

THE
SIVAGANGA ZEMINDARY.

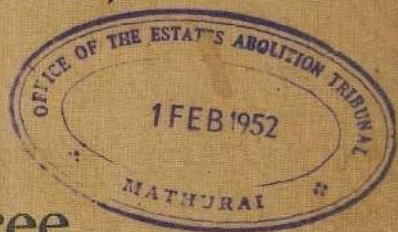


ORIGIN & ITS LITIGATION.

1730 TO 1899

WITH

A Genealogical Tree



COMPILED BY

H. Annaswamy Ayer,

2ND GRADE PLEADER & LESSEES' LAW OFFICER.

UNDER INSTRUCTIONS OF THE LESSEES

OF THE

SIVAGANGA ZEMINDARY.

1899.

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INTRODUCTION.

The Kingdom of Ramnad originally comprised the territories of Ramnad, Sivaganga and Pudukota of to-day.

Regunatha Sethupathy *alias* Kelavan Sethupathy, the 7th King of Ramnad, reigned between 1674 and 1710. He fell in love with a Kalla girl, named Kethali, the daughter of one of his dependents, and married her and appointed her brother Regunatha, chief of the District of Pudukota, with the title of Regunatha Tondiman, who subsequently attempted to detach the District from the parent State and to incorporate it with the Kingdom of Tanjore. Eventually, Pudukota became an independent Native State.

The said King of Ramnad assigned to Peria Oodaya Thevar of Nalukottai, a portion of land sufficient to maintain 300 armed men, and also conferred on him the title of Nalukottai Poligar.

Just before his death in 1710 Kelavan Sethupathy nominated his sister's son Vijia Regunatha Sethupathy, his successor, who reigned over Ramnad from 1711 to 1725. It was in his reign that the Nalukottai family came into prominence, in that Peria Oodaya Thevar became closely connected with the 7th King of Ramnad by a marriage between Akilandeswari Nachiar, his illegitimate daughter, and Sasivarna Thevar, the son of Nalukottai Peria Oodaya Thevar. The King gave him lands dowry, free of taxation, sufficient to maintain 3,000 men, and among the Chiefs whom he created to guard the several fortresses which were built to protect the Ramnad country from enemies, placed him in charge of the fortresses of Piranmalai, Tirupatoor, Sholapuram and Tirupooanam as well as the harbour of Tondi.

Vijia Regunatha Sethupathy, the 8th King of Ramnad, died in 1725 and was succeeded by his son-in-law Sundareswara Regunatha Sethupathy in 1726 as the 9th King. Bavani Sankara Thevan, the illegitimate son of Kelavan Sethupathy invaded Ramnad with the help of the Rajah of Tanjore, to whom he promised that he would give all the country north of Pambar, in the event of his being successful in the conquest of Ramnad. He eventually conquered the Ramnad Territory with the help of the Rajah of Tanjore, and took Sundareswara Regunatha, the reigning Prince, prisoner to Tanjore, and finally put him to death. Bavani Sankara proclaimed himself the Rajah of Ramnad and thus became the 10th King and reigned from 1726 to 1729. He did not, however, fulfil the promise he had made to the Rajah of Tanjore, and he also quarrelled with Sasivarna Peria Oodaya Thevar and

drove him out of his Polliem. Kattaya Thevan, the brother of the late Sundareswara Regunatha Sethupathy fled from Ramnad and sought refuge with the Rajah of Tanjore.

Sasivarna Peria Oodaya Thevar, while passing through the jungles of Kaliarkovil (which comprised large tracts of land even to the west of what is now known as the Town of Sivaganga), met a Gnani (Sage) by name Sathappier who was performing Thapas (meditation) under a jembool tree near a spring called Sivagangai. Sasivarna, being much struck with the austere devotion of the Gnani, prostrated himself before him and narrated all the previous incidents of his life. The Gnani sympathised deeply with his unfortunate condition in life, asked him to bathe in the spring, gave him sacred ashes, whispered a certain Mantra in his ears (Mantra Opadesam) and advised him to go to Tanjore and kill (by virtue of the Mantra Opadesam) a ferocious tiger which was kept by the Rajah especially to test the bravery of men and so obtain his friendship. Sasivarna accordingly took leave of the Gnani and went to Tanjore. There he became acquainted with Kattaya Thevan, a refugee like himself. The Rajah of Tanjore had fixed a certain date for a combat with the tiger and Sasivarna waited for the appointed day. No one would venture to fight with the tiger, until at last Sasivarna came forward, fought with it single-handed and killed it. This pleased the Rajah of Tanjore so much that he made him his personal attendant, or Aide-de-camp, and placed him on an equality with himself and treated him with the utmost kindness and respect.

A distant relative of the King of Tanjore who expected to succeed to the Kingdom was plotting to put the ruling King to death, and to compass this end he ingratiated himself into the good graces of the King's Dalavoy or Commander-in-chief. The expedient which they hit upon was to invite the King to witness a bull fight, a pastime in which he took delight. It was arranged to drive a ferocious bull towards the King that it might kill him. When the ferocious bull ran towards him and was about to attack him, his favourite Aide-de-camp, Sasivarna, went to his rescue and holding its horns with one hand cut them both off with his sword and kicked the bull with such force that it fell senseless. This circumstance raised him still more in the estimation of the King, who then desired to know what Sasivarna's object was in coming to Tanjore. Sasivarna related the whole history and said that he desired the Rajah's help in recovering his lost possessions in Ramnad Territory. The Rajah at once complied with his request, ordered his Dalavoy to go with a large army to invade the Ramnad Kingdom and directed him to act under the orders of Sasivarna and Kattaya Thevan.

Sasivarna Thevar and Kattaya Thevan at once proceeded to Ramnad with a large army furnished by the King of Tanjore, defeated Bavani Sankara Thevan and

captured Ramnad in 1730. Thus Kattaya Thevan became the 11th King of Ramnad. That part of the Territory lying north of Pambar river was given over to the King of Tanjore as Kattaya Thevan had promised. Out of gratitude to Sasivarna Thevar by whose acts of valour Kattaya Thevan became the King of Ramnad, and also in view of the relationship between them by the marriage of Akilandeswari Nachiar mentioned before, the said Kattaya Thevan divided Ramnad into five parts, retained three for himself, and granted the rest to Sasivarna of Nalukottai conferring on him the title of "Rajah Muthu Vijia Regunatha Peria Oodaya Thevar." Sasivarna, afterwards known as Sasivarna Peria Oodaya Thevar, returned to Nalukottai, paid his respects to his Guru Gnani Sathappier and as a mark of gratitude erected a Mutt for him, since known as Sathappier Matam, and also endowed it.

The spring where Sathappier was first met was enlarged into what is now the Teppakolam and close by it a palace was built and a town formed, called after the spring Sivaganga. Thus Sasivarna Peria Oodaya Thevar became the founder of the Sivaganga Dynasty.

Another account of the origin of this Dynasty, which says that Sasivarna was made King of Sivaganga in 1730 by the then Nabob of the Karnatic, is not borne out by tradition and the more authentic records available on the subject in Ramnad and Sivaganga Zemindaries. But it seems probable that the Nabob of the Karnatic to whom the King of Ramnad communicated the above partition soon after the event, recognised it and agreed to the apportionment of the tribute due to him.

Sasivarna Peria Oodaya Thevar died in or about the year 1750 and was succeeded by his son Muthuvaduganatha Peria Oodaya Thevar. He, the 2nd Rajah of Sivaganga, was shot dead at Kaliarkovil in or about the year 1780 in an engagement with the Nabob.

He had no male issue, but he left behind him his widow Velu Nachiar and an infant daughter named Vellachi *alias* Velu Nachiar both of whom fled to Verupatchi, where they were joined by the two Shervaigars, named Chinna Maruthu and Vellai Maruthu, menial servants of the late Rajah Muthu Vadugoo, who, with the aid of Hyder's forces, drove the Nabob's troops out of the Territory of Sivaganga, and usurped the country. The Nabob, in consequence of the calamitous war with Hyder Ali, was powerless to oppose or to punish the usurper; a compromise was, however, effected, whereby the widow was permitted to govern the Marava country and Chinna Maruthu, the younger, was appointed her Minister jointly with Vellai Maruthu, the elder brother. Thus the widow Velu Nachiar succeeded her husband in 1780.

She took under her protection Padamathoor Gowry Vallaba Thevar, an intelligent lad, and a collateral relation of Sasivarna Thevar, with a view to adopt

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him as her son and successor. But the two Shervaigars again usurped the country and contrived to marry the Rani's daughter Vellachi Nachiar to their favorite, Vengan Peria Oodaya Thevar of Nalukottai, and sought several times to put to death Padamathoor Gowry Vallaba Thevar, who afterwards became the Istimirar Zemindar and his elder brother Oyya Thevar, when both of them finally fled to the Territory of Pudukottai. Gowry Vallaba, the younger, settled at Arunthangi, while Oyya Thevar, the elder, went to Avacangi. Velu Nachiar died a few years later; but the exact date of her death is not known; it was about 1790.

Her daughter Vellachi *alias* Velu Nachiar was nominally made her successor by the two Shervaigars who still continued in power and virtually ruled Sivaganga. Vellachi Nachiar had an infant daughter, who, with the mother, died probably about the year 1793. With a view to keep the real power in the country in their own hands, Vellai Maruthu's daughter was married to the said Vengan Peria Oodaya Thevar. Thus the line of Sasivarna Thevar, the 1st Rajah of Sivaganga, became extinct.

Becoming rebellious and aided by Hyder Ali, the two Shervaigars drove the Nabob's troops from Sivaganga and withheld payment of Peishkist to the East India Company, who were entitled to it by the transfer of the Palliem to them in 1792. They were ultimately captured and hanged at Tirupatoor. It is generally supposed that the Shervaigars afforded protection to one Oomaiyan, who was the inveterate enemy of the English and whom they wanted to subdue.)

Gowry Vallabha Peria Oodaya Thevar was installed Zemindar of Sivaganga in 1801 by the East India Company under a Sanad-Istimirar in preference to Oyya Thevar, his elder brother, who, it is said, was illiterate, old and infirm. The said Oyya Thevar died on 17th April 1815, leaving behind him three sons (1) Muthuvaduga Thevar, (2) Gowry Vallaba Thevar, and (3) Botha Gurusami Thevar.

With these introductory remarks, I now proceed to record the course of ruinous litigation upon which this Zemindary entered.

The Istimirar Zemindar instituted Suit No. 4 of 1823 in the Southern Provincial Court for the recovery of arrears of Poruppu due on Padamathoor Palayapat against the above three sons of Oyya Thevar, in which the Defendants in their written statement claimed a right to succeed to the Zemindary after their father's death, alleging that their father was the person who was installed as Zemindar of Sivaganga by the East India Company, that the plaintiff, by his fraudulent acts while he was Manager to the Zemindary during their father's time, had created certain false documents in his own favour, and that, while they were intending to institute proceedings to recover the Zemindary, the plaintiff had preferred this suit. This suit, No. 4 of 1823, was finally compromised by the parties, and a Razinama, dated 5th

by 1826, was filed in Court, in which a declaration was made by the Defendants (sons of Oyya Thevar) that they were not entitled to the Zemindary of Sivaganga set forth in their written statements.

The Istimirar Zemindar died in 1829, and Muthuvaduganatha Thevar, the eldest son of Oyya Thevar, was, notwithstanding his denouncement of all title to the Zemindary in his Razinama in O. S. No. 4 of 1823, recognised by the Collector as successor to the Zemindary, on the ground that he was the eldest son of Oyya Thevar who was the only brother of the Istimirar Zemindar, and on the strength of an alleged Will left by the late Zemindar and agreements entered into between himself and the widows of the Istimirar Zemindar, Muthuvaduganatha Thevar was put in possession of the Zemindary in January 1830 by the Collector.

The Istimirar Zemindar had married seven wives of his own caste and had three wives or concubines of other castes. These were in order. (1) Vellai Nachiar, (2) Rakku Nachiar, (3) Velu Nachiar, (4) Muludar Nachiar, (5) Angamuthu Nachiar, (6) Parvatha Vardhani Nachiar, (7) Muthuveerayee Nachiar, (8) Karuppayee Nachiar, (9) Arunthangi Athal and (10) Kaliarkovil Athal.

Of the first seven wives, the first four predeceased their husband.

(1) Vellai Nachiar had a daughter named Boothaka Nachiar.

(2) Rakku Nachiar had a daughter, Vella Nachiar, who had two sons, Muthuvaduga Thevar, Doraisinga Thevar and a daughter, Pichama Nachiar.

(3) Velu Nachiar had three daughters, Kottai Nachiar, Mahamai Nachiar, and Kathama Nachiar. Kottai Nachiar had a son, Gowry Vallaba Thevar *alias* Araumanaisami Thevar.

(4) Muludar Nachiar left no issue.

The other three wives of the Istimirar Zemindar survived him. Of these three (5) Angamuthu and (7) Muthuveerayee had no issue, (6) Parvatha Vardhani alone had a daughter Sowmia Nachiar.

Thus it will be seen that the Istimirar Zemindar had at his death three wives, Angamuthu, Parvatha Vardhani and Muthuveerayee, and six daughters, Boothaka, Vellai, Kottai, Mahamai, Kathama and Sowmia, and of these six daughters, Kathama and Sowmia were unmarried at their father's death.

Though the eldest of the three surviving widows of the Istimirar Zemindar had a right to succeed him, his elder brother's son, Muthuvaduga Thevar, pretending to have a right to the Zemindary, as above stated, obtained possession thereof in 1830 and enjoyed the same till his death in 1831. He was succeeded by his son Bodha Gurusami Thevar, and from his reign the course of litigation as to the title to the Zemindary commenced.

First dispute of title.—

Three sets of claimants came forward.

The first was Muthuvadaga Thevar, the eldest son of Vella Nachiar, daughter of Istimirar Zemindar by Rakku Nachiar.

The second was Angamuthu Nachiar, one of the widows of the Istimirar Zemindar.

The third was Gowry Vallaba Thevar *alias* Aranmanaisami Thevar, son of Kottai Nachiar, who claimed the Estate as the adopted son of the Istimirar Zemindar.

The following suits were instituted against Bodha Gurusami Thevar by the above-named parties respectively in the Provincial Court for the Southern Division.

1. O. S. No. 4 of 1832.
2. O. S. No. 3 of 1833.
3. O. S. No. 4 of 1833.

Subsequent to the institution of these suits, the widow, Parvatha Vardhani, died in 1832, the daughters, Vellai and Mahamai in 1833, and the widow, Muthu-veerayee, in 1834.

The judgment in the above three suits being in favour of the defendant, Bodha Gurusami Thevar, the plaintiffs in the three suits appealed to the Sudder Adawlat. The appeals were there considered together, and disposed of in 1837 by a single decree.

1. A. S. No. 11 of 1835.
2. A. S. No. 13 of 1835.
3. A. S. No. 2 of 1835.

The Appeal Suit No. 2 of 1835 was dismissed on the ground that the adoption was not proved, and No. 11 of 1835 on the ground that a daughter's son's claim was inferior to that of a widow. The decree in O. S. No. 3 of 1833 was reversed by the decree in Appeal Suit No. 13 of 1835, and the widow, Angamuthu, declared to be the rightful Zemindarni of Sivaganga. Bodha Gurusami Thevar, however, appealed to the Privy Council and pending decision of the appeal the Zemindari was placed under attachment by the Court in 1837. He died on the 10th July 1841 while the appeal was pending, and it was afterwards prosecuted by his brother, Gowry Vallaba Thevar, and on it was passed the judgment of the Privy Council, dated 18th June 1844, dismissing the suit of Angamuthu Nachiar, and permitting her to bring a fresh suit as the proceedings in the Lower Courts prejudiced the parties, in that no issue had been framed as to division or non-division between Istimirar Zemindar and his elder brother, though it was alleged on the one side and denied by the other.

In accordance therewith, on the 2nd September 1844, Gowry Vallaba Thevar was put in possession of the Zemindary and leave was given, as above stated, to allow Angamuthu to bring a new suit within three years after the decree was pronounced in India and disclosed to the parties. Thus ended the first litigation.

Second dispute of title.—

In compliance with the Order of the Privy Council, Angamuthu brought her Second Suit (O. S. No. 2 of 1845) on the 20th August 1845, and on the 27th December 1847, the Civil Court of Madura decreed against her.

Against this decree Angamuthu appealed to the Sudder Court (A. S. No. 7 1849) on the 6th April 1848. The defendant Gowry Vallaba died in the same year and was succeeded by his infant son Bodha Gurusami Thevar, during whose minority the Estate was placed under the Court of Wards. The appeal was heard in the following year and judgment reserved. In the meantime, Angamuthu died on the 23rd June 1850, and the appeal abated.

Upon her death, the Sudder Court issued a notice, dated 15th July 1850, calling upon her heirs to come forward and prosecute the appeal. Three sets of claimants presented themselves; the first consisted of Boothaka, Kottai and Kathama; the second, Sowmia; and the third, Muthuvaduga Thevar, Plaintiff in O. S. No. 4 of 1832. Boothaka and her two sisters claimed to carry on the appeal as the heirs of the Istimirar Zemindar in succession to the widow; Sowmia as heiress, niece and devisee of the widow; and Muthuvaduga as grandson by a daughter. Their petitions were dated 24th August, 10th and 26th September respectively.

On the 21st October 1850, the Sudder Adawlat held that none of them could prosecute the appeal and directed their removal from the file, the claimants being all at liberty to bring fresh action if they chose so to do. On the 1st May 1851, the Sudder Court reversed their Order and the appeal to be replaced on the file, and the several claimants to be admitted as Appellants. On the 18th April 1852, they again reversed their Order of 1851 and renewed their Order of 1850.

Kottai Nachiar died on the 17th August 1852. Muthuvaduga appears in these proceedings for the last time on the 20th February 1851, and seems afterwards to have withdrawn his claim and died in 1857. Boothaka conveyed all her rights and title to the Zemindary to her sister, Kathama Nachiar, by a deed dated 26th November 1853, after which she and her sister, Sowmia, instituted their respective Suits, viz., O. S. No. 10 of 1856 and O. S. No. 4 of 1857 in the Civil Court of Madura which, going through various intermediate proceedings before the Civil and Sudder Courts, occupied nearly four years.

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After a still further delay of nearly three years, the Civil Court, with-
cording issues and admitting evidence, dismissed both the suits and directed
to be struck off the file on the 25th August 1859. The Zemindary was then
ed over to Bodha Gurusami Thevar upon his attaining majority on the
November 1859.

Both Kathama and Sowmia appealed from this decision to the Sudder C
praying that their suits might be remanded for adjudication on their merits. T
appeals were dismissed, the former on the 5th November 1859.

Gowry Vallaba Thevar *alias* Aranmanaisami, Plaintiff in O. S. No. 4 of 185
died on the 24th October 1860. On the 11th February 1860, Kathama petitioned f
leave to appeal to the Privy Council which was refused on 3rd March 1860.

On the 1st August 1860, Kathama obtained special leave from the Privy
Council to appeal against the above-mentioned Orders and decrees. Boothaka died
on the 16th April 1862. On the 19th July 1862, Sowmia obtained similar leave.
Both the appeals were to come on for hearing upon separate cases at the same
time, but Sowmia died on the 19th September 1862, leaving Kathama, the sole
surviving daughter of her father, and on whose appeal was passed the judgment
of the Privy Council dated 30th November 1863, by which Kathama was decreed to
be the rightful owner of the Zemindary as heir to the Istimirar Zemindar. Katha-
ma was accordingly put in possession of the Zemindary on the 18th February 1864.
And here ends the second dispute of title.

Third dispute of title.—

Bodha Gurusami Thevar, though dispossessed by the above decree, brought
a suit on the 25th April 1864 claiming the Zemindary under a Will of the Istimirar
Zemindar in favour of his *chuvaduga* Thevar, which was sum-
marily rejected without its *chuvaduga* being gone into by the order of the Civil Court of
Madura, dated 4th May 1864.

An appeal was preferred by him to the Sudder Court, R. A. 38 of 1864, and
the Order of the Civil Court of Madura was confirmed on the 11th July 1864.

Bodha Gurusami Thevar, dissatisfied with the decisions of the Lower Courts,
appealed to the Privy Council, where also his appeal was dismissed on the
7th November 1866. Thus ended the third dispute of title.

Bodha Gurusami Thevar died in 1872, being the last of the usurpers, ordina-
rily known as *abadhya* Zemindars, 1st of whom Muthuvaduga became Zemindar in
1830.

Fourth dispute of title.—

Ranee Kathama Nachiar was scarcely in peaceful possession of the Zemindary or four years when a new claimant came into the field. This was the younger son of Vellaichi, named Duraisinga Thevar, and a brother of Muthuvaduga Thevar, who had claimed the Zemindary in 1832 as the surviving senior grandson by a daughter. He instituted his suit, O. S. No. 2 of 1869, on the 8th March 1869, and claimed immediate possession of the Zemindary as the eldest surviving male heir of the Istimirar Zemindar; and if that should fail, to have a declaratory decree passed establishing his right to succeed as next heir after the death of the Ranee. He included the Ranee's son and her three daughters as defendants in his suit and obtained the judgment of the Civil Court dated 23rd February 1870, in his favour, declaring him to be the successor to the Ranee Kathama Nachiar after her death, as heir to the Istimirar Zemindar.

Against this decision, the Ranee and her children appealed to the High Court on the 3rd April 1870 (R. A. No. 37 of 1870) and the decree of the Lower Court was confirmed.

The Ranee was again compelled to go to the Privy Council. The appeal was dated 2nd February 1872. Both the decisions of the Lower Courts were reversed by the judgment of the Privy Council delivered on the 10th February 1873 holding that the declaratory decree passed by the Lower Courts was illegal, and that the Plaintiff should bring a suit to recover possession of the Zemindary after the Ranee's death. So ended the fourth dispute of title.

The Ranee was then left in undisturbed possession of the Zemindary till her death. She died on the 24th May 1877, but, by a deed dated 1st May 1877, purporting to discharge her debts, she leased the Zemindary to one B. Krishnasamy Chetty who took possession of the Zemindary by virtue thereof.

Fifth dispute of title.—

Immediately after the death of the Ranee Kathama, Duraisinga Thevar instituted, on the 12th July 1877, Suit No. 31 of 1877, on the file of the Subordinate Court of Madura, against her son, Muthuvaduga Natha Thevar, and his three sisters—Sethukarai Nachiar, Gowry Nachiar, and Kottai Nachiar, and the lessee B. Krishnasamy Chettiar, to recover possession of the Zemindary on the ground that he was the senior grandson by daughter of the Istimirar Zemindar and that, as such, he was entitled to succeed to the Zemindary in preference to the 1st Defendant, &c., and that the lease granted by the Ranee was a fraudulent transaction. This suit was taken by the District Judge on his file and numbered as No. 1 of 1877, and a decree was passed in Plaintiff's favor by judgment dated the 3rd Decem-

ber 1877, which at the same time provided that a portion of the Zemindary should be enjoyed by B. Krishnasamy Chetty, the fifth Defendant in the suit, till so much of the debt as was found to have been advanced by him for payment of Peishcush due to the Government, which the Plaintiff was bound to clear, was paid off. Duraisinga Thevar was put in possession of the Zemindary in pursuance of the decree, in January 1878. But one Arunachellam Chetty, the Judgment Creditor of Krishnasamy Chetty, was put in possession of Manamadura and Tirupoovanam Taluks by virtue of the decree.

Against this decree, all the Defendants appealed to the High Court of Judicature in Appeal Suit No. 13 of 1877, which was filed on the 5th February 1878, and Duraisinga Thevar, the Plaintiff, also appealed against so much of the decree as was against him in Appeal Suit No. 23 of 1878. These two appeals were dismissed and the judgment of the Lower Court confirmed by the High Court in their judgment and decree dated 31st January 1879. Against this decree of the High Court, the son and daughters of the late Rance Kathama Nachiar, *viz.*, the Defendants 1 to 4 in O. S. No. 1 of 1877, obtained permission to appeal to the Privy Council in petition No. 69 of 1879 dated 14th February 1879, and certificate was granted on the 19th March 1879 by the High Court.

The judgments of the two Lower Courts, *viz.*, Suit No. 1 of 1877 of the District Court of Madura, and the Appeal No. 13 of 1878, were confirmed, and the Appeal to the Privy Council was dismissed by their Lordships of the Privy Council in their judgment dated the 14th May 1881. Thus Duraisinga Thevar's claim to the Zemindary, as the eldest senior grandson of the Istimirar Zemindar, was upheld, and he was in possession of the Zemindary till his death (1883).

Duraisinga Thevar died on the 9th July 1883, and was succeeded by his eldest son Periasamy *alias* Oodayana Thevar.

Sixth dispute of title.—

Bala Gowry Vallaba Thevar, the son of Bodha Gurusami Thevar, the last usurper, who was succeeded by the late Rance Kathama Nachiar, instituted, on the 16th December 1885, Suit No. 2 of 1886 on the file of the Subordinate Court of Madura East, against Periasamy *alias* Oodayana Thevar and several others for the recovery of the Zemindary on the ground that, in Suit No. 10 of 1856 brought by the late Rance Kathama, the agents of his father, the Defendant in that suit, fraudulently misconducted the defence, that, in collusion with the Plaintiff in that suit, they left the suit to be decided against his father, that he was born on the 27th December 1864, that he was 8 years old when his father died on the 5th December 1872, that he became of age on the 27th December

2, and became aware of the fraudulent acts only in the beginning of 1885, and the decree of the Privy Council was solely due to the fraudulent acts of the d Rane Kathama, and to the fraudulent acts of Gowry Vallaba Thevar, the Istimirar Zemindar, &c., &c.

This suit was taken on the file of the District Court of Madura and filed as No. 2 of 1886. The District Court in its judgment and decree dated 20th November 1886, dismissed Plaintiff's suit.

Against the above decree, the Plaintiff appealed to the High Court of Judicature at Madras on the 14th February 1887, in Appeal No. 21 of 1887. The High Court remanded the suit calling for a finding upon the 2nd part of the fourth issue, in its Order dated the 19th July 1888.

In the meanwhile, the Zemindary was leased on 23rd May 1887 by Oodayana Thevar to Messrs R. G. Orr, Ryan and Stranack for the discharge of his debts, and they were hence made supplemental Defendants by the High Court in its Order dated 12th October 1888, on M. P. No. 867 of 1888, presented by the Plaintiff.

The District Court of Madura submitted to the High Court its finding dated 22nd January 1889, dismissing the Plaintiff's suit. The Plaintiff took objections in the High Court against the above finding of the District Court in his petition dated 12th February 1889.

The High Court in its judgment and decree, dated the 20th March 1889, dismissed the Plaintiff's suit. The Plaintiff, being dissatisfied with the decree of the High Court, applied for a certificate from the High Court to permit him to appeal to the Privy Council against the said decree of the High Court in his petition No. 952 of 1889 dated 13th September 1889, and the certificate was granted by the High Court in its Order dated 28th January 1891. The Plaintiff then submitted his grounds of appeal to the Privy Council which dismissed the suit and confirmed the decrees of the Lower Courts, in its judgment dated the 20th April 1894. Thus ended the sixth dispute of title.

Seventh dispute of title.—

Muthuvaduga Natha Thevar, the son of the late Rane Kathama, instituted on the 11th July 1889, Suit No 87 of 1889, on the file of the Subordinate Court of Madura East, against Periasamy alias Oodayana Thevar and others, to recover the Zemindary of Sivaganga on the ground that, on the death of Duraisinga Thevar, who held the Zemindary as a grandson by the elder daughter of the Isti Zemindar, the Zemindary devolved upon the Plaintiff as being the surviving son of the Istimirar Zemindar by the younger daughter, the late Rane Nachiar.

This suit was dismissed by the Sub Court in its judgment and decree, d. the 11th April 1890.

Against the above decree, the Plaintiff filed on the 20th August 1890 appeal to the High Court at Madras in No. 118 of 1890. The High Court in its judgment and decree dated the 25th April 1892 dismissed the appeal and confirmed the decree of the Subordinate Court of Madura.

The Plaintiff thereupon moved the High Court in his petition No. 1075 of 1892 and filed in No. 29 of 1892 for the grant of a certificate permitting him to appeal to the Privy Council which was granted by the High Court in its Order dated the 7th March 1893; and the appeal to the Privy Council against the decree of the High Court was dismissed by its judgment dated 27th June 1896.

The following is the history of the wives of the Istimirar Zemindar married from other castes :—

1st. Karuppayee or Kaliarkoil Athal.—Vellachi Nachiar, daughter of the second Rajah of Sivaganga, was married to Vengam Peria Oodaya Thevar by the intrigues of the two Marudhu Shervaigars as herein-above stated. They knew that Gowry Vallaba Thevar was not only the Padamathoor Poligar, but also a powerful man who had several influential men to protect his interests, and it was proposed that Velu Nachia should adopt him. They therefore thought that to prevent such an adoption and to effect the above marriage they must put under restraint Gowry Vallaba Thevar and reduce his power and influence; and consequently they imprisoned him at the Kaliarkoil temple with sufficient guards, and attempted to put him to death. While he was in prison, Karuppayee, a dancing girl attached to the said temple, pitying his condition, secretly supplied him with food, &c., and administered to his convenience and comforts. Naturally enough he fell in love with her and kept her as his concubine. She knew that the Shervaigars intended ultimately to put him to death, and therefore contrived to effect his escape. Gowry Vallaba Thevar at last managed to escape and took refuge with Karisaipatty Poligar. Vellai Bomma Naick, the Poligar, and his Manager, one Sama Iyer *alias* Sessa Iyer, sheltered him at Thuvrankuruchy for some months. When this fact was known to the Shervaigars, they demanded the surrender of Gowry Vallaba Thevar from the Poligars who, being afraid of the Shervaigars' power and influence, sent him to the Pudukotta Rajah who gave him refuge at Arunthangi. During his imprisonment at Kaliarkoil, Karuppayee had a son by him named Sami Aiyah Thevar *alias* Gowry Vallaba Thevar. The Istimirar Zemindar, after he was made the Zemindar of Sivaganga, him for his support and maintenance the village called Erinjirai in the 'arnad Taluk, and Ponnampatty in Sivaganga Taluk, and some lands as in Andichy Oorani. This illegitimate son and his successors enjoyed the

and lands until the second usurper Bodha Gurusami Thevar resumed on of those villages and lands and annexed the same to the Zemindary. His son (1899) occupying the buildings at the North-western portion of the which was given by the Istimirar Zemindar for their residence; and no were taken by them to recover the villages afterwards, nor did any of prefer any claim to the Zemindary as illegitimate sons of the Istimirar dar.

2nd.—Arunthangi Athal *alias* Manickathal—When Gowry Vallabha Thevar Aranthangi as already mentioned, he was, under the orders of Pudu-Tondiman, protected by one Chinna Subba Iyer, a temple archakar or al. While there, Gowry Vallabha Thevar fell in love with Manickathal who Kalla girl by caste and married her. After he returned to Sivaganga as mindar, he took her and Chinna Subba Iyer with him, gave her the several ings called Moolai Madi Aranmanai in the North-eastern corner of the for her residence, and made Chinna Subba Iyer his Manager or Prathani. Istimirar Zemindar had three sons by her. (1) Muthuramalinga *alias* ndai Pandiya Thevar, (2) Namasivaya Thevar, and (3) Ramasamy Thevar. granted on the 12th November 1818 for their support and maintenance 3 villages which formed the Sub-Division Zemindary of Kattanoor, &c. villages, and Rs. 7,363-15-6 was fixed as separate poruppu by the Collector in his Order dated 11th December 1822.

The successors of these three sons divided the Sub-Division among themselves. Among these divided estates, Siruvayal, Mudikandam and Kurunthampat with their connected villages are enjoyed by their heirs in succession; but several of the villages attached to the above sub-division have been sold or mortgaged to the Chetties.

Though the members of this Branch are the direct descendants of the Istimirar Zemindar not one of them seems to have taken any steps to claim succession to the Zemindary. Perhaps they were satisfied with the provision made by Gowry Vallabha Thevar for their support, which was not interfered with by any of the successors to the Istimirar Zemindar.

3rd. Karuppayee Athal was an Agambadia caste girl of Kuruvadipatty. She was married by Gowry Vallabha Thevar after he became the Zemindar. He had by her a son named Salugaisamy *alias* Salugai Peria Oodaya Thevar. He was treated as one of the family members of the Istimirar Zemindar, and resided in the palace until the death of his father, and was paid a monthly stipend. The several usurpers also maintained him and his son Kolandaj Pandya Thevar. When Kathama Nachiar became the Zemindarni of Sivaganga, she also supported him

and his family by an adequate allowance in addition to the Sub-Division of Okkoor and Puravali which she granted under a deed, dated 19th January. Being satisfied with the above grant, he did not prefer any claim to the Zemi But Duraisinga Thevar, on his succession to the Zemindary, instituted Suit of 1879 in the Sub-Court of Madura East to set aside the above alienation by the late Rane Kathama, but the suit was finally settled by an agreement 7th January 1880, by which the said two villages with their hamlets were reco ed as sub-division in favour of the Defendants in consideration of their bein children of the Istimirar Zemindar.

The following are the Rulers and Zemindars who have been in enjo of the Sivaganga Estate since it became separated from the Ramnad Territ 1730.

1st *Rajah*.—Sasivarna Thevar (1730—1750).

2nd *Rajah*.—Muthu Vaduganatha Thevar, son of the 1st Rajah (1750—1770). It was under him that the rebels, Marudus, who afterwards came prominence, served as adappakarans, menial servants, giving betel to the Ra

3rd *Rani*.—Velu Nachiar, widow of the 2nd Rajah (1770 to 1790). two Marudus became powerful in her time and in fact were the virtual rulers.

4th *Rani*.—Vellachi *alias* Velu Nachiar (1790 to 1792). After the demise of this Nachiar, the two Marudus usurped the place and wielded all the powers of a Rajah from 1792 to 1799. In 1800, the Estate escheated to the East India Company.

5th *Rajah*.—(1st Zemindar) Gowry Vallabha Thevar *alias* Gowry Vallabha Peria Oodaya Thevar, the Istimirar Zemindar (1801 to 1829).

6th *Rajah*.—(2nd Zemindar) Muthu Vaduga Natha Thevar, the son of the Istimirar Zemindar's brother Oyya Thevar. 1830 (1st usurper or Abadhya Zemindar.)

7th *Rajah*.—(3rd Zemindar) Bodha Gurusami Thevar, son of the 6th Rajah (1831 to 1841.) (2nd usurper). As said above, Angamuthu Nachiar, the widow of the Istimirar Zemindar, having obtained a decree in her favour declaring her to be the rightful Zemindarni of Sivaganga, was ordered to be put in possession of the Zemindary by the High Court. But Bodha Gurusami having appealed to the Privy Council, the Zemindary was placed in 1837 under the management of the Collector till the final disposal of the appeal. The Collector's management continued from 1837 to 1844.

8th *Rajah*.—(4th Zemindar) Gowry Vallabha Thevar, brother of the 7th Rajah (1841 to 1848) (3rd usurper). The Privy Council having dismissed the suit of Angamuthu Nachiar, referring her to a fresh suit as above stated, the Zemindary was delivered to Gowry Vallaba Thevar in 1844.

9th Rajah.—(5th Zemindar) Bodha Gurusami Thevar, son of the 8th Rajah (18 to 1863) (4th and last usurper). Being a minor at the time, the Zemindary under the Court of Wards from 1848 to 1859.

10th Rani.—(6th Zemindarni) Rane Kathama Nachiar, the daughter of the 9th Rani Zemindar.—(1864 to May 1877.) She leased the Zemindary for 10 years to George Fischer. He, and after him, his sons enjoyed the Zemindary till 1871. In 1871, Venkatasamy Naidoo obtained a Sub-lease from Mr. Robert Fisher and enjoyed the same up to 1874.

11th Rajah.—(7th Zemindar) Muthu Vaduga Natha Thēvar, the son of the 10th Rajah.—(May to December 1877.) The Zemindary was in the enjoyment of Krishnasamy Chetty as Lessee.

12th Rajah.—(8th Zemindar) Duraisinga Thevar, the grandson of the 11th Rajah Zemindar, by his daughter Vella Nachiar.—(1878 to 1883.) The Zemindary was in 1881 placed under Receiver Sankara Iyer by the East Sub-Court in attachment for the decree debts due by Duraisinga Thevar. He died in 1883 leaving behind him five sons:—

1. Periasami *alias* Oodayana Thevar.
2. Naduval Dorai *alias* Vadugya Thevar.
3. Sasivarna Thevar.
4. Dillibacha *alias* Kannumacky Udaya Thevar.
5. Mathurai Dorai *alias* Venkatasamy Thevar. Of these, the son died in 1888 and the 4th died in 1891.

13th Rajah.—(9th Zemindar). Periasami *alias* Oodayana Thevar, the son of Duraisinga Thevar.—(1883 to 1898.) The management of the Zemindary continued under the Receiver till May 1887, when it was leased to Messrs. R. G. J. Ryan, and E. F. Stranack for 22 years under document dated 23rd May 1887 by this Zemindar, Periasami *alias* Oodayana Thevar. The Lessees having cleared the decree debts, the Zemindary was released and the Zemindary put in possession. The Zemindar gave a further lease of the Zemindary for 10 years after expiry of the 1st lease under document dated 5th October 1889. The Zemindar had, by his first wife Rakku Nachiar, two sons and four daughters. The first son Alagirisami Thevar died in his 14th year long before his father. He succeeded to the Zemindary; the 2nd son Sivagangasamy *alias* Duraisinga Thevar died on 23rd November 1895 leaving behind him his widow, Nachiar. Subsequently, on 11th September 1896, the Zemindar adopted as his son Gowri Vallabha *alias* Duraisinga Thevar, the eldest son of the Zemindar's daughter. To set aside this adoption, the Zemindar's surviving next y

XVI

brother, Sasivarna Thevar, instituted a suit in O. S. No. 78 of 1897 on the the Subordinate Judge, Madura (East). This suit was dismissed. The Plaintiff Sasivarna appealed to the High Court of Judicature at Madras against the decree of the Subordinate Judge and the appeal also went against him. This Zamindar died on 26th February 1898, leaving behind him the said adopted son and his widow, Vellai Nachiar, whom he married on 1st September 1892 after the of his 1st wife.

14th *Rajah*. - (10th Zemindar) Gowry Vallabha alias Duraisinga Thevar the adopted son of the late Zemindar and a minor was installed as Zemindar of Sivaganga on 26th February 1898.

SIVAGANGA,

March 1899.

}

K. ANNASAMY,

2nd Grade Pleader and Lessees' Law

Y.

6TH WIFE
PARVATTA VARTHANI
NACHIAR.

7TH WIFE
MUTUVIRAYI
NACHIAR.

SOWMYA
NACHIAR.

ND HUSBAND CHINNA
alias CHINNATHAMBI
TEVER.

KOTTAY NACHIAR.

III RAJA, 7TH ZEMINDAR, MUTHUVADUGA-
NATHA TEVER, PLAINTIFF IN O. S.
No. 87 of 1889, DISTRICT COURT, MADURA.
MAY TO DECEMBER 1877.

BATGHA
TEVER.

5
VENKATASWAMI
TEVER.

1
DAUGHTER.

2
DAUGHTER.

3
DAUGHTER.

4
DAUGHTER.

SINGA DURAL.

VAILU DURAL.

MALE CHILD.

SINGA DURAL.

VAILU DURAL.

VELLASAWMI DURAL.

SINGA DURAL.

K. ANNASAMY IYEP

and Grade Pleader and Lessees' La

SI

DECREE OF THE SOUTHERN PROVINCIAL COURT

Original Swil. No. 4 of 1832

Vellai Nachchiar, mother and guardian of Mutta Vijaya

Raghunadha Mutlu Vadaga Periya Udaya Tevar.

a minor, and after her death, Chinna Muttu Tevan.....Plaintiff.

Thirumala Aivangar, Vakil.

Bodha Gurusami Teyar, Zemindar of Sivagunga..... *Defendant.*

Ellappa Mudali and Seshaiya, Vakils.

Attested
copy of the
decision of
the Provin-
cial Court
for the
Southern
Division in
Original
Suit No. 1
of 1892
dated 5th
December
1894

was brought by Vallai Nachohiar, daughter of Muttu Vijaya
allabha Periya Udaya Tevar, late Zemindar of Sivagunga,
Muttu Vijaya Razhunnadha Muttu Vaduga Periya Udaya
2 years, for the recovery of the Zemindari, annually paying
of Rupees 2,62,500 and producing a net profit of Rupees

[illegible]

The plaint set forth that Sanyama Periya Udaya Tevar was the original proprietor of the Zemindari and that he had a son, named Mattu Vaduganadha Periya Udaya Tevar, who succeeded him in the enjoyment of it. He died, leaving no male issue, but a widow and daughter, which latter was placed in possession

Attested
copy of the
decision of
the Provin-
cial Court
for the
Southern
Division in
Original
No. 4
1892
dated 5th
December
1894.

—continued.

of the Zemindari by the Carnatic Government. She enjoyed the Zemindari, and afterwards died, as did her mother and daughter, by which the family of the original holder, Sasivarna Poriya Udaya Tevar, became extinct. One Maruda Shervaiakar then usurped possession of the estate, but the Government dispossessed him, and placed the Plaintiff's father in the Zemindari and published a proclamation on the 6th July 1801, calling upon all of the inhabitants to obey him. A deed of permanent settlement was on the 22nd April 1803 granted to him, and on it he enjoyed the estate. Having been called upon by the Collector by order of the Government to state who his heir was, who was to succeed him in the Zemindari, he, on the 11th April 1822, stated that, if he should have no son or his first wife, the sons of his other wives must succeed, and, in the event of failure of other heirs named, his first wife should inherit the estate.

The Plaintiff's father had an elder brother, who died, leaving the eldest of whom was the father of Defendant. The Plaintiff granted them the village of Padamattur and 7 other villages for t but, as they refused to obey him, he instituted an action against recovery of those villages, as well as for their produce, in No. 4 of 18 file of this Court. In the answer, the Defendants declared that to the whole Zemindari; but in the Razinama
dera"

renoun... claims to the

She stated that her father had seven wives, of whom her mother Nachehiar, was the eldest; that he had a son by his third wife, who died before his father, without issue, in the 18th year of his age; that her father died on the 6th Ani of Virodhi (17th June 1829), leaving no Will, notwithstanding which, the Defendant's father produced a fabricated Will, which, he pretended, had been executed in his favor, and, having forwarded it with a false Arsi to the Collector, he obtained through him possession of the Zemindari.

She represented that four of her father's seven wives were dead, that two of the survivors had no issue, and that one had a daughter, who, she contended, could not claim the estate so long as her (Plaintiff's) son was alive. She further stated that one of the deceased wives had left one daughter, and another two, and that these daughters had sons; but she contended that they were all younger than the Plaintiff's son, who must moreover possess a superior right to them, the Plaintiff being the daughter of her father's eldest wife.

In his answer, the Defendant denied that the Plaintiff's father had succeeded to the Zemindari on account of any services which had been rendered by

him to the Sarkar, but because he was lineal co-heir of the original holder, Sasi-varna Periya Udaya Tevar. He contended that his grand-father, Oiya Tevar, ought to have succeeded as being the elder brother of the Plaintiff's father, but that, being old and infirm, he had yielded his right to his younger brother, as was fully stated in the public proclamation then published, as well as in the report made by the Collector, Mr. Lushington, to the Board of Commissioners on the 30th September 1802. He urged that the Plaintiff's father had acknowledged in the reply filed in Original Suit No. 4 of 1823 that he had succeeded as being co-heir. He admitted also that he had entered into a Razinama in that No., as described in the plaint, renouncing all claim to the Zemindari, but he contended that he had been obliged to execute that Razinama, and that he ought not in consequence of it to be shut out from the Zemindari. He urged that the Plaintiff's father had, on the day of his death, 17th June 1829, executed a Will in favor of his (Defendant's) father as being the eldest of his brother's sons, constituting him heir to the Zemindari in the event of one of his wives, then pregnant, not producing a son, copies of which Will he (Plaintiff's father) had immediately sent to the Collector and the Judge. He stated that the Collector had enquired as to the authenticity of the Will, and had made a report upon it to the Board of Revenue, who had made another to the Government, and that on the 13th July 1829 the Board had written to the Collector that the Defendant's father might succeed to the Zemindari on paying the arrears due to the Sarkar, which was confirmed by the Government on the 7th August following. Accordingly, the widow, who had been pregnant, having produced a child, and the Defendant's father having discharged the arrears due on the 13th, the Collector on the 4th December 1829 issued an Inayatnama in the name of the Defendant's father, constituting him Zemindar. The aforesaid widow, Parvadhani Nachchiar, and her two sisters, Angamuttu Nachchiar and Muttu rayi Nachchiar, also widows of the Plaintiff's father, on the 29th July 1830, executed an agreement in favour of the Defendant's father, engaging to enjoy the illages that might be given for their support and to allow him to enjoy the rest of the Zemindari according to the Will, which their husband had executed in his favour. This document was registered in the Katcheri of the Collector, and on the 27th October the Collector issued an Inayatnama in their favour that they should enjoy according to the said agreement. The Defendant denied that the Zemindari produced to the extent described in the plaint, and urged that he had been obliged to pawn the jewels, and to borrow money in other ways in order to clear off the balance which he had found to be due to the Sarkar.

In the reply, the Plaintiff contended that his father held the Zemindari under a deed of permanent settlement executed in his favor by the Government.

Attested by a copy of the decision of the Provincial Court for the Southern Division of Original Suits No. 4 of 1832 dated 5th December 1834.

and that, according to the 15th clause of that deed, it must descend to his heirs, and could not ascend to his elder brother. She denied that her father had executed the Will in favor of the Defendant's father, and urged the improbability of his having done so, after having been so long contending with him about the Zemindari. She further urged the right of her son to succeed to the exclusion of the other widows of her father and of their descendants.

In the Rejoinder, nothing material appeared.

In conformity with the points recorded by the Court, the following documents were produced by the respective parties.

Plaintiff's Documents.

- A. Copy of a Takid from the Collector to the Plaintiff's father, dated 9th March 1822.
- B. Copy of an Answer from the Plaintiff's father to the Collector, dated 11th April 1822.
- C. Copy of an Arzi from the Plaintiff's father to the Collector, dated 11th April 1822.
- D. Copy of a Razinama entered into by the Plaintiff's father and the Defendant's father with his two other brothers, date January 1826.
- E. Copy of an Arzi from Venkataramaiya, Head of Police, to the Collector, dated 17th June 1829.
- F. Copy of list of property written by the Defendant's father, 30th June 1829.
- G. An endorsement directed by the Government to the Board of revenue, dated 25th January 1832.
- H. An endorsement made on an Arzi by the Board of Revenue and sent to the Plaintiff's son, dated 26th January 1832.
- I. Copy of a Decree passed by the Southern Provincial Court of Appeal in Original Suit No. 10 of 1824.
- J. Copy of the Decree passed by the Court in Appeal No. 7 of 1828, dated 27th October 1829.

Defendant's Documents.

- A. A Proclamation of the Government, dated 6th July 1801.

- B. An Inayatnama from the Collector of Ramnad to the Plaintiff's father, dated 22nd September 1806.
- C. Copy of an Arzi from the Plaintiff's father to the Collector, dated 7th October 1806.
- D. A Will executed by the Plaintiff's father in favor of the Defendant's father, dated 6th Ani of Virodhi or 17th June 1829.
- E. Copy of an Arzi from the Plaintiff's father to the Principal Collector of Madura, dated do.
- F. Copy of do. from do. to the Zilla Judge of Madura, dated do.
- G. Copy of do. from Venkataramaia, Police Amin of Sivaganga, to the Principal Collector, dated 18th June 1829.
- H. Copy of an Arzi from Viraraghavaia, Zafiti Amin, dated 18th June 1829.
- I. An Inayatnama from the Collector to the Defendant's father dated do.
- J. Copy of an Arzi from the late Zemindar of Ramnad, Hiranya Garbha Yaji Ravikula Muttu Vijaya Raghunadha Pratapa Simha Vijaya Gopala Setupati, to the Collector, dated 7th July 1829.
- K. Copy of a deposition by the Plaintiff's husband, Udaya Tevar, to the Collector, dated 7th July 1829.
- L. Copy of do. by Virappa Chetti, dated do., to do.
- M. Copy of do. by Peria Karuppan Chetti, dated do., to do.
- N. Copy of do. by Kalyana Sandaram Pillai, dated do., to do.
- O. Copy of do. by Subramania Pillai, dated do., to do.
- P. Copy of do. by Kolandi Velayuda Tevar and 10 others, dated 8th July 1829, to do.
- Q. An Inayatnama from the Collector to the Defendant's father, dated 8th July 1829.
- R. Copy of a Deposition by Udaya Tevar, maternal uncle of the Plaintiff, dated 24th March 1830.
- S. Copy of a Deposition by Kolandi Velayuda Tevar and 7 others, dated do.

Attached
copy of the
decision of the
the Provincial
rial Court for
for the
Southern
Division
Original
Suit No. 4
of 1832 No.
dated 6th
December
1834
—continued—

- T. A letter from the Secretary to Government to the Defendant's father, dated 7th July 1829.
- U. Copy of a letter from the Board of Revenue to the Collector, dated 13th do.
- V. Copy of a letter from the Government to the Board of Revenue, dated 11th December 1822.
- W. Copy of do. from do. to do., dated 17th do.
- X. An Inayatnama from the Collector to the Defendant's father, dated 30th December 1822.
- Y. Copy of Vakalatnama by Parvata Vardhani Nachchiar to Guruvappa Naik, dated 31st July 1829.
- Z. Copy of an Arzi from Parvata Vardhani Nachchiar to the Collector, dated do.
- AA. Do. do. from Angamma Nachchiar, Parvata Vardhani Nachchiar and Muttu Virayi Nachchiar, to the Collector, dated 4th August 1829.
- BB. An Agreement executed by Angamma Nachchiar, &c., aforesaid, in favor of the Defendant's father, dated 29th July 1830.
- CC. Copy of an Arzi from Parvata Vardhani Nachchiar to the Collector, dated 21st October 1830.
- DD. An Inayatnama from the Collector, to Parvata Vardhani Nachchiar, dated 27th October 1830.
- EE. A do. from do. to the Defendant's father, dated do.
- FF. Copy of an Arzi from the Defendant's father to the Collector, dated 18th July 1831.
- GG. A permanent Patta from the Government to Plaintiff's father, dated 22nd April 1830.
- HH. Copy of a Decree passed in 402 of the file of the Zilla Court of Madura, dated 12th December 1806.

The following witnesses were also examined:—

Plaintiff's witnesses.

1. Sashiengar.

Defendant's witnesses.

1. Kuppaiyan.

- | | |
|---|-----------------------------|
| 2. Periatambi. | 2. Narasimaiyengar. |
| 3. Komarasami Pillai. | 3. Kolandavelu Pillai. |
| 4. Namasiyaya Modaliyar. | 4. Muttukaruppa Pillai. |
| 5. Maruda Pillai. | 5. Kalyana Sundaram Pillai. |
| 6. Arunachala Shervai. | 6. Subramania Pillai. |
| 7. Ramasami Shervai. | 7. Muttalaga Pillai. |
| 8. Soumya Narayan Aiyangar. | 8. Rakappa Shervai. |
| 9. Vairana Tevar. | 9. Peria Karuppan Chetti. |
| 10. Soumya Aiyangar. | 10. Guruvappa Nayakkan. |
| 11. Kanaka Pillai. | 11. Kayana Pillai. |
| 12. Muniyandiya Pillai. | 12. Sulia Naika Pandaram. |
| 13. Mr. Hughes. | 13. Ramasami Pillai. |
| 14. Surya Narayana Aiyangar. | 14. Srinivasaiyan. |
| 15. Lakshmana Aiyar. | 15. Papaiyan. |
| 16. Kamakshi Aiyar. | 16. Santa Pillai. |
| 17. Chellamaiyan <i>alias</i> Ganapati Aiyar. | 17. Adi Narayana Nayakkan. |
| 18. Soumya Mutu Tevan. | 18. Komarasami Aiyar. |
| 19. Muthusami Tevan. | 19. Muttukumara Pillai. |
| 20. Muttusami Tevan, son of Komaru Velayudha Tevan. | 20. Periya Karuppa Pillai. |
| | 21. Kutti Josiyan. |
| | 22. Peria Kuppaniyangar. |
| | 23. Jagannadha Sastri. |
| | 24. Panchaksharam Shervai. |
| | 25. Kandan Shervai. |
| | 26. Muttana Tevar. |

Attested copy of the decision of the Provincial Court for the Southern Division in Original 4 Suit No. of 1895 dated 5th December 1894.
—continued.

The Court, finding, upon a consideration of the pleadings and of the documents filed by the parties, that the decision of the suit depended principally upon a point of Hindu Law, as to who was the legal heir of Mutu Vijaya Raghunadha Gouri Vallabha Peria Udaya Tevar, resolved to submit the following question to the Hindu Law Officers of the Court of Sadr Adalat.

“A Zemindari was held by a certain person, after whom it was enjoyed by his son, his son's widow and his son's daughter. The daughter, having been married, produced a daughter, who died without issue. All of the above parties being dead, the Government published a proclamation that the hereditary right of succession to the Zemindari was extinct, and that the Zemindari had escheated to the State. The Government therefore conferred the Zemindari on A, who was

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Original
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collaterally descended from the original Zemindar, and granted him the usual Sanad of permanent property for it.

A married seven wives, of whom three were living at the time of his death. The first wife had a daughter, who bore three sons and a daughter. The 2nd wife had a daughter, who bore a daughter. The 3rd wife had three daughters, the first of whom bore a son and two daughters; the second, a son; and the 3rd was not married.

The 4th, 5th and 7th wives had no issue. The 6th wife had a daughter, who was not married.

A had an elder undivided brother, B, who died before A; but some years after the Zemindari had been granted to A, leaving three sons, the eldest of whom, C, on the death of A, took possession of the Zemindari and continued to hold it until his death, after which he was succeeded by his son, D, who is now in possession of the Zemindari.

Question 1st.—The Zemindari having escheated to the Government, and having by them been granted anew to A, and being therefore in the light of self-acquired property, to whom ought it, after his death, under the principles of Hindu Law, to have descended, to the widows of A and their descendants, or to C, the son of his elder brother, B?

Question 2nd.—Supposing the line of descent to be in the widows and their descendants, who should be considered the heir, the eldest surviving widow, or the eldest son of the daughter of the 1st widow deceased?

Question 3rd.—Would it have been consonant with Hindu Law for A to have adopted one of his grand-sons, (daughter's son) as his son?

Question 4th.—Supposing A to have left a Will in favor of his elder brother's son, C, constituting him heir to the Zemindari, and to the rest of his property to the exclusion of his wives, daughters, and grand-children, would such Will be valid under the principles of Hindu Law?

23rd September 1833."

To the above, the following answer was made.

Answer to the 1st Question.—"The Zemindari granted by Government to A should descend after his death to the son of his eldest undivided brother.

Answer to the 2nd.—"As the Zemindari should so descend, the widows of A and their offspring are not entitled to it.

Answer to the 3rd.—A. should have adopted one of his daughter's sons (Doubhtas), and it would have been agreeable to the Hindu law.

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Answer to the 4th.—If A had left a Will, entitling his nephew, C, to the Zemindari and other property, to the prejudice of his widows, his daughters and to (?) his grand-sons, such a Will will be valid, consent to the Hindu Law; but the nephew is however bound to allow a maintenance to the widows of A. Such are the texts propounded in the Codes, Vignanesvaram, Smriti Chandrika, and so forth.

—continued

28th October 1833.

(Signed) AIYA SASTRI,

(„) VADAPURI VAJIPEYA YAJIYAR,

Pandits.

The Court moreover entered into a lengthened examination of witnesses in behalf of both parties, but did not consider the Plaintiff's claim to be by any means established by their evidence. The Pandits of the Sadr Adalat having, as above, declared that, on the death of the said Muttu Vijaya Raghunadha Gouri Vallabha Peria Udaya Tevar, the eldest son of his elder brother was his heir, his widow's daughter, and grand-children being only entitled to look for maintenance from him, the Court dismiss the Plaintiff's claim, the Defendant, as son of Muttu Vaduga Tevar, the eldest son of Oiya Tevar the elder brother of the said original holder of the Zemindari, being under the above exposition of the Hindu Law entitled to the estate.

The Court remark that they place no importance on the Razinama filed by the three sons of the elder brother of Muttu Vijaya Raghunadha Gouri Vallabha Peria Udaya Tevar before the Court in Original Suit No. 4 of 1823.

In that document the said three persons agreed in consideration of receiving eight villages to renounce their claim to the Zemindari. In doing so, it must however be understood that they merely agreed to forego any claim which they might at that time have considered themselves to possess, and not such as might, by any possible contingency, subsequently accrue to them.

The Plaintiff will pay the whole of the costs of Suit.

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<i>Costs of Suit incurred by the Plaintiff, viz.,</i>	Rs.	A.	P.	Rs.	A.	P.
Stamp duty on institution under Section XIII, Regulation XIII of 1816	2,000	0	0			
Fees of the Vakil under Section XXV, Regulation XIV of 1816	1,000	0	0			
Value of stamp papers filed	226	0	0			
Stamp duties on 10 Exhibits filed by Plaintiff	20	0	0			
<i>Costs incurred by the Defendant, viz.,</i>				3,246	0	0
Fees of the Vakil under Section XXV, Regulation XIV of 1816	1,000	0	0			
Value of stamp papers filed	169	0	0			
Stamp duties on 34 Exhibits filed by Defendant	65	0	0			
				1,237	0	0
Total Rupees... ..	...	...	...	4,483	0	0
Deduct amount paid by the Plaintiff	...	...	...	3,246	0	0
Balance, Rupees... ..	...	...	...	1,237	0	0

Balance, Rupees one thousand, two hundred and thirty-seven, to be paid by the Plaintiff to the Defendant.

Given under our hands and the seal of the Court in the Court-House at Trichinopoly, this 5th day of December, A. D. 1834.

Attested.

(Signed) G. S. HOOPER,
Officiating 3rd Judge
for Registrar.

(Signed) Geo. GARROW,
1st Judge.

(Signed) H. DICKINSON,

2nd Judge.

The period for appealing will expire on the 20th June 1835.

(Signed) G. S. HOOPER,

Officiating 3rd Judge

for Registrar.

Appealed.

(Signed) GEO. GARROW,

1st Judge.

(True Copy)

(Signed) T. M. ADINARAYANA CHETTI,

Head Writer.

Filed as Q in Original Suit No. 1 of 1877, this 22nd October 1877.

(Sealed) P. P. HUTCHINS,

District Judge.

DECREE OF THE SOUTHERN PROVINCIAL COURT.

(c)

Original Suit No. 3 of 1833.

Unga Mutlu Nachchiar Plaintiff.

Bodha Gurusawmai Tovar Defendant.

The points in this case are precisely similar to those in No. 4 of 1832; the question at issue in both suits being whether the son of the elder undivided brother of the original Zemindar were heir to the zemindari, or whether his heir was to be sought among his widows and daughter's sons. The Court were, therefore, of opinion that it would be sufficient that attested copies of the said question of the Court and answer of the Pandits should be filed to enable them to come to a decision on the case without requiring any other evidence of whatever description, notwithstanding which they have gone at some length into the examination of witnesses.

Attested copies of the said question and answer were accordingly filed by the Defendant.

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Decree of
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of 1833,
dated 30th
December
1834.

Decree of
the South-
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Court in
Original
Suit No. 3
of 1833,
dated 5th
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1834.
—concluded.

And the Court finding it to be declared by the said answer of the Pandits that the line of descent to the zemindari was in the sons of the elder brother of the original zemindar, and not in his widows or daughters' sons, dismiss the Plaintiff's suit, and direct that she do pay all costs of suit.

The Court are of opinion that the right of the Defendant as grandson of the elder undivided brother of the original zemindar to hold the zemindari is in no way impaired by the Razinama filed by his father and uncles in Original Suit No. 4 of 1823, of the Court's file; since it must be understood that the father and uncles of the Defendant agreed by that document to forego any right which they then possessed to the zemindari, and not such as might subsequently by any possible contingency accrue to them.

The Court moreover declare that it is not proved that the Plaintiff's husband was adopted by Ramee Veloo Nachchiar, or that he succeeded to the zemindari by virtue of such adoption. The Proclamation published by the Government shows that he was raised to the Puttan by the choice and free will of the Government, and not in consequence of any inherent right whatever in himself to succeed to it.

TRICHINOPOLY,	}	(Signed) GEORGE GARROW, <i>First Judge.</i>
5th December 1834.		(Signed) H. DICKINSON, <i>Second Judge.</i>

DECREE OF THE SOUTHERN PROVINCIAL COURT.

Original Suit No. 4 of 1833.

Gouri Vallabha Tevar alias Araumanai Sawmy	... Plaintiff.
Rodha Gurusawmy Tevar	... Defendant.

The Court are of opinion that the Plaintiff has altogether failed to prove that the late Zemindar, Srimut Muttu Vijaya Raghoonatha Gouri Vallabha Periya Udays Tevar did, as stated in the plaint, before his death, adopt as his son, Araumanai Sawmy, the son of the daughter of his second wife.

It is stated in the plaint, that the adoption took place while Mr. Viveash, the Principal Collector of Madura, was at Sivagunga. Mr. Viveash, on being addressed on the subject, has stated in a letter, dated 26th March 1834, that he is not aware of any such adoption having taken place; that he recollects that the two grandsons of the Zemindar were brought to him when he was at Sivagun-

Decree of
the South-
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of 1833
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ga, and that the person under whose charge they were brought, spoke of the Zemindar having it in contemplation to adopt the youngest of them as his son, in the event of his wife, who was then pregnant with child, not producing a son; but that the Zemindar, when he visited him, did not speak to him on the subject, nor was any public communication ever made to him that the boy had been actually adopted.

Decree of the South-
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O. S. No. 4
of 1833 dated
22nd Sep-
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—continued—

It is clear that, if the boy had been adopted, an Arzi would have been addressed by the Zemindar to the Principal Collector, who would have made a communication of the circumstances to the Board of Revenue and the Government. No such Arzi being pretended to have been addressed to the Collector, is convincing proof that the adoption did not take place. It is pretended that, at the time that the boy was adopted, he was invested by the Zemindar with the Puttam, and that he caused all his people about him to treat the boy with honours, as being the actual Zemindar. It is not possible that such ceremonies should have taken place unknown to the Collector, who was at the time halting at Siyagunga. Communication of the intention of the Zemindar to perform such ceremonies must have been made to the Collector, and he would have been invited to be present at the celebration of that of investing the boy with the Puttam. No such communication, however, was made to him, nor did the Zemindar when he visited him ever speak to him on the subject.

The Court conceive it to be impossible that the Zemindar should, during his lifetime, have divested himself of his dignity, and have conferred it on his adopted son which he is declared to have done.

It is proved that, at the time of the death of the Zemindar, his sixth wife, Purnvata Wardhani Nachchiar, was pregnant, and that his hopes were raised that she would produce a son. With this hope before him it is not possible that he could have adopted a son.

At the request of the Plaintiff's Vakeel the Court called upon the Principal Collector to forward them a number of documents from his Outcherry, in order that the Court might inspect them and see whether there were among them any which could favour the Plaintiff's claim. These were accordingly sent. They consisted of Arzies addressed by the original Plaintiff and others, to the Board, and of copies of a correspondence which passed between the Collector and the Board, on the subject of the succession to the Zemindari. In the Arzies, mention was made of the adoption of the boy in whose behalf this suit was brought. As, however, these Arzies were written by the original Plaintiff and

Decree of
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others, whose interest it was to prove the adoption, and thereby retain the Zemindari in their possession, the Court did not consider such documents to be of the slightest avail to prove the adoption, and therefore refused to allow the record of the suit to be unnecessarily overloaded, by permitting the Vakeel of the Plaintiff to file copies of them. It is to be remarked that there was not a single document among them written by the late Zemindar, or indeed by any one who was not connected with the Plaintiff, and had a deep interest in proving the pretended adoption.

The Court think it necessary to remark that, although a letter addressed by Mr. Viveash to this Court has been admitted and filed as a document in the case, the Court place but little weight upon it, in coming to a decision on the case. The letter certainly goes to show that no adoption took place, and had the evidence of the Plaintiff been of that nature as to lead the Court to believe that adoption was made, the Court would have sought for the evidence of the late Principal Collector, as to what he knew on the subject. As, however, the Court are satisfied, upon a consideration of the Plaintiff's own evidence, that no adoption occurred, they do not consider it necessary to obtain Mr. Viveash's testimony.

The Court are, from the above reasons, satisfied that no adoption what-
ever took place. Even if there had been the most ample proof of the adoption, the Court would question its legality, it being proved that the boy, said to have been adopted, was the only son of his father and mother; as, however, there is no proof of the adoption, the Court need not further notice this point. On the above grounds the Court dismiss the Plaintiff's claim.

(Signed) GEORGE GARROW, *First Judge.*

(„) H. DICKINSON, *Second Judge.*

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17th April
1837.

TRICHINOPOLY,

22nd September 1834. }

DECREE OF THE COURT OF SADR ADALAT.

(10.)

Provincial Court, Southern Division, Original Suit No. 4 of 1833.

Court of Sadr Adalat, No. 2 of 1835.

Srimat Muttu Vijia Ragbunadha Gouri Vallabha Faria Udaya Tevar,
minor, alleged adopted son of the late Zemindar of Sivagunga,
by his father and guardian, Dorasami Tevar Appellant,

Hanumanta Row, Vakeel.

versus

Bodha Gurusami Tevar, Zemindar of Sivagunga Respondent.

Gulam Murtuza, Vakeel.

Provincial Court, Southern Division, Original Suit No. 4 of 1832.

Court of Sadr Adalat, No. 11 of 1835.

Muttu Vijaya Raghunadha Muttu Vaduga Peria Udaya Tevar, minor, by his guardian, Samia Muttu Tevar... .. Appellant.

Krishnamachari, Vakeel.

versus

Bodha Gurusami Tevar, Zemindar of Sivagunga Respondent.

Gulam Murtuza, Vakeel.

Provincial Court, Southern Division, Original Suit No. 3 of 1833.

Court of Sadr Adalat, No. 13 of 1835.

Unga Muttu Nachehiar, pauper, widow of the late Muttu Vijaya Raghunadha Gouri Vallabha Peria Udaya Tevar Appellant.

Gulam Raja, Vakeel.

versus

Bodha Gurusami Tevar, Zemindar of Sivagunga Respondent.

Gulam Murtuza, Vakeel.

(Signed) John Bird.

(") W. Hudleston.

(L. S.)

1. In the two former of these Appeals, the Appellants claim the Zemindari of Sivagunga, described as paying annually to Government the sum of Rupees 2,62,500, and yielding a net profit of Rupees 1,00,000, together with the amount of profit from 1829 to 1831, and cash, jewels, and other personal property, valued at Rupees 7,97,615-6-5. In the Appeal last enumerated, the claim of the Appellant is limited to the Zemindari abovenamed, described by her as producing annually Rupees 4,37,500, and paying to the Government a beriz of Rupees 2,62,500.

2. The matters put in issue in these three Appeals are so intimately connected with each other that it appears to the Court of Sadr Adalat that the only satisfactory mode of disposing of them is by a single Decree.

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3. The principal question to be determined in these Appeals is the right of succession to the landed estate of the late Muttu Vijaya Raghunadha Gouri Vallabha Peria Udaya Tevar, Zemindar of Sivagunga. It is claimed, first, by his alleged adopted son in the Original Suit No. 4 of 1833 on the file of the Provincial Court for the Southern Division, secondly, by the son of the said Zemindar's daughter by his eldest wife in the Original Suit No. 4 of 1832, and thirdly, by the only surviving widow of the said Zemindar, in the Original Suit No. 3 of 1833, on the file of the said Provincial Court.

4. It is resolved to dispose of each of the claims above-mentioned in the above order.

5. And first, with respect to the alleged adoption. The Court of Sadr Adalat, after the most mature consideration, entirely concur with the Provincial Court in deciding that it never took place. The Appellant has prayed the Court to call for certain documents mentioned in the Decree of the Provincial Court; but the Court of Sadr Adalat have resolved not to comply with that request, it being to the Court perfectly clear that the papers alluded to could not be available as evidence in support of the Plaintiff's case.

6. While, however, the Court of Sadr Adalat adopt the view taken by the Provincial Court of the evidence for the Plaintiff in this case, they do not concur with that Court in deeming of secondary importance the evidence of Mr. Viveash, the late Principal Collector of Madura, which in a case of this nature is held by the Sadr Court to be peculiarly deserving of consideration, with reference to the well-known fact, that publicity, if not absolutely essential to the validity of an adoption by a Hindu, is always sought on such occasions, and to the allegation in this case, that the definitive ceremonial of adoption took place on the day on which the child visited the said Principal Collector.

7. The Court of Sadr Adalat observe that "a letter addressed by Mr. Viveash to" the Provincial Court on this subject is mentioned in that Court's Decree as having "been admitted and filed as a document in the case", a proceeding wholly irregular, and also at variance with the established rules of evidence, inasmuch as this gentleman's testimony on oath might have been obtained by the Provincial Court.

8. Mr. Viveash, being present at Madras, the Court of Sadr Adalat have, under date the 6th January 1837, obtained his evidence on oath, which is ordered to be annexed to the record of this Appeal (Exhibit A); and it is proved by that gentleman's testimony that no communication of the fact of such an adop-

tion was, as alleged on behalf of the Plaintiff, at any time made to him before the death of the late Zemindar.

9. That the adoption could not have occurred, as described by the witnesses for the Plaintiff, without its having come to Mr. Vireash's knowledge, appears to the Court of Sadr Adalat to be unquestionable.

10. For the foregoing reasons, the Court resolve to dismiss the Appeal No. 2 of 1835, with all costs against the Appellant.

11. In the Original Suit No. 4 of 1832, the Plaintiff contends that, inasmuch as the parties are Maravars, the provisions of the Hindu Law of Inheritance do not apply: the Defendant, on the contrary, insists upon the application of those provisions.

12. The Courts are required by Clause 1st, Section XVI, Regulation III of 1802, to regulate their decisions by the Hindu Law, where the parties are Hindus.

13. The Decree of the Provincial Court in this case, dismissing the claim of the Plaintiff, is founded upon an opinion therein recited, delivered by the Pandits of the Sadr Adalat.

14. The Court see no reason to dispute the correctness of that opinion on the case put to the Pandits. The Court's affirmation of the Provincial Court's decision against this claim rests, however, on a totally different ground.

15. It is observed that the Plaintiff avers the prevalence of practices among the Maravars, which go to overthrow the principle of a widow's claim to succeed her deceased husband: but it is not pretended that the surviving widow of the late Zemindar of Sivaganga has given in to those practices in her own person; and that they prevail universally among Maravars is not proved.

16. In the appeal No. 18 of 1814, where the right of succession to the Zemindari of Ramnad was claimed, the parties were, as in this case, Maravars, and the decision of the Sadr Adalat, and the Decree of His Majesty in Council, affirming that decision, are founded upon the provisions of the Hindu Law.

17. By that Law, therefore, the decision on this Appeal must be determined, and there is no point of Hindu Law more clear than that a daughter's son has no claim to succeed to the inheritance, in preference to a surviving widow.

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18. The Court of Sadr Adalat, therefore, dismisses the Appeal No. 11 of 1835, but under all the circumstances deem it proper to adjudge that the parties to that Appeal shall pay their own costs respectively in the Provincial Court and in this Court.

19. In proceeding to determine upon the claim to succeed to the Zemindari of Sivaganga, as between the Appellant in Appeal No. 13 of 1835, Unga Muttu Nachchiar, the surviving widow of the late Zemindar, Muttu Vijaya Raghunadha Gouri Vallabha Peria Udaya Tevar, and the Respondent, Bodha Gurusami Tevar, who has succeeded, in the possession of that Zemindari, his father, who was the son of the elder brother of the said deceased Zemindar, the Court of Sadr Adalat deem it proper to notice decisions of this Court, of which the effect appears to them to be that the grantee of the Sannad-i-Milkiat Istimirar must be held to hold the Zemindari under that grant as self-acquired property. There is indeed in the present case especial ground, as observed in the question put by the Provincial Court to the Pandits, for so regarding the tenure of the abovenamed Zemindar, and that ground is mentioned in the proclamation of this Government, bearing date the 6th July 1801, which is an exhibit on record.

20. The general reasoning on the point to which the Court refer is contained in the following extract from the Sadr Court's Decree in Appeal No. 13 of 1813, which is repeated in other Decrees.

"It is plainly deducible from Regulation XXV of 1802 that, previously to the fixing of the permanent assessment, succession to Zemindari tenures was not governed exclusively by the laws of inheritance, but that the ruling power created, tolerated, abolished, or disposed of these tenures, as might be expedient for the purpose of realizing the public revenue due to the Government; and therefore, that, in rejecting the claims of the original Plaintiff, it be the specific grounds of such rejection, and in granting the Zemindari to the original Defendant, the British Government exercised a right, which, according to the declared usages of the country, was vested in the ruling power."

21. Other decisions on claims to Zemindaries have gone to affirm the decision that the grant of the Sannad-i-Milkiat Istimirar was in each instance an act of the mere will and pleasure of the Government, irrespective of the rules of hereditary succession, and the Court, contemplating therefore the property

conferred by the Sannad as the self-acquired property of the original grantee, put the following question to the Pandits of the Court, with reference to the claim under consideration.

Question.

A and B were brothers, of whom the younger, B, acquired, without the aid of any paternal property, a distinct and separate estate, in which A was not entitled to and did not participate.

A died, leaving a son, and afterwards B died, leaving a widow and daughters, but no son, son's son, or son's grandson.

Upon B's death, under the foregoing circumstances, is his widow entitled to succeed to his said estate, or is the son of A entitled to succeed thereto, in preference to B's widow?

The authorities for the answer to the above question to be stated at large.

Answer.

If A and B, the brothers, had not divided their common property acquired by their father or paternal grand-father or others, the son of A, the elder brother of B, is entitled, upon B's death, to succeed to the estate mentioned in the question, which was acquired by B himself.

2. If A and B, the brothers, had divided their common property acquired by their father, or paternal grand-father or others, the widow of B is entitled to succeed to his self-acquired estate mentioned in the question.

Authorities are:—

The text of Brihaspati, and the commentary thereof on the subject of the right of succession to the estate of one who leaves no male issue, in the Law Books, called Smriti Chandrika, Madhavyam, &c., Dharma Sastres. "It must be understood that "the widow has this right in case of her husband being separated from his co-heirs". Accordingly Brihaspati declares:—"The several kinds of property received in mortgage &c., the (Jaya) wife shall take with the exception of real property in cases of divided family". The meaning of this text is explained by the author of Smriti Chandrika as follows:—"The widow) shall in cases of divided family take the whole estate, real and personal, received in mortgage &c., belonging to her husband. By the term 'divided family,' it follows that, in the case of undivided family, the wealth of the person, who died,

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leaving no male offspring, shall devolve solely upon his father, brothers, &c., who lived together. The term 'Jaya' means the wedded wife. The passage 'with the exception of real property' regards the widow who has no daughter."

2. The text of Narada and its commentary on the subject of the right of succession to the estate of one who leaves no male issue, is in the Law Books, called Vyavahara Mayukham, &c., Dharma Sastras. Narada says:—"Among the brothers, if any one die without issue or enters a religious order, let the rest of the brethren divide his wealth, except the wives' separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. If they behave otherwise, the brethren may resume that allowance." This, Madana says, relates to the widow of an undivided or re-united brother, since it is read under that head.

3. The commentary on the text of Yagnavalkya, declaratory of the right of widow, daughter, &c., to inherit the estate of one who leaves no male issue, inserted in Clause 39, Section I, Chapter II, of the Law Book, called Mitakshara. "Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue."

28th December 1836.

(Signed) AIYA SASTRI,

(„) VADAPURI VAJIIPEYA YAJIYAR,

Pandits.

22. The answer of the Pandits makes the decision between the parties to this Appeal dependent on the fact of there having been, or not been, a division of paternal property between the late Zemindar and his elder brother.

23. The Provincial Court have assumed the negative of this question, but on what grounds does not appear; for, the Decrees of that Court take no notice of the evidence produced by the parties in the Original Suit No. 4 of 1832 on their point.

24. The Court of Sadr Adalat are of opinion that the direct evidence to the fact of a partition of patrimonial property between the said two brothers in the year 1792, including the "Kaval land at Padanaattur", which is given by witnesses for the Plaintiff in the Original Suit No. 4 of 1832, is entitled to much consideration, particularly, that of the 1st, 9th, 11th, 14th, 15th and 16th witnesses for the said Plaintiff.

25. It is incidentally mentioned in the course of that evidence that the late usurper of the estate deprived the younger brother of the share, which fell to him upon that partition, a circumstance accordant with what is stated in Mr. G. A. Hughes's evidence as to the treatment which he had received from "the Marada family."

26. The whole tenor of Mr. G. A. Hughes's evidence tends to strengthen the presumption of the separation of the brothers. The facts of the allotment by the younger brother to the elder of "the Taluk of Padamattur", of the latter's doing homage with other head inhabitants on the occasion of his younger brother's investiture as Zemindar in 1801, of the fostering care extended by the late Rani to the younger brother, which induced a general impression of his claim to be her successor, and would seem to have given rise to a belief of his adoption by her,—all tend to corroborate the direct evidence to the state of separation between the brothers previously to the grant of the Zemindari by the Government to the husband of this Appellant.

27. Of the state of division as between the said Zemindar and the descendants of his said elder brother, there is strong evidence deducible from their having lived separately, having manifestly no community of interests whatever, and also from the circumstances, out of which the Suit No. 4 of 1823 on the file of the Provincial Court arose, and the terms of the Razinamah, in which that suit resulted.

28. It is also worthy of observation that, while the direct evidence to the fact of partition is thus corroborated by facts proved by other and independent evidence, the testimony of the witnesses for the Defendant in the Suit No. 4 of 1832, who deny the fact of such division, and assert, in contradiction of the witnesses on the opposite side, that the two brothers lived and performed their religious ceremonies, together, is shaken; and their pretensions to credit are indeed destroyed, by their having deposed to notorious falsehoods, such as that the older on whom the Zemindari had been conferred by the Government, gave it to the younger, that the two brothers managed the Zemindari jointly, and that the younger held it as the elder's agent ("karyastan").

29. Upon the whole, it appears to the Court of Sadr Adalat that the fact of the division is proved, and that consequently, according to the foregoing exposition of the Hindu Law by the Pandits, the widow of the late Muttu Baghunadha Gouri Vallabha Peria Udaya Tavar, Unga Muttu Nakkchiar, Plaintiff in Appeal No. 13 of 1835, is entitled to succeed to the Zemindari as the right

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ful heir of her said husband, in preference to the descendants of his elder brother.

30. It remains for the Court to decide upon the effect of the Will alleged to have been executed by the said late Zemindar in favor of the father of the Respondent in this Appeal, and of the deed of agreement, dated 29th July 1830, purporting to be executed by the Appellant in conjunction with two other widows of her deceased husband.

31. As to the Will, there is, in corroboration of the evidence to its fraudulent fabrication, the obvious circumstance of the extreme improbability that the Zemindar, had he intended to make such a disposition, would have put it off until his last moments. The Court of Sadr Adalat, moreover, believe the evidence, which shews that, at the time of the alleged execution of this Will, the said Zemindar was in such a condition as to deprive it of all legal validity.

32. In the deed of agreement abovementioned, it is declared that the obligee and his posterity shall enjoy the Zemindari by the right, which he "possesses, and by virtue of the Will left in his favor by the late Zemindar"; and the three widows agree to receive certain villages described as granted by the other party for their maintenance.

33. The Appellant denies having been a party to the said agreement, which she avers to be a forgery; but it appears to the Court of Sadr Adalat that it is unnecessary to pass any determination on that point; because, in their opinion, even if she did execute that deed, it is in no way binding upon her, whose legal right to succeed, as the heir of her late husband, was preferable to that of the party to whom it was executed, and in whom the terms of the deed pre-suppose that a valid title vested at the time of its execution.

34. Error, as well as ignorance of right, renders a contract or agreement invalid by invalidating the assent given to it, and the Court of Sadr Adalat entirely concur also in the following observations by Sir Thomas Strange, in his "Notes of Cases of Madras", viz., a native woman is "under the special protection of the Court entitled to the benefit of that principle, which in equity subjects to be regarded with peculiar jealousy all transactions with persons whom the policy of the Law considers to be at the time incompetent to maintain their own right, and to exact for themselves justice. A native woman can never be deemed sufficiently *san juris*, to be held bound by her personal acts, if there exists the slightest reason to apprehend that advantage may have been taken of her (Vol. II, p.

Again, a Court, administering Hindu Law, must, to do justice, often interfere between a native woman and her acts, as Courts of Equity do at Home in

"all cases between persons standing together in certain specified relations giving to the one a presumed advantage over the other."—(Vol. II, p. 159).

35. In the present case, supposing that the Appellant did execute the said deed of agreement, it appears to the Court that there is the strongest reason to apprehend that advantage was taken of her.

36. The opposite party had obtained, and held for more than a year, possession of the Zemindari; the Appellant's ignorance of her own right is pre-
sumable from her not then impugning his, and acquiescing in his, usurpation. By this deed, moreover, she is made to accept a grant of villages belonging to the estate to which she is herself entitled, and on this consideration admits the usurper's title.

37. For the foregoing reasons, the Court of Sadar Adalat resolve to reverse the Decree of the Provincial Court in the Original Suit No. 3 of 1833, and do adjudge the said Appellant, Unga Muttu Nachohiar, to be the rightful Zemindar of Sivaganga, and, on the principle of the rule laid down in the circular Order of the 22nd October 1829, the Court do award to the said Appellant, in addition to the said Zemindari, the amount of the profits thereof from the date of the institution of the original suit to this date, which amount the Provincial Court of Appeal will ascertain by the best procurable evidence.

38. And the Court of Sadr Adalat do further adjudge that the Respondent in the Appeal No. 13 of 1835 shall pay all costs of suit in this Court and in the Provincial Court according to the following statement:—

(Here enter statement.)

Given under our hands and the seal of the Court this 17th day of April in the year of Our Lord, A. D. 1837.

By order of the Court of Sadr Adalat,

(Signed) W. DOUGLAS,

Registrar.

(True copy).

(Signed) W. MORGAN,

Deputy Registrar,

Appellate Side.

Filed as R in Original Suit No. 1 of 1877, this 22nd October 1877.

(Sealed) F. P. HITCHINS,

District Judge.

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Judgment of
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JUDGMENT OF THE PRIVY COUNCIL, DATED 18th JUNE 1844.

----- (6) -----

Bodha Gurusami Tevar	...	...	... <i>Appellant.</i>
Unga Muttu Nachchiar...	...	...	... <i>Respondent.</i>

Dr. Lushington :—

The present litigation is between the widow of the party who was last seized of the Zemindari and his great-nephew ; and various suits appear to have been instituted with regard to the right to this property, and the claim of the parties put on various grounds, but their Lordships are of opinion that the whole question is now narrowed to a very short point.

In the Provincial Court, certainly, some notice was taken of the question whether any division had actually been proved to have taken place between the two brothers or not, and the Provincial Court were of opinion that there was not satisfactory evidence to establish the fact of the division, but when the Appeal came to be brought before the Court of Sadr Adalat, that Court came to a contrary conclusion, and decided this case in favour of the widow on the express ground that the two brothers had become divided, and that, in consequence, this property, whether self-acquired property or not, according to their opinion and judgment, would belong to the widow, and not be inherited by either of the brothers, or the nephew or the great-nephew.

With regard to the question of law, as far as the opinion of the Pandits could determine it, there seems to have been no difference ; they have all stated in substance to this effect that the right and title to the Zemindari depended on the fact of division, and the fact of division, therefore, was, and is, a most substantial question to be determined in this case. Now, their Lordships find, upon an examination of all these proceedings, that the fact of the division has never been alleged in any of the pleadings. They find also that, according to the Regulation of 1816—the 15th Regulation—that the division ought to have been made a distinct point in the cause, and that an order ought to have been given for the production of evidence in proof of such an averment.

Then it comes to this :—That there has been no such averment, no such point made, and no such direction given ; and how it was that the evidence came to be taken, on the one side or on the other, with respect to the question of division, no satisfactory explanation has yet been afforded at the Bar.

Now their Lordships entertain a very strong conviction of the absolute necessity of adhering to this Regulation; for, it is in the first place a Regulation emanating from the highest authority, and is entitled to the force of Law, and it is, in the second place, one, in their Lordships' Judgment, of the utmost importance for preserving the regularity of the proceedings of the Courts in that country, and for preventing constant confusion and uncertainty as to what really are or are not the points in litigation, and to which the evidence is to be directed. They conceive that this Regulation has been most wisely framed; first, in affirmatively directing that the points on which evidence is to be taken shall be distinctly set forth, and that it shall be a duty imposed on the Court, if those points do not appear to be sufficient for the final termination of the litigation, that they should state distinctly, as a matter of record, the further points on which evidence is to be taken. Further, the Regulation, after having thus affirmatively stated what is to be done, goes on to state what shall not be done:—"In like manner, if "proof shall be required on any other points in the course of the trial, such points "shall be recorded on the proceedings, and the proper party shall be called upon "for the requisite evidence; and no exhibit shall be filed or witness summoned, "unless expressly declared to be in proof or refutation of some points upon which "the Court may have directed that evidence should be taken."

Judgment of
the Privy
Council
dated 18th
June 1844.
—continued.

Now, this Regulation, important as it is, and most clearly expressed, points directly against the course which has been unfortunately adopted in this case, because the point on which the whole case turns, and, in the opinion of the Sadr Adalat, beyond all question, the whole case was decided, never was alleged as a point in any of the proceedings, and the evidence which was received in support of it never was directed or sanctioned by the Court.

It is, in the opinion of their Lordships, therefore, indispensably necessary for the purpose of supporting and securing the compliance with this most wholesome Regulation that they should act in conformity with it; and if they act in conformity with this Regulation, the inevitable consequence is, that they cannot sustain the decision of the Sadr Adalat; because, it is upon the ground of that point or the point of division alone, on which the judgment rests.

But looking at the whole of these proceedings, they do not think that it would be consonant with justice at once to reverse the Decree of the Court below and to affirm the Decree of the Provincial Court. They think that the parties have unfortunately lost their way, and on that mistake and misapprehension it would be going too far finally to dispose of the case now.

Judgment of
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For these reasons, their Lordships are of opinion that the Decree of the Sadr Adalat must be reversed, but that leave should be given to the Respondent to bring a new Suit, notwithstanding the Decree of the Provincial Court, at any time, within a period presently to be specified and after full communication of Her Majesty's Order in Council shall have been made to the parties interested, and though their Lordships can make no order on the subject, it would be exceedingly desirable that it should be known to all those who are interested in this property, that the question of fact as to division or no division appears to be the only point on which the main question of title to this property will ultimately depend.

MADURA ZILLA CIVIL COURT.

—(10)—

Original Suit No. 2 of 1845.

Rani Unga Muttu Nachchiar Plaintiff (Pauper).

Vakil, Anna Sastri.

Versus

- | | |
|---|---------------|
| 1. Muttu Vijaya Raghunadha Gouri Vallabha | } Defendants. |
| Peria Udaya Tevar | |
| 2. Namasivaya Tevar | |

Vakil, Subba Row (for 1st Defendant).

(Seal)

1. This is an action to determine the right of succession to the Zemin-dari of Sivaganga and its appurtenances, together with the mesne profits, &c., as set forth in the plaint.

2. The following pedigree shows the relationship of the parties.

Namasivaya Tevar.

Oiya Tevar (died in 1814).

Gouri Vallabha Tevar, late
Zemindar and husband of
Plaintiff.

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Rani Unga
Muttu
Nachchiar
the
Zemindari
Sivagan-
&c.,
dated 27th
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1847.

Muttu Vaduga Tevar
(succeeded Plaintiff's husband
in 1829).

Bodha Gurusami Tevar
(succeeded his father in
June 1831).

Gouri Vallabha Tevar,
(succeeded his
brother on the
10th July 1841),
1st Defendant.

Namasivaya Tevar,
2nd Defendant.

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—continued.

3. Plaintiff claims as the senior surviving and childless widow of her late husband, whom she describes as having died in 1829, seized of the said Zemindari by hereditary right and Government grant, without male issue, natural or adopted, and after formal separation from his elder brother, Oiya Tevar, the grand-father of the Defendants.

4. 1st Defendant, now in possession, maintains his right thereto as heir-at-law to his grand-father and brother, no such division as that alleged by Plaintiff having taken place between his said grand-father and grand-uncle so as to obstruct the natural course of the said inheritance. 2nd Defendant was *ex parte*.

5. Upon consideration of the pleadings, the Court felt no difficulty in declaring, by its Proceedings of the 1st March 1847, under the provisions of Regulation XV of (1816), that the sole fact required to be proved by Plaintiff, and combatted by Defendants was the "division in 1792"—few points of Hindu law being so plainly and clearly determined as "that a widow, circumstanced as the Plaintiff describes herself to be, is her husband's heir to the temporary exclusion of all others."

6. In support of her case, Plaintiff cited twenty witnesses, of whom six were examined by the Court, and fourteen dispensed with by her Vakil, and tendered in evidence twenty-five documents, of which twenty were received, and five, rejected for the reasons detailed in the Court's Proceedings of 5th and 26th April, 19th June, 4th August and 27th October, 1847, upon Motions Nos. 123, 176, 227 (and) 238, respectively.

7. The Defendant, in view to show that no division had or could have taken place (as alleged), cited fourteen witnesses, of whom thirteen were examined, and one dispensed with by his Vakil, and also tendered in evidence sixty-eight documents, of which thirty were received, and thirty-eight rejected for reasons detailed in the Court's Proceedings above referred to.

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8. As the ground of its judgment upon the question of union or division, the Court has thus before it a mass of evidence, "oral", "documentary," and "inferential from circumstances", which it values in an ascending scale in the order in which it has named them, being the reverse of the rank which would be assigned to those several species of evidence by a Court in England, but one which those conversant in Indian Jurisprudence must feel that in this country they generally deserve.

9. The Court will proceed to comment on each in some detail, in illustration of the process, by which it has been led to the conclusion at which it has arrived.

10. And, first, of the oral evidence:—Five of the Plaintiff's witnesses speak positively, and of their own personal and ocular knowledge, to the actual fact of the division in 1792. Can their testimony be relied upon? Aged, according to their own account, 75, 79, 74, 73 and 71, and consequently being, at the time of which they speak, 20, 24, 19, 18 and 17, respectively, they narrate the most minute particulars of a transaction which took place 55 years ago, with an apparent accuracy, which would beget suspicion, if displayed by younger men in narrating the events of a few months, or even days past. We may fail to detect falsehood when she assumes the mask of truth; but fortunately that assumption is difficult; and experience of what must necessarily be the general nature of all human testimony under particular circumstances enables us to pronounce, with moral certainty in the present case, that the testimony of witnesses, circumstanced as these describe themselves to be, would, if true, present but dim and shadowy outlines of a main fact—an impression naturally accounted for by one, something imperfectly remembered by another, a recollection of a transaction, but without the details, by a third. On such obscure indications, we might feel justified in concluding that something of the nature to which they all seem to point had taken place; but common sense, the every-day experience of daily life, instinctively rejects such evidence as that given by these witnesses. Trivial actions, words, names, small portions of time, unimportant localities, are all deposed to with a mixture of folly and effrontery, perhaps not to be found save in an Indian Court; nor perhaps in any other tribunal would the presiding Judge feel able, while thus repudiating the evidence of the witnesses, to declare his opinion as to the truth or falsehood of the fact proposed to be established by them, to be so little affected thereby (?); and that, for all they have said, he considers it to be as likely that it took place as not. That such must be the case will be conceded by any one who reads the depositions of the witnesses for the Defendant, to all of which the re-

marks now made upon those for the Plaintiff evidently apply with equal, if not greater, force. Upon the whole, indeed, it may be thought that some of the circumstances to which they pretend to depose are more incredible in their nature than any asserted by those on the other side—that division may possibly have taken place, for instance, though the witnesses have sworn falsely as to their being present—but that the interview and consultation between the late Zemindar and his legal adviser, Sankara Aiyar, as detailed by the 10th and 13th witnesses, could not, in the nature of things, have happened. But, again, if the dramatic scene of the division, as described by the Plaintiff's witnesses, especially the 4th and 5th, be considered,—the discussion before the palace, vulgating (?) all the family matters, the retirement of Velu Nachchiar within the palace, while the subordinate actors are performing their parts, her re-appearance at the denouement, and the *finale* of the two documents, the one delivered by her to one brother, and the other to the other—it would be doing injustice to both parties to ascribe to either a greater degree of credibility than to the other.

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Having expressed this opinion of the utter incredibility of the oral evidence generally, it would be superfluous to enter into a minute examination and comparison of its individual parts and to point out each particular contradiction or inconsistency, as the Plaintiff has sought to do in her Motions Nos. 445 and 446, and the Defendant in his No. 465. Both had an easy task. It seems impossible carefully to consider the individual depositions on both sides, without discovering additional reasons for discrediting them as a whole: however, they are upon the record, and open to the judgment of superior tribunals.

11. Having thus explained the necessity of looking elsewhere than to the oral evidence for material on which to found its judgment, the Court proceeds to the consideration of "documentary evidence."

12. To the Plaintiff's documents Nos. 156 and 198, showing her husband's title, it is unnecessary to advert; and Nos. 160 and 161, being report and judgment of the Privy Council in a previous litigation between the parties, are only useful as showing under what permission Plaintiff is now in Court.

13. The first papers of importance, which present themselves in the documents filed by the parties, are certain parts of the record in a former suit between Plaintiff's husband and Defendant's father, No. 4 of 1823. Plaintiff produces two agreements, which were the cause of action therein (157 and 158), the Answer (162), and a deed of compromise (159); while the Defendant exhibits the Plaint, Answer and Reply (Nos. 167, 168 and 169). The history of this case may

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be briefly stated thus:—After the younger brother had received the Zemindari in gift from the Government, he assigned certain villages on beneficial lease to the elder, under agreement (No. 157). On his death, in 1814, his son and successor, Defendant's father, undertook to pay arrears of rent due, and renewed the subsisting agreement by another (No. 158), failing in terms of which, the Zemindar sued Defendant's father and his two brothers then living thereupon, and was answered by denial and pretension of right to half the Zemindari as their father's share. The suit was finally compromised by the deed (No. 159), under which it was agreed that rent should be paid as originally stipulated, and the Defendants admitted the futility of the claim put forward by them.

From these facts, Plaintiff would argue that division must have taken place between the brothers. The Defendant takes exception to the authenticity of the agreements as not having gone to proof; but this the Court considers untenable, they having been virtually admitted in the deed of compromise, which alone prevented proof being gone into. Another exception, taken by Defendant, is better founded, viz., that the deed of compromise is illegal and invalid, as embracing and settling a question not in issue in the suit, and that whatever resignation of right may therein appear to have been made, is of no force and effect whatever. This is true, and would avail Defendant, if his title were admitted in other respects, and denied on the ground of this deed alone. But that is not the present question; and what the Plaintiff would deduce from the circumstances of the Suit No. 4 of 1823 is, that Defendant's father must have been aware that he had lost his title by division, or he would never have executed such a deed. On carefully considering this subject as it affects the main question, the Court does not feel warranted in drawing from it such conclusion. Admitting the authenticity of the agreement on which the suit was brought, they do not seem necessarily to imply more than that the younger brother, having, by his individual talent, valour, or reputation (as the case may have been), acquired a separate property, in its nature indivisible, and also, under the ordinary rules of partition, exempted from division among collateral co-parceners by the mode of its acquirement, allotted a portion on certain favourable terms to his less fortunate elder brother. On the grantor being subsequently driven to enforce these terms at law, he was met by a most absurd plea on the part of those in possession under the grant, viz., "that they were entitled to half the Zemindari then"; and that they could compel him to divide. This was, under the circumstances, so preposterous, that it can scarcely be supposed to have been seriously put forward; and accordingly it was immediately withdrawn, without difficulty or special consideration. But it is

to be observed that the claim, though absurd at the time, whether division had taken place or not, was founded on the supposition that it had not; and that fact was not categorically denied, and the Zemindar was satisfied by the Defendants renouncing the claim they had put forward, viz., "the right to compel him to divide the Zemindari." Nothing was said of the right which might accrue to them as heirs. As mere co-parceners even in a division, they could not have taken any share of the Zemindari; but they might and would, in their due place and rank as heirs; and that rank would, if no division had taken place, be prior to that of the widow. This right was not alluded to at that time, which may be accounted for by the seeming improbability of its being ever advantageous to them, the Zemindar having then a son living and numerous wives. In short, all the pleadings and circumstances of the Case No. 4 of 1823 seem to be perfectly consistent with the supposition that no division had taken place, and, as far as they may be considered as proving anything, seem to incline the balance rather in favor of the Defendant than the Plaintiff.

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—continued.

14. Another point on which both parties tender documentary evidence of the same nature is the opinion of the late Zemindar himself on the right of succession. Defendant produces the letter written by him, the Zemindar, to the Collector in September 1806 (No. 171), in which his right is clearly admitted. Plaintiff exhibits another letter, written by the same individual in April 1822 (No. 199), in which it is altogether passed by. It must be borne in mind that these documents cannot, in any case, be evidence of more than the opinion of the individual as to the law. They do not make the law: still as they must be supposed to have been written with much care, and all the deliberation the importance of the subject required, we may conclude that the law of the case must have in both instances been a prominent consideration with the Zemindar and his advisers. Now, if we examine the earlier of these documents, written at a comparatively short time after the Zemindari had been granted to him by the Government, we find it to be a correct exposition of the law, provided no division had taken place—from whence there certainly arises a strong presumption that none had. Was the Zemindar so very skilled in law that he would pen an opinion on such occasion without consulting any authority? That can scarcely be supposed; and, if he made the very slightest enquiry, the point in question must have come before him. Neither himself nor his advisers could open a law book, without reading "in case of your dying without male issue, your brother is your heir, if undivided; if you are divided from him, your wife." He must be supposed to have had this within his knowledge; and with this before him he places his bro-

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—continued.

ther and his nephew in that position which the law would give them, if no division had taken place. This appears to be almost as though he had admitted the union in so many words.

15. The document (No. 199), produced by Plaintiff is of a later date, and proves either that the Zemindar had changed his opinion, or that he wished to be supposed to have done so. He could not but have recollected his former letter: he must have known that in the latter he was passing over in silence an important right mentioned therein. Or to make the case stronger, suppose the former letter never to have been written: even then, he must have felt that he was omitting the claim of those whom every child knew were his lawful heirs, unless the inheritance was in some way or by some cause obstructed. In the second letter, after stating, as in the first, the paramount claim of his own male issue, natural or adopted, he could not be ignorant that the next claim to admit or to reject was that of his brother. If he was giving his true sentiments, why not either insert it as a good and valid one, or give the cause of its rejection, if such existed? The omission argues ill-will; and if there was ill-will, it surely would have been supported by a reason, if one existed. He would have said then "My brother's sons would have succeeded; but, as we made division in 1792, their claim is null"—which would have settled the matter. And it is very remarkable also that, immediately after making this omission, he commits an error: he postpones the right of his widow, which would come next after his brother, and asserts his daughter to have the next right, and places the widow in a rank which she does not hold in the scale of legal inheritance,—from which it may fairly be inferred that the latter document was less the product of consideration, and more that of impulse or caprice, than the former. Weighing these documents then together, the Court cannot avoid regarding the former, not only as expressing the Zemindar's real opinion of the rights of the case, but as furnishing strong presumptive proof that no division had taken place between the brothers; and if we would account for the production of the latter document, there is a natural way of doing it. At the time of writing it, he was not on terms with his brother's family: he was on the eve of instituting the Suit No. 4 of 1823. In the reliance which it places on the letter of 1806, the Court feels much strengthened by the conduct of the Plaintiff in respect of it. In a former litigation between the parties nearly 17 years ago a copy of this document, professedly made from the original in the custody of the Collector, was placed on record. No objection was then taken to it as being correct copy of a genuine document. In the present case, when another copy taken from the same original is produced, the Plaintiff demurred, and asserted as the Court understood, and as it still believes she meant to do, that she did not

rely on the authenticity of the document filed (the copy), and requested that the original might be brought into Court. This, though scarcely deemed requisite under the circumstances, was done, the original was obtained from the Collector; and, (it) being found in all respects apparently unexceptionable and similar to the copy professedly made from it, the Plaintiff turns round upon it in Motion No. 247, saying she did not mean that the pretended original in the Collector's record had not now been faithfully copied, but that the real original had been destroyed or altered. This charge she would have investigated. But on anything so vague or improbable, it would be a waste of the Court's time to enter. She desires that it may be ascertained if a copy was sent to the Government at the time, and whether that corresponds with the original now produced. This the Court deems it unnecessary to do. With a document before it, delivered in as an original by a public officer, and bearing every mark of authenticity, it need not go in search of copies, in which, if any difference was found, it might be equally probable, if not more so, that the copy had been tampered with than the original. All the conclusions, therefore, which are to be drawn from this part of the documentary evidence, seemed to be in favor of the Defendant, by leading to a supposition that no division had taken place.

Attested copy of the Judgment in Original Suit No. 2. of 1845 on the file of the Civil Court of Madura, dismissing the claim of Rani Unga Muttu Nachchiar to the Zemindari of Sivagan-ga, &c., dated 27th December 1847.
—continued.

16. We have next to consider the Plaintiff's document No. 202, being proceedings of the Sadr Adalat, exposing an attempt to create evidence of the non-division by forgery. The papers in which that crime was committed were brought into Court by the Plaintiff's 6th witness, (the Record-keeper); and the Court ordered so many of them, as are referred to in these proceedings, to be selected and placed with the record of the suit for reference, should it be thought necessary.

That a gross forgery was committed, there is no doubt: neither party can deny that; and as it was manifestly for the advantage of Defendant's father (?), who was then conducting the litigation, it seems equally certain that it was effected or caused to be effected, by him, or his agents and advisers. Had the actual perpetrators been discovered, they would have been punished criminally; but the Court conceives it has now to do only with the civil question, and to determine how far the attempt should operate to the prejudice of the Defendants. Is the fabrication of evidence to a particular point to be taken as conclusively proving the fact to be the other way? If so, there would be an end of this case; for, that the opposite party did so fabricate is clear. But the Court cannot go so far, and feels bound, while stigmatizing this atrocious attempt to support either a falsehood or a truth, to keep steadily in view the question in issue, viz., whether the point so sought to be supported is true or false, regarding the forgery only so far

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as it may serve to elucidate that fact—which, of course, it does to a certain extent, leading to a strong presumption, that, when the attention of Defendant's brother was called to the necessity of proving the fact of union, no better or more honest way occurred to him or his advisers at the moment than this flagrant attempt, which was most injudicious, as well as criminal; for, as the present case shows, they had far better evidence to produce, if they had only patiently set themselves to search for and arrange it. They were probably led to the commission of this crime by considering it to be their only chance; they could not foresee that the Privy Council's exception to the violation of Regulation XV of 1816 would afford them an opportunity of bringing the question regularly to proof; and they may have supposed that no fresh evidence of an ordinary nature would be sufficient to induce the Sadr Adalat to revise its judgment, which nothing less than something of the striking and decisive sort they then brought forward would compel them to do. Upon the whole, the Court is of opinion that all the harm that can be done to a case by an attempt to fabricate evidence has been done in the present instance; but it cannot see in it anything absolutely conclusive as to the question of fact, any more than it can in the circumstance which it firmly believes, that both parties have created their oral evidence, either wholly or in part.

17. We now come to Plaintiff's documents, Nos. 163, 222, 223, 224, 225 and 226, being copies of depositions taken from witnesses in a former suit, and since deceased. No. 163, the deposition of Mr. Hughes, needs little remark. The deponent expressly says that he does not know whether division had taken place or not. In regard to the others, it is to be observed preliminarily that they are open to the serious objections of having been taken in a cause in which both the present parties were not concerned, and were not examined as to division upon a point given, and in consequence were not subjected to that cross-examination thereon, to which, as is shown by the examination of the witnesses in the present suit, they would in that event have been. They all, from 222 to 226, stated that a division had taken place between the brothers; and it may be said that the very fact of so much not being then perceived to depend upon that assertion, gives greater probability to its truth. Looking to the circumstances under which the testimony was given, to the condition of the parties giving it, to their means of knowing, to the evidence given by them, and to the nature of Indian testimony generally, the Court cannot say that it is able to place implicit reliance on this testimony, or that it would dare, unless it be found otherwise strongly supported upon it alone, to take from the heir-apparent in possession, a large property, and give it to one who claims it, on the presumption of that particular fact to which they depose having occurred,—to alter the usual and natural course of inheritance.

18. Some of the Defendant's documents have already been adverted to and contrasted when discussing those of the Plaintiff. It remains to notice the others. They are certainly of importance. No. 172, dated 24th March 1830, is a document, to which various members of the family, Plaintiff included, appear to have been parties, and which is a strong evidence of their opinion at that time that the Defendant's claim was preferable to any other. Nos. 173 and 174 show that such also was the opinion of Government and the public authorities. Nos. 175, 176, 179 and 180 related to an agreement, by which Plaintiff and other widows of the late Zemindar, again, not only formally recognize Defendant's right, but expressly state the conditions on which they hold satisfied all claims they may have on the estate. To the validity of this, it is objected that Plaintiff could only intend thereby to relinquish the rights of which she was aware; and that, being ignorant at the time of the right on which she now founds, she cannot be considered as having resigned it; that she did it unwillingly and protested against it; and that the law is bound to interfere between an Indian female and the consequences of her own acts.

Attested copy of the Judgment in Original Suit No. 2 of 1845 on the file of the Civil Court of Madras, dismissing the claim of Rani Uga Mutu Nachchiar to the Zemindari of Sivagan-ga, &c. dated 27th December 1847.

—continued.

19. As to the first of these objections, the Court would observe that, to make it good, the ignorance must not be only actual but unavoidable (see, for example the case of Rajendar Narrain Row, in appeal before the Privy Council from Bengal, Rep. Cases, I. C. P. C., Vol. II, p. 181), and must be so proved to enable a party to evade the consequences of his own solemn act, while the *onus probandi* is with the impeacher. Now in this case, the Plaintiff cannot pretend that, if she was ignorant of her right, she was unavoidably so. Supposing herself as a woman ignorant of such matters, she surely would not have acted in so important a case without inquiry and advice. If she did so act, then, she did not take due means to enlighten herself. If she did consult advisers, she could not have missed receiving the information.

20. As to the second objection against the validity of the agreement, that it was executed by her unwillingly, it may be remarked that it is not very consistent with the plea of ignorance. If ignorant of right, why the reluctance or unwillingness? And if not ignorant of the right, then, the deed was executed, though unwillingly, in knowledge of its effect.

21. The third objection, if taken in its full extent, would render all acts done by Indian females null *per se*, unless advantageous to themselves. But, admitting the equity and propriety of extending to them, where necessary, special protection, the Court considers that necessity can be determined by no general rule, but by the particular circumstances of each case, and can find in the present

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no reason for supposing the Plaintiff ever to have stood in such predicament, but, on the contrary, sees, in her whole conduct from the death of her husband, ample reason for supposing her capable of understanding and guarding her own interests. If Plaintiff be held to have executed the deed of compromise, the mere fact of relinquishing a right thereby, even though that right had confessedly been her life-interest in the Zemindari, would not invalidate the deed (see the case of Theochand Row, in appeal to Sadr Adalat in Bengal, Macnaghten's Reports, Volume, I., p. 22), though the same Court show themselves fully alive to the necessity of guarding a female under such circumstances, by refusing evidence of verbal relinquishment of right by a widow—see case of Radhacharn Roy (Ibid. p. 33).

22. The Plaintiff would have the Court regard her execution of this deed as a proof of her ignorance of her right. It is content to do so, but must carry the inference somewhat further, and say that ignorance appears, under the circumstances, as nearly tantamount to proof of non-existence. She and her advisers must have known of the division, if it had been made in the public manner described by the witnesses; and, if that was known, her rights in consequence could not have escaped notice.

23. The Defendant's documents, Nos. 181—186, are the pleadings, points, and opinion of Law Officers in a Suit No. 4 of 1832, in which he was also a party defending his title against another claim; and they are here produced to show (as they do) that in that suit Defendant's union was prominently put forward, but not denied, and that the law of inheritance, under that supposition, is as has been already stated by the Court.

24. The Defendant's documents:—187, 188 and 189 are Plaintiff, Answer and Reply in No. 3 of 1832 before the late Provincial Court,—a former suit between the same parties for the same title, in which certainly Plaintiff cannot be regarded as in any degree under the control or influence of the opposite party, but as putting forward what she and her advisers considered to be her strongest plea of right: and yet division was not that plea, although, in the consultations and deliberations, which in the very nature of things must have arisen as to the best mode of her coming into Court in that suit, it is not possible to suppose that the division could have been neglected, if it was known to have taken place. The supposition that it had not, to which this would lead, is much strengthened by the document No. 190, the appeal of the Plaintiff against the decree therein, in which she remained still silent on this vital point. The Plaintiff would have it supposed

that she learnt its importance from the decrees of the Sadr Adalat on that appeal. This the Court cannot credit: it seems morally impossible. But what the Court believes she did learn thereby, was that there was a possibility of getting that fact believed, which she had never ventured to put forward: nay more: she found that was actually not only believed without her asserting it, but acted upon, and the Zemindari given to her on grounds on which she had never thought of claiming it; and in the position in which she was thus placed, the Court sees the best excuse for the Plaintiff in her endeavours to defend it.

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25. Defendant's documents, Nos. 272 to 276, clearly prove what they are intended to do, and require but little comment; No. 272 shows that, when Plaintiff's husband wrote the letter to the Collector (No. 199), he was at variance with his brother's family—which accounts for his passing them over in silence; No. 273, that the law of the case is as the Court has already stated; and Nos. 274, 275, (and) 276, that the Plaintiff in her Suit No. 3 of 1833, caused or allowed her witnesses to represent her husband as 10 or 12 years old, when adopted by Velu Nachchiar, a point she was then seeking to prove, whereas, in the present suit, his age is given and deposed to as between 22 and 25 at the time of a division which was made as a preliminary to such adoption.

26. Having thus gone through the "Oral" and "Documentary" (evidence), the Court proceeds to consider what may be called the "evidence inferential from circumstances"—a description which is meant to include all the public and notorious facts of the case, which cannot be denied by either party, though they may draw different conclusions from them.

27. Among the circumstances of this nature may be reckoned that the Defendant is the natural and presumptive heir; that Plaintiff's claim is grounded on the supposition of a formal act having altered the natural relation of her husband with his brother, and so turned aside the regular course of inheritance; that, subsequently to this act, which is said to have occurred in 1792, that is to say, 1806, one of the parties to that supposed act appears to have most deliberately conducted himself in matters of great importance, as though that act had not taken place; that during his life the same party became engaged in a litigation, in which it was highly essential for him to have asserted that the said act had taken place, if it truly had, and yet did not so do, but, on the contrary, allowed what amounted to an express assertion that it had not happened to pass without explicit contradiction, when he might have set the question for ever at rest by mentioning it, detailing the circumstances, and adducing that evidence in sup-

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port of it, which he of all men could best have done; and again that the same party, when called upon, about the same time, and when he had the litigation alluded to in view, to declare whom he considered to his heir, gave a statement in other respects erroneous on the face of it, and moreover omitting all mention of the right of his brother's family,—thereby at once revealing his wish to defeat and prejudice that right, as far as in him lay, and yet in that second most favorable opportunity, which the course of his life presented, not specifically mentioning the only fact, which could effectually do so, and which therefore it must be inferred he would have inserted, if he could have done so with truth or without exposing his assertion to immediate challenge—without the fact, the omission on his part was important: his nephews might safely and perhaps prudently pass it: had it been made, they must, if it came to their knowledge, have at once disputed it or been silent for ever—; and further that, when, upon the death of the same party in 1829, it became necessary to determine his heir, the Defendant's father at once asserted his right, as though no division had taken place, and it was allowed at the time not only by the Government and its functionaries after due consideration and enquiry, but formally and under a solemn deed, by all parties most interested in denying it, this Plaintiff included; and further that when those parties subsequently repented of their acquiescence and severally attacked the said right, none of them did so on the ground that division had taken place, but this Plaintiff, especially on grounds calculated to defeat the claim, of an undivided brother, thereby, to a certain extent, admitting the non-division. And here too, it may be well to notice a circumstance regarding which, though alluded to and variously colored in the pleadings of both parties, it was not deemed necessary to call for proof from either, viz; that the same party (Plaintiff's husband) did, on the day of his death, make and execute a certain Will or testamentary paper, declaring, as he did in 1806, the right of succession to be in his nephew, the Defendant's father, saving the rights of his own posthumous male issue, should such arrive. That such a document was put forth and was asserted to be genuine is admitted by both parties, and there was no need of further proof of that fact; and whether it was genuine or not seemed equally immaterial so far as the main question of right is concerned. Genuine or forged, duly or unduly obtained, it could not alter or affect the claims of the respective parties if division had taken place. No Will or act of the dying man could bar the right of the widow, any more than, if no division had been made, it could do that of his nephews. As a Will, such a paper must be a mere nullity, and, as such, the Court needed not to look at or regard it. The only thing to be considered is, whether, from the mere fact of procuring, by whatever means, or by fabricating

or by laying stress on such a declaration, the Defendant's father did not betray a consciousness of want of title to a certain degree. It may be thought he did; but, on well considering the point, the Court does not think that inference could legitimately be pushed against the Defendant. The so-called Will was a mere declaration of a right, not a bequest of it, and was so regarded by all parties, especially the members of the family, who certainly did not act at the time as though they were admitting Defendant's father, in consequence of the Will, to a position to which they would not have admitted him but for that instrument.

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28. The Plaintiff herself, in the formal remonstrance made by her, on the 4th August 1829, admitted not only the Will, but that the Defendant's father's title, legally, was therein as expressed, and that he had succeeded not only that, but by local custom, and maintained the falsity of a pretence—that of "adoption," then about to be brought forward by another member of the family, and which was calculated to defeat his right, supposing him to be an undivided nephew—a title which was expressly given to him at the time.

29. And further, it is to be noted that in the above-mentioned litigation, the pleadings and evidence of the Plaintiff are at variance and inconsistent with those in this suit. In the former suit, she averred (her) husband to have obtained the Zemindari in right of his adoption by Velu Nachchiar, which adoption took place, as the witnesses then brought forward by her deposed, when he was about 10 or 12 years old; while in this suit she brings witnesses to depose that a division took place between him and his brother in 1792, prior to, and preparatory to such adoption, when he was about 22 or 25 years of age!! And it is worthy of remark also, that the witnesses, being acquainted, as they say they are, with the minutest particulars of the division, are not ignorant of its cause, and depose that it was rendered necessary by a quarrel between the brothers, who came to Velu Nachchiar as an arbitratrix, &c., which is consistent with Plaintiff's statement that it took place as a preliminary to the adoption, a ceremony, moreover which could not according to law have taken place after the age mentioned by the witnesses (see Decree of the Sadr Adalat, No. 18 of 1814, confirmed by the King in Council, 28th April 1828, S. U. Decrees, Vol I, p. 101)—all which inconsistencies and discrepancies, &c., are evidently unfavorable to Plaintiff's case.

30. Among the inferential circumstances has also to be reckoned the marriage of Defendant with his first cousin, Soumia Nachchiar. Upon this point, the Court is of opinion that, if such marriage be contrary to the strict letter of the law, it does not appear that people of the Defendant's description generally are

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such strict adherents of the law that it can fairly be argued it is impossible they could have infringed it, which must be held in order to make the point avail to the Plaintiff. Whether the Defendant has sinned or not in that marriage, the Court is not called upon to say whether the connection be legal; but, looking to all the circumstances of the case, it does not think that Defendant can be regarded as having thereby confessed the absence of a title on his part to the Zemindari and sought to create one by this marriage. If Plaintiff's idea be correct, that this marriage was the consequence of such deliberate design to acquire the estate, and if, as a matter of course, it was known to be so fatal to the supposition of his non-division, how came he to adopt it? If he contracted the marriage in ignorance of its illegality, Plaintiff's argument goes for nothing, if, in the face of it, his doing so is inconsistent with the motive alleged.

31. Another fact from which inference may be drawn, is the absence of the deed of division. If such exists, why does not Plaintiff produce it? For this she very reasonably and satisfactorily accounts by stating the archives of the Zemindari to have been, since her husband's death, in the possession of the opposite party. This of course would prevent her getting it, even if it existed; but the Court does not attach importance to the non-production by her, but rather to its non-production by her husband: the archives of the Zemindari were in his possession at the time when it was most material to have produced it in 1822 and 1823,—when the Court cannot but think he would have done so, had it been in existence.

32. The Court believes that what it has now said has touched upon every essential point and feature in the case, though it but imperfectly exhibits the long and careful consideration which it has bestowed upon the voluminous record, and upon the equity of the case in all its bearings. It has said, however, sufficient, it hopes, to illustrate and justify the conclusion to which it feels bound to come, viz., that the Plaintiff has not succeeded in proving the fact of division in that clear and indisputable way, in which it was necessary that she should, in order to disturb and set aside the natural and apparent right of the Defendant, which he, on the contrary, has shown, by evidence as satisfactory, perhaps as under the nature of circumstances could be expected; (and) that the Plaintiff's plea has no foundation in fact. The Court therefore decrees against the Plaintiff's claim, dismissing it with all costs.

33. In view to prevent further litigation, the Court will here remark that the effect of this decree, while it rejects the Plaintiff's claim to the Zeminda-

ri, virtually places her in the position of a widow entitled to liberal and adequate maintenance according to her rank. The Court cannot here fix the precise amount, but would hope that the Defendant, by readily and liberally allotting it, will prevent further disputes and restore harmony to the long-distracted family.

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	RS.	A.	P.
Value of Pauper paper used by Plaintiff	2,471	8	0
Do. of Stamp paper used by do. for copies of documents	59	8	0
Pleader's fee	1,000	0	0
Total	3,531	0	0

Costs incurred by 1st Defendant.

Value of Stamp paper	489	8	0
Pleader's fee	1,000	0	0
Peon's batta	1	8	0
Batta to witnesses... ..	35	0	0
Total	1,526	0	0

Grand Total 5,057 0 0

Deduct

Costs paid by Plaintiff for value of Stamp paper used for copies of documents	59	8	0
Amount to be paid by Plaintiff to Government for value of Pauper paper	2,471	8	0
Fees to be paid by Do. to her Vakil	1,000	0	0
Amount (of) balance to be paid by the Pauper Plaintiff to 1st Defendant	1,526	0	0

Given under my hand in the Civil Court at Madura, on the 17th day of December, A. D. 1847.

The Plaintiff and Defendants are hereby informed that, in conformity with the order of Sadr Adalat No. 48, no compromise entered into by the parties will be valid, unless it first receives the sanction of the Court by which this decree is passed.

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—concluded.

Signed and sealed, in open Court, this 27th day of December, A. D. 1847.

Term of appeal expires on the 27th day of March, A. D. 1847.

(Signed) C. R. BAYNES,
Civil Judge.

(True Copy)

(Signed) K. KRISHNAIYANGAR,
Sheristadar.

Filed as LXIX in Original Suit No. 1 of 1877, this 31st day of October 1877.

(Signed) P. P. HUTCHINS,
District Judge.

Appeal No. 7 of 1849.

*Extract from the Proceedings of the Sadr Court, under date the
21st October 1850.*

In Appeal Suit No. 7 of 1849 on the file of the Sadr Court.

Unga Muttu Nachchiar Pauper Appellant (deceased).

Versus

Srimat Raja Muttu Vijaya Raghunadha Bodha
Gurusami Peria Udaya Tevar, eldest son, and mi-
nor, of the late Zemindar of Sivaganga, by his
guardian, Kutta Josiyar Respondent.

Read Motions presented, on the 29th August and 5th September 1850, by
J. Onchterlopy, Esquire, Vakil, on behalf of Bhutaka Nachchiar, Kottai Nachchi-
ar, and Kattama Nachchiar, of Zilla Madura.

(Here enter Sadr Court Motions, Nos. 49 and 51 of 1850).

Read also Motions presented, on the 10th September and 3rd October
1850, by Srinivasa Chari, Vakil, on behalf of Soumya Nachchiar, of Zilla Ma-
dura.

(Here enter Sadr Court Motions, Nos. 53 and 61 of 1850).

Read also Motion, presented on the 26th September 1850, by R. Tiruma-

Copy of the
Proceedings
of the Sadr
Court, strik-
ing off Ap-
peal No. 7
of 1849 from
their file,
dated 21st
October
1850.

la Rao, Vakil, on behalf of Mattu Vijaya Raghunadha Mattu Vaduga Peria Udaya Tevar, of Zilla Madura.

(Here enter Sadr Court Motion, No. 58 of 1850).

Read also Motions presented, on the 26th September 1850, by Gulam Murtuza, Vakil, on behalf of the Respondent in the above Appeal Suit.

(Here enter Sadr Court Motions, Nos. 59, 60 and 62 of 1850).

Copy of the
Proceedings
of the Sadr
Court, strik-
ing off Ap-
peal No. 7
of 1849 from
their file,
dated 21st
October
1850.
—continued.

The above Motions, Nos. 49, 51, 53, 58 and 61 have been presented to the Court of Sadr Adalat in consequence of the death of Rani Unga Mattu Nachchiar, Pauper Appellant in Appeal Suit No. 7 of 1849 on the file of the Sadr Adalat, and their object is to induce the Court to recognise the right of the several parties therein to conduct the proceedings in that suit as the legal heirs of the aforesaid deceased Rani.

2. The Motion No. 59, presented on behalf of Respondent in the said Appeal Suit, is counter to No. 53; and the Motions Nos. 60 and 62 are presented by the same party in objection to Nos. 49 and 58.

3. The Court of Sadr Adalat have given their careful consideration to the arguments advanced by the contending parties in support of their respective pleas, as well as to those urged by the Vakil on behalf of the Respondent in objection to the same; and the Court are clearly of opinion that not one of the Motioners can be accepted by the Court as the heir of the deceased Appellant, and, as such, be permitted to conduct the proceedings in the suit in question.

4. The Court premise their observations by remarking that the deceased Appellant laid claim to the Zemindari as the widow of the late Zemindar, and (that) she was childless.

5. Every other claimant to the Zemindari must, therefore, rest his claim on other grounds than those advanced by the deceased Appellant; and these separate and distinct grounds cannot be disposed of in the present Appeal, but (must) form the subject of a new suit.

6. In respect to Motions, Nos. 49 and 51, the Court observe that the parties therein advance no title to the Zemindari, either as the legal heirs of the late Appellant, or in respect to any connection existing between them, or by virtue of any right conveyed to them by the deceased. They simply plead a right of

Copy of the succession, on the demise of the Appellant, to rest in them, as being the daughters of the late Gouri Vallabha Maharaja.

Proceedings
of the Sadr
Court, stri-
king off Ap-
peal No. 7
of 1849
from their
file, dated
21st October
1850.
—concluded.

7. And although it be true that the decision of the Appeal Suit in question might materially affect the title of the said Motioners to succeed to the Zemindari as the daughters of the late Gouri Vallabha Maharaja, still, in the opinion of the Court, such circumstance cannot in itself in any way be held to vest them with the right to continue the action commenced by the late Appellant.

8. The foregoing remarks, the Court observe, are equally applicable to the case of the Motioner in No. 58, who claims the right of conducting the suit as the late Appellant's heir, in consideration of his being the great grand-son of the late Gouri Vallabha Maharaja.

9. And in regard to Motions Nos. 53 and 61, in which the party, in addition to the pleas put forth by the other Motioners, of being the descendants of the late Zemindar, alleges the execution of a Will in her favor by the late Appellant, whose niece she was, the Court observe that, as neither the alleged Will, nor the immediate relationship of the Motioner to the late Appellant, confer upon her any right under the Hindu Law, as late Appellant's heir, to recover the Zemindari, these additional pleas are likewise worthless.

10. Entertaining this view of the case, this Court of Sadr Adalat resolve to direct that the Appeal Suit No. 7 of 1849 be removed from their file.

11. At the same time, the Court of Sadr Adalat deem it proper to observe that the foregoing resolution will form no bar to the institution by any of the parties in these Motions of a new action for the recognition of their alleged claims, provided the same be instituted on or before the 30th day of April 1851. At the expiration of that period, the Decree of the Civil Judge will be considered final.

Ordered.—That extract from these Proceedings be furnished to the Motioners' Vakils on their application.

Ordered also.—That extract from these Proceedings be sent to the Civil Judge of Madura for information.

Filed as U in Original Suit 1 of 1877, this 22nd October 1877.

(Signed) P. P. HUTCHINS,

District Judge.

Extract from the Proceedings of the Sadr Adalat, under date the 1st May 1851.

Attested
copy of an
Extract from
the Proceed-
ings of the
Sadr Court,
restoring to
file Appeal
No. 7 of
1849, dated
1st May
1851.

Read Miscellaneous Petition, presented on the 25th November 1850, by

No. 14, Extract from the
Proceedings of the Sadr Ada-
lat, dated 1st May 1851.

J. Ouchterlony, Esq., and T. Ramachandraiya, Vakils,
on behalf of Bhutaka Nachchiar, Kottai Nachchiar, and
Kattama *alias* Kolandapuri Nachchiar, of Zilla Madura.

(Here enter S. M. P. No. 424 of 1850).

Read also Miscellaneous Petition, presented on the 6th January 1851, by
Srinivasa Chari, Vakil, on behalf of Rani Soumya Nachchiar, of Zilla Madura.

(Here enter S. M. P. No. 3 of 1851).

Read also Miscellaneous Petitions, presented on the 6th January and
3rd February 1851, by Gulam Murtuza, Vakil, on behalf of Srimat Raja Muttu
Vijaya Raghunadha Bodha Gurusami Peria Udaya Tevar, eldest son of the late
Zemindar of Sivaganga, by his guardian, Kutti Josiyar, Respondent in Appeal
No. 7 of 1849 on the file of the Sadr Adalat.

(Here enter S. M. P. Nos. 2 and 58 of 1851).

Read also Miscellaneous Petitions, presented on the 20th February 1851,
by R. Tirumala Rao, Vakil, on behalf of Muttu Vijaya Raghunadha Muttu Vadu-
ga Peria Udaya Tevar, of Zilla Madura.

(Here enter S. M. P. No. 92 of 1851).

Read also the answers of the Pandits to the question submitted to them,
under date 13th March and 28th April 1851.

1. Of the foregoing Petitions, the first is presented on behalf of the
three daughters of the late Gouri Vallabha Tevar, the husband of the deceased
Rani Unga Muttu Nachchiar, Pauper Appellant in Appeal Suit No. 7 of 1849 on
the file of the Sadr Adalat, by his second and third wives, and has for its object
the two-fold purpose of inducing the Court, upon a re-consideration of the order
contained in their proceedings under date the 21st October last, to replace the
said Appeal Suit upon their file, and to admit the Petitioners as the legal heirs
of the deceased Appellant, and, having an identity of interest in her suit, to con-
duct the subsequent proceedings therein.

2. Petitions Nos. 3 and 96 of 1851 have the same object in view as the
preceding petition. The party in the former is the daughter of the said Gouri

Attested
copy of an
Extract from
the Proceedings
of the
Sadr Court,
restoring to
file Appeal
No. 7 of
1849, dated
1st May
1851.

—continued.

Vallabha Tevar by his sixth wife, and she bases her claim to continue the Appeal Suit on the alleged execution of a Will in her favor by the aforesaid Appellant, deceased. The claim of the latter is founded upon his being the son of a daughter of the said Gouri Vallabha Tevar by his first wife.

3. Petitions Nos. 2 and 58 of 1851 are presented on behalf of the Respondent in the said Appeal Suit, who seeks to obtain the confirmation of the Court's order, above referred to, and the rejection of the application of the foregoing Petitioners, to carry on the Appeal *in forma pauperis*.

4. The Law Officers of the Court declare that, assuming the family to be divided, upon the death of the late Appellant, Unga Muttu Nachchiar, the Sapindas of her late husband became entitled to succeed to the estate to the total exclusion of the daughters of contemporary wives.

5. The Court of Sadr Adalat, having attentively considered the arguments urged by the contending parties in support of their respective pleas, are of opinion that the ends of justice demand that their order, issued under date the 21st October last, directing the dismissal of Appeal No. 7 of 1849, be now revoked.

6. On referring to Brown's Report of Parliamentary Cases upon Appeals and Writs of Error, the Court of Sadr Adalat find that, in a case analogous to the one now under consideration, in which the Plaintiff died without issue, it was ruled by the Judges of Exchequer that the right of appeal was vested in the brother of the deceased, as heir in remainder.

7. A careful re-consideration of the question in all its bearings has led the Court of Sadr Adalat to conceive the above to be the just interpretation of the law on the point of practice at issue; and seeing reason to doubt the soundness of the opinion given by the Law Officers, they resolve to cancel the order contained in their Proceedings of the 21st October last, and to direct that Appeal Suit No. 7 of 1849 be replaced upon the file, and that the Petitioners in No. 424 of 1850, and No. 3 and No. 96 of 1851, be made Supplemental Appellants.

8. The Court of Sadr Adalat further resolve to intimate, for the information of all parties concerned, that they will at once proceed to decide the points brought specially to an issue in the Appeal, as it originally came up from the Lower Court, and that, should the Appeal be sustained, the Court will then determine, in order that the rights of the Petitioners, as against each other, and as against the Respondent, may be tried, whether the record shall be remanded

to the Court of Original Jurisdiction, or whether any other more appropriate course can be pursued in regard to the same.

Ordered.—The Extract from these proceedings be granted to the Petitioners' Vakils on their respective application.

(Signed) G. T. BEAUCHAMP,

Registrar.

(True copies)

(Signed) C. F. CHAMIER,

Registrar.

(True Extract)

(Signed) W. MORGAN,

Deputy Registrar.

Filed as Y in Original Suit 1 of 1877, this 22nd October 1877.

(Sealed) P. P. HUTCHINS,

District Judge.

Extract from the Proceedings of the Sadr Adalat, dated 19th April 1852.

(or)

THE HONORABLE J. F. THOMAS, Esq.,

H. MORRIS, Esq.,

G. S. HOOPER, Esq.,

W. DOUGLAS, Esq.,

In Appeal No. 7 of 1849.

Attested
copy of an
Extract
from the
Proceedings
of the Sadr
Court, stri-
king off the
file Appeal
No. 7 of
1849, dated
19th April
1852.

Rani Unga Muttu Nachchiar, Pauper Appellant, on her demise, her alleged heirs, Bhutaka Nachchiar, Kottai Nachchiar, and Kattama Nachchiar, by Vakil, J. Onchterlony, Esquire; Soumya Nachchiar, by Vakils, A. M. Ritchie, Esquire, Barrister-at-law, and Srinivasa Chari; and Muttu Vijaya Raghunadha Muttu Vaduga Peria Udaya Tevar, by Vakil, R. Tirumala Rao.

Srimat Raja Muttu Vijaya Raghunadha Bodha Gurusami Peria Udaya Tevar, minor Zemindar of Sivaganga, by his guardian, Kutti Josiyar, by Vakils, G. Norton, Esquire, Advocate-General, and Vakil, C. Dale, Esquire, and Gulam Murtuza, and Namasivaya Tevar, by Vakil, V. Seth Sam, Esquire.

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Extract
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Proceedings
of the Sadr
Court, stri-
king off the
file Appeal
No. 7 of
1849, dated
19th April
1852.

—continued.

1. The Court proceed to consider the record in Appeal No. 7 of 1849.

2. This is an Appeal *in forma pauperis* by Unga Muttu Nachchiar, widow of the late Zemindar of Sivaganga, from the Decree of the Civil Court of Madura in Original Suit No. 2 of 1845, instituted by the said sole Appellant and Plaintiff for the recovery of the Zemindari of Sivaganga, and which Appeal, the said Appellant having died on the 24th June 1850, is now prosecuted by the several parties named above, in succession to Unga Muttu Nachchiar, under the Order of the Court of 1st May 1851.

3. The Judges will first observe that these several parties do not claim as having a joint or common interest, but that their interest are altogether separate and conflicting, and further that not one of them has yet prosecuted her or his claim in an original action before the Zilla Judge of Madura.

4. There appears, therefore, to be two questions, which present themselves on the face of the record for the consideration of the Court :—

First.—Whether these several parties, who are now before the Court, and who are not Paupers, and have not qualified as such under the law in force, can be heard in, and permitted to prosecute, this Pauper Appeal; and

Regulation VII of 1818.

Second.—Whether it is competent to the Court of Sadr Adalat to determine their claims in an Appeal Suit, inasmuch as they have not been heard, nor judgment passed upon them in any Court of Original Jurisdiction.

5. Upon the first question, the Court are of opinion that, under the provisions of the law (Regulations VII of 1818, IV of 1825, and III of 1822), these parties, who are not Paupers, and do not claim to be such, have no standing in this Pauper Appeal; and that it is informal and contrary to equity, that parties should be admitted to try their rights, and sue the Respondent in this Appeal, who have neither paid the prescribed institution fee, nor qualified as Paupers.

Section 13, Regulation XIII
of 1816.

6. It is manifest to the Court, moreover, that these parties, who now appear as Appellants, are not, and cannot all be, the next and immediate heirs of the Pauper Appellant, Unga Muttu Nachchiar; nor do they appear and claim, as her representatives, but on their own distinct rights, as descendants of the late Zemindar. It is not, therefore, apparent to the Court, upon which ground under the Regulations in force they can be substituted for the widow, and carry on her Appeal.

7. It is clear also to the Court, looking to the provisions of Section 7, Regulation VII of 1818, Clause 1st, that the admission in the Pauper Appeal of motions by the parties before the Court, upon stamp papers, taints the proceedings with informality, if not, illegality.

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copy of an
Extract
from the
Proceedings
of the Sadr
Court, stri-
king off the
file Appeal
No. 7 of
1849, dated
10th April
1852.
—continued.

8. Upon the second question*, the Judges are of opinion that the Court of Sadr Adalat has no authority to exercise original jurisdiction on the claims before them, which are not only conflicting, but against which apparently adverse opinions have been placed on the record by the Law Officers of this Court; and that it is contrary to the general principle of the laws in force, and to the provisions of the Code, for this Court to hear and determine, in an Appeal Suit, the rights of parties to property, whose titles have never been brought to issue by such parties before a Court of Original Jurisdiction.

9. It is further clear to the Judges that, under Regulation XV of 1816, and Act VII of 1843, Section 9, parties can only be heard and have their rights determined in an Appeal Suit before the Court of Sadr Adalat, who have conformed to the rules prescribed for the admission and hearing of Appeals; but that, as this has not been done, as is evident upon the face of the record, by the several Appellants, it is not competent to this Court to pass judgment and determine their respective rights by means of this Appeal: for, this would in fact be to exercise, so far as regards their claims, an original jurisdiction, and to dispense with the rules and course of procedure prescribed by the law, neither of which, the Judges are of opinion, is it to open to this Court under any circumstances to do.

10. It is resolved, therefore, to reverse the Orders of the 1st May 1851, and to inform the several parties, viz.,—Bhutaka Nachchiar, Kottai Nachchiar, Kattama Nachchiar, Soumya Nachchiar, and Muttu Vijaya Raghunadha Muttu Vaduga Peria Udaya Tevar, who have appeared in Pauper Appeal No. 7 of 1849, that they cannot be heard in the said Appeal, but that they can pursue their rights in the Court of Original Jurisdiction in the first instance, viz., the Zilla Court; and that Court must be guided, in the admission and hearing of their claims, by the Regulations in force.

11. Before closing these proceedings, the Judges deem it right to state, at some length, the grounds upon which they have over-ruled the objections, which have been urged against the issue of the foregoing Order, namely, that, inasmuch as it reverses the Order of this Court of the 1st May 1851, passed after full and

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Extract
from the
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of the Sadr
Court, stri-
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file Appeal
No. 7 of
1849, dated
19th April
1852.

—continued.

deliberate hearing by a full Court, it is beyond the competency of the Court, and further, that it is unsound in principle, as it must introduce the greater confusion and uncertainty, if the different Judges, sitting at different times in this Court, reverse the acts and orders of their predecessors.

12. The Court will first observe that they attach the greatest possible weight to these objections; but they are of opinion that the principle contended for, that this Court ought not, and indeed cannot, reverse its own Orders at its discretion, cannot be upheld in all its breadth in matters or causes actually pending before the Court, and when, as in the case before them, the Appeal with the whole record is *sub judice*.

13. Further, that there must of necessity be some limitation in enforcing the principle urged upon the attention of the Court, such, for instance, that, if on the face of an Order it is evident that there has been manifest error or omission, the Court must have the power of rectifying such error, more especially when there is no Appeal to a higher tribunal for its correction.

14. The Court will also remark that, whilst the Order of the Court now declared reverses that of the 1st May 1851, it affirms in principle the previous Order of the same Judges of the 21st October 1850, equally upon the record of this Appeal, and that no precedent is consequently afforded by the Order now issued, which would sanction, as argued, the arbitrary and unlimited interference by one set of Judges with the Orders of their predecessors.

15. The Court must also observe that, in reversing the Order of 1st May 1851, they do not overlook the fact that that Order is based upon a ruling of an English Court of Justice, which can be no authority to this Court in the admission or hearing of this Appeal, the Regulations distinctly providing that in Appeal Suits on its file, this Court is to follow the rules and provisions enacted for the guidance of the Lower Courts; and the Court of Sadr Adalat have no power to deviate from, nor dispense with, them, under a ruling, or in accordance with the practice, of an English Court of Law.

16. It might also be questioned whether there is such analogy in the two cases, that the one could form any ground for the Order of 1st May 1851. In the case before the House of Lords, the party permitted to prosecute the Appeal stood in the same relation to the property as the party demised. He was

the sole and immediate heir, and there were no opposing and conflicting claims. His claim, too, was precisely of the same quality as that of the original Appellant.

17. In the Appeal No. 7 of 1849 before this Court, the several parties are not, and cannot all be, the immediate heirs. Further, the original Appellant claimed as the widow. These Appellants assert their titles on different and distinct grounds, and maintain, the one against the others, their priority of title as heirs to the property. The circumstances of the present case would appear, therefore, to differ materially from the case* cited in the Order of 1st May 1853, even if that case were a legitimate rule or guide to this Court, which it is not.

* *Osborne versus Basher, J. Pomeroy and others.*

the Order of 1st May 1853, even if that case were a legitimate rule or guide to this Court, which it is not.

18. Lastly, the Court entertain the greatest doubt if the ends of justice would be furthered, and the interests of the parties advanced, were the Judges to proceed at once to a judgment in this Appeal. The result they apprehend would only be to involve the several Appellants in still greater costs and delay and (lead) to heavy expenses before H. M's. Privy Council, to which such judgment would be carried up in Appeal, and whence the suit might be again remanded, and the parties required to bring their claims to a regular hearing before the proper and competent tribunal in the form and mode of procedure prescribed by the Regulations.

19. The Judges are of opinion, therefore, that they best consult the interests of all parties, and forward the ends of justice by the course they now pursue. And the Appeal No. 7 of 1849 is, therefore, now struck off the file of the Sadr Adalat, it having abated on the death of the Pauper Appellant, Unga Mutta Nachchiar.

Ordered.—That Extract from these Proceedings be furnished to the Petitioners' Vakils on their application.

Ordered also.—That Extract from these Proceedings be sent to the Civil Judge of Madura for his information.

(True extract)

(Signed) F. LUSHINGTON,

Registrar.

(True copy)

(Signed) C. F. CHAMIER,

Registrar.

Attested copy of an Extract from the Proceedings of the Sadr Court, striking off the file Appeal No. 7 of 1849, dated 16th April 1852.

—continued.

(Signed) W. MORGAN,
Deputy Registrar.

Filed as Z in Original Suit 1 of 1877, this 22nd October 1877.

(Sealed) P. P. HUTCHINS,
District Judge.

Attested
copy of an
Extract
from the
Proceedings
of the Sadr
Court, striking
off the
file Appeal
No. 7 of
1849, dated
19th April
1852.
—concluded.

Proceedings of the Sadr Adalat under date the 16th September 1852.

—(103)—

Read Miscellaneous Petition No. 221 presented on the 30th June 1852,
on behalf of Bodha Gurusawmy Tevar.

Read also Counter Miscellaneous Petition No. 326, presented on the
23rd August 1852, on behalf of Soumya Nachchiar, Supplemental Appellant in
the above Appeal.

In the foregoing Petition No. 221 of 1852, the Petitioner prays the
Court of Sadr Adalat to review the Judgment passed by them under date the
19th April last, dismissing from the file of the Sadr Adalat Appeal Suit No. 7 of
1849, and either to reverse or omit so much of the 9th para. thereof, as declares
that the parties therein referred to "can pursue their rights in the Court of Ori-
ginal Jurisdiction in the first instance—viz., the Zillah Court, and that that
Court must be guided in the admission and hearing of their claims by the Regu-
lations in force," or so to explain and modify the same, as to preclude any infer-
ence being drawn therefrom, that the Court of Sadr Adalat has decided in favor
of, or given sanction to the claim of, any or either of the parties whose Appeal
has been dismissed, to bring another Original Suit for the recovery of Sivaganga
Zemindary.

2. The Petitioner contends that the admission of any of the parties re-
ferred to, to file a new suit based upon the title claimed by them as the heirs of
the original Plaintiff, for the establishment of a title, which has been adjudicated
on by a Court of competent jurisdiction, and has been disposed of by a Decree,
which has become final in consequence of the dismissal of the Appeal preferred
from it, would be illegal and inequitable, as being contrary to the Laws in force
in this Presidency, and calculated to entail upon the Petitioner serious hardship,
and to expose him to endless litigation.

Proceedings
of the Sadr
Adalat un-
der date
18th April
1852.

3. The Counter Petitioner on the other hand contends that that portion of the Order referred to, to which the Petitioner objects, is perfectly correct, and prays that it may be allowed to stand.

Proceedings
of the Sadr
Adalat,
dated 16th
September
1862.
—concluded.

4. It appears to the Court of Sadr Adalat that the Petitioner has misconceived the purport and intent of the observations contained in para 19 of this Court's Proceedings of the 19th April last. It was not intended by those remarks, to convey any recognition or sanction of the claim of any of the parties referred to, to file a fresh suit for the establishment of the title in litigation in Appeal Suit No. 7 of 1849, which was a question not then before the Court, but to point out that the only means open to them for prosecuting any claim they might respectively consider themselves to possess to the Zemindari of Sivaganga, was to have recourse to the Court of Original Jurisdiction, which Court, it was expressly added, would be guided as to the admission or hearing of their claims by the Regulations in force.

5. This portion of the Order in question is sufficient to preclude the inference, that any expression of opinion in favor of the admission of any such claim to a hearing before the Court of Original Jurisdiction, much less that any authoritative sanction for the adoption of that course, was intended to be conveyed, and the Court, therefore, deem it unnecessary to omit or modify that portion of the Order to which the Petitioner refers.

6. It will be for the Court to give a decided opinion on the point in question, should it be ever duly brought before them by a motion.

C. F. CHAMIER,
Registrar.

Extract from the Proceedings of the Civil Court of Madura, under date the 25th of August 1859.

(cc)

1. Read Original Pleadings in Original Suit No. 10 of 1855 on the file of the Civil Court.

2. Read also Pleadings in Original Suit No. 4 of 1857 on the same file.

* * * * *

6. The Plaintiffs in both the above Suits sue the guardian of the present Minor Zemindar, and the Collector of Madura, as the Agent for the Court of Wards, for the recovery of the Sivaganga Zemindari, each averring herself to be the sole heiress of the deceased Zemindar, Goury Vallabha Tevar, who died in

Extract
from the
Proceedings
of the Madu-
ra Civil
Court, dated
25th August
1859.

Extract
from the
Proceedings
of the Madras
Civil
Court, dated
25th August
1859.
—continued.

1829. Plaintiff in Original Suit No. 10 of 1856, as his only surviving daughter having *male* issue—Plaintiff in Original Suit No. 4 of 1857, as the only daughter of the widow (6th) who survived her husband—both assert their father was divided from his brother Oya Tevar.

7. After due notice had been given, the Court, with the concurrence of the Vakils, fixed Thursday, the 11th August, for preliminary hearing in both these suits, they being intimately connected.

8. On the 11th August, Vakils being in attendance, the Court proceeded to obtain from the Plaintiff's Vakils the specific grounds on which they based their claims, and the following admissions and statements were made respectively:—

9. Plaintiff No. 10 of 1856 states, she sues for the estate *solely* as the *only* surviving daughter of her father, (the late Zemindar) having *male* issue, not as heir or successor to Unga Muttu Nachchiar; that her suit is based on the *pleaded* division between her father and his brother, and that if they were undivided she has no claim to the *ancestral property*, but still claims the Zemindary, *as the self-acquired property* of her father, under the law contained in pages 33, 152, 153, and 155 of *Macnaughten's Hindu Law*, Volume II. If the brothers were divided, she asserts that the law, as propounded by the Madras Pandits in Appeal No. 20 of 1838, and by the Bengal Pandits in their Futwah of the 23rd February 1837, and enumerated in a paper put in, establishes her right.

10. The Plaintiff in Original Suit No. 4 of 1857 states, she sues as the daughter of the Zemindar's surviving widow—the other two widows (5th and 7th) who survived the Zemindar having died childless; she avers, however, that had *they been living* now, they would have no right to the Estate; thus admitting that her right to the Estate commenced on the death of her mother in 1832, when she was in her sixth year, and that her present plaint was presented only on the 24th June 1856, or twenty-three-and-a-half years *after* the death of her mother; that if her father and his brothers were divided, as she pleads, her right is clear by the Futwahs of the Madras and Bengal Pandits; if undivided, by that of the latter only.

11. The Court proceeds to determine first, whether it is competent to allow the plea of division to be advanced.

12. The facts of the case are briefly as follows:—Unga Muttu Nachchiar, the mother of Plaintiff in Original Suit No. 4 of 1857, instituted a Suit No. 3 of 1833 before the Southern Provincial Court; her suit was dismissed—the Jud-

ges considering that as the late Zemindar and his brother were *undivided*, the Pandit's Futwahs clearly showed she had no right to succeed her husband. In Appeal, the Judges of Sadr Court were of opinion that the evidence adduced was sufficient to show that *division had taken place*; and the Law Officers of their Court having, under *these* circumstances, declared the widow was the heir of her husband, they reversed the Lower Court's decision, awarding the Estate to Unga Muttu Nachchiar. On Appeal to the Privy Council, it was discovered, that the very material question of division or non-division, on which the case hinged, had never been made a point, nor had evidence been cited to prove it, they therefore *dismissed the appeal*; but, for certain reasons given, they declared that Plaintiff, Unga Muttu Nachchiar, might bring a *fresh* action for the Estate, if she did so within three years. She accordingly instituted the Original Suit No. 2 of 1845, when the point of division or non-division, to which the Privy Council had restricted further investigation, was tried, and the late Judge, Mr. Baynes—on a full and careful consideration of *all the evidence*, oral and documentary—decreed that division had *not* been proved: on the contrary, he conceived that the Defendant had, as clearly as the circumstances would admit of, shewn that the brothers were *undivided*, and he therefore dismissed the suit, as might have been expected. The Plaintiff appealed (No. 7 of 1849), but, before the case was determined, she died; on which several parties petitioned to be allowed to carry on the Appeal. Their petitions were first rejected, but the Court, apparently considering that justice required that the Lower Court's award should not become *immediately final*, gave permission to the Petitioners (Plaintiffs) to bring regular actions for the Estate, *provided* they did so *before the 30th April 1851*. Instead of taking advantage of the Court's period of grace allowed them, Plaintiffs petitioned the Court for review of their Proceedings, the result of which was that the Court overruled their former Proceedings, and adjudged that the Plaintiff's petitions *could* be admitted to carry on the Appeal (No. 7 of 1849). Subsequently, on a Petition from the Defendant, the Sadr Court again took up the case, and *finally*, by their Proceedings,* revoked their Proceedings of the 1st May, confirming the principle laid down in those of the 21st October 1850, namely, that the Plaintiffs could not be allowed to

19th April 1852.

carry on the Appeal, which, having abated on the death of the Appellant, they struck off their file, referring the Plaintiffs to the regular Courts of Original Jurisdiction as those in which they should prefer, in the first instance, any claims they might have to the Estate. It will be observed, that the period originally allowed them for bringing an action had then expired, and *no second period of grace was given*. Upwards of four years after this final order of the Sadr had been passed,

Extract
from the
Proceedings
of the Madu-
ra Civil
Court, dated
25th August
1850.
—continued.

Extract
from the
Proceedings
of the Madras
Civil
Court, dated
28th August
1852.
—continued.

the Plaintiff in No. 10 of 1856 brings the present action; and a year later, Original Suit No. 4 of 1857 is likewise filed.

13. Original Suit No. 2 of 1845 was *specially* brought to determine the *status* of the late Zemindar, and for no other purpose; the evidence was restricted to this point, and, consequently, if ever there was a Judgment *in rem*, the Decree in that Suit No. 2 of 1845 is one; in that decision it is clearly determined that the late Zemindar and his brother *were undivided*. This Judgment the Court is not competent to question, still less to overrule; as a Judgment *in rem* it is *conclusive against all the world*, and no evidence can be admitted against it, unless it can be shown it was collusively or fraudulently given.

14. Taylor, in the second Section, quoted writes, "This rule appears to rest partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society that the social relations of every member of the community should not be left doubtful, but that, after having been clearly defined by *one* solemn adjudication, they should *conclusively* be set at rest." And in the following Section 1490, it is further stated, "that the decision *cannot be impeached in the same or another Court* by showing that the facts on which it immediately rests *are false*."

15. The Court is not aware on what grounds permission was granted by the Sadr Adalat to the Plaintiffs to bring an action, the avowed object of which was to impeach this judgment *in rem*; but the period of grace passed [without any action being brought, and no further period was allowed. Possibly the Court of Sadr Adalat, in considering the matter, discovered that they were not competent to grant it; or the omission may have been an oversight. As, however, on the former occasion, they gave only eighteen months, it is to be presumed further grace, if it had been given, would not have exceeded a like period.

16. Be this, however, as it may, in the absence of any precedent warranting such impeachment of a judgment *in rem*, and being of opinion "that nothing can be more inconvenient or dangerous than a conflict of decisions in *different Courts*, and that if judgments *in rem* are not regarded as binding upon all Courts alike the most startling anomalies may occur," the Court is unable to accept the Pleadings of the Plaintiff's on the status of the late Zemindar, *save as an undivided brother*.

17. This status being thus determined, it only remains to see if the Plaintiffs have by law any claim to the Estate.

18. The Plaintiff, in Original Suit No. 10 of 1856, admits she has none, save on the ground that it was self-acquired, and pleads the law as laid down in Volume II of *Macnaughten's Hindu Law*, pages 33, 152, 153 and 155, as establishing her right. A reference to them by the Plaintiff's Vakil would have shown him that the law therein propounded has reference solely to "*partition of property*," not "*succession*," and that it is clearly laid down in the preceding para, in page 33, that, after the death of the widow, "the property becomes vested in the heirs of her husband," but she is not a widow, but a daughter; the law which treats of widows is of no avail to her, but rather the contrary.

Extract
from the
Proceedings
of the Madras
Civil
Court, dated
25th August
1859.
—continued.

19. The Pandits of the Madras and Bengal Sadr Courts are unanimous that the Estate of the late Zemindar would descend to his widow, *only* if he was of a *divided family*.

20. Under the above circumstances, the Court is of opinion that the Plaintiff in Original Suit No. 10 of 1856 *has no claim in law* on the Estate sued for, and therefore directs that the suit be struck off the file without going into the other objections raised by the Defendants in their answer, Plaintiff paying all costs.

21. The Court's arguments for refusing to allow the Plaintiff, in 10 of 1856, to plead that the brothers were divided, are equally applicable to the case of Plaintiff in 4 of 1857. She bases her claim to the Estate on the law propounded in the *Futwahs* of the Pandits filed in this and the suits referred to above; these, however, all refer to widows, and not daughters, and declare widows only entitled to succeed to their husband's ancestral and self-acquired estate, when he is of a *divided family*. The Court, therefore, is of opinion, that she also has failed to show that she has any claim at law to the Estate sued for; and, without going into the other objections raised in the answer to her right to sue, resolves to strike off her suit likewise from the file, she paying all costs.

22. The Court, in continuance, would observe, that, though it has taken the late Judge's decision in No. 2 of 1845, as a Judgment *in rem*, and, therefore, not to be impeached, yet that, after a careful study of the whole case (which has occupied it almost incessantly for a period of six weeks), it fully concurs with the late Judge in all he has urged in that Decree and the Judgment awarded by him.

23. The Lords in Council, in their Decree, distinctly declare "it is exceedingly desirable that it should be known to all those who are interested in the property, that the question of fact as to division or non-division appears to be

Extract
from the
Proceedings
of the Madra
Civil
Court, dated
26th August
1859.
—concluded.

"the only point on which the main question of title to the property will ultimately depend." By thus declaring, the Court understands that, the question of status being about to be decided, all interested were then invited to come forward to prove their assertions to division or non-division, as the decision given *would be final*.

24. There cannot be a doubt that the Plaintiffs in the above suits were thoroughly acquainted with the Decree of the Privy Council; and it was for their interests to have assisted Unga Muttu Nachchiar to prove division, and see that all the evidence procurable was then advanced, and that the decision *passed on merits by the Civil Court* (unless such decision is ruled to be only equivalent to an adjudication or settlement by *order of Justice*) is conclusive against all the world *as regards the status of the late Zemindar*; but allowing that the Decree in No. 2 of 1845 was not final *when it was passed*, because appealed from, it appears to the Court that it is undoubtedly so *now*, inasmuch as it cannot be affected by any other suit, and there are no parties competent now to question it *in Appeal*. It is laid down that non-division is to be presumed *until division is proved*; non-division was the alleged state of the family when the suit was brought; *non-division* was the decision passed after a prolonged and patient investigation in Original Suit No. 2 of 1845, and *non-division* was the status, when the Plaintiff (Appellant) died. Such being the case, how can the Plaintiff's claims, which are based and *only sustainable* on the ground that *division* had taken place, be admitted? If they can be, where is the limit, and what becomes of the rule, that Judgments *in rem* are conclusive against all the world?

(Signed) R. R. COTTON.

Extract
from the
Proceedings
of the Sadr
Court, dated
5th November
1859.

Extract from the Proceedings of the Sadr Court under date the 5th November 1859.

(20)

Read Miscellaneous Petition, No. 373, dated the 5th ultimo, of Kattama Nachchiar *alias* Colandapoory Nachchiar, of Zilla Madura.

Petitioner appeals from the Order of the Civil Judge, under date the 25th August 1859, dismissing her Suit No. 10 of 1856, on the ground that it was *barred* by the Decree passed in Suit No. 2 of 1845 on the file of the Civil Court of Madura.

Read also Counter Petition, presented on the 3rd instant, of Srimat Muttu Vijia Raghunadha Bodha Gurusawmy Periya Udaya Tevar, Zemindar of Sivaganga.

The Sadr Adalat consider the Order of the Civil Judge appealed from to be correct, in so far as he has declared that the title of the Petitioner in No. 373 depends upon a question finally set at rest, adversely to such title, by the Decree of the Civil Judge of Madura in Original Suit No. 2 of 1845. That Decree, it is true, was appealed from by the then Plaintiff, Unga Muttu Nachchiar; but, on her demise, without heir, before the matter was brought to issue, the Appeal dropped, and was struck off the file. The Decree of the Civil Judge in No. 2 of 1845 remained thus undisturbed. The suit lay between the said Unga Muttu Nachchiar, as the widow of the late Zemindar Gouri Vallabha Tevar, and the grand-nephew of the latter, representing one of two branches in the family. The widow's right depended upon the fact that Vallabha Tevar, and his brother, the Defendant's grandfather, had divided, and it was negatived by the Civil Judge on his coming to the conclusion that there had been no such division as set up by her. The Petitioner comes forward as a daughter of Vallabha Tevar and alleges that on the demise of the said widow her right sprang up. She bases it also on the plea of the division negatived by the Decree in No. 2 of 1845. It is clear to the Court that the said Decree is an effectual bar to the admission of this plea. The plea was then set at rest as existing between the two parties at that time in contention for the Estate, and when disposed of the alleged title of the Petitioner had not come into being. The fact, that at some succeeding time the Petitioner came into a position to be affected by the said plea, cannot create for her a right to reopen it to adjudication. A Decree made final, by not being overthrown upon Appeal, settles any question decided upon by the Decree, unless a party by a fresh suit is in a position to call in question the Decree as having had an interest at the time it was passed, which interest may have been prejudiced by the Decree without his having been included in the suit so settled. This is not the Petitioner's case. It is clear, by her own showing, that she could not have been heard when Unga Muttu Nachchiar was alive and the Suit No. 2 of 1845 pending; and therefore, in the opinion of the Court, she is not at liberty to call in question the Judgment passed in the said suit.

The Court, consequently, reject the Petition No. 373 of 1859.

(Signed) C. T. CHAMBER,

Registrar.

Proceedings of the Sadr Court, 3rd March 1860.

(307)

Read Miscellaneous Petition, dated 11th February 1860, of Kattama Nachchiar alias Colandapoory Nachchiar, of Zillah Madura.

Proceedings
of the Sadr
Court, dated
3rd March
1860.

Extract
from the
Proceedings
of the Sadr
Court, dated
5th Novem-
ber 1859.
—concluded.

Proceedings
of the Sadr
Court, dated
3rd March
1860.
—concluded—

1. Petitioner submits a Petition of Appeal addressed to Her Majesty in Council against the Order of this Court, under date the 5th November 1859, upon Miscellaneous Petition No. 373 of that year, and prays the Court to receive the said Petition and the amount tendered by her as security for the eventual costs of the Respondent in such Appeal, and for the preparation of the record connected with the case in view of its transmission to England.

2. The parties having been heard by means of their respective counsel, the Court are of opinion that their Order, which is objected to by the Plaintiff, is not one from which they can accept and forward an Appeal to Her Majesty in Council.

3. The suit is one in which the Civil Judge of Madura has decided that he has no jurisdiction, because the matter upon which it depends has already been disposed of by a previous Decree of his Court. In so deciding and rejecting the suit, the Civil Judge exercised the powers vested in him by Section 10, Regulation II of 1802; and his decision having been of the nature described in the early part of Clause 2, Section 5, Regulation XV of 1816, became subject to Appeal to this Court, under the said enactment; and the order passed by the Court upon the said Appeal became, under Clause 10 of the above Section, final.

4. The Court therefore reject the said application for admission of an Appeal from their Order to Her Majesty in Council.

(Signed) C. F. CHAMIER,

Registrar.

Judgment of the Lords of the Judicial Committee of the Privy Council upon the Appeal of Kattama Nachahiar v. The Raja of Sivaganga from the Sadr Diwani Adalat at Madras, delivered 30th November 1863.

(10.)

PRESENT :—

LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILLE.

The subject of this Appeal and of the long litigation which has preceded it is the Zemindari of Sivaganga in the District of Madura and Presidency of Madras.

This Zemindari is said to have been created in the year 1730 by the then Nabob of the Carnatic in favor of one Sasivarna, on the extinction of whose

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lineal descendants in 1801, it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nabobs of the Carnatic, and was granted by the Madras Government to a person whom we shall distinguish by one of his many names as Gouri Vallabha. He had an elder brother named Oiya Tevar, who pre-deceased him, dying in 1815. The Zemindar himself died on the 19th of July 1829.

Copy of the Judgment of the Judicial Committee of the Privy Council in the Appeal of the late Zemindar of Sivagan-ga, dated 30th November 1883.

—continued.

He had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead), who left a son named Vaduga Tevar; the second had a daughter named Bhutaka; the third had two daughters, Kottai and Kattama, the present Appellant; and the fourth was childless. The three surviving widows were Unga Muttu Nachchiar, Parvata Nachchiar and Muttu Virayi Nachchiar. Of these, Parvata was *enccinte* at the time of her husband's death, and afterwards gave birth to a daughter named Soumya. The two others were childless.

Oiya Tevar, the brother, left three sons, of whom the eldest was named Muttu Vaduga.

The Zemindari is admitted to be in the nature of a principality, impartible, and capable of enjoyment by only one member of the family at a time. But, whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu Law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence, if the Zemindar, at the time of his death, and his nephews were members of an undivided Hindu family, and the Zemindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the Zemindar, at the time of his death, was separate in estate from the brother's family, the Zemindari ought to have passed to one of his widows, and, failing his widows, to a daughter, or descendant of a daughter, preferably to nephews—following the course of succession which the law prescribes for separate estate. These propositions are incontestable; but Gouri Vallabha's widows and daughters have advanced a third, which is one of the principal matters in question in this Appeal. It is that, even if the late Zemindar continued to be generally undivided in estate with his brother's family, the Zemindari was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and

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daughters and their issue, preferably to his nephews, though the latter, as coparceners, would be entitled to his share in the undivided property. Upon this view of the law, the question whether the family were undivided or divided, becomes immaterial. The material question of fact would be whether the Zemindari was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of Gouri Vallabha, at least on the failure of his male issue being demonstrated by the birth of his posthumous daughter, his nephew, Muttu Vaduga Tevar, obtained possession of the Zemindari. He seems to have set up an instrument, which in the Proceedings is called a Will. On the Appellant's side, this is treated as a forgery. The Respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may therefore be dismissed from consideration. Muttu Vaduga obtained possession with the concurrence of various members of the family, and of Government and its Officers, as is shown by the documents at pp. 62 and 63 of the Appendix. He afterwards obtained from the then three surviving widows the razinama or agreement set out at p. 64 of the Appendix. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July 1831, and was then succeeded by his eldest son, Bodha Gurusami Tevar.

Soon after this event, began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the first beginning with the institution of Suit No. 4 of 1832, and ending with the Order of the Queen in Council in 1844; the second beginning from the date of that Order, and ending with the death of the widow, Unga Muttu, on the 23rd of June 1850; and the third being that which covers the Proceedings which have been had since Unga Muttu died.

The Suit No. 4 of 1832 was brought by Vellai Nachchiar, the daughter of Gouri Vallabha by his first wife, on behalf of her infant son, Muttu Vaduga. It claimed the Zemindari for the infant by virtue of an Arzi said to have been sent to the Collector by Gouri Vallabha in 1822, according to which the succession would be to the son of a daughter in preference to his widows, and *a fortiori* in preference to his brother's descendants. The defence to this suit insisted that the Zemindari had been granted to Gouri Vallabha, solely in consequence of his relationship to the former Zemindars, and was therefore to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male

co-parceners in preference to any descendant in the female line from Gouri Vallabha. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the Zemindari was to be regarded as the self-acquired and separate property of Gouri Vallabha, and ought to pass by virtue of the Arzi to the Plaintiff.

Copy of the Judgment of the Judicial Committee of the Privy Council in the Appeal of the late Zemindar of Srirangapatna, dated 30th November 1833.

In 1833, two other suits were instituted against the Zemindar in possession. Of these, that distinguished as No. 4 may be left out of consideration, inasmuch as the Plaintiff in it rested his title on an alleged adoption by Gouri Vallabha, of which he failed to give satisfactory proof. Such a title, if established, would of course have been paramount to the claims of either the nephews or the widows.

No. 3 of 1833 is, however, the most important, with reference to this Appeal of the three suits now under consideration. It was brought by Unga Muttu, the fifth wife, and the elder of the three widows of Gouri Vallabha. She set up an adoption or *quasi* adoption of Gouri Vallabha by the widow of the last Zemindar of the elder line, and treated this as the consideration or a principal consideration for the grant of the Zemindari made to him by the East India Company; and she insisted that Muttu Vaduga Tevar on her husband's death got possession of the Zemindari, of which she was the legal heiress, by means of the forged Will. The defence to this suit, so far as it related to the title of the Zemindar in possession, was substantially the same as that made to the Suit No. 4 of 1832; but it also denied the alleged forgery of the Will, and insisted on the Razinama executed by Unga Muttu and the other widows to Muttu Vaduga Tevar. In her reply, Unga Muttu did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the Zemindari had been acquired by the sole exertions and merits of her husband; and, as an issue of law, that what is acquired by a man, without employment of his patrimony, shall not be inherited by his brothers and co-heirs, but, if he dies without male issue, shall descend to his widows, his daughters, and parents, before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the Decree or Decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether Gouri Vallabha and his nephews were or were not an undivided Hindu family, some evidence was given in the Suit No. 4 of 1832 to show that he and his brother were separate in estate. There was an Appeal in each of the three suits, and these were heard together, and disposed of by the

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Decree of the Sadr Court, which is set out at p. 270 of the Appendix. That Decree dismissed No. 4 of 1833, on the ground that the Plaintiff had failed to prove his alleged adoption by Gouri Vallabha, and it dismissed No. 4 of 1832, on the ground that the succession to the Zemindari was governed by the general Hindu Law, and not by any particular or customary canon of descent; so that, if descendible as separate estate, it would go to the widows of Gouri Vallabha in preference of a grandson by a daughter. In the Suit No. 3 of 1832, it decided, first, that, as a matter of fact, the Zemindari was the self-acquired and separate property of Gouri Vallabha: secondly, that, according to the opinion of the Pandits whom it had consulted, the rule of succession to the Zemindari, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that, in the former case, it would belong to the widow, and, in the latter, to the nephew; thirdly, that, upon the whole evidence, the brothers must be taken to have divided their ancestral property; and lastly, that the Plaintiff, Unga Muttu, was entitled to recover the Zemindari, not having forfeited her rights by the execution of the Razinama.

Against this Decree, the Zemindar, then in possession, appealed to Her Majesty in Council. The Order made on that Appeal on the 19th of June 1844, was that the Decree of the Sadr Court should be reversed, with liberty to the Respondent, Unga Muttu, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that Order in the Sadr Dewani Adalat. The grounds on which their Lordships who recommended this Order proceeded were, as appears from the judgment delivered by Dr. Lushington, that the Sadr Court had miscarried in deciding the question of division, which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the Respondent ought to be allowed to remedy the omission in a new suit: and their Lordships added that, though they could make no order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property, that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

On the 20th of August 1845, Unga Muttu commenced her second suit in *forma pauperis*. In the interim, Bodha Guru Tevar had died, and the Zemindari had passed to his brother, Gouri Vallabha, the father of the Respondent, and he with a younger brother were the Defendants to the new suit. In her Plaint, the widow, after stating the pedigree of the family, some of the former proceedings and the desire of Velu Nachchiar, the widow of the last Zemindar of the elder line,

to make Gouri Vallabha, the first of that name whom we have mentioned, her successor, proceeds to allege that with that object she had caused him and his elder brother, Oiya Tevar, to make a partition of their ancestral property as early as the year 1792. The Plaintiff then excuses her omission to plead this fact in the previous suit, by saying that she had been advised it was only necessary for her to show that her husband had been adopted by Velu Nachchiar, and that the Zemindari was his self-acquisition. She then proceeds to allege that, on the death of Velu Nachchiar, he actually became Zemindar until he was dispossessed by the usurpers, on whose defeat and destruction by the East India Company he was again put into possession under their grant. She also in this suit makes the alternative case, that, even if no partition of their ancestral property took place between Gouri Vallabha and his brother, Oiya, she, as the eldest widow, was entitled to the Zemindari, as a separate acquisition, in preference to that brother's descendants, and pleads the decision in what is called the Sandiur case, to prove that such is the Hindu Law, and that the opinion given in the former case by the Pandits to the contrary was erroneous.

Copy of the Judgment of the Judicial Committee of the Privy Council in the Appeal of the late Zemindari of Sivagan-ga, dated 30th November 1863.

—continued.

In his answer, the first and principal Defendant recapitulated the several facts relied upon by Bodha Guru in the former suit as constituting his title. He insisted that by the decision of the Privy Council the contest was narrowed to the issue whether the brothers were undivided in estate or not, and that the Plaintiff should have rested his claim on that issue. He contended that there had been no partition. The points recorded in the suit (Appendix, p. 24), are thus somewhat vaguely stated.

"The Plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the Defendant cannot be called upon to establish the negative side by direct proof. But the Defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the Plaintiff."

A large body of evidence is in fact given by each side on the question of division or non-division. The case was heard by the Zilla Judge, Mr. Baynes, whose Decree, dated the 27th of December 1847, is at page 143 of the Appendix. The effect of it was that the only question really open between the parties was that of division or non-division; that the Plaintiff had failed to prove the partition between Gouri Vallabha and his brother, Oiya; and that her suit must be dismissed with costs.

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Against this Decree, and on the 6th April 1848, Unga Muttu appealed to the Sadr Court. The Defendant, Gouri Vallabha, then died, and his infant son, the present Respondent, came in, and, on the 5th of November 1849, filed an answer to the Appeal. Before the Appeal was heard, and on the 24th of June 1850, Unga Muttu also died, and with her death ended the second stage of this long litigation.

On the death of Unga Muttu, the Court seems to have issued a notice in the form ordinarily used on the abatement of an Appeal by the death of the Appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. The form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindu widow, the right of action formerly vested in her devolves not upon *her heirs*, but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of Bhutaka Nachchiar, the daughter of Gouri Vallabha by his second wife, and Kottai and the present Appellant, his daughters by his third wife. They claimed as the rightful heirs of the Zemindari, if it passed as separate property, next in succession to the widow, Unga Muttu; but, considering its impartible nature, they expressed their willingness that it should be enjoyed, first by Bhutaka for her life, next by Kottai for her life, and lastly by the Appellant. They treated Soumya, the daughter by the sixth wife, as excluded from the succession by reason of her marriage with Bodha Guru, and of her being then a childless widow.

Soumya, however, came forward by a separate petition, claiming to be heiress both to Unga Muttu and the Zemindari, by virtue of an instrument alleged to have been executed by Unga Muttu in her life-time.

A third claimant was Muttu Vaduga, the Plaintiff in the dismissed suit of 1832. His contention was that, though the Decree in that suit may have been right in preferring to his claim that of Unga Muttu, his title as grandson was nevertheless preferable to that of daughters, and that on the death of the widow he became entitled to the Zemindari.

Counter-petitions were filed on behalf of the Respondent, objecting to the revival of an Appeal by any of these claimants; and it is observable that he then insisted that they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of Unga Muttu.

The Sadr Court, in dealing with these claims to prosecute the Appeal, has made three different and inconsistent Orders.

By the first, dated 21st October 1850, (Appendix, p. 290), it held that none of the claimants could prosecute the Appeal which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th April 1851.

They all petitioned for a review of this Order: Counter-petitions were filed on behalf of the Respondent; and the Court, by its Order of the 1st of May 1861, notwithstanding an adverse opinion given by its Pandits on the 7th of March preceding, reversed its former Order, and directed the Appeal to be replaced on the file, and the several claimants to be made supplemental Appellants—resolving to hear the Appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the Defendant should be tried.

On the 19th of April 1852, the Court, apparently of its own mere motion, on taking up the record of the Appeal, reversed the Order of the 1st of May 1851, and ruled that the several claimants could not be heard on the Appeal, but might prosecute their respective rights in the Court of First Instance, which Court was to be guided in the admission and hearing of their claims by the Regulations in force, and the Appeal was again removed from the file.

Thereupon the Respondent shifted his ground, and, by a Petition dated the 30th of June 1852, objected to the last Order and prayed for a review of it. His contention then was, that the heirs next in succession to Unga Muttu, according to that course of succession, might have been admitted to carry on the Appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its Proceedings of the 16th of September 1852, adhered to its Order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of Gouri Vallabha, who joined in the first of the above mentioned applications to the Sadr Court, the Appellant alone brought a fresh suit. The Plaint was not filed until the 5th of December 1856, but there seem to have been various intermediate proceedings before both the Zilla and Sadr Courts. These are referred to in the Appellant's Petition of Appeal at page 260 of the Appendix, line 51, but are nowhere stated in detail. Her Plaint stated that her father and his brother, Oiya Tevar, were divided in estate prior

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to 1801, and were then living separately; that the Zemindari was granted exclusively to the former, and was therefore his self-acquisition, and enjoyed by him in exclusion of his brother.

The Appellant's title in succession to Unga Muttu is thus stated:—"The Zemindari, which is the self-acquisition of the Plaintiff's father after his division with Oiya Tevar, belongs, on the death of his widow, Unga Muttu, to his second daughter, the Plaintiff, who has male and female issue: whilst his first daughter, Bhutaka, has no issue, and the third daughter, Soumya, is a widow." In the seventh paragraph (Appendix, p. 251), (though the point is not taken so distinctly as in the suit of Unga Muttu), she claims the Zemindari as her father's self-acquisition, irrespectively of the alleged partition with his brother and the question of division.

The answer took a formal objection to the suit, viz., that it was brought against the guardian of the infant Zemindar, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the Decree of the 17th of December 1847 as bars to the Appellant's claim. It further impeached her title as the heir next in succession to Unga Muttu in that line of succession, alleging that there were descendants of Gouri Vallabha through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845 as constituting the title of the infant Zemindar. The estate being then in the custody of the Court of Wards, the Collector was made a Defendant, and put in a similar answer. Replies and rejoinders were filed; but, without settling any issues or taking any evidence in the cause, the Zilla Judge (Mr. Cotton) on the 25th of August 1859 dismissed the suit, together with the Suit No. 4 of 1857, which had been instituted by Soumya, but with which we have no concern. His reasons for dismissing the Appellant's suit were:—first, that upon the question of division she was concluded, by the Decree of 1847, which he treated as a Judgment *in rem*, made final by the removal of the Appeal from the file: and, secondly, that it was clear upon the opinions of the Pandits that the Zemindari, whether self-acquired or not, could not descend to the widow, nor *a fortiori* to a daughter, except in the event of the Zemindar having been of a divided family.

The Appellant appealed from this decision to the Sadr Court, praying that the suit might be remanded for adjudication on the merits. Her Appeal was dismissed by a Decree dated the 5th of November 1859. The Sadr Court seems also to have considered that, by the dropping of the Appeal on Unga

muttu's death, the Decree of 1847 had become final, and, as such, was an effectual bar to the Appellant's claim. On the 3rd of March 1860, the Sadr Court refused to give the Appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of the Committee.

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The present Appeal is against the Decree of the Sadr Court of the 5th of November 1859, and its Order of the 3rd of March 1860, and the Decree of the 25th of August 1859. It is also against the Order of the Sadr Court of 1852 and the Decree of the Civil Court of Madura of the 27th December 1847. If, therefore, the latter Decree is in truth a bar to the Appellant's obtaining effectual relief in her Original Suit, the Appeal seeks by re-opening that Decree to remove the bar.

And here, before going further, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this Decree which was propounded by the Zilla Judge when dismissing the suit of 1856: because, if unnoticed here, as it seems to have been unnoticed by the Sadr Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in India. Their Lordships would otherwise think it necessary to observe that a Judgment is not a Judgment *in rem*, because, in a suit by A for the recovery of an estate from B, it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular Judgment was nothing but a Judgment *inter-partes*; and the only question which could properly arise concerning it in the suit of 1856, was to what extent, as such, it was binding on the Appellant.

Their Lordships also feel constrained to observe that the various proceedings, which have taken place since Unga Muttu's death, have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When Unga Muttu died, the Decree of 1846 was not a final Decree. An Appeal was pending against it. Either it was binding upon those, who in the event of her title being a good one would succeed to the Zemindari, or it was not. Those persons were obviously not her heirs, but the next heirs of her husband according to the canon of Hindu Law, which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to the description. If the Decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the Appeal. If the Decree were not binding upon them, it ought not to have been treated as an

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obstacle to the full trial and adjudication of their rights in an Original Suit. The Sadr Court, however, after making two other inconsistent Orders, referred the parties to an Original Suit; and yet a suit of that nature, when brought by the Appellant, has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the Decree of 1847. Therefore she has fallen, so to speak, between two stools. She has had neither the benefit of the Appeal against the Decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here, that for this result the Appellant is herself solely responsible; that the suit, which she ought to have brought, and which the Sadr Court intended her to bring, was one in the nature of a bill of revivor, or a bill of revivor and supplement, limited to the object of obtaining from the Zilla Court a declaration that she had established her title to stand in the place of Unga Muttu, and carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced), their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the Sadr Court had in its contemplation when it made its Order of 1852. The omission to reserve the hearing of this Appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the Respondent himself in his Counter-petitions filed in opposition to the first applications for leave to prosecute the Appeal,—all point to the conclusion that the new and Original Suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure Order of the 16th of September 1852 (Appendix, p. 243) is hardly inconsistent with this, though it seems to contemplate that the Decree of 1847 might prove an effectual bar to the suit which the Court itself had directed. Yet if there was ground for this apprehension, in what a position had the Sadr Court placed the claimants? It had denied to them the power of prosecuting the Appeal; it had thereby made final that which was not in its nature final; and, having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the Decree of 1847, when final, was binding on the claimants, the Sadr Court ought either to have dealt with the Appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that Decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest Order of the Sadr Court which is appealed against, viz., that of the 19th of April 1852.

It seems, however, to be necessary, in order to determine the mode in which this Appeal ought to be disposed of, to consider the question whether the Decree of 1847, if it had become final in Unga Muttu's life-time, would have bound those claiming the Zemindari in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that Decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in a Zilla Court by any person claiming in succession to Unga Muttu. For, assuming her to be entitled to the Zemindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle, which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a Decree fairly and properly obtained against the widow.

But then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the Respondent that this Committee can do no more than remand the cause, with directions to the Sadr Court to hear and determine the Appeal against the Decree of 1847; that it cannot itself deal with the merits of a Decree of a Zilla Court, until they have been determined by the Appellate Court. *Their Lordships, however, are not of that opinion.* The Appeal was ripe for hearing by the Sadr Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the Order, which the Sadr Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the Appellant and the Respondent is, as it was between Unga Muttu and the Respondent's predecessors, whether the Zemindari ought to have descended in the male and collateral line; and the de-

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termination of this issue depends on the answers to be given to one or more of the following questions :—

1. Were Gouri Vallabha and his brother undivided in estate, or had a partition taken place between them?
2. If they were undivided, was the Zemindari the self-acquired and separate property of Gouri Vallabha? And if so—
3. What is the course of succession according to the Hindu law of the South of India of such an acquisition, where the family is in other respects an undivided family?

Upon the first question, their Lordships are not prepared to disturb the finding of Mr. Baynes in the Decree of 1847. There are undoubtedly strong reasons for concluding that Gouri Vallabha and his brother, after the acquisition by the former of the Zemindari, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately-enjoyed Zemindari. And Unga Muttu, having admitted that the brothers had been joint in estate, and alleged a partition at a particular place and time, took upon herself the burthen of proving that partition—a burthen from which, it must be admitted, she has not satisfactorily relieved herself. Nor can their Lordships in considering this question be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made: and from the silence of the parties in the Suits of 1832 and 1833, as well as in the Suit of 1823, which is mentioned in these proceedings, upon the subject of a partition, which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court, that has dealt with the question, has treated the Zemindari as the self-acquired property of Gouri Vallabha. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the Zemindars of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's "Hindu Law" by Sir Hugh Cairns.

The third question is one of nicety and of some difficulty. The conclusion, which the Courts in India have arrived at upon it, is founded upon the

opinion of the Pandits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but, before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the Southern parts of India, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of India, is to be found in the Mitacshara, and in Chapter 2, Section 1 of that work, the right of widows to inherit in default of male issue is fully considered and discussed.

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The Mitacshara purports to be a commentary upon the earlier Institutes of Yagnavalkya; and the section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the Mitacshara refers to various authorities which are apparently in conflict with the doctrines of Yagnavalkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favor of widows; and consequently that, in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter, in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that, because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with, their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be obser-

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ved, in the first place, that the general course of descent of separate property according to the Hindu law is not disputed. It is admitted that, according to that law, such property descends to widows in default of male issue. It is upon the Respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done is by showing a general state of co-parcenaryship as to the family property; but, assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof or absence of proof cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindu family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain on a part-division of joint property is apparent from a passage in Macnaghten's "Hindu Law," "Title" "Partition," Vol. I, page 53, where it is said as follows:—"According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property. In other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that, on the death of the acquirer of separate property, the separately-acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that, if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that, according to the Hindu Law, there need not be unity of heirship.

But to look more closely into the Hindu law. When property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which from its first acquisition has always been separate. We have seen from the passage already quoted from Macnaghten's

"Hindu Law" that, where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was devolves in the old line; that which is changed and becomes separate devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

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Again, there are two principles on which the rule of succession according to the Hindu Law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands dying separated from their kindred, on the first of these principles (I. Strange, 135). But some ancient authorities also invoke the other principle. Vrihaspati (III. Dig. 458) tit. cccxcix; see also Sir William Jones' paper cited II. Strange, (250) says:—"Of him whose wife is not deceased, half the body survives. How should another take the property while half the body of the owner lives?" Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate? For, it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is perfectly intelligible that, upon the principle of survivorship, the right of the co-parceners in an undivided estate should over-ride the widow's right of succession, whether based upon the spiritual doctrine or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right established by the Mitaculara, whatever be its extent, must be taken to depend. If this be so, we can hardly, in a doubtful case, and, in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindu Law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship, that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that, as to the separately-acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails, and there are no grounds for postponing the widow's right to inherit it to any superior right of the co-parceners in the undivided property.

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Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended together; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe that the view which has thus indicated the Hindu Law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindu being a member of a united family having common property, and being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But, if the rule contended for were to prevail, he could not effect his first object without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to consider the opinions of the Pandits and the authorities referred to by them.

The case appears to have been referred to the Pandits on several occasions. The first of these references was made by the Zilla Court in 1833 in the Suit No. 4 of 1832. The answer of the Pandits bears date the 28th of October in that year, and is at pages 311 and 312 of the Appendix. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same Pandits in answer to references directed by the Sadr Court before making the Decree of the 17th of April 1837. The answers are dated the 28th of December 1836, and the 16th of January 1837, and are at pages 141 and 272 of the Appendix.

On examining the reasons on which the Pandits rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from Vrihaspati and as to the text in the Mitacshara to which they refer; but they leave untouched the question, which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from the Mitacshara and what we shall presently say as to the passages from Vrihaspati, is, we think,

a sufficient answer to this part of the reasons on which the Pandits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage; and, because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

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But the whole of this last argument seems to be founded on the passages in the Mitacshara contained in Clauses 2 and 3 of Section 1, Chapter 1; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage", and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed, the argument which the Pandits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the Pandits rely in support of their opinions. They consist of the text from the Mitacshara, to which we have already so frequently referred, and of passages from Vrihaspati and several other Commentators on the Hindu Law. We have already intimated our opinion that the text from the Mitacshara does not apply to this case, and as to the passage from the Commentators they are all of equivocal import. They may or may not have been intended to apply to a case like the present, and, if there was nothing more to be found upon the subject, they might or might not be thought sufficient to warrant the opinion which the Pandits have founded upon them; but these passages seem to be the same passages or passages similar to those, which were brought forward before the time of the Mitacshara, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from Narada. These authorities failed when contrasted with conflicting passages in the works of other Commentators, of which the Pandits in this case have taken notice, to negative the right of the widow where the property was wholly separate; and, as they have failed to this extent, we cannot but think that the Pandits in this case have gone much too far in bringing them forward as uncontradicted authorities in favor of the opinion which they have formed, that the widows are not in this case entitled to the separately-acquired property. It seems to us, too, that the decision in the Sandiyur case—a decision also founded on the opinion of the Pandits of the Sadr Court—is wholly at variance with the opinion of the Pandits in the present case. Whether the Pandits in that case were or were not right in the opinion that the Zemindari became the separate property of the uncle by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is that, holding the Zemindari to have become the separate property of

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the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The Pandits, in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pandits, in the Sandiur case, by assuming that the Pandits in that case proceeded upon an idea that the descendants of the common ancestor had been separated, but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case, therefore, stands thus upon the authorities. On the one hand, we have the opinions of the Pandits in this case, which seem never to have been acted upon by any *final* Decree. On the other hand, we have the decision in the Sandiur case, and the other authorities cited for the Appellants at the Bar, particularly the passage from Manu, in Sir William Jones' paper given at II Strange, p. 250, and the opinion of the Pandit Kistnamachari (II Strange, p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. Colebrooke and Dorin.

In this state of things, their Lordships cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favor of the Appellant's contention.

We proceed, then, to consider how the Sadr Court ought to have dealt with this case after Unga Muttu's death, and we are of opinion that that Court ought, upon the applications made by the different parties claiming to prosecute the Appeal, to have determined which of the parties was so entitled. We are of opinion that Soumya and the grandson were not so entitled, and that their claims therefore ought at once to have been dismissed. The claims of the Appellant and her two sisters were founded on a right common to them as against the Respondent; and we think that the Court ought to have held them entitled to prosecute the Appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and, upon the merits, we are of opinion, for the reasons above given, that the Appellant and her sisters were well entitled to the Zemindari as against the Respondent. We have, of course, not failed to consider the Judgment of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindu Law of Inheritance, Mr. Strange, one of the Judges of the Sadr Court of Madras, has expressed an opinion adverse to the conclusion at which we have arrived.

But we think it probable that the case was not so fully discussed and examined in 1844, as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the Appellant bound by the opinion which was then expressed, which, though of course entitled to the greatest possible respect, was not necessary to the decision then arrived at. And, as to the opinion expressed by Mr. Strange, it seems to rest upon the opinions of the Pandits and the proceedings of the Courts which we have now been called upon to review. If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but, as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

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We shall therefore humbly recommend Her Majesty to reverse the Decrees and Orders complained of by this Appeal; to declare that the Suit of 1856, which appears to us to have resulted from erroneous directions given by the Sadr Court, ought to have been and ought to be dismissed; and in the Suit of 1845, to declare that Soumya and Muttu Vaduga were not nor was either of them, but that the Appellant and her sisters were, as against the Respondent, entitled to prosecute the Appeal, and to recover the Zemindari—this declaration to be without prejudice to the rights of the Appellant and her sisters *inter se*; and further to declare that an account ought to have been and ought to be directed of the rents and profits of the Zemindari, received by the Respondent, or by his order, or for his use, since the death of Unga Muttu, with directions for payments to the parties entitled of what should be found due upon the account; and also to declare that the Zemindari ought at once to be put into the hands of the Collector, or of a Receiver to be appointed by the Court, with liberty to the Appellant and her sisters, or any of them, to apply to the Court, as they may be advised. We shall further recommend that the case be remitted to the Sadr Court, with directions to carry these declarations into effect: but we shall not recommend that any costs be given of the Suit of 1856, or of this Appeal, or of any of the proceedings below. But any costs to which the Appellant has been subjected must be refunded.

Proceedings of the Civil Court of Madras, dated 4th May 1864.

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 Bodha Gurusami Teyar ... Plaintiff.
 Kattama Nachchiar ... Defendant.

Read:—Plaint presented by Narayana Row, Vakil on behalf of the above-aid Plaintiff, suing for possession of Sivaganga Zemindari, together with all its appurtenances.

Proceedings of the Civil Court of Madras dated 4th May 1864. Bodha Gurusami Teyar vs. Kattama Nachchiar.

Order.

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chiar.
—concluded.

The question of title to the property referred to in the Plaint as between the present Plaintiff and Defendant having been disposed of by the Judgment of the Lords of the Judicial Committee of the Privy Council, delivered on the 30th November 1863, it cannot now be revived on the ground set forth in the Plaint. The Plaint is accordingly rejected.

(Signed) C. R. PELLY.

High Court
Judgment
in R. A. No.
38 of 1864
dated 11th
July 1864.
Bodha Gu-
rusami Te-
var vs. Kat-
tama Nach-
chiar.

Judgment of the High Court, dated 11th July 1864.

Bodha Gurusawmi Tevar	...	...	... Appellant.
Rani Kattama Nachchiar	...	...	... Respondent.

* This regular Appeal coming on for hearing, the following Judgments were delivered :—

Scotland, C. J.—The parties to this suit and to the suits in which judgment upon Appeal was recently given by the Judicial Committee of Her Majesty's Privy Council are the same. The question to be considered is, whether the cause of action, upon which the present suit is brought, was finally concluded by the Judgment and Decree in the Appeal, for, if so, the Civil Judge was right in refusing to take cognizance of the suit, and I am of opinion that the present cause of action was concluded. It can make no difference in the consideration of the question that the party now Plaintiff was Defendant in the former suit. What we have to be satisfied of is, that the ground of legal right, upon which the Plaintiff sues, was a point raised and open for decision in the former Suits, and that it was finally dealt with by the Judgment and Decree.

Now the cause of action in this suit is the right of the Plaintiff to recover possession of the Zemindari as the legal representative of Muttu Vaduga Tevar, the devisee under the alleged "Will" of Gouri Vallabha Tevar, the former Zemindar, in whom, under the *Sunnud Istimrar*, the Zemindari vested as his self-acquisition. The whole foundation of the suit clearly is the validity of the alleged devise to Muttu Vaduga Tevar, for, as a ground of action, no effect, it seems to me, can now be given to the statements in the Plaint as to the agreement of the 29th July 1830. Then what was the nature of the case made by the parties in the former suits, and what were the questions raised in those suits and involved in the final decision of Her Majesty in Council in the Appeal?

The Appeal appears to have been against the Decrees and Orders in the suit brought in 1845 by Unga Muttu, one of the widows of the Zemindar Gouri Vallabha, and in the suit brought in 1856 by the present Defendant, his second daughter, and we must look, I think, to the Plaint and Proceedings forming the record in both those suits. In the first, the widow in her Plaint rested her claim to recover the Zemindary from the principal Defendant, the father of the present Plaintiff, upon the grounds, first, that a division had taken place between her husband and the Defendant's grand-father Oya Tevar; and secondly, that the Zemindary had become the separate self-acquisition of her husband under the grant made to him by the Government. In answer, the Defendant pleaded a denial of the alleged division, and distinctly set up and relied upon his preferable right to the Zemindary, as the next heir male in the undivided family, and also under the terms of the Will of the Plaintiff's husband, giving the Zemindary to the Defendant's father in default of male issue. The reply and rejoinder it is unnecessary to refer to further than to remark that although, as pointed out by the Appellant's counsel, it was urged in one passage of the reply that the suit could be heard and decided upon the point of division only, yet, the Defendant in the rejoinder repeated and insisted upon the grounds of title set forth in the answer.

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In the second suit of 1856 against the guardian of the present Plaintiff, who had succeeded on the death of his father, the Plaintiff, claiming in succession to Unga Muttu, rested her title upon the same grounds. The answer of the guardian impeached the Plaintiff's right as heir, and, referring to many of the facts set forth in the suit of 1845, stated a number of circumstances as shewing that the infant Plaintiff was the rightful heir. It does not appear to contain express mention of the alleged Will, but in the rejoinder the Urzi to the Collector is referred to, and it is stated that under the Urzi and the Will the Zemindary had been held by those through whom the infant claimed.

Upon these pleadings it sufficiently appears, I think, that the claim of title under the gift by 'Will' to Muttu Vadaga Tevar was raised and made in defence as much a distinct question for decision, as it is conceded it had been in the earlier suits. It is true that the parties were restricted in the first suit to evidence upon the point of division, and that in the second suit no points or issues were settled. But the course of proceeding in both cases appears to have resulted from the Civil Judge's opinion, that division or non-division was the only ground upon which the widow's right could be questioned. The parties were not thereby precluded from afterwards relying upon the other questions raised by the pleadings. It was quite open to the present Plaintiff, as Respondent in the Appeals in both

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suits, to put forward the right claimed under the Will and to have his case upon that point fully heard and determined; just in the same way as it was open to the Appellant to rely (as she did successfully) upon her right to the Zemindary, as her husband's self-acquired property though there had been no division. Further, as the case for the Appellant was presented before the Privy Council, it became obviously most material for the Respondent alleging the genuineness of the Will to rely, if he could, upon its validity to pass the Zemindary, being the Testator's separately acquired property, from the female heirs, and, if this had been done, their Lordships who heard the Appeal would necessarily have given judgment expressly upon the question, before deciding in favor of the Appellant's right as heir. Looking then to the proceedings in the two former suits, it appears to me that the claim which is now made a cause of action was a question fully open to the Plaintiff upon the Appeal in those suits, and that it rested upon precisely the same circumstances as those upon which the Plaintiff seeks to support the present suit and that his case as regards the Will is in truth one and the same in this and the former suits.

But it was urged that, as there was no direct decision expressed by the Privy Council upon the Will, the Plaintiff was not concluded. What we find is that, on the part of the Plaintiff, the alleged Will was not relied upon, not, however, it appears, because the question of right under it was not open, but because, as a Will, it was considered and admitted to be quite untenable. Their Lordships observe in their Judgment that the Respondent denying the forgery does not now treat the document as a testamentary disposition or as material to his title, and it may therefore be dismissed from consideration and, so disposing of all questions of disposition by Will, their Lordships decide against the Plaintiff's right to the property then in litigation, and which is now sought to be made the subject of another suit. Under these circumstances, I think, the Judgment and final Order in the Appeal involved the decision of all claim of title under the Will, and must now be considered as between the parties tantamount to an express adjudication upon such claim.

As a rule, a party, I think, is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He is not at liberty to abstain from relying upon, still less to abandon (as in this case), a ground of claim, which is in question and proper for consideration and decision in the suit, and afterwards to make it a cause of fresh suit in respect of the same subject-matter of litigation. This rule was acted upon in the case of *Henderson v. Henderson*, 3 Hare 115, referred to in argument.

Several other cases were cited from the English Reports, as to which I need only observe that some of the cases turn upon questions of English pleadings, and none of them, I think, can be usefully applied as authorities to the circumstances here, except so far as they point out the principle and grounds upon which the defence of *res judicata* rests. The grounds are very clearly stated in the recent case of *Hunter v. Stewart*, 31, *Law Journal*, 349, and, applying the conditions which the Lord Chancellor there refers to from the commentary of Vinnius as necessary to the validity of such a defence, I think there is in this case *idem corpus eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum*.

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For these reasons, I am of opinion that the final decision upon Appeal in the two former suits must be considered as an adjudication in respect of the claim under the alleged Will, as well as the other questions raised, and that the Plaintiff is concluded from bringing the present suit, and consequently that the Plaint was properly rejected under Section 2 of the Civil Procedure Code. The Appeal therefore must be dismissed and with costs.

In the course of the argument, I alluded to another objection as arising upon the face of the Plaint, namely, that its subject-matter did not constitute a cause of action, this Court having in two or three recent cases (see Vol. I M. H. C. Reports, pp. 141, 349, and *supra* p. 128) decided that a Zemindar, holding under a permanent settlement, could not make any alienation of his Zemindary binding upon his legal successors, otherwise than as provided by the Regulation XV of 1802. It has become unnecessary to consider this objection, but I ought to observe that it is one which, under Section 32 of the Civil Procedure Code, the Court, I think, would have been bound to decide, before the case could properly have been remanded for trial in the Civil Court, and, if the decisions just referred to be correct, it seems difficult to see how the statements in the Plaint could be held to constitute a cause of action.

HOLLOWAY, J.—It is unnecessary to repeat the nature of the pleadings, but I will first consider the Decree, and then the record upon which it was made.

The Decree of the Lords of the Privy Council is, that the Plaintiff is entitled, as against the present Appellant, then the Defendant in possession, to recover the Sivangangah Zemindary. There is no question here as to the technicalities flowing from the nature of the English action of ejectment. The Decree could be arrived at only by affirming all matters necessary to the proof of the Plaintiff's title and by negating all matters, perhaps whether pleaded or not, which would enable the Defendant to resist such a Decree. It is unnecessary,

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however, in justification of my Judgment, to push the proposition so far, for it is quite clear that the Will was pleaded by the Defendant at every stage in the Court below. Then it is sought to avoid the effect of the Decree by shewing that the Court, following the former Judgment of the Privy Council, wholly excluded the question of this Will. This is so, and, if the Defendant's case was substantially prejudiced by this proceeding, it would have been a good ground for an application to the Superior Court for further enquiry. That counsel in not pressing the point were mistaken is answered by the passage of Neratius quoted by me during the Advocate-General's argument, "*Cum de hoc an eadem res est quaeritur, hæc spectanda sunt, personæ, id ipsum de quo agitur causa proxima actionis nec jam interest qua ratione quis eam causam actionis competere sibi existimasset perinde ac si quis postea quam contra eum judicatum esset, nova instrumenta causæ suæ reperisset.*" That the Law as to a cause of action applies with at least equal force to a possible exception, whether taken or not, there exists no doubt. As to the Law of the subject, and the rule derivable from the numerous cases cited, there is, I believe, no difference of opinion between the Bar and the Court. *Hunter v. Stewart* followed naturally from the nature of equitable pleadings. A Plaintiff cannot say generally, I am entitled to such relief, but he must allege the particular grounds upon which he seeks it, and he must further state everything which he intends to prove. The matter in that case was not *res judicata*, because "the allegations and equity of the one bill are different from the allegations and equity of the other." This decision is however supposed to have over-ruled that of Wigram, V. C., in *Henderson v. Henderson*, but, if the actual decision in that case had been in conflict with that of the Lord Chancellor in *Hunter v. Stewart*, His Lordship would scarcely have said, "but I find no authority for the position in civil suits, and no case was cited at the Bar, nor have I been able to find any, in which a Decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief but stating a different case, giving rise to a different equity." Undoubtedly there are in *Henderson v. Henderson* at p. 15 some general dicta, which, unless read, as we are bound to read them, with reference to the facts of that case, would conflict with the decision in *Hunter v. Stewart*. The decision itself, however, discloses no conflict whatever. The Plaintiff in equity sought relief on account of various irregularities, alleged by him to have been committed by the Court in Newfoundland, from which an Appeal, lay to the Privy Council which had power to stay execution pending the Appeal, and to remedy in Appeal the irregularities, if any such had been committed. It was quite clear, therefore, that the Plaintiff had made no case for an injunction against an action upon the Colonial Judgment.

Seddon v. Tutop (6 T. R. 697) is a case upon which we did not remark in our oral Judgments. It was an action for goods sold, and the plea was a recovery of £71-10 for the damages sustained as well by means of not performing the same identical promises, &c. The facts were that the Plaintiff had given no evidence on the writ of enquiry as to the goods sold. The replication denied that the promises declared upon were the identical promises, for the non-performance of which the said sum was recovered. Lord Kenyon says, "The issue was whether the damages demanded in this action have been already satisfied by the recovery in the former action, and most clearly they have not. On this narrow question, the only one raised by the pleadings both formally and substantially, justice was with the Plaintiff, and the case is no authority whatever for the position, that a new suit can be brought for a portion of the same demand because that portion has not for some reason been the subject of enquiry." A comparison of the plea in this case with that in *Bagot v. Williams* (2 B. and C. 235) will shew that this is so.

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It is not for us, sitting in this Court, to comment upon the question, whether the course taken by the Lords of the Privy Council was justifiable or not. It is sufficient to say that there is a Decree of a superior Court distinctly declaring that the Plaintiff is against the present Appellant entitled. I entertain no doubt whatever that the effect of this Decree is to bar the cause of action at present set up, because, it is *res judicata*, the matter of it being an exception to the Plaintiff's cause of action which that Decree must have over-ruled.

There is no question here of bills of review, if our procedure admitted of them, or if an inferior Court could entertain such a bill, if it were admissible. The case is simply one of a new suit brought by a defeated Defendant upon a plea which he had already pleaded in the suit in which Judgment was given against him.

It is unnecessary to consider now the different position of a Plaintiff whose bill has been dismissed, and of a Defendant whose plea must have been over-ruled to justify the Decree passed. The case seems to me a very plain one and this Appeal must be dismissed with costs.

Judgment of the Privy Council, delivered, 7th November 1866.

BODHA GURUSAMI TEVAR.....Appellant.
RANEE KATTAMA NACHCHIAR.....Respondent.

LORD WESTBURY.

The facts of this case have been lucidly presented to us, and the case

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has been argued very ably by the learned Counsel for the Appellant; but their Lordships feel no difficulty upon the point. All that has been urged is involved in and decided by the Judgment of the Privy Council in the year 1863, and what passed before this tribunal on that occasion.

To render our decision intelligible, it is necessary to make a short recapitulation of the leading facts of the case.

On the death of the Zemindar, the original proprietor, questions arose whether he was undivided in Estate with his brother, and whether this property was to pass as undivided or divided Estate. A document was produced in which the Zemindar made a testamentary gift of the Estate to the Appellant's father, in the event of the child of one of his widows, who was enciente, not proving to be a son. A great deal of litigation ensued; but in the suits that were brought before the Privy Council in 1844, the exact issue, whether the family was undivided or divided, had not been so raised as to become necessarily the subject of judicial determination. The issue, however, of the validity of the alleged testamentary paper had been raised, and the decision of the Sudder Court was against it.

When the case came before the Privy Council in 1844, having regard to the law touching undivided property, their Lordships were of opinion that there must be judicial determination upon the point, whether the family was divided or undivided before the question of the validity of any devise could arise. No opinion, therefore, was expressed upon the issue raised as to the validity of the testamentary paper, which remained until it had been ascertained that the property in question was capable of being devised. The Privy Council accordingly remitted the case, pointing the parties' attention to the necessity of having it determined whether there was division or no division. It is plain that, when the issue was raised, whether there was division or no division, the importance of determining whether the paper in question was a valid testamentary gift or not would immediately be felt; because, if it should turn out that it was a divided property, then the party in possession, claiming by virtue of his being a nephew of the deceased proprietor, would immediately have been enabled to set up the Will as constituting his title. But it has been contended before us to-day, that what was said by the Privy Council must be considered as amounting to a positive direction that there should not, in the subsequent litigation contemplated, be any question whatever raised except the question of division or no division. It is plain to us that the language used by the Privy Council on that occasion does not admit of any

such construction. The same point was raised and insisted upon before the Judicial Committee in 1863; for it was then contended, on behalf of the present Appellant, or those who preceded him in title, that the suits which had been instituted and were brought by way of Appeal were suits that transgressed the limits imposed by the Order in Council of 1844 (being, in effect, the same argument that we have heard to-day); but that contention was over-ruled, and it was held that the Order in Council of 1844 did not at all interfere with, or preclude the parties from, bringing forward the claim, and instituting the suits which they had instituted subsequently to 1844, the Decrees in which were the subject of the Appeal to the Queen in Council in 1863.

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We take as an example of these suits the form of the Suit No. 10 of 1856. One of the present Respondents filed her *Plaint* in this suit for the recovery of the Zamindary, and the question of the forgery or genuineness of this alleged testamentary paper was distinctly raised in the *Plaint*. By the answer to it, the present Appellant, answering by his guardian, did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property the brothers were undivided. Ultimately, all the suits came before the Judicial Committee of the Privy Council in 1863; and the Judicial Committee were of opinion that the question of division or no division was, after all, immaterial, because they found it clear that the Zamindary in question was self-acquired property: that is, that the deceased proprietor had been the first to acquire it: and they accordingly held, that, even if the brothers were undivided, yet that the Estate, being self-acquired, was not governed by the law applicable to undivided property, but descended to the heirs general, and was capable, therefore, of being devised. Immediately it became most material, in the mind of the Judicial Committee of 1863, to determine the question with regard to the testamentary paper: but they were wholly relieved from the necessity of doing so, because, the present Appellant, then appearing by most able Counsel, as the Respondent at the Bar, deliberately told their Lordships, that, although the paper in question had been familiarly called a Will, the name had been introduced only as a short denomination of the instrument, which in reality was not testamentary, and neither had, nor was ever intended to have, the effect of devising the property; and that the Respondent did not claim any title under it as a testamentary devise, but used it only as conclusive evidence of what the opinion of the last proprietor was, viz., that the Zemindari was in reality undivided property. It is quite plain why the learned Counsel for the then Respondent adopted that course. In their minds, it was thought safest to rest their case upon the question of divi-

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sion or non-division. They appear to have reasoned thus:—"If we set up this as a Will, then it is a conclusive declaration by the alleged Testator that the property was devisable; and, if devisable, that it was not undivided. We will, therefore, abstain from treating that instrument as an instrument of title, we will abstain from insisting upon it as a devise, and we will deliberately tell the Judicial Committee, that it is not to be regarded as being in any sense testamentary." The result, therefore, was, that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its Judgment the fact that the Respondent's Counsel had deliberately elected to disclaim any title under that instrument as a Will, and that, therefore, its validity or invalidity became no longer material for decision.

That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid Will and Testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the Appellant had then the power of relying upon that document as being a valid Will. He in effect stated, or might have stated, his defence in the Suit of 1856 in the alternative. He might, first, have insisted that it was an undivided property, and that, therefore, the Plaintiff in those suits had no interest therein: and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favor. When a Plaintiff claims an estate, and the Defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present Appellant might have insisted on the validity of the alleged Will; but instead of doing so when his suit came on to be heard and decided in the Court of Final Appeal, he in effect disclaimed all title under the instrument as a Will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the Appellant of setting up the Will were allowed.

On every ground, therefore, first, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the Judgment; secondly, upon the personal ground that the Appellant, having used this document and abandoned all right to it as a Will, cannot now use it for

a different purpose; we are of opinion that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present Appeal is brought, as a suit instituted without *bona fides* and directly contrary to what the Appellant must be considered to be bound by; and we have no hesitation, therefore, in advising Her Majesty to affirm the Decree, and to direct that this Appeal be dismissed with costs.

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Judgment of the Civil Court, 23rd February 1870.

Dorasinga Tevar	...	...	...	...	...	Plaintiff.
Ranee Kattama Nachchiar	...	...	...	...	...	} Defendants.
Muttu Vaduga Tevar	...	...	...	...	...	
Saithukarasu Nachchiar	...	...	...	...	...	
Gouri Nachchiar	...	...	...	...	...	
Kota Nachchiar.	...	...	...	...	...	

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1. The principal object of this suit is the ultimate succession to the Zemindary of Sivagangah, the Plaintiff claiming the reversionary right for himself as senior grandson of the Istimirar Zemindar, being the son of a daughter by his first wife; and the 2nd Defendant as the son of his only surviving daughter Kattama Nachchiar, to whom the Zemindary was adjudged by Decree of the Privy Council on the 30th November 1863.

2. For the Defendants, it is contended that this is not a suit in which a declaratory Decree can be given at all; I shall therefore proceed to consider the last issue first, for, if this is a matter in which a Decree declaratory of title cannot be pronounced, the contention between the parties, except in regard to Dorasinga Tevar's claim for maintenance, is at an end.

3. The words of the 15th Section of the Procedure Code under which the suit is brought are as follows:—"No suit shall be open to objection on the ground that a merely declaratory Decree or Order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Now the words of this Section are almost precisely those of Section 50 in the Chancery Amendment Act (15 & 16 Vic., Cap. 86), and, were it not that this kind of relief is frequently refused at home, I should have thought that little doubt could have existed as to their plain meaning.

4. With regard to their application some Judges in the High Court in Bengal appear to have considered that it was entirely in the discretion of the

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Court to grant relief under this Section, or to withhold it; and that each case must be judged by its own particular circumstances; others that some injury must appear so probable as to lead to the conclusion that, unless stayed by the declaratory Decree, the inchoate or threatened injury may be completely perpetrated (Wyman Civil & Crim: Reporter Vol. V., p. 242). In Madras in S. A. No. 62 of 1862 (Vol., M. H. C. R., p. 206), in a suit brought by A. and B against D and E regarding the Estate of their relative C, a Decree declaratory of A and B's reversionary right after D's death was upheld; but in this case an act had been committed hostile to the Plaintiffs; that is, the property in dispute had been transferred by the 1st to the 2nd Defendant. In S. A. No. 283 of 1863 (Vol. II., p. 171), where a Plaintiff had failed to establish his title affirmatively, it was held that he was not entitled to a Decree declaratory of his title as owner, and so also in S. A. No. 1 of 1865 (page 393 ib.) it was ruled that when a party is in possession of all his alleged rights he is not in a position to bring an action.

5. I think, however, the leading case is S. A. No. 22 of 1865 (p. 378 ib.) in which the Court, advertent to the difference in procedure which obtains at home and which admits of bills for the perpetuation of testimony, were of opinion, that it did not follow that in every case, in which the Section was held to be inapplicable by the Courts of Chancery, it was necessarily inapplicable here; and accordingly the Court confirmed the Decree declaratory to Plaintiff's reversionary right, in order to save him from the risk he might be exposed to of losing evidence of his title altogether; still the Decree carried with it a partial remedy, for the Defendant had alienated the property in which Plaintiff had the right in reversion. A more recent case and the nearest to the present one is S. A. No. 83 of 1869 from Tanjore (unreported) which was decided subsequent to the hearing in this suit. Here all that was sought for and obtained was a Decree declaratory of Plaintiff's reversionary title as a daughter's son, in preference to that of a daughter's daughter. No positive act of hostility seems to have been committed by the Defendant further than that she was anxious to acknowledge her daughter as the rightful reversioner.

For the Defendants, it is contended by the Advocate-General that there is no danger of Dorasinga Tevar being unable at any time to prove himself the eldest surviving grandson of the Istimirar Zemindar, as this is apparent from the blue book in the great Sivaganga case; and by Mr. Mayne, that, when the object is to establish a speculative interest in property, or to have a point of law cleared up, no action is maintainable. On the other hand, the counsel for Plaintiff maintain the contrary; alleging that Dorasinga Tevar's right to succeed is, as in

point of fact it is, resisted by the mother of the 2nd Defendant; and that even now she has appointed an agent, under a deed admitted and filed in the suit, to uphold her son's subsequent right to the inheritance. Certain alienations were also assigned in the original plaint as constituting a ground of action; but the Court by its Proceedings of the 22nd April ordered them to be struck out of the record.

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7. Giving due weight to the arguments advanced on both sides, I think there is sufficient authority for proceeding with the suit, for, if the point of law raised as to the right to succeed to the Zemindary be not cleared up during the life-time of the present incumbent, Plaintiff will be subjected if alive to the inconvenience of having to come to Court again at her decease; and, if he has the right, which he asserts he has, of having of necessity to wait out of possession till the question is finally determined. I am therefore of opinion that this is a case in which the Court is empowered to grant a declaratory Decree and accordingly I decide the 7th issue against the Defendants.

8. Upon the merits the argument on behalf of Plaintiff is briefly this:—that women, whether widows or daughters, when they inherit, take but a life Estate; and that, when therefore the line of daughters is exhausted, the property goes to him who is in the position of next heir to the Propositus; and Plaintiff in this suit is set up as that heir.

9. On the other hand, the counsel for the Defendants contend that, the Zemindary having devolved upon Kattama Nachchiar as sole surviving daughter of the Istimirar Zemindar in succession to Unga Muttu Nachchiar, the last surviving widow, and Plaintiff's mother Vella Nachchiar having predeceased Unga Muttu, the inheritance never vested in Vella Nachchiar, and that consequently she can transmit no right in it to her descendants. They further advance another and most ingenious theory; namely, that when property has devolved upon a daughter having male issue such male issue have from the time of their birth an inchoate right to the same; and that in virtue of this proposition the succession devolves on 2nd Defendant to the exclusion of the Plaintiff as co-heir of his mother, the 1st Defendant.

10. They thus contend, in opposition to the generally received opinion, that daughters take as a class in common, that the doctrine of survivorship is applicable only when the female, to whom the property has descended, is destitute of male issue; that, having once vested in a daughter who has male issue,

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it becomes vested in that issue also; and that thus by the operation of the law even other daughters are cut out of the inheritance. Whether or not there is any foundation for this proposition in Hindu law will be seen when the authorities are reviewed and commented upon; but it is clear that, if the line of descent is as contended for by the learned counsel who appeared for the Defendants, a fatal blow has been struck to the claim advanced by the Plaintiff.

11. The chief question therefore that has now to be decided is the nature of the Estate which a daughter takes in immoveable property, which has devolved upon her by inheritance from her father.

12. I will pass over that portion of Mr. Gould's argument which refers to the intimate relation which exists between the Law and the Religion of Hindus, and the efficacy which attaches to the offering of funeral oblations to the manes of deceased ancestors; for, though no doubt they are blended together to a considerable degree, it is incontestable that the maxim of law is, that the person who is entitled to succeed to the property of the deceased is also bound by religious duty to perform his funeral obsequies; and consequently any pretensions, founded upon the mere fact of having celebrated them, can only be construed as giving a claim to the succession, when put forward by the person who is legally the most competent to offer them. Hence it becomes unnecessary to consider further either the Plaintiff's allegation or the evidence adduced by the Defendants to disprove it, that he has been performing the usual ceremonies in honor of his deceased grandfather.

13. Illustrations have further been given to shew that the natural state of a woman under the Hindu system is one of dependence; that, being incompetent to offer the funeral oblation, they are by virtue of their sex incompetent to inherit, except in those instances expressly provided for, and from this it is inferred that, when females do succeed to property, the law confers upon them nothing but a life-interest in it; or in other words, that they hold as trustees for the ulterior heirs. That this is clear law in respect of the widow, mother and grandmother, is conceded by the counsel on the opposite side, but they deny that the same reasoning is applicable in the case of a daughter, whom they contend the law has placed upon a different footing.

14. I will therefore now turn to the authorities which govern this question, and in doing so I shall have to quote from the Mitacshara, the Smṛiti Chandrica and the Madhavya, works of acknowledged authority in Southern India; the Daya-Krama-Sangraha and its kindred treatise, the Dayabhagah of Jimuta Vahana,

which carry most weight in Bengal; and lastly from the *Saraswati Vilasa*, a work said to be an authority in Southern India, though supplanted in some measure by the *Mitacshara*.

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15. The passage in the *Mitacshara* is to be found in Chap. II, Sec. II (p. 440, Stokes' Ed.) on the right of the daughters and daughter's son. In para 1 it is declared that on failure of her (*i. e.*, the widow) the daughters inherit, and in para 2 the author supports his dictum by quoting the text of *Katyayana*, "Let the widow succeed to her husband's wealth provided she be chaste, and in default of her let the daughters inherit if unmarried," and also that of *Brahaspati*, "The wife is pronounced successor to the wealth of her husband; and, in her default, the daughter. As a son so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?" Then in paras 3 and 4 the order of succession in the event of their being competition is explained; thus the unmarried, it is declared, take first; then the married, preference being given to the one unprovided for over the enriched daughter. In failure of daughters, the daughter's son is placed next in the order of succession, according to the texts of *Vishnu* and *Menu* given in the 6th para, "If a man leave neither son, nor son's son, nor issue, (*i. e.*, female issue and implying wife also), the daughter's son shall take his wealth. For, in regard to the obsequies of ancestors daughter's sons are considered as son's sons" and "by that male child whom a daughter, whether formally appointed or not, shall produce from a husband of equal class, the maternal grandfather becomes the grandsire of a son's son. Let that son give the funeral oblation and possess the inheritance." Those portions of the *Smriti Chandrika* and the *Madhavya* which bear on the subject are to be found in Chap. XI, Sec. II and in paras 36, 37 and 38, p. 26, respectively; and the authors, citing with approbation the texts of *Brahaspati*, *Vishnu*, *Menu*, *Katyayana*, *Narada* and *Gautama*, arrive at precisely the same conclusions; the author of the *Smriti Chandrika* adding, in accordance with the doctrine of *Dikshita* as explained by *Jimuta Vahana*, that barren daughters and the like are excluded from the inheritance, on the ground of their being incapable of conferring upon their deceased father spiritual benefits.

16. The author of the *Daya-Krama-Sangraha* is somewhat more explicit. In Sec. 3, Ch. I, p. 476, he declares that in default of the wife the daughter next succeeds, in conformity with the following text of *Devala*: "His own maiden daughter, born in holy wedlock, shall like a son take the inheritance of him who dies without male issue," and also with that of *Parasara*, "Let a maiden daughter take the heritage of one who dies leaving no male issue; or, if there be

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no such daughter, a married one shall inherit." In para 3 the author brings to notice a special rule which he says must be observed, namely, that, if a maiden daughter in whom the succession had once vested and who was subsequently married should die without having borne issue, the married sister who has, and the sister who is likely to have, male issue, inherit *together* the Estate which had so vested in her; and that it does not descend to her heirs like her Stridhana; and so also in the event of there being no maiden daughter, it is declared in the next para, that the inheritance vests in the married daughters *together* as aforesaid, with the proviso, that on failure of either of them the other takes the heritage, on the ground that daughters of each description (*i. e.* appointed or not appointed) confer benefits on the deceased owner by presenting to him through their sons funeral oblations at solemn obsequies. The 4th Section treats of the right of the daughter's son, which in unison with all the other authorities is declared to be next after all the daughters, implying all those that are entitled to the succession.

17. Jimuta Vahana goes further and supplies a reason why property should not vest in the first instance solely in a daughter who has male issue, to the exclusion of the maiden daughter. In Ch. XI, Sec. II, para 11, p. 325 of the Dayabhāga, after describing the torments which await parents who fail in giving their daughters in marriage while yet young, he says, "It must not be alleged that, admitting this doctrine (*i. e.* benefits conferred being the cause of a right of succession), the daughter who has male issue should alone inherit in the first instance, but on failure of such then a daughter who may have issue. For her son born subsequently might in this manner be excluded from the succession. Nor is this proper; for both equally confer benefits on their grandfather as daughter's sons." And no reason is given why this argument should not apply equally, where, in default of the maiden daughter, the married take the inheritance. Then with regard to the ultimate succession, the same author, in that portion of the work which treats of the widow and the limited power which she has over her husband's Estate, declares (para 65, p. 322):—"In like manner if the succession have devolved upon a daughter those persons, who would have been heirs of her father's property in her default, take the succession on her death; not the heirs of the daughter's property;" thus making a clear distinction between the devolution of what might constitute her Stridhana and that which descended to her in the course of inheritance. The same rule, which he maintains is general in the case of a woman's succession, appears further on in para 30, p. 330: "Since it has been shown by a text before cited (Sec. 1, para 56), that, on the decease of the widow in whom

the succession had vested, the legal heirs of the former owner, who would regularly inherit his property if there were no widow in whom the succession vested, namely, the daughters and the rest, succeed to the wealth; therefore the same rule is inferred *a fortiori* in the case of the daughter and grandson whose pretensions are inferior to the wife's." This text, which has the strongest bearing on the question at issue before the Court, is spoken of by Jagannatha (p. 547, Vol. II Digest) as an opinion of Jimuta Vahana's respected by many lawyers, though not directly supported by the text of any legislator or concurrence of any commentator, and in allusion to the widow he throws out a hint that, nevertheless, it is not equally certain that a daughter's right of enjoyment is of the same restricted nature. Strange also, Elberling and the elder Macnaughten have delivered their opinions on the strength of this authority and, as far as my researches go, I have not seen anything directly contraverting it.

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18. So far therefore it seems to me the authorities do not countenance the proposition set up on behalf of the 2nd Defendant; but the Advocate-General has drawn my attention to, and laid great stress upon, the following passage from the Saraswati Vilasa; (a translation of which was laid before the Court by Mr. Sreenivasachariar and which I leave with the record in case of an Appeal to the High Court):—"Property inherited by a daughter, though in itself of the nature of obstructed heritage, shall become an unobstructed one, if there are daughter's sons at the very moment it has passed to daughters, because the conjunction "*cha*" which is used to signify things not specifically mentioned, and the particle "*eva*" remind us of the right of the daughter's son to the property at the very moment it is vested in the daughter." Being ignorant of Sanscrit I am unable to follow up the author's argument further than the passages of which I have the translation, but the text taken by itself is certainly one of equivocal import. It may or it may not apply to the Advocate-General's theory, but to my understanding it is no more than a general mention of the fact itself; for the heritage would be designated as an obstructed one were there no daughter's son then in existence. Strange in page 131 of the last edition thus distinguishes between obstructed and unobstructed heritage:—"The heritable pretension of the son of a Hindu being immediate is a heritage not liable to obstruction; answering with us to the heir-apparent whose right if he outlive his ancestor is indefeasible; while that of the remoter heirs, as of brothers, uncles and others, is distinguished as being liable to obstruction by the intervening birth of nearer ones, so that their title is not apparent but presumptive only." It follows therefore that the text quoted is not an authority for the proposition, that a son has necessarily an

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inchoate right to the property devolving on his mother; but rather that the other heirs expectant, whoever they may be, are cut out of the inheritance by reason of that son having sprung into being; and the effect upon them in this particular instance is the same, whether caused by the existence of Dorasinga Tevar or the 2nd Defendant. Indeed the author's summing up points to no more than this, for he says:—"Hence the inheritance by a daughter's son is unobstructed, but not by a daughter." He then forms the following conclusions:—"as the property vested in a daughter does simultaneously pass to the daughter's son, if she has a son, the inheritance inclines to him; and it is only when the daughter's son does not exist, it will not pass to his son, but reverts to parents." The whole force of this passage, which is really no more than declaratory of the daughter's son's ultimate right to the succession, as supporting the case for 2nd Defendant, rests on the word *simultaneously*; whether or not it is a right translation I do not know, I hardly think it can be, for, it is not required to establish the connection between the two passages; indeed it is rather opposed to the author's concluding dictum, for, if the ownership does, as is pressed upon the Court, pass *simultaneously* to a daughter's son, it is not easy to see, why, on the principle of representation which obtains among sons and son's sons, in her default his (that is, the daughter's son's) son should be excluded from the succession, on the ground, as other text-writers put it, of his being too remotely connected with the original owner to offer up the funeral oblation. It must therefore be admitted that the novel and ingenious theory which has been propounded by the Advocate-General rests upon a very narrow basis of authority, if indeed it has any foundation at all in Hindu Law.

19. It would prolong this Judgment to a degree that would be tedious if I were to refer to all the modern authorities cited on both sides, and therefore I will confine myself to a few and the most important. Some were alluded to by Mr. Gould for the purpose of analogy; of this class is the recent case of *Blugwan Deen Doobey v. Myna Babee* (Moo. 1. A. Vol. XI, p. 487), and the point of law that was determined is this:—that, when more widows than one succeed by inheritance to the property of their husband, they take a joint Estate as co-purceners with a right of survivorship; their Lordships in the Judgment expressing an opinion strongly in condemnation of that passage in the Mitacshara alluded to by Strange, which classes as Stridhana even the property acquired by a woman by inheritance. The case also of *Bachiraja v. Venkatappadu* (2 M. H. C. R., p. 402) supports this view, and it decides that a mother, inheriting from her son, does not take an absolute Estate, but has only a life-interest in the property; and that it goes at her death to the next heir of the Propositus. In Bengal also the law in this respect

is identical with that current here, for the same point was determined in a similar manner in the case of Nufur Mitur and others (Bengal S. D. R., Vol. IV, p. 310).

20. Other cases were considered more pertinent, for instance, that of *Hurrydoss Dutt v. Strenally Appoornah Dossee* (Moo. I. A. Vol. VI, p. 433); but here, though the arguments at the Bar extended to the very question which is now before the Court, no decision was pronounced upon it. In the Judgment however there is much to lead me to suppose that their Lordships' views would not have run contrary to what is now contended for by the counsel for the Plaintiff, for, at page 445 the following passage occurs:—"Now, the Bill alleges that, in this respect, (that is, in respect of their right over the subject-matter of the property in dispute), the widow and the daughter stand in the same situation. Whether they stand in the same situation or not, with respect to the right of disposition of the property, they at all events stand in the same situation as to the right of administration and right of enjoyment for their lives;" but then, no case of devastavit having been made out by the party who claimed to be the reversioner, the Appeal was dismissed and the Judgment of the Court below affirmed. Another case, the decision of which is coincident with Mr. Gould's and Mr. O'Sullivan's proposition, is that of *Mussummat Gyan Koowur and others* (Bengal S. D., Vol. IV., p. 330) where it was held that, according to the law as current in Mithila and the West, a daughter has no power to alienate her ancestral property to the detriment of other heirs; and the next in succession were declared to be the nearest heirs of her father then living. It is true that this is not an authority in the Madras Presidency, but the case may be usefully referred to by way of illustration.

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21. The counsel for the Defendants rely principally on the following:—*Venayak Anundrow v. Lucmeebae* (1 Bombay H. C. R., p. 117) and what is known there as Dewcooverbae's case reported at page 130 of the same volume. I have considered both the Judgments in these cases, and, though I observe that on that side it is held that daughters taking by inheritance take the estate absolutely, yet I do not find anything else in favor of the theory set up by the Advocate-General, nor on the other hand anything hostile to that relied upon for the Plaintiff. In the former case which was confirmed by the Privy Council (Vol. IX, p. 516) the effect of the decision is, that in Bombay, sisters, on the authority of the Mayukha, are treated as heirs of their brother, rather than his paternal relatives, such as the sons of his father's separated brother, and, in the latter, that, when a separated Hindu died without male issue, his widow took his moveable property absolutely and the immoveable for life; and at her death the daughter took absolutely in pre-

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ference to the brother and the issue of a deceased brother. *Navabram Atmaram v. Narotum* (1 Bombay H. C. R., p. 209) was also cited, but the decision is in direct conflict with what was found to be law on this side in S. A. No. 505 of 1866 (M. H. C. R., p. 312) and it cannot therefore be held up as an authority. It classes, on the authority of the Mitacsahara, all property inherited by a married woman from her father as Stridhana; and of course, if this was the law which obtained in the Madras Presidency, the Sivaganga Zemindary would descend to the 2nd Defendant. In the face, however, of the observations which fell from their Lordships in Myna Bacc's case (p. 512, Vol. XI) there are grave reasons for doubting if this decision would have held good, had the case been carried on Appeal before the Privy Council.

22. With regard then to the nature of the Estate which a daughter takes, there is, I admit, a conflict of opinion, springing perhaps in some measure from the confusion which arises in trying to fix upon Hindu tenures corresponding English technical terms, and this has no doubt led to what was felt at the Bar to be an erroneous decision in the case of *Jamiyatrum v. Bai Jumna* (2 Bomb. H. C. R., p. 10); it also by no means follows that, basing the assumption on the text of Menu, "the son of a man is even as himself, and the daughter is equal to the son," and, admitting the doctrine of representation in the case of the latter, that sons and daughters are in respect of the transmission of inheritance on terms of perfect equality; although, it may be, from the influence which the spiritual doctrine of benefits rendered has over the temporal affairs of the Hindus, the whole Hindu law being based on such, that their sons (i. e., son's son and daughter's sons) stand in the same analogous situation. On the contrary, the fact that they take in the first instance on different principles; that daughter's grandsons and daughter's daughters are excluded from the succession; and that daughter's sons when they do succeed take *per capita* has been affirmed by Jagannatha and decided in *Ramdhaun Sein and others v. Kishenkanth Sein and others* (3 B. S. D., p. 100) constitute a very essential difference.

23. It is quite intelligible, therefore, that, while the spirit of the Hindu law may not wish to place the same restrictions over the married daughter's power of dealing with the corpus of her father's property as it has placed upon the widows, though I do not express an opinion that it is not so, yet it may wish to provide that the succession at her death should not devolve upon her heirs, as is the case in regard to her Stridhana, but upon the person who may be the next according to the order of decree in relationship to her father. That this is the law which regulates the course of inheritance may be legitimately inferred from

the authorities current in the Madras Presidency, while, with the exception perhaps of the maiden daughter who subsequently marries and has male issue, it is expressly declared to be so in the Bengal; and surely it rests on those who assert a different principle, when the succession has vested in a married daughter having male issue, to establish that exception to the generality of the rule.

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24. Whether or not the inheritance ever vested in Vella Nachchiar does not appear to me to be of any material consequence, for, Plaintiff's rights, if he has any, though traceable through her, are derivable from his grandfather; and if, as declared by Brahaspati, a daughter is heir of her father's wealth in right of the funeral oblation which is to be presented by the daughter's son, and if the devolution of property upon persons who are said to be heirs rests upon the spiritual benefits to be performed by those heirs, it is difficult to see why 2nd Defendant should be preferred to the Plaintiff. Both minister in an equal degree to the peace of their departed ancestor, and if the property could be divided they would share it equally. It is not contended that the rule of succession is other than that of the general Hindu Law which obtains in Southern India, and, as therefore the property is capable of enjoyment by only one member of the family at a time, it follows that the succession to it must be regulated according to the law of primogeniture, which is also in this case in accordance with natural justice. In this view of the law therefore and following the Oorkad case (M. H. C. R., Vol. III, p. 75), I decide upon the first issue that, at the death of the present Ranee, as between the Plaintiff and 2nd Defendant, the Plaintiff as the eldest of the grandsons has the preferable right to succeed to this Zemindary.

25. The 2nd, 3rd and 6th issues have been abandoned, and it only remains now to be considered whether Dorasinga Tevar is entitled to any maintenance. The Defendants contend that his claim is barred by the Statute of Limitation; but I think not, as Kattama Nachchiar did not enter into possession till 1864 and the evidence shows that while the Zemindary was in the hands of the usurpers a small monthly allowance was being paid over to him. It is true this act of theirs is not binding on the Ranee, but it is manifestly unjust, if the time commenced to run against him according to the words of the 13th Clause, Section I of the Limitation Act, from 1850, the date of the death of Unga Muttu, not to admit this in the computation. I think, therefore, the time must be held to have commenced, either from the date of Kattama's accession or from the date of the last payment, which in neither case has exceeded 12 years. Nevertheless it does not appear to me that he is entitled to anything under Hindu Law. Strange lays down that the principle is, that whoever takes the estate of the deceased must main-

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tain those whom he was bound to support, and the question arises, would the Istimimar Zemindar if he were living, or his son if he had had one, be bound to maintain Dorasinga Tevar? Morally perhaps if he were starving, but I think not legally, for, his mother as a married daughter must be considered as provided for, and there is some little evidence to show that a provision was made for her during her lifetime and that Plaintiff has his father's Estate to live upon. The cases referred to are not in point, and Mr. O'Sullivan admits that there is no authority which expressly provides for a case similar to this one. I am however of opinion that, though Plaintiff is declared to be the next in succession, he has no legal claim to be maintained now out of this inheritance.

26. My Decree, therefore, is that, as between Plaintiff and 2nd Defendant, Plaintiff be declared to be the next in succession to the Sivaganga Zemindary; that Plaintiff's claim to maintenance and apartments be dismissed; and that he pay so much of his own costs as may be found due thereon, as well as those of the 6th and 7th Defendants. The 1st Defendant will bear the remainder.

*(Signed) J. D. GOLDINGHAM,

Civil Judge.

Judgment of the High Court, delivered 27th October 1871.

(C.)

Rancee Kattama Nachohiar and four others	...	...	Appellants.
Dorasinga Tevar	...	...	Respondent.

Judgment.

The Chief Justice.—This is an Appeal by the 1st, 2nd, 3rd, 4th and 5th Defendants from the Decree of the Civil Court of Madura, declaring the Plaintiff Dorasinga Tevar to be preferably to the 2nd Defendant the reversionary heir to the Zemindari of Sivaganga with its appurtenances on the death of the 1st Defendant, the present Zemindarni, but dismissing his claim to an annual allowance for maintenance and to the use of apartments in the Zemindari Palace, and adjudging the 1st Defendant to pay the Plaintiff's costs, except so much of the amount as was apportionable to his unsuccessful claim.

2. The grounds of Appeal relied upon are that the Plaintiff could not maintain the suit for a declaration of his right to be the next successor. But, if the suit was maintainable, the Decree ought to have declared either that the 1st Defendant's son (2nd Defendant) had the preferable right, or that the Zemindari

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was Stridhanam property of the 1st Defendant, and that her daughters (3rd, 4th and 5th Defendants) therefore were her rightful successors.

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3. There is happily no dispute as to the important facts of the case; Dorasinga Tevar, the Plaintiff, is the eldest surviving son of Vella Nachchiar, the only daughter of the Istimirar Zemindar, by his senior wife. The 1st Defendant, the Zemindar, is the younger of his two daughters by his third wife. He had also a daughter by his second wife and another by his sixth wife. When the 1st Defendant obtained possession of the Zemindary under the order of Her Majesty in Council establishing the right of the daughters of the Istimirar Zemindar to succeed to the Zemindary on the death of his surviving widow Unga Muttu Nachchiar but without prejudice to the rights of the 1st Defendant and her sisters *inter se*, she was the only survivor of the Istimirar Zemindar's five daughters. The Plaintiff's mother predeceased Unga Muttu, and the daughter by the second wife, the 1st Defendant's uterine sister and the daughter by the sixth wife, survived Unga Muttu, the first and third, twelve years and the second, two years. Beside the Plaintiff's mother, the 1st Defendant's uterine sister was the only one of the deceased daughters who had issue, and her only child (a son) died issueless, some years before the 1st Defendant had established her right to the Zemindary. Before Unga Muttu's death the 1st Defendant was twice married, and it is admitted on both sides that the marriages were proper by the custom of the Maravar caste to which the family belong and were both valid. The 3rd Defendant is the only child by her first husband and the 2nd, 4th and 5th Defendants are her son and daughters by her second husband. Both her husbands are dead.

4. I am of opinion that the first ground of objection cannot be supported. It has been decided by this Court that the rule of the Equity Courts in England is not applicable to declaratory suits here, and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th Section of the Code of Civil Procedure, although no consequential relief be grantable upon the declaration if a good ground for seeking the protection of such a suit is shown to exist. There have been several decisions on the point, that in the case of *Karyan v. Peria Sidden and others* decided on the 4th of August last being the most recent; and their combined effect, I think, is to establish that a suit for a declaration of title without any consequential relief will not lie upon the mere ground of denial or slander of a person's title, or the apprehension of a hostile claim at some future time. To support such a suit there must appear to have been



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some act done which had worked or was likely to cause injury or serious prejudice to the Plaintiff's alleged title, and in the present case I think that ground does appear. It appears that the 1st Defendant favoring the 2nd Defendant's title and concerting with him opposition to the Plaintiff had employed an Agent and executed a Power of Attorney to him for the purpose of assisting the 2nd Defendant to possess himself of the Zemindari and withhold possession after her death. This without reference to the other acts alleged is sufficient to show an extreme determination of hostility towards the Plaintiff; and there can be no doubt I think that serious injury to the Plaintiff's right is the probable, if not certain, result of the opposition thus begun. The Plaintiff therefore had, in my opinion, a right to institute the suit.

5. Then as to the substantial objection to the declaration made by the Decree: the first question to be considered is whether when paternal property descends to the survivors or survivor of several daughters the sons of all the daughters or only the son or sons of the daughter or daughters in whom the property vested are or is entitled to succeed as the heir or heirs of their grandfather. If all the sons are entitled it is not a defect in the Plaintiff's claim that his mother predeceased Ungu Mutru, and the Plaintiff has been rightly declared to be the next heir to the Zemindari in preference to the 2nd Defendant, the succession being governed by the law of primogeniture. On this question the learned counsel for the Appellants, taking the rule of law to be that daughters who succeed as a class to paternal property take a joint estate with benefit of survivorship, and that on the death of the last survivor their sons take *per capita* as next heirs of their grandfather, have argued that the reason of the rule is the capability of daughters to procreate sons who being equal to son's sons as offerers of the most effectual funeral oblations to the spirit of their deceased grandfather, are through their mothers his immediate male heirs; that the succession under the rule must be understood to pass from and through the daughters or survivor of the daughters in whom the property actually vested to their or her son or sons to the exclusion of the sons of other daughters, and that the 2nd Defendant therefore was the next successor. The learned counsel on the other side, affirming that daughters like widows and a mother succeed by positive law to only a life-interest in paternal property, contended that the hereditary right to it passes not through the daughters but directly from their father to his grandson or grandsons, or in default of a grandson to his next aspinda, subject to the daughter's life-interest, and that therefore the Plaintiff as the eldest grandson was the heir entitled to succeed on the death of the 1st Defendant.

6. There is no doubt I apprehend that, as to the Estate which daughters take by succession when there is a son to inherit, the view of the law presented by the position advanced on both sides is correct. It appears to me also that the law is the same when there is no grandson as put on behalf of the Respondent, but that is not a point which it is necessary to consider: I think it clear too that, as respects the reason upon which the law rests, the argument on behalf of the Appellants is supported by the weight of the authoritative texts and commentaries of the Benares and Bengal Schools, although the Schools differ perhaps as to the extension of the reason, to the exclusion of barren and sonless widows. See *Smṛiti Chandrika* (Krishnaswamy's Translation), Chap. 11, Sec. 2, Sl. 10; *Dayakrama-Sangraha*, Chap. 1, Sec. 3; *Dayabhaga*, Chap. 11, Sec. 21; *Str. H. L.* 138. In Chap. 2, Sec. 3, of the *Mitācshara*, which treats of the right of daughter to inherit, this reason is not explicitly declared, but it is I think implied and nothing found in Section 1 of the same Chapter, in which the applicability of the like reason to the right of widows to succeed is controverted, seems to me to go beyond refuting the generality of the reason: since at all events the far distant time when the reprobated and obsolete practice of appointing another to beget issue on the widow existed, her right of succession appears to have rested upon her own competency to make sacrificial offerings to her husband's spirit which are declared to be only less efficacious than that of sons.

7. Consistently with this reason the same authorities establish I think that, when the sons of daughters succeed to the property of their grandfather, they take by direct right of succession as being his nearest heirs, like the sapindas of a man succeeding to his property on the death of his widow, but *per capita*. The rule of succession exists as laid down in the *Dayabhaga* "a fortiori in the case of the daughter and grandson whose pretensions are inferior to the wife's" (see also the *Madhavya Commentary* by Mr. Burnell, p. 26); and it rests upon the great principle of the entire Hindu Law of succession to property; that nearness in regard to the attributed capacity and sacred duty to confer spiritual benefits by the offering of funeral oblations either immediately or mediately confers the right to inherit temporal wealth. Now it is beyond question that all sons of daughters are accounted to possess the virtue to confer such benefits with like efficacy. The general ordinance declared is that "in regard to the obsequies of ancestors daughter's sons are considered as son's sons" *Mitācshara*, Chap. 2, Sec. 3, Sl. 6; *Smṛiti Chandrika*, Chap. 11, Sec. 2, Sl. 10; the *Madhavya Commentary*, Sl. 37. In principle then the law does not admit of the succession of some of the sons of daughters to the exclusion of the others, and I do not find anything

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Judgment of the High Court dated 27th October 1871. expressed in the texts or commentaries of the school of law which prevails in Madras, giving support to the contention of the learned counsel for the Appellants on this point.

8. The rule laid down in the *Dayabhaga*, Chap. 11, Sec. 2, Sl. 30, and the *Dayakrama Sangraha*, Chap. 1, Sec. 3, Sl. 3, that married sisters succeed after the paternal property had vested in a maiden daughter, only on her death without issue, appears to be the single rule which favors the exclusive succession of the sons of a daughter in whom the paternal property actually vests. Mr. Macnaughten in his "Principles of Hindu Law" states as a settled distinction between succession of maiden and married daughters according to the Law of Bengal that, if the former marry and die leaving sons and sisters or sister's sons, her sons alone take to the exclusion of the sisters and their sons. But he adds "this distinction does not seem to prevail anywhere but in Bengal." At present I have a strong impression that the Hindu Law governing here does not recognize such a distinction, but, assuming the law to be the same, I do not see that the case of the Appellants would be aided even if the vesting of the property in the surviving daughters be taken to have relation back to the death of Unga Muttu, for, before that event the 1st Defendant had been twice married.

9. Some stress was laid by Mr. Mayne on translated passages from the *Saraswati Vilasa*, a treatise described as similar to the *Smriti Chandrika* and of some authority in Madras, as upholding the position that sons of a daughter succeeding to the possession of paternal property are in a better position as heirs than the sons of her sister. The passages are fully set out in the Judgment of the Civil Judge, and they do not appear to me to have a bearing in that way. They refer to the subject of obstructed and unobstructed heritage, and point out generally that the descent of paternal property to daughters is one of the instances in which obstructed heritage takes place, but it becomes unobstructed instantly on the descent if there are daughter's sons, because of the sons' rights as heirs of their grandfather attaching at the very moment of the vesting of the property. In effect as it seems to me that the heritage is unobstructed when there is male issue of any daughter because the rights of such issue as heirs exist simultaneously with the interest of the daughters. There is no allusion to a preferential right of the sons of any one daughter, and nothing expressed is inconsistent with the sons of several daughters sharing the inheritance.

10. For these reasons I am of opinion that unmarried or married daughters on whom as a class paternal property devolves take a joint life-interest

with rights of survivorship; that the estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs; and that on the death of the last surviving daughters the sons take the property equally and consequently that the Plaintiff, being the eldest surviving grandson of the Istimirar Zemindar, is the heir having the right to succeed to the property in dispute on the death of the Zemindar, the 1st Defendant.

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11. With respect to the second question raised by the Appellants' objection to the declaration of the Plaintiff's right, whether the Zemindari is the Stridhanam property of the 1st Defendant, I need not add anything, as my conclusion on the first question is obviously decisive of it. But I ought perhaps to say, with reference to the arguments (contradictory to those on the first question) advanced on behalf of the Appellants, that the authorities do not, I think, present any ground for them.

12. There are some texts and comments recognizing as Stridhanam paternal property devolving on a daughter; but they appear to me to relate only to an appointed daughter who was declared to become by the appointment the third description of son (*Mitacshara*, Chap. 1, Sec. 11, Sl. 13, and Chap. 2, Sec. 2, Sl. 5; *Dayabhaga*, Chap. 11, Sec. 2, Sl. 10 and 16), and they are of no force now, the appointment of a daughter like that of a widow having become obsolete as to other daughters. I can find no recognition of a similar kind and it is expressly declared, in the same section of the *Dayabhaga*, Sl. 30, and in the *Dayakrama Sangraha*, Chap. 1, Sec. 3, that paternal property does not become their Stridhanam; and in the passages cited from the *Valasa Metrodaya* the contrary position is refuted.

13. The comments in the *Mitacshara*, Chap. 2, Sec. 2, and the *Madhaviya*, Sl. 34, on the text of Gautama declaring a woman's peculiar property to belong to her daughters to the effect that it is equally applicable to paternal property, import, I think, merely that such property devolves on daughters.

14. The fundamental principle of the law of succession too is adverse to the contention of the Appellants; for, if paternal property passing to a daughter were to become her Stridhanam, the succession would pass away from those who were the nearest heirs by virtue of their capacity to offer oblations to the last male owner.

15. On those grounds I am of opinion that the Decree of the Civil Court is right and should be affirmed but without costs.

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Mr. Justice HOLLOWAY.—There are three points raised by the Appeal,—

(1) Was this a case for a declaratory Decree?

(2) Will an Estate which has passed to a daughter descend to her children to the complete exclusion of the children of another daughter who was dead at the grandfather's death, but who, if alive, would have succeeded?

(3) Is the question to be decided in favor of the Appellant because the property has descended to a woman and is thereby Stridhanam?

1. When once the doctrine of the English Courts as to declaratory Decrees is abandoned, I can scarcely conceive a case more fit for one than the present. The title is likely to become obscured by lapse of time, the point of law is a doubtful one, there was no admission of the pedigree until the case was about to be tried. It certainly seems to me that the quieting of doubtful titles is a better reason for such a suit than the fact of alienations having been made. The peril from the disappearance of testimony in these cases is that of the Defendant not of the Plaintiff and Reversioner. Many suits much more objectionable than this have been permitted and I see no reason to doubt that this should be.

2. On the second question I shall not unnecessarily repeat the authorities embodied in the elaborate Judgment of the Civil Judge, but shall content myself with stating what I consider to be the effect of those quoted by him and those addressed to us in this argument. The propositions asserted on the side of the Appellants are: The right of daughters to succeed at all is in consequence of the anticipated merit of the production of sons; where several take as a class they take jointly with benefit of survivorship; where the whole vests in one to the exclusion of the others in anticipation of getting a son and that son is got, the whole vests in that son to the exclusion of the sons of the other daughters, and, applying the proposition to the present case, the Plaintiff's mother was dead and it vested in the mother of Defendant; the death of the present holder will not let in the Plaintiff.

3. The proposition asserted on the other side was: In the Hindū Law females occupy a dependent position, they never inherit except in particular circumstances and take only a life-estate, the right of succession is therefore not to be traced from them but from the grandfather, as the question always is who would have been his heir if no daughter had interposed. The application was, if no daughter had survived, the eldest grandson (the Plaintiff) would have succeeded, and it can make no difference that the surviving daughter has interposed.

4. I am unable to see in any of the passages the least support for the proposition for which they were quoted on behalf of the Appellant. Dayabhaga, Chap. XI, Sec. II, 15 and 30, is dealing with the passage of Menu which permits the husband to take what has vested in his wife and applies to the case of the appointed daughter, and the second passage has the same bearing. It further shows that the heirs are to be sought by proximity to the grandfather and not to the daughter, and the argument *a fortiori* from the case of the widow is certainly adverse to the contention for which it was quoted. Chap. I, Sec. 10, Sl. 3, of the Mitashara applies to the son of two fathers. The language of the whole section shows the struggle of the commentator to get rid of the texts which allowed of getting by appointment. The passage from the Sarasvati Vilasa is more than ordinarily obscure, arising, it is very probable, from the arbitrary correction of corrupt manuscripts. Its meaning seems merely to be that the course of descent is certain in some cases; that, where it has vested in daughters, it is not so until the birth of sons. It says nothing, however, as to the question of what son is to succeed, and still less in the case of an impartible estate vesting not jointly in all the daughters with equal claims but in one of them, that it will go to her son only. In my opinion the question can only be solved and may be certainly solved by a recurrence to the principles of the Law and more especially to the principle upon which daughters inherit at all.

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5. In all cases in which the doctrines of one system of law are to be applied by lawyers of another, there is imminent risk of unconsciously reasoning upon motives wholly foreign. This is true of the laws of men whose view of human relations is fairly similar. It is so with the law of the Romans and Germans, still greater the risk where the view is wholly different.

6. The interminable disputes as to the quantity of the widow's estate and the talk of full owners, vesting heritable blood, whether the descent is to be reckoned from the last male owner, or the person last seized, present questions wholly insoluble, because they are questions without correspondent ideas in the Hindu Law of Inheritance. The Hindu Law, like the Hindu Cosmogony and the Hindu History, knows nothing of individuality.

7. As oriental history is well said to be "a compressed and compacted substance an undismembered unity within which disturbers have not yet appeared and individuality has not begun to live its life," so the leading feature of its earliest written rule is "that the whole of Indian life in its essential relations is knitted to another world above and beyond itself by no means carries its end or

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its satisfaction in itself. As Indian Philosophy strives before all things to bind the individual human spirit with the original godlike one, so the written law orders the life relations of this world for the ends of the other, and the very godlike which the Hindu sees pantheistically in the world as totality nevertheless gives to the life that is and its essential ordinances, as marriage, no godlike import and sanctity but merely invites the striving after intimate union with the primal one (*ur einen.*)"

8. The law of inheritance, as predominantly marriage also, has an essential relation to the offerings to the dead. Gans (I. 251) has rightly brought forward this, and hence names the Hindu Law of Inheritance, "A Law of Inheritance of the Offerings to the Dead." Within the two laws, that of the principal and that of the collateral offerings, the same system of arrangement appears as is shown as the necessary succession of stages of the worship of the dead. First come the worshippers and the providers of the principal offering to the dead; hence the descendants to the great-grandson. Here also the right of representation prevails, *because, among the worshippers there is no nearer who should exclude the more remote.*

9. Then follow those through the medium of whom such worshippers are produced and can be gained for the deceased, hence the wife and the daughter. They inherit not by force of a worth which is their own, as members of the family and nearly related, but *because they are the passive instruments of providing such worshippers for the deceased.* Last of all follow the inheritors of the third relation, *i. e.*, those who are connected with the deceased as companions of a common worship. Where however no farther offering is to be brought, the right of inheritance itself disappears. The bringers of water offerings, Vedas-reading Brahmins and the king follow.

10. I regard this statement of the principle of the Hindu Law of Inheritance to be absolutely correct. As the Roman Private Law is distinguished and partially disfigured by the prominence given to the individual will, so is the Hindu, in each case springing from the spirit and views of life of the people, characterized by the entire sinking of the individual, by the contemplation of the world as a unity, of the family as unity in multiplicity having no place whatever for individual rights, by regarding the individual himself as a mere link in a chain and if the repository of rights simply so because also the necessary performer of duties. Even in dissolution by which sacred rites are multiplied, and this is Menu's reason, there can scarcely be said to be severance, for the possi-

lity of complete reunion is always regarded. That this is the leading thought pervading the whole Hindu Law seems to me impossible to doubt.

11. Sir T. Strange (p. 139), says that the Mitacshara repudiates the notion of women only succeeding through males, and he quotes for this Chap. II. Sec. 2, Sl. 3, where Katyayana speaks of the succession of the widow and daughter. This succeeding through males is merely the unconscious application by the English lawyer of the principles of his own law. There is no succession through any one in Hindu Law, and in Sl. 6 of the same section the author quotes Vishnu reasserting the principle upon which all inheritance depends, "let that son give the funeral oblation and possess the inheritance." Now a principle of law as contradistinguished from mere propositions is the leading thought upon which the single proposition or entire institutions of law are based. The propositions ought to be deducible from it, and, trying the principle by this test, it seems to me that it bears it.

12. If there existed representation in Hindu Law and the units were more than the mere passive agents of a work in which their own individual existence has no place, it would be impossible to explain why the descent should stop at the great-grandson in the male line and at the grandson in the female. That it is said somewhere that in the son the whole body and in a daughter half the body of the father survives, may perhaps be a fanciful mode of expression accounting for the descent stopping a step earlier in the case of the female line.

13. If vesting could have any influence in determining the right to property, it would be impossible to account for grandsons coming in when the property never vested in the son, for the son of the lunatic, idiot or leprous taking when his father never could.

14. On this principle alone can the symbolical begetting and begetting by attorney be explained, and most of the passages which appear to put inheritance upon some other principle owe their rise to the desire to get rid of reasoning which would seem to authorize practices which time and change of manners had rendered repugnant to the writer.

15. The Hindu commentator did not recognize what legal science, where there is science, has now recognized that a principle of law is still living though time has by abolishing certain deductions destroyed its logical symmetry, that practical lawyers often apply with great certainty principles of which they are unconscious, and that many of the principles of a law are never to be discovered until itself has passed away.

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16. The principle is,—enquire the degrees in which the duty of the sacrifice attaches and you find the order of inheritance. That the daughter's sons are entitled the express texts state, that there have been disputes whether the sons do not come in even before the daughters is also clear. That the interposition of the daughter between the grandson and her son was perhaps, originally, an anomaly, but that interposition, as is plain when once we have cleared our minds of foreign ideas, cannot affect the order of descent. The daughters exclude all daughter's sons, but the officers of the funeral cake are the sons, and they by virtue of that offering clearly take after the interposition; that one daughter, as in this case, comes in because of the death of Plaintiff's mother can make no difference. At her death if the estate were partible, the principle of the law and as I think the express text would bring in all the sons of all the daughters jointly. The fact that it is impartible gives the Plaintiff the elder the preferable title, but only because it has been settled by custom that the estate is not divisible, and where there is not divisibility the same custom has settled that the elder comes before the younger. These sons are sapindas and they are the class who succeed after daughters.

17. On the question whether property coming to women by inheritance is Stridhanam or not, I do not consider it of the least consequence for the decision of this case to determine. By calling it Stridhanam we should not be in the least assisted to the solution of the order of its transmission, for the various sorts of Stridhanam are transmitted in very various ways. With respect to property of the grandfather which has passed to daughters because they have generated or may generate sons, it is clear that it passes after the interposition to daughter's sons. Whether it is properly called Stridhanam or as the Judgment of this Court decided improperly so called, makes not a shade of difference. Whichever it is, the order of its descent is settled consentaneously by those who assert and those who deny it to be so. I will shortly sum up the grounds upon which I come to the conclusion that the Decree of the Civil Judge ought to be affirmed.

(1.) The principle of the law is to determine the descent by the nearness or remoteness of connexion with the offering; there is no taking by or through or by virtue of any individual, the only effect of relationship is to connect with that offering; the very name sapinda is the clearest etymological proof of the predominant notion.

(2.) That this principle is the reason for the daughters taking at all.

(3.) That neither in this nor in any other case has what is called vest.

ing the slightest influence; the very notion of heritable blood is, as applied to Hindu Law, meaningless.

(4) The principle of the law is the only safe ground for deducing a rule of descent; the attempt to argue from subordinate propositions will, as the cases show, lead to a departure wider and wider from the real reason of the law.

18. In this suit for a declaratory Decree, I think that there should be no costs on either side.

19. I must be allowed to add that I feel the grotesque absurdity of applying to these Maravars the doctrine of Hindu Law. It would be just as reasonable to give them the benefit of the Feudal Law of real property. At this late day, it is, however, impossible to act upon one's consciousness of the absurdity. I would not however be supposed to be unconscious of it.

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(10)

Ranee Kattama Nachchiar ...	...	...	...	Appellant.
Dorasinga Tevar ...	...	...	...	Respondent.

SIR J. W. COLVILLE.

This is an Appeal against the Decree of the High Court of Madras affirming a Decree of the Civil Judge of which the ordering part is in these words:—The Court doth order and declare that as between the Plaintiff and 2nd Defendant, Plaintiff be declared the next in succession to the Sivaganga Zemindary; that Plaintiff's claim to maintenance and apartments be dismissed; and that he pay so much of his own costs as may be found due thereon." There was no Appeal to the High Court against the latter part of the Decree dismissing the Plaintiff's claim for maintenance and apartments, and therefore that which is the subject of the Appeal must be taken to be the declaration of the two Indian Courts that the Plaintiff is the next in succession to the Sivaganga Zemindary.

The title to this Zemindary was the subject of a very long litigation, which was finally closed by a Judgment of this tribunal in the year 1863. The points then decided were, *first*, that the Zemindary was in the nature of an impartible raj, to be held by one member of the family; *secondly*, that the Zemindary, having been granted by the Madras Government, after an escheat, to the Istimarrar Zemindar, was to be treated as his self-acquired property; *thirdly*, that the right of succession to it was to be determined, not by any particular custom, but

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by the general Hindu Law prevalent in that part of India, with only such qualifications as might follow from the impartible character of the subject. These propositions were, at least in the latter stages of the litigation, not much disputed. That which was really contested between the parties was that, even if the Istimirar Zemindar were, as he had been found to be, in the strict sense of the term, a member of an undivided Hindu family, the succession to this Zemindary, inasmuch as it was his separate self-acquired property, was to be determined by the rules which regulate the succession to the property of one separate in estate, and consequently, that his wife, daughter, and daughter's sons were entitled to inherit it, in preference to a brother, a brother's son, or any more remote collateral in the male line. This last point had been first raised by the Zemindar's last surviving widow, Unga Muttu Nachchiar, in a suit commenced in 1845. It was decided against her by the Judge of First Instance in 1847. She appealed against his Decree to the then Sadr Court of Madras, but died in 1850, before her Appeal was heard. Thereupon there ensued a very complicated and confused litigation amongst the descendants of the Istimirar Zemindar, touching their respective titles to succeed to the right claimed by the deceased widow, and to prosecute her Appeal. The claimants were first Kattama Nachchiar, who is the first on the record of the present Appellants, her sister of the whole blood, and her half-sister, all of whom seem to have been daughters of the Zemindar, then having or being capable of having issue; secondly, Soumya Nachchiar, a fourth daughter, who was a childless widow; and, thirdly, Muttu Vaduga, a grandson of the Istimirar Zemindar by a deceased daughter, and, as would appear by the pedigree admitted in this cause, and elder brother of the present Respondent, who is since dead. The final Judgment of this Committee determined both the question of representation raised between these parties, and also the question of succession raised in the widow's suit, against the person claiming as nearest male heir in the collateral line of the Istimirar Zemindar. It determined these questions by a declaration in these words:—"We shall therefore humbly recommend Her Majesty to reverse the Decrees and Orders complained of by this Appeal; to declare that the Suit of 1856, which appears to us to have resulted from erroneous directions given by the Sadr Court,"—that was a suit brought by the widow as an original suit,—"*ought to have been and ought to be dismissed*; and in the Suit of 1845, to declare that Soumya Nachchiar and Muttu Vaduga were not, nor was either of them, but that the Appellant and her sisters were, as against the Respondent, entitled to prosecute the Appeal, and to recover the Zemindary; this declaration to be without prejudice to the rights of the Appellant and her sisters *inter se*." The sisters, as appears by the admitted pedigree in this cause, have since died.

There is indeed a statement in Mr. Moore's report that they were dead at the time when the Judgment was pronounced, but, however that may be, it is certain that, under the order of Her Majesty made in pursuance of that Judgment, the 1st Appellant became the Zemindar of Sivaganga, taking it as the heir of her father next in succession to the widow.

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That having been the state of things for some years, the present Respondent brought the suit out of which this Appeal has arisen. The first paragraph of his plaint claimed "to recover the Zemindary of Sivaganga for the Plaintiff as the eldest surviving male heir of the Istimirar Zemindar." But this somewhat-desperate attempt to re-open the question, which had been closed by the Judgment of this Board was shortly afterwards abandoned, and by a subsequent proceeding he withdrew the claim to any right to immediate possession, and amended his plaint accordingly. The plaint then went on to pray in the alternative,—"*first*, to have a declaratory Decree passed, establishing the Plaintiff's right to succeed to the said Zemindary as next heir after the death of the 1st Defendant, and adjudging her to pay him Rs. 60,000 per annum for maintenance, and further declaring him entitled to immediate possession of a portion of the palace, No. 1, which was occupied and enjoyed by his maternal grandmother and mother during their life-time; *secondly*, to declare him entitled to immediate management of the devastanams, pagodas and choultries situated in the said Zemindary, and of the lands bestowed on them, to receive the honors done by the said devastanams and choultries, and to conduct the affairs thereof; *thirdly*, to grant to him such further or other relief as the nature of the case would admit of." The plaint then stated the title of the Plaintiff, which is in effect, that, inasmuch as upon the death of the present Zemindar the persons entitled to inherit and to succeed to the Zemindary would, according to the ordinary course of Hindu Law, be the grandsons of the Istimirar Zemindar, if the estate were partible, he, being the eldest of such grandsons, and the estate being impartible, must be taken to be, by right of primogeniture, the person next in succession to the Zemindary. The plaint then raised a case of waste against the 1st Defendant (the Zemindar). After mentioning certain leases which are no longer the subject of dispute, it went on to say,—"*The 1st Defendant has leased to the 6th Defendant the punnai (cultivated by the owner), and kolkriam (purchased) lands belonging to the said Zemindary which was put in her possession by virtue of the Decree of Her Majesty in Council, but she, notwithstanding her being a widow, has alienated, contrary to law, a great part of the said lands, and pledged the State jewels and incurred debts so as to affect the permanent income of the Zemindary.*" It

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then stated some special grounds for coming into Court. It said,—“The 1st, 2nd, 3rd, 4th and 5th Defendants and others have combined together to defraud the Plaintiff of his right to the said Zemindary, and the 3rd, 4th and 5th Defendants have executed an agreement to their brother, the 2nd Defendant, assigning to him their interest in the said Zemindary, which they pretend to have on the death of the 1st Defendant. The 1st Defendant has also executed a document to one Ponnusami Tevar whose daughter was lately married to the 2nd Defendant, authorizing him (the said Ponnusami Tevar) to establish the right alleged by the 1st Defendant to be possessed by her son, the 2nd Defendant, to succeed to the Zemindary after her death, and to exercise other powers in prejudice to the Plaintiff's interests in the said Zemindary.” Then followed the case made for the relief prayed in respect of the management of the charitable institutions and for maintenance, which it is unnecessary to state in detail.

The Defendants to the suit appeared and set up various defences, the 1st and 2nd Defendants impeaching the title of the Plaintiff upon several grounds; the 3rd, 4th and 5th Defendants setting up a case that the Zemindary to which their mother had succeeded had either always been or had become her Stridhanam; that, according to the proper course of succession, it would, upon their mother's death, devolve upon them, but that they had assigned and relinquished by deed their rights in favor of their brother, the 2nd Defendant. Upon these pleadings the following issues were settled:—

1. “Whether or not, according to Hindu Law, Petitioner is entitled to succeed to the Zemindary of Sivagangas at the death of the present Ranees?”
2. “Whether or not Petitioner is entitled to succeed to the said Zemindary at the death of the Ranees by virtue of any peculiar custom which obtains in that Zemindary?”
3. “Whether or not Petitioner is estopped by this being ‘*res judicata*’ from setting up any peculiar custom?”
4. “Whether or not Petitioner is immediately entitled to the maintenance claimed or what maintenance, as such, or to apartments in the palace, and what apartments?”
5. “Whether or not Petitioner's claim to maintenance and apartments is barred by the Law of Limitation?”
6. “Whether or not Petitioner is entitled to the immediate manage-

"ment of the devastanams and chuttrams in the Zemindary, and to the honors connected with the said management?"

7. "Whether this is a suit in which a declaratory Decree can be given at all?"

From the Judgment of the Court of first instance it appears that the second, third and sixth of these issues were abandoned. The Judgment conclusively disposed of the fourth against the Plaintiff and consequently made it unnecessary to adjudicate upon the fifth. But, having decided the seventh issue, viz, whether the suit was one in which a declaratory Decree could be given at all in the Plaintiff's favor, it proceeded to decide the first issue also in his favor, and thereupon made the declaration which is the subject of this Appeal. The questions raised by these issues were the only questions which were carried to the High Court, and that Court affirmed the Decree of the Lower Court upon both points.

Their Lordships, feeling that, if the seventh issue has been improperly found in favor of the Plaintiff and this is a case in which a declaratory Decree ought not to be given at all, it would be wholly unnecessary for them to discuss the first issue, have in the first instance confined the argument to the first of these questions, and now proceed to give Judgment upon it.

They at first conceived that the power of the Courts of India to make a merely declaratory Decree was admitted to rest upon the 15th Section of the Code of Civil Procedure, the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the Mofussil before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that, if the Legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Procedure, which, if a limited construction is to be put upon it, clearly implies that any Decree made in excess of the power thereby conferred would be objectionable, the words of the Section being,—“No suit shall be open to objection on the ground that a merely declaratory Decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.” Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory Decrees independently of that clause.

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Kattaria
Naschiar
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Tavar
—continued.

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Council
dated 16th
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1875.
Kattama
Nachechiar
vs. Dorasain-
ga Tavar.
—continued.

The point, therefore, to be determined upon this Appeal is, what is the true construction and effect to be given to that clause. It has been broadly urged at the Bar that the discretion given to the Courts is absolute, or at least controlled only by those reasonable considerations upon which Courts of Justice may be presumed to act in the particular case brought before them, and that in every case in which they think fit to make a declaratory Decree under that clause they are competent to do so, subject of course to having the exercise of their discretion controlled by the Appellate Court in cases in which the latter may think there are sufficient grounds for interfering with a discretion which the Legislature has vested in the Lower Court. On the other hand, it is contended that the clause must be construed upon the principles and by the light of the decisions of the English Courts of Equity, upon the 50th Section of the 15th and 16th Victoria, Cap. 86, which is in precisely the same words, and that the true limitation of the power of the Courts is that a declaratory Decree is not to be made unless there is a right to consequential relief, which, although not asked for, might, if asked for, have been given.

We have been referred to a vast number of authorities, some to show what has been the construction given to this clause in the Presidency of Bengal, some to show what construction has been given to it in the Presidency of Bombay, and some to show that a contrary construction has been put upon it in the Presidency of Madras. We have also been referred to three decisions of this tribunal, which, if clear and explicit on the point, are of course binding upon us. Their Lordships think it will be sufficient as to the Indian cases to say that, although the cases in Bengal are not uniform, and some of the Judges there have occasionally used expressions which imply that the Courts have a wide discretion in this matter, still the balance of authority is in favor of the limited construction which the Appellants would put upon the clause. In Bombay that seems to be even more decidedly the case, although the Bombay decisions to which we have been referred are not so numerous as those of the Courts in Bengal. It is obvious that an enactment which is intended to apply to all the Courts in India, and which is also a modern enactment, ought to receive the same construction in all those Courts and that no inconsistent course of practice should be allowed to spring up in any of the Presidencies. That construction must be governed by the decisions of this Board, and their Lordships in the course of the argument intimated an opinion that the three decisions which have been cited do in fact admit the authority and binding force of the decisions in England, and establish that, with such slight qualifications as may be required by the different circum-

stances of India and the different constitution of the Courts in that country, the application of the clause is to be governed by the same principles as those upon which the Court of Chancery proceeds.

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—continued.

In the first of these cases (that of Sreenarayan Mittro decided on the 15th of January 1873), there is a distinct reference to the case of *Rook v. Lord Kensington*. The learned Judge who delivered the Judgment of this Committee said:—"It has been held that, under 15th and 16th Victoria, Cap. 86, Sec. 50, a declaratory Decree cannot be made unless the Plaintiff would be entitled to consequential relief if he asked for it. (*Rook v. Lord Kensington*, 2 K. and J., 756). The 15th Section, Act VIII of 1859, is in similar terms. The Plaintiff upon the facts so founded is not entitled to any relief against the Defendant. It has been shown that, treating the documents as mere agreements between the Plaintiff and the father of the child, the Plaintiff could have no right to maintain the present suit." He no doubt afterwards observed—"It is not a matter of absolute right to obtain a declaratory Decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under all the circumstances of the case, to grant the relief prayed for." It appears, however, to their Lordships that that paragraph is far from claiming an unlimited discretion. The earlier part of the Judgment shows that the power is limited by the construction put upon an enactment in the similar words in *Rook v. Lord Kensington*, and what follows is merely to the effect that, even in cases in which some consequential relief might, if prayed, have been granted, it would still be a matter of discretion whether the Court should make a mere declaration in the particular case.

The next case was that which has been shortly called the case of Fyz Ali Khan decided on the 22nd of January 1873. Upon this point their Lordships then said:—"It must be assumed that there must be cases in which a merely declaratory Decree may be made, without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th Section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code and in the Court of Chancery upon the analogous provision of the English Statute, is, that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that the condition is sufficiently answered in the present case, even if it be assumed that no other consequential

Judgment of the Privy Council dated 10th February 1875. Kattama Nachohiar vs Dorasim-ga Tavar. —continued.

"relief was in the mind of the party or was sought by him, than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit." The case there was that the Plaintiff had sought as Zemindar to enhance the rent of a tenant. He was met by the objection that the Zemindary right was not in him. He then had to go, as he could only go for a final determination of that question, to the Zillah Court, but, the Zillah Court not having the power to give him the consequential relief, in order to which he sought that declaration, namely, the trial of his right to enhance, could only make the declaration leaving him to seek for his consequential relief in the Revenue Court.

The correctness or effect of this decision is not affected by the fact which Mr. Doyno pointed out, that the Plaintiff afterwards did go to the Revenue Court, and there, upon the merits of the question being tried, failed to establish his right to enhance.

The most recent case is that of the Rajah of Pachete, decided on the 5th of December 1874. The Judgment then delivered contains this passage:—"Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to as to the proof or the rebuttal of proof of the *bromuttur* tenure, because in their Lordships' opinion the Judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for a declaration of title, and it is a suit to set aside, not any deed nor any fact, but a mere allegation of the Defendants that they had a certain tenure. In their Lordships' view, such a suit is not maintainable." After giving the words of the clause, the Judgment proceeds:—"A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief, if relief had been prayed for; and that doctrine has been applied to this clause in the Indian Act. Now, applying that test, in their Lordships' opinion, this suit is not maintainable. The Rajah was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits, and he sought for and could obtain no other description of possession than that which he had." There is really no conflict between this decision and that which had been ruled in the case of Fyz Ali. In the case of Fyz Ali, the Plaintiff sought to establish the Zemindary title, which was properly triable in the Zillah Court, in order that on the title thereby established he might bring a fresh enhancement suit in the Revenue Court. In this case of the Rajah of Pachete, the Zemindary title was admitted by all the Defendants upon the proceedings; and the question which the

Rajah sought to conclude by a declarator was, that within his Zemindary there was no such *bramytur* tenure as that which some of the Defendants alleged to exist in limitation of the right to enhance, which as a Zemindar he would presumably have. In short, he wished to get a declaration, the effect of which would be to prevent the fair trial in the Revenue Court of the very question to be tried there; viz, the question, whether he as Zemindar was entitled to enhance the rents of his tenants or not.

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It seems to their Lordships that these three cases do all more or less affirm that the Indian enactment is to be construed as the English Courts have construed the similar provision in the English Statute, but, inasmuch as this question has been so fully discussed at the Bar, and there treated as not concluded by those decisions, and as it is desirable to have an authoritative decision upon it, their Lordships think it right to say that, if these three cases had not been decided, and if the question were before them as *res integra*, they would come to the above-mentioned conclusion, and I will state as shortly as I can the reasons upon which they would do so.

It is clear that, very shortly after the passing of the English Statute, in fact, in the course of the following year, the construction of its 50th Section came in question in the Court of Chancery. The first decision of Vice-Chancellor Wood, which is reported in the Appendix to the 10th Volume of Haro's Reports, no doubt states somewhat broadly the discretionary power of the Court to make declarators under that enactment, but in the two other cases which were decided a month or two afterwards, namely, the cases of *Greenhood v. Sutherland*, and *Garlic v. Lawson*, the learned Vice-Chancellor receded from that and held that the powers of the Courts were not so enlarged by the statute as to enable him to make any declaration touching future interests during the life of a tenant for life. In the case of *Garlic v. Lawson*, he said,—“Now a declaration in the lifetime of the tenant for life with regard to the interests of the parties entitled in reversion could not have been made in a cause at the time that statute passed, and therefore could not have been made on a special case. Then came the new Act, which merely said that a suit should not be open to objection on the ground that a merely declaratory Decree or Order was sought. It enabled the Court, in its discretion, where it should appear to be necessary for the administration of an estate, or to the relief to which a Plaintiff might be entitled to make a Decree notwithstanding it should be merely declaratory. But this was not a case in which it was necessary to do so.”

The question next came before Vice-Chancellor Kindersely, in *Jackson*

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v. Turnley, At the close of his elaborate Judgment on the particular case, the learned Judge says,—“I am of opinion that this question cannot be litigated :
“that the representative of a deceased lessee cannot file a bill against the lessor
“to litigate the question whether, in the event of a breach of a covenant taking
“place, the lessor would have a right founded upon it, and I may observe that the
“last branch of the section is not unimportant. It says,—‘It shall be lawful for
“the Court to make binding declarations of right, without granting consequential
“relief.’ That seems to imply that it contemplates a case in which the Court is
“capable of giving consequential relief. Here there is not merely no consequen-
“tial relief asked, but none is capable of being given.”

In the case of *Rook v. Lord Kensington*, Vice-Chancellor Wood also put the same construction upon the words of the clause. He said,—“The form of
“that section of the Statute implies that there is a consequential relief which
“might be granted in each case when the right has been so declared, but that the
“parties are not to be compelled to ask for that relief, and they may satisfy them-
“selves by simply asking a declaration of right and not pursuing the matter fur-
“ther.”

That decision was followed shortly afterwards by the case of *Lady Langdale v. Briggs*, which is the more important, because there, as here, the question was whether the clause empowered the Court to declare future interests. Lord Justice Turner went at great length through the earlier cases, in order to show that it was against the general course and practice of the Court to do this; that that had not been altered by his own act, enabling the parties to state a case for the adjudication of the Court; and then he proceeded to deal with the argument which had been raised before him to the effect that under the more recent statute, the 15th and 16th Victoria, Cap. 86, that power was given. He says,—“Some
“aid to the Appellant’s argument on this part of the case was also attempted to be
“drawn from the 50th Section of the 15th and 16th Victoria, Cap. 86, the Improv-
“ment of the Jurisdiction Act, but I take the same view of that enactment as the
“Vice-Chancellor Wood seems to have taken of it in *Garlic v. Lawson*—that it
“does not extend the cases in which declaration of right may be made, but mere-
“ly enables the Court to declare rights without following up the declarations
“by the directions which, according to the old practice, would have been neces-
“sarily consequent upon them.” Those directions, which according to the old practice would have been necessary and consequent, would have involved conse-
quential relief in one shape or another. There is, therefore, no ground for say-
ing that the Judgment of Lord Justice Turner did not go to the full extent as to

the construction of the clause of the Judgments of Vice-Chancellor Wood in *Book Judgment of*
v. Lord Kensington and Vice-Chancellor Kindersely in *Jackson v. Turnley.* *the Privy*
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What then has been the history of this clause in India? It appears that, before the passing of the Code of Procedure, it had been extended to India by Act VI of 1854, the 19th Section of which is in precisely the same words as the English enactment. I may remark that some of those who sat in the Supreme Court of Calcutta were always anxious that, when an English Statute was extended to the Presidency Courts, it should be so extended in precisely the same words, in order that those Courts might have, on questions of construction, the advantage of the English authorities, and that it should not be open to Council to make nice distinctions upon the varying language of the two Statutes. In this instance, that principle seems to have been acted upon by the Legislature, and, not long after the Indian Act was passed, the question of its construction appears to have come before the Supreme Court in the cause of *Sreenmatty Rajcoomaree Doosce v. Nobacomar Mullick and another* (Boulnois' Reports). That Court was bound to act upon the English authorities, and accordingly that portion of its Judgment which dealt with this question is in these words:—"One argument, which has been strongly pressed in support of this view, is founded on the 29th Section of Act VI of 1854. But that enactment only removes the objection to the suit which consists in its seeking merely a declaration of right without a consequential relief. It leaves untouched the objection that may consist in the want of sufficient interest in the Plaintiff to maintain such a suit, or in the absence of material parties interested in the question. And the cases cited by the Advocate-General show that the Courts at home, neither under the similar provision in the English Statute, nor under Sir George Turner's Act, will exercise their discretion in declaring rights where the parties principally affected are not before them." The cases cited were the cases which had then been decided on the construction of the English Act. And this decision shows that the construction which had obtained in the Court of Chancery was adopted and acted upon by the Supreme Court of Calcutta.

Then came Act VIII of 1859 or the Code of Procedure, in framing which the Legislature thought fit to pick, out of Act VI of 1854, the 19th Section, and to embody it in the very same words in the new Code. It seems to their Lordships unreasonable to suppose that the Legislature did not mean to use the words in the sense which by judicial construction they had then obtained. Again, it is to be observed that, when the Supreme Court of Calcutta ceased to exist,

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and the High Court was created, the Charter of the new Court requires that the Court to be guided in its original jurisdiction by the principles which have governed the Supreme Court. Unless, therefore, the limited construction put upon the clause by the Supreme Court is to prevail generally in all the Courts of India, we must come to the absurd conclusion that the same words are to be interpreted by the High Court in one sense when it is exercising its original jurisdiction, or sitting on an Appeal from a Decree made under that jurisdiction, and in a different sense, when it is sitting on an Appeal from a Mofussil Court. It is one further that the Legislature has by the same form of words intended to make law for the Mofussil Courts, and another for those of the Presidency Towns, which

It appears, therefore, to their Lordships that the construction which must be put upon the clause in question is, that a declaratory Decree cannot be made unless there be a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court. They admit the question introduced by the case of Fyz Ali.

With respect to the course of decision in the Presidency of Madras to be observed that some of the earlier cases decided there adopted the English construction. In others, the Judges, who claimed a wider discretion as to making declaratory Decrees, have assigned as a reason for its exercise that does not exist in India the power of entertaining a suit to perpetuate testimony. That reason does not apply to the present case in which there is no testimony to perpetuate, but in no case is it a satisfactory reason. The proper remedy for such a defect in the administration of justice, if it exists, is an Act of the Legislature. It cannot be supplied by putting an erroneous construction, or a different construction from that which prevails in other parts of India, upon a Statute which has no reference to the subject. It may be observed further upon Madras cases that the Courts there do not appear really to have claimed, as Doyne has claimed for them, an uncontrolled discretion in making declaratory Decrees. The Judgment of Chief Justice Scotland in this very case certainly does not go so far. He says,—“It has been decided by this Court that the rule of the Equity Courts in England is not applicable to declaratory suits here” and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th Section of the Code of Civil Procedure although no consequential relief be grantable upon the declaration, if a good ground for seeking the protection of such a suit is shown to exist.” What has already said on the part of their Lordships shows that they dissent from that position; but still the very proposition admits that there must be some

special ground "for seeking the protection of such a suit." He then refers to the last decided case, and the conclusion which he draws from the decision is this:—"to support such a suit there must appear to have been some act done which had worked or was likely to cause injury or serious prejudice to the Plaintiff's alleged title, and in the present case I think that ground does appear." Then he proceeds to consider the special grounds which exist in this case. Mr. Justice Holloway goes further, and says that the mere quieting of doubtful titles would be a sufficient reason and a better reason than the fact of alienation having been made. The principle so stated, if acted upon, would open the door to the determination of future interests whenever one party chose to think it desirable that a dispute as to title, which might at any time afterwards crop up, should be determined by a declarator.

Having said thus much on the construction of the Act, their Lordships will more deal with the arguments which have been addressed to them to show that, even upon the limited and strict construction of the enactment, this Decree may be maintained. The first point upon which it is desirable to observe is that of the claim to maintenance. Upon that it is only necessary to say that the suit must now be treated as if the claim to maintenance had never been put forward. There has been a final adjudication between the parties as to the right to maintenance. It was held by the Lower Court that, even if the Plaintiff were unquestionably the next in succession to the Zemindary, he would have no right to claim present maintenance from the Zemindar, and there was no Appeal from that decision to the High Court.

It will be convenient to consider next the grounds which the High Court of Madras seems to have considered sufficient to justify the declaration. The Chief Justice says,—“It appears that the 1st Defendant, favoring the 2nd Defendant's title, and concerting with him in opposition to the Plaintiff, had employed an agent, and executed a power of attorney to him, for the purpose of assisting the 2nd Defendant to possess himself of the Zemindary, and withhold possession after her death. This, without reference to the other acts alleged, is sufficient to show an extreme determination of hostility towards the Plaintiff, and there can be no doubt, I think, that serious injury to the Plaintiff's right is the probable, if not certain, result of the opposition thus begun.” It appears to their Lordships that the Defendant, the Zemindar, was perfectly competent to grant that power of attorney, and that there is nothing in it which would give the Plaintiff a right if he had brought a suit for that purpose to have it set aside. It is, from the very nature of the instrument, operate only during the Zemindar's

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lifetime, and we are not to assume that any act will be done under it which the Plaintiff would have a right to impeach; but, if any such act is done under it, as, for instance, if she were to devolve the succession upon her son, so that her interest might become absolute, or the like, their Lordships, by their decision upon the present question, would by no means preclude the Plaintiff from seeking to impeach that act, and to treat it as invalid. They do not prejudge any question of that kind which may arise. Mr. Justice Holloway, as before remarked, rested his Judgment broadly on the necessity of quieting titles, which their Lordships think is a ground far too wide for adoption, and one that cannot possibly justify the declaration in this case, because, independently of the construction of the Statute, it appears to have been very reasonably ruled in India that the Court will not try questions of title as to future interests, where neither claimant has a right to present possession, especially questions of title which, like the present, may never arise. See *Pranputty Koer, mother and guardian of infant Isreenundum v. Lall Futteh Bahadur*, 8 Sevestre 277.

A further question is raised by the pleadings, which was hardly adverted to in the argument, namely, the title set up by the sisters and the grant of their interest to the 2nd Defendant; but that cannot give the Plaintiff a right of action in this case, if it does not otherwise exist. That transaction cannot affect the interests of the Plaintiff; if these ladies would have no title against him, they cannot have given a better title than they had themselves to the 2nd Defendant. It, at most, raises another point to be determined, should the title to this Zemindari come, on the death of the existing Zemindar, to be properly litigated between the Plaintiff and the 2nd Defendant.

The point which, though not adverted to in the Judgment of the High Court, has been mainly pressed upon their Lordships by the learned counsel for the Respondents, is, that the Plaintiff originally made a case of waste; that it was necessary that the right of the Plaintiff as nearest reversioner should be ascertained in order to support such a suit; and, that, if the suit had been tried out as it was at first framed, there would have been a case for consequential relief. The course the case took was that, when it came before the Judge for the settlement of issues, he thought that the question of waste ought not to be tried in this suit. There was afterwards an application made to him to frame an additional issue, which he rejected; and the reasons for his coming to that conclusion are the following:—"At the settlement of issues, the Court was of opinion that the question of alienation of the revenues of the Zemindary was not one which had any place in the present suit, which should be confined as much as possible to the

“real object in view, which is to ascertain whether or not Plaintiff is the proper person to succeed to the Zemindary at the death of the Ranee. At present, Plaintiff has no title either in possession or expectancy, and, until he has established his right as remainderman, he is not in a position to question anything that may be done in regard to the disposal of the property by the present proprietor. Moreover, it would be impossible to frame an issue on this point when the property said to be alienated is not distinctly specified, and when the parties who must necessarily be in possession are not parties to the suit. It is not contended that these alienations can operate beyond the lifetime of the present Ranee, and therefore, if Plaintiff is successful in establishing his right to succession, he will have ample opportunity in future of preventing injury to the property. If, on the other hand, he is unsuccessful, the disposition of the property is a matter with which he has no concern.” The Plaintiff appears to have acquiesced in this interlocutory order. If he had thought it had improperly affected his case, he might have raised before the Appellate Court the question of its propriety, under the section of the Code which enables him to do so, and that question would then have been regularly before us. Considering the frame of the suit, their Lordships do not think the order was improper or unreasonable.

The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindoo female in possession from acts of waste, although his interest during her life is future and contingent. Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that, if such a suit as that is brought, it must be brought by the reversioner with that object and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot by bringing such a suit get, as between him and a third party, an adjudication of title which he could not get without it. Hence, if the Plaintiff had brought his suit to restrain the widow from acts of waste, he might, no doubt, have had to prove, not merely the acts of waste alleged, but be sufficient to give him a *locus standi* in Court. Their Lordships are not prepared to say that, by showing that he was a grandson of the Istimirar Zemindar, although a doubtful question might thereafter arise between him and the 2nd Defendant as to which should succeed to the Zemindary, he would not have established a sufficient *locus standi* against the widow, and the right to have her acts of waste restrained for the protection of the Estate. This, however, would not necessarily give him a right to bring the 2nd Defendant into Court in order to obtain a final adjudication of title against him.

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It appears, therefore, to their Lordships that, even if the Plaintiff had proved acts of waste against the widow, which he has not done, that would not have given him a right as against the 2nd Defendant to have the question which arises between them determined by a declarator.

Upon these grounds, their Lordships think that both the Courts below have come to a wrong conclusion upon the seventh issue; and holding that, they conceive it would be improper for them to intimate any opinion as to the correctness or incorrectness of the very learned Judgments given in India on the first issue. Consequently it will be their Lordships' duty humbly to advise Her Majesty, on the finding upon the seventh issue, to dismiss the suit of the Respondent, but without prejudice to any question of title to the Zemindary which he may hereafter be entitled to assert on the death of the 1st Defendant, the Zemindar. We think that, as he brought a suit which he ought not to have brought, he must pay the costs of the suit in the Indian Courts and those of this Appeal.

IN THE DISTRICT COURT OF MADURA.

The 3rd day of December 1877.

PRESENT:—P. P. HUTCHINS Esquire, District Judge.

Original Suit No. 1 of 1877.

Dorasinga Tevan alias Gouri Vallabha Tevan ... Plaintiff

Versus

- | | | | |
|----------------------------|-----|---|--------------|
| 1. Muttu Vaduganadha Tevan | ... | } Son and daughters of
the late Rani Kattama
Nachchiar. | } Defendant. |
| 2. Setukkarasu Nachchiar | ... | | |
| 3. Gouri Nachchiar | ... | | |
| 4. Kottai Nachchiar | ... | | |
| 5. B. Krishnasami Chetti | ... | | |

This suit coming on for hearing, the Court delivered the following JUDGMENT.

This is a suit to establish the Plaintiff's right as eldest grandson (daughter's son) of the Istimirar Zemindar to succeed to the Zemindari of Sivagangai. A similar suit was brought in 1869 during the life-time of the late Rani, the Istimirar Zemindar's daughter. It was decided in favor of the Plaintiff in this Court and in the High Court; but the decrees were set aside by the Judicial Committee of the Privy Council, on the ground that the succession had not then opened, and that the Plaintiff could not bring a declaratory suit in the Rani's life-time.

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4 others.

2. The Rani died on the 24th May last. This suit was filed immediately afterwards, and the hearing occupied me from the 22nd October till the 1st November. Since then, my whole time has been taken up with an unusually lengthy Criminal Session; and, being left to cope single-handed with the whole Session work of this large District in a time of famine, I can see no prospect within a reasonable time of the requisite leisure for such a judgment as the importance of the case demands. But my mind is, and was at the hearing, quite made up upon all the material issues, upon all the questions affecting the Zemindari; and it is of far more importance that the Plaintiff should not be kept, for an indefinite time, out of his just rights, than that my judgment should be so exhaustive as I should wish to make it. I therefore propose to give judgment at once as briefly as possible; and, if I have time before the appeal comes on, I will add a few words upon the points principally requiring discussion.

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3. What I called the primary issues were

- I. Is the succession governed by primogeniture?
- II. Is it to be traced from the Istimirari Zemindar?

4. The former of these issues has given rise to considerable argument; but, in this judgment, I shall dispose of it in a very few words. I consider it settled law, for this Court at all events and in this Palayagar country, that the succession in all impartible Zemindaries is presumed to be governed by Hindu Law with such qualifications as necessarily flow from the impartible character of the subject; and that, where, under ordinary Hindu Law, the property would devolve upon a class, the presumption is that the impartible property will go to the eldest of that class. The cases quoted by Mr. Handley and Mr. Thomson do not appear to me to detract from this doctrine. They merely show that a similar order of succession may be established in estates not properly called Zemindaries or Palayams by a special family custom, and that the presumption in favor of the eldest in a Zemindari or Palayam may be rebutted by proof of a special custom to the contrary. The impartibility of this Zemindari has been distinctly admitted by the 1st Defendant's mother under whom he claims. It always has been held by a single member of the family, and, in the only instances in which there was any competition between members of a class, it was enjoyed without dispute by the eldest of that class. I cannot see that the interposition of a female can alter the law of succession, more especially when that female had merely an estate for life.

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5. The 2nd issue I also take to be settled by the decision in 9. W. R., 508, and several other cases, assuming of course that the Rani had only a life-estate.

6. The 3rd issue is, Whether the Rani was the full and absolute owner of the Zemindari or had only an estate for life. Upon this point, I consider myself concluded by the High Court's Judgment, which, though reversed on a preliminary point and therefore not *res judicata* as between the parties, is still untouched, as a considered exposition of the law binding on all Subordinate Courts. It has further been approved and followed by the High Court of Calcutta—14. B. L. R., 235. This authority settles that the Rani did not take the Zemindari as full owner nor by way of Stridhanam.

7. The subordinate questions, (1), (2), (3), and (5), under this issue then present no difficulty. She had no vested title at all at her father's death. The second position is given up. The Privy Council did not profess to decide more than that she was the person presently entitled to possession as against the persons, then before them, or who had appeared in the earlier stages of the litigation.

8. The 4th subordinate issue is, Whether the Zemindari did not become hers absolutely by reason of its having been acquired or recovered at her own expense and by her own exertions. All the authorities quoted deal with the question as between co-parceners, father and sons, or brothers. It is possible that the analogy would have applied as against the Rani's sisters; but I do not see how this Plaintiff can be prejudiced; for, he was not in a position, nor was his elder brother, either to sue himself or to obstruct or encourage the Rani in her suit. So long as there was any daughter alive, a daughter's son could not come in. The doctrine relied on seems to be based on the acquiescence of the co-parceners, and Plaintiff was not in a position either to object or to acquiesce.

9. Issue IV is determined by the High Court's Judgment in the declaratory suit.

10. Issue V follows as a matter of course so far as the Zemindari is concerned. The Rani could not possibly devise property in which she had only a life-interest.

11. Issue VI is, Whether III was executed by Plaintiff, and IV and V by the sons of his elder brother; and whether they operate as a bar to Plaintiff's claim. A large part of the oral evidence is directed to the proof or disproof of

III; and I shall consider it my duty, if I can find time hereafter, to discuss this evidence at some length. But I am clearly of opinion that, whether genuine or a fabrication, it cannot be regarded as a renunciation by Plaintiff of all claim to the Zemindari. It is a partition deed, and not a deed of renunciation or family compromise. At that time, the whole question between the Rani's family and the usurpers was supposed to turn on the point of division or non-division; and Muttu Vaduga, who was suing for the Zemindari, may well have been advised to obtain or to fabricate a deed of division, which, in the event of his success, would prevent his brother from setting up a claim similar to that of the usurpers and so taking precedence of his sons. The document does not purport to be more than an acknowledgment on the part of Dorasinga that he has divided from Muttu Vaduga, that the latter's suit is entirely on his own account, and that, if he succeeds, the Zemindari will be his separate property and devolve on his lineal heirs. The words 'sons and grandsons', so much relied on, are merely the ordinary formula introduced into all such instruments of partition.

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12. As to the VII issue:—This does not appear to have been pressed. I do not find that the Plaintiff's mother received any endowment—certainly none at all commensurate with the Zemindari. Besides, in my view of the case and the High Court's decisions, her endowment would in no way affect the claim of her son, who claims, not through her, but direct from his grand-father.

13. The VIII issue is not much relied on, except with regard to the question of self-acquisition, which I have already disposed of.

14. Issue IX is as to jewels. It was conceded that these seem to have been the personal property of the Rani, and all that is now asked for is a declaration of Plaintiff's title to recover them or a moiety of them upon payment of the sums for which they are pledged. I do not think that the Plaintiff has made out his right to either the whole or a moiety. As the Rani's own, they would go to her own children, even if there were no Will. I cannot remember anything in the case to show that they were heir-looms or regalia, or even investments out of accumulations. Certainly no evidence of this kind was pointed out in the argument. Many of them must have been, and all still in existence may have been, the Rani's personal ornaments.

15. Issue X relates to certain bungalows and other specific properties, to the Kolkrayams and Pannais, and to outstanding arrears of kist and other debts. The Kolkrayams and Pannais are *prima facie* appurtenant to the Zemindari, and must go with it. The outstanding arrears must also go to the Plaintiff; but I

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cannot make any general declaration as to unknown debts. As to the bungalows, I apprehend that the general rule as to widows (L. R. 2, I. A., 256, 261) applies also to daughters, and that whatever the Rani purchased out of the profits would be an increment to the estate and devolve on the next Zemindar, unless disposed of by her in her life-time. The Chinnasami Aramanai (12) seems to have been such an investment, but has now passed to the 3rd Defendant. Similarly, Fletcher's bungalow in No. 28 has passed to two other daughters of the Rani. The other part of 28, however, viz., Cherry's bungalow, is old Zemindari property which the Rani could not alienate; and nothing beyond her right, title and interest seems to have passed to her daughters. As against the present Defendants, Plaintiff is entitled to a declaration of his title to the other properties 7, 9, 10, 11, 13, 14, 27 and Cherry's bungalow; but his claim to No. 12 and Fletcher's bungalow must be dismissed.

16. The remaining issues concern the 5th Defendant, who claims to hold the entire Zemindari, under a lease granted by the Rani three weeks before her death, and a village named Manalur, under a lease of 1873. The Rani being merely a tenant for life, her leases *prima facie* will not bind her successor. The consideration for the lease of Manalur was Krishnasami's payment of a personal debt due by the Rani, for which he has been reimbursed. That lease is clearly not binding on the Plaintiff. As for the general lease, granted and accepted when the Rani was in a dying state, immediately after her letter AU, and with the full knowledge that Plaintiff had been declared the heir by two Courts, I entertain no doubt that it was a mere colorable transaction, devised to obstruct the Plaintiff in his litigation and to keep the income at the command of the 1st Defendant and his partisans. I cannot now enter into all the circumstances which led me to this unhesitating conclusion; but, lest this should be my only opportunity, it is right that I should mention the evidence of Plaintiff's 15th witness as having been given in a very straight-forward and convincing manner. It is chiefly this attempt to obstruct the Plaintiff and complicate the litigation, which has made me so averse to postpone giving judgment. My view of the matter will also prevent my giving full effect to the lease even as a security for the re-payment of the sums paid as Peishcush; though the 5th Defendant is entitled to have those payments declared a charge on the estate, and ought not to be driven to a separate suit for their recovery. Under the circumstances, I think the fairest course will be to give the Plaintiff a decree for immediate possession and mesne profits, but to reserve to 5th Defendant liberty to apply, in execution, to be put back into possession of a reasonable portion of the estate, if the net amount due to him be not paid within

two months from the date on which it may be fixed and determined, or if the Plaintiff should in any way delay its determination. The 5th Defendant's payments amount to Rs. 1,77,660-7-11, from which mesne profits and costs will have to be deducted.

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17. The Plaintiff's costs on the Zemindari must be paid by the 1st and 5th Defendants; but he must pay the 1st Defendant's costs on the jewels. There will be no order as to the costs on the properties 7, 9, 10, 11, 13, 14 and 27. The 3rd Defendant must have her costs on No. 12, but pay Plaintiff's costs on the other property claimed by her. The other daughters must have their costs on Fletcher's bungalow, but pay Plaintiff's costs on the other property claimed by them.

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—concluded.

(True copy).

(Signed) P. P. HUTCHINS, District Judge.

IN THE HIGH COURT OF JUDICATURE, AT MADRAS.

(—o—)

Friday, the thirty-first day of January.

One thousand eight hundred and seventy-nine.

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PRESENT :—

THE HONORABLE SIR WALTER MORGAN, KNIGHT, *Chief Justice.*

THE HONORABLE MR. JUSTICE INNES.

THE HONORABLE MR. JUSTICE MUTTUSAMI AIYAR.

Appeals Nos. 13 and 23 of 1878.

Muttu Vaduganadha Tevar,
Setukkarasu Nachchiar,
Gouri Nachchiar,
Kottai Nachchiar, and
B. Krishnasami Chetti.

} *Appellants in Appeal No. 13.*

Dorasinga Tevar alias Gouri
Vallubha Tevar

} *Respondent in No. 13, and Appellant
in No. 23.*

Setukkarasu Nachchiar,
Gouri Nachchiar,
Kottai Nachchiar, and
B. Krishnasami Chetti.

} *Respondents in Appeal No. 23.*

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Appeals against the decree of the District Court of Madura in Original
Suit No. 1 of 1877.

These Appeals coming on for hearing, the Court delivered the following

JUDGMENTS.

Mr. Justice Innes.—These are Appeals from the decision of the District Judge of Madura, Mr. Hutchins, decreeing to Plaintiff the recovery of the Zemindari of Sivaganga. The first four Defendants are the son and three daughters of the late Zemindari, Kattama Nachchiar; and Plaintiff is the only surviving son of Vellai Nachchair.

Vellai Nachchiar and Kattama Nachchiar were daughters of the late Istimirar Zemindar, Gouli Vallabha, and with three other daughters survived him at his death.

By the Privy Council's decree in 1863, Kattama Nachchiar was declared entitled to succeed without prejudice to the rights of any other daughters of the Zemindar, who might be surviving. Vellai Nachchiar, Plaintiff's mother, was then dead.

This suit has arisen in consequence of the demise of Kattama Nachchiar, and its object is to have it determined, that Plaintiff, as the eldest surviving grand-son of the Istimirar Zemindar, is entitled to succeed to the Zemindari and to recover the Zemindari and its appurtenances under the decree.

The previous litigation in regard to this estate is matter of judicial history, and that history is to be found in IX. Moore, I. A., 539, and in VI. Mad. H. C. R., p. 310. This last was a suit in which Plaintiff in the life-time of Kattama Nachchiar sought for a decree declaratory of his reversionary title. In the result in the Privy Council, Plaintiff was unsuccessful; but the decisions of the learned Judges of this Court, the late Chief Justice and Mr. Justice Holloway, discuss the principal matters involved in the present suit, and are necessarily of much assistance to us and of the greatest weight in arriving at a conclusion as to the rights involved.

It is not a question in the Appeal, though it was one raised in the written statement of 1st Defendant, whether the Hindu Law of Succession is applicable to persons of the class or so-called caste of the parties; and I only touch upon the question, because in some recent works doubt has been thrown upon its applicability to them. One writer indeed goes so far as to propose that the application of the Hindu Law be restricted to Brahmins, and that the right of

succession of other tribes be determined by an investigation of their distinctive customs. If this course were followed, nearly 30 millions of people in this Presidency alone would be left without any ascertained law of succession, and the difficulties of arriving at a decision in each case would be complicated by a richer growth of perjury and forgery than has ever been seen. The non-Aryan tribes of the Peninsula, and none more so than the Maravars, may be trusted to be alive to their own interests. It may well be that originally the Hindu Law had no application to them. But it is not the case that the Courts have declined to administer their rights of succession under laws other than the Hindu Law, by which they may have claimed to be governed. If they and other Indian non-Aryan tribes have come (as indeed they always have come) to the Courts on the footing that they are governed by Hindu Law, stating their rights in accordance with that law, and appealing to the books and authorities which are recognized as guides to decisions of rights of persons subject to that law, it is reasonable to assume that, though they may not have been originally bound by its provisions, they have long ago conformed to and adopted it, and that the Courts have not erred in administering it to them.

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The whole question of Plaintiff's right to succeed at all appears to turn upon what was the nature of the estate in the hands of the late Rani.

The Hindu Law on the subject, which the Court should endeavour to ascertain, is the existing, living law, which is to be sought, not, merely in ancient treatises and commentaries, but in the consciousness of the people and the practice of every-day life.

From the commencement of the British Administration, the Courts have made it their business to ascertain the alterations to which in the course of ages the ancient law has been subjected; and for this purpose the Judges have from time to time consulted text books and commentaries and the opinions of learned Hindus and eminent Englishmen who have made the subject of Hindu Law a special study: and, unless we are willing, at the suggestion of recent writers, to ignore the principle of *stare decisis*, we shall not be prepared to introduce doubt and uncertainty into titles by treating every question of Hindu Law hitherto decided as *res-integra*, nor to confine ourselves to the consideration of obscure and conflicting texts, the binding authority of many of which has become obsolete; still less to yield to the prevalent spirit of depreciation of the labors of our predecessors and the long course of decisions on questions of Hindu Law, which tend to shew what the law has been in modern times, and still is.

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The view that the estate devolves on the Rani's heirs depends upon whether, as property inherited by a woman, it follows the mode of descent to the kinsmen of the woman, peculiar to property called woman's separate property (see Mitacshara, Ch. I, Sec. III, Para 8, and Ch. II, Section 1, Para 7), and to which a special mode of devolution is attached. The contention of the Appellants is that it does so devolve, and they base their contention on the express language of the Mitacshara, Ch. II, Sec. XI.

The author of the Mitacshara, in Ch. II, Sec. I, considers the devolution of the property of a man dying without issue, and determines that, if the widow survives, she takes the whole estate.

In Ch. II, Sec. XI, in which he proceeds to consider the distribution of the property of a woman upon her death, he appears to lay it down that all property inherited by a woman is woman's property and subject to the mode of devolution after her death peculiar to such property; and it is well recognized that the Mitacshara is the sole authority for this position.

In the commencement of Ch. II, Sec. XI, after stating general rules on the subject of inheritance of woman's property and giving instances of such property, none of which corresponds with property acquired by inheritance from a male, the commentator goes on to say, in Article 8, "A woman's property has been thus described. The author next propounds the distribution of it. The 'kinsmen take it, if she die without issue.'"

Articles 9 to 11 assume that the person, whose property has on her death devolved, has left no issue, while Articles 12 to 25 relate to the case, in which the owner dying has issue, evidently either sons or daughters, or both. The children and their descendants in certain orders are declared to be heirs, the sons coming after the daughters; and the 25th Sec. concludes the subject with the words "On failure of grandsons, also the husband and other relations above mentioned are successors to the wealth." The reference in the words "above mentioned" is to the persons so before mentioned in Articles 9 to 11, in which is set forth the succession to property inherited by a woman, who, dying, leaves no children. These Articles seem to assume the existence of the owner's husband and parents at the date at which the property was inherited. But, if this is so, they cannot have relation to property inherited by a woman from a male.—Mr. Justice West suggests, in the case reported in 8. Bombay, H. C. R. p. 240, that the husband is only named as a possible heir; and there is, no doubt, force in the remark, to be found at page 484 of the 2nd edition of West and Buh-

ler's Hindu Law of Inheritance and Partition, that "No one would contend from the mention of the parents as a man's heirs that the rules for inheritance of a man's property apply only to property acquired during the parents' lives."

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But none of the Hindu text books, treatises or commentaries, either before or after the time of the author of the Mitacshara, lends any support to this view of the descent of property inherited by a woman from a male; and the concurrence of the later commentators and writers of treatises in either excluding property inherited from males from the mass of woman's peculiar property, or in not including it in it, and in making the estate devolve upon the death of the widow upon the heirs of the husband, tends to shew that the law, as it was handed down to these later writers from a period prior to the time at which the author of the Mitacshara lived, was not the law, which it is assumed the author of the Mitacshara intended to propound. If then he had that intention, he would have been giving to the world a doctrine, which differed from what appears to have been before and after his time the accepted doctrine; and, in the absence of evidence as to any change in the law in this respect existing at the period at which the author wrote, it would be natural to expect that he would have dwelt with particularity upon the mode of descent, upon which he insisted, and would not have left it to be vaguely deduced from the very general language of the text of Goutama inserted at the close of the 2nd Article of Section XI, Ch. II, and the tenor of Articles 1, 2, 3 and 4.

He considers the devolution of the property in two main divisions, that of the deceased woman having no issue, and that of her having issue, and divides the former into two subordinate divisions, in which the kind of marriage the woman may have made determines the devolution of the property. No attempt is made to illustrate specially the doctrine as to the devolution of property inherited by a female from a male; and the several rules from Articles 8 to 25 are quite consistent with the author having intended them to be confined, in their application as regards inherited property, to the descent of woman's property derived from a woman. On the assumption that he intended the more general application contended for, he certainly shewed, by his cursory treatment of the question, an indifference, which is not displayed in other parts of his work, to the perpetuation of opinions which he regarded as erroneous.

West J. remarks, at page 269 in the judgment already referred to, in reference to some observations to be found at page 205 of Vol. II of the Madras High Court Reports, that it must be borne in mind that the author of the Mitac-

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shara had earlier in the same Chapter dealt elaborately with the very topic of woman's inheritance, especially a widow's inheritance from her husband. But the Sections as to the estate of the widow and daughters do not at all treat of the devolution of such estates on the demise of the female inheritor; and the force of the conclusion of Ch. II, Section 1, para 39, that the widow takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue, does not consist in the word '*whole*' as an attribute to '*estate*'; for, it was never disputed that, if she took anything, she took the whole: the force lies in that part of the conclusion, which contradicts the views refuted, that a woman only inherits, if she be solicitous of authority for raising up issue. Nor does the word "*whole*" necessarily carry with it any implication of absolute ownership. As remarked in West and Buhler, 2nd edition, page 463, it is clear that a right of absolute disposal did not enter into Vignessvara's conceptions of the essentials of ownership.

An estate may be regarded from two points of view, its extent in mass, and its duration in time. When there are restrictions upon the disposal of property by a man beyond his life-time, as in the case of a man with sons, and the law determines what is to become of it after his death, his estate, except so far as his own share is concerned, which he may dispose of in his life-time, is only in the mass of the property during his life. Except as to that kind of Stridhanam, called Sandayaka, a woman has, according to all Hindu lawyers who have treated on the subject, no independent power of disposal of her Stridhanam; and it is to be especially noted that, in regard to immovable property which may be received from a husband, she has no independent power of disposal. It goes to her heirs after her death. The author of the Mitacshara has laid down no rules as to a woman's power of disposal of her property; and it is not to be presumed that he differed from other Hindu writers in his views as to the limit of her power; and, if property received by a wife from a husband is not such as can be disposed of by a woman in her life-time, the law as to property inherited by a woman from her husband as Stridhanam under the doctrine attributed to the Mitacshara cannot be supposed to have allowed her a larger power of disposal. Thus her estate would still be only in the mass of the property of her life-time, and would correspond in this respect with the estate, which under the ordinary view she is regarded as possessing. No stress, therefore, in favor of the view, that property inherited by a widow from her husband descends as Stridhanam to her heirs, can rightly be laid upon the words "*whole estate*" in the concluding paragraph of Section I, Ch. II of the Mitacshara, as tending to shew that the estate intended by the

author was of a distinct and a more ample character, and carried with it a more ample and absolute power of disposal than what it would, if after her death it devolved upon her husband's heirs, instead of hers.

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On the other side, it is contended that the order of succession to property inherited by a woman from her husband had been already set forth by the author in Ch. II, Section I, Article 2, which shews that, after the death of the widow and daughters, property so inherited reverts to the husband's heirs, and that hence it may be inferred that nothing inconsistent with this could have been intended in Ch. II, Section XI. The reference is to the text of Yajnyavalkya in Ch. II, Section 1, Para 2 of the Mitacshara, "the wife, the daughters also, both parents, brothers likewise, and their sons, gnyatis, cognates, a pupil, and a fellow student; on failure of the first among these, the next in order is heir to the estate of one, who departed for heaven, leaving no male issue." Upon a text of Katyayana, "After her, let the heirs take it", the law in regard to succession as laid down in the passage is, by Jmutavahana, and also in the Viramitrodaya, which follows the Mitacshara, and by the rest of the writers who follow it, held to be that those persons, who are exhibited in the passage as the next heirs on failure of prior claimants, are likewise entitled in succession to such prior claimants. Or, as it is expressed in the Dayabhaga, those persons, who are exhibited as the next heirs on failure of prior claimants, shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom the succession had vested.

If this were the true import of the passage, "the wife, the daughters also, both parents, &c.," it would be impossible to say that the author of the Mitacshara had not set forth the order of the devolution of the property of a woman inherited from her husband; and the argument would be sound that, the author having already in Section 1 of Chapter II clearly laid down the order in which the heirs take, and made daughter's sons take in succession to daughters as heirs of their maternal grandfather, nothing inconsistent with this could have been intended by the language of Section XI.

But the plain and obvious meaning of the passage, apart from the text of Katyayana, with which it is not connected by the author of the Mitacshara, is that the first of the classes of heirs that should be surviving should take the estate. What was to become of it afterwards is neither expressed nor implied. And there is nothing to indicate that either Yajnyavalkya or his commentator understood

Judgment of this text as setting forth the order in which the heirs should take in succession to the High Court one another.
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If this be so, the author of the Mitacshara had not dealt, *specially* with the devolution of the property of a woman inherited from a male in any part of his treatise. And if, on the one hand, it be argued that in a Section, which declares all property however acquired by a woman to be Stridhanam, and then proceeds to deal with the devolution of Stridhanam, there is ground for saying that, in so proceeding to deal with the subject, property inherited from males by females was lost sight of, or at all events was not specifically dealt with, and that the devolution of it is certainly not specifically provided for, and that hence it may be inferred that after all it was not intended to declare that property inherited from males should descend as woman's peculiar property; it may with greater force be urged, on the other side, that the subject is nowhere else dealt with at all, either specially or generally, and that the proper inference is that the rules as to the descent of woman's property given generally in Chapter II, Section XI, without any distinction between particular modes of its acquisition, were intended to apply equally to property inherited by females from males, as to other property classed under the general term, Stridhanam. It appears then that, notwithstanding the meagre treatment of the subject by the author of the Mitacshara and the other grounds for doubting whether he really intended to declare that all property inherited by a woman from males should devolve on her death on her own heirs, there is no means of accounting for the language employed, except on the supposition that the general words were intended to have their full import.

But all the Courts, including the High Court of Bombay, are nevertheless agreed that, in the case of the widow, the mother and grandmother, the estate taken by them by inheritance from male members of their family reverts to the next heir to the last male holder in all those parts of India, which acknowledge the authority of the Mitacshara.

As to these three female members of a family, there can now be no question. The subject has been well sifted in numerous decisions, and these latter are supported by all the treatises on the Hindu Law of Succession, not excepting those which follow the Mitacshara; and it must be conceded that, whatever the ancient law may have been, the doctrine of the Mitacshara as to these three at least has not descended as law to the present time.

It has been consistently held by all Hindu writers, who have expressly discussed the subject, that, if the widow first takes the inheritance, upon her death

that relative succeeds, who would have been the heir of her husband, if he had died at that time; and upon this all the decided cases are agreed, and, according to all authorities, the daughter is that heir.

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The inheritance of the daughter, therefore, is not to her mother, but to her father. But it is said a daughter takes an absolute estate and can devolve it upon her own heirs. Her daughter would thus be the heir before her son.

—continued.

Analogy would suggest that the same reasons, which exist in the case of the widow, the mother, and the grandmother, for holding that their estate is special and qualified, exist equally in the case of the daughter, as they rest upon the principle of the want of independence of woman and the necessity of preserving the estate for the heirs, i. e., the heirs of the last male holder. Were the daughter's daughter to succeed after the daughter, the estate would by reason of her marriage devolve in a different line, and the object of continuing it to the lineage of the last male holder would be defeated.

But a daughter's son stands on a different footing from a daughter's daughter, and both by the Bengal School, which puts the right to succeed upon the superior spiritual benefit to be conferred by him upon the grand-father (Dāyabhāga, Chapter XI, Section 1, Verse 59) and by the Mitācshara, which puts it on the ground of propinquity (Chapter II, Section II, Verse 6) and makes the duty of the offering follow the inheritance, is placed upon the footing of a son's son; and, although the text of Menu, upon which the reasoning of the author of the Mitācshara is founded, when rightly rendered, applies only to the son of a daughter, who either has been actually or impliedly appointed: and the text of Vishnu quoted attributes the character of a son's son to a daughter's son, only in his capacity of an offerer, the opinion of the author as to what the law was as it existed in his time is clear, that a daughter's son is to be regarded as a son's son, and is to take the inheritance upon that footing. But in the Smṛiti Chandrika a text of Vishnu is quoted to the effect, that, where there exists son or grandson, the daughter's son inherits the wealth; and Varadarāja, the author of the Vyavahara Nirṇaya, says "In default of sons, what is to be done by son's sons is to be actively done by daughter's sons", and grounds his proposition upon the text of Menu from Chapter IX of the Institutes before referred to, and two other texts that precede it.

I have before observed upon the text of Yājñyavalkya quoted at commencement of Chapter II, Section I of the Mitācshara, and upon the sense in which the words, "upon failure", in connection with the text of Katyāyana, are

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understood by the Bengal School of writers and by the author of the Viramitrodaya and others who follow the Mitacshara.

Although their views are not admissible as, and do not profess to be, an exposition of the meaning of the passage standing by itself, they go far to show that the order of succession of heirs, one to another, corresponded, at the several periods at which they wrote, to that given in the text as the order in which, in default of the prior named class, the next surviving should succeed, and the daughter's son, therefore, after the decease of the daughter. And looking at the view of the law regulating the descent of the estate, viz., the keeping the estate as far as possible in the line of those nearest related by blood to the deceased owner ("After her, let the heirs take it"), and the continuation of the deceased owner's male line, as shown by the exclusion of all but the excepted females, it would be unreasonable to conclude without clear authority that, in the competition between the sons of a daughter and the daughters of a daughter who has inherited as heir to her father, the same objects are not recognized in the devolution of the estate after the death of the daughter, as in the case of the widow, the mother, and the grandmother. The books, with exception of the Mitacshara in Ch. II, Sec. XI, and the authority of decided cases—excepting those which will now be noticed—are at one, that the succession is to the daughter's sons.

The Bombay cases support the doctrine of the Mitacshara in reference to the devolution of the estate taken by a daughter from her father. Such an estate is said to descend as *Siridhana*, and not to revert to the heirs of the father.

But, as Mr. Mayne, in his learned work, points out, one of those cases (I. Bombay High Court, 120) is unsatisfactory, as it proceeds upon a text of Menu, to which a different effect is given to what is given it in every other part of India. Another case (I. Bombay, 209) is hardly an authority, because the brother of the successful female was the last male owner, and was the person to be traced from; and, in reality, therefore, she took as sister, and not as daughter of the last holder (her mother). The case reported in 8. Bombay. O. C., page 244, is the third. In this the sister of the last male holder was held to succeed on the death of the daughter of the last male holder. But in this case the result would in principle have been the same in Madras, as the heir found entitled was the heir of the last male holder; and, except for the opinion of Mr. Justice West in his elaborate judgment as to the descent of property inherited by a woman from a male, the case can scarcely be regarded as of importance to a decision of the question as to the descent of property inherited by a daughter.

The decision in VI, Madras High Court Reports, and that in 14, Bengal Law Reports, page 235, Chotai Lal *versus* Chennoo Lal, in which the decision at VI, Madras High Court Reports, is considered and approved, and the cases in the Bombay High Court are dissented from, are weighty authorities; and the decision of the High Court of Calcutta, just referred to, has recently been confirmed in appeal by the Privy Council; and this last decision is a binding authority upon the point, that the estate, when so taken by a daughter, does not go to her heirs upon her death, but to the heirs of the last male holder; and, according to all authorities, the daughter's sons are absolute heirs.

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One of the questions, however, raised in the suit is, whether the circumstance as that Kattama Nachchiar was the only unmarried daughter at her father's death, the only daughter with male issue at Uga Muttu's death, and the only surviving daughter at the date of the Privy Council's Judgment in her favor, or any one of these circumstances, can make the difference of giving her an absolute, instead of a limited, estate. But the rule as regards the estate taken by a daughter does not vary according to the existence or absence of any of these circumstances.

A passage in the Dayabhaga, Chapter XI, Section 2, Para 30, is the sole foundation for the opinion—that, if a daughter in whom the estate has vested have issue, the inheritance is continued in her line.

This passage runs as follows:—"But if a maiden daughter, in whom the succession has vested, and who has been afterwards married, die (without leaving issue), the estate which was hers becomes the property of those persons, a married daughter, or others, who would regularly succeed if there were no such (unmarried daughter) in whom the inheritance vested."

The words "without leaving issue" have been held to imply that, if there be issue, the estate does not go to the surviving daughter, but to the issue. But they are an interpolation of the commentator, Sri Krishna; and it is not now doubted in cases governed by the Mitacshara Law that, although the maiden daughter takes in competition with the married daughter, she cannot by having issue continue her estate in her line. It goes over to the nearest surviving heir of the male holder, who, in the case of daughters surviving, would be those daughters. *Danlat Kocer versus Burma Deo*. 22. W. R. 55.

The conclusion therefore is that the estate on the demise of the Rani did not devolve in her line, but in the line of the nearest heirs of her father, who in the present case are the surviving sons of his daughters. Then follows the

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question, whether the recovery of the estate by Kattama Nachohiar at her own expense and through her own exertions did not confer on her an absolute title.

At the most, under the texts referred to, she would be entitled to claim a fourth part as her exclusive share; but the present case is not the same as those to which the texts apply.

The Rani may possibly have recovered the Zemindari solely by her own exertions and at her own expense. But what she recovered was under the Privy Council's *dawar*. It was an estate which she took to her life and then passes to the heirs of her father. The mere possession under the decree could not extend her right beyond the limit imposed upon it by the legal nature of the estate which she took under the decree. Were it otherwise, there would be this inconvenience, that every Hindu widow, who recovers by legal process, would, by so doing, be able to change the nominal course of succession, and convert inheritance from a male into Stridhanam.

Having arrived at the conclusion, then, that, on the demise of the Rani, there being no other surviving daughter of the Istimirar Zemindar, the daughter's sons succeed, what consequence follows? In the case of an ordinary inheritance, all the surviving sons of all the daughters would take *per capita*. It is contended that, in the case of an impartible Zemindari, the eldest grandson of the Zemindar takes the Zemindari to the exclusion of the others. It is denied by Defendants that the Zemindari is impartible; and the further question is raised as to the right of the eldest grandson to succeed.

First, as to the question of impartibility;—It appears to me that it is very doubtful upon the evidence whether the estate is impartible. It clearly is not a Raj, though Lord Clive in his proclamation (Page 97, Appendix, Blue Book) speaks of the widow as a princess. Nor does it seem to me to be in the nature of a Raj, as it has none of the distinctive incidents of a petty sovereignty. Carved out of the old Ramnad estate in 1780, it escheated about 1792; and in 1801 an entirely fresh grant of it, as it appears to me, was made to a collateral relative of the original Zemindar of 1780. The Government (probably from policy) considered the claims of some other collateral relatives and rejected them. The proclamation recites that the Governor in Council "has been pleased to nominate, appoint and constitute Padamattur Udaya Tevar, collaterally descended from the progenitors of the first Zemindar of Sivaganga, Sasivarana Tevar, to be the present Zemindar of Sivaganga." It is obvious that the object aimed at was to settle the country, and with this view to continue the estate on the same footing

as before to a member of the same family. If in this light it can be regarded as having existed from 1730 to the present time, the length of time during which it has continued impartible is not of itself sufficient, having regard to the circumstances to establish the incident of impartibility as attaching to the estate; for, the first Zemindar had only one son, who could not claim as against his father a share in his separate acquisition. Then came the son, who had no co-parceners, and after him the widow of the late Zemindar. The new creation in 1801 did not leave room for any demand for partition, and the Istimirar Zemindar had no sons. In 1829, the estate went to his nephew; and, on his death in 1831, his son took the estate, and died in 1845. In 1831 commenced the long litigation which only terminated in 1863. The fact, therefore, that there has not been a partition since 1730, goes very little way, as it appears to me, towards shewing that the estate is impartible. It is apparent that the late Zemindar (Page 90, Appendix, Blue Book) thought that it was partible. By "partible", however, is meant that in which a co-parcener can claim partition. Every estate is "partible" in the sense that, however long the custom of impartibility may have existed, he, who singly possesses the entire interest, can apportion the estate of his own single will, or, if the holder has co-parceners, he and they collectively may do so by joint consent. The Zemindar, in his replies to the questions sent him to be answered, refers apparently to what he regarded as allowable on the part of a head of a family, and not to the rights of co-parceners to demand partition. The annual in 1803 authorizes the Zemindar to hold in perpetuity to him, himself, his heirs, successors and assigns; and the natural conclusion is that it has attached to it the ordinary incidents of a Hindu estate.

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As to what is said of admissions:—1st Defendant certainly did not admit that the estate was impartible. 2nd, 3rd and 4th Defendants set up impartibility, in the sense that the estate was not an ordinary ancestral estate, but one entire, and absolute estate vesting solely in the Rani to the exclusion of all but her own line. This is no admission, that, if the estate devolves upon daughter's sons as a class, it is impartible among that class and can be held by but one of their heirs at a time.

The judgment in the Sivaganga case also is not conclusive, because partibility or impartibility was not a question in that suit, and what was said by the Judicial Committee as to the character of the estate was mere *obiter dictum*. It may be the policy of Government to keep such estates together, but there is no law against breaking them up. For revenue purposes, such estates may be recognized as an entirety, and subject to certain liabilities if the *peishcush* is not paid

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on the whole; but this imposes no restriction upon partition, though such an estate, when broken up, may, still for revenue purposes, be regarded as one entire estate. Nothing therefore can be concluded in favor of impartibility from the mere creation of such estates and the placing them in the hands of a single holder. The public belief or consciousness as to impartibility of such estates is difficult of ascertainment, and would probably resolve itself into a belief in the permanence of that condition of things, with the existence of which the people were familiar. We have no evidence of it in the present case, and I think it would be of little value, if we had.

I do not think that the view I take is necessarily inconsistent with that taken in the Padamattur case as to the impartibility of that estate, because the existence of an estate which has by custom become impartible within the limit of a partible estate is quite possible.

At all events, the fuller consideration of the question in the present appeal has led me to the opinion I now entertain upon the question of impartibility as regards the Zemindari of Sivaganga.

No opportunity has been afforded in the succession to this Zemindari of enforcing a rule of primogeniture, if any such existed, nor is there any trace of its existence otherwise. If anything, the evidence is rather the other way, since the Istiwar Zemindar, as the younger of two brothers, the elder of whom, though originally proclaimed by Government as Zemindar, waived his claim as a collateral in favor of the younger.

The conclusion I arrive at is that the custom of impartibility and primogeniture have not been made out.

If the estate be impartible, and this I believe is the opinion of the majority of the Court, then, I agree that, although no custom of primogeniture has been proved, the rule of primogeniture in the case of two competing grandsons should be followed. There is no evidence absolutely negating such a custom or showing the existence of any custom inconsistent with such a custom. The holder of a Zemindari is in a position, which does not interfere with the rule of succession, further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not disserved, any more than by the succession of co-parteners to partible property, but the mode of its beneficial enjoyment is different.

Instead of several members of the family holding the property in common, one takes it in its entirety: and the common law rights of the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent on the same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each and to a provision for maintenance in lieu of co-parcenary shares. (See. 6. Mad. H. Court Reports, p. 105). The position of a Zemindar is then analogous to that of the managing member of a family; and this analogy, in the case of two members of the family of the same class and equally remote from the holder whose heir is to succeed, suggests the succession of the elder as that which is fittest, as being most in accordance with the spirit of the Hindu Law.

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The next question is as to the genuineness, and the effect, if genuine, of document III.

This document purports to be a deed of partition executed between Mutu Vijaya Raghunadha Muttu Vaduga Peria Udaya Tevar and his younger brother, Dorasingam *alias* Gouri Vallabha Tevar, the Plaintiff in the present suit, on the 28th September 1850.

It sets forth that 400 Rs. alone remained to them after the sale of ancestral and other property, with exception of one village, and that the brothers had divided the proceeds; (and) that they should jointly pay former debts and debts incurred in suits. It then proceeds—As you, the elder brother alone, are conducting the suit for the Zemindari of Sivaganga in the Sadr Court, you yourself are to bear the costs of the suit and recover it and without any connection on the part of the younger brother, Dorasingam *alias* Gouri Vallabha Tevar, with the Zemindari property; you, your sons and your grandsons, from generation to generation, are to enjoy the said Zemindari. Henceforward, only friendly relationship will subsist between us, and no property relationship. Thus the younger brother, Dorasinga, has given this partition deed to his elder brother, &c., &c. I think there is every ground for believing this document to be genuine, though its genuineness is now impeached.

The document is on a stamp, and the entry in the Stamp Vendor's book shows that the stamp was purchased on the date on which the document was executed, 28th September 1850. The endorsement, according to the evidence of the 16th witness, is in his hand-writing. He swears that he was the private Gumnasta of Selvaraya Naidu, the Stamp Agent at the Madara Cateherri, from 1834 to 1853, and that such endorsements were signed by the Stamp Agent. He also swears

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that the entry in the register produced by the Collector's Record-keeper is in his hand-writing, and that he used to keep this register. The endorsement on III shews that the purpose of the purchase was the execution of "a partition deed on account of Dorasinga Tevar *alias* Gouri Vallabha Tevar". The 17th witness, who was the nephew of the Stamp Agent, Selvaraya, and is a Clerk in the Collector's Office, swears that the signature to the endorsement is that of his uncle.

The document was not, so far as can be ascertained, publicly brought forward until the institution of the declaratory suit of 1869.

A petition then was put in by Ulaganadha, son of Muttu Vaduga. The evidence of 22nd witness, who was Agent to Plaintiff in the declaratory suit, shews that he was made aware of the petition, which he says made mention of a division deed. He got a copy of the petition and of the order passed upon it, and he also got a copy of the division deed referred to in the petition, and spoke to Plaintiff about it: and Plaintiff did not say it was not a genuine document. There seems to me to be no reason to doubt that the document came into existence on the date it bears; and then, if forged, it must have been forged by Muttu Vaduga in support of his sole title to the Zemindari. But it is improbable that it should have been forged; and the supposition that it is so is inconsistent with the conduct of Plaintiff in his indifference to the assertions in the petition and to the order of the Court passed upon the petition.

There is other evidence in corroboration of that which I have noticed in support of its genuineness, which I need not notice in detail. I will only say that the circumstance of its not having been brought forward publicly before 1869 ought not to tell against its genuineness, as there does not appear to have been any occasion when its production was called for by the circumstances. It was urged that the decision in 1867 between the widows of Muttu Vaduga, apportioning their property between their sons, was eminently an occasion on which such a document would have been referred to; but I do not see what possible bearing such a document could have upon the questions likely to arise upon such an apportionment. In no view of the rights of Plaintiff could he have been entitled to share in the property of Muttu Vaduga's widows, or they in his; nor would the question of the division between him and Muttu Vaduga affect in any degree the rights of the sons of Muttu Vaduga and his widows to the property which the widows proceeded to divide. I do not consider the evidence for Plaintiff sufficient to negative the cogent evidence in favor of the genuineness of the document. Then as to the effect of it. I quite agree with what was said by the learned Advocate General, who, among other cases, referred to *Lyall vs. Edwards*, C. H. and

N., 337, that transactions of this character must be limited in their operation to the matter contemplated by the parties at the execution of them. It must be recollected that in 1850 Muttu Vaduga (in consequence of the order of the Privy Council of 1845) renewed the claim, which had been preferred by his mother in his behalf in the suit of 1832. It was of course of importance to the success of Muttu Vaduga's object, not only to secure himself from rivalry in the litigation in which he had joined, but also, should he be successful, to guard against future claims to the Zemindari on the part of his brother, which might interfere prejudicially with the rights of his sons. But there is no clear evidence of the motive on either side which led to the execution of the document. The contents of it, however, sufficiently show that it is, as the learned Judge says, a partition deed, and not a release.

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It seems to convey (in that portion of it which has been construed as a release) a promise on the part of Plaintiff not to compete for the Zemindari, and that, if recovered, it should be enjoyed by the elder brother and his race, free of all claim on his part. But it seems apparent that it had relation to a supposed present vested right to the Zemindari, and not to future and contingent rights. The supposed present vested right to the Zemindari was afterwards negatived by the decree of the Privy Council; and, if the promise were obligatory, the obligation then ceased. But, assuming the obligation to be still existent, what is the effect of it against Plaintiff: by exhibits IV and V, executed by Ulaganadha and the sons of Muttu Vaduga in favor of 1st Defendant they assign to him all their rights in the Zemindari of Sivaganga "under law and under the deed of division" (document III). Now what are their rights to the Zemindari? Whatever the rights of Plaintiff and 1st Defendant may be, daughter's grandsons cannot succeed after daughters to the estate of their great grand-father. They had no rights to convey, and therefore the promise, if construed as a promise not to interfere with their rights, is not violated by the action taken by Plaintiff in bringing this suit.

The assignments by documents IV and V, therefore, conveyed nothing that can be effectually used to debar Plaintiff from preferring his claim.

In regard to the Kolkayams, the question arises thus. These were lands held as Inam lands at a rent considerably below the assessment rent. The peishcush, it is said, was fixed with reference to this low rent. These low rents were therefore the only assets of the Zemindari from these lands. The Inam rights, i. e., the rights to hold at the low rent, were brought in by the Rani. The

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claim of the Defendants is that the difference between the low Inam rent and the full assessments chargeable ought to enure to the Rani's heirs. Any improvement in the rental of the Zemindari must, I think, be so appurtenant to the Zemindari as to pass with it; but, assuming that these items of Defendant's claim could be viewed as property standing, in regard to its devolution, on the same footing with the income of the Zemindari with which the Inam rights were bought up, then, as this property was not disposed of by the Rani in her life-time, it would pass with the Zemindari on the principle of the decision in *IL Moore's I. A.*, 256. Nothing was said as to the Pannais, and I do not understand how it can be maintained that they do not pass with the Zemindari.

As to the bungalows, I think the learned Judge is right. The personal money decree could not pass more than the interest of the Rani in Cherry's bungalow.

Then as to the leases:—The 5th Defendant himself admits that the amount advanced, which was the consideration for the Manalur lease, has been repaid; even had it not been repaid, the estate could not be charged with it. The debt, which it was advanced to discharge, was a purely personal debt, and the lease could not be binding upon Plaintiff beyond the Rani's life.

As to the general lease, it is a lease of the Zemindari for 7 years and 2 months. There were arrears of peishcush to the extent of 2,27,974 Rs., and of this, 1,06,286 were owing for Fasli 1285 (1875-76), and the rest for Fasli 1286 (1876-77).

The lease, dated 1st May 1877, recites that the Government have expressed their willingness to receive the kists of the current Fasli 1287 or 1877-78 next year 1878, if the arrears of the last Fasli be paid before the end of April this year, and that in default it is likely that the Zemindari will be put in auction for arrears and for current kists; and whereas, in consequence of the scanty fall of rain during the current Fasli, there has been a severe famine, and the out-turn of the Zemindari having been deficient and hardly sufficient to meet the peishcush, &c., you have agreed to pay into the Collector's Office Rs. 1,06,286, being the arrears of peishcush and interest during the last Fasli, and thus to save the Zemindari from being sold in auction, &c., &c.

Thus the consideration for the lease was first of all the payment of one year's arrears of peishcush immediately, in order to save the Zemindari from being sold in public auction. It was said that the 5th Defendant thus advanced the

Rani the sum of Rs. 1,06,286, and was only to recover this amount in the last Judgment of the High Court dated 31st January 1879.

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Assuming this to be so, yet, if it is shewn that the object or one of the principal objects of the lease was to obstruct the Plaintiff in obtaining possession in case he should succeed in the declaratory suit, we could not hold the lease valid as against Plaintiff beyond the life-time of the Rani, except for the recovery of the amount of peishcush actually paid by him. The evidence of the 2nd, 3rd, 5th, 7th and 15th witnesses for Plaintiff seems to make it very clear, if their evidence is to be believed, that the lease was a mere contrivance to obstruct Plaintiff from obtaining possession, if, as was thought not improbable, he should succeed in the declaratory suit.

The position of these witnesses was such that their evidence is not improbable, and that of the 15th witness is especially noticed by the Judge as having been given in a manner which impressed him favorably; and, at the date of giving his evidence, he was still in the service of Mr. Fischer, the Rani's Agent. He says "I had a talk with Krishnasami himself five or six days after the lease, but not before. He then told me he had not taken the lease for his own profit and benefit, but on account of the Rani and her children. He also said he had given a letter to the Rani undertaking to give up the lease whenever she asked him to do so. I heard the same from Mr. Fischer."

5th witness, who was a store-keeper in the Zemindari, and states in cross-examination that he was the Rani's confidential servant, says that Mr. Fischer had said to him that the Rani was dangerously ill, and that, if she died, Dorasinga (Plaintiff), who had had two decrees in his favor, would interfere with the Zemindari; and that he had therefore told the Rani to arrange a lease, and asked him, as he seemed doubtful about it, to speak to him (her?) and persuade her to grant it. "Accordingly", he says, "I went and saw the Rani; I told her fully that it would be a very good thing for her. She said that her only difficulty was that, if she gave another lease, her son, who should be crowned and put in possession, would not get any advantage. I told Mr. Fischer this. He said, the lease was only designed to prevent Dorasinga from coming in, and would be nominal, and that some private arrangement would be made with the Chetti. I told the Rani so. She said—if so, it might be done, and that she depended on them." The other witnesses give evidence much to the same effect. No ground has been shown for disbelieving the evidence of these witnesses, except the denial of Mr.

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Fischer and 5th Defendant that anything of the kind was said or understood. Their evidence also receives support from the circumstances of the case. What could be the possible object of the lease? The condition of the Zemindari was not such as to call for such a measure.

The attachment on the Zemindari on account of Chidambara Chetti's decree was removed in March 1877, and the Government peishcush was the only pressing charge. Document XLVIII shows the indulgence which the Government were prepared to extend to the Rani; and she could have had no difficulty in raising the sum required, without resorting to the extreme measure of granting a lease for seven years.

The lease seems to be the natural sequel of the failure of the compromise. If Plaintiff could not be induced to take less than the Zemindari, every obstruction should be placed in the way of his getting possession in case of the Rani's death, so as to afford facilities to the Rani's immediate heirs in maintaining their rights to succeed.

But, even in this view, the 5th Defendant is entitled to be reimbursed sums paid by him in discharge of peishcush, of which Plaintiff in succeeding will have the benefit. The peishcush is a charge upon the estate, not simply upon the life-interest of the holder for the time being, and the discharge of arrears of peishcush by the 5th Defendant gives him a right to re-payment from the proceeds of the estate, irrespective of the causes which led to the accrual of the arrears. The new holder is not absolved from payment of arrears of peishcush by the circumstance that these arrears have arisen from the fraud or misconduct of his predecessor; and the discharge by 5th Defendant of arrears of peishcush, which, if he had not paid them, would have either led to the estate being sold in the life-time of the Rani to the prejudice of next heir or would otherwise have remained a debt to the State, which the next heir would be bound to pay, gives him a right to re-payment from the proceeds of the estate, irrespective of the causes which led to the accrual of the arrears, provided he did not intend to make a present to the Rani of the amount advanced; and it cannot be doubted that he had no intention of advancing the amount gratuitously.

As to how he should be reimbursed, I think that the mode proposed by the District Judge meets the justice of the case and is unobjectionable, and I do not feel disposed to disturb his judgment on that point.

Except in regard to the view, which I take as to the partibility of the Zemindari,—a view which is not concurred in by the majority of the Court,—

the Appeals, I think, substantially fail; and, as the majority of the Court hold that the Zemindari is impartible, the Appeals will be dismissed with costs.

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Mr. Justice Muttusami Aiyar.—This is an action of ejectment, and the question for decision is, whether the Plaintiff is entitled to possession as against the Defendants. The contest in this case is mainly between the Plaintiff and the 1st Defendant, and the several questions arising for decision in connexion therewith are sufficiently set forth in the judgment appealed against. The first question argued before us at some length relates to the character of the Zemindari, which is the subject of this litigation. It is contended for the Appellant that the Zemindari is partible, and that there is no proof that by custom it is impartible and capable of enjoyment but by one member of the family at a time. The state of the pleadings in this cause and of the admissions on record renders it doubtful whether this contention is open to the Appellant at this stage of the litigation. In his written statement, the 1st Defendant did not deny that the Zemindari was impartible, though impartibility was distinctly alleged in para 19 of the plaint, and though the rule of succession mentioned in the same para as prevailing in the Zemindari was expressly denied. The learned Counsel for the Appellant not only did not apply for an issue in the Court below on the subject of partibility, but also did oppose the application made by the Plaintiff for an additional issue, viz., whether he was entitled to recover the whole or any part of the property in dispute (*vide* the record of issues settled in the Court below). It appears further from the same document that it was agreed that all statements and admissions made in Original Suit No. 2 of 1869 were to be taken as made in this suit also, unless notice to the contrary was given to the opposite side and the Court within a fortnight. In the suit of 1869, to which the 1st Defendant was a party by his guardian, it was agreed that the judgment in the Sivaganga case, reported in 9, Moore's Indian Appeals, should be admitted as to the facts set forth in that judgment (BX, Plaintiff's Exhibits, page 181); and in this, the Judicial Committee observe,—“The Zemindari is admitted to be in the nature of a principality impartible and capable of enjoyment by only one member of the family at a time. But, whatever suggestions of a special custom of descent may heretofore have been made, (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu Law with such qualifications only as flow from the impartible character of the subject.”—9, Moore's Indian Appeals, 579 and 80. In these circumstances, it is perhaps hardly open to the Appellant to deny the impartibility of the Zemindari; but, as the case is one of importance, and as our attention is not called to any

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Judgment of evidence in his power bearing on the subject as excluded from the record, I consider it desirable to mention the estimate I form of such evidence as there is before us.

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This Zemindari was created in 1780. Ever since, it has always been held by one member of the family at a time, first by the original Zemindar, then by his only son, then by the son's widow, then by the Istimirar Zemindar, then by the eldest of his brother's descendants, and lastly by the 1st Defendant's mother. The contention for the Appellant both in this Court and in the Court below seems to be, not that the Zemindari has not hitherto been held only by one member of the family, but, though it may not have been divided heretofore, it is capable of being divided under special circumstances, such as the intervention of women or the absence of any recognized rule or custom regulating the succession to it.

Again, extensive litigation has prevailed in this Zemindari since 1823. Partibility has nowhere been alleged; but, on the other hand, it has throughout been treated as impartible both in the Courts in this country and in the Privy Council. In their judgment in the suit of 1869, the Judicial Committee refer to the character of the subject of this litigation as that of an impartible Raj to be held only by one member of the family at a time.

There are also indications of a general belief in the family from the year 1806 that the Zemindari is indivisible. In 1806, the Istimirar Zemindar stated in his letter to the Collector of Ramnad that his sons should hold it according to custom consecutively. (6. Blue Book, Appendix, page 109). In 1823, his brother's sons asserted a right to the entire Zemindari as representing the eldest branch of the family, IX. Moore's Indian Appeals, 543. In 1832, Unga Muttu Nachohiar, the widow of the Istimirar Zemindar, claimed the Zemindari as the eldest surviving widow; and in 1833, Bodha Gurusami Tevar, the grand-nephew of the Istimirar Zemindar, stated in his answer that the Zemindari was indivisible (Blue Book, p. 8.) In 1850, the late Rani and her two elder sisters set forth, in their application for permission to continue Unga Muttu's appeal, that they had arranged for enjoying the Zemindari *successively*. IX. Moore's Indian Appeals, 556. In the suit filed by the late Rani in 1856, she admitted that it was in the nature of an impartible Raj; and, in this very suit, the 2nd to 4th Defendants, sisters of the 1st Defendant, and certainly not in collusion with the Plaintiff, made a similar admission (para 9 of their written statement.) It appears to have been considered that, even when women succeeded to the Zemindari, they should take it as a single person.

It is to be observed that, prior to 1801, this Zemindari was a Palayapat, the owner of which originally acknowledged the ruler of Madura as Lord Paramount, paid him a tribute and rendered him military service; but, in other respects, he was a petty chief or ruler in his own Palayapat. In passing, I may call attention to the history and tenure of this Zemindari, which are set forth in Nelson's Manual published with the permission of Government. It appears from it that the Madura Palayams were created by the founder of the Nayak dynasty who assumed the Government of the Pandiyan territory in 1559, and that their tenure, as described therein (part III, page 98) was that of feudal estates and precisely similar to that of the Narganti Palayam, in connexion with which the Judicial Committee say "A Palayam is in the nature of a Raj. It may belong to an undivided family, but it is not the subject of partition. It can be held only by one member of the family at a time, who is styled the Palayagar, the other members being entitled to a maintenance or an allowance out of the estate."

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I may also observe that the Zemindari of Sivaganga originally formed part of the ancient Raj of Ramnad, regarding which a claim is laid to a very high antiquity, the title of Setupati (guardian of the Isthmus of Ramaswaram), which the family still bears, lending weight to that claim; and, in common with other ancient Zemindaries, it is impartible by custom.

The estate of Padamattur is an off-shoot of Sivaganga, and it has been held to be impartible.—VII. M. H. C. R., 171.

I may also allude to the consciousness among the people of the country indicated by the long course of decisions collected in H. Norton's Leading Cases, page 478, and referred to in the decision of this Court in the case of the Nuzvid Zemindari (E. A. 36 of 74).

The learned Counsel for the Appellant lays considerable stress on the rule of the Hindu Law, which declares that ordinary Hindu property is partible. But we have before us the case of property in the special position of a Zemindari or principality, which has been held for nearly 150 years by one member of the family at a time. The case before us is not the case of an ordinary Hindu, but of a person, whose ancestors were enjoying certain feudal rights before 1801 and bound to render certain feudal duties, thus holding by a special tenure. As was observed by this Court in the Nuzvid case, the Zemindari estate must be regarded as falling under one or other of the two classes of exceptions to the ordinary Hindu Law. An impartible estate may be so, either, first, as being in the nature of a Raj or principality, or second, as being governed by a family custom.

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It is then urged for the Appellant that the Zemindari of Sivaganga owes its origin to partition, and that the creation of the Padamattur estate is also an instance of partition. The several accounts given of the creation of this Zemindari differ from one another. In 9. Moore's Indian Appeals, 541, it is stated to have been created by Saadut Ally Khan, Nabob of the Carnatic, in the year 1730, and to have been given by him as an hereditary fief to the original Zemindar as a reward for his military services. According to Exhibit LVIII, it was created by the Zemindar of Ramnad and given to the original Zemindar as a reward for the service rendered by him in re-conquering the Ramnad Raj from the usurper, Bhavani Sankara Tevan. In Nelson's Manual, which was referred to at the argument in the Court below, Part III, 249, it is said to be the result of partition of the Zemindari of Ramnad into three and two-fifths by Kattu Tevan and the original Zemindar who recovered Ramnad and overthrew the usurper at the battle of Orayur. Whatever version we adopt as correct, it is certainly not in favor of the Appellant; for, according to the 1st, the creation of this Zemindari was an act of State: according to the 2nd, it was a grant made by a petty ruler to one who aided him in re-conquering his principality; and, according to the 3rd, it was a partition by right of conquest; while, according to none, it was a partition in recognition of concurrent co-parcenary right. With reference to the separation of the Padamattur estate, it was the result of a grant of a few villages as a provision for a junior branch of the family and in the nature of a family arrangement. It must be remembered here that the partibility now in contest is as the ordinary incident of a co-parcenary right or co-heirship, and not as the occasional result of an act of State or right of conquest, which may over-ride the provisions of the Municipal Law, or of a family arrangement, which has a place even in family systems, which, as in Malabar, recognize impartibility as the ordinary character of private property. Again, some stress is laid on the opinion of the Istimirar Zemindar, that he had a right to divide the Zemindari among his children from motives of regard, Exhibit LVIII; but I do not think that we can attach much weight to it, and I see reason to suspect that he was describing rather his wish than the custom prevailing in the Zemindari. It was not acted upon by the Privy Council, in so far as it substitutes as heirs sons-in-law for daughters and places daughters' sons before widows and daughters; and it also differs from the opinion of 1806, already mentioned, and which favored the succession of his nephews. Even taking it as an accurate description of the family custom, it only gives a right to the Zemindar to make a partition, perhaps, in the nature of a family arrangement. It appears further from Exhibit LVII that about this time the Istimirar Zemindar was very anxious to retain his power of

alienation and that it should not be taken away from him.

Another contention for the Appellant is that the Zemindari, which is the subject of this suit, escheated to the Crown for failure of lineal heirs, and was re-granted to the Istimirar Zemindar in 1801, and that it is therefore not entitled to be treated as an ancient Zemindari. The proclamation of 1801, no doubt, declared the Zemindari to be an escheat, but re-granted it at once to a collateral relation of the original Zemindar's family. The estate did not pass into the possession of Government even for a day; and, when Mr. Lushington proposed a temporary assumption of management in order that its resources might be accurately ascertained, the Special Commission for the settlement of the southern Palayams refused to sanction it, lest it might create impressions unfavorable to Government (Blue Book, Appendix, 271). The question whether there was a new grant or not is material to the determination of the title to the Zemindari as between the Istimirar Zemindar and his brother; but the question we have now to consider is, not whether there was a new grant or not, but whether the estate intended to be created was a new estate or a continuation of the old estate in a new owner. The policy indicated by the proclamation, viz., that of enlisting the sympathy and securing the co-operation of the people in connexion with the suppression of the rebellion raised by the two Marudas discloses an intention to change the owner without changing the nature of the estate or its incidents; and the refusal of the Special Commission to interfere with the possession of the Zemindar even with his own consent confirms this view. It is then suggested for the Appellant that a new estate was the effect of Regulation XXV of 1802; but such an intention was disclaimed by its authors in Regulation IV of 1822. The circumstances under which the Zemindari was re-granted, the terms of the proclamation, and the mode in which the Istimirar Zemindar was kept in possession, are consistent only with an intention to continue the old estate.

The learned Counsel for the Appellant next contends that, under the Hindu Law, even kingdoms are partible, and that this Zemindari may therefore be divided. Jagannadha, no doubt, says (I Dig. 416) that kingdoms may be divided among virtuous brothers, able and willing to protect them; for, sages have not inserted kingdoms under the head of indivisible property. While the opinion of Jagannadha is no authority in this part of the country, the texts cited by him show that they may be impartible by custom.

Addressing Rama, Vasishta says.—“Among all the sons of Ikshvaku, the first born is the king. Thou, son of Raghu, art first born and shalt be this day consecrated to the empire”. I. Dig. 415.

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Again, Manthara, in reply to Kaikeyi, says, "Of many sons one only is consecrated to an empire; if all were kings, it would be the highest injury." I. Dig. 417.

She says again, "Doubtless they consecrate to the empire the eldest by birth or excellence and never commit the entire kingdom to his brothers."

These passages relate to the kingdom of Rama or the solar race of kings; but Jagannadha observes that a similar custom existed among the Pandavas (I. Dig. 415); and in the dynasty of the Panchalas (I. Dig. 417) Jagannadha's opinion that kingdoms may be divided rests according to him more on the absence of a text in the Smritis expressly forbidding partition than on the absence or antiquity of such custom, as is alleged in this case, in many kingdoms. Referring to the genealogy of the Pandiyan kings, in whose territory this Zemindari is situated, it will be seen that it was always held by one member of the family and not made the subject of partition on the death of each king (*vide* Nelson's Manual, Part III, 74 to 75).

For these reasons, I am clearly of opinion that this Zemindari is impartible by custom and capable of enjoyment but by one member of the family at a time.

The next question is whether succession to this Zemindari is governed by the rule of primogeniture. Granting that the estate is impartible and capable of enjoyment but by one member of the family at a time, I can think of no other mode of preference, having regard to the analogies of the Hindu Law as applied to ordinary property. As between co-parceners, seniority of birth is the foundation for the right of management which vests in the eldest (Menu. Ch. IX, 106; Smriti Chandrika, Ch. I, V. 23). It was also the cause of a right when unequal partition was permitted to an extra share, not only in the case of the first born, but also in the cases of the eldest and the middlemost sons (Mit. Ch. I, Section III, 3 to 5). As between sapindas of parallel grades, who are equal in point of propinquity to a deceased Hindu, it is the senior in birth, who is entitled to precedence and to be the chief actor, while the others are passive participators in the performance of funeral rites, which do not admit of being separately performed, as, for instance, the ceremonies performed on the day of death in connexion with the cremation of the deceased's body. In all cases, in which the performance of ceremonies prescribed for the spiritual benefit of a deceased ancestor is joint, as among co-parceners living together, the eldest is, according to the law of ceremonial, the chief actor, the participation of the others in their performance being

passive. Moreover, Vishnu, in advocating the claims of daughter's sons to the position of heirs among sapindas, compares them to sons' sons (Mit. Chap. II, Sec. II, 6); and, if primogeniture is a ground of preference where there is a competition among the latter, I fail to see why it is not equally so where the competition is among the former. There is also the speech of Manthara with reference to succession to ancient kingdoms which were impartible by custom. She says, I. Dig : Hig : Edition, 418, that "the eldest by birth or excellence is consecrated to the empire." According to the text of Vasishtha (I. Dig : Hig : Edition, 15), which applied to the kingdom founded by Ikshvaku and to the dynasty commonly called the solar race of kings, "the first born was the king." I am therefore of opinion that, where the subject of inheritance is from its nature indivisible and can therefore descend to one only of several daughters' sons, the preferential right of succession as between them can only be determined by seniority of birth in the absence of a special custom to the contrary. It is contended for the Appellant that sons and sons' sons may be co-parceners, while the sons of different daughters, who have no common paternal ancestor, can never be co-parceners in the Hindu sense of the expression, and that the rule of preference, which obtains among the one, ought not to be extended to the other. It is, however, to be observed that the preference shown to the senior in birth is due to no special property of co-parcenary, but to superior merit, in a spiritual sense, which is supposed to attach to seniority of birth. Adverting to the eldest son, Menu says "By the eldest, at the moment of his birth, the father, having begotten a son, discharges his debt to his own progenitors. That son alone, by whose birth he discharges his debt and through whom he attains immortality, was begotten from a sense of duty; all the rest are considered by the wise as begotten from love of pleasure." (Menu Ch. IX, 106 and 107). Hence it is that the eldest is the Manager in a joint family, that he was entitled to an extra share in ancient times, and that he takes precedence in the joint performance of funeral and other rites. Thus, though the rule of preference is often applied as between co-parceners, the reason of the rule has nothing to do with co-parcenary; and daughters' sons as well as sons' sons come equally within it in the case of competition between them.

Another objection taken for the Appellant is that primogeniture is a custom and not a right, and, where such custom is not affirmatively shown as in this case, the Plaintiff must fail. It is true that, where a special custom is alleged and proved, it ought to prevail against the rule of primogeniture; but, where the property in litigation is not ordinary property, and where it is in the nature of an impartible Raj, it may be presumed, in the absence of a special cus-

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to the contrary, that succession is governed by the rule of primogeniture. The alternative suggested is division; but it seems to me that, if we are to respect the practice generally prevailing among ancient Zemindaries in this Presidency, our decision should be, in the absence of a special custom, what it would have been if the estate had still been a Palayapat, and, as such, an impartible Raj. The division of a kingdom, which is by custom impartible, would be the highest injury. Instances are mentioned at the argument, in which Zemindaries have become partible after remaining impartible for several generations; but it must be remembered that partibility is, in every one of them, a change introduced by custom originating in a family convention. As to succession by nomination, which is also mentioned in the speech of Manthara cited by Jagannadha, it is now the foundation for recognizing a special custom such as was proved in the Tipperah case, and certainly no authority for Courts of Justice to introduce partition. As is indicated by the order in which the two modes of succession are mentioned in the speech and by the course of decisions respecting ancient Zemindaries in this Presidency, succession by primogeniture is the ordinary mode, while succession by nomination is special; and these are related to each other in the same way in which general and particular customs are related. Although impartibility should be established by cogent evidence to preclude the operation of the ordinary Hindu Law, I am of opinion that, when once impartibility is proved, and the subject of litigation shown to be an impartible Raj, in which there must have been from the very nature of the case some mode of selecting a single heir, the presumption is in favor of primogeniture in the absence of a particular custom to the contrary, not only according to the practice of ancient kingdoms, but also as a necessary modification flowing from its impartible character and on the analogies of the general Hindu Law.

Though the evidence on record may not by itself be sufficient to establish a custom in favor of primogeniture, it acquires a special weight in this case from the inability of the Appellant to suggest and prove any other mode of succession by custom. This Zemindari has always been held but by one member of the family; but, from 1739 until 1833, there was no instance of competition between brothers when the succession opened up. Between 1833 and 1863, when the usurpers were in possession, there were several cases of competition; and, in each, it was the eldest who took the Zemindari. Though this practice of the usurpers may not be binding on the Appellant, still it negatives the existence of any other custom, which, if it did exist, the Appellant would not have failed to indicate.

Another objection relied on for the Appellant is that, in the case of ordinary property, there is no primogeniture among women; but this appears to me to be a reason for successive enjoyment, and certainly not for partition. Even in their case, only one could succeed at a time, where the property in dispute is an impartible Raj. Unga Muttu Nachchiar claimed it as the *eldest* surviving widow; and, when the late Rani and her sisters wished to continue the appeal preferred by their mother, they represented to the Court that they had agreed among themselves for successive enjoyment in the order of seniority. On these grounds, I think that the 1st issue was rightly decided in Plaintiff's favor by the Court below.

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The third question for decision is whether a daughter inherits for herself and her own heirs, or whether she takes a qualified heritage in the nature of a personal provision, so as to pass the inheritance on, upon her death, to her father's heirs. For the purpose of deciding this question, I assume that what she inherits from her father does not become her Stridhanam; and whether or not it is Stridhanam is a question, which I shall separately consider. As far as I am aware, there is no text, either in the Mitacshara or other Commentaries in this part of the country, which in terms deals with this subject; and we have therefore to rest our decision on the reason of daughters' succession and on general principles applicable to women. In the case of an appointed daughter, the heritage passed upon her death to her father's, instead of her own, heirs. Referring to the texts of Kara, Sichita, and Parthinasu and Menu, the author of the Dayabhaga arrives at the conclusion that her father's heirs take the heritage after her death (Dayabhaga, Ch. XI, Section II, V. 15); and there is nothing in the Mitacshara to lead us to a contrary conclusion. The appointed daughter was considered by a fiction of law to be a legitimate son; and her son was placed in the 3rd description of sons:—Mit. Ch. I, Section XI, V. 3; and the cause of her succession was the appointment which was usually made in these words, "This damsel, who has no brothers, I will give unto thee, decked with ornaments: the son who may be born of her shall be my son. Vasishta (Mit. Ch. I, Section XI, 3). Thus her position as heir was much higher than that of a daughter without appointment.

The latter is considered to be only * equal to the son, while the former was in law the † son himself: the one was excluded by her after-born brother, while the other shared the heritage with him, and the appointed daughter was § an heir long before

the widow and daughter had a place in the list of heirs. If, notwithstanding her

* Mit. Ch. II, Sec. II, 2.

† Menu Ch. IX, 130.

‡ Menu Ch. IX, 132.

§ Compare Mit. Ch. II, Sec. 1 with
Ch. I, Sec. XI.

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superior position as heir, the succession of an appointed daughter was only a case of interposition, it is unreasonable to say that the estate taken by a daughter is absolute.

Again, the position of a daughter as heir is inferior to that of the widow.

*Mit. Ch. II. Sec. I. V. 5. Menu Ch. IX. 45 and 85. Smṛiti Chandrika, Ch. XI. Sec. I. V. 12.

The former takes under and after the latter; and the one is the associate of her husband in Agnihotra and other *sacrifices, while the other is only the means of producing a sapinda to her father.

Though she is compared to a son in respect of consanguinity to her father, yet the equality is not perfect, and exists only to a limited extent; for, a son excludes the widow, while the daughter is excluded by her. In Smṛiti Chandrika, Ch. XI, Section II, 4, it is said, "In springing from the limbs of the father, a daughter is equal to a son." The difference, however, is this—In the procreation of a son, the contribution of the father's part is greater; whereas, in that of a daughter, it is less, it being declared, "A male child is procreated if the seed predominates, but a female child is procreated if the woman contribute most to the foetus." Thus the daughter stands in relation to her mother in the same subordinate position in which a son stands in relation to his father. If

* "After her, let the heirs take it." (Smṛiti Chandrika Ch. XI, Section I, 32).

then, on the authority of the text "of Katyayana," the husband's heirs inherit the property on the death of the widow to the exclusion of her own heirs, there is no valid reason for supposing that the estate taken by the daughter is higher than that of the widow.

Again, the historic development of the Hindu Law regarding women furnishes reason for saying that the term, widow, is, as observed by the author of the Dayabhaga (Dayabhaga, Ch. XI, Section II, 31), one of general import and applicable to all women alike. Originally, all women were excluded from inheritance by reason of their sex. This rule of exclusion is mentioned in Smṛiti Chandrika, Ch. XI, Section I, 56, in Madhavya, page 32, para 44, and in Mit., Ch. II, Section I, 14, and the cause of exclusion was their sex and not widowhood. The first exception to this rule was the case of appointment to produce an heir; and the principle on which it rested was that they then took, not in their own right, but in right of their progeny. This applied both to the widow and the appointed daughter. The next exception was the recognition of certain females as heirs on the authority of special Vedic texts. In the case of the widow, Brihaspati says that according to Scripture she is half the body of her husband; and, in the case of the daughter, he says she is equal to the son. In connexion with these Vedic

texts, there were two classes of Smrities, those which recognized them as forming an exception to the general rule of exclusion, and favored the succession of the widow and daughter, and those which did not recognize them as an exception at all, but gave the heritage to the father and brother in preference to the widow and daughter. Whether this conflict is due historically to tribal or other distinctions, it is not now easy to determine; but the fact is clear that there were conflicting texts and that they either admitted or excluded both as heirs, one after the other.

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The next period was that of Digests, in which Sankara's rule of interpretation, viz., all the texts are to be considered as if they formed one harmonious whole and applied to the whole Sanskrit-speaking race, came into use as a rule of law (Introduction to Daya Vihhaga, Madhavaya, XIII) and as one in accordance with which all the commentaries were to be written.

The first interpretation under this rule consisted in referring the texts in favor of the widow and daughter to the case of an appointment to raise up issue. It is refuted by the author of the Mitakshara in Chapter II, Sec. I; and it is ascribed to one Daresvara, Ch. II, Sec. I, 8. The interpretation substituted by Vignyanesvara Yogi referred the texts against the widow and daughter to co-parcenary, and the texts in their favor to a divided family. From this, it appears that, before the date of Mitakshara, both the widow and daughter were alike excluded from inheritance, and that, from the time of Vignyanesvara Yogi, they were both admitted as heirs to divided property. In refutation of Daresvara's theory, the author of the Mitakshara refers, first, to the Vedic rule of exclusion, which related to all women, and says that it is applicable to property expressly acquired for sacrifice; secondly, he refers the texts against women to co-parcenary, by which both the widow and the daughter are likewise excluded from inheritance; thirdly, he alludes to their competency to own property by instancing their ownership in Stridhanam; and fourthly, he refutes the argument that the appointment to raise up issue was the cause of their succession, an argument which applies to both. Thus it appears that the widow and daughter have been treated as taking on the authority of the same Smrities, and that the discussion in Mitakshara, Ch. II, Section I, relating to the widow, is equally applicable to the daughter.

Among the texts, which are in favor of the widow, the texts of Brihaspati and Katyayana show distinctly that the widow took but a qualified heritage. Katyayana said "Let the soulless widow, preserving unsullied the bed of her lord, enjoy the property with moderation until her death. After her, let the heirs take

Judgment of it." (Smṛiti, Ch. XI, Section I, 32).
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Bṛihaspati said likewise, "After the death of the husband, the widow shall retain the share of her husband so long as she lives, but she has not property to the extent of mortgage or sale." (Smṛiti Chandrika, Ch., XI, Section I, 38). These texts are mentioned in Madhavya, p. 33, and Vyavahara Mayukha, Ch. IV, Section VIII, paras 3 and 4. Again, in one of the passages, Bṛihaspati declared that women were incompetent to take real property, and said, "Even if virtuous, and if partition have been made, a woman is not fit to enjoy real property." The author of the Smṛiti Chandrika says, "The object of this passage is to explain that real property being the means of subsistence among the descendants of a Hindu family, a widow having no issue is incompetent to take it. (Sm., Ch., XI, Sec. I, 27)." This text of Bṛihaspati has been construed with reference to that of Katyayana only to impose a restriction on the alienation of immoveable property. Again, the reason mentioned for the restriction on the widow's power of alienation by the Judicial Committee is the state of every woman being one of perpetual tutelage. (The Collector of Masulipatam *versus* Kavali Venkata Naranappa). Thus it appears to me that the very texts under which the widow and daughter are recognized as heirs gave them but a qualified heritage, and that the reason for which the widow's power to alienate was restricted applied equally to the daughter. It looks as if the Smṛities in their favor converted the Vedic rule of exclusion from inheritance into one of restriction on the alienation of immoveable property in the interest of the heirs obstructed by their succession. I may also add that, in the Dana Dharma of Mahabharata, a religious work held in great reverence in this part of the country, it is said, "For women the heritage of their husbands is pronounced applicable to use. Let not women, on any account, make waste of their husbands' wealth."

As to the reason of the daughter's succession, it is contended, on the authority of the text of * Bṛihaspati, that her relationship to her father is the sole cause of her succession. Though no other reason is mentioned in

the passages in the Mitakshara that relate to her, still, in the case of her son, his position as a sapinda, and his equality to the sons' son in connexion with funeral oblations, are mentioned as the cause of his succession (Mit., Ch. II, Sec. II, V, 6.)

It is to be observed that the daughter's position as heir may be regarded from a two-fold standpoint, first, in connexion with the general theory of spiritual benefit, and secondly, in relation to her son, the sapinda produced by her, and the deceased's father, both of whom she excludes. It seems to me that the text of

Brihaspati is cited as a reason for her excluding her son, through whom she is connected with the funeral cake, and her father, who confers superior spiritual benefit; and I fail to see how relationship can be considered to be the *sole* or even *primary* cause of her succession, since incompetency to confer spiritual benefit is ground for excluding from inheritance even a son to whom she is only said to be equal in one sense. This view receives corroboration from Smṛiti Chandrika, the author of which cites a text of Nārada and arrives at the conclusion that the text of Brihaspati discloses the reason why she is preferred to her father's father, and that the primary cause is her son's competency to offer funeral oblations to her father (Smṛiti Chandrika, Ch. XI, Sec. II, 9, 10 and 12). The Madhavya and Vyavahara Mayukha are mere transcripts of the Mitakshara. Upon the commentaries of authority, therefore, in this part of the country, relationship is *not* the *sole* cause of her succession, and her connexion with the pinda through her son is the primary motive for her succession. In this view the texts of Dayabhaga and Dayakrama Sangraha relied upon in the judgment in the declaratory suit are pertinent. The reason mentioned by the Judicial Committee in the Collector of Masulipatam *versus* Kavali Venkata Narayanappa is the state of perpetual tutelage, a reason which is applicable both to the widow and daughter, and has reference to the sex and not widowhood. Another reason mentioned in Smṛiti Chandrika, viz., that real property is designed for the subsistence of heirs, is also applicable to both. Hence, in a double sense, her heritage is a qualified one. The text of Katyayana, as read by commentators, together with that of Brihaspati imposes a two-fold restriction, one upon alienation, and the other upon succession. It should also be observed that the text of Katyayana, which speaks of the sonless widow, does not imply that a widow with a son is competent to alienate. For, in the latter case, there can be no doubt of her incompetency to alienate, and the text means that even a sonless widow is incompetent to alienate. As to the texts (II. Dig. Hig. Edition, 159), which enjoin to the widow a life of ascetic privation, they affect the mode of enjoyment, in respect to which there is a difference between widows and women under coverture; and these ought not to be confounded with those that relate to the character of the heritage. For these reasons, the conclusion I come to is that the heritage of a daughter is special and qualified as in the case of a widow, and that, on her death, her father's heirs, as contra-distinguished from her own heirs, take it.

The next question is, Whether property inherited by the daughter from her father becomes her Stridhanam under the Mitakshara Law. There is no doubt that Vignyanesvara Yogi, the author of the Mitakshara, classes it as Stridhanam.

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In Ch. II, Section XI, Verse 2, he says "also property which she may have acquired by inheritance."; and in Verse 3 he observes that a technical interpretation is improper, while the literal acceptation is admissible. The term *Stridhanam* according to its etymology, means woman's property; and it follows therefore according to the *Mitakshara* that, in whatever mode a woman may acquire property, it is her *Stridhanam*. This is clearly an unwarranted interference with the *Smriti* Law; for, the very conception of *Stridhanam* according to the *Smritis* cited by him pre-supposes special or exceptional modes of acquisition and is historically related to the text of *Menn* (I. Dig. Hig. Edition, 459), which declares "Three persons, a wife, a son, and a slave, are declared by law to have in general no wealth of their own. The wealth which they may earn is regularly acquired for the man to whom they belong." Again, it is in conflict with the fundamental principle of Hindu succession, and transfers property to those who have no connexion whatever with the funeral offering. Moreover, it contradicts the text of *Katyayana*, who directs that, after the death of the widow, her husband's heirs should take the heritage, and the spirit of the text of *Yagnyavalkya*, which excludes from the list of heirs the daughter's daughter, and prefers to her the daughter's son, and likewise excludes the sister, and prefers to her the father. Although the *Mitakshara* is held in very great respect in Southern India, it would still be a mistake to rank it with statute law, it being in its nature a mere commentary, and as such acquiring the force of law by its being confirmed to by the people and forming thereby the basis of a customary law among them. Hence it becomes necessary to examine whether the *Mitakshara* has been followed in this respect, and whether there is any trace of a consciousness in the country that inherited property is *Stridhanam*. In *Myna Bebee's case*, *Moore's Indian Appeals*, Vol. XI, p. 487, the Privy Council have held that, according the law of the *Benares School*, notwithstanding the ambiguous passage in the *Mitakshara*, no part of the estate inherited by a widow forms part of her *Stridhanam*, and that, upon her death, according to the text of *Katyayana*, it passes to the heirs of her husband. If my view that the text of *Katyayana* is of general import and applies alike both to the wife and daughter is correct, it would follow that inherited property is not *Stridhanam* even in the case of the daughter. As regards property inherited by the mother from her son, it was held by this Court to be no *Stridhanam* (II, M. H. C. R. 402). In 1813, Sir Thomas Strange said (II. Notes of Cases, 211), "It seems settled indeed that, the mother thus inheriting to her son, her inheritance would descend after her death to his, and not to her, peculiar heirs, and that she could not alien to their prejudice." After reviewing the decisions under the *Mitakshara* Law in Bengal and in other Presidencies, the High

Court at Calcutta has held that property inherited by the daughter is not Stridhanam (14 B. L. R. 235). Though the High Court at Bombay treats it as Stridhanam, the decision rests on Vyavahara Mayukha, which is not binding in this Presidency, except among the Mahrattas.

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Besides the Mitakshara, there are three other leading commentaries in this Presidency, two of which, viz., the Smriti Chandrika and part of Madhavya, have been translated. In these, property acquired by a woman by mechanical arts or given to her by other than relations is not treated as Stridhanam. Smriti Chandrika, Ch. IX, Sec. I, V, 16. and Madhavya's Daya Vibhaga, p. 42.

They again differ from the Mitakshara in respect to the descent of different descriptions of Stridhanam—Smriti Chandrika, Ch. IV, Sec. III; and in neither of them is the property inherited by the daughter specially noticed as to its descent. In Smriti Chandrika, Ch. IX, Sec. I, V, 3, the suppletory term "Adya" is rendered as any other separate acquisition; and the text of Katyayana, which contains a two-fold direction in respect to alienation by the widow, and to the heirs who ought to succeed her, and the text of Brihaspati, which declares, in one place, in the interest of the regular heirs, that women are incompetent to take real property, are cited and commented upon in Madhavya's Daya Vibhaga, pages 32 and 33. Thus, it is clear that these commentaries do not follow the Mitakshara wholly in respect to the descent of Stridhanam, or to all property, however acquired by women, being Stridhanam. Though it is contended that the Madhavya is not correctly translated and that its author adopts the interpretation found in the Mitakshara, it is clear from what has been said that certain kinds of property, though acquired by the woman, are not classed by him as Stridhanam. As the texts of Katyayana and Brihaspati are cited in these commentaries, and as it cannot be supposed that Vignyanesvara Yogi, who founds upon them woman's position as heir, would not have known of the restriction, there is reason for considering that, in classing inherited property as Stridhanam, Vignyanesvara Yogi himself wished to do no more than to withdraw it from the husband's control and to establish her proprietary independence as against him, and not tacitly to do away with the direction of Katyayana and others. It is in this view that Mr. Justice Holloway has treated this question in the former suit as not material to the decision of this case. Be this as it may, I am satisfied that there is no reliable indication, either in the other commentaries prevalent here or in the course of judicial decisions for upwards of 50 years, that property inherited by a woman is Stridhanam.

I shall next proceed to consider the five subsidiary questions raised by the subordinate issues:—As to these, the contention for the Appellant in the

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- I. As the only un-married daughter at her father's death.
- II. As the only daughter with male issue at Unga Muttu's death.
- III. As being the only surviving daughter at the date of the Privy Council's decree.
- IV. Because the Zemindari was acquired or recovered at her own expense and by her own exertion.
- V. Upon the true construction of the Privy Council's decree.

The second position was, however, given up in the Court below; and the third and the fifth may be passed over with the remark that the Judicial Committee neither considered nor decided the question, whether the late Rani took an absolute or a qualified estate. As to the first, it rests upon the text of *Katyayana* (Mit., Ch. II., Sec. II., V, 2), which says "Let the widow succeed to her husband's wealth, provided she is chaste; and in default of her, let the daughter inherit, if unmarried. Whatever construction this text may bear, if it is considered by itself, it ought to be and has been taken to supplement the text of *Yagnyavalkya* (Mit., Ch. II., Sec. I., V, 1), that names the daughter's son as heir after the daughter. Referring to this text, the Chief Justice at Bombay observed in *Vinayaka Ambuda Row versus Lakshmiboyi* that it was not *restrictive*, but preferential only as between married and unmarried daughters. This is precisely the sense in which it is interpreted by the author of the *Mitakshara*. In verses 1 and 5, Ch. II, Section II, he explains that daughters and daughters' sons are heirs, each as a class, and that the former exclude the latter; and in verses 3 and 4, he considers two cases of competition between the married and unmarried, and the endowed and the unendowed daughters, and cites two texts as embodying the rule of preference applicable to them respectively. In this respect, all the other leading commentaries in the South agree with the *Mitakshara* (*Smriti Chandrika*, Ch. XI, Section II, Verse 28; *Daya Vibhaga* of *Madhavya*, page 26, para 36; *Vyavahara Mayukha*, Ch. IV, Section VIII, 11 and 12). With reference to the contention that the rule of *Katyayana* is restrictive, the Judicial Committee say (9, *Moore's Indian Appeal*, 532)—"It ought to be added, as to the argument that the marriage of the daughters and their marriage portions exclude them from participation, there is no ground for that argument either in principle or otherwise." Again, in the case of daughters' sons, they are all *sapindas*, and the spiritual benefit which they can confer is the same in kind and

extent; while, as between married and unmarried daughters, the former are of their father's gotram or retain the father's family name; and the application of paternal property in the first instance to the expenses of their marriage is a spiritual necessity. According to Kruti and the texts of Vasishta and Parthinasi, the father passes into a region of torment, if his daughter attains puberty, unmarried (Dayabhaga, Ch. XI, Section II, 6). Thus, as between married and unmarried daughters, there is a ground for preference; whilst, as between their sons, there is none. It is then urged that the Bengal School extends the preference to the latter (Dayabhaga, Ch. XI, Sec. II, 30; and Dayakrama Sangraha, Ch. I, Sec. III, 3). This extension formed no part of the Smṛiti law even in Bengal, and was recognized upon the authority of the commentator, Sri Krishna, who altered Verse 30 by interpolating in it the expression "without bearing issue", though the passage purports to transfer the heritage upon the daughter's death to her father's in preference to her own heirs. As Sri Krishna is no authority on this side of India, and as a commentator's interpretation is law, because it is adhered to by the people in practice with the conviction that it is law, his exposition cannot be treated as binding in this Presidency.

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As regards the fourth position, Appellant contends that the Zemindari, though ancestral, became the exclusive property of the late Rani in consequence of her having recovered it from the usurpers at her own expense. That she recovered it at her own expense is a fact which cannot be disputed; but the question for consideration is, whether it has thereby become her self-acquisition. The texts that bear on the subject are those of Menu, Yagnyavalkya, Parthinasi, Brihaspati, Kaka and Katyayana. Yagnyavalkya says "Nor shall he, who recovers hereditary property, which has been taken away, give it up to the parceners." (Mit., Ch. I, Sec. IV, 1). Menu, "If a father recovers the property of his father which remained unrecovered, he shall not against his will share it with the sons, since in fact it was acquired by himself." Brihaspati, "Over the grandfather's property, which has been seized by strangers and is acquired by the father, the father's full dominion is ordained." (Dayabhaga, Ch. VI, Sec. II, 32). Kaka. "Land, inherited in regular succession, but which had been formerly lost and which a single heir may recover, the rest shall divide according to their due allotments, having first given him a fourth part." (Mit., Ch. I, Sec. IV, 3). These texts show that, as between co-parceners, the person, who recovers hereditary property which has been seized by a stranger, may take it as his exclusive property, unless it is land, in which case he is entitled only to an extra share. Here I may also observe that, though they speak of the father,

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the term, father, is considered to be of general import (Dayabhaga, Ch. VI, Sec. II, 36). The principle recognized by them is that "It is in fact acquired by himself." In connexion with this principle, the Digests consider the circumstances, in which the joint interests of the other co-parceners may be supposed to have ceased, so as to render the property the self-acquisition of the person that recovers it. The author of the Dayabhaga mentions inability to recover it or aversion to the efforts requisite for its recovery (Ch. VI, Sec. II, 31); the author of the Mitakshara speaks of inability or other cause in the case of other co-parceners and of its recovery by the acquirer with the acquiescence of the rest (Ch. I, Sec. IV, 3); the Smriti Chandrika and the Madhavya conform to the Mitakshara, the former noticing also the case of an express permission granted by co-parceners, in the words, "Let what you shall recover be taken by yourself." As to the controversy among some commentators, whether an extra share alone should not be allowed where the property is recovered without express permission, and whether the theory of self-acquisition should not be restricted to cases of express permission without any distinction being made in either instance between land and other property, the author of the Smriti Chandrika notices it, and says, "What is reasonable should be adopted." Thus it seems clear that abandonment by the other parceners and recovery by one parcener with his own funds and unaided exertion are necessary to transform hereditary, into exclusive, property, and that the abandonment may be either express, as in the case mentioned in Smriti Chandrika, or implied, as in the case of acquiescence mentioned in the Mitakshara and Dayabhaga, the equity in the case of acquiescence consisting in this:—He, who stands by and allows another to expend money and alter his position to his prejudice, after causing the other to believe by his conduct that he has abandoned what is sought to be recovered, ought not to be allowed, after the property is recovered, to claim a share in it. Again, this question was also discussed by Colebrooke and Ellis in connexion with the case cited in 2. Str. H. L., 379; and they, as well as Sir Thomas Strange, rest the rule on implied abandonment. I do not see how the case now before us can be viewed as coming within this rule. The Plaintiff and the late Rani were no co-heirs, and they had no co-ordinate interest in the Zemindari. As the Plaintiff was not at the date of the Rani's suit in a position to recover the Zemindari, there is no foundation for a presumption of abandonment.

Furthermore, the property in litigation is land which comes within the meaning of Sancha's text; and, there being thus no implied abandonment, this

case is governed by the general rule of the Hindu Law, viz., that money spent on hereditary property, otherwise than upon an express agreement, cannot alter its character.

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The 5th issue is, whether the late Rani had any power of alienation, and whether either of her alleged Wills is a valid disposition of the property as against the Plaintiff. In the view which I take, viz., that a daughter takes under the Hindu Law a qualified heritage in the nature of a personal provision, and that, upon her death, the property descends to her father's heirs, she is competent neither to alienate, except for the specific purposes sanctioned in the case of a widow, nor to divert the Zemindari from the course in which it should descend according to law.

The 6th issue is, Whether Exhibits marked III, IV and V are true, and whether the right renounced in document III is the right now in contest; and, if so, whether Muttu Vaduga's sons can alienate it to the Plaintiff. Upon the evidence, I think that Exhibit III, as well as the other Exhibits, is authentic; and, though the former was mentioned in no judicial proceeding till 1869, I attach weight to the observation of the learned Counsel for the Appellant that during the interval there had arisen no occasion for its mention, and that in the then state of litigation regarding this Zemindari, the parties to this suit did not attach to it that importance, which the success of the late Rani and the prospect of litigation after her death have since imparted to it. In the view which I take of its legal effect, it may not be necessary to enter into an analysis of the evidence in its support; but, in an appealable case like this, I think it desirable to do so, especially as the Lower Court has recorded no finding as to the *factum* of the document III, while it is denied by the Plaintiff. This document was produced in 1869 in the District Court at Madura, when Ulaganadha Tevan applied for being made a party to the declaratory suit. The contention for the Plaintiff seems to be that on this occasion it came from Ponnusami Tevan, and that it is, therefore, in all probability, a forgery. But Muttusami Tevan, who wrote it, died in 1860, and his hand-writing is proved by his gumasta, his son and son-in-law, whom I see no reason to disbelieve. It is also in evidence that the stamp cadjan on which it is written was sold on the day mentioned in the endorsement thereon. This endorsement is sworn to by the person who wrote it, and the signature thereto is proved by the son of the Stamp Agent who died in 1855. The sale of stamps for the execution of this document and of its counterpart is placed beyond doubt by the register of stamps sold, which is produced from the records of the Collector's Office. On the 26th September 1850, Muttu Vaduga applied to the late Sadr Court

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for permission to prosecute the appeal preferred by Unga Muttu Nachchiar; and, as the document bears date, 1st October 1850, it is not improbable that Muttu Vaduga sought to obtain it, and that the Plaintiff, who was a junior member of the family, did not then attach to it the importance, which it has since acquired from Muttu Vaduga's death during the life-time of the late Rani. His petition to the Collector, wherein he denied division, may perhaps be due to the change in his position consequent on the death of Muttu Vaduga. No doubt Exhibit III came into the possession of Vakil Ramasami Sastri in 1869 from Ponnusami Tevan; but I do not think that it was forged by him; for, the presumptions arising from the rest of the evidence are inconsistent with that supposition. The probability is that Ponnusami Tevan gained over Ulaganadha Tevan, as deposed to by one of the witnesses, and used this document against the Plaintiff. As to the story told for the 1st Defendant, with a view to show that Ponnusami had nothing to do with it, it is highly improbable. But it is likely that, upon the failure of Muttu Vaduga to institute the suit which he intended to institute, neither party attached any importance to it until Ponnusami, whose daughter was married to the 1st Defendant, became aware of its existence and saw how it might be used against the Plaintiff by gaining over Ulaganadha Tevan, who had the document with him. If it had been a forgery, it is strange that the Plaintiff should have instituted no proceeding against those who might have forged it, and that there should have been that struggle on the part of Pichchama Nachchiar to get possession of it, to which several witnesses speak. Upon the whole evidence, I am inclined to think that Exhibit III is authentic. Though the 5th Defendant has exerted himself to get up evidence in support of it, still the circumstances attending its execution and the entry in the Register of Stamps lead me to the conclusion that Exhibit III is probably not a forgery, though the 14th witness, who speaks to its execution in his presence, may not be relied upon.

As to the circumstances, then, in which it was executed, it will be recollected that the Istimirar Zemindar preferred the daughter's son both to the widow and daughter in his enumeration of heirs (Exhibit LVIII). This gave rise to the suit brought by Vellai Nachchiar on behalf of her infant son on the 23rd March 1832, and to the application made by the Plaintiff's late brother on the 26th September 1850, for continuing the appeal preferred by Unga Muttu, as her heir and successor. At this time, there were two classes of heirs, who desired to eject the usurpers, the late Rani as the daughter of the Istimirar Zemindar, and the Plaintiff's elder brother as the senior male of the senior branch, though in the female line; and one of the questions which then attracted much

attention in the late Sadr Court was that of division or non-division as influencing the descent of the Zemindari. As a preliminary step and in the interests of his descendants, and with reference to the contingency of success in the suit which he then desired to institute, Muttu Vaduga appears to have taken the document III from the Plaintiff. It is as follows:—

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“Deed of partition executed on the 17th Peratasi of the year Satharana, voluntarily, between Muttu Vijaya Raghunadha Muttu Vaduga Peria Udaya Tevar and his younger brother Dorasingam *alias* Gouri Vallabha Tevar, the sons of Mappilaisami *alias* Udayana Tevar, the Zemindar of Nattagudi Palayam in the Sivaganga Zemindari.

“Of that which has been sold out of our ancestral properties, with the exception of the village of Padinettankotai, and out of our mother's property, the surplus of the sale proceeds of the village of Veliyattur, after payment of creditors, Rupees 400 remains, which we have divided. We both should pay the former debts, incurred and the amounts of debt for which suits have been brought in Courts; and as you, the elder brother, Muttu Vijaya Raghunadha Muttu Vaduga Peria Udaya Tevar, alone, are conducting the suit for the Zemindari of Sivaganga in the Sadr Court, you yourself are to bear the costs of the suit and recover it and without any connection on the part of the younger brother Dorasinga *alias* Gouri Vallabha Tevar with the Zemindari property; you, your sons and your grandsons from generation to generation are to enjoy the said Zemindari. Thereafter only friendly relationship will subsist between us, and no property relationship. Thus the younger brother Dorasinga *alias* Gouri Vallabha Tevar has given this partition deed to his elder brother Muttu Vijaya Raghunadha Muttu Vaduga Peria Udaya Tevar.”

The words “as you, the *elder brother*, alone, are conducting the suit, you yourself are to bear the costs of the suit and recover it without any connection on the part of the *younger brother* Dorasinga Tevar,” show that the success in the litigation commenced by the elder brother and its bearing on Plaintiff's right, as between himself and his brother's descendants, were the incidents in the contemplation of the parties to the contract. With reference to these, Dorasinga says:—You are the elder brother, and I am the younger. You are going to spend money upon the suit you are to bring. Here is my promise that, if you succeed, I will not assert a right either as against you or your descendants. The event thus contemplated was Muttu Vaduga's success; the right then considered was that of the daughter's son to supersede the daughter,

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and not to succeed to her, and the primary motive for the renunciation was the position of Muttu Vaduga and his descendants as the representatives of the senior branch. What is the event that has arisen? It is not Muttu Vaduga's success, for, he never brought a suit. The right now asserted is not to supersede the daughter, but to take after her; and the inducement to the renunciation, which was preference due to the senior branch, is now in favor of the Plaintiff. In these circumstances, I am of opinion that the right now in contest, whether I regard the words of the instrument or the intention that is to be collected from them, or the occasion or motive for its execution, was not then in the contemplation of the Plaintiff, and neither intended to be, nor renounced by Exhibit III. It is true that, as observed by this Court, a private right and interest, whether present or future, vested or contingent, may be renounced; but it must also be borne in mind that the right in dispute must be the one intended to be renounced, and that that intention must be unequivocal and clear, and appear either expressly or by necessary implication. As this is not the case in the suit before us, I am of opinion that the Lower Court was right in deciding this issue in Plaintiff's favor.

As to the 7th issue, whether the Plaintiff's mother received any endowment from her father, and whether the Plaintiff is thereby precluded from claiming the Zemindari, I have only to repeat that the rule in the Mitakshara, as to the competition between endowed and unendowed daughters, is, as in the case of competition between married and unmarried daughters, not restrictive, but preferential only as between daughters. As regards the 8th issue, it was not much relied on either here or in the Court below, except with regard to the question of self-acquisition, which I have already considered. It is only necessary to observe that neither relationship to the usurper nor receipt of Rs. 10 a month as maintenance from the Zemindar for the time being is in law a ground of forfeiture of the right of inheritance. I may add that it is extremely doubtful whether even active sympathy, if *bona fide*, would cause a forfeiture of the right; and, if it were recollected that, until 1863, even Courts of Justice held that the right of survivorship attached to the self-acquired property of a co-parcener as well as joint property, it would appear inconsistent neither with *bona fides* nor with reason to have regarded the late Rani's claim as unfounded and vexatious. It only remains for me to notice, with reference to the 1st Defendant's contention in para 13 of his written statement, wherein he claims consideration on the ground that the parties are Maravars, to whom the strict Brahminical rules of inheritance founded on religious observances have no application. In a country like this, where Brahminical religion and notions of the future state and spiritual benefit have been gene-

rally adopted, though with a difference as to the ritual to be observed and the texts that are to be uttered, the only way in which Courts of Justice can give effect to peculiar customs is to recognize them, when they are asserted and proved, as modifications with which the Hindu Law has been adopted by the particular class. The question is not *whose* law has been adopted, but *what* law has been adopted, by the particular class to which the suiters belong, and with what modifications as shown by proved customs. It would be preposterous to contend that we should speculate upon class distinctions, estimate *a priori* their juridical value and evolve out of our own consciousness rules of law as founded upon such estimate, without any foundation therefor in the evidence before us as to the usages that refer to them. As no special custom has been shewn to exist among Maravars regarding the descent of property, I have no hesitation in saying that the general Hindu Law is applicable to them.

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The next question relates to certain properties mentioned in the 10th issue. As to these, the District Judge upheld the Plaintiff's claim, except to two bungalows and unknown debts, and against this decision both the Plaintiff and the 1st to 5th Defendants appeal. As observed by the District Court, Kolkrayams and Pannai lands appear to have always been enjoyed as appurtenant to the Zemindari. Several witnesses for the Plaintiff depose to this effect, and there is nothing in the evidence for the Defendants to lead us to a different conclusion. It is then said that Kolkrayams are certain Inam villages hold subject to the payment of a poruppu or quit-rent, which alone formed part of the assets on which the peishkush was fixed at the date of the permanent settlement, and that the proprietor's interest therein, which has since been purchased by the Zemindar and which is called Kolkrayam, cannot be regarded as part of the Zemindari. Even in this view of the case, it appears to me to be an enlargement of the Zemindar's interest in what was undoubtedly Zemindari property. Our decision should, I think, depend, not on what was, and what was not, included in the assets on which the peishkush was assessed, but on the consideration whether the Kolkrayams have been treated as the Zemindar's private property or as an increment to the Zemindari. They have never been divided and always descended to the Zemindar; and we cannot, therefore, come to a different conclusion from that at which the District Judge has arrived. As to the two bungalows, in regard to which the Plaintiff's claim has been disallowed, they have been sold in execution against the late Rani and since re-purchased by the 2nd and 4th Defendants. It is contended that they were re-purchased by the late Rani with the Zemindari income, though in the names of her daughters, and that they

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should have been awarded to the Plaintiff. In either case, the Plaintiff is not, I think, entitled to them. If they were really purchased by the daughters, they belong to them, and, if by the late Rani and with the Zemindari income, they would be an investment of the income, to which she was exclusively entitled, and which she alienated to her daughters during her life. I am not prepared to say that immovable property purchased by a Hindu widow with the profits of her husband's estate ought to be held to form part of her husband's property, unless there is no proof of an intention on her part to sever such purchases from the estate and appropriate them to herself. As regards the outstandings, the Court below considers that they ought to go to the Plaintiff. It must be recollected, however, that these are debts which had *accrued due* at the date of the Rani's death; and, as her personal property at her absolute disposal, they should go to her own heirs; but, having regard to the arrears of peishkush which amounted nearly to four lacs and to the rule of law that the daughter or widow is entitled to take only the nett income, I am not disposed to disturb the finding appealed against. As to the other properties, the Judge below awards them to the Plaintiff, and I think rightly, on the ground that the late Rani was not competent to alienate them.

The next question for decision is, Whether the lease set up by the 5th Defendant is valid as against the Plaintiff. The *factum* of the general lease is not disputed, and I think there can be no doubt upon the evidence that it was granted with a view to defraud the Plaintiff and keep him out of possession in the event of his obtaining a judgment in his favor in the Courts in this country. The lease was granted on the 1st May 1877, and the late Rani died on the 24th. Mr. Fischer, her agent, states that he entertained apprehensions of her death in March 1877, and the lessee is an old dependent and friend of his family. The Rani says that the witness was always averse to a lease. In April, she was making her mind up to a lease, and she was waiting for the result of the negotiations for a compromise. The 5th witness for the Plaintiff swears that, at the instance of Mr. Fischer, he induced the Rani to consent to the lease and that she made up her mind to it on being assured that some arrangement might be made with the lessee for the lease being surrendered in the event of the Plaintiff failing in this suit. The same witness adds that he heard from the 5th Defendant that Mr. Fischer was to have a share in the lease; and several witnesses observe that the 5th Defendant has agreed to give up the lease if the late Rani's son succeeded, and to treat it only as nominal; and, when the lessee is cross-examined as to this matter, he says that he *does not remember* having writ-

ten a letter to that effect to the late Rani. The negotiations for a compromise failed on the 25th April (Exhibit BI); on the 27th, the letter AU was written, in which she informed the Collector that she had assigned to her son the right to succeed to the Zemindari. On the 30th, the Plaintiff heard of the attempt to get a lease, and asked the Sub-Registrar at Madura to decline to register it; and on the 1st May the lease was executed. In this state of facts, I have no hesitation in saying that it is a colorable transaction contrived to obstruct the Plaintiff in this litigation and to keep the income at the command of the 1st Defendant, and that, as such, it ought to be set aside. But it appears that the 5th Defendant has paid arrears of peishkush to the extent of Rs. 63,000 prior to the death of the late Rani, and of Rs. 1,09,660-0-11 after her death; and the contention for the Plaintiff is that, in a fraudulent transaction like this, the 5th Defendant is not entitled to payment of either of the sums on the security of the Zemindari. The learned Counsel for the Plaintiff relies on the decision reported in VI, Moore, I. A., 393, and argues that the 5th Defendant, who was employed as Manager under the late Rani from 1874 to 1876, must be taken to have been a party to the mismanagement, which has led to the peishkush remaining in arrear, and dis-entitled himself to repayment, either under Section 35, Act II of 1864, or under Section 69, Act IX of 1872. In 6, Moo., I. A., 393, the Judicial Committee say that "where there has been previous mismanagement, the actual pressure on the estate, the danger to be averted or the benefit to be conferred in the particular instance are the criteria to be regarded. If that danger arises from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong to support a charge in his favor against the heir grounded on a necessity which his own wrong has helped to produce." The general rule is that, where the heir is benefited, he cannot demur to the debt, and this case seems to fall under it; for, the Zemindari is liable to attachment and sale for arrears of peishkush, and, in so far as the 5th Defendant has reduced them by payment, he has conferred a benefit on the estate. I do not think that it is within the reason of the exception; for, the misconduct which is referred to must consist in some active aid rendered with a view to personal gain in furtherance of the fraud as prior loans, or in a neglect to exercise a control, which he was bound to have exercised, or which he was in a position to have exercised. It is true that the 5th Defendant was a manager under the late Rani from 1874 to 1876. But can he be said to have been a party to the mismanagement within the meaning of the Privy Council decision? It is not in evidence that he lent her any money in aid of mismanagement since 1874; and it is admitted that he was only her paid servant during that period. I think he was not in a position to

Judgment of
the High-
Court
dated 31st
January
1879.

—continued.

Judgment of the High Court dated 31st January 1879. —concluded.

have exercised control over her action, and that, if he had interfered to dictate to her in respect of her duties to the reversioner, he should have been summarily dismissed from his office. All that can be fairly ascribed to him is a knowledge that the late Rani was favoring her own heirs at the expense of the Plaintiff; but mere knowledge of antecedent mismanagement is not fatal to his claim, where the immediate object of the advance is to avert danger to the estate. Furthermore, though his lease was voidable at the instance of the Plaintiff, still he had an interest, until it was set aside, in the payment of the peishkush, within the meaning of Section 69, Act IX of 1872. Lastly, it may be observed that the Plaintiff, who has taken the outstandings, cannot claim exemption from the payment of the peishkush, which is paid with the rents collected from ryots. The principle on which I would rest my decision is that laid down by Lord Hardwicke, with reference to cases of fraud upon power, viz., fraud will affect only so far as it extends, and a Court of Equity will not say that *participis criminis* shall have no benefit of the agreement in any part. For these reasons, I am of opinion that the 5th Defendant is entitled to have the peishkush paid by him declared a charge on the Zemindari. Having regard, however, to the fraud upon the Plaintiff, in furtherance of which the lease was obtained, I do not think it desirable to interfere with the judgment appealed against as regards the mode in which the charge is to be enforced.

The judgment appealed against is confirmed, and both Appeals are dismissed with costs.

The Chief Justice desires me to say that he has had the advantage of reading this judgment and that he concurs in it.

(True copies).

(Signed) W. MORGAN,

Acting Registrar,

Appellate Side.

Judgment of the Privy Council dated 14th May 1881.

—(or)—

Muthu Vaduganatha Tevar and others ... — Plaintiffs.

Versus

Dorasinga Tevar ... — Defendant.

Judgment of the Privy Council dated 14th May 1881.

PRESENT :

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

Judgment
of the Privy
Council dat-
ed 14th May
1881.

--continued.

This appeal relates to the Zemindary of Sivaganga, an Estate situate in the Polygar countries of the Carnatic, which for 50 years has been the subject of almost incessant litigation in India and before this Committee. The judgments delivered here will be found in 3 Moore, Ind. App., p. 278; 9 Moore, Ind. App., p. 539; 11 Moore, Ind. App., p. 50, and L. R. 2, Ind. App., p. 169. The only one which directly bears on the present questions is that which was delivered in the month of November 1863, and is reported in 9 Moore.

The Zemindary appears to have been created in or about the year 1730. At that time, Kurta Tevar, Rajah of Ramnad, having received valuable services from one of his family, Sasivarna Tevar, granted to him two-fifths of the Ramnad Estate, calling the granted portion a distinct Zemindary of Sivaganga. Sasivarna's position as Zemindar must have been recognized by his sovereign, the Nabob, who is stated to have established his widow in the Zemindary after some disturbance of her possession. Sasivarna's lineal descendants became extinct in or shortly before the year 1801. It was in that year that the East India Company assumed the actual and direct sovereignty of the Carnatic, though for some years before they had undertaken to protect it, and had on that account received peishcush or tribute, and powers of management in case of war. On the failure of Sasivarna's line, certain Ministers, who it seems had for some time before had the management and control of the Zemindary, maintained their position there by force, and broke out into open rebellion. Upon this, the Madras Government issued a proclamation, dated the 6th of July 1801, by which they appointed one of the Tevar family, a collateral relative of Sasivarna, to be Zemindar. On the 22nd of April 1803, a sunnud was issued by the same Government, fixing the assessment of the Zemindary in accordance with the permanent settlement effected by Madras Regulation XXV of 1802. It will be necessary hereafter to refer more closely to the tenor of these documents. Their immediate effect was, that the grantee of the Government, who may conveniently be called the Istimirar Zemindar, was installed into the Zemindary, which he appears to have held peaceably during his life.

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of the Privy
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—continued.

In the year 1829, the Istimirar Zemindar died, and the succession to the Zemindary was disputed between his immediate family and his collateral relations. He had no son, but left widows and daughters surviving him. His elder brother, however, one Oiya Tevar, who held another family Zemindary, called Padamatoo, and who died in the year 1815, had sons, who survived the Istimirar Zemindar. The eldest of these, representing the Padamatoo or elder branch, alleged that the family was undivided, and that he, as the eldest nephew of the Istimirar Zemindar, was the heir to Sivaganga. The widows and daughters alleged that the family was divided, and that the heir was the senior surviving wife.

From this dispute sprung up a perfect jungle of law-suits, into which it would not now be profitable to enter. The way out of it was found by the decision of this Committee in the year 1863*. They held that the family was still undivided, but that the Zemindary was to be taken as self-acquired property in the hands of the Istimirar Zemindar, and that the widows being at that time dead, and also all the daughters except one named Kathama, the Zemindary devolved upon her. After this decision, the elder branch made one attempt to re-open the question, which was finally defeated by this Committee in the year 1866.† From that time, the younger branch of the Tevar family have remained in possession of the Zemindary, without disturbance by the Padamatoo or elder branch.

In the year 1877, Kathama died, and then disputes among the members of the younger branch came to a head. The state of the family with respect to the succession at that time was as follows:—Dorasinga Tevar, the Respondent, was the eldest surviving grandson of the Istimirar Zemindar, by his daughter Vella, who was the daughter of his second wife, Rakoo. Muthu Vaduga, the Appellant, was the grandson of the Istimirar Zemindar by his daughter Kathama, who was the daughter of his third wife Vailoo. The three other Appellants are the sisters of Muthu Vaduga. These were all the grandchildren of the Istimirar Zemindar who were living at the time of Kathama's death. And with his great-grand-children we need not now concern ourselves.

The dispute arises in this way. The Respondent says that Kathama's interest in the Zemindary endured no longer than her life, and that on her death it devolved on the heirs of the Istimirar Zemindar; that it is an impartible property, which can only be enjoyed by one person at a time; and that he, being the eldest surviving grandson, is that person. The children of Kathama say that

she took the Zemindary as stridhan, and as a heritage transmissible to her own heirs, and then, waiving any question between themselves, they agree that her son shall be preferred. If, however, that question is decided against them, then they say that the Zemindary is not an impartible property, and that at the least, Muthu Vaduga is co-heir with his cousin Dorasinga.

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ed 14th May
1831.

—continued.

Even in Kathama's life-time, the nature of her interest in the Zemindary did not escape dispute; for, a suit was instituted in the year 1869 by Dorasinga to obtain a declaratory decree affirming the same title which he asserts now. The Courts in Madras were unanimous in granting the decree, but on appeal this Committee reversed their action, not pronouncing any opinion on the title, but thinking that the case was not a proper one for a declaratory decree.

Upon Kathama's death, Dorasinga instituted the present suit, and obtained a decree in his favor from the District Judge of Madura on the 3rd December 1877. The Appellants, being Defendants in that suit, appealed to the High Court of Madras, who on the 31st of January 1879 affirmed the decree of the District Judge. From the decree of the High Court this appeal is brought.

Other issues were raised in the Courts below and in this appeal, but at the bar the Appellants' Counsel practically abandoned all except those which raise the questions above stated. There is another Defendant to the suit, but he is no party to this appeal.

The first question then is, whether Kathama, the daughter of the Istimirar Zemindar, took the Zemindari as her stridhan, and for an interest transmissible to her heirs. At the date of her father's death, she was a maiden. She was afterwards married twice, and in the year 1850, when the surviving widow died, she had male issue. These circumstances were relied on as constituting her title to be her father's heir in the year 1863, and it is contended by the Appellants that the same circumstances constitute her a new stock, from whom, and not from her father, the title is now to be deduced.

They rely mainly on the much discussed passage in the Mitakshara (Ch. II, Sec. XI, Verse 2), where its author Vijnaneswara adds the text of Yajnavalkya by declaring that the character of stridhan attaches not only to the acquisitions by a woman which the text specifies as such, but also to property which she acquires by inheritance, or in fact by any other mode. It is not necessary now to state in any detail how impossible it is, whether with regard to the authority of other commentators or to other parts of the Mitakshara itself, to construe this passage as conferring upon a woman taking by inheritance from a male a stridhan

Judgment of the Privy Council dated 14th May 1881. estate transmissible to her own heirs. The point is now completely covered by authority. In the case of *Mussamat Thakoor Deyhee v. Rai Baluk Ram* (11 Moore, Ind. App., p. 139), such an interest was claimed on behalf of a widow in her husband's immoveable property. In the case of *Bhugwandee Doobey v. Myna Beebee* (11 Moore, Ind. App., p. 437), such an interest was claimed on behalf of a widow in her husband's movable property. In the case of *Chotai Lall v. Chunnoo Lall* (L. R., 6 Ind. App., p. 15) such an interest was claimed on behalf of a daughter in her father's property. All these cases were governed by the Mitakshara law. And in all it was held that the woman took only a restricted interest, and that on her death the property devolved on the line of the last male owner.

—continued. No attempt has been made to distinguish this case from that of *Chotai Lall*, except the suggestion that decisions upon the Mitakshara, as applicable to Benares, are not decisions upon the Mitakshara as applicable to the Carnatic. But, if there be any ground for taking such a distinction, it would be favorable to the restriction of Kathama's interest in her father's property. For, there are two commentaries which are received as authority in the Carnatic, the *Smriti Chandrika* and the *Daya Vibhaga* by Madhavaya, neither of which follow the cited passage of the Mitakshara in assigning to a woman as her stridhan property inherited by her. Their Lordships think then that the Judges of the Courts below were quite right in holding that Kathama's interest ceased with her life, and that on her death the root of title is to be sought not in herself but in her father.

That leads to the question whether the Zemindari is a partible or an impartible estate. If impartible, the Respondent Dorasinga is entitled as sole heir of the Istimirar Zemindar. If partible, he and his cousin Muthu Vaduga are joint heirs.

It was much debated at the bar whether or no the Appellants had formally bound themselves in this suit by agreeing to admit the impartible character of the estate. What they did agree to was "that all statements and admissions made in Original Suit No. 2 of 1869 are to be taken as made in this suit also," unless a certain notice to the contrary was given. The statements and admissions made in Suit No. 2 of 1869 are to be found in pp. 215 and 216 of the Record. They embrace a number of family events, such as births, deaths, and marriages, and an agreement "that the judgment in the Sivaganga case, as reported in 9 Moore, Ind. App., should be admitted as to the facts set forth in that judgment." The impartible nature of this Zemindari was admitted by the parties to the litigation closed by the judgment of this Committee in 1863, and it is so stated in the judgment, though nothing then actually turned on the admission. But their

Lordships do not think it necessary for the present purpose to criticise closely the language used in the judgment of 1863. For, they think that the question of partibility is a mixed question of law and fact, and therefore does not fall within the terms of the agreement for admissions. Moreover, the agreement in this suit was made simultaneously with the settlement of issues, and one of those issues, which oddly enough was proposed by the Respondent who now seeks to exclude it, and was objected to by the Appellant who now insists upon it, was this, "whether the Plaintiff is entitled to recover the whole or any part of the property in dispute."

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—continued.

But, though the question must be decided upon its merits, it is impossible to disregard what has passed, whether in this suit or in others. For half a century this Zemindari has been under the harrow of litigation; for many years between the elder and younger branch of the Padamatoor Teyar family, and again for many years between separate scions of the younger branch. During this long period of discussion and examination, up to the settlement of issues in this suit, everybody has concurred, whether by statement, admission, or assumption, in ascribing to the Zemindari an impartible character. Even in the pleadings in this suit partibility is not alleged, and, as already stated, an issue implying partibility was granted against the wish of the Appellants. Against all this family belief is only to be set an extremely ambiguous and evasive answer given by the Istimirar Zemindar in the year 1822 to some questions put to him by the Collector of the District. Being asked whether it is customary for the Zemindar to divide the estate between his children, what would be his motives, and what his authority for a division, he does not answer the first or third questions at all, and merely says that "from motives of regard to the children, the Zemindar divides the estate between them." Nothing can be built on such an answer as this. It is at the utmost a contention that the estate is alienable by the Zemindar, and that he has a discretion to divide it; not that it is partible if not divided by him. Since the litigation began, it would seem that no definite idea of contending that the Zemindari was partible occurred to any one's mind till the parties found themselves face to face before the District Judge in this suit.

That the actual enjoyment of the property has been in accordance with the stream of family tradition is not disputed. It is explained away by reference to the state of the family, which is said to have presented no occasion for partition; but that is not the case with the elder branch, who were in possession for 32 years, during which time three descents occurred. There were co-parceners in that branch who would have taken shares if the Zemindari had been considered as partible; but in fact it was always taken entire by the eldest male re-

Judgment of the Privy Council dated 14th May 1881.
—continued.

presentative. It is true that the elder branch were ultimately held to be in wrongful possession, and are now called usurpers. All the same, their dealing with the estate while they had it, is evidence of the family traditions and of their practical operation.

Moreover, it is certain that other Zemindaries closely allied to this are impartible properties. Such is the case generally with the Polyams in the Polygar countries, as was laid down in the Naragunty case, reported in 9 Moore, Ind.

App., p. 66. It is agreed that the Zemindari of Ramnad, from which Sivaganga is derived, is impartible, and it has been held* that the Zemindari of Padamatoor, which is derived by grant from Sivaganga, is also impartible.

It was not proved that the grant of Padamatoor was made by the Istimimar Zemindar himself, as he on one occasion alleged, and there is reason to suppose that the grant was of earlier date; but, taking it to be so, the evidence that we have of the nature of the Sivaganga Zemindari is this: that it belongs to a class of possessions which are in the nature of chieftainships, and impartible; that the great Zemindari of Ramnad out of which it was taken is impartible; that the small Zemindari of Padamatoor which was taken out of it is impartible; that, according to family tradition and belief, it is impartible; and that from its first creation until now it has passed from hand to hand as if it were impartible.

This evidence is irresistible, unless it can be avoided by showing some dealing with the Zemindari which has transmuted its ancient qualities. The Appellant endeavours to find such a dealing in the transactions of 1801 and 1803 which have been above referred to; and he relies upon the case of the Nuzvid

Zemindari,† in which this Committee, differing from the Courts below, held that a Zemindari created by Sunnud in accordance with Regulation XXV

of 1802 was a partible property.

The estate constituting the Nuzvid Zemindari was formerly part of an old military jagheer in the nature of a Raj, and impartible. In the year 1783, the jagheer was confiscated for rebellion, and the next year it was restored on its old footing to the eldest son of the rebel Zemindar. In the year 1793, it was resumed by Government for default in payment of revenue; and in that state was it when the permanent settlement of 1802 was enacted. It was never again granted out entire or on its old tenure as a jagheer, but in the year 1803 two new Zemindaries were made out of it. The larger of these new Zemindaries called Nidadavolu was granted to the eldest son of the rebel Zemindar, and

* L. R., 5 Ind. App., p. 61.

† L. R., 7 Ind. App., p. 39.

Nuzvid, the smaller, was granted to his younger brother. Under these circumstances, it was held that the Nuzvid Zemindari could not be identified with any estate or title existing prior to the Sunnud of 1802, which put it on the same footing with ordinary estates.

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—continued.

But in this case the Istimirar Zemindar was put in his place by the proclamation of 1801, and it is to the terms of that document that we must look in order to find the quality of his estate. The Madras Government were no doubt in a position to grant out the estate on other than the old terms. The question is whether they did so.

The proclamation sets out by stating the creation of the Zemindari and the failure of Sasivarna's line. It asserts that the Zemindari "has positively escheated to the State from which it derives its protection." It asserts that Sasivarna was appointed by the Nabob, and advanced by him "to the rank of a feudal lord;" that he owed allegiance to the Nabob; and that the East India Company had then become the lawful sovereign of the Polygar countries. It then goes on to describe the disturbed state of the district, imputing it to the misconduct of the Ministers of a female Zemindar, which it thus describes:—"On the return of that Princess they became her principal Ministers in the administration of the affairs of Sivaganga, and, availing themselves of the disqualifications attendant on a female Government, established in their own hands an entire despotism and tyranny, as well over the Princess' lineal descendants of the house of Nakudi, as over the collateral branches of that family, and over the inhabitants of Sivaganga." Nakudi appears to be a Polyam appertaining from ancient times to Sasivarna's branch of the Tevar family.

The fifth paragraph of the proclamation runs as follows:—

Wherefore, the Right Honorable Edward Lord Clive, Governor in Council of Fort Saint George and all its dependencies, having judged it expedient at this time to exercise the legitimate powers acquired to the Honorable Company in settling the affairs of the Zemindari of Sivaganga upon a permanent foundation, has been pleased to nominate, to appoint, and constitute Padmanthoor Udaya Tevar, collaterally descended from the progenitors of Sasivarna Tevar, the first Zemindar of Sivaganga, to be the present Zemindar of Sivaganga; and the said Governor in Council hereby requires and commands all the inhabitants of Sivaganga to respect the rights and authority of the said Padmanthoor Udaya Tevar as the true and lawful Zemindar of Sivaganga.

The next paragraph weighs the claims of another collateral relation of Sasivarna, whom it alleges to be in rebellion against the Company, and of whom it "publicly and formally proclaims the disqualification now and in all times to come to the possession of the Zemindari of Sivaganga."

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—continued.

The rest of the proclamation is addressed to the inhabitants of Sivaganga, whom it warns of the approach of a large army under Colonel Agnew, and exhorts "while the time yet allows them, to retract their error," and "to acknowledge their allegiance to the lawful Zemindar of Sivaganga."

The accuracy of some of the remarks in this proclamation is open to question; but the object of examining it is to get at the intention of the Madras Government, which depends upon the impressions they had, and not upon the accuracy of those impressions. It is impossible to doubt what that intention was. From the beginning to the end the Zemindari is referred to not in its proprietary and private, but in its political and public, aspect. Sasivarna is a feudal lord. He owes allegiance to the State. The troubles are due to the weakness of a female Government. The late Zemindari is a Princess. Her agents are Ministers. The Governor in Council intends to settle the affairs of the Zemindari on a permanent foundation. For that purpose he nominates one to the post of Zemindar, another is rejected for all time to come. The inhabitants are called on to respect the rights and authority of the appointed Zemindar, and to acknowledge their allegiance to him.

Everything then points to the installation of the Istimirar Zemindar not merely as proprietor but as Ruler of the District. The policy of the Government clearly was to appoint a Ruler whom the rebellious inhabitants would obey. And we are told by Mr. Hughes, who was attached to Colonel Agnew's force, that the appointment completely answered its purpose.

The Istimirar Zemindar, Mr. Hughes says, was installed in state in Colonel Agnew's camp, when a hundred head inhabitants, including his elder brother Oiya Tevar, held up their hands in homage to him. And he adds that it had the effect of restoring peace and order almost immediately. The whole population turned to the Zemindar, and entirely abandoned the rebellious Ministers; so a most arduous service was quickly brought to a conclusion. This installation was effected in August 1801, the month after the proclamation.

Now the Istimirar Zemindar having thus been placed in the old position of dignity and authority which his predecessors occupied, it is difficult to see how the Madras Government could, by any executive act, alter that position. Whether they had exercised an act of paramount power on the footing of reconquest after rebellion, or whether they were merely supplying a vacancy caused by escheat, they had in July, or at latest in August 1801 perfected the act of appointment, and they could not undo it. And whether they could or not, there is

no evidence that they ever wished to undo it.

It is suggested indeed that as early as the year 1795 the Directors of the East India Company commended to the Madras Government the principles of land settlement introduced into Bengal by Lord Cornwallis, and that one ingredient in that policy was the partibility of estates as is shown by Regulation XI of 1793. The answer is, that the policy of the permanent settlement was applied to Sivaganga as well as to other estates; but that, if there were any general intention of introducing the principle of partibility, it was certainly not followed in the present instance. Here the policy of the Government required the appointment of a Ruler with authority in his hands, and that was accordingly done.

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—continued.

Moreover though the quality of the estate might doubtless be altered by a law, it was not within the scope of Regulation XXV of 1802 to effect any such alteration. It was framed with a view to the land revenue, and not otherwise to infringe on or limit the rights of anybody. And in Regulation IV of 1822 there is a declaration to this effect.

Again it is said that we must take the proclamation of 1801, the Regulation of 1802, and the Sunnud of 1803, as together constituting one transaction. Reading then the whole together, the proclamation only designates the individual Zemindar, while the Regulation and the Sunnud indicate the policy of the Government and the quality of his estate.

If this question was untouched by authority, it would be sufficient to answer this argument by reference to what has already been said on the intention and effect of the proclamation. But on this part of the case there is an authority very closely in point.* The Hunsapore Zemindari, situate in Behar, was an ancient impartible estate in the nature of a Raj. In the year 1767 it was confiscated upon the rebellion of its owner. From that time till the year 1790 it was let out to farm by the Government. In the year 1790, when the decennial settlement was in contemplation, & in course of being made, Lord Cornwallis granted the property to a younger branch of the family which had been dispossessed 23 years previously. It seems that no Sunnud was issued, and, though the decennial settlement, shortly afterwards effected under the Regulations of 1793, proceeds on the footing of certain rights and obligations subsisting between the Zemindar and dependent talookdars and ryots, he does not appear to have been appointed a Ruler or chieftain, as was the case in Sivaganga. He did not receive

* 12 Moore, Ind. App., p. 1.

Judgment
of the Privy
Council dated
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1881.

—concluded.

the title of Rajah till the year 1837, when the title of Maharajah was conferred upon him. Under those circumstances, this Committee held that, as there was nothing to show that the quality of the estate was altered by the grant of 1790, it must be taken to possess its old quality of impartibility, and that the Regulations of 1793 could not be imported so as to control the grant of 1790, or to indicate the intentions of Government in making that grant.

The Hunsapore case is also an authority for holding that a mode of acquisition which constitutes a property as self-acquired in the hands of a member of an undivided family, and thereby subjects it to rules of devolution or disposition different from those applicable to ancestral property does not thereby destroy its character of impartibility.

The result is, that their Lordships agree in the views taken by the Civil Court of Madura and by the High Court; that the appeal fails, and should be dismissed; and that their Lordships will humbly report to Her Majesty accordingly. The Appellants must pay the costs of the appeal.

Judgment
of the
District
Court of
Madura
dated 20th
November
1886.

IN THE DISTRICT COURT OF MADURA.

(:o:)

The 20th day of November 1886.

PRESENT:—T. WEIR, Esquire, *Acting District Judge.*

Original Suit No. 2 of 1886.

Bala Gouri Vallaba Tevar *Plaintiff.*
and

1. Periasamy alias Udayana Tevar, Zemindar of Sivaganga.
2. Muttavaduganada Tevar.
3. Sasivarna Tevar.
4. Delhi Batcha Tevar.
5. Venkatasami Tevar.
6. Dorasinga Tevar, minor, by his father and guardian the 1st Defendant.
7. Ravana Mana Ana Rana Arunachellam Chetty.
8. Annamalai Chetty.
9. Ramasami Chetty.
10. Arunachellam Chetty.
11. Ana Mana Murngappa Chetty.
12. Muttakaruppan Chetty alias Vellayan Chetty.
13. Ramasami Chetty.
14. Thina Ravana Mana Thinnappa Chetty.
15. Thina Ravana Mana Thina Subramanian Chetty.
16. Arunachellam Chetty.

} *Defendants.*

17. Muttaya Chetty.
18. Arnachellam Chetty.
19. Reverend Peter Wary Labarthere Maria Rayappa Samiar.
20. Mr. R. Fischer.
21. Vira Rama Na. Ramasami Chetty.
22. Adappa Chetty.
23. Subramanian Chetty.
24. Virappa Chetty } minors by their uncle and guardian the
25. Raman Chetty } 17th Defendant.
26. Palaniappa Chetty.
27. Chinnaya Chetty.
28. Raman Chetty.
29. Palaniappa Chetty.
30. A. Ru. Su. Virappa Chetty.
31. Ka. Pe. Ri. Poriakaruppan Chetty.
32. A. U. Muttaya Chetty.
33. Si. Ru. A. Ru. Su. Pa. Subramanian Chetty.
34. Ka. A. Ru. Su. Palaniappa Chetty.
35. Ka. Tei. Ramasami Chetty.
36. Mu. Ru. Rama Muttaya Chetty.
37. Rama Vayi Muttaya Chetty *alias* Vairavan Chetty.
38. Annamalai Chetty.
39. Ve. Narayanan Chetty.
40. Alagirisami Naik.
41. Appasami Naik.
42. Virappa Paradesiar.
43. Si. Pi. Si. Virappa Chetty.
44. Pa. Va. Du. Pe. Virappa Chetty.
45. Si. Ra. Su. Virappa Chetty.
46. A. La. Mu. Si. Virappa Chetty.
47. Su. Pa. Mu. Ru. Virappa Chetty.
48. Subramanian Chetty.
49. U. U. Chinnaya Chetty.
50. Ulagappa Chetty.
51. Chokkappa Chetty.
52. Kannappa Chetty.
53. Kailasam Chetty.
54. Lakshmanan Chetty.
55. Ka. Ru. Se. Pa. Subramanian Chetty.
56. A. Ru. Su. Pa. Palaniappa Chetty.
57. Mutturamalinga Tevar.
58. Seshaiyar.
59. Annasami Aiyar.
60. Gopalasami Naik.
61. Saminadhaiyar.
62. Subramania Aiyar.
63. Somasundaramaiyan, minor, by his guardian and executor
Muttasami Aiyar.
64. Rengesa Rayar.
65. Srinivasa Chetty.
66. R. Ramasubbaiyar.
67. Ramasami Aiyangar.

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68. Thatthangudi Tirumalai Aiyangar.
69. Muttukaruppan Chetty.
70. Uruvatty Aiyamperumal Pillai.
71. Janakareja Tevar.
72. Subbarama Sanniar.
73. Kali Ramasami Chetty.
74. Nettar Dorasami Tevar.
75. Mandarasami Chetty.
76. Kallivayal Aiyasami Aiyar.
77. Adappa Chetty.
78. Sivaraman Chetty.
79. Venkatavaradaiyengar.
80. Misiammal.
81. Ka. Muru Na. Sabapathy Chetty.
82. Ka. Ve. Chidambaram Chetty.
83. Velusami Tevar.
84. Kolandasami alias Alagirisami Tevar.
85. A. Ke. Mahama. Sundara Pandia Tevar.
86. Kolandai Pandia Tevar.
87. Sular Ramasami Aiyar.
88. Sonderamaiyan.
89. Krishnas Royar.
90. Ramasami Aiyar.
91. Thoppur Krishnaiyengar.
92. Narayanan Chetty.
93. Kolandasami Servai.
94. Muttaya Pillai.
95. Chidambaram Pillai.
96. Manikkam Pillai.
97. Subbaya Pillai.
98. Adivanlam Chetti.
99. Annapuramam.
100. Saagu Servai.
101. Ka. Suppaya Servai.
102. Muttu Ka. Ru. Arunaschellam Chetty.
103. Venkatachellam Chetty.
104. Karuppan Chetty.
105. Na. Annamalai Chetty.
106. Kasi Chetty.
107. Lakshmanan Chetty.
108. Sellachami Tevar.
109. Pounnasami Tevar.
110. Dorai Pandia Tevar. (Struck off by order on M. P.
No. 114 of 1885).
111. Velusami Tevar.
112. Alagattal.
113. Kumara Velu.
114. Narayanasami Pandarata.
115. Arumuga Desikar.
116. Vi. Ra. Le. Kutayan Chetty.
117. Ramasami Chetty.
118. Chinnaya Chetty.

Defendants.

119. Ramasami Chetty.
 120. Kottaisami Tevar.
 121. Amarapathy Padur Vayi Naga Rama Venkatachellam } Defendants.
 Chetty.
 122. A. Palanivelu Pandaram.

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This suit coming on for hearing, the Court delivered the following

JUDGMENT.

This is a suit to recover possession of the important Zemindari of Sivaganga.

2. The 1st Defendant is the present Zemindar of Sivaganga, the Defendants 2 to 6 are the younger brothers of the said Zemindar.

3. The remaining Defendants Nos. 7 to 122 are persons who are said to be in possession of portions of the Zemindari under alienations of various kinds executed by the late Rani Kattama Nachchiar and her successors in the Zemindari.

4. The plaint is as follows :—

“The Zemindari of Sivaganga was in or about the year 1730 granted to Sasivarna Tevar and he became the first Zemindar of Sivaganga.

“2. In or about the year 1730, Muttavaduganada Tevar, the only son of the said Sasivarna Tevar, died without issue, leaving Velu Nachchiar his widow and an infant daughter named Vellachee Nachchiar *alias* Velu Nachchiar and Padamattoor Namasisvaya Tevar, Polygar of Padamattoor, and his sons Padamattoor Woya Tevar *alias* Padamattoor Udaya Tevar or Peria Udaya Tevar or Padamattoor Worria Tevar and Gouri Vallaba Tevar his undivided cousins him surviving.

“3. The said Velu Nachchiar died in or about 1796.

“4. The said Vellachee *alias* Velu Nachchiar was married to one Vengum Peria Udaya Tevar and pre-deceased her mother dying without issue.

“5. Notwithstanding the claims of the said Padamattoor Namasisvaya Tevar who was the next heir to the Zemindari and who died in or about the year 1785, and after him of his eldest son, the said Padamattoor Woya Tevar, certain persons named Peria Murdoo and Chinna Murdoo, who pretended to be the Servacars or ministers of the said Velu Nachchiar, usurped the said Zemindari and, after holding same for a short time, rebelled against the Nabob of the Carnatic and the Honorable East India Company.

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"6. The rebellion was quelled by the troops of the said East India Company who in 1801 recognized the said Padamattoor Woya Tevar as the "rightful heir thereto in preference to the said Vengum Peria Udaya Tevar.

"7. Upon such recognition, the said Padamattoor Woya Tevar, who "had been obliged to go for protection from his said Palayaput to the Tondiman "Rajah of Pudukottah, returned to Sivaganga at the request of the said "Com-
"pany, and was proclaimed Zemindar of Sivaganga by the said Honorable Com-
"pany on or about the 6th July 1801.

"8. The said Padamattoor Woya Tevar died in 1814 leaving the said "Gouri Vallaba Tevar his undivided brother and three sons named Muttu Va-
"duganada Tevar, Muttusamy alias Gouri Vallaba Tevar, and Bodha Gurusamy
"Tevar.

"9. After the death of the said Padamattoor Woya Tevar as aforesaid, "his sons being young, his undivided brother, the said Gouri Vallaba Tevar, who "was looking after the affairs of the Sivaganga Zemindari, with a view to defraud "them and to create to himself a title to the said Zemindari, fraudulently got up "certain records both before and after the life-time of the said Woya Tevar for "showing that the Zemindari was originally granted to him and held the said "Zemindari till his death which took place in 1829.

"10. The said Muttuvaduganada Tevar, the eldest son of the said "Woya Tevar, then entered into possession of the said Zemindari and held same "until he died in 1831, leaving three sons, viz., Bodha Gurusamy Tevar, Gouri
"Vallaba Tevar and Namasivaya Tevar.

"11. On the death of the said Muttuvaduganada Tevar, his eldest "son, the said Bodha Gurusamy Tevar, succeeded to the Zemindari of Sivaganga "and continued to be Zemindar of Sivaganga until he died in 1840 without
"issue.

"12. On the death of the said Bodha Gurusamy Tevar as aforesaid, "his younger brother, the said Gouri Vallaba Tevar, succeeded to the Zemindari "and continued to be Zemindar of Sivaganga until he died in the year 1849, "leaving two sons named Bodha Gurusamy Tevar and Gouri Vallaba Tevar, who
"were both infants at the time of their father's death.

"13. Upon the death of the said Gouri Vallaba Tevar, the Court of "Wards took possession of and held the Zemindari during the minority of his
"son, the said Bodha Gurusamy Tevar, the Plaintiff's father, and, on latter coming

"of age, the said Zemindari was delivered to him by the said Court of Wards Judgment
 "and he continued to be Zemindar of Sivaganga until the year 1864.

"14. Although the said Gouri Vallaba Tevar, who died in the year
 "1829 as in the ninth para mentioned, left no male issue, he left three widows
 "him surviving, viz., Unga Muttu Nachchiar, Parvata Nachchiar and Muttuvirayi
 "Nachchiar all since deceased, and Bhutaka Nachchiar, deceased, a daughter by
 "his second wife; Vellai Nachchiar since deceased, a daughter by his deceased
 "first wife Rakhu Nachchiar; Kottai Nachchiar, Mahamu Nachchiar and Kattama
 "Nachchiar, all since deceased, daughters by Velu Nachchiar, his deceased third
 "wife. One or other of these has since the year 1832 been litigating the title of
 "the said Muttuvaduganada Tevar in the 8th para named and of his descen-
 "dants to the said Sivaganga Zemindari.

"15. Such litigation began with Suit No. 4 of 1832 in the Zillah Court
 "of Madura which was instituted by the said Vellai Nachchiar, the daughter of
 "the said Rakhu Nachchiar as guardian of her infant eldest son Muttuvaduga
 "Tevar for whom she claimed the said Zemindari by virtue of an Arzi said to
 "have been sent to the Collector of Madura by the said Gouri Vallaba Tevar in
 "1822, according to which she contended that her said son was entitled to suc-
 "ceed to the Zemindari.

"16. In 1833, two other suits were instituted in the said Zillah Court
 "of Madura. The first, No. 3 of 1833, by the said Unga Muttu Nachchiar, the
 "fifth wife of the said Gouri Vallaba Tevar, who claimed the said Zemindari in
 "her own right as the eldest surviving widow of the said Gouri Vallaba Tevar
 "and heiress to his self-acquired property which she alleged the Zemindari to be,
 "and the second, No. 4 of 1832, by Gouri Vallaba Tevar *alias* Aramanaisamy
 "Tevar, son of the said Kottai Nachchiar, who claimed to have been adopted by
 "the said Gouri Vallaba Tevar deceased, and as such to be entitled to succeed
 "to the said Zemindari.

"17. All these suits were dismissed by the Original Court and all such
 "decrees were appealed against to the late Sudder Court and all such appeals
 "were heard together by the said Sudder Court.

"18. The said appeals against the decrees of the said Original Court
 "in said Suits Nos. 4 of 1832 and 3 of 1833 were respectively dismissed by the
 "said Sudder Court: but the decree of the Original Court in the said Suit No. 3
 "of 1833 was reversed and the said Unga Muttu Nachchiar was decreed by the
 "said Sudder Court entitled to recover the said Zemindari.

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"19. Against this decree, the Defendant, the said Bodha Gurusamy Tevar, the then Zemindar (the Plaintiff's grandfather), appealed to Her Majesty in Council and, by decree of the 19th June 1844 made on such appeal, the said decree of the said Sudder Court was reversed with liberty to Respondent, the said Unga Muttu Nachchiar, to bring a fresh suit notwithstanding the decree of the said Original Court within 3 years from filing of the said decree of the 19th June 1844 in the said Sudder Court.

"20. The grounds on which the said decree of the Sudder Court was reversed were that the Sudder Court had miscarried in deciding the question of division between the said Woya Tevar and his brother, the said Gouri Vallaba Tevar, the Respondent's late husband, which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the Respondent ought to be allowed to remedy the omission in a new suit.

"21. On the 10th August 1845, the said Unga Muttu Nachchiar instituted Suit No. 2 of 1845 in the Zillah Court of Madura *in forma pauperis* against the Plaintiff's said grandfather Gouri Vallaba Tevar and his younger brother for possession of the said Zemindari, and on the 27th day of December 1847 such suit was dismissed by the said Zillah Court.

"22. On the 5th April 1848, the said Unga Muttu Nachchiar appealed to the said Sudder Court against the said decree. The Plaintiff's said grandfather died pending the disposal of the appeal, and the said appeal was revived against the Plaintiff's father who was then an infant under the guardianship of the Court of Wards.

"23. Before the said appeal was disposed of, and on the 24th of June 1850, the said Unga Muttu also died.

"24. Notice was then issued to the heirs of the said Unga Muttu to come forward and prosecute the said appeal and in answer to such notice there came forward the said Bhutaka Nachchiar, daughter of the said Gouri Vallaba (brother of the said P. Woya Tevar) by his second wife; the said Soumya Nachchiar, his daughter by his said sixth wife; and the said Muttuvaduga Tevar, the Plaintiff in the said Suit No. 4 of 1832, who severally claimed to be entitled to the said Zemindari.

"25. By order dated the 21st October 1850, the Sudder Court held that none of the claimants could prosecute the said appeal, and directed it to be removed from the file, but left them at liberty to bring fresh suits to enforce their respective claims provided such suits were commenced before 30th April 1851.

"26. By orders of the 16th April 1852 and 19th September 1852, the said Sudder Court confirmed its said order of the 21st October 1850 directing the said appeal to be removed from the file.

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"27. Subsequently, the said Kattama Nachchiar brought her Suit No. 10 of 1856 in the Zillah Court of Madura, and the said Soumya Nachchiar brought Suit No. 4 of 1857 in the same Court, each respectively claiming the Zemindari.

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"28. Both the above suits were dismissed by the Original Court on the 25th of August 1859.

"29. The decree dismissing the said Suit No. 4 of 1857 was not appealed against.

"30. The Suit No. 10 of 1856 was dismissed upon the ground that upon the question of division the Plaintiff therein was concluded by the decree of 1847, that being a judgment *in rem*, and that the Zemindari, whether self-acquired or not, could not descend to a widow or daughter except in the event of the Zemindar having been a member of a divided family.

"31. The Plaintiff in the said Suit No. 10 of 1856 appealed to the Sudder Court praying that the suit might be remanded for adjudication on the merits but such appeal was dismissed on the 5th November 1859.

"32. Against such decree of the 5th November 1859, the said Kattama Nachchiar, the Appellant therein, prayed leave to appeal to Her Majesty in Council, and such leave was refused by the Sudder Court on the 3rd March 1860, but leave was afterwards specially given on the recommendation of the Judicial Committee of Her Majesty's Privy Council, and, upon such leave, the said Appellant appealed to Her Majesty's Privy Council, and such appeal was heard as an appeal against the said decree of the Sudder Court of the 5th November 1859, and the order of the said Court of the 3rd March 1860, and the said decree of the 25th August 1859, and against the said order of the Sudder Court of the 19th April 1852, and the decree of the Civil Court of Madura of the 27th December 1849.

"33. In their Judgment upon the said appeal delivered on the 30th of November 1863, the Judicial Committee of the Privy Council held that, though the father of the said Kattama Nachchiar named Gouri Vallaba Tevar and his brother Woya Tevar were members of an undivided Hindu family, the Zemindari was the self-acquired property of the said Gouri Vallaba Tevar, and that upon his death his widows, and after them his daughters were entitled to inhe-

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"rit it in preference to his undivided brother. Their Lordships (the Judicial Committee of the Privy Council) recommended to Her Majesty to reverse the decrees and orders complained of by the said appeal, to declare that the suit of 1856, which appeared to have resulted from erroneous directions given by the Sudder Court, ought to have been and ought to be dismissed; and in the suit of 1845, to declare that Soumya and Muttavaduga were or were not, nor was either of them, but that the Appellant (the said Kattama Nachchiar) and her sisters were as against the Respondent (the Plaintiff's father) entitled to prosecute the appeal and to recover the Zemindari, such declaration to be without prejudice to the rights of the Appellant and her sisters *inter se*; and further to declare that an account ought to have been, and ought to be, directed of the rents and profits of Zemindari received by the Respondent or by his order or for his use since the death of Unga Muttu, with direction for payments, to the parties entitled, of what should be found due upon the account; and also to declare that the Zemindari ought at once to be put into the hands of a Collector or of a Receiver to be appointed by the Court with liberty to the Appellant and her sisters or any of them to apply to the Court as they may be advised; and that the case be remitted to the Sudder Court with directions to carry such declarations into effect, and that no costs of the suit of 1856, or of the said appeal or of any of the proceedings below be given, but that any costs to which the Appellant had been subjected be refunded.

"34. That the Plaintiff submits that, in the conduct of the said Suit No. 10 of 1856, the appeal to the Sudder Court and of the appeal to the Privy Council against the decree of the Sudder Court, the said Kattama Nachchiar and her agents by having recourse to various unfair means suppressed almost all the documents establishing the sole and exclusive right of the Plaintiff's family to the Zemindari and, by such fraudulent and illegal acts, obtained the said order of the Privy Council. The Plaintiff further submits that the said case was not properly managed on behalf of the Defendant therein and that the Respondent's case was materially affected by the case not having been remanded and also by the importation of the evidence in the former cases as evidence in the said appeal.

"35. Under the proceedings had and taken under such recommendation, the Plaintiff's father was ousted from possession of the said Zemindari in the year 1864, and the said Kattama Nachchiar was put in possession thereof by process of law in execution of the said decree and remained in possession thereof until her death in May 1877.

"36. On her death, her son Muttuvaduganada Tevar entered into Judgment of the District Court of Madura dated 20th November 1886. ---continued.
 "possession, but Dorasinga Tevar, who claimed to be entitled to succeed in pre-
 "ference to the said Muttuvaduganada Tevar upon the death of the said Kat-
 "tama Nachchiar, instituted in O. S. No. 1 of 1877, against him, and recovered
 "possession of the said Zemindari by the decree of the District Court of Madura,
 "dated 3rd December 1877, such decree was confirmed by the High Court and
 "by the Privy Council.

"37. The said Dorasinga Tevar died on the 9th July 1883 leaving the
 "Defendants 1 to 5 his sons: and the first Defendant, his eldest son, is now Ze-
 "mindar of Sivaganga, and the said Zemindari is now in possession of a Receiver
 "appointed by the District Court of Madura in certain Proceedings taken by
 "creditors in respect of debts due to them.

"38. The Plaintiff was born on the 27th day of December 1864.

"39. The Plaintiff's said father died on the 5th day of October 1872
 "leaving the Plaintiff (an infant of the age of about 8 years or thereabouts).

"40. The Plaintiff came of age on the 27th of December 1882 and
 "knew of the said fraudulent acts and conduct of the said Gouri Vallaba and
 "Kattama Nachchiar and of her agents as set forth in paragraphs 9 and 34 only
 "in the beginning of 1885.

"41. That the Plaintiff avers that the decree of the Judicial Committee
 "was due solely to the fraudulent acts of the said Kattama Nachchiar and Gouri
 "Vallaba as aforesaid and that the Judicial Committee were mistaken in assuming
 "or deciding that the Zemindari of Sivaganga was the self-acquisition of the said
 "Gouri Vallaba Tevar and further the said Sunnud was not and did not purport
 "to be a grant but only a recognition and appointment of the rightful heir from
 "and out of the family or next heirs of the last holder.

"42. The Plaintiff avers that the said Zemindari was not the self-
 "acquisition of the said Gouri Vallaba Tevar but was the ancestral property of
 "their family and that, if it can be regarded as the self-acquisition of anybody, it
 "was the self-acquisition of the said P. Woya Tevar.

"43. The Plaintiff avers that, on the death of Muttuvaduganada Te-
 "var in the 2nd para of this plaint mentioned without issue, the next heir to the
 "said Zemindari was the said P. Woya Tevar, Poligar of Padamattoor, the un-
 "divided elder brother of the said Gouri Vallaba Tevar, who as the elder brother

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"was entitled to succeed thereto, and that the said P. Woya Tevar as also his father Namasivaya Tevar did put forward their claims thereto previous to the interference of the Honorable Company in the matter, and that, owing to that said P. Woya Tevar setting up and attempting to enforce his said claims, he incurred the displeasure of the said Murdoos who sought his life and that of his brother, the said Gouri Vallaba Tevar; and he and his said brother were both forced to flee for their lives; and that he, the said P. Woya Tevar, Poligar of Padamattoor, had to leave his Palayaput of Padamattoor and take refuge with the Tondaman Rajah of Pudukottah and the said Gouri Vallaba Tevar fled to Arunthangy in Tanjore where he lived with a concubine.

"44. The only person who at that time endeavoured to contest the title of the said P. Woya Tevar was the said Vengum Peria Udaya Tevar, but he was not recognized as the rightful heir. To strengthen his claim, he married first the only daughter of the said Rani Velu Nachchiar, and, after her death without issue, one of the daughters of one of the two Murdoos in the 3rd paragraph hereof mentioned, who were then all powerful in that part of the country, and joined in their rebellion.

"45. On satisfying themselves that the said Padamattoor Woya Tevar was the rightful heir to the Zemindari, and that the country generally recognized his claim, and that his nomination thereof offered the readiest and most likely means of reducing the country to subjection and restoring tranquility, the said East India Company recognized the said P. Woya Tevar alias Peria Udaya Tevar and on or about the 6th day of July 1801 proclaimed him Zemindar of Sivaganga.

"46. The Plaintiff submits that the Judgment of the Judicial Committee of the Privy Council hereinbefore mentioned is not binding upon him and that the Plaintiff as the heir of the said P. Woya Tevar is entitled to the Zemindari of Sivaganga.

"47. The Defendants are now wrongfully in possession of the said Zemindari and, in the use and enjoyment of the rights and privileges thereof, and of the moveable and immoveable property appertaining thereto, under the said proceedings had and taken upon the Judgment of the 30th November 1863 as the debts heirs of the said Gouri Vallaba Tevar.

"48. The Plaintiff further submits that the debts, alienations and transfers in favour of several Defendants executed by the late Rani and her successors are fraudulent, invalid and not binding on him.

"49. Cause of action arose on the 27th December 1882 and in the be-
 "ginning of 1885."

The Plaintiff therefore prays Judgment as follows :

"1. That it be declared that the said decree of the 30th November
 "1863 is not binding on the Plaintiff.

"2. That the Plaintiff be declared to be the Zemindar of Sivaganga
 "and entitled to all the rights, privileges and honors thereunto appertaining.

"3. That the several alienations, leases, mortgages, &c., in favour of
 "the several Defendants be declared null and void as against the Plaintiff.

"4. That an account may be taken of all the said moveable and im-
 "moveable property belonging to the said Zemindari and of the rents, issues, in-
 "come and profit thereof come to the hands of the Defendants, their servants or
 "agents, or which but for their wilful neglect or default would have so come, and
 "of the application thereof.

"5. That possession of the Zemindari of Sivaganga together with lands
 "hereditaments, Pannai, Kolkryam, Sirutettu, &c., Devastanams, Pagodas and
 "Choultries; also all the jewels and other moveable and immoveable property
 "thereunto belonging, and all the rights and other appurtenances thereunto ap-
 "pertaining, be delivered over to the Plaintiff and to pay and to deliver to him
 "all such monies or properties as shall, on the taking of such accounts as afore-
 "said, be found to have come to the hands of the Defendants free from all incum-
 "brances made or suffered by the Defendant, or anybody, from, under or in trust
 "for whom they claim.

"6. That the Defendants be decreed to pay the costs of this suit.

"7. And that the Plaintiff may have such further or other relief in the
 "premises as to this Court shall seem meet and the nature of the case may re-
 "quire."

5. The claim set out in the above plaint is met by the following written
 statement filed on behalf of the Defendants 1 to 6.

"1. The Defendants deny that the Plaintiff is the son of Bodha Guru-
 "samy Tevar mentioned in the plaint.

"2. These Defendants say that the Zemindari of Sivaganga was the self-
 "acquisition of Gouri Vallaba Tevar mentioned in the plaint, who was the mater-
 "nal grand-father of the father of Defendants 1—5, and that the same was grant-

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"ed to the said Gouri Vallaba Tevar by the British Government in 1801, and has
"devolved upon these Defendants according to the Hindu Law of Inheritance.

"3. It has been finally established by the decision of the Judicial Com-
"mittee of the Privy Council mentioned in para 33 of the plaint, dated the 30th
"November 1863, that the Zemindari of Sivaganga was the self-acquired proper-
"ty of the said Gouri Vallaba Tevar, and that on his death it devolved upon
"the heirs to his separate property to the exclusion of his nephew, even if such
"nephew were to be regarded as an undivided member of the family.

"4. The alleged father of Plaintiff and Rani Kattama Nachchiar, the
"predecessor in estate of the father of Defendants 1—5, and the respective pre-
"decessors in title of the said Bodha Gurusamy Tevar and Kattama Nachchiar
"were the contending parties in the litigation which terminated in the said deci-
"sion of Her Majesty in Council, and this suit is therefore barred as *res judicata*
"by the said decision.

"5. These Defendants deny the allegations contained in paras 9 and 34
"of the plaint and say that they are too general and vague to admit of any issue
"being framed in reference thereto, and that the said allegations, even if true,
"are insufficient in law to deprive the said decision of Her Majesty in Council of
"its effect and operation as a bar to the present suit.

"6. These Defendants say that the Plaintiff is precluded from main-
"taining this suit while the said decision of Her Majesty in Council is subsisting
"and in force.

"7. These Defendants say that the Plaintiff's suit is barred by the law
"of limitation, and that Rani Kattama Nachchiar's adverse possession of the Ze-
"mindari commenced in February 1864, some months before the birth of the
"Plaintiff, and that the provisions of Section 7 of the Indian Limitation Act are
"inapplicable to the case.

"8. These Defendants deny the allegation contained in para 40 of the
"plaint that the Plaintiff discovered in 1885 the fraudulent acts imputed to Gouri
"Vallaba Tevar and Kattama Nachchiar and her agents in paras 9 and 34 of the
"plaint, and these Defendants also say that, even if the statement as to the alleged
"discovery be true, it cannot give the Plaintiff a fresh starting point for comput-
"ing the period of limitation for this suit.

"9. The Defendants say that the said Gouri Vallaba Tevar and his
"elder brother Woya Tevar mentioned in the plaint were divided in interest, and

" that at any rate the Zemindari of Sivaganga was held and enjoyed by the said Gouri Vallaba Tevar as his separate property from 1801 until his death in 1829.

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" 10. These Defendants further say that, in Suit No. 4 of 1823 which was brought by the said Gouri Vallaba Tevar against Muttuvaduganada Tevar and his two younger brothers, the sons of the said Woya Tevar who died in 1815, for the recovery of the villages of Padamattoor and 7 others, the said Muttuvaduganada and his brothers set up in their written statement a claim in themselves to the Zemindari of Sivaganga as against the said Gouri Vallaba Tevar on grounds substantially the same as those relied on by the Plaintiff in his plaint herein as to the alleged title of the said Woya Tevar to the Zemindari of Sivaganga.

" 11. These Defendants say that the Suit No. 4 of 1823 was lawfully compromised by a Razinama, dated the 5th January 1826, which was entered into between the said Gouri Vallaba Tevar of the one part, and the said Muttuvaduganada Tevar and his two younger brothers of the other part, whereby it was stipulated among other things that the said Muttuvaduganada Tevar and his two younger brothers were not entitled to the Zemindari of Sivaganga as claimed by them in their written statement.

" 12. These Defendants say that the right, if any, of the alleged ancestors of the Plaintiff was relinquished in favour of the said Gouri Vallaba Tevar under the Razinama aforesaid, and that such renunciation is binding upon the Plaintiff and operates as a bar to the present suit.

" 13. These Defendants say that the Plaintiff is not entitled to any account from them as claimed in Clause 4, para 49 of the plaint, as to the moveable and immoveable properties, &c., belonging to the Zemindari, but that, if he is entitled to any such properties and the delivery, &c., possession whereof is claimed in Clause 5 of the said para of the plaint, he should state what they are and describe and specify the same in Schedules attached to the plaint.

" 14. These Defendants do not admit any of the numerous allegations contained in the plaint, save and except such as may have been admitted in any of the preceding paragraphs of this written statement and they put the Plaintiff to the proof thereof or such of them as he may deem material to his case.

" 15. These Defendants pray for the foregoing reasons that this Hon'ble Court will be pleased to dismiss the Plaintiff's suit with costs".

6. At the first hearing on the 24th July last, the following Issues were agreed upon with the consent of the Counsel and Pleaders of both parties :—

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- " I. Whether Plaintiff is the son of Bodha Gurusamy Tevar and when
" was he born, it being admitted that he is the son of Bodha
" Gouri Nachchiar ?
- " II. Whether the decision of the Privy Council, dated 30th Novem-
" ber 1863, mentioned in para 33 of the plaint, is binding upon
" the Plaintiff and this suit is barred as *res judicata* by that
" decision ?
- " III. Whether the Plaintiff is precluded from maintaining this suit
" while the said decision of Her Majesty is in force or whether
" the proper course should not be for the Plaintiff to move the
" Privy Council to review their judgment ?
- " IV. (1) Whether the allegations of fraud contained in the plaint
" and Plaintiff's written statement now directed to be filed are
" sufficient in law to invalidate the said decree of Her Majesty
" in Council ? and (2) Whether such allegations are true in fact ?
- " V. Whether Plaintiff's suit is barred by limitation ?
- " VI. When did Plaintiff come to know of the fraudulent acts and con-
" duct of Gouri Vallaba Tevar and Kattama Nachchiar and his
" or her agents relied on and alleged in plaint and the written
" statement of Plaintiff directed to be filed, and whether the date
" when he derived such knowledge affects the operation of the
" law of limitation ?
- " VII. Whether the Razinama, dated 5th January 1826, which was
" filed in Original Suit 4 of 1823 mentioned in paras 10 and 11
" of the written statement of Defendants 1 to 6, is valid and
" binding and precludes the Plaintiff from maintaining the pre-
" sent suit and operates as a renunciation and release of the
" rights, if any, possessed by the ancestors of the Plaintiff in the
" Zemindari in favour of Gouri Vallaba Peria Udaya Tevar so
" as to bind the Plaintiff ?
- " VIII. Whether Woya Tevar mentioned in paras 6 and 7 of the plaint
" was proclaimed and constituted Zemindar of Sivaganga by the
" Honorable East India Company on or about 6th July 1801, or
" whether his younger brother Gouri Vallaba Peria Udaya Te-
" var was proclaimed and constituted as such Zemindar ?

- “IX. Whether, after the death of the said Woya Tevar, his brother
 “the said Gouri Vallaba Peria Udaya Tevar was, until his death,
 “managing the Zemindari of Sivaganga on behalf of the sons of
 “the said Woya Tevar?
- “X. Whether, on the death of Gouri Vallaba Peria Udaya Tevar,
 “Muttuvaduganada Tevar entered into possession of the Zemin-
 “dari in right of his being successor and heir to his father by
 “claiming to be the nephew and successor of the said Gouri
 “Vallaba Peria Udaya Tevar, and whether his possession in
 “either or any capacity in any way affects the question of limi-
 “tation in fifth issue inserted?
- “XI. Whether the Zemindari of Sivaganga was the joint and ances-
 “tral property of Woya Tevar and his brother Gouri Vallaba
 “Peria Udaya Tevar or was the self-acquisition of either of
 “them, and if so, which of them?
- “XII. Whether the Plaintiff is entitled to any account as claimed in
 “the plaint?

“XIII. Whether Plaintiff is entitled to any and what relief?”

As regards the 4th issue, Mr. Grant for Plaintiff undertakes to put in within one week a statement setting out specifically the fraudulent acts on the part of Gouri Vallaba Tevar and or Kattama Nachchiar on which he intends to rely.

Mr. Bashyam Aiyangar asks for an early date to be heard on the questions of law arising on the issues, viz., 2nd, 3rd, 4th, 5th and 6th Issues.

The case will stand adjourned for argument on the above points until the 16th August.

Mr. Grant represents that he has applied to Government and the Revenue Authorities for copies of certain documents and that he is not likely to obtain them by an early date.

The matter will stand over for orders until the 16th August. It appears that only a list of documents has been put in as yet. Defendants will file a list of documents on 16th August.

11-7-86.

(Signed) T. WEIR,
 Acting District Judge.

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7. It was agreed that, pending the disposal of the preliminary questions raised on the 2nd, 3rd, 4th, 5th and 6th issues, the questions raised on the remaining issues should stand over. Pending also the disposal of these preliminary questions, it was agreed that it was unnecessary to frame issues on the several defences put in by the 7th to 122nd Defendants.

8. The allegations of fraud, as stated in the 9th and 34th paras of the plaint, being of a general character, the Plaintiff was directed at the first hearing to supplement these statements by filing a further statement stating specifically the acts of fraud relied upon by him. In compliance with this order, the Plaintiff put into Court on the 16th August 1886 a supplemental statement relating to the alleged fraudulent acts.

Supplemental statement put in by Plaintiff is as follows :—

- " 1. That the Zemindari of Sivaganga was on 6th July 1801 given
" by the Government of Madras to Padamatoor Woya Tevar
" (who was the Polygar of Padamatoor) and who was recognized
" by the said Government after much correspondence as the law-
" ful heir to the said Zemindari.
- " 2. That, while the said Woya Tevar was Zemindar of Sivaganga,
" his younger brother Gouri Vallaba Tevar was the Manager
" of the said Zemindari and in such position he committed a
" series of acts for the purpose of defeating the title of his
" brother and his heirs to such Zemindari and of setting up
" his own.
- " 3. In 1802, when the Permanent Settlement Account was submitted
" to the Collector of Madura, the said Gouri Vallaba Tevar
" fraudulently inserted his name and title between the name
" and title of his brother Woya Tevar so as to enable him to
" pretend and assert thereafter that he was the grantee of the
" said Zemindari.
- " 4. In 1803, the Government forwarded to the said Woya Tevar
" through the Collector an Istimrar Sunnud for the said Ze-
" mindari, but the said Gouri Vallaba Tevar kept possession of
" the said Sunnud and pretended that he was the person named
" therein as grantee.

- "5. In 1802, when the Permanent Settlement Account was taken, Judgment of the District Court of Madras dated 20th November 1830.
 "75,000 pagodas was fixed as the Peishkush of 1,936 villages
 "attached to the Zemindari of Sivaganga including the 8 vil-
 "lages attached to old Palayaput of Padamattoor belonging to
 "the said Woya Tevar. While so, the said Gouri Vallaba Tevar
 "has, since the death of the said Woya Tevar, produced and
 "relied upon a fraudulent Muchilka pretending to bear date,
 "17th July 1803, in which his brother purports to recognize him
 "as the Zemindar of Sivaganga. —continued.
- "6. In 1815, the said Gouri Vallaba Tevar concocted another
 "Muchilka purporting to have been executed by the sons of the
 "said Woya Tevar to the said Gouri Vallaba Tevar acknowledg-
 "ing their liabilities to pay kists to him in respect of Padamat-
 "toor Palayaput.
- "7. During the life-time of Woya Tevar and after his death and
 "during the minority of his sons (when Gouri Vallaba Tevar
 "was managing the affairs of the Zemindari), the said Gouri
 "Vallaba Tevar, in order to strengthen his claim, conducted all
 "the correspondence relating to the Zemindari himself and in
 "his own name. He has also caused the Permanent Settlement
 "Accounts and other documents which were in the Collector's
 "Office and which stood in the name of Woya Tevar to be con-
 "cealed or destroyed.
- "8. In 1814, the said Woya Tevar died suddenly but the said Gouri
 "Vallaba Tevar did not report the matter to the supreme au-
 "thorities.
- "9. In 1820—21, the said Gouri Vallaba Tevar issued an attachment
 "against the sons of Woya Tevar for alleged non-payment of
 "tax and thereby strengthened his pretensions to the Zemin-
 "dari and his supposed superior rights over his brother's sons.
- "10. In 1823, the said Gouri Vallaba Tevar instituted Suit No. 4 of
 "1823 against the sons of Woya Tevar, for the recovery of
 "Rupees 33,000 and odd being the kist said to be due for the
 "old Palayaput of Padamattoor and filed in that suit documents
 "which he had concocted as well as correspondence which he

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- “from time to time had with the Collector and others in order
“to strengthen his claim, but he suppressed, concealed and
“destroyed all genuine documents which were in the name of
“his brother Woya Tevar.
- “11. In 1826, at the approach of the hearing of the above suit and
“fearing discovery of the frauds which he had committed, the
“said Gouri Vallaba Tevar fraudulently induced those who were
“helping the sons of the said Woya Tevar to defend the suit as
“also the Pleaders and Vakils engaged in the said suit, to ad-
“vise and compel the sons of the said Woya Tevar to come to a
“compromise which resulted in his withdrawing his said suit
“and in his fraudulently obtaining a declaration from the sons
“of the said Woya Tevar that they had no right or interest in
“the said Sivaganga Zemindari.
- “12. In 1829, when Gouri Vallaba Tevar died, he left a Will bequeath-
“ing his Zemindari to his expected son by his wife who was
“then pregnant and, in default of such son, to his nephews, the
“sons of the said Woya Tevar.
- “13. In 1832, a daughter of the said Gouri Vallaba brought Suit No.
“4 of 1832 claiming the Zemindari but that suit was dismissed.
- “14. In 1833, two other false suits were instituted, one by the wife of
“the said Gouri Vallaba and the other by the alleged adopted
“son but these were also dismissed.
- “15. In 1845, Gouri Vallaba's widow, Unga Mutta Nachchiar, brought
“a suit to the effect that her husband was adopted by the origi-
“nal Zemindar of Sivaganga, that he was divided from his bro-
“ther, the said Woya Tevar and that the Zemindari should come
“to her, but that suit was also dismissed. In that suit, many
“persons were bribed to give false evidence and many docu-
“ments were suppressed or caused to be destroyed so that the
“old contention that the original grant of the said Zemindari
“was to the said Gouri Vallaba Tevar and not to his brother
“Woya Tevar was still persisted in and used for the purpose of
“defrauding the said Woya Tevar's representatives and of de-
“ceiving the Court before whom such suit came on for hearing.

- " 16. In 1856, while the father of the present Plaintiffs was a minor, "one Kattama Nachchiar, a daughter of the said Gouri Vallaba Tevar brought a suit No. 10 of 1856 for recovering possession of the Zemindari but that suit was also dismissed before settlement of issues. In this suit also, the old contention and deceit and suppression of documents at the instance of the said Gouri Vallaba Tevar's representatives was persisted in and practised for the purpose of defrauding the said Woya Tevar's representatives and of deceiving the Courts before whom such suit came on for hearing.
- " 17. In the Judgment of the Privy Council in 1863, it appears that the Counsel for the said Woya Tevar's representatives failed to conduct their case properly through the fraud and deceit practised by the representatives of the said Gouri Vallaba Tevar.
- " 18. This statement is made pursuant to the order of this Court and as a supplement to the allegations in plaint contained and to the statement made by Plaintiff's Counsel before this Court on the 22nd July 1886 to both of which Plaintiff desires to refer.
- " 19. The Plaintiff's allegations of fraud are based on information and belief, but he hopes to support same upon the evidence, oral and documentary, to be hereinafter recorded.
- " 20. The Plaintiff charges that all previous decisions adverse to the representatives of the late Woya Tevar were the result of fraud and mistake, some instances of which so far as the Plaintiff can now state them are, as before mentioned, stated in plaint, Counsel's statement and their written statement.
- " 21. The Plaintiff charges by reason of the matters aforesaid he and his predecessors in title have been kept from the knowledge of their rights, the title on which it is founded and of the documents necessary to establish their rights which have been fraudulently concealed and that the fraud only became known to Plaintiff as in plaint alleged and that the Plaintiff has now in this suit for the first time only the means of producing the whole or any of the suppressed and false documents before mentioned or of compelling their production."

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9. The preliminary questions raised in the issues above adverted to were fully argued for the Plaintiff by Counsel (Messrs. Shephard, Grant and Pole and the Honorable S. Subramania Aiyar) and by Mr. V. Bashyam Aiyangar for the Defendants on the 29th ultimo, and the Court having in the interval been otherwise occupied has reserved judgment up to this date.

10. The case put forward by the Plaintiff is met, it will be seen, by the plea that the action is barred, (1) as being *res judicata* (2) by limitation. In connection with the plea of bar by *res judicata*, the further question is raised whether the Plaintiff's remedy in the circumstances alleged by him, *viz.*, that the decree of the Privy Council was obtained by fraud is by an original suit such as the present suit or by an application to the Privy Council to review their judgment.

The argument has dealt chiefly with the questions raised in these three issues, *viz.*, the 2nd, 3rd and 5th issues.

The 4th issue, in so far as it was discussed, relates to the sufficiency of the allegations of fraud as made in the plaint and in the supplemental statement.

The 6th issue relates to the question of the time at which the Plaintiff came to know of the fraudulent acts alleged and to the effect of the time of his becoming possessed of such knowledge as affecting the operation of the Law of Limitation.

11. The first question then to be considered is that of *res judicata* as stated in the second issue, *viz.*, whether the decision of the Privy Council, dated 30th November 1863 mentioned in para 33 of the plaint, is binding upon the Plaintiff and this suit is barred as *res judicata*?

12. The father of the present Plaintiff was, it is admitted, a party to the litigation which terminated in the Judgment of the Privy Council in November 1863 and he was ousted from the Zemindari by the Judgment then given. Kattama Nachchiar, the late Rani, was the other party to the litigation.

13. In supporting the argument that the suit was not *res judicata*, the Plaintiff's Counsel (Mr. Shephard), while admitting for the purpose of the question under discussion that the Plaintiff claimed through or under his father, argued that the 1st Defendant, the present Zemindar, could not be said to claim through or under the other party to the litigation of 1863, *viz.*, Kattama Nachchiar.

The present Zemindar or his father succeeded to the Zemindari after Kattama Nachchiar's death by seniority of descent from Kattama Nachchiar's

elder sister, but he did not succeed, it was contended, through or under Kattama Nachchiar, inasmuch as the latter, it was said, did not represent fully the whole branch of Gouri Vallaba Tevar. In support of this argument, reference was made, among other matters, to the circumstances that prior to Kattama Nachchiar's litigation suits had been brought on their own account by the sisters of Kattama Nachchiar or other female heirs of Gouri Vallaba. Judgment of the District Court of Madras dated 20th November 1886.

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It was therefore argued that there was no mutuality between the parties in the litigation which terminated in 1863 and the parties to the present litigation and that therefore the present suit could not be held to be *res judicata*.

14. On the other side it was argued that the present 1st Defendant was clearly represented by Kattama Nachchiar, in the litigation already referred to, and a number of authorities were cited in support of this argument which will be shortly referred to. In connection with this part of the case, it was pointed out by Defendants' pleader that the litigation which ended in 1863 was in effect only the culmination of the litigation set on foot in 1833 by Unga Muttu Nachchiar, Kattama Nachchiar having after long contest in the several Courts been allowed to come in and prosecute the suit brought by Unga Muttu Nachchiar as Original Suit No. 2 of 1845 which suit was itself in effect a revival of an earlier suit brought by Unga Muttu Nachchiar as Original Suit No. 3 of 1833.

15. The decision in this very suit, *viz.*, Original Suit No. 10 of 1856 by *Kattama Nachchiar v. the Rajah of Sivaganga* as reported in IX Moore, page 604, is in itself the strongest and principal authority for the principle that reversioners are, except in special circumstances, represented and bound by the result of a suit conducted by a Hindu widow or other female tenant for life of a Hindu estate.

16. The observations of their Lordships of the Judicial Committee are so relevant to the issue under consideration that I think it advisable to set them out in full. They are as follows:—

“It seems however to be necessary in order to determine the mode
 “in which this appeal ought to be disposed of to consider the
 “question whether the decree of 1847, if it had become final in
 “Unga Muttu Nachchiar's life-time, would have bound those
 “claiming the Zemindari in succession to her. And their Lord-
 “ships are of opinion that, unless it could be shown that there
 “had not been a fair trial of the right in that suit, or in other

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" words unless the decree could have been successfully impeached
" on some special ground, it would have been an effectual bar to
" any new suit in the Zillah Court by any person claiming in
" succession to Unga Muttu Nachchiar. For, assuming her to
" be entitled to the Zemindari at all, the whole estate would for
" the time be vested in her, absolutely for some purposes, though
" in some respects for a qualified interest and until her death it
" could not be ascertained who would be entitled to succeed.
" The same principle which has prevailed in the Courts of this
" country as to tenants in suit representing the inheritance would
" seem to apply to the case of a Hindu widow and it is obvious
" that there would be the greatest possible inconvenience in
" holding that the succeeding heirs were not bound by a decree
" fairly and properly obtained against the widow."

17. The principle thus laid down has, it was shown, been followed in a long series of subsequent decisions which were cited at the bar. The more important of these decisions are as follows :—

Weekly Reporter, Vol. IX, Civil Rulings, page 505.

I. L. R. Allahabad Series, Vol. I, p. 282.

" " Vol. VIII, pp. 366 and 429.

" Bombay Series, Vol. VI, p. 709 (b).

" Calcutta Series, Vol. VI, p. 479.

Moore's Indian Appeals, Vol. XIV, *Jogendro Deb Roy Kut v. Funindro Deb Roy Kut*, observations at page 376.

Law Reports Indian Appeals, Vol. II, p. 121.

" " Vol. XI, pp. 197—207.

18. Counsel for the Plaintiff, while admitting the effect of the decisions above cited to be as stated by the Defendants' pleader, nevertheless contended [that the decisions were founded upon the case of *Kattama Nachchiar v. the Rajah of Sivaganga* itself and referred to that decision as the source of the doctrine which they laid down and that this being so no greater weight could be assigned to the series than to the original decision and that a reference to the language of their Lordships of the Privy Council in the case of *Kattama Nachchiar v. the Rajah of Sivaganga* itself warranted the conclusion that their Lordships did not intend to lay down, to the extent that has been generally understood, the

binding character of an adjudication in a suit to which a Hindu widow in possession of an estate has been party. The language in the judgment relied on to support this argument was that contained in the observation that, 'unless it could be shown that there had not been a fair trial of the right in that suit, or in other words unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Courts etc.' This language, it was urged, was not the language which would have been used if it had been meant to hold that the matter was absolutely *res judicata*.

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19. That the principle laid down is subject to the reservation that there has been a fair trial of the right in suit is obvious from the language of the judgment itself (See this point also noticed in a recent decision by Mahmood J. in I. L. R. Allahabad VIII, p. 371) but, for the purposes of the question now under discussion, viz., whether the 1st Defendant as reversionary heir was represented by Kattama Nachchiar in the litigation which terminated in 1863, the fairness or otherwise of the trial must be left on one side, there being no suggestion that any unfairness existed as between the then Plaintiff and those standing in the position of reversioners but only as between the then Plaintiff and the then Defendant, viz., the father of the present Plaintiff.

20. Seeing also what has now for so long a period been deliberately held to be the effect and extent of the principle laid down by the Privy Council in their judgment on *Kattama Nachchiar v. the Rajah of Sivaganga*, the principle being re-affirmed in a very recent case by the Privy Council itself (Law Reports Indian Appeals, Vol. XI, p. 207), it is in any case scarcely to be expected that this Court can accede to the argument of the Plaintiff's Counsel and admit that it is competent to it to treat the oft-cited observations of their Lordships in that case as being open to a construction less wide than that which has so long been placed upon them.

21. This being so, I am of opinion that the question stated is concluded by authority, that the present 1st Defendant as the reversionary heir was represented by Kattama Nachchiar in the litigation which ended in 1863, that consequently both parties to the present suit claim under parties who were the parties to the former litigation and that the claim is therefore *res judicata* as defined in Section 13 of the Civil Procedure Code.

22. The next question is that stated in the 3rd issue, viz., 'whether the Plaintiff is precluded from maintaining this suit while the said decision, viz., that

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'dated 30th November 1863, is in force, or whether the proper course should not be for the Plaintiff to move the Privy Council to review their judgment.'

23. A number of authorities both, English and Indian, were cited on this point.

For the Plaintiff the following decisions were principally relied upon :—

English Cases :—

The Earl of Bandon v. Becker, 3 Clerk and Finnely, p. 479. *Patch v. Ward*, Law Reports, III Chancery Appeals, p. 203. *Flower v. Lloyd*, Law Reports, VI Chancery, p. 297.

Indian Cases :—

Indian Law Reports.

Bombay Series, Vol. VI, p. 703.

I. L. R. Calcutta, Vol. X, p. 359.

24. Plaintiff's Counsel also referred to a suit brought in this (District) Court (Madras) to set aside a decree on the ground of fraud, viz., Original Suit 19 of 1873, which formed the subject of the appeal to the High Court of Madras in Appeal Suit 14 of 1874. It was admitted that no judgment had been recorded by the High Court in the Appeal in question, but an incidental reference to the decision appearing in the report of another case at page 391, VII Volume of the Madras High Court Reports, was relied on.

25. The above authorities were relied on by Plaintiff's Counsel to show that the proper mode of seeking to set aside a decree which is impeached as having been obtained by fraud is by filing an original suit.

26. On behalf of the Defendants a distinction was sought to be made between fraud that was unilateral and fraud that was bilateral, and it was contended that, if the fraud alleged was, as it was maintained to be in this case, unilateral fraud, the remedy was by petition of review to the Court whose decision was impeached and not by original suit. Whether the fraud was bilateral, that is to say, where both the parties were implicated and the decree was in fact obtained by collusion, it was admitted on behalf of the Defendants that the proper mode of procedure was by original suit.

27. Besides the cases already referred to as cited by the Plaintiff's Judgment Counsel, the following authorities were cited by the Defendants' pleader.

Meddowcroft v. Huguenin, Moore's Privy Council Cases, Vol. VI, p. 386.

Perry v. Meddowcroft X. Beavan, p. 122.

Meadows v. the Duchess of Kingston, and *Prudhan v. Phillips*, 2 Ambler's Reports, p. 763.

Cammell v. Sewell, Exchequer Cases (1858) 27 Law Journal, p. 447 cited in 2 Smith's Leading Cases, p. 832.

Bradley v. Eyre (Exchequer 1843) reported in Meeson and Welsby's Reports, Vol. XI, p. 432.

Phillipson v. the Earl of Egremont (Queen's Bench) XXXIII, Law Journal, p. 25 and other cases.

Flower v. LLOYD, X Chancery, p. 327.

A case reported in Bengal Law Reports, Vol. XIII, Appendix page 11, was also relied on by Defendants' pleader as being conclusive in his favor.

28. On behalf of the Defendants, reference was also made to the terms of Sections 13 and 14 of the Code of Civil Procedure. Section 13, it was observed, does not indicate by its terms that any exception to the principle of *res judicata* is made in favor of decrees which have been obtained by fraud, but Section 14 which relates to foreign judgments grafts an exception on the general principle and lays down that no foreign judgment shall operate as a bar to a suit in British India if it has been obtained by fraud.

29. Referring again to unilateral fraud, Defendants' pleader argued that unilateral fraud did not take away the force of *res judicata* and that the remedy was therefore by review, but that bilateral fraud, being collusion and a travesty on justice (as expounded in the Duchess of Kingston's case in the oft-cited argument of Mr. Solicitor Wedderburn, *Fabula non iudicium est in scena non in foro res agitur*) did not come within the meaning of the term *litigating* in Section 13 of the Civil Procedure Code and that therefore in such circumstances the bar of *res judicata* did not apply.

30. The question raised in connection with this issue, viz., the 3rd, is one which I feel some difficulty in deciding.

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31. Apart from authority, the question being one, as I conceive it to be, governed by the Indian Law of Procedure, I should myself be disposed to hold that the proper and appropriate remedy in the circumstances which are for the purpose in hand assumed to exist, viz., the existence of a decree obtained by fraud, would be by a petition of review to the Court whose decree is challenged as having been fraudulently obtained.

The language of Section 623 of the Indian Code of Civil Procedure, viz., *or for any other sufficient reason*, is certainly I think wide enough to cover the case of a decree obtained by fraud and the inference arising from the argument by implication from the express provision in Section 14 and the absence of any corresponding provision in Section 13 of the Civil Procedure Code (see para 29 above) is not I think without weight.

32. The matter being, as already stated, one which it appears to me ought to be determined according to the rules of the Indian Law of Procedure, if any such are expressly applicable, the English authorities cited are not so relevant or so conclusive of the question as would have been the decisions, if forthcoming, of the superior Courts in this country. Of these last, however, only one case directly in point has been cited at the argument and I shall afterwards state my reasons for thinking that the authority of that case is not satisfactory or conclusive on the point.

In the absence therefore of any conclusive authority on the subject in the Indian Law Reports, the question falls to be decided on the authority of the English cases. These are, it will be seen, to some extent of a conflicting character.

33. In examining these authorities, it may be borne in mind in connection with the argument of Defendants' pleader that the case of fraud set up by the Plaintiff is said to be a case of unilateral and not of collusive or bilateral fraud.

Dealing first with the cases cited by the Plaintiff's pleader, the case of *Earl of Bandon v. Becher*, XIV Moore's Privy Council, p. 386, appears to be clearly a case of collusive fraud, i. e., of bilateral or even trilateral fraud and, this being so, it is not, assuming the soundness of the distinction contended for by Defendants' pleader, an authority in favor of the Plaintiff's argument.

34. On the other hand, the case of *Patch v. Ward*, III Chancery Appeals, 203, is, as I understand it, a case of (alleged) unilateral fraud. The term unilateral is not of course used and the fraud, if any, was a constructive fraud. It (the fraud) was held not to be proved and the bill was dismissed on that ground.

35. It is, I think, clear on a perusal of that case that the Plaintiff, (assuming he could have established the fraud), had adopted the proper procedure in filing a suit, (*viz.*, bill to set aside a decree absolute for foreclosure) instead of applying for a review. The language of Lord Cairns at page 206 and again of Sir John Romilly L. J. at page 211 of the same case is to establish this beyond a doubt. The observations of the latter Judge are that the Plaintiff seeks for 'relief against an order making the decree absolute.' He has not obtained and is not seeking for leave to bring a review in the suit in which the order absolute was made and indeed he is not taking the course he has taken, for, it is reasonably clear that he could not have obtained 'any such order.' The decision therefore in *Patch v. Ward* seems to me to support the Plaintiff's contention.

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36. The Judgment in *Flower v. Lloyd*, VI Chancery, page 297, which was a case of alleged unilateral fraud, again appears to me to be an authority in favor of the Plaintiff's contention. The Master of the Rolls there cites the treatise of Lord Redesdale, which is as follows:—'If a decree has been obtained by fraud, it may be impeached by original bill' and it goes on to say 'without the leave of the Court.' This is no doubt immediately qualified by the following words, 'but there are very few such cases: in most cases you must obtain leave, the fraud used in obtaining the decree being the principal point in issue and necessary to be established by proof before the propriety of the decree can be investigated.'

The Master of the Rolls then reiterates, of his own authority, that, under the practice hitherto and still prevailing, an original bill could be brought to impeach a decree for fraud (whether with or without leave is not stated) and he then distinguishes another class of cases in which a decree could be set aside when the discovery of subsequent matter showed the decree to be wrong although no fraud was used in obtaining it. The procedure in this class of cases is stated by the Master of the Rolls to be by review and this mode of proceeding always required the leave of the Court. Substantially the procedure in review, as stated by the Master of the Rolls, seems to be that laid down in our Indian Code of Civil Procedure, Section 623. The opinions of the other Judges who sat in the case are to the same effect and are if possible more explicit. Lord Justice James says, 'If it is true that there was a fraud practised on the Court by which the Court was induced to make a wrong decree, the way to obtain relief will be to bring a fresh action to set aside the decree on the ground of fraud.' Lord Justice Baggalay's opinion is stated thus:—'Justice can be done by adopting a course analogous to that taken under the old practice where, when a decree had been obtained by

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'fraud, a bill was filed in the Original Court in which the suit had been brought for the purpose of setting the decree aside.'

The decision appears to me certainly a strong authority in favor of the Plaintiff.

37. Two Indian authorities were also cited by the Plaintiff's Counsel (see para 23). Of these cases cited in I. L. R. Bombay, Vol. VI, p. 703, may be disposed of on the observation that in the case there dealt with is clearly a case of collusion or bilateral fraud (see plea of defence as stated at the head of page 705). The case reported in I. L. R. Calcutta, Vol. X, is an authority for the proposition that an original suit (among other modes of relief) might have been instituted if it could have been shown that the withdrawal of a suit was brought about by fraud and collusion between the party managing the suit and the defendants.

These cases do not therefore support the Plaintiff's argument.

38. The only other case relied on by the Plaintiff's Counsel was the suit filed by Kolanda Nachchiar in this Court in 1878 and disposed of by the High Court of Madras as Appeal Suit No. 14 of 1874. There is, however, no report and no judgment even in the case cited. The incidental reference to the case in the report at page 391 of VII Madras High Court Reports does not carry the matter further than the statement that 'the Court has recently decided that fraud of a certain character is a ground for impeaching the decree even of Her Majesty in Council.

It was asserted also at the argument and was not disputed by the Plaintiff's Counsel that in the suit in question there was, in addition, the allegation of fraud in obtaining the decree, a new and independent cause of action, viz., a Will, and it was argued that it was not clear that the suit which had been remanded by the High Court to this Court for re-trial was not remanded, at least in part, for a trial of the issue arising in connection with the Will.

In the absence of any authorized report or copy of the High Court judgment, the grounds on which the High Court dealt with the case must be based more or less on conjecture and cannot, it seems to me, be seriously discussed. The Court cannot I think reasonably or properly be asked to allow weight to a judgment which is non-existent or which at any rate has not been put before the Court in any form in which the Court can take notice of it.

39. Dealing now with the cases cited in the Defendants' argument in so far as they have not been already noticed.

In the case of *Meddowcroft v. Huguenin* (a) and of *Perry v. Meddowcroft* Judgment

(a) 1V Moore, page 386.

(b) X Bevan, page 122.

(b) a case of collusive fraud in obtaining a sentence of the Ecclesiastical Court as to the nullity of a marriage was sought to be set up, but could not be

supported, and, in the absence of any sufficient proof of such collusion, the impeachment of the sentence could not be sustained and the proceedings accordingly failed. These cases seem sufficiently disposed of by the observation that the case set up (although not proved) was bilateral or collusive fraud.

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40. The case of *Prudhan v. Phillips* was relied on as, and appears to me to be, an authority for the proposition that where there is unilateral fraud the remedy is by review. In the case in question, Willer C. J. is

II Ambler's Report, page 762.

said 'after much debate to have taken a distinction between the case of a stranger who cannot come in and reverse the judgment and therefore must of necessity be permitted to aver that it is fraudulent and the case of one who is a party to the proceedings. If he plead the judgment was fraudulent, he cannot give evidence of it but must apply to the Court which pronounced the sentence to vacate the judgment. If both parties colluded, it was never known that either of them could vacate it. The Defendant here was party to the suit and cannot have redress here.'

41. In the case of *Bradley v. Eyre*, as I understand it, the fraud is stated hypothetically but as so stated it is collusive fraud. The following are the observations of the Court at page 450 of the Report, *Meeson and Welsby* XI, p. 432. 'If the nominal party, (i. e. the secretary of a company) collusively suffers judgment to be entered against him and the share-holders are taken by surprise, they should apply to the Court to set aside the proceedings,' i. e., apparently by motion of review.

42. The observations of the Court of Queen's Bench in the case of *Phillipson v. the Earl of Egremont* again are relevant, but leave the matter somewhat open to doubt, viz., 'The question is whether that remedy is by pleading as he has done or by motion to the Court. We are far from saying that the latter course was not open to the Defendant, for fraud no doubt vitiates everything and the Court upon being satisfied of such fraud has power to vacate and would vacate its own judgment as is suggested in *Bradley v. Eyre*, etc. This case, viz., that of *Phillipson v. Egremont*, was, it may be stated as set out, clearly a case of collusive or bilateral fraud.' *Law Journal*, Vol. XXIII, p. 25.

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X Chancery, page 327.

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43. The case of *Flower v. Lloyd* does not appear to me to have any bearing upon the question immediately under consideration in this (3rd) issue but it will be referred to in connection with the succeeding, viz., the

44. The case of *Gammel v. Sewell* referred to in Smith's Leading Cases Vol. II, p. 832, which was a judgment *in rem* of a foreign Court is also more relevant to the question of species of fraud which the law will allow to affect a judgment.

45. Among the Indian cases cited by the Defendants' pleader, one case, as already stated was directly in point, viz., the case reported in the Bengal Law Reports, Vol. XIII, p. 11. This case is indeed the only case directed in point that has been put before me in the course of the argument. There a Plaintiff sought by suit to have a decree which was formerly passed against him by a competent Court set aside on the ground of *fraud and collusion*. It may be observed incidentally that collusion or bilateral fraud was alleged. The Court held on the merits that no fraud was established and then proceeded to add that the suit appeared to the Court to have been misdirected and that in the case set up the proper course was to move the Court which passed the decree to set it aside, if obtained *ex-parte*, or to apply for a review of judgment.

46. On behalf of the Plaintiff, it was objected that the observations of the Bengal Judges in the case relied on were in the nature of obiter dicta and, as the appeal had already been disposed of on the merits, it must be allowed that this objection is well-founded. It would also appear from the report that the question dealt with was not argued or exhaustively considered, the only authority referred to being the case of the *Earl of Brandon v. Becker* already noticed in this judgment. This being so, I am unable to treat the only direct authority in the Indian Reports as possessing any special weight.

47. Before coming to a finding on the issue now under consideration, it seems necessary to state that Counsel for the Plaintiff, in dealing with the argument of the Defendants' pleader as to the inference said to be derivable from Sections 13 and 14 of the Civil Procedure Code, referred to two instances in which it was asserted the Indian Legislature had expressly recognized the right of a party to sue to set aside a decree obtained by fraud, viz., Section 44 of the Indian Evidence Act (I of 1872) and Article 95 of the second Schedule to the Indian Limitation Act (XV of 1877) and it was suggested that these legislative provisions must be ignored if the arguments put forward by the Defendants' pleader should be

held to be well-founded. Section 13 of the Civil Procedure Code could not, it was said, be taken to affect or repeal the general principle of law laid down in Section 44 of the Evidence Act.

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48. The language of Section 44 of the Evidence (Act) undoubtedly is, as observed by Lathom J., at page 715 of the case reported in I. L. R. VI, very wide in a certain direction, but it appears to me that, however wide in one sense may be the language of the section, it does not in itself support the argument of the learned Counsel just noticed. Strictly construed, the section, as I read it, merely allows a party against whom a judgment has been proved (the words are 'which has been proved by the adverse party'), that is to say, a party attacked, not an attacking party, to give evidence that the judgment relied on has been obtained by fraud. In itself, this statutory provision appears to me to confer no right to bring a suit such as that now under consideration.

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49. The principle that such a suit will lie under proper circumstances does not, however, depend on any statutory provision such as those cited in the Evidence Act and the Schedule of the Limitation Act, but is established beyond dispute in the authorities already cited.

50. Having now considered, as far as appears to me necessary, the authorities cited and the arguments used in connection with this part of the case, I must state the conclusion at which I arrive. As already stated, if the question were an open one, treating it as I think it ought to be treated as a question of Indian Civil Procedure, I should be inclined to hold that the Plaintiff's proper remedy was to apply to the Judicial Committee of Her Majesty's Privy Council to set aside the decree which he now impeaches, but the question, although it may be almost said to be an open one as far as the Indian decisions are concerned, is not I think an open one on the English cases cited. The decisions in *Patch v. Ward* and in *Flower v. Lloyd* (see paras 34, 35 and 36 above) appear to me to be distinct authority for the conclusion that a suit such as that now brought is the proper mode of seeking to set aside a decree alleged to have been obtained by fraud. The earlier case of *Pradhan v. Phillips* (para 40 above) which, it may be observed incidentally, is very imperfectly reported, appears no doubt to be an authority to the contrary. The ruling in the case of *Bradley v. Eyre* appears also to have been understood as an authority in favor of the remedy being by review (para 41 above). The opinion expressed in *Phillipson v. the Earl of Egremont* (para 42) is not of a decided character. Whatever weight might reasonably be given to these earlier decisions of the English Courts, I think they cannot now safely be allowed in the face of the more recent and more pronounced decisions of

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the Court of Chancery just referred to. The Indian case (XIII Bengal, p. 11) which bears directly on the question seems to me an insufficient authority for the reasons already stated.

51. On the whole, therefore, although not without some hesitation, I come to the conclusion that the finding on the third issue must be in favor of the Plaintiff and that the Plaintiff is entitled to maintain the suit.

52. The next issue, i. e., the 4th, so far as the Court has at present to deal with it, relates to the sufficiency in law of the allegations of fraud contained in the plaint and in the Plaintiff's supplemental statement to invalidate the decree of Her Majesty in Council.

53. The circumstances under which the supplemental statement was put on the record have already been adverted to above (para 8).

54. Authorities on the subject of the nature and character of fraud which the Courts recognize as sufficient to invalidate decrees will be found among the cases cited in the argument relating to the 3rd issue.

55. In the case of *Meddowcroft v. Huguenin*, Lord Brougham lays down very strongly that the mere keeping back of witnesses or of evidence is insufficient to raise any presumption of fraud. His opinion as to what constitutes collusion may also be quoted. 'If one party only suppresses evidence, there can be no collusion. It must be collusion between the promoter of the suit and the Defendant. The fraudulent suppression of evidence by one party would be insufficient. It is when the two parties combine together that it becomes collusion.'

56. Again in *Perry v. Meddowcroft*, the Master of the Rolls makes the following observations:—

'I cannot but accede to the argument which has been used here that it is not because a case may have been negligently defended or because there may have been a luke-warmness on particular occasions on the part of the agent concerned or because he has not thought it fit to put in a responsive allegation or to cross-examine witnesses or to examine witnesses of his own that he is to be charged with fraud. That may be proof of ignorance of duty and want of zeal but it is not proof of a fraudulent collusion with somebody else for the purpose of making out a sham case before the Court. * * * In a case of this kind, the main evidence, the gist of it ought to be extrinsic. You ought to show externally and independently of the proceedings in the cause that there was a collusion and consent between these parties, but you must not wholly lose sight of

'the proceedings which very often are of such a nature that you cannot help suspecting some bad faith or bad conduct in the person and there may be something in them which may connect that bad faith or bad conduct with the other side so as to give color to the charge of collusion.'

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57. In *Patch v. Ward*, Lord Cairns lays down that 'the fraud required to impeach a decree must clearly be actual fraud such that there is on the part of the person chargeable with it the *malus animus* the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other for the purpose of actually and knowingly defrauding him.'

58. The observations of the Court of Exchequer in *Cammell v. Sewell* are as follows:—'It was said that the judgment could be avoided for fraud. This is so, if there were fraud found to affect it, but there is none. It is impossible to say there was any fraud in the Court. * * * If the defence to the suit by the Master or his Agent Mr. Clausen can be said to be fraudulent, that is not the species of fraud to affect the judgment. Such fraud must be a fraud in the procuring of the judgment, such as collusion or the like of fraud in the Court itself.'

59. In the comparatively recent case of *Flower v. Lloyd*, Lord Justice James with the concurrence of Lord Justice Thesiger made the following strong observations. After stating that the Court had for certain reasons dealt with the allegations of fraud on the merits, he goes on to observe:—

'But we must not forget that there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arms' length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories or a misleading production of documents or of a machine or of a process had been given. There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting and must be on one side or other wilfully and corruptly perjured. In this case, if the Plaintiffs had sustained in this appeal the judgment in their favor, the present Defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury and so the parties go on alternately *ad infinitum*. * * * The Court ought to pause long before it esta-

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'blishes a precedent which would or might make, in numberless cases, judgments 'supposed to be final only the commencement of a new series of actions, etc., etc.'

60. These observations are very forcible and pertinent to a case such as the present and they would seem even to have been considered as too unqualified by Lord Justice Baggalay who sat with Lord Justice James in the disposal of the case.

61. The principle to be gathered from the above decisions may, as I understand them, be stated as follows. To successfully impeach a decree for fraud it is not sufficient to allege matters which might be described as amounting to passive or constructive fraud, such as negligence in the conduct of the suit, the non-production of documents, the withholding of witnesses and the like; it is necessary to go much further and to show that there was actual and active fraud, a *malus animus* and *mala mens* actively operating in bringing about a state of circumstances resulting in evidence which induces the Court to give a wrong judgment or there must be collusion between the two parties to the suit or lastly fraud in the Court itself.

See observations of Lord Cairns in
Patch v. Ward III, Chancery p.
207.

62. The allegations of fraud made in the supplemental statement, which are an expansion of the more general statement made in the plaint-*paras* 9 and 34, must now be tested by the principles thus deduced.

63. At the hearing, a formal objection to para 15 of the supplemental statement which relates to Unga Muttu Nachchiar's suit of 1845 was taken by Defendants' pleader, *viz.*, that it went beyond the terms of the Court's order of 24th July which allowed an amendment of the plaint merely in respect of the fraudulent acts alleged against Gouri Vallaba Tevar and Kattama Nachchiar and Defendants' pleader asked to have this part of the supplement statement, *viz.*, para 15, struck out of the record.

64. Having regard to the contention advanced by Defendant himself that Kattama Nachchiar's successful litigation terminating in 1863 was really only the culmination of the litigation set on foot by Unga Muttu Nachchiar, I am of opinion that this objection must be over-ruled.

65. In dealing with the allegations of fraud in the supplement statement, Defendants' pleader argued that only such allegations of fraud as related to, or bore directly upon, the conduct of the suit culminating in 1863 could be considered as relevant and consequently that all allegations of fraud on the part of Gouri Vallaba Tevar, being in the circumstances necessarily of a date anterior

to the litigation which ended in 1863, were irrelevant and must be excluded from consideration.

66. This argument is, I think, well-founded and is in accordance with the authorities already referred to. The frauds, if any, committed by Gouri Vallaba Tevar are not, so far as I can see, brought into connection with the conduct of the litigation which ended in the decree now sought to be impeached. This being so, it becomes necessary to shut out of consideration the allegations of fraud up to at least those contained in para 15 of the supplemental statement.

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67. It was also pointed out by Defendants'pleader that the matters alleged in paras 10 and 11 of the supplemental statement were relevant only on the question stated in the 7th issue, an issue which at this preliminary hearing was not before the Court, the argument being by arrangement confined to the 2nd to 6th issues inclusive.

68. Excluding therefore the matters alleged in paras 3 to 14 inclusive of the supplement statement as not being strictly relevant to the issue under consideration, there remain for examination only the matters stated in paras 15 to 17 inclusive of the statement.

69. Before passing from the matters stated in the earlier portion of the statement, it may perhaps be observed that the matters stated in paras 3, 4, 6, 7, 10 and 11 of the statement appear to me to amount to allegations of fraud of a kind, which, if it could be connected with the suit of Kattama Nachchiar and could be established by evidence, might be sufficient to invalidate the decree. The allegations made in para 5 of the statement are obscure and, as far as I can see, irrelevant. The allegations made in paras 8, 9, 12, 13 and 15 appear to me to be irrelevant.

70. Turning now to the matters alleged in paras 15 to 17 of the statement, para 15 relates in terms to the suit instituted by Unga Muttu Nachchiar, but it is assumed, as already stated, that Kattama Nachchiar can constructively be held liable for the conduct of Unga Muttu's suit.

71. The material allegations then in para 15 are :—In that suit many persons were bribed to give false evidence and many documents were suppressed or caused to be destroyed so that the old contention that the original grant of the Zemindari was to the said Gouri Vallaba Tevar and not to his brother Woya Tevar was still persisted in and used for the purpose of defrauding the said Woya Tevar's representatives and of deceiving the Court before which such suit came

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'on for hearing.' In the succeeding para which relates expressly to Kattama Nachchiar's suit, the recital in the previous para just quoted is made applicable also to Kattama Nachchiar's suit, viz., 'in this suit the old contention and deceit and suppression of documents * * * was persisted in and practised for the purposes, &c., as before.'

72. The first remark that occurs, on a consideration of these allegations, is, that the statements are wanting in definiteness: it is not alleged for instance that specific witnesses were bribed, or that specific documents were suppressed or caused to be destroyed but that witnesses and documents generally were bribed or suppressed and destroyed.

It may be, however, that this absence of specification is not in itself a valid objection to the sufficiency of the allegations, but it is I think necessary that the fraudulent acts should actually and directly be connected or alleged to be directly connected with the result arrived at in the suit, for instance, as regards the allegation that the witnesses were bribed, it should I think be further alleged that the decision was founded at least to some extent upon the evidence of the witnesses said to be bribed. As regards the allegation of suppression and destruction of documents, it may be observed in the first place that suppression, *i. e.*, the withholding of documents, is one thing and their destruction is another thing. The latter appears to me to partake more directly of the character of active fraud and an allegation of the destruction of documents, assuming them to be documents which the party was bound to produce, might be a sufficient averment of fraud, but, before such an assumption can be made, I think there should be something to show or at any rate some allegation should be made that such and such documents (necessary to the case), describing them as far as possible, existed at the time of the suit, that they were in the possession of the party whose conduct is now impeached, that he was summoned or was otherwise bound to produce them and failed to do so and destroyed or made away with the documents. Some such allegation of actual active fraud as that just described is, it appears to me, necessary to make out even a *prima facie* case of fraud of the character which the law requires for the purpose now under consideration. As regards mere suppression of evidence, there is the distinct authority already cited of Lord Brougham in *Meddowcroft v. Huquenin* that the withholding of evidence does not amount to fraud of the character which the Court is now asked to hold is sufficiently alleged.

73. As regards collusion, there is clearly in paras 15 and 16 of the sup-

plemental statement no suggestion of such a state of affairs. The fraud if any is, on the Plaintiff's own allegation, entirely one-sided.

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74. We now come to para 17 of the statement which is as follows :—' In the judgment of the Privy Council in 1863 it appears that Counsel for the said Woya Tevar's representatives failed to conduct their case properly through the fraud and deceit practised by the representatives of the said Gouri Vallaba Tevar.'

75. The pleader for the Defendants complained, and I think with reason, of the peculiar terms in which the statement contained in this para is expressed and asked that it should be made explicit. The Counsel representing the Plaintiff however volunteered no further explanation as to meaning of the statement. The language employed is such that it may possibly be thought to suggest by implication that there was something approaching to collusion in the conduct of the case. This, however, is not, I think, a construction that can reasonably be put on the language employed. If a charge of so serious a character were to be made at all against the professional advisers of Woya Tevar's representatives, the Court has a right to expect and require that the statement should be made in unambiguous language. The language used however appears to me to mean no more than this, that, owing to the fraud and deceit practised by the representatives of Gouri Vallaba Tevar, *i.e.*, Kattam Kallachiar, the evidence for the Plaintiff, as put before their Lordships of the Privy Council, was apparently so strong and convincing that the Defendants' Counsel failed or were unable to make any successful defence to it.

76. This being the construction and I think the only reasonable and proper construction to be put on para 17 of the statement, it follows that no case of collusion is alleged.

77. As regards what appears to me to be alleged, *viz.*, a weak defence of the suit, the observations of the Master of the Rolls in the case of *Perry v. Meddowncroft* already cited (para 56) appear to me to be thoroughly pertinent and need not be repeated.

78. It appears to me then, on an examination of the Plaintiff's allegations of fraud, that no case of collusive fraud is or can be asserted, that the unilateral fraud asserted is vague in its character, that, assuming its vagueness not to be a valid objection at the present stage of the suit to its sufficiency, the fraud alleged, in so far as it rests upon the allegation of bribery of witnesses, is not

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brought into direct connection with the result of the suit and that the suppression and destruction of documents, in the terms in which they are alleged, are not sufficient in themselves to make out a case for allowing the decree to be impeached.

79. For these reasons, it appears to me that the finding on the 4th issue must be in favor of the Defendant.

80. The final issues, viz., the 5th and 6th issues, relate to the question of the bar by limitation. These two issues may be taken together, the question of fact stated in the first portion of the 6th issue having been admitted, as I understand the matter, for the purposes of the argument.

81. The Plaintiff in para 40 of his plaint asserts that he came of age on the 27th December 1882 and knew of the said fraudulent acts and conduct * * as set forth in paras 9 and 34 only in the beginning of 1885. Again in para 21 of the supplemental statement, the Plaintiff repeats that the fraud only became known to him as in the plaint alleged.

For the purposes of the argument then, it is taken that the Plaintiff having been born on the 27th December 1864 only became aware of the fraud of which he complains in the beginning of 1885. It was also admitted that the Plaintiff's father survived the date of his ouster under the decree for a period of 7 years.

82. In opening his argument in this part of the case, Plaintiff's Counsel requested that the matter should be looked at from two points of view, 1st, the view that the suit was *res judicata*, 2nd, the view that it was not *res judicata*. In the latter view, the case, it was said, would stand as if the Plaintiff's father had been dispossessed in 1864 by some one who had no title and the Plaintiff would be in time if he brought his suit within three years from the date of his majority. In the former case, that is, in the view that the suit was *res judicata*, it was said that, on the strength of the allegations of fraud, the suit was also within time if brought within three years of majority.

83. In supporting his argument in this part of the case, Plaintiff's Counsel further argued that his client having been conceived in 1864 (February 1864 was the date suggested) and being therefore in the womb, a right independent of his father accrued to him, and that, assuming the father's right to have been extinguished by 12 years' adverse possession on the part of Kattama Nachchiar, the independent right accruing to the son could not be said to be so extinguished. It was also argued that, even if the right of the son should be

held to be a right arising only as the representative of his father, nevertheless the suit by the Plaintiff would not be barred inasmuch as, although the father may never have been undeceived as to the fraud practised against him, the son having become so, and having sued within the statutory period allowed after such discovery was within time.

Judgment
of the
District
Court of
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dated 20th
November
1886.
—continued.

84. Defendants' pleader, on the other hand, contended that in any view of the case whether in the allegation, that there was fraud or apart from fraud, the suit was irremediably barred, that in the latter case the Plaintiff's father having been dispossessed in 1864 and being under no disability, time began to run then, that the minority Section (Section 7) of the Limitation Act could not be held to apply to a child in the womb but only to a minor child actually born into the world, that on the theory of fraud there was no possibility of contending that the Plaintiff's case came within the language of Section 18 of the Limitation Act, inasmuch as there was and could be no assertion that there had been *subsequent to 1864* any fraudulent suppression of the knowledge of Plaintiff's right to sue or of any documents necessary to establish that right, the allegations of fraud all relating, as has been seen, to matters prior to 1864.

85. In the course of his argument, Defendants' pleader referred among other cases to the following reported cases:—

Madras High Court Reports, Vol. II, p. 340.

Weekly Reporter, Vol. VII, pp. 134 and 135 and again at page 503.

Madras High Court Reports, Vol. VII, p. 340.

Indian Law Reports, Madras, Vol. VII, p. 242.

86. Of these, the first two are authorities for the proposition that time, having once commenced to run against a father or other head of a family under no disability, cannot be arrested by any disability subsequently arising.

87. The third case deals with the question of what is a document *necessary* to establish a right within the meaning of Section 18 of the Limitation Act. Such a document, it is held, must be one really necessary and not merely a document that would be useful.

88. The last case is an authority for the proposition that, as between the members of a Hindu joint family and claimants under a title adverse to the family, the co-parcener in enjoyment and the holder of a Zemindari for the time being represent for purposes of limitation the entire joint family consisting of lineal and collateral heirs.

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of the
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1886.

—continued.

On a consideration of the arguments and authorities, it appears to me clear that the Plaintiff's claim is barred by limitation.

89. The Court having held that the suit is also *res judicata*, it is necessary, assuming the finding on the point of *res judicata* to be well-founded, to consider the question of limitation with reference principally to the provisions of the Limitation Act on the subject of fraud. The provision of the Limitation Act on the subject is that contained in Section 18 of the Act and the terms of this Section are as follows:—'Whenever any person having a right to institute a suit or to make an application has by means of fraud been kept from the knowledge of such right or of the title on which it is founded or where any document necessary to establish such right has been fraudulently concealed from him, time shall be computed, as therein stated.'

91. The language of this Section was relied on, and I think rightly, by Defendants' pleader as showing that the Plaintiff's case could not be brought within its terms. The indulgence accorded by the Section only applies to the case of a party who has been kept by fraud from a knowledge of his right to institute a suit. The averments of fraud in the Plaintiff's plaint and supplemental statement cannot by any reasonable rule of construction be held to apply to the right of the Plaintiff to institute the present suit; they refer, as we have seen, to fraud alleged to have taken place in the conduct of a suit long since terminated.

92. Plaintiff's Counsel suggested that the construction of Section 18 of the Limitation Act which has just been stated would, if held to be correct, go far towards rendering inoperative the provision made in Article 95 of the Schedule to the Act.

93. I do not admit the force of this objection, for the reason among other reasons, that Section 18 of the Limitation Act refers to the right to institute a suit *generally* of a person who by means of fraud has been kept from the knowledge of his right and not by any means necessary to the right to institute a suit to set aside a decree obtained by fraud, but even, if it were otherwise, it appears to me that the Court must be guided by a clear and relevant provision in the body of an enactment rather than by an inference sought to be deduced from a subordinate or supplemental part of the Act such as an Article in the Schedule.

94. In the view, therefore, that it is necessary for the Plaintiff to avail himself of the provision of the Limitation Act relating to fraud in seeking to avoid the bar of limitation, I must hold that the circumstances of the Plaintiff's case as

set out in his plaint and supplemental statement are not such as to bring the case within the scope of Section 18 of the Act.

Judgment
of the
District
Court of
Madras
dated 20th
November
1886.
—concluded

95. For the rest, dealing with the case as apart from fraud, it appears to me to stand thus. Plaintiff's father was dispossessed in 1864. February 1864 was said to be the date, but this was not admitted. If in February 1864, it is scarcely reasonable to hold that the Plaintiff who was born on the 27th December 1864 can then have been conceived. Whether he were so or not however appears immaterial.

The Plaintiff's father was in 1864 under no disability to sue and, on the principle stated in I. L. R. Madras, VII, p. 245, limitation began to run as between Kattama Nachchiar and the Plaintiff's father as representing his joint family, including heirs, lineal and collateral, and time having once begun to run could not be stopped. No new starting point could accrue either on the birth of the Plaintiff or on the decease of the father seven years later.

96. Although in the view I have just stated it is not necessary to notice the point, I may here state that I concur in the argument of Defendants' pleader that the provisions of Section 7 of the Limitation Act cannot be made applicable to a child in the womb.

97. The provision in Section 7 of the Act appears to me to contemplate clearly an existent and not a merely possible minor and the doctrine of Hindu Law which for certain purposes recognizes a right as vesting in a child in the womb is a doctrine which must stand by itself and cannot be brought into line with a special statutory provision on the subject of minors.

98. For the reasons stated, it appears to me that the suit is barred by limitation and on this ground, as well as on the grounds stated in dealing with the 4th issue, I must hold that the suit cannot be maintained.

99. It is accordingly ordered that the suit do stand dismissed and that the Plaintiff do pay the 1st Defendant the taxed costs of the suit.

100. The result arrived at renders it unnecessary to deal with the other issues framed in the suit or to frame further issues on the pleas put in by the Defendants other than the 1st to 6th Defendants.

(Signed) T. WEIR,

Acting District Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

*Thursday, the nineteenth day of July,**One thousand eight hundred and eighty-eight.*

—(c.)—

PRESENT :—

THE HONOURABLE JAMES KERNAN, *Officiating Chief Justice,*

AND

THE HONOURABLE MR. JUSTICE WILKINSON.

*Appeal No. 21 of 1887.*Bala Gouri Vallaba Tevar *Appt. (Plff).**versus*

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|--|--|-------------------------------------|
| 1. Periasamy alias Udayana Tevar, Zemindar of Sivaganga. | } Younger brothers
of the 1st Respondent. | <i>Respts. (Defts.
1 to 6).</i> |
| 2. Muttuvaduganada Tevar, | | |
| 3. Sasivarna Tevar, | | |
| 4. Delhi Batcha Tevar and | | |
| 5. Venkatasami Tevar, | | |
| 6. Dorasinga Tevar, minor, by his father and guardian, the 1st Respondent. | | |

Appeal against the decree of the District Court of Madura in Original Suit No. 2 of 1886.

This appeal coming on for hearing, upon perusing the grounds of appeal, the Judgment and Decree of the Lower Court and the material papers in the suit; and upon hearing the arguments of Mr. J. H. Nelson, Counsel and the Honorable S. Subramaniam Aiyar, Vakil for the Appellant, and of Messrs. V. Bhashyam Aiyengar and S. Kalyanarama Aiyar, Vakils for the 1st Respondent, and the other Respondents not appearing in person or by Counsel, the Court made the following

ORDER.

The second part of the 4th issue was not tried nor was evidence taken thereon. We may point out one matter which shews the importance of trying that part of the issue, *viz.*, the Privy Council in 2 of 1845 relied on the Sunnud of

1903 amongst other documents as evidence that Gouri Vallaba Tevar had acquired the Zemindari. At that time the question of fraud did not arise and is alleged not to have been known. It is now alleged that Gouri Vallaba Tevar had fraudulently caused that Sunnud to be prepared inasmuch as he caused accounts to be prepared in the Collector's Office which were preliminary to the issuing of the Sunnud and in which he inserted his own name as Zemindar and that the issuing of the Sunnud in his name was the result.

Order of the High Court dated 19th July 1888 in Appeal No. 21 of 1887. —concluded.

It is plain therefore that the allegation of fraud as to the preparation of that Sunnud is material to be tried.

The District Judge is directed to try the second part of the 4th issue.

The finding is to be returned within 2 months from the date of receipt of this order, when ten days will be allowed for filing objections

(By the Court).

(Signed) W. MORGAN,

Deputy Registrar, Appellate Side.

MEMORANDUM OF CIVIL MISCELLANEOUS PETITION.

(10.)

Under Sections 372 and 559 of the Civil Procedure Code.

In the High Court of Judicature at Madras.

Appeal Suit No. 21 of 1887.

In the High Court of Judicature at Madras.

Civil Miscellaneous Petition No. 867 of 1888.

Civil Miscellaneous Petition of Mr. Orr and 2 others in the High Court to be made Respondents in Appeal No. 21 of 1887.

In the

High

Court.

In the

High

Court.

Messrs. R. G. Orr, E. F. Stranack and J. Ryan.

Petitioners.

versus

1. Sreemathu Muttu Vijia Ragunatha } 1st Respt. }	Counter-Petitioners.
Periasamy Tevar alias Udayana Tevar. }	
2. Bala Gouri Vallaba Tevar ... Appellant. }	

The Petitioners aforesaid pray that this Honorable Court will be pleased, under the provisions of Sections 372 and 559 of the Civil Procedure Code, to di-

Civil Miscellaneous
Petition of
Mr. Orr and
2 others in
the High
Court to be
made Res-
pondents in
Appeal No.
21 of 1887.
—concluded.

rect that the Petitioners be made party Respondents in the said Appeal No. 21 of 1887 for the following reasons:—

1. That, after the said appeal No. 21 of 1887 had been presented on 21st February 1887 in this Honorable Court, the 1st Respondent, the Zemindar of Sivaganga, granted in favor of the Petitioners a lease of the Zemindari of Sivaganga for a term of 22 years by an instrument dated 23rd May 1887.

2. That the said suit against the decree in which the said appeal No. 21 of 1887 was preferred was brought by the Appellant against the 1st Respondent and others to recover the Zemindari of Sivaganga on the ground that he is the preferential heir to succeed to the Zemindari.

3. That the Petitioners as lessees of the Zemindari for the said term of 22 years are interested in the result of the suit.

(Signed) V. BHASHYAM IYENGAR,

Vakil for Petitioners.

(Signed) ROBERT G. ORR.

I, Robert Gordon Orr, Petitioner aforesaid, do declare that what is contained is true to my knowledge except as to matters stated on information and belief and that as to those matters, I believe them to be true.

(Signed) ROBERT G. ORR.

Petition presented 25—9—1888.

Do. filed 25—9—1888.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Friday, the twelfth day of October,

One thousand eight hundred and eighty-eight.

PRESENT:—

THE HONOURABLE MR. JUSTICE KERNAN,

AND

THE HONOURABLE MR. JUSTICE MUTTUSAMI AIYAR, c. j. e.,

Civil Miscellaneous Petition No. 867 of 1888.

Order of the
High Court
on Civil
Miscellaneous
Petition
of Mr. Orr
and 2 others
to be made
Respon-
dents in Ap-
peal No. 21
of 1887.

- | | | |
|--|---|-----------------------------|
| 1. Mr. R. G. Orr. | } | <i>Petitioners.</i> |
| 2. Mr. E. F. Stranack and | | |
| 3. Mr. J. Ryan. | | |
| 1. Sreemathu Muttu Vijja Bagunatha Periasamy Tevar <i>alias</i> Udayana Tevar; and | } | <i>Counter Petitioners.</i> |
| 2. Bala Gouri Vallaba Tevar. | | |

Order of the High Court on Civil Miscellaneous Petition of Mr. Orr and 2 others to be made Respondents in Appeal No. 21 of 1887.
—concluded.

Application praying that, under Sections 372 and 559 of the Civil Procedure Code and in the circumstances stated therein, the High Court will be pleased to make the Petitioners party Respondents in Appeal No. 21 of 1887 on the file of this Court.

This application coming on for hearing, upon perusing the application, and upon hearing the arguments of Mr. N. Subramanyam, Counsel for the Petitioners and Messrs. J. H. Nelson and W. S. Gantz, Counsels for the Counter-Petitioners, the Court made the following

ORDER.

We think the lessees are entitled to be made parties and direct that they be added as such to the appeal and suit as Defendants under Sections 32 and 372 upon the terms that the issues already framed shall remain unaltered, and that the trial of the issues do proceed without any interruption from the making of this order or any order consequent thereon and upon the said terms that the Petitioners accept service at once and that the Petitioners do pay the Plaintiff the costs of this application and all costs consequent thereon and of the summoning of the Petitioners as directed by the Code.

(Memorandum of costs).

2nd Counter-Petitioner's (Plaintiff's) costs. Rs. A. P.

Pleader's fee not certified. 0-0-0.

(By the Court).

(Signed) W. MORGAN,

Deputy Registrar,

Appellate Side.

IN THE DISTRICT COURT OF MADURA.

(23)
 Tuesday, the twenty-second day of January,
 One thousand eight hundred and eighty-nine.

PRESENT:—H. T. ROSS ESQUIRE, Ag. District Judge.

High Court Appeal No. 21 of 1887.

Original Suit No. 2 of 1886.

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|--|-----|---|---|
| 1. Periasami alias Udayana Tevar, Zemindar of Sivaganga | ... | ... | |
| 2. Muttuvaduganada Tevar. | | | |
| 3. Sasivarna Tevar | ... | Younger brothers of the 1st Respondent. | Respondents (1st to 6th Defendants). |
| 4. Delhi Batcha Tevar and | | | |
| 5. Venkatasami Tevar | | | |
| 6. Dorasinga Tevar, minor, by his father and guardian, the 1st Respondent. | | | |
| 7. Mr. R. G. Orr. | | Lessees of the Sivaganga Zemindari. | Added as Respondents 7, 8 and 9 (Defendants 7, 8 and 9) by order of the High Court in Civil M. P. 867 of 1888, dated 12th October 1888. |
| 8. Mr. E. F. Stranack and | | | |
| 9. Mr. J. Ryan. | | | |

Appeal against the decree of the District Court of Madura in Original Suit No. 2 of 1886.

This case coming on for re-hearing as to the 2nd part of the 4th issue as directed by the High Court in their order, dated 19th July 1888, in Appeal No. 21 of 1887; upon perusing the order of the High Court, the judgment and decree of this Court, the evidence and fresh evidence in the case; and upon hearing the arguments of Mr. Johnstone, Counsel, L. Narasimhaachariar, D. S. Ranga Chariar and D. Sundrarajaingar, Vakils for the Appellant, of Mr. V. Bashyam Aiyangar, C. Desikachariar, R. Ramasubbaiyar, M. S. Narayanasami Aiyar and G. Gopaliengar, Vakils for the 1st Respondent, and of the Honorable Mr. Branson, the Advocate-General and N. Sundram Aiyar, Vakil for lessees-respondents, the Court made the following

FINDING.

By the order of the High Court, dated 19th July 1888, in Appeal No. 21 of 1887, I am directed to try the 2nd part of the 4th issue which, conveniently

re-stated, is :—

"Whether the allegations of fraud contained in the Plaint and in Plaintiff's supplemental statement of 16th August 1886 are true in fact".

Finding
submitted
by the Dis-
trict Court
of Madura
dated 22nd
January
1889.

—continued.

2. Of the several allegations of fraud set out in those statements, Plaintiff's Counsel has now selected, and confined his case to, the one fraud described in para 9 of the plaint and in paras 2 to 4 of the supplemental statement—namely, the original sin whereby 1st Defendant's ancestor, Gouri Vallaba Tevar, generally known as the Istimirar Zemindar, is alleged to have got his own name inserted in the Sunnud of 1803 which [Plaintiff says] was intended for, and was actually issued to, Gouri Vallaba's elder brother Woya Tevar, the Plaintiff's ancestor.

3. *Plaintiff's case is this.*—The first Zemindar of Sivaganga was Sasivarna Tevar, of the house of Nalakota. On the death of his son's widow, Rancee Velu Nachchiar, about 1796, without issue (her only daughter having married one Vengum Peria Udaya Tevar and having predeceased her, also without issue) the Plaintiff's ancestor Woya Tevar, of the Padamattur branch of the Nalakota house, became the rightful heir to the Zemindari. He was so, even in the Rancee's lifetime; and his attempts to enforce his claim as such made him a special object of displeasure to the Rancee's Ministers, Vella and Chianna Murdoo. These Murdoos, on the Rancee's death, usurped the Zemindari; forced Woya Tevar and his younger brother Gouri Vallaba Tevar to flee their country; and, joined by the aforesaid Vengum Peria Udaya Tevar, who had married Vella Murdoo's daughter as his second wife, raised a rebellion against the Company's Government.

Woya Tevar found protection with the Tondiman at Padukotta; while Gouri Vallaba Tevar fled to Aradangi in Tanjore.

The Government employed a force under a Col. Agnew against the rebels. During the operations, Government, on the suggestion of the Collector Mr. Lushington and of Col. Agnew, as the most probable means of speedily reducing the country to order, resolved to proclaim the rightful heir to Sivaganga as Zemindar and to send him with the troops to assume the rule of his Estate. Satisfying themselves that Woya Tevar, then with the Tondiman, was the rightful heir, Government accordingly proclaimed him Zemindar on 6th July 1801. In August, Woya Tevar joined Col. Agnew: the rebellion was speedily brought to an end: and Woya Tevar, returning to Sivaganga as Zemindar, was duly installed in all his rights and privileges.

He at once appointed his younger brother Gouri Vallaba as his Manager.

Finding
submitted
by the Dis-
trict Court
of Madras
dated 22nd
January
1889.
--continued.

In 1802, a Special Commission was appointed by Government with a view to the Permanent Settlement of Zemindaris and Palliams in the Southern Districts. The Collector, Mr. Lushington, to enable him to make his recommendations to that Commission for the settlement of Sivaganga, required the Zemindar to furnish him with an account of the average revenues of the estate.

Gouri Vallaba Tevar, foreseeing that the name and title of the Zemindar as entered in that account would eventually be reproduced in the Istimirar Sunnud of Permanent Settlement, and designing to defraud Woya Tevar's sons and create a title to himself to the Zemindari, took advantage of his opportunity as Manager to insert his name and title between the name and title of Woya Tevar in the account submitted to the Collector. The name so written was reproduced in the account submitted by the Collector to the Special Commission; and again in the account submitted by the latter to Government; and finally in the Permanent Sunnud issued by Government on 22nd April 1803 (A).

When that Sunnud was forwarded by Government to Woya Tevar through the Collector, Gouri Vallaba kept possession of it: thenceforth conducted all the correspondence relating to the Zemindari in his own name; and in 1814, when Woya Tevar died, omitted to report his death to the authorities and quietly assumed the position of Zemindar as the pretended grantee under the Sunnud of 1803, and so retained the Zemindari till his own death in 1829.

4. *Defendants' case is this*:—"Woya Tevar,"—or Udaya, or Worria or Odaya Tevar, as it appears variously spelt in the history of Sivaganga litigation,—is not a specific individual name, but a mere term used to distinguish the Tevars of the house of Nalakota. Gouri Vallaba and his elder brother belonged to the Padamattur branch of the Nalakota Woya Tevars. Thus Gouri Vallaba was, like his brother, a Padamattur Woya Tevar. The elder brother, in the time of the Ranee, lived at Padamattur and was never heard of in connection with the succession to Sivaganga. The younger brother, though not actually adopted by the Ranee, was fostered in her family and was generally looked upon by the people of Sivaganga as her settled and rightful successor. This was strong reason for the Murdoos to seek his life; and on the Ranee's death he fled for protection to the Tondiman. When the first suggestion of proclaiming a new Zemindar and sending him with Col. Agnew's troops was made, Gouri Vallaba Tevar was, for the time being, at Aradangi. The proclamation of 6th July 1801 was founded, not on any recognition of rightful heirship to the Zemindari, but on the expediency of supporting, and appointing as their ruler, the one man on whom the eyes of the Sivaganga people were fixed as the Ranee's settled successor. This was

Gouri Vallaba, the only Padamattur Woya Tevar thought of by anybody. He was accordingly proclaimed as such, and joined Col. Agnew from Pudukota (the Tondiman's capital) and accompanied him to the close of the rebellion. In Agnew's camp, he was duly installed as Sivaganga Zemindar, and among the inhabitants who held up hands in homage to him on that occasion was his elder brother, the Woya Tevar, from whom Plaintiff claims and whose individual name is not, to this day, known.

Finding submitted by the District Court of Madras dated 22nd January 1889.

--continued.

The Permanent Settlement accounts and the Permanent Sunnud of 1803 were, therefore, in Gouri Vallaba Tevar's name; and he continued the actual and only Zemindar from his installation in 1801 to his death in 1829. His elder brother lived at Padamattur.

5. The contentions of the parties, as now set out, clearly trench upon the 8th issue, which I am not directed to try; but, if these contentions were to be excluded on that ground, a satisfactory determination of the question, whether the exact fraud to which Plaintiff's case is now confined was committed, would be impossible. The Sunnud of 22nd April 1803 (A) reproduces the name and title of the Zemindar as given in the accounts (DD and EE) submitted to Government by the Permanent Settlement Special Commission on 5th April 1803 (OO): and these, in their turn, reproduce the name and title as given in the account (BB) submitted to the Commission by the Collector on 30th September 1802 (AA). The name and title so given is—"Muttu Vijia Regunada Gouri Wulla Worria Tevan:" and this account BB of 30th September 1802 is the very earliest document on the record in this case in which Gouri Vallaba's name appears as that of the Zemindar, the proclamation of 6th July 1801 [TT and K1] and all other documents prior to BB, describing the Zemindar simply as Padamattur Woria Tevar, or Woya Tevar, or one of its equivalents. From the Collector's letter (AA) of 30th September 1802, it is evident that, for the purpose of preparing his own account BB, he had obtained an account from the Zemindar. And that is the account in which Gouri Vallaba, taking his opportunity as the Zemindar's Manager, is alleged to have interpolated his own name between the name and title of the Zemindar—which is the exact fraud to which the Plaintiff's case is now confined. That account is not before the Court: and Plaintiff has put in two endorsements NN and OO to show that his applications for copies to the Collector and to the Revenue Board have met with the reply that the account is not forthcoming. There is, accordingly, nothing in the nature of direct evidence to prove the alleged interpolation. But the Plaintiff has endeavoured to prove, and is entitled to prove, circumstances from which, if true, this particular fraud must according to his con-

Finding
submitted
by the Dis-
trict Court
of Madura
dated 22nd
January
1839.

—continued.

tentions, be inferred. It is Plaintiff's case that Gouri Vallaba was not the name of the elder brother; and it is obvious that, unless Gouri Vallaba was not the Zemindar, there could have been no fraud. The appearance of the name for the first time on record in the Collector's account BB points strongly to its having been taken from the Zemindar's account not now forthcoming; and, if the elder brother was the Zemindar, the appearance of the younger brother's name as Zemindar in that account is consistent only with fraud. If the younger brother was the Zemindar's Manager, he would be in an exceptionally favorable position to perpetrate the fraud. The two main circumstances, therefore, which the Plaintiff has endeavoured to prove as circumstances from which the fraud must be inferred, are that the elder brother was Zemindar and that the younger brother was his Manager. This is, in fact, trying the 8th issue; but it is inevitable, and as this view has been acted upon throughout the hearing both by Mr. Johnstone, who appears for Plaintiff, and by the Advocate-General, who appears for the Lessees-Defendants, nothing further need be said of the highly refined objection taken by Mr. Bashyam Aiyengar, who appears for the 1st Defendant, that the trial has not been restricted, as directed in the High Court's order of remand, to the 2nd part of the 4th issue.

6. With these remarks, I proceed to state the grounds on which I find that the younger brother Gouri Vallaba Tevar was the Zemindar intended to be proclaimed and actually proclaimed in 1801, and who continued as Zemindar till his death in 1829.

7. The initial difficulty in the way of Plaintiff's case is that, although the Courts have been flooded with Sivaganga litigation ever since 1804, and although since 1832, the direct question of succession to the Zemindari has been hotly contested, up to the Privy Council, between Plaintiff's and 1st Defendant's ancestors of every generation, in numerous suits, the present story of fraud has never once been suggested. On the contrary, the explanations that have been offered by Plaintiff's ancestors, of how the younger brother got the Zemindari, have been absolutely inconsistent with this story of fraud.

8. The earliest suits for the Zemindari were only 3 or 4 years after the younger brother's death. They were (1) Original Suit No. 4 of 1832 by the younger brother's daughter Vella Nachchiar, (2) Original Suit No. 3 of 1833 by the younger brother's widow Unga Muttu Nachchiar, (3) Original Suit No. 4 of 1833 by the younger brother's grandson Gouri Vallaba Tevar,—all against the elder brother's grandson Bodagurusami Tevar, and all were dismissed in the first

instance. In appeal No. 13 of 1835, the Sudder Court allowed Unga Mutta Nachchiar's suit 3 of 1833; and Exhibits IV, V, VI and VII contain Plaintiff's ancestor Bodagurusami's pleadings in that appeal. In Exhibit IV, dated 21st November 1836, Bodagurusami Tevar, as Respondent, stated :—"The Honorable Company.....delivered the said Zemindari over to Udaya Tevar *alias* Woya Tevar.....who was the Respondent's grandfather, and the elder brother of the Appellant's husband. As he was then old and infirm, his undivided brother, the Appellant's husband, was installed with the Puttam with his consent, and he continued to enjoy it. He addressed an Arzi to the Collector on 7th October 1806 stating that, on failure of his son, the son of his elder brother should become his heir to succeed to the said Zemindari. He died without sons leaving a willthat Respondent's father should hold and enjoy the said Zemindari***. The Respondent's grandfather who got the Zemindari in question as stated above had, owing to his infirmity, got it placed in possession of his undivided younger brother, the Appellant's husband, by making the necessary reference to Col. Agnew***. If your Court will take into consideration the facts.....you will find that, with the consent of the Respondent's grandfather, the Appellant's husband obtained possession of the said Zemindari solely by right of co-heirship; but that he did not get it by virtue of an adoption, as alleged by the Appellant."

Finding
submitted
by the Dis-
trict Court
of Madras
dated 22nd
January
1883.

—continued.

Exhibit V is Bodagurusami's Review Petition to the Sudder Court, who had found against him on the ground of division between the brothers. In this Petition, Bodagurusami relied on having newly discovered the pleadings of the younger brother Gouri Vallaba himself in 3 suits filed against him as *Zemindar* in 1804. In those pleadings, as set out by Bodagurusami, the younger brother was represented as consistently making out non-division and co-heirship to the Zemindari between himself and his elder brother. The Sudder Court, however, on sending for the original pleadings, found that all the passages relied on by Bodagurusami as showing a state of non-division were interpolated forgeries; and these the Sudder Court clearly set out in their Judgment (Exhibit VI). Even in those forged interpolations, Bodagurusami never thought of setting up the present story of fraud. But further than that, the original pleadings of the younger brother Gouri Vallaba, when freed from the forgeries, show that even Bodagurusami's story of *consent* was an invention. For here are the Defendant Gouri Vallaba's pleadings in those 3 suits of 1804, just one year after the Sunnud—"The Defendant begs to state, in answer, that the right of ruling over the Zemin was vested formerly in the Defendant. As Murdoo Shervagar had expelled him and had designated Vengum Peria Udaya Tevar as the Zemindar, assuming at the same time possession of the estate and hereditary offices which belonged to the

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Defendant, he suffered much distress and was obliged to emigrate into other countries. The Honorable Company then had compassion upon him, subdued his enemies, and restored to him the Zemindari which he formerly possessed." Again—"The Defendant begs to state that, as the Zemin property and rights enjoyed by Vengum Peria Udaya Tevar and the two Murdoo Shervagars and others were made over to the Defendant by the Honorable Company, he himself and no other person has a right to them."

Gouri Vallaba, throughout his pleadings, makes no sort or kind of reference to his elder brother: and one illustration of the forgeries, inserted in those pleadings to serve Bodagurusami's defence, will suffice to show that even the latter's story of the elder brother having given over the estate to the younger was an invention. In the original, Gouri Vallaba said—"As the Defendant is the begotten son of the Company, he prays the gentlemen will be pleased to inquire into the case &c." In the forged version, Gouri Vallaba is made to say—"The Defendant is a Zemindar: the Defendant's brother is elder than him, and, if he were capable of governing the Zemin, he would have been invested with that power. The Defendant and his brother live together and have not divided the family property.....The Defendant therefore prays, &c." Bodagurusami was this present Plaintiff's grandfather.

9. The key to Bodagurusami's pleadings is to be found in the fact that, until the Privy Council decided otherwise in Kattama Nachchiar's case, it was generally understood to be Hindu Law that self-acquisition followed the rule of undivided property. Unga Muttu Nachchiar was therefore setting up division and adoption of Gouri Vallaba by the old Ranee: and Bodagurusami was meeting her case with non-division, co-heirship, consent, a Will, another instrument and, in fact, every conceivable sort of defence—*except fraud*. The important point, for the purposes of the present issue, is that Plaintiff's own grandfather not only never suggested fraud but set up a story of consent absolutely inconsistent with fraud and even that story of consent was an invention founded on a series of forgeries of which the Sudder Court remarked that "More pal- pable or more infamous forgeries than those exhibited in the originals never were detected and never came before a Court of Justice" (VI). If there had been any truth in the story of consent, some hint or trace of it would surely be forth- coming in all the correspondence of the time; but there is no such suggestion to be found on the record. The Plaintiff's grandfather, if fraud ever existed, was fifty years nearer the event than Plaintiff is now. And, curiously enough, this very report of Collector Mr. Lushington dated 30th September 1802 (AA and BB)

which is the chief document on which Plaintiff now relies, as containing the first appearance of Gouri Vallaba's name as Zemindar, was filed as Exhibit B in that old suit (*vide* IV), as also was the proclamation of 6th July 1801: while Boda-gurusami's references to Col. Agnew show that he then had at his command the materials on which the present allegation of fraud is founded. Under all the circumstances, it is plain that Plaintiff's grandfather was in a position to expose, and had a strong incentive to expose, the present fraud if such had ever really taken place. His conduct is the first strong point against this Plaintiff.

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10. He furnishes also the next point against the Plaintiff. For, he brought to light the fact that, in 1804, the younger brother was being publicly sued in the Courts as Zemindar by his own name of Gouri Vallaba Tevar (*Vide* VI). The first of the Plaintiffs in the 3 suits of 1804 was the widow of Vengum Peria Udaya Tevar, the protegee of the Murdoos. It is simply inconceivable that she and her advisers, of all people in Sivaganga, would sue the younger brother as Zemindar if he was not the Zemindar. Plaintiff's case, it has to be remembered, is that in 1804 the younger brother was simply Manager with the concealed Sunnud of his elder brother safe in his own keeping: and Plaintiff has been at pains to put 3 almost-centenarians (7th, 8th and 9th witnesses) into the box to prove that, up to the elder brother's death, the elder brother and no other was going about in public processions and so forth as the Zemindar, riding the elephant, shooting the arrows and performing functions permitted only to the Zemindar. If there is a particle of truth in this evidence, it is impossible to understand how 3 suitors in 1804 could have been deluded into suing as Zemindar the younger brother who, whatever control he might have over Zemindari accounts, could have no control over other peoples' plaints. The public suing of Gouri Vallaba Tevar as Zemindar, as early as 1804, by the very last persons likely to be deceived as to who had ousted the claims of Vengum Peria Udaya Tevar, is a strong point against the Plaintiff.

11. The next point against Plaintiff is that there is no evidence, worth the name, that Gouri Vallaba was ever his elder brother's Manager: Plaintiff's case—I particularly put this question to Plaintiff's Counsel—is that Gouri Vallaba commenced managing for the elder brother from the time of his installation in 1801. His 7th witness, who says he was a peon under the elder brother for 3 or 4 years, states that the younger brother was managing: and is corroborated by the 8th witness who claims to be a relation of the family, and by the 9th witness who says he used to carry the Zemindar's betel-box. The cross-examination of these witnesses shows how little value can be attached to their testimony: and

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there is no documentary evidence to support their statements. Plaintiff's own Exhibits Z and AA indeed are fatal to the theory that Gouri Vallaba was the Zemindar's Manager. These are the letters in which the Collector explained to the Special Commission in 1802 his proceedings and personal interviews with the Zemindar with reference to the very account with which Gouri Vallaba is now said to have tampered—the account of the average revenues of the estate. The Collector's letters leave no doubt on the mind that he was dealing, directly with the Zemindar, and that the Zemindar with whom he was dealing was a capable shrewd man with a keen eye to his own interest and a knowledge of affairs, and not the infirm and incompetent old man that Plaintiff's grand-father describes the elder brother to have been. Further, the Collector in Z distinctly refers to an interview he had "with the Zemindar and his principal servant Subbiah". If Gouri Vallaba was the Zemindar's Manager, it is difficult to understand why the Collector should not only not mention him but should actually mention another person as the Zemindar's principal servant. Exhibit Z points strongly to Gouri Vallaba himself as the actual Zemindar.

12. The next point against the Plaintiff is that there is absolutely no evidence to show a change of Zemindars at the elder brother's death in 1814. That Gouri Vallaba was the Zemindar who died in 1829 there can be no doubt: and it lies on Plaintiff who asserts that he was not Zemindar from 1801 to show how he came in as Zemindar between 1801 and 1829. Plaintiff's case on this point, as stated in para 9 of his plaint, is this—"After the death of the said Padamattur Woya Tevar as aforesaid, his sons being young, his undivided brother the said Gouri Vallaba Tevar fraudulently got up certain records both before and after the life-time of said Woya Tevar for showing that the Zemindari was originally granted to him, and held the said Zemindari till his death which took place in 1829." Gouri Vallaba's ability to usurp the Zemindari, as it were, and to deceive the elder brother's sons is attributed to the tender age of the latter. This presupposes that the sons had nobody interested in advising them, at their father's death, which is improbable even if they were really minors at that time. And the only evidence of the sons' ages which has been offered by Plaintiff is that of his 8th witness, the relation of the family, who swears that "when Woya Tevar died, his eldest son was about 40, the second son about 30 or 35, and the 3rd son about 20 years old." This is capped by Plaintiff's 6th witness who deposes that "Woya Tevar's sons remained at Padamattar. * * * After Woya Tevar's death, they used to come and visit Gouri Vallaba at Sivaganga and show him the respects due to the Zemindar. I saw them come 5 or 6 times." Plaintiff's own evidence, therefore, is of adult sons of the elder brother deliberate-

ly recognising the younger brother as Zemindar on their father's death. Not a scrap of evidence has been offered to show that the death of any Zemindar of Sivaganga in 1814, or at any time between 1801 and 1829 was reported. It is a fair conclusion, in the absence of any evidence to the contrary, that the man installed in 1801 as Zemindar was the man who died as Zemindar in 1829. And that, undoubtedly, was Gouri Vallaba Tevar.

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13. The Plaintiff is that his case as to Gouri Vallaba's taking possession of the ~~Sunnud~~—to get which was the suggested object of the fraudulent interpolation of his name in the accounts—is quite unsupported by evidence. Plaintiff's case on this point as set out in para 4 of his supplemental statement of 16th August 1836 is this—"In 1803, the Government forwarded to the said Woya Tevar, through the Collector, an Istimrar Sunnud for the said Zemindari, but the said Gouri Vallaba Tevar kept possession of the Sunnud and pretended that he was the person named ~~the~~." This allegation is completely falsified by Exhibit ~~the~~ Collector's report, dated 29th August 1803, of the ceremonial at which he delivered the Sunnuds to the various Zemindars and Poligars of the Southern Districts, in person, at Tinnevely. This report shows clearly that, with one exception, the Collector delivered each Sunnud to each Zemindar, in public darbar, and took a Kabuliat from each personally. That the Collector did not allow any Zemindar to be represented by his Manager or anybody else is clear from his explaining why he allowed it in the one exceptional case of the Ranees of Ramnad. The Zemindar of Sivaganga is particularly specified (para 2) as one of those present; and the Collector says (para 11)—"I called each Poligar separately, informed him of the jamma fixed on his Zemindari and in the name of the Governor in Council presented him with permanent Sunnud." It is impossible that the younger brother, if he was not the Zemindar, could have imposed himself on the Collector on such an occasion: and as Plaintiff's case admits that the younger brother is the man who has kept possession of the Sunnud ever since it was "forwarded to" the Zemindar, there is a strong inference that he was the man who got the Sunnud as Zemindar at the Collector's darbar in April 1803.

14. With all these points against him, Plaintiff falls back on the only circumstance in which he can find any support—namely, the undoubted fact that throughout the correspondence on the record, from the time of the first suggestion of proclaiming a Zemindar as a means of speedily suppressing the rebellion up to the preparation of the account now impugned as fraudulent, there is not a single allusion to the intended and proclaimed and installed Ze-

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mindar as "Gouri Vallaba Tevar," but he is consistently described as Woya or Udaya or Worria Tevar.

15. If "Woya Tevar" were a specific individual name, it would afford strong evidence that the correspondence referred only to the elder brother. But I am satisfied it is a mere term. In Exhibit G1, dated 25th June 1801, which is Col. Agnew's draft Proclamation [not eventually issued], para 6 and 7 run as follows:—

"6. Lieutenant-Col. Agnew has taken under the Hon'ble Company's protection the Padamattur *Woya Tevars* in order to restore to the family the full enjoyment of their proper rights.

"7. He summons to attend him in his camp all the remaining relations of the Nalakota *Wodia Tevars &c.....*"

This use of "Woya Tevars," both as respects the branch of Padamattur and the original stock of Nalakota, is not reconcilable with the use of "Woya Tevar" except as a mere term. And that Woya and Udaya are the same thing, Plaintiff is forced to admit: because the proclamation of 6th July 1801 K appoints Padamattur *Udaya Tevar* as Zemindar and, if that is not the same as Woya Tevar, Plaintiff, who pins his case on the name Woya, would be nowhere.

So in G [covering G1], Sasivarna Tevar, the first Zemindar, is called Sasivarna Udaya (or Woya) Tevar: and Plaintiff's grandfather himself also described Sasivarna in the same way in his pleadings IV and VII. So, Plaintiff's father [See Kattama Nachchiar's suit] and numerous other members of the Nalakota family [including present 1st Defendant] consistently have styled themselves as Udaya [or Woya] Tevars throughout the long history of Sivaganga litigation.

Again in H, dated 6th July 1801, informing the Revenue Board of the issue of the Proclamation of that date, Government describe the proclaimed Zemindar indiscriminately as "Padamattur Woya Tevar" and "Padamattur Tevar" (3 times): and they request the Board to instruct the Collector "to receive Padamattur Tevar as the lawful Zemindar of Sivaganga." That Government did not contemplate Woya as an individual name, seems clear.

Lastly, in II, dated 2nd January 1804, the Collector, writing to the Judge about the suits which were being brought against the Zemindar, calls the Zemindar throughout as Woya Tevar, simply. Exhibit VI, as already pointed

out, discloses the fact that the man then being sued as Zemindar was Gouri Vallaba Tevar: and the Collector's letter specifies as an intended suit the very suit [the widow's] which I have already noted as of peculiar significance to show that Gouri Vallaba Tevar was actually the Zemindar. Yet the Collector, who must have known Gouri Vallaba well,—for he was the identical Collector who had delivered the Sumud in the previous year—calls him simply "Woya Tevar."

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16. The use, in the Proclamation of 6th July 1801, of no more specific description of the Zemindar than Padamattur Udaya (or Woya) Tevar has to be considered along with the facts that, when that Proclamation was issued, the intended Zemindar had not yet joined Col. Agnew's camp from Tondiman's territory; and that, in all the correspondence leading up to that Proclamation, only *one* man was ever thought of as the Zemindar most likely to be acceptable to the people, from among the family of "Padamattur Woya Tevars," as Col. Agnew called them. The existence of two brothers is not even hinted at in all that correspondence: and thus there was no apparent necessity for the Government to use any distinguishing name in the Proclamation. They adopted the general title "Woya Tevar."

17. Plaintiff, however, relies on various circumstances to show that the Woya Tevar proclaimed (taking it as mere term) was the elder brother.

In para 43 of the plaint, the point is made that, when the brothers were forced to flee their country, the elder took refuge with the Tondiman, while the younger went to Aradangi in Tanjore: and one circumstance relied on by the Plaintiff to show that the elder brother was the man intended and proclaimed as Zemindar is that the correspondence dealing up to the Proclamation describes that man as living under the Tondiman's protection. But I find that, in Exhibit B, dated 1st June 1801, which is the Collector's letter containing the very first suggestion of the proposal to proclaim a new Zemindar, the Collector (para 8) writes—"It appears to me that considerable advantage would arise to your operations by sending for *Woya Tevar* now at *Aradangi* to your camp. If Plaintiff is to adhere to para 43 of his plaint that the younger brother alone went to Aradangi, his own document B affords striking proof not only that "Woya Tevar" is a mere term, as applicable to the younger brother as to the elder, but that the younger brother at Aradangi was the man suggested from the very outset to be proclaimed as Zemindar. Who the Woya Tevar then at Aradangi was, is made clearer by another of Plaintiff's documents, Exhibit LL, the genealogical table referred to in Exhibit MM [para 10] by the Collector as having been sent to him by Chinna Murdo, the rebel chief. Exhibit MM (the copy now filed) is not dated;

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but from its contents and from the particular reference to it and to its enclosed genealogical tree (LL), in the Plaintiff's documents JJ1 and KK1, the date of MM is shown to be 13th May 1801, an earlier date than even B: and in the genealogical table (LL), the two brothers' father, Namasivaya Tevar (see plaint para 2), is entered as having one son and that it is

Gouri Vallaba Tevar now at Aradangi.

This is strong evidence showing that "Gouri Vallaba Tevar now at Aradangi," about 13th May and "Woya Tevar now at Aradangi," about 1st June, are but one and the same person; and it further lends corroboration to the 1st Defendant's case that Gouri Vallaba was the only brother ever thought of by the authorities as the individual generally looked on by the Sivaganga people as the Ranee's settled successor, and that he became, therefore, a special object of displeasure to the rebellious Murdoos. He was, apparently, the only brother ever thought of by the Murdoos themselves, for, in LL, we find Chinna Murdoo himself either ignorant of, or not thinking it worth while to take any count of, the existence of any son of Namasivaya Tevar but the one son Gouri Vallaba. In these circumstances, a consistent reference to Gouri Vallaba throughout the correspondence leading up to the Proclamation, as if he were the only Padamattur Woya Tevar in existence, becomes readily understood: and, at all events, Plaintiff's attempt to distinguish the intended Zemindar as the brother who did *not* go to Aradangi completely fails.

18. The next circumstance on which Plaintiff relies to show that the elder brother was the Woya Tevar intended and proclaimed as Zemindar is the recurrence of certain expressions (in the correspondence preceding the Proclamation) indicating that the officers who suggested it had in view "the rightful heir" to Sivaganga, which could never be the younger brother, if the proposals were founded on a recognition of hereditary right. The plaint (para 43) states that the elder brother was, in fact, the next heir to Sasivarna's son: and alleges [para 41] that the Sunnud of 1803 "was not and did not purport to be a grant but only a recognition and appointment of the rightful heir from out of the family or next heirs of the last holder."

19. Now, in the first place, there is no evidence to show that the elder brother was the next heir to Sasivarna's son: in the next place, there is nothing to show that the suggesting officers, in speaking of the "rightful heir," meant

more than the man on whom the people looked as the Ranees's intended successor (and it will presently be seen that this was Gouri Vallaba) : and finally, the Proclamation itself (K1 and TT) is conclusive that the selection made by Government was *not* founded on any recognition of hereditary right in the man selected to be Zemindar. Para 1 of the Proclamation distinctly declares that "the hereditary right of succession to that Zemindar (*i. e.*, Sasivarna Tevar) is therefore extinct, and the Zemindari of Sivaganga, upon the principles on which it was erected into a Zemindari, has positively escheated to the State" : and para 5 explains "that the Governor in Council "having judged it expedient" to set the affairs of the Zemindari upon a permanent foundation, has been pleased to nominate Padamattur Udaya Tevar to be "the present Zemindar." With this positive proof that the appointment was not a recognition of hereditary right, the contention—that the man intended must necessarily have been the elder brother—falls to the ground.

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20. It is quite clear, from the Proclamation and the correspondence preceding it, that the measure proceeded solely upon the expediency of breaking up the rebellion by supporting and giving to the people, as their Zemindar, the person most acceptable in their eyes as the man whom they had long been brought to look upon as their future ruler.

21. That this was the younger brother Gouri Vallaba, there is positive evidence. Exhibit III is the evidence of Mr. Hughes in Original Suit No. 4 of 1832 (already referred to) between the younger brother's daughter and the elder brother's grand-son. Mr. Hughes was attached to Col. Agnew as Interpreter throughout the operations against the Murdoos, and states that he knew Gouri Vallaba Tevar intimately and took an active part in bringing his right to the notice of the Collector and of Col. Agnew. He then explains what that right was :—that Gouri Vallaba was all his life considered the nearest collateral descendant of the Ranees by whom he had been fostered with constant affection. "I cannot say that the rights of adoption passed.....; but this is most certain that the whole country viewed Muttu Vijia Ragonada Gouri Vallaba Peria Udaya Tevar as the rightful claimant, and it was this universal conviction which exposed him for so long a period to the persecution of the Murdoo family." "The general voice of the country proclaimed Peria Udaya Tevar as the rightful claimant under the circumstances of his life, and every enquiry on the part of the local functionaries amply confirmed that matter." He then explains that the Proclamation was an act of grace and policy, to invest with the Zemindari that personage on whom the eyes of Sivaganga were fixed, as the best resource to put down usurpation and rebellion : and that the elevation of the Zemindar had the desired effect of produc-

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ing peace and order at once. As to the elder brother, Mr. Hughes' testimony is that "few had heard of him, and certainly no one whatever had ever dreamt of any right in him;" he was "wholly in obscurity and no one knew anything of him, or would ever have known anything of him, but for the generosity of the Zemindar installed in 1801." And as to the installation, Mr. Hughes swears—"I saw this brother Woya Tevar hold up his hands in homage in common with a hundred head inhabitants, when the Zemindar Udaya Tevar was installed in all possible state in Col. Agnew's camp about August 1801."

22. Nothing could be stronger than this evidence. Plaintiff has endeavoured to get over it by calling two wretched old men (12th and 13th witnesses) to traduce Mr. Hughes' memory, and to suggest that he was bribed to give that evidence. It is unnecessary for me to characterise the testimony of these two witnesses: their depositions have only to be read. If Mr. Hughes were speaking under the influence suggested, or as a partisan, he would not have stopped short of the alleged adoption which Gouri Vallaba's daughter, in that litigation, was asserting. And his testimony receives strong corroboration from the early correspondence put in by Plaintiff in this case. That the elder brother was "wholly in obscurity" receives confirmation from LL, already referred to. In B, dated 1st June 1801, the Collector, in describing the Woya Tevar whom he suggests to be proclaimed, writes—"The inhabitants of Sivaganga, particularly the military part of them, are bound by ancient ties to his family, and from a knowledge of his character they are said to have a secret attachment to him." This is surely not the old, infirm, incompetent elder brother whom Plaintiff's grandfather describes in Exhibit IV as consenting to the younger brother being invested with the Puttam, and handing over the Zemindari at once, and whom the Plaintiff himself makes out to have been as easily duped and thrust aside by his manager brother from the very outset of his rule.

In G, dated 25th June 1801, Col. Agnew, in pressing upon Government the project of proclaiming Woya Tevar as Zemindar, writes to him—"Entitled by long established custom as the nearest though a very remote connection of his family to marry the heiress of Sivaganga, he was long regarded as her destined husband, and as such publicly received the homage of the Shervagars and people as the future chief of Sivaganga. The intrigues by which he was driven from the country defeated this project and occasioned the marriage with another..... [i. e. Vengum Peria Udaya Tevar]." This is surely not the toothless, grey-haired man described by Plaintiff's 8th witness.

In JJ1, JJ, KK1 and KK—the correspondence between the Collectors of Madura and Tinnevely in 1850 relative to the suit then pending in regard to the Zemindari (then under the Collector as Agent of the Court of Wards)—Mr. Hughes' description of the elder brother, as a man of no account, receives further confirmation. The Collector of Madura, referring to the genealogical table (LL), asks the Collector of Tinnevely to search the correspondence with a view of ascertaining whether any account is given of such a person as Gouri Vallaba's elder brother, and whether the brothers gave any Kararnamah to Col. Agnew in favor of the younger. The Collector of Tinnevely replies that no such Kararnamah is forthcoming and that "the only mention of Woya Tevar that has been discovered is in a letter addressed by Mr. Lushington to the Board of Revenue under date the 13th December 1801"—an extract from which is forwarded.

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Plaintiff has not put in either the extract or the letter of 13th December 1801: and the use of the name "Woya Tevar" in the Collector's letter [KK] clinches all the other evidence that it is a mere term. Because, if it were a specific name, it is simply impossible that the Collector could have, in the face of the perpetual use of "Woya Tevar" in all the correspondence preceding the proclamation, said that the "only mention" of it was in that one letter of December 1801.

23. With all this corroboration of Mr. Hughes' evidence, I see no reason why it should not be believed: and, if believed, it is practically conclusive that the younger brother was the intended and proclaimed and actual Zemindar from 1801 to 1829.

Mr. Hughes' evidence also furnishes the probable explanation of Exhibit U, a letter from Collector Lushington, dated 3rd October 1801, in which it is stated that Woya Tevar, "having been cruelly treated by the Murdoos, appealed to the justice and sought the protection of the Company:" and adds—"his petition was heard, and he has been appointed to all the rights and privileges of the Zemindar of Sivaganga." No such petition has been traced; but the passage conveys the impression that Woya Tevar had been proclaimed because of his own representations to the Government. No trace of such representations having been made is forthcoming: and the Proclamation itself is completely opposed to any such theory. But Mr. Hughes explains that he was confidentially employed by the Collector to obtain all possible information as to who was the rightful claimant, and that he brought the younger brother's right to the notice of the Collector and of Col. Agnew. Probably this is what the Collector had in his mind in speaking of Woya Tevar's appeal to the justice of the Company, of which he (the Collector) was the representative.

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24. There remain to be noticed the documents PP (6th November 1802), RR (25th January 1803), QQ (28th January 1804) and SS (29th August 1805)—which are orders and grants of lands purporting to have been issued by the Zemindar to the ancestors of the Plaintiff's witnesses who now produce them. These are all signed simply "Woya Tevar" and, as they are all subsequent to the account BB, and three of them are subsequent to the Sunnud [A] in which Gouri Vallaba's name appears as Zemindar, Plaintiff's argument is that Gouri Vallaba could not have been the Zemindar, or he would have signed these documents with his own name. There is nothing to show that these are signatures of the elder brother and it seems to me that, if Gouri Vallaba was in a position, as Plaintiff alleges, to fraudulently insert, and had the courage to insert, his own name in public accounts calculated to lead to the reproduction of that name in a Sunnud personally delivered to the Zemindar in public durbar, he would not have hesitated to issue these cadjan orders and grants in his own name from the office of which Plaintiff says he was the Manager. Besides, at this time, Gouri Vallaba was, according to the plaint, "conducting all the correspondence of the Zemindari in his own name," and in this view, these four documents go to show that Gouri Vallaba Tevar did, on occasions, call himself simply Woya Tevar; and this view is confirmed by Plaintiff's omission to produce any document even subsequent to the elder brother's death, in which Gouri Vallaba calls himself Gouri Vallaba. There is no contrast of signatures before and after the elder brother's death, which Plaintiff ought to show, to substantiate his case of a change of Zemindars in 1814. The fact seems to be that in ordinary correspondence and ordinary documents the Zemindar was called by, and himself used, his general title of the Woya Tevar; but that in documents of such formality as the Permanent Sunnud and the Permanent Settlement Accounts, and in suits in the Courts (See VI) he was naturally and properly described by his full name and title. The first appearance of the full name in the Settlement Account BB is, therefore, quite consistent with a practice not at all implying fraud.

25. It is this practice which has enabled the Plaintiff to found his present suit on a juggle with the term "Woya Tevar," which his own grandfather Bodagurusami was too near the event to attempt; and I have no hesitation in finding, for all the reasons stated, that Plaintiff has entirely failed to substantiate his allegations of fact, from which he seeks to have his allegation of fraud inferred.

26. My finding on the 2nd part of the 4th issue, therefore, is that the allegations of fraud contained in the plaint and in Plaintiff's supplemental state-

ment of 16th August 1886 are not true in fact.

(Signed) H. T. ROSS,

Acting District Judge.

Note.—The following are the documents filed and witnesses examined.

Plaintiff's Exhibits.

- A. Sunnud-i-Milkeut Istimirar issued to Muttu Vijia Rangunada Gouri Wulla Worria Tevar, Zemindar of Sivaganga, dated 22nd April 1803. Admitted by Plaintiff and filed.
- B. Letter from Mr. Lushington to Lieut. Colonel Agnew, dated 1st June 1801. Admitted by Defendants.
- C. Do. from Lieut. Colonel Agnew to the Acting Chief Secretary to Government, dated 3rd June 1801. Do.
- D & D1. Do. from the Chief Secretary to Government to Lieut. Colonel Agnew enclosing a draft Proclamation, dated 12th June 1801. Do.
- E. Do. from Lieut. Colonel Agnew to the Acting Chief Secretary to Government, dated 13th June 1801. Do.
- F. Do. from do. to do., dated 23rd June 1801. Do.
- G & G1. Letter from Lieut. Colonel Agnew to the Acting Chief Secretary to Government, enclosing a draft Proclamation, dated 25th June 1801. Admitted by Defendants.
- H. Do. from Secretary to Government to President and Members of the Board of Revenue, dated 6th July 1801. Do.
- J. Do. from the Secretary to Government to Lieut. Colonel Agnew, dated 6th July 1801. Do.
- K & K1. Do. from do. to the Resident at Tanjore enclosing a copy of the Proclamation, dated 6th July 1801. Do.
- L. Do. from the Government of Madras to Tondiman of Pudukota, dated 9th July 1801. Do.
- M. Do. from the Resident at Tanjore to the Chief Secretary to Government, dated 10th July 1801. Do.
- N. Do. from the Secretary to the Board of Revenue to Mr. Lushington, dated 10th July 1801.

Finding submitted by the District Court of Madura dated 22nd January 1889.

—continued.

Finding
submitted
by the Dis-
trict Court
of Madras
dated 22nd
January
1883
—continued.

- O. Do. from Lieut. Colonel Agnew to the Chief Secretary to Govern-
ment, dated 12th July 1801. Do.
- P. Do. from the Resident at Tanjore to the Chief Secretary to Govern-
ment, dated 19th July 1801. Do.
- Q. Do. from Mr. Lushington to the President and Members of the
Board of Revenue, dated 20th July 1801. Do.
- R. Do. from the Resident at Tanjore to the Chief Secretary to Govern-
ment, dated 8th August 1801. Do.
- S. Do. from Lieut.-Colonel Agnew to the Chief Secretary to Govern-
ment, dated 21st August 1801. Do.
- T. Letter from Lieut.-Colonel Agnew to the Chief Secretary to Govern-
ment, dated 5th September 1801. Do.
- U. Extract of para 5 of the letter from Mr. Lushington to Captain Ha-
zard, dated 3rd October 1801. Do.
- W. Letter from Mr. Lushington to the President and Members of the
Board of Revenue, dated 6th January 1802. Do.
- Y. Do. from Lieut.-Colonel Agnew to Mr. Lushington, dated 6th March
1802. Do.
- Z. Do. from Mr. Lushington to the President and Members of the Spe-
cial Commission, dated 14th April 1802. Do.
- AA. Do. from do. to do., dated 30th September 1802. Do.
- BB. General Statement submitted by Mr. Lushington to the Board of Re-
venue showing the result of Permanent Settlement recommended for
the Southern Poliems, dated 30th September 1802. Do.
- CC. Letter from the Special Commission to Government, dated 5th April
1803. Do.
- DD. Extract from the list of the names of the Zemindaris and Zemindars
kept in the Revenue Board Office, not dated. Admitted by Defen-
dants.
- EE. Do. do. of the names of Poliems and Poliagars, dated 5th April
1803. Do.
- FF. Letter from the Secretary to Government to the President and Mem-
bers of the Board of Revenue, dated 4th June 1803. Do.

- GG. List of Sums sent to the Collector in the Zilla of Ramnad, dated 10th June 1803. Do.
- HH. Jamabundy and Kistbundy of the Collector of Assigned Poliagar Peisheush south of the Coleroon for Fusli 1212, dated 20th June 1803. Do.
- JJ. Letter from the Collector of Madura to the Collector of Tinnevely, dated 28th September 1850. Do.
- KK. Do. from do. to do., dated 17th September 1850. Do.
- KK. Do. from the Collector of Tinnevely to the Collector of Madura, dated 5th November 1850. Do.
- KK 1. Do. from do. to do., dated 23rd September 1850. Do.
- LL. Genealogical table of the Zemindar's family, not dated. Do.
- MM. Letter from Mr. Lushington to Lieut.-Colonel Agnew, dated 13th May 1801. Do.
- NN. Endorsement of the Collector of Madura on the application of L. Narasimha Chariar, Plaintiff's Pleader in Original Suit No. 2 of 1836, for copies of certain documents, dated 1—11—38. Proved by Plaintiff's 1st witness.
- OO. Do. of the Acting Secretary to the Board of Revenue on the application of M. K. Venkataramaiyar, authorized Agent of the Plaintiff in Original Suit No. 2 of 1836, for copy of certain statement, dated 12--10--38. Admitted subject to further proof. *Vide* order on the Exhibit.
- PP. Order to the Samprathy of Tirupatur purported to be signed by 'Woya Tevar', dated 6th November 1802. Proved by Plaintiff's 2nd and 3rd witnesses.
- QQ. Do. to the Ambalam and Karnam of Themmapatty, Tirupatur, purported to be signed by do., dated 28th January 1804. Do.
- RR. Do. to the Maniagar of Aralikottai purported to be signed by do., dated 24th January 1803. Do. 4th witness.
- SS. D. to the Maniagar of Pattamangalam purported to be signed by do., dated 29th August 1803. Do. 5th witness.
- TT. Proclamation issued in the name of Padamattur Worria Tevar, dated 6th July 1801. Admitted by Defendants.

Finding submitted by the District Court of Madura dated 22nd January 1859.
--continued.

Defendants' Exhibits.

- I. Letter from Mr. Parish, Collector of Tinnevely, to the President and Members of the Board of Revenue, dated 29th August 1803. Admitted by Plaintiff.
- II. Do. from do. to the Judge and Magistrate of the Zilla of Ramnad, dated 2nd January 1804. Do.
- III. Evidence of Mr. Hughes on interrogatories, dated 7th May and 8th September 1834. Admitted in evidence over-ruling the objection by Plaintiff. *Vide* order on the Exhibit.
- IV. Answer in A. S. No. 13 of 1835, Sudder Adalat Court at Madras, put in by Muttu Vija Ragunada Bodha Gurusami Peria Udaya Tevar, Respondent in the said appeal, dated 21st November 1836. Admitted by Plaintiff.
- V. Review petition in do. do. by do. do., dated 14th August 1837. Do.
- VI. Extract from the Proceedings of Sudder Adalat Court of Madras in A. S. No. 13 of 1835, dated 8th January 1838. Do.
- VII. Petition of appeal to the Privy Council presented by Muttu Vija Ragunada Bodha Gurusami Peria Udaya Tevar against the decree in Appeal Suit No. 13 of 1835, dated 23rd October 1837. Do.

Plaintiff's Witnesses.

1. Venkata Ramiyar.
2. Lala Meah.
3. Pichai Rautan.
4. Dada Meah.
5. Periasami Ambalam.
6. Surra Samhara Pillay.
7. Tirumala Naik.
8. Subbia Tevan.
9. Rengaiyengar.
10. Ramasami Aiyangar.
11. Srinivassaiyengar.
12. Balu Naidu.
13. Chandra Suria Tevan.

(Signed) H. T. ROSS,
Acting District Judge.



Finding
submitted
by the Dis-
trict Court
of Madras
dated 22nd
January
1889
—concluded.