

Feeling as I do that to grant a decree of dissolution in the present case would be to go beyond what has been done in any case that I have been able to find or am aware of, I must refuse to make the decree prayed, and dismiss the petition. I think I ought, in conclusion, to express my obligation to the learned counsel for the petitioner (who did all that the facts of the case allowed in support of his client's cause) for the assistance he has afforded to the Court in the consideration of the present case.

Attorney for the petitioner : *J. Cleary.*

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PIRBHAI KHIMJI v. THE BOMBAY, BARODA, AND CENTRAL
INDIA RAILWAY COMPANY.

April 1.

Removal of Cause from Small Cause Court—Certiorari—Reasons for Removal—Purposes of Justice—Inability of Small Cause Court to issue Commission—Superintendence of Small Cause Court by High Court—Act IX. of 1850, Sec. 54—Letters Patent of High Court, Cl. 13.

The Bombay Court of Small Causes is subject to the superintendence of the High Court within the meaning of Cl. 13 of the Letters Patent of the High Court, and the latter has, therefore, power, for purposes of justice, to remove a case from the Small Cause Court, and itself to try and determine such case.

The inability of the Small Cause Court to issue a commission to examine for the defence witnesses residing outside its jurisdiction, though not in general, may under peculiar circumstances be a good ground for granting an order to remove a case from the Small Cause Court into the High Court.

Terms upon which such order will be granted.

ON the 16th of March 1871 *McCulloch* moved before GREENE, J., for a rule *nisi* for a writ of *certiorari*, or for an order under Cl. 13 of the Amended Letters Patent of the High Court (1865) calling upon Purbhai Khimji to show cause why the proceedings in the Court of Small Causes of Bombay in Suit No. 4350 of 1871 should not be removed into the High Court.

The rule was moved for upon the affidavit of Charles Albert Winter, a partner in the firm of Messrs. Keir, Prescott, and Winter. The affidavit stated that on the 24th of August 1870 a suit, No. 18,758, was instituted in the Court of Small

1871. Causes of Bombay by Pirbhái Khimji against The B. B. & C. I. Railway Company, in which the plaintiff sought to recover Rs. 766-11-4 from the defendants, on account of 18½ *mans* 2¾ *seers* of fishmaws short in weight out of 27 bags, and 1¾ *mans* short out of 19 bags of sharkfins in a consignment of 46 bags, delivered to the defendants by the plaintiff's agent at Damaun, to be conveyed to Bombay and there delivered to the plaintiff, and on account of the fare paid on the quantity short delivered. The summons was made returnable on the 16th of November 1870. By consent, the hearing of the case was postponed more than once, and ultimately came on for hearing on the 22nd of December 1870, before Mr. Mánikji Kharsetji, then acting as First Judge.

The defendants were advised that certain officers of the company employed upcountry, one Hormasji Bezanji, an inspector of customs, and one Bhímhbái Vassanji, a weighing clerk in Government employment at Kuntá, a customs station between Damaun and British territory, were material witnesses for the defence, but that the Small Cause Court had no power to compel their attendance, as they lived beyond its jurisdiction.

In order to facilitate the trial of the suit, Messrs. Keir, Prescott, and Winter wrote to the Deputy Commissioner of Customs at Súrat, requesting him to allow Hormasji and Bhímhbái to come to Bombay, and undertook to pay their expenses, and also sent their clerk to Hormasji and Bhímhbái to induce them to come to give evidence at the trial. Hormasji and Bhímhbái came to Bombay. The case came on for hearing on the 22nd of December 1870, when the plaintiff's witnesses were examined, as also were Hormasji and Bhímhbái for the defence, and the case was then adjourned. On the 9th of February 1871 the case was again called on, when the plaintiff appeared in person, and Mr. Keir appeared for the defendants. The plaintiff applied for an adjournment, on the ground that his attorney was engaged. This application was refused, and the plaintiff thereupon elected to be nonsuited, and the Judge ordered a nonsuit to be entered, though Mr. Keir objected that he would be unable

to obtain the attendance of the witnesses again from Kuntá. Pirbhái Khimji then filed another suit, No. 4350 of 1871 (the present suit), against the defendants, for the same cause of action as the former. There was an allegation that Hormasji and Bhimbháí were material witnesses for the defence; that they were beyond the jurisdiction of the Small Cause Court, and that they could not by the process of that court be compelled to attend to give evidence in Bombay, nor could they be examined under a commission.

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McCulloch, in moving for the rule, contended that there would be a failure of justice if the rule he asked for were not granted; that though this was not a case embraced by Sec. 54 of Act IX. of 1850, yet the provisions of that section were in effect enlarged by Cl. 13 of the Letters Patent, which were passed in pursuance of, and were, therefore, equivalent in operation to, an Act of Parliament (24 & 25 Vict., c. 104); that the Court of Small Causes in Bombay was subject to the superintendence of the High Court within the meaning of Cl. 13 of the Letters Patent, and that for "purposes of justice" this was a case in which the High Court would exercise the discretion confided to it under that clause. He relied upon *Pillāns v. The P. & O. S. N. Co.* (a) as a case in point, and cited *Symons v. Dimsdale* (b); Archbold, Q. B. Practice, pp. 1240-1248 (9th ed.).

The Court took time to consider whether it had power to grant the rule, and on the 18th of March 1870 granted a rule *nisi*, stating the following reasons for so doing:—

GREEN, J. (after stating the facts as they appeared from the affidavit of Mr. Winter, proceeded):—There is no doubt that the late Supreme Court of Bombay had power by *certiorari* to remove suits depending in the Court of Small Causes in the cases specified in Sec. 54 of Act IX. of 1850 (the Small Causes Courts' Act). The conditions of such removal were that the debt or damage or value of the property claimed should exceed Rs. 100, and that the leave of a Judge of the Supreme Court should be obtained, on proof to

(a) I. Ind. Jur., O. S. 68. (b) 2 Exch. 533.

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his satisfaction that some question of law or equity was likely to arise in the cause which, by reason either of its difficulty, novelty, or general importance, or of some erroneous course of decision on the same point in the Court of Small Causes, might appear to him fit to be tried in the Supreme Court, and upon such terms as to payment of costs, giving security for debt or costs, or otherwise, as he might think fit. By the operation of Sec. 11 of the 24 & 25 Vict., c. 104 (the Act for establishing High Courts of Judicature in India), the power of removing causes from the Small Cause Court given to the late Supreme Court by Sec. 54 of Act IX. of 1850 is continued to the High Court, and the case, cited by counsel, of *Pillans v. The P. & O. S. N. Co.* (*ubi supra*), is a precedent for the exercise by the High Court of the power of removing by *certiorari* a suit from the Small Cause Court, given to the late Supreme Court by Sec. 54 of Act IX. of 1850, in a case coming within the conditions prescribed by that section.

I mention Sec. 54 of Act IX. of 1850 (which, however, it will be material to consider for another purpose) at the outset to explain why I treat the present application as one not for a writ of *certiorari* under the practice of the late Supreme Court, but for an order under Sec. 13 of the Letters Patent of the High Court. The circumstances of the case, as they appear from Mr. Winter's affidavit, do not bring the application within Sec. 54 of Act IX. of 1850. It does not appear to me that any such question of law or equity as is there mentioned is likely to arise, and indeed that ground for the present application is not suggested; but the ground of the application is that certain persons are material witnesses for the Company at the hearing of the cause, and that the Small Cause Court has no jurisdiction to compel their attendance, or procure the taking of their evidence on commission. These circumstances, it is contended, make the case a proper one for the exercise of the power conferred on the High Court by Sec. 13 of the Letters Patent, by which it is ordained: "That the said High Court of Judicature at Bombay shall have power to remove, and to try and

determine as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Bombay, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court."

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Now, I do not feel any difficulty in coming to the conclusion that the removal of this cause is proper for purposes of justice, having regard to the fact that the defendants have already, at considerable expense and trouble, procured the attendance and examination in Bombay of the two witnesses in question; that such attendance and examination was rendered of no avail by the application of the plaintiff for a nonsuit having been granted by the Judge; and that the defendants, the Company, are unable again to procure the attendance of those witnesses. In my opinion, the First Judge of the Small Cause Court (if it be true that the difficulty of again procuring the attendance of the defendants' witnesses was duly represented to him) should not, in the circumstances of the case, have exercised his power to nonsuit the plaintiff, except on the terms of the plaintiff consenting that the evidence already taken on behalf of the defendants should be used in any future suit which the plaintiff might institute for the same cause of action.

The difficulty I have felt with regard to the application of the 13th clause of the Letters Patent has not, however been on the question whether the removal of the suit is proper for purposes of justice, but on this, whether the Court of Small Causes at Bombay can be said to be "subject to the superintendence" of the High Court. The Charter Act and the Charter itself do not afford much, or indeed any, assistance on this point, as Sec. 15 of the Act enacts that "each of the High Courts established under this Act shall have superintendence over all courts which may be subject to its appellate jurisdiction," &c.; and Cl. 16 of the Letters Patent ordains "that the High Court of Judicature at Bombay shall be a

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court of appeal from the Civil Courts of the Presidency of Bombay, and from all other courts subject to its superintendence," &c. : so that, taking the Act and Letters Patent together, I find that the High Court has superintendence where it has appellate jurisdiction, and has appellate jurisdiction where it has superintendence. Now, there can be little doubt that the High Court is not in any proper sense a court of appeal for the Small Cause Court. The Judges of that court have indeed power, in their discretion, under Sec. 55 of Act IX. of 1850, and under Sec. 7 of Act XXVI. of 1864 are bound, in cases falling within such last-mentioned section, to reserve questions of law or equity as to which they entertain any doubts, or which they are requested by either party to reserve for the opinion of the High Court. But neither this power or obligation to reserve questions for the High Court, nor the power of the High Court to remove causes under the 54th section, gives the High Court appellate jurisdiction, properly so called, over the Small Cause Court. However, Sec. 15 of the Charter Act does not, in my opinion, limit the superintendence of the High Court to the courts which may be subject to its appellate jurisdiction ; it only says that over such courts the High Court shall have superintendence, not that it shall have superintendence over those courts which are subject to its appellate jurisdiction, and over no others. This Sec. (15) of the Charter Act was discussed in the matter of John Thomson, where it was held that the High Court of Bengal has general superintendence over the Court of the Recorder of Moulmein, so as to have power to set aside an order of the Recorder directing the withdrawal of a license to practise as an advocate in the Small Cause Courts at Rangoon and Moulmein (c). That case, however, does not exactly touch the question in the present case, as by Act XXI. of 1863 (which established the Recorder's Court at Moulmein) a certain appellate jurisdiction, though a limited one, over such court is given to the High Court of Bengal ; and it was held that the existence of such appellate jurisdiction, though limited, brought the court in question under

the superintendence of that High Court within Sec. 15 of the Charter Act.

In the present case I am of opinion that the Bombay Court of Small Causes must be considered to be subject to the superintendence of the High Court at Bombay, for the purpose of Sec. 13 of the Letters Patent, for the following reasons:—Subject to the conditions prescribed in Sec. 54 of Act IX. of 1850, the High Court has authority, under that section, to remove causes from the Small Cause Court, and itself to try and determine them. By Sec. 41 of the same Act, any general rules for regulating the practice and proceedings of the Small Cause Court made and issued by the Judges of that court, are to be sent to the High Court, for approval of the Judges of that court, though they are to have force until disapproved. Then there is the power of this court (which has been from time to time exercised) to prohibit the Bombay Court of Small Causes from proceeding where it is acting without jurisdiction or in excess of its jurisdiction, which is a power of the same kind as that exercised over the County Courts in England by the Superior Courts of Common Law at Westminster by means of a writ of prohibition. Then there is the power of reserving questions of law or equity for the opinion of the High Court, and the obligation to do so in cases above the value of Rs. 500, on the application of either of the parties, to which I have already adverted. The decision of the High Court on such reserved question is binding on the Small Cause Court, and Mr. Justice Phear, in the above-cited case of John Thomson, it is to be noticed, speaks of such a power of reference to the opinion of the High Court as a “modified form of appeal.”

For the above reasons I am of opinion that the Bombay Court of Small Causes, though not subject in all respects, or perhaps generally, to the superintendence of the High Court, nor, strictly speaking, subject to its appellate jurisdiction at all, is so far subject to its superintendence as to give the latter court, under Sec. 13 of the Letters Patent, power to remove, and try and determine, any suit pending in the former

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court, when the High Court, for purposes of justice, shall think proper to do so.

The order which I consider proper to be made on this application is as follows:—That an order be issued, under the seal of this court, addressed to the Judges of the Bombay Court of Small Causes, that all proceedings in Suit No. 4350 of 1871, instituted in the said court by Pírbháí Khimji against the Bombay, Baroda, and Central India Railway Company, be removed from the said Court of Small Causes to this court, and commanding the said Judges to send and certify to this court the said proceedings, with all things touching the same, as fully and entirely as the same remain in their court before them, that this court may further cause to be done thereupon what of right this court shall see fit to be done, unless cause be shown to the contrary, by or on behalf of the said Judges, or the said Pírbháí Khimji, within four days after service of this order on the Clerk of the said Bombay Court of Small Causes, and on the said Pírbháí Khimji, respectively. And it is further ordered that in the mean time, and until the further order of this court, the said Pírbháí Khimji be restrained by injunction from further proceeding with the said suit, No. 4350 of 1871. And it is hereby recorded, in pursuance of Cl. 13 of the Letters Patent, that the reason for making this order is the consideration of the inability of the said Bombay Court of Small Causes to enforce the attendance or procure the evidence of witnesses material and necessary for the defence of the said suit.

Anstey showed cause against the above rule on the 28th of March 1871. He contended that the Small Cause Court of Bombay was not subject to the superintendence of the High Court, though it was inferior to it; that the defendants had mistaken their remedy, and ought to have filed an injunction suit, no case having been made out for a writ of *certiorari*; that the precedent afforded by this case would be a most dangerous one, and that, on the principle of "*expressio unius alterius exclusio*," the power of the High Court

to interfere was limited to the cases provided for in Act IX. of 1850, Sec. 54.

McCulloch in reply.

Cur. adv. vult.

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April 1. GREEN, J.:—In this case an order, dated the 18th of March, was made by this court, exercising its extraordinary original jurisdiction, on the application of the defendants, the Baroda Railway Company, to remove the above suit from the Court of Small Causes at Bombay to this court, unless cause was shown to the contrary. On Tuesday the 28th of March, Mr. Anstey was instructed, on behalf of the plaintiff in the Small Cause Court, to show cause. The objection chiefly urged by the learned counsel against the order was, that the High Court has jurisdiction to remove suits from the Bombay Court of Small Causes only in the cases provided for by Sec. 54 of Act IX. of 1850 (having regard also to the extended jurisdiction given by Act XXVI. of 1864), and not for the cause alleged in the present case, namely, the inability of the Court of Small Causes to procure the attendance of certain witnesses necessary to support the defence.

I quite agree that the question whether the Court of Small Causes at Bombay can be said, under Sec. 13 of the Letters Patent, to be subject to the superintendence of the High Court, is not so clear as in the case of the Courts of Small Causes in the Mofussil, constituted or regulated by Act XI. of 1865, and of the courts in the Mofussil, which are subject to the appellate jurisdiction of this court. By Sec. 4 of Act XI. of 1865, the Courts of Small Causes in the Mofussil are expressly made "subject to the general control and orders of the High Court." But, for the reasons stated in the judgment which I gave on the 18th of March last, I adhere to the opinion then expressed, that the Bombay Court of Small Causes is so far subject to the superintendence of the High Court at Bombay as to give the latter court, under Sec. 13 of the Letters Patent, power to remove, and try and determine, any suit pending in the former court when the High Court may think proper to do so for purposes of justice. I feel the weight of the consideration urged by the learned counsel, that

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to remove a cause to the High Court simply because the Small Cause Court has not powers to try such cause as effectually as the High Court has (and the omission to give which powers must be supposed to have been present to the mind of the Legislature in constituting the former court) would be, to a considerable extent, to curtail the benefits of speedy and cheap justice, which was contemplated when the Small Cause Courts were established; and if a case rested there this court ought, I think, to be slow to be induced to exercise the power. But in making the order of the 18th of March I was influenced not only by the consideration that in the suit in question the Small Cause Court could not enforce the attendance of witnesses necessary for the defence, but by the other circumstances stated in Mr. Winter's affidavit, and which are also detailed in my judgment. I think such an order for removal ought to be granted only on the terms of the party seeking to have a case removed paying all costs of his opponent of the proceedings in the Small Cause Court down to the time of removal, and undertaking to abide by any order the High Court may think fit to make with reference to the costs of the cause when in the High Court, and, if necessary, giving security for such costs. The only precedent I am aware of, of an order under Sec. 13 of the Letters Patent having been made by this court, is one made on the 23rd day of August 1866, by which this court, as a court of extraordinary original civil jurisdiction, removed from the Court of the Principal Şadr Amín at Tháná a suit there depending, of Jacob Eck against Jamnádas Javerlál. When I made the order of the 18th of March I was not aware of the existence of this precedent, but on examining it I do not find in my order any substantial departure from it. I, therefore, make absolute the order of the 18th of March 1871, on payment by the defendants, the Bombay, Baroda, and Central India Railway Company, of all reasonable costs incurred by the plaintiff, Pirbhái Khimji, in the said Bombay Court of Small Causes in the said suit, No. 4350 of 1871, since the institution thereof down to the time of making this order, and on the undertaking of the defendants to abide by and perform any order

this court may make with regard to the costs of the present motion, and of the proceedings so removed to this court which may be hereafter incurred. Following the form of the precedent which I have mentioned, I think the record of the reasons for the removal should be in these words:—"And it appearing to this court conducive to the purposes of justice to make such order, and especially on the grounds set forth in the said affidavit of Charles Albert Winter, sworn on the 15th day of March 1871: It is ordered," &c.

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Order accordingly.

Attorneys for the plaintiff: *Jefferson & Payne.* Plaintiff or
 Attorneys for the defendants: *Keir, Prescott, & Winter.*

Appeal No. 165.

NABOTAM BA'PU(Plaintiff) Appellant.
 GANPATR'AV PA'NDURANG ... (Defendant) Respondent.

April 29.

Prescription—Easement—Twenty Years' User—Act XIV. of 1859—Indian Limitation Act, 1871 (Act IX. of 1871).

Prior to the passing of the Indian Limitation Act, 1871, in order to give rise to an easement by prescription over immoveable property in the island of Bombay it was necessary for a plaintiff claiming such an easement to prove twenty years' uninterrupted user of it.

THE plaint in this case stated that the plaintiff was possessed of a piece of land, with a house standing thereon, in Agiary Lane; that there was a *galli* on the west side of the house, about twenty-four inches wide, which was the property of the plaintiff, and that the entrance to the *galli* from the street (Agiary Lane) was through a gate and thence over the land of the defendant, which had always been open ground, but shortly before the suit was brought had been built over by the defendant. The plaint, in its fourth paragraph, then stated that the plaintiff was entitled to a right of way from Agiary Lane through the gate over the open ground of the defendant, and back again, for him-