APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

1898.
April 21.

RANGO BALAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* MUDIYEPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Evidence—Indian Evidence Act (I of 1872), Secs. 107 and 108—Person not heard of for seven years—Presumption of death—Adoption—Validity of adoption depending on whether natural son alive or dead—Onus of proof—Deed or will conferring estate on a person described as adopted son—Res judicata—Former decree in favour of plaintiff, but issue as to adoption found against him—No appeal open to plaintiff against that finding.

Death is to be presumed after a certain interval (seven years); but there is no presumption as to the time of death. If, therefore, any one has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the continuance of life. There is no presumption of law that because a person was alive in 1877 therefore he was alive in 1878.

One Shankar died in September, 1878, leaving a widow Bhagubai. The year before his death his only son (Bala), a child of eight years old, had left his home and was never heard of again. A few days before his death, Shankar adopted the plaintiff (his nephew) and executed a deed of adoption, which stated that he had no hope that his son Bala was alive, and that he had, therefore, adopted the plaintiff. The deed further declared the plaintiff to be the owner of all Shankar's property with all the rights of a natural son, but provided that, in the event of the lost son returning, he should have half. In 1892 the plaintiff as Shankar's adopted son brought this suit to recover some of Shankar's property, which was in the hands of the defendants, who claimed it as Shankar's heirs. They (*inter alia*) impeached the plaintiff's adoption.

Held that, in order to recover the property as the adopted son of Shankar, it lay on the plaintiff to prove a valid adoption. It was a condition precedent to prove that, at the date of the adoption, Shankar was without a son. It was, therefore, for the plaintiff to prove that Bala was then dead. There was, at that time, no presumption that Bala was dead, and there being no evidence on the point it was impossible to say when he died, or consequently that the adoption was valid.

Held, however, that plaintiff was entitled to succeed as donee under the deed of adoption (Exhibit A). It was clearly Shankar's intention to give the estate to the plaintiff as being his adopted son. But if the adoption was invalid, the gift had no effect. The *onus* here was on the defendants. It was for them to show that Bala was at that date alive and the adoption, therefore, invalid. That burden they had not discharged, and the plaintiff, therefore, was entitled to a decree.

* Second Appeal, No. 1234 of 1897.

Per FARRAN, C. J.:—Where a deed of gift or will confers an estate upon a named person, because he fills or by reason of his filling a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character, which is the reason of the gift, lies upon those who dispute his claim. The whole question is one of *onus* of proof.

The plaintiff had previously sued one Krishnaji, the father of the defendants, in another suit (No. 804 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that nevertheless he was entitled to recover the lands sued for, on the strength of the above stated deed (Exhibit A), and a decree was passed for the plaintiff.

Held that the issue as to adoption in that suit was not *res judicata* in the present suit. In the former suit the plaintiff recovered upon the deed. He could not have appealed from the decree which was in in his favour, nor could he under the Civil Procedure Code (Act XIV of 1882) appeal from the finding upon the adoption issue which was against him. Upon that issue there had not been a final decision.

SECOND appeal from the decision of R. A. Graham, Assistant Judge, F. P., at Bijápur, reversing the decree of the Subordinate Judge of Bágalkot.

Suit to recover certain land which had been formerly the property of one Shankar Subaji, the uncle of the plaintiff, and (as the plaintiff alleged) his adoptive father.

The defendants Nos. 2, 3 and 4 were in possession of the property. They denied the plaintiffs' adoption, and claimed to be the heirs of Shankar.

Prior to 1873, Shankar, who owned the lands in question, had mortgaged them to the grandfather of defendant No. 1 with possession, on the terms that they were to be restored free from the mortgage lien on the 31st March, 1888. In 1887 defendant No. 1 surrendered them to defendants Nos. 2, 3 and 4, who, as already stated, claimed to be the heirs of Shankar.

Shankar died on the 13th September, 1878. He had had a son Bala who was about eight years of age. This child had left his home about a year before Shankar's death, and was never heard of again. The plaintiff alleged that, in the belief that Bala was dead, Shankar had adopted him, and on the 1st September, 1878, executed an adoption deed (Exhibit A), by which he gave plaintiff all his property. The following is the material portion of the deed (Exhibit A):—

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"I had a natural son by name Bala aged eight years. It is now about a year since he has run away. He was much searched for, but no trace of him could be found. As I have no hope of his being alive, and in order that my obsequies should be performed and my generation should increase, I have adopted you with the consent of your mother Gangabai and according to caste custom and shastras. Therefore you are the owner of all my moveable and immoveable property. You have all the rights of a natural son. * * *. Should fortunately the natural son Bala return, you and he should divide equally my property—he as elder son and you as younger son."

Shankar left a widow Bhagubai. It was admitted, however, that she had been incontinent and had become a Mahomedan and had forfeited all rights of inheritance to Bala if he (Bala) had survived his father Shankar.

The plaintiff and the defendants were related in an equal degree to Bala.

The plaintiff had previously sued one Krishnaji, the father of the defendants Nos. 2, 3 and 4, in another suit (No. 804 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that, nevertheless, he was entitled to recover the lands sued for on the strength of the above stated deed (Exhibit A), and a decree was passed for the plaintiff.

The plaintiff filed this suit in 1892. His claims to Shankar's estate rested either on the fact that he was Shankar's adopted son or upon the terms of the deed (Exhibit A).

The defendants (*inter alia*) denied the adoption and also contended that the question of adoption was *res judicata* by the decision in the former suit (No. 804 of 1885).

The Subordinate Judge held that upon the deed (Exhibit A) the plaintiff was entitled to the lands sued for, and gave him a decree.

On appeal by the defendant the Judge held that the question of adoption was not *res judicata* by the decision of Suit No. 804 of 1885, inasmuch as the decision in the plaintiff's favour in that suit was based upon the deed (Exhibit A). The Judge said:—

"The question as to the plaintiff's adoption being illegal is not *res judicata*, for the decision on that issue was not material for the determination of the case in the view the Subordinate Judge took of the plaintiff's rights. Having

obtained a decree in his favour, plaintiff had no opportunity to question the correctness of that finding."

The Judge further considered the question as to Bhagubai's title to inherit the property as heir of her son Bala (assuming that he was dead), and sent back the following issue to the Subordinate Judge:—

"(*a*) Has Bala's mother Bhagubai lost her right of inheritance in this case by any and what lawful reason and on what date?

"(*b*) If so, who would be the next heir to his property after Bala's death in 1889, in case Bhagubai is excluded from inheriting her son's estate, or has forfeited her rights subsequent to this inheritance?"

On the said issues the Subordinate Judge found as follows:—

"Both sides admit that, as Bhagubai first became incontinent and then became a Mahomedan, she has forfeited her right of inheritance to the estate of her son.

"It appears that in 1889, when Bala was presumed to have died, his heirs (his mother having lost her rights) were plaintiff Rango Balaji, his brother Shrinivas Balaji, the two defendants, and Ramappa Rangappa. They are all equally related to deceased Bala, as will be seen from Exhibit No. 71, and they were the only persons alive in 1889."

On receipt of these findings the Judge held that Bhagubai, notwithstanding her incontinence and subsequent conversion to Mahomedanism, was entitled to inherit the property as the mother of Bala, and that the suit was not maintainable in the present form, because there were other heirs of Bala who were equally entitled to the property along with the plaintiff. He, therefore, reversed the decree and dismissed the suit.

The plaintiff preferred a second appeal.

Branson (with *Ganpat V. Mulgaumkar*) appeared for the appellant (plaintiff):—We contend that the plaintiff's adoption was valid—Tagore's Law Lectures, 1888, p. 194. The defendants contend that it was invalid because Bala was then alive. They must prove that fact. There is no presumption, one way or the other, as to the actual date of Bala's death—Taylor on Evidence, p. 219; *Dharup Nath* v. *Gobind Saran*[1]. Sections 107 and 108 of the Indian Evidence Act deal with the question whether a man is alive or dead, but they do not create any presumption as to the date of

(1) (1886) 8 All., 614.

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death. There is no doubt that Bala is now dead. The question is when did he die. Everything ought to be presumed in favour of our adoption. Under the deed (Exhibit A) in case of Bala's return the plaintiff is to take half the property. Under any circumstances there is a gift to the plaintiff of one-half of the property. Bala has never come forward to dispute the deed. Shankar could dispose of his property as he chose. The plaintiff is legally entitled to the property of Shankar under the terms of the deed, which may be looked upon as either a deed of adoption or a will.

We also contend that the decision in Suit No. 804 of 1885 brought by the plaintiff against the father of the defendants is *res judicata* as regards the effect of the deed. The Court held in that suit that the deed could be acted on as a deed of title or a deed of settlement.

Scott (with *Mahadeo V. Bhat*) appeared for the respondents (defendants Nos. 2 to 4):—The plaintiff's adoption could only be valid if it be proved that at the date of the adoption the missing son Bala was dead. The plaintiff must prove affirmatively this fact. The *onus* of proof lay on the plaintiff, and he having failed to discharge it, the suit must fail—*Dhondo* v. *Ganesh* (1). The plaintiff can only claim by virtue of his adoption, because adoption is the essence of the deed.

The finding in the former suit makes the question of the plaintiff's adoption *res judicata*. In that suit it was held that the adoption was invalid and that the plaintiff was entitled to recover the property only as trustee for Bala.

It was argued that the deed, if not a deed of adoption, was at any rate a deed of gift. Even if it be a deed of gift, Bala and his heirs would be entitled to contest it, the property mentioned therein being ancestral.

Branson, in reply :—There is no doubt about the fact of plaintiff's adoption. It is for those who impeach the adoption to prove that Bala was alive at its date. It is not necessary for the plaintiff to prove that Bala was dead.

(1) (1886) 11 Bom., 433.

FARRAN, C. J.:—Shankar Subaji was the owner of the lands in suit. In 1873, he mortgaged them to Mudiappa, the grandfather of defendant No. 1, with possession upon the terms that they were to be restored freed from the mortgage lien on the 31st March, 1888. In 1887, defendant No. 1 surrendered the lands to the defendants Nos. 2---4, who claimed to be the heirs of Shankar Subaji. The plaintiff alleging that he is the adopted son of Shankar Subaji brought the present suit for possession of the lands with mesne profits. The fact that Shankar Subaji went through the form of adopting the plaintiff is not disputed, nor that he executed the adoption deed (Exhibit A) in the plaintiff's favour. The deed, which is registered, is dated the 1st September, 1878. Shankar died on the 13th of the same month. The material portion of the deed runs as follows (His Lordship read the above passage from the deed, and continued:—)

The circumstances were as recited in the deed. Bala never returned, nor was he ever heard of again.

The question to be determined is, whether the plaintiff acquired any right to the property of Shankar either as his adopted son or under the terms of the deed (Exhibit A). The only further fact necessary to be stated is that Shankar left a widow Bhagubai. As to her, it was admitted, upon remand before the Subordinate Judge, that as Bhagubai first became incontinent, and then became a Mahomedan, she had forfeited her right of inheritance to the estate of her son Bala.

In 1889 the heirs of Bala, in the absence of Bhagubai, were the plaintiff Rango Balaji, his brother Shrinivas Balaji, the defendants Konher Krishna and Janardhan Krishna, and one Ramappa Rangappa. These were all related in an equal degree to Bala. The Assistant Judge has found that Bhagubai had not in 1889 by reason of her apostacy and incontinence lost her right to inherit to her son Bala—*Akora Suth* v. *Boreani*[1]; *Kojiyadu* v. *Lakshmi*[2]; *Advyapa* v. *Rudrava*[3]. No argument has been addressed to us upon this branch of the case. Upon the finding upon it the plaintiff cannot have any claim to the estate of

(1) (1868) 2 B. L. Rep., A. C. J., 199. (2) (1881) 5 Mad., 149.
(3) (1879) 4 Bom., 104.

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Shankar except as an adopted son or under the terms of the deed (Exhibit A).

Before considering the plaintiff's claim based upon the above grounds it is necessary to refer to the question of *res judicata* which has been argued before us, but which by the Assistant Judge was decided against the defendants. In 1885, the plaintiff sued (in Suit No. 804 of 1885) to recover two fields not now in suit from Krishnaji Chawdo, the father of the defendants Konher and Janardhan Krishnaji. In that suit it was held that though the plaintiff was not an adopted son of Shankar under the deed (Exhibit A), effect could be given to that deed as a deed of title or a deed of settlement, and the possession of the lands was decreed to the plaintiff (Exhibit 76). The reason for the finding was that as the deed passed in plaintiff's favour by Shankar could only be impeached by the natural son Bala, and as the deed provided that both Bala and the plaintiff should take Shankar's property equally, plaintiff became a trustee for Bala, and as trustee he could eject Krishnaji. I agree with the Assistant Judge that the issue as to adoption found against the plaintiff in that suit does not render the question of the adoption *res judicata* in this suit. The plaintiff succeeded in the former suit upon the deed and recovered possession of the two fields in suit. He could not have appealed from the decree which was in his favour, nor could he under the Code appeal from the finding upon the adoption issue which was against him. Upon that issue there cannot be said to have been a *final* decision. The decree in his favour was made in spite of the finding—see *Thakur Magundeo* v. *Thakur Mahadeo Singh*[1]. Mr. Scott contends that the finding in the former suit, that the plaintiff recovered possession as trustee for Bala, makes that question at all events *res judicata*. I think that this is not so. Bala was not a party to that suit, nor was Krishnaji sued as his heir. The finding of the Court as to the capacity in which the plaintiff recovered possession would not have been *res judicata* either for or against Bala, nor can it be used either for or against the defendants claiming to be heirs of Bala.

(1) (1891) 18 Cal., 647.

The main question is whether the plaintiff is the adopted son of Shankar. The answer to that question depends upon whether Bala was alive or dead at the date of the adoption. For the determination of it, in the absence of specific proof, recourse must, I think, be had to the Evidence Act—*Mazhar Ali* v. *Budh Singh*[1]; *Dharup Nath* v. *Gobind Saran*[2]; *Dhondo* v. *Ganesh*[3]. Having regard to the provisions contained in sections 107 and 108 of that Act the presumption is that Bala is now dead, but there is, I think, no presumption as to when he died. There is no presumption that he lived for seven years—*Dharup Nath* v. *Gobind Saran* (*supra*). The question is fully discussed in *In re Phene's Trusts*[4]. See *Hickman* v. *Upsall*[5]. If it is necessary to establish the exact date of his death he, upon whom the *onus* of establishing that date is cast, must establish it or otherwise he must fail. Now here the plaintiff is seeking to recover the property in suit as against the natural heirs of Shankar. He must, therefore, I am inclined to think, prove affirmatively that Bala was dead at the date of his adoption. He must show that Shankar was then sonless. This, in the opinion of the Assistant Judge, he has not done. It follows, I think, that he fails affirmatively to prove the adoption. It is quite impossible for this Court to determine whether the adoption was valid or not. The plaintiff cannot prove that it was valid; the defendant cannot prove that it was invalid. Under the particular circumstances of this case, I do not think that there is any presumption to be raised for or against the adoption. It is a question of *onus* of proof.

The next question arises upon the terms of the deed, Exhibit A. It is whether, in the events which have happened, the plaintiff takes the property of Shankar Subaji under the deed. This is a question of construction. The intention of Shankar must be gathered from the terms of the deed, and from the surrounding circumstances if there is room for doubt—*Fanindra Deb Raikat* v. *Rajeswar Dass*[6]. Here, apart from the character in which the gift was made to the plaintiff, it appears clearly that it was the inten-

(1) (1884) 7 All., 297.
(2) (1886) 8 All., 614.
(3) (1886) 11 Bom., 433.
(4) (1869) L. R. 5 Ch., 139.
(5) (1875) 20 Eq., 136.
(6) (1885) 12 I. A., 72 at p. 89.

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tion of the testator (the deed is, I think, in effect a will) that the plaintiff should take the whole estate in the event of Bala not returning. That cannot, I think, be doubted. Bala never has returned. The circumstances under which the testator desired that the plaintiff should become the owner of all his moveable and immoveable property have continued unaltered. It appears to me, therefore, that it lies upon the defendants to show that the testator was mistaken in his belief that his son Bala was dead and that he had adopted the plaintiff when he executed Exhibit A. The defendants say that the words of gift contained in the document—for they are, I think, words of gift—are inoperative because the testator had not validly adopted the plaintiff and only supposed that he had done so, but admittedly they cannot prove anything of the sort. In all probability the child Bala was dead when the document was executed. In the Privy Council case above referred to, it was established that the adoption was invalid, but here nothing is established. So far as we know, the circumstances under which the old man executed the deed were exactly as he supposed them to be. I think that the plaintiff can claim the property under the terms of the deed executed in his favour.

To prevent misapprehension I should add that my judgment on this point is based upon the proposition that where a deed of gift or will confers an estate upon a named person because he fills, or by reason of his filling, a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character which is the reason of the gift, lies, in my opinion, upon those who dispute his claim. The whole question is, in my opinion, one of *onus* of proof. I have not found any direct authority sanctioning the above view. It is, I think, supported by the judgments in *In re Corbishley's Trusts*[1]. It may be that, if the defendants could show that the plaintiff was not the adopted son of Shankar, they ought to succeed.

The defendants, however, contend that as the property was ancestral, Shankar had no power to deal with it to the detriment of his son Bala. It is somewhat difficult to see how this objec-

(1) (1880) 14 Ch. D., 846.

tion is open to them. They profess to make it as the heirs or some of the heirs of Bala, but they are, for the reasons already assigned, unable to prove that they are the heirs of Bala or that Shankar was not his heir. In this respect the case somewhat closely resembles that of *In re Green's Settlement*(1). If they cannot prove that they are the heirs of Bala, the objection can only be made by them as reversioners after the death of Bhagubai entitled to the estate of Shankar or as persons in possession without title. In the former capacity they clearly cannot take the exception. In so far as they are concerned, Shankar could dispose of his property as he chose. I also think that as trespassers it is not competent for them to say that Shankar's conveyance is invalid. If Bala had survived and objected to it, doubtless he could have avoided it, but until avoided the settlement of the property by Shankar upon the plaintiff appears to me to confer title upon the latter.

I have, it will be observed, rested my decision to some extent upon English precedents. I have done so, not because they are binding as authorities, but because they appear to me to be founded on reason.

The plaintiff appears to me in all human probability to be the person legally entitled to the property of Shankar under what may be fairly termed his will. There is no rule of law, that I am aware of, which compels me to decide this appeal contrary to the probabilities of the case, or to defeat the clearly expressed wishes of Shankar Subaji. I would, therefore, reverse the decree of the Assistant Judge and restore that of the Subordinate Judge with costs throughout on the respondents.

CANDY, J. :—It is clear that plaintiff can only recover as the validly adopted son of Shankar, or as donee from Shankar by the deed A. With regard to the adoption it is a condition precedent that Shankar should have been without issue at the time of the adoption—Mayne, Section 97. The *onus* is on plaintiff, who before he can succeed must establish his title. It is for him to show when Bala died. It may be presumed that Bala is dead. But there is no presumption that Bala was dead in 1878.

(1) (1865) 1 Eq., 288.

Therefore, in the absence of any evidence on the point, it is impossible to say when Bala died, and so it is impossible for plaintiff to prove that his adoption was valid.

Next, as to plaintiff's title as donee. The Assistant Judge, F. P., found as a fact that Shankar intended to give the estate to plaintiff as his adopted son capable of inheriting by virtue of his adoption. This is a finding of fact and binding on us—*Dyami Naik* v. *Lingappa*[1]. The question then arises whether the adoption was invalid. If it was, then the deed of gift had no effect on the property—*Fanindra Deb Raikat* v. *Rajeswar Das*[2]. Here the *onus* is on defendants. They must show that Bala was alive at the time of the adoption. Sections 107, 108 of the Evidence Act relate to the question whether a man *is* alive or dead. On this point there is in the present case no doubt. Bala has never been heard of since his disappearance in 1877 : therefore the burden of proving that he is alive is shifted to the person who affirms it. That burden admittedly is not discharged. But the question here is whether Bala is proved to have been alive in 1878. Mr. Field in his notes to sections 107, 108 of the Evidence Act quotes Taylor, section 157, showing that though death is to be presumed after a certain interval, there is no presumption as to the time of death, and, therefore, if any one has to establish the precise period during these seven years at which the person died, he must do so by evidence, and can neither rely on the one hand upon the presumption of death, nor on the other upon the presumption of the continuance of life.

This is really what was ruled in *In re Phene's Trusts*[3], which laid down that, if a person has not been heard of for seven years, there is a presumption of law that he is dead ; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that

(1) P. J., for 1889, p. 37. (2) (1884) 11 Cal., 463.
(3) (1869) L. R. 5 Ch., 139.

a person alive and in health on a certain day was alive a short time afterwards.

In my opinion, sections 107, 108 of the Evidence Act have made no difference in this statement of the law. In the present case if it were possible to draw an inference of fact, I should say that the little boy Bala, aged eight years, who ran away from home in 1877 must in all probability have died before September, 1878. There is no presumption in law that because he was alive in 1877, therefore he was alive in 1878. In this view of the case, defendants cannot, in my opinion, successfully contest plaintiff's claim under the document A; and plaintiff, therefore, is entitled to have the decree of the Assistant Judge reversed and that of the Subordinate Judge restored.

Decree reversed.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

FAKIRGAUDA (ORIGINAL PLAINTIFF), APPELLANT, v. GANGI (ORIGINAL DEFENDANT), RESPONDENT.*

1898. *April 22.*

Husband and wife—Suit for possession of wife—Wife herself defendant—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 35—Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), Sec. 23.

Where a husband sued to recover possession of his wife, making the wife herself the defendant to the suit,

Held, it was in substance a suit for the restitution of conjugal rights, and article 35 of the Limitation Act (XV of 1877) applied.

The demand and refusal, which form the starting point for limitation under article 35, are a demand by the husband and refusal by the wife (or *vice versâ*) being of full age.

A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.

Quære—Whether in case of a refusal by a wife of full age to a demand made by her husband, that she should return to him, a suit by him for her recovery is barred under article 35 of Schedule II of the Limitation Act (XV of 1877), or falls within the purview of section 23 as based on a continuing cause of action?

* Second Appeal, No. 950 of 1897.