over twelve years prior to the date of the suit. These findings must be accepted. On these findings it is quite clear that the decree passed by the lower appellate Court is proper.

We, therefore, confirm the decree of the lower appellate Court with costs.

*Decree confirmed.*

R. R.

## ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

MESSRS. KING, KING & Co. (ORIGINAL PLAINTIFFS AND DECREE-HOLDERS), RESPONDENTS, *v.* MAJOR F. D. DAVIDSON (ORIGINAL DEFENDANT AND JUDGMENT-DEBTOR), APPLICANT.*

1914.
*February* 2.

*Civil Procedure Code (Act V of 1908), section 60, clause 2 (b)—Army Act, 1881 (44 & 45 Vict., c. 58), sections 136 and 190, sub-section 8, as amended by Army (Annual) Act, 1895 (58 & 59 Vict., c. 7), section 4—Officer on the Indian Staff Corps—Money decree—Execution—Salary not liable to attachment.*

Messrs. K. K. & Co. filed a suit and obtained a decree for a sum of money against Major D., an officer in the Indian Army. They subsequently attached a moiety of that officer's pay under Order XXI, Rule 48, of the Civil Procedure Code and in pursuance of such attachment the Deputy Controller of Military Accounts remitted such moiety to the Sheriff of Bombay who had paid out a portion of the moneys received by him under Messrs. K. K. & Co.'s attachment and had in his hands a further sum which in the ordinary course would have been paid out likewise, when Major D. took out a summons calling on the plaintiffs to show cause why their attachment should not be raised and the sums recovered thereunder refunded.

*Held*, that Major D. under section 190, sub-section 8, of the Army Act, 1881, was an Officer of His Majesty's Regular Forces and under section 136 of the Army Act, 1881, and section 60 of the Code of Civil Procedure he was entitled to receive his pay without any deduction and that the attachment must be raised and that the Sheriff must pay to Major D. the sum received by him under the attachment and not yet paid away.

* Suit No. 303 of 1911.

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*Velchand* v. *Bourchier*[1], applied.

*Held*, however, that, as the moneys actually paid out to the execution creditors had not been paid out under coercion or under a mistake of fact, though possibly under a mistake of law, Major D. was not entitled to a refund of such moneys.

ON the 25th of July 1911 the plaintiffs in this suit obtained a decree against the defendant, then a Captain in the Indian Army, in the High Court of Bombay for payment of a sum of money and costs. The defendant having failed to pay, the plaintiffs obtained an order under Order XXI, Rule 48, for the attachment of a moiety of the defendant's pay as it accrued due from time to time, notice of which order was sent to the Deputy Controller of Military Accounts, 5th (Mhow) Division, as the officer whose duty it was to disburse the defendant's salary, and that officer from time to time remitted to the Sheriff of Bombay a moiety of the defendant's salary. Subsequently Messrs. Amerchand Hazarimal & Co., a Marwari firm, who had obtained a decree against the defendant in Civil Suit No. 290 of 1907 in the Court of the First Class Subordinate Judge at Poona, applied for and obtained an order under section 73 of the Code of Civil Procedure for the rateable distribution of the moneys in the hands of the Sheriff.

A portion of the moneys received by the Sheriff was paid out by him under the plaintiffs' attachment and a portion remained in the possession of the Sheriff. On the 24th of January 1914 the defendant issued a summons against the plaintiffs to show cause why the attachment levied by them on the defendant's salary should not be raised and why all moneys recovered under the said attachment should not be refunded to the defendant and why the Sheriff should not repay to the defendant the moneys realised under the said attachment and

(1) (1912) 37 Bom. 26.

which had not yet been distributed between the plaintiffs and the other judgment-creditors.

The summons was argued on the 2nd of February 1914.

*Nicholson*, for the plaintiffs-respondents.

*Moos*, for Messrs. Amerchand Hazarimal & Co. :—The defendant is an army officer and therefore his pay cannot be attached : see *Velchand* v. *Bourchier*[1].

The moneys in the hands of the Sheriff must be refunded.

But as regards the return of the moneys already paid to us, the defendant knew of the attachment and has made no objection until now. The defendant has allowed payments to be made and then after a year comes forward and asks for all previous payments to be refunded.

The defendant might argue that he did not know his legal rights, and therefore payment was made in mistake of law. Parties cannot afterwards recover : see Halsbury's Laws of England, Vol. 21, page 32 ; Pollock on Contracts, page 483 ; *Aiken* v. *Short*[2].

*Inverarity*, for the defendant-applicant, refers to *Calcutta Trades Association* v. *Ryland*[3] ; *Watson* v. *Lloyd*[4] ; *Colonel Lecky* v. *Bank of Upper India, Limited*[5] ; *Velchand* v. *Bourchier*[1].

Both the Calcutta and Madras cases take no notice of the definition of " Regular Forces " in section 190 of the Army Act, 1881, nor of the proviso to section 60 of the Civil Procedure Code.

The defendant's commission is not in the Indian Army but in the Land Forces.

(1) (1912) 37 Bom. 26.
(2) (1856) 1 H. & N. 210.
(3) (1896) 24 Cal. 102
(4) (1901) 25 Mad. 402.
(5) (1911) 33 All. 529.

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See Halsbury, Vol. 14, page 32, as setting aside of wrongful or irregular execution : see also *Kanhayà Lal* v. *National Bank of India, Ld.*[1]. Payment made under the force of execution proceedings is a payment made under compulsion and can be recovered back.

It is not a mistake of law, it is a case of private right ; a private right to have our salary paid to us in full without any interference by judgment-creditors.

See Leake on Contract, page 230 ; Indian Contract Act, section 72.

The attachment should be set aside from the commencement unless barred by limitation : see article 181, Limitation Act. The order ought to be that the money should be returned to the Sheriff.

*Captain*, for the defendant-applicant (in Suit No. 290 of 1907), refers to *In re Smith. Ex parte Brown*[2].

*Moos*, in reply.

In this case the judgment-debtor is asking for his money back ; he should be estopped by his conduct.

MACLEOD, J. :—Messrs. King, King & Co. obtained a decree against Major Davidson, then a Captain in the Indian Army, in Suit No. 303 of 1911 on the 25th of July 1911 for a sum of Rs. 4,454-15-3 and costs and further interest. In execution of the said decree the plaintiffs attached a moiety of defendant's pay, and in pursuance of such attachment the Deputy Controller of Military Accounts remitted to the Sheriff such moiety. Thereafter Amarchand Hajarimal & Co., who had obtained a decree against the same defendant in Suit No. 290 of 1907 in the Court of the First Class Subordinate Judge at Poona, transmitted their decree to this Court for execution, and applied for rateable distribution between themselves and Messrs. King, King & Co., under section

[1] (1913) 40 Cal. 598.

[2] (1888) 20 Q. B D. 321.

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73 of the Civil Procedure Code. Rs. 2,384-2-11 paid to the Sheriff as aforesaid have been rateably distributed between the two execution plaintiffs. There is now in the hands of the Sheriff the further sum of Rs. 2,979-12-7, which in the ordinary course would be distributed in like manner. But on the 20th of January 1914 the defendant took out a summons in the Poona Suit No. 290 of 1907, calling upon the plaintiffs to show cause why the attachment levied by them on the salary of the defendant should not be raised and why the sum of Rs. 2,384-2-11 recovered by the plaintiffs under such attachment should not be refunded. On the 24th of January the defendant took out a similar summons against the plaintiffs in Suit No. 303 of 1911. I adjourned the summonses into Court, and they were argued before me on the 2nd of February.

In the face of the decision of a Bench of this Court in *Velchand* v. *Bourchier*[1], counsel for the plaintiffs were unable to contend that the attachment on the defendant's pay could be continued. In that case the defendant was an Officer in a British Regiment; but the reasons given by the learned Judges for their decision apply equally to an Officer in the Indian Army. In *Calcutta Trades Association* v. *Ryland*[2] and in *Watson* v. *Lloyd*[3], the defendants were Officers of the Indian Staff Corps, and in both cases it was held that there was a distinction between an Officer of the Indian Staff Corps and an Officer of the Regular Forces. But no reference was made to section 190, sub-section 8, of the Army Act of 1881, from which it is clear that Officers of the Indian Staff Corps or the Indian Army are also Officers of His Majesty's Regular Forces. Nor in either of those cases was any reference made to sub-section 2, sub-clause (*b*), of section 266 of the Civil Procedure Code

(1) (1912) 37 Bom. 26 at p. 31. (2) (1896) 24 Cal. 102.
(3) (1901) 25 Mad. 402.

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of 1882. This has been reproduced in section 60 of the Code of 1908 which was held in *Velchand* v. *Bourchier*[1] to be a bar to the Court considering whether an Officer in the Army fell within the definition of "public officer" given in the Civil Procedure Code. Therefore, there can be no doubt that the defendant is entitled to receive his pay without any deduction, and that the attachment levied by the plaintiffs in Suit No. 303 of 1911 must be raised. The Sheriff must also pay to the defendant the sum of Rs. 2,979-12-7 which he realized under the attachment and which has not yet been distributed between the plaintiffs.

The question whether the plaintiffs can be ordered to refund to the defendant what has already been paid to them by the Sheriff under the attachment depends on whether the money so received by them can be considered as having been paid by the defendant under coercion, or money voluntarily paid under a mistake of fact. It was admitted by the defendant's counsel that he had had no objection to Messrs. King, King & Co. receiving the moiety of his pay under the attachment levied by them. It was only when he discovered that the plaintiffs in the Poona suit were obtaining a share in that moiety that he decided to question the validity of the attachment. It must be taken, therefore, that the money paid out by the Sheriff was not money paid under coercion. Nor was it money paid under a mistake of fact. It was paid because the defendant did not choose to apply to the Court to raise the attachment. If there was any mistake in the matter it was one of law, that is to say, the defendant must be taken as having under mistake considered that the attachment on his pay was permitted by law. Though it is also possible that there was no mistake of any sort, the defendant preferring

[1] (1912) 37 Bom. 26 at p. 31.

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that Messrs. King, King & Co. should be paid their debt in this manner. Therefore, in my opinion, defendant is not entitled to a refund of what has already been paid out to the execution plaintiffs.

It was suggested in argument that the defendant might be estopped from claiming a refund; and it is quite possible that the plaintiffs may have acted upon the belief arising from the defendant making no attempt to dispute the attachment that he acquiesced in it. But, as far as this case is concerned, there is no evidence on which a case of estoppel could be founded.

Attorneys for the plaintiffs: *Messrs. Captain and Vaidya.*

Attorneys for the defendant: *Messrs. Craigie, Blunt and Caroe.*

H. S. C.

## APPELLATE CIVIL.

*Before Mr. Justice Beaman and Mr. Justice Hayward.*

1914.
*June* 16.

ARJUNA BIN RAGHU NAROLE (ORIGINAL OPPONENT, AUCTION-PURCHASER), APPLICANT, *v.* KRISHNAJI VENIMADHAV WALIMBE (ORIGINAL PLAINTIFF), OPPONENT.*

*Civil Procedure Code (Act V of 1908), sections 68, 70, Rule 14,† Order XXI, Rule 101—Decree—Execution by Collector—Court* functus officio *for the time being—Exhaustion of all the power conferred upon the Collector for execution—Matters requiring to be done in execution must be done by the Court which passed the decree.*

After a decree has been transferred to a Collector for execution, the Court which passed that decree is for the time being *functus officio* for all purposes of execution; but as soon as the Collector has exhausted all the power of

* Application No. 147 of 1913 under the extraordinary jurisdiction.

† Rule 14 framed under section 70 of the Civil Procedure Code (Act V of 1908) is as follows:—

14. When the property sold is in the occupancy of the judgment-debtor, or of any other person, and a certificate in respect thereof has been granted under the last preceding rule, the Collector or other official aforesaid shall, on