for which see the preliminary note to sec. 87 above.

**115. Persons capable of making wills.**—Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will.

*Hedaya,* 673; Baillie, 627.

*Majority under Mahomedan Law.*—The age majority as regards matters other than marriage, dower, divorce and adoption, is now regulated by the Indian Majority Act IX of 1875. Sec.3 of the Act declares that a person shall be deemed to have attained majority when he shall have completed the age of eighteen years. In the case, however, of a minor of whose person or property a guardian has been appointed, or of whose property the superintendence has been assumed by a Court of Wards, the Act provides that the age of majority shall be deemed to have been attained on the minor completing the age of twenty-one years.

Minority under the Mahomedan law terminates on completion of the fifteenth year; therefore, before the passing of Act IX of 1875, a Mahomedan who had attained the age of fifteen years was competent to make a valid disposition of his property (Ameer Ali, 4th ed., Vol. I, pp.42-43). But this rule of Mahomedan law, so far as regards matters other than marriage, dower and divorce (adoption not being recognized by that law), must be taken to be superseded by the provisions of the Majority Act, for the Act extends to the whole of India (s.1), and applies to every person, domiciled in India (s.3). Hence minority in the case of Mahomedans, for purposes of wills, gifts, wakfs, etc., terminates not on the completion of the fifteenth year, but on completion of the eighteenth year*(a)*.

**Shia law: Suicide.**—A will made by a person after he has taken poison, or done any other act towards the commission of suicide, is not valid under the Shia law: Baillie, II, 232. In *Mazhar Husen v. Bodha Bibi (b),* the deceased first made his will, and afterwards took poison. It was held that the will was valid, though he had contemplated suicide at the time of making the will.

**116. Form of will immaterial.**—A will (Vasiyyat) may be made either verbally or in writing .

*Writing not necessary.*—"By the Mahomedan law no writing is required to make a will valid, and no particular form, even of verbal declaration, is necessary as long as the intention of the testator is sufficiently ascertained" *(c)*. In a case before the Privy Council a letter written by a

*(a)* Compare *Bai Gulab* v. *Thakorelal* (1912) 36 Bom. 622, 17 I.C. 86.

*(b)* (1898) 21 All. 91.

*(c) Mahomed Altaf* v. *Ahmed Buksh* (1876) 25 W.R. 121 P.C.

testator shortly before his death and containing directions as to the disposition of his property, was held to constitute a valid will *(d)*. The mere fact that a document is called *tamlik-nama* (assignment) will not prevent it from operating as a will, if it possesses the substantial characteristics of a will *(e)*. But where a Mahomedan executed a document which started, "I have no son, and I have adopted my nephew to succeed to my property and title," it was held by the Privy Council that the document did not operate as a will. Nor did it operate as a gift, for there was no delivery of possession to the nephew by the deceased *(f)*. An immediate and irrevocable disposition subject to the reservation of the usufruct for life operates as a gift and not as a will *(g)*.

Under the Mahomedan Law no writing is required to make a valid will and no particular form is necessary. Even a verbal declaration is a will. The intention of the testator to make a will must be clear and explicit and form is immaterial. Revocation also is an inferential fact from proved facts and circumstances in a given case. No express mention of revocation of the will is mandatory. The bequest must be of one third of the testator's estate after meeting the funeral expenses and debts and a bequest to an heir is invalid unless the other heirs consent to it after the demise of the testator. A writing by a Mahomedan by way of a testamentary disposition is valid and binding on the persons claiming through his estate. Where under the document styled as a will the testator declared his daughter and nephew to be his heirs and mentioned their shares in the property bequeathed and divided the properties during his lifetime and gave them in species and put the heirs in possession for enjoyment and stated that the will would come into effect after his lifetime and there was no mention that the bequest was of one third of his estate after deducting the funeral expenses and debts, the recitals in the document and their cumulative effect would show that the testator devised his properties by means of a conveyance and expressed the same by the words "by means of this bond." Therefore, the document was a conveyance and not a will and since it was not registered it was invalid though styled as a will and was not binding on the legal heirs. AIR 1940 Mad. 153 Rel. on.

*Vazeer Bee* v. *Putti Begum* A.I.R. 1986 — A.P. — 159.

A Mahomedan will, though in writing, does not require to be signed *(h)*; nor, even if signed, does it require attestation *(i)*. The reason is that a Mahomedan will does not require to be in writing at all.

*Oral will, proof of.*—The burden of establishing an oral will is always a very heavy one; it must be proved with the utmost precision, and with every circumstance of time and place *(j)*. The Court must be made certain that it knows what the speaker said and must from the circumstances and from the statement be able to infer for itself that testamentary effect was intended, in addition to being satisfied of the contents of the direction given *(k)*.

**117. Bequests to heirs.**— A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator *(l)*. Any single heir may consent so as to bind his own share *(m)*.

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*(d) Mazar Husen* v. *Bodha Bibi* (1898) 21 All. 91; *Abdul Hameed* v. *Mahomed Yoonus* (1940) 1 M.L.J. 273, 187 I.C. 414, ('40) A.M. 153.

*(e) Saiad Kasum* v. *Shaista Bibi* (1875) 7 N.W.P. 313; *Ishri Singh* v. *Baldeo* (1884) 11 I.A. 135, 141-143, 10 Cal. 792, 800-802.

*(f) Jeswant Singjee* v. *Jet Singjee* (1844) 3 M.I.A. 245, 258; Macnaghten, p. 124, case 54.

*(g) Mohammad* v. *Fakhr Jahan* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A.PC. 281.

*(h) Aulia Bibi* v. *Alauddin* (1906) 28 All. 715.

*(i) In re Aba Satar* (1905) 7 Bom. L.R. 558 [Cutchi Memon will]; *Sarabai* v. *Mahomed* (1919) 43 Bom. 641, 49 I.C. 637 [Cutchi Memon will]; *Ramjilal* v. *Ahmed Ali* ('52) A. Madhya Bharat 56. See Section 138 and the following case: *Ibadat Ali* v. *Baldia Co-operative Bank* (1968) 11 A.L.T. 124.

*(j) Venkat Rao* v. *Namdeo* (1931) 58 I.A. 362, 133 I.C. 711, ('31) A.PC. 285.

*(k) Mahabir Prasad* v. *Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.PC. 174; *Mt. Izhar Fatma Bibi* v. *Mt. Ansar Bibi* (1939) A.L.J. 642, 182 I.C. 801, ('39) A.A. 348.

*(l) Ghulam Mohammad* v. *Ghulam Husain* (1932) 59 I.A. 74, 54 All. 93, 136 I.C. 454, ('32) A.PC. 81; *Shek Muhammad* v. *Shek Imamuddin* (1865) 2 B.H.C. 50; *Ahmad* v. *Bai Bibi* (1916) 41 Bom. 377, 39 I.C. 83 [Bhagdari property]; *Muharram Ali* v. *Barkat Ali* (1931) 12 Lah. 286, 125 I.C.886, ('30) A.L. 695; *Ghulam Mohammad* y. *Ghulam Husain* (1932) 59 I.A. 74, 54 All. 93, 34 Bom. L.R. 510, 136 I.C. 454, ('32) A.PC. 81; *Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683.

*(m) Salayjee* v. *Fatima* (1923) 1 Rang. 60, 63, 71 I.C. 753, ('22) A.PC. 391; *Mohammad Ata Husain* v. *Husain Ali* (1944) 216 I.C. 276, ('44) A.O. 139.

A bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent. *Narunnissa* v. *Sheikh Abdul Hamid*, AIR 1987 Karnataka, 222.

*Explanation.*—In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of the testator's death.

*Illustrations*

(a) A Mahomedan dies leaving him surviving a son, a father, and a paternal grandfather. Here the grandfather is not an "heir," and a bequest to him will be valid without the assent of the son and the father.

(aa) A Mahomedan dies leaving a son, a widow and a grandson by a predeceased son. The grandson is not an heir and a bequest to him is valid to the extent of one-third without the consent of the son and widow *(n)*.

(b) *A*, by his will, bequeaths certain property to his father's father. Besides the father's father, the testator has a son and a father living at the time of the will. The father dies in the lifetime of *A*. The bequest to the grandfather cannot take effect, unless the son assents to it, for the father being dead, the grandfather is an "heir" at the time of *A*'s death.

(c) *A*, by his will bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to *A*. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir *at the date of the will,* he is not an "heir" *at the death of the testator,* for he is excluded from inheritance by the son. If the daughter and the brother has been the sole surviving relatives, the brother would have been one of the heirs, in which case the bequest to him could not have taken effect, unless the daughter assented to it: Baillie, 625; *Hedaya*, 672.

(d) *A* bequeaths property to one of his sons as his executor upon trust to expend such portion thereof as he may think proper "for the testator's welfare hereafter by charity and pilgrimage," and to retain the surplus for his sole and absolute use. The other sons do not consent to the legacy. The bequest is void, for it is "in reality an attempt to give, under colour of a religious bequest," a legacy to one of the heirs: *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 3 I.A. 291. If the bequest had been exclusively for religious purposes, and if those purposes had been sufficiently defined, it would have been valid to the extent of the bequeathable third.

(e) A Mahomedan leaves him surviving a son and a daughter. To the son he bequeaths three-fourths of his property, and to the daughter one-fourth. If the daughter does not consent to the disposition, she is entitled to claim a third of the property as her share of the inheritance: see *Fatima Bibee* v. *Ariff Ismailjee* (1881) 9 C.L.R.66.

(f) A document named as a partition deed is executed to which the father and his sons are parties. It embodies a condition that two of the sons will not, after the father's death, claim any share in any property not covered by the deed and that such property will go to the other three sons. Such a disposition in favour of the three sons is testamentary and this bequest not having been consented to by the two sons after the father's death, it is invalid under Mahomedan law: *Kunhi Avulla* v. *Kunhi Avulla* ('64) A.Ker. 201 *(o)*.

It is for person who claims under a will to establish that other heirs had consented to bequest. Bequest in excess of 1/3 of estate cannot take effect unless such bequest consented to by heirs after death of testator. *Yasin Imambhai Shaikh* v. *Hajarabi* 1986 — Bom.—357.

*Hedaya,* 621; Baillie, 625, as to Explanation. Under the Mahomedan law a bequest to an heir is not valid without the consent of the other heirs; and such consent may be inferred from their conduct *(p)*. The policy of that law is to prevent a testator from interfering by will with the course

*(n) Abdul Bari* v. *Nasir Ahmad* ('33) A.O. 142, 150 I.C. 330.

*(o)* See also *Abdul Kafoor* v. *Abdul Razack* ('59) A.M. 131.

*(p) Mahomed Husain* v. *Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84.

of devolution of property according to law among his heirs, although he may give a specified portion, as a third to a stranger *(q)*. The reason is that a bequest in favour of an heir would be an injury to the other heirs, as it would reduce their share, and "would consequently induce a breach of the ties of kindred" *Hedaya*, 671. But it cannot be so if the other heirs, "having arrived at the age of majority," consent to the bequest. The consent necessary to give effect to the bequest must be given *after* the death of the testator, for no heir is entitled to any interest in the property of the deceased *in his lifetime*. The fact that an heir consenting to a bequest to a co-heir is an insolvent at the time when the consent is given is immaterial; the consent is effective all the same *(r)*.

*Silence not consent.*—Where a will contained a bequest excluding the female heirs and mutation of names took place, it was held that consent of the heirs could not be implied from mere silence on their part at the mutation proceedings *(s)*.

*Custom.*—If the succession is governed by custom which does not destroy the testamentary capacity of the owner the rule still applies. The bequest to an heir is invalid without the consent of those who are the other heirs according to the custom *(t)*.

*Bequest subject to condition.*—Where a bequest is made to *an heir* subject to a condition which is void as being repugnant to the Mahomedan law, e.g., that the legatee shall not alienate the property bequeathed, and the other heirs consent to the bequest, the legatee will take the property absolutely as he would have done if he were a *stranger (u)*. Similarly where a bequest is made to an heir subject to the condition that in the event of his death the property shall go to *X*, and the other heirs assent to the legacy, the condition attached to the legacy being void, he will take the property absolutely *(v)*. See sec. 164 below.

*Bequests to heirs and non-heirs.*—See notes to sec. 118 under the same head.

*Bequest of remainder.*—*A* bequeaths the rents of a house to one of his sons for life, and after his death to a charitable society for the benefit of the poor. The other sons do not consent to the legacy. The bequest to the son being void for want of assent of the other sons, the subsequent bequest to charity also fails *(w)*. *A* bequeaths the whole of his property to his widow for life and thereafter to all his children. The bequest to the widow is invalid, unless the other heirs have consented to it *(x)*.

*Shia law.*—According to the Shia law, a testator may leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs. But if the legacy exceeds one-third, it is not valid unless the other heirs consent thereto; such consent may be given *either before or after the death of the testator (y)*: Baillie, II, 244. But such consent cannot be given after previous repudiation *(z)*. The consent of the heirs will not, however, validate the illegal conferment of a power of appointment or a transgression of the rule against perpetuities *(a)*. In *Fahmida* v. *Jafri (b)*, the High Court of Allahabad laid it down as a broad proposition of law that where a bequest to an heir exceeds one-third, and the other heirs do not consent to the bequest, the bequest is void in its entirety. *Fahmida's* case was followed by the same High Court in *Amrit Bibi* v. *Mustafa (c)*. But in the first case the bequest was of the entire property to one heir (daughter) to the exclusion of the other heir (another daughter). In the second case also the bequest was *substantially* of the whole of the testator's property to one heir (testator's widow) to

*(q) Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 196, 3 I.A. 291, 307.

*(r) Aziz-un-Nissa* v. *Chiene* (1920) 42 All. 593, 59 I.C. 296; *Imadadul Rahaman* v. *Purbi Din* (1938) 13 Luck. 174, 166 I.C. 980, ('37) A.O. 239, disapproving *Kali Charan* v. *Mohammad Jamil* (1930) All. L.J. 588, 122 I.C. 762, ('30) A.A. 498.

*(s) Izzul Jabbar Khan* v. *Chairman, District Kutchery* (1956) Nag. 501.

*(t) Irshad Ullah Khan* v. *Mt. Fakira Khan* (1937) 12 Luck. 592, 165 I.C. 322, ('37) A.O. 4.

*(u) Abdul Karim* v. *Abdul Qayum* (1906) 28 All. 324.

*(v) Nasir Ali* v. *Sughra Bibi* (1920) 1 Lah. 302, 54 I.C. 853.

*(w) Fatima Bibee* v. *Ariff Ismailjee* (1881) 9 C.L.R. 66, with facts slightly altered.

*(x) Anarali* v. *Omar Ali* (1951) 55 C.W.N. 33, ('51) A.C. 7.

*(y) Husaini Begam* v. *Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673, ('27) A.A. 340, dissenting from *Fahmida* v. *Jafri* (1908) 30 All. 153 where it was held that the consent must be given *after* the death of the testator.

*(z) Mahabir Prasad* v. *Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.PC. 174.

*(a) Nawazish Ali Khan* v. *Ali Raza Khan* (1948) 75 I.A. 62, (1948) A.PC. 134.

*(b)* (1908) 30 All. 153.

*(c)* (1924) 46 All. 28, 77 I.C. 66, ('24) A.A. 20.

the exclusion of the other heir (daughter's daughter), and the Court treated it as a case of entire exclusion of the daughter's daughter. In the latest Allahabad case on the subject *(d)*, the testatrix had two daughters, and it was not clear whether the bequest to one of them exceeded one-third. In any event the finding of the Court was that each of the two daughters had a portion of the estate bequeathed to her. On these facts the Court refused to apply the rulings in the two earlier cases, and upheld the bequest. As to the decision in the earlier cases it was said that it should be confined to cases where the whole estate was bequeathed to one heir and the other heirs were excluded entirely from inheritance. This, it is submitted, is the correct view. The only authoritative text on the subject is to be found in *Sharaya- ul-Islam*, where it is said: "If a person should make a will *excluding* some of his children from their shares in his succession, the exclusion is not valid." The text further goes on to say that the better view is that the words of exclusion "are quite futile and of no efficacy whatever" Baillie, II, 238. The meaning of this text would appear to be that where a bequest is made of the *entire* property to one heir to the exclusion of the other heirs, the will is to be read as if it did not contain any disposition of the property. But it does not follow that where a bequest to an heir is not of the *entire* estate, but merely exceeds the legal third, such bequest also is void in its entirety.

**118. Limit of testamentary power.**— A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator *(e)*.

*Hedaya,* 671; Baillie, 625.

*Origin of the rule.*— "Wills are declared to be lawful in the Koran and the traditions; and all our doctors, moreover, have concurred in this opinion": *Hedaya,* 671. But the limit of one-third is not laid down in the Koran. This limit derives sanction from a tradition reported by Abee Vekass. It is said that the Prophet paid a visit to Abee Vekass while the latter was ill and his life was despaired of. Abee Vekass had no heirs except a daughter, and he asked the Prophet whether he could dispose of the whole of his property by will to which the Prophet replied saying that he could not dispose of the whole, nor even two-thirds, nor one-half, but only one-third: *Hedaya,* 671. But though the limit of one-third is not prescribed by the Koran, there are indications in the Koran that a Mahomedan may not so dispose of his property by will as to leave his heirs destitute. See Sale's Koran, Sura IV, and the Preliminary Discourse—section VI.

*Consent of heirs.*— It will be seen from this and the preceding section that the power of a Mahomedan to dispose of his property by will is limited in two ways, first, as regards *the persons* to whom the property may be bequeathed, and, secondly, as regards the *extent to which* the property may be bequeathed. The only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir. But a bequest in excess of the legal third may be validated by the consent of the heirs; similarly, a bequest to an heir may be rendered valid by the consent of the other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs, and the heirs may, if they like forgo the benefit by giving their consent. For the same reason, if the testator has no heirs, he may bequeath the whole of his property to a stranger: see Baillie, 625.

If the heirs do not consent, the remaining two-thirds must go to the heirs in the shares prescribed by the law. The testator cannot reduce or enlarge their shares, nor can he restrict the enjoyment of their shares *(f)*.

*Consent cannot be rescinded.*— As to the consent of heirs to a legacy exceeding the legal third, it is to be remembered that the consent once given cannot be rescinded: *Hedaya,* 671.

*Consent maybe expressed or implied.*— The consent need not be express: it may be signified by conduct showing a fixed and unequivocal intention. *A* bequeaths the whole of his property, which consists of three houses, to a stranger. The will is attested by his two sons who are his only heirs. After *A*'s death the legatee enters into possession and recovers the rents with the knowledge of the

*(d) Hussaini Begum* v. *Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673, ('27) A.A. 340.

*(e) Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 3 I.A. 291; *Cherachom* v. *Valia* (1865) 2 M.H.C. 350.

*(f) Jeewa* v. *Yacoob Ally* (1928) 6 Rang. 542, 114 I.C. 303, ('28) A.R. 307.

sons and without any objection from them. These facts are sufficient to constitute consent on the part of the sons, and the bequest will take effect as against the sons and persons claiming through them *(g)*.

*Bequests to heirs and non-heirs.*— Where by the same will a legacy is given to an heir and a legacy also to a non- heir, the legacy to the heir is invalid unless assented to by the other heirs, but the legacy to the non-heir is valid to the extent of one-third of the property. *A* bequeaths 1/3 of his property to *S*, a non-heir, and 2/3 to *H*, one of his heirs. The other heirs do not assent to the bequest to *H*. The result is that *S* will take 1/3 under the will, and the remaining 2/3 will be divided among all the heirs of *A (h)*. Similarly if *A* bequeaths the whole of his property to his wife and a non-heir, and the bequest to the wife is not assented to by the other heirs of *A*, the non-heir will take 1/3 under the will (that being the maximum disposable under the will), and the remaining 2/3 will be divided among the heirs of *A (i)*.

*S*, a Muslim, purchased certain properties and became the absolute owner thereof. *S* left a will by which he gave a life interest in favour of his wife, namely, the first defendant and gave the remainder to his sister's son, the second defendant. The validity of this will was challenged by the brother of *S* who contended that the will was not in accordance with their personal law. The trial Court found that the will was true but was not valid. On appeal by the defendants:

The terms of the will provided that the first defendant should enjoy the properties for her life, and thereafter, the second defendant was to take the properties as his absolute properties. In this respect, no contingency was involved. The period during which the right to enjoy the usufructs of the properties was postponed was again the creature of the intention of the testator. So long as such a situation was not repugnant either to the personal law or even to the common law full force had to be given to such a recital. It has to be reconciled and not understood as a contingent bequest to the remainderman. The possible reconciliation which could be effected was by treating the words as postponing the right of the remainderman to enjoy the properties till after the intervening life estate holder.

The bequest to an heir coupled with a bequest to a non-heir had to be reconciled as far as possible and the totality of the instrument could not be rejected *in toto*. If this was the method by which such an instrument has to be understood and interpreted, then it should be held that the bequest to the first defendant who was an heir in this case was not valid, because it was against the personal law but, in so far as the bequest to a non-heir, namely the second defendant was concerned it would be operative to the extent of a third of the estate of *S*.

(On facts): the first plaintiff and P.W. 2 together would be entitled to 3/4 x 2 of the totality of the estate; the first defendant would be entitled to 1/4 x 7/3 and the balance of 1/12 would be the share of the totality of the estate which would be the property of the second defendant. [T. Ramaprasada Rao and N. Ratnavel Pandian, JJ.] *Rahumath Ammal* v. *Mohammed Mydeen Rowther* (1978) 2 M.L.J. 499: 91 L.W. 369.

*Bequest for pious purposes.*— A bequest, though it be for pious purposes, can only be made to the extent of the bequeathable third *(j)*.

*Commission to executor.*— A commission to an executor by way of remuneration is "a gratuitous *bequest,* and . . . certainly *not* in any sense a *debt*." It is therefore subject to the rules contained in this and the preceding section *(k)*.

*Cutchi Memons and Khojas.*— As to Cutchi Memons and Khojas see sections 23 and 24 *supra.*

*Shia law.*— Under the Shia law, the consent necessary to validate a bequest exceeding the legal third may be given either *before* or *after* the death of the testator: Baillie, II, 233.

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*(g) Daulatram* v. *Abdul Kayum* (1902) 26 Bom. 497. See also *Sharifa Bibi* v. *Gulam Mahomed* (1892) 16 Mad. 43; *Mahomed Hussain* v. *Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84; *Ma Khatoon* v. *Ma Mya* (1936) 165 I.C. 232, ('36) A.R. 448; *Faqir Mahomed Khan* v. *Hasan Khan* (1941) 16 Luck. 93, 190 I.C. 132, ('41) A.O. 25.

*(h) Muhammad* v. *Aulia Bibi* (1920) 42 All. 497, 61 I.C. 947; *Ghulam Jannat* v. *Ramat Din* (1934) 15 Lah. 889, 153 I.C. 33, ('34) A.L. 427.

*(i)* (1920) 42 All. 497, at p. 502, 61 I.C. 947, *supra; Abdul Bari* v. *Nasir Ahmed* ('33) A.O. 142, 150 I.C. 330; *Mohammad Ata Husain* v. *Husain Ali* (1944) 216 I.C. 276, ('44) A.O. 139.

*(j) Badrul Islam Ali Khan* v. *Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251.

*(k) Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 18 P.C.; *Salayjee* v. *Fatima* (1923) 1 Rang. 60, 71 I.C. 753, ('22) A.PC. 391.

**119. Abatement of legacies.—** If the bequests exceed the legal third, and the heirs refuse their consent, the bequests abate rateably.

*Hedaya,* 766; Baillie, 636-637.

*Bequests for pious purposes.*— Bequests for pious purposes fall under three classes according to the purpose for which they are made, namely:—

(1) *Bequests for faraiz,* that is, purposes expressly ordained in the Koran, namely, (i) *haj* (pilgrimage), (ii) *zakat* (tithe or poor's rate), and (iii) expiation, e.g., for prayers missed by a Mahomedan.

(2) Bequests for *wajibat*, that is, purposes not expressly ordained, but which are in themselves necessary and proper, namely *sadaka fitrat* (charity given on the day of breaking fast), and sacrifices.

(3) Bequests for *nawafil,* that is, bequest of a purely voluntary nature e.g., bequests to the poor, or for building a mosque, or a bridge, or an inn for travellers.

Of these three classes bequests of the first class take precedence over bequests of the second and the third class, and bequests of the second class take precedence over bequests of the third class. In class (1) again, a bequest for *haj* must be paid before a bequest for *zakat* or tithe, and a bequest for *zakat* must be paid before a bequest by way of expiation.

*Hedaya,* 688; Baillie, 653-654.

*Shia law.*— The Shia law is different for that law does not recognize the principle of rateable distribution. Under that law if a testator bequeaths 1/3 of his estate to *A*, 1/4 to *B*, and 1/6 to *C*, and the heirs refuse to confirm the bequests, *A*, the legatee first named, takes 1/3, and *B* and *C* take nothing: Baillie, II, 235. But if, instead of 1/3, 1/12 was given to *A,* then *A* would take 1/12, and *B* would take 1/4, but *C,* who is last in order would not be entitled to anything as 1/12 + 1/4 exhausts the legal third. To the above rules there is an exception—where there are successive bequests of the exact *third* to two different persons, as where a testator bequeaths 1/3 of his property to *A*, and 1/3 again to *B*, in such a case the later bequest would be a revocation of the earlier bequest, so that *B* would take the whole of the one-third, and *A* would take nothing: Baillie, II, 235. If a will is made of the whole property in favour of a single legatee, then no doubt that legatee may claim that he should take one-third of the property. But where there are different objects provided for in the document, there is no rule by which each object should be reduced to one-third of the amount and therefore the document does not appear to be valid as a will *(l)*.

**120. Bequest to unborn person.—** A bequest to a person not yet in existence at the testator's death is void; but a bequest may be made to a child in the womb, provided it is born within six months from the date of the will.

The legatee, according to Mahomedan law, must be a person *competent* to receive the legacy: Baillie, 624; he must therefore be a person in existence at the death of the testator *(m)*. As to bequests to a child in the womb, see *Hedaya,* 674.

**121. Lapse of legacy.—** If the legatee does not survive the testator, the legacy will lapse, and form part of the estate of the testator.

Compare the Indian Succession Act, 1925, sec. 105, which, however, does not apply to Mahomedans.

*Shia law.*— Under the Shia law the legacy would, in such a case, pass to the heirs of the legatee, unless it is revoked by the testator; but if the legatee should die without leaving any heir, the legacy would pass to the heirs of the testator *(n)*. Baillie, II, 247.

**122. Subject of legacy.—** It is not requisite to the validity of a bequest that the thing bequeathed should be in existence at the time of making the will; it is sufficient if it exists at the time of the testator's death.

Baillie, 624. The reason is that a will takes effect from the moment of the testator's death, and not earlier. The subject of a *gift*, however, must be in existence *at the time of the gift:* see sec. 162.

*(l) Kaniz Kubra Bibi* v. *Muzaffaruddin Haider* (1940) A.L.J. 504, 192 I.C. 410, ('40) A.A. 462.

*(m) Abdul Cadur* v. *Turner* (1884) 9 Bom. 158.

*(n) Husaini Begum* v. *Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673. ('27) A.A. 340.

**123. Subject of Bequest.**— A bequest may be made of any property which is capable of being transferred, and which exists at the testator's death. It need not be in existence at the date of the will.

Baillie, 624, 655-666.

**124. Bequest in futuro.**— A bequest in futuro is void: as to gift, see sec. 162.

**125. Contingent bequest.**— A contingent bequest is void: as to gift, see sec. 163.

**126. Conditional bequest.**— A bequest with a condition which derogates from the completeness of the grant takes effect as if no condition was attached to it, for the condition is void *(o)*. But *Amjad Khan's* case *(p)* must be taken into account before applying the doctrine to destroy a life estate. See sec. 55. As to gifts, see s. 164.

**127. Alternative bequest.**— An alternative bequest has been held to be valid.

A Cutchi Memon, who had no son at the date of his will, bequeathed the residue of his property in effect as follows: "Should I have a son, and if such son be alive at my death, my executors shall hand over the residue of my property to him; but if such a son dies in my lifetime leaving a son, and the latter is alive at my death, then my executors shall hand over the residue to him. But if there be no son or grandson alive at my death, my executor shall apply the residue to charity." The restator died without having ever had a son. It was held that the gift was not conditioned in *futuro,* but it was an absolute gift in the alternative and that the charity was entitled to the residue *(q)*.

**128. Revocation of bequest.**— A bequest may be revoked either expressly or by implication.

*Hedaya,* 674; Baillie, 624. Revocation is express, when the testator revokes the bequest in express terms either oral or written. It is implied, when he does an act from which revocation may be inferred.

It is doubtful whether, if a testator denies that he ever made a bequest, the denial operates as a revocation; but the better opinion seem to be that it does not: *Hedaya,* 675; Baillie, 630.

**129. Implied revocation.**— A bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an extinction of the proprietary right of the testator.

(a) A bequest of a piece of land is revoked, if the testator subsequently builds a house upon it.

(b) A bequest of a piece of copper is revoked, if the testator subsequently converts it into a vessel.

(c) A bequest of a house is revoked, if the testator sells it, or makes a gift of it to another.

*Hedaya,* 674, 675; Baillie, 628-629. This was criticised by Chagla J. in *Ashrafalli* v. *Mahomed Alli* 48 Bom. L.R. 642 at 651-653. The original texts are, however, against the view of the learned Judge. The illustrations are taken from the *Hedaya*.

**130. Revocation by subsequent will.**— A bequest to a person is revoked by a bequest in a *subsequent will* of the same property to another. But a subsequent bequest, though it be of the same property, to another person in the *same will,* does not operate as a revocation of the prior bequest, and the property will be divided between the two legatees in equal shares.

*Hedaya,* 675; Baillie, 630.

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*(o) Ma Hmyin* v. *P.L.S.A.R.S. Chettyar* (1935) 158 I.C. 848, ('35) A.R. 318.

*(p)* (1929) 56 I.A. 213, 4 Luck. 305, 116 I.C. 405, ('29) A.PC. 149.

*(q) Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 284-286 31 I.C. 106 [Cutchi Memon will].

**131. Probate of a Mahomedan will.**— (1) A Mahomedan will may, after due proof, be admitted in evidence even though no probate had been obtained *(r)*.

(2) In the case of a Mahomedan will, the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the power to alienate the estate for the purpose of administering it, and has all other powers of an executor under the Probate and Administration Act, 1881, and the corresponding provisions of the Indian Succession Act, 1925 *(s)*. See sec. 40 and notes.

The same rule applies to wills of Cutchi Memons *(t)* and Khojas *(u)*.

As to suits for recovery of debts, see sec. 48.

**132. Letters of administration.**— Except as regards debts due to the estate of the deceased [sec. 48], no letters of administration are necessary to establish any right to the property of a Mahomedan who has died intestate [Indian Succession Act, 1925, sec. 212(2)].

Accordingly, we hold that the trial court was quite justified in considering the application for grant of letters of administration on merit and not throwing the same simply on the view that the will in question was opposed to Mahomedan law. P. K. Banerjee and G. N. Roy, JJ. *Dhane Ali Mia And Ors.* v. *Sobhan Ali And Ors.* (1982) C.W.N. 431.

**133. Executor need not be a Mahomedan.**— It is not necessary that the executor of the will of a Mahomedan should be a Mahomedan.

A Mahomedan may appoint a Christian, a Hindu, or any non-Mahomedan to be his executor *(v)*.

**134. Powers and duties of executors.**— The powers and duties of executors of a Mahomedan will are determined by the provisions of the Indian Succession Act, 1925, in so far as they are applicable to Mahomedans. See sec. 40 and notes.

Per Sargent, C. J., in *Shaikh Moosa* v. *Shaik Essa (w)*. The Probate and Administration Act, 1881, applied amongst others to Mahomedans. Before the passing of that Act the posers and duties of Mahomedan executors were regulated by the Mahomedan law. After the passing of the Act, they were determined by the provisions of that Act. The Probate and Administration Act has been replaced by the Indian Succession Act, 1925.

When there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any one of them who has proved the will: Indian Succession Act, 1925, sec. 311. But if no probate has been obtained they must all act jointly; none of them is entitled to represent the estate alone or to exercise any of the powers of an executor alone *(x)*.

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*(r) Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255; *Abdul Karim* v. *Karmali* (1920) 22 Bom. L.R. 708, 58 I.C. 270; *Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392; *Mahomed Hussein* v. *Ashabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84.

*(s) Venkata Subamma* v. *Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A.PC. 92 [a case of a Hindu will, but applies also to a Mahomedan will]; *Shemail* v. *Ahmed Omer* (1931) 33 Bom. L.R. 1056, 135 I.C. 817, ('31) A.B. 533; *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255; *Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392.

*(t) Haji Ismail, in the matter of the will of* (1880) 6 Bom. 452.

*(u) Abdul Karim* v. *Karmali* (1920) 22 Bom. L.R. 708, 58 I.C. 270.

*(v) Moohummud Ameenoodeen* v. *Moohummud Kubeeroodeen* (1825) 4 S.D.A. [Beng.] 49, 55; *Henry Imlach* v. *Zuhooroonisa* (1828) 4 S.D.A. [Beng.] 301, 303.

*(w)* (1884) 8 Bom. 241, 256.

*(x)* (1884) 8 Bom. 241, 255-256, *supra*.

# CHAPTER X

## DEATH-BED GIFTS AND ACKNOWLEDGMENTS

**135. Gift made during marz-ul-maut.**— A gift made by a Mahomedan during *marz-ul-maut* or death-illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death *(a)*.

*Explanation.*— A *marz-ul-maut* is a malady which induces an apprehension of death in the persons suffering from it and which eventually results in his death.

*Hedaya*, 684, 685; Baillie, 551-552.

*Marz-ul-maut (b).*— It is an essential condition of *marz-ul-maut*, that is, death-illness, that the person suffering from the *marz* (malady) must be under an apprehension of *maut* (death). "The most valid definition of death-illness is that it is one which it is *highly probable* will issue fatally": Baillie, 552. Where the malady is of long continuance, as, for instance, consumption or albuminuria, and there is no immediate apprehension of death, the malady is not *marz-ul-maut;* but it may become *marz-ul-maut* if it subsequently reaches such a stage as to render death highly probable, and does in fact result in death *(c)*. According to the *Hedaya*, a malady is said to be of "long continuance," if it has lasted a year; a disease that has lasted a year does not constitute *marz-ul-maut*, for "the patient has become familiarized to his disease, which is not then accounted as sickness": *Hedaya*, 685, but "this limit of one year does not constitute a hard-and-fast rule, and it may mean a period of *about* one year" *(d)*. In short, a gift must be deemed to be made during *marz-ul-maut*, if, as observed by the Privy Council, it was made "under pressure of the sense of the imminence of death" *(e)*.

To constitute a malady *marz-ul-maut*, there must be (1) proximate danger of death, so that there is a preponderance of apprehension of death, (2) some degree of subjective apprehension of death in the mind of the sick person and (3) some external indicia, chief among which would be inability to attend to ordinary avocations *(f)*, although his attending his ordinary avocations does

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*(a) Wazir Jan* v. *Saiyyid Altaf Ali* (1887) 9 All. 357; *Fazal Ahmad* v. *Rahim Bibi* (1918) 40 All. 238, 244, 51 I.C. 638; *Mt. Sakina Begum* v. *Khalifa Hafiz-ud-din* (1914) 194 I.C. 77, ('41) A.L. 58.

*(b) Fatima Bibee* v. *Ahmad Baksh* (1903) 31 Cal. 319, Affm. by P.C. (1908) 35 Cal. 271, 35 I.A. 67 [Albuminuria for upwards of a year—not *marz-ul-maut*]; *Ibrahim Goolam Ariff* v. *Saiboo* (1908) 35 Cal. 1, 22, 34 I.A. 167, 177. [Sudden bursting of a blood vessel in the stomach—not a case of *marz-ul-maut*]; *Labbi Beebee* v. *Bibbun Beebee* (1874) 6 N.W.P.H.C. 159; *Hassarat Bibi* v. *Golam Jaffar* (1898) 3 C.W.N. 57 and *Mt. Zanrao* v. *Sher Mohamed* (1934) 151 I.C. 671, ('34) A. Pesh. 91 [both cases of asthma—not *marz-ul-maut*]; *Mahammad Gulshere Khan* v. *Mariam Begum* (1881) 3 All. 731 [lingering illness—no *marz-ul-maut*]; *Sarabai* v. *Rabiabai* (1906) 30 Bom. 537 [paralysis—not a case of *marz-ul-maut*], *Rashid Kamalli* v. *Sherbanoo* (1907) 31 Bom. 264 [rapid consumption—held *marz-ul-maut*]; *Janjira* v. *Mohammad* (1922) 49 Cal. 477, 489-494, 67 I.C. 77, ('22) A.C. 429, [not a case of *marz-ul-maut*]; *Fazl Ahmad* v. *Rahim Bibi* (1918) 40 All. 238, 51 I.C. 638 and *Musi Imran* v. *Ibn Hussan* (1933) All. L.J. 53, 147 I.C. 835, ('33) A.A. 341 [both cases of galloping consumption—held *marz-ul-maut*]; *Jahar Ali Khan* v. *Nasimanissa Bibi* (1937) 65 Cal. L.J. 34, ('37) A.C. 500 [lingering consumption—held not *marz-ul- maut*]; *Fazlur* v. *Mahomned* (1917) 3 Pat. L.W. 232, 43 I.C. 196; *Massood Ali* v. *Mohammad Khan* ('57) A.A. 395 [pneumonia not a lingering disease].

*(c)* (1918) 40 All. 238, 243-244, 51 I.C. 638, *supra*.

*(d) Fatima Bibee* v. *Ahmad Baksh* (1903) 31 Cal. 319, at p. 326.

*(e) Ibrahim Goolam Ariff* v. *Saiboo* (1908) 35 Cal. 1, 22, 34 I.A. 167, 177.

*(f) Sarabai* v. *Rabiabai* (1906) 30 Bom. 537, 551; *Rashid Kamalli* v. *Sherbanoo* (1907) 31 Bom. 264; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 490, 67 I.C. 77, ('22) A.C. 429; *Abdul Ahmad* v. *Ahmad Nawaz* (1931) 12 Lah. 683, 132 I.C. 391, ('32) A.L. 229; *Mohammad Ayub Khan* v. *Mt. Gauhar Begum* (1932) 7 Luck. 705, 137 I.C. 804, ('32) A.O. 233; *Tufail Ahmed* v. *Umme Khatoon*, (1938) A.L.J. 16, 174 I.C. 465, ('38) A.A. 145; *Mumtaz Ahmad* v. *Wasiulnesa* ('48) A.C. 301.

not conclusively prove that he was not suffering from *marz-ul-maut (g)*. It is not necessary, however, to come to a definite finding that the disease which caused the apprehension of death was the immediate cause of death *(h)*.

". . . A gift made by a Mahomedan during *marz-ul-maut* or death-illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death.

*Explanation:*— A *marz-ul-maut* is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death."

It has been pointed out by the same author that it is an essential condition of *marz-ul-maut*, that is, death-illness that the person suffering from the *marz* (malady) must be made under an apprehension of *maut* (death) and that the most valid definitions of death-illness, is that it is one which it is *highly probable* will issue fatally. Where the malady is of long continuance and there is no immediate apprehension of death, the malady is not *marz-ul-maut*. To constitute a malady *marz-ul-maut*, there must be: (1) proximate danger of death, so that there is a preponderance of apprehension of death; (2) some degree of subjective apprehension of death in the mind of the sick person; and (3) some external indicia, chief among which would be inability to attend to ordinary avocations. It is not necessary however, to come to a definite finding that the disease which caused the apprehension of death was the immediate cause of death. The statement of the legal position of the above lines is not and cannot be in dispute.

A Bench of the Calcutta High Court in *Fatima Bibee* v. *Ahmed Baksh* 1904 I.L.R. 31 Cal. 319. observed:

"According to the Mahomedan Law, three things are necessary to constitute *marz-ul-maut* or death-illness *viz.*, *(i)* illness, *(ii)* expectation of fatal issue, and *(iii)* certain physical incapacities, which indicate the degree of the illness. The second condition cannot be presumed to exist from the existence of the first and the third as the incapacities indicate, with perhaps the single exception of the case in which a man cannot stand up and say his prayers, are not in fact the signs of death-illness.

When a malady is of long continuance and there is no immediate apprehension of death, it is not a death-illness; so that a gift made by a sick person in such circumstances, if he is in the full possession of his sense will not be invalid . . ."

This decision was taken on appeal in *Fatima Bibi* v. *Ahmed Baksh.(i)* The decision was affirmed and it was held that whether the donor was or was not under apprehension of death at the time the *deed was executed was the death bed and that was* a question essentially of fact.

To constitute a malady *marz-ul-maut*, there must be (1) proximate danger of death, so that there is a preponderance of apprehension of death, (2) some degree of subjective apprehension of death in the mind of the sick person and (3) some external indicia, chief among which would be inability to attend to ordinary avocations. It is not necessary, however, to come to a definite finding that the disease which caused the apprehension of death was the immediate cause of death. O. 6, R. 4, C. P. Code, provides that in all cases in which the party pleading relies on among others undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms provided in the Code, particulars (with dates and items, if necessary) shall be stated in the pleadings. Thus, in the case of undue influence there is a mandatory requirement of particulars having to be set out in the pleadings.

The law as regards onus is clear. The person who propounds a will is under a greater obligation to prove by clear evidence that the will was executed by the testator and at the time of the execution, he was a free agent and possessed of a sound disposing of state of mind. However, in the case of a settlement, as well as a will, so long as the execution of the document is provided, the onus is on the person who inserts that the documents was procured by undue instance. In cases other than a will, at any rate, the person who alleges has to prove that the executant did not have the mental capacity to comprehend the nature of the transaction. [V. Sethuraman, J.] *Goodu Saheb* v. *Rakiabi*

*(g) Safia Begum* v. *Abdul Razak* (1945) 47 Bom. L.R. 381. ('45) A.B. 438.

*(h) Mt. Sakina Begum* v. *Khalifa Hafiz-ud-din* (1941) 194 I.C. 77. ('41) A.L. 58.

*(i) Asmat Begum* v. *Hussain Jan* ('56) P. Pesh. 5: *Jahan Khan* v. *Feroze* ('51) P. Lah. 433.

alias *Nunni Bi* (1978) 2 M.L.J. 426.

Total evidence and all circumstances should be examined (principles restated). A finding of gift being made in *marz-ul-maut* cannot be given when it is not alleged in the plaint or raised at the trial. It is not for the court to raise the point *suo motu*. *Abdul Hafiz Beg* v. *Sahebbi* ('73) A.B. 165 *Bhoona Bi* v. *Gujar Bi* ('73) A. Mad. 154.

**Shia law.**— The Shia law as to what constitutes *marz-ul-maut* is the same. In *Khurshed* v. *Faiyaz (j)* a gift to one heir was held to be valid to the extent of one-third without the consent of the other heirs. This was considered in a Madras case *(k)* to be tenable only if the donor was a Shia of the Ithna Ashari school and it was held that a death-bed gift by an Ismailya Shia to an heir without the consent of the co-heirs was altogether invalid.

*Sale.*— The provisions of this section do not apply to a transfer for consideration, *e.g.*, a sale *(l)*. A transfer of property made by a husband to his wife in lieu of dower is in effect a *sale*, though the transaction may be described as a gift *(m)*. On the other hand, a transaction, though in reality a gift, may be described as a sale to evade the provisions of the law relating to gifts made during *marz-ul-maut*. Such a transaction will be governed by the law relating to gifts made during *marz-ul-maut (n)*.

**136. Conditions necessary for its validity.**— A gift made during *marz-ul-maut* is subject to all the conditions necessary for the validity of a *hiba* or gift, including delivery of possession by the donor to the donee.

Baillie, 551. As to the conditions requisite to the validity of a *hiba* or gift, see the Chapter on Gifts below. See also the cases cited in the preceding section. A death-bed gift is essentially a *hiba* or gift, though the limits of the donor's power to dispose of his property by such a gift are the same as the limits of his *testamentary* power. It is therefore subject to all the conditions of a gift, including delivery of possession by the donor to the donee before the death of the donor.

**137. Death-bed acknowledgment of debt.**— An acknowledgment of a debt may be made as well during death-illness as "in health."

When the *only proof* of a debt is an acknowledgment made during *marz-ul-maut* or death-illness, the debt must not be paid until after payment of debts acknowledged by the deceased while he was "in health" and of debts proved by other evidence. An acknowledgment of a debt made during death-illness in favour of an *heir* is no proof at all of the debt, and no effect can be given to it.

*Hedaya*, 436, 437, 438, 684, 685; Baillie 693-694. This section is to be read with that part of sec. 39 which refers to *priority* of debts.

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*(j) Khurshed Husain* v. *Faiyaz Husain* (1914) 36 All. 289, 23 I.C. 253; cf. *Musi Imran* v. *Ibn. Hasan* (1933) All. L.J., 53, 147 I.C. 835, ('33) A.A. 341; *Sajjad Hussain* v. *Mahomed Sayid Hasan* (1934) All. L.J. 71, 154 I.C. 434, ('34) A.A. 71 [presumably a Shia case as the last case is cited].

*(k) Sharif Ali* v. *Abdul Ali Safiaboo* (1936) 71 Mad. L.J. 247, 163 I.C. 626, ('36) A.M. 432.

*(l) Fazal Ahmad* v. *Rahim Bibi* (1918) 40 All. 238, 244-245, 51 I.C. 638.

*(m) Eshaq* v. *Abedunnessa* (1914) 42 Cal. 361, 28 I.C. 692; *Sadiq Ali* v. *Mt. Amiran* ('29) A.O. 439, 121 I.C. 87: *cf. Mahabir Prasad* v. *Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.PC. 174.

*(n) Fazl Ahmad* v. *Rahim Bibi* (1918) 40 All. 238, 244-245, 51 I.C. 638.