No. 393. Read the following letter from the Collector of the Kistna District, to the Secretary to Government, Revenue Department, dated Masulipatam, 20th September 1871, No. 2,922 :—

WITH reference to the Orders of Government No. 1,485, dated 29th August [illegible] upon me to report the present state of affairs as regards the agreement executed by Kavali Venkata Narayanappa, Zemindar of Vissannapeta estate in this district, I have the honour to inform you that in the month of March last, I prepared the agreement with all the necessary requirements, and forwarded it to Venkata Narayanappa for execution. He refused then to sign it on the ground that in the list of the villages attached to the deed the assessments of the estate for Fusly 1277, on which the Road Cess for Fusly 1278 was imposed upon him, ought to have been entered instead of the assessment for Fusly 1278, and that the boundaries of the estate were not properly marked out in the plan. I have accordingly revised the list and attached a fresh one to the deed, which I forwarded again to the Government Pleader on 31st August 1871, with request to get the same executed by the Zemindar without further reference, and to communicate to him at the same time that the boundaries of the estate have been marked out in the plan correctly, as far as practicable, from the survey map in the Collector's Office; and that I have no materials to modify the same in any other way to suit the views of the Zemindar Venkata Narayanappa. I presume he will now execute the deed, and as soon as it is returned to me by the Government Pleader after execution, I will have it registered and present the same to the Civil Court at Guntur in the manner already suggested by the Government Pleader.

2. The petition of Venkata Narayanappa is returned herewith.

No. 394. ORDER THEREON, 29th September 1871, No. 1,703.

Miscellaneous.

ORDERED to be recorded.

(True Extract.)

(Signed) W. HUDLESTON,
Secretary to Government.

To the Collector of the Kistna District.

Exd. F. R. Bantleman.

To

THE RIGHT HONORABLE THE GOVERNOR IN COUNCIL,
Fort Saint George.

THE HUMBLE PETITION OF C. V. NARRAINAPAH, JAGHIREDAR OF TINNANOOR, AND ZEMINDAR OF VISSUNNAPET.

HUMBLY SHEWETH,

That your Petitioner having complied with the Order of Government, dated 6th May 1870, contained in an Endorsement on his Petition, dated 5th January 1870, to the effect that "the Petitioner is informed, that unless he executes the agreement referred to in para. 1 of his Memorial, within one month from this date, the Order of Government, under date 23rd April 1869, No. 1101, will be formally cancelled, and measures taken to exercise the right of redemption:"—takes leave to avail himself of the promise contained in the second para. of that Endorsement which states that "they will be prepared to receive from him any further representation which he may be in a position to make on the subject of the costs of the suit," to lay, for the equitable consideration of Government, a brief *resumé* of his case.

In submitting for the impartial consideration of Government the facts of the case, and the equity of the measure involved therein, the question of costs will, of necessity, have to be taken with that of the *mesne profits* of the estate, inasmuch as they are intimately connected with the question as a whole, relatively and conjointly, and cannot be separated without prejudicing the interests at issue.

For the just appreciation of the arguments which will hereafter be adduced, it is urged, for the ends of justice, that the consideration of the question shall be narrowed to the bare merits of the case, supported by the facts and rulings of law; and to discard all other elements that cannot be confined within such limits.

Before entering into the merits of the case, your Petitioner feels it imperative on him to place in a clear and comprehensive manner, the history of the case itself, as briefly as possible, from its beginning to the present day, although the matter has before this been before Government, and the Government have fully considered it, when they recorded their Proceedings of 23rd April 1869, unconditionally relinquishing their alleged right of redemption.

C. V. Narrainapah's family for a long series of years had dealings with the Zemindary of Vissunnapet, which belonged to a Brahmin named *Vareegondah Ramanappa*, and which had been guaranteed to him by a *Sunud-i-Moolkyet-Istimarar*, or a solemn deed of permanent settlement, granted by the British Government, (on their assuming charge of the Northern Circars from the Nizam), subject to an annual payment of revenue of about Rupees 5,000 as peishcush, which was calculated at two-thirds of its value, signed and sealed by the Governor in Council of Fort Saint George, giving full powers and liberty to the holder thereof freely to dispose of or alienate it, declaring in its seventh para. that:—"You shall be at free liberty to transfer, without the previous consent of Government, or of any authority, to whomsoever you may think proper, either by gift, sale, or otherwise, your proprietary right in the whole or in any part of your Zemindary; and such transfer of your land shall be valid and recognised by the Courts and Officers of Government."

The said *Ramanappa* died in 1810, much involved in debt, and without surviving issue, leaving a widow, *Vareegonda Lukshmidavamah*, who entered into possession of the said Estate as his heiress and successor; so that one *Cavelly Seetiah*, the half-brother of the said *Narrainapah's* father *Lutchmiah*, was in the habit of making advances to the said *Ramanappa*, during his life time, to enable him to pay the revenue of the Zemindary to Government, and after his death, to his widow, the said *Lukshmidavama*, to defray the unavoidable expenses of her husband's funeral rites, &c., for which an adjustment of accounts took place in the latter end of 1810, when a fresh Bond was obtained under certain stipulations, on the mortage of the said Zemindary, upon returning all the former documents, &c. therewith connected, and reciting the same.

The said *Narrainapah's* father assisted the said *Lukshmidavama* with advances of money after her husband's death, to meet the demands on her in respect of the Zemindary, and also became a transferee of the debts that were contracted by her husband and herself with the said *Cavelly Seetiah*; and similar advances were continued to be made by him (*Lutchmiah*) at various times up to the end of the year 1837, when all the accounts between them were adjusted, and he obtained a fresh Bond from the said *Lukshmidavama* for the sum of Rupees 48,614-13-6, on the mortgage of the said estate, after returning all the former documents therewith connected, and reciting the same.

Narrainapah's father instituted a Suit No. 18 of 1838, in the late Provincial Court of the Northern Circars, for the recovery of the amount on the conditions of the said Bond, and obtained a Decree, the mortgage property being held liable in satisfaction.

His father having died, *C. V. Narrainapah* sued out execution, whereupon the said *Lukshmidavama* and *C. V. Narrainapah*, by the interference and pressure of the Collector of Masulipatam, came to a *Razenamah*, which is in effect a Deed of Conditional Sale, under date 5th April 1841, the conditions of which were, *that the debt which with interest had swollen to Rupees 67,444-12-0, should be paid in eight yearly instalments; that failing any one of the instalments, the Zemindary originally mortgaged for the debt should be placed in C. V. Narrainapah's possession by the Collector of the District, under the Orders of the Court, in satisfaction of the debt, and that the whole Zemindary should be enjoyed by him as his permanent estate.*

Default was made in the payment of the debt due to *Narrainapah*, no part of the instalments whatever having been discharged; and the Zemindary, according to the conditions of the said *Razenamah* or Deed of conditional sale, became the property of the said *C. V. Narrainapah* in the latter end of 1841, when its possession ought to have been delivered over to him. But such possession was deferred, in the first instance, for more than eight years, by a suspension of the said Decree, No. 18 of 1838, *i. e.* the *Razee*, by the Court of Sudr Adawlut in 1841, upon the motion of certain pretenders, who sought to succeed to the estate as heirs at law.

These pretenders first moved the Provincial Court of the Northern Division in 1839, for the admission of a pauper complaint to establish the adoption of their father, who had been dead for some time. After a series of fictitious Suits brought by him during the course of several years, their motion was dismissed by the said Provincial Court in 1840, stating that :—"The complaint was made by the Plaintiffs contrary to Sec 10, Reg. 2 of 1802:"—Thereupon they appealed to the Sudr Adawlut from the said proceedings. Without even issuing any notice to the parties, the said Court at once cancelled the said proceedings, and directed the Provincial Court in 1841, to admit and take the said pauper complaint on the file, and to proceed therewith; and further directed suspension of the execution of the said Decree No. 18 of 1838 (viz., the *Razee*,) till the final decision of the said Suit.

Accordingly the Provincial Court re-admitted the said Suit and proceeded therewith and again dismissed it in 1843, on the same grounds, *i. e.* :—"That the claim in question is contrary to sec. 10 of Reg. 2 of 1802."

When they appealed again to the said Sudr Adawlut, from the said Decree, that Court, in the first instance, remanded the Suit for rehearing; but subsequently admitted it in Appeal, and after going through it, dismissed it in 1848, stating that :—"The Court of Sudr Adawlut having duly considered the Proceedings in the case, are satisfied that the Decree of the Provincial Court is correct, and that the claim now urged by the Appellants, to the Zemindary of Vissunnapet, on the plea of their late father Venkatarayadoo having been adopted by the Zemindar Ramanappa, is not maintainable under the provisions of sec. 10, Reg. 2 of 1802."

Nevertheless in dismissing the Suit, the Court of Sudr Adawlut, not confining themselves to the issue, directed the parties to bring another suit in another form.

The said Decision became final, inasmuch as it was not appealed from to the highest Court. The said *C. V. Narrainapah* moved in the Civil Court of Masulipatam to execute the terms of the said *Razenamah*, and hand over the said Zemindary to him, according to the terms of the said deed of conditional sale or *Razenamah* hitherto suspended. Nevertheless possession was further delayed for a period of six years later under the following circumstances.

On the 1st September 1849, the said *Lukshmidavama* died. There being no heirs, and the succession to the estate having been disputed by certain individuals, the Collector and Magistrate of Masulipatam, who first took possession of the Zemindary, as part of her estate, under the provisions of Act No. XIV of 1841, afterwards turned round and filed a Petition in the Court, claiming the estate under an Escheat, with reference to certain Government Proceedings, said to have been passed specially on the recommendation of the Commissioner of the Northern Circars—Walter Elliot, Esq.

Thereupon, after a delay of more than three years, the Civil Judge in 1853, setting aside the above Motion that was submitted by *C. V. Narrainapah* for the execution of the *Razee*, directed the aforesaid *Impostors*, who also submitted petitions, claiming succession to the Zemindary, to bring again a suit against *C. V. Narrainapah* in another form, stating, "That under any circumstances the Court resolve to call upon the Collector, with reference to his Miscellaneous Petition No. 296 of 1850, forwarding Extracts of Minutes of Consultation, dated 16th July 1850, to retain the Zemindary in question under Attachment, pending the final disposal of Petitioners' (Nos. 543 and 569 of 1849), claims as legal heirs to the same, and these Petitioners are hereby directed to prefer a suit against the holder of the Decree No. 18 of 1838, and the Collector, for the purpose of finally setting aside the Decree in question, and for the establishment of their legal claim to the property *as next of kin*, within six weeks from and after the date of these Proceedings."

Thereupon the said *Impostors* accordingly brought the Suit in *forma pauperis*, which, after appeal upon appeal by *C. V. Narrainapah* to the higher authorities, and remand upon remand, was dismissed as groundless, on deliberate consideration by the Civil Court itself, in 1855, when the said Court recorded in their Proceedings that :—"The Acting Civil Judge has given this case his consideration, and is of opinion that the Petitioners cannot be admitted to sue as paupers, because ere pauper suits can be filed, it is necessary that this Court should be satisfied the pauper has good ground for an action, and in this case, the paupers have a strong opinion of Pundits against their claims as founded on the alleged relationship. In the face of an opinion, equal, if not better than any Vakeel's, it seems folly to go, and at any rate the Acting Civil Judge cannot allow them to do so as paupers."

In the meantime *C. V. Narrainapah* appealed against the Proceedings of 1853, of the Civil Judge of Masulipatam, which set aside his motion for the execution of the *Razee*, to the late Sudr Adawlut; and they cancelled that part of the Proceedings of the Civil Judge which set aside the motion of *C. V. Narainapah* for execution of the *Razee*, and ordered the possession of the said Zemindary to be given to the said *C. V. Narainapah*, under the terms of the said *Razee*, *i. e.*, the Deed of Conditional Sale; and the Sudr Adawlut further ordered that the proceeds of the estate be paid to him up to the time he had been kept out of possession, under the Suspension Order, from 1841. And, further, though possession of the property was kept out for more than a year, yet, on peremptory orders by the Sudr Court, the possession of the Zemindary was handed over in 1855, to *C. V. Narrainapah*.

Thereupon, the Collector applied to the Sudr Court, praying on behalf of Government that their Order of February 13th aforesaid, should be cancelled, in deference to the right which the Government asserted to hold the Zemindary as an Escheat, which prayer was rejected on the 11th October following.

Upon this, the Coellctor, on behalf of Government, instituted a Suit in 1855, claiming under the spirit of the Hindu law the said Zemindary free of all encumbrances as an Escheat. The case came before the Civil Judge of Masulipatam, who travelled out of the record and evidence, and decided, that:—"The terms of the *Razee* of 1841, should not be carried out." He decreed that the Decree which formed the *Razee* of 1841, should be enforced by the sale of the Zemindary, that any surplus of proceeds that might remain after satisfying the debt should go to Government as an Escheat, and that if the property failed to realize the sum decreed, the Zemindary itself should be made over to *Narrainapah*.

Narrainapah and the Collector being both dissatisfied with the above Decree, appealed to the Sudr Court, when the Suit of the Collector was dismissed, on the ground that under the Hindu law, according to the declaration of *Menu*, viz.:—"That the property of a Brahmin shall never be taken by the King," the Government had no right of Escheat in respect of the Zemindary at issue which was the estate of a Brahmin.

This Decree was appealed against to the Lords of the Judicial Committee of the Privy Council, who reversed the finding and recorded their views as follows:—"In so dealing with the question, the Sudr Court was applying the actual or supposed Hindu law, in derogation of the general right of the British sovereignty." The Suit was remanded to the Sudr Court for further consideration of the other merits of the case.

The Suit came on to be heard by the Sudr Adawlut, when they again dismissed the Suit of the Collector, declaring that "upon every ground above taken, the Court resolve, in reversal of the Decree below, to dismiss the suit with costs; first, because the Law of Escheat does not give the Plaintiff the power to question the assignment objected to; second, because the Plaintiff acquiesced in the assignment when made; third, because the burden of shewing cause against the assignment rests upon the Plaintiff, had he been in a position to challenge the same, and no such cause has been shewn by him or alleged."

The Collector being still dissatisfied with the said Decree, appealed to the Privy Council, which overruled the said points decided by the Sudr, and again remanded the suit for further trial, giving three Issues for enquiry by calling for fresh evidence.

The said Issues having been referred by the High Court of Madras to the Civil Judge of Guntoor for enquiry, in its original jurisdiction, he, the Civil Judge, taking fresh evidence from *Narrainapah* and the Collector, found all of the three Issues framed by the Privy Council in favor of *Narrainapah*. To the first Issue, he decided that the alienation by the widow was for legal purposes sanctioned by the Hindu law, and that the right of the Crown as next heir to her husband, was therefore absolutely defeated by the *Razee* in the pleadings.

With regard to the second Issue, the Civil Judge decided, that up to the date of the *Razee* filed in 1841, the amount due to *Narrainapah* with interest accumulated to Rupees 67,444-12-0. He had no data to go upon to enable him to fix any other amount than the above as aggregate of the sums really advanced by *Narrainapah's* father, with interest accruing thereon, or to declare that they were advanced for other than legal purposes, as alluded to by him when considering the first Isssue.

With regard to the third Issue, the Civil Judge was of opinion that *Varegonda Ramanapa* died possessed of no other property available for any purpose, save and except the estate in dispute, which, at his death, was not unencumbered.

From this Finding the Collector appealed to the High Court, which, in the first instance, admitting almost all the facts of the claim of *Narainapah*, lastly turned round in a contrary direction, and passed their Decision on the 22nd January 1866, upsetting all the rights and claims of *Narrainapah*, and, quite contrary to the Evidence on the Record, stating, among other things, that "from the death of the Zemindar in 1810, up to the year 1813, advances had been made to the widow by *Narrainapah's* father, for purposes for which, according to Hindu law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, if such there had been, and that on the 18th May 1822, the balance due by the widow upon these advances, with interest, was about Rs. 20,000; that, in the year 1828, a further advance was made for similar

purposes of Rs. 1,033-3-3; and that at the time the advances before mentioned had been respectively made, the widow had no other estates of her husband sufficient to answer the purposes for which the advances were taken, and to which they were applied. That *Narrainapah* has not shown what, at the date of advances last mentioned, was the debt upon the former advances, or whether any such former debt still existed—that no advances were made from this date to the date of the Mortgage Deed (Exhibit XXI in 1838); that *Narrainapah* was bound to show, and has not shown, what the widow was in debt to *Narrainapah's* father at the date of the execution of Exhibit XXI, the Mortgage Deed, for advances made for the purpose aforesaid; and that the Collector (on the part of Government) is therefore entitled to take the estate by Escheat, unencumbered by charges created in favor of *Narrainapah's* father and *Narrainapah*."

From this Judgment *Narrainapah* appealed to the Privy Council, who reversed the said Decision of the High Court of Madras, dated 20th December 1867, and ruled, that "The widow is shown to have succeeded to the Zemindary, encumbered with debt which she had no means of discharging, except the revenues, that are admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and provide for the expenses of her establishment and family. A landholder, whether male or female, when in such circumstances, rarely, very rarely in India, succeeds in getting out of debt. Again, in the present case, the Zillah Judge has shown that more than one of the years, in the course of which the process of payment is assumed to have taken place, were years of distress and famine, when the collections from the Estate must have fallen short of the Government revenue. And there is also evidence of occasional litigation, in which the widow had to defend her title against adverse claimants. She seems to have been throughout her tenure of the estate, a needy and embarrassed woman. Nor can their Lordships find reasonable grounds for assuming that, between the years 1822, and 1838, she was in a condition to make payments in excess of those which, from the account said to have been settled in 1838, it must be inferred that she had then made on account of interest.

"The transaction of 1838, is, on the face of it, a settlement of accounts between the widow and her creditor, a balance struck and a mortgage taken to secure that balance.

"They think that the burden of proof that this settlement of account was not a *bonâ fide* transaction between the debtor and creditor, lies on the Respondent, and that he has failed to adduce any evidence to that effect.

"Their Lordships think that it is a fair and just inference to take this sum of 48,614 Rupees 13 Annas and 6 Pies, which was secured by the mortgage, to be the balance due in respect of such advances.

"Their Lordships therefore are of opinion that the Appellant has succeeded in establishing that under the mortgage of 1838, his father acquired a charge on the Estate for the sum therein named, which, on the widow's death, would have been valid against the next heirs of her husband, if such there had been.

"Further than this their Lordships are not prepared to go.

"The result is, that their Lordships must humbly recommend Her Majesty to reverse the Decree of the High Court, and to declare that, on the 20th April 1838, there was due from the widow to the father of the Appellant in respect of advances, for which she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, the sum of 48,611 Rupees 13 Annas and 6 Pies; that that sum was duly charged upon the estate by the mortgage of the 20th April 1838, and that accordingly the Appellant is now entitled to hold the Zemindary against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid. This declaration is fatal to the Respondent's claim to immediate possession of the Zemindary; but it will leave an equity of redemption to the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity if it shall be so minded, in a suit properly framed for that purpose.

"The Appellant is entitled to have the costs of this Appeal, and of the Proceedings of the Courts below under Her Majesty's Order of January 1862, and the general costs of the suit below

except such portion of them as was occasioned by his contesting the title of the Crown to take by Escheat. This latter portion ought to be borne by him, and unless already paid, should be set off in the usual manner. The apportionment of these costs will be dealt with by the Court below."

Thereupon *Narrainapah* moved in the Civil Court of Guntoor to enforce the said decision of the Privy Council, praying them to restore the possession of the Zemindary which was taken from him, *Narainapah*, and handed over to the Collector in execution of the Decree of the High Court, which now stands dismissed (though he proposed to give sufficient security till the result of his Appeal to the Privy Council was known) and to settle the question of costs, &c., therein stated.

Thereupon the Civil Judge of Guntoor restored possession of the Zemindary on the 13th September 1868, as it stood before the suit of 1855, now dismissed by the Privy Council, and directed the Collector of Kistna District to furnish the accounts of *mesne* profits, &c., to the Court.

Moreover the said *Narrainapah* also submitted a Petition, with a statement, calling on Government whether, under the circumstances of the case, they could enforce the alleged right of Redemption or leave him alone.

Thereupon the Government on the 23rd April 1869, passed Proceedings, unconditionally relinquishing their alleged right of Redemption, and gave him an Endorsement to that effect on 30th April 1869. And the Collector of the Kistna District also sent an *Enayetnamah* on 17th June 1869, intimating that the Board have directed him to inform that the Government have relinquished their right of Redemption, and have resolved to leave him alone in the undisturbed possession of the estate.

The Collector on the 14th October 1869, called on *C. V. Narainapah* to execute an agreement relinquishing the *mesne* profits of the Zemindary during the time it was in his (Collector's) hands and the costs of the Suit, which is in contravention to the above Proceedings.

Thereupon *C. V. Narrainapah* remonstrated with the Government against the demand of the Collector to sign the above Agreement, waiving his claim to the *mesne* profits and costs of the Suit.

Thereupon the Government, on the 6th May 1870, made an Endorsement on the said Petition, intimating that unless he—*Narrainapah*—execute the said Agreement within one month, they would cancel the said Proceedings of the 23rd April 1869, and bring a Suit for the right of Redemption, reserved to the Government by the Decree of the Privy Council.

Feeling assured that the Government will not withhold from your Petitioner his rights after he complies with the above requisition, and that they will feel more inclined to dispose of his claims according to the justice and merits of the case after signing such agreement, your Petitioner agreed to do so without the least *compunction*, and accordingly signed the Agreement forwarded to him by the Collector.

Subsequently the same Officer having taken objection to the sufficiency of the Stamp on which the said agreement was engrossed by him, he undertook to prepare another on proper Stamp, but annexing to it such plan and particulars as were necessary to make the agreement eligible for registration. But the same is not ready.

From the above history of the case, it will be evident that, after repeated remands for a long series of years, having for its object the negation of the validity of the debt, it has been satisfactorily established, as laid down in the Privy Council Decree of the 20th December 1869, that the debt incurred by the late Zemindarnee was for objects of necessity—such as the payment of Government Peishcush, and the discharge of the liabilities of her husband, as warrant even "a widow to alienate the property as against the next heirs of her husband, if such there had been." The debt thus admitted up to 13th April 1838 was Rupees 48,611-13-6, and this sum was secured by a mortgage bond.

The debt due under this Instrument not having been satisfied, the mortgage was foreclosed by a suit No. 18 of 1838, and a Decree was obtained in 1839, for the discharge of that amount with interest and costs by the sale of the estate in the first instance.

The order for the execution of the said Decree was met by a Razeenamah, which stipulated a conditional sale of the estate. A default in the fulfilment of the conditions of the said *Razeenamah* or Deed of conditional sale did take place, and the right to the Zemindary became vested in *Narrainapah* in the latter end of 1841. According to its terms, possession had to be given, but it was however delayed, pending result of the suits instituted by third parties, and eventually in 1855, the conditional sale under the *Razee* was carried out by the Collector by handing over the estate to him, (*Narrainapah*) under the orders of the Courts of Judicature. Hence, the sole question for determination is, *Whether under the law the interest of a mortgagee under a Deed of conditional sale does or does not become absolute according to the terms of the contract by the failure of the mortgagee to redeem at or before the time specified in the deed.*

First of all, the said alienation by conditional sale, which was carried out by the Deed of 1841, is not repugnant to Hindoo or Mahomedan law, nor to the regulations and enactments of Government, nor indeed to the customs and usages of the country from the remotest period, which have before and after the year 1841, been recognized and sanctioned by the Courts of Judicature.

Moreover in the Suit, the Law officers of the late Sudr Adawlut, in answer to the Court replied, that the widow has, under Hindu law, authority to transfer by mortgage or conditional sale, the real estate for the purposes stated, and is therefore binding upon her and her relations. Further, this question has been set at rest by the decision of the Privy Council, dated 20th January 1871 (herein forwarded), in regard to the operation of such contracts; and they distinctly declare that this form of security has long been notoriously common in India, and that its enforcement under the Hindu law is recorded in Colebrook's Digest, Vol. I, pp. 183,187,188,193, and equally so in the Mahomedan law as shewn by Mr. Baillie in his introduction to his learned work on the said law of sale. They further observe that if the ancient Law of the country has been modified by any later rule having the force of law, that rule must be founded either on positive legislation or on established practice, and "nothing concerning such contracts is, so far as their Lordships are informed, in the Statute Law of Madras." So strong is the opinion of their Lordships on this point that they admit that they have been unable to discover any course of decisions in the Courts of Madras which can be set against the authority cited above.

Now, the Zemindary having been duly alienated and transferred to *Narrainapah*, who got possession under the orders of competent authorities, as shewn above, where then is there any right of Redemption to the Estate in question either to the Government or to any other persons whatever?

The questions which reasonably and naturally follow this state of facts are:—

1st.—Whether the said Deed of conditional sale by *Razee* absolutely alienating the Zemindary on failure of its conditions is not common in India?

2nd.—Whether such contracts are repugnant to Hindu or Mahomedan law or to the Regulations and Enactments of the Government?

3rd.—Did not the Government in the 7th para. of the *Sunud-i-Moolkeit-Istemarar*, or Deed of permanent settlement referred to, entered into with the Zemindar, authorize the transfer of the proprietary right in the whole or in any part of the Zemindary, either by gift or sale or otherwise?

4th.—Whether the Government did not bind themselves to acknowledge such transfer as stated above to be valid?

5th.—Whether the Government did not authorize their officers to recognise similarly such alienations?

And lastly, have not the Government pledged themselves to administer the Civil law to the Hindus in accordance with the Hindu law?

To the foregoing queries, it is humbly submitted, that the Government cannot but reply in the affirmative. Then such admissions lead to the inevitable conclusion that *Narrainapah's* right

in possessing absolutely the Estate under the Deed of alienation is incontrovertible, and therefore they cannot now plead that they have a right of Redemption under any phase of law or color of agreement, except under cover of the suggestion of the Privy Council in the said Decree.

On this point *Narrainapah* begs to be permitted to submit the following :—

In the first instance, the Ruling Power establishes Courts for dispensing Justice, and empowers them to dispose of cases on the issues before them in one way or the other; and when they have done so, they are not at liberty to travel out of them, and promote suits—in fact, litigation in another form, to annoy and harass parties, as has been the singular course in Petitioner's case all along, even by the highest Court, the Privy Council, itself; for in the action of ejectment brought by the Government under an Escheat by the Hindu law, they failed in that action by the Privy Council dismissing the suit, and in point of law or equity, they should have stopped there; but to have voluntarily suggested in their Decree, that the Crown might assert that equity of Redemption if it shall be so minded in a suit properly framed for that purpose; no such claim having been even at any one time during the whole course of the litigation put forward either in the plaint or otherwise by the Crown.

This being an extra judicial opinion in the matter *not* before them, it would be viewed as a passing observation, and ought not to have had any weight in an arbitrament; for incidental remarks thrown out in a Decree, cannot be taken as conclusive on the point to which they refer, their tendency being only to keep a claim, otherwise barred, open for litigation.

Again, it is evident by the Decree of the Privy Council itself, that they did not proceed to consider the facts of the case further than the Bond of 1838, stating that "further than this they are not prepared to go." Possibly, when their Lordships were prepared to do so, their decision would doubtless be in accord with the Decree of the 20th January 1871, already alluded to; or in case they thought otherwise, they would be precluded by law and equity, and the conditions of the 7th para. of the Deed of *Moolkyet-Istemarar*, which says, "that such transfer of your land either by sale, gift or otherwise, shall be valid and recognised by the Courts."

It is clear, then, that the right of Redemption cannot be sustained upon any ground, and therefore should be discarded as a point for discussion. But the *mesne* profits still remain to be considered. If the Government has not the shadow of a right of Redemption, it has, it is respectfully submitted, less to the *mesne* profits, which were merely retained till the result of the suit brought by them in 1855, was known, and which was the dismissal of their suit. In all fairness, then, *Narrainapah* ought to get them, and he indulges the hope that the Government, fully appreciating the merits of the case, will not withhold from him the amount now standing.

It is further respectfully submitted that the *mesne* profits are nothing more than a sum accumulated from the income of his Zemindary during the time it was under the Collector's management, in consequence of the dilatory and illegal proceedings of the Courts, as above narrated; consequently, your honorable and paternal Government ought not to take advantage of such irregular proceedings, to keep him out of his rights to the possession of what lawfully belongs to him.

The next question to be disposed of is that of costs. He has been in litigation for upwards of 30 years, of which 15 were with parties in *forma pauperis*, from whom nothing has been recovered. The other 15, with the Crown, whose highest tribunal has directed that the Respondent, the Collector, do pay the Appellant £435-19-8 for the costs of the last Appeal, "and the general costs of the suit in the Courts below;" but their Lordships added, "except such portion of them as was occasioned by his contesting the title of the Crown to take by Escheat." But it was the Crown that was his opponent. It was the Crown, prompted by its legal advisers, who litigated with him, and caused him enormous expense. He had not only to pay the Attorneys, Advocates, Pleaders, Stamp Duties, *cum mutis aliis*, but also to meet personal attendance by travelling now and then from his place of residence to watch the conduct of his case, and to employ private agents to look after their proceedings in his absence. If *Narrainapah* did not defend himself against the Crown, the only opponent he latterly had, what other course was open to him? He defended himself by simply denying that the Government, upon the death of *Laskhmidavama*, became entitled by Hindu law to enter upon and enjoy the Estate; and if it had any right to succeed, it could only be on the discharge in full of all encumbrances contracted by the Zemindar, or former proprietor, and this was the only course open to save himself from the meshes of the law in which he was entangled. There was no other course. And it is hard to be now told that he ought not to receive costs from an opponent, whose justice of the case was questionable. He therefore submits in common fairness, as between man and man, whether consideration should not be shewn him. It is not the intention of the Government to crush one who has undergone much privation, and, as now considered, unfairly too.

Under all the circumstances of the case, he submits the questions which have presented themselves for that impartial consideration for which the Government, as at present constituted, is highly and peculiarly distinguished.

And for which act of justice your Petitioner

SHALL EVER PRAY.

Madras
18th July 1871

COPY OF JUDGMENT *delivered by the Lords of the Judicial Committee of the Privy Council, acknowledging the validity of the Alienation, effected by a Deed of Conditional Sale, expressing, that such Conditional Sales are common in India from time immemorial, and that they are sanctioned by both Hindu and Mahomedan Law, and are not repugnant to the Regulations and Enactments of the Government.*

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Pattabhiramier v. *Vencata Row Naicken and another, from the late Sudder Dewany Adawlut at Madras; delivered 20th January* 1871.

PRESENT.

LORD CHELMSFORD. | LORD JUSTICE MELLISH.
SIR JAMES W. COLVILE. | SIR LAWRENCE PEEL.

In this case the Appellant claims to be the absolute owner of the lands in question under several conveyances from the first and second of his co-defendants in the suit, or from those whom they represent. That the title of his vendors or their ancestor was originally a mortgage title is undisputed; and the suit out of which the appeal has arisen was brought in October 1853, by the representatives of the mortgagor to redeem the property, alleging it to be still redeemable. The decision of the Court of First Instance was in their favor, but that was reversed by the Principal Sudder Amin of Combaconum, who decreed in favor of the Appellant. His decree was reversed by the late Sudder Dewany Adawlut of Madras on special appeal; and the present appeal is against the decree of that Court.

The Sudder Court having no jurisdiction to determine on special appeal any question of fact, and there being no cross appeal to Her Majesty in Council against the decree of the Principal Sudder Amin, their Lordships must accept his findings on the facts as conclusive. Those findings were—

1st.—That the original contract between the mortgagor and the mortgagee was contained in the deed of conditional sale, dated the 13th of June 1803, which is at page 71 of the record and is there called Exhibit No. I; and that the Plaintiff has failed to establish that there was any other instrument of mortgage.

2nd.—That Exhibit No. 2, purporting to have been executed on the 16th of June 1816, upon which the Appellant had relied either as a confirmation of the then absolute title of his vendors or as a conveyance or release of the right of redmption to them, was not a genuine document.

3rd.—That certain letters put in by the Plaintiff in order to prove acknowledgments by the mortgagees that the mortgage was a subsisting and redeemable mortgage as late as 1851, were also forgeries.

The conclusion of law which the Principal Sudder Amin drew from his first finding was, that under Exhibit No. I the title of the mortgagees became absolute on the 10th of June 1813, by reason of the failure of the mortgagor to redeem at that date; and the special appeal was admitted to try the correctness of that conclusion. Hence the sole question for their Lordships' determination is whether, under the law of the Madras Presidency, the interest of a mortgagee under a deed of conditional sale does or does not become absolute, according to the terms of the contract by the mere failure of the mortgagee to redeem at or before the time specified in the deed.

This form of security being common in India, the question is of very general importance, and on that ground the Appellant obtained Her Majesty's special leave to present this appeal, which, after considerable delay, has, unfortunately, come on to be heard *exparte*.

The contract embodied in Enclosure No. I was, that the mortgagee should hold possession of the land for five years, paying the Government revenue; the mortgagor should repay the principal and redeem the land on the 10th June 1813; and that, in default, the mortgagee and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c.

The transaction then was one of mortgage by *Bye-bil-wufa or Kut-kabala usufructuary*; the usufruct of the property to be taken in lieu of interest. And the first question that suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract according to the interest and meaning of the parties plainly expressed by its language?

That this form of security has long been common in India is notorious. The fact is stated in the preamble to the Bengal Reg. No. I. of 1798. That such contracts were recognised and enforced according to their letter by their ancient Hindoo law appears from several passages in Colebrook's Digest (Vol. I. pp. 183, 187, 188, and 193). That they were equally recognised and enforced between Mohamedans is shewn by Mr. Baillie in his introduction to his learned work on the Mohamedan Law of Sale. If the ancient law of the country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation, or on established practice.

Nothing concerning such contract is, so far as their Lordships are informed, to be found in the Statute Law relating to the Presidency of Madras, except Regulation 34 of 1802. The 8th and 9th Sections of that Regulation extended to Madras the provisions of the 10th and 11th Sections of the Bengal Reg. No. 15 of 1793. Both these Regulations were passed with the object of fixing the legal rate of interest and of preventing the taking of interest in excess of it; and both have since been wholly or in great part repealed, with other usury laws, by Act XXVIII. of 1855. The clauses in question affected only that part of the contract now under consideration which related to the usufruct of the property. As to that they may have made it necessary, contrary to the intention of the parties, to take upon a redemption an account of the rents and profits as between mortgagor and mortgagee in possession, compelling the latter to set what he might have received in excess of legal interest against the principal; but they neither extended the time of redemption nor imposed upon the mortgagee, when the mortgagor had failed to redeem, within the stipulated period, the obligation of taking any judicial or other proceedings in order to make his title absolute.

In Bengal there was further legislation. In that Presidency, a Regulation (No. 17 of 1806) was passed which allowed a mortgagor, who had executed such a security as that now in question, to redeem at any time before the mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure.

It is, however, unnecessary to observe that this Bengal Regulation has of itself no force in the Presidency of Madras, and their Lordships cannot find, either in the Madras Regulations or in the Acts of the Indian Legislature subsequent to the Charter Act of 1834, any statute by which similar provisions have been enacted for Madras.

That, in cases to which the Regulation 17 of 1806 does not apply, the interest of a mortgagee under a deed of conditional sale becomes absolute according to the terms of the contract by the mere failure of the mortgagor to redeem within the stipulated period, has recently been decided by a full Bench of the High Court of Bengal in the case of Surreefoorisa *vs.* Shaiek Mayah Hossein, 5 Weekly Reporter, p. 88. On that case the mortgage bore date the 30th November 1801; the mortgage was made payable on the 28th of September 1806. The mortgagor sued for redemption, and the mortgagee admitted that there had been no foreclosure pursuant to the Regulation.

The High Court, however, ruled that, if the Regulation did not apply, the interest of the mortgagee became absolute on the 28th September 1806, and finding that the Regulation had not been promulgated, and therefore had not become operative in the district until the 7th of January 1807, dismissed the Plaintiff's suit. The point, so decided, is also assumed to be law in the judgment delivered at this Board in the case of Forbes *vs.* Ameeronissa Begum, 10, Moore, J. A. 348; and unless it be law it is difficult to see why the Regulation of 1806 was passed.

Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras which can be set against the authority just cited. The utmost that can be gathered from this record is that some uncertainty concerning the operation of these contracts may have crept into the lower courts of Madras. If the Principal Sudder Amin was right in thinking that this afforded a reason why the Appellant had sought to strengthen his title by the production of the false deed No. 2, it is to be observed that the Plaintiffs, on the other hand, shewed their sense of the uncertainty of the law by setting up the the false case that another form of mortgage had finally been substituted for the deed of conditional sale. Moreover the Sudder Court does not rest its judgment upon decided cases. The first reason advanced in support of that judgment is clearly untenable. That a party is precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which is treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or in law. Nor does the second reason assigned for the judgment appear to their Lordships to be better founded. It assumes that an obligation lay on the mortgagee to do some act by way of enforcing what is not very correctly termed penalty, and that there could be no adverse possession against the mortgagor until there had been a tender and refusal of the mortgage money. But this assumption implies that in some way or in another the rights and obligations of the parties as defined by the contract had been qualified by a known rule of law. Their Lordships have already stated that, so far as they can discover, no such qualifications have been introduced as in Bengal by any act of legislation into the Statute Law applicable to Madras. What is known in the law of England as "the equity of redemption," depends on the doctrine established by the Courts of Equity that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. It must not, then, be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the forum, wherever such may prevail, or, to affect any title founded thereon.

Their Lordships therefore being of opinion that the decree under appeal is erroneous and ought to be reversed, and that the special appeal to the Sudder Court ought to have been dismissed with costs, will advise Her Majesty accordingly. But considering the great and unexplained delay which has taken place in the prosecution of this appeal, they do not think that they ought to give the Appellant the costs of it.

Revenue 1871 Department.

No. 3100.

From,

The Collector

of Kistna District.

To,

The Secretary to Govt
Revenue Dept.

Dated 20 Sept. Fort St George

Received 27 "

No. 2922

Enclosure 1

Reporting that the deed of agreement originally prepared was rejected by the Visaanum pattam under and a revised one recently substituted for it. No. 703 29 Mar 72

Received

1880 Oct 6 College of Fine Arts Vault Box 6 Ord -

C. 25 Sept 71 R. 29 Feb