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to maintain the tombs of deceased relatives." The other object, *viz.*, the acquiring, by a few private persons, of benefits through the protection of the *frohúrs* seems to me to resemble a gift to a private company, and, therefore, not a gift to a charitable use—*Cocks v. Manners*⁽¹⁾; *Attorney General v. Haberdashers' Company*⁽²⁾. On the present question which arises under section 527 of the Civil Procedure Code in a case stated, there has been no conflict, the parties being of accord that the devise is void, and the Advocate General, as representing the charity, leaving them in the hands of the Court.

For the reasons given, I find that the trusts declared with reference to the one-third share of the *bungalow* at Khetvádi are void, and that the direction in the will, that it should not be sold, is not valid, nor binding, and that the plaintiff, as committee of the lunatic, and the first four defendants are lawfully entitled to the said one-third share. The decree will so declare, and will incorporate the substance of clause 12 of the case stated and clause 14 thereof as to costs.

Attorneys for the plaintiffs:—Messrs. *Wadia and Ghandy*.

(1) L. R., 12 Eq., 574.

(2) 1 My. & K., 420.

ORIGINAL . CIVIL.

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

1887. TOOLSÁ GOOLÁL AND OTHERS, (PLAINTIFFS), *v.* JOHN ANTONE
March 11-18. AND ANOTHER, (DEFENDANTS).*

THE BOMBAY TRAMWAY COMPANY, LIMITED, APPLICANT.

Execution—Practice—Garnishee—Attachment by a judgment-creditor of a debt due to judgment-debtor by a third party—Order upon third party to pay, where debt admitted—Procedure where existence of debt not admitted—Civil Procedure Code (XIV of 1882), Secs. 267—268, 503.

When a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment-creditor, the Court may, under section 268 of the Civil Procedure Code (Act XIV of 1882), make an order upon the garnishee for the payment of such debt to the judgment creditor in case the former admits it to be due, or for so much as he admits to be due to the judgment-debtor. Where

* Suit No. 25761 of 1884.

however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under section 503 of the Civil Procedure Code (Act XIV of 1882).

THIS was a reference to the High Court by Mr. N. Spencer, Acting Chief Judge of the Small Cause Court, as to the effect of a prohibitory order issued under section 268 of the Civil Procedure Code (Act XIV of 1882); and raising the question as to the proper course to be pursued by a creditor who, in execution of his decree, has attached moneys in the hands of a third party which are due by such third party to the judgment-debtor.

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Toolsá Goolál and others obtained a decree against one John Antone and another for Rs. 51-14, which by the decree was made payable by monthly instalments of Rs. 2 each. In December, 1886, there remained a sum of Rs. 20-2 still due to the plaintiffs under the decree. The defendant, John Antone, was a servant in the employ of the Bombay Tramway Company. In December, 1886, the defendants failed to pay the instalment due, whereupon the plaintiffs on the 9th December caused a prohibitory order to be issued by the Small Cause Court, under section 268 of the Civil Procedure Code (XIV of 1882), prohibiting the Tramway Company from paying to the defendant, John Antone, the said sum of Rs. 20 out of the amount of Rs. 30 due to him as wages from the month of November, 1886. The prohibitory order, which is hereafter referred to as order A, was in the following terms:—

“ TO THE MANAGER, BOMBAY TRAMWAY COMPANY, LIMITED.

“ Whereas John Antone, a carpenter in the Bombay Tramway Company, Limited, has failed to satisfy a decree passed against him and one Bhimá Rámji on the 9th day of December, 1884, in favour of the plaintiffs above named, for Rs. 51-14, and whereas Rs. 19-14, the balance of the said decree, and the costs of this order, Rs. 4, now remain unpaid, it is ordered that the first defendant be and he is hereby prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said first defendant, namely, the sum of Rs. 20-2 out of his salary of Rs. 30 for the month of November, 1886; and that you, the said Manager, Bom-

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bay Tramway Company, Limited, be and you are hereby prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever."

On the 7th January, 1887, the plaintiffs obtained a summons calling on the Manager of the Tramway Company to show cause why he should not pay to the plaintiffs the moneys in his hands belonging to the first defendant (John Antone), or so much thereof as would be sufficient to satisfy the amount due by the defendants.

On the return of the summons it was contended on behalf of the Tramway Company that, under the Civil Procedure Code, the Court had no power to issue such a summons, or to make any order upon it, and that the only course open to a creditor for enforcing the payment of a debt due to his judgment-debtor by a third party was to procure the appointment of a receiver, who might sue for the debt. The Chief Judge, however, made an order on the Manager of the Tramway Company out of the money in his hands to pay to the plaintiff the sum of Rs. 20 in respect of his decree.

At the request of the Tramway Company the Chief Judge stated the case, under section 617 of the Civil Procedure Code (XIV of 1882), for the opinion of the High Court.

The reference was as follows :—

"1. The plaintiffs above named recovered judgment in this Court against the defendants for the sum of Rs. 51-14 payable by monthly instalments of Rs. 2.

"2. Default was made in payment of the instalments, and on the 9th of December, 1886, there was a balance due to the plaintiffs, under their decree, of Rs. 20-2.

"3. The first defendant is employed in the Bombay Tramway Company, and on the 9th of December the plaintiffs obtained an order (order A) under section 268 of the Code of Civil Procedure (Act XIV of 1882) prohibiting the Tramway Company, until the further order of this Court, from paying to any person whomsoever the above sum out of the salary due to the defendant for the month of November, 1886.

" 4. On the 7th of January, 1887, the plaintiffs obtained a Judge's summons requiring the Manager of the Tramway Company to appear before this Court on the 19th of January to show cause, if any, why he should not pay to the plaintiffs the moneys in his hands. A copy of the summons is annexed, marked B.

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" 5. Mr. Roughton appeared for the Tramway Company in obedience to this summons. He admitted that the company had the money in their hands, but he contended that no provision was made in the Code of Civil Procedure for issuing such a summons after the prohibitory order, and that the summons itself and the order, which it has been the practice of this Court to make on the summons when no cause is shown, were *ultra vires*. He further contended that, if the money was not paid into Court after service of the prohibitory order, the Court could only adopt one of two courses: either appoint a receiver to collect the debt, or direct that this debt be sold by auction.

" 6. Since the passing of Act XV of 1882 making the Civil Procedure Code applicable to this Court, it has been the practice, when a debt has to be attached, to issue a prohibitory order under section 268, and, if the debt is not paid into Court under clause (c), to issue a summons according to the form Appendix B; and, if no cause is shown, to make an order that the debtor shall pay the decree-holder the amount in his hands, or so much thereof as shall be sufficient to satisfy the amount due by the defendant. A form of the order usually made in such cases is annexed, marked C.

" 7. The prohibitory order A is taken from form No. 140 in the schedule of forms attached to the Code. The other forms, B and C, were, I believe, adopted from forms obtained from the office of the Prothonotary of the High Court after the passing of Act XV of 1882.

" 8. The English Supreme Court of Judicature Act, 1875, Order XLV, cl. 2, provides for the attachment of debts by an order of the Court, and directs that 'by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as such Judge or Court shall appoint, to show cause why he should not pay

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the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt.' There is no similar provision in the Civil Procedure Code, but section 268 of the Code and the form of prohibitory order (Annex. A) do contemplate the passing of a 'further order,' and it appears to me that the Court cannot make this 'further order' without having the parties before it. Again, section 267 empowers the Court to summon and examine persons as to property liable to be seized in satisfaction of decrees, and the issue of the Judge's summons annexed, marked B, and the inquiry on the summons may be considered as authorized under this section. No form of summons under this section is given in the Code, nor does the section say that the inquiry contemplated shall be made before the issue of the prohibitory order under the next following section. What is the effect of the order which it has been hitherto the practice to make on the Judge's summons, when no cause is shown, is a distinct question which does not now arise. The contention of Mr. Roughton is that the Court has no power to issue the summons B, or to make the order C.

"On his application I submit the question he has raised for the opinion of the High Court."

The following is the summons above alluded to as summons B:—

"Upon reading the prohibitory order issued herein, and dated the 9th day of December, 1886, and the return of the bailiff of service thereof, and on hearing the plaintiffs, I do order that the Manager, Bombay Tramway Company, Limited, do appear before me at this Court on the 19th day of January, 1887, at eleven o'clock in the forenoon, to show cause, if any he has, why he should not pay to the plaintiffs the moneys in his hands belonging to the first defendant, or so much thereof as shall be sufficient to satisfy the amount due by the defendants to the plaintiffs under the decree herein.

"I further direct that a copy of this summons shall be served on the first defendant above named."

The following is the order C:—

"Upon reading the Judge's summons issued herein dated, &c., and on proof of service thereof, and on hearing the plaintiff, &c., I do order that the said, &c., do out of the moneys in his hands pay to the plaintiff the sum of rupees, &c., in respect of the decree herein."

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Inverarity for the Tramway Company:—The order C is *ultra vires*. We contend that the Civil Procedure Code gives the Judge no power to make an order upon a third party to pay a debt alleged to be due by him to a judgment-debtor. Nor does it give a Judge power to issue the summons B, calling upon a third party to show cause why he should not pay such a debt. Under the Code, the only course open to a decree-holder is to get a receiver appointed under section 503 of the Code, and then the receiver may recover the debt.

[SARGENT, C. J.:—Does not that section apply only where a debt is disputed? Here the Tramway Company admits there is a debt due by it to the judgment-debtor.]

The section does not say so. We do not admit we owe the money to the judgment-debtor, although we do admit we have this money in our hands. Section 267 is the only section which enables the Court to summon a third party for examination; but that is only with reference to property "liable to be seized in satisfaction of the decree." A debt due by a third party to a judgment-debtor is not liable to be seized. It is attached by written order, and section 276 of the Code shows that a distinction is made between property liable to attachment by seizure and by written order. Section 267 only applies where there is property liable to actual seizure. The Court has no power, under the Code, to interrogate a person who is not a party to a suit, and ask him about his affairs generally. It is clear that summary orders to pay debts can only be made against parties to suits. If it were otherwise, there might be great injustice done, for a party against whom such an order is made would have no appeal. Section 244 of the Code only applies to parties to suits. We submit there is no power in the Court to issue the summons B, or to make the order C. Counsel referred to the English Rules.

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and Orders, Order XLII, Rule 32, and Order XLV and rules thereunder.

SARGENT, C. J. :—The question we have to determine is whether the Small Cause Court has power to issue the summons B or to make the order C annexed to the reference. This depends upon the language of certain sections of the 19th chapter of the Civil Procedure Code (Act XIV of 1882), which, by section 23 of Act XV of 1882, are made applicable to the Small Cause Court.

Section 267 of the Civil Procedure Code (Act XIV of 1882), which is substantially the same as sections 219 of Act VIII of 1859 and 267 of the Code of 1877, gives power to the Court to "summon any person" it thinks necessary, and "examine him in respect of any property liable to be seized in satisfaction of the decree." Sections 268 and 269 show that seizure does not necessarily mean *actual* seizure, and may include such constructive seizure as is provided by the former of those sections. Nor is there anything in section 266 which is clearly in aid of execution requiring that the summons should necessarily issue before attachment has been effected.

But it was said that, in any case, the summons should not be in form B; as it assumes that under certain circumstances an order might be made on the garnishee to pay the judgment-creditor, and there was no section corresponding to Rule 3, Order XLV of the English Judicature Act, which enables this to be done. But although there is no section expressly providing for it, clause (a) of section 268 implies that the Court may make an order for payment of the debt which the garnishee is to obey, and by the long-established practice of this Court ever since Act VIII of 1859 came into force this has been held to justify an order for payment to the judgment-creditor, when the garnishee admits the debt to some amount, or does not deny the debt *in toto*. As the sections of the Code are—to use the language of Chief Baron Pollock in *Pochin v. Duncombe*⁽¹⁾—susceptible of this interpretation, which has been put upon them by long usage, the Court will not disturb that construction.

We think, therefore, that an order for payment may be made on a garnishee under the above circumstances. If, however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under section 503. Subject to these remarks we see no objection either to the summons B or the order C.

Attorneys for the Bombay Tramway Company :—Messrs. *Tobin and Roughton.*

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APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhai Haridas KA'NE BA'BLE, (ORIGINAL PLAINTIFF), APPELLANT, v. ANTA'JI GANGÁ-DHAR AND OTHERS, (ORIGINAL DEFENDANTS Nos. 11, 12 AND 13), RESPONDENTS.**

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December 22.

Limitation Acts XIV of 1859, Clause 13 of Section 1, IX of 1871, Art. 127, and XV of 1877, Art. 127—Joint family—Partition—Claim by absent member—Adverse possession—Exclusion—Participation in profits of joint property—Payment—Occasional residence of wife of absent member with joint family.

The plaintiff and his four brothers (Gáne, Shive, Rámá, and Bále) were members of a joint Hindu family. The only one of them who lived at home was Shive. In 1854 the family property, which had been mortgaged, was redeemed by the brothers, and after redemption it was placed under the management of Shive by the eldest brother, Gáne. Subsequently, two of the brothers died while absent from the village; and the plaintiff, who was twenty years of age in 1854, joined the army in 1855. He did not return until 1876; but, during the interval, his wife used occasionally to visit her husband's native place, and during these visits resided in the family house with Shive and Gáne. In 1872 Gáne died.

The plaintiff alleged that in 1876 he demanded his share, but was refused. In 1883 he filed this suit for partition.

It was contended that the right of the plaintiff had become barred by the Limitation Act XIV of 1859, and was not revived by Act XV of 1877, which was in force at the date the suit was brought.

The Court of first instance awarded the plaintiff's claim. On appeal, the Assistant Judge reversed the decree of the Court below, holding that under clause 13 of section 1 of the Limitation Act XIV of 1859 the plaintiff had lost his right to sue, and that such right could not be revived by the passing of the subsequent Limitation Acts IX of 1871 and XV of 1877. He was of opinion that the fact that the plaintiff's wife "had put up at Shive's house for a few days, if it were a fact, did not help the plaintiff's title."

* Second Appeal, No. 400 of 1884.