FULL BENCH.

Before Mr. Justice Bayley, Acting Chief Justice, Mr. Justice West, Mr. Justice Pinhey, Mr. Justice Scott and Mr. Justice Latham.

In re THE PLEADERS OF THE HIGH COURT.

1883
October 5,
&
December 14.

Pleaders—Vakils—Bombay Court of Small Causes—History of and legislation affecting the Court of Small Causes, Bombay—Mofussil Courts—Barristers—Attorneys—Civil Procedure Code, Act XIV of 1882, *Secs.* 2 *and* 36—*Presidency Small Cause Court Act, XV of* 1882, *Secs.* 38 *and* 76—*Right to practise—Rules—Power to make rules.*

Per BAYLEY, WEST and LATHAM, JJ.—None but barristers and attorneys have a legal right to practise in the Bombay Court of Small Causes. Neither sections 2 and 36 of the Code of Civil Procedure, (Act No. XIV of 1882,) nor sections 36 and 76 of the Presidency Small Cause Court Act, (No. XV of 1882,) give the pleaders of the Bombay High Court that right.

The provisions of section 47 of Regulation II of 1827, authorizing persons holding *sanads* from the High Court to practise in the Mofussil Courts, are still in force.

Per BAYLEY, WEST, PINHEY and LATHAM, JJ.—Section 2 of the Code of Civil Procedure, 1882, does not give every pleader a title to appear and plead; it only enacts that pleader means every person entitled to appear and plead for another in Court, and includes an advocate, a *vakil* and an attorney of a High Court. Consequently, if pleaders or *vakils*, who are the same class of practitioners, are not entitled by law to appear or plead for another in Court, the definition of 'pleader' gives them no new right or *status*.

The words in section 36 of the Code of Civil Procedure, Act XIV, 1882, "by a pleader duly appointed to act on his behalf," do not simply mean a person duly appointed by the party in the suit, but a pleader duly appointed according to law regarding pleaders in force in the particular Court.

Per PINHEY, SCOTT and LATHAM, JJ. (WEST, J., *dissentiente*).—The High Court has the power of making rules for the admission of pleaders to practise in the Bombay Court of Small Causes; and the Bombay Court of Small Causes under section 9 of the Presidency Small Causes Court Act XV of 1882 also has the power of making similar rules with the sanction of the High Court.

THIS was an application by the Pleaders' Association of Western India, praying for the issue of a circular order to all the subordinate Courts in the Presidency, including the Small Cause Court at Bombay, intimating to them that High Court pleaders, as such, are entitled to plead in them without special *sanad* or permission. The matter arose thus:—

Mr. W. E. Hart, First Judge of the Court of Small Causes at Bombay, on behalf of himself and the other Judges of the Court

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submitted the following letter to the High Court, requesting sanction to the rule therein proposed :—

"To the REGISTRAR of the HIGH COURT,
Appellate Side, Bombay.

Bombay, 19th January 1881.

"Sir,—I have the honour to request that you will be good enough to submit, under section 41 of Act IX of 1850, for the sanction of the Honourable the Chief Justice and the Judges of the High Court the following rule, which has been made by the Judges of the Small Cause Court, subject to such sanction :—

"'After the 30th April, 1881, no person shall be admitted to practise as a pleader of the Small Cause Court unless he shall have been duly qualified to practise as a barrister, advocate, solicitor, attorney, or *vakil* of the High Court.'

"2. Prior to 1860 the only practitioners recognized in the Small Cause Court were barristers and attorneys. *Vakils* of the Sadar Adálat were not then allowed to practise in this Court, because the examination which they were required to pass did not demand any knowledge of the English language, or of English law as administered in the Small Cause Court. In 1860, however, in deference to the opinion of Government, expressed in a Resolution in the Judicial Department (No. 1349 of 1860), dated the 14th April, 1860, the Judges of this Court consented to admit as pleaders before them, under the name of 'qualified law students,' such students of the Government Law School as after attending the lectures of that school for a term of four years should succeed in passing a final examination to the satisfaction of the Government law professors. A rule to this effect was submitted by the Judges of this Court for the approval of the Judges of the Supreme Court, who never expressed either their approval or disapproval thereof, and, consequently, under the provisions of section 41 of Act IX of 1850, it remained in force. These qualified law students' were never admitted to practise in the Supreme Court, nor, so far as I am aware, in the district Courts.

"3. When the Government Law School was affiliated to the Bombay University, the stock of 'qualified law students' came to an end, and their place was virtually taken by those persons

to whom the University granted the degree of LL.B., the examination for which was substituted for the final examination above mentioned of the students in the Government Law School. The Judges of this Court, accordingly, allowed those who passed the examination for the degree of LL.B. to practise before them, just as they had previously allowed those who passed the final examination in the Government Law School, but no express rule seems to have been framed for this purpose. About the same time I believe the Judges of the Sadar Adálat admitted to practise as *vakíls* of that Court those persons who succeeded in obtaining the degree of LL.B.

"4. When the Judges of the High Court passed the rules of 13th August, 1869, whereby a change was effected in the nature of the examinations to be passed by *vakíls* of the High Court on the Appellate Side, making a knowledge of the English language and English law essential, the Judges of this Court determined to allow those who passed that examination to practise in the Small Cause Court, but framed no special rule to that effect.

"5. From that time, the class of 'qualified students' being no longer in existence, the conditions for admission to practise in the High Court and the Small Cause Court were exactly the same, until the coming into force, in April 1879, of the present Stamp Act (I of 1879), article 27 of the first schedule to which renders necessary the payment of Rs. 500 by any person seeking to be admitted to practise as an advocate, solicitor, or *vakil* of any High Court. This provision, however, not being necessarily applicable to the Small Cause Court, persons who succeeded in passing the examination for the degree of LL.B., or the examination for *vakíls* of the High Court, continued to be enrolled as pleaders of the Small Cause Court without being admitted as advocates or *vakíls* of the High Court. The Judges of this Court consider it somewhat anomalous that there should exist a class of legal practitioners over whom the highest tribunal in the country can exercise no sort of supervision or control, and also that one of the qualifications for admission to practise in the Small Cause Court should be the passing of an examination

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intended only to qualify for admission to practise in the High Court by persons who have no intention of ever practising there.

"6. Apart from these considerations, however, the number of such persons has of late greatly increased, and will every year receive a fresh accession as the results of the two annual examinations above named are declared. The consequent overcrowding of the bar of the Small Cause Court seems to us to be a result most prejudicial to the interests of the poor suitors who form so large a majority of the litigants in this Court. A continual increase in the number of the practitioners naturally tends to lower the fees, and though up to a certain point this is to the advantage of the public, yet after a certain point the contrary is the result. Competition may reduce the fees so low that it will no longer be worth the while of competent and respectable advocates or *vakíls* to appear in the Small Cause Court, and, by still continuing, will encourage, or even oblige, incompetent or disreputable pleaders, not only to undertake work which they are unfit to perform, but even to resort to the merest pettifogging to obtain a livelihood. Thus there will eventually be practising in this Court a large number of persons whose principal means of subsistence will be obtained by fostering petty litigation, undertaking merely speculative cases, practising extortion and deceit on their poor and ignorant clients, and for the sake of an adequate remuneration scamping the work which to be properly done would require a far higher fee than they are content to receive. I regret to say all the Judges of this Court have already noticed certain indications which lead them to suspect the near approach of this state of things; nor in the case of the pleaders of the Small Cause Court are there any such rules enforced among themselves, or such professional etiquette as in the case of barristers, advocates, solicitors and *vakíls* to a certain extent guard the public against the evil results of a too great increase in the numbers of those professions. Besides which, the latter are, for the most part, recruited from persons of a better education and higher social standing than those who form the majority of the pleaders of the Small Cause Court, and are, therefore, on the one hand more likely to be imbued with notions of strict integrity, and on the other hand less likely to be exposed to the

temptations which beset men of more straitened means and less culture.

"7. The effect of the rule now submitted for the approval of their Lordships will be to prevent persons from practising in the Small Cause Court who have not paid the Rs. 500 necessary to enable them to practise in the High Court, and, therefore, to limit the number of practitioners in the inferior Court to the same extent that the provision in the Stamp Act limits the number in the High Court. The Judges of this Court admit that all the objections which can be urged against the mere 'property qualification' apply against the proposed rule, and are aware that any person who can borrow Rs. 500 from a Márvádi will be able to avoid its effect; but at the same time they submit that these objections also apply equally to the provisions of the Stamp Act mentioned above, and that a real necessity exists for further restricting the number of persons admitted to practise in the Small Cause Court, and they are unable to suggest any other means of doing this than by adopting the expedient which has had that effect in the High Court.

"8. The Judges of this Court are of opinion that any rule they may frame for the above purpose should have no retrospective force, so as to affect those persons who have been already admitted as pleaders of the Small Cause Court without having been enrolled as advocates, solicitors, or *vakíls* of the High Court. They also consider that it would be only fair to those who, relying on the existing practice, have passed the examinations hitherto considered a sufficient qualification for admission to practise in this Court, but who have not yet obtained the enrolment of their names as pleaders, that the operation of the rule should be deferred until they should have an opportunity for so doing. For these reasons the rule is worded so as not to come into operation for a period of three months. It is proposed in the interval to publish the proposed rule if approved by the High Court. I have, therefore, the honour to request that you will be so good as to beg their Lordships to intimate their approval or disapproval of the proposed rule as soon as possible.—I have, &c.

W. E. HART,
First Judge."

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To the above letter Sir Michael Westropp, the then Chief Justice, and the Judges of the High Court directed the following reply to be sent:—

"Sir,—I have the honour to acknowledge your letter of the 19th January, 1881, addressed to the Registrar of the High Court at its Appellate Side, submitting for the sanction of the Honourable the Chief Justice and Judges of that Court the following rule made by the Judges of the Court of Small Causes at Bombay:—

"'After the 30th April, 1881, no person shall be admitted to practise as a pleader of the Small Cause Court, unless he shall have been duly qualified to practise as a barrister, advocate, solicitor, attorney, or *vakíl* of the High Court.'

"I am desired by the Honourable the Chief Justice and Judges to reply to that letter as follows:—

"2. Sir William Syer (first Recorder of Bombay) in 1799 purporting to act under the Charter of his Court (dated 1798) seems to have made rules establishing, as a species of *imperium in imperio*, a Small Cause Court (perfectly distinct from the Court of Requests subsequently to be mentioned) for the recovery of debts not exceeding Rs. 175, which limit was extended in 1818 to Rs. 350 by rules made by Sir Alexander Anstruther. On the 22nd April, 1847, the Supreme Court (Sir David Pollock and Sir E. Perry) made rules further enlarging that limit to Rs. 600, and applying the jurisdiction of the so-called Small Cause Court to torts and trespasses as well as to debts. These rules, dated April 1847, were on the 22nd July, 1847, confirmed by Her Majesty in Council, but subsequently (6th September, 1847,) the President of the Board of Control (Sir J. Hobhouse) advised the Supreme Court not to act upon these rules until further notice, a doubt having arisen as to their legality. By further letter (6th March, 1848,) from the same Board the then Chief Justice, Sir E. Perry, was informed that the Attorney General, the Solicitor General and the standing counsel of the E. I. Company had 'given it as their opinion that the rules for establishing and modifying the Small Cause Court at Bombay were not passed by competent authority, and that, in order to obtain the object in

view, the aid of the Legislature will be required' (1). Under these circumstances, at the instance of the Board, Her Majesty in Council on the 15th April, 1848, revoked the order of the 22nd July, 1847, which revocation was by letter of the 24th April, 1848, communicated by Sir John Hobhouse to Sir E. Perry. Pending the above correspondence, Sir E. Perry had, upon the 5th August, 1847, made several further rules regulating his Small Cause Court; but these, like the previous rules, were *ultra vires*, and consequently were not confirmed by Her Majesty in Council, as appears by subsequent correspondence; but the object sought to be attained by the Recorder so early as A. D. 1799, and subsequently by the Supreme Court Judges, and especially by Sir E. Perry, so warmly commended itself to the Bombay Government, the Government of India, and the Board of Control, as greatly to facilitate, if not to lead to the legislation of 1850, presently to be noticed.

"3. The above-mentioned irregularly constituted Small Cause Court was open to the barristers and attorneys, at first of the Recorder's Court, and subsequently of the Supreme Court. Barristers are noticed in relation to that Small Cause Court in Rule 217 at page 48 of Mr. Mackenzie's Book of Rules and Orders of the Supreme Court, and attorneys in Rules 207, 208, 209, 210, 219 at pages 46, 47, 48 and 49 of the same book. It is not very easy to perceive the reason of Mr. Mackenzie for publishing these rules, inasmuch as the existence of the Small Cause Court of the Supreme Court had ceased before 1852 when his book was published.

"4. The present and legitimate Court of Small Causes at Bombay seems to owe its name to the Court, the subject of the last paragraph; but is, legally speaking, an expansion of the Court of Requests, as appears from the preamble and first section of Act IX of 1850.

"5. The Court of Requests was established A. D. 1753 by the Royal Charter of that year, which renewed the Mayor's Courts originally created, A. D. 1726. Clauses 34, 48 and 60 are the portions of the Charter of 1753 (26th January, 22 Geo. II) which

(1) Neither the Charter of the Supreme Court nor the Stats. 2 and 3 Vic., cap. 34, was deemed a sufficient legal basis for these rules.

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relate to Courts of Requests. That Charter provides for the constitution and jurisdiction (5 pagodas) of the Courts of Requests for Madras, Bombay and Calcutta, but is silent as to the admission of legal practitioners of any class either to the Mayor's Courts or to the Courts of Requests. The Charter of 1726, which related to Mayor's Courts only, was equally silent as to legal practitioners.

"6. The Statute 37, Geo. III (A.D. 1797), authorizing the creation of Recorders' Courts at Madras and Bombay, also extended the jurisdiction of the Courts of Requests in the three Presidency towns to Rs. 80; but in other respects made no provision in regard to them (1). The Charter of the Recorders' Courts of Madras and Bombay (2) subjected the Courts of Requests to the order and control of the Recorders' Courts to the same extent as Courts of inferior jurisdiction are in England subject to the Court of King's Bench(3), but made no provision for the admission of legal practitioners to the Courts of Requests. It did make a provision for the admission of legal practitioners to the Recorders' Courts by recognizing *bonâ-fide* practitioners of the law then existing in the Mayors' Courts, and by empowering the Recorders' Courts to admit barristers and attorneys or solicitors. It excluded from practice in the Recorders' Courts all other persons.

"7. In like manner the Charter of the Supreme Court of Bombay provided for the recognition of *bonâ-fide* practitioners in the Recorder's Court and for the future admission of barristers, attorneys and solicitors, and for the exclusion of all other persons(4). That Charter(5) subjects the Courts of Requests to the order and control of the Supreme Court in the same manner as Courts of inferior jurisdiction in England are subject to the Court of King's Bench (6); but is silent as to the practitioners in the Court of Requests.

(1) The subsequent Stat. 40 Geo. III, cap. 79, sec. 17, related to the Courts of Requests at Calcutta and Madras only.

(2) Dated 17th February, 1788. Proclaimed and published in Bombay, 8th October, 1798.

(3) *Ex gr.*, to writs of certiorari, prohibition, &c., &c.

(4) Clauses 24, 25. (5) Clause 59.

(6) *Ex gr.*, to writs of certiorari, prohibition, &c.

"8. Bombay Regulation II of 1827, chap. vi, relating to pleaders, was applicable to the Mofussil and Sadar Adálat only.

"9. Act I of 1846, in so far as it relates to pleaders, is applicable to the Courts of the East India Company only. The Courts of Requests at the Presidency towns having been formed under the Royal Charter of 1753, did not come under that Act. Act I of 1846, sec. 5, seems to have been the first enactment which recognized the right of barristers to be heard in the Sadar Courts of the East India Company.

"10. Act XII of 1848 applied to the Calcutta Court of Requests only.

"11. The result of an examination of the enactments, Indian and Imperial, and of the Royal Charters down to A. D. 1850 is that in none of them have the Honourable the Chief Justice and Judges discovered any provision for the admission of any class of legal practitioners to the Court of Requests in Bombay.

"12. Act IX of 1850, which substitutes the Courts of Small Causes thereby created for the Courts of Requests, does not make any express provision for the admission of legal practitioners to those Courts of Small Causes. Section 41 enables the Judges of those Courts 'to make and issue all the general rules for regulating the practice and proceedings of the Court and also to frame forms'—'the rules so made and the forms so framed shall be observed and used in the Court', 'and shall be sent to the Supreme' (now High)[1] 'Court for approval, but shall be of force until disapproved, and in any case not expressly provided for herein or by the said rules, the general practice in the Supreme Court may be adopted and applied at the discretion of the Judges to actions and proceedings in their Courts." Although the Charter of the Supreme Court at Calcutta[2] in its 38th clause contained a nearly similar power, *viz.*, "to frame such rules of practice, and make such standing orders for administration of justice, and the due exercise of the Civil, Criminal, Admiralty and Ecclesiastical Jurisdiction hereby created, and to all such other things as shall be found necessary thereunto, yet it was deemed requisite

(1) Stat. 24 and 25 Vic., cap. 104, sec. 11.

(2) Dated 26th March 1774, 14 Geo. III.

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by the Crown to introduce into that Charter a special power for the Supreme Court of Calcutta in the 11th clause to admit advocates and attorneys. The same distinction, though perhaps not quite so strongly marked, and separate provisions* are to be found in the Charter of Recorders' Courts of Madras and Bombay, clauses 18, 27, 28, 73, 79, and in the Charters of the Supreme Courts of Madras, clauses 17, 28, 29, and of Bombay clauses 24, 25, 37, 38, 39, and being distinctly in the Charter of the High Court of Bombay of 1865, clauses 9, 10, 37. In all of the Charters (mentioned in this paragraph) the authority to admit legal practitioners *and the authority to make rules as to process and practice* are treated as distinct powers, and are accordingly separately conferred. Under these circumstances, and upon a careful consideration of section 41 of Act IX of 1850, the Honourable the Chief Justice and Judges are unable to regard it as including an authority to the Judges of the Court of Small Causes to make, or to the Supreme or High Court to approve, rules for the admission of the legal practitioners,—a subject which seems to have been then either accidentally overlooked, or purposely ignored by the Indian Legislature.

"13. Act XX of 1853 related to the Courts of the East India Company only. There were not then any recognized pleaders in the Court of Small Causes at Bombay. That Act (section 3) permits attorneys of the Supreme Court to practise in the Sadar Adálat, and barristers and attorneys to practise in Courts subordinate to the Sadar Adálat. It does not mention the Presidency Towns' Courts of Small Causes.

"14. Act XXVI of 1864, which enlarged the jurisdiction of the Presidency Courts of Small Causes, is the first enactment relating to the Court of Small Causes of Bombay which speaks of legal practitioners. It makes no direct provision for the admission of such practitioners; but section 3 incidentally recognizes the right of attorneys to practise there, by giving an optional jurisdiction in cases where the debt, damage, or the value of the property in dispute exceeds Rs. 1,000 when 'both parties shall agree, by a memorandum signed by them or by their attorneys,' that the

* In *Morgan* v. *Leech*, 2 Moo. Ind. Ap. 428, the Privy Council appears to have considered the two as essentially distinct.

Court 'shall have power to try any action not included in the proviso in section 25 of Act IX of 1850.' And section 13 of the same Act (XXVI of 1864) still more recognizes the right of barristers and attorneys to practise in the Presidency Courts of Small Causes by regulating the fees which should be allowed to them respectively on the taxation of costs. The same Act is completely silent as to pleaders—which is the more remarkable, inasmuch as they had been, since 1860, *de facto*, if not *de jure*, practitioners in the Bombay Court of Small Causes. This appears from para. 2 of the letter under reply. As a matter of fact, barristers and attorneys of the Supreme Court have practised in the Bombay Court of Small Causes ever since its establishment under Act IX of 1850.

"15. The Government of Bombay, in conformity with the advice of the High Court, has refrained from extending Act XX of 1865, relating to pleaders and *mukhtyars*, to this Presidency, which might have been done under the 47th section of that Act. If it had been extended to this Presidency at all, it should have been so in full. There was not any power of making a partial extension of that Act.

"16. Act XVIII of 1879, relating to legal practitioners generally, does not, with the exception of its first section, at present apply to this Presidency. But by that section the Bombay Government 'may from time to time, by notification in the official gazette, extend all or any of the provisions of the rest of this Act to the whole or any part of the territories under its administration.' A considerable portion of that Act, like Act XX of 1865, the Honourable the Chief Justice and Judges deem to be objectionable, and quite unsuitable to this Presidency.

"17. The foregoing examination of the history of, and the legislation relating to, the present Court of Small Causes at Bombay, and of the history of the Courts of Requests, and the so-called Small Cause Court formerly established in the Supreme Court, has led the Honourable the Chief Justice and Judges to the conclusion that, under the law at present applicable to the present Court of Small Causes in Bombay, its Judges have not now, and never have had, any power to make rules for the admission of

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pleaders to practise in that Court, and the Honourable the Chief Justice and Judges of the High Court have not authority to make or to sanction any such rules. Hence it follows that the Honourable the Chief Justice and Judges hold that the pleaders at present practising at the Small Cause Court have not any legal standing ground there; but nevertheless are of opinion, and understand the Judges of the Court of Small Causes to entertain the same view, that all due consideration should be shown for those pleaders, and that, *quamdiu se bene gesserint*, they should be permitted to continue to practise in that Court.

"18. In order to secure to those pleaders a legal *locus standi* and to provide for the future regular admission of pleaders to the Court of Small Causes, the Honourable the Chief Justice and Judges of the High Court, should such be the desire of the Judges of the Court of Small Causes, are willing to advise the Government of Bombay to extend to this Presidency the definition of subordinate Courts in section 3 of Act XVIII of 1879, so far at least as it is applicable to the 'Court of Small Causes established under Act IX of 1850.' This, having regard to the decision of the Honourable Mr. Justice Green upon the applicability of clause 13 of the High Court Charter of 1865 to the Court of Small Causes, cannot be deemed an innovation[1]. The object of extending that definition would be the treating it as prefatory to the following portion of the sixth section of the same Act, *viz.*, '6. The High Court may, from time to time, make rules consistent with this Act as to the following matters (namely):—(*a*)—The qualifications, admission and certificates of proper persons to be pleaders of the subordinate Courts.' '(*c*)—The fees to be paid for the examination and admission of such pleaders.' '(*d*)—The suspension and dismissal of such pleaders' 'All such rules shall be published in the local official gazette, and shall thereupon have the force of law.' That portion of the Act, so far as the same may be applied to the Bombay Court of Small Causes, the Honourable Chief Justice and Judges are willing to advise the Government of Bombay to extend to this Presidency. If the Government of Bombay act upon that advice, the Honour-

(1) *Pirbhai Khimji* v. *B. B. & C. I. R. Company*, 8 Bom. H. C. Rep., 59, O. C. J.

able the Chief Justice and Judges would, so far as pleaders are concerned, make a rule in conformity with that which the Judges of the Court of Small Causes have (by the letter under reply) submitted for sanction under Act IX of 1850, as the former fully concur with the latter in their laudable desire to maintain the pleaders of the Court of Small Causes at as high a level as may be practicable, and deem that object to be most beneficial to the suitors of the Court[1]. The Honourable the Chief Justice and Judges would also make a rule recognizing the present pleaders of the Court, and would give their best consideration to any other rules relating to pleaders which the Judges of the Court of Small Causes may suggest, but it is not desirable that they should admit any more pleaders under Act IX of 1850, which does not appear to warrant the admission of pleaders.

I have, &c.,
(Signed) G. H. FARRAN,
For the Prothonotary, High Court

"*P. S.*—The Honourable the Chief Justice and Judges have not overlooked section 53 in the Bill now before the Legislative Council of the Governor General in relation to the Presidency Towns' Small Cause Courts. That section will not remove the necessity for the proposed extension of so much of Act XVIII of 1879 as above specified."

On the 4th of September, 1883, the present application was made to the High Court by the Pleaders' Association of Western India. The application set forth :—

"With reference to the rule which requires, in accordance with Regulation II of 1827, that a pleader of the High Court should obtain a special *sanad* on payment of a fee of Rs. 5 in order to enable him to practise in any of the districts, I am directed by the Pleaders' Association to request you to solicit the attention of the Honourable the Chief Justice and Judges to the change made by section 2 of the new Code of Civil Procedure (Act XIV of 1882) in the *status* of a pleader of the High Court. The Association respectfully submits it for the consideration of their

(1) Barristers and attorneys, having been recognized by Act XXVI of 1864, need not, so long as that Act is in force, be included in the proposed extension.

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Lordships that, under the last mentioned enactment, a High Court pleader, as such, is entitled to practise in all the Courts subordinate to the High Court, and requests that their Lordships will, therefore, be pleased to cancel the last sentence in Rule 14 of the Pleaders' Examination Rules, and issue a circular to all subordinate Courts intimating that the High Court pleaders are entitled to practise in those Courts without special *sanad* or permission.—I have, &c.

SHA'MRAV VITHAL,
Secretary."

The rule referred to in the above letter is at page 142 of the High Court Circular Book. The last sentence of the rule which the pleaders of the High Court sought to be cancelled runs as follows:—

"Pleaders of the High Court may, on application and payment of a fee of Rs. 5 for each *sanad*, obtain *sanads* authorizing them to practise in any districts with the vernacular language of which they may satisfy the Honourable the Chief Justice and Judges that they are sufficiently acquainted."

The Court of Small Causes at the Presidency town having been held to be subordinate to the High Court, and a compliance with the application of the High Court pleaders being contrary to the view expressed in the letter of the High Court above cited, the Honourable the Acting Chief Justice and Judges directed a note to be sent to the Advocate General as representing the Bar and to the Chairman of the Bombay Law Society as representing the solicitors of the High Court intimating that the Court would be happy to hear counsel if it was desired to show cause why the pleaders' application should not be granted, and that the application would be heard by a Full Bench.

Shántárám Náráyan for the pleaders of the High Court.

Shámráv Vithal for the Pleaders' Association of Western India.

Jehángir Mervánji for the pleaders of the Bombay Court of Small Causes.

Hon. *J. Marriott*, Advocate General, for the Bar.

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Jardine for the Bombay Law Society representing the attorneys.

Shántárám Náráyan.—The prayer of the pleaders of the High Court substantially is that they be allowed to practise in the Presidency Small Cause Court and the Courts in the Mofussil by virtue of their office as *vakil* of the High Court. The occasion for this application arose when the Judges of the Small Cause Court made an order refusing to admit as pleaders of that Court certain persons who had been admitted as *vakíls* of the High Court. On the 14th of April, 1860, the Resolution No. 1349 was passed by the Government of Lord Elphinstone, which says "that the Right Honourable the Governor in Council is of opinion, under the statements submitted in the letters of the Director of Public Instruction, that qualified law students should be permitted to practise in the Court of Small Causes under such regulations as the Judges of that Court may deem expedient." This resolution was approved of by the Secretary of State for India. A rule framed by the Judges of that Court, and sanctioned by the late Supreme Court, admitted qualified law students to practise in that Court. The class of students originally admitted were those who had successfully passed the final examination of the Government Law School. Bachelors of law of the Bombay University came next; and, finally, the *vakíls* of the High Court who had passed an examination under the rules of the 13th August, 1869, and the 2nd of October, 1878. So that for more than twenty years from 1860 down to the refusal of the Judges of the Small Cause Court to admit persons who had taken the LL.B. degree, or passed the High Court *vakil's* examination, but who had not taken out a High Court *sanad*, our right to practise in the Small Cause Court had been admitted, and not questioned. The passing of the Stamp Act (I of 1879), which rendered the payment of a sum of Rs. 500 necessary before enrolment as an advocate, solicitor, or *vakil* of the High Court, and the alleged evasion to pay this fee induced the Judges of the Small Causes Court to submit to the High Court the rule that "after the 30th of April, 1881, no person shall be admitted to practise as a pleader of the Small Cause Court unless he shall have been duly qualified to practise as a barrister, advocate,

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solicitor, attorney, or *vakil* of the High Court." This rule, under the circumstances stated in Sir M. Westropp's letter, he and his colleagues would not sanction, having been led to the conclusion "that, under the law at present applicable to the present Court of Small Causes in Bombay, its Judges have not now, and never have had, any power to make rules for the admission of pleaders to practise in that Court, and the Honourable the Chief Justice and Judges of the High Court have not authority to make or to sanction any such rules." This view, though entitled to great respect, was formed *ex parte*, and without any notice to those whom it concerned.

[BAYLEY, A. C. J.—You are quite at liberty to show that the view there arrived at is erroneous.]

I will endeavour to show that the Small Cause Court had either no power to admit any practitioners at all, or that it had power to admit such it approved of. The present Small Cause Court is a creation of Act IX of 1850, which makes no mention whatever of practitioners beyond forbidding a Judge of the Court from practising as an advocate, attorney, or *vakil* in any of the Queen's Courts or Courts of the East India Company, and imposing penalties on officers of the Court practising as an attorney or *vakil*. Nor does the succeeding Act (XXVI of 1860), which increases the limit of jurisdiction from Rs. 500 to Rs. 1,000, authorize the admission of any class of practitioners. It only assumes that at least the barristers and attorneys do practise in the Court of Small Causes. Section 3 provides for cognizance of suits for sums exceeding Rs. 1,000 if the parties agree by a memorandum signed by themselves or by their attorneys; and section 13 provides for the payment of fees to barristers and attorneys in suits tried under the Act. If, then, the Royal Charters previous to 1850 did not give to the predecessors of the present Court of Small Causes authority to admit any class of practitioners, and if section 41 of Act IX of that year is rightly construed as not giving that authority, then barristers and attorneys were in merely by sufferance, and continue to do so on that footing alone. The pleaders have thus some rule to rely upon; barristers and attorneys have none. But if sections 3 and 13 of Act XXVI of 1864 are to be construed as inferentially giving to them a legal *status*, I do not

wish to quarrel with the construction. I will only point out that to advocates not being barristers neither these sections nor any others of that or any other Act give the *status*. So long ago as Act IX of 1850, sec. 8, a distinction was taken between barristers and advocates of the Supreme Court. So far, therefore, the pleaders and advocates must stand or fall together, except that I say the Judges of the Court of Small Causes were authorized to pass the rule, which they did to admit qualified law students.

Assuming, without granting, that the state of the law previous to 1882 was defective, we come to Acts XIV and XV of that year, the present Code of Civil Procedure and the Small Cause Court Act, which remove all doubt. In discussing the provisions of these Acts it must be borne in mind that the Court of Small Causes at the Presidency town has been held by Mr. Justice Green to be subordinate to the High Court—*Pirbhai Khimji* v. *The B. B. & C. I. Railway Company*[1], on which ruling sections 6 and 9 of the Small Cause Court Act are founded. Section 6 makes the Small Cause Court expressly subject to the superintendence of the High Court, and section 9 empowers that Court, with the previous sanction of the High Court, to provide for all matters not specially provided for by Act XV of 1882. Section 23 provides what portions of the Code of Civil Procedure are to be applied to the Small Cause Court. Amongst others, sections 2, 36 and 38 have been applied to the Small Cause Court. Section 2 is the interpretation clause, and defines "pleader" to mean "every person entitled to appear and plead for another in Court, and includes an advocate, a vakíl and an attorney of a High Court." This should be construed in its plain grammatical sense. So construed it will be observed that the condition of being entitled to appear and plead for another in Court does not attach to an advocate, a *vakil* or an attorney of a High Court. To put a different construction would be to render the second part of the sentence entirely superfluous, or to alter the existing arrangement of the words. As to the word *vakíl*, that obviously means a *vakíl* of the High Court, even though

(1) 8 Bom. H. C. Rep. 59, O. C. J.

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the words 'of a High Court' be read as qualifying merely the word 'attorney'. The word *vakíl* is used in the Code as meaning a *vakíl* of the High Court. This appears clear from the use of the word '*vakíls*' in section 635, which occurs in a chapter containing special rules relating to the chartered High Courts. Under this section a *vakíl*, by a rule similar to that which has been made by the High Court at Madras, can be permitted even to practise at the Original Side of the High Court. Sections 36 and 38, which relate to the appearance of parties and the service of process, give to the pleaders a recognized standing to appear in the Small Cause Court. These, read with sections 38 and 76 of the Small Cause Court Act, remove all possible doubt in the matter. In section 38 the word *vakil* is used as contradistinguished from pleader in section 76 from other legal practitioners. I argue that the Legislature intended the employment, in the Small Cause Court, of advocates, *vakíls*, attorneys as well as pleaders, and my argument is as fair as that which has been used by the Judges of the High Court in favour of the recognition of barristers and attorneys. I claim the same process of construction as regards pleaders which has been applied by the High Court as regards barristers and attorneys to section 13 of Act XX of 1864. Rules 18 and 19 made by the Small Cause Court and sanctioned by the High Court under section 9 of the new Small Cause Court Act show that this is the right construction. Sections 9 and 10 of the Letters Patent show that a *vakíl* is a pleader enrolled in the High Court. Every *vakíl* must be a pleader, but not *vice versâ*. Section 126 of the Indian Evidence Act (I of 1872) forbids the disclosure of professional communications by barristers, attorneys, *vakíls* as well as by pleaders. The Legal Practitioners' Act, though not applied to Bombay, also throws light on the matter. The definition of the term legal practitioner in section 3 distinguishes a *vakíl* of the High Court from a pleader. Section 4 entitles a *vakíl* on the roll of any High Court, as such *vakíl*, to practise in any Court in British India other than a High Court on whose roll he is not entered, or with the permission of the Court in any High Court on whose roll he is not entered. So that a *vakíl* of the Bengal High Court can, as such, practise in any subordinate Court in the Punjáb, or in any

subordinate Court in Madras, where the Legal Practitioners' Act was partially applied on the 28th November, 1881, and would be entitled to practise in any Court subordinate to the High Court at Bombay if the Act be extended to the Bombay Presidency. At present a *vakíl* of the Bombay High Court, as such, can appear in the subordinate Courts, including Courts of Small Causes of Bengal, Madras and the Punjáb, and with permission even in the High and chief Courts. The rule, of which we now seek cancellation, is superseded by the law, and should be expunged, and a circular issued explaining the law both as regards the Court of Small Causes in the town and island of Bombay and the Courts in the Mofussil.

Hon. *J. Maxriott,* Advocate General.—I appear in this case on behalf of the Bar, not to offer any invidious opposition to any rights which the pleaders may show that they possess, but to submit such observations as may appear necessary upon the argument advanced on their side. Their application is based on the alleged change made in their *status* by section 2 of the Civil Procedure Code, Act XIV of 1882, and it prays for the cancellation of a rule made in October, 1878. I deny that any change has been made. The definition of the word pleader in this Code and that in the Code of 1877 is, word for word, the same; and I presume that the examination rules of 1878 were framed upon a full consideration of their *status* as recognized by the Code of 1877. The argument founded on the change, therefore, falls to the ground. If the *vakíls* have a right founded on the Small Cause Court Act, 1882, they should apply to the Small Cause Court. There is no necessity for the High Court to consider the application. The right of the *vakíls* rests on the definition of section 2 of the Code of Civil Procedure, and I submit the words 'entitled to appear and plead for another in Court' apply to all the three classes of practitioners there spoken of. In fact, the succeeding words are added merely to amplify the preceding words. As regards the suggestion of the *vakíls* to apply to Government for the extension of the Legal Practitioners' Act, I am requested to state that, in the opinion of the Bar, it is not desirable.

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Jardine.—The attorneys also do not wish to offer any invidious opposition. They merely desire to maintain the *status quo*. The innovators have to make out their case, and I submit the *vakíls* have failed to do so. If the *vakíls* have a statutory right, that should have been asserted in the Small Cause Court, and, if denied, a *mandamus* might have been applied for in this Court. Before 1860 none but barristers and attorneys were allowed to practise in the Small Cause Court, or the Courts which preceded it. The pleaders were admitted in 1860, and from that year down to 1881 their right has, no doubt, not been challenged. In 1881 the question was raised by the Small Cause Court and decided against the pleaders by the High Court. The pleaders have now again raised it, and base their right on the change effected in their *status* by the Civil Procedure Code of 1882. As has been urged on behalf of the Bar, I submit that no such change has been made, the law having been precisely the same since 1877. I do not appear for the Mofussil pleaders, and the attorneys have no individual interest in the Mofussil Courts. But if the argument urged by the *vakíls* of the High Court be sound, they would be entitled to appear in the Mofussil Courts also. I submit, the argument is not sound. The words in section 2 of the Code—'and includes an advocate, a vakíl and an attorney of a High Court'—are put in *ex abundanti cautela*. No class of practitioners can appear in Court if it has not a right to appear. If the construction sought to be put by the *vakíls* be correct, the right of the High Court to make rules concerning advocates, *vakíls* and attorneys given by section 635 would be taken away. In Act IX of 1850 no mention is made of legal practitioners, but Act XXVI of 1864 impliedly admitted barristers and attorneys, not any other class of practitioners. The express mention of barristers and attorneys necessarily excludes other practitioners. In considering the provisions of the Small Cause Court Act, 1882, it must be borne in mind that it was intended to apply to all the Presidencies, and that the Legal Practitioners' Act, 1879, had been shortly before passed. Sections 38 and 76 have been relied on in support of the *vakíls'* contention, and it is said that the word *vakíl* is used in section 76 as contradistinguished from other legal practitioners. Now under Act XVIII of 1879 legal practitioner includes a

mukhtyár or revenue agent. Is it to be inferred that a *mukhtyár* is also permitted to practise in the Small Cause Court? If not, the argument advanced must be fallacious. Moreover, it may be noted that chapter VI of Regulation II of 1827 relating to pleaders is still in force. It gives the High Court the power of supervision over the pleaders, and contemplates the assignment of pleaders to particular Courts. If a *vakíl* of the High Court can, as such, appear in any of the Mofussil Courts, the regulation must so far be deemed to have been repealed. The Legislature would never effect such an important repeal except in clear and express terms. That disposes of the question of right.

As to the suggestion for procuring the extension of the Legal Practitioners' Act to Bombay, that is not a matter regularly before the Court. The tendency of legislation is to increase the pecuniary jurisdiction of the Small Cause Court. The increase represents a proportionate abstraction from the litigation on the Original Side of the High Court, with which the *vakíls* have nothing to do, and which falls exclusively within the province of barristers and attorneys. As between attorneys and *vakíls* there is no reciprocity. The attorneys, as such, are no longer allowed to practise on the Appellate Side of the Bombay High Court as they are allowed in Calcutta under certain conditions. Notwithstanding the high character and ability of the *vakíls*, the practice in the Small Cause Court—involving, as it does, commercial litigation—is better suited to the acquirements of attorneys.

Shántárám Náráyan in reply.—It has been assumed that the examination rules of 1878 were framed upon a consideration of section 2 of Act X of 1877. I assert on the contrary, without fear of contradiction, that, when those rules were passed, the change made by that section in the *status* of *vakíls* was not present to the minds of the Judges of the High Court who passed them. The High Court, therefore, did consider the effect of sections 2 and 36 of the Code of 1877 or 1882, and had no occasion to do so till now, and it would be very unfair to presume otherwise. The rule which we seek to get cancelled is either in consonance with the interpretation I suggest, or is *ultra vires*.

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If the other interpretation be adopted, each class of practitioners would have to make out a title. Advocates, not being barristers, have none to show. Act I of 1846, sec. 5, gives every barrister of any of Her Majesty's Courts in India a title to plead in any of the Courts of the East India Company. Act XX of 1853 re-enacts the title of barristers, and extends it to attorneys. The Presidency Court of Small Causes not being a Court of the East India Company, the title of barristers and attorneys to practise there must be sought for elsewhere. That founded on the various Small Cause Court Acts is, at best, implied and inferential. The argument, that to allow the *vakíls* to practise in the Small Cause Court would be to diminish the sphere of litigation allotted to other practitioners, will not hold in the face of the Legal Practitioners' Act, which permits an advocate, *vakíl* or attorney of the High Court of Bengal to practise in the Court of Small Causes in the town of Bombay. I submit that the Code of Civil Procedure alone goes to that length.

Cur. adv. vult.

BAYLEY, C. J. *(Acting)*.—On the 4th September, 1883, the following letter was addressed by the Pleaders' Association of Western India to E. M. H. Fulton, Esq., Registrar of the High Court on its Appellate Side:—(His Lordship read the application set forth *supra*, p. 117, and continued:—)

Although no reference was made, in direct terms, to any desire on the part of the pleaders to obtain permission to practise in the Bombay Court of Small Causes, it appeared to my learned colleagues and myself that the letter was so worded as to be applicable to that Court, where barristers and solicitors have from the first always practised, and we, therefore, directed copies of the above letter to be furnished to the Advocate General as representing the Bombay Bar, and to the Chairman of the Bombay Law Society as representing the solicitors of the High Court, and we likewise directed that copies of a letter, dated February, 1881, written by the Prothonotary of the High Court to the First Judge of the Court of Small Causes at Bombay, expressing the views of the Judges of the High Court then in Bombay as to the *status* of legal practitioners in the Bombay Court of Small Causes, should be furnished to the Pleaders' Association, the Bar, and the soli-

citors, and it was intimated that a Full Bench would sit and hear any observations which any of the three above-mentioned bodies might wish to address to us on the subject of the application made by the Pleaders' Association as set forth in their letter of the 4th September. Accordingly, on the 5th October last, a Court, consisting of Justices West, Pinhey, Scott, Latham and myself, sat, and we were addressed by Mr. Shántárám Náráyan, who, with Mr. Shámráo Vithal and Mr. Jehángir Mervánji (whose death I much regret to see announced in this morning's papers), appeared for the Pleaders' Association; by the Honourable Mr. Marriott, the Advocate General, who represented the Bombay Bar; whilst Mr. Jardine appeared for the Bombay Law Society. After a discussion, which occupied the entire day, the Court reserved its decision.

During the course of Mr. Shántárám's very able argument we intimated to him that he was quite at liberty to contend that the conclusions shown by the letter of February, 1881, to have been arrived at by the Judges were incorrect. Having given to his observations the best consideration in my power, I am of opinion that he has not succeeded in casting any doubt upon the views expressed in that letter, with which I myself at the time concurred, and which I still consider as accurately stating the position of pleaders in the Bombay Court of Small Causes at the time that letter was written. Paragraph 17 of that letter is as follows:—

"The foregoing examination of the history of, and the legislation relating to, the present Court of Small Causes at Bombay and of the history of the Court of Requests, and the so-called Small Causes Court formerly established in the Supreme Court has led the Chief Justice and Judges to the conclusion that, under the law at present applicable to the present Court of Small Causes in Bombay, its Judges have not now, and never have had, any power to make rules for the admission of pleaders to practise in that Court, and the Honourable the Chief Justice and Judges of the High Court have not authority to make or to sanction any such rules. Hence it follows that the Honourable the Chief Justice and Judges hold that the pleaders at present practising at the Small Cause Court have not any legal standing ground

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there; but, nevertheless, are of opinion and understand the Judges of the Court of Small Causes to entertain the same view, that all due consideration should be shown for those pleaders, and that, *quamdiu se bene gesserint*, they should be permitted to continue to practise in that Court."

Mr. Shántárám stated that the pleaders' application, as formulated in their letter of the 4th September last, would also include the Small Causes Court in the Presidency towns.

I will first consider the question as to the Bombay Court of Small Causes. It appears that in 1860 a new class of practitioners was admitted by the Judges of the Bombay Court of Small Causes. They were originally passed students of the Government Law School who had passed the final examination. Mr. Shántárám informed us that afterwards persons who had obtained the degree of bachelor of laws in the Bombay University were admitted as *vakíls* of the High Court and pleaders of the Small Cause Court, and that, with one exception, all persons now practising as pleaders in the Bombay Court of Small Causes are *vakíls* of the High Court. The cause of the admission of such practitioners was a Resolution of the Government of Bombay, No. 1349, dated the 14th April, 1860, the opening paragraph whereof was in these words:—"The Right Honourable the Governor in Council is of opinion, under the statements submitted in the letters of the Director of Public Instruction,(1) that qualified law students should be permitted to practise in the Court of Small Causes under such regulations as the Judges of that Court may deem expedient. The Right Honourable the Governor in Council concurs with the Director of Public Instruction in considering that the establishment of the Small Cause Court is of too recent occurrence to confer any prescriptive right on the solicitors and attorneys of Bombay—even if such a plea were not obviously inadmissible upon other grounds." From a pamphlet containing papers relating to the qualified students of the Government Law School, printed in Bombay in 1862 and referred to by Mr. Shántárám during his argument, the following extract is given (at p. 13) from a despatch (date not given) of Her Majesty's Secretary of State for India approving of the Resolution of the Bombay Government:—"With

(1) The late Mr. Edward Howard.

reference to the early portion of the correspondence contained in proceedings under review I have further to express my concurrence in your Resolution negativing the claim of certain of the attorneys at Bombay to the exclusive privilege of pleading in the Small Cause Court."

Mr. Shántárám further stated that the Judges of the Small Cause Court accordingly framed a rule, dated the 15th October, 1861, for the admission of pleaders to practise in their Court: that such rule was, under section 41 of the Small Cause Court Act IX of 1850, submitted for sanction to the Supreme Court, and that such rule was not and has never been formally disapproved of. Having regard to the views expressed in the Prothonotary's letter of February, 1881, and to which I adhere, it follows that, in my opinion, the action taken by the Government of Bombay in their Resolution of the 14th April, 1860, supported though it was by the Secretary of State for India, and the steps subsequently taken to carry out the same were clearly *ultra vires*, and that the admission of the law students and others, who were neither barristers nor attorneys of the Supreme and High Courts, conferred no legal *status* whatever on such persons.

The present application is mainly based upon certain sections of the Presidency Small Cause Courts Act, 1882, entitled "an Act to consolidate and amend the law relating to the Courts of Small Causes established in the Presidency Towns" (Act XV of 1882 which came into force on the 1st July, 1882), and Mr. Shántárám strenuously contended that there is now no possible doubt as to the title of *vakils* of the High Court to practise in the Small Cause Court of Bombay. Now in construing that Act it is necessary to bear in mind that it is not exclusively confined to the Bombay Court of Small Causes, but that it applies also to the Small Cause Courts established in Calcutta and Madras, and regard must be had to the law in force at the time that Act came into operation regulating the legal practitioners in the Small Cause Courts in Calcutta and Madras as well as those entitled to practise in the Court of Small Causes in Bombay.

Two Acts relating to Pleaders are in force in other parts of British India, but which have not been extended to Bombay. Act XX of 1865 is "an Act to amend the law relating to the pleaders

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and mukhtyárs" (amended by Act XXIX of 1865). By the interpretation clause 2 "pleader" includes *vakíls*, and "Court" means all Courts subordinate to the High Court including Courts of Small Causes. It was held, however, by Sir Barnes Peacock, C. J., and Mr. Justice Mitter in *In re Shashi Bhushan Bhadury*(1) that a pleader holding a certificate under section 12 of Act XX of 1865 was not thereby entitled to be admitted to practise in the Court of Small Causes at Calcutta, and the Court distinguished the case from that of *In re Tulsidás Seal*(2) in the following manner:—"That case was decided with reference to the construction to be put upon section 45 of Act XX of 1875. By that section it is enacted that every advocate or *vakíl* on the roll of any High Court shall be entitled, as such, to practise in any Court in British India other than a High Court in which he is enrolled. An advocate or *vakíl* of one High Court is not entitled, as such, to practise in any other High Court in which he is not enrolled, but with that exception he is entitled to practise in any Court in British India. We thought that the Small Cause Court in Calcutta was not a High Court, but that it was a Court in British India, and, consequently, that an advocate or *vakíl* of any High Court was entitled to practise there."

The other Act is Act XVIII of 1879, "an Act to consolidate and amend the law relating to legal practitioners." It extended, in the first instance (section 1) only to the Lower Provinces of Bengal, the North-West Provinces, the Punjáb, Oudh, the Central Provinces and Assam. But by the same section power was given to any other local Government, by notification in the official gazette, to extend all or any of the provisions of the rest of the Act to the whole or any part of the territories under its administration. Mr. Shántárám stated that the Act had been extended to Madras by Government notification of the 28th August, 1881. It applies, therefore, to Calcutta and Madras, but has not as yet been extended, either in whole or in part, to the Presidency of Bombay. By the interpretation clause 3, "subordinate Court" means all Courts subordinate to the High Court, including Courts of Small Causes, established under

(1) 1 Beng. L. R., A. C., pp. 48, 49.
(2) 7 Cal. W. R. Civ. Rul., 228.

Act IX of 1850 or Act XI of 1865, and "legal practitioner" means an advocate, *vakíl* or attorney of any High Court, a pleader, *mukhtyár*, or revenue agent. By section 4 every person now or hereafter entered as an advocate or *vakíl* on the roll of any High Court under the Letters Patent constituting such Court * * * shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered * * * and any person so entered who ordinarily practised in the Court on the roll of which he is entered, or some Court subordinate thereto, shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court on whose roll he is not entered * * * * It appears, therefore, that when the recent Presidency Small Cause Courts Act (No. XV of 1882) passed, the *vakíls* and pleaders of the High Courts of Calcutta and Madras had a clear right, conferred upon them by the Indian Legislature, of practising in the respective Small Cause Courts of those cities,—a fact which we may assume would be prominent to the minds of the framers of that Act. They as well as all other subjects of Her Majesty must, of course, be taken to know the law; but I think it extremely doubtful whether any person really knew the exact *status* of the practitioners in the Bombay Court of Small Causes until the matter was carefully investigated by our late Chief Justice, Sir Michael R. Westropp, who himself drafted the letter, dated February, 1881, from the Prothonotary to the First Judge of the Bombay Court of Small Causes already referred to.

By Act XV of 1882, sec. 23, large portions of the Civil Procedure Code (Act XIV of 1882) are extended to the three Presidency Courts of Small Causes, and Mr. Shántárám stated that the pleaders of the Bombay High Court claimed admission to all Courts subordinate to the High Court under the definition of "pleader" in section 2 (the interpretation clause) of the Civil Procedure Code, and also under the provisions of section 36 of that Code. Section 2 states that "pleader" means every person *entitled to appear and plead for another in Court*, and includes an advocate, a *vakíl* and an attorney of a High Court. That definition is not a new one, but is an exact copy of the definition of

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"pleader" in the interpretation clause (*ii*) of the former Civil Procedure Code, Act X of 1877. By section 36, appearances or acts may be made or done by a party to a suit in person "or by a pleader duly appointed to act on his behalf." Now, section 2 does not say that all pleaders are entitled to appear and plead, but that the word "pleader" means every one *entitled to appear and plead for another in Court.* If a pleader or *vakíl,* by the law then in force regulating the particular Court to which he seeks admission, is not entitled to appear for another in that Court, the definition gives him no right or *status* which he did not possess before. The definition, adopted as it is by the incorporation of the interpretation clause in Act XV of 1882, applies, beyond doubt, to the pleaders and *vakíls* of the High Courts of Calcutta and Madras, because such persons were, when Act XV of 1882 came into force, entitled to practise in the Courts of Small Causes in those cities; but, in my opinion, it does not apply to the Bombay Court of Small Causes; for, as shown in the Prothonotary's letter, no other persons than barristers and attorneys had a legal right to practise there at all. So the words in section 36—"a pleader duly appointed to act on his behalf"—do not simply mean a person duly appointed by the party in the suit, but a pleader duly appointed according to the law regarding pleaders in force in the particular Court. I do not, therefore, think that these two sections warrant the construction sought to be put upon them by the applicants.

It was next contended that section 38 of Act XV of 1882 set at rest any doubt as to the right of pleaders to practise in the Bombay Court of Small Causes. That section relates to applications for a rehearing in the High Court where the amount or value of the subject-matters exceeds Rs. 1,000, and it enacts that "such application shall be supported by affidavits, and, in case the applicant has appeared in the Small Cause Court by advocate, *vakíl,* attorney, or pleader, by a certificate from such advocate, *vakíl,* attorney, or pleader that, in his opinion, there are good grounds for rehearing the suit." Now, it was necessary to use the words "*vakíl*" or "pleader" in the section as it applied to the Small Cause Courts at Calcutta and Madras, where such persons had the right to appear and plead. The same remark applies

to the argument founded on the words in section 76 as to the expense of employing legal practitioners. "The expense of employing an advocate, vakíl, attorney, or other legal practitioner incurred by any party shall not be allowed as costs in any suit in which the amount or value of the subject-matter does not exceed Rs. 20, unless the Court is of opinion that the employment of such practitioner was under the circumstances reasonable,"—words necessary for Calcutta and Madras, but, until the practice in the subject is legally altered, having no force or application in Bombay.

The strictness with which the right to admit persons to practise in Courts in India has been watched is shown by the case of *Morgan* v. *Leech*(1). That was an appeal to Her Majesty in Council respecting the admission of persons to practise as attorneys or solicitors in the late Supreme Court of Bombay, and involved the authority of the Judges of that Court to make a rule or order for their admission after they had served for three years with an attorney in India without any previous service in England. The rule or order had been made by the Judges,—Sir Herbert Compton, C. J., and Sir John Awdrey, P. J., —on the 13th November, 1834, and was similar to the one made by the Supreme Court of Madras which had been approved by the Chief Justice at Calcutta. Mr. Leech, the respondent, had been admitted to practise as an attorney, solicitor and proctor of the said Court by an order made by the Chief Justice on the 21st December, 1837. The Judicial Committee of the Privy Council, however, by its judgment delivered in February, 1842, by Dr. Lushington, held that the Supreme Court at Bombay had no power to admit persons, as attorneys and solicitors, to practise in the Courts there except such as were qualified in the manner pointed out by the Bombay Charter and Letters Patent of 1823 establishing the Court, *viz.*, those who had been admitted attorneys or solicitors in one of the Courts at Westminster, or were practising in the Recorder's Court at Bombay, at the time of the publication of that Charter, and allowed the appeal, and ordered that the rule admitting Mr. Leech and the rule refusing to strike him off the rolls be rescinded. Act XIII

(1) 2 Moo. Ind. Ap., 428.

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of 1845 was accordingly passed by the Governor General of India in Council by which the Supreme Court at Bombay was authorized and empowered to admit and enrol persons having been admitted as attorneys in any of Her Majesty's Courts at Westminster, and *also persons being otherwise capable* to act as attorneys of the said Supreme Court of Bombay.

The privilege of those entitled to address the High Court on its Original Civil Jurisdiction side is, no doubt,—to use Mr. Shántárám's expression—sufficiently fenced by section 635 of the Civil Procedure Code (Act XIV of 1882), which enacts that "nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its ordinary original Civil Jurisdiction, or to examine witnesses, except when the Court shall have, in the exercise of the power conferred by its Charter, authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakíls and attorneys,"—a section identical with the corresponding section (635) in the former Code.

I do not consider that the pleaders now have the right, which they claim to have, of practising in the Bombay Court of Small Causes. If thought desirable, the matter can easily be rectified in the manner pointed out in paragraph 18 of the Prothonotary's letter of February, 1881. I may here remark that by the "Presidency Small Cause Court Act, 1882" (Act XV of 1882), section 9, power is given to the Small Cause Court to make rules in the following words:—"Except as otherwise provided by this or any other law for the time in force, the Small Cause Court may with the previous sanction of the High Court make rules to provide in such manner as it thinks fit for all matters not specially provided for by this Act. Whether the Bombay Small Cause Court can now, under the provisions of that section, make a rule which would open the door to the High Court pleaders, may hereafter be well worthy of consideration. As it is not necessary, for the purpose of disposing of the present application, to decide such point, I abstain from expressing any opinion upon it.

With regard to the other branch of the pleaders' application, *viz.*, that this Court will be pleased to issue a circular to all the

subordinate Courts in the Mofussil, intimating that the High Court pleaders are entitled to practise in those Courts without special *sanad* or permission, I agree with Mr. Jardine that it must stand or fall with the other part of the application. I do not consider that the provisions of Regulation II of 1827, sec. 47, have been repealed by the portions of the Code of Civil Procedure which have been cited on behalf of the applicants. In *Ex parte Warrington*[1] Lord Justice Turner said (page 171): "I take the rule of law to be that an affirmative statute is not, without express words, repealed by a subsequent affirmative statute, unless the two statutes cannot stand together." Here section 47 of the Regulation of 1827 and the section of the Civil Procedure Code relied upon by Mr. Shántárám can, in my opinion, well stand together. I think, therefore, that this Court is bound to reject this application of the pleaders of the Bombay High Court in both its branches.

WEST, J.—The demands of the pleaders[2] in the present case are that all Courts subordinate to the High Court be instructed to admit them to practise without any license for the particular Court or district, and that the rule providing for the issue of a license when necessary be revoked as virtually superseded. The purpose of the application is partly to obtain unconditioned access to the Courts of the Mofussil, but chiefly to gain a recognition of the right of all pleaders or *vakíls* of the High Court to practise in the Court of Small Causes of the Presidency town. That is a Court subordinate to the High Court, and subject to its superintendence (Act XV of 1882, sec. 6; Letters Patent of 1865, para. 16). The practitioners who now have audience in it enjoy that right through their connection with the High Court, and the High Court, it is contended, may give to all its pleaders the privilege now enjoyed by but a few. There can be no serious question as to the reasonableness of the claim set up by the pleaders if it is within our legal competence to accede to it. The pleaders who during the last two or three years have been excluded from the Bombay Court of Small Causes are presumably not less competent than those who had previously obtained a footing there, which has not been disturbed. The standard of

(1) 3 De Gex. M. & G., 159.

(2) Letter dated 4th September, 1883. *Supra* p. 117

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qualification which entitles a gentleman to appear and plead in the High Court must be esteemed sufficiently high to ensure professional competence for the work of the Small Causes Court. It was urged by Mr. Jardine that the attorneys of this Court are more likely than pleaders to be proficient in the law applicable to commercial cases; but commercial cases are by no means the only ones tried in the Small Causes Court. The pleaders have to pass an examination in the corresponding subjects, and no doubt receive very effective instruction in these in the law classes of the University; but if, in fact, they are inefficient in any particular class of cases, their rivals will be preferred to them by the suitors engaged in that kind of litigation. Whether the competitors be pleaders or attorneys, examination and certificates attest only a general educational proficiency which does not at all supersede the discretion of individuals in choosing their professional representatives and advisers.

As to the legal position of pleaders in the High Court there is at present no contest. The matter is governed by the Letters Patent, para. 9, which give the Court authority to approve and admit advocates, *vakíls* and attorneys, as para. 10 enables us to make rules for their qualification. *Vakíls* are pleaders. An argument has been built on the use, in some instances, of the one term and in some of the other, but so far as the ideas the two words represent have been distinctly conceived at all, the sense of them is simply identical; and when, as occasionally, both have been used together, that has been due to an attempt to meet the variations of language favoured by usage in different provinces and Courts. The Letters Patent call the same person a *vakíl* whom the rules of this Court provide for as a pleader: nothing can really be established on a supposed difference in the extension of the two designations. We may approve and enrol pleaders of our own Court; the privileges we can give to them in any other Court must depend on other provisions and privileges than those contained in the paragraphs I have referred to. These, in fact, serve only to emphasize the proposition that the constitution of the bar is something quite distinct from the direction and superintendence of practice and procedure. In the Mofussil Courts, Bombay Regulation II of 1827 in sections 47 and 48 provides that plead-

ers *(vakíls)* may be authorized to practise on obtaining the *sanad* or license issued by the Sadar Court. The authority of the Sadar Court in this as in other respects was preserved to the High Court by the Statutes 24 and 25 Vic., cap. 104, sec. 9. In the exercise of the authority we have made and maintained the rules which have done so much to raise the professional *status* of the native bar. The "Legal Practitioners' Acts" of 1875 and 1879 have not in any way affected the authority or its exercise. They have not been introduced into the Presidency of Bombay, nor could the later one, Act XVIII of 1879, be introduced wholly or partially without attendant difficulties and evils which would perhaps outweigh the advantage that could thus be gained. The Regulation under which we act, contemplates the issue of a license or *sanad* for the particular district Court in which, or under which, its bearer is to practise; we have no authority to dispense with its provisions, unless the power has been conferred on us by some more recent Act either expressly or by clear implication. An argument in favour of the pleaders' right of audience in every subordinate Court has been drawn from sections 36 and 2 of the Code of Civil Procedure. Section 36 says that in any appearance or act in a Court a party may be replaced by "a pleader duly appointed," and section 2 says "pleader means every person entitled to appear and plead for another in Court, and includes an advocate, a vakíl, or an attorney of a High Court." Hence, it is urged, every *vakíl* is a pleader entitled, as such, to act for any party wherever the Code of Civil Procedure is in operation. But if the true sense is this, then also every advocate of the High Court is a pleader, entitled not only to plead, but to act for his client under the Code, except where this may be controlled by a more specific law. It is, in truth, only the pleader duly qualified who is entitled to appear, the *vakíl* where and as his qualification entitles him, the advocate where and as his qualification gives him the right, and the attorney where and as he, too, may be qualified. If for pleader in section 36 we substitute the definition "person entitled to appear and plead" it is obvious that the question of title is not settled, or meant to be settled, by the use of a phrase. The purpose of the definition was not to reconstitute the profession of

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the law; but to abridge the language of the Code elsewhere by making one word answer for several which must otherwise have been used. The advocate is not made an attorney by the word pleader embracing both, nor does a pleader become, by merely bearing that name, "a person entitled to appear and plead in Court" without regard to the rules governing his right of audience there. These remain what they were. The recasting, in 1878, of our rules relating to the admission and practice of pleaders was made, no doubt, without particular advertence to the sections of the Code that have in this case been relied on; but had these sections wrought a change in the law, that would probably not have escaped attention. The supposed change has not been made; the notion that it has, rests on a fallacy of false conversion that every "pleader" is necessarily entitled to audience, because every one "entitled to appear" is a pleader for the purposes of the Code, even though differently named for other purposes. The right contended for by the pleaders does not, therefore, subsist as regards the Mofussil Courts, nor are we at liberty to divest ourselves of an authority for making rules on the subject which has been committed to us, not to be used or laid aside at our pleasure or discretion, but to be exercised always, or whenever the occasion arises in furtherance of a beneficial administration of the law.

As to the Presidency Court of Small Causes, the position of the legal practitioners there was discussed at length in the letter sent by the Chief Justice and Judges of this Court to the Chief Judge in February, 1881. The matter had not then been forensically argued, but now that it has been, I see no reason for doubting the correctness of the views expressed in our letter. The attorneys of the Recorder's Court and of the Supreme Court seem to have practised in the Court of Requests and afterwards in the Court of Small Causes by a right or a privilege as attorneys of the highest Court in the Presidency equivalent to that enjoyed by attorneys of the Royal Courts at Westminster in inferior Courts in England. This right was so strongly maintained in England that even in the case of an inferior Court newly created the King's Bench two centuries ago on the complaint of an attorney compelled the

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Court to give him audience[1]. The subject was afterwards taken in hand by the Legislature; and the Statute 6 Geo. II, cap. 27, sec. 2, while it provided for the admission of an attorney of any of Her Majesty's Courts at Westminster to practise in any inferior Court, imposed the condition that "he be in all other respects capable and qualified to be admitted an attorney according to the usage and custom of such inferior Court." A similar provision for solicitors of the Court of Chancery had been made by Statute 2, Geo. II, cap. 23, sec. 21. Thus we find the usage of the Court combined in these cases with the ordinary admission to give a title to practise to attorneys. The two were united in the case of the Court of Small Causes, itself an emanation from the Recorder's Court and the Supreme Court of Bombay. From this, as the inferior Court itself, was of very doubtful legality, no deduction of title could fairly be drawn; but the Court of Requests was distinctly a lawful Court of inferior jurisdiction subordinate to the Recorder's Court and afterwards to the Supreme Court in the same way as the inferior Courts to the Court of King's Bench in England. No provision, as observed in the High Court's letter, was made for the admission of practitioners in the inferior Court. None probably was thought necessary, because provision was made for practitioners in the superior Court, and the relation statutably established between it and the inferior Court extended the provision as to the practitioners to the latter. As attorneys of the Supreme Court were, by the clearly implied, though not expressed, intention of Parliament, entitled to practise in the Court of Requests, it was an extension supported by many examples to allow them to practise in that Court as advocates. The faculty of practising as attorneys in the Court might be deemed a right in the fullest sense: advocacy was, perhaps, at first a privilege, but still a privilege so like a right that an example of its withdrawal could not probably be found in the inferior Courts in England; and as the attorneys had a perfectly legal and valid basis for their right of audience, so, *a fortiori*, had the barristers whose functions as advocates the attorneys were allowed to assume only on account of the smallness of the amounts at stake making it necessary to restrict expenses. Act IX of 1850, by which the pre-

(1) *Ex. p. Hastings* 1; Siderfin, 410.

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sent Small Cause Court was constituted, made no provision (as observed in our letter) for the appointment of legal practitioners. But neither in this case, according to my view, any more than in that of the Statute of 37 Geo. III, subordinating the Court of Requests to the Recorder's Court, was any such provision needed. It is to be borne in mind that the Small Cause Courts were not a wholly new creation. What section 1 of Act IX. of 1850 says is that the "Court of Requests * * * * shall be holden according to the provisions of this Act." This means continuation, not extinction. Section 6 again says: "Every Court holden under this Act shall be a Court of Record, and shall be deemed a Court of Requests." Thus the old Court of Requests was continued under the new title (section 4) of the Bombay Court of Small Causes as an inferior Court of record. In it, as an inferior Court of record, the practitioners in the Supreme Court had a right to practise unimpaired by the mere change of designation of the inferior Court as by that, in more recent years, of the superior Court standing to it in the relation of a Court of Queen's Bench. The continuity of a Court notwithstanding an enlargement of its jurisdiction and a new arrangement of the offices in it has been recognized in many cases. One is that of the City of London Small Debts Court, which after several previous changes was partly reconstituted as the City of London Court with an introduction generally of the rules of the County Courts by Statutes 30 and 31 Vic., cap. 142 (see *Wetherfield* v. *Nelson*[1]). The same principle, but in still more marked degree, seems to have been recognized in a case to which I have to refer at second hand (Petersdorf's Abridgment, vol. viii, p. 652). The ancient officers, though with new designations, were held not to come within the disqualification for voting imposed on the holders of new office by Statute 6, cl. 7, Anne, sec. 25. A mere change of title, then, did not make a new Court of the old Court of Requests; and the rights connected with it, including the right of advocacy, were not and could not be annihilated while the Court itself continued by any other means than an Act of the Legislature. On the mere ground of its being an inferior Court of record the Court of Small Causes was open to attorneys and barristers of

(1) L. R., 4 C. P., 571.

the Supreme Court, *a fortiori* when their right of advocacy was supported by the usage of a Court identical in being with the Small Cause Court, though in a less developed stage of existence.

If the foregoing is a correct statement of the law down to the institution of the Bombay Court of Small Causes, it accounts easily and naturally for the terms used in Act XXVI of 1864. Section 13 of that Act says: "The fees to be taken by barristers-at-law and attorneys practising in the said Courts in cases brought within the jurisdiction given by this Act shall be as follows." Barristers and attorneys had a legal *status* in the Courts of Small Causes: other practitioners had not. The rules made in 1860 for admitting passed law students to practise had been made without legal authority, and the class was disregarded by the Legislature. In April, 1864, it is unlikely that there was a single advocate of a High Court who was not also a barrister-at-law; but when, somewhat later, a class of advocates arose who were not barristers, the section I have quoted might most reasonably be extended to the allowance of their fees on the principle of *eadem ratio eadem lex* (see Bacon De Augm. bk. viii; De Just. Univ. Aph. 20) supposing they were properly allowed to practise in the Court. Now, barristers held their right by tradition and usage as advocates of the higher Courts, and other advocates would, as such, equally fall within the scope of the principle. The right of the classes thus indicated to the fees earned under the enlarged jurisdiction of the Court of Small Causes would be good when they had actually been allowed to practise, even though the allowance had rested on an erroneous conception of the law, and though the Legislature itself had been mistaken in assuming that barristers and attorneys, as such, practised as of right in the Court. A recital in a statute is not at all conclusive, much less is a mere tacit assumption of a state of things as existing. The previous state of the law may be shown to have been different from that supposed—*Mollwo March & Co.* v. *The Court of Wards*[1]; *The Collector of Ahmedabad* v. *Sámaldás*[2]. But when the Legislature goes on to constitute a legal right, or utter a command, effect must be given to its enactment, even though plainly

(1) L. R. Ind. Ap. Supl. Vol. at p. 104. (2) 9 Bom H. C. Rep. at p. 215.

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induced by error: see *R.* v. *Mayor of Oldham*[1]. Thus the direction as to the allowance of fees must have been followed, even though it rested on a mistake; but there was, in truth, no mistake. The right to practise existed, and needed recognition only for the settlement of fees under the extended jurisdiction. If, however, the position of an advocate or attorney of the High Court is attended with the accessory privilege of practising in the Court of Small Causes, why is not the position of a pleader attended with the same advantage? The answer to this is that, historically, the right as it subsists was acquired through a purpose of Parliament and of the Crown, and through a conception of the necessary relations of a superior and an inferior Court of record, which took no account at all of such a class as pleaders. There could be no command or purpose of the Legislature for the Courts to carry out in relation to a class not present to its consciousness in making the law. More recently the Letters Patent and the rules of the High Court have recognized the class of *vakíls* or pleaders, but at the same time provided for their rights and duties, as a class, quite distinct from advocates and from attorneys. They cannot, as members of one class, enjoy rights and privileges through their having been gained by another cognate class. An attorney cannot, as such, act as a pleader; neither can a pleader, as such, claim the privileges of an attorney. Even a statute which, like the new Act for the Presidency Small Cause Courts, repeals and re-enacts with amendments is not to be construed as bearing on any new and different class of persons, unless the intention be clear (see *Brown* v. *McLachlan*[2]) and in Bombay the Act XV of 1882, as it does not itself constitute any new class of practitioners, must be limited to those who as members of a class already practised under a privilege independently subsisting. Under sections 9 and 10 of the Letters Patent we may make rules for the admission of practitioners, and under those rules may admit them to the High Court. By this they acquire certain privileges in other Courts; but we cannot give them any such privilege apart from their *status* in this Court. Our function in relation to the inferior Courts is one of superintendence, not of appointment or consti-

(1) L. R., 3 Q. B., 474. (2) L. R., 4 P. C., 543.

tution. The power to make "rules for regulating the practice and proceedings" of inferior Courts is one quite distinct from that of determining the composition of their bench or their bar. The latter power is only in part conceded to the High Courts, and must be exercised only on the terms and within the limits prescribed by statute. There is a strong temptation to transgress the proper limits of our authority in such a case as the present, but it is one that ought to be resisted. Every encroachment of authority begins, as a rule, under some pretext not wholly false of generosity or immediate convenience, but we whose special function it is to curb any illegal excess of authority in others must sedulously guard against such excess in ourselves. A dispensing power assumed by a Court, as by a king, leads straight to a subversion of the law.

The argument based on the provisions of sections 38 and 76 of the Presidency Small Cause Courts Act XV of 1882 is so far cogent, but so far only, that these sections contemplate the employment of a *vakíl* or pleader in the Small Cause Court as possible and possibly legal. The Legal Practitioners' Acts of 1875 and 1879 provide for *vakíls* and pleaders practising in the Courts subordinate to the High Courts in which class the Presidency Small Cause Courts are included (Act XV of 1882, sec. 6; Stat. 24 and 25 Vic., cap. 104, sec. 15). In the provinces in which the Act XVIII of 1879 is in force there must needs be *vakíls* entitled to practise in the Small Cause Court where there are any *vakíls* of the High Court at all. It is in force in Calcutta, and was so when Act XV of 1872 was passed; and as that Act applies to all the Presidency towns, a proper application for the language of sections 38 and 76 is found without using it to create in Bombay a class of practitioners in order to give it a similar operation here. Such a construction would make the sections so far repeal, by mere implication, that part of Act XVIII of 1879 which leaves the introduction of the Act into Bombay to the discretion of the local Government, and would be unwarrantable in the case of enactments having quite a different direct purpose. Putting the case most favourably for the argument, the old and the new laws are in *pari materia*, and where that is so, effect is to be given, as far

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as may be, to both as operating together, or to the one as a particular and partial exception not to be extended beyond its necessary scope by mere inference.

Section 9 of the Small Cause Courts Act is not one the construction of which is necessarily thrown on us in the present case, but in order to a complete survey of the subject it may be useful to state the interpretation of that enactment which seems to me to be the correct one. The section might, on large construction of the words "all matters not specially provided for by this Act", enable the Small Cause Court to make rules for the admission of pleaders subject to the sanction of the High Court. But it is plain that "all matters" does not mean "all matters conceivable". It means "all matters of the same kind, but not specially provided for by this Act." The Act provides for several matters, but not for the admission of practitioners. The Charters of the High Courts and the Acts of the Indian Legislature have always dealt with this as a subject apart from rules of practice, and the Legal Practitioners' Act shows that the Legislature is of the same mind still. The power to make rules conferred in such general and extensive terms, as in this instance, is manifestly one that must be subjected to a reasonable construction. The rules must not grant or imply the exercise of distinct functions from those contemplated, or deal with matters outside the obvious scope of the Act, but must within that scope be in furtherance of its general design. They may properly supply details, but not transgress the outline drawn by the Legislature. That a rather strict construction is to be placed on the power of an inferior Court to make rules, may be gathered from the observations of the learned Judges in the case of *Wetherfield* v. *Nelson*,[1] to which I have already referred. It cannot be supposed that the Legislature intended to give all the Small Cause Courts the power of superseding its own laws, with regard to pleaders, by their own rules; and yet if it did not intend all to have the power, neither did it intend any to have it: there is no distinction. The Small Cause Court of Bombay has not, under section 9, a power, any more than that of Calcutta or Madras (apart from express enactments giving and regulating this power),

(1) L. R., 4 C. P., 571.

to constitute a bar for itself, nor could the High Court sanction rules framed for such a purpose. It is to be regretted that the pleaders of this Court should be excluded from the Small Cause Court, even for a time; but the proper remedy is to be found, not in a loose and illegitimate construction of the existing law, but in a new law specially adapted to the mischief which it is desired to remedy.

PINHEY, J.—In my opinion this application should be dealt with in two aspects. First, the pleaders of the High Court contend that, under the definition of the word "pleader" in the latest Code of Civil Procedure, they are entitled to appear in all Courts subordinate to the High Court, including the Presidency Small Cause Court, without special *sanad* appointment or allocation. Secondly, that, even if the rights of the pleaders of the High Court be not so wide as this, they should at least be entitled to appear in the Small Cause Court of Bombay under rules framed for the purpose. I am not prepared to allow the first contention. The rules under which the pleaders of the High Court practise elsewhere were passed on 2nd October, 1878, when the Code of Civil Procedure of 1877 was in force. That Code has been superseded by the Code of Civil Procedure of 1882, and in the latter the definition of the term pleader in section 2 and the provisions of section 36—the two sections cited for the pleaders—are identical, *verbatim et literatim*, with the corresponding sections in the Code of 1877. The law has not been altered since the rules of 2nd October, 1878, were passed. It has been attempted to argue that pleader and *vakíl* are not identical; but this is wrong. Pleader is English for *vakíl*, and *vakíl* is vernacular for pleader. In consequence, however, of an unfortunate use of the vernacular word *vakíl* for pleader in various English statutes, proceedings, orders, &c., some confusion has been caused, and possibly some people may have been led to believe that pleaders and *vakíls* are two distinct classes of legal practitioners. This would account for the use of the word *vakil* in the Letters Patent of the High Court. These were doubtless drawn up by some lawyer in England who knew that pleaders *there* never appeared in Court to plead. Hence *vakíl* was entered in the Letters Patent. This necessitated the use of the word *vakíl* in the definition of pleader in section 2 of the Code of

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Civil Procedure. But the meaning of the definition of pleader becomes obvious if you invert the clauses of which the sentence is made up, and read it thus:—"Pleader" means every person including an advocate, a *vakíl*, and an attorney of a High Court, entitled to appear and plead for another in Court. Thus read, there is nothing in the section inconsistent with the rules of the 2nd October, 1878, passed by the High Court under the powers conferred on it by the Letters Patent constituting the Court.

On the second point my opinion is that, regarding the Presidency Small Cause Courts as subordinate to the High Court, the High Court can make rules for the admission of pleaders to practise in the Small Cause Court; and that, under section 9 of the Presidency Small Cause Court Act XV of 1882, the Small Cause Court, with the sanction of the High Court, may also make rules for the admission of pleaders to practise in the Small Cause Court. And having regard to the provisions of section 38 of the Presidency Small Cause Court Act, and the obvious intention of the Legislature as therein indicated, I think this Court should call on the Presidency Small Cause Court to submit rules for the sanction of this Court, enabling duly qualified persons (*e.g.* pleaders of the High Court) to practise in the Presidency Small Cause Court.

I refrain from either justifying or criticizing the Prothonotary's letter of February, 1881, to the First Judge of the Small Cause Court, as I was not in India when it was written, and therefore took no part in discussing its terms.

SCOTT, J.—This is an application made by the Pleaders' Association of Western India, requesting that a circular may be issued to all Courts subordinate to the High Court, to the effect that the High Court pleaders are for the future entitled to practise in such subordinate Courts without special *sanad* or permission. The occasion for the application arose from an order made by the Judges of the Small Causes Court refusing admission to certain pleaders of the High Court to appear and plead in the Small Causes Court.

The main question at issue is, whether the High Court has power to regulate the admission of legal practitioners to the Small Causes Court, or whether that is matter for legislative action only.

The Chief Justice and Judges, by their letter of 9th February, 1881, declared that the High Court has not that power.

It is with great hesitation and reluctance, and only after much consideration, that I differ from that declaration and from the learned opinions on the subject just expressed by my seniors of this Court. But I myself draw an opposite conclusion from the various Charters, Regulations, Acts and Letters Patent by which the powers of the High Court are defined. I will briefly summarize the grounds for my conclusion. In the first place, the Small Causes Court, together with the other subordinate Courts of this Presidency, is placed under the supervision of the High Court by section 15 of High Court Charter (24 and 25 Vic., cap. 114) which runs as follows:—"Each of the High Courts established under this Act *shall have superintendence over all Courts which may be subject to its appellate jurisdiction*, and shall have power to call for returns and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, *and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts.*" * * * In considering the nature and extent of the general supervising authority thus conferred, it is important to bear in mind the terms of that part of section 9 of the same High Court Charter which says that "each of the High Courts to be established under this Act shall have and exercise * * * all such powers and authority *for and in relation to the administration of justice in the Presidency for which it is established* as Her Majesty may by her Letters Patent grant and direct." (The italicized words serve as a guide when a doubt, like the present one, is raised as to the extent of the supervising authority of the High Court.)

These general powers conferred at the creation of the High Courts are new, and are much more extensive than the powers conferred on the Courts for which the High Courts were substituted. The Charter of the Supreme Court (1823) authorizes that Court to exercise "the same jurisdiction and authority as the Court of King's Bench in England". I need hardly say that the Court of King's Bench had no power to make rules and regulations for subordinate Courts, and had no disciplinary authority over them. The relation was of a strictly judicial character.

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Passing from the Supreme Court to the Sadar Court, Regulation II of 1827 only empowered the Sadar Court "to hear appeals", to "enforce the hearing of suits", to "enjoin an adherence to prescribed forms of proceedings", and to "call for the proceedings of subordinate Courts". Thus the powers conferred up to 1861 were only those now given by the Code of Civil Procedure in the sections which deal with the ordinary and extraordinary jurisdiction of the High Court. There is now added by the Charter of the High Court the general supervising authority just mentioned. Next, turning to the Letters Patent, we find authority given (sections 9 and 10) to the High Court "to approve, admit, and enrol such and so many advocates, vakíls, and attorneys as to the said High Court shall seem meet," and they are authorized "to appear for the suitors of the High Court and to plead, or to act, or to plead and act, for the said suitors according as the said High Court may by its rules and directions determine," and the High Court is further authorized (section 10) "to make rules for the qualification and admission of proper persons to be such advocates, vakíls, and attorneys, and to remove or to suspend them from practice." Finally, it must be remembered that, under section 9 of the Charter, the High Court was not only given wider powers, but it also retained all power and authority that had been vested in the abolished Courts which it superseded. Clearly, therefore, the High Courts, as at present constituted, have wider powers than those entrusted to their predecessors. And we have seen that these powers are expressly created with a view to the proper administration of justice in the Presidency (see section 15 of the Charter). Bearing that object in view, let us consider what powers are given. They are:—First, superintendence over all subordinate Courts; and this authority is given in addition to the power of calling for proceedings or for returns, or of transferring causes. Second, power to make and issue general rules for the regulation of the practice and procedure of all subordinate Courts. Third, power to admit proper persons as advocates, pleaders and attorneys to practise before the High Court, and to fix the standard of qualification to be required from such persons. Fourth, power to grant *sanads* to pleaders to appear and practise in the Courts subordinate to the Sadar Court. Now, in view of these special

and general powers, I cannot think that the authority to regulate which classes of practitioners should practise in the Small Causes Court—a Court expressly under the superintendence of the High Court—is not included. I did not believe that the Legislature intended that it should be matter of express statutory provision. It must not be forgotten that this legislative power emanates from England. It seems contrary to common sense to suppose that it was intended to direct these Courts in detail as well as in principle. The pleader class was admitted in principle by the Legislature to the High Court and its predecessors. But the regulation of details was, in my opinion, evidently intended to be left to those possessed of local knowledge of the requirements of the tribunals. It must also be observed that no new class of practitioners is proposed to be created. All that is asked is that rules should be made regulating which of the existing classes should be admitted to the Courts of inferior jurisdiction. Legislative authority was undoubtedly necessary to regulate the admission of practitioners to the High Court. But when power was given to that Court to admit advocates, attorneys and pleaders to plead before itself, I think power by implication was also given to make rules as to the admission of those practitioners to Courts expressly subordinated to that High Court. In my opinion, the general supervising authority, combined with the power to make rules and regulations, include this particular authority.

Apart from the argument based on the general powers of the High Court I think the terms of the new Small Causes Court Act support this view. Thus section 15 forbids only certain persons to act as *vakíls*, and section 76 provides for the question of the cost of employing *vakíls*. It was argued that these sections were only intended to apply to Calcutta and Madras, where *vakils* are admitted to plead. But the Act is made for all the three Presidency towns, and there is no express exclusion of Bombay from the operation of any of its sections.

But I do not rely on the mere wording of particular sections of a single Act. I think the power is vested in the High Court under the Acts, Charters, Regulations, and Letters Patent which created it and its predecessors.

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In re THE PLEADERS OF THE HIGH COURT.

There remains the question whether this particular application of the Pleaders' Association may properly be granted. I am of opinion that a revision of the basis of admission of legal practitioners in all the subordinate Courts of the Presidency is within the competency of the High Court. But I am opposed to any step which might lead to favour any special class of pleaders, or to lower the standard of proficiency and personal fitness of all pleaders which is now established. I think the present application is not free from that danger, and although I am of opinion that the High Court has power to make rules on this subject or in the case of the Small Causes Court to sanction rules on this subject tendered for its approval, I am opposed to the exercise of that power by the promulgation of the circular we are asked to issue. But under the powers with which I believe the High Court to be invested, the present system of admission of legal practitioners might safely and with advantage be revised so as to admit pleaders to the Small Causes Court, and such an application I would have gladly supported. That, however, is not the form of the present application, and I, therefore, with some reluctance concur in its rejection.

LATHAM, J.—I have had the advantage of reading the judgments of the Chief Justice and Mr. Justice West, and as I concur in what has been said in them I have thought it unnecessary to deliver a separate judgment. There is, however, one point which has been alluded to, upon which I am not quite satisfied. It is not clear to me that under section 9 of Act XV of 1882 the Small Cause Court has not the power to make a rule under which pleaders may be allowed to appear. This point was not argued at the hearing, but Mr. Justice West has stated it to be his opinion that the Court has not this power. The judgment in the case of *Morgan* v. *Leech*[1] may perhaps seem to indicate that such a power exists, but I wish it to be understood that I reserve my opinion on the point.

Petition rejected.

(1) 2 Moo. Ind. Ap., 428.