[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

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W. MORAN AND OTHERS *v.* DEWAN ALI SIRANG.

Money had and received—Money paid into Conrt—Pleader of Small Cause Court—Attorney—Instruction to Counsel on References from Small Cause Court—Letters Patent, 1865, cl. 10.

See also 14 B, L. R. ap. 12

The defendant sued one J. H. P. in the Small Cause Court, and obtained a decree, in execution of which he caused a steamer to be attached as being the property of J. H. P. Thereupon the plaintiffs, alleging themselves to be in possession of the steamer as mortgagees from J. H. P., in order to obtain its release, paid the amount of the decree against J. H. P. into Court, and the steamer was given up. Subsequently an order was made by the Court, on the application of the plaintiffs, that the money should remain in Court pending the result of a suit to be brought by them for its recovery. They accordingly brought a suit against the defendant. The Judge of the Small Cause Court found that J. H. P. had no attachable interest in the steamer, and that the plaintiffs had paid the amount of the decree on compulsion. *Held*, the plaintiffs could maintain the suit, although the defendant had not actually received the amount of the decree.

Giving instructions to Counsel in references from the Small Cause Court is acting for the suitor within clause 10 of the Letters Patent of the High Court and can only be done by an Attorney of the Court.

THE following case was referred by the Officiating First Judge of the Small Cause Court at Calcutta, for the opinion of the High Court :

" Dewan Ali Sirang sued J. H. Poulson in this Court, and obtained a decree in execution of which, on 7th September last, he caused the Steamer *Reliance* to be seized under a writ of this Court as being the property of Poulson.

" On 8th September Messrs. W. Moran and Co., alleging themselves to be in possession of the said steamer under a mortgage from the said Poulson; in order to obtain its release, paid the amount of the said decree against Poulson into Court, under protest, whereupon the steamer was given up. Subsequently on the application of Messrs. Moran and Co., an order was passed by the Court that the money paid into Court, as above stated, should be detained in Court pending the result of

a suit to be brought by Messrs. Moran and Co. against Dewan Ali Sirang for its recovery. A suit was accordingly instituted by Messrs. Moran and Co. against Dewan Ali Sirang on 12th September, in which the cause of action is set forth as follows :— The plaintiffs sue the defendant to recover the sum of Rs. 895-14 paid by the plaintiffs, under protest, to the bailiff of this Court on behalf and to the use of the defendant, and which the plaintiffs were compelled to pay under an attachment against a certain steam vessel of the plaintiffs called the *Reliance*, which was attached on 7th September instant by the defendant upon a warrant issued out of this Court on 6th September instant, upon the application of the defendant in a suit wherein the said defendant was plaintiff and one J. H. Poulson defendant. The said vessel was attached as the property of the said J. H. Poulson, whereas it was the property of the present plaintiffs, and the said J. H. Poulson had no attachable interest in the same, and the plaintiffs were compelled to pay the said sum for the preservation of their property from sale under the said illegal and void attachment.

" At the trial of the case, I found that the plaintiffs were mortgagees in possession of the Steamer *Reliance*, and that Poulson had not at the time of the seizure any interest therein which could be attached by this Court in execution, and that the money paid into Court by the plaintiffs was paid under duress : and I was of opinion that, if the money had been handed over to the defendant, the plaintiffs would have been entitled to recover it from him as money had and received. But, inasmuch as the payment of the money had been withheld on the application of the plaintiffs, and it had not in fact been paid to, or received by the defendant, it appeared to me that the plaintiffs' cause of action was not complete, and I gave judgment for the defendant, contingent, however, on the opinion of the Judges of the High Court, as to whether the payment by the plaintiffs of the money, the subject-matter of this suit, in the manner appearing created a complete cause of action against the defandant Dewan Ali."

Mr. *Phillips* for the plaintiff.

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Mr. *Fergusson* for the defendant.

Mr. *Gray*, an Attorney of the Court, on the case being called on, drew the attention of the Court to the fact that the Counsel for the defendant was instructed by a pleader of the Small Cause Court, who was not an Attorney of the Court, and referred to clause 10 of the Letters Patent of 1865. [COUCH, C. J. —I think instructing Counsel is acting for the suitor within the meaning of the last paragraph of clause 10 of the Letters Patent of 1865, and it can only be done by an attorney of this Court.]

Mr. *Phillips* said he did not object to Mr. Fergusson appearing.

Mr. *Phillips* then contended that the plaintiff rightly brought his suit for the recovery of the money from the defendant, notwithstanding it had not actually been paid over to him, but remained in Court. It was practically money had and received. The Court ought to have called on the defendant to say whether he adopted the act of the bailiff, or whether he disclaimed the money. Here he defends the action, and yet says the money is not his. The bailiff is the agent of the execution-creditor to receive payment of the judgment debt, and the bailiff here has done everything to entitle the execution-creditor to receive the money. The sheriff is the agent of the execution-creditor to discharge the judgment—*Gregory* v. *Cottrel* (1). [COUGH, C. J.— That case only shows that the judgment is satisfied by payment to the sheriff; there is no agency.]

Mr. *Fergusson contra*, contended that no cause of action had been made out. The defendant had never received the money. The proper procedure would have been by inter-pleading under section 88 of Act IX of 1850.

Mr. *Phillips* was not to called on to reply.

COUCH, C. J.—The case states that the present defendant having obtained a decree against Poulson, in execution of that

(1) 5 E. & B., 571.

decree caused the Steamer *Reliance* to be attached under a writ of the Small Cause Court as the property of Poulson. It then states that "the present plaintiffs alleging that they were in possession of the steamer under a mortgage from Poulson, in order to obtain the release of the steamer, paid the amount of the decree against Poulson into Court, whereupon the steamer was given up." I think they might very well do this; and the present defendant was not prejudiced by that proceeding. Instead of the steamer being kept in the custody of the officer of the Court pending the determination of the question whether it could be seized as the property of Poulson, the amount for which execution issued was paid into Court, and the execution-creditor got all he could have obtained under his attachment; and we must regard the money which was paid into Court as representing the steamer which had been attached, and as what ought to have been dealt with by the Court, instead of the steamer. The money having been brought into Court in this manner and the present plaintiffs having obtained an order that it should be kept there until the question which was at issue between the parties had been decided, this suit was instituted. In their plaint, as appears from the statement in the case, the plaintiffs did not, and wisely did not, bind themselves to any particular cause of action, but they set forth the facts, and said that they sued the defendant to recover the sum which was paid by them under protest to the bailiff of the Small Cause Court on behalf and to the use of the defendant, and which was deposited in Court by the bailiff on behalf and to the use of the defendant. I think that the learned Judge of the Small Cause Court was not right in considering that, unless he could see that the money had been received by the defendant so as to make it money had and received by the defendant, there was no cause of action. The way the learned Judge ought to have considered it was this, that the money being in Court at the time, and the real question being which party was entitled to it, he should have determined whether the claim had been proved or not. If he found that it was proved, he ought to have declared that the plaintiffs were entitled to the money, without holding that the money had been received by the defendant which the plaintiffs

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did not allege; and if he had ordered the money which was then in Court to be paid over to the plaintiffs, he would without raising any technical question, have done real justice between the parties. It may be that the procedure adopted by the plaintiffs is not quite correct, and that it is an informal kind of inter-pleader which is not authorized by the Act, but it arises out of the circumstances that, instead of the claim having been preferred to the steamer, the money is substituted and paid into Court. I see no reason why that should not be allowed, the defendant not having been prejudiced in any way.

We make an order that the money be paid out to the plaintiffs, and that the defendant do pay the plaintiffs the costs of reserving the question, and stating the same for the opinion of this Court, to be taxed according to the scale which is usually allowed in references from the Small Cause Court.

Attorneys for the plaintiff: Messrs *Gray* and *Sen*.

Pleader for the defendant: Mr. *DeSilva*,

[FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Loch, Mr. Justice Jackson, Mr. Justice Glover, Mr. Justice Mitter, and Mr. Justice Ainslie.

THE QUEEN *v.* HIRA LAL DAL AND OTHERS IN THE MATTER OF THE PETITION OF THE GOVERNMENT OF BENGAL.*

Trial by Magistrate of Charge instituted by him as Sub-Registrar—Registration Act XX of 1866.

The proceedings of a Magistrate who tries prisoners charged with having committed offences under sections 93 and 94 of the Indian Registration Act XX of 1866 (1) are not illegal, and without jurisdiction, or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his capacity of Sub-Registrar.

Under such circumstances, where it can be done, it would be better if the case were tried by some other person.

* Miscellaneous Criminal Cace, No. 89 of 1871.

(1) See sections 80, 81, Act VIII of 1871.