Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thekkiniyetath Kirangatt Manakkal Narayanan Nambutiripad (styled Deva Narayanan) v. Iringallur Tharakath Sankunni Tharavanar and others, from the High Court of Judicature, at Madras; delivered December 9th, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

IN this case the Plaintiff is the head of an ancient Brahmin family in Malabar, the head of which appears to possess many names, but has been called in this suit generally by the name of Nambutiripad. The Defendants, except one of them who has only a derivative title, also represent a Malabar family, and are called the Tharavanars. There have been for a great many years pecuniary transactions between the Plaintiff's family and the Defendants' family, and properties have from time to time been mortgaged by the Plaintiff's family to the Defendants' family to secure sums of money. This suit began in the month of August 1877; and the Plaintiff sued the Defendants, the Tharavanars, to recover from them certain lands as being part of the ancient jenm or domain of his family. By the Plaintiff's own showing, at least by the documents that he produced when the issues were settled, his family had been out of possession of these lands for nearly 120 years, and the Tharavanar family had been in possession of them for nearly 100

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years. In order to avoid the effect of that long lapse of time, the Plaintiff relied upon a series of mortgages executed by his family to the Tharavanars or to persons who had transferred their interest to the Tharavanars. Of those mortgages it is only necessary to examine very closely the latest,—that is the mortgage called an Otti or usufructuary mortgage. It purports to be a demise for the term of 55 years to the Tharavanar of the day, dating from the year 1820,—the most exact date we have is either the month of April or May 1820,—for the purpose of securing a sum of 3,000 fanams. If that mortgage had been executed the Tharavanars would have held the lands by a rightful title in conformity with the mortgage until the year 1875, and under the existing law of limitations the suit would have been in time; but if no such mortgage can be proved, then the long possession of the Defendants would, under the old law of limitations, as well as under the existing law, bar the title of the Plaintiff.

By way of defence, the Defendants have been ill advised enough to set up the story that the jenm or domain of the lands in dispute never belonged to the Plaintiff's family at all, but was from ancient and immemorial time the jenm of the Defendants. To support that defence they have produced certain Government accounts, called Pymash accounts. It has been found in both Courts that those Pymash accounts are false and fabricated, and that the forgery or fabrication was effected a number of years ago in order to give some advantage to the Defendants' family in a contest then pending between them and the Plaintiff's family. Therefore so far as the defence is grounded on original title in the Defendants, and does not rest simply upon possession, lapse of time, and lack of evidence on the Plaintiff's part, it is a fraudulent defence, and it fails. Still the Plaintiff must recover by the

strength of his own title; and the question is, whether he has proved his Otti mortgage.

Before examining the evidence to support that mortgage, their Lordships would make one or two remarks about the earlier series of mortgages, which extends from the year 1758 to the year 1820. The Plaintiff brings forward the earliest Pymash accounts that ever were taken—the accounts of the year 1799—in order to prove that his family were then the jenmis or owners of the land in question; but those same accounts have columns in them for the mortgagees of the land, which appear to be filled up according to general forms. When the land now sued for is mentioned, although it is mentioned to be the jenm of the Plaintiff's family, it is also mentioned that the mortgagee is some person or other who is not the person in whom, according to the Plaintiff's theory, the mortgage would then be vested. For instance, at page 34 of the record, the Ayakurishi land, which is the greater portion of the land comprised in the Otti mortgage, is mentioned to be the jenm of Kirangatt Mana, one of the appellations of the Plaintiff's house, but it is in the name of and under kanom or mortgage to Mannil Koru Nayar, who is not one of the Tharavanar family. The Kuthamkurishi land, another portion of the land in the Otti mortgage, is the jenm of the Plaintiff's family, but it is in the name of and under kanom to Iynvan Palani, who again is not one of the Tharavanar family. The Nirkara land and the Pokkala land, which are the two other tracts of land in the Otti mortgage, are also put in the names of mortgagees who are not of the Tharavanar family. Mr. Leith argued, and their Lordships think quite rightly, that that is not conclusive against the Plaintiff's case. It is not; but it certainly does tend to throw a doubt upon

those documents, on which the Plaintiff very much relies in order to bring up the history of his title to the date of 1820, when the Otti mortgage is alleged to have taken effect.

Another point to be observed with respect to the earlier history of the title is that all the earlier mortgages reserved rents, and there is no evidence whatever of rents having been paid. No doubt it is justly observed that the receipts for rents would be in the hands of the mortgagees, and not of the mortgagor. But the mortgagor employed agents. We have his family documents produced to show the existence of these mortgages, what is called the Grandhavari book and the Kutti-kanak accounts. If the agents of the Plaintiff's family had received these rents it is impossible not to believe that accounts would be forthcoming in which the agents would have charged themselves with the rent as between themselves and their principals, in which receipts would have been entered in the ordinary course of business, and which would have been good evidence in an ancient case like this of the receipt of rents.

Those difficulties would not be conclusive against the Plaintiff if he could only prove his Otti mortgage, and their Lordships will now proceed to examine the evidence adduced to prove it.

In the first place, the document which their Lordships have had before them written on a palm leaf is not an original. The original, however, would be in the possession of the mortgagee, and it would be sufficient for the Plaintiff to prove his case by other means. The document produced purports to be either a copy or a draft, probably a draft, according to the evidence; and it is unsigned and unwitnessed. It is to be observed that, according to the Plaintiff's own story, he was parting with his

land for a term of 55 years, and he paid no interest, and reserved no rent. Therefore during those 55 years all the ordinary indicia of title as between landlord and tenant, mortgagor and mortgagee, would be wanting; and there was every reason why he should preserve the most accurate evidence of this deed which he says was executed. But we find that, instead of preserving accurate evidence, he keeps only either a draft or a copy which does not even mention who signed the original or who attested it.

Another observation is that the term of 55 years is a very unusual one. It is alleged that it is not unknown in Malabar; but their Lordships have not been referred to any evidence to show that such a term ever was granted by way of mortgage in that country.

On the face of the document therefore it is a very unsatisfactory proof of the mortgage. Can that proof be supplemented by oral evidence? For that purpose two witnesses are produced; for we may disregard the evidence of a third witness, who tells a very loose story, in which he contradicts himself, as to having seen the document in the hands of the Defendants. The first witness called with reference to this point is the witness Patinjarepatt, and he says:—"The Thara-"kath house"—that is the Defendants' house—"has a veppu right over these lands. I was present "when the Otti demise was made in their favour. "That demise was, I think, in 995 (1820-21). "It was for 3,000 fanams. Plaintiff's grand-"father granted the demise to Chathu Thara-"vanar. There were no attesting witnesses "to the said veppu document. It was not "then customary to write the names of the "witnesses in the documents executed by the "Mana." Now, pausing there for a moment, their Lordships would observe that, if it were not customary in the business of the Plain-

tiff's house to write the names of the witnesses on such documents, it is a most unfortunate custom for those who part with their property for long terms of years. A man who does not take such a precaution, whether customary or not, when granting a very unusual term, must not be surprised if he finds himself in difficulties at the end of the term. The witness goes on:—"The document was "written by the accountant. A period has been "fixed in the document. It was for 55 years. "The demise was made in renewal of a former "document. In the former document a period "of 20 years had been fixed. A longer period "than that of the former document was fixed "in this document, as a larger sum was "advanced in addition to the kanam. The "period was enlarged because a sum of 1,000 "fanams was paid as renewal fees. The former "demise was for 2,000 fanams. The demise "for 3,000 fanams was granted on payment "of a further advance of 1,000 fanams in "addition to the said amount. The former "kanam document of 2,000 fanams was re-"turned to the Nambutiripad. A draft was "made of the veppu document to be executed. "That was in the handwriting of the above-"named Parangotasha Menon, who made the "fair copy. The copy was taken and secured "as the marupattam (counterpart). The veppu "document and the counterpart are in the "Koleyuth character. The veppu docu-"ment was signed by the Nambutiripad, "and given to Chattu Tharavanar." In cross-examination he says:—"I am now 76 years old. "* * * I was in the pay of the Plaintiff "Nambutiripad from 1017 (1841-42) to 1031 "(1855-56). * * * * I do not know "the Koleyuth character. * * * I have "a particular recollection of this demise in

" consequence of having seen many times the " Kutti-kanak (accounts), and the marupattam " (counterpart) at the Mana."

The first observation on this evidence is that we have here an old man, 76 years of age, who is speaking of a great number of small details which took place when he was a lad 18 years old. He does not tell us why he was present. He was not then employed in the Mana or Plaintiff's establishment, nor was he so employed until 20 years afterwards. He seems only to have been casually or accidentally present. He speaks to the identity of a document of which he himself tells us he does not know the character in which it is written. Well then, is there anything to stimulate his recollections? He says he recollects because he has seen many times the Kutti-kanak accounts and the counterpart at the Mana. But his seeing the counterpart is open to the same observation, that he does not even know the character in which it is written, and we see from looking at these palm leaves that one document is very like another, and when a man does not know the character in which a document is written he can hardly be sure that the document which he sees is the same document which he thinks he saw 30, 40, or 50 years before.

Then turning to the Kutti-kanak accounts to which he refers, exhibit G., we find a document on which the Subordinate Judge has placed considerable reliance. But it is an exparte document, it is only to be found in the family accounts of the Plaintiff, and when it is looked at it is found to labour under the fatal defect of not mentioning the term of years for which this Otti mortgage of 1820 was granted. Excepting on that point, it is an entry in the Plaintiff's own books corresponding with the Otti mortgage; but when we come to look for the

term of years that is granted the original is mutilated, and the term cannot be ascertained.

The next witness, also 76 years old, says this: "The lands were demised by the Mana to Chatu "Tharavanar on veppu in 995 (1820–21). It was "for 3,000 fanams, and was demised by the above- "mentioned Deva Narayanan Nambutiripad. A "marupattam (counterpart) has been taken and "secured as evidence thereof. The marupattam "(counterpart) was written by the Menon "(accountant); his name is Kiringat Paran- "gotasha Menon. He is dead. I have seen a "counterpart being taken. All these things took "place at Vatanakurishi. In the demise a period "of 55 years has been fixed. Chatu Tharavanar "was sent for, and told by the Mana that some "money was wanted. Chathu Tharavanar "then answered that money was very scarce, "and that if a demise was executed for a period "of 55 years he would, however, give money. "The former demise was one for 20 years. As "a larger sum of money was given, the demise "was made for 55 years. The former demise "was returned to the Plaintiff, Nambutiripad. "When the 55 years demise was executed a sum "of 1,000 fanams was given as veppu and a sum "of 1,000 fanams as present." He introduces another sum of 1,000 fanams, given as a bonus or present at the time. "As I was living at the "Mana as a Kutti Pattar (literally a young "Brahmin), I came to be present at the time of "the demise."

That witness no doubt states how he came to be present. Whether a Kutti Pattar means a cook, as the High Court seem to have thought, or a young Brahmin, it does not appear in what capacity this witness was employed in the household. He had nothing to do with the transaction; he was only casually present. He speaks to a great number of details relating both

to the Otti mortgage, and to the previous mortgage, which had then expired, which it is almost impossible to believe that anybody 76 years old could remember to have casually happened in his presence when he was a lad of 18. Nor does he mention, as the last witness mentions, that there was anything to stimulate his recollection. According to his evidence, nothing bearing on the subject has happened between the year 1820, when he says all these details take place in his presence, and the year 1878, when he was called upon to give evidence in the suit.

Well then we have this state of things: to prove a mortgage of most unusual form, there is produced a document without signature, without witnesses, not professing to be an original, called a counterpart, but not shown to be more than the copy of a draft; and it is spoken to at 58 years' distance of time by two old men who, when the events happened which they speak to, were young lads who, somehow or other, were about the Plaintiff's household, and happened, not, in any official character, but accidentally, to be present when the Otti mortgage was executed, and one of whom cannot even read the character in which the document is written. It would be extremely dangerous to allow titles resting on long possession to be shaken by such evidence as that.

The case against the Plaintiff is somewhat intensified by what took place in the year 1856. In that year there came to his knowledge the fact that either the Defendants, who had got an official position in the district, or somebody in their interest, was falsifying the Government accounts with a view to prove that the Defendants were the jenmis of these lands, and a formal complaint was lodged by the Plaintiff before Mr. Collett, the magistrate of Malabar. He states there, "Our

" jenmis have been altered into those of the Thara-
" kath " —which is another name for the Thara-
vanar family—" and others in the accounts." Therefore he knew the plot that was going on against him. There was an official inquiry. It was found the accounts were tampered with, and some of the officials were punished for it. That was in the year 1856, 22 years before this suit was brought. At all events one would have thought that a man so threatened would then have made every effort to get some acknowledgement, to perpetuate testimony, or to put upon record his title as against the persons in possession who were falsifying documents with a view to keep him out. But beyond this complaint to the magistrate we do not find that any effort whatever was made by the Plaintiff or his family to substantiate their title to the lands. There may have been witnesses living then who could have spoken with very much more authority than the two old men who are now brought forward; at all events one would expect to find a person who knew himself to be the owner of these lands, and knew that steps were being taken to put a new ownership on the record, making much more effort than the Plaintiff did make to establish his title.

The result is that their Lordships think the Plaintiff's case is not proved. They do not desire to take the ground that was taken by the High Court, nor in fact do they altogether see their way to taking the ground, that there has been a deliberate fraud on the Plaintiff's part. There is force in much that Mr. Leith urged upon the state of these documents, and in his argument that many of the badges of fraud which one would expect to find in a deliberately concocted case are absent in this case. But they consider the case is not proved; that it would be most dangerous to Indian titles

if evidence such as is adduced by the Plaintiff in this suit were allowed to disturb long possession; and on that ground they will humbly advise Her Majesty to dismiss this Appeal, and the costs must follow the result.