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and to *Marshman* v. *Brookes* (1) and *In the Goods of Jones* (2).

WHITE, J.—The preferable course is, that the bond should be assigned. Amend the petition by adding an alternative prayer, that the bond may be assigned to the petitioner, his executors and administrators, for the purpose of being sued upon, and let a rule *nisi* issue to the plaintiff to show cause why the bond should not be sued upon in the name of the Chief Justice, or why it should not be assigned to the defendant.

Attorney for the petitioner: Mr. *Leslie*.

PRIVY COUNCIL.

P. C.* 1879 *May* 28 & *July* 26.

ASHUTOSH DUTT (DEFENDANT) *v.* DOORGA CHURN CHATTERJEE AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Trust for Religious uses—Beneficial Interest in Surplus—Construction of Will.

A Hindu lady left by will to her sons lands belonging to her to support the daily worship of an idol, and defray the expenses of certain other religious ceremonies, with a provision, that in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, such surplus should be applied to the support of the family.

Held, that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might be considerable, and could not be presumed to be valueless.

fendant such costs as might be decreed to him, the bond should be void, otherwise in full force.

Suit dismissed with costs.

5th September 1866.—On the application of the defendant, it was ordered that a plaint be filed in the name of Mr. Justice Peterson, against Lall Mohun Mookerjee, and that the warrant be signed, and plaint verified, by Registrar.

(1) 32 L. J., P. & M., 26.

(2) *Ibid*, 26.

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

Held also, that directions given by the testatrix in her will to the effect, that her heirs should have no power of gift or sale over the property bequeathed, and that it should not be attached or sold on account of their debts, being inconsistent with the interest actually given, were wholly beyond her power, and must be rejected as having no operation.

THE suit in which this appeal was brought, was instituted by the respondents as *Sebaits* of a family idol under a will alleged to have been executed by their mother, Saraswati Debi, to prevent an order for execution of a decree obtained by the appellant, Ashutosh Dutt, against the respondent Doorga Churn, being carried out by the sale of Doorga Churn's interest in a certain taluk, on the ground that by the terms of his mother's will he was interested in the taluk only as *Sebait*, and possessed no personal or beneficial interest in it which could be legally sold.

The questions raised in the suit were, as to whether the will of Saraswati was a genuine document, and whether it was a valid disposition of the property with which it purported to deal; and further, whether, if valid, its effect was to dedicate the property wholly to religious uses, or whether it reserved an interest to the respondent Doorga Churn, which might be attached and sold for his private debts.

The Subordinate Judge of Hooghly, in whose Court the suit was instituted, decided in favor of the respondents on all the points in issue, and his decision was substantially affirmed by the High Court, in a judgment dated 5th December 1876, which, as well as the will of Saraswati, is printed in their Lordships' judgment.

Mr. *Leith*, Q. C., and Mr. *Doyne* contended for the appellant, that the alleged endowment of the idol was a mere device whereby Saraswati intended to secure the taluk in question to her sons clear of liability for their debts, and was invalid as contrary to the law against perpetuities. But assuming it to be a valid disposition, of which the effect and object was to create an endowment substantially for religious uses, the testatrix had nevertheless in terms reserved to the respondent an interest which might be made the subject of attachment and sale for his separate debt.

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The respondents did not appear.

Their Lordships took time to consider their judgment, which was delivered by

SIR B. PEACOCK.—The principal question to be determined in this appeal is, whether or not the respondent Doorga Churn Chatterjee had any right, title, or interest in a certain taluk called Lot Panchgatchia, in Zilla Hooghly, liable to be attached and sold in execution of a money-decree against him. The question arose in this manner. The appellant sued him in the High Court, Original Jurisdiction, and on the 16th November 1864, obtained a decree against him for Rs. 3,500, with interest and costs. In execution of that decree an attachment was issued. The attachment is not on the record, but it appears from the plaint, that under it a one-third share of the taluk was attached, and thereupon Doorga Churn (the debtor) and his brother Shama Churn, who are the respondents in this appeal, intervened, and put in a claim to the property, alleging that it was not liable to attachment, inasmuch as they held it in trust for an idol, Raj Rajeswar, by virtue of a will executed by their mother Saraswati. The Judge of Hooghly, having investigated the claim, distrusted the genuineness and *bonâ fides* of the will; he stated that he did not believe that the property was held in trust for the idol, and, under the provisions of s. 246 of Act VIII of 1859, disallowed the claim of the respondents, and ordered the execution to proceed. The present suit was consequently brought by the respondents against the appellant under the same section, to set aside the order of the Judge, and prayed that the will executed by their late mother should be confirmed; that the share of the taluk which had been attached, and ordered to be sold, should be declared *debuttur* property, or property dedicated to religious uses, and not liable to be attached or sold for a private debt of Doorga Churn.

A written statement was put in on behalf of the defendant, and several issues were raised, and amongst them the 3rd, 4th, and 5th, which were the material ones on the merits. The 3rd

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was, whether the will set up by the plaintiffs was a genuine document, and whether the mother, Saraswati, endowed the property in suit for the sole benefit of the idol, and whether the profits of the disputed estate had been appropriated to the idol alone. 4th, whether the plaintiffs were entitled to a declaration, that the estate was not liable to be attached, and sold in execution of the decree obtained against one of them personally. 5th, whether the plaintiffs were the beneficial owners of the property. The Subordinate Judge found in substance that the will was genuine, that it was not colourable or fraudulent, and that it was intended to be acted upon, and thereupon he held that the property was *debuttur*, and not liable to be attached or sold for a private debt, and ordered it to be released from attachment. Each party was ordered to bear his own costs.

Upon appeal to the High Court, it was contended, that the lower Court was wrong in finding that the will was a *bonâ fide* instrument, and that the Court ought to have found upon the evidence on the record, and the probabilities of the case, that the will did not create a *bonâ fide* endowment, but was a mere device to secure the property from sale in execution of a decree; that the endowment to the household idol was a mere colourable device to give a show of legality to a transaction, which was in reality a perpetuity, and to preserve the property in the hands of the family, and that, as such, it was void and illegal.

Further, it was contended that, under any view of the nature and effect of the will, the debtor, Doorga Churn, had a considerable beneficial interest in the property.

The High Court affirmed the decision of the lower Court. They said:—"We have no doubt that the will made by Srimati "Saraswati Debi is a valid disposition of her property, and "that the effect of it was to create an endowment substan- "tially for religious uses. That being so, it is clear that the "attachment issued against a share of this property at the "instance of the execution-creditor, and the order made by the "Judge of Hooghly that the execution should proceed, ought "both to be set aside; and it is impossible to say that the Subor- "dinate Judge was wrong in confirming the will, and declaring

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"the subject of it to be *debuttur* property. It may be that, "under that clause of the instrument which disposes of the "surplus proceeds of the estate, the '*shanshar*,' or members of "the family establishment, may hereafter become entitled to "some beneficial interest in such surplus; but this interest is of "such a fluctuating and uncertain character that it could never "form the subject of attachment or sale."

The lower Court having found that the will was genuine and *bonâ fide*, and the High Court having upheld the decision, it has not been attempted to dispute that finding. It must, therefore, be assumed that the will was genuine and *bonâ fide* intended to operate; and effect must be given to it, so far as its provisions are in accordance with law.

The will is in the words following:—

"This will is executed by Srimati Saraswati Debi. I am always sick; hence I execute this will to the following effect:—I dedicate the auction-purchased property, No. 3496, Lot Panchgatchia, Pargana Baligori, Zilla Hooghly, standing in my name, to the Thakur Ishwar Raj Rajeswar that is in my house. And the *Sarodia Pooja* and other ceremonies that are being performed in the house will be performed as hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits, then the family will be supported therefrom. This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale. I appoint my eldest son Doorga Churn Chuttopadhya and the second son Shama Churn Chuttopadhya to be the executors of this will. When my youngest son Bhogobati Churn Chuttopadhya, who is now a minor, arrives at majority, he will similarly be an executor. Collecting the proceeds of this property, you will deduct therefrom the rent, revenue, taxes, charges for repairs, and whatever other expenses may be necessary for the preservation of property, and the collection charges; and will defray from the aforesaid profits the expenses of the daily worship of the said Thakur, the expenses of the *parbans*, *i.e.*, the *Dole-jattra*, the *Rashjattra*, &c., on his account, [the expenses of] the *Doorga Pooja*, the *Shama Pooja*, and the

Jagadhatri Pooja, the expenses of the annual *shradh* of my father-in-law, of the first *shradh* of myself and my husband after our death, and the expenses of our *ekodista* and *sapindikaran*. I appoint you as the executors of this will. You will pay my debts, and, collecting the sums due to me, you will incorporate them with my estate, and from the proceeds thereof you will meet the expenses described above; and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid. After your death, he who is my heir for the time being will be the executor of this will. Beyond performing the aforesaid worship of the *deb*, and the ceremonies and *poojas*, none of my heirs shall have any interest in or profit from my property. And they will have no power of gift or sale over it. And it will not be attached or sold on account of their debts. To this effect, of my own accord, and in full possession of my senses, I execute this will.

The 2nd of Cheyt 1274. SARASWATI DEBI."

According to the construction which their Lordships put upon the will, it cannot be said that the property was wholly *debuttur*. They consider that it created a charge upon the property for the expenses of the daily worship of the idol, as it was performed at the time of the death of the testatrix, and of the *poojas*, *shradhs*, and religious ceremonies for which provision is made by the will. For the purpose of this decision the charge may be termed generally a charge for such religious acts and ceremonies. So far the case falls within the class of which that of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1) may be referred to as an example.

The next question that arises is, who are entitled to the beneficial interest in the taluk, subject to the religious and ceremonial trust. The testatrix has certainly attempted to dispose of this, and, if she has done so effectually, it cannot be held, as has been held in some cases, to have passed to her sons in their character of heirs-at-law as property undisposed of. Her disposition is contained in the words "after all these

(1) 8 Moore's I. A., 66.

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"acts have been observed from the proceeds of the said property, "if there be a surplus, then the family will be supported "therefrom."

Their Lordships, not without some doubt and hesitation, have come to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit. It is true that the testatrix further declares, "this property of mine will not be liable for the debts of any "person. None will be able to transfer it, none will have the "rights of gift and sale." But these directions, being inconsistent with the interest given, were wholly beyond her power, and must be rejected as having no operation. This being so, it follows that Doorga Churn took a share of the property in question, which, after satisfying the expenses actually incurred in the worship of the idol, cannot be assumed to be valueless, and might be considerable, and which, in their Lordships' opinion, was subject to be taken in execution by his creditor. Inasmuch as their Lordships are not precisely informed of the state of the family on the death of the testatrix, they are unable to specify what that share was, and there being no *constat* as to what is required for the performance of the religious trust, the interest acquired by a purchaser at any such execution-sale would have to be ascertained, and realised in some other further proceeding. In these circumstances, their Lordships are of opinion that the attachment should be allowed to stand; but that the summary order of the Judge of Hooghly, which would apparently authorise the sale of one-third of the taluk, as if unaffected by the will of the testatrix, is erroneous, and should be set aside.

They will, therefore, humbly advise Her Majesty that the decrees of both the lower Courts be reversed. That it be declared that the will of *Saraswati* was a genuine will, and *bonâ fide* intended to operate, and that the effect of the will was to charge the property in the hands of the executors thereby appointed, with the payment of such sums as might be necessary to defray the expenses, which might, from time to time, be incurred in the daily worship of the idol therein mentioned, in the manner in which such service was performed

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at the time of the death of the testatrix, and with the expenses of the *parbans*, and of the *poojas* and other religious acts and ceremonies in the said will mentioned; that, after defraying such expenses, the surplus belonged to the members of the joint family, of whom Doorga Churn was one, and that his interest in the taluk under the said will was liable to be attached and sold in execution of the decree of the High Court of the 16th of November 1864; and to order that the summary order of the Judge of Hooghly be set aside, but that the appellant be at liberty to proceed to a sale in execution of the right, title, and interest of Doorga Churn in the said taluk under the said will, and that each party do bear his own costs of the suit in both the Courts below.

The appellants having failed in their attempt to impeach the genuineness and *bona fides* of the will, their Lordships are of opinion that they are not entitled to the costs of this appeal.

Agents for the appellant: Messrs. *Robert Oldersham* and *Son*.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

RADHAKISSEN ROWRA DAKNA *v.* CHOONEELOLL DUTT.

1879 *Aug.* 16.

Registration—Denial of Execution, What is—Suit to compel Registration—Party to Suit—Registration Act (III of 1877), ss. 34—36, 73—77.

Refusal to admit execution of a document is a denial of execution within the meaning of the Registration Act of 1877, and so also is a wilful refusal or neglect to attend and admit execution; and where such refusal or neglect occurs, a suit will lie under s. 77 for the purpose of having the document registered.

The Registrar is not a necessary party to such a suit.

IN this case the defendant entered into a deed of agreement and covenant with the plaintiff for valuable consideration, whereby he mortgaged certain premises, and covenanted to give an assurance in the English form whenever required by