[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice West.

1877. December 21.

LAKSHMAN RA'MCHANDRA JOSHI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SATYABHA'MA'BA'I, WIDOW OF GOVIND NA'RA'YAN (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Widow—Maintenance—Charge on estate in the hands of purchasers with notice—Notice.

In a suit for maintenance brought by a Hindu widow against her husband's brother, who was the sole surviving member of that husband's family, and against *bonâ fide* purchasers for value from him (the defendant) of certain immoveable ancestral property of the family,

Held—

The mere circumstance that such purchasers had notice of her claim, is not conclusive of the widow's rights against the property in their hands.

If the property were sold in order to pay debts (not incurred for immoral purposes) of her husband, or his father, or grandfather, or for the benefit of the undivided family, or to satisfy a former decree obtained by the plaintiff herself against the same defendant for maintenance, such sale would be valid against her, whether or not the purchasers had notice of her claim.

Per West, J. :—According to the Mitákshara, sons must, from the moment of their father's death, be regarded as sole owners of the estate, yet with a liability to provide for the maintenance of their father's widow, and with a competence on the widow's part to have the estate made answerable. If the sons make a division of the estate, they must allot to their mother an equal share, and the same to any sonless widow of their father. The widow has no proprietorship in the estate before its partition, but she has an equity to a provision, which the Court will enforce to guard her against attempted fraud.

The debts of the deceased owner take precedence of the maintenance of the widow. The estate is properly applied, in the first instance, by the sons as managers in payment of such debts.

By a sale of the property, the sons cannot evade a personal liability to provide for the widow.

If a mother, foregoing her claim to a separate provision out of the paternal property, resides with her sons or step-sons, and is maintained by them, she must submit to their dealing with the estate. A fraudulent alienation for the purpose of defeating her claims, will not be supported, but the particular assignee for value acquires a complete title.

In the case of a widow of an ordinary co-parcener as against the surviving members of the joint family, *her* claim being strictly to maintenance only, regulated by the circumstances of the joint family, it appears that, although she may have her maintenance made a charge on the property, yet, if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion and in good faith.

* Special Appeal No. 135 of 1877.

If there is an ample estate left, out of which to provide for the widow, or if, knowing of a proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the co-parcener, if she lives apart, and if the estate is small and insufficient, it is the vendee's duty, before purchasing, to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor. It is in this connection that the doctrine of notice becomes of importance.

The knowledge of collateral rights created by agreement, in equity frequently qualifies those acquired by a purchaser. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists, though equity as between the vendee and the vendor will make the property retained by the latter primarily answerable.

Whether such a claim by a widow against the estate of her deceased husband in the hands of a purchaser, is enforceable or not, does not depend upon whether the remainder of the estate in the hands of the heir has been exhausted. What was honestly purchased, is free from her claim for ever. What was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale.

There is no authority for the doctrine which makes the claim of widows not entitled to a share of property in case of partition, a real charge on the inheritance, and ranks the claim of widows who are so entitled as a mere moral obligation. In all cases it is a claim to maintenance merely, not interfering (so long as it has not been reduced to certainty by a legal transaction) with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit.

The reduction of the number of surviving co-parceners to a single person makes no difference in the widow's legal position. The rights and obligations of the original co-parceners fall at last to the sole survivor. The widows must be maintained by him out of the property, but he may still deal with the estate at his discretion in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right *in re*. The purchaser from him takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the vendor's family.

Authorities on the subject of Hindu widow's maintenance reviewed.

THIS was a special appeal from the decision of W. Wedderburn, Judge of the District of Thána, amending the decree of the Subordinate Judge at Alibág.

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The plaintiff Satyabhámábái, a Brahman widow, sued in the Court of the Subordinate Judge of Alibág to recover Rs. 188-10-8 on account of maintenance for forty months from 11th June 1869 to 5th October 1872, and for an order entitling her to maintenance at the same rate, during her life-time, from the three defendants personally and from the joint family property. The property was valued by the plaintiff at Rs. 4,000, and it had been sold by Máhádev, defendant No. 1, brother of the plaintiff's deceased husband Govind, to Lakshman, defendant No. 2, who sold a part of it to Vishnu, defendant No. 3.

Máhádev did not appear.

Lakshman, defendant No. 2, answered that the plaintiff had no claim against him or against the estate, which was first mortgaged to him by Máhádev and afterwards sold for Rs. 1,400 in order to pay debts, for which the plaintiff's husband was liable, and to satisfy a decree for maintenance obtained by the plaintiff; that the estate was not worth more than Rs. 400; that a portion of the estate, consisting of a garden, had been sold by him to Vishnu, defendant No. 3; and that the remainder produced only enough to pay the Government assessment, the cost of repairs, the interest on the purchase-money, and the maintenance awarded to Sarasvatibái, a widow belonging to the family whose husband was a half-sharer in the property.

The third defendant, Vishnu, answered that the plaintiff had no claim against the property in his hands; that he had purchased from Lakshman a garden which had been sold to Lakshman by Máhádev to pay the debts of the plaintiff's husband and of the joint family and the maintenance awarded to the plaintiff herself; and that the said garden was already charged with the cost of maintaining a lamp in the temple of Rámeshvar, with an annual payment of Rs. 18 to Sarasvatibái, and with the Government assessment.

The Subordinate Judge of Alibág decreed that the plaintiff was entitled to maintenance from Máhádev, defendant No. 1, but not from the family property, which had been purchased by the other defendants.

Against this decree the plaintiff appealed to the District Judge. The two points mainly argued before him were, first, whether, in consequence of a former suit, which the plaintiff had brought for maintenance from the year 1864 to the year 1866, the plaintiff's present suit was *res judicata*; second, whether the plaintiff's maintenance was a charge on the estate in the hands of the purchasers who had notice of her claim. Both these points were decided by the District Judge in the plaintiff's favour. He, therefore, amended the decree of the Court of first instance, and directed that the plaintiff should recover from the family property in the hands of defendants, Nos. 2 and 3, at the same rate as was decreed to her in her former suit. He was of opinion that, looking to the deed of sale (exhibit No. 34) executed by Máhádev to Lakshman, as well as to the decree formerly obtained by the plaintiff (exhibit No. 35), there could be no doubt that the purchaser was aware of the plaintiff's claim; and, following the decision in the case of *Srimati Bhagábati Dási* v. *Kánailál Mitter and others*,(1) passed a decree for the plaintiff.

The defendants appealed.

Mr. Shántárám Náráyan for the appellant.

Mr. Máhádev Chimnáji Apte for the respondent.

The arguments and cases cited fully appear in the following judgments:—

WESTROPP, C. J.—The first question, raised at the hearing of this appeal, was whether the cause of action alleged by the plaintiff is *res judicata*. We have already, during the argument, stated our opinion to be that, inasmuch as the former suit brought by her was for maintenance from the year 1864 to the year 1866, and the decree made therein against Máhádev Náráyan personally was not prospective and not against the ancestral estate, and the present suit is for maintenance from 11th June 1869 to 5th October 1872 and for an allotment of future maintenance out of the ancestral estate, this suit is not *res judicata*.

I may observe, however, that it is to be regretted that, in the former suit, an order, awarding to the plaintiff future maintenance, was not included in the decree. It is not desirable that there

(1) 8 Beng. L. R. 225.

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should be several suits in respect of the maintenance of one widow. The system of seeking or granting relief piecemeal, subjects both plaintiff and defendant to much unnecessary expense and trouble, and is only advantageous to the legal profession. Such a course ought to be discountenanced, so far as may legitimately be done, by the civil Courts.

It has been properly admitted that the defendant Lakshman, when he accepted the deed of sale (exhibit 34) from Máhádev Náráyan, had notice of the plaintiff's claim for maintenance. Indeed, Lakshman's learned pleader relies on the alleged fact that a part of the consideration for the sale to Lakshman was money paid by him in or towards satisfaction of her claim for past maintenance against Máhádev, her brother-in-law. It has also been rightly admitted that Vishnu, when he purchased the garden from Lakshman, was aware of the plaintiff's claim. Under these circumstances, his right to resist the plaintiff's claim is dependent on that of Lakshman to do so.

The District Judge has held that the fact that Lakshman and Vishnu had such notice, bound the immoveable property in their hands, and left it subject to her demand.

It appears, however, to me, on consideration of the Hindu law as administered under the Mitákshara and Mayûkha in this Presidency, that the circumstance of notice of her claim for maintenance is not conclusive of her rights as against the immoveable property in their hands.

Putting her claim at the highest, it cannot be regarded as superior to that, amongst Hindus, of a son against the ancestral estate. A sale by a father for payment of the debts of his own father or grandfather, not contracted for immoral purposes, is good as against his son. Even if the father have sold ancestral property for the discharge of his own debts, not incurred for immoral purposes, and the application of the bulk of the proceeds in payment of those debts have been satisfactorily accounted for, the fact, that a small part is not accounted for, will not invalidate the sale—*Girdháree Lall* v. *Kantoo Lall*,[1] *Náráyanáchárya* v. *Nárso Krishna*,[2] Nárada (Dr. Jolly's Translation), p. 98, pl. 32.

[1] L. R. 1 Ind. Ap. 321. [2] I. L. R. 1 Bom. 262.

The same rule is applicable to the present case. And, even if the ancestral property devolve upon a Hindu widow, she would not only be justified, but it would be her duty to apply it, if necessary, in payment of the debts (not contracted for immoral purposes) of her deceased husband or of his father or grandfather—Mayûkha, ch. V, sec 4, pl. 17, 20; 1 Dig., bk. I, ch. V, pl. 171, Comm.; 2 Stra. H. L., 280, 281, 282; 1 West & Bühler, 68; 1 Morris S. D. A. Rep. 184; 2 Borr. 127 (Reprint).

Therefore, if the mortgage by Máhádev to Lakshman, or the sale to him, were made for the purpose of paying debts of Náráyan, who was father of Govind as well as of Máhádev, or of Náráyan's father, or for the purpose of paying the debts of Govind himself, and such debts were not of an immoral nature, the mortgage and sale would be valid as against the plaintiff, whether or not Lakshman had notice of her claim for maintenance. *A fortiori*, in so far as the consideration for the sale to Lakshman consisted of money advanced by him in or towards the plaintiff's past maintenance, or in or towards satisfaction of her decree and the costs of her suit against Máhádev for past maintenance, it would be a valid consideration, and would bind her independently of the fact that Lakshman had notice of her claim.

In so far as the consideration for the deed of sale consisted of the amount due on the mortgage, it would be a valid consideration to the extent to which, on the grounds already mentioned, the mortgage itself would be sustainable against the widow.

If any portion of the consideration, either of the mortgage or of the deed of sale, consisted of moneys raised for the purpose of paying debts, other than those already mentioned, but incurred for the benefit of the joint family, such portion would be rightly deemed a valid consideration so far as it may extend.

I refrain from expressing any opinion as to the rights of a widow who obtained a decree against the family estate for prospective maintenance, if subsequently the creditors of her husband, or of his father, or grandfather, instituted an administration suit, against her and the surviving parceners, praying a sale of the estate, and application of the proceeds in payment of the debts due to creditors by her husband or his father or grandfather.

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The decree of the District Judge should, I think, be reversed (except as regards his finding that the suit is not *res judicata* in the plaintiff's former suit for maintenance), and the cause should be remanded for re-trial by the District Judge on the merits. On such re-trial, the District Judge should determine whether the mortgage of the 6th January 1867 by Máhádev to Lakshman was *mainly* executed for the purpose of raising money to pay the debts (not incurred for immoral purposes) of his father or grandfather or of his brother Govind, or of any one or more of them, or of paying other debts incurred for the benefit of the joint family whereof Govind and Máhádev were amongst the members; and whether the deed of sale (exhibit 34) of the 24th July 1867 was *mainly* executed in consideration of the moneys due on the said mortgage, or of moneys applied in payment of such debts as aforesaid, and of moneys applied in or towards the claim of the plaintiff for past maintenance, or of the amount due to her for such maintenance and costs awarded to her by the decree in her former suit for maintenance.

The costs of this suit and of both appeals should be disposed of by the District Judge in such manner as may be just.

WEST, J.—Satyabhámábái, the plaintiff in the present case, is the widow of Govind Náráyan who died united in interest with his brother Máhádev. As Máhádev refused to pay her the maintenance to which she was entitled, she sued him, and obtained a decree, under which it appears that she was paid rupees one hundred and thirty-four nine annas and nine pies by the defendant Lakshman on account of Máhádev (exhibit 35). This Lakshman is the purchaser, by the document (exhibit No. 34), from Máhádev of the family estate, and a part of the consideration specified is "rupees (300) three hundred, borrowed to pay the maintenance of Máhádev's sister-in-law under a decree." Lakshman, therefore, knew of Satyabhámábai's existence, and the right she set up when he purchased the property. So, too, did Vishnu, the third defendant, who purchased a portion of the property from Lakshman. He inquired from Máhádev how Satyabhámábái's subsistence was to be provided for; but, being told that certain rice-land

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had been reserved for the purpose, he rested content with that mere assurance.

The District Judge, following the case of *Srimati Bhagábati Dási* v. *Kanailál Mitter and others*,(1) has held that the notice thus brought home to Lákshman and Vishnu makes the joint property answerable for the maintenance of Satyabhámábái, and he has pronounced in favour of her right, as against the property purchased by Lakshman and Vishnu, to maintenance at the rate settled as appropriate in the former decree against Máhádev.

It is now contended that Satyabhámábái's maintenance was not such a charge on the estate as to give her any kind of proprietary interest in it; that her right, however limited in amount by the value of her deceased husband's share in the property, is a merely personal one against Máhádev, and that notice of what is not really a charge in the sense of an interest in the property, cannot convert the merely personal obligation into a real right, by way of incumbrance on the property, accompanying it into any hands whatever into which it may pass. The alienation, too, it is argued, was to enable Máhádev to pay off debts chargeable against the united brethren while any remained to form a joint family with Máhádev, or else contracted by the plaintiff's husband Govind, and, therefore, properly met by a sale of the joint property so far as necessary to defray them within the limits of his share, out of which alone Satyabhámábái, it is urged, can claim a maintenance.

In the recent case, relating to the same estate as that now before us, of *Lahshman* v. *Sarasvatibái*,(2) it is said "if the vendor was absolute owner, it is clear the sale conveyed absolute ownership of the property to the vendee, the first appellant. But if that was not the case, it is equally clear that by the sale such right only passed to the vendee as was possessed by the vendor;" and, after a discussion of some of the cases on this subject, the learned Judges arrived at the conclusion that they do not "establish that the maintenance of a Hindu widow is a charge on any such property (as in this case) in the hands of a *bonâ fide* purchaser from her late husband's successors." In one of those

(1) 8 Beng. L. R. 225.

(2) 12 Bom. H. C. Rep. 69; see. p. 71.

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cases, however, (*Heerálál* v. *Mussamut Kousilláh*,[1]) the Court certainly say that the widow's right to maintenance is not merely "a right of action against the heirs personally who take the property," but "a charge on the property which formed the estate of her husband;" which charge the Court accordingly enforced against the purchaser of part of the family property, though with an equitable reserve in his favour that execution should first proceed (if possible) against the vendors. In *Rámchandra* v. *Sávitribái*[2] also it was laid down that "by Hindu law the maintenance of a widow is a charge upon the whole estate, and, therefore, upon every part thereof." It is true that the learned Judge, Sir R. Couch, C. J., who delivered the judgment of the Court on that occasion, afterwards (*S. M. Nistarini Dási* v. *Makhanlál Dutt*)[3] declined to recognize its authority. "The question," he says, "there was as to whether one brother could be sued alone, and it was held that he could;" but still the one brother appears to have been sued as holding part of the family property, not as liable apart from that circumstance, so that, as regards the coparceners in possession, the case must be taken as an authority for the position that the widow's maintenance is a charge on the property, and not merely against the person—a distinction which is necessary to support the decision in several other cases.

In the case of *Mussamut Golab Koonwer* v. *The Collector of Benares*,[4] it was held that the confiscation of an estate did not annul the right of the mother of the owners, who had inherited it, to maintenance out of it. The learned Judges in the case of *Lakshman* v. *Sarasvatibái*[5] explain the decision of the Privy Council as having proceeded upon a tacit concession of the widow's right by the Government. Phear, J., in the case of *Gunga Báee* v. *The Administrator General of Bengal* (2 I. J. N. S. 124) as quoted by L. Jackson, J., in *Adhirance Narain* v. *Shona Mali*,[6] explains the decision in another way. "The plaintiff's right to maintenance," he says, "had by her husband's death become an actual charge on the estate in question before the cause of

(1) 2 Agra Rep. 42.
(2) 4 Bom. H. C. Rep. 73, A. C. J.
(3) 9 Beng. L. R. 27.
(4) 4 Moo. Ind. Ap. 246.
(5) 12 Bom. H. C. Rep. 69.
(6) I. L. R. 1 Calc. 365; see p. 374.

forfeiture had accrued." This seems to be only what may be said of the right of every Hindu widow whose husband has left property out of which her maintenance can be supplied; and the case is an authority, though under the circumstances not a strong one, for the widow's maintenance constituting a real interest in the estate.

The other cases, referred to by our learned colleagues, do not appear, when taken with several other important decisions, to be necessarily decisive of the question at issue in the present case; and, considering the diversity of views that has existed on the important topic of the Hindu widow's maintenance in relation to the family estate, it seems desirable to examine the subject rather more at large.

Through her marriage a Hindu woman, according to Jimûta Vâhana,[1] acquires an interest in her husband's property, though only, according to some writers, of a secondary kind, such as may be divested by a gift by the husband to a third party. A higher interest could certainly not be assigned to her consistently with that text of Manu (chap. VIII., pl. 416), which ranks her along with a son and a slave as incapable of having wealth exclusively her own,[2] but this interest has been deemed enough to entitle her to an equal share with sons when her husband makes a partition of his property.[3] The Vyavahâra Mayûkha deals even with the reunion of a wife with her husband, which implies a previous partition, in the sense probably of the allotment of a share in a division with the sons. Apastamba denies (Coleb. Dig., bk. V., ch. II., pl. 89) that such a partition can take place, because of the essential unity of the married pair,—a reason which could not apply after the husband's death. That event, however, while removing the superior and dominant interest of the husband,

(1) Dáya Bhága, ch. XI., sec. I., pl. 26: Jagannáth, see Coleb. Dig., bk. V., ch. VIII., sec. I., pl. 415; see also Smriti Chandrika, ch. IV., pl. 9; ch. IX., sec. 2, pl. 14; ch. II., sec. I., pl. 19.

(2) Vyav. Mayûkha, ch. IV, sec. 10, pl. 7; Smriti Chandrika, ch. 9, sec. I., pl. 12-13.

(3 Coleb. Dig., bk. V., ch. II., pl. 87, 88, Comm.

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appears to have been recognized by, at least, some of the Smritis as bringing out the wife's right into greater definiteness. Manu (chap. V., pl. 148) and Nárada (Pt. 1, ch. III., 36) alike insist on the dependence of women; yet Nárada (Pt. I., ch. III, 39, 40) assigns to the widow, on her husband's death, a general control of the estate in priority even to sons. Manu (chap. IX., 104) says that a partition cannot be made during her life by the sons —cannot be made, it has been understood, without her assent —and H. H. Wilson (Works, vol. 5, p. 28) makes the necessity of this consent a ground for her right of absolute disposal over the share allotted to her in the partition (2 Str. H. L. 383). In this Presidency the sons' right to a partition, as it subsists against their father, subsists also against their mother; but the widow's right has not been regarded by the shástris as originating in the partition, though a separate effect is thus given to it (Miták., ch. I., sec. VII., pl. I.) In the case at 1 West and Bühler, 27, Q. 10, and in several other cases, as at 2 West and Bühler, 29, the widow has been pronounced entitled to a share equal to that of a single son, who, being such, could not make a partition in the sense to which the text of the Mitákshara directly applies. That this share is not a mere maintenance to be allowed in the discharge of a filial duty,[1] appears from the passage of Vyâsa quoted in the Vyavahâra Mayûkha, chap. IV., sec. IV., pl. 19 :—"Even childless wives of the father are pronounced equal sharers." The sons, therefore, who in a partition fail to allot the proper share to their mother, can be compelled to do it afterwards : 2 West and Bühler, 31, Q. 3. In Bengal it has been held that the mother is a necessary party to a suit brought by a son for a partition : *Laljeet Singh* v. *Rájcoomár Sing*.[2]

If the mother is a necessary party to a suit for partition, it is hard to conceive of her as not having an interest in the property as distinguished from a mere claim against the persons of her sons for a sufficient allotment.[3] It is consistent with the existence of this interest that in many cases, such as that of *Subchandur Bose* v. *Gooráopersad Bose* (Sir F. Macn., Cons. H. L., 62), an order

(1) Manu, cited Coleb. Dig., bk. 3, ch. IV., pl. 397, Comm.

(2) 12 Beng, L. R. 373 ; see p. 383, S.C. 20 Calc. W. R. 336.

(3) Coleb. Dig., bk. V., ch. II., pl. 89, Comm.

to provide a suitable maintenance for the widows, even sonless widows, of a deceased father should have been regarded as a necessary preliminary or ingredient of a decree for partition. In the case of *Comulmony* v. *Rámmnáth*,(1) Seton, J., says: "The right of a Hindu female to maintenance is one peculiarly needing protection, and ought not to be defeated, but upon the clearest grounds. A nuptial or testamentary gift by the husband might have this effect, or, at all events, might put her to her election." In that case, the partition had been made under a will which bequeathed the whole property to the sons without mention of the widow; but her right was maintained by construing the will as having tacitly reserved it. In *Jodoonáth* v. *Brojonáth*,(2) a mother who had taken some benefit under her husband's will, was declared entitled, on a partition amongst the sons, to so much as with her legacy would make her share equal to one of theirs. This seems to be in substance allowing the widow to elect to take a son's share against the provisions of the will.

The debts of the deceased owner, as Mr. Shántárám Náráyan pointed out, take precedence even of the maintenance of the widow. In the case at 1 West and Bühler, 68, the shástri says that the alienation of a house by a widow who has inherited it from her husband, must be made for the payment of his debts in precedence of her own subsistence. The same obligation, however, or even a stronger one, rests on the sons (2 West and Bühler, Intro. xxviii). According to the letter of the texts they are not to divide the paternal estate until the paternal debts are paid. Yet this has never been held to prevent them from acquiring a complete right, and even separate rights, in the property through the existence of debts at the time of their father's death. They may even dispose of the estate notwithstanding the existence of such debts, and convey a good title to a purchaser: *Jamiyatráv Parbhudas*.(3) If the widow of a man who has left sons, therefore, has an interest in the property itself, that right is in no way inconsistent with the estate's being charged with the debt of

(1) 1 Fulton's Rep. at p. 203. (2) 12 Beng. L. R. 385.
(3) 9 Bom. H. C. Rep. 116.

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the deceased husband, or with other debts for which it may be made answerable. Her rights may be postponed to those of creditors, because she shares the ownership of that out of which their claims have to be satisfied, and which is most properly applied to such a purpose in the first instance by the sons as managers of the joint estate.

In the case of *Mangala Debi* v. *Dinánáth Bose*,(1) Sir B. Peacock, C. J., ruled, with the entire concurrence of Mitter, J., that an adopted son could not convey to a stranger such a right to the family dwelling as to deprive his adoptive mother of her right of residence. For this position a Bombay case, *Prankoonwar* v. *Devkoonwar*(2) is quoted, and reference is made to a passage of Kaťyáyána in Coleb. Dig., b. II., chap. IV., t. 19. This precept, which the Court construed as of legal and not merely moral obligation, seems to put the requisites for the maintenance of the family on the same footing as the family dwelling. If the one cannot be affected by alienation without a due provision made for the widow, neither, it may not unreasonably be contended, can the other. The authority of this case is recognized in *Srimatti Bhagábati* v. *Kanailál Mitter*,(3) where Phear, J., applies it to support the proposition that, "as against one who has taken the property as heir, the widow has a right to have a proper sum for her maintenance ascertained and made a charge on the property in his hands. She may also, doubtless, follow the property for this purpose into the hands of any one who takes it as a volunteer, or with notice of her having set up a claim for maintenance against the heir." It has been followed and extended in the case of *Gauri* v. *Chandrámani*,(4) in which the purchaser at an execution sale of the rights of a nephew was successfully resisted as to one-half of the family dwelling by the widow of the judgment-debtor's uncle.

These several authorities, no doubt, afford, in combination, a strong support to the proposition that a widow's maintenance, especially as against the sons, is a charge on the estate, a right *in re* in the fullest sense adhering to the property, into whatever hands it may pass. Jagannath insists on her right to a partition as

(1) 4 Beng. L. R. 72, O. C. J. (2) 1 Borr. 404. (3) 8 Beng. L. R. 225.
(4) I. L. R. 1 All. 262.

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against her sons,[1] and, according to Sir W. Macnaghten,[2] "the widow (in Bengal) is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it, although her allotment will devolve on the heirs of her husband after her decease," and this right was, on the authority of a number of unreported cases, recognized in the recent case of *Sowdáminee Dossee* v. *Joyeshchandra Dutt*,[3] though declared subject to the discretion of the Court. It is not easy to see how a widow who cannot be deprived of her proper share by her husband's will, whose maintenance is secured by a text recognized as legally binding, and must be provided for in any partition, and who may demand a severance of her proper aliquot allotment, can, as to her life-interest, be less than an actual co-sharer in the estate. Yet Jimûta Vâhana says: "There is neither partition nor co-parcenary with the mother"[4]—no co-parcenary, as he explains, in the special sense of membership of a joint Hindu family.[5] In the recent case of *Baboo Din Dayál Lál* v. *Baboo Jag Dup Náráin Sing*[6] the Privy Council (25th July 1877), holding that a purchaser at an execution sale of the father's interest had acquired a right only to a severance of his share as distinguished from the sons', recognized that, in the partition to be thus made, the wife also of the judgment debtor, if he had one, might be entitled to an allotment. This is to be referred to the wife's right in her husband's property acquired by her marriage. As to this "there is no proof"—the Dáya Bhága says (chap. XI., sec. I., pl. 26)—"that it ceases on her husband's death. But the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue." Jimûta Vâhana in this way makes out that, while the widow's right to her husband's whole share or whole estate subsists in spite of the survival of other undivided co-parceners, it is extinguished by the superior right of a son, grandson, or great-grandson, through the operation of the special texts in their favour. In Bengal, then, it seems that the widow has a complete proprietorship, subject to restrictions on waste,

(1) Coleb. Dig., bk. V., ch. II., pl 89, Comm.
(2) 1 Macnaghten's Hindu Law, 49.
(3) I. L. R. 2 Calc. 262.
(4) Dáya Bhága, ch XI., sec. I., pl. 30.
(5) *Ibid.*
(6) L. R. 4 Ind. Ap. 247.

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as against other co-parceners; no proprietorship at all as against sons. Yet in Bengal, as in the provinces governed by the Mitákshara, "when partition is made by brothers of the whole blood after the demise of the father, an equal share must be given to the mother."(1) The mother's ownership, which has, according to this view, been extinguished, revives again on a partition amongst her sons. Their ownership in the mean time is complete. The mother's right during that time may be considered as in some degree analogous to the wife's equity to a settlement under the English law. Out of prudence and affection her deceased husband would have made a distinct provision for her had that seemed necessary. She may at any moment require that such a provision be made by the sons, and duly secured. They cannot free themselves from the co-parcenary relation without giving her an equal share. Although, therefore, her power of disposition is in many respects limited to her own life, there seems to be nothing unreasonable in pursuing the analogy somewhat further. As it is a consequence of her forbearance that the estate is larger by the particular portion that she might have required to have distinctly settled on her, she may fairly claim, as against her sons' assignees or creditors, a maintenance allowed as a charge on the estate which they appropriate, except in cases of a responsibility arising from her fraud or direct participation in the sons' transactions. As regards her husband's united brethren (and brethren here are the type of all co-parceners), the widow's right appears, according to the Dáya Bhága, to be developed into a completed ownership, subject to its proportion of the common burdens, at the moment of her husband's death. If she chooses, she may forthwith have her own share ascertained and separated. But this is placed by the Dáya Bhága(2) on the ground that the several co-parceners are really rather like tenants in common, each having a right only to an aliquot, though unseparated, portion, so that, on the death of one, there is no right of survivorship to intercept his widow's right of succession under Yajnávalkya's text, which the Bengal lawyers apply to a united as well as to a divided family.(3)

(1) Dáya Bhága, ch. III., sec. II., pl. 29. (2) Chap XI., sec. I., pl. 25, 26.

(3) Dáya Bhága, ch. XI., sec. I., pl. 26, 46; Coleb. Dig., bk. V., ch. I., sec. I., pl. ii, Comm.

This right of survivorship, on the other hand, is fully recognized by the Mitákshara as excluding the widow and the other heirs in the enumeration of Yajnávalkya, when there are undivided co-parceners to take the estate.(1) The rule is a consequence of the doctrine(2) that the right of each co-parcener extending to the whole estate, it is fully owned as to every part notwithstanding the death of one of the joint-tenants.(3) If the co-parceners of the deceased were his sons, they, as in Bengal, take in preference to all other pretenders.(4) If they make a division of the estate, they must allot to their mother an equal share, and the same to any sonless widow of their father; but this does not of necessity invest the widows here, any more than in Bengal, with a proprietorship in the estate before its partition. The sons must, from the moment of their father's death, be regarded as sole owners, yet with a liability to provide for the widow's maintenance, and with a competence, on the widow's part, to have the estate made answerable. In the case of *Baijun Doobey* v. *Brij Bhookun Láll Awusti*(5) the Judicial Committee say: "The maintenance of Net Kouwar, the widow of Muddun Mohan, was a charge on the inheritance which came from Muddun Mohan. The liability to maintain the mother passed to Chintáman when he got the estate of his father, and, when the estate passed from Chintáman to his widow, the liability to maintain Net Kouwar still attached to the inheritance,(6) and Doorga (the son's widow) was bound to maintain her out of the inheritance." Apart from the general obligation to maintain aged parents,(7) the relations out of which this right of the widow springs, appear to exist as effectively under the law of the Mitákshara as under that of the Dáya Bhága. Her moral identity with her husband is no less complete; her rights as a widow succeeding to the estate are rather more extensive under the western than the eastern law.

(1) Mitáks., ch. II., sec. I., pl. 19. (2) Mitáks., ch. I., sec. I., pl. 30.

(3) See Smiriti Chandrika, ch. XII., pl. 9.

(4) Mitáks., ch. I., sec. XI., pl. 28, 33, sec. I., pl. 3, sec. V.

(5) L. R. 2 Ind. Ap. at p. 279.

(6) See also Peacock, C. J., in *Khetrámáni Dási* v. *Kashináth Dás*, 2 Beng. L. R. at p. 34, A. J. C.

(7) See Coleb. Dig., bk. V., ch. VI., pl. 379, Comm; 2 Macn. H. L., 114; 1 West and Bühler, bk. I., ch. II., sec. I., Q. 2.

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She has been pronounced entitled to a provision out of her husband's property, given or bequeathed by him to another (Q. 1837 M. S. Surat, 5th June 1847). But the joint tenancy, under the Mitákshara, of the sons with their father giving them an ownership antecedent to the rights of the widow as such, not as in Bengal[1] coming into existence only at the same moment with those rights, they may be here regarded by the subtlety of the Hindu lawyers as holding a more completely untrammelled power of dealing with the estate without regard to the widow's claims, however subject they may be to moral reprobation should they needlessly dispose of it, and however impossible it may be for them to escape a personal liability for the widow's maintenance.[2] Thus in the case at 1 West and Bühler, 24, Q. 5, the shástri denies to a step-mother any right even in the paternal house as against her step-son. At 2 West and Bühler, 31, Q. 4, is a case of a creditor of a son seeking to enforce his decree against a house inherited by his debtor from his father. The widow set up a claim to a moiety of the dwelling, but the shástri's answer is: "A son, after the death of his father, acquires a perfect right to his property, and while sons are alive the widow has no claim to his property. She cannot, therefore, claim any share of the house." It seems opposed, therefore, both to the text of the Mitákshara and to the constructions of the local interpreters to regard the widow's maintenance as "a charge on the inheritance" taken by the sons in the sense of a perfect right *in re*. At the same time, as the maintenance, even of a concubine, "is a burden placed upon (the estate) by Hindu law,"[3] which may properly be secured by an investment or other secure provision under the direction of the Court, the widowed mother or step-mother may demand, at least, an equal protection. Her right, then, though resting on a somewhat different theory, appears, on the whole, to stand practically on the same level here as in Bengal. "The widow's claim to maintenance from her husband's estate," Mr. Ellis says, "is absolute, unlimited by circumstances; but then it is only a claim

(1) Dáya Bhága, ch. I., pl. 12-14.

(2) See Nárada in 1 West and Bühler 355; 1 Str. H. L. 172.

(3) See *Vrandavandás* v. *Yámunábái*, 10 Bom. H. C. Rep. at p. 232; *Khemlor* v. *Umáshankar*, *Ibid.* 381.

to maintenance, and it is not correct to say that she is entitled to any share or division."(1) The sons taking the property subject to the burden of maintaining the widow, are in a position bearing some analogy to that of a husband becoming owner at law of his wife's property, but bound to provide for her support. The origin of the obligations, no doubt, is quite different; but, in the relations to which they give rise between the parties and in their bearing on the property, they seem to be very nearly alike. If, then, a mother, foregoing her claim to a separate provision out of the paternal property, resides with her sons or step-sons, and is maintained by them, she must submit, I think, to their dealing with the estate. A fraudulent alienation for the purpose of defeating her claims, as pointed out by Sir G. Turner, V.C., in the case of a wife (in *Tidd* v. *Lister*(2)), will not be supported; but the particular assignee for value acquires under such circumstances a complete title not impaired, like that of the assignee in insolvency, by the then obvious incapacity of the insolvent son to support out of the estate those whose maintenance is a charge on it. The charge must, I think, be regarded as an equitable one of a special kind, enforceable in all cases in which the mother or step-mother living apart is not maintained by the sons, but not in other cases, except under circumstances which affect the good faith of a transaction by which it is sought to get rid of the burden.

In the case of a widow of an ordinary co-parcener as against the surviving brothers or cousins forming the joint family, her identity with her deceased husband(3) cannot be considered less than where the husband was separated from his brethren and has left sons. But the right of the widow rests on different texts. Kátyáyána, as quoted in the Vyavahára Mayúkha,(4) says: "In an undivided family, if the husband have died, the widow obtains maintenance or a share of the property for her life."(5) The

(1) 2 Stra. H. L. 307.

(2) 10 Hare 140. (3) 1 Mad. H. C. Rep. 475.

(4) See 1 West and Bühler 9, and Coleb. Dig., bk. V., ch. VIII., pl. 481, Comm.; Smriti Chandrika, ch. XI., sec. I., pl. 35.

(5) Svaryâte svâmini strî tu grâsâchchhâdanabhâgini.
Avibhakte dhanâns'an tu prâpnotyâmarananântikam.

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passage of Nárada[1] to a similar effect applied by the Vyavahâra Mayûkha[2] to the widows of unseparated and of reunited brethren, is by the Mitákshara[3] limited to the latter class; but Vijnyáneshwara refers to it, not for the purpose of cutting down the widow's advantages, but in order to support her right to complete inheritance. His antagonist desiring to reduce her to a mere maintenance in all cases, he contends that the passage relied on cannot extend beyond the widows of reunited brethren; but as he admits the claims of the wives and daughters of disqualified persons[4] and of the concubines of one deceased to a provision,[5] which in the latter case is directed to be made by the king, succeeding as *ultimus hæres*, by "excluding or setting apart a sufficiency for the food and raiment of the women," it follows, *á fortiori*, that he could not have meant the widow of one who had actually held as a qualified co-parcener to be left destitute, or dependent on the mere caprice of the survivors of her husband amongst the males of the united family. The passages in Manu[6] which forbid a woman to make a hoard[7] out of the common property, and reserve from partition only the ornaments usually worn by her, being immediately followed by an enumeration of the males disqualified for inheritance, and an injunction that all are to be supported, that injunction is in all probability meant to extend to the widows disqualified by their sex as well as the brethren excluded by their defects. Nárada distinctly impo-

(1) Bhrâtrînâmaprajâh preyat kas chichchet pravrajeta vâ,
Vibhajeran dhanan tasya s'eshâste stridhanam vinâ.
Bharanañ châsya kurviran strînâmâjivanakshayât,
Rakshanti s'ayyâm bhartus'chedachchhidyuritarâsutviti,

"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the brethren may resume that allowance." (Borr., ch. IV., sec. VIII., pl. 6.)

(2) Ch. IV., sec. VIII., pl. 6. (3) Mitáks., ch. II., sec. I., pl. 20.

(4) Mitáks., ch. II. sec. X., pl. 13, 14. (5) Mitáks., ch. II., sec. I., pl. 27, 28.

(6) Ch. IX., pl. 199, 200.

(7) The word "nirhara" is by the Viramitrodaya, 2 West & Bühler 74, and the Vyav. May., ch. IV., sec. X., pl. 8, construed "expenditure;" but the translation of Sir W. Jones and Colebrooke Dig., ch. V., text 474, seems to agree best with the context as well as with the ordinary use of the word.

ses [1] the duty of maintenance on the brethren, and there is no indication that Vijnyáneshwara, in assigning to the widows under some circumstances more than this, intended in any case to allow them less. He seems rather to have taken it for granted that no question could arise in the case of the widow of a deceased member of a joint family, and the passage cited in the Mayûkha is a mere explication, not an extension, of the doctrine of the elder authority. This right to maintenance under the Mitákshara law takes the place of the general right to an actual possession of her husband's share, which, as we have seen, is allowed by the Dáya Bhága, notwithstanding the subsistence of a state of union between the deceased and his brethren. Yet, as in the division of an estate by co-parceners there is no express injunction to assign an aliquot portion to any widow except the widow of a father, a distinction may be taken, and has been pressed upon us, as to her rights in ordinary cases anterior to division, which, it is argued, are of a merely personal kind against the surviving co-parceners. The text of Katyáyána, which we have already quoted, is against this contention, and Sir T. Strange says that in every case "an allowance..... proportioned to her support..... with a reference to the amount of the property so as, at the utmost (as has been said), not to exceed a son's or other parcener's share," is to be made to her, and that "care should be taken to have it secured."[2] He thus places the widow of the ordinary co-parcener apparently on exactly the same level with a mother seeking maintenance from her sons. His language is adopted in the case of *Sakvarbái* v *Bhavanji*,[3] though with the less weight for other cases, as the question there in controversy was between a widowed step-mother and her step-son. The case of *Rámchandra* v. *Sávitribái*,[4] already referred to, is in itself more decisive in recognizing the widow's right generally as a charge; but one of

(1) Nárada, Pt. 2, ch. 13, slokas 26, 28 :—

For sloka 26, *vide* note (1) *supra*, page 512.

Sloka 28. Mrite bhartaryaputrâyâh patipakshah prabhuh striyâh,
Viniyogâtmarakshâsu bharane cha sa is'varah.

"When the husband is deceased, his kin are the guardians of his childless widow; in disposing (of her) and in the care of her, as well as in her maintenance, they have full power." (1 West and Bühler 355.)

(2) 1 Strange H. L. 171. (3) 1 Bom. H. C. Rep. 198.

(4) 4 Bom. H. C. Rep. 73, A. C. J.

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the learned Judges who gave that judgment declined afterwards, as we have seen, to recognize its apparent import. In *Rázábái* v. *Sádu*,(1) a widow having been sued by her husband's heirs for his property in her possession, this Court, though it appeared that the deceased had made a will in favour of the plaintiffs, directed, in remanding the case, that an award of maintenance to the widow should be included in the decree. On the other hand, it was ruled by the late Sadr Court in *Bhugwunt* v. *Goozábaee*(2) that a decree for maintenance obtained by a widow against her husband's brother did not prevent his selling with a good title his share in the family dwelling so as to exclude her claim upon it. This decision agrees in principle with one reported at N. W. P. Rep. for 1860, p. 447; but it is opposed to that at 2 N. W. P. Rep. 134, which says that, though "the widow is bound to look to the heir for her maintenance and to claim it from him primarily rather than from the estate transferred or wasted," yet the estate "may nevertheless be in the last resort answerable to her claim." The decision of the Bombay case, it may be observed, was opposed to the opinion of the shástri at Sholápur, and the sale was by one brother to another, so that the widow's right to residence may have been supposed to have remained unaffected. Otherwise the case is opposed to that of *Mangála Debi* v. *Dinánáth Boee*,(3) and to that of *Gauri* v. *Chandrámani*,(4) to which we have already referred, as well as to the Bombay decisions referred to by Sir B. Peacock in *Mangála Debi's* case.

The right of the widow of a deceased co-parcener to maintenance as a charge on the estate in which her husband had a share, as well as against the co-parceners personally who have taken that share, has been recognized in several cases by the High Court at Calcutta. In *Anand Moyee* v. *Gopál Chandar Bánerji*(5) it is said of the widow resisting the purchaser from a surviving co-parcener: "There may be other property in the hands of Dwarkánáth out of which that maintenance can be derived, and if there is no other, there is nothing to prevent her from suing to establish her right to make her maintenance a charge upon the property purchased by the plaintiff." In *Mussámut Khukroo Misrain* v.

(1) 8 Bom. H. C. Rep. 98, A. C. J.
(2) 8 Harr. 120.
(3) 4 Beng. L. Rep. 72, O. C. J.
(4) I. L. R. 1 All. 262.
(5) Calc. W. R. for 1864, 310.

Jhoomuck Lall Dass, (1) a case from the Mithila District, a widow sued to enforce an equity of redemption which she said had descended to her in succession to her husband, who, she alleged, had died separated from his brethren. This fact was found against her, and the Court say: "But with the finding that her husband "died a member of the joint family, all her claim disappeared, and "she has no interest whatever in the family estate. It has been "contended that her claim for maintenance is a charge on the "estate, and that, therefore, she has an interest in keeping the "estate in the family; but, as a matter of fact, change of ownership "would not affect her lien, and if she failed in getting her main-"tenance from the members of her late husband's family, she could "make the estate chargeable with it into whose hands soever it "had fallen under the foreclosure." The doctrine laid down in these passages, appears to be substantially identical with that of the High Court of Allahabad to which I lately referred. It apparently involves the inconvenient consequence of subjecting the ownership acquired by a purchaser to a sort of springing use dependent on the solvency of his vendor, and the honesty of the vendor and perhaps several other persons. No authority, so far as I can recollect, is to be found for such an estate subject to a right so uncertain and so calculated to injure the value of property. Either the land can be sold or it cannot, and only rights in existence at the time, or certain to come into existence on the expiration of some particular estate, are recognized in derogation of the ownership. The widow's claim being strictly to maintenance and maintenance only, without any defined share in the estate even on partition, and the kind of maintenance even that she can claim being dependent on the perhaps fluctuating circumstances of the joint family,(2) it appears that although she may, at her will, get her claim recognized as chargeable on the estate in the hands of the co-parceners, reduced to certainty, and secured as a specific charge on the estate, or, as Kátyáyana says, by "the allotment of a share for her life,"(3) yet if she should refrain from that course in

(1) 15 Calc. W. R. 263.

(2) See *Ramlál* v. *Lakmichand*, 1 Bom. H. C. Rep. 51, App.: *Johurra Bibee* v. *Sreegopál*, I. L. R. 1 Calc. 470.

(3) See *Rámpershad Tewárry* v. *Sheochurn Dass*, 10 Moore's I. A. 490. The right of the ordinary co-parcener's widow, either before or after partition, is still only to maintenance, not to a share, as in the case of a mother.

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the hope of sharing the improving circumstances of the family or through mere carelessness, she leaves to the co-parceners an unlimited estate to deal with at their discretion, and must share their ill as well as their good fortune. The case *of Rámlál* v. *Lakmichand*[1] affords an analogy on which this proposition may be rested. If, indeed, there should be an alienation or wasting of the property for the very purpose of depriving her, and possibly others in the like situation, of their subsistence, such a proceeding being a fraud upon persons whom the Hindu law, like the English, regards as deserving a special protection, and being in direct opposition to the precept which forbids the alienation of that which is needed for the sustenance of the family, would be pronounced invalid, or subject to revision in the interest of the persons thus prejudiced. The analogy of the English law as to debts chargeable on the estate taken by an heir, is but very partially or not at all applicable. According to that law, a liability for debts does not constitute a charge on lands before a judgment is obtained against the heir of a deceased, and ranks subsequent to any alienation, even equitable, to a *bonâ fide* purchaser or mortgagee (*British Mutual Investment Company* v. *Smart*[2]), because this liability being a creation of the law can extend no further than its clearly-defined scope; and a debt is not by the English Courts regarded as binding the debtor's conscience so as to make it inequitable to deal with his property as he can. Even the charge created by a prior judgment, has not the effect of binding the property, however capable of being made an interest *in re*, and ranks subsequent to a later judgment which is first registered (*Benham* v. *Keane*).[3] Now, indeed, under the statute 27 & 28 Vic., c. 112, sec. 1, a judgment creditor acquires no charge on his judgment debtor's land until he has taken it in execution. It cannot be said that, under the Hindu law, the heir's or surviving co-parcener's conscience is not affected by the widow's claim to maintenance out of the estate he has taken. It is the object of a direct injunction; and the purchaser, who joins him in defeating that provision, may properly be himself made subject to

(1) 1 Bom H. C. Rep. at p. 51, App.

(2) L. R. 10 Ch. App. 567.

(3) 31 L. J. Ch. 129.

the charge. (1) If there is an ample estate out of which to provide for the widow, so that she may still get her claim fixed and secured, or, if knowing of the proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint-property. If the widow, on the other hand, is not accepting support from the co-parcener in satisfaction of her claim; if she lives apart, and the estate is small and insufficient, it is the vendee's duty before purchasing to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor.

It is in this connexion that the doctrine of notice becomes of importance, and thus in *Srimati Bhagábati Dási* v. *Kanailál Mitter*, (2) Phear, J., says, the widow "may also, doubtless, follow the property for [her maintenance] into the hands of any one who takes it as a volunteer or with notice of her having set up a claim for maintenance against the heir." The distinction taken between the volunteer and the alienee for value, rests rather on English than on Hindu notions; and for "notice of her having set up a claim" we should rather substitute "notice of the existence of a claim likely to be unjustly impaired by the proposed transaction;" but, in so far as notice is recognized as making an important difference, the principle is correct and important. It is said, further on in the same judgment, "when the property passes into the hands of a *bonâ fide* purchaser without notice, it cannot be affected by anything short of an already existing proprietary right; it cannot be subject to that which is not already a specific charge, or which does not contain all the elements necessary for its ripening into a specific charge." If this is to be applied to the Bombay Presidency, it may be said that the widow's claim in every case does "contain all the elements necessary for its ripening into a specific charge:" it only needs formal assertion to obtain recognition. But, nevertheless, I do not think it can be called an "already existing proprietary right." Under the English law the knowledge of collateral rights frequently qualifies

(1) See per Wood, V. C., in 31 L. J. Ch. at pp. 134, 135, and per Turner, L. J., *ib.*, at p. 139.

(2) 8 Beng. L. R. at p. 228.

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those acquired by a purchaser; there is a class of cases, for instance, of which it is said that "where the right comes into existence by covenant, the burden does not, at law, run with the servient tenement; but equity says that a person who takes it with notice that a covenant has been made, shall be compelled to observe it" (per Mellish, L.J., in *Leech* v. *Schweder*.[1]) In the case we are considering, the right does not come into existence by covenant, but it is a right maintainable against the holders of the ancestral estate in virtue of their holding, no less through the operation of the law than if it had been created by agreement; and so, when the sale prevents its being otherwise satisfied, it accompanies the property, as a burden annexed to it, into the hands of a vendee with notice that it subsists. Equity, as between the vendee and vendor, will make the property retained by the latter primarily answerable; but such property there must be to make the sale and purchase free from hazard where the vendee has knowledge or the means of knowledge of a widow's claim that cannot be satisfied without recourse to what he proposes to buy.

In *Baboo Goluck Chunder Bose* v. *Rânee Ohillá Dáyee*,[2] it is said: "It has been settled by more than one decision of this Court that when a purchaser purchases property from the heir with notice that a Hindu widow is entitled to be maintained out of it, the property in the hands of the purchaser continues to be charged with that maintenance," and to this the Court add an opinion that "it is not a correct proposition of Hindu law to say that in all cases a Hindu widow is not entitled to follow the properties from which she is entitled to obtain her maintenance in the hands of the purchaser, unless she at first attempts to recover her maintenance from the heir at law." In this latter statement, if it be taken strictly, I concur; but I think that, whether the property purchased is subject or not subject to the charge, depends on the conditions which I have already considered. The law steps in only to counteract what it regards as a furtherance of an unconscientious attempt to evade a sacred duty.

The Court, in the case just referred to, declined to entertain the question of whether the widow's claim for maintenance was sub-

(1) L. R. 9 Ch. App, at p. 475. (2) 25 Calc. W. R. 100.

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ordinate to the debts binding on the family. Even in the case of a mother, however, her share, like that of a son, is intended to be fixed on a division of the property after the family debts have been paid.(1) Much more is this the case with the widow of an ordinary co-parcener, who can never demand any precise aliquot share at all, only sustenance according to the means of the family. Those means are not, in honesty, available except with a deduction for debts unpaid. This principle is properly insisted on in *Adhiránee Náráin Coomáry* v. *Shoná Máli*.(2) The case of *Gangábái* v. *Sitárám*(3) might have been disposed of by reference to the same principle. There the ancestral house had been sold for debts, and the claim was one, as the Court say, "which the son himself, if alive, could not have resisted." This being so, it was not necessary, I think, to place the decision on what seems to me the more than doubtful ground, that a daughter-in-law cannot claim maintenance when the father-in-law has sold the ancestral property.(4) A passage from the Viramitrodáya is quoted in support of the judgment, which I have not, for want of a precise reference, been able to verify, but which is probably a repetition merely of the common maxim "He who takes the property (where there is property) shall bear its burdens."(5) That surviving co-parceners, by merely selling the estate or changing its form, should be able to get rid of the obligations properly attached to it(6) would be a premium on trickery opposed equally to the spirit of the Hindu as of the English law. In *Srimati Bhagabati Dási* v. *Kanailál Mitter*,(7) already referred to, this point is touched on; "and obviously," according to Phear, J., "the consideration received by the heir for the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold." It will take its place so long as it remains undissipated; but as "the Hindu wife, upon her marriage, passes into and becomes a member of (her husband's) family, it

(1) 2 West and Bühler, Introd., pp. 28, 36. (2) I. L. R. 1. Calc. 365 at p. 377.
(3) I. L. R. 1 All., 170.
(4) See Colebrooke in 2 Str. H. L. 412, and the judgment of the Privy Council in the case of *Sri Virádá Pratápá Raghunádá Deo* v. *Sri Brozo Kishoro*, I. L. R. 1 Mad. at page 81; Agra Sadar Reports for 1859, p. 52, and for 1863, p. 638; Mad. Sadar Reports for 1849, p. 5.
(5) Nárada, Pt. I., ch. III, sloka 18; Pt. II, ch. XIII, slokas 26-27.
(6) See 7 N. W. P. H. C. Rep. 261 (F. B.) (7) 8 Beng. L. R. 225.

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is upon that family that, as a widow, she has her claim for maintenance" (per Judicial Committee in *Sri Virâdâ Pratápá Râghunádá Deo* v. *Sri Brozo Kishoro Patt Deo*, [1] and her right is not extinguished by any wilful or negligent diminution of the means of satisfying it.

But while this right to maintenance out of the family property and at the hands of the surviving co-parceners may at all times be exercised as against them, I find a difficulty in accepting the doctrine that it depends on how the widow's claim may be or can be met, whether she can have recourse to property already sold or mortgaged to provide her with subsistence. I have already discussed some of the cases bearing on this question. In the able judgment of L. Jackson, J., in *Adhiránee Náráin* v. *Shoná Máli*[2] that learned Judge, while holding that the widow's lien (for such it is called) for maintenance does not affect the estate in the hands of a purchaser without notice of it, further lays down that it operates only on failure of property of the deceased in the heir's hands. The laws of inheritance applicable to the particular case which was before the learned Judge, may have varied somewhat from the ordinary rules; but I should hesitate to recognize, as a principle generally applicable, that "it lay upon her (the widow) to show that his estate (that of the Raja who had succeeded her husband) has been exhausted before she could come upon the property in the hands of the first defendant,"[3] and still more the converse proposition that its exhaustion would create for her a new right. What was honestly purchased, is free from her claim for ever: what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale.

Amongst the cases pressed on us at the hearing, was that of *Khetrámáni Dási* v. *Kashináth Dás*.[4] In that case it was ruled that a widow of a son who had died without property, was not entitled to a separate maintenance from her father-in-law. The question was one under the Bengal law, according to which the

(1) I. L. R. 1 Mad. at p. 81.

(2) I. L. R. 1 Calc. 365.

(3) *Ibid.* at p. 398.

(4) 2 Beng. L. R. 15, A. C. J.

son, not becoming by his birth a joint owner with his father of the ancestral estate stands on a different footing from that which he occupies under the Mitákshara. Under that law the daughter-in-law's right to maintenance out of the estate which her husband shared, has been recognized in many cases.(1) She seems to stand towards the father-in-law in the position of an ordinary widow of a deceased co-parcener to his survivor, and thus the cases relating to her rights serve to define and illustrate those of the whole class. I cannot find either that the father, restored to his position of sole owner by his son's death, is prevented from giving, in all ordinary cases, a perfectly good title to the property which he chooses to sell, or that he can get rid of the obligation of maintaining his daughter-in-law out of it while it exists, and in spite of its non-existence, if he has chosen to waste it. In the same case, Phear, J., delivering the judgment of himself and of Jackson and Hobhouse, JJ., says that the maintenance of persons excluded from a share, ranks as a real charge on the inheritance, while that of the daughter-in-law is no more than a moral obligation. But precisely the same word "*bhartavyám*" is used by Yajnavalkya to express the claim of these persons and of their wives, and the same verb is used to express the right to support of a deceased co-parcener's widow in Nárada.(2) If, then, the sustenance of persons entitled to no definite share, is an indefeasible charge in the one case, it must apparently be so in the others. In all, as it seems to me, it is a claim to maintenance merely(3) not interfering, so long as it has not been reduced to certainty by a legal transaction, with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit. The case at 1 West and Bühler, 286, Q. 4, is not stated with enough of circumstance to enable us to say whether the debt for which a decree had passed against the active brethren, was one incurred in fraud of the lame brother's right. If it were so incurred, the property should apparently be charged to a reason-

(1) See *Visalatchi* v. *Annasamy*, 5 Mad H. C. R. 150; *Kumla Buhoo* v. *Muneshunker*; 2 Borr. at p. 749-750; 1 West and Bühler, 10, 18, No. 287; *Mussámat Lalti* v. *Ganga Bishaw*, 7 N. W. P. Rep. 261.

(2) Pt. II., ch. XIII., sloka 28.

(3) See Manu, ch. IX., pl 202; Nárada quoted in the Smriti Chandrika, ch. XI., sec. 1, para. 34; and Katyáyána in the Vivádа Chintámani, p. 261.

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able extent for his maintenance; if not, his rights would be limited to a claim on his brethren and the property remaining in their hands. The shástri has quoted as an authority only the passage from Yajnávalkya given in the Vyav. May., ch. IV., sec. XI., pl. 1, which is cited also in the Mitákshara,[1] whence it may be inferred that no passage more directly supporting his opinion could readily be found. Question 6, at page 288 of the same work, is answered to the effect that a dumb or mad man may claim a maintenance from the ancestral property, but the authorities cited are still only those that we have considered. In the case of an idiot or lunatic, the special guardianship assigned by Hindu law to the sovereign would probably justify a greater intervention of the Courts than would be proper in other cases; but on the exact extent to which this intervention could be carried, it is not necessary to express an opinion.

The right of a co-parcener's widow being such as we have seen against the surviving co-parceners and, under circumstances, against the common property, the question has, lastly, to be considered of whether the reduction of the survivors to a single one, makes any difference in the widow's legal position. Where the claimant of maintenance is a mother, or even an unmarried sister of the co-parceners, and thus entitled on partition to a definite share,[2] it is necessary, as we have seen, that a share should be assigned to her in the division of the common property. And as a judgment-creditor of a single member can work out his decree only by means of a partition, the rights of the widow are thus effectively preserved. As is said in *Srimatti Soorjee Money Dásee* v. *Denobundoo Mullick*,[3] "Those who come in the place of the original co-sharer by inheritance, assignment, or operation of law, can take only his rights as they stand, including, of course, the right to call for a partition." Though the judgment was afterwards reversed by the Judicial Committee, this principle was not questioned,[4] and in *Rámchandar Dutt* v. *Chander Coomár Mundul*[5] it is said that the alienation of the

(1) Ch. II., sec. X., pl. I.

(2) Miták, ch, I., sec. VII., pl. 2-14; 2 Strange H. L. 311.

(3) Boulnois, 228.

(4) 6 Moo. Ind. Ap. at p. 539.

(5) 13 Moo. Ind. Ap. 198.

shares of two out of three members, by mortgage and foreclosure, merely substitutes the status of joint ownership for that of an undivided family,—a status, as the Judicial Committee say, "only to be determined by an actual partition or an agreement by mutual consent to divide." In such a division the mother's or sister's share would be set apart and preserved, after provision had been made out of the aggregate for debts properly incumbent on the whole family. In the case even of co-parceners not having a mother or sister to provide for, it has, as we have seen, been definitely ruled that the Court in decreeing a partition may properly assign an adequate portion to the widow of a deceased co-parcener as a source of subsistence during her life *(Rámpershad Tewárry* v. *Sheochurn Doss)*.[1] When, therefore, the creditor of a single co-parcener, amongst a group of first or second cousins, seeks through an enforced partition to obtain satisfaction of his separate debt, the widow's claim may well be recognized, and due provision made to meet it. But it is clear that such a group is not obliged, in a voluntary partition, to allot a part to the cousin's or brother's widow as a co-sharer. Her right remains after the division what it was before it,—a right to maintenance and nothing more, or, at most, should she advance a definite claim, to a provision, determined according to circumstances, out of the property. And as in a dwindling brotherhood the rights and obligations of four members become those of three and of two, so do those of the two fall at last to the sole survivor. The widows must be maintained by him out of the property that has become burdened with that incumbrance; but he is not, therefore, fettered in dealing with the estate at his discretion, in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right *in re*. The purchaser from him, as in the familiar case of a sale by a father-in-law, takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the vendor's family.

In the present case, we have it found as a fact that the purchaser Lakshman (defendant No. 2) was aware of the existence and of the claim to maintenance set up by the widow (now plain-

(1) 10 Moo. Ind. Ap. 490.

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tiff) Satyabhámábái of the brother of the vendor Máhádev. It is part of his case that the property was first mortgaged and afterwards sold to him to raise funds for the discharge of debts contracted by the deceased husband of the plaintiff, and for the satisfaction of a decree for maintenance obtained by Satyabhámábái against the vendor Máhádev. If mere notice, therefore, of the existence of an undivided brother's widow, and of a claim to maintenance set up by her, was sufficient to bind the ancestral property under all circumstances and as against all other claims, the judgment of the District Judge in favour of the plaintiff should be unreservedly upheld. He has awarded her maintenance out of the property in the hands of Lakshman and his vendee Vishnu at the rate adjudged to be proper in her former suit against Máhádev. But a full review of the law on this subject has satisfied me that the ground of decision taken by the Court below is too narrow. For proper reasons, as for the discharge of a debt incumbent on the family and on him as its sole surviving proprietary member, Máhádev might sell the estate which had thus vested in him. He could not thus affect the right of another co-parcener's widow Sarasvatibái, whose claim had by means of a decree become a right *in re* adhering to the estate; but the right of Satyabhámábái, not yet reduced to definiteness and made a precise and actual charge on the property, could not prevent his dealing with it at his discretion. If he sought to defraud her, he could not, indeed by any device in the way of parting with the estate, or changing its form, get rid of the liability which had come to him along with the advantage derived from his survivorship; and Lakshman—taking from him with reason to suppose that the transaction was one originating not in an honest desire to pay off debts, or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a design to shuffle off a moral and legal liability—would, as sharing in the proposed fraud, be prevented from gaining by it; but if, though he knew of the widow's existence and her claim, he bought upon a rational and honest opinion that the sale was one that could be effected without any furtherance of wrong, he has, as against the plaintiff, acquired a title free from the claim which still subsists in full force as against the recipient of the purchase-money,

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Máhádev : *Dabee Rawoot* v. *Heeramun Muhatoon*.[1] As to Vishnu, the sub-purchaser of part of the property, the same considerations apply. He knew of Satyabhámábái's position and her claim. If, with this knowledge, he chose to purchase from Lakshman, himself but recently become vendee, he took the property with the same risks as Lakshman. If he acted in good faith and with due care, he is entitled to protection for his purchase.

These being the principles on which the case ought to have been disposed of, and the question of notice, except as an element of the larger question of whether Satyabhámábái's interests were fraudulently touched by Lakshman's purchase, not being determinative of the rights of the parties, I think that the decision of the case solely by reference to that question in the Court below is to be regarded as having shut out the consideration of the really decisive issues. Was the sale justifiable under the circumstances? Was it unfairly prejudicial to Satyabhámábái's rights or remedies? Was Lakshman's and was Vishnu's purchase made under such circumstances that the property passed to each or either of them exonerated from the liability to support Satyabhámábái with which it was burdened in the hands of Máhádev? That these questions may be dealt with in the form prescribed by my Lord the Chief Justice, we must reverse the decree of the District Court, and remand the cause for re-trial and a new decree on the merits.

Decree reversed and case remanded.

(1) 8 Calc. W. R. 223.

[APPELLATE CRIMINAL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

1878. February 14.

IMPERATRIX *v.* BHAWA'NI BIN PANDUJI AND SAKHA'RA'M BIN KHUNDOJI.*

Criminal Procedure Code (Act X. of 1872), Section 263, Clauses 4 and 5—Dissent of Court from verdict of jurors.

The "dissent" referred to in the 4th clause of section 263 of the Criminal Procedure Code (Act X. of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court.

THE prisoners Bhawáni and Sakhárám were tried by a jury before H. Phillpotts, Acting Sessions Judge of Poona, on a charge

* Criminal Appeal No. 15 of 1878.