Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sevvaji Vijaya Raghunadha Gopalar v. *Chinna Nayana Chetti, from the late Sudder Dewanny Adawlut of Madras; delivered* 13*th December,* 1864.

Present:

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
THE MASTER OF THE ROLLS.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THEIR Lordships are of opinion that the Decree of the Court of Sudder Dewanny Adawlut should be affirmed.

Two questions are raised in this Appeal: first, that the Court of Sudder Dewanny Adawlut had no power under the Act of 1853 to permit a Special Appeal in this case; and secondly, that on the merits the decision of the inferior Court is correct. On both these points their Lordships concur with the Court of Sudder Dewanny Adawlut; but in order to explain the view they take of the application of the Act of 1853 to this case, it will be convenient to refer to the facts of this Appeal, and in doing so to consider the merits of the case.

This is a suit instituted by the Appellant in August 1849, to recover possession of a village which has been held without disturbance since the year 1805. The Appellant alleges that in the month of May in that year his ancestor, the widow of the former owner, Valoyi Gopala, who had no power to sell, made a mortgage of this village for 300 pons to Palaniyappa Chetti, and put him into possession on an agreement that the usufruct of the village

should be set off as against the interest on the mortgage.

To succeed in such a case as this, it is obvious that the burthen of proof lies on the Appellant.

A Plaintiff who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason of the weakness of his opponent's. It would be contrary to all principles of law and justice that upon such an allegation a Plaintiff should be able to require the present possessor to prove his title, and if he failed in doing so to dispossess him of the land in question.

The first material thing therefore here is to examine how far the Plaintiff's evidence establishes the fact of the mortgage originally. The original mortgage is not produced ; no copy of it is produced; it never was registered. The whole of the evidence respecting it is that of three witnesses, Ananda Pillai 76 years, Tambi Servagaram 68 or 69 years, and Venkatasesha Ayyar 70 years, who all swear that a mortgage of the village in question for 300 pons was executed by Tayilayi in the first compartment of her house at 10 or 11 o'clock in the morning, and that she received the 300 pons in Tanjore fanams.

Notwithstanding the minute accuracy of these witnesses' recollection, their Lordships are of opinion that it would be too dangerous to act upon this evidence, if unsupported by any other testimony, in order to disturb an uninterrupted possession of forty-five years.

There is also evidence of some applications by the Plaintiff, and by the preceding alleged owners of the Equity of redemption to redeem the mortgage. But with this exception the Plaintiff's case is in fact wholly unsupported by any other evidence adduced by him. The Court of original jurisdiction seems indeed principally to have relied on the Defendant's evidence for the support of the Plaintiff's case. It may undoubtedly sometimes happen that the evidence adduced by the Defendant, instead of supporting his case, may establish that of his adversary. It remains to be examined whether that is so in the present instance. The Defendant alleges that Valoyi Gopalar sold the

village to Palaniyappa Chetti, through whom the Defendant claims. He adduces a bill of sale purporting to be executed by Valoyi Gopalar, and supports it by many witnesses. This document is clearly shown to have been a forgery, and it is not only sufficient to destroy this pretended bill of sale, but to discredit all the oral testimony which the Defendants can adduce. But their Lordships are of opinion that it goes no farther, and that it does not follow because the bill of sale adduced by the Defendants is forged that the evidence adduced by the Plaintiffs must be correct. It might be possibly an advantageous rule if, as Mr. Scott expresses it in his Judgment, "where a party has resorted to forgery to establish his claim, he must take the consequences of his own act, and that the Court is not at liberty to assume for him a position which he has himself rejected."

But their Lordships are unable to arrive at that conclusion, and are apprehensive that if such was the practice adopted, some cases might occur in which the Court could not determine the point in issue in favour of either party. We think also that in this case, even if this rule were adopted, it is pushed too far, as though the bill of sale is found to have been forged, the knowledge of the forgery is not brought home to the Defendant. We find also in a recent case, that of the *Maharajah of Nuddea v. the Ranee Surnomoyee Dossee*, this Committee gave effect to the Defendant's title, although a document by which she sought to strengthen it had been found to be a forgery.

The evidence which is not susceptible of being forged, is *primâ facie* strongly in favour of the Defendant.

Possession of the village, by persons through whom the Defendant claims, is proved by accounts registered in the years 1805, 1806, 1807, 1829, 1839, 1844. The Arzee of 23rd March, 1816, addressed by the Tasildar of Mannargudi to the Collector of Tanjore, and the answer of the Collector of the 2nd April following, speaks distinctly of the village having been sold to Gopalar Chetti in 1804, a year previous to the period alleged by the Plaintiff as the date of the mortgage by the Tayilayi.

We think the preponderance of evidence is in favour of the Defendant, even if the burthen

of proof lay on him. However much the want of trustworthiness in the evidence of cases from India is to be regretted, we cannot by reason of the proof that a document adduced by one party is forged, transfer the property in which he and his ancestors have been in possession for forty-five years, to another, who has not, in the opinion of their Lordships, established any right to it himself. If, therefore, the case had come before their Lordships, unfettered by any question on the Act of 1853, they would have had no hesitation in concurring with the Court of the Sudder Dewanny Adawlut, and in holding that the Plaintiff had not established his case, and that his plaint ought to be dismissed.

The remaining point on which the Appellant mainly relies is, however, one of great importance; and if determined in his favour, supersedes the question of merits.

The point is that by reason of this proviso in the 4th paragraph of the 4th clause of the Act of 1853, the Court of Sudder Dewanny Adawlut had no power to admit the special Appeal. The words of the clause are these: "Provided always, that no such special Appeal shall lie, nor shall any such decision be reversed, altered, or remanded by any of the said Sudder Courts, upon the ground that the decision of any question of fact is contrary to or not warranted by the evidence duly taken in the cause, or any probability deduced from the record."

Their Lordships think it of great importance that this provision should be carried to its full legitimate extent, and that no Appeal should be allowed on account of difference of opinion as to the value of evidence. But their Lordships concur with the Court of Sudder Dewanny Adawlut that this is not the present case. Mr. Scott, whose Judgment is that appealed from, does not find, as a fact, that the Plaintiff had proved the mortgage he alleged. On the contrary, he states the inclination of his opinion to be that the evidence proved a sale, but that the Defendant was not at liberty to rely on that evidence by reason of his having adduced and relied on a forged bill of sale. What Mr. Scott (the Civil Judge) does find is a conclusion of law. His words are these: "The Appellant has failed to show that the village was sold to Palaniyappa Chetti, and if it was not sold it must have been mortgaged,

as contended by the Plaintiff, and I must therefore affirm that part of the Decree of the Lower Court which decides that the village was mortgaged."

The Sudder Adawlut considered this not to be a finding of fact, but an inference of law, and accordingly allowed a special appeal. Their Lordships concur in this view. By way of testing the accuracy of it, it may be supposed that the case had been tried before a jury in this country, and that the Judge had directed the jury in the words of the Civil Judge, which I have just read, viz.: "The Appellant has failed to show that the village was sold to Palaniyappa Chetti, and if it was not sold it must have been mortgaged as contended by the Plaintiff. It is your duty therefore to find that the village was mortgaged."

Their Lordships entertain no doubt that a bill of exceptions from a misdirection to the jury would have been sustained if such a direction had been given. That is, that such a statement would have constituted a misdirection in point of law, on the reliance on which the jury found the fact of the mortgage.

Their Lordships, therefore, are of opinion that the Act of 1853 does not prevent any special Appeal in this case, and that the Court of Sudder Dewanny Adawlut was right in admitting the Appeal and right in dismissing the Plaintiff's plaint. The Appeal will be dismissed, with costs.