1958 *Present:* **Gratiaen J. and Gunasekara J.**

THE ATTORNEY-GENERAL, Appellant, *and* V. RAMASWAMI IYENGAR *et al.* (Administrators of the Estate in Ceylon of Rm. Ar. Ar. Rm. Arunachalam Chettiar, deceased), Respondents

S. C. 235—D. C. Colombo, 37 (Special)

Estate Duty—Hindu undivided family—Way of proving a question of foreign law—Death of "co-parcenary member" in 1934—Liability of his estate to pay estate duty—"Passing" of property—"Executor"—Ordinance No. 8 of 1919, ss. 7, 8, 17(6)—Ordinance No. 1 of 1938 (Cap. 187), ss. 24, 77, 79—Wills Ordinance (Cap. 49), s. 7—Partition Ordinance (Cap. 56), s. 18.

A. C., a Natucottai Chettiar, and his father were the only "co-parcenary members" of a Mitakshara Hindu undivided family which, regarded as an entity, owned considerable "joint property" in various countries including Ceylon. A. C. predeceased his father in 1934. During his lifetime, there had been neither a complete nor a partial division of title or separation of interests in the joint property of the family.

The Crown claimed estate duty in respect of A. C.'s estate in Ceylon. The assessees were the administrators of the estate of his father, who had himself died subsequently in 1938.

Held, (i) that the law governing a Mitakshara Hindu undivided family involved a question of foreign law which must be regarded as a "question of fact" of which the Courts in Ceylon cannot take judicial notice. The decision of the Court must, therefore, be based upon the testimony of the qualified experts who gave evidence and upon the references to textbooks and judicial decisions which were incorporated in their evidence.

(ii) that, under the Mitakshara law, the joint property belonged to the entire family group to the exclusion of its individual members. Upon the death of A. C. no effective change occurred in the title or possession of the joint property belonging to the undivided family. His father who survived him did not, in consequence of the death, receive any "property" which he did not have before. The Crown's claim to estate duty failed, because there was neither an actual nor a notional "passing" of property within the meaning of sections 7 and 8 of the Estate Duty Ordinance, No. 8 of 1919.

(iii) that in regard to the immovable property which formed part of the estate sought to be taxed, section 7 of the Wills Ordinance and/or section 18 of the Partition Ordinance had no relevancy to the "devolution" of a "co-parcener's" interests in any part of the joint property of a Hindu undivided family.

(iv) that the present assessees could not be made accountable in the present case for any estate duty levied under section 8 (1) (*a*) of the Estate Duty Ordinance, No. 8 of 1919, in view of sections 79 and 24, and the meaning of "executor" in section 77, of the later Estate Duty Ordinance (Cap. 187).

APPEAL from a judgment of the District Court, Colombo.

Walter Jayawardena, Crown Counsel, with *V. Tennekoon* and *G. F. Sethukavaler*, Crown Counsel, for the appellant.

H. V. Perera, Q.C., with *S. J. V. Chelvanayakam, Q.C.*, *Peri Sunderam*, and *S. Sharvananda*, for the respondents.

Cur. adv. vult.

2——J. N. B 37004-1,590(7/54)

October 12, 1953. GRATIAEN J.—

This is an appeal by the Crown against a judgment of the learned District Judge of Colombo rejecting a claim for estate duty in respect of the estate in Ceylon of a person to whom I shall refer for convenience as " Arunachalam Chettiar (jnr.) ". He died in India on 9th July, 1934, and the assessees are the administrators of the estate of his father " Arunachalam Chettiar (snr.) ", who himself died subsequently in 1938.

The assessees had paid under protest to the Commissioner of Estate Duty a sum of Rs. 283,213·24 representing the duty claimed from them in respect of the son's estate, the property being described in the formal notice of assessment as " the deceased's interest in the business of RM. AR. AR. RM. and AR. AR. RM. " which had been carried on in Ceylon. On the basis of the learned Judge's decision on their appeal against the assessment, he entered a decree ordering the Crown to refund this amount, with interest, to the assessees.

The case for the Crown is that the Commissioner's assessment should be restored, subject to the qualification that, upon a correct valuation of the deceased's property which is claimed to have attracted estate duty in Ceylon, the Commissioner's computation must be reduced to Rs. 214,085·19 together with interest at 4% from 10th July, 1935. Mr. Jayawardena explained that the Commissioner had erroneously taken into account the value of certain assets situated outside this country.

Arunachalam Chettiar (jnr.) predeceased his father at a time when the earlier Estate Duty Ordinance, No. 8 of 1919, was in operation. The property assessed for payment of estate duty on the deceased's estate had, prior to and until the time of his death, been the " joint property of a Hindu undivided family " of which he and Arunachalam Chettiar (snr.) were the only " co-parcenary members " (I have advisedly inserted this phrase within inverted commas for reasons which will emerge in a later part of my judgment). The Crown claims that the deceased had an " interest " in this joint property which " passed " on his death within the meaning of section 7 of the Ordinance or, in the alternative, that an undivided half-share of the joint property must be " deemed to have passed " on his death within the meaning of either section 8 (1) (*a*) or section 8 (1) (*b*). Section 7 of the Ordinance, which corresponds to section 1 of the Finance Act, 1894, of England, is in the following terms :

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

Sections 8 (1) (*a*) and 8 (1) (*b*), which correspond to sections 2 (1) (*a*) and 2 (1) (*b*) respectively of the English Act, are in the following terms :

> " Property passing on the death of the deceased shall be deemed to include the property following, that is to say :
>
> (*a*) Property of which the deceased was at the time of his death competent to dispose.

(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest, inclusive of property the estate or interest in which has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bona fide* made or effected three years before the death of the deceased, and *bona fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thence forward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise, but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

It is also necessary, in order to understand the scope of the provisions of sections 8 (1) (*a*) and 8 (1) (*b*) respectively, to examine section 2 (2) (*a*) [corresponding to section 22 (2) (*a*) of the Act] and section 17 (6) [corresponding to section 7 (7) of the Act]:

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

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

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

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

The acceptance or rejection of the argument for the Crown ultimately depends upon the true nature of the interest which a "co-parcenary member" of a Hindu undivided family enjoys in the joint property so long as the family retains its undivided status. Before this question is answered, however, it will be convenient to examine the circumstances in which property *actually* "passes" on a man's death within the meaning

of section 7, or, in the alternative, *notionally* " passes " on his death so as to attract duty either under section 8 (1) (*a*) or section 8 (1) (*b*). Fortunately, there are authoritative rulings of the English Courts to guide us as to the meaning of the corresponding sections of the English Act. In the quotations which follow, I propose to substitute the sections of the local enactment for the corresponding sections which the Judges had interpreted in England :

(*a*) " The principle on which the (Ordinance) was founded is that whenever property *changes hands* on death, the State is entitled to step in and take toll as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding. Section (7) gives effect to that principle . . . Section (8) is merely subsidiary and supplemental. If a case comes within section (7), it cannot also come within section (8). *The two sections are mutually exclusive* . . . Section (7) might properly be headed ' With regard to *property passing on death*, be it enacted as follows '. Section (8) might with equal propriety be headed ' And with regard to *property not passing on death*, be it enacted as follows '. . . . . Section (8) does not apply to an interest which passes on the death of the deceased. That is already dealt with in the earlier section ".—*per* Lord Macnaghten in *Cowley v. C. I. R.*[1]

(*b*) " The expression ' passing on death ' (in section 7) is evidently used to denote some *actual change in the title or possession of the property as a whole* which takes place at the death . . . Section (8), by providing that property passing at the death shall *be deemed to include certain kinds of property which do not in fact pass*, artificially enlarges the ambit of the expression ' property passing on death' ".—*per* Lord Parker.

" By sections (7) and (8) a tax is imposed whenever, to use very untechnical language, a death occurs, *and somebody, in consequence, gets property which he had not before ;* and this tax is imposed on the property according to its value, irrespective of the question of the kind of interest which *the new taker* gets, and of his or her relation to the deceased."—*per* Lord Dunedin, in *A. G. v. Milne*[2].

(*c*) " The scheme of the (Ordinance) seems to be this. First of all, when a man dies, a graduated duty is to be laid upon the property passing on his death (section 7). Secondly, it is to be levied on property which does not pass on his death, but which by his death is in some way *either set free or altered in the course of its destination* (section 8) ". —*per* Lord Phillimore in *Neville v. I. L. R.*[3]

(*d*) " For the purpose of fulfilling the word ' passes ' in section (7) . . . there must be at the death the property in existence which, upor the death, *continues and passes on to the successor* ".—*per* Hanworth M. R. in *A. G. v. Quixley*[4].

[1] (*1899*) *A. C. 198.*
[2] (*1914*) *A. C. 765.*
[3] (*1924*) *A. C. 385.*
[4] (*1929*) *98 L. J. K. B. 652.*

(*e*) " The (Ordinance) is only concerned with *beneficial interests capable of valuation*, since the object of the (Ordinance) is to levy revenue ".—*per* Maugham L.J. in *Scott v. I. R. C.* (1935) Ch. 246, affirmed in (1937) A.C. 174.

(*f*) " In order to test whether it can be said that property ' passed ' on death (section 7), one must *compare the position as regards the persons beneficially interested in the property immediately before the death with the position immediately afterwards* ".—*per* Lord Russell of Killowen in *Burrell v. A. G.*[1] In other words, there must be " *an alteration in rights as distinguished from the mere possibility of an alteration* "—*per* Clauson L.J. in *Re Hodson's Settlement* [2].

(*g*) The phrase " competent to dispose " in section 8 (1) (*a*) " is not a phrase of art, and taken by itself and quite apart from the definition clause, it conveys to my mind the ability to dispose, *including, of course, the ability to make a thing your own* . . . The language of the definition clause seems to me beyond doubt to cover the case of a legatee to whom a legacy has been given and who is in a position *either to take it or to transfer it to somebody else or to disclaim it as he thinks fit* ".—*per* Lord Greene M.R. in *Re Parsons* [3].

(*h*) With regard to the phrase " cesser of interest " in section 8 (1) (*b*), " the (Ordinance) gives some assistance in determining what is meant by an ' interest '. The section comes into operation if the property does not pass under section (7). So, an interest is *some right* with regard to the property, e.g., an annuity payable out of the income to it, *which can cease without the property passing.* Then, a benefit to someone must accrue or arise by the cesser of the interest ".—*per* Lord Reid in *Coatts & Co. v. C. I. R.*[4]

According to the Crown, the property in respect of which estate duty has been claimed is his " share " in the Ceylon assets of the joint property of the Hindu undivided family of which he was a " co-parcener " at the time of his death. That " share ", it is contended, represents " some real and definite proprietary interest which could be the subject of a legal transfer of property ". The argument proceeds on the footing that " the proprietary interest " which the deceased " acquired " by birth into his family (*A. I. R. 1931 P. C. 118 at 120*) was, by operation of the Mitakshara law as it is applied in the Madras Presidency, transmitted on his death to the sole surviving " co-parcener " Arunachalam Chettiar (snr.).

If this fundamental proposition can be established, I do not doubt that the deceased's share " changed hands " in the fullest sense of the term upon his death, and therefore " passed " to his father within the meaning of section 7 of the Ordinance.

The assessees do not dispute that if, as alleged by the Crown, there was an actual " passing " of the property from the deceased to his father upon his death, the father would in the first instance have been accountable for estate duty computed on the value of that property. In that

[1] (*1937*) *A. C. 286.*
[2] (*1939*) *Ch. 343.*
[3] (*1943*) *Ch. 12.*
[4] (*1953*) *2 W. L. R. 364.*

event, they, as the administrators of the father's estate, concede their liability to the extent of the reduced amount which the Crown now claims to be due from them, namely, Rs. 214,085·19 and interest.

What precisely is the "interest" which a "co-parcenary member" enjoys in the joint property of an undivided Hindu family? The persons concerned were Natucottai Chettiars, and, being Hindus resident in S. India and domiciled in India, were admittedly governed on questions of personal law by the Mitakshara law as it is administered in the Madras Presidency. The problem therefore introduces an extremely difficult question of foreign law which must nevertheless be regarded by us as a "question of fact" of which the Courts in Ceylon cannot take judicial notice. Our decision must be based upon the evidence of the qualified experts who have testified in the actual case, and upon the references to textbooks and judicial decisions which are incorporated in their evidence. —*Lazard Bros. & Co. v. Midland Bank Ltd.* [1]

Two distinguished members of the Madras Bar have given evidence explaining the incidence of the Mitakshara law as it is administered in Madras. Their competency as experts and the honesty of their respective opinions are not challenged. Both agree that the "strict Hindu law" is to be found in the translations of the ancient texts, and that the modifications to which it has been subjected from time to time in Madras are correctly explained in recognised textbooks, and elucidated (in particular contexts) in decisions of the Privy Council and the superior Courts of India. Nevertheless, these two experts have arrived at ultimate conclusions which are in sharp conflict with one another. In the result, we are left in the invidious position of having to "decide as best we can on the conflicting evidence" upon issues with which, I regret to confess, I am completely unfamiliar.—*The Sussex Peerage Case.* [2]

It is necessary, before I proceed further, to place on record the agreement arrived at by learned Counsel who appeared before us, and for whose assistance we are very much indebted, that certain additional decisions of the Privy Council and of the Courts of India concerning the Mitakshara law should be treated as having been incorporated in the evidence already on record. I have examined these authorities and tried to understand them, but do not refer to each of them specifically in the judgment which follows. [A list of the additional authorities has, at our request, been filed of record.]

To describe the deceased as a "co-parcener" in relation to the joint property is but to adopt a convenient term in the process of attempting to analyse a legal concept which has no precise equivalent in this country. The term certainly cannnot be equated in all respects to the term "co-parcener" as it is understood in English law. (*A. I. R. 1921 P. C. 62 at 68*). Indeed, the problem before us cannot satisfactorily be solved by the mere selection of appropriate language.

Mayne's Hindu Law (2nd Edn.) sec. 264 explains that, when one speaks of a Hindu joint family as constituting a "co-parcenary", one includes only those members of the family who, "by virtue of relationship,

[1] (*1933*) *A. C. 289.* [2] (*1884*) *11 Cl. & F. 85 at 116.*

have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and at their pleasure to enforce a partition. Outside this body there is a fringe of persons possessing inferior rights such as that of maintenance ". *The whole body of such a family, consisting of males and females, " constitutes a sort of corporation* ", some of the members of which are "co-parceners ", that is, persons who on partition would be entitled to demand a share, while others are entitled only to maintenance. So long as the family retains its undivided status, its joint property continues to " devolve " upon the " co-parceners " for the time being " by survivorship and not by succession "—*sec. 265.*

What, then, are the " interests " of a " co-parcener " in the joint property of the undivided family to which he belongs ? Turner L.J. pronouncing the judgment of the Privy Council in *(1863) 9 Moore's I. A. 543 at 611*, refers to the property as " *the common property of a united family* . . . . There is community of interest and unity of possession between all the '(" co-parcenary ") 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 life-time a common interest and a common possession ". Similarly, in the judgment pronounced in *(1866) 11 Moore's I. A. 75 at 89*, Lord Westbury said, " According to the true notion of an undivided family in Hindu law, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of the rent, and claim to take from the collector or receiver of the rents, a certain definite share. The proceeds must be brought, according to the theory of the undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of the undivided family ".

I conclude from these observations that, under the strict Mitakshara law, no part of the joint property can be the subject of individual ownership by any members in definite shares unless and until there has been *either* a separation of the family which automatically results in a division of title (and is almost invariably accompanied by an actual partition) *or* at least a division of the title, by mutual agreement, in respect of a particular property which had previously been the subject of joint enjoyment (in which latter event the undivided status of the family, and its collective ownership of the rest of the joint property, is not affected). *As a third alternative*, a division of title may also take place if one " co-parcener ", after due notice to the others, unequivocally separates himself from the family leaving the rest of the property (i.e., apart from his share) available to the family which retains its undivided status. It is only upon one or other of these events that there arises, in relation to the entirety of the common property or to a particular asset (as the case may be) what Lord Westbury described as " a separation in interest and in right ". In other words, so long as the undivided status of the family subsists, the interest of a " co-parcenary " member in the joint property

of the family of which he remains a member " is not individual property at all ".—*per* Sir Arthur Wilson pronouncing the judgment of the Board in *(1903) I. L. R. 25 All. 407 at 416.*

When property is held in " co-parceny " by a joint Hindu family, " there are ordinarily three rights vested in the " co-parceners " : (1) the right of joint enjoyment (2) the right to call for partition, and (3) the right to survivorship ". *(1881) 4 I. L. R. Mad. 250.* The property is managed by the head of the family, i.e., the *karta* who has, within certain prescribed limits, a wide discretion in the exercise of his general powers of management, and, as " the individual enjoyment of the ' co-parceners ' is ousted by his management ", their right of joint enjoyment is virtually limited to the right to receive maintenance from the *karta. A. I. R. 1918 P. C. 81 at 82.* They may also, of course, restrain him from acting beyond the scope of his legitimate functions, and in certain matters—e.g., the alienation of joint property except for " family necessity "—the power of alienation must be exercised by all the " co-parceners " collectively

Before the strict Mitakshara law was modified so as to meet the demands of a developing society, any alienation by an individual " co-parcener ", whether gratuitously or for value, was wholly null and void, and one gathers that this is still the position in some parts of India. In due course, however, the rigid rule of earlier times was relaxed in Madras and in certain other States. The rights of the creditors of individual " co-parceners " first received recognition, so that an execution-purchaser of " the right, title and interest of " an individual " co-parcener " was held by the Privy Council to have " acquired *a right limited to that of compelling the partition which the debtor might have compelled, had he been so minded, before the alienation took place* ". (1877) I. L. R. 3 Cal. 198. It was considered, apparently, that this limited concession could be made in the name of equity and good conscience without unduly interfering with the peculiar status and rights of the undivided family. Two years later, the Privy Council also accepted it as settled law in the Presidency of Madras that one " co-parcener " may dispose of ancestral undivided estate for value, *even by private contract or conveyance,* " to the extent of his own share ". *(1879) I. L. R. 5 Cal. 148 at 166.* Such alienations were " inconsistent with the strict theory of a joint and undivided Hindu family ", but the judgment pronounced by Sir James Colville points out that the law, as established in Madras and Bombay, had been " one of gradual growth, *founded upon the equity, which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition* ".

In Madras, the purchaser's equities are " worked out " by allotting to him at the ultimate partition a share (but not necessarily the particular property which he had purported to acquire) out of the *corpus* which his vendor would have received *at the date of the transfer* (*and not merely at the date of actual partition*).—(1902) I. L. R. 25 Mad. 690. Indeed, his claim is not defeated even by the death of his vendor before the partition has taken place. *A. I. R. 1952 Mad. 419.* It logically followed that the claims of the official Assignee of the estate of an insolvent

" co-parcener " should receive similar recognition.—*A. I. R. 1925 P. C. 18.* In these respects, then, it must be conceded that some inroads have been made into the doctrine of survivorship which is an essential feature of the strict joint Hindu family system, because the improvident acts of one " co-parcener " might well operate to the detriment of the other members of the larger group.

Does it follow that, by some gradual process of erosion to which the strict law of earlier times has been subjected by the impact of equitable doctrines, a " co-parcener " must now be regarded as himself continuously enjoying a definite vested " share " in the joint property, and that this " share " may be freely alienated (albeit, the Crown concedes, only for value) without first effecting a separation of the united family or at least a division in the title to a particular asset of the joint property ? If this be the correct position, the only relevant distinction which now exists between the position of a Hindu " co-parcener " and his counterpart in England would be that the former's rights are transmitted upon his death to his surviving " co-parceners ", whereas the latter's rights are transmitted to his legal heirs. In either case, there would necessarily be a " passing " of property within the meaning of section 7 of the Ordinance.

With respect, I find myself unable to accept the proposition (which may appear to receive some support from the language of judicial pronouncements made in other contexts) that the gradual modification of the Mitakshara law in Madras during the past century has converted the " interests " of " co-parceners " in the joint Hindu family into *proprietary rights* such as we may properly concede to " co-owners " governed by the Roman-Dutch Law in this country. Still less do I subscribe to the view that a Mitakshara " co-parcener " *always* enjoyed in the joint estate a vested proprietary interest or a " share " equivalent to " real property ". The judgment of the Privy Council pronounced by Sir George Rankine in *A. I. R. 1941 P. C. 48 at 50* specially emphasises the fact that " what is loosely described as a ' share ' of a member of a Mitakshara family is really the share *which, if a partition were to take place today would be a (fractional) share* ", and this fundamental distinction was re-iterated in *A. I. R. 1943 P. C. 196 at 199.* Indeed, if the position were otherwise, I fail to see why execution-purchasers and purchasers for value must still submit to a mere " working out " of their " equities " in subsequent proceedings for partition ; or why claims to proprietary rights by transferees (before partition) from such purchasers have never been recognised in any part of India.

The conflict of opinion expressed by the experts called in the lower Court must now be examined. The assessees' expert, Mr. Bhashyam, takes the view that, upon the authorities which he has cited, a Hindu undivided family is, and always was, regarded as " a unit in contradistinction to its individual members, and treated as a sort of corporation owning property just as under other systems of law individuals own property ". Ownership, according to this witness, " vests in the family as such, and every member is entitled to its enjoyment. Under the Hindu law there is no such thing as succession of property. The joint

members of the family take whatever they take by survivorship; in fact, *there is no question of taking, they had the right, that is, they had what they had before the death*". If this be so, no "passing" of property on the death of Arunachalam Chettiar (jnr.) within the meaning of section 7 could possibly have taken place.

As against this view, Mr. Rajah Aiyar, who was the expert called by the Crown, considered that, upon a correct understanding of substantially the same authorities as those relied on by Mr. Bhashyam, "a joint family is not a corporation in the sense that, as a unit, it possesses property apart from the co-parceners who constitute the co-parceny . . . . The property is *vested in the co-parceners as individuals*, each having with the others a unity of ownership and unity of possession. In a Mitakshara family during its continuance the interests of the co-parceners are necessarily fluctuating interests, but *despite the fluctuations a co-parcener has what might be called a real interest* which persons who are merely entitled to maintenance have not . . . . A co-parcener has proprietary interests in the property and *that proprietary interest is taken by the other members upon his death*". Upon that view of the matter, there would clearly be an actual "passing" of property under section 7, and the alternative submissions with regard to a *notional* passing under either section 8 (1) (*a*) or section 8 (1) (*b*) would not arise.

I now approach, with considerable diffidence, the task of arriving at my own decision on this "question of fact" upon which such distinguished professional gentlemen have failed to agree. In favour of Mr. Rajah Aiyar's opinion, certain phrases contained in some judicial decisions doubtless do tend to support the theory of a transmissible individual proprietary interest which is vested at all material times in a "co-parcener". For instance, the judgment pronounced in *A. I. R. 1931 P. C. 118 at 120* mentions "the proprietary interest" which each member "acquires" by birth, and in *A. I. R. 1927 P. C. 159* reference is made to the "present ownership" of the "co-parceners" who are even described in one passage as "co-owners". Similarly, the High Court of Patna has recently ruled that a Hindu undivided family cannot *as a unit* be adjudicated insolvent because, *inter alia*, "the ownership of the family property *belongs to the individual members who are existing at the time in undivided shares*". *A. I. R. 1947 Pat. 665.*

On the other hand, Mr. Bhashyam's theory of "corporate" ownership in relation to the joint property (as contrasted with "individual" ownership) is by no means novel. Apart from the passage in *Mayne's Hindu Law* sec. 265 to which I have previously referred, Bhashyam Ayyengar J., in (*1901*) *25 I. L. R. Mad. 144 at 154*, described the joint property of an undivided Hindu family as being "owned by the family *as a corporate body*". In *A. I. R. 1941 P. C. 120* it was decided that, even in the *impartible* estate of a joint Hindu family, the head of the family (whose individual powers so greatly exceed those of the *karta* of a partible estate that they even include an unfettered power of disposition while the family is undivided in status) could not, for income tax purposes, be regarded as the "owner" of the property; he was in truth the "owner" of the income arising from it, but the property was

nevertheless " *the property of the joint family* ". Similarly, in *A. I. R. 1937 P. C. 36 at 38*, the judgment of the Board, also pronounced by Sir George Rankine, reminds us that, in certain circumstances, property " belongs to the family as distinct from the individual " in the eye of the Hindu law. In *A. I. R. 1948 P. C. 9* reference is made to " the view of some eminent Hindu lawyers that a joint Hindu family is, in its true nature, *a corporation capable of a continuous existence in spite of fluctuating changes in its constitution* ". It was considered sufficient, however, in that particular case to decide that, for the purpose of entering into a partnership transaction, the family may properly be regarded as " *an entity capable of being represented by its manager* " i.e., the *Karta*. [The Indian Courts have subsequently decided that such a transaction could only take place through the agency of the *karta*, because " a joint Hindu family, though at times spoken of by judges as a corporation, cannot be taken as a legal person *in the strict sense of the term* so as to constitute a partnership between an individual on the one hand and a real corporation on the other.—*(1952) 21 Indian Tax Reports 474.*]

I venture to take the view that these apparently conflicting theories are not incapable of reconciliation. An undivided family obviously does not possess all the attributes of a *juristic person* capable as such of suing and being sued in the Courts, of being adjudicated insolvent, or of entering into commercial transactions except through the medium of an agent who is a legal *persona* in the strict sense of the term. To this extent therefore, the doctrine of " semi-personality " has not received full recognition in the Courts. Nevertheless, " many of the advantages of corporate life " may be enjoyed today by an unincorporated association of persons (" capable of a continuous existence in spite of fluctuating changes in its constitution ") without the gift of legal personality by the State.—*Paton : Jurisprudence* (2nd Edn.) p. 341. This can be achieved by various means, for example, where a " semi-personality " operates through the agency of a legal *persona*, or where " a hedge of trustees " is established to afford " a convenient protection behind which the corporate life may flourish "—*Paton Jurisprudence* (2nd Edn.) p. 342. In the latter case, " the property (of the quasi-corporation) is deemed by the law to be vested, not in its true owners, but in one or more determinate persons of full capacity, who hold it in safe custody on behalf of those . . . . multitudinous persons *to whom it in truth belongs*. The law is thus enabled to assimilate collective ownership to the simpler form of individual ownership "—*Salmond : Jurisprudence* (10th Edn.) p. 337.

This method of approach suggests to my mind a logical solution which, without " laying an axe at the roots " of the joint family system of Mitakshara law, preserves that system in its substantial integrity without in any way ignoring the modifications introduced from time to time for the protection of *bona fide* purchasers for value and others in that category. The following passage, based on *Mitakshara 1 Pl. 28 to 30*, appears in one of the judgments pronounced in *A. I. R. 1952 Mad. 419 F. B. at p. 439*, and lends support to this idea :

> " *The family property is held in trust for the members then living and thereafter to be born* ."

Applying this line of reasoning, I would say that, so long as the status of a Hindu undivided family remains intact, and *so long as there has been no division of title or separation of interests in respect of the whole or any part of the joint property*, the true relationship is as follows :

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

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

3. That upon the death of any male " co-parcener ", his " interest " is automatically extinguished, and the property *continues* to be held by the surviving " co-parceners " for the benefit of the undivided family ; in other words, the interest which they enjoy upon his death is in truth a " pre-existing interest ", no more and no less. (See *A. I. R. 1941 P. C. 72 at 78*).

The position as set out above represents, in my opinion, the true distinction between the property rights of the family unit on the one hand and of its individual " co-parcenary " members on the other, so long as the family remains undivided in status. This distinction is preserved until there has occurred either a complete or partial " division of title and separation of interests " between the " co-parcenary " members, in one or other of the modes recognised by the Mitakshara law. The " co-parceners " are no doubt invested with power to remove the " hedge " which protects the property rights of the so-called " corporation ". It is also possible, as an alternative, to pass some part of the property beyond the reach of the protecting " hedge ". But, generally speaking, the concept of individual ownership of joint property is ruled out while the corporate existence of the family is still intact.

In this view of the matter, it follows that, during the lifetime of Arunachalam Chettiar (jnr.), there had been neither a complete nor a partial division of title or separation of interests in the joint property of the undivided family of which he was at all material times a " co-parcenary " member. Upon his death, therefore, no effective change occurred in the title or possession of the joint property belonging to the undivided

family. His father who survived him did not, in consequence of that event, receive any "*property*" *which he did not have before.* In the result, section 7 does not apply.

The circumstance that, upon the death of Arunachalam (jnr.) his father became the *sole surviving* "*co-parcener*" does not, in my opinion, introduce an alteration of property rights. For, although the *powers* which a sole surviving "co-parcener" over the joint property became, according to Mitakshara law, virtually unfettered except by moral considerations, nevertheless the death of Arunachalam (jnr.) did not operate either to disrupt the undivided family or to bring about an extinction of the beneficial ownership of that family in the property. The surviving "co-parcener" still continued, as he had previously done, to hold the property in fact and in law for the benefit of the family.

[After we reserved our judgment on this appeal, the consequences of a man becoming the "sole surviving co-parcener" of what was previously "the joint property of a Hindu undivided family" was more fully discussed during the argument in the connected appeal (*S. C. 236 of 1951/D. C. Colombo 38 Special* *). I see no reason to alter the views which I have ventured to express in my present judgment.]

A question was raised in this Court for the first time as to whether, in regard to the *immovable property* which forms part of the estate sought to be taxed, the *lex situs* brings into operation section 7 of the Wills Ordinance (Cap. 49) and/or section 18 of the Partition Ordinance (Cap. 56). These sections were introduced for the purpose of preventing the share of a *co-owner*, in the strict sense of the term, from devolving by survivorship instead of by succession on his death. The intention, apparently, was to exclude the incidence of "joint tenancy" under the English Law, but the sections have no relevancy to the "devolution" of a "co-parcener's" interests in any part of the joint property of a Hindu undivided family.

I have so far concluded that an actual "passing" of property did not take place within the meaning of section 7. I therefore proceed to consider whether there was at any rate a *notional* "passing" under section 8 (1) (*a*) or section 8 (1) (*b*). The latter section can more conveniently be disposed of first. Was there a "cesser" of the deceased's or anyone else's "interest" in the property upon his death, and if so, did a "benefit accrue or arise" to his father by reason of that cesser? The precise nature of an "interest", whose cesser attracts estate duty if the second condition laid down by section 8 (1) (*b*) is also fulfilled, can only be understood by an examination of the connected section 17 (6). The deceased or someone else must have enjoyed in respect of the property *a beneficial interest capable of valuation in relation to the income which the property yields.*

In the present case, the deceased did not enjoy during his lifetime an interest which "extended" either to the whole or to a fractional part of the income. *A. I. R. 1941 P. C. 120 at 126.* He merely had

*See page 496 (*infra*).—Ed.

a right to be maintained by the *karta* out of the common fund to an extent which was at the *karta's* absolute discretion; in addition, he could, if excluded entirely from the benefits of joint enjoyment, have taken appropriate proceedings against the *karta* to ensure a recognition of his future maintenance rights and also to obtain compensation for his earlier exclusion. I find it impossible to conceive of a basis of valuation which, in relation to such an "interest", would conform to the scheme prescribed by section 17 (6). Nor do I think that, upon a cesser of that so-called "interest", a "benefit" of any value can be said to have accrued to the surviving "co-parcener" when the deceased's "interest" lapsed. Section 8 (1) (*b*) is therefore inapplicable to the present case.

There remains the alternative submission which was based on section 8 (1) (*a*). The arguments presented on behalf of the Crown, if I correctly understood them, were to the following effect:

(*a*) that (having regard to the recognition now given to the rights of purchasers for value) a "co-parcener" is at any point of time "competent to dispose" of a fractional share of the joint property *for value*, the appropriate fraction being ascertained by reference to the total number of "co-parceners" then alive;

(*b*) that, in the alternative, a "co-parcener" may at any time form a unilateral intention to separate himself from the undivided family and to communicate that decision to the other "co-parceners"; he would thereupon become vested with a "definite and certain share" of which he would be "competent to dispose" in any way he pleased.

I reject the first of these submissions. An alienee for value does not become vested immediately with a definite share *in specie* of any part of the joint property. No share is "carved out", so to speak, of the joint property until the Court has subsequently "worked out the equities" between the purchaser and the non-alienating "co-parceners" in appropriate partition proceedings. Before that occurs, it cannot be said that there is actually *in existence* any "property" of which a "co-parcener" is "competent to dispose" within the meaning of section 8 (1) (*a*). I have assumed in this connection, although I do not hold, that the section applies if a man can "dispose of" specific property only for valuable consideration but not in any other way.

With regard to the alternative submission, I concede that, upon the communication of his unilateral decision to separate himself in status and title from the undivided family, a "co-parcener" immediately becomes "competent to dispose" of the definite share which he thus acquires for the first time. *A. I. R. 1916 P. C. 104.* But no such "competence" exists until the necessary disposing qualification (i.e., by the formation of an intention followed by its communication to the others) has been first attained. In the facts of the present case, Arunachalam Chettiar (jnr.) had, until he died, formed no intention to separate

himself from the family ; still less had he communicated such an intention to his father ; in the circumstances, he enjoyed at best an *option* (which he could have exercised) of attaining competency to dispose of a fractional share of the property, and that option, being personal, died with him. A man is not " competent " to do something until he has placed himself in a position to do it effectively.

Mr. Jayawardena relied strongly on the decision of Luxmoore J. in *Re Penrose* [1], where a person was held to be " competent to dispose " of property within the meaning of section 5 (2) of the Finance Act, 1894, of England, if he can achieve that result by taking " *two steps instead of one* ", namely, by an appointment to himself, followed by a subsequent gift by way of disposition. The necessity of visualising a succession of acts done by a person in order to qualify himself for " competence to dispose " of property no longer seems to arise in England, because the Court of Appeal has since decided that " the ability to make a thing your own " is by itself sufficient to satisfy the requirements of section 5 (2) of the act—*In re Parsons* [2].

The ruling in *Penrose's case* (*supra*) cannot assist the Crown in the present case. For the purposes of section 8 (1) (*a*), " competence to dispose " must exist at *a single moment of time*, namely, the moment immediately preceding a man's death. Section 5 (2) of the Finance Act, 1894, of England, on the other hand, contemplates *a period of time within which there is scope for a number of separate and distinct acts to take place in a given order of succession.* On the other hand, section 8 (1) (*a*) does not apply unless the formation of an intention to separate and the communication of that intention to others, have both *preceded* the potential " disposition " of property by a " co-parcener ". I do not think that either the words of the section or the spirit of the Ordinance require a Court, for the purpose of sanctioning the imposition of estate duty, to contemplate *a notional synchronisation of a succession of distinct events.* The *Penrose case* must not be regarded as deciding that the deceased person concerned was competent to dispose of the fund " *at the time of his death* ". Moreover, I do not find myself compelled to place a construction on section 8 (1) (*a*) which would have the effect of attracting estate duty where a deceased person did not in fact dispose of any property before he died, and where, in consequence, his interest in that property lapsed upon his death without consequential benefit accruing to anyone who survived him. The Ordinance was not enacted to impose a penalty for the non-disposition of rights which become extinguished on death.

Finally, the present assessees could not be made accountable in the present case for any estate duty levied under section 8 (1) (*a*). The original machinery for the assessment and collection of duty payable under the Ordinance had, before any assessment was made, been superseded by the machinery laid down in the later Estate Duty Ordinance (Cap. 187—see sec. 79). Under section 24 of the new Ordinance, the " executor " of a deceased's estate is the person primarily accountable for duty levied on property which he was " competent to dispose " at his death. The assessees in this case are the administrators only of

[1] (*1933*) *Ch. 793.* [2] (*1943*) *Ch. 12.*

the deceased father's estate, and were not "executors" of the deceased because, even if the definition of that term in section 77 were called in aid by the Crown, neither they nor Arunachalam Chettiar (snr.) had "taken possession or intermeddled with" the *deceased's property* after his death. Such "interests" as the deceased enjoyed in the joint property during his lifetime were automatically extinguished when he died. A man cannot intermeddle with something that does not exist.

In the result, I would hold that the Crown's claim to estate duty fails, because there was neither an actual "passing" of property under section 7 nor a notional "passing" of property under section 8 upon the death of Arunachalam Chettiar (jnr.). The appeal must accordingly be dismissed with costs.

It is no longer necessary to deal with the assessees' contention (which was submitted in appeal before us with very little enthusiasm) that section 73 of the new Ordinance operates retrospectively so as to exempt the joint property of a Hindu undivided family even in the case of "co-parceners" dying before 1st April, 1937. Section 73 of the new Ordinance does not appear to me to have any relevancy either way to the consideration of this appeal.

GUNASEKARA J.—I agree.

Appeal dismissed.

1953 *Present:* **Gratiaen J. and Gunasekara J.**

V. RAMASWAMI IYENGAR *et al.* (Administrators of the Estate in Ceylon of Rm. Ar. Ar. Rm. Arunachalam Chettiar, deceased), *and* ATTORNEY-GENERAL, Respondent.

S. C. 236—D. C. Colombo 38 (Special)

Estate Duty—Hindu undivided family—Death of sole surviving "co-parcenary member" —Liability of estate for estate duty—Estate Duty Ordinance (Cap. 187), ss. 6 and 73, as amended by Ordinance No. 76 of 1938, s. 5.

The sole surviving "co-parcenary member" of a Mitakshara Hindu undivided family died in February, 1938, leaving no male issue in existence. His son had predeceased him, and the actual survivors of the family were all females and included his widow.