APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MAHA'DU GANU (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* BAYÁ JI SIDU (ORIGINAL PLAINTIFF), RESPONDENT.* 1893. *December* 20.

Hindu law—Adoption—Relinquishment by the adopted son in favour of his adoptive mother of his rights as adopted son—Release—Second adoption—Registration—Registration under the Dekkhan Agriculturists' Relief Act (XVII of 1879), *Secs.* 56† *and* 60‡*—General Registration Act (III of* 1877).

The plaintiff was adopted in 1880 by Koiná, the widow of one Ganu. In June, 1885, he executed a document which recited that he and Koiná had not been on amicable terms, and that his adoption had consequently been cancelled, and that she had adopted another son (defendant No. 1) to whom she had given all rights of heirship, and declared that in consideration of Rs. 200 paid by Koiná he delivered back to her the rights which he had obtained by virtue of his adoption and heirship. This document was not registered under the General Registration Act (III of 1877), but was registered under section 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), which section applied to the district in which the transaction took place. Koiná died in October, 1885, and the plaintiff brought this suit, as adopted son, to recover the property of Ganu. The first defendant, who had been adopted by Koiná subsequently to the plaintiff's adoption, contended that he had been validly adopted and that he was entitled to the property. He relied *(inter alia)* upon the document executed by plaintiff in June, 1885.

* Second Appeal, No. 277 of 1892.

† Section 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) :—

56. No instrument which purports to create, modify, transfer, evidence or extinguish an obligation for the payment of money or a charge upon any property, or to be a conveyance or lease, and which is executed after this Act comes into force by an agriculturist residing in any local area for which a village registrar has been appointed, shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon by any such person, or by any public officer, unless such instrument is written by, or under the superintendence of, and is attested by, a village registrar:

Provided that nothing herein contained shall prevent the admission of any instrument in evidence in any criminal proceeding, or apply to any instrument which is executed by an agriculturist merely as a surety, or to any instrument required by section 17 of the Registration Act (1877) to be registered under that Act.

‡ 60. Every instrument executed and registered in accordance with the foregoing provisions shall be deemed to have been duly registered under the provisions of the Indian Registration Act, 1877; and no instrument which ought to have been executed before a village registrar, but has been otherwise executed, shall be registered by any officer acting under the said Act, or in any public office, or shall be authenticated by any public officer.

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Held, that the plaintiff could not renounce his status as adopted son, although he might give up his right of inheritance, and that whatever estate became vested in Koiná by the release came to the plaintiff on her death, either as the adopted son of Ganu or as heir of Koiná.

Held, also, that the defendant's subsequent adoption was invalid, and that nothing would pass to him by force of such adoption.

It was contended that the release in question was not admissible in evidence, not having been registered under the General Registration Act (III of 1877).

Held, that the document was admissible. It was a conveyance within section 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and the law in force as to its registration was contained in sections 56 and 60 of that Act.

THIS was a second appeal from the decision of J. W. Walker, District Judge of Sátárá.

The plaintiff alleged that he was the adopted son of Ganu bin Sadu, and he brought this suit to recover certain property that had belonged to his adoptive brother. He alleged that he had been adopted by Ganu's widow Koiná on the 16th September, 1880; that she had executed to him a deed of adoption dated the 20th September, 1880; that owing to disagreements he had lived apart from her and allowed her to remain in possession of the property; that she died on the 2nd October, 1885, and that while he was absent from the village, Sonu, the natural father of the first defendant, took possession of the property, falsely alleging that his son Mahádu (defendant No. 1) had been adopted by Koiná.

The first defendant Mahádu, a minor represented by his natural father Sonu as guardian, denied plaintiff's adoption and set up his own. He further alleged *(inter alia)* that Koiná acted as his guardian and administratrix under a certificate from the District Court, and that after her death the certificate was renewed in the name of his father and present guardian Sonu; that plaintiff had never had possession of the property in dispute, and had on the 16th June, 1885, in consideration of Rs. 200 paid to him by Koiná, executed a release and conveyance to her of all his rights as adopted son. The other defendants supported the first defendant's case. The following is a translation of the release referred to; it had been registered by a village registrar under section 57 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), but had

not been registered under the General Registration Act (XV of 1877):—

"Agreement dated Shake 1807, cyclical year named Parthiv, Jeshta Shuddha 11th, passed to Koiná kom Ganuji bin Sadu Pátil Sálukhe, occupation agriculturist, residing at Koregaon, táluka Sátárá, agreement passed by Bayáji bin Síduji Sálukhe, occupation agriculturist, residing at Boregaum in táluka aforesaid, to the effect as follows:—On 16th September, 1880, you took me in adoption and we have not been on amicable terms; consequently you do not give me the immoveable and moveable property in your possession, and thinking that I have not acted according to your wishes you have cancelled my adoption and have adopted another boy, son of Sonu Santáji. You have performed his adoption, have given him all rights of heirship, and have obtained a certificate of heirship in his name. In reference to this I do not consider it proper that there should be further disputes between us and that we both of us should be put to the difficulties of expense; therefore, I have received to-day rupees two hundred in cash from you and have delivered back to you the right which I had obtained by virtue of my adoption and heirship. I have nothing further to say. I have returned to you the deed of adoption you had executed to me. I have received the said sum of rupees two hundred in cash. To this effect I have given you in writing, dated 16th June, 1885.

"(Endorsement by the village registrar appointed under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879)."

The Subordinate Judge found that the plaintiff's adoption was proved, and that the plaintiff's adoption being prior in date, the subsequent adoption of the first defendant was invalid; that the release passed by plaintiff to Koiná, relinquishing all his rights as adopted son for Rs. 200, being unregistered was inadmissible in evidence under section 17 of the Registration Act (III of 1877), and that its registration by a village registrar under section 57 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) was improper and insufficient, inasmuch as it did not purport to create, transfer, or extinguish an obligation for the payment of money or a charge on any property, nor was it a conveyance or lease falling under any of the kinds enumerated in section 56 of the Act.

He, therefore, allowed the plaintiff's claim, except as to certain portions of the property in question. Plaintiff and the first defendant preferred cross appeals. The First Class Subordinate Judge with Appellate Powers (Ráo Bahádur N. G. Phadké) held that Sonu bin Santáji Sálukhe, the natural father of the first defendant, ought to have been joined as a party defendant to the suit, and not merely in his representative capacity as the

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guardian of his minor son. He, therefore, reversed the decree and remanded the case under section 562 of the Civil Procedure Code (Act XIV of 1882), directing that Sonu should be joined as a defendant and the case investigated and determined on the merits.

Against the order of remand the plaintiff appealed to the High Court, which passed the following order (see Printed Judgments for 1890, page 100) :—

"The lower appellate Court's order of remand was not justified by section 562 of the Code of Civil Procedure, as the Court of first instance did not dispose of the suit upon a preliminary point. It disposed of the suit on its merits, and its decision on *none* of the issues was reversed in appeal. The lower appellate Court remanded the case only because it considered that one Sonu should be joined as a defendant. But that was not a sufficient ground for an order of remand by a Court hearing a first appeal. The proper course in such case is referred to in *Ganesh Bhikáji* v *Bhikáji Krishna* (I. L. R., 10 Bom., 398). The order of the lower appellate Court is reversed. The appeal should be heard according to law. Costs to be costs in the cause."

The case accordingly went back to the lower appellate Court which passed a decree for the plaintiff. The first defendant filed a second appeal.

Jardine (with *Mahádev Chimnáji Apté*) for the appellant (defendant No. 1) :—The release of the 16th June, 1885, was admissible in evidence although not registered under the General Registration Act (III of 1877). It was sufficiently registered under sections 56 and 57 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The district in which the transaction took place is a district to which Act XVII of 1879 applies, and the so-called release was a conveyance to Koiná, by the plaintiff, of his rights as adopted son. The proviso now added to section 56 was added by Act XXIII of 1886 and was not in force at the date of this document. That proviso has no retrospective operation—*Javánmal* v. *Muktábái*[1].

The lower Court held that even if the release was admissible it was inoperative, as the plaintiff could not relinquish his status as adopted son, and it relied upon *Bálkrishna Trimbak* v. *Sávitribái*[2]. In the present case, however, the plaintiff, after conveying or releasing to Koiná his rights in the property, by his conduct confirmed the subsequent adoption made by Koiná

(1) I. L. R., 14 Bom., 516. (2) I. L. R., 3 Bom., 54.

and the consequent devolution of property to the first defendant as her adopted son, and is now estopped from disputing the effect of the document.

Branson (with *V. K. Bhatavdekar*) for the respondent (plaintiff):—The document in question is not a conveyance within the meaning of section 56 of the Dekkhan Agriculturists' Relief Act, and its registration under that section does not make it admissible: see Wharton's Law Lexicon. The document is a release, and could not be registered under section 56, but ought to have been registered under the General Registration Act (III of 1877).

But even if admissible it is ineffectual. An adopted son cannot relinquish his status as adopted son—*Bálkrishna Trimbak* v. *Sávitribái*[1]. It is by virtue of his status as adopted son that the plaintiff now claims the property as heir. Even assuming the document in question to be a conveyance, it was a conveyance to Koiná and not to the first defendant. On Koiná's death the plaintiff as her adopted son succeeds as her heir. The first defendant, his adoption being illegal, cannot succeed.

Mahádev Chimnáji Apté in reply:—Assuming that the conveyance was a conveyance to Koiná only, the property then became her property and she could dispose of it as she chose. Her adoption of the first defendant was, in effect, a declaration that it was to go to him after her death. She died in the belief that the first defendant would succeed her as her son. The plaintiff stood by and allowed her to get a certificate of guardianship of the first defendant as her adopted son. In all respects he confirmed the new arrangement made by her after his release. He is now estopped from disputing it. The transaction may be regarded as a family arrangement and should on that ground be upheld—*Aishábibi* v. *Khurshedbibi*[2]; *Bhavánishankar* v. *Ganda*[3]; *Stapilton* v. *Stapilton*[4]. Even though the parties were under the erroneous impression as to the operation of the release, or as to the validity of the first defendant's adoption, the family arrangement would be good. A mistake on a point of law common to both parties

(1) I. L. R., 3 Bom., 54.
(2) P. J., 1892, p. 97.
(3) P. J., 1892, p. 103.
(4) 2 White & Tudor L.C. (6th Ed.), p. 920.

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does not upset such an arrangement—*Pullen* v. *Ready*[1]; *Stapilton* v. *Stapilton*[2]; Snell's Equity (8th Ed.), p. 525; Indian Contract Act IX of 1872, sec. 21.

Branson (with *V. K. Bhatavdekar*):—The contention that the transaction was a family arrangement has been raised for the first time in reply. It was not urged at any previous stage of the suit. It should, therefore, not be allowed. The conveyance purports to have been made for a valuable consideration of Rs. 200. But the consideration came from the property which legally belonged to us. Therefore, there was no consideration for the conveyance.

SARGENT, C. J.:—Both the lower Courts have found that the plaintiff was adopted as the son of Ganu and that his adoption was prior to the first defendant's alleged adoption. It was contended, however, that plaintiff relinquished his rights as the adopted son. The District Judge held that the only evidence of such relinquishment was the release (Exhibit 70) passed by plaintiff to Koiná in 1885, but which, he held, was not admissible for want of registration under the General Registration Act, having been only registered before a village registrar. But the law in force as to registration, when the document in question was executed, was provided by sections 56 and 60 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and was applicable to all documents purporting to be a "conveyance," which this document undoubtedly is, if it passes all the plaintiff's rights as adopted son in the immoveable property of Ganu, and, as such, required to be registered.

This document was, therefore, validly registered, and the important question arises as to the construction and effect of it. After reciting that disputes had arisen between the plaintiff and Koiná, and that she had superseded him and adopted the defendant, it states that he had agreed to accept Rs. 200 and to give into her possession whatever right he had acquired by adoption and heirship. An adopted son cannot renounce his status as an adopted son—see West and Bühler, pages 938 and 1153, where it is stated, as the result of the authorities, that "the status created

(5) 2 Atk., 587. (6) 2 White and Tudor L. C. (6th Ed.), p. 920, at p. 935.

by adoption cannot be given up by the adopted son," although "he may give up his right of inheritance." This document, therefore, can only operate as a release to Koiná of all the plaintiff's rights as adopted son in Ganu's property, and would, we think, only reinstate her in the same position as she occupied before plaintiff was adopted by her; and as defendant's adoption was invalid, nothing would pass to him by force of such adoption.

It was contended, however, by Mr. Aptó that Koiná, after the plaintiff had passed the release, became a trustee of the property for the benefit of the defendant; but if Koiná could possibly be regarded as a trustee for the defendant, it could not be otherwise than in his intended character of the adopted son of Ganu, which character he could not legally fill as before stated. The defendant No. 1, therefore, never acquired any title to the property.

On the other hand, whatever estate may have been vested in Koiná by the release, plaintiff would be entitled to it on her death either as the adopted son of Ganu or as heir of Koiná. We must, therefore, confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BA'I SOMI (ORIGINAL OPPONENT), APPLICANT, *v.* CHOKSHI ISHVARDA'S MANGALDA'S (ORIGINAL APPLICANT), OPPONENT.*

1894. *February* 20.

Surety—Surety for guardian of a minor's estate—Release of surety—Minors' Act (XX of 1864), Sec. 12—Contract Act (IX of 1872), Sec. 130.

Where a surety for the guardian of a minor's estate appointed under the Minors' Act (XX of 1864) applied to be released from his obligation as surety on account of the guardian's mal-administration of the estate,

Held, that the very object of requiring security was to guarantee the minor's estate against such misconduct or mismanagement on the part of the guardian; that the surety, therefore, could not be discharged, and that section 130 of the Contract Act (IX of 1872) was not applicable to the case.

Quære—Whether the surety may not apply to the Court for protection against the guardian.

*Application No. 169 of 1893 under the extraordinary jurisdiction.