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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.

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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 Thán̤á, 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.

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The plaintiff estimated his damages as follows :—

Damages paid to Naoroji	Rs.	351	0 0
Loss at public sale	„	510	0 0
Interest at one per cent. on Rs. 1,325	„	138	10 0
	Rs.	999	10 0

The defendant, Lallu, answered that his judgment-debtor, and not the plaintiff, was the owner of the boat, and that he (Lallu) was not liable in damages.

The Subordinate Judge at Bassein found that the real loss sustained in consequence of the attachment amounted to Rs. 285, to which he decreed the plaintiff entitled. He also awarded interest.

Mr. Coghlan disallowed the entire claim, on the ground that no action lay. The following is an extract from his judgment :—"The defendant, Lallu Khusáldás, having obtained a decree of the court against his debtor, Degin, attached a boat in Degin's possession. It turned out afterwards that the boat at the time really belonged to the plaintiff, to whom on inquiry the court made it over. The boat had formerly been Degin's property. There is no allegation of malice, or that the defendant, Lallu, knew, or had reason to believe, that the boat was not still the property of Degin, as it had formerly been. The plaintiff may have suffered loss, but legally there has been no injury, the defendant's conduct having been that of a reasonable man carrying out a decree of a court in the usual manner."

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

Shántárám Náráyan, for the appellant :—The view of the lower appellate court as to the law of wrongs is erroneous. This was an action *ex delicto*. The tort alleged was a tort to personal property. This kind of tort is distinguished into two classes—torts to personalty in possession, and torts to personalty out of possession. In this case the lower court holds it to be an admitted fact that the judgment-creditor, Lallu Khusáldás, attached and seized the boat in his judgment-debtor Degin's possession, whereas exhibit No. 41—

which is a judgment between the present parties, passed when the special appellant applied for the removal of the attachment, and the recovery of the property, under Sec. 246 of the Code of Civil Procedure, and is, therefore, conclusive —shows that the contrary was the fact, namely, that the boat was in the possession of the special appellant. I am entitled to speak of the tort alleged in this case as of a tort to personalty *in possession*. Now the seizure of a boat caused to be made by Lallu, as the judgment-creditor of Degin, was clearly a trespass. It was a direct wrongful interference with property in possession, or, as Broom describes it (Commentaries, 3rd ed., p. 789), it was "a tort to personalty in the possession of the owner constituted by the wrongful deprivation of that possession." It was not at all necessary that there should be any malice, or any allegation of it, or any knowledge as to who was, or who was not, the owner. Apart from all malice, even an innocent person may be guilty of trespass, and liable to be sued for it—even madmen and infants having, in the eye of the law, no immunity from the consequences of a trespass. Nor, in accordance with the practice of all courts, was there any protection to the attaching creditor, or even to the Sheriff or the Názar, from the fact that the seizure was effected in the prosecution of a court's order in the execution of a decree. In England such actions are constantly brought against the Sheriff, and there is no reason why the person who procured the trespass at the hands of the officer who stands in the place of the Sheriff, namely, the Názar, should not be responsible for what he caused to be done.

Ráv Sáheb Vishvanáth Náráyan Mandlik, contrà :—The court below finds that the boat was in Degin's possession. Indeed it notes it as an admitted fact. If it was in Degin's possession, the judgment-creditor was quite justified in seizing it as the property of his judgment-debtor, Degin, although it afterwards proved to be the property of another, and was thereupon restored to that other, namely, the plaintiff in this case. There was no wrong here. The case of *Davies* v. *Jenkins* (*a*) shows that if the wrong man have been served

(*a*) 11 M. & W. 745.

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with the writ of summons, and sued as the defendant, much inconvenience and some pecuniary loss may thus be entailed upon the defendant, yet he has no remedy. This is a case of *bonâ fide* mistake in which no legal wrong is involved.

The judgment of the court was delivered by

MELVILL, J.:—We are unable to agree with the District Judge in holding that the plaintiff has no cause of action. We think that 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. We do not know that there has been any previous decision of this court on the subject, but it has been discussed at length and determined by the Calcutta Court in *Mussamut Subjan Bibi and others* v. *Sheikh Sariatulla* (*b*). We reverse the decree of the District Judge, and remand the case in order that it may be determined what damages the plaintiff has sustained: costs to follow final decision.

Decree reversed and case remanded.

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Special Appeal No. 358 *of* 1871.

BA'LKRISHNA' GOVIND GA'DGIL.....*Appellant.*

NA'RA'YAN SAKHA'RA'M *et al.* .....*Respondents.*

Mál *Land—Assessment—Survey—Forfeiture.*

A person who fails at the Survey to take up *mál* land, which he held without assessment before the Survey, and allows it to be taken up by another cultivator who pays the assessment upon it, must be held to have forfeited his claim to such land.

THIS was a special appeal from the decision of George Ayerst, Acting Assistant Judge at Thánâ, confirming the decree of the Munsif of Bhivadi.

The plaintiffs sued to prevent the defendants from obstructing them in their enjoyment of a piece of land, Survey No. 66, alleged to be the *mál* attached to a field called "Tullái."

(*b*) 3 Beng. L. R., A. J. 413.