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living with them, married only four or five months after father's death. Her possession therefore commenced, so to speak, from the time of the deed and she has been living in the house included in the gift ever since." He reversed the District Munsif's decree and dismissed the suit.

Plaintiff preferred this second appeal.

A. J. Ambrose for appellant.

V. Krishnaswami Aiyar for second respondent.

JUDGMENT.—The voluntary registration of the deed of gift by the legal representative of the donor has the same effect as its voluntary registration by the donor himself in his life-time. There was, therefore, a valid gift to the second defendant.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

1901. December 5.

APPATHURA PATTAR (PLAINTIFF), APPELLANT,

v.

GOPALA PANIKKAR (DEFENDANT), RESPONDENT.*

Evidence Act—Act I of 1872, ss. 63, 65, 90, 114—Copy of document—No evidence that original could not be produced—Secondary evidence—Presumption.

In a suit to recover possession of land, the defendant relied principally on a document which was filed in the Munsif's Court in support of his title. According to the evidence this document had been prepared with reference to a document of an earlier date. This earlier document was not produced, though it was admittedly in existence, nor was it shown that it could not have been produced. The Munsif decreed in plaintiff's favour. On appeal, a copy of the earlier document was produced and filed:

Held, that although the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned, and inasmuch as the exhibit was a copy and not the original, the presumption which, under section 90

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* Second Appeal No. 725 of 1900 against the decree of K. Krishna Rao, Subordinate Judge of South Malabar, in Appeal Suit No. 450 of 1899, reversing the decree of M. Subba Ayyar, District Munsif of Temelprom, in Original Suit No. 73 of 1898.

of the Evidence Act, may be made where a document over thirty years old is produced, ought not to be made.

Khetter Chunder Mookerjee v. *Khetter Paul Sreeterutno*, (I.L.R., 5 Calc., 886), referred to.

SUIT for possession of a paramba and for money. Plaintiff claimed to be entitled to the paramba on a perpetual service grant and to the improvements thereon. He alleged that defendant had forcibly entered the paramba and cut and removed timber from it and he sued to eject him and to recover possession, and claimed the value of the trees which, as he alleged, defendant had cut. Defendant denied plaintiff's claim to the paramba, as well as the alleged trespass. He pleaded that the paramba had been assigned to him and was in his possession and that if it had been demised to plaintiff, the demise was fraudulent. He further claimed that the suit was barred by time, and by adverse possession. At the hearing before the Munsif, a document, being a registered kanom deed executed in the year 1060, was filed as exhibit XIV, and was strongly relied on by the defendant. It contained a reference to a water-course as forming the eastern boundary of the paramba and it was on this that defendant principally relied in proof of his claim. The Munsif said that exhibit XIV was of great importance, because all the other documents filed by defendant which had come into existence subsequently to exhibit XIV depended upon it for the information they contained, the reference in it to the water-course as the eastern boundary appearing in that document for the first time. Defendant, in his cross-examination, stated that he had known the paramba from the year 1060, which was the year in which exhibit XIV had been executed. He was at that time employed under the Zamorin and went to the paramba and noted its boundaries. He also stated that he had prepared the renewal deed, the draft of it being made with reference to a prior deed of 1033 or 1038. The prior deed of 1033 was produced and filed as exhibit VIII; and did not mention the water-course as the eastern boundary of the paramba. But the deed of 1038 was not produced before the Munsif. It was not shown that the document could not be produced. On the contrary, it was admitted to be in existence and in the custody of the Zamorin. The Munsif inferred from its non-production that no mention was made in it of the water-course as the eastern boundary of the paramba. Considering the effect of exhibit XIV,

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he thought that the circumstances under which the material portion of it had been introduced, describing the water-course as the eastern boundary, and defendant's own connection with its introduction, rendered the document on that point suspicious. He believed plaintiff's documents and distrusted exhibit XIV, and attached no weight to defendant's other documents, as they merely reproduced the reference to the water-course from exhibit XIV. In the result, he passed a decree directing defendant to deliver up the paramba to plaintiff, and to pay the value of the timber which had been cut.

Defendant appealed to the Subordinate Judge, who thus referred to the Munsif's comments on exhibit XIV:—"He remarks that the earlier kanom document of 1038, which was stated by the defendant to have been referred to in drawing up exhibit XIV, had not been produced. The document is now found to have been filed in an important suit in the Palghat Sub-Court, and the Zamorin, who had filed it and who belongs to the Kilake Kovilagom which is the grantor to the plaintiff, was said to be in no mood to get it back and file it for the benefit of the defendant. Now, however, the defendant is able to obtain a copy of it and has filed it as exhibit XV. Even the copy was obtained in 1889 when this present dispute had evidently not arisen. Exhibit XV distinctly mentions the water-course as the eastern boundary of the defendant's holding and so supports exhibit XIV. The two documents XIV and XV, by the mention of the water-course marked D on the plan, make it clear that the plaint ground belongs to the defendant." He also found in defendant's favour on the question of possession. He reversed the decree and dismissed the suit.

Plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

J. L. Rosario and *Bhaskara Menon* for respondent.

JUDGMENT.—We think the Subordinate Judge was wrong in admitting exhibit XV in evidence as proving that in 1862 a deed was in fact executed by the parties referred to, and in the terms set out, in that exhibit. In the circumstances, exhibit XV was admissible as secondary evidence under the provisions of sections 63 and 65 of the Evidence Act. But it is only secondary evidence of the contents of a document. There is no evidence that the document, of the contents of which the exhibit is evidence, was in fact executed in 1862 between the parties mentioned, and in the

terms stated in the exhibit. No doubt the document of which exhibit XV is a copy purports to have been executed in 1862 and therefore purports to be more than thirty years old, but it is not produced, and this being so, we think the presumption which, under section 90 of the Evidence Act, may be made where a document over thirty years old is produced from proper custody, ought not to be made. It is not necessary to consider whether we should be prepared to follow the decision in *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno*(1), if it had been shown, as it was in that case, that the original document could not be produced by reason of its having been lost. In the present case there is nothing to show that the original document, which admittedly is in existence, and in the custody of the Zamorin, could not have been produced if proper steps to procure its production had been taken. It has been argued that section 114 of the Evidence Act enables us to make the presumption of the genuineness of the original document; but the law as to the presumptions which may be made in the case of documentary evidence is laid down in the sections which deal with documentary evidence, and section 114 has no application to a case of this sort. Apart, however, from the evidence of title the Judge states that he believes the oral evidence as to twelve years' possession by the defendant and disbelieves the plaintiff's evidence of possession. On the question of possession there is, therefore, a finding of fact in defendant's favour with which we cannot interfere on second appeal.

The second appeal is dismissed with costs.

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(1) I.L.R., 5 Calc., 886.