A

DIGEST OF MOOHUMMUDAN LAW

ON THE

SUBJECTS TO WHICH IT IS USUALLY APPLIED BY BRITISH COURTS OF JUSTICE IN INDIA.

COMPILED AND TRANSLATED FROM

AUTHORITIES IN THE ORIGINAL ARABIC,

WITH

AN INTRODUCTION AND EXPLANATORY NOTES.

PART FIRST

CONTAINING

THE DOCTRINES OF THE HANIFEEA CODE OF JURISPRUDENCE.

SECOND EDITION,

REVISED, WITH SOME ADDITIONS TO THE TEXT, AND A SUPPLEMENT ON SALE, LOAN, AND MORTGAGE.

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BOOK XI.

OF FURAIZ OR INHERITANCE.

CHAPTER I.

OF THE DEFINITION OF 'FURAIZ,' AND THE PURPOSES TO WHICH THE 'TURKUT,' OR PROPERTY LEFT BY A DECEASED PERSON, IS APPLICABLE.

Definition.

'FURAIZ' is the plural of *fureezut*, a derivative from *furz*, which, as rendered in the dictionaries, means, 'appointment, precision, explanation,' and is applied in law to anything that is established by precise and conclusive evidence. This branch of law is termed *furaiz* because the *sihám*, or shares in a deceased person's property, have been expressly appointed or ordained, and are based or established on precise and conclusive evidence. So that there is an agreement between the ordinary and legal acceptations of the word.

Funeral expenses are first to be paid.

The estate of a deceased person is applicable to four different purposes—his funeral, his debts, his legacies, and the claims of his heirs. The funeral comprises the washing, shrouding, and interring of his body; all of which are to be performed in a manner suitable to his condition; and for the necessary expenses incurred thereby all his property is liable, save only property which is subject to some special charge, as a pledge, for instance, to which the pledgee has a preferable right.

Then debts.

Debts are next to be paid; and debts may be wholly of health or wholly of sickness, or partly of health and

partly of sickness. If they are wholly debts of health, or wholly debts of sickness, they are all alike, and none is entitled to any preference. If they are partly debts of health and partly debts of sickness, the former are preferred if the latter can be established only by the acknowledgment of the deceased. But when the debts of sickness can be established by proof, or have been openly incurred for known causes, such as the purchase or destruction of property, or the proper dower of a wife, the debts of sickness are on the same footing as those of health. Debts not actually due at the time of the debtor's death become payable immediately on the occurrence of that event, because the privilege of postponement is a personal right which dies with him. The death of a creditor has not the same effect, because the person to whom the right of delay belongs is still alive.[1]

Next legacies to the extent of a third of the residue.

Legacies are next to be paid out of a third of what remains after payment of funeral expenses and debts, unless the heirs allow them beyond a third. Then the residue is to be divided among the heirs, according to their shares in the inheritance. This, or the preference of a legatee to the heirs, is only when the legacy is of something specific; for if it be a confused legacy, as the bequest of a third or a fourth, it has no right to preference. Nay, the legatee in that kind of legacy is a partner with the heirs, and his interest rises or falls with any increase or diminution of the testator's estate.

Grounds of inheritance.

The right to inheritance is founded on three different qualities—*nusub*, which is *kurabut*, or kindred; special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is invalid or void, according to all;[2] and *wula*, which is of two kinds—*wula* of emancipation, and *wula* of *moowalat*, or mutual friendship; the superior being the heir

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[1] *Jowhurrut-oon-Neyyevah*, chap. *Morábukut*.

[2] *Doorr ool Mookhtar*, p. 852. From which it appears that, with regard to this effect of an invalid marriage, there was no difference of opinion between Aboo Huneefa and his two disciples.

to the inferior in both kinds, and not the inferior to the superior, unless when there is a special condition, as when he has said, 'If I die, my property is an inheritance to these,' when the inferior would be heir to the superior.

Three different kinds of heirs.

There are three different kinds of heirs—*ashab ool furaiz*, or sharers, *asubát*,[1] or agnates, and *zuvool arham*, or uterine relatives. The two last have been termed, from their position in the inheritance, residuaries and distant kindred.[2] The sharers are first; then the residuary by *nusub*, or kindred; then the residuary for special cause, or the emancipator, whether male or female;[3] then the residuary of the emancipator. After this, there is the return; that is, when there are sharers, but none of these residuaries, the surplus, if any, reverts to the sharers, and is divided among them in proportion to their shares. Next are the distant kindred. After them the *mowla* of mutual friendship. Then a person in whose favour the deceased has made a declaration of *nusub*, or descent, as against another, but not such as to establish his descent, and has persisted in such declaration to his death. In this three conditions are implied. The declaration of descent must be as against another, as, for instance, when the deceased has declared a person of unknown descent to be his brother, which involves a declaration against his father that the person is his son. The declaration must be such as not to establish the descent of the person acknowledged, as when it is not acquiesced in by the father. And the acknowledger must die without retracting his acknowledgment.[4] The person next in succession is one to whom the deceased has bequeathed the whole of his property. And, lastly, the *beit-ool-mal*, or public treasury.

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[1] Pl. of *asubut*, usually pronounced *asubah*.

[2] By Sir William Jones, in his translation of the *Sirajiyyah*.

[3] *Shureefea*, p. 9.

[4] *Shureefea*, p. 11.

CHAPTER II.

OF SHARERS.

Twelve sharers.

SHARERS are all those for whom shares have been appointed or ordained in the sacred text, the traditions, or with general assent. And they are in number twelve persons; of whom the rights of ten are founded on *nusub* or kindred, and of two on special causes. Of the former there are three males, and seven females. The first of the males is the father, who has three states or conditions: One when he has merely a share, which is a *sixth*; and it is when the deceased has left a son or son's son how low soever. Another when he is merely the residuary; and that is when there is no successor but himself, and he takes the whole property as residuary, or when there is only a sharer with him, who is not a child, nor child of a son (how low soever), as a husband, a mother, or a grandmother, and the sharer takes his share, and the father takes what remains as residuary. And the third state is when he is both a sharer and the residuary; as when there are with him a daughter and a son's daughter, and he has a sixth as a sharer, the daughter a half,—or two thirds when there are two or more daughters,—the son's daughter a sixth, and the father the remainder as residuary. The second of the males entitled by *nusub* is the true grandfather, and he is defined to be one into whose line of relationship to the deceased no mother enters, as the father's father, or the father's father's father; one into whose relationship to the deceased a mother enters being termed a false grandfather, as the father of the father's mother. The true grandfather is entirely excluded by

Ten of which are by *nusub*.

Three males.

1. The father.

2. True grandfather.

False grandfather—who?

the father; but in default of him comes into his place, save that he does not, like him, reduce a mother's share to a third of the residue, nor entirely exclude a paternal grandmother. He excludes, however, all the brothers and sisters of the deceased, according to Aboo Huneefa, with whom the *futwa* concurs. The third of the males entitled by *nusub* is the half-brother by the mother, whose share when there is but one is a sixth; or when there are two or more of them, a third, which is equally divided among them all.

3. Half-brother by the mother.

Of females who are entitled by *nusub*, the first is the daughter, whose share when she is alone is a *half*; and when there are two or more daughters, they have two thirds between them. When there are both sons and daughters, the sons make the daughters residuaries with them, the share of each son being equal to that of two daughters. The second are the son's daughters, who, when there is no child of the loins, are like daughters, one taking a half, and two or more taking two thirds between them. When there is a son, the children of a son take nothing; when there is one daughter, she takes a *half*, and the son's daughters have a sixth; and if there are two daughters, they take *two thirds*, and there is nothing for the son's daughters. That is, when there is no male among the children of a son; but if there is a male he makes the females (whether his sisters or cousins) residuaries with him; so that if there were two daughters or more of the loins, they would have two thirds between them, and the remainder would pass to the children of the son, in the proportion of two parts to the males and one part to the females. Though the male were in a grade below them, he would make them residuaries with him; so that the remainder would be between him and them in the same proportion, or two parts to each male, and one to each female. Thus, if there were two daughters, a son's daughter, the daughter of a son's son, and the son of a son's son, the daughters would take two thirds, and the remainder be between the son's daughter and all below her, in the proportion of two parts to the male, and one part to

Seven females:—
1. The daughter.

2. Son's daughter.

each female. The principle in this case is, that a son's daughter becomes a residuary with a son's son, whether he is in the same or a lower grade with herself,—when she is not a sharer.[1] The third of the females entitled by *nusub* is the mother, who, like the father, has three states or conditions. One when there is with her a child or child of a son, how low soever, or two or more brothers or sisters of the whole or half blood, and on whatever side they may be, and then her share is a *sixth*. Another when there are none of these, and then her share is a *third*. And a third case is when there is a husband or a wife, and both parents: and then the mother has a third of what remains, after deducting the share of the husband or wife, and the residue is to the father according to all opinions. But if in the place of the father there were a grandfather, the mother would have a third of the whole property for her share. The fourth is the true grandmother, as the mother's mother how high soever, and the father's mother how high soever. Everyone into whose line of relationship to the deceased a mother enters between two fathers is a false grandmother. The share of the true grandmother, on the father's or the mother's side, is a *sixth*, whether there be one or more; all partaking of it equally who are in the same degree. When there are two grandmothers, one of whom is related to the deceased on both sides, and the other only on one side, Aboo Yoosuf has said, and there is one report to the same effect from Aboo Huneefa, that the *sixth* is to be divided between them equally, and the *futwa* is in accordance with this opinion. The fifth are full sisters, and their share is a *half* when there is only one, and *two thirds* when there are two or more. When there is a full brother with them, the male has the share of two females; and when there are daughters, or daughters of a son, the full sisters take the residue.[2] The sixth are half sisters by the father, and they are like

3. The mother.

4. The true grandmother.

False grandmother—who?

5. Full sisters.

6. Half-sisters by the father.

[1] This qualification prevents any injury to her by the application of the principle. See *M. L. I.*, second ed., p. 39.

[2] For the reason, see *ibid.*, p. 40.

full sisters when there are none, one taking a *half* and two or more *two thirds* in that case; with one full sister they take a *sixth*, which makes up the two thirds. But with two full sisters they have no portion in the inheritance, unless there happens to be with them a half-brother by the father, to make them residuaries, when the full sisters take their two thirds, and the children of the father only have the residue between them, in the proportion of two parts to the male, and one part to each female. The seventh are half-sisters by the mother; of whom, when there is one, she takes a *sixth*, and when there are two or more, they take a third. But all brothers and sisters are excluded by a son or son's son, how low soever, or a father, by general agreement, and also by a grandfather, according to Aboo Huneefa. And children of the father (that is, half-brothers and sisters on his side) are excluded not only by these, but also by a full brother; and children of the mother (or half-brothers and sisters on her side) are excluded by a child, though a daughter, and by the child of a son, a father, and a grandfather by general agreement.

7. Half-sisters by the mother.

The two sharers who are entitled for special cause are the husband and wife. The share of a husband is a *half*, when there is no child nor child of a son how low soever; and a *fourth* with a child or child of a son. The wife's share is a *fourth* in the former of these cases, and an *eighth* in the latter; the fourth or eighth, as the case may be, being equally divided among all the wives when there are more than one.

Sharers for special cause.

Husband.

The shares appointed or ordained by the sacred text are six in number:—a half, a fourth, an eighth; and two thirds, one third, and a sixth. A half is appointed for five different persons. It is the share of a husband when the deceased has left neither a child nor child of a son; the share of one daughter of the loins, and the share of a son's daughter when there is no daughter of the loins; and the share of the full sister, and of the half-sister on the father's side when there is no full sister. A fourth is the share of two persons, that is, of a husband when the deceased has left a child, or a child of a son, and of a wife

Number of shares, and the persons entitled to them.

A half.

A fourth.

or wives when he has left neither child nor child of a son.

An eighth. An eighth is the share of one or more wives, when the deceased has left a child or child of a son.

Two thirds. Two thirds are the share of four different persons—the share of two daughters or more of the loins; the share of two or more daughters of a son, when there is none of the loins; the share of two full sisters or more, or two half-sisters by

A third. the father, when there is no full sister. A third is the share of two persons—that is, of a mother, when the deceased has left neither a child nor child of a son, nor two brothers or sisters; and the share of two children or more of a mother, whether they be male or female. And

A sixth. a sixth is the share of six persons. The share of a father, when the deceased has left a child or child of a son; the share of a grandfather, when there is no father; the share of a mother, when the deceased has left a child or child of a son, or two brothers or sisters; the share of a single grandmother, or of several grandmothers when there are more at the time of inheriting; the share of a son's daughter with a daughter of the loins, to make up two thirds; and the share of one child of the mother, whether male or female.

CHAPTER III.

OF ASUBÁT OR RESIDUARIES.

THE Asubát are all persons for whom no share has been appointed, and who take the residue after the sharers have been satisfied, or the whole estate when there are none. They are of two kinds: residuaries by *nusub*, or kindred to the deceased, and residuaries for special cause. Of the former there are three classes: residuaries by themselves or in their own right, residuaries by another, and residuaries with another. Three classes of residuaries.

The residuary by himself or in his own right is defined to be 'every male into whose line of relation to the deceased no female enters;' and such residuaries are of four sorts—the offspring[1] of the deceased, and his root; the offspring of his father, and the offspring of his grandfather. Hence the nearest of the residuaries is the son; then the son's son, how low soever; then the father; then the grandfather, or father's father, how high soever; then the full brother, then the half-brother by the father, then the son of the full brother, then the son of the half-brother by the father,[2] then the full paternal uncle, then the half paternal uncle by the father, then the son of the full paternal uncle, then the son of the half paternal uncle by the father,[3] then the full paternal uncle of the father, then the half paternal uncle of the father on the father's 1. Residuary in his own right.

[1] *Jooza*, literally part of the deceased.

[2] Then their sons, how low soever, in the same manner, the full blood being preferred to the half-blood at each stage of descent.—*Sirajiyyah*, pp. 48, 49.

[3] Then their sons how low soever.—*Ibid.*

side, then the son of the father's full paternal uncle, then the son of the father's half paternal uncle on the father's side, then the paternal uncle of the grandfather, then his son how low soever.[1]

When there are, several, the estate is divided equally between them.

When there are several residuaries in the same degree the property is divided between them by bodies, not by families (*per capita* and not *per stirpes*). As, for instance, when there is a son of one brother and ten sons of another, or the son of one paternal uncle and ten sons of another, the property is to be divided into eleven parts, of which each takes one part.

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[1] The *Mubsoot* is the authority cited, and it is confirmed by the *Doorr ool Mookhtar*, p. 854. To these I can now add the *Sirajiyyah*, though the direct detail of the residuaries stops at the sons of the paternal uncles, and I failed, when preparing 'The Moohummudan Law of Inheritance,' to observe that it is carried, by implication, to the full extent of the paternal uncles of the grandfather. Thus, the author, after stating that the son of the full brother is preferred to the son of the half-brother by the father, proceeds to say that 'The same rule is applicable to the paternal uncles of the deceased, then to the paternal uncles of his father, and then to the paternal uncles of his grandfather;' words that are plainly inconsistent with a limitation of the succession to the offspring of the 'nearest grandfather,' as might, at first sight, be inferred from Sir William Jones's translations of the passage. See the examination of it in the treatise above mentioned, 1st ed., p. 78, 2nd ed., p. 47. The detail of the residuaries is not carried farther in any of the authorities than the uncles of the grandfather; but it would have been superfluous to do so, as the grandfather had been already defined to be a father's father, *how high soever*. So that the detail is, in reality, co-extensive with the definition, and the succession of residuaries in their own right as unlimited in the collateral as it is in the direct line, where it is expressly said to be 'how low and how high soever.' In several cases decided by the superior courts in India, descendants of a great-grandfather have been found entitled to succeed as residuaries. See Bhanoo Beebee *versus* Imam Bukhsh, *Rep. S. D. A. Calcutta*, vol. i., p. 68; Sheikh Moohummud Bukhsh *versus* Shurf-oon-Nissa Begum, *M. L. I.*, p. 82; and Mohadeen Ahmud Khan *versus* Syed Mohamed and another, High Court of Madras Reports, vol. i., p. 92, and *Indian Jurist Reports*, p. 132. See farther, *M. L. I.*, 2nd. ed., p. 50, where it is inferred from a passage in the *Shureefeea*, p. 176, that there is no limit to the succession of the residuaries in the collateral, any more than in the direct line.

Residuaries by another.

The residuary by another is every female who becomes or is made a residuary by a male who is parallel to her; and such residuaries are four in number: a daughter by a son, a son's daughter by a son's son, a full sister by her brother, and a half-sister by the father, by her brother. The remaining residuaries, that is, all besides these, take the residue alone, that is, the males take it without any participation of the females: and they are also four in number; the paternal uncle and his son, the son of a brother, and the son of an emancipator.

Residuaries with another.

The residuary with another is every female who becomes a residuary with another female; as full sisters or half-sisters by the father, who become residuaries with daughters or sons' daughters.

Residuaries of a *wulud-ooz-zina*, and son of a *mooláunah*.

The residuaries of a *wulud-ooz-zina* and of the son of an imprecated woman are the *moowalees*[1] of their mothers; for they have no father, and the *kurabut*, or kindred of their mother inherit to them, and they inherit to them. So that if the son of an imprecated woman should leave a daughter, a mother, and the imprecator, the daughter would take a half, the mother a sixth, and the remainder would revert to them as if he had no father. If besides these there were also a husband or a wife, he or she would take his or her share, and the remainder be between the others, either as share or as return. And if he should leave his mother, a half-brother by the mother, and a son of the imprecator, the mother would take a third, the half-brother by the mother a sixth, and the remainder would revert to them, there being nothing for the son of the imprecator, as the deceased has no brother on the side of the father. When the child of the son of

[1] Pl. of *Mowla*, which signifies both emancipator and emancipated, though it also means the son of a paternal uncle. It is here, I think, to be taken in the sense of emancipated; in which sense it occurs in a section of the *Fut. Al.*, vol. ii., p. 490, that treats of appropriations for the benefit of *Mowalees*, *moodubburs*, and *oom-i-wuluds*. The mothers in the text would thus be women free by origin who had emancipated slaves, and whose freedmen would become residuaries to their illegitimate children. See *Doorr ool Mookhtar*, p. 855.

an imprecated woman dies, the family of his father inherit to him, being his brothers; but the family of his grandfather, who are his paternal uncles, and their children, do not inherit to him. The same is true of the *wulud-oozzina*, except that there is a difference between them in one case, which is that the *tuwam*, or twin of the *wulud-ooz-zina*, inherits only as a half-brother by the mother, while the twin of an imprecated son inherits as a full brother.[1]

Among residuaries of different kinds, the nearest is preferred.

When there are several residuaries of different kinds, one a residuary in himself, another a residuary by another, and the third a residuary with another, preference is given to propinquity to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first. Thus, when a man has died, leaving a daughter, a full sister, and the son of a half-brother by the father, a half of the inheritance is to the daughter, a half to the sister, and nothing to the brother's son, because the sister becomes a residuary with the daughter, and she is nearer to the deceased than his brother's son. So, also, when there is with the brother's son a paternal uncle, there is nothing to the uncle. And in like manner when in the place of the brother's son there is a half-brother by the father, there is nothing for the half-brother.[2]

Residuary for special cause.

The residuaries for special cause are the emancipator, and then his residuaries in the same way as has been already mentioned.

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[1] A man may deny one of twins and acknowledge the other, but in that case the paternity of both is established (*Hidayah*, vol. ii., p. 325); so that each is full brother or sister to the other.

[2] Because strength of propinquity, or being the master of two propinquities, is preferred to being master of one.—*M. L. I.*, 2nd. Ed. p. 57.

CHAPTER IV.

OF 'HUJUB,' OR EXCLUSION.

Exclusion: Partial. Total.

EXCLUSION is of two kinds—partial, and total; and partial exclusion is a reduction from one share to another. As regards total exclusion, there are six persons who are not subject to it. These are the father, the son, the husband, the mother, the daughter, the wife.[1] As regards all others besides these, the nearer excludes the more remote;[2] and persons who are related through others do not inherit with them, except only the children of the mother, that is, half-brothers or sisters on her side, who are not excluded by her.

One incapable of inheriting has no effect in excluding others.

One who is deprived of any interest in the estate, that is, one incapable of inheriting, as an infidel, a homicide, or a slave, has no effect in excluding others, either partially or totally. But one who is only excluded may exclude others, by general agreement; as, for instance, two or more brothers or sisters, full or half, and on whatever side, who do not inherit when there is a father, but reduce a mother's share from a third to a sixth.

Examples of exclusion.

Full brothers and sisters are excluded by a son, son's son, and a father, and by a grandfather also, with some

[1] In the *M. L. I.*, p. 58, the son is omitted by mistake. Rectified in the 2nd ed., p. 53.

[2] This is true absolutely, as between residuaries. But a nearer residuary does not always exclude a more remote sharer; as, for instance, a mother's mother is not excluded by a father: and a nearer sharer does not exclude a more remote residuary, nor even a more remote sharer, unless there is one cause of succession, as in the case of a mother and grandmother, or a daughter and daughters of a son.—*Shureefeea*, p. 62.

difference of opinion. Half-brothers and sisters on the father's side are excluded by the same persons, and also by full brothers and sisters; and half-brothers and sisters on the mother's side are excluded by a child, the child of a son, a father, and a grandfather, by general agreement. All grandmothers, whether maternal or paternal, are excluded by a mother; and paternal grandmothers are excluded by a father, as a grandfather is excluded by him, and they are also excluded by a grandfather when anterior to him; but a paternal grandmother is not excluded by a grandfather, because she is not anterior to him. Grandmothers on the side of the mother are not excluded by a father; so that if one should leave a father, a father's mother, and a mother's mother, the father's mother is excluded by the father; but there are different opinions as to the mother's mother, some saying that she has a sixth, and others only the half of a sixth. The nearer excludes the more remote, whether himself an heir or excluded. Thus, if one should leave a father, a father's mother, and the mother of a mother's mother, it is said that the father has the whole, because he excludes his mother, and she excludes the mother of the mother's mother, because she is nearer to the deceased. There is a difference of opinion as to her succeeding with her son, who is paternal uncle to the deceased; but according to the generality of 'our sheikhs,' she does inherit with her son who is the paternal uncle.

Only one maternal grandmother who can be an heir.

It should be remembered that only one grandmother on the side of a mother can be considered an heir, for true grandmothers are only those in whose line of relationship a father does not come between two mothers; so that this single heir is the mother's mother how high soever, and the nearer excludes the more remote, so that only one grandmother can inherit. But of the paternal grandmothers it may be conceived that many may be heirs.

CHAPTER V.

OF IMPEDIMENTS TO INHERITANCE.

SLAVERY is an impediment to inheritance; and in this respect there is no difference between an absolute and a qualified slave. Even a partially emancipated slave is not capable of inheriting, according to Aboo Huneefa. 1. Slavery.

One who has unlawfully killed another is incapable of inheriting to him, whether the killing was intentional or by misadventure, as by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer is riding. But being the indirect cause of a person's death is not a sufficient ground for excluding from his inheritance; as, for instance, when a person has dug a well into which another falls, or placed a stone on the road against which he stumbles and is killed in consequence. Every act of homicide that induces retaliation or expiation is a cause for depriving one of a right of inheritance to the person slain; and anything that does not induce either of these consequences is merely an indirect cause. When a father has circumcised his child, and the child dies in consequence of the operation, the father is not deprived of his right in the child's inheritance. But if he should admonish him by stripes, and the child should die in consequence, he is responsible for the *deeyut* or fine, and loses his right to inherit, according to Aboo Huneefa, though he is not responsible, according to the other two. And if a teacher be the person who punished the child, with the father's permission, he does not incur any liability, according to all their opinions. 2. Homicide.

3. Difference of religion.

Difference of religion is also an impediment to inheritance; by which is meant the difference between *Islam* and infidelity. But a difference of faith among unbelievers, such as Christianity, Judaism, Mujooseeism, or idolatry, is no impediment to inheritance; so that there are mutual rights of inheritance between Christians and Jews and Mujoosees.

4. Difference of country.

Difference of *dar* or country is also an impediment to inheritance, but this applies only to unbelievers, not to Mussulmans. So that if a *Mooslim* should die in the *dar-ool-hurb*, his son in the *dar-ool-Islam* inherits to him. The difference of country is actual when an alien dies in the *dar-ool-hurb*, having a father or son who is a *zimmee* in the *dar-ool-Islam*; and in that case the *zimmee* does not inherit to the alien. In like manner, if a *zimmee* should die in the *dar-ool-Islam*, having a father or son in the *dar-ool-hurb*, they would not inherit to him. The difference of country is constructive when a *moostamin* dies in 'our' territory, having a *zimmee* heir, or *vice versâ*, and neither is heir to the other. Countries differ by a difference of armies and governments, which cuts off protection between them.[1] When a *moostamin* dies in 'our' territory, leaving property, it should be sent to his heirs; when a *zimmee* dies without heirs, his property goes to the *beit ool mal*, or public treasury.

[1] See further on this subject, *M. L. I.*, 2nd ed., p. 18.

CHAPTER VI.

OF THE INHERITANCE OF INFIDELS AND SOME OTHER CLASSES OF PERSONS.

SECTION FIRST.

Of Infidels.

INFIDELS inherit among themselves, for the same causes that *Mooslims* inherit, that is, kindred and marriage. The same person may, also, among them as with *Mooslims*, inherit for two causes; as, for instance, when the deceased has left two cousins, one of whom is also his half-brother by the mother. When the two causes of inheritance are of such a nature that one of them excludes the other, it is only by means of the excluding cause that the person can inherit; but if one of the causes does not exclude the other, he may inherit by means of both.[1] Thus, when a *mujoosee* marries his mother, and she bears him a son, the child is both her son and her grandson, but inherits only as the former, and not as the latter; while if the child were a daughter, she might take a half in her mother's succession as a daughter, and a sixth as the daughter of a son, to make up two thirds; and might also inherit as a daughter from her father, but could not take, in his succession, as his half-sister by the mother, because a sister is excluded by a daughter.

The inheritance of infidels is generally regulated in the same way as that of *Mooslims*.

[1] This seems to be a general rule, equally applicable to *Mooslims* as to infidels, though the examples cannot apply to the former.

Invalid marriage not a ground for inheritance.

Infidels do not inherit by reason of marriages which they (only) account to be lawful; as when a *mujoosee* marries his mother. For an invalid marriage does not induce mutual rights of inheritance among *Mooslims*, and cannot do so among *mujoosees*.[1]

Section Second.

Of Apostates.

Male apostate.

A male apostate cannot inherit to anyone, neither to a *Mooslim* nor to an apostate, because, among other reasons inheritance has respect to religion, and he has none. And it is for this reason that he is not allowed to marry a *Mooslimah*, an original infidel, or an apostate, since marriage also has respect to religion.[2]

Succession to his estate.

When a male apostate is put to death, or dies naturally, or escapes to a foreign country (and is judicially declared to have joined the enemy),[3] all that he had acquired while a *Mooslim* belongs to his heirs. Among these his wife is included, if she is a *Mooslim*, and her *iddut* is unexpired at the time of his death. But if her *iddut* has expired, or if her marriage was never consummated, she has no right to any share in his inheritance. She also loses her right if she apostatizes with him; though, when a husband and wife apostatize together, their marriage still continues. If she should bear a child after their apostasy, and the husband should then die, the child would be entitled to a share in his inheritance if the birth takes place within six months from the day of the husband's apostasy; but if the birth should take place at more than six months from the day of the apostasy, the child would have no right.

Difference between his acquisitions

According to Aboo Huneefa, it is only what an apostate had acquired while he adhered to the faith that can be inherited from him; and all his acquisitions subsequent to

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[1] *Doorr ool Mookhtar*, p. 861, and see *ante*, p. 694.
[2] *Shureefea*, p. 200. [3] *Sirajiyyah*, p. 198.

his apostasy become *fei*, and are to be placed in the public treasury. According to Aboo Yoosuf and Moohummud, the acquisitions of his apostasy are inherited from him in the same way as what he may have acquired before it; that is, there is no distinction between them, and both alike are divisible among his heirs.

before and after apostasy.

A female apostate, like a male apostate, cannot inherit to anyone, because she has no religion.[1]

Female apostate.

When a female apostate dies, the right of her husband to take a share in her inheritance depends on the fact of her having apostatized during health, or during sickness. If the apostasy took place when she was in health, he has no right to anything. If it took place when she was sick and she has died while her *iddut* is still unexpired, though by analogy she was no evader, and he could, therefore, have no right to her inheritance, yet, on a liberal construction, she is accounted to be such, and he is allowed to participate.

Succession to her estate.

On the death of a female apostate, her whole property is to be divided among her heirs, according to the rules of distribution, whether it was acquired during her adherence to the faith, or after her apostasy.[2]

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[1] *Sirajiyyah* and *Shureefea*, p. 200.

[2] By Act XXI. of 1850 of the Indian Legislature, it is declared that 'So much of any law or usage as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law' in all the courts of the country. This removes the disqualifications of the apostate himself; but his children, if brought up in his new faith, would be still excluded from the inheritance of their Mussulman relatives by mere difference of religion—an objection that is left untouched by the Act; while, apparently, there would be no objection to the relatives inheriting from the apostate or his children, for being no longer of the Mussulman religion, his or their succession could hardly be regulated by Moohummudan law.

Section Third.

Of a Child in the Womb.

A share must be reserved for it.

A child in the womb inherits; and a share must be reserved for him according to all 'our masters,' which he is entitled to if born alive within two years. This has reference to a posthumous child. But if the child's father be alive, as for instance, if the deceased has left a mother pregnant by another man than his father, and she is delivered of a child at more than six months from the day of his death, the child does not inherit, unless the other heirs acknowledge that his mother was pregnant at that time; because it is possible that he may have been conceived subsequently. But if the child is born at six months, he does inherit.

How much is to be reserved.

A child in the womb may be of those who totally or who partially exclude the other heirs, or who participate with them. If he be a total excluder of all the heirs, as (for instance a son) when the other heirs are brothers or sisters or paternal uncles, the whole of the estate must be reserved to abide the event of his birth. When only some of the heirs are excluded, as when there is a grandmother and a brother, the grandmother's sixth is to be paid to her, and the remainder of the estate reserved. If the child be only a partial excluder, as when there is a husband or a wife besides him, the smaller of the shares to which the party may be entitled is to be paid to him or her, and the remainder to be retained. And when the heirs are persons who are not subject to partial exclusion, as a grandfather or grandmother, their full shares are to be paid to them, and the remainder to be retained. If the child is only a participator with the other heirs, and neither a total nor a partial excluder, as when the deceased has left sons and daughters and a pregnant widow, the share of one son is to be reserved. So Khusaf has reported as the opinion and practice of Aboo Yoosuf, and to the same effect also is the *futwa*.

A still-born child

If the child is born dead he does not inherit, and

there is no other legal effect or consequence. The signs of life are breathing, making a sound, sneezing, weeping, laughing and motion, as of the eyes or hands. If half of the child is protruded alive and it then dies, it is entitled to inherit, but not if less than half be protruded. When the head is presented, and the breast is protruded while the child is still living, it inherits; but if the feet are presented, regard is to be had to the navel. When a child is born dead it does not inherit as already mentioned, but this is to be understood of a regular delivery; and if violence has been done to the mother, as, for instance, if she has been struck on the belly and has cast her progeny, such progeny is to be regarded as one of the heirs. For the law imposes a liability on the striker, and liability is incurred only for an offence against the living, not against the dead. When therefore we presume the child to have been alive, he is entitled to his share in the inheritance, and the share can be inherited from him, in the same way as the exchange for his life is inherited from him, and that is the fine. does not inherit.

Section Fourth.

Of Missing Persons, Captives, and Persons Drowned or Burned together.

A person is missing when he has gone away and it is not known where he is, or whether he is dead or alive. Such a person, according to 'our' sheikhs, is to be accounted alive so far as regards his own property, and dead as regards the property of others, until such a time has elapsed that it is inconceivable that he should be still alive, or until his contemporaries are dead; after which he is to be accounted dead with respect to his own property as from the day when such time is completed, or the last of his contemporaries has died, and with respect to the property of others, as if he had died on the day of his being missing. Missing person.

When a person has died to whom one who is missing is an heir, his share is to be reserved until his state be When he is an heir,

a share is to be reserved for him.

determined, on account of the possibility of his being alive; and when the time has arrived which has been above indicated, his own property is to be divided among those of his heirs who are then alive; but what was reserved for him from the estates of other persons is to be returned to the heirs of such persons, as if the missing person had never been.

Captive.

A captive is subject to the same rules as other Mooslims in respect of inheritance unless he renounces his religion, and if he renounces it, he is subject to the same rules as apostates. If it is not known whether he has renounced his religion, or whether he is dead or alive, he is subject to the same rules as missing persons.

Persons perishing together.

Where several persons have been drowned or burnt together, and it is not known which of them died first, 'we' treat them all as having died together. The property of each will accordingly go to his own heirs, and none of them can be heir to another, unless it is known in what order they died, when those who died last will inherit to those who died before them. And the rule is the same when several are killed together by the falling of a wall or in the field of battle, and it is not known which of them died first.

CHAPTER VII.

OF DISTANT KINDRED.

Definition.

THE distant kindred are all relatives who are neither sharers nor residuaries; and they are like the residuaries insomuch that when there is only one of them he takes the whole property. Of the distant kindred there are four classes. The first comprises the children of daughters and sons' daughters; the second are the false grandfathers and false grandmothers; the third are the daughters of full brothers and of half-brothers by the father, the children of half-brothers by the mother, and the children of all sisters; the fourth are the paternal uncles by the mother (that is, the half-brothers of the father by the same mother) and their children, paternal aunts and their children, maternal uncles and aunts and their children, and the daughters of full paternal uncles and half-paternal uncles by the father. These, and all that are connected with the deceased through them, are his distant kindred.

Four classes.

Order of succession.

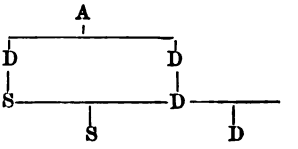
The first class of the distant kindred is first in the succession, though the individual claimant should be more remote than one of another class. The second is next; then the third; then the fourth; according to the order of the residuaries. And this has been adopted. Neysabooree has stated in his Book on Inheritance, that none of the second class can inherit, though nearer to the deceased, while there is one of the first, though more remote; and in like manner as to the third with the second, and the fourth with the third. And he has said that this has been approved of for the *futwa*, and acted upon by 'our' sheikhs, who give precedence absolutely

to the first class over the second, the second over the third, and the third over the fourth. So that the daughter of a daughter, how low soever, is preferred to the mother's father.

Rules of preference among the individuals of each class.

The preference of individuals in the different classes is regulated by the following rules:—1st. The nearer to the deceased is preferred to the more remote. Thus the daughter of a daughter is preferred to the daughter of a daughter's daughter, and a maternal grandfather is preferred to the father of a mother's mother. 2nd. When there is an equality in degree, that is, in proximity to the deceased, the child of an heir, whether sharer or residuary, is preferred. Thus the daughter of a son's daughter is preferred to the son of a daughter's daughter. But this rule is not applicable to the second class, though it applies to all the rest. 3rd. If the claimants are equal in proximity to the deceased, and there is no child of an heir among them, the property is to be equally divided among them, if they are all males or all females; and if there is a mixture of males and females, then in the proportion of two parts for a male and one to a female. This is without any difference of opinion when the sex of the ancestors, whether male or female, is the same. But when the ancestors are of different sexes, though, according to Aboo Yoosuf the division is to be made in the same way, yet, according to Moohummud, it is only the number that is to be taken from the individual claimants, and the quality of sex is to be taken from the generation in which the difference of sex first appears. Thus, if one should leave the son of a daughter and the daughter of a daughter, the property is to be divided among them in the proportion of two shares to the male and one to the female, because here the sex of the ancestors is the same; but if he should leave the daughter of a daughter's daughter, and the daughter of the son of a daughter, the property would be divided between them in halves, according to Aboo Yoosuf, regard being had merely to the number of the individuals; while, according to Moohummud, the property is to be divided between them in thirds, two thirds to the

daughter of the son of a daughter, and one third to the daughter of the daughter's daughter. The Imam Asbeejanee has given the preference to the opinion of Aboo Yoosuf, as being of easier application, and the author of the Moheet and the sheikhs of Bookhara have also adopted it in this class of cases. 4th. If one of the claimants is connected with the deceased in two or more ways, he will inherit by each way, regard being had to the branches, according to Aboo Yoosuf, and to the roots, according to Moohummud; except the grandmother, who, according to Aboo Yoosuf, can inherit only in one way. Thus, suppose a man to have left two daughters who have died, one leaving a son and the other a daughter; and suppose this son and daughter to intermarry, and to have a son, after which the daughter marries another man, to whom she bears a daughter,—her first child is thus the son of a daughter's son and also the son of a daughter's daughter, while her second child is only the daughter of a daughter's daughter, according to the scheme in the margin. Now suppose the husband and wife and the grandmothers to be dead, and the question to relate to the estate of the great-grandfather: according to Aboo Yoosuf, the son would take four fifths and the daughter one fifth, that is, a double share as a male, and that doubled by reason of his being connected in two ways. While, according to Moohummud, the son would take five sixths, and the daughter only one sixth; that is, Moohummud would make the division according to sexes in the second generation, where the distinction first appears, giving two thirds or four sixths to the grandson which would pass wholly to his son, and leaving the remaining third or two sixths for the granddaughter, which would be equally divided between her son by the first marriage, and her daughter by the second.[1]



[1] For further details regarding the distant kindred, the reader is referred to the *M. L. I.*, chap. xi., 2nd ed. chap. xii.

CHAPTER VIII.

OF THE COMPUTATION OF SHARES.

Extractors or divisors of shares.

Of the six appointed shares, a sixth, a third, and two thirds, form one series, and an eighth, a fourth, and a half, form another series; and each one of the shares has an extractor or divisor of its own.[1] Thus, a half is the extractor of two shares, and of each of the remaining shares the name is the extractor, so that eight is the extractor of an eighth; four of a fourth; three of one third and two thirds; and six of a sixth. When there are several shares of the same series, the name of the lowest share is the extractor, and when there are shares of different series, the smallest number divisible by all the shares without a fraction, is the extractor.[2] If four is found in conjunction with all or any of the other series, the extractor is twelve; if eight is found in such conjunction, the extractor is twenty-four; and if two is found in such conjunction, the extractor is six.

How the extractor must be multiplied when there is one class whose share is not divisible without a fraction.

When the shares have been determined, and each share is divisible among the individuals who are entitled to it without a fraction, nothing farther is required. But if there is any share that is not so divisible, multiply the number of individuals who are entitled to it by the extractor, and its increase if it be increased,[3] and the product

[1] That is, a number by which it may be eliminated without a fraction from the amount of the property.

[2] *M. L. I.*, pp. 87, 88, 2nd ed. 59, 60.

[3] The original extractor may be increased, as will be seen in the next chapter: and if so, the increased extractor is to be used in the operation instead of the original.

will satisfy the case. Thus, the deceased has left a widow and two brothers, and the share of the widow being a fourth, the extractor is four, and there remain three fourths which cannot be divided among two brothers. Accordingly, four is to be multiplied by two, and the estate to be divided into eight parts, which will resolve the case; for the widow taking a fourth of the eight or two parts, the remaining six will be equally divisible among the two brothers. If there is a common measure between the shares, and the number of individuals who are entitled to it, divide the number of individuals by the common measure, and multiply the extractor by the quotient. Thus, there are a widow and six brothers, and the widow taking a fourth, there remain three parts which are not divisible without a fraction among the six brothers. But there is a common measure of both the numbers, and six divided by three gives two, which is accordingly to be multiplied by four, the original extractor, and the product or eight parts will be found to be equally divisible; for the widow taking her fourth or two parts, there remain six for the brothers, or one for each. As another example, take the case of a widow, six full brothers and three full sisters. Here the division is at first into four parts, whereof the widow taking one, there remain three, which cannot be divided into fifteen parts (the number required to allow each brother double the share of each sister), but there is a common measure between three and fifteen, which is three, and fifteen being divided by three, the quotient is five, and the original extractor being multiplied by it, the product, or twenty shares, will resolve the case.

How it is to be multiplied when there are two classes whose shares cannot be divided without a fraction.

When there are two shares which do not admit of being divided without a fraction between the individuals who are entitled to them, first seek for a common measure between each share and the individuals, and then between the numbers of individuals; and if they are *mootumathil* or equal, multiply one of them by the original extractor of the case; if they are *mootudakhil*, or one a multiple or equal part of the other, multiply the greater of the two by the extractor; if they are commensurable multiply the

lowest term of one by the other, and then multiply the product by the extractor; and if the numbers are *mootubaien* or prime to each other, multiply each by the other, and the product by the original extractor. Thus, take the case of three uncles and three daughters. Here the daughters take two thirds, and the uncles one third, and both the shares are indivisible without a fraction among the persons entitled to it, but the numbers in the two classes are equal; one of them, or three, is accordingly to be multiplied by the extractor which is also three, and the product or nine shares will resolve the case. Or take the case of five grandmothers, five full sisters, and one paternal uncle. Here, the original division is into six parts (one to the grandmothers, four to the full sisters, and one to the uncle); but two of the shares are indivisible among the individuals entitled to them. The individuals, however, are equal; and one of the two numbers, or five, is accordingly to be multiplied by the extractor six, and the product or thirty resolves the case. Again, there are a grandmother, six full sisters, and nine half-sisters by the mother, and the original extractor is six increased to seven, of which the grandmother takes one, the half-sisters by the mother two —the numbers of the shares and of the individuals being incommensurable—and the full sisters take four, but between them and their portions there is the common measure two, which reduces their number to three, and that being an equal part of nine (the number of the half-sisters) nine is to be multiplied by the increased original extractor, and that will give sixty-three, which resolves the case. Again, there is a daughter, six grandmothers, four daughters of a son, and one paternal uncle, and the original extractor is six. Here, there is no common measure of the shares, and the individuals entitled to them; but there is a common measure between individuals and individuals (that is, between six, the number of grandmothers, and four, the number of son's daughters). The common measure is two, and half of one being multiplied by the other, the result is twelve, which, being multiplied by the original extractor,

Example where the numbers of individuals are equal.

Example where the number of one class is a multiple of the number of another.

Examples where the numbers are commensurable.

gives seventy-two as the number of parts into which the whole is to be divided.

How the extractor is to be multiplied when the shares of three or more classes cannot be divided without a fraction. Examples

When there are three or more shares that do not admit of being divided among the individuals entitled to them without a fraction, a common measure is first to be sought between the shares and the individuals, then between individuals and individuals, and you are to do so as you have done with the two shares in respect of the numbers being equal, commensurable, or incommensurable, or one being a multiple of the other. Thus, take the case of four wives, three grandmothers, and twelve paternal uncles. The extractor being twelve, the widows take a fourth, or three parts between them; the grandmothers a sixth, or two parts, and the uncles the remainder, or seven parts, and there is no common measure between any of the shares and the individuals entitled to it; but the numbers of the three sets of individuals are either multiples or parts of each other. The largest, accordingly, is to be taken, or twelve, and multiplied by twelve, the original extractor of the case, and the product, or one hundred and forty-four, is the number of parts into which the estate is to be divided; and as the widows had three out of twelve, they have now thirty-six between them, or nine to each; and as the grandmothers had two out of twelve, they have now twenty-four, or three to each; and as the uncles had seven out of twelve, they have now eighty-four, or seven each. Again, take the case of six grandmothers, nine daughters, and fifteen paternal uncles: the original extractor being six, the grandmothers have one share which cannot be divided between them without a fraction, and there is no common measure between their number and the share, the daughters have four in the like condition, and the uncles have one also in the like condition; but between the numbers of the individuals there is a common measure, which is three. Take, then, a third of the six grandmothers, or two, and multiply that by the number of daughters, which is nine, and the product will be eighteen. Of this, taking a third,

or six, multiply it by the number of uncles, which is fifteen, which will give ninety; and this again being multiplied by six, the original extractor, the product, or 540, is the number of parts into which the estate is to be divided.

CHAPTER IX.

OF THE INCREASE.

THE shares of the sharers may be equal to, or less or more than, the shares of the property.[1] In the first case, they are said to be *ádil*, or just, as when the deceased has left two full sisters and two half-sisters by the mother, and the former take two thirds, and the latter one third; or when the shares of the sharers are less than the shares of the property, but there is a residuary to take what remains. In the second case the shares are said to be *kasir*, or deficient, as when they are less than the shares of the property, and there is no residuary; for instance, where the deceased has left two full sisters and a mother, and the sisters take two thirds, and the mother a sixth, and they also take what remains, because there is no residuary. This is a case of return. In the third case, which is termed *âïl*, or excessive, the shares of the sharers exceed the shares of the property by there being, for instance, two thirds and a half, as in the case of a husband with two full sisters and a mother, or two halves and a third, as in the case of a husband with one full sister and a mother. To a case of this kind the rule of the *awl*, or increase, is applicable, according to the majority of the companions; and it consists in raising the shares of the property to the number of the shares of the sharers, by which means the deficiency is distributed over all the sharers in proportion to their shares. Thus, in the two

The shares may be equal to, or less or more than, a whole number.

When they are in excess the extractor must be increased.

[1] Or, in other words, the sum of the fractions that represent the shares are equal to, or less or more than, an *integer*, or whole number.

cases above mentioned, where the shares amount to seven sixths and eight sixths respectively, the extractor of the case, or six, is raised to seven and eight respectively, so that the sharers, instead of getting so many sixths of the property, get only so many sevenths in one case, and so many eighths in the other.

Can happen only with the extractors, 6, 12, and 24.

Of the seven extractors, four—or two, three, four, and eight—never increase;[1] but of the remaining three—or six, twelve, and twenty-four—six may increase to ten, and all intervening numbers, both odd and even, twelve may increase to thirteen, fifteen, and seventeen, and twenty-four may increase to twenty-seven. One or two examples of the increase of six may suffice as illustrations of the whole. Thus, there are a grandmother, one full sister, two half-sisters by the mother, and one half-sister by the father, and the division is into six shares, whereof the grandmother has a sixth (one), the full sister a half (three), the half-sister by the mother a third (two), and the half-sister by the father a sixth (one), or seven in all, to which number accordingly the extractor must be raised. Again, there are a husband, a mother, and two full sisters, and the original extractor is six, which must be raised to eight. So, also, where there are a husband, a mother, and three sisters of different kinds, the original extractor, which was six, must be raised to nine, whereof the husband has three, the mother one, the half-sister by the mother one, the full sister three, and the half-sister by the father one, to make up the complement of two-thirds;—all *ninths*, instead of sixths, as they would have been but for the necessity of the increase.[2]

Examples.

[1] Because, in the cases in which they are required, the estate is either equal to or in excess of the shares.—*M. L. I.*, p. 91, 2nd ed., p. 61.

[2] For further examples of the increase, see *M. L. I.*, pp. 62, 63, 64.

CHAPTER X.

OF THE RETURN.

Definitions.

THE return is the converse of the increase. Where there is no residuary the surplus of the shares of the sharers reverts to them in proportion to their shares, with the exception of the husband and wife. All the persons to whom there may be a return are thus seven in number, the mother, the grandmother, the daughter, son's daughter, full sister, half-sister by the father, and half-brother or sister by the mother; and a return may take place to one, two, or three classes of sharers, but not to more. The numbers to which extractors may be reduced by means of the return are four, that is, two, three, four, and five.

When all the sharers participate in the return.

When all the sharers are persons to whom a return may be made, the surplus drops, and the extractor is reduced to the aggregate of the shares.[1] As an example take the following cases. 1. Example of a reduction to two. A grandmother and a half-sister by the mother. Here, each of the parties is entitled to one sixth, and the remainder reverts to them in proportion to their shares. The original division of the case, which was into six parts, is thus reduced to two, and each party takes a half. 2. Example of a reduction to three. A grandmother and two half-sisters by the mother. Here the grandmother has one share out of six (the original of the case), and the sisters two shares, so that the division is reduced to three. 3. Example of a reduction to four. A daughter and a mother. The daughter takes a half, or three out of six (the original of

[1] See *M. L. I.*, p. 115, 2nd ed., 79.

the case), and the mother a sixth, or one out of six, and the division is into four. 4. Example of a reduction to five. Four daughters and a mother (the daughters being entitled to two thirds, or four sixths, and the mother to one-sixth), the original division which was into six parts is reduced to five.

When there is a sharer who cannot participate, and only one class of sharers who can.

When the case comprehends a person who cannot participate in the return, as a husband or wife, and the persons who can participate are all one class, give the person who cannot participate his or her share by means of the lowest extractor of the case, and then divide the remainder according to the number of individuals if it can be done without a fraction. Thus, in the case of a husband and three daughters, give the husband his share, which is a fourth, that is one out of four, and the daughters the remaining three. If the division cannot be made without a fraction, but there is a common measure between the number of the remaining shares and the number of the individuals entitled to participate in them, take the quotient of the individuals (divided by the common measure), and multiply it by the extractor of the share of the person who does not participate. As, for instance, where there is a husband and six daughters, the husband has one fourth, and the daughters the remaining three, which cannot be divided between them without a fraction. There is, however, a common measure (three) between them, and dividing the number of individuals by it, the quotient is two, which being multiplied by the extractor of the share of the person not entitled to participate, which is four, gives eight as the number of shares into which the estate is to be divided; whereof the husband's fourth being two shares, there remain six which are equally divisible among the daughters. If there is no common measure, as in the case of a husband and five daughters, the whole number of heads, which is five, is to be multiplied by the extractor of the share of the person who cannot participate, which is four, and the result is twenty, which satisfies the case.

When with one

If with the person who does not participate in the re-

turn, there are two or three classes of persons who do participate, first give the former his or her share, and then divide the remaining parcels among those who do participate, if divisible without a fraction. If not, multiply the whole of the shares of those who can participate by the extractor of the share of the person who cannot, and the result will satisfy the case; then multiply the share of the person that does not participate by the extractor of those that do participate, and the shares of those that do participate by what remains, after extracting the share of the person who does not participate. Example of the first :— A wife, a grandmother, and two half-sisters by the mother. The wife takes a fourth, and there remain three shares which are divisible among those who participate; that is, one-third to the grandmother, and two-thirds to the half-sisters, and there is no fraction. Example of the second :— Four wives, nine daughters, and six grandmothers. The wives take an eighth, or one share, and there remain seven shares, which are reduced by the return to five, and these cannot be divided without a fraction, neither is there any common measure. The shares of the return, which are five, are accordingly to be multiplied by the extractor of the share of the person who does not participate, or eight, and the product is forty, which will satisfy the case. Then multiply the share of the person that does not participate, which was one (eighth), by the extractor of those who do participate, which is five, and the product or five (that is five fortieths) is the share of the wives, and multiply the extractor of those who do participate, which is five, by what remains after deducting the share of the person who does not participate, which is seven, and the product is thirty-five, of which the daughters have four fifths or twenty-eight, and the grandmothers one fifth or seven.[1]

who cannot, there are two or more classes who can participate.

[1] For further details, see *M. L. I.*, 2nd ed., chap. xi.

CHAPTER XI.

OF VESTED INHERITANCES.[1]

When the heirs of a deceased heir are the same as the original heirs, one partition suffices.

WHEN one of the heirs of a deceased person has died before a partition of his property has been made, and the heirs of the second deceased are the same persons who are heirs of the first deceased, one partition will suffice for both cases. Thus, when the heirs are sons and daughters, and one of either of them dies, he or she has no other heirs than the surviving brothers and sisters, and the property is divided among the survivors in the proportion of two shares to a male and one to a female.

Rule of partition when they are different, but the deceased's share is divisible without a fraction.

When among the heirs of the second deceased there are persons who are not heirs of the first deceased, the estate of the first deceased is to be divided, to ascertain the share of the second deceased, and then the estate of the second deceased is to be divided amongst his heirs; and if his share can be divided amongst them without a fraction, there is no necessity for any further operation. Thus, when the heirs of the first deceased are a son and a daughter, and the son dies before a partition, leaving a daughter and his sister, the estate of the first deceased is to be divided into three parts, whereof two being the portion of the son, a half (or one of them) goes to his daughter, and his sister takes the rest.

Rule when it is not so divisible, but there is a common measure.

If the share of the second deceased is not divisible without a fraction among his heirs, but there is a common measure between the share and the parcels into which it is divisible, reduce both to their lowest terms, and multiply

[1] *Moonasukhut*—means, literally, the transfer, by the death of an heir, of his share in the inheritance to another.—FREYTAG.

the number of parcels in the first estate by the lowest term of the number of parcels in the second, and the product will resolve the case. Then, in order to ascertain the share of each one of the heirs of the first deceased multiply his share in that estate by the lowest term of the parcels in the second; and to ascertain the shares of each one of the heirs of the second deceased, multiply his original share in it by the lowest term of the share of the second deceased in the estate of the first deceased. Thus, a person dies leaving a son and a daughter, and before a partition is made of his property the son dies, leaving a widow, a daughter, and three grandsons (son's sons): the estate of the first deceased is divisible into three parts, whereof two, or the son's share, must be divided into eight parcels, of which his widow has an eighth, or one parcel; his daughter a half, or four parcels; and his grandsons the remaining three. But two cannot be divided into eight parts without a fraction. There is, however, a common measure, two, between them; and reducing each to their lowest terms, the result is one and four. Now multiply the parcels of the estate of the first deceased, or three, by the lowest term of the parcels of the estate of the second deceased, or four, and the product will be twelve, which will resolve the case. To ascertain the son's share in the estate of the first deceased, multiply his original share, which was two, by the lowest term of the parcels of the second estate, which was four, and the product, or eight, is his share out of twelve. And following the same course for the daughter's share, it is found to be four parcels out of twelve. To ascertain the widow's share, which is an eighth or one, multiply that by the lowest term of the second deceased's share in the estate of the first deceased, which is one also, and her share is one out of twelve parcels. And following the same course with the daughter and the grandsons respectively, her share is found to be four, and theirs three, or one to each.

Rule when there is no common measure.

If there is no common measure between the share of the second deceased in the estate of the first and the parcels into which the share must be divided, multiply

the number of parcels of the first estate by the number of parcels in the second, and the product will satisfy the case. Then, to ascertain the portion of each one of the heirs of the first deceased, multiply his original share by the number of parcels in the second estate; and to ascertain the portion of each one of the heirs of the second deceased, multiply his original share by the share of the second deceased in the estate of the first. Thus, a person dies leaving a son and a daughter, and before a partition of the estate is effected, the son dies, leaving a son and a daughter. Here the first estate is divisible into three portions, whereof the son's share is two, but he dies, and his estate is also divisible into three portions. Three is accordingly to be multiplied by three, and the product, nine, will satisfy the case. Then to ascertain the son's portion in the estate of the first, multiply his original portion, or two, by the number of parcels in his own estate, or three, and the product, or six, is his portion. In like manner, to ascertain his son's portion, multiply his original share in the second estate, which is two, by his father's share in the first, which was two also, and the result is four. And following the same course for his daughter's portion, it is found to be two.

In like manner, if any of the heirs of the second deceased should die before the partition of his estate among his heirs, it is to be divided in the same way as has been explained.

CHAPTER XII.

OF THE DISTRIBUTION OF ASSETS.

General rule.

When the estate is *dirhems*, or *deenars*, and you wish to divide it according to the shares of the heirs, multiply the share of each heir by the amount of the estate, and divide the product by the number of parcels into which the estate is divisible. If there is a common measure between the amount of the estate and the number of parcels, multiply the share of each heir by the lowest term of the estate, then divide it by the lowest term of the extractor; and this will bring out the share of the heir. In the same way you may find the share of each class. If you desire to prove the operation, add up the items, and compare the sum with the amount of the estate, and if they are equal the work is right; if not, there is some error, and you must do the work over again, and rectify the error (D.V.). As an example, take the case of a husband, a half-sister by the father, and a half-sister by the mother. The extractor is six increased to seven, and suppose the amount of the estate to be fifty *deenars*: then multiply the husband's share, which is three, by fifty, the amount of the estate, and the product is 150, which divide by seven, and the result is $21\frac{3}{7}$. The share of the half-sister by the father is the same. And the half-sister by the mother has one share, which, being multiplied by fifty and divided by seven, gives $7\frac{1}{7}$.[1] When all are added up, it will be found that they make fifty.

[1] Or as 7 : 50 :: 3 : $21\frac{3}{7}$, and 7 : 50 :: 1 : $7\frac{1}{7}$.

Case of a composition.

When a creditor or heir has entered into a composition for some part of the estate, treat that part as if it were not in existence, and then divide the remainder according to the shares of the remaining heirs. Thus, when the heirs are a husband, a mother, and a paternal uncle, and the husband compounds his share of the estate for what is due by him of the dower, treat the debt as if it did not exist, and divide the remainder according to the shares of the remaining heirs, that is, by giving two thirds to the mother, and the rest to the uncle.

CHAPTER XIII.

OF 'MOOLUKKUBAT' OR TITLED CASES.

THE MUSHRUKAH.—This was the case of a husband, a mother, two children of the mother, and full brothers and sisters. The husband took a half, the mother a sixth, the children of the mother a third, and the rest were excluded. So, also, if, instead of a mother, there were a grandmother. Such was the opinion of Aboobekr and Ibn Abbas, and it is the doctrine of 'our masters.' But Ibn Musood and Zeyd, the son of Thabit, have said that the residuary among the full brothers should participate with the children of the mother in their third. Such also was the last opinion of Omar. He had decided, in the first instance, according to 'our doctrine;' but on one of the full brothers saying to him, 'O Commander of the Faithful, grant that our father was an ass, still we had one mother,' he directed a participation with them, saying, 'This was what we intended by our decision.' The case has accordingly been called *mushrukah*, because Omar made a participation between them; and it has also been termed *himariyyah* (from *himar*, an ass), because of the brothers saying, 'Grant that our father was an ass.'

THE KHURKA.—This was the case of a mother, a grandfather, and a sister, and it has been so named because the various opinions of the companions have in a manner torn it. Aboobekr has said that the mother should take a third and the grandfather the remainder;[1] Zeyd that the mother

[1] This is agreeable to the doctrine of Aboo Huneefa, according to whom, a true grandfather comes into the stead of a father when there is none. See *ante*, p. 697.

should take a third, and that the remainder is between the others in thirds; Aly, the mother a third, the sister a half, and the grandfather the residue. There are two reports of Ibn Abbas' opinion, with one of which Omar agreed, and it was to the effect that the sister should have a half, the mother a third, and the grandfather the residue. While Othman was alone in the opinion that the mother should have a third, and the remainder be equally divided between the grandfather and sister. There were thus in all six different opinions on the case.

THE MERWANIYAH.—This was a case of six sisters of different kinds and a husband. The husband took a half, the full-sisters two thirds, the half-sister by the mother a third, and the half-sister by the father fell out altogether, the original extractor, which was six, being increased to nine. The case obtained its name from Merwan, the son of Hookum, in whose time it occurred.

THE HUMZIYAH.—This was a case of three grandmothers on both sides, a grandfather, and three sisters of different kinds; and, according to Aboobekr and Ibn Abbas, the grandmothers should have a sixth, and the grandfather the remainder. But, according to Aly, the full sister should have a half, the half-sister by the father a sixth to make up two-thirds, the grandmothers a sixth, and the grandfather a sixth; while, according to Zeyd, the grandmother should have a sixth, and the remainder be divided between the grandfather, the full sisters, and the half-sister by the father. The case obtained its name from Humza, who, being questioned regarding it, gave these answers.

THE DEENARIYAH.—This was the case of a wife, a grandmother, two daughters, twelve brothers, and one full sister and the estate to be divided between them was 600 *deenars*, of these the grandmother took a sixth or 100 *deenars*, the two daughters two thirds or 400, and the wife an eighth or 75, leaving 25 *deenars*, of which each brother had two, and the sister one. The case is also termed Daoodiya from Daood-ood-Tai, who pronounced the decision. On the sister complaining to Aboo Huneefa that her brother had left an estate of 600 *deenars*, of which she had received

only one *deenar*, he asked her who had given the decision, and, on her answering, 'Your disciple Daood-ood-Tai,' showed her, by repeated questions as to the other heirs left by her brother, to which she replied to the effect before mentioned, that he had done her no wrong, and that she was only entitled to one *deenar*.

THE IMTIHAN.—This was a case of four wives, five grandmothers, seven daughters, and nine half-sisters by the father. The original division being into twenty-four parts, the wives take an eighth or three, the grandmothers a sixth or four, the daughters two thirds or sixteen, and the sisters the single share that remains; and since there is no common measure between the shares and the persons entitled to them, all the numbers of the latter are to be multiplied together, and the product by twenty-four. The result is 30,240, thus:—$4 \times 5 \times 7 \times 9 \times 24 = 30{,}240$. The reason of the *Imtihan* (which literally means 'trying or making an experiment') is that it can be said, a man left heirs of different kinds, the numbers of each kind being less than six, yet that the case cannot be resolved by any number under thirty thousand.

THE MAMOONIYA.—This was a case of two parents and two daughters, but one of them died, and left whom she did leave. Al Mamoon, intending to appoint a judge of Bussorah, summoned Yahya Ibn Aktum before him, of whom he had a low opinion, and put the question to him (how the estate should be divided), to which he answered, 'O Commander of the Faithful! tell me whether the deceased was a male or a female;' whereupon Al Mamoon, perceiving that he understood the question, appointed him to the office. The answer varies according as the first deceased was male or female. If a male, the division of the property must be into six parts, whereof the two daughters would have two thirds, and the parents two sixths. But when one of the daughters died, she would have left a sister, a true grandfather—a father's father—and a true grandmother—a father's mother. The grandmother would accordingly take a sixth, and the grandfather the remainder, the sister falling out altogether, according to Aboobekr, but ac-

cording to Zeyd, the grandmother would have a sixth, and the remainder be between the grandfather and sister in thirds. If, again, the first deceased were a female, the daughter would have left at her decease a sister, true grandmother — mother's mother,—and a false grandfather —mother's father,—and the grandmother would take a sixth, the sister a half, and the remainder returned to them, the false grandfather falling out altogether.