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v. *Rámasvami*[1], held that idiotcy to disqualify must be congenital. And, as we have pointed out, the Mahadaviya, which is of high authority in Madras, quotes the text of Manu, Ch. IX., pl. 201, without any mark of dissent or disapprobation.

In *Vallabhrám* v. *Bái Hariganga*[2] it has been ruled that dumbness, to disqualify for inheritance, must be congenital, and accordingly the Court directed an issue as to whether the widow, there claiming to inherit, had been dumb from her birth.

Upon the best consideration that we have been able to give to this question we are of opinion that there is a considerable preponderance of authority in favour of the conclusion that blindness, to cause exclusion from inheritance, must be congenital.

We, therefore, hold that Sakerbái's blindness did not prevent her from inheriting the property of her husband Gokaldás Vithaldás on his decease upon the 24th August 1873.

The other questions in this case will now be disposed of by my brother Sargent on behalf of us both.

SARGENT, J., then delivered the judgment of the Appellate Court on the questions of fact; and the will of Sakerbái having been found to be a genuine document, and its execution not to have been procured by fraud or undue influence, the decree of the Court below was reversed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 305 *of* 1875.

February 2.

VALA'JI ISA'JI AND OTHERS (PLAINTIFFS AND APPELLANTS) *v.* THOMAS (DEFENDANT AND RESPONDENT).

Registration Act VIII. of 1871, *Section* 17, *Clauses* 2 *and* 3; *Section* 18, *Clause* 7—*Acknowledgment of receipt of consideration.*

J. T. passed a writing to V., under date the 28th April 1874, stipulating that the deed of sale of J. T.'s bungalow to V., for Rs. 4,300, which was to have been made that day, owing to certain circumstances therein mentioned, should be made and delivered by J. T. to V. 20 days thereafter. The writing further acknowledged the receipt, by J. T. from V., of Rs. 100 as earnest money for the purchase

(1) 1 Mad. H. C. Rep. 214. (2) 4 Bom. H. C. Rep. 135 A. C. J.

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of the bungalow, and concluded with certain penalties in the event of a default by either party. In a suit in the nature of a suit for specific performance, brought by V. to compel J. T. to execute the deed of sale to V., and to register the same as promised in the writing of the 28th April 1874,

Held that the writing required registration under Act VIII. of 1871, Section 17, Clauses 2 and 3, as it distinctly acknowledged the receipt of Rs. 100 as part of the consideration for sale of the house to the plaintiff for the sum of Rs. 4,300, and operated to create an interest in the house of the value of Rs. 100 and upwards.

Máhád v. *Dari*(1) approved and followed.

Jusab Haji Jafar v. *Haji Gul Mahamad*(2), *Hargovandas* v. *Balkrishna*(3), and *Kedarnath Dutt* v. *Shamlal Khettry*(4) distinguished.

THIS was a special appeal from the decision of W. H. Crowe, Assistant Judge at Puna, in appeal No. 55 of 1875, reversing the decree of the Subordinate Judge at Puna in Original Suit No. 742 of 1874.

The facts of the case are briefly these:—Valáji and his two brothers brought this suit against Julia Thomas, and prayed for a decree that, according to the terms of a writing (No. 21) passed by the said Julia Thomas to the plaintiffs on the 28th April 1874, she should be compelled to execute, in favour of the plaintiffs, a deed of sale of a certain bungalow described in the writing, and to register the same. The instrument (No. 21) on which the suit was brought, is fully set out in the judgment of the High Court. The defendant, among other objections, pleaded that the instrument required registration under Act VIII. of 1871, and that as it was not admissible in evidence under Section 49 of the Act for want of registration, the suit was not maintainable. The Subordinate Judge passed a decree in the plaintiff's favour. The Assistant Judge, however, reversed that decree in appeal, on the ground that the document had not been registered as required by Section 17, Clauses 2 and 3, of the Registration Act 1871. The following are his reasons:—

"Exhibit No. 21, the instrument on which the plaintiff has sued, is an agreement passed by the defendant to execute a deed of sale to the plaintiff in respect of a certain house for the sum of Rs. 4,300, and acknowledging the receipt of Rs. 100 as

(1) S. A. No. 420 of 1874. See *infra* p. 196 and note *ibidem*.

(2) 12 Bom. H. C. Rep. 175.

(3) Mentioned in the course of the judgment in *Jivandas* v. *Framji*, 7 Bom. H. C. Rep. 45 O. C. J.; see p. 67.

(4) 11 Beng. L. R. 405.

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earnest money. Act VIII. of 1871, Section 17, Clauses 2 and 3, requires certain documents creating, assigning, or limiting an interest in immoveable property, or acknowledging the payment of any consideration of the value of Rs. 100 and upwards, to be registered, and Section 49 of the Act lays down that no document required by Section 17 to be registered, shall be receivable in evidence, unless duly registered. The question here is, whether the present document falls within the description given in Clauses 2 and 3 of Section 17, and I am of opinion that it does. I can see no difference between this case and that of *Futteh Chund Sahu* v. *Leelumber Singh*, reported in 14 Moore's Ind. Ap. 129. Exhibit No. 21 is an agreement to execute a deed of absolute sale. It further acknowledges the receipt of Rs. 100 as part of the purchase money Rs. 4,300, and it prescribes certain consequences in the event of either party failing to carry out the contract. It appears to me that it would operate in equity as a sale of the property, and, if duly registered, would have been sufficient for the party claiming under it to have sued on it for specific performance. If this document be taken off the record, there remains no foundation for the plaintiffs' suit. I must, therefore, reverse the decree of the Lower Court, and dismiss the plaintiffs' claim with all costs."

In special appeal the only question argued, was whether Exhibit No. 21 required registration.

The special appeal was argued before WESTROPP, C. J., and MELVILL, J.

Scoble (Advocate General), with him *Bamanji Pherozesha*, for the appellants :—Exhibit No. 21 is an agreement, and falls within Section 18, Clause 7, of Act VIII. of 1871. It ought not to be considered as the contract itself, but only a memorandum from which a contract may be inferred. It distinctly states that a deed of sale was to be made and delivered in future. This case, therefore, exactly falls within the rule laid down by Sir Charles Sargent in *Jusub Haji Jafar* v. *Haji Gul Mahamad*[1]. That case fully supports the plaintiffs' contention. It was followed by Green, J., in another suit, No. 412 of 1875, decided on the Original Side on

(1) 12 Bom. H. C. Rep. 175.

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the 18th December 1875. No. 21 was merely preliminary to the main contract, which was to be executed subsequently, as appears from the writing itself. This view is supported by Bayley, J., in *Jivandas* v. *Framji*(1), and by Couch, C. J., in *Kedarnath Dutt* v. *Shamlal Khettry*(2). This case differs from the Privy Council ruling in *Futteh Chund Sahu* v. *Leelumber Singh*(3). In that case the whole consideration money was paid, and its receipt acknowledged in the unregistered agreement sued upon.

Marriott (with him *Shántárám Náráyan*) for the respondent:—This case is entirely governed by the Privy Council ruling just referred to. No. 21 is a contract itself, as it fixes the price and mentions the fact of the sale. It was a sale in equity. The writing, therefore, falls under Section 17, Clauses 2 and 3, because it acknowledges the receipt of Rs. 100 as part of the consideration money agreed between the parties. In *Kedarnath Dutt* v. *Shamlal Khettry*(4) the question was whether the writing itself was the contract, or whether it was evidence of facts which constituted the contract. The decision of Green, J., in the case cited, is based on the same principle. This case is similar to *Máhád* v. *Dári*(5). The learned counsel also referred to *Joyram Gossain* v. *Kali Narayan Roy*(6).

Scoble (Advocate General) in reply.

The judgment of the Court was delivered by

WESTROPP, C. J.:—The instrument in regard to which the present suit is brought, and the question of registration arises, is as follows:—

"Agreement paper, Tuesday the 12th of the month of Waisakh Shoodh, the Shak 1796, the year being called Bhav (28th April 1874), on that day to Valiji Esaji and brother, Boharas, residing at Bohara Lane in Camp, Sadar Bazaar, Poona. From Mrs. J. Thomas, Madam, residing in Lascar Pet, Staff Lane, Poona. I give this agreement paper in writing as follows:—There is my tiled bungalow, No. 2436, situated at East Street Lane. The agreement for the sale thereof to you by me for Rs. 4,300, four.

(1) 7 Bom. H. C. Rep. 45 O. C. J.; see p. 67. (2) 11 Beng. L. R. 405.
(3) 14 Moore Ind. Ap. 129; S. C. 9 Beng. L. R. 433. (4) 11 Beng. L. R. 405.
(5) S. A. No. 420 of 1874. (6) 20 Calc. W. R. 291 Civ. Rul.

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thousand three hundred, was to be made this day, but my creditor Balkrishna Sayapa has gone to Bombay. On his return after about (20) twenty days I will make and deliver a deed of sale in accordance with what is written above. Should I not make and deliver the deed of sale within that time, or on the return of the said person, I will make good whatever loss you may sustain. And Rs. (100) one hundred, which you have now paid as earnest, will be (considered) as forfeited if you do not buy (it). You shall have no claim thereto, and the said Rupees one hundred which you have paid I have received in ready cash in full; therefore it is not necessary to give a receipt for the same. I have duly given this agreement paper in writing in my sound mind and of my free will and accord. The 28th of the month of April in the Christian year 1874."

The Assistant Judge was of opinion, and in that opinion we concur, that this case is governed by the decision of the Judicial Committee of the Privy Council in *Futteh Chund Sahu* v. *Leelumber Singh Doss*(1). The only material difference between the two cases is, that in the Privy Council case the whole of the consideration for the sale had been paid, while in the present case there has been a payment of part of the consideration only. It does not appear to us that this difference affects the question of registration. The law applicable to the question is contained in Clauses (2) and (3) of Section 17 of Act VIII. of 1871, which renders registration of the following instruments compulsory, viz.:—

"Instruments (not being wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property" (Clause 2).

"Instruments (not being wills) which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest" (Clause 3).

In the present case the instrument (Exhibit No. 21) distinctly acknowledges the receipt of Rs. 100 as part of the consideration

(1) 14 Moore Ind. App. 129; S. C. 9 Beng. L. R. 433.

for the sale of a house to the plaintiff for the sum of Rs. 4,300. And we do not see how it is possible for the plaintiff to deny that the same instrument operates to create an interest in the house of the value of one hundred rupees and upwards. His claim is very unscientifically stated in his plaint, but we must take it to be of the nature of a bill by a purchaser for specific performance, and the very foundation of such a claim is that the contract between the parties did presently operate as a sale of the property. If it did so operate, the contract required registration. If it did not so operate, the plaintiff has no case.

The learned Advocate General, in his argument for the special appellant (the plaintiff), has relied on a decision of Sir Charles Sargent in Suit No. 229 of 1874, decided 9th March 1875[1]. The report of the judgment in that case, which has been submitted to us, is very meagre, and we are inclined to think that it does not correctly represent all that the learned Judge said. But it is sufficient for us to say that in that case the instrument in question had been executed, not by the intending vendor, but by the intending purchaser, and, of course, therefore, could not operate to create any right, title, or interest to, or in, the property to be sold. The case of *Hargovandas Girdharlal* v. *Balkrishna Kanoba* (which was a suit against a purchaser), referred to at page 67, Vol. VII, Bombay H. C. Reports (O. C. J.), would (so far as we can gather from what is there said of it) appear to have been a case of similar nature.

The case of *Kedarnath Dutt* v. *Shamlal Khettry*[2] also relied on by the learned Advocate General, has no real bearing on the present case. That was the case of an equitable mortgage by deposit of title-deeds; and it was held that a subsequent memorandum, which was "not the contract for the mortgage nor the agreement to give a mortgage", did not require registration.

(1) *Jusab Haji Jafar* v. *Haji Gul Muhammad*, 12 Bom. H. C. Rep. 175. See also the case of *Currie* v. *Mutu Ramen Chetty* (3 Beng. L. R. A. C. 126) there cited, *Asgur Ali Shikdar* v. *Mothoora Nath Ghose* (15 Calc. W. R. 354 Civ. Rul.) following this latter case, and *Cowar Rajkumar Roy* v. *Cowar Kalikrishna Roy* (7 Beng. L. R. at pp. 204-5). These three cases were not referred to in *Futteh Chund Sahu's* case, but the decision of the Privy Council in that case seems to overrule them.

(2) 11 Beng. L. R. 405.

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The judgment of this Court (Westropp, C. J., and Kemball, J.) in Special Appeal No. 420 of 1874, decided 13th October 1875[1], supports the view which we take of the present question. The reasons for that judgment are thus stated: "This Court is of opinion that the *yádi* (receipt, Exhibit No. 9) of the 18th April 1872 being unregistered was by Section 17, Clauses 2 and 3, and Section 49 of Act VIII. of 1871 inadmissible in evidence. If authority for this proposition were needed, we have it in *Futteh Chund Sahu* v. *Leelumber Singh Doss*[2], decided on the similar sections of Act XX. of 1866. That exhibit (No. 9) was produced, not for the mere purpose of showing a payment, but of defending the title of Bhágai to possession of the land. The effect of the payment and acceptance of part of the consideration for the sale of the land to her, would be to give her an equitable estate in the land, and to leave to the plaintiff only a lien for that portion of the purchase money which still remained due to him. The sum of Rs. 483 (the details of which are given) is stated in the *yádi* (Exhibit No. 9) to have been paid to the plaintiff on account of the sale by him to her of the land. It is unnecessary for us to say whether, if this were merely a suit by the plaintiff for the whole amount of the purchase money, the defendant Bhágai might, in proof of a part payment, give the receipt in evidence, and we do not now give any opinion on that point. It is enough to say that in a suit to recover possession of land, such as this is, the defendant cannot defend her title or possession by such a document, unless it be registered."[3]

For these reasons we are of opinion that it has been rightly decided by the Assistant Judge that Exhibit No. 21 required registration; and, as the Assistant Judge states, as a fact, that, if this document be taken off the record, there remains no founda-

(1) The case referred to is that of *Máhád bin Dándpa* v. *Dári bin Bálee and others*. The facts were shortly as follows:—The plaintiff sued to recover possession of certain land from Bhágai, one of the defendants. She pleaded that he had sold the land to her, and in support of this plea tendered in evidence a "*yadi*", or memorandum, purporting to be executed by him to her, reciting the sale, and acknowledging the receipt of Rs. 483 in part payment of the price. This *yadi* bore a one-anna receipt stamp, and was not registered.

(2) 14 Moore Ind. Ap. 129.

(3) See *Máhádaji* v. *Vyankaji*, *infra*, p. 197.

tion for the plaintiff's suit; and, as this fact has not been disputed before us, we confirm the Assistant Judge's decree with costs on the special appellant.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 113 *of* 1875.

MA'HA'DA'JI, SON AND HEIR OF VITHAL VISHWANATH DESAI (ORIGINAL DEFENDANT No. 1, SPECIAL APPELLANT) *v.* VYANKAJI GOVIND (ORIGINAL PLAINTIFF, SPECIAL RESPONDENT).

March 16.

Registration—Memorandum—Receipt—Section 17 (*Clauses* 2 *and* 3) *and Section* 49 *of Act XX. of* 1866 *and Act VIII. of* 1871—*Evidence—Practice—Special Appeal—Point not taken in either of the Lower Courts.*

A document purporting to have been passed by a mortgagee to his mortgagor and reciting the demand of the former for repayment of his mortgage money before the due date of the mortgage, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property; and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee; and purporting, in conclusion, to contain a declaration by the original mortgagee that nothing remained due to him in respect of his mortgage, is a document which, under Clauses 2 and 3 of Section 17 of Act XX. of 1866 as well as under Clauses 2 and 3 of Section 17 of Act VIII. of 1871, requires registration, and, if unregistered, is by Section 49 of the same two Acts inadmissible as evidence of any transaction affecting any property comprised therein.

The fact of the extinction of the original mortgagee's lien may, however, be proved by other documentary or proper oral evidence.

A point not taken in either of the Lower Courts was disallowed as being too late when taken for the first time at the hearing of the special appeal.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge of Ratnágiri, in appeal No. 161 of 1874, reversing the decree of the 1st class Subordinate Judge's Court at Ratnágiri.

The plaintiff sued as the purchaser, under a deed (Exhibit 3) dated the 13th September 1871, of the interest of one Kazi Muhammad, who was the mortgagee, under a mortgage, dated 24th April 1868 (Exhibit 4), of a *thikán*, the property of the first defendant Vithal Vishvanáth Desai. The mortgage was for six years from the date of the mortgage deed, and to secure Rs. 350. The plaintiff, alleging that the defendants had dispossessed his vendor before the sale to himself, sought to be established in