APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

TRAILOKIA NATH NUNDI (PLAINTIFF) *v.* SHURNO CHUNGONI (DEFENDANT.)* 1885 *March* 30.

Evidence Act (I of 1872), s. 90—Documents thirty years old, their natural and proper custody.

Where a daughter professed to hold under a *pottah*, more than thirty years old, in favour of her father, and was found to have been in possession of the land ever since her father's death for a period of forty years without interruption on the part of the father's heirs: *held*, that the daughters' custody of the *pottah* was a natural and proper custody within the meaning of s. 90 of the Evidence Act.

The rule laid down in s. 90 as to proof of execution of documents thirty-years old ought to be applied in this country with special care and caution.

THIS was a suit to eject, after notice, a tenant from a small parcel of homestead and garden land. The defendant contended that she had been in possession of the land by payment of rent ever since the death of her father for a period of forty years, and relied upon a *pottah* which purported to have been executed in favour of her father on the 11th Aughran 1229 B. S., corresponding with the 25th November 1822. The Munsiff not only found the document to be spurious, but held that, inasmuch as the father had grandsons by other daughters living, the possession of the defendant, who was a childless widow, was that of a mere tenant-at-will, and gave a decree to the plaintiff. On appeal, the Subordinate Judge held that there was no reason to question the genuineness of the *pottah* under the thirty years' rule; that the defendant had an occupancy right in the land; that, although she was not the heiress of her father, she had been in possession of the land for more than twelve years, and set aside the Munsiff's decree.

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Maclean, one of the Judges of this Court, dated the 3rd of December 1883, in appeal from Appellate Decree No. 1552 of 1882, against the decree of Baboo Bhubon Chunder Mukerji, Second Sub-Judge of Hooghly, dated the 14th July 1882, reversing the decree of Baboo Durga Churn Ghose, Second Munsiff of Hooghly, dated the 31st of January 1882.

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The plaintiff appealed to the High Court, and, the value of the suit being laid at Rs. 10, the appeal was heard and dismissed by a single Judge of the Court.

On appeal to a Division Bench, it was contended on behalf of the plaintiff that the thirty years' rule ought to be received with caution; and that in view of the circumstance that the defendant was not the heiress of her father, her status was no higher than that of a tenant-at-will, and her custody of the *pottah* not a natural and proper custody.

Baboo *Trailokia Nath Mitter* for the appellant.

Baboo *Kalikissen Sen* for the respondent.

The judgment of the Court was as follows:—

GARTH, C.J. (MCDONELL, J., concurring.)—In this case the plaintiff claims to eject the defendant from a small property, upon the ground that she is a tenant-at-will, and he has given her a notice to quit.

The defendant's answer is, that she and her father before her have been in possession of this property, which is homestead land, for about sixty years, under a *pottah* which was granted to her father by the person who is admitted to have been the proprietor at that time.

The plaintiff tried to make out that the defendant held under some agreement with a person under whom he claims; but that fact was negatived by the Court below

The *pottah* said to have been granted to the defendant's father was produced in the Court below by the defendant; and the Subordinate Judge considers it to be proved, inasmuch as he finds that the defendant has had it in her custody since her father's death, and that under the circumstances this was the proper custody.

That decision of the Subordinate Judge has been confirmed by the learned Judge of this Court; and we are asked to say by the appellant that the learned Judge was wrong for two reasons: First, it is said that the defendant, although she is the daughter of the person who obtained the *pottah*, was not his legal heir, because it appears from the defendant's own evidence that she has a sister's son alive, who would be her father's legal heir. But

it appears that this young man, although no doubt her father's heir, has never claimed the property in question, nor has he interfered to disturb the defendant's possession of it; and the Court below has found as a fact that the defendant has been in possession, as she says she has, for the last 40 years, and that her father was in possession before that time.

Under these circumstances we are asked to say that the *pottah* was not in its proper custody, because it was in the possession of a person who was not the legal heir of the first grantee.

Then, secondly, it is contended that the plaintiff ought to succeed, because the only person who can legally hold under the *pottah* is the heir of, or some one legally claiming from, the first grantee; and as the defendant was not the heir of the first grantee, and as she has not proved any other title from him, she can only be holding as a tenant-at-will, and is therefore liable to be ejected as such.

Upon the first of these points I have already made some observations during the argument. No doubt the rule laid down in s. 90 of the Evidence Act ought to be applied in this country with special care and caution. It is a rule which even in England must be exercised with caution. Mr. *Taylor*, in dealing with that subject in page 595 of the 6th ed., (7th ed., p. 560) of his Book on Evidence says: "No doubt this species of proof deserves to be scrutinized with care; for, first, its effect is to benefit those who are connected in interest with the original parties to the documents, and from whose custody they have been produced, and next, the documents are not proved, but are only presumed to have constituted part of *res gestæ*. Still as forgery and fraud are, comparatively speaking, of rare occurrence, and as a fabricated deed will generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed."

I very much wish that in this country we could say, as Mr. *Taylor* here says of the state of things in England, *that forgery and fraud are of rare occurrence*. I need hardly say that the more frequent fraud and forgery are, the more care and caution is necessary in applying this rule, because nothing can be more easy than for an unscrupulous person, who is wrongfully in possession

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of property, and wants to make out a title to it, to forge a deed in his own favour more than thirty years old, and then produce it himself in Court, and say that, because he is in possession of the land, he must needs be the proper custodian of the deed, and so relieve himself from the necessity of proving the execution of the instrument. We, therefore, entirely agree with the learned vakeel, who has argued this case for the appellant, that any Court should be exceedingly cautious in applying that rule in this country.

But as regards the question in this case, let us see what Chief Justice *Tindal* says, in delivering judgment in the House of Lords in the very important case of the *Bishop of Meath* v. *The Marquess of Winchester* (1), where, in speaking of documents found in a place in which, and under the care of persons with whom such papers might naturally and reasonably be expected to be found, he says, "and this is precisely the custody which gives authenticity to documents found within it, *for it is not necessary that they should be found in the best and most proper place of deposit.* If documents continue in such custody there never would be any question as to their authenticity, but it is when documents are found in other than their proper place of deposit, that the investigation commences *whether it was reasonable and natural, under the circumstances in the particular case,* to expect that they should have been in the place where they are actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper there may be various and many that are reasonable and probable; though differing in degree, some being more so, some less, and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases."

These words of the Chief Justice may be taken as laying down an excellent rule in questions of this kind, and in this case we must look, not only to the actual custody but to the circumstances

(1) 3 Bing (N. C.) (183) 200.

under which this *pottah* is produced. It is found by the Court below that the defendant and her father have been in possession of this property for sixty years, and having regard to the close relationship which existed between them, and to the fact, that the property is a very small one, there would seem nothing more likely than that the defendant should have been allowed to have the enjoyment of the property, to the exclusion of a grandson, who, if he was born at all at his grandfather's death, which does not appear, was probably a child of tender years.

Under these circumstances it seems to us impossible to say that the *pottah* when produced by the defendant did not come from such a custody, as after the lapse of sixty years brought it within the rule, which rendered it unnecessary to prove its execution.

Suppose, on the other hand, that the *pottah*, instead of being produced by the defendant, had been produced by the nephew, a young man who had never been in possession of the property and perhaps had never seen it, surely the objection that his was not the proper custody would have been more cogent than it is now.

We think that the daughter of the grantee, who has been in possession of the property these many years and has paid rent for it all that time, may fairly be considered as a more proper and less suspicious custodian of the document than the nephew, who has never been in possession of the property.

Then, as regards the second point that has been raised by the appellant, we think that the plaintiff has no right to treat the defendant as a tenant-at-will. Assuming the *pottah* to be a good one, which we must do for the purposes of this question, it is clear that the plaintiff has no right to treat a person, who holds by right of the *pottah* as a tenant at will. The defendant has been holding professedly under the *pottah*, and paying the plaintiff the rents reserved by it. If she is not entitled to the *pottah* herself, she must be taken to have been paying rent for the person, whoever he may be, who is entitled under it. She may be answerable to that person for the profits, but the plaintiff has no right to treat her as holding by a different tenure or to eject her as a tenant-at-will.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.