1956 *Present :* Basnayake, C. J., and K. D. de Silva, J.

C. A. H. DAVOODBHOY, Appellant, *and* M. J. M. FAROOK *et al.*, Respondents

S. C. 49—D. C. Colombo, 6,419

Evidence Ordinance—Section 90—Document thirty years old—"Proper custody"—Will executed in 1850—Proof thereof—Frauds and Perjuries Ordinance, No. 7 of 1840, s. 15.

The duplicate of a Will which is over thirty years old and which was duly admitted to probate in a testamentary case the record of which is missing is admissible in evidence under Section 90 of the Evidence Ordinance provided it is produced from the proper custody as contemplated by that Section.

Whether or not a particular custody is proper is a question of fact to be determined according to the circumstances of each case. Proper custody does not necessarily mean legal custody. It is sufficient if the circumstances render it probable that the origin was legitimate.

The duplicate of a Will executed in the year 1850 was transmitted to the District Court by the Notary who attested it. The Notary transmitted it to the District Court because he had some reason to believe, though mistakenly, that such transmission was required by law. The document was later transferred to the Registrar-General, who produced it in the present case after it had been in the custody of the Land Registry for over 100 years.

Held, that the document was produced from proper custody within the meaning of Section 90 of the Evidence Ordinance.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *G. D. C. Weerasinghe*, for the defendant appellant.

C. Thiagalingam, Q.C., with *T. Parathalingam*, for the plaintiffs respondents.

Cur. adv. vult.

April 26, 1956. K. D. DE SILVA, J.—

This is an appeal by the defendant from an order made by the Additional District Judge, Colombo, admitting certain documents in evidence having overruled an objection taken by the defendant's Counsel that they were inadmissible. The documents in question are P9, P10, P11, P14 and P15. At the hearing of this appeal the objection was confined to P14 and P15. The document P15 is claimed to be the duplicate of the Last Will No. 418 dated 22nd July, 1850, of one Mohideen Natchia who died in the year 1855, while P14 is a certified copy of that document. It is necessary to set out, in brief, the respective claims of the plaintiffs and the defendant in this action in order to consider the question raised in this appeal in its correct perspective.

The plaintiffs instituted this action against the defendant for a declaration of title to the piece of land described in the schedule to the plaint and for consequential relief. It is common ground that this land originally belonged to Mohideen Natchia. According to the plaintiffs, Mohideen Natchia by Last Will No. 418 dated 22nd July, 1850, bequeathed her property including the subject matter of this action to her two sons, Hamidu Lebbe and Ahamadu Lebbe. She died on 24th July, 1855. Thereafter, plaintiffs allege, that her Last Will was admitted to probate in D. C. Colombo Testamentary Case No. 1734. It was contended by the plaintiffs that this Last Will created a fideicommissum in favour of the descendants of Hamidu Lebbe. If in fact no such fideicommissum was created the plaintiffs' action admittedly fails. Ahamadu Lebbe was the executor under the Last Will of his mother, and he by executor's conveyance P7 of 1856 conveyed to his brother Hamidu Lebbe the interests that the latter was entitled to under his mother's Last Will. Hamidu Lebbe died leaving three children namely Noordeen, Samsudeen and Cadar Umma and they by deed P8 of 1902 amicably partitioned the property which their father acquired under this Last Will. At this division, the land in suit was allotted to Samsudeen who died leaving a son and a daughter namely Jaleel and Zubaida Umma. It is alleged that Jaleel has not been heard of since the year 1942 and on the presumption that he is dead his rights devolved on his three children the 1st and 2nd plaintiffs and one Quirasha who died leaving as her heirs the 3rd and 4th plaintiffs. The 6th plaintiff is a purchaser of certain rights from 1st and 2nd plaintiffs. According to the plaintiffs Zubaida Umma left no issue and

her share devolved on her brother Jaleel whose rights passed to the plaintiffs. The defendant claims the entire land by right of purchase on deed P13 of 1917 from Jaleel who had already acquired the share of his sister Zubaida Umma on deed P12 of 1917 from the latter's husband. The defendant does not admit that Mohideen Natchia left a Last Will or that such a Will was admitted to probate. Even if such a Will was proved he contends that it did not create a fideicommissum. He also takes up the position that neither the Will nor the probate relied on by the plaintiffs was registered and that therefore he acquired an absolute title to the whole land on P13.

At the trial the plaintiffs' Counsel raised, *inter alia*, the following issues :—

1. Did the Last Will No. 418 dated 22.7.1850 create a fidei commissum for four generations ?
2. Was the said Last Will duly admitted to probate ?
3. Was the property in the hands of Hamidu Lebbe Samsudeen subject to a fideicommissum for ever in favour of his children and descendants ?
4. If so, are the plaintiffs entitled to the entirety of the property in dispute in the shares set out in paragraph 9 of the plaint ?

Some of the issues raised by the defendant's Counsel were :—

1 (*a*) Was Mohideen Natchia the owner of the premises in question ?

1 (*b*) Did she execute the Last Will No. 418 dated 22.7.1850 ?

2 (*a*) If not, is this action maintainable ?

2 (*b*) Is this action maintainable unless the probate of the said Last Will is produced ?

In the course of the trial the Counsel for the plaintiffs sought to produce a document which purported to be a certified copy of the Last Will No. 418.

Mr. Weerasooria, Q.C., the Counsel for the defendant objected to the production of this document. This objection was upheld. Thereafter the plaintiffs' Counsel stated to Court that he wished to summon the Registrar-General to produce the original of the duplicate of the Last Will. The learned Judge accordingly adjourned the trial. When the trial was resumed on 1.1.'54 the 1st plaintiff stated that the Last Will of Mohideen Natchia was admitted to probate in Testamentary Case No. 1734 of the District Court, Colombo, but that the record of that case was missing. In support of his statement he produced P5, a letter, dated 13.9.'52 of the Secretary of the District Court, Colombo, in which it is stated that according to an inventory prepared some years ago the record of D. C. Colombo Testamentary Case No. 1734 is missing. He also produced P6 which is a certified extract from the Testamentary Index Registor of the District Court, Colombo, which shows that the estate of Mohidin Natchie was administered in Case No. 1734. Thereafter one

D. S. Peiris a clerk of the Land Registry produced P15 the duplicate of Last Will No. 418 dated 22nd July, 1850 and P14 a certified copy of that duplicate. Mr. Weerasooria objected to the production of these two documents. After hearing the arguments of the Counsel for plaintiffs and the defendant the learned Judge made the following order :—

> " I admit in evidence Last Will 418 of 22.7.1850. I shall give my reasons in my judgment. "

It is from this order that the defendant has appealed. Further trial has not been proceeded with in view of this appeal.

Mr. H. V. Perera contended :—

(1) that P15 is only a copy of the Last Will.

(2) that it is not a public document within the meaning of Section 74 of the Evidence Ordinance (Cap. 11).

Therefore he argued that it is inadmissible in evidence. Mr. Thiagalingam on the other hand maintained that this document should be regarded as the original Will and that in any event it is a public document within the meaning of Section 74 (*b*) of the Evidence Ordinance as a public record of a private document and that on either of these two grounds it was admissible. I would first deal with the question as to whether or not this document is admissible under Section 90 of the Evidence Ordinance. That Section provides that any document thirty years old produced from any custody which the Court in the particular case considers proper, may be presumed to be genuine both regarding to its contents and its due execution. The explanation appearing under that Section reads :—

> " Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be ; but no custody is improper if it is proved to have had a legitimate origin, or in the circumstances of the particular case are such as to render such an origin possible. "

There is no doubt that the word " document " in this Section refers to the original document. Mr. Perera contended that P15 is not the original Will. Although Mr. Thiagalingam at one stage suggested that P15 may well be the very document which was admitted to probate in Case No. 1,734 there does not appear to be any merit in that contention. In fact the plaintiffs' case in the Court below was that the original Will admitted to probate had been lost and that P15 was its duplicate lying at the Land Registry. P15 itself shows that the Last Will of Mohideen Natchia was attested in triplicate, for the attesting Notary states therein :—

> " In witness to the declaration and execution of this Last Will and Testament the signature and seal were affixed to three of these same presents in the presence of Pakirthamby Sesma Lebbe of Old Street, Colombo, and Kunji Mohamadu Nagutha Segu Fareed of New Street, Colombo, on the date and year aforesaid. "

Therefore I would proceed to treat this document as a duplicate and consider the question of its admissibility on that basis. The duplicate of any document is necessarily identical with the original in regard to its contents. Both the original and the duplicate are prepared and signed at the same time and by the same parties. It was held in *Kiri Menika v. Duraya* [1] that a duplicate of a deed is not a copy but must be treated as the original itself. Lascelles C.J. stated in that case :—

> "The document in question cannot, in my opinion, be treated as a copy of the original deed. This document, no less than the deed which passed to the grantee, was signed by the parties and attested by the Notary. It is in all respects an original deed."

That was the duplicate of a deed over thirty years old and the learned Chief Justice held that it was admissible in evidence provided it came from the proper custody. On the analogy of that decision Mr. Thiagalingam submitted that the learned District Judge was correct in admitting P15. Mr. Perera, however, contended that the reason why the duplicate of that deed was admitted was because every deed has to be executed in duplicate and the duplicate must be forwarded to the Registrar of Lands and it was that duplicate which was sought to be produced in that case. It does not appear, however, from the judgment that the reason for treating the duplicate as the original itself was due to the legal requirement that deeds should be executed in duplicate. The reference in that judgment to the legal requirement that deeds must be executed in duplicate was made in considering the question whether the document came from the proper custody. The character of the duplicate of a document is not dependent on whether or not the law requires that the particular document should be executed in duplicate. The original and the duplicate are contemporaneous in execution, identical in terms and signed by the same parties. Apart from that parties to the document intend to treat them alike. Although there is no legal requirement that a Will should be attested in duplicate there is nothing to prevent it being so attested if the testator desires to do so. A duplicate is not the same as a protocol. In *Raliya Umma v. Mohamed* [2], Gratiaen J. said :—

> "As to the argument concerning the protocol, I concede that a testator may, for greater security, execute his Will in duplicate—either retaining both instruments himself, or retaining one and committing the other to the custody of someone else. In such cases, the disappearance of the duplicate retained by the testator would give rise to 'various gradations of presumption' according to the circumstances of the particular case—".

In that case Gratiaen J. seems to have taken the view that although a protocol of a Will is not admissible to prove the contents of the Will the duplicate is entitled to take the place of the original. I am therefore of the view that the duplicate of a Will over thirty years old is admissible under Section 90 of the Evidence Ordinance provided it is produced from the proper custody as contemplated by that Section. The Will in question.

[1] *(1913) 17 N. L. R. 11.* [2] *(1951) 55 N. L. R. 385.*

purports to have been attested in the year 1850. Therefore it is over thirty years old. But does P15 come from the proper custody ? According to Mr. Perera it does not. He submitted that at the relevant time there was no provision either to attest deeds in duplicate or to forward a duplicate to any Government office. Mr. Thiagalingam however argued that in the year 1850 the law required duplicate of Wills to be deposited in the District Court. I am unable to agree with him on that point. It is Section 4 of The Frauds and Perjuries Ordinance No. 7 of 1834 which required deeds and Wills to be attested in duplicate. The same Section enacted that duplicates of deeds and Wills should be transmitted by the Notary to the District Judge who was enjoined to preserve them. Section 8 (6) of the Notaries Ordinance No. 1 of 1837 provided that duplicates of all deeds and Wills should be transmitted to the District Court as required by Ordinance No. 7 of 1834. A breach of that requirement was made punishable with a fine. This Ordinance was repealed by the Notaries Ordinance No. 4 of 1839. Section 6 (4) of the latter Ordinance enacted that duplicates of all deeds and Wills should be sent by the Notary to the District Court " as requird by law ". The " law " referred to here is Ordinance No. 7 of 1834. The Frauds and Perjuries Ordinance No. 7 of 1840 repealed Ordinance No. 7 of 1834. Section 15 of Ordinance No. 7 of 1840 required every deed or other instrument except any Will to be executed in duplicate and that the Notary should at the end of each month transmit the duplicate of all deeds or other instruments executed by him during the month to the District Court. This Ordinance however did not expressly enact that Wills should not be executed in duplicate. But as Ordinance No. 7 of 1834 was repealed by it the legal requirement that Wills should be executed in duplicate ceased to exist. So that at the time that Will No. 418 of Mohideen Natchia was attested it was not obligatory to attest Wills in duplicate. But, at that time Notaries Ordinance No. 4 of 1839 was still in operation. Although by reason of the repeal of Ordinance No. 7 of 1834 the requirement under Section 6 (4) of Ordinance No. 4 of 1839 for the transmission of the duplicates of Wills ceased to operate, notaries do not appear to have realized that that necessity no longer existed because no specific reference was made in Ordinance No. 7 of 1840 to Section 6 (4) of Ordinance No. 4 of 1839. It would not be strange that if they thought that they were still required to send duplicates of Wills to the District Court for the reason that Ordinance No. 4 of 1839 had not been repealed. That probably was the reason why the Notary who executed this Will transmitted a duplicate to the District Court. Ordinance No. 8 of 1863 enacted that District Judges should send up the duplicates of all deeds and Wills in their possession to the Registrar of Lands. That is how these duplicates came into the custody of the Registrar of Lands.

Does the fact that there was no legal requirement to transmit the duplicate of a Will—in this case—to the District Court make it inadmissible in evidence on the ground that it does not come from the proper custody ? If there was such a requirement the custody from which this document P15 comes must, without question, be held to be the proper custody. But the absence of such a requirement does not necessarily follow that the custody involved in this case is improper. The reason

why Section 90 insists on proper custody is to ensure the authenticity of the documents admitted under that Section. Whether or not a particular custody is proper is a question of fact to be determined in the circumstances of each case. Proper custody does not necessarily mean the best or the strictly legal custody. It is sufficient if the circumstances render it probable that the origin was legitimate. In *Bishop of Meath v. Marquess of Winchester*[1] which is a case decided by the House of Lords, Tindal C.J. said,

> " . . . . for it is not necessary that they should be found in the best and the most proper place of deposit. If documents continued in such custody there never would be any question as to their authenticity ; but it is when documents are found in other than the 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 whilst there can be only one place of deposit strictly and absolutely proper, there may be various, and many that are reasonable, though differing in degree ; some 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. "

The principle laid down in this case was followed by Wendt and de Sampayo JJ. in *Maria Silva v. Adoris Soysa* [2].

Do the circumstances in this case suggest that the custody of P15 had a legitimate origin ? I think they do. It has been in the custody of the Land Registry for over 100 years. There are no suspicious circumstances as to the manner that this Government Department came to possess it. The custody from which it comes is undoubtedly disinterested. It has been transmitted to the District Court by the Notary who attested it, at a time when he had some reason to believe—though mistaken—that such transmission was required by law. There is no reason at all to doubt the authenticity of the document. Therefore I hold that P15 comes from the proper custody and it is admissible under the provisions of Section 90 of the Evidence Ordinance. The certified copy P14, too, is admissible. It is not therefore necessary to consider the question whether P15 is a public document.

Accordingly I dismiss the appeal with costs.

BASNAYAKE, C.J.—

I have had the advantage of reading the Judgment prepared by my brother de Silva with which I agree. As my brother has stated the relevant facts fully I shall confine my Judgment to the question of law involved in this appeal.

[1] *(1836) 3 Bing. (N.C.) 183.*

[2] *1 Balasingham's Reports 46.*

The sole question for determination on this appeal is whether the learned District Judge is right in admitting in evidence the duplicate of the Last Will No. 418 dated 22.7.1850 produced from the custody of the Registrar-General.

Section 90 of the Evidence Ordinance provides—

> " 90 : Where any document purporting or proved to be thirty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested ".

The will in question which is in Tamil is clearly over thirty years old and purports to be signed by the testator and two witnesses and attested by a notary public. It is produced from the custody of the Registrar-General. The evidence of the officer of the Registrar-General's Department who produced the document in question is that the will was in the volume of deeds containing the duplicates of notary K. M. Mohammed Lebbe for the years 1849–1851. He also stated that these documents were originally in the custody of the District Court of Colombo and was later transferred to the Registrar-General. The learned District Judge considers that on the facts of this case the custody from which the Will has been produced is proper custody. I am not prepared to say that on the material before us the learned District Judge is wrong. In that view of the matter the Court may presume the actual attestation and execution of the Will.

On the subject of the presumption created by the section it is sufficient to refer to the case of *Munnalal v. Kashibai* [1].

Appeal dismissed.