THE LAW OF JOINT PROPERTY AND PARTITION IN BRITISH INDIA

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CORRIGENDA.

Page 41 Line 32. For "all" read "each of."
" 91 Line 4 For "defendant" read "plaintiff."
" 118 " 34. For "alienation" read "Sale."
" 137 Omit the second marginal note.
" 154 Line 4. For "from" read "by."
" 168 " 11. Omit "for the return."
" 192 " 26. For "in" read "to."
" 226 " 17. For "On this point see" read "Thus in."
" " " 19. Omit "in which."
" 276 " 11. For "impartible" read "partible."
" 313 " 33. For "different" read "distinct."
" 321. Omit the third marginal note.

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The Law of Joint Property and Partition.

LECTURE I.

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The subject. The subject of these Lectures is "the Law of Joint Property and Partition in British India including the Procedure relating thereto." It consists of two parts—1st the Law of Joint property in British India, and 2ndly the Law of partition of such property.

Divided into two parts.

With a view to give you a clear idea of the nature of the discussions that I intend in these Lectures to invite your attention to, I shall in this Introductory Lecture consider the aim and scope of the subject. I shall also give you here an analysis of each of the parts into which I have divided the subject and indicate briefly the line that I shall adopt in discussing the questions in their proper place.

PART I.

The conception of Joint Property involves within it that of property in general.

What is property.

The term "property" is used by Jurists in more applications than one. They use it to denote (1) ownership or (2) the subject of ownership —or (3) valuable things. In the first of these applications, ownership is not unfrequently considered as the aggregate of the rights of an owner, and in this sense, he only is the owner of a thing who has absolute control over the thing, whose interest is unlimited as to duration and who has the absolute power of disposal of it.

But this is taking too limited a view of the signification of the word. It seldom happens that all the rights over a thing are centred in the same person. "The distribution of rights" says Sir William Markby "detached from ownership which we actually find in use is very extensive." And yet it is the holder of the residuary right in a thing or subject of ownership, whom we in common parlance always consider as the owner of the

thing and distinguish the holders of the detached rights as owners of *particular rights*.

In all the above three applications of the word "property," the idea of a right to exclude all others from the enjoyment of the subject of ownership is predominant. In the case of public property although no one has the right to exclusive enjoyment, none can rightfully prevent another from enjoying it.

The word "property" which is used in describing the subject of these Lectures need not be restricted to the aggregate of the rights or to the residuary rights only. It properly comprehends the "detached rights" too, if I may use the expression—in short all possible combinations of rights over a thing, the subject of ownership.

I do not propose to discuss the different classifications of property. They do not legitimately form the subjects of our consideration. I proceed with the supposition that the student understands the different expressions—"real" and "personal property," "movables" and "immovables," and "corporeal" and "incorporeal rights."

What is Joint property.

When property (using the term to mean all possible combinations of rights over a thing which is the subject of ownership) is owned by more individuals than one, it is said to be the joint property of those individuals. It must be the same property or the same combination of rights over the thing, which must be the subject of joint or common ownership. It not unfrequently happens that different interests or rights in respect of the same thing, the subject of ownership, belong to different individuals. A piece of land may be owned by *A* by tilling and reaping the crops and by *B* by receiving money-rent for it from *A*. Here *A* and *B* are owners of different rights or

interests and are not joint owners, though the piece of land in respect of which they enjoy the different rights is the same. But if in the case supposed instead of A and B being the exclusive owners respectively of the particular rights of tilling and reaping the crops and of receiving the money-rent, A_1 and A_2 were the co-sharers of A and similarly B_1 and B_2 of B, then A, A_1 and A_2 would have been joint proprietors and so also B, B_1 and B_2. The joint property in the case of A, A_1 and A_2 would have been the right to till the land and reap the crops, while that in the case of B, B_1 and B_2 would have been the right to receive the rents in respect of the same land. In popular language the same land in the case supposed might be called the joint property of A, A_1 and A_2 and also of B, B_1 and B_2; but it would be a mistake to call A, A_1 or A_2 a joint proprietor with B, B_1 or B_2. By the expression "joint property" therefore we understand such common ownership over a thing as belongs to two or more individuals. The common ownership must be over the same rights and interests in the subject of ownership, though it is not necessary that the extent of the right or interest of each of the owners should be the same or that there should be unity of title among the joint owners. Thus, of two joint owners one may be entitled to receive $\frac{5}{16}$ths of rents payable by a tenant in occupation of the land and the other to the remaining $\frac{11}{16}$ths of the same rents—the former as an heir to his father and the latter by purchase.

very dissimilar to English Joint-tenancy.

The expression "joint property" is of a class with the similar expression—"joint-tenancy" with which English lawyers are so familiar. But the joint property which is the subject of these Lectures is very different from the English estate known as "joint-tenancy." I shall in a future Lec-

ture point out to you in detail the points of resemblance and dissimilarity between the English estate joint-tenancy and the joint ownership of the members of a joint Mitakshara family. I shall at this stage content myself with a few words on the nature of the English joint-tenancy with a view to show that of the various classes of joint property with which we shall be concerned, only a small portion have a few of the peculiar incidents of the English joint-tenancy.

Mr. Williams in his book on Real property says :—

English Joint-tenancy.

"A gift of land to two or more persons in joint-tenancy is such a gift as imparts to them with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights ; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint-tenancy is accordingly said to be distinguished by unity of *possession,* unity of *interest*, unity of *title* and unity of the *time* of the commencement of such title. Any estate may be held in joint-tenancy ; thus, if lands be given simply to *A* and *B* without further words, they will become at once joint-tenants for life. Being regarded with respect to other persons as but one individual, their estates will necessarily continue so long as the longer liver of them exists. While they both live, as they must have several rights between themselves, *A* will be entitled to one moiety of the rents and profits of the land and *B* to the other ; but after the decease of either of them the survivor will be entitled to the whole during the residue of his life.....An estate in fee simple may also be given to two or more persons as joint-tenants. The unity of this kind of tenure is re-

markably shown by the words which are made use of to create a joint-tenancy in fee simple."

And again—

"The incidents of joint-tenancy.....last only so long as the joint-tenancy exists. It is in the power of any one of the joint-tenants to sever the tenancy; for each joint-tenant possesses an absolute power to dispose, in his life time, of his own share of the lands by which means he destroys the joint-tenancy. * * * Thus if there be three joint-tenants, and any one of them should exercise his power of disposition in favour of a stranger, such stranger will then hold the undivided third part of the lands as tenant-in-common with the remaining two."

Kent in his Commentaries speaking of Joint-Tenancy says:—

"Joint-tenants are seised *per mie et per tout* and each has the entire possession, as well of every parcel as of the whole * * * The doctrine of survivorship or *Jus accrescendi* is the distinguishing incident of title by joint-tenancy; and therefore the entire tenancy or estate upon the death of any of the joint-tenants went to the survivors and so on to the last survivor who took an absolute estate of inheritance."

There is, it is true, no prohibition in the Law of this country against the creation of joint ownership having all the peculiar incidents of the English joint-tenancy. Parties may by proper instruments bring such estates into existence. But as a matter of fact such estates are unknown in British India. I shall therefore simply point out here the striking features of resemblance and dissimilarity between this English Estate, on the one hand and, on the other, the estate which two or more Hindu widows inherit under the Hindu Law from their deceased husband (polygamy not being an

Compared with the Estate of Hindu widows.

offence among the Hindus) or that which two or more daughters succeed to as heiresses to their father. The estate which widows or daughters jointly inherit makes the nearest approach to the English joint-tenancy. Here there is unity of *possession*, unity of *interest*, unity of *title* and unity of the *time* of the commencement of such title. The right of survivorship also obtains among the widows and the daughters. But though the analogy is close, the two estates are not exactly alike. One of several widows or one of several daughters cannot by any act of hers change the nature of the estate, as an English joint-tenant can do, nor will the law allow the heirs of the last survivor to take the entire inheritance.

I have said above that one of several widows or daughters cannot change the nature of the estate. This should be understood with certain reservations. One of several* widows, as one of several daughters, can for legal necessity and with the consent of her coparceners alienate any portion of her undivided interest in her coparcenary property and the purchaser may acquire an interest to which the right of survivorship may not attach and which may be partitioned off from the shares of the other widows or daughters. But if the alienation be without legal necessity, the other widows or daughters, unlike an English joint-tenant, would not lose their rights of survivorship.

Compared with the interests of the members of a joint family.

Joint-tenancy is not unfrequently compared to the interest of the members of a joint Mitakshara family in their joint property. But I shall in a subsequent lecture shew that though in a Mitakshara family there is unity of *possession* and the whole

* Bhugwandeen Doobey *v.* Myna Baee (1868) 11 M. I. A. 487.

family may be looked upon as one person, as in the case of joint-tenants under the English Law, in other respects, the two estates differ very widely.

From the above definition of joint property it follows that the subjects of joint ownership may be as various as the subjects of ownership. In short all kinds of property that may be the subjects of individual ownership may also be joint property.

Principal classes of joint property in British India.

By the phrase "British India" we denote "the territories which are for the time being vested in Her Majesty by Statute 21 and 22 Victoria Chapter 106 entitled 'An Act for the better government of India' except the Settlement of Prince of Wales' Island, Singapur and Malacca." These territories are vast in extent and are inhabited by various races of men of different religious persuasions, Hindus and Mahomedans, Europeans and Eurasians. Some of these people have their peculiar modes of holding property under their own class or personal laws. Thus the Mitakshara Joint-family-system under which men descended from a common ancestor live with their wives in the enjoyment of ancestral property gives rise to a large class of joint property. Then again, as the principles of primogeniture do not obtain in India as a rule, whenever on the opening of a succession more persons than one are the heirs, joint ownership is the result. Of the various classes of joint property, therefore, that prevail in British India the principal are the result of the personal (class) laws that govern the people, while the rest are the creation of the people themselves. As to this latter class of joint properties which are the creation of the parties themselves, they are various in their nature. Their incidents depend upon the contracts whereby they are created and will not form

The result of personal laws.

the subjects of our consideration except such as are very common.

1. Mitakshara.
2. Dayabhaga.
3. Mahomedan Law.

As regards the former class of joint properties which are the result of the personal laws of the people, they are chiefly of three kinds—(1) those that arise under the Mitakshara Law, (2) those under Dayabhaga Law and (3) those under the Mahomedan Law. In dealing with the subject of joint property under the Mitakshara Law, I may have to refer to texts which are held as special authorities in the Mithila, the Maharashtra and the Dravida School of Hindu Law.

Laws to be discussed as applicable to the several classes of joint property in British India.

A rational treatment of the subject of ordinary Joint Property would consist in discussing the rules and laws which the proprietors must conform to in enjoying the property, and in transferring it by lease, mortgage, gift, sale or will. It would further consist in formulating the rules of succession to the property upon the death of one or more of its proprietors, in pointing out the periods of limitation applicable to suits in connection with such properties, in indicating the procedure to be adopted in such suits and also in suits for partition, in discussing the rights and liabilities of individual proprietors before partition, and in ascertaining their shares at partition. But, as I shall show you hereafter, the joint property of a Mitakshara family has its peculiar incidents. It is such that before partition no member has any definite share in the property. The whole family is looked upon as one individual. There is properly no succession upon the death of any member of the family: the survivors continue in possession as before. Individual rights which had no previous existence spring up all at once at partition. All the members are not entitled to share at partition and the shares again, which then for the first time come into existence, are not equal.

Though fluctuations in the number of the members of a family, caused by births and deaths in the family make no change in the status of the members while the family is joint, their effect is for the first time seen in determining the shares of the members at a general partition of property. Add to this, the courts of law in some of the Provinces have made a distinction between private sales by individual members before partition and compulsory sales in execution of decrees of courts. On account of these peculiarities, besides discussing the ordinary questions above suggested, I shall have to consider at length the peculiar incidents of this kind of property as settled by the case-law on the subject and also the privileges and liabilities of the managers or *kurtas* of joint families.

Now that I have in a general manner indicated the mode of my treatment of the subject, let me take you to the particular branches of Law that I shall have to draw your attention to as applicable to our subject.

Acts enjoining the administration of Hindu and Mahomedan Laws.

By the Declaratory Act of 1781, Section 17 it was enacted "with regard to the native inhabitants of Calcutta that their inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party should be determined in the case of Mahomedans by the laws and usages of Mahomedans and in the case of Gentoos by the laws and usages of Gentoos &c." Similarly when the Supreme Courts were established at Bombay and Madras, the native laws were made applicable to the natives of Bombay by Section 29 of 4 George IV. C. 71, and to the natives of Madras by Section 22 of 40 George III C. 79. The Charters by which the present High Courts have been substituted for the old Supreme Courts in the Presidency Towns have,

no doubt, repealed the previous Acts but they have allowed by express words the old state of things to continue.

As regards the mofussil, the law is to the same effect and is contained in the following Acts.

1. For Bengal, North-Western Provinces and Assam, Act XII of 1887 Sec. 37.
2. For Lower Burmah, Act XI of 1889 Sec. 4, which makes also the Buddhist Law applicable to the Buddhists.
3. For Bombay, Reg. IV of 1827 Sec. 26.
4. For Madras, Act III, of 1873 Sec. 16.
5. For Central Provinces, Act XX of 1875 Sec. 5.
6. For Oudh, Act XVIII of 1876 Sec. 3.
7. For Punjab, Act IV of 1872 Sec. 5.

These Statutes also recognize well-established local customs as having the force of laws under certain conditions.

Pre-emption as incident of joint property.

It is a fortunate circumstance that the local customs, which the Statutes, above referred to, enjoin our courts of law to observe, have not any influence in moulding the incidents of joint property, beyond introducing the Mahomedan Law of Pre-emption among the Hindus in some localities. I call this a fortunate circumstance, because, with a few exceptions there are hardly any authentic collections of local customs.

The principles of Law, therefore, that I shall have to consider in these Lectures as applicable to the joint property which is the result of the personal laws of the people, will be the Hindu and the Mahomedan Law of joint property.

In considering the incidents of joint property under the Mahomedan Law, I shall discuss the law of pre-emption so far as the Mahomedan Law and Hindu customs have made the same applicable to both the classes of people.

Then as regards the Hindu Law, I intend to discuss the incidents of joint property under two

heads—the Mitakshara and the Dayabhaga. There are, it is true, five principal schools of Hindu Law, three in the north and two in the south of India—those in the north being the Bengal, the Mithila and the Benares School and those in the south the Dravida and the Maharashtra School. But though the schools are so numerous, the principles of law they inculcate are, with a few exceptions, common to them all and for practical purposes the Mitakshara is the Hindu Law for the whole of India except Bengal, where the Dayabhaga of Jimutvahana is the law.

Different schools of Hindu Law grouped under two heads.

I assume you are aware that the Smritis (institutes) of the Rishis are universally respected. It is only their particular commentaries that are held in greater or less esteem in particular localities. The Mitakshara is a commentary by Vijnaneswara on the Institutes of Yajnavalkya. It is a work of paramount authority in the whole of India except Bengal, and even in Bengal it is referred to and followed as a guide to settle doubtful questions of law on which the Dayabhaga is silent. *

I have said that the Mitakshara is a work of paramount authority in the different schools of Hindu Law. It is no part of my subject to consider what the other authorities are in the different schools and which of them, in the event of a conflict of opinions, are preferred to the others of them. Mr. Herbert Cowell and successive Law Lecturers have dwelt on that subject and I shall content myself with simply enumerating here

* See the observations of the Judicial Committee in Bhugwandeen Doobey v. Myna Baee (1868) 11 M. I. A. 487.

the various works of authority in the different schools, as I may have to refer to some of them at least.

Authorities in the different schools.

Bengal School	... 1. Dayabhaga. 2. Raghunundun's treatise. 3. Dayakrama Sangraha. 4. Srikrishna's Commentaries. 5. Dattaka Chandrika.
Mithila School	... 1. Mitakshara. 2. Vivada Chintamani. 3. Vivada Ratnakara. 4. Dvaita Nirnaya. 5. Sudhiviveka. 6. Dvaita Parishista. 7. Dattaka Mimansa.
Benares School	... 1. Mitakshara. 2. Vira Mitrodaya. 3. Nirnaya Sindhu. 4. Dattaka Mimansa.
Dravida School	... 1. Mitakshara. 2. Smriti Chandrika. 3. Parasara Madhavya. 4. Sarasvati Vilasa. 5. Dattaka Chandrika.
Maharashtra School	... 1. Mitakshara. 2. Vyavahara Mayukha. 3. Nirnaya Sindhu. 4. Dattaka Mimansa. 5. Kaustava.

But the Hindu and the Mahomedan Law of joint property are not all the law that we shall have to discuss. Under the British Administration the Hindu Law is not the law which determines all the rights and liabilities of a Hindu. Nor does the Mahomedan Law determine all the rights and liabilities of a Mahomedan. In matters of contract, of civil rights as landlord or tenant, of obligations to the Government of the country and, in short, in

Several Acts of Indian Legislature have application to joint property.

all questions save such as relate to inheritance, marriage and succession, the legislative enactments passed from time to time govern the position of a Hindu and a Mahomedan. In connection therefore with the subject of joint property it is not only the Hindu or the Mahomedan Law but the statutes passed from time to time that we have to consider in determining the various incidents of such property. To take a concrete example: Suppose a Mitakshara family in Bengal composed of a father and two sons is possessed of an ancestral holding for which rent has to be paid to the landlord, and suppose the father is desirous of selling the holding. The question whether the alienation of the holding by the father would bind the sons would have to be determined by the provisions of the Mitakshara Law; while the question whether the transfer would be good against the landlord would depend upon the provisions of the Bengal Tenancy Act. It is only the first of these questions that properly forms the subject of our consideration; for, the answer to the second question does not depend upon the incidence of the property, joint or exclusive. Take another example. Suppose a family consisting of an uncle and two nephews (sons of a deceased brother) governed by the Dayabhaga have jointly inherited from their ancestor a jote for which a certain rent has to be paid annually to the landlord, and suppose the uncle wishes to keep the jote, entire while the nephews wish to split it up. The question of the division into shares has to be decided under the Dayabhaga while the question whether the zemindar would be bound to recognize the division would be one under the Bengal Tenancy Act. In this case both the questions would be proper subjects for our discussion.

Thus it is clear that portions of the Law of

Limitations, of the Civil Procedure Code, of the Tenancy Acts and of the Transfer of Property Act have important bearing on the subject of these Lectures and I shall have to discuss these provisions at some length.

Ordinary incidents of joint property.

Then, as I said before, some of the incidents of joint property that owe their origin to contracts are so common, that the present Lectures will not be complete without our discussing them. A man purchases a fractional share of some lands from another who is the exclusive proprietor of them. By reason of his purchase, the former becomes a joint proprietor with the latter. Suppose now that the two proprietors cannot agree between themselves as to how the lands should be enjoyed. What must they do? Or, suppose one of the co-sharers without the consent, express or implied, of the other builds a pucca house on the entire lands or on a portion thereof. What is the remedy of the other co-sharer? Or, suppose the lands previous to the purchase were in the occupation of ryots who were not protected from enhancement of their rents, and the purchaser after his purchase of a fraction wishes to enhance the rents payable by the ryots, while his co-sharer does not so wish. What must the co-sharer do? Or suppose one of the two proprietors wishes to eject a tenant, while the other does not so wish. What course must the proprietor who wishes to eject adopt? Or, suppose a co-sharer at a considerable expense raises a crop of indigo on his sole account. Would his co-sharer be entitled to share with him in the profits? It not unfrequently happens that joint property in which the shares are defined while in the occupation of the proprietors, is considerably improved by one of them at his own expense to suit his convenience. Would the proprietor who improves get, at a general partition, credit for his

improvement, if there was no understanding among the sharers to that effect? We may also suppose cases where one co-sharer, without actually interdicting the use by his co-sharers of the joint property, may so use it as to make it, by laying out capital on his sole account, a source of profit. Would his co-sharers be entitled to share in the profits? We need not here multiply instances. Then again a trading concern is a joint property of the partners. The rights and liabilities of the joint proprietors—the partners—which are determined by the Contract Act, ought to have a place in these Lectures.

We shall consider these and similar questions in a separate chapter.

Impartible joint property.

It yet remains for me to notice that there are some estates which though not partible are joint. By their very constitution they are capable of being enjoyed by only one person at a time, the other co-sharers simply receiving maintenance from the holder. The Law of primogeniture generally obtains in these cases; otherwise, the *kulachar* of the family (immemorial family custom) supplies the rules of descent. The joint character of the property is evidenced, in several cases, by the exclusion of females from succession and by the restrictions placed on alienations by the holder of the estate for the time being. I shall consider this class of joint property last.

Law of property generally applicable to joint property.

I have already said that all classes of property may form the subjects of joint ownership. From this, it follows that the law applicable to property in general applies equally to joint property, with this difference that whereas in the case of other properties the owners would be single individuals, in the case of joint properties the owners would be the whole body of proprietors collectively. Viewed in this light, the whole of the law of property would

be applicable to joint property too. Thus if a person who is the exclusive owner of a thing must sue to recover possession, within a certain period of his dispossession, within the same period must a suit for the same purpose be brought if the thing, previous to dispossession, was owned by a number of individuals; only that in this latter case, the whole body of proprietors must sue unless the law would allow any one of them to sue on behalf of the whole body. So also the procedure to be followed for the recovery of the property by suit would be the same whether it belonged to one or more individuals.

Special law of joint property.

But beside the body of general law applicable to joint property in common with other kinds of property, there are some special laws of procedure, limitations &c. applicable only to joint property; as, the law applicable to disputes among the joint owners themselves; the law which allows one of several joint owners under certain circumstances to sue on behalf of others; the law of Limitations applicable to the suit of one co-sharer against another &c. &c. It is these laws only that properly form the subjects of our discussion. Otherwise it is not the scope of these Lectures to discuss or consider the whole body of laws, general or special, that may have to be applied to joint property under any circumstances.

PART II.

Partition.

The second branch of our subject is the Law of partition of joint property in British India.

The word "partition" is differently understood in the different schools of Hindu Law.

According to Mitakshara.

According to Mitakshara, "partition is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate. Before partition the right of each co-owner extends over the whole property. The effect of partition is to create in favour of each co-owner an exclusive right to a part in lieu of the joint right which he previously possessed over the whole." Col. Mit. I., 1, 4. As to what constitutes a partition under the Mitakshara, Lord Westbury in delivering the judgment * of the Privy Council in Appoovier *v.* Ramasubha Ayyan observed.—"According to the true notion of an undivided family, no individual member of that family, whilst it remains undivided, can predicate of the joint undivided property that he that particular member has a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain definite shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and in the estate each member has

* 11 M. I. A. 75 or 8 W. R., P. C. 1

thenceforth a definite and certain share, which he may claim a right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." According to another authority, "even when there is a total absence of common property a partition is effected by a mere declaration, 'I am separate from thee;' for partition is but a particular condition of the mind; and this declaration is indicative of the same." Under the Mitakshara, partition is the origin of property; before partition no member has a definite share, and then there is no succession and the joint family-property upon the death of one member continues the same joint family-property of the survivors. After partition, the share received by any member becomes his property, and it passes to his heirs at his death according to certain rules of succession. The females who would not inherit any interest in joint property would be entitled to succeed to the shares of their fathers or husbands if these die after separation. Thus, very important consequences follow the partition of joint properties in a Mitakshara family.

According to Dayabhaga.

According to Dayabhaga, "partition is the allotment of separate portions of the family property to the co-sharers corresponding to the shares already owned by each. By a partition, an allotment is made in respect of the share of a coparcener." From the above definition it follows that partition in Bengal is generally a partition by metes and bounds. The shares of the members of an undivided Dayabhaga family are always defined, and the separation or division is complete upon the separate enjoyment of their shares by the members in whatever way this may be done.

The Dayabhaga definition would generally apply to partition under the Mahomedan Law.

I shall therefore, in my first lecture on this part consider the Mitakshara Law of partition; that is (1) what amounts to a separation or partition under the Mitakshara Law, (2) who can demand a partition of coparcenary property and when, (3) who would be entitled to share at partition and what would be their shares, and (4) the legal consequences of partition.

In my next Lecture on this Part, I shall discuss the Law of Partition under the Dayabhaga and the Mahomedan Law.

Partition by separate collection of rents.

You must have seen that in Bengal, as elsewhere, co-sharers do not, as a rule, divide among themselves by metes and bounds, landed properties of which they enjoy possession by receipt of rents from the tenants in occupation. They generally divide the rents, after they have been collected, in proportion to their shares on paying the collection charges jointly, or they separately collect their shares of the rents from the tenants direct. This is also a mode of partition and all the legal consequences of a partition attach to such a division.

Rules for partition by metes and bounds same for all property.

The rules for actual division of joint properties by metes and bounds, as well as for the allotment of some entire properties to any sharers after providing for the payment of owelty-money, with a view to make the shares equal or equivalent to their proportionate money-value are the same for all classes of people and for all kinds of joint property, save the revenue-paying estates. But until lately there was no legislative enactment of general application, throughout the whole of British India, authorizing the civil courts, in suits for partition, to sell the whole or a portion of the property under partition in order to prevent inconvenient divisions. The Act I refer to is No. IV of 1893. It provides a procedure for the sale of all classes of immovable property to which the provisions of Sec.

Act IV of 1893.

396 of the Civil Procedure Code apply *i. e.*, all property save the revenue-paying estates for which a separate procedure is prescribed in other Acts. I shall have to consider the provisions of this Act IV of 1893, as well as those of Sec. 396 above mentioned, in a subsequent Lecture.

Law of partition of revenue-paying estates

There is yet another kind of landed interest for which a special procedure has to be followed in effecting a division among co-sharers by metes and bounds—I mean the revenue-paying estates. In respect to these properties, besides the joint owners of the estates, there is always the interest of a third party to be considered—the interest of the Government to whom the revenue is payable. In case of a disproportionate division, the Government would lose their security for the revenue and accordingly the Legislature has provided that the apportionment of the Government revenue among the different allotments into which an estate may be divided at partition must be made only by the Revenue officers of the Government.

in Bengal.

For the partition of Revenue-paying Estates in Bengal, an elaborate procedure is prescribed by the Bengal Council Act VIII of 1876 supplemented by rules framed by the Board of Revenue.*

N.-W. Provinces.

The Law of partition of Revenue-paying and Revenue-free mahals in the N.-W. Provinces is contained in Act XIX of 1873.

Oudh.

The Law of partition of revenue-paying and revenue-free mahals as well as taluqdary and underproprietary mahals in Oudh is contained in Act XVII of 1876.

Punjab.

The Law of partition of revenue-paying estates in the Punjab is contained in Chapter IX Act XVII of 1887.

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* There is at the present time a Bill before the Bengal Council for the amendment of the procedure prescribed in this Act.

Central Provinces.

The Law of partition of revenue-paying estates in the Central Provinces is contained in Act XVIII of 1881 as amended by Act XVI of 1889.

Bombay.

The Law for the partition of revenue-paying estates in Bombay is contained in Bombay Act V of 1879 Sections 113-117, subject to the provisions of Bombay Act V of 1862 entitled "an Act for the preservation of Bhagdari and Narwadari Tenures."

Madras.

The Law for the partition of revenue-paying estates in Madras is contained in Act II (Madras) of 1864, Sections 45 and 46 and Act I (Madras) of 1876 and some earlier Regulations.

Assam.

The Law for the partition of revenue-paying estates in Assam is contained in Chapter VI, Regulation I of 1886.

We shall have to consider all the above Statutes.

Importance of the subject.

By far the largest portion of landed property in India is held as joint family-property. Here, unlike other countries, joint ownership is the rule, while individual proprietary right is the exception. That aggregate ownership is an archaic institution, and individual proprietary right, a modern development of it, is evidenced by the comparative ages of the Mitakshara and the Dayabhaga. The former, which is an ancient work, treats elaborately of the subject of joint ownership, while the latter gives prominence to individual right. The observations of Sir Henry Maine in his work on Ancient Law and of Mr. Mayne in his work on Hindu Law and Usage fully bear out the prevalence and the ancient origin of this system of holding property, and I shall take liberty to quote those observations.

Sir Henry Maine says:—*

"The mature Roman Law, and modern juris-

* P. 261.

prudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, *Nemo in communione potest invitus detineri* ("No one can be kept in co-proprietorship against his will"). But in India this order of ideas is reversed and it may be said that separate proprietorship is always on its way to become proprietorship in common. * * * * As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father and the property constantly remains undivided for several generations though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the community is more than a brotherhood of relatives and more than an association of partners."

Mr. Mayne speaking of the antiquity of the joint family system, says :— *

"The joint family is only one phase of that tendency to hold property in community, which, it is now proved, was once the ordinary mode of tenure. The attention of scholars was first drawn

* Mayne's Hindu Law and Usage 5th Ed. § 8.

to this point by the Sclavonian village communities. But it is now placed beyond doubt that joint ownership of a similar character is not limited to Sclavonian or even to Aryan races, but is to be found in every part of the world where men have once settled down to an agricultural life."

Even the most careless observer, at every step of his progress through India, would be struck at the general prevalence of the system of living in family groups. The reports of the proceedings of our Courts of law teem with cases of joint ownership. The law of joint property, therefore, has here an importance which it has not in other countries.

The same may be said of the law of partition. We have seen that by far the largest portion of the Hindus are governed by the Mitakshara law and that under that law very important consequences are attached to a partition. From this it follows that the law of partition too cannot but be of immense interest to the people—not to speak of its importance to one who has to administer the law to the people, or to one who has to practise as a lawyer in the Courts of the country.

Division of the Subject.

PART I.

THE LAW OF JOINT PROPERTY IN BRITISH INDIA.

Division of the subject into parts, chapters & lectures.

CHAPTER I.

Lecture II.

Joint Property under the Mitakshara Law.

Lecture III.

The Law of alienations of joint ancestral property under the Mitakshara Law and of the liability of such property for payment of debts in certain cases.

CHAPTER II.

Lecture IV.

Joint Property under the Dayabhaga.

CHAPTER III.

Lecture V.

Mahomedan Law of Joint Property together with the Law of pre-emption among co-sharers.

CHAPTER IV.

Lecture VI.

Ordinary incidents of several kinds of Joint Property and the principal doctrines of equity applicable to such property.

CHAPTER V.

Lecture VII.

The Law of Limitations and Procedure applicable to suits in respect of Joint Property.

CHAPTER VI.

Lecture VIII.

Impartible Joint Estates.

PART II.

THE LAW OF PARTITION.

CHAPTER I.

Lecture IX.

The Law of Partition under the Mitakshara.
