abetted the offence before its commission by obtaining duplicate keys is contrary to law.

[His Lordship then considered, on the evidence, whether a re-trial should be ordered, and the judgement thus concluded :—]

I do not consider that on this evidence I should be justified in ordering a re-trial, for had the case come before me in appeal it is not improbable that the accused would have been acquitted. I, therefore, allow this application, set aside the conviction and sentence passed upon the accused and order that he be set at liberty. The fine, if paid, will be returned to him.

*Application allowed.*

## FULL BENCH.

*Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Sulaiman, Mr. Justice Daniels, Mr. Justice Mukerji and Mr. Justice King.*

RAM REKHA SINGH AND OTHERS (PLAINTIFFS) *v.* GANGA PRASAD MUKARADDHWAJ AND OTHERS (DEFENDANTS).* 1926 *July*, 27.

*Hindu law—Joint Hindu family—Mortgage—Previous mortgage renewed in favour of same mortgagee—Previous debt set off in subsequent deed—"Antecedent debt."*

Where a previous mortgage-deed of joint family property is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one, the alienation can be deemed to be in lieu of an "antecedent debt" so as to be binding on the sons, unless they can establish immorality or illegality.

* Second Appeal No. 116 of 1924, from a decree of H. Beatty, District Judge of Ghazipur, dated the 13th of October, 1923, confirming a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 28th of February, 1923.

1926

RAM REKHA SINGH v. GANGA PRASAD MUKARADDHWAJ.

Whenever a previous debt is set off in a subsequent mortgage-deed, the true test to apply, in order to ascertain the antecedency of the debt, is whether the first debt was independent of the second. The two transactions must be dissociated in time as well as in fact. *Brij Narain* v. *Mangal Prasad* (1), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2), *Muddun Thakoor* v. *Kantoo Lall* (3), *Nanomi Babuasin* v. *Modhun Mohun* (4), *Badri Prasad* v. *Madan Lal* (5), *Chandradeo Singh* v. *Mata Prasad* (6), *Sahu Ram Chandra* v. *Bhup Singh* (7), *Chet Ram* v. *Ram Singh* (8), *Gauri Shankar Singh* v. *Sheonandan Misra* (9) and *Lal Bahadur* v. *Ambika Prasad* (10), referred to.

THE facts of this case were as follows :—

The great-grandfather and the grandfathers of the plaintiffs executed a mortgage-deed of joint family property in 1889 in favour of the ancestor of the contesting defendants. The present plaintiffs were not then born but the fathers of the plaintiffs were alive and did not join in the deed. Between 1889 and 1910 three of the plaintiffs were born and by birth acquired an interest in the family property. Before the period allowed by section 31 of the Limitation Act of 1908 expired, the fathers of the plaintiffs acting for themselves and as guardians of their minor sons, jointly with the uncle and the grandfather of the plaintiff No. 3, executed a fresh mortgage-deed of the same property in favour of the same mortgagee and in lieu of the bulk of the amount due on the previous document, the remaining portion being remitted. In 1920 the mortgagees sued on the last mentioned mortgage, impleading the present plaintiffs under the guardianship of their respective fathers. The other adult members

(1) (1923) I.L.R., 46 All., 95.
(2) (1878) I.L.R., 5 Calc., 141.
(3) (1874) L.R., 1 I.A., 333.
(4) (1885) I.L.R., 13 Calc., 21.
(5) (1893) I.L.R., 15 All., 75.
(6) (1909) I.L.R., 31 All., 176.
(7) (1917) I.L.R., 39 All., 437.
(8) (1922) I.L.R., 44 All., 368.
(9) (1924) I.L.R., 46 All., 384.
(10) (1925) I.L.R., 47 All., 795.

of the family were also impleaded. No one contested the suit and an *ex parte* decree for sale was passed, which was subsequently made absolute. The plaintiffs now sued for a declaration that the decree of 1920 was not binding on them as they were not properly represented. They alleged that the mortgage debt was without any legal necessity and, therefore, not enforceable against the family property. Both the courts below dismissed the suit. The plaintiffs appealed.

In view of a difference of opinion as disclosed by certain unreported rulings, the appeal was referred to a Full Bench.

Dr. *Kailas Nath Katju* (for Pandit *Ambika Prasad Pande*), for the appellant.

Munshi *Kamla Kant Varma*, for the respondents.

The judgement of the Full Bench (WALSH, A. C. J., and SULAIMAN, DANIELS, MUKERJI and KING, JJ.), after stating the facts as above, thus continued :—

Assuming that there have been such irregularities in the appointment of the guardians *ad litem* in the previous suit as to entitle the plaintiffs to reopen the question, they cannot by merely showing irregularities succeed, unless they can satisfy the court that they have been prejudiced and have been deprived of some good defence which was open to them. The respondents' position is that the mortgage of 1910, being in lieu of the amount due on the previous mortgage of 1889, was in lieu of an antecedent debt of the fathers and grandfathers of the plaintiffs and is binding on them, even though no legal necessity for the advance of 1889 be shown. In the alternative

1926

RAM REKHA SINGH v. GANGA PRASAD MUKARAD-DHWAJ.

they maintain that the debt of 1889 was in itself good and binding on the family.

The main point which arises for the consideration of the Full Bench is whether, where a previous mortgage-deed is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one, the alienation can be deemed to be in lieu of an "antecedent debt" so as to be binding on the sons unless they can establish immorality or illegality. The answer to the question depends on the interpretation of the authoritative pronouncement of their Lordships of the Privy Council in the case of *Brij Narain* v. *Mangal Prasad* (1). Before discussing this case it seems desirable to point out what was understood by the expression "antecedent debt" in a few previous leading cases.

The expression "antecedent debt" does not find any place in the Hindu Shastras. The courts, however, have made the pious obligation of the sons to pay their fathers' debts the ground for the doctrine of antecedent debts. In the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2), Sir J. COLVILLE, in delivering the judgement of their Lordships of the Privy Council, laid down that the earlier case of *Muddun Thakoor* v. *Kantoo Lall* (3), was an authority for the proposition, among others 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

(1) (1928) I.L.R., 46 All., 95. (2) (1878) I.L.R., 5 Calc., 148 (171).
(3) (1874) L.R., 1 I.A., 223.

contracted for immoral purposes and that the purchasers had notice that they were so contracted."

Later on, in the case of *Nanomi Babuasin* v. *Modhun Mohun* (1), Lord HOBHOUSE remarked that

"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."

Quoting the passages in the last mentioned cases, Sir JOHN EDGE in delivering the principal judgement of the Full Bench, with which the other four learned Judges agreed, in *Badri Prasad* v. *Madan Lal* (2), held that the passages in his opinion showed that the expression "antecedent debt" is not to be restricted to a prior debt due to a person other than the purchaser or mortgagee, and that the Hindu sons were bound by a mortgage executed by their father alone, the consideration having been, with a trifling exception, money advances antecedently made by the mortgagee to him.

Similarly, in the Full Bench case of *Chandradeo Singh* v. *Mata Prasad* (3), Sir JOHN STANLEY, C. J., in expressing the view of the majority, remarked:

"The true rule is that a 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."

This passage was quoted with approval by Lord SHAW in *Sahu Ram Chandra* v. *Bhup Singh* (4). In this last mentioned case a mortgage had been granted for Rs. 200 advanced at the time and on the faith of it. Nevertheless it was boldly contended

(1) (1885) I.L.R., 13 Calc., 21 (35). (2) (1893) I.L.R., 15 All., 75 (80).
(3) (1909) I.L.R., 31 All., 176 (199). (4) (1917) I.L.R., 39 All., 437 (449).

1926

RAM REKHA SINGH v. GANGA PRASAD MUKARADDHWAJ.

that the transaction substantially was that the father got Rs. 200 into his hands and that when subsequently he granted the mortgage he was accordingly "an antecedent debtor." This contention was repelled by their Lordships and it was held that "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." There were, however, passages in the judgement indicating that "the joint family estate could not be transferred so as to bind the sons except where the transfer 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." These passages were the basis of the decision in *Chet Ram* v. *Ram Singh* (1), and gave rise to a conflict of opinion in India. The recent pronouncement of their Lordships in the case of *Brij Narain* v. *Mangal Prasad* (2), was an authoritative pronouncement intended to set such conflict at rest. It was pointed out that in *Sahu Ram Chandra's* case the incurring of the debt was the creation of the mortgage itself and that there was no antecedency either in time or in fact. At page 101 it was remarked that "the family estate may become liable by being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought": and at page 102 it was said that "it seems to have been felt that if the debt for which a mortgage was given, was, *in any proper sense, antecedent*, then it, so to speak, escaped the direct infringement of the

(1) (1922) I.L.R., 44 All., 368. (2) (1923) I.L.R., 46 All. 95.

principle that the father manager could not burden the estate except for necessity." The fourth proposition laid down by their Lordships at page 104 was as follows :—

"Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached."

It is significant that their Lordships do not say that the two debts must be absolutely independent of each other, or wholly unconnected with each other. All that is said is that the previous debt, in order to be antecedent debt, should be truly independent and not part of the subsequent transaction. This is quite different from saying that the latter debt should be unconnected with the earlier one. Whenever a previous debt is set off in a subsequent mortgage-deed, the second deed is in one way connected with the first, and one might in one sense say that the second is not independent of the first. But the true test to apply is whether the first one was independent of the second. We think that what their Lordships meant to lay down was that the two deeds must not be part and parcel of the same transaction, but that they must be distinct and separate not only in point of time but in reality. There must be dissociation in time as well as in fact. If at the time when the earlier mortgage transaction was entered into the later one was not even in contemplation, the first will be independent and will remain an antecedent debt, even though it be set off in the second document and even though both be in favour of the same mortgagee. If this were not the true interpretation, the whole effect of the ruling of their Lordships would be nullified. It seems to us that their Lordships have affirmed the view expressed by

1926

RAM REKHA SINGH v. GANGA PRASAD MUKARADDHWAJ.

STANLEY, C. J., in the Full Bench case of *Chandradeo Singh* v. *Mata Prasad* (1), where the learned CHIEF JUSTICE remarked :—

"By the expression 'antecedent debt' I understand a debt which is not for the first time incurred at the time of a sale or mortgage, that is, presently incurred, but a debt which existed prior to and independently of such sale or mortgage. It must be a *bonâ fide* debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object."

We do not think that the mere fact that the mortgage is a renewal of the earlier mortgage in favour of the same mortgagee would make any difference. If that were so, then an old debt, which would be an antecedent debt if it were paid off by a deed in favour of a third person, would cease to be so if paid off by a deed in favour of the same mortgagee. It is difficult to see how on principle the personality of the subsequent creditor can necessarily make any difference. Of course if the former debt were a mere device and were incurred merely for the sake of creating an antecedency in time and with a view to support a subsequent transfer, the liability could not be upheld. In the present case, however, there can be no such suggestion as the two deeds are separated by a long distance of time.

In the case of *Gauri Shankar Singh* v. *Sheonandan Misra* (2), a previous mortgage debt, on which the personal remedy had become barred by time, but not the remedy of the enforcement of the charge, was held to be a good antecedent debt so as to support a subsequent possessory mortgage in favour of the same mortgagee.

The view that property can be transferred to a creditor in lieu of a previous debt due to him is

(1) (1909) I.L.R., 31 All., 176 (190). (2) (1924) I.L.R., 46 All., 384.

further supported by the recent case of *Lal Bahadur* v. *Ambika Prasad* (1), decided by their Lordships of the Privy Council. In that case two previous mortgages of 1895 were held to be "antecedent debts" which would justify for their liquidation a sale of family property in favour of purchasers who were, one, some, or all nominees of the mortgagee.

We are accordingly of opinion that the mortgage of 1910 was in lieu of an antecedent debt due from the plaintiffs' fathers and grandfathers and was, therefore, binding on the plaintiffs. The plaintiffs were, therefore, in no way prejudiced by the previous decree. The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Banerji.*

EMPEROR *v.* ATMA RAM AND OTHERS.*

1926 *October*, 7.

*Act No. XLV of* 1860 (*Indian Penal Code*), *section* 323—*Criminal Procedure Code, section* 106—*Security to keep the peace—Summary trial—Notes of evidence not kept.*

Where a magistrate trying a case summarily made some notes of the evidence given but destroyed them: *held* that this was a sufficient cause for setting aside the conviction.

*Held* also, that a magistrate having convicted an accused person under section 323 of the Indian Penal Code cannot bind him over to keep the peace under section 106 of the Code of Criminal Procedure unless he also finds that the offence was one involving a breach of the peace. *Ainuddi Sheikh* v. *Queen-Empress* (2), *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (3) and *Muhammad Rahim* v. *Emperor* (4), referred to.

* Criminal Reference No. 526 of 1926.

(1) (1925) I.L.R., 47 All., 795.
(2) (1900) I.L.R., 27 Calc., 450.
(3) (1920) I.L.R., 48 Calc., 280.
(4) (1925) 23 A.L.J., 1053.