Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals (3) *of Moonshee Buzloor Ruheem, Appellant,* v. *Shumsoonnissa Begum, Respondent; and of Judoonath Bose, Appellant,* v. *Shumsoonnissa Begum, Respondent, from the High Court of Judicature at Calcutta; delivered on the 4th July,* 1867.

Present:

Sir James W. Colvile.
Sir Edward Vaughan Williams.
Sir Richard Torin Kindersley.

Sir Lawrence Peel.

THE Appellant, in three of the four Appeals of which their Lordships have now to dispose, is Moonshee Buzloor Ruheem, a Bengal Zemindar. The Respondent, in all four Appeals, is his wife, Shumsoonnissa Begum. Her father, Moonshee Hossain Ali, died in the year 1837, possessed of considerable wealth. His co-heirs, according to Mahomedan law, were his three widows, Ashruffnissa, Oomdatunnissa, and the Respondent's mother, Komerunnissa; two daughters, viz. the Respondent and a posthumous child, named Nujmunnissa, and his nephew Boo Ali. His estate was divisible amongst these persons, in twenty-fourth parts or shares, of which the Respondent and her sister each took eight. The settlement of his affairs, however, occasioned a good deal of litigation, and the Respondent did not obtain full possession of her share until November, 1847.

She had previously, and in the month of April or May of that year, being then a widow, with five children by her first husband, become the wife of the Appellant the Moonshee. By him she has had one daughter. In July, 1853, in consequence of the death of her sister Nujmunnissa, which took place in August, 1849, and of the compromise of a suit with that lady's husband, she received a large

accession of fortune. Her cohabitation with the Moonshee continued until the 28th of December, 1855; when, on a complaint by her of ill-usage on his part, she was allowed, by the Magistrate of the Twenty-four Pergunnahs, to leave his house. They have since lived separately, and the present litigation dates from that time.

On the 8th of April, 1856, she instituted against her husband a suit for the recovery of her property, which, she alleged, he had detained or made away with. On the same day he commenced against her and one of her sons-in-law a suit, of which the object was, to enforce his marital rights, by compelling her return to his house and control. These suits, in the argument before us, were called respectively, the "Property Suit" and the "Restitution Suit"—a nomenclature which it may be convenient to adopt.

The "Property Suit" was originally brought against the husband alone. By his answer it appeared that certain portions of the landed property claimed by her had got into the possession of two persons, named Juddonath Bose and Mirtonjoy Bose. They were accordingly brought before the Court by supplemental plaint, on an allegation that they were the dependants of the principal Defendant the Moonshee, and held benamee for him. The suit was tried before the Civil Judge of the Twenty-four Pergunnahs. His decree, which bore date the 25th of July, 1859, awarded to the Respondent Company's paper, to the amount of Rs. 2,34,800, and cash to the amount of Rs. 20,511, dismissing the suit as to the other moveable property claimed by her. It also decreed the restitution to her of the immoveable property held by Juddonath Bose, with mesne profits, to be paid by the Moonshee, but dismissed the suit as against Mirtonjoy Bose without costs. All the Defendants appealed against this decree, the Appeal of Mirtonjoy being for his costs. The High Court of Calcutta, by its decree, dated the 29th of November, 1862, confirmed, with some slight variations, the decree as to the Company's paper, directing the Moonshee to restore the papers, to the amount of Rs. 82,000, which remained in his hands; and to replace the others by the purchase of Company's papers, to an amount equal to that of the

missing papers, but reversed the Judge's decree as to the Rs. 20,511 cash. It confirmed, however, the decree as to the property held by the Appellant Judoonath Bose, making him also responsible for the mesne profits. And it further decreed the reconveyance to the Respondent by Mirtonjoy, of the immoveable property held by him. Against this decree the Appellants, Moonshee Buzloor Ruheem and Judoonath Bose, have severally appealed to Her Majesty. No Appeal has been preferred by Mirtonjoy Bose.

The Restitution Suit was tried by the Principal Sudr Ameen of the Twenty-four Pergunnahs, who, by his decree, dated the 28th of December, 1860, dismissed it with costs. On Appeal, the High Court of Calcutta confirmed that decision by its decree of the 25th of July, 1863. The Moonshee has appealed against both these decrees.

His remaining Appeal is against a decree of the High Court, made on the 13th of February, 1863, in another suit instituted against him by his wife. The object of that suit was to recover from him a Company's paper for Rs. 10,000, for which, as she alleged, she had inadvertently omitted to sue in the Property Suit. Objections, which will be hereafter considered, were taken to the maintenance of this fresh suit, and were allowed by the Zillah Judge. But the High Court reversed his decision, and remanded the cause for trial on the merits.

Having thus stated the general history and scope of this unfortunate and complex litigation, their Lordships will proceed to deal first with the Appeals in the Property Suit. The Respondent having preferred no Appeal against the decree of the High Court, her claims in respect of the moveable property, must be taken to be now reduced to one for the Government securities, to the amount of Rs. 2,34,800, which the Moonshee has been ordered to restore or replace. And their Lordships will begin by considering whether the decrees under Appeal can be supported against him in that respect.

That all these securities came to her hands whilst she was an inmate of his zenanah; that they all passed from her to him; that some of them remain in his possession; and that others have been

traced to his creditors,—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between husband and wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to the rights and interests of the wife. Her case is, that the securities were intrusted to him for a particular purpose, viz. that of receiving the interest on them for her, and that though they may have been indorsed, she never meant to transfer the property in them. His case is, that he purchased them from her on several occasions, and that on their indorsement and delivery he paid her the full value for them. The principle of the judgments of the Courts below seems to be, that although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion that this is a sound principle, and in accordance with the long-established practice of the Courts in India. Mr. Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Mahomedan and a Hindoo woman; nay, that in all that concerns her power over her property, the former is by law more independent than an Englishwoman of her husband. It is no doubt true that the Mussulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition. But the Hindoo law is equally indulgent in that respect to the Hindoo wife. It may also be granted that in other respects the Mahomedan law is more favourable than the Hindoo law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from

the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Mussulman woman of rank, like the Hindoo, is shut up in the Zenanah, and has no communication, except from behind the Purdah, or screen, with any male persons, save a few privileged relatives or dependants; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must therefore hold that this lady is entitled to the protection which, according to the authorities, the law gives to a Purdah-Nusheen, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him. They will proceed to consider whether the Courts below were right in holding that he has failed to prove his case.

The transactions are five in number, three of them being in the year 1848. On the 20th of May in that year, she is said to have sold to her husband the two papers for Rs. 9500 and Rs. 7000, which she received on a compromise of a suit with her step-mother, Ashruffnissa. On the 27th of the same month she is said to have sold to him all the papers specified at the foot of his answer, which make up the sum of Rs. 1,03,800, except a paper for Rs. 11,300, which is said to have been sold on the 12th of the following month. These exhaust all the papers claimed, which formed part of her original share of her father's estate. The papers for Rs. 1,14,500 which she received in 1853 from the estate of her sister are said to have been sold on two occasions in 1855, viz. papers for Rs. 32,500 on the 2nd of March, and papers for Rs. 82,000 on the 2nd of July in that year.

These several transactions are sworn to by various witnesses, of whom most, if not all, are or have been dependents of the Appellant. There may be slight discrepancies in their testimony, but its general effect is, that on each occasion money, being the full value of the papers purchased, passed

in cash or notes from the Appellant to the Respondent. The Appellant has himself deposed to the same effect, and has produced certain Khatta books in corroboration of his testimony. The evidence, if believed, is sufficient to establish his case.

Both the Courts below have, however, disbelieved these witnesses, and have cast discredit on the books as being unlike those which were likely to be kept in order to record the transactions of a person in the Appellant's position. The Zillah Judge, obviously a gentleman of experience and ability, appears to have tried the cause very carefully; and their Lordships cannot but feel the difficulty of holding against his judgment,—confirmed, as it is, by that of the High Court,—that either the witnesses or the books, considered by themselves, are trustworthy. In what degree, then, do the other facts and proceedings proved in the cause tend to confirm or to cast doubt upon their testimony?

The earliest in date are the applications for a certificate under Act 20 of 1841. It appears that a difficulty had arisen in the way of drawing the interest on the two Company's papers for Rs. 9500 and Rs. 7000, which stood in the name of Moonshee Hossein Ali, the Respondent's father. The Respondent applied for a certificate, which is in the nature of letters of administration to his estate, on the 5th of May, 1848. Her application was refused, but the grounds of the refusal do not appear. The transfer of these papers to the Appellant took place on the 20th of May; and on the 2nd of July the Appellant presented to the Sudder Dewanny Adawlut his petition, supported by a petition from the Respondent, complaining of the Judge's order of the 5th of May, and praying that a certificate might be granted to him in her stead. The only bearing of these documents upon the present suit is, that in his petition the Appellant describes himself as the purchaser, and the Respondent as the seller of these papers, and that the Respondent in her petition says, "Owing to my having sold to Buzloor Ruheem, by an indorsement, the above-mentioned papers," etc. The importance of this as an admission is obviously very slight. We do not know,—and this is an observation which applies to all the other evidence of this kind,—how or by whom the

proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts in these Courts. And taking the admission at its highest, it would show only that for some cause or another, possibly only in order to facilitate the receipt of interest, the apparent ownership of the notes had been transferred from her to her husband as upon a sale and purchase,—the only way, in truth, in which it could be done, since the Treasury in Calcutta takes no notice of trusts. This proceeding throws little (if any) light upon the nature of the actual transactions between the man and his wife.

The proceedings next in order of date that are relied upon are those in the execution suit, which began in September, 1848, and was finally disposed of in May, 1850. These relate more to part of the lands now held in the name of the Appellant Juddonath, the title to which will be hereafter considered, than to the Company's paper. It may, however, be well to state their nature here. Oomdatunnissa having, in the course of the protracted litigation of this family, a decree against the Respondent for the small sum of Rs. 671 : 13 : 1, took out execution against her share in one parcel of the lands inherited from her father. The Appellant, the Moonshee, intervened as objector (App. p. 48), stating that the lands seized, as well as the other lands belonging to the Respondent, and these Company's papers, had been, before the execution, sold and transferred to him; and that the Respondent, the judgment debtor, had no interest therein. His objection was overruled by the Judge on the 12th of January, 1849 (App. p. 57). He brought a regular suit to impeach that decision, to set aside the execution, and recover the property sold under it. That suit was dismissed (App. p. 63) on the 21st of May, 1850, on the ground that the alleged transfer of the Respondent's properties to the Appellant was collusive, and in fraud of her judgment creditor. The chief bearing which these proceedings have upon the title to the Company's papers is that, in the answer filed by the Respondent in the regular suit, she stated that, after her marriage with the Appellant, fearing lest her properties should be wasted by her agents, she dis-

posed of the same to her husband, and deposited the value thereof for the benefit of her children. Now as that answer was filed long before any disagreement had arisen between the Appellant and Respondent, it can hardly be doubted that, if not actually prepared under his direction, it was at least filed with his concurrence. And it is to be observed that this statement is by no means consistent with the case now made by him of sales out and out to him, in order to raise money to meet the Respondent's debts and other necessary expenses. It suggests a different motive for the sales, and treats the proceeds as remaining in the hands of somebody or another for the benefit of her family. The sales, too, having been found to be collusive and unreal transactions, are quite consistent with the supposition that the lady was persuaded into making them upon the suggestion that she would thereby defeat her creditor, and that they were merely colourable, and made for that purpose. These proceedings tend more to discredit than to support the case now made by the Appellant of absolute sales of these securities to him, and of the actual payment by him, out of his own funds, to the Respondent of the purchase money at the dates of the several purchases.

That case suggests the questions so much insisted upon in the Courts below, viz. 1st, why should the Appellant wish to purchase these large amounts of Company's paper, and how was he able to pay for them? and 2ndly, why should the Respondent wish to sell her Company's paper, and how has she disposed of the proceeds of it? What answer does the evidence give to these questions?

The Appellant is no doubt shown to be a Zemindar, possessed of considerable estates. But the evidence tends to show that, at the time of his marriage, and at the date of the earlier, at least, of these transactions, he was, like many landed proprietors, an embarrassed man. He and his brother owed large sums to one Ramchand Mookerjea, and to Ashotosh and Promothonauth Day. These were secured by bond and by judgments confessed, probably on warrant of attorney, in the Supreme Court, of which one bore date the 27th of March, 1845, and was for C. Rs. 1,48,000, and the other, dated the 30th of June, 1846, was

for C. Rs. 1,00,000. The precise amounts due on these judgment debts are not shown, but it is pretty clear that neither judgment, at the time of the earlier transfers of the Respondent's papers, was satisfied. It is admitted by the Appellant that most of the Company's papers, which, he says, he purchased on the 27th of May and 12th of June, 1848, were, on the 6th of July, transferred by him to Ashotosh Day, in payment of one of these debts. He and his brother were also, at this time, bound, under an order of the Supreme Court of the 12th of April, 1848, to pay into Court the sum of Rs. 62,000. It is not credible that a person under these liabilities should be purchasing Government securities, bearing a rate of interest considerably lower than that at which his debts were running on,—securities which, if the necessity for selling them existed, might have been sold through a broker in the market.

Again, the Appellant's case is that the Respondent, when she married him, was herself in debt; that she afterwards required large sums for the marriages of her children, and other family ceremonies; that she sold her Government securities in order to meet these necessities, and applied the proceeds in meeting them. He is driven to this allegation, because, as it is clear that she carried nothing with her out of his house, it would be still more difficult to support a theory that the money remained with her in some other form of investment. It is to be observed, however, that some of his own witnesses assign a different motive for the sales. Some of them say that she sold in order to get rid of difficulties caused by the Company's papers standing in the name of a Purdahnusheen. Others say, as she says herself in her answer in the execution suit, that she was afraid of being cheated by her agents. That the Respondent, during her seven or eight years of cohabitation with the Appellant, must have incurred considerable expenses in respect of her children by the first marriage, and for other family purposes, is pretty certain; but that she should have expended upwards of two laks of rupees, the proceeds of these Company's papers, over and above the other property, which, at one time, she unquestionably possessed, is not very credible. It is to be remembered also that,

on the assumption of the Courts below, she had the interest of these Company's papers wherewith to meet her necessary expenses. It is inconceivable that if these very large sums had been expended in the payment of debts, and for the other purposes alleged, the Appellant should not have been able to give better proof of the fact. It may suit his present purpose to profess that he had little personal connection with the management of her affairs; but the evidence, and in particular his petitions of the 27th of October, 1854, and the 4th of December, 1855 (App. pp. 88, 91), are strong to show that this was not the case. He there represents himself as active in the management of her property and interests.

The first of these documents is, in various particulars, strangely inconsistent with the case which the Appellant now sets up. He is there defending himself from a charge, made before the magistrate, of having confined his wife, and having refused to give up to her not merely the Company's papers derived from Nujmunnissa, which according to his case would then be still in her possession, but also Company's papers to the amount of 80,000 or 90,000 rupees, which according to his present case he had long before 1854 purchased from her; yet he does not say a word of this purchase. He covers the whole charge with the general answer, "The entire property of Shumsoonnissah being her own property, and my entire property being mine, what ground could there exist between her and me that I should confine her?"

We have hitherto considered the evidence with reference to the alleged sales of the Government securities generally. Some parts of it however suggest considerations, which apply exclusively to the alleged transactions of 1855 and and the transfer of the papers for Rs. 1,14,300. It may be that the means of the Appellant to make these alleged purchases had then been further diminished by the litigation in which he appears to have been engaged with his first wife, and by the decree which she obtained against him. On the other hand, he may have been in more prosperous circumstances than he was in 1848. But if he, so late as the months of March and July, 1855, paid to the Respondent the value of these papers, it is almost incredible that he should

not be able to give some better explanation, how she disbursed those large sums between those dates and the following December, when she left his house destitute. Again, his Petition of June, 1854, discloses a state of things which is far more consistent with the Respondent's case, that she made over to him these Company's papers in 1853, as soon as she received them, than with his, that they were not transferred to him until 1855. It shows that in June, 1854, a petition had been presented to the magistrate, complaining of his ill-treatment of his wife. He no doubt denied the charge, and treated it as emanating, not from his wife, but from discharged servants, and the magistrate then considered that the charge was unfounded. But when light is thrown upon this transaction by what subsequently happened, by his ill-usage of the Respondent, which is proved, and by her release from the house by the magistrate, on the subsequent Petition of 1855; it is difficult to resist the conclusion, that the quarrel between the husband and wife had begun in 1854 (the date to which her plaint assigns its commencement), or at all events, that in July, 1855, there must been a state of feeling between them, which would make a voluntary sale of her property to a him a most improbable transaction. If he did, so shortly before their final separation, obtain a transfer of those securities to himself, the burden of showing that he did so righteously is assuredly made heavier.

Again, the evidence of ill-usage which has been given in this suit, seems to have a further bearing upon the issue between the parties which is now under consideration. We have not now to consider whether what he did was within or in excess of the marital powers of a Mussulman husband. It is sufficient to say that very harsh treatment, and a restraint from which the magistrate saw fit to release her, are proved, and that she left the house in circumstances to which no native woman of her rank, who was not suffering under a sense of intolerable wrong, would have exposed herself. Now what was the cause of this grave quarrel? Her account of it is more probable than his, if indeed he has given any. It seems more likely that he should have attempted by harsh measures

to frighten her out of a just demand, than that he should have met, in that way, one which was without foundation. Her conduct, too, if the quarrel had begun in 1854, has ever since been consistent; his, as has been shown above, has been inconsistent.

It would doubtless have been more satisfactory if the Respondent had thought fit to support her claim by her own testimony. Her abstaining from so doing certainly affords an objection to her case deserving of serious consideration; and their Lordships do not think that it is altogether removed by the suggestion of the strong repugnance felt by native females in the Respondent's position to taking such a step. But the objection, though it may weaken, does not destroy the case made by the Respondent; and their lordships are of opinion that, whatever weight may be due to it, it is quite insufficient to affect the conclusions in her favour to be drawn from the facts and circumstances of the case which have been already adverted to.

The admission of the tutor, a witness produced on the part of the Respondent, to the effect that on the transfer to which he speaks he saw money pass, is also a circumstance in the Appellant's favour. But if the witness has spoken the truth about the money, it is to be remembered that the transaction to which he speaks was that of the 27th of May, 1848, when it may have been desired to make a colourable sale for the purpose of defeating the execution in the manner shortly afterwards attempted.

Their Lordships, then, after carefully weighing the evidence and considering the able arguments addressed to them, have come to the conclusion that the burden of proving *boná fide* purchases of these Company's papers was properly thrown on the Appellant; that he has failed to do so, and that no ground has been shown for disturbing the concurrent judgments of both the Courts below on this part of the case.

The next question for consideration is that raised by the Appeal of Jodonath Bose, as well as by that of the Moonshee, viz. whether that portion of the decree under Appeal which directs the reconveyance to the Respondent of the immoveable property held by Jodonath, and the payment to her of

the mesne profits by both the Appellants, can be supported.

The property in question consists of certain shares in two gardens, of which the entirety formed part of the estate of Moonshee Hossein Ali. They are known as the Dum-Dum Garden and the Narain Mundul Gardens, and, like the rest of the estate, were divided amongst the coheirs in twenty-fourth shares. Of the first, the Decree gives to the Respondent sixteen shares, or two-thirds of the whole, comprising both her original share and the share which she inherited from her sister. Of the other, it gives her only the eight shares inherited from her sister, her original share having passed, under an execution sale, into the hands of a stranger to the suit.

The history of the Dum-Dum Garden, after the death of Moonshee Hossein Ali, and its division amongst his heirs, is this:—As early as 1843, Boalli sold his five shares, and Ashruffnissa Begum sold her one share to one Dilrus Begum for Rs. 3000. These six shares were conveyed by one bill of sale, dated the 29th Bysack, 1250. On the 22nd of May, 1848, the Respondent executed a bill of sale, by which she purported to convey her original eight shares of this garden to her husband, in consideration of C. R. 2000. On the 15th of August, 1848, he, by an indenture in the English form, conveyed these eight shares to Dilrus Begum, in consideration of C. R. 4000. On the 20th of July, 1853, Dilrus Begum, by a bill of sale, conveyed both the six shares which she had acquired from Boalli and Ashruffnissa, and the eight shares which she had acquired from the Appellant the Moonshee, to one Jegree Khanum, for Rs. 6000. And on the 27th of September, 1853, Jegree Khanum conveyed all these fourteen shares to the Appellant Jodonath, for Rs. 4000. On the 9th of January, 1854, the Respondent executed a bill of sale, purporting to convey the one-third part of this garden, which she had inherited from her sister, to Jodonath, for Rs. 2000. The Appellant Jodonath therefore holds twenty-two shares of this garden,—eight under a direct conveyance from the Respondent; eight under a title, founded on her conveyance to her husband, but strengthened by the mesne conveyances; and six under a title,

dating from 1843, and unimpeached, at least in this suit.

In May, 1848, the Respondent conveyed her original eight shares of the Narain Mundul Gardens to her husband; this property was the subject of the seizure which gave rise to the execution suit; and the sale having been declared fraudulent as against the judgment creditor, these shares were purchased by the judgment creditor, and cannot now be followed.

On the 12th of May, 1855, the Respondent executed a bill of sale, purporting to convey to the Appellant Jodonath, in consideration of Rs. 1500, the eight shares of this garden, which she had inherited from her sister. That transaction is impeached. He had previously acquired part of the share of Booalli in this garden, having inherited it from his brother Koylas, who, in 1850, purchased it at an execution sale. His title to this portion is not impeached.

The substantial issue on this part of the case is one between the Respondent and Jodonath Bose. It is obvious, therefore, that the principle upon which, on the trial of the issue already considered, the burden of proof was shifted from the Plaintiff to the Defendant, is not necessarily applicable to the trial of this issue. The Respondent comes into Court, seeking to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her; and it lies upon her to establish her right to that relief. Has she done so?

She has proved that Jodonath Bose is the servant of her husband. She has produced three witnesses, Gholam Arub, Gholam Ruhman, and Sheikh Taki, to prove that her husband is the person who is really in the possession or in the receipt of the rents and profits of the property. But nothing can be less satisfactory than the testimony of these witnesses, of whom the first is her manager; the second, a tailor; and the third, a menial servant; none of them having any connection with the lands.

The evidence of possession given on the other side, by ryots and others, may not be altogether trustworthy; but, such as it is, it outweighs the

loose statements of these three witnesses. Some of the inferences to be drawn from the conveyances from her to her husband are also favourable to the Respondent's case; but these apply only to that portion of the property claimed, which consists of her original share in the Dum-Dum Garden.

It may be conceded that the conveyances from her to her husband in 1848, considered with the light reflected on them from other parts of this case, and in particular from the proceedings in the execution suit, could not stand. It may also be conceded that if the question were between her and her husband, he ought not to be permitted to say that she is bound by her fraudulent conveyance, since she may be presumed to have executed it under his influence or pressure. And if the property had passed directly from him to his dependant, the presumption that the latter is a mere trustee for him might be stronger than it is.

But what are the facts proved? This portion of the property in dispute passed apparently by sale from Bazloor Ruheem to Dilrus Begum. It remained with her for nearly five years; was sold, ostensibly at least, by her to Jegree Khanum, from whom two months later it passed to Jodonath. These intermediate conveyances are treated in the Courts below, and in the argument before their Lordships, as mere "circuity of fraud;" and it has been argued that we have no proof who Dilrus Begum and Jegree Khanum are, or, indeed, that there ever were such persons. But what proof, on the part of the Respondent, is there to support these arguments? On the other side, there are witnesses who state that Dilrus Begum was the wife of the Nawab of Chitpore, a well-known person, and that Jegree was a wife or concubine of apparently the same person. The conveyance to Dilrus was by English deed, prepared and executed in the office of a respectable English attorney, acting apparently for the purchaser. That circumstance afforded the means of investigating that transaction. But no attempt has been made to do so. Again, that Dilrus Begum was a real personage, not necessarily connected with the Appellant the Moonshee, is placed almost beyond a doubt by the undisputed fact that in 1843, several years before the second marriage of the Respondent, the

six shares of this garden had been conveyed to her by Boalli and Ashruffnissa. What, again, was the motive for this "circuity of fraud"? If Dilrus Begum held five years' benamee from the Moonshee, why raise suspicion by transferring the property from her to his known dependant, Jodonath? Sir Roundell Palmer insisted strongly on the fluctuations in the amounts of the purchase money for which the different instruments purported to convey the same property, as a badge of fraud. The first transaction, which we may admit to have been fictitious, expresses a consideration which, on a comparison with the price for which the six shares were sold in 1843, seems to be below the real value of the property. Tried by that test, the sum of Rs. 4000, for which it was conveyed to Dilrus, would be about the true value. This fact, taken by itself, tends to support the reality of the sales to Dilrus. Again, if she sold for Rs. 6000 property which had cost her Rs. 7000, the difference is not greater than might be accounted for by the necessities of the vendor, or by a diminution in the value of the property in the period during which it remained in her hands. The further reduction of the price to Rs. 4000 in the sale to Jodonath is certainly a more suspicious circumstance. It is not, however, one which seems to go very far to supply any defect of proof on the part of the Respondent. It is not impossible that Jegree Khanum may have found that she had made a bad bargain, or that Jodonath may have made an extremely good one. On the other hand, if the transactions were fictitious, and the price cost the professed purchaser nothing, it is not easy to see why an adequate consideration was not expressed in the conveyance. There seems to have been no inquiry or cross-examination on this point in the Courts below.

Again, what is the case proved in respect of the conveyances from the Respondent herself to Jodonath? She is proved to have executed these conveyances. She has not met this fact fairly in her pleadings. In the original plaint there is no mention of Jodonath's title; and on the face of the supplemental plaint it is not very clear whether she treats the conveyances as forgeries, or admits the execution and impeaches their effect. She has

certainly not stated on what grounds she impeaches them, nor has she come forward as a witness to explain her execution of them. It lay upon her to do so; to show by her own or other testimony under what circumstances they were procured from her, and to rebut the evidence that the consideration money passed to her. Again, the purchase of these parcels of land by Jodonath is not wholly improbable. The purchases are not beyond the means of a person in that rank of life. He already held portions of both gardens by titles not deduced from the Respondent, and unimpeached. The first conveyance from the Respondent was executed in January, 1854, when the Moonshee was absent from home and at Singapore. The Zillah Judge treats the circumstance of his absence as indicative of fraudulent forethought and contrivance. His presence probably would have afforded the inference of pressure and undue influence. The habit may be superinduced by the manifold cases of fraud with which they have to deal; but judges in India are perhaps somewhat too apt to see fraud everywhere. The second conveyance was in May, 1855. At that time the quarrel with her husband had, according to the Respondent's case, begun. She is not likely to have executed this instrument voluntarily at his instigation. She has not shown that she was forced to do it. And on the other hand, it is not improbable that in the circumstances in which she thus stood, she may have been glad to raise the comparatively inconsiderable sum which is stated to have been the price of the property.

On the whole, then, their Lordships are of opinion that the Respondent has failed to show a sufficient title to recover any of the shares in these gardens from the Appellant Jodonath. The habit of holding land benamee is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership. This principle was enforced by this Committee in a recent case. Their Lordships do not deny that in the particular case the connection of Jodonath with the other Appellant, the proved conduct of the latter towards his wife, and other circumstances threw some cloud of suspicion over the title to these parcels of land. But such suspicions

are not proof. Their Lordships think that the Judges of both Courts below have given too much weight to them; that they have not sufficiently considered in what degree the burden of proof lay upon the Respondent; and that when the proofs which she ought to have given and might have given were defective, they have allowed the deficiency to be supplied by presumptions and inferences which the facts do not altogether warrant. Their Lordships cannot, therefore, recommend Her Majesty to confirm this portion of the decrees in the "Property Suit."

Third Suit.

As the third suit also concerns property, and the point raised by the Appeal in it is very short, their Lordships think it will be convenient to dispose of it before they proceed to consider the Appeal in the "Restitution Suit." Two objections were taken to the maintenance of this suit. It was pleaded, first, that the Respondent's claim was barred by the law of limitation; and, secondly, that she was precluded from suing to enforce it by the 7th section of Act VIII. of 1859, which provides that "if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." From the Plaint it appears that the Company's paper for Rs. 10,000, which is the subject of the suit, was specified in the petitions for a certificate under Act XX. of 1841, already referred to, together with the papers for Rs. 9500 and Rs. 7000, which are included in the Respondent's demand in the "Property Suit," and that her claim respecting it is precisely the same as her claim for the other two papers. The only reason she assigns for not suing for it in the former suit is, that "as she was a Purdanusheen and unacquainted with reading and writing, she could not ascertain anything about the aforesaid Government paper and the interest of the same." She says she discovered her mistake in July, 1859, and insists that her cause of action arose at that time. The Zillah Judge held that the second objection was fatal to the suit, which he accordingly dismissed on that ground.

The High Court has reversed this decision, for the following reasons:—they hold with him that

the omission to include this item in the first suit was an oversight; that she knew of the existence of this paper before she brought her first suit, and might have included it therein; and that the real question to be decided was whether that omission, neglect, or oversight was sufficient to bar her present claims under the law fairly applied. This question they decide in the negative, on the ground that it was clear she was not actuated by any fraudulent or dishonest motive; that the stamp paid on the first suit would have covered also this paper; that she cannot have omitted this claim in order to bring the case within the cognizance of a particular court; and that although it may be desirable for the ends of justice that the various items claimed by a plaintiff should form the subject of one single action, yet there was nothing in the law to make it imperative upon her to include every item of such a claim as hers in a single suit.

To these reasons their Lordships cannot assent. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The words of this law are,—"If a plaintiff relinquish *or omit to sue for* any portion of his claims." It plainly includes accidental or involuntary omissions as well as acts of deliberate relinquishment. In their Lordships' opinion, the only ground on which (if at all) the Judgment of the High Court could be supported, is that which is somewhat doubtingly expressed by the Judges in the following sentence:—"Nor do we think that, under the circumstances of the case, the Plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the Defendant on a particular date." Their Lordships think that the correct test in all cases of this kind is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the Respondent seems to them to be the refusal by the

husband to restore, or his misappropriation of, the wife's property, which she says she intrusted to him. There is nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present Plaint to have been omitted from it, for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular Company's paper for 10,000 Rs., she would have been equally justified in making each one of the Company's papers which are comprised in the "Property Suit" successively the subject of an independent suit. Their Lordships are of opinion that the ruling of the Zillah Judge on this point was correct, and that the suit was properly dismissed. This being their view, it is unnecessary to say anything on the question of limitation. They are disposed, however, to think that the claim being founded on an alleged breach of trust, was not, as pleaded, subject to limitation, either under the old law or under Act No. 14 of 1859, which, the suit having been commenced in December, 1861, seems to be the law applicable to it. If the Plaintiff had failed to prove a breach of trust, but had established some other title to relief, the question of limitation might have arisen. But this could only happen upon a trial of the suit on its merits.

Restitution Suit.

Their Lordships will now address themselves to the novel and difficult questions raised by the appeal "in the Restitution Suit."

The first is that which has been strenuously argued at the Bar, though it does not appear to have been raised in the Courts below, or even in the Respondent's case, viz., whether any suit by a Mussulman husband will lie in the Civil Courts of India to enforce his marital rights under the Mohamedan law, by compelling his wife, against her will (she being a free agent, and not detained by others), to return to cohabitation with him. If the law which regulates the relations of the parties gives to one of them a right, and that right be

denied, the denial is a wrong; and unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice. Of authority negativing the jurisdiction there is none. It has been argued that the proper remedy, if there be one, is the denial of maintenance to the rebellious wife, or, at most, a suit for damages; because a suit to compel the wife to return to her husband, though obviously a more complete remedy than either of them, is in the nature of a suit for specific performance; and being founded on the contract of marriage, which the Mohamedan law regards as a civil contract, the Court entertaining the suit must be prepared to enforce all the obligations, however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them. And referring to the definition of some of those obligations, as given with somewhat prurient particularity in certain Mohamedan treatises, the learned Counsel argued that it was impossible for Courts constituted like those of British India to exercise such a jurisdiction. It may be admitted that the Courts of India would properly decline to entertain such questions; although amongst the Wahabees of Central Arabia, or other communities in which the Mohamedan law is observed in its utmost strictness, the magistrate might perhaps take cognizance of them. But this admission is not decisive of the question. The Canonists lay down many things concerning the relative duties of man and wife which the Courts Christian, at least of our country, feel compelled to leave as duties of imperfect obligation. They do not therefore refuse to enforce the broad duty of cohabitation. In the words of Lord Stowell, quoted by Mr. Attorney-General, "They are content to take the wife to the husband's door and to leave her there."

But how does this question stand upon the authorities? In the case of *Ardaseer Cursetjee* v. *Perozeboye*, 6 Moore, I. A., 390, in which it was here decided that a suit for restitution of conjugal rights between Parsees, and *à fortiori*, one between Hindoos and Mahomedans, did not lie on the ecclesiastical side of the Presidency Courts, Dr. Lushington, in delivering the Judgment of the Committee, says, "The Civil Courts in India can bend

their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mohamedans, Hindoo law to Hindoos; but the Ecclesiastical law has no such flexibility." And after ruling that the Court below had not the jurisdiction which it claimed, he adds, "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the Parsees). We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between the Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description." And he afterwards observes, "Such remedies (the remedies afforded by their own usages) we conceive that the Supreme Court on the civil side might administer; or at least remedies as nearly approaching to them as circumstances would allow." It may be said that those dicta, though proceeding from so high an authority, are extrajudicial, and merely indicate an opinion that suits of this kind might possibly be entertained by the Civil Courts of India. The Attorney-General, however, has cited positive authorities which support the jurisdiction, and shows the principles upon which it ought to be exercised. There are the cases of *Mussumat Hingu*, decided in 1832, and reported in 6 S. D. A. R. p. 200; of *Mussumat Ameena*, decided in 1841 and reported 7 S. D. A. R., p. 27; and the case of *Sona Chand Bibi*, decided in 1848 and reported in the Reports of the Bengal Sudr Court for that year, at p. 795. In the last of these cases the suit was dismissed on the ground that the marriage was not proved, but the jurisdiction was not questioned. The second case may be distinguishable from the present on the ground that the wife was of tender years, and under the control of the co-defendants in the suit. But in the first case the wife was clearly of full age, and a free agent. The co-defendant in the suit, though charged with harbouring her, had little more control over her than the co-defendant in the present case had over the Respondent. The suit, which went through three Courts, was resisted by

the wife on grounds personal to herself; and it was finally decided that, according to the Mohamedan law, by which the question was to be decided, the Plaintiff had a right to the possession of his wife, and she was compelled to return to him. It does not very clearly appear by what process the judgment in this case, or in that of Mussumaut Ameena, was to be enforced. From some passages it might be inferred that in the event of disobedience the wife was to be given bodily into her husband's hands. Whether this could be done under the new Act of Procedure, which now regulates the Civil Courts of India, may well be doubted. Disobedience to the Order of a Court directing the wife to return to cohabitation would seem to fall within the 200th section of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

Upon authority, then, as well as principle, their Lordships have no doubt that a Mussulman husband may institute a suit in the Civil Courts of India, for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation; and that that suit must be determined according to the principles of the Mohamedan law. The latter proposition follows not merely from the imperative words of Regulation IV. of 1793, sec. 15, but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities; so, especially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties.

The matrimonial law of the Mohamedans, like that of every ancient community, favours the stronger sex. The husband can dissolve the tie at his will, subject to the condition of paying the wife her dower and other allowances; but she cannot separate herself from him except under the arrangement called Khoola, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the wife by the husband. It cannot, we think, be doubted, that, whilst the tie subsists, his power over her is considerable. The cases already cited are to the effect that he may compel her to return to his house, if

she has left it. We do not find this expressed in the Hedayah, which speaks only of her forfeiting her right to maintenance if she be disobedient or refractory, or go abroad without her husband's consent, until she return and make submission (vol. i. p. 394); but it seems implied throughout that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent. In fact, the principle of keeping a man's hareem in seclusion and under his control is so essential a part of the framework of Oriental society that it is naturally assumed and taken for granted by a Mussulman expounder of the law.

On the other hand, the law assures to the wife considerable rights as against her husband. She may insist on maintenance according to her rank and his ability; and if he fails to give it, she may enforce that right before the Kazee (1 Hedaya, book iv. chap. xv. sec. 1. pp. 393, 394). If he has power to keep her within the zenanah, and to prevent access to her, subject to certain qualifications, he is bound to provide her with a separate apartment, exclusively appropriated to her use (p. 402). As to personal violence, there are certainly passages in the Hedayah which, founded on a text in the Koran, imply that the husband may use it for correction; but this right of corporal chastisement is expressly said to "be restricted to the condition of safety;" and it may be questioned whether these authorities go the full length of the Futwah at p. 14 of the record (see Hedayah, vol. ii. pp. 75–81). The Mohamedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—"There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it. The Court, as Lord Stowell said, has never been driven off this ground."

If, however, it be granted that, according to Mohamedan law, the husband may sue to enforce his right to the custody of his wife's person; and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means

follows that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights. The marriage tie amongst Mohamedans is not so indissoluble as it is amongst Christians. The Mahomedan wife, as has been shown above, has rights which the Christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety, and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Kazee by the Futwah at p. 32 of the Record (if the law, indeed, warrants such a jurisdiction), of selecting a proper place of residence for the wife, other than her husband's house.

Enough has been said to show that, in their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Mohamedan law, as well as strict proof of the facts to which it is to be applied. Has the present case been so tried and determined in the Courts below? Their Lordships are constrained to say that this has not been the case. In the first place, they think that the *ratio decidendi* adopted by the Judges of both Courts is erroneous. The Principal Sudr Ameen held that oppression had been proved (the correctness of his conclusion will be hereafter considered). He did not then proceed to consider whether the oppression was so far beyond the bounds of marital authority, under the Mohamedan law, as to constitute an answer to the suit. He seemed to think that, oppression once proved, the case was taken out of the Mohamedan law, and was to be decided on what the Court, upon general principles, might deem to be expedient for the security of the wife's person. He then proceeded to argue, apparently without the slightest foundation of proof, that the wife, having been ill-treated, had probably been unfaithful, and that if she were restored to her husband, he was not unlikely to revenge himself by taking her life. He afterwards argued, with more reason, upon the danger of restoring her to one who had been decreed liable to pay her a very large sum of money.

The facts upon which the Judges of the High Court proceeded were that the magistrate had seen fit to release the Respondent from her husband's house, and that a decree had passed against him for having made away with her property for a large sum, of which they overstated the amount. They appear to have considered that, according to the Mohamedan law, these facts were not an answer to the suit; and they then say, "This being so, are we required to decide this case in conformity with the principles of the Mohamedan law? Are we to compel the Defendant to return to her husband, convinced as we are that she should not be forced to return? If, under the Mohamedan law, no wife can separate herself from her husband under any circumstances whatsoever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mohamedan law giving no relief to a woman, be the conduct of the husband ever so bad: it is a case to be disposed of by equity and good conscience. And on these principles we have no hesitation in saying that the grounds upon which the Defendant has separated from her husband justify her in that step," etc.

The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mohamedan law, but according to what is termed equity and good conscience, *i. e.* according that which the Judge may think the principles of natural justice require to be done in the particular case.

Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment already referred to (Regulation IV. of 1793, sec. 15), which directs that in suits regarding marriage and caste, and all religious usages and institutions, the Mohamedan laws with respect to Mohamedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mohamedan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their do-

mestic relations. The Judges were not dealing with a case in which the Mohamedan law was in plain conflict with the general municipal law or with the requirements of a more advanced and civilized society,—as, for instance, if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own sense of what is just and fair, without reference to positive law, would let the wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband.

In what they have just said their Lordships must be taken to object only to the general supersession of the Mohamedan law as the *ratio decidendi* in cases of this description, which seems to them to be implied in the judgments under review.

They do not mean to lay down that it was sufficient for the decision of the case to show that, according to the Mohamedan law, the husband has a right to the custody of his wife, or that there was no answer to his suit unless it could be shown that the wife had been separated from him either by Talâk or Khoola, either of which would dissolve the *vinculum*. This assumption, which seems to have been made by the Judges of the High Court, is, their Lordships think, erroneous. It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Mohamedan law.

Before, however, any of these principles can be applied, the facts to which they are to be applied must be established by legal proof; and this, their Lordships are of opinion, has not been done in the present case. Besides the evidence on the futile

and now abandoned issue about freemasonry, there is little evidence in the cause.

The Zillah Judge's judgment in the "Property Suit" was put in evidence. The fact, therefore, that the Appellant had been decreed liable to make good a large sum of money to the Respondent in respect of the property which he had misappropriated was established; but the proof of personal cruelty rests almost entirely on the proceeding of the magistrate. That proceeding is neither one *inter partes* nor even a conviction of the Appellant upon a criminal charge. It was treated by the Nizamut Adawlut (Record, p. 33) as being the record of an act done by a police officer, and not the judicial proceeding of a magistrate. It is, therefore, difficult to see how, in strictness, it can be evidence at all against the Appellant; but at most it proves only that the magistrate set the lady free from what he considered improper restraint.

To establish a case of cruelty as a defence to the suit, the Respondent might have called the magistrate, if then still in India, to speak to the state in which he found her when he set her free. She might also have given such evidence of her treatment as she adduced in the "Property Suit," but which, whatever were her reasons for it, she did not adduce in this suit. And, lastly, she might have given her own testimony, which it is most desirable to have on such an issue. She has failed to do any of these things; and it is impossible to say that the Courts below had before them, in proof, the facts from which any Court could infer that a defence on the ground of cruelty had been established.

From what has been said, it must be obvious that their Lordships are not prepared to affirm the decrees under appeal in this suit. They do not, however, feel themselves in a condition to make a final decree, which would put an end to this painful litigation. They will not visit upon the Respondent the mismanagement of her cause by sending her back at once to her husband. Enough has been shown to render it doubtful whether she can be restored to his zenanah with safety, at least whilst the relation of debtor and creditor continues to subsist between them, unless proper security for her protection is taken. It may ultimately turn

out that she ought not to be sent back at all. Their Lordships must, therefore, unwillingly recommend that this cause be remitted to the High Court, with directions to put the same in a course of re-trial, and with power, if necessary, to amend the issues or frame new ones. If cruelty be relied upon as a defence, there should be a distinct issue as to the fact of cruelty.

Their Lordships, however, cannot help suggesting, for the consideration of the parties, that it is for the interest, the happiness, and the respectability of both to settle the questions still open between them by amicable arrangement rather than by further litigation. They have surely friends who might effect such an arrangement between them.

Their Lordships have now only to recapitulate the several recommendations which they will humbly make to Her Majesty on these Appeals. These are—

1st. That the Appeal of the Appellant, Buzloor Ruheem, in the "Property Suit," be dismissed, except so far as it relates to his liability to pay the mesne profits of the shares in the Dum Dum and Narain Mundul Gardens jointly with the Appellant Judoonath Bose; that the Appeal of the last-named Appellant in the same suit be allowed; and that the decree of the High Court be amended by omitting so much thereof as relates to the shares in those gardens, and by directing, in lieu thereof, that that portion of the Respondent's claim be dismissed with costs, and that the said decree be in all other respects confirmed.

2dly. That in suit No. 256 of 1862 the decree of the High Court be reversed, and that, in lieu thereof, the decree of the Zillah Judge dismissing the Respondent's suit, with costs, be affirmed, with the costs of the Appeal in the High Court.

3rdly. That in the "Restitution Suit" the decrees of the High Court and of the Principal Sudder Ameen be reversed, and the cause be remitted to the High Court, with directions to have the same retried on fresh evidence, and with power to amend the issues or to frame new issues, if they shall see fit to do so.

That the Respondent should pay the costs of the Appeals in Suit No. 256 of 1862 and in the

"Restitution Suit." That she should also pay the costs of the Appeal of Judoonath Bose in the "Property Suit." And that the Appellant Buzloor Ruheem should pay the costs of his Appeal in that suit.