A similar objection raised by Mr. Ghanashám Nilkanth, on behalf of his client Bálájí, must be disposed of in the same way.

[His Lordship then proceeded to discuss the case on the merits, and ordered the acquittal of all the three accused persons.]

Convictions reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

BASA'WA' AND GURBASA'WA', HEIRS OF PARA'PA' (ORIGINAL DEFENDANTS), APPELLANTS v. KALKA'PA', SHARBA'NA' AND SIDOJI (ORIGINAL PLAINTIFFS, NOS. 1 AND 2, AND ORIGINAL DEFENDANT NO. 1), RESPONDENTS.*

December 10.

Registration—Act VIII. of 1871, *Section* 49—*Receipt—Release.*

Held that the Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below.

Held, also, that a document called a receipt, but intended to be used to prove the release of a claim secured by mortgage, required registration under section 49 of Act VIII. of 1871, inasmuch as it affected immoveable property.

THIS was an appeal from the decision of A. M. Cantem, Subordinate Judge, First Class, at Belgaum.

The plaintiffs sued to be put into possession of the village of Rámpur for twenty-five years under a mortgage executed to them by the first defendant Sidoji on the 6th of February 1873.

The second defendant Parápá, at the time of the institution of the suit, was in possession of the property under a decree obtained by him in a previous suit against Sidoji upon a mortgage executed by Sidoji to him in the name of one Basalingá. The plaintiffs alleged that this decree had been fraudulently and collusively obtained by Parápá, that Sidoji had, in the first instance, denied the claim made in that suit, and had produced a receipt for the payment of his debt, but had subsequently cancelled the power of attorney of the pleader through whom he had adduced the receipt, appointed another pleader, withdrawn his defence, and submitted to a decree. The plaintiffs in the present suit produced the receipt, and the Subordinate Judge, holding it to be proved, was of opinion that the decree, under which Parápá was in possession of

* Regular Appeal No. 22 of 1877.

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the property in question, was collusive, and gave judgment for plaintiffs. No objection to the admissibility of the receipt in evidence, on the ground of its not being registered, was raised in the lower Court.

Shántárám Náráyan for the appellants :—The document of 18th June 1873 is nominally called a receipt, but is really one which, if genuine, operates to extinguish a right. As such it must be registered, or it cannot be received in evidence in the case. This objection is raised here for the first time, but the Court is bound to entertain it under section 49 of Act IX. of 1871. If this document be excluded, there is no evidence to prove the collusion alleged.

Vishvanáth Náráyan Mandlik :—The document in question is called a receipt on the face of it, and the plaintiffs want to use it merely as a receipt. [WEST, J. :—If so, it cannot prove a release by Basalingá, and, therefore, is of no use in proving collusion between Parápá and Sidoji.]

WEST, J. :—When Kalkápá obtained from Sidoji the mortgage for Rs. 6,000 on which he now sues (No. 3, dated 6th February 1873), the mortgage of 1869 to Basalingá, representing Parápá, was still unsatisfied. It is referred to in exhibit No. 3, and the money, it is recited, is borrowed in part for the purpose of paying it off. Parápá subsequently, suing Sidoji to enforce his earlier lien, obtained a decree for possession on the 10th November 1873, under which he was put into possession on the 22nd December 1873.

Kalkápá has now come forward seeking possession on his mortgage; and he says that the decree in favour of Parápá was obtained by collusion with Sidoji, Parápá's claim having, in fact, been satisfied by an intermediate transaction of the 18th June 1873. To establish this transaction, Kalkápá put in evidence a document (No. 45) called a receipt, but intended, if authentic, to entirely release Parápá's claim, through Basalingá, under the mortgage of 1869. This instrument seems not to have been objected to below on the ground of its non-registration; but that objection having been taken before us, we have to consider whether it is open to the defendant Parápá at this stage, and whether it must be ad-

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mitted so as to exclude the document as evidence to be made use of in disposing of the case. On the first point, we are of opinion that we are bound to take notice, in regular appeal, of a positive invalidity of a document created by a statute, even though no objection may have been raised to its admission in the Court below. In the case of *Nixon* v. *The Albion Marine Insurance Company* (1) the Court declined to proceed on a case submitted to it, the document on which the claim rested being unstamped, though both parties were desirous of a decision. The interests of the revenue, the Court thought, required that they should, *suo motu*, notice the defect which came under their observation in the course of the inquiry. The bulwark against fraud, intended to be constituted by registration, is of as great public importance even as the interests of the revenue, and when we find that the Registration Act VIII. of 1871, section 49, says not only that a document requiring registration, but unregistered, shall not be received in evidence, but also that it shall not affect any immoveable property, we think that we could not, consistently with the law, allow it to count as a part of the materials on which we have to dispose of this case, supposing that registration was, indeed, indispensable to its validity.

On that point it has been urged by Mr. Mandlik that the document No. 45 is, *primâ facie*, a receipt, that his client Kalkápá wishes to employ it in no other character, and that as a receipt it did not need registration. But as a mere receipt for so much money, if it were, in truth, limited to that, it could not prove the release or extinguishment of any particular right over the property in dispute vested in Parápá by the mortgage. It could not, therefore, show that, in subsequently admitting Parápá's claim under that mortgage, Sidoji wilfully failed to assert his own rights. It was only if his mortgage was released that Parápá's claim to possession could be unfounded, or Sidoji's admission of it could be a fraud on Kalkápá. To prove that it had been released, the document No. 45, which is express to that effect, was put in, and that is exactly the use that was made of the document by the Subordinate Judge. In the case of *ex p. Mackay*, (2) Mellish, L.J., says of an agreement to execute a bill of sale: "No doubt, *quâ*

(1) L. R. 2 Ex. 338. (2) L. R. 8 Ch. App 643.

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agreement, it does not require registration; but, in my opinion, we ought to hold that an agreement to execute a bill of sale ought not to be held equivalent to an actual bill of sale in equity without involving the consequence that brings it within the Bills of Sale Act, and that, if it is not registered, the Court will look on it as invalid." This was followed in *ex p. Conning,*(1) and it is clear that the design of the Registration Acts would be entirely defeated if a document, introduced as of a kind not requiring registration, could then forthwith be employed for purposes which the law intends to be effected only by registered instruments. The observation of Lord Cottenham in *Evans* v. *Prothero,*(2) show that, in his opinion, a document which required a receipt stamp could not be used unstamped to prove either the payment of the money as an ultimate fact, or any remoter matter towards the proof of which the payment of the money would tend by way of inference. In a subsequent stage of the same case Lord St. Leonards(3) thought that, as evidence of an agreement referred to in it, the document would be admissible, but this would have been independently of the sense of the document as a receipt, and through words separable from those which constituted the acknowledgment. In the case now before us, the document No. 45 can have made the subsequent suit and admission collusive only by operating as an actual release; and operating or being meant to operate in that way, it required registration.

The case of *Futtehchund Sahoo* v. *Leelumber Singh*(4) strongly supports the view we take of this case. There an instrument acknowledging the receipt of money as consideration, not for an absolute conveyance, but for an agreement to execute a conveyance was held by the Judicial Committee, under circumstances of considerable hardship, to be inadmissible without registration as evidence of the transaction recorded in it. To the same effect is the case of *Valáji* v. *Thomas,*(5) and *Máhádáji* v. *Vyankáji*(6) is closely parallel to the present case. Westropp, C. J., says: "The object of the first defendant (appellant) in giving the instrument No. 17 in evidence, is to show that Kázi Muhammad's mortgage lien

(1) L. R. 16 Eq. 414.
(2) 20 L. J. Ch. 450.
(3) 21 L. J. Ch. 772.
(4) 14 Moore's Ind. Ap. 129.
(5) I. L. R. 1 Bom. 191.
(6) I. L. R. I Bom. 197.

on the land has been extinguished, and was so previously to the alleged transfer or assignment of that lien to the plaintiff;" and as the acknowledgment would have this operation, and it was proposed to use it for that purpose, the learned Chief Justice said that it was clearly "inadmissible for such a purpose." Although, therefore, the document No. 45 might conceivably be admissible for some purposes, it cannot, we think, be used to establish the fact which it was brought forward to prove; and the basis, on which the allegation of fraud and collusion rested, thus seems to us entirely to fail.

It is said, however, that the plaintiffs, had this document No. 45 not been admitted in the Court below, might have proved the alleged collusion by other testimony, and that they ought now to have an opportunity of bringing forward that testimony if it be procurable. But the charge against Parápá and Sidoji was one of collusion to defeat Kalkápá's mortgage lien, by a specified means, namely, the fraudulent withholding, by Sidoji, of the good defence which the document No. 45 afforded to him against Parápá's suit on his mortgage. If there was any other ground than this particular collusion on which Kalkápá's claim could be rested, he was bound to bring it forward: resting on the alleged collusion, he was bound to bring forward all the evidence of it that he thought might strengthen his case. A good deal of such evidence he has, in fact, brought forward, and we cannot doubt that if he had found additional testimony available, he would have made use of it. But we do not think that when a portion of the available evidence has been neglected by a party in reliance on a particular document, not in itself decisive of the issue, but only affording strong evidence bearing upon it, he can reasonably claim that this defect of judgment on his part should be remedied by a new trial of the same issue. The document No. 45 in this case, even if proved, was not necessarily decisive of the issue of collusion; the conduct of Parápá and Sidoji might admit of explanation; and Kalkápá ought to have brought forward, as, indeed, he probably did, all the confirmatory evidence that could be had. We cannot, therefore, remand the case; and as it is hardly contended that the decision of the Subordinate Judge can be supported on the evidence as it stands, we must reverse it, and reject the claim, with costs in both Courts on the plaintiffs.

Decree reversed with costs.