[EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.]

From the District Court, Kanara.

Suit No. 1 *of* 1871.

VYAKUNTA BAPUJI, Inhabitant of the village of Bád, in the taluka of Karwar .....*Plaintiff.*

May 1.
1875.

vs.

The GOVERNMENT of BOMBAY .....*Defendants.*

Muli—Land Revenue—Kanara—Land Tenure—Bombay Act VII. of 1863 *—Bombay Act I. of* 1865*—Bombay Regulation XVII. of* 1827.

The Mulavargdar, a holder of land on *Muli* tenure in Kanara, enjoys an hereditary and transferable property in the soil, and cannot be ousted so long as he pays the land revenue assessed upon his land.

In the absence of special terms to the contrary, Government may enhance the land revenue payable in respect of land so held.

The history of the Land Revenue in Kanara narrated.

The question of the cultivating rayut's property in the soil considered both with reference to the Hindu and the Muhammadan Law.

Similarity of the Mirasi, Kaniyatchi, the Janmakari, the Swasthyan, and the Muli tenures mentioned.

The rule of the Hindu and Muhammadan as well as of the English Law is *Nullum tempus occurrit regi.*

The extent to which that maxim has been restrained by legislation in the Presidency of Bombay considered.

Construction of Bombay Act VII. of 1863, Section 21, and Bombay Act I. of 1865, Sections 25 and 49.

The revenue system of Akbar under Todar Mul, and of Aurangzib discussed.

If there be no specific limit, either by grant, contract, or law, to the right of Government to assess land for the purpose of land revenue, the Civil Courts have no jurisdiction under Bombay Regulation XVII. of 1827, Sections 4 and 7, to entertain a suit to rectify the assessment made by the Collector or other competent revenue authority.

Statement.

THIS case came on for hearing, upon the 18th of January 1875, before Sir Michael Roberts Westropp, Chief Justice, and Mr. Justice West, in the High Court under its Ex-

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

traordinary Jurisdiction. The arguments of counsel extended over fourteen sitting days, viz., the 18th, 19th, 21st, 22nd, 25th, 26th, 28th, 29th of January, and the 1st, 2nd, 4th, 5th, 8th, and 9th of February 1875.

Statement.

The counsel, who appeared for the plaintiff, were *Mr. Farran, Mr. Branson,* and *Mr. Budrudin Tyabji.*

The counsel, who appeared for the defendants, were the *Honourable A. R. Scoble (Advocate General), Mr. Latham, Mr. Tyrrell Leith,* and *Mr. Hart.*

The oral evidence had been taken, under commission from the High Court, by Mr. Spens, District Judge at Karwar, on the 23rd, 24th, 25th, 26th, 27th, 28th, and 30th of June, and the 1st, 2nd, 3rd, 4th, 5th, 28th, and 29th of July 1873. Mr. Shaw Stewart, formerly Collector of North Kanara, had been examined *de bene esse,* on behalf of the plaintiff, before the Prothonotary, on the 31st March 1873; and again, before the Deputy Registrar, on the 6th November 1874.

The documentary evidence, prepared for the cause, was voluminous, and, a considerable portion of it being in the vernacular, occupied a long time in translation. It chiefly consisted of an octavo volume of letters relating to the early revenue administration of Kanara, printed in 1866 for the Government of Bombay, and three volumes in folio, containing a great variety of documents, printed at the close of the year 1874 for this case. The 1st folio volume (printed in 1820 for the Court of Directors) containing a selection of Revenue and other Records at the India House, Gleig's Life of Munro (3 vols.), Mountstuart Elphinstone's History of India, and Wilk's History of Mysore, were extensively referred to. Several documents in manuscript were likewise given in evidence.

The object of the suit was to dispute the right of the Bombay Government to enhance the assessment charged on the plaintiff's lands in Kanara.

The facts sufficiently appear in the judgment.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

Farran, on behalf of the plaintiff, contended that Bombay Act I. of 1865 was not meant to apply to lands held in proprietary right by the subject, and that therefore any enhancement under that Act of the assessment charged on *muli* lands in Kanara was illegal. That the ancient land tax, (known as the *shist*,) together with the greatest exaction enforced by any Government prior to the British, (known as the *shamil*,) had been adopted in the year 1800, by the British Government, as the maximum limit of assessment, under the name of the *kadim beriz*. That the Crown had no ownership in *muli* lands in Kanara, where the *Mulgars*, ever since the British occupation of Kanara, had been treated as absolute owners of their *muli vargs*, subject only to the payment of the *shist* and *shamil*, and that therefore the attempt to apply the provisions of Bombay Act I. of 1865 to *muli* lands in Kanara was tantamount to an attempt to confiscate private property, which the Bombay legislature had no power to do. That on a true construction of Bombay Act I. of 1865 the plaintiff's lands, being entered in the registers as liable only to the *shist* and *shamil*, must be considered as land "partially exempt." That the Act, not having been originally intended to apply to Kanara, must be read *mutatis mutandis*, its spirit being to record and to retain existing settlements. That the right of the *Vargdars* of Kanara to sub-divide and sell their *vargs* had always been distinctly recognised by the Government, and that any construction of the Act other than that now contended for would make of it an act of confiscation such as would be *ultra vires* of the Bombay Government. That the *muli* lands in Kanara were private property, as evidenced by the report of Major Munro, dated 31st May 1800, and by the existence of *Mul-gaini* tenants at a fixed rent in perpetuity; for inasmuch as the *Mulgar* could not raise the rent of his *Mul-gaini* tenant, if the Government assessment were raised on his own lands, he would virtually be deprived of his estate. That the Government of Madras frequently expressed an intention of introducing a permanent settlement lower than the *shist* and *shamil*, but never hinted at the possibility of

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

exceeding that limit, thus virtually admitting that the *shist* and *shamil* together formed the maximum assessment which they were entitled to charge. That to exceed that limit would be a confiscation of private property to effect which an Imperial Act would be necessary; but Bombay Act I. of 1865 was not intended to interfere with existing rights, and therefore the local Government had no authority under that Act to raise the rate of assessment in Kanara. That Mr. Blane in his Report of 20th September 1848 distinctly asked the Government whether they were pledged to the existing order of affairs, and recommended them, if they were not, to order a survey; but no survey being ordered, the inference was that the Government were pledged to the then existing order of things, that is to the *tharav* settlement wherever it had been introduced, and to the *kadim beriz*, or *shist* and *shamil*, wherever it had not. That to succeed in their contention the Government must show that they have the power to alter the fixed assessment over the whole of Kanara. That even if this assessment were in the first instance fixed without authority, yet the Government had by long acquiescence recognised it as binding on them, and the plaintiff had thus acquired a prescriptive right under Bombay Regulation V. of 1827 which had been extended to Kanara by Bombay Act III. of 1863. That the only increase of revenue expected by the Madras Government was that to be gained from the extended cultivation of waste lands, and not from an increase of the assessment on lands already under cultivation. That in the debates on Act I. of 1865, previous to its passing, the word Kanara never once occurs, whence it was to be inferred that the Act was not intended to apply to Kanara. That so to apply the Act, was *ultra vires* of the Bombay Government, for the Act empowering local Governments to legislate, provides that the laws to be passed by them are to be for the peace and good government of the country, which an Act of confiscation cannot be said to be. That this Act as applied to Kanara was opposed to the spirit, if not the letter, of the Queen's proclamation of 1st November 1858. But that, whether

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

ultra vires or not, the Act must be held from its title to be intended not to interfere with existing proprietary rights. In the course of his argument he cited principally Major Munro's letter to the Board of Revenue, 31st May 1800; Letter of the Board of Revenue to the Governor General, 28th August 1800; Reply of Governor General to Board of Revenue, 20th September 1800; Mr. Harris' letter to the Board of Revenue, 27th August 1817; Major Munro's letter to the Tahsildar of the Taluka of Sadashivgad, 4th January 1800; Major Munro's proclamations of 26th and 27th March 1800; Mr. Read's proclamations of 12th July 1800, 10th June 1801, and 6th September 1805; Mr. Harris' proclamation of 6th June 1819; Major Munro's report to the Board of Revenue, December 1800; Major Munro's letter to the Collectors of Kanara, 9th December 1800; Mr. Read's report to the Board of Revenue, 1st January 1814; Minute of the Board of Revenue, 28th April 1817; Letter of Mr. Harris to the Board of Revenue, 27th August 1817; Reply of the Board of Revenue to Mr. Harris, 30th October 1817; Correspondence between the Board of Revenue and Mr. Harris, and orders and minutes of the Board of Revenue extending from 12th October 1817 to 28th July 1819; Resolution of the Board of Revenue, 15th January 1850; Resolution of Government, 5th March 1850; Report of Mr. Harris to the Board of Revenue, 2nd August 1820; Extract from the Proceedings of the Board of Revenue, 28th December 1820; Mr. Harris' report to the Board of Revenue, 14th June 1821; Mr. Babington's letter to the Board of Revenue, 24th August 1825; Extract from the proceedings of the Board of Revenue, 15th September 1831; The 5th report of the Special Committee of the House of Commons 1812; Mr. Stokes' report to the Board of Revenue, 12th January 1833; Extract from the proceedings of the Board of Revenue, 11th January 1836; Memo. by the Head Sheristedar; Extract from the proceedings of the Board of Revenue, 16th November 1843; Extract from the Minutes of Consultation, 2nd January 1847; Mr. Blane's report to the Board of Revenue, 20th September 1848; Extract from the Proceedings

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

of the Board of Revenue, 8th May 1851; Mr. Goldingham's minute on Mr. Blane's report, 5th November 1850; Mr. Maltby's letter to the Board of Revenue, 22nd July 1839; Calcutta Review Vol. 21, 2nd No. for 1853, p. 356 et seq.; Buchanan's Journey; Letter from Mr. Dalyell to Mr. Sim, 2nd April 1862; *Collector of Trichinopoli* v. *Lekkamani* L. R. 1 Ind. Ap. 282; and Letter from Mr. Shaw Stewart to Mr. Havelock, 24th July 1871, with its annexures.

He was followed by *Branson*, who contended that Act I. of 1865 was not intended to apply to estates held in proprietary right, but, as shown by the title, only to estates held by the tenants of Government, the Act itself drawing a distinction between occupants and owners, and that it was only with regard to tenants that the Act had any assessive force. That even if Act I. of 1865 did apply to the *Mulgars* of Kanara, still they could not under that Act be assessed without limit, inasmuch as the power of assessment is by s. 25 limited to "such an amount as is in accordance with the previous practice," and that there was an agreement, between Major Munro, as the implicitly trusted agent of the British Government, and the landholders of Kanara, that the assessment should not be increased beyond the *shist* and *shamil*. That until the present proceedings the Government had never questioned the authority of Major Munro to make such an agreement, nor even the fact of such an agreement having been made, and no attempt had subsequently been made by the Madras Government to raise the assessment beyond the *shist* and *shamil*.

He cited principally Major Munro's letter to the Board of Revenue, 31st May 1800; Major Munro's report to the Board of Revenue, December 1800; Major Munro's letter to the Collectors of Kanara, 9th December 1800; Major Munro's letter to the Board of Revenue, 28th June 1800, and *Sub-Collector of Colába* v. *Ganesh* 10 Bomb. H. C. R. 216 A. C. J.; and *the Collector of Kanara* v. *Kanapu*, Mad. S. A. Sp. Ap. 9 of 1831, decided on 21st November 1832.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

Scoble, A. G., for the defendants, argued that Bombay Act I. of 1865 became applicable to Kanara by virtue of the Acts and proclamations mentioned in the case of *Reg.* v. *Vyankatsvámí*, (reported at 2 Bomb. H. C. Rep. 106,) and that on the face of it the Act was evidently intended to apply to the whole of the Bombay Presidency. That the Stat. 24 and 25 Vic. C. 67, S. 43, shows what Acts are *ultra vires* of the local Government, and that it must be presumed that this Act was not so, from the fact of its having received the sanction of the Governor General on 6th January 1865. That there was no force in the argument that the nature of land tenure in Kanara is such as to render Bombay Act I. of 1865 inoperative in that province, for a *Mulgar* is admittedly a holder of land bound to make a certain payment to the Government, in default of which his land is liable to be sold. That *Mulgars* come under the definition of "superior holders" as contained in Bombay Act I. of 1865, there being nothing in the Act to prevent a "superior holder" being also an "occupant"; whereas the term "owner" under the Act means an absolute owner or *inamdar*, not liable to pay any revenue at all. That the definition of "alienated villages" in Bombay Act I. of 1865, contemplating a documentary title, would not apply to the lands of the plaintiff, who had produced not a single document of title. That even assuming it to be possible for any prescription against taxation to exist, Sec. 25 of Bombay Act I. of 1865 destroyed the force of all the argument as to the plaintiff's prescriptive right. That Sec. 3 of Bombay Act I. of 1865 confirmed existing Survey Settlements of land revenue, but there never was any Survey Settlement made by Major Munro confirmed by the Governor in Council, while Sec. 30 provided for a fresh survey and revision of assessment, and Sec. 4 empowered the extension of the survey to Kanara. That the rights of the *Mulgar* of Kanara were neither more nor less than the rights of the *Mirasdar* of the Deccan, described by Mr. Grant Duff as a tenant, the word *Mulgar*, derived from *mul*, a root, meaning in fact a rooted tenant, one who might be said to be *adscriptus glebæ*, and the terms

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

mulgar and *mirasdar* being capable of being used interchangeably, as appears from the derivations of those words in Wilson's Dictionary. That the lands of the plaintiff being situate in Soonda, and not in Kanara proper, such of his arguments were not applicable to the case as were based on expressions contained in reports and minutes referring only to Kanara proper. That Major Munro's powers, though great, were not absolute, nor did he himself consider them as absolute, or his acts binding on his successors in office. That by the term "private property" Major Munro meant not absolute freehold, but property held in right of payment of the revenue to Government, and that by "fixed" he meant not "unchangeable for all time," but "not subject to constant fluctuations," as appears from his use of the word "permanent" as distinguished from "fixed"; or he might have meant "uniform" as distinguished from "arbitrarily exacted from each landholder according to his ability to pay." That the survey assessment now sought to be imposed amounted only to 15 per cent of the gross produce, or one-half proportionately of that imposed by Major Munro. That the *shist* was fixed, under the Hindu rule, in A.D. 1618, and all subsequent additions thereto, whether by Hindu or Muhammadan rulers, came under the denomination of *shamil*, but none of these exactions were computed on the value of the land. That Major Munro, on taking charge of the province at the date of the British occupations, had in view a two-fold object: 1st, to get what he could for the Company, and 2nd to conciliate the people by granting them remissions from the exactions which he found had been imposed on them by their former native rulers, but that such remissions were only granted temporarily for the present purposes of administration. That even if by the word "fixed" Major Munro meant "permanent," still his expressions amounted only to suggestions, which had never been adopted by the Government as the basis of a permanent settlement. That had Major Munro ever promised the landholders of Kanara that no addition should ever be made to the assessment charged on their lands, he would infallibly have reported to

the Government the fact of his having made such a promise; but no report to that effect existed, nor could it be shown that the Government were ever aware of, or sanctioned, any such promise. That neither did Major Munro himself consider his successors bound by his acts, nor did his successors or the Government consider themselves bound by his expressions of opinion. That what the policy of the Madras Government was appears from Regulations XXV. of 1802 and XXXI. of 1802, passed after the departure of Major Munro from Kanara. That Regulation XXV. of 1802, providing for the introduction of a permanent settlement, never was applied to Kanara and Soonda, nor were *sanads* of the kind contemplated in Sec. 3 of that Regulation ever issued in those districts. That Regulation XXXI. of 1802 applied in terms to Kanara and Soonda. That the case of *Collector of Trichinopoli* v. *Lekkamâni* (reported at L. R. 1 Ind. Ap. 282) shows that what the Government reserved in those two Regulations was the right to raise the revenue from time to time, and that those two Regulations, being authoritative evidence of what the opinion of the Madras Government was at the time they were passed, effectually disposed of the plaintiff's argument that the Madras Government had then already empowered the Collectors to introduce a permanent settlement of any kind. That this contention was further supported by the subsequent passing of a Regulation (I. of 1803) defining the powers of the Board of Revenue, and another (II. of 1803) defining the powers of Collectors. That a survey was necessary for the satisfactory settlement of the assessment, because no reliable revenue accounts had ever been kept, the persons who actually kept them being those most interested in falsifying them. That the whole *shist* together with the whole *shamil* was not considered the maximum limit in those *moganies* into which the survey was introduced. That if there had then existed any idea among the rayuts that the Government were not justified in settling the assessment as they pleased, some trace of such an objection would have appeared amongst the Government records of the period, which, however, only show that the Revenue Board consi-

Argument.

VYAKUNTA BAPUJI v. GOVERNMEN OF BOMBAY.

Argument.

dered it their duty as well as their right to regulate the assessment according to circumstances. That the conclusions, to be drawn from the documents in evidence in the case, were: 1st, that no permanent or maximum settlement had been established by Major Munro either with or without the sanction of Government, who, so far as they adopted any suggestions by Major Munro, adopted them only partially and provisionally. 2nd, that the assessment introduced by Major Munro under the provisional sanction of Government was departed from by his immediate successors, its principle was departed from in ancient Kanara by the introduction of the *tarao*, and in ancient Soonda by the introduction of a survey, and the whole correspondence showed a desire on the part of the Collectors to reintroduce Major Munro's principle of assessment, giving to the Government a one-third share of the gross produce. 3rd, that Major Munro's assessment was based on false, fraudulent, and fallacious accounts, which were furnished to him by interested persons, and which were the only information he had. 4th, that the survey assessment had been recommended from the first by Major Munro, and his recommendation followed by all his successors, the survey was introduced and partially carried out in Soonda, and the Madras Government contemplated the carrying of it out in North Kanara down to within two years of the transfer of that province to the presidency of Bombay. 5th, that the Madras Government had done nothing to interfere with the paramount right of a Government to fix such assessment as they please. 6th, that the Government, in their dealings with the holders of land, took up the same position as in correspondence with Government officers, none of the *mulpattas* granted by the Government holding out any intimation to the grantees that the assessment had been fixed, but on the contrary expressly reserving to Government the right thereafter to introduce a permanent settlement, which might be greater or might be less, and none of the *beriz pattas* granted by Government professing to do more than show the assessment for the current year, and relating to *muli* as well as other lands. 7th, that not even

the transactions between the inhabitants of Kanara themselves show that there was amongst them any impression, at the date of Major Munro's assessment, that that assessment would not be exceeded. 8th, that while the plaintiff had produced not a single document of title, but based his whole claim to be considered a *mulgar* on the fact of his lands being entered as *muli* in the Government books, the whole evidence went to show that the proprietary right was in the Government, and that none of the lands come under any of the exceptions in Section 25 of Act I. of 1865.

Argument.

In the course of his argument he referred principally to Major Munro's letter to the Board of Revenue, 31st May 1800; Minute of 31st December 1824; Mr. Harris' report to the Board of Revenue, 14th June 1821; Mr. Lewin's letter to Mr. Babington, 5th September 1827; Major Munro's letter of instructions, 1st February 1800; Regulations for the Collectors in the Madras Presidency, Appendix 15 to the 5th Report of the Special Committee of the House of Commons 1812; letter of the Board of Revenue to the Government, 1st February 1800; Gleig's Life of Munro; Letter of Government to the Board of Revenue, 20th September 1800; Major Munro's letter to the Collectors of Kanara, 9th December 1800; Minute of the Board of Revenue, with Major Munro's remarks, 28th April 1817; Extract from the Proceedings of the Board of Revenue, 15th September 1831; Mr. Blane's report to the Board of Revenue, 20th September 1848; Mr. Read's report to the Board of Revenue, 1st January 1814; *Rajah Muttu* v. *Perianyagam*, L. R. 1 Ind. Ap. 209; Mr. Read's report to the Board of Revenue, 19th January 1874; Government to the Collector in Kanara, 20th October 1817; Mr. Harris' letter to the Board of Revenue, 27th August 1817; Reply of the Board of Revenue to Mr. Harris, 30th October 1817; Mr. Harris' letter to the Board of Revenue, 30th December 1819; Reply of the Board of Revenue to Mr. Harris, 10th January 1820; Report of Mr. Harris to the Board of Revenue, 2nd August 1820; Extract from the Proceedings of the Board of Revenue, 28th December 1820; Mr. Harris' reports to the Board of Revenue, 14th

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

June 1821, 17th June 1822, 17th June 1823, and 27th May 1822; Letter from Mr. Cotton to Mr. Babington, 30th June 1825; Mr. Babington's report to the Board of Revenue, 24th August 1825; Extract from the Proceedings of the Board of Revenue, 30th April 1827; Letter from the Government to the Board of Revenue, 28th March 1828; Letter from Mr. Lewin to Assistant Judge of Honore, 16th August 1827; Letter from Mr. Babington to the Board of Revenue, 15th August 1828; Memorandum by the Head Sheristedar; Letter from Mr. Viveash to the Board of Revenue, 31st August 1833; Minute of the Government, 16th February 1836; Extract from the Proceedings of the Board of Revenue, 20th March 1837; Minute of the Government, 16th May 1837; Mr. Maltby's Jummabundy report of Fasli 1248; Extract from the Proceedings of the Board of Revenue, 16th November 1843; Mr. Reade's report to Mr. Blane, 6th September 1847; Mr. Blane's reports to the Board of Revenue, 12th October 1847 and 12th October 1849; Mr. Maltby's reports to the Board of Revenue, 7th October 1850, and 12th February 1853; Extracts from the proceedings of the Board of Revenue, 28th April 1853, and 7th April 1856; Letter of Mr. Fisher to Mr. Newill, 9th November 1860; the following letters in MS., Board of Revenue to Major Munro, 27th September 1800, Government to the Board of Revenue, 1st November 1800, Board of Revenue to Major Munro, 13th November 1800, and Board of Revenue to the Government of Bombay stating that no order had been made on the letter of 9th September 1819 (Exht. B); *Sub-Collector of Colaba* v. *Ganesh*, 10 Bom. H. C. Rep. 216; and *Ramsden* and *Dyson*, L. R. 1 Eng. and Tr. Ap. 129.

He was followed by *Latham*, who argued that the burden of proof lay wholly on the plaintiff. That the Survey Act applies generally to the whole of the presidency of Bombay. That existing rights were sufficiently protected by Section 25 of that Act, but that it rested on the plaintiff to show that he came, and how he came, within the provisions of that section. That the evidence of the plaintiff's witnesses

went principally to prove two points, 1st that *muli* lands in Kanara had been exempted by proclamation from additional assessment, and 2nd that *muli* lands in Kanara were by prescription liable to one fixed assessment only, viz. *shist.* That in support of the oral evidence on the 1st point 7 kaulnamas had been put in evidence, of which 5 on the face of them admittedly referred only to waste lands, and one appeared never to have been signed or promulgated, while the last (Exhibit E) was evidently intended to have only temporary application; for not only had Major Munro no power to make a permanent settlement, but in his letter of 31st May 1800, written after the date of the last mentioned kaulnama, he makes no mention of having introduced any permanent settlement. That the plaintiff sought to establish the 2nd point by the evidence of 7 witnesses, of whom 4 did not come from Soonda, and one had no landed property in North Kanara, while none of them seemed to know anything about the history of the alleged permanent assessment. That whatever assessment was introduced by the Hindu rulers, both Hindu and Muhammadan Kings seemed to have added to it at pleasure. That if the British Government succeeded to the rights of Tippoo, it succeeded to them all in their integrity, and not only to the extent to which he might have chosen to avail himself of them. That the plaintiff's counsel had urged a 3rd point, viz., that the communications between the Government of Madras and its officers led to the inference that the Government had fixed a maximum of assessment, but that it was perfectly manifest from the statements of plaintiff's witnesses that they had never drawn any such conclusion from the communications of the Government to its officers, to which they could have had no recognised access. That such communications were private and could not be considered as proclamations to the people, even if some of the *rayuts* had succeeded in gaining some knowledge of their purport. That if the *muli* lands in Kanara were private property, still they were subject, in the absence of a special *sanad*, to the right of the Government to increase the assessment.

Argument.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Argument.

Farran in reply urged that though Bombay Act I. of 1865 might contain no special words rendering it locally inapplicable to Kanara, yet it could operate in that province only where there was a proper subject for it to operate on, and that if the Act were read according to its true intent and meaning it would be seen that *muli* lands were not a subject on which it could operate. That in construing the Act the Court should apply the rules for the construction of English statutes. That the object of the Act was not to interfere with existing private rights, and there were no express words in the Act taking away any such rights, the words "whether hitherto assessed or not" applying to Government waste lands and alluvion. That the plaintiff came under the provisions of Section 25, or must be treated as the proprietor of an alienated village. That it mattered little whether or not the plaintiff was a "superior holder" within the definition of the Act, as that expression occurred only in Sections 43 and 44, but that he could not be deemed an occupant, as it was only after a Revenue Survey had been introduced that "occupants" came into being. That the Government had no right simply by surveying the plaintiff's lands to convert him into an occupant, their power of entry on the lands being only for the purpose of fixing boundaries. That not only was there no proof of *muli* and *mirasi* lands being identical, but they had even been distinguished by the officers of Government. That the definition of private property, as given by the Government, applied to the plaintiff's lands, for he had the exclusive right to the hereditary possession of them, and the usufruct of the soil. That though the plaintiff's lands were in Soonda, yet the irresistible presumption was that the *muli* rights there were the same as in the adjacent district of Kanara, and though Major Munro did not make the same minute enquiry into the land tenures of Soonda as of Kanara, yet he points to the fact of the greater part of Ankola being on the same footing as Kanara, and the survey of 1822 had been introduced only above the ghauts. That Major Munro's proclamation of a fixed assessment was not *ultra vires* under the old rules of

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

1791, Sections 27 and 42, but was in fact merely an announcement to the people that he would be guided by the principles of international law, according to which a change of sovereigns makes no change in the condition of private property. That Munro's object was to announce to the people a maximum assessment, and induce Government to grant reductions, and Government tacitly accepted the principle of the maximum assessment. That all additions, made to the assessment by native rulers prior to the British Government, were made on particular occasions, and for particular objects, showing that they had no right to raise the *beriz* at pleasure; so that even if a limited monarchy, such as the English, could be said to succeed by right of conquest to the despotic powers of the native dynasties, it would only succeed to those powers subject to the same limits and modifications as existed in the days of the native rule.

Argument.

In the course of his argument he referred to Broom's Comm. p.6; Object and Reasons, published with Bombay Act I. of 1865; Major Munro's minute of 1824; Tucker's Review; Revenue Selections I. p. 906; Minute of the Board of Revenue with Major Munro's remarks; Major Munro's report to the Board of Revenue, 31st May 1800; Gleig's Life of Munro; Major Munro's letter to the Board of Revenue, December 1800; Major Munro's letter to the Collectors of Kanara, 9th December 1800; Wheaton's International Law, Sec. 163; and Regulations XXV. of 1802 and IV. of 1822.

The following judgment* of the Court was, on the 1st of May 1875, delivered on behalf of himself and Mr. Justice West by

Judgment.

WESTROPP, C.J.:—The plaint in this suit was filed in the Court for the District of North Kanara (held at Karwar), on the 1st of June 1871, against Colonel William Coussmaker Anderson, as Revenue Survey Commissioner, and against the Collector of the same district as the defendants. Subsequently upon the application of the defendants, assented to by the plaintiff, the suit was, by order of this Court, made on the 20th

* *Note.*—The footnotes to this judgment are those of the Court itself.—*Ed.*

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

of January 1872, transferred, upon certain conditions which it is not necessary now to specify, for trial by it under its extraordinary jurisdiction.

Judgment.

A further order of this Court, of the 9th of April 1873, permitted the plaintiff to amend his plaint by substituting the Government of Bombay as defendants in lieu of the Revenue Survey Commissioner and the Collector.

By his plaint, the plaintiff, claiming as owner in perpetuity of certain lands in his possession, which he stated to be liable from time immemorial to a fixed assessment of Rs. 200-5-7 and no more, complained of an order of the Governor in Council (dated the 29th of March 1870), whereby Act I. of 1865 of the Bombay Legislature had been improperly applied to those lands, and the assessment for land revenue enhanced "so as to render his ownership and enjoyment not perpetual." The plaint concluded with a prayer that the order should be set aside, that the assessment should be declared to be fixed at Rs. 200-5-7, and the plaintiff's right to the lands decreed to be perpetual.

On the 17th of February 1872, the plaintiff (upon certain terms as to payment of the old rate of land revenue, and as to security for the enhanced rate, if ultimately established, and other matters,) obtained an injunction restraining the defendants from levying the enhanced rate of land revenue until the hearing of the suit or further order of this Court.

The defendants, in their written statement in defence, filed on the 20th of April 1872, denied that the plaintiff is entitled to the relief prayed by him, and that any permanent settlement of the land revenue binding on the British Government has ever been made, or that the plaintiff has any such permanent right in the lands, or any part thereof, in the plaint mentioned, as alleged therein; and the defendants alleged that those lands were liable to be assessed under Bombay Act I. of 1865, and have, in pursuance of that Act, and by virtue of an order of the Governor in Council of

Bombay, made on the 29th of March A.D. 1870, and issued under the powers conferred on them by the same Act, been assessed at Rs. 468-14-0, and were, upon survey, found to contain 116 acres 30 goontas 4 annas, and that the assessment was so fixed in accordance with the Act.

Judgment.

On the 9th of April 1873 the following issues were settled with the consent of counsel on both sides :—

"1*st*, Whether the plaintiff is entitled to the absolute ownership and proprietary right in perpetuity to the lands in the plaint mentioned free from any estate or interest therein of the Crown, save and except the right of the Crown to the receipt of a certain fixed and unalterable assessment payable in respect of the same lands; 2*nd*, whether the assessment made in 1800 by Major Thomas Munro, then Collector of Kanara, upon the said lands, was a fixed and permanent and unalterable assessment; 3*rd*, whether such assessment was made by the said Major Thomas Munro as the duly authorised agent in that behalf of the late East India Company, and whether the same was ratified and confirmed by the said East India Company, and whether the same became valid and binding as against the Crown; 4*th*, whether Bombay Act I. of 1865 in any way applies to or affects the said lands; 5*th*, whether such lands are alienated villages within the meaning and exception of Sec. 49 of the said Act; 6*th*, whether the passing of the said Act by the Local Government of Bombay, in so far as it purports to affect or alter the said annual land assessment payable in respect of the said lands, was *ultra vires*; 7*th*, whether the order of the Government of Bombay of the 29th March 1870 is null and void so far as it purports to affect the said lands; 8*th*, whether the plaintiff is entitled to the relief prayed for or any part thereof."

Amongst the various territories, now officially designated as the collectorate of North Kanara, is included the ancient province of Soonda (Sunda), which is divided by the great chain of Ghâts running parallel to the Malabar Coast. That portion

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

which skirts the sea has long been known as Soonda payen Ghât (Soonda below the Ghauts), and the inland portion as Soonda bala Ghât (Soonda above the Ghauts) (*a*). The taluka Ankola (Ankolah, Unkolah), as constituted by British authority, comprised two divisions. Of these, the northern division was called the Panch Mahals (corruptly Panjymahl), and is identical with Soonda payen Ghât (*b*). It consisted of five maganis (*c*), viz., Kudra (Cadera), Siveshwar, Bád, Kudavad (Cudavad) and magani Ankola. The southern division is called Gokurn, and extends so far south as the Tuddri River. That division alone of the taluka Ankola formed part of ancient Kanara. The northern division of Ankola (the Panch Mahals *alias* Soonda payen Ghât) with which the Court is now principally concerned, extends no further south than the Gangavali River, and, together with Soonda bala Ghât and Soopa, at one time formed the dominions of the Raja of Soonda (*d*). In Bád, one of the five maganis comprised in the Panch Mahals or northern division of Ankola, are included three villages: namely Kusba Bád, Kattinakone, and Kodibagh (*e*). The lands, the right to enhance the Government revenue of which is in controversy in this suit, are situated in those villages.

The plaint, in setting forth those lands in detail, describes each lot as a *varg* (or *varga*, corruptly *wurg*). It treats twenty-three lots as in the village of Kusba Bád, seventeen of which it describes as *Varg-muli* (*Mula-varga* [corruptly Moolwurg], *Mulgari*), and six as *Varg-gaini* (or

(*a*) At first, after the fall of Tippoo, Lord Mornington set apart Soonda bala Ghât with other territory for the Peishwa, but for excellent reasons speedily abandoned that arrangement.—Wellesley's Despatches, Vol. II., pp. 32, 77, 120, 174, 181, 182.

(*b*) Plaintiff's Exhibit A, pp. 28, 68.

(*c*) *Alias* Maganam, Mogani, Magni, a group consisting usually of six or seven villages, and being a sub-division of a taluka.—See Wilson's Glossary, p. 316.

(*d*) Defendant's Exhibits Nos. 9 and 18, Vol. III., Printed Books, pp. 52, 70.

(*e*) Defendant's Exhibit No. 9, Vol. III., Printed Books p. 55.

Gaini-Varg). It further states that there are two *vargs* in the village of Kattinakone, and two in the village of Kodibagh, all of which four lots are in the plaint described as *Varg-muli.*

Our Kanarese translator renders *varga* or *varg* as an estate or holding (*f*). It has, in the course of the argument, been said to have originally meant an account relating to an estate in land, and, in the progress of time, to be used, as now, to indicate the estate itself (*ff*). A *varg* (or estate), as described by Munro, was often composed of unconnected parts situated in different villages, and sometimes even in different districts, without having any specific rent affixed to the different parts, but only one general rent for the whole (*g*).

Wilson, in his Glossary (p. 542), says that in Karnata (Kanarese) it signifies an ancestral hereditary estate, and that *Mulavarga* means original proprietary right in land, and that *Mulavargdar* (corruptly *Moolwurgdar* or *Moolgar*) is the proprietor of an ancestral hereditary estate. *Múla* is derived from the Sanscrit *Múl,* signifying literally a root, and figuratively (*inter alia*) the root of a tree or origin of a family. Hence arises the character of permanence or perpetuity which we find in it when used in composition as in *Mulavarga* and *Mulavargdar* above instanced, and as also in *Mul-gaini,* presently to be again mentioned. (See Wilson's Glossary, 353, 354.)

Gaini, also read *geni,* and corruptly *guenie* or *gueny,* is by Wilson (Glossary, 162) rendered "rent paid to the landlord or proprietor." He notes that it is incorrectly ex-

(*f*) See, as to *vargs,* Gleig's Life of Munro, Vol. I., p. 294; Selections from Revenue and Records of the E. I. Co., published at London in 1820, p. 894. Exhibit A, p. 208 (Mr. Blane's Letter); Exhibit U (Printed Books, Vol. II., p. 28.)

(*ff*) And see Papers on Mirasi Rights published at Madras in 1862, p. 488, note, and Appendix p. vi., note.

(*g*) Exhibit A, p. 69, Munro's Letter of 9th December 1800 to his successors, para. 11, and Mr. Blane's Letter of 20th September 1848, para. 59. Ex. A., p. 208.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

plained in the Glossary to the 5th Parliamentary Report as "Tenant."* He adds that "the word itself is rather doubtful, and does not occur in Reeve's Karnata Dictionary," and "should possibly be *gehini*, (from *geha*, Sanscrit and Karnata, a house,) relating to a house, house rent, &c. Brown says "it is the same as kaini, a field." The most likely derivation of *gaini* appears to be from the Sanskrit root *grahan*, with the sense of taking or receiving. From the same root the Mahrattas obtain their verb *ghene*, to take.

For the plaintiff it is contended that a *Múli-varg* is an hereditary and alienable estate, of which the *Málavargdar* is complete proprietor in perpetuity, subject to a fixed land revenue, or quit-rent, payable to the sovereign, and which cannot be lawfully enhanced; and that a *gaini-varg* was, originally, land held from the sovereign liable to payment of land revenue in the ordinary way, but has been since permitted by the British Government to become a property in the hands of the tenants similar in all points to a *Múli-varg*. The learned counsel, at the commencement of his speech for the plaintiff, stated that his case for resisting the enhancement of rent was much stronger in respect of the *Muli-vargs* than of the *gaini-vargs*. It has been admitted by him that Government, in order to realise the land revenue, has the right to sell land held under either of those tenures, if the land revenue, lawfully due, be unpaid.

A *gaini-varg* must not be confounded with a *mul-gaini* (corruptly *moolgeni*) holding. The *gaini-varg* is held, as already stated, directly from the State, whereas the *mul-gaini* tenure is said to be a permanent tenancy under the rayut or *mula-vargdar* at a fixed, and, (with the exception, recorded by Sir Thomas Munro, which we shall mention,) invariable rent (*h*). In some cases a fine would appear to have been

* See also Exhibit U (Printed Books, Vol. II., p. 28.)

(*h*) See Exhibit A, pp. 70, 79, 82, 83, 84, 85, 86, 87, 131, 132, 133, 220. See also Selections from Revenue, &c., Records, p. 894, Exhibit U. Mid. p. 28 *et seq.*, Defendants' Exhibit No. 4, Vol. III., Printed Books, pp. 1, 2, 3, Mr. Ravenshaw's Report 7th August 1801, Fifth Parliamentary Report (Madras Reprint) Vol. II., p. 472.

paid by the tenant (mul-gainidar) to the landlord (*i*). The *chalie-gainidar* is a tenant-at-will or temporary tenant under the rayut or *mula-vargdar*. In certain remarks of Sir Thomas Munro, made in July 1801, and quoted by Mr. Read in para. 24, column 2 of his report of the 1st January 1814 to the Madras Board of Revenue (*j*), the former says:—"I think it also probable that the *chalie-gainis* or tenants-at-will in some places have been called *Mulgainis* or tenants by purchase, that is for ever, because the landlords may get some additional rent from the former whenever there is a higher offer; but they can get none from the latter, because their rent can be raised only by Government, which was seldom done except at long intervals in former times when the additional assessment was imposed after a new valuation." Appaji Subhrao, a witness for the plaintiff, on cross-examination as to Munro's assertion of the right of Government to raise the rent of the *mul-gainidar*, attempted (*k*) to explain away or qualify the force of that assertion, but with what degree of success, it is unnecessary that we should now say. The result of an enhancement by the State of the *mula-vargdar's* assessment to an amount exceeding or equalling the rent received by him from the *mul-gainidar*, would be an annihilation of the interest of the *mula-vargdar* in his property, if the State had not, or failed to exercise, the power, imputed to it by Munro, of raising the *mul-gainidar's* rent in proportion to the enhancement of the assessment on the *muli-varg*. For the plaintiff it was said, in the course of the argument, that, in several instances in Kanara and Soonda, the property of *mula-vargdars* had been thus ex-

(*i*) Exhibit A, pp. 70, 133; Exhibit U, Printed Books, Vol. II., p. 29.

(*j*) Exhibit A, pp. 85, 86, Fifth Parliamentary Report, p. 467, Madras Reprint Vol. II., and see to the same effect by Mr. Ravenshaw in his report of 7th August 1801, ibid. p. 468, *et vide infra* p. 99. Mr. Thackeray, in his report of 4th August 1807, ibid. p. 481, when saying "the *Mulgainis*, or fixed tenants, have not been obliged to contribute anything when the proprietor has been extra assessed," must, we think, be regarded as limiting his remark to the East India Company's raj, then only of seven years' standing. He added that he thought they ought to be made to contribute.

(*k*) Printed Books, Vol. I., p. 127.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

tinguished during the recent Revenue Survey; but, on behalf of the defendants, it was replied that, on those cases being brought to the notice of Government, relief against the assessment had been granted to the *mula-vargdars*, and that directions had been given that in future, in making the new assessment, allowance should be made to the rayut or mula-vargdar, where *mul-gaini* tenancies existed. In the present case there do not appear to be any *mul-gainidars* under the plaintiff, so we are exonerated from any further discussion of *mul-gaini* rights. We have referred to *mul-gaini* holdings merely for the purpose of distinguishing them clearly from *gaini-vargs*.

The plaintiff has not produced any sanad, grant, deed, mul-patta (corruptly mool-pottah), or other documents belonging to himself or those persons under whom he claims, specially relating to the lands mentioned in the plaint, or showing his title to them. The only document, exclusively relating to those lands, upon which he does rely, is his Exhibit A. E., consisting of three statements respectively lettered B, C, and D. Of these, Statements B and D are compilations from the Government books in the Collector's kutcherry, furnished by the Collector, and containing statistics regarding the lands to a share in which the plaintiff is entitled. The correctness of those statistics is not disputed on either side. Statement C, we were informed by the counsel for the defendants, was compiled from information supplied to the Collector by the plaintiff, and this was not impeached. It shows the modes whereby the plaintiff acquired the various parcels of land, and, to a certain extent, the dates of acquisition. Two estates or *vargs* appear to have been acquired by inheritance, one partly by inheritance and partly by purchase, one by mortgage (*l*), and all of the rest by purchase. Statement B agrees with the plaint in describing (in column 2) seventeen of the *vargs* in the village of Bád as *muli* (corruptly *mooly*), and both of those in the village of Kodibagh and one in Kattin-

(*l*) As to mortgages see Exhibit U, Printed Books, Vol. II., p. 30.

kone also as *muli*, but the remaining *varg* in Kattinkone is described as *Melwashi, i.e., Melvási*, which word is rendered by our interpreter as meaning "additions, excess, or addition made to the rate of Government assessment" (*ll*). Columns 4 and 5 of Statement B respectively show the results of certain surveys of the vargs in the years 1822-23 and 1852-53 of the Christian era, whereby it would appear that in every instance except three, the quantity of ground under cultivation, ranged under the names of the several vargs, was slightly larger in the year 1852-53 (Fusli 1262) than in the year 1822-23 (Fusli 1232). We say "under cultivation," because we do not understand that any land lying waste at the time of either survey was then taken into account. The learned Advocate General contended that the increase in the quantities in the latter year showed encroachment on the part of the *vargdar* upon Government waste land, but Mr. Farran for the present vargdar (plaintiff) denied that this was a necessary inference, inasmuch as he said that in most vargs there was waste land belonging to each *vargdar*, and the quantity of land, which each *vargdar* cultivated in his varg, frequently varied from year to year according to his means, or his industry (*m*). There was not any

(*ll*) *Melvási* signifies that the land bears an assessment exceeding the amount properly leviable according to its produce. Munro in his letter to the Collector of Kanara, 9th December, 1800 (Exhibit A, p. 70) says, that reductions of Melvási are not to be made until the concealed ináms are brought into the account. The meaning of this is that, in many places, land had been withdrawn from *vargs* as inám, and held free from assessment, the whole assessment (which thus became excessive) being placed on the remaining lands in the varg. See Exhibit HH, Printed Books, Vol. III., p. 97, paragraphs 7 and 8, and Exhibit No. 18; Mr. Lewin's letter, 5th September 1827, ibid. p. 70.

(*m*) As to waste lands generally see Plaintiff's Exhibit A, pp. 12, 17, 18, 19, 20, 26, 128, 129, 130, 149, 178, 182, 186 to 198, 201 to 207, 235 to 238; Gleig's Life of Munro, Vol. III., pp. 328 to 330; Elph. Hist. of India, p. 69, 4th ed.; Defendant's Exhibit No. 24, Printed Books Vol. III. p. 19, para. 28, and p. 110. The evidence of Mr. Shaw Stewart has been relied upon by Mr. Farran as supporting his argument. See also, as to waste lands, the Mirasi Papers published in 1862 with the permission of the Madras Government.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

evidence on this question given upon either side with regard to these particular lands, and it, in the view taken by us of this case, becomes unimportant. Therefore we shall not give any opinion upon it, although presently again we may find it necessary to notice a distinction in law taken between cultivated and waste lands.

The total (Rs. 200-5-7) at the foot of column 7 of B is the amount at which (in his plaint) the plaintiff says his assessment ought to be regarded as inalterably fixed. The total (Rs. 468-14-0) at the foot of column 13 of B is the amount at which his assessment has been fixed by the recent survey of 1870, and has occasioned the present action. Statement D is much relied upon by the plaintiff as showing that, from the Fusli year 1209 (A.D. 1800-1) to the Fusli year 1279 (A.D. 1869-70), the land revenue, taken by Government from sixteen of the several *vargs* now belonging to the plaintiff has not in any year exceeded the amount mentioned in column 4 of that statement, as the old assessment (*kadim beriz*) leviable in the Fusli year 1209 (A.D. 1800-1) from those *vargs*. That old assessment is there described as *shist* and *shamil*, terms which we shall presently explain.

Of the sixteen *vargs*, whose *shist* and *shamil* in Fusli 1209 (A.D. 1800-1) is mentioned in D, only one (No. 23) is a *gaini-varg*. With that simple exception all of the *gaini-vargs* are, in the 15th column of D, stated to be new *vargs*, which would appear (see columns 8 to 14) to have been created at various periods in the interval between the years 1810 and 1870 of the Christian era, and not to have been formed until several years after Major Munro had ceased to be Collector of Kanara. For six *Muli-vargs* and the *Melvasi-varg* the *shist* and *shamil* are not mentioned in column 4 of D. Some other remarks in the 15th column of D, beside those already noticed, might have required special consideration on our part, had not the general view which we take of the plaintiff's case rendered that special consideration superfluous.

The phrase "permanent settlement of the Land Revenue" occurs very frequently in the books and documentary evi-

dence referred to in this case. It is sometimes employed to denote any permanent settlement of that revenue, but it is far more frequently used to signify a proposed permanent settlement of the Land Revenue, of the same species as that introduced into Bengal, Bahar, and Orissa in 1793, during the Governor-Generalship of the Marquis Cornwallis, with respect to which, therefore, some observations become necessary. In the discussions which preceded and in those which followed that settlement, and more especially as to the parties with whom Government should negotiate it, a controversy arose as to the ownership of the soil in India, involved in which was the question as to the character in which native governments claimed, from the occupants of the land, payments either in money or in produce in respect of the land. Were these payments rent or revenue? Some maintained that those payments were rent, not revenue; because, it was said, the land could only be occupied and cultivated by the permission of the sovereign, and that such produce, as there may be in excess of what sufficed for the bare subsistence of the cultivators and for the expenses of cultivation, is the property of the sovereign. Others maintained that the sovereign was only entitled to a fixed portion of the produce, and that the surplus beyond that portion, plus the subsistence of the rayuts (cultivators) and the cost of cultivation, belonged to a class of great landlords between the sovereign and the rayuts, which intermediate class consisted of zemindars, talukdars or similar personages; while others again strongly contended that, subject to a land-tax payable to the sovereign, the property in the soil was vested in the cultivators, sometimes in the form of village communities holding corporately, at other times as individuals holding in severalty, or jointly as members of an undivided family. In 1793, (either upon the ground that the soil was vested in the sovereign power, and that it was expedient that, by that power, a landed aristocracy should be created, or upon the ground that the land, subject to the revenue assessment, *i.e.*, the king's (or State's) share of the produce, ought to be publicly recognised as

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

vested in the class of zemindars, &c., as landlords) the permanent settlement in Bengal, Bahar, and Orissa was made by the Government of Lord Cornwallis, by recognizing the zemindars, &c., as the proprietors of the soil, and entitled to transfer it, and by fixing, once for all, the land-tax payable by them to the State at an immutable annual rate (*n*). Doubtless this arrangement was, by a large proportion of the statesmen of that day, both in England and India, conscientiously believed and intended to be an act of justice and benevolence (*o*), and it has been well said that "the distinguished character of Lord Cornwallis, and the authority which the permanent settlement derived from the approbation of Mr. Pitt, of Lord Grenville and Lord Melville, clothed it with an awful veneration which for many years precluded the agitation of any question as to its merits" (*p*). Yet subsequently, though honourably maintained in those parts of India to which it was made applicable, the permanent settlement system of 1793 has by numerous critics been classed in the order of well-meant, but maladroit and unfortunate experiments, which zealous, but insufficiently informed foreigners, acquiring dominion in a country remote from their native land, are prone, in the infancy of their rule, to essay. There has been a remarkable concurrence amongst the many able men (*q*), who,

(*n*) Beng. Reg. I. of 1793.

(*o*) Warren Hastings, however, denied the right of the zemindars to be landlords—see Galloway's Law and Constitution of India p. 42.

(*p*) See note 1 to p. 292, Mill and Wilson's Hist. of India, 5th ed. Vol. VII.

(*q*) Ex. Gr. Mr. Mill [Mill and Wilson's Hist. Vol. V., Bk. VI., Ch.V., pp. 339, 340, 5th ed.]; Mr. H. H. Wilson [*Ibid.* p. 338 *n.* and Vol. VII., Bk. I. Ch. VII., pp. 310 *et. seq.* 316 *n.*]; Colonel Wilks [Hist. Mysore Ch. V., *passim*]; Patton [Principles of Asiatic Monarchies, pp. 77 to 82 *et seq.* 115, 116, 117, 131 to 133 *et seq.* 159, 171, 190]; General Galloway [Law and Constitution of India, Chap. II. *passim*]; Sir Thomas Munro [Exhibit A., pp. 59, 62; Gleig's Life of Munro, Vol. II., pp. 68, 258; Vol. III., pp. 320, 340, 381, 382, 425]; Professor R. Jones [Essay on Rent, p. 111.]; Sir H. S. Maine [Village Communities, Lecture IV., p. 105]; Professor McCulloch [Note XIX., p. 581, to Adam Smith's Wealth of Nations, 5th ed.] Beng. L. R. F. B., p. 295 per Morgan J.; Grant Duff [Hist. Vol. I., p. 31, Bombay reprint;] Rev. Sel. Vol. I., p. 527, para. 7; p. 639, para. 75, *et seq.*

during the last half century and upwards, have, from various points of view,—Hindu, Mahomedan, and British,—discussed the permanent settlement of Lord Cornwallis, in the opinion that, generally speaking, (for there were many admitted exceptions (*r*)) the zemindars were not landlords, but were hereditary collectors of Government revenue, (customs and excise as well as land-tax) in the large district over which they exercised authority; and that, in establishing them as landlords, the right of the rayuts, as proprietors, was overlooked and set aside. Although in his Modern India (p. 303) Sir George Campbell, previously to his service in Bengal, had adopted this opinion, his subsequent official and judicial experience in that province led him to a different conclusion. In his Essay on the Land Tenures of India, of which, without binding ourselves to all its details, we may say that it affords the best general view of those tenures with which we are acquainted, he expresses his opinion to be that Lord Cornwallis and his advisers "quite understood and did not over-estimate the real position of the zemindars, who were made proprietors, not in recognition of a right, but in pursuance of a deliberate policy;" and that the Government, "having found the uncertainty of tenure of the zemindars and others to be attended with much evil, made the zemindars in one sense proprietors. As between the Government and the zemindars, the claims of the former were strictly limited, and the zemindars became proprietors, instead of mere revenue officers; but they were by no means made sole and absolute proprietors." After pointing out the provisions enacted for the protection of the rayuts' interest, and the effete condition of the village system in Bengal, and that the settlement was not exclusively made with great zemindars, but with holders of small degree when they were supposed to have stronger claims, so that "in one or two of the eastern districts of Bengal the settlement is, for the most part, to all intents and purposes

(*r*) Mill and Wilson's Hist., Vol. VII., p. 316, Note 1, 5th ed.; Mountstuart Elphinstone's Hist. of India, pp. 72, 78, 4th ed.; Tucker's Indian Government, by Kaye, p. 120 *et seq.*

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judyment.

rayutvar," he said: "On the whole, my impression is that (perpetuity of revenue apart) the principles of the permanent settlement of Bengal were in the main good and sound, and that the ground for subsequent complaints is to be found not so much in those principles as in the failure properly to carry them out, and in the ideas which afterwards arose from a misinterpretation of them." Sir George Campbell then pointed out how the provisions for the protection of the rayuts and inferior holders were neglected and allowed to fall into disuse. The fixing of the Government revenue demand for ever instead of for a long period, he thought to be "a financial mistake." He shows that zemindars were not homogeneous in origin. They were, he said, variously descended, some from old tributary rajas, others again from heads of Hindu castes or clans, robber chiefs, or collectors or farmers of revenue, although the word "zemindar" is a Persian word signifying actually "landholder." In Bengal it was generally applied to the great middlemen who rose to power on the decline of the Mogul Empire, while in the Panjab it is applied to the peasantry. The term, in its ordinary English acceptation, he observed, implies a holder between the State and the actual cultivator. Inasmuch as we have not, in the present case, to deal with zemindars, it not having been asserted on either side that any claims of a zemindari nature here present themselves, it would be irrelevant to treat in detail of the rights and duties of the zemindari class previously to "the permanent settlement." It has been admitted, on both sides, that a permanent settlement of the zemindari species has never been introduced into Kanara, although such a settlement was made in some other provinces in the presidency of Madras (*rr*). Sufficient has been said to indicate the meaning of the phrase "permanent settlement," as most frequently, though not invariably, employed by the writers of the letters and minutes in evidence before us. The contest here is not one of the State with the zemindar, nor of the zemindar with the

(*rr*) Mentioned in detail in the note to Rev. Sel. Vol. I., p. 885, and in the Fifth Parliamentary Report, Vol. II., p. 122, Madras Reprint.

rayut, but between the State and the rayut. The term "rayut," "which is familiar to all acquainted with Indian finance as applied to designate the cultivators of the soil in general," is here used by us "to distinguish that particular class only among them who employ, superintend, and sometimes assist the labourer, and who are everywhere the farmers of the country, the creators and payers of the Land Revenue" (*s*).

Previously to considering the questions of proprietorship in the soil as treated from the Hindu point of view, it will be convenient shortly to state the substance of the texts of Hindu Lawgivers relating to Land Revenue.

It is declared in Manu, Chapter VII., pl. 130, 131, 132; also in Ch. X., pl. 118, 119, 120; and 1 Jagannatha's Digest, Bk. II., Ch. II., Sec. I., pl. XIV., XV., XVII., XVIII., XIX., XXIII., quoting Manu, Parasara, Vidyaranya [the Madhaviya], Vrihaspati, and Kalidása, that the king may, in ordinary times, take a twelfth, eighth or sixth part of the crops of the land, "according," adds Cullúcá Bhatta, "to the difference of the soil, and the labour necessary to cultivate it"—and that a military king, in times of war, invasion or great public adversity, may take even a fourth part of the crops. A passage in the drama of Sakuntala by Kalidása also shows that, at the date of its composition, the sixth part was, at least popularly, recognised as the royal share (*t*). And Narada's text is: "Both the sixth part of what is acquired in some other customary way, and the sixth part of

(*s*) Selections from Revenue, &c., Records, Vol. I., p. 888, para. 17 of Minute of Madras Board of Revenue of 5th January 1818. See also *ibid.* p. 886, paras. 7, 8. Mr. St. George Tucker (Indian Government ed. by Kaye, p. 126,) said: "the term 'rayut' is very indefinite. There are rayuts who may justly be esteemed petty landholders; there are others who are tenants with a right of perpetual occupancy; others, again, who are not domiciled on the land (the Payunkasht rayut), who are moveable, sometimes cultivating in one village and sometimes in another, and who may be regarded as contractors for carrying on the cultivation; and, lastly, there are rayuts who are mere labourers for hire, who possess neither cattle, nor plough, nor stock of any kind, and who are supplied even with the seed-grain, receiving the wages of labour usually in kind."

(*t*) Chap. VIII., v. 304, 308.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

the produce of the land, is the king's due, the reward obtained by him for the protection of his subjects." A previous text of the same Smriti writer is :—"The income of kings is comparable to the influx of clean and unclean floods which mingle in the ocean. As tin becomes clean when it is brought into a blazing fire, wealth, acquired by whatever means, becomes clean in the hands of a king" (*tt*).

We now proceed to mention the Hindu texts mainly relied upon in support of the sovereign's claim to the proprietorship in the soil (*u*). Amongst them is the following from the Nerasinha Purana :—"Thrice seven times exterminating the military tribe, Parasu Rama gave the earth to Kasyapa as a gratuity for the sacrifice of a horse" (*v*). From this highly figurative and nebulous passage, which belongs to the region of allegory or mythology and not to that of history or law, the author of the Digest, Jagannatha Tercapanchanana, has been erroneously regarded by some critics as successfully evolving the doctrine that the soil is vested in the sovereign. That theory has been adopted by the elder Mill in his History, and the Haileybury Professor, Mr. Jones, in his Essay on Rent (*w*). However, in relation to the very next text (pl. XIII., taken from Yajnyavalkya) which Jagannatha cites, his commentary admits, in accordance with the text itself, that a Brahman, taking possession of unclaimed property, may retain the whole of it as against the king, and that any other person than a Brahman, occupying unclaimed property, on giving up a sixth part of it to the king, may retain the residue. If this be so as to unclaimed property, *à fortiori* would it seem to be so as to property long cultivated by the occupant. He admits that "the cultivator has a subordinate usufructuary property, not a royal property;"

(*tt*) Dr. Jolly's translation of Narada, p. 115, pl. 44-47.

(*u*) As to the sources of property according to Hindu Law, see Manu, Ch. X., pl. 115; Mitacshara, Ch. I., Sec. I., pl. 8; Mayukha Ch. IV., Sec. I., pl. 1, 2.

(*v*) 1. Digest translated by Colebrooke, Bk. II., Ch. II., Sec. I., pl. 12.

(*w*) P. 106.

and refers also to Srikrishna Tarkalankara's opinion that "there may be, in the same land, property of various kinds, vesting in the king, the subject, and so forth." Subsequently, Jagannatha says (*x*) that "others hold that the king has no property in the soil, nor power to dispose of the subject's abode, because all have a right in the soil; since the earth was created for the support of living animals as expressed in the Sri Bhagavatta: 'the earth which God created for the abode of living creatures;' and because Manu has only declared that "the subjects shall be protected by the king" (*y*); and Jagannatha adds:—"The subject's property in the soil is weaker than the king's, for the subject is weaker than the king; but it is founded on the reason of the law and on settled usage: therefore the land of the subject ought not to be sold by the king to another;" and, finally, he admits that "the meaning of the text, which describes the earth as the abode of living creatures, is positively this: the property is his who uses the land where he resides, and while he uses it; and thus when land belonging to any person is sold by the king, it is a sale without ownership." (*z*)

(*x*) Colebrooke's Translation of the Digest, Bk. II., Ch. II., Sec. I., pl. XII.; ed. of 1801, p. 461; and *Ibid*, pl. XXIV. pp. 471, 472.

(*y*) *Ibid*. pl. XXIII., p. 471.

(*z*) *Ibid*. pl. XXIV., pp. 471, 472, 473, 474. The myth of the gift to Kásyapa appears, as narrated by Jagannatha, in the Santi Parvana, whence it is extracted by Dr. Muir (Sanskrit Texts, Vol. I., p. 452 *et seq.*) A reference to this will show that the same legend, which establishes Kásyapa's dominion, states also an abdication by him in favour of the Brahmans, who proving to be inefficient governors, the earth (Prithivi) was about to sink through despair into Chaos, when Kásyapa sustained her, and, at her behest, appointed the remnants of the Kshatriyas to be kings (pp. 453, 454). There are several variations of this myth, in two of which Prithivi remonstrates as to the unauthorised mode with which she was dealt, threatens to subside into Chaos, and ridicules Visvakarman (the alleged donor in this version of the tale), by saying that his conduct is that of a simpleton in attempting to bestow that which was not his own. She denies that any mortal can give her away. (Muir, S. T., Vol. I., pp. 456, 457, 464; Vol. IV., p. 369, *et ibid*. note 117). But what is meant as the object of the gift of Kásyapa, or Visvakarman, is clearly the lordship of the earth, not the usufruct of the soil. One indeed of the oppressions under which Prithivi had groaned was that, "in consequence of there being no Government, the weak were oppressed by

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

the strong, and no one was master of any property;" and Kásyapa's intervention would have been in vain had he installed the Kshatriyas in power to perpetuate rather than to remedy this state of insecurity.

It is important, however, to note that Jagannatha, immediately before the passage cited from the Nerasinha Purana, and as the basis of his disquisition on property in the soil, refers to the legend of Prithivi as the wife of Prithu, the illustration chosen by Manu (Ch. IX. pl. 44), with which Jagannatha must have been perfectly familiar, to show that property arises by occupation. But Kásyapa himself is commonly regarded as the grandson of Brahma. He is called also the self-generated, and is accepted as the father of the twelve Adityás, and a Prajapati or Praja srij, *i.e.*, a creator of beings (Muir, S. T., Vol. I., pp. 116, 195, 196; Vol. III., p. 285; Vol. IV., pp. 27, 33, 118, 119; Williams' Sanskrit-Eng. Dict., p. 608, col. 2). The divided empire, which Parasu Rama shares with him, is thus a mythical embodiment of the dominion of external nature enjoyed by man (as in Psalm VIII. v. 6) under a gift from the deity, and accompanied by a still subsisting power in him. This agrees with Manu's notion. Manu is called the bard as well as the grandson of Kásyapa, an idea that could not well have arisen if his interpretation of the tale had been disparaging to the dignity of Kásyapa as then understood. An argument for the non-existence of private property in the soil could hardly have begun by a reference to Manu; and a close examination of Jagannatha's disquisition does not seem to justify the opinion that he intended to make the rights of the king or State absorb the ownership of the individual. When, in his commentary on Yajnyavalkya's text, Dig. Bk. II., Ch. II., pl. XIII., he says:—"But whence is it deduced that such property vests in the cultivator?" he means not the usufructuary property, mentioned immediately before in his statement of Srikrishna's theory, but the absolute property excluding even *jura regalia*, which only Jagannatha, as he shows immediately before, pl. XIII. cl. 2, sought to refute. The concluding portion of his commentary on that placitum is equally inconsistent with a denial of private ownership. After describing the theory of those who take the view that private ownership arises from an express or implied grant on condition of payment of revenue, he concludes by suggesting that, when land is delivered, a specific undertaking should be obtained from the tenant. This would be needless if he had accepted the theory to which he refers in the conclusion of his commentary on placitum XXVII. of the king's sole ownership. He thinks rather that there are concurrent rights, those of the king subsisting necessarily for the protection of the subject (Dig. Vol. I., pp. 470, 471, Ed. of 1801). "The cultivator," he says, "has a subordinate usufructuary property, not a royal property" (p. 462), and the right both of the king and the subject in the soil is proved upon the concurrent opinions of many authors (p. 472). This is a doctrine not in any wise more unreasonable than that of the coexistence of the *dominium directum* and *dominium utile* recognized by European jurists, and still operative in Scotland (2 Bell. Comm., 6th Ed., pp. 730, 731, and see Mackeldey Lib. 1, Cap. IV. pl. 296, note (*a*), p. 306, Ed. Lipsiæ 184); Pothier Vol. X., pp. 102, 103, Bugnet's Ed. of 1861, 1

Mr. Mill, after making several quotations, most of which were irrelevant to this question of Hindu Law, said:—"From these facts only one conclusion can be drawn—that the property of the soil resided in the sovereign; for if it did not reside in him, it will be impossible to show to whom it belonged. The cultivators were left a bare compensation, often not so much as a bare compensation for the labour and cost of cultivation: they got the benefit of their labour: all the benefit of the land went to the king" (*a*). Previously (*b*) Mr. Mill had quoted an ordinance of Yajnyavalkya, whence he argued that it appeared "that the kings alienated their lands within their dominions, in the same manner and by the same title as they alienated any portion of their revenues." The text (*bb*) will be found in Vol. II., Bk. II., Ch. IV., Sec 2., pl. XXXIV. of Jagannatha's Digest, p. 162 of the ed. of 1801, and is translated by Mr. Colebrooke thus:—"Let a king having given land, or assigned a corody, cause his gift to be written for the information of good princes who will succeed him," &c. In the translation relied on by Mr. Mill, we find in lieu of "or assigned a corody," the words "or assigned revenue." For present purposes it is unneces-

Cru. Dig. 8). It agrees very closely with the observations of Lord Romilly, to which we shall presently refer (*infra* p. 40). The learned grammarian (Jagannatha) entangles himself (Dig. Vol. I., pp. 471, 472) in some perplexing subtilties arising, it would seem, from the identity of the word "swamitra" (which sometimes is used to express sovereignty and at other times ownership), and the technical impossibility of a gift of that which has not yet come into existence; but his conclusion is unexceptionable—that the subject's property in the soil, though weaker than the king's, as the subject is weaker than the king, "is founded on the reason of the law and uponsettled usage: therefore the land of one subject ought not to be sold by the king to another." Nay more, he places the subject's right so high, that, in the commentary on pl. 28 (p. 477), he is unable to recognize a complete transfer of the rayut's ownership, even for the realization of a penalty, without the owner's assent, though with a not unusual moral inconsistency he thinks that, in despite of Manu to the contrary (Dig. p. 458, pl. 10), this may be obtained by compulsion.

(*a*) Mill and Wilson's Hist. of India, Vol. I, p. 216, 5th Ed. (by Wilson).

(*b*) *Ibid.*, p. 213. (*bb*) See also Mayukha, Ch. II., Sec. 1, pl. 6.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

sary to consider which of these is the better rendering of the original. In both translations occur the words "Let a king having given land;" which words Mr. Mill treats as applicable to all of the lands in the king's dominions, whereas those words would be satisfied by applying them to waste or escheated lands, or lands abandoned by the rayuts (sometimes described in Kanara as *kulnasht* or *koolnusht*), or to the royalties in the land.

Mr. Mill (*c*) also relied on Manu, Ch. VIII., pl. 39, "of old hoards and precious minerals in the earth, the king is entitled to half by reason of his general protection, and because he is the lord paramount of the soil," and substituted the word "supreme" for "paramount" used by Sir William Jones, being of opinion that the latter "has no meaning, but as it relates to the feudal institutions of Europe, and is calculated to convey an erroneous idea." He also refers to pl. 243 in the same chapter of Manu, which empowered the king to punish the farmer if he neglected to sow his field (*d*). But Professor H. H. Wilson, in his note (*e*) to this portion of Mr. Mill's History, shows that the latter completely misapprehended the meaning of Manu. The note is as follows :—

"With regard to the right of the Hindu Raja, it is by no means analogous to those of the rulers of Egypt, or of Turkey, or of Africa, supposing them to be accurately stated in the text (of Mr. Mill); and the texts which have been conceived to warrant such an inference are wrongly interpreted or understood. He is not lord of the 'soil,' he is lord of the earth, of the whole earth or kingdom, not of any parcel or allotment of it; he may punish a cultivator for neglect in order to protect his acknowledged share of the crop; and when he gives away lands and villages, he gives away his share of the revenue. No donee would ever think of following up such a donation by actual occupancy; he would be resisted if he did. The

(*c*) Mill and Wilson's Hist., Vol. I., p. 212.

(*d*) Mill and Wilson's Hist., Vol. I., p. 213. (*e*) *Ibid.* p. 212.

truth is that the rights of the king are a theory, an abstraction; poetically (*f*) and politically speaking, he is the lord, the master, the protector of the earth (Prithvi pati, Bhumiswara, Bhúmipa) just as he is the lord, the master, the protector of men (Narapati, Naréswara, Nripa). Such is the purport of the common title of a king; but he is no more the actual proprietor of the soil than he is of his subjects: they need not his permission to buy it or to sell it, or to give it away, and would be very much surprised and aggrieved if the king or his officers were to buy or sell or give away the ground which they cultivated." In a subsequent page (224) the author (Mr. Mill) is forced to admit, that "all which is valuable in the soil, after the deduction of what is due to the sovereign, belongs of incontestable right to the Indian husbandman." To the same effect is the note by Professor Wilson at p. 296 of Vol. VII. of Mill and Wilson's Hist., being Vol. I. of Wilson's continuation of Mill. In weighing the value of the title, given by Manu to the king, of supreme or paramount lord of the earth, we should recollect that the same sage has (Chap. VII. pl. 7) described the king as 'the regent of waters' and 'lord of the firmament.'

Moreover Manu and his most trustworthy commentator Cullúcá Bhatta expressly assert the ownership of the cultivator. In Chap. IX. pl. 44 of Sir William Jones' translation of Manu, we read that "sages, who know former times, consider this earth (Prithivi) as the wife of King Prithu; and thus they pronounce cultivated land to be the property of him who cut away the wood, *or who cleared and tilled it;* and the antelope of the first hunter, who mortally wounded it." The words "or who cleared and tilled it" in italics, are the gloss of Cullúcá Bhatta. The portion of Manu in which

(*f*) As to the birth of Prithu—(the Cecrops of India) and his subjugation, by agriculture, of the earth (Prithivi), see the Vishnu Purana translated by H. H. Wilson Vol. I. Ch. XIII.

In the Apocrypha, we find an oriental potentate, Nabuchodonosor, king of the Assyrians, speaking of himself as "the great king, the lord of the whole earth"; Judith, Chap. II., vv. 4 and 5.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

that passage occurs is the Chapter on Judicature and on the commercial and servile classes. Endeavouring to explain the same passage away, Mr. Jones of Hailebury, in his Essay on Rent (*g*), writes :—"Manu is in fact deciding to whom the children shall belong, born of an adulterous intercourse between a married woman and her paramour. 'Learn now that excellent law universally salutary, which was declared, concerning issue, by great and good sages formerly born.' And, illustrating this in his own allegorical fashion, he compares the *earth* to the lady; and declares that he who received her virgin charms should be the owner of all the progeny she might produce, under any circumstances, however strong, of detected or permitted faithlessness; and that as cultivated ground belonged to him who first tilled it, and the antelope to the first hunter who mortally wounded it, so 'men who have no marital property in women, but sow in the fields owned by others, may raise up fruit to the husband, but the procreator can have no advantage from it.' This subject Manu pursues from pl. 31, p. 291 to pl. 55, p. 295 of Haughton; and follows up his illustration by putting a variety of cases, which I certainly shall not quote, but which, once read, will effectually (I should think) prevent any person's again referring to this passage as a grave authority for the laws relating to landed property in India." That argument, however, was anticipated and completely refuted by the historian of Mysore, Colonel Mark Wilks, who has, in the 5th chapter of his scholarly work (*h*), discussed, with remarkable ability and learning, the question as to the ownership of the soil. He strongly maintains that Hindu Law declares the proprietorship of the soil to be in the cultivators. From pp. 75, 76 of the Madras reprint we extract this passage :—

"The most ancient and authentic authorities accessible to the English reader are the institutes of Manu, translated by Sir William Jones; and the texts from a great variety of books of sacred law, which are collected and arranged in

(*g*) Appendix p. 350 published in 1841. (*h*) Vol. I.

the Digest of Hindu Law already mentioned. The author of that work (Jagannatha) informs us in his commentary, that *Chandeswara and others* explain the word *husbandman*, as *owner of the field*, and endeavours to remove the difficulty of reconciling these authorities with his own courtly opinion (founded on the text from the Nerasinha Purana) already mentioned, by a series of quibbles, which I will not attempt to discuss, because I profess myself unable distinctly to comprehend them (*hh*). This author has not thought proper to quote a text of which he could scarcely be ignorant, viz. :—'Cultivated land is the property of him who cut away the wood, or who first cleared and tilled it;' a passage which distinctly establishes the existence of private property in land in the days of Manu. It may possibly be objected that this passage occurs not in a disquisition concerning land, but for the purpose of illustrating a question o filiation, by comparing the respective claims of the owner of seed and the owner of the land in which it is sown; but this apparent objection, as I conceive, materially strengthens the authority; we illustrate facts which are obscure, by reference to facts of general notoriety; and it is manifest that this origin of landed property, so consonant to the dictates of reason, and to the general opinion of mankind, must have been familiarly known and acknowledged as a practical rule of society at the period when the code of Manu was compiled (for it professes to be a compilation), viz. about 800 years before the Christian era and 553 before the expedition of Alexander."

In the Essay on the Mimansa of Jaimini (*i*), Mr. Colebrooke says:—"A question of considerable interest, as

(*hh*) The quibbles, which Colonel Wilks professes himself unable to understand, deserve perhaps to be called by that name; but he has, we think, mistaken their design, which was to establish and not to abolish the cultivators' ownership, by proving that it might co-exist with the higher "dominium" of the sovereign (as described in the note of Professor Wilson to which we have referred), but which Jagannatha could not conceive as subsisting without a kind of ownership in the soil.

(*i*) Colebrooke's Essays, Vol. II., p. 345, originally published Vol. I, Trans. Royal Asiatic Society 458.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

involving the important one concerning property in the soil of India, is discussed in the sixth lecture. At certain sacrifices, such as that which is called *visvajit*, the votary, for whose benefit the ceremony is performed, is enjoined to bestow all his property on the officiating priests. It is asked whether a paramount sovereign shall give all the land, including pasture ground, highways, and the site of lakes and ponds; an universal monarch, the whole earth; and a subordinate prince, the entire province over which he rules? To that question the answer is: the monarch has not property in the earth, nor the subordinate prince in the land. By conquest kingly power is obtained, and property in house and field which belonged to the enemy. The maxim of the law that 'the king is lord of all excepting sacerdotal wealth,' concerns his authority for correction of the wicked and protection of the good. His kingly power is for government of the realm and extirpation of wrong; and for that purpose he receives taxes from husbandmen, and levies fines from offenders. But right of property is not thereby vested in him; else he would have property in house and land appertaining to the subjects abiding in his dominions. The earth is not the king's, but is common to all beings enjoying the fruit of their own labour. It belongs, says Jaimini, to all alike: therefore, although a gift of a piece of ground to an individual does take place, the whole land cannot be given by a monarch, nor a province by a subordinate prince; but house and field, acquired by purchase and similar means, are liable to gift."

Nilakantha (a high authority on Hindu Law in this presidency), in his Vyavahara Mayukha, Ch. IV., Sec. 1, pl. 8, supports the same view thus:—"In conquest also, where the conquered possesses ownership of houses, lands, money or the like, over the same objects the conqueror obtains ownership; but, if the conquered had only the right to take taxes, that alone, not ownership, accrues to the conqueror. Thus in the 6th Book of the Mimansa 'the whole earth is not to be given away by the king of

the world, nor a whole district by its ruler. The property in each village, house, or other part of the whole earth or of a district belongs solely to the holder of the soil or other property. The revenue only is to be taken by the prince.' Therefore in a gift, or other alienation (by him) of such lands as aforesaid, gift-of-land is not effected: it is only a provision of an income, but, in purchases from the landholder, ownership does accrue in the houses, land or other property purchased, and, through ownership thus acquired, and such objects thus given, the benefits (to the donor) of the gift-of-land may really be obtained." This is a revised translation, the rendering of the same passage in Borrodaile's translation being obviously incorrect.

Mr. Mountstuart Elphinstone, in his History of India (*j*), when treating of the controversy as to the bearing of Hindu Law upon the question of the proprietorship of the soil, sums up against the king in these words :—"The conclusive argument is that the king's share being limited, as above, to one-sixth, or at most one-fourth, there must have been another proprietor for the remaining five-sixths or three-fourths, who must obviously have had the greatest interest of the two in the whole property shared." Subsequently (p. 74) he says :—"It has been mentioned that the king can alienate his share in a village. In like manner he often alienates large portions of territory, including numerous villages as well as tracts of unappropriated waste. But in all these cases it is only his own rights that he makes over: those of the village landholders and permanent tenants, (where such exist), of district and village officers, and of persons holding by previous grants from himself or his predecessors, remaining unaffected by the transfer." And, in a note to the same passage, he observes that "want of advertence to this circumstance has led to mistakes regarding the property in the soil. The native expression being 'to grant a village' or 'a district,' it has been inferred that

(*j*) 4th ed., p. 21.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

the grant implied the whole, and excluded the notion of any other proprietor."† We may point to an instance of such an error by Mr. Mill in his note (3) to page 213 of his History of India, Vol. I., 5th ed., and in the text of the same page.

Judgment.

Some observations of Lord Romilly in giving the judgment of the Privy Council in *Gunga Gobind Mundul* and the *Collector of the Twenty-four Pergunnahs* (*gg*) may be advantageously quoted here. He says:—"If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply to the rent, the nature of which was that of a jama or tribute; and if the holders of these lands asserted then or subsequently a groundless claim to hold them free of rent, as Lakiraj, that claim would not destroy their proprietary right in the lands themselves, but simply subject their owners to liability to be sued in a resumption suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure, involving the measurement and assessment of the lands and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed." And again (*hh*), "the interest of the person in possession is not a limited, but an absolute interest; the title to the lands is one inheritance, the title to the khiraj or rent is another." And again, "it is not the case of a lease at all, still less of a lease of temporary duration; it is the case of an absolute ownership of the lands; and the title of the Government rather resembles a seignory than that of a lessor with a reversion" (*ii*). And again, "there is no relation of landlord and tenant in such a case between the Government and the owner of the lands, who is the

† *Et vide* Gleig's Life of Munro, Vol. II., pp. 330, 331, and 4 Bom. H. C. Rep., p. 7, A. C. J.

(*gg*) 11 Moore, Ind. App. 345. The title, relied upon in that case, existed A. D. 1783, and was, therefore, independent of the Cornwallis permanent settlement.

(*hh*) *Ibid.*, pp. 359, 3

(*ii*) *Ibid.*, pp. 361, 362.

landlord, and not a rayut. The Government has a title to the rent or jama. By whatever name it may be called, the right and title is to the rent substantially: it does not include a right to the possession of the lands, though such a right might arise by forfeiture or extinction of the ownership" (*jj*).

The Court of Directors, in a despatch written in 1822 to the Government of Bombay, speaking of a draft Regulation prepared for the purpose of giving greater validity to the result of surveys yet to be undertaken, said :—"The preamble, as it originally stood in the draft prepared by Captain Williams, is much more correct than the preamble as altered at the suggestion of Mr. Prendergast (a member of council), which asserts the proprietary right in the land to be vested in the Ruling Power, whereas in the draft of Captain Williams it is stated that the Ruling Power is entitled to a certain share of the produce of the land." Rev. Sel., Vol. IV., p. 646, para. 59.

Sir Thomas Munro, indeed, in a letter of the 15th August 1807 (Revenue Selections, Vol. I., p. 94), proposing, to the Board of Revenue, a plan for permanently settling the Ceded Districts on the rayutvari principle, said :—"Nothing can be plainer than that private landed property has never existed in India, excepting on the Malabar Coast." The context, however, of that letter shows that by "private landed property" he meant land assessed so low as to command a ready sale. Referring to Aurangzib's opinion that "one-half of the gross produce was in general enough for the rayut, and that he ought in no case to have more than two-thirds," Munro says:—"The mode of assessment, in the Ceded Districts and in the Dekkan, still limits the share of the rayut to those proportions, but makes it commonly much nearer to one-half than two-thirds of the produce. If, by fixing the Government rent at one-third, he were allowed to enjoy the remainder, and all such future increase as might arise from his industry, he would never relinquish

(*jj*) *Ibid.*, p. 362.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

his farm, and all cultivated land would soon become private property. If more than one-third is demanded as rent, there can be no private property; for it is found, when land, which has formerly been inâm, is assessed, that as long as the rate is not more than one-third of the produce, the land is regarded as a private estate, and can generally be sold; but that whenever the rate exceeds one-third, the land is scarcely ever saleable, is no longer reckoned private property, and is often abandoned." A minute, from which we shall largely quote, written by Munro in 1824 when he was Governor of Madras, and when his knowledge of India had become much wider than it was in 1807, admitted the existence of private property in land in many regions besides that of the Malabar Coast, within which coast he doubtless intended to include Kanara when he wrote in 1807.

Mr. J. W. Ellis, a very weighty authority on such a subject (*a*), accounting for the absence of texts, in the Hindu Law-books, *expressly* conferring upon the rayuts property in land, "though the existence of such property under a variety of terms, and for a variety of purposes is alluded to in every page," adds :—"The fact is that the thing existed in India when the Lawgivers wrote, and it was evidently superfluous for them to prescribe what they found fully established" (*b*). *Immo magnæ auctoritatis hoc jus habetur, quod in tantum probatum est, ut non fuerit necesse scripto id comprehendere* (*c*).

In his judgment in *Thakooranee Dossee* v. *Bisheshur Mookerjee* (*d*), Morgan, J., regards property in land under the native rulers as "a kind of joint ownership between the Government and the cultivator." He says :—"The

(*a*) He rendered considerable assistance to Sir Thomas Strange in composing his treatise on Hindu Law, as has been acknowledged by that learned author—1 Stra. H. L., Preface, p. xxiii. of Ed. of 1830.

(*b*) Mirasi Papers published in 1862 by permission of the Madras Government, p. 197, note 39, *et vide* Ibid p. 82, paras. 99 and 100, to the same effect by Mr. Lushington, Collector of Tinnevelly, in his Report of 29th December 1800.

(*c*) 1 Dig. 3, 36 (Paulus.)

(*d*) Beng. L. R. F. B. 295.

right of the cultivator to hold his land as long as he paid assessment to Government never was questioned."

Theoretically, it may be that proprietorship may, as Savigny (*e*) argues, be regarded as derived from the State, by whose sanction and under whose protection it springs into existence and is perfected, in which sense it was said of the *contribution foncière*, when imposed by the Constituent Assembly upon landed property in France : "*On pourrait donc dire avec justesse que c'est la propriété qui est seule chargée de la contribution, et que le propriétaire n'est qu' un agent qui l'acquitte pour elle avec un portion des fruits qu' elle lui donne*" (*f*). This right of participation of the State in the produce of the land, which always may and in urgent circumstances must be asserted, prevents, as Jagannatha substantially contended, an unburdened ownership, but no more excludes private proprietorship than the Land Tax in England, which, in the time of William III., is said to have amounted to 40 per cent of the Public Revenue (*g*).

This proprietorship of the soil took various aspects and names in India. It is found in the village communities formed in early Hindu times (*h*), which still exist in great strength in the Panjab (*i*), and of which the most perfect types in this Presidency are the Bhagdari and Narvadari villages in parts of Guzerat (*j*). In the western and southern regions of India the property of the rayuts in the soil has in recent centuries been widely known under the name of Miras, a term borrowed from the Mahomedan invaders and rulers of a great part of the country. Some of the wisest of these no doubt revived that proprietorship in districts where it had become faint or

(*e*) Traité de Droit Romain plac. LVII. Traduction Francaise, par M. Guenoux, Tome I., p. 375, 1st Ed.

(*f*) DeParieu, Traité des Impots, Vol. I., p. 229, 2nd Ed.

(*g*) *Ibid.* p. 178, and Journal of the Statistical Society, Vol. I., p. 247.

(*h*) Campbell's Modern India, 84 *et seq.*

(*i*) *Ibid.* and Campbell's Land Tenures of India, *passim.*

(*j*) Capt. Cruickshank's Report 10th October 1827, paras 27, 28; Robertson's Glossary, 27 (8), 35 (1), 42 (6, 7, 8, 9); Mr. Pedder's Report, Bombay Printed Government Records No. CXIV, *passim*; Bom. Reg. VIII. of 1827, Bombay Act V. of 1862.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

nearly extinct in the presence of oppression, war and rapine, and hence have been sometimes accredited with its creation. It would, however, be a partial and superficial view of the subject of the rayut's property in the soil to hold that it originated with the Mussulmani princes. The Mirasi Papers published in 1862 by Mr. W. Huddleston, Secretary to the Madras Board of Revenue, with the sanction of the Government of Madras, exhibit the various phases and names under which the Mirasi tenure existed in that Presidency or the greater part of it. In some places the traces of it were faint, in others almost obliterated, and in these virtually extinct. In others again it was still strong. Amongst these papers (p. 176) is the valuable reply of Mr. F. W. Ellis to the seventeen questions, as to Mirasi right, put by the Government of Madras to its Collectors in August 1814 (*k*). That reply is also published in the Revenue Selections, Vol. I., p. 812. He says that the word 'Miras' is Arabic, originally signifying inheritance (*l*), but, like other revenue terms, passed to the languages of India through the Persian (whence the final "*i*" with which it is often written), and is in Southern India employed as a general term to designate a variety of rights, differing in nature and degree, but all more or less connected with the proprietary possession or usufruct of the soil or of its produce." In describing the various acceptations in which it is used, he says :— "That right to the hereditary *possession*, or, as some consider it, to the *occupation* of land, differing locally in mode, but always the same in essence, universally known by the people and generally allowed by Government in all the provinces under this Presidency, the Northern Circars and the Ceded Districts excepted, is called *Miras*." His note upon that passage is important; it is this :—"Generally speaking, Mirasi right in land prevails wherever the Tamil language is spoken, and all terms, expressive of this right and its incidents, belong to this language; this specification

(*k*) Those questions are printed in the Mirasi Papers, pp. 155, 156, *et seq.*

(*l*) Wilson's Glossary, 342, and Forbes' Hind. and Eng. Dic. concur in this interpretation of Miras.

does not exclude the provinces now called Malabar and Kanara, for Malayálma, the dialect of the former, and Tuluva, the dialect of the latter (for Kanarese is not the Native tongue of this country, but of the conquerors or colonists of it), are immediate derivatives from the same source as the modern Tamil." The word Miras, when *adopted* into Tamil, Mr. Ellis says, "taking the idiomatic termination of that tongue, becomes *Mirasu*" (*m*). But the ancient Tamil designation of it is *Kaniyatchi* (corruptly *Caniyatchi, Canachi, Kanachi, Cainatchy*). It is derived from *káni*, a Tamil word signifying "property, possession, right of possession, hereditary right," and *atchi*, which is Tamil for heritage, inheritance, a domain, or lordship obtained by inheritance, a right, a privilege, power or dominion (*n*). Professor Wilson says that *Kaniyatchi* is used in the Tamil countries, and is equivalent to the term Mirasi (*o*). Mr. Ellis, in his note to Sankarya's replies to the Government questions, observes that *Kaniyatchi*, "in its general sense, is the native term for which the foreign term Mirasi has in latter times been substituted," but that "in the districts to which" Sankarya's answers "more particularly apply, it is restricted to mean the Manyams, Cuppatams, and other special privileges of the Mirásudar, considered as the symbol of their proprietary right in the soil" (*p*). *Uzhavadei* has the same meaning as Mirasu or *Kaniyatchi* when used as a general term (*q*). In Malabar the Sanskrit word *Janma* (signifying, in its primary sense, "birth,") corruptly *Jalm, Jalma, Jenm*, &c.; and in Tamil, *Janmam* is used to indicate birthright and hereditary property in land. The hereditary proprietor is there styled *Janmakaran*, or *Janmkar*, corruptly *Jenmacar* or Jelmkar (*r*). Amongst Brahmans, Mirasi land is known

(*m*) Mirasi Papers, p. 176, note 1.

(*n*) Wilson's Glossary, pp. 38, 258, Mirasi Papers, 182 (n. 19).

(*o*) Wilson's Glossary, 258.

(*p*) Mirasi Papers, p. 218 (note 2). The districts in which this special meaning is given to Kaniyatchi is Tanda-Mandalam.

(*q*) *Ibid.*, p. 218 note 3.

(*r*) Wilson's Glossary, 231, 232; Monier Williams' Sansk. and Eng. Dic. 33, 8; Mirasi Papers, 177 (n. 5), 179 (para. 6), 180 (para. 7.), 201 (para. 12); Revenue Selections, Vol. I., 889 to 894.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

by the Sanskrit term *Swasthyam* and the Mirasidar as *Swastiyamdar* (*s*). *Swasthyam* is derived from the Sanskrit *Sva*, which, when treated as a pronoun, signifies "own, one's own, my own, his own, &c.," according to the context; but, used as a substantive, means "kinsman" or "property" (*t*). A compound of it, *Sva-sthana*, means "one's own place, own home" (*u*). It is necessary here to recall to memory what we have already mentioned, that, in Kanarese, *Mulavarga* denotes original proprietary right in land, and *Mulavargdar*, (which the plaintiff claims to be) the proprietor of an ancestral hereditary estate.

The whole tenor of the report of Mr. Ellis, in 1816, on Mirasi tenure and the ancient documents, translations of which he furnished in the appendix to it, favour the opinion that, notwithstanding its modern name of Miras, the tenure was of Hindu origin, and was no other than that private property in the soil which, if not directly expressed, was, he thought, unmistakeably implied in the writings of the ancient Hindu lawgivers (*v*). There is, as we shall presently see, reason to believe that the same remark may be made with regard to Mirasi tenure in the Presidency of Bombay. Mirasi land must be distinguished from official Mirasi (the Mirasi of village officers), of which we shall say no more than to notice its existence (*w*). Mirasi in land is the only class of Miras which demands our attention in this case (*x*). Our object in treating of it, will become more apparent when we revert to Munro's minute of 1824. Whatever diversity of opinion as to the ownership of waste lands may have existed amongst the Revenue Officers and other authorities whose views are preserved in the Mirasi Papers,

(*s*) Wilson's Glossary, 497; Mirasi Papers, 106.

(*t*) Monier Williams' S. and E. Dic., 1156.

(*u*) *Ibid.*, 1157.

(*v*). See also Mr. Lushington's Report as Collector of Tinnevelly, on 29th December 1800; Mirasi Papers, p. 82, para. 99, to the same effect.

(*w*) Mirasi Papers, pp. 176, 177 *et seq.*; p. 373, para 67 *et seq.*

(*x*) "In Malabar," Mr. Ellis says, "there is no official Mirasi, in Kanara none but that of Shanabhogas (*i.e.* village accountants and revenue officers). *Ibid.* p. 181.

there would seem to have been a general *consensus* of opinion amongst them that, in cultivated lands held on Mirasi tenure, the holders enjoy an hereditary and transferable estate (*y*). Mr. Smalley, Collector of Chingleput, on November 4th, 1820, writing to the Madras Board of Revenue in support of the Mirasidars, then known as *Caneyatchi carers*, says :— "Within the last sixty years there is, I think, a very substantial proof of the nature and value of *Kaniyatchi*, which is that Rayaji, Dewan of the Nawab of the Karnatic, purchased it in order to present a village to some Brahmans" (*z*).

And the Court of Directors, in a despatch of August 18th, 1824, to the Madras Government, say :—"The right of Mirasdars, to the lands which they themselves cultivate, is, in general, indisputable" (*a*).

This right must of course be understood as dependent on the performance by them of the duties which, in respect of it, they owe to the State (*b*).

Miras differs considerably in the various districts. In the tract of country which received the special attention of Mr. Ellis, known to the natives by the name of Tonda-Mandalam, extending from the limits of Nellore nearly to the Coleroon River, and embracing the two divisions of Arcot and the Jagir, Mirasi land is, he says, "marked by distinctions *nowhere else known*, the proprietary Mirasidars holding a certain extent of land free of all assessment," such exempted land being called *Kaniyatchi-Manyam*, whence the Mirasidars known in other provinces by the names of *Kanikarer, Kareikarer, Janmakarer*, &c., are in Tonda-Mandalam called *Kaniyatchikarer* (*c*). Continuing his description of the Mirasidars in Tonda-Mandalam, he says that they are "entitled to receive fees under the various denominations

(*y*) Mirasi Papers, pp. 85, 89, 90, 91, 94, 98, 99, 105, 106, 154 (para. 17), 196, 197, 226, 394, 400, 401, 406, 423.

(*z*) Mirasi Papers, pp. 401, 402. See as to Caneyatchi, pp. 218, (n. 2), 177, 372, 373, 375.

(*a*) Mirasi Papers, p. 423.

(*b*) Mirasi Papers, pp. 82 (para, 100), 85, 89, 186, 221, 222, 400, 410, 411, 414, 415, 421, 425 (para. 17).

(*c*) Mirasi Papers, p. 177.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

of Cuppatam, &c., &c. This species of Mirasi is divided into two kinds: *Pasungcarei* (*Pasunkarai*) where the whole lands of the village are held jointly, and either cultivated in common, or divided yearly or at some fixed period, according to established custom among the proprietors: *Arudikarai*, where the lands are held in severalty and subject consequently to no periodical distribution" (*d*).

With regard to provinces other than Malabar and Kanara, we do not gather, either from the report of Mr. Ellis, or the other documents comprised amongst the Mirasi Papers, that the rent or revenue payable by Mirasidars to the State was permanently fixed. As to Malabar and Kanara, what Mr. Ellis says is as follows:—"In the three southern provinces of the tract called by the natives Malayalam, the coast of Malabar, there are no villages and consequently no rights of any kind in common; each family of Náyers (Nairs) reside apart on their own estate and hold their janmam right free of all participation or control, and, *formerly*, free of all rent, the share which the law gives the sovereign in the produce of land having been commuted for military service, each *Nádu* or district being assessed at so many armed Nayers (*e*), instead of so many measures of grain, or so many *veray fanams*. This was also the condition of the fourth or northern division of Malayalam, *Tulu-Nadu*, now called Kanara, before the foundation of the Vidyanagara, or, as corruptly called, the Bijanugger empire, in which this district was, by force or agreement, included: a general assessment was then introduced, grounded on the share allowed by law to the sovereign in landed produce, one-sixth; this has since, by successive additions, been considerably increased, but does not appear to have operated any considerable alteration in landed tenures, which, divested of all community of rights, like those of Malabar, are nearly the same as those which obtain in the *Arudi-karei* villages to the south of

(*d*) Mirasi Papers, p. 178, Wilson's Glossary, 33, 406.

(*e*) It will be seen *infra* p. 78 that Munro, Col. Wilks, and the Board of Revenue state that the grain assessment of one-sixth existed from time immemorial previously to the Vidyanagara empire.

the Coleroon. There appears, however, in practice to exist this essential difference, that, though the mortgage, assessment, and temporary or permanent lease of Mirasi land are known in the districts of Tanjore, Madura, and Coimbatore, they are not generally prevalent, the actual cultivation of the lands being more or less in the hands of the Mirasidars, by whom the Sarkar revenue is paid; on the contrary, subordinate tenures of all kinds are very common in Kanara; and, in many districts of Malabar, the possession of the land has passed from the proprietary Janmakár to under-tenants of various descriptions, who render him a Swami-bhogam or acknowledgment of superiority, pay the Government rent, and enjoy all remaining profits" (*f*). With respect to the Mirasi tenure, it was necessary to quote that passage from the report of Mr. Ellis here, although it, to some extent, anticipates the history of the land revenue in Kanara, of which subsequently we must speak at some length. Until the conquest of Malabar (A.D. 1766 (*g*)) by Hyder Ali, that province remained free from land tax, but he immediately declared half the produce to be the share of the Sarkar. The mode in which his revenue officers carried this declaration into effect was by assessing each Janmkar's estate at the rate of 50 to 60 per cent on the patom (rent) receivable by him from his tenants (patomkars) (*h*). It would seem also that Hyder Ali's deputy introduced the system of a quinquennial revision of the land revenue (*i*). On the conquest of Malabar by the British it was found that its assessment was very unequally distributed (*j*), and that few of the Janmkars were in occupation of their lands, although many still retained a considerable portion of the landlord's rent. This condition of the ancient proprietors was caused partly by the oppression exercised by Hyder Ali and

(*f*) Mirasi Papers, p. 179.

(*g*) Wilks' Hist. of Mysore, pp. 289 to 293, Madras reprint of 1869.

(*h*) Minute of Madras Board of Revenue of 5th January 1818, para. 31 and note * thereto. Revenue Selections, Vol. I, pp. 891, 892.

(*i*) *Ibid.* note † to para. 32 p. 892.

(*j*) *Ibid.* paras. 32 to 34. *Vide* infra pp. 99, 100, as to periodical revision of land assessment.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Tippoo and partly by the indebtedness of the Janmkars. The lands were, for the most part, in the hands of Kanumkars (mortgagees without power to foreclose) or Patomkars (tenants) (*k*).

Judgment.

Mr. Mountstuart Elphinstone, in his valuable report of the 25th October 1819 (*l*) on the territories conquered from the Peishwa, now forming part of the Presidency of Bombay, in treating of the Mirasi tenure, says that the result of the reports of his three Collectors and of his own inquiries was:—"That a large portion of the rayuts are the proprietors of their estates, subject to the payment of a fixed land-tax to Government; that their property is hereditary and saleable, and they are never dispossessed while they pay their tax, and even then they have for a long period (at least thirty years) the right of reclaiming their estate on paying the dues of Government. Their land-tax is fixed; but the late Mahratta Government loaded it with other impositions, which reduced that advantage to a mere name; so far, however, was this from destroying the value of their estates, that, although the Government took advantage of their attachment to make them pay considerably more than an Oopari (corruptly Oopree), and though all the Mirasidars were, in ordinary cases, obliged to make up for failures, in the payment of each of their body, yet their lands were saleable, and generally at ten years' purchase. This fact (he adds) might lead us to suppose that, even with all of the exactions of the late Mahratta Government, the share of the rayut must have amounted to more than half the produce of the land; but experience shows that men will keep their estates, even after becoming a losing concern, until they are obliged to part with them from absolute want, or until oppression has lasted so long that the advantages of proprietorship, in better times have been forgotten. The Mirasidars are perhaps more numerous than the Ooparis all over the Mahratta Country. In the Karnatic, I am

(*k*) *Ibid.* paras. 35 to 39, pp. 892 to 894.

(*l*) Revenue Selections, Vol. IV., p. 159, 160 and twice since separately printed.

informed by Mr. Chaplin, that they do not exist at all. Beside 'Mirasidar' they are called 'Thulkuri' about Poona. *An opinion prevails throughout the Mahratta Country, that under the old Hindu Government all the land was held by Mirasis*; and that the Ooparis were introduced, as the old proprietors sunk under the tyranny of the Mahomedans. This opinion is supported by the fact that the greater part of the fields, now cultivated by Ooparis, are recorded in the village books as belonging to absent proprietors; and affords, when combined with circumstances observed in other parts of the Peninsula, and with the light land-tax authorized by Manu, a strong presumption that the revenue system under the Hindus (if they had a uniform system), was founded on private property in the soil. All the land which does not belong to the Mirasis, belongs to Government, or those to whom Government has assigned it. The property of the zemindars in the soil has not been introduced or even heard of in the Mahratta Country. The cultivated land belonging to Government, except some parts which it keeps in its own hands to be managed by Mámlatdárs, was always let out to Ooparis, who had a lease; with the expiration of which their claims and duties expired." Subsequently he remarks:—"The assignment, by Government, of its own revenue or share of the produce will be mentioned hereafter. It need only be observed that, in making these grants, it could not transfer the share of a Mirasidar. Even Bajirao, when he had occasion for Mirasi land, paid the price of it." In saying the zemindars have no property in the soil, he was speaking of the soil at large, and not intending to deny that they were occasionally owners of portions of land in the parganas in which they exercise their offices. This appears from his observations (pp. 20, 21) upon Deshmukhs and Deshpándes, who performed in Maharashtra duties somewhat similar to those of the zemindars of Bengal, and were sometimes found to be proprietors of five acres in each hundred. He further (p. 22) says:—"Deshmukhs and Deshpándes, as well as Patils and Kulkarnis, sell their own land and fees (or *vatan* as both

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

are called), but neither pretend to any property in the rest of the lands."

Judgment.

The Board of Revenue at Madras, in their elaborate minute of the 5th January 1818, speaking of the rayut landholders, said :—

"18. The universally distinguishing character as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil, so long as they render a certain portion of the produce of the land, in kind or money, as public revenue ; for whether rendered in service, in money, or in kind, and whether paid to Rajahs, Jagirdars, Zemindars, Polygars, Mootehdars, Shotriumdars, Maniamdars, or Government officers, such as Tehsildars, &c., the payments which have always been made by the rayut are universally termed and considered the dues of the Government."

"19. The hereditary right of the rayut, as above described, though everywhere of the same, or at least of a similar nature, is in value very different in different districts. After discharging the wages of his hired labourers, and defraying the subsistence of his slaves, or other immediate expenses of cultivation, if the public assessment payable by him is so moderate as to leave him a considerable annual surplus, his interest in the soil is that of the *landlord*, and his land yields a clear land rent, and is of course a saleable and transferable property ; but where the revenue payable by him is so high as to absorb the whole of the landlord's rent, and to leave him a bare and precarious subsistence only, his interest in the land dwindles into mere occupancy, and from a *landlord* he is reduced to a *landholder*, still indeed clinging to the soil and subsisting by tilling it, but no longer possessing any saleable property in it."

"20. The value of the rayuts' right, therefore, varies with the weight of the public assessment of the land, which is generally found to be heavy in proportion to the length of time that the country may have been subjected to the Mahommedan Government. On the western coast of the Peninsula,

where the Mussulman's power was both of the most recent introduction and of the shortest duration, this right constitutes a property of great value, which is vested in each individual rayut. In the Tamil country it is vested more frequently in all the rayuts of a village collectively than in each individually, and is of less value than in Kanara and Malabar, and sometimes of little or no value as a saleable property. In the Ceded Districts and Northern Circars, which were the longest under Mahommedan rule, though the Coonbees, Reddies, Naidoos, and other kadim (ancient) inhabitants assert their hereditary right to a priority and preference of occupancy, they do not now appear to possess any saleable property in the soil."

This review of the authorities leads us to the conclusion arrived at also (after careful discussion of the question) by Professor H. H. Wilson (*m*), that "the proprietary right of the sovereign derives no warrant from the ancient laws or institutions of the Hindus, and is not recognized by modern Hindu lawyers as exclusive, or incompatible with individual ownership."

We shall now consider how the question, as to the property in the soil of India, stood by Mahomedan Law, and, incidentally thereto, the amount of land revenue leviable under the same law by the State. These points have been the subject of an able disquisition by General, afterwards Sir Archibald Galloway, who, in his work on the Law and Constitution of India, published in 1825, contended with much ability that the Mahomedan Law was the *lex loci* of India. He would, however, appear to have regarded the Hindu Law as far more completely abrogated and fallen into oblivion throughout India during the seven centuries of Mahomedan dominion of which he speaks (*n*), than history would at all seem to justify. On reference to Steele's Law and Customs of Hindu Castes, in which there is a long list of Hindu Law books written in Sanskrit, frequently exhibiting the respec-

(*m*) Mill and Wilson's Hist., Vol. VII., p. 298, 5th Ed.

(*n*) P. 7, *et seq.* 11 *et seq.* 31 *et seq.*

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

tive dates of their composition, it will be seen that very many of those books were written during the Mahomedan period. Amongst them is the Mayukha Vyavahara from which we have already quoted. It was written about 300 years before the publication of Steele's work in 1827, and is there stated (p. 7) as "of chief notoriety in the Karnatic, though attended to both in Poona and at Benares;" to which we may add—and especially so in Guzerat and Bombay. There are in that list many other Hindu Law books of later date. It should also be recollected that at times the Mahomedan power greatly fluctuated, and that, even when it was at its zenith, there were always some parts of India under Hindu Governments and Hindu influence. The considerable extent of that influence even on Mahomedan sovereigns is clearly indicated by Mr. Patton in Parts II. and III. of his Principles of Asiatic Monarchies. (See also Grant Duff's Hist., Vol. I., pp. 26 *et seq.*, 70, 92.) However, as to what the Mahomedan Law itself was, considerable reliance may be placed on General Galloway (*o*). At page 13 of his work he speaks thus:—

"The Moohummudan law of conquest is explicit; and the first act of the conqueror is required to be to carry the law into effect, either by partitioning the spoil and lands among the conquerors, or by fixing the *kharáj*, or public revenue, on the lands, and the capitation-tax (*jizeeah*) on the heads of the conquered. The inhabitants are first called to embrace the faith. If they become converts, they enjoy all the privileges of Moslems; if they refuse, they are then called upon to pay the capitation-tax; for, if they consent to this and to pay the *kharáj*, it is not lawful to put them to death." In the case of "all land conquered by force of arms and suffered to remain in the hands of the people, the Imaum shall fix the capitation-tax upon the inhabitants (*lit.* on their necks), if they do not embrace the faith; and, on their lands, the kharáj, whether they embrace the faith or not." This latter passage he quotes from Suranj ool Vuhanj,

(*o*) See 7 Mill and Wilson's Hist., 5th ed., p. 297, Note 3.

At page 32 General Galloway quotes from the same author thus :—"The land of the Suwand of Irak (a conquered province) is the property of its inhabitants. They may alienate it by sale and dispose of it as they please; for when the Imaum conquers a country by force of arms, if he permit the inhabitants to remain in it, imposing the kharáj on their lands and the jizeeah (capitation-tax) on their heads, the land is the property of the inhabitants; and since it is their property, it is lawful for them to sell it, or to dispose of it as they choose" (*p*). This statement is confirmed in 2 Hedaya, Bk. IX., Ch. VII., p. 205 of Hamilton's translation.

The Mahomedan Law, as laid down in the above passages, is that of the school of Hanifa, which was that mainly prevalent in Hindostan. In support of that predominance General Galloway (*q*) gives the following extract from the introduction to a Farmán of the Emperor Alam Gir (Aurangzib) :—"We have deemed it expedient to issue our royal edict to all officers interested with the management of affairs throughout Hindostan, directing them to levy the kharáj in the mode and proportion enjoined by the holy law and the tracts of Abu Hanifa." The three other sects of the Suni persuasion (the Shafeas, Malikias, and Humbulias) were in favour of the vesting of the property in the soil in the State (Galloway, pp. 37, 38, 39; Mill and Wilson's Hist., Vol. VII., p. 297).

At page 39 General Galloway continues :—

"Adverting to the difference of tenets among the Suni Imaums, the learned Hanifia Surrukhsee observes that 'the learned have differed in opinion with regard to land conquered by force of arms, on which the Imaum has suffered the inhabitants to remain on paying the kharaj and jizeeah. Some say that the lands are the property of the Moslemen (*i.e.*, of the State) and that the inhabitants are slaves—*aabeed*—of the Moslemen, upon whom may be imposed whatever burden the liege shall determine, as a master may

(*p*) See also Galloway, p. 65. (*q*) P. 37.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

on his slave. But, according to our law (the Hanifia) the inhabitants are freemen, as zimmees; their lands are their indefeasible property, and that which is exacted from them is kharaj.'" And again:—"On the whole then, according to the Hanifia law, if a Moslem army conquered a non-Moslem province or kingdom by force of arms, and the conqueror chose to suffer the inhabitants to remain in it, his duty would be, either himself or by commissioners (as Omar did in settling the kharaj of the province of Irak), to partition the lands among them and to fix the land-tax. Those who share in this partition are the proprietors of the soil for ever, and may not be disseised of it, without their consent, so long as they pay the land-tax."

Colonel Wilks (*p*) gives these quotations to the same effect:—

"In the book *Khazanatul Rewayah* it is written:—'Tributary land is held in full property by its owner; and so is tithed (or decimated) land; a sale, a gift, or a charitable devise of it is lawful, and it will be inherited like other property. Thus in the book *Mohodeyah*, in a passage quoted from *Almohit* (a work of the lawyer Mahomed,) lands are held in full property by them, they shall inherit those lands, and shall pay the tribute out of them;' and in the book *Alkhanujah* it is written, 'The sovereign has a right of property in the tribute or rent;' so in the book *Modena Sharhi Baaz* it is written, 'A town and the district annexed to it shall not be sold by the sovereign, if it pay tribute or rent to the crown, nor shall it be given, nor inherited, nor shall it belong to the royal domains; for inheritance is annexed to property, and he who has the tribute from the land has no property in the land; hence it is known that *the king has no right to grant the land which pays tribute, but that he may grant the tribute arising from it.*'"

General Galloway (p. 35) cites Abu Yusuf as holding that if the tenant of kharáji land can afford to cultivate it, but

(*p*) Hist. of Mysore, Vol. I., p. 117, Madras reprint of 1869.

neglects to do so, he shall not compel him to labour, but he shall take from him the kharaj. If the tenant sublet his land, he is still held to be the cultivator and responsible to the State for the kharaj (*Ibid* 37).

Judgment.

The Mahomedan Law, even of the Hanifia School, made a strong distinction between cultivated and waste land. General Galloway, at p. 91 of his work, says :—

"By the Moohummudan law the land revenue of the crown was fixed on the arable land only. That alone was given away to the husbandman, who became the owner. All other lands remained the property of the State, and were ready to be given away, on application, to any one who would undertake to cultivate them. If he did cultivate, well; if not, within a reasonable time, which was limited to three years, the land was taken from him, and might be given to another. By law, therefore, it is evident that no right can exist in any individual, or body of individuals, to any other description of land than that which is cultivated."

The different rule as to waste land is also thus noticed in the Hedaya, Vol. IV., p. 129 :—

"Whosoever cultivates waste lands, with the permission of the chief, obtains a property in them; whereas, if a person cultivate them *without* such permission, he does not in that case become proprietor, according to Hanifa. The two disciples maintain that, in this case also, the cultivator becomes proprietor, because of a saying of the prophet, '*Whosoever cultivates waste lands does thereby acquire the property of them;*' and also because they are a sort of common goods, and become the property of the cultivator in virtue of his being the first possessor; in the same manner as in the case of seizing game or gathering firewood. One argument of Hanifa on this point is a saying of the prophet, '*Nothing is lawful to any person but what is permitted by the Imám;*' and with respect to the saying quoted by the two disciples, it is to be construed merely into a *judicial permission* (for the prophet was himself an Imám), in the

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

same manner as where he said, '*Whoever kills an infidel is entitled to his armour.*' Besides, all waste lands are plunder, seeing that the Mussulmans acquired the possession of them by conquest; and hence no person can assume a property in them without the consent of the Imám, as holds in all cases of plunder."

At p. 131 it is stated that, according to Hanifa, the consent of the Imám is necessary in the case of a zimmee, as well as of a Mussulman, before a zimmee can acquire property in the waste lands which he may cultivate.

Both Sir Thomas Munro and Mr. Mountstuart Elphinstone maintained that the waste land now belongs, and has always belonged, to Government. The former, in a Minute of the 31st December 1824, penned by him as Governor of Madras, when his experience had reached its ripest maturity, after referring to the opinion of Mr. Ellis, that the waste land in Miras villages in Arcot belonged to the Mirasdars jointly, denied that they had "the right of ownership" (*s*). He added, "The Circar (sarkar) from ancient times has *everywhere*, even in Arcot *as well as in other provinces*, granted waste in inâm, free of every rent or claim, public or private, and appears in all such grants to have considered the waste as being exclusively its own property. It may be objected that if this were the case, it may give away the whole waste lands of a village, and injure the inhabitants by depriving them of their pastures. It certainly might give away the whole, but whether the exercise of this right would be injurious to the inhabitants would depend on circumstances (*t*). And again he says: "In all villages, whether miras or not, the inhabitants reserve to themselves the exclusive use of the waste. But this right is good only against strangers, not against the Circar

(*s*) Gleig's Life of Munro, Vol. III., 328. (Minute of 31st Dec. 1824.) Mr. Ellis said, however, that the right was limited by the nature of the waste, and therefore the Mirasdars could not cultivate or cut down the valuable timber on immemorial waste.—Mirasi Papers, p. 184.

(*t*) *Ibid.*, p. 329.

(sarkar), which possesses, I think, by the usage of the country, the absolute right of disposing of the waste as it pleases, in villages which are miras as well as in those which are not. In the Dekkan, in miras villages, the corporation has not the right of disposing of unoccupied land, but the Circar has" (*u*). And Mr. Elphinstone says :—" The unoccupied waste, as in all other cases where society has assumed a regular form, must no doubt have belonged to the State; but the king, instead of transferring this property to the intended cultivators for a price paid once for all, or for a fixed annual rent or quit rent (as is usual in other countries), reserved a certain proportion of the produce, which increased or diminished according to the extent and nature of the cultivation. The rest of the produce belonged to the community of settlers " (*v*).

The State, he subsequently, at some length, shows, might grant those waste lands on such terms as it deemed fit and found practicable. In fact, those terms frequently varied.

The general rule, that waste lands in India belong to the State, was, A.D. 1843, distinctly recognized and enforced by the Supreme Court of Bombay (Roper, C. J., and Perry, J.) in *Doe d. East India Company* v. *Hirabai* (*w*). The

(*u*) Gleig's Life of Munro, Vol. III., pp. 329, 330.

(*v*) Hist. of India, p. 69, 4th ed. See, however, Sir H. S. Maine's Village Communities, p. 120. Sir George Campbell, in his Essay, says :—

"A very important difference between a rayutvar system and the others which have been described is this, that in the rayutvar provinces all the waste and unoccupied lands are considered to be Government property, and, being separately assessed in fields or survey plots, are available to the first comer, native of the village or stranger, who chooses to take them upon the prescribed terms. Whether the settlement be made with the Bengal zemindar or with the Panjâb village community, the lump sum assessed includes all the lands of each village area, cultivated and uncultivated; and the proprietors may make their own managements for cultivating the waste without increase of revenue, except when there is a new settlement. In Madras and Bombay it is not so; there, for every new field cultivated, the Government has an additional revenue."

(*w*) Sir Erskine Perry's Oriental Cases, p. 480; and see 1 Madras H. C. Reports, 12, 407.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

same rule probably aided Sir James Mackintosh in making the decision, at which he arrived with manifest reluctance, A.D. 1805, in *Shaik Abdul Amlity* v. *Nasirvanji Kavasji* (*x*) in the Recorder's Court, as to the right of the East India Company to resume foras land from a tenant of upwards of thirty years' possession, and who had given, to the previous occupant, valuable consideration for the land. The foras land question has since been settled by legislation founded on compromise (*y*).

Whether certain lands in Kanara which the *Mulavargdars* claim to be their private property, as forming part of their *vargs*, in support of which contention they relied (*inter alia*) upon paragraph 24 of Mr. Blane's Report (20th September 1848) Exhibit A, pp. 181, 182, are to be regarded as exceptions to the general rule as to waste lands in India, is a question which, though raised, as already mentioned, it is unnecessary to decide in the present case, and therefore we do not offer any opinion upon it.

As to the amount of land revenue (tribute) which a Mussulman sovereign may levy in a conquered country, we first refer to the Hedâya, Vol. II., Bk. IX., Chapter VII., p. 205 :—

"The learned in the law allege that the utmost extent of tribute is *one-half of the actual product*, nor is it allowable to exact more; but the taking of a *half* (*z*) is no more than *strict justice*, and is not tyrannical, because, as it is lawful to take the *whole* of the *persons* and *property* of infidels and to distribute them among the Mussulmans, it follows that taking half their incomes is lawful *à fortiori*" (*a*). And, again, at p. 208 :—"The compiler of the Hedâya remarks that, in our country, tribute is levied upon all lands in *cash* :

(*x*) Mr. LeMessurier's Report on the Foras Lands. Bombay Government Records, Vol. III., New Series, p. 6, para. 17.

(*y*) Act VI. of 1851, 4 Bom. H. C. Rep., p. 40 note (*h*), O. C. J., p. 103, note (*r*) ; 5 Bom. H. C. Rep., pp. 13, 14, O. C. J.

(*z*) Acc. Patton, p. 91.

(*a*) See also, to the same effect, Wilks' Hist. Mysore, Vol. I., pp. 101, 102, Madras reprint of 1869.

but this is immaterial, because the amount of the tribute is due, according to ability, either in *cash*, or in the actual product of the land. If the land be incapable of yielding the established tribute, the Imám must make an abatement, and it is lawful so to do, where the product falls short. According to Mahommed, it is lawful to exact *beyond* the established tribute where the product happens to exceed, judging of a case of *increase* from a case of *deficiency*. But, according to Aboo Yoosaf, it is not lawful to take more than the *established* tribute: and this is approved, because Omar never exacted anything beyond what was established, upon being informed of any increase of produce: if, however, anything be *voluntarily* given in addition to what is established, it may be accepted."

General Galloway, at p. 34 of his work, records a *responsum prudentis*, which there is reason to believe was occasionally the rule of practice, at least when the Mahomedan power was on the wane, and especially in the territories ruled by Hyder Ali and Tippoo Sahib. It is this :—

"But the great Hanifia lawyer, Shums-ool-Aymah-ool-Surrukhsee, in speaking of kharáj, on the question, What is the utmost extent of kharáj which land can bear? says: 'Imám Muhummud hath said, regard shall be had to the cultivator, *to him who cultivates*. There shall be left *for every one who cultivates his land* as much as he requires for *his own support* till the next crop be reaped, and *that of his family, and for seed*. This much shall be left him; what remains is kharáj, and shall go to the public treasury.'"

Professor H. H. Wilson justly observes (*b*) that the property, which, under such circumstances, the Mahomedan Law recognised as vested in the cultivator, would seem not to be very valuable. The same learned and discreet writer (*c*) remarked that the ancient Hindu rule, which gave to the State a twelfth, eighth, or sixth in ordinary times, or a max-

(*b*) Mill and Wilson's Hist., Vol. VII., p. 299, note 4, 5th ed.
(*c*) *Ibid.*, p. 299 in the text.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

imum of a fourth (and that only in time of war, invasion, or public adversity), "evidently left such a share to the cultivator as was equivalent to a profit upon his cultivation, or to a rent enabling him at his will to transfer the task of cultivation to tenant farmers, and placing him in the position of a landed proprietor as far as ownership of rent is evidence of such a tenure." But with reference to the Moslem rule, as enunciated by the Hanifia lawyer, Shums-ool-Aymah-ool-Surrukhsee, first cited, Mr. Wilson says "it established a totally different proportion. It extended the claim of the crown to the whole of the net produce; assigned to the cultivator only so much of the crop as would suffice for one year's subsistence of himself and his family, and for seed; and reduced him to the condition of a mere labourer on his own land. The whole of the profit or the rent went to the sovereign, who thus became the universal landlord." That no doubt practically would have been so wherever that rule was enforced, although, theoretically, the Mahomedan law of the Hanifia School, as already mentioned, vested the property in the cultivator. Mr. Wilson continues:—"The more equitable spirit and sounder judgment of Akbar limited the demand of the sovereign to one-third of the average produce of different sorts of land; the amount to be paid preferably in money, but not to be increased for a definite number of years (*d*). Under more

(*d*) Ayin Akbari, translated by Gladwin, Vol. I., Ch. III., pp. 306, 314. Sir Thomas Munro, however, in his Report of the 15th August 1807 on the Ceded Districts (Rev. Sel., Vol. I., pp. 94, 95), said: "The assessment of Akbar is estimated by Abul-Fazl at one-third, and by other authorities at one-fourth of the gross produce. But it undoubtedly was higher than either of these rates; for had it not been so, enough would have remained to the rayut, after defraying all expenses, to render the land private property; and as this did not take place, we may be certain that the nominal one-fourth or one-third was nearly one-half. This seems to have been the opinion of Aurangzib, for he directs that not more than one-half of the crop shall be taken from the rayut; that where the crop has suffered injury, such remission shall be made as may leave him one-half of what the crop might have been; and that where one rayut dies and another occupies his land, the rent should be reduced if more than one-half of the produce, and raised if less than a third. It is evident, there-

modern Governments, whether Hindu or Mahomedan, the demand seems to have fluctuated from a third or half of the gross produce, to the whole of the net produce, or even to have exceeded those proportions; leaving to the cultivator insufficient means of subsistence, and not unfrequently compelling him to abandon in despair the cultivation of the lands which his forefathers had tilled, and to which his strongest affections chained him, extortion being thus punished by dearth and depopulation" (*e*).

Speaking of the extent of the interest of the State in the land in his own time, Mr. Mountstuart Elphinstone says:—"The sovereign's full share is now reckoned at one-half; and a country is reckoned moderately assessed where he takes only one-third. This increase has been made, not so much by openly raising the king's proportion of the crop as by means of various taxes and cesses, some falling directly on the land, and others more or less circuitously affecting the cultivator. Of the first sort are taxes on ploughs, on cattle, and others of the same description; of the second, taxes on the use of music at certain ceremonies, on marriages with widows, &c., and new taxes on consumption. Besides these there are arbitrary cesses of both descriptions, which were professedly laid on for temporary purposes, but have

fore, that Aurangzib thought that one-half was in general enough for the rayut, and that he ought in no case to have above two-thirds."

The meaning attached by Sir T. Munro to the phrase "private property" is stated *infra*, p. 66 *et seq.*

(*e*). In Ankola the rent was still payable in kind, though subject to commutation, fifty years before the time at which Mr. Harris wrote his report of the 14th June 1821 (Exhibit No. 9, para. 58, Printed Bk. Vol. III., p. 53), and when the demands of the Government were not evaded by the fraudulent artifices which that officer describes; he shows that these demands in many instances rose to the full amount of the gainihûtvali or rack rent, equal to two-thirds of the gross produce of the land. This method of assessment would obviously, in some cases, swallow up all of the rent of the land, and like tithes (*see* Adam Smith, Wealth of Nations, Bk. V., C. II.), but in a higher degree, it tended to check an extension of cultivation at increased expense. It was probably only by artificial estimates and local adjustments that it was made compatible with the general welfare of the agricultural class, and, when its natural unevenness was exaggerated by proportional cesses, the burden which it imposed must in many cases have become intolerable.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

been rendered permanent in practice. Of this kind are a cess on all occupants of land, proportioned to their previous payments, and a cess on the emoluments of village and district functionaries" (*f*).

The Madras Board of Revenue, in their Report of the 28th January 1813 (Rev. Sel., Vol. I., p. 562), in speaking of the sovereign's share, say :—"Now this rent or share is supposed to amount generally to the value of little less than one-half, and, in some situations, to even more than one-half of the gross produce."

Grant Duff, in the first volume of his History of the Mahrattas (p. 26, Bombay reprint), says :—"By the evidence of the Shastrs, one-sixth of the crop is the lawful share payable by the rayut or cultivator to the raja. But this usage of remote antiquity has been long unknown in practice; and different rates and modes of collection have been fixed or enacted by succeeding rulers as wisdom and good policy suggested, or as rapacity and necessity may have urged."

Sir George Campbell, in his Essay on the Land Tenures of India, says :—"It must not be supposed that the customary rent consisted of a uniform share of the produce levied equally on all crops and under all circumstances. On the contrary, the system was to a remarkable degree adapted to the circumstances, with much regard to principles which we should call political economy. Not only did the share taken vary in different parts of the country, but it also varied in respect of different kinds of crops and different modes of cultivation. For instance, crops raised by artificial irrigation (not supplied from Government works) usually rendered a smaller proportion than those raised without irrigation, because in the former case a larger proportion was due to the labour and capital of the cultivator. The more valuable products, as sugar-cane, cotton, vegetables, &c., paid money rates according to the measurement of the land—the produce not being divided. The proportion of grain crops taken as rent or revenue may be said in modern times

(*f*) Elphinstone's Hist., p. 70, 4th ed.

to have varied from one-fourth to one-half, one-fourth being a decidedly light assessment, one-half the heaviest. One-third and two-fifths were, I should say, the most common rates. The grain only was divided, the cultivator usually retaining the straw. In ordinary agricultural villages he also had free grazing for his cattle in the village common, but in parts of the country where a large proportion of the land was given to grazing, a cess per head was levied on the cattle."

In a minute written by Sir Thomas Munro so recently as in the year 1822, on a decision of the Supreme Court at Madras, we may, without committing ourselves to an adoption of all of the views there expressed, quote with advantage the following description of the revenue of Indian sovereigns :—" A small part of the public revenue arose from customs; the rest, about nine-tenths of the whole, from the land revenue or tax. All land was assessed to the public revenue; a part of the land was allotted to religious and charitable purposes and to municipal institutions, and the public revenue of such lands was enjoyed by the incumbents. But the public revenue of all other land came to the royal treasury, unless when assignments of particular villages or districts were made to civil and military officers for their personal allowances and the pay of their respective establishments ; all which assignments, however varied, ceased at the will of the sovereign. As there was no public body, no class of nobles or clergy, which had any right to interfere in the settlement of the land-tax; as this power was vested in the sovereign, and *as he could raise or lower the tax as he saw proper;* and as the whole produce was at his disposal,—it is manifest that he could derive no advantage from, and therefore have no motive for holding, as 'private possessions of the crown,' any lands apart from the general mass of the Sarkar or Government lands of the empire; and it is also obvious that whenever he granted land rent-free, he granted the public revenue " (*g*).

(*g*) Gleig's Life of Munro, Vol. II., pp. 330, 331.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

We revert to the Minute of 1824, as illustrating the general views of its writer, Sir T. Munro, in regard to what constituted "private property"—a term much used by him in his earlier correspondence presently to be discussed. He said:—"The Hindu Governments seem to have often wished that land should be both an hereditary and saleable property; but they could not bring themselves to adopt the only practicable mode of effecting it—a low assessment" (*h*). In suggesting that otherwise the rayut's holding was neither "hereditary" nor "saleable," Sir T. Munro did not mean that the heirs of a rayut might not, if they pleased, succeed to his land, or that the rayut (if not, by reason of special circumstances in connexion with the law of his caste, restricted from alienation) might not, without any opposition on the part of the State, alienate the land if he pleased, but that the assessment was too high as well to induce the heirs to care to retain it, as to enable the rayut or them to find a purchaser. Munro seemed to think that *generally* there was little to choose in point of moderation in assessment between Hindu and Mahomedan princes (*i*). "We find," he said, "the assessment as high in the territories of Hindu as of Mahomedan Chiefs." And again:—"Among the Chieftains of the Northern Circars, descended from the ancient sovereigns of Orissa, and who have for ages been in a great measure independent, as well as among many of the Rajahs of the upper and lower Carnatic, descended from the sovereigns of Vizianagar (Vidyanagar, Bijanagar), or their deputies, and who also since the fall of that empire have, in a great measure, been independent, *we find the same rate of assessment, amounting usually to about one-half, and fluctuating, according to the soil, from two-fifths to three-fifths of the gross produce with little variation*, except that in some places it is paid in kind, and in others in money." And again:—"The few imperfect records which have reached us of the revenues of Vizianagar, the last of the *great* Hindu powers, do not show that

(*h*) Gleig's Life of Munro, Vol. III., p. 332.
(*i*) See also Elph. Hist., p. 423.

the assessment was lighter under that Government than under its Mahomedan successors. If, then, there ever did in any age prevail throughout India a moderate land-tax, its loss must be attributed to some other cause than that of Mahomedan invasion" (*j*). He then refers to the moderation in assessment and to the financial reforms of the great Mogul Emperor, Akbar, also recorded by Mr. Elphinstone (*k*), and Mr. Patton (*l*). Both of the latter authors speak of Akbar's celebrated Brahman Minister, Raja Todar Mul (*m*). Mr. Patton particularly notices the employment of such a revenue minister as a signal instance of the influence of Hindus upon Mahomedan Governments, and of the wisdom of the enlightened sovereign, by whom he was appointed, in making such a selection. To some of Akbar's measures we must presently recur. Ambar Malik, when conducting the Government of the Nizam Shahi dynasty at Ahmadnagar, with the liberality of spirit which influenced Akbar, is said to have introduced the Mirasi system in the Dekkan (*n*). It is, however, for the reasons we have already mentioned, probable that he was only the reviver of it. Sir Thomas Munro's Minute of 1824 continues thus:—"There is, however, no ground, either from tradition or record, or from the present state of the country, for believing that a moderate land-tax was ever at any time throughout India the general principle of its revenue system. It is much more likely that a variety of systems have always prevailed in different provinces at the same time,—some more, some less favourable to the people; some admitting of private landed property, some rejecting it; that in the same province different systems have

(*j*) Gleig's Life of Munro, Vol. III., pp. 333, 334.

(*k*) Elph. Hist., p. 471 *et seq.*, p. 474.

(*l*) Principles of Asiatic Monarchies, p. 110 *et seq.*, p. 114 *et seq.*

(*m*) Occasionally spelled Tudor Mull and Tooril Mul, Patton 111., Wilks' Mysore, p. 102, Madras reprint; Elph. Hist., pp. 443, 474.

(*n*) Elph. Hist., pp. 482, 483; Gleig's Life of Munro, Vol. III., pp. 334, 335. Rev. Sel., Vol. IV., pp. 409 *et seq.*, 418 *et seq.* to p. 430, by Mr. Robertson; and pp. 318, 472 *et seq.* by Mr. Chaplin commenting on Mr. Robertson's remarks.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

predominated at different times ; and that the system of all land being the property of the Circar (Sarkar) has sometimes succeeded that of private landed property, and sometimes given way to it. At Vizianagar, the seat of the last *great* Hindu Government, and in the countries immediately around it, where, according to the theory of private landed property having been the ancient Hindu system *until* destroyed by foreign invasion, we might naturally hope to see it in its greatest perfection, we find no trace or record of its having ever existed. In the countries in the Peninsula it is most perfect in Kanara, which was long, and in Malabar, which was a considerable, time under a Mahomedan Government. Next to these provinces it is most complete in Travancore, which never was subdued by that power. In Arcot and Tanjore it is less valuable than in Travancore, and in Madura and Tinnevelly still less so than in Arcot. In a narrow strip of country along the eastern side of the Western Ghauts, from the south of Mysore to Satara, it is found nearly in the same state as in the adjoining districts below the Ghauts. With the exception of this narrow slip, it is unknown in Mysore, in the Southern Mahratta Country, in the ceded districts, and in the Northern Circars. It is unknown in Bijapûr ; it is found further north at Sholapûr, on the same footing as at Satara, but again disappears to the eastward on the Nizam's frontier. In Satara the proportion of Mirasdars to other occupants of the land is two to one ; in Poona three to one ; and in Ahmadnagar about equal. In Khandesh there are very few Mirasdars, and it is thought by the Collector, Captain Briggs, that miras has generally ceased in that province since its conquest by the Mahomedans in 1306. But Mr. Chaplin thinks that there is no proof that it existed antecedent to the Mahomedan conquest. The Miras system (*o*) was established in Ahmadnagar about the year

(*o*) Grant Duff, in speaking of the Dekkan, says :—" The Mirasdar is an hereditary occupant whom the Government cannot displace as long as he pays the assessment on his field. With various privileges and distinctions in his village, of minor consequence, the Mirasdar has the important power of selling or transferring his right of occupancy at pleasure. To

1600, by Malik Ambar, the Mahomedan ruler of that province, and in some other provinces where it is found, and which were long under the Mahomedan dominion. It is uncertain whether it is of Hindu or Mussalmani origin. It is no doubt possible that private landed property may in some countries have been swept away by the violence of Mahomedan invasion, and the long continuance of oppressive Government; but it is equally possible that the same thing may have been produced long before the Mahomedan conquest, by the wars arising among the Hindus themselves, and by the subversion of one great Hindu empire by another; and it is probable that enlightened princes, both Hindu and Mahomedan, seeking the welfare of their subjects, may have either revived or introduced private landed property into their dominions" (*p*). He then proceeds to say that "in most districts the miras is worth little, and has no value that might not be easily given to the lands in every province by a moderate reduction in the assessment. It is much more important to ascertain how this moderate assessment is to be gradually introduced, and private lands and property reared upon it, than to seek to trace the origin and the fluctuations of miras. It is only *on the Malabar Coast* that the miras yields such a landlord's rent as to make it saleable. In Arcot it yields little landlord's rent, and though nominally saleable can seldom be sold. In the southern provinces it gives hardly any landlord's rent, and

render this right saleable, of course infers a low rate of assessment; and much discussion, as to his being the proprietor of the soil, has in consequence arisen in different parts of British India. It is a current opinion in the Mahratta Country that all of the lands were originally of this description."—Grant Duff's Hist., Vol. I., p. 22. As to Miras in Southern India, see Rev. Sel., Vol. I., 811 *et seq.*, and pp. 900, 906; Rev. Sel., Vol. IV., p. 474, para. 114.

(*p*) Gleig's Life of Munro, Vol. III., pp. 335, 336. Mr. (afterwards Sir Henry) Pottinger writing as Collector of Ahmednagar, in 1822, said:—"The Mirasi tenure has existed in this part of India (in common, I believe, with all others) from time immemorial, and when I have inquired about the period of its establishment, I have been told I might as well inquire when the soil was made." Rev. Sel., Vol. IV., p. 736.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

in the Dekkan the assessment is usually so high as to leave little or none, and the land when thrown up by the Mirasdar can seldom pay the old rent, because the uncertain tenure of the cultivator (oopari) prevents his bestowing the same labour upon it. It may, therefore, be assumed that, except in a few districts, miras land yields no landlord's rent. *But this does not hinder it from being a desirable property;* for as a man cannot always find employment for his labour and stock, it is of great importance to possess land by which this employment may be secured. *In Cirkar (Sarkar) land, as well as miras, rayuts sometimes have a landlord's rent;* for it is evident that whenever they so far improve their land as to derive from it more than the ordinary profit of stock, the excess is landlord's rent; but they are never sure of long enjoying this advantage, as they are constantly liable to be deprived of it by injudicious over-assessment. While this state of insecurity exists, no body of substantial landholders can ever arise; nor can the country improve, or the revenue rest on a solid foundation. In order to make the land generally saleable, to encourage the rayuts to improve it, and to regard it as a permanent hereditary property, the assessment must be fixed, and more moderate in general than it now is; and, above all, so clearly defined as not to be liable to increase from ignorance or caprice." This is a long quotation, but we have thought it better to allow Sir Thomas Munro to speak for himself as to his meaning of private landed property than to abridge his remarks. He evidently regards the miras of the Dekkan as private landed property, although he believed that, in many districts, it yielded but little, if any, landlord's rent, and although the assessment was not permanently fixed. Taken as a whole, his remarks amount to this—that miras, even without a permanently fixed assessment, is the private landed property of the mirasdar, but not so valuable as when the assessment is permanently fixed. Further, it is evident that he regarded the landed property belonging to the rayuts in Kanara, Soonda and Ankola as a species of miras. He said that on the Malabar Coast only did miras yield such a landlord's rent

as to make it saleable. In the Malabar Coast are included Kanara, Soonda, and consequently Ankola (as being part of Soonda) and other provinces. With all due respect for his opinion, that on the Malabar Coast only was the miras marketable, we must observe that any one familiar with this Presidency, or who has sat in its Sadr Adalut or High Court, must be aware that not only miras lands, but lands held on inferior tenure, have been the subject of alienation and charge in the provinces of this Presidency, and that such sales and incumbrances have been recognised by those courts. Miras lands have been and are so sold and incumbered and treated as private property, albeit that the claim to fixity of assessment has been long since extinguished by the Mahratta Government (*q*).

Sir T. Munro, as we have seen, admits, in his Minute of 1824, that even the common Sarkari tenant may have a property in the soil. It seems also to be nearly certain that, in advocating, as above, a fixed rent, he did not mean a rent fixed for ever. In a subsequent part of that Minute (*r*) he speaks of the introduction of a fixed assessment into Baramahl, Coimbatore and the Ceded Districts, in all of which he says the survey assessment has, besides giving a beginning to private landed property, simplified and facilitated the collection of the revenue." He, however, adds:— "No survey assessment of a great province can ever be made so correct as not to require future alteration; when, therefore, it has been completed with as much care as possible, a trial should always be made of it for six or seven years. This period will be sufficient to discover all defects in the assessment. A general revision of it should then be made, and wherever it might be found too high, it should be lowered, and it may then with safety be made permanent. None of the districts, however, in which the survey assessment had been introduced had

(*q*) Rev. Sel., Vol. IV., pp. 474, 475, 479, 541, 649; Mr. Chaplin's Report of 20th August 1822, paragraphs 114, 122, 130, 143; Capt. Robertson's Report, 10th October 1821, para. 51; and Capt. Grant's Replies, 17th June 1822.

(*r*) Gleig's Life of Munro, Vol. III., pp. 349, 350.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

the benefit of such a trial, as in all of them a permanent settlement, or lease, was introduced very soon after the completion of the survey. Coimbatore was more fortunate than the rest; it escaped the decennial lease, and is now the best ordered, the most easily managed, and the most thriving district under the Madras Government. A survey assessment, besides its other advantages, prevents thousands of disputes and litigations about rent and boundaries, and *it furnishes a standard by which the revenue of the country can at any time be raised or lowered according as the state of affairs may require an increase of the burdens of the people or may admit of their diminution.* I trust that we shall never have occasion to go beyond the original assessment, and that we shall in time be able to make considerable reductions in it. The fixed assessment will not for some years have the same effect in encouraging improvements as it had before the introduction of the leases and permanent settlements; because these measures have shaken the confidence of the rayuts in the continuance of the present system, and will render them cautious in undertaking improvements, lest they should be prevented from enjoying the full benefit of them by being placed under a renter or a zemindar. Some years, therefore, must yet elapse before this apprehension can subside, and the survey assessment have its full effect in encouraging improvement and promoting the growth of landed property." In the conclusion of the same minute he says:—"I have, in the course of this minute, urged again and again the expediency of lowering our land revenue, and of establishing a moderate and *fixed* assessment, because I am satisfied that this measure alone would be much more effectual, than all other measures combined, in promoting the improvement both of the country and of the people. But before we can lower the land revenue to the best advantage, we ought to know clearly what it is we are giving up. As the information requisite for this purpose can only be obtained from an accurate survey of each province, these surveys, where still wanting, should be undertaken wherever the Collectors are competent to the

task. When completed, they will furnish a groundwork on which the land revenue of the country may with safety hereafter be lowered or raised, according to circumstances. We should look forward to a time when it may be lowered. India should, like England, be relieved from a part of her burdens whenever the state of affairs may permit such a change. Whatever surplus might remain after the payment of all civil and military charges, and of all charges connected with the improvement or protection of the country, should be remitted. The remission granted in peace might be again imposed in war, *and even something additional.* This would probably obviate, in a great measure, the necessity of raising money by loans on the recurrence of war. The people would bear the addition willingly, when they knew that it was for a temporary object; and the remission, which had been previously granted, would dispose them the more readily to place confidence in the assurance of Government, that the increase was not intended to be permanent" (*s*). By a fixed assessment he distinctly appears to have meant fixed *sub modo,* not inalterably fixed. He intended that the right to raise the land revenue, if necessary, should be reserved, but that the resort to such a measure should be rare, and that the Government should decide whether or not the occasion had arrived for an exercise of the power of enhancement. This minute of 1824 is a statement of the general policy of Sir Thomas Munro. The passages, which we have quoted, should be kept in mind, when we come to his letters written in 1800, with regard to Kanara, as to some extent furnishing a key to the sense in which he used the terms "private property" and "fixed assessment."

In advocating his favourite rayutwari system in the same Minute (*t*), and with it the gradual introduction of a fixed and moderate money assessment, he is careful to impress on his readers that "before we endeavour to make such a change in any district, it is absolutely necessary that we should survey its lands, and ascertain as nearly as possible its average

(*s*) Gleig's Life of Munro, Vol. III., pp. 389, 390.

(*t*) *Ibid.* pp. 353, 354.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

revenue for a long series of years. If we attempt, without this previous knowledge, to convert a fluctuating into a fixed rent, we shall certainly fail, even if our knowledge should be so complete as to enable us to distribute fairly upon the land a fair assessment exactly equal to its former average revenue." And here may be appropriately quoted one of his aphorisms (*u*) :—"There is nothing we ought to avoid so cautiously as precipitancy in committing the faith of Government in permanent measures of which we cannot possibly foresee the consequences, and which may often be quite contrary to our expectations. We ought always to keep open the road for correcting our mistakes, and never to bind ourselves in such a way, by hasty regulations, as to render our injustice, once committed, permanent." We are inclined to infer from this, and the preceding quotations, that Sir Thomas Munro would have deemed the imposition of an inalterable assessment so light in its pressure upon one province or one individual as to render it necessary for Government to lay a proportionately heavier tax upon other provinces or other individuals, in order to bring the revenue up to the level of the exigencies of the State, as precipitate and unjust.

There has not been any more able or more zealous upholder of the hereditary and indefeasible right of the rayut in India to property in the land and stronger opponent of the zemindari permanent settlement system than Colonel Wilks, who has devoted the 5th Chapter of his History of Mysore to those subjects; but he, while objecting to frequent fluctuation in Government assessment, maintained that an inalterably fixed rate of assessment was not a necessary element in the constitution of such property and was objectionable (*uu*).

In a despatch of the Government of Madras, of the 24th October 1808, to the Court of Directors (Rev. Sel., Vol. I., p. 481, para. 62), the former speaks of private property in

(*u*) Gleig's Life of Munro, Vol. II., p. 263.

(*uu*) History of Mysore, Vol. I., p. 122. Madras reprint.

Kanara in the same sense, thus :—"With the exception of the provinces of Malabar and Kanara, and other districts in which the traces of private property existed when they became subject to the British Government, *or, perhaps, more correctly speaking, where the assessment on the land is comparatively light,* the provinces subject to the Presidency of Fort St. George are described as exhibiting nearly the same system of landed property and revenue policy. The interest in the soil was divided between the Sarkar and the rayuts, and the share of Government constituted so large a portion of the produce as to leave little more to the rayut than the interest of an hereditary tenant."

The term "proprietor of land", as used in the Regulations of the Madras Government, had a technical statutory signification conferred upon it by Madras Reg. XXVII. of 1802, Sec. 2, which enacted that the "designation of proprietor of land," "whenever it occurs in any Regulation, shall describe zemindars, independent talukdars, and all actual proprietors of land who pay the revenue assessed upon their estates immediately to Government." A portion, however, of the preamble to Madras Reg. XXV. of 1802, (which was passed with a view to the establishment in the Presidency of Madras of a permanent settlement on the Cornwallis principle) after stating that it had been customary to regulate the augmentation of the assessment of land revenue by the inquiries and opinions of the local officers appointed by the ruling power for the time being, recited "that, in the attainment of an increased revenue on such foundations, it has been usual for the Government to deprive the zemindars, and to appoint persons on its own behalf to the management of the zemindaries, thereby reserving to the ruling power the implied right, and the actual exercise of the proprietary possession of all lands whatever," but admitted that such a mode of administration was injurious to (*inter alia*) the security of "private property"; and Sec. 2 provided that, upon the fixing of an assessment under that Act, "the proprietary right of the soil shall become vested in the zemindars or other proprietors of land, and in their heirs and law-

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

ful successors for ever." Madras Reg. XXXI. of 1802, (passed for trying the validity of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue, &c.,) in its preamble, recited that "the ruling power of the provinces, now subject to the Government of Fort St. George, has, in conformity to the ancient usages of the country, reserved to itself, and has exercised the actual proprietary right of lands of every description," and that "consistently with that principle all alienations of land, except by the consent and authority of the ruling power, are violations of that right; but" that "considerable portions of land have been alienated by the unauthorized encroachments of the present possessors, by the clandestine collusion of local officers, and by other fraudulent means." Doubts having arisen as to the construction of Reg. XXV. of 1802, and of Regulations XXVIII. and XXX. of 1802 (which two latter enactments professed to regulate to a certain extent the relations of landlord and tenant), the Madras Legislature, by Reg. IV. of 1822, "declared that the provisions of Regulations XXV., XXVIII. and XXX. of 1802 were not meant to define, limit, infringe or destroy, the actual rights of any description of landholders or tenants; but merely to point out in what manner tenants might be proceeded against, in the event of their not paying the rents justly due from them, leaving them to recover their rights, if infringed, with full costs and damages, in the established courts of justice." This Regulation did not touch Reg. XXXI. of 1802, but, in the recent case of *the Collector of Trichinopoly* v. *Lakkamani* (*v*), it has been decided by H. M. Privy Council that the object of that Regulation was only the protection of the revenue from invalid *lakhiraj* grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue, and that it was not intended to confer upon Government any title which did not then exist. The words "alienations of land" were held to refer not to mere transfers from one proprietor to another, but to grants

(*v*) Law Rep., 1 Indian Appeals, 282, 304, 308.

for holding lands exempt from the payment of revenue. It was in the same case ruled that the preamble of Reg. XXV. of 1802 must be regarded as recognizing the right of private property, and not as asserting a right on the part of Government to deprive or dispossess zemindars in their lifetime, or, after their deaths, their heirs, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of the revenue, and that the affirmative words in the 2nd section of that Regulation neither gave new rights to the owners of lands not permanently assessed, nor took away from them any rights which they then had, but merely vested in all zemindars, &c, an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. That decision finally disposes of any inferences hostile to the right of private property in the soil which had previously been drawn from the inartistically penned preambles of Regs. XXV. and XXXI. of 1802. To the preamble of Reg. XXV. of 1802, so far as it relates to the right of Government to enhance the assessment of land revenue, we shall presently again advert. That regulation, in introducing the Cornwallis permanent settlement in the territories of Madras, has never been acted upon in the province of Kanara.

Having given a general view of the Hindu and Mahomedan law as to the proprietorship of land in India, and as to the revenue payable in respect of it to the State, and the opinions of Mountstuart Elphinstone, Sir Thomas Munro, Professor Wilson, Colonel Wilks and other writers on those questions as they stood at the commencement of the British Rule, we, with a vivid sense of the wisdom of the remark of Mr. Elphinstone, (fortified as it was by a similar expression of opinion by Sir Thomas Munro already quoted) that "many of the disputes about the property in the soil have been occasioned by applying, to all parts of the country, facts which are only true of particular tracts, and by including, in conclusions drawn from one sort of tenure, other tenures totally dissimilar in

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

their nature" (*w*), now proceed to consider the history of the district in which the plaintiff's lands are situated, and whether, in opposition to what would seem to have been the general rule, that history reveals any special and permanent limitation of the sovereign's share of the produce existing in practice before the acquisition of the provinces of Soonda and Kanara in 1799 by the East India Company, or made by any duly constituted authority since that event. Such we deem to be practically the question to be determined.

The history of the Land Revenue of Kanara is to be found chiefly in Munro's Report of the 31st May 1800 addressed to the Madras Board of Revenue (*x*), Colonel Wilks' History of Mysore (*y*), and a Minute of the Madras Board of Revenue of the 5th January 1818 (*z*).

The Nairs (Nayrs) seem to have been the first rayut landlords or *mula-vargdars* of whom there is any record. Under them were, as tenants, two classes, the *mul-gainis* (permanent tenants) and *chali-gainis* (temporary tenants) already mentioned. Land originally waste or which had devolved upon the State by escheat or abandonment, when let to a tenant by the State, was called a *gaini-varg*. A *muli-varg* was both hereditary and alienable, and so long as the *mula-vargdar* paid the Government land revenue he could not be disturbed.

From time immemorial until the conquest of Kanara (circa 1252 of the Christian era) by the Pandian princes of Madura, one-sixth of the produce (in rough grain), according to Hindu Law, is stated to have been paid by the landlord for the support of the State (*a*). The conquerors altered the mode of payment to a delivery of the sixth divested

(*w*) Elph. Hist., 4th ed., p. 73. (*x*) Exhibit A, pp. 5, 9, *et. seq.*

(*y*) P. 95 *et seq.* Madras reprint.

(*z*) Exhibit U, Printed Books, Vol. II., p. 28; and Rev. Sel., Vol. I., pp. 885, 894.

(*a*) Munro, Exh. A., p. 9, para. 6; Col. Wilks' Mysore, Vol. I., p. 94; Rev. Sel., Vol. I., p. 895, para. 48.

of the husk, which change had the effect of increasing the assessment to the extent of about 10 per cent.

On the Pandian conquest most of the Nair landlords are said to have been expelled, and their privileges appear to have been conferred on the ancestors of the present Hullers and various other castes now in possession of the *muli-vargs*. The descendants of the *Mulgainidars* who held under the Nair landlords are called *Nair-Mulgainidars* to distinguish them from the *Shud-Mulgainidars*, who subsequently acquired *mulgaini* holdings under the new landlords. We, however, must limit our remarks to the rights of the *Mulavargdars* and the *Gaini-vargdars*, inasmuch as the plaintiff in the present case occupies these positions only (*b*).

The assessment of one-sixth of the produce in grain divested of the husk continued until A.D. 1336 (*c*), when the

(*b*) Rev. Sel., Vol. 1, p. 895. In the Fifth Parliamentary Report of 1812, p. 77. of the Madras reprint, the Committee have confounded the *Nair-Mulgainidars* (or, as they have styled them, the *Nair Mul-guenies*), with the *Mulavargdars* (or *Mulgars*), who are the landlords, the *Nair-Mulgainidars* being, as above described, only a class of tenants of high degree. The error seems to have arisen from a misapprehension by the Committee of the remarks made by Munro, after he had left Kanara, on Mr. Ravenshaw's survey of Barcoor, on the 1st July 1801, printed in the Appendix to the fifth Report at p. 467 of the Madras reprint, under the incorrect title of extracts of Report from Principal (it ought to have been Ex-Principal) Collector of Kanara. The passage in Munro's remarks is as follows :—"Besides the *Mulgaini*, or tenant by purchase, there is in some parts of Kanara, and probably in Bárcoor, another species of tenants for ever, called the *Nair-gaini*. The origin of this tenure is, by some, derived from the tenants having held of the Nairs, who were in ancient times masters of the country : but the more common opinion derives it from agricultural services, which gave the right of ploughing ; the word *Nair* signifying a plough ; and in this way it corresponds in some degree to the description, which has sometimes been given of the socage tenure. The *Nair Mulgaini*, as it is usually called, is both a more ancient and more secure tenure than the other, properly denominated *Shud Mul-gaini*, or tenure by simple purchase. In this last case, when the descent to heirs is not particularly specified, there are instances of the landlords resuming the farm on the death of the tenant ; but he is never allowed to retain it, unless where he is supported by the revenue servants." See also Exhibit A., pp. 85, 86, containing only a portion of Munro's remarks on Mr. Ravenshaw's survey of Barcoor.

(*c*) Wilks' Hist. of Mysore, p. 94.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

Pandian dynasty yielded to the new Government established at Vizianagar (Vijeyanuggur or Bijeyanuggur), founded by fugitives from the subverted Government of Varangul.

Hurryhur Roy (*d*) (whose minister was the author Vidyaranya), subsequently to his acquisition of Kanara and before the year A.D. 1347, made a new assessment of that province purporting to be in accordance with the principles laid down in the Shastrs, which (says Sir Thomas Munro) "suppose the produce to be to the seed as twelve to one, and which prescribe the proportions into which it is to be divided between the Sarkar, the landlord and the cultivator. Agreeably to the Shastrs, therefore, he (Hurryhur Roy) reckoned that 2½ kátis of seed yielded 30 kátis of paddy (rice in husk), which he divided as follows :—

To the landlord	7½
To the cultivator or labourer ...	15
To the Sarkar	7½
	30

and still following the Shastrs he divided the Sarkar's share as follows :—

For the Sarkar one-sixth of the gross produce	5
Dewasthan	1
Brahmans, one-twentieth	1½
	7½

He reckoned the 7½ kátis of paddy equal to half or 3¾ kátis of rice, from which he deducted 4 hanis or one-tenth for beating it from the paddy. The balance, 3 kátis and 15 hanis, he supposed to be the fund from which the Sarkar rent of one Ghetti Pagoda to 2½ kátis of land was to be paid. Though it is said that, in the 7½ parts of the gross produce taken as the Sarkar's share, 2½ are for Pagodas (Dewasthan) and Brahmans, it appears from a statement of

(*d*) Harihar Rai.

Inams that the share actually allowed them was little more than one. This curtailment was made on the idea of their possessing lands to a large amount not included in the Jama (*e*) (revenue), and it appears from investigations made in subsequent periods that these Inams, added to what they held, openly exceeded the 2½ parts which ought to have been allotted to them. Besides Inams to Brahmans and Pagodas, there were many Inams to Polygars and Patels, not entered in the Jama, which were brought forward and added to it in succeeding reigns."

"This settlement of Hurryhur Roy, which is referred to in all after assessments, and is the foundation of the present land rent of Kanara, is not supposed to have been made from any actual measurement, but merely from the rough estimate of the quantity of seed reported to have been usually sown in each field." This is what is called the Bijávári (corruptly Beejwarry) mode of computation (*f*). In continuation Sir Thomas Munro said :—"The distance of Kanara from the seat of Government might have been the reason why it (the assessment) was conducted either very carelessly or with great indulgence to the inhabitants, for, between the years 1348 and 1366, additions were made to the Jama of above 20 per cent., arising solely from lands not entered in the original settlement. From this time down to the year 1587, when Sadasiv Roy made over Kanara on certain conditions to Chunnapa Gour of Keldi, the founder of the Bednore Government, the Sarkar rental continued unaltered. It was so light that the inhabitants could have no pretence for demanding a reduction of it."

Subsequently Sir T. Munro observes :—"The Bednore family made no additions till 1618, when they imposed *an additional assessment of 50 per cent. on the whole of the Jama,*

(*e*) Corruptly Jumma.

(*f*) So called from Bij, which signifies seed. Printed Books, Vol. III., p. 232. Plaintiff's Exh. II., para 42. The demerits of the Bijavari principle of assessment are fully exposed by Mr. Blane in paragraphs 60 and 61 of his Report of Sept. 20, 1848, Exh. A., pp. 184, 208, 209, 237.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

except in what is called the Hoobloe of Mangalore (*g*), which comprises about one-third of Kanara, and which, being at the time held by a number of tributary Polygars, was only partially subjected to this assessment. Between this period and 1660 the only considerable addition they made to it was by an assessment of cocoanut and other fruit trees, which, under the Vizianagar Government, do not seem ever to have paid any rent exclusive of the land rent. The Vizianagar assessment, with all additions down to this era incorporated with it, has been more than a century considered as the Rekah or standard rent, of all the lands in the country, cultivated and waste." From it was deducted all *kulnasht* (corruptly *koolnusht* or *coolnusht* (*h*)) land, ancient waste, and such as was found too highly assessed or unfit for cultivation. The remainder was the shist or actual demand (*i*). All subsequent additions to the assessment of land in Kanara are called *shamil*. The *shist* and *shamil*

(*g*) In South Kanara.

(*h*) See Revenue Board's minute of 16th November 1843, Exhibit I.I., Printed Books, Vol. III., p. 232, para. 42. The word 'shist' literally signifies a line, and its derivative senses are easily referred to this primitive meaning. Thus it is sometimes used for the border line of a field between two boundary marks, and even for the aim or direction of a gun. In the account of a rayut the standard or rekah demand being placed opposite to his name was followed in the same line by a series of deductions on account of waste and over-assessed lands, and lands unfit for cultivation where these were included in his varg or estate. At the end of the line the remainder, after the sum of these several deductions had been subtracted from the *rekah* or standard assessment of the Vizianagar Government, was cast out and constituted the actual demand subject to casual temporary remissions dependent on the circumstances of the particular year which were allowed in settling the *jamabandi*, viz.: the revenue demand to be actually paid in that year. The aggregate of the several shists of the rayuts was the shist of the village, and this was obviously arrived at by placing the rayuts' names, the sums due from them according to the rekah, and the recognised ordinary deductions, in columns properly headed on a tabular statement. Thus as the individual rayut's shist came to mean the sum claimable from him, so the aggregate of such shists became the shist of the village and of the *magani*.

(*i*) *Kulnasht* is composed of two words: *kul*, a cultivator or rayut, and *nasht*, loss. The compound *kulnasht* usually means a *varg* or land abandoned or deserted by the proprietary cultivator. *Rekah nasht* usually means

conjointly are known as the *beriz*, and are sometimes described as the *kadim beriz, i.e.*, old assessment.

The remarks of Colonel Wilks upon these stages of the revenue history of Kanara, which differ slightly from those of Munro, to whose reports he had access, deserve quotation. After referring to the work of Vidyaranya, Minister of Hurryhur Roy, which was intended as a manual for the officers of State, Colonel Wilks says "it is founded on the text of Parasara, with a copious commentary by Vidyaranya, assigning as usual to the king one-sixth as the royal share of the crop, and very rudely pronouncing the king who takes more to be infamous in this world, and consigned to (Nareka) the infernal regions in the next. This share he was desirous of converting from a grain to a money payment, and established fixed rules for the conversion, founded on the quantity of land, the requisite seed, the average increase, and the value of grain. The result literally conforms to the law of the Digest, viz., one-sixth to the king, one-thirtieth to the Brahmans, one-twentieth to the gods, the rest to the proprietor. It is unnecessary to enter further into this detail, than to state that thirty is the whole number on which the distribution is made; of which it is calculated that fifteen, or one-half, is consumed in the expenses of agriculture, and the maintenance of the farmer's family. The distribution of the remaining fifteen stands thus :—

land fit for cultivation but primevally or immemorially waste, and in respect of which, as waste, a remission was made by the Vizianagar Government from the *rekah* in ascertaining the *shist*. The term *nasht* seems to have been applied to land periodically overflowed by the sea in creeks, &c.; land torn up and rendered uncultivable by the action of rivers or nullahs (water-courses), land never cultivated since the time of the Vizianagar Government, and which, from its situation amongst hills and jungles, being deemed unlikely to be ever again cultivated, was withdrawn from the sum of the general assessment of the country. See, as to such lands, Exhibit A., pp. 67, 119, 128, 129, 178, 186, 187, 188 *et seq.*, to 198, 200, 201 to 204, 206, 207; Exh. X, Printed Bks., Vol. II., p. 48, para. 3; Exh. No. 29, para. 18; Exh. No. 30, para. 30; Exh. G.G., 11th January 1836, para. 19; Exh. A. K. 1806, 1807; Exh. I.I. (10th November 1843), paras. 16, 17, 18, 29. Printed Bks., Vol III., pp. 108, 109, 185, 201, 223, 227, 249.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

To the sovereign one-sixth of the crop produce.	5
To the Brahmans one-twentieth	1½
To the gods one-thirtieth	1
Remains proprietor's share, which is exactly one-fourth	7¼
	15

The share payable to the Brahmans and the gods was received by the sovereign and by him distributed; so that the sum actually received by the sovereign and by the proprietor were equal. Instead of satisfying himself with leaving things as they were, and taking from this province a smaller revenue on account of its remote situation, as suggested in the report" (of Munro) ["it is in fact not remote compared with many other parts of the dominion,] it is evident that Hurryhur Roy called in the aid of Shastrs for the purpose of raising the revenue; and did actually raise it exactly 20 per cent. by his skill in applying that authority to his calculations; the result of the whole detail being that he received one Ghetti Pagoda for two kátis and a half of land, the same sum only having been formerly paid for three kátis. From 1336 until 1618, when the hereditary Governors of the province began to aim at independence, this rate continued unaltered; but soon after this latter period an additional assessment of 50 per cent. was levied on the whole revenue, with some exceptions, in which the usurper was opposed by minor usurpations; but even at this period lands were saleable at ten years' purchase, and, in some instances, so high as twenty-four and thirty."

The astute application of the Hindu Law by Hurryhur Roy was, in raising the land revenue 20 per cent., a thinly veiled violation of that law. In further augmenting that revenue 50 per cent., the Bednore Government did not even affect to take the Hindu Law for their guide.

Munro, in his same report of the 31st May 1800, enumerates the subsequent additions to the land revenue of Kanara. These were :—

"The Pagdi or extra assessment of 1711, imposed by the wife of the Raja, who was regent during the madness of her husband, on the occasion of the marriage of her son Buswapa Naique; it was at the rate of one-sixteenth of the shist or standard rent, and was for a few years levied as a Nuzza, but soon came to be considered as a part of the Jama.

Judgment.

"The Putti or extra assessment of 1718, imposed by the Rajah of Soonda for the purpose of discharging the Mogul Peshkash (tribute) at the rate of 30 per cent. upon all gardens, and from 2½ to 12½ upon all fields of rice. The addition under this head in Buntwal (*j*) was made by the Adju Polygar who then rented part of that district.

"The Chucker or extra assessment of 1720 was imposed in lieu of interest paid to the savkars who advanced the early kists (instalments of revenue) for the rayuts. In Bednore always 50 per cent. had been paid by the middle of October, but only 12½ per cent. in Kanara. The Rajah wished to regulate the kists of Kanara in the same manner; but the inhabitants, from the lateness of their crops, being unable to comply, it was agreed that he should borrow the money, and that they should pay him as interest half an anna, or one-thirty-second part additional on the shist of standard rent.

"The assessment of Buswapa Naique was made in 1723 at the rate of one-tenth of an anna, or one hundred and sixtieth part of the standard rent in order to erect chutters (*k*) and feed pilgrims on account of the murder of his father."

The next in order mentioned by Munro are extra assessments by petty Polygars in Mangalore Hooblee, and "Nuzzurs formerly made to the Rajahs of betel-nut and pepper converted into money and a variety of other trifling articles."

(*j*) In South Kanara.

(*k*) Dharmsalas, places of shelter for pilgrims and travellers.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

"The addition of 1758 was made by the Rani to discharge the arrears of the Mahratta Chaut."

They had accumulated to so great a sum that she pretended she could not pay them off without a Nuzzerana from the inhabitants equal to one year's rent. To this demand they utterly refused to submit, and when she attempted to force compliance, they rose in a body upon the Amildars. The matter was at last accommodated by their consenting to pay 50 per cent. in four years at the rate of 12½ per cent. each year, but on the 5th year when it was to have been remitted, Hyder ordered it to be made permanent.

"Extra assessments made by petty Polygars in the districts which they rented, to supply deficiencies from increase of waste lands.

"An increase of 2½ per cent. in Soonda, which was the advantage gained by substituting the Savanoor for the Dharwar Pagodas. It contains also a small additional rent upon salt pans, the produce of cocoanut trees formerly presented to Amildars at festivals, and a great variety of other trifling articles."

On Hyder (Haidar) Ali's conquest of Bednore (which included Kanara and Soonda) in 1763 (*l*) he is stated by Sir T. Munro to have caused "an investigation to be made into every source of revenue for the purpose of augmenting it wherever it could be done." In a tabular statement in connexion with his report, Sir T. Munro particularised the extra assessment imposed by Hyder Ali. Having been "informed that a great part of the deductions made in three preceding centuries had been granted in consequence of false statements, he (Hyder), therefore, ordered that such a portion of these lands as amounted, when all extra assessments were added, to their standard rent, should be added to their *Jama*; but as it appeared on inquiry that no such lands were actually in cultivation, this sum was added to the rent of those that were so. He ordered the extra assessment of

(*l*) Wilks' Hist., Mysore, Vol. I., p. 95, and *post* Chap. XII.

1711 to be imposed upon the lands of Patels and other head rayuts who had then been excused, and an additional assessment of 12,000 Pagodas to be laid upon the Mangalore Hooblee, because it had been only partially subjected to the additional 50 per cent. of 1618."

Judgment.

Munro next mentions the additions made to the assessment of Kanara and Soonda by Shaik Ayaz (*m*), who was appointed by Hyder Ali, Dewan of the provinces of Nuggur and Kanara. He restored to the standard rent the charge in respect of Tunkas (*n*) to peons which had been previously remitted. "He raised the rent of all cocoanut plantations. He calculated the amount of all Roosooms, services, &c., usually exacted from Amildars and Killadars, and added them to the land rent. These various heads taken together form the greatest extra assessment next to that imposed immediately after the conquest by Hyder himself, and as it is also one of the most recent it is always most complained of; and on this account Dhoondia, after taking Nuggur in June last promised in the Kaulnamas which he sent into Kanara to abolish it."

Munro, after mentioning some further extra assessments made in the time of Hyder Ali, proceeded to the reign of his successor Tippoo, during which the chief "addition made to the land rent was by the total resumption of all Inams." He then continued thus:—"The other heads of actual increase, being similar to those of his father, require no explanation; but there is, in column 64 (of Munro's tabular statement) a nominal increase of no less than Star Pagodas 2,52,589-27-66, no part of which was ever collected. It is composed of a tax upon cocoanut trees amounting to Star Pagodas 17,753-32-54 ordered in 1789, of an additional land tax of 30 per cent., and of a tax amounting to 7½ per cent. of the land rents, which, it was supposed, might be raised from shroffs and tobacco, by

(*m*) As to Shaik Ayaz, see Wilks' Hist., Mysore, Vol. I., p. 406 Madras reprint.

(*n*) See Exhibit A, pp. 12, 14.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

farming the sale of coins to particular shroffs and raising the price of tobacco. This 37½ per cent. imposed in 1794 as well as a Nuzzerana in 1792 of 50 per cent., seem to have been suggested to Tippoo by his advisers merely with a view of involving his accounts in confusion, that they might with the more safety embezzle the revenue; for in fact it was only the land rent that was collected and entered in the village accounts, but which was afterwards in the Kutcherries classed under the heads of Nuzzerana 37½ per cent. additional and 'Land Rent,' and the simple balance of land rent by being divided into these three classes, grew into such a confused mass of balances as to set all investigation at defiance." After stating that those portions of the land rent which had been received in kind were commuted for a money payment, Munro says :—"The increase of land rent is in his tabular statement divided into 'extra assessments' and 'new heads of revenue,' because it is the extra assessments alone that add to the burthen of the landholders, and exhibit the excess of the modern above the ancient assessment of the same lands. The annual assessment is still written, not only in all general accounts of districts, but in those of every landholder. It is alone considered as the due of Government; all subsequent additions are considered as oppressive exactions. They are not called rent, but are stigmatised with the names of chaut, imposts, fines, &c., and distinguished by the name of the Dewan who first levied them. They were always opposed by the inhabitants, and it was, therefore, necessary to make them as general and equal as possible by an even rate of percentage. This forms a remarkable distinction between the land rent of Kanara and that of Mysore and the neighbouring countries, for there the rent of every village and of almost every rayut fluctuates yearly because it is not fixed upon the land, but is regulated according to the supposed ability of the cultivator."

In a previous part of the same report (*o*) he had spoken of the accounts kept by the Kurnums or Shanbogues in

(*o*) Exhibit A, p. 9.

black books, which at that time (A.D. 1800) were he said in a sufficient state of preservation "to furnish a complete abstract of the land rent during a period of more than four hundred years." Those books appear to have since, for the most part, been mutilated by insects or destroyed by fire (*p*). Subsequently (*q*) he says that those accounts "demonstrate that the fourth of the gross produce, said to have been taken as the Sarkar's share in the Vizianagar assessment, was fully as much as was paid by the rayuts under that Government, for after the addition made to it by the Bednore family, in 1618, of 50 per cent., besides many smaller additions making about 20 per cent. more, it appears to have been little felt by the inhabitants. Indeed it appears that the Sarkar's share was reckoned higher than it ought to have been by adopting the Shastr rule of the seed yielding 12 to 1 as the basis of cultivation; for an ancient estimate of produce and the expenses of cultivation drawn up at the time of the original assessment makes the Sarkar share one-sixth, which was probably nearer the truth than one-fourth. Whatever proportion it might have been to the gross produce in 1762-63, at the time of the conquest of Kanara by Hyder, it still seems to have been sufficiently moderate to have enabled the country, if not to extend its cultivation, at least to preserve it in the same flourishing state in which it had been in earlier times. Where districts were in a decline, it was not caused by the land rent, but had been the consequence of the diminution of their population during the frequent revolts of their numerous petty Polygars, or it had been occasioned by temporary acts of oppression; for the Rajahs of Bednore, though they adhered to the principle of a fixed land rent, frequently permitted their favourites and dependants, when placed in the management of

(*p*) Exhibit A, p. 164. See also Printed Bks., Vol. III., pp. 73, 78, 80, 81, *et seq.* 234; viz. Exh. 12, paras. 71 to 75; Exh. H. H., paras. 2,5; and Exh. I.I., para 53, which show that the value of the black books was wholly over-estimated by Munro. *Vide infra*, p. 134, note (*v*), and p. 201 *et seq.*

(*q*) *Ibid.*, p. 19.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

districts, to ruin many of the principal inhabitants by the exaction of exorbitant fines under various pretences. From these and other causes there were, in many parts of the country, tracts of waste land which paid no rent, and which could not be sold (*r*); but the lands which were occupied could, for the most part, be sold at the rate of from one to eight or ten years' purchase of the Sarkar rent. I have met with some instances of fields which had been sold so high as twenty-five and thirty years under the Bednore princes; therefore the outstanding balances which have since been common in Kanara were almost unknown. It was thought unnecessary to keep annual details of the state of cultivation. It was never inquired what portion of his estate a landlord cultivated or left waste. It was expected that in whatever state they were he was to pay the whole rent." Munro then states that sales of land for arrears of revenue were of rare occurrence and considered harsh measures. Time was usually granted, or a loan of money given, or the debt remitted.—"The village or district was scarce ever assessed for individual failures. On the whole the revenue was then easily realised, and when there were at times outstanding balances, they seem to have proceeded rather from mismanagement than from the operation of the land rent."

He then laments that "Kanara has, however, now (1800) completely fallen from the state of prosperity," that its lands have to a great extent become waste or unsaleable, and its inhabitants as poor as those of the adjacent countries. He particularises Ankola (with others) as having become depopulated, and attributes the decadence of Kanara and Ankola, &c., to the oppressions of Hyder Ali and Tippoo. Speaking of Hyder Ali, he says that "the whole course of the administration of his deputies seems to have been nothing but a series of experiments made for the purpose of discovering the utmost extent to which the land rent could be carried, or how much it was possible to extort from the farmer without diminishing cultivation."

(*r*) That is, for which a purchaser could not be found.

The reign of Tippoo, his successor, as we have already stated, was marked by heavier assessment and oppression and greater mismanagement. When the revenue fell into arrear "he knew no way of making up for failures, but by compelling one part of the rayuts to pay for the deficiencies of the others. He made them pay not only those which arose from the waste lands, but also of dead and deserted rayuts, which failures were daily increasing. Severity and a certain degree of vigilance and control in the early part of his Government kept the collections for some time nearly at their former standard; but it was impossible they could remain so long, for the amount of land left unoccupied from the flight or death of its cultivators became at last so great that it could not be discharged by the remaining part of the inhabitants, and the collections before the end of his reign fell short of the assessment from 10 to 60 per cent. The measure which he adopted to preserve his revenue was that which most effectually destroyed it. He forced the rayuts, who were present, to cultivate the lands of those that were absent, but, as the increased rent of their own lands required all their care and labour, by turning a part of it to those new lands, the produce of their own was diminished, and they became incapable of paying the rent of either" (*s*). This policy extinguished very many of the ancient proprietors and rendered land unsaleable. The practice of forcing lands upon cultivators Munro described as prevalent more or less through Kanara, and as very general everywhere to the north of Kundapur (Cundapoor) *i.e.*, through Soonda and Ankola (*t*).

In paragraph 4 of the same report (*u*), Munro speaks of the inhabitants of Kanara (except in the districts claimed by the Polygars) as "having once been in possession of a fixed land rent" and as "still universally possessing their lands as private property—circumstances which distinguish Ka-

(*s*) Munro's Report, 31st May 1800, Exhibit A, p. 22.
(*t*) *Ibid.*, pp. 22, 23. (*u*) Exhibit A, p. 8.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

nara in a remarkable manner from all the countries beyond the Ghauts, and which must be attended to *in whatever system may hereafter be framed* for its management." Again, in paragraph 22, he says:—"The demand of the Sarkar was fixed for two centuries and a half under the Vizianagar Government, and may be said to have been fixed under the Bednore Rajahs, also, during more than a century; for in all that period the *fixed additions* to it hardly amounted to ten per cent." And in paragraph 23 he said:—"The alienation of land by sale or otherwise was unrestrained; for nothing but gift, or sale, or nonpayment of rent could take it from the owner. If he absconded with balances standing against him, it was transferred to another person, but if he or his heir returned at ever so distant a period, it was restored on either of them paying a reasonable compensation for the balance, and such extra expenses as might have been incurred on account of improvements." And in paragraph 26:—"The lands of Kanara are still to be considered as held under the same conditions, and governed by the same rules of transfer, as they were under the ancient Government. The increase of assessment by Hyder and Tippoo Sultan has in some places annihilated the old proprietors, and it has everywhere diminished the quantity" (*quære* value or interest) "but not altered the nature of the property." He then testifies to the earnestness with which they cherish the residue which has been left to them; and that "the destruction of part of the property by the heavy demands of the Sarkar seems rather to have increased than impaired the attachment of the proprietor to the remainder. He never quits the estate of his ancestors while he can live upon it as a farmer or a labourer. But if, after paying the Sarkar rent, and what is due to himself for his labour, there remains the most trifling surplus, he will almost as soon part with his life as with his estate." "Disputes" (*i.e.*, between private individuals) "concerning land, where the property frequently does not amount to ten pagodas, are often carried before every successive Amildar for twenty years."

The right, here mentioned by Sir Thomas Munro to have existed in ancient times, whereby proprietors who had deserted their lands might, after the lapse of an indefinite period, come back and reclaim them, has been in some instances acknowledged; but Mr. Blane, in his report as Collector of Kanara, made on the 20th September 1848, a State paper, which is preëminent in ability and accuracy amongst the many which have been given in evidence in this case, says that "this right" to recover the land "is not at all well established, even as a theoretical one" (*v*). The same right has in bygone years been claimed by, and in some instances allowed to, Mirasdars in this Presidency; but that pretension, though often made in the High Court, has never, so far as we know, been recognised by it in any actual decision. On the contrary the claim to *miras* land has, for a long time past, been regarded here as subject to the same laws of limitation as regulate suits to recover other immoveable property. *Salu* v. *Ravji* (*w*). *Arjuna* v. *Bhavan* (*x*). A *dictum* in 10 Bombay High Court Reports 326, not essential to the decision there pronounced, if intended, (a point perhaps not quite certain,) to indicate different doctrine, would appear to have been made without a recollection of those cases, which have been frequently followed, and should, we think, be regarded as settled law in this Court. We shall presently see that Munro himself in practice limited very strictly the supposed right to claim the restoration of deserted land. To his Minute of 1824 we have already referred as placing private immoveable property in Kanara in the same category with *miras*. His own narrative of the history of the revenue in Kanara (in his report of the 31st May 1800) shows that in describing it as once having had a fixed rent, he cannot mean absolutely fixed even before the conquest by Hyder Ali. That narrative exhibits how the land revenue previously to that event varied, and that the variation was almost uniformly in the direction of augmentation. The fluctua-

(*v*) Exhibit A, p. 238. (*w*) 1 Bom. H. C. Rep. 41.

(*x*) 4 *Ibid.*, 133 A. C. J.; and *see* 6 *Ibid.* 66 A. C. J.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

tions were neither so frequent nor so violent as in many other parts of India, but they sufficiently indicated that the rulers of Kanara did not regard themselves as confined within any impassable boundary in the nature of an invariable standard. Munro, therefore, in speaking of the past condition of that province, must be understood as using the term "fixed" with respect to land revenue in a comparative and not in an absolute sense. His previous experience, as an Assistant Collector, in a province (*y*) where the land revenue was high and in frequent fluctuation, caused its comparative lightness and steadiness in Kanara previously to its subjugation by Hyder Ali to strike him more forcibly than would have happened had his financial career commenced in Malabar or other favoured provinces where, as already remarked, he would have found what he, Col. Wilks, and other writers on Indian affairs describe as private landed property, *i.e.*, where the land-holding rayut is subjected to so moderate an assessment as to leave him a profit beyond the expenses of cultivation sufficient to render his land marketable. This does not necessarily imply an assessment absolutely inalterable. The subsequent experience of Munro in the Dekkan in 1817 and 1818 considerably extended his information, and, as his Minute of 1824 indicates, enabled him to identify private property in land in Kanara with the Miras tenure in that region.

The fact, that the British Government succeeded neither the Visianagar nor Bednore raj in Kanara, but the Mahomedan rule of Hyder and Tippoo, must not be forgotten, and, as we shall presently find, was not omitted from the consideration of Munro. Those sovereigns, at the least enforced, if they did not transcend, the Hanifian Canon that—"there shall be left for every one who cultivates his land as much as he requires for his own support till the next crop be reaped and that of his family and for seed. This much shall be left him. What remains is Kharaj, and shall go to the public treasury."

(*y*) Baramahl.

We now pass to the revenue history of North Kanara in so far as it regarded the Province of Soonda. Of that province, Munro, in the report of the 31st May 1800 (*z*), says :—

"Soonda has undergone a much greater reverse than even Kanara, but it has not been occasioned solely by the tyranny of the Mysore Government. Its decline seems to have begun under the Mahomedan princes of Bijapur, and to have continued under its own rajahs, who were successively tributaries to the Bijapúr sultans and the Mogul emperors, and who, besides the payments of their Peshkash, were compelled to satisfy the rapacity of the Omrahs, under whose control they were placed, by heavy exactions from their subjects."

"Soonda has, like Kanara, an ancient land rent. Sanads mention a survey made in the 2nd century : but whether what is now called the old land rent is the same or a more modern assessment is uncertain.

"Gardens or plantations of cocoanut, betel and pepper are considered as private property, and follow the same rule as in Kanara, *but all other land is supposed to belong to the Sarkar.* It is also understood that, even in gardens, the property of the soil is vested in the Sarkar, and that only the trees belong to the owner. As the Sarkar, however, has no right to the ground whilst the garden remains, this is a distinction that never can be attended with any inconvenience to him ; for when a garden is once planted it may be kept up for ever by a succession of young trees, so that he may be said to be the proprietor of the soil as well as of the produce. As in Soonda Payen Ghaut one-third of the land rent arises from cocoanut and betel-nut gardens ; *as all rice lands are occupied by Sarkar tenants* who are not removeable while they pay their rents, except in the case of another person offering a nuzzarana, which seldom happens ; as in Soonda Balaghaut about three-fourths of the land rent is drawn from gardens of

(*z*) Exhibit A, p. 27.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

betel-nut and pepper; and, as it is only in a few villages on the Mahratta frontier that the rayats ever quit their lands, there seems to be nothing else wanting but a reduction of the present assessment, in order to constitute the rice lands private property as well as the gardens. There is even now a certain class of them distinguished by the name of Shassan or Sanad lands which have in this manner become private property. They were originally waste lands for which a nuzzarana was paid to the Sarkar, in consideration of which they were made over to the purchaser for the simple shist or standard rent exempt for ever from all extra assessment. They amount to about six or eight per cent. of the Sarkar lands. All rice lands cultivated and waste, which have no sanad, being liable to be sold by the Sarkar, lands highly improved were sometimes taken from the ancient tenant and given to a stranger for a nuzzarana, who, at the same time, received a sanad which secured him against all future increase of rent."

"Exclusive of those two descriptions of sanad lands, no land in Soonda is saleable except gardens, and many of them even, in consequence of the rent with which they are loaded, are unsaleable. Punjymahl (Panchmahal) or Soonda Payen Ghaut, is nearly in the same state with respect to cultivation as the most desolate districts of Kanara; but Soonda Balaghaut is much worse than either. It is nearly a complete desert; it has not throughout its whole extent a cultivated spot of a mile square, except a few small openings thinly scattered; all the rest of the country is overgrown with so thick a forest that it can only be penetrated in the few places where roads have been made. Most of the heads of villages formerly retained parties of thieves in their service; for Soonda having long been a frontier country touching upon the boundaries of several different powers, and its jungles affording the most complete cover to banditti, it has probably been accustomed to plunder all its neighbours, and to be plundered by them ever since those circumstances concurred to favour such disorder."

From the foregoing description of Soonda we learn that, in Munro's opinion, the lands there for the most part belonged to the State, and that private property was exceptional (*a*). Certain limited species of lands, such as gardens, &c., he deemed to be private property, but rice lands he affirms to have been generally occupied by Government tenants who *ordinarily* were not removed so long as they paid their rents, unless another person offered a nuzzarana (a fine, or benevolence). It is important to observe that the plaintiff's *vargs* have been admitted by his counsel, in the course of the hearing before us, to be all rice lands (*b*). Certain rice lands, called shassan or sanadi lands, held by some persons under special sanads, containing a proviso against increase of assessment, Munro esteemed to be private property. These were exceptional; all other rice lands he asserts to belong to the State. For not one, of the many *vargs* in respect of which the plaintiff has brought this suit, has he, as already noted in the commencement of this judgment, produced a sanad, mulpatta, kaul, or other title-deed. In paragraphs 54, 55 of the report of Mr. Harris, as Collector of Kanara, to the Madras Board of Revenue, dated 14th June 1821 (*c*), he notices the extreme difficulty experienced by Munro in Ankola in obtaining any revenue accounts or documents, and he states that all were suppressed by the Shanbogues (village accountants), who pretended that during invasions they had been lost or destroyed. These officers had entered into a confederacy to conceal every account which contained information as to the productive powers of the land or mode of assessment under former Governments. Mr. Harris subsequently succeeded with great difficulty in obtaining some few accounts. He speaks of a Rekha (or shist) as es-

(*a*) See, to the like effect, the reports of Mr. Alex. Read (Collector of N. Kanara), of 1st May 1801, and 30th April 1802 in the Appx. to the Fifth Parliamentary Report (1812), Madras reprint of 1866, pp. 466 and 477; and Report of Mr. Harris of 14th June 1821, para. 24, Exh. No. 9, Printed Bks., Vol. III., pp. 33, 39.

(*b*) As to the unvarying nature of the crops, *see* plaintiff's Exhibit U., Printed Books, Vol. II., p. 31.

(*c*) Defendant's Exhibit No. 9, Printed Books, Vol. III., pp. 52, 53.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

tablished by the Adil Shah dynasty (Mahomedan) of Bijapur founded (1489 A.D.) by Yusuf (Eusof) Adil Shah, the southern boundary of whose kingdom Mountstuart Elphinstone describes as the river Tumbadra (Toongbuddra), one of the principal sources of which the maps represent as lying to the southward of Soonda and Bilghi. In the same manner as the Roman Emperors assumed the title of Cæsar, so did the kings of Bijapúr that of Adil Shah (*d*). From Yusuf Adil Shah, the Portuguese conquered Goa. (Ferishta, Vol. III., 29, 30, 34). Ankola (together with other territory) was wrested from the last of his successors by the celebrated Mahratta Chief Sivaji, A.D. 1673-1675 (*e*), in whose possession it was when visited by Dr. Fryer, A.D. 1675-76. Sivaji built there at Karwar (Carwar) the fort of Sadasivghur (*f*). He died A.D. 1680, and was succeeded by his son Sambhaji, who was executed by the command of the Emperor Aurangzib in 1689 (*g*). In his Mahrati provinces, Sivaji's revenue system was founded upon that of Dadaji Konedeo, (as to which see Grant Duff's Hist., Vol. I., p. 93), which was similar to that of Malik Ambar, (described in the same volume, pp. 70, 71). Grant Duff says :—"The assessments were made on the actual state of the crop, the proportionate division of which is stated to have been three-fifths to the rayut, and two-fifths to Government. As soon as Siváji got permanent possession of any territory, every species of military contribution was stopped; all farming of revenue ceased; and the collections were made by agents appointed by himself." (*Ibid.*, pp. 169, 170). To what extent (if any) he carried his system into effect in Ankola, there is not any evidence before us. That country does not appear to have been subject to the Mahrattas for more than nine to eleven years. Dr. Fryer's account of that country

(*d*) Fryer's Travels, p. 168, (ed. of 1698).

(*e*) Grant Duff's Hist. of the Mahrattas, Vol. I., pp. 188, 194, 250; Elph. Hist., p. 566; Fryer's Travels, Letter IV., Chap. I., pp. 146, 158.

(*f*) Grant Duff, Vol. I., p. 195. (*g*) *Ibid.*, p. 261.

in A.D. 1675-76 leads to the supposition that Sivaji had not then a very firm grasp of it.

The Dessais of Karwar and the Chief or Raja of Soonda appear to have cast off their allegiance to Sambhaji A.D. 1684, five years previously to his death (*h*). The kingdom of Bijapúr was extinguished A.D. 1686, on the capture of Bijapúr by Aurangzib in that year. The last of the Kings, Sultan Sikander Adil Shah, fell, while yet in his minority, into the hands of his conqueror, was kept a close prisoner in the Mogul camp for three years, when he died suddenly, not without suspicion of having been poisoned by Aurangzib (*i*).

The Emperor Akbar and his minister Todar Mul, after settling for the Mogul dominions the quantity of produce due to the State as land revenue, provided for its commutation into money, and, having regard to the fluctuations in the value of money, provided that the rate of commutation should be periodically reconsidered, and, if necessary, readjusted (*j*). Todar Mul's system was afterwards introduced into the Dekkan by Shah Jehan (*k*). A quinquennial scru-

(*h*) Grant Duff, Vol. I., p. 238.

(*i*) *Ibid.*, p. 246. A list of the Adil Shahs of Bijapúr down to the period at which the History of Ferishta terminates (*see* Vol. III. Ferishta by Briggs, pp. 1 to 188), is given by Mountstuart Elphinstone in his History (Appx. to 4th ed. p. 667). The last name mentioned in that list is Ibrahim Adil Shah II. He died A.D. 1627, much about the same time as Ambar Malik (Elph. Hist., p. 505, Grant Duff, Vol. I., pp. 73, 74), and was succeeded by his son Muhammad Adil Shah, who died A.D. 1656, (Elph. Hist. p. 516, Grant Duff Vol. I., 113), who was succeeded by his son Sultan Ali Adil Shah II., who died A.D. 1672, and was succeeded by his son Sultan Sikander Ali Shah, then in his fifth year (Grant Duff, Vol. I., p. 186 ; Elph. Hist., p. 566. See Fryer's Travels, Chap. IV., Letter IV., pp. 168, 173). Some of the Adil Shahs professed to be of the Shia faith, others to be Sunis of the Hanifa school. Yusuf, the founder of the dynasty, oscillated between those creeds—(Ferishta by Briggs, Vol. III., pp. 22 to 25, 28, 34). His successor Ismael was a Shia, (Elph. Hist., p. 668). Ibrahim I. was a Suni (*Ibid* ; and Ferishta, Vol. III., p. 78). His son Ali was a Shia. Ibrahim II. was a Suni of the Hanifa persuasion (Ferishta, Vol. III., pp. 116, 169 ; Elph. Hist., p. 668). In his time the Sunis obtained the supremacy. (*Ibid.*)

(*j*) Ayin Akbari, Vol. I., p. 315 ; Elph. Hist., p. 473, 4th ed. ; Galloway, 214.

(*k*) Grant Duff, Vol. I., p. 22 ; Elph. Hist., p. 514.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

tiny is, under the name of Rekah Jirti, (*jharti* (*l*)), spoken of by Mr. Harris as existing in Ankola in the time of the Adil Shah dynasty. It would seem to have been of the same character as Todar Mul's system of readjustment with the additional object of detecting frauds committed by the hereditary accountants (Shanbogues, Kulkarnis, Kurnums,) of the district (*m*). Mr. Blane mentions that periodical revisions of assessment also took place in Kanara (*n*), and Sir T. Munro states that on those occasions only, which he describes as of rare occurrence, could the rents of *Mul-gaini* tenants be raised when an additional assessment was imposed upon their landlords "after a new valuation" (*o*).

In addition to the shist, various other assessments were imposed by the Governments which prevailed from time to time in Soonda and Ankola, including that of Hyder Ali and Tippoo. That country was conquered for Hyder Ali by Fazul Oolla Khan (Hybut Jung) in December 1763 (*p*). The additional assessments were, as in Kanara proper, styled shamil, and accordingly we find in the plaintiff's Exhibit AE. (already mentioned) that the revenue charges upon his vargs appear under the name of shist and shamil. One of these extra assessments, the Putti, was imposed, as previously stated by us, to the extent of 30 per cent. on all gardens, and from $2\frac{1}{2}$ to $12\frac{1}{2}$ per cent. upon all

(*l*) A Mahrati word signifying an inspection, examination, or scrutiny

(*m*) Report of Mr. Harris to Madras Board of Revenue, 14th June 1821, paragraphs 25 and 52 to 64. (Defts.' Exhibit No. 9,) Printed Books, Vol. III., p. 39.

(*n*) Report of Mr. Blane of 20th Sept. 1848 to Madras Board of Revenue, para. 71, Exhibit A., p. 218.

(*o*) Exhibit A, pp. 85, 86, where Mr. Read, in his report of the 1st January 1814, extracts the passage from Munro's remarks on Mr. Ravenshaw's Survey of July 1801, *et vide supra* p. 21. In Malabar there was a new assessment of garden land every twelve years; Rev. Sel., Vol. I., p. 857.—Munro's Report of the 4th July, 1817. As to occasional enhancement of land revenue payable by Mirasdars in the Deccan, *see* Rev. Sel., Vol. IV., pp. 318, para. 35; p. 477, para. 130; p. 479, para. 143, and p. 527, para. 17; and as to correction of inequalities of assessment by new surveys under Native Governments, *see* p. 481, para. 151, in Mr. Chaplin's Reports of 1821 and 1822.

(*p*) Wilks' Mysore, Ch. XII., pp. 280, 281.

fields of rice, by the Rajah of Soonda, for the purpose of discharging the Mogul Peshkash (*q*), these Rajahs having become tributary to the Emperor of Delhi from or shortly after the conquest of Bijapúr by Aurangzib. Hyder Ali and Tippoo seem to have dealt with Soonda in the same way as with Kanara. Munro, in paragraph 33 of his report of the 31st May, speaking of both of these provinces, says:—"There can be little doubt that both Hyder and Tippoo generally raised rents as high as they could go, and frequently beyond what the lands could bear" (*r*); and in paragraph 36 he describes Honore and Ankola as "in a much more desolate state than any other part of Kanara" (*s*). The name of Kanara was there, as frequently on other occasions used by him and other writers, as including Soonda Balaghaut and Soonda Payen Ghaut.

We now proceed to the acquisition of Kanara and Soonda by the British in A.D. 1799.

In order to be near to the scene of action during the preparations for the final campaign against Tippoo Sahib, the Earl of Mornington (afterwards Marquis Wellesley), Governor General of India, leaving Fort William, repaired in December 1798 to Madras, and by proclamation of the 2nd of January 1799 assumed, under the Stat. 33 Geo. III. C. 52, Sec. 52, the duties of Governor of Madras, where he continued until the 5th of September in that year making the arrangements rendered necessary by the fall of Seringapatam and death of Tippoo Sahib, which occurred on the 4th of May 1799 (*t*). In a letter of the 1st of June 1799, addressed to Lieutenant-General Stuart of the Bombay Army, who had taken a brilliant part in the campaign, Lord Mornington after directing him to take possession of

(*q*) Report of Munro, 31st May 1800, para. 10 (Exhibit A, p. 13).

(*r*) Exhibit A, p. 29. (*s*) *Ibid.*, p. 31.

(*t*) Wellesley Despatches, Vol. I., pp. 384, 388, 389, 390, 391, 392, 406; Vol. IV., p. 119. Mill's Hist., Vol. V., p. 76, 5th edition.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

Kanara (*u*), which had formed part of the dominions of Tippoo, said:—

"I now proceed to add such general directions as occur to me with respect to the first settlement of the country, if it should fall into our hands. With respect to the policy to be observed upon our entrance into the Government of Kanara, our great object should be to reconcile the inhabitants to our authority by the utmost degree of indulgence to their prejudices and customs, and by refraining from any other changes of system than such as evidently tend to alleviate oppression, if oppression were felt by the people under the former Government. With this view I empower you to establish such a *temporary system of administration of revenue* and justice as may appear best calculated to maintain order and tranquillity, and to conciliate the affections of the people" (*v*).

The Commissioners first appointed for Mysore (4th June 1799), amongst whom was Colonel Barry Close, were by Lord Mornington directed not to interfere with General Stuart in the management of Kanara (*w*).

Subsequently, the duties of the Commission seem to have devolved on Colonel Barry Close alone as Resident of Mysore.

Captain Munro (already so frequently mentioned as Sir Thomas Munro, in reputation one of the brightest amongst the many illustrious names which adorn the British annals in the East) was, by Lord Mornington, appointed Collector of Kanara in June 1799 (*x*). He had previously distinguished himself as Assistant to Colonel Read in the newly acquired district of Baramahl, which Munro was reluctant to leave. On public grounds alone he accepted his new office in

(*u*) Kanara is here used in its widest sense, including Soonda.

(*v*) Wellesley Despatches, Vol. II., p. 18.

(*w*) Wellesley Despatches, Vol. II., p. 22.

(*x*) 1st Gleig's Life of Munro, pp. 224, 225, 232, 233, 237; Wellesley Despatches, Vol. II., pp. 58, 87.

Kanara (*y*). Arriving there in July 1799, he laboured incessantly in obtaining information as to the revenue and land tenures of that province, as to which he made highly valuable reports to the Government of Madras which have furnished most important materials for the arguments addressed to us on both sides in this case (*z*). The anxiety which he expressed for removal to some other district, drew forth strong expressions of the confidence which that Government reposed in his capacity. Lord Clive (Governor of Madras) through Mr. Webbe, Chief Secretary, sent to Munro this message:—"Pray tell him my desire of detaining him on the Malabar Coast has arisen from my opinion and experience of his superior management and usefulness" (*a*), and Mr. Cockburn, a distinguished member of the Madras Revenue Board (*b*), in reply to a letter from Munro, dated 28th February 1800, said:—"I regret your situation should be so extremely irksome; the more so, as any attempt to procure your removal would be considered *treason* to the State. Such is the estimation of your services, that no one is deemed equal to the performance of the difficult task you are engaged in; and though I can consider no reward adequate to the sacrifice you make, yet I trust you will be able to overcome your difficulties, and that Government will do you ample justice when you have brought the country into some degree of arrangement" (*c*).

Munro, who had in the meantime been promoted to the rank of Major, remained in Kanara until November 1800, when, in compliance with his own wishes, he was transferred

(*y*) 1st Gleig, pp. 227, 228, 234, 235, 242. 3rd Gleig, pp. 113, 115.

(*z*) See plaintiff's Exhibit A, pp. 1 to 64—Reports dated 4th May 1800, 31st May 1800, 28th June 1800, 4th November 1800, and his letter to his successors dated 4th December 1800.

(*a*) 1st Gleig, p. 310, and *see* also Exhibit C, Vol. III., Printed Books, p. 209.

(*b*) Wellesley Despatches, Vol. II., p. 239.

(*c*) *Ibid.*, p. 246, and *see* Gleig's Life of Munro, Vol. II., p. 237.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

to the Collectorship of the territories acquired in 1792 and 1799 under the treaties of Seringapatam and Mysore by the Nizam, subsequently made over by him on certain terms to the E. I. Company, and thenceforward known as the Ceded Districts (*d*). It is to Munro's career in Kanara that our attention must be directed, and to that we now revert.

At or very soon after his appointment as Collector of Kanara he appears to have been, in that capacity, placed under the immediate authority of Colonel Barry Close, the Resident at Mysore, but not to have continued so long. On the 1st of February 1800 Munro was transferred by the Government of Madras from the immediate control and superintendence of the Resident at Mysore to that of the Board of Revenue at Madras, but still was left subject to the general *political* powers of the Resident, as is shown by the following documents in evidence on behalf of the defendants as Exhibits Nos. 1 and 3 :—

DEFENDANTS' EXHIBIT No. 1.

To

CAPTAIN THOMAS MUNRO,
Collector of Kanara.

SIR,

Circumstances having now rendered it practicable to place the provinces of Kanara and Soonda under the immediate control and superintendence of the Board of Revenue at the Presidency, in the same manner as all other parts of the Company's territorial possessions under this Presidency are subjected to their authority, I am directed by the Right Honourable the Governor in Council to desire that you will obey all such orders as you may receive from that Board, and that you will make such reports and communications to it as may be necessary for the administration of the Civil Government and of the revenues of the province under your charge.

(*d*) Exhibit No. 40 M. S.; Gleig, Vol. I., pp. 300, 304, 308.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

Considering, however, the intimate connection between those provinces and the territories of His Highness the Rajah of Mysore as well as their distance from the seat of Government, the Governor in Council still judges it expedient, and accordingly directs, that you shall continue to be subject to the general political powers which have been vested in the Resident of Mysore for the conduct of affairs in the conquered countries.

As the Governor in Council considers you to be the sole judge on the spot (subject, as stated, to the orders of the Board of Revenue and of the Resident in Mysore,) of all questions relating to the administration of the revenues and of the Civil Government, His Lordship has deemed it necessary to furnish the Officer Commanding in Kanara with an explanation of the powers entrusted to you, and with orders for a compliance with your requisition for military aid according to the established usage under this Presidency; these orders are herewith transmitted to be delivered by you, and I enclose a copy of them for your information.

I am, &c.,

(Signed) J. WEBBE,
Secretary to Government.

Fort St. George, 1st February 1800.

DEFENDANTS' EXHIBIT No. 3.

Extract of a letter from Government to the Board of Revenue, dated 1st February 1800.

17. The causes which rendered it necessary to place the Collector of Kanara under the immediate authority of the Resident in Mysore, having, in a great degree, ceased to be operative by the general establishment of tranquillity throughout the conquered countries, we deem it necessary to place the provinces of Kanara and Soonda under your superintendence and control, and we desire that you will

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

furnish the Collector with all such orders and instructions as you may judge necessary for the administration of the Civil Government, and of the revenues of those provinces.

18. Under the existing arrangement for the conduct of affairs in Mysore, we still, however, judge it expedient that Captain Munro shall be subject to the general political powers which have been necessarily entrusted to Lieutenant Colonel Close; and we desire that your communications to the Collector may be made with due reference to this arrangement.

19. Having the fullest reliance on the experience, judgment, and integrity of Captain Munro, we wish him to be as little restrained as possible in the exercise of his own discretion; but as nothing can more impede the settlement of the provinces than the revival of antiquated claims to independent jurisdictions, *rights and lands*, we desire that he may be cautioned to receive such pretensions (which appear to have been too frequently advanced) with the greatest degree of caution. As we consider Captain Munro to be the sole judge on the spot in cases of this nature, we have furnished the Officer Commanding in Kanara with positive orders to comply with the requisitions of the Collector for military aid, to the extent of his means."

In the instructions (*e*) issued to Collectors under the Government of Madras, dated in June 1791, which place them under the control of the Board of Revenue (*f*), we do not find any authority given to Collectors to abandon the right of Government to vary from time to time the assessment of lands. Rule 27 is :—" That the Collector do give the most unremitting attention to ascertain the rules and rates of assessment on the rayuts under his jurisdiction, and en-

(*e*) Defendants' Exhibit 2, and Fifth Report of Parliamentary Committee 1812. Original ed. p. 709. Madras reprint, pp. 290 to 298.

(*f*) *See* especially Rules 34, 38, 45, 70, 11, 14, 17, 24, 26, &c.

deavour to fix upon some mode by which they may be regulated on general, fair, and ascertained principles." And Rule 42 is:—"That no Collector should be authorised to confer grants of lands, or authorise any alienations, sale, mortgage, or other transfer of landed property, without the express sanction of the Board of Revenue; and that he prevent all alienations, or grants of lands, by zemindars or others under his authority."

These rules direct the Collectors to ascertain existing rules and rates of assessment, but do not empower them to abandon any right which the Government may have then had to vary the rate of assessment, nor, of their own authority, to make any such variation.

Even if Munro had carried with him full powers to fix the assessment of Kanara and Soonda once and for ever, the condition of those countries during his brief sojourn in them and the amount of information which he could in that time accumulate were such as to render it improbable that he would have so bound himself and Government. In his report to the Board of Revenue, dated the 31st May 1800 (*a*), he thus describes the condition in which he found Kanara and Soonda:—"When I entered Kanara from the southward in July last, the districts of Coombla and Vittel, lying between Bekul and Mangalore (*b*), were in the possession of two chiefs, styling themselves Rajahs, who had long been pensioners of the Bombay Government. Jumalabad had refused to surrender (*c*). A great part of the country from Nulsaram to Barcoor had been ravaged by the Cooroogs. In many places the cattle had been swept away, the villages burnt, and the inhabitants, men, women and children, carried off into captivity. The

(*a*) Plaintiff's Exhibit A., p. 5.

(*b*) These four places are in South Kanara, of which Mount Delly seems to be the southernmost point.

(*c*) Wellesley Despatches, Vol. II., pp. 114, 266.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

followers of Dhoondia (*d*) had made an irruption from Bednore into the district of Cundapoor. Bilghi was in possession of a Polygar. Ankola and Sadasivghur were garrisoned by the Sultan's (Tippoo's) troops, and the Rajah of Soonda had entered that district as his ancient inheritance. It was the height of the monsoon, and rivers, which cross the country at the distance of every five or six miles, were all full, and could only be crossed at the few places where there were canoes, so that it was extremely difficult either to communicate orders or assemble the ryots of the neighbouring districts in order to settle their rents." Munro had only two European Assistants, (one of whom was Mr. Alexander Read, hereafter to be more especially mentioned,) and experienced great difficulty in procuring natives capable of giving him any efficient aid (*e*). In a letter of the 20th December 1799 to Mr. Cockburn, he says:—"It cannot be supposed that I yet know much of the state of landed property. I have seen enough, however, to convince me that it is very different in different parts of the country," &c. (*f*). This he wrote from Huldipore (called Haleydapoor on Stanford's Map of India), a place to the southward of the river Tuddri and Gokurn, and before he had reached Ankola, which, as already observed, lies to the northward of Gokurn and its northern boundary, the river Gangavali. Yet we are asked on behalf of the plaintiff to believe that within fifteen days afterwards, possibly before he had yet set foot in Ankola—certainly before he could have had any adequate information respecting it (*g*), he determined finally and for all time what should be the maximum of assessment in that

(*d*) Dhoondia Waugh, Wellesley Despatches, Vol. II., pp. 53, 114, 267, eventually defeated and slain by the forces under Col. Wellesley on Sept. 10th, 1800; Gleig, Vol. I., p. 268, and see *Ibid.* p. 247, *et seq.*

(*e*) Gleig, Vol. I., pp. 239, 240. Plaintiff's Exhibit A., p. 5.

Ibid., p. 240.

(*g*) The jamabandi of Soonda for Fusli 1209 was not finished until the middle of April 1800. See Munro's letter of the 4th May 1800 to the Board of Revenue in Exhibit A, p. 1, paragraph 1. And see the concluding portion of paragraph 3 of his letter of the 31st May 1800 to the Board, in Exhibit

country. That is the effect which the plaintiff attributes to Exhibit E, a document bearing date on the 4th of January 1800, which has been dealt with by his counsel as of cardinal importance, virtually as if it were the principal muniment of the rights of the landholders of Ankola. It is difficult to suppose that an officer, so noted for ability and discretion as Munro, would, at the inception of his mission, when he was candidly admitting the scantiness of his knowledge and the varieties in the landed properties in the districts with which he had to deal, have compromised himself and the Government which he served.

That exhibit is as follows :—

PLAINTIFF'S EXHIBIT E (*h*).

" To

The dignified Govindrav,

Tahsildar of the Talooka of Sadashivgad, &c.

Compliments.—At this time [be it known that] the villages of the Kasba of Ankola are being surveyed in order to [the making of] an estimate of the crops [Azmaish]. Therefore the ryots will be somewhat disheartened. By the survey being made the total assessment will not at all be increased. The estimate is being made for (the preparation of) the Sarkar's accounts, but [this] is not being done for raising the total assessment. Due notice in accordance herewith should be caused to be given to the ryots. There is no occasion whatever for any fears being entertained. Consequently the ryots should be duly informed. And, besides this, in those places where the assessment [shist] of (*i. e.* on) the ryots appears to be heavy, there it will be reduced, but the total assessment will not

A, p. 8, in which he says that the Kanara jamabandi was not finished until January and that of Soonda delayed his report until May. See also his letter of the 28th February 1800 to Mr. Cockburn in Gleig's Life of Munro, Vol. I., pp. 244, 245.

(*h*) Printed Books, Vol. II., p. 6.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

be increased. In accordance herewith the ryots should be informed. If twenty persons, rope-bearers, be collected and brought, the wages of the said (persons) will be fixed according to the pay of the peons in (this) office. If the office people request [you to supply] ropes, wood, &c., that may be required for the survey, then what is necessary should be brought and supplied. Credit will be given to you by the Sarkar for the amount of the price thereof. May [this] be known.

The date the 4th of January. Shidharte Savatsar (A.D. 1800).

THOMAS MUNRO.

Postscript.—The Moktesars and the village accountants of the village should be warned to appear before Babovrav for the purpose of pointing out the boundaries of the Kasba. The ryots of the respective *vargs* (*i.e.*, ancestral estates) should be warned to be present at the time of the measurement to point out their respective lands. May this be known.

The date as above.

THOMAS MUNRO."

An endorsement shows that this letter was received on the day of its date.

In estimating the scope and purpose of this letter addressed to the Tahsildar, it must be recollected that Munro was only settling the land revenue for the then current year 1209 of the Fusli Era. The commencement of his first letter (dated 4th May 1800), printed in Exhibit A and addressed to the Madras Board of Revenue, shows this to be so. It began thus :—" I now send you my Moyen (Muaiyan) Zabitahs and estimates for the current year Fusli 1209." " Muaiyan Zabitah " for Fusli 1209, means the appointed or established arrangement of jamabandi for that

year. Many passages in his reports, made while he was in Kanara, indicate clearly that it was for that year only he was settling the land revenue (*i*), and it will be presently manifest that he could not have then had authority to do more. In considering that point it is indispensable to bear in mind that the popularity amongst statesmen of the Bengal Permanent Settlement System was, A.D. 1799, at the time of the fall of Seringapatam and the conquest of Kanara and the adjacent provinces, though near its culminating point, still in the ascendant. In fact some portions of territory within the Madras Presidency were subsequently brought under the Permanent Settlement Zemindari System (*j*). In his despatch to Lord Mornington of the 21st March 1799, received at Fort William on the 5th August 1799 (*k*), Mr. Secretary Dundas (afterwards Lord Melville) speaks of the Permanent Settlement System in terms of admiration, although admitting that there was then in Bengal what he regarded as only a temporary increase of arrears of land revenue. He says :—" On the subject of Bengal I have much satisfaction in feeling that I have occasion to say very little. The wise system adopted during Lord Cornwallis's administration, and to which I make no doubt you will adhere, leaves me no reason to apprehend any real danger to the wealth and resources of the valuable provinces under your administration."

On the 24th October 1799, Lord Mornington in his despatch to Mr. Dundas said :—

" We are now employed in framing a code for the introduction of a *permanent settlement of revenue,* and a system of judicature for the Company's possessions in the Peninsula. I have ordered two members of the Board of Revenue to proceed immediately from Madras to Calcutta for

(*i*) *See* also Exh. 9, (14th June 1821), end of para. 19, Printed Bks., III., p. 38, the statement of Mr. Harris to that effect.

(*j*) Those places are enumerated in Rev. Sel., Vol. I., p. 885, note, and *see* p. 911.

(*k*) Wellesley Despatches, Vol. II., p. 107.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

the purpose of aiding in this salutary work; and I trust that its benefits will be extended in a short time over the whole of the Northern Circars, the Jaghire, the countries under the Company's dominion ceded in the last war, and those conquered in this (*with the exception of Malabar and Kanara*), the countries of the Southern, Eastern and Western Polygars, and the Kingdom of Tanjore" (*l*).

And, so late as the 5th of March 1800, Lord Mornington wrote in his despatch to Mr. Dundas as representing the Home Government, thus:—

"The conquest of Mysore will, I trust, enable us to settle Malabar and Kanara on a systematic and durable plan of Government. The subject is now under my consideration" (*m*).

Hence it is evident that, so late as the 5th of March 1800, the Governor General had not determined the basis on which the settlement of Malabar and Kanara should be made, and, therefore, that he, who originally appointed Munro as Collector, up to that time had not empowered him to bind the Government by any final settlement. In the term 'Kanara,' as there and in the previous despatch of the 24th October 1799 issued by Lord Mornington, we understand Soonda and therefore Ankola to be included.

The first paragraph of Munro's letter of the 9th of November 1800 to the Board of Revenue, in which he acknowledges a letter from the Board of the 26th March 1800, shows that he had been by them warned in that letter that he "might be suddenly called upon to make a permanent settlement," and is of much importance as establishing that he had received that information before he had penned either of his two

(*l*) Wellesley Despatches, Vol. II., pp. 128, 130. The instructions as to the mode in which a permanent settlement should be made in the provinces other than Malabar and Kanara, appear to have been issued by Lord Mornington's Government on the 31st December 1799. Rev. Sel., Vol. IV., p. 930, para. 31.

(*m*) *Ibid.*, p. 248.

principal letters to the Board of Revenue, viz., those of the 31st May 1800 and 9th of November 1800. A "permanent settlement," (in the sense in which that phrase, then generally and by Munro individually (*n*), as those and other of his letters show, was understood,) implied the creation of a landed gentry of the zemindari type, a recognition of them as proprietors of the soil, and a fixing, with them, in perpetuity of the revenue payable to Government, an arrangement, which if carried into effect on the Bengal model, would have been irreconcilable with a recognition of the existing rayuts (whose holdings or vargs were for the most part very small) as owners of the soil paying the land revenue directly to Government. It would undoubtedly have been a dereliction of duty, so grave on the part of Munro under such circumstances, not to have informed the Board, at the earliest moment after receiving their letter of the 26th March 1800, that he had already entered into an arrangement with the rayuts in Kanara and Soonda or either of them wholly inconsistent with any such permanent settlement, and whereby the maximum of their quit rent or land-tax had been fixed with them for ever as enjoying their lands directly under Government, that we could not believe, without the most distinct proof, that an officer of his probity and intelligence would have been guilty of such an omission, if he believed that he had so compromised Government. In none of his letters do we find any admission or suggestion that he had done so, or that he conceived that he had any authority so to bind Government on his own responsibility. Strong recommendations by him on the subject of a maximum of assessment and in favour of a reduction of assessment, we do find, but no statement of any pledges given by him to the rayuts on those points. He evidently did not for a moment presume that he had any power to give them. He writes to Mr. Cockburn, on the 20th December 1799 (*o*) :—"I was resolved, after making allowances for the desolation of two wars, to bring the revenue back to what it had been in

(*n*) Exhibit A, pp. 56, 59, 62. (*o*) Gleig's Life of Munro, Vol. I., p. 238.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

1789, the last year of any regular government in Tippoo's reign, and then to leave it to Government to relinquish as much of it as they might think fit." And in his letter of the 31st May 1800 (*p*) he says:—"I considered myself merely as a Collector, who was to investigate and report upon the state of the country." Any measures which he then described himself as having taken, the whole tenor of that letter shows that he regarded as temporary and pending the final determination of Government. It is too as "a Collector" simply that Lord Mornington described him in his despatch of the 3rd August 1799 to the Court of Directors (*q*).

And Munro prefaces his account of the vicissitudes of the revenue of Kanara and Soonda thus (*r*):—"In order to enable the Board to determine as to the principle on which the permanent assessment of this country is to be made, it is necessary that I should offer some remarks on the ancient and present state of its landed property."

And in his report of the 9th November 1800 to the Board of Revenue (*s*) he said:—

"23. Supposing, however, that it may be expedient for the present to adopt the system of great estates, the regulations I have recommended will apply to every part of Kanara and to the greater part of Ankola, Soonda, and Bilghi; but in many villages in Bilghi and Ankola, and throughout the whole of the villages in Soonda running along the Mahratta frontier, the land belongs to the Sirkar and may, therefore, be divided into estates, and given away at the pleasure of Government. These villages are in general in such a desolate state that a permanent settlement of them would now be made under very great disadvantages. It would, for many reasons, be best to defer the settlement of them and also of Kanara for at least five years. The Collector can hardly in a shorter period gain the requisite

(*p*) Exhibit A, p. 18. (*q*) Wellesley Despatches, Vol. II., p. 87.
(*r*) Exhibit A, p. 23, paragraph 22. (*s*) Exhibit A, p. 62, paragraph 23.

knowledge of the country for carrying into execution a measure of so much importance." So that here, acting in the spirit of the aphorism already quoted (*supra*, p. 74), in which he condemns precipitancy in entering into binding engagements, he proposes that any final arrangement as to Ankola and Soonda should be deferred for at least five years. That he was not over-cautious in that advice is evident from the fact that the opinion of Mr. Harris 21 years afterwards, *i. e.*, in 1821, concurred in by the Board of Revenue, was that the information regarding the resources of Ankola and Soonda was even then too imperfect to justify any final arrangement as to them (*t*). It is impossible to suppose that Munro, holding such language in November 1800 as that which we have just quoted, could have believed that, on the 5th of January in the same year, he had irrevocably pledged the State never to increase the assessment in Ankola, in which he had then, at the utmost, only just set his foot for the first time, and as to the final arrangement of which he, in the November following, professed himself unable to decide, and advised Government to defer its own judgment for at least five years. The survey, contemplated in the letter (E) to the Tahsildar, if it ever took place, must have been of the most summary and imperfect kind. No record of it is forthcoming, and Munro does not appear to have, in any of his reports or letters to the Board of Revenue or Government, ever mentioned it. The only survey, which he states to have been made in Kanara or Soonda in his time, was in Barcoor in South Kanara, and that was proceeding when he left Kanara for the Ceded Districts (*u*).

(*t*) See his letter of the 14th June 1821 to the Board of Revenue, Printed Books, Vol. III., p. 33 *et seq.* and Exhibit A, p. 154 paragraph 50 of the Board of Revenue's Minute of the 15th September 1831, and their Minute of the 29th October 1821, Exh. No. 85 M. S.

(*u*) *See* Exhibit A., pp. 3, 69, 75, para. 7 of Munro's letter of 4th May 1800 ; para. 11 of his letter of 9th December 1800 ; para. 11 of Mr. Read's letter of 1st Jan. 1814 ; and Exhibit A. J., dated 31st May 1800, being copy of a MS. letter from Government authorising the survey of Barcoor.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

Writing on the 4th May 1800 to the Board of Revenue in para. 7 of his letter he says :—

"In the charges extraordinary the first article is the survey establishment, *the lands in this country never having been surveyed.* The extent of cultivated and waste being unknown, and the fields being so mixed and divided that hardly anybody but the owners knew to whom they belonged, I saw that, without surveying one district, it would be impossible to form any judgment of the rate of assessment; I, therefore, began upon the district of Barcoor, and it will yet be several months before it is finished" (*v*).

That passage is especially important as proving that, without some adequate survey of at least one district, he thought it would be impossible to form any judgment as to what the rate of assessment should be. The document E was issued in anticipation of, and to prevent, possible opposition on the part of the rayuts to a rough survey, and not after such information, as it might afford, had been obtained. The only allusion throughout the documentary evidence which we find to any survey, as having taken place in the northern talukas of Kanara, previously to 1821-22, is in the 15th paragraph of the letter of Mr. Harris of the 2nd August 1820 (*w*). It is not quite clear when that survey took place. He describes it as merely "a partial field survey." Assuming it to have been the survey spoken of in Munro's letter of the 4th January 1800 to the Tahsildar (E), we are of opinion that it must have been made simply for the purpose of fixing the land revenue in Ankola for that year (Fusli 1209), and that Munro's promise not to increase the assessment meant that he would not augment it for that particular year. More than this we think he had neither the power nor the intention to promise.

Another document relied upon for the plaintiff was Exhibit F, which is an alleged copy of a Kowl (Kaul), the

(*v*) Exhibit A, p. 3. (*w*) Printed Books, Vol. III., p. 16.

original of which is, by a memorandum on the same Exhibit (F), asserted to have been signed by Munro. This Exhibit F is said to have been found in the Tahsildar's Cutcherry, but there is not any proof that it is an authentic copy of any original, or that such original was ever issued to the public. The style of it is unlike that of Munro as will be seen by comparing it with plaintiff's Exhibit H, which is in *pari materia*, and is authentic, bearing, as is admitted, Munro's signature. In Exhibit H we find nothing as to the villainy of Tippoo's Government, as there is in Exhibit F. The memorandum upon Exhibit F contains a further statement that the original was forwarded with a report on the 22nd March, Fusli 1236, A.D. 1827, under order No. 224 of Mr. Malcolm Lewin, Assistant Sub-Collector. Exhibit F is as follows :—

"Copy of Munro Saheb's Kaul (or writing of assurance)" (*x*) "A Kaulnama (or writing of assurance) to the address of the subjects (or tenants) *i.e.* [Riaya] and persons free to stay or depart [Khooshbash] of the Taluka of Ankola, &c., as follows :—

"Under the late Government of Tippoo, in consequence of all [manner of] villainy, and the Rayuts having fled away [or absconded], the whole of the lands have been lying waste. Therefore, with regard to the cultivation of the lands in future, a message for the assurance of the Rayuts is given as follows :—

"Should any Rayuts cultivate lands, the levying in future of more than [what was levied as] the sum of the ancient assessment, as well as [what was levied as] Albhat under the late Government should be deferred. Should any one cultivate lands, the settlement of the revenue [Jamabandi] will be made with all indulgence (or kindness) as may be proper according to (the yield of) the produce, in this way : (namely) at one-fourth [the assessment] for the first year, half for the second year, three-fourths for the third year, and

(*x*) For this Exhibit, see Printed Books, Vol. II., p. 2.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

the full [assessment] for the fourth year. Wherefore the people, (who are) the Rayats, having come, should cultivate their lands. This will not be changed by the Sarkar. The date the 26th of March in the Christian year 1800."

Judgment.

Memorandum on above Exhibit.

"There is on the original the English writing of Munro Saheb."

"The original was forwarded with a report (on) the 22nd of March in the Fusli year 1236, A.D. 1827, under order No. 224 of Mr. Malcolm Lewin, A : (*ie.*, additional) Sub-Collector."

It will be observed that the date of Exhibit F is the 26th March 1800, whereas the date of Exhibit H (*y*) is the following day, the 27th March 1800. The correspondence relating to the forwarding in 1827 to Mr. Malcolm Lewin of a Kaulnama is at p. 403 of Vol. II. of the Printed Books marked G. In that correspondence the Kaulnama is simply described as granted by Munro A.D. 1800. Neither the month nor day of the month on which it bore date is given. The correspondence shows that the original Kaulnama was forwarded to Mr. Lewin, and was returned by him, and replaced in the Daftar at the Tahsildar's Cutcherry at Ankola on the 3rd April 1827. No original, identical with F or dated on the 26th March 1800, has been found in that Cutcherry, but Exhibit H, (which is a Kaulnama bearing date on the 27th March 1800, and, like F, relates to waste or deserted lands only,) is produced from the Daftar of that Cutcherry, and we believe that it must have been the Kaulnama forwarded to and returned by Mr. Lewin. It is unnecessary to go so far as to say that Exhibit F has been fabricated for the purpose of the present litigation ; it is sufficient to say that its genuineness is wholly unproved. It wears very much the aspect of a clumsy paraphrase or summary, from memory, of Exhibit H, probably made by a

(*y*) Printed Books, Vol. II., pp. 3, 4, and 5.

karkûn on the occasion of the despatching of Exhibit H to Mr. Lewin, and intended to be kept in the Daftar as a memorial of Exhibit H.

Even, however, if we assume F to be a correct copy of an original Kaulnama, signed by Munro, it does not aid the plaintiff's case. 1st. Because it relates only to lands which were waste or deserted A.D. 1800, and the plaintiff's vargs are not proved to be of that description; and, 2ndly. Because it does not contain any pledge that the revenue shall not be eventually raised beyond the former assessment. It merely states that any such augmentation should be "deferred."

Judgment.

Exhibit H, which has also been relied on for the plaintiff as fixing a maximum of assessment, relates only to lands which were waste or deserted in the year 1800. The first part of it is applicable to such lands in the Panchmahals in Ankola. The 2nd part to similar lands in "Mirjan and other places" in Ankola. Mirjan, though in Ankola, is not in the Panchmahals, where the plaintiff's vargs are situated. It is worthy of special remark that Munro, in Exhibit H, directs that the waste or deserted lands should be offered in the first instance to the original proprietors (Moolkars, *i.e.*, Mulgars or Mulavargdars) and, if they were not forthcoming, to such persons as might apply for the lands, and that if the original Mulgars, within a twelvemonth, repaid to the successful applicants the expenses of cultivation and one year's assessment, the former might recover the lands from the latter, but otherwise the latter should be confirmed in their holdings. This was a very great curtailment of the alleged right of the Mulgars to recover their mula-vargs after any lapse of time.

In his report of the 31st May 1800 (para. 3.) Munro thus describes the difficulties against which he had to contend in making his settlement of the revenue for the Fusli year 1209 (*z*) :—

(*z*) Exhibit A, pp. 7, 8.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

"Previous to the conquest of Kanara by Hyder, all lands were private property, the rents were fixed (*a*) and moderate; but the Amildars of Hyder and Tippoo laid on one assessment after another, till at last rents were as high as in Mysore. The inhabitants, anxious to recover what they had lost, had frequently been in a state of partial insurrection, and had frequently been severely punished. The principal men among them, however, never lost sight of their object; they kept up a general correspondence from one end of the province to the other by means of confidential people, who were maintained by private contributions among themselves. They made an attempt, on every change of a Dewan or Asoph, to gain their point, and they had so far succeeded in 1796 as to obtain a nominal remission of about twenty per cent, which was paid the first year as a bribe to the officers of Government, and went the following two years partly to the revenue servants and partly to the inhabitants, especially the higher classes who least wanted it. They thought the transfer of the country to the Company a favourable opportunity of securing what they had so recently gained, and what they could only have expected to hold by large and continual payments to the officers of revenue. With this view, therefore, wherever I went they sent me in a paper, a kind of bill of rights, stating this deduction as the only preliminary on which they could agree to come to any discussion at all of their settlements. *I, of course, refused to admit any previous stipulations.* I answered them that the revenue must first be brought back to its former standard, and that then whatever appeared oppressive should be remitted. Finding that, after several weeks wasted in messages, I would not give up, they at last came in. The other districts followed their example, and, after the fall of Jumalabad in the beginning of October, the

(*a*) We have already pointed out that Munro's own historical narrative of the Revenue is inconsistent with this assertion, if the word "fixed" were used by him to indicate that the rents were invariable. He could not, however, have meant that, and must have used the expression in a modified sense.

country being forced from the enemy, the ryots made very little further opposition to the settlements. Those of Kanara were finished in January, and the Jamabandi might have been forwarded to you in February, had not the placing Soonda under my charge made it necessary to wait for the settlement of that province, which, from its desolate state and from the disorders to which it had long been exposed, required a much longer time in proportion to its rent than Kanara."

In the same report Munro strongly inculcates the advantages of moderation in the assessment of land. When (he says) the land revenue "is fixed and light, the farmer sees that he will reap the reward of his own industry; the cheerful prospect of improving his situation animates his labours, and enables him to replace in a short time the losses he may sustain from adverse seasons, the devastations of war, and other accidents" (*b*). In para. 33 he continues thus:— "Having thus explained at some length the ancient and present state of Kanara and Soonda, it only remains for me to offer a few remarks respecting what ought to be the rate of assessment, and the extent of farms, under a fixed settlement; but as the assessment is of much greater importance than the division of the country, I shall confine myself entirely to it in the present letter. It may be supposed that without the aid of a previous survey, or of the experience to be derived from a long residence, I cannot form any correct judgment upon the subject. This may be true with respect to the assessment of farms or villages in detail, but there are certain points from which sufficiently just conclusions may be drawn with regard to what ought to be the total amount of the assessment. There can be little doubt that both Hyder and Tippoo generally raised rents as high as they could go, and frequently beyond what the lands could bear. Their example, therefore, ought certainly not to be our guide; but *the assessment of the current year* (*c*)

(*b*) Exhibit A., para. 19, p. 21, and *see* the conclusion of para. 32, p. 29.

(*c*) Fusli 1209, A.D. 1800.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

upon the same quantity of land is nearly as high as even Hyder's was at any time, and is higher than Tippoo's collections were, except during a few years in the early part of his reign, as appears from the Statement No. 2" (annexed to his report). "But when it is considered how much the country has suffered, both in population and property, within the last twenty years, I am perfectly convinced that the settlement is now, in proportion of the resources of the inhabitants, full as heavy as it ever was in any year, under either Hyder or Tippoo Sultan. It might always be realised in times of tranquillity; but without a reduction of it, land would never become generally saleable, and it ought, therefore, to be rejected as inconsistent with the liberal principles of the Bengal system."

After premising that "it may very safely be assumed that no Native Government is ever more indulgent in the assessment of its subjects than the British ought to be," he concludes that it may "be admitted that the whole of the land in cultivation ought not to be assessed at a higher rate than it was under the Bednore Government at the time of Hyder's invasion" (*d*). After estimating the amount of the reduction which it would be necessary to make from the assessment of the then current year in order to bring down the assessment to the Bednore rate at the time of Hyder's invasion, he observes that "as Government have determined, *on the introduction of the permanent system,* to abolish all road customs and all duties whatever on grain, which will in a certain degree have the same effect, though not so directly, as a reduction of the land rent would have, it will not be necessary to grant the whole of the proposed abatement" of the land revenue (*e*). But as the abolition of the custom duty on grain would not largely benefit Honawar (Honore) and Ankola, which were then in a much more desolate state than any other part of Kanara, he recommended that the land revenue there should be reduced

(*d*) Exhibit A., para. 34, p. 30. (*e*) *Ibid.*, para. 35, p. 30.

to the Bednore assessment. As to Kundapore, Bilsawur, Barcoor, Soonda, Balaghât and Bilghi, he advised that the reduction should be to the Bednore assessment *plus* 25 per cent. of the extra assessments of Hyder, and that in all other districts the reduction should be to the Bednore assessment *plus* 30 per cent. of the extra assessments of Hyder. He estimated the total loss of land revenue which would be incurred in Kanara and Soonda by those reductions as about 80,000 pagodas (*f*).

He then proceeded thus :—

"Whether the Board may think it expedient to adopt the assessment here proposed, or any other, as the foundation of a permanent settlement, it is very clear that, whatever it may be, it must be greatly below the existing one; and as it is certainly desirable that the inhabitants should, as early as possible, partake of the benefits of the system intended to be introduced, no time ought to be lost in making some reduction of the land rent and abolishing a considerable part of the customs. This might be done by remitting in the settlement of the ensuing year one-half of the proposed reduction of the land rent, by abolishing all duties on rice in Ankola and Honore, and all except one Pahadri Pagoda per corge in exportation by sea in the other districts of Kanara, and by abolishing all duties on rice and one-fourth of the duties on pepper in the districts above the Ghaut (*g*)."

Annexed to the report of the 31st May 1800 was a tabular statement, whereby Munro, displayed at one view the changes which the land revenue of Kanara and Soonda had undergone from A.D. 1660 to A.D. 1799-1800 (Fusli 1209). That statement is not printed in Exhibit A. (the Government compilation of 1866), but it does appear in Vol. II. of the Fifth Parliamentary Report. It shows the Rekah or assessment in gross of that country, and, deducting thence so much of that assessment as was not leviable by or avail-

(*f*) Exhibit A, para. 36, p. 31. (*g*) *Ibid.*, para. 37, p. 32.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

able for Government, viz: the assessment in respect of inams, waste lands, nasht, kulnasht (*h*), &c., it exhibits under the name of *shist* the balance of assessment actually leviablef rom the landed proprietors in A.D. 1660, *i.e.*, pagodas 2,46,623. After setting forth in detail the additions made to the *shist* by the Rajah of Bednore, amounting to pagodas 27,043, and those made by the Rani of Bednore amounting to pagodas 40,339, and the village taxes, it shows that the *shist* stood in A.D. 1763 (the time of Hyder Ali's conquest) at pagodas 3,20,827, thus exceeding the *shist* of A.D. 1660 by pagodas 74,204, *i.e.*, by nearly one-fourth—a very substantial enhancement in fact, though not perhaps very much when compared with what took place in other parts of India during the same period of 103 years. It was, however, quite enough to be fatal to the contention that the *shist* was immutably fixed in A.D. 1660. The tabular statement next shows the various additions to and deductions from the land revenue subsequently to 1763 by Hyder Ali, the general result of which was that the land revenue stood, at the time of his death in December 1782, at pagodas 5,33,202. Subsequently are specified the additions made from 1782 to 1799 by Tippoo Sahib, whereby he raised the land assessment to pagodas 8,68,678, of which, however, Munro states that pagodas 2,52,589 were never collected. Taking the balance, or land revenue actually levied, pagodas 6,16,089 as his guide, and deducting thence, in respect of lands lying waste at the time of the British conquest, pagodas 1,50,940, he arrived (in round numbers) at pagodas 4,65,149 as the assessment which he imposed upon Kanara and Soonda in Fusli 1209 (A.D. 1799-1800), whereof pagodas 2,84,604 were *shist* and pagodas 1,80,545 (including Rs. 10,565 village taxes) were *shamil* or extra assessment.

His next report to the Board of Revenue was dated from Kundapore on the 28th June 1800, and beyond the allusion, with which it opened, to the intention of Government "on the introduction of a permanent system" to abolish

(*h*) *Vide* note (*i*), *supra*, p. 82.

road customs and all duties of every description upon grain, is not material in this suit (*i*).

The Board of Revenue, under cover of a letter of the 28th August 1800 (*j*) forwarded Munro's reports of the 31st May and 28th June 1800 to the Governor (Lord Clive) in Council of Madras. The Board of Revenue in their letter said :—"We are not prepared to enter into a consideration of Major Munro's suggestions for reducing the land assessment of the districts in the proportions he has pointed out, it appearing to us on examination of the statement (*k*), and the apparent inequalities that would subsist by their adoption, to require further investigation and elucidation; a delay which is of the less consequence, as the relief which we shall propose by the abolition and reduction of the heavy duties will operate in a great measure as a direct reduction of land tax, and from its effects better enable the collector to judge what further relief may be necessary" (*l*).

They then proceeded to recommend even a more extensive abolition of duties and customs than suggested by Munro. They also advised that nothing further should be undertaken "in regard to making a general survey of the country until that of Barcoor is completed," when Government would "be better able to judge of the necessity and advantages of continuing it by the information derived therefrom."

The reply of the Government of Madras (*m*) dated 20th September 1800 is a document of great importance. It highly extols the ability of Major Munro (*n*) as displayed in his reports. His information Government thought "sufficiently authentic to lay the foundations of permanent improvement," and observed "with particular satisfaction that the

(*i*) Exhibit A, p. 33. (*j*) Exhibit B., Vol. III., Printed Books, p. 205,

(*k*) Annexed to Munro's report of the 31st May 1800.

(*l*) *Ibid.*, p. 206, and see to the same effect p. 208.

(*m*) Exhibit C., Printed Books, Vol. III., p. 209.

(*n*) *Ibid.*, paragraphs 1 and 20, pp. 209, 212.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

proprietary rights in the lands of Kanara have been derived from so remote a period, and that the existing knowledge and estimation of the value of these rights among the descendants of the original proprietors indicate the easy means of introducing a permanent system of revenue and judicature." The letter then proceeds thus :—

"Considering the antiquity of the Rekah, and the affection with which it appears to have been cherished by the people of Kanara, we are disposed to think that, if the subsequent deductions and extraordinary assessment have an equal proportion to that original standard, the materials we possess would afford us the immediate means of adopting a general principle on which to fix the settlement of the land revenue; but on a minute observation of your" (the Board of Revenue's) "objections, founded on the inequality of the proportions, we concur in your opinion that a further investigation of the causes of that disproportion is indispensable to the formation of a final settlement" (*o*).

While admitting that inequalities, "produced by local causes of abundance or sterility, facility or difficulty of sale," must always exist in the assessment of lands, the Government of Madras, after noticing in some detail the great inequalities which disclosed themselves in Munro's assessment for Fusli 1209, remarked that "it is difficult to conceive that these disproportions arise from the local causes above stated. And as the effects to be produced on the public revenue of Kanara by a decision of this point are of very considerable extent, we are desirous that the subject may be referred to the further inquiry and serious consideration of the Collector" (*p*). "We think this caution the more necessary, because a reduction to the amount of 1,50,000 pagodas (*q*) has already been made in the current revenue from the

(*o*) Exhibit C., Printed Books, Vol. III., para. 3, p. 209.

(*p*) *Ibid*, para. 4 :—"From the great inequality of the land-tax in Kanara it appears that some estates sell as low as one and others as high as thirty-five years' purchase," Rev. Sel., Vol. I., p. 899, para. 63.

(*q*) *Ibid*, para. 5.

assessment laid on the provinces of Kanara and Soonda by the late Tippoo Sultan, and although that assessment may justly be considered to have exceeded the productive powers of the country, the punctual discharge of the remainder is no indecisive proof of the relief which the people have derived from the change of Government" (*r*). After observing that the Board of Revenue confined their recommendation to the abolition of the export duty on grain and to a suspension of the internal duties, the Government of Madras, while approving of that recommendation, expressed its concurrence with the Collector (Munro), that, having regard to the condidition of Kanara and Soonda at that time, further immediate relief was necessary in the form of a remission of land revenue in order to augment the industry of the landholders. The letter of the Madras Government then continues thus :—

9. " Independently of the objections which we have already stated against a permanent remission of land rent, we observe that the Collector, in recommending this measure, considers the original Shist, with the extra assessment of the Bednore Government, and thirty per cent. of the assessment of Hyder Ali, to form a just standard for the land revenue. But we remark that Major Munro does not appear to have included in his calculation the amount of ináms, being pagodas 1,43,886-12·20, deducted from the Rekah. Although this amount did not constitute any part of the public revenue under the Hindu Government, it formed a part of the aggregate resources of the province; the particular grounds on which these ináms were granted have not been explained by the Collector; but as a considerable deduction was made in forming the Shist on account of waste lands and other causes affecting the resources of the country, it may justly be presumed that the ináms were granted for services performed, or other objects of a personal nature. The ináms having been entirely resumed by the House of Hyder Ali, the original

(*r*) 1 Pagoda or Hoon = 4 Rupees. 10 Phalams = 1 Hoon.
16 Kanarese Annas = 1 Phalam.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

grounds on which they were granted have been subverted, and the Company having succeeded to the right actually exercised by Tippoo Sultan, it cannot be incumbent on them to revert to the original institution of those grants."

Judgment.

10. "It is probable that many of those inâms were bestowed on religious institutions, and that the descendants of the first grantees possess the means of establishing their claims. In these cases the Governor in Council will be ready to give the most liberal consideration to the nature of such claims; but in all other respects it is manifest that the inâms have escheated to the State, and ought to be included in the rolls of Malguzari lands."

11. "The amount of the inâms deducted from the Rekah being greater than the subsequent extra additions made by the Bednore Government, and the 30 per cent. of Hyder Ali's assessment, proposed to be retained by the Collector, it follows that *the assessment now proposed by Major Munro cannot be considered an adequate revenue for Kanara, with reference to the principles of the Rekah.* But from the information and reasoning of the Collector, it is evident that he calculates the assessment recommended by him on the *present* actual productive powers of the country, and, therefore, the aggregate amount may be considered to bear a just proportion to those powers. *Under the circumstances, however, already stated, the principle of adopting the Shist, the Bednore assessment, and the 30 per cent. of Hyder Ali as the foundation of the permanent revenue, ought to be received with caution,* because as the existing stock must, according to Major Munro, be inadequate to the purposes of the whole province, *it can neither be necessary nor expedient that* the resumable inâms, and *the disproportionate assessment arising from general impoverishment should be finally excluded from the available resources of the Government;* for if the present stock is unequal to the whole agriculture of the province, this deprivation could add nothing to the resources of the landlords; and if a portion of the lands must lie waste for want of stock and inhabitants, the right of the

Government should be reserved for the eventual return of population and prosperity."

12. "To accelerate those happy events, the demands of the State must be regulated by the principles described in our instructions to you of the 2nd June last, and the *temporary* assessment of Kanara proportioned to its actual productive powers: we adopt, therefore, the suggestion of the Collector on this point, and authorize an immediate reduction of the land revenue assessed on the province for the last Fusli 1209."

13. "In granting this remission of the land rent we should be disposed to wait for an explanation of the disproportion observed in the rates recommended by the Collector; but, being convinced that immediate relief in this respect is indispensably necessary, we can have no anxiety in trusting the immediate application of it to the known prudence and discretion of Major Munro. We accordingly desire that you will convey to him our authority and permission for assessing the whole of the lands in cultivation at the rates recommended by him, viz., Ankola and Honore at the Bednore assessment; Kundapore, Bilsawer, Barcoor, Soondá Bálá Ghaut, and Bilghi at the Bednore assessment, with 25 per cent of the additional assessment of Hyder Ali; and all the other districts at the Bednore assessment, with 30 per cent of Hyder Ali's extra assessment."

14. "In leaving, however, this latitude to the Collector, we direct his particular attention to the disproportion in the rate of assessment recommended by him, and empower him to make such alterations as subsequent information and reflection may render expedient in his judgment. *But it is our particular instruction, that this sacrifice which we have made to the welfare of the people of Kanara shall not be converted into an instrument injurious to the public revenue and the rights of the Company: we direct, therefore, that the amount of this deduction shall not be entered in the accounts of the province as a diminution of any of the existing principles of assessment, but that the whole amount shall be*

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

entered under a separate head of 'temporary gratuitous remission' to be deducted from the aggregate assessment of Fusli 1209."

The Government of Madras in the same letter assented to the suggested relief to Kanara in respect of customs, road and inland duties, and, recurring to the proposed remission of land revenue for Fusli 1209, said:—"We think it, however, necessary to direct the particular attention of the Collector to the extent of the present sacrifice, and if in the progress of his further inquiries, founded on the orders contained in this letter, sufficient ground should be established for doubting the necessity or expediency of the proposed aggregate remission, we rely on the judgment of Major Munro for availing himself of this latitude to such an extent only as may be requisite from local causes." Then, after warmly commending Major Munro's ability and industry, the Government concluded its letter by desiring that the survey should for the present be limited to the district of Barcoor.

It is manifest that, in that cautious letter, the Government of Madras made no permanent concession whatever with respect to land revenue, and did not authorise Munro to take any such final step. On the contrary, it desired that the remission in that respect, which it did empower Munro to make, should be entered as temporary, and should not be regarded as impairing in any respect "the existing principles of assessment"—namely those of Hyder Ali and Tippoo, which the British found there on occupying the country in 1799. It is also evident that the great inequalities of assessment, which existed in Kanara and Soonda, had attracted the attention of the Madras Government as a matter demanding further inquiry and consideration. We have not discovered in the evidence in this suit any trace of an intention on the part of that Government to abandon its right to remove those inequalities.

On the 9th November 1800, Major Munro addressed to the Madras Board of Revenue his promised letter (*s*) as to

(*s*) Exhibt A. p. 41.

the extent to which a permanent settlement of the Bengali type could be applied to Kanara. He commenced, however, with what was evidently an allusion to the letter of the Madras Government (Exhibit C). His estimate of reduction of the revenue of Kanara, proposed in his letter of the 31st May 1800, was, he said, framed on the principle, "of making it so ample as to provide for every possible contingency." He then proceeded thus:—"By obtaining the sanction of Government, I was secured against every chance of a failure of revenue, and I was, at the same time, at liberty to stop as much short of the reduction as might seem to be advisable on further investigation. The letter, too, of the Board, dated the 26th March 1800, which I had just received, led me to suppose that I might be suddenly called upon to make a permanent settlement, and induced me to propose a greater reduction than I should otherwise have done, from an apprehension that a failure in some quarter or another might be the consequence of a higher assessment. It never was my idea, however, that my settlement should have been so permanent as to be exempted from all future change, but only that it should have been so far fixed as not to be liable to partial and frequent alterations, and that the right should have been reserved for Government to avail itself of the increasing resources of the country by adding to the *jama* a certain portion of the abatement at some after period, when it might appear that it could be effected without detriment to the country." A careful study of that letter of the 9th November 1800 shows that the first sixteen paragraphs contain Munro's views as to what the assessment should be if a permanent settlement of the Bengal kind were adopted, and that the residue of the letter is a sketch of what he deemed to be the only scheme by which, consistently with vested rights, any approximation to such a settlement could be made as regarded the division of Kanara and Soonda into estates on the zemindari pattern, and that such approximation would be but a distant imitation of the original. As neither the system of division then suggested by Munro nor any

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

other permanent settlement system of the zemindari species was at that time or has ever since been adopted for Kanara or Soonda, it is unnecessary for us to enter into the details of Munro's scheme. It is due to him to add that he put it forward merely because he believed that Government had resolved upon introducing everywhere a permanent settlement system of the Cornwallis type, and that he was, as their servant, bound to indicate the only practicable approach which could be made to it. His letter, however, contains many strong arguments against such settlements generally (*t*), and especially in Kanara. In the 17th paragraph he says :—" In Kanara, where almost all land is private property derived from gift or purchase or descent from an antiquity too remote to be traced, where there are more title-deeds, and where the validity of these deeds have probably stood more trials than all the estates in England, great proprietors cannot be established without annihilating all the rights of the present landlords ; nor do I believe that, by any arrangement for placing a number of small estates under the collection of one head landlord, any facility in the collection, or any security could be obtained that may not be obtained from letting the estates remain as they now stand." The 22nd paragraph concludes with what amounts to a prediction of the general collapse of permanent settlements of the zemindari class, and an assertion that the only species of permanent settlement, which is sound in principle, is the rayutvari system, of which he was subsequently the most earnest advocate. He says :—" All systems of Indian revenue must, I imagine, end in making a direct settlement with every independent landholder, without the intervention of any superior lord, and in making every one of them answerable for his own rent, and *the whole of the estates composing a village or district answerable for the failure of any particular estate therein by a*

(*t*) His correspondence is full of condemnation of the Bengali system of permanent settlement, and of advocacy of the rayutvari system.—*See* especially Gleig's life of Munro, Vol. III., p. 340, 353, 381, 421, 425, and Rev. Sel., Vol. I., p. 94 *et seq.* (his report of the 15th August 1807).

second assessment." The liability thus imposed upon the whole, in the event of a failure of a part, would have the effect occasionally of considerably enhancing the amount of revenue payable by the individual landholder. Munro adhered to this part of his scheme in his letter of advice to his immediate successors (para. 11 Exhibit, A, p. 69).

Reverting to the first part of that letter, which relates to assessment, we find that Munro's opinion was that, if a permanent settlement of the Bengali kind were immediately made, the remission of land revenue ought to be larger than if that settlement were deferred; that he had formed a more favourable opinion of the condition of the country than he had entertained when writing his previous letter of May 31st in the same year; and for this change of view he gives his reasons—amongst these were the vigour and quantity of litigation with respect to land. While admitting that a careful survey would be the best means of obtaining information on which to base a satisfactory assessment, he says that it would be very expensive, and that, "next to a survey, the best way of gaining this knowledge would be by keeping a register for some years of the rent and produce of all lands that became the subject of litigation" (*u*), and that "the average produce of such lands might be taken as that of the whole district, or, at least, would not be far from it after deducting Sarkar lands, which, from not having an owner, are but poorly cultivated." This discussion as to the best *means* of arriving at an assessment is inconsistent with the supposition that Munro had already irrevocably pledged Government to a fixed assessment. In the sixth paragraph he treats of the extent of the landlords' rent, which, in the causes relating to land which came before him, he found to be more frequently "above than below 50 per cent of the net produce; in many instances it was 60, 70 and 80 per cent." He had hoped to have obtained a detail of one thousand estates, and to have thus

(*u*) *See* also 1 Gleig, 291, and see this passage criticised by Mr. Blane in Exhibit A, p. 173 and p. 210, and in Rev. Sel. Vol. I., p. 658.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

arrived at an average, but his limited sojourn in Kanara prevented this. He conjectured from such opportunities as he had "that the average rent of landlords is about 50 per cent of the net produce in all the districts below the ghauts, except Mulki, Kandapur, and Bekul, where it may be from 30 to 40; and Ankola, and part of Honore, where it is somewhat less." Munro next (para. 7) observes that "anything like equality of assessment can hardly be supposed to exist throughout so extensive a tract of country. The clear rent in many instances is as low as 15, and in many as high as 80 per cent of the net produce. The disparities are oftener owing to the different proportions of labour bestowed on the land than to the assessment; many of these estates, which now yield the smallest proportions of rent, were formerly amongst the most productive." The exaction of nuzzuranas for the Sarkar, fines for pretended or trifling offences, presents for an endless succession of Asophs and Amildars, kists of arbitrary and uncertain amount, anticipation of them, by particular landlords, against whom they were directed by bribed Amildars in order to coerce those landlords to sell or mortgage their estates to the bribers, and, above all, gratuitous services for the Sarkar, whereby the labourers of the minor class of landholders were taken from the vargs, are the causes enumerated by Munro as causing those inequalities. But in the 9th paragraph he glanced at what subsequent Collectors (*v*) (who had a longer experience of Kanara) perceived much more distinctly than did Munro to be the main cause

(*v*) *Ex. gr.* Mr. Harris, Defendants' Exhibit No. 9, Printed Books., Vol. III, pp. 54, 55. Letter of 14th Aug. 1821, paras. 62, 63, 66, 67, 68. Mr. Babington, Defendant's Exhibit No. 19, Printed Books, Vol. III., p. 73. Letter 15th August 1826, paras. 71 to 75; and most especially Mr. Blane, in paras. 14 to 16 of his letter of 20th September 1848, Exhibit A, pp. 173 to 177, and pp. 247 to 256 where in the Appendix are Nos. 4, 5, 6, 10, 11, 14, all being instances of such frauds in Ankola; and see Exhibit H. H., being an undated Memorandum by the Collector's Head Sheristedar, Krishna Rao, forwarded by Mr. Dickinson, Principal Collector of Kanara, to the Board of Revenue, with his letter of the 18th June 1830, and printed at pp. 77 to 98 inclusive of Vol. III. of the Printed Books. The causes of the numerous irregularities are very fully stated in para. 11 of the Memorandum, Vol. III., p. 96. The writer evidently possessed an extensive know-

of those inequalities, viz., "the falsification of accounts" by the landholders and other village officers. He admitted that the *shist* or *rekah* "can no longer be implicitly followed as a guide." He added: "It is safer to be directed by the present condition of the inhabitants and of the revenue with a retrospect to what it has been for the last twenty years." He continued: "No guide is so sure as collection." This was the principle of the *sarasari* system, upon which the *tharav* assessment of certain parts of Kanara, not including Ankola, was afterwards based. To that assessment we presently shall briefly advert. The inapplicability of such a principle to Kanara forms the subject of an able disquisition by Mr. Blane (*w*). In paragraph 8, Munro assigned further reasons for his change of opinion as to the condition of the rayuts and of their capability to bear the assessment. He then stated his proposed reductions, the object of which was to bring the assessment to half the net income of the landlords. Those reductions varied from 14 to 40 per cent; the smallest, 14 per cent, being in Mangalore, and the largest, 40 per cent, being in Soopah and Bilghi, both of which are above the ghauts. The reduction proposed for Ankola was 35 per cent. Speaking of the country below the ghauts, he says:—"Honore and Ankola have long been declining. They contain more waste land and fewer proprietors than any of the other districts, and, therefore, require a greater remission." *It must be recollected, as we have already said, that all of these remissions were proposed by Munro on the hypothesis that a permanent settlement of the Bengali type was to be made.* In paragraph 13 he said:—"The only reductions I have made for the present year are by lowering the land rent 2½ per cent, and the export of customs on rice to two bahadri pagodas per corge, and abolishing the inland duties on grain

ledge of the revenue of Kanara and of the malversations of the subordinate officers in the Revenue Department before and during British Rule. *See* Exhibit I. I., para. 54., Printed Books, Vol. III., p. 234, 235.

(*w*) *See* his Report of 24th September 1848, paras. 19 to 24, and 25; Exhibit A, pp. 179, 181, *et seq.*

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

and cattle, sheep, &c.; and these are all that are required to serve the end of affording some immediate relief. The remaining reductions of customs may be deferred till the Madras Custom Regulations are introduced, *and of land revenue* (*x*) *till the permanent system is established.*" Subsequently in the same paragraph he added :—" My chief reason for remitting the 2½ per cent was to convince the landlords that our (*y*) demand is limited, and thereby to encourage them to exert their whole means in improving their estates to the utmost without any fear of a new assessment." Whatsoever Munro's object may have been, we must here repeat that the Government of Madras had most positively directed that the remission to be made by Munro should be entered in the accounts as " temporary gratuitous remission," and " not as a diminution of any of the existing principles of assessment."

In several paragraphs of that letter of the 9th November 1800, Munro describes the lands in Kanara as " private property."

In the same letter is the recommendation, quoted in a previous part of this judgment, that the permanent settlement of Ankola, Soonda, Bilghi, and indeed Kanara at large, should be deferred for at least five years.

So far as there is any evidence before this Court, the Government of Madras, on submission to it of Munro's report of the 9th November 1800, and of the subsequent reports by his successors (dated, respectively, the 30th April and 14th May 1801), together with the remarks of the Board of Revenue upon those reports, appear to have done no more than to express satisfaction at the favourable picture, drawn by the Board, of the state of Kanara (*z*). The latter had stated their belief that the assessment of Kanara was " lighter than

(*x*) The word " revenue " seems by mistake to have been omitted in the printed copy in Exhibit A, p. 53.

(*y*) The word " our " seems to have been by mistake omitted in the printed copy in Exhibit A, p. 54.

(*z*) Exhibit A, p. 141, paras. 16, 17, of an historical sketch of Kanara by the Board of Revenue on the 15th September 1831.

that of any other district" in the Presidency of Madras, and "that any permanent remission of its land rent would, therefore, be unnecessary, and they hoped under efficient management that a gradual improvement in the revenue might be looked for from the cultivation of waste land. They also intimated an opinion that a reduction of the export duty on rice was not required."

The Madras Government, not as yet having been informed whether the Supreme Government would sanction a permanent settlement of the Bengali species, was not in a position to enable it to arrive at any decision upon the suggestions of Munro.

One of these suggestions being, that a period of at least five years should be permitted to elapse before any permanent arrangement was made, afforded an additional reason for the reticence of the Madras Government.

The Board of Revenue requested Munro, immediately after his departure from Kanara for the Ceded Districts, to address to his successors (*a*),—Mr. Read for North Kanara, and Mr. Ravenshaw for South Kanara,—a letter of advice as to the management of those countries. Accordingly, on the 9th December 1800, he wrote to them a letter from Anagoondy (*b*). That it was merely a letter of advice, and did not treat them as necessarily bound to his policy, is manifest from the preamble:—"Gentlemen,—Having been directed by the Board to communicate to you whatever regulations I had in view for the preservation and improvement of the resources of Kanara, I must refer you to my two reports (*c*), which contain almost everything I have to say on the subject.

(*a*) Wrongly described by the Board of Revenue at page 143, of Exhibit A, para. 21, as his Subordinate Collectors. They had been so, but had become his successors before the 9th December 1800. North and South Kanara were subsequently re-united under one Collector, and again separated on the transfer of the former to the Presidency of Bombay.

(*b*). Exhibit A., p. 65. Anagoondy was a suburb of, and is situated on the right bank of the Tumbudhra, opposite to the ruined city of Visianagar. (*See* Wilks' History, Mysore, Vol. I., p. 9, Madras reprint.)

(*c*) 31st May 1800, 9th November 1800,

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

"2. *Whether you wish to carry into execution my ideas, or to form better plans founded on the result of longer experience and close investigation*, it is essential that your cutcherry should be so constituted as that it should facilitate, and not impede, the accomplishment of your object." After discussing the mode in which their office establishment should be constituted, he continues thus:—"3. In settling the land rent for the *current year*, much caution should be observed in imposing any new assessment on any land that pays the Bednore rent and half of Hyder's addition, and no (*d*) more should be laid on any land that pays the Bednore and three-fourths of Hyder's assessment. No land that may be raised in the *current* year to the Bednore and half of Hyder's addition should *ever* be raised higher, because, though many causes have contributed to sink the rent of land below the Mysore Government assessment, none have had so great a share as the quality of the land itself having been such as to have rendered it incapable of continuing to pay the high rates which had been forced from it during a few years, and because the raising of rents *from year to year* discourages improvement, and weakens the confidence of the owners in the security of private property in land."

"4. Where land, either through fraud or favour, has of late years been reduced below the Bednore assessment, it ought to be raised to that assessment, together with half of Hyder's addition, in the course of the present or following year, after which no further increase should be demanded. There may be instances, but I imagine they are very rare, where the land is so barren as to be incapable of bearing half of Hyder's addition, in which case we must be satisfied with one-third, or perhaps one-fourth of it."

"5. The rent of land, however productive it may be, *ought* never on any account to be raised higher than it has been at some former period. Land, therefore, which may have escaped partly, or even wholly, the Mysore additions, *ought* not now to be burdened with them. The inequality

(*d*) In the printed copy of this letter in Exhibit A, p. 66, the word "no" has been accidentally omitted.

thus occasioned is of no importance, for the rent of land never can be so nicely adjusted as to correspond always with a certain proportion of the produce. It cannot perceptibly affect the revenue; not one estate (*varg*) in a hundred has been exempted, and it should be considered, too, that many of the present holders, in purchasing them from the former proprietors, have given a high price in proportion as the rent was low." So far he says he has been "speaking of such land as is private property"; and in the 6th paragraph he proceeds to discuss the alienation of land the property of the Sarkar, which had reverted to it in various ways:—"All cultivated lands" of that class he recommends to be alienated to individuals "in proprietary right, according to the form which had this year been observed with respect to lands thus transferred in Kandapúr (*e*). Whenever the tax is equal to the Bednore and half of the Mysore assessment, the land should be made over to the pre-occupier without any additional taxation. When it is below, it should be raised to that standard, and if the holder does not agree to this increase, it should be given to the highest bidder. The conversion of Sarkari into private land should not be hurried." In the 7th paragraph he mentions that a form of kaul for letting every description of waste land, with variations suitable to the various districts, was to be found in the kutcherries.

Leaving the subject of waste lands, he recurs to "private property":—

"9. As so great a part of land in Kanara is private property held at a fixed rent, your settlements in future will require little time or labour, because nothing is to be done except to add to the Jama of the preceding year the extra rent of a few estates which may have been held at an under rate, and the rent of such waste lands as may have been brought into cultivation. In Ankola and Soonda, however, more time will be required, because in those districts private property in land not being so general as in Kanara, the cultivators sometimes quit one village for another, and, as they

(*e*) In South Kanara.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

are exposed to an arbitrary increase, they frequently claim a reduction of rent, when they have suffered losses. The assessment of last year was so moderate that there can hardly anywhere exist the smallest pretence for demanding an abatement. Buddengoor (Buddengode) and some other villages, which have suffered from the ravages of Dhondia's adherents, ought to be kept at a low rent for two years."

In the 11th paragraph he refers to the survey then in progress in Barcoor and the most material advantages to be derived from it. After noticing that in the *vargs* there are broken portions of estates, he says:—"The landholders must be cautioned that, in the event of any failure of payment by the broken estate, and of there being no purchaser, their own lands will be assessed for the deficiency."

It seems doubtful whether any copy or extract of that letter of advice was furnished to the Board of Revenue until the year 1814 (*f*), and there is not any evidence as to its having been laid before Government. Whether it was so or not does not appear to be a matter of much importance; for, as already observed, it was no more than a letter of advice stating the line of policy which Munro had intended to follow if he had remained in Kanara, and which, without the sanction of Government, he could not have made legally binding. It is, however, most important to note, that neither in his reports of the 31st May or 9th November 1800, nor in the letter of advice to his successors, does he assert that he had entered into any engagement with the *Mulavargdars* or holders of private property generally, that their assessment should never exceed the *kadim beriz* (*i. e.*, the total amount of the *shist* and *shamil*) or any other special limit. With the Sarkari (Government) lands, referred to in the 6th and 7th paragraphs of that letter, we are not at present concerned, inasmuch as they, so far as they had been dealt with by Munro, were apparently the subject of special grant by *kaul sanad*

(*f*) See the letter of Mr. Read of the 1st January 1814, para. 3, and the Board's minute of the 15th September 1831, para. 21, Exhibit A, pp. 71, 143.

or *mulpatta*, and there are not, in this case, any lands which the plaintiff alleges to have been so held.

The preamble of Reg. XXV. of 1802 of the Madras Code (passed on the 13th July 1802), to which we have already referred on the question of the right of property in land, recites (*inter alia*) as follows:—"Whereas it is known to the zemindars, mirasidars, rayuts, and cultivators of land in the territories subject to the Government of Fort St. George, that from the earliest *until the present period of time* the public assessment of the land revenue has never been fixed, but that, according to the practice of Asiatic Governments, the assessment of the land revenue has fluctuated without any fixed principles for the determination of the amount, and without any security to the zemindars or other persons for the continuance of a moderate land tax, etc." Admitting that the preamble is no part of the enactment, and that a mere recital in an Act of Parliament (and, therefore, in a Madras Regulation) "either of fact or law is not conclusive, and that we are at liberty to consider the fact or the law to be different from the statement in the recital" (*g*), yet this recital, at the least, tends to show that the Madras Government was under the impression that up to that time there had not been in any part of the Presidency of Madras (which then included Kanara and Soonda) a final and permanent assessment of the land revenue. While aware that the provisions of the enacting part of that Regulation, passed as it was on the same basis as the Bengal Reg. I. of 1793, for the introduction of the Cornwallis permanent settlement system into the Presidency of Madras, have never been actually availed of for that purpose in Kanara, and that it has been held by the Privy Council (*h*) that neither Reg. XXV. of 1802 nor Reg. XXXI. of 1802 interferes with pre-existing rights of private property, we venture to think that those circumstances do not detract from the value of the recital as a statement of the belief

(*g*) *See* Lord Campbell, C. J., in *Reg.* v. *Haughton*, 1 El. and Bl. 501, 516, and *see* 9 Bom. H. C. Rep. 215.

(*h*) L. R. 1, Ind. App. 282, 305; *see* also Madras Reg. IV. of 1822.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

of the Government of Madras that, up to the 13th July 1802, there had not been an unalterable assessment in any part of their Presidency.

Not until after Munro had left Kanara, and then with some hesitation, did the Court of Directors, in their despatch to the Government of Madras of the 11th February 1801 (*i*), authorise that Government to proceed to a permanent settlement, in the Company's territories in that Presidency, of the revenue (and as it would seem on the Bengal model), "without any clause suspending its final effect till it should receive our (the Court's) ultimate sanction" This concession, however, was accompanied by the solemn admonition which we now extract :—

"4. But, although we have thus invested you with full power to proceed in the final execution of this permanent arrangement, there are a few precautions which we deem it proper to recommend to your attention.

"5. The first, which naturally presents itself, is that, although we shall sincerely rejoice to see this measure finally completed, we do not expect that you are to proceed in it with a precipitancy inconsistent with full and accurate investigation. You will always bear in mind that you are concluding a settlement, which good faith and the honour of our Government require should be held for ever sacred and inviolable. It is a measure on which is to rest for ever the extent of our interest in the extensive landed property entrusted to the care of your Government; in proportion therefore, as the decision you are to pass is permanent and irrevocable, in the same proportion ought your previous inquiry to be accurate, and your information to be complete.

"6. In the next place it behoves you to attend in a particular manner to the different situations of landed property, not only of different provinces and districts, but of different estates in the same province and district. You will certainly err, if it is supposed to be necessary that whole provinces

(*i*) Rev. Sel., Vol. I., p. 601.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

and districts should be settled with at the same time. The information respecting one estate in a district may be so complete, while that of a neighbouring estate was so imperfect as to create great inequality if, to save further trouble of investigation, it should be thought material to arrange with both of them at the same time. From the nature of the business, the execution of it must be gradual and progressive; and not doubting that you will give to the subject your unremitting attention, we can only in general say, that we shall be much more satisfied if you can report to us that it is *well* done, than that it is *quickly* done. It is impossible to have perused the report of the Revenue Board, without being satisfied that the detail of this business is of a most extensive and complicated nature; and, impressed with that reflection, it is equally impossible for us to indulge any impatience under the lengthened period to which the necessary investigation may extend."

The Court of Directors in the same despatch remarks that "there is a material difference between the provinces in the Carnatic and those of Bengal, where the measure of a permanent settlement was first taken into consideration. The Bengal provinces were infinitely further advanced in the habits of order and subordination to Government than most places in the Carnatic, and certainly much more so than in the generality of Polygar provinces or the Northern Circars." They then proceed to say that the establishment of complete subordination is an essential preliminary to any "attempt to introduce either a permanent system of land revenue or the exercise of a regular judicial authority."

Of orders, given by the Governor General in Council upon the 18th of June 1801, respecting the annexation of the provinces of Malabar and Kanara to the Presidency of Madras, there is not any copy in evidence; but the substance of those orders (the issuing of which followed the despatch of the Court of Directors of the 11th February 1801, whereof we have been speaking,) may to a considerable extent be collected from paragraphs 31 and 32 of a despatch of the 19th July 1804 (Rev. Sel., Vol. IV., p. 924) from the Gover-

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

nor General (then become Marquis Wellesley) in Council to the Madras Government. The despatch of the Governor General in Council of the 31st December 1799 (mentioned *supra*, page 112, note *l*), which related to provinces other than Malabar and Kanara, is also referred to in the despatch of the 19th July 1804, of which paragraphs 31 and 32 are as follow:—

"31. The instructions of the Governor General in Council under date the 31st December 1799, and the orders of His Excellency in Council of the 18th June 1801 respecting the annexation of the provinces of Malabar and Kanara to Fort St. George, state the principles conformably to which the settlement of the land revenue of the districts, in which no settlement has been formed, must be regulated. Where the necessary inquiries for forming a permanent settlement have not been completed, the settlement should be made for such term of years as local circumstances may render advisable. In all cases it is desirable that the settlements should be formed with the zemindars or other description of landholders. Where no such descriptions of persons exist, it would be proper to form the lands into estates, and to dispose of them to persons who will attend to their cultivation. These persons, as well as all other landholders, should be permitted freely to transfer their estates by sale, gift, or in any other manner. It can never be desirable that the Government itself should act as the proprietor of the lands, and should collect the rents from the immediate cultivators of the soil. The rates of rent payable for the different descriptions of produce must vary in every district, and often in every village. Where any proprietors may be found, they will generally collect those rents agreeably to the specific engagements which they may conclude with their tenants, or according to the established usage of the country. If any differences should arise between the landholders and the tenants regarding those engagements, or usages, the Courts of Judicature will form the proper tribunals for deciding such differences. These questions are of private right, in which the executive authority can-

not interfere consistently with justice, policy, or its own interests. The difficulties experienced in Malabar in regulating the assessment on the pepper-vines and other articles of produce, and the evils which have resulted from the measures adopted for that purpose, afford most convincing proof of the bad policy of a system of revenue which requires the executive authority of Government to assume everywhere the character of a proprietor of land, and to interfere in details which cannot be conducted in a manner favourable to the interests of the cultivator of the soil, and to the extension of agriculture, excepting by the proprietors of the lands."

"32. The cultivation of the country must depend on the landholders. In order to encourage them to employ those exertions, and to conduct themselves with moderation and justice towards the immediate cultivators of the soil, the annual payments of the landholders to Government should be fixed upon a scale of equity and moderation, regulated with reference to the receipts of Government from the lands or estates of the different landholders for a period of years; and all the authorities of every description employed in the collection of the revenue, including the executive authority of the Government itself, should be rendered amenable for their acts to the control of the laws, according to the rules already established in those parts of the country to which the new constitution has been completely extended. The early extension of these principles to the unsettled districts will combine the interests of the State, as connected with its revenues, with the welfare of every class of its subjects concerned in the cultivation of the lands. It will rest with your Lordship in Council to apply these principles to local circumstances in Malabar and other districts in which a permanent settlement has not been concluded."

These passages and the concluding portion of the 30th paragraph (*see* note (*j*) in pp. 146 to 148 *infra*) render it manifest that Lord Wellesley and his colleagues still adhered, not only in June 1801 but down to July 1804, to a permanent settlement of the zemindari species, if possible; and that they

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

could not have supposed that a permanent settlement of any kind had been made in Kanara, and deprecated precipitancy in making any final settlement (*j*).

Judgment.

(*j*) Some further particulars of the despatch of the 19th July 1804 will elucidate the 31st and 32nd paragraphs above extracted. The despatch commenced by the Governor General in Council removing the erroneous impression of the Madras Government that the instructions of the former, of the 31st December 1799, restricted the Madras Government from establishing the new judicial department in any districts into which a permanent settlement of land revenue had not been introduced, and required the maintenance in those districts of the authority of the Board of Revenue and Collectors in all matters civil and criminal. Lord Wellesley's Government, in clear and earnest terms, disclaimed any such restrictive intention, and said of the old system, which it subsequently, in the same letter (para. 19), described as "confounding all the powers of the Government in the person of a Collector of Revenue," that His Excellency in Council was "persuaded that the most serious evils are to be apprehended from the partial continuance of that system, both with respect to the revenues of the country, its tranquillity, and the stability of the British power" (para. 8). To possible objections that the duties of the Collectors would be limited to the assessment and collection of the revenues, that their official acts would be subject to the cognizance of Courts of Justice, and that the Collectors might thus find their powers inadequate to the ascertainment of the just dues of Government; and to their punctual collection, it was replied that the experience of Government in Bengal afforded "satisfactory proof that such apprehensions are without foundation" (paras. 12, 13), that "the same usages, which regulate the dues of Government from the lands, also vest in it adequate powers for levying those dues. Those powers extend to the sale of the crops or property, and even to the attachment of the persons of defaulters of every description by the most summary process. The new constitution leaves to the Collectors of the Revenue, in cases in which a permanent settlement has not been concluded, the full exercise of those powers to the extent requsite for realizing the public demands; the Collectors, therefore, will possess the means of realizing the public dues, as far as the collection of them can be ensured, by the legitimate exercise of regular power after the just demands of Government shall have been satisfied or secured (but not otherwise). Individuals who may conceive that they have been compelled to pay a sum exceeding the amount due from them, will possess the privilege, under the new constitution, of suing the Government or the Collector in the Courts of Judicature for the recovery of the excess; the grant of this privilege to individuals will not enable them to withhold the dues of the State, but will merely protect them against unjust claims of the Government, or extortion on the part of its officers. It would be an unnecessary occupation of the time of your Lordship in Council to enter into a course of argument for the purpose of demonstrating that the interests of the Government, as relating to the public revenue and the obligations of the State towards its

We now come to the period at which the tide which had run so strongly in favour of the zemindari permanent settlement system showed symptoms of a disposition to turn.

subjects, equally require that the executive authority and all its officers should be responsible to the laws for the due exercise of the extensive powers necessary for realizing the public revenue" (para. 14); and again, "an improved revenue, cheerfully paid and realized without the application of military force, is not to be expected from a system of administration which affords no encouragement to augment their means of contribution, and which relies for success on the extent of the means entrusted to the officers of Government for levying the largest revenue which can be obtained by the direct exercise of power" (para. 17); and "were it possible for the Collectors of the Revenue to appropriate a sufficient portion of their time to the administration of justice, and to the maintenance of the peace of the country, the nature of their duties as officers of the revenue disqualifies them for the discharge of judicial functions; the people cannot repose a firm confidence in the protection of the laws, while the administration of the laws shall be entrusted to the collectors of the revenue, because the conduct of those officers, and of the numerous native agents and servants acting under their authority, necessarily forms a principal object of legal control" (para. 19).

In para. 25 it is said:—"In the territories subject to your Lordship's Government to which the new constitution has not been extended, the system of administration is similar in its general principles (however ameliorated in the execution by the characters of individual public officers) to that which prevailed under the native Governments under the most favourable exertions of individual talents and integrity. Such a system of Government must produce public and private oppression and abuse; it provides no restraint upon the exercise of power sufficient to ensure the uniform, impartial, and general operation of the laws, and to inspire the people with a sense of confidence and security in the ordinary conduct of private transactions, and in the undisturbed exercise of private rights exempt from those salutary restraints. The public officers may pursue a course of evil administration in many of the subordinate departments of the State without the knowledge of the Government; and the Government may continue ignorant of the abuse of its name and power until private distress and public suffering shall compel the people to combine against the authority, whose name and power have been perverted to the purposes of vexation and oppression. In this condition, open resistance affords to the people the sole mode of appeal to the justice of the Government: to that dreadful appeal the most peaceable, industrious, and dutiful people must resort, wherever the laws shall afford no regular organ to convey the complaints to the ear of the sovereign, &c."

The 29th para., in accordance with the foregoing views, directed the Madras Government "without delay to establish the Zillah Courts and the Courts of Appeal and Circuit, and to extend the authority of the

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

It does not appear that, as regards Kanara or Soonda, the Madras Government, previously to the receipt of the despatch of the 21st July 1802, presently to be mentioned, had in anywise availed itself of the permission, contained in the despatch of the 11th February 1801, to make a permanent zemindari settlement, either with or without a clause suspending its final effect, until the ultimate sanction of the Directors, or any other final arrangement as to either of those countries. By the despatch of the 21st July 1802, the Directors, so far as regarded the Malabar provinces and Kanara (and these would include Soonda, which then formed part of North Kanara), and the Ceded Districts, revoked the authority conferred upon the Madras Government to make a permanent settlement without the previous sanction of the Directors. The contents of the despatch of the 21st July 1802, and those of another important despatch of the 10th April 1804, are, sufficiently for the purposes of this case, extracted in the Court's despatch of the 16th December

Sudder Adawlut and Foujdari Adawlut throughout the Carnatic, Malabar, Kanara, Tanjore, the territories ceded to the Company by the Nizam, and all the countries" then subject to the Madras Government.

The 30th para. was as follows:—"Under these orders the powers vested in the Board of Revenue and the Collectors by the clauses of the first and second Regulations passed by your Lordship in Council in the year 1803, will be abolished, and the authority of the Collector of the Revenue in the newly acquired territories will be limited to the assessment and collection of the revenue, under whatever plan the circumstances of the several districts may render advisable; and those officers will exercise the same powers, and be subject to the same control of the laws and of the Courts of Judicature, as the Collectors of the Revenue in the districts in which the new constitution has been established. The Collectors of the recently acquired territories will have full leisure to prosecute the inquiries which may be necessary for forming a permanent settlement of the land revenue, and that arrangement may be postponed until the completion of those inquiries and the state of the respective districts shall render it advisable to fix the amount of land revenue in perpetuity."

The direction for the establishing of Zillah Courts, contained in the 29th paragraph, was carried into effect by Madras Regulation II. of 1806, which also abrogated the judicial powers of the Board of Revenue and of Collectors in districts where the land revenue had not been permanently fixed.

1812 at page 527 of the Revenue Selections, Vol. I, as follows :—

1875.

VYARUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

"We here particularly allude to the instructions contained in our revenue letters of the 21st July 1802, of the 10th April 1804, and of the 30th August 1809. In the former of these letters, after expressing our hope that it would reach you before any considerable progress should have been made in the actual conclusion of the permanent settlement, and directing that, in such districts where it had not been finally arranged, the measure should be suspended until you should have been able to ascertain whether every possible degree of information had been obtained as to the real value of their resources, we added :—'We at the same time think it proper further to direct that a permanent settlement of the revenue in the provinces of Malabar and Kanara, and of the lands lately ceded by the Nizam, be not concluded, until all the previous measures leading thereto shall have been specifically reported to us, accompanied by every possible information that can be procured upon the subject.' These orders were repeated in our letter of the 10th April 1804, in the following paragraph :—'From the peculiar circumstances connected with the revenues of the provinces of Malabar and Kanara, and of the districts ceded by the Nizam, we have already directed that a permanent settlement of the lands in those districts be not carried into execution without our previous sanction, which direction we now repeat. We much fear that the state of those countries, and the defective information which we at present possess of their real resources, or what they would produce under proper management, will not admit of a fair and adequate settlement for some time to come.'"

Assuming, for the purpose of argument, that the permanent settlement present in the minds of the Directors when writing these despatches of 1802 and 1804 was more especially one of the zemindari class, it must be remembered that the Directors still, should they eventually approve of such a settlement, retain to themselves the power to make

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

it, and thereby virtually prohibit any other final settlement without their sanction, if such a settlement would be incompatible with a zemindari settlement.

And in a despatch of the Directors, of the 18th December 1811 (*k*), to the Madras Government, is this passage :—

"220. We observe that these leases" (not of lands in Kanara or Soonda) "are intended as preparatory to the conclusion of permanent settlements. We desire it, however, to be understood by you, that we are by no means anxious for the early adoption of that system *in any part of our territories to which it has not been hitherto extended.* We have always entertained a full persuasion, and have uniformly pressed it upon your minds, that before *any settlements* be formed that are *intended for permanency,* it is highly necessary that the most correct knowledge, which it is practicable to obtain, should be acquired respecting the actual state and resources of the lands, their capacities of improvement, and of the tenures and rights of individuals. Strong and decisive as our opinion has invariably been on this point, it has received no small confirmation from the experience which, we are sorry to say, has been recently afforded us of the frequent failure of assessments, formed on the principle to which we allude, in our possessions subject to your immediate authority; and *we hereby think it proper to restrict you from concluding any settlement of a district in perpetuity, without having previously received our specific sanction for that purpose:* nor shall we grant that sanction, unless we are put in possession of every information necessary to direct our judgment in a matter of such essential concern." The language of that despatch we should find difficult of reconciliation with the supposition that it was intended to include Zemindari settlement only.

The Directors' despatch of the 16th December 1812 (which contained the extracts, already given, of their despatches of the 21st July 1802 and 10th April 1804) censured the Government of Madras for granting, in the Cuddapah

(*k*) I Rev. Sel., p. 492, para. 220.

Division of the Ceded Districts and the Northern and Southern Divisions of Arcot and in Coimbatore, decennial leases at a fixed rent determined with reference to the collections of former years and the general capabilities and resources of the village, with a proviso that, if approved by the Directors, that rent should, at the expiration of the ten years, become permanent. The fifth paragraph is important :—"The other reason adduced by the Board (of Revenue) for having taken upon themselves to authorize the decennial leases to be considered as permanent on the expiration of them, without any reference to the final approbation of the Government at home, is that the orders from us '*tending*,' as they express it, 'to prohibit the further extension of a permanent settlement without their authority, related to the zemindari settlement, the extension of which was not contemplated.' *The directions, however, which we have at different times conveyed to you, since the first introduction of settlements in perpetuity, against the extension of such arrangements without our previous sanction, will be found to have a clear and explicit reference, not to the principle on which arrangements of that nature should be founded, but to the importance of deferring an unalterable adjustment of the public demand on the land, until every necessary information should be obtained of its value and resources, and of the rights of those connected with it;* and if any new arguments were wanting to convince us of the necessity there was for furnishing you with those instructions, they would be supplied by the facts and conclusions contained in your despatch now under reply, upon which we shall have further occasion to remark in this letter. The Board of Revenue are not less incorrect when they describe our orders on the above subject as *tending* to prohibit the formation of permanent settlements without our sanction previously obtained; for not only did those orders from the first, which we transmitted to you on the 11th February 1801, evince a disposition more and more adverse to any early proceedings for extending the measure further than it had hitherto gone, but, in several instances, they positively restricted you from so doing." Then the Direc-

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

tors referred to the despatches, already mentioned, of the 21st July 1802, and of the 10th April 1804, and also to a despatch of the 30th August 1809, renewing their prohibition of any permanent settlement, without their previous sanction, in the Ceded Districts and in the Northern Division of Coimbatore. The 12th paragraph of this despatch of the 16th December 1812, contains an extract of considerable importance from a previous despatch of the Directors. They say :—"In our revenue letter of the 24th August 1804, we observed that 'in forming the materials *at a distant period*, for the permanent settlement of the lands of Malabar and Kanara, great caution should be used lest you interfere with rights which had hitherto been considered inviolable, or disturb those ancient boundaries or landmarks which at that time had determined the extent of private property, and by which the proprietors of land have been governed from time immemorial.'" If we are to read the phrase "permanent settlement," in that passage, as bearing the meaning which the Directors, as we have already noticed, in 1812, said it was intended to bear in their previous despatches, namely "unalterable adjustment of the public demand on the land," and not merely a permanent settlement of the zemindari kind, it is very clear that not only were they on the 24th August 1804 unaware that any permanent fixing of the land revenue or land rent had been made in Malabar or Kanara, but their intention was that, if any such fixing did take place at all, it should be at a distant period. Even, however, assuming that they, in writing that passage, had in their minds a permanent settlement of the zemindari type, if yet they were aware that they had been irrevocably pledged by Munro and the Madras Government to an immutable rent payable to Government either in Kanara or Malabar, we should look for some reference by them to it, forming, as it would, a serious difficulty in arranging any settlement of the Cornwallis class. They enjoin great caution lest the boundaries of private estates should be interfered with; and we should certainly expect that if they believed that any pledge as to the rate of rent had been given, either with or without authority, they would not have then passed

it over in silence. In the same paragraph (12) of the despatch of the 16th December 1812 (*l*), they continue thus :— "In our revenue letter, also, of the 6th November 1805, when referring to your request to be permitted to settle the lands of Kanara in perpetuity, and when noticing the strict regard due to the proprietary rights which individuals in Kanara enjoyed in the soil, we took occasion to state that not only ought this kind of right, when it was proved to exist, to remain undisturbed, but the perpetual settlement ought not, for the sake of official or revenue divisions of the country, to place the smaller estates under any kind of subordination to the greater, or at all affect the boundaries by which property had hitherto been separated and distinguished.

"13. We recite these passages, because they show that as soon as we were apprised by you that individual proprietary rights existed in any portion of the territories under your Government, we were most anxiously desirous that they should be respected and maintained. You have now recognised the rights of proprietorship to be possessed by Mirasidars ; and yet, speaking of those in Tanjore, you say that 'where they may refuse to accede to the settlement of the villages by either of the modes above set forth, agreements shall be entered into with the Parakudis, &c.,' thus proposing to act, not only in opposition to the principle of the 233rd paragraph of your letter of the 29th February 1812, already quoted, by which you had professed your intention of being guided, but in disregard of the sentiments we had so pointedly conveyed to you in August 1804 and November 1805.

"14. These considerations operate so powerfully on our minds, that, even if we could devise the means of removing the other objections which we feel against the measure you have submitted for a permanent settlement, we should most reluctantly sanction its adoption ; and we do, therefore, most anxiously hope that the authority of Government may not have been extensively committed by you upon it."

(*l*). Rev. Sel., Vol. I., p. 529.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judament.

In paragraphs 26 to 28 (inclusive) of the same despatch the Directors make further observations upon Kanara, whence we gather that they regarded its land tenure as rayutvari in character, and its rayuts as having a proprietary right in the soil. The minute of Lord William Bentinck of the 28th November 1836 is quoted with approbation, and to the special report, subsequently made at his desire by Mr. Thackeray in 1807, they refer in a similar spirit. Lord William Bentinck speaks of the prosperity of Kanara, which he attributes to "the tenure of landed property peculiar to the province," and to "the moderation with which the rights of the Sarkar to a proportion of the land revenue have been exercised." He also speaks of the rayutvari settlement and of its great advantages "as an *annual* settlement." He says :—"Those advantages consisted in the equal distribution and the defined amount of the land tax, and in the security afforded to the poor against extra assessment from head inhabitants." We have, however, seen that at the time of the British conquest of Kanara the land tax had undergone frequent enhancement, and experience soon disclosed that the supposed equality of distribution of that tax was a flagrant mistake. The great and unjust inequality in the incidence of taxation became the theme of successive Collectors, and was apparently produced by the fraudulent conduct of subordinate revenue officers such as shanbogues, karnams, &c., during many years. Lord William Bentinck observed that he was "astonished" by the "close resemblance between the actual state of property in Kanara and the proposed *permanency* of the rayutvari settlement. Among other peculiarities, the greater part of the estates, though fully assessed, pay less than ten pagodas *per annum* to the Sarkar." He continued: "Kanara thus became the great landmark by which I hope to trace out those principles and regulations which might be applicable to the unsettled districts when the permanent tenures are to be introduced. I have reason to believe, though I cannot speak with any positive certainty, that the same tenures as in Kanara existed originally through every part of the Penin-

sula. In other parts the boundaries of individual rights have been trodden down by the oppression and avarice of despotic authority; but still there exists, in almost every village, the distinction of Mirasi inhabitants or hereditary cultivators. Now, the hereditary right to cultivate certain lands, and to reap the benefits of that cultivation, seems to be nearly one and the same thing with the right in the land called property." The remark of his Lordship as to the proposed permanency of the rayutvari settlement being similar to the actual state of Kanara would lead to the belief that he supposed the land revenue in the latter to be, to a certain extent, fixed; but his concluding sentence, in which he compares the land tenures of Kanara with the Mirasi tenure, has the opposite tendency, fixity of assessment not being one of the ingredients of Mirasi tenure; and we have previously observed that when Munro, the most powerful and persistent advocate of the rayutvari system, recommended a fixed rent, he did not appear to mean a rent unalterably fixed, but a rent not subject to the frequent fluctuations of the assessment in many provinces.

Mr. Thackeray, in his report of the 4th August 1807 (*m*), said:—"The greater part of the lands of Kanara are private property. The former and present state of private property has been so amply discussed by Major Munro that it leaves me little to say on the subject. Original inscriptions on stone and copper prove the antiquity of this venerable institution. They consist of grants of ancient princes to pagodas, &c., granting the land-tax derivable from certain lands and villages; thus transferring the land-tax from the treasury, to the individual grantee; but the property in the soil was not granted, because not possessed or claimed by the prince; when he gave the absolute property in the soil, the sanad expressly mentions the previous purchase of the right." Such ancient grants to temples engraved on copper, &c., are not confined to Kanara. Many such have been

(*m*) Contained in the Appendix to the Fifth Parliamentary Report, Vol. II., p. 479 *et seq.*, Madras reprint.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

found in other parts of this Presidency (*n*), as well as elsewhere in India. Mr. Thackeray continues:—"Although black books, papers, leaves, or even copper-plates, are often forged; yet these inscriptions, so generally found, could not have been forged. They, therefore, are unquestionable evidence to the antiquity and validity of the institution. The black books, however, are very curious records; and as inscriptions, black books, tradition, annual settlements, and revenue accounts, all concur to show what the *ancient* land tax *was*—to show that it was light and fixed, they show that the lands were private property. The sanads and inscriptions on stone and copper are to be found in any part of Kanara; in every pagoda; they, together with the revenue accounts, the black books, tradition, and the state of the country, afford undeniable proof of the antiquity of the institution. A complete investigation of these ancient inscriptions would throw great light on the former state of the country, perhaps of the ancient history of India. The different princes of Bednore, Vizianagar, and even Mysore, never seem to have questioned the general rights of the people, though an arbitrary assessment and individual acts of oppression may have rendered some private estates less valuable." Mr. Thackeray instances the saleability of land in Kanara, its state of cultivation, and the attachment of the landholders to these holdings, as so many proofs of their right of property. Written muniments of title he regards as not essential to title, but prescription he deems to be "the best of all titles;" and he observes that "no person who has seen Kanara, or considered the subject, can doubt the antiquity and validity of the title of the Kanara landlords; and any Government that

(*n*) Journal of the Bombay Branch of the Royal Asiatic Society, No. V., April 1843, pp. 200, 216 to 224; No. VIII., October 1844, pp. 1 and 4; No. X., July 1845, pp. 263, 270; No. XI., July 1847, p. 371. The Honourable Rao Saheb Visvanath Mandlik has lately in the same Journal, No. XXXII., April 1875, published translations of three grants (by Walabhi Kings) engraved on copper-plates found in Kattiawar. One of these grants by Sri Viladitya (pp. 333, 363) actually names the cultivators in possession. The grant was for certain religious and charitable purposes connected with the Buddhist faith.

should attempt to overturn it, would act like the French Government when it confiscated the private estates of the nobility and Church." The disparity in the incidence of assessment did not escape his notice. He says: "The inequality of the land tax and the distance from great towns, perhaps, makes the value of land to vary; in some places it is not saleable. In some cases estates, bought ninety or a hundred years ago for a considerable sum, would not, as the owners say, sell at all now on account of the extra assessment which has been laid on since the purchase." In speaking of the tenantry under the proprietors, he says:—"Few *Mulgainis*, or fixed tenants, have, it is said, been created *since the Company's Government.* This is attributed by the Collector to their confidence in our Government. This is one cause," (it is not quite clear why this should have been so,) he proceeds:—"and the increasing stock of the landlord, which enables him to cultivate more of his own estate is, perhaps, another. The Mulgainis, or fixed tenants, have not been obliged to contribute anything when the proprietor has been extra-assessed; however, I should think that they ought to contribute in the same manner, in proportion to the value of their estates. If it be just to equalise the assessment on the landlords, it ought to find its level on the fixed tenants." We have seen that Munro said that the power to effect this lay in Government. Mr. Thackeray remarks that "the great difference between the land in these two provinces" (Kanara and Malabar) "and those in other provinces is, that here it is vested in individuals; there, in communities. The villages above the ghauts are like corporations, communities, municipalities, republics, which are the proprietors of the whole lands of the village—at least, they and the Sarkar share the qualities of property between them. They have cleared and cultivated the village lands, time out of mind; and there is none but the Sarkar who can claim any share in the property from them. The village community only wants a fixed land tax, which shall leave them some part of the rent, to become joint proprietors of the village lands; they are, however, at present only

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

common tenants, because, in most places, the Government draws the whole landlord's rent. If the Government exacted the whole rent from Kanara and Malabar, the present proprietor would not be common, but individual tenants." Mr. Thackeray next made some statements, as to the history of the land revenue of Kanara, which were obtained by him from Munro's report of the 31st May 1800, and the accounts annexed to it. After mentioning that Munro's assessment for Fusli 1209 was pagodas 4,65,148-33-64, he says:—"The Collectors of Kanara have ever since gone on lowering or raising the rent, according to circumstances, upon Tippoo's standard" (pagodas 6,16,089-2-20, the balance arrived at as such standard by Munro after deducting from Tippoo's total assessment [pagodas 6,68,678-25-16] additions [pagodas 2,52,589-23-76] never actually collected by him). "Each rayut's payment to Government consists of two parts—*shist* and *shamil*. The *shist* is the old land tax, and is easy: the *shamil* is the extra assessment, which is sometimes more, sometimes less than the *shist*. Few individuals pay the full sum, including shist and shamil; but while the Collector keeps the full standard, 6,16,089-2-20, in view, the rayuts have to look forward to pay it, according to the *Kykaguz* (*o*) as it is termed. This standard is too high; but the annual settlement is made with a view to it, and the amount is regulated by circumstances. It may here be proper to observe that, though the standard of Tippoo be too high, for the country, yet the settlement of Fusli 1209 was concluded and regularly collected under great disadvantages." He then mentions the troubled state of the country at that time to which we have already adverted. He next mentions Munro's proposed reductions, "which he considered necessary to give that spirit to agriculture which former ages never saw. His opinion seems to have been justified by experience: the Fusli 1209 settlement has been, in some measure, increased; and though the country has improved, those rapid advances, which a reduction might have produced, have perhaps not taken place."

(*o*) For the meaning of this term *vide infra*, p. 166.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

In their despatch of the 17th December 1813 to the Government of Madras (*oo*), the Court of Directors reiterate the opinions to which we have referred as contained in their despatches of 1802, 1804, and 1811, already mentioned, and at once acknowledge and manifest their desire to respect the right of property in the soil vested in the rayuts. In paragraph 165 they say :—"In framing fiscal arrangements applicable to the existing state of society in Malabar and Kanara, it is important not to lose sight of the strong ground upon which the proprietary rights of the landholders in those provinces are founded. By attempting to introduce an intermediate class of persons (call them Zemindars, Mootahdars, or what we may) between the Government and the Jelmkars (*p*), or hereditary proprietors of the soil, we should not be creating an order of great proprietors, since we have not property in the land to confer, with the exception of some forfeited estates ; but we shall be raising up a set of farmers of revenue, with interests distinct from, and at variance with, the interests both of the sovereign and the subject. Fortunately the thriving condition of the provinces, and the improving state of the public revenue under the present mode of collection, remove every inducement to hazard experiments upon a system which, though it may have its inconveniences in common with every other system, a trial of several years has shown to be, in operation, highly beneficial."

These objections are directed against the interposition of a new class of landholders between Government and the rayuts, and not against any alteration of the amount or equalization of the incidence of the assessment.

By the phrase "forfeited estates" the Court apparently intended to refer to the waste and deserted lands belonging to Government. In a despatch from the Court of Directors to the Government of Madras (Exhibit 86, and Rev. Sel., Vol. I., p. 638, para. 73) of the 12th April 1815, relating more especially to the Ceded Districts, the Court of Directors state that they are not prepared to accede to what they regard as an extreme proposition of the Board of Revenue,

(*oo*) Rev. Sel., Vol. I., p. 511. (*p*) *Vide supra*, p. 45.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

viz., irrevocably to limit the power of assessment vested in the sovereign to the then existing rate of land revenue.

Judgment.

It would appear from the letters of Mr. Alexander Read of the 1st January (*q*) and 19th January 1814 (*r*) addressed to the Board of Revenue (Mr. Read having at that time been Collector of all Kanara), that the supposed prosperity of the province of Kanara and of its revenue, upon which the Directors, in December 1813, congratulated themselves in the concluding sentence of the extract just made, was to some extent, at least in his opinion, a delusion. For five years previously to writing those letters Mr. Read had complained that he experienced more difficulty than formerly in collecting the land revenue. In 1811, 1812, and again in 1813, he stated that he considered the assessment generally, and particularly at a distance from the coast, to be too high, and that the inhabitants were beginning to feel the effects of over-assessment every year. The Board of Revenue, adverting to Mr. Read's approaching departure from Kanara (where he had been from the time of the conclusion of Munro's administration A.D. 1800), called upon him to report the measures pursued by him in that province, and the causes which had contributed to retard its improvement (*s*). Mr. Read's letters of January 1814 were written in reply to that requisition. In the letter of the 1st January he admitted that there had been an increase in the rates proposed by Munro—"the decline of agriculture and various causes of poverty amongst the rayuts" having compelled him and Mr. Ravenshaw, in order to maintain the revenue of the province at its annual standard, to augment the assessment of low rated lands as a substitute for other lands which had failed to pay any revenue. He added, however, that he and Mr. Ravenshaw had so far adopted the views of Munro as not in a single instance to raise the rent of an estate "higher than it had been rated at some former period," and that,

(*q*) Exhibit A., p. 71. (*r*) Printed Books, Vol. III., p. 1.

(*s*) Exhibit A, Rev. Board minute of 15th September 1831, paras. 18 to 20, pp. 142, 143.

although the majority of the landholders were rated higher than they would have been according to the standard recommended by Munro, yet that few persons paid the full assessment; by which we understand Mr. Read to have meant the *kadim beriz* as it existed at the time of the acquisition of Kanara by the British. There were accounts annexed to his letter which have not been given in evidence in this cause, but the general result of them is stated in the 23rd and 24th paragraphs of the Minute of the Board of Revenue of the 15th September 1831 (*t*). It appears thence that, after making a necessary adjustment, the assessment on the province of Kanara (including Soonda) had, in the period extending from Fusli 1209 to Fusli 1222, been increased by 23,763 pagodas. That, of this increase, 5,569 pagodas had accrued from extended cultivation of waste lands, pagodas 4,024 from concealed lands discovered, or inundated lands recovered, and pagodas 14,170 from additions made to the land revenue payable by lowly-assessed lands. And that, of 43,366 revenue payers, 22,467 were assessed within Munro's proposed maximum and 20,899 (who paid more than half of the whole revenue of the province) were assessed above that standard. Mr. Read was of opinion that the salt and tobacco monopolies, the sea and land customs, the stamp duties as well as the land assessment, pressed too heavily on the province—its export trade in the staple productions having declined, agricultural produce having fallen in value, and the inhabitants being consequently less prosperous than during the years immediately following the acquisition of Kanara by the British.

It will be recollected that the then existing mode of assessment was the Bijavari system, resting, not upon any actual measurement of lands, but upon a rough estimate of the quantity of seed reported to have been usually sown in each field. Upon that the *kadim beriz*, the alleged ultimate limit of land assessment, rested. Mr. Read, who so long as Munro had been in Kanara, was his assistant, and must have known whether Munro had given any promise on behalf of

(*t*) Exhibit A, Rev. Board minute of 15th September 1831, p. 144.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

the State to the rayuts that the *kadim beriz* should never be exceeded, proposed in his letter of the 1st January 1814 (para. 20), and supported that proposition more fully in his letter of the 19th January 1814 (para. 3 *et seq.*), a system of assessment totally different from the Bijavari method, namely that 30 per cent of the gross produce should be taken by Government as the standard assessment. Thus he was in favour of discarding the ancient shist and shamil of Kanara altogether, the inequalities in which he said were so great that the ancient shist and shamil would not serve as a guide in equalising the rents of estates (para. 6). He said that it should be considered whether 20 per cent of the gross produce would not be sufficient for Soonda and Bilghi, because their revenue could easily be enhanced through the medium of hamlet and road duties (para. 10). Possibly by Soonda, he here meant Soonda-bala-ghát only. It is true that one of the objects of his proposal to take a percentage on the gross produce as land revenue in lieu of the Bijavari assessment was to reduce the general amount of land revenue taken; yet many individuals, who had not, in consequence of the great inequalities in the Bijavari system, paid their fair share of the revenue, would, by the mode of assessment proposed by Mr. Read, have been subjected to a much heavier liability than the *kadim beriz* of the Bijavari system. And this would have been consistent with Mr. Read's intention, as one of his objects was to equalise the pressure of the land revenue. He could not, therefore, have supposed that Munro had in anywise pledged Government to maintain the *kadim beriz* in permanency. If any such difficulty existed, he was manifestly too candid a public servant to have passed it over in silence, as he did.

On the 28th April 1817, the Board of Revenue transmitted to Mr. Harris, who had been recently appointed Collector of Kanara in succession to Mr. Read, certain paragraphs, relating to Kanara (*u*), of a minute, which was ultimately

(*u*) Exhibit U., Printed Books, Vol. II., p. 28, transmitted under cover of Exhibit T., *Ibid.*, p. 46. The paragraphs so sent were 40 to 63 inclusive.

recorded on the 5th January 1818 (*v*). The Board directed Mr. Harris to forward a copy of those paragraphs to Colonel Munro, who about that time happened to be in Kanara. He had left it, however, before the document reached him.

Judgment.

In its 56th para. the Board of Revenue, speaking of Munro, say:—"His settlement for the first year after our acquisition of Kanara, Fusli 1209, was, therefore, pagodas 4,40,630, or about 1,39,000 pagodas below the *rekah* and *shamil* of Hyder; and in his *instructions* to the subordinate Collectors for the settlement of the following year (Fusli 1210) he *directs* that no lands should be assessed higher than at some former period; in other words, that if any land has escaped the extra assessments of the Bednore princes or of Hyder's Government, they should continue exempted from them; but that if they had been made liable to the assessments, and did not now pay them, the maximum of the demand on such lands should be the ancient *rekah*, with one, two, or at the utmost not more than three-fourths, of the modern additional cesses, thereby limiting the maximum land-tax to the *rekah*, and three-fourths of the *shamil* in Hyder's time."

There are two mis-statements in that paragraph. At the time Munro wrote his letter of advice to Messrs. Read and Ravenshaw, these gentlemen were his successors, not his subordinates. He had no power to give them instructions or directions. He gave them neither one nor the other, and simply limited himself to stating what, he thought, would have been his own policy if he had continued to be Collector of Kanara, and advised them to adopt the same, but necessarily left it completely within their discretion whether they should do so or not.

(*v*) Revenue Selections, Vol. I., pp. 885, 894, 897; and *see* Exhibit A, Revenue Minute of 15th September 1831, p. 145, para. 28, which paragraph is too concise to give a perfectly correct idea of the observations of the Board of Revenue in paragraphs 57, 58, 59, and 60 of their minute of the 5th of January 1818.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

The Board of Revenue, still speaking of Munro's policy, continued thus :—

"57. Under the judicious limitation thus imposed on the land-tax in Kanara, no field was assessed with a higher tax than that to which it had already been subject, and where experience had proved this amount to be so high as to trench on the vital resources of the country, it was proportionally reduced. The effects of a moderation to which the people for many years past had been so little accustomed, immediately became perceptible throughout the province; for, by inspiring the inhabitants with confidence against any further unlimited demands on the part of Government, it gave rise to innumerable claims to land, which once again resumed its former value, a general improvement was sensibly observable in all parts of the district, and the revenue was realized with a facility which, except in Malabar, was elsewhere unknown."

This passage is too rhetorical. Munro, as we have seen, had imposed no limitation upon the land revenue. He had simply settled it for the Fusli year 1209, and advised that there should be a limit fixed; but he manifestly thought that longer experience was necessary before Government could advantageously determine what that limit should be, at least in that part of Kanara with which this suit is concerned. Neither he nor the Board of Revenue was authorised to fix a permanent limit. It is more than doubtful that an absolutely invariable assessment was ever in his contemplation. The whole question of a permanent settlement was still open; and, from the time of the receipt of the despatch of the Court of Directors of the 21st July 1802, even the Government of Madras could not, without the assent of the Court of Directors, have made any final settlement of the land revenue of Kanara. The only period during which the Government of Madras was at liberty to have made a permanent settlement without the sanction of the Court of Directors was that intervening between the receipt of the Court of Directors' despatch of the 11th February 1801 and

the receipt of their despatch of the 21st July 1802, during which time the Madras Government, as we have seen, did not make any such settlement.

The Board of Revenue, in their Minute of the 18th January 1818, further said :—

Judgment.

58. It is greatly to be regretted that a limitation founded on such wise principles, and followed by such happy effects, should on any account have been infringed by the local authorities who succeeded Colonel Munro; but especially that the mere desire of maintaining the land rent to the same annual standard should have induced them to adopt a measure confessedly so 'impolitic and unjust' as to make up by a small increase to low-rated lands the rent of others which had failed altogether. For" &c.

That remark was not quite fair to Mr. Read and Mr. Ravenshaw. The principle of requiring the solvent landholders to contribute towards making good the defaults of those who were not solvent was recognized, as we have already mentioned, by Munro himself (*w*). It seems to have existed in Kanara during the Bednore dynasty, though seldom then enforced (*x*), and was not unknown amongst the *Mirasdars* of the Dekkan (*y*). It had been advocated by Munro for other provinces so early as 1794 (*z*), and was subsequently a prominent feature in his rayutvari system, and, as such, participated (*see* paragraphs 267, 268, 269, 270, and 306 of the Minute of the 5th January 1818, on which we are now commenting) in the censure passed upon that system by the Revenue Board (*a*). Those paragraphs, together with certain others, were deemed objectionable, and

(*w*) *Supra*, pp. 132, 140, and Exhibit A, pp. 62, 69. (Munro's letters of 9th Nov. 1800, para. 22, and 9th Dec. 1800, para. 11.)

(*x*) Exhibit A., p. 20, para. 17 of Munro's letter of 31st May 1800.

(*y*) Rev. Sel., Vol. IV., p. 160 (Mr. M. Elphinstone's Report of 1819); p. 477 (Mr. Chaplin's Report of 20th Aug. 1822).

(*z*) Gleig's Life of Munro, Vol. III., pp. 95, 96, letter to Capt. Allen.

(*a*) Rev. Sel., Vol. I., pp. 941, 942, 950. *See* the *remark* of Munro at p. 882, para 46. The paragraphs struck out by Government had not been amongst those submitted to Munro by the Revenue Board.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

were struck out by the Government of Madras previously to permitting the circulation of that minute for the information of Collectors. The Board continued :—

"59. This, however, in the opinion of the Board, is not the whole extent of the evil. It appears that the *rekah*, with the full amount of the *shamil* in Hyder's time, is now declared the maximum demand on all the lands of the province (*b*). As such it is entered under the term *beriz* in the *Kykaguz* (signed paper) or individual pottah (patta) given annually to each rayut under the Collector's seal and signature; and in the same paper is specified the proportion thereof which may be fixed as his *jamabandi* or settlement for the Fusli year; but as the latter is never determined until near the conclusion of the Fusli, it is liable annually to variation; and as it must often be left to be settled at the discretion of the revenue servants, experience has shown that it may occasionally be, and doubtless often has been, fixed with reference rather to the capability of the rayut than to the productive powers of his land."

The plaintiff has not produced any such *Kykaguz* or *patta* as is mentioned by the Revenue Board in that paragraph, which *Kykaguz* or *patta*, annual or otherwise, has been granted to himself or his predecessors in title. It is a remarkable circumstance that he, who is the holder of twenty-three vargs (most of which were obtained, as we have mentioned, by purchase), should not have offered in evidence a single document of title connected with any one of them. It is difficult to suppose that he has none. He has not ventured to enter the witness box and say that such is the fact. The term *beriz* denotes the total amount of revenue assessment, consisting, as already stated, of the *shist* and *shamil*, and sometimes including the assessment

(*b*) See to the same effect the observations of the Board of Revenue in paragraphs 7 and 8 of their letter of the 30th October 1817 to Mr. Harris (Exhibit W., Printed Books, Vol. II, p. 46 *et seq.*) and also para. 4 of the letter of the same Board to the Madras Government, dated 9th Sept. 1819, Printed Books, Vol. III., p. 9, Exhibit B. B.; and Vol. II., p. 541; also Exhibit A. I., 28th Jan. 1813, para. 74; and Rev. Sel., Vol. I., p. 570.

in respect of *hosagami* (lands recently brought into cultivation (*c*). The term *kadim* (corruptly *kudeem* or *kuddim*), occasionally found in conjunction with *beriz*, signifies "ancient or original (*d*)." The phrase *beriz* or *kadim beriz*, without more, does not imply any guarantee that the revenue so described is permanent and immutable in amount. The revenue, as collected before the British rule in Kanara and Soonda, was described by those names; but, as we have seen, was liable to change, and was in fact frequently changed by the Native Governments, almost invariably in the direction of enhancement. The construction of any *patta, mulpatta,* or *sanad,* must depend upon what it contains, and its efficacy upon the authority of the officer of Government who gave it, or upon its ratification by Government. Its genuineness, as well as its true scope and validity, can only be determined in each case in which such a document is propounded and relied upon. It is possible that there may be *pattas, mulpattas,* or *sanads* in North Kanara, in which the context may indicate that the phrase *beriz* or *kadim beriz* has been extended beyond its normal signification, and so employed in those particular instances as to mean an invariable land revenue or rent.

Sir Thomas Munro, in commenting on paragraphs 55 and 56 of the minute of the Revenue Board of 5th January 1818, and in referring to the rates of assessment which he had proposed, and which, as already stated, were only temporarily sanctioned by the Madras Government, said :—

"The opinions which I then (A.D. 1800) gave were founded upon an anxious and constant attention to the subject, and upon a complete command of every source of information, and are much more likely to be right than any that I could now offer. I did not read over this paper until after I had left Kanara; and, had I even seen it before my arrival

(*c*) As to *hosagami* see Printed Books, Vol. III. pp. 191, 227, and there para. 28 of Mr. Maltby's Report of Oct. 1838, Defendants' Exhibit No. 24, and Plaintiffs' Exhibit I. I., para. 28, being a minute of the Board of Revenue of 16th Nov. 1843. Mr. Blane's Report of the 30th Sept. 1848, paras. 51, 52, Exhibit A, pp. 188, 201, 202.

(*d*) *Ex. gr. kadim shanbogue* (old village accountant). *See* Printed Books, Vol. III., 78, para. 2.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

there, my stay was too short to have enabled me to acquire any new information that could be depended upon. From all that I could learn, whenever in my progress through the district, I see no cause to change my former opinion respecting the maximum of assessment. The state of the country at present shows that the rate which I then proposed for each district was sufficiently high. In some districts the old *rekah* and $\frac{1}{4}$, in others the rekah and $\frac{1}{2}$ or $\frac{3}{4}$ of the extra assessment by the Bednore Rajas and Hyder, was proposed as the maximum." Munro had not, however, in practice, adhered with inviolable rigour to his own proposals. Mr. Harris, in his letter of the 27th August 1817 (Exhibit V), para. 6, says :—" I certainly, at the same time, did not confine the limit of demand to the standard of the *shist* and $\frac{3}{4}$ths of the *shamil*, because hundreds of Mulgars were assessed beyond the *shist* and $\frac{3}{4}$ths of the *shamil* by Colonel Munro in his first settlement of Kanara, and they have continued (except when remission was necessary) to pay the assessment until this day" (*e*). Munro, during his comparatively short experience of Kanara, must then have to some extent discovered the fact, which became more distinctly apparent to his successors, that many of the mulgars, whatsoever may have been the condition of the others, were, to use carefully-measured language, not over-assessed (*f*); and, when treating of remission, he was suggesting a general and not a universal policy to be pursued in Kanara. He continued thus :—" More accurate knowledge, acquired during a period of sixteen years, may have

(*e*) Printed Books, Vol. II., p. 38 ; and *see* paras. 13, 14, of the letter (Exhibit No. 7) of the 2nd Aug. 1820 ; Printed Books, Vol. III., p. 15, in which, exclusive of those in Ankola and Soonda, Mr. Harris gives the actual number of rayuts in Kanara paying the full beriz as 5,650. The Board of Revenue seems eventually to have assented to a certain extent to the propriety of such an assessment, Exhibit B.B., 9th September 1819, para. 6, Printed Books, Vol. III., pp. 10, 26, and p. 236, para. 46.

(*f*) Minute of Board of Revenue of 11th Jan. 1836, para. 19, (Exhibit G.G. Printed Books, Vol. III., pp. 177, 185) ; Exhibit A.A., dated 28th July 1819, para. 2, Printed Books, Vol. III., p. 8. ; Exhibit Y (dated 9th Sept. 1819), para. 6. The Board of Revenue admitted this to be so. Printed Books, Vol. II., p. 55.

shown that these proportions were not exactly suited to the state of the respective districts. But I did not think that minute exactness was necessary, or that it was, even if attainable, half so important as the giving to each district a fixed limit of assessment. Until this is done the land-owners can have no confidence, and will rather be disabled or deterred from extending cultivation. It is true that a maximum has been established in the *patta* annually issued ; but as this maximum is the old *rekah* with the full extra assessment of Hyder, it will in general rather discourage than give confidence to the landholders, because it holds over them an assessment which few of them will ever be able to pay." By the establishment of a maximum in the annual *pattas,* we understand that the *kadim beriz* (old assessment) or *joomla beriz* (total assessment) was mentioned by his successors in documents of that nature issued in years subsequent to Fusli 1209, for which year alone Munro made his jamabandi settlement. We have already spoken of the force of that phrase, and of the effect which might follow its introduction into a grant or *patta,* and shall presently recur to that topic. Sir Thomas Munro further said :—

"It is not necessary that the land rent should always be maintained at the same amount, or that the assessment of Hyder should be taken in order to enable us to raise the rent of thriving estates to that standard. A moderate standard should be adopted for each district. No estates, however flourishing, should pay more ; those which pay less may be suffered to reach it gradually, and if they are not likely to do so, a lower standard might be adopted for them." And he added :— "I believe that Kanara is more able now, than it was at the time it came under the British Government, to pay its assessment. There have been partial failures, particularly in districts near the Ghauts, but the province in general has improved, &c."

It is deserving of especial notice that Sir Thomas Munro did not, in making his notes on the portion of this minute

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

of the Revenue Board of the 5th January 1818, which was submitted to him, say, although the occasion demanded such a statement if it could be made consistently with fact, that he himself had given any promise to the landholders of Kanara and Soonda that the assessment, made by him in Fusli 1209, should never be changed. Hence we cannot be surprised to find that neither he, nor the Revenue Board, although the latter did not stint itself in criticising the policy and conduct of Munro's immediate successors, Mr. Read and Mr. Ravenshaw, ever ventured to assert that any breach of faith with the landholders had been committed (*g*).

Referring again to the remark of Munro, that a maximum had been established in the *pattas* annually issued, we should observe that, although the plaintiff has not produced any such *pattas* or other title-deeds relating to his own *vargs*, the assessment of which is in dispute, he has, with a view to establish the character of a *muli* holding to be a tenure recognised by the State as involving a strict limitation of its fiscal rights within the bounds of an invariable assessment, adduced in evidence several documents of the nature of grants, pattas, or leases relating to lands belonging to other persons. It is somewhat remarkable, considering with what care muniments of title have been habitually preserved in Kanara, that so few documents of this class, dated in the time of native rule, should have been produced. It was, we think, to have been expected, had the rights vested in the *muli* land-owner been such as have been contended for before us, that many grants or confirmations of title would have been forthcoming, decisive in their indications of the *mulgar's* tenure, as operating permanently in derogation of the sovereign's general right of taxation. Instead of these we have such documents as O. O. at page 56 and P. P. at page 73 of Vol. II. of the Printed Books of Evidence. The former of these does not contain the word

(*g*) In their minute of the 8th July 1819, para. 8, forwarded to the Madras Government on 12th July 1819, the Board only speaks of the departure from Munro's general policy as injudicious, and subsequently, as mentioned *supra*, in p. 168, note (*e*), to a certain extent acquiesced in the propriety of that departure.

mulgar or *muli*. It is expressly a grant of land in *miras*. The witness, Appajee Soobrao (II., 117), says, in reference to this document, "I consider that a *miras shasun bhumi patta* and a *mulpatta* are of the same character." This may be true, and, once admitted, would enable us to refer the mulgar's rights to a tolerably familiar standard; but we do not understand the learned counsel for the plaintiff as solicitous to place the *muli* tenure on a level with ordinary *miras*. The grant P. P. is of the same character as O. O. "It is settled to give them (*i. e.* three pieces of land) to the said Desai on *shasan bhasa* fixing (*i. e.* establishing) *miras*." It was, no doubt, competent to the sovereign and his authorized representatives to make grants or leases in individual cases, on any terms whatever; but those terms can furnish no standard for the estimation of the *muli* right, unless the equivalence or precise relation of the one to the other be plainly deducible from the language of the grants themselves. Where, as in the *second* document marked P. P. (*h*) (Vol. II., p. 73), the grant calls itself a "Krāma mūli shāsun patta," it is expressly set forth that the grantee had asked for the land on an undertaking to pay the "diwān tergi," or land tax; and though the grant is made, as it is said, on "shāsun bhasha," (which seems to mean "an explicit grant" or "a declaration by way of grant"), and although a proprietary right may be conferred for such time as the grantees pay the "diwān tergi," there is not any express engagement that the "diwān tergi" or land tax shall never be increased. The phrase "diwān tergi" has been rendered by the interpreter "Government tax." If this necessarily implied an invariable tax, the grant would have to be construed accordingly; but whether the land tax was or was not subject to variation is the question—one, the solution of which is not furthered in any way by the use of the words, whose sense has to be determined without accompanying expressions such as to show that the one or the other meaning must have been intended. There is, indeed, a statement in

(*h*) Both of the documents marked P.P. were granted in Tippoo's time, and bear dates corresponding with A.D. 1799.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

this *mul patta* of what the "tergi" is, and a direction for its annual payment; but, unless invariableness be otherwise established, this affords no proof of it. Supposing a liability to variation to have subsisted, however sparingly the corresponding right of the Government may have been exercised, it is necessary to bear in mind what the Privy Council said in a stronger case, being that of a private grant, that; "where variableness of *jama* (the amount payable by the grantee) is the normal condition, the mere naming of a sum certain in connexion with the grant of a descendible tenure does not impart, of itself, fixity to that sum, in the absence of positive words, or of other evidence to show that such was the original design."—*Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (*i*). The promise is limited to this:—"You and your descendants personally and by assignment are successively to enjoy the lands in accordance with what is above written," *i. e.*, paying the *diwān tergi*, the present amount of which is indicated, but without the expression or, so far as we are at present informed, the implication of any guarantee against variableness according to the needs of the State, but rather the contrary.

As to the grants or leases made after the introduction of the British Government, none of those issued by Munro himself have been produced. The earliest in date are some issued by his successor, Mr. Read. Exhibits Q. Q. and R. R. (Vol. II., pp. 58, 59) are two *muli* grants made by him in February 1803. They transfer to the grantees the same rights as were enjoyed by the previous *mulgars*, and, not specifying what those rights were, afford us no light for the determination of what was essential in a *muli* tenure. They set forth the *joomla beriz* (*i. e.* total assessment) payable on the lands; but this specification, without words importing the invariableness of the demand, would impose no restriction on a readjustment of it by the Government. Moreover, if Mr. Read had intended to grant the estates at a rent fixed for ever, he had no authority in that respect. We have seen that the interests of Government were guarded against

(*i*) 13 Moore's Ind. App., 275.

alienation by the instructions to Collectors of the 25th June 1791, under which Munro himself acted. According to Madras Reg. II. of 1803, S. S. 43, 44, a Collector could not grant cowls (*kauls*), or alienate Government lands, without express authority; and by Reg. I. of the same year, and forming a part of the same connected system of revenue legislation, the Board of Revenue itself was prohibited from confirming a fixed rent without the sanction of Government. Accordingly we find Mr. Read, on the 15th May 1807 (Vol. III., p. 201, Exhibit A. K.), requesting authority for the creation of private property in Sarkar lands, which the Government sanctions (28th October 1807) on condition that the grantees are to engage for the ordinary land tax. What "the ordinary land tax" was, has to be gathered from other sources; but it was certainly not a fixed rent for the constitution of which the Regulations specially provide, and none such was proposed for approval.

The *mulpatta* S. S. (*j*) at page 61 of Vol. II., might, if there were no question of the Collector's authority, seem, at first sight, to admit of a construction such as the plaintiff desires us to put on it. It is, in fact, relied on by the witness Munjoonthaya (Vol I., page 156) as implying that the *beriz* is never to be increased. But, independently of the important principle of construction laid down by the Privy Council, and to which we have already adverted, the remark occurs that the concession of specially liberal terms, whether through design or inadvertence, to a *mulgar* in a particular instance, by no means implies that these terms were an essential, or even ordinary, element of the *muli* tenure. That no such inference is to be drawn is conclusively established by the numerous specimens of *mulpattas* collected in Printed Bks, Vol. II., pp. 81, 88, 89, 91, 95, 97, 98, 381 *et seq.* (viz., Exhibits 44, 45, 47, 48, 58, 55, 56, 57, 58, 60, 61, 62, 63, 64, 66, 67, 68), all of which purport to be grants in *muli* tenure, conferring a *mulgar's* estate (proprietary

(*j*) Dated Fusli 1227 (A.D. 1817-1818). The land, the subject of this *mulpatta*, is in Southern Ankola (Gokurn), and not in the Panch Mahals in which the lands in this suit are situated.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

right) on the grantees and their descendants from generation to generation, but specifying an annual rent to be paid by them either "until the *beriz* be fixed and thereafter such amount as shall be fixed for the country," or "until the settlement of the fixed assessment and thereafter the amount fixed according to the *beriz* (assessment) settled for the country," or "according as may be fixed at the revenue settlement by Government," or "and thereafter the amount of money fixed according to the revenue settlement settled for the country from time to time," or "for one year in the Haidari coinage and thereafter the hoons fixed according to the *beriz* (assessment) settled for the taluka." Even the *mulpatta* S. S. itself is, by its granter Mr. Harris, expressly based upon and meant to conform to "an order received from the Madras Government under date the 30th August 1807," which date is evidently intended either for the 31st August 1807 or the 31st October 1807; and to have had reference to the order of the 28th October 1807, which is included amongst the documents lettered collectively as A. K., previously mentioned by us. The person who drafted the *mulpatta* S. S. intended to refer to that order of the Madras Government either under the date 31st October 1807, upon which it in all probability would, in the normal course of the transmission of such documents, have been received by the Collector or Board of Revenue from Government,—August being very commonly, by Native clerks, written in abbreviated form by mistake for October,—and *vice versâ*; or he intended to refer to the same order under the date of the application of the Revenue Board to Government for its sanction, upon which application the order was made, that date being the 31st August 1807. The Exhibit S. S. is not the only instance of error in referring to the same order (*see* Exhibits 40, 51, 55, and 66 (*k*); but the date given, with regard to the same order, in Exhibits 46, 49, 53, 54, 60, 61, 62, 63, 64, 65, 67, and 68, is the 31st August 1807 (*l*). The *mulpatta* T. T. (Vol. II., p. 67), dated in 1826-27, gives to the grantee,

(*k*) Printed Books, Vol. II., pp. 88, 385, 386, 389, 391, 392, and 393.

(*l*) Printed Books, Vol. II., pp. 81, 89, 91, 95, 96, 97, 98, 394, 395, 397, 398, 399, 400, and 401.

under Sec. 15 of Madras Reg. XXVI. of 1802, the rights of the former *mulgar*. What those were, it does not say; but if they are to be gathered by inference from the context, in which it is provided that the grantee was to "pay from season to season the amount of the revenue settlement," they did not exclude variability of assessment. A like responsibility is imposed on the *mulgar* by the earlier *mulpatta* U. U. (Vol. II., p. 72) dated in 1803. A promiseis, in that case, added, that "although greater cultivation be effected, yet the above *tirwa* is fixed," but the "above tirwa" is defined thus:—"You are, year after year, like other ryots, to pay to the Sirkar the amount of the jamabandi," *i.e.*, the revenue as annually settled by the Collector; and the engagement comes to no more than this, that the tirwa shall not in consequence of superior cultivation of the land by the tenant or grantee, be increased beyond the rate properly imposable on the land if the cultivation were of the ordinary character. The word "fixed" is used, as in other instances, only with reference to some particular cause of possible varieties. The common forms sent up by Mr. Maltby to the Board of Revenue in 1838 (Vol. III., pp. 192, 193), and the numerous *mulpattas* set forth in Vol II. of the Printed Bks, pp. 81, 88, 89, 91, 95, 97, 98, 381 *et seq.*, all point distinctly to the co-existence of a muli right in the landholder, with a power in Government to vary its demand. Had the two things been inconsistent, the documents could not reasonably have been called *mulpattas;* there was no occasion to give them this name, unless they answered to the general conception which it implied, at a risk of causing future embarrassment by affording an apparent foundation for claims which the Government distinctly intended not to recognize. Mr. Blane, in speaking of grants of waste land made by his predecessors in the collectorship of Kanara, said that there is a "clause in most of these *pattas* which appears to have been by some means or other kept out of notice, and which reserves the right of increasing the *beriz* on any permanent settlement being made" (*m*).

(*m*) *See* his report of the 20th September 1848, para. 53, Exhibit A., p. 203.

1875.

VYJ KUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

We now should mention what has been styled the *tharav* (corruptly *tarow* and *tarrow*) in Kanara. The word *tharav* is derived from the Hindustani verb *tharana*, to fix, determine, or settle, and signifies a settlement, a determination, an arrangement, a fixing. The phrase *tharav-beriz* means a fixed assessment, and is usually applied to the new assessment made on the *tharav* of A.D. 1819, on the *sarasari* system, which we shall now very briefly describe.

On the 30th October 1817, the Board of Revenue at Madras wrote a letter to Mr. Harris as Collector of Kanara (*n*), and stated in its 10th paragraph that the Board was "of opinion that the best universal standard of maximum demand would be the average collections realized from each estate since the province has been under the British Government." That mode of assessment, by adopting the average, is the *sarasari* system. The Board in its 11th paragraph directed that, subject to the confirmation of Government, the settlement for that year should be founded on that basis, the average collections from each estate for the immediately preceding sixteen or seventeen years being assumed as the maximum of the Government demand thereon. Mr. Harris, by a subsequent letter (*o*), having demanded more detailed instructions, the Board, on the 29th December 1817 (*p*), gave these further instructions, and authorised him to defer the new settlement on the *sarasari* principle until Fusli 1228. The Board having, on the 12th July 1819 (*q*), submitted the proposed *tharav* based on that principle to the Government of Madras for approval, that Government authorised the Collector to make a settlement on that basis for that year (*r*), and Mr. Farran, the plaintiff's

(*n*) Exhibit W., Printed Books, Vol. II., pp. 46, 47.

(*o*) Dated 12th December, 1817, Exhibit X., Printed Books, Vol. II., p. 48.

(*p*) Exhibit Y., Printed Books, Vol. II., p. 52.

(*q*) Exhibit Z., Printed Books, Vol. III., pp. 5, 6, 7.

(*r*) *See* Exhibit A., p. 151, para. 42, referring briefly to a letter of the 30th August 1819 from the Secretary to Government to the Board of Revenue, which letter was not given in evidence in this suit.

counsel, in the course of his argument, has admitted that no final sanction has been accorded to the *tharav* system by Government (*s*). As a consequence of that admission, and for another reason which we now proceed to state, it is unnecessary for us in this case to express any opinion upon the finality of the *tharav* settlement of 1819. That reason is, that it has been admitted on both sides that the *tharav beriz* has never been applied to Ankola, Soopa, or Soonda (*t*), although the Revenue Board had originally not excepted those portions of North Kanara from their instructions to Mr. Harris to assess on the *sarasari* system (*u*). Estates subjected to the *tharav*, and paying the full *tharav beriz*, were styled *bharti* (corruptly *bhurtee* or *bhurty*) ; and estates so subjected, but on which a remission of assessment had been given, were styled *kambharti* (corruptly *combhurtee* or *cambhurty*) (*v*). The *tharav* settlement, in those parts of Kanara in which it had been introduced, appears, in 1832-33, to have been reconsidered by Mr. Viveash, as Collector, with a view to equalization of the assessment (*w*), but his method was not eventually approved by the Board of Revenue or by the Madras Government (*x*).

Although at an early stage in the career of Mr. Harris at Kanara, before he can be regarded as having mastered the

(*s*) *See* Mr. Blane's Report of 20th Sept. 1848, paras. 23, 68, Exhibit A., pp. 181, 214 ; Exhibit C. C., 17th Jan. 1850, para. 14 ; Printed Books, Vol. III., p. 115 ; Exhibit No. 30, 12th Jan. 1843; *Ibid.*, p. 109 ; Exhibit I. I., 16th Nov. 1843, paras. 69, 70, 71 ; Exhibit G. G., 11th Aug. 1836, Printed Books, Vol. III., p. 181, para. 11.

(*t*) *See* Exhibit No. 5, dated 30th Dec. 1819 ; Exhibit. No. 6, dated 10th Jan. 1820 ; Exhibit No. 8, dated 14th June 1821, paras. 4 *et seq* and 52 to 70 ; Printed Books, pp. 128, 129, 33, 52 to 56 ; Exhibit 85, dated 29th Oct. 1821, M. S. ; Exhibit A., pp. 152, 154, paras. 46 and 50 of Revenue Board's minute of 15th Sept. 1831 ; and p. 219, Mr. Blane's letter 20th Sept. 1848, para. 73 *et seq.*

(*u*) Exhibit No. 8, dated 28th Dec. 1820, para. 32.

(*v*) This division into *bharti* and *kambharti* was made by Mr. Viveash as Collector of Kanara on a revision of the *tharav* by him, not eventually sanctioned by the Board of Revenue or the Government of Madras ; Printed Books, Vol. III., pp. 75, 76, 77, 101, 102, 103, 104, 105, 107, 240, para. 71.

(*w*) *See* paras. 1 and 4 in Exhibit I. I., dated 16th Nov. 1843, and the papers mentioned in the margin thereto, Printed Books, Vol. III., p. 218.

(*x*) *See* the references in note (*v*) *supra.*

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

real state of the revenue in that province, and especially in Soonda and Ankola, he, in a letter of the 27th August 1817 (*y*), said :—"There is no doubt that from the highest to the lowest ryot, and I know from the head kutcherry servant to the shanbogue of every *magani*, has the total beriz in his *patta* been looked upon as the Sarkar's limit of demand by every possessor of land in Kanara." Yet assuming, what perhaps is doubtful, that he intended to include Soonda, Soopa, and Ankola in that remark, he, after a personal investigation of those regions, and of the condition and history of their land revenue, admitted, in his report of the 14th June 1821 (*z*), that he could not attempt to introduce the *sarasari* system of assessment, on which he had based his *tharav* for the rest of Kanara, into those localities. He, in paragraphs 52 to 70, especially discusses the case of Ankola. The concealment of the extent of land cultivated (under the denomination of *Nasht* [*nusht*] remissions (*a*)), the systematic and long continued frauds of the shanbogues (village accountants), who were chiefly Shenvi (corruptly Shenuawee or Shunuawee) Brahmans, and who were also amongst the chief landholders, and the gross inequalities of the assessment (*b*), satisfied him that a survey of at least the *pahani* (corruptly panee) kind (*c*) was indispensable before any satisfactory settlement could be effected, and he solicited the sanction of the Board of Revenue to the appointment of a special establishment for that purpose. A careful perusal of the whole of his long report, though it was penned with small regard for lucidity of style or even

(*y*) Para. 8, Exhibit V., Printed Books, Vol. II., p. 37.

(*z*) Exhibit No. 9, Printed Books, Vol. III., pp. 33 *et seq.*

(*a*) *Vide supra*, p. 82, note (*i*).

(*b*) A continuance of which he said (para. 8) would be "an act of culpable and unpardonable folly and neglect of duty" on his part.

(*c*) Mr. Robertson, in his report 1st May 1820, in speaking of the surveys of Malik Ambar in the Dekkan, said they "were only what are termed Nazur pahanees, or estimates from beholding and traversing the land without actually measuring it." Rev. Sel., Vol. IV., p. 418, para. 101, Mr. Harris describes it as a survey by sight (inspection) and measurement.

grammatical accuracy, has satisfied us that he had then devoted considerable attention to the revenue of Soonda, Soopa, and Ankola, as well in its economical as in its historical relations. Such a perusal is essential to a right apprehension of his remarks as to Ankola. He had (para. 51) with his own establishment been attempting a *pahani* survey of "several villages in Soonda and Soopa, including the whole magani of Buddengode," and promised to report the result of it to the Board. The Board of Revenue, concurring in the necessity of obtaining more information as to Soonda, Soopa, and Ankola, recommended to the Government of Madras (at the head of which was then Sir Thomas Munro, who worthily filled the high office of Governor from the 8th June 1820 to the 6th July 1827), that the proposal of Mr. Harris for a special establishment to conduct a pahani survey (*e*) in Ankola, and an increase of his establishment for the same purpose in Soonda and Soopa, should be adopted (*f*). This course was sanctioned by that Government (*g*). Mr. Harris, on the 27th May 1822 (*h*), reported the result of his survey of Buddengode to the Revenue Board as, in his opinion, successful, and proposed an assessment, founded upon it, of Buddengode to the extent of one-third of the gross produce. This proposal was sanctioned (Sir Thomas Munro still being Governor of Madras) with an injunction to Mr. Harris to be moderate in carrying it into execution, and he was authorised to entertain an establishment to enable him to survey and assess on the same principles the whole of Ankola and Soonda and the rest of Soopa (*i*). The taking of one-third of the gross produce was a rejection of the

(*e*) Mr. Blane, in his report of 20th Sept. 1848, condemned this mode of survey as perfunctory and inefficient; Exhibit A., pp. 214, 226, paras. 67, 83, and *see* Exhibit I. I., Revenue minute 16th Nov. 1843, para. 67, Vol. III., P. B. 239.

(*f*) Minute 29th Oct. 1821, Exhibit No. 85, M.S.

(*g*) Resolution 7th Dec. 1821, Exhibit A., p. 155, para. 54.

(*h*) Exhibit No. 12, Printed Books, Vol. III., p. 130; and *see* Exhibit No. 10, dated 17th June 1822, and Exhibit No. 11, dated 17th June 1823, Printed Books, Vol. III., p. 61.

(*i*) Exhibit A., pp. 156, 157, Report of Rev. Board, dated 15th Sept. 1831, paras. 56 to 60.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY,

Judgment.

theory that the *kadim beriz*, consisting of the full *shist* and *shamil*, constituted the extreme legitimate limit of land taxation. The inequalities of the assessment under the old system were so great and so numerous, that in many instances one-third of the gross produce would exceed the *kadim beriz*, and in others would fall short of it. The fact that Mr. Harris, through the Board of Revenue, made to a Government presided over by Sir Thomas Munro, and that such a Government accepted, the proposal that the assessment should be one-third of the gross produce, tends strongly to prove that neither the proposer nor the acceptors could have thought that any guarantee had been given to the mulgars at large in Ankola, Soonda, and Soopa by Sir Thomas Munro in the year 1800, or by any other person since that time, that the *kadim beriz* in Ankola, Soonda, and Soopa should be treated as an impassable limit of assessment. Mr. Harris died about the year 1824 (*j*), and was succeeded as Collector by Mr. Babington, from the 7th paragraph of whose letter, to which we shall next refer, it appears that the new survey *beriz* of Buddengode exceeded the *kadim beriz* by Rs. 1,924, notwithstanding that on such lands, in that magani, as had been excessively assessed, the burden of assessment had been reduced; the gain to Government having been apparently caused by the assessment of previously unassessed, but clandestinely cultivated lands—the figures, which he gives in the margin, being exclusive of waste lands.

In the same letter of the 24th August 1825 (*k*), addressed by Mr. Babington to the Board of Revenue, he mentioned (paras. 2, 3, 5) the completion of the survey and assessment of Buddengode by Mr. Harris, and of four other maganis by Mr. Cameron, and (para. 25) that he (Mr. Babington) had "not heard a single complaint against what has been done or discovered the least sign of apprehension respecting the further introduction of the settlement." This, however, Mr.

(*j*) Exhibit A., p. 162, para 73.

(*k*) Exhibit 14, Printed Books, Vol. III., pp. 64 to 69.

Babington and Mr. Cotton, from whom the former obtained his information (Exhibit No. 13, dated 30th June 1825), attributed to the fact that in those five maganis the landholders, though styled mulgars in the revenue accounts, were substantially only *sarkari* tenants. The garden lands, however, in Soonda Balaghat Mr. Cotton deemed to be private property of the true *muli* type, and generally considered not to be assessable beyond a certain limit. Mr. Babington further stated that the survey in the Panch Mahals in Ankola and in Soonda Taluka, with the exception of Burmavasi, and in Soopa with the exception of a few villages in Sambrani and Mudunoor maganis, had been completed, and that the survey in the excepted parts would be so in less than one month after the monsoon, proceeded to criticise the mode of assessment applied to the five maganis (including Buddengode) already settled by Mr. Harris, and to make suggestions as to the assessment of the remaining twelve maganis in the Panch Mahals of Ankola, and in Soonda and Soopa, the survey of which, on the *pahani* method, had been, as now mentioned, far advanced, and was to be soon finished. He doubted "whether under the Sthalvar (corruptly Stulwar (*l*)) Settlement that had been adopted the rayuts might not be induced to relinquish parts of estates now under cultivation," and explained that his apprehension arose from what he deemed to be faults in the rules which had been prescribed for the conduct of the survey. According to them, one-third of the gross produce was to be fixed as the share of the Government on all kinds of land,—good, bad or indifferent,—and it appeared to him that the assessment so determined could not fall fairly on each sort. As the expenses of cultivation are less in good land, so the profit to the rayut would proportionably be greater than in bad land, and Mr. Babington apprehended that if

(*l*) From Sthal (corruptly Stull), a plot of ground containing one or more fields. The Sthalvar Settlement spoken of here is that arrived at by Mr. Harris by his pahani survey.—*See* Printed Books, Vol. III., p. 65, para. 9; p. 130, para. 2; p. 36, para. 15; p. 71, para. 49; pp. 78, 79, 213, para. 3; p. 229, para. 33; and *see* Vol. II., pp. 148, 149, 150, where Sthalvar is used to indicate the area of the land.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

the assessment were regulated upon that principle it might tend to an abandonment by the rayuts of their inferior lands and a concentration of their stock and labour on the superior lands. He, therefore, requested authority to fix the assessment on each entire estate consisting of good and bad land at an amount equal to one-third of the gross produce, and to sub-divide it on each sort of land at rates varying from 35 to 20 per cent, instead of one uniform rate of 33⅓ per cent, for the whole. This, he thought, would obviate the objection which he made to the plan of Mr. Harris. Mr. Babington; therefore, on this occasion, no more than Mr. Harris, held Government fettered in the proposed assessment of the general lands situated in the twelve maganis by the *kadim beriz;* but, with respect to *garden* lands which he considered as held on *muli* or *quasi muli* tenure, and as producing the halut duty payable to Government, he objected, at considerable length, to an equalisation of the assessment, and expressed his opinion to be "that no excess above the present *kadim beriz* should be made on any estate unless it be clearly proved by other evidence, in support of that acquired by survey, that there are lands now forming part of it which are not included in that *beriz*, or (in other words) which are now held by the rayut fraudulently and unassessed" (*m*).

In its minute of the 30th April 1827 (*n*), written while Sir T. Munro was governor, the Board of Revenue disapproved of Mr. Babington's opinion that the assessment should be regulated so as to give the rayut an equal net profit from every acre of land he may occupy, as being wrong in principle, and unattainable in practice, and maintained that the proper object of Government was to equalise the assessment on the land, not the profits of the cultivators. To equalise the profits on good and bad lands, they observed, would be to

(*m*) Paras. 18 to 21. It should be recollected that Munro drew a strong distinction between garden lands in the province of Soonda (including the Panch Mahals of Ankola) and the rice lands. In the former he recognised private property to a certain extent in the holders. The latter, he said, were sarkari lands, Exhibit A, pp. 27, 28. The plaintiff's lands are rice lands.

(*n*) Exhibit No. 15, Printed Books, Vol. III., p. 212.

render assessment in reality very unequal and unjust. The proprietor of good land would be taxed not only in proportion to the larger return which it yielded, but in a greater proportion. He would not even be on a par with the owner of bad land, who would enjoy an equal profit, and, from being answerable for a smaller amount of revenue, would incur a smaller risk. The best lands would, in fact, become the least desirable. Equality of assessment, in the opinion of the Board, consists in taking a certain fixed proportion of the net produce of all descriptions of land, or, what is the same thing, of its value in money. As the proportion which the net produce from a given extent of land bears to the gross produce varies with the fertility of the soil, and other circumstances, the proportion which each of its constituent parts, viz., the share of Government and the rayuts' profit bear to the gross produce must vary in the same degree, though they do not vary in relation to each other. The rayut will have a larger return from the good land, but he will have more revenue to pay; he will have a less return from the bad land, but he will have less to pay. This the Board considered to be the true theory of assessment.

The Board did not consider Mr. Babington as yet sufficiently informed to warrant his reducing the rate of assessment of garden land below that of rice land. It directed him to make further investigation and to assess experimentally a few villages of each of those kinds of land.

As to certain rice lands held, but underlet at a low rent by certain Brahmans, to assess which at one-third of the gross produce Mr. Babington said would be to destroy all private property in them, the Board of Revenue admitted that some allowance must be made for the Brahman landlords, but directed that the lands should be assessed and entered in the accounts at their full value, and that the allowance should be given by way of remission at the annual settlement (para. 15).

The objections made by Mr. Babington to the equalization of the assessment, according to the survey which had

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

been made by Mr. Harris, were unequivocally overruled by the Board of Revenue, which objections, it observed, "would go to oppose the introduction of survey rates elsewhere as in Soonda." The Board said "his (Mr. Babington's) chief objections seem to be :—

"1*st*.—That the equalization of the assessment will effect a total change in the value of all private property in land. This may be true, but the assessment will only remove a distinction which ought never to have existed, and which originated as it has continued through fraud or oversight. Some will gain and some will lose; but in no other way can justice be done to all, or the land revenue be placed on a sound footing. The inconvenience will be temporary, the good permanent. The Board have no doubt that the equalization of the assessment will be for the general good of the district; but it is an object to make it as little distressing as possible on its first introduction, and if the Principal Collector should think it advisable to palliate the partial inconvenience likely to arise from the measure, by bringing it gradually into operation, the Board would be inclined to give an indulgent consideration to any suggestion to that effect."

"2*nd*.—That if the assessment be fixed according to the Survey, many rayuts will be taxed on the fruits of their own industry. On this point the Board would observe that the rayuts are everywhere taxed on the fruits of their own industry. They ought not, however, to be taxed on the fruits of any *extraordinary* industry which they may have bestowed on their lands, for the assessment should be fixed with reference to an ordinary, not to a high state of cultivation."

"3*rd*.—That in a few years there will be almost the same inequalities and the same necessity for a revision as at present; and that the rayuts, knowing this, will be apprehensive that they will always be liable to alterations of assessment, and that this apprehension will check improvement. The Board are aware that every assessment has a tendency to become unequal in process of time; but if an

assessment is equal and moderate in the first instance, a long period may elapse before the inequalities are such as to render a revision necessary. The Board have also little doubt that the rayuts will soon be brought to consider the assessment permanent as a maximum, if proper *pattas* are given to them, and if they understand that the principle of the assessment is to tax the lands according to a moderate estimate of the capabilities, not according to their actual culture."

The Board of Revenue, we are inclined to think, would not, as it did on the 3rd May 1827, forward such a minute to the Government of Sir Thomas Munro, if it believed him to have pledged the faith of the State twenty-seven years previously to a guarantee that the assessment then made in Kanara, Soonda, and Ankola should never be enhanced, or if they supposed that his successor had been authorised to give and did give any such general assurance to the rayuts.

Sir Thomas Munro died on the 6th July 1827.

The minute of the Board was not answered by the Government of Madras until March 1828, when it seems to have met with the approval of that Government, which, as to the proper means to be adopted for equalization of the revenue, said (*o*) :—

"3. The rule, as stated in the 4th paragraph of your proceedings, which it is your opinion should be observed in order to secure an equality of assessment, namely, to take a certain fixed proportion of the net produce of all descriptions of land, or, what is the same thing, of its value in money, is considered by the Right Honourable the Governor in Council to be correct, if by the term 'net produce' is meant the surplus which remains after defraying every expense attending the cultivation of the land, and that of maintaining the rayut. If the latter be not deducted, it is obvious that the cultivators of the worst lands, which generally require the greatest labour and expense, and yield the least produce, would be compelled to abandon their cultivation, unless they

(*o*) Exhibit No. 16, dated 28th March 1828, Printed Books, Vol. III., p. 217.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

held good and bad land in equal proportions, or nearly so, when the profits derived from the one might enable them to keep up the cultivation of the other, if so disposed.

Judgment.

"4. The main object of the Collector should be to regulate the assessment, so as to hold out no inducement to the rayuts to occupy or abandon any particular description or portion of land; and that object will best be obtained by attending, in the classification of the land, to all the circumstances which increase or diminish the facility and expense of cultivation: these are well understood by the rayuts themselves, and the classification has in most parts of the country, and in the best surveys, been left in a great measure to them. The Board have well observed in another place, that 'it is not sufficient to know from what source the water is to be obtained, and the colour or description of the soil to which it is to be appropriated; the labour and expense of the rayut depend upon the quantity and certainty of the supply, the ease or difficulty attending its conduct to the required place, and the distance of the field from the village; and it is impossible that any assessment, formed without a due regard to these considerations, can be either just or permanent.'

"5. When the land has been correctly classed, a portion of the produce converted into money, or, what is perhaps a safer guide where there is reason to believe that past collections have not been too low, from fraud, neglect, or incorrect accounts, a sum of money, calculated with reference to such collections, might be separately fixed for each class as its rate of assessment; the lands comprised in each separate class would then be assessed alike, though the rates for the several classes would be different. This seems all that is necessary to secure equality of assessment."

From these papers it distinctly appears that neither in the year 1827 the Board of Revenue, nor, in 1828, the Government of Madras, supposed that any valid legal objection existed to the revision of the assessment, or to the raising of it beyond the *kadim beriz* even where the lands were held on *muli* tenure.

In a letter of Mr. Babington to the Board of Revenue, dated 15th August 1828 (*p*), he refers to a letter of the 20th September 1825 (*q*). written less than a month after his letter of the 24th August 1825, of which we have been speaking, in which letter of the 20th September 1825 he had treated the *beriz* as a limit not to be exceeded. "This opinion," he said, "I found was entertained so generally by the European authorities in the province, that I considered it a fixed and established rule, and did not in consequence investigate deeply into the grounds of it. My subsequent inquiries have given me reason to think that it is not so well founded or indisputable as I had assumed it to be, and that the Government, at least, is not committed by any pledge not to increase the *beriz* on any estate found to be lowly assessed, particularly in cases where the assessment may have been founded on fraud and imposition on the part of the rayut or even misconception on that of the local authorities." In our printed copies the *beriz* to which Mr. Babington is represented as referring is that of Fusli 1229 (1819), which would be the *tharav beriz*, but it has been admitted on both sides that 1229 is a misprint for 1209, the year for which Munro settled the *jamabandi*.

Early in the year 1831, tumultuous assemblies (*r*) of the rayuts having been held in Kanara (*s*), the Madras Government commissioned Mr. H. Stokes to inquire into the causes, and especially directed his attention to the "extent to which the assessment should be permanently reduced where it may have been already ascertained to be too high, and the best means of raising it where it is far below a moderate rate of demand, and no good reason can be assigned for relieving the estates from their just proportion of the public burthens." It is difficult to reconcile that direction with any belief on the part of the Madras Government at that time that it was pledged never to exceed the *kadim beriz*. Mr. Stokes, in his report of the

(*p*) Paras. 70, 71, Exhibit 19, Printed Books, Vol. III., pp. 71, 72.

(*q*) Not in evidence.

(*r*) Styled 'koots' in some of the correspondence.

(*s*) Exh. E. E., dated 8th Feb. 1831, Printed Books, Vol. III., p. 153.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

12th January 1833 (*t*), after discussing the inequality of the distribution of assessment and the causes of it (para. 59, p. 171), and, as we understand him, recommending, as a temporary measure, the extension of the *tharav* principle to Ankola, Soonda, and Soopa, said:—"The survey (*u*) should be completed, but it should be rather for the purpose of discovering the extent of and comprised in each *varg*, and its income, by ascertaining boundaries, and learning the rent produce, than for calculating the assessment on any new principle. It should be considered that the measure is intended rather for the purpose of lowering the demand where it is too high than for raising or even equalising it. It is desirable that the assessment should eventually be framed on the same model throughout the district; and in the meantime I think it better that the settlements should be made, as formerly, on estates rather than on fields." And he advised an extension of the same system to "the estates denominated *sarkar-gaini*, the proprietary right of which is assumed to have lapsed to Government." Subsequently, however, he says:—

"78. But to determine whether a more extensive interference with the land revenue will be expedient, and at the same time to afford the most convenient means of making it, there is a measure, which, after much reflection, I consider likely to be attended with greater advantages than any that could be devised. I mean a registration of deeds relating to landed property.

"79. In this district where land is so valuable, and almost all of the estates are private property, and have been so from time immemorial, and where consequently leases and transfers by sale or mortgage have been of frequent occurrence, the most valuable materials for an assessment might easily have been collected in the period since we acquired the province."

Having mentioned that this was the opinon of Munro in 1800 (*v*), and that a register of all lands that became the

(*t*) Exhibit F. F., Printed Books, Vol. III., p. 156 *et seq.*

(*u*) That must have been on the *pahani* method.

(*v*) Exhibit A, page 44, para 4.

subject of litigation had been directed by the Board of Revenue in 1801, but that it did not seem to have been long kept, and that Mr. Thackeray recommended a registration of rents in 1807 *as a basis for a revision of the assessment,* but his suggestion did not appear to have been adopted, and that it was subsequently proposed by Mr. Graeme for Malabar, Mr. Stokes recommended that a register of deeds relating to landed property should be established in the provinces on the western coast of the Madras Presidency (Kanara and Malabar). Speaking of its advantages and objects he said:—

"83. Viewed in connexion more immediately with the revenue administration of the district, most important benefits might be expected from the measure. The actual rental of the whole province having been once ascertained, the assessment might at any time be fixed at a given rate of it, which would bear with almost exact equality on each separate estate; and the rental varying with fluctuations in the value of money and produce, &c., the assessment would also accommodate itself to these changes."

"85. When our knowledge of the income of each proprietor is thus complete, *such general modification in the assessment may be made as shall then appear expedient,* should a diminution in the public expenditure, or an increased income from other sources, admit of it; the most desirable mode of effecting the equalization of the land-tax would unquestionably be by reducing the higher to a level with the lower rates of assessment. In the meantime I do not think the object is of such paramount importance that it ought to be much insisted on.

"86. I do not think the principle of equalization unjust. On the contrary, it seems in theory unjust that one man should be taxed in a greater ratio to his resources than another. But in the course of a series of years it must be remembered that the mischiefs of inequality, so far as private interests are concerned, have in a great measure yielded to a natural compensatory process. The most

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

highly assessed estates have been purchased for less money, the others for more than they would have been; and to reverse these conditions would in effect produce the very evils that would have ensued from original inequality. Hence, in carrying into effect any measure of the kind proposed, it is desirable that provisions should be made to prevent this revolution in the vested rights of individuals.

"87. It would not be expedient to pursue the principle of uniformity to the utmost, so as to interfere with all estates that were not assessed exactly at the assumed ratio. A maximum and minimum might be fixed so as to give the preponderance in the way of reduction. Were it assumed that the rate of 60 per cent were a fair average, alteration might be limited to estates assessed below 40 on the one side and above 70 on the other. The point to be aimed at is, without any material sacrifice, to remove the existing inequalities, so far as they interfere with the prosperity of the country and the punctual realization of the revenue."

Hence we perceive that Mr. Stokes at the close of the second year of his inquiry in Kanara saw no legal objections to a revision of the assessment of the province. He thought that such general modification in the assessment might be made as might be expedient subsequently to Government obtaining the information which a register of sales, leases, mortgages, &c., of land might afford. He was disposed to deal tenderly with landholders, especially with those who had acquired their lands on terms of purchase governed by the existing assessment upon them; but his proposed revision was not, as a matter of right, to be narrowed to a mere reduction of the higher rates to the lower level of assessment, although he was more in favour of lowering than of raising existing rates in cases of inequality. He does not hint that Government was fettered by the *kadim beriz;* and the execution of his scheme, as sketched in the 87th paragraph of his letter, would necessarily often involve a higher assessment than the *kadim beriz* where that was low.

On the 11th of January 1836 the Board of Revenue, in their minute (*w*) of that date, say:—

"19. The remarks of Mr. H. Stokes, regarding *cool nusht* (*kulnasht* (*x*)), concurring as they do with those of the Commissioner in the 59th paragraph of his report, are deserving of particular attention, *and show the necessity of caution in confirming absolutely the assessment upon those estates even which are classed as paying the full standard rates.* The Board think it advisable to defer the final determination regarding them until the inquiry into the state and circumstances of the other estates has been concluded, as it seems very probable that part of the land for which remission is claimed by the owners of the latter as being *cool nusht* has been clandestinely added to some of the former." These remarks are inconsistent with the supposition that the Revenue Board regarded the *kadim beriz* as an absolute limit to assessment.

Judgment.

The minute of the Board of Revenue of the 20th March 1837 (*y*) treats of lands in Soopa both below and above the ghauts. The Board says of them "that it is inexpedient *at present* to attempt to regulate the permanent assessment before them as they now stand. They think, however, that it will tend to produce permanency of occupation to subdivide the estates which are partially cultivated, and fix a just assessment upon the cultivated portion, giving kauls for reclaiming the waste. The Principal Collector will please to consider this suggestion." Here the Board deals with the readjustment of the assessment as a question of expediency and not as any question of right. The Government of Madras, in commenting upon that minute and upon the previous proceedings of Mr. Viveash, already mentioned, spoke (*z*) of "the necessity for the greatest caution and consideration in every measure connected with the revision of the assessment," and said that the necessity for "a complete

(*w*) Exhibit GG., para. 19, Printed Books, Vol. III., p. 185.
(*x*) *Vide supra*, p. 82, note (*i*), and p. 178.
(*y*) Exhibit No. 22, para. 31, Printed Books, Vol. III., p. 100.
(*z*) Minute of 10th May 1837, Exhibit 23, Printed Books, Vol. III., p. 101.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

revision of the assessment of the greater number of the estates in Kanara District remains as urgent as ever," and did not give the slightest intimation of a doubt as to its right to readjust the assessment.

Judgment.

Mr. Maltby, who was acting as Principal Collector of Kanara, in his letter of the 22nd July 1839 (*a*) to the Board of Revenue, in describing the revenue system which prevailed in his district, after observing that it did not afford any evidence on a point then under the consideration of the Government of India, namely, the respective merits of the village and the rayutvari settlements, inasmuch as the tenure of land in Kanara, though leaning towards the rayutvari system (*b*), essentially differed from it in this that, in the rayutvari system, the assessment was made on every field according to its class, whereas in Kanara the assessment was annually made on each *varg*, or estate in the aggregate (*c*), and that at the time of the British occupation of Kanara "we found a proprietary right in land clearly established and acknowledged," which right was vested in a body of hereditary farmers, each holding his separate estate, and paying his assessment direct to Government, without the intervention of any zemindar or village community," and "the rights of the under-tenants, whether permanent or temporary, were equally established by the known customs of the country" (*d*), said :—"The established proprietary right, *joined to a fixed assessment*, offers every inducement to the improvement of the land" (*e*). In discussing a proposed revenue survey he said :—"The revenue system which prevails in the province, and particularly the revision of the assessment which is now in progress, render this a subject of much importance, but at the same time they render it one of much difficulty. The revenue of the Government on the more productive estates is limited by prescriptive right, the intimation given by our Government that the ancient rates, or *shist* and *shamil*, will not be increased."

(*a*) Exhibit A., pp. 122, 123, paras. 2, 3, 4, 7. (*b*) *Ibid.*, p. 124, para. 7.
(*c*) *Ibid.*, p. 122, paras. 2, 4. (*d*) *Ibid.*, p. 122, para. 3.
(*e*) *Ibid.*, p. 124, para. 6.

There is a manifest incoherence in this concluding sentence in which "prescriptive right" and "the intimation" which Mr. Maltby says was "given by Government that the ancient rates, or *shist* or *shamil*, will not be increased," are treated as identical. And Mr. Maltby, unfortunately, has not mentioned the grounds upon which he arrived at his conclusion that such an intimation had been given by the Madras Government. If those grounds were of a nature to warrant such a conclusion, they must have been different in character from those now laid before this Court, although the plaintiff may be regarded as using his utmost efforts to prove that such a general intimation was given to the landholders of Kanara and its appurtenant districts; and it is evident that Government has not thrown any obstacles in his path by withholding such official correspondence or documents likely to elucidate the case as the plaintiff has called for. Mingling, as Mr. Maltby has mingled, the alleged intimation with prescription, we are inclined to suppose that he meant that the intimation was given many years previously to his own Collectorship. We cannot omit from our consideration that his predecessors, Mr. Harris, to some extent, and still more Mr. Babington, at the outset of their respective careers in Kanara, appear to have been under the influence of somewhat similar views, but eventually, as we have seen, abandoned them, when time and experience enabled these officers to form opinions independently of those which were doubtless pressed upon them and their assistants (*ex. gr.* Mr. Cotton) by the many persons, especially the subordinate Native revenue officers, who were interested in their adoption. Mr. Harris recommended, and the Government of Sir Thomas Munro sanctioned, a course of conduct inconsistent with the supposition that any such intimation, as Mr. Maltby speaks of, had been given by the Madras Government, or with its authority, to the rayuts of Kanara; and Mr. Babington expressly discarded his early opinion that the *kadim beriz* could not lawfully be exceeded; and Mr. Read, who was for seventeen years the Collector of Kanara and senior to both of them,

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

and the contemporary and immediate successor of Sir Thomas Munro, not only was silent as to any such intimation or pledge, but advised a policy quite incompatible with any knowledge that Government had been compromised by the acts of Munro. In a minute of the Board of Revenue of the 28th January 1813 (*f*), addressed to the Government of Madras, in arguing in favour of the benefits to be derived from a fixed assessment, the Board said:—

"74. In illustration and support of this opinion we will adduce, as an example, the provinces of Malabar and Kanara, where, though no 'permanent settlement' has been formally declared by the British Government, the 'maximum of the claims' of the sovereign upon the lands has long been considered as established."

The Board here expressly admits that no permanent settlement had up to that time (1813) been *formally* declared by the British Government, *i.e.*, no formal intimation of a final fixing of the revenue in Kanara had been made to the land holders. It is true that the Board goes on to say that the maximum of the claim of the sovereign upon the lands had long been considered as established,—an opinion which we shall discuss after first referring to a minute written by the same Board on the 5th August in the same year (1813), which (at page 587, Rev. Sel., Vol. I.) contained the following passage:—

"Adopting the sentiments recorded by Lord William Bentinck in the year 1806, it appears that the Honourable Court have taken Kanara as the great 'landmark by which' they hope 'to trace out those principles and regulations which might be applicable to the unsettled districts where the permanent tenures are to be introduced.' So far as Kanara is concerned, as well as the adjoining province of Malabar, nothing has been done in contravention of these views. In these provinces, *where the land-tax is happily so moderate that private property in the soil is still preserved,* it might perhaps be found practicable to form a ryotvari per-

(*f*) Rev. Sel., Vol. I., p. 570.

manent settlement without any great sacrifice of revenue. Accordingly, these provinces were excepted from the operation of the general arrangement by which the triennial lease, and subsequently the decennial lease, has been elsewhere established; the system of management has remained unchanged, because no change was immediately required." And (at pages 594, 595 of the same volume) this further passage :—

"The Honourable Court must have been satisfied, from the evidence already before them, that the inhabitants of Kanara and Malabar enjoy no benefits which are not enjoyed in common by the inhabitants of other parts of their territory; the very substantial one excepted that the Company take less as land-tax from them, under a more equal climate, than they do from their other subjects: and as the Honourable Court dwell with approbation on the evidence and opinions contained in the reports of Colonel Munro and Mr. Thackeray on this subject, it must be inferred that the Honourable Court are prepared to accede to this sacrifice of revenue (temporary perhaps), without which it would be impossible to extend the same advantages to the inhabitants of the other territories subject to this Presidency."

It will be observed that there is a difference between the minute of the 28th January 1813 and that of the 5th August 1813. On the 19th May, in the period intervening between those dates, the Government of Madras had received the despatch of the Court of Directors of the 16th December 1812 (previously referred to), censuring the conduct of that Government and of the Board of Revenue for the establishment of decennial leases in certain parts of the Presidency of Madras other than Kanara, with a clause that the rent should, if approved by the Directors, become permanent, and strictly prohibiting the settlement of any district in perpetuity without the previous sanction of the Directors. In January the Board, which had been up to that time arguing in favour of permanent settlements, said that though no formal permanent settlement had been declared in Kanara, yet the land revenue had long been considered

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

as fixed at a maximum. But after the Board had been censured for attempting to fix the revenue in Cuddapah, &c., without the previous sanction of the Directors (who reminded the Madras Government and Board of Revenue of the Directors' previous orders to the same effect), and when the Board was making its defence in August, although it admits that the rayuts in Kanara and Malabar have private property in the soil, inasmuch as the land tax is "moderate," says nought as to the land tax being fixed in permanence, but accounts for the exception of these provinces from the triennial and decennial leases (to which latter the perpetuity clause was annexed) by saying that "no change was immediately required;" and also observes that "the inhabitants of Kanara and Malabar enjoy no benefits which are not enjoyed in common by the inhabitants of other parts of their territory; the very substantial one excepted, that the Company take less as land tax from them, under a more equal climate, than they do from their other subjects." And here, again, they do not assert that the land tax so taken was permanently fixed.

It must be remembered that the opinions of public officers, contained in their correspondence with Government, howsoever earnestly expressed, or howsoever eminent may be the writers, do not bind the Government as though those opinions were admissions made by it, even though it may receive them in silence. For it is not under any obligation to notice them, and frequently its most politic course is to refrain from doing so. The impossibility of binding Government by the most solemnly expressed convictions of its servants, thus addressed to itself, is well exemplified by the four folio volumes of revenue and judicial selections to which we have often referred in this judgment, which teem with valuable matter and numerous opinions upon many subjects, but often most discordant with each other—of which the controversy as to the respective merits of the zemindari and rayutvari systems of revenue settlement is a signal instance amongst many. We need not, however, to travel beyond the not very narrow precincts of this case to learn

that lesson. For notwithstanding what the Board of Revenue may have said in January 1813 as to the understanding that the assessment in Kanara was permanently fixed, and without laying much stress on the perhaps slender indications, which we have noticed, of a disposition on its part to recede from that position in August of the same year, we have seen that, in April 1827, the Board advocated a general survey and re-assessment for the purpose of an equal distribution of the incidence of the land revenue, and warmly repelled the original suggestion of Mr. Cotton, echoed by Mr. Babington (and subsequently retracted by him), that the Government could not exceed the *kadim beriz*. We have pointed out that in January 1836 the Board remarked upon the necessity for caution previously to any absolute confirmation of the assessment upon estates paying full standard rates, and we now proceed to quote a reiteration by the Board in 1843 of the right of Government to survey and re-assess Kanara and to equalize the distribution of the revenue charge upon the lands.

In their comprehensive minute of the 16th November 1843 (*e*), a state paper the result of much labour and ability, the Board of Revenue, in speaking of the inequality in the rates occasioned by the improper transfer of assessment from the estates of influential to those of poor rayuts, say (para. 36):—"This should be adjusted by a revision of the *beriz*, not by a sacrifice of revenue." After discussing at some length the various modes which had been tried or suggested in former years for redressing this grievance and their inadequacy, the Board continues:—

"69. The only decided remedy which would enable the revenue officers to introduce a more equable and fair settlement is a survey founded on an entire measurement of the lands. The advantages of such a measure, considered by itself, are indisputable; the objections urged against it, and which must not be overlooked, are its expense, its interference with the existing state of property and of

(*e*) Exhibit I. I., Printed Books, Vol. III., p. 230.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

conveyances executed in anticipation of the permanency of the present state of things, and the dissatisfaction and distrust which would be thus engendered amongst a people so easily excited as the Kanarese. The expense, no doubt, will be considerable, but it will be compensated in some degree by the increased revenue derived from concealed and misappropriated land. On the other hand, the Government are in no ways pledged to the permanency of the present state of things, and the prevalence of fraud and encroachment, so amply testified by the voluminous records referred to in these proceedings, is sufficient to deprive any objections under the second head of all force. The third objection might possibly be got over by conciliation and decision.

"70. In equalising the assessment it is essential to the welfare of the province that the landlords' rights should be maintained, preserving them where extant, and restoring them where invaded, by the pressure of over-assessment. Care should be taken never to fix the mulgars' rent at less than 50 per cent. This will form the basis of the Government demand. A more than ordinary degree of care and vigilance would be required in conducting survey operations of lands belonging to proprietors who have profited at the expense of the public revenue. It is not to be expected that such parties would cheerfully submit to have their advantages diminished by such a process; and as the owners of the most profitable estates are almost all men of wealth or connected with the public service, it is to be expected that the whole weight of their influence would be exerted to thwart and nullify the results to be expected from a faithful survey. Instances of this influence have been quoted above, and a former Principal Collector does not scruple to aver that the accuracy of the *tharav* was materially affected by such motives on the part of Mr. Harris' head sheristadar.

"71. Meantime the unsatisfactory working of the present classification of estates has convinced the Board that no benefit can be expected from persevering in it. They are of opinion that, pending the adoption of some more permanent system, the distinctions of *bharti* and

kambharti should cease and that the settlement should be formed, as in other districts, with reference to the resources of the land in each estate. The *jamabandi* accounts should be prepared according to the forms transmitted by the Board under date 8th February 1830, and care taken to ascertain the outturn of all estates unable to pay the full *tharav* by special inquiries conducted under the supervision of a responsible Government officer, who should resort to measurement of the land in all doubtful cases. Of course all *kauls* (leases) given to estates to bring them up to the *tharav* would remain in force. In the surveyed taluks the survey accounts should form the basis of the settlement, as at present. It is desirable, moreover, with reference to the fluctuations properly before adverted to, and to the concealment practised for the sake of remissions, that the *jamabandi chittas* should specify the proprietor of each *varg*, and whether the party, in whose name it is now entered, is the actual or only the ostensible owner."

Consequent upon that minute, the Government of Madras by its resolution of the 2nd of January 1847 (*f*) paragraphs 14 and 15, directed the Board of Revenue to request Mr. Blane, who had then become Collector of Kanara, to report on the propriety of a "general and accurate survey" of Kanara. Upon the 20th September 1848, he made his report (*g*) to which we have already more than once referred. After mentioning that Kanara was then in a state of greater prosperity than it had ever previously attained, and that its population had in forty-eight years of British Rule increased by 402,000, *i.e.*, at the rate of sixty-eight per cent. he said that nevertheless the revenue had remained nearly stationary, and that such insignificant increase as it showed was in the districts above the ghauts. He concurs with the Board of Revenue in its opinion as to "the defective and unsatisfactory nature of the earlier settlements," and adds that "subsequent or later settlements,

(*f*) Exhibit J. J., Printed Books, Vol. III., pp. 242, 244.

(*g*) Exhibit A., p. 165 *et seq.*

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

as they are entirely founded upon these, must of necessity in a great measure partake of their defects." "The cause of the stagnant condition of the revenue is," he says, "to be sought for in the great inequality in the settlement from the commencement; in the omission to take early measures for procuring information upon those points on which the future correct administration of the revenue would much depend, particularly the extent and resources of the estates; in the defective principle on which, as it appears to me, the *tharav* settlement was formed; and in the facilities which this want of information has ever since offered to the people for encroaching on the rights of Government, and evading every attempt to vindicate its fair claim to a participation in the growing prosperity of the country" (*h*). Light as the land tax appeared as a whole, the extraordinary inequality in its distribution he thought had not been sufficiently accounted for. "It seems entirely opposed to the principle of a uniform share of the produce being paid upon all the land on which the *rekah* settlement is said to be founded, and it is difficult to account for it in any other manner than by supposing that in the lapse of time, and by the frauds of the *shanbogues*, favoured by each successive change of government, the true *rekah* had, in point of fact, been actually abandoned and lost, and it seems reasonable to suppose that this had never been the case to so great an extent as immediately previous to the annexation of the province to the British dominions." He next refers to the disorganisation of the revenue administration as found and depicted by Sir Thomas Munro on its conquest from Tippoo, the frequent state of insurrection in which the people were under his oppressive rule, the combination amongst the principal inhabitants "to defeat the objects of his Government by bribing its officers at every successive change of Dewans or Asophs. The use of the old registers of lands had been prohibited, and a great part of them lost, and the native accountants or *shanbogues* by whom these had been kept had all been dismissed and their places supplied by

(*h*) Para. 13.

strangers. These circumstances, and particularly the last mentioned, would in themselves be sufficient to show the utter derangement into which the public accounts had fallen, and the necessity for extreme caution in admitting those which were afterwards produced as genuine. The readiest resource the people appear to have had to save themselves seems to have been the falsification of the accounts for the purpose of deceiving the officers of Government. It is to this cause that I principally attribute the excessive inequality in the assessment in different estates; and I think it more reasonable when we find such numerous instances of estates not paying, as noticed by Mr. Viveash, one-tenth of their produce, and very many not so much, to ascribe it rather to the success with which influential landholders, the shanbogues and their relations and friends, were enabled to conceal the actual state of their farms, and lower the original assessment, than to the fact of the old Rekah having been originally so absurdly low as it is now often found. To reject this supposition seems to me to involve the only other alternative, viz: that the principle upon which the original assessment is said to have been fixed never had any operation in these estates (*i*)." Supporting Mr. Blair's observation "that the several additions to the assessment made under the former Government were frequently unfairly distributed upon the estates of the poorer rayuts in order to relieve the rich and influential landholders from the burden," Mr. Blane says "there can be no doubt that they were so, and not only in the cases of 'the additions to the assessment' but of the original assessment itself." After pointing out the unbounded facilities which the Shanbogues had of so acting, and that they lost no opportunity of reaping the utmost advantages afforded by their position, he says: "That they did so, is indeed so notorious as to render idle any laboured assertion of the fact. Nothing, therefore, surprises me more than the manner in which the accounts furnished by the Shanbogues appear to have been received at the commencement of our adminis-

(*i*) Para. 14.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

tration as genuine documents which might be relied on. The 'shist' or original assessment of each estate, and the 'shamil' or subsequent additions, appear to have been accepted, and are to this day treated as if they were of ascertained authenticity, and might be relied on as representing the actual state of the assessment, whereas there can be little doubt that the system, described by Mr. Blane, of favouring influential rayuts and over-assessing the poorer, was carried to an extent far beyond what he represents, and that the greater part of these very lightly assessed estates are the result of such frauds. In some of them, particularly those situated along the banks of rivers, the plea of extensive improvements to account for the lightness of the assessment has no doubt considerable foundation, but in many there can have been no room or means of effecting such improvements, and the plea is one of those subterfuges of which a Kanarese rayut is never at a loss to avail himself, and to which the intricacy of the settlement and the absence of all efficient checks is so singularly favourable (*j*)". He then says : " The inference which I am disposed to draw from these observations is that we were from the very commencement building upon a rotten foundation, and that the inequality in the assessment, now so much complained of, was the result of proceeding upon false data"—and " Had Sir T. Munro remained in charge of the province, there can be little doubt that he would soon have perceived the absolute necessity for creating some more secure basis on which to carry on the settlement than that of a statement of the amount of produce or of rent paid, furnished by corrupt and interested district servants. He would have seen the necessity of ascertaining what proportion each estate bore to its assessment, and that it was not less necessary for the future administration of the revenue to have some record of the extent and value of the land than of the rent paid for it. This would have led to a measurement of the land by some process more or less perfect, and probably to a survey, " &c. (*k*). He dwells on the necessity for a

(*j*) Para. 15. (*k*) Para. 16.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

survey. He condemns the *sarasari* system on which the *tharav* was founded, and expresses his opinion that Government is not pledged to maintain it (*l*). He next discusses with much care and ability the subject of waste lands (*m*), and then proceeds to consider the question of revision of assessment (*n*). He says that a revision of the *beriz* with the object of equalising the assessment can only be effected in two ways,—either by reducing the assessment on the highly taxed lands to a level with those which are lowly assessed, or by lowering it on the one and increasing it on the other. The first mode he pronounces to be impracticable as involving too great a loss of revenue, and inconsistent with the views of the Board of Revenue which had expressly stated in its minute of the 16th November 1843 (para. 36), that the "inequalities should be adjusted by a revision of the *beriz*, not by a sacrifice of revenue." Under that system he observes that in increasing the *beriz* upon the lightly assessed estates, the estates, which are classed as paying the full amount of the *Kadim beriz* (ancient assessment), would be those principally subject to increase of assessment and he says "whether this ancient *beriz*w as at first ascertained upon sufficiently trustworthy data is not now the question. I have not hesitated to state my opinion that it was not; but it has been adopted as the limit to the public demand on those estates, and it must be determined before any other step can be taken by way of revision, whether the Government considers itself at liberty now to abandon this limitation or not." Arguing in favour of the necessity of relinquishing the kadim beriz as such a limit, he contends that unless that course be adopted the lands which had been encroached upon could not be brought under assessment, as there was no record of lapsed or waste lands, and it would not be practicable to prove the extent of the encroachment. He condemned the existing Bijavari system of measurement as affording unlimited scope for fraud and litigation and any imperfect or partial survey on that basis

(*l*) Paras. 21, 22, 23, 24, *et seq.*

(*m*) Paras. 30 to 54. (*n*) Para. 55.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

such as the *pahani* mode adopted by Mr. Harris in Ankola and Soonda Balaghaut (*o*). He then says :—" The above considerations have led to the fullest persuasion on my part that any attempt at a revision of the assessment, founded upon the old system, and the records which now exist, would lead to much confusion and expense, and to the certainty of ultimate disappointment. The great object of Government appears ever to have been to effect a settlement which it should be able to pronounce permanent and fixed, and *the reason for its having withheld its sanction from the settlements before effected has been a well-founded suspicion of the accuracy of the information upon which they were based* (*p*). He then observes that the only practicable method of obtaining the information requisite for the establishment of such a revenue is " that pointed out by the Board, viz., a survey founded on an entire measurement of the lands," or as it is now usually styled a cadastral survey (*q*). He fully acknowledged and desired to preserve " the valuable private property in the land " possessed by the landholders, and he advised that the re-assessment to be founded on a cadastral survey should be upon an " equitable and uniform principle," and conducted with that " liberality and consideration" which had always animated Government and the Board of Revenue (*r*), and not " with a view of increasing the *general* rate of assessment," but should " be directed mainly against previous and future frauds, and the hitherto almost unrestrained encroachments of wealthy landlords, Brahmans, merchants and others, who are not the really laborious or productive class, but who, by the various means" Mr. Blane " had attempted to detail, have contrived to lower their former rents, and to appropriate, as they still continue to do, the surplus rent of nearly all the newly occupied lands which are taken up and brought into cultivation by persons holding under them as tenants, instead of directly under the Government. By this the condition of the actual cultivator would not seem to be improved, while

(*o*) Paras. 56 to 67.
(*p*) Para. 68.
(*q*) Paras. 68 to 70.
(*r*) Para. 70.

the Government is defrauded of its legitimate share" (s). Referring to the report in July 1842 of a former Collector, Mr. Blane says in para 71:—"Mr. Blair has expressed an opinion that the effects of such a measure as a survey 'would be to overturn the ancient principle on which the land revenue of Kanara was fixed.' I cannot, I confess, see that this objection rests on a valid foundation. To me it appears that it would rather be to revert to or restore that ancient principle. It could be no part of the ancient principle of fixing the rent that the lands of one estate should be surreptitiously transferred to another, and that by this and other fraudulent means some should be saddled with an assessment so high that it is impossible that it can be paid, while others are assessed only at a nominal rent. Mr. Blair observes that the assessment was fixed 'not on actual measurement, but from the estimated quantity of seed sown in each field, the aggregate assessment on fields forming the *Jama* on each estate.' Granting this, and that the assessment so fixed was supposed and intended to be a given portion of the produce of these fields, it is necessary to assume as a fact that the result aimed at was attained with some tolerable degree of accuracy, for otherwise the principle of assessment would, in point of fact, have been no principle at all. The case then appears to stand thus:—We find that the *Jama* on the estates does not represent 'the aggregate assessment on the fields' of which it is composed according to the principle on which it is said to have been ascertained, and that, whereas the principle was that one-sixth or one-fourth, according to the period we take, of the produce of the fields or estates should go to the Sarkar, the Sarkar now takes, from some, three-fourths of the produce, and, from others, not one-twentieth part. The principle, therefore, is already overturned. We cannot trace how this has taken place, but we suspect that it has been in gradual operation; that it is the result of frauds, encroachments and false accounts which we have too readily accepted as true ones; and that, in short, the aggregate

(s) Para. 103.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

Jama of the estates is not what it pretends to be, viz., a true record of the Sarkar's share of each field; while the plea of improvements, often urged, and admissible to a certain extent and in some cases, is yet wholly insufficient to account for the great inequality now existing. The question, then, arises, whether any measure, which the Government might adopt for equalising its demand by reverting to the first principle of taking an uniform proportion of the produce of the land, can fairly be deemed an abandonment of a principle which has practically ceased to exist, and which it seeks to re-establish. The history of Kanara shows that such revisions of the assessment have at former times been thought necessary, and imperfect and rude attempts have been made to effect them under Native sovereigns (*t*); and I can discover no circumstance which appears to bar the abstract right of the Company's Government to undertake a similar measure, if it deems it necessary and advisable (*u*)." This lucid report, which is amongst the documents contained in the book marked as Exhibit A, and put in evidence on behalf of the plaintiff, but extensively referred to and relied upon on behalf of the defendants, concludes by discussing the probable political effect of a revision of the assessment, into which branch of his subject we are precluded from following the able writer.

Mr. Blane's Report seems to have been for a long time under the consideration of the Board of Revenue. Mr. Goldingham the second member of the Board, appears to have written a minute of the 5th November 1850 (*v*), on the whole unfavourable to any general equalisation of the revenue. Mr. Blane, who had in the meantime become third member, in a minute of the 25th March 1851 (*w*) mentions a draft minute of the senior member, Mr. Elliott, in which, in the main, Mr. Blane concurred; but that draft minute has not been given in evidence, and it does not appear that it was forwarded to the Madras Government. Mr. Blane, in his minute, mentions

(*t*) *Vide supra*, p. 99. (*u*) Para. 71.

(*v*) Exh. K.K., Printed Bks., Vol. III, p. 245. (*w*) *Ibid*, p. 251.

that in the then state of the public finances a general survey of Kanara would be too costly an undertaking—that a survey had been proposed for other districts, and he doubted that such a step should be taken first in Kanara. As a temporary measure he proposed that a small survey establishment should be attached to the Collector's office to be employed in examining and measuring such estates as he might "consider the most to require it, and also for the purpose of assisting him in carrying out the orders of the Civil Courts for the transfer and sub-division of lands," and said :—"I am persuaded that it would for many years amply repay its own cost, by the frauds and abuses it would bring to light." He also expressed doubts as to the advisability of disturbing the *tharav* in the districts where it had been introduced, except in "cases of manifest fraud or encroachment, and of needless reduction of the ancient *beriz*" such as he had "given instances of in the Appendix" to his report "which the Government is by no means called upon to perpetuate, and has both in reason and equity the fullest right to rectify when they have been brought to light." And he said: "As an act of indulgence, and in consideration of long tenure, I would, in no case, impose more than a very light additional assessment; and with this view I would lay it down, as a rule, that additional assessment should not be imposed when it already amounts to one-fifth of the gross produce of the estate." He said it was for Government "to determine whether it approves of a general survey either immediately, or in prospective, or a more limited measure for the correction of abuses, and guarding against them in future, but with less disturbance of the existing tenures and interests than a general survey would involve."

On the 8th May 1851 the Board passed a resolution that Mr. Blane's report of the 20th September 1848 should be forwarded to the Madras Government. They recommended, as a temporary measure, the small survey establishment mentioned in Mr. Blane's minute of the 25th March 1851, and Mr. Goldingham's minute of the 5th November 1850, both of which were forwarded with the resolution to Gov-

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

ernment. Mr. Elliott would seem not then to have been in Madras, or to have taken any part in the resolution (*x*).

The Madras Government, on the 29th May 1851, in a minute, referring to the fact that the Revenue Board had forwarded copies of their last-mentioned resolution and the minutes of Mr. Goldingham and Mr. Blane to Mr. Walter Elliott, who had taken a principal part in former proceedings of the Board regarding Kanara, for his information, and that from Mr. Blane's minute it seemed that Mr. W. Elliott had previously proposed a draft upon the subject, proceeded to say:—"The Government are anxious not to add to the present labours of the first member of the Board in his own peculiar province as Commissioner, but they would nevertheless be reluctant to enter upon the consideration of a question of such importance as the Kanara Survey, to which Mr. Elliott seems to have devoted much attention, without having the benefit of his sentiments upon it. It occurs to them that Mr. Elliott might without difficulty throw his draft above referred to into the shape of a minute, accompanying it with any further remarks which might present themselves to him. The Board will be pleased to forward that draft to the Commissioner, to enable him to give effect to the above suggestion (*y*)."

So far as there is evidence before this Court, the history (so long as North Kanara remained part of the Presidency of Madras) of the questions of a cadastral survey and of consequent revision of the assessment ends with that minute of the Government of Madras, and it does not appear either whether Mr. Elliott ever complied with the wish of the Madras Government to write a minute upon those subjects, or whether the Madras Government considered or passed any resolutions upon Mr. Blane's report of the 20th September 1848, or upon the important questions just mentioned, and so clearly raised in that report. Whether the financial considerations, mentioned in Mr. Blane's minute of the 25th

(*x*) Exh. K.K., Printed Bks., Vol. III, p. 244.
(*y*) Exh. K. K., Printed Bks., Vol. III, p. 253.

March 1851, or other reasons prevented the Madras Government from coming to any final conclusions upon those questions, does not appear, and we do not feel at liberty to speculate upon the subject.

Judgment.

By an order of the Secretary of State for India in Council, dated 28th February 1862, made under the Statutes 16 and 17 Vic., C. 95, Sec. 18, and 21 and 22 Vic., C. 106, North Kanara, with the exception of the taluka of Kandápur (corruptly Cundapore), was detached from the Presidency of Fort St. George and annexed to the Presidency of Bombay from such date as the Governor General of India in Council should by proclamation appoint for the purposes of the Indian Councils Act.

A proclamation was accordingly issued by the Governor General in Council on the 15th April 1862, declaring that North Kanara, with the exception already mentioned, should be detached from the Presidency of Fort St. George and annexed to the Presidency of Bombay. By Act III. of 1863 of the Legislative Council of Bombay (which received the assent of the Governor of Bombay on the 4th January 1863 and of the Governor General on the 25th March 1863), Section 6, it was enacted that the district of North Kanara with the exception of the taluka of Kandápur, as transferred from the Presidency of Fort St. George, shall, from and after the sixteenth day of March 1862, be subject to the Regulations and Acts which are, or shall at any time hereafter be, in force within the territories subject to the Presidency of Bombay. And Section 7 provided that "Nothing in this Act shall affect any acts done, or proceedings held, or any sentence passed, or order made in the district of North Kanara previously to the passing of this Act" (z).

Although the lands of the plaintiff are rice lands, situate in Soonda payen Ghaut (that part of Ankola known also as the Panch Mahals), where Munro has said that all rice lands belong to Government, and although the plaintiff has not produced any patta, sanad, or other document of title granting

(z) *Reg.* v. *Vyankatswami*, 2 Bom. H. C. Rep., p. 106, 2nd Ed.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

to him, or to the persons under whom he claims, the proprietorship of the soil in any of the vargs in his possession, yet we think that the admission, contained in the Government books, that seventeen of those vargs are held by him on muli tenure, must be regarded as establishing in him the hereditary and transferable proprietorship in the soil of those seventeen vargs. The muli, the mirasi, the kaniyatchi, the svasthyam, and the Janmakari tenures are merely so many various names for the ancient proprietary right of the rayut in the soil recognized by Mr. Ellis of Madras, Mountstuart Elphinstone, Lord William Bentinck, Professor H. H. Wilson, the Madras Board of Revenue, and other eminent authorities. But that is a right subject to the sovereign's share of the produce. Partial or total exemption from payment of land revenue being in India the exception and not the rule, the burden of proof of partial exemption, which is substantially what the plaintiff claims here for his lands in denying the right of Government to exceed the *Kadim beriz* or ordinary assessment, lay upon the plaintiff. The history of the land revenue of Kanara (under which general name we include Soonda, Scopa, and Ankola) as already narrated, shows that although the land assessment of Kanara may have fluctuated less in extent and more rarely in occasion than the land assessment of many other provinces of India, yet that assessment did in fact vary frequently in both of those respects, and almost always in the direction of increase. Whether the limits of one-sixth in peace, and one-fourth in war, as prescribed by the Hindu Rishis, ever uniformly or even generally prevailed throughout India, is very doubtful. For some centuries past the prevailing rate throughout India has ranged from one-half to three-fifths. There is some historical evidence that one-sixth was in remote times the rate in Kanara; but so early as A.D. 1337, *i.e.*, upwards of five centuries ago, that limit, we have seen, was exceeded by a Hindu prince although he affected to adhere to the shastr. Nearly two centuries before the British conquest of Kanara all pretence of conforming to the shastr was cast aside by Hindu princes of the house of Bednore, who openly discarded the rate of one-sixth, by adding 50 per

cent. to the assessment, and afterwards various additions were made to it at the pleasure of the ruling power for the time being. Even admitting that at any time the moderate assessment introduced by Akbar, and continued perhaps even favourably modified by Aurangzib, in other parts of India, prevailed in Ankola or Soonda, it is manifest that their co-religionists, Hyder Ali and Tippoo Saheb, departed from it, as, according to the Hanifian doctrine professed by Akbar himself, they were at perfect liberty to do.

The uniformity and moderation of the assessment under the most civilized Mahomedan Governments such as those of Akbar or Aurangzib were the result of what they rightly deemed a wise policy, beneficial alike to the governor and the governed, and not of guarantee to or contract with the landholders. Not only Akbar, Aurangzib but the Adil Shahs who ruled in Kanara before him, had periodical revisions of the land assessment in Soonda and Ankola, which revisions were wholly incompatible with immutability of the land's liability to contribute to the necessities of the State. During the dynasty of Hyder Ali and Tippoo there was no limit to the right of assessment except the pleasure of the ruler on the one side and the capacity of the land and its cultivators to pay on the other. These considerations lead us to the conclusion that the plaintiff has wholly failed to prove that permanency of the rate or amount of assessment, or, in other words, partial exemption from liability to payment of land revenue, was an element in the Muli tenure in Kanara for some centuries before the British conquest of that province in 1799. The opposite proposition has, in fact, been established by the narrative of Sir Thomas Munro on which the plaintiff relied. In speaking of a fixed assessment as existent in Kanara, Munro must have done so comparatively and not positively. He merely meant that, previously to Hyder Ali's conquest, the assessment was lighter and less frequently varied in Kanara than in most other provinces, and being lighter the landholder had such an interest in the land as rendered it saleable and therefore constituted it private property. We have referred to passages

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

in the voluminous documentary evidence before us which establish that this was not only his idea of private property in the soil of India, but also that of the Historian of Mysore, the Madras Board of Revenue, the Government of Madras, and the Court of Directors. As a final instance of Munro's opinion that, although a fixed rent would be a valuable, it is not an indispensable element in private property, and was not then an ingredient in the Muli tenure of Kanara, we shall mention the sentence with which he opens the 4th paragraph of his Report to the Board of Revenue of the 31st May 1800 (*a*), where he says:—"I have been the more particular in describing the obstacles I met with in the settlement of Kanara, because, (except in the districts, claimed by Polygars,) they originated entirely in the inhabitants having *once* been in possession of a fixed land rent, and in their *still* universally possessing their lands as private property." The fixity of the land rent, such as it may have been, had then perished, but the private property remained in the landholder, the *mulavargdar*.

It remains for us briefly to state our reasons for holding that the land revenue payable by the plaintiff has not become unalterably fixed in law since the British acquisition of Kanara.

We have shown that Munro had no authority from the Government of Madras or from the Governor General so to fix it; that he merely settled the revenue for a single year granting temporarily a general but not a universal remission for that year, Government carefully reserving all then existing principles of assessment. What these were at the time of conquest in 1799 has been stated; fixity of land revenue was conspicuous in its absence from amongst them. A permanent settlement of the Zemindari class was for some years under consideration for Kanara, as well as for other provinces in Madras. Munro, at the desire of Government in the year 1800, gave his opinion as to what he conceived to be the only practicable approximation to such a permanent settlement

(*a*) Ex. A., p. 8.

in Kanara, but he strongly advised that none such should be attempted,—that the rayutvari system was preferable for India in general, and Kanara in particular; and that there should be a fixed rent; but not, as we think, so absolutely fixed as to be beyond the power of the Executive Government to enhance it if justice or necessity required. Even if he did mean an absolutely fixed rent, he himself certainly did not so fix it, and he neither had, nor assumed to have authority to make any such lasting arrangement. It would have been incompatible with the Zemindari settlement then under consideration, and for a long time the favoured scheme of the Home and Indian Governments. Authority to establish a Zemindari settlement in Kanara was actually conferred upon the latter by the former, but was withdrawn before it was put into execution in Kanara, and any final settlement there forbidden unless made with the sanction of the Home Government. The Madras Government, no doubt, desired that the land assessment in Kanara should be more equal and steady, and that the constant system of remissions should be abandoned. Experiments with that object, especially the *tharav*, were tried by the Collectors and Board of Revenue; but whatever may be the binding force (if any) of the *tharav*, which was never extended to Ankola, Soonda or Soopa, we cannot find that either the Madras Government or the Court of Directors ever sanctioned in Ankola or Soonda the general establishment of an absolutely fixed rent. There certainly was not any express sanction of it by those authorities, and it seems impossible to imply a sanction merely because for many years subsequently to Munro's time the rent fixed by him for Fusli 1209 remained unaltered, when we recollect the discussion that was going on between the Government and the Board of Revenue and Collectors as to what should be done in Kanara to remedy the inequalities in and check the frauds upon the revenue. What the settlement of land revenue should be was the subject of a correspondence extending over sixty years, and that question seems to us to have been as much undetermined in 1861, when North Kanara was transferred

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

to this Presidency, as in 1800 when Munro quitted Kanara for the Ceded Districts, notwithstanding, the possession, by the Presidency of Madras, of the costly advantages of a Board of Revenue to aid in the settlement of its fiscal questions. The Government of Madras seems, so far as we can perceive, to have preserved to the end the same cautious attitude which it adopted in its earliest resolution upon the first despatch of Sir Thomas Munro—a resolution, stamping the remission then made as temporary, signifying an intention to preserve "existing principles of assessment" undiminished, and asserting that the assessment, then proposed by him, "cannot be considered an adequate revenue for Kanara" even "with reference to the principles of the Rekah." How inadequate it was with reference to those principles, and how grossly unjust in the inequality of its incidence, were facts proved to demonstration by Mr. Blane, and were the subject of comments by other Collectors. The assent of Sir Thomas Munro's Government to the proposal in 1822 by Mr. Harris, to take one-third of the gross produce, showed most clearly that the former did not conceive itself to have been pledged by Sir Thomas Munro, or his successors in the Collectorship of Kanara, either to the maintenance of the Rekah itself or of the *kadim beriz* of Fusli 1209. Strong opinions in the course of the Kanara correspondence were, no doubt, expressed from time to time by some revenue officers with reference to the fixity of land revenue in that province; but, as we have already said, the opinions of individual officers or even of the Revenue Board, given in confidence in their correspondence with Government, cannot operate as a guarantee by Government itself. In construing written grants from the Crown to the subject, the well-known rule is that, if the grant be not clear but ambiguous, it must be interpreted favourably to the Crown. "In no species of grant," said Cockburn, C.J., "does this rule of construction more especially obtain than in grants which emanate from and operate in derogation of the prerogative of the Crown" (*b*). Lord Stowell said that

(*b*) *Feather* v. *The Queen*, 6 B. & S. 284, 285.

the rule was based "upon this just ground, that the prerogatives and rights and emoluments of the Crown, being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away" (*c*). If the right created by the Crown in favour of the subject be clear, this Court will enforce it and has enforced it (*The Sub-Collector of Colaba* v. *Mehendale (d)*), and has done so notwithstanding an attempted revocation. *The Collector of Ratnágiri* v. *Vyankatrao N. Survé* (*e*). If it be the duty of the Court not to enforce the written grant of the Crown unless it be clear and unambiguous, it is not too much to say that, at the very least, it is equally incumbent on the Court to ascertain beyond doubt that the Crown has intended to part with its prerogative, to which it has succeeded by right of conquest, when the evidence, offered in proof of such an alienation, is not any grant or sanad or any entry in a Government book admitting that the land is subject to an invariable rent or is partially exempt from payment of land revenue, but is sought to be spelt out against the Crown from the acts and statements of its officers, and mainly from the circumstance that the Crown has not been pleased to exercise its prerogative of enhancement, as regards the plaintiff or those under whom he claims, since the Christian year 1800. Keeping in mind the rule of construction as to grants by the Crown in derogation of its prerogative, we are very far from being satisfied that the Government of Madras has, on behalf of the State, parted with the right to augment the land tax. A waiver of the prerogative is not to be easily implied from the correspondence of its officers, unless they have full authority, and their language be clear and unequivocal. Nothing could be more lax and ambiguous than the way in which some of them, and notably Munro himself, used the term 'fixed.'

(*c*) *The Rebekah* 1 C. Rob. 227, 230.

(*d*) 10 Bom. H. C. Rep. 216. (*e*) 8 Bom. H. C. R. 1 A. C. J.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

The uniformity of the payments received by Government in respect of the plaintiff's lands ever since the year 1800, and the general testimony of Mr. Shaw Stewart and other less important witnesses as to the *Kadim beriz* not having been exceeded, have been much relied upon for the plaintiff. We proceed to notice the law on the subject.

The rule of the Hindu Law, were we at liberty in such a case to look to that as a guide, is that adverse possession for a considerable time would *as between subjects* give a good title—*see* Jagannatha's Dig., Book V., pl. 395, 396, quoting Brihespati and Vyasa, and see Smriti Chandrika, Ch. XVI. p. 15, and 10 Bom. H. C. Rep. 450, 451—*but not so as between a subject* and the king. In Roer and Montriou's translation of Yajnyavalkya at pages 15 and 16, pl. 24, 25, that Rishi is represented as saying :—

"If one see his land in the possession of another and say nothing, it is lost after twenty years : moveables after ten years, excepting pledges, boundary disputes, deposits with specification, property of the monarch, of women, and of those learned in the Vedas." And Nilkantha in the Vyavahara Mayukha, Ch. II., Sec. II., pl. 7, after referring to Katyayana, quotes Narada thus :—"A pledge, boundaries, a minor's estate; deposits both specified and unknown. women; the property of the king, and that of crotriyas are not lost to the owners by another's possession of them" (*f*).

(*f*) The passages in Narada relating to this subject are rendered into English by Dr. Jolly in his recently published translation thus :—

"9. Pledges, boundaries, the property of children, common deposits, sealed deposits, women and goods belonging to the king or learned Brahmans are not lost to the owner through their being possessed by a stranger."

"10. Even pledges, &c., are lost if strangers have enjoyed them for twenty years before the owner's eyes; the property of women and of kings is excepted from this rule."

"11. The property of women and kings can never be lost, even though it be enjoyed for hundreds of years by strangers who have no title to it."

The Hindu Law also resembles the English Law in giving preference to debts due to the Crown. Vyav. Mayukha, Ch. V., S. IV., pl. 9; 5 Bom. H. C. Rep. 23, 49, O. C. J.

The Mahomedan Law does not recognize lapse of time as a good defence even as between subjects, still less as against the State (*g*).

The rule of the English Common Law is, as well known, *nullum tempus occurrit regi*, that is to say non-user of the royal prerogative does not destroy it. Both here and in England that rule has been restricted in certain cases by legislation, which allows time to give a prescriptive right as against the Crown. For such restrictive legislation here we must first look to Bombay Act VII. of 1863, Sec. 21, (*h*) of which section the commencement and Clause 1 only are material in this case.

"Sec. 21. Claims to exemption from payment of land revenue in virtue of prescription shall be admitted under the following circumstances:—

Clause 1st. When land, situated in districts ceded by or conquered from the Peishwa after 1803, is proved to have been held by any person, his heirs, or others deriving right from him, wholly or partially exempt from payment of land revenue, under a tenure recognized by the custom of the country, for sixty years in succession next preceding the date of this Act, or where land situated in any other district is proved to have been held in like manner for thirty years as aforesaid."

The latter part of that clause, viz. that "When land situated in any other district is proved to have been held in like manner" (*i.e.* "wholly or partially exempt from payment of land revenue under a tenure recognized by the custom of the country") "for thirty years as aforesaid"—*i.e.* thirty years in succession next preceding the date of the Act, "claims to exemption from payment of land revenue in virtue of prescription shall be admitted," is the only portion of that enactment bearing upon such a case as the present, but does not help the plaintiff, inasmuch as, although he or

(*g*) An incorrect statement to the contrary by the Bengal Committee of Circuit is to a certain extent denied in the preamble to Pong. Reg. II. of 1805.

(*h*) Bombay Act II. of 1863 only applies to those parts of the Presidency of Bombay in which Act XI. of 1852 were in force. Of these Kanara was not one.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

his predecessors in title may have held the *vargs* mentioned in the plaint for more than thirty years by a title recognized by the custom of the country, he has, in our opinion, failed to prove that those lands have been so held either wholly or partially exempt from payment of land revenue. As the plaintiff's case does not fall within that enactment, it is unnecessary for us to consider what the effect upon it is of Bombay Act I. of 1865, which is the next to which we must look in order to ascertain whether the Crown is restrained from enhancing the plaintiff's assessment. Its preamble recites not only "the desire of Government to equalize assessment," but also that "it is proper to maintain by law, during their currency, all existing settlements which have been made under the authority of Government." Had the Madras Government, with due authority, made a perpetual settlement with respect to Kanara, such a settlement notwithstanding the terms "during the currency" might fairly be contended to come within the scope of this recital. The 25th section enacted "That it shall be lawful for an officer in charge of a survey to assess the land revenue, under such general and local rules as may be in force in the survey under his charge, all lands cultivated or uncultivated, and whether hitherto assessed or not, provided that such assessment shall not be levied for more than one year until the sanction of the Governor in Council shall have been obtained thereto, and provided that it shall not be leviable from any land held and entered in the land registers as wholly or partially exempt from payment of land revenue, except to such amount as is in accordance with previous practice, or any law which has been, or may hereafter be, enacted relating to lands so held." The 49th section enacted that "the provisions of this Act shall not, except for the purpose of defining village boundaries, be applied to alienated villages." "An alienated village" is by Cl. E. of the Glossary (Sec. 2) of the Act defined to be "a village held and managed by private individuals, exempt from payment of land revenue or under Act II. or VII. of 1863 of the Council of the Governor of Bombay, or under a grant or lease fixing the Government demand in perpetuity." The learned counsel for the plaintiff, while admit-

ting that Bombay Act I. of 1865 is wide enough in its terms to embrace Kanara, yet, upon the theory that its land revenue before and at the time when North Kanara was transferred to Bombay was unalterably fixed, contends:—1st. That the Bombay Legislature could not have intended to be guilty of such a breach of faith as to have rendered North Kanara assessable at the pleasure of the Bombay Government and its revenue survey officers, and in support of this view he referred to several passages in the Act. Secondly, that, even if such were the intention, the Bombay Legislature had not authority to pass an Act so opposed in spirit to the Royal Proclamation issued in 1858 on Her Majesty's taking over the Government of India from the East India Company. We have stated that, in our opinion, the theory upon which both of those arguments rested cannot be maintained. The plaintiff has failed to prove that, either before or at the transfer of North Kanara to Bombay, the land revenue was immutable or guaranteed to be so. For the same reason that we think Bombay Act VII. of 1863, Sec. 21, to be inapplicable to the plaintiff's lands, we hold that the concluding proviso in Sec. 25 of Bombay Act I. of 1865 does not save those lands from assessment under the previous portion of that section. The plaintiff's lands, not being held and entered in the land registers (a term to which we are willing to give a large and liberal construction *ex. gr.* the Collector's books or authorized village accounts) as wholly or partially exempt from payment of land revenue, are not protected from an enhancement of revenue by the concluding proviso. Without giving any opinion on the point whether the plaintiff's vargs or any one of them not constituting a village in itself, but only a part or parts of a village, could come within the description of "an alienated village," it is enough to say that the lands not being exempt from land revenue either under Act II. or Act VII. of 1863, or under any grant or lease fixing the Government demand in perpetuity, cannot be brought within the meaning of "an alienated village" as defined in the Act.

We may add that, independently of Bombay Act I. of 1865, and if it never had been passed, we see no objection

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

in point of law to the enhancement by the Crown of the assessment in North Kanara.

Though not, in the view which we have taken of this case, an important, it is a singular circumstance that no evidence has been given on behalf of the plaintiff, nor indeed on that of the defendant, to show what proportion the new assessment bears to the actual gross produce of the lands. For aught that we know to the contrary, the new assessment may be within the Rishis' limit of one-sixth.

In consequence of the opinion at which we have arrived *aliunde* as to the power to enhance the revenue, we have not deemed it necessary to make any lengthened inquiry into the instances in which the learned Advocate General has contended that Government had actually exercised that prerogative. Mr. Farran contended that in all of those cases the additional assessment was laid upon lands previously waste or uncultivated being taken into cultivation, and Mr. Stewart's evidence was to the same effect. If that contention be correct, and the new lands formed no part of the rayut's varg, the additional assessment would have been satisfactorily accounted for. But, without further consideration, we would not be prepared to say that if the newly cultivated lands formed part of the rayut's varg the explanation would be satisfactory. However it is unnecessary for us to give, and we do not give, any opinion upon the point.

As to the *gaini vargs* held by the plaintiff, which, he contends, have, by the conduct of Government, been raised to the same level as muli-vargs, and therefore are not subject to enhancement of assessment, it is, for two reasons, unnecessary to say more than a few words. First—Because we have come to the conclusion that the plaintiff has failed to prove that *muli-vargs* are not liable to increase of assessment. Secondly—Because, even if that were not so, the plaintiff has not proved that his *gaini-vargs* are entitled to such protection as the proclamation (Exh. S.) of Mr. Harris, dated the 6th of June Fusli 1229 (*g*), can afford to him. Had he obtained any of his *gaini-vargs* in pursuance of that proclamation, he would have received such a *mulpatta* as is specified in it. He has not produced any such *mulpatta*. Nor has he

(*g*) Printed Bks., Vol. II., p. 22.

brought any of his *gaini-vargs* within the notification or proclamation of Mr. Viveash (Exh. W. W.), dated the 24th October Fusli 1244 (*h*), by production of such a *mulpatta* as there mentioned or by showing that any of his gaini-vargs have been entered as *muli-vargs* in the manner described in that notification. It also speaks of payment of "the full assessment according to the settlement," which *primâ facie* means the settlement for the time being, and contains no provision against enhancement of the assessment.

With respect to Mr. Charles Read's letter to the Tahsildar of Ankola (Exh. A. D.), dated 4th October Fusli 1253 (A.D. 1843-44) (*i*), we should observe that, assuming what has not been proved, viz., that Mr. Charles Read, the Head Assistant Collector, had authority from the Madras Government to issue such a letter, the plaintiff has not shown that the Board of Revenue sanctioned any remission upon his gaini-vargs. Lastly —The Madras Government, in its Resolution of A.D. 1853 (*j*), which sets forth the terms on which proprietary or *muli* right will be conceded to the occupants of *gaini-vargs*, expressly stated that such concession would be made on the distinct understanding that the "paramount right of the State to revise or readjust the tax or assessment on the lands in question in common with all others, is not affected by such concession;" and the Revenue Circular and form of mulpatta annexed to it, then issued by the Collector of Kanara (Mr. F. N. Maltby) in relation to the conversion of the *gaini-vargs*, of such persons as might desire it, into *muli-vargs*, are conformable to the Resolution of Government in making that reservation (*k*). There is not any evidence that the plaintiff has received even such a mulpatta.

Some remarks have been made as to the hardship of this case upon the plaintiff and of the enhancement of the land revenue payable by other landholders in Kanara similarly situated. But our duty is a simple one, namely to ascertain whether "there is a right on the part of the occupant" (the plaintiff) "in limitation of the right of Government in consequence of *a specific limit* to assessment having been

(*h*) Printed Bks. Vol. II., p. 23. (*i*) Printed Bks., Vol. II., p. 24.

(*j*) Exh. XX., Printed Bks., Vol. II., pp. 92, 93, 94 and 95, para. 4.

(*k*) Exh. YY., Printed Bks., Vol. II., p. 275.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

established and preserved." If there be such a right, Reg. XVII. of 1827, Sec. IV., Cl. 2, from which we have extracted the foregoing words, enacts that "the assessment shall not exceed such specific limit." The 1st clause of the same section enacted that "When there is no right on the part of the occupant in limitation of the right of Government to assess, the assessment shall be fixed at the discretion of the Collector, subject to the control of Government." If there be no such specific limit to the right of Government to assess, it is perfectly clear that the civil courts have not any jurisdiction to interfere in the assessment which, when discretionary, is expressly placed, by the clause which we have just read, in the hands of the Collector, subject to the control of Government, and thus, by an implication which is irresistible, excludes the interference of the Courts in that case, notwithstanding the somewhat loose penning of Section IX., especially in its second clause.* That second clause, however, should be, and we believe always has been, both here and in the Civil Courts of this Presidency, read distributively. The preamble of the Regulation, and especially the 1st and 2nd Clauses of Section IV., render any other construction of Sec. IX., Cl. 2, impossible. Hence, when a petition is presented to Government by a person deeming himself aggrieved by a decision of the Collector as to assessment, Government can deal with the matter as it may please, the discretion of the Collector being subject to that of Government; but a Civil Court can only entertain an action when the legal right or title of the plaintiff to ex-

* That section is as follows :—

IX. *First.*—The Collector's decision upon any question arising out of the provisions of the preceding sections shall, in the first instance, be obeyed and acted upon as the rule.

Second.—But if any person should deem himself aggrieved by any such decision, he may either present to the Collector a petition, addressed to Government praying for redress, or may file an action against the Collector in the Civil Court under the ordinary rules, or he may pursue both methods at the same time :—

Third.—The Collector shall forward to Government without delay, any petition presented to him under the preceding clause; but the reference to Government shall have no effect upon any suit instituted in the Civil Court.

Fourth.—No revenue officer except the Collector (permanent or acting), or an Assistant in charge of the Collector's duties, shall exercise the authority conferred by the first clause of this section.

emption or partial exemption from payment of revenue in consequence of a specific limit to assessment having been established and preserved is in jeopardy. That view of the law has, we believe, prevailed in this Presidency ever since the Regulation of 1827 has been passed, and has been lately acted upon in two important cases at Ratnágiri by Mr. Birdwood, the District Judge, which were published in pamphlet form in 1873. This Court has always carefully kept within that construction. See *Gadré* v. *Collector of Ratnágiri* (*l*), *Sub-Collector of Colába* v. *Mehendale* (*m*), and *Wamnáji Sadasiv Thaite* v. *the Collector of Ratnágiri and another* (*n*). The plaint in this case has evidently been framed in accordance with that view, and we do not understand the learned counsel for the plaintiff, although dwelling earnestly upon the hardship to his client of the enhancement, to maintain that, in the absence of a specific limit to the assessment, we could interfere. Having come very clearly to the conclusion that there was not, at the time of the Resolution of Government complained of in the plaint, any such specific limit to the right of Government to assess the plaintiff's lands, we think that we should exceed our duty and usurp that which is the proper province of Government, were we to express any opinion upon the propriety of the assessment. That is a question belonging to the region of politics, and not within the range of the Civil Courts.

Our findings upon the issues are as follow :—

The first issue—Whether the plaintiff, is entitled to the absolute ownership and proprietary right in perpetuity to the lands in the plaint mentioned free from any estate or interest therein of the Crown, save and except the right of the Crown to the receipt of a certain fixed and unalterable assessment payable in respect of the same lands ?—being taken as a whole, we must find in the negative, and for the defendants.

The second issue—Whether the assessment made in 1800 by Major Thomas Munro, then Collector of Kanara, upon the said lands, was a fixed and permanent and unalterable assessment ?—we find in the negative, and for the defendants.

The third issue—Whether such assessment was made by

(*l*) 6 Bom. H. C. Rep., 101. (*m*) 10 Bom. H. C. Rep., 216.
(*n*) Reg., App. 25 of 1869.

1875.

VYAKUNTA BAPUJI v. GOVERNMENT OF BOMBAY.

Judgment.

the said Major Thomas Munro, as the duly authorised agent in that behalf of the late East India Company, and whether the same was ratified and confirmed by the said East India Company, and whether the same became valid and binding as against the Crown ?—we find in the negative, and for the defendants.

The fourth issue—Whether Bombay Act I. of 1865 in any way applies to or affects the said lands ?—we find, in the affirmative, and for the defendants.

The fifth issue—Whether such lands are alienated villages within the meaning and exception of Sec. 49 of the said Act ?—we find in the negative, and for the defendants.

The sixth issue—Whether the passing of the said Act by the local Government of Bombay, in so far as it purports to affect or alter the said annual assessment payable in respect of the said lands, was *ultra vires ?*—we find in the negative, and for the defendants.

The seventh issue—Whether the order of the Government of Bombay, of the 29th March 1870, is null and void so far as it purports to affect the said lands ? We find in the negative, and for the defendants.

And the eighth and last issue—Whether the plaintiff is entitled to the relief prayed for, or any part thereof ?—we find in the negative, and for the defendants.

We must, therefore, make a decree for the defendants, but, having regard to all of the circumstances of the case, and to the fact that this cause has, on the motion of the ~~plaintiff~~ defendants, been transferred from the District Court of Kanara to this Court, in order that the decision in it may serve as a guide to the former Court in the great number of suits (said to exceed one thousand) more or less of a character similar to that of this cause, which are stated to have been instituted in the District Court, we direct that the parties respectively do bear their own costs.

In order to give to the District Court as much assistance as we legitimately could, we have stated our reasons, and the documents and authorities on which we rest them, more fully than would have been necessary if Government had been sued by the present plaintiff alone.

Decree for the defendants without costs.