

CONFIDENTIAL.

Revenue (1897) Department.

MISCELLANEOUS SERIES.

G.O., No. 2741

Confidential 945

Dated 31 May 1897.

[Despatch Abstract.]

Agreeing with the Court of Wards in the opinion that in
selecting Counsel its wishes are to be consulted in cases
in which the interests of its wards are involved.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.
66	1475	Rev	13-4-97				
70	1182	Rev	2-3-97				
		L	1				

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.
70	3791	Rev	22-7-97				
70	3792	Rev	22-7-97				

Revenue (1897) Department.

CURRENT No. 3708

From The Court of Wards

Order

No. 692
Conf. No. 24

Dated 1st May 1897

Received 5th May 1897

Registered 5th

Enclosures one

Spare copies

SUBJECT.

Submitting the four to
views on the Advocate General's
suggestion regarding the engagement
of counsel in England for the conduct
of the Pittapur Privy Council appeal.

CONFIDENTIAL.



Proceedings of the Court of Wards,

Dated 1st May 1897.

No. 692 His
Conf. No. 24

Full Court

READ Proceedings of Madras Government, Revenue
Department, No 1975 His, dated 13 April 1897.

Resolution.

In reply to the G.O. read above, the Court of Wards submits that it has no wish to raise any objection to His Lordship the Secretary of State for India selecting Counsel in order to deal with the issue in which the financial responsibility of the State is involved. The Court of Wards is contending for the privilege of naming counsel in cases in which the interests of one or more of its wards are at stake: and if the Court of Wards is allowed to name the Counsel for the 2^d Defendant it has no objection to separate Counsel being named by the Secretary of State as suggested in para 18 of Advocate General's opinion.

Done Extract

W. Swamikannu

3 MAY 1897

For Secretary

To The Secretary to Government
Revenue Department with Opinion returned.

BACK PAPERS.

G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.

CONFIDENTIAL

1896.
Court of Wards,
MADRAS.

To

THE COLLECTOR OF

Proceedings, dated
No.
Conf. No.

1896.

Abstract.

The Hon Mr Grose C.E.
The Hon Mr Bliss C.E.
H E the Govr.

Flagged A

Despatch under G.O. 56
6-4-97
Flagged B

The Court of Wards has
wanted to engage Sir E. Clarke
& Mr Woodroffe for the Pithapur
appeal on the ground that it was
necessary to engage them in order
to prevent the opposite side from

at Pithapur under G.O. 1975
13-4-97

Flagged C

retraining him. G.O. telegraphed to
that effect to the Sec. of State.
This was on 5. 11. 96, more
than 6 mos. ago. The Sec. of State
replied that under the rules in
force he ^{had the power to appoint} appointed Counsel at
his discretion after seeing all the
papers connected with the appeal,
& so could not do as the Court
wished. This was in accordance
with a despatch of 1889, in which
it was decided that all in all
appeals in which G.O. was interested
the papers should be sent to the Sec.
of State &c. In the despatch
forwarded in G.O. 7.2.96 this is
repeated & the following words are
used: "As regards all appeals in
which G.O. or the Court of Wards
are parties" the Sec. of State should

C.O. 3708 of 97

For orders.

Please see
note for orders under
G.O. 18.5086 d. 11-12-96.
The Secy of State having
stated that the
selection of counsel
to represent any Indian
authorities in litigation
at home must
be left to his sole
discretion, the Conf.
of Wards pointed out
that "undoubtedly the
Court has been
willing to leave the
selection of counsel
in the hands of the
Secy of State; but when,
as in the present
instance, it has reason
to believe that the
interests of Wards
would be benefited
by the retention of
any specified counsel,
its legal
position is such as
to justify the expectation

"that its wishes will be complied with." As this contention raised the question as to how far the court of wards was legally independent of the executive, the papers were forwarded to the Honble the Advocate General for opinion. In reply, that officer stated that the court of wards was independent of the executive in the exercise of its functions which were purely judicial. That in respect of management of estates which was more of an executive than of a judicial character, the court was subject to such instructions as the Govt might issue, that the conduct or defence of suits connected

in each case be furnished with a distinct expression of the opinion of the Govt. transmitting the papers to the court. Its output was adopted by him. (30.7.2.96) The Court has since expressed that weighty interests are involved in the Pittapur appeal, & that early steps should be taken to secure the Court it thinks most competent to deal with the case, viz. Clarke and

G.O. 1182 2-3-97 flagged D

Woodroffe. It holds that its wishes as to the counsel output to be can-

~~with~~ flag E

culated in cases in which the interests of its wards are involved. The Sec. thinks it is "technically" right in this. I think it is absolutely right, & so does the Ad. Gen., who says in para 16 of his opinion: "The Court of wards was strictly within its powers when it used its previous knowledge & experience (the case had been established the taking of voluminous evidence in England) 'in respect of its selection from the English Bar to meet the exigencies of the Pittapur case, & when it had reasons to believe that the interests of its wards would be benefited by the intervention of any specified counsel, its fiduciary position towards its wards is such as to justify the expectation that its wishes will be complied with.' The Court goes further & thinks it has a right to select counsel independent of the Sec. of State."

Ad. Gen's opinion is distinctly against their having this right, but, as I have said, it is the effect that they ought to be allowed to do so. In my opinion this view should be laid before the Sec. of State, & he should be again asked to engage Messrs. Clarke & Woodroffe, if they are not already engaged by the opposite side. The Ad. Gen. says that the Court & its wards may be represented by separate counsel, so that Messrs. Clarke & Woodroffe can still be appointed, even if the Sec. of State has engaged one or other. It is quite possible he has not. He disputes this even because that he will not take any steps with regard to the appeal, till he has seen the papers & received an expression of the opinion of Govt. The papers are probably ready now & should be sent to the Sec. of State at once, with the expression of opinion that the appeal should be defended, & that Messrs. Clarke & Woodroffe should be engaged to defend it if they are still free.

Yours, on behalf of the Ward of the Govt, who may be selected by the S. of S. to appear on behalf of the C. of W. itself
J. G. 18/5/97
J. G. 23.5.97
19/5/97

with the ward, 'estate' must generally be regarded as of an executive character and that therefore the Govt could control the court in the selection of counsel to conduct its suits. The acting advocate Genl also added "In so far as the Pittapur appeal is concerned, the difficulty, if any, maybe easily met by the 1st Defendant, the court of wards, entering appearance separately from its ward the second Defendant. This is a fit and proper case for adopting this course in England, for the court of wards as a Defendant in the suit independently of its ward is interested only in one question raised in the case; and in that question,

"its ward is in no way interested. The two defendants therefore may appear by separate solicitors and counsel, the counsel for the Court of Wards confining himself to the first issue in the case, namely, whether the plaintiff has a cause of action against the Court of Wards as such. If the appeal of the adopted son be dismissed, separate costs will, in the ordinary course, be awarded to the 1st and 2nd Defendant respectively."

2. H.Ms. having decided that the Court of Wards should be referred to in the first instance with reference to the suggestion to engage separate counsel for the two Defendants, the papers were forwarded to

to it for remark. The current noted at the top of this note is the reply.

3. The Court states that "it has no wish to raise any objection to His Lordship the Secy of State for India selecting counsel in order to deal with the issue in which the financial responsibility of the State is involved. The Court of Wards is contending for the privilege of naming counsel in cases in which the interests of one or more of its wards are at stake; and if the Court of Wards is allowed to name the counsel for the Second Defendant it has no objection to separate counsel being named by the Secy of State as suggested in para 18 of Advocate General's opinion" and

4. In making the above remarks, the Court of Wards seems to be under some misapprehension. There is no doubt that for the conduct of that portion of the appeal in which the Court of Wards as such, i. e. ~~independently~~ independently of its ward, is interested, the Secy of State has the right to select counsel at his pleasure. It would also appear from the Advocate General's opinion, that the Secy of State could control the selection of counsel by the Court of Wards even when it is acting on behalf of its ward (though the Court seems to view the Advocate General's opinion in a different light). Under the circumstances, it does not seem advisable

to address the Secy of State ^{again} as proposed by the Court of Wards.

5. The ~~Advocate General's~~ ^{Advocate General's} view seems to be that if the two Defendants, i. e. (1) the Court of Wards and (2) the ward of the Court be represented by separate solicitors and counsel and if the Govt of Madras should make a ~~specific~~ ^{Special} recommendation to the Secy of State urging the desirability, if not the necessity, of engaging the counsel named by the Court in view of the weighty interests involved in the case so far as the ward is concerned, the probability is that while the India Office solicitor and counsel will be engaged on behalf of the 1st Defendant, the counsel suggested by the Court of Wards

would, in deference
to its views, be engaged
on behalf of the 2nd
Defendant, independently
of any question of right
on the part of the Court
of Wards to nominate
~~the~~ counsel to repre-
sent its ward and of
obligation on the part of
the Secy of State to
accept such nomi-
nation.

If the above inter-
pretation of the Ag's
view is correct, orders
are requested as to
whether the Secy of
State may be address-
ed as indicated there-
in.

What the Court of Wards wants
established here is that it
is legally entitled to name the
Counsel on behalf of its ward.
The Ag's opinion is against it.

Technically it is right in saying
that its legal position is such as
to justify it in appointing ^{that} its wishes

in the matter of this selection
P. in 13 May 97

+ of Counsel who attend to
but it wants much more than
these words necessarily convey.

11/5/97

W. P. in 9. 1975. para 5

Read etc 37 08 of 97
G.O. mis. 8 31 May 1897 No 2741

The Govt agrees
with the Court of
Wards in the opinion
that, in selecting
counsel, it wishes
ought to be consult-
ed in cases in which
the interests of its
wards are involved.
It does not, however,
consider that, in
such cases, the
Court of Wards has
a right to select
counsel independ-
ently of the Secy of
State. Such a right
is distinctly denied
by the Honble the
Advocate General,
though he is of opi-
nion that "the Court
of Wards was strictly
within its powers
when it used its
previous knowledge
and experience in
respect of a selection

from the English bar
to suit the exigencies
of the Pittapur case,
and where it had
reason to believe
that the interests
of its ward would
be benefited by the
retention of any
specified counsel,
its fiduciary position
towards its ward
is such as to justify
the expectation that
its wishes will be
complied with. In
this view the Govt
is prepared to again
request the Secy of
State to engage Messrs
Clarke and Woodroffe
if they are still free
to defend the appeal
on behalf of the
Court's ward, who-
ever may be selected
by the Secy of State
to appear on behalf
of the Court of Wards
itself. As, however, the

the Secy of State de-
clines to take any
action until he has
seen the papers, the
Court of Wards will
be requested to send
up the records in
the case with the
least possible delay
in view to His Lord-
ship being address-
ed on the subject.

To the Court of Wards

Despt 1/6/97

31/5/97

From orders

GA.
28 May 97

27/5/97

When given for copying _____
 When copied _____
 When examined _____
 When signed _____

189 .

READ AGAIN G.O., No.
 189 ,

DATED

CURRENT No.

ENCLOSURES TO C. No.

ORDER OF GOVERNMENT A A A A A A A

LETTER OF GOVERNMENT.

STATEMENT WITH DITTO.

PAPERS NOT FILED UP, BEING MEANT FOR DESPATCH
 IN ORIGINAL.

N.B.—

- A = Copy in full.
- B = Not to be copied.
- P = Copy abstract only.
- Q = Copy heading only.

U
te
o
h
c
o
a
to
Se
o
C
a
o
p
v
a
u
s
e
u
h
at
i
Ca
Th
Lu
th
K
A
130

CONFIDENTIAL.

[illegible]

IN THE PRIVY COUNCIL
ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.

IN APPEAL SUIT No. 95 of 1891

Between

Sundaralingasami Kamayya Naick, minor, by his mother and next friend
Nagammal, appellant (plaintiff)

and

Ramasami Kamayya Naick, minor under the protection and guardianship of
Nagayyasami Naick and through the Collector of Madura and Agent of the Court
of Wards, respondent (defendant).

Case

On behalf of the abovenamed respondent, Ramasami Kamayya Naick, minor
under the protection and guardianship of Nagayyasami Naick and through the
Collector of Madura and Agent to the Court of Wards.

1. The abovenamed appellant was the plaintiff in the first court, which was
that of the Subordinate Judge of Madura (West) in the Madras Presidency, and this
respondent was defendant.

2. This suit was brought by the plaintiff to establish his exclusive title to the
zamindari of Saptur together with its appurtenances and to the trusteeship of
certain devasthanams (temples) and choultry, to recover possession of the same with
the mesne profits and also for partition and recovery of his half share of such
properties, moveable and immoveable, as are partible and which belonged to the
plaintiff's late father, Nagayyasami Kamayya Naick, who was the last zamindar
but one of Saptur.

3. The genealogical table of the family is herewith appended; Nos 1 to 9 in
the table are stated by the plaintiff to be the legally-married wives of Nagayyasami
Kamayya Naick (senior) and that the plaintiff is his legitimate son. The defendant
denied that Nos. 6, 7 and 8 (plaintiff's mother) were the legally-married wives and
that the plaintiff is the legitimate son of Nagayyasami Kamayya Naick (senior).

4. The late Nagayyasami Kamayya Naick (senior) died on 14th October 1885;
Nos. 1, 2 and 7 in the genealogical tree died before him. He was succeeded by
his eldest son also called Nagayyasami Kamayya Naick (junior No. 10). As he
was a minor, the Court of Wards took possession of the estate and have been
managing it since. He died a minor unmarried on 31st December 1887, and the
plaintiff and defendant now set up rival claims to the estate.

5. The facts admitted by both parties in this suit are as follows:—

- (a) The zamindari of Saptur and its appurtenances are impartible and
descendible to a single heir.
- (b) The defendant is the legitimate son of Nagayyasami Kamayya Naick
(senior) by his lawful wife (No. 4).
- (c) The plaintiff is also a son of Nagayyasami Kamayya Naick (senior), but
his legitimacy and the marriage of his mother (No. 8) are disputed by
the defendant.
- (d) The plaintiff is older than the defendant by two years.
- (e) The defendant's mother (No. 4) was married prior to the admission of
the plaintiff's mother (No. 8) into the palace by Nagayyasami
Kamayya Naick (senior).

6. The allegations on which the plaintiff bases his right to the zamindari are
(1) that he, like the defendant, is a legitimate son of Nagayyasami Kamayya Naick
(senior) and (2) that, being senior in age of the surviving brothers of Nagayyasami
Kamayya Naick (junior), the last male holder, he is entitled to the succession
according to the law and custom of primogeniture.

7. The defendant pleads his right to the succession in preference to plaintiff
on four main grounds, namely:—

- (1) The plaintiff's mother, Nagammal (No. 8), was not legally married to
Nagayyasami Kamayya Naick (senior), and that plaintiff is therefore
an illegitimate son, while he, the defendant, is admittedly the legiti-
mate son by his mother Muthuverammal (No. 4).
- (2) That even if the plaintiff's mother (No. 8) was legally married to
Nagayyasami Kamayya Naick (senior), she was a lady of a different
and inferior caste and rank to that of the defendant's mother, Muthu-
verammal (No. 4).
- (3) That by family custom, the defendant is entitled to succeed by reason
of his mother having been married prior to the plaintiff's mother.
- (4) That he (defendant) is a full brother of the last holder Nagayyasami
Kamayya Naick (junior), i.e., uterine brother, while plaintiff is only
the half brother.

8. Upon these contentions the following issues were framed by the first
court:—

- (1) Whether the mother of the plaintiff was the wife of the father of plaintiff
as alleged in the plaint, or his mistress as alleged by the defendant.
- (2) Whether the plaintiff's mother was of the same caste as plaintiff's father
or of a different and inferior caste, and if of a different and inferior
caste, whether, according to custom obtaining in the caste to which
the plaintiff's father belonged, a marriage between plaintiff's father
and mother would be invalid as alleged by the defendant.
- (3) Whether even if plaintiff's mother and father were married and such
marriage was valid, the defendant's mother, as alleged by the defen-
dant, was a wife of a caste and rank superior to that of the plaintiff's
mother, and, if so, whether, as alleged by the defendant, he is entitled
to succeed in preference to plaintiff.
- (4) Whether, as alleged by the defendant, he is entitled by the custom pre-
vailing in the Saptur zamindari and in other zamindaris held by
zamindars of the same caste in Madura and neighbouring districts to
succeed in preference to plaintiff by reason of the defendant's mother
having been married prior to plaintiff's mother.
- (5) Whether, on the death of the last zamindar, his full brother, the defen-
dant is entitled to succeed to the impartible estate in preference to
plaintiff, even if he is his legitimate half-brother.
- (6) Whether the properties comprised in schedules C, D and E are parti-
ble as between plaintiff and defendant or are impartible as appur-
tenant to the zamindari as alleged by the defendant.
- (7) If the properties are not impartible, what share is plaintiff entitled to
therein.
- (8) What properties mentioned in schedules C, D and E existed at the time
of the death of the plaintiff's father in 1885, and what were the accre-
tions to such properties up to 31st December 1887.
- (9) Whether any and what amount of interest and mesne profits is plaintiff
entitled to.
- (10) Whether the schedules attached to the plaint are erroneous and defec-
tive as specified in the schedules attached to the defendant's written
statement.
- (11) To what relief or reliefs is the plaintiff entitled.

As to the first issue.

9. The contention on the plaintiff's side was that his mother, Nagammal, was
a Kambla (a sub-division of Sudra caste) and was married to the late zamindar,
Nagayyasami Kamayya Naick (senior), in accordance with the rites and customs of
the Kambla caste to which he belonged, the presence of the dagger being merely
an addition. The contention on the defendant's side was that the plaintiff's
mother was a Parivara (another sub-division of Sudra caste) and taken as a
mistress, and that a bottu was caused to be tied round her neck in the presence of

the zamindar's dagger without any Kambla caste ceremonies being performed. The intermediate case is that plaintiff's mother, Nagammal, is a dagger wife as distinguished from the caste wives such as defendant's mother and others, and, as such, has a sort of position lower than the caste wives and considerably higher than the kept concubines.

10. The Subordinate Judge of Madura, who tried the case, found, as a matter of fact, that the plaintiff's mother, Nagammal, was married to the plaintiff's father; that on that occasion a dagger was used and it played a very prominent part; that a number of ceremonial rites were observed; that the plaintiff's father was actually present at the ceremonial and that there was a marriage in fact between plaintiff's father and mother. In the appeal preferred by the defendant on this point to the High Court of Madras (Appeal No. 78 of 1891), the High Court agreed with the Subordinate Judge of Madura and stated as follows:—"As to the factum of marriage there is voluminous evidence, both oral and documentary, to prove beyond a doubt that on the 9th of July 1875 the plaintiff's mother was united to the plaintiff's father by a number of ceremonial rites." There is thus a concurrent finding of fact by the two Indian courts on the factum of the marriage of the plaintiff's mother and the defendant was therefore advised not to prefer a cross appeal to Her Majesty in Council on this point. Hence the finding of the two Indian courts that there was a marriage in fact between plaintiff's mother and his father remains final.

As to the second issue.

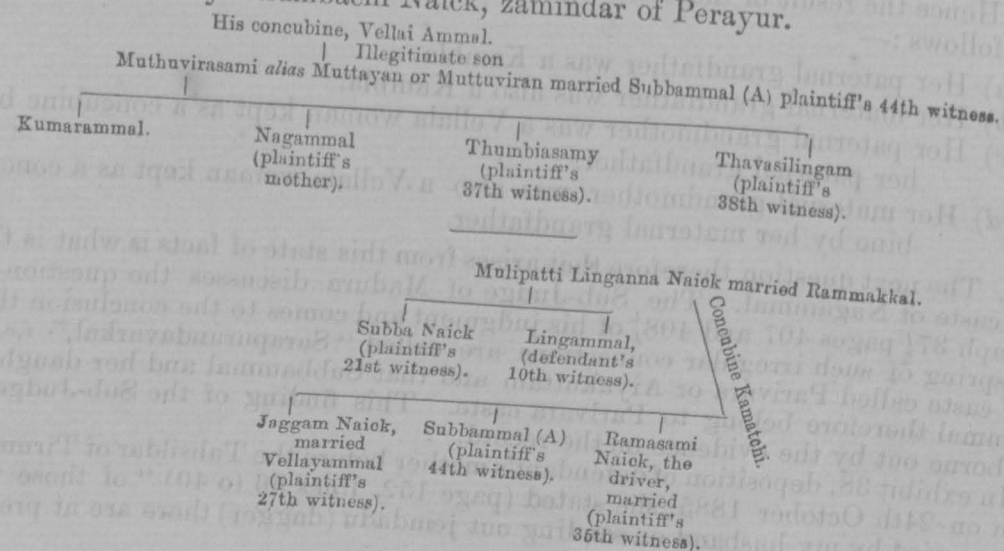
11. This issue divides itself into two parts—

- (1) Whether the plaintiff's mother was of the same caste as plaintiff's father or of a different and inferior caste.
- (2) If of a different and inferior caste, whether, according to custom obtaining in the caste to which the plaintiff's father belonged, a marriage between plaintiff's father and mother would be valid as alleged by the defendant.

As to the first part of the second issue.

12. The plaintiff's contention on this point is that his mother, Nagammal, was of exactly the same caste as the late zamindar of Saptur, and a very vigorous effort was made on the part of the plaintiff to show that she (Nagammal) belonged to the pure Kambla caste to which the zamindar belonged and that she and her relatives were treated as pure Kamblas. The defendant's contention on this point is that Nagammal, the plaintiff's mother, does not belong to Kambla Totiya caste as the zamindar's was, but Parivara which is an inferior caste and consists of descendants of parents of illegitimate origin. This contention therefore introduces the question of the pedigree and caste of plaintiff's mother. The pedigree of the plaintiff's mother, Nagammal, as elicited from the evidence on the record stands thus:—

Thumbiasamy Thumbachi Naick, zamindar of Perayur.



13. The first question in this pedigree is whether Vellai Ammal was the legally-married wife or the concubine of Thumbiasamy Thumbachi Naick. The plaintiff's case is that she was the legally-married wife, and the defendant's contention is that she was a mere concubine. The Sub-Judge of Madura found that Vellai Ammal was a Vellala woman (another sub-division of Sudra caste), while Thumbiasamy Thumbachi Naick was a Kambla, and that Vellai Ammal was his concubine and not his legally-married wife and therefore Muthuvirasami (father of Nagammal) was an illegitimate son of his parents (*vide* paragraph 36 of the Sub-Judge's judgment, pages 406 and 407). Exhibit XXXIII, statement No. 2, fully supports the defendant's contention on this point. Exhibit XXXIII contains three statements as its enclosures. In statement No. 2 (page 115) the following words are to be found:—"Muthuviran, aged four years, son of Vellai, another concubine of the deceased zamindar." Again defendant's eleventh witness, the sister's son of Vellai Ammal, also states (page 289, line 2) that she was kept by Thumbiasamy Thumbachi Naick. The evidence of Nagammal, who was examined as forty-second witness on behalf of the plaintiff, greatly supports the defendant's contention. She deposed that her father lived in a house close to but apart from the palace (page 247), and that he was brought up after his mother's death by one Lakshmi, another concubine of the zamindar of Perayur (page 253). [Statement No. 2, exhibit XXXIII, shows Lakshmi was a concubine (page 115)]. On the plaintiff's side two witnesses were called to prove that the said Vellai Ammal was actually married to the Perayur zamindar, viz., plaintiff's nineteenth and thirty-second witnesses and both of them were disbelieved by the Sub-Judge; hence it is clear that Nagammal's father was the offspring of a Kambla zamindar by a Vellala concubine.

14. The next question in respect of this pedigree relates to Subbammal, mother of Nagammal. It is admitted on both sides that Subbammal was married to Nagammal's father. Plaintiff's case is that Kamatchi, mother of Subbammal, was the legal wife of Mulipatti Linganna Naick, and the defendant's case is that she was a mere concubine. On this point there is only oral evidence on both sides. On plaintiff's side two witnesses were called, viz., plaintiff's fourteenth and twenty-first witnesses. Plaintiff's fourteenth witness first stated that Kamatchi was a concubine, and it was only in re-examination he corrected this statement. As to plaintiff's twenty-first witness the Sub-Judge of Madura observed in his judgment that this witness overshot the mark and showed a great bias in plaintiff's favour. On the defendant's side five witnesses were examined, viz., defendant's ninth, tenth, twenty-second, forty-third and sixty-second witnesses. The Sub-Judge did not believe defendant's tenth, twenty-second and sixty-second witnesses, but remarked very favourably as to defendant's forty-third witness. The conclusion arrived at by the Sub-Judge of Madura on this point is that Kamatchi was not the wife but concubine of Mulipatti Linganna Naick (*vide* Sub-Judge's judgment, paragraph 35, pages 405 and 406). Again Mulipatti Linganna Naick was a Kambla while Kamatchi was a Vellala woman.

15. Hence the result of these findings as to the parentage of Nagammal appears to be as follows:—

- (a) Her paternal grandfather was a Kambla.
- (b) Her maternal grandfather was also a Kambla.
- (c) Her paternal grandmother was a Vellala woman kept as a concubine by her paternal grandfather.
- (d) Her maternal grandmother was also a Vellala woman kept as a concubine by her maternal grandfather.

16. The next question therefore that arises from this state of facts is what is the proper caste of Nagammal. The Sub-Judge of Madura discusses the question in paragraph 37 (pages 407 and 408) of his judgment and comes to the conclusion that the offspring of such irregular connections are called "Sarapurandavarkal," i.e., a mixed caste called Parivara or Aiyakuttam and that Subbammal and her daughter Nagammal therefore belong to Parivara caste. This finding of the Sub-Judge is fully borne out by the evidence on the record.

In exhibit 38, deposition of defendant's mother before the Tahsildar of Tirumangalam on 24th October 1885, she stated (page 152, lines 36 to 40) "of those who were married by my husband on sending out jemdadu (dagger) there are at present

here two women. The name of one of them is Muthu Kamatchiammal, and that of the other is Nagammal. The said two women are not of our Totiya Kambla caste. They are born of Kamblathar's illegitimate wives, that is to say, born of the other caste women." Nagammal in her deposition as plaintiff's forty-second witness deposed: "By Parivara caste is meant those who do menial services" (page 251, lines 7 and 8). Defendant's eleventh witness states as follows:—"The illegitimate children of zamindars and their brothers are, through courtesy, called 'Aiyakuttam' (page 288, lines 24 and 25). Parivara is equivalent to monegar" (page 289, line 36).

17. The documentary and oral evidence adduced on both sides in respect of the caste of Nagammal are fully discussed by the Sub-Judge of Madura in paragraphs 39 to 43 of his judgment, and his conclusion is stated in paragraph 44, (pages 410 to 413). He finds that Nagammal belongs to a sub-caste called Parivara or Kolla Kambla and not to the pure Kambla caste to which the zamindar belonged; that her caste was not a totally different one from that of the zamindar, but that it is a subdivision of it and is in some degree inferior to that of the zamindar. The Sub-Judge in paragraph 38 of his judgment states that there is a consensus of opinion that the Parivara caste is inferior to Kambla, and that between the two there is a well-marked distinction, though there may not be much difference in their habits of life and that the marriage customs between these two castes are widely different.

18. The documentary evidence adduced on behalf of the plaintiff to show to what caste Nagammal belonged consists of the following exhibits:—B, GG, HH, DDD, EEE, FFF, GGG, HHH, KK.

In these documents the driver Ramasami, brother of Subbammal, mother of Nagammal, and Thumbiasamy, brother of Nagammal, are described as belonging to Kambla caste. All these documents except FFF were executed subsequent to the death of the plaintiff's father in October 1885. Nagammal was examined on 24th October 1885 by the Tahsildar immediately after the death of the zamindar (exhibit KK); then she was questioned about her dagger marriage and her maternal grandmother. In her deposition in this suit as plaintiff's forty-second witness she stated "that from the time the Tahsildar questioned me I entertained some doubts as regards my status. Before that I had none" (page 250, lines 18 to 20).

In FFF, dated 23rd May 1885, it is stated that Thumbiasamy, brother of Nagammal, is of Totiya caste (page 27, lines 30 and 31).

19. The plaintiff's oral evidence on this point consists entirely of a few interested witnesses who say that Nagammal was of a Kambla caste.

20. On the other hand the following documents were produced on behalf of the defendant, which clearly show that Nagammal and her relations are described as belonging to Parivara caste. In exhibits X and Xa, dated 24th July 1887, Thumbiasamy, brother of Nagammal, is described as a maniem (page 44, line 28). Exhibit XIII, dated 24th May 1883: In this exhibit Subbammal, mother of Nagammal, and Thumbiasamy, are described as belonging to Ayyakuttam or mixed caste (page 64, lines 34 and 35). Exhibit XXVIIa, dated 1st July 1880: In this Nagammal is described as belonging to Parivara caste (page 101). Exhibit XXVIIe, dated 31st August 1880: In this Kumarammal, sister of Nagammal, is described as belonging to Parivara caste (page 110).

The Sub-Judge fully sets out the nature and effect of the defendant's documentary evidence on this point in paragraphs 40 to 43 of his judgment (pages 410 to 412). Defendant's fifty-second witness states that Kolla Kambla is the same as monegar or Parivara or Ayyakuttam caste (page 334, lines 18 to 20).

21. The finding of the Sub-Judge that Nagammal belongs to a sub-caste called Parivara or Kolla Kambla and that it is inferior to that of the zamindar is accepted by the High Court. Hence there are two concurrent findings of the two Indian courts on the first part of the second issue.

As to the second part of the second issue.

22. The defendant in this case set up a special custom prohibiting a legal marriage between his father and Nagammal. This custom has been found against both by the Sub-Judge and the High Court, and the defendant was therefore advised

not to prefer any cross appeal on this point to the Privy Council. The two Indian courts having found that there was a marriage in fact between plaintiff's father and his mother and that the defendant failed to establish by any reliable evidence the existence of the particular custom set up by him, decided on the authority of the decisions of the Judicial Committee reported in XIII, Moore's Indian Appeals, page 141, and XIV, Moore's Indian Appeals, page 340, that the marriage of the plaintiff's mother with his father is valid in law, although the plaintiff's mother was of a different and inferior caste to that of the plaintiff's father. As to further authorities on this point—*vide* Mayne on Hindu Law and Usage, Fifth Edition, paragraph 85, note (b).

The third issue.

23. This issue involves a pure question of law. The plaintiff's contention in respect of this issue is that both the Sub-Judge of Madura and the High Court of Madras having found that plaintiff's mother was married to the plaintiff's father, and that the marriage is legal and valid, and that the plaintiff being admittedly older than the defendant, the plaintiff is entitled to the zamindari and all its appurtenances in preference to the defendant. The defendant's contention is that although the marriage of plaintiff's mother with his father was a valid marriage and that the plaintiff is therefore the legitimate son of his father, still he is a son by a wife of inferior caste and rank to that of the defendant's mother and is for that reason not entitled to the zamindari, &c., in preference to the defendant whose mother is admittedly of a caste and rank superior to that of plaintiff's mother.

24. As to the caste of the plaintiff's mother, that point has been already dealt with in the first part of the second issue. As to her rank, the Sub-Judge held upon the evidence in the record and probabilities of the case that plaintiff's mother is decidedly inferior in rank to the defendant's mother (*vide* paragraphs 46 and 53, Sub-Judge's judgment, pages 415 and 423). In the judgment of the High Court, after setting out certain facts, the Judges state:—"It is therefore clear to us that the plaintiff's mother was in status and rank inferior to her husband and the defendant's mother." On these findings of fact the question of law involved in this third issue arises, viz., whether the inferiority of the plaintiff's mother on account of her caste and rank to that of the defendant's mother disentitles the plaintiff notwithstanding his priority in birth to succeed to the zamindari in preference to the defendant. This issue was decided by both the Indian courts against plaintiff in favour of the defendant.

25. There is no decision directly on this point, but there are two cases of the Privy Council that may be considered in the disposal of this issue, viz., XIV, Moore's Indian Appeals, page 570, and Law Reports, Indian Appeals, Vol. VIII, page 1. These two decisions are authorities only for the proposition that as between sons born of wives equal in class and without any other distinction there is no seniority in right of their mothers, but that the seniority recognized by law is according to birth. In the present case the plaintiff's mother and defendant's mother are *not* equal in caste or class. The case reported in XIV, Moore's Indian Appeal, page 570, is generally known as Urkad case, and it was an appeal from a decree of the High Court of Madras. The judgment of the Madras High Court is reported in pages 75 to 81, Vol. III, Madras High Court Reports. In this case there was no difference of caste among the wives and they were of the same caste and rank. The Judges of the High Court of Madras expressly state in that judgment that their decision leaves untouched the question how far a difference of caste between the wives and the husband would affect the right of the first-born son (*vide* page 80, Vol. III, Madras High Court Reports); again in page 77, same volume, the Judges say that they are relieved from considering any qualification that the law may attach to the difference of caste amongst the wives. The Judicial Committee in page 592, Vol. XIV, Moore's Indian Appeals, state as follows:—"On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction except seniority of birth amongst the sons of wives of the same caste and class" (*vide* also page 594, same volume). The second case reported in Law Reports, Indian Appeals, Vol. VIII, page 1, is usually known as Bangaripalayam case, and it was also an appeal from a decree of the High Court of Madras. In this case also there was no

contention that the wives are not of the same class. In page 6 the Judicial Committee expressly state that their Lordships do not determine what would be the proper rule of succession where the wives are of a *different class or caste*. Thus it will appear that although the point of law involved in this third issue was noticed by the Privy Council in the aforesaid two cases still it was not decided. Now the fact having been found that although the plaintiff's mother and defendant's mother belong to the same main caste of Sudras, still the plaintiff's mother is in status and rank inferior to her husband and the defendant's mother, the question arises whether this difference in their status and rank will make them of a *different class* within the meaning of sloka 125, chapter IX, Manu. This point is fully discussed both in the judgment of the Sub-Judge in paragraph 45 of his judgment and in the judgment of the High Court in all its various aspects. It is therefore unnecessary to state anything more here. There is however only one matter which may be noticed here. The institutes of Manu with the commentaries of Kullaka Bhatta and others are published in Sanskrit language by V. A. Mandlik of Bombay. In that book (vol. II, page 1178), the verse 125, chapter IX, runs as follows:—"As between sons born of *like wives* (sadrusa streshu) (सदृशस्त्रीषु) without any other distinction there can be no seniority in right of the mother, but the seniority ordained by law is according to the birth." In this verse the word jati or varna meaning caste is not mentioned although similar expressions are used in other verses where the author wanted to refer to caste. The Sanskrit phrase used in sloka 125 is "sadrusa streshu" which, when strictly interpreted, signifies "like wives," and Kullaka Bhatta, the commentator, whose authority has been accepted by the Privy Council in Law Reports, Indian Appeals, Vol. VIII, page 1, has interpreted the phrase as "wives equal in their class" (vide also Colebrook's Digest, Book V, Chapter I, Section II, Article LVII, notes thereon, i.e., pages 225 and 226, Vol. II, Higginbotham's Edition of Colebrook's Digest).

Fourth issue.

26. This issue is one of fact. No doubt according to the ordinary law of succession among Hindus in respect of an impartible zamindari priority of birth and not the seniority of marriage of the mothers gives the preferable claim. This rule of law has been clearly declared by the Privy Council in XIV, Moore's Indian Appeals, page 570, and Law Reports, VIII, Indian Appeals, page 1; but the defendant sets up a special custom prevailing in his zamindari and in other zamindaris held by zamindars of the same caste in Madura and neighbouring districts, that the son by a senior wife has a prior right of succession to a son by a junior wife although the latter may be the elder son. In this case it is admitted that the defendant's mother was married before the plaintiff's mother. This custom set up by the defendant gave rise to the fourth issue.

27. The Subordinate Judge of Madura deals very fully with all the evidence, oral and documentary, on this point in paragraphs 47 to 50 of his judgment (pages 415 to 419), and his conclusion is that the evidence adduced by the defendant shows that the custom set up by him is a well-established and ancient one and it has by common consent been submitted to as the established and recognised rule of the Kambla caste zamindars in Madura and Tinnevely. The Judges of the High Court also, after an elaborate examination of the whole evidence, came to the same conclusion and state in their judgment that the custom has been clearly proved to be ancient and invariable and therefore one that the courts must recognize. Thus there is concurrent finding of fact by the two Indian courts on this issue in favour of the defendant.

28. No doubt a portion of the evidence now adduced in this case was before the Judicial Committee in the case reported in XIV, Moore's Indian Appeals, *Rama Lakshmi Ammal v. Sivanatha Perumal* (vide page 587). In that case the Judicial Committee took objection to the Collector's letter and summary on the ground that the original statements made by the zamindars in respect of the custom were not produced, and held therefore that the alleged custom was not established by legal evidence. In the present case, care was taken to avoid all such objections. The opinions of the Kambla zamindars are now produced and the persons who

gave them are proved to be dead and every legal requisite to make those statements legally admissible in evidence was adopted. Even after rejecting certain documents produced on behalf of the defendant in respect of this issue, either on the ground of irrelevancy or inadmissibility, there is abundant documentary evidence on the record to support the concurrent findings of the two Indian courts in respect of this issue in favour of the defendant. The Judges of the High Court state:—"The general result of the evidence as to the custom set up is that we have the opinion of five deceased persons and of three living persons *plus* two well authenticated instances of its observance in proof of it, while there is nothing whatever on the other side to disprove it." No doubt that the instances spoken to by the defendant's witnesses are few and numbered, but it must be remembered that the Kambla zamindars form a very small community only in two out of twenty-one districts in the Madras Presidency and that cases of competition between the sons of junior wives must of necessity be of a very rare occurrence.

29. The documentary evidence on this point runs from 1826, and both the court of first instance and the High Court having carefully analysed the evidence after rejecting all that is not legally admissible or irrelevant, it is not necessary to go over the same here. The defendant also called five witnesses—eighteen, nineteen, twenty-four, forty-one and sixty-two—who gave particular instances of the custom and establish the same.

Fifth issue.

30. This issue is purely a question of law. The plaintiff's contentions on this point are that the family being undivided and the zamindari being admittedly an impartible estate and held by only one member of the family at a time, and the plaintiff being older in age than the defendant he (plaintiff) is entitled in law to succeed in preference to the defendant. The defendant's contention on the other hand is that he being the full brother of the last zamindar and the plaintiff only a half brother, he (defendant) has a preferential claim in consequence of nearness of blood to the last male holder. This issue is decided against the defendant by the Sub-Judge and the High Court. The decree of the High Court being entirely in defendant's favour in respect of the zamindari and all its appurtenances, the defendant could not prefer any cross appeal to Her Majesty in Council on this point. The defendant is now the respondent before the Privy Council and he seeks simply to support the decree of the High Court and does not want to alter it. No doubt if the defendant (respondent) before the Privy Council desires to alter or vary the decree of the High Court, he can do it only by means of a cross appeal. What the defendant now wishes to do before the Privy Council is to support the decree of High Court in his favour, and, in so doing, to impeach a finding of that court in its judgment on one of the issues recorded in that suit and this he is entitled to do without preferring any cross appeal. Section 561 of the Civil Procedure Code lays down that a respondent though he may not have appealed against any part of the decree may upon hearing support the decree on any of the grounds decided against him in the court below. He need not for that purpose put in any memorandum of objections or cross appeal, but if he wants to take any objection to any portion of the decree, he should do it only either by means of a cross appeal within the time allowed by law or by filing a memorandum of objection in the Appellate Court within one month from the date of the service of notice on him.

31. There is a recent decision of the Judicial Committee in February-March 1896 in the case of *A. Casperoz, official receiver, v. Kishori Lal Roy Chocudi* reported in page 922, Vol. XXIII of the Indian Law Reports, Calcutta Series. In that case the plaintiff obtained a decree in the court of first instance against some defendants alone including the fourth defendant for damages for cutting certain trees. The plaintiff appealed to the High Court to make all the defendants liable. The fourth defendant filed a memorandum of objection in the nature of a cross appeal contending that he did not cut the trees. The High Court varied the decree of the first court on plaintiff's appeal, and, while dealing with the memorandum of objections of the fourth defendant, disallowed certain items which the court of first instance had allowed to him and thereby enhanced the amount of damages against him. The plaintiff preferred an appeal to Her Majesty in Council against that portion of the

decree of the High Court which went against him, and, in doing so, he included the fourth defendant as a respondent. The fourth defendant did not prefer any cross appeal to Her Majesty in Council. When the plaintiff's appeal to Her Majesty in Council failed, the fourth defendant wanted to vary the decree of the High Court in his favour. The Judicial Committee held that he could not be heard except to support the decree and can only alter it by means of a cross appeal; but in the present case the defendant (respondent before the Privy Council) does not want to vary the decree of the High Court of Madras which is in his favour regarding the zamindari, but simply to attack a ground of decision in the judgment of the court for the purpose of supporting its decree.

32. The defendant (respondent) wants to contend before the Privy Council that the decision of the two Indian courts on the point of law involved in this fifth issue is wrong. The Sub-Judge deals with this issue in paragraphs 51 and 52 of his judgment. The judgment of the High Court on this point is to be found in pages 325 to 334, Vol. XVII, Indian Law Reports, Madras Series (pages 456 to 463). Here it may be remarked that the point of law involved in this issue was raised in two different suits—one is the present suit before the Sub-Judge of Madura, another was a suit between different parties in respect of another zamindari before the Sub-Judge of Tinnevely. These two Sub-Judges decided this point of law in two different ways. The Sub-Judge of Madura in the present case held that the plaintiff, who is the half brother, is entitled to succeed in preference to the defendant, who is a full brother. The Sub-Judge of Tinnevely decided in the other case that the plaintiff in that suit, who was also half brother to the last holder, had no preferential claim to the succession over the full brother. Appeals were preferred to the High Court of Madras against the decrees passed in these two suits. The appeal in the present case was first heard by Messrs. Justice Muthusami Aiyar and Davies, and the judgment was reserved. The other appeal from the decree of the Sub-Judge of Tinnevely was heard at a subsequent date by Messrs. Justice Muthusami Aiyar and Best, but before the decision in the present case was pronounced. The judgment in the Tinnevely appeal was pronounced first, and the portions of that judgment in respect of this point of law were repeated verbatim in the appeal judgment in the present suit. The judgment of the High Court in the Tinnevely appeal is reported in pages 316 to 343, Vol. XVII, Indian Law Reports, Madras Series, and this point of law is discussed in pages 325 to 334. The judgment of the High Court in the present case is reported in pages 422 to 445, Vol. XVII, Indian Law Reports, Madras Series (pages 456 to 463). As to this point of law, a mere reference is made to the other judgment (*vide* page 444). The facts upon which this question of law arises for determination are—

33. (1) Nagayyasami Kamayya Naick (junior No. 10 in the pedigree) was the propositus or the last male holder who died without issue and from whom succession must be traced.

(2) The defendant is his uterine brother, whereas the plaintiff is only his half brother.

(3) The latter is older than the former.

(4) The right of primogeniture is the rule of succession in this zamindari and the family is undivided.

The first point for consideration here is whether the plaintiff and defendant had the ordinary rights of coparcenership in the zamindari in question with the last male holder Nagayyasami Kamayya Naick (the junior) from whom the succession must be traced so as to generate the right of survivorship on his death to them or whether the last male holder was the sole and separate owner of the estate, the plaintiff and defendant not possessing in it any coparcenary right by birth under Mitakshara Law.

34. Mitakshara deals with all properties under two heads, viz., joint property and separate property, and an impartible estate must come under one or other of these two heads, and the rule of succession to it is that of the general Hindu Law prevalent in that part of India with such qualification only as follows from the impartible character of the subject. If an impartible estate belong to a joint Hindu family, it is governed regarding the law of succession by the ordinary rules of Hindu law relating to joint property except in so far as the nature of the estate would

not permit or an established custom would vary, *i.e.*, the general law relating to joint family property is superseded only to the extent of excluding the right of partition and of joint enjoyment, beyond this the ordinary Hindu Law is applicable: strictly speaking there is no such thing as succession properly so called in an undivided Hindu family (Mayne on Hindu Law and Usage, paragraph 246). Coparcenership and the right of survivorship are incidents peculiar to Mitakshara Law, since among Hindus following the Mitakshara law joint tenancy with the rights of survivorship is by operation of law (Indian Law Reports, Madras Series, Vol. X, page 69). If an impartible estate be the separate property or self-acquisition of the last holder, it will follow the course of succession which the law prescribes for a separate estate.

35. The defendant's contention in this case is whether the zamindari in question belonged to the joint family of the last male holder and his brothers (plaintiff and defendant), or whether it was the separate property of the last male holder Nagayyasami Kamayya Naick (junior), still the defendant is entitled under the Mitakshara law to succeed in preference to the plaintiff. Therefore it is strictly unnecessary in this case to see whether the estate in question formed the joint family property or whether it was the separate property of the last male holder. No doubt a contention was raised on behalf of the defendant in the court of first instance—that in regard to an impartible estate governed by the law of primogeniture the holder of the estate is its sole owner and the estate is for all practical purposes his separate property. This argument is no doubt based on certain passages from the judgment of the Judicial Committee reported in Vol. XV, Indian Appeals Law Reports, page 51, which has obtained a great notoriety in Southern India and is usually called the X Allahabad case, being reported in Vol. X of Indian Law Reports, Allahabad Series, page 272.

In page 63, Vol. XV, Indian Appeals Law Reports, their Lordships of the Privy Council state as follows:—"This is a clear opinion that though an impartible estate may be for some purposes spoken of as joint family property, the coparcenary in it which under the Mitakshara Law is created by birth does not exist." In the same page their Lordships further observe:—"The reason for the restraint upon alienation under the law of Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons."

In page 64, their Lordships observe:—"The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it."

In page 65, the following remark is made:—

"If, as their Lordships are of opinion, the eldest son where Mitakshara law prevails, and there is the custom of primogeniture does not become a co-sharer with his father in the estate."

These observations of the Privy Council undoubtedly lead to the conclusion that in the case of an impartible estate survivorship cannot exist as being an incident of joint ownership, and that the holder of an impartible estate is therefore its sole owner. No doubt the main question in this case was as to the powers of alienation possessed by the holder of an impartible estate, but if an impartible estate should be treated for the purposes of alienation as the sole and separate property of the holder for the time being, how could it be called joint property for the purposes of succession? If the defendant's contention, viz., that the zamindari of Saptūr was the sole and separate property of the last male holder, viz., Nagayyasami Kamayya Naick (junior) is a valid one, then undoubtedly, according to the law of Mitakshara as laid down in chapter II, section IV, sloka 5, the defendant, who is a full brother, is entitled to succeed in preference to the plaintiff, who is only a half brother; but it may be contended on the other side that the zamindari in question was the joint family property of the last male holder and his brothers and that the rule of succession must be regulated by the Mitakshara law of survivorship with such qualifications only as flow from the impartible character of the subject. Admitting, for the sake of argument, that the zamindari in question was the joint property of the last male holder and of his brothers (plaintiff and defendant)

a further question arises: What are the rights of the members of a joint Hindu family in an impartible estate governed by the law of Mitakshara?

36. Where property is held in coparcenary by a joint Hindu family governed by the law of Mitakshara there are ordinarily four rights vested in coparceners—(a) the right of joint enjoyment, (b) the right to call for partition, (c) the right of survivorship and (d) the right of being maintained out of the income of the joint estate. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition as the right of an undivided coparcener are from the nature of the property incapable of existence, but there being nothing in the nature of the property inconsistent with the right of survivorship and the legal obligation on the part of the co-owner in possession to provide his coparceners with maintenance, these rights do exist. The right to call for partition altogether disappears. The right of joint enjoyment is superseded by a right of successive enjoyment (Indian Law Report, Madras Series, Vol. IV, page 266). When from the nature of the property possession is left with one coparcener, the others are not divested of co-ownership. Their necessary exclusion from possession imposes on the co-owner in possession two obligations, to his coparceners in virtue of their co-ownership—the obligation to provide them with maintenance and the obligation to preserve the *corpus* so as to generate the right of survivorship on his death to them; separate possession but not separate ownership is the characteristic of property, which, though impartible, is *ex hypothesi* joint. Co-ownership is the cause of survivorship. It follows therefore that in case of coparcenary property the right of survivorship is mentioned as a dominant right which controls the rule of succession (*vide* chapter II, section 1, sloka 20, Mitakshara).

37. As to the course of decisions on the above points the following cases may be consulted:—

The first is the case of *Naragunty Lutchemi Devamma v. Vengama Naidu* (IX, Moore's Indian Appeals, page 66). In page 86 their Lordships of the Privy Council say:—"A palaiyam 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 by only one member of the family at a time who is styled poligar, the other members of the family being entitled to maintenance or allowance out of the estate." The Judicial Committee further held in this case that the succession to the palaiyam which was an ancestral estate vested in the nearest undivided male cousin of the poligar last seized, who died without male issue in preference to his widow.

38. The second is the case of *Katama Natchiar v. The Raja of Sivaganga* (IX, Moore's Indian Appeals, page 539, chiefly pages 588, 589, 610 and 611). In this case, which was followed in all subsequent decisions, the following principles of law are clearly laid down:—

(a) An impartible estate may be held by a joint Hindu family and the members of that family may possess a coparcenary right in that estate subject of course to such qualification only as follows from the impartible character of the subject.

(b) There is coparcenership 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.

39. The third case on this point is *Stree Raja Yanumula Venkayamah v. Stree Raja Yanumula Boochia Vankonda* (XIII, Moore's Indian Appeals, 333, chiefly pages 336 to 339).

40. The fourth case on this point is *Ranganaickama v. Ramayya* decided in the Privy Council on 5th July 1879 (*vide* Mr. Mayne on Hindu Law, paragraph 499).

41. The fifth case is *Pariasami v. Pariasamy* (Law Reports, V, Indian Appeals, 61). In this case the Privy Council observe as follows:—

"He would therefore necessarily be joint in that estate so far as was consistent with its impartible character with his two younger brothers, the latter taking such rights and interest in respect of maintenance and possible rights of succession as belong to junior members of a joint Hindu family in the case of a raj or other impartible estate descending to a single heir. Hence

there can be no doubt that the estate, though impartible, was up to the year 1829, in a sense the joint property of the joint family of the three brothers."

42. The aforesaid decisions are therefore clear authorities for the following propositions:—

(a) An impartible ancient zamindari may be the common family property of a joint Hindu family and belong to the different members thereof.

(b) The mere impartibility of the estate and therefore the incapacity of the members of the joint family to demand partition and joint enjoyment do not render the estate the sole and separate property of the holder for the time being so as to make the succession follow the course of succession of separate estate and destroy the right of survivorship.

(c) The rule in regard to succession to impartible property is to be found in the Mitakshara Law applicable to partible property. If the impartible property be joint family property, the rules applicable to joint property regarding succession will apply; if it be the separate property the rules applicable to separate property will govern it.

(d) The only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class, who would be entitled to succeed to the property, if it were partible under the general Hindu Law.

(e) In the absence of a special custom the rule of primogeniture furnishes a ground of preference.

43. In connection with this part of the case the judgment of the High Court Madras in Indian Law Reports, Vol. IV, page 250, chiefly pages 265 to 267, may be looked at and considered.

Now comes the question how far the above propositions of law deduced from a long course of decisions from 1861 are affected by the observations of the Privy Council recently reported in Law Reports, Indian Appeals, Vol. XV, page 51. The question is whether the zamindari governed by Mitakshara Law could alienate by way of gift a part of the estate to a junior wife, his heir-apparent. No doubt there are certain passages in the judgment of the Privy Council as pointed out in paragraph 35 of this memorandum which seem to show that in the case of an impartible estate there cannot exist co-ownership in the different members of the joint family and there is therefore no survivorship; but these observations are mere *obiter dicta* and opposed to the whole course of decisions in the Madras Presidency (*vide* page 204, Vol. XIII, Indian Law Reports, Madras Series, and Mayne on Hindu Law, paragraph 315), but the Privy Council in page 62, Vol. XV, Indian Appeals, Law Reports, observe with reference to the Sivaganga case and the others referred to in paragraphs 37 to 41 aforesaid that in all of them the question was as to the succession to the property on the death of a zamindar and that for the purpose of determining who was entitled to succeed the estate must be considered as the joint property of the family. Again, in a subsequent case reported in page 128, Vol. XVII, Law Reports, Indian Appeals, their Lordships of the Privy Council state in page 131, as follows:—

"Whether according to the rules of Hindu Law having regard to the fact, which was admitted, that the law of Mitakshara is applicable, the plaintiff is entitled by right of survivorship to succeed to the raj upon the death of his half brother." Hence it is clear that the decision of the Privy Council in Indian Appeals Law Reports, Vol. XV, page 51, does not alter the rule of law laid down so long ago as 1863 in the Sivaganga case, that when an impartible estate belongs to a co-parcenary family, the right of survivorship determines the heir entitled to succeed and that the right of survivorship is not extinguished in consequence of the estate being impartible and governed by the law of primogeniture.

45. Now the property in question being admittedly the joint family property of the last male holder Nagayyasami Kamayya Naick and his brothers (plaintiff and defendant), the question arises whether the plaintiff or the defendant has the preferential right having in view the principles of law above enunciated. If the property were partible, undoubtedly the class of heirs who would be entitled in that case to succeed, regard being had to its nature as coparcenary property, would be the last male holder's brothers, *i.e.*, plaintiff and defendant by right of survivorship. Then looking again to the Mitakshara Law of succession, we have another rule enunciated by Manu in chapter IX, sloka 187, and followed by Mitakshara. "To the nearest sapinda the inheritance next belongs" (*vide* chapter II, section III, sloka 3, and also chapter II, section IV, sloka 5, Mitakshara). This rule of inheritance in the Hindu Law is founded in the religious duty and superior efficacy of oblation and sacrifice. Among the two claimants—the plaintiff and defendant—the latter is more nearly related to the last male holder than the former who has no doubt the qualification of seniority in age. Seniority in age or the right of primogeniture is only a customary law and where a custom is proved to exist it no doubt supersedes the general law which however still regulates all beyond the custom. When these two tests of Hindu Law, *viz.*, the right of survivorship and the nearer excludes the more remote are applied to the present case the defendant acquires a better title than the plaintiff and if there remain two or more full brothers like the defendant, then the rule of primogeniture must be resorted to for the selection of a single heir.

46. There is a case exactly on all fours with the present one reported in Vol. XII, page 523, Moore's Indian Appeals, called Tipperah case. In page 541 their Lordships of the Privy Council state as follows:—"Now this rule of religious obligation and priority marks the brother of the whole blood as preferable heir in succession to the estate of his brother over the brother of the half blood only. The reason given is that he offers more sacrifices and benefits to the manes of the dead of his family, in their eyes a real substantial ground of preference. In nature also he is nearer and therefore satisfies nearest of kin" (*vide* also page 540). Madras High Court declined to follow the ruling of the Judicial Committee. Tipperah case quoted above on the ground that the Tipperah estate was part of India governed by the Dayabaga School of Hindu Law. The court was closely examine the reasonings of the Judicial Committee, the case is not based upon any peculiarities of the Dayabaga law. The principles of Hindu Law applicable to all schools qualified by the principles of primogeniture governing all the ancient zamindaris (pages 540 and 541). In this the Tipperah case is quoted by the Judicial Committee in several cases (see Reports, Indian Appeals, Vol. XV). If the rule of law enunciated in the Judicial case and the defendant has a better claim to succeed to the zamindari in preference to the plaintiff.

47. The first five main issues in this case have been discussed and the result is as follows:—

First Issue.—Finding of both courts is that plaintiff's mother is the wife of the father of the plaintiff (no appeal on this point by the defendant to the Privy Council).

Second Issue.—Both the Indian courts find as a matter of fact that the plaintiff's mother was of a different and inferior caste to that of the plaintiff's father although they belonged to the main divisions of the Sudra caste; that the prohibiting such union was not made out.

Third Issue.—The finding of the two Indian courts on this issue is that the defendant's mother and therefore the defendant is inferior to that of the zamindari in preference to the plaintiff.

Fourth Issue.—The concurrent finding of the two Indian courts on this issue is that according to the custom prevailing among the Kambla zamindars, to which

admittedly the parties belong, the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, seniority referring to the date of marriage and not to the age of the wife. Therefore this issue was decided in defendant's favour.

Fifth Issue.—Both courts have held as a question of law that the defendant as a full brother is not entitled to the zamindari in preference to plaintiff, a half brother to the last zamindar.

48. The findings on first, second and fifth issues are in favour of the plaintiff and against the defendant, and the findings on the third and fourth issues are against plaintiff and in favour of the defendant. The result therefore is that the plaintiff's suit to recover the zamindari was dismissed. If the Judicial Committee therefore uphold the decision of the two Indian courts on the third or fourth issue or decide the fifth issue in defendant's favour by reversing the decision of the Indian courts on that issue, the decree must be in favour of the defendant and the plaintiff's suit for the zamindari in question must fail.

49. The other issues recorded in this case relate to properties other than the zamindari in question.

50. The sixth issue is dealt with by the Sub-Judge of Madras in paragraphs 55 to 58 of his judgment (pages 424 to 426).

The properties comprised in the schedule C attached to the plaint relate to pannai lands lying within the limits of the zamindari which the zamindars have acquired from time to time. Pannai lands are those which are under the direct control of the zamindar, *i.e.*, the home-farm lands of the zamindar. The plaintiff's contention on this point is that the lands are partible and he is entitled to a share. The defendant's contention is that these are not partible, that they have never been divided but treated always as an increment to the zamindari and intended to be incorporated with the estate and to follow the estate on its devolution. The Sub-Judge held that all such pannai lands in schedule C as were acquired by the grandfather of the parties are not partible, while those acquired by the father are partible. The Sub-Judge was clearly wrong in making this distinction and he erred in treating the father as the last holder of the estate. The High Court on the appeal preferred by the defendant modified the Sub-Judge's decree and held that all the lands comprised in the schedule C being situated within the limits of the zamindari acquired with the intention of incorporating the same with the zamindari and the zamindar's interest in what was undoubtedly the zamindari property. To this point the following cases may be considered:—Indian Law Reports, Madras Series, page 340, lines 8 to 23; Indian Law Reports, XVI, page 54, chiefly pages 58 and 59.

As regards the lands, houses, &c., comprised in the plaint schedule D, the High Court confirmed the Sub-Judge's decree on this point and held that the items 1 to 8 therein are partible and the items 9 to 15 are not. The High Court confirmed the Sub-Judge's decree on this point and the appeal to Her Majesty in Council in respect of these properties or of the properties comprised in schedule E of the plaint.

MADRAS,
26th April 1897.

T. RAMA ROW,
High Court Vakil.

CONFIDENTIAL.

MEMORANDUM, DATED 26TH APRIL 1897, BY RAJAH
T. RAMA ROW FOR THE GUIDANCE OF COUNSEL
IN ENGLAND IN THE SAPTUR PRIVY COUNCIL
APPEAL.

anga (IX,
'1). In this
principles of
Law
Judicial
to the present
preference

be 44.
from a long Co
of the Privy. The
XV, page 51. impar
of an ancient gift a
by way of gift a
without the conse
are certain passa
35 of this
Sub-Judge here
impartible. th
there is no
mov