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THE MAHOMEDAN  
**Law of Inheritance**

ACCORDING TO THE SCHOOL OF

**Shafii**

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BY

*Charles Herbert*  
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## PREFACE

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The greater part of this commentary is to be found in another treatise by the Writer (a), but there are two reasons for its publication in this form. First, although this work is written in relation to the Shafii School of Mahomedan Law as recognised in the Straits Settlements, the principles and rules enunciated are in general applicable wherever the Shafii law of inheritance applies, and, unlike the treatise already referred to, this book is not limited in its scope to this Colony. Secondly, there has been added, as an appendix, a table of succession, to provide a ready means whereby any member of the Bar called upon to advise may do so without having to spend some hours in research and sometimes complicated calculations.

The Author is greatly indebted to the recognised authorities upon Mahomedan Law to whom acknowledgment is made individually in the text. So far as text books written in English are concerned, however, the Shafii law of succession is but dealt with cursorily as an exception to the Hanafi School; except in the translation of the *Rahbia* by Sir William Jones (1791) and in Howard's translation of Van den Berg's translation of the *Minhaj et Talibin*. Even in the latter the law of inheritance is but briefly considered. Luciani's *Successions Musulmanes* which is the fullest text book upon this branch of Shafii law has not been translated into English (b).

Mahomedans consider their law of inheritance as founded upon divine revelation; and remembering that it is enjoined in the Hadis: "Learn the laws of inheritance and teach them to the people, for they are the one half of useful knowledge", their jurists have evolved in the

- 
- (a) Administration of and Succession to Estates in the Straits Settlements.
- (b) Since writing this commentary, the Author has read the learned abridgement of Mohamadan Law by S. Vesey-Fitzgerald (Oxford-1931) which particularly discusses the Shafii law of inheritance.
- AP 22-22-37

utmost detail and with the greatest ingenuity a system of sound logic if of some intricacy. Upon this subject the imagination of the arithmeticians has run riot, as where one contemplates a claim by no less than thirty-five grandmothers, and it has been the Writer's endeavour in this commentary to give a clear and concise statement of the law.

If this work makes clear some of the complexity with which this subject is enshrouded, and in some small measure assists those who have occasion to deal with problems arising therefrom, the object of the Author will have been achieved and he will be more than satisfied with the result of his labours.

C. H. WITHERS PAYNE.

SINGAPORE,

*November, 1932.*

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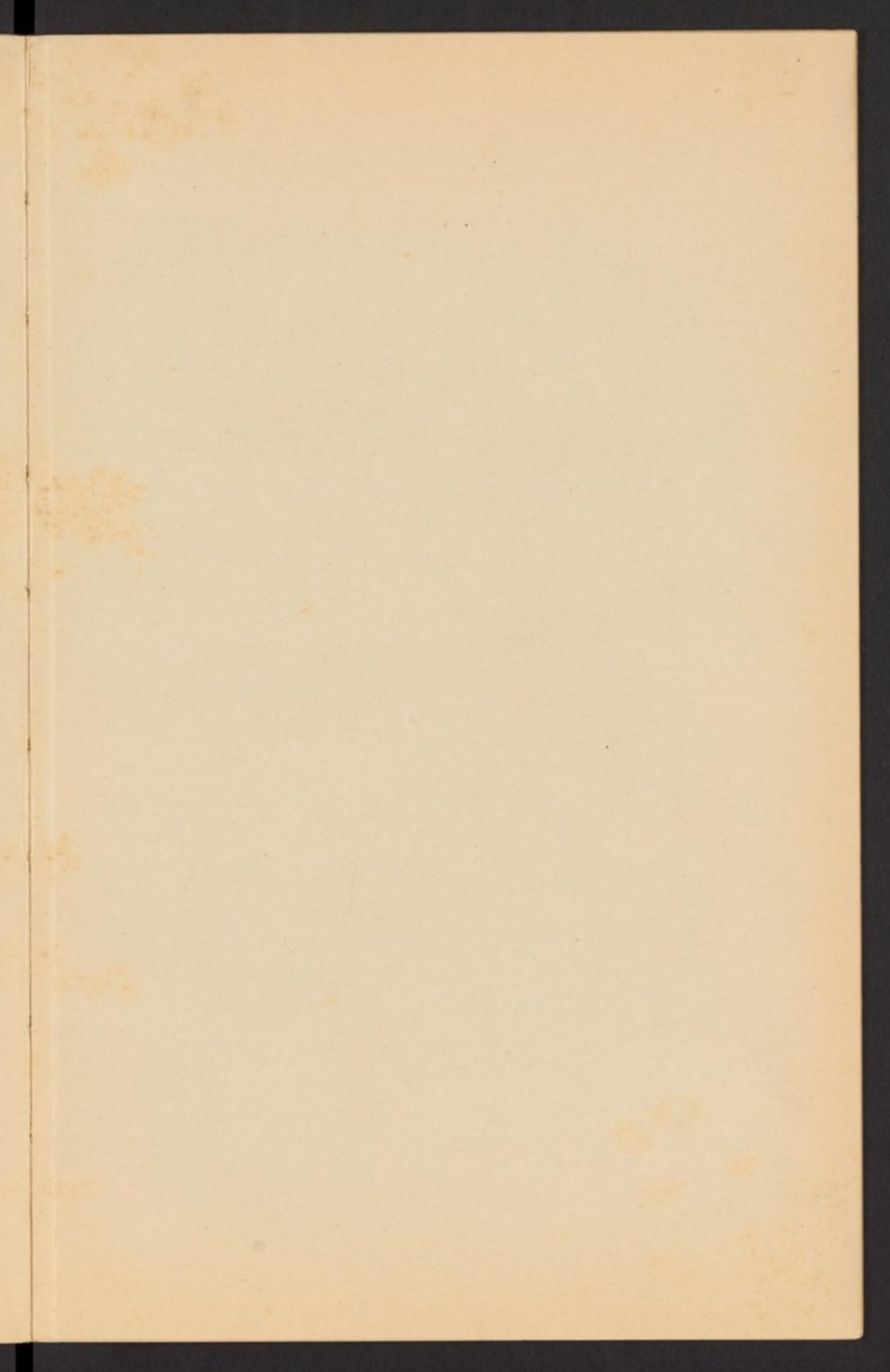
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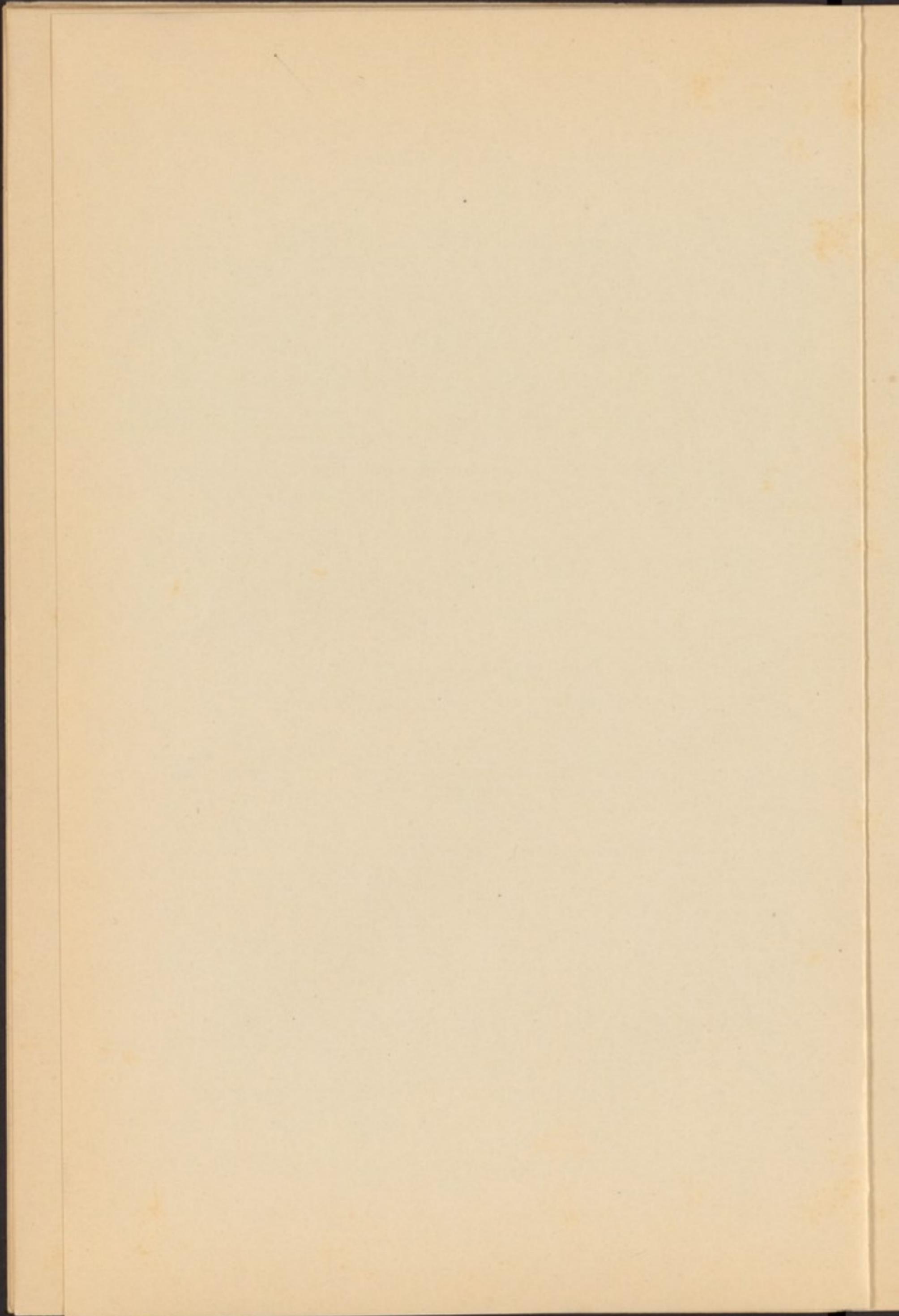
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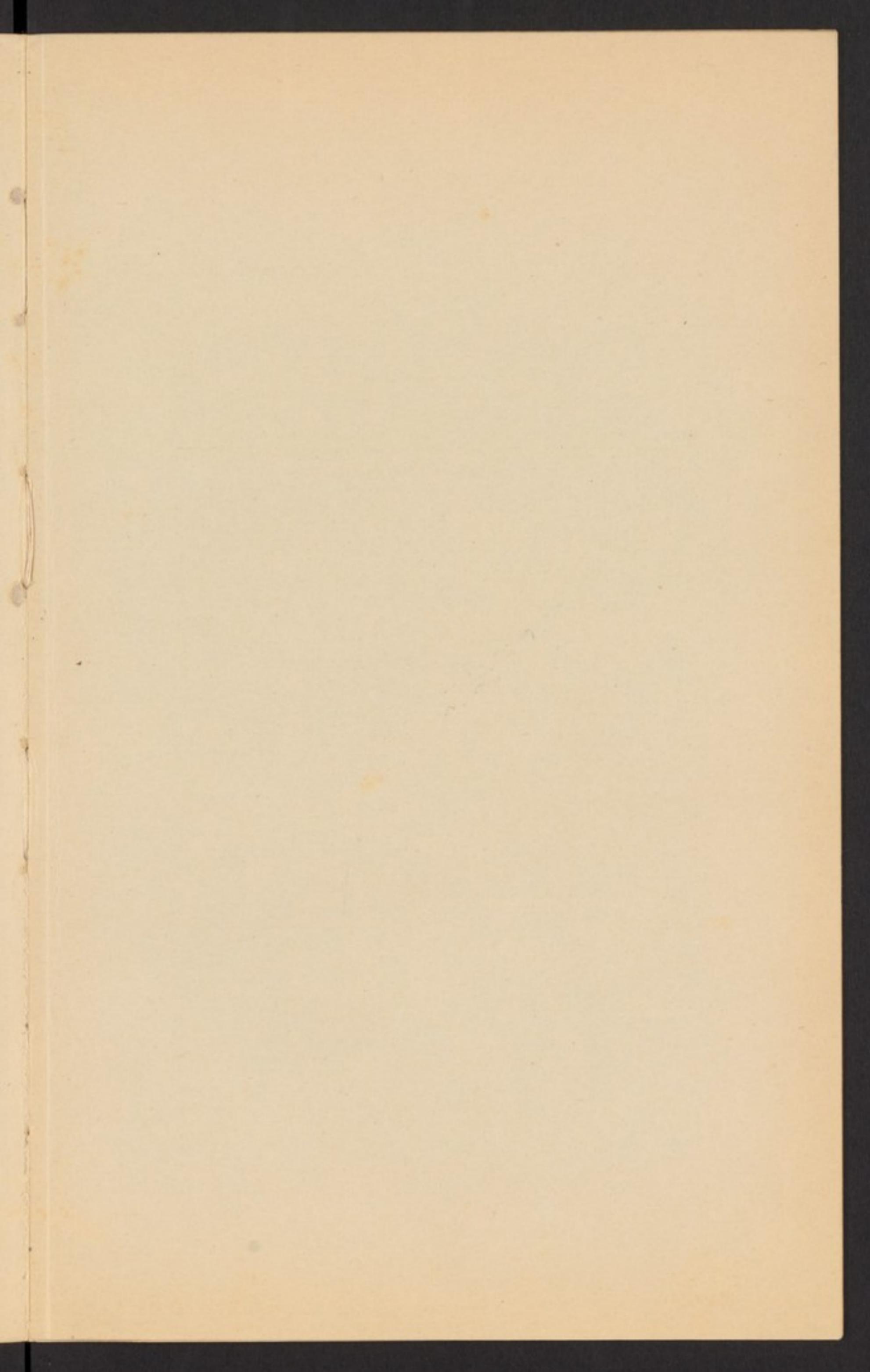


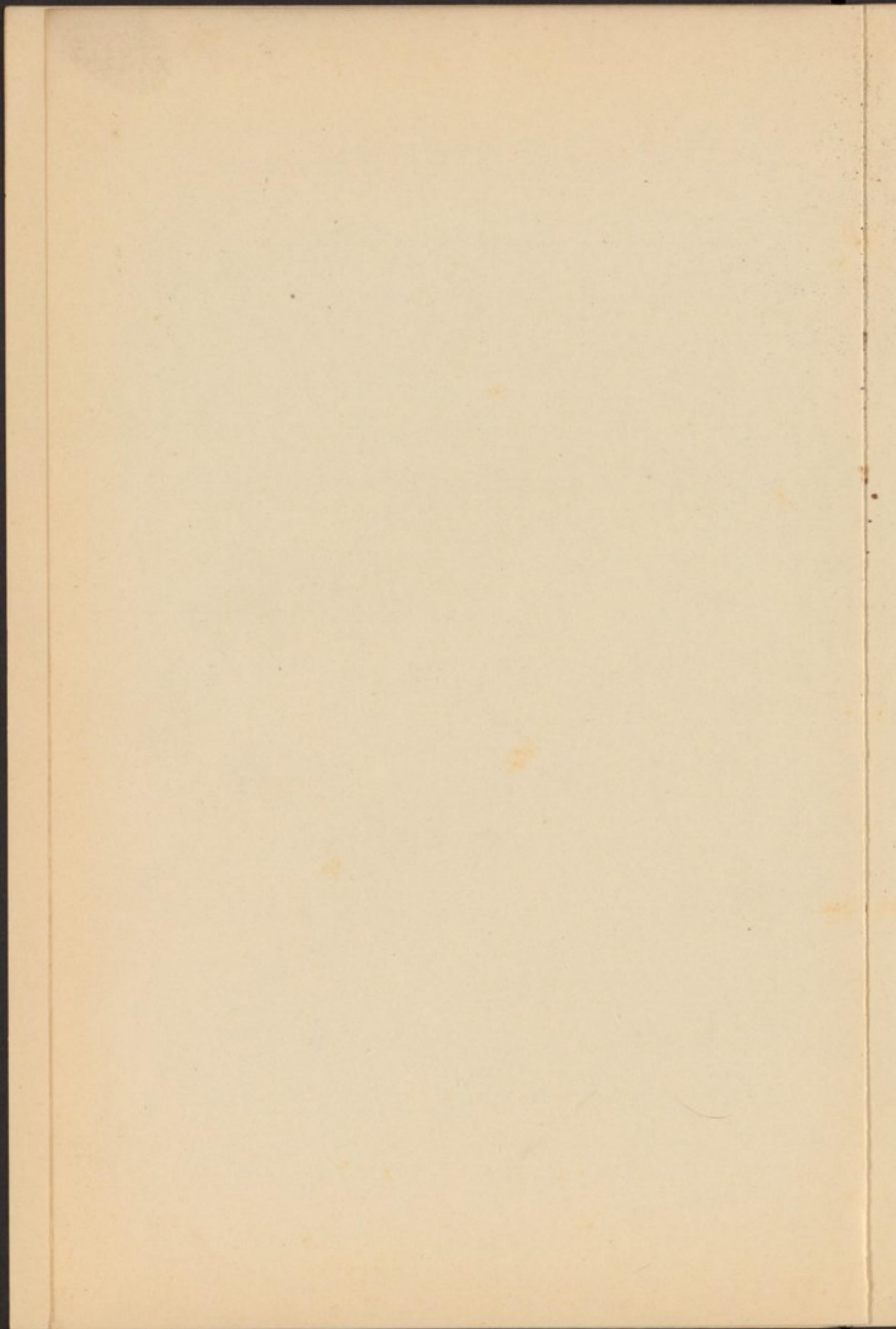
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## CHAPTER I.

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### INTRODUCTION.

The Mahomedans are divided into two principal sects, the Shiah, the followers of the house of Mohammed, who reject not only the decisions of the œcumenical Councils but also all traditions not received from the Ahl-i-Bait, that is those handed down by Ali, Fâtima and their immediate descendants and adherents; and the Sunnis who base their doctrines upon the entirety of the traditions. The sources of the law of the latter are (1) the Koran (2) the Hadis or Sunnat, the traditions derived from the Prophet by word, action or even silence (*takrîr*) (3) the *Ijmâ'a-ul-Ummat*, the decisions of the leading disciples of the Prophet and especially of the first four Caliphs, Abû Bakr, Omar, Osmân and Ali and (4) *Qiyâs*, the exercise of private judgment by the use of reason and analogy in interpreting every implication of the commandments in the Koran and the Hadis.

The Sunnis are divided into four orthodox schools (*madzab*) the Hanafi, Maliki, Shafii and Hanbali, and it is the third of these schools that predominates in Egypt, East Africa, Southern Arabia and Ceylon, and applies, with but few exceptions, to Moslems living in the Malay Peninsula and the East Indies. Abu Abdullah Mohamed ibn Idris esh-Shafii was born in A.D. 767 at Gaza or Ascalon, and, after studying law under Malik at Medina, went to Baghdad and was there taught by jurists of the Hanafi school. He himself between 811 and 814 lectured at Baghdad, but afterwards went to Egypt where he lived at Old Cairo and taught with great authority until his death in 820. He is the first Moslem jurist whose work has survived, and the leading authority in the school of law founded by him is the treatise called *Minhaj et Talibin* by Imam Mahiudin en Nawawi itself derived from many sources (*c*) and particularly the *Moharrar* of Imam Abu Kasim er Rafii. An English translation by E. C. Howard of a French translation by Van den Berg of this work is evidence in the Supreme Court of the Straits Settlements, and any definite statement of law therein contained may be accepted as proof (*d*). The like applies to two other

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(*c*) Nawawi also introduced several improvements by indicating reservations correcting any conflict between his authorities, and in doing so wrote a critical survey of the whole law, which nevertheless in the form of an abridgment is of half the volume of the *Moharrar*.

(*d*) Ord. No. 26 (Mahomedans) sect. 27.

works namely Mahomedan Law by Syed Ameer Ali (*e*) and a Digest of Moohummudan Law by Neil B. E. Baillie (*f*), but care must be taken in using the former, which considers but very briefly the Shafii law of inheritance, and the second part of the latter, which is intended to give the Shiah law only.

In the Colony of the Straits Settlements and in the Malay States the Shafii law of inheritance is by far the most important as the very great majority of Mahomedans there living belongs to this school (*g*). This law, like those of the other three schools is founded upon four different rights—(1) Nasab or Karabat, Kinship, (2) Sabab, special cause, viz. a valid marriage, (3) Wala, which is of two kinds that of emancipation and that of clientage (*h*), and (4) Islam as represented by the Bait-ul-Mal (*i*). Amongst the Sunnis (*j*) the persons entitled to share in the intestate's estate on the ground of blood relationship are divided into three classes, the Sharers (*k*), the Agnates or Residuaries (*l*) and the Uterine Relations (*m*). The Sharers are entitled to

- (*e*) Mahomedan Law by Syed Ameer Ali, 5th Edition, 1929.  
 (*f*) A Digest of Moohummudan Law by Neil B. E. Baillie, 1869.  
 (*g*) The Mahomedan Malays and Arabs are Shafiis, the Mahomedan Indians residing in the Colony are generally Shafiis, but there is a small number belonging to the Hanafi school: (see Min. et. Tal. 563 sub. nom. Shafii). All the Khathis appointed by the Governor under Ord. No. 26 (Mahomedans) s. 4 have been and are Mahomedans of the Shafii School. It is exceptional to meet a Mahomedan of the Shiah school, hence in this treatise it is proposed to discuss the Shafii law of succession adding footnotes of any differences between it and the Shiah law. The Maliki school does not, and the Hanafis rarely, differ from the Shafiis as to the rules of succession.  
 (*h*) Am. Ali. p. 47.  
 (*i*) The general body of Mahomedans represented by the Bait-ul-Mal; Am. Ali p. 98 and p. 145-147: see post page 30.  
 (*j*) The Shafii, Hanafi, Maliki and Hanbali Schools.  
 (*k*) The Zav-il-Furuz, persons whose shares are specified in the Koran, traditions or the Ijmaa-ul-Ummat. There is no difference between the Sunnis and the Shiahs as to Sharers. The enumeration must not be considered as indicating any order of precedence.  
 (*l*) The Asabah, who are by the Shiahs grouped with the Zav-il-Arham. These residuaries are persons whose relation to the deceased can be traced without the intervention of female links.

#### Alternative modes of Distribution.

- I. If there is any sharer or residuary—
    1. the sharers take their shares and thereafter
    2. the residue is taken by—
      - (a) the residuaries (Agnates) if any or failing them—
      - (b) the sharers, who are blood relations.
  - II. If there are no sharers or residuaries, the whole estate is taken by the other blood relations.
  - III. In default of all these blood relations, the estate is taken by the husband or wife, or, failing him or her, the Crown.
- (*m*) The Zav-il-Arham, or "the distant Kindred," and generally means relations connected with the deceased through females. According to early Shafii doctrine, these were not recognised; Min. et Tal. 247; Sirajia 38, 39; Sircar, 143.

their specified portions, and, if these exhaust the estate, the Agnates take nothing. It is only when a residue is left after allotment of the shares, that the Agnates take the residue (*n*). If there are no Agnates the residue reverts to the Sharers in proportion to their shares, except in the case of the husband or the wife. It is only where there are neither Sharers nor Agnates that the estate is divided among the Uterine Relations (*o*).

The Sharers are twelve in number, four of whom are males viz., the father, grandfather or lineal male ascendant, the uterine brothers, and the husband; and the remainder females, viz: the widow, daughter, daughter of a son or lineal male descendant, mother, true grandmother, consanguine sister *i.e.* half sister on the father's side, and uterine sisters *i.e.*, half sisters on the mother's side (*p*).

The rights of inheritance of different relations of the deceased are subject to variation and also to exclusion, but as to the husband or widow, father, mother, son and daughter, however their shares in the succession may vary, they are never excluded from succession (*r*).

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(*n*) Am. Ali 98; Min. et Tal. 248; Baill. Dig. Intr. XXIII.

(*o*) Am. Ali 48; Gujadhur Pershad v. Abdoollah (1869) 11 W.R. 220. These include the cognates *i.e.* persons related to the deceased through one or more female links, (whether male links intervene or not), and all relations who are neither sharers nor residuaries *e.g.* the great grandson of the brother of the deceased's grandfather: Abdul Serang v. Putee Bibi (1902) I.L.R. 29 Cal. 738.

(*p*) Am. Ali 49; Baill. Dig. 378; Min. et Tal. 247.

(*r*) Am. Ali. 35 & 49: Min. et Tal. 248: see also Macn. Princ. rule 11.

## CHAPTER II.

### A. EXCLUSION FROM INHERITANCE.

#### (a) TOTAL EXCLUSION (s).

A person who denies the Unity of God and the Messengership of the Prophet (viz., Kufr) is by Mahomedan law excluded from any share in the deceased's estate (t), but in this Colony any next of kin who is not a Mahomedan is entitled to share in the distribution as though he were a Mahomedan (v). There are, however, other causes of exclusion by Mahomedan law which would seem to apply here.

No person is entitled to a share in the estate if he has unlawfully killed the deceased whether intentionally or by accident. The act committed must have been unlawful (w), and be the direct cause of the death of the intestate (x).

There is, however, no exclusion where the act causing death was done in justifiable war, or in inflicting punishment under the direction of the law; or by an infant (y), or an insane person (z). If a person kills his father, and the homicide has a child, this child may inherit from the grandfather for the crime of the father is no bar to the succession of his children (a). It is conceived that the Court should follow the Shafii law and exclude the person guilty of homicide from the inheritance in all cases, but that it will do so is doubtful (b).

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(s) Mawanah-ul-Irs.

(t) Min. & Tal. 253; Baill. Dig. 264; Am. Ali. 88, 100.

(v) Ord. No. 26 (Mahomedans) Sect. 27. Under Sunni law a Moslem does not inherit from a non-Moslem; Min. et. Tal. 253; Am. Ali. 100.

(w) An act punishable under Mahomedan Law. Where a child is circumcised by his father and dies in consequence of the operation, the father is not excluded: Am. Ali. 91, and see *ibid.* 100; *Shah Abdee v. Shah Ali Mukee* (1803) 1 S.D.A. Rep. 73.

(x) E.G. by rolling over the deceased in sleep or by falling on him from a roof of a house. A person who is unintentionally the indirect cause of another's death is not excluded, hence, if A digs a well and B falls into it, or A places a stone in the road against which B stumbles, and is killed, A does not lose his right to inherit; Baill. 1, 697; Am. Ali. 91. According to Shiah Law the homicide must be intentional and unjustifiable to be a bar: Baill. Dig. Intr. XXII; Macn. Princ. App. p. 458 case 67.

(y) According to Shafii law a child whether male or female who has not attained the age of fifteen years; Min. & Tal. 167; Am. Ali. 535.

(z) Am. Ali. 90.

(a) Baill. Dig. 267—369.

(b) This difficulty illustrates the great care which should be taken in repealing Ordinances as being obsolete, for had Indian Act No. XXI of 1850 not been repealed no doubt could have arisen. By that Act, *inter alia*, so much of any law or usage, . . . . . "as may be held in any way to impair or affect any right of inheritance (of any person) by reason or his or her renouncing or having been excluded from the communion of any religion . . . . ." shall cease to be enforced as law," and it was held that the impediment of homicide under Mahomedan law was thereby removed; *Khunnu Lal v. Gobind Krishna Narain* (1911)

An illegitimate child and his father are not related in law and cannot inherit from each other (*c*), although in the absence of legitimate issue he is entitled to inherit from his mother (*d*). The same rules apply to relations on the illegitimate father's or mother's side (*e*).

According to Mahomedan law, there is a third impediment namely slavery, but this will not be recognised in this Colony (*f*). A physical defect *e.g.* insanity or blindness does not exclude a person from inheritance (*g*), nor does want of chastity in a daughter, whether before or after marriage (*h*). The infidelity of a wife during her husband's life does not exclude her if the marriage has not been dissolved (*j*).

When two persons called respectively to succeed to each other perish in a common calamity, or, if they die apart, either simultaneously, or in such circumstances that it is

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I.L.R. 33 All. 356, 365. This Act was repealed by Ord. No. XXXIII of 1907, after reciting in the preamble that it had had its effect and was no longer required to remain law within the Colony and being described in the second part of the Schedule as "Indian Act 21 of 1850—Forfeiture on *change* of religion," a very limited statement of the scope of the Act which, without any change of religion, relieved persons who had been excluded from communion or deprived of caste. The Court might well hold that not to exclude the heir would be opposed to a local custom which prior to 1st January, 1924 had the force of law; Ord. No. 26 s. 27. A murderer will not however be allowed to benefit by his crime; *Sher Khan v. Muhammed Khan* (1924) A.I.R. Lah. 505.

- (*c*) Am. Ali. 91; *Boodhun v. Jan Khan* (1870) 13 W.R. 265; see also *Sahebzadi Begum v. Himmud Bahadur* (1870) 12 W.R. 512, 14 W.R. 125.
- (*d*) Am. Ali. 91; *Bafatum v. Bilaite Khanum* (1903) I.L.R. 30 Cal. 683; it seems that where the child is a Christian, the mother will not inherit for in such a case the child is not a "Mahomedan person dying intestate" within Ord. No. 26 s. 27; *Nancy alias Zuhoorun v. Burgess* (1862) 1 W.R. 272. As to imprecation and its consequences, see *Min. & Tal.* 362; Am. Ali. 56.
- (*e*) By Shiah Law an illegitimate child (*i.e.* a child of fornication) cannot inherit from either of his parents; *Baill. Dig.* 305; Am. Ali. 92, 128; *Sahebzadee Begum v. Himmud Bahadur* (1869) 12 W.R. 512 s.c. (1870) 14 W.R. 125. An adopted son cannot inherit among Mahomedans; *Oheed Khan v. Collector of Sahabad* (1868) 9 W.R. 502; *Bai Machbai v. Bai Hirbai* (1911) I.L.R. 35 Bom. 264.
- (*f*) Slavery has never been recognised in this Colony and no rights arising out of an alleged property in or services of another as a slave can be enforced by the Courts: Indian Act V. of 1843 Sect. 2 (repealed by Ord. XXXIII of 1907). It was the purpose of this Act to relieve all persons then subject to the disabilities arising out of the status of slavery; *Mir Ujmuddin Khan v. Ziaul-Nissa Begum* (1879) 3 Bom. 422; s.c. 6 I. A. 137.
- (*g*) Am. Ali. 92; *Macn. Prec. Inh.* case 10; *Mir Mathar Ali v. Amani* (1869) 2 B.L.R. (A.C.) 306, s.c. 11 W.R. 212.
- (*h*) *Ibid*: *Noronarain Roy v. Neemall Chang Neogy* (1866) 6 W.R. 303.
- (*j*) *Ibid*. If the divorce is pronounced in death illness and the husband dies before completion of the wife's *iddat*, she is entitled to inherit; *Bhagbari v. Khatun* (1924) 80 I.C. 118.

not known which predeceased the other, there is no succession between them and their estates devolve on their respective heirs (*k*).

The step-mother, step-son and step-daughter of the deceased have no right to succeed to any part of his estate (*l*).

(*b*) RELATIVE EXCLUSION (*m*).

**I. Absolute.**

Relative exclusion is either from the whole inheritance or from a part of a person's share, and, with regard to the former, the rule of law is that respect is to be paid to nearness of blood to the deceased. The nearer relative always excludes the more remote from succession. Thus the child of a child cannot inherit with a child, male or female, *e.g.* a daughter excludes a grandson; and where there are lineal descendants of several degrees, the nearer in descent to the deceased excludes the more remote. Direct descendants exclude all persons related to the deceased through his parents or one of them, and no one can participate with them in the inheritance except his father and mother, and husband or wife (*n*).

Amongst collaterals also the nearer excludes the more remote *e.g.* brothers and sisters and their descendants and true grandparents exclude paternal and maternal uncles and aunts *viz.*, collaterals of the third class. Relations of the full blood generally exclude those of the half blood if they are of equal class and degree (*o*).

**II. Partial.**

Partial exclusion or the diminution of a share is of two kinds, exclusion by a child and exclusion by brothers and sisters. A child or lineal descendant, male or female, reduces the share of the husband or widow from one half to one fourth, or from one fourth to one-eighth share respectively, and excludes the parents of the deceased from

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(*k*) Min. et Tal. 253; Am. Ali. 100; Baill. Inh. 119.

(*l*) Am. Ali. 79. Allah Baksh v. Muhammad Umar (1929) 115 I.C. 479; Begam v. Jalal Din (1917) 41 I.C. 263.

(*m*) Al-Najab.

(*n*) Baill. Dig. 270; Am. Ali. 34, 129. Whoever is related to the deceased through another cannot inherit whilst that other is living, except that the mother's children may inherit with her because she has no title to the whole inheritance. Among the residuaries, persons nearest in degree exclude the more remote, thus sisters are excluded by sons and daughters; grandfather by a father. Since slavery cannot exist in this Colony the rights of a manumittor over an uterine relation do not apply.

(*o*) Am. Ali. 130.

more than two sixths of the estate, except in cases where with one daughter or two or more daughters there is only one parent (*p*).

Brothers and sisters reduce the share of the mother from one third to one sixth, though they themselves take nothing, upon four conditions, (1) that they consist of two or more brothers, or a brother and two sisters, or four or more sisters (2) that the father of the deceased be alive (3) that they are Mahomedans and have not been convicted of murder (*r*) and (4) that they are either of the full blood or consanguine (*s*).

A child in the womb of its mother is competent to inherit provided that it is born alive, but if still born it has no title to any portion (*t*), whereas if born alive, though death ensues immediately after its birth, its share belongs to its heir. If a miscarriage is produced by violence, regard is to be had to any motion which may be exhibited by the child, whether it be such as can proceed from a living being, or is merely a quivering of the limbs which sometimes takes place involuntarily after death (*v*). Where any heir of the deceased is unborn, the estate can only be divided amongst the other heirs subject to such a part thereof being reserved as will ensure that the unborn heir shall be able to receive his full share when born (*w*).

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- (*p*) Baill. Dig. 271; Min. et. Tal. 247 cf., Am. Ali. 131: children of the deceased reduce the share of the deceased's mother from one-third to one-sixth.
- (*r*) Since the brothers and sisters take nothing, it is conceived that Ord. No. 26 sect. 27 will not apply, and that, to reduce the mother's share, they must be Moslems. As to the exclusion of a murderer, see Baill. Dig. 272. per contra; according to the most prevalent doctrine a murderer would not be excluded.
- (*s*) Baill. Dig. 272; Am. Ali. 131: it is doubtful whether these conditions apply to Shafis, and it is conceived that the mother's share is reduced where there are two or more brothers or sisters, whether full, consanguine or uterine, co-existing with the mother: Baill. 1 688; Sirajia par. 10, 15; Min. et Tal. 248, see post 198.
- (*t*) The signs of life are breathing, making a sound, sneezing, crying, laughing and motion, as of the eyes or hands; Am. Ali. 75; Min. et Tel. 254.
- (*v*) Am. Ali. 74, 133; Baill. Dig. 269; but it seems birth must take place within the ordinary period of gestation: Am. Ali. Moh. Law 74; Min. et. Tal. 254. It seems that where a miscarriage is produced by violence some authorities consider that there is a presumption that the child was born alive: see Am. Ali. 75; Tyabji 834. The first authority also lays down the further limitation that where a child is born after the decease of any relation (other than its father) to whose inheritance it would have been entitled had it been alive at the date of death, it will succeed only if born within six months from such death, unless the other heirs acknowledge that the child's mother was pregnant when the deceased died.
- (*w*) Am. Ali. 75, 100; Baill. Intr. 112; Min. et Tal. 254. According to Hanafi the reserved portion should be that of four sons or four daughters, whereas according to Abu Yusuf it should be that of one son or one daughter (this is adopted in the Egyptian

A person who is missing is presumed to be alive until it is proved in accordance with the Evidence Ordinance (*x*) that he is dead; and so long as he is presumed to be alive his property cannot be divided amongst his presumptive heirs, nor, where he is entitled to inherit, can his share be given to others. His property or share must be kept for him until he claims it or is presumed to be dead (*y*). It seems that after a lapse of seven years a presumption of death is raised, and the estate can by order of Court be divided without segregating the share of the missing person, but it is very doubtful whether such a division can safely take place without such an order (*z*).

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Code Art. 631) but errs in making no provision for twins. Imam Mohamed has the limit of three sons or daughters; Sirajia 60-64. If delivery of the child does not take place after the expiration of the longest period of gestation, the child will not inherit and can not be inherited from. Shafii extended the Hanafi period of two years to four years; Baill. Inh. 110.

- (*x*) Ord. No. 53 (Evidence) Sects. 107 & 108; cf., Indian Evidence Act 1872 ss. 107 and 108 and see Mazhar Ali v. Budh Sing (1884) I.L.R. 7 All. 297; followed by the Privy Council in Imdad Ali v. Ghulam Jilani (1892) 27 Punj. Rec. 156 (No. 42); Moola Cassim v. Moola Abdul Rahim (1905) 33 Cal. 173: L.R. 32 Ind. App. 177; the presumption of Mahomedan law is doubtful; see Am. Ali 95; Min. et Tal. 254: Baill. Dig. 269.
- (*y*) Am. Ali. 100.
- (*z*) Ord. No. 53 (Evidence) ss. 107 and 108; according to Mahomedan law there is great difference of opinion as to the period during which the share of a missing person should be held for him some have said 90 years, other 70, which moderns generally fixed; but the recognised rule as laid down in the Fath-ul-Kadir is that the Judge may give any direction having regard to the circumstances of each case and the probability of death: Am. Ali. 94; Baill. Dig. 269; Min. et Tal. 254; see also Hedaya. Bk. XIII. 292, Macn. Princ. p. 29 r. 101; Baill. Intr. p. 116; see also Kalee Khan v. Jaden 5. N.W. 62.

## B. INTERPRETATION.

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In this treatise the following words and expressions have the meaning stated below, where not inconsistent with the context:—

- (1) "Lineal relation" is that which exists between two persons one of whom is descended in a direct line from the other, each generation constituting one degree.
  - (2) "Collateral" means a person having a common ancestor with the deceased, either on the paternal or maternal side, but who is neither a descendant nor an ancestor of the deceased.
  - (3) "Agnate" means a person whose relation to the deceased can be traced exclusively through males.
  - (4) "Cognate" means a person whose relation to the deceased is traced through one or more females, whether males intervene or not.
  - (5) "Consanguine brothers and sisters" mean children of the same father but a different mother.
  - (6) "Uterine brothers and sisters" mean children of the same mother but a different father.
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## CHAPTER III.

### THE KORANIC SHARERS.

#### I. Relations by Affinity.

##### 1. The Husband.

If the deceased died leaving a child or any agnatic descendant, the husband is entitled to one fourth share of the estate; but, if there be no such child or descendant, is entitled to one half share. His share is not altered by the child of a daughter of the intestate being alive (*a*).

##### 2. The Widow.

If the deceased died leaving a child or lineal male descendant, the widow is entitled to one eighth share of the estate, but, in default of any such children, to one fourth share (*b*). Where the intestate has left two or more widows, they will take the widow's share equally between them (*c*). The widow's share is not altered by the fact that the deceased's daughter has left a child (*d*).

The husband and wife are the only heirs by affinity recognised by law (*e*), and they always succeed to their shares. In the event of the wife dying leaving her husband but no other heir of any description, the husband is entitled not only to his share but also the whole of the residue in

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- (*a*) Am. Ali. 50; Min. et Tal. 247; Baill. Dig. 338; Sale Kor. IV 13. The husband must deduct his share from the unpaid dower, if any, due from him to the estate of his deceased wife; Macn. Princ. App. p. 462 case 88; Am. Ali. 449; Ali Buksh Khan v. Kaleem Bibee (1804) 1 Sel. R. 86. (*n*); Mahammed Ishak v. Shaikh Akramal Haq (1907) 12 C.W.N. 84.
- (*b*) Ibid., 50. This share is in addition to any unpaid dower, which ranks as an ordinary debt, and must be paid before distribution of the residue; Am. Ali 449 & 450; Wil. Ang.—Muh. Law. 270; Wahedunnissa v. Shubratun (1870) 6 B.L.R. 54; but if she assents to a legacy, she cannot retract; Reza Hossein v. Ifatoonnissa (1873) 24 W.R. 564. Amongst the Shiahhs a childless widow is not entitled to share in her husband's land; Toonajan v. Begum 3 Agra 13; Asloo v. Umdutoonissa (1873) 20 W.R. 297; Ali Hussain v. Sajuda I.L.R. 12 Mad. 27; but she may inherit a share in the buildings; Umadaraz v. Wilayat (1896) I.L.R. 19 All. 169.
- (*c*) Ibid. 50; Macn. Prec. Inh. case 14; see page 33 post.
- (*d*) Ibid. 50. A widow is not entitled to maintenance out of the estate of her deceased husband in addition to what she is entitled to by inheritance; Aga Mahomed Jaffer Bindanim v. Kool-som Beebee (1897) 24 I.A. 19, s.c. I.L.R. 25 Cal. 9.
- (*e*) A step-son, the son of a husband by another wife or of a wife by another husband than the deceased is not an heir; Mussammat Begum v. Jalal Din (1917) 52 Punj. Rec. 182 (No. 50); Am. Ali. 79; Macn. Prec. Inh. cases 21 and 22.

priority to the Crown (*f*). The marriage must have been regular and valid for if it be void or invalid there is no title to inheritance between the parties (*g*).

## 2. Blood Relations.

### (a) Female Agnatic Descendants.

#### 3. The Daughter.

Where the intestate has left no son so as to render her a residuary, the daughter is entitled to one half of the estate, or, where there are two or more daughters, to a two thirds share of the estate equally between them (*h*).

#### 4. The Daughter of a Son or lineal male descendant.

(1) Where the deceased dies leaving neither a daughter (*j*) nor a son (*k*) him surviving, the daughters of his predeceased sons (*l*) become sharers and are entitled to one half of the estate, if there be one such grand-daughter, and a two thirds share if there be two or more, provided that there is no son's son co-existing with them (*m*).

(2) Where the deceased leaves a daughter and a son's daughter surviving him but no son or son's son, the daughter takes one half of the estate and the son's daughter takes one sixth as Koranic sharer (*n*). If

- (*f*) Am. Ali. 70; Baill. Dig. see p. 30 post.
- (*g*) Hence deathbed contracts of marriage, if not consummated, found no title; secus where there is consummation or recovery from the illness; Baill. Dig. 340; Am. Ali. 327; and Chap VI. Sect. 2. Chastity of the wife is not a condition precedent to inheritance; Muhammad Bakhsh v. Hayat Khan (1887) 23 Punj. Rec. 98 (No. 37); and a deathbed divorce does not determine her right of succession unless one year has elapsed; Baill. Dig. 341; and see *ibid.* 373; Bhaghari v. Khatun (1924) 80 I.C. 118.
- (*h*) Am. Ali 50; Bail. Inh. 687, 690; Dig. 378; Min. et Tal. 247. There must be no son for, if there is any son, he, being the nearest male agnate, is the customary heir and the daughter is not nearer than him but is in the same degree. She cannot therefore get a prior claim to the estate as sharer, but only ranks as a co-residuary with him and receives half his share; Macn. Princ. p. 1, r. 3.
- (*j*) Am. Ali. 50; Min. & Tal. 247. If there be a daughter, she would become a sharer.
- (*k*) *Ibid.* a son being nearer in degree excludes a son's daughter.
- (*l*) *Ibid.* and see Macn. Princ. p. 4 r. 18. A daughter of a daughter is not a sharer because she is not an agnatic female descendant.
- (*m*) If a son's son is living, the son's daughters are co-residuaries with him; Baill. Dig. 386.
- (*n*) Am. Ali. 50; Min. et Tal. 248. If the deceased left two or more daughters, a son's daughters take nothing unless there is a lineal male descendant of the same or lower degree; Macn. Prin. p. 4. r. 19; Am. Ali. 50.

there are two or more daughters of sons and a single daughter, the former divide the one sixth share equally between them (*o*).

(3) Where the deceased leaves no daughter or son's daughter, the nearest agnatic female descendant takes a one half share, or, if there be more than one, a two thirds share equally between them, provided that there is no agnatic male descendant in the same or nearer degree, and, if there is only one in the nearer degree, those in the next degree take a one sixth share (*p*).

(*b*) Ascendants.

5. The Father.

Where there is any agnatic descendant surviving, one sixth of the estate is allotted as the Koranic share to the father (*r*). In default of any agnatic descendant, the father is entitled, in addition to his share to take as a residuary (*s*), or, if a daughter or a son's daughter has a concurrent claim, he is entitled to his share and the residue after the allotment of the share of the daughter or son's daughter (*t*).

6. The Father's Father.

In the absence of the father of the deceased and where there is no agnatic descendant living, the father's father or the nearest agnatic male ascendant takes one sixth of the estate, that is the share which the father would have taken had he survived (*v*). Such an agnatic male ascendant is called "a true grandfather" (*w*), as distinguished from a male ancestor between whom and the deceased a female

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(*o*) They may be the daughters of one son or of different sons for this makes no difference.

(*p*) Am. Ali. 50; Baill. Dig. 386. This share of 1/6 is made up as follows; two daughters would have taken 2/3 and this share is divided between the daughter, who being the nearest receives 1/2, and the grand-daughter who receives the remainder of 1/6.

(*r*) Min. et Tal. 247; Am. Ali 49; Baill. Dig. 381; Sale. Kor. IV. 12: before the promulgation of Islam, the father was the customary heir and entitled to take the whole estate in the absence of a son or grandson or other male descendant, but otherwise entitled to no share. He now takes 1/6 of the estate as a sharer, but his rights as a residuary are not taken away.

(*s*) Am. Ali. 49; Baill. Dig. 378, 383.

(*t*) Min. et Tal. 249; Am. Ali. 49.

(*v*) Am. Ali. 49; Baill. 386. The true grandfather takes a similar interest to the father in the estate except (1) he does not reduce the mother's share from 1/3 of the estate to 1/3 of the residue (2) he does not exclude the true grandmother and (3) he does not exclude the brothers and sisters; Am. Ali. 98; but as to (3) see Ibid. p. 50 and Macn. Princ. p. 4. r. 21. and page 19 post.

(*w*) Baill. 1. 686, 690.

intervenes. Such an ancestor, not being an agnate, is called "a false grandfather" (*x*), and cannot inherit either as a sharer or a residuary (*y*).

#### 7. The Mother (*z*).

The mother of the deceased is entitled to one sixth of the estate if there is any agnatic descendant surviving; but, if there is no such descendant, she is entitled to one third of the estate as a sharer, subject to the following exceptions:—

(*a*) Where the father (*a*) and the husband or wife of the deceased are surviving and there are no other heirs (*b*), the mother takes, subject to the exception (*b*) below, one third of the residue after the husband or wife has taken his or her share and not one third of the whole estate (*c*); and

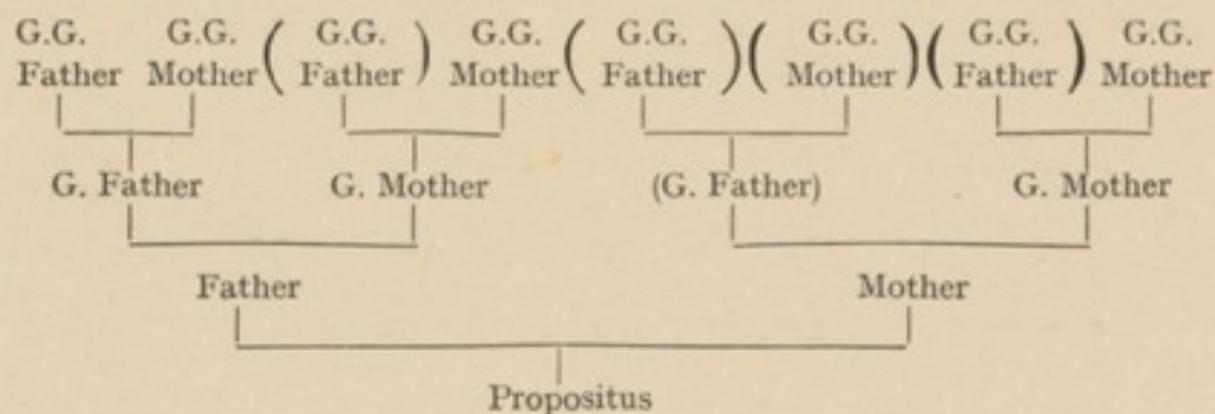
(*b*) Where there are two or more brothers or sisters, whether full, consanguine or uterine, surviving, the mother takes only one sixth of the estate, although there be no agnatic descendants of the deceased surviving (*d*).

#### 8. The True Grandmother.

The true grandmother, however remote, where not excluded by a nearer true female ancestor, *e.g.* the mother, is entitled as a Koranic sharer to one sixth of the estate

(*x*) Am. Ali. 49; this distinction is unknown to Shiah law.

(*y*) He is not an agnatic ascendant. The table below shows "true" and "false" grandparents, the latter within brackets:—



(*z*) See page 21 post.

(*a*) Not the grandfather.

(*b*) *i.e.* agnatic descendants who alone can inherit with the father.

(*c*) See authorities note (*d*), and Macn. Princ. p. 6 r. 34; Wil. Ang. Muh. Law. 272. The Koran gives the mother 1/3 of the estate when the father is living (Sale. Kor. IV 12), and the Sunnis, wishing to preserve the proportion between her share and that of the father, give her 1/3 of the residue if the husband or wife survive. The Shiah allow her to take 1/3 of the whole estate, leaving only 1/6 to the father if there is a husband, and 5/12 if there is a widow surviving.

(*d*) Am. Ali. 51; Min. et Tal. 247; Baill. Dig. 380.

(e). A true grandmother is one between whom and the deceased no false grandfather intervenes (f). The true grandmother who is related to the deceased in the nearest degree excludes one who is remoter, but is herself excluded by any intermediate male agnatic ascendant (g). Where more than one true grandmother in the same degree survives, they take the one sixth share equally between them, though one may be related to the deceased both on his father's and his mother's side (h).

(c) Collateral Relations.

9. Full Sister.

If the deceased dies leaving a full sister but no male agnatic descendant or ascendant, she is entitled to one half share as a Koranic sharer; and, if there are more than one full sister, they are entitled to a two thirds share equally between them (j).

10. Consanguine Sister.

Where there is no heir who would exclude a full sister and no full sister surviving the deceased, the consanguine sister is entitled to one half share, or, if there are more than one such sisters, to two third shares; but, if there be a full sister living, then a consanguine sister is entitled to one sixth share. If there be two or more full sisters living, a consanguine sister is given no share unless there is a consanguine brother with her (k).

11. Uterine Brother.

If the deceased left no child, or agnatic descendant, father or true grandfather, then an uterine brother is entitled to a one-sixth share, or, if there be two or more

(e) Am. Ali. 51; Baill. Dig. 386; Min. et Tal. 248.

(f) Am. Ali. 51; Rumsey 6; "true grandmothers" are either (1) agnatic grandmothers of the deceased, (2) grandmothers related to the deceased through female links or (3) grandmothers of the deceased's father or true grandfather related through female links (the intervention of the true grandfather is not taken into account for he stands in the place of the propositus and can therefore be regarded as eliminated for the purpose of ascertaining capacity to share though not in computing the proximity of degree): see table p. 13 note (y).

(g) Thus the father's mother is excluded by the father, and the father's father's mother by the father or father's father; in accordance with the rule that no one can inherit who is remoter than the customary heir i.e. the nearest male agnate.

(h) Am Ali. 51; Maen. Princ. p. 7 r. 40; cf., Sirajia 22.

(j) Am. Ali. 51; Baill. Dig. 280; Min. et Tal. 247.

(k) See note (a) sup. Neither the full nor consanguine sister is entitled to a share if there is a full or consanguine brother respectively, for in such case she becomes a co-residuary with the brother who is the customary heir, or if there is any female agnatic descendant, for then she becomes a residuary excluding any more remote male agnatics; see Meherjan v. Shajadi (1899) 1 Bom. L.R. 549 and page 17 post.

uterine brothers, they are entitled to divide equally between them a one-third share (*l*). If co-existing with them there be an uterine sister or sisters, they share the one third part with such sister or sisters (*m*).

## 12. Uterine Sister.

The uterine sister is upon exactly the same footing as the uterine brother (*n*).

### 3. The Doctrine of Increase or "Aul."

It may happen in practice that, when there are several Koranic sharers surviving the deceased, their fractional shares when added together amount to more than unity. In such a case their shares are subjected to a proportionate abatement by increasing the common denominator. This is termed the increase or "aul."

If a man dies leaving his widow, two daughters, father and mother the shares to which they are entitled are one-eighth, two-thirds, one-sixth and one-sixth respectively, making a total of twenty seven twenty-fourths. The common denominator in this case is twenty four, representing the number of shares into which the estate must be divided, three being the widow's share, sixteen the daughters,' four the father's and four the mother's share, totalling twenty seven. The Sunnis in order to give the exact number of shares to each heir, therefore divide the estate into twenty seven shares (*o*).

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- (*l*) Am. Ali. 50; Min. et Tal. 247, 248. The uterine relations cannot succeed unless they are nearer than the customary heir or nearest male agnate i.e. there must be no male agnatic descendant or ascendant. A female agnatic descendant will also exclude them because then the share given to females nearer than the customary heir is taken by the female descendants and none is left for the uterine relations. Thus, where the deceased left a daughter and an uterine sister, the latter is excluded; Am. Ali. 51; Mothooranauth Mozoomdur v. Eusuff Ali Khan (1870) 14 W.R. 356.
- (*m*) Am. Ali. 51; they divide the share equally between them; Sale Kor. IV. 15; Sirajia 16.
- (*n*) Ibid. The uterine brother is not an agnate and consequently not a customary heir, he cannot therefore claim a larger share than the sister as a male agnate can when of the same degree as a female agnate: Bail. Dig. 381; Wil. Ang.-Muh. Law 275.
- (*o*) Am. Ali. 74, 101; Min et Tal. 256, where a list of cases of "aul" is given in cases where the common denominator is six, twelve or twenty four. Among the Shiah's this doctrine is prohibited as illegal, and, where their fractional shares exceed unity, the deficiency is made to fall upon the heirs whose shares are liable to variation viz. the share of the daughter or daughters, or the share of a sister or sisters either by both parents or by the father only: Baill. Dig. 395-398, and 274.

## CHAPTER IV.

## THE AGNATES OR RESIDUARIES.

The agnates or residuaries (*p*) are divided into two groups, residuaries by kinship to the deceased (*nasab*), or residuaries by *sabab* or the special cause of *wala* (*r*). If the entire estate is disposed of among the Koranic sharers then they receive nothing, but otherwise they can claim the residue of the estate after deducting these shares (*s*).

## 1. Residuaries by Kinship.

All the agnatic male relations of the deceased (*t*) are residuaries in their own right, and there are rules giving priority amongst them. The nearer in degree to the deceased excludes the more remote (*v*), and lineal male descendants exclude all agnative ascendants or collaterals (*w*). Ascendants are preferred to collaterals, subject to the special rule where a grandfather and brothers or sisters survive the deceased (*x*). Amongst collaterals the descendant, however low, of a nearer common ancestor is preferred to the nearest descendant of a more remote ascendant (*y*),

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- (*p*) i.e. Asabah or customary heirs.
- (*r*) Am. Ali. Mah. Law. 51; Baill. Dig. 261; Min. et. Tal. 246.
- (*s*) Min. et. Tal. 248. In this chapter reference to "the estate" or "the succession" mean the residue after deducting the Koranic shares.
- (*t*) These are in their order of priority, sons, son's sons (however low), father, father's father (however high), full brothers, consanguine brothers, full brother's sons, consanguine brothers' sons, full brother's son's sons, consanguine brothers son's sons etc. father's full brothers, father's consanguine brothers, their sons, etc. father's father's full brothers, their sons and so on; Am. Ali. 53; Baill. 1 691. A male agnate however remote is, with one exception (see post pp. 18, 19) competent to inherit as residuary; *Mohedeen Ahmed Khan v. Muhammed* (1862) 1 Mad. H.C.R. 92 (agnatic descendant of true grandfather); *Syed Showkut Ali v. Ahmud Ali* (1867) 8 W.R. 39 (agnatic descendants of true grandfather's brother); *Mahomed Haneef v. Mahomed* (1874) 21 W.R. 371; *Bhanoo Bibee v. Iman* (1803) 1 S.D.A. Rep. 680; *Rahim Bahsh v. Muhammed Hasan* (1888) 11 All. 1 (father's paternal cousin). Originally the Shafiis and Malikis only allowed the right of succession to residuaries in the collateral branch up to the 6th degree, but the right of agnates of a lower degree is now recognised; Min. et Tal. 247; Am. Ali 96. An adopted son cannot inherit; *Oheed Khan v. Collector of Sahabad* (1868) 9 W.R. 502.
- (*v*) *Moolla Kassim. v. Moolla Abdul Rahim* (1905) 33 Cal. 173, 32 I.A. 177: thus a son excludes a son's son; Am. Ali. 99.
- (*w*) Am. Ali. 53; Baill, Dig. Chap. II p. 276; Min. et Tal. 248; In other words the rule that the nearest in degree succeeds applies to each class of heirs and not to the heirs of different classes viz. descendants, ascendants and collaterals, thus a son's son is preferred to the father though the latter is nearer in degree.
- (*x*) e.g. the grandfather is preferred to a brother. For the special rule referred to in the text see page 19 post.
- (*y*) See Macn. Prec. Inh. cases 26, 29, 35, 83.



agnate as near or nearer than herself (*g*). Except in these cases all residuaries take the residue of the estate without any part being allotted to females of the same degree (*h*). If male and female residuaries co-exist then the residue is divided in such proportions that each male receives twice as large a part or share as that received by each female (*j*).

A son excludes the children of another predeceased son, but, in the case of concurrent claims by an only daughter and children of a predeceased son, she can claim half and the remainder falls to the children, if they include a male, otherwise they can only claim a joint sixth. In the same way, where the deceased has left two or more daughters and the children of a deceased son, the former take two thirds of the estate, and the latter, if they include a male, the residue (*k*). If the children are all daughters they have no right to succession unless entitled as agnates (*l*).

In default of residuaries who are descendants of the deceased, the residue of the estate is inherited by the father (*m*), who excludes brothers and sisters (*n*).

Where the deceased left full brothers and sisters they share the estate as if they were the deceased's children, females taking half the share of males (*o*).

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- (*g*) This is the only case in which the nearest male agnate is excluded; *Meherjan Begam v. Nawab Mir Nurudin* (1899) 24 Bom. 112; Am. Ali. 55.
- (*h*) Am. Ali. 54; it is only when the female is a Koranic sharer herself that, instead of taking a share, she takes as a residuary when co-existing with a male residuary.
- (*j*) Min. et Tal. 249, 256; Baill. Dig. 276; Am. Ali 54, 99; thus a daughter with a son takes half the share of her brother, but when by herself a moiety as Koranic sharer.
- (*k*) Min. et Tal. 249; it is conceived that the word "sixteenth" is a printing error; see *ibid.* 248; Baill. Inh. 687; Macn. Princ. p. 4. rules 19 & 20. See *Mubarak-un-nissa v. Muhammad Raza Khan* (1924) A.I.R. All. 384, where deceased dies leaving three grandsons by a predeceased son, two daughters and a brother, the daughters get 2/3 share, and grandsons one third.
- (*l*) Min. et Tal. 249; Am. Ali. 77, 99. As a general rule the principle of representation is not recognised, although to a limited extent it applies to the succession of cognates; thus uterine brothers and sisters, when they do succeed, take the mother's share; *ibid.* 35, and see ante p. 14.
- (*m*) Where there are no agnatic male descendants, the father is the nearest male agnate and as such the customary heir: Am. Ali. 53; "then comes the root that is his father" *Sirajia* 24, where he is called to the succession with a daughter or son's daughter; Min. et Tal. 249.
- (*n*) Am. Ali. 53, 76; Macn. Princ. rule 21, Prec. Inh. case 61. and Dig. p. 447 case 2 citing 1 S.D.A. Ben. Rep. 68; *Bhanoo Beebee v. Imam* (1803) 1 S.D.A. Rep. 680.
- (*o*) Min. et Tal. 250; Am. Ali. 54, 78, 99; Macn. Prec. Inh. cases 37, 85, and 86. App. p. 453. c.34; they are preferred to half brothers and sisters; *Shaik Buxoo v. Shaik Jummal* (1817) East. Notes Case 65.

In default of full brothers and sisters as a general rule the residue devolves on the consanguine brothers equally, concurrently with the consanguine sisters, each of the latter taking half the share of each consanguine brother (*p*). Full or consanguine sisters share when their brother, full or consanguine respectively, is the nearest male agnate (*r*), or when the nearest male agnate is more remote than a brother but there are, co-existing with the sisters, daughters or sons' daughters or any female agnatic descendant (*s*). The consanguine brothers and sisters are subject to the same rules as full brothers and sisters except in a case of *mussharraka* viz., when a woman dies leaving her husband, mother, two uterine brothers or sisters and a full brother. In such a case the full brother shares with the two uterine brothers or sisters in the third allotted to them in the Koran (*t*); but, if, instead of a full brother, there had been a consanguine brother, he would have inherited nothing (*v*).

There are special rules applying in the case of concurrent claims by a true grandfather and brothers and sisters of the whole or half blood on the father's side (*w*). Where there are no other heirs who can claim a Koranic share, the grandfather may take either one-third of the estate or may share with brothers and sisters as if he were a brother (*x*).

- (*p*) Am. Ali. 53, 54; when there are full brothers or sisters co-existing with consanguine brothers or sisters, the latter are excluded unless the full sister or consanguine sister becomes an heir by being with a brother: Ibid. 99. To ascertain the residue the Koranic shares of full sisters and of uterine brothers or sisters, if any, must deducted.
- (*r*) They then become residuaries with him and entitled each to one half his share; Am. Ali. 54.
- (*s*) In such a case the female agnatic descendant takes her moiety, or, if more than one, two thirds, and the residue devolves on the sister. When there are several such descendants and full sisters they will exhaust the inheritance and a consanguine sister will be excluded: Am. Ali. 55; *Meherjan Begam v. Nurudin* (1899) 24 Bom 112; Macn. Princ. rule 25. This is the only case in which the nearest male agnate is excluded from the succession.
- (*t*) Am. Ali. 99; the reason for this rule is that otherwise the Koranic shares exhaust the estate (husband  $\frac{1}{2}$ , mother  $\frac{1}{6}$ , uterine brothers or sisters  $\frac{1}{3}$ ) and there is no residue for the full brother. In this case the latter counts as a sharer and is not allowed a double portion as a male: Min. et. Talibin. does not state this definitely, but it is explicitly laid down in Luc. Succ. Musulmanes p. 318; and see Baill. Inh. 723. It seems that the rule applies where there are more than two uterine brothers and sisters, and where there are two or more full brothers and sisters; Wil. Ang-Muh. Law. 435; Tyabji 868.
- (*v*) Am. Ali 99; Min. et Tal. 250.
- (*w*) An agnatic sister is excluded by the grandfather unless she co-exists with a brother except in one case referred to later in the para. The uterine sisters or brothers, who are sharers, are always excluded by the grandfather.
- (*x*) According to the Shafis the grandfather does not exclude full or consanguine brothers and sisters; Sirajia 40; Min. et Tal. 250, 252; Luc. Succ. Mus. 327; Wil Ang.-Moh Law 435; Tyabji. 874. This seems to be implied by Ameer Ali.—the paternal grandfather is governed by the same rules as the father except

If there be other heirs who can claim a portion specified in the Koran, the true grandfather may choose any one of the following alternatives (1) a sixth of the estate as Koranic sharer, or (2) take one third of the residue (after deducting the shares of the other heirs), or (3) share the residue with the brothers and sisters as if he were himself a brother (*y*). This option is, however, subject to three conditions: (1) where the estate is exhausted by the Koranic shares, or (2) where, after deducting the shares, there remains less than one sixth of the estate, the grandfather takes a one sixth share of the estate subject with the other shares to the doctrine of Aul (*z*), and (3) where, after deducting the Koranic shares, there remains exactly one-sixth of the estate the grandfather takes this one-sixth share. In all these three cases the brothers and sisters are entirely excluded from the succession. Although consanguine brothers and sisters are not excluded by the grandfather, yet they are excluded by full brothers and sisters, unless the grandfather is content to take his Koranic share and does not claim a fraction of the residue or participate with the brothers and sisters in sharing it (*a*). Where there are no full brothers, but there is a whole sister, and where there are two or more full sisters and a true grandfather, the estate is exhausted by the respective shares of two-thirds and one-third and the consanguine brothers and sisters take nothing (*b*). The father's father on being called to the succession concurrently with full or consanguine sisters, is admitted to share as if he were a brother, and the sisters cannot then be considered as heirs entitled to their Koranic shares, except in the particular case called *el akdariya*, viz; where there is a true grandfather and only one sister, neither brother, daughter nor other female agnatic descendant having survived (*c*), the grandfather is entitled to have one-sixth share given to him and one half to the sister, then, having

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that brothers and sisters are always excluded by the father unless they become entitled with him as residuaries—in the case of Shafii and Maliki (Am. Ali. p. 98), but the contrary is implied in the case of Hanafi (ibid. 53), but the author does not give any definite rules. According to Hanafi the grandfather is excluded and according to Shafii and Malik he is not excluded, and it seems that each school follows its teacher's rule; Sirajia 40 (and see 17 & 20); Tyabji, 874, 877; cf., Macn. Princ. rule 21. The Shiah law does not exclude brothers and sisters where the grandparents co-exist; Am. Ali. 162; Baill. Dig. 282, 364; Macn. Princ. p. 4 (note). The Egyptian Code in Arts., 597 and 609 (3) has the two contradictory rules.

- (*y*) Sirajia 40; Min. et Tal. 252. Where the grandfather elects to participate in the residue the estate is apportioned between the grandfather, brothers, and sisters, both full and consanguine, so that each male has twice the share of each female.
- (*z*) See page 15 ante.
- (*a*) Min. et Tal. 252;
- (*b*) Ibid. 253; Am. Ali. 99; Luc. Succ. Mus. rr. 454-9.
- (*c*) If any one of these persons has survived, the sister may be a residuary but not a sharer. The brother must be a full brother, if the sister is a full sister, or consanguine, if she is consanguine.

consolidated the two shares making together two-thirds of the residue (*d*), two thirds of the consolidated portion is taken by the grandfather and one-third by the sister (*e*). The true grandfather, if alone without any co-heir, takes the entire inheritance and so does a true grandmother. If they survive together they share the inheritance on the general principle that a male receives double the portion of the female (*f*). The mother is not strictly a residuary (*g*), but when she claims with a father, and the husband or wife, there being no descendants, the father being the nearest male agnate and hence customary heir, the husband or wife takes his or her Koranic share, and out of the residue the mother takes one-third and the father two-thirds, in other words shares the residue with the father, he as a male being given twice her portion (*h*).

The sons of full brothers and consanguine brothers follow in general the rules relating to the succession of their fathers except that (1) they do not reduce the mother's share to one-sixth (*j*), (2) they are excluded by the father's father, (3) they do not make their sisters co-residuaries, and (4) they are excluded in the case of musharraka (*k*).

The full or consanguine brother of the father is subject to the same rules as the full or consanguine brother of the deceased, and this principle applies to all male agnatic relations (*l*).

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- (*d*) This rule may be subject to the doctrine of Aul, e.g., where a woman leaves a husband ( $\frac{1}{2}$ ), mother ( $\frac{1}{3}$ ) grandfather ( $\frac{1}{6}$ ), one sister, ( $\frac{1}{2}$ ), the shares are proportionately reduced; then the two shares of the grandfather and sister are combined and of that combined share the grandfather takes  $\frac{2}{3}$  and the sister  $\frac{1}{3}$ ; Min. et Tal. 253.
- (*e*) Sirajia 42; Min. et Tal. 253.
- (*f*) Am. Ali. 78; Macn. Princ. rule 38, 39, 40.
- (*g*) Her rights are affected where brothers and sisters co-exist in a way quite unlike the rights of Koranic residuaries; Min. et Tal. 247; Sirajia 22; Macn. Prec. Inh. case 41. and Dig. cases 22, 37.
- (*h*) Min. et Tal. 250; Am. Ali. 99; Wils. Ang.-Muh. Law 272. If the father be dead, a true grandfather does not prevent the mother from being allotted  $\frac{1}{3}$  of the whole estate instead of the residue; Sirajia 16 (cf., *ibid.* 22, where Abu Yusuf puts the grandfather on the same footing as the father): Am. Ali. 99.
- (*j*) See page 13 ante.
- (*k*) Min. et Tal. 251 Am. Ali. 99, 100. As to the case of Mussharraka, See page 19 ante.
- (*l*) Min. et Tal 251. Neither brother's daughters, nor sisters' children nor the sons of uterine brothers can take as residuaries, not being agnates.

## 2. The Doctrine of Return or "Radd."

When there are Sharers but no person able to establish his or her claim to succeed as a residuary, the residue of the estate, after the allotment of the Koranic shares, is divided among such of the Sharers as are blood relations (*m*) in proportion to their respective shares (*n*). This right of the Sharers is termed the right to take by return or "radd" (*o*).

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- (*m*) Hence the husband and wife do not take by return; Am. Ali. 71; Sheik Musseeoollsh v. Missarnut Beebee Sherifun (1864) 1 W.R. 122; Mahomed Noor Bukhsh v. Mohamed Hamedool Huq (1866) 5 W.R. 23; Gujadhur Koonari Bibi v. Dalim Bibi (1884) I.L.R. 11 Cal. 14. Where husband or wife is the sole heir; see page 30 post.
- (*n*) Thus, if a mother and daughter be left, the shares are  $\frac{1}{2}$  and  $\frac{1}{6}$ , the residual  $\frac{1}{3}$  returns to them and they taken in lots  $\frac{3}{4}$  and  $\frac{1}{4}$  ( $\frac{1}{6} : \frac{1}{2} = 1 : 3$ ,  $\therefore$  Daughter takes  $\frac{1}{2} + \frac{3}{12} = \frac{3}{4}$ , and mother  $\frac{1}{6} + \frac{1}{12} = \frac{1}{4}$ ): A mother and four daughters, shares  $\frac{1}{6}$  and  $\frac{2}{3}$ , take with radd  $\frac{1}{5}$  and  $\frac{4}{5}$ ; husband and 3 daughters share  $\frac{3}{4}$  and  $\frac{2}{3}$ , residue goes to daughters only and they take  $\frac{3}{4}$ , see Am. Ali. 71; 72: Sircar 232—243; Baill. Inh. pp. 77—84.
- (*o*) The doctrine of Radd applies to the Shafiis. Though it is not so definitely stated, it is implied in Am. Ali 96 and see p. 70 "under Sunni Law." It is curious that it is not mentioned in Min. et Tal. Bk. 28, but reference is made to the rule in Baill. Dig. Intr. XXIII: see also Sirajia 37: Macn. Princ. p. 23 sect. VIII and Prec. Inh. cases 71, 73 & 74. It seems that at one time there was no "return" but the residue according to Malik and Shafii went to the Bait-ul-Mal (Public Treasury); Sirajia 32; Sircar 233:

## CHAPTER V.

### THE UTERINE RELATIONS OR DISTANT

#### KINDRED (*p*).

Where there are no blood relations who are Koranic sharers or residuaries, the uterine relations succeed to the inheritance according to the class to which they belong and to their respective rights, and they are entitled to succeed to the residue of the estate even though the husband or wife of the deceased is living. The uterine relations are divided into four classes (1) the ascendants of the deceased (*r*), (2) his descendants (*s*), (3) children of his parents (*t*), and (4) the children of his grandparents or other ascendants (*u*), and in fact comprise all relatives who are neither sharers nor residuaries (*v*). The general order of their succession is according to their classification, the first class succeeding first and so on, whilst among members of each class there are rules of priority (*w*). It seems that the Shafii school differs from the Hanafis in the order of the first two classes, the latter giving descendants of the deceased priority (*x*).

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- (*p*) Zav-il-Arham.
- (*r*) Viz: mother's father, parent's maternal grandfathers, mother's paternal grandparents and other ascendants in the same order: Baill. Inh. 127. "These persons are known as false grandfathers and grandmothers;" Macn. Princ. rule 42; Am. Ali 50.
- (*s*) Viz: Daughter's children; son's daughters' children, grandchildren of daughters, son's son's daughter's children, daughters of grand-children and other descendants in the same order.
- (*t*) Viz: Full brother's daughters, full sister's children, consanguine brother's daughters and consanguine sisters' children ranking with uterine brothers' and sister's children; Am. Ali 99, following Imam Mohamed contra Abu Yusuf; see also Mahomed Noor Buksh v. Mahomed Hameedool Huq (1866) 5 W.R. 23; then full brother's son's daughters, consanguine brother's son's daughters and lower descendants of brothers and sisters in the same order.
- (*u*) Father's full sister and mother's full brother and sister; father's consanguine sister and mother's consanguine brother and sister; then uterine brothers and sisters of the father and mother. The stronger in blood is preferred; Sirajia 243, 253.
- (*v*) Baill. Dig. Intr. XXIII; Am. Ali 58; Abdul Serang. v. Putee Bibi (1902) I.L.R. 29 Calc. 738.
- (*w*) Sanfuddin Muhammad v. Mohiuddin (1927) 105 I.C. 67.
- (*x*) Descendants are preferred to ascendants by the order of succession according to the Hanafis generally followed and accepted; Am. Ali, 58; Sir. 45; Baill. Inh. 89; Macn. Princ. p. 7. sect. III rules 43-46; but several learned Authors, whilst agreeing that this is the order generally followed, state that according to some authorities the ascendants rank before the descendants; Sirajia 29; Baill. Inh. 90; Baill. Dig. (1865) 90; Elb. 52; Grady 50; Sircar 139; Rumsey 15; Tyabji 882. None of these writers state which rule the Shafiiis follow. The Minhaj et Talibin

### Ascendants.

Where the uterine relations are ascendants, the nearer in degree to the deceased is preferred, or, if they are equal, priority is given to one claiming through a sharer. If, however, there be equality in the latter case, and some of the ascendants are ancestors of the father and some of the mother of the deceased, then two-thirds of the estate is allotted to the ancestors of the father and one-third to those of the mother. These portions are divided, according to Abu Yusuf, so that each male received double the share of each female; but, according to Imam Mohamed, the portions are divided in the same manner as if the relation of the claimants were at each degree descending and not ascending (*y*). In the same way, if the sexes of those through whom the ascendants are related differ, then the property is distributed according to the first rank that differ in sex, as in the preceding class (*z*).

### Descendants.

The nearest in degree to the intestate is preferred, but, if the claimants be of equal degree, the children of female

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states that cognates are all relations except legitimate heirs and "are of ten different kinds of relationship (1) mother's father and any lineal ascendant of the mother who is not a legitimate heir or heiress (2) daughters' children (3) any brother's daughters (4) sister's children (5) uterine brother's sons (6) father's uterine brother (7) father's brother's daughters (8) father's sisters (9) mother's brothers and sisters and (10) relatives of all these persons, male and female." Persons so related are entitled to share in the estate in default of agnates, but the author, in this his only reference to the subject, does not state that the order given in his text is the order of their priority, *Min. et Tal.* 247. On the authority of this work, Sir Roland Wilson states that this is the order of priority, and a "modern practice" contrary to the rule laid down in the *Sirajia* 38; *Wils. Ang.-Muh. Law* 436. Syed Ameer Ali does not mention this order in his chapter on Maliki and Shafii rules (pages 96-101), but Luciani agrees with the Hanafi law in preferring descendants but differs with both systems as to cognates; *Luc. Succ. Mus.* 527 and see *Sir.* 38, 45. It has been thought advisable to ascertain the local custom and for this reason the Author has obtained the opinion of Shaik Omar bin Mohamed Bashamed (see note (*d*) page 25), who states that amongst Shafiiis in this Colony, the mother's father or lineal ascendants are preferred to daughter's children, following the order in the *Minhaj et Talibin*, and cites in support the *Fatawa Syed Abdulrahman al Mashur*.

- (*y*) *Am. Ali* 65; *Sirajia.* 51, 52; *Tyabji* 892; *Min. et Tal* 247; for a full consideration of the two principles see note (*f*) page 27 and *App. II B.* page 41 post. It seems that the Shafiiis follow Imam Mohamed's teaching.
- (*z*) *Am. Ali* 65; *Al Sharifa-Jones Works VIII* 312. According to some authorities an exception occurs in the case of the maternal grandfather who ranks with the third class, though belonging nominally to a higher class: *Sir.* 30; *Rumsey* 15; *Grady* 49; but the contrary seems to be the law; *Min. et Tal.* 247; *Am. Ali* 57 and 66.

agnates are preferred to those of cognates (a). If the claimants be equal in degree and there is not among them the child of an agnate, or if they are all related through a female agnate, then the shares are allotted according to the number and sex of the persons existing at the time the inheritance opens, provided that the persons through whom the claimants are related to the deceased are of the same sex, or, in other words, "provided the sex of the roots agree" (b). In such a case the estate is distributed per capita and not per stirpes, and in such a way that each female receives one half the share of each male (c). Where, however, the sex of the root differs or the claimants are related to the deceased through persons differing in sex, there are two conflicting principles of distribution. According to Imam Mohamed, the shares are not governed by the number and sex of the claimants alone, but the distribution is in the first place made per stirpes (d). If the

- (a) "When there is equality of degree the child of an heir, whether sharer or residuary (i.e. a female agnate) is preferred"; Baill. Inh. 706; thus a son's daughter's son or daughter, excludes the child of a daughter's daughter; Sirajia 47. See Shahab Din v. Mt. Umran (1926) A.I.R. Lah. 440, daughters of a deceased brother exclude descendants of their sister.
- (b) Durr-al-Muktar 870; Am. Ali 591; Macn. Princ. p. 11. note.
- (c) Am. Ali 59; Baill. 1. 706; thus if the deceased has children of two predeceased daughters, by the one two sons and by the other two daughters, the two grandsons take two thirds and the two grand-daughters one third of the estate between them respectively.
- (d) Am. Ali 59; Sirajia 90, 131; Macn. Princ. rule 49; this is the rule followed by Indian Hanafis and applies whatever be the claimant's sex. It seems that the same principle is followed by the Shafis in this Colony. If these two conflicting principles only applied to uterine relations who are descendants, the contingency is so remote that they might be mentioned and passed over without further consideration; but they apply to the descendants of brothers and sisters and of uncles and aunts amongst whom it might be necessary to divide an estate. The Minhaj et Talibin contains no reference to these principles, and none of the authorities quoted in this chapter states which of the two is followed by the Shafii school. In Baillie's Law of Inheritance it is stated broadly, on the authority of the Sharifyah, that Imam Mohamed's opinion has been adopted by the followers of Abu Hanifa; *ibid.* p. 92 "there is an admitted decision of the Companions of the Prophet in the case of a paternal and maternal aunt when  $\frac{2}{3}$  was allotted to the former and  $\frac{1}{3}$  to the latter, which cannot be reconciled with Abu Yusuf's principle of looking only to the sex of the claimants"; Shureefeeah p. 144. According to Fatawa Alamgiri (Book of Faraiz Chap. VII) (i) there are two reports about Abu Hanifa's view as regards this, and of the two the better known report is that as regards all the rights of the Zav-il-Arham he agrees with Imam Mohamed and the "fatwa" is upon the same view but (ii) the Imam Asbeejanee has given the preference to the opinion of Abu Yusuf and (iii) the author of the Moheet and the Sheikhs of Bukhara have adopted in such questions the opinion of Imam Abu Yusuf; Baill. Dig. Pt. 1. 707; Tyabji. 892. Macnaghten states that although the rule of Abu Yusuf is the more simple, it is not the most approved; Macn. Princ. page 9. note; and this is the opinion of other writers;

claimants are more than two in number and, although equal in degree, derive their descent from separate ancestors differing in sex, the distribution will be made with regard to the sex of the ancestors in the first line of descent from the deceased where the difference in sex occurs. After this the males will be grouped into one class and the females into another class, and the shares of each class will descend to their descendants to be divided so that each male receives twice as large a share as each female. Where the intermediate ancestors of the claimants differ in sex from each other in more generations than one, this rule of differentiation must be followed in each such generation (e).

On the other hand according to Abu Yusuf in every case where the claimants are of an equal degree, and there is not among them the child of a sharer or residuary the property is divided according to the sex and number of the claimants (f).

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Grady 51, cf., page XLII "when Abu Yusuf and Mohamed differ from Abu Hanifa and each other the authority of Yusuf particularly in judicial matters is to be preferred"; Sircar 140 Note; Tyabji 892. See *Ashia Khatoon v. Abdul Hakin Maistry* (1929) 120 I.C. 129; except in questions of inheritance under Hanafi law; *Akbar Ali v. Adar Bibi* (1931) A.I.R. Calc. 155.

Tyabji adds to his comment "quaere, whether the Courts in British India will not prefer Abu Yusuf's system for its simplicity." Syed Ameer Ali states that the Indian Hanafis follow the teaching of Imam Mohamed, but that the rule of Abu Yusuf, being simpler and more intelligible, is followed throughout Western Asia (page 59); but cf., *Akbar Ali v. Adar Bibi* (sup.)

The question as to which principle is followed in this Colony has never come before the Court or at least no decision has been reported, and this may well be due to the fact that such a matter would be referred by the parties to an authority learned in their religion and law. Such being the state of the Authorities, the Author has obtained the opinion of Shaik Omar bin Mohamed Bashamad, who is a learned Mahomedan jurist to whom the Imams in this Colony resort for opinions on all questions of Shafii law. Shaik Omar states that the Shafis in this Colony follow the system of Abu Yusuf, and cites in support "I'ânât at tâlibin" by Sayid Bekrî Abû Bekr Shatta (consisting of glosses or commentaries on Zainnaddin al Malibari's commentary "Fath al Mu'in" on his work "Qurrat al 'ain") 4 Vols. Cairo. 1883.

- (e) Am. Ali 60-65. This complicated system is an attempt to give priority to males of nearest degree to the deceased over females of the same degree without adopting a division per stirpes. For an example showing the simplicity of Abu Yusuf's system contrasted with the complexity of that of Mohammed, and also the working of each; see App. II. B. post; & Baill. Inh. 90-109.
- (f) Am. Ali 59; the difference of the two schools is clearly shown where a man dies leaving one son of a daughter's daughter and two daughters of a daughter's son. According to Mohammed the former takes his mother's share of one third, and the latter their father's share of two thirds; whereas Abu Yusuf would divide the property into four shares of which the son would take two and the daughters one each.

### Children of Parents.

The rules that the nearest in degree or, where equal, the child or children of a residuary is preferred apply to this class (*g*). If equal in all respects, according to Abu Yusuf each male is entitled to double the portion of a female, but according to Imam Mohamed in the case of descendants the estate is divided between the brother or sister of the deceased, through whom the claimants respectively descend, as though they had survived but so that, if there be two or more claimants descended from the same brother or sister, that brother or sister is allotted the share of two or more as the case may be (*h*). The portions so allotted to the brothers or sisters are re-divided amongst their descendants in accordance with the rules already stated. The same rule applies to consanguine and uterine brothers and sisters, but it is important to remember that descendants of full brothers exclude the consanguine brothers but not the uterine brothers and sisters. The descendants of full sisters do not exclude the descendants of consanguine brothers and sisters. The portion allotted to the descendants of consanguine brothers and sisters is divided amongst them in the same way as that of full brothers, but that given to the descendants of uterine brothers and sisters is divided amongst them per capita so that males and females take equal portions (*j*).

### The Children of Grandparents.

Where the claimants are children of grandparents or other ascendants or their descendants, the estate, after deduction of the Koranic shares, is divided into three parts, two of which are allotted to the relations on the paternal side and one to the relations on the maternal side (*k*). These portions of two thirds and one third are then divided amongst the claimants on their respective sides following the same rules as apply to children of parents and their descendants. If, however, there are claimants related by the father and mother, they are preferred to those related on the paternal or maternal side only (*l*).

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(*g*) Am. Ali. 66, 57, 99: see also Sirajia 52-55; Ang.-Muh. Law 297-302; Min. et Tal. 247.

(*h*) Thus the share of a full or consanguine sister is  $\frac{1}{2}$  and of two sisters  $\frac{2}{3}$ : therefore, if there are two descendants of the same sister they get  $\frac{2}{3}$  not merely  $\frac{1}{2}$ : the share allotted in no case exceeds two, however many claimants there may be. If there were two sisters both deceased and one only left a daughter, the latter is entitled to  $\frac{1}{2}$  only.

(*j*) The portion allotted to the uterines can only be  $\frac{1}{6}$  when there is one claimant, or  $\frac{1}{3}$  where there are many: Am. Ali. 99.

(*k*) Abu Yusuf and Imam Mohamed agree on this rule: Wils. Ang.-Muh. Law 303-305.

(*l*) Am. Ali 67.

If any claimant is related to the deceased in more ways than one, he or she inherits in the right of each relation (*m*), with this exception, according to Abu Yusuf, that a grandmother can inherit in only one way (*n*).

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(*m*) Min. et. Tal. 255.

(*n*) Baill. 1. 707.

## CHAPTER VI.

### 1. OTHER RIGHTS OF SUCCESSION.

#### "Wala" or Clientage.

"Wala" literally means friendship and assistance, but, in the language of the law, it signifies that assistance which is the cause of inheritance (*o*). It is in fact the peculiar relationship, which, in a state of society like the Arabs, came into existence when the master freed his slave or when one person made himself the client of another. The Shafiis recognise two kinds of wala namely wala-ul-itk, the right of inheritance acquired by emancipation, and wala-ul-malawat, the right of inheritance by clientage (*p*). The latter implies a responsibility on the part of the patron for the delicts of the "mawla" or client.

Rights of succession founded on wala can never have applied to this Colony, for Mahomedan law is not fully administered by the Court in the case of Mahomedan intestates unless they have died after 1st January, 1924 (*r*), whereas Indian Act V. of 1843 (*s*) removed all bars to the succession of the natural heirs of an emancipated slave to his or her inheritance and swept away the right of inheritance by "wala" which the emancipator previously had (*t*).

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(*o*) Hedaya, Bk. XXXIII. pp. 436 and 444.

(*p*) Am. Ali 68; Wils. Ang.-Muh. Law. 306; in addition the Shiahhs recognise wala of Imamut or headship of the Mahomedan community; Baill. Dig. 262.

(*r*) Ord. No. 26 s. 27.

(*s*) Indian Act V. of 1843 s. 3; which is omitted from the sections of the said Act applying to this Colony in 1890; Indian Acts 1835 to 1866 p.14 compiled under the Statute Law Revision Ord. 1889.

(*t*) Mir Ujmuddin Khan v. Zia-ul-Nissa Begum (1879) L.R. 6 I.A. 137; I.L. 3 Bom. 422. According to Mahomedan law, when a person emancipated a slave he was asabah by wala, and inherited in preference to the uterine relations; Hedaya Bk. XXIII; Am. Ali 68; Min. et Tal. 251. It is a matter of interest to compare this law with Roman Law for, under Justinian's Institutes, on the death of a libertinus or freedman intestate his children, whether in potestate or not, inherited, but in default of such children, the patron or his descendants were entitled to the estate by virtue of the jus patronatus (jura in bonis): Justinian's Institutes Lib. III Tit. 7 (3) "Sin autem sine liberis (libertus et liberta) decesserint, si quidem intestati, ad omnem hereditatem patronos patronasque vocavimus." Later the deceased's father, mother, brothers and sisters were preferred to the patron.

## 2. SUCCESSION WHERE NO UTERINE RELATIONS.

### (A) The Husband and Wife.

As has already been stated the doctrine of return or "radd" applies strictly only to blood relations of the deceased who are Koranic sharers, and the ancient authorities held that the husband or wife was not entitled to the return (*v*). In British India more modern authorities have however decided that, in the absence not only of other sharers and residuaries but also of uterine relations, the husband or wife takes by return (*w*).

### (B) Escheat and Bona Vacantia.

Where there are no blood relations, husband or wife (*x*) the Crown is entitled to the estate by escheat or as bona vacantia (*y*). According to Shafi law the estate would devolve upon the general body of Moslems represented by the Bait-ul-Mal, which now is no longer regularly established (*z*).

- 
- (*v*) Am. Ali 71; Baill. Dig. 399; cf., *ibid.*, 262 (the husband and not the wife entitled to return).
- (*w*) Mahomed Arshed Chowdhry v. Sajida Banu (1878) I.L.R. 3 Cal. 702, 712; Isub Mir Imis v. Isub (1920) 58 I.C. 48; Bafatum v. Bilaite Khanum (1914) I.L.R. 31 Cal. 63; Mussamat Soobhane v. Bherun (1811) S.D.A. (Cal) 346; and see Hurmutool-Nissa Begum v. Allah Dia Khan (1871) 17 W.R.P.C. 108; Macn. Princ. App. 452 case 32; Sircar 91, 234; Am. Ali 71.
- (*x*) According to the Shafis there is no such person as an heir by acknowledgment; Min. et Tal. 92. Hanafi law after husband or wife admits to the inheritance such an heir i.e. one in respect of whom the deceased has admitted a tie of blood other than paternity, both the deceased and the claimant being of unknown descent; Am. Ali 70; Baill. 1.406; Wils. Ang.-Muh. Law 308. A person claiming under Hanafi law by "Maula" or contract cannot it seems be recognised for the consideration, the "diat," is illegal being compensation for criminal acts. Such a person is not recognised by the Shafis: Luc. Succ. Mus. 108.
- (*y*) Collector of Masulipatam v. Cavalry (1860) 8 Moo. 1 A.498, 525; Since this decision was directly contrary to Hindu Law, it must apply a fortiori to the case of Mohamedans: Wils. Ang.-Muh. Law 309.
- (*z*) Soodhane v. Bhetum (1811) 1 S.D.A. (Cal) 346, 348, app'd in Mahamed Arshed v. Sajida (sup). See however Am. Ali Chap. VIII 145.

### 3. DOUBLE INHERITANCE OR VESTED INTERESTS (a).

When the deceased leaves a certain number of heirs, and one of them, before the distribution of the estate, dies leaving no inheritors other than those of the original succession, who can claim the like portions in the second as in the first, the distribution takes place as if the deceased heir had never existed. Thus, where a man dies leaving sons and daughters, one of whom dies before distribution, leaving no other heirs, the estate is divided as if he had never existed. On the other hand, where the heir dying before distribution left heirs other than the heirs of the original inheritance or these heirs are called to the succession of his estate in different shares to those they receive in the original inheritance, these different shares must be separately determined out of his share (b). Where the shares assigned to the deceased heir permit of his assigning to his heirs portions consisting of shares in whole numbers there is no difficulty, but otherwise the number of shares in question must be rendered divisible by the basis of the second succession (c). The same rule applies where more than one heir dies (d).

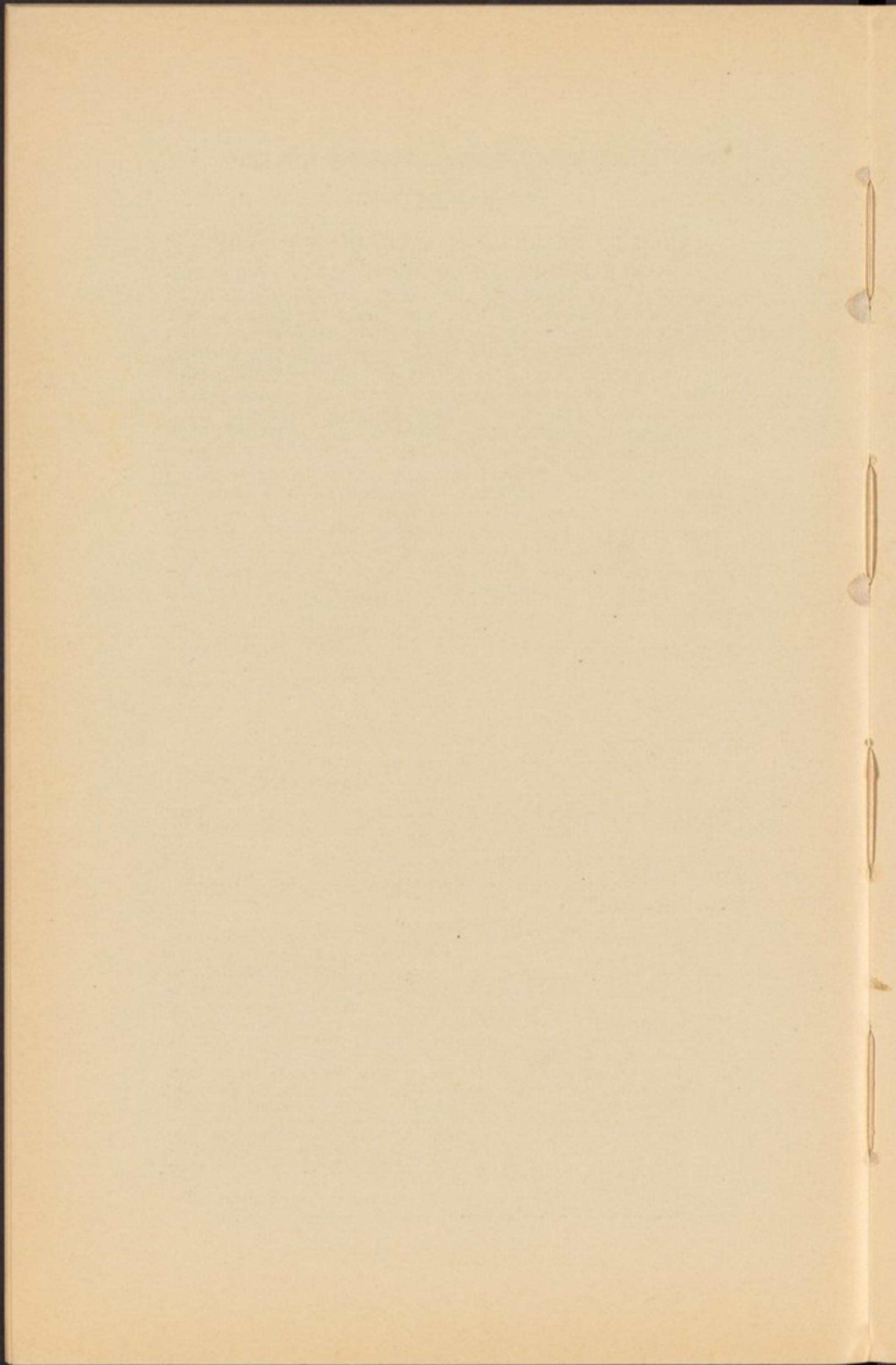
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(a) Moonaskhat.

(b) Min. et Tal. 258; Am. Ali. 72; Baill. Dig. 318, Inh. Chap. XI pp. 85-88.

(c) Ibid. The basis and portions of the original succession must be multiplied by the particular factor of the basis of the second, at least if there be a common multiple between the number of shares allotted to the deceased heir and the basis of his succession. If there be no common multiple, the portions must be multiplied by the basis. Example: A dies leaving a son, daughter and consanguine brother; the son excludes the last, but before distribution the son dies leaving only the daughter and consanguine brother as his heirs. In this case the sons  $\frac{2}{3}$  is divided equally between the daughter and consanguine brother. See further examples Am. Ali 73. Baill. Dig. 319. The rule applies to shares of widows dying after the intestate but before distribution; Macn. Princ. App. p. 451. case 25. citing (1804) 1 S.D.A. Ben. Rep. 78.

(d) Am. Ali 73; Baill. Dig. 320.



## APPENDIX I.

### TABLE OF SUCCESSION ACCORDING TO THE SHAFII SCHOOL OF MAHOMEDAN LAW.

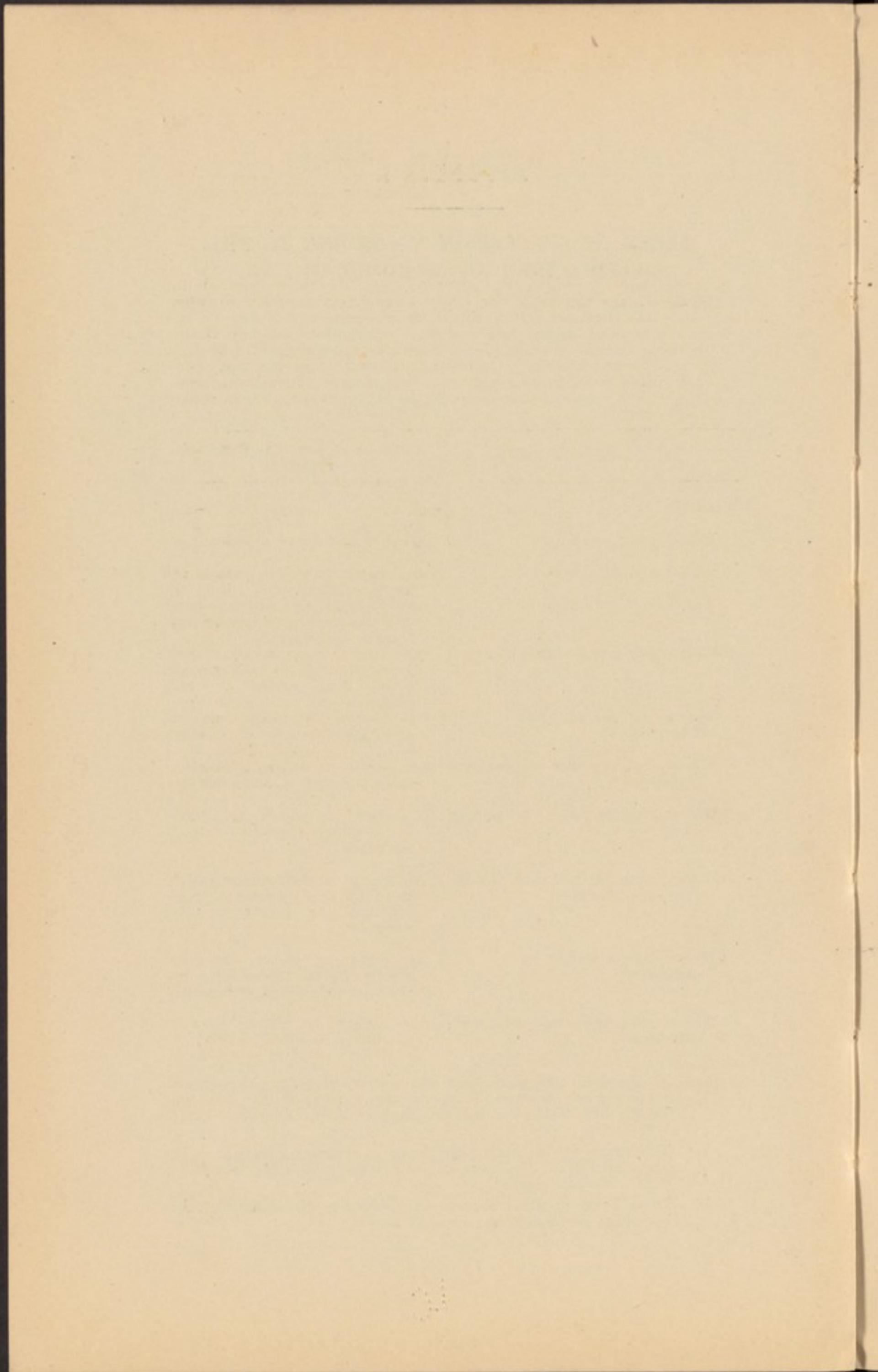
*NOTE.*—To use this table, the reader should first ascertain whether the deceased left a widow or husband, and if she or he survived, should look under the appropriate heading. Only in default of either should search be made under "children," "grandchildren," "father and mother" and the rest, and then in the order given in the first margin. In each instance it is supposed that there are no nearer relations than those named.

If a person die leaving	Division of Real and Personal Property
<b>WIDOW.</b>	
Widow and no relations .. ..	All to widow ( <i>a</i> ).
Widow and son (sons) .. ..	One eighth to widow, rest to son (sons equally).
Widow, son and daughter .. ..	One eighth to widow, seven twelfths to son, seven twenty-fourths to daughter.
Widow, two sons and two daughters	One eighth to widow, seven twenty-fourths to each son and seven forty-eighths to each daughter ( <i>b</i> ).
Widow, and one daughter (daughters) .. ..	One eighth to widow, rest to daughter (daughters equally) ( <i>c</i> ).
Widow, daughter and one son's son (h.l.s.) .. ..	One eighth to widow, one half to daughter, rest to son's son.
Widow, daughters and one son's son (h.l.s.) .. ..	One eighth to widow, two thirds to daughters equally, rest to son's son.
Widow, daughter, one son's son and one son's daughter .. ..	One eighth to widow, one half to daughter, one quarter to son's son and one eighth to son's daughter.
Widow, daughter and son's daughters .. ..	One eighth to widow, seventeen twenty-fourths to daughter, one sixth to son's daughters equally.
Widow, daughters and one son's daughter .. ..	One eighth to widow, rest to daughters equally.

(*a*) Where there are more than one widow, they take the widow's share equally between them: Sirajia 17, 18; Baillie Inh. 689; Baillie Dig. 294; Am. Ali 71; Musseeollah v. Sheriffun (1864) 1 W.R. 122.

(*b*) The daughters in such case being residuaries (asabah). The same applies in the case of son's sons with son's daughters, if of the same degree.

(*c*) There being no other sharers or residuaries, the daughter takes by return or "radd," see page 22 ante.

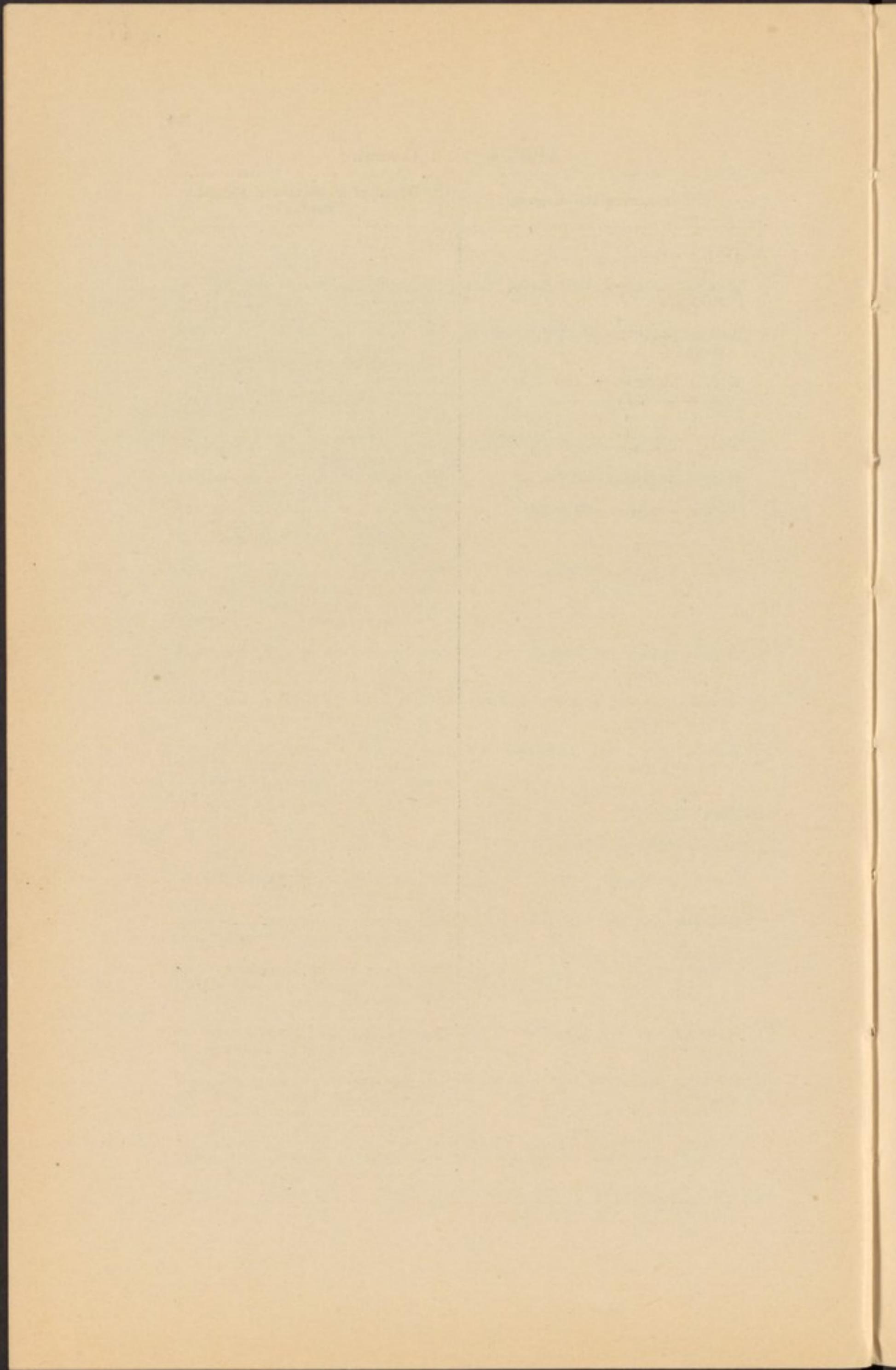


APPENDIX I—*contd.*

If a person die leaving	Division of Real and Personal Property
<b>WIDOW—<i>contd.</i></b>	
Widow, daughter and three full brothers .. .. .	One eighth to widow, one half to daughter, one eighth to each brother.
Widow, daughters and two paternal uncles .. .. .	One eighth to widow, two thirds to daughters equally, and five forty-eighths to each uncle.
Widow, daughters and four true grandmothers .. .. .	One eighth to widow, two thirds to daughters equally, and five ninety-sixths to each grandmother.
Widow, son and father (h.h.s.) ..	One eighth to widow, one sixth to father, rest to son.
Widow, daughter and father ..	One eighth to widow, one half to daughter, rest to father.
Widow, daughter and mother ..	One eighth to widow, twenty-one ninety-sixths to mother and sixty-three ninety-sixths to daughter ( <i>d</i> ).
Widow, daughters, father and mother .. .. .	Three twenty sevenths to widow, four twenty-sevenths each to father and mother, sixteen twenty-sevenths to daughters ( <i>e</i> ).
Widow, father and mother ..	One quarter to widow, one half to father, and one quarter to mother.
Widow, four full brothers and two full sisters .. .. .	One quarter to widow, one fifth to each brother, one tenth to each sister.
Widow, four true grandmothers and two paternal uncles ..	One quarter to widow, one twenty-fourth to each grand mother and seven twenty-fourths to each uncle.
<b>HUSBAND.</b>	
Husband and no relations ..	All to husband.
Husband and son (sons) .. ..	One quarter to husband, rest to son (sons equally).
Husband, son and daughter ..	One quarter to husband, one half to son, one quarter to daughter.
Husband, two sons and two daughters .. .. .	One quarter to husband, one quarter to each son, one eighth to each daughter.
Husband, and one daughter (daughters) .. .. .	One quarter to husband, rest to daughter (daughters equally).
Husband, daughter and one son's son (h.l.s.) .. .. .	One quarter to husband, one half to daughter, rest to son's son (h.l.s.).

(*d*) An instance of the doctrine of return or "radd," see page 22 ante.

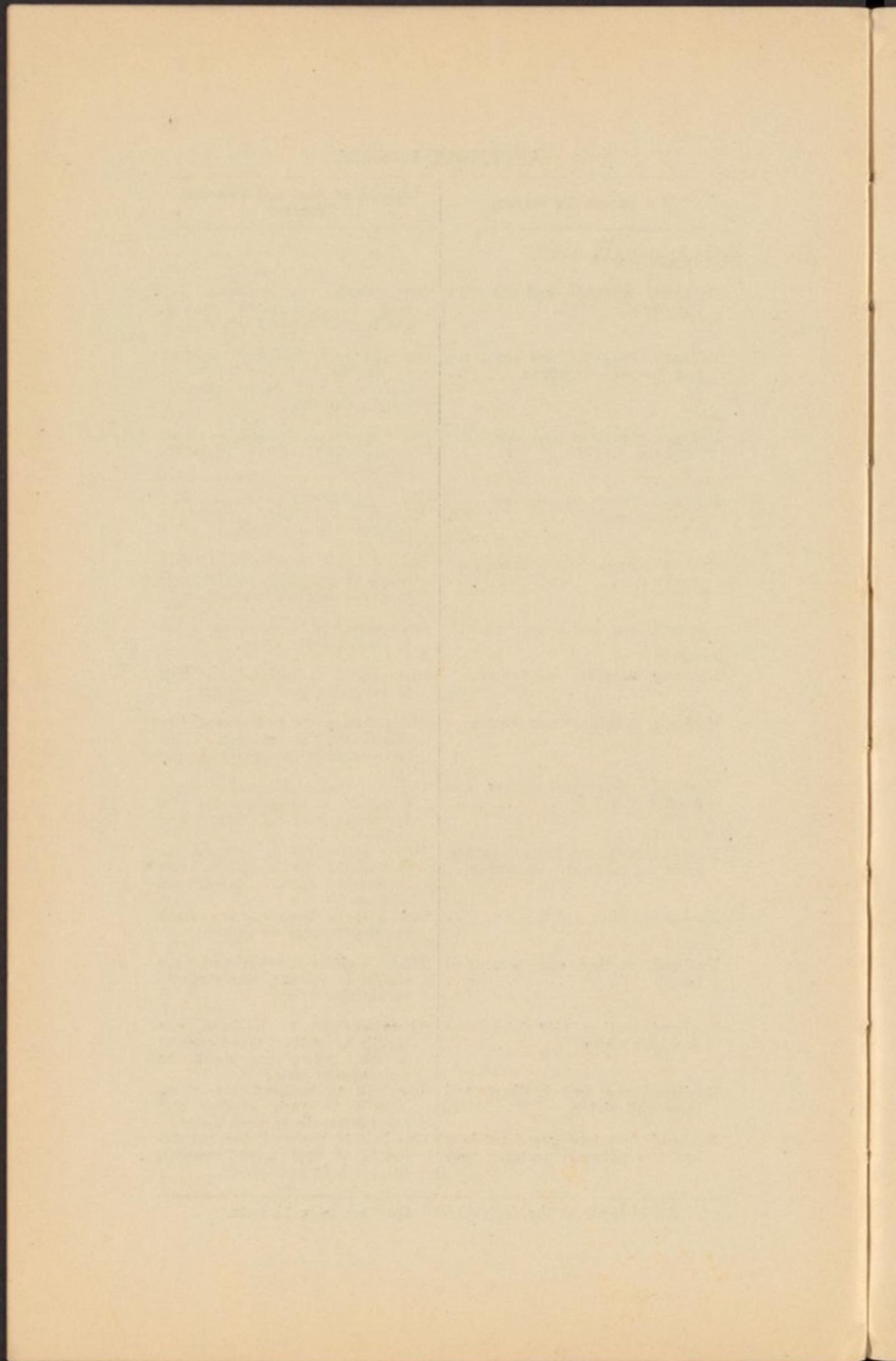
(*e*) An instance of the doctrine of "aul" or increase; see page 15 ante.



APPENDIX I—*contd.*

If a person die leaving	Division of Real and Personal Property
<b>HUSBAND—<i>contd.</i></b>	
Husband, daughters and one son's son (h.l.s.) .. .. .	One quarter to husband, two thirds to daughters equally, one twelfth to son's son (h.l.s.).
Husband, daughter, one son's son and one son's daughter .. .. .	One quarter to husband, one half to daughter, two twelfths to son's son and one twelfth to son's daughter.
Husband, daughter and three full brothers .. .. .	One quarter to husband, one half to daughter, rest to brothers equally.
Husband, daughters and two paternal uncles .. .. .	One quarter to husband, two thirds to daughters equally, one twelfth to uncles equally.
Husband, daughters and true grand mothers .. .. .	One quarter to husband, two thirds to daughters equally, rest to grand mothers equally.
Husband, son and father (h.h.s.)	One quarter to husband, one sixth to father, rest to son.
Husband, daughter and father ..	One quarter to husband, one half to daughter, rest to father.
Husband, daughters and mother ..	Three thirteenths to husband, two thirteenths to mother, eight thirteenths to daughters equally ( <i>f</i> ).
Husband, daughters, father and mother .. .. .	Three fifteenths to husband, eight fifteenths to daughters and two fifteenths each to father and mother ( <i>f</i> ).
Husband, daughter, father, mother, son's son and son's daughter ..	Three thirteenths to husband, six thirteenths to daughter, two thirteenths each to father and mother ( <i>f</i> ).
Husband, father and mother ..	One half to husband, one sixth to mother, rest to father.
Husband, mother and three full sisters .. .. .	Three eighths to husband, one eighth to mother, one sixth to each sister ( <i>f</i> ).
Husband, mother, full sister, consanguine sister .. .. .	Three eighths to husband, one eighth to mother, three eighths to full sister, one eighth to consanguine sister ( <i>f</i> ).
Husband, two full brothers and three full sisters .. .. .	One half to husband, two fourteenths to each brother and one fourteenth to each sister.
Husband, four true grand mothers and two paternal uncles ..	One half to husband, one twenty-fourth to each grand mother, one sixth to each uncle.

(*f*) An instance of the doctrine of "aul," see page 15 ante.

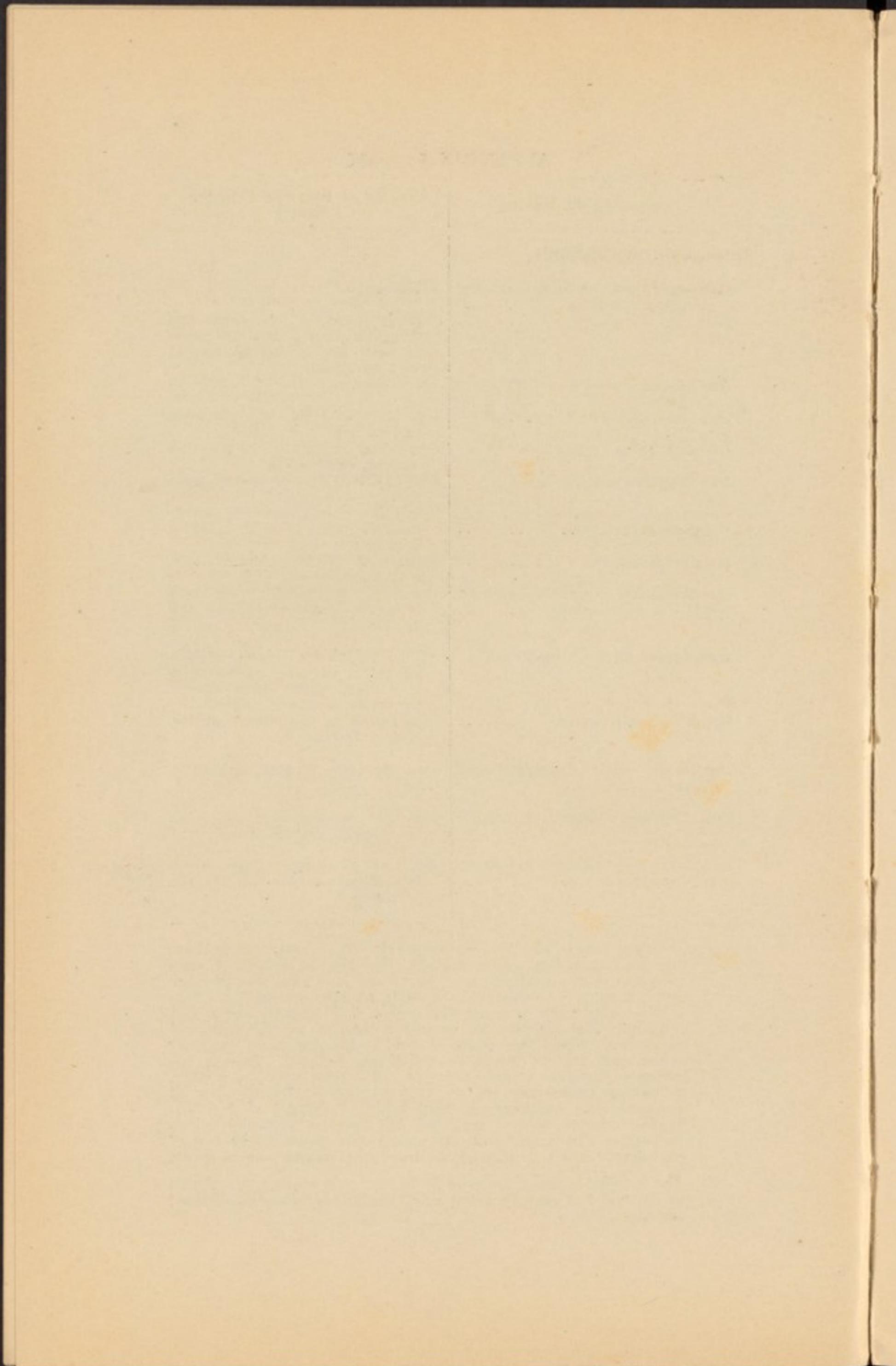


APPENDIX I—*contd.*

If a person die leaving	Division of Real and Personal Property
<b>SONS AND DAUGHTERS.</b>	
One child, son or daughter, and no other relations .. ..	All to child.
Sons and daughters .. ..	Equally between all sons and daughters, but so that the share of each son is double that of each daughter.
One son and son's son or son's daughters .. ..	All to son.
One son and father (or mother) ..	One sixth to father (or mother), rest to son.
One son, father and mother ..	One sixth each to father and mother, rest to son.
One daughter and son's son ..	One half to daughter, rest to son's son.
One daughter, son's son and son's Daughter .. ..	One half to daughter, two sixths to son's son, one sixth to son's daughter.
Daughters and son's son .. ..	Two thirds to daughters equally, rest to son's son.
One daughter, one son's daughter, and one full brother .. ..	One half to daughter, one sixth to son's daughter, rest to full brother ( <i>g</i> ).
Daughters and son's daughters ..	All to daughters equally (son's daughters excluded unless there is a lineal male descendant of the same or lower degree).
Daughters and father .. ..	Two thirds to daughters equally, rest to father.
Daughters, son's daughters and father .. ..	Two thirds to daughters, rest to father ( <i>h</i> ).
One daughter, father and mother	One half to daughter, one sixth to mother, rest to father.
One daughter, mother and four full brothers .. ..	One half to daughter, one sixth to mother, one twelfth to each brother.

(*g*) A doubt arises had the deceased left two or more daughters, one son's daughter and a brother. In such an event the son's daughter is not entitled as a sharer and it is said that she can only be made a residuary by a male agnatic descendant. This is true where she is to be deprived of her Koranic share, but it is not clear whether an agnatic ascendant or collateral will be allowed to take the residue without making the son's daughter a residuary for she would otherwise take nothing. Thus in the instance given she would share the 1/6 residue with the mother, he taking double her share. This appears to be the view of Sautayra and Cherbonneau "Du Statut Personnel et des Succession (Paris—1873)" Sect. 645, but there is authority to the contrary. The question is one of the rare cases in the law of inheritance where no authoritative and final answer can be given.

(*h*) The division given is believed to be that followed by the Shafiis in Malaya, but see preceding note, the father being substituted for the brother.

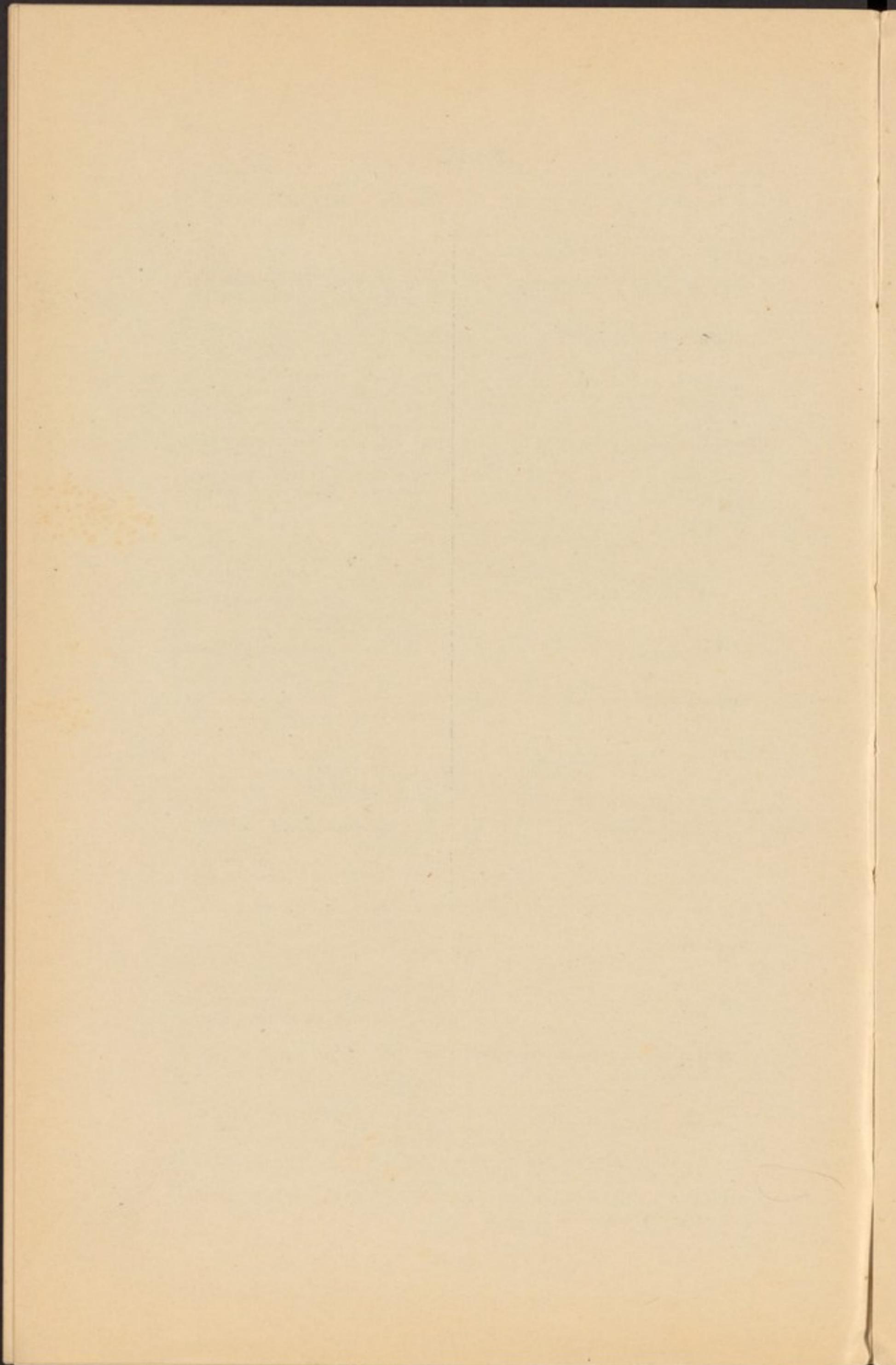


APPENDIX I—*contd.*

If a person die leaving	Division of Real and Personal Property
<b>SONS AND DAUGHTERS—<i>contd.</i></b>	
One daughter and mother .. ..	Three quarters to daughter, and one quarter to mother ( <i>j</i> ).
Daughters and mother .. ..	Four fifths to daughters equally, and one fifth to mother ( <i>j</i> ).
Daughters, father, mother and son's son .. .. .	Two thirds to daughters equally, one sixth each to father and mother, nothing to son's son there being no residue.
Daughters and four paternal uncles	Two thirds to daughters equally, one twelfth to each uncle.
Daughter (son's daughter) and full (consanguine) sister .. ..	Half to daughter (son's daughter), and half to full (consanguine) sister.
Daughters (son's daughters) and full (consanguine) sisters ..	Two thirds to daughters (son's daughters), and one third to full (consanguine) sister.
Daughters, four true grandmothers and six paternal uncles ..	Two thirds to daughters equally, one sixth to grand mothers equally ( <i>i.e.</i> 1/24 each) and one thirty-sixth to each uncle.
Son's sons and son's daughters (of same degree) .. .. .	Equally between son's sons and son's daughters but so that the share of each of the former is double that of each of the latter.
Son's daughters and son's son's sons .. .. .	Two thirds to son's daughters, rest to great-grandsons equally.
<b>FATHER AND MOTHER.</b>	
Father and no other relations ..	All to father.
Father and mother .. .. .	Two thirds to father, one third to mother.
Father, full brothers and sisters ..	All to father.
Mother, and full brothers .. ..	One sixth to mother, rest to brothers equally.
Mother, full brother, and uterine brother .. .. .	One third to mother, one sixth to uterine brother, rest to full brother.
Mother and full sisters .. ..	Six thirtieths to mother, and twenty four thirtieths to sisters equally ( <i>k</i> ).
Mother, full sister, and consanguine brother and sister .. ..	One sixth to mother, one half to full sister, rest to consanguine brother and sister but so that the former receives double the share of the latter.

(*j*) An instance of the doctrine of return or "radd," see page 22 ante.

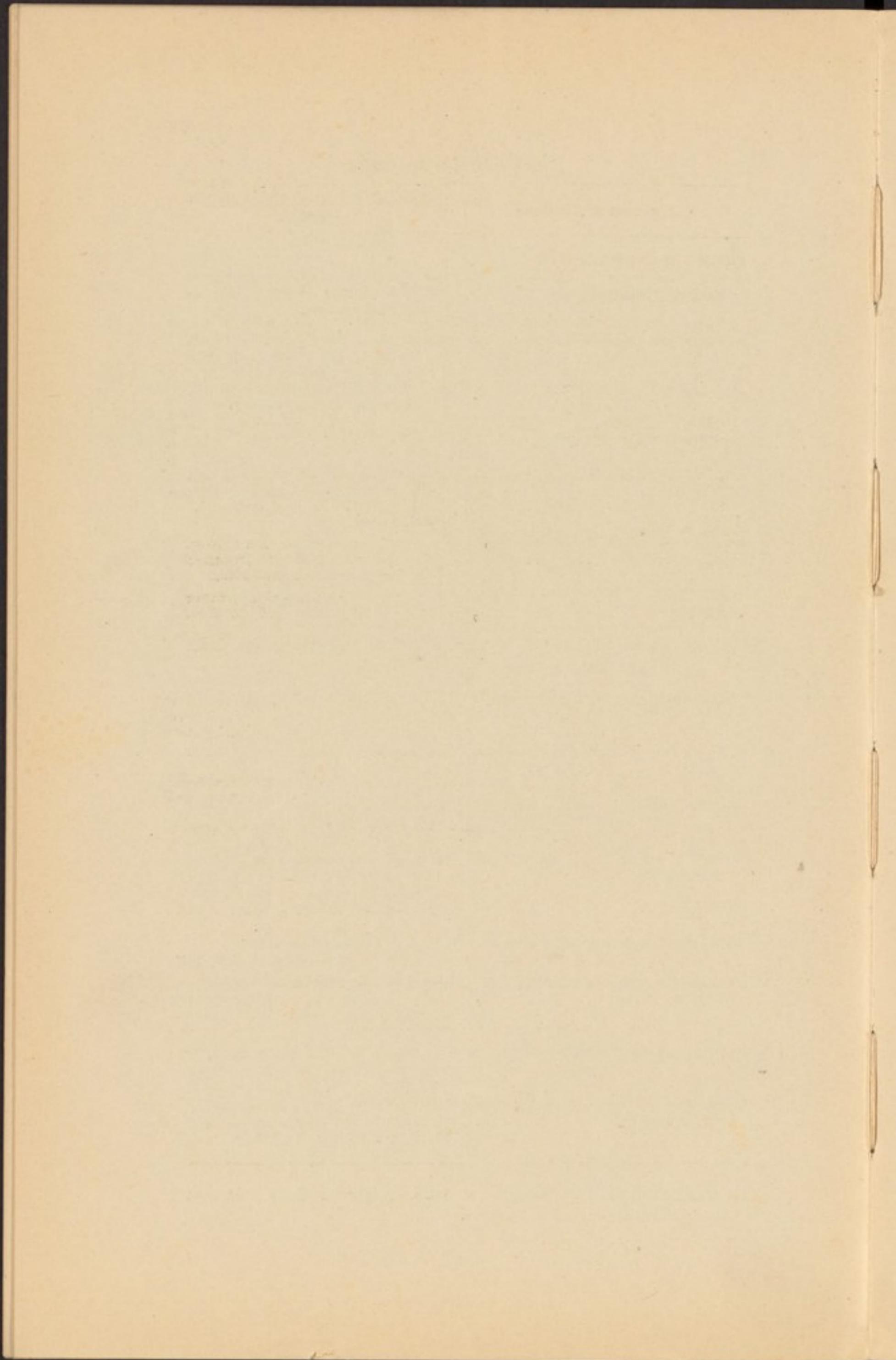
(*k*) An instance of the doctrine of return or "radd," see page 22 ante.



APPENDIX I—*contd.*

If a person die leaving	Division of Real and Personal Property
Mother, full sisters, consanguine brother and sister .. ..	One sixth to mother, two thirds to full sisters equally, rest as in preceding case.
Mother, consanguine sisters and uterine sister .. ..	One sixth to mother, two thirds to consanguine sisters equally, one sixth to uterine sister.
Mother, and paternal uncles ..	One third to mother, two thirds to paternal uncles equally.
<b>BROTHERS AND SISTERS.</b>	
Full brothers and sisters .. ..	Equally between all brothers and sisters, but so that each brother receives double the share of each sister.
Full brother and sister, and consanguine sister .. ..	One sixth to consanguine sister, ten eighteenths to full brother, five eighteenths to full sister.
Full brother and uterine brother and sister .. ..	One sixth each to uterine brother and sister, rest to full brother.
Consanguine brother and full sister	Two thirds to brother, one third to sister.
Consanguine brother and consanguine sister .. ..	Two thirds to brother, one third to sister.
Consanguine brother and uterine sister .. ..	One sixth to uterine sister, rest to brother.
Uterine brothers and full sisters	One third to brothers, two thirds to sisters equally.
Uterine brother and sister and consanguine sisters .. ..	One sixth each to uterine brother and sister, two thirds to consanguine sisters.
Full sisters .. ..	All to sisters equally.
Full sisters and consanguine sister	All to full sisters equally
Full sisters and consanguine brother and sister .. ..	Two thirds to full sisters equally, two ninths to consanguine brother, one ninth to consanguine sister.
Full sisters and uterine sisters ..	Two thirds to full sisters equally, one third to uterine sisters equally.
Consanguine sisters and uterine brothers (sisters) .. ..	Two thirds to consanguine sisters equally, one third to uterine brothers (sisters) equally.

(l) It must be remembered that these collaterals do not exclude true grandparents as sharers.



APPENDIX I—*contd.*

If a person die leaving	Division of Real and Personal Property
<b>TRUE GRANDPARENTS.</b>	
Father's father .. .. .	All to father's father.
Father's father, full brother and consanguine brother .. .. .	One third to father's father, rest to full brother.
Father's father, full sister, and consanguine sister .. .. .	One half to father's father, one half to full sister.
Father's father, full sister and two consanguine sisters .. .. .	One half to full sister, one twentieth to each consanguine sister, two fifths to father's father.
Father's father, father's mother, two full brothers and one sister	One sixth to father's mother, two ninths to each brother, one ninth to sister, five eighteenths to father's father.
Father's father, and father's mother .. .. .	Two thirds to father's father, one third to father's mother.
Father's mother, full sister, consanguine sister and uterine sisters	One seventh to father's mother, three sevenths to full sister, one seventh to consanguine sister, and two sevenths to uterine sisters ( <i>m</i> ).
Two true grandmothers, full sisters and uterine sisters .. .. .	One seventh to grandmothers, four sevenths to full sisters, and two sevenths to uterine sisters equally ( <i>m</i> ).
True grandmothers and uterine sisters .. .. .	One third to grandmothers equally, two thirds to sisters equally ( <i>n</i> ).
Two true grandmothers, full sisters and paternal uncle .. .. .	One sixth to grandmothers equally, two thirds to sisters equally, rest to paternal uncle.
Three true grandmothers and paternal uncles .. .. .	One sixth to grandmothers equally, rest to paternal uncles equally.

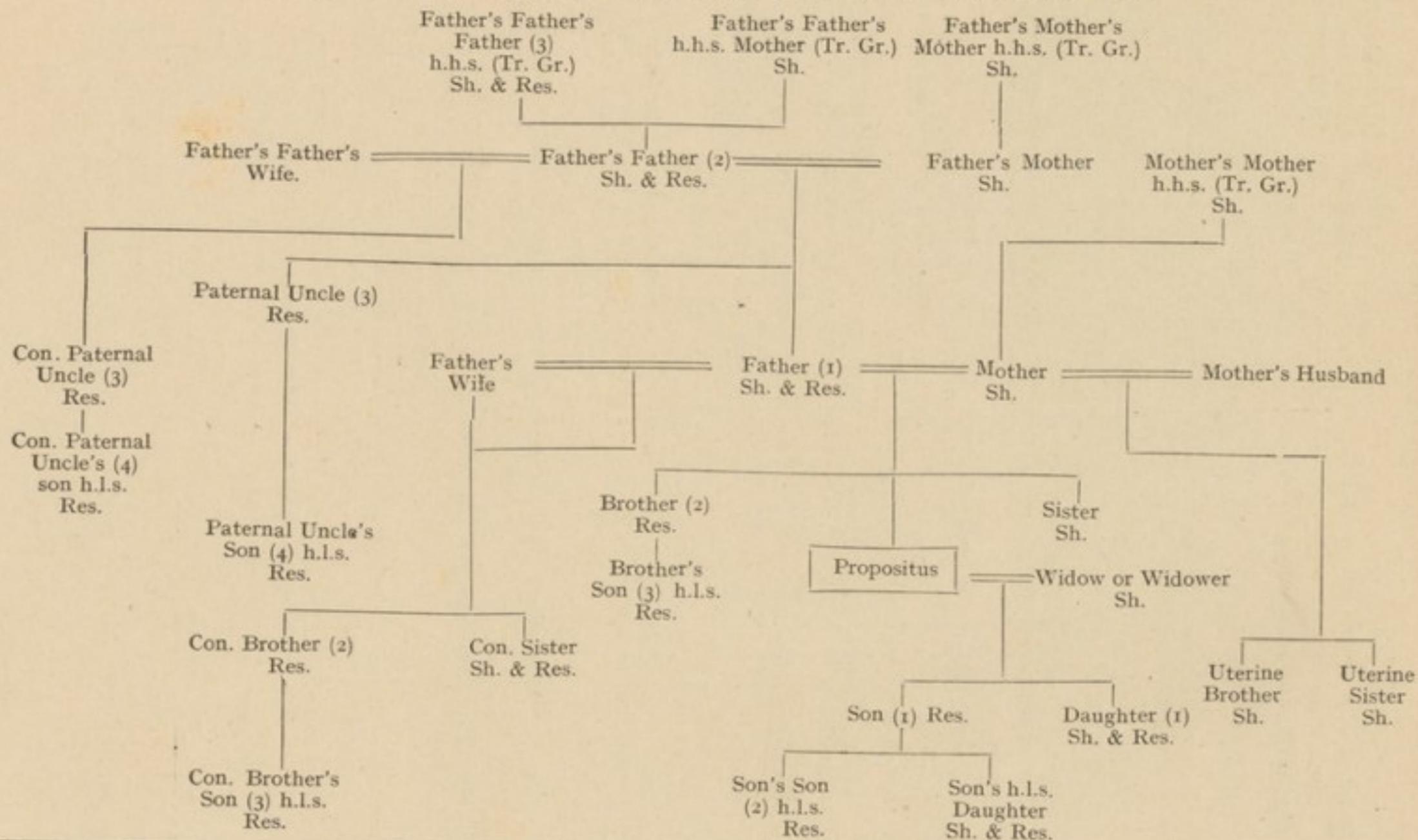
(*m*) The doctrine of "aul" or increase; page 15 ante.

(*n*) The doctrine of "radd" or return; page 22 ante.

## APPENDIX II.

### THE SHAFII LAW OF INHERITANCE.

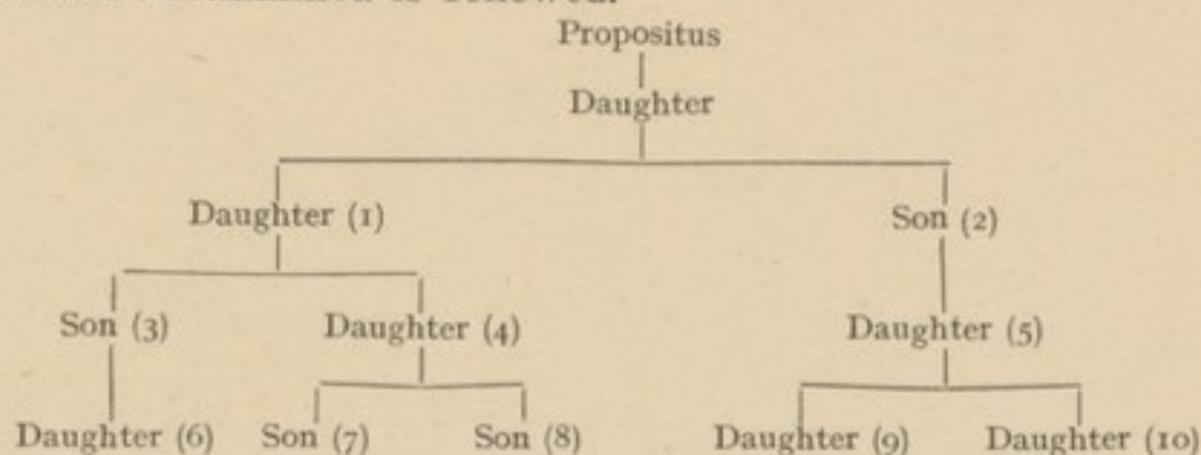
#### (A) PEDIGREE SHOWING SHARERS AND RESIDUARIES.



**Abbreviations.**—Sh. = Koranic Sharer : Res. = Residuary : h.l.s. = how low soever : h.h.s. = how high soever : Tr. Gr. = true grandparent and a figure in brackets the degree of the person from the Propositus.

**(B) DISTANT KINDRED.**

An example showing the difference in the distribution of an estate among distant kindred or uterine relations according as to whether the opinion of Abu Yusuf or of Imam Mohammed is followed.



In the above case, the Propositus has left him surviving the sons (7 and 8) and daughters, (6, 9 and 10), who are his heirs and the claimants to his estate.

(1) According to Abu Yusuf the estate will be divided among the claimants, each male receiving twice the portion of a female. The estate will therefore be divided into seven parts, of which the sons (7 & 8) will receive  $\frac{2}{7}$  each and the daughters (6, 9 & 10)  $\frac{1}{7}$  each.

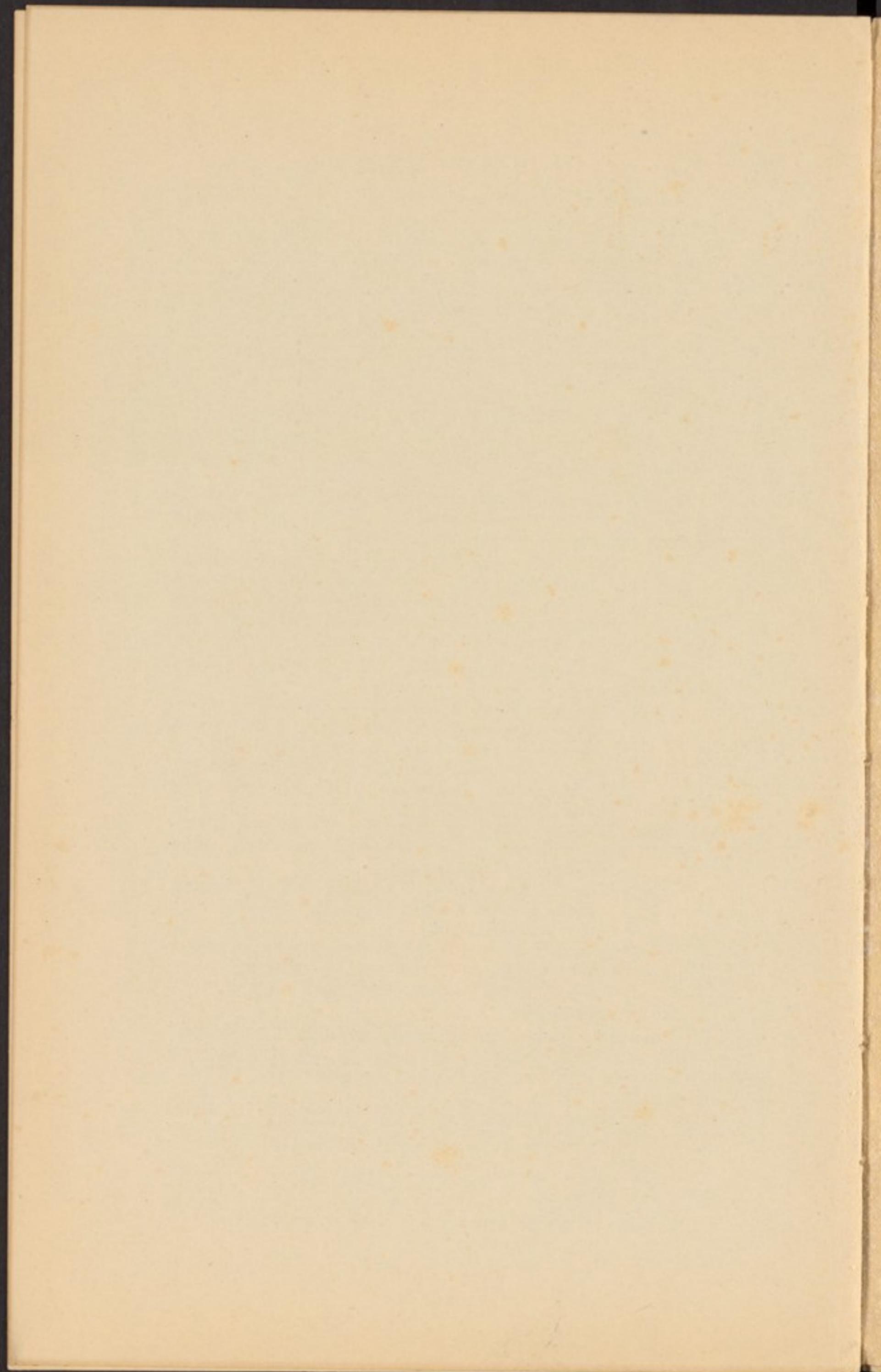
(2) According to Imam Mohamed, the following rules must be followed:—

- (i) The sex of the ancestors (in the same generation) of the claimants first differs in the second generation. Daughter (1) is allotted  $\frac{3}{7}$  for each of the claimants through her, and Son (2) is allotted  $\frac{4}{7}$  being the double share of each of his two descendants.
- (ii) The  $\frac{3}{7}$  share of Daughter (1) is shared between Son (3) and Daughter (4) each being allotted  $\frac{3}{14}$  share (a).
- (iii) The  $\frac{3}{14}$  share of Daughter (4) is divided equally between Son (7) and Son (8) each receiving  $\frac{3}{28}$  share.
- (iv) The  $\frac{4}{7}$  share of Son (2) devolves on Daughter (5) and then is divided equally between Daughter (9) and Daughter (10) each receiving  $\frac{2}{7}$  share.

The estate will therefore be divided into twenty-eight shares, of which Daughter (6) receives six ( $\frac{3}{14}$ ), Sons (7) and (8) three each ( $\frac{3}{28}$ ) and Daughters (9) and (10) eight each ( $\frac{2}{7}$ ).

*NOTE*—For further illustrations the Reader is referred to the Authorities following: Am. Ali pp. 59-65; Wils. Ang-Muh. Law pp. 294-302; Tyabji 890-900; Baill. Inh. 90-109; and Sirajia pp. 47-55.

(a) As daughter (4) has two descendants as claimants viz., sons (7) and (8), she is allotted one share in respect of each, and son (3), having one descendant, is given his double share.



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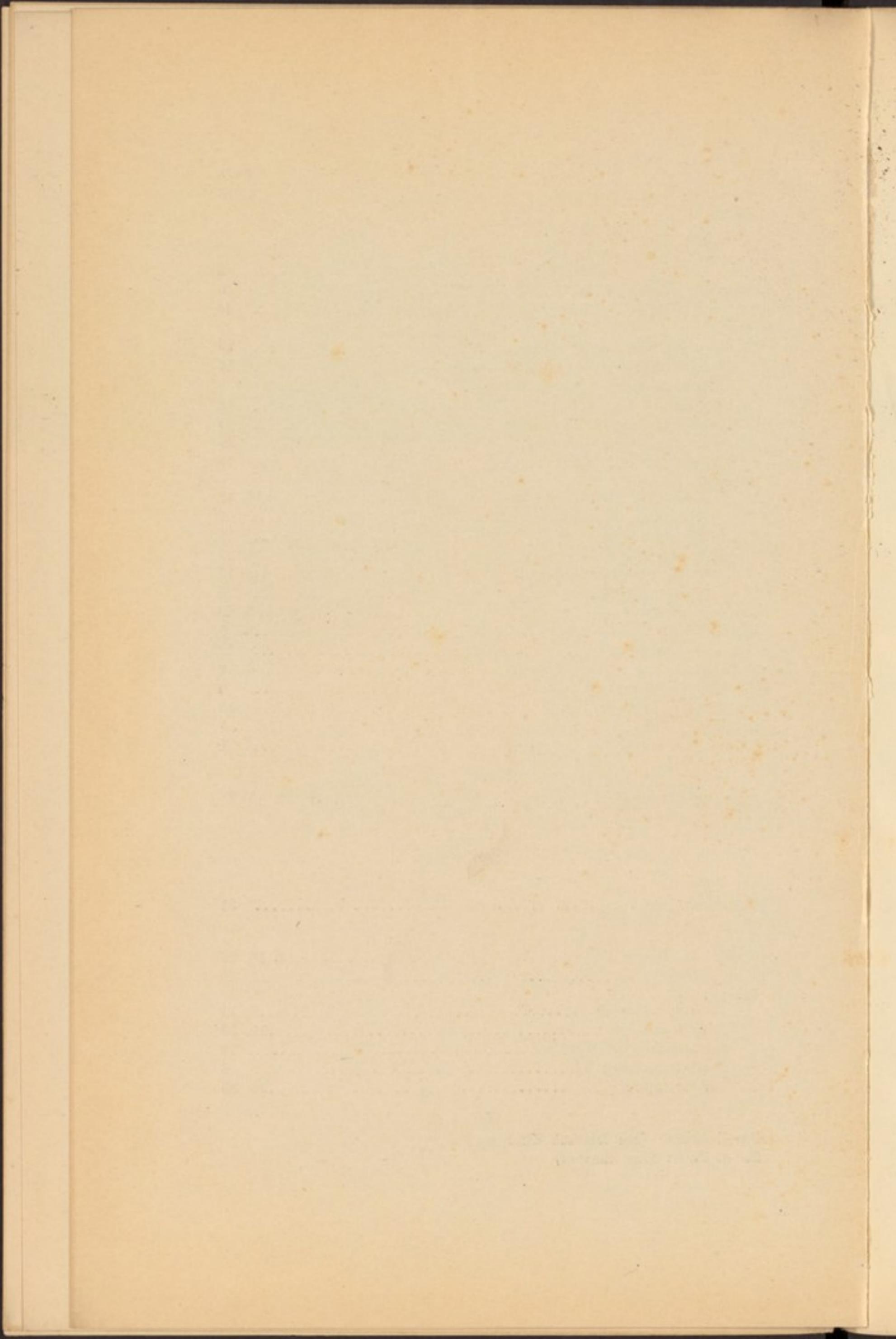
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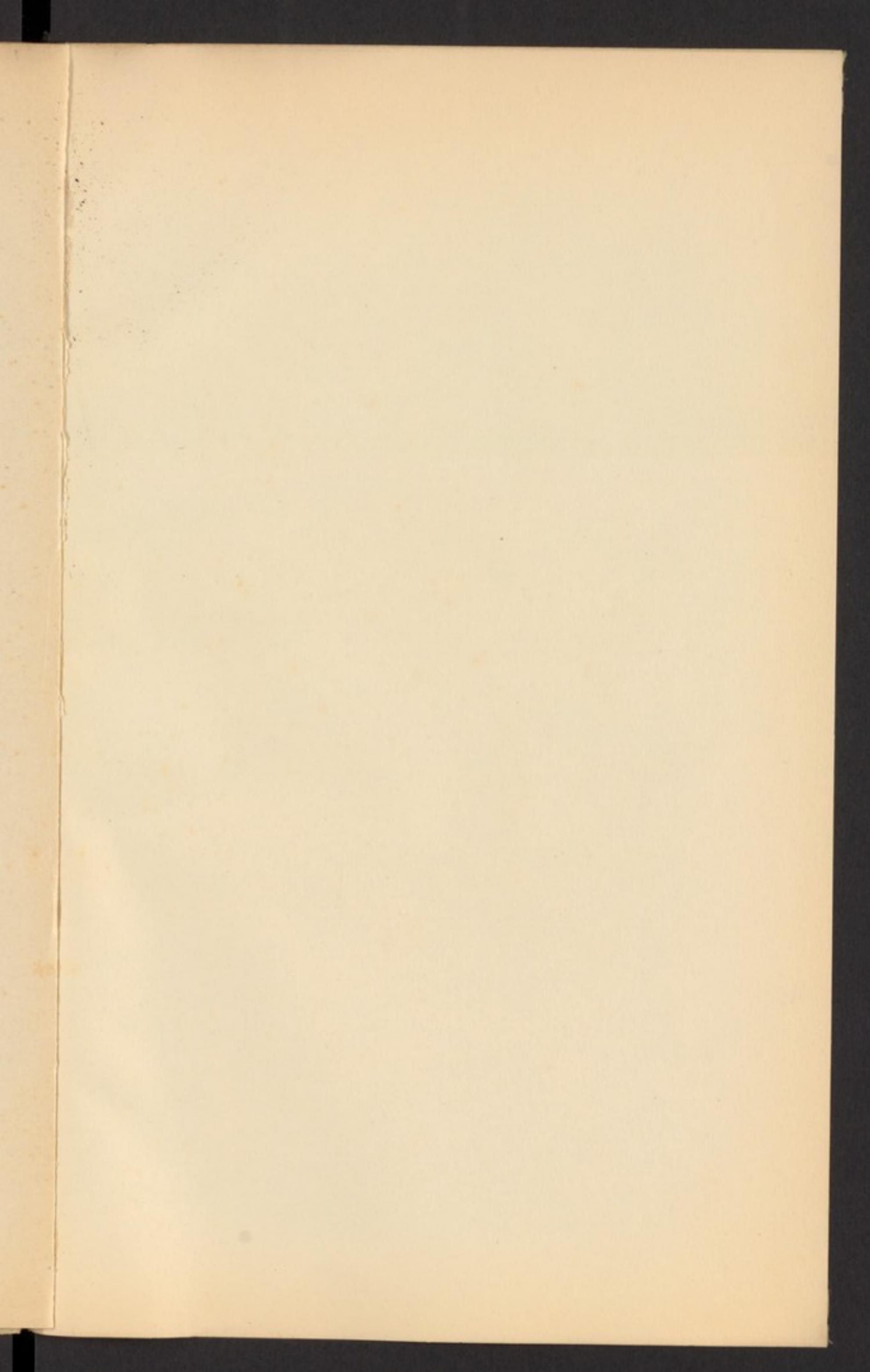
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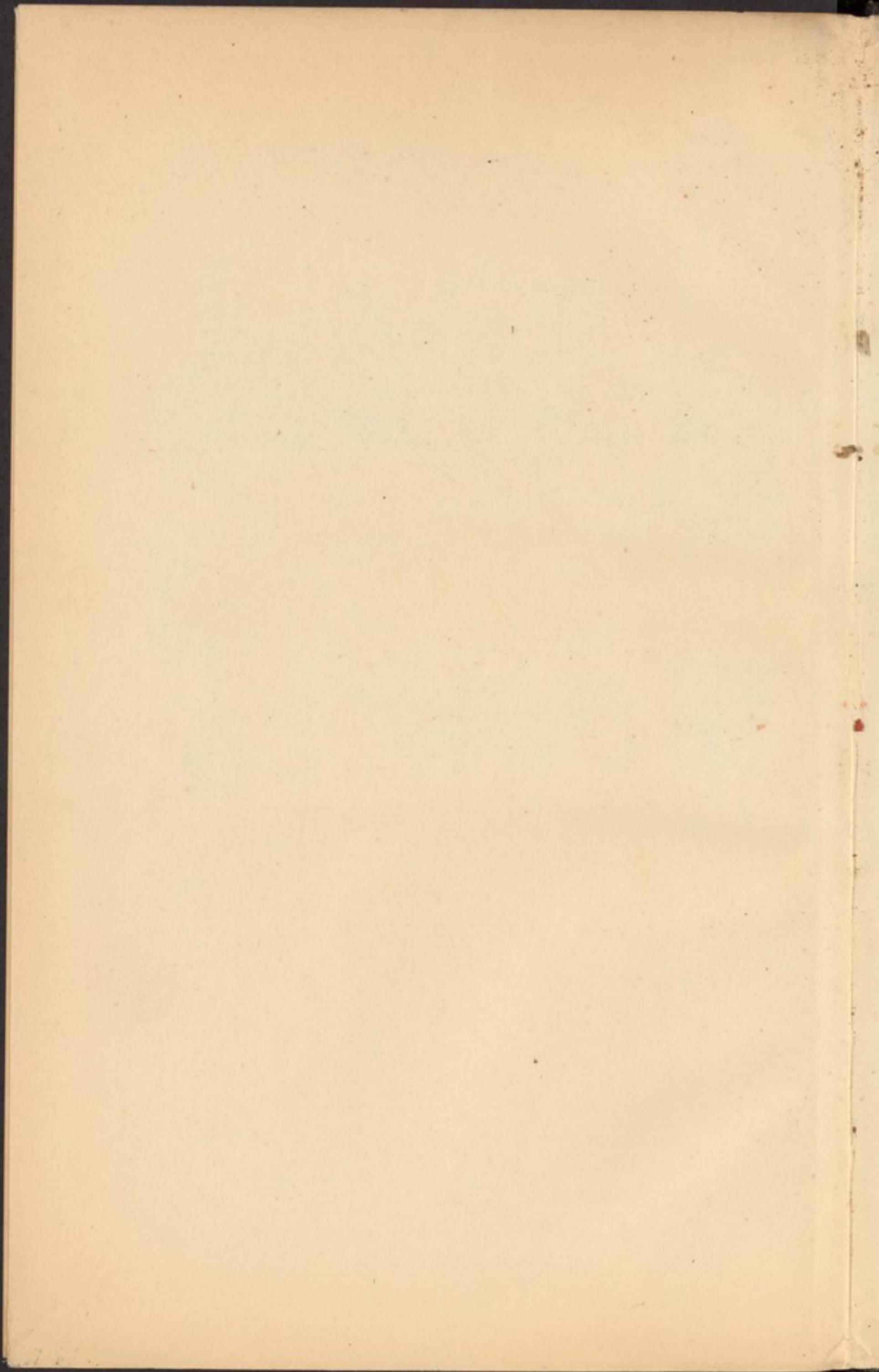
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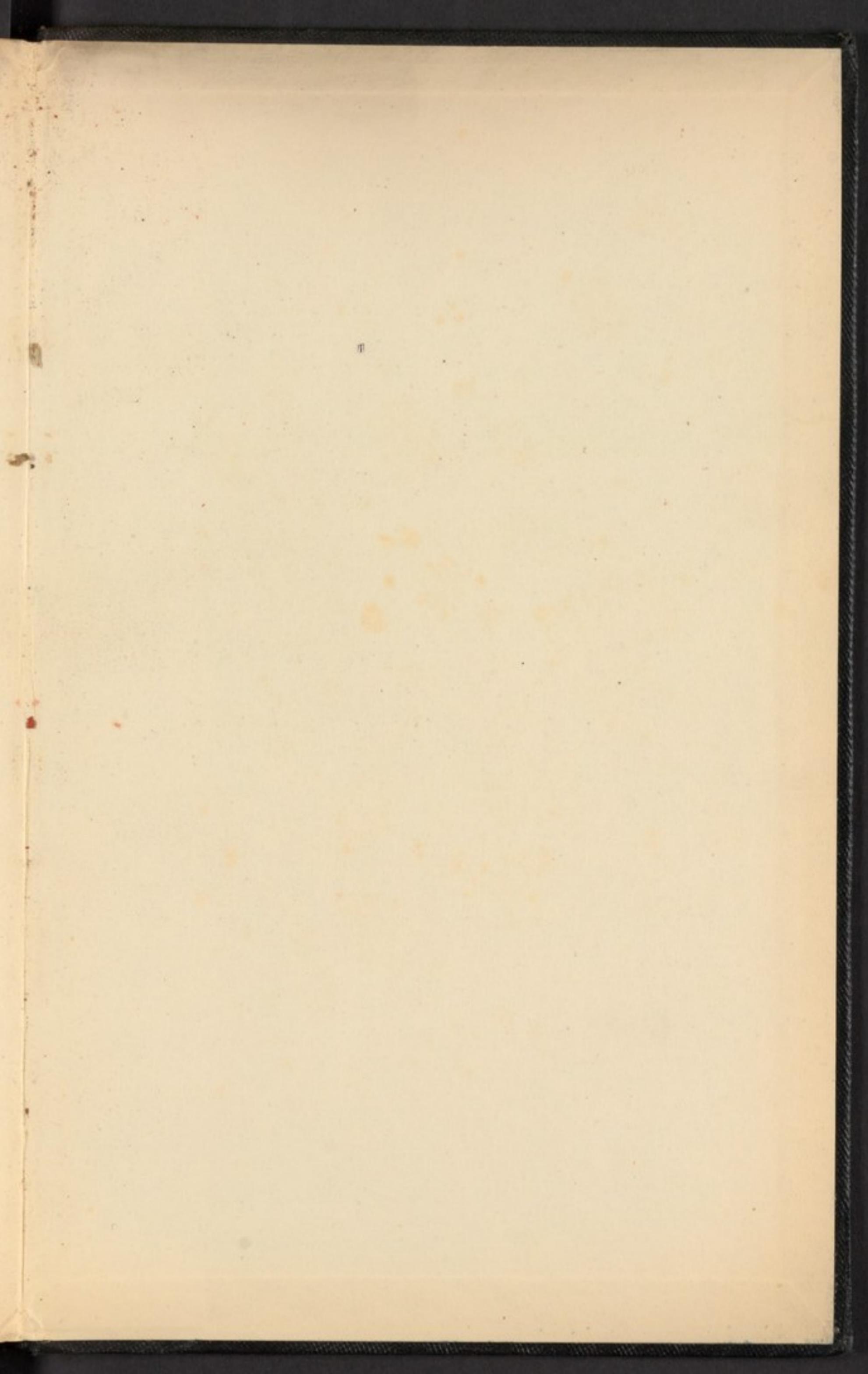
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