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persons and property of other people from illegal violence. The case is not one to which chapter 9 of the Code of Criminal Procedure (X of 1882) applies for the protection of the soldier, who, in dispersing an unlawful assembly, acts in obedience to an order which under military law he is bound to obey. It is unnecessary to consider the case of a soldier who, acting on such an order, obstructs a civil officer, *whom he knows to be such* in the execution of his duty in ordinary times of quiet. In the present case there was no criminal intention, the kick was a mild and bloodless means of acting up to the military order, and it is found that the accused did not know who the chief constable was, and it is not found that he ought under all the circumstances to have guessed it. I have no doubt that, if the chief constable had not been an official, the soldier would, under our ordinary law, have committed no offence in obstructing and, if necessary, kicking him if he (the soldier) in good faith thought that the man forcing his way through the guard was, in so doing, removing the protection placed by the presence of the guard on the property. The kick would be justified under s. 81 of the Penal Code (XLV of 1860) as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle that the man is excused by that section who in a great fire pulls down other people's houses to prevent the conflagration from spreading. As Bostan did not know the official character of the chief constable, and this ignorance was a mistake of fact, not of law, he must be dealt with as if the chief constable were an ordinary citizen; and the District Magistrate of Ahmednagar is right in his view of the law that the conviction and sentence are wrong. We now quash the conviction and sentence.

Conviction quashed.

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[629] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

AJIBAL NARASINHA HEGDE AND ANOTHER (*Original Defendants*), *Appellants v.* SHIREKOLI TIMAPA HEGDE (*Original Plaintiff*) *Respondent.** [25th August, 1892.]

Civil Procedure Code (XIV of 1882), s. 282—Order in attachment proceeding, effect of—Judgment-debtor not necessarily a party to the investigation under an attachment proceeding.

The plaintiff obtained a decree. The defendants appealed. At the hearing of the appeal in the District Court a question was raised as to whether the defendants were not barred by limitation from denying the genuineness and validity of the lease and mortgage, they having failed to do so in certain execution proceedings which had taken place in 1890. It appeared that in execution of a decree against the father and the uncle of the defendants these lands had been attached. The plaintiff on that occasion had intervened, and set up his mortgage and lease which he produced. They were then held to be proved, and the lands were ordered to be sold subject to the plaintiff's mortgage. Upon these facts the District Judge held that by the attachment of their lands in these execution proceedings the defendants had been subrogated either to the cause of the decree-holder or to that of the plaintiff who intervened, and, therefore, they were parties "against whom the order was made." That order became conclusive against them within one year from its date, as they did not bring a suit

* Second Appeal, No. 461 of 1891.

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to establish their right (art. II, sch. II, Limitation Act, 1877). He, therefore, confirmed the decree of the Court of first instance.

On second appeal to the High Court,

Held, reversing the lower Court's decree, that the defendants were not necessarily to be regarded as parties against whom the order in the execution proceedings was made. Whether they were or not, depended on the facts of the case. The Court accordingly remanded the case that the District Judge might investigate the facts and pass a decree accordingly.

[Diss., 15 M.C.C.R. 89 (91).]

SECOND APPEAL from the decision of A. H. Unwin, District Judge of Kanara.*

This suit was instituted by the plaintiff to recover arrears of rent and interest thereon. He produced the counterpart of a lease upon which he based his claim.

The defendants pleaded (*inter alia*) that the counterpart of the lease sued upon was not genuine, and that it was given in connexion with a fraudulent mortgage transaction effected by the plaintiff.

[630] The Subordinate Judge held that the counterpart was proved, and gave the plaintiff a decree.

On appeal by the defendants, the District Judge raised a question as to whether the defendants were barred from denying the genuineness and validity of the mortgage (Ex. 49) and the counterpart of lease (Ex. 68) relied on by the plaintiff. It appeared that the land in question had been attached in execution of a decree obtained against the father and uncle of the defendants in a suit in the Sirsi Court (No. 509 of 1878). The plaintiff had then intervened, alleging his mortgage and lease and producing the Exs. 49 and 68. In the investigation then held, the Subordinate Judge found that the mortgage (Ex. No. 49) was proved, and ordered that the attached lands should be sold subject to the plaintiff's mortgage. Upon these facts the District Judge observed, in giving his judgment in the present case: "It seems now to be urged, that the judgment-debtor defendants got no notice of, and were no parties to, this proceeding, and that the decision does not, therefore, bind them. This contention I believe to be utterly untenable. By the attachment of their lands, they must have had sufficient notice, and have been subrogated either to the cause of the decree-holder or to that of the intervening mortgagee in the subsequent proceeding 'as a party to the investigation of the claim': see *Netietom* v. *Tayanbarry*, (1) and therefore, defendants were 'as much a party against whom the order was made under the s. (246 of Act VIII of 1859=283 of Act X of 1877, under which the Sirsi Court's order was passed) as their judgment-creditor." That order became consequently conclusive against defendants after the lapse of one year from its date, 5th February, 1890, without suit brought by them to establish their right clear of the intervenor's alleged mortgage and lease—art. 11, sch. II of the Limitation Act, XV of 1877. They appear to have benefited, moreover, under the order by being left in physical possession of the lands."

The defendants preferred a second appeal.

Shamrav Vithal, for the appellants:—The order in the execution proceeding cannot be held to be binding upon us, because we **[631]** were

* This case was once before the High Court on a different point: see 15 B. 297.

(1) 4 M. H. C. R. 472.

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not parties to it—*Shivapa* v. *Dod Nagaya* (1); *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (2). The order then made cannot be held to have the effect of *resjudicata*.

Narayan Ganesh Chandavarkar, for the respondent.

JUDGMENT.

PER CURIAM:—The District Judge, on the authority of *Netietom Perengaryprom* v. *Tayanbarry Parameshwaren* (3), has held that the order of the Court in the attachment proceedings is conclusive. But the authority of that case has been doubted; see *Shivapa* v. *Dod Nagaya* (1); *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (2). As was pointed out in the former of these two cases, a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but it must depend upon the facts of each case.

We must, therefore, reverse the decree of the District Judge and remand the case, that he may investigate the facts and pass a decree accordingly. Costs to abide the result.

Decree reversed and case remanded.

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17 B. 631.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

LALU GAGAL (*Original Plaintiff*), *Appellant* v. BAIMOTAN BIBI (*Original Defendant*), *Respondent.** [6th September, 1892.]

Landlord and tenant—Suit by tenant to recover possession claiming as full owner—Subsequent claim as yearly tenant unjustly dispossessed—Notice to quit—Denial of landlord's title.

A plaintiff sued to recover possession of certain fields, &c., alleging that he was a permanent tenant of the defendant, having purchased the right of occupancy from previous occupants of the land. The lower Court held that the plaintiff's vendors were mere yearly tenants and not permanent tenants, but that the sale of their right to the plaintiff was valid, and that the plaintiff had been wrongfully dispossessed by the defendant, no notice to quit having been given. But,

Held, that the plaintiff could not recover, inasmuch as his plaint and the conduct of his case amounted to a denial of his landlord's (defendant's) title. In his suit the plaintiff claimed to be full owner, and he could not afterwards claim [632] to be restored to possession on the ground that he was a yearly tenant entitled to notice to quit, which was not given.

Vithu v. *Dhondi* (4) distinguished.

[R., 20 B. 759 (763).]

SECOND APPEAL from the decision of E. M. H. Fulton, District Judge of Ahmedabad, in appeal No. 333 of 1889.

The plaintiff sued to recover possession of certain fields and houses, alleging as follows:—

"In Thori Mubarak there is a field of 12 bighas which belonged to Bhala Rupa's occupancy, and was in his possession and enjoyment. He sold it to me for Rs. 50 by a registered deed dated 14th May, 1886. The said field was made over to my possession. *Since then I have been*

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* Special Appeal, No. 522 of 1891.

(1) 11 B. 114. (2) 15 C. 674. (3) 4 M.H.C. R. 472. (4) 15 B. 407.