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"four, to go against the separate estate of the deceased partner. "Whether it may be just or not, the creditors of the four have "no other right than the four themselves would have had, and the "equity of the creditors in these cases is worked out through "the equity which the debtors themselves have."

In the case before us defendant No. 3 was the creditor of the defendant No. 1 and not of the joint family, and items 2, 4 and 6, against which he insisted *inter alia* that the plaintiff should first proceed did not belong to his debtor, but belonged to defendant No. 2. Defendant No. 1 had no equity to insist that the plaintiff should first proceed against the separate property of defendant No. 2 in order to save his own separate estate. The direction given by the Judge is therefore bad in law, so far as it relates to items 2, 4 and 6, which fell to the share of defendant No. 2 and the decree appealed against is hereby modified by excluding those items from the direction embodied in the decree. The decree is confirmed in other respects, and the third respondent will pay the appellant the costs of this appeal. Respondents will bear their own costs in this Court.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

1888. Nov. 20.

RAMANADAN (DEFENDANT No. 1), APPELLANT,

v.

RANGAMMAL (PLAINTIFF), RESPONDENT.*

Hindu law—Right of a widow to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes.

A house, being ancestral property of a Hindu family, was sold in execution of a decree by which the decree-amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the coparceners for the time being, but since the death of such coparceners' father:

Held, the widow of the latter who resided in the said house during her husband's lifetime was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided

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* Second Appeal No. 403 of 1886.

in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided in subsequent to her husband's death—*Venkatammal* v. *Andyappa*(1) distinguished.

SECOND APPEAL against the decree of T. Weir, Acting District Judge of Madura, in appeal suit No. 392 of 1885, affirming the decree of V. Kuppusami Ayyar, Additional District Munsif of Madura, in original suit No. 189 of 1884.

Suit to declare the right of the plaintiff, a Hindu widow, to occupy a certain house.

The plaintiff was the widow of one Sankarappa Naick, against whose sons and grandsons defendant No. 1 obtained a decree in original suit No. 3 of 1882 on the file of the Subordinate Court of Madura (West) for the principal and interest of a sum of money borrowed of him by them. The house in question which had formed part of Sankarappa's ancestral property was attached in execution of the decree; and a claim asserted by the present plaintiff having been investigated and rejected under s. 331 of the Code of Civil Procedure, the house was sold in execution and purchased by defendant No. 1 in the name of defendant No. 2.

The plaintiff now sought to set aside the order made under s. 331 of the Code of Civil Procedure, and to obtain the above declaration on the ground that she, as the widow of Sankarappa Naick, had a right to occupy the family dwelling-house for life, and that the above proceedings in execution did not bind her interest as she was not a party to the suit.

Both the District Munsif and, on appeal, the District Judge recorded a finding to the effect that the plaintiff had occupied part of the house in question during her husband's lifetime and had continued to occupy it after his death; and though her husband and his sons had other houses at Karepetti and Madura the District Judge said:—"The plaintiff is not shown to have "ever resided in the house in the village of Karepetti, and the "other houses or shops belonging to the family in the town of "Madura have never been occupied as residences, and are not "suited for such a purpose." It was also found that defendant No. 1 had notice, at the time of his purchase, of the fact that the plaintiff was in occupation of part of the house. On these facts the District Judge upheld the decree passed by the District Munsif

(1) I.L.R., 6 Mad., 130.

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declaring that plaintiff was entitled to occupy the portion of the house in question in which she had resided hitherto.

Defendant No. 1 preferred this second appeal.

Subramanya Ayyar for appellant.

Mr. *Ramasami Raju* for respondent.

The arguments adduced on the various hearings of this second appeal appear sufficiently for the purpose of this report from the order of reference and the judgments which follow.

At the first hearing the High Court directed a trial of the issue whether the debt sued on in original suit No. 3 of 1882 had been incurred for the benefit of the family. This issue was determined in the affirmative, and no objection was taken by the respondent to the finding on this question. The case having then come on for rehearing, the Court (Kernan and Brandt, JJ.) made the following

Order of Reference to the Full Bench :—

"The facts of this case, so far as it is necessary to state them for the purposes of the reference which we propose to make to the Full Bench, are that a tenement, in part of which the plaintiff continues to live, and in which she lived with her husband and sons prior to her husband's death, was sold in November 1880 by the plaintiff's son, Alagirisami, to the first defendant in discharge of a debt incurred in 1875 by Alagirisami and his three brothers, and secured by an instrument hypothecating this property; the creditor and purchaser, the first defendant in the present suit, filed a suit against the sons and grandsons of Sankarappa, the plaintiff's husband, to obtain possession of the house or for its value, and secured a decree in original suit No. 3 of 1882 for money, which was constituted by the decree a charge on the property; and in execution of that decree he purchased the tenement in suit.

"The present suit is brought by Sankarappa's widow, Rangammal, for a declaration of her right to continue to reside for her lifetime in that portion of the house in which she has lived since the death of her husband. The District Munsif held the plaintiff's right to occupy for her lifetime a portion of 'the family house' notwithstanding the purchase of the interests of the male coparceners of the family by a stranger to be established, and eviction of the widow 'without providing some other suitable

dwelling for her' to be prohibited, on the authority of *Mangala Debi* v. *Dinanath Bose*(1), *Gauri* v. *Chandramani*(2), *Talemand Singh* v. *Rukmina*(3), *Dalsukhram Mahasukhram* v. *Lallubhai Motichand*(4), and *Venkatammal* v. *Andyappa*(5). He further held it proved that the purchaser had notice at the time of his purchase of the occupation of part of the premises by the plaintiff, as the mother of his judgment-creditors, and widow of Sankarappa, their father. The District Judge upheld the decision.

"This second appeal is preferred on the ground that the house having been sold for a family debt, the plaintiff is not entitled to decree. For the purposes of this reference, the property must be held to be ancestral.

"We called for a finding on the fourth issue (which had not been tried), viz., whether the judgment-debt in original suit No. 3 of 1882 was incurred for the benefit of the family; the finding is in the affirmative, and no objection is taken to that finding.

"In *Gauri* v. *Chandramani*(2) the learned Judges cite the case of *Mangala Debi* v. *Dinanath Bose*(1) as authority for their decision that the auction-purchaser of property sold in execution of a decree against a nephew of the widow's husband could not eject the widow from the house in which she had resided with her husband. It does not appear from the report whether the fact that in Mangala Debi's case the sale was a voluntary sale was specially noticed by the learned Judges.

"*Talemand Singh* v. *Rukmina*(3) simply follows the decision in *Gauri* v. *Chandramani*(2), but reference is also made in it to 'authorities referred to by West and Bühler;' but reference to that work appears to us to show at least as much authority against the view taken by the Allahabad Court as in favor of it.

"The case of *Lakshman Ramchandra Joshi* v. *Satyabhamabai*(6) is not noticed by either the District Munsif or the District Judge, though it is referred to and distinguished in the Bombay case *Dalsukram Mahasukhram* v. *Lallubhai*(4) cited by the District Munsif. It appears to us that the last-named case itself might be distinguished from the case before us on the ground that in the former the sale was a voluntary sale; and we entertain at present

(1) 4 B.L.R., O.C., 72. (2) I.L.R., 1 All., 262. (3) I.L.R., 3 All., 353.
(4) I.L.R., 7 Bom., 282. (5) I.L.R., 6 Mad., 130. (6) I.L.R., 2 Bom., 494.

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little doubt as to the law on the subject as expounded in *Lakshman Ramchandra Joshi's case*(1) as to family property sold to pay debts (not incurred for immoral purposes) of the husband of a widow claiming maintenance or of his father or grandfather, that a sale of family property in such circumstances would be valid as against the widow, irrespective of notice of her claim on the part of the purchaser. The question for determination in the case before us is, however, somewhat different, the original debt having been incurred by the coparceners for the time being after the death of the plaintiff's husband. The view taken by West, J., in *Lakshman Ramchandra Joshi* v. *Satyabhamabai*(1) carries it however much further, and on the grounds that the debts ordinarily take precedence of claims to maintenance and that assent to the propositions of law necessary to support the decree appealed against would seem to imply that a widow has a right difficult to distinguish from a right to a charge or lien on family property, which will affect purchasers under a title such as that in the present case, although effect has not been given to such right either by agreement or by a decree of a Court such as to constitute it a charge on specific property.

"In *Venkatammal's case*(2), however, which was decided by this Court since the latest of the two Bombay cases above referred to, and in which the circumstances connected with the sale of the property at the court auction do not appear to be distinguishable in principle from those in the case before us, the learned Judges (Turner, C.J., and Muttusami Ayyar, J.), while holding that the widow, the mother of Kristnasami Chetty, by whom the original debt was incurred, could not resist the sale, decided that the widow was entitled to continue to reside in the house she had theretofore occupied, and that the house must be sold subject to that right and the decree is drawn accordingly.

"For the reasons indicated above and having regard to the apparent conflict of authority, we think it desirable that the question should be considered by a Full Bench.

"We are inclined to concur with the Bombay High Court in considering that the fact of *bonâ fide* purchasers having notice is immaterial in cases in which ancestral property is sold to defray the just debts of a widow's husband, his father's or grandfather's

(1) I.L.R., 2 Bom., 494. (2) I.L.R., 6 Mad., 130.

debts, and if the case of a sale of such property for a debt contracted by coparceners of the widow's husband otherwise competent to deal with such property for proper purposes stands upon the same footing, notice would be immaterial in this case also.

"The question then which we would refer for the decision of a Full Bench is as follows:—

"Where ancestral property consisting of a house is sold in execution of the decree of a Court by which such property is held liable to sale in satisfaction of the sum decreed, and such decree is the result of a debt incurred not otherwise than for the benefit of the other coparceners by the coparceners for the time being, but subsequent to the death of such coparceners' father, is the widow of the latter who resided in the said house during her husband's lifetime entitled as of right, as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided in that house and still claimed to reside there), to continue to reside for the term of her life in such portion of the house sold as she resided in subsequent to her husband's death?"

This second appeal came on for hearing before the Full Bench, and judgment was reserved. Subsequently the Court delivered the following judgments:—

KERNAN, J.—I am of opinion that, upon the facts, the widow of the father of the manager has not a right as against the purchaser to reside in the house of her late husband and family.

If the debt, in respect of which the sale took place, was a debt due by her husband, no doubt could be entertained that she had no such right. The only doubt there could be, as it appears to me, is whether her right to reside in the house had not accrued as against the manager who succeeded her husband and whether such manager could have, by any act of his, voluntarily affected her right. However, the finding is that the debt incurred by the manager was for the benefit of the family. The widow was one of the family, and, though I do not believe her right to maintenance would give her a right to increased maintenance by reason of large increase of the property of the manager, still, as the acquisition of the means of providing food and raiment for her as well as for the rest of the family was one of the objects of the manager in carrying on business, I do not see how she can resist effect being

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given to the manager's act for the family benefit. If she had got a right by contract or by decree to reside in the house before the execution of the deed by the manager, she could rely on it and resist the title of the purchaser.

I would answer the reference in the negative.

MUTTUSAMI AYYAR, J.—The house in dispute was the ancestral property of one Sankarappa, who died, prior to 1875, leaving him surviving, a widow and four sons. In 1875, the sons hypothecated the house as security for money which they borrowed from the appellant, and, in 1880, the eldest son sold the property in satisfaction of the debt. Thereupon the appellant brought original suit No. 3 of 1882 against the sons and grandsons of Sankarappa to recover either the possession of the house or its value, and obtained a decree which declared the debt to be a charge upon it. In execution of the decree, he brought the house to sale and purchased it. The widow of Sankarappa had continued to live in the house with her sons and grandsons since the death of her husband, as she had lived during her husband's lifetime. She had joined neither in the execution of the hypothecation bond of 1875, nor of the deed of sale of 1880, nor had she been made a party to original suit No. 3 of 1882. She instituted the present suit to obtain a declaration of her right to continue to reside for her lifetime in that portion of the family house, in which she had lived both prior and subsequently to her husband's death. It was found by the Courts below that the purchaser had notice, at the time of his purchase, of the occupation of that part of the house by the respondent (plaintiff) as the mother of his judgment-debtors and the widow of Sankarappa, their father. Upon these facts, the District Munsif, and, on appeal, the District Judge held that nothing more than the interests of the male coparceners passed by the court-sale, and decreed the claim in respondent's favor. On second appeal, the question, whether the debt in original suit No. 3 of 1882 was incurred for the benefit of the joint family, was ordered to be tried, and a finding was returned in the affirmative. It was contended for the appellant that the decision of a Divisional Bench of this Court in *Venkatammal* v. *Andyappa*(1) was open to doubt. The question referred to the Full Bench is :—" Where ancestral property consisting of a house is sold in execution of the

(1) I.L.R., 6 Mad., 130.

decree of a Court, by which such property is held liable to sale in satisfaction of the sum decreed, and such decree is the result of a debt incurred, not otherwise than for the benefit of the other coparceners, by the coparceners for the time being, but subsequent to the death of such coparceners' father, is the widow of the latter who resided in the said house during her husband's lifetime entitled as of right as against a purchaser for value in good faith under such decree (but with notice that she resided there, and during her husband's life in that house and still claimed to reside there), to continue to reside for the term of her life in such portion of the house sold as she resided in, subsequent to her husband's death."

I am also of opinion that the purchase is valid against the respondent. It is found that the judgment-debt is a family debt, and I take it that the debt, though contracted only by the male coparceners, was contracted by them, not for their exclusive benefit, but for the benefit generally of the joint family consisting of themselves and their mother. A sale for the payment of her own debt would bind her interest in the house, whatever it might be, and the decree in original suit No. 3 of 1882 was one which executed the hypothecation of 1875, and which was passed against the representatives of the joint family. In these circumstances, the respondent is not entitled to set aside the sale unless she shows that the debt, which has led to it, is not binding upon her. In *Venkatammal* v. *Andyappa*(1), there was no finding as in this case that the debt in question was a family debt, that is to say, a debt contracted for the joint benefit of the mother and her sons, and that case is not therefore on all fours with the one before us. As I took part in it, and as the soundness of the decision therein is doubted in the order of reference, I desire to state the considerations upon which a distinction was made between the mother's right of maintenance generally and her right to reside in the family house in which she had lived.

For the appellant, it is urged that the claim to maintenance creates only a personal obligation against the heir in possession. I cannot accede to this contention. The son in possession of ancestral property is no doubt under a personal obligation to maintain his mother, but this is not all. The mother is entitled to insist that the maintenance should be charged on a specific

(1) I.L.R., 6 Mad., 130.

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part of ancestral property either when a partition is made by her sons or when the managing member wastes ancestral property, or when she is not duly maintained, or when for any other good and sufficient cause, the ancestral property indicated by Hindu law as the general fund from which her maintenance is to be paid is in peril. The correct view is that the obligation to maintain the mother is strengthened by giving her an interest in immovable property and thereby enabling her to constitute that interest into a specific charge, or an actual existing proprietary interest for the term of her life, and to protect her right of maintenance against improvident alienation of the fund from which it is to be satisfied. To this extent, the right of maintenance is a right *in re* or an interest in ancestral property. Neither Mr. Justice Phear nor Mr. Justice West, who held that such right was not an existing proprietary interest denied that it was a real right. Mr. Justice Phear said:—"When the property passes into the hands of a *bonâ fide* purchaser without notice, it cannot be affected by anything short of an already existing proprietary right: it cannot be subject to that which is not already a specific charge or which does not contain all the elements necessary to its ripening into a specific charge. And obviously, the consideration received by the heir for the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold." He added that the widow might also doubtless follow the property for her maintenance into the hands of any one, who takes it as a volunteer or with notice of her having set up a claim for maintenance against the heir (*Srimati Bhagabati Dasi* v. *Kanailal Mitter*(1)). Adverting to that judgment, Mr. Justice West said:—"The distinction taken between the volunteer and the alienee for value rests rather on English than on Hindu notions;" and the notice necessary to affect the purchase must be a notice of the existence of a claim likely to be unjustly impaired by the transaction. He added, if Mr. Justice Phear's observation were applied to the Bombay Presidency, the widow's claim in every case does contain all the elements necessary for its ripening into a specific charge and went on to state that it was however in his opinion not an existing proprietary right. He referred to the English law as applied to purchases made with knowledge of collateral rights and observed, "where

(1) 8 B.L.R., 228.

the right comes into existence by covenant, the burden does not at law run with the servient tenement, whereas equity says that a person who takes it with notice that a covenant has been made shall be compelled to observe it." "In cases of maintenance," he added, "the right does not come into existence by covenant, but it is a right maintainable against the holders of the ancestral estate in virtue of their holding, no less through the operation of the law than if it had been created by agreement; and so, when the sale prevents its being otherwise satisfied, it accompanies the property, as the burden annexed to it, into the hands of a vendee with notice that it subsists. Equity, as between the vendee and vendor, will make the property retained by the latter, primarily answerable, but such property there must be to make the sale and purchase free from hazard, where the vendee has knowledge or means of knowledge of a widow's claim that cannot be satisfied without recourse to what he proposes to buy." The conclusion he came to was that the maintenance of persons entitled to no definite share was *not an indefeasible* charge, so long as it was not reduced to certainty by a legal transaction (*Lakshman Ramchandra Joshi* v. *Satyabhama Bai*(1)). The *ratio decidendi* is that the heir in possession of ancestral property is under an obligation to maintain the mother, and that she has an interest in ancestral property to ensure its due fulfilment or *jus in re* as a strengthening right, but that that right does not ripen into an indefeasible charge, until it is referred to specific property by contract or decree, that meanwhile it is only an interest analogous to a collateral right resting in covenant, that, until it is reduced to certainty, it is not an existing proprietary right, that a purchaser, however, with notice that that right cannot be satisfied without recourse to the purchase he makes, is liable for her claim, and that if the purchase is *bonâ fide* and legal at the time when it is made, a subsequent change in the circumstances of the family does not invalidate a transaction legal in its inception. I am, therefore, of opinion that the contention that the right of maintenance creates no real right, but only a personal obligation must be overruled.

Another contention is that the distinction made in *Venkatammal* v. *Andyappa*(2) between the right of residence in the family house and the right generally of maintenance is not sound

(1) I.L.R., 2 Bom., 494. (2) I.L.R., 6 Mad., 180.

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in principle. The right of residence of Hindu females is ordinarily referable to the family house and a purchaser may be presumed to have notice of that fact. It is reasonable to hold that he is not a *bonâ fide* purchaser entitled to eject her, unless it is proved that the sale is valid as against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her. The consideration that a real right is not a specific charge, unless that right is referable to specific property, has no application in the case of a family dwelling. Prior to the decision in *Lakshman Ramchandra Joshi* v. *Satyabhama Bai*(1), Sir Barnes Peacock, and Mr. Justice Mitter, held that an adopted son could not convey to a stranger such a right to the family dwelling as to deprive his adoptive mother of her right of residence (*Mangala Debi* v. *Dinanath Bose*(2)). The same view was taken in a Bombay case reported in *Prankoonwur* v. *Dovkoonwur*(3). There is also a smriti of Katyayana which says "except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be whether movable or immovable; otherwise, it may not be given" (*Colebrooke's Digest, B. II, Ch. IV, Sect. II, text* 19). In *Gauri* v. *Chandramani*(4), the Allahabad High Court held that the widow had a valid right of residence against the purchaser of the family house at a Court-sale. Again, the view that the right of maintenance is not an already existing proprietary interest so as to affect a *bonâ fide* purchaser for value is in substance rather an equity founded on analogy to the English law of purchases made with knowledge of collateral rights than a strict logical deduction from texts of Hindu law or the usage of the country. According to Yajnavalkya, the mother was entitled to a share equal to that of a son when partition was made of ancestral property. This was the Smriti law on the point and the author of the Mitakshara expounded the law according to Yajnavalka's Smriti (*Mit. Chap. I, s.* 7, 1—2). But a distinction was made by the author of Smriti Chandrika between the nature of a son's interest and of a widow's interest, and the former was characterized as independent

(1) I.L.R., 2 Bom., 494.
(2) 4 B.L.R., O.S., 72.
(3) 1 Borr., 2nd ed., p. 404.
(4) I.L.R., 1 All., 262.

ownership and the latter as limited to the assignment of a portion by way of maintenance. Thus, the mother's right, which originally extended to a definite share according to Yajnavalkya was limited to such a portion as would suffice for her support. According to Hindu notions, it was still a real right or a charge on ancestral property. According to the course of decisions until 1877, the mother's maintenance was considered to be a charge on ancestral property. In *Ramchandra Dikshit* v. *Savitribai*(1), it was laid down that by Hindu law the maintenance of a widow was a charge upon the whole estate and, therefore, upon every part of it. In *Heera Lall* v. *Mussumat Kousillah*(2) it was stated that the widow's right to maintenance was not merely a right of action against the heirs personally, who take the property, but a charge on the property, which formed the estate of her husband. The High Court at Allahabad observed that the charge should be enforced against the purchaser of a part of the family property with the equitable reserve that execution should, if possible, proceed in the first instance against the vendors. This is the first form of equity recognized as modifying the rule that the widow's maintenance was a charge on every part of the estate. In this Presidency, the late Sudder Court held in 1860 that a sale of property by the husband was invalid where nothing was left for the maintenance of his wife *Lachchanna* v. *Bapanamma*(3). Thus, according to judicial decisions, the mother's right of maintenance was considered to be a charge on ancestral property until 1877. But in its nature the charge was indefinite in its scope, and, as in the case of a male coparcener, a right to carve specific and individual property out of a general fund which is the common property of the joint family. In *Lakshman Ramchandra Joshi* v. *Satyabhama Bai*(4), a distinction was made between a charge on specific property and a *jus in re* in a general fund which might ripen into such charge and elucidated by Mr. Justice West in a very learned judgment by reference to several authorities. The foundation, however, for the distinction is that so long as the mother lives with her sons as a member of the joint family and continues to be supported by them, she submits

(1) 4 Bom., H.C.R., 73. (2) 2 Agra Reports, 42.
(3) Decisions of the Sudder Udalut (Madras), 1860, p. 290.
(4) I.L.R., 2 Bom., 494.

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to their dealing with the ancestral property, and that the interest she has in ancestral property under Hindu law to protect her claim to maintenance is indefinite and not referable to a specific portion of ancestral property and, until it is made certain and referred to some specific property, it does not acquire the character of a specific charge, so as to affect *bonâ fide* purchasers for value. It was the equitable protection due to *bonâ fide* purchasers for value that suggested the distinction between a specific charge, and the right over a general fund from which such charge might be carved out. It must be observed here that, though the mother living with and under the protection of her sons submits to their dealing with ancestral property, the submission is under Hindu law subject to this condition, viz., that the managing coparcener who deals with the property must act, either really or to the purchaser's knowledge, within the scope of his authority as the manager of a joint fund. As to the mother's right of residence in the family house, it is a right inherent in her and an incident of her status as mother and the son cannot arbitrarily eject her from it. There is no indefiniteness as to the specific property to which it is referable and as the residence of Hindu females in family houses is a fact well known in this country, a purchaser was held not entitled to eject her, unless he showed that the sale bound that interest. The reason for the distinction between a *jus in re* over a general fund and a charge on a specific part of that fund did not extend to the right of residence in the family house, and it was therefore held with special reference to the mode in which the theory of a charge in the nature of an existing proprietary right was developed, that the equity of a purchaser for value did not extend to the mother's right of residence in specific property, viz., the family house, unless the sale was binding on her.

In the case before us, however, the sale was made in satisfaction of a debt binding on her and in execution of a mortgage decree made against male coparceners as the representatives of the joint family.

I concur, therefore, in the opinion of Mr. Justice Kernan.

THE CHIEF JUSTICE.—I concur.

PARKER, J.—I concur.