Special Appeal No. 291 *of* 1871.

1871.
Nov. 20.

VA'SUDEV DA'JI ....*Appellant.*
BA'BA'JI RA'NU ....*Respondent.*

Estoppel—Landlord and Tenant—Payment of Rent admitted—Tenant's Right to dispute Title of Landlord.

If the existence of a tenancy be established by the fact of the tenant's payment of rent to his landlord or otherwise, the tenant cannot ordinarily dispute the title of his landlord in a suit brought against him for recovery of possession. He must first give up possession, and then, if he has any title *aliunde*, that title may be tried in a suit of ejectment against the landlord.

THIS was a special appeal from the decision of R. F. Mactier, Judge of the District of Satárá, confirming the decree of the Munsif of A'sthá.

The plaintiff sued to recover a piece of land from the defendant, alleging that his agent, Gaṇesh, had let it on a lease for three years to the defendant, who, though the term mentioned in the lease had expired, refused to vacate. The plaintiff also alleged that his agent had sued the defendant in the Mámlatdár's Court for rent of the same piece of land on the identical lease, which was found proved, and had recovered judgment.

The defendant denied the plaintiff's title, and, asserting his own, alleged that the land had been mortgaged by his father to the father of the plaintiff in 1807, but released in 1852. He produced two cancelled mortgage-bonds in support of his allegation. In a deposition, however, given by him in the course of this suit, the defendant admitted that ever since the Mámlatdár's decree he paid rent regularly to the plaintiff.

The court of first instance rejected the claim, and the court of appeal arrived at the same conclusion. They both considered the evidence bearing on the genuineness of the plaintiff's lease unsatisfactory, and pronounced it to be a forgery.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Bahiravnáth Mangesh, for the special appellant:—The Mámlatdár's court was a court of competent and exclusive

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jurisdiction for the trial of rent-suits, in which it had to determine whether or not a contract of tenancy, expressed or implied, existed, and whether or not the defendant was the plaintiff's tenant: Reg. XVII. of 1827, Sec. XXXI., cl. 3; *Bái Mahálakshmi* v. *Andhyáru Keshavrám Narsirám* (a). Judgment of a court of exclusive jurisdiction directly upon the point is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose: *Duchess of Kingston's Case* (b). The judgment of the Mámlatdár obtained by Gaṇesh, about whose managership there was no dispute in the lower court, is such a judgment. It cannot be disputed in this, and is conclusive. The effect of not considering this conclusive is to allow the tenant to dispute his landlord's title, recognised by a judicial decree. He must first put an end to his tenancy by giving up possession, and then if he has any title *aliunde* have it tried in ejectment: *Doe d. Knight* v. *Lady Smythe* (c). The District Judge has, moreover, found that the defendant has not explained the fact of his having paid rent; and, as long as he has not done so, he cannot retain possession: *vide* Smith's L. C., Vol. II., pp. 757-759.

There was no appearance for the special respondent.

MELVILL, J.:—It is to be regretted that the respondent is not represented before us, but in his absence we are obliged to come to the conclusion that the decree in his favour cannot be sustained. There seems to have been no dispute in the court of first instance as to the authority of Gaṇesh to act as manager for Vásudev. In regard to the existence of a tenancy, we find that not only was a decree for rent made and enforced against the defendant by the Mámlatdár in 1863, but in his deposition given in the present suit in 1868 the defendant admits that he has ever since paid rent regularly to the plaintiff, and he offers no explanation whatever of his having done so. Without deciding positively what may be the legal effect of the Mámlatdár's decision, we think that the defendant is concluded by the unexplained

(a) 2 Bom. H. C. Rep. 185, 2nd ed.
(b) 2 Sm. L. Ca. 679 (6th edn.). (c) 4 M. and S. 347.

payment of rent from disputing the plaintiff's title in the present suit: *Cooper* v. *Blandy* (*d*), *Doe d. Marlow* v. *Wiggins* (*e*). The defendant must give up possession to the plaintiff, and then if he has any title *aliunde*, that title may be tried in a suit of ejectment brought by him against the present plaintiff: *Doe d. Knight* v. *Lady Smythe* (*f*).

The decrees of the courts below are reversed, and the claim allowed. Costs on the respondent throughout.

Decrees reversed.

Special Appeal No. 316 *of* 1871.

1871. Nov. 23.

DA'MODHAR TULJA'RA'M ....*Appellant.*
LALLU KHUSA'LDA'S ....*Respondent.*

Attachment of Property of third person—Action ex delicto—*Trespass.*

A judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly.

THIS was a special appeal from the decision of W. M. P. Coghlan, Judge of the District of Thánā, reversing the decree of the Subordinate Judge at Bassein.

The claim in the original suit was to recover damages on account of unlawful and wrongful detention by the defendant of the plaintiff's personal property, namely, a boat. The plaint set forth that the defendant wrongfully caused the plaintiff's boat to be attached in execution of his decree against one Degin; that the plaintiff had contracted to sell the boat to one Naoroji for Rs. 1,325, but that the plaintiff being unable, in consequence of the attachment, to deliver the boat to Naoroji within the stipulated time, the latter recovered damages from him for the delay; and that when the boat, on being released from attachment, was sold by a public sale, the price it fetched fell short of the price agreed upon by Naoroji by Rs. 510.

(*d*) 1 Bing. N. C. 45. (*e*) 4 Q. B. 367. (*f*) 4 M. & S. 347.