

The accused when removing the girl was not legally bound to inquire whether she had a guardian if the girl herself consented to accompany her, as she did.

*Per Curiam.*—The Court is of opinion that the fact of the accused not inquiring at the time of removing a child ten years of age from lawful guardianship, whether she had a guardian or not, is no excuse; for, by not inquiring, the accused takes the risk on himself and cannot escape its legal consequences. A child of such tender age is, *prima facie*, subject to guardianship, and no one is at liberty to take away such child without permission properly obtained. The objective fact of the child being in the keeping of a guardian, satisfies in this respect the requirements of this section of the Code.

*Application refused.*

### APPELLATE CIVIL.

( 42 )

*Before Mr. Justice Melvill Mr. Justice Kemball.*

GORDHAN PEMA (PLAINTIFF) v. KASANDAS BALMUKUNDAS  
(DEFENDANT.)\*

*Civil Procedure Code (Act X of 1877), Section 283, and Section 57, cl. (a)—Court of Small Causes—Jurisdiction—Act XI of 1865, Section 12.*

A suit brought by a defeated claimant, under sec. 283 of Act X of 1877, to establish his right to, and to recover possession of, certain moveable property attached in execution of a decree of a Small Cause Court, is within the jurisdiction of, and must, therefore, under Act XI of 1865, sec. 12, be instituted in a Small Cause Court.

THE following question was referred for the opinion of the High Court by Sunmukharam Navnitral Hora, First Class Subordinate Judge at Surat:—

“Whether a suit brought by a defeated claimant, under section 283 of Act X of 1877, to establish his right to, and to recover possession of, certain moveable property attached in execution of a decree of a Small Cause Court is maintainable in a Subordinate Judge’s Court, or must be instituted in the Small Cause Court which attached the property and passed the summary decision which it is the object of the suit to set aside?”

\* Civil Reference, No. 16 of 1873,

In submitted the case the Subordinate Judge made the following remarks :—

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“The point has arisen under the following circumstances :—One Kasandas Balmukandas obtained a money decree in the Court of Small Causes at Surat against the estate of one Pema Ratanji, deceased, and having applied for execution of the said decree to the same Court, attached certain moveable property, consisting of household utensils, furniture, &c., to the value of Rs. 38-10-3, as the property of the said Pema, deceased. Gordhan Pema intervened, and applied to the Small Causes Court to raise the attachment, alleging that the property belonged to him, and was in his possession at the time it was attached. This application was dismissed on the 15th instant in consequence of the absence of Gordhan Pema, who has now filed a regular suit in this Court against the judgment-creditor, Kasandas, to establish his right to, and to recover possession of, the said moveable property, which has been advertised for sale by the Court of Small Causes. I have received the plaint; but before either ordering it to be registered, or returning it for presentation to the Small Cause Court, solicit the orders of the Honourable the Chief Justice and Judges on the above-mentioned question, regarding which I entertain some doubt.”

In the case of *Nathu Ganesh v. Kalidas Umed*, (1) in which the previous decisions of the different High Courts on the subject were reviewed, the High Court held a similar suit, brought by the alleged owner under section 245 of Act VIII of 1859, to be cognizable by a Mufassal Court of Small Causes. But the question whether the case would be the same or otherwise under the new Civil Procedure Code, was left undecided, His Lordship the Chief Justice, in delivering judgment in the case, observing (page 370) “whether the new Civil Procedure Code (Act X of 1877) allows such a suit as the present, by an alleged owner, to be brought in a Court of Small Causes, it will be time enough to say when the question arises.”

I am inclined to the opinion that such a suit continues to be cognizable by a Small Cause Court, there being nothing in the

(1) I. L. R. 2 Bom. 365.

new Code which can be held to deprive the said Court of the jurisdiction it possessed under the old law. The classes of suits which may be heard by a Mufassal Small Cause Court are specified in section 6 of Act XI of 1865, and among these are "claims for personal property or for the value of such property." I do not think that the fact of plaintiff's also seeking to "establish his right" to the property, makes any difference; for, as remarked by the High Court in the case above quoted, (page 370,) whenever a person sues to recover property alleged to have been wrongfully taken from him, he sues to establish his right to it, and if he did not so establish his right, he could not recover it *in specie* or compensation by way of damages for it."

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Clause (f) of section 16 of Act X of 1877, (which is among the portions of the Code shown in the second schedule to it as extending to Mufassal Courts of Small Causes,) provides that "suits for the recovery of moveable property actually under distraint or attachment shall be instituted in the Court within the local limits of whose jurisdiction the property is situate." This is an entirely new provision, and I think applies to the facts of the case out of which this reference has arisen, the moveable property sued for being still under the attachment of the local Small Cause Court.

Section 12 of Act XI of 1865 directs that "wherever a Court of Small Causes is constituted under this Act, no suit cognizable by such Court shall be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes." I, therefore, respectfully consider that the plaint should be returned to the plaintiff for presentation to the Court of Small Causes under clause (a) of section 57 of Act X of 1877.

No counsel or pleader appeared for either party.

*Per Curiam.*—The Court considers that the suit is within the jurisdiction of the Court of Small Causes.