stances of local convenience which still exist—the Governor-General in Council has enacted the following rule to be in force in the provinces of Bengal, Behar and Orissa from the date of its promulgation.

II. Regulation XI. 1793 shall not be considered to supersede or affect any established usage which may have obtained in the Jungle Mahals of Midnapore and other districts, by which the succession to landed estates the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir to the exclusion of the other heirs of the deceased. In the *mahals* in question the local custom of the country shall be continued in full force as heretofore and the Courts of Justice be guided by it in the decision of all claims which may come before them to the inheritance of landed property situated in those *mahals*.

Effect of the Regulations.

The effect of the two Regulations was considered by the Privy Council in Raja Deedar Hossein *v.* Rani Zuhooroonissa, 2 M.I.A. 441. Their Lordships observed :—"It was contended on the part of the appellant, that the Regulation of 1793 was repealed with respect to this Zemindari by another Regulation (meaning X of 1800). But it is clear to their Lordships that this latter Regulation did not apply to undivided Zemindaries in which a custom might prevail that the inheritance should be indivisible, but only to the Jungle Mahals and other entire districts where local custom prevails. The construction contended for *viz.*, that every individual Zemindari in which the custom had been that it should descend entire was exempted, would repeal the Regulation of 1793 altogether, whereas it is clear that it was intended to be partially repealed only." This case seems to decide that in the provinces of Bengal, Behar,

and Orissa *local custom* prevailing in an *entire district* may, though family usage cannot, make a zemindari impartible and descendible to a single heir in cases to which Regulation XI of 1793 is applicable. You will note that this Regulation deals with zemindaries and not with principalities.

Principalities or Raj.

As to a Raj or principality, their Lordships of the Privy Council in Gunesh Dutt Singh *v.* Maharajah Moheshur Singh (1855) 6 M. I. A. 164 said: "We apprehend that the principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in this district, and indeed generally under the Hindu law, estates are divisible among the sons, when there are more than one son; they do not descend to the eldest son, but are divisible amongst all. With respect to a Raj, as a Principality, the general rule is otherwise and must be so. It is a Sovereignty or Principality—a Subordinate Sovereignty and Principality no doubt, but still a limited Sovereignty and Principality, which, in its very nature, excludes the idea of division in the sense in which that term is used in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families, where it is shown that usage has prevailed for a long series of years be controlled, unless there be positive law to the contrary. Now, it is said in this case that there is no positive law which excludes the divisibility, unless it be clearly proved to be an ancient Raj which it is denied that it is."

Maintenance allowances.

We have seen that in some of the impartible zemindaries, allowances are made in lands for the maintenance of the younger members of the family. In the above case of Gunesh Dutt Singh, referring to these allowances made in the particular Principality or Raj, their Lordships observed:

"Where an estate is granted to a younger son as a Babu allowance, he continues to pay the rent and assessment to the Raja; the property is never separated from the zamindari at all. The cases, therefore, of absolute grants and of grants by way of Babu allowance are essentially different in their nature."

Saranjams in Bombay.

In Bombay, *saranjams* are grants of the Government share of the revenue due in respect of any estate. They have been held to be impartible. Ram Chandra Mantri *v.* Venkat Rao (1882) I. L. R. 6 Bom. 598. But where it appears that the members of a family have treated *saranjams* as partible over a long period of years and have dealt with them as such, in effecting partitions of the entire family property which consisted both of the incomes and *saranjams*, it was held that the Court was justified in concluding that the *saranjams* were originally partible or had become so by family usage. Madhav Rao Manohar *v.* Atmaram Keshav (1890) I. L. R. 15 Bom. 519.

LECTURE IX.

Law of Partition under Mitakshara.

In the earliest times immovable property was indivisible and partition unknown—Partition under the Mitakshara—Partition is origin of property—Meaning of above—Important consequences attached to partition under Mitakshara—Evidence of partition—What amounts to legal partition—Appoovier's case—Decision construed by Justice Markby—Share not known before partition—Cases—Summary—Partial partition as to members—Onus of proof when partial separation is admitted—Partial partition as to property—Effect on other properties after partial partition—Partition under Mitakshara—Four heads—(1) What is the property to be divided—(2) Who can demand partition—(3) Four periods of partition—The periods refer to self-acquired property of father—Son can demand partition of ancestral property at any moment—Son cannot demand partition of property inherited by father collaterally—(4) Who are entitled to share—Partition of obstructed heritage—Partition among father and his descendants—Who are incompetent to share—Their sons free from defects—their adopted sons—Sons of a disqualified heir born after partition—Krishna *v.* Sami—Who are the persons entitled to share—Sons—Grandsons—Adopted sons and adopted sons of sons—Mothers—their portions—unmarried sisters—Grandmother—afterborn son—Sons of different tribes—adopted son—Kritrima son—Dattaka son—Shares of a natural and adopted son in competition—adopted son and adopted son of natural son—effects discovered after partition—partition after father's death—When partition is re-opened—at instance of absent member—at instance of afterborn son—upon removal of disqualification—afterborn son of a disqualified coparcener—Minors—Effect of partition—Why sons do not more frequently seek partition during father's lifetime—Reunion—only among certain relations—Brothers of whole and half blood.—Incomplete partition—Onus to shew reunion.

In earliest times immovable property was indivisible and partition unknown.

Professor Julius Jolly in his Lectures in 1883 dwelt at length on the law of partition according to the Hindu *shastras*. He has shewn that in the earliest times partition was unknown, that immovable property was then looked upon as indivisible and that, as time advanced, partition by the will

of the father became prevalent. Touching the question of such partition by the will of the father, he says :—"The distribution of the family-property by the father appears to be a very ancient practice in India, as it is recorded in the Veda. It was a natural exercise of the *patria potestas*, and is found almost wherever the right to make a will is wanting, which is so characteristic an attribute of the power of a *pater familias* under Roman Law." The Professor has traced the gradual development of the present law of partition from its earliest stages as evolved in the Smritis and commentaries. I shall not tread over the same grounds, but shall refer to his lectures whenever necessary. I shall consider at length the case-law on the subject, and place before you the practical, rather than the theoretical, view of the questions that arise in this connection.

Partition under the Mitakshara.

The author of the Mitakshara in chap. I sec. I para. 4 defines partition as "the adjustment of divers rights regarding the whole, by distributing them in particular portions of the aggregate." In para. 7, he proposes to himself the question, "whether property arise from partition or the division be of an existent right," and in para. 18 answers the question thus: "Of these positions, that of property arising from partition is right." Indeed the author in para. 8 quotes with approbation the text of Gautama, *viz.*, "An owner is by inheritance, purchase, partition, seizure, or finding"; thus enumerating *partition* as one of the sources of property. It does not follow from this that property in a thing or land belonging to several individuals does not, before partition, vest in any body. On the contrary, the whole body of proprietors, as a single person, own the thing or land; or, in other words, the property in the thing or land resides in the whole body of proprietors con-

Partition is origin of property.

Meaning of above.

sidered as one person. Nor is it meant to be asserted that before partition none of the body of proprietors have any interest in the thing or land. But what is meant to be predicated is that, before partition, the interest of single members composing the whole body of proprietors is inchoate, and that partition perfects or matures this interest.

Important consequences attached to partition under Mitakshara.

Now, under the Mitakshara, a separation has important consequences attached to it. Thus, Narada (13, 25-26) speaking of brothers living joint in food, worship and estate, says :—"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth." We have also seen* that survivorship obtains among the coparceners while the family is joint. But, if a brother dies in a state of separation, his widow would be entitled to his estate in preference to his divided brothers. Thus Vijnaneswara in Mit. ch. II sec. II para. 39 says :—"Therefore it is a settled rule, that a wedded wife being chaste, takes the whole estate of a man, who, being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue."

Evidence of partition.

We have seen before, that a partition has also very important results attached to it, as regards the right of enjoyment and disposal of the several shares by the separated owners. Oftentimes, therefore, a court of justice has to find as a question of fact, whether there has been a legal partition. The author of the Mitakshara in ch. II sec. XII deals with the question in this way :—

1. "Having thus explained partition of heritage the author next propounds the evidence by which it may be proved in a case of doubt. "149.

* Ante pp. 48-49.

When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof, or by separate possession of house or field." In the next three paragraphs the commentator dilates on the above text.

But this is a question of evidence, and the legislature has not vouchsafed to the people of India their personal law of evidence. The question must be decided in accordance with the rules of the Indian Evidence Act I of 1872, though, of course, what amounts to a legal partition must be determined under the personal law of the people.

What amounts to legal partition.

Now, in determining what amounts to a legal partition, the provisions of Chap. II sec. XII of the Mitakshara throw considerable light. Thus, the separate possession of a house or field indicates partition by metes and bounds, and if nothing short of such separate possession had been required to be established in order to prove a legal partition, one might have inferred that there could be no partition except by metes and bounds. But Yajnavalkya mentions also written proof, (as agreements to hold in severalty), and evidence of kinsmen, and the commentator quotes in support Narada 13. 36-37 and says in para. 3: "The practice of agriculture or other business pursued apart from the rest, and the observance of the five great sacraments and other religious duties performed separately from them, are pronounced by Narada to be tokens of a partition." The text of Narada referred to above has been thus translated: "If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs. The religious duty of unseparated brethren is single. When partition indeed has been made, religious

duties become separate for each of them." In this connection should be read the observations made in the Vyavahara Mayukha at the beginning of the chapter on Partition, *viz.*, "Even where there is a total absence of all property, a partition is effected by the mere declaration, 'I am, separate from thee'; for, partition is but a particular condition of the mind; and this declaration is an indication of the same."

Confining ourselves, therefore, to the texts and commentaries, we see that a partition, when disputed, may be proved by showing separate possession of a house or field, or by agreement as to separate enjoyment, or by proving that there was a distribution of the whole property among the sharers, or by establishing a separation in the status of the family, or by showing the intention to separate. Now a distribution among the sharers may be by the assignment of separate shares in the same entire property, as well as by assigning distinct portions of such property.

Appoovier's case.

In Appoovier *v.* Ramasubba Ayyan (1866) 11 M. I. A. 75; 8 W. R., P. C., 1, it was held in 1866 that an actual partition by metes and bounds was not necessary to render a division of undivided property complete, but when the members of an undivided family agreed among themselves, with regard to a particular property, that it should thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment was taken away from the subject matter so agreed to be dealt with. Lord Westbury in delivering the judgment of the Judicial Committee said:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, etc."* In the

* Ante p. 18.

case before Lord Westbury, there was a written document whereby an actual division by metes and bounds of certain villages was effected, and as to others it provided for enjoyment in distinct shares, but deferred the division by metes and bounds to a future date. Lord Westbury after stating the above facts proceeded—"Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought in the common chest as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family who are thenceforth to become entitled to those defined shares. Thus—using the language of the English law merely by way of illustration,—the joint tenancy is severed and converted into a tenancy in common."

Construed by Justice Markby.

Mr. Justice Markby in Bikramajeet Lall *v.* Mussamat Phoolbas Kooer (1870) 14 W. R. 340, held (see p. 345) that a mere signification of intention was sufficient to constitute a separation without an actual partition by metes and bounds. An application for review having been made (see 18 W. R. 48) the learned Judge construed Lord Westbury's judgment in Appoovier's case as indicating that even before partition, the shares of the parceners were defined. He says:—"It is clear to me that what Lord Westbury had under consideration was not so much the separate ownership of a share in the *corpus*, as separate enjoyment of the profits of it." And again "If I might venture to put my own construction on Appoovier's case, I should say that the main features of the change which takes place in a Mitakshara family upon partition of ownership without partition by metes and bounds were

these :—that both before and after such a partition, each member of the family is the owner of a share to be ascertained at any given moment by the same rules as those which govern partition; that both before and after a partition of ownership without a partition by metes and bounds, the rights of possession of the members of the family over the *corpus* are the same; that after such a partition the right of enjoyment is modified in this that each member can, after such a partition, claim to have a separate share in the profits set apart to his own use, and can claim nothing out of the other profits." It would seem that the construction put by Justice Markby would have the effect of making out that partition is of pre-existing property, and not that partition is the origin of property, as acquisition or seizure is, and further, that separate enjoyment is of the essence of a partition.

Share not known before partition.

What really amounts to partition under the Mitakshara is a question of some nicety. But nothing is more clear than this, that before partition the extent of the shares of the several members is in the eye of the law not known. I have advisedly used the expression "in the eye of the law." For, what determines the extent of these shares is the constitution of the family, and when that is known, the extent of the shares of the individual members is also known. And, as a matter of fact, every one of the members of a family has the ready means of knowing what fraction of the whole he would be entitled to at partition, if then effected. But until a formal partition determines this fraction, it is not known for any purpose. Thus, even in Madras and Bombay where private alienations of the shares of individual members before partition are good and operative, the share purchased can only be determined at a partition. In fact, what the

purchaser purchases is the interest of the vendor as it would be ascertained at a partition.

Let us now consider some of the decided cases to see how they help us in determining what amounts to a legal partition. Cases.

The earliest case that I have traced out in the Reports is a Dayabhaga case—that of Prawn Kissen Mitter *v.* Sreemutty Ram Sunderee Dossee, Fulton's Reports p. 110, decided in October 1842 by Chief Justice Peel and Justices Grant and Seton. In that case the father of the plaintiff Prawn Kissen Mitter having died leaving the plaintiff and another son and a widow, a bill for partition was filed, and it was decreed that the widow and her sons were each entitled to a third part of the ancestral property. But the partition was in fact never made, and the family notwithstanding the decree continued to live joint. While so living, Prawn Kissen's brother died, leaving a son who succeeded to his third share, and upon the death of this son, the defendant Ram Sunderee as his childless widow succeeded to her husband's third share. Upon the death then of Prawn Kissen's mother, Prawn Kissen instituted the present suit against Ram Sunderee for possession of the entire third share of his mother. The learned Judges said: "No partition having, in fact, been made, the decree directing a partition had not altered the nature of the property and it must be looked upon as undivided in its nature. We are inclined to think that the heirship must stand as at the time of the grandfather's death and that the son and grandson's widow in this case are equally entitled." It might at first sight seem that the effect of the judgment was to lay down that an unexecuted decree for partition would not be sufficient to effect a legal division. But this case lays down no such law. In the first

place, it was a Bengal case in which the word "partition" has a very different signification from what it has in the Mitakshara. In the second place, the family continued joint, notwithstanding the decree for partition, and for aught that is known to the contrary, they might have given up the idea of separation after the passing of the decree. In the third place, their living joint after the decree might be looked upon as effecting a re-union, in which case the same results would follow. And in the last place, would the decree in Prawn Kissen's suit for his mother's third part have been different, if his mother during her lifetime had partitioned off her third share? No. The share allotted to the mother was for her maintenance only, and was taken, from out of the sons' portions to which it reverted equally upon her death. See Sorolah Dossee *v.* Bhoobun Mohun Neoghy (1888) I. L. R. 15 Cal. 292.

In Bulakee Lal *v.* Mussamat Indurputty Kowar, 3 W. R. 41, the High Court of Calcutta held that any act or declaration showing unequivocally an intention on the part of any shareholder to hold his own share separately, and to renounce all rights upon the shares of the others constituted a complete partition.

In Badamoo Koowar *v.* Wuzeer Sing 5 W. R. 78, it was held that a definitive separation in estate, indicated by separate enjoyment and distinct liabilities, constituted a legal separation.

In Josoda Koonwar *v.* Gourie Byjonath Sahae Singh (1866) 6 W. R. 139, it was held that partition could be effected otherwise than by actual division into parcels.

In Sheodyal Tewaree *v.* Judoo Nath Tewaree, 9 W. R. 61, decided by Justices Loch and D. N. Mitter in 1868, it was laid down in very general

terms "that under the Hindu law two things at least were necessary to constitute partition: the shares must be defined and there must be distinct and independent enjoyment of these shares." But these general words must be understood with reference to the particular facts of the case which the learned Judges had to decide. This case was considered by Justice Wilson in Tej Protap Singh *v.* Champa Kalee Koer (1885) I. L. R. 12 Cal. 96, where that learned Judge observed: "The judgment was delivered by Dwarkanath Mitter, J., and we see no inconsistency between that case and the view we take in the present case. The subject dealt with in that judgment was the interest which a mother or grandmother takes under a partition between her sons or grandsons. In such a case the mother or grandmother has no vested title so long as her sons or grandsons are joint. She acquires her title only by virtue of partition. And, as we understand that judgment, it decides no more than this that in order to complete the title of the mother or grandmother which she acquires by partition, the partition must be completed, that there must be not only a decree for partition, or an agreement for partition, but a decree or an agreement carried into effect." And again, "Now, these authorities seem to us to establish this, that an agreement for separation and partition, or a decree for separation and partition, if according to its terms it purports to be an agreement or a decree for present separation, and present division in interest and right, operates to make the parties from that time separate, although the actual partition by metes and bounds and separate possession and enjoyment be postponed until the agreement or the decree is fully carried into effect."

In Debee Pershad *v.* Phool Koeree *alias* Ghena

Koeree (1869) 12 W. R. 510, it was held that though actual partition by metes and bounds was not necessary to a separation between the members of a joint Hindu family, yet there must be some unequivocal act or declaration, on the part of the family, of their intention to separate, and that a suit by one member for a declaration of his right was not a sufficient indication of such intention. This case was considered by their Lordships of the Privy Council in Joynarain Giri *v.* Girish Chunder Myti (1878) I. L. R. 4 Cal. 434 or L. R. 5 I. A. 228, which has been hereafter considered.

In Raja Suraneni Venkata Gopala Nara Simha *v.* Raja Suraneni Lakshmi Venkama Roy (1869) 3 B. L. R., P. C. 41, their Lordships held that according to the Mitakshara, an agreement for a partition, although not carried out by actual partition of the property, was sufficient to constitute a division of the family, so as to entitle the widow of a deceased brother to succeed to his share of the ancestral property in preference to the surviving brothers. The Judicial Committee observed: "Their Lordships are further of opinion, that they must presume, that although there was no division of the zemindari or of the lands, by metes and boundaries, yet that the arrangement proceeded upon the footing of the deed, that the rents were divided according to the stipulations of the deed, and that if the contrary took place, it lay upon the plaintiff to shew that such was the case."

In *re* Phuljhari Koer (1872) 8 B. L. R. 385, Loch and Ainslie, JJ., held that where by a deed of *Sharakatnama*, the members of a Hindu family declared that each of the members was entitled to a definite fractional share of the whole estate, such deed was not sufficient to constitut

a valid partition. Justice Ainslie, in delivering the judgment of the Court, said :—" I altogether fail to see that the decisions, either of the Privy Council or of this Court, warrant us in saying that a mere definition of an interest in a joint estate, in terms of a fraction of the whole without any indication of an intention to divide interest and liabilities, is sufficient to constitute a legal dissolution of a joint family."

In Doorga Persad *v.* Mussamat Kundun Koowar (1873) 13 B. L. R. 235; L.R. 1, I. A. 55; 21 W. R. 214, the Privy Council held on the authority of Appoovier's case that an Ekrarnama, which did not recite a previous status of indivision, and did not in terms declare that the parties thereto should thenceforth be an undivided family nevertheless meant that the parties would thenceforth hold and enjoy the property in severalty. They further held that in cases of division of joint property, not carried out by a partition by metes and bounds, the question whether the *status* of the family had been thereby altered was a question of intention of the parties to be inferred from the instruments which they had executed and the acts which they had done to effect such division.

In Joynarain Giri *v.* Girish Chunder Mytee (1878) I. L. R. 4 Cal. 434; L. R. 5 I. A. 228, the facts were shortly these :—

Joynarain and Shib Prosad were two cousins descended from the same grandfather. Shib Prosad having been expelled from the family, brought a suit against Joynarain and obtained a decree, in the Zilla Court as well as in the High Court, for possession of a moiety of the properties in the possession of Joynarain, with mesne profits. An appeal was preferred by Joynarain to the Privy Council, but, pending the appeal, Shib Prosad died and Joynarain applied to bring the name

of his widow on the record; but the Courts in India gave effect to a will which had been executed by Shib Prosad, and substituted the respondent Giris Chunder Mytee in place of Shib Prosad. The Privy Council having affirmed the decree of the Courts in India, Girish Chunder applied to execute the decree in favour of Shib Prosad. Joynarain thereupon instituted the present suit for setting aside the will of Shib Prosad on the allegation, that he and Shib Prosad were joint owners under the Mitakshara, and that though Shib Prosad had obtained a decree, no execution of the decree having been effected during his lifetime, Shib Prosad died in a state of jointness, so that he had no authority to will away his undivided share, while by the principles of survivorship Joynarain was entitled to the whole undivided estate.

Their Lordships held that a separation had taken place during the lifetime of Shib Prosad and that the will was, therefore, valid and operative. They said :—"Their Lordships regard the conduct of Shib Prosad Giri, when he left the house in which both he and Joynarain Giri lived, and withdrew himself from the commensality with his cousin, as indicating a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for his separate maintenance, as well as his making a will, as indicating, at all events, that he himself considered that a separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after a separation. But further, it appears to their Lordships that the decree which has been read is in effect to give to Shib Prosad Giri a separate share of

the property of the grandfather. It gives him, in terms, possession of the eight annas which he claimed of the real estate; it gives him mesne profits from the day of the separation, *i.e.*, from the time when he left the house in which he had been living with his cousin, and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually in terms of partition, yet that the decree does effect a partition, at all events, of rights which is effectual to destroy the joint estate under the doctrine laid down in the case which has been quoted of Appoovier *v.* Rama Subba Aiyan."

In Ambika Dat *v.* Sukh Mani Kuar (1877) I. L. R. 1 All. 437, it appears that there was a quarrel between the two sharers, Maneshar Ram and Dhaneshar Ram, in 1854, and that they then defined their shares in the property which they held and which at their deaths came to be recorded in the same way in their sons' names. The Allahabad Court ruled that there had been no separation under the above circumstances. Justice Turner said :—" If we find through a long course of years nothing to show that the definement of shares which took place in 1854 has been acted on, and that the parties continued to enjoy the property on the same footing as before, it is but reasonable to suppose that, although they may have taken some steps towards separation, from some cause or other, it may be a reconciliation, the intention to separate was abandoned." This case was commented on by Justice Wilson in I. L. R. 12 Cal. p. 96.

In Raghubanund Doss *v.* Sadhu Churn Doss (1878) I. L. R. 4 Cal. 425, Justice Markby said : " No right vests in any member of the family to a specific share until some act has been done

which has the effect of turning the joint ownership into several ownership. This may be done by a mere signification of intention, and when a signification of intention has once taken place which has this effect, the share of each member becomes at the same moment both several and defined."

In Hoolash Kooer *v.* Kassee Proshad (1881) I. L. R. 7 Cal. 369, Mitter and Maclean, JJ., held that the registration of the names of the four brothers, who constituted the joint family, with the specification of their respective shares under the Land Registration Act VII (B. C.) of 1876, not accompanied by an intention to deal with a particular share separately, would not constitute a separation of the joint family.

In Sakharam Mahadev Dange *v.* Hari Krishna Dange (1881) I. L. R. 6 Bom. 113, Chief Justice Westropp held that a decree for partition does not effect a severance as among the parties to the suit so long as it remains under appeal, and that, if, pending the appeal, one of the parties to the suit, who has been declared entitled to a specific portion, dies, there is nothing to prevent the other coparceners from being entitled to such portion by the principles of survivorship. The general principle here enunciated is not opposed to the principle laid down in Joynarain Giri *v.* Girish Chunder Myti already considered. There also, Shib Persad died while yet the decree for partition was under appeal to the Privy Council. But Joynarain, instead of applying for abatement of the suit by reason of Shib Persad's death, sought to bring upon the records his widow's name as if the property had been divided.

In Babaji Parshram *v.* Kashi Bai (1879) I. L. R. 4 Bom. 157, the Bombay Court held that where there was no indication of an intention to

presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to merely divide was not of itself sufficient to effect a partition. The Judges said—"we feel nothing to support the conclusion that the decree operated to change the character of the property. The direction 'that the estate be divided' was, at best, but an inchoate partition which remained to become legal by an appropriation in execution of the respective shares." It should be noted that the Privy Council cases of Doorga Persad and Joynarain Giri were not cited in argument or referred to in the judgment.

In Chidambaram Chettiar *v.* Gauri Nachiar (1879) I. L. R. 2 Mad. 83, the younger of two brothers sued his brother and some other defendants for recovery of a moiety of the family-property after setting aside certain encumbrances created by the elder brother in favour of the other defendants. The Court, after holding that the property was partible and the younger brother was entitled to a moiety, was enquiring into the validity of the encumbrances, when the younger brother died without sons. The question, thereupon, arose as to whether the younger brother died in a state of separation so that his widow might inherit his share. The Privy Council held that the younger brother died in a state of separation. They said: "Their Lordships are of opinion that the judgment must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties and making the brothers separate in estate from that date if they had not previously become so."

In Ram Lal *v.* Debi Dat (1888) I. L. R. 10 All. 490, it was held that from evidence of definement of shares followed by entries of separate

interests in the revenue records, if there be nothing to explain away this circumstance, separation as to estate might be inferred.

In Ananta Balacharya *v.* Damodhar Makund (1888) I. L. R. 13 Bom. 25, it was held that an agreement to divide was sufficient to constitute partition.

In Madho Parshad *v.* Mehrban Singh (1890) I. L. R. 18 Cal. 157, their Lordships of the Privy Council said: "Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process....Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient" to constitute a separation in the family and a partition of the property.

In Budhamal *v.* Bhagwan Das (1890) I. L. R. 18 Cal. 302, the Judicial Committee of the Privy Council held that where a distribution of ancestral estate among the members of a family had taken place in former years and been followed by continuous possession without their having any intention to re-adjust or to hold on behalf of the family, the partition was complete.

Summary.

From all the above decisions, the following inferences seem legitimately to arise:—

(1) In those cases where a coparcener can at any moment demand a partition, a coparcener has merely to signify to the other coparceners his present intention to separate, and from the time when such intention is made known to the other sharers, the coparcener may be considered separate from the others both in family and property.

A long time may elapse before any separation into distinct portions can be actually effected, or even before the extent of such coparcener's share in the *corpus* can be determined, but the joint interest of the separating coparcener ceases and his individual interest begins from when he makes the demand. We have seen that the extent of the shares depends upon the state of the family, and that though by births and deaths in the family the shares decrease and increase, and theoretically, therefore, no member of a joint family before partition has any definite share, practically every member of the family at any given moment of time has the ready means of knowing what fraction of the whole his share represents.

Agreements effecting separation.

(2) In cases of written agreements effecting separation, either by metes and bounds or by defining shares in the corpus, the separations take effect from the dates of such agreements. But agreements, which merely define the shares and do not disclose a present intention to follow up the definement by separate possession of such shares, have not this effect.

(3) Decrees for partition, executed or unexecuted, effect separation among the coparceners in respect of the property divided or sought to be divided, *i.e.*, the *status* of the coparceners would be one of separation in respect of the property.

(4) Declaratory decrees which merely define the shares of the parceners also effect a legal partition. But the effect of such decrees may be counteracted by subsequent joint possession for a long time.

Momentary separation may be followed by re-union; but you will do well to keep the *status* of separation distinct from the *status* of re-union. You will thereby steer clear of the difficult questions of the onus of proof that otherwise may beset you.

(5) Evidence of separate enjoyment is conclusive on the question of separation, and in cases where the person, whose separation or jointness is in issue, is not a coparcener who can demand a partition, such separate enjoyment is the only test. But even, without such evidence, separate enjoyment is to be presumed among coparceners as following an agreement or a decree to divide. In every case an intention to follow up the agreement or the decree at no distant future is to be presumed, and it will be for the party asserting jointness to shew that such intention was given up or abandoned.

Partial partition as to members.

Partition under the Mitakshara may be by some members only—the others remaining joint. The Mitakshara is altogether silent on this point. Mayne quotes Ch. I sec. II para. 2, as authority for holding that there may be partial* separation as regards the members.

It is true that at a general partition not only is the family-property divided but also the liabilities, and that among the liabilities are included the debts of the family and the charges for the maintenance of some of the members of the family, and that in order that the separate rights and liabilities of the separating member may be correctly determined, the rights and liabilities of the others *inter se* should also be examined. But a mere ascertainment of the separate rights and liabilities of the members cannot, in opposition to the express wishes of the members, operate as a division. This point, moreover, seems to have been settled by the authority of judicial decisions.

In Mussamat Chutha *v.* Miheen Lal 11 M. I. A. 369, their Lordships of the Privy Council said:

* The text is "when a father wishes to make a partition he may at his pleasure separate his children from himself, whether one, two or more sons."

"The family originally consisted of three brothers, Shama Dass, Damodar Das and Koonj Kishore Dass. It is admitted on all hands that Shama Dass separated himself from his brothers and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the appellant) that the two other brothers continued joint after the separation of Shama Dass, and further, that for many purposes Damodar Dass and the respondent (being his nephew, the son of Koonj Kishore Dass) were members of a joint family at the time of Damodar Dass's death."

In Deendyal Lal *v.* Jugdeep Narain Singh (1877) I. L. R. 3 Cal. 198, to which we referred at length in the earlier Lectures, their Lordships of the Privy Council, after observing that in a partnership concern though one partner could not by private alienation of his interest introduce a stranger into the firm, a creditor of one of the partners could do the same thing by execution sale, proceed in this way : "It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate ; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the co-parceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded before the alienation of his share took place."

In Radha Churn Dass *v.* Kripa Sindhu Dass (1879) I. L. R. 5 Cal. 474, a contention was raised as to whether when a separation, as regards some members, was admitted, the separation of the others *inter se* was not also to be presumed. But no decision was passed on the question as to

whether a separation as regards some members only was allowable under the law.

In Upendra Narain Myti *v.* Gopee Nath Bera (1883) I. L. R. 9 Cal. 817, the Judges held that the separation of one member of a Hindu family does not in itself affect the position of the other members *inter se*.

We have been here considering whether, under the Mitakshara, a separation of some members is not practicable, and not whether generally, or under the general law, there is any objection to such separation.

We find as an ordinary event that at a general partition of family-property, some of the members live joint in estate among themselves, though separate from the others, and there is nothing in the law to prevent such partial separation. Professor Jolly on p. 135 says:—"Partial partition as regards the owners must have become common as soon as each coparcener obtained the right to demand a partition."*

Onus of proof when partial separation is admitted.

In this connection, I ought to state that a question frequently arises as to whether when the separation of some of the members has been proved, the Court ought not to infer that the others also separated *inter se*. The authorities on this point seem to be conflicting: see Radha Churn Dass *v.* Kripa Sindhu Dass (1879) I. L. R. 5 Cal. 474; and Upendra Narain Myti *v.* Gopee Nath Bera (1883) I. L. R. 9 Cal. 817.

It seems that the presumption that a joint family continues to be joint is to be acted upon until the case of any particular members having actually separated is established, and that then such members only should be held to have separated, as to whose separation the evidence may be conclusive.

* In this connection see Manjanatha *v.* Narayana I.L.R. 5 Mad. 362.

Partial partition as to property.

Let us next consider whether, under the Mitakshara law a partition can be made of a portion only of the entire family-property.

There is no text in the Mitakshara directly bearing on this point. But in Ch. II sec. 10 the author in excluding the impotent, the outcast &c. from participation declares them entitled to maintenance from those who take their inheritance (see Vishnu XV, 33). It is clear that this text applies only when a partition is effected among the coparceners; for, so long as the family remains joint, all the members including the impotent, the lame, &c., must be maintained.

At a general partition, a portion of the joint property is generally set apart for the discharge of these liabilities, and the rest is divided among the coparceners. The portion so assigned is not the allotment of the persons entitled to maintenance, nor is it divided among them, if they are more in number than one. The charges for maintenance are jointly met from out of the income of the properties thus set apart. And then when by death or other causes, the liability for maintenance ceases, the properties left joint are divided among the original co-owners or their heirs.

From this practice which is recognized in the texts, one can infer that the author contemplated partition of a portion of the property of a joint family. But there are various considerations which would influence a modern court of justice to allow or not a partition of a portion of the family-properties. Thus, when the co-sharers are in possession of different portions, it would not be equitable at the instance of one of them to effect a division of such portion only as is not in his occupation. But there can be no objection if all the co-sharers wish for a partition of a portion only of the joint property to suit their conveni-

ence. In fact, the case of a portion of the family-property being left joint at a general partition, in order to meet the common liabilities of the coparceners, also resolves itself into one of partition by consent or arrangement. And, accordingly, Sir Richard Garth in Radha Churn Dass *v.* Kripa Sindhu Dass (1879) I. L. R. 5 Cal. p. 474 observes :—"It seems indeed very doubtful whether by the Hindu law any *partial partition* of the family-property can take place except by arrangement." See observations of Justice Muthusami Ayyar in Manjanatha Shanabhaga *v.* Narayana Shanabhaga (1882) I. L. R. 5 Mad. 362. See also Koer Hasmat Rai *v.* Sunder Das (1885) I. L. R. 11 Cal. 396 ; and Venkatarama *v.* Meera Labai (1889) I. L. R. 13 Mad. 275. Professor Jolly in his Lectures on p. 135 says :—"Partial division as regards the property is not expressly referred to either in the Smritis or in the Digests. That it was an old and common practice may be inferred from the rules about individual property." I have here considered the question as one of Hindu law. I shall refer to it again in a subsequent Lecture.

Effect on other properties of a partial partition.

Let us next discuss the effect of a partial partition of family-property on properties left joint at such partition, *i.e.*, whether such property intentionally left joint by the coparceners would descend as separate property or the principles of survivorship would apply.

We have seen that a mere declaration by one of several coparceners of an intention to separate has the effect of making a separation in the *status* of the family and of effecting a partition of the joint property. But we are now supposing the case of properties having been left joint by the parties themselves. As to these, the law of succession applicable to joint property should

apply. It is, we know, the nature of the property and not the *status* of the owner that determines the law of succession to it. Thus property inherited by a man as ancestral property under the Mitakshara is the unobstructed heritage of his sons and grandsons. To such property the principles of survivorship apply, and if the owner were to die childless in a state of union with a brother, the brother would exclude the widow. But if the property were the self-acquired property of the man and he died childless in a state of union with his brother, the widow would inherit the property. Now the same man may be possessed of both classes of property—ancestral and self-acquired. And the rules of succession would be different in the one case from those in the other. Applying these principles to the case under our consideration, the coparcener would be possessed of both separate and joint properties and different rules of succession would apply to the different kinds of property.

See 3 Agra 37; also Gavrishankar Parabhuram *v.* Atmaram Rajaram (1893) I. L. R. 18 Bom.611.

Partition under Mitakshara.

Let us now consider generally the Mitakshara law of partition. This branch of the subject may be conveniently divided into four heads: (1) the property to be divided, (2) the persons who can demand a partition, (3) the periods of partition, and (4) the persons who are entitled to share at partition.

(1) What is the property to be divided.

(1) We have already seen what is coparcenary property and what is not. We have seen that in a joint family, some of the members may own property which is exclusively their own and which cannot be taken account of at a general partition. It is simply the coparcenary property, as before defined, that is the subject of partition in the Mitakshara, and in the present Lecture,

therefore, I shall confine myself to the partition of coparcenary property. As regards the self-acquired property of the father, whatever moral precepts there may be in the texts against their being divided according to the will of the father, the case-law has declared his absolute right over it.* When such property in the hands of the successor becomes ancestral property, it is partitioned under the same rules as coparcenary property.

(2) Who can demand partition.

(2) The Mitakshara law treats of the partition of unobstructed heritage among the coparceners. It not unfrequently happens that the family-property is in the hands of persons who are not coparceners in the technical sense of the term, and in such cases, where the rights of the co-sharers are co-ordinate, any one or more of the sharers can demand a partition. But the Mitakshara considers *only* the case of partition of unobstructed heritage among the coparceners, and we are to consider here, not generally who can demand a partition, but supposing all the coparceners to be alive, which of them can demand partition. Otherwise, as a rule every one of a body of co-ordinate owners can demand a partition.

We have seen before † who the coparceners are who can demand partition. We have seen that they are not all the persons who are the coparceners, nor all who at a partition take shares. Professor Jolly thinks ‡ that the right to demand partition is an innovation on the ancient law. He says:—"It is obvious that partition in order to become a common and established practice, presupposes the existence of a right to demand it on the part of every one of those who are likely to be benefited by it. The absence of such a right

---

* Ante pp. 105-106. † Ante pp. 45-47.

‡ Tagore Law Lectures for 1883 p. 97.

as this in the earliest period of the Hindu law is among the clearest proofs of the general prevalence of the joint-family system in that period. No other single family member than the father was allowed to institute a partition on his own account, and whether he would exercise this right or not depended entirely on his discretion. The female family members could never demand a partition. The sons might divide the property after his death by mutual consent, but not at the instance of one single coparcener." And again at p. 125: "That the sons should be authorized in certain cases to demand a partition of their father's self-acquisitions seems a thoroughly anomalous theory no doubt and one strongly opposed to the strong sense of the deference due to elders, which pervades the Indian law. Even this right to demand a partition of ancestral property at any time has been recently contested. Nevertheless it is impossible to doubt that these two propositions are actually contained in the Mitakshara, and that the Mitakshara doctrine has been consistently interpreted in that sense in all the subsequent Digests of the Mitakshara school. The most decisive passage in the Mitakshara itself is in I, 5, 8 where a distribution of the ancestral estate is said to take place solely by the wish of a son, even in spite of the mother being capable of bearing more sons and the father retaining his worldly affections."

(3) Four periods of partition.

(3) Under the Mitakshara, Ch. I sec. 2 there are four periods for the partition of property. Para. 7 provides: "One period of partition is when the father desires separation, as expressed in the text "When the father makes a partition." Another period is while the father lives, but is indifferent to wealth and disinclined to pleasure, and the mother is incapable of bearing more sons; at

which time a partition is admissible, at the option of sons against the father's wish: as is shown by Narada, who premises partition subsequent to the demise of both parents ("Let sons regularly divide the wealth when the father is dead") and adds "or when the mother is past child-bearing and the sisters are married, or when the father's sensual passions are extinguished." Here the words "let sons regularly divide the wealth" are understood. Gautama likewise, having said "After the demise of the father, let sons share his estate" states a second period, "or when the mother is past child-bearing;" and a third, "while the father lives, if he desire separation." So, while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. That Sancha declares: "Partition of inheritance takes place without the father's wish, if he be old, disturbed in intellect, or diseased."'

Thus the periods are, (1) when the father so wishes, (2) when the father has given up sensual pleasures and the mother has ceased child-bearing, (3) when the mother is capable of child-bearing but the father is addicted to vice, and (4) after the death of the father.

The periods refer to self-acquired property of father.

It seems to me that these four periods relate only to the partition of the father's self-acquired property and not to ancestral property. My reasons for this conclusion are:—

(1) Because in Ch. I sec. 5 para. 8 the son is allowed to claim partition of ancestral estate in the hands of the father *at any time*. The para. says: "Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does never-

theless take place by the will of the son." This clearly refers to the partition of ancestral property, and it provides that the partition can be demanded by the son *at any time*. Among the four periods mentioned in Sec. II there are two when the son can compel the father to effect a partition. Would this special provision for the two periods have been necessary when the author intended to give the son wider powers in the end?

(2) Because the mention of the four periods appears only in Sec. 2 and in Ch. I sec. 5 para. 7, the author, referring to Sec. 2 para. 1, says that it relates to property acquired by the father himself; while nowhere in the Mitakshara does he say that any of the other paras in Sec. 2 refer to ancestral property. From these circumstances the inference fairly arises that the author was referring to the same class of property throughout the whole of the Sec. II.

(3) Because the provisions for equal and unequal partition contained in Sec. II, if applied to ancestral property, would contradict the fundamental doctrine of the equality of rights of the father and son in ancestral property preached in Sec. 5 para. 3;—I refer to the text of Yajnavalkya in Book II verse 121, *viz.*, "For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels which belonged to him."

I have stated my reasons at length because Justice Phear, in concurrence with Justice Morris, in Laljeet Sing *v.* Raj Coomar Sing (1873) 12 B. L. R. 373, in inferring the right of a mother to a share at a partition of family-property under the Mitakshara law made during the life of the father, observed that the provisions of Sec. 2 applied generally to partitions of ancestral as well as self-acquired properties of the father, and

in this he was supported by certain observations of Chief Justice Scotland and Justice Bittleston in Nagalinga Mudali *v.* Subbirmaniya Mudali (1862) 1 Mad. H. C. Rep. 77. The decision of Justice Phear that the four periods relate to the partition generally of self-acquired and ancestral property is merely an *obiter dictum*, while the principle of the decision of the Madras Court has been disapproved by the Judicial Committee, see I. L. R. 6 All. 560.

From what has been said above, it is clear that the four periods of partition provided for in Sec. 2 Ch. I relate to the father's own acquisitions. Now, as to these acquisitions at the present day the authority of the father, as we have already seen,* is supreme. It is true that a distinction is often times sought to be made between a partition by a father and a gift by him, and it is contended that a father purporting to make a partition cannot make a gift which, in order that it may be valid, requires acceptance by the donee. But after all, the distinction is not of any practical importance. It has been held that the injunctions against an unequal distribution by the father are mere moral precepts which no Court of law would enforce. A father bent upon making an unequal distribution may do so in more ways than one.

Son can demand partition of ancestral property at any moment.

Sons never attempt to compel their fathers to divide their self-acquired property, and we may dismiss from our consideration the four periods of partition. But as regards ancestral property the son can at any moment demand a partition, (see Sec. 5 para. 8.)

We have seen that property inherited by a father collaterally is treated as self-acquired pro-

---

* Ante pp. 105-106.

perty of the father. That a son cannot demand partition of such property, while the father is alive, will appear from the decision in the case of Rayadur Nallatambi *v.* Rayadur Mukunda Chetti (1868) 3 Mad. H. C. Rep. 455. In Jasoda Koer *v.* Sheo Pershad Sing (1889) I. L. R. 17 Cal. 33, the High Court of Calcutta held that the principles of survivorship did not attach to property inherited from a maternal grandfather, that is, that such property was not unobstructed heritage for the partition of which the son could make a demand against the father while he was alive.

Son cannot demand partition of property inherited by father collaterally.

A question frequently arises as to whether when a father is joint with the uncles, sons can demand partition. On this point see Subba Ayyar *v.* Ganasa Ayyar (1894) I. L. R. 18 Mad. 179, where all the previous decisions have been reviewed.

But can seek partition when his father and uncles are joint.

(4) We have seen that the term "coparcenary property" is properly applicable to the "unobstructed heritage" only, and that the coparceners are the first three generations of male descendants of the last owner in the direct male line. In the absence of such male descendants the coparcenary property may descend collaterally to other persons and even to females, but in all such cases, as we have already seen, the inheritors take *per capita* and their shares are definite. A partition among the sharers, of property inherited by them by collateral succession, in a word, of obstructed heritage, is either separate enjoyment of the distinct shares or allotment of specific portions of the *corpus* to represent the distinct shares. The collateral heirs are bound to pay the unpaid debts of the last owner and also to maintain persons whom it was the legal or moral duty of the last owner to maintain.

Who are entitled to share.

Partition of obstructed heritage.

Unlike the case of the persons who take by survivorship, the heritage in the hands of collateral heirs is assets of the last owner in their hands, and they are bound to repay all his debts whether of a moral or immoral nature. Collateral heirs, in the same way as the unobstructed heirs, are bound to maintain the impotent, the lame, the blind &c. (all the disqualified heirs or coparceners except the outcast) who if not disqualified would have taken the inheritance in preference to them. They would also be bound to maintain the wives of such disqualified heirs. But we are at present not concerned with the partition of such obstructed heritage. Such heritage may be partitioned under the general rules discussed in Lecture XI.

Partition of ancestral property may take place either among the father and his sons and grandsons, or after the death of the father, among the brothers and their descendants. Let us consider the two cases separately.

Who are incompetent to share.

But before proceeding further, I ought to state that under the Mitakshara, certain persons, otherwise qualified to participate, are disqualified under the following text.*—"An impotent person, an outcast, and his issue, one lame, a madman, an idiot, a blind man and a person afflicted with an incurable disease, as well as others similarly disqualified must be maintained; excluding them, however, from participation." Yajnavalkya Book I. V. 140 quoted in Mitakshara ch. II. sec. X. para 1.

Vijnaneswara defines, (1) "an impotent person" as "one of the third gender," (2) "An outcast" as "one guilty of sacrilege or other heinous crime," (3) "His issue," as "the offspring of an outcast,"

* Act XXI of 1850 has to a great extent modified the law as to the exclusion of *outcasts* in general.

(4) "Lame" as "one deprived of the use of his feet," (5) "A madman" as "one affected by any of the various sorts of insanity proceeding from air, bile or phlegm, from delirium or from planetary influence," (6) "An idiot" as "a person deprived of the internal faculty; meaning one incapable of discriminating right from wrong," (7) "Blind" as "one destitute of the visual organ," and (8) "Afflicted with an incurable disease" as "one affected by an irremediable distemper such as *marasmus* or the like." Under the term "others" are comprehended "one who has entered into an order of devotion, an enemy to his father, a sinner in an inferior degree and a person deaf, dumb or wanting any organ." Mit. ch. II. sec. X. para. 3.

'These persons are debarred of their shares if their disqualification arose before the division of the property.' Mit. ch. II. sec. X. 6. 'But one already separated from his co-heirs is not deprived of his allotment, and if the defect be removed by medicaments or other means as penance or atonement at a period subsequent to partition, the right of participation takes effect by analogy to the case of a son born after separation.' Mit. ch. II. sec. X. 7. But though the persons above enumerated are excluded from participation, their sons are entitled to allotments if free from defects.* To this again there is an exception: the adopted son of a disqualified heir does not take any share Mit. ch. II sec. X para. 11; Chandrika sec. VI para 1.

Their sons free from defects.

Their adopted sons.

In connection with this subject, let me point out to you a well-considered decision of the Madras High Court as to the right of a son of a disqualified heir to participate, when such son is born after the death of the grandfather and the actual partition. A Full Bench of the Madras

Son of a disqualified heir born after partition.

* Yajnavalkya II. 141.

Krishna v. Sami.

Court in Krishna *v.* Sami (1884) I.L.R. 9 Mad. 64, held that such sons were entitled to participate to the extent of their full share in the family-property. This decision gives a summary of almost the whole subject of partition under the Mitakshara, and I shall at this place quote certain passages, from the judgment bearing on the subject.

Sir Charles Turner, C. J., speaking generally of the provisions of the Mitakshara, said:—"A right of maintenance was assigned to members of the family whose claims to inherit were postponed to preferable heirs, or whose possibility of inheritance had been lost, or who were disqualified for inheritance. Sons as coparceners with equal rights with their father in ancestral estate might compel the father to divide that estate and retain but a single share for himself; but they could not compel him to divide his self-acquired property, and, if he was willing to do, he might retain a double share of it for himself and must make his wives participants of shares equal to those of sons, unless separate property had been given to them and in that case they received half shares. There was thus secured to the parents a fund for children who might be born after partition. The child, if a son begotten before partition, was entitled to reopen the partition and receive a share equal to that of his brothers; if begotten after partition, he inherited what wealth remained to his father and all the father's subsequent acquisitions, and, if there were no daughter, he solely inherited his mother's portion also. The case in which a son born after partition would receive nothing is not contemplated by any of the authors of the texts and commentaries to which we have had access except Varadaraja in the Vyavahara Nirnaya in a passage to which reference will presently be made.

"The text of Manu as to the right of a son born after partition is as follows :—" A son born after a division shall alone inherit the patrimony or shall have a share of it with the divided brethren if they return and re-unite themselves with him "—Chap. IX, s. 216.

"Yajnavalkya, after declaring that a father may make a partition in his lifetime, and under some circumstances unequally, and that brothers after the father's death must make an equal partition, notices the case of the son born after partition : "When (after) the sons, &c., have separated, a son is born of a wife of the same class, he becomes a partaker of a share, or his allotment should be made out of the visible estate corrected for profit or loss." Yajnavalkya II s. 123.

"There is also a text of Brihaspati : "A son born before partition has no claim on the wealth of his parents, nor one born after it on that of his brother," and again "all the wealth which is acquired by the father himself who has made a partition with his sons goes to the son begotten by him after the partition. Those born before it are declared to have no right." Mitakshara I, 6, s. 6.

"Vijnaneswara commenting on these three texts observes that, the sons being separated from their father, one who shall be afterwards born of a wife equal in class shall share the distribution, and explains that the distribution means what is distributed, in other words the share of the father and the share of the mother, if there be no daughter. He deduces from the text of Manu that sons born previously to the distribution have no property in the share of the separated father and mother, and that a son born to separated parents is not a proprietor in his brother's allotments, but, as shown by the text of Brihaspati, is entitled to the property acquired by the father

subsequently to partition as well as to the father's share. He meets the case suggested of a division after the father's death, wherein the father would receive no share, by deducing a rule from the last portion of Yajnavalkya's text. The posthumous son, whose mother's pregnancy was not manifest at the time of partition, must receive, out of his brother's allotments, a share equal to their shares after computing the income which has accrued and the father's debts that have been discharged.

"As to the rights of sons born after partition, Devanna Bhatta, quoting the text of Vishnu that a son with whom a father has made a partition should give a share to the son born after the distribution (Vishnu, ch. XVII, s. 2) explains that it refers to a partition made when the fact of the existing pregnancy of the mother was unknown—Smriti Chandrika, ch. XIII, ss. 1, 2. He then refers to the text of Gautama, XXVIII, s. 29 "—A son begotten after partition takes the wealth of his father only :" (it may be observed this text is otherwise translated "takes exclusively the wealth of his father" the term "eva" being referred to the taker and not to the wealth; but the sense is much the same). On this text Devanna Bhatta observes—"The reason why a son born after partition has no claim on the paternal wealth is because he has divided off from his father, and the reason why a son begotten after the partition has no claim on the wealth of the brother is because such a brother possesses no property in which the son born after the partition can have an interest. Thus it must be understood."—Smriti Chandrika, ch. XIII s. 8. After adverting to a text of Brihaspati as to all the self-acquired wealth of the father, the commentator observes the term "all" was used to preclude the supposition that in the wealth acquired by the father subsequent to parti-

tion, the sons born before the partition have a claim to share, no share having previously been obtained by them in it. Hence he concludes that the sons born before partition and the sons born after it have no claim whatever on each other's wealth, and in this respect they are viewed as if they were not at all related to each other—S. 11.

"The same commentator, quoting the text of Yajnavalkya before cited, explains it as referring to a partition made by brothers on the demise of their father while the pregnancy of the father's widow was not manifest.

"The author of the Sarasvati Vilasa, following Vijnaneswara, interprets the first part of the text of Yajnavalkya as applying to the son begotten after partition, and the last part of the text as applying to the son born of a mother whose pregnancy existed but was unknown at the time of partition. Sarasvati Vilasa, 227—239."

The learned Chief Justice, referring to the question of repartition upon the appearance of a co-heir, says:—"An argument that the share obtained by partition may be divested in part by the appearance of a co-heir, whose right was not anticipated at the time of partition, may, however, be deduced from the rule respecting the absent coparcener and his descendants. This rule, the author of Sarasvati Vilasa considers analogous to the rule respecting the son born after partition—Sarasvati Vilasa, 240."

Referring to the circumstance of the disqualified heirs subsequently being cured of their defects the judgment proceeds:—"The Hindu law did not take thought only for those members of the family who were competent to discharge sacrificial functions, and while it saw the wisdom of restraining the disqualified from dealing with the family wealth, it secured to them maintenance during

disqualification and a restoration to their rights when that disqualification ceased." And again, "The right of the disqualified person to inherit, if he is cured of his disqualification, is likened to the right of a son born after partition. The son born after partition may be a son begotten and born after partition in his father's lifetime. He may be a son begotten before partition and born after it in his father's lifetime. He may be a son begotten before partition and born after it when the partition has been made after the father's death. The common feature in all three cases is that he takes a share in the wealth. In the first case he takes the shares of his parents and acquisitions made after partition, or, if his father has reserved no share, he may call upon his brothers to make up a share to him. In the second and third cases he takes a share made up out of the shares of his brothers. In no case is he excluded altogether although the estate may have vested."

Referring to the contention that an estate once vested cannot be divested the learned Chief Justice said:—"That the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exceptions, in respect of property governed by the law of the Mitakshara, appears to be established by admitted rules and by judicial decision.

"A, who after his father's death becomes the sole and absolute owner of the wealth in which on his birth he had become a co-owner with his father, marries and has a son B born to him. His absolute estate is immediately converted into a coparcenary estate, and as other sons C and D are born, the interests of A and B are practically curtailed by the admission of new coparceners. It is true that while the estate remains copar-

cenary it is vested as a unit in all the male members, and that the diminution in the interest which each member would take on a partition is not strictly a divesting, though it must be remembered that the right vests in birth and not on partition. But let a partition be made in A's lifetime and let him reserve no share for himself and then let a son E be born to him who was not in the womb at the time of partition. We have authority for saying he would be entitled to require his brothers to contribute out of their allotments so that all might receive an equal portion of the family wealth.

"Again, let the eldest son B have gone to a foreign country and let his brothers in his absence make a partition of the family wealth: a share is not necessarily set apart for him: the time may have elapsed when it may reasonably be believed he was dead. According to Hindu law, which does not in other cases ignore limitation, he may, after seven generations return and claim to have a share or a half share made up to him out of his brothers' allotments.

"Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father—Sri Raghunada *v.* Sri Brozo Kishoro L.R., 3 I. A. 154; I. L. R. 1 Mad. 69. * * *

"A case, however, arose in this Presidency and went before the Judicial Committee in which an estate was divested from a full male owner by reason of an adoption made by a widow.

"An impartible zemindari the property of two

undivided brothers was in the possession of the elder. On his death leaving a widow and no male issue, the brother became entitled by survivorship to the entire estate. The widow made a valid adoption to her husband and it was held, the adopted son was entitled to possession of the zemindari—Sri Raghunadha *v.* Sri Brozo Kishoro L. R. 3 I. A. 154; I. L. R. 1 Mad. 69."

Who are the persons entitled to share

We are now in a position to say who the persons are who share at a partition of the coparcenary property made during the lifetime of the father. They are in a word the coparceners who are not disqualified under the above rules. Now, the coparceners are the first three generations of male descendants in direct male line *i.e.*, the sons, grandsons and great-grandsons of the last owner. The rights of the sons of the last owner being equal, it is convenient to take the case of one of these sons and to treat him as the head man of the family. He may now be represented as the father and the two succeeding generations as his sons and grandsons. The shares of the father and each of his sons are equal in the ancestral property under the text of Yajnavalkya quoted before.* Grandsons whose fathers are alive do not take separately: they take along with their father—Grandsons whose fathers are dead represent† their deceased fathers at the partition *i. e.,* they take *per stirpes* the shares of their deceased fathers. The adopted son of a son when an exclusive heir succeeds to the estate of his grandfather like a natural-born grandson. Where there is a son, and the adopted son of a predeceased son, the grandson by adoption does

Sons.

Grandsons.

Adopted sons and adopted sons of sons.

* Book II verse 121. "For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels which belonged to him."

† Mitak. ch. I sec. V. para. 3.

not take the share of his father, but the share which his father would have taken if he had himself been an adopted son.—Dattaka Chandrika V. 25.

At a partition of family-property when there is a competition, an adopted son and the adopted son of a natural son stand exactly in the same position, and the adopted son of a natural son takes only half of the share which he would have taken if he had been a natural son. Raghubanund Doss *v.* Sadu Churn Doss (1878) I. L. R. 4 Cal. 425.

Wives.

It has now been settled by a long series of decisions that at a partition of the ancestral property, each of the wives of the father receives a share: *vide* Sheo Dyal Tewaree *v.* Judoonath Tewaree (1868) 9 W. R. 61; Mahabeer Persad *v.* Ramyad Sing (1873) 12 B. L. R. 90; Laljeet Sing *v.* Raj Coomar Sing (1873); 12 B. L. R. 373; Bilaso *v.* Dinanath (1880) I.L.R. 3 All. 88; Pursidnarain Sing *v.* Honooman Sahay (1880) I.L.R., 5 Cal. 845; Sumrun Thakoor *v.* Chunder Mun Misser (1881) I.L.R., 8 Cal. 17; and Damoodur Misser *v.* Senabutty Misrain (1882) Ibid 537.

Their portions.

As regards the portions of the wives, Yajnavalkya in Book II. V. 115 quoted in Mitakshara ch. I. sec. II para. 8, says—"If he make the allotments equal, his wives to whom no separate property has been given by the husband or the father-in-law must be rendered partakers of like portions." This verse is read in connection with verse 148 the last words of which are; "but, if any have been assigned, let him allot half." The case-law on the subject has settled that, where the wife has *stridhan* given to her by her husband, she would be entitled only to so much as, with her stridhan, would make her share equal to that of a son. This view is in accordance with the leading Hindu authorities of all the schools: See Jodoonath Dey *v.* Brojonath Dey (1874) 12 B.L.R.

385; Kishori Mohun Ghosh *v.* Moni Mohun Ghosh (1885) I.L.R. 12 Cal. 165; Mitakshara ch. I. sec. II. para. 9; Dayabhaga chap. III. sec. II. para. 31; and Mayukha IV. 17.

Unmarried daughters.

Touching the rights of unmarried daughters to share (the married who belong to a different family having no claim), Professor Jolly on p. 103 of his Lectures says: "The rules regarding the shares of unmarried daughters relate exclusively to the case of partition after the father's death. Thus it is ordained by Manu (IX. 118), Brihaspati and Katyayana that the sisters shall receive a quarter of a share from their brothers; and Yajnavalkya (II. 124) gives the same rule, adding that her marriage expenses shall be defrayed out of such property. Devala ordains generally that the daughters shall receive a marriage portion from the paternal wealth. Vishnu (XV 31) directs that they shall be married by their brothers in a manner correspondent with the amount of the paternal property. Sankha says that on a division of the estate a maiden daughter shall receive ornaments, and Stridhana for nuptials. As before division, the obligation to marry maiden sisters and other unmarried females was among the principal charges on the estate, it was but natural that a certain amount should have been set apart for that purpose when the estate was divided. It deserves to be noticed that the rule regarding the fourth share does not make its appearance before the period of the metrical Smriti. Some of these works go much further than this. Narada (XIII. 13) makes her right equal to that of a younger son, when the father distributes the estate. Katyayana awards a son's share to the maiden daughter when the estate is very small. But during the life of the father the provision to be made for the daughter continued to be left entirely to his dis-

cretion, and the wives and daughters of disqualified heirs and deceased coparceners have never advanced beyond a claim to be maintained or provided for in marriage by the co-heirs." On this point see the decision in Damoodur Misser *v.* Senabutty Misrain (1882) I. L. R., 8 Cal. 537. See also Mitakshara ch. I sec. VII. paras 5-14.

Son cannot demand partition when his father is joint in estate with his uncles.

When ancestral property is in the joint possession of brothers, it has been held by the Madras High Court that the son of one of the brothers may compel his father to effect a partition.—Subba Ayyar *v.* Ganasa Ayyar (1894) I. L. R., 18 Mad. 179. But the Bombay Court held otherwise—Apaji Narbar Kulkarni *v.* Ram Chandra Ravi Kulkarni (1891) I. L. R. 16 Bom. 29. See also Rai Bishen Chand *v.* Mussamut Asmaida Koer (1883) I.L.R. 6 All. 560; L. R. 11 I. A. 164.

Grandmother.

With respect to the right of a grandmother to a share see Badri Roy *v.* Bhugwat Narain Dobey (1882) I. L. R., 8 Cal. 649 where it was held that at a partition of ancestral property where the family consisted of a father, mother, a grandmother and a son, the grandmother was entitled to a fourth share and so too, the mother. But the Allahabad Court in the same circumstances has held the grandmother not entitled to a share: see Radha Kishenman *v.* Bachaman (1880) I. L. R. 3 All. 118.

After-born son.

When a son is born after a partition made during the lifetime of the father, such son may have been begotten either before, or, after, partition and he may be born either during the father's lifetime or after his death. In each of these cases he would take the whole of his father's share, and, if there be no daughter, the whole of his mother's property (see paras. 2 and 3 sec. VI, ch. I).

Sons of different tribes.

The author of the Mitakshara in ch. I sec. VIII treats of the shares of sons belonging to different

tribes at a partition among *brethren* dissimilar in class *i.e.*, after the father's demise. He does not discuss their shares at a partition made by the father. It seems doubtful, therefore, whether sons belonging to a different class from the father can demand a partition. But it is clear that when a partition is made by the father, these sons would also be entitled to shares, and that their shares would be the same as at a partition after the father's demise.

There are, as you know, four tribes the *Brahmana*, the *Kshatriya*, the *Vaisya* and the *Sudra* occupying the ranks as they have been here named. In former days a *Brahmana* could marry a girl in any of the four tribes, a *Kshatriya*, in any of the three lower tribes, a *Vaisya*, in either of the last two and a *Sudra*, in his own tribe only, and it was not allowable for a girl in any of the three higher tribes to marry a male of a lower tribe than herself. The sons of such connections were entitled to share at a partition in competition with other sharers.

Yajnavalkya in Book II verse 125 says : "The sons of a *Brahmana* in the several tribes have four shares or three, or two, or one : the children of a *Kshatriya* have three portions, or two, or one, and those of a *Vaisya* take two parts or one." The commentator in para. 4, sec. VIII. ch. I. explains it thus :—

"The sons of a *Brahmana* by a *Brahmani* woman take four shares, apiece; his sons by a *Kshatriya* wife receive three shares each ; by a *Vaisya* woman. two ; by a *Sudra* one." Similar interpretations have been given in paras. 5, 6, and 7 with regard to a *Kshatriya*, a *Vaisya* and a *Sudra*.

You will understand from this that where a *Brahmana* has a son by a woman of the same tribe and also a son by a *Kshatriya*, the shares of the son by the *Kshatriya* woman and of the son

by a *Brahmani* will be as 3 is to 4. In modern times such marriages are unknown, and I need not therefore stop to consider the details.

Several kinds of sons by adoption were made in former days. Of these, two kinds, *viz.*, the *dattaka*, or son given in adoption, and the *kritrima*, or son made, are the forms now chiefly in vogue. The *Kritrima* son is created by contract and the relationship exists between the contracting parties only. Generally, when a man has no son, he makes a *kritrima* son on his deathbed for the purpose of creating an heir and providing for the performance of his *Shrad*. The creation of such a son does not require any formalities, and when a female creates such a son, he does not inherit her husband. We may dismiss from our consideration the case of such sons, as they are never made where natural sons exist, and as they depend for their portions upon the persons who make them.

Adopted sons.

Kritrima son.

But *dattaka* sons are for purposes of inheritance the same as natural-bornsons. They are co-owners with their adoptive fathers in ancestral property from the date of their adoption (Rambhat *v.* Lakshman Chintaman (1881) I. L. R., 5 Bom. 630). They may demand partition from their adoptive fathers. They may prevent their adoptive fathers from unnecessarily alienating ancestral property (Rungama *v.* Atchama 4 M. I. A. 1; Sudanaund Mahapatra *v.* Soorjoo Monee Dayee (1869) 11 W. R. 436; Rambhat *v.* Lakshman Chintaman (1881) I. L. R. 5 Bom. 630.) They succeed their coparceners by survivorship in the same way as *aurasa* sons.

Dattaka son.

A son cannot be taken in adoption in the *dattaka* form when an *aurasa* son (son of the body) exists. And a man only takes an adopted son when he has, according to his ideas, no hopes

Shares of a natural and adopted son in competition.

of getting an *aurasa* son. It sometimes, therefore, happens that after he has taken an adopted son, an *aurasa* son is born to him. In such circumstances, there is a competition between the natural-born son and the adopted son for shares at a general partition, and our ancient law-givers have made provision for the same at a partition among the sons. There are no special provisions for the shares of the natural son in competition with an adopted son, when the partition is made by the father, but the proportions will evidently be the same in both cases. Vijnaneswar says—"So the allotment of a quarter share to other inferior sons, when a superior one exists, has been ordained by *Vasishtha*: "When a son has been adopted, if a legitimate son be afterwards born; the given son shares a fourth part." Here the mention of a son given is intended for an indication of others also, as the son bought, son made by adoption and (son self-given and) the rest: for they are equally adopted as sons."—(Mit. I. XI. 24). And again "Accordingly Catyayana says:—"If a legitimate son be born, the rest are pronounced sharers of a fourth part, provided they belong to the same tribe; but, if they be of a different class, they are entitled to food and raiment only."—(Mit. I. XI. 25).

In the Dattaka Chandrika V. 16, the reading is a third. Professor Golap Chandra Sastri in his Lectures for 1888 (page 399) says:—"But the Madras High Court have held upon the authority of the Sarasvati Vilasa, that an adopted son takes one-fourth of the real legitimate son's share, that is to say, each begotten son is to be considered equal to four adopted sons. Expressions like quarter share may be construed in another way; according to the Mitakshara a maiden daughter is declared to be entitled to a quarter share on

partition of her father's estate being made by her brothers; and the quarter share is ascertained in this way—divide the property into as many shares as there are brothers and maiden sisters, divide one such share into four parts, allot one such part to each of the maiden sisters, and then distribute the residue amongst the brothers equally. Nanda Pandita appears to indicate that the quarter share of an adopted son is to be similarly determined."

Mr. Mayne in his work on Hindu Law and Usage § 157 says:—"Whatever may have been the original meaning of the texts, a difference of usage seems to have sprung up, according to which the adopted son takes one-third of the whole in Bengal, and one-fourth of the whole in other Provinces which follow the Benares law. The Madras High Court, however, have decided on the authority of the Sarasvati Vilasa, that the fourth which he is to take is not a fourth of the whole, but a fourth of the share taken by the legitimate son. Consequently the estate would be divided into five shares, of which he would take one, and the legitimate son the remainder. A similar construction has been put upon the texts in Bombay. Nanda Pandita suggest as further explanation, that he is to take a quarter share; *i. e.*, a fourth of what he would have taken as a legitimate son, that is to say, a fourth of one-half or one-eighth. Where there are several after-born sons, of course, the shares will vary according to the principle adopted. Supposing there were two legitimate sons, then, upon the principle laid down by Mr. MacNaghten, the estate would be divided into seven shares in Benares and into five shares in Bengal. According to the Sarasvati Vilasa, it would be divided into nine shares, the adopted son taking one share

in each case. According to Nanda Pandita he would take one-twelfth. Among various castes in Western India the rights of the adopted son vary from one-half, one-third, and one-fourth, to next to nothing, the adoptive father being at liberty, on the birth of a legitimate son, to give him a present and turn him adrift."

In Ayyavu Muppanar *v.* Niladatchi Ammal (1862) 1 Mad. H. C. Rep. 45, it was held that the share of an adopted son was one-fourth of the share of a son born to the adoptive father after the adoption. It is convenient to state the shares of the natural and the adopted son in the proportion of 4 to 1. The result is, that if there are two *aurasa* sons, they together would get eight shares, while the adopted son would get one, and if the partition takes place during the father's lifetime, the father would get a share equal to that of an *aurasa* son. But the Bombay High Court in Giriapa *v.* Ningapa (1892) I. L. R., 17 Bom. 100, held that the adopted son was entitled to a fifth of the entire estate upon the subsequent birth of an *aurasa* son. In Raghubanund Doss *v.* Sadhu Churn Doss (1878) I. L. R., 4 Cal. 425, the High Court of Calcutta held that an adopted son and an adopted son of a natural son under the Mitakshara shared equally.

Adopted son and adopted son of natural son.

As to effects liable to partition being discovered after a partition, Yajnavalkya in Book II, verse 126 says: "Effects which have been withheld by one co-heir from another and which are discovered after the separation, let them again divide in equal shares: This is a settled rule."

Effects discovered after partition.

The Mitakshara does not contemplate the question of partition after the death of the father while yet the mother is alive. It is owing to this circumstance that no share is provided for the mother in the Mitakshara in the event of

Partition after father's and mother's death.

a partition among the brothers. But when considering the question of maintenance in Lecture II, we saw that a mother was entitled to maintenance, and we have now seen that at a partition by the father, his wife would be entitled to a share equally with her sons. From these circumstances, the case-law has settled that a mother is entitled to a share equal to that of a son (see Damoodur Misser *v.* Senabutty Misrain (1882) I. L. R., 8 Cal. 537; 10 C. L. R. 401, and Isree Pershad Sing *v.* Nasib Kooer (1884) I. L. R., 10 Cal. 1017.)

The rules applicable to a partition made during the lifetime of the father apply to a partition made after his demise. The only modifications are (1) that the father being dead, the share which he would have taken is merged in the family-property and goes to increase the shares of the survivors, (2) that upon the birth of a posthumous son after partition, the whole of the proceedings are re-opened to provide for the newborn son, (see chapter I sec. VI paras. 8, 9 & 10,) and (3) when a Sudra father has left a* son begotten by him on a female slave and also sons born in lawful wedlock, the former would get a moiety of a lawful son's share at partition (Yajnavalkya II, 134 quoted in Mitakshara ch. I sec. 12 para. 1).

When partition is re-opened.

A partition regularly made may be re-opened in the following cases :—

At instance of absent member.

(1) When a coparcener entitled to a share was absent at partition and subsequently turns up. —Sarasvati Vilasa 240.

At instance of after-born son.

(2) If a partition is made after the death of the father and a brother who was conceived before is born afterwards, the partition may be re-opened,

* Jogendro Bhupati Hurro Chundra Mahapatra *v.* Nittyanand Man Sing (1890) I. L. R. 18 Cal. 151 ; Thangam Pillai *v.* Suppa Pillai (1888) I. L. R. 12 Madras 401.

—Mit. ch. I sec. VI para. 8 and Krishna *v.* Sami I. L. R., 9 Mad. 64.

Upon removal of disqualification.

(3) If on account of the disqualification of any coparcener at the time of partition he be excluded, then upon the subsequent removal of the disqualification, the partition proceedings may be re-opened to allow the coparcener a share. The Mitakshara views him as a son born subsequently to the partition. If the partition took place during the father's lifetime, the newly qualified son would be entitled to the father's "distribution" in the same way as a son born after partition—See ch. II sec. X para. 7. The Mitakshara law does not expressly provide for the case when the partition takes place after the father's death, but in Krishna *v.* Sami (1884) I. L. R., 9 Mad. 64, the Madras Court held that the partition proceedings might be re-opened to provide for the newly eligible sharer.

(4) In the same case it has been held that upon the birth of a son, free from defects, to a disqualified coparcener, after partition, the partition proceedings may be re-opened to make up an allotment for the newly born son supposing him to be one who would have been a sharer if he were in existence at the date of the partition. But the correctness of this decision is questionable: it is very dangerous to draw inferences on questions of Hindu law from analogy.

Minors.

I have already in a previous Lecture† cited cases to show that even a minor can demand partition on proof of malversation. Thus Baudhayana II. 2. 3. para. 36 says. "Let them carefully protect the shares of those who are minors as well as the increments thereon. This seems to imply that even in the days of our ancient Rishis, a legal partition could be effected during the minority of some of

† Ante p. 185.

the coparceners. There is also a text of Katyayana which ordains that 'the wealth of the minors and absent coparceners should be deposited free from disbursement with relatives and friends.'

Effect of partition.

Let us now consider the effect of a partition regularly made. Brihaspati quoted in Mitakshara ch. I sec. VI para. 4 says:—"A son born before partition has no claim on the wealth of his parents." In paras. 5 and 6 sec. VI ch. I Vijnaneswara says: "One, born previously to the distribution of estate, has no property in the share allotted to his father and mother who are separated (from their elder children): nor is one born of parents separated (from their children) a proprietor of his father's allotment." Thus, whatever has been acquired by the father in the period subsequent to partition, belongs entirely to the son born after separation. For, it is so ordained: 'All the wealth, which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition: those, born before it, are declared to have no right.'"

As to the effect of a partition among widows or daughters, see Rindnamma *v.* Venkatara Mappa (1866) 3 Mad. H. C. R. 268 and Sengamalathammal *v.* Valayuda Mudali (1867) 3 Mad. H. C. R. 312. In this latter case, Bittleston, C.J., in concurrence with Justice Ellis, observed (p. 317): "Though sisters or co-widows may divide, the division will not alter the course of succession as Sir F. M'cNaghten (p. 55) says 'among sisters or co-widows a division cannot be productive of more than convenience to the partitioning parties themselves; it will not give any of them a right to dispose of her separate share, or in any manner vary the rules of inheritance." In the former case the same judges held that, except where each

of the widows made an absolute surrender of her interest, she would not lose her right of survivorship. On this point see also Bhugwan Deen Doobey *v.* Myna Baee (1868) 11 M. I. A. 487; 9 W. R., P. C., 23.

Why sons do not more frequently seek partition during father's lifetime.

In a country where respect for age is a characteristic of the people, and where the Sacred Codes enjoin that the parents are objects of worship, it is no wonder that a father should be looked upon with veneration by his sons. Many a son, therefore, who might secure some pecuniary advantage by an early separation from their father prefer to live under his protection. They take pleasure in obeying his behests, and look upon every act which is likely to incur his displeasure as sinful. This is the predominant idea that keeps the sons together under the father. But apart from these considerations, it is not always to the advantage of the son to seek separation from his father; for, he thereby deprives himself of the whole or portions of the separate allotments of his father and mother, and also of the father's subsequent acquisitions which oftentimes are considerable. There is a further consideration; and it is this, that by separation a man deprives himself of the rights which accrue by survivorship.

Re-union.

It remains for me now to consider the subject of re-union under the Mitakshara.

Vijnaneswara devotes a whole section (IX of chap. II) to the consideration of this subject. According to him, "effects which had been divided and which are again mixed together are termed re-united, and he to whom such appertain is a re-united parcener" (para. 3.) But according to Brihaspati this cannot take place with any person indifferently, but only with a father, a brother, or a paternal uncle." Vachaspati Misra, an authority in Mithila, maintains: "The first principle of re-

Only among certain relations.

union is the common consent of both the parties, and it may be either with the co-heirs or with a stranger after the partition of wealth (Vivada Chintamani translated by Prosunno Coomar Tagore, p. 301). The Mayukha holds that the re-union must be with some or all of the persons who made the first partition (Vyavahara Mayukha ch. IV, sec. 9 para. 1).

Brothers of whole and half blood.

Yajnavalkya says (Book II. V 138) :—"A re-united brother shall keep the share of his re-united co-heir who is deceased; or shall deliver it to a son subsequently born." Again (138*a*): "But an uterine or whole brother shall thus retain or deliver the allotment of his uterine relation." So too (139): "A half brother being again associated may take the succession, not a half brother though not re-united; but one, united by blood though not by coparcenary, may obtain the property: and not exclusively the son of a different mother."

In the above quotations, the term "half-brother" is used to denote one born of a rival wife (para. 8).

From the above, you will perceive that, when brothers of the whole blood and of the half blood are all re-united, the brothers of the whole blood succeed in preference to those of the half blood, and that where brothers of the half blood are re-united while brothers of the whole blood are separate, the brothers of the whole and half blood inherit together, and further that a half brother not re-united does not take the inheritance: see the cases of Tara Chand Ghose *v.* Pudum Lochun Ghose (1866) 5 W. R. 249; Gopal Chunder Daghoria *v.* Kenaram Daghoria (1867) 7 W. R. 35; Ramhari Sarma *v.* Trihiram Sarma (1871) 7 B. L. R. 336; 15 W. R. 442; Kesab Ram Mahapattar *v.* Nand Kishor Mahapattar (1869)

3 B. L. R., A. C., 7; and Abhai Churn Jana *v.* Mangal Jana (1892) I. L. R., 19 Cal., 634. These, it is true, are all cases under the Dayabhaga, but in this respect there is no difference between the Dayabhaga and the Mitakshara. In Ramasami *v.* Venkatesam (1892) I. L. R. 16 Mad. 440, it was held that the adopted son of a re-united half brother succeeded equally with two unassociated full brothers. But the correctness of this decision seems questionable.

Incomplete partition.

In the section treating of re-union, Vijnaneswara considers the case of a partition commenced but not concluded by delivery of possession. He says, in para. 13: "Among re-united brothers, if the eldest, the youngest or the middlemost, at the delivery of shares (for the indeclinable termination of the word denotes any case); that is, at the time of making a partition, lose or forfeit his share by his entrance into another order (that of a hermit or ascetic,) or by the guilt of sacrilege or by any other disqualification; or if he be dead; his allotment does not lapse, but shall be set apart. The meaning is that the re-united parceners shall not exclusively take it. The author states the appropriation of the share so reserved: "His uterine brothers and sisters &c." (§ 12). Brothers of the whole blood or by the same mother, though not re-united, share that allotment so set apart. Even though they had gone to a different country, still, returning thence and assembling together, they share it: and that "equally"; not by a distribution of greater and less shares. Brothers of the half blood, who were re-united after separation, and sisters by the same mother likewise participate. They inherit the estate and divide it in equal shares." You will note that this is the only instance where brothers and sisters are said to inherit equally.

Onus to show re-union.

The onus of proving re-union, when once separation has been established, will always lie on the party pleading re-union. What is necessary to be proved will appear from Ramhari Sarma *v.* Trihiram Sarma (1871) 7 B. L. R. 336. Mere dwelling under the same roof does not constitute re-union.

Then again, as re-union would consist in the uniting together of the effects taken at a partition, there is nothing to prevent a partial re-union. In the case of a partial re-union in respect to *some* of the properties, the rules of succession to re-united property would be those applicable to joint property, while the rules applicable to self-acquired property would apply to divided property.*

* See discussion ante pp. 314-315.

LECTURE X.

Partition under Dayabhaga and Mahomedan Law.

What is partition under Dayabhaga—Contrast between Partition under Dayabhaga and that under Mitakshara—Evidence of partition under Dayabhaga—Partition has important results attached to it under Mitakshara—But not so under Dayabhaga—Sons cannot demand partition against father's will—Sons have no ownership in father's wealth—Any one coparcener may seek partition—Two periods of partition—Father may retain double share—Unequal division by father allowable—Partition after father's demise—Among heirs only—Sons, grandsons and great-grandsons—'Sons' include adopted sons and sons by women of different tribes—But the sons &c. must not be disqualified—Other heirs who jointly inherit are similarly related and take *per capita*—Division among sons, grandsons and great-grandsons when all inherit simultaneously—Texts—Cases—Mother's share at partition among sons—Step-mother cannot claim from her step-sons—When father makes partition each of his childless wives entitled to share—maintenance of mother is charge on her sons' (not step-sons') share—Mother's share when she has separate property—Mode of determining mother's share at a division among her sons—Paternal grandmother's share—Unmarried daughter's share—Her share means funds sufficient for her nuptials—Who are disqualified to inherit—They must be supported except the outcast—Their childless wives too—their daughters to be married, and, till then, maintained—After-born brother—Absent coparcencer—Sons by women of different tribes—Competition between a natural and an adopted son—Brothers of whole blood and half-blood—Who may re-unite—Partition among co-widows—among daughters—Survivorship among co-widows and daughters—Interest which a widow has in share allotted at partition for her maintenance—agreement not to separate—Mahomedan law of partition—of inheritance—interest taken by female heirs—Special law as to wills.

What is partition.

Partition according to the Dayabhaga "consists in manifesting, or in particularizing, by the casting of lots or otherwise, a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously

unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed "—Dayabhaga ch. I para. 8. Contrasting this definition with that given in the Mitakshara (ch. I sec. I para. 4*) you will find that partition under the Mitakshara consists, first, in the ascertainment of the shares in the *corpus*, which previously had no existence, and secondly, in the separating of such shares from one another; while that under the Dayabhaga consists only in the separating of the previously existing shares from one another. You will also observe that separate enjoyment of the distinct shares is of the essence of partition under both the systems of Hindu law, and that it is not necessary that the partition should be by metes and bounds.

Contrast between partition under Dayabhaga and that under Mitakshara.

We have in the preceding† Lecture seen what facts the author of the Mitakshara thinks should be proved in order to establish the *factum* of partition. Jimutvahana adds—"The proof is by the circumstance of separate transaction of affairs as it is stated by Narada,—"gift and acceptance of gift, cattle, grain, house, land and attendants, must be considered as distinct among separated brethren as also diet, religious duties, income and expenditure. Separated, not unseparated, brethren may reciprocally bear testimony, become sureties, bestow gifts and accept presents. Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence."—ch. XIV, para. 7.

Evidence of partition under Dayabhaga.

To a partition under the Mitakshara are attached important consequences, not only as regards the enjoyment of the allotments by the separated owners, but also as regards the powers

Partition has important results attached to it under Mitakshara.

* See ante p. 293.
† Ante pp. 295-310.

of alienation possessed by the owners and the succession to such allotments. As regards the enjoyment of the allotments by the separated co-sharers, the same results follow a partition under the Dayabhaga; but in other respects no important results are connected with a separation under the Dayabhaga. Thus, whether a member of a family under the Dayabhaga dies joint or separate, his heirs are the same persons, and whether he separates off his share or keeps it joint with others, he can always alienate his interest. It is perhaps due to this small importance of the subject of separation under the Dayabhaga that we hardly find any cases laying down the test of separation or unseparation as we find under the Mitakshara.

But not so under Dayabhaga.

Sons cannot demand partition against father's will.

Partition can only take place, as of right, between coparceners. In a Dayabhaga family with father at the head, the father, as we have already seen,* is the absolute owner of all ancestral and self-acquired property, and his sons or grandsons, have no control over his actions in reference to such property. The result is that sons or grandsons have no power to compel the father to effect a division of his property amongst them against his will. But, as in former times, wills were unknown, whenever a father in his old age wished to dispose of his property, he divided it among his sons, grandsons and other dependants in a way that pleased him most. Hence arose the practice for the father to effect a partition of his property among his descendants in his lifetime. Of course, upon his death, when the property descends under the rules of inheritance to his sons and grandsons in certain definite shares, it is open to these coparceners to effect a separation.

---

* Ante p. 176.

Sons have no ownership in father's wealth.

That sons have no co-ownership in their father's wealth is clear from paras. 14 and 18 of chap. I of the Dayabhaga. These paras are :—

14. "That is not correct: for it contradicts Manu and the rest. "After the death of the father and the mother, the brethren, being assembled, must divide equally the paternal estate: for they have not powers over it, while their parents live."

18. "Devala too expressly denies the right of sons in their father's wealth. "When the father is deceased, let the sons divide the father's wealth: for sons have not ownership while the father is alive and free from defect."

Any one coparcener may seek partition.

Lest from the use of the expression, "the brethren being assembled," one should infer the concurrence of all the coparceners necessary to effect a separation, Jimutvahana in para. 35 ch. I says :—"Since any one coparcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible."

Two periods of partition.

Speaking of the periods of partition, the author in ch. I para. 38 says :—"Thus there are two periods of partition: one, when the father's property ceases; the other by his choice, while his right of property endures"; and, again, in para 50 —"It is thus established by reasoning, as well as by positive law, that two periods exist for the partition of wealth appertaining to a father, whether acquired by himself or inherited from ancestors."

Who are the sharers.

Let us next see who the persons are who are entitled to share at a partition.

Father may retain double share.

When a partition is made of ancestral property in the father's lifetime according to his will, he may reserve a double share for himself—See ch. II para. 35, where the author quotes Brihaspati and Narada. He may reserve a double share even in his son's acquisition—ch. II para. 65. As regards his acquired property, he may reserve any

portion—see ch. II paras. 56 and 73. But it is not necessary to examine the provisions of the law in reference to a partition made by the father's will, either of his self-acquired or his ancestral property. Under the law, he has absolute power over both classes of property, and the injunctions against unequal division are mere moral precepts, (para. 85) which will not avail against any partition made by the father, under the principle of *factum valet* which we considered in one of the previous* Lectures.

Unequal division by father allowable.

At a partition made after the father's decease, the persons entitled to share are evidently the persons who under the law jointly inherited his property. Now, I presume you know that, the right of succession to property is founded on the competence to offer oblations at obsequies and that Manu in Book 9, Sloka 186 declares: "To three must libations of water be made, to three must libations of food be presented; the fourth in descent is the giver of these offerings; but the fifth has no concern with them." According to these rules, the heirs of a deceased are his sons, grandsons and great-grandsons simultaneously, where these exist; and under the term "sons" are included adopted sons and sons by women of different tribes. But besides these heirs, others, *e.g.*, the widow, the mother and the unmarried daughters have claims upon the estate of the deceased for maintenance, and the unmarried daughter a further claim for her marriage expenses. When, therefore, sons, grandsons and great-grandsons inherit together or exclusively, the mother and the other persons would have a claim upon them for maintenance only. I have said above that the sons, grandsons and great-grandsons, where

Partition after father's demise.

Among heirs only.

Sons, grandsons and great-grandsons.

Sons include adopted sons and sons by women of different tribes.

* Ante p. 178.

they exist, are the heirs of a man. You must take this as correct, subject to the qualification that they are not disqualified under the law to inherit.

But the sons &c., must not be disqualified.

Failing the above, other persons inherit, as the widow, the daughter, the daughter's sons, the father, the mother, the brothers, the nephews &c., each class of relations succeeding exclusively in the order in which they have been here named. In such contingencies, whenever more persons than one of the same class inherit, any of them may seek a partition. But in all these cases, the heirs are persons of the same class similarly related to the last owner, and they take the inheritance in equal shares. Thus, if there be three grandsons by two daughters *viz.*, one by one daughter and two by the other, the three grandsons would share equally *per capita* and not *per stirpes*. We may, therefore, dismiss such cases from our consideration and confine ourselves to the case of the simultaneous succession of sons, grandsons and great-grandsons—relations of different grades.

Other heirs who jointly inherit are similarly related and take *per capita*.

As regards the shares of the sons, grandsons and great-grandsons when they inherit together, Jimutvahana in ch. III sec. 1 para. 18 says :—"The rule of distribution among sons extends equally to them and to grandsons and great-grandsons in the male line. There is not here an order of succession following the order of proximity according to birth. For, those three persons, the son, grandson and great-grandson do not differ in regard to the presenting of two oblations at solemn obsequies, one which was incumbent on the ancestor to present, and the other which is to be tasted by his manes." The author supplements the above in para. 21 thus :—"If there be one son living, and sons of another son who is deceased, then one share appertains to the

Distribution among sons, grandsons and great-grandsons when all inherit simultaneously.

Texts.

surviving son, and the other share goes to the grandsons, however numerous. For, their interest in the wealth is founded on their relation by birth to their own father; and they have a right to just so much as he would have been entitled to." And again in para. 23:—"If there be a numerous issue of one brother and few sons of another, then the allotment of shares is according to the fathers."

Cases.

That sons share equally the landed estate of their deceased father has been held from the earliest times.—Gudadhur Surma *v.* Ajodharam Chowdhree, 30th October 1794, S. D. A. Rep. Vol. I p. 6; Bhoyrub Chand Rai *v.* Russomonee, 18th Sept. 1799, S. D. A. Rep. Vol. I p. 27; Issur Chunder Carformah *v.* Gobind Chand Carformah, January 1823, MacCons of H. L. 74.

That grandsons inherit *per stirpes* and not *per capita* will appear from the following cases: Joynarain Mullick *v.* Bissumbhur Mullick, Aug. 1819, MacCons H. L. 48; Manjanatha Shanabhaga *v.* Narayana Shanabhaga, (1882) I. L. R. 5 Mad. 362.

Mother's share at partition among sons.

As regards the mother, the law under the Dayabhaga is that she is entitled to maintenance and that at a partition among her sons, if she received no property from her husband, she takes a share equal to the share of a son.

That she does not take except at a partition among her own sons appears from para. 29 sec. II ch. III, which provides:—"When partition is made by brothers of the whole blood after the demise of the father, an equal share must be given to the mother. For the text expresses "the mother should be made an equal sharer." On this point see Shib Chunder Bose *v.* Gooroopro-saud Bose, MacCons H. L; Jodoonath Dey Sircar *v.* Brojonath Dey Sircar (1874) 12 B. L. R. 385; Cally Churn Mullick *v.* Janova Dossee 1 Ind. Jur.

N. S. 284; Torit Bhoosun Bonnerjee *v.* Tara Prosonno Bonnerjee (1879) I. L. R. 4 Cal. 756; Jewmoney Dossee *v.* Attaram Ghose, Mac.Cons. H. L. p. 64; Hemangini Dasi *v.* Kedar Nath Kundu Chowdhry (1889) I. L. R., 16 Cal., 758 (see p.765) Kristo Bhabiney Dossee *v.* Ashutosh Bosu Mullick (1886) I. L. R., 13 Cal., 39.

Step-mother cannot claim from her step-sons.

From the above it follows, as a corollary, that when a mother has one son, she cannot demand a share, though her maintenance may be a charge on the ancestral property in his hands.—Jewmoney Dossee *v.* Attaram Ghose above referred to.

That a step-mother cannot claim a share from her step-sons appears from para. 30 sec. II ch. III, Dayabhaga which says:—"Since the term "mother" intends the natural parent it cannot also mean a step-mother. For, a word employed once cannot bear the literal and metaphorical senses at the same time."

When father makes partition, each of his childless wives entitled to share.

When the partition is made by the father, he is enjoined to allot to each of his childless wives a share equal to a son's. Thus ch. III sec. II para. 32 provides:—"Wives of the father (meaning step-mothers) who have no male issue, not those who are mothers of sons, must be rendered equal sharers with the son." So Vyasa ordains 'Even childless wives of the father are pronounced equal sharers.'" But when the partition is made by her step-sons she is simply entitled to maintenance. On this point Sricrishna and Achyuta say:—"A certain author supposes this (para. 32) to relate to partition made by sons because the father's wives, whether mothers of sons, or childless, take one share apiece at a distribution made by the father. But that is erroneous; for it is inconsistent with the remark that the word "mother" does not signify 'step-mother.' See also the case of Gooroo Prosad Bose *v.* Shib