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was not a service of that order. Much less were the previous notices so served as to make the defendant subject to the final order.

For these reasons, and as the English Courts abnegate the function of inquiring into the sufficiency of notice, I am obliged to make the inquiry, and I find that the notice to the defendant and the balance order of the 5th June, 1879, were not served either as a summons in a suit or according to the order made under the Indian Joint Stock Companies Act which follows that under the English statute which I have already referred to. [232] The obligation to obey the command of the Court of Chancery has not arisen as against the defendant, and the foundation of the present suit fails. Taking the issues 2 and 3, as from the arguments they were meant to be taken, in the sense of questions as to whether the Court of Chancery had so called the defendant before it as to enable it in his absence to pronounce a definitive order against him, and had exercised this power so as to bind him in the Court of his domicile, I must find in favour of the defendant, although he was included in the order of the Court of Chancery. There are inaccuracies of expression in the issues, and I have at the last stage modified them, with the consent of counsel for the plaintiffs, so as to state more neatly the points actually in contravency. The real question was, whether the Court of Chancery, exercising as to the subject-matter an undoubted jurisdiction, had made an order without an essential preliminary condition of its binding the defendant in this case having been satisfied. The Court of Chancery had jurisdiction of the matter and could have concluded it; but in finding that the notices were not sufficient to make the balance order of the 5th June, 1879, binding on the defendant as a contributory, I exercise a function necessary to prevent injustice through the action of this Court, and one which the English Court intends to be used in the proper cases to prevent unqualified effect being given to its own apparently final orders.

I reject the claim with costs.

Attorneys for the plaintiffs—Messrs. *Tobin and Roughton*.

Attorney for the defendant—Mr. *Shamrao Pandurang*.

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*Before Mr. Justice West.*

SAKHARAM KRISHNAJI AND ANOTHER, (*Plaintiffs*) v. MADAN  
KRISHNAJI AND THREE OTHERS, (*Defendants*).\*  
[17th, 19th, 21st, 22nd and 24th March, 1881.]

*Evidence—Registration Act III of 1877, ss. 17, 49, Clauses (b) & (c)—Unregistered document—Document to contradict witness—Meaning of word “declare” in s. 17 of Act III of 1877—Acknowledgment, necessity for registration of.*

S and R sued their brothers M and V in 1880 for partition of the family property. The defendants pleaded that the property had been partitioned [233] in 1870, and that the various members of the family had been ever since in possession and enjoyment of their respective shares. At the hearing a document was produced by the defendant M, dated the 13th January 1877, which was proved to have been signed by his three brothers, S, R and V, on the occasion of M's effecting a mortgage of part of the property. This document contained the following words:—

“Our eldest brother M has built houses and is building new houses on property appertaining to his share . . . . To the same we three persons and our heirs and representatives have no interest of any kind whatever. If we or they should

\* Suit No. 418 of 1880.

prefer any claim, then the same is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind." This document had not been registered, and was, therefore, inadmissible as evidence of the alleged partition. In cross-examination of the plaintiff R, he was interrogated as to the circumstances under which the mortgage was made by M on the 13th January, 1877. He said: "I was present when the mortgage was made, but I was ill in bed. . . This was on the 13th January, 1877. . . I did not say on that day that I had no claim to the property." He was then shown the above document, and admitted his signature. The document was then tendered in evidence, not as a release, but to contradict the witness.

*Held*, that the document was admissible for that purpose, as it was not a document which itself declared a right in immovable property in the sense intended by s. 17 of the Registration Act III of 1877. It was an acknowledgment that there had, in time past, been a partition between the brothers who signed it and the defendant M, but it was not itself the instrument of partition.

That an acknowledgment of a partition is distinct from the instrument of partition, is to be gathered from cl. (c) of s. 17 of the Registration Act III of 1877. Had the terms of cl. (b) of that section been satisfied by a mere acknowledgment, cl. (c) would have been superfluous. Its operation is to require an acknowledgment in the form of a receipt to be registered, but not an acknowledgment in any other shape as distinguished from the instrument of the transaction.

The word "declare" in s. 17 of the Registration Act III of 1877 is to be taken in the same sense as the words "create, assign, &c.," used in the same section *viz.*, as implying a definite change of legal relation to the property by an expression of will embodied in the document referred to. It implies a declaration of will, not a mere statement of a fact, and thus a deed of partition which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. It is not the expression or declaration of will by which the right is constituted.

*Quære*, whether, if the above document were itself a release operating or intended to operate as a declared volition constituting or severing ownership, it could be received even for the purpose of contradicting a witness who had denied that he had previously made a statement inconsistent with his evidence.

[R., 21 B. 704 (707); 27 B. 452 (464); 9 Bom. L.R. 254 (257); 5 C.P.L.R. 102; 13 Ind. Cas. 500 (502); L.B.R. (1893-1900), 178; 48 P.R. 1905=33 P.L.R. 1905=51 P.W.R. 1905; D., 20 B. 553 (557); 24 B. 615 (618); 2 Bom. L.R. 800; L.B.R. (1893-1900), 34; P.L.R. 1900, 459.]

SUIT for partition.

[234] The plaintiffs (Sakharam and Ramchandra), who were the sons of Krishnaji Raghunath, sued their half-brothers (defendants Nos. 1 and 2) for partition of the family property.

Defendant No. 3 was the mother of the plaintiffs, and was friendly to their claim. Defendant No. 4 (Hormusji Ardesir Santuk) was a mortgagee of a large portion of the property which had been mortgaged to him in 1880 by defendant No. 1.

*Latham and Telang*, appeared for plaintiffs.

*Lang and Jardine*, appeared for defendant No. 1.

*Farran and Kirkpatrick*, for the mortgagee.

The other parties did not appear.

Defendants Nos. 1 and 2 resisted the plaintiffs' claim, and alleged that the property had been partitioned in 1870, during Krishnaji Raghunath's lifetime, among his four sons, who had ever since been in separate possession and enjoyment of the portions allotted to them. In proof of the partition, evidence was given at the hearing, on behalf of the defendants, that each of the brothers had dealt independently with portions of the property. It was proved that, in 1877, Madan Krishnaji (defendant

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1881 No. 1) had mortgaged a certain part of the land for his own purposes, and that on the occasion of this mortgage a document, in the following terms, had been signed by the other three brothers :—

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"This release paper is passed in writing on Saturday, the lunar date the 14th of Powsha Vadya, in the year of Shahlivan 1798, the name of the cyclical year being Dhatra, and the English date the 13th day of the month of January in the year 1877,—to Rajeshri Madan Krishnaji, residing at New Mazagon, by Vithoba Krishnaji, Sakharam Krishnaji and Ramchandra Krishnaji, residing at the place aforesaid. The cause of this release paper being passed in writing is as follows :—Our eldest brother Rajeshri Radan Krishnaji, has built houses, and is building new houses on the immoveable property appertaining to his share. Their numbers are 85, 84, 83, 81, 86. These houses have been built by him with his own property (money). To the same we three persons and our heirs and representatives have no interest of any kind whatever. If we (or they) should prefer any claim, then the same [235] is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind.

Vithoba Krishnaji,  
Sakharam Krishnaji,  
Ramchandra Krishnaji."

This document had never been registered, and was consequently inadmissible in evidence as a release. In cross-examination, however, the plaintiff Ramchandra was interrogated as to the circumstances under which the mortgage was made by his brother Madan in 1877. He said : "I was present when the mortgage was made, but I was ill in bed. This was on the 13th January, 1877. . . . I did not say on that day that I had no claim to the property."

He was then shown the above document, and admitted his signature. Thereupon counsel for the defendant tendered the document in evidence, not as a release, but to contradict the witness, and it was admitted.

Subsequently, in giving judgment,

#### JUDGMENT.

WEST, J.—[With reference to the admission of the above document, said :—] There was a former mortgage by Madan in 1877—. To what property that, extended, is not shown ; but a paper was on that occasion signed by which Ramchandra's present statement that he never admitted a partition having been made, is flatly contradicted. The testimony as to the signing of this paper is, like the rest, of an unsatisfactory character. Ramchandra says truly that he was ill, and suggests that pressure was put upon him when he hardly knew what he was about. Ananta and Laldas, if they could be quite relied on, refute this ; but they are inconsistent with each other, and Ananta contradicts a previous statement of his own. This much, however, is certain, that Ramchandra signed the paper ; that it could be read in a couple of minutes ; that he thought or knew that it was connected with important business. He says that, in fact, he thought he was becoming a surety. It was very unlikely he should sign the document without reading it ; and, as it admits a fair partition, it makes his present denial almost worthless.

[236] An objection was taken to the admission of the document as being a declaration of an interest in immoveable property of value of Rs. 7,000, and unregistered. The law in force in 1877, when it was executed, was Act III of 1877, and if this document were itself a release,

operating or intended to operate as a declared volition constituting or severing ownership, I should doubt whether it could be received even for the purpose of the contradiction of a witness that he had previously made a statement inconsistent with his deposition. What s. 49 says, however, is that no instrument required by s. 17 to be registered shall, if unregistered, be received as evidence of a transaction affecting such property. If tendered as evidence of an admission that such a transaction once occurred, it would not seem to be within the prohibition strictly construed; but still, as directly evidencing the transaction, it ought not, apparently, to be got in by the simple device of asking a question about the same matter. It would be practically impossible to sever its use as a contradiction from its use as direct testimony of the transaction recorded in it. Here, however, the document is not itself one which declares a right in immoveable property, in the sense probably intended by s. 17. There "declare" is placed along with "create", "assign", "limit", or "extinguish" a "right, title or interest," and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word "declare." It implies a declaration of will, not a mere statement of a fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. It does in one sense "declare" a right; that is, the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of will by which the right is constituted. Unless such a distinction as this were accepted, all correspondence would be excluded from which an admission might be gathered of a right or interest the instrument of which, if there was one, [237] would need to be registered. In the present case the paper is an acknowledgment that there has, in time past, been a partition between the brothers who signed it and the present defendant Madan. It is not in itself the instrument of partition; and that an acknowledgment of a partition is distinct from the instrument of partition, is to be gathered from s. 17, cl. (c) of the Act. Had the terms of cl. (b) been satisfied by a mere acknowledgment, cl. (c) would have been superfluous; its operation is to require an acknowledgment in the form of a receipt to be registered, but not an acknowledgment in any other shape as distinguished from the instrument of the transaction. Apart, therefore, from the document being applied only to the particular use of contradicting Ramchandra's assertion that he never admitted a partition, I think it is admissible, not as declaring his will and a right arising therefrom, but as admitting that there had formerly been such a transaction, and as such capable of contradiction which the instrument itself would not be.

Without resorting to this document, however, I should still be of opinion that Ramchandra's conduct had shown that he regarded himself as separated in interest from Madan. [His Lordship then proceeded to examine the evidence, and passed a decree for the defendants.]

Attorney for the plaintiffs.—Mr. *Shamrao Pandurang*.

Attorneys for defendant No. 1.—Messrs. *Balcrishna and Bhagwandas*.

Attorneys for *Hormusji Ardesir Santuk*.—Messrs.—*Ardesir and Hormusji*.

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