wrong-doer would not have a right to claim contribution from his companion. You should note that the law requires that the wrongful act should be known as such to the parties. See Suput Sing *v.* Imrit Tewari (1880) I. L. R. 5 Cal. 720; 6 C. L. R. 62. The principle of this decision was adopted by the Allahabad Court in Kishna Ram *v.* Rakmini Sewak Sing (1887) I. L. R. 9 All. 221 and assumed as correct by the Madras Court in Thangammal *v.* Thyyamuthu (1887) I. L. R. 10 Mad. 518. But though there is no right of contribution among joint wrong-doers or tort-feasors such a right exists among persons who have been jointly made liable for damages on account of a breach of contract. The leading case of Merry Weather *v.* Nixon 2 Smith's Leading Cases p. 546, points out the distinction between the two classes of cases. See Brojendro Kumar Roy Chowdhry *v.* Rash Behari Roy Chowdhry (1886) I. L. R. 13 Cal. 300.

Among persons jointly liable for breach of contract.

One of the questions that frequently arise in connection with joint property is whether a co-sharer who spends money over any improvement of joint property is entitled to be reimbursed by the other co-sharers in proportion to the shares of these latter. If the other co-sharers enjoy the benefit of the improvement there is no reason why they should not pay for the same in proportion to their share in the property. The case would be more difficult if the co-sharer bent on making the improvement, makes it notwithstanding the express wishes of his co-sharers to the contrary.

But even in such a case if the improvement is attended with an additional advantage and the other co-sharers enjoy this additional advantage, the law would compel them to pay for the improvement. See Muttasvami Gaudan *v.* Subbira Maniya

Gaundan (1863) 1 Mad. H. C. Rep. p. 309; also Buzlool Hossein *v.* Gunput Chowdhry (1876) 25 W. R. 170; also Mahomed Khan *v.* Shaista Khan 2 N.-W. P. Rep. p. 248.

Repairs.

A distinction may be, and is generally, made between repairs and improvements. As to repairs made to the subject matter of a co-tenancy, Mr. Freeman, in his work on "Co-tenancy and Partition" 2nd edition, Section 261, says "compensation may be claimed; 1st, as forming a sufficient affirmative cause of action against one of the co-owners not contributing his proportion of the expenses thereof; 2nd as forming a matter of set off, to be deducted from an amount which one making the repairs is under obligation to pay to another of the co-tenants for mesne profits, or profits made or received from the thing owned in common..... All the cases agree that a notice of the repairs needed, and a demand that he participate in making them, is a pre-requisite to a recovery in such action against a part owner." But as to improvements, that author says (Sec. 262)—"Neither co-tenant has any power to compel the others to unite with him in erecting buildings or in making any other improvements upon the common property. If either chooses to make such improvements, he cannot recover from the others for their share of the expenses incurred thereby, in the absence of an express agreement on their part, or of such circumstances, or such a course of dealing between the parties, as convinces the Court that a mutual understanding existed between them to the effect that these expenses were to be repaid. It naturally follows, from the rule that one co-tenant is not entitled to charge the others for improvements made without their authority, that the latter have no such interest in such improvements as to make them the basis of any part of a claim

Improvements.

against the co-tenant erecting them. Hence, when called upon to account, he cannot be charged with the increase in the productive value of the property resulting from his improvements; nor, on the other hand, can he insist upon holding the entire property until reimbursed for money expended in improvements made without the consent of his co-tenants. If a co-tenant has assented to or authorized improvements to be made, he is answerable therefor."

Injunction against a sharer's use.

At one time it was thought that each of joint proprietors had a right to enjoy the whole land, and therefore if any of them took up exclusive possession of the whole or a portion, the others of them even without proving any damage could obtain an injunction to restrain the one from exclusive possession. On this point see Stalkartt *v.* Gopal Panday (1873) 20 W. R. 168; 12 B. L. R. 197 in which Justice Phear observed—"The lands have not been partitioned, and as holders of an undivided 4 anna share they are part-owners of every beegah of the whole mouza, and by virtue of that right of ownership, I apprehend that they can claim either to occupy the land themselves jointly with the defendant or defendant's assignees, or to insist that the land shall not be occupied and used by any person (excepting always persons having a right of occupancy) otherwise than with their assent:" In the case of Nundun Lall *v.* Lloyd (1874) 22 W. R. 74 the same learned judge observes "one shareholder alone in a joint-estate, or his assignee, cannot claim to cultivate any portion of the joint property, which is not his zerait land, exclusively without the consent of the other shareholders, merely on the ground that he is willing to pay a reasonable rent for it." In Lloyd *v.* Sogra (1876) 25 W.R. 313, Sir Richard Garth in concurrence with Justice Ainslie

held that where a suit was brought to recover possession of certain lands in which plaintiff and defendant were co-sharers, and to secure damages for the exclusive possession which defendant had enjoyed for some years, and to obtain an injunction against defendant to prevent him from cultivating indigo on the land in suit without the consent of the plaintiff, it would be an ineffectual way of enforcing plaintiff's right to allow the adverse possession of the defendant to continue and to let the plaintiff recover damages from time to time.

No injunction except on proof of waste.

In all the above cases, the Court granted plaintiff the injunction prayed for. But in the Shamnugger Jute Factory Co., Limited *v.* Ram Narain Chatterjee (1886) I. L. R. 14 Cal. 189 Justice Wilson in concurrence with Justice Porter held in 1886 that in granting or withholding an injunction, a Court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plaintiff against that which the injunction, if granted, would cause to the defendant. The judgment further laid down that there was no such broad proposition as that one co-owner was entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or the withholding of the injunction. In deciding this case the judges followed the principle laid down in 1869 by Sir Barnes Peacock, C. J., in Biswambhar Lal *v.* Rajaram 3 B. L. R., Ap. 67. The learned Chief Justice is reported to have said in delivering the judgment of the Court : "It appears to me that even if the defendant had not a strict legal right to build the wall upon the joint land, that this is not a case in

which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights. It appears to me that this is a case in which apparently no injury to the plaintiff has been caused by the erection of the wall, and that, therefore, the plaintiff ought to be left to such remedy as he may have, without applying to a Court of Equity for assistance, in having the wall demolished." To the same effect are the decisions in Nocury Lall Chuckerbutty *v.* Brindabun Chunder Chuckerbutty (1882) I. L. R. 8 Cal. 708; and Joy Chunder Rukhit *v.* Bippro Churn Rukhit (1886) I. L. R. 14 Cal. 236.

The above cases were followed by Justice Mahmud in Parasram *v.* Sherjit (1887) I. L. R. 9 All. 661 and the principle underlying these decisions was affirmed by the Full Bench in Shadi *v.* Anup Singh (1889) I. L. R. 12 All. 436.

Watson v. Ram Chund Dutt.

The result of the above decisions is that if a co-sharer attempts to take up exclusive possession of any lands in excess of his legitimate share, and his co-sharers in consequence apprehend loss, a Court would be justified in granting an injunction to prevent such prospective loss to the co-sharers. But when a co-sharer has already taken exclusive possession, a Court should not deprive him of such possession except on very strong grounds. Thus, the Privy Council in the case of Watson & Co. *v.* Ram Chund Dutt (1890) I. L. R. 18 Cal. 10; L. R. 17 I. A. 110 held that if in any case the dispossessing co-sharer does not dispute the title of the other co-sharers but simply tries to defend his own possession, and if it should appear to the Court that the granting of an injunction may have the effect of deteriorating the pro-

perty in value, while the loss of the co-sharers may be re-imbursed by money-payment, an injunction should not be granted to put the plaintiff in joint possession with the defendants. Sir Barnes Peacock, in delivering the judgment of the Judicial Committee, observed:—"It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession - - - In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandman like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course in large estates, would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if in

a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

Lachmeswar Singh v. Manowar Hossein.

One joint proprietor without injuring his co-proprietors may use joint property so as to be entitled to exclusive profits.

The above observations were quoted with approbation by Lord Hobhouse in Lachmeswar Sing *v.* Manowar Hossein (1891) I. L. R. 19 Cal. p. 253; L. R. 19 I. A. 48. This last is a very important case on the question of joint ownership. Here a river bed with the banks, was the joint property of the plaintiff and the defendant. The defendant at his own expense had plied a ferry for some years across the river, and used the banks for landing passengers. By reason of the river and the landing ghats on both sides being the joint property of the plaintiff and the defendant, plaintiff claimed a share of the profits of the ferry in proportion to his share in the lands. Their Lordships observed "The parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He has not excluded any co-sharer. It is not alleged that he has used the river for passage in any such way as to interfere with the passage of other people. It is not alleged that the defendant's proceedings have prevented any one else from setting up a boat for himself or his men, or even from carrying strangers for payment....All that is complained of is that he has expended money in a certain use of the joint property, and has thereby reaped a profit for himself. But property does not cease to be joint merely because it is used so as to produce more to one of the owners who has incurred expenditure or

risk for that purpose." And again "If the defendant's use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any, and none have been earned by the exclusion of them from possession." The plaintiff's suit was dismissed with these and similar observations. See also Gopee Kishen Gossain *v.* Hem Chunder Gossain (1870) 13 W. R. 322; and Anantram Rav *v.* Gopal Balvant (1894) I. L. R. 19 Bom. 269.

Buildings on joint lands.

The Reports teem with cases of individual co-sharers erecting for their exclusive use *pucca* houses on portions of joint land, and the question oftentimes raised is whether such buildings ought not to be demolished. Now, if one of a number of co-sharers intending to appropriate to his own use his share of the joint land should, without partition, take up a portion of such land and build a *pucca* house for his own habitation, he should not be treated as a trespasser. So also if a sharer seeing one of his co-sharers erect a house on a piece of joint land stand by and make no objection, a Court of Equity will presume his acquiescence to the erection of the building. From these two fundamental principles it follows that if the land covered by the building does not exceed appreciably the area that would represent such co-sharer's portion, and further if the objecting co-sharers do not object to the erection of the buildings in proper time, a Court of Equity will not favour the claim. But if in the case where a sharer makes his own selection, the objection of the other co-sharers is made at or before the commencement of the building operations, a Court of Equity will favour the objectors, unless the portion taken up approximately represents the proper share of such co-sharer. See the Full Bench

Acquiescence.

decision in Shadi *v.* Anup Sing (1889) I. L. R. 12 All. 436 already referred to.

Reasonable rent where demolition would be a hardship.

In cases where the demolition of building would entail hardship—*e.g.*, where a co-sharer admitting the rights of his co-sharers took up a little more land than his proper share owing to a *bona fide* mistake—a Court of Equity should make up the loss of the co-sharers by decreeing them reasonable rent or other compensation. In Pran Kishore Gossain *v.* Dinnobundhoo Chatterjee (1868) 9 W. R. 291 the Court thought that as the lands in suit had been in the possession of the co-sharer-defendants as tenants, they could not be ousted therefrom by the co-sharer-plaintiff though they might be liable for rent.

No demolition if practicable.

The result of the above discussion is, that in no case should the Courts, at the instance of a co-sharer, order demolition of *pucca* buildings on joint land, after the same have been erected by another co-sharer, unless it be shown (1) that injury would otherwise accrue to the co-sharer-plaintiff and (2) that before the buildings were started objection was taken to their erection. Nocurry Lall Chuckerbutty *v.* Brindabun Chunder Chuckerbutty (1886) I. L. R. 8 Cal. 708. In short, it is only where a co-sharer cannot be adequately compensated otherwise than by the demolition of a building that a Court of Equity should order such demolition.

An ordinary case of a dwelling house in Bengal.

It not unfrequently happens that as regards the ancestral dwelling house of a number of shareholders, there is a mutual understanding among the co-sharers whereby the parties appropriate to their several use specific portions of such house, and make additions to, and alterations in, these portions at their own expense to suit their convenience. In such cases, at a general partition, the parties ought to get credit for the

values of their additions calculated at the time of the partition.

Co-sharer growing valuable crop on joint land which was waste.

In the event of a sharer without the permission of his co-sharers growing any valuable crop on joint land, which previous to such use remained waste, the co-sharers would merely be entitled to reasonable compensation for use and occupation. The grower of a crop has to make an outlay in purchasing seed and growing the crop, and it is he alone who takes the risk of cultivation. It would not be fair under such circumstances that his co-sharers should take a share of his profits.

Suit for *khas* possession by all co-sharers.

It not unfrequently happens that lands in the occupation of tenants are jointly owned by several landlords who receive their shares of rent separately from the tenants. If such landlords are dispossessed by a trespasser collecting the entire rents from the tenants who attorn to him, the dispossessed landlords may sue the trespasser and the tenants for *khas* possession of the lands; for, in such a case the tenants by disowning the title of their landlords forfeit all right to continue in possession.

Remedy of one dispossessed by a co-sharer.

When a person is dispossessed by his co-sharers taking exclusive possession, the remedy of the sharer dispossessed is to sue for joint possession with the co-sharers. In Gobind Chunder Ghose *v.* Ram Coomar Dey (1875) 24 W. R. 393, Sir Richard Garth, C. J., doubted whether a suit for possession should lie and seemed to think that a suit for partition was the only remedy. But the learned Chief Justice in Lloyd *v.* Bibee Sogra (1876) 25 W. R. 313 referring to the above decision, said, it was not his Lordship's intention to say that a suit to recover joint possession or for an injunction could not have been maintained.

Where agricultural lands in the occupation of tenants are the property of several landlords, suits

In Bengal. Enhancement of rent must be sued for by all the joint landlords.

for enhancement of tenants' rents or for additional rents, in the territories under the administration of the Lieutenant-Governor of Bengal, under the Bengal Tenancy Act VIII of 1885, must be brought by the whole body of landlords. See Secs. 30 and 188 of the Bengal Tenancy Act; also Gopal Chunder Das *v.* Umesh Narain Chowdhry (1890) I. L. R. 17 Cal. 695. In Haladhar Saha *v.* Rhidoy Sundri (1892) I. L. R. 19 Cal. 593 this ruling was held applicable even where the co-sharers collected their rents separately and the plaintiffs made the dissentient co-sharers defendants. But in Panchanan Banerji *v.* Raj Kumar Guha (1892) I. L. R. 19 Cal. 610 where there was a separate Kubulyat in respect of an undivided share, it was held that the co-sharer to whom the Kubulyat was given was competent* to sue for enhancement of the rent payable to him. So also where rent was being collected separately by a co-sharer and where according to arrangement, the tenant was bound to pay rent at a particular rate for all lands subsequently brought into cultivation, a co-sharer was held entitled to recover his share of the increased rent by suit. See Ramchunder Chuckrabutty *v.* Giridhur Dutt (1891) I. L. R. 19 Cal. 755.

Even where the co-sharers collect their rents separately.

Enhancement by a co-sharer to whom a separate kubulyat was given.

Circumstances under which share of increased rent was held to be recoverable.

Suits for determination of the incidents of tenancies can be brought by landlords under Sec. 158 of the Bengal Tenancy Act. To such proceedings all the landlords (where there are several jointly owning the land) must be applicants *vide* Moheeb Ali *v.* Ameer Rai (1890) I.L.R. 17. Cal. 538.

Suit for determination of incidents of tenancies.

Where a tenant holds lands under several joint landlords for one consolidated rent, (the

*See Tejendro Narain Sing *v.* Bakai Sing (1895) I. L. R. 22 Cal. 658.

lands belonging to them all in defined shares), any one of the landlords may sue for apportionment of the rent and severance of the tenure. In Ishwar Chunder Dutt *v.* Ram Krishna Dass (1880) I. L. R. 5 Cal. 902; 6 C. L. R. 421, Sir Richard Garth, C. J., in delivering the judgment of the Full Bench, said:—"But if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and then, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit. No real injustice will be done to the tenant under such circumstances, because the possibility of the severance of the tenure by butwara, sale, or otherwise, is only one of those necessary incidents of the property which every tenant is, or must be, presumed to have been, aware of when he took his lease; and as regards the costs of any suit which may be brought for the purpose of having the rent apportioned, they would of course be a matter for the discretion of Court, and would probably depend upon how far in each case the tenant has had a fair opportunity of amicably adjusting the apportionment."

One of several landlords may sue for apportionment of rents

It seems that the severance and the apportionment contemplated in this case is a complete severance so as to make separate tenancies of specific lands with distinct rents, and the decision cited above provides that the apportionment and separation must be in the presence of the tenant and all the shareholders.

In Obhoy Gobind Chowdhry *v.* Hury Churn Chowdhry (1882) I. L. R., 8 Cal. 277, one of the shareholders who had his share of the zemindari

allotted to him at a Butwara sued the tenant in respect of his share of the rent without making the co-sharers defendants. The Court held upon the authority of the Full Bench decision quoted above that, in the absence of an apportionment of the rent between the tenant and the several landlords, the suit for share of the rent would not lie. It should be noted that in this case the Court seemed to think that the suit for a share of the rent might proceed if the co-sharers had been made parties. But you should remember that when the decision was passed, Sec. 188 Bengal Tenancy Act which prohibits suits by *some* only of the co-sharers was not the law.

If joint property is let to a tenant at an entire rent, the rent is due in its entirety to all the co-sharers and all are bound to sue for it. Annoda Churn Roy *v.* Kally Coomar Roy (1878) I. L. R. 4 Cal. 89 ; 2 C. L. R. 464.

Whether in the circumstances above contemplated one of the shareholders can sue for the entire rent, if the other sharers refuse to join with him as plaintiffs, is a debatable question.

Whether a co-sharer can sue for entire rent and when.

In Prem Chand Nuskur *v.* Mokshoda Debi (1887) I. L. R. 14 Cal. 201 ; and Umesh Chandra Roy *v.* Nasir Mullick (1887) I. L. R. 14 Cal. 203, foot note, it was held that a sharer on proving that his co-sharers refused to join with him as plaintiffs, and on making such co-sharers defendants, might sue for the entire rent. See also Dino Nath Lakhan *v.* Mohurum Mullick (1880) 7 C. L. R. 138; and the observations of Ghose, J., in Jugobundhu Pattuck *v.* Jadu Ghose (1887) I. L. R. 15 Cal. 47 (See p. 50). But the authority of these rulings has been considerably shaken by the decisions in Beni Madhub Roy *v.* Jaod Ali Sircar (1890) I. L. R. 17 Cal. 390 ; and Haladhar Saha *v.* Rhidoy Sundri (1892) I. L. R. 19 Cal. 593.

It is clear, however, that in such suits for entire rent the co-sharers must be made defendants along with the tenant. Dino Nath Lakhan *v.* Mohurum Mullick (1880) 7 C. L. R. 138.

When can a sharer sue for his share of rent separately.

If after the creation of a tenancy consisting of *ijmali* lands on a consolidated rent, the tenant agrees to pay each sharer separately his quota of rent, or if he for some years is shown to have paid the sharers their shares of the rent separately according to some arrangement, then so long as the arrangement is not put an end to, any co-sharer may sue* the tenant for his share of the rent without making his co-sharers defendants.

Tenure not saleable at the instance of one of several landlords.

But in such a case the landlord in the absence of his co-sharers would not be competent to sell the tenure or holding in execution of his decree for share of rent. He would be simply entitled to sell the interest of the debtor, and the purchaser would not acquire the tenure void of encumbrances ; (see Beni Madhub Roy *v.* Jaod Ali Sircar (1890), I. L. R. 17 Cal. 390, which was a Full Bench case under the Bengal Tenancy Act VIII of 1885.

The law in this respect was the same under the repealed Act VIII (B.C.) of 1869. See Sec. 64 and Bhaba Nath Roy Chowdhry *v.* Durga Prosonno Ghose (1889) I. L. R. 16 Cal. 326.

Apportionment of rent on land ceasing to be joint.

When the land demised ceases to be *ijmali* and different portions of it become the property of difierent owners, any co-sharer may sue for the apportionment of the rents, but he must make his

* Ganga Narayan Das *v.* Saroda Mohan Roy Chowdhry (1869) 3 B. L. R., A.C. 230 ; 12 W. R. 30 ; Sree Misser *v.* Crowdy (1871) 15 W. R. 243; Dinobundhoo Chowdhry *v.* Dinonath Mookerjee (1873) 19 W. R. 168 ; Lalun *v.* Hemraj Singh (1873) 20 W. R. 76; and Doorga Proshad Mytse *v.* Joynarain Hazra (1878) I. L. R. 4 Cal. 96; 2 C. L. R. 371 (where all the previous cases were quoted with approbation and the ruling of Justice Prinsep reported in I. L. R. 2 Cal. 474 was held erroneous.

co-sharers defendants to the action. Annoda Churn Roy *v.* Kally Coomar Roy (1878) I. L. R. 4 Cal. 89.

In order, however, that a shareholder in an estate or revenue-free property may successfully sue for his share of the rent, his name must be registered under the provisions of Act VII (B.C.) of 1876 in respect of the share claimed. That Act provides:—Sec. 78 (leaving out the words which do not concern us now) —— "No person being liable to pay rent to two or more proprietors, holding in common tenancy, shall be bound to pay to any one such proprietor more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor is registered bears to the entire estate or revenue-free property."

Registration of shares under Act VII (B.C.) of 1876.

At one time it was held that the registration of the plaintiff's name under Act VII (B. C.) of 1876 in respect of the share claimed must be a condition precedent *to the institution* of the suit for rent; but a Full Bench of the Calcutta High Court has since ruled that it would be sufficient if before the institution of suit an application for registration be shown to have been made, and the actual registration be effected before the decree is made in the rent suit. See Surya Kant Acharya Bahadur *v.* Hemant Kumari Devi (1889) I. L. R. 16 Cal. 706; Dhoroni Dhur Sen *v.* Wajidunnissa Khatoon (1888) *Ibid* 708; Alimuddin Khan *v.* Hira Lall Sen (1895) I. L. R. 23 Cal. 87.

Suit for Kubulyat by a sharer.

In Doorga Proshad Mytse *v.* Joynarain Hazra (1878) I. L. R. 4 Cal. 96; 2 C. L. R. 370 the Court held that one sharer could not sue for a Kubulyat in respect of his share of the lands comprised in a tenure or holding.

Enhancement of rent can be made under the

Bengal Tenancy Act either by contract or by suit. See Secs. 29 and 30 of the Act.

Enhancement of rent of share by deed

We have considered the procedure for enhancement of rent by suit when the land belongs to joint landlords. In cases of enhancement by contract, Sec. 29 would not prevent one co-sharer who receives his share of rent separately from securing an increase in the rent by a registered instrument, subject, to the provisions of the section.

Suit for ejectment of tenant by one of several landlords

One of several joint landlords cannot for obvious reasons eject a tenant from his tenure or holding. The possession of the tenant is the possession of the whole body of proprietors, and to allow a single sharer to eject the tenant would be to allow him to take up exclusive possession of the entire tenure or holding, or to undo what his co-sharers in the exercise of their legal rights did. But though a co-sharer cannot eject a tenant from his entire tenure or holding, he may obtain possession of his share jointly with the tenant of the other proprietors. In Radha Proshad Wasti *v.* Esuf (1881) I. L. R. 7 Cal. 414 ; 9 C. L. R. 76, it was held, the legal means by which a partial ejectment could be effected was by giving the plaintiffs possession of their shares jointly with the tenant as explained in the case of Hulodhur Sen *v.* Gooroo Doss Roy (1873) 20 W. R. 126. Of course, the co-sharer would be bound to follow the procedure prescribed in Secs. 44, 45 and 89 of the Bengal Tenancy Act when proceeding against non-occupancy ryots. The case of Radha Proshad Wasti was followed in Dwarkanath Rai *v.* Kali Chunder Rai (1886) I. L. R. 13 Cal. 76.

Mode of executing partial ejectment.

Joint landlords under Bengal Tenancy Act.

In connection with this subject should be read Sec. 188 of the Bengal Tenancy Act. It provides: "where two or more persons are joint landlords, anything which the landlord is under this Act re-

quired or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them." This section was construed by Prinsep and Beverley, JJ., in Prem Chand Nuskur *v.* Mokshoda Debi (1887) I. L. R. 14 Cal. 201, as not contemplating suits for rent by joint landlords.

Common manager.

Joint landlords, in the event of any dispute existing among them, may be required by the District Judge to appoint a common manager, and upon the landlords failing to make an appointment, the judge himself may appoint a manager or authorize the Court of Wards to assume the management. The procedure prescribed for the appointment of a manager and the powers of the manager are given in Secs. 93 to 100 of the Bengal Tenancy Act. VIII of 1885.

Lease on behalf of a minor by his guardian void even as regards shares of adult members.

In Harendra Narain Singh Chowdhry *v.* Moran I. L. R. (1887) 15 Cal. 40, it was held that where the guardian of a minor appointed under Act XL of 1858 granted a lease for more than 5 years without obtaining permission of the Civil Court, such lease was *ab initio* void, and not valid even for 5 years, and that if the minor was a share-holding proprietor with adult members, the minor was entitled to eject the lessee as trespasser in respect of his own share.

Private partition of revenue-paying estates not binding on Government.

In the case of revenue-paying estates held jointly by several owners, a partition privately made among the owners, without the knowledge or sanction of the Revenue authorities, is not binding on the Government to whom the revenue is payable, though it may be binding on the owners themselves. The reason why the owners themselves should not be allowed to sever an entire estate into several shares and apportion the revenue on such shares must be evident to you. After the division of an estate into several small

estates, with separate revenue-liabilities, if default is made in the payment of revenue, only the small estate on account of which the revenue is due is liable to be sold for the realization of the Government demand. If, therefore, the proprietors of estates had the power of making partition privately, they might create false shares of small areas with big revenue-liabilities and appropriate the rest on nominal revenues. Such a course might make the Government revenues insecure; and accordingly we find in Secs. 12 and 101-107 of the Partition Act for Bengal (VIII of 1876 B. C.) provision made for the revenue authorities to test the correctness of private partitions before giving effect to them. Similar provisions, as we shall see in a subsequent Lecture, have been made for the other provinces.

Partition of tenancies under B. T. Act.

For the same reasons the Bengal Tenancy Act Sec. 88 provides:—"A division of a tenure or holding, or distribution of the rent payable in respect thereof, shall not be binding on the landlord unless it is made with his consent in writing."

Surrender by one of several tenants.

Let us next consider the effects of a surrender by one of several tenants. Where a joint lease was given to many persons with an entirety and equality of interest among the tenants, the resignation of some of the joint lessees was held not necessarily to void the lease, Mohima Chunder Sein *v.* Pitambur Shaha (1868) 9 W. R. 147. In such a case the landlord would not be *bound* to accept any partial surrender. If the lease had been originally granted to one person and by inheritance came to be enjoyed by several shareholders, the surrender, in order to be effective and binding on the landlord, must be a surrender of the whole lease by all the co-sharers. It is, of course, optional with the landlord either to accept the partial surrender or not.

Opening of separate accounts under Act XI of 1859.

Estates paying revenue to Government are frequently held jointly by several owners. In some cases, the owners hold the entire lands comprised in the estate in common tenancy in defined shares for each proprietor. In other cases, specific portions of the lands comprised in the estate are held by the proprietors respectively who have to pay definite sums for Government revenue. In either case whenever there is a default in the payment of the Government revenue, the entire estate may be sold for the realization of the demand. But the sharers have, under the law, certain powers, to prevent their shares from being sold for default made by their co-sharers.* I refer

* "X. When a recorded sharer of joint estate, held in common tenancy, desires to pay his share of the Government Revenue separately, he may submit to the Collector a written application to that effect. The application must contain a specification of the share held in the estate by the applicant. The Collector shall then cause to be published in his own office, in the Court of the Judge, Magistrate (or Joint Magistrate as the case may be,) and Moonsiffs and in the Police Thannahs in whose jurisdiction the estate or any part thereof is situated, as well as on some conspicuous part of the estate itself, a copy of the application made to him. If within six weeks from the date of the publication of these notices, no objection is made by any other recorded sharer, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account shall be held to be that from which the separate liabilities of the share of the applicant commence."

XI. When a recorded sharer of joint estate, whose share consists of a specific portion of the land of the estate, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to that effect. The application must contain a specification of the land comprised in his share, and of the boundaries and extent thereof, together with a statement of the amount of Sudder Jumma heretofore paid on account of it. On the receipt of this application, the Collector shall cause it to be published in the manner prescribed for publication of notice in the last preceding section. In the event of no objection being urged by any recorded co-sharer within six weeks from the time of publication, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account, shall be held to be that from which the separate liabilities of the share of the applicant commence.

XII. If any recorded proprietor of the estate, whether the same be held in common tenancy or otherwise, object that the applicant has no right to the share claimed by him, or that his interest in the

to the provisions of Secs. 10-15 of Act XI of 1859.

In N.-W. P. **When co-sharers refuse settlement of Pattidari mahal.**

If in a *pattidari* or imperfect *pattidari* mahal some of the co-sharers refuse, or fail within 30 days from the date of the declaration by the Settlement Officer, to accept the proposed assessment, the shares of the persons so refusing or failing are either farmed out by the settlement officer or the Collector of the District with the previous sanction of the Board of Revenue or held under direct management,—the persons excluded being granted an allowance of 5 to 15 per cent. on the proposed assessment: *vide* Secs. 45-49 Act XIX of 1873.

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estate is less or other than that claimed by him, or if the application be in respect of a specific portion of the land of an estate, that the amount of Sudder Jumma stated by the applicant to have been heretofore paid on account of such portion of land, is not the amount which has been recognized by the other sharers as the Jumma thereof, the Collector shall refer the parties to the Civil Court, and shall suspend proceedings until the question at issue is judicially determined."

XIII. Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid, in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts an arrear of revenue may be due. In all such cases notice of the intention of excluding the share or shares from which no arrear is due, shall be given in the advertisement of sale prescribed in Section VI of this Act. The share or shares sold, together with the share or shares excluded from the sale, shall continue to constitute one integral estate, the share or shares sold being charged with the separate portion or the aggregate of the several separate portions of Jumma assigned thereto.

XIV. If in any case of a sale held according to the provisions of the last preceding Section, the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale, the Collector or other officer as aforesaid shall stop the sale, and shall declare that the entire estate will be put up to sale for arrears of Revenue at a future date, unless the other recorded sharer or sharers or one or more of them, shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share. If such purchase be completed, the Collector or other officers as aforesaid shall give such certificate and delivery of possession as are provided for in Sections XXVIII and XXIX of this Act, to the purchaser or purchasers, who shall have the same rights as if the share had been purchased by him or them at the sale. If no such purchase be made within ten days as aforesaid, the entire estate shall be sold, after notification for such period and publication in such manner as is prescribed in Section VI of this Act."

Record of rights to determine the proportions in which revenue should be paid by sharers and the mode in which rent is to be collected.

In preparing a record of rights under the Land Revenue Act, N.-W. P., the Settlement Officer is enjoined to prepare for each mahal, a list of co-sharers, and to record the arrangement made by himself or agreed to by the co-sharers (*a*) for the distribution of the profits derived from sources common to the proprietary body, (*b*) for fixing the share which each co-sharer is to contribute of the Government revenue and of the cesses levied under any law for the time being in force and of the village expenses, and (*c*) as to the manner in which the co-sharers are to collect from the cultivators (see Secs. 64 and 65 *Ibid*).

Right of pre-emption possessed by co-sharer at sales for arrears of revenue.

When for the recovery of land revenue due upon it, any patti of a mahal is sold under the provisions of the Land Revenue Act, N.-W. P., any recorded co-sharer not being himself in arrear with regard to such land, may, if the lot has been knocked down to a stranger, claim to take the said land at the sum last bid: provided that the said demand of pre-emption be made on the day of sale and before the officer conducting the sale has left the office for the day: and provided that the claimant fulfil all the other conditions of the sale (see Secs. 188 and 166 *Ibid*). This is also the law in Oudh: Sec. 155 Act XVII of 1876.

A co-sharer landlord cannot enhance rents.

Enhancement of the rent payable by a tenant has to be made after service of notice on the tenant stating the grounds of the enhancement in the same manner as was provided for Bengal in Act VIII (B.C.) of 1869 and Act X of 1859. The law provides that one of several joint landlords cannot enhance the rents payable by a tenant. See Secs. 13 and 106 Act XII of 1881.

One of several tenants cannot surrender.

When a number of persons hold jointly as tenants under a landlord and, as among themselves they make a private partition, so that each holds a specific portion, none of the tenants with-

out the consent of the landlord can surrender his portion independently of the remainder. See the explanation to Sec. 31 Act XII of 1881.

One of joint tenants cannot be ejected

In order to eject a tenant notice has to be given by the landlord to the tenant specifying the land from which he wishes the tenant to be ejected. See Sec. 37 Act XII of 1881. It follows therefore that where a lease is for an entire land, though the tenants may be several persons jointly holding such land, the landlord cannot sue to eject any undivided tenant from the tenure or holding.

No co-sharer to sue for portion of rent.

As to whether one of several joint landlords can sue for his share of the rent, the law in the N.-W. Provinces is clear. Sec. 106 of the Rent Act XII of 1881 provides: "No co-sharer in an undivided property shall in that character be entitled separately to sue a tenant under this Act, unless he is authorized to receive from such tenant the whole of the rent payable by such tenant, but nothing in this section shall affect any local custom or any special contract." In Murlidhar *v.* Ishri Prasad (1884) I. L. R. 6 All. 576 it was held that one co-sharer could sue for balance of rent due, upon proof that the other co-sharers had been paid their quotas and that Sec. 106 was no bar to such suit.

Circumstance in which one co-sharer can sue for share of rent.

In Oudh. Joint settlement.

When several persons are in possession of a mahal not being a taluqdari mahal, the Settlement Officer may make a joint settlement with all such persons or with their representatives—Act XVII of 1876 Sec. 27.

Member of community or co-sharer can obtain possession of defaulting share by payment of defaulter's revenue.

If an arrear of land revenue has become due in respect of the share of any member of a village community, such community or any member thereof may tender payment of such arrears or may offer to pay such arrears by instalments. If such tender be made, or if the Deputy Commissioner considers such offer satisfactory, he may

transfer the share of the defaulting member to the community or member making the tender or offer on such terms as the Deputy Commissioner may think fit, and either for a term of years or until such arrear is paid. In case of conflicting tenders the co-sharer who, in case the share were sold, would have a right of pre-emption under the Oudh Laws is preferred. Sec. 121 *Ibid.*

Tenant not competent to relinquish portion.

As to surrender by one of several tenants, Act XXII of 1886 sec. 20 para. 3 provides that a tenant cannot without the consent of his landlord relinquish a part only of his holding. From this it follows that if there are several joint tenants under the same lease but each enjoys possession of specific plots, no single co-sharer can surrender his specific plot without the consent of his landlord.

Suits for enhancement of rent, ejectment of tenants &c. to be brought by the common manager.

As to the recovery of arrears of rent, enhancement of rent, ejectment of tenants, or distress, a sharer in a joint estate or under-proprietary or other tenure in which a division of land has not been made among the sharers cannot, barring any local custom or special contract, exercise any of the powers conferred by the Act otherwise than through a manager authorized to collect the rents on behalf of all the sharers. Sec. 126 *Ibid.*

In Bombay. **A co-sharer as manager can sue for rent &c.**

In Bombay it has been held that one of several tenants in common, joint tenants or coparceners unless he is acting by consent of the others as manager of an estate is not at liberty to enhance rents, or eject tenants under him at his pleasure. Balaji Baikaji Pinge *v.* Gopal (1878) I. L. R. 3 Bom. 23.

In Punjab. **Joint liability of tenants for rent.**

In the Punjab, without the express consent of the Financial Commissioner, a partition of land among co-sharers does not affect the joint liability of the land, or of the land-owners thereof, for the revenue payable in respect of the land, nor does it

operate to create any new estate : Sec. 110 cl. (1) Act XVII of 1887.

Similarly a partition of a tenancy does not without the express consent of the landlord, affect the joint liability of the co-sharers therein for the payment of the rent thereof : Sec. 110 cl. (2) *Ibid.*

In Central Provinces. **Settlement in case of a co-sharer refusing to accept settlement.**

When a mahal owned by several proprietors is re-settled, if some of the proprietors consent and some refuse to accept the Settlement Officer's assessment, the Settlement Officer may, with the sanction of the Chief Commissioner, if the interest of the recusant proprietors in the lands taken into account in the assessment consists entirely of lands held by them separately from the other proprietors, exclude such recusant proprietors from settlement for a period not exceeding 3 years from the date of such exclusion, and either let their lands in farm or take such lands under direct management. In other cases, *i.e.*, when the lands of the recusant proprietors are not separate from the rest, the assessment of the entire mahal is offered to the proprietors who consented to accept the assessment when originally offered, and on their refusal, the mahal is let in farm or taken under direct management.

When the recusant proprietors are excluded, the land of the proprietors who consented to accept the assessment originally offered is deemed to be separate mahal and is assessed as such, and such assessment is offered to the consenting proprietors ; and if the lands of the recusant proprietors are let in farm, the farm is offered to the proprietors who consented to accept the assessment originally offered.

Allowance of a sharer excluded from settlement.

Any proprietor excluded from settlement is entitled to receive from the Government an annual allowance the amount of which is fixed by the Chief Commissioner at 5 to 10 per cent. on the

amount of the assessment offered to him by the Settlement Officer : Act XVIII of 1881, Secs. 58-61.

When the whole of the land comprised in a mahal is held in severalty, the Settlement Officer can apportion to the several holdings the amount with which such land is assessed under a settlement and when only part of the land comprised in a mahal is held in severalty the Settlement Officer can apportion such amount to the part held in common and the part held in severalty, and can further apportion to the several holdings the amount to which they are liable under the former apportionment : Sec. 66 *Ibid.*

Statutory pre-emption among sharers.

If in the course of a sale for realization of the revenue the property (mahal or a share thereof) is knocked down to a stranger, the following persons may claim to take it at the sum last bid in the following order :—

(1) Any malguzar who had paid the revenue which as between him and the other malguzars is payable by him.

(2) If the superior proprietorship is sold the inferior proprietor or (3) if the inferior proprietorship is sold, the superior proprietor.—Sec. 110 *Ibid.*

Tenant not ordinarily bound to pay rent to one of several landlords.

When two or more persons are landlords of a tenant in respect of the same holding, the tenant, subject to any rule which the Chief Commissioner may from time to time by Notification in the official gazette make in this behalf, and to any contract between the parties, is not bound to pay part of the rent of his holding to one of those persons and part to another or others; and subject as aforesaid, those persons, if the tenant so desires, have to appoint one of their number or some other person to receive the rent : Act IX of 1883, Sec. 8.

Common manager to collect rents.

Property of a firm.

There is a large class of joint property which we have yet to consider. It is the property belonging to a firm, or a body of persons who have agreed to combine their capital, labour or skill in some business. The law of partnership in general is very extensive and is not comprised in our subject. That portion of the law which relates to the rights and liabilities of partners in connection with the partnership property need only be noticed in these Lectures.

The law of partnership has been codified in Secs. 239 to 265 of the Indian Contract Act IX of 1872. All partners have been declared, in the absence of any contract to the contrary, joint owners of all property originally brought into the partnership stock or bought with money belonging to the partnership, or acquired for purposes of the partnership business. The share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss: Sec. 253 cl. (1).

Share of each partner.

Where there are joint debts due from the partnership and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts and the surplus, if any, in the payment of the debts of the firm: Sec. 262.

Partnership property primarily liable for partnership debts in preference to personal debts.

Although a partner cannot introduce a stranger into the partnership by a private sale of his own interest to such new member, yet there is nothing to prevent such sale of interest in execution of decree (*ante* p. 119).

Family idol.

The family idol is often looked upon as joint property. It is held to be a divinity and a juridical person capable of holding property. Large properties are dedicated to such idols by pious Hindus. When such properties, dedicated by remote ancestors, come down to the family, the descendants, by virtue of their right to worship the idols, become entitled to collect the profits of the endowed properties.

In most cases, the sharers, when there are several, worship the idol by turns—these turns being called *palas*—and enjoy the *dewuttur* properties during these turns. Family idols sometimes attract votaries for various causes, and when they are allowed to be worshipped by the public, they bring their owners large presents.

On this subject you may refer to Professor K. K. Bhattacharyya's Lectures pp. 450-458.

LECTURE VII.

Law of Limitations and Procedure.

Different kinds of suits with respect to joint property—Limitation generally applicable to joint property—Limitation specially applicable to joint property—To suits for pre-emption—Effect of fraudulent concealment of sale—To suits to restrain waste by co-sharers—To suits against managers for accounts—To contribution suits—Previous law—To suits under Mitakshara law to set aside father's alienations—To suits to set aside alienations by any other members—To suits between co-sharers for possession—applied to Mahomedan family—conflicting decisions—Under Act XIV of 1859—Act IX of 1871—Present law—Possession of one is possession of family—Law same for movables and immovables—Rules of Procedure—Parties to suits for joint property under Mitakshara—All coparceners must sue—Exception—No suit for share of joint property under Mitakshara against trespasser before partition—When plaintiff sues as manager—Rule in England in suits for joint interest—Reason of the exception—After decree upon joint liability against some co-sharers, others cannot be sued—Suits by sharers in Dayabhaga or Mahomedan family—Suits by single sharers for enhancement of rent or ejectment—Procedure in suits for contribution—Parties to pre-emption suits and valuation thereof under Court Fees Act—Valuation of suits for shares of family property under Court Fees Act—Of suits for maintenance—Jurisdiction—Valuation of partition suits under Court Fees Act—Valuation of such suits for jurisdiction—Views of Bombay Court—Effect of decree in partition suit—Effect of decree in partition suit when plaintiff's share only is separated—Views of Allahabad Court—Receivers in Partition suits—Costs in such suits.

In this Lecture I intend to consider (1) the various periods of Limitation applicable to suits concerning joint property, and (2) the rules of Procedure prescribed for such suits.

Different kinds of suits with respect to joint property.

Now, suits relating to joint property may be classed under three heads: (1) those in which the joint proprietors or any of them sue, or are sued by, a stranger for recovery of the entire joint property or of some interest therein; (2) those in which one co-sharer sues to recover from a stranger his share of the joint property; and (3) those in which one sharer sues another, or the other co-sharers, for some relief in respect of the joint property.

Limitation generally applicable to joint property.

We have seen that all tangible property and all intangible rights, that may be the subjects of ownership, may as well form the subjects of joint ownership. It follows from this, that in dealing with the first class of suits above mentioned, we have to consider the law of limitations applicable to all kinds of property. Babu Upendra Nath Mitra, in his admirable Lectures on the Law of Limitations, has dwelt on the law generally, and the object of the present Lectures is not to consider all the law that is applicable to joint property in common with every kind of property, but to consider and discuss only such laws as have special application to joint property. The only remark, therefore, that I have to make in reference to the first of the above classes of suits is, that whether one person as the sole proprietor, or more persons as joint proprietors, seek any relief in respect to any property, the law of limitations is the same. In the eye of the law, the whole body of proprietors is one person, and the singular includes the plural.

By these observations, I do not, by any means, intend to convey that any number of persons may join together and institute an action in respect of any property. The rules of the Procedure Code will determine who the persons are who can jointly sue. But what I mean to

convey is, that whenever, under the rules of the Procedure Code, a number of persons is entitled to sue upon a cause of action, they must sue within the same period, as is provided for in the Limitation Act in reference to a suit by a single person.

The same observations would apply to the case of one co-sharer suing for the entire joint property. It is only in some cases, (as to which we shall presently see), that one co-sharer can sue for the entire joint property. But in those few cases, the suits should be instituted within the same periods as those within which they should be instituted if the plaintiff were a single person exclusively entitled to the property. There is no difference between the two classes of suits as regards the law of limitations applicable to them.

The second of the above classes of suits may also be dismissed from our consideration with a few observations. If a single member of a family has a valid cause of action against a stranger in respect of his share in a certain family property, he must sue within the same time as is allowed to a person suing upon his right, for the recovery of the entire property. Whether a single member has a valid cause of action in respect of the share depends upon other considerations; but, supposing there can be no objection to such a suit under the rules of the Procedure Code, or upon the facts giving him a cause of action, his suit must be brought subject to the ordinary law of limitations.

Limitation specially applicable to joint property.

The third class of suits are those in which one or more co-sharers are the plaintiffs and one or more co-sharers, alone or along with others, are the defendants. These are the suits that specially concern us in the present Lecture. The articles of Schedule II Act XV

of 1877 which demand our attention are the following:—

Serial number.	Art.	Description of Suit.	Period of limitation.	Time from which period begins to run.
1	10	To enforce a right of pre-emption, whether the right is founded in law or general usage or on special contract.	1 year.	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.
2	41	To restrain waste.	3 years.	When the waste begins.
3	89	By a principal against his agent for movable property received by the latter and not accounted for.	3 years.	When the account is during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates.
4	99	For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers.	3 years.	The date of the plaintiff's advance in excess of his own share.

Serial number.	Art.	Description of Suit.	Period of limitation.	Time from which period begins to run.
5	107	By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate.	3 years.	The date of the payment.
6	126	By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	12 years.	When the alienee takes possession of the property.
7	127	By a person excluded from joint family property to enforce a right to share therein.	12 years.	When the exclusion becomes known to the plaintiff.
8	128	By a Hindu for arrears of maintenance.	12 years.	When the arrears are payable.
9	129	By a Hindu for a declaration of his right to maintenance.	12 years.	When the right is denied.

To suits for pre-emption.

(1) Under the repealed Limitation Act IX of 1871, time ran from "when the purchaser took actual possession under the sale sought to be impeached." Previous to Act IX of 1871, Act XIV of 1859 Sec. 1 cl. (1) also provided to the same effect.

The Mahomedan Law prescribes the period

of one month, from when the sale becomes known to the pre-emptor, for a suit to enforce pre-emption.

The present law is contained in Art. 10 quoted above. In this connection you should read Secs. 7 and 17 of the Act, and note that the legislature makes no concession in favour of minors or lunatics, and does not extend the time in cases where at the accrual of the cause of action, there is no person capable of suing or being sued.

Art. 10 makes a distinction between cases in which physical possession is feasible and those in which it is not. In the latter class of cases, limitation runs from when the deed is registered. Now, we know that when the consideration for a sale is rupees one hundred or upwards, the transfer can be made only by a registered instrument, and when the consideration is below Rs. 100, the transfer may be made either by a registered instrument or by delivery of the property (See Transfer of Property Act IV of 1882, Sec. 54). In a case, therefore, where physical possession is impracticable, the transfer must be effected by a registered instrument, and the limitation would begin from the date of registration. The previous law did not contemplate the case where physical possession was not feasible.

In cases where the mortgagee was previously in possession, and the subsequent sale conveys the equity of redemption, time begins to run from the registration of the instrument conveying the equity of redemption (Shiam Sundar *v.* Amanaut Begam (1887) I.L.R., 9. All. 234). So also where a conditional sale becomes absolute by extinguishment of the right of redemption, time runs from the date when the conditional mortgagee takes possession as absolute owner (Digambur Misser

v. Ram Lal Roy (1887) I. L. R. 14 Cal. 761). The Allahabad Court has held that this article applies only to absolute sales and Art. 120 applies to conditional sales. Now, we have seen* that a right of pre-emption does not arise in the case of a conditional sale until the sale becomes absolute, and in this view the Calcutta decision would seem to interpret the law correctly.

Effect of fraudulent concealment of sale.

If the vendor and vendee of immovable property intentionally and actively conceal the fact of sale from the plaintiff in order to deprive him of his right of pre-emption, time will not run against the plaintiff until he discovers the fraud practised upon him (Rivaz 50 ; also Sec. 18 Act XV of 1877).

Suits to restrain waste by co-sharer.

(2) Suits instituted by undivided parceners for injunctions to restrain their fellow parceners from wasting the common property would come under this article.

Suits against managers for account.

(3) A movable property in this article is not necessarily confined to specific movable property only. Money in the hands of an agent would also come within the expression. Suits for account against managers who generally act as the agents of the other members of the family and for money would be governed by this article. But see Muhammad Habibullah Khan *v.* Safdar Husain Khan (1884) I. L. R. 7 All. 25.

Contribution suits. Previous law.

(4) The law under Act IX of 1871 was the same. But under Act XIV of 1859 the 6 years' rule applied to suits for contribution (2 W. R. 266 and 3 W. R. 134).

We have seen that a co-sharer by paying the entire Government revenue does not acquire a charge on the estate.† Art. 132, therefore, would not apply to a suit for recovery of the money paid

* Ante p. 201. † Ante p. 222.

in excess of the plaintiff's own share (Khub Lal Sahu *v.* Pudmanund Singh (1888) I. L. R. 15 Cal. 542; Achut Ram Chandra Pai *v.* Hari Kanta (1886) I. L. R. 11 Bom. 313). We have also seen that under the Bengal Tenancy Act a co-sharer by such payment acquires a lien over the tenure or holding under Sec. 171 Bengal Tenancy Act. In this latter case, if the suit is to enforce the lien, the plaintiff would have 12 years under Art. 132. Otherwise Art. 120, which governs other contribution suits would apply.

(5) It has been held that where money is borrowed by the manager of a joint Hindu family on his personal security for purposes of necessity, his right to contribution arises when he expends the money, and limitation runs against his claim from that date and not from the date when he repays the loan (Aghore Nath Mukhopadhya *v.* Grish Chundra Mukhopadhya (1892) I.L.R. 20 Cal. 18.)

Suits under Mitakshara to set aside father's alienations.

(6) Private alienations of ancestral property by a father are binding on the sons when such alienations are made (1) for the benefit of the family, or (2) for the payment of any debt of the father—the debt not having been contracted for an immoral purpose. The suits contemplated in this article are suits to recover either the entire ancestral property conveyed by the father, or any portions of the same and instituted either during the father's lifetime or after his death. See Raja Ram Tewary *v.* Luchmun Pershad (1867) 8 W. R. 15; and Munbasi Koer *v.* Nowrutton Koer (1881) 8 C. L. R. 428.

The article moreover makes no distinction between movable and immovable property.

to set aside alienations by any other member.

You will further note that the article under consideration contemplates only alienations by the father, and suits to set aside alienations made by

any other member would be governed by Art. 144 which runs thus :—

Art.	Description of Suit.	Period of limitation.	Time from which period begins to run.
144	For possession of immovable property or any interest therein not hereby otherwise specially provided.	12 years	When the possession of the defendant becomes adverse to the plaintiff.

The possession of the purchaser becomes adverse from the time when he takes possession of the property purchased, *i.e.*, the cause of action arises, as under Art. 126, at the time the alienee takes possession.

(7) Act XIV of 1859 Sec. 1, cl. 13 ran to this effect :—

Suits between co-sharers for possession.

"To suits to enforce the right to share in any property, movable or immovable, on the ground that it is joint family-property * * * the period of 12 years from the death of persons from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in possession or management of some property or estate, on account of such alleged share." In Radhanath Dass *v.* Elliot (1870) 14 M. I. A. 1; 6 B. L. R. 530 or 15 W.R., P. C., 24, the Privy Council held that this clause of Sec. I, Act XIV of 1859 contemplated suits between members of a joint family. As regards the present law, the High Court of Calcutta in Ram Lukhi *v.* Durga Charan Sen (1885) I. L. R. 11 Cal. 680 held that Art. 127 of Sch. 2, Act XV of 1877 applied only to suits between members of a joint family. To the same effect see Horendra Chundra Gupta Roy *v.*

Aunoardi Mundul (1887) I. L. R. 14 Cal. 544; and Kartick Chunder Ghuttuck *v.* Saroda Sunduri Debi (1891) I. L. R. 18 Cal. 642.

Applied to a Mahomedan family.

In Faki Abas *v.* Faki Nurudin (1891) I. L. R. 16 Bom. 191 the article was applied to a Mahomedan family. Sir Charles Sargent, C.J., said: "It may be...that the presumption that the possession of one member is on behalf of himself and all the others must necessarily be weaker in the case of Mahomedan than of Hindu family-property, and that circumstances of a less decided character might well be deemed in the former case to make the possession adverse as regards the co-sharers, but the governing principle is the same." To the same effect see Bavasha *v.* Masumsha (1889) I. L. R. 14 Bom. 70.

Conflicting decisions.

But the decision in this last case was dissented from by the Allahabad Court in Amme Raham *v.* Zia Ahmad (1890) I. L. R. 13 All. 282; by the Madras Court in Patcha *v.* Mohidin (1891) I. L. R. 15 Mad. 57; and by the Calcutta High Court in Mahomed Akram Shaha *v.* Anarbi Chowdhrani (1895) I. L. R., 22 Cal. 954.

Under Act XIV of 1859.

You will note that under the Act of 1859 in order that a member of a joint family might not lose his hold on the family-property it was necessary for him to receive periodically something from out of the income of the family-property.

Under Act IX of 1871.

Act IX of 1871 changed the law. Art. 127 of that Act ran thus:—

Art.	Description of Suit.	Period of limitation.	Time when period begins to run.
127	By a Hindu excluded from joint family-property to enforce a right to share therein.	12 years	When the plaintiff claims and is refused his share.

While the above was the law, practically there was no limitation to an action by a Hindu excluded from joint family-property. He might, by simply deferring to claim his share, get an indefinite time to sue.

Present law.

The present law requires that the plaintiff must come to Court within 12 years of the time when his exclusion from joint family becomes known to him. Now, there are various ways by which a man may know of his exclusion from property. He may make a demand and be refused. His co-sharers may, by their acts, even if he makes no demand, inform him of their having excluded him from the property. Kane Bable *v.* Antaji Gangadhar (1886) I. L. R. 11 Bom. 455.; Dinkar Sadashiv *v.* Bhikaji Sadashiv (1887) I. L. R. 11 Bom. 365.

It would seem that the exclusion contemplated by this article is "total exclusion from the family-property."

Possession of one is possession of family.

We have already seen* that in a joint family the possession of a property by one member of the family is not inconsistent with the possession of the rest. From the mere fact of receipts for rent being issued in the name of one member, or even of the title deeds in respect to any property being in the name of one member, no inference adverse to the other members ought to be drawn.

It often happens that in a joint family, some of the members live in their ancestral dwelling house enjoying the profits of the family-property, while others live abroad holding lucrative appointments under the Government, or carrying on independently some profitable trades. These members who live abroad are by no means excluded from the family-property. Thus in Ram Lakhi *v.* Durga

* Ante pp. 92-93.

Charan Sen, I.L.R., 11 Cal. 680, Sir Richard Garth, C. J., says: "Those persons (meaning the Hindus) often leave their houses for long periods of time to seek employment in some distant place, and their relatives may take steps to exclude them from their family-property without their knowing it. It has, therefore, been considered right to allow them to bring a suit under such circumstances to enforce their right within 12 years from the time when they first know of their exclusion."

The law presumes that when any property is shewn to have been at one time joint family-property, the possession of one member in the joint family is the possession of all. See Taruck Chunder Poddar *v.* Jodeshur Chunder Koondoo (1873) 11 B. L. R. 193; 19 W. R. 178; Asud Ali Khan *v.* Akbar Ali Khan (1877) 1 C. L. R. 364 and Rakhal Das Bundopadhya *v.* Indrumonee Debi (1877) 1 C. L. R. 155. But whenever one member of a joint family is in exclusive possession of a property, it lies on the other members to explain away this circumstance. Thus in Lachiram *v.* Uma I. L. R., 11 Bom. 222, Justice West observes: "When of two persons one is in enjoyment of property and the other has no enjoyment or possession, that is *prima facie* an exclusion of the latter. There may be a contract or other jural relation between the parties which accounts for the sole possession and makes it preserve, instead of destroying, the joint right, but of such a state of things positive evidence is always required, since otherwise, possession continued even for centuries would afford no security to property." To the same effect see Ram Chandra Narayan *v.* Narayan Mahadev (1886) I. L. R. 11 Bom. 216 and the cases therein cited. Now, in order to see whether a claim on the ground of joint property is barred by limitation, a Court

must assume that the plaintiff's title is correct, and then find whether (1) as a fact he was excluded for more than 12 years before suit and (2) whether he was aware of such exclusion. Now the exclusion must be by an act of the co-sharer defendants in reference to the plaintiff. It follows, therefore, that unopposed possession of a co-sharer over a particular property cannot be looked upon as adverse possession or as possession by excluding another co-sharer. In the majority of cases this will be merely a question of fact.

Law same for movables and immovables.

You should note that the article makes no distinction between movable and immovable property.

Rules of Procedure.

Let us now consider the rules of procedure specially applicable to suits in relation to joint property. As I have said before, I do not propose to give you a summary of all the law that has to be applied in relation to these suits. That is not the object of these Lectures and I shall not therefore make any attempt to accomplish such a feat within the compass of these Lectures. The rules of procedure for suits in general are numerous, and they apply generally to suits in relation to joint property. I shall here consider only those rules that have special bearing on joint property.

The Sections of the Civil Procedure Code Act XIV of 1882 that have reference to our present subject are 26, 28, 31, 32, and 35. They are given in the foot notes.*

* "26. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court, in disposing of the costs of the suit, otherwise directs.

Parties to suits for joint property under Mitakshara.

All coparceners to sue.

Exception.

In an undivided family under the Mitakshara law, the family-property belongs jointly to all the coparceners. A suit, therefore, in respect of such property must be instituted by all the persons interested *i. e.*, by all the coparceners. The only exception to the rule is when some of the coparceners refuse to join the others who intend to sue and are thereupon made defendants, or where they have acted prejudicially to the interest of the entire body of coparceners. Thus in Dwarka Nath Mitter *v.* Tara Prosunna Roy (1889) I. L. R. 17 Cal. 160, the Court observed; "We have no doubt that it is only when the plaintiffs can show that those entitled to join with them have refused to join or have otherwise acted prejudicially to their interests, that they are entitled to sue alone and to make the

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Sec. "28. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities without any amendment.

Sec. "31. No suit shall be defeated by reason of the misjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Sec. "32. The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out; and the Court may at any time either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Sec. "35. When there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding under this Code; and in like manner when there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any such proceeding."

reluctant or refusing co-sharers defendants to the suit. As authority for this we may refer to the case of Luke *v.* South Kensington Hotel Co., L. R., 11 Ch. D. 121; and also the cases of Patiharipat Krishnan Unni Nambiar *v.* Chekur Manakkal Nilakandan Bhattathiripad, I. L. R. 4 Mad. 141; and Kalidas Keval Das *v.* Nathu Bhagvan, I. L. R. 7 Bom. 217; and we may further refer to Ram Sebuk *v.* Ramlall Koondoo, I. L. R. 6 Cal. 815. In the case of Prem Chand Lusker *v.* Mokshoda Debi, I. L. R. 14 Cal. 201, it was expressly stated that the co-sharers of the plaintiffs had refused to join in the suit." To the same effect see Parameswaran *v.* Shangaran (1891), I.L.R. 14 Mad. 489; Arunachala Pillai *v.* Vythialinga Mudaliyar (1882), I. L. R. 6 Mad. 27.

No suit for share of joint property under Mitakshara against trespasser before partition.

It is also clear that so long as the family is undivided and the property joint, no single coparcener has a right to any definite share. It follows from this that in respect of any aliquot fraction of the family property no suit would lie at the instance of any but the whole body of joint proprietors. Thus in Rajaram Tewaree *v.* Luchmun Pershad (1869) 12 W. R. 478, Sir Barnes Peacock, C. J., said: "The right of action has been misconceived and the proper persons have not been made parties. The suit should have been brought by all the joint owners to set aside the deed as to the charge created by Oodit, as well as to the charge created by Jeetun; and the suit should have been brought by all the members of the joint family, and not by two of them alone who before partition have no definite share. If the deed were to be set aside, it would be impossible by the decree to define the share which the plaintiffs are entitled to recover, so long as the property is joint. If the other members of the joint family refused to join as

plaintiffs they might have been made defendants in the suit." In Balkrishna Moreshwar Kunte *v.* The Municipality of Mahad (1885) I. L. R. 10 Bom. 32, Sargent, C. J., said: "The general rule is that 'unless there is a special provision of law, co-owners are not permitted to sue through some or one of their members, but that' all must join in a suit to recover their property; nor can the defendant be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone." In Hari Gopal *v.* Gokal Das Kushabashet (1887) I. L. R. 12 Bom. 158, the plaintiff as manager of an undivided Hindu family sued to recover possession of certain lands from the defendant. The defendant contended that the plaintiff's minor brother and uncle who were his undivided coparceners should be made parties to the suit. The first Court, holding that the plaintiff alone could sue, passed a decree for the plaintiff, but the first appellate Court reversed that decree. In second appeal Sir Charles Sargent, C. J., in concurrence with Justice Nanabhai Haridas, held that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as plaintiffs or as defendants and that "the right of a plaintiff to assume the character of manager, and to sue in that character, raises a question, of fact and law which varies as the other members of the family are minors or adults, ...and therefore, the defendant is always entitled in such suits when the objection is taken at an early stage to have the other members of the family, when they are known, placed on the record to ensure him against the possibility of the plaintiff's acting without authority." In Kattusheri

When plaintiff can sue as manager.

Pishareth *v.* Vallotil Manakel (1881), I. L. R. 3 Mad. 234 it is said: "Unless where, by a special provision of law, co-owners are permitted to sue through some or one of their members, all co-owners must join in a suit to recover their property. Co-owners may agree that their property shall be managed and legal proceedings conducted by some or one of their member but they cannot invest such person or persons with a competency to sue in his own name on their behalf, or, if sued, to represent them. It may, indeed, happen that a suit by one of several co-owners can be successfully maintained against a tenant. This is the case when the tenant has dealt with such co-owner as sole landlord and, by so dealing, is estopped from denying the title of the person who has let him into possession."

Rule in England in suits for joint interest.

The rule of English Law is that all persons having a joint interest must join in an action at law, but in equity it is sufficient if all interested in the subject of the suit should be before the Court either as plaintiffs or defendants, Wilkins *v.* Fry, 1 Mer. 262; Sandes *v.* Dublin Tramway Co. 12 L. R. (Irish), 206; Guru Prashad Roy *v.* Ras Mohun Mukhopadhyay 1 C. L. R. 431.

Reason of the exception.

The reason of the rule in equity is that no person can compel another against his will to join him as plaintiff. If, therefore, suits for the recovery of joint property could not lie except at the instance of all the persons entitled to the property, a co-sharer might often find it extremely difficult for him to obtain redress in a court of justice. Courts, therefore, allow co-sharers to sue for the whole property, when it is shewn that the absent co-sharers were asked to join as plaintiffs but declined, and they have been accordingly made defendants.

Suits by sharers in Dayabhaga or Mahomedan family.

But in a Dayabhaga or a Mahomedan family, the shares of the several members interested being definite even before an actual partition, one or more co-sharers may sue a trespasser in respect of his or their own shares. Such suit when for possession of shares must be for possession jointly with the trespasser.

After decree upon joint liability against some co-sharers, others cannot be sued.

Let us next consider the procedure applicable to a suit *against* the members of a coparcenary. It is clear that in a Mitakshara coparcenary, the liability of the coparceners, in all that concerns the family, is joint. A suit, therefore, may lie against all the coparceners or against some of them in respect of a joint family-liability. But when a plaintiff sues and obtains a decree against some of the coparceners only, in respect of a joint liability of the family, the law would not allow him afterwards to sue the other coparceners or any of the whole body, in respect of the same cause of action. See King *v.* Hoare 13 M. & W. 494; Brinsmead *v.* Harrison, L. R., 7 C. P., 547; Kendall *v.* Hamilton L. R., 4 App. cases 504; Hemendro Coomar Mullick *v.* Rajendro Lall Moonshee (1878) I. L. R. 3 Cal. 353; Rahmubhoy Hubibbhoy *v.* Turner (1890) I. L. R. 14 Bom. 408. These cases lay down the same principles in cases arising out of a breach of a joint contract as in those where the liability arises out of a tort.

Suits by single co-sharers for enhancement of rent or ejectment.

In the preceding Lecture,* I discussed the question of the rights of individual co-sharers to sue for enhancement of rents payable by tenants on *ijmali* land, as well as their rights to sue for ejectment from tenures and holdings.

Procedure in suits for contribution.

You will remember that in suits for contribution, all the co-sharers of the plaintiffs must be made defendants,† and the plaintiffs must state and

* Ante p. 234. † Ante p. 223.

prove their respective liabilities. The decree in such suits should also set out the respective liabilities of the defendants. I have already dwelt on the question of the jurisdiction of courts to try such suits.*

Parties to pre-emption suits and valuation thereof under Court Fees Act.

In suits to enforce the right of pre-emption the co-sharer (vendor) and the vendee must be made defendants. Such suits should be valued according to para VI Sec. 7 of the Court Fees Act VII of 1870, at the value (computed according to para. V preceding) of the land, house or garden in respect of which the right is claimed.

Valuation of suits for shares of family-property under Court Fees Act.

Suits to enforce right to share in any property on the ground that it is joint family-property have to be valued under Sec. 7 para. IV sub-para. (*b*) of the Court Fees Act, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

Of suits for maintenance. Jurisdiction

Suits relating to maintenance are not cognizable in the Mofussil Courts of Small Cause, (*vide* Art. 38 sch. 2 of Act IX of 1887) and such suits should be valued under Sec. 7 para. II of the Court Fees Act at the value of the subject matter of the suit, such value being determined to be ten times the amount claimed to be payable for one year. When maintenance is claimed as a charge, on, or by reason of, some joint or ancestral property (and that is the only case with which we are concerned in these Lectures), the Presidency Small Cause Courts would not have jurisdiction to try them (*vide* Secs. 18 & 19 Act XV of 1882).

Valuation of partition suits under Court Fees Act.

A suit for partition has to be instituted on a Court Fee stamp of Rs. 10 under Art. VI cl. 17 sch. 2 of Act VII of 1870. It seems that when the plaintiff's right to the share claimed is admitted, and the object of the suit is merely to have a

* Ante p. 221.

partition by metes and bounds, the plaint may be admitted on a Court Fee stamp of Rs. 10. If the extent of plaintiff's interest be not admitted, the Court may treat the suit as one for declaration of plaintiff's right and for partition. In such a case the plaint should be stamped upon the money-valuation as in an ordinary suit.

Valuation of such suits for jurisdiction.

In Madras, in suits for the partition of coparcenary property under the Mitakshara Law, the value of the whole property and not of the share claimed determines the jurisdiction. See Vydinatha *v.* Subramanya (1884) I. L. R. 8 Mad. 235. In such suits the share of every parcener is determined and not merely that of the plaintiff. The Madras Courts draw a distinction between such suits and those in which the plaintiff simply claims to be declared an heir and seeks possession of his share from the defendants. They hold that in these latter cases the proper value of the suit is the value of the share claimed. See Khansa Bibi *v.* Syed Abba (1887) I. L. R. 11 Mad., 140; followed in Ramayya *v.* Subbarayuda (1889) I. L. R. 13 Mad., 25. In the same way in Bengal when the plaintiff seeks to recover possession of his share he must value the suit at the value of his share; and where he is in possession and prays for a partition, the value of the whole property under partition determines the jurisdiction of the Court. See Kirty Churn Mitter *v.* Aunath Nath Deb (1882) I.L.R. 8 Cal. 757; followed in Boidyanath Adya *v.* Makhan Lal Adya (1890) I. L. R. 17 Cal. 680.

Views of the Bombay Court.

But the Bombay High Court has ruled that in partition suits when the plaintiff claims a definite share on partition, the value of such share determines the jurisdiction of the Court. Thus in Lakshman Bhatkar *v.* Babaji Bhatkar (1883) I. L. R. 8 Bom. 31, Justice West, in concurrence with Justice Nanabhai Haridas, is reported to

have said: "It has been contended that the subject matter of a partition suit by one who claims his share from the other coparceners is the whole joint estate. In a sense this is so. The land and goods as a whole are the material substratum of the proprietary right, a part of which the plaintiff seeks to enforce. But in the sense of the Act, we think, the subject matter is the jural relation between the parties as alleged by one and denied by the other, and that, in the case of a single aliquot part, is the ownership of such part. Materially this is embraced in the aggregate estate, which is thus itself also the subject matter, but more remotely, and not in a sense conformable to that in which subject matter must be understood in analogous cases."

Effect of decree in partition suit.

The view taken by the Calcutta Court of the effect of a decree in partition suit will appear on reference to the judgment of Justice Ainslie in Sheikh Khoorshed Hossein *v.* Nubbee Fatima (1877) I. L. R. 3 Cal. 551. That learned judge said. "We are of opinion that a decree for partition is not like a decree for money or for the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and having been so made, it is unnecessary for those persons who are defendants in the suit to come forward and institute a new suit to have the same rights declared under a second order made. It must be taken that a decree in such suits is a decree, when properly drawn up, in favor of each shareholder or set of shareholders having a distinct share."

When plaintiff's share only is separated.

The view taken by the Allahabad High Court of the effect of a decree in an ordinary suit for partition of plaintiff's own share of joint family-property is different from that propounded by

Justice Ainslie in Khoorshed Hossein's case. Thus in Hikmat Ali *v.* Waliunnessa (1889), I. L. R. 12 All. 506, Sir John Edge, C. J., in concurrence with Justice Tyrrell, said: "we may say with regard to that case (Khoorshed Hossein *v.* Nubbee Fatima) that, should the question in that case arise, we would not be prepared to follow that decision. .....It is not necessary for us to consider whether, in a suit for partition framed differently to that before us, a decree could be passed partitioning the shares of the defendants *inter se* which might operate as *res judicata* in a subsequent suit. In this suit we understand no partition among the defendants *inter se* was prayed for." The decision of the Court was that the value of the plaintiff's share determined the jurisdiction of the Court.

Views of the Allahabad Court.

On a close examination of the above cases it would appear that there is really no conflict. If the object of the suit be merely to separate the share of the plaintiff from that of the defendants, and not to effect a division among the defendants, (and there is no doubt that such a suit would lie), the jurisdiction of the Court should be determined according to the value of the plaintiff's share. Of course, if the object of the suit be to allot distinct portions to all the sharers (as in Khoorshed Hossein's case) the whole property should be taken to be the subject of the suit.

Receiver in partition suits.

Partition proceedings are generally dilatory, and considerable delays take place when any co-sharer fails to punctually pay in his quota of the costs. Whenever, therefore, a Court wishes to complete the proceedings within the shortest time possible, it appoints a receiver and places him in charge of the property with instructions to defray the expenses of the partition from out of the rents and profits collected by him. This

course is adopted, particularly in those cases where the co-sharers are not in good circumstances.

Then again, by the appointment of a receiver the property under partition is secured against the risk of being sold up for arrears of revenue or rent. The receiver meets these demands together with the costs of the partition proceedings on behalf of all the co-sharers who are liable for the same in proportion to their several interests.

The following is a schedule of costs ordinarily allowed in the Original Side of the Calcutta High Court, in an ordinary suit for partition where the value of the entire property under partition does not exceed Rs. 10,000.

Attorney's Fees.

	Rs.	A.	P.
Attendances for obtaining commission ...	10	0	0
Attending meeting of commissioner, including service of notice, each ... ... (Not to exceed on the whole Rs. 100.)	25	0	0
Instructions to confirm return	5	0	0
Drawing and engrossing notice	5	15	0
Copying same for service	0	15	0
Service	2	0	0
Affidavit of service	5	15	0
Swearing same	2	0	0
Obtaining certificate of return filed ...	2	0	0
Briefing papers for counsel	10	0	0
Attending counsel with brief	2	0	0
Attending court when application made ...	10	0	0
Filing papers	1	0	0
Obtaining and sealing order	2	0	0
Serving same and copy	2	15	0
Affidavit of service	5	15	0
Swearing same	2	0	0
Filing same	1	0	0

Counsel's Fees.

	Rs.	A.	P.
Application to confirm return	17	0	0

Registrar.

Commission of partition	5	0	0
Filing return	5	0	0
Order to confirm return, including all other charges	15	0	0

Commissioner &c.

Commissioner	160	0	0
Surveyor	80	0	0
Interpreter and clerk	40	0	0

LECTURE VIII.

Impartible Joint Property.

Impartible estate, what—Rules of succession determined by custom —Estates to be presumed partible—What is necessary to be proved to show impartible character—Evidence to establish custom—Incidents of such estates under the Mitakshara—Son acquires no property by birth—Son cannot control father's alienations—Alienability to be presumed—Inalienability depends on custom—Rules of primogeniture apply in absence of custom—Impartible estates under Dayabhaga —Power over income—Earnings and property purchased therewith divisible—Destruction of customary law—Hunsapar Raj case—Shivagungah case—Nuzvid case—Madras Regulation XXV of 1802—Mirangi case—Bengal Regulation XI of 1793—Regulation X of 1810 —Effect of the Regulations—Principality or Raj—Maintenance allowances—Suranjams of Bombay.

We have seen that even in an undivided Hindu family governed by the Mitakshara or the Dayabhaga law, and possessed of joint property, some members may own property belonging exclusively to them. Such property would not be taken account of at a general partition of the family-property, *e. g.*, gains of science learnt without detriment to ancestral property, gifts of affection, recovered ancestral property when the recovery is made without spending any money out of the ancestral estate, &c., &c. All such properties are considered the exclusive properties of the acquirer, and are, therefore, not partitioned or divided at a general partition of the family-property. We have also seen that in a Hindu family possessed of ancestral property, some members may jointly inherit, by collateral succession, property to which the other members of the coparcenary would not be entitled, and that as to such property the principles of

survivorship would have no place, though when such property is inherited jointly by a number of persons in defined shares, their shares are always capable of actual division. In the same way, clothes and wearing apparel of individual members are excluded from partition: they are allowed to belong to the persons who use them. Wells are also mentioned by our ancient law-givers among this class of property.

The above are several descriptions of property which, though *in their nature* impartible, are not allowed by the law to be divided among the coparceners at a general partition.

Impartible estate, what.

There is another class of property which, independently of the personal law of the holder, are impartible by the terms under which they were created, or, by custom,—being only capable of enjoyment by one person at a time. In the case of several such estates, their origin and the terms of their creation have only to be inferred from a long uninterrupted mode of enjoyment. Such estates when belonging to an undivided Hindu family are looked upon as the joint property of the family—the members other than the person in enjoyment being entitled to maintenance from the income. It may be asserted of these estates, that long established custom always governs the rules of succession to them, and determines the extent of the power of alienation possessed by the owner for the time being, and that rules of primogeniture and of exclusion of females generally obtain in such estates.

Rules of succession determined by custom.

Estates to be presumed partible.

In all cases, the presumption will be that an estate is partible and the party alleging it to be impartible will have to prove by very clear evidence, not only that the estate was never before partitioned, but also, that one person only enjoyed

it at a time. In Shankar Baksh *v.* Hardeo Baksh (1888) I. L. R. 16 Cal. 397, Lord Hobhouse, in delivering the judgment of the Judicial Committee observed: "The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition." In Thakur Durryao Singh *v.* Thakur Dari Sing (1873) 13 B. L. R. 165, Sir James Colvile, in delivering the judgment of the Privy Council, said: "In the present case there was no evidence of *enjoyment* by a single member of the family during six or seven generations—all that was found was that during that period the estate had never been divided. That fact alone cannot control the operation of the ordinary rule of Hindu law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded."

What is necessary to be proved to shew impartible character.

As to the nature of the evidence that must be adduced to establish a custom overruling a positive direction of law, their Lordships of the Privy Council in Rama Lakhshmi Ammal *v.* Sivanantha Perumal (1872) 12 B.L.R. 396 remarked: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." To the same effect are the observations of Sir Robert Collier in Adrishappa *v.* Gurushidappa (1880) I. L. R. 4 Bom. 494.

Evidence to establish custom.

Incidents of such estates under Mitakshara.

Let us now consider some of the incidents of these impartible estates under the Mitakshara Law.

Under that law, a son by birth acquires an interest with his father in ancestral property and can prevent him from alienating it except for certain allowable purposes. At one time it was thought that in the case of impartible estates too, the son by birth acquired such rights, and could interfere with his father's alienations as of right. Thus in Rajah Yenumula Gavuri Devamma Garu *v.* Rajah Yenumula Ramandora Garu (1870) 6 Mad. H. C. Rep. p. 93, it was held that the special rule of succession, entitling the eldest of the next of kin to take solely, does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. Chief Justice Scotland and Justice Innes said: "The unity of the family right to the heritage is not dissevered any more than by the succession of coparceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others who would be coparceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of coparceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of coparcenary shares" (see p. 105). And again (p. 109) "We are of opinion that the sound rule to lay down with respect to undivided or impartible ancestral property is, that all the members of the family who, in the

way we have pointed out, are entitled to unity of possession and community of interest according to the Law of Partition, are co-heirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near Sapindas in the male line, the family heritage both partible and impartible, passes to the survivors or survivor to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir relatively as to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property." This decision was passed in 1870. Mark now the gradual change in the law. In Thakur Kapil Nauth Sahai Deo *v.* Government (1874) 13 B. L. R. p. 445, Government having confiscated the property of Bishnath, who was declared a rebel,—the property having been an impartible estate which according to the family custom descended by the rules of primogeniture,—his son Kapil Nauth instituted the suit for recovery of the property on the allegation, among others, that under the Mitakshara law which governed the family, he was an undivided coparcener with his father. In disposing of this contention Sir Richard Couch, C. J., observed: "The question appears to be reduced to this:—Is the law of Mitakshara, by which each son has by birth a property in the paternal or ancestral estate (Ch. I sec. IV. 27), consistent with the custom that the estate is impartible, and descends to the eldest son? The property by birth gives to each son a right to compel the father to divide the estate—Rajaram Tewari *v.* Luchmun Persad and Nagalinga Mudali *v.* Subbiramaniya Mudali which is inconsistent with the estate being impartible. On the father's death, the whole estate goes

Kapilnauth Sahai Deo v. Government.

No property by birth.

to the eldest son, and the property by birth in the others has no effect. Property by birth in such an estate is a right which can never be enjoyed by the younger sons. It is not only not necessary to secure the descent to the eldest son, but if it had effect in respect of the younger sons it would prevent it. This part of the Mitakshara law cannot be reconciled with the custom, and we think we should hold that it is not applicable to this estate." This decision, however, did not settle the law. For, in Doorga Persad Sing *v.* Doorga Konwari (1878) I. L. R. 4 Cal. p. 190 the Judicial Committee in 1878 held, that the impartibility of property did not *per se* destroy its nature as joint family-property, or, render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. In 1883 the Allahabad Court in the case of Bhawani Ghulam *v.* Deoraj Kuari (1883) I. L. R. 5 All. 542 held that where there was no local or family custom overriding the general law, the succession to a Raj or impartible zemindari according to Hindu law goes by primogeniture. In the absence of any custom to the contrary, a Raj or impartible zemindary is according to Hindu law, not separate property but joint family-property, and, as such, according to the Mitakshara law is not alienable by any member of the family save for urgent and necessary expenses of the family without the consent of the coparceners.

These were the earlier decisions; you will now mark the great departure made in 1888. In that year in the case of Sartaj Kuari *v.* Deoraj Kuari, I. L. R. 10 All. p. 272, Sir Richard Couch who as Chief Justice of Bengal in the year 1874 in

the case of Kapilnauth Sahai Deo *v.* Government held that the Mitakshara theory of right of sons by birth did not apply to these cases of impartible estates delivered the judgment of the Judicial Committee. The suit was by the son to set aside the gift of some mouzas made by his late father. Sir Richard Couch in the course of the judgment said: "It was admitted that the Raj or estate was impartible; that there was in the family the custom of primogeniture; and that the family was governed by the law of the Mitakshara." His Lordship, upon the question which we are now considering, said—"The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordship's opinion, so connected with the right to a partition that it does not exist where there is no right to it. In the Hunsapore case there was a right to have Babuana allowances, as there is in this case, but that was not thought to create a community of interest which would be a restraint upon alienation. By the custom or usage, the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family and to hold that there is a joint ownership which is a restraint upon alienation." Their Lordships in conclusion seemed to think that the power of alienation was to be presumed to exist in such cases, and those who contended that no such power existed had to establish the custom of inalienability.

Son cannot control father's alienations.

Alienability to be presumed.

Inalienability depends on custom

To the same effect see Beresford *v.* Rama Subba (1889) I. L. R. 13 Mad. 197.

I have not in this connection quoted the observations of the Privy Council in the Bengal case of Nil Kristo Deb Barmano *v.* Bir Chandra Thakur 3 B.L.R., P.C. 13, made in 1869. Those observa-

tions accord well with the view taken in this later Allahabad case. Their Lordships said—"when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction involving also a contradiction, to call this separate ownership, though coming by inheritance at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature and there can be no community of interest; for, claims to an estate in lands, and to rights in others over it, as to maintenance for instance, are distinct and inconsistent claims."

Rules of primogeniture apply in absence of custom.

We have already seen that custom determines the rules of succession to these impartible estates. In the absence of any custom the rules of primogeniture apply. Bhawani Ghulam *v.* Deoraj Kuari (1883) I. L. R. 5 All. 542. In Jogendro Bhupati Hurro Chundra Mahapatra *v.* Nityanand Man Sing (1890) I. L. R. 18 Cal. 151, Sir Richard Couch in delivering the judgment of the Judicial Committee observed—"the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at."

We have also seen that in such cases the younger members receive allowances (called Babooana allowances), but their Lordships of the Privy Council in Sartaj Kuari *v.* Deoraj Kuari (1887) I. L. R. 10 All. p. 272, thought that the right to receive maintenance did not create a community of interest which would be a restraint upon alienation.

Under Dayabhaga.

The law would be the same under the Dayabhaga which advocates exclusive ownership. In Udaya Aditya Deb *v.* Jadub Lal Aditya Deb (1881) I. L. R. 8 Cal. 199, it was held that the imparti-bility of a Raj did not make it inalienable.

Power over income.

The holder of an impartible estate may, even where immemorial custom would restrain his power of alienation as regards the *corpus,* spend all the income derived from the estate. For, he need not effect any savings. If, therefore, he effects any savings they belong to him absolutely. If he buys any property with such savings, such property would be at his absolute disposal during his lifetime, and after his death would be inherited according to the *kulachar* or custom which obtains in the family relative to the succession to such property. Of course, it is open to the possessor of the impartible estate for the time being to treat the savings, or the property purchased with the savings, as part of the impartible estate. In Rajeswara Gajapaty Naraina Deo *v.* Rudra Gajapaty Naraina Deo (1869) 5 Madras H. C. Rep. p. 31, Chief Justice Scotland in concurrence with Justice Innes is reported to have said: "The established rule which takes ancient zemindaries out of the general law of partition and succession is, we think, strictly limited to the *corpus* of the land and other immovable property forming the estate of the zemindary, and such movable property as by customary descent may have become an heritage appurtenant thereto." And again, "whether regarded as the separately acquired funds of the zemindar, or, as it really is, his acquisition derived from ancestral property owned by him solely, it is equally divisible family property as between his sons, the plaintiff and defendant. It was said in argument on behalf of the defendant that if the division of this fund were allowed,

Savings and property purchased therewith divisible.

sons might call upon their father for a share of his savings as often as he made them; but that clearly they could not do. The law vests the whole proprietary right to the zemindary in the person who succeeds to it, and consequently he alone possesses the title to the rents and profits of the estate."

Destruction of customary law.

I have in this Lecture quoted certain observations of their Lordships of the Privy Council as to the nature of the evidence to establish a custom overriding a positive rule of law. As to the destruction of such a custom by non-user or discontinuance, the following observations were made in Raja Raj Kishen Singh *v.* Ramjoy Surma Mozoomdar (1872) 19 W. R. 8, "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate depending solely on family usage may not be discontinued so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits within which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous; and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned and the abandonment had been long acted upon."

In deciding whether an estate is partible or impartible, Courts have frequently to consider the terms of the deeds, if any, whereby such

estate was created, or, where there were no formal deeds executed, the circumstances under which it came into existence. In interpreting the deeds and circumstances, considerable light is thrown by a long established custom.

Hunsapore Raj case.

In the Hunsapore case—Babu Beerpertab Sahee *v.* Maharaja Rajender Pertab Sahee (1868) 12 M. I. A. I., 9 W. R. P. C. 15—the estate was confiscated in 1767 and kept by Government in their possession until 1790 and then granted in that year to a younger member of the family on whom the title of Raja was afterwards conferred. Their Lordships observed that there was no fresh Sanad granted and the question was whether it was a fresh grant of the family Raj with its customary rule of descent or merely a grant of the lands formerly included in the Raj to be held as an ordinary Zemindary, and it was held that it was the intention of the Government to restore the Zemindary as it existed before the confiscation and that the transaction was not so much the creation of a new Zemindary as the change of the tenant by a *vis major*.

Shiva-Gungah case.

In the Shiva-Gungah case—Kattama Nauchear *v.* The Raja of Shiva-Gungah (1863) 9 M. I. A. 539, Suther. P. C. Judgments p. 520 ; 2 W. R. P.C. 31—the estate was granted by a proclamation in 1801 and there was a sanad granted in 1803 which besides containing the usual terms of such documents of permanent settlement, contained a clause authorizing the Zemindar to transfer without the authority of Government, all or any part of the Zemindari. Their Lordships observed that every thing pointed to the installation of the istemrari Zemindar, not merely as proprietor but as ruler of the district, and that the policy of the Government clearly was to appoint a new ruler whom the rebellious inhabitants would obey:

that the policy of the permanent settlement was applied to the Shiva-Gungah as well as to other estates, but that if there were any general intention of introducing the principle of partibility, it was certainly not followed in that instance.

Nuzvid case.

In the Nuzvid case Raja Venkata Rao *v.* the Court of Wards (1879) I L.R. 2 Mad. 128, their Lordships of the Privy Council said: "In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services and under the Government of a chieftain, and was in the nature of a Raj or principality; but when the ancient Zemindari was resumed and two new estates were created out of it of which the Zemindars ceased to be liable to military service, or to be independent chiefs, but held merely as ordinary Zemindars subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly created estates."

Madras Reg. XXV of 1802.

Upon the passing of the Madras Reg. XXV of 1802, which fixed the assessments on Zemindaries in perpetuity, sanads were granted to Zemindars, but these did not change the previous impartible character of the Zemindaries. In Yarlagaddu Mallikarjuna *v.* Yarlagaddu Durga (1890) I. L. R. 13 Mad. 406.; L. R. 17. I. A. 13 their Lordships of the Judicial Committee held that the question whether an estate was impartible and descended by the law of primogeniture, or was subject to the ordinary Hindu law of inheritance, must be decided in each case upon the evidence given in it, and that notwithstanding the issue of sanads under Reg. XXV of 1802 estates continued to be impartible as before.

In Satrucharla Jogannadha Razu *v.* Satrucharla Ram Bhadra Razu (1891) I. L. R. 14 Mad. 237 ; L.R. 18 I.A. 45, their Lordships of the Privy Council held the Morangi zemindari to be a partible estate although at one time it was impartible. They said : "Taking it, in accordance with the arguments of the appellant's counsel, that impartibility was the rule then applicable to the estate, their Lordships are clearly of opinion that the subsequent dealings with the estate, the nature and terms of the grant under which it has been held throughout the present century, the absence of proof of any usage or practice of impartibility in the succession to the estate, contrary to the ordinary Hindu law of succession, and the character of the estate which is in no way distinguishable from an ordinary zemindari subject to the payment of a fixed amount of revenue, all clearly lead to the conclusion that the zemindari is now a partible estate in a question of succession." Morangi case.

In this connection I have to place before you some of the provisions of the Bengal Regulations. The preamble to Regulation XI of 1793 says : "A custom, originating in considerations of financial convenience, was established in these provinces under the native administrations, according to which some of the most extensive zemindaries were not liable to division. Upon the death of the proprietor of one of these estates, it devolves entire to the eldest son or next heir of the deceased to the exclusion of all other sons or relations. This custom is repugnant both to the Hindu and Mahomedan laws, which annex to primogeniture no exclusive right of succession to landed property, and consequently subversive of the rights of those individuals who would be entitled to a share of the estates in question, were the established laws of inheritance allowed to operate with regard Bengal Regulation XI of 1793.

to them as well as all other estates. It likewise tends to prevent the general improvement of the country from the proprietors of these large estates not having the means, or being unable to bestow the attention requisite for bringing into cultivation the extensive tracts of waste land comprised in them. For the above reasons, and as the limitation of the public demand upon the estates of individuals as they now exist, and the rules prescribed for apportioning the amount of it on the several shares of any estates which may be divided, obviate the objections and inconveniences that might have arisen from such divisions when the public demand was liable to annual or frequent variation, the Governor-General in Council has enacted the following rules." Then the rules are given, declaring that landed property, in cases of intestacy, is to descend according to the Mahomedan and Hindu law of inheritance, and providing for division of estates. But in course of the following 7 years it was found, that there existed landed estates in the Jungle Mahals of Midnapore and other Districts, where the custom of holding estates entire had prevailed for a long time, and accordingly Regulation X of 1800 was passed to counteract the effect of Regulation XI of 1793. The Regulation consists of the two following sections.

Reg. X of 1810.

I. By Reg. XI of 1793 the estates of proprietors of land dying intestate are declared liable to be divided among the heirs of the deceased agreeably to the Hindu or Mahomedan laws. A custom, however, having been found to prevail in the Jungle Mahals of Midnapore and other districts, by which the succession to landed estates invariably devolves to a single heir without the division of the property, and this custom having been long established and being founded on certain circum-