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upon the dwellings which he visits. A beggar usually, in some countries at least, invokes a blessing on the head of one who bestows alms upon him. The defendant's benediction is, no doubt, held in far higher esteem amongst his devoted adherents; and his visiting their houses is esteemed, like the visit of an earthly sovereign, a high honour and distinction; but this does not change the nature of the act of benediction or of visiting. The offerings which the defendant receives, though expected, are not bargained for. That at least is the evidence of the plaintiff's witness.

I, therefore, for these reasons decide the issue before me in the negative. To do otherwise would be to snatch a jurisdiction which was not intended to be conferred, and which the words of the Letters Patent, taken in their usual meaning, do not confer; and though *boni judicis est ampliari jurisdictionem*, that maxim has been diversely interpreted, and should not lead the Court to appropriate that which does not rightfully appertain to it. Issue found in negative and for defendant. Suit dismissed with costs.

Attorneys for the plaintiff: Messrs. *Conroy and Brown.*

Attorneys for the defendant: Messrs. *Craigie, Lynch, and Owen.*

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## [555] ORIGINAL CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.*

IN THE MATTER OF NARRONDAS DHANJI, A MINOR. JAVERVAHU, WIDOW, *Petitioner.* [27th June, 1890.]

*Criminal Procedure Code (Act X of 1882, s. 491—Custody of minor*—Habeas corpus—*Rule to show cause why minor should not be delivered to claimant—Rule discharged—Right to appeal against order of discharge—Judgment—Letters Patent, 1865, cl. 15—Practice.*

The petitioner as step-mother claimed to be entitled to the custody of her deceased husband's minor son, who was living with D., his maternal uncle. She obtained a rule calling upon D. to show cause why the child should not be delivered to her. After argument the rule was discharged.

*Held*, that the order discharging the rule was a judgment within the meaning of cl. 15 of the Letters Patent, 1865, and that, therefore, under that clause the petitioner had a right to appeal against the order.

[R., 29 C. 286.]

IN this case the petitioner, who was the step-mother of Narrondas Dhanji, an infant under ten years of age, presented a petition, under s. 491 of the Criminal Procedure Code (Act X of 1882) on the 2nd April, 1890, stating that her husband Dhanji Dharamsi died in 1883, leaving herself, his widow, and the infant Narrondas, his son by a predeceased wife, his only heirs and representatives; that by his will he appointed Dossa Jewan and Gopalji Jugjivan to be his executors; that she (the petitioner) had gone on a pilgrimage about a year after her husband's death, and during her absence had allowed the infant Narrondas to remain with the said Dossa Jewan, who was his maternal uncle; that since her return from pilgrimage she had frequently endeavoured to get possession of the child from his maternal uncle, but had failed. She submitted that she was "entitled to the custody of the said minor, as she was advised that she

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was both the testamentary and legal guardian of the said minor." The prayer of the petition was as follows:—

"Your petitioner, therefore, humbly prays that this Honourable Court will be pleased to issue a writ of *habeas corpus* addressed to the said Dossa Jewan, commanding him to produce the body of the said minor Narrondas Dhanji to submit to the order of this Honourable Court in this matter."

**[556]** In accordance with the practice, a rule was subsequently granted (2nd April, 1890), calling on Dossa Jewan "to show cause why the minor Narrondas Dhanji should not be delivered to the petitioner."

On 2nd May, 1890, Farran, J., discharged the rule.

Javervahu desired to appeal from the order discharging the rule, and a memorandum of appeal was prepared and lodged in the office of the Clerk of the Crown on the 9th June, 1890, to be filed. As this was the first instance, in Bombay, of an appeal from such an order, the Clerk of the Crown before filing the memorandum of appeal desired that the matter should be referred to the Court of appeal, in order that a decision might be obtained as to whether an appeal lay from an order by a Judge rejecting an application under s. 491 of the Criminal Procedure Code (Act X of 1882).

The matter now came on for hearing.

*Macpherson* (Acting Advocate-General), for appellant.—This order is a judgment, and an appeal from it is given by s. 15 of the Letters Patent, 1865—*Kristo Kissor Neoghy* v. *Kadermoye Dossee* (1); *In the matter of the Petition of Kally Soondery Dabia* (2); and as to the practice in England, *Ex parte Rev. James Bell Cox* (3).

*Lang* (*Inverarity* with him) *contra.*—There is no appeal from such an order as this, and the memorandum of appeal should not be received. The 15th section of the Letters Patent, 1865, only gives an appeal against a judgment. This order is not a judgment. A judgment must determine the rights of parties—*Sonabai* v. *Ahmedbhai Habibhai* (4). The order of 2nd May discharging the rule decided nothing. It was merely a refusal by the Court to exercise the power conferred upon it by s. 491, cl. (*a*) of the Criminal Procedure Code (Act X of 1882). The petitioner notwithstanding the order still has a right of suit in which the question between her and Dossa Jewan may be decided. This order is not a judgment as defined in decided cases—*In the matter* **[557]** *of the Petition of Kally Soondery Dabia* (2). The English cases have no application here. An appeal is given in England by s. 19 of the Judicature Act, 1873, which is quite different from cl. 15 of the Letters Patent, 1865. Counsel referred to *Reade* v. *Krishna* (5).

*Macpherson* (Acting Advocate-General) in reply.—The word 'judgment' in the Letters Patent includes orders, or at least some orders, and the English cases on this subject apply here. Any order determining a right is a judgment. This order decides that the petitioner is not entitled to the guardianship of the minor. No doubt the order in form merely discharges the rule, but before making the order the Judge had to decide upon the right to the guardianship. The rule raised the question as to the possession of the child. The petitioner obtained and supported the rule by arguing that she was entitled to be guardian, and,

(1) 2 C.L.R. 583. (2) 6 C. 594 (601, 602). (3) L.R. 20 Q.B.D. 1.
(4) 9 B.H.C.R. 398 (405, 406). (5) 9 M. 391.

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as such, entitled to the possession of the child. The Judge decided against her, and his decision was a determination as to her right, and, therefore, a judgment within the definitions that have been referred to. It is clear that the judgment referred to in cl. 15 of the Letters Patent need not be a final judgment. Where a final judgment is meant, those words are used as, *e.g.*, in cl. 39. Section 491, cl. (*a*) of the Criminal Procedure Code provides only for the minor being, "brought up before the Court to be dealt with according to law." The practice here has always been that the rule issued after the petition has been filed should raise the question of possession.

JUDGMENT.

SARGENT, C. J.—The petitioner seeks to appeal from an order discharging the rule which she obtained on the 2nd April. That rule calls upon Dossa Jewan to show couse why the minor Narrondas Dhanji should not be delivered to the petitioner. The question raised by it, therefore, as between the parties is as to the right to the possession of the child. That question was discussed at the argument of the rule, and the Judge decided it against the petitioner, holding that she was not entitled to the child, and he discharged the rule which she had obtained.

[558] We think that this order of discharge was a judgment within the meaning of the words in cl. 15 of the Letters Patent, 1865. The judgment there mentioned is not necessarily a final judgment. That is clear from the express use of these words in cl. 39. But the order of the 2nd May was certainly "a decision or determination affecting the rights" of the petitioner, and is a judgment within the definition of that term which we adopted in *Sonabai* v. *Ahmedbhai Habibhai* (1), and we think, therefore, that under cl. 15 of the Letters Patent, 1865, the petitioner has a right to appeal. The memorandum of appeal must be admitted.

Attorneys for petitioner: Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for Dossa Jewan: Messrs. *Payne, Gilbert and Sayani.*

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14 B. 558.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.*

GURUPADAPA AND OTHERS (*Original Defendants Nos.* 1, 2, 4 *and* 5), *Appellants v.* IRAPA (*Original Plaintiff*), *Respondent.**
[22nd January, 1890.]

*Decree—Execution—Estoppel—Omission to assert a claim in execution proceedings—Practice.*

Defendants Nos. 1 and 2 were sued by a creditor of their undivided grand-uncle D. as his legal representatives, and a decree was obtained against them as such. In execution of that decree the house in dispute was put up for sale and purchased by the plaintiff. After satisfying the decree the surplus of the sale-proceeds was paid to the defendants, who received it and divided it between themselves. Plaintiff having been obstructed by the defendants in obtaining possession of the house, brought the present suit to recover possession. The

* Second Appeal No. 639 of 1888.

(1) 9 B. H. C. R. 398 (405).