being excluded from tarwads or tavazhies managed exclusively by females of certain Marumakkattayam Mappillas, we discussed in some detail all the decisions in which such a custom might be said to have been judicially recognized or its recognition refused, and we stated that we regarded them as inconclusive. The District Judge was therefore asked to return a finding on such evidence as might be produced before him to prove the existence of the particular custom in question. This he has done, and we agree with him in holding that it is wholly inadequate to prove the prevalence of any custom by which males are treated as having no right to be consulted in the management of the affairs of the tarwad or tavazhi and no right to participate in the income of the tarwad or tavazhi properties. It is not necessary to express any opinion as to the existence of tarwads in which the manager or Karnavathi is a female.

We therefore answer the reference made to us in the affirmative.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

SUBRAYA SAMPIGETHAYA AND TWO OTHERS (DEFENDANTS 1, 3 AND 4), APPELLANTS,

v.

KRISHNA BAIPADITHAYA (PLAINTIFF), RESPONDENT.*

1923, March, 12.

Section 6 (d), Transfer of Property Act (IV of 1882)—Personal right of widow to future maintenance, not transferable.

Where a widow who had succeeded as heir to her husband's properties surrendered her life-interest therein to the nearest

* Second Appeal No. 498 of 1921.

SUBBAYA v. KRISHNA.

reversioner who in return agreed to her residing in the family house and sharing the meals of the family or to her receiving a certain amount of paddy annually if she chose to live away from the family house, the option being exercisable by her at her will and without her being subject to any liability to elect once and for all,

Held that the right to maintenance conferred on the widow was purely "personal" to her, within section (6)(*d*) of Transfer of Property Act and was not transferable.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Subordinate Judge of South Kanara, in Appeal Suit No. 122 of 1920, preferred against the decree of P. NARAYANA MENON, District Munsif of Karkal, in Original Suit No. 148 of 1919.

The document (Exhibit B) is given in the judgment of the learned Chief Justice and the facts are given in the Referring Order of SPENCER, J. The defendants against whom a decree was given by the lower Appellate Court preferred this Second Appeal.

This Second Appeal coming on for hearing on Thursday and Friday, the 6th and 7th days of April 1922, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—I agree to a reference to a Full Bench in the terms, which my learned brother is about to state. In doing so, I commit myself to no opinion as to whether section 6, Transfer of Property Act, is to be interpreted with reference to public policy. For it is not clear that the considerations which arise correspond with any of the heads of public policy, which authority has hitherto recognized and which it is undesirable to multiply or that the refusal of the law to treat certain things and rights, of which a widow's right to future maintenance may be one, as property susceptible of transfer, may not be a sufficient justification for interpreting the section in the manner proposed.

SPENCER, J.—In this Second Appeal a question has arisen whether the sale of a right to maintenance which a Hindu widow executed in favour of the plaintiff was valid. The widow, who is named Lakshmi Hengsu, in 1904 surrendered by Exhibit B her husband's estate to the nearest reversioner subject to a condition by which she became entitled to food and clothing for life and a right of residence, the food to consist of 45 muras of rice of two descriptions charged on the liability of the surrendered properties; and nearly ten years later she conveyed under Exhibit A her right to collect future maintenance in the form of 45 muras of rice annually to the plaintiff in consideration of a sum of Rs. 1,000. The description of property in the document refers to another conveyance of the widow's right to collect arrears of maintenance which she executed on the same day.

Mr. Anantakrishna Ayyar who appears for the appellant concedes that the transfer of arrears of maintenance already accrued at the time of transfer is valid. But he argues that Exhibit B is invalid in so far as it purports to transfer future maintenance. In the lower Appellate Court in dealing with this point of law, the Subordinate Judge relied on an observation in *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(1) of Sir ARNOLD WHITE, Chief Justice, and MUNRO, J. They state:

> "It may be that voluntary alienations of rights for future maintenance should be prohibited as well as the taking of such rights in execution. The legislature has not thought fit to prohibit them. We are not prepared to say that, at any rate, where, as here, the amount payable is subsequently fixed by agreement or by decree, a transfer of a widow's right to maintenance from her late husband's estate is inalienable."

With due deference, I feel some difficulty in accepting that dictum as a correct statement of the law on the

(1) (1911) I.L.R., 34 Mad., 7 at p. 9.

SUBBAYA v. KRISHNA.

subject. So far as it makes an agreement to pay maintenance to a widow transferable it seems to be opposed to section 6, clause(*d*) of the Transfer of Property Act which declares that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. On this section and clause there is a note in the commentary by SHEPHARD and BROWN on the Transfer of Property Act, which is so well accepted an authority that I do not hesitate to quote it. It says :

> "The right to future maintenance cannot be attached in execution of a decree and it seems clear that such a right enjoyed by a Hindu widow cannot be made the subject of a sale or other transfer, by her since the right exists for her personal benefit only."

It may be doubted whether she could effectually transfer her interest in property allotted to her for her maintenance. As regards attachment of the right to future maintenance reference is made to *Diwali* v. *Apaji Ganesh*(1) and section 60 of the Code of Civil Procedure. In *Diwali* v. *Apaji Ganesh*(1), the decision proceeded upon the proviso against alienation contained in the deed of assignment. But section 60, clause (*n*) is quite clear. The Courts have consistently held that a right to future maintenance cannot be attached in execution. In *Nanammal* v. *The Collector of Trichinopoly*(2), the fact that the right to maintenance had ripened into a decree did not, in the opinion of ABDUR RAHIM, J., and MUNRO, J., who was also a party to *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(3), make the right to maintenance any more attachable. In *Palikandy Mammad* v. *Krishnan Nair*(4), SADASIVA AYYAR and MOORE, JJ., had no hesitation in holding that

(1) (1886) I.L.R., 10 Bom., 342.
(2) (1909) 20 M.L.J., 97.
(3) (1911) I.L.R., 34 Mad., 7.
(4) (1917) I.L.R., 40 Mad., 302.

there could be no attachment of a right to future maintenance. As pointed out by SADASIVA AYYAR, J., in that case, the public policy of prohibiting transfers found in section 6 of the Transfer of Property Act and the prohibition against attachment under Civil Procedure Code, both rest upon the same foundation. In England it was held in *Watkins* v. *Watkins*(1), that alimony granted to a separated wife was not alienable by her. LINDLEY, L.J., indicates the reason for this. He says the Court which orders it never loses its control over it and the doctrine of inalienability is based on the old ecclesiastical law. The learned Judges, who decided *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(2) evaded the application of the Transfer of Property Act by saying that the right to future maintenance was not in their opinion "property." SESHAGIRI AYYAR, J., in *Seshappa Heggade* v. *Chandayya Heggade*(3) also expressed an opinion that a right to maintenance would not be covered by clause (*d*) of section 6 as it could not be described as an interest in property restricted in its enjoyment to the owner personally. But my learned brother, OLDFIELD, J., who sat with him pronounced an opinion only on the other question which arose as to the maintainability of the suit in a Small Cause Court. In *Annada Mohan Roy* v. *Gour Mohan Mallik*(4), MOOKERJEE, acting Chief Justice, in deciding that the chance of a Hindu reversioner succeeding to the estate of the last full owner was not alienable property under clause (*a*) of section 6, discussed a definition of "property," a definition which could cover a widow's right to maintenance. He pointed out that when non-existent property is made the subject of a contract, the party who takes

(1) [1896] Prob., 222.
(2) (1911) I.L.R., 34 Mad., 7 at p. 9.
(3) (1919) 37 M.L.J., 402.
(4) (1921) I.L.R., 48 Calc., 536.

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the agreement is in no better position when he attempts to defeat the application of the statutory provision by this means, as no Court of equity will assist him in his endeavour to accomplish his purpose which is opposed to public policy. In 12 Calc. L.J., there are two instructive cases, *Asad Ali Molla* v. *Haidar Ali*(1) and *Tara Sundari Debi* v. *Suroda Charan Banerjee*(2). MOOKERJEE, J., obeserved in the earlier case at page 133 that if a person is entitled to a monthly allowance under a deed the allowance can be attached by an execution creditor only after it has become due so that an assignee of a decree for arrears of maintenance can execute it against the judgment-debtor in the same manner as the original decree-holder and at page 154 where land has been granted in lieu of a right to maintenance the interest of the grantee is liable to be sold in execution of a personal decree. He quotes the decision in *Harris* v. *Brown*(3) by the Privy Council where a monthly allowance of Rs. 50 devised by Will for the maintenance of a daughter was transferred and the Privy Council treated the assignment as operative. In that case no question as to the illegality of the assignment by the legatee Flora Williams of this allowance was raised with reference to section 6 of the Transfer of Property Act. The two cases *Enaet Hossein* v. *Nujeeboonissa Begum*(4) and *Maharajah Dheraj Mehtab Chand Bahadoor* v. *Sreemutee Dhun Coomaree Bibee*(5), the latter relating to an annuity charged on an estate in favour of a brother which was held to be attachable in execution, are not very material to the question before us, as they were decisions prior to the passing of the Transfer of Property Act in which the provisions of the Civil Procedure Code alone were considered. In the present case the

(1) (1910) 12 C.L.J., 130.
(2) (1910) 12 C.L.J., 146
(3) (1901) I.L.R., 28 Calc., 621.
(4) (1869) 11 W.R., 138.
(5) (1872) 17 W.R., 254.

provisions for residence and clothing under Exhibit B. appear to be undoubtedly interests restricted in enjoyment to the widow Lakshmi Hengsu. As the allowance of rice was intended to be for her support after she had parted with her interest in the land and as it would come to an end at her death this also appears to be an interest restricted to her personally, and a transfer of such an interest is, in my opinion, prohibited on grounds of public policy by section 6, clause (*d*). Whether after a decree has been obtained for arrears of past maintenance the decree-holder can assign the decree for execution is a matter which does not require to be decided on the facts of this case. As the decision in *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(1), appears to be at variance with section 6 of the Transfer of Property Act and the other decisions already referred to, we refer the question to a Full Bench,

"*Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her life-time even if charged upon specified immoveable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due.*"

C. V. Anantakrishna Ayyar (with *K. Srinivasa Rao*) for appellants.—Exhibit B is a valid deed of surrender of whole estate by the widow stipulating for maintenance —*Bhagwat Koer* v. *Dhanukdhari Prashad Singh*(2), *Angamuthu Chetti* v. *Varatharajulu Chetti*(3). She has also therein stipulated that she would not create any further charge on the said properties or have any claim to their return. Her right therein is purely personal to her and it is not assignable. See section 6, clauses (*d*) and (*h*) of the Transfer of Property Act, Trevelyan's

(1) (1911) I.L.R., 34 Mad., 7. (2) (1920) I.L.R., 47 Calc., 466 (P.C.).
(3) (1919) I.L.R., 42 Mad., 854 (F.B.)

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Hindu Law, page 80, *Narbadabai* v. *Mahadeo Narayan Kashinath Narayan and Shamabai*(1), West and Buhler (1919) Edition at pages 253 and 254. The decision against me is *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(2). It is *obiter* and also wrong and it is adversely commented on in *Palikandy Mammad* v. *Krishnan Nair*(3). In English Law alimony and maintenance are not transferable. *Watkins* v. *Watkins*(4) ; 4 Halsbury, paragraph 855.

[THE CHIEF JUSTICE referred to *In re Robinson*(5).] Maintenance is not property ; it is subject to variation in amount. See definition of "property" in section 28 of the Provincial Insolvency Act. Right to future maintenance is not attachable. See section 60, clause (*n*) of Civil Procedure Code. *Tara Sundari Debi* v. *Saroda Charan Banerjee*(6).

B. Sitarama Rao for respondent.—Right to maintenance becomes property when it is settled by agreement or is charged on property. When an annuity is agreed in lieu of maintenance the annuity is property and cannot be restricted to enjoyment personally—*Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(2), *Enaet Hossein* v. *Nujeeboonissa Begum*(7), *Maharajah Dheraj Mahtab Chand Bahadoor* v. *Sreemutee Dhun Coomaree Bibee*(8), *Rajat Kamini Debi* v. *Raja Satya Niranjan Chakrabarty*(9), *Seshappa Heggade* v. *Chandayya Heggade*(10) and *Asad Ali Molla* v. *Haidar Ali*(11). *Salakshi* v. *Lakshmayee*(12), *Harrison* v. *Harrison*(13). Future property is assignable in equity.—*Palaniappa* v. *Lakshmanan*(14). The fact

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(1) (1881) I.L.R., 5 Bom., 99 at p. 104.
(2) (1911) I.L.R., 34 Mad., 7.
(3) (1917) I.L.R., 40 Mad., 302 at p. 306.
(4) [1896] Prob., 222.
(5) (1884) 27 Ch.D., 160.
(6) (1910) 12 C.L.J., 146.
(7) (1869) 11 W.R., 138,
(8) (1872) 17 W.R., 254.
(9) (1919) 23 C.W.N., 824.
(10) (1919) 37 M.L.J., 402.
(11) (1910) 12 C.L.J., 130.
(12) (1908) I.L.R., 31 Mad., 500.
(13) (1888) 13 Prob., 180.
(14) (1893) I.L.R., 16 Mad., 429.

that the alternative right is personal does not make the original right also personal; *Coleman Henry* v. *Strong*(1). The dictum in *Narbadabai* v. *Mahadeo Narayan Kashinath Narayan* and *Shamabai*(2) is *obiter*. Section 6, clause (*d*) is intended to cover cases of contract of personal service. *Tara Sundari Debi* v. *Saroda Charan Banerjee*(3) is a case of attachment for a decree.

C. V. Anantakrishna Ayyar replied.

OPINION.

SCHWABE, C.J.—The question referred to the Full Bench is : SCHWABE, C.J.

" Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her life-time even if charged upon specified immoveable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due."

I do not think that it is possible to give a general answer to this question, and I will confine myself to considering whether the assignment in this case is valid. By a document called a general power-of-attorney, the widow surrendered all her interest in her late husband's property in favour of the nearest reversioner of her husband in consideration of his agreeing to pay some debts of the husband and to maintain her during her life-time. The document then continues (according to a corrected translation) :

" Besides maintaining me by giving me food and clothing, etc. until my life-time you should also perform my obsequies, etc., after my death. Henceforward, you should also perform the sraddhas of my husband, father-in-law and mother-in-law, making the necessary expenses therefor. . . . If it is not convenient for me to live jointly with you, I should remain in the building where I now reside. In that event, except that for

(1) (1888) 39 Ch.D., 443, 451.
(2) (1881) I.L.R., 5 Bom., 99. (3) (1910) 12 C.L.J., 146.

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my food and clothing you should pay yearly 33 muras of kuchlu rice and 12 muras of beltige rice charged on the following properties. I have no right to contract any debts as a charge on the said properties or have any claim to the return of the property."

Whether the right to future maintenance, apart from a contract, or under a contract to provide clothing, board and residence in the house of the other contracting party is property at all, within the meaning of section 6 of the Transfer of Property Act, is a matter upon which there has been considerable divergence of opinion, but it is unnecessary to consider that here as in my judgment, it is a purely personal right and is clearly inalienable.

The right under a contract to a defined amount in cash or kind for future maintenance is, in my judgment, property under the enabling words of section 6 of the Transfer of Property Act of 1882. But the question remains whether it is an interest in property restricted in its enjoyment to the owner personally, such an interest under clause (*d*) of that section being inalienable. This must depend on the facts of each particular case and must be ascertained by the ordinary rules of the interpretation of the contract; the question being, whether the intention of the parties was that the right should be personal and therefore inalienable. That intention is to be ascertained from the language of the document itself and the surrounding circumstances at the time of its execution. It must be considered as a contract to come into operation at once, and in the light of the surrounding circumstances as they then stood. What has in fact happened since is not a relevant consideration, except perhaps as an illustration of what may possibly have been in the contemplation of the parties at the time of this contract. The widow was surrendering her life-interest in the property in exchange for the agreement for maintenance, and it seems to have been quite clearly

in the contemplation of the parties that the reversioner should continue in possession of the property and of the family house, and the fact that he has since sold the property does not help us to arrive at the true interpretation of the contract.

Examining the contract itself, we find that the first alternative form of maintenance provided was by residence in the house and by sharing the meals of the family. The second alternativ was that, if she chose to live apart, she should receive definite amounts of paddy secured by a charge on the land. There is no provision for an election once and for all, and I see no reason why she should not at her will at one time live in the house, and at another live away and receive the paddy. This leads me to the conclusion that the intention of the parties to be derived from the document was that the rights under the contract should be personal and inalienable ; for, she could not give to another the right of living and feeding with the reversioner's family.

I think that the view expressed above that this question must turn on the intention of the parties reconciles most, if not all, of the apparently conflicting decisions on this question.

The right to future maintenance properly so called, by which I mean the right to be maintained by the supply of clothing, board and lodging is inalienable, and so I understand the statements in the text-books, Trevelyan's Hindu Law, II Edition, page 80, West and Buhler's Hindu Law, page 253 and Shephard and Brown Transfer of Property Act, page 209, and so, I think, may be explained the decision in *Rajat Kamini Debi* v. *Raja Satya Niranjan Chakrabarty*(1), where, on facts

(1) (1919) 28 C.W.N., 824.

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somewhat similar to these, it was held that a widow who released her life-interest in return for an agreement to pay her Rs. 100 per annum and supply her with 39 maunds of rice per annum could alienate her interest under the agreement; for, in that case, it was no part of the agreement that she should be clothed, fed or housed and therefore there was nothing personal about the contract at all. This too, was, I think the view of MOOKERJEE, J., who in two cases decided in the same month held that the widow's right to maintenance under one contract could be taken in execution and under another it could not. *Asad Ali Molla* v. *Haidar Ali*(1) and *Tara Sundari Debi* v. *Saroda Charan Banerjee*(2). The right to attach is governed by the Code of Civil Procedure, but in his judgments he discussed fully the inalienability of such right. In *Tara Sundari Debi* v. *Saroda Charan Banerjee*(2), in which he held the right inalienable and, therefore, not attachable, the payments were not to be made until the donee lived separately from the family, and he distinguishes between cases where the provision of land, money or goods is taken in lieu of maintenance without any restraint upon alienation where the land, money or goods are alienable, and cases where the right is purely personal. If the latter, he considers that, even when the right is merged in a decree, it is not alienable. *Bhyrub Chunder Ghose* v. *Nubo Chunder Gosho*(3), *Enaet Hossein* v. *Nujeeboonissa Begum*(4) and *Maharajah Dheraj Mahtab Chand Bahadoor* v. *Sreemuttee Dhun Coomaree Bibee*(5), I think may be reconciled on the same ground. *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(6) and the explanation of it in *Palikandy Mammad* v. *Kishnan Nair*(7), by

(1) (1910) 12 C.L.J., 130.
(2) (1910) 12 C.L.J., 146.
(3) (1866) 5 W.R., 111.
(4) (1869) 11 W.R., 138.
(5) (1872) 17 W.R., 254.
(6) (1911) I.L.R., 34 Mad., 7.
(7) (1917) I.L.R., 40 Mad., 302.

SADASIVA AYYAR, J., do not assist me in arriving at the principle to be applied. The remarks of SESHAGIRI AYYAR, J., in *Seshappa Heggade* v. *Chandayya Heggade*(1), on this point were purely *obiter* but can properly be explained by limiting their application to cases of maintenance properly so called. I do not think that any useful purpose will be served by going in further detail into any of these cases or others to which our attention was drawn.

I answer the question referred by saying that this widow's right to future maintenance was inalienable.

OLDFIELD, J.—The question referred is stated in general terms, which, as the referring order of SPENCER, J., and the argument before us show, are liable to be applied to interests of different kinds and subject to different legal incidents. Some confusion has again been introduced by reliance on the exemption under section 60, Civil Procedure Code, of a right to maintenance from attachment. But that exemption is inconclusive, when, as here, a transfer by act of parties is in question and when some of the descriptions of property enumerated in the section certainly are not, and it is not to be assumed that a maintenance right is, exempted from attachment. Authorities relating to attachment are accordingly irrelevent, except in so far as they deal with the only provision of law at present material, section 6 (*d*), Transfer of Property Act, under which property cannot be transferred, if it is

OLDFIELD, J.

> " restricted in its enjoyment personally to the owner."

And on this account *Palikandy Mammad* v. *Krishnan Nair*(2), one of the decisions of this Court regarded as conflicting in the reference, is not of assistance, the prohibition against attachment having been relied

(1) (1919) 37 M.L.J., 402.

(2) (1917) I.L.R., 40 Mad., 302.

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on directly. The other *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(1), proceeds on the view that a right to future maintenance is not property within the enabling words or an interest in property contemplated by paragraph (*d*) of section 6. But, with all respect, we have not been shown that this view has been taken elsewhere; it is inconsistent with the statutory exclusion of such a right from property liable to attachment; and, if it were acceptable, explanation would still be necessary as to the law, by which the validity of a transfer of what is not property is recognized or can be tested at all.

Authority need not be cited to show that section 6(*d*) requires more than the termination of the interest in question with the life of its owner. But in the present case that requirement is complied with. For it is not conceivable that Exhibit B was meant to enable the widow to have some other person clothed or to introduce any stranger she might nominate to the family meals. The rights conferred on her are clearly personal; and it is therefore unnecessary to follow MOOKERJEE, J., in his exhaustive discussion in *Tara Sundari Debi* v. *Saroda Charan Banerjee*(2), of the questions (1) whether an interest created in lieu of and in discharge of a right to maintenance is assignable and (2) whether it is material that the right is enforceable by a charge on immoveable property. For as regards the first I agree that there is no question of a discharge in Exhibit B, the widow's option to return at any time to actual maintenance instead of a periodical allowance having been preserved, and as regards the second the only substantive right under transfer is the right to future maintenance already considered and no question of an impersonal interest in

(1) (1911) I.L.R., 34 Mad., 7. (2) (1910) 12 C.L.J., 146.

land available for the enforcement of that right can arise, except incidentally and in case a default takes place. SUBRAYA v. KRISHNA. OLDFIELD, J.

I concur in the opinion expressed by my Lord.

COUTTS TROTTER, J.—I am of the same opinion and have nothing to add. COUTTS TROTTER, J.

N.R.

SPECIAL BENCH.

Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

CHIEF COMMISSIONER OF INCOME-TAX, MADRAS, REFERRING OFFICER, 1923, March 8.

v.

DORAISWAMI AYYANGAR AND BROTHERS, ASSESSEES.*

Indian Income-tax Act (VII of 1918), sec. 2 (12-A)—Registration of some members of a joint family as a firm—Partnership of some members by a document—Liability of the joint family to super-tax.

Registration of some members of a joint family as a firm as defined in section 2 (12-A) of the Indian Income-tax Act (VII of 1918) precludes the assessment of the family as an undivided family to super-tax on the income derived from the business of the firm unless the firm so registered has been shown to carry on its business on behalf and for the benefit of the joint family. Nor does mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family, if the partnership is conducted on behalf of and for the benefit of the joint family.

CASE stated by the Secretary to the Chief Commissioner of Income-tax, Madras, in his letter, dated 5th

* Referred Case No. 14 of 1921.