APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

PIRSAB VALAD KASIMSAB ITAGI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GURAPPA BASAPPA KADIGI (ORIGINAL PLAINTIFF), RESPONDENT.* 1913. *October 7.*

Instrument reserving a life-estate to the maker, not a will—Instrument creating interest in adoptive mother—Value of the interest in excess of Rs. 100—Registration—Adverse possession—Absence of intention to acquire absolute interest—Limitation.

Any instrument which confers or reserves a life-estate to the maker is not a will.

A deed of adoption by which an interest is reserved to the wife of the adopter in immoveable property which she otherwise would not have possessed and could not have possessed when such interest exceeds in value Rs. 100 requires registration.

In a suit to recover possession by an adopted son against the lessees of the deceased adoptive mother who was in possession, where the plaintiff believed that the adoptive mother was entitled to remain in possession for life and she shared that belief and so remained in possession while the plaintiff took no steps to disturb her,

Held, that the plea of adverse possession by the adoptive mother could not arise, there being no intention to hold adversely so as to acquire an absolute estate.

SECOND appeal against the decision of E. H. Leggatt, District Judge of Dharwar, confirming the decree of H. V. Chinmulgund, Subordinate Judge of Gadag.

The plaintiff sued to recover from the defendants possession of two survey numbers and Rs. 600 for mesne profits for two years prior to the suit, together with subsequent mesne profits. The plaint alleged that the plaintiff's adoptive father Basappa was the owner of the lands, that Basappa and his wife Rachava adopted the plaintiff in January 1893 on the condition that plaintiff should be the owner after the deaths of Basappa and

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Rachava, that Rachava should enjoy the property during her life-time, that after Basappa's death in 1894, Rachava enjoyed the property till her death which took place in March 1907, that after Basappa's death Rachava began to ill-treat plaintiff and drove him away, that thereafter plaintiff lived with and was maintained by his natural father, that Rachava died about 2½ years before the filing of the suit on the 9th October 1909, that the defendants were in wrongful possession and set up two leases executed in their favour by Rachava in the year 1902, and that the leases were unauthorized and not binding on the plaintiff. Hence the suit.

The material portion of the deed of adoption relied on by the plaintiff was as follows :—

> You are full owner of all the articles and estate as above after our death. My kinsmen and the executors of my will (and) the administrators of my estate have no sort of right of ownership over this. You alone are fully entitled to the rights to the extent to which we are entitled.

Defendant 1, who was the tenant of one of the lands, answered *inter alia* that he had no knowledge of the plaintiff's conditional adoption, that for the purpose of making improvements in the land Rachava let it out to the defendant in the year 1902 under a registered deed, that plaintiff was estopped by his acts and conduct during and after Rachava's life-time from disputing the defendant's lease, that Rachava made the lease as manager of the family for consideration and for protection of the property, that the defendant spent Rs. 450 in improvements, that the plaintiff was not entitled to maintain the suit, that if the plaintiff was entitled to file the suit, he must pay to the defendant the amount spent by him in making the improvements and must indemnify him for future loss and that the claim was time-barred under Article 91 of the Limitation Act.

Defendant 2 added that he had improved the land under his charge by spending Rs. 700.

Defendant 3 was absent.

The Subordinate Judge found that the deed of adoption relied on by plaintiff did not require registration, that the plaintiff's adoption was proved, that the plaintiff's adoptive mother Rachava was not authorized to make the leases in dispute so as to be binding on plaintiff after Rachava's death, that the plaintiff was not liable to pay anything to the defendants as a condition of recovering possession of the lands, that the plaintiff was entitled to recover from defendant 1 only Rs. 102 for the two years in suit and Rs. 177 a year for subsequent mesne profits and that the suit was not time-barred by Article 91 of the Limitation Act. The Subordinate Judge, therefore, allowed the plaintiff's claim for possession and profits as mentioned above.

On appeal by the defendants the District Judge confirmed the decree holding that the leases to the defendants were not binding on the plaintiff and that the defendants were not entitled to any compensation.

The defendants preferred a second appeal.

S. V. Palekar, for the appellants (defendants):—Under section 3 of the new Limitation Act (1908) the lower Courts should have thrown out the plaintiff's claim as time-barred. On the pleadings as set out in the plaint it is clear that the possession of the plaintiff's adoptive mother became adverse to him from the year 1894 when she drove him out of the house: *Bajrangi Singh v. Manokarnika Bakshi Singh*[1]. Under normal circumstances, that is, if the plaintiff had been a major at the time of his expulsion, the suit would have been barred in 1906. The fact that the plaintiff was only a child of ten years in 1894 does not make much difference in the situation in his favour. He became a major in 1902.

[1] (1907) 30 All. 1.

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Under section 8 of the Limitation Act he cannot get more than three years from that date. So in the present case the suit would have been barred against his adoptive mother in 1906 at the latest. We claim through the adoptive mother, therefore, the suit as against us also became barred in that year. The suit was brought in the year 1909, that is, three years after it was barred according to the plaintiff's own admission in the plaint. The cause of action having become extinguished three years before the date of the suit, the lower Courts should have thrown out the suit. No doubt, we did not set up this plea of limitation in our defence but the provisions of section 3 of the Limitation Act are imperative. It lays down that a suit instituted "after the period of limitation prescribed therefor by the first schedule shall be dismissed although limitation has not been set up as a defence".

The result of the plaintiff's admissions in the plaint is sought to be neutralized by the adoption-deed, Exhibit 30. It is sought, on the strength of that document, to prove that the widow's possession from the year 1894 onwards was on behalf of her minor adopted son. But Exhibit 30 is not admissible in evidence being not registered. It was executed by the adoptive father of the plaintiff and it purported to give to his wife, that is, the plaintiff's adoptive mother a life-interest in the property. It is admitted that Exhibit 30 was executed some months after the adoption. The adoptive father, therefore, had no right to convey away the eight annas share in the property which vested in the adopted son from the moment of his adoption, whatever the father might have done with regard to the eight annas share which was still his own. But even such share he could not transfer except by a registered deed. The consequence is that Exhibit 30 is inadmissible in either case and cannot help the plaintiff.

N. V. Gokhale, for the respondent (plaintiff) :—The plaintiff was a minor in 1894. Therefore, the possession of his adoptive mother must be regarded as on behalf of her minor son : *Padapa* v. *Swamirao*[1]. Adverse possession must be proved by clear and positive evidence. It cannot be inferred from casual statements in the pleadings.

The defendants cannot be allowed to raise the plea of limitation in the manner they have done it now for the first time in second appeal. They did not urge it in the lower Courts.

Palekar, in reply :—The ordinary presumption that a widow's possession is on behalf of her minor adopted son cannot arise here, because the plaintiff admits that his adoptive mother drove him out of the house in 1894 and managed the property in her own right.

As to limitation, section 3 of the Limitation Act is imperative and the lower Courts were bound to throw out the claim even if we did not raise the plea of limitation.

BEAMAN, J. :—In this case the plaintiff has sued to have certain leases, executed by his adoptive mother Rachava to the defendants, set aside. The material facts are, that in January 1893 or thereabouts, the husband of the lessor and the lessor, being then man and wife without issue, adopted the plaintiff with the consent of his natural father, and apparently shortly after the actual adoption executed a writing, Exhibit 30 in the case. That writing states that the adopting parents possessed certain property, and after their death the adopted son is to obtain the whole of it. In 1894 the adoptive father Basappa died. We have not unfortunately the exact date. According to the plaintiff's own statement in his plaint, within two or three months of the death of

[1] (1900) 24 Bom. 556.

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his adoptive father Basappa, his adoptive mother Rachava drove him out of the house, and from that time until her death in 1907 the plaintiff resided with his natural father or at any rate never returned to the home of his adoptive mother. In 1902 the lessor executed these two leases to the defendants. It was also in 1902 that the plaintiff attained his majority. In 1907 the lessor, that is to say, the widow, the adoptive mother of the plaintiff, died, and within three years of her death the plaintiff brought this suit to have the leases set aside as being alienations invalid beyond the life-time of the widow with the life-estate. Upon these averments, the lower Courts held that the widow was given a life-estate under Exhibit 30 and therefore that the plaintiff's suit was within time. We have felt ourselves unable to admit Exhibit 30 in evidence for want of registration. Once that paper is out of the case, the position is somewhat changed. A very neat point of limitation was then very neatly put to us by Mr. Palekar and it arises in this way. He contends that in law the effect of the plaintiff's adoption was to make him the sole heir of his father, the widow being entitled to nothing more than maintenance. But since in 1894 she drove the plaintiff out and thenceforward managed the property herself, her possession from that day unto her death in 1907 must be considered adverse to the plaintiff: see the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1]. Inasmuch as the plaintiff attained his majority in 1902 and adverse possession started in 1894, it is clear that the plaintiff would have been completely time-barred by the end of the year 1906 at the latest. Therefore he is not now in a position to question any of the acts done by his adoptive mother during that period. It is true that he is still her heir and would therefore retake the

[1] (1907) 30 All. 1.

property but would not be in a position to challenge any of the alienations made by her as of her absolute estate. This point of limitation does not appear to have occurred to any of the pleaders or learned Judges concerned with the trial upto the conclusion of the proceedings in the Court of first appeal. The only bar of limitation relied on by the defendants in the first Court appears to have been set up under Article 91 of the Ist Schedule of the Limitation Act and that would arise in this way. The leases having been made in 1902 and presumably to the plaintiff's knowledge, if he believed them to be in derogation of his rights as heir expectant, he ought to have brought the suit within three years of the date of the leases or after attaining his majority, whichever gave him most time. That period would have ended at the latest at the close of the year 1905. It will be observed that for the purposes of this argument, I have stated that the plaintiff was presumed to have known of the leases. The point however was early dropped and has not been pressed before us. At one time it appeared as though there might have been something in it, but having regard to the fact that actual evidence would have been required to show that the plaintiff had in fact known of the leases more than three years before suit and no evidence of that kind being apparently available, this would clearly be a matter into which we could not go in second appeal.

I shall now proceed to deal in some detail with the new point of limitation taken by Mr. Palekar. But, first, I must explain the reasons for which we have excluded Exhibit 30 from consideration. Regarded from the point of view of the adoptive father, we find it impossible to say that this paper could be his will, because, rightly analysed, it appears to reserve a life-interest to himself and after himself to his widow

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before giving the remainder absolutely to the plaintiff, and any instrument which confers or reserves a life-estate to the maker could hardly in strictness, we think, be called a will. Nor can it be said to be a gift *in presenti* to the widow. Even were it so, it would certainly require registration, so that in any view, except that of contract, it may be doubted whether this instrument creates any rights at all to which legal effect could be given. Now, there are many cases of a like nature in which similar writings appear to have been treated by the Courts in India and even by their Lordships of the Privy Council as contracts or *quasi* contracts between the adoptive widow of the one part and the natural father of the minor adopted, of the other. All those are cases of adoptions by widows and this is a different case because here the true adopter was of course the father, the widow having no right whatever during his life-time to prevent him adopting if he chose to do so. Nevertheless, even in the cases I have adverted to, analysis will, I think, reveal many difficulties. Speaking for myself, I have always found it most difficult to refer these instruments imposing conditions apparently upon an adopted minor logically to any true category of contract. If real contract, then it must be a contract between the natural father of the minor and the adoptive widow, the natural father representing his minor son and the resultant contract supposed to be for the benefit of the minor and on that account held to be binding upon him. But I think the very furthest that any such arrangement could be taken under the law of Contract would be that it would be open to the minor on attaining majority either to ratify or repudiate, so that if contracts at all, these conditions annexed to adoptions would be contracts only complete when ratified by the minor after attaining majority. But if the minor desired to ratify any such contract on attaining majority, the pre-existing contract would

obviously be nugatory, since it would clearly be open to him as an adult to confer upon his adoptive mother a life-estate, or, in other words, to abrogate so much of his full rights if he chose to do so. Nor is it easy to understand upon what ground the taking of a son in adoption can be regarded as consideration; and when the matter is referred, as it usually is, to a future and expectant ratification, the invalidity of the whole argument becomes more apparent, since, while it is open to the minor to resile from his share of the contract, it is quite impossible for the widow to resile from hers. An adoption once made cannot be unmade. So that it would appear that these instruments of condition sometimes precedent to, sometimes contemporaneous with, sometimes subsequent to an adoption can hardly be regarded as true contracts. Nevertheless, when contemporaneous with or immediately precedent to and particularly when embodied in a deed of adoption, there can be no doubt, I think, now but that the law has agreed to accept and validate them. They then appear to stand upon some footing entirely peculiar to themselves. Thus the widow is said to be in law entitled to make any reasonable conditions at the time of adoption, such as, reserving to herself a life-estate, although that is utterly opposed to the resultant legal effect of an adoption upon the rights of the parties, and having done so that those conditions must be enforced as binding upon the adopted son. So that here had the adoption been made by the widow and this term incorporated in the deed of adoption or in any writing immediately precedent to or contemporaneous with it we should have felt it hard to say that it was not on all fours with similar writings which have been admitted and acted upon by the highest judicial authority without the need of registration. But having regard to the fact that the estate to be dealt with was at the time of the adoption

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not the widow's estate at all, it is clear that she at least had no power to make any reservations for her own benefit and in her own interest. Thus it comes out at last that whatever benefit was to be reserved to the widow under this adoption deed, must have been either by way of gift from her husband or by way of contract with the minor, and in any case quite clearly there was created in the widow an interest in the immoveable property which she otherwise would not have possessed and could not have possessed, and that interest exceeded in value Rs. 100 and was created by the instrument, Exhibit 30. I therefore think that that instrument requires registration and not having been registered is inadmissible in evidence for any purpose whatever affecting the property now in suit.

That leaves me now face to face with the point of limitation raised by Mr. Palekar on such facts as remain after the elimination of the explanatory paper, Exhibit 30, and it appears to me that his very clear and cogent argument would be conclusive but for one reply, and that reply, I think, in turn is equally conclusive. In the first place, I must not omit to notice that contentions of this kind taken for the first time in second appeal are usually viewed with considerable disfavour. It may very fairly be doubted whether a point of limitation like this involving as it does the character of the widow's possession does not really raise a question of fact which can only be answered upon evidence, and were that necessary to be taken, it is quite clear that we sitting in second appeal should be precluded at this stage from re-opening the enquiry at any point and inviting or discussing any further evidence. Mr. Palekar replies, however, that no evidence whatever is needed, that his point is a pure point of law arising upon the materials before the Court, not one of which is in dispute. At first I was disposed to think that the

widow's possession, from 1894 to 1902 when the plaintiff attained his majority, might be referred and therefore ought to be referred to her position as his natural guardian. But in view of the plaintiff's admission that she drove him from the house in 1894 since which time he has never resided with her, it certainly does appear to me to be sufficient in itself to negative the ascription of her possession to any such character as that of natural guardian. Still, it may be contended that the character of the possession remains undetermined in the absence of all evidence. Speaking here entirely for myself, I should be inclined to think that the admission of the plaintiff, were there nothing else in the case, would sufficiently indicate the character of the widow's possession, and if that were so, then all the legal consequences upon which Mr. Palekar insists would flow from that possession and the plaintiff would indubitably, in my opinion, have been completely time-barred at the close of the year 1906. Nor do I think that conclusion could be affected by the suggestion that all that the widow obtained by her adverse possession was a life-estate. For, after giving my most careful consideration to that point, I am utterly unable to understand or conceive any circumstances in which a widow could possibly acquire by adverse possession a merely limited estate of that kind. Adverse possession of the property would certainly give her absolute ownership, and absolute ownership being larger, would of course include the lesser estate. I repeat I cannot conceive any circumstances in which a person could set out consciously to acquire a limited within a larger estate by adverse possession, the natural legal consequences of which would be to confer the latter, *i. e.*, full ownership upon him. So that I do not think that the respondents derive any advantage from that line of argument.

But I do think that although we have been obliged to exclude Exhibit 30 entirely from our minds as proof

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of any conditions annexed to the adoption of the plaintiff, I cannot ignore the very plain understanding which existed between the plaintiff and his mother as evidenced throughout the whole course of this trial in both the Courts below. Looking to the pleadings, looking to the contentions of the defendants themselves, there can be no doubt that the real truth is this, that the plaintiff believed that his adoptive mother was entitled to a life-estate under Exhibit 30. It is equally clear that the defendants dealt with her in the belief that she had a life-estate, and I think it is quite as clear that the widow herself was really managing the property in the like belief, namely, that she had obtained the estate under Exhibit 30. Now, if that was the true belief of the plaintiff and his adoptive mother, the widow, it would follow obviously that her possession so long as she lived would not be adverse to the plaintiff at any period, but merely permissive. That is to say, if the plaintiff honestly believed, though wrongly, that she was entitled to remain in possession for life and if she shared that belief and so remained in possession while he took no steps to disturb her, the principal ingredient in Mr. Palekar's case would be wanting, namely, the intention, to hold adversely in order to acquire an absolute estate, and it is upon that basis that I think the relief prayed for by the plaintiff in this appeal ought to be granted. For it follows that if I am so far right, the plaintiff allowed the widow a life-estate, and at the conclusion thereof in the year 1907 no question of limitation could arise either upon the old ground under Article 91 or upon the new ground so ingeniously taken and in my opinion so admirably argued by Mr. Palekar. I think too that the merits and justice of the case point the same way.

In my own opinion, therefore, for the reasons I have stated, the judgment of the Court below, though arrived at by a different process of reasoning, is substantially

right and this appeal ought to be dismissed with all costs.

MACLEOD, J. :—I agree with the conclusion arrived at by my brother Beaman, but I would like to add a few words on the point raised by Mr. Palekar that the plaintiff's claim is time-barred on the ground that the possession of the widow from 1894 was adverse to him. There may be cases where admissions on the pleadings clearly show that the plaintiff's claim is barred under the Limitation Act, but it is very rarely that such admissions appear, and it is only in such cases that the point of limitation on the ground of adverse possession could be raised in second appeal. In this case there is only the allegation in the plaint that the widow some time after her husband's death had treated the plaintiff badly and driven him out of the house, and that the plaintiff did not thereafter return to live with the widow, his adoptive mother. That is not sufficient by itself to establish a case of adverse possession by the widow, if only because there is no date from which adverse possession is stated to have begun, and it would be necessary to adduce other evidence to show, not only that the widow possessed the property adversely to the interest of the minor adopted son, but also when such adverse possession began. As the plaint stands, it is quite possible that although the widow did not wish the minor to live with her, still she was willing to recognise his rights, and was willing to manage the property in his interest, or at the most, was desirous of enjoying the life-estate which was given her under the adoption-deed, while recognizing that the adopted son was entitled to the property after her death. So that before the Court could hold that the widow held adversely to the son, evidence would certainly have to be brought to show precisely that such possession was adverse. There is no evidence in this case, as the point was not even

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raised in either of the Courts below, and therefore I should dispose of Mr. Palekar's contention on that ground, *viz.*, that there is no evidence before the Court which could induce it to hold that the widow's possession was adverse.

Appeal dismissed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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SITARAM BHIMAJI DESHPANDE AND ANOTHER (ORIGINAL DEFENDANTS 3 AND 4), APPELLANTS, *v.* SADHU BIN AWAJI PARIT AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Suit based on title to recover possession—Presumption of right arising from possession applies as much to defendant as to plaintiff—Plaintiff to prove such possession as will give him better title—Suit in ejectment—Proof of such title as carries a present right to possession—Determination of annual tenancy—Notice to quit—Relinquishment of tenancy gives no right to present possession —Jus tertii.

In a suit based on title to recover possession, the presumption of right arising from possession applies as much to a defendant as to a plaintiff and the fact of possession within twelve years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendant can show.

To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession.

Ordinarily, unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit.

It is a reasonable inference that if the plaintiff had not asserted his right as yearly tenant for eight years, he must be taken to have abandoned the tenancy or to have relinquished such other occupancy right as he might have, and if so, he would have no right to present possession such as would entitle him to maintain a suit for ejectment.

The defendant in ejectment might set up and prove *jus tertii*.

* Second Appeal No. 811 of 1912.