16,957

No. 16 of 1955.

In the Privy Council

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

THE ATTORNEY GENERAL OF CEYLON . *Appellant*

AND

1. AR. ARUNACHALAM CHETTIAR
2. AR. RAMANATHAN CHETTIAR
3. AR. VEERAPPA CHETTIAR

(Substituted for (1) V. RAMASWAMI IYENGAR and (2) K. R. SUBRAMANIA IYER, Administrators of the Estate in Ceylon of RM. AR. AR. RM. ARUNACHALAM CHETTIAR, deceased) . . *Respondents.*

Case for the Appellant

RECORD.

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 12th October, 1953, dismissing an appeal from a Judgment and Order of the District Court of Colombo, dated the 8th November, 1949, whereby an assessment to estate duty under the provisions of the Estate Duty Ordinance No. 8 of 1919 in respect of the estate in Ceylon of the deceased, one Rm. Ar. Ar. Rm. Ar. Arunachalam Chettiar (hereinafter called " Arunachalam Junior ") was set aside and the amount of estate duty paid in respect of the said estate ordered to be refunded. pp. 318–331. p. 332. pp. 286–313.

2. Arunachalam Junior and his father (conveniently referred to hereinafter as " Arunachalam Senior ") were the co-parcenary members of a joint Hindu trading family with extensive business interests in Ceylon, India and other countries. They were members of a well-known Hindu community known as Nattucottai Chettiars who inhabit certain districts in South India and who, on the material dates, were governed in matters relating to inheritance, succession, adoption, marriage, etc., by (1) the Mitakshara system of Hindu Law as it was applicable to Nattucottai Chettiars in South India ; and (2) customs and usages of their own. p. 59, l. 46 to p. 60, l. 5. p. 60, ll. 42–49. p. 287, ll. 18–20. p. 117, ll. 40–44.

Father and son (as co-parceners) and certain females (as non-co-parceners) together constituted an undivided Hindu family, of which the father was *karta* (manager).

Ex. A 1, p. 340.

Arunachalam Junior died in India on the 9th July, 1934, leaving him surviving one widow (but no children) and his father.

Arunachalam Senior, who had thus become the sole surviving member of the co-parcenary, died, also in India, on the 23rd February, 1938.

3. At the date of the death of Arunachalam Junior, the Estate Duty Ordinance, No. 8 of 1919 (hereinafter, also, called " the 1919 Ordinance "), was in operation in Ceylon. The 1919 Ordinance was replaced in 1938 by the present Estate Duty Ordinance (C.187) (hereinafter, also, called " the 1938 Ordinance ").

Annexure " A."

By Section 7 of the 1919 Ordinance estate duty was payable upon the value of all property which passed upon the death of a person ; and, by Section 8 (1) (*a*) and (*b*) thereof, such property was to be deemed to be inclusive of : (A) property of which the deceased was, at the time of his death, competent to dispose ; and (B) property in which the deceased had an interest ceasing on his death to the extent to which a benefit accrued or arose by such cesser.

4. The main question for determination on this appeal is whether or not the property assessed for estate duty as the Ceylon estate of Arunachalam Junior was property which passed, or which must be deemed to have passed, upon his death, within the meaning of Sections 7 and 8 (1) (*a*) and (*b*) of the 1919 Ordinance.

For the determination of this question in the Courts below it was necessary to ascertain, *inter alia*, the nature of the interest which a co-parcener of a Hindu (Nattucottai Chettiar) undivided family enjoys in the joint property of the family and this, in Ceylon, being a question of foreign law expert evidence in proof thereof was called by both sides.

The experts—one on each side—gave their evidence at considerable length basing their opinions upon numerous authorities—many of them decisions of the Board. They could not, however, agree. Called upon to resolve the conflict and to apply the doctrines of Hindu Law which emerged, the Courts below decided (in accordance with certain of the views expressed by the expert witness called by the predecessors of the present Respondents and, also, as a result of their own investigations) that on Arunachalam Junior's death there had not been either a " passing " of property under Section 7 of the 1919 Ordinance or a notional " passing " of property under Section 8 (1) (*a*) or (*b*) thereof.

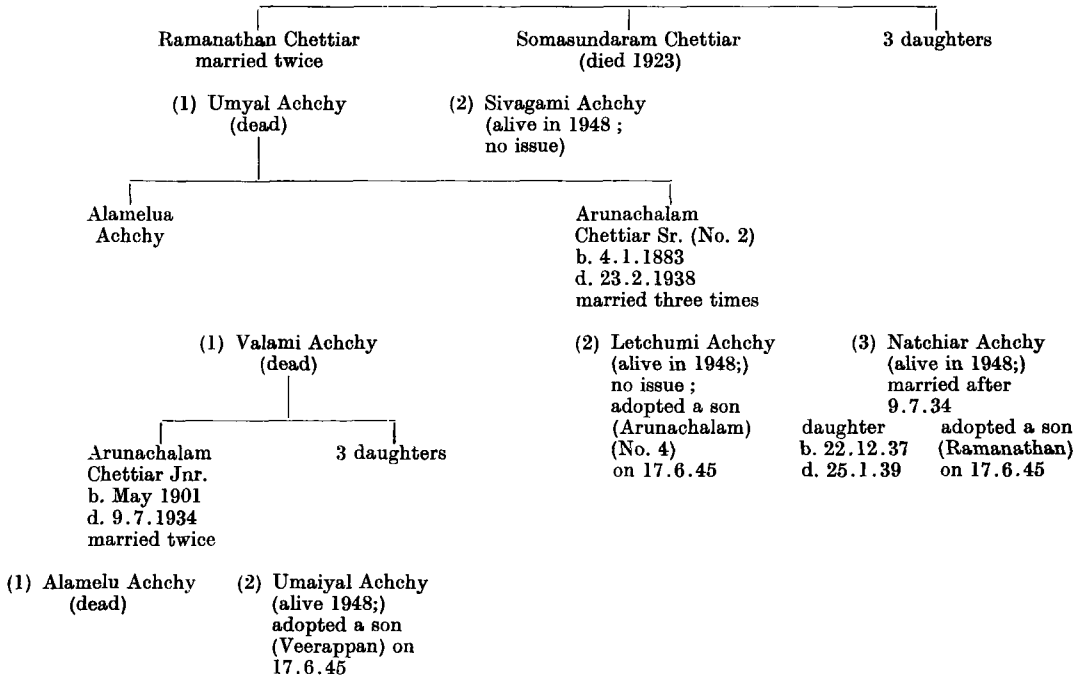
In the Appellant's respectful submission their decision was contrary to law and to the authorities which were before them.

5. A further question for determination on this appeal is concerned with the liability of the original assessees (the predecessors of the present Respondents) for estate duty due on the estate of Arunachalam Junior and with the true interpretation of provisions in the 1919 Ordinance and in the 1938 Ordinance relating to the machinery for the assessment and collection of the duty.

6. Relevant portions of the 1919 and 1938 Ordinances, the Wills Ordinance (C. 49) and the Partition Ordinance (C. 56), are included in Annexure " A " hereto.

7. The following genealogical table of the family with which this appeal is concerned is extracted from a table (Ex. A 1 at p. 340) which was before the Courts below :—

ARUNACHALAM CHETTIAR (No. 1).



8. The facts are as follows :—

By his Notice of Assessment, dated the 31st October, 1938, addressed to the Administrators of the Estate of Arunachalam Senior (hereinafter also referred to as " the assessees ") the Assessor, Estate Duty, Colombo, notified the assessees that the estate duty payable by them in respect of the estate of Arunachalam Junior had been assessed at Rs.215,000 ; and, subsequently, by an Additional Notice of Assessment, dated the 9th May, 1941, similarly addressed, he increased the said assessment to Rs. 223,493.70. p. 19. pp. 20–21.

The assessees objected to the assessment under Section 35 of the 1938 Ordinance by delivering to the Commissioner of Estate Duty (hereinafter called " the Commissioner ") a written notice of their objections ; but the Commissioner, by his letter dated the 16th April, 1942, notified them of his decision to maintain the assessment subject to the exclusion therefrom of a quarter share of certain Estates. This had the effect of reducing the increased assessment from Rs.223,493.70 to Rs.221,743 (as stated in the Assessor's Amended Notice of Assessment, dated the 29th April, 1942). p. 16, ll. 9–13. p. 22. p. 22.

9. Aggrieved by the assessment and the Commissioner's decision thereon the assessees appealed to the District Court of Colombo making the Attorney-General of Ceylon (the present Appellant) respondent to their petition of appeal in accordance with Section 38 of the 1938 Ordinance. p. 15. p. 15, ll. 31–33.

pp. 16–17. p. 18, ll. 1–20. The petition was based upon several grounds and concluded with the prayer that the assessment be set aside, for a declaration that Arunachalam Junior's estate was not liable to pay any estate duty, and for an Order for the refund of any amount that might thereafter be paid as duty in pursuance of the assessment; or, in the alternative, for a reduction of the assessment by the deletion therefrom of certain specified items.

pp. 25, 37. pp. 314–316. 10. Several Issues were framed in the suit and, of these, Issues (1) to (8) were, after a consideration of the evidence, answered thus by the learned District Judge :—

p. 314, ll. 39–41. "(1) Are the Appellants" (the assessees) "the proper persons on whom an assessment in respect of the alleged estate of Arunachalam Junior can in law be made?"

p. 315, ll. 1–2. "(2) Are the Appellants liable to pay any estate duty on the said estate?"

p. 312, ll. 22–23. *Answer to Issues* (1) *and* (2): "In view of my Answers to subsequent Issues I have not considered it necessary to discuss this matter."

p 315, ll. 3–4. "(3) Did the deceased leave an estate in Ceylon liable to estate duty?"

p. 312, l. 24. *Answer:* "No."

p. 315, ll. 5–8. "(4) (A) Was the deceased a member of an undivided Hindu family which carried on business in Ceylon of moneylenders, rice merchants, etc. under the vilasams" (trade names) "of Rm. Ar. Ar. Rm. and Ar. Ar. Rm.?"

p. 312, l. 25. *Answer:* "Yes."

p. 315, ll. 9–10. "(4) (B) Was the deceased not entitled to any definite share in the assets of the said family?"

p. 312, ll. 26–27. *Answer:* "He was not entitled to any definite share but he could on partition have asked for a definite share."

p. 315, ll. 11–12. "(4) (C) Did whatever interests the deceased have in the assets of the said family cease on his death?"

p. 312, ll. 28–30. *Answer:* "He had a co-parcener's interest in the assets of the joint family, but it was not of such a nature as passed on his death within the meaning of the Ordinance."

p. 315, ll. 13–15. "(5) Was all the property that has been assessed as liable to pay estate duty the joint property of a Hindu undivided family of which the deceased was a member?"

p. 312, l. 31. *Answer:* "Yes."

p. 315, ll. 16–18. "(6) If any portion of Issue No. (4) or of Issue No. (5) is answered in favour of the Appellants is estate duty payable on the property that has been assessed?"

p. 312, l. 32. *Answer:* "No."

" (7) If Issue No. (6) is answered in favour of the Respondent " (the present Appellant) " what is the value of the interest of the deceased in the property that has been assessed ? " p. 315, ll. 19–21.

Answer : " Does not arise." p. 312, l. 33.

" (8) If Issue No. (5) is answered in favour of the Appellants is the alleged estate in question exempt from estate duty by virtue of Section 73 of Chapter 187 (the 1938 Ordinance) ? " p. 315, ll. 22–24.

Answer : " Section 73 of Chapter 187 will not apply to Arunachalam Junior's estate." p. 312, ll. 34–35.

11. The remaining Issues (9) to (17) (B) were answered thus by the learned District Judge :—

" (9) (A) Had the Crown for purposes of income tax accepted the position of the deceased that all his income in Ceylon was the income from the joint property of an undivided Hindu family of which he was a member ? " p. 315, ll. 25–28.

Answer : " Yes." p. 312, l. 36.

" (9) (B) If so is the Crown estopped from denying that the said estate is the joint property of an undivided Hindu family ? " p. 315, ll. 29–30.

Answer : " No. No question of estoppel arises. In one case it is an income tax matter, and in the other, it is an estate duty matter. *Vide* in this connection 45 N.L.R. 230." p. 312, ll. 37–39.

" (10) Are the items referred to as ' the amount in deposit in the Bank of Mysore ' and ' the debt by the firm of T. N. V. of Negapatam ' liable to be included among the assets which are liable to duty ? " p. 315, ll. 31–34.

Answer : " Does not arise in view of my Answer to (3)." p. 313, l. 1.

" (11) Are the Appellants " (the assessees) " entitled to claim a reduction of Rs.15,206/– being income tax for the year 1934–35 from the total value of the estate assessed as liable to duty ? " p. 315, ll. 35–37.

Answer : " This has been abandoned by the Appellants and I would accordingly answer it in the negative." p. 313, ll. 2–3.

" (12) Are the Appellants entitled to a reduction in terms of Section 20 sub-sections (3) to (5) of Ordinance No. 1 of 1938 in respect of immovable property which has been assessed as liable to duty ? " p. 315, ll. 38–40.

Answer : " This Issue was not pressed by Appellants and I accordingly answer it in the negative." p. 313, ll. 4–5.

" (13) Are the Appellants liable to pay interest on the assessed duty for any period anterior to the date of assessment ? " p. 315, ll. 41–42.

Answer : " Liability to pay interest was conceded by the Appellants and I would accordingly answer the Issue in the affirmative." p. 313, ll. 6–7.

p. 315, ll. 43–44. " (14) On the death of the deceased did any property pass within the meaning of the Estate Duty Ordinance of 1919 or 1938 ? "

p. 313, l. 8. *Answer :* " No."

p. 315, ll. 45–46. " (15) If Issue No. (14) is answered in the negative is any estate duty payable ? "

p. 313, l. 9. *Answer :* " No."

p. 316, ll. 1–3. " (16) Has any claim for a refund of estate duty been made to the Commissioner of Estate Duty in terms of Section 58 of the Estate Duty Ordinance (C.187) ? "

p. 313, ll. 10–13. *Answer :* " No . . . It seems to me that the Court has power to order a refund."

p. 316, ll. 4–6. " (17) (A) If the Answer to Issue (16) is in the negative is it open to the Court to make an order for a refund in terms of paragraph (B) of the prayer in the petition of appeal " (" refund of the amount that may hereafter be paid as duty in pursuance of the assessment ") ?

p. 316, ll. 7–10. " (17) (B) In any event is it open to the Court in these proceedings to make an Order against the Defendant " (the Attorney-General of Ceylon) " or the Commissioner of Estate Duty in terms of paragraph (B) of the prayer in the petition of appeal ? "

p. 313, l. 14. *Answer to* (17) : " Yes."

p. 23, ll. 23–30. 12. The present case (37/T Special) was heard together with another connected case (38/T Special) in which the assessees, as Administrators of Arunachalam Senior's estate, contested the liability of that estate to pay estate duty under the provisions of the 1938 Ordinance. This connected case, which went to trial on different Issues, is now before the Board as Privy Council Appeal No. 17 of 1955.

Admissions. pp. 27–28. In respect of both cases the following facts were admitted by both sides in the District Court :—

p. 27, ll. 15–18. (1) During Arunachalam Junior's lifetime the returns of income delivered by him and his father for purposes of income tax in Ceylon were made on the basis that they were members of a Hindu undivided family.

p. 27, ll. 19–22. (2) During the said period the income of both father and son was assessed on the basis that they were members of a Hindu undivided family.

p. 27, ll. 23–25. (3) Only one return was made in each year in respect of the joint income of father and son and one assessment was made on that return.

p. 27, ll. 26–28. (4) After the son's death the returns of income derived by the father were assessed on the basis that he was a member of a Hindu undivided family.

(5) After the son's death the father's income was assessed on the footing that he (the father) was a member of a Hindu undivided family. p. 27, ll. 29–31.

(6) The property assessed for payment of estate duty on the son's estate was (immediately prior to his death) the joint property of a Hindu undivided family of which he and his father were members. (While agreeing to this the assessees did not concede that the father and son were the sole members of the undivided family.) p. 27, ll. 32–38. p. 51, ll. 1–20. p. 57, ll. 35–38.

(7) The property assessed for payment of estate duty on the father's estate was property which, had the son been alive on the 22nd February, 1938 (i.e., immediately prior to the father's death) would have been on that date the joint property of a Hindu undivided family of which the father and son were members. (In regard to this admission, the assessees, while conceding that father and son were members of a joint Hindu undivided family did not concede that they were the only members thereof.) p. 28, ll. 1–8.

13. Both sides proposed to produce evidence in support of their respective contentions and as the evidence—particularly that of the Hindu Law experts—was likely to either overlap or be concerned with doctrines of Hindu Law applicable to the connected case as well, it was agreed between the parties that the present case should be heard first and that evidence led herein should be regarded as having been led in the connected case subject to the right of either side in that case to lead any additional evidence. p. 23, ll. 23–34.

14. Summaries of the expert evidence on the relevant Hindu Law adduced by both sides in support of their respective cases are included as Annexures " B " and " C " hereto.

15. Giving evidence in support of the present Appellant, L. G. Gunasekera, Assistant Commissioner of Income Tax, Estate Duty and Stamps, said that, in respect of the estate of Arunachalam Junior, the return for estate duty purposes had been made under the 1938 Ordinance as had the assessment on the Administrators of Arunachalam Senior's estate as Receivers in charge—directly or indirectly—of property belonging to Arunachalam Junior's estate. In this connection the witness said that he relied on Section 26 of the 1938 Ordinance, the corresponding section of the 1919 Ordinance having been repealed. He said also that at the date of Arunachalam Junior's death (the 9th July, 1934) the 1919 Ordinance was in operation and that Sections 1 to 17 thereof were still (i.e., on the 19th July, 1948, when he gave evidence) in force. p. 52, ll. 12–15, 29–32. p. 55, l. 36 to p. 56, l. 16. p. 52, ll. 33–38. Annexure.

In cross-examination the witness said that the procedural part of all the assessments had been under the 1938 Ordinance; and that, in the case under review, the assessees had paid the duty on the 26th May, 1942. p. 52, l. 43. p. 53, ll. 19–21.

16. By his Judgment, dated the 8th November, 1949, the learned District Judge held that in the case of Arunachalam Junior " there was no estate which was liable to tax either on the footing that Arunachalam Chettiar (Jr.) was competent to dispose of it, or on the footing that he had pp. 286–312. p. 298, ll. 20–24.

an interest in property which ceased on his death." He therefore entered
p. 313, ll. 15–21. Judgment for the assessees in the sum of Rs.283,213/24 (which amount had admittedly been paid by them as estate duty in respect of Arunachalam Junior's estate) with legal interest and costs.

As already stated (see paragraph 12 hereof) the present case was tried together with a connected case in which the main issue was whether or not Arunachalam Senior's estate was liable to pay estate duty. The learned District Judge dealt with both cases by his said Judgment but he answered the Issues framed in each case separately. His Answers to the Issues framed in the present case have already been set out (see paragraphs 10 and 11 hereof). 10

p. 286, l. 45 to p. 287, l. 36. 17. The learned District Judge said that in order to ascertain whether Arunachalam Junior's interest in the family property was of such a nature as to come within the scope of the 1919 Ordinance (which was in force at the date of his death)—i.e., whether it was property which must be deemed to have passed within Section 8 (1) (*a*) or (*b*) of the said Ordinance—it was necessary to examine the nature of a co-parcener's interest in the joint family property—on which topic two legal experts from India had given evidence.

The learned Judge referred to, and considered, certain portions of this 20 expert evidence and, interpreting the opinions of the experts in the light of his own investigations, he came to the following conclusions upon which he based his Judgment :—

p. 290, ll. 3–5. (1) The joint family property of an undivided Hindu family vests only in the co-parceners, i.e., the male members in unbroken male descent. The other members of the joint family are entitled only to rights of residence and maintenance.

p. 290, ll. 6–11. (2) A co-parcener's right of maintenance is based upon ownership which, however, is indefinite and fluctuating. A non-co-parcener's right of maintenance is not a real right ; it is a mere 30 right to be maintained which may, in certain circumstances, be made a charge upon the property.

p. 291, l. 19 to p. 292, l. 10. (3) A co-parcener originally had no power of disposition but, as Hindu Law developed, the Courts in India recognised alienations of co-parcenary property in certain circumstances, e.g., where the alienation was for value or where a co-parcener's interest in the joint family property was attached by a judgment creditor.

p. 292, ll. 11–37. (4) In Madras on an alienation of his interest by a co-parcener the share taken by the alienee (in proceedings initiated by him) is computed as at the time of the alienation. 40

18. Other conclusions and propositions upon which the learned District Judge based his Judgment were as follows :—

p. 293, ll. 9–18. (5) A co-parcener is undoubtedly an owner of property but the ownership is of a peculiar nature. It only gives to him a right of maintenance, the amount given being dependent on the needs

of the family and not in proportion to the share he would get on a partition. This right of maintenance is based upon unity of ownership and unity of possession.

(6) The co-parcener's power to dispose of his share is only recognised as a right in equity for the benefit of the alienee and not for the benefit of the alienor. It is limited to alienations for value and does not extend to gifts or devises and bequests. A person who is *sui juris* is not so restricted. It cannot be said therefore that a co-parcener is " competent to dispose " of his share within the meaning of Section 8 (1) (*a*) of the 1919 Ordinance. p. 293, l. 49 to p. 294, l. 14.

(7) Arunachalam Junior had not an interest in the joint family property which could be said to have ceased on his death and no benefit accrued to Arunachalam Senior and the others on his death by the cesser of his interest within the meaning of Section 8 (1) (*b*) of the 1919 Ordinance. The interest of Arunachalam Junior in the joint family property was a right of maintenance which was not a fixed right but a variable interest. It was difficult of valuation and could not be assessed in any specific sum of money. There was no provision in the Ordinance for the valuation of any personal benefits accruing to one co-parcener on the death of another until partition. No co-parcener can predicate of the joint property that he has any particular share therein. A share therefore cannot pass on his death. The 1919 Ordinance did not apply to the estate of a Hindu undivided family or to the interest which a co-parcener had in such property. p. 294, l. 23 to p. 298, l. 20. p. 295, l. 48 to p. 296, l. 6. p. 296, ll. 36–39, p. 297, l. 39 to p. 298, l. 3. p. 298, ll. 17–20.

19. Against the said Judgment and Order of the District Court, the present Appellant appealed to the Supreme Court of Ceylon upon the several grounds set out in his Petition of Appeal, dated the 16th November, 1949. pp. 314–318.

20. By their Judgments, dated the 12th October, 1953, the learned Judges of the Supreme Court (Gratiaen and Gunasekara JJ.) dismissed the appeal, with costs. pp. 318–331.

21. Delivering the main Judgment of the Supreme Court, Gratiaen J. (with whom Gunasekara J. agreed) said that—

> " the acceptance or rejection of the case for the Crown must ultimately depend upon the true nature of the interest which a ' co-parcenary member ' of a Hindu undivided family enjoys in the joint property so long as the family retains its undivided status." p. 320, ll. 16–19.

This, in the view of the learned Judge, " introduces an extremely difficult question of foreign law which must nevertheless be regarded as a ' question of fact ' of which the Courts in Ceylon cannot take judicial notice. Our decision must be based upon the evidence of the qualified experts who have testified in the actual case, and upon the references to textbooks and judicial decisions which are incorporated in their evidence." In regard to this evidence the learned Judge said that it was agreed by both sides " that certain additional decisions of the Privy Council and of the Courts in India concerning the Mitakshara law should be treated as having been incorporated in the evidence already on record." The learned Judge p. 322, ll. 27–32. p. 322, l. 47 to p. 323, l. 3.

said that he had examined these authorities and had " tried to understand them," and that while he did not refer to them specifically they were included in a list which had been filed of record at the Court's request (see pages 421–422 of the present Record).

p. 322, l. 22 to p. 325, l. 30. 22. On the " interests " of a " co-parcener " in the joint property of an undivided Hindu family, the learned Supreme Court Judge (Gratiaen J.), expressed the following views :—

p. 323, ll. 4–10. (1) The word " co-parcener," in relation to joint property, is only a convenient term used in analysing a legal concept which has no precise equivalent in Ceylon. The term cannot be equated in all respects to co-parcenary as understood in English Law. The problem however could not be solved by the mere selection of appropriate words.

p. 323, l. 24 to p. 324, l. 7. (2) From the observations of the Board in *Katama Natchier* v. *Raja of Shivaganga* (1863), 9 Moore I.A. 543, at p. 611, and in *Appovier* v. *Rama Subba Aiyan* (1866), 11 Moore I.A. 75 at p. 89, it is clear that " under the strict Mitakshara law no part of the joint property of an undivided Hindu family can be the subject of individual ownership by any members in definite shares unless and until there has *either* been a separation which automatically results in a division of title (and is almost invariably accompanied by an actual partition) *or* at least a division of the title, by mutual agreement, in respect of a particular property which had previously been the subject of joint enjoyment (in which latter event the undivided status of the family and its collective ownership of the rest of the joint property, is not affected). As a third alternative a division of title may also take place if one ' co-parcener ' after due notice to the others, unequivocally separates himself from the family leaving the rest of the property (i.e., apart from his share) available to the family, which retains its undivided status. It is only upon one or other of these events that there arises, in relation to the entirety of the common property or a particular asset (as the case may be) what Lord Westbury described* as a ' separation in interest and in right '."

*In *Appovier's* case (1866), 11 Moo. I.A. 75, 89.

p. 324, ll. 25–30. (3) The rigid rule of earlier times (against any alienation of family property by a co-parcener) has been gradually relaxed in

p. 325, ll. 23–31. South India and in certain other places in India. But this gradual modification has not resulted in converting the " interests " of " co-parceners " in the Hindu joint family into *proprietary rights* such as exist in the case of " co-owners " governed by the Roman-Dutch Law of Ceylon. A Mitakshara co-parcener cannot be said to have *always* enjoyed in the joint estate a vested proprietary interest or a " share " equivalent to " real property."

p. 327, ll. 12–43. 23. The learned Supreme Court Judge (Gratiaen J.) was of the opinion (which, it is respectfully submitted, was an erroneous one) that a reconciliation of the " apparently conflicting " theories of the two Hindu Law experts who gave evidence in the present case would result if effect

were given to the following propositions which, in his view, set out the distinction between the property rights of the family unit on the one hand and of the individual co-parceners on the other :—

" So long as the status of a Hindu undivided family remains intact, and so long as there has been no division of title or separation of interests in respect of the whole or any part of the joint property, the true relationship is as follows :— p. 327, ll. 45–47

" 1. The ' co-parceners ' for the time being collectively hold the joint property for the benefit of all the members then living (including themselves) and of members thereafter to be born ; to this extent, the undivided family, in spite of fluctuating changes in its constitution, may properly be regarded as a corporate ' entity ' which is ' the true owner ' of the property to the exclusion of its individual members ; p. 327, l. 48 to p. 328, l. 4.

" 2. . . . the male ' co-parceners ' for the time being constitute at any particular point of time a ' hedge of trustees ' who, while enjoying community of interest and unity of possession in the property hold it collectively—indeed, as a sub-division of the larger group—for the benefit of the entire family ; the powers attaching to the management of the property, and the obligations towards the individual members who constitute the undivided family are centred in the *karta* who is the head of the family for the time being ; but in certain respects the power of alienation can only be exercised by all ' co-parceners ' acting collectively ; p. 328, ll. 5–14.

" 3. . . . upon the death of any male ' co-parcener ' his ' interest ' is automatically extinguished, and the property *continues* to be held by the surviving ' co-parceners ' for the benefit of the undivided family ; in other words, the interest which they enjoy upon his death is in truth a ' pre-existing interest ' no more and no less (see *In the matter of the Hindu Women's Right to Property Act* A.I.R. (1941) F.C. 72, at p. 78)." p. 328, ll. 15–20.

24. Applying the reasoning referred to in the preceding paragraph to the present case the learned Supreme Court Judge (Gratiaen J.) held that as during the lifetime of Arunachalam Junior there had not been any division of title or separation of interests in the joint property of the undivided family of which he was a co-parcener, his death had not caused any effective change in the title or possession of the said property ; and, consequently, his father who survived him did not receive any " property " which he did not have before. He held therefore that no " property " had " passed " within the meaning of Section 7 of the 1919 Ordinance. He expressed the further opinion that no alteration of property rights was introduced by the circumstance that the death of the son had resulted in the father becoming the sole surviving member of the former co-parcenary. It was his view that the son's death " did not operate either to disrupt the undivided family or to bring about an extinction of the beneficial ownership of that family in the property." p. 328, ll. 34–42. p. 328, l. 42, p. 329, ll. 20–21. p. 328, ll. 43–50.

p. 329, ll. 9–19. He rejected also the argument contained in Reason (5) of this Case (see page 14, *post*) on the ground that the statutory provisions upon which it was based were not relevant to the devolution of a co-parcener's interest in any part of the joint property of a Hindu undivided family.

p. 329, ll. 21–46. 25. On the question as to whether or not on the death of the son there had been a *notional* passing of property under Section 8 (1) (*a*) or Section 8 (1) (*b*) of the 1919 Ordinance, the learned Supreme Court Judge (Gratiaen J.) referred to the provisions of Section 17 (6) of the said Ordinance and said : " The deceased or someone else must have enjoyed in respect of the property *a beneficial interest capable of valuation in relation to the income which the property yields.*" It was his view that, during his lifetime, Arunachalam Junior's interest in the joint family property consisted of a mere right of maintenance by the *karta* out of the common fund to an extent which was at the *karta's* absolute discretion ; and this being his view (which, it is respectfully submitted, is contrary to law) he found it " impossible to conceive of a basis of valuation which, in relation to such an interest, would conform to the scheme prescribed by the said Section 17 (6)." He was also of the opinion that upon a cesser of the said interest of Arunachalam Junior no benefit of any value accrued to his father Arunachalam Senior as the sole surviving member of the co-parcenary. He held, therefore, that Section 8 (1) (*b*) of the 1919 Ordinance was inapplicable to the case.

p. 329, l. 46 to p. 330, l. 9. 26. Next, the learned Supreme Court Judge (Gratiaen J.) referred to the following arguments which, he said, had been advanced on behalf of the Crown in support of the submission that Arunachalam Junior must be *deemed* to have been " competent to dispose " of his share of the property within the meaning of Section 8 (1) (*a*) of the 1919 Ordinance : " (A) that (having regard to the recognition now given to the rights of purchasers for value) a ' co-parcener ' is at any point of time ' competent to dispose ' of a fractional share of the joint property *for value*, the appropriate fraction being ascertained by reference to the total number of ' co-parceners ' then alive ; (B) that, in the alternative, a ' co-parcener ' may at any time form a unilateral intention to separate himself from the undivided family and to communicate that decision to the other ' co-parcener ' ; he would thereupon become vested with a ' definite and certain ' share of which he would be ' competent to dispose ' in any way he pleased."

p. 330, ll. 10–35. The learned Judge rejected these arguments because it was his view that " an alienee for value does not become vested immediately with a definite share *in specie* of any part of the joint property " and because, although a co-parcener becomes " competent to dispose " of a definite share after he has communicated to the other co-parceners his unilateral decision to separate from them the " competence " does not exist until the disposing qualification (i.e., the intention to separate and its communication) has first been attained—which had not happened in the present case.

p. 331, ll. 18–19. 27. Finally, the learned Supreme Court Judge (Gratiaen J.) held that the assessees could not be made accountable for any estate duty levied

p. 331, ll. 20–26. under the said Section 8 (1) (*a*). The machinery for the assessment and collection of the duty was now contained in the 1938 Ordinance under

Section 24 of which " the executor of the deceased " was primarily accountable for duty levied on property which the deceased was " competent to dispose " at his death. By Section 77 of the said Ordinance " executor " p. 331, l. 26–33. includes " any person who takes possession of, or intermeddles with, the property of a deceased person " but, in the learned Judge's view, the assessees (who, as administrators of the estate of Arunachalam Senior were in, or were entitled to be in, possession of the whole property) could not be regarded as having " taken possession of or intermeddled with " the property of Arunachalam Junior after his death ; for such interests as the said deceased had enjoyed in the joint property were, in the learned Judge's opinion, automatically extinguished when he died.

28. The learned Supreme Court Judge (Gratiaen J.), in conclusion, p. 331, ll. 39–45. referred to the argument on behalf of the assessees " which was submitted in appeal with very little enthusiasm that Section 73 of the new Ordinance operates retrospectively so as to exempt the joint property of a Hindu undivided family even in the case of ' co-parceners ' dying before the 1st April, 1937." He said that it was no longer necessary for him to deal with the contention but he rejected it nevertheless being of the clear opinion that that section had no relevancy at all to the present appeal.

29. A Decree in accordance with the Judgment of the Supreme Court was entered on the 12th October, 1953, and against the said Judgment and Decree this appeal is preferred to Her Majesty in Council, the Appellant having obtained leave to appeal by decrees of the Supreme Court dated pp. 337, 339. the 18th February, 1954, and the 28th May, 1954.

30. The present Respondents Nos. 1 to 3 were substituted or entered of record in place of the two previous Respondents ((1) V. Ramaswami Iyengar and (2) K. R. Subramania Iyer, Administrators of the Estate in Ceylon of Rm. Ar. Ar. Rm. Arunachalam Chettiar, deceased) by Order of the Supreme Court, dated the 10th August, 1956.

In the Appellant's respectful submission the Judgment and Decree of the Supreme Court, dated the 12th October, 1953, and, in so far as it relates to the subject-matter of this appeal the Judgment and Order of the District Court, dated the 8th November, 1949, should be set aside, the appeal against the assessment should be dismissed, and this appeal should be allowed, with costs throughout, for the following among other

REASONS

(1) BECAUSE the property assessed for estate duty in this case passed upon the death of Arunachalam Junior within the meaning of Sections 7 and 8 of the 1919 Ordinance and is therefore liable to the payment of the said duty.

(2) BECAUSE upon a proper appreciation of the whole of the evidence in this case and upon any reasonable interpretation and application of the relevant portions of the Mitakshara system of Hindu Law (as, on the material dates, it was applicable to Nattucottai Chettiars in the old Province of Madras) it is clear that Arunachalam

Senior and Arunachalam Junior together, when both were alive, constituted an undivided Mitakshara co-parcenary owning, as co-parceners, in equal, if undivided, shares, the entire property of the joint Hindu family of which they were members and of which the only other members were non-co-parceners being females entitled only to certain rights of maintenance and residence.

(3) BECAUSE during his lifetime Arunachalam Junior could admittedly have obtained his share of the co-parcenary (or joint Hindu family) property by partition or, by communicating to his father his intention to separate, could have fixed the amount of his share as at the date of such communication, or could have alienated his share for value and he was, therefore, at the time of his death, competent, or must be deemed to have been competent, to dispose of the property assessed within the meaning of Section 8 (1) (*a*) of the 1919 Ordinance and the definition of the term " competent to dispose " in Section 2 (2) (*a*) thereof.

(4) BECAUSE, alternatively, on Arunachalam Junior's death all his proprietary interests in the co-parcenary (or joint Hindu family) property passed, or accrued to, or were taken by, Arunachalam Senior as the sole survivor of the former co-parcenary and to the extent to which Arunachalam Senior thus benefited the said proprietary interests of Arunachalam Junior must be deemed to be property which passed on his death within the meaning of Section 8 (1) (*b*) of the 1919 Ordinance.

(5) BECAUSE, alternatively, the devolution of at least so much of the Ceylon estate of Arunachalam Junior as consisted of immovable property held by him jointly with his father and/or other persons must, in accordance with the accepted rule of private international law, be governed by the *lex situs* which is contained in Section 18 of the Partition Ordinance No. 10 of 1863 (C. 56) and/or Section 7 of the Wills Ordinance No. 21 of 1844 (C. 49) and the effect of which is to ensure devolution of the said immovable property by succession (and not by survivorship) thus causing it to attract estate duty as property passing on the death of the deceased within the meaning of Section 7 of the 1919 Ordinance.

(6) BECAUSE the said interests of Arunachalam Junior were proprietary interests capable of valuation in relation to the income yielded by the property and the decision of the Supreme Court to the contrary was based upon the erroneous view that during his lifetime Arunachalam Junior's interest in relation to the joint family property was limited to a mere right of maintenance therefrom.

(7) BECAUSE the assessees, as administrators of the estate of Arunachalam Senior, were in possession of, or had intermeddled with, Arunachalam Junior's property which on the son's death, had passed to the father as sole survivor of the former co-parcenary.

(8) BECAUSE the decisions of the Courts below on questions of law and fact in relation to the subject-matter of this appeal were based not upon a true appreciation of the effect of the expert evidence which was given in the case (and the authorities upon which the said evidence was based) but upon incorrect inferences drawn therefrom.

FRANK SOSKICE.
JOHN SENTER.
R. K. HANDOO.

ANNEXURE " A "

THE ESTATE DUTY ORDINANCE No. 8 OF 1919.

Interpretation

2.—(1) In this Ordinance, unless the context otherwise requires, the term—

" Estate duty " means the duty imposed under the provisions of this Ordinance in case of the death of any person dying on or after the commencement* of this Ordinance.

*July 1, 1919.

" Deceased " means any person dying on or after the commencement of this Ordinance.

* * * * *

" Property " includes movable and immovable property of any kind situate or being in the Colony and the proceeds or sale thereof respectively, and any money or investment for the time being representing the proceeds of sale. . .

" Property passing on the death " includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and the expression " on the death " includes " at a time ascertainable only by reference to the death ".

(2) For the purposes of this Ordinance—

(*a*) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property; and the expression " general power " includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself.

* * * * *

Grant of estate duty.

7. In the case of every person dying after the commencement of this Ordinance, there shall, save as hereinafter expressly provided, be levied and paid, upon the value of all property settled or not settled, which passes on the death of such person, a duty called " estate duty ", at the graduated rates set forth in the Schedule to this Ordinance.

What property is deemed to pass.

8.—(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say :—

(*a*) Property of which the deceased was at the time of his death competent to dispose.

(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest . . .

* * * * *

17.—(6) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

(*a*) If the interest extended to the whole income of the property, be the value of that property ; and

(*b*) If the interest extended to less than the whole income of the property, be such proportion of the value of the property as corresponds to the proportion of the income which passes on the cesser of the interest.

* * * * *

THE ESTATE DUTY ORDINANCE

(Chapter 187)

6th January, 1938.

24. The executor of the deceased shall pay the estate duty in respect of all property of which the deceased was competent to dispose at his death... Liability of executor.

26.—(1) Subject to the provisions of sub-section (2)—

(*a*) the estate duty payable by an executor shall be a first charge on all the property of which the deceased was competent to dispose at his death and such charge may be enforced against any such property for the recovery of the whole or any part of such estate duty ;

(*b*) the estate duty payable by any person other than the executor in respect of any property shall be a first charge on that property.

(2) Subject as hereinafter provided, the first charge referred to in sub-section (1) shall rank in priority over all alienations, leases and incumbrances effected or created before or after the death.

Provided that . . .

(3) . . .

* * * * *

77.—(1) In this Ordinance, unless the context otherwise requires— Interpretation.

* * * * *

" deceased " or " deceased person " means any person dying on or after the first day of April, nineteen hundred and thirty-seven ;

" estate duty " or " duty " means the duty imposed under this Ordinance ;

" executor " means the executor or administrator of a deceased person, and includes, as regards any obligation under this Ordinance, any person who takes possession of, or intermeddles with, the property of a deceased person, and any person who has applied or is entitled to apply to a District Court for the grant or re-sealing of probate or letters of administration in respect of the estate of a deceased person.

* * * * *

Recovery of estate duty due under Ordinance No. 8 of 1919.

79.—(1) Any estate duty payable in respect of property passing on the death of any person who died at any time between the first day of July nineteen hundred and nineteen, and the first day of October, nineteen hundred and thirty-five, shall so far as that duty is unpaid on the date of the commencement of this Ordinance be assessed, paid, collected or refunded in accordance with the provisions of this Ordinance ; and such provisions, so far as they are not inconsistent with the provisions of sections 1 to 17 of the Estate Duty Ordinance, No. 8 of 1919,* and the rules and forms prescribed thereunder, shall have application accordingly . . .

*Partly repealed by 1 of 1938.

THE WILLS ORDINANCE
(Chapter 49)

23rd December, 1844.

No survivorship as to property undivided held in shares, unless expressly stipulated for.

7. And for the avoiding of all doubts and questions as to the respective rights of persons jointly holding landed property situated within certain districts of this Island, it is further enacted and declared that all landed property situated in this Island which shall belong to two or more persons jointly, whether the same shall have come to them by grant, purchase, descent, or otherwise, is and shall be deemed and taken to be held by them in common, and upon the decease of any of such persons the said property so jointly possessed shall not remain or belong to the survivor, but all the right, share, and interest of the person so dying in and to the property so jointly possessed as aforesaid shall form part of his estate ; and the person or persons to whom the same shall by him be devised or bequeathed, or to whom it shall devolve, shall thereupon become and be co-proprietors with the survivor in the said property, in the proportion and according to the share of such deceased person therein, unless the instrument under which the said property is jointly held and possessed, or any agreement mutually entered into between them, shall expressly provide that the survivor, upon such decease, shall become entitled to the whole estate.

THE PARTITION ORDINANCE
(Chapter 56)

1*st January*, 1864.

No survivorship as to property held in undivided shares unless expressly stipulated for.

18. All landed property situated in this Island which shall belong to two or more persons jointly, whether the same shall have come to them

by grant, purchase, descent, or otherwise, is and shall be deemed and taken to be held by them in common, and upon the decease of any such persons the said property so jointly possessed shall not remain or belong to the survivor, but all the right, share, and interest of the person so dying in and to the property so jointly possessed as aforesaid shall form part of his estate; and the person or persons to whom the same shall by him be devised or bequeathed, or to whom it shall devolve, shall thereupon become and be co-proprietors with the survivor in the said property, in the proportion and according to the share of such deceased person therein, unless the instrument under which the said property is jointly held and possessed, or any agreement mutually entered into between them, shall expressly provide that the survivor, upon such decease, shall become entitled to the whole estate.

ANNEXURE " B "

A SUMMARY OF RELEVANT PORTIONS OF THE EVIDENCE OF K. BHASHYAM, ADVOCATE, MADRAS HIGH COURT, IN SUPPORT OF THE ASSESSEES.

NATTUCOTTAI CHETTIARS.—The members of this Hindu community (to which the joint family concerned in this appeal belonged) are resident mainly in the southern portions of the original Madras province. They are governed by the Mitakshara School* of Hindu Law as recognised in Madras. p. 59, l. 46 to p. 60, l. 5. p. 60, ll. 42–43.

*The propositions of Hindu Law referred to, and applied, by both experts are, or purport to be, of this School.

SUCCESSION AND SURVIVORSHIP.—Under the Hindu Law there is no succession of property. The joint members of the family take (whatever they " take ") by survivorship. The rights of the survivors are those possessed by them before the death. p. 77, ll. 4–7.

" Survivorship " in Hindu Law means that when a person dies whatever interest he has dies with him. On the death of one of several co-parceners the survivors take that in which they already had an interest during the deceased's lifetime. The deceased's share goes, or attaches itself, to the shares of the survivors. In this sense there may be said to be an accretion to the shares of the other members. p. 93, ll. 44–46. p. 95, ll. 1–25.

THE JOINT HINDU FAMILY.—A joint Hindu family is the normal state of Hindu society. It consists of males and females who are joined together in respect of food, worship and estate. Members are admitted into the family by birth, adoption and by marriages whereby women enter into a family. The family as a sort of corporation owns property. The ownership of this joint family property vests in the family and every member of the family is entitled to its enjoyment. Joint family property cannot be regarded as co-parcenal property. Its character cannot be changed—it cannot be made the separate property of a member of the family in whose hands it is. When property is acquired as a result of the partition of joint family property its character as joint family property continues. " Separate property " and " joint property " are mutually exclusive terms. p. 62, ll. 14–17. p. 61, l. 34. p. 61, ll. 45–46. p. 61, ll. 16–25. p. 62, ll. 6–7. p. 63, ll. 12–16. p. 105, ll. 36–37. p. 85, ll. 11–20. p. 86, ll. 5–9. p. 62, l. 48 to p. 63, l. 3. p. 81, ll. 44–45.

p. 84, ll. 18–42. One person with ancestral property in his hands could constitute a joint family. If there is a possibility of his having a son then the property would become joint family property, even if the contingency has not happened. The prospective father would have however a right of disposal.

p. 61, ll. 24–28. " Self-acquired property " is property acquired by a Hindu without detriment to the joint family property.

p. 62, ll. 40–48. There is no presumption that a joint family owns any property although that is the usual rule. Individual members of the family may have separate property of their own acquired either by their personal exertion or otherwise—e.g., by gift. The owner of separate property can deal with it as he likes. Women who are born into a joint Hindu family or who enter into it by marriage become members of the family and have certain interests in the joint family property.

p. 72, ll. 1–4.

p. 72, l. 45 to p. 73, l. 19. A joint Hindu family may consist of females only.

p. 61, ll. 34–45. THE CO-PARCENARY.—Within a joint Hindu family there is a narrower body called " the co-parcenary." This narrower body consists of a man, his son, his son's son, and his son's son's son. The eldest co-parcener or head of the family is generally the *karta* (manager) of the joint family.

p. 62, ll. 36–37.

p. 64, ll. 10–20.

p. 61, ll. 43–44. There are differences between a co-parcener's rights in the joint family property and those of an ordinary member of the family.

p. 91, ll. 16–45. A co-parcener is not the owner of co-parcenary property—" he only has community of possession, i.e., he has got the right to enjoy the profits of the property in common with the rest." He is not entitled to take physical possession of the property to the exclusion of the others. No matter how large the joint family estate a co-parcener's interest therein is merely a right of maintenance. He has no vested interest in the joint family property. He cannot predicate any share or item as his own. All that he can transfer (see also " Alienation " *infra*) is an *equity* to work out his right. On his death his rights are extinguished and do not pass to another.

p. 89, ll. 14–22.

p. 103, ll. 11–30.

p. 101, ll. 20–22.

p. 93, ll. 1–5. SOLE SURVIVING CO-PARCENER.—A sole surviving co-parcener benefits not by the death of the other co-parcener or co-parceners but by the consequence of the law supervening. The only benefit that accrues to him is that his right of disposing of the property is enlarged.

p. 90, ll. 1–11.

p. 104, ll. 29–43. The statement in Mayne to the effect that property vested in the last surviving male member becomes his separate property subject to its becoming at any moment co-parcenal property is wrong. Such property is joint family property in the hands of the sole surviving co-parcener and he has, in regard to it, a disposing power.

p. 75, ll. 24–30. A sole surviving co-parcener can alienate the joint family property lawfully and when such an alienation is followed by an adoption the adopted son takes only that which is left after the alienation.

p. 96, l. 23 to p. 97, l. 31. Although he has the power to alienate the joint family property a sole surviving co-parcener is not the owner thereof—except in so far as he

is entitled to maintenance therefrom. When he does alienate the property he is regarded, in theory, as being also the other co-parcener or co-parceners (who have predeceased him) and their consent to the alienation is then implied. On such an alienation the transferee's title to the property is absolute. p. 109, ll. 37–43.

A sole surviving co-parcener can dispose of the joint family property by will but the disposition would be invalidated by the birth of a child. His power to make a gift of the property *inter vivos* is unlimited. p. 99, ll. 36–38. p. 87, ll. 40–42.

A sole surviving co-parcener holds the joint family property subject to the obligations that existed previously. He can make a gift of the property but not to the prejudice or detriment of other members of the family. p. 89, ll. 39–45.

On the death of a sole surviving co-parcener the family does not come to an end if there is in existence a potential mother with power to adopt a son into the family. p. 74, ll. 5–8.

ALIENATION OF JOINT FAMILY PROPERTY. (See also " Sole Surviving Co-parcener " *supra*).—Unless for family necessity (e.g., marriage expenses, payments of taxes, etc.) or for family benefit or for pious purposes the *karta* (manager) cannot alienate the joint family property. A co-parcener (or member) may do so for value only if all the others consent. And, in the absence of any consent or arrangement between the co-parceners, no portion of the joint family property may be disposed of by will. No member of the joint family can make a *gift* of any portion of the joint family property except (1) in the case of a daughter's marriage when a father may make such a gift, or (2) for pious purposes. p. 64, ll. 16–21. p. 64, l. 47 to p. 65, l. 4. p. 99, ll. 27–35. p. 65, ll. 24–30.

According to pure Hindu Law a co-parcener cannot alienate his share as his share is unpredictable. There can be no definite share until partition. In modern times where a co-parcener has alienated his share for value the Courts have recognised an equity in favour of the purchaser who, standing in the vendor's shoes, can claim a partition. p. 66, ll. 28–39.

When on the partition the vendee is allotted a share he takes it subject to the rights of the family. A co-parcener has no vested interest and, on a transfer by him of his share, the transferee gets no vested interest in the share transferred. The Courts, however, work out the equities. p. 67, ll. 2–30. p. 68, l. 32 to p. 69, l. 8.

A co-parcener may divide in status from his other co-parceners and thereafter may dispose of by will what would become his share. He may divide himself by merely declaring his intention to separate. He cannot however dispose of the property to the detriment of other members of the family. p. 67, l. 50 to p. 68, l. 11.

Females may not alienate and their consent to an alienation of joint family property is not necessary. If however their right to maintenance is affected by an improper alienation they can seek redress in the Courts. Joint family property cannot be alienated to their detriment. p. 65, ll. 13–24. p. 66, ll. 25–26.

PARTITION.—Only co-parceners are entitled to demand a partition or division of joint family property. Partition can be achieved either amicably (by agreement) or by an action in Court. Male members who are not p. 62, ll. 28–30. p. 63, l. 46 to p. 64, l. 1.

co-parceners and female members (except as to rights granted to widows under the Hindu Women's Right to Property Act, 1937) cannot demand a partition.

p. 88, l. 27 to p. 89, l. 8.
p. 96, ll. 10–22.
p. 100, ll. 6–7.

The right to demand a partition is not a proprietary right even though it ultimately results in affecting property. It is a right to work out a co-parcener's right as a member of the family. By it a co-parcener exercises a process to get some interest in the property at a later date.

p. 64, ll. 5–10.

On a partition the joint family and joint family property are divided. Each part or group becomes a new family with its own property which becomes the joint property of that separated family subject to the
p. 106, ll. 40–43. exception where each dividing member is the sole member. The head of each separated group would necessarily be a male.

p. 107, ll. 9–30.

On a partition of joint family property the property awarded to any separated member cannot be regarded as his separate property if there are prospective mothers. In such a case it retains its character of joint family property.

p. 115, ll. 45–46.
p. 74, ll. 33–34.

ADOPTION.—A Hindu widow cannot adopt to herself. She must adopt to her husband and the adoption takes effect from the date of the death of the husband.

p. 74, ll. 42–50.

The power of a Hindu widow to adopt does not come to an end on the death of the sole surviving co-parcener. The power does not depend upon the vesting or divesting of the estate and is unaffected by partition between
p. 75, ll. 4–12. the co-parceners. When a sole co-parcener dies unmarried and without issue and his mother validly adopts a son the adoption will take effect upon the property which belongs to the joint family. The fact that the property has vested in the meantime in the sole surviving co-parcener's heir is not of itself a reason why it will not vest in, and pass to, the adopted son.

p. 117, ll. 41–44.

Among Nattucottai Chettiars the widows of a deceased person can each adopt a son to the deceased by custom. If established this custom
p. 116, ll. 40–48. cannot be extended. Simultaneous adoptions are not sanctioned by Hindu
p. 78, ll. 26–32. Law but in this case there was a custom recognised by law under which Arunachalam Senior could, before he died, have adopted a son for each
p. 118, ll. 16–19. wife. There is no oral evidence in these proceedings which would support such a custom.

p. 120, ll. 38–43.

APPLICATION OF HINDU LAW TO THE PRESENT CASE.—(A) *When both father and son were alive.*—The power of alienating the joint family property was in the whole family for ownership of the property was in the whole
p. 75, l. 45 to p. 76, l. 3. family. The whole family consisted of the father, son, father's stepmother, father's wives, son's wife and certain daughters. The co-parceners were the father and son.

p. 76, ll. 44–48.

The son's interest in the joint family property was merely a right of maintenance.

p. 76, ll. 21–33.
p. 109, ll. 19–32.

At the time of his death the son was not competent to dispose of the joint family property whether by gift, or by will, or for value. If, however,

he had alienated his share the purchaser would, by application of equitable principles, have had the right to have the share allotted to him on a partition. p. 108, ll. 22–40.

(B) *On the son's death.*—On the son's death his interests ceased and nothing passed from him to any other person. The son had only a right of maintenance which ceased on his death. The benefit derived by the others was " practically nothing because their right to be maintained out of the family funds is still there, neither increased or diminished and therefore no benefit accrues to anybody." p. 76, ll. 46–48 p. 77, ll. 1–4. p. 77, ll. 20–25.

The son did not die possessed of property which he was competent to dispose of. Increased powers in favour of the father arose when the son died, but this was because the family continued with the father as sole member (co-parcener ?) and not by reason of the cesser of the son's interests. The son, at the time of his death, had not the right to dispose of his property, but by his death the father's powers of disposal were enlarged because " something has happened to make that power bigger." The benefit that could be said to have accrued to the father was only in connection with the right to maintenance. The right of disposing of the entire property accrued to him because he became, by the son's death, the surviving co-parcener—not because of cesser of the son's rights. p. 99, ll. 39–43. p. 109, ll. 19–31. p. 121, ll. 15–24. p. 100, ll. 19–26. p. 100, ll. 34–42. p. 77, ll. 36–37.

After the son's death the father could have made a gift of the entire property or disposed of it by will, provided he made provision for maintenance of the female members of the family. In the absence of such provision the title of the transferee or devisee would be subject to the said obligation to maintain. The property was joint family property when both were alive and when the son died it retained this character in the father's hands although the father could have done a number of things with it as if it were his separate property. p. 110, ll. 1–15. p. 120, ll. 19–23.

On the son's death the father and the female members constituted a Hindu undivided family of which the daughter-in-law had a right to adopt a son to her deceased husband. p. 78, ll. 13–16.

(C) *On the father's death.*—The joint Hindu family did not come to an end on the father's death for there were then living three potential mothers. p. 74, ll. 26–29.

The three children adopted in 1945 take as adopted sons as from the dates of the deaths of father and son subject to any previous alienations made. p. 114, ll. 14–15.

On the father's death his widows, before they adopted sons, took the joint family property by succession—as heirs. They did not however take it absolutely and could not have alienated it except for necessities. On their deaths it would (but for the adoptions) have passed to others. It remained throughout as joint family property. p. 104, ll. 23–28. p. 106, ll. 1–18.

The father's will (in Tamil) authorised the executors, after consultation with the widows, to select satisfactory boys and cause them to be adopted by the widows. Translated literally the power given by the testator to his widows was to adopt sons *to* themselves but " to " should read as " by." p. 116, ll. 20–39.

p. 110, ll. 16–25.

(D) *Rights of father and son contrasted.*—(*a*) The son could not alienate any portion of the joint family property. The father, as sole surviving co-parcener, could do so.

(*b*) The son could not make a gift of the property or dispose of it by will. The father, as sole surviving co-parcener, could do so, subject to the obligations to maintain the female members of the family.

(*c*) While the son (? father) was alive the obligations of the joint family remained—being on property and not on the person.

ANNEXURE " C."

A SUMMARY OF RELEVANT PORTIONS OF THE EVIDENCE OF K. RAJA AIYER, ADVOCATE-GENERAL, MADRAS.

p. 189, ll. 17–33.

BASIC PROPOSITIONS OF THE RELEVANT HINDU LAW.—1. Only co-parceners (and not the other members of a Hindu joint family) are the owners of the co-parcenary (or joint family) property.

2. Until a partition of co-parcenary (or joint family) property has been effected each co-parcener has in such property a proprietary, if fluctuating, interest.

3. In the hands of a sole surviving co-parcener (i.e., the sole survivor of a former co-parcenary) such property ceases to be co-parcenary (or joint family) property and becomes the survivor's separate property in the same way as property obtained by a co-parcener on partition would; and the property continues to retain that character as long as no other co-parcener is brought into the family by birth or adoption.

4. The effect of an adoption of an heir is that the adopted son takes the property which has already devolved on others by inheritance but he takes it subject to all lawful dispositions which have been made and obligations and liabilities which have already attached to the property prior to the date of adoption.

p. 133, ll. 2–15.

SUCCESSION AND SURVIVORSHIP. (See also " The Co-parcenary " and " Sole Surviving Co-parcener " *infra.*)—On the death of one of several co-parceners in a joint Hindu family his share is taken by the other co-parceners by operation of the law of survivorship. There is a definite *nexus* between the death and the enlargement of the share of the surviving co-parcener or co-parceners. If a man dies leaving separate property then that property is taken by his sons. If he dies leaving co-parcenary property the same process has taken place but in favour of the co-parcenary. The surviving co-parceners benefit in the sense that his share is distributed among those who remain.

p. 133, ll. 31–34.

p. 133, l. 41 to p. 134, l. 4.

p. 134, ll. 24–36.

A deceased co-parcener's interest in the co-parcenary is property which the deceased was competent to dispose of for value during his lifetime.

By reason of the cesser of the said interest a benefit would accrue to the surviving co-parceners. (See, also, " The Co-parcenary " and " Alienation " *infra.*)

On the death of a sole surviving co-parcener succession is by devolution, i.e., inheritance (and not survivorship). p. 138, ll. 24–25.

THE JOINT HINDU FAMILY.—The joint Hindu family is usually a group of persons lineally descendant from a common ancestor and includes the wives and unmarried daughters of such lineal descendants. Thus it includes also a deceased co-parcener's widows. The recent trend of decisions is that females by themselves can constitute a joint Hindu family. p. 122, ll. 24–33. p. 123, ll. 3–5.

There is no distinction between a Hindu undivided family and a Hindu joint family. p. 122, ll. 26–27.

It would be misleading to call the joint Hindu family a corporation and then to apply to it the incidents of a corporation. It is not a corporation in the sense that as a unit it possesses property apart from the co-parcenary. Unlike some corporations, when a joint Hindu family is reduced to only one member the joint family ceases to exist; for one member cannot constitute a joint Hindu family. Nor would property in the hands of the sole survivor be co-parcenary property. p. 124, ll. 24–41. p. 187, ll. 40–48. p. 122, ll. 34–43.

A Hindu bachelor may be a person who could bring a family into existence but until he does so he cannot by himself be regarded as a Hindu family.

It is nobody's case that the joint family is identical with a joint stock company with all its incidents. The joint Hindu family is not a legal entity. It can enter into contracts but only through the *karta* or head of the family who is the family's representative in all such matters. p. 163, ll. 45–46.

Joint family property becomes separate property in the hands of a sole surviving co-parcener and this character of separate property remains until a co-parcener comes in as a result of birth or adoption. p. 166, ll. 9–19.

Self-acquired property retains its character as such until the acquirer throws it into, or blends it with, the joint family property, or if it takes a descent when it again becomes joint family property. p. 171, ll. 32–34. p. 184, ll. 23–26.

THE CO-PARCENARY.—The co-parcenary—a narrower body within the joint family—owns the property of the joint family. It is limited to persons who acquire an interest in the joint family property by birth (including adoption) and in whom the property is vested. p. 123, ll. 6–9, 34–38. p. 125, ll. 11–12. p. 157, ll. 19–39.

The terms " joint family property " and " co-parcenary property " are synonymous. In India the joint property of a Hindu undivided family can only mean the co-parcenary property of the joint family. p. 123, ll. 10–12, 32–33. p. 188, ll. 11–14. p. 164, ll. 12–16.

The joint family owns the property but it would be fallacious to say that it does so as a legal entity. It is the body of co-parceners within it that own the property. Co-parceners are not more than 3 degrees removed from the common ancestor (i.e., son, grandson and great-grandson). Females can be members of a joint Hindu family but cannot be co-parceners. The right of maintenance of female members is not an " interest " in the p. 162, ll. 33–38. p. 123, ll. 22–27. p. 123, ll. 21–24. p. 124, ll. 9–15.

p. 139, ll. 2–3.
p. 145, ll. 26–29.
p. 127, ll. 30–34.

family property—it is not (as in the case of co-parceners) a right on account of ownership. Their right to receive maintenance does not make them co-sharers with those who are liable to maintain them. The right is not referable to any ownership of the property. A co-parcener may be under an obligation to maintain certain persons but those persons themselves are neither the owners of the property nor have they any real rights in the property which remains the absolute property of the co-parceners.

p. 128, ll. 13–18.

Ownership vests in the holder of the property and the right of maintenance has not the effect of converting that property into joint family property.

p. 124, ll. 1–16.
p. 128, ll. 19–24.
p. 130, ll. 27–36.
p. 128, ll. 27–36.
p. 137, ll. 33–43.
p. 138, ll. 30–42.

Co-parceners have a real or proprietary interest in the joint family or co-parcenary property. A co-parcener's right in respect of the co-parcenary property is correctly described as " a share " therein. It is a proprietary interest and is, in that sense, property. It is a present vested interest which is transferable for value, the transferee taking a present vested interest until partition. A co-parcener has both unity of ownership and unity of possession. His right to maintenance is but part of his larger right of ownership. The view that a co-parcener's right is only a right of maintenance the property itself being owned by a unit called the joint family is far fetched and opposed to all the authorities. The true view is that the property is vested in the co-parceners as individuals, each co-parcener having with every other co-parcener unity of ownership and unity of possession. The fundamental conception of a co-parcenary is united ownership and possession and when, as in the case of a sole co-parcener, this does not exist there is no co-parcenary. If there be one co-parcener and two joint family members and one of the latter dies then the joint family would not come to an end but the co-parcenary would. If however there be only one member left who is also the sole co-parcener then both the joint family and the co-parcenary are at an end. As to " Sole Surviving Co-parcener " see also *infra*. A co-parcener cannot claim any specific portion of the property or income as his own but he is entitled to be in possession of any portion of the property and he cannot be excluded from such rights which are similar to those of a co-owner.

p. 130, ll. 20–25.
p. 179, ll. 32–36.

If a co-parcener cannot sue for his share of the profits of the joint family estate it is not because there is no such divided share but because he has not obtained it by partition.

p. 131, ll. 21–24.

On a co-parcener's conversion to another religion he ceases to be a member of the family and takes his share of the property as at that time.

p. 125, ll. 21–37.
p. 137, l. 30 to p. 138, l. 21.
p. 138, ll. 26–27.
p. 174, ll. 25–33.
p. 139, ll. 37–40.
p. 184, l. 30 to p. 185, l. 10.

SOLE SURVIVING CO-PARCENER. (See also " The Co-parcenary," *supra*.)—Strictly speaking there cannot be (or continue to be) a " sole surviving co-parcener " for, in such a case it would be meaningless to talk of *united* ownership and possession which are fundamental conceptions of a co-parcenary. The co-parcenary or ancestral property in the hands of the sole survivor becomes his " separate property." It passes by succession, testate or intestate. There is no distinction between property which a co-parcener obtains by partition and that which is in his hands as the sole surviving co-parcener—the legal incidence is the same. In each case the property would be separate property in the hands of either the sole surviving co-parcener or the remaining member. The potentiality of its

becoming co-parcenary property is the same in each case. A bachelor who obtains property on partition is entitled to treat the property as his separate property although his mother is alive and entitled to maintenance.

The statement in Mayne that " family property vested in the last surviving male member or co-parcener will be his separate property subject to its becoming at any moment co-parcenary property when he has male issue or when adoption is made to him or to a predeceased co-parcener in the family " is correct. p. 146, ll. 1–7.

The sole surviving co-parcener is regarded in Hindu Law as the real owner of the property in his possession. He can dispose of it by will, or by way of gift, or by transfer for consideration. His unlimited right to do so is not restricted by rights of maintenance which other members of the family may be entitled to or by certain obligations attaching to the property, e.g., the widow's right to reside in an ancestral house which has been sold for the co-parcener's pleasure and not for payment of family debts. The liability to maintenance would attach to the property in the hands of any donee receiving the property from the sole surviving co-parcener by way of gift. The widow of a deceased co-parcener has a right of maintenance against the co-parcenary property in the possession of the sole surviving co-parcener. p. 125, l. 38 to p. 126, l. 39. p. 137, l. 38 to p. 138, l. 27. p. 139, ll. 2–14. p. 168, ll. 16–39. p. 167, ll. 28–33.

A sole surviving co-parcener is entitled to dispose of the property in his possession by virtue of his own right (and not because, by some fiction, he represents also non-existent co-parceners whose consent is presumed). " It is also difficult for me to conceive of a sole surviving co-parcener as representing the spirits of a deceased co-parcener and unadopted co-parceners." p. 146, ll. 24–34.

ALIENATION.—In some provinces in India the right of private alienation has been conceded—in others it has been denied. But even where it is denied the co-parcener has a share in the property—he has proprietary interests which are taken by the other co-parceners upon his death. p. 132, ll. 23–40.

In Madras (to which State in India the family belongs) a co-parcener is entitled to alienate his undivided share for value ; and when such an alienation takes place it is the property—the share—which is transferred however the *quantum* be worked out. It would be incorrect to say that what is transferred in such cases, or what is purchased, is a right in equity. p. 180, ll. 23–25.

A co-parcener can sell his share but cannot ordinarily make a gift of it nor dispose of it by will. The right to sell is a late development for originally a co-parcener could sell only for family necessities. p. 177, ll. 4–48. p. 137, ll. 15–21. p. 136, ll. 42–44.

An agreement by a co-parcener to sell his share can now be specifically enforced. p. 130, ll. 27–36.

What the co-parcener sells and what the vendee takes is a present vested interest—the transfer operating upon the vested interests of the transferor in the co-parcenary property just before the alienation. Where there is a sale the vendee enforces his rights by a suit for partition and the equities between the vendee and the rest of the family are then worked p. 137, ll. 15–21.

out by the Courts. Consent of all the other co-parceners might enable a co-parcener to make a gift of his share; this would not apply however to a testamentary disposition.

p. 146, ll. 36–40. A co-parcener cannot, even with the consent of the other co-parceners, dispose of by will any part of the co-parcenary property.

p. 136, ll. 23–25. A co-parcener has a disposable share in the joint family property which is transferable to an execution purchaser. The attachment of a p. 132, ll. 8–14. co-parcener's share in execution of a money decree creates as it were a lien on the share—which is worked out by giving the execution purchaser a declaration that he has purchased the said share and leaving it to him to work out his rights by a suit for partition.

p. 132, l. 46 to p. 133, l. 2. A release of his interests in favour of the other co-parceners can be effected by a co-parcener; and this would be a release of his share in the joint family property.

p. 131, ll. 25–28. On his insolvency and adjudication a co-parcener's share in the co-parcenary property vests in the Official Receiver.

p. 130, ll. 27–36. PARTITION.—Each member of an undivided Hindu family has a present vested interest which, by a partition at his will and pleasure, can be converted into a separate interest. Such interest is transferable, in whole or in part, for value, and when this happens the transferee takes a present vested interest and not an uncertain future contingent interest fluctuating until partition.

p. 131, ll. 16–17. The right to give a notice of an intention to separate is a right in the co-parcenary property.

p. 171, l. 35 to p. 171, l. 17. On a partition a share taken by a co-parcener who has no son becomes —in relation to those from whom he has separated—his separate property and this continues to be so until he gets a son.

p. 184, l. 30 to p. 185, l. 10. The incidents of property obtained by a member of a joint Hindu family on partition and that in the hands of a sole surviving co-parcener are the same—in each case the property would be separate property. On partition of the entire family property the liability for the maintenance of the mother is fastened to the divided share of a bachelor and in his hands the property is subject to maintenance and to the potentiality of his marrying and begetting children and thereby becoming joint family property. Until these events take place the property is his own.

p. 186, ll. 28–44. The award of mesne profits anterior to the date of partition is a recognition of a co-parcener's right to property. It is based upon the fact that a share is awarded at the time of the partition; and in a case of exclusion the relief is carried back to an anterior period so as to hold that the plaintiff in the action was entitled to that share and to the profits thereof even from the earlier period.

p. 150, ll. 11–12. ADOPTION.—Adoption is always made to a male. Hindu law does
p. 152, ll. 20–25, 45. not permit a widow to adopt to herself and any such adoption would, by Hindu Law, be invalid.

Simultaneous adoption of two sons by two widows of a deceased Hindu is not valid under Hindu Law, and, in the absence of proof of custom, would be ineffective. p. 150, ll. 30–39.

The power to adopt has never been held to affect the vesting of property in persons. p. 140, ll. 20–21.

The rights of an adopted son arise only from the date of the adoption and have no retrospective effect. p. 149, ll. 8–41.

APPLICATION OF HINDU LAW TO THE PRESENT CASE.—(A) *Authorities.*—If (in 1948) this case were to be decided in Madras (in which State the Arunachalam Chettiar family was resident) the decisions of the Privy Council would be supremely authoritative, the Federal Court decisions would come next, the Madras High Court decisions would follow, and then the decisions of other High Courts; failing all these, the case would be decided in accordance with the fundamental notions of Hindu Law and common sense. p. 154, ll. 4–9. p. 162, ll. 13–14.

(B) *When both father and son were alive.*—The right of either father or son to alienate his share in the co-parcenary for value would be governed by the Hindu Law relevant to the question—see " The Co-parcenary " and " Alienation " *supra.*

The son could not have disposed of his share by will. p. 181, ll. 15–16.

(C) *On the son's death.*—The son's share in the joint family or co-parcenary property passed on his death to the father, the surviving co-parcener. And see " Succession and Survivorship," *supra.* p. 147, l. 45 to p. 148, l. 3.

From the time of the son's death up to the death of the father the property was never the joint property of an undivided family—it did not resume or continue its original character. In the hands of the father it was not co-parcenary or joint family property—and the decision of the Federal Court in other proceedings in India relating to this estate (see *Rm. Ar. Ar. Rm. Ar. Ar. Umayal Achi* v. *Lakshmi Achi* A.I.R. (1945) F.C. 25) does not support the contrary view. p. 148, ll. 10–11. p. 141, l. 44 to p. 142, l. 5.

(D) *On the father's death.*—The father was the surviving member of a co-parcenary and on his death the property devolved on the executors by his will. If the father had died intestate the property would have passed to his widows by succession—and would have done so immediately, for succession to property can never be in abeyance. p. 143, ll. 5–9. p. 147, ll. 1–5. p. 148, ll. 3–5. p. 189, l. 42 to p. 190.

" If the liability of the estate duty is to be determined with reference to the point of time at which the death took place I would say that the liability attaches in the hands of the executors and that the adopted son can take the estate subject to the obligation." p. 147, ll. 17–23.

The adoption by the son's widow to her husband would be unaffected by the adoptions of the father's widows to their husband. p. 181, ll. 35–37.

(E) *Impartible estates.*—In this case any analogy sought to be drawn from incidents relating to impartible estates would be as misleading as the analogy sought to be drawn from a corporation (see " The Joint Hindu Family " *supra*). An impartible estate is a creation of custom and requires special consideration. p. 183, ll. 6–11.

No. 16 of 1955.

In the Privy Council.

ON APPEAL

from the Supreme Court of Ceylon.

BETWEEN

THE ATTORNEY-GENERAL OF CEYLON . . . *Appellant*

AND

1. AR. ARUNACHALAM CHETTIAR
2. AR. RAMANATHAN CHETTIAR
3. AR. VEERAPPA CHETTIAR

(Substituted for (1) V. RAMASWAMI IYENGAR and (2) K. R. SUBRAMANIA IYER, Administrators of the Estate in Ceylon of RM. AR. AR. RM. ARUNACHALAM CHETTIAR, deceased)

Respondents.

Case for the Appellant

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