Chunder Bose (1820) MacCon's H. L. 69. In Sorolah Dossee *v.* Bhoobun Mohun Neoghy (1888) I. L. R. 15 Cal. 292, the judges observed :*—"If there be two groups of sons by different mothers and those groups separate each from the other, the maintenance of the widow is a charge on her own sons' property not on her step-sons'. If her sons do partition, it has long been the settled law of Bengal that her share is taken out of their shares, not out of her step-sons'. And she has in no case a right herself to initiate a partition."

Maintenance of mother is charge on her sons' (not step-sons') share

That a mother, when she has received property from her husband, has, at a partition by her sons, to make allowance for such property from her share will appear from the following decisions : Jugomohun Haldar *v.* Saroda Moyee Dossee (1877) I. L. R. 3 Cal. 149; Jodoonath Dey Sircar *v.* Brojo Nath Dey Sircar (1874) 12 B. L. R. 385, where Justice Macpherson held that the expression "half" in para. 31 sec. II ch. III means such portion as may with what she has already received give her an equal share. Para. 31 runs in these words :—"The equal participation of the mother with the brethren takes effect if no separate property had been given to the woman. But if any have been given, she has half a share. And if the father make an equal partition among his sons, all the wives who have no issue must have equal shares with his sons * * * ." See Kishori Mohun Ghose *v.* Monimohun Ghose (1885) I. L. R. 12 Cal. 165.

Mother's share when she has separate property.

The extent of a mother's share depends upon the number of her own sons and the aggregate share of these sons. Thus, if A and B be the widows of a deceased father and A have 5 sons and B, three; the sons of A would be entitled together to

Mode of determining mother's share at a division among her sons.

* P. 397.

5/8ths of the inheritance and the sons of B to the remaining 3/8ths. At a partition among the sons of A, A would be entitled to 1/6 of 5/8ths share and B under similar circumstances to 1/4 of 3/8ths share—Hemangini Dasi *v.* Kedarnath Kundu Chowdhry (1889) I. L. R. 16 Cal. 763; and Kristo Bhabiney Dossee *v.* Ashutosh Bosu Mullick (1886) I. L. R. 13 Cal. 39.

Paternal grandmother's share.

The paternal grandmother receives a share like the mother at a partition made by the father. Vyasa, quoted in Dayabhaga ch. III sec. II para. 32 says :—"Even childless wives of the father are pronounced equal sharers and so are all paternal grandmothers: they are declared equal to mothers." But whether she gets a share at any other partition is exceedingly doubtful on the authority of decided cases: see Puddum Mookhee Dossee *v.* Rayee Monee Dossee (1869) 12 W. R. 409; same case in Review 13 W. R. 66; Sibbosoondery Dabia *v.* Bussoomutty Dabia (1881) I. L. R. 7 Cal. 191.

Unmarried daughter.

As to the right of an unmarried daughter to a share, the texts seem to conflict with each other. Some declare them entitled to a third of a son's share, while others enjoin that their brothers should allot sufficient funds for the celebration of their nuptials. Thus para. 34, sec. II, ch. III provides :—"Unmarried daughters, following the allotments of sons take a quarter thereof." Thus Brihaspati says—"mothers are equal sharers with them; and daughters are entitled to a fourth part." And similarly para. 35 provides. "A son has three parts and a daughter one." So Catyayana declares: "For the unmarried daughter, a quarter is allowed; and three parts belong to the son. But the right of the owner to exercise discretion is admitted when the property is small." So again in para. 36: "If the funds be small, sons must give a fourth part to daughters deducting it out of

their own respective shares." Thus Manu says: "To the maiden sisters, let their brothers give portions out of their own allotments respectively; let each give a fourth part of his own distinct share: and they who refuse to give it shall be degraded." On the other hand, para. 37 provides: "Let each give." From the mention of giving and the denunciation of the penalty of degradation if they refuse, it appears that portions are not taken by daughters as having a title to the succession. For one brother does not give a portion out of his own allotment to another brother who has a right of inheritance." And again in para. 39: "Thus since the daughter takes not in right of inheritance; if the wealth be great funds sufficient for the nuptials should be allotted. It is not an indispensable rule that a fourth part shall be assigned."

Her share means funds sufficient for her nuptials.

Elsewhere will be found the observations of Professor Jolly on this point which I have* quoted at length. In Damoodur Misser *v.* Senabutty Misrain I. L. R. 8 Cal. 537, the High Court of Calcutta held that the brothers had only to provide for the nuptials of their sisters.

Who are disqualified to inherit.

As under the Mitakshara, so under the Dayabhaga, certain persons are considered disqualified to inherit or to participate. In ch. V, para. 11 Jimutvahana quotes Devala: "When the father is dead as well as in his lifetime, an impotent man, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast and a person wearing the token of religious mendicity are not competent to share the heritage. Food and raiment should be given to them excepting the outcast. But the sons of such persons being free from similar defects shall obtain their father's share of the in-

They must be supported except the outcast.

* Ante. p. 332.

heritance. 'A person wearing the token of religious mendicity' is one who has become a religious wanderer or ascetic." As to the disqualified, their childless wives must be supported for life, and their daughters must be maintained until married (see para. 19, ch. V, Dayabhaga).

Their childless wives and daughters.

As to a son born after partition, para. 10, ch. VII of the Dayabhaga provides:—"If property inherited from the grandfather as land or the like, had been divided, he may take a share of such property from his brothers: for, partition of it is authorized only when the mother becomes incapable of bearing more children. Consequently since the partition is illegal, having been made in other circumstances, it ought to be annulled."

After-born brother.

If a coparcener is absent at the time of partition, he would be entitled to his due share on return. Dayabhaga ch. VIII.

Absent coparcener.

We have seen that in former days* males belonging to higher castes could marry females of the same or lower castes. Sons born of such marriages had various shares assigned to them. Jimutvahana treats of this subject in ch. IX. As such marriages are unknown in our days—the only circumstance that ought to be noted in this connection is the prohibition against division among any but sons by a Brahmini of what has been acquired by the father through acceptance of a pious donation—para. 17, ch. IX.

Sons by women of different tribes.

Brahmin's acquisitions by acceptance of pious donations not divisible except among sons by Brahmin wives.

When a natural son is born to a father after he has adopted a son, the natural and the adopted son share in the proportion of 2 to 1. See ch. X para. 7. From this it follows that if there are two natural sons, they would get 4 shares while the adopted son would get one.

Competition between a natural and an adopted son.

The Dayabhaga, in the same way as the Mitakshara, makes a distinction between brothers of

* Ante. pp. 46-47 and 333-335.

Brothers of whole blood and half blood.

the whole-blood and half-blood. Where brothers of the whole and the half-blood are all re-united, the brothers of the whole-blood share the inheritance to the exclusion of those of the half-blood; so also where they are all separated. But where brothers of the half-blood are re-united, while those of the whole-blood are separate, all of them of both classes share equally. Of course, where uterine brothers are associated while the half-brothers are not so, the inheritance goes exclusively to the whole brothers. Jimutvahana says in para. 36, sec. V, ch. XI—"Among whole brothers if one be re-united after separation, the estate belongs to him. If an unassociated whole brother and re-united half-brother exist, it devolves on both of them. If there be only half-brothers, the property of the deceased must be assigned in the first instance to a re-united one; but if there be none such, then to the half-brother who is not re-united."

The same rule is affirmed in relation to associated and unassociated uncles in para. 39.

Who may re-unite.

Whatever doubts may arise in reference to the relations who are competent to re-unite under the Mitakshara, the Dayabhaga is very clear in its provisions. Thus in para. 3, ch. XII re-united coparceners are described: "He who being once separated dwells again through affection with his father, brother or paternal uncle is termed "re-united," and para. 4 excludes all other relations. It says "A special association among persons other than the relations here enumerated is not to be acknowledged as a re-union of parceners; for the enumeration would be unmeaning."

Where several persons of the same class inherit together, as widows, daughters, nephews, uncles &c., they are equal sharers in the *corpus*, and a separation of their interests may be effected

in accordance with the procedure prescribed in the following Lectures.

Partition among co-widows.

The Madras Court in Kathaperumal *v.* Venkabai (1880) I. L. R. 2 Mad. 194, held that there could be no compulsory partition, (though there could be one by arrangement), between two co-widows inheriting their husband's property together, and that the interest of one of the widows could not be alienated. But this ruling was dissented from in Janokinath Mukhopadhya *v.* Mothuranath Mukhopadhya (1883) I. L. R. 9 Cal. 580 F. B.; 12 C. L. R. 215. See also Bhugwandeen Doobey *v.* Myna Baee 11 M. I. A. 487; 9 W.R.,P.C. 23; Sundar *v.* Parbati (1889) I.L.R. 12 All. 51; L.R., 16. I.A., 186; and Gajapathi Nilamani *v.* Gajapathi Radhamani (1877) I.L.R. 1 Mad. 290; 1, C. L. R. 97; L. R. 4 I. A. 212.

Among daughters.

So in the case of daughters, there may be a partition among them—Padmamani Dasi *v.* Jagadamba Dasi (1871) 6 B. L. R. 134. I have already* noticed that among co-widows as well as among daughters, the right of survivorship obtains, and that it is so strong that it is not destroyed by partition.

Survivorship among co-widows and daughters.

Interest which a woman has in share allotted at partition to meet her maintenance.

Touching the question of the interest which a woman obtains over a share allotted to her at a partition, Justice Wilson in Sorolah Dossee *v.* Bhuban Mohun Neoghy (1888) I. L. R. 15 Cal. 292 says:—"The wife's interest in her husbands' estate resolves itself into a right to maintenance except in the absence of lineal male heirs, in which case she takes the inheritance, and in two cases—one occurring in her husband's lifetime, the other after his death—in which she takes a share. * * * * . The conclusion which I draw from the Bengal authorities is, that a wife's interest in

* Ante pp. 6-7.

her husband's estate given to her by marriage ceases upon the death of her husband leaving lineal heirs in the male line; that such heirs take the whole estate; and that the share which a mother takes on a partition among her sons she does not take from her husband, either by inheritance, or by way of survivorship in continuation of any pre-existing interest; but that she takes it from her sons in lieu of, or by way of provision for, that maintenance for which they and their estates are already bound. I think it follows as a necessary inference that, on her death that share does not descend as if she had inherited it from her husband, but goes back to her sons from whom she received it."

Agreements not to separate.

Agreements made between coparceners that they would never effect severance of their interests are binding on them, but such agreements to the effect that neither the coparceners nor their heirs should ever effect any partition are not binding on the heirs.—Rajender Dutt *v.* Sham Chund Mitter (1880) I. L. R. 6 Cal. 106. In Ramlinga Khanapure *v.* Virupakshi Khanapure (1883) I.L.R. 7 Bom. 538, it was held that an agreement between coparceners never to divide certain property was invalid under the Hindu law as tending to create a perpetuity.

Mahomedan Law of partition.

The Mahomedans have no personal law of their own for the separation of joint ownership. Among them, joint ownership is oftentimes the result of several persons—males and females—jointly inheriting the estate of a deceased relative. The heirs succeed to specific shares, as in the Dayabhaga, while the interest which the female heirs take is in no sense different from the interest of their male co-sharers. If, under these circumstances, any sharer in the *corpus* wishes to have some portion of the *corpus* meted out to him as representing his interest, he has to follow the procedure prescribed in the succeeding Lectures.

Mahomedan law of inheritance.

The Mahomedan Law of inheritance is not properly a portion of my subject. I shall not, therefore, consider the details of the law of inheritance, but shall simply indicate generally the shares of the several heirs when they inherit together so that you may determine how a partition is to be made in any particular case.

The order of succession in the Shia sect is different from that in the Soonnee; but the fundamental doctrine which is quoted below is the same in both sects. The doctrine I refer to is:—"God hath thus commended you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one she shall have the half; and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child: but if he have no child, and his parent be his heirs, then his mother shall have the third part, and if he have brethren, his mother shall have a sixth part after the legacies which he shall bequeath, and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. Moreover you may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and their debts be paid; they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave after the legacies which ye shall bequeath and your debts be paid. And if a man or woman's substance be inherited by a distant relation and he or she have a brother or sister, each of them two shall have a sixth part of

the estate; but if there be more than this number they shall be equal sharers in the third part, after payment of the legacies which shall be bequeathed, and the debts without prejudice to the heirs."

"They will consult thee for thy decision in certain cases: say unto them, God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue and have a sister, she shall have the half of what he shall leave, and he shall be heir to her, in case she have no issue; but if there be two sisters, they shall have, between them, two third parts of what he shall leave; and if there be several both brothers and sisters, a male shall have as much as the portion of two females" Koran, Chapter 4.

From the above you will see that not only do the children but the father, the mother, and the husband or wife simultaneously inherit in certain shares. There is no distinction between real and personal or between ancestral and acquired property. Females always get half the share of males similarly related when inheriting with them, and take with the same full proprietary right as males, so that the shares inherited by them devolve after *their* deaths on *their* heirs. A right of representation is unknown and illegitimate children inherit only from the mother and mother's kindred.

Interest taken by female heirs.

I presume you also know that under the Mahomedan law no person can disinherit an heir at law and that a devise holds good only to the extent of a third of the entire property.

Special law as to wills.

In any given case of partition among the Mahomedan heirs, the shares will have to be first determined according to the rules of inheritance and then partition effected according to the procedure laid down in the succeeding Lectures.

LECTURE XI.

The General Law of Partition of all classes of Joint Property except Revenue-paying estates.

Scope of the present Lecture—Jurisdiction of civil courts before the passing of Act IV of 1893.—Sale of whole or portion of joint property for purposes of partition before Act. IV of 1893—partition by the parties themselves—by reference to arbitrators—scope of s. 523, Act. XIV of 1882 and s. 21 of Act. I of 1877—partition by application to court for reference to arbitration (s. 506, XIV of 1882)—partition by Civil Court through commissioners named by parties—preliminary decree—reference to commissioners—Procedure in a contested partition suit—partition as between some of the co-sharers—who can sue—Persons who under the Mitakshara cannot demand partition cannot sue—Case of co-widows—case of daughters—who should be made defendants—qualification as to plaintiff—all who are interested in property should be made defendants—Some sharers may remain joint—partition of portion of joint properties—Form of the plaint in a partition suit—ss. 2 and 9 Act. IV of 1893—31 and 32 Vic. Cap. 40—Provisions of the Indian and the English Partition Acts compared—Issues in partition suits—Preliminary decree—s. 3 Act IV of 1893—circumstances in which joint-property ought to be sold instead of being partitioned—The order of the Court directing sale is appealable—ss. 6 and 7 of Act IV of 1893—ss. 4 and 5 of Act IV. of 1893—Court to watch the interest of parties under legal disabilities—Family dwelling-house—The Civil Court, and not the commissioners, is to carry out the provisions of Act IV of 1893 and to determine shares of co-sharers—The way in which partition is to be effected—Form of preliminary decree—commissioners for partition—expenses of the commission—power of commissioners (ss. 396-400, XIV of 1882)—Final decree—owelty—forms of report by commissioners and final decree—Equities arising in a partition suit—Waste by a co-sharer—Improvements made by one of the proprietors—Improvements must be made *bonafide*—Improvements extending over the whole estate—Estimation of compensation payable to the party making improvements—when a party is entitled to the benefit of his own improvements—past conduct and acquiescence of the other parties—who may act as commissioners—proceedings of the commissioners ought to be open—duties of the commissioners—ascertainment of the properties—Inspection of the properties—preparations of plans—detailed valuation—Employment of surveyors—mode of division—Family idol—family dwelling house—

Right of residence of a Hindu widow—Interests and rights of all the parties to be kept in view—proximity of separate property of a party—drawing lots—Right of way of persons not being parties to the partition proceedings—Easements of light and air—Custody of title deeds—Costs—payment of costs how enforced—No lien for commissioners' charges—Rights of a mortgagee from a co-sharer—Rights of a putnidar—partition by collector—collector to complete partition proceedings by delivery of possession—Exchange of mutual conveyances in Calcutta—Expenses of a partition suit in the original side of the High Court of Calcutta—Failure of title after partition.

Hitherto we have considered the personal law of the Hindus and Mahomedans for the partition of joint property. That law is applicable to determine the *shares* of the various individuals who jointly succeed to the estate of a deceased proprietor. The procedure according to which the actual separation of the shares has to be effected, or rather according to which specific portions of the joint property representing the different shares have to be allotted is laid down by statutes generally for all classes of property save and except the revenue-paying estates. In this Lecture, I intend to discuss those general rules of procedure, reserving the consideration of the rules for the partition of the revenue-paying estates for the following Lectures.

Scope of the present Lecture.

The rules that we are now about to discuss are of general application throughout the whole of British India. Until recently, (*i.e.* the 19th March 1893 when Act IV of 1893 authorizing in certain cases the sale of the whole or a portion of the property sought to be partitioned was passed), the Civil Courts had no jurisdiction to cause a sale of any portion of the joint property but were obliged, however inconvenient the partition into small shares might be to the parties, to effect a separation by metes and bounds according to the provisions of the Civil Procedure Code. The result was that partition, in several instances, was

Jurisdiction of Civil Courts before the passing of Act IV of 1893.

entirely destructive of the property. But since that year, the legislature has authorized the Courts in certain circumstances to cause a sale of the whole or a portion of the property under partition in the interests of the joint owners. We shall discuss the provisions of the Act at length presently. But before entering upon that discussion, let me state to you that previously to the passing of the Act, Civil Courts had for their guidance, only the provisions of sections 396-400 of the Civil Procedure Code. By this I do not intend to convey that as a matter of fact Courts did not exercise their discretion in partition suits so as to produce the least possible hardship to any sharer. On the contrary, the general words of sec. 396 para. 2 gave the commissions for partition and the Courts ample powers in the making of the allotments. It is also a fact that previous to Act IV of 1893 parties in their own interests did often cause sales of whole or portions of properties under partition rather than suffer the loss and inconvenience attendant on partition into small shares. Nor do I mean that there are at present any rules for the guidance of the Civil Courts in effecting an actual division besides those contained in the Civil Procedure Code. The new Act only provides for sale of the whole or a portion of the property under partition in certain contingencies.

Sale of whole or portion of joint property for purposes of partition, before Act IV of 1893.

In some cases, as in those of joint property under the Mitakshara, the partition proceedings may have to determine the extent of shares of the different owners before effecting an actual severance into distinct portions; while in other instances the shares are definitively known, and the object of the proceedings is merely to create several independent and exclusive estates out of one. But no partition proceedings would be complete without final severance.

Partition by the parties themselves.

Now, partition may be either voluntary or compulsory. When it is made voluntarily by the parties interested, they generally determine their respective shares and then make their own allotments among themselves. In cases where the shares are equal, they make the divisions as nearly equal as they can, and then either the owners according to their seniority make the selection, or when such selection is not allowed, they draw lots. And finally to create good titles to the separate portions they execute mutual conveyances or releases.

By reference to arbitrators.

In other cases where the properties are small in extent and the parties do not apprehend long disputations over the valuations of the properties though they cannot agree among themselves as to the allotments, the owners refer to some arbitrators, who with such help as the parties give them, value the entire property to be divided, make the different allotments and publish an award. If the parties have no objection to the award, they cause it to be registered under Act III of 1877, sec. 17 cl. (i) and either file it in Court under the provisions of section 525 Civil Procedure Code, or execute mutual conveyances or releases in respect of the different divisions. If all the parties think the award bad, they take no action upon it. But, if some of the parties wish it to be enforced, they proceed under sec. 525 Civil Procedure Code. In all cases where the parties appoint arbitrators to make a partition, they generally execute written agreements for such purpose. If after the execution of a written agreement appointing arbitrators to effect a division, any of the parties has reason to apprehend that the agreement may not be carried out, he may apply to Court and file the agreement under the provisions of sec. 523 Civil Procedure Code.

In this connection allow me to note a distinction, pointed out by Mr. Justice Farran in Adhibai *v.* Cursandas Nathu (1886) I. L. R. 11 Bom. 199, between an actual submission to arbitration and a contract generally to refer a controversy to arbitration.

Scope of s. 523, Act XIV of 1882 and s. 21 of Act I of 1877.

That learned judge said that in an actual submission it was necessary that the points in issue should be definitively submitted to named arbitrators, and that such cases were contemplated in section 523 Civil Procedure Code; while a general agreement to refer an existing or possible future dispute to arbitration fell within the purview of the last para. of sec. 21 Specific Relief Act I of 1877, and that in cases of such general agreement, the Court by refusing to entertain suits under the provisions of sec. 21 abovementioned, might compel the parties to have their differences settled by arbitration.

The last para. of the section above alluded to runs in these words :—"And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

Justice Farran says :—"The object of the section is to compel parties, who have agreed to refer a matter to arbitration, so to refer it before having recourse to a Court of law. Exception I to section 28 of the Contract Act IX of 1872 provided the remedy of a suit for specific performance for a limited class of contracts to refer to arbitration. That was opposed to the English authorities, which have decided that the Courts should not grant specific performance of

agreements to refer—Fry on Specific Performance p. 417. That portion of section 28 of the Contract Act IX of 1872 has, probably for that reason, been repealed and the section under consideration has provided a new means of compelling parties to agreements to refer to carry them out by an actual reference, namely, by placing them under a severe disability, if they refuse to do so. The mischief to be suppressed was the refusal of parties, who had *agreed to refer* disputes to arbitration, to carry out such engagements in *specie*. The object aimed at, was to induce parties to such agreements to have recourse to arbitration before proceeding by suit. In respect of an *actual submission* to arbitration there was no such mischief to be suppressed. Where a specific dispute had been referred to the arbitration of named arbitrators, the Civil Procedure Code (XIV of 1882) made ample provision for compelling the parties to the submission to abide by, and carry out, its terms, unless they could shew sufficient cause to the contrary: see section 523. The Privy Council have held that the parties to such a submission are not at liberty, unless for good cause, to withdraw from it before it is filed in Court—Pestonjee Nussurwanjee *v.* Manockjee.* That was a decision under Section 326 of Act VIII of 1859, but the provisions of the present Code are almost identical with it. If the withdrawal of a party from an *actual submission* to arbitration were a refusal to perform a contract to refer within the meaning of section 21 of the Specific Relief Act I of 1877, the result would be that a withdrawal, for good cause, from a submission would preclude the party so withdrawing from suing in respect of the same

* 12 M. I. A. 112.

matter; otherwise, it would be necessary to read into the Section, after the words "has refused to perform it," the words "unless for good cause shown;" but their Lordships intimated in the above case that a withdrawal from a submission to arbitration would be in many cases justifiable."

From the above it is clear that the law prevents a suit for partition when the parties have entered into an agreement to have the partition effected through *arbitrators named*, except when good cause is shown why the agreement should not be enforced.

Partition by application to court for reference to arbitration (S. 506, Act XIV of 1882.)

Hitherto we have considered only two modes usually adopted by parties for effecting a partition of immovable properties by arrangement. In the third mode, some of the persons interested in the property file a plaint in the Court having jurisdiction, with a prayer that a division of the property specified may be effected, and sometimes also with a further prayer to have accounts taken of the profits of the property in the hands of the defendants. We have in Lecture VII.* seen how such a suit should be valued for purposes of determining the jurisdiction of the Court in which the plaint should be presented. As regards the question of territorial jurisdiction, that is determined with reference to the provisions of Secs. 16 and 19 of the Civil Procedure Code. Then, when the defendants appear in the suit, all the parties—the plaintiffs as well as the defendants—in pursuance of their agreement apply to the Court under the provisions of Sec. 506 of the Civil Procedure Code that the matters in difference between them be referred to arbitration. The Court in compliance with the prayer of the parties refers the

Partition by Civil Court through commissioners named by parties.

* Ante p. 270-271.

matter, in dispute, to the arbitrators named by the parties, and thereupon the procedure prescribed in Chapter XXXVII of the Civil Procedure Code is followed. You should note that these arbitrators are not the commissioners for partition contemplated in Sec. 396.

Preliminary decree.

In the fourth mode the plaint is filed as in the previous case. The defendants then file their written statements and the court after recording such evidence as the parties choose to adduce, makes a decree preliminary to the actual division by metes and bounds. Such a decree, it is true, is not expressly provided for in the Civil Procedure Code, but the provisions of Section 396 para. 1, hint at it. That para. runs thus : " In any suit in which the partition of immovable property not paying revenue to Government appears to the Court to be necessary, the Court after ascertaining the several parties interested in such property and their several rights therein may issue a commission to such persons as it thinks fit to make a partition according to such rights." The Court must see, before proceeding to actually divide the properties, that the plaintiff has any share in the same. How can it say who the persons interested and what their respective rights are, without making a preliminary decree ? To the same effect are the observations of Justice Pontifex in Gyan Chunder Sen *v.* Durga Churn Sen (1881) I. L. R. 7 Cal. 318.; 8 C. L. R. 415. That learned judge says :—" We think it obvious, that what was intended by that section was, that upon the first hearing of the suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are, and shall direct by a preliminary decree or order that commissioners be appointed to make the partition."

Reference to commissioners named.

Now, in the fourth mode which we have been considering, the parties, after the preliminary decree has been made, apply to the Court to appoint persons named by them to be commissioners under the provisions of Sec. 396, Civil Procedure Code. The Court, unless it sees any reasons to the contrary, generally appoints the persons, so named, to act as Commissioners, and on receipt of their reports, makes such decree as it thinks fit. The Commissioners named by the parties have to follow the procedure prescribed by the Civil Procedure Code and to act under instructions from the Court.

Procedure in a contested partition suit.

I shall now consider the procedure to be followed in a contested suit for partition where the parties disagree not only as to their respective shares, but also as to the valuations of some of the properties sought to be partitioned, and as to whether any of the properties ought to be sold or divided.

Partition as between some of the co-sharers

We have seen in Lecture VII* that, according to the view taken by the Calcutta High Court, a decree in a partition suit has the effect of assigning a specific portion to each of the shareholders corresponding to his share in the *corpus*, and that the Bombay and the Allahabad High Court think that although distinct portions may be assigned to the several shareholders when asked for, there may be partition suits in which the Court may simply carve out the plaintiff's portion leaving the rest entire.

Who can sue.

We have in a previous Lecture † seen who the persons are who can demand a partition of Mitakshara coparcenary property. Any one of these persons may be the plaintiff in a partition suit, but not any of the others, who, though they

* Ante pp. 270-272.

† Ante pp. 45-47.

Persons who under the Mitakshara cannot demand partition cannot sue.

may be entitled to share when a partition is actually made, have no right under the Mitakshara to demand a partition. In the same way, a mother, or a grandmother, who under the Dayabhaga would be entitled to a share on partition among her sons or grandsons, would have no right to sue for partition. But except in these instances, every sharer in any joint property would be entitled to sue for partition. That there may be partition among co-widows would appear from Bhugwandeen Doobey *v.* Myna Baee (1868) 11 M. I. A. p. 487 and Sundar *v.* Parbati (1889) L. R. 16 I. A. 186; I. L. R. 12 All. 51. Similarly there may be partition among daughters: Padmamani Dasi *v.* Jagadamba Dasi (1871) 6 B.L.R. 134.

Case of co-widows.

Case of daughters.

Who should be made defendants.

All parties interested in the property to be partitioned and who would be entitled to share, save those who are plaintiffs, should be made defendants. Thus in Pahaladh Singh *v.* Luchmunbutty (1869) 12 W. R. 256, it was held that a suit for partition cannot be properly dealt with unless all who are admittedly shareholders in the joint property are before the Court. The principle laid down in this case was followed in Kali Kanta Surma *v.* Gouri Prosad Surma (1890) I.L.R. 17 Cal. 906.

In the case of Torit Bhoosun Bonnerjee *v.* Tara Prosonno Bonnerjee (1879) I. L. R. 4 Cal. 756; 4 C. L. R. 161, it was held that to a partition between half-brothers after the death of their father, the mother must be made party. But as a mother would not be entitled to share except at a partition among her own sons, she need not be made a party if her sons jointly take a share at the partition.

In Sadu Bin Raghu *v.* Rambin Govind (1892) I. L. R. 16 Bom. 608, it was held that a mortgagee

or purchaser should be made a party. Mr. Clark D. Knapp in his Treatise on Partition, Ed. of 1887, p. 103 says:—"A decree for partition cannot be made, unless all persons interested in the premises are made parties to the suit: and the party applying for a partition of lands must not only have a present estate in the premises of which partition is sought, as a joint tenant or tenant in common, but he must also be actually or constructively in the possession of his undivided share or interest in such premises. Because, if there is adverse possession, valid and succeeding, the only proper course for the Court to pursue is to dismiss the bill as having been prematurely filed." Mr. Freeman in his work on "Co-tenancy and Partition," 2nd Ed., § 463 says:—"It is a general principle of law that a litigation can never result in an adjudication which will be binding upon others than the parties to the suit, and their privies in blood or in estate. To this general rule proceedings in *rem* form no exception, for in those proceedings the subject of the litigation is itself a party and being itself bound by the result, all interests in it must be likewise bound. A suit for partition is sometimes spoken of as a proceeding in *rem*; but ordinarily it is not such a proceeding, for the process is not served upon the land nor is the land a party defendant, nor is the final judgment binding on any of the co-tenants who were not brought within the jurisdiction of the Court by some service of process, actual or constructive. It is, therefore, indispensable that all the co-tenants not uniting in the petition be made parties defendant." But though all the persons interested should be parties to a suit for partition, it is not necessary that the partition proceedings should carve out the share of each of the sharers. Mr. Freeman in § 508 of his work on "Co-te-

Qualification as to plaintiff.

All who are interested in property should be made defendants.

Some sharers may remain joint.

nancy and Partition" says:—"Two or more co-tenants may unite in a petition for partition, and have their moieties set off to them, to be by them enjoyed together and undivided. The plaintiff in partition is entitled to have his share set off, if the premises are capable of being divided, for that is his object in instituting the proceedings: but if the situation of the defendants is such as to render it for their interest to retain their proportion together and undivided, there can be no possible objection, in principle, in permitting it to be done, nor is it incompatible with the spirit and intent of the act."

Partition of portion of joint properties.

Let us now see whether a plaintiff can seek partition of a portion only of *ijmalee* (joint) properties. This question was considered in Lecture IX as bearing on the Mitakshara law.* I shall now consider it generally. In Hari Das Sanyal *v.* Pran Nath Sanyal (1886) I. L. R. 12 Cal. 566, plaintiff prayed for partition of one of several *ijmalee Khanabaries*. Defendants objected to the partial partition. The High Court allowed the objection.

In Venkatarama *v.* Meera Labai (1889) I. L. R. 13 Mad. 275, it was held that the purchaser of a Mitakshara member's undivided interest in a portion of the family-property could not seek partition of that portion only, but his remedy was to cause the member whose right he had purchased to seek partition of the whole family-property. Indeed, under the Mitakshara, according to which no member has any property before partition, any other result would be out of question. In Chandu *v.* Kushamed (1891) I. L. R. 14 Mad. 324 under similar circumstances as in the above case, but in a Mahomedan family, the suit for partial partition was maintained: (1) because the vendor had a

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* Ante pp. 313-314.

definite share, and (2) because the purchaser had no interest in any of the other *ijmalee* properties of the family. The same principle would hold under the Dayabhaga.

In Punchanun Mullick *v.* Shib Chander Mullick (1887) I. L. R. 14 Cal. 835, Justice Trevelyan held that in a suit for partition of *ijmalee* property where the defendant stated that there were other properties, such properties should be included in the suit; but that if the territorial jurisdiction of the Court would not permit the inclusion of the additional properties, the original claim should proceed. In Harinarayan Brahme *v.* Ganpat Rav Daji (1883) I. L. R. 7 Bom. 272, it was held that where the plaintiff himself was in possession of some *ijmalee* properties, he could not sue for partition of other properties only.

The result of the authorities seems to be that no suit for partial partition ought to be thrown out if the defendant does not object to it, and on the other hand no suit for partial partition ought to be maintained if the defendant opposes it and it should appear that the plaintiff is in exclusive possession of other *ijmalee* properties which have not been included in the plaint. If in any case it should appear that the plaintiff is not in exclusive possession of any *ijmalee* properties, he may sue for partition of such portion thereof as lies within the local jurisdiction of a particular Court.

We have up to this time seen who the necessary parties to a suit for partition are, what are the properties to be included in the suit, how such suits should be valued and in what Courts the suits should be filed. Let us now determine upon the form of the plaint.

Form of the plaint in a partition suit.

The Civil Procedure Code does not give us any particular instructions as to such plaints, and the schedule to the Code which contains draft forms

for several classes of suits does not contain a form which might be used in partition suits. At the end of this Lecture will be found some forms which may help you in drawing up plaints in such suits.

Referring to the forms appended to this Lecture you will find that in each of them a prayer, in the alternative, for sale of the entire property under partition, or a portion thereof, has been made. In each case it will be for the plaintiff, regard being had to the provisions of Secs. 2 & 9 of Act IV of 1893, to consider whether a prayer to this effect ought to be inserted in the plaint, for very important consequences are attached to the insertion of such a prayer. This leads me to consider the provisions of Act IV of 1893. The important portions of the Act bearing on the present question are Sections 2 and 9. Those sections are :—

Secs. 2 & 9, Act IV of 1893.

2. "Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and distribution of the proceeds."

9. "In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act."

From the above, it is clear that before a Court

in a partition suit may assume jurisdiction to consider whether a sale of the property or of a portion thereof would be more beneficial to all the owners than a partition of the same among them, it must be moved so to consider, by the owners holding at least a half share in the property. If, therefore, the plaintiff in a partition suit does not consider it advantageous to him that the property should be sold, he should not insert in his plaint the prayer for sale.

While considering the provisions of Sec. 2, it will not be out of place to point out the difference between this section and the corresponding Section 4 of the English Partition Act of 1868 (31 & 32 Victoria Cap. 40). The English Act provides :—" In a suit for partition where, if this Act had not been passed a decree for partition might have been made, there if the party or parties, interested individually or collectively to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary or proper consequential directions."

31 & 32 Vict. Cap. 40.

Provisions of the Indian and the English Partition Acts compared.

You must have marked, as I read the section, that under the English Act whenever an application for sale is made by owners interested individually or collectively to a moiety or more, the Court is bound to sell, unless the other owners show that a partition would be more advantageous than a sale. By the English Act a larger discretion is given to the Court to sell than by the Indian Act. Thus, Section 3 of the English Act provides :—" In a suit for partition

where, if this Act had not been passed, a decree for partition might have been made, there if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it think fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and give all necessary and proper consequential directions." According to this section, any one of the co-sharers may move the Court, and if the Court in the exercise of its discretion think a sale more advantageous than a partition, it may cause a sale to take place. There is no such provision in Act IV of 1893.

The Indian Act provides for sale of a portion of the property under partition (Sec. 9). This is a very salutary provision. You will observe that the Act enjoins that the sale of a portion has to be made "under the Act." By these last words you will understand that the conditions provided for in Sec. 2 and under which only, a sale of the property under partition can take place, must exist in the case of a sale of a part also.

After the plaint has been filed, summons will be issued to, and served on, the defendants under the Civil Procedure Code, and it will be time then for the defendants to appear and file their written statements. They may admit or deny the plaintiff's claim to the partition as laid in the plaint, or while admitting his claim to a partition, they may deny that he is in actual or constructive possession of

the share claimed in the plaint; they may pray for a division of the whole or a sale thereof; they may ask for the sale of a portion and division of the rest; they may admit or deny the plaintiff's valuation, and they may raise other objections.

If upon the plaint or any of the written statements, it does not appear whether the plaintiff or the defendant wishes a sale of the property under partition or of a portion thereof, the Court may ascertain the fact by an examination of the parties.

Issues in partition suits.

Upon the pleadings as above stated, issues will, in the ordinary course of things, be framed and the parties called upon to adduce evidence. The issues at this stage of the case will ordinarily be (1) whether the plaintiff is entitled to a partition, (2) who are the other parties entitled to the property, (3) what are the shares of all the several owners, and (4) when co-sharers owning at least a moiety of the property under partition wish for a sale of the whole or a portion, whether a sale or a partition would be more beneficial to all the shareholders. If upon the trial of the first issue it should appear that the plaintiff has no right to partition, the suit should be dismissed. Otherwise the other issues should also be tried and a preliminary decree made recording a finding on each of the above issues*. We have observed that some of the shareholders may wish to have their shares intact though separated from other shares. In such cases, in deciding the third issue the Court need not find the extent of the separate shares of such of the owners as do not wish separation among themselves. On the fourth of the above issues, the Court would have to ascertain from the shareholders other than those who have prayed for sale, if they or any of them are willing to purchase, under

* Ante p. 371.

the provisions of Sec. 3 of Act IV of 1893, the shares of those who have applied for sale at a valuation to be made by the Court. Now the provisions of Sec. 3 are these :—

Sec. 3, Act IV of 1893.

3. "(1) If, in any case in which, the court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale. the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

"(2) If two or more shareholders severally apply for leave to buy as provided in subsection (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

"(3) If no such shareholder is willing to buy such share or shares at the price so ascertained the applicant or applicants shall be liable to pay all costs of or incident to the application or applications."

You will observe that if any of the shareholders, interested individually or collectively to a moiety or upwards, apply for sale under Sec. 2 and any of the other shareholders offer to purchase such share or shares under Sec. 3, it would not be necessary for the Court, at that stage, (though it may be necessary afterwards) to find whether a sale or partition would be more beneficial to the parties. The law (Sec. 3) says the Court *shall* offer to sell, &c. In such a case, therefore, *i.e.*, where any shareholder would express the desire to purchase, the Court would have to make a valuation of the share or shares of the applicants for sale, and offer to sell the same at the price ascertained. Should the shareholder or shareholders,

who expressed a desire to purchase before the valuation was made, decline to effect the purchase after the Court has made the valuation, the provisions of clause 3 Sec. 3 would come into operation, and in that event it would be necessary for the Court to see whether a sale or partition would be more beneficial. In order to determine this question, the Court may have to take into consideration various circumstances. Thus, where the number of sharers is very large and the property small, it may have to find whether a division into small plots would not be destructive of the property. So also, in the partition of a dwelling house where it may be necessary to demolish portions of the existing buildings in order to allow passage to the partitioned plots in the interior, the Court may have to determine whether, in the interests of all parties, the demolition of a portion would be more advantageous than a sale. If upon the adjudication of the fourth issue, the Court should come to the conclusion that the whole of the property under partition or a portion thereof should be sold in the interests of all the shareholders, the Court ought to make an order to that effect. Such order under Sec. 8 would be deemed to be a decree and would be appealable under the provisions of Sec. 540 Civil Procedure Code.* We have seen that under cl. (3) Sec. 3 the applicants for sale have to pay all costs of advertising and conducting the sale. The Court, upon deposit being made of such costs, would hold the sale under the provisions of Secs. 6 and 7 of the Act. Those sections provide :—

Circumstances in which joint property ought to be sold instead of being partitioned.

The order of the Court directing sale is appealable.

6. "(1) Every sale under Sec. 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such man-

Ss. 6 and 7 of Act IV of 1893.

* On this point see Dulhin Golab Koer *v.* Radha Dulari Koer (1892) I. L. R., 19 Cal., 463.

ner as it may think fit and may be varied from time to time.

"(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable.

"(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

7. "Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely :—

"(*a*) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon, the procedure of such Court in its original Civil jurisdiction for the sale of property by the Registrar;

"(*b*) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees."

None of the High Courts, as I understand, have prescribed any rules of procedure for the sale of properties under Act IV of 1893. After the sale, the proceeds have to be divided by the Court rateably among the shareholders. I have discussed the principal provisions of the Partition Act of 1893. It remains for me to

notice only the provisions of Secs. 4 and 5. They run in these words :—

Ss. 4 and 5, Act IV of 1893.

"4. (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit, and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf."

"(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

Court to watch the interest of parties under legal disabilities.

"5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability."

As regards Sec. 5, I presume, you know that an infant or any other person under a legal disability can only sue through a next friend and be sued through a guardian *ad litem*. I have already observed that an* infant can sue for partition, only on proof of malversation, and that a Court before allowing a suit for partition to proceed on behalf of a minor has to satisfy itself that the partition would be beneficial to the minor. Notwithstand-

* Ante p. 185.

ing the appointment of a next friend or a guardian *ad litem*, the Court has to satisfy itself that the interests of the minor or other person under legal disability are not sacrificed by any compromise. And accordingly Section 462 of the Civil Procedure Code provides: "No next friend or guardian for the suit shall without the leave of the Court enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise, entered into without the leave of the Court, shall be voidable against all parties other than the minor."

Knapp in his work on Partition p. 120 says:—"The fact that one of the parties interested in the partition of an estate is an infant, or a lunatic, or an habitual drunkard, will not deprive other parties in such interest of their right to a partition and sale of the premises so held in common by them. But before the interest of the infant or lunatic, or habitual drunkard can be disposed of and his title vested in a purchaser, he must in some proper form, be brought before the Court and his rights passed upon and protected." Now you know that the law protects the person and the property of every minor, and Section 5 only adopts the ordinary practice and accentuates it. A request for sale or an application for leave to buy are *extraordinary* proceedings in the conduct or defence of a suit, and the law requires the Court to certify to the reasonableness of the request or the application. You should also observe that the law allows a minor on attaining majority to sue to set aside a partition on proof of fraud: see Chanvirapa *v.* Danava (1894) I. L. R. 19 Bom. 593.

Family dwelling house.

As regards Section 4, you know how inconvenient it is for the members of an undivided family

to have a stranger among them as a co-sharer in their dwelling house to which they cling to the last. The stranger, on the other hand, cannot enjoy his purchased share without a partition. The law protects the rights of both parties by giving to the stranger the value of his purchased property, and by keeping the family in the possession of their dwelling house.

You should note in this connection that whatever may be the extent of the share of the purchaser, the members would have a right to compel him to sell it to them.

The Civil Courts and not the Commissioners to carry out the provisions of Act IV of 1893 and to determine the shares of co-sharers.

I have now considered all the provisions of the Partition Act of 1893. You will notice that the Civil Court (and not the Commissioners for Partition) has to carry out the provisions of the Act. You should note that under the Indian Acts, a Court cannot make a reference to Commissioners (except when the parties apply for the same) to ascertain the shares of the parties, or to find upon the comparative advantages of a sale and partition, but the Court has to come to its own findings on these questions.

The way in which partition is to be effected.

Hitherto we have considered how the power of sale conferred on Courts should be exercised. Let us now see how a partition should be effected, either of the whole property in suit or of such portion as may remain to be partitioned after the sale of the rest.

We have seen that the Court has to make a preliminary decree determining the shares of the several parties.

Form of preliminary decree.

In the schedule to this Lecture at the end will be found a form of such a preliminary decree.

Commissioners for partition.

By the preliminary decree, a reference is made to a number of persons (generally three) called Commissioners for Partition. Though the practice is to appoint generally more than one Com-

missioner, the High Court of Calcutta in Gyan Chunder Sen *v.* Durga Churn Sen (1881) I. L. R. 7 Cal. 318; 8 C. L. R. 415, has held that the Court is not bound to appoint more than one Commissioner. But before issuing the Commission, the Court makes the party, on whose application the Commission is issued, pay* into Court a reasonable amount for the expenses of the Commission. The preliminary decree, or the reference, which is then issued to the Commissioners gives them full directions as to how the partition is to be made; and the Commissioners in making the division into parcels and awarding compensation for *unavoidable* inequalities have to follow their directions strictly. The only powers which the Code of Civil Procedure gives to the Commissioners, independently of the instructions of the Court, are that any one of them, unless otherwise directed by the Court, may examine the parties themselves and any witnesses whom they may produce or whom he may think necessary to examine,† and may also call for and examine documents and other things relevant to the enquiry, and at any reasonable time enter upon or into any land or buildings directed to be partitioned. The Commissioners, after making the enquiry and division, submit to the Court which issued the Commission one or more reports according as they agree or disagree. The Court, on receipt of the report or reports of the Commissioners, calls upon the parties to attend, and after hearing their objections, if any, either quashes the reports and issues a new Commission, or where the Commissioners agree in their report and no objections against it are substantiated, passes a decree in accordance with such report. This decree is

Expenses of the Commission.

Powers of Commissioners (Ss. 396–400, Act XIV of 1882).

Final decree.

* Sec. 397 Civil Procedure Code.
† Sec. 398 Civil Procedure Code.

called the final* decree in a partition suit. In this connection, see the observations of Justice Ghose in Dwarka Nath Misser *v.* Rabinda Nath Misser (1895) I. L. R. 22 Cal. 425.

The above is a summary of the provisions of Secs. 396 to 400 of the Code of Civil Procedure. These sections have been printed in extenso in the Appendix at the end of the Lectures.

Owelty.

You will note that sums directed to be paid for the purpose of equalizing the values of the shares under the second para. of Sec. 396 are in legal language called "Owelty." The Commissioners have no authority without† express authorization by the Court to award this compensation.

Forms of report by Commissioners and final decree.

I have in the Schedule at the end of this Lecture given a form of Report by Commissioners for Partition, and also a form of final decree. These forms will help you in understanding the duties of the Commissioners and the directions that have generally to be given in a final decree.

Equities arising in a partition suit.

Our Courts in this country are Courts of law and equity. They may, therefore, in a suit for partition be called upon to adjust all the equities existing between the parties and arising out of their relation to the property to be divided. But these equities are so vast and complicated in their nature that an exhaustive consideration of them is impossible in the course of a Lecture. I shall, therefore, refer to some of the leading principles that ordinarily arise in a suit for partition. It is one of the first principles of equity that "he who seeks equity must do equity." Hence whoever by a suit for partition invokes the jurisdiction of a Court of equity in his behalf thereby submits himself to the same jurisdiction, and concedes its authority to compel him to deal equitably with his co-sharers.

* Para. 2 sec. 396 Civil Procedure Code.
† Sec. 396 Civil Procedure Code.

Waste by co-sharer.

Thus, "if one of the co-tenants has wasted any part of the lands of the co-tenancy, the Court may take that fact into consideration, and do justice between the parties by assigning to the wrong-doer the part which he has wasted"—Freeman§ 506.

Improvements made by one of the co-tenants.

As to improvements made on a portion of joint lands by one of several proprietors, Mr. Freeman says*:—"The fact that a co-tenant has located upon a particular portion of the lands of the co-tenancy and has enhanced its value by making improvements, or by reducing it from a wild state to one fit for profitable cultivation, is a circumstance always deemed worthy of the attention of a Court charged with the duty of making a partition. Such improvements are generally indispensable to a profitable and comfortable enjoyment of the property, and contribute to the general prosperity of the community. The law declines to compel one co-tenant to pay for improvements made without his authorization; but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises, the fruits of his expenditures and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. 'It is the duty of equity to cause these improvements to be assigned to their respective owners, (whose labour and money have been such inseparably fixed on the land) so far as can be done consistently with an equitable partition.'" But when the property is not susceptible of such a division, the more doubtful question arises: whether compensation

* § 509.

ought to be awarded to the co-tenant who has made the improvements. Mr. Freeman on this point extracts the following rule from decided cases:—"Where* one tenant in common lays out money in improvements on the estate, although the money so paid does not, in strictness, constitute a lien on the estate, yet a Court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise, on their part, to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements, and their refusal." "The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants or encumbering their estate, or hindering partition." But "if one joint tenant, or tenant in common, covers the whole of the estate with valuable improvements, so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it would be the improver's own folly to extend his own improvements over the whole estate, and because it would be unjust to permit a co-tenant, at his pleasure, to charge another co-tenant with improvements he may not have desired. In such a case, the im-

Improvements must be made *bona fide*.

Improvements extending over the whole estate.

* § 510.

prover stands as a mere volunteer, and cannot, without the consent of his co-tenant, lay the foundation for charging him with improvements." As the allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the Court to do justice, the compensation will be estimated so as to inflict no injury on the co-tenant against whom the improvements are charged. He will therefore be charged, not with the price of the improvements, but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum to which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements."

Estimate of compensation payable to the party making improvements.

In order to determine whether at a partition, a party would be entitled to the benefit of his own improvements, the past conduct of the joint owners would oftentimes be a considerable help. Mr. Knapp in his work on Partition p. 226 says; "The doctrine of acquiescence in what has been done, or what is to be done is well recognized in law as the admission of a party. The Commissioners in making their division and allotment are to take into consideration the acquiescence of the parties in what has been done relative to the premises, and to the improvement of such premises in the past, and, also, to take into consideration such admissions or agreements as have been made in relation to the division of the property or improvement of the property in the future. As for instance, it may have been agreed upon by all the parties in interest that some one of the co-tenants shall have, in case of future division, set apart to him a certain parcel of land, and he, by reason of such

When a party is entitled to the benefit of his own improvements.

Past conduct and acquiescence of the other party.

agreement on the part of his fellow co-tenant, has taken possession of the same, has built upon it, or set fruit-trees upon the land, thus having an equitable interest in such particular parcel so improved by him, greater than his interest therein as a co-tenant, and it being an interest that should be considered by the Commissioners in making their allotment; and the admission of the other co-tenants, or their acquiescence in the acts of the co-tenant thus improving such parcel, should estop all who are interested having thus acquiesced, in claiming, upon a division and allotment of the land, that the co-tenant thus improving said particular parcel should not be allowed the benefit of the acquiescence, admission or agreement of his fellow co-tenants. Such acquiescence, to have effect, must be some act of the mind and amount to voluntary demeanour, or conduct of the party as it may be an acquiescence in conduct as well as acquiescence in language. Such conduct or language must be fully understood by the party, claiming benefit under it, before an inference can be drawn from the passiveness or silence of the opposite party."

Mr. Robert Belchambers, in his compilation entitled "Practice of the Civil Courts," has embodied a large number of rules of practice in suits for partition, and you will do well to refer to them.

Who may act as commissioners.

It has been held that only indifferent persons can be Commissioners. An advocate or attorney, concerned in the cause, or, a person related to any of the parties cannot be a Commissioner. Nor can a person be a Commissioner who is nearly allied to any of the parties, or to whom any apparent cause of partiality can be imputed; as a master, a servant, a partner or a debtor.—Moslyn *v.* Spencer, 6 Beav. 135; Sayer *v.* Wagstaff 5 Beav.

462. The objection to an attorney applies also to his clerk.—Newton *v.* Foot, 2 Dick. 792 ; 2 Ch. R. 393 ; Cooke *v.* Wilson 4 Madd. 380.

It is desirable that only persons acquainted with the ordinary procedure and qualified to act should be appointed Commissioners.—Seton 1st Edition 197, Lord Redesdale's opinion in Curzon *v.* Lyster.

When the Court appoints Commissioners named by the parties, their award is less liable to be disturbed than that of Commissioners appointed by the Court of its own accord.—Manners *v.* Charlesworth 1 Myl. and K. 332.

The proceedings of Commissioners are in their character judicial or quasi-judicial, and ought to be open.—Seton 1st Edition 192, 193.

Let us now consider the duties of the Commissioners according to decided cases.

The first duty of the Commissioners is to ascertain the properties to be divided. This should be done, as far as possible, from the pleadings. Evidence should only be taken if the properties or any of them are not mentioned, or fully or accurately described in the pleadings, or, if there is any intermixture of boundaries between the properties to be divided and other properties. Except on questions of boundary, evidence as to other properties would be irrelevant and ought to be rejected.—Lord Redesdale's opinion, Seton 1st edition 194 ; Manners *v.* Charlesworth Myl. and K. 335.

It is sometimes useful to invite a mutual production and exchange of descriptions of the properties, and then, if the parties can agree, to invite a like production and exchange of valuations of the properties and proposals for division.

Inspection of the properties.

The Commissioners, having ascertained the properties to be divided, should next walk over and inspect each property, except those situate at a

distance, when the parties do not insist upon the inspection of such.

Preparation of plans.

It is essential that plans should be prepared of the properties to be actually divided, but, except for some special reason, not of those to be allotted in their entirety.

Detailed valuation.

It is also essential that a detailed valuation should be made of each property and of the different shares into which it is apportioned. The proper mode of valuing property for the purposes of partition is to consider what would be its value if it were put up to auction, and the parties interested were not allowed to buy—Story *v.* Johnson, You. and Col. 544. But whatever mode of valuation may be adopted, it is important that it should be a uniform mode, so that the value of each property intended to be allotted in its entirety, as well as of every portion of any property intended to be actually divided among the parties may be ascertained without inequality. When the shares of several persons are equal, the plans and valuation, after the apportionment into shares but before allotment, should be placed before the parties for acceptance, as then the parties may have no special interest in disputing the valuation of any share. Mr. Knapp in his work on Partition, p. 229 says:—

Employment of surveyors.

"The law empowers them (the Commissioners) to employ, when necessary a surveyor and such persons skilled in the science of surveying as may be necessary to assist the surveyor in the performance of his labours."

Mode of division.

Where the estate consists of several properties, it is not necessary that each property should be divided, though care should be taken that each party has his full share in value—Earl of Clarendon *v.* Hornby, 1 P. Wms 446; Peers *v.* Needham, 19 Beav. 316. But it would not be right to allot, in its entirety, to any party the right to worship the

Family idol.

family idol.—Mitta Kunth Audhicarry *v.* Neerunjun Audhicarry (1874) 14. B. L. R. 166.

Family dwelling house.

The partition of the dwelling house of a joint Hindu family will be decreed if insisted on. In practice, that is, within the local jurisdiction of the Calcutta High Court, the family dwelling house is always actually divided among the parties except where they consent to its being allotted in its entirety to one or some of the parties.

In Raj Coomaree Dassee *v.* Gopal Chunder Bose (1878) I. L. R. 3 Cal. 514, where two out of three coparceners consented, and the third objected, to a portion of the family dwelling house remaining joint, Justice White, in concurrence with Justice Mitter, made the following order:—"Let the Pooja Dalan, the rooms on either side of it, the courtyard attached thereto, and the western wall of that courtyard, be valued, and if any one or two of the coparceners wish to retain the same separately or jointly as part of his or their share, let the proportionate share of its value be paid to the remaining coparcener or coparceners who do not wish to retain the same. If none of the three coparceners agree to take the same as part or parts of their share or shares, paying to the other or others of them a proportionate share of its value, or if the three coparceners cannot agree amongst themselves as to which of them shall be allowed to take the same as part of his or their share or shares, then let this property be divided between the three coparceners in proportion to their respective shares in the same."

Right of residence of a Hindu widow.

Where a Hindu widow has a right of residence in the family house, the partition should be made subject to such right—Mungala Dabee *v.* Dino Nath Bose (1869) 12 W. R., O. J., 35.

It is a matter of discretion to determine how best the estate, as it exists, may be partitioned

without unnecessarily detracting from the value of the estate or of the different portions thereof. To divide a particular portion of the property might be to diminish its value greatly. And one proprietor cannot claim that a particular part of the property to which he may have taken a fancy shall be so divided as to cause needless detriment to the interests of the other proprietors. In each case the interests and rights of all the parties must be looked to, and effect given to them, as far as possible. But special regard should be had to the circumstance that a party has a particular interest in any property by reason of its situation in relation to adjacent property belonging to him or otherwise—Padmamani Dassi *v.* Jagadamba Dassi (1871) 6 B. L. R. 134; Story *v.* Johnson, 1 You. and Coll. 538; Canning *v.* Canning, 2 Drew 437.

Interests and rights of all the parties to be kept in view.

Proximity of separate property of a party.

"A Court of equity will assign to the parties respectively such parts of the estate as would best accommodate them, and be of most value to them with reference to their respective situations, in relation to the property before the partition. For, in all cases of partition, a Court of equity does not act merely in a ministerial character, and in obedience to the call of the parties, who have a right to the partition; but it founds itself upon its general jurisdiction as a Court of equity, and administers its relief *ex aequo et bono*, according to its own notions of general justice and equity between the parties. It will, therefore, by its decree adjust all the equitable rights of the parties interested in the estate; and will, if necessary for this purpose, give special instructions to the Commissioners, and nominate the Commissioners instead of allowing them to be nominated by the parties. (Story Eq. Jur. 2nd Eng. Edn. p. 634).

The word 'allot' has a different sense from

Drawing lots.

merely drawing lots. It has the sense of appropriating whether by drawing lots or otherwise, the respective shares to the respective parties—Canning *v.* Canning, 2 Drew 436.

If the Commissioners can find no reason, weighing one way or the other then they are reduced to the alternative of drawing lots, because there is nothing else to guide them. But the drawing of lots is the last resort and ought only to be adopted when they do not find anything to guide their discretion one way or the other.

Where the allotment of shares is made by lots, an indifferent person should be called in to draw the lots.

Right of way of persons not being parties to the partition proceedings.

The fact of particular persons or the public having acquired rights of way over the property sought to be divided, is no reason in law for refusing a partition, as those rights cannot be affected thereby. Nor is it a sufficient reason for refusing a partition, that some of the coparceners would be inconvenienced, if property held in common were divided—Rampershad Narain Tewaree *v.* Court of Wards (1874) 21 W. R. 152.

Easements of light and air.

On a partition, an easement of a continuous nature passes by implication of law, as well as by the general words of the conveyance.—Rantanji Hormasji *v.* Edalji Hormasji 8 Bom. H. C. Rep. O. J. 181 ; Watts *v.* Kelson L. R., 5 Ch. Ap., 166

At a partition of property in Calcutta, parties take their respective shares with easements of light and air as would be necessary for the reasonable use and enjoyment of the premises allotted to them respectively—Bolye Chunder Sen *v.* Lalmoni Dasi (1887) I. L. R. 14 Cal. 797.

Custody of title deeds.

As to the custody of the title deeds on partition, the practice is, if all the parties are equally interested in the property, to give the custody to the plaintiff; but if they arenot, then they are

usually given to the person who has the largest interest.—Elton *v.* Elton, 27 Beav. 632.

Costs.

The general rule as to costs is, that the parties bear their own costs of suit up to and including the decree, and that the costs of partition, that is of issuing and executing the Commission and confirming the return are borne by the parties in proportion to the value of their respective interests, but not the costs of any subsequent proceedings; as, settling conveyances, &c. The costs of the hearing on further consideration should be included in the costs to be borne by the parties in proportion to their interests.—Agar *v.* Farifax, 17 Ves. 557, and Elton *v.* Elton, 27 Beav. 632.

Where the plaintiff's right to a partition is questioned, the party questioning it unsuccessfully should be ordered to pay the costs occasioned thereby, *i.e.*, the extra costs occasioned by the plaintiff's title being disputed, and not the costs of making out his title; for, that is necessary in any event in a suit for partition—Norris *v.* Timmins, 1 Beav. 411; and Hill *v.* Fulbrook, Jac. 574; Lyne *v.* Lyne, 21 Beav. 318.

The party who sues out, or has the carriage of, the Commission usually pays the costs of the partition in the first instance, but any party may do so and then proceed to recover from each of the other parties his proportionate share ascertained on taxation. The mode of proceeding to compel payment is by execution, preceded by a *rule nisi* in which the amount claimed is specified.

Payment of costs how enforced

Although in a partition suit, the Court has the property before it and within its reach, it does not order any portion of the property to be sold for the payment of costs, otherwise than in the course of execution, except where some of the parties are under disability, and some other person is, therefore, liable in the first instance for the costs

incurred in their behalf. It is then only that it orders *these* costs to be charged upon, and raised by sale of, the shares allotted to the persons under disqualification—Kailas Chandra Ghose *v.* Ful Chand Jaharri (1871) 8 B. L. R. 474; Singleton *v.* Hopkins, 1 Jur., N. S., 1199.

No lien for Commissioners' charges.

The Commissioners have no lien on the Commission for their charges.—Young *v.* Sutton, 2 V. and Beames 265; Raj Moheshey Debi *v.* Muddoo Shudan Dey, Bourke's Repts. 24.

Rights of a mortgagee from a co-sharer.

In Byjnath Lall *v.* Ramoodeen Chowdhry (1874) L. R., 1 I. A. 106; 21 W. R. 233, the Privy Council held that one co-sharer in a joint and undivided estate could not deal with his share so as to affect the interests of other co-sharers, and persons who take any security from one co-sharer, do so subject to the right of the others to enforce a partition; and further, that a mortgagee who takes such a security in the share of one co-sharer who has no privity of contract with the other co-sharers, would have no re-course against the lands allotted to such co-sharers but must pursue his remedy against the lands allotted to the mortgagor. To the same effect see Sharat Chunder Burmon *v.* Hurgobindo Burmon (1878) I. L. R. 4 Cal. 510; and Hem Chunder Ghose *v.* Thakomoni Debi (1893) I. L. R. 20 Cal. 533. In Hridoynath Shaha *v.* Mohobutnessa Bibi (1892) I. L. R. 20 Cal. 285, a putni lease was granted of certain lands which, according to a private partition made by all the co-sharers, had been assigned to the mortgagor, one of the co-sharers. At a subsequent partition by the Collector, the lands of the putni were allotted to a different shareholder. The Judges distinguished this case from the previous case of Byjnath, where there had been no previous partition at the instance of *all* the sharers, and held that the putni would stand notwithstanding the

Rights of a putnidar.

partition by the Collector. The reason of the decision was that the putni of specific lands, though granted by *one* co-sharer, was the result of a partition made by *all* the co-sharers and was therefore binding on all.

Partition by Collector.

In Parbhu Das Lakhmi Das *v.* Shankar Bhai (1886) I. L. R. 11 Bom. 662, it was held that the duty of the Collector, to whom a decree had been transferred under Sec. 265 of the Civil Procedure Code, was not confined to a mere division of the lands decreed to be divided, but included the delivery of the shares to their respective allottees.

Collector to complete partition proceedings by delivery of possession.

Where a reference, as above mentioned, is made to a Collector, the Civil Court would have no jurisdiction to examine his work.—Dev Gopal Savant *v.* Vasudev Vithal Savant (1887) I. L. R. 12 Bom. 371; and Shrinivas Hanmant *v.* Guru Nath Shrinivas (1890) I. L. R. 15 Bom. 527.

Exchange of mutual conveyances in Calcutta.

Even after the final judgment of Court in a partition suit, parties execute mutual conveyances or releases in respect of properties within the town of Calcutta. But in the Mofussil, this practice does not obtain.

Expenses of a partition suit in the original side of Calcutta High Court

The expenses of a partition suit in the original side of the Calcutta High Court are proverbially enormous. They are out of all proportion to the value of the property under partition.

Failure of title after partition.

A co-sharer when he is evicted by title paramount after partition has the right to obtain compensation for the portion lost. Mr. Freeman on this point says:—"Upon partition, the parties are in *equali jure;* there is supposed to be mutual confidence by reason of the privity of estate; and the object is to make an equal division of a common fund. There is no chaffering or trafficking about it. Third persons, selected by themselves, or appointed by the Court, make the division, and if the common fund is not so large, as the parties

suppose, either from defect of title or of unsoundness as to part, the loss should be borne equally; in other words, in partition, there is an implied warranty both as to title and soundness."* Of course, before any co-sharer can obtain compensation he must show that the eviction was not due to his laches, or to any act or omission on his part, done or made since after the partition. The proceedings in the suit in which he was sued alone and evicted would be no evidence in *his* suit against his co-sharers.

Forms of Plaints in Partition Suits.

(1)

(Title).

The plaintiff abovenamed states as follows:—

1. That the plaintiff and the defendants *Y* and *Z* are the owners of, and possess as *tenants in common* (or jointly), the following properties situated in ——— within the jurisdiction of this Court to wit———

———

and that the plaintiff desires a partition of them.

2. That the plaintiff has an estate of inheritance therein to the extent of one undivided third part and that each of the said defendants *Y* and *Z* has a similar estate of one undivided third part.

* § 524.

3. That there are no liens or encumbrances thereon appearing of record, and that no person other than the plaintiff and the said defendants are interested in the said premises as owners or otherwise.

Wherefore, the plaintiff prays judgment:

For a partition and division of the said premises according to the respective rights of the parties aforesaid, (or if a partition cannot be had without material injury to those rights, then for a sale of the said premises or the portion thereof described herein to wit (insert description) and a division of the proceeds between the parties, according to their rights, after payment of the costs of this action and for partition of the remainder).

(2)

Another Form.

(Title).

The plaintiff abovenamed states as follows:—

1. That on or about the day of 18 , one C. B. died intestate possessed of the following described properties.

2. That the said C. B. left M. B. his widow one of the defendants, who is entitled to dower in the said premises.

3. That the said deceased C. B. left as his children and only heirs at law the plaintiff and defendants N. C., and P. D. ———— ———— who are tenants in common with the plaintiff in the said premises.

4. That the plaintiff and defendants each are entitled as such heirs, subject to the said dower, to an undivided part of the said properties. [If there are incumbrances upon the premises the holders should be made parties and a particular statement of the incumbrances made].

Wherefore the plaintiff demands judgment: that the shares of the parties as above alleged in and to the said property be confirmed; that partition thereof be made (or if the same cannot be equitably divided, then that a sale of the said premises or a portion thereof and division of the proceeds and partition of the remainder may be made between them, according to their respective shares and that such other orders may be made as shall be deemed just in the premises).

Preliminary decree in Partition suit.

In the Court of the ——— of ———

Present:

(Title of Cause).

Upon reading the plaint of the plaintiff abovenamed and the written statements of the defendants abovenamed and such oral and documentary evidence as both the parties abovenamed produced:

It is hereby ordered and adjudged, That parti-

tion be made of the property herein below mentioned between the parties entitled thereto according to their respective rights, shares and interests in said property, which said rights, shares and interests are as follows so far as the same have been ascertained, to wit (here set forth the interests of the parties as ascertained) and that T. R., F. I., and J. M. three reputable and disinterested gentlemen be and they are hereby designated as Commissioners to make the said partition.

And it appearing to the Court that the defendants A. B. & C. D. desire to enjoy their shares in common with each other, it is hereby directed that partition be so made as to set off to the said A. B. and C. D. their shares of the property partitioned without partition as between themselves to be held by them in common.

And if the said Commissioners find that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, then they shall report the amount of compensation to be made by the parties respectively for equality of partition; but they shall not report that compensation be made by a party who is unknown or whose name is unknown, nor by an infant, unless it appears that he has personal property sufficient to pay it and that his interests will be promoted thereby.

And it is further directed that all the parties to this action shall produce to, and leave with, the said Commissioners, for such time as the Commissioners shall deem reasonable, all deeds, writings, surveys or maps relating to the premises or any part thereof.

Form of
Report of Commissioners making Partition.

(Title of Cause).

TO

THE JUDGE OF———

In pursuance of a preliminary decree of this Court made in the above entitled action on the day of 18 , we, the undersigned Commissioners thereby appointed and designated to make partition of the premises described in the said judgment, among the parties entitled thereto, according to their respective estates and interests therein, do hereby report.

That having been appointed Commissioners as aforesaid we have carefully examined the premises described in the said judgment and caused them to be surveyed and have made partition thereof between the said parties according to their respective rights and interests therein, as the same have been ascertained, declared and determined by the said Court in and by the said judgment in manner following:—

We divided the whole of the said premises other than the portion herein let off to the defendant M. F., as her dower interest therein, into allotments, the lots composing which are designated on the map hereunto annexed by the letters A, B, C, etc., each of which allotments is, in our opinion, of equal value, and that being in our judgment the most beneficial division, all circumstances considered, that could be made of such premises

and that we have set off in severalty to the said plaintiff S. G. all those certain parcels of the said premises designated on said map by the letter A and which are respectively bounded as follows—— as will more fully appear by reference to said map.

And we have also set off in severalty to the said defendant I. G. all those certain pieces or parcels of said premises, designated on the said map by the letter B, which are respectively bounded as follows——— as will also more fully appear by reference to said map.

And we have set off to the defendants A. H. and E. C. all those certain pieces or parcels of said premises designated on the said map by the letter C which are respectively bounded as follows ——— as will also more fully appear by reference to said map to be held by them in common.

And we further report that we have set off in severalty to the defendant M. F. as her dower right in said property the premises described as follows——— and designated on said map by the letter D. and we have made partition of the said lot D. among the parties entitled thereto in remainder as follows :—to the plaintiff S. G. the lot designated on said map by the letter E. and described as follows :—and to the defendant I. G. the lot designated on said map by the letter F. and described as follows———, to be enjoyed by them respectively upon the determination of said dower interest by the death of the said M. F.

And we have set off in severalty to the defendant having the ———— share in said property, who is unknown, the parcels of said property marked N. upon said map and described as follows :—

And it appearing to us that partition cannot be made equal between the parties according to their

respective rights, without prejudice to the rights and interests of some of them and that the payments hereinafter named are necessary to produce such equality we have awarded compensation to be made between the parties as follows:—the plaintiff S. G. is to pay the defendant I. G. the sum of Rs. ——.

And we further certify and report that the items of the various expenses attending the execution of the said Commission including our fees as Commissioners are contained in a schedule hereto annexed marked A. and forming part of this, our Report, and that we have caused a map to be made thereof, as aforesaid, showing what parts of the said premises have been allotted to the respective parties which map forms a part of this our report and is hereto annexed marked B.

In witness whereof, we, the said Commissioners have set our hands to this our report this day of 18 .

Schedule A.

For services as Commissioners at Rs. a day for——days Rs.————

Cash paid for services as surveyor Rs.————

Final decree upon report of Commissioners making actual partition.

In the Court, &c.

(Title of Cause).

This cause having been brought on to be heard upon the report of Commissioners appointed therein under and by virtue of the preliminary decree dated the and upon reading and filing the said report bearing date the—— day of ———— 18 and proof of due service of notice of application for judgment thereupon on the attorneys for all parties who have appeared herein having been made, and it appearing by the said report that the said Commissioners have made partition of the premises described in the plaint in this action between the parties to this action according to their respective rights and interests therein as the same have been ascertained declared and determined by this Court and by which said partition the said Commissioners have divided the whole of said premises other than the portion thereof set off to the defendant M. F. as her dower interest therein into two allotments of equal value and have set off in severalty to the plaintiff S. G. one of the said allotments bounded and described as follows (insert description) as will more fully appear by a map of said partition thereto annexed being the lots marked A. on said map; and it also appearing by said report that by such partition the said Commissioners have set off in severalty to the defendant I. G. the other of the said allotments which is bounded and des-

cribed as follows, to wit: (insert description) as will also more fully appear by reference to the said map of the partition annexed to such report being the lots marked B. on the said map:

And it further appearing by said report that the said Commissioners have set off in severalty to the defendant M. F. as her dower interest in the said premises partitioned, the following described property, to wit (insert description) and that they have made partition of the said last mentioned lot among the parties entitled thereto in remainder as follows: to the plaintiff S. G. the lot designated on the said map by the letter E and described as follows to wit, (insert description) and to the defendant I. G. the lot designated on said map by the letter F and described as follows to wit (insert description) to be enjoyed by them respectively upon the determination of the said dower interest by the death of the said M. F.

Now on motion of ———— Counsel for plaintiff and after hearing ———— for defendants.

It is ordered, adjudged and decreed and this Court by virtue of the authority therein vested doth order, adjudge and decree that the said report and all things therein contained do stand ratified and confirmed and that the partition so made be firm and effectual for ever.

And it having appeared by the said report that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them and that the following payments are necessary to produce such equality, it is hereby ordered and adjudged, that compensation be and is hereby awarded between the parties as follows: that the defendant I. G. pay to the said plaintiff S. G. the sum of ————.

And it is further ordered and adjudged that

each of the parties who is entitled to the present possession of a distinct parcel of said premises hereby assigned to him be let into the possession thereof immediately and that the parties who are entitled to possession of distinct parcels of said premises after the expiration of dower interest therein of the defendant M. F. be let into possession thereof after the determination of the said estate of the said M. F. by the death of the said M. F.

And it is further ordered and adjudged that the said S. G. pay to the said S. the one-half of the costs and charges of the proceedings in this cause, the whole amount of said costs and charges being the sum of Rs. and that the said S. G. have execution therefor.

LECTURE XII.

Procedure for the partition of Revenue-paying estates in Bengal.

Bengal law of partition of Revenue-paying estates—Estate—Joint undivided estate—Separate liabilities on opening separate accounts—Advantages of partition to proprietors—to Government—Reason why Government have not left to parties to apportion Government-revenue—Revenue officers in Bengal—Civil Courts ousted of their jurisdiction—Summary of the Act—Fundamental principle for apportionment of revenue—Who can demand partition—Applications for partition—Sec. 24—Sec. 25—Sec. 26—Sec. 28—Sec. 27—Sec. 33—Establishment for partition and costs thereof—Adoption of rent-roll and measurement—Partition by arbitrators—General arrangement of partition—Mode of division—Compactness—Confirmation of partition by Commissioner—Analogy between partition by Collector and that by Civil Court—Rules of Board of Revenue.

Bengal Law of partition of revenue-paying estates.

The rules for the partition of immovable property that we considered in the last Lecture were those provided for in the Civil Procedure Code and Act IV of 1893. But Section 396 of the Code of Civil Procedure and Sec. 1 cl. (4) of Act. IV of 1893 expressly exclude from the operation of the Code and the Act, all immovable property for which revenue has to be paid to the Government by the joint owners. I have advisedly added the words "by the joint owners," for, as a rule, all the land in the country pays the Government revenue, and what is excluded from the operation of the Code and the Act, is the proprietary interest for which revenue has to be paid direct to Government by the joint owners. Thus a revenue-paying Mehal owned jointly by A and B as Zemindars may be let in *putnee* to X and Y

as joint *putneedars*. The separate interests of X and Y may be partitioned under the Civil Procedure Code with the consent of the Zemindars, A and B. But the Zemindari interests of A and B cannot be partitioned under the Civil Procedure Code. The properties that are excluded from the Civil Procedure Code and Act IV of 1893, are estates paying revenue to Government and so far as Bengal is concerned, the law for the partition of these excluded properties is contained in Act VIII of 1876 of the Council of the Lieutenant Governor of Bengal.

In the present Lecture I shall consider the rules for the partition of revenue-paying estates in Bengal.

'Estate.'

The word "Estate" has been defined in the Act, as meaning "all lands which are borne on the revenue-roll of a Collector as liable for the payment of one and the same demand of land revenue." When such an estate is owned by two or more proprietors jointly *i.e.*, without an actual division of lands and without an apportionment of the liability for revenue, the estate is called 'a joint undivided estate.' Now we know that though an estate may be joint, the proprietors often separately discharge their respective liabilities for the Government revenue and divide among themselves the rent collections in proportion to their shares. But so long as the estate, remains joint and undivided, the entire estate under Act XI of 1859, remains liable to Government for the entire revenue, and if the proprietors do not discharge fully their separate liabilities the entire estate is sold summarily under the sunset laws (Act XI of 1859,) and all the proprietors without distinction lose the estate. It is true that separate accounts may be opened under Sec. 10 and 11 of Act. XI of 1859 by co-sharers

Joint undivided estate

Separate liabilities on opening separate accounts.

willing to pay separately their shares of revenue. but you must remember that even when separate accounts are opened, the entire estate may be sold if a sale of the defaulting share proves insufficient for the realization of the amount due. It is of the highest importance therefore to joint-proprietors of estates that they should be able to create separate estates with separate liabilities out of an entire undivided estate. The object of a partition under the Estates Partition Act of 1876 is to bring about such a state of things. And accordingly in Act VIII of 1876 although the word "partition" is not defined we find the word "applicant for partition" defined as meaning "a person who has applied to the Collector under the provisions of the Act, for the separation from the parent estate of land representing his interest in such parent estate, and for the assignment to him of such lands as a separate estate liable for a demand of land revenue distinct from that for which the parent estate is liable."

Advantages of partition to proprietors.

I have said above that it is of the immense importance to joint proprietors that they should be able to create separate estates with separate liabilities. But it is not the joint owners alone who are interested in the division. Government also would have greater security in the separate than in the aggregate assessments ; for, we know from our daily experience how small debts are sooner realized from the individual debtors than large debts from a number of persons jointly liable. There is another way in which Government is interested in the division. If it rested with the proprietors alone to make the division so as to bind the Government to whom the revenues have to be paid, the proprietors might create false estates *i.e.*, estates in the names of unknown persons with small areas and large

To Government.

Reason why Government have not left to parties to apportion Government revenue.

revenues and appropriate the rest of the lands among themselves for nominal revenue-demands, so that when the false estates would be sold under the sunset laws, no bidders would come forward and the revenues assessed thereupon would be a loss to the State. We have seen that for similar reasons in the case of tenants holding under landlords, Sec. 88 of the Bengal Tenancy Act provides that a division of a tenure or holding or a distribution of the rent payable in respect thereof would not be binding on the landlord unless it is made with his consent in writing. It is clear then that a partition of revenue-paying estates should not be allowed to be made among the persons liable for the Government revenues without the consent of the Government.

We have seen before that it is the interest of Government to encourage divisions into small estates and we have now seen that Government ought to be careful that the divisions are made properly. There is a further consideration as regards the Government. They have to provide for the administration of justice and it is the duty of their revenue officers to see not only that the Government interests are protected but also that in protecting the interests of Government, they do no injustice to any subjects. The rules of procedure for the partition of revenue-paying estates contained in Act VIII (B. C.) of 1876 have been accordingly prescribed for securing all the above objects.

Revenue officers in Bengal.

The revenue officers of the Government in Bengal are the Sub Deputy Collectors, the Deputy Collectors, the assistant Collectors, the Collectors, the Commissioners and the Board of Revenue. They are the officers authorized to effect partitions of estates and to take cognizance of all questions relating to such partitions. Finally the Lieutenant-

Governor has been authorized to re-open a partition on proof of fraud within 12 years after it has been actually effected.

Civil Courts ousted of their jurisdiction

The policy of the Act is to confer exclusive jurisdiction in questions of partition of revenue-paying estates on the revenue officers, and accordingly we find Sec. 149 of the Act excepting from the jurisdiction of the Civil Courts questions relating to partitions of estates. The same observations would apply to the second para of Sec. 133 which similarly excludes from the jurisdiction of the ordinary Civil Courts orders passed by the Lieutenant-Governor re-opening partitions. You should observe that Sec 30 limits the jurisdiction of the Civil Courts in these matters.

But it is worthy of note that it is only the questions that concern the apportionment of the revenue that are excepted. Thus Sec. 150 provides that the orders of the revenue officers determining questions of title to lands as between the proprietors of the estate under partition on the one hand and the proprietors of a conterminous estate on the other, as well as orders determining the shares of individual proprietors would be capable of being contested in the ordinary Civil Courts.

The Estates Partition Act contains elaborate rules of procedure for division of estates and I have in the Appendix at the end printed the Act in extenso with explanatory notes of some of the sections. In cases of doubt as to the exact interpretation of any section, the section itself will have to be referred to and read in connection with the context. I shall therefore give you here a mere summary of the Act.

Summary of the Partition Act.

The Act is divided into ten Parts.

Part I contains the definitions of words used in the Act and lays down the principles of division

in these words. "The amount of land revenue assessed on each separate estate shall bear the same proportion to the whole amount of land revenue for which the parent estate was liable as the assets of such separate estate bear to the whole assets of the parent estate" (Sec. 8.) This rule commends itself as at once just and fair to all the proprietors. It is founded on the principle that every joint owner is entitled to the profits of the joint estate in proportion to his share.

Fundamental principle of apportionment of revenue.

Part II treats of the right to claim partition. Under Act VII (B.C.) of 1876, Sec. 38 every joint proprietor of an estate has to register his name in respect of the share owned by him. This part provides that every recorded proprietor (whose name has been registered under Act VII (B.C.) of 1876) in actual possession except (1) one who holds a mere life estate, (2) when there has been a private partition in accordance with which the proprietors have been in possession, (3) when the revenue upon the separated portion does not exceed one Rupee and the owner of the share does not agree to redeem the amount of revenue under rules for redemption of Government revenue, and (4) when the partition would have the effect of creating out of a compact estate several estates, each consisting of scattered parcels of land, has a right to demand partition. Though a sharer whose name is not recorded would not have a right to demand partition, he would of course be entitled to his share when the partition actually takes place. Sec. 9 contained in this Part treats of the various modes of separation. Thus when a man is the owner of a fractional share in the parent estate, as in cases under Sec. 10 of Act XI of 1859, the effect of the partition proceedings will be to allot to him lands cal-

Who can demand partition

culated to yield the same fractional share of the gross assets of the entire estate. This is one mode of partition. There is a second mode and that is when a man is in possession, as in cases under Sec. 11 of Act XI of 1859, of specific lands included in a parent estate. In such a case the effect of the partition proceedings is to determine the amount of Government revenue payable for the lands in possession.

I have said that a partition cannot be made at the instance of a recorded proprietor if it should appear that there was a previous partition privately effected according to which the parties were in possession. But if all the proprietors join in the application, a partition would be effected. There is a practice for owners of estates or shares in estates to transfer specific parcels of land on condition of the transferee paying a certain determined sum on account of Government revenue. If the sum privately apportioned by the owner or sharer does not correspond to the lands assigned, (according to the calculations of the Revenue officers) the Revenue officers will be bound to refuse the partition. But should the parties waive the condition as to the amount of revenue, the partition would be effected.

Application for partition

Part III treats of applications for partition to the Collector of the District. You should note that Sec. 18 requires the applicant to state the names of all the proprietors recorded or unrecorded and that Sec. 22 enjoins the Collector to cause service of notice on all such proprietors. Should disputes arise as to the extent of the interest of the applicant for partition, the Collector is to stay his hands for 4 months but if within this period he receives no precept from the Civil Court to stay the partition, he is competent to resume the partition after the period and effect a division.

Sec. 24.

Sec. 25

Sec. 26.

In such a case should the Civil Court after the partition make a decree the Court has to make it in recognition of the partition proceedings *i.e.*, as if the partition had been effected before suit. If on the other hand the decree of the Civil Court be passed while yet the partition proceedings are pending, the division should be made according to the decree. Sec. 31 makes a very important provision. It requires the Collector to declare if the estate is to be partitioned and if so into what shares and in which of the several modes. After making the above declaration, the Collector can transfer the proceedings to the Deputy Collector *i. e.*, according to the definitions, to any assistant Collector, Deputy Collector or Sub-Deputy Collector whom the Collector may appoint to effect a partition and allotment of assessment under the Act, or to conduct any of the proceedings connected with such partition and allotment.

Sec. 28

Sec. 27

Sec. 33.

Part IV treats of the establishment necessary for effecting a partition and provides for the recovery of the costs of partition from the owners of estates. You will note that under Sec. 40 the costs would be ordinarily realizable from the owners in proportion to their respective shares in the parent Mehal. This part provides also for the establishment of the "Estates Partition Fund."

Establishment for partition and costs thereof.

Part V treats of the partition proceedings up to the adoption of a rent roll and measurement papers. In order that the Revenue authorities may apportion the Government revenue on all the separated shares, or, as they are called, *puttis*, and allot lands in due proportion, the rents payable for the various classes of lands comprised in the estate and the areas of the different classes of lands should be ascertained. The Collector after making the declaration under Sec. 31, generally

Adoption of rent-roll and measurement

refers the proceeding to the Deputy Collector and this latter officer with the help of amins and surveyors collects the necessary information. You will note that the amins and Deputy Collectors can call upon the parties to produce their own measurement and collection papers.

Partition by arbitrators.

Part VI treats of partition by arbitrators. You will note that under Sec. 69, the Collector has to assess the Government revenue on each separate estate into which the arbitrators may divide the parent estate.

General arrangement of partition.

Part VII treats of the proceedings from the determination of the general arrangement of the partition by the Deputy Collector to the approval of the partition by the Collector.

You will note that the law requires the Deputy Collector to consult orally all the proprietors present and to determine in concurrence with them upon the general arrangement of the partition. The Deputy Collector then sends the plans, measurement papers and his project of the partition with calculations to the Collector who has to approve or disapprove of the project. If the project is disapproved, the case is remanded to the Deputy Collector and if it is approved the papers are forwarded to the Commissioner upon whose confirmation depends the completion of the partition.

Mode of division.

Part VIII treats of the general principles on which partition is to be made.

Now two or more estates may have as between or among them lands in common. These lands should be first partitioned among the different estates before the partition of any of those estates is taken up in hand.

There may be disputes about the possession of some lands between the proprietors of the estate under partition on the one hand and