Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Vencataswara Naicker, Zemindar of Yethapooram, v. *Alagoomoohoo Servacaren, from the Sudder Dewanny Adawlut of Madras; delivered on the 13th March,* 1861.

Present:

LORD KINGSDOWN.
JUDGE OF THE ADMIRALTY COURT.
SIR EDWARD RYAN.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THIS appeal arises in a suit brought by the Respondent to establish a claim to hold in perpetuity, at a fixed rent, certain villages forming part of the Zemindary of Yethapooram, which belongs to the Appellant.

The Civil Court of Tinnevelly, in which the suit commenced, decreed in favour of the Plaintiff's title, and that judgment has been confirmed by the unanimous opinion of the Judges of the Sudder Adawlut of Madras.

The Zemindary in question is of great extent, comprising above 100 villages; the claim of the Respondent extends to fifteen of them.

The case of the Respondent is that he and his ancestors have had some right or interest in those villages, or the district in which the villages now exist, for a very long period, long antecedent to the establishment of the English authority in the country, and that when the English authority was established in 1803 a grant of the whole Zemindary, without noticing the rights of the Respondent's family, was made at a fixed Jumma to the Appellant's ancestor.

That in order to secure such rights, without

disturbing the grant of the Zemindary, an agreement was made in the year 1805 between his ancestor and the then Zemindar, by which it was settled that the Respondent's ancestor and his descendants should hold the fifteen villages in question on a Cuttoogootagay lease, or, in other words, should hold them in perpetuity at a low fixed rent payable to the Zemindar, and that such rent was fixed at 1940 pons, being in fact the proportion of Jumma which was assessed upon them by the Government.

The Respondent alleges that he and his ancestors remained in possession of these villages under this agreement for many years till he was turned out of possession by the Appellant in the year 1848.

The case of the Appellant is an extremely simple one. He alleges that the case set up by the Respondent is a pure fiction; that the documents which he produces in support of it are mere forgeries; that the Plaintiff's possession began in the year 1814 under a lease on ejara, or in other words an ordinary tenant lease at a rent agreed upon; that such lease was from time to time renewed for different periods, the last of such leases being made on the 29th July, 1836, for twelve years, on the expiration of which the Plaintiff, having no longer any right to the property, was turned out of possession.

In support of this case, certain instruments purporting to be counterparts of these leases are produced, and it is admitted that if they are genuine they are quite inconsistent with the right alleged by the Respondent.

There is clearly forgery either on one side or the other; and both of the Courts below, who had the documents before them, have concurred in attributing the forgery to the leases produced by the Appellant.

It would be a strong measure for their Lordships upon a question of fact to reverse a decision founded, at least in part, upon an examination of the documents themselves, in which all the Judges below came to the same conclusion. At the same time, cases may exist warranting such a course, and one was mentioned at the Bar in which this Board did actually adopt it. The question is, whether such a case has been made out by the Appellant.

No doubt the onus was on the Respondent, who was the Plaintiff, to prove his case.

Let us see, then, what the evidence on each side was.

The first instrument produced was a deed on copper, dated in 1557, and purporting to contain a grant of the district in question to an ancestor of the Respondent. It was produced by the Respondent, who was the proper person to have it in his custody, and some objections alleged to exist upon the face of it, as if it had borne to be executed by a person not then enjoying the sovereignty of the country, seem to have been removed by the diligence and exact investigation of Mr. Mackeson.

Many other documents were produced, beginning in the year 1712, and bearing different dates in 1747, 1749, 1777, 1779, and 1789, all showing dealings with the property by ancestors of the Respondent.

It is said that there is no proof of these papers; they are all of a date which excludes the possibility of direct proof: but they are proved by the production itself to come from the possession of the Plaintiff, and the want of formal proof that they were found in his muniment-room cannot be regarded as of any importance in a suit of this description.

It is contended, however, that they are, if genuine, inconsistent with the case now made by the Respondent, because the original grant appearing to be rent free, it is improbable that the Respondent's ancestor could ever have accepted a lease charging him with a rent, and yet such is the nature of the lease now set up as the foundation of the Respondent's title.

But the documents produced show that whatever might be the case originally, there was in 1712 a certain tribute payable by the whole zemindary of which one-sixteenth part was apportioned to the Respondent's district.

The Judges below placed no reliance on these documents, not, so far as appears, because they disbelieved their genuineness, which their Lordships see no reason to doubt, but because they held them to be immaterial to the Plaintiff's case. They are, however, of some value as matter of inducement, showing the probabilities of the statements made by the opposite parties.

The next document which the Plaintiff puts in evidence is the instrument on which he rests his

claim. It is a paper writing, alleged to be signed on 5th August, 1804, by the then Zemindar of Yethapooram, and addressed to the ancestor of the Respondent in these terms:—

"As I have leased out to you fifteen Cuttoogootagay villages" (it then enumerates them) "attached to Cuttalangolam division, under a deed, for the fixed rent of 1,940 pons, you should, without delay, continue to pay, every year, the said amount into the Treasury of the Yethapooram Cutcherry, and yourself, your son, and grandson can enjoy the said fifteen villages for ever, paying the kist amount thereof."

Supposing this document to be genuine, of course there is an end of the case. It is, however, alleged by the Appellant to be a forgery.

The direct evidence in support of it is not very satisfactory; it is spoken to by several witnesses who profess to have seen it, and to remember its execution nearly fifty years before, on whose testimony, however, no great reliance can be placed; but if the dealing with and possession of the estate has been consistent with the instrument, its date sufficiently accounts for the absence of better direct testimony.

The next document, in point of date, is a mortgage dated in 1811-12, made by the grandfather of the Respondent, to a person named Pillay, of a portion of this property for a term of ten years.

The mortgagee is sworn by two witnesses to have been in possession under this instrument, and, when the debt was satisfied, to have returned the deed to the mortgagor (pp. 94 and 95).

Now the date of this instrument is more than two years before, as the Appellant alleges, the Respondent's family had anything to do with the property.

In addition to this, there is the testimony of many old witnesses that the ancestors of the Respondent had been in possession of this property for very many years, and long before the period assigned by the Appellant for the commencement of such possession. The office of Servegar appears to be one of authority, implying the command of 100 men, and it is shown to have been held in this zemindary for a very long series of years by the family of the Respondent, and it is further shown

that the grant of lands in Cuttoogootagay or Java-tha, is a usual mode of remunerating such services.

The case, therefore, of the Respondent is probable and consistent.

But the evidence goes a great deal further, and shows very clearly, in the opinion of their Lordships, that the title of the Respondent has been repeatedly admitted by the ancestors of the Appellant.

The lessee seems not to have been very punctual in the payment of his rent, and, in the year 1822, the Zemindar found it necessary to apply to the Collector at Tinnevelly to enforce payment, and he presented an arzee on the 27th November, 1822, to Mr. Hudleston, the then Collector.

The arzee in question comes from the Collector's office; it is open to no suspicion, and it is of itself sufficient to disprove the Appellant's case, and to afford a strong confirmation of the statements of the Respondent.

It is found at p. 101 of the Appendix, and is to this effect:—

"Fourteen villages in Cuttalungolan division, attached to the zemindary which was obtained by my late father from the Honourable Company, were given to Alagoo Moottoo Savikaran, son of Alagoo Mootoo Sarvykaran, of the said Cuttalangoolam, for his maintenance at a jumma of pons 1,959 a-year, which was paid by him, and, after him, by his son, Alogoo Mootho Sarvykaran, in fact, up to the 992 Aundoo (this date corresponds with the year 1816); but he had entirely discontinued the payment of the same for the Aundoo 993 and 994, though he was holding out mere promises whenever demands were made for it; the balance due by him from the Aundoo 994 to 997, amounts to about pons 1,541, and fanams $5\frac{3}{8}$."

This is a statement, therefore, that the villages had been granted to the ancestor of the Respondent for his maintenance at a fixed jumma, and that up to the year 1816 the rent had been regularly paid by the grantee and by his son, and yet it is now pretended by the Appellant that the Respondent's ancestor first came into possession of the property in 1814, and then under an Ejara lease. It is clear that this statement refers to the payment of rent for

a considerable period, and could not mean a payment for two years. There is evidence, indeed, that the person to whom this grant is said to have been made, and who is represented to have paid rent under it, died in 1808.

The Zemindar then prays that the property of Alagoo Moottoo may be attached to pay this demand.

There is another document less strong, but, as far as it goes, confirmatory of the Plaintiff's case.

It is found in an order of Mr. Bird, the Collector, made in the year 1845, at which time disputes had arisen with respect to the boundaries of some of the villages in the Zemindary, and amongst others of villages in the district of Cattalangoolam, the district claimed by the Respondent.

This order mentioned that the Zemindar had submitted an Arzee stating that he had nothing to do with certain lands therein mentioned, "which are in the enjoyment of the Merassidars of Cattalangoolam, to whom he had leased it out under Cuttoogootagay tenure."

There is abundant other testimony in support of the Respondent's case, and in direct contradiction of the Appellant's, but it is useless to pursue it further. Their Lordships have not the slightest doubt that the Court below could have arrived at no other conclusion than that the case set up by the Appellant was based in fraud and perjury, and that as far as the facts are concerned the Plaintiff had completely established his claim.

It is hardly worth while to notice the objections taken to the Plaintiff's documents.

First it was said that the sum mentioned in the paper of 1805 (1,904 pons, as printed in the Records) differed from the actual rent of 1,959 pons and some fanams actually paid.

It appeared, however, very clearly that the 1,904 pons was a misprint for 1,940, and that the difference between 1940 and 1,959 odd was accounted for by the addition of shroffage.

The representation of the Appellant that the division of the Zemindary claimed by the Respondent contained only thirteen villages at the period when his title commenced, and that two of them were added afterwards, is clearly disproved by the public accounts for the year 1802, showing that at that time Cuttalangoolam was a known district held

on Cuttoogootagay, containing the fifteen villages of which it now consists, and was subject to an assessment of 1,000 pagodas.

It is said, however, that whatever may be the Respondent's right in point of fact, he is precluded from recovering by an objection of Law, viz., that the Plaintiff's title is not registered according to the Madras Regulation 25 of 1802, s. 8; and it is said to have been settled in India that although an instrument not registered may be good against the Zemindar who executed it, the successor is not bound by it.

The language of the Regulation would seem to apply to questions between the Zemindar and the Government, and to have been framed with a view of preventing a severance of the Zemindary without public notice to the Government. It is not very obvious upon what principle it can be held that an instrument good against the party making it is bad against an heir, if the ancestor had an absolute power of alienation. If the successor is, as we should term it, a remainder man, or claiming by a title which the ancestor could not defeat, the case, of course, is different.

But their Lordships are of opinion that there is in this case no ground for the objection. This is not an alienation of the Zemindary, or any part of it. It is a perpetual lease of a distinct portion of the Zemindary, which constituted a distinct portion before the Appellant's title to the Zemindary accrued, and such an estate could not, without great violence to the language, be considered as a transfer within the words of the Regulation. The title of the Respondent has been recognized not only by the Zemindar who created it, but by subsequent Zemindars, and there has been a possession under it of above fifty years.

Their Lordships will advise Her Majesty to affirm the Judgment complained of, with costs.