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once before us as untenable. It follows, from the remarks made above, that I am inclined to hold that no relief by injunction could be sought for against defendant No. 2 in this case. He is now acting in accordance with the decree of 1875; if the result of the present suit should be to render that decree void, there is nothing to show that the manager will not respect the second decree. He has all through this dispute acted in accordance with the statutory obligations. I doubt, therefore, whether the plaintiff is entitled to ask for an injunction against him. For similar reasons I doubt whether an injunction can, in the present suit, be granted against defendant No. 1. Even if plaintiff succeeds in obtaining a declaration that defendant Ganpatsing is not a member of the family, it does not follow that plaintiff can obtain an injunction restraining Ganpatsing from receiving maintenance in future; for, there is no reason to suppose that, in such a case, Ganpatsing would ever get the chance of receiving maintenance in future from this estate. But as my learned colleague is [404] strongly of opinion that even in the present circumstances an injunction against defendant No. 1, and perhaps against defendant No. 2 also, can be asked for in this plaint, I withdraw my objections, in order that we may at once concur in the order of remand, the only difference between us being as to the necessity of plaintiff being given the opportunity of amendment by adding a prayer for injunction. As such addition cannot prejudice the plaintiff's claim on the merits, I concur with the terms of the orders of remand.

Decree reversed and case remanded.

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14 B. 404.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Telang.

NARAYAN KHANDU KULKARNI (*Original Plaintiff*), *Appellant v.* KALGAUNDA BIRDAR PATEL (*Original Defendant*), *Respondent.**
[21st December, 1889.]

Vatandars' Act III of 1874, *s. 5—Alienation of service* vatan *land by the holder of it—Impeachment of such alienation by the alienor—Estoppel—Construction.*

The plaintiff, who was a *vatandar kulkarni*, sued to recover from the defendant possession of certain land with mesne profits, alleging that it was his service *vatan* land wrongfully taken possession of by the defendant in 1880. The defendant set up a mortgage of the land alleged to have been executed to the defendant by the plaintiff's mother in the plaintiff's name during his minority. Both the lower Courts found that the land was the plaintiff's *kulkarni vatan* land; that it had been mortgaged by the plaintiff's mother to the defendant for good consideration; and that the mortgage was binding on the plaintiff. On appeal by the plaintiff to the High Court.

Held, confirming the decree of the lower Court, that the plaintiff was estopped from denying his title to mortgage the field. The general rule being that the grantor cannot dispute with his grantee his right to alienate the land to him, the circumstances in the case did not justify a departure from the rule. The plaintiff, although an hereditary public officer, was not a trustee for the purposes of the Vatan Act, and it could not be presumed that the grantee knew that the plaintiff's guardian had not obtained the previous sanction of Government to

* Second Appeal, No. 319 of 1888.

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the mortgage. The plaintiff was, therefore, estopped from saying that the grant was forbidden by the Act.

Quare—whether s. 5 of the Vatandars' Act III of 1874 makes an alienation to a person outside the *vatandar* family void as between the grantor and grantee.

[F., 5 Bom. L.R. 652 ; R., 35 B. 507=13 Bom. L.R. 895=12 Ind. Cas. 387 ; 36 B. 510=14 Bom. L.R. 598=16 Ind. Cas. 570 ; 6 O.C. 331 (336) ; D., 28 M. 84=14 M.L.J. 468 .]

[405] SECOND appeal from a decision of A. D. Pollen, District Judge of Belgaum.

This was a suit by the plaintiff to recover a field in the village of Borgaum, in the Belgaum district, which the plaintiff alleged was his *kulkarni* service *vatan* land. He alleged that the land was his hereditary property ; that under Act III of 1874 it could not be aliened from the family of the *kulkarni vatandars*, and that the defendant had wrongfully taken possession of it in 1880 while the plaintiff was a minor. He, therefore, prayed that the land might be restored to him with mesne profits.

The defendant denied that he was in wrongful possession of the land, and alleged a mortgage of the land executed by the plaintiff's mother in the plaintiff's name on the 6th April, 1880, for a consideration of Rs. 2,200. He contended (*inter alia*) that the land, was not service land, but was private property, that full assessment was levied on it, and that the plaintiff's mother had full authority to mortgage it so as to bind the plaintiff.

Both the lower Courts found that the land was *kulkarni vatan* land, that the mortage effected by the plaintiff's mother was binding on the plaintiff, and that the plaintiff was estopped from contending that the land could not be alienated under Act III of 1874.

The plaintiff preferred a second appeal to the High Court.

Daji Abaji Khare, for the appellant.—Both the Courts have found that the land in dispute is service *vatan* land, and under the Vatandars' Act III of 1874 alienation of it is forbidden. Its alienation is void. It is land assigned for remuneration, and, as such, is inalienable—West and Buhler, (3rd ed.), 846. Sections 10 and 13 of the Vatan Act protect such property from attachment and sale on interference of the Collector. It cannot follow, then, that it is liable to sale if the Collector does not interfere. The alienation in the present case is *ab initio* void ; and the plaintiff is not estopped from impeaching it—*Fairtitle* v. *Gilbert* (1); *Doe dem Baggaley* v. *Hares* (2).

Mahadev Bhaskar Chaubal, for the respondent.—The Vatan Act declares an alienation of a *vatan* property void as between the [406] members of the *vatandar* family and also where it is not permitted by Government. It is not absolutely void. Section 9 of the Act gives power to the Collector to put a mortgagee of such land in possession of it and to allow him part of the profits. Full assessment is levied on the land, and for that reason it is no longer service land. Section 5 of the Act correctly interpreted bars alienation beyond the life of the alienor at the most, and if the mortgage be held not binding on the plaintiff, it is good during the lifetime of the plaintiff's mother. The transaction has been acquiesced in by the plaintiff. He cannot now impeach it. Under s. 65 of the Contract Act IX of 1872 any consideration received under a contract which is

(1) 2 T. R. 169.

(2) 4 B. & Ad. 435 (440).

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subsequently found void is to be returned to the party entitled to it. Here, if the alienation be held void, the respondent is entitled to have his money back. A grantor cannot impeach his own title to grant—*Doe dem Levy* v. *Horne* (1). The plaintiff, therefore, is estopped from impeaching the mortgage.

JUDGMENT.

SARGENT, C. J.—The plaintiff in this suit sought to recover a field alleged to be *kulkarni* service land, which his mother, whilst he was a minor, had mortgaged to the defendant by a bond dated 6th April, 1880. The Courts below have found that the land was *vatan* property of the *kulkarni vatan*, and also that the mortgage was one which, under the circumstances, the plaintiff's mother was competent to enter into, so as to bind the minor, and that the plaintiff was estopped from contending that the field being service *vatan* land could not be alienated to a stranger under the Vatandars' Act III of 1874.

Under ss. 19 and 20 of Reg. XVI of 1827 it was well settled that a grant of service *vatan* land by the holder of it was good as against himself—*Krishnarav Ganesh* v. *Rangrav* (2); *Ravlojirav bin Tamajirav* v. *Balvantrav Venkatesh* (3). The Vatandar Act of 1874 purports to declare and amend the existing law, and with the exception of s. 5, which forbids alienation of the *vatan* to any person not a *vatandar* is exclusively directed to arming the Collector with special powers for recovering [407] *vatan* lands which have been alienated and restoring them to the *vatan* and also for providing, as between the members of the family, for the efficient and regular performance of the service of the *vatan*. Such being the nature of the Act, and having regard to the law as it stood when the Act was passed, it may well be doubted whether s. 5 should be construed as making an alienation to a person outside the family void as between the grantor and grantee, although such alienation is doubtless made void as against the Collector, who, if he thinks proper, can at once invoke the aid of the Court, under ss. 9 and 10, to recover back the *vatan* property.

But, however this may be, we agree with the Court below that the plaintiff was estopped from denying his title to mortgage the field. The general rule, as stated by Lord Denman in *Doe dem Levy* v. *Horne* (1) is that "the grantor cannot dispute with his grantee his right to alienate the land to him." In *Fairtitle* v. *Gilbert* (4), which was referred to in that case, it had been laid down by Mr. Justice Ashhurst that the general rule did not apply where the grantors were trustees who were not acting for their own benefit, but for the benefit of the public, and, further, that, as it was a public Act of Parliament under which the trustees were acting, the Court was bound to take notice that the trustees had no power to execute the mortgage in question. Also in *Doe dem. Baggaley* v. *Hares* (5), Littledale, J., says: "I am inclined to think the trustees, acting in the execution of a public trust under an Act of Parliament, are not estopped from saying that this deed is not their own act." In *Doe dem Levy* v. *Horne*, Lord Denman, delivering the judgment of the Court, would appear to have doubted whether the public character of the grantor could affect the question of estoppel, but he pointed out that Mr. Justice Ashhurst's statement proceeded on the presumption that the contents of the Act were known to the contracting parties, but that, however that might be, there was no

(1) 3 Q. B. 760 (766). (2) 4 B. H. C. R. A. C. J. 1. (3) 5 B. 437.
(4) 2 T. R. 171. (5) 4 B. & Ad. 440.

presumption that the mortgagee knew the fact of a previous mortgage having been made, which by the act in that case prevented his suing in ejectment. Here the plaintiff, although an hereditary public officer, [408] is not a trustee for the purposes of the Vatan Act; and it certainly cannot be presumed that the grantee knew that the plaintiff's guardian had not obtained the previous sanction of Government to the mortgage.

We think, therefore, that the circumstances do not justify a departure from the general rule, and that the plaintiff, who has been found by the Court below to be bound by the mortgage executed by his mother in his name, was estopped from saying that his grant was forbidden by the act. We confirm, the decree, with costs.

Decree confirmed.

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14 B. 408.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

RAHMUBHOY HUBIBBHOY (*Original Defendant*), *Appellant v.* C. A. TURNER, OFFICIAL ASSIGNEE, AND ASSIGNEE OF THE ESTATE AND EFFECTS OF ALLADINBHOY HUBIBBOY, AN ADJUDGED INSOLVENT (*Original Plaintiff*), *Respondent.**

[24th, 30th, 31st January, 6th, 7th and 13th February, and 17th March, 1890.]

Limitation Act (*XV of* 1877), *s.* 18—*Fraud*—Res judicata—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 13—*Party for purpose of discovery only*—*Civil Procedure Code* (*Act XIV of* 1882), s. 43—*Judgment against joint wrong-doer.*

Prior to, and in the year 1865 the defendant's brother Alladinbhoy carried on an extensive business in Bombay and in China. The defendant and another brother (Ahmedbhoy) carried on a separate business under the name of Ahmedbhoy Hubibhoy. In December, 1866, Alladinbhoy became insolvent, and his property vested in the Official Assignee, The present suit was brought in 1887 against the defendant by the Official Assignee to recover certain property which he alleged belonged to the insolvent, and ought to be distributed among his creditors. The plaintiff alleged that in 1865 the insolvent was possessed of a very large amount of property, and that, being unwilling to meet his liabilities, he and his son, and his two brothers, *viz.*, Ahmedbhoy and the defendant Rahmubhoy, fraudulently concealed his property from his creditors, and in September, 1866, he himself went to Daman, beyond British jurisdiction. In 1881 the plaintiff, having obtained information that some of the insolvent's property was in the possession of his brother Ahmedbhoy, filed a suit (No. 473 of 1881) against Ahmedbhoy to recover it. That suit was referred to arbitration, and the plaintiff obtained a decree for Rs. 3,60,000. The plaintiff now alleged that, shortly before the hearing of that suit and subsequently, he had obtained information which led him to [409] believe that the defendant had obtained some of the insolvent's property for which he was accountable. The defendant had been made a party to the former suit No. 473 of 1881, for the purpose of discovery only, and it was in the course of such discovery being given that some of the above information had been obtained. The plaint then set forth, in detail, the various items of claim in respect of which the plaintiff sought to make the defendant liable.

The defendant pleaded (1) that the claims were barred by limitation; (2) that the said claims had been in issue in the former suit (No. 473 of 1881), and were adjudicated upon and that this suit was, therefore, barred by s. 13 of the Civil Procedure Code (Act XIV of 1882); (3) that the plaintiff was barred by s. 43

* Suit No. 89 of 1887; Appeal No. 640.