maintain a suit by himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent. We must, therefore, reverse the decree of the lower Court and order plaintiff's suit to be dismissed with costs on him throughout.

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BÁLKRISHNA v. MORO.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

FANNYAMMA AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 3), APPELLANTS, *v.* MANJAYA HEBBAR AND OTHERS (ORIGINAL PLAINTIFFS NOS. 2, 3 AND 4), RESPONDENTS.*

1895. *October* 14.

Limitation Act (XV of 1877), Sch. II, Arts. 118 and 140—Limitation Act (IX of 1871), Sch. II, Art. 129—Suit by devisees to recover possession of property devised by will—Prayer to declare alleged adoption invalid.

A suit by a devisee to recover possession of immoveable property and for a declaration that an alleged adoption (on the strength of which the defendant was in possession) was invalid or never took place not being one merely to obtain a declaration, is governed by article 140 of the Limitation Act (XV of 1877). To such a suit article 118 does not apply, as the prayer for declaration is subservient or auxiliary only to the prayer for possession.

APPEAL from a remand order passed by E. H. Moscardi, District Judge of Kánara.

The plaintiffs alleged that under the will of one Nagabhatta, who died on the 28th July, 1880, they were entitled to his immoveable property, all of which was in the possession of the defendants; that on the will being presented for registration in 1880, the first defendant (the widow of Nagabhatta) had declared it to be a forgery, and alleged that in 1879 Nagabhatta had adopted the third defendant.

The 28th July, 1892, was a Court holiday.

On the 29th July, 1892, the plaintiffs brought this suit to recover possession of the property, and praying for a declaration that the alleged adoption was invalid or never in fact took place.

Defendants Nos. 1 and 3 pleaded that defendant No. 3 was the adopted son of Nagabhatta, having been duly adopted by him in

* Appeal No. 27 of 1895 from order.

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June, 1879, and that the suit was now barred by limitation, Nagabhatta having died on the 27th July, 1880.

The Subordinate Judge held the suit barred by limitation, holding that the suit should have been brought within six years under article 118, Schedule II of the Limitation Act (XV of 1877).

On appeal by the plaintiffs, the Judge reversed the decree and remanded the case for retrial, holding that the suit was one for possession of immoveable property and not simply for a declaration as to the validity of the adoption, and was, therefore, governed by twelve years' limitation.

Defendants Nos. 1 and 3 appealed.

Shámráv Vithal, for the appellants (defendants Nos. 1 and 3) :—The suit is clearly barred. Article 118 of the Limitation Act (XV of 1877) applies. The adoption of defendant No. 3 was brought to the knowledge of the plaintiffs in the year 1880, when the alleged will of Nagabhatta was presented for registration. The present suit was brought in 1892. He cited *Jagadamba* v. *Dakhina* (1); *Mohesh* v. *Taruck* (2); *Lachman Lál Chowdhri* v. *Kanhayá Lal Mowar* (3); *Shekh Sultán* v. *Shekh Ajmodin* (4)

Náráyan G. Chandávarkar, for the respondents (original plaintiffs) :—This is a suit for possession. The prayer for a declaration as to the adoption is merely auxiliary. A series of decisions of the High Courts in India has held that articles 118 and 119 of the Limitation Act are to be applied where suits are merely for a declaration. Where the relief by declaration is merely ancillary and subservient to the main relief sought, these articles have no application—*Padájiráv* v. *Rámráv* (5); *Kalgavda* v. *Lingavda* (6); *Basdeo* v. *Gopál* (7); *Revubái* v. *Nagapa* (8).

PARSONS, J. :—Plaintiffs bring this suit as devisees under the will of one Nagabhatta to obtain possession of certain immoveable property. They ask also that the adoption and all other condi-

(1) L. R., 13 I. A., 84 at p. 95; I. L. R., 13 Cal., 308.
(2) L. R., 20 I. App., 30 at p. 37; I. L. R., 20 Cal., 487 at p. 497.
(3) I. L. R., 22 Cal., 609.
(4) L. R., 22 I. App., 51.
(5) I. L. R., 13 Bom., 160.
(6) P. J. for 1889, p. 86.
(7) I. L. R., 8 All., 644.
(8) P. J., 1892, p. 34.

tions of title relied on by the defendants may be set aside and their sole right to the property declared.

For all practical purposes, and apart from any technicalities of pleading, this latter prayer is superfluous. It is enough that plaintiffs suing for possession should sue on their own title, leaving the defendants to establish their counter title if they can. It is not necessary to their suit for possession that they should obtain a declaration that the adoption alleged by the defendants did not take place or is invalid. As observed in *Abdul* v. *Kirpárám* [1], the declaration is subservient or auxiliary only. We must, therefore, treat the suit as one brought to obtain possession of immoveable property.

The defendants plead that the will relied on by plaintiffs is a forgery, that the defendant No. 3 is the owner of the property, having been adopted by Nagabhatta, and that the suit is time-barred.

The following facts only need be stated:—The will under which plaintiffs claim, is said to have been executed on the 21th July, 1880. Nagabhatta died on the 27th or 28th July, 1880. The present suit was brought on the 29th July, 1892. Defendant No. 3 alleges that he was adopted by Nagabhatta in June, 1879. The parties respectively knew of their rival claims in 1880.

On these facts it is argued that the suit is time-barred under article 118 of the Limitation Act (XV of 1877), because, although it asks for a declaration that an alleged adoption is invalid or never in fact took place, it has not been brought within six years from the date when the alleged adoption became known to the plaintiffs. It is, however, a complete answer to this argument to say that the suit is not one merely to obtain a declaration, but that it is one to obtain possession of immoveable property by a devisee for which article 140 allows twelve years' time. To such a suit article 118 would not apply. That article applies only to declaratory suits, the sole object of which is to obtain a declaration that an alleged adoption is invalid or never in fact took place. Suits for possession of property to which another limitation law is applicable are governed by that law even though

(1) P. J. for 1891, p. 79.

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the validity of an adoption may arise and may have to be determined.

No doubt this was not so under the Act of 1871 as interpreted by the Privy Council in the case of *Jagadamba* v. *Dakhina*[1], but the wording of article 118 in the Act of 1877 is different, and we must construe that article according to the express rulings of the Courts here—*Basdeo* v. *Gopál*[2]; *Natthu Singh* v. *Gulább Singh*[3]; *Lala Parbhu Lal* v. *J. Mylne*[4]; *Pádajiráv* v. *Rámráv*[5]; *Kalgavda* v. *Lingavda*[6]; *Revubái* v. *Nágapa*[7]. It is idle now to speculate whether from certain expressions used in the cases of *Mohesh* v. *Taruck*[8] and *Shekh Sultán* v. *Shekh Ajmodin*[9] the Privy Council will not decide that the Act of 1877 is to be constructed in the same way as they constructed the Act of 1871. It is sufficient to say that they have not as yet so decided. In the present case either party within six years from 1880 could have sued for a declaration that the claim set up by the other party was bad and his own title good. Neither did so. Both waited on, and now at the very verge of the twelve years the plaintiffs have brought their suit. The principle, therefore, in *Jagadamba's case* hardly applies, for it was open to the defendants to have forced on the settlement of the dispute within a moderate period.

For the reason that this suit is not one for a declaration to which article 118 applies, but one for possession to which the twelve years' rule applies, we confirm the order with costs.

CANDY, J.:—Plaintiffs say that Nagabhatta died on 28th July, 1880, having by his will, dated 24th July, 1880, devised his property to plaintiffs. When the will was presented for registration shortly after Nagabhatta's death, plaintiffs were opposed by defendants, who contended that defendant No. 3 had been adopted by Nagabhatta in 1879.

Since then the parties have been at arm's length. Defendants have been in possession on the strength of the alleged

(1) L. R., 13 I. A., 84.
(2) I. L. R., 8 All., 644.
(3) I. L. R., 17 All., 167.
(4) I. L. R., 14 Cal., 401.
(5) I. L. R., 13 Bom., 160.
(6) P. J. for 1889, p. 86.
(7) P. J., 1892, p. 34.
(8) L. R., 20 I. A., at p. 37.
(9) L. R., 22 I. App., 51.

adoption. On 29th July, 1892, (the 28th July being a Court holiday), the plaintiffs brought this suit, praying that the alleged adoption be set aside and for possession of the immoveable property devised to them by the will.

It is clear that they cannot succeed in their suit unless they succeed in proving that the alleged adoption is invalid, or never in fact took place. But they claim, as devisees suing for possession of immoveable property, to be allowed twelve years' limitation under article 140 of Act XV of 1877, from the time when their estate fell into possession, *i.e.*, the death of the testator Nagabhatta.

The Subordinate Judge, relying on certain remarks of the Privy Council in *Mohesh* v. *Taruck*(1), held that plaintiffs were bound to have sued within six years from 1880 under article 118 of Act XV of 1877.

On appeal the District Judge set aside this decision, holding that until there is a formal decision of the Bombay High Court or the Privy Council to the contrary, the case of *Basdeo* v. *Gopál*(2) must be held to be the best authority regarding the interpretation of the present law, and that claims which involve the determination of the validity or fact of an adoption are not barred by articles 118, 119 of the Schedule of Act XV of 1877, *unless they are simply suits for a declaration* of the validity or existence or otherwise of a former adoption.

The decision of the Privy Council in the leading case of *Jagadamba* v. *Dakhina*(3) was given in April, 1886, with reference to article 129 of Act IX of 1871. After showing that the expression in that article 'set aside an adoption' is and had been for many years applied, in the ordinary language of Indian lawyers, to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature, their Lordships proceeded, page 94: "It is worth observing that in the Limitation Act of 1877, which superseded the Act now

(1) L. R., 20 I. A., 30, at p. 37; S. C. I. L. R., 20 Calc., 487, at p. 497.

(2) I. L. R., 8 All., 644.

(3) L. R., 13 I. A., 84; S. C., I. L. R., 13 Calc., 308.

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under discussion, the language is changed. Article 128 (*sic* mistake for 118) of the Act of 1877, which corresponds to article 129 of the Act of 1871, so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind, and that more precision was desirable.

"If, then, the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiffs' counsel were asked, but were not able to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

In August, 1886, in *Ganga Sahai* v. *Lekhráj Singh*[1] Mr. Justice Mahmood (at page 267) referred to the very recent ruling of the Privy Council in *Jagadamba* v. *Dakhina*[2], holding that the ruling was wholly inapplicable to the case before him, both

(1) I. L. R., 9 All., 253. (2) L. R., 13 I. A., 84; S. C., I. L. R., 13 Calc., 308.

on account of the facts, and also because their Lordships had themselves pointed out the change of law effected by article 118 of the Limitation Act of 1877. (Their Lordships said: "Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships.")

In August, 1888, in *Padájiráv* v. *Rámráv*[1] Sir Charles Sargent, C. J., and Mr. Justice Nánábhái Haridás remarked, at page 165: "Before leaving this part of the case we think it will be useful to notice the view pressed upon us in argument by defendant's counsel, that article 119 of the Act of 1877 was the article applicable to the case, and that taken in connection with the ruling in *Jagadamba Chowdhráni* v. *Dakhina Mohun*[2] the plaintiff's suit, although one to recover the land, was barred six years after plaintiff came of age. That case, however, was decided under article 129 of the Act of 1871, and was held by the Allahabad High Court, and we think rightly, to have no application to sections 118 and 119 of the Act of 1877, which are confined in terms to suits for a declaration—*Ganga Sahai* v. *Lekhráj Singh*[3]."

In 1889 in *Kalgavda* v. *Lingavla*[4] Sargent, C. J., and myself held that article 144 of Act XV of 1877 applied to the case before us, which was a suit brought by an alleged adopted son to recover the property of his deceased adoptive father. We relied on the cases of *Padájiráv* v. *Rámráv*[1] above noted and *Basleo* v. *Gopál*[5]. This last was a case in August, 1886, in which Oldfield and Tyrrell, JJ., went fully into the question. They said (page 645): "The Privy Council decision in *Jagadamba Chowdhráni* v. *Dakhina Mohun*[2] has no application. That decision dealt with the limitation in article 129 of the old Act, IX of 1871, which referred to suits to set aside an adoption, and their Lordships held that the terms 'to set aside an adoption' referred to and included suits which bring the validity of an adoption into question, and applied indiscriminately to suits to have an adoption declared invalid and for possession of land, when the validity of an alleged adoption is brought into question.

(1) I. L. R., 13 Bom., 160.
(2) L. R., 13 I. A., 84; S. C., I. L. R., 13 Cal., 308.
(3) I. L. R., 9 All., 253.
(4) P. J. for 1889, p. 86.
(5) I. L. R., 8 All., 644.

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"But that decision had peculiar reference to the terms in which article 129 was framed. The present law of limitation has made an alteration. It contains no such article as 129. On the other hand, we have articles 118 and 119, the former for suits to obtain a declaration that an alleged adoption is invalid or never took place, and the latter to obtain a declaration that an adoption is valid; and the period of limitation is reduced to six years, and the time from which it will run is altered, and the Act provides separately for suits for possession of property by article 141.

"There is no ambiguity about article 118 as there was about article 129 of the old law, and it can be held only to refer to suits purely for a declaration that an alleged adoption is invalid, or never, in fact, took place; and where the suit is for possession of property, to which another limitation law is applicable, it will be governed by it, although the question of validity of adoption may arise. As already observed, it is discretionary in a Court to grant relief by declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

"It is observable that, in the case we have referred to, their Lordships of the Privy Council remarked upon the difference between the language of article 129 of Act IX of 1871, which they designate as being of a loose kind, and the precise terms of articles 118 and 119 of Act XV of 1877, which we have described above."

In February, 1892, in *Revubái* v. *Nagápá* [1] Sargent, C.J., and Birdwood, J., said: "We think it right to remark that both Courts were wrong in regarding the suit as one only for a declaration of the validity of the plaintiff's adoption. The plaint sought further relief by the plaintiff being put into possession of the property, and such a declaration would be merely ancillary to that relief. The question for determination would, therefore, be—whether defendant No. 1 has been in adverse possession for twelve years before the suit was brought."

(1) P. J., 1882, p. 34.

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In December, 1892, Lord Shand delivered the judgment of the Privy Council in *Mohesh Náráin* v. *Taruck Náth Moitra*[1]. It was held that the suit, having been brought to recover possession on the ground that the defendant's adoption was invalid, was a suit to "set aside an adoption" within the meaning of the Limitation Act, 1871, and the suit being thus barred long before the Act of 1877 came into force, the plaintiff must fail. At page 37 Lord Shand said:

"It was suggested that the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to, as necessary to save the limitation, being described as one "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place." It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage."

It is on these last words that the argument for the present appellants is founded. In the case just quoted, their Lordships were satisfied that the defence of limitation had been clearly established on the ground of the long unchallenged adoption of the principal defendant, notwithstanding his assertion of the status and right of an adopted son, and his enjoyment, with the complete knowledge of the plaintiff, of the advantages which that status gave him. Plaintiff's allegation was that the adoptive mother of the principal defendant had been in possession of the property till her death in 1884, and that consequently until that event occurred no cause of action for possession arose. But their Lordships held that as the plaintiff's claim (for a declaration of his right, and that possession might be given to him of the properties in dispute) obviously involved the setting aside of the defendant's adoption, the suit was barred under article 129 of Act IX of 1871, which provided the limitation of twelve years for suits "to set aside or establish an adoption" from "the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father;" and their Lordships thought it

(1) L. R., 20 I. A., 30.

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more than doubtful whether plaintiff would have taken any advantage, even if the words of the statute of 1871 had been (as in the Act of 1877) "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place." And such indeed must have been the case, when the fact is regarded that defendant was adopted in 1851 by his adoptive mother on the alleged authority of an *annumati patra* given by her husband, who died in 1850. What advantage could plaintiff have gained by the change in language? He said that the *annumati patra* gave a life estate to the widow; but the High Court found as a fact that the defendant and his adoptive mother had been in actual possession, and the Privy Council held that defendant had enjoyed, with the complete knowledge of the plaintiff, the advantages which the status of adopted son gave him.

An examination of the case thus shows that the remark of their Lordships is no foundation for upsetting the current of decisions which are founded on the difference of languages in article 129 of the Limitation Act, 1871, and in article 118 of the Limitation Act, 1877. This Court has, after due deliberation, adopted the reasoning of Oldfield and Tyrrell, JJ., in *Basdeo* v. *Gopál*[1]; and we should not now be justified in departing from that reasoning without the distinct authority of the Privy Council.

Mr. Shamráv, for appellants, referred to the judgment of the Privy Council in *Lachman Lál* v. *Kanhaya Lál*[2], but there is nothing in that judgment which really bears on the point at issue.

It appears that recently (February, 1895) in the Allahabad High Court, Edge, C. J., and Banerji, J., reiterated the conclusions arrived at in *Basdeo* v. *Gopal*[1], pointing out that the same conclusions were to be found in another Allahabad case—*Ghandharap Singh* v. *Lachman Singh*[3], in a Bombay case (the one quoted above), and also in a Calcutta case, *Lála Parbhu Lál* v. *J. Mylne*[4].

It may further be remarked that Edge, C. J., and Banerji, J., in February, 1895, did not consider it necessary to refer to the remark in the Privy Council judgment in *Mohesh Nárain* v. *Taruck Náth Moitra*[5].

(1) I. L. R., 8 All., 644.
(2) L. R., 22 I. A., 51.
(3) I. L. R., 10 All., 485.
(4) I. L. R., 14 Cal., 401.
(5) L. R., 20 I. A., 30.

No doubt there is one passage in the earlier judgment of the Privy Council (*Jagadamba Chowdhrani* v. *Dakhina Mohun*[1]) which must raise some doubts as to whether the present law works equitably. I refer especially to the passage :—"The plaintiffs' counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

In the present case the parties were at arm's length in 1880. Then was the time for the delicate and intricate question involved in defendant's adoption to be brought into dispute. It may be said that it was always open to defendant—the alleged adopted son—to file a suit to obtain a declaration that his adoption was valid any time within six years from the date when plaintiffs put forward the alleged will of Nagabhatta and denied defendant's alleged adoption. But for defendant it may fairly be asked, why should he have been driven into the Court as plaintiff? He was in possession; what need was there for him to take action? As the law is at present interpreted, if the declaration as to the validity or invalidity of an alleged adoption is only ancillary to the claim for possession, the suit may possibly be brought more than sixty years after the alleged adoption. Take the present case : suppose that Nagabhatta had devised the estates to A. for life, and then to the plaintiffs. That would have been a legal devise, A. and the plaintiffs being alive at testator's death. The plaintiffs' estate would not fall into possession till A.'s death.

(1) L. R., 13 I. A., 84 at p. 95.

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That might take place fifty years after Nagabhatta's death, and thus plaintiffs after more than sixty years might maintain that the alleged adoption was invalid or never took place.

But we have to administer the law as it is. We have held that in such a case as the present, article 118 of the Limitation Act does not apply. Under these circumstances I agree that we must confirm the order of the District Judge with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895. *October* 14.

MOTILA'L LALUBHA'I (ORIGINAL DEFENDANT), APPELLANT, *v.* RATILA'L MAHIPUTRA'M (ORIGINAL APPELLANT), RESPONDENT.*

Hindu law—Mayukha—Widow—Widow's power to dispose of moveables bequeathed to her by her husband.

Held, that a widow in Gujarát under the law of Mayukha had power to bequeath moveable property taken by her under the will of her husband which gave her express power of free disposition.

Gaddádhar v. *Chandrabhágábái* (1) distinguished.

Per RA'NADE, J.:—There is a threefold distinction between the moveable and immoveable property, between title by bequest and a title by inheritance, and a distinction between the Mayukha and Mitákshara, which must be borne in mind before the rights of a widow in Gujarát, claiming under a will which gave her express powers of free disposition over the residue of moveable property, are negatived solely on the authority of the Full Bench decision quoted above. If Rewá Bái had made no disposition herself, the moveable property, in respect of which freedom of disposition had been allowed her, would have gone to the reversioner as her husband's heir.

CROSS appeals from the decision of Ráo Bahádur Lálshankar Umiáshankar, First Class Subordinate Judge of Ahmedabad, in Suit No. 82 of 1893.

The plaintiff sued as the reversionary heir of one Girjáshankar Govindrám to recover property in the hands of the defendant. Grijáshankar died in 1880, leaving three houses and considerable moveable property. His wife Bái Rewá and two daughters Muli and Pási survived him.

By his will he gave house No. 3 to his daughters who were to be the owners thereof, and to take possession after his death.

* Cross Appeals, Nos. 80 and 166 of 1894.

(1) I. R. R., 17 Bom., 690.