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in itself furnished no ground of action, and that the plaintiff could not, as held by the lower Courts, have sued till some portion of the allowance was left for distribution over and above the amount reserved for the officiator. On this point also, we think, the decisions of the Courts below were right.

As regards the claim to arrears, the District Judge has relied upon a ruling of this Court in *Chhaganlál* v. *Bápubhái*[1], which, however, one of the learned Judges who took part in it has, in a more recent judgment—*Harmukhgauri* v. *Harisukhprasad*[2]—pronounced to be unsustainable. That the three years' rule of limitation is applicable, is also clear from a recent decision of the Judicial Committee of the Privy Council in *Ahmad Hossein Khán* v. *Nihal-ud-din Khán*[3].

We, therefore, amend the decree of the District Court by diminishing the amount awarded to the plaintiff to three years' arrears previous to the date on which the plaint was filed, with costs throughout on the defendant.

Decree amended.

(1) I. L. R., 5 Bom., 68. (2) I. L. R., 7 Bom., 191.
(3) I. L. R., 9 Calc., 945.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1883 *November* 19 *et seq.*, 1884 *June* 20.

THACKERSEY DEWRA'J AND OTHERS (PLAINTIFFS), *v.* HURBHUM NURSEY AND OTHERS (DEFENDANTS).*

Caste—Suit by members of a caste and worshippers at caste temple against trustees of caste and temple property—Civil Procedure Code Act X of 1877, *Secs.* 30 *and* 539—*Right to manage caste and temple funds—Public charity—Private charity—Parties—Trustees—Negligence—Wilful default—Acquiescence of majority of caste in unauthorised use of trust funds—Rights of minority—Express trust—Limitation Act XV of* 1877, *Sec.* 10—*Jains.*

In or about the year 1839 a temple to the god Shri Anantnáthji was erected in Bombay by the Dossa Oswall Bania caste, the religion of which caste is the Jain religion. A large portion of the funds required for building the temple was advanced by one Nursey Náthá, at that time the leading man in the caste; the rest

* Suit No. 424 of 1881.

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was obtained from the caste by subscription. The firm of Nursey Náthá acted as the bankers to the caste and to the temple, received all the gifts and offerings made by the worshippers, and for many years administered all the affairs of the temple. The sums advanced by Nursey Náthá were gradually, but entirely, repaid to him out of the gifts and offerings. There were three separate funds, of which separate accounts were kept in the books, *viz.*, (1) the *darása* fund, which was devoted to the temple purposes, such as maintenance of priests, repairs, &c., and gifts to poorer temples; (2) the *sadáran* fund, which was more extended in its objects, but still limited to religious and charitable purposes, such as payments to poor devotees irrespective of their caste, &c.; and (3) the *mahájan* fund which was devoted to caste purposes such as purchase of caste utensils, &c. All three funds were collected at the temple. Gifts and offerings were made by all worshippers at the temple, whether members of the caste or not. Subscriptions were made only by members of the caste. All the regular subscriptions came from the caste exclusively, and the great bulk of the gifts and offerings came from the caste also. Only about Rs. 12,000 had been given by outsiders up to the date of the suit, while nearly 6 lákhs had been given by the caste. Nursey Náthá died in 1842, and his adopted son Virji Nursey became head of the firm, which continued to manage the funds of the temple under the name of Virji Nursey & Co. Virji Nursey died in 1852, and Hurbhum Nursey (defendant No. 1) succeeded him. The firm meanwhile had invested the funds of the temple in eight lots of immoveable property. In 1867 the caste determined to appoint trustees of the temple property, and in September, 1867, a trust-deed was executed whereby HurbhumNursey, Kessowji Náik, Ghellábhoy Puddumsey (defendants Nos. 1, 2 and 3), together with three others who were dead at the time of this suit, *viz.*, Jewráj Ruttonsey, Tricumji Wellji and Madan Tejsey, were appointed trustees of all the immoveable property belonging to the temple. The deed set forth the objects to which the income of the property should be applied and provided that the surplus should be invested in Government securities, in corporation shares, or in landed property, but in no other shares of any description whatsoever. It also authorized the trustees to invest surplus moneys in the firm of Virji Nursey. It was admitted that, subsequently to June, 1869, the trustees managed the temple, and not only the immoveable property, but all the funds. A debt of Rs. 2,40,000 was due from the firm of Virji Nursey & Co. to the temple and caste when the trustees took over the management. In 1870 the firm of Virji Nursey & Co. became insolvent, and in their schedule the trustees were entered as creditors in respect of *darása* account, Rs. 1,57,649; on *mahájan* account, Rs. 68,017; on *sadáran* account, Rs. 22,597. It was admitted that the trustees knew of this entry in the said schedule. They, however, received no dividend, although other creditors, including Kessowji Náik (defendant No. 2), were paid two annas in the rupee. This sum of Rs. 2,40,000 due to the temple was wholly lost. In April, 1867, Rs. 15,000 of the temple funds were invested—it did not appear by whom—in the name of Ghellábhoy Puddumsey (defendant No. 3), and in August, 1868, a sum of Rs. 15,000 was advanced to one Jairáz Pirbhoy. In 1869 a sum of Rs. 10,000 was advanced by the trustees to Nursey Kessowji & Co., which was never repaid, nor was any interest received upon it. It was lost on the failure of that firm in 1879. The principal partner of that firm (Nursey Kessowji) was the only son of

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Kessowji Náik (defendant No. 2), who also had an interest in it. In 1877-78 various loans were made by the trustees to three mills in which one or more of the trustees was interested. Of Rs. 55,000 lent to the mills and to Nursey Kessowji & Co. Rs. 42,000 were lost. Half a lákh of outstanding gifts to the temple remained uncollected owing to the negligence of the trustees. Two suits brought by another caste against the trustees were defended out of the temple funds. All the defendants (trustees), with the exception of Kessowji Náik, were in needy circumstances. In 1880 a hundred members of the caste protested against the management of caste and temple affairs by the defendants. The plaintiffs, six in number, took part in the protest, and filed the present suit in 1881. Thereupon there was a caste agitation in favour of the defendants, who were all *shettiás* of the caste. A meeting of the caste was held, and a series of resolutions, supporting the defendants' management and approving of their conduct, was passed, and a document to that effect was signed by 1,468 persons—the whole caste in Bombay numbering only 1,500. The plaintiffs sought to make the defendants liable in respect of the moneys lost to the caste and temple funds, and prayed for the appointment of new trustees and for the settlement of a scheme.

The defendants denied the charges of negligence, and pleaded that the suit was not properly constituted, not having been brought under section 30 or 539 of the Civil Procedure Code of 1877, and that it was in contravention of Regulation II of 1827, ch. 2, sec. 21. They relied upon the fact that the caste had approved of their conduct and had allowed them to defend this suit at the expense of the caste. They contended that under these circumstances the plaintiffs were not entitled to maintain the suit, and that the Court would not interfere with or control the decision of the majority of the caste in matters relating to the internal management of its affairs.

Held that section 30 of the Civil Procedure Code (Act X of 1877) did not apply. If the plaintiffs had any right of action it was a complete right of action vested in each of them, and not a mere joint right shared with others and incomplete unless they united themselves with others. They sued as subscribers to the temple and devotees of the idol, and, as such, each had a right to complain of maladministration. They were entitled to sue in their own right and in their own name without permission of the Court or notice to other parties interested.

Held, also, (following *Thanga Karuppa* v. *Arumuga Nadan* (1)) that section 539 of Act X of 1877 did not apply. The three funds administered by the defendants were different in character. The *mahájan* fund was a purely secular fund; the other two funds were religious and charitable funds. Even if the case came under the Civil Procedure Code (XIV of 1882), section 539 would not apply, that section being permissive or directory, and not mandatory. Any person interested in the proper observance of a religious endowment may sue in his own name to have the trust properly administered. The section does not prohibit a private suit, and does not make the sanction of the Advocate General a condition precedent.

The gifts to the temple comprised in the *darása* and *sadáran* funds were irrevocably dedicated to a public charity, and, therefore, the approval, by the caste, of

(1) I. L. R., 5 Mad., 383.

the conduct of the trustees was no bar to the suit. They were also dedicated to the idol, who was a public, not a mere private household divinity. The ideal personality of such an idol is well recognized, and in case of misappropriation of the property he is entitled to the protection of the public authorities, on the ground that it has been devoted to public religious purposes, and must not be wasted even by the donors.

The management of the temple belonged to the Dossa Oswall Bania caste, and not to the whole Jain community. Although the donations were irrevocably dedicated to public purposes, the donors had never lost the right, which was attached to the caste from the beginning, of managing the temple which they had founded, and their management could only be interfered with as a public charitable trust on proof of maladministration.

On the evidence *held* that the defendants were not liable for losses prior to 1867. It was not clearly proved that they were managers of the temple funds before that date.

Held, also, that the defendants were liable for the losses incurred subsequently to 1867. They assumed the management on the execution of the trust-deed in that year, and ought to have taken steps to recover the moneys which had been improperly advanced on loan or otherwise negligently invested. Not having done so they were guilty of wilful neglect, and were liable to refund the moneys which had been lost. The liability was, however, confined to the first three defendants, it not being proved that the remaining defendants had ever acted as trustees. The negligence of the trustees in not taking steps to recover the Rs. 2,40,000 due from the firm of Virji Nursey & Co. was a clear breach of trust. The evidence showed that although the whole sum could not have been recovered at any time during the trusteeship of the defendants, yet that some portion of the money might have been obtained if due diligence had been used, and that other creditors of the firm had actually been paid two annas in the rupee. The first three defendants were, therefore, liable to refund two annas in the rupee of such portion of the Rs. 2,40,000 as belonged to the *darása* and *sadáran* funds. As to the *mahájan* fund, it belonged to the caste, and the caste had condoned its misapplication, which it had power to do. The defendants were also held liable to refund such other sums as had come into their hands and had been lost in consequence of their negligence.

Held, also, that, under the provision of section 10 of the Limitation Act (XV of 1877), the suit was not barred. The property became vested in the defendants for specific purposes; and, although it was no longer in their hands, the suit fell within the section, inasmuch as the money could be traced to the hands of the trustees, and the losses were caused by their misconduct and improper dealing with it.

The Court removed the defendants from the trusteeship, and ordered a scheme to be settled.

THIS was a suit brought by the plaintiffs, who were six in number, against the defendants as trustees of a temple at Mándvi.

In 1867 the following six persons were appointed trustees of the temple, which had then been about thirty years in existence,

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viz., Hurbhum Nursey, Kessowji Náik, Ghellábhoy Puddumsey, Jewráj Ruttonsey, Tricumji Wellji and Madan Tejsey. Of these six trustees the first three (Hurbhum Nursey, Kessowji Náik and Ghellábhoy Puddumsey) were still living, and were defendants Nos. 1, 2 and 3 to this suit. The remaining trustees were dead before this suit was filed, and their heirs and legal representatives were made defendants. Cuverji Jewráj (defendant No. 4) was the representative of Jewráj Ruttonsey; Umersey Wellji and Devkuverbái (defendants Nos. 5 and 6) were the representatives of Tricumji Wellji; and Megji Jaitha and Mulbái (defendants Nos. 7 and 8) were the representatives of Madan Tejsey.

The plaintiffs and the defendants were members of the Dossa Oswall Bania caste. In or about the year 1839 the temple in question to the god Shri Anantnáthji was erected at Mándvi Bandar by the caste, partly with funds belonging to the said caste appertaining to another temple which had existed in the same neighbourhood and partly with money advanced by one Nursey Náthá, then a leading member of the caste. The money advanced by Nursey Náthá was subsequently repaid to him out of the offerings and presents made by the worshippers at the temple.

On the completion of the temple its affairs were, in the first instance, administered by the firm of Nursey Nátha Co., which acted also as bankers to the temple and caste. The gifts, offerings and contributions, which amounted to a very large sum, were received by them, and were invested in the purchase of immoveable properties in Bombay. They also received all the fees and fines levied from members of the caste on marriage and other occasions which were intended to be applied for religious and charitable purposes connected with the caste. They further received subscriptions from the caste to a charitable fund, called *sadáran*, out of which donations were given and payments made for religious and charitable purposes. It was alleged that three separate accounts were kept in the books of the firm of Nursey Náthá, *viz.*, first, the *darása* account to which all the contributions to the temple were credited; second, the *mahájan* account to which the fees and fines were credited; and, thirdly, the *sadáran* or charitable fund account.

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At the time the temple was built the firm of Nursey Náthá consisted of himself, Bhármal Tejsey, Madan Tejsey and Vurdhma Tejsey. In or about the year 1842-43 Nursey Náthá died, and after his death his adopted son Virji Nursey became a partner in the firm. The name of the firm was subsequently changed to that of Virji Nursey & Co., but the firm continued to act as bankers of the temple and caste. In the year 1852-53 Virji Nursey died, and shortly after his death the defendant Hurbhum Nursey, who had been adopted by the widow of Nursey Náthá, became a partner in the firm. In 1864-65 Bhármal Tejsey died, and his nephew Mudan Govindji became a partner in the firm.

In 1864-65, Wellji Mullu, who had taken the principal part in the management of the affairs of the temple and caste, died. Before his death the three defendants Hurbhum Nursey, Kessowji Náik, Ghellábhoy Puddumsey, together with Jewráj Ruttonsey, Tricumji Wellji and Madan Tejsey, who were leading members of the caste, became the managers and trustees of the temple and funds of the caste and of the fund called *sadáran*.

About the year 1865-66 the firm of Virji Nursey became involved in pecuniary difficulties, and the defendant Hurbhum Nursey, the principal partner in the firm, absconded from Bombay, decrees to an enormous amount being passed against him. An attachment was placed upon the whole moveable and immoveable property of the firm, as well as upon the property of the temple. In 1867-68, however, the defendant Hurbhum Nursey settled with most of his creditors; but, in order to do so, large sums were drawn from the firm, and the whole of the immoveable properties of Hurbhum Nursey and of the other partners in the firm were mortgaged. The moneys due to temple and caste were not repaid.

By an indenture bearing date the 7th September, 1867, and made between Lilbái, widow and legal representative of the said Virji Nursey, and the defendants Hurbhum Nursey, Kessowji Náik, Ghellábhoy Puddumsey, Jewráj Ruttonsey, Tricumji Wellji, and Madan Tejsey, and after reciting (amongst other things) that the said Nursey Náthá and Hurbhum Nursey had purchased with the funds of the said temple of Shri Anantnáthji Máháráj certain immoveable properties specified in the said indenture, the said

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Lilbái and Hurbhum Nursey respectively conveyed the said immoveable properties to the defendants Hurbhum Nursey, Kessowji Náik, Ghellábhoy Puddumsey, Jewráj Ruttonsey, Tricumji Wellji and Madan Tejsey to hold upon the trusts specified in the said indenture, and it was provided that the said trustees might deposit all or any part of the surplus moneys coming to their hands under the trusts of the said indenture with the said firm of Virji Nursey & Co. at the current rate of interest, or with any other banker. The above-mentioned trust-deed was executed without the approval or consent of the caste, and was kept secret from the majority of the caste. The plaintiffs alleged that at the execution of the said trust-deed it was well known to the defendants Hurbhum Nursey, Kessowji Náik and Ghellábhoy Puddumsey and to Jewráj Ruttonsey, Tricumji Wellji and Madan Tejsey that the firm of Virji Nursey & Co. was hopelessly insolvent, and that the provision giving liberty to the trustees to deposit the trust funds with the firm was fraudulently inserted. The plaintiffs also alleged that the defendant Ghellábhoy Puddumsey was at the date of the deed largely indebted to the firm. The said managers and trustees permitted the funds to remain with the firm, and caused all moneys received after the execution of the deed to be paid into the said firm.

In the month of November, 1870, the said firm suspended payment, and the defendant Hurbhum Nursey and the other partners filed their petition and schedule in the Insolvent Court. In their schedules they entered the names of Kessowji Náik and the others, as managers of the said temple and caste, as creditors for sums amounting, in all, to Rs. 2,48,263-3-6, out of which the sum of Rs. 1,57,649 was stated to be due on the *darása* or temple account; Rs. 68,017-5-6 on the caste or *mahájan* fund account, and Rs. 22,597 on the *sadáran* or charitable fund account.

The plaintiffs further alleged that, after filing their schedules, the defendant Hurbhum Nursey and his partners settled with most of their creditors, paying sums varying from 2 to 8 annas in the rupee on the amount of their debts, and in 1875 the defendant Hurbhum Nursey and his said partners, with

the knowledge of the defendants Kessowji Náik, Ghellábhoy Puddumsey, Tricumji Wellji and Jewráj Ruttonsey, induced one Ubhái Rághoji, the natural brother of Hurbhum Nursey, to apply to the Court that the schedule and petition of the defendant Hurbhum and his other partners should be dismissed for want of prosecution, and it was accordingly dismissed. Kessowji Náik and the other trustees fraudulently made no attempt to obtain payment from Hurbhum Nursey and his partners of the said sum of Rs. 2,48,263, and the said sum was lost.

The plaintiffs further complained that in 1877 and 1878 the said managers and trustees lent a sum of Rs. 15,000 to the Prince of Wales Spinning and Weaving Company, and advanced other loans, amounting to Rs. 40,000, to other companies. They alleged that these loans were unauthorized, and that the defendants knew that these companies were then in insolvent circumstances. Of the abovementioned loan of Rs. 15,000, Rs. 7,500 was wholly lost, and of the Rs. 40,000, Rs. 35,000 was lost. They also complained that by reason of transfers improperly made by the defendants there was a sum of Rs. 57,000 due by the caste fund to the temple fund, and that the defendants had taken no steps to recover the same from the caste; that the defendants had wasted Rs. 20,000 in litigation, &c., &c.; that some of the defendants were insolvent, and that none of them were fit to be managers or trustees, and the plaintiffs submitted that they ought to be removed, and ought to be required to make good to the caste the losses incurred by their negligence and improper conduct.

The plaintiffs prayed—

1. That an account might be taken of the moneys and property of the temple, caste and *sadáran* come to the hands of the first three defendants (Hurbhum, Kessowji and Ghellábhoy) and into the hands of the deceased trustees and of defendants Nos. 4 and 5 (Cuverji and Umersey) as trustees as aforesaid, or into the hands of any or either of them, or to the hands of any person or persons in their or in his behalf, and of the application and use of such moneys or property.

2. That the first three defendants personally, and defendants 4 and 5 (Cuverji and Umersey) personally in respect of moneys

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and property found to be misapplied by them, should be ordered to make good the same.

3. That, so far as property had been misapplied by the deceased trustees, the defendants Nos. 4, 5, 6 and 7 as their representatives should make good the same out of their estates respectively.

4. That the first three defendants personally and the other defendants as representatives of the deceased trustees might be ordered to pay to the plaintiffs the sum of Rs. 2,48,263.

5. That defendants Nos. 1, 2, 3, 4 and 5 might be ordered to pay to the plaintiffs the sums of Rs. 7,500 and 35,000.

6. For an injunction and receiver and for the appointment of new trustees, and for the settlement of a scheme.

Hurbhum Nursey in his written statement denied the various charges of negligence, and stated that, except the plaintiffs, all the members of the caste were opposed to the suit, and at a general meeting on 16th October, 1881, approved of his management, and were not desirous that any of the prayers of the plaint should be granted.

Defendants 2 and 3 (Kessowji Náik and Ghellábhoy Puddumsey) filed a joint written statement in which they denied that the suit was brought on behalf of the Dossa Oswall caste; alleging that the caste was opposed to it, and at the general meeting of the 16th October, 1881, had passed a resolution approving of their management, and authorizing them to defend the suit at the expense of the caste; that the caste numbered about 1,500 members and that 1,468 of these approved of the resolution, and that most of the rest were absent from Bombay. The defendants submitted that under these circumstances the plaintiffs were not entitled to maintain the suit, and that the Court would not interfere with or control the decision of the majority of the caste in matters relating to the internal management of its affairs.

The defendants also contended that the suit was not properly constituted as to parties, not having been instituted under section 30 or section 539 of the Civil Procedure Code (Act X of 1877); that the subject-matter of the suit did not come within the provisions of either of these sections; that the suit was in contravention of Regulation II of 1827, ch. 2, sec. 21.

They further denied the various allegations of negligence and fraud, and stated that they were not trustees of the temple until the year 1867.

Defendants 4, and 5 (Cuverji and Umersey) denied that they were ever managers and trustees, and stated they had no knowledge of the matters referred to in the plaint.

Defendant No. 6 (Devkuverbái) pleaded that she was the widow of Tricumji Wellji, and that none of his property had come to her hands.

Defendants Nos. 7 and 8 (Megji and Mulbái) stated they had no knowledge of the matters referred to in the plaint, and pleaded limitation. The material issues raised in the pleadings are stated in the judgment (*post*, p. 449).

Hon. *J. Marriott* (Advocate General) and *Lang* for the plaintiffs.—The temple was a public temple, not a private one—not dedicated to Dossa Oswalls exclusively, but to the public at large. The funds were contributions to charity, and were to be applied to charitable purposes. Section 539 of the Civil Procedure Code (X of 1877) applies, and the plaintiffs are entitled to sue—*Thanga Karuppa* v. *Aramuga Nadan*(1); *Rádhábái* v. *Chimnáji*(2); *Fatmábibi* v. *The Advocate General of Bombay*(3). The word "charitable" includes "religious"—Tudor on Charitable Trusts, pp. 10, 155; *Pickering* v. *Ld. Stamford*(4); *Attorney General* v. *Flowers*(5); *Gungbái* v. *Thávar Mulla*(6); *Manohar Ganesh* v. *Keshavrám*(7). The funds entrusted to the managers could not be used for any other purpose than charity—Mayne's Hindu Law, pl. 363. In making loans to firms the defendants misapplied the funds. The Court can remove the defendants from being trustees. The trustees here are either insolvent or heavily indebted—*In re Barker's Trusts*(8). The questions here are not purely caste questions so as to fall under Regulation II of 1827. A right to property is claimed.

(1) I. L. R., 5 Mad., 383.
(2) I. L. R., 3 Bom., 27.
(3) I. L. R., 6 Bom., 42 at p. 50.
(4) 2 Ves., 273.
(5) 15 Ves., 85.
(6) 1 Bom. H. C. Rep., 71, and see p. 76.
(7) Printed Judgments for 1878, p. 252.
(8) L. R., 1 Ch. Div., 43

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Inverarity and *Jardine* for the defendants.—This is not the case of a public charity. The temple belongs to the caste exclusively. No doubt persons of other castes may worship there, just as members of other sects may worship in English parish churches, but that does not give them a right to interfere. This temple belongs to the Cutchi Dossa Oswall caste. It was built by subscription, the largest subscription being given by Nursey Náthá. Since its foundation no one but a member of the caste has been manager. If, then, this temple is caste property the caste has a right to deal with it as a private individual would deal with his property. Here we have a member of the caste trying to take the temple from the caste. The majority of the caste only could bring this suit, but the majority is opposed to it. The majority being opposed to this suit, can the Court interfere? It has been proved that out of 1,200 or 1,500 members of the caste only 90 are against the defendants. If the plaintiffs succeed in this suit the result will be that no more contributions will be made to the temple, and it will be ruined. The Court has no jurisdiction in such a case—Regulation II of 1827, sec. 1.

A caste fund has never been held to be either a religious or a charitable fund. It is a secular fund. It has not been dedicated to charity. This suit has been improperly instituted. Section 539 of the Civil Procedure Code of 1877 does not apply—*Thanga Karuppa* v. *Aramuga Nadan*(1).

The firm of Virji Nursey acted as bankers of the temple. The partners were not necessarily trustees. The defendants, who were trustees, are not necessarily liable to refund the money lost, because they did not seek to recover it from the firm. The caste knew all the circumstances. It knew of the firm's insolvency. It did not wish proceedings to be taken. The plaintiffs themselves have not taken any steps for sixteen years. The individual members of the caste are not *cestui que trusts;* the whole caste is the *cestui que trust.* As to the liberty of a trustee, *Clarke* v. *Holland*(2); *Hobday* v. *Peters*(3). As to the fact that the trustees made loans out of the fund, every charitable institution does

(1) I. L. R., 5 Mad., 383.

(2) 19 Beav., 262.

(3) 28 Beav., 603.

this. As to the improper transfers in the accounts, these do not show the funds to have been misapplied. The money belonged to the caste. If it was safe, the accounts were not important. If errors were made, the caste could condone, and has done so. The caste favours the defendants. The resolution of the caste against this suit was unanimous: 1,468 members of the caste have signed a document in defendants' support.

Lang in reply.—Section 539 of the Code applies—*Thanga Kurappa* v. *Aramuga Nadan*(1); *Fatmábíbi* v. *The Advocate General of Bombay*(2). In cases relating to charity a majority cannot control the minority—Tudor's Charitable Trusts, pp. 4-10. By section 539 of the Code two persons can sue. The majority were ignorant of the facts. The fact that the plaintiffs do not receive much support from other members, is not very important when we recollect the power of intimidation possessed by the caste. As to the right of the plaintiffs to sue, it is clear that this was a public temple, and any one who goes to worship there has an interest in seeing that it is properly managed and its funds properly administered. The accounts of the firm of Virji Nursey show that Rs. 2,40,000, the property of the temple, were lost in the insolvency of that firm. The evidence has shown that the trustees are insolvent, and ought to be removed.—*Adam's Trusts*(3).

20th June, 1884. SCOTT, J.—This suit occupied many days, but the importance of the issues involved justifies its duration. The five plaintiffs are all members of that section of the Cutchi Dossa Oswall Bania caste which is resident in Bombay. Its members are mostly of the commercial class. Its main body, numbering over 10,000, is resident in Cutch. But an important branch of it, numbering about 1,500, is resident in Bombay. The Bombay section, so far as the present suit is concerned, must be treated as a separate caste, and in speaking of the Dossa Oswall caste it must be taken to mean the Bombay section. The whole caste are followers of the Jain religion.

The suit is brought against the defendants either as managers or as representatives of deceased managers of a temple at Mándvi

(1) I. L. R., 5 Mad., 383. (2) I. L. R., 6 Bom., at p. 50.
(3) L. R., 12 Ch. Div., 634.

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Bandar dedicated to the Jain deity Shri Anantnáthji, and principally used as a place of worship by this Dossa Oswall caste in Bombay. The prayer of the plaint is for—(1) an account of the management, (2) restitution of money fraudulently appropriated, (3) dismissal of the defendants from their post, and (4) for a new schemo. It is necessary for the proper understanding of the case that I should briefly sketch the history of the temple.

The Bombay section of the Dossa Oswall caste came to Bombay about fifty years ago. Their leader at that time was one Nursey Náthá. He seems to have been one of those successful Hindu traders who apply their wealth as much to the advancement of their caste brethren as to their own advantage. The tradition of his benevolence still lives amongst his people. The influence of the school he founded is visible in their education. His family is acknowledged as their head, his statue is revered in the temple, a flag is hoisted annually from its roof by his descendant, and an annual feast is given in the caste cast in his honour. For the first few years of their sojourn in Bombay the caste seems to have worshipped in a room in Nursey Náthá's house. But their affairs prospered, and in 1839 the temple now in dispute was built. A large portion of the necessary funds was advanced by Nursey Náthá; the rest was obtained by subscription from the caste. The money lent by Nursey Náthá was gradually, but entirely, repaid out of the gifts and offerings made by the worshippers. Nursey Náthá's firm received all these gifts. They were the caste and temple bankers, and for many years they seem to have administered all the affairs of the temple. When Nursey Náthá died in 1842 his adopted son, Virji Nursey, was at the head of the firm, which henceforward was known as Virji Nursey & Co. The firm continued after Nursey Náthá's death to manage the funds of the temple. When Virji Nursey died in 1853, Hurbhum Nursey, one of the present defendants and a second adopted son of Nursey Náthá, succeeded Virji. The firm in the administration of the funds of the temple had invested the surplus moneys in eight lots of immoveable property, five of which were placed in the name of Hurbhum Nursey, two in the name of Nursey Náthá, and one in the name of a third person, Tukha Jairám.

In 1865 Hurbhum Nursey got into money difficulties, and in 1866 the properties of the temple which were held in his name, five in number, were seized for his private debts. The attachment was raised on proof of the rights of the temple and the position of Hurbhum Nursey as mere *benámidár*. This circumstance seems to have awakened the attention of the headmen of the caste, and it was decided that a new system was necessary. A trust-deed was drawn up and signed by the widow of Virji Nursey and by Hurbhum Nursey, the two nearest representatives of Nursey Náthá, whereby the present defendants Hurbhum Nursey, Kessowji Náik and Ghellábhoy Puddumsey together with three others now dead, (Madan Tejsey, Tricumji Wellji and Jewráj Ruttonsey) were made trustees of all the immoveable property belonging to the temple. That trust-deed was made in September, 1867. Its terms have an important bearing on the case. It states the purposes of the fund to which the immoveable property belongs, and says that after the proper expenditure for repairs, &c., the income should be applied to the due maintenance of the temple, to the provision of ornaments for the idol, to charitable gifts to other temples, and the surplus, it says, should be invested in Government securities, in corporation shares, or in landed property, but in no other shares of any description whatsoever. It also empowered the trustees to invest surplus money in the firm of Virji Nursey.

Thus, so far as the immoveable property of the temple is concerned, we have clear evidence of the purposes to which it was intended to be applied, and we have equally clear evidence as to the kind of investments that were thought fit and proper for the temple money. In June, 1869, new books were started, and from that time forth the defendants themselves admit that they managed the temple, and not only the immoveable property but all the funds. A debt of Rs. 2,40,000 was due from the firm to the temple and caste when they took over the management, but that was not entered in the new books. There was no balance carried forward from the old books at all. Although the debt was thus summarily written off from the books, it does not seem to have been treated as extinguished, for Virji Nursey & Co. became insolvent in 1870,

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and the defendants were then entered as creditors in their schedule in the following manner:—"Kessowji Náik and other managers of the Dossa Oswall caste and their *darása* (temple) at Bombay. Balance due to these creditors as managers of the *darása* on *darása* account, Rs. 1,57,649; on *mahájan* account, Rs. 68,017; on *sadáran* account, Rs. 22,597." The defendants admitted that they were aware of this entry in the schedule. They also said that more than once before the failure and subsequently to the failure also they asked for payment. But, as a matter of fact, they received no dividend, although other creditors, including Kessowji Náik himself, were paid two annas in the rupee. In short, this sum of Rs. 2,40,000, due to the temple, was totally lost.

To go back to 1867, the date of the trust-deed. In April, 1867, Rs. 15,000 of the temple funds were invested, and it is not clear by whom, in the name of the defendant Ghellábhoy Puddumsey; and in August, 1868, a sum of Rs. 15,000 was advanced to one Jairáz Pirbhoy. In 1869 the sum of Rs. 10,000 was advanced, admittedly by the present defendants, as managers of the temple, to Nursey Kessowji & Co. This sum was never repaid, nor was any interest received upon it. It stood in the books for some years, and principal and interest were finally lost in the failure of Nursey Kessowji & Co. in 1879. Nursey Kessowji, the principal partner in that firm, is the only son of Kessowji Náik, the defendant, who furnished the capital of the firm, and never ceased to have an interest in it. In 1877 and 1878 various loans were made by the defendants to three mills. Of these mills Ghellábhoy Puddumsey, the defendant, was chairman of one and director of the two others. Kessowji Náik, the defendant, was chairman of two and the director of the other. Nursey Kessowji & Co., the firm whose capital was furnished by Kessowji Náik, were agents, bankers and treasurers of all three mills. In 1879 two of the mills failed, and one compromised with its creditors. Rs. 42,000 of the temple money was lost out of Rs. 55,000 advanced to the mills and to Nursey Kessowji & Co. This loss together with that of the loan to Nursey Kessowji & Co. and the omission to collect any dividend on the insolvency

of Virji Nursey & Co. constitute the main acts of negligence charged against the defendants. Minor errors are also alleged. Other loans of considerable amounts were made by the managers on personal security and on security of goods, but all of them were repaid. A caste oart was built in 1878 out of the funds. A lákh of outstanding gifts to the temple is alleged in the plaint to have remained uncollected owing to the negligence of the defendants; but the sum does not, in fact, exceed half a lákh. Two suits, which were brought by the Kurrád caste against the managers of the temple, were defended out of temple funds.

All the defendants, with the exception of Kessowji Náik, are in needy circumstances. Two have been insolvent, and have never obtained their discharge under section 60 of the Insolvency Act. The pecuniary circumstances of the plaintiffs are still worse than those of the defendants.

The temple funds were in the early years kept in two accounts which were known as the *darása* account and the *mahájan* account, but thirty-five years ago a third account was introduced, the *sadáran* account. The purposes of the three funds appear, from the evidence and from works of authority in the Jain religion cited at the hearing, to have been as follows. The *darása* fund is devoted strictly to temple purposes, such as the maintenance of priests, repairs of the temple, and the adornment of the idol. The *sadáran* fund is more extended in its objects, but still limited to religious and charitable purposes. They were thus described by a priest of the Jain religion:—"Payments to the temple, the idol, the *shástris, sádhus* and *sádhvis* (male and female devotees who have renounced the world), and poor Jains (male and female.)" It also appeared, from the Jain sacred books quoted, that the *darása* fund must not be lent on personal security, and that whoever destroyed either fund is subject to "endless regenerations" in place of that rest from the cycle of existence, that happy repose which is the *nirvána* of the Jain votary. The third, or *mahájan*, fund is devoted to caste purposes, the purchase of caste utensils, the erection and maintenance of caste buildings, &c. The temple is intimately connected with the caste. The caste fund is collected at the

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temple, as well as the temple and *sadáran* funds. The high priest of the temple in the presence of the caste drew up the tariff of fees to be contributed to the three funds. The managers of the temple administer the fund of the caste as well as that of the temple. All fees for marriages, births and deaths, as well as all fines for breach of caste rules are paid to the temple, and the money is administered by the managers of the temple. By usage, so long continued as almost to amount to law, the three funds were administered indiscriminately without regard to their different objects. The *shettiás* of the caste, *quá shettiás*, have apparently no control over the caste purse, and are apparently confined to quasi-judicial functions, with jurisdiction over all breaches of the caste regulations. The three funds were maintained partly by gifts and offerings from the votaries of the temple, partly by annual subscriptions. The gifts and offerings were made by all worshippers at the temple, whether members of the caste or not. The subscriptions were made by members of the caste alone. The sum required was Rs. 4½ yearly by head, but only R. 1 was exacted from the poorer members who could not afford to pay the whole sum. All these regular subscriptions came exclusively from the caste, and the great bulk of the gifts and offerings came from the caste also. Not more than Rs. 12,000 has been given by outsiders during the whole forty years, whilst close on six lákhs have been given by members of the caste; of this sum nearly a lákh and a half was subscribed by the defendants' families and Nursey Náthá's firm, whilst the plaintiffs have given only Rs. 6,276 altogether. The immoveable property of the temple is estimated at Rs. 1,75,000, the jewels at Rs. 50,000. There are Government promissory notes in hand, Rs. 1,10,000, and cash Rs. 8,000. The original cost of building the temple is fixed at Rs. 1,75,000.

In 1880 there was a movement of the caste originated by the plaintiffs, reprobating the management of the defendants. Over a hundred members signed a protest. Whether from pressure from influential members of the caste, or from dread of that terrible social persecution which a caste can impose upon its members, or whether from more mature reflection, that hundred has now dwindled down to the six plaintiffs and one or two others, and some of the signatories of the protest declared they had been

deceived as to the purport of the document. When the plaintiffs filed their suit in 1881 there was a counter agitation in favour of the defendants, who are all *shettiás* of the caste. A meeting of the caste in Bombay was held, and a series of resolutions supporting their management and approving their acts was signed (October 1881) by 1,468 members, the whole caste in Bombay numbering only 1,500. But it must not be forgotten that the rank and file of a caste will often follow their leading men like sheep.

So far I have treated the case historically in order to make my meaning clear when I treat it judicially, as I will now proceed to do. On filing their plaint the plaintiffs obtained a rule *nisi* for an injunction and the appointment of a receiver. Voluminous affidavits were filed, but it was agreed that the rule should stand over till the hearing of the suit. At the first hearing certain amendments were allowed in the plaint so as to introduce the specific charges of fraud contained in the plaintiffs' affidavits filed in the rule. Two defendants, who only appeared in a representative capacity, were also withdrawn by the plaintiffs from the record. Between forty and fifty issues were raised on the plaint and written statement as amended, but the following really cover all the questions raised. *Questions of law.*—Is the action maintainable (1) under section 30 or 539 of the Civil Procedure Code or under Regulation II of 1827? (2) Is the acquiescence and approval of the defendants' management by the great majority of the caste a bar to the suit? (3) Is the suit barred by lapse of time? or (4) because of inconsistent causes of action? *Questions of fact.*—(5) Has the whole Jain community in India a voice or share in the management of this temple? (6) Was there mismangement prior to 1867, and are the defendants liable for it? (7) Was there mismanagement after 1867, and are defendants liable for it? (8) Are defendants liable for money lost in the firm of Virji Nursey & Co? (9) Were the loans to [a] Nursey Kessowji & Co.? [b] those to the mills? [c] those to other persons justifiable? Are the defendants liable to the repayment of the losses, or to any of them? (10) Was the building of the caste cart and the defence of the two suits properly paid out of temple funds? Were the defendants negligent in the collection of offerings promised to the temple? (11) Were the temple

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funds kept in three distinct accounts, and had each account its own separate object? (12) Were transfers made from one account to another, and were such transfers justifiable? (13) Would the three accounts be right if the sums paid in and the sums expended were all properly allocated to those accounts? (14) Were Cuverji and Umersey ever trustees? (15) Does the present financial position of the defendants justify their remaining trustees?

I will now deal with these questions in order. Is the action maintainable, first, under section 30? If the plaintiffs have any right of action it is a complete right of action which is vested in each of them, not a mere joint right shared with others and incomplete, unless they united themselves with the rest. They sue, not because they are members of the Dossa Oswall caste, but as subscribers to the temple funds and devotees of the idol, and, as such, each has a right to complain of maladministration. Whether there has been maladministration or whether the maladministration, if any, has been condoned, is a separate question. All I need say now is that there is no case for the application of section 30. The plaintiffs can maintain the suit in their own right and in their own names without the permission of the Court or the notice to other parties interested required under section 30. The latest authority on the point is *Rádhábái* v. *Chimnáji*[1]: "Worshippers or devotees of an idol are entitled to bring a suit complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple." This same decision is also a sufficient answer to the objection, raised under the Regulation of 1827, that this case comes under the exclusion from the ordinary Civil Courts of mere caste disputes. See also *Náráyán* v. *Chintáman*[2].

As to section 539, the Civil Procedure Code of 1877, not that of 1882, applies. The section in the former Act did not contain the words "or religious". It ran thus:—"In case of any illegal breach of any express or constructive trusts created for public charitable purposes." The words "or religious" were inserted in the new Code of 1882, and it now reads "For public, charitable,

(1) I. L. R., 3 Bom., 27. (2) I. L. R., 5 Bom., 393.

or religious purposes." It has been expressly decided in Madras that section 539 of the 1877 Code does not apply to the case of an endowment for purposes religious as well as charitable—*Karuppa* v. *Aramuga Nadan*(1). The Judges in that case said: "The construction lately put by the Legislature upon section 539 of Act X of 1877 by the alteration of the corresponding section in Act XIV of 1882 so as to include suits for breaches of trust connected with religious purposes, is evidence that the Legislature in framing Act X of 1877 intended to restrain the operation of section 539 to suits for breaches of trust connected with public charitable purposes, exclusive of purposes that were purely religious."

What, then, are the objects and purposes of the funds now in question? Are they charitable, or religious, or both? The funds are three in number, each different in character. The *mahájan* fund is a purely secular fund. It is made up partly of subscriptions from the caste members, partly of fees and fines paid by them, partly of payments made for the use of caste pots. The other two funds, the *darása* and the *sadáran*, are really made up, as I have already shown, of donations intended for pious as well as charitable purposes. The maintenance of the temple and gifts to other temples are express objects of the temple funds just as the benefit of *sádhus* and poor Jains is one of the express objects of the *sadáran* fund. Those who are entrusted with the administration of such funds are undoubtedly administering a public religious endowment as well as a public charitable trust. No caste line of demarcation is drawn either with regard to the temples to be assisted, or the poor to be relieved. The terms would cover all Jain temples and all the Jain poor. These two funds, therefore, differ widely from the *mahájan* fund, whose object is narrowed to the supply of the needs of the caste as a social institution. All the three funds were in the hands of the defendants, and, following the Madras case, I do not think the section 539 of Act X of 1877 applies. Even if the case came under the Act of 1882 I do not think the section would apply. That section is, in my opinion, permissive or directory, but not man-

(1) I. L. R., 5 Mad., 383.

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datory. I am of opinion that any person interested in the proper observance of a religious endowment may still sue in his own name to have the trust properly administered. This section contains no prohibition of a private suit, and does not, in words, make the sanction of the Advocate General a condition precedent The Calcutta Court has, I think, correctly shown the law as follows :—"The Advocate General is not a necessary party to such suits, although it is desirable that such cases should be brought with his consent or by leave of the Court"—*Panch Cowrie* v. *Chumroolall*(1).

The next question is a most important one, and my answer to it is the key-note of my decision. Is the acquiescence and approval of the conduct of the defendants by the majority of the caste a bar to the suit? I may mention that in the consideration of that question I have derived great assistance from the recent edition of West and Bühler's Hindu Law, and the authorities cited there. See especially pp. 175, 185, 197, 202, 205, 215, and 398. The answer to this question depends on whether this temple is a public, religious, and charitable institution. All such institutions are under the superintendence of the Crown as *parens patriæ*, and those who manage them can at any time be called to account for their management. Story (Equit. Jurisp., Vol. II, p. 595,) reviews all the authorities, and says: "The king, as *parens patriæ*, has a right to guard and enforce all charities of a public nature by virtue of his general superintending power over the public interests." And he further shows that, apart from the statute of Elizabeth, there is an original jurisdiction in the Court of Chancery over all gifts which are charitable or religious in their nature; and where there is a want of proper persons to administer, the Court will interfere. In *Panch Cowrie* v. *Chumroolall*(1) the Judges say: "Suits of this description come under the ordinary jurisdiction of the High Court inherited from the Supreme Court and conferred upon that Court by its charter,—a jurisdiction similar in its general features to that of the Lord Chancellor in England." It is worthy of notice on the point whether the institution is charit-

(1) I. L. R., 3 Calc., 563.

able, and whether it is public, that this is a Jain temple. The Jains are classed with the Buddhists in the census and in public returns. But although they sprang from Buddhism and assert their faith to be purified Buddhism, they have their own distinctive characteristics. Their *nirvána* is a rest from transmigration, but not a cessation from existence. They rely little on ceremonial, much on the practice of active virtues such as charity. They have no funeral ceremonies; they pray neither to the sun nor to fire; they hold all life in intense respect. They originally acknowledged no distinction of caste. They denied the sanctity of the four great divisions, just as they denied the sacred origin of the Vedas and the supernatural power of the gods. They latterly have admitted caste, but only from politic conformity to Hindu feeling, just as they allowed the Hindu Pantheon a place, but below their own twenty-four deified mortals. But although caste was not recognized by the Jains, they were, and are still, divided into schools and sections in religious matters. As the followers of the Christian religion are divided into the two great divisions of the Roman and the Protestant faith, so the Jains are separated into Digambáras and Swetambáras. Their minor divisions are as numerous as those in the West. They admit to eighty-four sects or, as they call them, Gutches, and in religious matters at any rate the Gutch, not the caste, is the unit of division. The Dossa Oswall caste, for instance, belongs to the Unchal Gutch, and the evidence shows this Gutch to observe certain days as holy which are secular to the other Gutches, and to have, at least, two religious observances—Juljatra and Ujumnu—peculiar to itself. No other Gutch can take part in these ceremonies, although if other castes belonging to that Gutch there would seem to be no impediment to their attendance.

It is important, also, in considering whether these gifts are or are not charitable, to bear in mind that the orthodox Hindu, whether Jain or Bráhminical in his faith, has a stronger motive for charity than an Englishman. The desire to perpetuate a name or to render some great service to his fellow-creatures has been the chief cause of great public charitable gifts in the West. The propitiation of heaven may also have been an object, but it is only a secondary one. But here in India the importance of the

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motives is reversed. All the sacred writers lay down clearly that charitable acts in this world ensure future bliss in the next. Manu (chapter iv, para. 226-227) promises those who do such acts "an imperishable reward", and in the Rig-veda Sanhita sacrifices and charities are described as the certain road to heaven. No wonder, therefore, that gifts for religious and charitable purposes are favoured by Bráhminical law, and that charity is one of the four *dharmas*, or meritorious virtues, enjoined on all votaries of Jainism who aspire to the Jain heaven. The fact that gifts to a charity, like gifts to an idol, are an investment sure to be repaid richly in the next world, tells strongly in favour of the contention that the gifts to *darása* and *sadáran* were given unreservedly, and with no intention, on the part of the donor, to retain any property in his donation.

But it is not enough for this present case to show that the gifts made to this temple were irrevocably made for charitable or religious purposes. It must also be shown that the charitable purposes were public in character; that the gifts were not made merely in the interest of the Dossa Oswall caste who, if they rank as sole beneficiaries of this as a private charity, may condone any maladministration. If the gifts were contributions to a public charity, or to a religious endowment, there would be no doubt of the incapacity of the caste to interfere by way of condonation. Mismanagement of any public trust is a distinct contravention of the law, and is a case for the intervention of the State. "The consent or private agreement of individuals is ineffectual in rendering valid any direct contravention of the law, and it will altogether fail to make just or sufficient that which is unjust or deficient in respect to any matter which the law declares to be indispensable—*Phillips* v. *Innes* (1) and *Swan* v. *Blair* (2). This rule is embodied in the maxim *pacta privata juri publico derogare non possunt*.

Is the fund, then, private or public? The defendants, whose case was conducted throughout with great skill by Mr. Inverarity, say it is private, that the temple is a proprietary temple, the property of the Dossa Oswall caste, and its funds belong to the

(1) 4 Cl. & Fin. at p. 241. (2) 3 Cl. & Fin. at p. 621.

caste—at any rate in the sense that they can be dealt with by the caste as the caste pleases. The plaintiffs, whose funds broke down and who lost the advantage of Mr. Lang's ability at a critical stage, say that the temple and its funds belong to the idol to which it is dedicated, that the funds were a gift to the temple and the god, not merely a gift to the caste subject to a trust for the performance of the religious purposes. In my opinion the contention of the defendants is not sustainable. The dedication of the money is complete and irrevocable. The donors placed a limitation on their gifts and fixed their destination. They were made expressly to the *darása* or *sadáran* funds, whose religious objects and charitable objects are shown by the evidence to be matters of notoriety among all followers of the Jain religion. The money was given either to the idol or to public charitable purposes. Sometimes property is given in beneficial ownership subject to a religious or charitable trust as to part of the income. But that is not the case here. The whole of the gifts were devoted absolutely to the temple or *sadáran* fund. The temple was built by subscriptions, and a fund for its maintenance and for other objects in connection with it has been gradually formed by these gifts. The fund, or such of it as has not been lost through bad management, has been invested in lands, securities and jewels. No donor individually, no body of donors collectively, has ever claimed any present or reversionary right in the fund. The terms of the trust-deed of 1867 in themselves estop the defendants from now maintaining that the gifts and funds are revocable and not unconditionally dedicated to the temple, the idol, and the purposes set forth in the deed. The text-books are all in favour of the irrevocability of such gifts. The general rule in Hindu law is that property dedicated to a god is irrevocable—*The Collector of Thána* v. *Hari*[1]. Morley (Dig. N. S. Vol. I, p. 351,) says: "A house dedicated to Mahavisha is inalienable and for ever set apart for purposes of religion." And again (Vol. I, p. 550, pl. (9)) : "Land appropriated to defray the expenses of the worship of idols cannot be alienated by the Sebait so as to terminate the right of the idol to the net revenue." And I find in Punjab Customary Law, Vol. II, p. 166 : "A gift of land for charitable purposes cannot be revoked, but sometimes

(1) I. L. R., 5 Bom., 546.

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the person to whom it is given may be changed if he does not perform properly the religious service for which it was given." Colebrook in his Digest (Vol. II, p. 287), commenting on passages quoted from the Mitákshára and Yajnavalkya, enjoins the endowment of temples, and says that the management of temples must be diligently observed and enforced by the king. Macnaughten (Vol. II, p. 305,) in his work on Hindu law says as to the sale of temple land: "If the land has been endowed for the worship of some deity, and the house be occupied by it, the donor has no right to the endowment, and he is incompetent to sell the property." The following is the doctrine laid down in the 11th section of the Srimat Bhagavata: "He who seizes the subsistence of the gods or of priests, whether given by himself or another, is born a reptile in ordure for a million of million of years." Strange says (Vol. I, p. 151): "Lands endowed for religious purposes are not inheritable as private property, though the management of them for their appropriate object passes by inheritance subject to usage."

It was argued by the defendants that the case was on all fours with *Howard* v. *Pestonji*[1]. But the decision there turned on the words of the instrument of dedication, whose terms, the Judges said, made it "quite clear that the donors intended to retain the property of the temple in themselves and their heirs for ever." The modern authorities fully confirm the more ancient writers, and are thus summed up by the Judicial Committee of the Privy Council:—"When once property is solemnly devoted to the service of an idol, the donor cannot revoke the gift. It cannot be alienated, save in the interests of the idol. But it can be mortgaged or transferred for the purpose of the necessary sustentation of the worship of the idol"[2]. In short, the deity of the temple is considered in Hindu law as sacred entity or ideal personality possessing proprietary rights. The managers hold these rights as trustees, and any alienation or infringement is a kind of sacrilege. The money once entered in the temple books is dedicated to the god, and becomes *res sacra*. It is laid down by the Privy Council that the intention of the

(1) Perry's Or. Ca., 535. (2) L. R., 2 Ind. App., 157; 13 Moore Ind. App., 270.

donors in these temple lands must be gathered from the deed of foundation, and, in the absence of such a deed, from their acts—*Greedharidoss* v. *Nandokisore*[1].

From this point of view it is also clear that the defendants and the other donors made their gifts without any reservation, and that the objects of their gift were the maintenance of the temple and the idol on the one hand and the furtherance of charity on the other. This is clearly shown from their own written statement, in which they say: "As to the fourth paragraph of the plaint, these defendants say that it is the case that large sums were received in the shape of gifts and offerings to the temple, such offerings being purely voluntary, and not by way of regular or fixed contributions. The said offerings were primarily for the purposes of the temple,—that is, for jewels and other ornaments for the idol and the shrine, ghee for lighting the hall of the temple, and repairs and improvements of the building. And, besides the above purposes, the said moneys were applicable, and were from time to time applied, in gifts to other temples up-country. Some of the surplus moneys were also expended in the purchase of immoveable property in Bombay. Fines and fees and contribution of Rs. 1-4 from each independent member of the caste were allotted to the expenses of the annual caste feast and to keeping the caste cart in order. A contribution of Rs. 3 *per annum* from each independent member of the caste is levied for the *sadáran*, in consideration of which payment each donor is entitled every day, together with his wife and children, to be supplied with warm water for bathing in the temple compound, two clean *dhoties* and woollen cloth for using same while performing worship, and saffron and sandalwood for the forehead. Certain other moneys, including the rent of the immoveable properties, have been usually allotted to the *sadáran*. The expenses paid from the *sadáran*, besides those above mentioned, are wages, gifts made to poor persons from time to time (of no fixed or prescribed amounts and to no prescribed ascertained persons or class of persons), to stranger Gorgies or priests, to the priests of the temple, to persons engaged to sing before the god, and sundry expenses of the above character.

(1) 11 Moo. Ind. App. at p. 428.

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None of the aforesaid offerings, contributions, fines or fees are, or were, paid for any purposes other than the religious or caste purposes, such as are above set forth, or for any charitable as distinguished from religious purposes."

The origin of the funds and the object of the temple was stated by the headmen of the caste, as long ago as 1869, in answer to a claim for a share in the temple and funds advanced by the Kurrád caste. This statement is the more important, as it was made before there was any thought of the present suit. "The same was built by means of funds advanced by one Nursey Náthá, a leading man of that time of the Dossa Oswall caste, and such advances were repaid to him by the income derived from such temples, which consists of the free gifts or offerings to the god of those who resort to it for worship. Such offerings are made, not only by members of the Dossa Oswall and Kurrád castes, but also by Ballf Jains, Blethe Banians or other castes who go to the temple for worship. The temple was founded for worship according to the Jain religion and in the name of the Jain deity Shri Ananáthji." (See written statement in Suit No. 169.)

It is clear that such gifts as those which make up the *darása* and *sadáran* funds would in England be held to constitute a public charity. The authorities are numerous on the point, but I will only cite two. When gifts are devoted absolutely to religious and charitable purposes, or for specific purposes of a public general character, they are treated by law as public charities—*Governors of Charity* v. *Sutton*[1]. Lord Hardwick put the matter very clearly many years ago, and his dictum is still quoted with approval. "The Charter of the Crown," said his Lordship, "cannot make a charity more or less public, but only more permanent. It is the extensiveness which will constitute it a public one. Where testators have not any particular person in their contemplation, but leave it to the direction of the trustee to choose out the object, though such person is private, and such particular object may be said to be private, yet in the extensiveness of the benefit they may very properly be called public charities."—*Attorney General* v. *Pearce*[2].

(1) 27 Beav., 651. (2) 2 Atk. at p. 88.

It was also contended that the temple belonged to the caste, and, therefore, its funds were equally caste property. I do not think this argument bears examination. The temple itself was erected primarily, perhaps, for the convenience of the caste, but it was also built for purposes of ordinary worship, and has always been open to all the Jain community. Permission to worship there was subject to good behaviour, but it was not shown to have been closed to any who came to do homage or worship. The good-conduct condition is imposed on all votaries in every place of worship; it does not make the temple a private temple. It is a condition imposed on the right of attendance in this Court, but it does not make the Court any the less a public place.

It was argued that the temple was never dedicated to the public. It is difficult to say in what exactly consists dedication to the public. The fire temple in the case reported by Sir Erskine Perry, the private temples in the gardens of Mr. Kessowji Náik and Mr. Premchund Roychund are consecrated, but they are certainly not dedicated to the public in the sense that their owner could not at any time have closed them, just as much as if they were a private chapel in an English nobleman's park. The Judicial Committee has treated the *status* of such a temple—*Máháránee Brojosoondery* v. *Ránee Luchmee*[1]. "Mere purchase of land in the name of an idol set up by the purchaser in his own house, not for the benefit of the public worship, but for the private worship of the purchaser himself where no priests are appointed, where there is nothing to show that the purchaser intended that the idol should be kept up for the benefit of his heirs in perpetuity,—that is to say, in short, when an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary rights are found, then the property belongs to the purchaser, not to the idol." The present temple is on a very different footing. The land on which it is built, the three lákhs which had been amassed by subscriptions, belong, not to the caste, but to the idol. It is *res nullius* and *extra commercium*, and the managers are only fiduciary owners, just as the parson in England owns the parish

(1) 20 W. R. Civ. Rul., 95.

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church. Ghellábhoy Puddumsey said: "On all the articles belonging to the temple the name of the deity is impressed; on all the articles belonging to the caste the name of the caste." Govinji Ludda, one of the headmen of the caste, clearly explained the position of the temple. He said: "The temple belongs to our caste, because my caste people pay contributions to it; by right, I mean right to perform religious ceremonies and to pay contributions, but we have no right to divide the income amongst ourselves, and we have not a right to sell the temple." But, even supposing the caste does possess some peculiar rights in the temple, that does not alter the fact that the funds, now in question, were irrevocably put beyond the power of the donors by the manner of gift. The temple must not be identified with funds which are dedicated to certain religious and charitable objects. The idol on the one hand, poor *sádhus* on the other, are the beneficiaries. If the temple is not properly maintained and served, if the surplus is not devoted to the idol and the other public objects, the State can intervene, and no caste agreement can arrest that intervention. The Privy Council had laid this down in very broad terms as follows:—"The British Government by virtue of its sovereign power possesses, as the former rulers of the country did, the right to endowments of this kind and to redress abuses in their management"—*Rajah Muttu Rámálinga* v. *Perianayagum Pillai*(1); *Mitford* v. *Reynolds*(2); *Attorney General* v. *W. Brodie*(3). In short, the donations were dedicated to religious and charitable purposes, and once so dedicated they cannot be diverted from their original purpose. The approval, by the caste, of the conduct of the trustees is, therefore, no bar to this suit.

The next question is, are these inconsistent causes of action? The claim is not made by the whole Jain community, but by six members of the caste. No specific claim is made on behalf of the whole Jain community. The plaintiffs do not claim, for them, a share in the management. They apparently only introduce them to rebut the influence of the acquiescence of the caste majority. The suit, with all its demands, would be as good without any

(1) L. R. 1 Ind. Ap., at pp. 232-3. (2) 1 Phill., 185.
(3) 4 Moo. Ind. Ap., 190.

mention of the Jain community. The mismanagement of the defendants is the cause of action; their removal with or without restitution of funds is the relief sought for. In short, I am of opinion that the various causes of action are such as can all be conveniently disposed of in one suit, and the suit is properly framed so as to afford ground for a final decision upon all the subjects in dispute. The action is, therefore, maintainable.

I now come to the questions of fact. The first is, has the whole Jain community a voice or share in the management? Whether the whole Jain community or the more special devotees of the temple have the right to manage, does not affect the chief point of the case, which is, whether the funds can be mismanaged with impunity as long as the Dossa Oswall caste condones the mismanagement. But the question has still an important, though subordinate, bearing on the case. There is little doubt that, according to the customary law of such institutions in India, the present managers hold their office under sufficiently legal authority. In the absence of any deed of foundation, the founder's family, persons chosen by them, persons chosen by the special devotees who subscribe to the temple fund, would all be endowed with sufficient authority as long as they duly performed the duty of management. But in case of failure of duty they must answer for their derelictions to a wider tribunal than that which placed them in office. But I do not think the whole Jain community has a voice in the management. The temple was originally built by the caste with the assistance of their head, Nursey Náthá. Almost all the accumulated funds have been subscribed by the caste. The caste alone makes fixed annual contributions. The sum paid by outsiders, which do not average more than Rs. 2 *per* head *per annum*, are hardly enough to pay for the sandalwood and saffron, the temple clothes, the hot water, and the attendance which are supplied to every votary. Undoubtedly all followers of the Jain religion have the right to do homage and worship in this temple as long as they behave decently. All the evidence is in favour of such a right; but none of the evidence, save that of the plaintiffs, carries that right any further. There is nothing to show that outside Jains have any proprietary right over the funds of the temple, or any claim to the management. The right of out-

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side Jains resembles the right of the general public to the use of any parish church in England. They may attend any of the ordinary services, but they cannot interfere either in the nomination of the church wardens, or the vestry board, or the officiating clergyman. The management of those funds has, by usage—which, in such matters, has the force of law—belonged to the caste that founded the temple and subscribed the funds. Although the donations were irrevocably dedicated to certain public purposes, the donors have never lost the right, which was attached to the caste since the beginning, to manage the temple which they founded, and the management can only be interfered with as a public charitable trust on proof of maladministration. I must, therefore, answer this question in the negative.

Was there any mismanagement of the funds prior to 1867? It is an important fact that the temple was always maintained as a temple should be. Even the plaintiffs did not contest this fact. A great error was, no doubt, made in entrusting so large a sum as Rs. 2,40,000 to the firm of the founder. But it must be remembered that it is customary in Hindu temples to leave the family of the founder to manage the temple funds. Little or no systematic control is imposed on these institutions. But as long as no check from outside is placed on that management, and no system of audit imposed, no annual accounting insisted upon, there is great risk of misapplication of the funds. The application of their gifts is a matter of minor consideration to the donors. The offerings, as I have said before, are made to secure bliss in heaven, and the votaries do not care what becomes of the gifts on earth. As long as the temple itself is properly served, they will not, as a rule, incur odium by impeaching the conduct of those who are in charge. Moreover, in the case of this temple each separate gift was not of great importance, save and except the gifts from the members of the founder's family themselves. There was, therefore, special reason why the funds should be left in their charge. No fraud was proved. No loss to the temple was shown before the loss of the two and a half lákhs. A large sum was invested in immoveable property, a still larger sum was accumulated in the hands of the firm who managed the temple, and the rest seems to have been fairly spent on matters connected with the temple,—at any rate

none is proved to have found its way into the family pocket. Subsequent investments were by no means blameless, but that does not prove the defendants' liability for losses previous to 1867. I do not think it has been clearly proved that they were managers of the temple funds before that date. It has been shown that they gave one or two orders of small importance; but the explanation given of these orders, that they were such as any *shettiá* of the caste might give, seems to me sufficient, especially as other persons, admittedly not managers, were shown to have given similar orders. The evidence of many witnesses shows clearly that Bhármal Tejsey and Madan Tejsey together up to Bhármal's death, and then Madan alone, really managed the temple up to date of the trust-deed. For instance, Kessowji Bhimsey, the *mehta* of the temple from 1916 to 1922, states that he invariably received his orders from Madan Tejsey, and that he never received a single order from any of the defendants. This evidence was fully confirmed by Tejsey Punjá, a servant of the temple and attendant on the idol for a still longer period. The conclusion I draw as regards this question of liability before 1867, from the facts proved by the evidence, is that all donations went, as a matter of course, to the founder's firm; that, as long as that firm was prosperous, the funds were as fairly administered as such funds ever will be while the present want of system prevails in the matter of these endowments; that, when speculation injured the stability of the firm, the funds were used too freely in trade, but that as regards the present defendants no liability has been brought home to them for what occurred previously to 1867.

Was there mismanagement after 1867, and are the defendants liable for it? The defendants admit they are liable for anything wrong after June, 1869,—subject, of course, to their defence of limitation. But from October, 1867, to June, 1869, they repudiate liability, save for the management of the immoveable property. The evidence convinces me that they really assumed all the management when the founder's family became embarrassed, or, at latest, when the defendants became trustees under the trust-deed. That deed speaks of Hurbhum Nursey in one of the

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recitals: "Whereas Hurbhum Nursey has been for some time trustee and manager of the Darása Shri Ananáth." On the 4th April, 1867, there is an entry in the cash book of Rs. 16,559, paid for "three promissory notes bought on account of the temple; the trustees thereof are four persons, Kessowji Náik, Hurbhum Nursey, Tricumji Wellji and Ghellábhoy Puddumsey; the same have been transferred to their names." Again, on the 2nd August, 1868, Rs. 15,000 of the temple money was advanced on loan, and debited to the account of Kessowji Náik and Madan Tejsey. Even if the defendants only became trustees of all the property in 1869, I fail to see why they then wrote off the debt due to the temple from Virji Nursey & Co. They did not convene a meeting of the caste; they did it of their own motion. They say now that they did it because the caste was under great obligations to the family of Nursey Náthá, and nobody wished to press the family firm. Even if that fact would constitute an excuse, I do not think it has been sufficiently proved. But, I think, it was their duty to collect this money if it was possible. The firm was not yet insolvent. The defendants now say the firm could not have paid, but Hurbhum Nursey admitted that they could have paid if the demand had been made before 1870. The defendants say that they did not undertake any old responsibilities; but the rules as regards the duties of trustees in India are the rules which obtain in England so far as they are not contrary to local custom—*Gopeekrish* v. *Gungápersaud*[1]. In India, where fiduciary relations prevail extensively these rules are certainly as much required as in the West. Guardians, managers of joint families, *gumástás* and *munims* of great firms, *benámídárs* of all kinds, as well as the trustees of endowments for religious and charitable purposes—all stand in need of the legal checks and sanctions which the law of trusts imposes. The Trusts Act has not yet become law in Bombay, but the main rules applicable to trusts are part of the common law I am bound to administer, and I propose to apply them in the present case. Nobody is bound to accept a trust, but if he does accept it he must fulfil the purposes of the trust. He must acquaint himself with the nature and circumstances of the trust property, and he must get in as

(1) 6 Moo. Ind. Ap. at p. 63.

speedily as possible all trust money that is invested in insufficient or hazardous security. And if debts are outstanding it is the duty of trustees to get them in as soon as possible. If in consequence of their negligence the debts are lost by the debtor's insolvency, they are personally liable—*DeSouza* v. *DeSouza*(1); *Jones* v. *Higgins*(2). A trustee is not liable, of course, for the acts of his predecessor. In this case the defendants were not liable for the loan to Virji Nursey & Co., but they *were* liable for their own negligence in doing nothing to repair the error. It is quite clear that the firm could, at least, have paid some portion of the debt, even if not all the debt, and the trustees had no right to forego any part. I have already pointed out that, as this was a trust of a public character, the consent of the caste would not excuse the neglect. The authority of temple managers has been assimilated by the highest Court, the Privy Council, to that of the managers of an infant heir, and such neglect as has been proved in the present case would certainly not be excused in a guardian—*Prosunno Kumari* v. *Gurubchand*(3). The case of negligence is, in my opinion, much aggravated by the fact that one of the trustees, Kessowji Náik, actually encashed a dividend of 2 annas in the rupee on a private debt of his own of Rs. 90,000. I am quite clear that this cancellation of the Rs. 2,40,000 debt constituted gross neglect and maladministration.

Next comes the question whether the defendants are liable to refund the money lost in Virji Nursey & Co. Although there may have been no actual design to perpetrate a positive fraud, yet, in my opinion, the defendants violated the confidence reposed in them. They committed an abuse of their fiduciary position. They omitted to collect outstandings which were clearly due. In such cases the public interest and the law require that the offending parties should be held as responsible as if they had committed actual fraud. The negligence, of which they have been guilty, is just as bad in its consequence as actual fraud, and they are responsible for all the loss they have occasioned, and are bound to make it good, unless they are protected by the statute of limitations. The trust-deed exempts the trustees from all but wilful

(1) 12 Bom. H. C. Rep., 184. (2) L. R., 2 Eq., 538.

(3) L. R., 2 Ind. Ap., at p. 151.

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neglect. They have, in my opinion, been guilty of wilful neglect. Gross negligence is tantamount to wilful neglect: *latá culpa dolo æquiparatur.* The loan to Nursey Kessowji & Co. stands on the same footing, save that it was an act of commission, not mere omission. It was an advance of money in a manner prohibited by the trust-deed. Nursey Kessowji is the only son of one of the trustees, Kessowji Náik. That trustee was a partner in the firm, and admitted that he always retained an interest in it. The money was advanced without security. The interest was not even collected. I think the loan was an improper transaction. It virtually amounted to a use of the trust property for the benefit of one of the trustees. The loans to the mills come in the same category. These loans and that I have just dealt with must be considered in relation to the terms of the trust-deed of 1867, under which the defendants admit they hold their trust. The purposes to which the fund might properly be applied, are there set forth, and it is distinctly laid down that the surplus shall be only invested in land, Government paper corporation shares, and no other shares whatever. The mill transactions must also be considered in conjunction with the opinion of witnesses, and the rules laid down by the books cited at the hearing as to the nature of the investment permitted. One additional form of investment—to wit, loans to the firm of Virji Nursey—was added in the trust-deed, but the defendants say that was only added out of compliment to the family, and, as a matter of fact, no money subsequent to the Rs. 2,40,000 was invested in that way.

These loans to the mills, then, were not justified by the trust-deed. They are not any more justified by the sacred Jain books which limit such investments to loans on good security. And this limitation was also placed by almost every witness whose opinion was asked on the matter. Perhaps it would be inadvisable to narrow trust investments in India within the limits placed by English law. The custom of lending on securities, whether jewels or immoveable property, is well established here, and I see no good reason why it should not continue. But I am of opinion that the Courts should set their face in India, as in England,

against the placing of trust money in the hands of traders exposed to all the risks of trade. These particular loans were blameworthy for another reason. The trustees were largely interested in the concerns to which the advances were made. It is a sound rule of equity, quite as applicable to India as to England, that trustees must do nothing which would unnecessarily place them in a situation of temptation by bringing their interest in conflict with their duty, and they are, therefore, bound to keep their trust money strictly separate from their own private funds. A case of direct fraud was attempted to be made out, because one creditor of the Prince of Wales Company was paid his debt in full, but I do not think this was done with intent to defraud. He was the last unsatisfied creditor, he had induced the rest to accept the composition, and he thus saved the concern from liquidation. He says the sum was paid him as brokerage, and that is supported by the receipt he gave for the money. I do not think the charge of direct fraud is made out.

The loans made to other persons were for short periods, and were all repaid. Although they were outside the proper limit of investment it is not worth while to dwell upon them.

The building of the caste cart has, I think, been sufficiently justified. Part of it, at least, has proved most useful to the temple. It is a property which has increased in value. The defence of the two caste suits is also justified. The first was a claim which directly affected the interests of the temple; the second had, at least, an indirect bearing on them. The first suit was dismissed without leave to commence another suit, and the second was an attempt to evade this absence of leave and to revive indirectly the old claim. Both suits failed, and their defence comes within those purposes to which the temple funds could legitimately be applied. The Privy Council has expressly sanctioned such expenditure. "It is competent for the manager of property dedicated to the worship of an idol to incur debts ..... for the proper expenses ..... of defending hostile litigious attacks" —*Prosunno Kumari* v. *Gulábchand*[1]. The neglect to collect out-

(1) L. R., 2 Ind. Ap. at p. 151.

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standing subscriptions and offerings proves want of diligence. Prompt collection would probably have realized the greater part of the half lákh which is now irrecoverable in all probability. The retention of large sums of money in their hands was also charged against the trustees as an abuse of their position. As a general rule, trust money should at once be invested. But in this instance no misuse was proved of the particular sums, and the excuse given, that they were waiting for a mortgage and a rise in stock, is admissible.

I now come to the question whether the claim for the return of the money lost, is barred by lapse of time. The rule in England is that the statute of limitation does not apply to a liability for a breach of trust. "If," said Lord Cottenham, "there be no doubt as to the origin and existence of a trust, the principles of justice require that the lapse of time should not enable those who are mere trustees to appropriate to themselves the property of others"[1]. This rule has been modified in India, and is limited by section 10 of the Act of 1877 as follows:—"No suit against a person in whom property has become vested in trust for any specific purpose ... for the purpose of following in his or their hands such property shall be barred by any length of time." Two questions, therefore, present themselves for consideration—(*a*) Is this a trust where property became vested in the defendants for a specific purpose? (*b*) Is the suit for the purpose of following in their hands the said property? The first question presents little difficulty. The trust-deed vested the immoveable properties in the defendants in trust for the specific purposes there set forth. The defendants themselves acknowledge that they subsequently took over all the funds, subscriptions, and offerings in the same trust. The money invested in Virji Nursey & Co. formed part of these funds. The defendant managers were entered in the insolvency schedule as creditors, and they admitted that they applied more than once for payment. They say they did not accept any duty as regards that money, but as managers they could not divest themselves of the responsibility. By clear implication they accepted the trust for all the property that came into their hands on the terms set forth in the

(1) 5 M. & C., 17.

deed. This is clearly a trust where property became vested in the defendants for a specific purpose. The second question is one of more doubt and difficulty. It may be argued that this cannot be a suit for the purpose of following in the defendants' hands the property which is vested in them for a specific purpose, because the property passed out of their hands when the various improper loans were made. But I think the section is satisfied if the money can be traced to the trustees' hands, and if the loss can be shown to have been caused by their misconduct and improper dealing with it; otherwise every improper use of trust money in trade or speculation would be beyond the application of the section. The words of the section have been judicially interpreted by the Privy Council (*Balwantráo* v. *Biswant Chandra*[1]): "The expression used by the Legislature for purpose of following in his or their hands such property means for the purpose of recovering such property for the trusts in question, that when property is used for some purpose other than the proper purpose of the trust in question, it may be recovered, without any bar in time, from the hands of the person indicated in the section." The narrow meaning sought to be given by the defendants is contrary to the Indian decisions also. Thus in a case reported in the printed judgments, 1877, p. 197, the proceeds of a mango grove had been improperly wasted, and, though not actually in the hands of the trustees, the lapse of time was held to be no bar to his liability. (See also *Kherodemoney* v. *Doorgamoney*[2] and *Greender Chunder* v. *Mackintosh*[3]).

The accounts were kept very loosely from the foundation of the endowment. Although *darása, sadáran* and *mahájan* were distinct objects for which offerings or subscriptions were made, the sums paid to them were not kept distinct, and improper advances were made by one fund to another. Still the confusion has not been shown to have covered any wrongful appropriation or fraud. The accounts were kept in this loose fashion from the beginning, and as each of these institutions must be guided by its own customs, so long as they do not serve as a cover to fraud or wrong, and as

(1) L. R. 10 Ind. Ap. at p. 96. (2) I. L. R., 4 Calc., 897.
(3) I. L. R., 4 Calc., 455.

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an account would involve great loss of time and money, I do not think it necessary to order the account prayed for. At the same time I must add that clear and distinct accounts of the property ought to be kept by all trustees, so that they are ready, at any time, with accurate information as to the disposition of the trust fund.

Whether Cuverji and Umersey are proved to have been trustees, is a difficult question. They are described as such in the circular sent round to the caste to consider the present suit. They are similarly described in the resolutions. Kessowji Náik stated they were trustees. On the other hand, they swore they were never trustees, and never acted as such. No satisfactory evidence was given of their so acting. It was argued that they succeeded their brothers and father, respectively, in the position of trustees, but no good proof was given, and the office is not of necessity hereditary. It is quite possible that their explanation of the circular and resolutions, that they only acted as *shettiás*, not as managers, and that the blunder came from the attorney's clerk, was true. I think this is the more likely, as their evidence is confirmed by Mr. Roughton, who stated that the description given of them in the circular and in the resolutions was a mistake of his managing clerk, and quite contrary to his instructions. I do not think it proved, therefore, that they acted as trustees and managers, and the liability in this suit must be confined to Hurbhum Nursey, Ghellábhoy Puddumsey and Kessowji Náik.

It is not necessary, after my decision on the previous issues, to discuss, at length, the question whether the pecuniary position of the defendants justifies their removal. But neither Hurbhum Nursey nor Ghellábhoy Puddumsey on that ground are fit persons to be managers. They have both been insolvent, and neither have any means of livelihood. They are not proper persons to have the charge of trust money. It has been more than once laid down in England that trustees should be removed who are insolvent (see *Adam's Trust*[1].) Insolvency does not necessarily imply misconduct, but it always implies impecuniosity, which is ground enough for the removal of a trustee from the control of

[1] 12 Ch, Div., 634.

other people's money. Kessowji Náik is still, in spite of his losses, a wealthy man. But he is old and infirm. On his own showing he gives little or no time to his stewardship, which requires the attention of an active man of business. The law, as Mr. Lewin in his work on Trusts says, knows no such thing as a passive trustee, and this confessed inability to perform the duties is a strong ground for removal. It has been stated more than once, in the course of the case, that, if these present trustees are removed from their post, the subscriptions and offerings to the temple will fall off. Of course I am bound to have regard to the question whether the appointment of new trustees will promote or impede the execution of the trust. But I am sceptical about the threatened result. Other men of the caste of position and respect will be found, I do not doubt, to take the place, and the votaries will renew their offerings when the temple affairs resume their normal state. But, however that may be, I cannot allow an evil precedent to be established and the maladministration of a public trust to go without redress, because the wrong-doers are men of influence, leaders of the caste, able to persuade a number of private persons, members of the same caste, to throw a cloak over the abuse. The management of the temple can be conducted on the income of the accumulated fund alone if placed in safe hands. The worst consequence, if no offerings were made, would be the absence of a surplus. Surpluses, in the past, have not been much devoted to the charitable objects of the funds to which they were subscribed. It is evident, from the amount of the accumulated fund, that very little has been dispensed in charity, and the increase of the temple store is not a very important object. The threatened consequence is not sufficient to deter the law from taking its course. At any rate, the present decision will have the salutary effect of introducing better management and more prudent modes of investment into all similar institutions in Bombay.

It now remains for me to sum up the result of my judgment. In the first place, the present trustees—Hurbhum Nursey, Ghellábhoy Puddumsey and Kessowji Náik—are disqualified and removed from office. The remaining defendants have not been proved to be trustees, and are entitled to their costs. The three first named defendants are also declared liable to refund the temple money

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that has been lost through their negligence and misapplication of funds, such negligence and misapplication having been so gross as to amount to a breach of trust. It is a delicate question to say what definite sums are to be refunded. As regards the Rs. 2,40,000, the accumulated fund which the present trustees allowed to remain in the hands of the temple bankers, Virji Nursey & Co., there is no doubt that their negligence in leaving this fund as a mere book debt, after the principal partner, Hurbhum Nursey, had been an absconding debtor, was a case of gross negligence amounting to a clear breach of trust. But it appears equally clear, from the evidence, that this sum could not at any time during the trusteeship of the defendants have been collected in full. At the same time it is clear, on the evidence, that some portion of the money might have been obtained if due diligence had been shown. The other creditors, including Kessowji Náik, obtained their two annas in the rupee; Hurbhum Nursey says they could have obtained a portion of this debt. Kessowji Náik says that even now the representatives of the firm could pay something. I think, on the whole, the defendants must be held liable to refund in the proportion of two annas in the rupee. But this restitution must, of course, only apply to that portion of the fund which is composed of *darása* and *sadáran* moneys.

As regards the *mahájan* money, it clearly belongs to the caste. The caste may condone its misapplication, and such condonation has been given. The amount of the *mahájan* fund to be deducted is stated to be Rs. 68,017. Owing to the mixing of the three accounts this sum is probably not accurate. But the defendant Ghellábhoy Puddumsey admitted that, if there was an error, it was one of excess. Rather than involve the parties in a long enquiry before the Commissioner to ascertain the exact sum, I will give the defendants the benefit of the excess, and deduct the whole of the Rs. 68,017. That will leave Rs. 1,80,246, and the 2 annas' proportion must be calculated on that sum. It may also be fairly argued that a similar deduction should be made in the case of the other loans. The mixing of the accounts continued up to the time those loans were made, and it is difficult to fix with accuracy the exact sum to be deducted. I

think it will be fair to make the deduction on the basis I have just given,—that is, to deduct 17·62 from the whole sum lost. Interest at nine per cent. must be paid on the above sums from the respective dates of the loss, which I shall fix, as regards the Virji Nursey & Co. debt, at the time of the first payment of dividend. As regards the various loans, from the date of the respective failures or liquidations or voluntary compositions.

I think a new scheme of management is necessary, and the scheme must be finally settled by the Judge in chambers. I would, however, propose, as the basis of scheme, the following heads:—New trustees should be nominated by the caste, the present trustees being disqualified. The trustees should be three in number. The choice should not be limited to those who hold the office of *shettia* to the caste. But yearly accounts should be submitted by the trustees to the *shettiás* or head men, and in those accounts receipts and expenditure under the three funds should be kept absolutely separate. When the amount of accumulations in the temple strong box and in the temple bank exceeds in the aggregate Rs. 5,000, this should be invested in Government paper. The income of the present accumulated fund, so far as that portion invested in immoveables is concerned, should be applied, in accordance with the terms of the trust-deed of 1867, so as to secure the due maintenance of the temple. But the accumulation of Government securities in cash might be applied to the erection of a *dharmshála* for Jains, which would be an object quite within the purposes of the two funds. I do not think the right and interest of the Jain community outside the caste sufficiently direct to entitle them to any share in the management of the temple.

The question of costs alone remains. The ordinary rule where trustees are concerned, is that they obtain their costs out of the trust funds. But when they are in the wrong, and the suit has been made necessary by their wrong-doing, they are made to pay the costs personally, just as if they were an ordinary losing party (Lewin on Trusts, 6th ed., 833.) In this case they are by no means blameless, and I shall order Hurbhum Nursey, Kessowji Náik and Ghellábhoy Puddumsey to pay their own costs and

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those of the plaintiffs, including the costs of the rule. The private individual costs of the other two defendants, such as are independent of the necessary general costs of the suit, must be paid out of the trust funds. I will not throw them upon the plaintiffs, as the plaintiffs were misled by the circular and the resolutions.

Attorneys for the plaintiffs.—Messrs. *Smith and Frere.*

Attorneys for the defendants.—Messrs. *Tobin and Roughton.*

ORIGINAL CIVIL.

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

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ARDESIR JEHA'NGIR FRA'MJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HIRA'BA'I AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Pársi will before Indian Succession Act—Probate in 1866—*Act XXVII of* 1860—*Effect of probate—Construction of will—Executrix also trustee—Suit against executrix—Representation of the estate—Civil Procedure Code, Sec.* 437.

The will of a Pársi testator in Bombay affecting lands in the Mofussil, made before the 1st January, 1866, when the Indian Succession Act, X of 1865, came into force, and proved subsequently, *viz.*, on the 25th day of January, 1866, but before Act XXIV of 1867 came into operation, is governed by Act XXVII of 1860.

Held that such probate had the same effect as probate in respect of the property of British subjects, but for the purpose only of collecting debts. It did not confer a title on the executrix to represent the testator's estate, except for the above-mentioned limited purpose, or to exercise the usual powers of an executrix, where the testator's intention, to be gathered from the whole of the will, was to vest his property with the entire management of, and control over it, in a series of persons in succession as trustees, the first of whom was the executrix.

Held also that, having regard to section 437 of the Code of Civil Procedure, the persons acting as such trustees in succession under the said will, adequately represented all persons beneficially interested in the estate in all suits relating to it.

APPEAL by plaintiff against the decree of Birdwood, J., made on the 4th day of August, 1883, whereby judgment was passed against the plaintiff with costs.

The suit was brought by the plaintiff against the first defendant Hirábái, widow and executrix of the late Dádábhái Jámasji Pochkhánávála; the second defendant Mithibái, widow and executrix of the plaintiff's father, the late Jehángir Frámji Bánáji, deceased; and one Hormasji Dádábhái Jámasji, a son of the first

* Suit No. 228 of 1882.