the parties could not give it jurisdiction. The Judicial Committee in the second of the above-mentioned cases at page 166 say: "It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard* v. *Bull*[1]".

Now we hold upon the words of section 32 of the Provincial Small Causes Courts Act that the exclusion of the jurisdiction of all Courts not vested with Small Cause Court powers is indicated in express terms, and the position of the appellate Court in Ahmedabad was that it was a Court where, in the words of the Judicial Committee, no jurisdiction existed.

We, therefore, set aside the decree of the lower appellate Court and restore that of the Second Class Subordinate Judge, but having regard to the conduct of the appellant we make no order as to costs.

Decree reversed.

G. B. R.

(1) (1886) L. R. 13 I. A. 134.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1909. October 6.

GANGABAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. BASWANT BIN BALLAPPA (ORIGINAL DEFENDANT), RESPONDENT.*

Regulation XVI of 1827—Transfer of Property Act (IV of 1882), section 43—Deshgat Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property—Mortgagee's claim to hold the property against the mortgagor's heir.

A mortgagee of Deshgat Vatan knew that the property which was mortgaged to him was land appurtenant to an hereditary office and inalienable beyond the

* First Appeal No. 75 of 1907.

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life-time of the incumbent. Subsequently to the mortgage the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. After the enlargement the mortgagee having claimed to hold the property against the heir of the mortgagor,

Held, that the mortgagee took only such estate as the holder of the Vatan property was capable of conveying to the mortgagee at the time of the mortgage and that the mortgagee could not claim to retain the property in virtue of the mortgage after the death of the mortgagor.

FIRST appeal from the decision of M. R. Nadkarni, First Class Subordinate Judge of Belgaum, in Suit No. 38 of 1902.

The plaintiff Hariharrav Nagnath, who died while the suit was pending in the Subordinate Judge's Court, sued to recover from the defendants possession of the land in dispute with arrears of rent and mesne profits, alleging that he held the land as mortgagee in possession and had let it out to defendant 1 under a rent-note and that the defendant held over the land after the termination of the tenancy.

Defendant 1 admitted the rent-note and stated that about a month after the execution of the rent-note the plaintiff told him that he had no right to the land and desired the defendant to attorn as tenant to one Mamad Isakh walad Gowaskhan Desai, that he accordingly executed a rent-note to Mamad Isakh and paid him rent every year, that the plaintiff fraudulently retained the rent-note executed in his favour by the defendant and that the defendant was not liable to the plaintiff for possession, rent or profits of the land.

Mamad Isakh being joined as defendant 2 on the contention of defendant 1 answered that the land in dispute was not mortgaged to the plaintiff and was never in his possession, that defendant 1 held a portion of the land as the yearly tenant of defendant 2 and that the plaintiff not having produced his mortgage-deed, nor having given any description of it in the plaint he was unable to say anything with regard to the alleged mortgage.

The Subordinate Judge found that the plaintiff was mortgagee of the land in suit and that he was not entitled to recover possession or the arrears of rent claimed. He, therefore, rejected the suit and directed the parties to bear their own costs.

In his judgment the Subordinate Judge made the following observations:—

The mortgage-deed, exhibit 190, and the exhibits 238, 239 and 240 from the Revenue records show that the plaint land is a part and parcel of the Deshgat Vatan of the second defendant's family. The mortgage, exhibit 190, was effected while sections 19 and 20 of Regulation XVI of 1827 were in force and therefore it was void after the death of the mortgagor, the second defendant's father, who died on the 29th June 1890 (*vide Kulu Narayan* v. *Hanmapa bin Bhimapa*, I. L. R., 5 Bombay, 435; *Ravlojirav* v. *Balvantrav*, I. L. R., 5 Bombay, 437; and *Padappa* v. *Swamirao*, I. L. R., 24 Bombay, 556). The Sanad is not forthcoming and from the endorsement, exhibit 238's original, it seems that on 21st of May 1894 a note was made on the Sanad in accordance with the Government Resolution No. 4277 of the 19th June 1890 to the effect that the said lands shall be continued for ever without increase of the land tax or Nazrana over the said fixed amount and without objection or question on the part of Government as to the rights of any rightful holders thereof whether such rights shall have accrued by inheritance, adoption, assignment or otherwise.

The mortgage, exhibit 190, ceased to be valid on the death of the second defendant's father, the mortgagor, in June 1890 as against the second defendant and the subsequent correction of the Sanad in 1894 by the addition of the note mentioned above cannot operate to render it valid beyond the mortgagor's life-time.

The representatives of the deceased plaintiff appealed.

Inverarity with *C. A. Rele* for the appellants (plaintiffs).

Raikes with *N. A. Shiveshvarkar* for the respondents (defendants).

The appeal was argued before Scott, C. J., and Heaton, J., and it was then contended on behalf of the appellants that the Subordinate Judge ought to have raised an issue as to whether the land in suit, though originally a Deshgat Vatan, continued to be so during the life-time of the mortgagor or whether and if so when it became alienable. The following issues were therefore referred for trial to the Subordinate Judge with liberty to the parties to adduce fresh evidence:—

"(1) Whether the mortgage was a subsisting mortgage of the plaint property after the death of the mortgagor?

(2) Whether the property ceased to be a Deshgat Vatan or inalienable beyond the life of the mortgagor in his life-time or if so, when?"

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The findings of the Subordinate Judge on both the above issues were in the affirmative. He held that the lands ceased to be inalienable from 1862 and that the mortgage was a subsisting mortgage after the death of the mortgagor for the following reasons :—

The mortgagor, who was owner in 1862, submitted an application (exhibit 260) to Government testifying his willingness to pay annas 3 in the rupee as Judi in consideration of the commutation of the right of service and in order that the Vatan may be continued permanently and that permission to adopt may for ever be granted.

Government began to levy Judi accordingly but a Sanad was at first issued in which there was the usual provision restricting alienation. He urged that he was entitled to the property free of any restriction. The matter went up to Government and the Legal Remembrancer has in his report (sanctioned and adopted by Government) given a full history of the case and gave his opinion that since 1862 Government treated the property as the private property of the man. Under orders (exhibit 262) from Government the Sanad originally tendered to the Vatandar was amended and the clause restricting alienation was dropped. The Sanad as it now reads does not contain any restriction against alienation.

It is urged for defendant No. 2 that the Sanad itself describes the property as Vatan and that it has been so treated in the records of Government (*vide* exhibit 239). As to this it appears that Government does not mean to say that the property has ceased to be Vatan, but by special agreement entered into in 1862 Government has removed the restriction against alienation. Government has the power to make such agreements under section 15 of Bombay Act III of 1874.

Reliance is placed on an order of the Deputy Collector (exhibit 258) ruling that the property could not be alienated beyond the life-time of the then holder. That order was, however, set aside by the Collector (exhibit 249).

Against the findings of the Subordinate Judge the respondents (defendants) preferred cross-objections.

D. A. Khare with *C. A. Rele* for the appellants (plaintiffs) :—The Subordinate Judge has returned his findings in our favour. Therefore the decree should be reversed and our claim for possession should be awarded with arrears of rent.

Robertson with *N. A. Shiveshvarkar* for respondent 2 (defendant 2) :—We have taken objections to the findings of the Subordinate Judge and we contend that those findings cannot

stand. The facts are all admitted and there now remains a question of law.

The mortgage was executed by defendant 2's father in the year 1850. What was then mortgaged was Deshgat Vatan. At the time of the transaction, sections 19 and 20 of Regulation XVI of 1827 were in force. They were repealed by the Hereditary Offices Act III of 1874. Therefore the mortgage which was effected while the provisions of the said regulation were in force, was void against the heir of the mortgagor: *Padapa* v. *Swamirao*[1], *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa*[2]. The mortgagor died on the 29th June 1890. Till then the mortgage was perfectly good under those provisions. It was on the death of the mortgagor that we could question the validity of the mortgage and the possession of the mortgagee began to run against us adversely from that time. But before the adverse possession could ripen into ownership, we got into possession and we have a right to tack it on to our title. The mortgagee cannot now question our right to such possession.

The Subordinate Judge held that the land, though originally inalienable, ceased to be so from 1862, and for that reason the mortgage continued to subsist after the death of the mortgagor. For his conclusion the Subordinate Judge has relied upon three things, namely (1) the application of defendant 2's father in the the year 1862, exhibit 260, (2) the report of the Legal Remembrancer on that application, and (3) the ultimate resolution passed by Government in the year 1890, a few days before the death of the mortgagor. We contend that the report of the Legal Remembrancer was not admissible in evidence and any finding based thereon is bad. Moreover, the construction which the Subordinate Judge has put on exhibit 260 is wrong. That application shows that our father did not ask that the Vatan should be made his absolute private property and the Government resolution granting the application says that a Sanad should be granted in the terms of the application.

Even assuming that exhibit 260 is capable of the construction put upon it and that the mortgaged property was subsequently

(1) (1900) 24 Bom. 556. (2) (1879) 5 Bom. 435.

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enlarged by the said resolution, still the mortgagee would not be entitled to that enlarged estate. In 1850, when the mortgage was effected, the mortgagee was aware that the land was inalienable beyond the life-time of the mortgagor under the provisions of Regulation XVI of 1827. He can get what he then contracted for and not more.

We further contend that our father's application, exhibit 260, and the Government resolution based thereon cannot validate what was in its inception void. The view taken by the Subordinate Judge is erroneous.

D. A. Khare, in reply:—We contend that the property mortgaged was not Vatan. The mortgage-deed does not describe it as such. Even assuming that the property was originally Vatan, we contend that on the application, exhibit 260, made by defendant 2's father, it was converted into private property. Therefore defendant 2 cannot now say that it still continues to be Vatan property. The opinion of the Legal Remembrancer is admissible. In construing a Sanad correspondence may be looked to: *Gulabdas Jugjivandas* v. *The Collector of Surat* (1); *Dosibai* v. *Ishwardas Jagjivandas*(2). The letter of the Legal Remembrancer forms part and parcel of the Government Resolution No. 4277 of the 19th June 1890, and the Sanad was issued in the terms of the resolution.

The findings recorded by the Subordinate Judge are correct. The enlargement is an accession to the mortgaged property and such accession enures to the benefit of the mortgagee. Long before defendant 2 was born, the estate was made transferable. The Sanad was accepted by the Nazir as the guardian of defendant 2 during his minority and this acceptance was not impugned by defendant 2 on his attaining majority.

The orders of the Revenue Courts holding that the property became the private property of the mortgagor and that the mortgage was binding on defendant 2 were not sought to be set aside, exhibit 249.

What is made void under the Regulation of 1827 is the alienation of the allowance attached to the Vatan: *Padapa*

(1) (1878) 3 Bom. 186 at p. 189. (2) (1885) 9 Bom. 561 at p. 567.

v. *Swamirao*[1] and *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa*[2] were not cases of settlement. The ruling in *Appaji Bapuji* v. *Keshav Shamrav*[3] lays down that a particular settlement may remove a restriction against alienation. In the present case there was a settlement of that description and it had the effect of making the previous alienation (mortgage) valid and binding on the heirs of the mortgagor.

SCOTT, C. J.:—The contest in this appeal is between the representatives of a mortgagee and the heir of a mortgagor.

The mortgage in question was of a certain Deshgat Vatan property effected in the year 1850 between the holder of the Vatan who was the father of the defendants and the person under whom the plaintiffs claim. The property mortgaged is described as *ámchi khásgat deshgati paiki jamin* (land out of our private Deshgat or property attached to our hereditary office). The mortgage being ostensibly of land attached to an hereditary office was under the rule enunciated in *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa*[2], approved of by the Privy Council in *Padapa* v. *Swamirao*[1], in its inception void against the heir of the mortgagor by reason of the provisions of Regulation XVI of 1827.

It is contended, however, on behalf of the mortgagee's representatives that by reason of a certain settlement effected between Government and the mortgagor subsequent to the year 1861, the estate of the mortgagor was enlarged into an estate similar to that of any owner of private property and that therefore the mortgagee's representatives are entitled to claim to hold the mortgaged property under the mortgage against the heir of the mortgagor. It is argued that the settlement which is evidenced by an application in the year 1862, a Government Resolution in the year 1890, and a Sanad in the year 1894 issued subsequent to the death of the mortgagor had the effect of converting the property into his absolute estate.

(1) (1900) 24 Bom. 556. (2) (1879) 5 Bom. 435.
(3) (1890) 15 Bom. 13.

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Without admitting that the interpretation sought to be put upon those documents on behalf of the appellants is correct, but assuming for the purpose of argument that it is so, we think that the altered position cannot affect the representative of the mortgagor. At the date of the mortgage in 1850, the mortgagee knew that the property which was being made over to him in mortgage was land appurtenant to an hereditary office. He knew or ought to have known that by reason of the provisions of the regulation of 1827, that land was inalienable beyond the life of the incumbent. He therefore cannot allege that he has any title by estoppel under which any enlarged estate coming to the mortgagor subsequent to the mortgage would enure to the benefit of the mortgagee, for a title by estoppel rests upon representation made by the grantor and acted upon by the grantee; see *Mussamat Udey Kunwar* v. *Mussamat Ladu* (1), and section 43 of the Transfer of Property Act. We hold therefore that the mortgagee took merely such estate as the holder of the Vatan property was capable of conveying to a mortgagee in 1850, and that being so he cannot claim to hold under the mortgage after the death of the mortgagor.

We affirm the decree of the lower Court with this variation that the plaintiffs do bear the costs throughout.

Decree affirmed.

G. B. R.

(1) (1890) 6 Ben. L. R. 283 at p. 291.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1909. *October 19.*

BAI DIVALI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHAH VISHNAV MANORDAS AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 33, Order XX, Rules 6 and 7—Administration suit—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Decree—Appeal.

In an administration suit the first Court recorded a finding on a substantial question of right between the parties and appointed receivers. The plaintiff

* Second Appeal No. 431 of 1909.