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from the Judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen." Their Lordships were dealing there with an appeal from a single Judge of the Supreme Court of Justice. We think that these remarks apply to an appellate court in this country dealing with appeals from the decisions of Munsifs and Subordinate Judges and justify interference by the appellate court at least to the extent indicated. In India Munsifs and Subordinate Judges in many cases have to hear a case at intervals and not continuously from day to day. Frequently they have to decide many other cases in the intervals. Also, in India the trial courts have to spend much labour in recording *verbatim* with their own hand the evidence of the witnesses, and judgements are frequently not written until a considerable time has elapsed after the evidence is heard. There is in this and in other respects a marked contrast between a trial in England and a trial in this country. The trial Judge in India has not as a general rule the same opportunity of observing the demeanour of the witnesses as a trial Judge in England.

We allow the appeal; we set aside the decree of the learned Judge of this Court, and we restore the decree of the lower appellate court with costs of both hearings in this Court.

Appeal decreed.

PRIVY COUNCIL.

SAHU RAM CHANDRA AND ANOTHER (PLAINTIFFS) *v.* BHUP SINGH AND OTHERS (DEFENDANTS).*

[On appeal from the High Court of Judicature at Allahabad.]

1917 *January*, 25, 26. *March*, 9.

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property by father—Mortgage executed at time of loan—Liability of sons in suit to enforce mortgage—Antecedent debt—Burden *of proof.*

The exception relating to antecedent debts which covers the case of a mortgage or sale by the father of a joint family governed by the Mitakshara law, being an exception from a general and sound principle that if a debt contracted by the father is not for the benefit of the joint family estate he should have no power either of mortgage or sale of the estate to meet such a debt, is one which should not be extended and should be very carefully guarded.

33 M.L.J. 14

* *Present:*—Viscount HALDANE, Lord SHAW, Sir JOHN EDGE, and MR. AMEER ALI.

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A loan made to the father on the occasion of a grant by him of mortgage on the family estate is not an antecedent debt: to hold otherwise would be to extend unduly and improperly the whole scope of the exception provided by the Mitakshara law.

The decision of the majority of a Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (1) approved.

The statement of the law in *Nanomi Babuasin* v. *Modhun Mohun* (2) by Lord HOBHOUSE as to the establishment by the Courts in India of "the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors remedies for their debts if not tainted with immorality," does not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate. The exception applied only to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which did not personally belong to him but were joint family property. If it were extended further, the exception would be made so wide as in effect to extinguish the sound and wholesome principle that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain, and it might be a deliberate breach of trust. The Mitakshara law does not warrant or legalize any such transaction. The limits of the exception thus set forth form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt. In their Lordships' opinion the mortgage in suit was not granted in respect of an antecedent debt, and was invalid. *Chandradeo Singh* v. *Mata Prasad* (1), per *Sir* JOHN STANLEY, C. J., referred to.

APPEAL 102 of 1915, from a judgement and decree (26th May, 1913) of the High Court at Allahabad, which confirmed on appeal a judgement and decree (29th February, 1912) of the Subordinate Judge of Mainpuri.

Bhup Singh, the first defendant, father of defendants 2, 3 and 4, and the grandfather of defendants 5 and 6, on the 21st of February, 1882, executed a security bond in favour of Thakur Umrao Singh from whom he had taken a lease of 20 biswas of mauza Ajaibpur, and hypothecated his own property and one zamindari in mauza Pendhat, pargana Mustafabad. In the following year, on the 6th of January, 1883, to meet his necessity, as stated in the deed he borrowed Rs. 200 from one Bhagirath to bear interest at

(1) (1909) I. L. R., 31 All., 176. (2) (1885) I. L. R., 13 Calc., 21, 35 : L. R., 13 I. A., 1 (14.)

Re. 1-8-0 per cent. per mensem and hypothecated the same property. On the 7th of July, 1884, Bhup Singh again mortgaged the same property to Sahu Ram Chandra, one of the present appellants. Ram Chandra then brought a suit to enforce this security, amounting with principal and interest to Rs. 947-6-0, and his claim was decreed conditionally on his paying off Bhagirath's mortgage. He accordingly paid into court Rs. 200 principal and Rs. 37 interest, and the bond in favour of Bhagirath was made over to him.

The suit which gave rise to this appeal was brought by Ram Chandra and Tejram on the 27th of July, 1910, making defendants Bhup Singh, his sons and grandsons, and various other persons who were in possession under mortgage deeds and deeds of sale executed by Bhup Singh. After stating the facts above set out, and that the defendants had paid nothing towards the debt and had alienated portions of the mortgaged property by deeds of sale and mortgages, the plaintiffs claimed Rs. 15,000 with costs, and in default, the sale of the property mortgaged.

The defendants pleaded that the claim was barred by section 47, order II, of the Code of Civil Procedure, 1908, and by limitation, and that the amount was not borrowed for family necessity.

The Subordinate Judge dismissed the suit on the ground that the burden of proof as to legal necessity was on the plaintiffs and they had not discharged that *onus*.

On appeal the High Court (*Sir* H. G. RICHARDS, C. J., and H. W. LYLE, J.) affirmed the decision of the Subordinate Judge, and dismissed the appeal.

The decisions of both Courts in India were based on the authority of the Full Bench ruling in *Chandradeo Singh* v. *Mata Prasad* (1).

On this appeal, which was heard *ex parte*—

De Gruyther, K. C., and *W. A. Raikes* for the appellants, contended that a son was bound to pay his father's debts unless they were incurred for immoral purposes. Where that is not proved, and it is not proved here, the son has no defence. There was by the Hindu law a pious duty laid on the son to pay his father's debts, and on that foundation rested the power of the

(1) (1909) I. L. R., 31 All., 176.

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father of a Mitakshara joint family to alienate the joint family property so as to bind his sons. Reference was made to Mayne's Hindu Law, 7th Ed., section 303. He has power to dispose of the joint family property for an antecedent debt. The question then arises, what is an antecedent debt? The Privy Council decisions speak of an antecedent debt, but it is not clear what is the distinction between that and an ordinary debt, or why the father can sell the property out and out for an antecedent debt, as he undoubtedly can, and yet is unable to mortgage it for such a debt, which it has been held by the Allahabad High Court in *Chandradeo Singh* v. *Mata Prasad* (1) he cannot do. That was a decision of a majority of a Full Bench, three Judges to two. The mortgage in suit in the present case was a simple mortgage as defined in section 58 (*b*) of the Transfer of Property Act (IV of 1882), and not like an English mortgage, a transfer of property with a right to redeem it. A mortgage, it was submitted, was necessarily for an antecedent debt, and the judgements of the two Judges of the Full Bench who differed from the majority is correct. There is a considerable conflict of opinion in the decisions of the High Courts in India as to what is an antecedent debt within the meaning of the various decisions of the Privy Council. But the decisions in India were all founded on the son's liability to pay his father's debt, and not on his liability to pay antecedent debts. The decision of the Calcutta High Court in *Maheswar Dutt Tewari* v. *Kishun Singh* (2), which apparently had not been overruled, was relied on as being rightly decided. That a mortgage for an antecedent debt can be enforced appears from the Board's decision in *Bhagbut Prasad Singh* v. *Girja Koer* (3) see also *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan* (4). The passage from the judgement of Lord HOBHOUSE in *Nanomi Babuasin* v. *Modhun Mohun* (5) was cited to the effect that "the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts," which, it was submitted,

(1) (1909) I. L. R., 31 All., 176.
(2) (1907) I. L. R., 34 Calc., 184.
(3) (1888) I. L. R., 15 Calc., 717 : L. R., 15 I. A., 97.
(4) (1886) I. L. R., 12 Mad., 142 : L. R. 16 I. A., 1.
(5) (1885) I. L. R., 13 Calc., 21, 35 : L. R., 13 I. A., 1, 17.

included the remedies of a mortgagee on his mortgage; and a debt for which a mortgage was executed was an antecedent debt. Reference was also made to the following cases decided by the High Courts in India; *Babu Singh* v. *Bihari Lal* (1); *Dattatraya Vishnu Dhamankar* v. *Vishnu Narayan Dhamankar* (2); *Lachman Dass* v. *Giridhur Chowdhry* (3); *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (4); *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (5); *Sami Ayyangar* v. *Ponnammal* (6); and *Chidambara Mudaliar* v. *Koothaperumal* (7). And the following decisions of the Privy Council were also cited; *Hunooman Pershad Panday* v. *Munraj Koonweree* (8); *Girdharee Lall* v. *Kantoo Lall* (9); *Suraj Bunsi Koer* v *Sheo Pershad Singh* (10); *Mahabir Prasad* v. *Moheswar Nath Sahai* (11); and *Madho Pershad* v. *Mehrban Singh* (12).

1917, March, 9th:—The judgement of their Lordships was delivered by Lord SHAW:—

This is an appeal from a judgement and decree of the Allahabad High Court, dated the 26th of May, 1913, which confirmed on an appeal the judgement and decree of the Subordinate Judge of Mainpuri, dated the 29th of February, 1912.

The suit is brought to enforce a mortgage granted so far back as the 6th of January, 1883, over, *inter alia*, one biswa zamindari share in mauza Pendat, pargana Mustafabad. The mortgage was granted in favour of one Bhagirath. It was paid off by Ram Chandra, one of the defendants, in the course of an action brought by him to enforce a subsequent security granted over the same property. It appears from the judgement appealed from that the plaintiffs proceeded against the property comprised in their own mortgage and that the decree-holders purchased the

(1) (1908) I. L. R., 30 All., 156.
(2) (1911) I. L. R., 36 Bom., 68.
(3) (1880) I. L. R., 5 Calc., 855.
(4) (1907) I. L. R., 34 Calc., 735.
(5) (1905) I. L. R., 29 Mad., 200.
(6) (1897) I. L. R., 21 Mad., 26.
(7) (1903) I. L. R., 27 Mad., 326.
(8) (1856) 6 Moo., I. A., 393, 421.
(9) (1874) 14 B. L. R., 187: L. R. 1 I. A., 321.
(10) (1879) I. L. R., 5 Calc., 148, 171: L. R., 6 I. A., 99, 104.
(11) (1889) I. L. R., 17 Calc., 584: L. R., 17 I. A., 11.
(12) (1890) I. L. R., 18 Calc., 157: L. R., 17 I. A., 194.

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property themselves. All this happened over twenty years ago. It is manifest from these facts that, in so far as the advance of 200 rupees was concerned, a claim for repayment of it as a simple debt would be long ago barred by limitation.

Accordingly, it is the mortgage which is sued upon, and the plaintiffs claim as standing in right of it, they having discharged the debt of Bhagirath, the original mortgagee. Their Lordships had not the advantage of hearing any argument in support of the judgement appealed from, the respondents not being represented by Counsel; but there is sufficient in the case to suggest that other elements going to dispute the validity of the appellants' claim might have been brought before the Board. Their Lordships, however, were willing to consider the arguments submitted to them upon the one particular point hereafter to be explained, and they agree with the argument of the learned Counsel for the appellants that, in view of a certain conflict of decisions in the various Courts in India, it may be well that the point should be settled.

The mortgagor was the defendant, Bhup Singh. The other defendants are his sons and grandsons. Under the Mitakshara Law they are, as members of a joint family, coparceners in the ownership of the property over which the mortgage was granted.

It is well to keep the general principle applicable to such a situation in mind. There have been so many decisions by courts of law on the exception to the principle that the principle itself has been apt to be forgotten. Under the Law of the Mitakshara the joint family property owned, as stated, by all the members of the family as coparceners, cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale or mortgage granted by one coparcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and its entirety stands free of it.

The rule of the Mitakshara is clear (I, 1, 27): even the father—

"is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other-

predecessor; since it is ordained 'though immovables or bipeds have been acquired by a man himself a gift or sale of them should not be made without convening all the sons.' "

The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or muth, or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the coparceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded.

This view is in no way novel. In *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) Sir JAMES COLVILE said :—

"All agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required."

But for the exception immediately to be noted, these two principles would cover the ground, and it would be clear that if the father of a family purported or presumed to mortgage or sell the joint family estate, the mortgage or sale would be entirely ineffectual.

Before dealing with that exception, their Lordships desire to note an argument presented, to the following effect. It was argued that a mortgage was binding because of an obligation of religion and piety which is placed upon the sons and grandsons, under the Mitakshara Law, to discharge their

(1) (1879) I. L. R., 5 Calc., 148: L. R., 6 I. A., 88.

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father's debts. If, accordingly, he has incurred a debt, and the debt was not for immoral purposes, the pious obligation resting upon the sons and grandsons to discharge this debt is in practice worked out by giving effect to any mortgage or sale of the family property, in which they, with the father, its manager, were joint owners, so as to enable the debt to be discharged.

While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive and that there is a concurrent finding by both of the courts below to the effect that the plaintiffs have failed to prove that the debt of 200 rupees, for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate.

The whole of this part of the case is accordingly at an end. But while the principles as above set forth still stand, an appeal is made in this case to the following exception. Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded. They desire, in the first place, to make it clear that

much if not all of the law upon this subject has arisen from the necessity of protecting the right of third persons, say, the purchasers of the property, who have taken their title for onerous consideration and in good faith. This is at the bottom of the doctrine of *onus*, which was dealt with so fully by Lord JUSTICE KNIGHT BRUCE in *Hunooman Pershad Panday* v. *Munraj Koonweree* (1).

"According to the argument," said the learned Judge, "if a factum of a deed of charge by a manager for an infant be established and the fact of the advance be proved, the presumption of law is *primâ facie* to support the charge and the *onus* of disproving it rests on the heir."

His Lordship controverts any such general proposition, and decides that the *onus* of proof in such suits is one—

"not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances and must be regulated by and dependent on them. Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan."

The point need not be pursued, because their Lordships are entirely satisfied with the position adopted by the Courts below in the present case.

For the facts are startling. The advance itself was for a trifling amount, namely, 200 rupees, but the interest was Re. 1-8-0 per cent. per month compound. Accordingly the amount due upon the mortgage, if good and subsisting, was, as stated by the High Court, "the appalling sum of 22,131 rupees." In point of fact, the mortgage is asked to be enforced for a sum of 15,000 rupees. The lapse of time between the date of the mortgage and the date of the suit was 27 years, nothing having been done upon it during that period. The *onus* was accordingly properly laid and the issue of no benefit to the estate is settled.

As has been already observed, too little weight has been attached to the consideration that, so far as the joint family estate is concerned, the law has been invoked for the protection of third parties, whose rights in or with regard to it have been

(1) (1856) 6 Moo., I. A., 393, 420.

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acquired in good faith. A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and right have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head. In the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) already referred to, Sir JAMES COLVILE, referring to the case of *Girdhari Lall* v. *Kantoo Lall* (2), observed :—

"1st. That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and

"2ndly. That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

Their Lordships desire to record their adhesion to the following comment made on this pronouncement by Sir JOHN STANLEY in the case of *Chandradeo Singh* v. *Mata Prasad* (3). The learned Chief Justice stated :—

"The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in *consideration of an antecedent debt or* in order to raise money to pay off *an antecedent debt, or under* a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases, and the words antecedent debt seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

In their Lordships' opinion this is a correct and useful statement of the law.

It need only be further stated that, while the case founded on family necessity is excluded, and while the case founded on pious obligation fails, there is a still more radical objection to the claim.

(1) (1879) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88. (2) (1874) L. R., 1 I. A., 321: 14 B. L. R., 187.

(3) (1909) I. L. R., 31 All., 176, 196.

It is denied that the mortgage can be held to have been granted for an antecedent debt. Antecedent debt, it is said, there was none, and to call a borrowing made on the occasion of the grant of a mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic. As to this unfortunately there has been much difference of view in the Courts in India.

The law was thus stated by Lord HOBHOUSE in *Nanomi Babuasin* v. *Modhun Mohun* (1):—

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, viz., that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights

(1) (1886) I. L. R., 13 Calc., 21, 35: L. R., 13 I. A., 1, 17.

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which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalize any such transaction.

The limits of the principle of the exception have been thus set forth because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt. In the present case the question arises clear from all complications. A mortgage has been granted for 200 rupees advanced at the time and on the faith of it. This debt was not for the benefit of the estate, it was purely a debt of the father. It is boldly contended that the mortgage did from its date properly hypothecate the entirety of the joint family estate, and it is said that the transaction substantially is that the father got the 200 rupees into his hands, and that when he granted the mortgage he was accordingly an "antecedent debtor." Their Lordships are of opinion that the contention cannot be upheld.

The importance of the case being free from complications is this: that except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for. Accordingly, unless the mortgage validly affects the joint family estate, the appellants must fail. In the view taken by the Board the mortgage was not granted in respect of an antecedent debt, and was invalid.

The conflict of authorities cited to the Board is a conflict which occurs, not merely between the Courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself. The cases particularly mentioned were as follows :—

Lachman Dass v. *Giridhur Chowdhry* (1), *Maheswar Dutt Tiwari* v. *Kishun Singh* (2), *Babu Singh* v. *Bihari Lal* (3), *Chandradeo Singh* v. *Mata Prasad* (4), *Sami Ayyangar* v. *Ponnammal* (5), *Chidambara Mudaliar* v. *Koothaperumal* (6).

(1) (1880) I. L. R., 5 Calc., 855.
(2) (1907) I. L. R., 34 Calc., 184
(3) (1908) I. L. R., 30 All., 153.
(4) (1909) I. L. R., 31 All., 176.
(5) (1897) I. L. R., 21 Mad., 28.
(6) (1903) I. L. R., 27 Mad., 326

Venkataramanaya Pantulu v. *Venkatarama Doss Pantulu* (1) and *Dattatraya Vishnu Dhamankar* v. *Vishnu Narayan Dhamankar* (2).

From this mass of authority their Lordships venture to refer to the judgement of Chief Justice Sir JOHN STANLEY, in *Chandradeo Singh* v. *Mata Prasad*, (3) already mentioned :—

"The true rule," says that learned Judge, "is that the son cannot impeach an alienation of ancestral joint family property made by a father *for which the consideration is an antecedent debt of the father* not tainted with immorality or the object of which is to pay *such* a debt . . . The doctrine has no application to a case in which no antecedent debt of the father, that is, a debt antecedent to the alienation in question, is concerned as the consideration or object of the alienation."

The argument in support of the validity of the mortgage also took this shape. It was said, :— "What difference would it make if the father had contracted the debt an hour, a day, a year before granting the mortgage ? Then *de facto* it would be an antecedent debt, and the creditor would have a mortgage good upon that ground." Their Lordships cannot assent to any such proposition that a mortgage on the family estate would follow the loan. The case as put might instantly raise the presumption that what occurred was substantially this : that the father contracted the debt knowing that he was at the end of his personal resources and that the creditor advanced the money relying upon an understanding or agreement, express or implied, given to the father. In truth, in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence.

Their Lordships will humbly advise His Majesty that the appeal be disallowed.

Appeal dismissed.

Solicitors for the appellant :—*T. C. Summerhays & Son.*

J. V. W.

(1) (1915) I. L. R., 29 Mad., 200. (2) (1911) I. L. R., 36 Bom., 68.
(3) (1909) I. L. R., 31 All. 176 (189).