for the reasons already given that the case is governed by the second sentence of the paragraph and that the decision of the courts below is correct. I accordingly dismiss the appeal with costs.

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On appeal, MEARS, C. J., and SULAIMAN, J., upheld the judgement and dismissed the appeal.

Appeal dismissed.

REVISIONAL CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

1925 *June*, 17.

A. L. BROWNE (PETITIONER) *v.* H. A. PEARCE (OPPOSITE-PARTY).*

Act No. VIII of 1911 (*Indian Army Act*), *sections* 2 *and* 120 *—Civil Procedure Code, section* 60 (*j*)*—Execution of decree—Attachment of pay—"Warrant officer"—"Soldier"—Assistant surgeon.*

Held that the pay of an Assistant Surgeon attached to a British Regiment serving in India is not liable to attachment in execution of a decree of a civil court.

THE facts of this case are fully stated in the judgement of the Court.

Mr. *G. W. Dillon*, for the applicant.

The opposite party was not represented.

MEARS, C. J. and MUKERJI, J. :—Madam Pearce, a milliner of Agra, sued Assistant Surgeon Browne, a member of the Indian Medical Department, for a sum of about Rs. 40. There are no particulars before us to show us the date or the actual amount, but at all events at the time when the judgement-creditor was seeking to recover the money by attachment, the sum was then Rs. 46-6-0.

* Civil Revision No. 47 of 1925.

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An application was made to the Small Cause Court Judge asking for the attachment of part of the pay of this Assistant Surgeon. That attachment issued, and when the papers arrived at headquarters the authorities there refused to recognize the order of the court, contending that the pay of the Assistant Surgeon was not attachable. Certain correspondence followed, and eventually the Government Pleader was instructed to lodge objections to the attachment of the judgement-debtor's pay. Those objections were dated the 21st of October, 1924, and seemed to treat the matter on the basis that this Assistant Surgeon was subject to the provisions of the Indian Army Act. On the argument the Small Cause Court seems to have been to some extent embarrassed by want of authorities and eventually the Judge decided to disallow the objection. Thereupon the matter has come up here in revision.

The point really is a very short one, and we may as well treat it under both the heads of the English authorities and the Indian, because Mr. *Dillon*, whilst putting forward the view that the Assistant Surgeon is in fact recruited under British conditions, agrees that it is possible he might have been recruited in India. In effect the position is precisely the same. An Assistant Surgeon is a Warrant Officer and is so described in Army Regulations, vol. 2, paragraph 132. Whatever his grade, be it 1st, 2nd, 3rd or 4th class, he is a Warrant Officer. Whether in the British or Indian Army he is alike a Warrant Officer. As regards the British Army he undoubtedly comes under the generic title of " soldier " as distinguished from " Officer ", the latter word being used as applicable only to those who hold His Majesty's commission. A reference to the Army Act of 1881 (44 and 45 Victoria, Chapter 58), section 190 (clause 6), shows that " the

expression 'soldier' does not include an officer as defined by this Act but with the modifications in this Act contained in relation to the Warrant Officers, . . . does include a Warrant Officer not having an Honorary Commission". The Assistant Surgeon in this case is a Warrant Officer who does not hold an Honorary Commission. He, therefore, is in the Army Act designated as a "soldier" and subject to the legislation enacted for "soldiers". By section 136 of the same Act it is prescribed that "the pay of an officer or soldier of Her Majesty's Regular Forces shall be paid without any deduction other than the deductions authorized by this or any other Act or by any Royal Warrant for the time being". To that section must be added, in virtue of the provision of the Army Act (58 Victoria, Chap. 7) section 4, "or by any law passed by the Governor-General of India in Council".

Therefore, so far as we have gone, it is perfectly clear that, unless there has been some law passed by the Governor-General of India in Council, the pay of a British soldier of His Majesty's Regular Forces serving in India cannot be the subject of attachment.

Attachment is dealt with in section 60 of the Code of Civil Procedure, and in the proviso to that section certain salaries of certain public officers or servants are attachable to a certain extent. Section 2 (clause 17) describes who are the public officers who fall under the description of persons whose salaries are attachable. Sub-head (*c*) of clause 17 is as follows:—"Every commissioned or gazetted officer in the military or naval forces of His Majesty . . . while serving under the Government". Now it is obvious that the clause does not include Assistant Surgeon Browne, because he is not a commissioned officer. But it has been suggested that the enactment known as the Civil Procedure Code was in fact a law

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passed by the Governor-General of India in Council, and if so, clause 17 (*c*) might be read as making the pay of commissioned officers in the military forces of His Majesty, serving in this country, liable to attachment. We understand, although it is not necessary for our decision, that a commissioned officer of His Majesty's forces serving in a British Regiment is not technically serving under the Government, and that is why the provision in the Code of Civil Procedure, section 60, is not applicable to him. We understand also, though it also is not necessary for our decision, that a British officer who passes into the service of an Indian Regiment, and thus is serving under the Indian Government, is liable to have his pay attached. We have thought fit to mention this because had we not said something of this character, it might have been assumed that Assistant Surgeon Browne escaped simply on the ground that he was not a commissioned officer, and that had he happened to have held an Honorary Commission, he would have been liable to have his pay attached.

Now on the assumption that he was an Assistant Surgeon recruited in India, we find the position to be the same. Section 120 of Act VIII of 1911 says that the pay and allowances of any person subject to this Act shall not be attached by direction of any civil or revenue court in satisfaction of any decree or order enforceable against him. Section 2 of the same Act mentions Warrant Officers specifically as persons subject to it. Under the provisions of this Act, therefore, Assistant Surgeon Browne is clearly included and his pay is not attachable even on the assumption that he was recruited in India. Further a reference to section 60 (*j*) of the Code of Civil Procedure shows that no attachment can issue as regards pay and allowances of persons

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to whom the Indian Articles of War applied. Act V of 1869 was described as the Indian Articles of War—a description also continued in the amended Act XII of 1894. Both of the Acts have been repealed, and the present Act is Act No. VIII of 1911, to which we have just referred. That is styled the Indian Army Act. So that there is no doubt that the reference in the Civil Procedure Code, wherein the statutes are described as the Indian Articles of War, must now be regarded as referring to Act VIII of 1911.

In these circumstances we are of opinion that this revision must be allowed and that the salary of this Assistant Surgeon was not attachable.

The money which has been paid under protest by the Controller of Military Accounts, Meerut, must be refunded.

Revision allowed.

APPELLATE CIVIL.

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June, 19.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sulaiman.

TAJAMMUL HUSAIN (PLAINTIFF) *v.* BANWARI LAL AND OTHERS (DEFENDANTS).*

Landlord and tenant—Sale of houses in abadi—*Custom—Evidential value of sale deeds and transfers in favour of strangers.*

Held that the existence of a large number of sale-deeds, extending over a period of some sixty years, whereby tenants owning houses in the *abadi* had transferred them to strangers, without any objection on the part of the zamindars, was evidence upon which the High Court, in second appeal, might find the existence of a custom established, although the lower courts had negatived its existence.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single judge.

* Appeal No. 29 of 1924, under section 10 of the Letters Patent.