CHAPTER II.

Lecture X.

Partition under the Dayabhaga as well as under the Mahomedan Law.

CHAPTER III.

Lecture XI.

The general law of Partition of all classes of Joint Property except Revenue-paying Estates.

CHAPTER IV.

Lecture XII.

Procedure for partition of Revenue-paying Estates in Bengal.

Lecture XIII.

Procedure for partition of Estates in the N.-W. Provinces, Oudh, Punjab, the Central Provinces, Assam and the Presidencies of Madras and Bombay.

---

grounds, cattle, &c., &c. Sir Henry Maine in his work on "Ancient Law" has shewn that the view of the primeval condition of the human race which is known as the Patriarchal theory is established by the evidence derived from comparative Jurisprudence, and he says* that "the legal testimony, comes nearly exclusively from the institutions of societies belonging to the Indo-European stock, the Romans, Hindoos and Sclavonians supplying the greater part of it." But though the primitive condition of man was everywhere the same, what strikes us at the present moment is that some countries are considerably in advance of others in point of civilization. This is neither the place nor the occasion to enter into a disquisition on the causes that lead to such results. "The difference between the stationary and progressive societies is one of the great secrets which enquiry has yet to penetrate." Speaking of the expansion of law in India, Sir Henry Maine says† "We can see that Brahminical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion."

Patriarchal family.

In the natural order of events, the patriarchal family, consisting of the father and his sons and in which the influence of the father (the *pater-familias*) was supreme, must have preceded the joint family and the village community. Upon the death of the patriarch or the father, the family consisted of brothers and their sons, and when they chose to live together, they lived as a joint family. The joint family thus became the second stage of living in groups. The eldest of the brothers, as the head of the family, swayed all its

Joint family

* p. 123.
† p. 32.

affairs; but his influence was very different from that of the father in a Patriarchal family. In the infancy of the world, when hunting was a man's chief occupation and his wants were few, the families naturally grouped together for their own protection from the inroads of their neighbours, and hence arose the system of village communities.

Origin of village communities.

As time advanced the individual members of the village communities, *viz.*, the joint families therein comprised, saw that the disadvantages of their combinations outweighed their advantages and began to separate. So again, in course of time the practice of living in joint families has been giving way to the ideas of greater comforts in separate living with greater freedom of action.

Partition of property a later development.

As the peculiar nature of living together in patriarchal and family groups as well as in communities was everywhere the same and as several of our present laws owe their origin to this mode of living in ancient times, I will read to you certain passages on the subject from Sir Henry Maine's work on "Ancient Law."

Speaking of the primitive family, he says* "The points which lie on the surface of the history are these:—The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves; indeed the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself. The flocks and herds of the children are the flocks and herds of the father, and the possessions of the parent, which

Extent of patriarch's power.

Son's property father's.

* p. 123.

he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree, the eldest son sometimes receiving a double share under the name of birth-right, but more generally endowed with no hereditary advantage beyond an honorary precedence." Speaking of the change gradually brought about in the position of the son from one of absolute dependance on the father, that eminent Jurist says*—"So far as regards the person, the parent, when our information commences, has over his children the *jus vitae necisque*, the power of life and death, and *a fortiori* of uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them. Late in the Imperial period we find vestiges of all these powers, but they are reduced within very narrow limits. The unqualified right of domestic chastisement has become a right of bringing domestic offences under the cognisance of the civil magistrate; the privilege of dictating marriage has declined into a conditional veto; the liberty of selling has been virtually abolished, and adoption itself, destined to lose almost all its ancient importance in the reformed system of Justinian, can no longer be effected without the assent of the child transferred to the adoptive parentage. In short, we are brought very close to the verge of the ideas which have at length prevailed in the modern world. But between these widely distant epochs there is an interval of obscurity, and we can only guess at

Changes gradually introduced in respect of father's powers.

* p. 138.

the causes which permitted the Patria Potestas to last as long as it did by rendering it more tolerable than it appears. The active discharge of the most important among the duties which the son owed to the state must have tempered the authority of his parent, if they did not annul it. We can readily persuade ourselves that the paternal despotism could not be brought into play, without great scandal, against a man of full age occupying a high civil office." And again* "many of the causes which helped to mitigate the stringency of the father's power over the persons of his children are doubtless among those which do not lie upon the face of history. We cannot tell how far public opinion may have paralysed an authority which the law conferred; or how far natural affection may have rendered it endurable. But though the powers over the persons may have been latterly nominal, the whole tenour of the extant Roman jurisprudence suggests that the father's rights over the son's *property* were always exercised without scruple to the full extent to which they were sanctioned by law. There is nothing to astonish us in the latitude of these rights when they first show themselves. The ancient law of Rome forbade the Children under Power to hold property apart from their parent, or (we should rather say) never contemplated the possibility of their claiming a separate ownership. The father was entitled to take the whole of the son's acquisitions, and to enjoy the benefit of his contracts, without being entangled in any compensating liability. So much as this we should expect from the constitution of the earliest Roman Society; for we can hardly form a notion of the primitive family group unless we

* p. 141.

Curtailment of parental authority.

suppose that its members brought their earnings of all kinds into the common stock, while they were unable to bind it by improvident individual engagements. The true enigma of the *Patria Potestas* does not reside here, but in the slowness with which these proprietary privileges of the parent were curtailed, and in the circumstance that, before they were seriously diminished, the whole of the civilised world was brought within their sphere. No innovation of any kind was attempted till the first years of the Empire, when the acquisitions of soldiers on service were withdrawn from the operation of the Patria Potestas, doubtless as part of the reward of the armies which had overthrown the free commonwealth. Three centuries afterwards the same immunity was extended to the earnings of persons who were in the civil employment of the state. Both changes were obviously limited in their application, and they were so contrived in technical form as to interfere as little as possible with the principle of Patria Potestas. A certain qualified and dependent ownership had always been recognised by the Roman law in the perquisites and savings which slaves and sons under power were not compelled to include in the household accounts, and the special name of this permissive property, Peculium, was applied to the acquisitions newly relieved from Patria Potestas, which were called in the case of soldiers Castrense Peculium, and Quasi-Castrense Peculium in the case of civil servants. Other modifications of the parental privileges followed, which showed a less studious outward respect for the ancient principle. Shortly after the introduction of the Quasi-Castrense Peculium, Constantine the Great took away the father's absolute control over property which his children had inherited from their mother, and reduced it to a *usufruct* or life-

interest. A few more changes of slight importance followed in the Western Empire, but the furthest point reached was in the East, under Justinian, who enacted that unless the acquisitions of the child were derived from the parent's own property, the parent's right over them should not extend beyond enjoying their produce for the period of his life."

And again* "Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no higher place in the law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity. The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their

Transition from status to contract.

* p. 169

capacities and incapacities regulated by the Law of persons."

Analogies between Roman and Hindu jurisprudence.

I have quoted these passages at length in the hope that, if you follow me closely in what follows, you will not fail to perceive the close analogy that exists between these ancient laws and the laws of modern India. There is the same injunction on a son to obey his father's mandates. There is the same interdiction against a father's alienation of joint family-property to the destitution of his children. There is the same power given to a father over his son's acquisitions. There is the same declaration of the incompetency of women to hold property. There is the same incorporation of strangers into the family by adoption. There is the same exemption, of property acquired without detriment to paternal property, from the father's control.

Relics of village community in India.

Professor Krishna Kamal Bhattacharyya in his Tagore Law Lectures for 1884-85 on the Joint Hindu Family has shewn that in India, as elsewhere, village communities existed in former days, and that even at the present day in the Province of Madras, the High Court of that Presidency has to decide cases in which collective ownership in the village lands and the custom of periodical redistribution of the arable soil, (which are the characteristics of a village community, pure and simple), are asserted by parties to suits. Professor Julius Jolly in his Tagore Law Lectures for 1883 speaking* of the various forms of joint family in India says.—

"The vast continent of India may be said to exhibit an epitome of all possible forms of ownership, from the corporate property of the village community to the absolutely private property of the individual."

* p. 88.

Mr. Mayne in his learned work on Hindu Law and Usage also speaks of the existence of village communities in the Punjab and traces the right of pre-emption to them. He says* "Three forms of the corporate system of property exist in India; the Patriarchal Family, the Joint Family and the Village Community. The two former, in one shape or other, may be said to prevail throughout the length and breadth of India. The last still flourishes in the north-west of Hindostan. It is traceable, though dying out, in Southern India. It has disappeared, though we may be sure it formerly existed, in Bengal and the upper part of the peninsula." And again "the Village system of India may be studied with most advantage in the Punjab, as it is there that we find it in its most perfect, as well as in its transitional, forms. It presents three marked phases, which exactly correspond to the changes in an undivided family. The closest form of union is that which is known as the *communal zemindari* village. Under this system 'the land is so held that all the village co-sharers have each their proportionate share in it as common property, without any possession of, or title to, distinct portions of it; and the measure of each proprietor's interest is his share as fixed by the customary law of inheritance. The rents paid by the cultivators are thrown into a common stock, with all other profits from the village lands, and after deduction of the expenses the balance is divided among the proprietors according to their shares.' This corresponds to the undivided family in its purest state. The second stage is called the *pattidari* village. In it the holdings are all in severalty, and each sharer manages his own portion of land. But the extent of the share

Communal zemindari system.

Pattidari system.

* Fifth Ed S. 199.

is determined by ancestral right, and is capable of being modified from time to time upon this principle. This corresponds to the state of an undivided family in Bengal. The transitional stage between joint holdings and holdings in severalty is to be found in the system of redistribution, which is still practised in the Pathan communities of Peshawar. According to that practice the holdings were originally allotted to the individual families on the principle of strict equality. But as time introduced inequalities with reference to the numbers settled in each holding, a periodical transfer and redistribution of holdings took place. This practice naturally dies out as the sense of individual property strengthens, and as the habit of dealing with the shares by mortgage and sale is introduced. The share of each family then becomes its own. The third and final stage is known as the *Bhaiachari* village. It agrees with the *Pattidari* form in as much as each owner holds his share in severalty. But it differs from it, in as much as the extent of the holding is strictly defined by the amount actually held in possession. All reference to ancestral right has disappeared, and no change in the number of the co-sharers can entitle any member to have his share enlarged. His rights have become absolute instead of relative, and have ceased to be measured by any reference to the extent of the whole village, and the numbers of those by whom it is held. This is exactly the state of a family after its members have come to a partition."

Bhaiachari system.

At the present time in India village communities have nearly disappeared, but many of the laws which they brought into existence are yet in full force. The restraints on alienation of coparcenary property under the Mitakshara Law are some of the relics of the olden times and under the British ad-

Relics of village communities now in full force.

ministration are destined to continue. In this respect there is a vast difference between the past and the present age. In former times commentators, under the guise of expounding original Institutes which were beyond the reach of the majority of the people, promulgated laws as seemed to them best suited to the changing times. The differences in the laws of the different provinces thus owe their origin to the different customs which had grown in those localities—the commentators simply validating the customs as good law. But under the present administration, such changes with the changeful times seem impracticable.

They seem destined so to continue under British rule.

As the subject of the Joint Hindu Family has already been discussed with great ability and scholarship by Professor Krishna Kamal Bhattacharyya, I shall not attempt to dwell upon it, but shall simply refer you to his book, and for the purposes of my present lecture adopt the conclusions arrived at by him. The Professor, after a collation of all the authorities on the point, says in Lecture III, p. 138. "From all these circumstances taken together, from the indication furnished by Baudhayana's text and from the actual state of things existing at the present day, I conclude that in forming a definite notion of a joint family with regard to its constitution, we may view it as a group of individuals related to one another by their descent from a common ancestor within seven generations in the ascending line." The text of Baudhayana referred to by the Professor in the above quotation runs as follows—"Paternal great-grandfather, paternal grandfather, father himself, brothers of the whole blood, a son born in a wife of the same caste, son's son, and the son of a son's son, all these participators of an undivided *daya* or heritage,—are spoken of as sapindas;—the participators of a divided *daya* or heritage,

Constitution of the Hindu Joint Family.

are spoken of as sakulyas. Issue of the body existing, it is on them that property devolves. In the absence of a Sapinda, a Sakulya,—and in his absence the preceptor, or the disciple,or the household priest, should take. In absence thereof the king." In the above quotation "the group of individuals related to one another" must be understood as comprising individuals every one of whom is a descendant of the common ancestor in an unbroken male line. Females have always been considered as members of the family to which they are transferred by marriage,[1] but so long as they are unmarried they continue members of their father's family. In the same way, the wives of the male members are taken to be members of the family. So too, sons incorporated into the family by adoption become members of the family. Thus in Ballabh Das *v.* Sunder Das (1877) I.L.R. 1 All. 429 it is said.—"The Joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connection among its members by blood, relationship, *adoption*, and marriage (the *italics* are mine)." To the same effect are the decisions in Sham Kuar *v.* Gayadin (1877) I.L.R. 1 All. 255; Joy Kishore Chowdhry *v.* Panchoo Baboo (1879) 4 C.L.R. 538; Rambhat *v.* Lakshman Chintaman (1881) I.L.R. 5 Bom. 630; Uma Sunker Moitra *v.* Kali Komul Mozumdar (1880) I.L.R. 6 Cal. 256; 7 C. L. R. 145 affirmed by the Privy Council in 1883, I.L.R. 10 Cal. 232; Surjo Kant Nundi *v.* Mohesh Chunder Dutt (1882) I.L.R. 9 Cal. 70; Mokundo Lall Roy *v.* Bykunt Nath Roy (1880) I.L.R. 6 Cal. 289; 7 C. L. R. 478.

Affiliation by adoption.

(1) This would be clear upon a reference to the social customs of the Hindus. The question was also considered by the late Justice Dwarkanath Mitter in Chundernath Moitra v. Kristo Komul Singh (1871) 15 W. R. 357.

Who are the coparceners.

But though the Mitakshara joint family usually consists of such a large number of male and female members, yet each and every one of them would not be entitled to a share of the family property or to any interest in it on a partition. The family property in the language of jurists is called the coparcenary property. Under the Mitakshara law coparcenary property is that in which the extent of the share of any member is not definite before partition. In Bengal some only of the members of a family governed by the Dayabhaga would own among themselves, even while the family is joint, the entire property in *certain defined shares* and such shares would neither increase nor decrease by subsequent deaths or births in the family. But in the case of a Mitakshara joint family, the case would be otherwise. So long as the family remains joint the coparcenary property may be said to be the property of the whole family, some only of the members being entitled to definite shares in the property on a partition and the others of them simply to maintenance, and no single member having any definite share before partition. Who then are the coparceners? Are they those who can demand a partition, or those who upon a partition would be entitled to share, or those who have a vested interest in the property?

Shares of coparceners definite in Bengal.

Not so under the Mitakshara till a partition is effected.

Now the members of a family who, upon a partition, would be entitled to shares are not the same as those who have a right to demand a partition, nor those, again, who have a vested interest in the property. If all these three groups had consisted of the same individuals, we might at once conclude that they were the coparceners; but as we shall see presently the groups consist partly of different persons.

I have just said that before a partition of coparcenary property no single member has any definite

share in it. This will appear to be true when we consider that the author of the Mitakshara looks upon partition as one of the sources of property or proprietary right, and that he treats the subject of partition under the head of inheritance.

Treatment of the subject of partition in the Mitakshara.

In ch. 1 sec. 1 the author of the Mitakshara discusses two questions simultaneously *viz.*, (1) whether partition is the cause of proprietary right or it merely ascertains the pre-existing right, and (2) whether property *i.e.*, proprietary interest arises by birth or by demise of the previous owner. Dealing with the first question he says (para 7)—"Does property arise from partition? or does partition of pre-existing property take place? Under this (head of discussion) proprietary right is itself necessarily explained; and the question is whether property be deduced from the sacred institutes alone, or from other and temporal proof. Para 8. "(It is alleged) that the inferring of property from the sacred code alone is right, on account of the text of Gautama; 'An owner is by inheritance, purchase, partition, seizure or finding. &c. &c.'"

Partition is the origin of property.

In para 17 the first question in para 7 is resumed. Thus "Next, it is doubted whether property arise from partition or the division be of an existent right." Para 18 "of these (positions) that of property arising from partition is right; since a man to whom a son is born, is enjoined to maintain a holy fire: for, if property were vested by birth alone, the estate would be common to the son as soon as born: and the father would not be competent to maintain sacrificial fire and perform other religious duties which are accomplished by the use of wealth." This is the conclusion come to by the commentator on the first of the above questions. The meaning of this conclusion is not that the coparcenary property is not the property

of any definite number of persons, or that the owners collectively are not known before partition; but that as among the persons, who together represent the body of proprietors, their *several* shares are not known before partition.

All who are entitled to share at partition can not demand partition.

I have observed above that all the persons who are entitled to share at a partition are not the same as those who can demand a partition. This would be evident when we consider that at a division of ancestral property by brothers, the mother would be entitled to a share for her life in lieu of maintenance, but under the texts and case-law she would have no right to *demand* a partition. Sunder Bahu *v.* Monohur Lal Upadhya (1881) 10 C. L. R. 79, also Judoo Nath Tewaree *v.* Bishonath Tewaree (1868) 9 W. R. 61. Similarly a grandmother who would be entitled to share at a partition among her grandsons would have no right to demand a partition.

Who are the persons who acquire a vested interest.

We shall now see that all the persons who acquire a vested interest in the property are not entitled to demand partition. For this purpose we should first see who are the persons who acquire a vested interest in the property. This brings us to the consideration of the second of the questions discussed by Vijnaneswara in chapter I. section I.

Obstructed and unobstructed heritage.

The author deals with this question thus:—In para 2, he defines "heritage" as wealth which becomes the property of another by reason of relation to the owner. In para 3 he divides heritage into two classes, unobstructed অপ্রতিবন্ধ্য and obstructed সপ্রতিবন্ধ্য and says "The wealth of the father or of the paternal grandfather, becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons: and that is an inheritance not liable to obstruction. But property devolves on parents

(or uncles,) brothers and the rest, upon the demise of the owner, if there be no male issue : and thus the actual existence of a son and the survival of the owner are impediments to the succession ; and, on their ceasing, the property devolves (on the successor) in right of his being uncle or brother. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other (descendants)."

Great grandson an unobstructed heir though not expressly mentioned as such in the Mitakshara.

The Mitakshara does not mention the great-grandson as one of the unobstructed heirs, but the Viramitrodaya is clear upon the point. See paragraph 16 ch. II. Part I. p. 72 of Babu Golap Chandra Sastri's English Translation which I have here quoted for easy reference :—

"Katyayana says :—when one himself dies unseparated, his son who has not received maintenance from his grandfather, shall be made participator of the heritage ; he is to get, however, the paternal share from the uncle or the uncle's son ; the very same share shall equitably belong to all the brothers : or his son also shall get : afterwards cessation of succession shall take place." "One himself"—signifies a brother. "His son"—the brother's son. "Maintenance" means share. The question occurring—what sort of share is he to get? it is said, "the paternal share." "His son" intends the "great-grandson of the person whose" estate is divided—because the case of a grandson is considered." "Afterwards"—that is, "after his son," "Cessation" that is "cessation" of succession takes place. The meaning is that the great-grandson's son is not entitled to a share. Accordingly, also, Devala says :—'Partition of heritage among undivided parceners and second partition among divided parceners dwelling together, extends to the fourth in descent. This is the settled law—the meaning is that the partition

of heritage extends inclusively to the fourth degree counting from the proprietor."

In paras 21 and 22 of Mitakshara ch. I sec. I the author considers the arguments of his adversaries and in para 27 comes to this conclusion.—"Therefore it is a settled point that property in the paternal (correctly "grandfathers" for the word is *paitamaha*) or ancestral estate is by birth &c.

It follows then that in property inherited as unobstructed heritage by a man from his ancestors, the persons interested simultaneously are, besides himself, his sons and grandsons—all these three generations take vested interest in the property. But are they all entitled to demand partition? No. As regards grandsons, para 3 sec V, ch. I provides—"If the father be alive and separate from the grandfather, or if he have no brothers, a partition of the grandfather's estate with the grandson would not take place; since it has been directed that shares shall be allotted, in right of the father if he be *deceased*; or, admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions." The Privy Council also held that a grandson whose father was alive had no right to demand partition. See Rai Bishen Chand *v.* Mussamat Aşmaida Koer (1884) I. L. R. 6 All. 560; L. R. 11 I. A 164.

All who take vested interest cannot demand partition.

Grandson cannot demand partition during lifetime of his father and grandfather.

The Hindu law recognizes the right of the father to make a partition, and in Mitakshara ch. I sec. V para 8 a similar right is given to the son. "Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." But there is no text declaring a similar right on behalf of the grandson.

We have now seen that the three groups *viz.*, (1) the sharers at a partition, (2) the persons entitled to demand partition, and (3) the persons who acquire a vested interest in the property by birth, are different. But the Mitakshara coparceners are the persons included in the third group, whose shares are not definite before an actual partition. You should note the peculiar signification of the word "coparceners" under the Mitakshara law. It is true that when by collateral succession, more persons than one inherit together, the several heirs should they continue joint would be co-sharers. But such heirs would have their shares definitely known under the law, as they always inherit *per capita*. But the interest of a Mitakshara coparcener extends to the whole, and before an actual division or partition, the extent of his share is unknown.

Peculiar signification of the word 'Coparceners' in the Mitakshara.

The practice of incorporating into the family sons by adoption has been in vogue from the ancient times. Adopted sons from the time of their adoption are taken into the family of the adopter. They take, under the Hindu law, the place of sons of the body to all intents and purposes. Their claims are supported by original texts as well as decided cases. The reader is referred to Sastri Golap Chandra Sarkar's Lectures on Adoption under the Hindu Law, p. 403; see also *ante* p. 40.

Adopted sons.

In former days, a man belonging to any of the three higher castes could marry a woman either of the same caste with him or one of a lower caste. Sons born of such parents could share (though not equally) with legitimate sons at a partition after father's death. But such sons could not demand partition while the father was alive. The text which supports this inference is Mitak. ch. I, sec. VIII, verse 1 which runs thus: "The

Sons by women of different tribes

adjustment of a distribution among brothers alike in rank, whether made with each other, or with their father, has been propounded in preceding passages. The author now describes partition among brethren dissimilar in class. The sons of a Brahman in the several tribes have four shares, or three, or two, or one &c. &c."

Son begotten by Sudra on female slave.

So also in regard to a Sudra's estate the Mitakshara in ch. I. sec. XII. provides that while the father is alive a son begotten by a Sudra on a female slave must depend on his father for his share, though after his death he may inherit the whole or share equally with legitimate sons.

Such sons, however, would not be the coparceners of the father.

Sons, grandsons and great-grandsons are coparceners.

The result, therefore, upon examination of the texts is that the owners of the coparcenary property are the sons (including adopted sons) grandsons and great-grandsons of the last owner.

The same result was arrived at by West and Nanabhai Haridas J. J. on an examination of all the texts. *Vide* the judgment of the Bombay High Court in Moro Vishvanath *v.* Ganesh Vithal (1873) 10 Bom. H. C. Rep. 444. In that case Haridas J. is reported to have said.* "The rule, which I deduce from the authorities on the subject, is not that a partition cannot be demanded by one more than four degrees removed from the acquirer or *original owner* of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the *last owner*, however remote he may be from the original owner thereof" *i.e.*, as I have indicated above the sons, grandsons and great-grandsons of the last owner, or, in other words, confining our attention to the persons in existence, the owner and his sons and grandsons.

* P. 465.

Provided they are not disqualified.

But the above enumeration of coparceners would not be complete without our noticing a qualification which the Hindu law lays down. It debars from the coparcenership all those who are blind, lame, or impotent. In a subsequent Lecture on Partition, I shall consider at length who these disqualified persons are. They are expressly excluded from inheritance and partition (*vide* Mit. ch. II, sec. X). The coparceners, therefore, are those sons, grandsons and great-grandsons who are free from the disqualifications.

Summary.

The inferences which arise from the above discussion may be summarised under the following heads.

(1) In certain kinds of ancestral property (as to which we shall see presently) inherited by a man, his sons and grandsons by birth acquire an interest with him—Adopted sons are also his coparceners in such property from the time of their adoption.

See Mitak. ch. I, sec. I, paras. 23 and 27 and Babu Golap Chandra Sastri's Law of Adoption p. 403.

(2) Grandsons whose fathers are dead represent their (deceased) fathers at a general partition of such property. Mitak. ch. I, sec. V, para. 1.

(3) Grandsons, if their father be alive, have not the right to demand partition but are dependent on their father, Mitak. chap. I sec. V, para. 3.

(4) At any instant of time not more than three generations of male descendants are together entitled to the coparcenary property. This follows as a corollary from Mitak. ch. I, sec. I, paras. 2 and 3.

(5) Though the property may be the joint property of a number of persons consisting of

three generations of male descendants, upon the death of the coparcener of the first generation the property would pass, not as an inheritance but by the principles of survivorship, to the surviving coparceners, and also to such other persons as would, according to the foregoing rules, have by birth a vested interest in the ancestral property. In short, while one generation above will be removed by death, another generation downwards will take its place.

(6) But if in the case above supposed any other member were to die, the coparcenary represented by the survivors would take up the share, so that no third person who was not a coparcener previously would by such event become a coparcener.

(7) The distinction between obstructed and unobstructed heritage is similar to the distinction between the vested interest of an heir-at-law and the contingent interest of an heir presumptive.

Cases.

Let us now see how the decided cases help us in the above conclusions. A Full Bench of the Calcutta High Court in Sadabart Prasad Sahu *v.* Foolbash Koer, 1869 (3 B. L. R. F. B. 31 or 12 W. R. F. B. 1) laid down that in a joint Mitakshara family consisting of brothers, and their wives, upon the death of one of the brothers without sons, the surviving brothers took by survivorship and not as an inheritance. In Raja Ram Tewary *v.* Luchmun Pershad (1867) 8 W. R. 15, five Judges of the Calcutta High Court held that under the Mitakshara, sons acquired by birth a right with their father in ancestral property. In Suraj Bunsi Koer *v.* Sheo Persad Sing, (1879), I. L. R., 5 Cal. 147 : L. R. 6, I. A. 88 ; 4 C. L. R. 226, the Judicial Committee of the Privy Council held to the same effect. In Subbayya *v.* Surayya (1886), I. L. R. 10 Mad. 251 the Judges observed.

Survivorship.

"According to Vignyanesvara Yogi, the author of the Mitakshara, the son's ownership in ancestral estate is not subordinate but co-ordinate and it is dependent only when the father himself acquires the property." In Sartaj Kuari *v.* Deoraj Kuari (1888), I. L. R. 10 All. 272, Sir Richard Couch (p. 284) is reported to have said "The great distinction between the doctrine of the Mitakshara in regard to heritage and that of the Dayabhaga, the law in Bengal, is found in ch. I, sec. I, V. 27 where it is said that property in the paternal or ancestral estate is by birth." The right of a grandson whose father predeceased his grandfather is discussed in Luchmun Pershad *v.* Debee Pershad, (1864) 1 W. R. 317. The judgment of the Full Court of Bombay in Apaji Narhar *v.* Ram Chandra Ravji (1891) reported in I. L. R. 16 Bom. p. 29 enters into a full discussion of the rights of grandsons, whose fathers are alive, to a partition against the will of their grandfather (pp. 40-41) see also Rai Bishen Chand *v.* Mussamat Asmaida Koer (1884), I. L. R. 6, All. 560; L. R. 11, I. A. 164. In the Full Bench decision in Jogul Kishore *v.* Shib Sahai (1883) I. L. R. 5, All. 430, the right of a grandson to enforce partition during the lifetime of his father and grandfather was acknowledged, but the principle of this judgment would seem to be at variance with the Privy Council Judgment in Bishen Chand's case above referred to. I ought to tell you here that the term 'sons' does not under the Mitakshara include grandsons as the same word does under the Dayabhaga. See Suraya Bhukta *v.* Lakshminarasamma (1881) I. L. R. 5, Mad. 291.

Right of sons to ancestral property by birth.

Right of grandsons to partition.

The word 'Sons' in Mitakshara does not include 'grandsons.'

Let us next consider what is the property which under the Mitakshara law is coparcenary property. We have seen who the coparceners (using the term in its limited sense) are. They

What is coparcenary property.

are the father, sons and grandsons who in the coparcenary property have at one and the same time a vested interest. What is that property in which they have such interest? In the language of the Hindu Jurists that property is "the unobstructed heritage." Now the author of the Mitakshara defines "heritage" and "unobstructed heritage" in these words:—

"Heritage signifies that wealth which becomes the property of another solely by reason of relation to the owner." It is of two sorts, 'unobstructed' *(apratibandha)* or liable to obstruction *(sapratibandha)*. The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons: and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest upon the demise of the owner, if there be no male issue: and then the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other descendants."

This definition makes no distinction between movables and immovables, and therefore, when a man inherits movables or immovables from his father, grandfather or great-grandfather (and when this takes place, it becomes *unobstructed heritage*) the son and grandson of such man become his coparceners. The principal characteristic of a coparcenary property is that it must have been inherited by the man as an unobstructed heritage, *i. e.*, by reason of the inheritor being either a son or grandson or great-grandson to the

Distinguishing features of such property.

previous holder of the property. It is not necessary that during the lifetime of the previous holder of the property, his son, grandson or great-grandson should have a vested interest in the property. It may be the self-acquisition of the previous holder which he was competent to alienate during his lifetime at his pleasure. But if he does not alienate it during his lifetime, and it passes to his sons, grandsons, or great-grandsons by inheritance, it becomes in the hands of such sons, grandsons or great-grandsons an unobstructed heritage *i.e.,* the rights of the sons and grandsons of the heir attach to such property.

Unobstructed heritage or coparcenary property has several distinguishing features. Thus:

(1) The extent of the interest of each coparcener is not known before actual partition. This follows from what we have already seen *viz.*, that partition is the origin of property. In this connection, you should note that Vijnaneswara discusses the law of partition only in connection with coparcenary property, that is, among the father and his sons and grandsons, or among brothers and their descendants and that he discusses the law of inheritance as respects the obstructed heritage.

(2) Coparcenary property is capable of division at the instance of the father or of a son at any moment and of a grandson in certain circumstances.

This incident has also been already considered in the preceding pages.

(3) Any alienation of such property by a coparcener may be questioned by the other coparceners. For, as respects the property, all the coparceners, before actual separation, have equal rights of enjoyment and if any one or more of them without consulting the wishes of the rest

would alienate any portion of the family property, it is only just that the others should be allowed to set the alienation aside by showing the absence of circumstances which alone would justify an alienation.

Ancestral property.

At the present time, the term 'ancestral property' is used as synonymous with unobstructed heritage, though in its literal acceptation it includes all property coming down from the ancestors, male or female, and either from the direct or collateral ancestors. Thus West and Buhler in their Digest of Hindu Law say: "ancestral property as among the descendants comprises property transmitted in the direct male line from a common ancestor and accretions to such property made with the aid of inherited ancestral estate."

The result is that only the property which a man inherits from his father, grandfather or great-grandfather together with the accretions to such property made from out of the income is coparcenary property, *i.e.* property in which the rights of *his* sons and grandsons attach by birth.

Son cannot compel father to partition property inherited collaterally by the latter.

In Rayadur Nallatambi Chetti *v.* Rayadur Mukunda Chetti (1868), 3 Mad. H. C. Rep., p. 455 it was held that a suit by a son against his father to compel a division of immovable property inherited by the latter from his paternal cousin would not lie, as the son would not by birth acquire a right to such property with his father. So also in Jawahir Singh *v.* Guyan Singh, (1868) 3 Agra H. C. Rep., 78 it was held that a son could not control his father's acts in respect to property the succession to which was liable to obstruction, and it was only in respect to property not liable to obstruction that the wealth of the father and grandfather became the property of his sons and grandsons by virtue of birth. Following the above decisions of the Agra and Madras Courts,

Son cannot control father's acts in respect to such property.

Sir Richard Couch, C.J., in Nund Coomar Lal *v.* Ruzeeooddeen Hossein (1872) reported in 18 W. R., p. 477; 10 B. L. R., 183 held that the son could not control his father's acts in respect to obstructed heritage. The same view was adopted in Jasoda Koer *v.* Sheo Pershad Singh (1889), I. L. R., 17 Cal. 33.

Share of ancestral property received at partition is ancestral property as regards issue.

It has been held in several cases that when ancestral property has been divided among the owners, the share allotted to each of the members is ancestral property in his hands *as regards his own issue*, though it is looked upon as separate property as regards the separated members. On this point see the case of Muddun Gopal Thakoor *v.* Ram Buksh Pandey (1863) 6 W. R., 71, also Adur Moni Deyi *v.* Chowdhry Sib Narain Kur (Mitakshara case) (1877), I. L. R., 3 Cal. 1, also Chatturbhooj Meghji *v.* Dharamsi Naranji (1884), I. L. R., 9 Bom., 438.

Property received by son as gift or under will ancestral or not.

It is not always easy to say, whether when a son receives any property from his father under a deed of gift or a will, such property should be considered ancestral (in the limited acceptation of the term) or self-acquired. In the case of Muddun Gopal Thakoor *v.* Ram Buksh already referred to, the Judges held that in the hands of the successor, the property was to be regarded as ancestral.

Test for determining the point.

The correct test for the determination of the question, whether in any individual case the property received by the successor under a will or gift should be looked upon as ancestral or self-acquired, depends upon whether the gift or the devise was valid. If in any particular case the father gives away his self-acquired property which he is competent to give away, the recipient though he would have been the legal heir if no disposition had been made of it by the acquirer would take the property not as heritage but as

self-acquired property. But if the father executes a will in respect of the *whole ancestral property*, in favor of his sons these latter would not take the property under the will, but would receive it as ancestral property in coparcenership with their sons and grandsons.

Property purchased from the profits of ancestral property should like the corpus be looked upon as ancestral property. On this point see the following cases :—Sudanund Mohapattur *v.* Bonomallee Doss, (1863), 2 Hay, 205; Sudanund Mohapattur *v.* Soorjoo Monee Dayee (1869), 11 W. R., 436. Jugmohan Das *v.* Mangal Das (1886), I. L. R., 10 Bom., 528, and Ramanna *v.* Venkata I. L. R. (1888), I. L. R., 11 Mad., 246. You will see, these cases lay down that not only should the property which was acquired from the profits *after* the birth of a son and coparcener be looked upon as ancestral but also that all property purchased at a time when the father was the absolute owner of the income, *i. e. before* the birth of the son should also be held to be joint family-property. In this connection it should be noted that in Sham Narain Singh *v.* Rughoobur Dyal (1877), I. L. R., 3 Cal., p. 508; 1 C. L. R., p. 343, Ainslie and Kennedy, JJ., were inclined to think that immovable property purchased with ancestral movables partook of the incidents of ancestral immovable property.

Property purchased from the profits of ancestral property.

Even when the purchase was made before the birth of a son.

Ancestral movables converted into immovables.

To form a clear idea of coparcenary property, let us now consider some descriptions of property which are not coparcenary property though possessed by the members of a joint family.

Instances of properties which are not coparcenary.

(*a*) One or more members of a joint family may inherit property from collateral ancestors. To such property, their sons and grandsons would have no right by birth, and it would not come under the description of "unobstructed heritage."

Collateral inheritance.

Jasoda Koer *v.* Sheo Pershad Singh (1889), I. L. R., 17 Cal., 33. In the case here supposed if more persons than one succeed jointly to an estate by collateral succession, such members as between or among themselves would be joint owners but by reason of their succeeding *per capita* to defined shares the principles of survivorship would not come into operation on the death of any of them. Jasoda Koer *v.* Sheo Pershad Singh. But when property inherited collaterally is not disposed of by the inheritor or heir and passes by descent, it becomes coparcenary property in the hands of the sons, and *their* sons and grandsons become entitled thereto jointly as if it were "unobstructed heritage," *vide* Ram Narain Singh *v.* Pertum Singh (1873), 20 W. R., 189; 11 B. L. R., 397. Chatturbhooj Meghji *v.* Dharamsi Naranji (1884), I. L. R., 9 Bom. 438. (see p. 450.) In this connection it should be noted that the Privy Council in Muttayan Chetti *v.* Sangili Vira Pandia (1882), I.L. R., 6 Mad. 1; L. R. 9 I.A, 128; 12 C. L. R. 169 held that property inherited from a maternal grandfather may not be self-acquired property and doubted if it was not ancestral property. The above case was discussed in Jasoda Koer *v.* Sheo Pershad Singh (1889), I. L. R., 17 Cal., 33.

Separate acquisition without use of ancestral property.

(*b*) One or more members of a joint family may acquire property by their own exertions. Such property movable or immovable would not be the coparcenary property of the family. In the earliest times, *i. e.*, in the days of the patriarchal family, the acquisitions fell into the common stock. Manu ch. VIII. sloka 416 says "Three persons, a wife, a son and a slave are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they

belong." To the same effect is the text of Narada (ch. V. para. 59) who says, "of a son, he is of age and independent in case his parents be dead: during their lifetime he is dependent even though he be grown old." Upon the decline of the Patriarchal, and the rise of the joint, family consisting generally of brothers, the authority of the eldest became limited and the inconvenience of the above rule of Manu was perceived. No individual member had any particular incentive to exert, so long as he was not sure that the fruits of his exertions would be exclusively his. Rules were therefore made for allowing acquisitions to belong to the persons to whose exertions they were due, and accordingly we find Manu, when speaking of joint family of later days consisting of brothers and other descendants in ch. IX. slokas 206-209 says—"what a brother has acquired by labor or skill without using the patrimony, he shall not give up without his assent, for it was gained by his own exertion." The author of the Mitakshara in ch. I. sec. IV in discussing what effects are not liable to partition quotes verses 118 and 119 of Book. II. of Yajnavalkya. They are :—

118. "Whatever else is acquired by the coparcener himself without detriment to the father's estate, as a present from a friend or a gift at nuptials, does not appertain to the co-heirs.

119. "Nor shall he, who recovers hereditary property, which had been taken away, give it up to the parceners: nor what has been gained by science."

The author then adds that the qualifying words "without detriment to the father's estate must be applied to each one of the acquisitions enumerated

in the verses. (See ch. I. sec. IV. para 6). The conclusions arrived at are given in paras. 29-31.*

While on this subject, let me draw your attention to the interpolation made by the author of the Mitakshara of the words "or mother's" between the words "father's" and "estate" in the passage quoted from Yajnavalkya. The result is that property acquired with money from the paternal or maternal estate is not looked upon as self-acquired property.

What amounts to spending of patrimony.

What would amount to an expenditure of partimony so as to make the acquisition ancestral property was considered in Purtab Bahadur *v.* Tilukdharee 1807, Select Reports Vol. I. p. 236 and the principles there laid down were that "of several brothers living together in family partnership, should one acquire property by means of funds common to the whole, the property so acquired belongs jointly to all the brothers. Should, however, the means of acquisition, drawn from the joint funds, be of little consideration, and the personal exertions considerable, two shares belong to the acquirer, and one to each of the other brothers." The above principles were also laid down in Sree Narain Berah *v.* Gooro Pershad Berah (1865) 6 W. R. 219 and Sheo Dyal Tewaree *v.* Bisho Nath Tewaree (1868) 9 W. R. 61.

Marriage presents.

(*c*) Nuptial presents which are made to the bridegroom belong to the bridegroom, notwithstanding that he may be a member of a joint

---

*29. It is settled, that whatever is acquired at the charge of the patrimony is subject to partition. But the acquirer shall, in such a case, have a double share, by the text of Vasishtha. 'He among them, who has made an acquisition, may take a double portion of it.'

30. The author propounds an exception to that maxim. 'But if the common stock be improved an equal division is ordained.'

31. Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place: and a double share is not allotted to the acquirer.

family. The only condition is that the presents must be obtained without causing any detriment to the ancestral wealth *i. e.*, ancestral money must not be spent in order to secure such presents. Yajnavalkya's text and Vijnaneswara's comments thereon have already been quoted when dealing with the subject of acquisitions of labor without the spending of joint money. In Beharee Lal Roy *v.* Lall Chand Roy (1876) 25 W. R. 307 Macpherson J, upon a consideration of the texts of Hindu Law, held that when one of two brothers, who inherited no property from their father, obtained valuable presents by marriage, the other was not entitled to a share of the same though he lived with his brother as member of a joint family. Here from the nature of things, there was no detriment to ancestral or joint property of the family, and consequently the presents by virtue of the texts we have just considered became the exclusive property of the brother who acquired them.

It has been held that in modern times most of the marriages take place in the Brahma form in which the bridegroom has not to pay anything to the bride's father. Judoonath Sirkar *v.* Busunt Coomar Roy Chowdhury (1871) 16 W. R. 105. But though the bride's father receives no money in cash, both parties,—the bridegroom's as well as the bride's—have to spend large sums in the exchange of gifts. Marriage presents obtained under such circumstances should be looked upon as divisible.

Ancestral property recovered with out help of joint family property.

(*d*) When a member of an undivided family without spending any money belonging to the joint family recovers any ancestral property, he acquires it for himself, and his coparceners in the family-property are not entitled to any shares therein. This rule of law is based on Yajnavalkya's text, Book II

verse 119 already quoted. It should be remembered that the qualification "without detriment to the father's estate" mentioned in verse 118, applies, according to Vijnaneswara to verse 119 also.

Vijnaneswara in ch. I, sec. 5 para 11 quotes Manu ch. 9 sloka 209 which runs as follows: "If the father recover paternal wealth not recovered by his co-heirs, he shall not, unless willing, share it with his sons; for, in fact, it was acquired by him." He also quotes with approbation in ch. I. sec. IV, para. 3, a text of Sankha which runs in these words "Land inherited in regular succession, but which had been formerly lost and which a single heir shall recover solely by his own labor, the rest may divide according to their due allotments having first given him a fourth part." These texts which at first sight seem contradictory, may be reconciled by making the former applicable to the only case of the *father* recovering the lost property and by making the latter apply to all other cases.

But it is not every recovery of ancestral property that would entitle the recoverer to treat the property as self-acquired. The texts as well as the reported cases lay down the restrictions.

Reported cases on the point.

In Visalatchi Ammal *v.* Annasamy Sastry (1870) 5 Mad. H. C. Reports, p. 150, Scotland, C. J., in reference to a contention made before him that property redeemed by a member should be held to be the self-acquired property of the member, said. "We are of opinion that the rule of law thus propounded is inapplicable to the present case. In the first place, we are not prepared to hold that the rule extends to property held by a title derived from the joint family. The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply to hereditary property of which the members of the

family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time. * * * But supposing this construction not to be correct, we rest our opinion on the ground that the recovery to be within the ordinance should appear to have been undertaken when the neglect of the coparceners to assert their title had been such as to shew that they had no intention to seek to recover the property, or were at least indifferent as to its recovery and thus tacitly assented to the recoverer using his exertions and means for that purpose." To the same effect are the observations of Macpherson, J., in Bissessur Chackerbutty *v.* Seetul Chunder Chackerbutty (1868), 9 W. R., 69 and of Markby, J. in Bolakee Sahoo *v.* Court of Wards (1870), 14 W. R., 34 and of Sir Charles Turner, C.J., in Naraganti Achammagaru *v.* Venkata Chalapati (1880), I. L. R., 4 Mad. p. 250 (see page 259).

When the recovery is due to the spending of ancestral funds, the acquisition is classed as ancestral property (*vide* the case of Jugmohan Das *v.* Mungul Das, I. L. R., 10 Bom. 528 already referred to).

Gains of science.

(*e*) Gains of science made by any individual member of a joint family without detriment to the ancestral estate belong to the acquirer as his exclusive property and are not liable to partition. This rule of law is also founded on the text of Yajnavalkya quoted from Book II verse 119. You should read this in connection with para 6 sec. IV ch. I. The words there used are "what is gained by science *without use of father's goods.*"

In para 8 Vijnaneswara quotes in this connection a passage of Narada which runs in the following words "He who maintains the family of a brother studying science, shall take, be

he ever so ignorant, a share of the wealth gained by science." So again in para. 13 he quotes Manu chap. 9 sloka 204. "After the death of the father if the eldest brother acquire any wealth, a share of that belongs to the younger brothers provided they have duly cultivated science." It seems that the duty, enjoined on the brother studying science to share his acquisitions with his brothers who took care of the family during his absence at his teacher's, is founded on principles of equity and natural justice, and that the rule of law which provides for the eldest brother sharing his acquisitions from all sources with his learned brother was provided only for the encouragement of learning. The student will do well to read on this point the Lectures delivered by Professor K. K. Bhattacharyya, pp. 661—667.

Reported cases on the point.

This mode of separate acquisition of property by a member of an undivided family has been considered in several reported cases. Their Lordships of the Privy Council in Pauliem Valoo Chetty *v.* Pauliem Sooryah Chetty (1877), I. L. R. 1 Mad. p. 252; L.R., 4 I.A. p. 109, doubted the correctness of the very wide proposition of law therein contended for. Sir Robert Collier in delivering the judgment of the Committee, said "This being their Lordships' view it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant—which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property,—is or is not maintainable. Very strong and clear authority would be required to support such a proposition." His Lordship was inclined to adopt the more

moderate view of the law laid down by Jackson and Mitter, JJ. in Dhunookdharee Lall *v.* Gunput Lall (1868), 10 W.R., 122; 11 B. L. R., 201 note. This point was subsequently considered in 1882 in Lakshman Mayaram *v.* Jamnabai (1882), I. L. R., 6 Bom. p. 225. The judges held that the education intended by the texts was the special training for a particular profession which is the immediate source of the gains and "not the elementary education which is the necessary stepping stone to the acquisition of all science." This case was followed in Krishnaji Mahadev *v.* Moro Mahadev (1890), I.L.R., 15 Bom. p. 32. The other cases to which reference may be advantageously made are Bai Manchha *v.* Narotam Das, (1869) 6 Bom. H. C. Rep. A. C., 1, Durvasula Gangadharudu *v.* Durvasula Narasammah (1872), 7 Mad. H. C. R., 47, and Boologam *v.* Swornam (1880), I. L. R., 4 Mad. 330.

Grants from Sovereign.

(*f*) It not unfrequently happens that grants of estates or Jagirs are made by Government in their sovereign right to individual members of undivided families in recognition of their public services. Such grants are in the nature of rewards and if the consideration for which they may have been granted be not traceable to any expenditure of the funds of the family, the property would be self-acquired as contradistinguished from ancestral within the meaning of the verse 118 Book II of Yajnavalkya already quoted. On this point see the case of Kattama Natchiar *v.* the Rajah of Shivagunga, 9 M. I. A., p. 539; 2 W. R. P. C. 31. But if the grant be only a confirmation in the name of one member of a joint family, of a grant which originally belonged to the family, it cannot be looked upon as a separate acquisition by the individual member. On this point the case of Beerpertab Sahee *v.* Rajender Pertab Sahee

(1868) commonly known as the Hunsapore case reported in 12 M. I. A. p. 1; 9 W. R., P. C. 15 may be referred to. But this is a question of evidence and of construction of grants and is not peculiar to the law of joint property.

Savings made by proprietor for time being of impartible estate.

(*g*) We have seen that in a joint family, acquisitions or purchases made from out of the income of the joint family are looked upon in the same light as the corpus or the source. This is true and just when the income is the joint property of the members. In such a case the savings made also become part of the joint property. But the case is different when although the property is the common property of the family, the income is at the absolute disposal of any single member of the joint family. And this is exactly the case with the savings made from out of the income of an impartible estate. We shall in a subsequent lecture see that estates which, under the custom of the family or the terms of the grants whereby they were created, are impartible, are not to be looked upon as necessarily the self-acquired property of their owners for the time being *i. e.*, as if they cannot be the joint property of the family. In fact in the Mitakshara territory, estates impartible in their nature and yet the joint property of the family are very common. As to such estates, the owners for the time being have the absolute disposal of the income and any savings made by them are therefore looked upon as their separate property. Such property if left undisposed of by the holder would be partible among the heirs.*

We have up to this time seen that a Mitakshara joint family generally consists of a large number of persons—males and females—but of

* Rajeswara Gajapati Naraina Deo *v.* Virapratapah Rudra Gajapaty Naraina Deo (1869) 5 Mad. H. C. R. p. 31. See, p. 41.

them, only some males are the owners of the joint property of the family. We shall now see that of the rest, some of the males and females are entitled to maintenance from out of the joint property. The subject of maintenance generally does not form a part of my subject. I shall not therefore discuss here whether a Mitakshara father inheriting no ancestral property from *his* father is under any legal or moral obligation to maintain an adult son, or whether a father-in-law under similar circumstances is bound to support a widowed daughter-in-law. These and similar questions are parts of the general subject of "Maintenance under the Hindu Law." What I have to consider is who are the members of the joint family, who by reason of the family being possessed of joint property are entitled to maintenance, and whether as regards those persons, their maintenance would be a charge on the joint property, and if so, under what circumstances. If a son or a wife has a moral claim to support from his father or her husband, such claim stands upon its own merits.

Members of joint family entitled to maintenance.

General question of maintenance is not subject of consideration.

Properly speaking the subject of maintenance ought to be treated after that of partition; for so long as the family is joint, all persons in the family, whether they be coparceners or merely entitled to maintenance, do receive maintenance on the same scale. But I prefer treating the subject here, in as much as even before an actual partition of ancestral property among the coparceners, females who would be merely entitled to maintenance at a partition do sometimes find it necessary to seek the help of courts in order to be able to support themselves. In several instances the profits of a portion of the joint property are assigned to a widow for her maintenance, and such portion upon her death reverts to the family. In other cases a monthly allowance in cash is determined upon and

Maintenance, connected with partition.

provided for. But in either class of cases the family-property remains joint as regards the other members, and the allotment of a portion of the family-property for purposes of maintenance of some members does not affect the undivided status of the family.

In a subsequent Lecture we shall see that at a general partition, property sufficient to meet the demands for maintenance of those entitled to it is frequently set apart and the rest divided among the coparceners. The portion set apart remains the joint property of the coparceners and is divided among them or their heirs after the liability for maintenance has ceased.

Texts as to who are entitled to maintenance

In considering the subject of maintenance let us first examine the Rishi texts on the point.

VISHNU XV. (DR. JOLLY).

"32. Outcasts, eunuchs, persons incurably diseased or deficient in organs of sense or action; such as blind, deaf, dumb or insane persons or lepers do not receive a share.

"33. They should be maintained by those who take the inheritance.

"34. And their legitimate sons receive a share.

"35. But not the children of an outcast.

"36. Provided they were born after the commission of the act on account of which the parents were outcasted.

"37. Neither do children begotten by husband of an inferior caste on women of a higher caste receive a share.

"38. Their sons do not even receive a share of the wealth of their paternal grandfather.

"39. They should be supported by the heirs.

VASISHTHA XVII. (DR. BUHLER).

"53. Eunuchs and mad men have a claim to maintenance."

BAUDHAYANA PRASUN II. ADHYAYA 2. KANDIKA 3.

"37. Granting food, clothes and shelter they shall support those who are incapable of transacting legal business.

"38. (*viz.*), the blind, idiots, those immersed in vice, the incurably diseased and so forth.

"39. Those who neglect their duties and occupations.

"40. But not the outcast nor his offspring.

"42. But he shall support an outcast mother without speaking to her.

NARADA XIII.

"24. Persons afflicted with a chronic or acute disease or idiotic or mad or blind or lame (are also incapable of inheriting). They shall be maintained by the family, but their sons shall receive their respective shares of the inheritance.

"26. They shall make provision for his (deceased brothers') women till they die, in case they remain faithful to the bed of their husband. Should the women not remain chaste, they must cut off that allowance.

"27. If he has left a daughter her father's share is destined for her maintenance. They shall maintain her up to the time of her marriage; afterwards let her husband keep her.

BRIHASPATI XXV.

"54. A wife though preserving her character and though partition have been made is unworthy to obtain immovable property. Food or a portion of the arable land shall be given to her at will for her support." Dr. Jolly.

All these texts appear under the heading "Inheritance," and from the context they evidently refer to a partition of the joint property. The

conclusion I draw from these texts is that where there is joint ancestral property, all the members enumerated in the texts must be supported. By this I do not mean to suggest that where there is no ancestral property, none can claim support. A man may have the moral and legal duty of supporting a number of persons even though he may not be possessed of ancestral property. Thus Manu, Book 3, sloka 406. says. "A mother and a father in their old age, a virtuous wife and an infant son must be maintained even though doing an hundred times that which ought not to be done." This text seems to prescribe a moral and a legal duty for every man whether he be possessed of any ancestral property or not.

Vijnaneswara is silent on the question of maintenance. There are only three verses of Yajnavalkya which have any bearing on this subject. Two of these are:—Book II, verse 123a "Of heirs dividing after the death of the father, let the mother also take an equal share. 143. And their childless wives conducting themselves aright must be supported; but such as are unchaste should be expelled and so indeed should those who are perverse."

The first of the above two verses is quoted by Vijnaneswara in discussing who are entitled to shares at a partition and the second in discussing the question of inheritance to one who leaves no nearer heirs. In treating of the exclusion of certain persons from inheritance, Vijnaneswara quotes the third verse from Book I. It is V. 140 which runs in these words "An impotent person, an outcast and his issue, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease as well as others similarly disqualified must be maintained, excluding them, however, from participation." These are all the texts on the point.

While on the subject of maintenance as incidental to the possession of joint property it would not be out of place to mention that under the Hindu Law one who inherits the property of another is under a legal obligation to discharge even the merely moral duties of the latter. Thus if it is the moral duty of a man to support his widowed daughter-in-law, it would be a legal duty of his son to support his own widowed sister-in-law. The heir holds the property for the benefit of his ancestor. So although a father-in-law could not be compelled to support his widowed daughter-in-law, still upon his death, the inheritor of his property—say his son,—the brother-in-law would be bound to provide her with maintenance.

Rights of daughter-in-law and sister-in-law.

Let us now attempt to use the texts we have quoted in connection with the owners of a coparcenary property.

It is clear that so long as the family is joint and is in the enjoyment of joint property the coparceners—and who they are we already know—are entitled to be maintained. It is *their* property. It also follows that other persons who *would have a moral and legal claim* upon the coparceners for maintenance should also be supported from out of the joint property. Now the persons who without reference to property would have a claim upon another to maintenance are his infant sons, his unmarried daughters, his wife and his parents. Some of these persons may, by reason of their being his coparceners, be entitled to maintenance as of right. The texts of Manu already quoted* establish the right of minor sons, wife and parents. As to daughters their right has to be inferred from Mitak. ch. I, s. VII, para. 5, which provides a share for her at partition.

Coparceners.

Persons entitled to maintenance without reference to ancestral property.

---

* Book III Sloka 406.

Members expressly excluded from inheritance.

Besides the two classes of persons above enumerated *viz.*, the coparceners and their dependants, there may be a third class of persons who without being coparceners would be entitled to maintenance. These are the persons who are expressly excluded from inheritance, the blind, the lame, the impotent, the outcast and the lepers. These persons would not be coparceners in the joint property and their shares upon a partition would go to increase the shares of the coparceners. The ancient Rishis therefore thought it fair and just that these latter should support the disqualified members and their wives. For similar reasons the widow and unmarried daughter of a deceased undivided brother and a widowed daughter-in-law would be entitled to maintenance; for, though it is true that the deceased brother or the son had in the absence of a partition no property and his interest in the joint property lapsed upon his death to the survivors, not as assets left by the deceased but by the principles of survivorship, yet as the brother and the son might by partition, during their lives make provision for their* wives, the law allows them maintenance from the joint property.

Widow and unmarried daughter of a deceased undivided brother and widowed daughter-in-law.

Unmarried sister.

The right of the unmarried sister to maintenance would follow from the consideration that she is the daughter of the previous owner and coparcener who was bound to support her. There is, besides, the text of Yajnavalkya:—"But sisters should be disposed of in marriage giving them as an allotment the fourth part of a brother's own share."† Her right to maintenance has therefore to be inferred.

---

* Devi Persad *v.* Gunwanti Koer (1895), I. L. R., 22 Cal. 410

† Book II. v. 124a.

Reported cases on the subject of maintenance.

Let us now examine the decided cases. In Savitri Bai *v.* Luximi Bai (1878), I. L. R., 2 Bom. 573, a Full Bench of the Bombay High Court upon a consideration of the ancient Smritis and the commentaries on them, and also of the cases on the question of maintenance decided in the several High Courts and of the practice in the Bombay Presidency, came to the conclusion, that a claim for maintenance by a Hindu widow against the uncle of her deceased husband—his nearest surviving male relative,—was unsustainable where the defendant was separate in estate from the plaintiff's husband at the time of his death, or where at the institution of the suit the defendant had not in his hands any ancestral estate or any estate which had belonged to the plaintiff's husband. The learned judges on p. 597 speaking of the texts say :—"We have no need, in this case, to decide positively upon the right to maintenances under such circumstances as we have here, of a wife against her husband, or of a mother against her son. It is, however, incumbent upon us to notice in the language of Manu and other Hindu jurists, an important distinction when without reference to the existence of family-property they especially treat of the maintenance and support of the wife or of parents or of an infant son, and when they speak of the maintenance and support of the females of the family at large. In the former case their tone is mandatory, in the latter only preceptive."

The above decision was followed by a second Full Bench of the Bombay High Court in Apaji Chintaman Devdhar *v.* Ganga Bai (1878), I.L.R., 2 Bom. p. 632. Here the claim of a brother's widow for maintenance was disallowed because the defendant did not hold any ancestral property or receive any property from the plaintiff's husband.

In Madhav Rav *v.* Ganga Bai (1878) I. L. R.,

2 Bom. 639, the Court went to the length of holding that the amount of maintenance was limited to the extent of the income of the property received by the defendants from the plaintiff's husband or in respect of which the plaintiff's husband had a claim.

In Kalu *v.* Kashi Bai (1882) I. L. R., 7 Bom. 127; Bai Kanku *v.* Bai Jadav (1883) I. L. R., 8 Bom. 15; and Bai Daya *v.* Natha Govind Lal (1885) I.L.R., 9 Bom. 279, claims for maintenance were disallowed on the ground that the defendants held no joint property.

In Adhibai *v.* Cursandas Nathu (1886) I. L. R., 11 Bom. 199, the claim of a widow for maintenance was allowed against her late husband's brother—her husband having died during the lifetime of his father, who was possessed of only self-acquired property and who died intestate leaving the defendant his sole surviving son. Justice Farran held that the father having died intestate, the property when inherited by the son became ancestral property in his hands according to the principles of Hindu law and the son by reason of his holding ancestral property was bound to maintain his sister-in-law who was a member of the joint family. According to the decisions in I. L. R., 2 Bombay Series already referred to and Lalti Kuar *v.* Ganga Bishun, 7 N. W. P. Rep. p. 261, a further ground on which the claims of widows to maintenance were sometimes allowed seems to have been the idea that their husbands died possessed of some property which by reason of their widows' incapacity to inherit was received by the persons against whom the claims were pressed. But in the case before Justice Farran, the property having been the self-acquired property of the father-in-law, during his lifetime the plaintiff's husband had no interest in it and the claim for maintenance

Moral obligation of a person becomes a legal obligation of his son when he inherits paternal property.

therefore could not have been based on this ground. The learned judge allowed the claim by the application of the principle, that as it was a moral duty of the father-in-law to support his daughter-in-law, the brother-in-law, who inherited the father-in-law's property, became legally bound to discharge the moral obligation of the father-in-law.

The view here suggested was expressed by a Full Bench of the Allahabad High Court in Janki *v.* Nandram (1888) I. L. R., 11 All. p. 194, followed by Justice Banerji in the Calcutta High Court in Kamini Dossee *v.* Chandra Pode Mondle (1889) I. L. R., 17 Cal. 373. In Amma Kannu *v.* Appu (1887) I. L. R., 11 Mad. 91, it was held that possession of ancestral property by a father-in-law was a condition precedent to maintenance being granted to the daughter-in-law, and that only aged parents, wife and minor children had a valid claim to maintenance against any man irrespective of any ancestral property. See also Subbarayana *v.* Subbakka, I. L. R., 8 Mad. 236.

I am afraid I have been digressing from my main subject. There is, it is true, a conflict of opinions as to whether, when a man is not possessed of ancestral property, he is bound legally to support his widowed daughter-in-law or sister-in-law. See the cases already cited and Khetra Moni Dasi *v.* Kashinath Das (1868) 2 B.L.R., A.C. p. 15; 10 W.R., F.B. 89. An examination of these decisions is not necessary for the purpose of these Lectures. But all the authorities agree in thinking that when a person possesses ancestral property, in which another, but for some legal disqualification, would have been entitled to an interest, either directly or through a third person who was under a legal and moral obligation to support such person, the latter would have a valid claim to maintenance against the person holding the ancestral property.

Adult sons, only when they are coparceners.

You will have noticed from the texts, already quoted, that adult sons unless they are coparceners cannot have any claim on their fathers for maintenance. This point was decided in a Dayabhaga case, Premchand Peparah *v.* Hulas Chand Peparah (1869) reported in 4 B.L.R. App. 23; 12 W.R. 494 and the decision was cited with approbation by Pinhey J., in Ram Chandra Sakharam *v.* Sakharam Gopal Vagh (1877) I. L. R., 2 Bom. p. 346 (see p. 350). On this point you may refer also to the case of Nilmoney Singh Deo *v.* Baneshur (1878) I. L. R., 4 Cal. p. 91.

Sons by concubines.

The texts provide for maintenance of sons by concubines.* The case of Muttu Samy Jaga Vira Yettapa Naikar *v.* Venkata Subba Yettia (1865) reported in 2 Mad. H.C. Rep. p.293, and Coomara Yettapa Naikar *v.* Venkateswara Yettia (1870) 5 Mad. H. C. Rep. 405 may be cited in support.

Unchastity forfeits maintenance.

Before I conclude this branch of my subject, I ought to point out to you that unchastity, according to the text† and all reported cases, disentitles a woman to all claims to maintenance. See the decisions in the following cases—Valu *v.* Ganga (1884) I. L. R., 7 Bom 84; Vishnu Shambhog *v.* Manjamma (1887) I. L. R., 9 Bom. 108; Yashvantrav *v.* Kashi Bai (1887) I. L. R., 12 Bom. 26; Romanath *v.* Rajonimoni Dasi (1890) I. L. R., 17 Cal. 674; Daulta Kumari *v.* Meghu Tewari (1893) I. L. R., 15 All. 382; Nagamma *v.* Virabhadra (1894) I. L. R., 17 Mad. 392.

Charge for maintenance.

Let us next consider whether maintenance, whenever there is a legal liability for it, is a charge on any property in the hands of the persons liable to pay such maintenance. I exclude, of course, the coparceners who have a right to be maintained

---

* Mit ch. I sec. XII. provides for shares and indirectly for maintenance.

† Narada 13, 25-26 quoted in Mitakshara ch. II. sec. 1 para. 7.

from their own property. The question raised may be considered in two parts: (1) whether the person entitled to maintenance can at any time seek for a declaration of his or her lien for maintenance on any property in the hands of the person liable to pay such maintenance, and (2) whether, when the maintenance is payable, only because of the possession of any ancestral property, the person entitled to maintenance can follow such property in the hands of third persons who may derive their title by purchase, gift or devise from the person originally liable to pay the maintenance. As to the first part of the question: when the liability to pay the maintenance is based upon the possession of ancestral property, it is manifest that the maintenance can be charged on the ancestral property while it continues in the possession of the person liable to pay the maintenance.* In other words, it would be open to the person entitled to the maintenance to have his or her lien on the property, either declared by decree of court, or provided for in a private agreement. In such a case when once the lien has been formally created, any transfer of the property charged with such lien would be subject to the lien *i. e.*, the transferee would be bound to discharge it. But before such lien is actually declared the property would not be subject to any charge. Bhagirathi *v.* Anantha Charia (1893) I. L. R. 17 Mad. 268. The other cases where the liability to maintain is a moral and legal obligation wholly irrespective of the possession of any property, we need not consider. The person entitled to the maintenance may, when a cause of action should arise, obtain a decree declaring his or her

When claim based on possession of ancestral property.

When not so based.

* Mahalakshmamma Garu *v.* Venkataratnamma Garu (1882) I. L. R. 6 Mad. 83; Muttia *v.* Virammal (1886) I. L. R. 10 Mad. 283; Kalpagathachi *v.* Ganapathi Pillai (1881) I. L. R. 3 Mad. 184; Sham lal *v.* Banna (1882) I. L. R. 4 All. 296.; Masha Devi *v.* Jiwan Mal (1884) I. L. R. 6 All. 617.

lien on any property which the person liable to pay the maintenance may be possessed of. Let us now discuss the second part of the question *viz.*, whether, when the liability to pay the maintenance is based on the possession of any ancestral property, such property can be followed in the hands of the third persons who may have acquired a right to the same by gift, devise or purchase from the person liable to pay the maintenance. It goes without saying that when a specific charge has been created either by agreement between parties or by a decree of Court, the transferee takes the property subject to the charge. But what we have now to consider is, whether when no specific charge has been so created, the law would imply a charge.

Can such property be followed in hands of third persons.

When a specific charge has been created.

when not.

Let us first consider whether properties can be followed in the hands of donees. On the subject of gifts, Brihaspati says. XV. 2. "That which may not be given is declared to be of eight sorts, joint property, a son, a wife, a pledge, one's entire wealth, a deposit, what has been borrowed for use, and what has been promised to another."

Case of gifts.

The above precept has been amplified in the succeeding paragraphs 3-7, Vide Professor Jolly's Translations edited by Dr. Max Müller in his "Sacred Books of the East, Vol. XXXIII part I p. 342). There are similar texts of Katyayana and Vyasa quoted by Mr. Mayne in his work on Hindu Law and Usage. Narada in Book IV, para. 4 prohibits the gift of the whole property of one who has offspring (*Vide* the Translations above referred to p. 128).

On this point you may refer to the judgment of Mr. Justice West in Narbada Bai *v.* Mahadeo Narayan (1880) I. L. R., 5 Bom. p. 99. That learned judge held that, under the Mitakshara law, a Hindu husband could not give away the whole of his self-acquired immovable property to the

destitution of his wife. But the High Court of Calcutta in a case governed by the Dayabhaga (Debendra Coomar Roy Chowdhry *v.* Brojendra Coomar Roy Chowdhry (1890) I. L. R., 17 Cal. 886) held that a person had the right to dispose of his property by will so as to deprive his widow of her share on partition. You must remember that we are not now considering the question of the validity of gifts made by an undivided member of a joint family. Here we are considering whether gifts of entire property made by all the persons entitled to the coparcenary are valid as against the claims of persons entitled to maintenance. If such gifts are made gratuitously or with the purpose of depriving a person of his maintenance, then under the Transfer of Property Act IV of 1882 sec. 39, or where that Act does not apply under the general law, such person may enforce his right to maintenance against the property in the hands of the donee. The same consideration would apply to devises of entire property.

Case of devise.

Sales stand on a different footing. They may often be necessary for the payment of debts, the non-payment of which would consign the debtors to hell. Purchasers may purchase in good faith and for proper price from which the claimant himself for maintenance may derive some advantage, and if the sales are set aside they may not get back their purchase-money. But the conflicting equities which arise in the case of sales have no place in the case of voluntary gifts. On this point sec. 39 of Transfer of Property Act* and the

Case of sale.

* "Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hand."

following decisions may be referred to:—Bhagabati Dasi *v.* Kanai Lall Mitter (1871), 8 B. L. R., 225; 17 W. R., 433 note; Adhirani Narain Kumari *v.* Shonamalee (1878) I. L. R., 1 Cal. 365; Laksman Ram Chandra Joshi *v.* Satyabhama Bai (1877) I. L. R., 2 Bom. 494, where it was held that even if the purchaser had notice of the claim for maintenance, he would not be liable to meet the claim. Shamlal *v.* Banna (1882) I. L. R., 4 All. p. 296, Kalpagathachi *v.* Ganapathi Pillai (1881) I. L. R., 3 Mad. 184.

When portion of property remains in the family, purchaser cannot be followed.

Before leaving this part of the subject I ought to tell you that under the reported cases, so long as the person liable to pay the maintenance is in possession of a portion of the ancestral property sufficient to defray the maintenance expenses thereout, the property in the hands of a purchaser cannot be followed; *vide* the case of Adhiranee Narain Coomary *v.* Shonamalee (1876) I. L. R., 1 Cal. 365, already referred to. Nor can a female, who would be entitled to a share in lieu of maintenance at a partition, be entitled to claim such share except when the joint estate ceases to be so. See the case of Barahi Debi *v.* Deb Kamini Debi (1892) I. L. R., 20 Cal. 682.

Family dwelling house.

With regard to the family dwelling house, the Transfer* of Property Act sec. 44, para. 2 provides "where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house." This is as vague as any thing can possibly be. It leaves untouched all the rights of the purchaser as are independent of the Act or rather of the section of the Act.

* The Act has no application to Bombay, Burma or the Punjab.

Joint family compared with corporation.

We are now in a position to picture to ourselves a joint Hindu family governed by the Mitakshara Law. It may be compared with corporations. Thus Sir Henry Maine in his work on Ancient Law says :—"Succession in corporation is necessarily universal and the family was a corporation. Corporations never die. The decease of individual members makes no difference to the collective existence of the aggregate body, and does not in any way affect its legal incidents, its faculties or liabilities."

Contrasted with partnership concern.

Mr. Justice Markby in Rangan Mani Dasi *v.* Kasinath Dutt (3 B. L. R., O. C. p. 1; 13 W. R., 76 note) contrasted a joint-family with a partnership concern. He said "There is no analogy whatever, in this respect between the members of a joint Hindu family and the members of a partnership; each partner is the agent of the other, bound, by his contract, to protect and further the interests of his copartners unless relieved from that responsibility by special arrangement; and each partner is entitled to consume on his own account, no more of the partnership property than the share of the profits.

"If he exceeds this, he becomes immediately a debtor to the concern. But in a Hindu family, it is wholly different. No obligation exists on any one member to stir a finger, if he does not feel so disposed, either for his own benefit or for that of the family; if he does do so, he incurs no responsibility; nor is any member restricted to the amount of the share which he is to enjoy prior to division. A member of the joint-family has only a right to demand that a share of existing family-property should be separated and given him; and so long as the family union remains unmodified, the enjoyment of the family-property is, in the strictest sense, common; as against each other the members

of the family have no rights whatever, except that I have mentioned, and the only remedy, for a dissatisfied member, is by partition. But this relation is purely a voluntary one. Like many other relations, which are of frequent occurrence, the law has ascertained and defined, or attempted to ascertain or define, what it is in its unmodified form; but it has not imposed, on any family, the necessity of adopting that relation, or of adopting it in its unmodified form only; it is therefore capable of being modified in every way, and is frequently modified, either by the concurrent will of the family, or by the will of the ancestor from whom the property is derived."

Mode of enjoyment of joint property.

Let us now consider the mode in which joint property is enjoyed by the coparceners. For this purpose it will be convenient to divide joint families into two classes *viz.*, (1) those in which the father is at the head, and (2) those in which an uncle or an elder brother is at the head, of affairs. All the joint families of the present day would fall either under the first or the second class. The reason of the above division of families into two classes must have suggested itself to you. The father is the natural protector in the first group of families. Although the rights of the father and the sons are equal in the ancestral property, yet the father naturally occupies a position of respect and reverence. He is also, as it were, the naturally constituted agent of the sons besides being their protector. The sons are by duty bound not only to be submissive to their father but even to pay his debts with few exceptions. But a family with an uncle or an elder brother at the head, as *kurta*, is in a very different situation. Here the rights of the members are strictly alike; the authority of the *kurta* in such a family is derived by the sufferance of the other members. He may be

removed if it should please the other members to do so.

In families under the leadership of father.

In the first group of families under the leadership of the father, the rent collections are made in the name of the father. There is generally one *tehvil* or purse, and that remains in the charge of the father; liabilities for rent and revenue, due by the family, are met by the father; the household expenses are all defrayed by the father or are defrayed under his superintendence and guidance; sales and purchases of movable and immovable properties are, as a rule, made by the father and in his own name; marriages of male and female children are celebrated according to the wishes of the father who defrays the expenses; *shrads* and *pujas* are performed according to his desires; expenses of education are defrayed by him according to the actual needs of the family, and, in short, all the affairs of the family are carried on by and in the name of the father. I shall once again call to your recollection the apt observations of Lord Westbury in Appoovier *v.* Ramasubba Ayyan (1866)* which I have elsewhere quoted. In the second group of families under the leadership of an uncle or an elder brother, the rights of the members are equal, and, as in the case of families under the leadership of fathers, sales and purchases of properties are made in single names; but the difference in such cases is that whenever the members are dissatisfied with the management they either appoint another of themselves to be the *kurta*, or associate some one or more of themselves with the existing manager. I do not mean to suggest that in the case of a father being the manager, the sons cannot, as a question of law, with their

in other families.

* 8 W. R. P. C. 1; 11 M. I. A. 75. and ante. p. 18.

father's concurrence, constitute one of their number as the manager; but what I say is, that the usual course adopted, when the sons are dissatisfied with the father's management, is to seek a partition.

From what I have stated above it follows that so long as a family is joint and is in the enjoyment of joint property, no individual member can grudge any *bona fide* expenditure in the interests of another member, even when such expenditure is beyond the legitimate share of such member. In a Mitakshara family, it is true, it is idle to speak of a share of any member before partition. But, as we have seen when considering the subject of maintenance, the idea of shares of individual members pervades the whole law and the extent of such shares is well known to the members of the family. Whenever any individual member has reason to be dissatisfied with the management of the father, or is grieved to find that the expenses on behalf of any other member exceed the legitimate share of such member, he seeks a partition of the family property; for, so long as the family remains joint, he cannot prevent any *bona fide* expenditure in the interest of any other member beyond such member's legitimate share.

Liability of Kurta to account.

A question frequently arises as to whether a *kurta*, who is oftentimes the eldest of the coparceners, is liable to the others to account. In Rangan Mani Dasi *v.* Kasinath Dutt (1868) 3 B. L. R., O. C., 1., Mr. Justice Markby was of opinion that in an ordinary joint family the *kurta* could not be called to account at the instance of any individual member. Mr. Justice Dwarkanath Mitter in a subsequent case, in which the question of the liability of a *kurta* to account arose, doubted the correctness of Justice Markby's conclusion, though he agreed with him in his view of a joint family. In making the reference to a Full Bench, Justice Mitter

(5 B. L. R. p. 347 Abhay Chandra Roy Chowdhry *v.* Pyari Mohon Guho 1870) said : " It is true that the position of the managing member of a joint Hindu family is, in many respects, different from that of the managing member of an ordinary partnership concern. But the former is not without his responsibilities. He is entitled to obtain credit from his coparceners for all sums of money *bona fide* spent by him for the benefit of the joint family; but he is certainly liable to make good to them their shares of all sums which he has actually misappropriated, or which he has spent for purposes other than those in which the joint family was interested. Of course, no member of a joint Hindu family is liable to his coparceners for any thing which might have been actually consumed by him in consequence of his having a larger family to support, or of his being subject to greater expenses than the others ; but this is simply because all such expenses are justly considered to be the legitimate expenses of the whole family. Thus, for instance, one member of a joint Hindu family may have a larger number of daughters to marry than the others. The marriage of each of these daughters to a suitable bridegroom is an obligation incumbent upon the whole family so long as it continues to be joint, and the expenses incurred on account of such marriage must be necessarily borne by all the members without any reference whatever to respective interests in the family estate. The rule would be quite different, it is true, in the case of a partnership concern, every member of which is liable to the others for every pice which he has spent over and above his legitimate share in the business. But this distinction, while it goes to create a material difference in the principle, according to which the accounts are to be adjusted

Views of Justice D. N. Mitter.

in the two cases, does not constitute any ground whatever for holding that the managing member of a joint family is not bound to render an account of his managership to the other members if they choose to insist upon it." Sir Richard Couch, in delivering the judgment of the Full Bench, said that the right to call for an account depended upon the right which the members of the joint family had to a share of the property, and that where there was a joint interest in the property, and one party received all the profits, he was bound to account to the other parties who had an interest in it.

To the same effect are the observations of Sargent, C.J., in Damodardas Manek Lal *v.* Uttamram Manek Lal (1892), I. L. R., 17 Bom. 271 (see p. 278). That learned Judge referring to a previous decision of Justice West says :—" Mr. Justice West is here speaking of the manager's liability to a suit for an account and we do not understand him as meaning that the manager is exempt from any liability to account on the occasion of a partition of the family estate between the members * * * and we think it would be difficult to hold that there is anything in the custom of a Hindu family which can justify the manager in refusing to render any account whatever of his management on the occasion of a partition. * * What that account should be, so as to discharge him from his liability to account as manager and what objection the other members can take to it must, we apprehend, depend on the conduct of the manager and the other members, the nature of the property and the circumstances of the family and cannot be satisfactorily stated in definite terms." These observations sufficiently lay down the principle on which the account should be taken.

Principle on which account should be taken.

In Ratnam *v.* Govinda Rajulu (1877) I. L. R. 2 Mad. p. 339 it was laid down, that in the case of improvements of the family property made by the managing member of a Hindu family, where the sum spent was large but the discretion of the managing member was exercised *bona fide* and for the benefit of the estate, and the family, had this benefit, such discretion should not be narrowly scrutinized.

In Lakshman Dada Naik *v.* Ram Chandra Dada Naik (1876) I. L. R. 1 Bom. 561 affirmed by the Privy Council in 1880 I. L. R. 5 Bom. 48, (also 7 C. L. R. 320; L. R. 7 I. A. 181) it was laid down that members of an undivided Hindu family, when making a partition, were entitled, *as a rule*, not to an *account* of past transactions, but to a division of the property actually existing at the date of the partition. The same principles were enunciated in Konerrav *v.* Gurrav (1881) I. L. R. 5 Bom. 589. The reason of this principle as regards adult members living in commensality with the manager is not far to seek. The manager acts as the agent of the members, whose interest in the property, defined (as in a Dayabhaga family) or undefined (as in a Mitakshara family) is joint. He keeps, and need keep, no separate accounts of the individual members. It follows therefore that when called upon to account it would be sufficient for him to show that what he spent was in the interest of the family.

Reason of the rule as regards adult members.

In Gan Savant Bal Savant *v.* Narayan Dhond Savant (1883) I. L. R. 7 Bom. 467 it was held that a minor member of a joint family in the absence of a fraud or collusion was bound by the result of a suit in the name of the manager of the family. *

Minor co-sharers.

* On this point see Damodar Das Manek Lal *v.* Uttamram Manek Lal (1892) I. L. R. 17 Bom. 271.

In Bhasker Tatya Shet *v.* Vija Lal Nathu (1892) I. L. R. 17 Bombay 512 it was held that the manager of a joint Hindu family could, by acknowledging the liability of the family for a debt properly contracted, give a new start to the Law of Limitations.

Revival of barred debt.

In Gopal Narain Mozoomdar *v.* Muddomutty Gooptee (1873) 14 B. L. R. 21 it was held that the manager of a joint Hindu family had no power, by acknowledgment, to revive a debt barred by the law of limitations except as against himself. This principle was acted upon in Kumara Sami Nadan *v.* Pala Nagappa Chetti (1878) I. L. R. 1 Mad. 385.

Minor coparcener wrongly ejected by manager.

In Krishna *v.* Subbanna (1884) I. L. R. 7 Mad. p. 564, it was held that the rule, which limits the right of members of a Hindu family seeking partition to a division of the family property existing at the date of the division, does not apply to the case of an infant who has been ejected by the manager from the family house, and excluded from enjoyment of the family property. In such a case the manager is bound to account to the infant for mesne profits from the date of his exclusion. In Bhivrav *v.* Sitaram (1894) I. L. R. 19 Bom. 532 the principle of this decision was extended to the case of an adult member wrongly excluded from the family.

Alienation by manager.

I shall in the next lecture consider the powers of a manager or *kurta* of a joint family to alienate joint property. It goes without saying that when such alienations are made by the manager on behalf of the family and for its benefit, the other members are bound by the transfer. Such alienations in those cases may be looked upon as acts or transactions done by an agent in the due discharge of his functions as such agent, and they would accordingly be binding on the principal.

Nor is this without authority in the Hindu law itself. Yajnavalkya quoted in Mitakshara ch. I, sec. I, para. 28 says "Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes." Vijnaneswara explains this in the following para. thus: "while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." Thus there is authority in the Hindu law to support the transactions made by the head of the family. In the case of adult persons their consent to the alienation should be inferred from the fact of their acquiescence or delegation of authority.

Presumption as to property purchased in the name of a member of the family.

Regard being had to the fact that purchases of properties in joint families are, more frequently than not, made in the names of single members, you should not presume separate acquisition by any individual member, simply from the fact of his name appearing as the purchaser in documents, or as the proprietor in the property-registers of the collectors. The following cases may be referred to on this point. Jowala Buksh *v.* Dharum Sing (1866) 10 M. I. A. 511; Tundan Singh *v.* Pukh Narayan Sing (1870) 5 B. L. R. 546; 13 W. R. 347, on appeal to P. C. (1874) 22 W. R. 199. The decisions have proceeded so far as to hold that not only should properties standing in the names of male coparceners be presumed to be joint family properties, but that the presumption

Presumption when purchased in the name of a female member.

should also arise when the names of the wives of the coparceners or of any other female members are used. On this point refer to the case of Chunder Nath Moitro *v.* Kristo Komul Sing (1871) 15 W. R. 357 in which the judgment was delivered by Mr. Justice D. N. Mitter "one of the greatest masters of Hindu Law who has ever administered justice in this country." I have quoted here the observations of Wilson J. in Nobin Chunder Chowdhry *v.* Dokhobala Dasi (1884) I. L. R. 10 Cal. 686, in which the above decision was followed.

In the Madras High Court, however, Sir Charles Turner C. J. and Justice Muttusami Ayyar in Narayana *v.* Krishna (1884), I. L. R. 8 Mad. 214, held that the presumption of joint property did not arise when the property stood in the name of a female member. The learned Chief Justice said: "There is not, so far as we are aware, any case in which it has been held that, where property stands in the name of a female member of a Hindu family, it is to be presumed that it is the common property of the family, and that it is incumbent on a person who asserts that it is the property of the lady in whose name it stands to prove it. Nor is there any ground on which such a presumption could be founded. Where a family lives in coparcenary, the presumption which exists in the case of male members arises from the circumstance that they are coparceners. On the other hand, the ladies are not, in an undivided family, coparceners: whatever property they acquire by inheritance or gift is their separate estate, and, although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members or to place it beyond the risk of extravagance on the part of

the male members, such dealings are exceptional and can afford no ground for a general presumption."

While on the question of presumptions I ought to tell you that under the Hindu Law, every Hindu family ought to be presumed to be joint and not separate. In Naragunty Luchmeedavamah *v.* Vengamr Naidoo, (1861) 9 M.I.A., 66; 1 W.R., P.C., 30, their Lordships said that the presumption with regard to a Hindu family is that it remains undivided.

In Nilkristo Deb Barmono *v.* Bir Chandra Thakur (1866) 12 M. I. A., 523; 3 B. L. R., P. C. 13 or 12 W. R., P. C., 21, their Lordships are reported to have said: "The normal state of every Hindu family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things."

Onus of proof as to joint family property.

In this connection I ought to mention that as a member of a joint family may have some separate property of his own, even while the family is joint, a question frequently arises as to whether when a member of a joint family sues another member for joint possession of any property as family-property, he has not the onus on him to shew that it is the property of the family and not of the defendant exclusively. Now, you know that the onus of proof is always shifting from one party to the other as each step in the chain of facts necessary to be established in a particular case is reached. It is an elementary principle of law that the plaintiff has to start his case, but he may be relieved of this duty by the defendant admitting the correctness of some of his allegations. Then again, certain presumptions of fact arise from the peculiar circumstances of a Hindu family.

Presumption of jointness.

The question of the shifting of onus depends upon these presumptions. Thus, suppose a Court has to find whether two Hindu brothers are joint or divided. In the absence of any evidence one way or the other, the Court would be justified in presuming them to be joint; for, as we all know, in India living in joint families among brothers is the rule and separation is the exception. In the same way, in a joint family, all property in the possession of any member of the family should, in the absence of evidence one way or the other, be presumed to be the property of the family. But these are mere presumptions and they may be rebutted by proof. Thus, in the former case, if actual separation is proved, the presumption of a family continuing in its normal condition vanishes. So, in the latter case if the acquisition of the property is recent and it is proved, either, that at the time of the acquisition of the property, the family lived from hand to mouth, upon the income of its new property, and that there were no savings wherewith the property in question could be acquired, or, that an individual member acquired the property from out of his own separate income, the presumption of the property being that of the family vanishes. In the latter case, should the party who benefits by the presumption show that the income of the family property was more than sufficient for the maintenance of the family and that savings were feasible, he would place the presumption on a firm basis. It is very difficult to lay down precise rules on the question of the onus of proof. You should always distinguish what is common from what is rare, and base your presumptions accordingly. Thus, suppose in a certain case, the plaintiff, one of the members of the family, sues to establish against the defendant, the other mem-

The presumption may be rebutted.

ber of the family, that a particular property is the joint property of both. If the defendant asserts that the property in question is his self-acquired property, though he admits the defendant to be his brother, the Court, in the absence of any evidence one way of the other, should in the particular circumstances of the case presume that the parties are members of a joint Hindu family; for, as a matter of fact in a Hindu family, brothers more frequently live as members of a joint Hindu family than otherwise. The Court having reached this stage of the case would be justified in inferring, in the absence of any evidence on either side, that the property in the possession of either of the brothers is the joint property of them both. Thus we find that from the initial finding that the plaintiff and the defendants are brothers (the finding being based on defendant's admission) the Court by degrees, per force of the presumptions of facts, comes to the conclusion that the property in dispute is joint. If in the case supposed, the defendant does not appear and the plaintiff proves that the defendant is his brother, the presumptions would follow all the same. But if the defendant in the case supposed show that the property was acquired at a recent period in his name and that he was an earning member of the family, while plaintiff had no separate earnings, the presumption of the property having been acquired as the joint family-property would be weak and the plaintiff would do well to show that there was a nucleus wherewith the property was or could be acquired, *viz.*, that savings were feasible from out of the income of the joint family-property.

In this discussion we have throughout supposed the defendant not to have exclusive possession of the property in dispute at the time of the

action. If the defendant's exclusive possession be proved or admitted, the plaintiff would have to explain away the circumstances which gave the defendant such exclusive possession, before the presumptions can arise.

I have in this connection advisedly used the expression "exclusive possession;" for, in a joint family the possession of one member is not inconsistent with the possession of the whole family.

In Dhurm Das Pandey *v.* Mussamat Shama Soondery Debia (1843) 3 M. I. A., 229; 6 W. R. P.C. 43, their Lordships of the Judicial Committee of the Privy Council said: "It is allowed that this was a family who lived in commensality eating together and possessing joint property. It is allowed that they had some joint property and there can be no doubt that under these circumstances, the presumption of the law is that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of a separate property."

This case was followed in Vedaralli *v.* Narayana (1877) I. L. R., 2 Mad. 19.

In Taruckchunder Poddar *v.* Jodeshur Chunder Koondoo (1873) reported in 11 B. L. R., 193; 19 W. R., 178, Sir Richard Couch, C. J., considered all the decisions of the High Court which laid down or seemed to lay down a contrary view, and, upon the authority of the decisions of the Privy Council, said: "Now, with regard to what their Lordships say as to the family being possessed of property, and that the presumption of law is that all the property the family is in possession of is joint property, the rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of

Possession of one member to be presumed possession of family.

them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him but as a member of a joint family. It being so, until in this case it is shewn that Ishur Chunder had acquired it separately, and it was property which could by law be treated as a separate acquisition, the presumption is that it was the joint property of the family. It was for the person who set up a different state of things from what is to be presumed, to give evidence of it. It was the duty of the defendant to meet the presumption which arose from the state of the family, and the possession by one of them of the property."

In Gobind Chunder Mookerjee *v.* Doorga Persad Baboo (1874), 14 B. L. R., p. 337; 22 W. R., 248, Sir Richard Couch, C.J., in reversing the judgment of Justice Pontifex observed: "I have said that the defendant must be taken to have known what is the presumption of Hindu law. That is stated by the Judicial Committee of the Privy Council for the first time, as far as I am aware in Luximon Row Sadasew *v.* Mullar Row Bajee (1831) 2 Knapp p. 60; 5 W. R., P. C., 67. Their Lordships there decided that in a suit for the division of the property of an undivided Hindu family, the whole of the property of each individual is presumed to belong to the common stock and it lies upon the party who wishes to except any of it from the division to prove that it comes within one of the exceptions recognised by the Hindu law." Again on page 350 he is reported to have said: "In these decisions I do not find it anywhere laid down that the plaintiff need give any other evidence than that there is an undivided Hindu family. The presumption then applies.