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and no part of the consideration has failed in point of fact, so as to give the debtors a counter claim of any description.

The third question should, therefore, be answered in the negative so far as the right to sue on the bond is concerned, and it becomes unnecessary to consider the first two questions.

Attorneys for the plaintiff:—Messrs. *Crawford, Burder & Co.*

Attorneys for the defendants:—Messrs. *Payne, Gilbert and Sayáni.*

ORIGINAL CIVIL.

Before Mr. Justice Parsons.

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July 4, 14.

TRICUMDA'SS MULJI AND ANOTHER, PLAINTIFFS, v. KHIMJI
VULLABHIDA'SS AND OTHERS, DEFENDANTS.*

Civil Procedure Code (XIV of 1882), Sec. 539—Public charitable trust—No consent of Advocate-General—Suit not maintainable.

Two out of five trustees appointed by a will to administer a public charitable trust brought this suit against the remaining three trustees praying (i) that the first defendant might be ordered to account for a specific sum of money of which it was alleged he had committed a breach of trust, (ii) that the first defendant might be removed from the office of trustee and some other person appointed in his stead, and (iii) for such other or further relief as the nature of the case might require. The consent in writing of the Advocate-General to the institution of the suit under section 539 of the Civil Procedure Code (XIV of 1882) had not been obtained.

Held, that the suit was one which fell within the purview of section 539, and consequently, in the absence of such consent, was not maintainable.

THIS suit was brought by the plaintiffs, two of the trustees of the estate of one Kánji Khetsey, deceased, under his will, against Khimji Vullabhda'ss and two others, the remaining trustees of that estate, claiming from the first defendant, Khimji, an account in respect of two notes of four per cent. Government paper of the value of Rs. 500 each, which the plaintiffs alleged had been received by him as one of the trustees of the said will, and had been converted by him to his own use, and praying that the said Khimji might be removed from his office of trustee of the said estate and that some fit and proper person might be

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appointed in his stead. The plaint also prayed for such further and other relief as the nature of the case might require. No relief of any sort was claimed against the second and third defendants, the remaining trustees.

The will of Kánji Khetsey, by which the plaintiffs and defendants were created trustees of his estate, besides directing the trustees to dispose of the income of the estate in various private benefactions, set aside certain funds for supplying *áthás* to the residences of ascetics, through the temple of Shri Jagannáthji; defraying the expenses of two *sadávarats*; and out of any surplus there might be, distributing food to the poor; making wells or tanks; and building *dharamshálas* on the banks of sacred rivers. On the case coming on for hearing,

Lang (Acting Advocate-General) (with him *Scott*) for the first defendant raised a preliminary issue, whether the consent of the Advocate-General was not necessary to the maintenance of the suit. This he contended was a charitable trust, and, therefore, under section 539 of the Civil Procedure Code, the suit could only be brought by the Advocate General acting *ex officio*, or by two or more persons having an interest in the trust, and having obtained the consent in writing of the Advocate-General. It was very doubtful whether trustees could be considered "persons having an interest in the trust," and, therefore, whether the plaintiffs could sue in this case, even with the Advocate-General's consent. This suit being based upon an alleged breach of the trust, the relief sought, *viz.*, to procure the appointment of a fit person as trustee, came under the words "such further or other relief as the nature of the case may require" in section 539—*Narasimha v. Ayyan*⁽¹⁾.

Jardine (with him *Inverarity*) for the plaintiffs:—The consent of the Advocate-General is not necessary. The trustees here seek to recover part of the trust-monies, which the Advocate-General is not authorized by section 539 to sue for. He can sue for five things mentioned in the section, and trust-monies are not among them. Such a section, being in restriction of ordinary rights, must be strictly construed. It is a question whether this is a public trust, for it is only after a surplus is shown after

(1) I. L. R., 12 Mad., 157.

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meeting the expenses of the *sadāvarats* that the charity becomes a public one.

Guzdār and *Slater* for the third defendant.

Lang in reply :—One trustee cannot sue another for possession of trust property. Clauses (a), (b), (c), (d) and (e) of section 539 are not exhaustive, and “appointing new trustees” must clearly include removing old trustees—*Subbāyya v. Krishna*⁽¹⁾.

[PARSONS, J.:—Do you contend that one trustee cannot sue another for misappropriation of a part of trust funds?]

Yes, in all cases of public charitable trusts—*Tháckersey Dewráj v. Hurbhum Nursey*⁽²⁾.

Cur. adv. vult.

PARSONS, J.:—I have come to the conclusion that the plaintiffs are not entitled to maintain this suit. It is settled by authoritative decisions that the provisions of section 539 of the Code of Civil Procedure are mandatory; in other words, suits to which that section applies can only be brought in accordance with its provisions, and not otherwise. That is the decision of the Calcutta High Court in *Lutifunnissa Bibi v. Nazirun Bibi*⁽³⁾. It is also the decision of this Court. For although Scott, J., was of a different opinion (see *Tháckersey Dewráj v. Hurbhum Nursey*⁽⁴⁾), and Wedderburn, J., in *Daniel David v. Samuel Elájah*⁽⁵⁾ decided on the 2nd February, 1886, concurred in that opinion, saying that he agreed in the reasoning on which it was based, the Appellate Court (Sargent, C. J., and Farran, J.,) on the 3rd December, 1886, reversed the decree in the latter case on the ground that the suit, which was admittedly one to which section 539 applied, was not maintainable, having been brought without the consent of the Advocate-General.

We have, then, only to see whether the section applies to the present suit.

There can be no doubt that clause 12 of the will creates a public charitable trust, and the plaintiffs and the defendants are

(1) I. L. R., 14 Mad. 186.

(3) I. L. R., 11 Cal., 33.

(2) I. L. R., 8 Bom. 432.

(4) I. L. R., 8 Bom., 432, at p. 451.

(5) Suit No. 93 of 1885.

the five trustees appointed to administer that trust. The two plaintiffs, alleging breach of trust on the part of the first defendant, have brought this suit against him and the remaining two trustees, who, they say, are his friends, to obtain a decree (1) ordering the first defendant to account for the money in respect of which they say he has committed a breach of trust, (2) removing the first defendant from the office of trustee and appointing some fit person in his stead, and (3) granting such further or other relief as the nature of the case may require. The words of the third prayer are the very same words as are used in section 539 of the Code of Civil Procedure, so that there can be no doubt that that section applies to it. The appointing of new trustees is specifically named in clause (a) of the section, so that the section clearly applies to a suit for that purpose. It has been held by the Madras High Court—*Subbayya v. Krishna*⁽¹⁾—that under the section a suit will lie for the removal of a trustee, and I follow that decision.

The first prayer alone remains to be considered. Looking at the position of trustees, *inter se*, it appears to me that two trustees cannot claim to hold any trust property exclusively to themselves as against three other trustees, and that, therefore, in the case of a breach of trust, the only remedy would be by a suit for an account. Such a suit, in the case of a trust created for public charitable or religious purposes, comes, in my opinion, within the terms of section 539, since it alleges a breach of trust, and asks for a decree for a relief, namely for an account, which is included in the words "decree granting such further or other relief as the nature of the case may require." The plaintiffs in the present case have not obtained [the consent, in writing, of the Advocate-General, and, therefore, they cannot maintain this suit. I find the issue in the negative. The suit is dismissed with costs.

Attorney for the plaintiffs :—Mr. *Khanderao Moraji*.

Attorneys for the first defendant :—Messrs. *Ardasir Hormasji and Dinsha*.

Attorneys for the second and third defendants :—Messrs. *Bhāishankar and Kānga*.

⁽¹⁾ I. L. R., 14 Mad., 186.

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