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of the decree *nisi* and must be determined with reference to the terms of the decree and the facts of the case. The point is by no means free from difficulty; and there is a clear conflict in the decisions bearing on the point, even when due allowance is made for the facts of each particular case. Personally I should have been glad to hold that the second redemption suit would be always maintainable, where the execution of the decree *nisi* for sale of the property in the event of non-payment has been barred by limitation; and where there has been no order absolute for the sale of the property. My view would involve some hardship to the mortgagor in some cases but I do not think that any such consideration can afford a good ground for ignoring what I hold to be the clear effect of sections 11 and 47 of the Code.

J. G. R.

### APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Macleod.*

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August 28.

MAY GERALDINE DUCKWORTH (ORIGINAL PLAINTIFF), APPELLANT  
v. GEORGE FRANCIS DUCKWORTH (ORIGINAL DEFENDANT), RES-  
PONDENT.\*

*Army Act (St. 44 & 45. Vic. c. 58), sections 145 and 190—Army (Amendment) No. 2, Act 5 & 6 Geo. V. c. 58, section 4—First Class Warrant Officer of the British Army—Soldier—Decree for alimony and maintenance—Order by Commander-in-Chief for payment of alimony and maintenance—Civil Court cannot attach salary in execution of decree—Civil Procedure Code (Act V of 1908), sections 4, 60 (2) (b), Order XXI, Rule 48—Repeal of section 60 (2) (b) by the Repealing and Amending Act (X of 1914).*

In a suit for dissolution of marriage the defendant, who was a First Class Warrant Officer of the British Army, was ordered to pay permanent alimony to his wife (plaintiff) and maintenance to his children by her. Later, the Court

\* First Appeal No. 235 of 1917.

having fixed the amount of Rs. 65 as payable on each account, the plaintiff applied to the Court for attachment of the defendant's salary and allowance, under the provisions of Order XXI, Rule 48 of the Civil Procedure Code, 1908. The application was dismissed under section 136 of the Army Act. The plaintiff having appealed, it was contended for the defendant that in view of an order made by the Commander-in-Chief directing that a certain sum be deducted from the defendant's salary for payment to the plaintiff under section 145 (2) of the Army Act (44 & 45 Vic. c. 58), on the footing that the defendant was a soldier, his pay could not be attached under the provisions of the Civil Procedure Code, 1908.

*Held*, upholding the contention, that section 145 of the Army Act prevailed over the provisions of the Civil Procedure Code in spite of the repeal of clause (b) from sub-section (2) of section 60 by the Repealing and Amending Act of 1914.

*Held*, also, that the terms of section 4 of the Civil Procedure Code compelled the Court to apply the special rule of procedure provided by section 145 of the Army Act in preference to the general provisions of the Code.

FIRST appeal against the decision of C. V. Vernon, District Judge of Ahmednagar, in Darkhast No. 8 of 1917.

Proceedings in execution.

George Francis Duckworth (defendant) and May Geraldine Duckworth (plaintiff) were husband and wife. There were three children born of the marriage. The defendant was a second class Assistant Surgeon in the Subordinate Medical Service, drawing a salary of Rs. 200 per mensem and Rs. 30 as allowance.

The plaintiff obtained, on the 19th June 1916, a decree for dissolution of her marriage with the defendant in the District Court at Ahmednagar under the Indian Divorce Act.

Within six months from the date of the decree *nisi* for the dissolution of his marriage with the plaintiff, the defendant contracted a second marriage.

The plaintiff having applied, the District Court fined on the 19th March 1917, the amount of Rs. 65 to be paid by the defendant as permanent alimony to the

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plaintiff every month; and, on the same day, he passed a separate order directing the defendant to pay Rs. 65 per mensem for the maintenance of the three minor children.

The plaintiff presented a Darkhast to the District Court at Ahmednagar on the 20th March 1917, praying *inter alia*, that under Rule 48 of Order XXI of the Civil Procedure Code, 1908, the salary Rs. 200 and allowance of Rs. 30 paid to the defendant be attached and that the moiety of the said salary and allowance be withheld every month under sub-clause (3) of clause (i) of section 60 of the Civil Procedure Code, 1908 and be paid to the plaintiff.

While the above Darkhast was pending, the Commander-in-Chief, on the 26th June 1917, passed an order under section 145 of the Army Act (44 & 45 Vic. c. 58) that the defendant should pay the amount of 1s. 6d. per day as maintenance and alimony. The order ran as follows:—

"I am directed to inform you that under the provisions of section 145 (2) of the Army Act as amended by the Army (Amendment) No. 2, Act 1915, His Excellency the Commander-in-Chief orders that a sum of *one shilling and six pence per diem shall be deducted from the pay* of Assistant Surgeon (George Francis Duckworth), Indian Subordinate Medical Department, at present serving under your command, in respect of the *alimony and maintenance awarded to Mrs. May Geraldine Duckworth residing at 27, Ganadhar Babu Lane, Calcutta*, and her children by orders of the District Judge, Ahmednagar, passed on the 19th day of March, 1917.

The deduction will be made with effect from the date of this order and will continue to be made and regularly remitted monthly to Mrs. Duckworth so long as Assistant Surgeon Duckworth remain a *Warrant Officer*."

The District Judge dismissed the plaintiff's Darkhast on the 13th July 1917 in view of section 136 of the Army Act and following the ruling of *Velchand v. Bouchier*<sup>(1)</sup>.

(1) (1912) 37 Bom. 26.

The plaintiff appealed to the High Court.

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*Campbell*, with *J. G. Rele*, for the appellant:—The lower Court dismissed our application for execution relying upon section 136 of the Army Act, (44 & 45 Vic. c. 58), and the decision of this High Court in *Velchand v. Bourchier*<sup>(1)</sup>. Section 136 as amended in 1895 (see 58 Vic. c. 7) permits of the deduction from the pay of an officer or soldier of Her Majesty's Regular Forces as may be authorised by any law passed by the Governor-General of India in Council. We submit that the Civil-Procedure Code is such a law and that under section 60 (i) (III) of the Code, the salary of a "public" officer is attachable to the extent of one moiety. Section 2 (17) defines "public officer" and includes in that term every commissioned or gazetted officer in the military forces of His Majesty while serving under the Government. The word 'gazetted' is now being introduced into the Code for the first time in 1908 (Act V of 1908). The respondent is a Second Class Assistant Surgeon in the Subordinate Indian Medical service and his appointment is gazetted. We submit, therefore, that he is a public officer whose pay is authorised by law to be attached. The Act of 1908 in section 60 (2) (b) at one time provided that that section was not to affect the provisions of the Army Act and the Bombay High Court considered that such reference to the Army Act was a bar to attachment of the salary of a military officer: *Velchand v. Bourchier*<sup>(1)</sup>.

[MACLEOD J.:—Have I not decided a case recently under the Army Act?]

Yes, in 1914, *King, King & Co. v. Major Davidson*<sup>(2)</sup> in which *Velchand's case*<sup>(1)</sup> was followed. Now, however, section 60 (2) (b) has been expressly repealed.

<sup>(1)</sup> (1912) 37 Bom. 26.

<sup>(2)</sup> (1914) 38 Bom. 667.

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see Act X. of 1914, Schedule II. We submit that the effect is that the two Bombay cases are overruled and are no longer good law. There is, therefore, nothing to prevent the application of section 60 to the case of the respondent.

[SCOTT C. J. :—Is not clause (b) repealed because the Army Act is a recurring Act that goes out of force every year?]

We submit not. The Army Act is always the Army Act though the date may alter year by year. The Allahabad High Court has taken this view in *H.F.B.D. Hay v. Ram Chandar*<sup>(1)</sup>.

*Jayakar*, with *P. B. Shingne*, for the respondent.—We submit the respondent's pay cannot be attached. He is treated as a First Class Warrant Officer. As a non-commissioned Warrant Officer he falls within the definition of a soldier in section 190 (6) of the Army Act (St. 44 & 45 Vic. c. 58). The Commander-in-Chief treating him as a Warrant Officer, equal in rank to a soldier, made an order under section 145 (2) of the Army Act as amended by the Army (Amendment) No. 2, Acts 5 & 6 Geo. V. c. 58, directing that 1s. 6d. per diem should be deducted from the pay of the respondent, in respect of alimony and maintenance of the appellant. Under this section, the pay of a soldier cannot be attached in execution of a decree for maintenance against him and it provides a special procedure which, we submit, cannot be controlled by Civil Procedure Code: see section 4 of the Civil Procedure Code, 1908.

We further submit that the removal of sub-section (b) of section 60 (2) from the Civil Procedure Code has not the effect contended for by the appellant's counsel. This sub-section had become unnecessary since the introduction of section 4 in the Civil Procedure

Code of 1908. The Repealing and Amending Act X of 1914 did nothing beyond taking out the provisions which had become a dead law or were redundant or unnecessary.

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*Campbell*, in reply.—Section 145 of the Army Act might have prevailed over the provisions of the Civil Procedure Code owing to the express saving of the Army Act by section 60 (2) (b) of the Code but the saving words having been repealed by Act X of 1914, we can invoke the application of the Code.

Section 4 of the Civil Procedure Code cannot save the application of the Code. It provides that in the absence of any specific provisions to the contrary nothing in the Code shall affect any special or local law. By the amendment of section 136 of the Army Act specific provision has been made for the application of the Code for attaching salaries of military officers. Besides we submit that "special or local law" in section 4 cannot refer to an Act of Parliament, but is intended to apply to Acts of the Governor General in Council.

The soldier here is "gazetted" and is therefore a public officer whose pay is attachable.

*SCOTT, C. J.*—This is an appeal from the District Judge of Ahmednagar who has dismissed an application under the Civil Procedure Code for execution of an order for alimony in favour of the first wife and children of the respondent, Duckworth. The respondent's marriage with the appellant was dissolved by the District Judge of Ahmednagar and the decree for dissolution was confirmed by the High Court.

The respondent is a First Class Warrant Officer of the British Army and as such he falls within the definition of "soldier" in the Army Act, 44 & 45 Vic.

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c. 58, section 190. Section 145 of that Act provides a special procedure when any order or decree is made for payment by a man, who is a soldier, of the cost of the maintenance of his wife or child. Under the provisions of that section as amended by Army (Amendment) Act No. 2 of 1915, the Commander-in-Chief ordered that a particular sum should be deducted from the pay of the respondent for payment to the appellant. This sum is less than the monthly sum awarded by the order of the District Court. For the appellant it is contended that although section 145 of the Army Act might once have prevailed over the provisions of the Civil Procedure Code owing to the express saving of the Army Act by section 60 (2) (b) of the Code of 1908, the saving words have now been repealed by the Repealing and Amending Act (X of 1914), and therefore the appellant has a right to demand the application of the Code and get attachment of one moiety of the respondent's pay and allowances. In support of this contention the decision of a Bench of the Allahabad High Court in *H. F. B. D. Hay v. Ram Chandar*<sup>(1)</sup> is referred to. We are unable, however, to hold that the removal of the sub-section (b) of section 60 (2) from the Civil Procedure Code has the effect contended for. It was removed by a Repealing and Amending Act (X of 1914) on the ground that it, as well as the other Enactments referred to in the Second Schedule, were spent or had ceased to be in force otherwise than by express specific repeal or had by lapse of time or otherwise become unnecessary. The preparation of these Acts is part of the routine work of the Legislative Department in the expurgation of dead law from the Statute Book. They are not Amending Acts. The sub-section may be taken to be dead law on the ground that it had "expired" by the re-enactment since 1908 of the Army Act, which thus became a later Enactment superseding and

(1) (1917) 39 All. 308.

rendering unnecessary the saving clause in the Civil Procedure Code: see Craies on Statute Law, Chapter V. Even if this were not so, the terms of section 4 of the Civil Procedure Code and the maxim "*generalia specialibus non derogant*" would compel us to apply the special rule of procedure provided by section 145 of the Army Act in preference to the general provisions of the Code. We affirm the decree and dismiss the appeal. No order as to costs.

MACLEOD, J. :—The respondent, an Assistant Surgeon in the Indian Medical Service, is a Gazetted Officer and therefore a public officer so that *prima facie* his pay and allowances would be liable to attachment to the extent of one half under section 60 of the Civil Procedure Code. But he is also a First Class Warrant Officer and is therefore a "soldier" as defined by section 190 of the Army Act. Under section 145 (2) of that Act an order has been made by the Commander-in-Chief that a sum of 1s. 6d. per diem, the maximum allowed, should be deducted from the respondent's pay in respect of the alimony and maintenance awarded to the appellant for herself and her three children by the District Judge, Ahmednagar. I agree with the learned Chief Justice that we must hold that in this case the Army Act prevails over the Civil Procedure Code. The respondent has married another woman before the period prescribed by the Indian Divorce Act expired. She is allowed Rs. 150 a month by the authorities out of the respondent's pay, while the wife and children whom he has deserted get 1s. 6d. a day.

*Decree confirmed.*

J. G. R.

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