1904.
June 30.

Re Last Will of GABRIEL SOYSA.

SILVA *v.* SOYZA.

D. C., Negombo (Testamentary).

Last will made in 1867—Application for probate after thirty years—Proper custody—Presumption of genuineness—Evidence Ordinance, s. 90.

The word "document," as defined in the Evidence Ordinance, is large enough to include a will, and therefore the presumption created by section 90 applies to the case of a will thirty years old.

Where a will is found in the custody of the testator's widow and such custody has a legitimate origin, the Court should presume in favour of its genuineness, even if the best and most proper custodian of the will is the Court itself.

IN this suit the petitioner sought to propound a will dated the 28th December, 1867.

The District Judge dismissed the petition, holding that as the last will was not produced in Court within six months of the testator's death, it could not now be said to come from proper custody.

The petitioner appealed.

H. J. C. Pereira, for appellant.—The will was in the custody of the widow, and therefore it was in proper custody. She did not produce it in time, as the document was mislaid.

30th June, 1904. WENDT, J.—

This is an application by the executrix for probate of the last will of her husband Gabriel de Soysa, who died in 1868. The will is dated 28th December, 1867, and the question is whether it has

been proved. The notary who attested it is certainly dead, and it is alleged (what is probable enough) that the attesting witnesses are dead too. No attempt, however, was made to prove the handwriting of the testator or of the notary or witnesses, and the petitioner had to depend on the fact that the instrument was over thirty years old and came from proper custody. She is the executrix named in the will, and though she is not mentioned in it as one of the testators she says she signed it along with her husband. A strip of paper has been torn off the last leaf of the will, carrying with it the greater part of the testator's signature and the whole of the petitioner's signature and those of the notary and one of the witnesses. The District Judge accepts the explanation that this strip became detached and was accidentally lost, and the ragged state of the document supports the explanation. The notary appears to have duly preserved a duplicate of the will (duly executed) in his protocol, and he being dead the protocol is in the Land Registry Office, and a copy of it has been produced.

There is nothing irregular or suspicious about the will or its contents. The petitioner deposed that the instrument was with her husband till his death, and that thereafter it was with her; that she had forgotten its existence until, a short time ago, her youngest son unearthed it among some other old papers in a chest. The District Judge considers petitioner a witness of truth, but feels constrained to hold that, inasmuch as the will ought to have been produced to the Court shortly after the testator's death, it cannot now be said to come from proper custody when produced by the executrix.

" Proper custody " is explained in section 90 of the Evidence Ordinance. A document is in proper custody if it is in the care of a person with whom it would naturally be, but no custody is improper if it is proved to have a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. Here the custody of the widow-executrix is proved, and that it had a legitimate origin, and it is therefore not improper custody, and I would go further and say that the instrument would naturally be looked for in her custody. In the case of *Bishop of Meath v. Marquess of Westminster, 3 Bing. N. S. 183*, Tindal, C.J., 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, says, " 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. " Accordingly, even if the Court would have been the best and most proper custodian of this

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will, yet the custody of the widow-executrix is also proper custody. And the Court ought therefore to presume in favour of the genuineness of the instrument. The question is only in regard to the deceased testator Gabriel, and we decide nothing as to the will being possibly also that of the petitioner. We set aside the order appealed from and direct the issue of probate to the petitioner in due course. The petitioner will have the costs of appeal.

SAMPAYO, A.J.—

I am of the same opinion. The word " document " as defined in the Evidence Ordinance is large enough to include a will, and therefore the presumption created by section 90 applies to the case of a will thirty years old. The corresponding section of the Indian Evidence Act appears to have been construed in the same way in the Indian Courts. *Mukkerji v. Pal Sritiratna, I.L.R. 5, Cal. 886.* It has, however, been held in India, and I think rightly, that the presumption should generally be drawn with caution, and there should be at least some evidence of transactions or states of affairs necessarily or at least naturally referrable to it so as to free it from the suspicion of being fabricated. (See *Prasad Bai v. Chandra Bai, 6 W. R. 82; Dishit Moro v. Lakshman, I. L. R. II., Bom. 89.)* In this case evidence of execution is not absolutely wanting, for the widow of the deceased swears to his having signed it. Further, transactions of the kind referred to are also shown to have taken place, as it appears that the widow and the children who were beneficiaries under the will sold some of the property of the estate, and the vendees have been in undisturbed possession for a great many years without opposition from the respondents to this appeal, who are the children of the widow by a marriage contracted subsequently to the death of the first husband, the deceased testator. I therefore think that the requirements in the proof of a will of an ancient date have been sufficiently fulfilled, including the necessity for the document to come from proper custody.