

Attorneys for the appellants: *Messrs. Matubhai, Jamielram & Madan.*

Attorneys for the respondent: *Messrs. Kanga & Patell.*

B. N. L.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batchelor.*

1904 AGA SHERALLI VALAD AGA FAIZALLI AND OTHERS (ORIGINAL
August 17. DEFENDANTS), PETITIONERS, APPELLANTS, v. BAI KULSUM
1908 KHANAM (ORIGINAL PLAINTIFF), OPPONENT, RESPONDENT.*
February 12.

*Mahomedan Law—Shia branch—Descendants of paternal uncles and
aunts—Stirpital succession.*

The heirs by consanguinity under the Shia Law of inheritance fall into three classes. In the first class are, first the parents, and secondly children and other lineal descendants. In the second class there are first grand-parents and ascendants and secondly brothers and sisters and their descendants. And in the third class come paternal and maternal uncles and aunts of the deceased and his parents and their descendants.

Succession in the third class, like that in the first and second class, is *per stirpes* and not *per capita*.

APPLICATION for review of Judgment in second appeal No. 102 of 1904 decided by Jenkins, C. J., and Batchelor, J., on the 17th August 1904.

The second appeal was preferred from the decision of H. L. Hervey, District Judge of Surat, varying the decree of L. P. Parekh, First Class Subordinate Judge.

The plaintiff sued to recover from the defendants by partition her share consisting of 6 annas and $4\frac{1}{2}$ pies in the rupee in the estate of one Nurjahan Khanam *alias* Fatma Khanam, deceased. The plaintiff and the three defendants stood in equal degree of relationship to the deceased. The plaintiff was a descendant of the paternal uncle of the deceased and defendants 1 and 2 of

*Civil application No. 562 of 1914 for a review of judgment.

another paternal uncle, while defendant 3, who was the wife of defendant 2, was a descendant of a paternal aunt.⁽¹⁾

The defendants contended *inter alia* that the plaintiff was entitled to a 2 annas and 8 pies share only.

The Subordinate Judge relying on the passages on pages 385 to 387 of Baillie's Mahomedan Law found that the plaintiff was entitled to a 6 annas and $4\frac{1}{2}$ share according to the Mahomedan Law for Shias. He therefore allowed the claim with costs against all the three defendants.

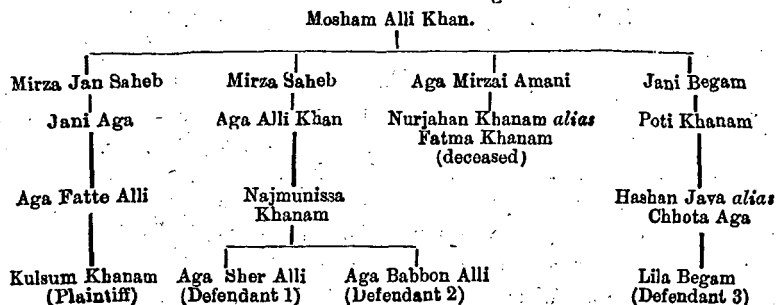
Defendants 1 and 2 appealed and they joined defendant 3 as respondent 2 in appeal. The Judge confirmed the decree on the merits but varied it as to costs by ordering that costs be borne by defendants 1 and 2 only.

Defendants 1—3 preferred a second appeal. At the hearing, the following authorities were quoted during the arguments. Passages 1—6 and 8 were cited for the appellants and passage 7 for the respondent.

1. The descendants of uncles who are of different parents (i. e., of half brothers of the father) will receive the share of their forefathers : thus the offspring of a paternal uncle by the same mother will get $\frac{1}{6}$ th ; if there are children of two paternal uncles by the same mother, they will get $\frac{1}{3}$; and the rest (will be) for children of (full) paternal uncles and aunts and for the children of uncles and aunts by the same father.

Sharayat-ul-Islam, p. 203/4. (Teheran Edn. 1284.)

(1) The following is the genealogical tree embodied in the Judgment of the Subordinate Judge—



1908
 AGA
 SHEBALLI
 v.
 BAI KULSUM
 KHANAM.

2. The inheritance of the children of paternal uncles and of maternal uncles is as the share of their fathers ; this (right) was introduced (into the law) by the Ayat of " Ool-al-Arham," accordingly their right to inherit (*lit.* the evidence of their inheritance) is independent of the right of their fathers ; and the only question is (this :) as they receive the share of their fathers, the detail of the description of their inheritance.

Masalik-ul-Afham. (Teheran Edition.)

3. For since they are related to the deceased through their fathers and mothers their inheritance was in virtue of the share of their fathers and mothers. As we have described in the statement above, viz., all having kinship are in the place of the " rahm " (kinsman) through whom he is drawn in ; and it is in this wise : viz. for the offspring of a paternal uncle through a female her share will be $\frac{2}{3}$; and for the offspring of a paternal aunt though a male, his share will be $\frac{1}{3}$.

Masalik-ul-Afham. (Teheran Edition.)

4. If all the children who stand in the place of their fathers (will be given) the share of him through whom they are related, according to what you have learnt about the children of brothers ; and so for the child of the uterine paternal uncle $\frac{1}{3}$; and for the children of two uterine paternal uncles $\frac{1}{3}$ equally, although they are different in sex ; and the rest for the offspring of the paternal uncles by (the same) father and mother, or by (the same) father alone ; to males twice the share of females, when (whether) they are children of one or more uncles, or similarly (whether they are children of one or more) aunts ; but subject to this that every one of them has received the share of the person through whom he claims kindred ; but it is not thus that when there are the son of an uncle and the daughter of another uncle together, the son of the uncle gets $\frac{2}{3}$; and for the daughter of the other uncle is $\frac{1}{3}$; but the property will be divided between them half and half as you have heard before in the section on the children of children and children of brothers.

Najat-ul-Ibad, p. 394. Bom. Ed. 1318 A. H.

5. On failure of full and half brothers and sisters, their children come into their places, without any difference of opinion among the jurists and so it is said in express terms, and the Fatwa (also) is in accordance with it. Hence there is no difficulty regarding the rule that each of them inherits the portion of the person through whom he is connected with the deceased, because the former represents the latter. That being so, if there is only one child, he takes the whole of that portion ; or if there are several and they are all males or all females, they take that portion equally between them ; but if some of them are males and the rest females, the division between them is in the proportion of 2 shares to a male for 1 share to a female, provided they are children of full or consanguine half brothers, according to the person in whose place they stand.

Javahir-ul-Kalam. Chapter on Inheritance. Tabka-i-Salisa.

6. Question.—A person (is) dead and his heirs (are) children of his paternal aunt and children of his paternal uncle and the children of his maternal aunt and the children of his maternal uncle and the children of each differ in being males and females ?

1908

AGA
SHEBALLI
v.
BAI KULSUM
KHANAM.

Answer.—The inheritance should be divided into three portions, two-thirds of that to the class (Tabka) of the children of the paternal uncle and paternal aunts and one-third of it to the class of the children of maternal uncle and the children of the maternal aunt if all are of the same kind; in this way, that all the paternal uncles and paternal aunts and maternal uncles and maternal aunts are all of (the same) father and mother or all of (the same) father or all of (the same) mother. The two-thirds of the class of the paternal uncles and paternal aunts children will be divided into three portions, two portions to the children of the paternal uncle and one portion to the children of the paternal aunt. And they should divide among themselves for male the share of two females; and one-third of the portion of the maternal uncle and maternal aunts children should be divided among them equally.

P. 608. Extracted from *Jame us-Shatat* of late Mirzai Kumri.

7. Question.—Zaid, Amru, Bakr and Hind (female) are children of the same father and mother. And Zaid, Amru and Hind are dead; and Zaid leaves two sons and Amru leaves three sons and one daughter. And Hind leaves one daughter. Then Bakr died without issue. How is his inheritance to be divided ?

Answer.—The heritage will be divided into five shares. One share will be taken by the daughter of Hind; and two shares will be taken by the sons of Zaid in equal parts; and two shares (will be taken) by the children of Amru, in the proportion of 2 for males and 1 for females.

Jami-us-Shatat, p. 615, line 5.

8. The question is—You have known that the children of the paternal uncles and paternal aunts stand in the place of their fathers in their absence; and (in) the absence of one who is in their grade from the maternal uncles, and that a paternal uncle's son does not inherit with a maternal uncle though he is related in two ways and the maternal uncle in (one) way and neither a maternal uncle's son with a paternal uncle though he is related in two ways, not to speak of the paternal uncle and the maternal uncle, except in the unanimously agreed question. But the nearer though the cause of his (relation) is single is preferred. For inheritance to the more remote, though the causes of his (relation) are numerous; (this is) contrary to what is likely to appear from the two passages of Mukni and Muknaa which have preceded and (contrary) to what is (related) from Abi Ali about (his) expressly stating that for a maternal uncle's son, when he co-exists with the paternal uncle, there is one-third and for the paternal uncle two-thirds, and possibly it is founded upon the paternal uncles and maternal uncles being two species, and you have known its absurdity in what has preceded; and you have known also that from them is the portion of one through whom they are related like the children of brothers and sisters and sons and

1908
 AGA
 SHERALLI
 v.
 BAI KULSUM
 KHANAM.

daughters. (And) for the same reason (it) is (that) [the children of different paternal uncles take the portion of their fathers, hence for the children of paternal uncles (related) through the mother is one-sixth and if they are children of two paternal uncles (related) through the mother for them is one-third] equally though they differ in being males and females for what you have known before, contrary to what is (related) from Fazal and Sadook about the general statement that for the children of the paternal aunt is one-third, and for the children of the paternal uncle two-thirds [and the rest (is) for the children of the paternal uncle or paternal aunt, or for the children of the paternal uncles or paternal aunts (related) through the father and mother] or through the father only when they (full-blood) do not exist—for the male double of the female, when they are children of one paternal uncl^o or more or aunt similarly; because of this that when the son of a paternal uncle coexists with the daughter of another paternal uncle, for the son of the paternal uncle there are two-thirds and for the daughter of the other paternal uncle one third; which I find (laid down) without any contrariety (*i. e.*, undisputed or without contradiction) (according to what is laid down) here.

Jawahir-ul-Kalam fi Sharhi Sharaya-ul-Islam, 1287 Hizri.

Faiz Tyabji (with *Manubhai Nanabhai*) appeared for the appellants (defendants 1—3):—The question is in what proportion the several heirs will share the estate. The first Court has relied on two passages in Baillie's Mahomedan Law, Vol. II, pages 385—387, but we contend that they are not applicable either directly because they refer to the heirs of the first class, or by analogy because the rules differ as to the heirs of the first and those of the third class who are collaterals. The descendants through females in the first class take two shares for a male to one share for a female, while in the other classes they share equally. As to the second passage in Baillie's Mahomedan Law relied on by the first Court, we submit that the expression "shares of the parents" has been misconstrued inasmuch as it is made to refer to the shares of the parents of the claimants. That expression has reference to the parents of the deceased. It shows that the relations on the side of the father and the mother of the deceased respectively get different shares.

The Koran itself by the *Ayat-ul-al-Arhan* gives the distant kindred rights of inheritance and they succeed in their own right and not through others, Palmer's Translation of the Koran, Vol. I, pages 96, 172; Sale's Koran, page 60

As to the Arabic texts cited before the Court:—

The first passage is the most important Shia authority next after the Koran. It refers entirely to primary division, that is, division among relations on the father and mother's side respectively.

1908

AGA
SHEERALLI
v.
BAI KULSUM
KHANAM.

The 2nd and the 8th passages strongly support our contention.

The 4th and the 8th passages are from the same author. The fourth passage creates some difficulty. If it be construed against us, then it would become inconsistent with the eighth passage.

If the doctrine of representation be recognized in the Mahomedan Law, various difficulties will arise, such as the springing up of vested interests which have no place in that law; the descendants of half blood will become entitled to the share of their parents; interests which had once become extinct will spring up into existence in the case of successive deaths of a number of brothers, all leaving children; and it will act in direct conflict with the direction in the Koran that the males should get twice the shares of the females.

Setalvad (with *M. N. Mehta* and *N. K. Mehta*) appeared for the respondent (plaintiff):—The principle of representation is not confined to the heirs of the first class only, it applies equally to the heirs of the second and third classes also: see the 7th passage. The 4th passage also clearly shows that the principle applies to the third class of heirs. There is an apparent conflict between the 4th and the 8th passages. But when it is borne in mind that the author of the two passages was one and the same person, the conflict seems to have had its origin in the mistake of the copyist. In the 8th passage there is the omission of a dash which gives a negative sense. Such omissions are not uncommon in manuscripts. Moreover, the last few lines are not consistent with the previous lines of the same page.

The principle laid down by the Mahomedan jurists is that all having kinship stand in the place of him from whom they are related, that is, they are entitled to the shares of their respective roots; *Baillie's Mahomedan Law*, Vol. II, pages 385-387.

1908
 AGA
 SHERALI
 v.
 BAI KULSUM
 KHANAM.

The 2nd and the 3rd passages refer to two questions, namely, whether a particular individual is an heir to the deceased and what is the *quantum* of his share. See also the 6th passage. They fully establish the principle that the heirs of the third class take *per stirpes*.

The following authorities were cited. Baillie's Mahomedan Law, Vol. II, pages 261, 262, 285, 323, 328, 385—387; Wilson's Digest of Mahomedan Law (2nd Edn.), sections 450, 470, 473; MacNaghten's Mahomedan Law (4th Edn.), page 34; Grady's Mahomedan Law, pages 149, 151, 152.

JENKINS, C. J.:—The plaintiff sues to recover by partition possession of her 6 annas and $4\frac{1}{2}$ pies share according to Mahomedan Law in the estate of Fatma Khanam and mesne profits from the date of filing the plaint.

The relationship of the parties is shown in the tabular statement set out at the commencement of the Subordinate Judge's judgment.

The first Court decreed the claim advanced by the plaintiff and that decree was confirmed on appeal by the District Judge with a variation with which we are not now concerned.

The defendants now appeal from the decree of the lower appellate Court.

The question is whether the shares of the present litigants in the estate of Fatma Khanam are to be ascertained by reference to a capital or a stirpital distribution. Both the Courts have decided in favour of a stirpital distribution.

The argument on behalf of the appellant has been placed before us by Mr. Faiz Tyabji with care and ability and from his argument we have derived great assistance; and none the less because with commendable candour he has placed before us passages which were unfavourable to him as well as those on which he relied.

Starting from the fact that there are three classes of heirs, Mr. Tyabji's contention is that under the Shia law, which governs in this case, the principle of representation is confined to the first of these three classes, while the present heirs fall within

the third class. He has had to contend with the difficulty that the language of Baillie in his Digest of Mahomedan Law is not favourable to his argument, but he has claimed that the language which *prima facie* is opposed to him is really favourable to him if only it be borne in mind that the remarks of the learned author are concerned only with the side (as it has been termed) in reference, to which the descent had to be determined, in other words, that he merely had in mind the preliminary division, in accordance with which two-thirds of the estate goes to the side of the father and one-third to the side of the mother. This argument was placed before us with much ingenuity and we should have been more inclined to accede to it than we are, but for the fact that we have texts of evident authority placed before us which are in our opinion conclusive the other way. In the first place it is clear from the extract from *Jami-us-shatat*, page 615⁽¹⁾, that the principle of representation is not (as was argued) limited to the first class, but extends to the second class of heirs, while it is an obvious inference from what we will call the 4th passage⁽²⁾ among the texts furnished to us, that representation is not even limited to the first and the second classes but also applies to the third, and, as we read the text there is in it a determination upon fact on all fours with those with which we are here concerned pointing to a stirpital succession among those who come under uncles and aunts. It was argued by Mr. Tyabji that such value as that passage might otherwise have possessed is nullified by the fact that it is not in accord with another passage⁽³⁾ taken from another work of the same author. But there is (in our opinion) strong reason to believe that it is not the learned author, but a copyist who is responsible for this contradiction which arises from the presence of a negative in the second passage. This negative in the manuscript copy on which Mr. Tyabji relies is represented by a dash and may well have been introduced in error. At the same time this error is one that might easily have been made, the difference involved in the introduction of a negative being very slight; the negative is

1908

AGA
SHERALLI
v.
BAI KULSUM
KHANAM.

(1) See the 7th passage quoted above. (2) See the 4th passage quoted above.

(3) See the 8th passage quoted above.

1908
 AGA
 SHEBALLI
 v.
 BAI KULSUM
 KHANAM.

inappropriate to the logical sequence of the passage as a whole ; and the conclusion to which we come is that it was inserted in error so that there is no real antagonism in the works of this author.

Then there is an extract from *Jami-us-shatah*⁽¹⁾ which favours the contention of the respondent.

On these materials we hold that the principle of representation in Shia law extends to those standing in the position of the litigants at present before us, and in this respect we are in agreement with the lower Court.

The other point raised before us was as to whether the lower Courts were right on the question of legitimacy. We think that the finding of the District Judge, though not very clearly expressed, really means that an acknowledgment of legitimacy by the father is the reasonable inference to draw in the circumstances of this case, and if this be so no error was committed with which we can deal in second appeal.

The result therefore is that we must confirm the decree of the lower appellate Court with costs.

Decree confirmed.

After the said judgment was delivered the appellants (defendants) applied for a review of judgment and a *rule nisi* having been issued requiring the respondent (plaintiff) to show cause why the judgment should not be reviewed.

Faiz Tyabji (with *Manubhai Nanabhai*) appeared for the applicants (appellant-defendants) in support of the rule:—The decision must be reviewed as it is inconsistent in itself. It holds that the negative is inappropriate to the logical sequence of the passage as a whole, and this has been our contention. The Court has been under the impression that the positive expression went against us, but this is not so. We have produced other edition, which negative the theory of the copyist's error, and this with the new passages strengthens our case.

Setalvad (with *M. N. Mehta* and *N. K. Mehta*) for the opponent (respondent-plaintiff):—No doubt there is a slip in

(1) See the 6th passage quoted above.

the judgment It should have said that the "positive" is inappropriate. This is what the Court really meant to decide as would appear from the original draft. It is thus only a clerical mistake and no sufficient ground is shown for a review.

The Court then granted the application for a review, and proceeded to rehear it on merits :—

At the hearing the following passages were quoted during the arguments :—

9. *Five Propositions* :—

The first :—You have already learnt from what has preceded, the order of the relations who (are) from the borders of the lineage (*i. e.* in the collateral line). *Then the paternal uncles of the deceased, and his paternal aunts, and their children how low soever, and his maternal uncles, and his maternal aunts, and their children, how low soever, (are) better entitled to inheritance than the paternal uncles of the father (of the deceased), and his (the father's) paternal aunts, and his maternal uncles, and his maternal aunts ; and also better entitled than the paternal uncle of the mother (of the deceased), and her paternal aunts, and the maternal uncles and maternal aunts because the paternal uncles of the deceased and his maternal uncles (are) nearer to him ; and all the nearer (relations) are preferred to the remoter, according to the Kerán, the tradition and the Ijmaa ;* and their children stand in their place.* Seeing that the daughter of the maternal aunt (*e. g.*) is from (*i. e.* one of) the children of the grandmother, and the paternal aunt of the mother, (*e. g.*) is from the children of the grandmother of the mother, the child of the grandmother of the deceased is preferred for inheritance to the child of the grandmother of the mother of the deceased ; therefore what (is related) from Hassan about the sharing of the paternal aunt of the mother and the daughter of the maternal aunt is clearly incorrect. No doubt *in the absence of the paternal uncles of the deceased, and his paternal aunts, and his maternal uncles, and his maternal aunts, and their children how low soever, their place is taken by the paternal uncles of the father, and his paternal aunts, and his maternal uncles, and his maternal aunts, and the paternal uncles of his mother, and her paternal aunts, and her maternal uncles, and her maternal aunts, and their children, how low soever,*—they stand in their place in succession also upon the principle of the preference of the nearer to the more remote ; and the maternal uncles and paternal uncles being of the same grade, they are preferred to the paternal uncles of the grandfather and grandmother and their maternal uncles and to the children of these and the same is the rule about the father of the grandfather and his grandfather and so also *every group*

* On the margin are the words :—“and the children stand in the place of the fathers.”

1908

AGA

SHERALI

v.

BAI KULSUM
KHANAM.

of them how low soever is preferred to the higher group as stated with all its arguments though it is obvious—and God knows.

Jawahir-ul-kalam, p. 289.

N. B.—The italics represent the text of the Sharaya-ul-Islam. The rest is the commentary.

10. *Question* :—Zaid is dead and his only heirs are one son of a paternal aunt and one son of a maternal aunt, how is his inheritance to be divided?

Answer :—The children of the paternal uncle and maternal uncle and paternal aunt and maternal aunt are under (*i. e.*, are governed by the rule of their own ancestors), and the best known and strongest (opinion) is this, that two-thirds * are for the paternal uncles and paternal aunts, and one-third * for the maternal uncles and maternal aunts, and the most obvious and the most well known (opinion) does not distinguish between unity and plurality, that is to say, for instance, there is no distinction, whether there is one paternal uncle and one maternal uncle, or several paternal uncles and several maternal uncles, for in every case one-third belongs to the group of maternal uncles and maternal aunts and two-thirds to the group of paternal uncles and paternal aunts, but in the case of plurality and † the division among the maternal uncles is equal, though some are males and others females, and in the group of paternal uncles and aunts for the male there is double (the portion) of the female.

Jam-i-ush-shattat, p. 616.

11. If one of the paternal uncles and paternal aunts is consanguine, and the other of full blood, the children of the consanguine (uncle or aunt) do not get anything at all, (but) the children of the full blood will divide (the inheritance) as stated above. And if one is uterine, and the other of full blood, one-sixth of the two-thirds should be given to the children of the uterine (uncle or aunt), and they divide equally, and the children of the other divide the other five-sixths (in proportion of) two (shares) to males and one (share) to females. And as to the children of the generation of the maternal uncle and maternal aunt, if these are also of the same kind as regards what we have mentioned above (*viz.*, if they are all of the full blood, or all consanguine, or all uterine) they should share equally, and if one is consanguine and the other of full blood, and † the children of the consanguine uncle or aunt are excluded from inheritance, and if one is uterine and the other consanguine or of full blood, the children of the uterine (uncle or aunt) get one-sixth, to be divided amongst them equally and the rest is divided also equally by the children of the other—and God knows.

Jam-i-ush-shattat, p. 608.

* The words between the asterisks are on the margin.

† "and" is obviously a redundant.

FOURTH DISCOURSE.

1908

AGA
SHERALLI
v.
BAI KULSUM
KHANAM.

12. The children of children, however they may descend, males or females, stand in the places of their ancestors in sharing with the parents or consorts and in precluding them (parents or consorts) from (off) the greater share (and bringing them down) to the smaller one and in preventing others than themselves out of the relatives according to the more rightful judgment. But they come in the order of the nearer (in relationship) the nearer (in the right of inheritance). Accordingly a progeny does not inherit together with that who is nearer to the deceased than he : And as regards the details of their inheriting, every one of them inherits the share of one through whom he approaches the deceased. Accordingly for the progeny of the daughter is the share of its mother whether it be male or female and that is $\frac{1}{2}$ of single or if with parents : and the remaining goes to it although it is a male just as the remaining would have gone to his mother if she had been alive and for the progeny of the son is the share of its father whether it be male or female ; the whole property, if single ; and whatever remains after the fixed portions (are paid off) if there are co-existing with him the sharers of that, for example, the parents and the wife ; and if there is a single child of a son and a single child of a daughter, for the child of the son, although it be a single female, is $\frac{2}{3}$ which is the share of the son, by way of the fixed share (Faraz) ; and for the offspring of the daughter, although several, and males, is $\frac{1}{3}$ which is the share of the mother (daughter) in the Faraz according to the lower right judgment and if there be the husband or wife, for them is the share, viz. : $\frac{1}{4}$ and $\frac{1}{8}$ and $\frac{1}{3}$ of the rest is for the progeny of the daughter and $\frac{2}{3}$ for the progeny of the son ; and the children of the daughter divide the shares of their mother, for the male double of the female just as the children of the son divide according to the correct judgment.

Najatel-i-bad pp. 453, 454, p. 386 Bom. Edn.

Tehran Edition.

FOURTH DISCOURSE.

13. The grandfather, however remote, shares with the brothers, provided there is no nearer (grandfather). And if they (a nearer and a remote grandfather) co-exist with brothers, the nearer shares with them and the more remote (who is) precluded, is excluded in the same way as are excluded the children of the brothers, in spite of their (the latter) being of the same parents, co-existing with the brothers, notwithstanding they (the latter) are of one parent only, according to the more correct view. Yes ; they stand in the place of their fathers in sharing with the grandfathers and with others in their absence. And when such is the case, every one of them inherits the share of that through whom he approaches the deceased, and is his substitute. Then, if he is alone, the (whole) share is his, and if they are several, they divide that share equally between them if they are all males or females ; and if they are mixed up, then for the male is twice the share of the female, if they are the progeny of brothers of the same parents

1908
 AGA
 SHRAZZI
 v.
 BAI KULSUM
 KHANAM.

or of the same father alone like the person in whose places they stand. Similarly if they are the children of brothers by the same mother, they divide the property between them equally like the persons in whose places they stand, there being no difference between their being the children of one brother or sister and between their being the children of a number of brothers, although with regard to their relationship with the several (when they are children of several), every one of them takes the share of one through whom he approaches the deceased, but then the share is divided among themselves also equally. Accordingly, if the children of brothers by the same mother be three for instance, and if one of them (*i.e.*, these three) be the child of one brother and the other two are the children of another brother, then for the first out of them is $\frac{1}{6}$, the share of his father which is half of one-third (which is the share of their mother from the property of the deceased) and for the other two is the other half, which is also one-sixth, which is the share of their father and which they divide among themselves equally.

Najatel-i-bad, pp. 458-459, p. 390, Bombay Edn.

Tehran Edition.

FIFTH DISCOURSE.

14. The children of paternal uncles and maternal uncles stand in the place of their fathers (*viz.*, the paternal uncles and maternal uncles) just as you have heard in case of the children of the brothers : but provided there is none who is nearer than they out of those who are in the same category. Accordingly, the son of a paternal uncle will not receive inheritance in the presence of a paternal uncle, except in the case already mentioned before. And neither will the son of the paternal uncle receive any inheritance in the presence of the maternal uncle. And neither will the son of a maternal uncle receive any inheritance, in the presence of a paternal uncle, much less in the presence of a maternal uncle, although the son of the maternal uncle approaches the deceased in two ways unlike the maternal uncle ; the reason being what you have already learnt, that they belong to one category. And similar is the case of maternal uncles among themselves also. Accordingly, one who is more remote in relationship will not inherit in the presence of one nearer in relation to him. And the nearer in two ways precludes the one whose relationship is by the father alone and though he is in the same grade with him. Yes, if all those (*viz.*, paternal and maternal uncles and their progeny) are absent, their places are taken by the paternal uncles of the father of the deceased, and his (*viz.*, of the father of deceased) paternal aunts and his maternal uncles and his maternal aunts, and the paternal uncles of the deceased's mother and her paternal aunts and her maternal uncles and her maternal aunts ; and their progeny take their place just as you have heard in the first two (*viz.*, the uncles and aunts of the deceased) cases. Again, if all these are absent, their place is taken by the paternal uncles of the paternal grandfather of the deceased and the paternal grandmother of the deceased or their maternal uncles.

And in the same way is the Sixth Discourse.

For all the children who stand in the place of their fathers (will be given) the share of him through whom they are related, according to what you have learnt about the children of brothers; and so for the child of the uterine paternal uncle is $1/6$; and for the children of two uterine paternal uncles $1/3$ equally, although they are different in sex; and the rest for the offspring of the paternal uncles by (the same) father and mother, or by (the same) father alone; to males twice the share of females, when (whether) they are children of one or more uncles, or similarly (whether they are children of one or more) aunts; but after this that every one of them has received the share of the person through whom he claims kindred; not that when there are the son of an uncle and the daughter of another uncle together, the son of the uncle gets $2/3$ and for the daughter of the other uncle $1/3$; but the property will be divided between them half and half as you have heard before in the portion on the children of children and children of brothers. And the same are the details in the case of maternal uncles. And when the children of paternal uncles and of maternal uncles exist together, then for the progeny of the maternal uncles is one-third, although the progeny be one single female, and for the progeny of the paternal uncles is two-thirds similarly. Then if the issues are numerous (*i.e.*, more than one) and are equal in relationship, they divide equally. Otherwise $1/6$ th of the $1/3$ rd is divided equally among the issue of the maternal uncle or of the maternal aunt by the mother side only, if the latter is only one; and if several, one-third (of $1/3$) is divided equally also, but after giving the issue of each the share of that through whom he approaches the deceased. And the rest of the one-third is for the issues of the maternal uncles though one or more through both father and mother or through the father alone to be divided equally; although when the uncles are several, the issue of each in this case also first take away the share of one through whom he approaches the deceased. As for the two-thirds, one-sixth thereof is for the issues of paternal uncles through the mother alone, in case the (uncle) person through whom they have approached the deceased is single, and $1/3$ thereof in case of there being several. But in any case the issue divide equally after each taking the share of one through whom they approach, in case of plurality those through whom they approach are several. And the remaining portion after deducting the $1/6$ th or $1/3$ rd as the case may be is for the issues of the paternal uncles through father and mother both or through the father alone, whether the said uncles are several or one, to be divided in the proportion of 2 for males to 1 for females after issues of each have taken the share of the person through whom they approach the deceased in case of plurality (if the persons through whom they approach the deceased are numerous).

1908.

AGA
SHERALLI
v.BAI KULSUM
KHANAM.*Najat-i-bad*, pp. 463-464. Tehran Edition.

THE SECOND DISCOURSE.

15. You have known that the children of paternal uncles and paternal aunts stand in the place of their ancestors in their absence and in the absence of one who is in their (*i.e.*, the same) grade out of the maternal uncles, and (you have known) that a paternal uncle's son does not inherit

1908

AGA
SHEBALI
v.
BAI KULSUM
KHANAM.

in the presence of a maternal uncle although he approaches the deceased in two ways, whereas the maternal uncle in one way; and neither (does) a maternal uncle's son in the presence of a paternal uncle although he approaches the deceased in two ways much less in the presence of both paternal and maternal uncles, except in the unanimously agreed question. But the nearer although related in a single way is preferred for inheritance to the more remote though related in numerous ways, this being contrary to what almost appears from the two foregoing passages of Makna and Maknia and contrary to what is related of Abi-Ali's expressly stated contention, viz., that for a maternal uncle's son when co-existing with the paternal uncle there is $\frac{1}{3}$ and for the paternal uncle $\frac{2}{3}$ which (contention) is perhaps based on the assumption that paternal uncles and maternal uncles are to be two species. And you have already known the absurdity of this contention in what has preceded. And you have known also that for them is the share of one through whom they approach the deceased just as in the cases of the children of brothers and sisters and (the children) of sons and daughters, and therefore it is that *the children of the different paternal uncles take the share of their fathers; hence for the children of paternal uncles, through mother alone, is $\frac{1}{6}$ and if they are the progeny of two paternal uncles through the mother alone, then for them $\frac{1}{3}$ to be divided equally among themselves although they are males and females for the reason you have known before; contrary to the contention of Fazl and Saduk based upon their view of the applicability (of the rule of unequal division) being all embracing, according to which for the children of the paternal aunt (whether through both the parents or through mother alone) is $\frac{1}{3}$ and for the children of the uncle (similarly) $\frac{2}{3}$. And the rest is for the children of the paternal uncle or paternal aunt or for the children of paternal uncles or paternal aunts through both father and mother, or through father alone in the absence of the former, to be divided in the proportion of for the male double of the female if they are the children of one paternal uncle or more and in the case of paternal aunts similarly; because of that when the son of a paternal uncle co-exists with the daughter of another paternal uncle, for the son of the paternal uncle is $\frac{2}{3}$ and for the daughter of the other paternal uncle is $\frac{1}{3}$, there being no difference of opinion of a single writer on the point of the subject. And similar is the Discourse about the progeny of the maternal uncles. And if the children of the paternal uncle and the children of the maternal uncle co exist then for the children of the maternal uncle is $\frac{1}{3}$, whether they are the children of one or many, and for the children of the paternal uncle the rest, just as in the case when paternal uncles and maternal uncles co-exist; so much so that the same things are made applicable here which you have heard of in that place. Accordingly for the son of the maternal uncle is $\frac{1}{6}$ if the maternal uncle is one and $\frac{1}{3}$ if many. Then if they are similar one side,*

the division will be equal; otherwise those related through the mother are to those related through the father or both parents (in this case also) as the motherly relatives are to the fatherly or parental relatives (in all other cases). Accordingly in the example here $\frac{1}{6}$ of the $\frac{1}{3}$ is for the children of the maternal uncle or maternal aunt through the mother, equally if the maternal uncle or aunt is single, and $\frac{1}{3}$ thereof to the children of many, for every group (is) the share of one through whom they approach the deceased, to be divided equally; and the rest of the $\frac{1}{3}$ is for the children of the maternal uncle or maternal aunt, single they be or plural, by both parents or by father alone, for each the share of one through whom he approaches the deceased, to be divided equally; and $\frac{1}{6}$ of $\frac{2}{3}$ is for the children of the paternal uncle or paternal aunt through the mother, for the male equal to the female, if the one through whom they approach is single and $\frac{1}{3}$ thereof is for the children of many, for each the share of him through whom he approaches the deceased, for the male equal to the female, and the rest is for the children of the paternal uncle or paternal aunt or of both by both the parents or by the father alone, for each the share of one through whom he approaches the deceased, for the male double of the female. And if the children of the maternal uncle, maternal aunt, paternal uncle and paternal aunt co-exist, for the children of the maternal uncle and maternal aunt is $\frac{1}{3}$ equally and for the children of the paternal aunt is $\frac{1}{3}$ of $\frac{2}{3}$ and the rest for the children of the paternal uncle. And Hasan has gone against this and has given the children of the maternal uncle and maternal aunt $\frac{1}{3}$ equally and the children of the uncle $\frac{1}{3}$ for male double of the female and for the children of the paternal aunt *(and) the remaining, the division in this case being also for the male double of the female.

1908

AGA
SHERALLI
v.
BAY KULSUM
KHANAM.

Jawahir-ul-kalam, p. 283.

Faiz Tyabji (with *Manubhai Nanabhai* for the applicants, (appellant and defendants) to show cause:—The distribution among the heirs of the third class is not *per stirpes*. There are two main groups, *vis.*, the paternal and maternal sides. Each of these groups is divided into sub-groups which are enumerated in the texts with their different shares. The expressions about the heir taking the share of one through whom he is related refer only to these different sub-groups of the full blood, the consanguine and the uterine relations. This is shown by the 1st passage. The different heirs would then sub-divide *per capita* the share which falls to the sub-group in which they are

* 'And' (redundant).

1908
 AGA
 SHEHALLI
 v.
 BAI KULSUM
 KHANAM.

included. The 2nd passage shows that the claimants take in their own right. The 3rd and the 6th passages do not really go against us.

The 4th is directly against us but then the 8th is directly in our favour. The 5th and 7th passages have no bearing as they refer to the second class. The 9th passage furnishes an illustration of what is meant by "standing in their place." The daughter of the maternal aunt is preferred because she stands in the place of the grandmother through whom she is connected to the deceased, and thus prevents the inheritance from going upward. This passage also shows that in the case of the higher groups they are brought down and the uncles of the father are made to stand in place of the uncles. This is inconsistent with the theory that the person in whose place the heir stands is the immediate ancestor of the heir.

The 10th and 11th passages indirectly support our contention that the distribution is *per capita*.

The other passages are put in by the opponent. The expressions such as "through whom he approaches the deceased," "and is his substitute," refer to the sub-groups.

The 15th passage corresponds with the 8th passage. They are directly in our favour. There can be no doubt now as to its correctness as three different editions agree in adopting the positive expression. The Persian Edition of the Nejatul-Ibad also agrees with this. The only passage which has a negative expression is the 4th passage from the Bombay Edition. This is only a small handbook, whereas the Javahir-ul-Kalam is a large work consisting of six big volumes, and more weight should be given to the reading adopted by the latter.

Reference was also made to Ameer Ali's Mahomedan Law, Vol. II (2nd Edn.), pp. 40, 41, 62, 78, 79, 105; Sircar Tagore Sections on the Mahomedan Law, Vol. II, pp. 172, 205, 250; Baillie's Mahomedan Law, Vol. II, pp. 262, 268, 285, 332, 333, 334, 386, 389.

Setalwad (with *M. N. Mehta* and *N. K. Mehta* for the opponent, respondent-plaintiff):—All the heirs in this case belong to the third class. We say that Shiya law recognises stirpital division throughout.

The applicants had at the previous stage restricted the stirpital division only to the heirs of the first class. Now they concede that it is recognised in the second class also: but they say that the principle is not applicable to the third class.

1908

AGA
SHERALLI
v.
BAI KULSUM
KHANAM.

The question, therefore, that naturally arises is: If the division is stirpital in the first two classes, why should it not be so in the third class also? If it is to be so restricted, there must be very clear words to that effect in the Texts. But that is not the case. On the other hand the passages put in by us clearly bear out our contention. Baillie's Imameea, p. 385, also goes conclusively against the applicants. The passage at p. 389 is part of the whole argument commencing with the fourth rule at p. 388 and should be read as a whole.

Again the expression 'taking the share of one through whom they approach the deceased' is a technical one and is to be found used with regard to all the three classes. The applicants have now conceded that as applied to the first two classes, it means that each one takes the shares of its *immediate* ancestor through whom it approaches the deceased: and it must mean the same things as applied to the heirs of the third class also.

The 14th passage very clearly brings out our point; so does also the 15th passage.

The 2nd and the 3rd passages are continuous passages. The 2nd deals with the question as to whether a particular person is an heir: and the 3rd deals with the share of such a person if he is an heir: and that passage also clearly supports our contention.

The only passage that seems to support the applicants' contention is the 8th passage, which corresponds with the 15th. But that passage would not read consistently but for the negative. The applicants only rely on an accidental error caused by the omission of a negative which is expressed only by a dash. The Nijatul-Ibad passage, *i.e.*, the 14th passage only elaborates the argument of the Javahir-ul-Kalam passage, *i.e.*, the 8th or 15th. The author of both the works is the same.

The passages put in by the applicants, the 9th, 10th and 11th only lay down the principle that among heirs the

1908 nearer exclude the more remote; and that the heirs related through the mother take among themselves equally irrespective of sex.

AGA
SHEBALLI
v.
BAI KULSUM
KHANAM.

Tyabji, in reply.

JENKINS, C. J.:—We have taken advantage of an error apparent on the face of the record to grant the application for review sought by the appellants who were unsuccessful before us on the first hearing of their appeal. We were the more ready to do this as we were told that there were now additional materials in the shape of further and more accurate translations of works by commentators who had discussed the question with which we are concerned.

That question is, whether under the Shia Law the succession in the case of descendants of paternal uncles and aunts is stirpital or capital. On the former occasion we held that it was stirpital.

The heirs by consanguinity under the Shia Law of inheritance fall into three classes. In the first class are, first the parents, and secondly children and other lineal descendants. In the second class there are first grandparents and ascendants and secondly brothers and sisters and their descendants. And in the third class come paternal and maternal uncles and aunts of the deceased and his parents and their descendants.

It is now conceded before us that in the case of those coming within the first and second classes, succession is stirpital. Why should it not be so in the case of the third class?

A further examination of the relevant passages in the second part of Mr. Baillie's Digest of Mahomedan Law, which appears to be largely composed of translations from an authoritative text-book of Shia Law, *Sharayai-ul-Islam* confirms us in the conclusion that in the third class as well as in the first and second, succession is stirpital.

The passages read to us, and more particularly that at pages 386 and those that follow point clearly to that conclusion. And the extracts from commentators which have been brought to our notice in our opinion, strongly support that view.

It is admitted by Mr. Faiz Tyabji that he can only rely on one of those passages as being in his favour, that is, the passage which was marked 8th on the former hearing and is now 15th.

It is quite true that there is a statement there which seems to support his contention. But that statement is in direct conflict with an exposition of the law as laid down by the same author in another work, and as between these conflicting statements we have no hesitation in again accepting the 14th passage as it now is, as being the true statement of the writer's views.

The conflict of views arises from the fact that in one case a negative is present and in the other case it is absent.

We have now had further opportunity of examining the record and examining it with the assistance of the Arabic Translator, and it is apparent to us that the absence of the negative from the 15th passage might very well have been a copyist's error, while it is impossible to treat the presence of the negative in the 14th passage as due to any such accidental cause. For, the sentence in which this negative appears, read with that which immediately follows it, shows that the negative was absolutely necessary for the purpose of giving expression to the writer's views. And we further think, reading the whole of the 15th passage, that the negative would be more consistent with the general views there expressed. So that it comes to this that the only passage on which Mr. Faiz Tyabji is able to rely in support of his conclusion is one which we are unable to accept for the reasons we have here indicated as being the true exposition of the law.

The result is that as on the former occasion we confirm the decree with costs.

The appellant must pay the costs of this appeal and the costs of the application for review.

Decree confirmed.

G. B. R.

1908

AGA
SHEERALLI
v.

BAI KULSUM
KHANAM.