Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Radhajeebun Moostuffy v. *Taramonee Dossee, Nos.* 264 *of* 1865 *and* 285 *of* 1868, *from the High Court of Judicature at Calcutta; delivered the* 23*rd February*, 1869.

Present:

Sir James W. Colvile.
Lord Justice Selwyn.
Lord Justice Giffard.

Sir Lawrence Peel.

THEIR LORDSHIPS are of opinion that no ground has been laid for prolonging this unfortunate litigation by the allowance of these Appeals.

It is unnecessary to state the earlier proceedings in the first Cause. It seems sufficient to begin with the Order of the 30th August, 1862, which Mr. Cave has admitted to be final. By that Order it was held that Shurbeshur has established his right to take out execution for the mesne profits claimed by him, as well as for the possession of the land included in the fourth article of the compromise; and that it was no bar to his execution that it had been alleged that he had broken trust, inasmuch as he had not carried out the terms in accordance with which it was agreed that he should hold possession.

This Order was neither the subject of Appeal, nor in their Lordships' opinion could have been successfully made so. There is no ground, as it appears to them, for saying that the proof of the performance of the religious ceremonies was a condition precedent to the enforcement of the claim for the rents which the fourth article of the compromise gave to Shurbeshur. And without inquiring whether many of the points which are now taken might not have been raised in the litigation which led to the Order in question, or are concluded by

it, it is sufficient to state that its effect was that, as between the two brothers, Shurbeshur was entitled to take out the execution which he claimed to take out, and that the Respondent, if he had any claim by reason of the non-performance of the religious ceremonies, or any other breach of the agreement, was bound to prefer that claim in a regular Suit.

In anticipation of that Order, the younger brother (the Appellant) had commenced the Suit out of which the other Appeal has arisen. It will be convenient to consider the nature of that Suit, and the right of the party to have the Decree that has been made in it reversed or altered, before we proceed to the subsequent proceedings in the original Suit.

The Suit which was so instituted was not exactly such a Suit as that suggested by the Judgment of the 30th of August, 1862. What the Judges of the High Court said was, that if the Appellant, on the ground of any breach of agreement, claimed a right to dispossess the Respondent, he might prefer that claim in a regular Suit. But the Suit really instituted was of this nature. It was a Suit in which the party alleged that, by reason of the non-performance by Shurbeshur of the duty which he had undertaken under the fourth article of the compromise, he, the Plaintiff, had been compelled to perform certain religious ceremonies at his own cost, and that he had a right of action over against Shurbeshur for the moneys expended in the performance of those ceremonies. It was therefore essential, in such a Suit, that he should show that he really had that right of action; that there not only had been the breach of duty alleged, but that by reason of it he was entitled to recover the damages which he had sustained from his brother. And he had of course to prove the amount of those damages.

Now, as to the proof of the damages, that failed altogether. He produced only one witness, who proved nothing; he called the Defendant, who denied generally that the claim was well founded. Upon that the Judge of First Instance made a decree against him, and dismissed the Suit.

The case was carried, by appeal, before the High Court, and they affirmed the decision. They re-

marked on the miscarriage of the Judge in refusing to allow the Plaintiff to cross-examine the Defendant when called, and their Lordships fully concur in the propriety of that censure. Nevertheless, if the Defendant had been cross-examined, all he could have proved would have been so much of the Plaintiff's case as rested on the performance of the religious ceremonies, and by possibility, though that was not very probable, the cost to which the Plaintiff had been put in the performance of them; but that, in their Lordships' opinion, would not have made out that he had any right of action. For the existence of that right of action you must go back to the original compromise, and in their Lordships' opinion, the Plaintiff had wholly failed to prove that he had such a right of action, because, upon the compromise and the acts of the parties, the case stood thus:—The compromise gave certain lands and the rents of those lands to the elder brother, coupled, we may admit, with the performance of a trust, but a trust of that nature which is constantly vested in the managing or elder brother of a Hindoo family, a trust which implies some considerable beneficial interest. If the non-performance of that trust, or the non-performance of those ceremonies, could, by any possibility, give such right of action to the Appellant as that asserted in his Suit, it surely was necessary for him to show that it was not by reason of any default on his part that the non-performance of the trust took place.

Now, the undisputed facts of the case are, that the younger brother did not perform his part of the agreement; that he retained his share of the rents of the land; and that the elder brother was put to take out execution under the decree founded on the compromise, in order to get the funds which that compromise gave to him.

Therefore, it seems to their Lordships that this Suit, brought by the Appellant, substantially failed upon the ground which is suggested by the Judges in the three last lines of their Judgment of the 2nd of February, 1864, viz. that there was no cause of action at all; and in these circumstances it would be unreasonable to send down that case for a new trial, because the Judge did not allow the cross-examination of a witness; whom, moreover, by

reason of his subsequent death, it is now impossible to examine.

These observations, therefore, dispose of the second Appeal, and I now revert to the proceedings in the original Suit. Shurbeshur died pending the second Suit, and without having taken out execution under the Decree of the 30th of August, 1862. His widow then applied to take out execution, and as she merely sought to take out execution for that which had been adjudged to belong to her husband, and was therefore part of his estate, there seems no ground whatever for disputing her right, or imposing upon her the obligation of proving something which Shurbeshur had not been called upon to prove.

The Principal Sudder Ameen seems, therefore, in their Lordships' opinion, to have taken a right view of the question. He overruled the objections to the execution, which had been repeated by the Appellant.

The case then went by appeal to the High Court, and two of the learned Judges of that Court then took the view which I have just alluded to as being, in their Lordships' opinion, erroneous, saying that she could not stand in her husband's shoes; that it lay upon her to prove that Shurbeshur had actually expended his own moneys in performance of the ceremonies, and they therefore, in the first instance, overruled the Order and Judgment of the Principal Sudder Ameen. There was, then, an application for review before the same learned Judges; and upon their being referred to the decree in the other suit, and to some additional evidence, but principally to that decree in the other suit, they came to the conclusion that the widow must be taken to have established, chiefly, if not wholly, by that decree that of which they had required proof from her, viz. that Shurbeshur had expended his own moneys in the performance of the ceremonies, that therefore their former Order was wrong, and that the final Order to be made was, that she should be entitled to issue execution,—in fact, to affirm the Principal Sudder Ameen's Order. A subsequent Order was made, declaring her entitled to interest on the amount for which the original execution had been sued out.

Their Lordships are unable to assent to the rea-

soning of the learned Judges of the High Court. They think, for the reasons which I have given, that the original Order, reversing the Principal Sudder Ameen's Order, was wrong; but if that Order had been properly made, they would have been unable to adopt the reasoning of the learned Judges, as to the effect of the Decree in the suit of the Appellant, which certainly does not prove that Shurbeshur expended his own moneys in the performance of ceremonies. The utmost which that Decree can be taken to prove is that the Appellant had failed to show that he had performed separate ceremonies upon his own account, or that he was entitled to recover the sum claimed in that suit in respect of those ceremonies.

The effect, however, of the Final Orders of the High Court is to give to the widow that to which their Lordships consider she is entitled; and therefore the Order which they will humbly recommend Her Majesty to make is, that both these Appeals be dismissed, and that the Orders of the Courts below, which are the subjects of them, be affirmed.