Nor need he in fact give evidence that the family is undivided, although it is advisable to give it when it is possible to do so; and so it is to give evidence that there was family-property from which the acquisition could be made in anticipation of evidence that may be given to rebut the presumption." The principle laid down in these decisions was followed in Cassumbhoy Ahmedbhoy *v.* Ahmedbhoy Hubibhoy (1887), I. L. R., 12 Bom. 280, (see page 309), and in Vedavalli *v.* Narayana (1877) I.L.R., 2 Mad. 19 (see p. 22). The contrary view was taken in the cases noted by Sir Richard Couch, C.J., in Taruck Chunder Poddar's case already considered and also in Lakshman Mayaram *v.* Jamna Bai (1882) I. L. R., 6 Bom. 225 (see p. 232). The rule laid down in this last case is that where there was ancestral property by means of which other property may have been acquired, there it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. To the same effect are the observations of Justice Scott in Toolsey Das Ludha *v.* Premji Tricumdas (1888) I. L. R., 13 Bom. p. 61. On p. 66 Justice Scott is reported to have said, "Although presumably every Hindu family is joint in food, worship or estate, there is no presumption that every family possesses property. Unless there is an admitted nucleus of family property the onus of proof of the existence of joint property lies on the claimant. In the present case there is no such nucleus and the brothers embarked in separate trades." The learned judge found on evidence that there was no nucleus; so the presumption was rebutted. On this point the case of Murari Vithoji *v.* Mukund Shivaji (1890) I. L. R., 15 Bom. 201, may be referred to.

Ancestral trade.

In many families, trade is one of the valuable (if not the most valuable), sources of income. Such

trades descend like other heritable property and all the heirs—adults as well as infants—participate in the profits as in any other joint ancestral property. Generally the head man (the *kurta* or managing member of the family) manages the business as part of the ancestral property.

Now, the rights and liabilities of the partners, *inter se* as well as with regard to third persons, are ordinarily determined according to the provisions of chapter V of the Contract Act IX of 1872. Thus, we know that in every ordinary case of partnership, the death of any partner dissolves the partnership. But in the case of ancestral trades under the Hindu law, they do not cease upon the death of any partner. In Ram Lal Thakursidas *v.* Lakmichand Muniram (1861) 1 Bom. H. C. Rep. App. 51, the Court held that an ancestral trade might descend like other heritable property upon the members of a Hindu undivided family and that persons carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family-property and credit for the ordinary purposes of the business. The Court said. "The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the status of the family represented by the manager while dealing with him on the credit of the family-property. Were such a power not implied, property in a family trade which is recognised by Hindu law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned; for no one would deal with a manager, if the minor

Minors bound like adults by manager's transactions in reference to ancestral trade

were to be at liberty on coming of age to challenge, as against third parties, the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest, and the recognition of a trade, as heritable property, renders it necessary for the general benefit of the family that the protection which the Hindu law generally extends to the interests of a minor should be so far trenched upon as to bind him by the acts of the family manager, necessary for the carrying on and consequent preservation of that family-property ; but that infringement is not to be carried beyond the actual necessity of the case." In Johurra Bibee *v.* Sree Gopal Misser (1876) I. L. R., 1 Cal., p. 470, the principles of the above decision were approved, and it was held that a joint family-property acquired and maintained by the profits of a trade is subject to all the liabilities of that trade.

No difference in this respect between Mitakshara and Dayabhaga.

In Bemola Dossee *v.* Mohun Dossee (1880) I. L. R., 5 Cal. 792 ; 6 C. L. R., 34, Sir Richard Couch, C. J., in dismissing the appeal from Justice Wilson's decision, approved of the observations in Ramlal Thakursidas quoted by me above, and said that he saw no difference in respect of the law so laid down between families governed by the law of the Mitakshara and the law of Dayabhaga.

Limit of minor's liability.

In Joykisto Cowar *v.* Nittyanund Nundy (1878), I. L. R., 3 Cal. 738 ; 2 C. L. R. 440, the case in 1 Bom. H. C. Reports was followed as to the manager's power to bind the family, but the learned Chief Justice thought the limit prescribed by sec. 247 of the Contract Act as to the liability of a minor partner was a proper limit. In Samalbhai Nathubhai *v.* Someshvar Mangal (1887), I. L. R., 5 Bom. p. 38, it was held that the rights and

liabilities arising out of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also "with regard to the general rules of Hindu law, which regulate the transactions of united families, and that an ancestral trade may descend like other inheritable property upon the members of a Hindu undivided family. The partnership so created or surviving has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership; nor as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses."

Incidents of partnership not determined solely by Contract Act.

Death of a partner effects no dissolution.

Outgoing partner entitled to share only in existing assets

In this connection, I ought to mention that there is a conflict of opinions as to whether, in a trading concern upon the death of one of the partners, the right of suit would survive to the remaining partners, and it would not be necessary for the heirs of the deceased partner to obtain a certificate of succession. In Gobind Prasad *v.* Chandar Sekhar (1887), I. L. R., 9 All. 486 the Court held that the surviving partners in the absence of the representatives of the deceased partner might carry on a suit for a partnership debt. But in Ramnarain Nursing Doss *v.* Ram Chunder Jankee Loll (1890), I. L. R., 18 Cal. 86, the Judges declined to follow this ruling. A certificate would, however, be necessary in the case of a suit upon a bond given to one of the members of a joint family where, upon the face of the bond it does not appear that the debt is due to the joint family. See Venkataramanna *v.* Venkayya (1890), I. L. R., 14 Mad. 377. Ordinarily upon the death of an undivided coparcener,

Whether succession certificate is necessary upon death of a partner.

the survivors take by survivorship and hence there is no necessity for a succession certificate.

Let us next consider whether a guardian can be appointed by the Civil Court under the Guardian and Wards Act VIII of 1890 in respect of a minor coparcener in an undivided Mitakshara family. In Durga Persad *v.* Kesho Persad Singh (1882), I. L. R., 8 Cal. 656; L. R., 9 I. A., 27; 11 C. L. R., 210, their Lordships of the Privy Council held that the manager of an undivided Mitakshara family, although he might have the power to manage the estate, was not the guardian of the infant co-proprietors of that estate for the purpose of binding them by a bond, or for the purpose of defending suits in respect of money advanced with reference to the estate. Certain observations made by their Lordships in the case might seem to suggest that in their Lordships' opinion an application might be made for certificate under Act XL of 1858, which has been replaced by the Guardian and Wards Act VIII of 1890, in respect of the estate of an infant coparcener. But their Lordships had not to consider the point directly in the case under consideration. On the other hand it has been held by the Calcutta and the Bombay High Court that a certificate cannot be granted by the Civil Courts in respect of the undivided interest of a minor coparcener in a Mitakshara family. See Sheo Nundun Singh *v.* Ghunsam Kooeree (1874), 21 W. R., 143; Aghola Kooeree *v.* Digambur Singh (1875), 23 W.R.,206; Gourah Koeri *v.* Gujadhur Purshad (1879), I.L.R., 5 Cal. 219; 4 C.L.R., 398; Sham Kuar *v.* Mohanunda Sahoy (1891) I. L. R., 19 Cal. 301; Shivji Hasam *v.* Datu Mavji Khoja, (1874) 12 Bom. H.C. Rep., 281; Guracharya *v.* Svamirayacharya (1879) I.L.R., 3 Bom. 431, and Narsingrav Ram Chandra *v.* Venkaji Krishna (1884) I. L. R., 8 Bom., 395.

Certificate cannot be granted to manage the undivided interest of a minor

LECTURE III.

The Law of Alienations of Ancestral Property.

Father's powers of alienation of ancestral movables and immovables alike—Power of alienation of immovable property for legal necessity —of ancestral movables for legal necessity—Father's powers over acquired immovables absolute—Wrong translation of text—self-acquisition thrown into common stock—Father's power over acquired movables—Position of the managing member—Resemblance between Joint family and Partnership Concern—In early days ancestral immovables were alienated for necessity—but undivided shares in them were seldom alienated—Voluntary alienation of a coparcener's interest in joint ancestral property—The law as understood in Bengal—An undivided coparcener's interest in ancestral property not alienable—The law is the same in the N.-W. Provinces—Consideration money or debt made a charge on coparcener's interest when sale or mortgage is declared invalid—Law otherwise in Madras and Bombay—Law as to gifts and devises—Law of compulsory sale of an undivided coparcener's interest same everywhere—Effect of such sale—rights of purchaser to partition—what is the point of time which determines the share of the purchaser—Alienation by the whole body of coparceners—when some of them are minors—growth of the power of alienation—Legal necessity—Circumstances in which one coparcener can alienate family-property—when coparceners are minors—when they are adults—Implied consent of adult coparceners—Sale to avert calamity—to provide husband for daughter or sister—for obsequies of father—for maintenance of family—for preservation of property—for payment of debts due from father or grandfather—Texts providing for payment of debts generally—Vishnu—Narada—Brihaspati—Yajnavalkya—Whether sons are bound to pay their father's debts during his lifetime—Father's debts have to be paid whether the family is benefited or not—The whole ancestral property is liable for father's debts during his lifetime—only such portion to be alienated as is absolutely necessary—Powers of managers —Hunooman Persaud Pandey's case applied to cases of sales by managing members in Mitakshara families—Hunooman Persaud Pandey's case—Enquiry into necessity by lender—*De facto* manager to be held rightful manager—Transfer of Property Act—Voluntary alienations of family-property—what has the purchaser to prove when his purchase is questioned—Onus to prove character of debts—Sons to prove purchaser's knowledge of debts being for immoral purposes—Effect of decision in Suraj Bunsi's case—"Antecedent debt"—Recitals in deeds

no evidence of necessity—Cases where the alienation would not bind the family-property but would be good against the interest of a coparcener —Decree in cases where purchaser is entitled to a coparcener's interest —Sale of properties in execution of decrees—whether interest of judgment debtors only pass—Conflicting decisions—Doubts settled by P. C. decisions—Suits should be against all coparceners—even when the mortgage is executed by one member—Enquiry as to what has been actually purchased—Certificates of sale vague—when sale takes place in execution of mortgage decree—If father be mortgagor whole interest passes unless sons show the debt was immoral—when the debtor is any other member—Sale in money decree—when money decree is against father and purchaser proves purchase of entire property—when money decree is against any other member, purchaser to show he purchased whole and for legal necessity—difference between the positions of an execution purchaser and a purchaser at a private sale according to old decisions—Debt must be shown to have been immoral to alienee's knowledge—When the debt is illegal or immoral, father's share is liable—when debt is immoral, creditor would have no remedy against sons after father's death—Exceptions—if the debt be not immoral or illegal, father's death does not defeat the rights of his creditors against his sons—A private sale failing as to entire interest may be valid as to a coparcener's interest—Difference between the law of Bengal and N.-W. P. and that of Bombay and Madras—After-born sons—Ratification—Equities which arise on setting aside sales—No refund in cases of execution sales—but consideration money must be refunded by plaintiff if he should be otherwise liable for it—Court may declare lien of purchaser on setting aside a sale—Reported cases on the subject of this Lecture do not all seem to be reconcilable.

Father's powers of alienation of ancestral movables and immovables alike.

We have in the preceding Lecture seen that in the case of movables and immovables inherited by a man from his father, grandfather or great-grandfather, his sons and grandsons from the moment of their births become his coparceners. The texts as well as the case-law make no distinction between movables and immovables inherited by the man, in prescribing restraints on his power of alienation and of partitioning them among his sons and grandsons. The reason why in dealing with the subject of alienation, the ancient Hindu lawgivers considered the powers of the father and not of any other member of the joint family, must have suggested

itself to you. The father occupies in a family the position of a superior member, and by restricting *his* powers of alienation they restricted the powers of the members generally. For, what a father, as a coparcener, cannot alienate, any other member cannot also alienate.

I shall consider here the father's powers to alienate ancestral movables and immovables and reserve for a future Lecture, the discussion of his powers to partition. The power to alienate may be discussed under two heads :—(1) in reference to ancestral immovables and (2) in reference to ancestral movables.

Power of alienation of immovable property for legal necessity.

(1) Para. 27* sec. I ch. I, Mitakshara provides that the father has no independent power to dispose of ancestral immovable property. If the commentator had stopped here, neither a father nor any other member of a joint family would have been competent to dispose of, on behalf of himself and others of the family, any immovable property of the family under any circumstances. But an exception is made in the next para.—"Even a single individual may conclude a donation, mortgage or sale of immovable property during season of distress, for the sake of the family, and especially for pious purposes." This is a text of Brihaspati and Vijnaneswara explains it thus in para. 29: "while the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or, while brothers are so and continue unseparated, even one person who is capable may conclude a gift, hypothecation or sale of immovable property, if a cala-

* "Therefore it is a settled point that property in the ancestral estate is by birth although the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty..... but, he is subject to the control of his sons and the rest in respect to the immovable estate."

mity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as, the obsequies of the father or the like, make it unavoidable." Here, it should be observed, the alienation contemplated is the alienation of the interest of the whole family and not of any particular individual. It should also be observed that upon the happening of the contingencies contemplated, not only would the father but *any* member who looks after the family concerns be competent to dispose of the family-property. Nay more, even the Committee of an insane father and head of a joint family would be competent to mortgage, or sell family-property for the benefit of the family. As to the powers of the father or any other member see Luchmun Koer *v.* Madura Lall. S. D. A. N.-W. P. 327; Motee Lall *v.* Mitterjeet Sing (1836), 6 Select Reports p. 71; Sheo Persad Jha *v.* Gungaram Jha (1866), 5 W. R. 221; Kantoo Lall *v.* Greedharee Lall (1868), 9 W. R. 469. Duleep Singh *v.* Sree Kishoon Pandey (1872) 4 N.-W. P. 83; Mittrajit Singh *v.* Raghubansi Singh (1871) 8 B. L. R. Ap. 5; Darsu Pandey *v.* Bikarmajit Lal (1880) I. L. R. 3 All. 125. As to the power of the Committee see Abilakh Bhagat *v.* Bheki Mahto (1895) I. L. R. 22 Cal. 864.

I may here mention that there is no difference of opinion as regards this class of property.

Of ancestral movable property for legal necessity.

(2) The author of the Mitakshara includes movables and immovables under the term "heritage" in ch. I, sec. I, para 2. He, then, without distinguishing the movables from the immovables, says in para. 3, sec. I, ch. I, that the unobstructed heritors or heirs get the unobstructed heritage. It is true that in para. 27, after stating in clear terms that property in ancestral estate (movable and immovable) is by birth, he distinguishes the two kinds of property—ancestral movables and ancestral

immovables—and says, that as regards the former the father has independent power of disposal for certain purposes therein enumerated *i. e.*, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth, whereas as regards the immovables they should not be disposed of by the father without convening his sons. But the difference is very slight and even this is not consistently maintained; for, in paras. 28 and 29 quoted above, the father—nay, any member of the family—has been given the power to alienate any immovable property of the family by sale, gift, or hypothecation, in the same contingencies as those in which he may alienate any movable property; and thus the author quotes, in para. 3 sec. V, ch. I, the text of Yajnavalkya Book II, V. 121, *viz.*, "For the ownership of the father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels which belonged to him." As from the nature of things a greater regard has always been paid to immovables, by fathers in management of family affairs, and in cases of necessity, where ancestral immovables might also have been justly sold, movables were disposed of, an impression has been created that the father's powers over ancestral movables are absolute. But there is no foundation for it in the texts.

You should in this connection note that paras. 27, 28 and 29 sec. 1 ch. I Mit. have reference to an alienation of the family-property, while para. 30 refers to the sale of the undivided interest of a single coparcener.

Let us next examine the case-law.

In Lakshman Dada Naik *v.* Ram Chandra Dada Naik (1876) I. L. R. 1 Bom. p. 561 (see

p. 567) it is said :—"Such are the provisions of the Mitakshara which are similarly stated by Sir Thomas Strange. "Even of *movables,* if descended, such as precious stones, pearls, clothes, &c., &c., any alienation to the prejudice of heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his ; and he has independent power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty and purposes warranted by texts of law ; while the disposal of the land whencesoever derived, must be, in general, subject to their control ; thus in effect leaving him unqualified dominion over personalty acquired." The Mayukha (ch.IV sec.I para. 5) limits the powers of the father even more strictly—"As for this text, 'the father is the master of all gems, pearls and corals : but neither the father nor the grandfather is so of the whole immovable estate', it also means the father's independence only in the wearing and other use of ear-rings, rings, &c., but not as far as gift or other alienation." In Baba *v.* Timma (1883) I. L. R. 7 Mad. 357 a Full Bench of the Madras Court held that a Hindu father while unseparated from his son has no power except for purposes warranted by special texts to make a gift to a stranger of his undivided share in the ancestral estate, *movable or immovable.*

In Jugmohan Das Mangal Das *v.* Sir Mangal Das Nathubhoy (1886) I. L. R. 10 Bom. p. 528, which was a case of compulsory partition at the instance of a son during his father's lifetime and not of alienation, the judges declined to make any distinction between ancestral movables and immovables.

From these texts and cases it seems clear

that the powers of a father to deal with ancestral property are very limited and that his alienations can be supported, only when effected for purposes recognised by the Hindu law, and further that his sons and grandsons, who by birth are his coparceners, can question the legality of his alienations.

Father's power over acquired immovables absolute.

Let us next consider the powers of a father over his acquired property. To begin with the self-acquired immovables: the text of Vyasa on this subject quoted in para. 27 sec. 1, ch. I of the Mitakshara runs in these words:—"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. They who are born and they who are yet unbegotten and they who are still in the womb, require the means of support; no gift or sale should therefore be made." The commentator upon the authority of this text says,—"but he (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.*" If this text and commentary had stood alone, there would not have been any difficulty in interpreting the law, and probably then, the case-law would have placed all immovable property, whether acquired or ancestral, under the same restrictions. But then, there is another commentary in ch. I sec. V, para. 10, and from the earliest times the translation furnished to our administrators of justice has made it run thus—"the son must acquiesce in the father's disposal of his own acquired property." As it runs, it contradicts the commentary as well as the text of Vyasa in para. 27, sec. I, ch. I of the Mitakshara quoted above. But the word which has been translated into "property" really means article or "movable property."

Wrong translation of text.

If the commentary had been correctly translated there would not have been any contradiction.

The civilized ideas of the modern times fit in well with the theory that the acquirer of a property ought to have absolute powers of disposal over it, and, accordingly with the contradiction before them, our courts of law have given the father absolute dominion over his self-acquired immovables.

In Raja Bishen Perkash Narain Singh *v.* Bawa Misser (1873) 12 B. L. R., 430; 20 W. R., 137 the Judicial Committee of the Privy Council held, on the authority of the Vivada Chintamani, that one might give away at his pleasure his self-acquired property to any body and that the father had full power over the property of *his* father which, having been seized, was recovered by his own exertions or over what was gained by him through skill, valour or the like.

In Sital *v.* Madho (1877) I. L. R., 1 All. p.394, Justices Spankie and Oldfield upon a consideration of the texts and case-law held that the father could validly give away his self-acquired immovable property. The same principles were adopted by the Madras High Court in Subbayya *v.* Surayya (1886) I. L. R., 10 Mad. 251. The Bombay High Court in Jugmohan Das Mangal Das *v.* Sir Mangal Das Nathubhoy (1886) I. L. R., 10 Bom. p. 528, speaking of the doubt at one time entertained by the Madras Court as to the right of the father to dispose of his self-acquired property says* :—"But that view is inconsistent with what must now be considered as well settled, *viz.*, that, notwithstanding the language of that section, at any rate as regards the self-acquired property of the father, whether movable or immov-

* P. 578

able, the right of "sons and the rest," which would include grandsons, is an imperfect one, and that the restriction on the father's power of disposal is in the nature of a moral injunction which may affect conscience; but that for all legal purposes as between the father, on the one hand, and the "sons and the rest," on the other, his power is absolute." Of course it is competent to the acquirer of the property to throw it into the common stock with the intention of abandoning all separate claims upon it. In such a case the property would be the joint property of the family. See Krishnaji Mahadev Mahajan *v.* Moro Mahadev Mahajan (1890) I. L. R., 15 Bom., 32.

Self-acquisition thrown into common stock.

The Hindu lawyers, as we have already seen, divide property into movables and immovables. They show a marked anxiety for the immovable property, whether acquired or ancestral. But as regards the movables they seem indifferent. Nor is this without reason. India has all along been an essentially agricultural country. Land has always a special value to its owner, but the movables of the days of our Hindu legislators were hardly of any value. Accordingly we find that sales of lands were enjoined to be made publicly with consent of townsmen, of kinsmen, of neighbours and heirs and by gift of gold and of water (*vide* para. 31, sec. I, ch. I Mitak.). But no such formalities were prescribed for the sale of the movables, and the father has always exercised an absolute power over them. The very text, which we noticed above in the case of acquired immovables as wrongly translated, clearly applies to movables and thus both the texts and the case-law give the father absolute dominion over his acquired movables.

Father's power over acquired movables.

I have here considered the powers of a father over the various classes of property in view of the

fact that the father is the head or managing member of a large number of joint families governed by the Mitakshara law. In families in which the managing member is not the father or the grandfather, the acquirer of property, movable or immovable, has absolute dominion over his acquisitions all the same; and alienations of family property made by the managing member bind the other members, only when such alienations are made in the interest of the family. "The managing member is merely the constituted agent of the family, the chairman of the corporation. By virtue of his appointment, he transacts business with the outside world in the interest of the family and so long as he does not exceed his authority his transactions bind the members." The appointment, generally, is not made under any written instrument. It is oftentimes made in consideration of seniority in age and relationship, and with due regard to business-habits. Of the members, some may be minors and, therefore, incapable of exercising any discretion in the selection of the manager. The appointment, therefore, is often made by some capable member assuming the management with the tacit consent of the other members. And the managing member, once appointed in this manner, continues as long as he actually looks after the affairs of the family, and the other members suffer him to continue. It not unfrequently happens, that when the managing member finds age telling upon him, he gives up the management in favour of some other member.

Position of the managing member.

From what I have above stated let it not be inferred that so long as the managing member looks after the family affairs, the other members cannot have any voice in the internal management. On the contrary, in several families, the

managing member acts in conference with the adult members. Their mode of operation reminds one of the analogy that exists between joint families and partnership concerns. I have elsewhere quoted the language used by Justice Markby in Rangan Mani Dasi* *v.* Kasinath Dutt to contrast a joint family with a partnership concern. I shall now show the points of resemblance between them. In a partnership concern, each partner who does any act necessary for, or usually done in carrying on, the business of the partnership, binds his partners to the same degree, as if he were their agent duly appointed for that purpose. In a joint family too, notwithstanding that the managing member generally looks after the family affairs, yet, should any other member in the interest of the family enter into a transaction with one outside the family circle, such transaction would be binding on the family. And we accordingly find our early lawgiver Brihaspati laying down.—"Even a single individual (meaning any member of the joint family) may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family and especially for pious purposes." From the fact, that our ancient legislators attached greater importance to immovables than to movables, you will see that the subject of restraints on alienations has reference mainly to ancestral immovables. And again you will hardly find any allusion made by our early lawgivers to alienations of the interest of any individual member. Such a contingency, regard being had to their theory that no individual member had any property before partition, was with them an occurrence that could seldom come to pass and accordingly the only rule

Resemblance between joint family and partnership concern.

In early days ancestral immovables were alienated for necessity.

But undivided shares in them were seldom alienated.

* 3 B. L. R., O. C., 1 See p. 79 ante.

provided for is that contained in para. 30 *viz.*, that the interest of an undivided member can only be alienated with the consent of all the members. But, as we shall see presently, the courts of justice have in some localities held sales of individual interest valid, and where they have declared voluntary alienations to be invalid, compulsory sales in execution of decrees have been ruled to be valid. The subject of alienations, therefore, may be conveniently treated under two heads:—(1) the law of voluntary alienations of the undivided interest of a single coparcener in ancestral property including the law of compulsory sale of such interest in execution of decree against such coparcener and (2) the law of voluntary alienations of the entire coparcenary interest in a property by the managing member of the family including the father and also the law of compulsory sale of such interest in execution of decree against such member.

Voluntary alienation of a coparcener's interest in joint ancestral property.

(1) If you will call to mind the words of Lord Westbury in Appoovier *v.* Rama Subha Ayyan (1866) 11 M. I. A. 75; 8 W. R., P. C. 1, already* quoted by me and if you will also recall the discussion † that partition is the origin of property, you will at once perceive that in an undivided Mitakshara family, no member has any definite share in the family-property, and that the shares for the first time arise at a partition. In such a state of things, a purchaser of the inchoate interest of a single member would be entitled (supposing the law allows a private sale of such interest) to such share only as would be allotted to such member at a general partition of the family-property.

The law as to whether under the Mitakshara an undivided member of a joint family in posses-

* Ante p. 18.
† Ante p. 42.

sion of coparcenary property can mortgage or sell his undivided interest in any portion of the family-property is contained in Mit. ch. I, sec. I, para. 30, which runs in these words :— "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is in common," and Sir James Colvile in delivering the judgment of the Judicial Committee in Suraj Bunsi Koer *v.* Sheo Persad Sing (1878) I. L. R. 5, Cal. 148 ; 4 C.L.R. 226 or L.R., 6, I.A. 88 said, "There can be no doubt that all alienations, whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family." But at present the case-law has interpreted the law differently in the different Provinces.

The law as understood in Bengal.

In Bengal, as early as 1823, in Nundram *v.* Kashee Pande (reported in 3 Select Reports p. 232) the question was put to the Law Officers of the Court, whether it was lawful under the Mithila law for one of several undivided coparceners to transfer his share by sale or gift, and the Pundits referring to the Mitakshara (which in this respect is the same as the Mithila law) replied that a gift even to the extent of the donor's share was not valid and that before partition no member had any property to sell or give away. The Court acted upon this answer.

The law laid down in the above case was followed in 1826 in Sheo Surrun Misser *v.* Sheo Sohai reported in 4 Select Reports p. 158, in 1832 in the case of Jivan Lall Sing *v.* Ram Govind Sing reported in 5 Select Reports p. 163, in 1837 in the case of Sheo Churn *v.* Jummun Lal reported in 6 Sel. Rep. p. 176, in 1853 in Mussummat Roopna *v.* Ray Reotee Rumeen roported in S. D. A. Rep. Bengal p. 344 and in 1865

An undivided coparcener's interest in ancestral property not alienable.

in Cosserat *v.* Sudaburt Pershad Sahoo 3 W. R. 210.

In Sadabart Prasad Sahu *v.* Foolbash Koer (1869) 3 B. L. R., F. B. p. 31; 12 W. R., F. B. 1 a Full Bench of the Calcutta High Court, upon a consideration of the original texts and decided cases, came to the conclusion that a member of a joint Hindu family governed by the Mitakshara Law had no authority to mortgage his undivided share in a portion of the ancestral joint-family property in order to raise money on his own account and not for the benefit of the family. It was brought to the notice of the Court that the law in the N.-W. Provinces was to the same effect, but that it was different in the other Presidencies. The Chief Justice Sir Barnes Peacock, in delivering the judgment of the Full Court, observed :—"The decisions founded on the doctrine of the schools of southern India and of Bombay, though entitled to great weight are not sufficient to justify this Court in a case governed by the Mitakshara law in overruling a long series of decisions expressly founded upon that law." And again "In that case (Appoovier *v.* Rama Subba Ayyan) their Lordships stated that they would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; and we must, I think be guided by the same principle." The Full Bench based their judgment upon Mitak. ch. I, sec. I, V. 30 which * has been already quoted. Sir Barnes Peacock, C. J., added "According to the law of England, if there be two joint-tenants, a severance is effected by one of them conveying his share to a stranger, as well as by partition; but joint-tenants under the English

* Ante p. 111.

law are in a very different position from members of a joint Hindu family under the Mitakshara law; for instance, if a Hindu family consist of a father and three sons, any one of the sons has a right to compel a partition of the joint ancestral property (Mit. ch. I sec. 5, V. 8); but upon partition during the lifetime of the father, his wives are entitled to shares; and if partition is made after the death of the father, his widows are entitled to shares, and daughters are entitled to participate;—(Mitakshara ch. VII). If partition be made during the lifetime of the father, and another brother is afterwards born, that brother alone will be entitled to succeed to the share allotted to the father upon partition, (Mitakshara ch. I, sec. 6); but so long as the family remains joint, and separation has not been effected either by partition or by agreement, such as that recognised in the case above cited from the Privy Council, every son who is born becomes, upon his birth, entitled to an interest in the undivided ancestral property. In such a case, neither the father nor any of the sons can at any particular moment, say what share he will be entitled to when partition takes place.

"The shares to which the members of a joint family would be entitled on partition are constantly varying by births, deaths, marriages, &c., and the principle of the Mitakshara Law seems to be that, no sharer, before partition, can, without the assent of all the co-sharers, determine the joint character of the property by conveying away his share. If he could do so, he would have the power by his own will, without resorting to partition, the only means known to the law for that purpose, to exclude from participation in the portion conveyed away those who by subsequent birth, would become members of the joint family, and entitled to shares upon partition."

This case of Sadabart's was appealed to the Privy Council (*vide* Phoolbas Koonwar *v.* Lalla Jogeshur Sahoy (1876) I. L. R., 1 Cal. p. 226),* but Sir James Colvile in delivering the judgment said (see p. 248): "Their Lordships abstain from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point (the question of alienation by a single undivided member of his individual interest) referred to them, a question which, the appeal coming on *exparte,* could not be fully or properly argued before them."

In Deen Dyal Lal *v.* Jugdeep Narain Singh (1877) I. L. R., 3 Cal. 198† (p. 208) their Lordships are reported to have said "They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in Sadabart's case as to voluntary alienations."

In Suraj Bunsi Koer *v.* Sheo Persad Singh (1878) I. L. R., 5 Cal. 148; 4 C. L. R., 226; L. R., 6 I. A., 88, Sir J. Colvile, in delivering the judgment of the Judicial Committee, said: "There can be little doubt that all alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. See 1 Strange Hindu Law, first Edition p. 179 and App., Vol. II, pp. 277 and 282.

"In Bengal, however, the law which prevails in the other Presidencies as regards alienation by

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* L. R., 3 I. A., 7 or 25 W. R., 285.
† L. R., 4 I. A., 247 or 1 C. L. R. 49.

private deed has not yet been adopted. In a leading case on the subject, that of Sadabart Prasad Sahu *v.* Foolbash Koer (3 B. L. R., F. B., 31) the law was carefully reviewed, and the Court, refusing to follow the Madras and Bombay decisions, held that, according to the Mitakshara law as received in the Presidency of Fort William, one coparcener had not authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family estate in order to raise money on his own account, and not for the benefit of the family."

The ruling in Sadabart's case, thus approved of by the Privy Council in Suraj Bunsi's appeal, has been the leading authority in Bengal as regards voluntary alienations. The principle of these decisions was subsequently again acted upon by the Privy Council in 1890 in the case of Madho Parshad *v.* Mehrban Singh (1890) I. L. R., 18 Cal. 157. The principle is that no single member, in an undivided family, governed by the Mi akshara, can mortgage or voluntarily sell his interest in the family property for his own purposes and not for the benefit of the family.

Same in the N.-W. P.

In the North-Western Provinces the law is the same as in Bengal in reference to alienations of a coparcener's interest. The earliest case on the point is Jey Narain Singh *v.* Roshun Singh, S. D. A., N.-W. P., Vol. I. (1860) p. 162. The principle laid down in this case was adopted in 1864 in Byjnath Singh *v.* Rameshur Dyal S. D. A., N.-W. P. 1864 Vol. I. p. 299. In Chamailikuar *v.* Ram Prasad (1879) I. L. R., 2 All. 267 a majority of the Full Bench of the Allahabad High Court, upon a consideration of the texts of Hindu law and all the earlier decisions on the point, adopted the principle laid down by the Calcutta Court in Sadabart's case. Justice Oldfield, one of the Judges in the Full Bench is

reported to have said (on p. 273): "I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest."

The principle laid down in the above case was followed in Ramanand Singh *v.* Gobind Singh (1883) I. L. R. 5, All. 384. The law of voluntary alienations in Bengal and the N.-W. Provinces would thus prohibit an undivided coparcener from making a valid alienation of his undivided interest.

But from this it does not follow that a Court of equity would be bound unconditionally to declare a mortgage or a sale of an undivided coparcener's interest invalid, so as to allow the coparcener, (mortgagor, or vendor) to profit by his own wrong.

Consideration money or debt made a charge on coparcener's interest when sale or mortgage declared invalid.

Thus in Mahabeer Persad *v.* Ramyad Sing (1873) 12 B. L. R., 90; 20 W. R. 192, Justice Phear, in setting aside a mortgage of an undivided coparcener's interest, declared that the property was to be thenceforth held in defined shares, and that the lien of the mortgage money would attach to the mortgagor's share. This decision of the High Court was quoted with approbation by the Privy Council in Madho Parsad *v.* Mehrban Sing (1890) I. L. R. 18, Cal. 157.

Law in Bombay and Madras Presidencies.

In Bombay and Madras the law has always been otherwise. There a mortgage as well as a sale for value of the interest of one undivided member has always been held to be valid. The Bombay cases which may be referred to on the point are Damodhar Vithal Khare *v.* Damodhar Hari Soman (1864) 1 Bom. H. C. R. 182; Pandurang Anandrav *v.* Bhaskar Shadashiv (1874) 11 Bom. H. C. Rep. 72; Udaram Sitaram *v.* Ranu Panduji (1875) 11 Bom. H. C. R. 76; Vasudev Bhat *v.* Venkatesh Sanbhav (1873) 10 Bom. H. C. Rep. 139 and Fakir Apa *v.* Chanapa *ibid.* 162.

All these cases were referred to by the Privy

Council in Suraj Bunsi Koer *v.* Sheo Persad Singh I. L. R. 5, Cal. 148 as establishing the uniform practice followed in Bombay. In Vasudev Bhat *v.* Venkatesh, Westropp, C.J., is reported to have* said: "On the principle *Stare decisis*, which induced Sir Barnes Peacock and his colleagues strictly to adhere to the anti-alienation doctrine of the Mitakshara in the Provinces subject to their jurisdiction where the authority of that treatise prevails, we at this side of India find ourselves compelled to depart from that doctrine, so far as it denies the right of a Hindu parcener, for valuable consideration, to sell, incumber, or otherwise alien his share in undivided family property....Were we to hold otherwise, we should undermine many titles, which rest upon the course of decision, that, for a long period of time, the Courts at this side of India have steadily taken. Stability of decision is, in our estimation, of far greater importance than a deviation from the special doctrine of the Mitakshara upon the right of alienation."

Law as to mortgage in Bombay.

The case of Rangayana Shrinivasappa *v.* Ganapabhatta (1891), I. L. R. 15, Bom., 673 was one of mortgage by a coparcener and the mortgage was held good in respect of the coparcener's interest after his death.

The Madras cases which may be referred to as establishing the practice of one undivided coparcener validly alienating by mortgage or conveyance his interest in joint ancestral property are Virasvami Gramini *v.* Ayyasvami Gramini (1863) 1 Mad. H. C. R. 471; Peddamuthulaty *v.* Timma Reddy (1864) 2 Mad. H. C. R. 270; Palanivelappa Kaundan *v.* Mannaru Naikan (1865) 2 Mad. H. C. R. 416; J. Rayacharlu *v.* J. V. Venkataramaniah (1868) 4 Mad. H. C. R. 60.

* P. 160.

The case in 1 Mad. H. C. Reports is considered the leading case on the point in Madras.

As to gifts and devises.

As to gifts and devises, the Madras Court at one time held that they were valid even in respect of an undivided coparcener's interest (see the case of Vencatapathy *v.* Luchmee 6 Mad. Jurist p. 215). Probably this was the case which Sir "James Colvile had in view when his Lordship in Suraj Bunsi's case said: "The Madras Courts seem to have gone so far as to recognize an alienation by gift." But later decisions show that gifts as well as devises are held invalid, see Baba *v.* Timma (1883) I. L. R. 7 Mad. 357; Ponnusami *v.* Thatha (1886) I. L. R. 9 Mad. 273; Ramanna *v.* Venkata (1888) I. L. R. 11 Mad. 246; Virayya *v.* Hanumanta (1890) I. L. R. 14 Madras 459 and Rathnam *v.* Siva Subramania (1892) I. L. R 16 Mad. 353. In Vitla Butten *v.* Yamenamma (1874) 8 Mad. H. C. Rep. p. 6, it was held that a devise by an undivided coparcener of his interest was invalid. This judgment was approved by the Privy Council in Lakshman Dadanaik *v.* Ram Chandra Dadanaik (1880) I. L. R. 5 Bom. 48; L. R. 7 I. A. 181, 7 C. L. R. 320.

In Bombay the law as to gifts and devises is the same as in Madras. *Vide* Vrandavan Das Ram Das *v.* Yamuna Bai 12 Bom. H. C. Rep. 229 referred to by the P. C. in Suraj Bunsi's case. See also Lakshmishankur *v.* Vaijanath (1881) I. L. R. 6 Bom. 24.

Law of compulsory sale of an undivided coparcener's interest everywhere the same.

But though the law as to voluntary alienation of coparcenary interest by a single member is not the same in all the Provinces, that as to compulsory alienation has always been the same *viz.*, that the undivided interest of a member may be attached and sold in execution of decree. Indeed Sir Barnes Peacock, C. J., in delivering the judgment of the Full Court in Sadabart Prasad's case

referring to the question as to whether an undivided interest of a coparcener could be seized and sold in execution of decree, said: "It is unnecessary for us to decide whether, under a decree against Bhugwan, in his lifetime, his share of the property might have been seized, for that case has not arisen. According to a decision in Stokes' Reports, it might have been seized."

In Deendyal Lal *v.* Jugdeep Narain Sing (1877) I. L. R. 3 Cal. 198; L.R. 4, I. A. 247; 1 C.L.R. 49, which is the leading case on the subject of sales of the interest of an undivided coparcener in execution of decree, Sir James Colvile, after expressing his opinion as to voluntary sales observed: "But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

"It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the particular *status* and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place." Their Lordships added

that on this point they saw no distinction between a sale in execution of a simple money decree and a sale in execution of a mortgage decree.

In Suraj Bunsi Koer *v.* Sheo Persad Sing (1878) I.L.R.5 Cal. 148, see p.167 their Lordships referring to the question of execution sales of the undivided interest of single members said—"That question must now be taken to have been set at rest by the recent decision of this tribunal in Deendyal Lal *v.* Jugdeep Narain Sing, by which the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt, does acquire his share in such property with the power of ascertaining and realizing it by a partition."

Right of purchaser to partition.

The purchaser of the rights of an individual member must sue for partition of the whole family-property, making all the parties interested, parties to the suit. He cannot sue for partial partition of only the property in which he is interested; *vide* Radha Churn Dass *v.* Kripa Sindhu Dass (1879) 4 C. L. R. 428; I. L. R. 5 Cal. p. 474. For, in such a case he merely acquires the right of one coparcener to demand a partition.*

What is the point of time which determines the share of the purchaser.

Another question that frequently arises is, what is the point of time in reference to which the division is to be made, whether the state of the family at the date of the purchase or that at the date of actual partition is to be considered in effecting the partition. The authorities are unanimous in holding that the state of the family at the actual separation is to determine the shares.

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* *Vide* the cases of Chinna Sanyasi *v.* Suriya 1882 I. L. R. 5. Mad. 196. Venkatarama *v.* Meera Labai 1889 I. L. R. 13 Mad. 275; Hasmat Rai *v.* Sunder Das 1885 I. L. R. 11 Cal. 396 and Pandurang Anandrav *v.* Bhaskar Shadashia (1874) 11 Bom. H.C. Rep. 72.

See Rangasami *v.* Krishnayyan (1890) I. L. R. 14, Mad. 408 and the cases therein cited, also, Hardi Narain Sahu *v.* Ruder Perkash Misser (1883) I. L. R. 10, Cal. 626; L. R. 11, I. A. 26.

Alienation by the whole body of coparceners.

(2.) Before considering the effect of alienation of entire coparcenary interest at the instance of a single coparcener it should be observed that the whole body of coparceners can jointly convey a valid title by gift, mortgage or sale. In such cases the purchaser, mortgagee or donee need not make any enquiry as to the existence of legal necessity, and the transfer would hold good for whatever purposes it may be made. The after-born coparceners would not be competent to question the validity of the transfer.

When some coparceners are minors.

If any of the members be minor, he may be represented by the managing member of the family, and in that case the alienation must be for the benefit of the minor.

Growth of power of alienation.

In the earliest times, of which we have any record, transfer of any kind was unknown. As time advanced, the first concession made to an owner of property to exercise his power of transfer was by declaring him competent to make gifts to pious Brahmins for pious purposes, and the practice of transferring property by sale gradually grew up in more recent times. Wills are unknown to the Hindu law, and it is only in modern times that following the practice of Western nations, Hindus have commenced to execute wills. The law with regard to wills is mainly the Hindu law of gifts. Mortgages have been known to the Hindus from the ancient times. So the various kinds of transfer contemplated by our early lawgivers are sales, gifts and mortgages, and we find that all of them are provided for in Mitak. ch. I, sec. I, para. 28, which forms the groundwork of all the law on the subject.

Vijnaneswara explains this para. in these words :—"While the sons and grandsons are minors and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary or indispensable duties, such as, the obsequies of the father or the like, make it unavoidable." This commentary contemplates both classes of families ; those in which the father is the managing member, as well as those in which an elder brother or any other coparcener is the manager. The force of the word "even" in "even one person" is clearly to counteract the earlier injunction in para. 27 that the sale, gift or mortgage should be made by the father upon convening all the sons.

Legal necessity.

The purposes for which the entire coparcenary interest may be transferred are technically termed "legal necessity." To us in modern times, though sales and mortgages seem necessary in the management of the family affairs, gifts appear as incapable of being turned into any useful purpose. But as to gifts of land, the Brahma Vaivarta Purana says "Both he who accepts lands and he who gives it are performers of a holy deed and shall go to a region of bliss." See Raghunath Prasad *v.* Gobind Prasad (1885) I. L. R. 8, All. 76.

Circumstances in which one coparcener can alienate family-property.

We have seen that, confining ourselves to the texts (and they are paras. 28 and 29, sec. I, ch. I of the Mitak.) the only instance where one person can alienate coparcenary property belonging to himself and others is, where the other coparceners are minors and therefore "incapable of giving their

consent to a gift and the like." As regards adult members the texts suggest that they must either join in the alienation or give their consent to it. Now, consent may be given either by express words or by implication. Thus, when the adult members of a family constitute one of themselves as manager to transact the family affairs, it is only natural and reasonable to infer the consent of them all to whatever the managing member does. In such circumstances the liability of the adults would be more complete than that of the minor members. For, whereas a minor cannot be bound by a managing member's acts unless done with the object of benefiting such minor, or, a number of persons of whom the minor is one, an adult member would be bound by such acts unless they were done in excess of the powers conferred, expressly or impliedly, on the managing member. If the acts are for the benefit of an adult his consent would be implied. But in other cases too, where his consent can *reasonably* be implied, he would be bound. Thus in Miller *v.* Runganath Moulick (1885) I. L. R. 12, Cal. 389, Justice Mitter after considering various cases said : "The result of these cases, in our opinion, is that an alienation, made by a managing member of a joint family, cannot be binding upon his adult co-sharers unless it is shewn that it was made with their consent, either expressed or implied. In cases of implied consent, it is not necessary to prove its existence with reference to a particular instance of alienation. A general consent of this nature may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family. The latter, in entrusting the management of the family affairs to the hands of the manager must be presumed to

When other coparceners are minors.

When they are adults.

Implied consent of adult coparceners.

have delegated to the said manager the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them, and obtain their consent before pledging such credit or estate." It may be said that this was a case under the Dayabhaga law, according to which the members of a joint family have their shares defined even before partition, and under which the principles of survivorship have no place except in the case of some female heirs. But if the principles I have above enunciated apply to a Dayabhaga family, *a fortiori* they apply to a Mitakshara family. In Chhotiram *v.* Narayan Das (1887) I. L. R. 11, Bom. 605, Sargent, C.J., after considering the above observations of Justice Mitter in Miller *v.* Runga Nath I. L. R. 12, Cal. 389, and the remarks of the same learned Judge in Upooroop Tewary *v.* Lalla Bandhjee Suhay (1881) I. L. R., 6 Cal. p. 749; 8 C. L. R., 192 said: "This leaves the question to depend mainly upon the urgency of the necessity and the inconvenience in obtaining the consent of the adult members"; and again, "These authorities show that no hard and fast rule can be laid down, but that in each case the conclusion as to consent of the adult member must depend upon its own special circumstances."

Let us now consider some cases of necessity which under the law would authorize the managing member to alienate ancestral immovable property.

Sale to avert calamity.

The commentaries provide that a sale of ancestral property may be effected to avert a calamity affecting the whole family. Suppose, a father, on account of a debt which is not legally payable by the sons, and which therefore cannot be realized from the ancestral property, is in the immi-

nent danger of being taken to jail. The incarceration of the father would be a calamity affecting the whole family, and I think a sale of ancestral property to prevent the calamity would be allowable in the special circumstances of the case. See Duleep Singh *v.* Sreekishoon Pandey (1872) 4 N.-W. 83.

To provide husband for daughter and sister.

Similarly it is the indispensable duty of a father to provide a suitable bridegroom for his daughter, and after the father's death the duty devolves upon the brothers. Now the expenses of a marriage in these days are proverbially enormous and sales of ancestral property are generally made to meet such expenses. Such sales would be justifiable on the ground of necessity.

Obsequies of father.

Obsequies of the father and of the grandfather must be performed on a scale suitable to the position of the sons and grandsons, and for the defraying of such expenses, the law authorizes a single member to sell a portion of ancestral property during the minority of the other coparceners.

Maintenance of family.

A sale of ancestral property may also be needed for the maintenance of the family. In several families, their incomes from all sources are just sufficient to enable them to live from hand to mouth in ordinary years. In years of famine, therefore when the prices of food-grains rise considerably high, the managing members are obliged to sell portions of ancestral property to defray the expenses of maintenance.

Preservation of properties.

Then again, expenses have to the incurred for the preservation of properties. Thus a portion of ancestral property may have to be sold in order to meet the expenses of repairing a dilapidated building which yields a large income. So also, as you know, Government revenue has to be paid for certain kinds of property, and unless it is punctually paid the properties are brought

under the hammer. A family possessed of such revenue-paying properties may find it necessary in its own interest to part with a portion of its ancestral property in order to protect from sale its revenue-paying properties (See Maheshpertap Singh *v.* Ramghurreed Chowbee (1857) (Sel. Reports N.-W. P., 173; 1 Ratt. Rep. 239).

Payment of debts due from father or grandfather.

These are some of the many legal necessities for which a managing member may justly alienate any portion of ancestral property by mortgage or sale. But by far the largest number of such necessities owe their origin to those precepts of Hindu law, which declare the payment of a father's and grandfather's debts, save such as are of an immoral nature, to be a pious duty of his sons and grandsons.

At one time it was a question, whether the obligation of the sons and grandsons existed while the father or grandfather was alive, but now it is settled that even when the father or grandfather is alive, it is the pious duty of the sons and grandsons to pay the debts. The result is that for the father's debts, the father, sons and grandsons—all the coparceners—are liable and the family-property consequently may be used to meet these debts.

Texts providing for payment of debts generally.

As by far the largest number of alienations of ancestral property are sought to be justified on the ground of the sons' liability to pay their father's debts, let us at the risk of a digression pause here to consider the texts and case-law on the subject.

Vishnu.

Vishnu VI, "27. If he who contracted the debt should die or become a religious ascetic or remain abroad for 20 years, that debt shall be discharged by the sons or grandsons.

"28. But not by remoter descendants against their will.

"29. He who takes the assets of a man, having or not having such issue, must pay the sum due by him.

"33. Nor (should) a father (be compelled) to pay the debt of his son.

"39. And so must he (the householder) pay that debt which was contracted by any person for the behoof of the family."

Narada. Narada I, "2. The father being dead it is incumbent on the sons to pay his debt, each according to his share of the inheritance in case they are divided in interests, or if they are not divided in interests the debt must be discharged by that son who becomes manager of the family estate.

"3. That debt which has been contracted by an undivided paternal uncle, brother or mother, for the benefit of the household must be discharged wholly by the heirs.

"4. If a debt has been legitimately inherited by the sons and left unpaid by them, such debt of the grandfather must be discharged by his grandsons. The liability for it does not include the fourth in descent.

"5. Fathers wish to have sons on their own account thinking in their minds he will release me from all obligations towards superior and inferior being.

"10. A father must not pay the debt of his son but a son must pay a debt contracted by his father excepting those debts which have been contracted from love, anger, for spirituous liquor, games or bailments.

"11. Such debts of a son as have been contracted by him by his father's order or for the maintenance of the family or in a precarious situation must be paid by the father.

"15. Every single coparcener is liable for the debts contracted by another coparcener if they

were contracted while the coparceners were alive and unseparated. But after their death the son of one is not bound to pay the debt of another."

Brihaspati.

Brihaspati XI, "47. A loan shall be restored on demand if no time has been fixed for its restoration, or on the expiration of the time (if a definite period has been fixed): or when interest ceases on becoming equal to the principal. If the father is no longer alive the debt must be paid by his sons.

"48. The father's debt must be paid first of all, and after that a man's own debt; but a debt contracted by the paternal grandfather must always be paid before these two even.

"49. That the father's debt on being proved must be paid by the sons as if it were their own; the grandfather's debt must be paid by his son's sons without interest; but the son of a grandson need not pay it at all.

"50. When a debt has been incurred for the benefit of the household by an uncle, brother, son, wife, slave, pupil or dependant it must be paid by the family.

"51. Sons shall not be made to pay a debt incurred by their father for spirituous liquor, for losses at play, for idle gifts, for promises made under the influence of love or wrath or for suretyship nor the balance of a fine or toll (liquidated in part by their father)."

Yajnavalkya.

Mitakshara Vyavaharadhyay ch. VI, sec. III, para. 5, "That the debt shall be paid by the son and the grandson will be expounded hereafter. But the exceptions are declared beforehand 'A son is not bound to pay, in this world, his father's debts if they are incurred for the spirituous liquor or for gratification of lust or in gambling, nor is he bound to pay any unpaid fines or tolls; or idle gifts.'"

Para. 13. "Again the author resumes the three subjects *viz.*, what debt should be paid, by whom they are to be paid and when. "If a father has gone abroad or died or is subdued by calamity, his debt shall be paid by his sons and grandsons; on their denial the debt must be proved by witnesses.

14. "If the father, without paying a debt which is due, dies or goes to a distant country or is afflicted with an incurable disease, &c., then his debt must be paid by his son and grandson by reason of their sonship and grandsonship, even if no assets of the father or of the grandfather have been left." * * *

Whether sons are bound to pay their father's debts during his lifetime.

From these texts it was at one time inferred, that so long as the father was alive, he was bound to pay his own debts, and that the obligation of the son to pay his father's debts arose upon the death of the father. But if we carefully read the texts together, we ought to infer that though so long as the father is alive, he is bound to pay his debts, the obligation of the sons to pay them during the same time is none the less. Narada states the periods when debts of different kinds become due; and the law that the father's debts should be paid at the father's death implies that even if the debts be not due at the father's death, whenever that event may happen, they must be then paid; for, otherwise according to Hindu ideas, the father would be consigned to hell. To conclude that a son is not bound to pay his father's debts during the latter's lifetime would be inconsistent with the texts which declare that a father longs for a son because such son would release him from all obligations. I have not seen this construction adopted by any of the writers, but I venture to give the texts this interpretation because of the total absence of any injunction not

to pay these debts during the father's lifetime. If the Rishis had any such idea they would not have failed to give expression to it, as they have done when they did not wish that the father should be under any obligation to pay his son's debts. Besides, it is no argument against this present construction to say that a father should pay his own debts. There is nothing absurd in the injunction that two persons should be primarily liable for the same debt.

Father's debts have to be paid whether the family is benefited or not.

I have quoted above, not only the texts which bear on the question of father's debts, but also texts which treat of debts contracted by other persons, to show the distinction made between them by our holy legislators. Father's debts have to be paid whether the family is benefited by them or not, but the case is otherwise with the debts contracted by* other members of the family. It is only those debts which the father incurs for spirituous liquor &c. that the son is not bound to pay.

Let us now examine the case-law on the subject.

1. In Hunooman Persaud Pandey *v.* Munraj Koonweree (1856) 6 M. I. A., 393; 18 W. R. 81 note, Lord Justice Knight Bruce is reported to have said: "Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th volume of the decisions of the Sudder Dewany Adalut N.-W. P. incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's

* Ante p. 128. Brihaspati XI. 50.

debt, has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

2. In Junnuk Kishore Koonwar *v.* Roghoo Nundun Sing, Bengal Sudder Dewany Adalut Reports of 1861 it is said (p. 222): "Freedom on the part of the son, so far as regards ancestral property from the obligation to discharge the father's debts under Hindu law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred."

3. In Muddun Thakoor *v.* Kantoo Lall, and in Gridharee Lall *v.* Kantoo Lall and others (1874) 22 W. R., 56; 14 B. L. R., 187; L. R., 1, I. A. 321, Sir James Colvile quoted with approbation from Hunooman Persaud Pandey *v.* Mussamat Babooee Munraj Koonweree (6 M. I. A. 393) and said: "That is an authority to show that ancestral property, which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts."

This case has been followed by a long series of cases. Under the authorities, the whole of the ancestral properties in the hands of the sons and grandsons, would be liable for such debts. Chief Justice Westropp in the case of Udaram Sitaram Ranu *v.* Panduji (1875) 11 Bom. H. C. Rep., 76 is reported to have said: "Subject to certain limited exceptions, as for instance, debts contracted for immoral or illegal purposes, the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the

The whole ancestral property is liable for the father's debts during his lifetime.

debts of the father and grandfather. Accordingly when ancestral property has passed out of the family either under a conveyance executed by the 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 latter'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 of a kind for which they would not have been liable, and that the purchasers had notice to that effect; and a purchaser at an execution sale being a stranger to the suit without such notice is not bound to make enquiry beyond what appears on the surface of the proceedings." This observation of the Chief Justice was quoted with approbation by their Lordships of the Privy Council in Suraj Bunsi Koer *v.* Sheo Persad Sing (1878) I. L. R. 5, Cal. p. 148 (169); L. R. 6, I. A., 88; 4 C. L. R., 226.

At one time the obligation of the son to pay his father's debts was held not to arise until after the father's death. But in Muddun Thakoor *v.* Kantoo Lall already referred to, their Lordships of the Privy Council held that ancestral property was liable even during the father's lifetime.

In Laljee Sahoy *v.* Fakeer Chand (1880) I. L. R. 6, Cal. p. 135; 7, C. L. R., 97, Justice Pontifex observed: "No doubt, previously to the Privy Council judgment, it was considered that the pious duty of paying the father's debts did not arise until after his decease. This resulted from what appears to have been considered by the Privy Council a too literal interpretation of the texts which applied to the subject, and which for convenience' sake, may be referred to as to a great extent collected in ch. V, sec. IV of the Mayukha. But by the decisions of the

Privy Council it has now been established, 'that it is a pious duty of the son to pay his father s debts out of the ancestral estate even in the father's lifetime." To the same effect are the observations of Justice Pigot in Khalilul Rahman *v.* Gobind Pershad (1892) I. L. R. 20, Cal. p. 328. That learned judge observed: "It is also now established that a decree for the personal debt of the father, not illegal or immoral, may be enforced by sale in execution in his lifetime of the entire joint family estate.—Meenakshi Naidu *v.* Immudi Kanaka (L. R. 16, I. A. 1; I. L. R. 12, Mad. 142. This is one of the advances lately made on the older law, which made the son's shares liable in respect of the pious duty to pay the father's debts, after his natural or civil death."

The result is that a valid alienation of ancestral property may be effected by the managing member whenever it may be necessary to raise money in order to avert a calamity affecting the whole family, to meet the expenses of maintenance, to provide suitable bridegrooms for daughters or sisters, to perform *shrads*, to pay ancestor's debts save such as are immoral, &c. &c.

Only such portion to be alienated as is absolutely necessary.

In this connection it should be observed that it is not always easy to alienate only such portion of the ancestral property as is *just* sufficient for a necessity. Accordingly in Luchmeedhur Singh *v.* Ekbal Ali (1867) 8 W. R., 75 it was held that the rule that only so much of the property should be sold as would meet the necessity did not apply to cases where the excess was small, or, where the money really required could not be otherwise raised.

But though a managing member is competent to mortgage, sell or even to give away coparcenary property in the interest of the family, it is not within his power to dispose of any property

for any other purpose. The other members of the family have a right to see that family-property is not frittered away at the whims of the manager and accordingly they have a right to question the title of the mortgagee, purchaser, or, donee when he derives his title from the managing member. Hence arises the necessity of considering the powers of managers.

Powers of managers.

The leading case on this subject is that of Hunooman Persaud Pandey *v.* Mussamat Babooee Munraj Koonweree 6 M.I.A., 393. That was the case of a mother acting as guardian of her infant son. But the observations made in the case by their Lordships of the Privy Council have been held applicable to all cases of management under the Mitakshara Law *vide* Soorendro Pershad Dobey *v.* Nundun Misser (1874) 21 W. R., 196; Tandavaraya Mudali *v.* Valli Ammal (1863) 1 Mad. H. C. Rep., 398; and Bemola Dossee *v.* Mohun Dossee (1880) I. L. R. 5, Cal. 792; 6 C. L. R. 34, where Justice Wilson is reported to have said: "It follows, I think, upon principle that the managing members of the family must have the same power to pledge the credit or property of the family, for the maintenance of the business as for the preservation of any other piece of property, that is to say, they must be able to do so when a sufficient case of necessity for the benefit of the estate arises; Hunooman Persaud Pandey *v.* Babooee Munraj Koonwaree and the authorities there cited are to the same effect."

Hunooman Persaud Pandey's case applied to cases of sales by managing members in Mitakshara families.

Allow me now to read to you certain passages from the judgment of Lord Justice Knight Bruce in the case of Hunooman Persaud Pandey. "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the bene-

Hunooman Persaud Pandey's case

fit of the estate. But where in the particular instance the charge is one that a prudent owner could make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor, against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt can not be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the

Enquiry into necessity by lender.

management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." One of the contentions in the case was, that the manager was not rightly appointed, and that the mortgagee, therefore, did not acquire a valid title by his mortgage from the *de facto* but not *de jure* manager. Their Lordships referring to this contention said: "Upon the third point, it is to be observed that, under the Hindu law, the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title."

De facto manager to be held rightful manager.

This case has been the leading case on all the above mentioned points for 40 years. It requires the purchaser or the mortgagee to establish the factum of the necessity for which the sale or the mortgage is effected. It requires him to prove the factum of the advance of money, either as loan or consideration for the purchase. If he was deceived as to the actual existence of the necessity, it requires him to show that he made *bona fide* enquiry on the point and was satisfied of the existence of the necessity. It does not require him to enquire if the necessity might have been avoided, or prevented from arising, by better management. It does not require him to look to the application of the money paid by him to the avowed object for which the sale or the mortgage is sought.

In this connection it is important to note the provisions of sec. 38 of the Transfer of Property

Act. The section simply embodies, in a concise form the result of the rulings that we have just discussed, and though the Act itself is not in force in several parts of India, the principle contained in the section applies everywhere. It runs thus : "Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer, on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Transfer of Property Act.

Illustration. A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed."

Illustration. A, a Hindu widow &c.

In cases of mortgage, gift and private sale, the instruments executed are often precise in their terms, as to the property intended to be mortgaged, given, or sold. Indeed, under the Hindu law, as you have elsewhere learnt, a gift cannot be complete without the donee being put into possession of the property. No question, therefore, arises in such cases as to whether the mortgagee, purchaser or donee intended to bargain for the entire coparcenary interest, or a fractional part thereof.

Voluntary alienations of family-property.

Of course, it would be open to the members

What has the purchaser to prove when his purchase is questioned.

other than the executants to question the *bona fides* of the mortgages, sales or gifts, but in these cases the mortgagees, purchasers, or donees must prove the factum of the mortgages, sales, or gifts, as well as the existence of legal necessity, or, if they were deceived as to the real necessity, that they made reasonable enquiry and were satisfied upon such enquiry of the existence of the alleged necessity.

Onus to prove character of debts.

When a mortgage or a sale of an entire family-property is effected by the managing member in order to pay off an antecedent debt of the father, (and you must remember that the father himself as the managing member can also do this), a question frequently arises as to who has to prove the character of the debts,—whether the sons seeking to avoid the alienation have to show that the debts were of an immoral nature, or, the alienee, that they were not so. It is now settled by a long course of decisions that the person impeaching the debt has to show that it was immoral, and in the absence of any evidence on the point, the debt must be presumed to be of a character binding on the heirs. In Hunooman Persaud Pandey *v.* Mussamat Babooee Munraj Koonweree (1856) 6 M. I. A., 393 ; 18 W. R., 81 note, Lord Justice Knight Bruce, referring to a *dictum* of the judge of the Sudder Dewany Adalut in Oomed Rai *v.* Heera Lall (6 S. D. A. Rep. N.-W. P., 218) that the onus was on the sons, said : "It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate.

Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may perhaps be supported in the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded." In Suraj Bunsi Koer *v.* Sheo Persad Singh (1878) I. L. R. 5, Cal. 148 (171); 4 C. L. R., 226; L. R. 6, I. A., 88, Sir James Colvile observed: "Where 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."

To the same effect see Bhagbut Pershad Singh *v.* Girja Koer (1888) I. L. R. 15, Cal. 717; Mahabir Pershad *v.* Moheswar Nath Sahai (1889) I. L. R. 17, Cal. 584; Beni Madho *v.* Basdeo Patak (1890) I. L. R. 12, All. 99.

It would appear that in all these cases it was

the son who was the plaintiff; but I think that in suits by purchasers against the joint family for possession of family-property on the allegation that the father or other managing member sold the property for payment of an antecedent debt, they would in the first instance have only to prove the existence of the previous debt or of a decree for such debt. It should then be presumed that the debt was a proper debt, and that it bound the ancestral property. Such a presumption, rebuttable though it be, would be perfectly in accordance with the rules of evidence. Debts are, as a rule, such as bind the son's estate; while those that are of an immoral nature are merely exceptions. And as you know from the rules of evidence, the person who seeks advantage of an exception has to prove the circumstances which entitle him to the advantage. See Chintamanrav Mehendale *v.* Kashinath (1889) I. L. R. 14, Bom. 320. In this last case the onus was placed on the defendant to show that the debt was of an immoral nature.

Sons to prove purchaser's knowledge of debts being for immoral purposes.

I have said above that the purchaser has simply to prove the existence of the previous debt. The ruling in Suraj Bunsi Koer's case requires that not only must the debt be shown to have been for immoral purposes but that it must also be shown that the purchaser had notice that it was contracted for such purposes, before a son can succeed in setting aside a sale. To the same effect are the observations of Westropp, C.J., in Udaram Sitaram *v.* Ranu Panduji (1875) 11 Bom. H. C. Rep., 76 and of Justices Birdwood and Parsons in Krishnaji Lakshman *v.* Vithal Ravji Renge (1878) I. L. R. 12, Bom. 625. As the purchaser himself can best say whether he had such notice, it is always advisable for him to give his own evidence on the point, if he wishes to contest the notice.

From what I have now said, you will observe

that a son seeking to avoid a sale by his father for an antecedent debt, or a sale in execution of a decree against his father for such debt, has, besides showing that the antecedent debt was contracted for immoral purposes, also to show that the purchaser had notice that the debt in question was contracted for immoral purposes. Were the law otherwise, an anomaly would be the result; for, whereas a sale of family-property by a father or manager for an alleged legal necessity other than the payment of an antecedent debt would stand if the purchaser were satisfied upon enquiry as to the existence of the necessity even though the necessity might have been false, a sale of the same property for the payment of an alleged valid antecedent debt would be set aside, only because the purchaser was deceived in his enquiry.

Effect of decision in Suraj Bunsi's case.

This condition, *viz.*, that the debt must be shown to have been immoral to the knowledge of the alienee, has virtually done away with all restraints on the father's powers and left the *bona fide* purchaser from a father for an antecedent debt, in exactly the same position as a purchaser from a father in a family governed by the Dayabhaga law. I presume you know that the father in a Dayabhaga family is the absolute proprietor of all ancestral and self-acquired property, and, that unlike what we see in a Mitakshara family, his sons have no co-ordinate rights with him. A purchaser from such a father, to whatever purposes the purchase money may be applied, acquires an absolute title to his purchased property. So also if a person being satisfied of the existence of an antecedent debt (as to which we shall see presently) of a Mitakshara father, and not being apprised of any circumstances which would make the antecedent debt a debt contracted for immoral purposes, should acquire a title from

the father, he would acquire an indefeasible title. The only difference between the two cases will consist in the circumstance that whereas the Mitakshara son would have a right to put the purchaser's title to test, the Dayabhaga son would have no such right.

Antecedent debt

In some of the cases which we have considered in this Lecture, the expression "antecedent debt" has been used. Now what is 'an antecedent debt'? It means a debt previous to some transaction or proceeding in a Court of Justice. We have seen that it is the pious duty of sons to pay their father's debts, save those which are incurred for immoral purposes. By the expression "antecedent debt" we mean the debt of the father which has been paid off by a fresh debt, a sale or a mortgage. The last debt or mortgage-debt would not be an "antecedent debt." The prior debt which is wiped off is the antecedent debt. In Laljee Sahoy *v.* Fakeer Chand (1880) I. L. R. 6, Cal. 135; 7 C. L. R., 97, Pontifex, J., said: "It would seem in consequence of the rulings of the Privy Council, we are bound to hold that the payment, even in the father's lifetime, of an antecedent debt due by him is a pious duty on the part of the son; and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons (but not against his adult sons) whether such antecedent debt does or does not come within the words—'If a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties, such as the obsequies of a father or the like, make it unavoidable;' always provided that the antecedent debt is not incurred for immoral purposes. It was however the opinion of the Full Bench, that the antecedent debt spoken of by the Privy Council means

a debt antecedent to the transaction, *viz.*, the sale or mortgage purporting to deal with the property.

But if the property is dealt with by a decree in a suit upon a mortgage by the father alone, to which suit the father and the sons are parties, it follows from the Privy Council decisions, that as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and notwithstanding V 29, ch. I, sec. I and V 10, sec. VI, of the Mitakshara the property would be bound not indeed by virtue of the mortgage, but by virtue of the father's debt antecedent to the suit being enforceable against the joint ancestral estate, and therefore against the mortgaged property as part of it."

In Khalilul Rahman *v.* Gobind Pershad (1892) I. L. R. 20, Cal. 328, Pigot, J., on p. 346 after quoting the above observations of Pontifex, J., said: "The result would perhaps seem to be that 'antecedent debt' in the meaning of the Full Bench, means with regard to a mortgage, 'debt antecedent to the transaction', and, in the case of a proceeding by suit 'debt antecedent' to the institution of the suit." Here Pigot, J., was referring to the Full Bench decision in Luchmun Dass *v.* Giridhur Chowdhry (1880) I. L. R. 5, Cal. 855.

Recitals in deeds no evidence of necessity.

While on the subject of legal necessity, it should be observed that in almost all cases of alienations, the deeds contain recitals of the purpose for which the money was wanted. Now, the law as to recitals in a deed is that they are some evidence that the fact recited was present to the minds of the parties to the transaction, but they are no evidence to establish the facts so recited—Sikher Chund *v.* Dulputty Singh (1879) I. L. R. 5, Cal. 363; 5 C. L. R., 374. Sunker Lall *v.* Juddoobuns Suhaye (1868) 9 W. R., 285.

It remains for me to consider whether when a

purchaser fails to establish the existence of the alleged legal necessity or to show that he made any enquiry on the question of necessity, the sale should fall through *in toto* or should hold good to the extent of the interest of the selling member. The answer to this question depends upon various considerations. If the sale was a voluntary sale and not in execution of decree, then, as we have already seen, the law as adopted in Bengal and the N.-W. Provinces would hold the sale to be bad; whereas the law of the Presidencies of Bombay and Madras would hold the sale good as to the share of the selling coparcener. If, on the other hand, the sale was held in execution of decree, it would be good in respect of the share in all the provinces.

Cases where the alienation would not bind the family-property but would be good against the interest of a coparcener.

In cases where the sale of the entire property being set aside, the purchaser is deemed entitled to a member's interest the decree ought to declare that possession should remain with the joint family and the purchaser should be entitled to the interest of the member whose share he has purchased and that such share should be ascertained by partition of the family-property. See Deen Dyal Lal *v.* Jugdeep Narain Singh (1877) I. L. R. 3, Cal. 198; L. R. 4, I. A., 247; 1 C. L. R., 49 (where father's interest was sold); Rai Narain Dass *v.* Nownit Lal (1879) I. L. R. 4, Cal. 809; 4 C. L. R., 67 (where a son's interest was sold); Pursid Narain Sing *v.* Honooman Sahay (1880) I. L. R. 5, Cal. 845; 5 C. L. R., 576. In Mahabeer Persad *v.* Ramyad Singh 12 B. L. R., 90; 20 W. R., 192 Justice Phear in setting aside the sale by a co-sharer on the ground that no legal necessity was proved, declared that the property should be held in defined shares and that the shares of the members who had benefited by the sale should be subject

Decree in cases where purchaser is entitled to a coparcener's interest.

to the lien of the purchaser. The Privy Council in the case of Deen Dyal Lal *v.* Jugdeep Narain Sing (1877 I. L. R., 3 Cal. 198, determined the mode in which the decree in such cases should be drawn.

Sale in execution decree.

So much for private alienation, including mortgage, gift and sale, of ancestral property, by single members on behalf of the family. Let us now consider the law as to compulsory sales of such property in execution of decrees. We know that whatever is capable of being privately alienated is ordinarily saleable in execution of decree, and further that the circumstances which would justify a private alienation would also justify a sale in execution. The law, that we have hitherto considered in respect of private alienation, would therefore, equally apply to sales in execution of decrees. But in cases of sales in execution of decrees there are two disturbing elements. In the first place, the decrees in execution of which the properties are sold are, generally, against some members only of the family, and the question, which therefore frequently arises, is whether the sales conveyed only the interest of the judgment-debtors on the record. In the second place, the sale certificates which are granted to purchasers at such sales are generally vague in their terms, and the proceedings leading up to sale throw no light on the question; they may be construed to convey, either only the interest of the judgment-debtors on the record or the family-property itself. Let us consider both these points in the order in which they have been here stated.

Whether the interest of judgment-debtors only pass.

1. Whether the sales convey only the interest of the judgment-debtors on the record.

At one time the law on this point was unsettled, that is, while some decisions held that the names

Conflicting decisions.

of the debtors on the record were the index as to what passed, others held that the purchaser might go behind the names and show that the original debt was binding on the family.

Thus in Subramaniyayyan *v.* Subramaniyayyan (1879) I. L. R., 5 Mad. p. 125, Justice Innes, in delivering the judgment of the Full Bench, is reported to have said: "It would be strange and novel to find that a decree, by reason of the terms in which it was drawn up, to the effect that the *property* should be sold, could affect the interests of parties other than those made liable by the decree. But it was argued before us that we should look not to the decree or to the capacity in which first defendant was sued, but to the nature of the transaction. If the debt was incurred for family purposes, and one who is the managing member was sued personally upon the obligation, all the members of the family, it was said, are liable.

"But if Saminadhayyan elected to enforce his remedy against first defendant alone, plaintiff was not bound to come forward and ask to be made a party and to be allowed to take part in the liability upon the bond. The decree being a decree against first defendant alone, all that passed by the sale in execution was the interest of first defendant." In Pursid Narain Sing *v.* Honooman Sahay (1880) I. L. R., 5 Cal. 845; 5 C. L. R., 576, Pontifex, J., said: "We find no authority for saying that a judgment-creditor of the father in respect of the father's own separate debt, can, either in the father's lifetime, or afterwards, attach or take any specific portion of the ancestral property beyond the father's own proportionate right in it, without having made the other members of the family parties to his suit. The case of Deendyal Lal *v.*

Jugdeep Narain Sing is an authority of the Privy Council for holding, in a case where no necessity is shown to have existed, that execution-proceedings by a judgment-creditor on a bond given by a Mitakshara father against property not hypothecated by the bond, and when the father alone had been made a defendant to the suit, cannot affect the interests of the other co-sharers of the family. Indeed, if it were otherwise, there would be an end virtually of the Mitakshara family, for a father would only have to borrow for purposes not immoral and submit to a decree, and the family might, in execution of that decree, be deprived of the most cherished portion of the ancestral property without any opportunity of redeeming it." In Abilak Roy *v.* Rubbi Roy (1885) I. L. R. 11 Cal. 293, Mitter and Field J. J., followed the above judgment and in noticing its effect observed "that in a case where the elder brother acting as a manager, executes a mortgage bond, if a decree be obtained against the executant of the bond and not against his other brothers as well, the interest of the brothers who are not parties to the suit would not be affected by the decree and the execution sale, although the mortgage itself might be binding on them."

The principles of the above decisions were adopted in Dorasami Vajappayyar *v.* Atiratra Dikshatar (1883) I. L. R. 7, Mad. 136. In Deendyal Lal *v.* Jugdeep Narain Singh (1877) I. L. R. 3, Cal. 198, Sir James Colvile said: "whatever may have been the nature of the debt, the appellant can not be taken to have acquired by the execution sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property and the co-sharers therein who were no parties to the bond, he ought to have framed his

suit accordingly and have made those co-sharers parties to it." His Lordship referred to the cases of Nugender Chunder Ghose *v.* Kaminee Dossee 11 M. I. A. 241 ; and Baijun Doobey *v.* Brij Bhookun Lall Awasti (1875) I. L. R. 1 Cal. 133 ; 24 W. R. 306 ; L. R. 2, I. A. 275. To the same effect see Hardi Narain Sahu *v.* Ruder Perkash Misser (1883) I. L. R. 10, Cal. 626 ; L. R. 11, I. A. 26. These decisions would seem to lay down that only the interest of the debtor as named in the decree would pass to the purchaser at a sale in execution and that it was not open to the Court in a regular suit to go behind the decree to see what might have passed.

But, side by side with these decisions, there were others in which the Courts went behind the decrees and held that not only did the interest of the parties on the record pass, but the entire interest of the family was purchased by the purchaser. In Bissessur Lall Sahoo *v.* Luchmessur Sing, (1879) L. R. 6, I. A. 233 ; 5 C. L. R. 477, the purchaser was held to have purchased the entire interest of the family notwithstanding that the decree was against one of the several members of the family, on the ground that the debt was a family debt for rent. The same principles were adopted in Deva Sing *v.* Ram Manohar (1880) I. L. R. 2, All. 746 ; in Ram Sevak Das *v.* Raghubar Rai (1880) I. L. R. 3, All. 72 ; in Radha Kishen *v.* Bachhaman (1880) I. L. R. 3, All. 118 ; in Gayadin *v.* Rajbansi Kuar (1880) I. L. R. 3, All. 191 ; in Ram Narain Lal *v.* Bhawani Prasad (1881) I. L. R. 3, All. 443, and in Javiam Bajabashet *v.* Joma Kondia (1886) I. L. R. 11, Bom. 361.

Doubt settled by P. C. decisions.

But whatever doubts may have existed at one time on the question, they have been set at rest by the decisions of the Privy Council in Nanomi Babuasin *v.* Modhun Mohun (1885)

I. L. R. 13, Cal. 21; L. R. 13, I. A. 1; and in Daulat Ram *v.* Mehr Chand (1887) I. L. R. 15, Cal. 70; L. R. 14 I. A. 187. In the former of these cases, Lord Hobhouse, in delivering the judgment of the Judicial Committee, observed: "Their Lordships do not think that the authority of Deendyal's case bound the Court to hold that nothing but Girdhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser, are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in Deendyal's case there certainly was an ambiguity of that kind) the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." In the latter case, some of the members of a joint family executed a mortgage of an entire family estate. The mortgagee obtained decree upon the mortgage against the mortgagors only, and in execution of the decree caused the property to be sold. The purchaser being obstructed by the other members of the family in taking possession of his purchased property, brought the

action out of which the appeal arose. The other members did not dispute that the mortgage was binding on the family, but insisted upon the circumstance that the purchaser had purchased only the interest of the debtors on the record. Sir Barnes Peacock, in delivering the judgment of the Judicial Committee, observed—"It appears from the cases that have been cited, that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right, title and interest of the two parties who were made defendants."*

It follows from what has been stated above that the description of the debtors in the decree would not debar the purchaser from showing (if that is a fact) that the interest of persons other than the debtors has also passed.

You must have seen from the observations of Lord Hobhouse in Nanomi Babuasin's case quoted above, that persons other than the debtors on the record would have the right to question the title of the purchaser as regards their own interest. It would, therefore, be always advisable for a creditor intending to proceed against the family-property to make parties to the suit all persons entitled to the property, even in cases where some members only, mortgage the family-property. That this course is allowable would appear from Badri Prasad *v.* Madan Lall (1893) I. L. R. 15, All. 75. In this case a Full Bench of the Allahabad High

Suit should be against all coparceners.

Even when the mortgage is executed by one.

* The above cases were followed in Hari Vithal *v.* Jairam Vithal (1890) I. L. R. 14, Bom. 597, and in Sheo Pershad Sing *v.* Saheb Lal (1892) I. L. R. 20, Cal. 453.

Court held that upon a mortgage executed by the father, a suit could be instituted against the father and the sons, if the plaintiff's case was that the mortgage-money benefited the father and the sons. In Luchmun Dass *v.* Giridhur Chowdhry (1880) I. L. R. 5, Cal. 855, a Full Bench of the Calcutta High Court held that, where the mortgage-debt was not shown to have benefited the family, the suit would not lie against the family, and that it might lie against the mortgagee alone if the law allowed an alienation by an undivided coparcener of his interest in joint property. For the same reasons in the case of an unsecured debt contracted by a single member of a joint family, a suit would lie against the whole body of coparceners, if it could be shown that they all were benefited by the loan.

Enquiry as to what has been actually purchased.

2. Let us now come to the second disturbing element which is peculiar to sales in execution of decrees—I mean the ambiguity that arises from the imperfect description given in the certificates of sale which form the title-deeds of purchasers to the properties purchased.

In such cases Courts are frequently called upon to consider not only whether the circumstances relied upon would justify a sale of the entire property, but whether *as a fact* the entire property was sold.

Now, we all know that when a debtor is entitled to a valuable property, it is competent to his creditor to cause a sale of such valuable property in its integrity. But, in the generality of cases, either because the creditor thinks that his dues are small compared with the value of the property, or, for other reasons, he causes a sale of some smaller interest. In such a case, even if the terms of the sale-certificate, the title-deed of the purchaser, should favour the inclusion of the bigger

interest, it would not be just to allow the purchaser to take possession of it. I have here said "even if the terms of the sale certificate would favour" the purchaser's claim; for, under the Civil Procedure Code, the only description given in the certificates is that the right, title, and interest of the debtors on the record in the property attached are sold. These terms may mean, either the share that upon a partition of the family-property may be allotted to the debtor, or the entire family-property as the interest of the managing member, the debtor. In every case of sale, therefore, the Court would have to examine the antecedent circumstances, with a view to determine if they would justify a sale of the whole property. If upon such enquiry, the Court finds that the circumstances would not justify a sale of the entire family-property, it need not pursue its enquiry further. But should it find that the circumstances might warrant a sale of the whole, it should then proceed to determine whether as a fact* the purchaser bought the whole or a fraction. In coming to a finding on this question, the Court may interpret the action of the creditor in suing one member alone as an indication of his desire to seek† the smaller relief. It may take into consideration, the price paid for the property. It may construe the proceedings in execution of a mortgage-decree as evidencing an intention to sell the entire mortgaged property. It may look upon any order of Court in the execution department refusing exemption of any portion of attached property at the instance of sons, as indi-

Certificates of sale vague

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* Mahabir Pershad *v* Moheswar Nath Sahai (1889) I. L. R. 17, Cal. 584; L. R. 17, I. A. 11.

† Simbhu Nath Pande *v*. Golap Sing (1887) I. L. R. 14, Cal. 572; L. R. 14, I. A. 77, which was an action against the father.

cating an intention to sell the entire family-property. Mahabir Pershad *v.* Moheswar Nath Sahai (1889) I. L. R., 17 Cal. 584; L. R., 17 I. A. 11. In every case, the question, *viz.*, whether the purchaser is entitled to the whole or a partial interest, is one of mixed law and fact. In every case the court has to see what the purchaser paid and bargained for *i. e.*, what he could reasonably think he was buying.

The result of the above discussion is, that very frequently what is actually sold is less than what was capable of being sold, and, therefore, you should not infer a sale of a particular interest, merely because such interest was capable of being sold. Thus, from what we have already observed though in execution of a decree for debt against a father, the whole ancestral property is saleable, courts have to determine upon the evidence what interest was actually sold.

It is not always easy to interpret the sale certificates. In Nanomi Babuasin *v.* Modhun Mohun (1885) I. L. R., 13 Cal. 21; L. R., 13 I. A. 1, the terms in the sale certificate were "8 annas 11¼ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in mouza Rampur Bhatkhera." Now the fraction mentioned was the whole of the family-property and accordingly their Lordships of the Privy Council in speaking of the Subordinate Judge who originally tried the case, said: "he was clear that the language of the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all parties thought the same."

In Mahabir Pershad *v.* Moheswar Nath Sahai (1889) I. L. R., 17 Cal. 584; L. R., 17 I. A. 11, their Lordships observed: "The sale certificate was issued on the 6th February 1875 to

the vakil of Chowaram, the decree-holder. After stating that all the 'right, interest and connection which the judgment-debtor had in the property,' had been purchased 'from the decree-holder,' and 'that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment-debtor,' it describes the property thus—'five annas four pie of mouza Udoypore *alias* Maharajgunge Pergunnah Cherand which belonged to the judgment-debtor, Rai Moheswar Nath, is sold for Rs. 10,000.' The Procedure Code at that time required that property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as a co-sharer. It is a question of fact in each case; and in this case their Lordships think that the transactions of the 4th and 5th January 1875 (certain petitions by the sons praying that their ancestral property which was the property of the whole family and which was put up for sale might be exempted from sale, or time granted to them) and the description of the property in the sale certificate are conclusive to show that the entire corpus of the estate was sold."

In Basa Mal *v.* Maharaj Sing (1885) I. L. R., 8 All. 205 the Court construed the sale certificate in execution of a money-decree as covering the entire interest of the family.

In Sitaram *v.* Zalim Sing (1886) I. L. R., 8 All. 231 the question arose before the execution sale as to whether the entire family-property or

merely the interest of the debtor (father) was saleable. The Court finding that the debt was not of an immoral nature directed sale of the entire property.

In Balbir Sing *v.* Ajudhia Prasad (1886) I. L. R., 9 All. 142, also, the question arose before the execution sale. There were two decrees—one upon mortgage and the other a simple money-decree and both against the father. The Court finding that the mortgage was binding on the family held that the entire property covered by it was saleable, but as regards the money-decree, the creditor having proceeded only against the father as a personal debt, was not entitled in execution to sell the entire family-property.

In Jagabhai Lalu Bhai *v.* Vij Bhukandas Jagjivan Das (1886) I. L. R. 11, Bom. 37, the sons, suing for release of their shares, had previously made an infructuous attempt in the execution department to get their interest released from sale, and the High Court held that under the circumstances, and as the father was sued as the head of a firm, the entire property was sold.

In Jairam Bajabashet *v.* Joma Kondia (1886) I. L. R. 11, Bom. 361, the High Court of Bombay finding that the decree for money, though passed against one member of the family, was really against the whole family, the other members of which were minors, and on the authority of Bissessur Lal Sahoo *v.* Maharaja Luchmessur Singh held as a fact that the entire property had been sold. It remanded the case to the Lower Court to find whether what was actually sold could be validly sold, regard being had to the allegations of the plaintiffs.

In Krishnaji Lakshman *v.* Vithal Ravji Renge (1887) I. L. R., 12 Bom. 625 the Court found that the debts were contracted for immoral pur-

poses within the knowledge of the lenders, and therefore, though the decree was one upon mortgage held that the purchaser had acquired a valid title only to the father's interest.

In Simbhunath Pande *v.* Golap Singh (1887) I. L. R., 14 Cal. 572; L. R., 14 I. A., 77, a father borrowed money upon a single bond—the obligation being simply on the part of the father. When he was subsequently sued upon this bond he admitted his liability and agreed that his right and interest in mouza Kindwar should be the security for the decree-debt. In execution of the decree, the right and interest of the father in mouza Kindwar was sold and purchased, and the sale certificate described the property sold as the right and interest of the father in the mouza. Under such circumstances the Privy Council held the purchaser entitled to the father's interest only. Their Lordships said—"They conceive that, when a man conveys his right and interest and nothing more, he does not *prima facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father. It is true that the language of the certificate is influenced by that of the Procedure Code. But it is the instrument which confers title on the purchaser. Its language like that of the certificate in Hurdai Narain's case is calculated to express only the personal interest of Luchmun. It exactly accords with the expressions used in the decree of August 1869, founded on Luchmun's own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *prima*

facie conclusion instead of counteracting it, for, the creditor took no steps to bind the other members of the family, and the Rs. 625 which he got for his purchase appears to be nearer the value of one-sixth than of the entirety."

The case last considered was followed by the Bombay Court in Kangal Ganpaya *v.* Manjappa (1888) I. L. R., 12 Bom. 691.

In Maruti Sakharam *v.* Babaji (1890) I. L. R., 15 Bom. 87, the Court held that when the mortgage was of the whole family-property, the Court in execution ought to be held to have sold the entire property, and in the case of a money-decree against a single member (including the father), the presumption would be that the debtor's interest only was sold, though it would be open to the purchaser to rebut the presumption by showing the existence of circumstances leading to the inference that the entire property was sold as a fact.

In Daulat Ram *v.* Mehr Chand (1887) I. L. R., 15 Cal. 70; L. R., 14 I. A., 187 the decree against the managing member was upon a mortgage of the entire family-property and it was this property that was eventually sold in execution of the decree. There was no doubt, therefore, as to what was actually sold, and the Court had simply to consider, whether what was actually sold was capable of being sold *i.e.*, whether the mortgage was valid and binding on the family-property. The defendants did not contest that it was not binding and so the Judicial Committee held the whole estate had passed.

In Bhagbut Pershad Sing *v.* Girja Koer (1888) I. L. R., 15 Cal. 717; L. R., 15 I. A., 99 the mortgage was of the entire family-property by the father and it was this property that was eventually sold in execution of decree. The

sons having failed to show that the loan was for immoral purposes, the Judicial Committee held that what was actually sold was also validly sold. They further held that in the particular case it was not necessary for the purchaser to prove the existence of family necessity, or that he made any enquiry.

In Narasanna *v.* Gurappa (1886) I. L. R., 9 Mad. 424, there was no question as to the nature of the debt while it was admitted that the purchaser actually purchased the entire estate. Under these circumstances the High Court of Madras held that though the father only was the debtor named in the decree, the whole estate passed.

In Minakshi Nayudu *v.* Immudi Kanaka (1888) I. L. R., 12 Mad. 142 there was in the execution department an infructuous attempt by the sons to limit the sale. Lord Fitzgerald said: "Upon the documents their Lordships have arrived at the conclusion that the Court intended to sell, and that the Court did sell, the whole estate and not any partial interest in it. On this point see also Janki Bai *v.* Mahadev (1893) I. L. R., 18 Bom. 147.

The inferences that arise from the above cases are the following:—

1. When in execution of a decree upon mortgage of a family-property, passed against father or any other member, the mortgaged property is sold, the sale should be held to be in fact a sale of the entire family-property and not of the interest of the father or of such other member only as is named in the decree.* But whether the sale would be valid so as to pass a good legal title would depend on other considerations.

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* See *ante* p. 157.