APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

HARI CHINTA'MAN DIKSHIT, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MORO LAKSHMAN, (ORIGINAL DEFENDANT), RESPONDENT.* 1886. *August* 3.

Evidence—Ancient documents—Admissibility and weight of—Evidence Act I of 1872, Secs. 32 and 90—Hindu law—Nuncupative will—Construction of a váraspatra.

In 1847, A., a Hindu widow, executed in favour of B. a *váraspatra* (a deed of heirship) in the following terms :—

"My husband has died. We have no issue, and you are a son of my husband's cousin. Taking this into consideration, my husband expressed his wish, when he was on the point of death, that all the houses and shops situate in Poona, except the house at Banares, should be given to you, and that you should be made owner of all money-dealings connected with Poona. I, therefore, in obeying his command pass this deed of heirship to you, and make you owner of all the property mentioned above like our son. You, therefore, enjoy the property in your name joyfully."

Under this *váraspatra*, B. took possession of the property mentioned therein, and enjoyed it during his life-time. After his death, his *gumásta* (agent) managed it for and on behalf of B.'s minor son, C. In 1881, C. filed a suit to redeem a house and a garden, part of the property covered by the *váraspatra*, and which had been mortgaged by A.'s husband in 1831. One of the defences to this suit was that neither C. nor his father was the heir of the original mortgagor, and that, therefore, C. could not redeem the property in dispute. At the trial, C. produced the *váraspatra* of 1847 in support of his title, alleging that he had found it among the papers of the old *gumásta* of his father, who used to look after his affairs during his minority.

Held, that the *váraspatra* of 1847 was evidence of a nuncupative will by A.' husband in favour of B. Such a will by a Hindu would be quite effectual, except in cases governed by the Hindu Wills' Act (XXI of 1870).

Held, also, that the *váraspatra* was admissible in evidence under section 90 o the Evidence Act I of 1872, as a document purporting to be more than thirty years old, and produced from a custody, which under the circumstances of the case was a proper custody, the possession of the *gumásta* being legally the possession of his master.

The *váraspatra* was also admissible under section 32, clause 3, of the Evidence Act (I of 1872), as it was manifestly a declaration by A against her proprietory interest; for by it she divested herself of her widow's estate in the property, and there being no evidence of her existence after 1847, she must be presumed to have been dead in 1881, when the suit was filed.

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The degree of credit to be given to an ancient document depends chiefly on the proof of transactions or state of affairs necessarily, or at least properly or naturally, referrible to it.

APPEAL from the decree of Ráv Bahádur Náráyan Govind, First Class Subordinate Judge of Poona, in Suit No. 534 of 1881.

This suit was instituted by the plaintiff Yadneshwar Bálkrishna Dikshit to redeem a house and a garden from the defendants. The property in dispute had belonged to one Hari Chintáman, who mortgaged it in 1831 to the defendants for Rs. 4,999. The plaintiff alleged that Hari Chintáman had made a nuncupative will at the time of his death, bequeathing his houses and gardens at Poona, including the property in dispute, to the plaintiff's father, Bálkrishna Dikshit. To prove this will, the plaintiff produced a *váraspatra* (or deed of heirship) passed in 1847 by Tái, the widow of Hari Chintáman, in Bálkrishna Dikshit's favour. The *váraspatra* was to the following effect:—

"My husband has died. We have no issue, and you are a son of my husband's cousin. Taking this into consideration, my husband expressed his wish, when he was on the point of death, that all the houses and shops situate in Poona, except the house at Banares, should be given to you, and that you should be made owner of all money-dealings connected with Poona. I, therefore, in obeying his command pass this deed of heirship to you, and make you owner of all the property mentioned above like our son. You, therefore, enjoy the property in your name joyfully. It is proper on my part to accompany you to Poona, but I cannot leave my residence in Banares and come to Poona. You should, therefore, furnish me with maintenance, as a dutiful son would do, till I am alive, and after my death perform my funeral rights as a son. In a word, I tell you that you should perform our annual ceremonies as you do those of your parents. I have made you an heir according to the command of my husband; our other relations, &c., therefore, can have no interest in the houses and shops situate in Poona."

In accordance with this *váraspatra*, Bálkrishna took possession of Hari's property at Poona, and dealt with it as his own. After Bálkrishna's death the property was managed by Bálkrishná's *gumásta* during the plaintiff's minority. On his attaining

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majority, the summary settlement for the greater part of the estate was made with the plaintiff. In 1881 the plaintiff filed the present suit for redemption of the property in dispute.

The defendants contended *(inter alia)* that Bálkrishna was not the heir of Hari Chintáman, and, consequently, the plaintiff had no right to sue.

The Subordinate Judge was of opinion, that, under Hindu law, Tái, the widow, was not competent to make Bálkrishna an heir to her deceased husband's property by an instrument like the *váraspatra*. He, therefore, held that Bálkrishna did not acquire, under the *váraspatra*, any right over the property of Hari Chintáman, and that, consequently, the plaintiff was not entitled to the property through his father. The suit was, therefore, dismissed.

Against this decision the plaintiff appealed to the High Court.

Mahádev Chimnáji A'pte for the appellant:—The *váraspatra* is evidence of a nuncupative will in favour of the plaintiff's father. Such a will is valid under the Hindu law—*Bhagvan Dhullabh* v. *Kálá Shankar*(1); West and Bühler (3rd. ed.), 222!

In *Mahárájáh Pertáb Náráin Singh* v. *Maháránee Subhao Kooer*(2) the Privy Council lay down that a parol revocation of a will is valid. The *váraspatra* is admissible in evidence under section 32, clause *c*, of the Evidence Act, as a declaration by the widow against her proprietory interest. And as she has not been heard of for the last thirty years, she must be presumed to be dead. The document is also admissible as a document more than thirty years old, and produced from proper custody. The clerk's custody is really the custody of the master, and this document has been acted upon. The plaintiff and his father have been in possession under this document, and have dealt with the property as their own.

Shántárám Náráyan for the respondents:—The law as to the admissibility of ancient documents is laid down in *Hari Dhangar* v. *Biru Dasru*(3) and *Trailokia Náth Nundi* v. *Shurno Chungoni*(4).

(1) I. L. R., 1 Bom., 641.
(2) L. R., 4 I. A., 228.
(3) 5 Bom. H. C. Rep., 135, A C. J.
(4) I. L. R., 11 Calc., 539.

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The *váraspatra* does not come from a proper custody. Nor has it been acted upon in such a way as to raise the presumption of its genuineness. Assuming that it is genuine, it is not valid. It sets forth a command on Hari's part to his wife to transfer the property to Bálkrishna. This amounts to a gift by the widow at the bidding of her husband, and as it was not accompanied by possession, the gift was inoperative and ineffectual. Nor is the document admissible under section 32, as it is not shown that the widow, who executed it, is dead.

WEST, J.:—The principal points in the present case are those of the admissibleness and the effect of the document No. 28. This is a paper, called a *váraspatra*, apparently executed by a lady, named Tái, at Banares in the year 1847. By it she proposes to make over the whole property lately held by her husband, Hari Chintáman, to the present plaintiff's father, Bálkrishna. Such a document would naturally be sent to the person who was to benefit by it, and all the more certainly if he was called on, as Bálkrishna was, to fulfil certain duties in return for the benefit conferred on him. The plaintiff deposes that he found the document amongst the papers of a clerk, named Báláji, on Báláji's death. Báláji was an old servant of the family. He had been employed by Bálkrishna, who died in 1851, and the plaintiff being then a child, Báláji had two or three years afterwards filed this very document on his behalf with the Inám Commissioner. Báláji had other papers of the plaintiff at his death, and being employed as he was, his custody of this one on account of his master could not be called an improper one. Legally, his possession was that of the plaintiff, and he was perhaps more likely to have the actual detention of the document while he lived than was his master.

The document purports to be more than thirty years old, and, therefore, had to be, as it was, admitted in evidence. The degree of credit to be given to it, would depend on circumstances, chiefly on the proof of transactions or states of affairs necessarily, or at least properly or naturally, referrible to it. What these were, will have to be considered when the nature of the document itself has been ascertained.

It purports to be a declaration by Tái that in his last moments her husband, Hari Chintáman, had expressed his desire that all his property, with certain exceptions, should on his death pass to Bálkrishna. Some subtilties of interpretation have been proposed to us for the purpose of showing that what Tái says is that her husband directed her to make a gift to Bálkrishna; but a testamentary command ought not to be frittered away if the sense is clear, and it is clear that Tái means to say that her husband bequeathed his property to Bálkrishna. This declaration was manifestly against Tái's proprietory interest; for, by it, she divested herself of her widow's estate in the property; and there being no evidence of Tái's existence after 1847, she must be presumed to have been dead in 1881. The document 28, therefore, was properly admitted as a declaration by Tái, and, as such, it is evidence of a nuncupative will by Hari Chintáman. Such a will by a Hindu would be quite effectual.

The father Bálkrishna and the plaintiff himself are shown to have been and to be in possession of some parts of the property formerly held by Hari Chintáman. By the document No. 34 it appears that the plaintiff's mother dealt with a house, once Hari's, and could give extracts from his books concerning the *váda* mortgaged to the defendants. The summary settlement for the estate, or some of it, was made with the plaintiff. These are all transactions properly referrible to the right created by document 28, and going to sustain it as genuine. On the whole, then, we think that the will of Hari in favour of Bálkrishna is proved, and that on the title derived from this source the plaintiff has a right to sue, if any representative of Hari can do so, to redeem the property in dispute from the defendants as mortgagees.

The Subordinate Judge has taken evidence on all the issues, but finding that the plaintiff had not a representative character enabling him to sue, he has not dealt with that evidence. Thus for adjudication purposes he has excluded it. We reverse his decree, and remand the cause for adjudication on the issues not so far disposed of. Costs to follow the final disposal.

Decree reversed and case remanded.

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NOTE:—The law relating to the admissibility and weight of ancient documents is discussed by Mr. Justice West in *Timángavda v. Rángangavda* (1) (Regular Appeal No. 24 of 1877). The following is a short report of the case:—

The plaintiff sought to recover his share of certain *inám* lands and *haks* or cash allowances enjoyed by his family on account of the *nádgavda* and *nádkarni vatan*. The first defendant, who was the son of the plaintiff's elder brother, answered that, according to a long-established family custom extending over seven generations, the property in dispute was impartible, and enjoyed solely and exclusively by the representatives of the eldest branch, and that the plaintiff, as representing the younger branch, was entitled to maintenance only. To disprove the custom set up, the plaintiff adduced in evidence a number of documents more than thirty years old.

K. T. Telang (with *Ghanasham Nilkant*) for the appellant.

Máneksháh Jehángirsháh for the respondents.

WEST, J.:—The plaintiff in this case is uncle of the first and brother of the second defendant. He sues for a partition of the family estate. The answer is, that the estate, being a *vatan* attached to the ancient offices of *nádgavda* and *nádkarni* of the pargana of Kundgol, is, according to the custom of the family, impartible.

The proof of such impartibility rests on him who asserts it (B. & W., 339 (2nd ed.)), and in this case the decision of the Subordinate Judge, that it has been established by the defendants, is supported by a strong body of evidence. The oral testimony of a number of witnesses, whose examinations are recorded under exhibit 325, is uniformly in favour of the alleged impartibility. It is fortified by similar evidence as to the custom amongst the families of other hereditary office-holders of the pargana. The testimony, on the other side, is that of obviously interested persons, such as witnesses 105 or 293 and 294, well-informed some of them no doubt, but anxious themselves to obtain shares, or to establish a right upon which shares may be claimed. They do not make out that they actually hold portions of the estate as sharers on equal terms with the head of the family, the first defendant. He, on the other hand, does show that, though the exclusive or superior right of his own senior line was challenged at least three times during the last century, it was on each occasion successfully vindicated. As to the last of the documents bearing on this series of contests, exhibit 219, there was a conflict of testimony. Witness No. 332, one of the *bhaubands* (members of the same family) asserted that the signature of the Chief of Jamkhandi, attached to that document was not genuine; but to our minds it was satisfactorily proved by the witnesses Nos. 27, 28, 30, 31, and 35 under the commission, exhibit 325.

On the other hand, it is clear that in the year 1800 or 1801 the defendants' family were deprived of their exclusive possession of the village of Kop, which was then handed over to Bassangavda, a representative of a long-severed branch called the Pádoshis, as the family amongst whom the present contest is going on are called the Mudoshis. It is argued that this determination of a dispute between the branches establishes that impartibility could not have been the law of

(1) Printed Judgments for 1878, p. 240.

the family. And, if not the law of the family (it is urged) when the severance of the two great branches took place towards the close of the seventeenth century, it could not be made the law by any subsequent resolution or practice of the Mudoshi branch. The Privy Council have indeed said that such a "custom is capable of attaching and of being destroyed" (W. & B., 338 (2nd ed.)) and many cases have been disposed of on the ground that a special family custom may be abandoned. If, however, such a custom was a law in the proper sense, it could no more, on general principles, be exchanged for the ordinary law at the option of those subject to it, than it could be adopted in opposition to the ordinary law.

It would seem, then, that for some purposes, and as affecting the members themselves who compose it, a Hindu family is recognized by the highest tribunal as having a legislative or *quasi* legislative authority to which individuals must submit, and which the Courts will enforce. How far this authority extends, and what are the precise circumstances which will be taken as demonstrative of its having been exercised, are questions which will necessarily arise in working out the *dictum* of the Judicial Committee, should it be maintained in its literal strictness, to its logical conclusion. In the present case it might be said that the evidence shows the adoption, if not the existence from beyond the reach of memory, of the custom of primogeniture and impartibility in this family; while the award of Kop to the rival Pádoshi branch would, if it could be called an adjudication, tend strongly the opposite way. But, in truth, there was nothing that can properly be called an adjudication, or assimilated to an adjudication, in that case. The whole district, in which the estate in question is situated, fell for a time under the dominion of Tippu Sultán. There was a general uprooting of old-established rights, and of the traditional respect for rights sustained by habit and their continued exercise. In the counter-revolution, which followed at the close of the last century, the Pádoshis represented by Basangavda came forward with a claim which they seem to have rested on the document No. 31. That document has been tampered with, inasmuch as in the Maráthi version the name of Dugangavda, one of the grantees, has been wholly obliterated; but the Chief of Jamkhandi and the Panchâyat, to whom the matter was referred, may still have been impressed by it. It purports to be a grant of Kop, in A. D. 1693, to Yellápá and Dugáná in common with Kenchangavda, the ancestor of the litigants in the present case. Had a regular tribunal pronounced the family on this and other evidence not subject to a rule of impartibility of property, and made this determination of their legal status the ground of its decision, that would be a matter of considerable importance; but, as the case stands, the resolution of the Panchâyat and the order of the Jamkhandi Chief (exhibit 325, witness sub-No. 32) may have been, probably were, influenced by other than strictly legal considerations. It is really of more weight, for the purposes of this suit, that, except during Tippu's usurpation, the village of Kop should have remained unpartitioned for a century, as it seems to have done, than that it should then have been disposed of as it was, without a judicial investigation. The document No. 31 would have some effect in showing that, as between the Mudoshis and Pádoshis, there was at least a capability of taking and holding some property in common If there had been a common enjoyment of this village clearly proved, it might

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still have been said, no doubt, that the holding of a particular property in common, according to terms of the grant, would not prove general partibility any more than general union, that partibility would in so numerous a family have led to many sub-divisions in the course of a century, and that an original custom of impartibility before the severance of the family into two branches was consistent with such a severance, and the abandonment by the Pádoshis of the special family law, while the Mudoshis still adhered to it. And hence it would be argued that no useful inference as to the family custom of the Mudoshis could be deduced from this transaction. But the joint possession is not, in truth, made out down to the time when the Chief of Jamkhandi, acting on the suggestion of the Panchâyat, ousted the Mudoshis by an act of arbitrary authority. It may have subsisted; but the opinion of the Panch, as stated by the Chief of Jamkhandi, would appear to have been rather that while the right was joint, the possession had been exclusively held by Basangavda's branch of the family, until Mahádu, representing the Mudoshis, seized it on the overthrow of Tippu's power. Mahádu persisted in asserting (exhibits 19 and 18, dated in 1809 and 1811) against the further claims of Basangavda that the co-sharers had long ago abandoned all claims to equal co-parcenery to his own line, which had ever since held exclusive possession of the *vatan*; and with the exception of Kop it appears to have been thus retained by the family unpartitioned down to the present day.

The principal sources of the title to the estate now in dispute are the documents Nos. 213, 214 and 215, produced with exhibits 216 and 217 by the hereditary *subnis* of Kundgol, exhibit 325, sub-No. 27. From exhibit 217 it appears that a share of the *pateelship* of the town of Kundgol had been added to the district *nádgavship*, a share which had belonged originally to Lakshman and Sangangavda. A claim to a share in this part of the estate was in 1747 made by one Venkatgavda, but it was declared to belong exclusively to Kenchangavda, the common ancestor of the present parties, who for this favourable decision seems to have been charged a fee of 4,000 *hons* or 16,000 rupees by the Sirkár (exhibit 217). A decision in 1751 by the Nawáb of Savanur similarly recognizes an exclusive right (exhibit 218).

The exhibits 213—215 all relate to a grant made in 1692 to Kenchangavda, the grandfather of the one lately mentioned, on account of the injuries he had sustained through his delay in giving in his submission to the commander of the Emperor's invading army. It has been argued that the expression *aulad aflad*, in the Persian of the grant, implies and necessitates a descent different from what the Hindu law as modified by a custom of impartibility prescribes; and that the custom could not, consequently, attach to the estate. But the language really means no more than that the grant is meant to be hereditary, not merely personal. The precise devolution of the estate would nevertheless be governed by the law to which the grantee was subject, so far as this was consistent with keeping the estate together, so as to afford a means of support to the office to which it was attached. That this condition has thus far been satisfied, the present suit shows; but the process of disintegration once begun would doubtless soon proceed so far, as, if unchecked, to defeat the original object, the fulfilment of which ought to control all dealings with the property even under the Hindu law as

explained by Mr. Ellis (W. & B., 338 (2nd ed.)). It is a powerful confirmation of the case made by the defendants, that of the many descendants of Kenchangavda, of his father Timangavda, and his grandfather Gavdappágavda, through whom this family is traced back to the earlier half of the seventeenth century, no one, except the representative member of the senior line, seems to hold or to have held anything beyond a small plot of land, extending to 30 or 40 acres, as a means of subsistence. The exhibit 219, dated in 1794, a decision by the then Chief of Jamkhandi, rests on an express denial of the right of the junior branches to anything more. The corroboration, which such an existing state of the property and such authenticated transactions derive from the other documents filed by the principal defendant, is comparatively unimportant. The documents Nos. 220 and 221, which, however, are not supported by any independent evidence of acts done in accordance with them, go to prove that in 1769 and 1772 a member of the Nádgavda family, named Gavdáppá, mortgaged, not his share, but his *potgi* or maintenance with the head of the family Kenchangavda as surety. Exhibits 224, 226 were not, in strictness, admissible as evidence. They are not deeds produced by the possessor of an estate which relating to transactions affecting it may be taken as part of those transactions or *res gestæ*. Nor are they shown to be accounts whereby some person charges himself (see *Doe d. Kinglake* v. *Beviss* (1)), or entries made by some person in "books kept in the ordinary course of business, or in the discharge of professional duty" (Ind. Evid. Act, s. 32 (2)). They are mere estimates drawn up by some unknown person, and the fabrication of which, however genuine they may really be, would involve no appreciable responsibility. Taking them as evidence admitted without objection (Indian Evidence Act, sec. 167), they are estimates, whether correct or not, in the middle of the last century, of the produce of the Nádgavda estate, from which it appears that, out of 24 *mars* of land at Kundgol, 11 *mars* were set aside as maintenance for the family of the ancient *pátels* of that place consistently with what is said in exhibit 217. At Poora the *vatan* lands amounted to 15½ *mars*, and out of these 4 *mars* were set aside for the maintenance of the junior members. It appears, indeed, from exhibit 226 that, of the 11 *mars* of land set aside at Kundgol, one-half was enjoyed by members of the Pádoshi branch. This points, *primâ facie*, to a former union between the two branches and a partition by which the provision for dependent members made out of the *kasba* or town *patilki vatan* had been equally divided between them, but the Pádoshis may consistently with a general rule of impartibility have severed from the Mudoshis on terms of an equal share of the lands recognized as applicable to the support of dependent members being allotted to their branch. Exhibit 229 is one drawn out by the plaintiff himself in 1857 when during his father's life he was in charge of the family records. This document, having been framed by the plaintiff in his capacity of secretary, cannot, of course, act as an estoppel against him in his personal capacity; but it cannot have been fabricated with any fraudulent design, unless he shared in that design. It contains several entries of allowances of 2 *mars* of land by way of maintenance, but no shares and no allotments exactly representing the aliquot portions of united co-sharers enjoying what they held on equal terms with the head of the family. That the rule of impartibility prevails in the family, was strongly

(1) 18, L. J., C. P., 128.

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asserted by the plaintiff's father (grandfather of defendant No. 1) himself in 1852, as appears from his statement, exhibit 339. The counter assertion now made by the witness Venkangavda (105, 293) is that of a man who acknowledges that his family (Pádoshis) and that of the parties to this case have been at feud as long as he can recollect. His assertion, that he holds *vatan* lands as a sharer at Kundgol, is contradicted by himself. His evident *animus* is calculated to throw suspicion even on the documents (Nos. 106 to 135) produced by him.

A rather stronger witness in favour of partibility is Shankargavda (140, 294). This witness belongs to the Mudoshi branch, and he produced the documents Nos. 141 to 151. One of these, No. 150, if genuine, goes to show the acquisition of the property by Bhairanagavda of the Pádoshi branch. This, it is said, was superseded by the order No. 45 in 1673, by which Bhairanagavda was turned out in favour of Dugáná and Sinápágavda, the latter belonging to the Mudoshi branch. How this witness became possessed of documents addressed to the Pádoshis, does not appear. He admits that he has not a share in the *nadkarni vatan* lands, and accounts for this by his forefathers having declined to pay *nazarana*. He says that his holding in the *vadgavda vatan* falls short of his proper share by 20 *mars*, and this he explains by a mortgage on the part of his ancestor Kalangavda to the family of the parties to this suit. The statement is one which any one could make, and being uncorroborated and self-serving is probably false. He admits that he never before produced the documents Nos. 141 to 151, as he would naturally have done long ago in order to recover the land which, as he says, is properly his due. A series of papers thus brought forward will naturally be adapted, superficially at least, to the existing possession as to the other absolutely incontrovertible facts connected with the property to which they refer; but this kind of agreement does not afford them any corroboration. We have to look to the possession, in order to give credit to the documents; we cannot logically then turn round, and say that the documents are to be taken to account for the possession. That may be accounted for in many ways, as the same result may spring from various causes; and it is only when the possession or enjoyment is necessarily or most properly referrible to documents produced by a party that a mere consistency is to be raised to the dignity of cause and effect. The practice of conveyancing in England; the complication of transactions and titles affording multiplied means of exposing falsehood by comparison with unquestionable truth; and the careful preservation of muniments by the owners of estates have made a rule convenient and beneficial there which cannot be applied so indulgently in this country without encouraging forgery and fraud. Section 90 of the Indian Evidence Act says only that the Court *may* presume that documents purporting to be more than thirty years old are genuine, not that it must presume them to be so, and experience teaches us that "may presume" in such instances ought generally to be construed in the more rigorous of the senses allowed by section 4 of the Act. The illustrations indeed to section 90 are all cases of deeds relating to land produced by the person in possession, or by one to whom the person in possession has committed the custody of the documents. They do not extend to the documents by which a person out of possession strives to reduce the

possession actually enjoyed by another to a temporary or limited interest; and it would be very unsafe to presume that the counterpart of a mortgage with possession by A. to B. for thirty-one years had really been executed by A. and B. when brought forward thirty-one years after its ostensible date by A.'s son for the purpose of depriving B.'s son of the property of which he was in possession, and should, therefore, be presumed to be the owner according to section 110 of the Indian Evidence Act. Such a document would be admissible as coming from the proper custody, and such cases as *Doe Dem. Neale* v. *Samples* (1) sanction a liberal construction of what may be deemed proper custody; but a document thus adduced, without possession to support it, and without proof of any act done in connection with it, would generally have almost no weight in this country as a ground of inference. Applying the principle, which we have thus endeavoured to explain, to the case before us, we do not think it would be safe, were we trying the cause in the exercise of original jurisdiction, to presume that the documents Nos. 141 to 151 as coming from proper custody were genuine. The Subordinate Judge appears to have received them in evidence as though he thought they had come from proper custody, but without presuming them to be genuine, or being satisfied with such evidence as was offered of their genuineness. So far we think he was right, though, in admitting the documents at all, except upon some evidence in each case, beyond their mere production, of their being genuine, we think he was wrong. Such a document, for instance, as No. 146, purporting to be an order continuing the *vatan* to Surápá and Dugangavda, would properly be found in the possession of the head of the one or of the other branch, not in the hands of a petty sub-sharer whose ancestor's interest, according to his own account, had been forfeited, or absorbed in the estate of the principal branch of the family. It certainly is not to be presumed to be genuine merely because the existing possession of the first defendant might be referred to it, since it might and ought to be referred to another title produced by the possessor: nor is the document No. 150 to be allowed any weight at all without direct proof, seeing that, according to exhibit 45, the possession alleged to have been acquired under it, ended more than two centuries ago.

Similar considerations apply, but in a still stronger degree, to the set of documents Nos. 281 to 292 produced by the witness No. 279, Yellapágavda. This witness is a member of the Mudoshi family enjoying 2¼ *mars* of land as a maintenance. He asserts a title to a share in the estate as partible property, but says that the remainder of his sub-branches portion was made over to the defendants' family one hundred or one hundred and fifty years ago. Clearly, therefore, he has no possession to which the documents produced by him can be referred. As to his possession of these papers, he says that a quantity of documents was left by his grandmother with a dependant of the family at Milundi seventy years ago. The witness knew of this forty years ago, but never thought of taking possession of them until four or five years ago, when he extracted the documents in question, not with the aid of the custodian (he cannot himself read Kánarese), but of his maternal cousin. As to the care with which the papers were guarded; why they were not taken charge of by the witness; and as

(1) 8 A. & E. 151.

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to the possibility of spurious papers having been foisted into the daftar, we have no satisfactory account. The custody has not been considered a proper one by the Subordinate Judge, and he should have paid no attention whatever to the documents thus adduced, except in so far as each was distinctly proved to be genuine. He has not relied upon them; but he ought not without evidence, such as he was bound to receive, have even admitted such documents in evidence.

The document exhibit No. 33, to which this witness deposes, is one which goes to show a temporary resignation by the witness' great-grandfather and his mother of their share of the family lands to the head of the family. Thus the exclusive actual possession of defendant No. 1 is sought to be reconciled with a right contradicting the natural inference from it. The grounds which Yellápá gives for identifying his ancestor's alleged signature of 1714 are utterly untrustworthy, and serve only to show the worthlessness of this kind of evidence. If he had been entitled, as he says, to a share, and familiar with the records which would establish his right, it is utterly unlikely that he should have resigned himself for a lifetime to the negation of his claim and to the bare subsistence afforded by 2¼ *mars* of land.

Venkangavda, witness No. 295, is another member of the family who holding but ¼ *mar* of land set up a claim to 19 *mars*. These he admits have been out of the possession of his family for fifty years; and this he accounts for by a mortgage, which he supports by the production of an unauthenticated Marathi translation of a Kánarese mortgage otherwise quite unproved.

Harigavda, witness 309, asserts a custom of partibility, yet says he holds but 7 *mars* of land as his family have held it for two centuries. Witness 332 is another *bháuband*, who says that the property is partible; and that his own sub-branch of the family is entitled to 42½ *mars* of land, half of which, he says, has been held in Kamavisi by the defendant's family. Of this assertion there is no proof but his own statement, and he admits that he has been sued by the first defendant Rangangavda.

This is, in substance, the sum of the oral testimony adduced in support of the claim, and it only requires a little consideration to show that instead of supporting, it refutes it. None of the witnesses enjoys the share to which, if the asserted partibility is the rule, he is entitled. None of them pretends that the wrong which he suffers is of recent origin. Yet none of them has taken steps to get his wrong redressed. They would all, no doubt, be glad to obtain a share of the *vatan*; but that they are not entitled to it, is shown too conclusively by their conduct and that of their fathers for their mere assertions to the contrary to deserve any respect.

The plaintiff now, as at an earlier period, naturally relies on the document No. 31 as strong evidence against the custom of impartibility. Its genuineness rests chiefly on the testimony of the witness No. 343, and that is extremely weak. He says: "I am not aware of the names of the different Savnur Nawábs.....of the different kinds of seals.....and the impressions they

contained. I cannot make out fully the impressions of the seals.....I have seen other papers bearing the seals of the Nawáb Diller Khán and NawábAbdul Masjid, and the impressions thereon tally with the said Nawáb's impressions on some of the papers now shown to me. I cannot read all the letters of the impressions made on exhibits Nos. 21, 22, 23, 24, and 31." What claims this witness Rafiudin had to the character of an expert, does not appear. No question appears to have been asked on that subject, though without it his testimony was not properly admissible. But, taking his testimony as he gave it, it cannot be said to prove any one of the documents 21, 22, 23, 24, and 31. He cannot even read some of the letters of the impressions that they bear. He commits himself to nothing whereby, should it be disproved, he would expose himself to punishment for false evidence. There is, indeed, no reason at all for suspecting him to be a dishonest witness. His qualified statements indicate veracity. But if such extremely loose and feeble evidence could be accepted as proving documents, it would be forthcoming in abundance whenever any purpose was to be served by its production. The law requires that there should at least be a profession of special qualifications on the part of a person who thus comes forward to depose to matters lying beyond common knowledge—*Rowley* v. *London and North Western Railway Company* (1), though he need not in every case be strictly a professional expert. And by the aid of this knowledge the witness must be able to say something more than that he cannot read the inscription on a seal in order to make it admissible as that of a particular era and of a particular authority. The Subordinate Judge might properly have held that the documents in question were not proved, and, therefore, were not to be regarded at all.

It was urged that the documents relied on by the defendant were themselves open to objections of a similar character. That may be so; but this great difference is to be observed, that, as to these, particular proof was not required. They come from the proper custody, and they are connected with a continued possession. In the case of *Bisheshar Bhattacharji* v. *G. H. Lamb* (2) the Judicial Committee say: "In order to satisfy the Court that such a document as this was a valid document, intended to operate as a *mirási* tenure, it would be important to prove that possession had accompanied it." It would be impossible to insist more emphatically on the importance of possession as the essential support of ancient documents. In the case of *Bháskar Trimbak Acháryа* v. *Mahádev Rámji* (3), as in many English cases, it was held that the terms of a grant not produced at all might be inferred from the nature of the actual enjoyment for more than a century, and we are thus brought back again to the principle, stated earlier in this judgment, that in such cases the grant requires aid from the nature of the enjoyment, and will not sustain a claim conflicting with the facts of such enjoyment as established by satisfactory testimony—*Talis enim præsumitur titulus præcessisse qualis apparet usus et possessio* (4). The enjoyment which it is said supports the document No. 31 is

(1) L. R., 8 Ex., 221.
(2) 21 C. W. R., 22.
(3) 6 Bom. H. C. Rep., 1.
(4) Dumonlin at 4 Merlin Repertoire, 763. See also *Willingale* v. *Maitland*, L. R., 3 Eq. Ca., 103.

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traced to a particular order of the Chief of Jamkhandi, and the document is not essentially connected with it as part of the *res gestæ*, except in so far as the order adopts and incorporates it. And even if the order could be said in any way to rest upon the exhibit, that would by no means place its genuineness beyond question. If a judicial decision had been rested on it, that would be conclusive as between parties; the legal relation constituted by it would have been authoritatively adopted as an element of that declared by the judgment; but that the Chief of Jamkhandi did or did not believe the document to be genuine in an inquiry not of a judicial kind, or in which the right created or declared by the document was not distinctly adjudged to exist in virtue of it, leaves it in exactly the same position as evidence in which it stood before. If the possession of Kop, as stated to us by the plaintiff's counsel Mr. Telang (see witness No. 105) is exclusive, that possession is not referrible to a document which provides for a joint ownership. The document may, indeed, be admissible; but being unsupported by a corresponding enjoyment, it cannot be allowed any weight, and especially for the purely collateral purpose of establishing a particular custom in another and long-severed branch of the family (see Taylor on Evidence, sec. 599.)

The document No. 21 is open to still stronger objections than No. 31. It is dated A. D. 1731; and, on the ground that the Pádoshis had failed to pay the sums due to the Government on account of the shares assigned to them in the *vatan*, it purports to hand over those shares to Krishnagavda, the second son of Kenchangavda. Now Krishnágavda's descendants Bhistáppá and Govindágavda are at present in enjoyment, not of shares of the estate, but merely of 2 *mars* of land by way of *potgi* or maintenance. If the document No. 21 be genuine, it does not indicate partibility amongst the Mudoshis; for the grant it makes, is wholly to the one brother Krishnágavda, without regard to Rangáná and Melgirgavda, the other brothers; but it is absolutely unsupported by any possession necessarily connected with it, and not being otherwise proved, must not be allowed to influence our judgment on this case.

The documents Nos. 22 and 23 are apparently orders addressed, by some one having authority, to Krishnágavda in A. D. 1731 directing the payment, by him, of 233 *hons* and of Rs. 200 to dependants of the *darbár*. It is not shown that anything was done in connection with them. The seals to them are not proved, and there is thus nothing in the case to make them even admissible.

The document exhibit 24, dated also in A. D. 1731, would, if it were proved, tend to show that, by the agreeing to pay to the Government of the day a sum of 11,000 *hons*, Krishna had got the *nádgavda* and *nádkarni vatan* assured to himself, but that when pressed for payment he had absconded. The amount payable having through the intercession of a friend been reduced to 9,000 *hons*, he is now invited to return and pay it. Whether he did so, does not appear. There is nothing to connect the document with any actual transaction otherwise proved or indicated. Such evidence as is forthcoming, negatives the idea that Krishná's bargain, if ever made, was ever carried out; though even if it had been carried out it would merely have been a supplanting by him of his

elder brother; not a partition or a transaction evidencing partibility of the estate. The document, however, being unproved, and unsupported by any evidence of enjoyment referrible to it, ought not to have been received at all. Presuming it even to be genuine, we know not what authority its writer had to pronounce on the legal status of this family, and it cannot be connected as part of the *res gestæ* with any transaction of which the traces still remain.

The documents Nos. 26 and 27, dated in A. D. 1792, show that on a report of a kulkarni as to the lapse of a share of the estate, through a death of a co-owner heirless, the property was temporarily attached, but that the attachment was shortly afterwards removed. The kulkarni's statement not having been adopted, proves nothing as to the partibility of the *vatan*.

The document No. 28, dated apparently in 1681, seems to be a memorandum signed by Kenchangavda of a partition of property effected between him and Krishnágavda. This document, produced by the plaintiff as from the family records, must be received as admissible. It points to the possession by the family, in 1681, of some portions of the estate, and to a partition which would contradict the defendant's assertion of a custom of impartibility always strictly adhered to. But there may have been causes in 1681 for allowing to Krishna a share of the estate which legally he could not claim. The document, being too old for proof, may have been framed to accord with existing possession and circumstances of the property, so as to reconcile these with a continuing right in the members to insist on partition. It cannot reasonably outweigh the well-established facts which point to the custom of impartibility as recognized and submitted to for many generations.

Exhibits 29 and 30, dated A.D. 1683, are letters from the Kundgol Diván to Dugáná and to Lingáná, members of the rival branch, who had absconded in consequence of a dispute with Gavdáppá and Kenchangavda. They are invited to return and Dugáná to resume his "*nádgavdiki*" or place amongst the *nádgavda vatandárs*. These documents are not connected by extrinsic testimony with anything done under them. To assume that the existing possession is to be attributed to them, would be to beg the question in favour of their genuineness. They contain no adjudication on the point of partibility, and no admission on the subject by those whom the parties to this cause represent. Being mere letters addressed by a stranger to strangers, they were not even admissible in evidence in the case.

The document No. 32, dated in 1698, is an order said by the Subordinate Judge to have been issued by the "mamla officer of Bankápur" for a partition between Kenchana and Yellappágavda on the one hand, and Dugáná and Lakshmangavda, on the other; and it is said that exhibits 285 and 115 corroborate this as affording a basis for it. Exhibit 115 was produced by the witnesses Nos. 105, 293, whose evidence we have already pronounced unworthy of reliance. Exhibit 285 was produced by witness No. 279, and has been pronounced inadmissible, as not having come from proper custody. Whether the document No. 32 was actually carried into effect, does not appear. Probbaly not. It wasadmitted, in argument, that there was no evidence of actual

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enjoyment corresponding to the document; and though, no doubt, the possession held by the Mudoshi branch of the family might be referred to this document, it may also be referred to other documents; while, if this one were genuine, there ought to be clear evidence forthcoming of an actual division made and maintained in fulfilment of its terms. It assigns the income derived from Budihál to the Pádoshis; and yet this income has always, as pointed out by the Subordinate Judge, been enjoyed by the Mudoshi branch.

The two grants, exhibits 41 and 42, in A. D. 1673, to Surápá and Dugáná do not necessarily imply general partibility of community of interest between them. They might receive these small benefices in common, though members of a family subject to impartibility. But there is no testimony of enjoyment referrible, of necessity, to these grants. The Budihál *inám*, which is granted in part to Dugáná, has never, so far as appears, been enjoyed by his branch of the family. Exhibits 43 and 44, dated also in 1673, are receipts for money said to have been passed by the village officer, Mustá Khán, to Dugáná and Surappágavda for payments on account of Budihál and Yelival. They cannot be considered as adding any material authenticity to exhibits 41 and 42.

Exhibit 34, dated in 1765, is a mortgage from Kadáppá and Krishna, sons of Kusappágavda, of 6 *mars* of land and other property to Kenchangavda, the head of the Mudoshis, at that time. But these mortgagors, as they set forth, represented the ancient holders of the *kasba* or town *pátelship* of Kundgol, which, they say, had been made over by their father to Kenchangavda, and which they had recovered. As to partibility or impartibility in Kenchana's family, the document proves nothing. The document, exhibit 35, dated in A. D. 1692, seems to be confirmed by exhibit 147 produced by witness No. 294. But these documents relating to a particular transaction between members of the Pádoshi branch could not, without something, further establish a custom of partibility even amongst them. Kenchana resigns to Devána a moiety of the *nádkarni vritti* or income; and Morári, in consideration of this, becomes surety that Devána should pay an equivalent share of the expenses connected with the office or estate. Whether anything was done upon this agreement, does not appear. In the absence of evidence, it is probable that nothing was done, and thus, even as to the Pádoshis, the document would have but little weight. To affect the Mudoshi family it has none at all.

The document exhibit 109, dated in A. D. 1683, points to an attachment of one-fourth of the *nádgavdiki vatán* as specially belonging to the eldership owing to a dispute between Gavdáppá on the one side and Yellápá on the other. The attachment after some inquiry was removed, so that no inference can be drawn, except that the complaint made to the higher authorities was deemed groundless. There is, of course, no possession or enjoyment necessarily or most properly to be referred to this document, which merely replaced matters in *statu quo*; nor is there independent testimony of anything done in connection with it, so as to give it a stamp of authenticity.

Having thus considered, in some detail, all the principal items of evidence upon which the plaintiff relies to rebut the inference of impartibility deducible from the existing state of the family nd its property, we are of opinion that it is

quite insufficient for this purpose. It has been argued by Mr. Telang that, supposing the family to have been united in the ordinary sense of the Hindu law, there have been but two occasions, owing to a generally single line of successions, on which a partition could have been demanded, so that the undeniable circumstance of but small appanages being enjoyed by the representatives of the junior sub-branches is of no great weight in favour of impartibility. But, in the first place, were the family a joint one in the ordinary sense, and with the ordinary rights, there would be no proper place in its arrangements for these hereditary appanages at all. Each member of the united family would take his means of subsistence indiscriminately out of the common stock. In the second place, if we are to imagine a transaction of which there is no evidence by which Hiregavdáppá's claim on Kenchana, or one by which Krishná and Melgirgavda's claims on Rangangavda were reduced from those of general co-sharers to the enjoyment merely of small allotments for subsistence, yet this would not affect the sons of the immediate contractors. Krishná's son, Govindágavda, being with Rangáná or Kenchaná, in the other line, a member of a joint family, could claim equal participation, or equal partition just as well as his father could have done. So, too, could Gavdappágavda, son of Melgirgavda, or Laksháppá, son of Hiregavdáppágavda. The only thing that could have shut out such claims, would be a general partition; and it is not pretended that any such partition has taken place. We thus have seven generations submitting to the rule of impartibility, and in that way giving the strongest practical confirmation to the direct evidence in favour of it as the family law. It is, according to the evidence, the custom of other families similarly situated in the pargana. It was affirmed in three public transactions at different times in the last century, and was strongly insisted on by the father of the plaintiff who now seeks to set it aside. The only unquestionable transaction pointing strongly the other way, is the assignment, in 1801, of Kop to Basangavda as representative of the Pádoshi branch of the family; but this, whether morally justifiable or not, seems to have been an act of arbitrary power. The whole village, not a share merely of it, was, it is said, given to Basangavda, and it had remained undivided then for more than a century. The other property of the family was not distributed, as, if Basangavda and Mahádevgavda were joint owners, it ought to have been. Thus the way in which the village of Kop was dealt with, does not support, even as to that village, the document No. 31, under which the plaintiff says it came into the family, if that document is to be construed and made a ground for inferences in the way that the plaintiff contends. The other documentary evidence suffers from infirmities which we have already indicated. The oral testimony adduced by the plaintiff is almost wholly that of interested persons, and is quite outweighed by that which the defendants have adduced. On a consideration of the whole case, therefore, we must confirm the decree of the Subordinate Judge, with costs on the appellant.