

ORIGINAL CIVIL.

Before Mr. Justice Marten.

1918. KERING RUPCHAND & Co., PLAINTIFFS v. G. B. MURRAY, DEFENDANT.^o

October 11.

The pay of a British Officer in the Indian Army is liable to attachment—Civil Procedure Code (Act V of 1908), sections 2 (17), 60 (1) (i) and Order XXI, Rule 48—Repealing and Amending Act X of 1914—Army Act, 1881 (44 & 45), Vic. c. 58, sections 136, 190 (8)—Army (Annual) Act, 1895, section 4—Government of India Act, 1915, sections 33, 65 (1) (d) and (2)—Chamber Summons.

A British Officer in the Indian Army is a 'Public Officer' within the meaning of section 2 (17) of the Civil Procedure Code, 1908, and as such public officer he is liable to have half his pay or salary attached under section 60 (1) (i) and Order XXI, Rule 48 of that Code, inasmuch as that attachment is a deduction authorised by a law (viz., the Civil Procedure Code) passed by the Governor-General of India in Council within the meaning of section 136 of the Army Act, 1881, as amended by section 4 of the Army (Annual) Act, 1895.

The proviso in section 60 (2) (b) of the Code of Civil Procedure, 1908, having been repealed by the Repealing and Amending Act X of 1914, must be regarded as unnecessary or dead-law.

H. F. B. D. Hay v. Rqm Chandar⁽¹⁾, followed.

Calcutta Trades Association v. Ryland⁽²⁾ and *Watson v. Lloyd*⁽³⁾, referred to.

Duckworth v. Duckworth⁽⁴⁾, distinguished.

Colonel Lecky v. Bank of Upper India, Limited⁽⁵⁾, *Velchand v. Bourchier*⁽⁶⁾ and *King, King & Co. v. Major Davidson*⁽⁷⁾, regarded as obsolete owing to the repeal of the proviso in section 60 (2) (b) of the Civil Procedure Code, 1908.

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The plaintiffs advanced to the defendant a sum of Rs. 4,000 on a bond payable by twenty monthly

^o O. C. J. Suit No. 651 of 1917.

⁽¹⁾ (1917) 39 All. 308.

⁽⁴⁾ (1918) 43 Bom. 368.

⁽²⁾ (1896) 24 Cal. 102.

⁽⁵⁾ (1911) 33 All. 529.

⁽³⁾ (1901) 25 Mad. 402.

⁽⁶⁾ (1912) 37 Bom. 26.

⁽⁷⁾ (1914) 38 Bom. 667.

instalments of Rs. 200 each. On the first ten instalments becoming due and on the defendant failing to pay the same the plaintiffs filed a suit in the Court of Small Causes, Bombay, and obtained on 21st January 1914 a decree for Rs. 2,000 and costs.

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The defendant failing to pay the decretal amount, proceedings in execution were adopted in that Court, and on 31st July 1914 a prohibitory order was issued by the Court of Small Causes, Bombay, attaching a moiety of the pay of the defendant. The defendant, however, made no payment.

The remaining ten instalments on the defendant's bond having become due, the plaintiffs filed a suit in the High Court against the defendant, being suit No. 651 of 1917 for Rs. 2,523 and costs. In execution of the decree in the suit, dated the 9th October 1917, the plaintiffs got a moiety of the defendant's pay attached and the same was received by the Sheriff of Bombay. Meanwhile other attachments were levied against the moiety of the defendant's pay at the instance of other creditors. The plaintiffs thereupon got their decree, obtained in the above suit of the Court of Small Causes, transferred to the High Court to enable them to share in a *pro rata* distribution with other creditors. As the decree was more than a year old, the usual notice under Order XXI, Rule 22 of the Code was issued by the High Court calling upon the defendant to show cause why the decree should not be executed against him. The defendant did not appear upon the said notice to raise any objection and the Court on the 3rd August 1918 made an order directing the decree to be executed notwithstanding the lapse of over a year.

On the 24th July 1918, the Prothonotary had at the instance of the plaintiffs issued a notice under

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section 73 of the Civil Procedure Code to all persons who claimed to be entitled to distribution of the moneys received by the Sheriff. The notice was adjourned into Court for argument by the learned Chamber Judge

On the 1st October 1918 the defendant obtained a cross-summons calling upon the plaintiffs to show cause why an order should not be passed to set aside the attachment of a moiety of his pay and the several orders under which the attachment was made, and to direct the Sheriff to repay to him any moneys still in the hands of the Sheriff. This summons was also adjourned into Court for argument.

Kanga, for the plaintiffs.

Campbell, for the defendant.

MARTEN, J.:—These suits raise an important question, viz., whether the pay of a British Officer in the Indian Army can be attached under the Civil Procedure Code.

The question arises in execution in three suits, namely, a High Court suit No. 651 of 1917, a Small Causes Court suit No. 475/18039 of 1913, and a civil suit No. 413 of 1913 in the Poona Court. The decrees in the two latter suits have been sent to this Court for execution. The plaintiffs in the first two suits are the same. The defendant in each suit is a Major G. B. Murray. He is, and at all material dates has been, an officer in the Supply and Transport Corps of the Indian Army, and at the present time he is Commandant of the 53rd Pack Mule Corps stationed at Quefta.

In the first-mentioned suit the decree was made on the 9th October 1917, and, on the 1st December 1917, the plaintiffs obtained an order under Order XXI, Rule 48, from the Acting Prothonotary, Mr. Malabari, attaching a moiety of Major Murray's pay. Under that

attachment various sums have been received by the Sheriff, and in pursuance of orders made by the Acting Prothonotary on the 15th February, 19th March and 24th June, 1918, the sums so received up to the 10th June 1918 have been distributed by the Sheriff amongst the attaching creditors.

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So far as regards that suit, what we are concerned with are the further moneys received by the Sheriff in July, August and September, 1918, amounting, after deducting poundage, to approximately Rs. 1,343. Mr. Campbell for Major Murray admits that he cannot claim a refund of the previous sums which have already been distributed by the Sheriff under the Court's orders. But he does claim all moneys still held by the Sheriff.

Then as regards the next suit, the Small Causes Court suit, the decree was made on the 21st January 1914 and the plaintiffs obtained, on the 31st July 1914, an order from that Court attaching half the Major's pay. Nothing appears to have been obtained under that attachment and no reliance has been placed on that order for attachment in the arguments before me. Eventually the decree was sent to this High Court and, on the 3rd August 1918, the plaintiffs obtained an order from me under Order XXI, Rule 22, enabling the decree to be executed notwithstanding the lapse of over a year. This order was made after an adjournment of some four weeks granted at Major Murray's request, but he eventually did not appear nor did he then raise any objection to the proposed order or to any past order. On the 16th August 1918, the Prothonotary, Mr. Kajiji, made an order attaching half of Major Murray's pay. The plaintiffs in that suit now claim to share in the proceeds of the attachment levied in the first-mentioned High Court suit. Similarly, as

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regards the execution of the decree of the 9th June 1914 in the Poona suit the plaintiffs in that suit also claim an attachment in their application to this Court of 28th June 1918. They further claim to share in the benefit of the existing attachment in the High Court suit. An objection taken by the defendant under the Indian Limitation Act was abandoned before me.

The formal applications now before me are two in number. The first is a notice in the High Court suit, dated the 24th July 1918, and issued at the instance of the plaintiffs for the distribution under section 73 of the Civil Procedure Code of the moneys received by the Sheriff on the 9th July 1918. The other application is a cross-summons of the 1st October by Major Murray entitled in all three suits and asking for an order to set aside the attachment of a moiety of his pay and the several orders under which the attachment was made, and asking also for the repayment to him of any moneys still in the hands of the Sheriff. Both applications have been adjourned into Court.

The question I have to determine depends primarily on the true construction of certain amended British and Indian Statutes. I propose therefore in the first instance to consider the case as it stands on these amended Statutes alone, viz., those Statutes in force at the material dates in the present case. For the moment I will put aside the earlier legislation and also the decided cases. That being so I find that the position of Major Murray under those Acts is as follows: I find that Major Murray being an officer in His Majesty's Indian Forces is an officer of His Majesty's Regular Forces within the meaning of the Army Act, 1881: see section 190 (8). I further find that under section 136 of that Act as amended by section 4 of the Army (Annual) Act, 1895, his pay as an officer of His Majesty's Regular Forces is to "be paid without any

deduction other than the deductions authorized by this or any other Act...or by any law passed by the Governor-General of India in Council." It is common ground that the words, "paid without any deduction" taken by themselves would prevent any attachment on the pay. But it is the latter words, viz., "or by any law passed by the Governor-General of India in Council" which are particularly important here. They are of importance because without them the Government of India could not, I think, legislate so as to affect the Army Act in this particular. If one turns to the Government of India Act, 1915 (which is an Act consolidating a very large number of earlier Statutes), one finds in section 33 that "the superintendence, direction and control of the civil and military Government of India is vested in the Governor-General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State." The legislative powers of the Governor-General in Legislative Council are dealt with in section 65. Under sub-section 1 (d) of section 65 power is given to make laws "for the government of officers, soldiers and followers in His Majesty's Indian Forces, wherever they are serving, in so far as they are not subject to the Army Act," but under the proviso in sub-section 2 "the Governor-General in Legislative Council has not, unless expressly so authorized by Act of Parliament, power to make any law repealing or affecting any Act of Parliament passed after the year 1860 and extending to British India (including the Army Act and any Act amending the same.)"

I assume, therefore, that under the Government of India Act, 1915, it would be *ultra vires* of the Legislative Council to pass any Act of the Indian Legislature affecting the Army Act unless it is expressly authorized by Act of Parliament so to do. But as I have already

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pointed out, this express authority is conferred by the amended section 136 of the Army Act so far as regards deduction of pay.

Has then any law been passed by the Governor-General of India in Council authorizing a deduction of pay? The plaintiffs say that the Civil Procedure Code is such a law and they rely on the definition of "Public Officer" in section 2 (17) and also on section 60 (1) (i) of that Code as authorizing the attachment of one moiety of Major Murray's pay. Taking section 60 first, I think it clear on that section, as it now stands, that one moiety of Major Murray's pay is liable to be attached, if he is a "Public Officer" within the meaning of that section.

The question whether Major Murray is a "Public Officer" depends, I think, on the definition clause, viz., section 2 (17) (c). I do not overlook the fact that the beginning of that definition clause contains the qualifying words "unless there is anything repugnant in the subject or context" but nobody has pointed out anything to me in the subject or context of section 60 which is repugnant to the definition of "Public Officer" in section 2 (17) (c). Now section 2 (17) (c) says:—

"'Public Officer' means a person falling under any of the following descriptions, namely:—every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government."

Undoubtedly Major Murray is a commissioned officer in the military forces of His Majesty. The only point then that can be raised is "whether he is serving under the Government" within the meaning of section 2 (17) (c). As to that, I have already referred to section 33 of the Government of India Act, 1915, which shows that the Governor-General in Council has the superintendence, direction and control of the military

Government of India. Further Major Murray is unquestionably paid by the Government of India, and I regard that as an important point.

I think it also material to refer to the information as to Major Murray's Corps (the Supply and Transport Corps) and as to the Indian Army in general which will be found in the Imperial Gazetteer of India, Vol. IV, at pages 360 and 361. It is there stated at page 360 that since March 1906 the system of administration of the Army in India has been recast. The supreme authority is still vested in the Governor-General in Council, but the business connected with military affairs is now conducted through two Departments—the Army Department and the Department of Military Supply—which have taken the place of the former Military Department. The Army Department, in charge of the Commander-in-Chief, deals with all affairs concerning the army except those specially allotted to the Department of Military Supply, and also disposes of business connected with cantonments and the volunteers. The Department of Military Supply, which is in charge of an Ordinary Member of Council, deals with matters connected with important army contracts, and the supply and registration of transport animals and certain other matters particularly mentioned. Then at page 361 the Gazetteer states that up to 1905 the Supply and Transport Corps, until recently known as the Commissariat Transport Department, was entirely under the Military Department; but that the Military Supply Department is now responsible for the supply and storage in bulk of all provisions and stores, and for the registration and provision of transport animals and attendants. It then proceeds as follows:—
“The executive control of the corps, the administration of transport units when formed, and questions relating to the distribution of stores to troops have, however,

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been transferred to the Commander-in-Chief." [That means of course the Commander-in-Chief in India.] "The officers of the corps are recruited from both the Indian and British armies...A mule corps is commanded by a British officer." In my opinion the above extracts from the Gazetteer all tend to show that Major Murray is "serving under the Government," viz., in his case, the Government of India:

Further, I think, one may get some light on the expression "serving under the Government" from the Code itself. In the First Schedule, Order XXVIII, which deals with suits by or against military men, Rule 1 (7) begins as follows:—

"Where any officer or soldier actually serving the Government in a military capacity is a party to a suit..."

Then at the end of Rule 1 the explanation runs:—

"In this Order the expression 'commanding officer' means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs."

I think, therefore, that the Code itself considers that an officer commanding a regiment or a corps, as Major Murray does here, is serving under the Government. This negatives any suggestion that "serving under the Government" in section 2 (17) must be confined to civil employ under Government.

I should perhaps add that formerly British Officers of the Indian troops constituted a body known as the Indian Staff Corps. In 1902, the use of the term "Staff Corps" was abandoned, and these officers are now said to belong to the Indian Army (see Ilbert's Government of India, 3rd Edition, page 157). As also appears from Ilbert at page 157, these officers are employed not only in the Indian Army and in Military appointments on the staff but also in a large number of civil posts, subject to the directions of Government.

Therefore, looking at what has been put before me, I am satisfied that a British Officer serving in an Indian Regiment or Corps in India is "serving under the Government" within the meaning of the Civil Procedure Code. No express authority on the point was cited to me, but a similar conclusion was arrived at in *Calcutta Trades Association v. Ryland*⁽¹⁾ and *Watson v. Lloyd*⁽²⁾ as regards officers in the Indian Staff Corps. It follows therefore that in my opinion on the Statutes, British and Indian, as they now stand, and apart from authority Major Murray's pay would be liable to attachment to the extent of a moiety.

So far I have dealt with the case apart from the earlier legislation and apart from authority. I will now consider whether there is anything in that earlier Legislation or in the decided cases which would cause me to alter or modify the opinion I should otherwise form. Mr. Campbell has argued that I ought to construe the Code in the light of a proviso to section 60 which has since been repealed and of decisions based on that repealed proviso. The proviso in question is section 60 (2) and runs:—

"Nothing in this section shall be deemed...^(b) to affect the provisions of the Army Act or of any similar law for the time being in force."

Now, that proviso was repealed by the Repealing and Amending Act, X of 1914. Mr. Campbell, however, says that that proviso at any rate, while it existed, prevented the pay of a British Officer in the Indian Army being attached. He has this to urge in support of that view, viz, that there is a decision of this High Court to that effect in *King, King & Co. v. Major Davidson*⁽³⁾ where Mr. Justice Macleod

⁽¹⁾ (1896) 24 Cal. 102.

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followed and extended the decisions of the Allahabad High Court in *Colonel Lecky v. Bank of Upper India, Limited*⁽¹⁾ and of this High Court in *Velchand v. Bouchier*⁽²⁾, to the effect that the salary of an officer in the British regular army could not be attached. These two latter cases dealing with officers in the British Army were based solely on the proviso in section 60 (2), and in the first-mentioned case it was held that the same line of reasoning based on that proviso applied to British Officers in the Indian Army. Mr. Campbell says that the proviso shows what was the real intention of the Indian Legislature, viz., not to affect the Army Act and in particular section 136 of that Act, and that the repeal having been effected by a mere Statute Law Revision Act ought not to affect the construction of the Act.

But there is of course another view of the proviso in section 60 (2) (b), viz., that it was inserted out of abundant caution to show that the Indian Legislature did not intend to override the Army Act but only to legislate in so far as it was authorised so to do by the Army Act. That, it is true, is not the view taken of the proviso in the above Allahabad and Bombay cases. The Indian Legislature has however thought fit by the Repealing and Amending Act, 1914, to repeal that particular proviso. The preamble to the Act states that it (viz., the proviso) as well as the other enactments referred to in the Second Schedule "are spent or have ceased to be in force otherwise than by express specific repeal, or have by lapse of time or otherwise become unnecessary." So we have this result, viz., that the Indian Legislature has declared that this particular proviso on which the Allahabad and Bombay High Courts based their decisions was in point of

(1) (1911) 33 All. 529.

(2) (1912) 37 Bom. 26.

fact an unnecessary proviso to the Code or else was spent or dead law.

Now I have not got to construe the Code as it existed at the date of the Allahabad and Bombay decisions. If I had, I should as a Judge of first instance follow those decisions without expressing any opinion of my own, and leave the parties to appeal if so advised. What I have to do is to construe the Code as amended since the date of those decisions by the repeal of the very proviso on which those decisions were founded. There is also a recent dictum of my Lord the Chief Justice which I will presently refer to and which seems to me to throw doubt on the correctness of those decisions as the law then stood. Under these circumstances I think it wrong to say that in construing the Code I am to treat the Code as if it still retained the repealed proviso. I think the Legislature has said in the Repealing Act, and said reasonably clearly, that the repealed proviso was really unnecessary and that it was merely inserted out of abundant caution to negative any suggestion that the Indian Legislature was acting *ultra vires*. That proviso was unnecessary because, whether the proviso was inserted or not, if the Indian Legislature did purport to interfere with the Army Act, except as expressly authorised, its purported interference would be *ultra vires* and void.

Nor can I accept Mr. Campbell's contention that if I decide in favour of the plaintiffs, I shall be in effect deciding for the first time that the Legislature intended by a mere Statute Law Revision Act to make a vital change in the liability to attachment of an officer's salary. Mr. Campbell's argument was that the Allahabad and Bombay decisions showed that under the Code, as it existed up to 1914, the salary of an

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officer could not be attached, and I ought not therefore to hold that it can now be attached merely because a few words are eliminated by a Statute Law Revision Act. But I do not think on the facts that Mr. Campbell's argument is accurate. In the first place, the previous decisions in *Calcutta Trades Association v. Ryland*⁽¹⁾ in 1896 and *Watson v. Lloyd*⁽²⁾ in 1901 were that the pay of an officer in the Indian Staff Corps could be attached. Consequently during the fifteen years or thereabouts from 1896 to 1911 (which was the date of the decision in *Colonel Lecky v. Bank of Upper India, Limited*⁽³⁾) the Indian High Court decisions supported the legality of such an attachment. Secondly, as I have already pointed out, the amendment in section 136 of the Army Act which authorised the Indian Legislature to effect deductions of pay was made by the Army (Annual) Act, 1895. Now that Act of 1895 also by section 5 repealed section 151 of the Army Act, 1881, and under that repealed section 151 (3) the pay of an officer in India as opposed to that of a "soldier" as defined by the Act could be attached by a civil Court in execution of a money decree. Therefore if it is material to consider the previous history of these Acts, one would say that, as under section 151 of the Army Act, 1881, an officer's salary in India could be attached, there would be nothing surprising in finding that any such law would in effect be continued in 1895 or by the Code of 1908. And there is this reason for the amendments made in 1895, viz., that the British Parliament thought it more convenient that the Indian Legislature should prescribe the precise mode of procedure in suits against officers in the Indian Civil Courts rather than that procedure should be fixed by sections such as section 151 which

⁽¹⁾ (1896) 24 Cal. 102.⁽²⁾ (1901) 25 Mad. 402.⁽³⁾ (1911) 33 All. 529.

would necessitate a reference to the British Parliament whenever any amendment might be found desirable. Accordingly, in my opinion, neither the repealed Legislation nor the authorities decided prior to the Repealing Act of 1914 are such as to induce me to alter or modify the opinion I should form on the Acts as they now stand apart from such repealed Legislation and authorities.

It now remains to consider two authorities decided since the Repealing Act of 1914. The first is a decision of the Allahabad High Court in *H. F. B. D. Hay v. Ram Chandar*⁽¹⁾ where Mr. Justice Piggott and Mr. Justice Walsh held that since the repeal of the proviso in section 60 (2) (b) the pay of a British officer in the Indian Army can be attached. They, therefore, impliedly held that the *ratio decidendi* in *Colonel Lecky v. Bank of Upper India, Limited*⁽²⁾ could no longer be upheld. This decision in *H. F. B. D. Hay v. Ram Chandar*⁽¹⁾ is therefore a direct authority in support of the plaintiffs, but it is fair to state that the Allahabad High Court did not have the advantage of hearing any argument from counsel.

The other case is a decision of this High Court on which Mr. Campbell placed great reliance and which, he contended, bound me. It is a very recent decision of the Appellate Court on the Appellate Side in *Duckworth v. Duckworth*⁽³⁾ decided on 28th August 1918 by my Lord the Chief Justice and Mr. Justice Macleod. Of course, if that case was really in point, I should unhesitatingly follow it without expressing any opinion of my own. But in point of fact that case when looked into seems to me to have only a slight bearing, if any, on the case I have to deal with. In the first place it was the case of a "soldier" as defined in the Army Act

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(1) (1917) 39 All. 308

(2) (1911) 33 All. 529.

(3) (1918) 43 Bom. 368.

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as opposed to an officer. In the second place, it was a case that arose about the maintenance of that soldier's wife and children and there is an express clause in the Army Act, namely, section 145, which as amended by the Army (Amendment) No. 2 Act, 1915 (5 & 6 Geo. V, c. 58) lays down express provisions and confers express powers on the military authorities as regards making certain deductions from the pay of a soldier to meet such cases of maintenance. In point of fact in that case the Commander-in-Chief had ordered certain deductions of a very limited character, viz., 1s. 6d. per day the maximum allowed by section 145. The case before the Civil Court was one for a divorce in which the Court was asked to execute its order for a much larger allowance by way of alimony for the wife of the soldier, viz., Rs. 150 per month. If, therefore, the Civil Courts had attached half the pay in execution of its order for alimony, there would have been a contest between two authorities, namely, the military authorities under the Army Act deducting 1s. 6d. per day only and the Civil Courts deducting Rs. 75 per month under the Code, and the latter would thereby have been overriding the express terms of section 145 of the Army Act. Now, the decision of the Appellate Court was that as there was an express section of the Act, viz., section 145, dealing with this matter, and fixing a certain maximum of 1s. 6d. per day that express section must govern and be preferred to the general provisions of the Civil Procedure Code. If I may respectfully say so, I entirely follow that decision. But we have no such special provision as section 145 in the present case, and accordingly the decision and the real ground for that decision seem to me to be far removed from the present case.

It appears however that an argument was put forward in that case that section 145 of the Army Act could only prevail over the Civil Procedure Code by reason

of the proviso in section 60 (2) (b) to the Code and that as that proviso had been repealed the Code would now prevail over section 145. Mr. Justice Macleod did not, I think, deal with this point but the Chief Justice did and in the course of his judgment he said as follows :—

“The sub-section [viz., section 60 (2) (b)], 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 rendering unnecessary the saving clause in the Civil Procedure Code.”

Now that was not the real ground of the Chief Justice’s judgment, because, as I have already said, he held, and Mr. Justice Macleod did so too, that the special rule of procedure provided by section 145 of the Army Act was to be applied in preference to the general provisions of the Code. But, whether the above observations of the Chief Justice on the repealed proviso form part of his substantial reasons or are merely dicta, it seems to me that they are against Mr. Campbell’s client rather than in his favour, for they throw doubt on the above decisions in *Colonel Lecky v. Bank of Upper India, Limited*⁽¹⁾; *Velchand v. Bouchier*⁽²⁾ and *King, King & Co. v. Major Davidson*⁽³⁾. I say this because the view of the Chief Justice is, I think, that in 1909 this sub-section 60 (2) (b) was dead law as the Army Act referred to in the Code of 1908 had expired. If that was so, it would follow, I think, that the Allahabad and Bombay decisions in *Colonel Lecky v. Bank of Upper India, Limited*⁽¹⁾; *Velchand v. Bouchier*⁽²⁾ and *King, King & Co. v. Major Davidson*⁽³⁾, which were based on that very sub-section being subsisting law and not dead law, would conflict with the above observations

(1) (1911) 33 All. 529.

(2) (1912) 37 Bom. 26.

(3) (1914) 38 Bom. 66.

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of the Chief Justice. With great respect to the Chief Justice I agree with the conclusion which he has arrived at in these observations, but I prefer to base that conclusion on a different reason. The conclusion itself seems to me clear. The Legislature has said that by 1914 this sub-section 60 (2) (b) was unnecessary or dead law. Unnecessary or dead law it must therefore be. The only question is, for what reason? I prefer the reason that from the beginning the sub-section was unnecessary and was only inserted *ex abundanti cautela*. The difficulty I feel in adopting the other reason is that the words in the sub-section are not merely "nothing in this section shall be deemed to affect the provisions of the Army Act," but "nothing in this section shall be deemed to affect the provisions of the Army Act or of any similar law for the time being in force." Now I take it that there can hardly be a more similar law to the Army Act at the date of the 1908 Code than the Army Act in the year 1909 and following years, because as everybody knows the Army Acts are annual recurring Acts. Therefore I feel the force of the argument that, even if the Army Act specifically referred to in section 60 (2) (b) expired when the next Army Act was passed, that would not involve an expiry of any law covered by the words "or of any similar law for the time being in force" and that each subsequent Army Act was such a similar law. But I need not pursue that point any further. My conclusion as to *Duckworth v. Duckworth*⁽¹⁾ is that, if anything, it is an authority against Major Murray rather than in his favour. The other authority in *H.F. B. D. Hay v. Ram Chandar*⁽²⁾ is clearly against him. The result therefore of authority is in my opinion to support the view which I should arrive at apart from authority, viz., that Major Murray's pay can be attached.

(1) (1918) 43 Bom. 368.

(2) (1917) 39 All. 308.

I have thus dealt with the present case at length because I think it useful that in an important case such as this a Judge of first instance should check carefully the reasoning on which his decision is based. But a concise summary is sometimes nearly as useful. I may accordingly summarise my decision by saying that in my judgment (1) Major Murray as a British Officer in the Indian Army is a "Public Officer" within the meaning of section 2 (17) of the Civil Procedure Code and that as such public officer he is liable to have half his pay or salary attached under section 60 (1) (i) of that Code, inasmuch as that attachment is a deduction authorised by a law (viz., the Civil Procedure Code) passed by the Governor-General of India in Council within the meaning of section 136 of the Army Act, 1881, as amended by section 4 of the Army (Annual) Act, 1895; (2) that the proviso in section 60 (2) (b) of the Code, having been repealed by the Repealing and Amending Act, X of 1914, must be regarded as unnecessary or dead law and that the decisions based on that proviso, viz., *Colonel Leckey v. Bank of Upper India, Limited*⁽¹⁾, *Velchand v. Bouchier*⁽²⁾ and *King, King & Co. v. Major Davidson*⁽³⁾ must be regarded as obsolete; (3) that I arrive at a similar conclusion to that come to in the earlier cases of *Calcutta Trades Association v. Ryland*⁽⁴⁾ and *Watson v. Lloyd*⁽⁵⁾ and to the more recent case of *H. F. B. D. Hay v. Ram Chandar*⁽⁶⁾ and that I consider *Duckworth v. Duckworth*⁽⁷⁾ is clearly distinguishable as relating to the special case of a soldier governed by a special section of the Army Act, viz., section 145.

(1) (1911) 33 All. 529.

(2) (1912) 37 Bom. 261.

(3) (1914) 38 Bom. 667.

(4) (1896) 24 Cal. 102.

(5) (1901) 25 Mad. 402.

(6) (1917) 39 All. 308.

(7) (1918) 43 Bom. 368.

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In the result, therefore, I am of opinion that the orders for attachment made first by Mr. Malabari, the Acting Prothonotary, and subsequently by Mr. Kajiji, the Prothonotary, were correct. Accordingly I hold that the summons taken out by Major Murray must be dismissed and dismissed with costs. The other application, viz., the notice by the plaintiffs, must be made absolute with costs against Major Murray and there will accordingly be a rateable distribution by the Sheriff of the moneys in question amongst the decreeholders as provided by section 73 of the Code.

I wish to add by way of warning that the case I am dealing with here is the case of a British Officer in the Indian Army. I am not dealing with the case of an officer in the British Army. This latter case can be dealt with when it arises and I say nothing as to that. Still less am I dealing with the case of a soldier as opposed to an officer.

I also wish to add this about the Legislation on the point. I think it very unfortunate that the Legislature cannot say quite clearly whether it intends officers' salaries in India to be liable to attachment or not, whether they are in the British or the Indian Army. One or two lines would put the matter beyond any question or argument. I would also suggest that, where, as was the case in 1914, the then existing decisions of the Allahabad and Bombay High Courts relied on a particular clause of an important Code like the Civil Procedure Code as protecting British and Indian Officers from attachment of their salary, that clause should not be repealed by a mere Statute Law Revision Act. Amongst other reasons a repeal effected in this way may easily be overlooked by legal practitioners. This particular repeal was in fact unnoticed in the 1916 edition of a leading text-book on the Civil Procedure

Code. A similar repeal in the Criminal Procedure Code effected by the same repealing Act of 1914 escaped the vigilance of three leading text-book-writers, as I had occasion to point out in *Emperor v. Somya Hirya*⁽¹⁾. There also, trouble was caused by the mode of repeal. A Code is so useful to work with that I deprecate any alterations being made which are avoidable or which are not contained in an Act which by its mere title is sufficient to put legal practitioners on their guard.

Solicitors for plaintiffs : Messrs. *Khambatta & Co.*

Solicitors for defendant : Messrs. *Little & Co.*

Notice absolute : Cross-Summons dismissed.

G. G. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

RAOJI WALAD BABURAO (ORIGINAL DEFENDANT), APPLICANT v. BANSILAL NARAYAN MARWARI AND ANOTHER (ORIGINAL PLAINTIFFS), OPPOSANTS.

1918.
February 21.

Civil Procedure Code (Act V of 1908) section 115, Order XXI, Rule 89—Decree—Execution—Auction sale—Deposit in Court—No application to set aside sale—Sale confirmed—Subsequent application to set aside sale—Application refused—No irregularity—Titles arising from judicial sales should be settled as soon as possible.

The property of the applicant was sold in execution of a decree against him. Within thirty days of the date of sale the applicant deposited in Court the amount of the decree together with interest on the purchase money for the property sold. The applicant, however, having made no application to set aside the sale, the sale was confirmed and the Court called upon the applicant to take away his money. The applicant then applied that his deposit should

⁽¹⁾ (1918) 43 Bom. 134 at p. 146.

² Civil Application No. 74 of 1918 under Extraordinary Jurisdiction.