2. In the circumstances of the above case should the judgment-debtor be the father, then the purchaser would be entitled to the father's personal interest, or to the entire family-property sold, according as the *sons* should succeed or fail to prove that the mortgage-debt was to the knowledge of the purchaser incurred for immoral purposes. And if the sons fail to prove that the mortgage debt was of an immoral character to the knowledge of the purchaser, it would not be necessary for the purchaser to show either that he was satisfied upon any enquiry as to legal necessity, or, that he made any enquiry at all.

If father be mortgagor whole interest passes unless sons show the debt was immoral.

3. But if the debtor be a member of the family other than the father, then the purchaser would acquire the entire family-property, or such member's share only, according as *he* should succeed or fail to show that the mortgage debt was for a legal necessity, or that *he* made a reasonable enquiry and was satisfied of the existence of legal necessity.

When the debtor is any other member.

4. When in execution of a simple decree for money passed against a father or any other member, the interest of such debtor is sold, the sale should be presumed to be a sale of only the interest of the debtor named in the decree. But it would be open to the purchaser to show (1) that the entire family-property was, as a fact, bargained for and sold, and (2) the existence of circumstances which would support a sale of such entire property.

Sale in money-decree.

5. If, in the case last supposed, the father be the debtor, and the purchaser should show that he actually bargained for the entire property, then the purchaser would be entitled to the entire property unless the sons should show that the debt for which the decree was passed against the father was of an immoral nature.

When money-decree is against father and purchaser proves purchase of entire property.

When money-decree is against any other member.

6. But if any other member be the debtor then the purchaser would be entitled to the entire property, only upon showing (1) that he bargained for the same and (2) that the debt was incurred for a legal necessity, or, that he enquired and was satisfied that the debt was required for a legal necessity.

Difference between the positions of an execution purchaser and a purchaser at a private sale according to old decisions.

In this connection allow me to observe that a purchaser in execution of a decree for money due from a father either upon a mortgage of the family-property by the father, or otherwise, was heretofore in a better position than the purchaser at a private sale.

The money for which the decree was passed was considered an antecedent debt, *i.e.*, a debt due by the father in a transaction previous to the auction-sale, and the purchaser, if he was a person other than the decree-holder, was taken to be a *bona fide* purchaser for value. The law did not require the purchaser to look beyond the decree. In Junnuk Kishore Koonwar *v.* Roghoo Nundun Sing S. D. A. Rep. Bengal 1861 p. 222 the Judges said: "We are clearly of opinion that the plaintiff has been unable to show that the expenses for which those decrees were passed were, looking to the decrees themselves (and we cannot now look beyond these) immoral and such as, under Hindu law, the son would not be liable for." In Girdharee Lal *v.* Kantoo Lall (1874 22 W. R., 56; 14 B. L. R., 187; L. R. 1, I. A., 321, Sir James Colvile said: "A purchaser under an execution is surely not bound to go beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons as well as the interest of the fathers, in the property,

although it was ancestral, were liable for the payment of the father's debts. The purchaser, under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen (the fathers); that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having enquired into that and having *bona fide* purchased the estate under the execution, and *bona fide* paid a valuable consideration for the property, the plaintiffs were not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant." But this was attributing to the decree a value which it did not deserve. If the law stood as laid down in these cases, a father, intent upon dissipating family-property, had simply to borrow money, suffer a decree to be passed against him and in execution cause a sale of the family-property. Accordingly in Nanomi Babuasin *v.* Modhun Mohun L. R., 13 I. A., p. 1 (I. L. R., 13 Cal. p. 21) their Lordships of the Privy Council said: "All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." It would thus appear that the importance attached to the decree in execution of which the sale took place has been completely taken away. But, if on the other hand, the law as laid down in Nanomi Babuasin's case had stood alone, it would not have been safe for any person to purchase at an execution sale. A son might set aside *bona fide* purchases for value. To prevent this state of things, the condition laid down by their Lordships of the Privy Council in Suraj Bunsi's case must be established *viz.*, that it would not do for a son, seeking to avoid a sale

Debt must be shown to have been immoral to alienee's knowledge.

by his father, to show merely that the debt for which the sale was held was contracted for immoral purposes; he must also show that such debt was immoral to the knowledge of the purchaser.

When the debt is immoral, or illegal, the father's share is liable.

If in any case, a Court comes to the conclusion that the debt, for which a sale, purporting to convey the entire interest of the family, took place in execution of decree against the father alone, was a debt which under the law the son was under no obligation to pay, and that the purchaser was aware of the character of the debt, the sale of the entire property would not stand. But, as in such a case the father's share could have been proceeded against for his own debt, and the sale having taken place in execution of decree, it would, under the ruling in Deen Dyal's case, stand good as to such share, the proper decree to be passed would be to declare that the purchaser had acquired the rights of the father, leaving him to get such rights determined by partition proceedings. This was substantially the form of decree in Deen Dyal's case.

If the debt is immoral, creditor would have no remedy against son after father's death.

From what I have already said on the subject, you may have seen that unless the sale, in execution of decree against a father for debts of an immoral character, actually takes place during the father's lifetime, *i. e.*, while yet he has an interest in the undivided property, the decree-holder cannot get any benefit from his decree. For, immediately upon his death, the sons* would take by survivorship, and the father's interest would not be assets in the hands of the heirs. This is the law in all the provinces. It is true that, in Bombay and Madras, the power of alienation of the interest of single coparceners is recognized, while such power does not exist in Bengal

* Balbhadar *v.* Bisheshar (1886) I. L. R., 8 All. 495; Madho Parshad *v.* Mehrban Singh (1890) I. L. R., 18 Cal. 157 (L. R. 17 I. A. 194). Venkatarama *v.* Senthivelu 1890 I. L. R., 13 Mad. 265; Jagannath Prasad *v.* Sita Ram (1888) I. L. R., 11 All. 302.

and the N.-W. Provinces. But as regards the principles of survivorship, which we are now considering, the law is the same everywhere. Indeed, it is one of the fundamental principles of the Mitakshara; and if the son is under a legal liability to pay his father's debts, it is in the first place not to pay all debts indiscriminately, and in the second place, the liability is not because he receives his father's assets, but because the Hindu law declares his liability. In this respect, indeed, it is strange that the son's liability should be limited to the ancestral property, just as in the case of the liability of any heir to the assets received by him (*ante*. p. 131) but all I can say is that the coincidence is remarkable.

I have said above that unless the sale in execution takes place during the father's lifetime, the decree-holder gets no benefit under his decree. This is true only when the decree-debt was contracted for immoral purposes to the knowledge of the lender, and even then, it should be understood with certain reservations. In the case of Suraj Bunsi Koer* where the debt was found to be of an immoral nature, and the purchaser was shown to have known that it was so, the sale had actually taken place after the father's death. But because the attachment in execution had taken place while yet the father was alive, their Lordships of the Privy Council held that a valid charge had been created on the father's share. For the same† reasons, where the decree against the father was a decree upon mortgage and the decree-holder was allowed to sell the property after the father's

Exceptions

* I. L. R., 5 Cal. 148; 4 C. L. R. 226; L. R. 6 I. A. 88.

See also Rai Bal Kishen *v.* Rai Sitaram (1885) I. L. R. 7 All. 731; Jagannath Prasad *v.* Sitaram (1888) I. L. R., 11 All. 302; Beni Pershad *v.* Parbati Koer (1892) I. L. R., 20 Cal. 895.

† Rangayana Shrinivasappa *v.* Ganapabhatta (1891) I. L. R., 15 Bom. 673; Sivagiri Zamindar *v.* Tiruvengada (1884) I. L. R., 7 Mad. 339.

death in the presence of his heirs, the purchaser was held to have acquired a valid title to the father's share, if not to any thing more. And this would be true not only in Madras and Bombay where alienations of coparcenary interest are recognized, but also in Bengal and the N.-W. P., by reason of the debt being, as it were, a charge on property.

The attachment considered in the preceding paragraph must be one after decree; for, attachment before decree will not have this effect. See Ramanayya *v.* Rangappayya (1893) I. L. R., 17 Mad. 144.

If the debt be not immoral or illegal the death of the father does not defeat the right of his creditor against the son.

But if the debt be one for which the sons can be legally made liable, the death of the father after a decree has been passed against him and before it has been executed should not disconcert the decreeholder. In such a contingency, a suit against the sons, on the basis of the antecedent decree-debt, may be instituted by the creditor for recovery of his money, from the whole of the ancestral estate. See Karnataka Hanumantha *v.* Andukuri Hanumayya (1882) I. L. R., 5 Mad. 232; Udaram Sitaram *v.* Ranu Panduji (1875) 11 Bom. H. C. R. p. 76; and Lachmi Narain *v.* Kunji Lal (1894) I. L. R., 16 All. 449.

A private sale failing as to entire interest may be valid as to a coparcener's interest.

I have up to this time considered cases of sale in execution of decree as to which the law is the same in all the provinces. As regards the law of private alienations of the interest of an undivided coparcener, the law in Bengal and the N.-W. Provinces is, as we have already seen, different from that of Bombay and Madras. In Bengal and the N.-W. P. no individual member can privately alienate his undivided interest in the family-property. And, accordingly, if a father purporting to sell for a valid antecedent debt sells the entire interest in an estate for what, after

all, turns out to be an immoral debt to the knowledge of the purchaser, the alienation, if in Bengal or the N.-W. P., would fall through *in toto*; but in Madras and Bombay, it would be good as to the father's share.

After-born sons.

In this part of our subject, we have been considering the rights of sons to question alienations made by their fathers. But it is well to remember that it is only those sons who were in existence at the date of the alienations that have the right to question them. Previous to their birth, the father was independent of them and their rights arose only on their birth. If the father had any sons previous to the alienation, such pre-born* sons and their father represented the entire coparcenary, and if they together made the alienation, it cannot be questioned by the after-born sons. For the same reasons, if the father had no son at the date of the alienation, the purchaser from the father would take an indefeasible title. It is true that the original texts speak of the "yet unbegotten" sons but the case-law† on the point has settled the question to the effect, that the text contemplates only the case of a son in the womb at the time of the alienation.

Ratification.

In several cases, sons who can question alienations made subsequent to their births are subsequently made to ratify them by consent. In such cases the consent of after-born sons *i. e.*, of sons born after the alienation in question should be obtained, along with the consent of the other sons

* Rajaram Tewary *v.* Luchmun Pershad (1867) 8 W. R. 15; B. L. R. Sup. Vol. 731; Girdhari Lall *v.* Kantoo Lall (1874) 22 W. R. 56; 14 B. L. R. 187; L. R. 1 I. A. 321.

† Yekeyamian Agniswarian (1869) 4 Mad. H. C. Rep. 307. The Privy Council declined to pass any opinion in Parichat *v.* Zalim Singh (1877) L. R. 4 I. A. 159; I. L. R., 3 Cal. 214; Sabapathi *v.* Somasundaram (1882) I. L. R., 16 Mad. 76.

who did not ratify the transactions before the birth of the after-born sons; for, it has been held that alienations which are invalid as against some sons are also invalid against others who came into existence before the alienations* were made valid by subsequent ratification.

Equities which arise on setting aside sales.

It remains for me to notice the cases in which the equities require that the setting aside of a sale should be attended with certain conditions.

No refund in cases of execution sales.

In cases of sales in execution of decrees, where it is doubtful what interest the purchaser has acquired by his purchase—the doubt arising, either because one of the members was sued, or because of the imperfect description of the property in the sale-certificate—and the court determines that though the purchaser thought he was purchasing too much, he has become entitled by his purchase to a smaller interest, the court merely construes the sale proceedings and does not set aside a sale, wholly or in part. In such a case the purchaser can have no claim to a refund of any portion of the purchase money paid by him. And this is so, because the purchaser paid for what he bargained, or, because the person who gets the benefit of such a decision—a coparcener who was no party to the original suit—is one who derived no advantage from the purchase-money. We may therefore leave these cases out of our consideration on the present occasion. So in Madras and Bombay where private alienations, of the interest of individual members, not consented to by the other members, are recognised, in the event of a private alienation of the entire family-property by a single member for an alleged necessity being questioned by the other coparceners, the

* See Hurodoot Narain Sing v. Beer Narain Sing (1869) 11 W. R. 480.

alienee can have no equitable claim to refund of any portion of the purchase money from the plaintiff-coparceners. If in any case, the alienor deceives the alienee into believing that he has a right to convey a bigger interest than he really possesses, the purchaser, upon his purchase being limited to a smaller interest, may have a claim for compensation against the alienor, but none whatever against the person whose interest was not affected by the sale. And if in such a case it be the duty of the coparcener seeking to have the sale set aside, wholly or partially, to pay such compensation, *i.e.*, the compensation which his coparcener, the alienor was bound to pay, courts may, and ought to, declare that the sale be set aside, in part or wholly, only upon the condition of such coparcener-plaintiff paying the compensation. Thus, in Bengal where a private sale of the entire coparcenary property by a single coparcener can take place only for legal necessity, including the payment of an antecedent debt, if in any case the plea of legal necessity is not made out, the sale must under Sadabart's case, be set aside *in toto*. But if the alienor be the father, then whether he be alive or not at the setting aside of the sale, the consideration received by him would be a debt binding on the sons, unless it was spent by him for immoral purposes; and the Court, in setting aside the sale at the instance of the sons, may provide, as a condition precedent, that the purchase-money should be paid. But, if the consideration money were spent for immoral purposes, and the sale be set aside after the father's death, the decree should be without any conditions. For, upon the death of the father, the ancestral property by survivorship became the property of the sons, and the creditor, by the death of his debtor, lost all remedy. On the other hand, if the consideration money

But consideration money must be refunded by plaintiff if he should be otherwise liable for it.

were spent for immoral purposes, and the sale set aside during the father's lifetime, the creditor would be competent to proceed immediately against the father and sell his interest in execution of decree. In such a case, therefore, a Court of equity may, as in the case of Mahabeer Persad *v.* Ramyad Sing (1873) 12 B. L. R. 90; 20 W. R. 192, order that the property should be thenceforth possessed in defined shares, and that the shares of the vendors should be subject to a lien for the return of the purchase money. So also, if the alienation be made by any other member, and if at the date of the setting aside of the sale such member be alive, then it would not be equitable to set aside the sale and allow such member to receive his share discharged of the lien for the purchase money. The decree ought to be made as in the case of Mahabeer Persad, of which the decision was approved by the Privy Council in Madho Persad *v.* Mehrban Sing (1890) I. L. R., 18 Cal. 157; I. R. 17 I. A. 194. But if the vending coparcener be dead at the time of the setting aside of the sale, the creditor would have no claim to lien or to refund. See the judgment in the case of Madho Persad above cited.

Court may declare lien of purchaser on setting aside a sale.

In Jamuna Parshad *v.* Ganga Pershad Singh (1892) I. L. R., 19 Cal. 401 two out of three coparceners executed a mortgage of some joint properties in favour of one person, and then all the three executed a mortgage of the same properties in favour of another person. The prior mortgagee after the creation of the second mortgage sued all the three coparceners and obtained a decree. The second mortgagee thereafter instituted suit against all the three mortgagors and obtained a decree, and in execution thereof the plaintiffs purchased the mortgaged property. After the plaintiffs' purchase in execution of the second decree, the

previous mortgage-decree was executed, and the defendant purchased the property. The plaintiffs, who were the purchasers in execution of the decree upon the mortgage by all three coparceners, then sued the defendant for a declaration that the mortgage by two out of three coparceners was inoperative, and that the defendant had acquired no lien by his purchase in execution of decree upon the mortgage. The court held that the mortgage by the two coparceners was not proved to have been for legal necessity and was, therefore, according to the law as interpreted in Bengal, invalid: but as an unconditional setting aside of the mortgage would enure to the benefit of the two coparceners, and through them to the plaintiffs, the Court in accordance with the principle laid down in Mahabeer Persad *v.* Ramyad Singh (1873) 12 B. L. R., 90 declared that the first mortgage-debt was a charge on the shares of the mortgagors which the plaintiffs had purchased.

Reported cases on the subject of this Lecture do not all seem to be reconcilable.

The Reports teem with decisions of the several High Courts and of the Privy Council on the several questions considered in this Lecture. I have not attempted to reconcile them all, and indeed such an attempt would have been fruitless. That the decisions are so irreconcilable appeared to the Judicial Committee itself. In Nanomi Babuasin *v.* Modhun Mohun (1885) I. L. R., 13 Cal. 21, Lord Hobhouse is reported to have said (p. 35). "There is no question that considerable difficulty has been found in giving full effect to each of the two principles of the Mitakshara Law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible

to say that the decisions on this subject are on all points in harmony, either in India or here." So in Laljee Sahoy *v.* Fakeer Chand (1880) I. L. R., 6 Cal. 135 (p. 137) Justice Pontifex, in delivering the judgment of the Court, said: "This appears to us to be one of those fraudulent cases on the part of a Mitakshara father and son which have led to the late fluctuating developments of Mitakshara law."

LECTURE IV.

Joint Property under the Dayabhaga.

Hindu law, personal law—Particular Hindu law governs particular localities—Domicile ordinarily determines the School of law—Joint property under Dayabhaga contrasted with that under Mitakshara—Partition under Mitakshara—under Dayabhaga—Family with father at head no joint family under Dayabhaga—Joint-tenancy and Mitakshara coparcenary—Tenancy-in-common and Dayabhaga coparcenary—Son has no interest in father's property, acquired or ancestral, during father's lifetime—Mitakshara texts explained away by Jimutvahana—Texts against alienation of whole property—Doctrine of *factum valet*—Mode of living in joint families under Dayabhaga—Maintenance—Maintenance of wife, infant sons and aged parents—Right to maintenance of unmarried sisters—of widowed daughter-in-law—of mother and step-mothers at partition—of disqualified members—Whether maintenance is charge on property—coparcenary and partnership concern—managing member's liability to account—existing assets only to be divided—Minor members—observations as to the existing practice of executing conveyance &c., and instituting suits—When adult members bound by managing member's acts—Adult members can demand partition—Minors too can demand partition—Effects not liable to partition—Gains of science—Gifts of affection—Marriage presents—Recovered property—Presumptions—Any member of joint family can alienate his interest—Purchaser's right to demand partition—woman's estate in property inherited—In Bombay the law is different—Sisters inherit in Bombay—Daughter's estate in Bombay—Sale for legal necessity—Guardians and Wards Act VIII of 1890, Sec. 29.

Hindu law, personal law.

We have already seen that in any part of British India, Hindu law is the personal law of a Hindu by birth and religion, and I presume you know that a family, governed by the special doctrines of any particular school of Hindu law, may migrate from one province to another and yet continue to

be governed by the doctrines of its own school.* This may seem to imply that there is no locality or territory which generally is governed by the doctrines of any particular school. But the fact is otherwise. In Bengal, the majority of the inhabitants are governed by the Dayabhaga of Jimutvahana and *prima facie,* therefore, every Hindu resident in Bengal must be presumed to be subject to the Dayabhaga law, until he is shown to be subject to a different school (Ram Das *v.* Chandra Dassia, (1892) I.L.R., 20 Cal. 409). This, you must remember, is a presumption of fact and the strength of the presumption will depend upon the facts of each case. Thus, in a commercial town like Calcutta, where people of different nationalities and religious persuasions reside, side by side, the presumption will be very weak. It may be rebutted by proving that the domicile of the family is a Mitakshara territory, or, that the family originally migrated from a Mitakshara province and in its new abode has continuously observed the peculiar rites of the Mitakshara in marriages, births and deaths (Ram Bromo *v.* Kaminee 6 W. R., 295). With these prefatory remarks I shall confine my attention for a time to the law of joint property under the Dayabhaga.

Particular Hindu law governs particular localities.

Domicile ordinarily determines the school of law.

Joint property under Dayabhaga contrasted with that under Mitakshara

The Dayabhaga conception of joint property is very different from the Mitakshara. Under the latter, as regards ancestral property, the sons and grandsons acquire a right by birth, with their father and grandfather. Under the former the father is the absolute owner of all ancestral, not

* Rutcheputty Dutt Jha *v.* Rajunder Narain Rae (1839) 2 M. I. A. 133. Byjnath Pershad *v.* Kopilmon Singh (1875) 24 W. R. 95. Surendra Nath Roy *v.* Hiramani Barmani, (1868) 12 M. I. A., 81; 1 B. L. R., P. C., 26; 10 W. R., P. C., 35. Sreemutty Dibeah *v.* Koond Luta (1847) 4 M. I. A. 292; 7 W. R. P. C., 44. Manik Chand Golecha *v.* Jagat Settani (1889) I. L. R., 17 Cal. 518. Padmavati *v.* Doolar Singh (1847) 4 M. I. A., 259; W. R. P. C., 41.

to mention of his self-acquired, property. Under the Mitakshara, partition is one of the modes of acquisition of property like inheritance, seizure, etc., and before partition no one can predicate what his share would be at the partition when made; but under the Dayabhaga, partition is merely the outward manifestation of previously existing separate interests. Under the Mitakshara, there may exist joint families consisting only of a father and sons and grandsons, and in such joint families the rights of the members, as regards the ancestral property of the family, will be co-ordinate, but under the Dayabhaga such families will not come under the denomination of a joint family—the sons being absolutely dependent on the father.

Partition under Mitakshara.

under Dayabhaga.

Family with father at head no joint family under Dayabhaga.

It is usual to compare a coparcenary under the Mitakshara with an English joint-tenancy, and family-property under the Dayabhaga, with an English tenancy-in-common. But though the analogy between a coparcenary and a joint-tenancy is not so close, the analogy between a Dayabhaga joint family and tenancy-in-common is marked. I have said that a joint-tenancy and a coparcenary under the Mitakshara do not bear a very close resemblance to each other. A word is necessary to explain my meaning. Joint-tenants have unity of possession, as we have seen in Lecture I.* So have the members of a Mitakshara coparcenary unity of possession. In a joint-tenancy, there is no descent of interest upon the death of any joint-tenant, but the survivors take up his interest. So, in a Mitakshara family consisting of a father and sons, upon the death of one of the sons, the survivors take up the interest of the deceased. Should one of two joint-

Joint-tenancy and Mitakshara coparcenary.

† *Ante* p. 5.

tenants convey his interest in the tenancy to a third person, the nature of the tenancy would be changed into that of a tenancy-in-common. So, in Madras and Bombay, should one of two coparceners alienate his undivided interest, or in any province should an execution sale take place in reference to the interest of such member, the coparcenary would be changed into a tenancy-in-common. But here the resemblance ceases. In a joint-tenancy, while the tenancy continues as such, none but the original tenants, or the survivors of them, can have any interest in the tenancy, and by deaths the interests of the survivors go on continually increasing. But in a Mitakshara coparcenary, new members are continually added to the original number by births. The resemblance between joint-tenancy under the English law and a Mitakshara coparcenary is, therefore, not very close. But the resemblance between joint property under the Dayabhaga and the English tenancy-in-common is striking.

Tenancy-in-common and Dayabhaga coparcenary.

Tenancy-in-common under the English law, "is created when several persons have several distinct estates, either of the same or of a different quantity, in any subject of property, in equal or unequal shares, and either by the same act or by several acts, and by several titles and not a joint title.....Tenants-in-common have several and distinct estates in their respective parts; hence the difference in the several modes of alienation and assurance by them. Each tenant-in-common has, in contemplation of law a distinct tenement and a distinct freehold...Tenants-in-common hold by unity of possession, because neither of them knows his own severalty and therefore they all occupy promiscuously. This is the only unity belonging to the estate; for since the tenants may hold different kinds of interest, so there exists no

necessary unity of interest, and there is no unity of title; for, one may claim by descent, and another by purchase; also the estate may vest in each tenant at different times. There being no unity of interest among tenants-in-common, each is seised of a distinct though undivided share: they hold *per mie et non per tout* and consequently the *Jus accrescendi* does not apply to them.....This estate is dissolvable by a voluntary deed of partition; by the union of all the titles and interests in one tenant.....or by compulsive partition under decree."—Wharton

We shall now see how a joint property or ownership is created under the Dayabhaga. I presume you know that under the Dayabhaga of Jimutvahana if a man should die intestate leaving sons, grandsons by predeceased sons, and great-grandsons whose fathers and grandfathers predeceased him, the inheritance would devolve on the sons, grandsons, and great-grandsons —the grandsons and great-grandsons taking respectively the shares of their predeceased fathers and grandfathers along with the sons. It is optional with the sons, grandsons and great-grandsons to divide among them the inheritance, according to their several shares as above indicated. But if they do not divide the inheritance they live together as members of a joint family. During the time that they so live jointly, their shares are defined. Fresh births in the family do not reduce their shares, though deaths bring them in new shares by right of inheritance. They can dispose of their shares, entirely or partially, by sale, gift, or devise. They can by partition, made voluntarily or under decree of Court, transform their joint estate into several estates.

You will now understand the analogy between joint ownership under Dayabhaga and tenancy-

in-common under the English law. In both there is unity of possession. In both none of the members knows his own severalty and all of them therefore occupy promiscuously. Both the estates are dissolved under the same circumstances and to neither does the principle of *jus accrescendi* apply.

Son has no interest in father's property, acquired or ancestral, during father's lifetime

I have said above that under the Dayabhaga the son has no interest in his father's property so long as the father is alive. A word is necessary to explain this: Jimutvahana* "defines the term heritage" as "wealth, in which property, dependant on relation to the former owner, arises on the demise of that owner." He quotes Manu Book 9 sloka 104, which runs in these words: "after the death of the father and the mother, the brethren, being assembled must divide equally the paternal estate: for they have no power over it, while their parents live."

Apprehending that his opponents might seek to apply the above text of Manu as a prohibition against partition during the lifetime of the parents, Jimutvahana in para. 18, fortifies himself with a text of Devala which runs thus:—"When the father is deceased, let the sons divide the father's wealth: for sons have not ownership while the father is alive and free from defect." The conclusion come to by the author is thus stated in para. 30: "Hence the texts of Manu and the rest (as Devala para. 18) must be taken as showing, that sons have not a right of ownership in the wealth of the living parents but in the estates of both when deceased". The conclusion is very clearly expressed.

Mitakshara texts explained away by Jimutvahana.

I have† elsewhere observed in the course of these Lectures that the original *smritis* are universally respected. It is amusing to note, how the texts of Yajnavalkya, which form the groundwork

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* Ch I. para. 5.
† *Ante* p. 12.

of his theory of equal rights of father and son in property ancestral, have been explained away in the Dayabhaga. Jimutvahana in ch. II, para. 9, speaking of the text, "The ownership of father and son is the same in land which was acquired by his father or in a corrody or in chattels," explains it in these words: "when one of two brothers, whose father is living, and who have not received allotments, dies leaving a son: and the other survives; and the father afterwards deceases; the text, declaratory of similar ownership, is intended to obviate the conclusion, that the surviving son alone obtains his estate because he is next of kin. As the father has ownership in the grandfather's estate: so have his sons, if he be dead. There is not in that case, any distinction founded on greater or less propinquity; for both equally confer a benefit by offering a funeral oblation of food, as enjoined at solemn obsequies." In the same way the text, "the father is master of the gems, pearls and corals and of all other movable property, but neither the father nor the grandfather is so of the whole immovable estate," has been explained in ch. II, para. 24, in the following words:—"The prohibition is not against a donation or other transfer of a small part not incompatible with the support of the family. For, the insertion of the word 'whole' would be unmeaning if the gift of even a small part were forbidden." We might multiply instances. But it is sufficient to note that the Dayabhaga draws a distinction between moral and legal precepts, while the Mitakshara knows of no such distinction. To render my meaning clearer, I shall quote here paragraphs 28-30 of ch. II. They run in these words:—

Texts against alienation of whole property.

"28. But the texts of Vyasa exhibiting a prohibition, are intended to show a moral offence: since the family is distressed by a sale, gift or

other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer.

"29. So likewise other texts (as this, 'though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made by him, unless convening all the sons') must be interpreted in the same manner. For here the words "should" be made, must necessarily be understood.

Doctrine of *factum valet.*

"30. Therefore, since it is denied, that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null: for a fact cannot be altered by a hundred texts" This is the doctrine of "*factum valet.*"

The Mitakshara makes a distinction between ancestral and self-acquired property, but the Dayabhaga observes no such distinction in considering the right of sons to their father's wealth.

Mode of living in joint families under Dayabhaga.

The mode of living in joint families under the Dayabhaga is the same as under the Mitakshara. The members live joint in food, worship, and estate. But in a Dayabhaga family, unlike what we have seen in a Mitakshara family, the father is the absolute owner of all ancestral and self-acquired property, and his sons and grandsons are mere dependants on him. When treating of the question of maintenance under the Mitakshara, we saw that, independently of the possession of joint property, a father is bound to maintain his infant sons, his unmarried daughters, his wife and his parents.* This observation applies equally to a Dayabhaga family and as a logical inference a father is not bound to maintain his adult son or grandson. But in a Mitakshara family, the sons and grand-

* Ante p. 69.

sons, being joint owners with the father and grandfather in ancestral property, have every right to maintenance from out of such property. In several Dayabhaga-families, the members separate in food and worship, and as to property they allow it to be managed by a common manager, and divide the nett income among themselves. But this is properly one mode of partition or separation. There is, in Bengal, another class of families in which the ancestral property consists mostly of a dwelling house or other property yielding no income, and the members live abroad for earning their livelihood by service or profession. These families are also to be deemed separate, except as regards the ancestral property. But we are now considering the case where the members, though they have separate interests, choose to live together with one purse and under the management of one of them as the *kurta*. In such cases, no separate accounts of the incomes of the different members, or of their separate expenditure are kept and expenses of education, maintenance and marriages are defrayed according to the actual wants.

Maintenance.

In a previous Lecture, I considered the question of maintenance to which some of the dependants may be entitled under the Mitakshara, irrespective of the possession of any joint property.* We saw that under the Hindu law (Dayabhaga as well as Mitakshara) the wife, infant sons and aged parents are enjoined to be provided for. Under the Mitakshara unmarried daughters have a claim to a fourth† share at a partition, and hence we inferred that under that law they have also to be provided for, so long as the family con-

Of wife, infant sons, and aged parents.

* Ante p. 69.

† Mitak. ch. I, sec. VII, para 5

tinues in the possession of its joint property. We also saw that a mother's claim to maintenance rested on several grounds. We quoted positive texts from Manu as to the maintenance of the mother,* wife and infant sons. These texts are equally binding under the Dayabhaga. As to the unmarried sisters, when the family is possessed of ancestral property there is a positive declaration in the *shastras* for a portion being allotted to her (see Dayabhaga ch. III, sec. II, para. 34). Moreover her right has to be respected because it was the duty of her father to support her, and *a fortiori*, after the death of the father, it becomes the duty of her brothers,† who inherit their father's property for his spiritual benefit, to provide her with proper food and raiment.

Right to maintenance of unmarried sisters.

Of widowed daughter-in-law.

A widowed daughter-in-law is in a better position under the Mitakshara than under the Dayabhaga. In a Mitakshara joint family by reason of the undivided interest of her deceased husband lapsing to the survivors, these latter are bound to maintain her. But under the Dayabhaga she has no legal claim on her father-in-law for maintenance. *Vide* Full Bench decision in Khetramani Dasi *v.* Kashinath Das (1868) 2 B. L. R., 15 A. C; 10 W. R., F. B., 89, which laid down that she had only a moral claim on her father-in-law which could not be enforced in a court of justice. This is the leading case on the subject. In Kamini Dassee *v.* Chandra Pode Mondle (1889) I. L. R., 17 Cal. 373, Justice Banerji held that a man might be legally bound to maintain his widowed sister-in-law (brother's widow) if he inherited property from his father who was morally bound to maintain her.

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* Ante p. 68.

† Kamini Dassee *v.* Chundra Pode Mondle (1889), I.L.R. 17, Cal. 373.

Whether a sister-in-law possessed of wealth can claim maintenance from her brother-in law is an open question.

Of mothers at partition.

As to the rights of mothers to maintenance under the Dayabhaga, see the case of Kedarnath Coondoo Chowdhry *v.* Hemangini Dasi I. L. R., 13 Cal. p. 336; in appeal to the Privy Council Hemangini Dasi *v.* Kedar Nath Kundu Chowdhry (1889) I. L. R., 16 Cal. p. 758 or L. R., 16 I. A., p. 115. In this case the Judicial Committee held that the share allotted to a mother on partition is in lieu of maintenance, and that so long as the estate remains joint and undivided the maintenance of the mother is a charge on the *whole* estate; but where a partition takes place among sons of *different* mothers each mother is entitled to maintenance, only out of the share or shares allotted to her son or sons. Thus, if a man dies leaving two widows and seven sons, of whom two are by one widow and the remaining five by the other, the inheritance will be divided into 7 shares among the sons, and the widow who is the mother of two sons will receive ⅓ of 2/7ths share, and the other widow 1/6 of 5/7ths share of the inheritance. If the sons of the same mother choose to remain joint after separation from their half-brothers, then the mother's claim to maintenance attaches only to the share allotted to her sons, and not to the share allotted to her stepsons.

Of disqualified members.

As to disqualified members, except the outcast and his sons, the others would be entitled to maintenance from those who would take what would have been their just inheritance but for the disqualification, (see Dayabhaga ch. V, para. 11). Such disqualified members, when their father is the owner, would have a legal claim on him for maintenance, and after his death, on his heirs. Their wives and unmarried daughters would also be

entitled to maintenance from those who take their shares.

We shall in a subsequent Lecture see who are the several persons who have been declared disqualified to inherit.

Whether maintenance is charge on property.

The question whether maintenance is a charge on property has been fully considered when discussing the incidents of joint property under the Mitakshara law.* The same discussions you will consider applicable to cases under the Dayabhaga.

Coparcenary and partnership concern.

The observations of Justice Markby † in contrasting a Dayabhaga family with a partnership concern have been quoted in a previous Lecture. In that connection you will also remember the discussion that we made as to the power which a managing member or *kurta* possesses in a joint family. In a Dayabhaga family, as well as in a Mitakshara, he will be liable‡ to account, and that on the same principles; *i.e.*, no member would be competent to take exception to any expenditure *bona fide* incurred on behalf of any member in excess of the legitimate share of the income of the latter. At a partition too, the *existing* assets are only to be divided, and if any family-property has been sold away during the time of joint ownership, such property would go out of the entire coparcenary property, and what has been consumed by a co-heir over and above his due proportion he should not be required to make good.

Managing member's liability to account.

Minor members.

In Bengal, as elsewhere, the minor members of a family are represented by their elders. But, unlike what we see in a Mitakshara territory, if a mortgage or a sale has to be effected of the entire family-property, the mortgage or the conveyance

* Ante pp. 74-78.
† Ante p. 79.
‡ Ante p. 82.

is executed on behalf of all the members of the family entitled to the property. Similarly if a suit has to be instituted by or against the whole family in respect of any coparcenary property, all the members of the family interested in the property are made plaintiffs or defendants to the suit. And in all cases of mortgages, sales and suits the minors are represented by their elders when they have no conflicting interest.

Observations as to the existing practice of executing conveyances &c. and instituting suits.

It would have considerably simplified the Mitakshara law of alienations of joint property, if in all cases of legal necessity, where the intending mortgagee or purchaser wished to acquire an interest in the whole property, he had insisted upon all the persons entited to the coparcenary being joined as executants of the mortgage or conveyance, and if, similarly, the creditors, intending to proceed against the whole coparcenary property, had made all the persons entitled to the coparcenary, defendants to their actions. But as we saw in Lecture III this is seldom done. And our courts of law which have to administer equity are obliged to lay down inconsistent principles to meet the exigencies of particular cases.

Let us next see whether if an adult co-sharer does not join with the managing member in the execution of a mortgage or conveyance, such mortgage or conveyance would bind him, and if so, under what circumstances.

When adult member is bound by managing member's acts.

The adult members of a family have as much right as the managing member to look after the management. If they choose to allow the managing member to look after the affairs of the family, such managing member acts as their agent and he can bind them by his acts, performed within the ordinary scope of his agency. Of course, if the manager acts in contravention of the express or implied wishes of any adult member, such acts

would not bind such member. Then again, we have seen that in several families there exist ancestral trades which often are very profitable sources of income. These trades are generally placed under the management of single members, and they can not go on unless the managing members would have the power, in cases of emergency, to contract loans and mortgage properties without consulting their co-sharers. Thus, by the necessity of circumstances, the acts of the manager would be *prima facie* binding on the adult members, even without their being parties to the transaction. On this point see:—Saravana Tevan *v.* Mutayi Ammal (1871) 6 Mad. H. C. Rep 371; Bemola Dossee *v.* Mohun Dossee (1880) I. L. R., 5 Cal, 792.; Ramlal Thakursidas *v.* Lackmichand Muniram (1861) 1 Bom H. C. R., App 57; Trimbak Anant *v.* Gopalshet (1863) 1 Bom H. C. Rep. A. C. J., 27; Johurra Bibee *v.* Sreegopal Misser (1876) I.L.R., 1 Cal., 470; Miller *v.* Runga Nath Moulick (1885) I. L. R., 12 Cal 389; Ratnam *v.* Govinda Rajulu (1877) I. L. R., 2 Mad. 339.

Adult member can demand partition.

If an adult member of the coparcenary finds reason to be dissatisfied with the management, he may at once demand partition. His rights are co-ordinate with those of the other members, and, each of them therefore would have the right to a partition.

Minor too can demand partition.

Nor will the existence of any minor shareholder prevent the division being made. The Hindu law contemplates such divisions during the minority of some of the members,* as is evident from the following text of Katyayana—"Let them deposit free from disbursement in the hands of kinsmen and friends the wealth of such as have not attained majority as well as of those who are absent." At the present time managers appointed on behalf of

* Dayabhaga ch. III. sec. 1, para. 17.

minors take care of their property, and when a partition is effected under orders of a court of justice, the Court has to examine the allotments and sanction them, as we shall see in a subsequent Lecture. As regards the minor members of the coparcenary, their guardians may on proof of malversation demand a partition, though otherwise, according to the present state of authorities* a minor cannot seek a partition.

Jimutvahana devotes a whole chapter (Chap. VI) to the consideration of the various sorts of effects and acquisitions exempt from partition. While dealing with the Mitakshara law of joint property, we saw that even while a family continued joint, individual coparceners thereof might enjoy their self-acquired properties which were exempt from partition *i. e.*, which would not be divided at a general partition of the coparcenary property. We also saw that some only of the members of a coparcenary might, as among themselves, own such property, and it would not† be divided at a general partition of the coparcenary property, though it would be divisible among its separate owners. The same observations apply to separate acquisitions in a Dayabhaga family.

Effects not liable to partition.

Jimutvahana enumerates properties not liable to partition in the following order :—

Gains of science.

(A) Gains of science including (1) prize for the solution of a difficulty, (2) fee for instructing a pupil, (3) fee for officiating at religious rites, (4) reward for solving a question, (5) reward for clearing a doubtful point or for deciding a litigated question, (6) reward for display of science, (7)

* Chokkalingam Pillai *v.* Svamiyar Pillai (1862) 1 Mad. H. C. R. 105; Alimelammal *v.* Aruna-chellam Pillai (1866) 3 Mad. H. C. R. 69; Kamakshi Ammal *v.* Chidambara Reddi (1866) 3 Mad H. C. R. 94; Damoodur Misser *v.* Senabutty Misrain (1882) I. L. R. 8 Cal. 537; 10 C. L R. 401; Mahadev Balvant *v.* Lakshman Balvant (1894) I. L. R. 19 Bom. 99.

† Ante pp. 55-64.

prize gained or stake won in a disputation, (8) prize for reading, (9) the gain of a skilful artist and (10) a stake won by skill in play; (B) gifts of affection; (C) nuptial presents; (D) clothes (personal apparel) and raiment intended to be worn at assemblies, vehicles (carriages and horses and the like), ornaments (rings and so forth), prepared food (sweetmeats &c.), water (contained in a pond or well as suited to use), women (other than female slaves), and furniture for repose or for meals, (beds and vessels used for eating and sipping and similar purposes); (E) gains of valour, as spoil taken under a standard; and (F) ancestral property, except land, recovered by any member without detriment to ancestral wealth. As to ancestral land recovered by a member by his own exertions, the law is that a fourth part* should be allotted to the acquirer and then division made equally.

Gifts of affection.

Marriage presents.

Recovered property.

Presumptions.

The law of presumptions, as to (1) whether a family is joint or separate and (2) whether a particular property is the joint property of the family or the separate property of any of its members, is the same under the Dayabhaga as that under the Mitakshara. Here also, as in the Mitakshara, no inference can be drawn as to the ownership of any property from the fact of the title-deeds of such property standing in the name of any single member of the family.†

Any member of joint family can alienate his interest.

The shares of the coparceners in a joint Dayabhaga family being definite and known, any one of them can convey a valid title to a person by sale, gift or mortgage. Upon such transfer the vendee, donee or the mortgagee acquires a good title to the share of the coparcener, and he may demand a partition by metes and bounds. When considering the question of alienation of the

* Dayabhaga ch. VI. sec. II. para. 38.
† See Ante pp. 87-94

undivided interest of one out of several members of a joint Mitakshara family, we saw (p. 120) that where such alienation was valid, the purchaser acquired the right of the vendor to demand partition, and as partial partition was not allowable, except with the consent of all the coparceners, the purchaser had to seek partition of the entire family property, in the presence of all the parties interested. But the purchaser of the undivided interest of a member of a Dayabhaga coparcenary in a particular property is in a different position. He may seek partition, by metes and bounds, only of the property in which he is interested. This difference is owing to the idea that in a Mitakshara family, none of the coparceners has any definite share before partition, and all that the purchaser purchases is not the particular coparcener's *share* in any particular property, but only the *interest* of the particular coparcener in the property as may be determined at a general partition of the entire coparcenary property. But an undivided member in a Dayabhaga family possesses not only a definite share in the entire coparcenary property, but the same share in every village or mouza comprised in the coparcenary. It is true, that if, while the members of the coparcenary are in joint possession of all their estates, a partition be effected, the same share in each mouza or village would not be allotted to a sharer, but as each member in the absence of any special circumstance would be *prima facie* entitled to the same share in each mouza, a court of equity would give effect to the purchase of the share in any mouza by causing a separation of the mouza from the rest and then dividing the mouza itself.

Purchaser's right to demand partition.

In a Mitakshara joint family, females cannot be coparceners with males, though, in a case of partition they may share together; as, when a

mother shares with her sons &c. But in a Daya-bhaga family they often share with the males. Thus, suppose of two brothers, living together in possession of joint property, one were to die leaving two sons, and the other, a widow and no son. In this case the family property under the Daya-bhaga would belong—one moiety to the widow and the other to her two nephews jointly, so that the aunt and her nephews would be the coparceners, or, more properly, co-sharers. But if the family be governed by the Mitakshara law, the two nephews would be the exclusive owners of the coparcenary, and the aunt would be simply entitled to maintenance.

Woman's estate in property inherited.

In Bombay law is different.

Under the Hindu law in all the provinces except Bombay, the rights of all female heirs in property inherited by them are of a peculiar nature. In Bombay, the decisions recognize the heirship of sisters to the property of their brothers,* and draw a distinction between the nature of rights enjoyed by female heirs who belong by marriage to the *gotra* of the propositus and the interest of those who by marriage belong to a different *gotra*.† Thus, a daughter and a sister, who by marriage would belong to a different *gotra*, would according to the Bombay decisions take an absolute interest; but a widow, mother and grandmother who are of the same *gotra* with the propositus would simply be entitled to what we have described above as the peculiar estate. In Bombay therefore where several daughters or sisters inherit together, they have a right to partition and the principles of survivorship do not obtain. You have elsewhere learnt that this

Sisters inherit in Bombay.

Daughter's estate in Bombay.

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* Rinda Bai *v.* Anacharya (1890) I. L. R. 15 Bom. 206

† Vijiarangam *v.* Lakshuman 8 Bom. H. C. Rep., O. C. 244; Hari Bhat *v.* Damodar Bhat (1878) I. L. R. 3, Bom. 171; Bulakhi Das *v.* Keshav Lal (1881) I. L. R. 6 Bom. 85; Bhagirthi Bai *v.* Kahnuji Rav (1886) I. L. R. 11. Bom. 285 F. B.

peculiar estate of a female heir is more than a life estate, that for legal necessity the holder of the peculiar estate can create an absolute estate, and that the powers of the holder of this peculiar estate fall short of those of an absolute owner, in that she cannot at will dispose of the property by sale, gift or devise, as an alsolute owner should be able to do; and I presume you also know what is meant by legal necessity for which a widow can convey an absolute estate.

Sale for legal necessity.

When a coparcenary is held under the Dayabhaga exclusively by female heirs, or partly by females and partly by males, in order that a purchaser for value (for a female can make a valid gift by way of relinquishment, only in favour of the next reversioner)* may acquire a valid title to the shares of the females, he must purchase for legal necessity. If he fails to prove the existence of legal necessity, his purchase holds good, only for the lives of the females whose interest he purchased.

When the male and female members of a family governed by the Dayabhaga live together as a joint family under the management of one of themselves, the manager generally performs all acts necessary for the well-being of the family, as if he were the constituted agent of the members. Now, as the powers of a female, in dealing with the family-property, would be limited, the manager as her agent would not have higher powers.

Guardians & Wards Act.

We have seen that minor co-sharers are generally represented by their elders who act as their guardians. Sometimes these elders constitute themselves as the guardians and then their actions, unless shown to be grossly negligent, bind the

* Nobokishore Sarma Roy *v.* Hari Nath Sarma Roy (1884) I. L. R., 10 Cal. 1102 F. B.

minors.* In other cases, Civil Courts in the exercise of the jurisdiction conferred on them by Act VIII of 1890 appoint guardians to protect the persons and property of minors, and then the minors are under the protection of Courts.

Sec. 29 Act VIII of 1890.

Guardians appointed by the Courts have very limited powers conferred on them by Act VIII of 1890. Thus they have no power to sell any immovable property, or to grant a lease on behalf of their wards for any period exceeding five years. If it be necessary for them to grant leases for longer terms or sell properties, they can do so with the permission of the Court. As to the powers of guardians generally to bind their wards, the leading case is that of Hunooman Persaud Pande *v.* Mundraj Kunwaree (1856) 6 M. I. A., p. 393; 18 W. R. 81 note. In a case where the managing member of an undivided Dayabhaga family was the guardian appointed by Court on behalf of a minor co-sharer in the same family, a lease granted by him of an estate belonging to the joint family for a period exceeding five years without obtaining permission of the Court was set aside, as granted in excess of his powers. See Harendra Narain Singh Chowdhry *v.* Moran (1887) I. L. R., 15 Cal. 40.

Lease in respect of a minor's share by manager along with shares of adults set aside.

* Nathuram *v.* Shoma Chhagan (1890) I. L. R., 14 Bom. 562.

LECTURE V.

Joint Property under Mahomedan Law.

Joint property among Mahomedans—Shares definite—Males and females inherit together—female heirs have same powers as male heirs—Mode of enjoyment determined by contract—Living in joint families after Hindu style—Assets and liabilities joint when they so live—How partition is to be effected in such cases—No presumption that acquisitions by members of families are for family—What is partition among the Mahomedans—Purchaser from a sharer acquires the share—acquires the right to partition—Pre-emption—Justice Mahmud's definition—Justice D. N. Mitter's definition—Pre-emption among three classes of persons—Pre-emptor must be absolute owner—Hindu widow can pre-empt—Beneficial owner in *benami* purchase cannot pre-empt—Pre-emption among Hindus—Mahomedan law determines incidents of pre-emption among Hindus and Mahomedans—Pre-emption only where Mahomedan influence prevailed—*Wajib-ul-urz*—Pre-emption among Hindus founded on and co-extensive with Mahomedan law—Preliminary forms—Reason of observance of forms—Pre-emption even among ancient Hindus—Pre-emption among Hindus in different districts—Pre-emption not confined to cases of Mahomedan co-sharers or Mahomedan vendees—*Wajib-ul-urz*—Conditions under which pre-emption arises—absolute sale—in conditional sale—Sale must be complete—Sale in liquidation of dower—not in cases of gift, charity, inheritance or bequest—Sale must be exchange of property for property—No pre-emption against purchase by co-sharer—Pre-emptor must be a co-sharer without partition.—Sharer in substance has the prior right—next to him sharer in appurtenances—Next to him the neighbour—Companion in way has superior claim to companion in channel of water—So also the owner of land which supplies irrigation over a neighbour—Right of special and general partners—Party-wall—Pre-emptor must take whole property sold—except when two persons purchase under same document—or when a co-sharer and a stranger together purchase—or when property sold consists of distinct plots—Co-sharers of same class owning unequal shares pre-empt equally—in case of absent co-sharers—Preliminaries to be observed for perfecting the right—First demand—Delay is dangerous—Second demand—Strict observance of forms necessary—Suit for pre-emption—Limitation—Valuation—Parties to suit—Not necessary to deposit price—Court to determine price bargained for and not market-price—Onus of proof—Resignation must

be before decree in order that co-sharer may benefit—Pre-emptor claiming in one capacity cannot succeed in another—Loss of right by latches—ceremonies may be performed by agent—When right which had accrued ceases—right revives upon correct information as to price, purchaser, or thing sold—resignation must be after accrual of right—Improvements made by purchaser—pre-emptor entitled to deduction of price if property be deteriorated by purchaser—pre-emptor acquires free of encumbrances created by purchaser—Pre-emption in auction sale—Form of decree in pre-emption suit—Time for payment of price to be fixed in decree—Pre-emptor not entitled to mesne profits—pre-emption among Shias only between two co-sharers.

Joint property among Mahomedans.

Among the Mahomedans joint property is either the result of joint acquisition by the owners or the result of joint succession to the estate of a deceased relative. In either case the shares of the owners are definite and known prior to actual partition.

Shares definite.

Males and females inherit together.

Now the Mahomedan law of inheritance allows both males and females to inherit simultaneously. The result is that coparcenaries with both male and female coparceners come into existence as in a Dayabhaga family, with this difference, that, whereas under the Dayabhaga, female heirs cannot be absolute owners of their shares, under the Mahomedan Law there is no restriction in the powers of female heirs to deal with their shares in any way they please.

Female heirs have same powers as male heirs.

Mode of enjoyment determined by contract.

Among the Mahomedans the mode of enjoyment of joint property oftentimes depends upon contract, express or implied. What we frequently find is that upon the opening out of a succession, the heirs, without effecting a partition by metes and bounds, allow the joint property to remain under the management of a common manager, frequently one of themselves, and divide the nett income after defraying all expenses in connection with the property according to their several shares. Such a state of things may be followed by a perfect partition by metes and bounds.

Living in joint family after Hindu style.

In several instances the co-heirs with their relations and dependants live together in the enjoyment of joint property, which perhaps is all they can call their own, much in the style in which Hindus live in joint families, without preserving any accounts of their separate expenditure and income. In such cases the expenses of maintenance, marriages and education are defrayed according to actual requirements from out of the total income. If during the continuance of this state of things any liabilities are incurred, any savings effected, or any estates purchased with such savings, it is only reasonable that such liabilities, savings or estates should be divided among the owners at a general partition according to their original shares. Indeed, any other mode of division may be not only impracticable for want of accounts, but also unfair to some of the co-sharers. This mode of living appears to have been imitated by the Mahomedans in some places from their Hindu brethren.

Assets and liabilities joint when they so live.

How partition is to be effected in such cases.

By what I have said above, I by no means intend to convey that as a rule the Mahomedans, wherever they live in joint families, live after the Hindu style. The contrary is the general state of things, and if they live in family groups, they live like joint boarders in order to keep down their expenditure—their mutual liabilities being determined in each case by special contract. Accordingly in the case of Hakim Khan *v.* Gool Khan (1882) I. L. R. 8 Cal. 826; 10 C. L. R. 603 the Judges declined to presume that acquisitions made by the members of a Mahomedan family were for the benefit of the joint family. In Abdool Adood *v.* Mahomed Makmil (1884) I. L. R. 10 Cal. 562 it was contended that though the property stood in the name of one member of a Mahomedan joint family, the presumption was that it was the

No presumption among Mahomedans that acquisitions by members of family are for family.

property of the family. But M'cDonell and Field J. J. held that the presumption had no place in a Mahomedan family.

You will observe that under the Mahomedan law, as under the Dayabhaga the jointness of the property consists only in the same tangible thing or incorporal right being the subject of ownership by several individuals; otherwise the rights of the owners are distinct. In such a case the result of a partition is only to mark out separate portions of the property, and allot such portions to the exclusive use and enjoyment of the separate owners. Even in the absence of a partition any of the joint owners can transfer his share by sale. The share of the owner being definite and known, the purchaser acquires that share. By his purchase he becomes entitled to joint possession with the remaining co-sharers and can also demand partition by metes and bounds.

What is partition according to Mahomedan Law.

Purchaser from a sharer acquires the share. Acquires the right to partition.

Pre-emption.

One of the incidents of joint immovable property under the Mahomedan law is the right of pre-emption (*shoofa*) which a *shureek*, (partner in the substance of the thing) or a *khuleet* (partner in its appurtenances and appendages) possesses under certain circumstances. Mr. Justice Mahmud in Gobind Dayal *v.* Inayatullah (1885) I. L. R. 7 All. 775 (see p. 799 defines pre-emption thus "Pre-emption is a right which the owner of certain immovable property possesses as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person." In Kudratulla *v.* Mahini Mohan Shaha (1869) 4 B. L. R., F. B. 134, Mr. Justice Dwarkanath Mitter said that "a right of pre-emption was nothing more than a mere right of

Justice Mahmud's definition.

Justice D. N. Mitter's definition.

repurchase not from the vendor but from the vendee."

Presumption among three classes of persons.

Under the Mahomedan law three classes of persons have the right to pre-empt: (1) the *shureek* or the partner in the land, (2) the *khuleet* or the partner in the right of way or of water-course appurtenant to the land, and (3) the *moolasik* or contiguous neighbour. All these three classes of persons must be owners and not tenants of the property which gives rise to this right. Beharee Ram *v.* Shoobhudra (1868) 9 W. R. 455; Sakina Bibi *v.* Amiran (1888) I. L. R. 10 All. p. 472. A Hindu widow, fully representing the estate, has been held entitled to the right of pre-emption. Phulman Rai *v.* Dani Kuari (1877) I. L. R. 1 All. 452; but see Dila Kuari *v.* Jagarnath Kuari (1883) I. L. R. 6 All. 17. Karan Sing *v.* Muhammad Ismail Khan (1878) I. L. R. 7 All. 860. A secret purchase *benami* does not constitute the purchaser a co-sharer. Beni Shankar Shelhat *v.* Mahpal Bahadur (1887) I. L. R. 9 All. 480. But in the present Lectures on joint property we are concerned only with the first two classes—the *shureek* and the *khulleet*.

Pre-emptor must be absolute owner.

Hindu widow can pre-empt.

The beneficial owner in *benami* purchase cannot pre-empt.

Though this right owes its origin to the Mahomedan law, the principle on which it is established, *viz.*, the prevention of disagreement arising from having a bad neighbour or from partnership, is generally applicable, and even more so, to Hindus on account of their division into castes than to Mahomedans. There being no provision in the Hindu law, wherever this right exists among the Hindus by reason of long established usage, its incidents are* determined according to the Mahomedan law, unless long established

Mahomedan law determines incidents of pre-emption among Hindus and Mahomedans.

* See Gordhandas Girdharbhai *v.* Prankor (1869) 6 Bom. H. C. Rep. 263; Fakir Rawot *v.* Emambaksh (1863) B. L. R. Sup. Vol. p. 35; W. R., F. B., 143.

custom makes the incidents different. In this connection allow me to observe that it is a noticeable fact that in Bombay and Madras where the Mahomedan influence was the least, we find no trace of this right. In Deokinandan *v.* Sriram (1889) I. L. R., 12 All. 234 Mr. Justice Mahmud one of the judges composing the Full Bench said (see p. 266).

"Among those facts is a proposition which cannot be controverted, and which apparently was not pressed upon the attention of the learned judges forming the majority of the Full Bench from whom Mr. Justice Roberts dissented, that as a matter of fact and not one of theoretical surmises or hypotheses, the right of *shufa* or pre-emption is unknown in those parts of India where Mahomedan jurisprudence had not in days gone by had full sway, and where Mahomedan influence was not felt as vigorously as in this part of the country and other parts of Upper India, in Bengal and in some parts of the Bombay Presidency such as Guzarat. For instance it is unknown in the Madras Presidency, where the High Court in Ibrahim Saib *v.* Muni Mir Udin Saib (1870) (6 Mad. H. C. R. 26) have gone the length of holding that even in the case of Muhammadans the doctrine of pre-emption is not law in that Presidency. Similarly in such parts of the Bombay Presidency as have not been subject to Muhammadan influence, the right of pre-emption does not prevail, and where it is found to prevail it has been distinctly held to prevail among the Hindus on no basis other than their acceptance of the Muhammadan rule of pre-emption. For this the case of Gordhandas Girdharbhai *v.* Prankor (6 Bom. H. C. R. 263) is a distinct authority. That was a case entirely between Hindus, and the learned judges after stating that there had been

Pre-emption only where Mahomedan influence prevailed.

many cases disposed of by the Sadar Diwani Adalut of that Presidency, went on to say—"There is no doubt that the custom in Guzarat is the Mahammadan right of pre-emption, or *hak shufa*; and therefore that in deciding such a suit as the present, it is to the particulars of that law we must look for guidance."

Wajib-ul-urz.

"If it were a correct proposition to maintain that the law of pre-emption as contained in the *Wajib-ul-urz* is an offshoot of the Hindu law relating to joint undivided Hindu families, I should have expected that in other parts of the country also, such as Madras and Bombay, where that law has had uninterrupted and full operation, a similar doctrine of pre-emption might have been evolved by village communities and joint Hindu families. But there is no contention that any such evolutionary phenomenon has taken place, and its absence is all the more remarkable because so far as the joint Hindu family system is concerned, those parts of the country are governed by the Mitakshara School of Hindu law in common with this part of the country. Equally remarkable is the circumstance that in none of the numerous cases to be found in the printed reports has any attempt been made to engraft on to the right of pre-emption the analogies of the Hindu law relating to legal necessity for alienations and other similar doctrines as understood in that law. It is also a fact which must not pass unobserved that so far as the pre-emptive clauses in this part of the country are concerned, village communities which have entered those clauses are as often mixed communities of Hindus and Muhammadans as they are unmixed Hindu or Muhammadan communities, and yet in the vast majority of cases of pre-emption which come before this Court the terms of the pre-emptive clause

are similar, and this fact, upon the hypotheses of the majority of the Full Bench, leads to the conclusion either that a Hindu law of pre-emption which never existed or an evolutionized form of the Hindu law as to joint undivided families, was adopted by the Muhammadans in such cases, an evolution which has not yet been recognized even by Hindus themselves in respect of sales of joint immovable property such as houses and other buildings."

In Fakir Rawot *v.* Emam Baksh (1863) B. L. R. Sup. vol. 35; W. R., F. B. 143, Sir Barnes Peacock, in delivering the judgment of the Full Bench, said: "We, therefore, think the established law upon this subject is clear enough, that a right or custom of pre-emption is recognised as prevailing among Hindus in Behar, and some other provinces of Western India; that in districts where its existence has not been judicially noticed, the custom will be matter to be proved; that such custom, when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown; that the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record. In this requirement we see no evil, in as much as a right of pre-emption, undoubtedly, tends to restrict the free sale and purchase of property, and it is desirable,

Pre-emption among Hindus founded on and co-extensive with Mahomedan law.

Preliminary forms.

Reason of the observance of forms.

therefore, to encompass it with certain rules and limits lest the right should be exercised vexatiously." In Hira *v.* Kallu I. L. R. 7 All. 916 (1885) it was held that among Hindus the right was founded on contract or custom and that where it was founded on contract or agreement it ceased on a transfer to a stranger to the agreement. Professor Jolly in his Lectures (p. 89) says: "There exists also a trace of a right of pre-emption among the members of one village in a text (Mit. ch. I sec. I, v 31) which declares the assent of townsmen, of kinsmen, of neighbours and of heirs as requisite for any transfer of landed property." In Joy Kooer *v.* Suroop Narain Thakoor W. R. (1864) p. 259; Sheojuttun Roy *v.* Anwar Ali (1870) 13 W. R. 189; and Ramdular Misser *v.* Jhumack Lal Misser (1872) 17 W. R. 265, 8 B. L. R. 455 it was held that the custom of pre-emption was recognized among Hindus in the province of Behar. In Surdharee Lall *v.* Laboo Moodee (1876) 25 W. R. 499 the existence of the custom was recognized in Bhagulpur. In Gordhan Das Girdhar Bhai *v.* Prankor (1869) 6 Bom. H. C. Rep. A. C. 263 the existence of the custom was recognized in Guzarat and it was held that the custom was regulated by the Mahomedan law. In Akhoyram Shahgee *v.* Ramkant Roy (1871) 15 W. R. 223 it was admitted that in the district of Sylhet the custom existed. In Ibrahim Saib *v.* Muni Mirudin Saib (1870) 6 Mad. H. C. Rep. 26 it was held that the Mahomedan law of pre-emption did not apply to Madras. In Gobind Dayal *v.* Inayatullah (1885) I. L. R. 7 All. 775 the Judges of the Allahabad Court held that the Mahomedan law was applicable not only where the vendor and vendee were Mahomedans but also where the vendor was a Mahomedan and the vendee non-Mahomedan. Nor need the pre-emptor be a Mahomedan. Baillie

Pre-emption even among ancient Hindus.

Pre-emption in different districts.

Pre-emption not confined to cases of Mahomedan co-sharers or Mahomedan vendees.

in his Digest on Mahomedan law says:—"Islam on the part of the pre-emptor is not a condition, so that *zimmees* are entitled to the right of pre-emption as between themselves or against Mooslims."

In Bengal it has been held that where the pre-emptor and the seller are Mahomedans and the purchaser a Hindu, the Mahomedan law of pre-emption should not be applied to deprive the Hindu of his purchased right. Shekh Kudratulla *v.* Mahini Mohan Shaha (1869) 4 B. L. R., F. B. 134; 13 W. R., F. B. 21. But a Full Bench of the Allahabad Court has held otherwise. Gobind Dayal *v.* Inayat-ullah (1885) I. L. R. 7 All. 775.

From what has been said above it is clear that we have to consider the Mahomedan law of pre-emption as regards partners in substance and partners in the appurtenances and our observations will be applicable both to the Mahomedans and Hindus.

Wajib-ul-urz.

But before discussing the law let me state to you that in several villages in the N.-W. Provinces we find *Wajib-ul-urz* providing for the various circumstances under which the right is to accrue in those villages. You may refer to the following cases which contain mentions of such documents.

(1) Gokal Sing *v.* Mannu Lal (1885) I. L. R. 7 All. 772.

(2) Shiam Sundar *v.* Amanant Begam (1887) I. L. R. 9 All. 234.

(3) Balwant Singh *v.* Subhan Ali (1887) I. L. R. 10 All. 107.

(4) Khuman Singh *v.* Hardai (1888) I. L. R. 11 All. 41.

(5) Kuar Dat Prasad Singh *v.* Nahar Sing (1888) I. L. R. 11 All. 257.

(6) Safdar Ali *v.* Dost Muhammad (1880) I. L. R. 12 All. 426.

(7) Jasoda Nand *v.* Kandhaiya Lal (1891) I. L. R. 13 All. 373.

The report of this last case contains translation of a *Wajib-ul-urz*. In all cases where the conditions upon which the right is to arise have been reduced to writing, the right would arise only upon the happening of the contingencies contemplated in the document. Under such an instrument the right may arise not only upon a sale but also upon a mortgage or lease, and the observance of formalities may be dispensed with. Zamir Husain *v.* Daulat Ram (1882) I. L. R. 5 All. 110.

Conditions under which pre-emption arises.

The right of pre-emption under the Mahomedan law arises under the following conditions :—

(1) Absolute sale.

(1) There must be a sale out and out without any conditions.* In Dewanutulla *v.* Kazem Molla (1887) I. L. R. 15 Cal. 184 it was held that where a co-proprietor did not part with his entire interest in land by an absolute sale, but merely granted a lease of it, even though it might be a mourasi lease, the right of pre-emption would not arise. In Ajaib Nath *v.* Mathura Prasad (1888) I. L. R. 11 All. 164 and Digambur Misser *v.* Ram Lal Roy (1887) I. L. R. 14 Cal. 761 it was held that in the case of a conditional sale, the right of pre-emption would not arise until the foreclosure proceedings made the sale absolute, and that acquiescence in a mortgage by conditional sale would not deprive the pre-emptor of his right to pre-empt when the sale became absolute. See also Gurdial Mundar *v.* Tek Narayan Singh (1865) B. L. R. Sup. Vol. p. 166; 2. W. R. 215. Hazari Ram *v.* Shankar Dial (1881) I. L. R. 3 All. 770. Tara Kunwar *v.* Mangri Meea (1871) 6 B. L. R. Ap. 114. In Buksha Ali *v.* Tofer Ali (1873) 20 W. R. 216 and Janki *v.* Girjadat (1885)

In conditional sales.

Sale must be complete.

* Ladun *v.* Bhyro Ram (1867) 8 W. R. 255. Ram Golam Singh *v.* Nursing Sahoy (1875) 25 W. R. 43.

Sale in liquidation of dower.

I. L. R. 7 All. 482 it was held that the sale must be complete before the right can arise. In Fida Ali *v.* Muzaffar Ali (1882) I. L. R. 5 All. 65 it was held that a sale to a wife in liquidation of a portion of her dower was within the meaning of this condition. It follows that in the case of gift, charity, inheritance or bequest this right does not arise, though if the gift be *heba-ba-shurt-ool-iwaz* or with a condition that something should be given in exchange, and mutual possession is taken the right arises.

Not in cases of gift charity inheritance or bequest.

(2)Sale must be exchange of property for property.

(2) "The sale must be an exchange of property for property. So if one should emancipate a slave in exchange for a mansion there is no right of pre-emption" Baillie. Sale is defined to be exchange of property for property by consent of parties, and therefore where property was transferred for dower the right of pre-emption arose. Fida Ali *v.* Muzaffar Ali (1882) I. L. R. 5 All. 65. In such cases the consideration payable by the pre-emptor is the estimated value of the property given in exchange. Sewaram *v.* Risal Chowdhry 1 Agra 144.

(3) No pre-emption against purchase by co-sharer.

(3) The purchaser must not himself be a co-sharer with the seller; that is, the pre-emptor cannot claim the right against a purchaser who is a co-sharer like himself. Nowbut Lall *v.* Jewan Lall (1878) I. L. R. 4 Cal. 831; 2 C. L. R. 319. In this connection it should be noted that as regards the right of pre-emption any kind of actual partition, private or public, is looked upon as complete severance. Digambur Misser *v.* Ram Lal Roy (1887) I. L. R. 14 Cal. 761.

(4) Pre-emptor must be a co-sharer.

(4) The pre-emptor must be a co-sharer of the vendor. When therefore there has been a separation between the pre-emptor and the vendor, the former would have no claim to pre-empt. The separation here contemplated seems to be separa-

tion by metes and bounds. Hedaya Vol. III p. 563 says: "When there has been a division and the boundary of each partner is particularly discriminated, the right of a *shuffa* can no longer exist." Gureeboola Khan *v.* Kebul Lall Mitter (1870) 13 W. R. 125; and Koromali *v.* Amir Ali (1868) 3 C. L. R. 166. A co-sharer by associating himself with a stranger forfeits his right of pre-emption. Bhawani Persad *v.* Damree (1882) I. L. R. 5 All. 197.

Sharer in substance has the prior right.

Of the three classes of persons entitled to the right of pre-emption, a sharer* in the substance is preferred to one who is only a sharer in the rights and appurtenances of the lands; and he again to one who is only a neighbour. Should the sharer in substance give up his claim, the right of the sharer in appurtenances would arise, and should the sharer in appurtenances resign, the right of the neighbour would accrue. But the sharer must be one between whom and the seller there has not been a complete severance. See Byjnath Sing *v.* Dooly Mahtoon (1869) 11 W. R. 215; Gurreeboollah Khan *v.* Kebul Lall Mitter (1870) 13 W. R. 125.

Next to him sharer in appurtenances.

Next to him the neighbour.

"Among partners in appurtenances, a companion in a way is preferred for pre-emption to a companion in a channel of water when the place of the channel is not his property." Baillie p. 480.

So also the owner of the land from which waters for irrigation are received has a preferential right of pre-emption to a mere neighbour. Chand Khan *v.* Naimat Khan (1869) 3 B. L. R., A. C., 296; 12 W. R. 162.

Baillie, in his Digest on Mahomedan Law, in illustrating what has been said above, says

* Golam Ali Khan *v.* Agurjeet Roy (1872) 17 W. R. 343.

"Take the case of a mansion which is situate in a street without a thoroughfare, and belongs to two persons, one of whom sells his share. The right of pre-emption belongs, in the first place, to the other partner in the mansion. If he surrenders his right, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not so; for they all are *khulleets* in the way. If they surrender the right, it belongs to a *moolasik*, or contiguous neighbour. If there be another street leading from this street, and having no passage through it, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, because they are more specially intermixed with it than the people of the other street. But if a house in the outer street be sold, the right of pre-emption belongs to the people of the inner as well as to those of the outer street, for the intermixture of both in the right of way is equal. If the street were open, with a passage through, and a mansion in it were sold, there would be no right of pre-emption except for the adjoining neighbour. In like manner, when there is a thoroughfare which is not private property, between two mansions (that is, when they are situate on opposite sides of the way), and one of them is sold, there is no pre-emption, except for the adjoining neighbour. If the road be private property, it is the same as if it were no thoroughfare. A thoroughfare which does not give the right of pre-emption is a street that the people residing in it have no right to shut. In like manner as to a small channel from which several lands or several vineyards are watered, and some of the lands or some of the vineyards watered by it are sold:—all the partners are pre-emptors, without any distinction between those

who are and those who are not adjoining. But if the channel be large, the right of pre-emption belongs to the adjoining neighbour."

Rights of a special and a general partner.

Of partners in the substance a special is always preferred to a general partner. Thus if within a mansion belonging to several owners there is a house belonging to two persons and one of them sells his share in it, the right of pre-emption belongs first to the partner in the house and then to the partner in the mansion. So if there is a party-wall between two houses* and the land on which the wall stands belongs to the owners of both houses, the right of pre-emption arises when one of the houses is sold to a stranger. But unless the land on which the wall stands is the joint property of the owners of the houses, they would not be partners though they may be neighbours.

Pre-emptor must take whole property sold.

Again a partner in the substance or in the appurtenances must as a rule claim the right of pre-emption in respect of *all* that is sold, or bargained to be sold, to a stranger. It would not be competent to him to claim the right in reference to a portion only of the subject of sale. Izzatulla *v.* Bhikari Molla (1870) 6 B. L. R. 386; 14 W. R. 469; Kashinath *v.* Mukhta Prasad (1884) I. L. R. 6 All. 370. In Doorga Prasad *v.* Munsi (1884) I. L. R. 6 All. 423 the Court on the authority of earlier cases held that every suit for pre-emption must include the whole of the property subject to the plaintiff's pre-emption conveyed by one bargain of sale to one stranger, and a suit by a plaintiff pre-emptor which does not include within its scope the whole of such pre-emptional property is unmaintainable, as being inconsistent with the nature and essence of the

* Prag Dutt *v.* Bandi Hossein (1871) 7 B. L. R. 42: 15 W. R. 225 and on review Bundey Hossein *v.* Puriag Dutt 16 W. R. 110.

pre-emptive right. This case was followed in Hulasi *v.* Sheo Prasad (1884) I. L. R. 6 All. 455. To the same effect see Arjun Sing *v.* Sarfaraz Sing (1888) I. L. R. 10 All. 182; Muhammad Wilayat Ali Khan *v.* Abdul Rab (1888) I. L. R. 11 All. 108; and Surdharee Lall *v.* Laboo Moodee (1876) 25 W. R. 499. The only exceptions to this rule are (1) where two persons purchase from one under the same document and (2) where the purchase is made by a co-sharer conjointly with a stranger. In the first of these cases, the pre-emptor can obtain the share of one of the two purchasers, and in the second case if the purchase of the stranger can be separated, he can have the share purchased by the stranger. Sheobharos Rai *v.* Jiach Rai (1886) I. L. R. 8 All. 462.

Except when two persons purchase under same document.

Or when a co-sharer and a stranger together purchase

In Hargas *v.* Kanhya (1884) I. L. R. 7 All. 118 the Offg. Chief Justice Straight is reported to have said. "If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned; for, it may will be that he has no desire to exclude such co-sharer."

When a stranger conjointly with a sharer makes a purchase, the joining co-sharer loses his right of pre-emption. Saligram Sing *v.* Raghubar Dyal (1887) I. L. R. 15 Cal. 224.

Co-sharers of same class owning unequal shares pre-empt equally.

Under the Mahomedan law* co-sharers of the same class irrespective of the extent of their shares are equally entitled to the right of pre-emption. Thus if A, B, C and D be the joint owners† of a property—their shares respectively

* Hedaya Vol. III pp. 562-567.

† Moharaj Sing *v.* Lalla Bheechuck Lall 3 W. R. 71; Roshun Mahomed *v.* Mahomed Kaleem 7 W. R. 150; Nundo Pershad Thakur *v.* Gopal Thakur (1884) I. L. R. 10 Cal. 1008.

being as the fractions ½, ¼, ⅛ and 1/8—and if A who is entitled to a moiety contract to sell his share to a stranger, then B, C and D will each be entitled to claim the right of pre-emption *equally* and unless any one of them surrenders his right they will each obtain 1/6th share of the property though their own shares in the property are not equal. So if B surrenders his right before decree, C and D will each obtain a fourth share.

In case of absent co-sharers.

If some of the sharers happen to be absent, the right of pre-emption belongs to those who are present, because it is uncertain whether those who are absent are inclined to make use of their right; but when the absent sharers afterwards appear and claim their share, they are entitled to it.*

Preliminaries to be observed for perfecting the right.

The Mahomedan law enjoins the performance of certain preliminaries as essential to the completion of the right, and these must be performed, except where the *Wajib-ul-urz* dispenses with the observance of any of these formalities. See Ram Prasad *v.* Abdul Karim (1887) I. L. R., 9 All. 513.

When the right commences.

The right of pre-emption *commences* when the seller declares his intention to sell, though it cannot be enforced until *after* the sale. Gobind Dayal *v.* Inayatullah (1885) I. L. R. 7 All. 775. If the vendor does not then inform his co-sharers, they are entitled to enforce their right as soon as it becomes known to them that the property has been sold. The first duty† of the pre-emptor is to claim his right *immediately* on learning of the sale. The Mahomedan law is so particular in this respect, that the Hedaya provides,

First demand.

* Hedaya Vol. III pp. 562-7.

† Jhootee Sing *v.* Komul Roy (1868) 10 W. R. 119; Jarfan Khan *v.* Jabbar Meah (1884) I. L. R. 10 Cal. 383; Ali Muhammad *v.* Taj Muhammad (1876) I. L. R. 1 All. 283; Ram Charan *v.* Narbir Mahton (1870) 4 B. L. R., A. C. 216; 13 W. R. 259.

Delay is dangerous.

that "if a pre-emptor receives the information of a sale by letter, and the information is contained in the beginning or middle of the letter, and he reads it on to the end and without making his claim, the right is lost." In Amjad Hossein *v.* Kharag Sen Sahu (1870) 4 B. L. R., A. C. 203; 13 W. R. 299 a little delay which was necessary to ascertain if the sale had really taken place was allowed not to interfere with the right. This first demand is called "*tulub-moowathubut.*" If when the first demand is made, witnesses be present and the demand made in the presence of the purchaser, or seller, or of the premises which are the subject of the sale, the pre-emptor should ask these witnesses to attest his demand.

Strict observance of forms necessary.

After the first demand has been made whether in the presence of witnesses or not, the pre-emptor should as early as practicable make what is known as *tulab-ish-had* (or demand with the invocation of witnesses) also called *tulub-tukreer* or confirmatory demand.* This second demand should be made in the presence of witnesses and in the presence of the seller or purchaser† or of the property sold. No particular‡ form of words is necessary for the demand. The pre-emptor may say "I do demand pre-emption of such premises (giving boundaries or other description). Bear ye testimony; I have performed

Second demand.

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* Narbhase Sing *v.* Luchmee Narain Pooree (1869) 11 W. R. 307. Razeeooddeen *v.* Zeenut Bibee (1867) 8 W. R. 463; Prokas Sing *v.* Jogeswar Sing (1868) 2 B L R., A. C. 12; Jadu Sing *v.* Raj Kumar (1870) 4 B. L. R., A. C. 171; 13 W. R. 177; Nuraddin Mahomed *v.* Asgar Ali (1882) 12 C. L. R. 312.; Jamilan *v.* Latif Hossein (1871) 8 B. L. R. 160; 16 W. R., F. B. 13.

† Janger Mahomed *v.* Mahomed Arjad (1879) I. L. R 5 Cal. 509; 5 C. L. R. 370. Chamroo Pasban *v.* Puhlwan Roy (1871) 16 W. R. 3.

‡ Ram Dular Misser *v.* Jhumack Lal Misser (1872) 8 B. L. R. 455; 17 W.R. 265; Girdharee Sing *v.* Rojun Sing (1875) 24 W. R. 462; Imamuddin *v.* Shah Jan Bibi (1870) 6 B. L. R. 167 note—Rujjubali Chopedar *v.* Chundi Churn Bhadra (1890) I. L. R. 17 Cal. 543

the ceremony of *tulub-moowathubut*" or words to that effect.

If the pre-emptor should make any delay in declaring his intention, he loses his right. See Ali Muhammud *v.* Taj Muhammud (1876) I. L. R. 1 All. 263; Bhairon Sing *v.* Lalman (1884) I. L. R. 7 All. 23; Surdharee Lall *v.* Laboo Moodee (1876) 25 W. R. 499. In Koromali *v.* Amir Ali 3 C. L. R. 166 where the first demand was made in the presence of the purchaser, the seller and the purchased premises, and with invocation of witnesses, the Court held that the second demand was not necessary. See also Jadunundun Sing *v.* Dulput Sing (1884) I. L. R. 10 Cal. 581.

Suit for pre-emption.

Should the seller or the purchaser object to the pre-emptor's right, the pre-emptor must enforce his claim by an action, and under the Mahomedan law the action must be instituted within a month of the time when the pre-emptor first became aware of the sale. But under the Limitation Act, (and in this respect the provisions of the Limitation Act and not the Mahomedan law will determine the period), the pre-emptor has a year* from the registration of the conveyance, or, the taking of possession by the purchaser, within which to prefer his claim in a court of justice.

Limitation.

Valuation.

A suit for pre-emption ought to be valued for purposes of jurisdiction at the value at which the property has been sold. Naun Singh *v.* Rash Behari Singh (1886) I. L. R., 13 Cal. 255.

Parties to suit.

To such a suit the defendants should be the seller and the purchaser, and the plaintiff should prove his right as co-sharer in the substance or in the appurtenances, as the case may be. He should also prove that the purchaser purchased the property for the price ascertained by him

* Act XV of 1877 Sch. II. Art. 10.

and express his willingness to take the property upon the same terms as the purchaser-defendant.

Not necessary to deposit price.

It would not be necessary* for the pre-emptor to deposit the price into court on preferring his claim. It would be sufficient if he would pay it when his right has been declared by Court, or when the Court would require him to pay it. But if he fails to pay the price in strict compliance with the Court's order, he loses his rights under the decree. Jai Kishn *v.* Bholanath (1892) I. L. R. 14 All. 529.

Court to determine the price bargained for and not market price.

In several of these suits for pre-emption, a question arises as to whether in order to defeat the right of pre-emption a considerably higher price was not entered in the conveyance than what was actually paid or stipulated for. In such cases the Court is called upon to determine not what the market price of the premises in question should be, but what was the real price, for which the premises were contracted to be sold, or which was paid by the purchaser.

Onus of proof.

Very slight proof need be given by the pre-emptor on this point. He is not expected to know what price was fixed upon between the buyer and the seller. If he gives evidence to show that the market price of the premises was considerably below the sum mentioned in the conveyance, the purchaser should be called upon to prove by strong evidence what price he actually paid or agreed to pay. On this point see Bhagwan Singh *v.* Mahabir Singh (1882) I. L. R. 5 All. 184; Tawakkul Rai *v.* Lachman Rai (1884) I. L. R., 6 All. 344; Sheopargash Dube *v.* Dhanraj Dube (1887) I. L. R. 9 All. 225; Agar Singh *v.* Raghuraj Singh (1887) I. L. R., 9 All. 471. In Ajaib Nath *v.* Muthura

* Khoffeh Jan Bebee *v.* Mahomed Mehdee (1868) 10 W. R. 211; Heera Lall *v.* Moorut Lall (1869) 11 W. R. 275; Nundo Pershad Thakur *v.* Gopal Thakur (1884) I. L. R. 10 Cal. 1008.

Prasad (1888) I. L. R., 11 All. 164 where the price was settled by compromise, it was held that the consideration payable by the pre-emptor was the amount specified in the compromise. In Ashik Ali *v.* Mathura Kandu (1882) I. L. R., 5 All. 187, where there was originally a mortgage by conditional sale, the court held that the entire amount due on the mortgage was the consideration payable by the pre-emptor.

Resignation must be before decree in order that a co-sharer may benefit.

We have seen that the rights of pre-emptors of the same class are equal and that if one of the pre-emptors resigns his right, such resignation enures to the benefit of the rest. All this can be done before decree. If the resignation by one co-sharer be made after decree, the entire share sold cannot be taken up by the other co-sharer but each of these latter must take according to the decree.

The same rule holds in the case of pre-emptors of different classes. Thus, we have seen that the right of a partner in substance is superior to that of a partner in the appurtenances, and that if a partner in substance should resign, the right of the partner in the appurtenances would arise. But no such benefit can accrue to the pre-emptors of the lower class, if the resignation be made after decree. So also a pre-emptor claiming in one right cannot get a decree in a different right. Sheojuttun Roy *v.* Anwar Ali (1870) 13 W. R. 189.

Loss of right by laches.

A pre-emptor may lose his right by laches* or by voluntary act. If he fails to comply with the preliminaries in due time he loses his right by laches. Sometimes also a pre-emptor is seen to give up his right of his own accord. He may do so by acquiescing in the sale, or by taking an agreement from the purchaser. Habibunnissa *v.* Barkat Alli (1886) I. L. R., 8 All. 275.

* Bhairon *v.* Lalman (1884) I. L. R. 7 All. 23; Habib-un-Nissa *v.* Barkat Ali (1886) I. L. R., 8 All. 275.

Ceremonies may be performed by agent.

The ceremonies which have to be performed by a pre-emptor may be performed by an agent. Wajid Ali Khan *v.* Hanuman Prasad (1869) 4 B. L. R., A. C., 139; 12 W. R. 484; Abadi Begam *v.* Inam Begam (1877) I. L. R. 1 All. 521. In such cases the same effect should be given to the manager's acts and omissions as to the acts and omissions of the principal. Harihar Dut *v.* Sheo Prasad (1884) I. L. R. 7 All. 41.

When right which had accrued ceases.

The right according to the Mahomedan law ceases upon the death of the pre-emptor after the making of the two demands and before taking the premises under the pre-emption. For the same reason, the right ceases when the pre-emptor dies before decree; but if he dies after obtaining a decree and before paying the price or obtaining possession of the property, his heirs get the benefit of the decree and become responsible for the price (Baillie's Digest Vol. I p. 499).

Right revives upon information as to price, or thing sold.

In some cases the pre-emptor relinquishes his right upon misinformation of the price, the purchaser, or, the thing sold. If in such cases upon receipt of correct information, the pre-emptor should wish to enforce his right he would be at liberty to do so. But the onus would lie very heavily on him to prove his case of misinformation and *bona fides*. Lajja Prasad *v.* Debi Prasad (1880) I. L. R. 3 All. 236.

Surrender must be after accrual of right.

In order that a purchaser may reap the benefit of a surrender by the pre-emptor, such surrender must be shown to have been made after the accrual of the right of pre-emption. A surrender before a sale is not effective. But in Braja Kishor Surma *v.* Kirti Chandra Surma (1872) 7 B. L. R. 19; 15 W. R. 247, the correctness of the law was questioned by Justice Onoocool Chandra Mookerjee. On this point see Toral Komhar *v.* Auchhi (1873) 9 B. L. R. 253; 18 W. R. 401;

Kooldeep Singh *v.* Ram Deen Singh (1875) 24 W. R. 198; Abadi Begam *v.* Inam Begam (1877) I. L. R. 1 All. 521.

When the purchaser before the passing of the decree has made improvements on the property, the pre-emptor may either take them for their value, or allow the purchaser to remove them. In such cases if the improvements were made after the pre-emptor's demand was known to the purchaser, and if the removal of the improvements would deteriorate the land in value, it would be competent to the Court to order possession to be given to the pre-emptor with the improvements without his having to pay for them. A purchaser knowing of the demand should therefore abstain from incurring any expenditure on improvements. But if the property has been deteriorated in value by the purchaser, the pre-emptor would be entitled to a proportionate deduction in the value. (Baillie's Digest on Mahomedan Law p. 498.)

Pre-emptor entitled to deduction of price if property be deteriorated by purchaser.

The pre-emptor in ordinary cases in getting possession of the property would get it void of all encumbrances that may have been created on it by the purchaser. Were it otherwise, the purchaser might in several cases defeat the pre-emption. Nor is this principle likely to injure any party if the equities are properly worked out. The price paid for the property by the pre-emptor would represent the property and be a substitute for it, and if a *bona fide* mortgage had been created by the purchaser, such mortgage should be satisfied out of the price.

Pre-emptor acquires free of encumbrances created by purchaser.

When property is sold at a public auction, the pre-emptor, in order that he may have a valid right of pre-emption, must bid for the property at auction up to the highest amount for which it may be knocked down. See Tej Singh *v.* Gobind Singh (1880) I. L. R. 2 All. 850; and Hira *v.* Unas Ali

Pre-emption in auction sale.

Khan (1881) I. L. R. 3 All. 827. Section 310 of the Civil Procedure Code (Act XIV of 1882), which the Court had to consider in coming to the above conclusion runs in these words :—" When the property sold in execution of a decree is a share of undivided immovable property, and two or more persons of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer." But previous to the passing of the present Code, the law was otherwise. Thus, in Abdul Jabel *v.* Khelat Chandra Ghose (1868) 1 B. L. R., A. C. 105 ; 10 W. R. 165, the High Court of Calcutta had held that under Sec. 14, Act XXIII of 1861 a co-sharer had no right of pre-emption in case of public sale.

The right of pre-emption has been secured in several instances by statutes. Thus in the case of sales for arrears of revenue under the Land Revenue Act of N.-W. P. (Act XIX of 1873) a co-sharer may acquire the right of pre-emption under the provisions of Sec. 188 of the Act. Baij Nath *v.* Sital Sing (1890) I. L. R. 13 All. 224 also recognizes the right of pre-emption in sales for arrears of rent. You will find similar provisions in the Punjab Revenue Act XVII of 1887 Sec. 87.

Devices to defeat pre-emption.

It is amusing to note the devices generally resorted to by sellers and purchasers to evade the right of pre-emption. Some of these have reference only to the rights of a neighbour. We have no concern with them. The devices frequently used to deprive co-sharers of their just rights are (1) to transfer properties under ostensible deeds of gift ; (2) to overstate the price in the conveyance with a view to scare away the co-sharers ; and (3) to sell under the same document other property with which the pre-emptor has no concern.

As to this last device, see Rowshun Koer *v.* Ram Dihal Roy (1883) 13 C. L. R. 45.

Form of decree for pre-emption.

As to the form of decree in a suit for pre-emption, see the provisions of Sec. 214 of the Civil Procedure Code which runs as follows :— "When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid, the suit shall stand dismissed with costs." See also Kashinath *v.* Mukhta Prasad (1884) I. L. R. 6 All. 370 and Parshadi Lal *v.* Ram Dial (1880) I. L. R. 2 All. 744.

Time for payment of price to be fixed in decree.

It is incumbent that a time should be fixed in the decree for payment of the price. The Appellate Court may extend such time Parshadi Lal *v.* Ram Dial (1880) I. L. R. 2 All. 744. See also Rup Chand *v.* Shamshul Jehan (1889) I. L. R. 11 All. 346; and Balmukand *v.* Pancham (1888) I. L. R. 10 All. 400. In Naubat Singh *v.* Kishan Singh (1881) I. L. R. 3 All. 753 it was held that a decree for possession in favour of a pre-emptor might be made conditional upon his paying a higher sum on account of the price than what was first offered by him. In Jai Kishen *v.* Bholanath (1892) I. L. R. 14 All. 529 it was held that if the pre-emptor failed to pay the price within the time mentioned in the decree he lost his right. It should be noted that a pre-emptor would not be able to claim the benefit of any arrangement as to the payment of price by instalments made between the vendor and the vendee. Nihal Singh *v.* Kokale Singh (1885) I. L. R. 8 All. 29.

Pre-emptor not entitled to mesne profits.

In Deodat *v.* Ram Autar (1886) I. L. R. 8 All. 502, it was held that the vendee in possession could not be deemed a trespasser and that the pre-emptor would not be entitled to mesne profits from him. This principle was approved by the Full Bench in Deokinandan *v.* Sri Ram (1889) I. L. R. 12 All. 234. These cases laid down that the right of the pre-emptor to possession accrued from when he completed his purchase by payment of the price.

Pre-emption among the Shiah sect exists only between two co-sharers.

The prevalent doctrine of the Shiah sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers. Abbas Ali *v.* Mayaram (1888) I. L. R. 12 All. 229.

LECTURE VI.

Joint Property generally.

Disputes as to mode of enjoyment are determined by partition—why co-sharers generally allow joint property to run into waste—Dread of partition suit—Division of subject—Contribution among co-sharers—Contract Act—Equitable doctrine—Jurisdiction of Small Cause Court—Under Act XI of 1865 after the passing of Contract Act—Under present Act—Under Presidency Small Cause Court Act—Payment of revenue secures no lien—When payment of rent in Bengal secures lien—Parties to contribution suits—Decree in such suit—Plaint to specify shares—Contribution among wrong-doers—among persons jointly liable for breach of contract—Repairs—Improvements—Injunction against co-sharers' use—No injunction except on proof of waste—Watson & Co. *v.* Ram Chund Dutt—Lachmeswar Singh *v.* Manowar Hossien—One joint proprietor without injuring his co-proprietors may use joint property so as to be entitled to exclusive profits—Buildings on joint lands—Acquiescence—reasonable rent where demolition would be a hardship—No demolition if practicable—An ordinary case in Bengal—Co-sharer growing valuable crop on joint land—Suit for *khás* possession by all co-sharers—Remedy of one dispossessed by a co-sharer—*In Bengal*—Enhancement of rent must be sued for by all joint landlords—Even where co-sharers collect their rents separately—Enhancement by a co-sharer to whom a separate kubulyut was given—Circumstances under which share of increased rent was held recoverable—Suit for determination of incidents of tenancies—one of several landlords may sue for apportionment of rent—Whether a co-sharer can sue for entire rent and when—When can a sharer sue for his share of rent separately—Tenure not saleable at the instance of one of several landlords—Apportionment of rent on land ceasing to be joint—Registration of sharers under Act VII B. C. of 1876—Suit for kubulyut by co-sharer—Enhancement of rent of a share by deed—Suit for ejectment of tenant by one of several landlords—mode of executing partial ejectment—Joint landlords under Bengal Tenancy Act—Common manager—Lease on behalf of a minor co-sharer void even as regards shares of adults—Private partition of Revenue-paying Estates not binding on Government—Partition of tenancies under Bengal Tenancy Act—Surrender by one of several tenants—opening of separate accounts under Act XI of 1859—*In N.-W. Provinces*—when co-sharers refuse settlement of Pattidari Mahal—Record of rights to determine the proportions in which Government

revenue should be paid by sharers and the mode in which rent is to be collected—Right of pre-emption possessed by co-sharer at sales for arrears of revenue—a co-sharer landlord cannot enhance rents—one of several tenants cannot surrender—one of joint tenants cannot be ejected by the landlord—no co-sharer to sue for portion of rent—circumstances in which one co-sharer can sue for share of rent—*Oudh Laws*—Joint settlement—Member of village community or co-sharer can obtain possession of defaulting share by payment of defaulter's revenue—tenant not competent to relinquish portion—suits for enhancement of rent, ejectment of tenants &c. where the land is owned by several landlords to be brought by the common manager—*In Bombay*—a co-sharer as agent of the others can sue for rent—*In Punjab*—Joint liability of tenants for rent—*In Central Provinces*—settlement in case of a co-sharer refusing settlement—allowance of a sharer excluded from settlement—statutory pre-emption among sharers—Tenant not ordinarily bound to pay rent to one of several landlords—Common manager to collect rents—Property of a firm—Share of each partner—Partnership property primarily liable for partnership debts in preference to personal debts—Family idol.

Heretofore we have discussed the special incidents of that class of joint property, which is the result of the personal laws of the people of India. Let us now consider some of the common incidents of joint property in general.

When a piece of land or a building belongs to a number of joint proprietors, disputes often arise among them in reference to the mode of enjoyment. Partition is the best means of putting an end to such differences, and we frequently find that the owners, who before partition, did not care to spend any money on the improvement of their joint property, do not hesitate to improve their separate allotments after partition.

Disputes as to mode of enjoyment are determined by partition.

The secret of this oftentimes is that, comparatively larger sums have to be spent for the improvement of the entire property, and no individual sharer wishes to lay out such large sums which he may find very unpleasant to realize from his co-sharers. It is true that the sharers may, before undertaking the improvement, contribute

Why co-sharers generally allow joint property to run into waste.

according to their shares, to raise the sum required; but in the majority of cases, the comparatively needy circumstances of some of the share-holders stand in their way. Other causes also tend to check improvements of joint property.

Dread of partition suit.

But though under such circumstances the sharers may desire partition, the delay and the expenses incidental to an actual separation by metes and bounds by recourse to Court are sufficient to deter them from making an attempt in that direction. Unless, therefore, the co-sharers can agree among themselves as to separate allotments, or can avail themselves of the services of some common friends and mediators, they are obliged to continue in joint ownership. In this Lecture, I intend to consider some of the statutes, case-law and principles of equity which govern the relations of the co-sharers among themselves, and also those which regulate their rights and liabilities in reference to third persons.

Division of subject.

Contribution among co sharers.

When rent or revenue has to be paid in respect of any joint property all the owners are jointly and severally liable for such rent or revenue. In a Mitakshara or a Dayabhaga joint family, where the owners have only one *tehvil* or purse, any payment made on account of such liability, from out of the common *tehvil* is a payment by all the owners, and no question of contribution arises. But when the owners have not a common *tehvil* and their interests in the land or property on account of which the rent or revenue is due, are, as among themselves, distinct, though the liability, for the rent or revenue is entire and undivided, if one of the co-sharers discharges the entire liability he would have an equitable claim to contribution as against the other sharers. The principle underlying this rule of law must commend itself to you as sound and good equity. In the Indian

Contract Act.

Contract Act IX of 1872, there is a chapter which treats of certain relations resembling those created by contract, and in that chapter Sec. 69 provides—"A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be re-imbursed by the other." In the case under our consideration, it is true, that the "another" was not bound to pay the entire rent or revenue, but only a fraction of it as between himself and his co-sharers, and that the person who discharged the entire liability was bound to discharge a portion of it. But as the "another" was benefited by what may be called the excess payment, he would be justly liable to contribute his share of the excess in an action by the person who paid the entire amount. You should notice that the law contemplates that the person who discharges the liability must be one interested in the payment of the money. One who, therefore, makes a voluntary payment cannot come under this section.

Equitable doctrine.

In Ram Bux Chittangeo *v.* Modoo Soodhun Paul Chowdhry (1867) 7 W. R. 377; B. L. R. sup. vol. 675; 2 Ind. Jur. N. S. 155, it was laid down that in such cases the right to contribution rests upon the equitable doctrine that one shall not bear the whole burthen in case of the rest, and that all the co-sharers shall bear the burthen in proportion to their respective shares. Sir Barnes Peacock, C.J., in delivering the judgment of the Full Court went to the length of saying that the obligation would arise even if the payment were made "contrary to express directions."

Though it may be desirable to consider here only the substantive law as regards the rights of joint owners, reserving for a subsequent Lecture the adjective law and all questions of procedure, it would certainly be more convenient to find all the

law bearing on such contribution suits in the same place. With the view of securing this convenience, I shall consider here the question of jurisdiction and procedure applicable to these special suits.

Now the decision in Chittangeo's case proceeds mainly on the question of jurisdiction, and was passed at a time when the Contract Act had not been passed. On the question of jurisdiction, it laid down that a Small Cause Court had no jurisdiction to try a suit for contribution. It was followed, though not without considerable hesitation, in Nobin Krishna Chakravati *v.* Ram Kumar Chakravati (1881) I. L. R. 7 Cal. 605; 9 C. L. R. 90, and subsequently again in Ramjoy Surmah *v.* Joynath Surmah (1882) I. L. R. 9 Cal. 395; 12 C. L. R. 314. In Krishno Kamini Chowdhrani *v.* Gopi Mohun Ghose Hazra (1888) I. L. R. 15 Cal. 652 a Full Bench of the Calcutta High Court held that the Contract Act of 1892 had effected a change in the law, and that the Court of Small Causes would have jurisdiction under Act XI of 1865 to entertain such suits for contribution.

Under Act XI of 1865 after passing of Contract Act.

To the same effect is the law laid down by a Full Bench of the Allahabad Court in Nath Prasad *v.* Baijnath (1880) I. L. R. 3 All. 66. The Madras Court, even before the passing of the Contract Act, had laid down that such suits for contribution would be cognizable in the ordinary Courts of Small Causes. *Vide* Govinda Muneya Tiruyan *v.* Bapu (1870) 5 Mad. H. C. Reports 200.

The question of jurisdiction, as regards suits in the mofussil, has now been settled by the Provincial Small Cause Court Act IX of 1887. In Schedule II of the Act, Art. (41) suits for contribution are expressly excepted from the jurisdiction of Courts of Small Causes in the mofussil. In the Presidency Small Cause Courts Act XV of

Under present Act.

Under Presidency S. C. Court Act.

1882 suits for contribution are not excepted from the jurisdiction of Small Cause Courts in the Presidency Towns.

I have here considered only the case of liability for rent or revenue. But a suit for contribution would lie all the same at the instance of any one sharer paying the whole of any other similar demand, *e.g.*, the cesses, &c.

Payment of revenue secures no lien.

The question whether a co-sharer upon paying the revenue due by another undivided co-sharer or upon paying the entire revenue due upon the whole estate acquires a charge over the share of his coparcener may now be taken, as regards Bengal, to have been settled in the negative by the Full Bench decision in Kinuram Das *v.* Mozaffer Hosain Shaha (1887) I. L. R. 14 Cal. 809. The earlier decisions on the point and the *dictum* of the Privy Council in Nugender Chunder Ghose *v.* Kaminee Dassee 11 M. I. A. 241 were considered at length by the Full Court. The judges came to the conclusion that by such payment of revenue the co-sharer did not obtain a charge, because there was nothing in Act XI of 1859 to give rise to such a charge. As regards the N.-W. Provinces the law has been settled to the same effect by the Full Bench decisions in Seth Chitor Mal *v.* Shib Lal (1892) I. L. R. 14 All. 273.

When payment of rent secures lien.

In Bengal, if a tenure or a holding is owned jointly by a number of persons, and if one of them should pay into Court the whole rent, *when the tenure or the holding has been advertised for sale,* he would acquire a lien on the tenure or holding under the provisions of Sec. 171 of the Bengal Tenancy Act. The words of the section are very wide and would admit of under-tenants as well as co-sharers paying up the decree and acquiring a lien. You should note that under the strict letter of the law no such lien would be acquired if the pay-

ment be made before the tenure or the holding is advertised for sale. You should also note that as sales under the Patni Regulation VIII of 1819 are made by the Collector, no payment can be made into "Court." (see Tariny Debi *v.* Shama Churn Mitter (1882) I. L. R. 8 Cal. 954).

Parties to contribution suits.

In a suit for contribution, all the parties interested—all the shareholders—should be made parties ; *vide* the case of Khema Deba *v.* Kamola Kant Bukshi (1868) 10 W. R. 10, 10 B. L. R. 259 note.

Decree in such suit.

In the same case, Justice Markby ruled that in such a suit, though all the co-sharers may be sued together, yet it is the business of the Court by its decree to apportion the liability among the shareholders according to their respective shares, and not to give a joint decree against all. In Bholanath Chatterjee *v.* Inder Chand Doogur (1870) 14 W. R. 373 it was ruled that in order to prevent a multiplicity of suits, the plaint in such a case should specify the amount due by each of the co-defendants. The decision in Pitambur Chuckerbutty *v.* Bhyrubnath Paleet 1871 15 W. R. 25 is to the same effect. The principle of the above decision was adopted by the Allahabad Court in Ibn Husain *v.* Ramdai (1889) I. L. R. 12 All. 110.

Plaint to specify shares.

Contribution among wrong-doers.

But there is no right of contribution among wrong-doers in respect of their joint liability for a wrongful act which was done by them with the knowledge that the act was wrongful. Thus if two persons, after forcibly and wrongfully dispossessing a rightful owner of some land, continue in joint possession of the same until they are ousted by a decree of Court making them jointly liable for mesne profits, and, if in execution of decree, the entire mesne profits be recovered by the rightful owner from one of the two wrong-doers, such