

1903.

GURUVAYYA
v.
DATTAPRAYA.

plaintiff had been recognized as manager by the whole family, the suit had actually been instituted by the plaintiff in his individual capacity.

We purposely refrain in this case from resting our decision in any measure on the authority of the ruling of the Calcutta High Court in *Grish Chunder Sasmal v. Dwarka Nath Dinda* ⁽¹⁾ which was cited at the hearing, as that ruling appears to proceed upon a misapprehension of the principle affirmed in *The Oriental Bank Corporation v. Charriot* ⁽²⁾ on which alone it purports to be based. What had there been held was that a Court in joining parties under section 32 of the Civil Procedure Code was untrammelled by any question of limitation in respect of an application for such joinder, not that the joinder could be made in disregard of any question of limitation in respect of the suit itself as affected by such joinder.

For the reasons above given, we reverse the decree of the District Judge and restore that of the Subordinate Judge with costs of both appeals on the defendants.

Decree reversed.

(1) (1897) 24 Cal. 640.

(2) (1833) 12 Cal. 642.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903.

July 29.

NAVROJI MANEKJI WADIA AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. DASPUR KHARSEDJI MANCHERJI AND OTHERS
(ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 539—Atash Behram (Parsi fire-temple)—Parsi community of Udwada—Trust—Suit—Capacity to hold property—Mandatory injunction—Trespasser—Removal of encroachment.

In this country a fluctuating body of persons, such as a village community, is capable of owning property.

It is opposed to the notions of the Parsi community that the Iran Shah (sacred fire) should be regarded as capable of, or the subject of, ownership; but even if there be difficulty or doubt as to its ownership, it is obvious that there

* Appeal No. 106 of 1900.

must be some one entitled to protect from improper invasion the temple property, and those who can predicate of themselves that they have exercised the management, authority and supervision as alleged in the plaint, are so entitled.

The Parsi inhabitants of Udwada, as the Anjuman (that is, a constituted council or assembly to which all questions regarding their peculiar customs are referred) of that town, are vested with the control, management and supervision of the Atash Behram at that place and all that appertains to it.

A suit for the vindication of the right of management which is vested in, and actually being exercised by, the plaintiffs and those they represent at the date of the obstruction does not fall within section 539 of the Civil Procedure Code (Act XIV of 1832) merely because those who cause the obstruction happen to have been nominated trustees.

A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.

APPEAL from the decision of Lallubhai P. Parekh, First Class Subordinate Judge of Surat, in original Suit No. 239 of 1897.

Suit for certain declarations and injunction with respect to, and the right of, management of the Parsi Atash Behram (fire-temple) at Udwada in the Surat District.

After the conquest by the Arabs of the Kingdom of Persia in the seventh century, the inhabitants of that country migrated in parties to distant countries. One such armed party landed near Sanjan in Western India and asked the permission of the then ruling Chief to settle in the land, stating that they honoured the cow, water, fire, the sun and the moon; that they wore the sacred girdle and observed strict rules about the ceremonial impurity of women. The Chief granted them a spot on their agreeing to learn the language of the country, to make their women dress like Hindu women, to cease to carry arms, and to hold their marriages at night. On that spot they built a temple for the holy fire of angel Behram and the settlement prospered in every way. After the Parsis had been settled for nearly six hundred years in Sanjan, their Rajput Chief was attacked by the Musalmans, who, having obtained a victory, the Parsis were driven from Sanjan. Those who escaped took their sacred fire with them to the Bharut hills near Sanjan. They remained in hiding in the hills for twelve years and afterwards went to Bandsa, taking with them the sacred fire. At Bandsa also their community prospered. In A. D. 1419 a Dawar, or religious layman,

1993.

NAVROJI
MANEKJI
WADIA
v.
DASTIR
KHARSEDDJI
MANOHERJI.

1933.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSETJI
MANCHERJI.

named Changa Asa, built a magnificent fire-temple at Navsari and had the sacred fire brought from Bandsa to that place with great pomp by three Sanjan high priests, Nagan Ram, Khorshed Kamden and Chaya Sahiyar. Each of these three high priests had three sons. These nine sons became the founders of the present nine priestly families of Udwada. At Navsari disputes having arisen between the two bodies of priests, that is, the original priests on the one hand and those who had come from Sanjan on the other, the latter taking their sacred fire with them went to Surat in A. D. 1733. Afterwards on the 28th October, 1741, they moved to Udwada, where the original sacred fire has since remained.

The first building for the accommodation of the Atash Behram at Udwada was built by one Minochar Baman of Nargol. The second was built by Bhikaji Edalji of Surat in or about A. D. 1770. The third by Jamsetji Nanabhai Guzdar of Bombay about A. D. 1812 or 1815, but the evidence about the building by Guzdar was conflicting. The fourth was built by two brothers, Dadabhai and Mancherji Wadia, in March, 1830, and the fifth and the latest by Motlibai Jehangir Wadia in October, 1894. Subsequently under an indenture, dated the 2nd September, 1896, Motlibai appointed Navroji Manekji Wadia, Kavvasji Kharsetji (afterwards Sir Jamsetji Jijibhai), Jijibhai Mervanji Wadia, Behramji Pestanji Bharda and Nasarvanji Jehanjir Wadia, since deceased, as trustees to look after the Atash Behram. Under the orders of the trustees the three doors of the northern hall of the Atash Behram were, from the 19th October, 1896, daily closed and locked up at night between 9 P. M. and 6 A. M. Further, the trustees on or about the 7th November following completely blocked up a doorway in the compound wall between the Atash Behram and Dareh Meher built by Sir Dinsha Manekji Petit in 1891 to the west of the Atash Behram. The doorway was opened by Sir Dinsha at the request of the Anjuman (Society) of Udwada. These acts on the part of the trustees put the Parsi community at Udwada to great inconvenience and trouble which culminated in disputes. The plaintiffs, therefore, in the year 1897 brought the present suit on behalf of themselves and as representatives of the Parsi community of Udwada, alleging—

1903.

 NAVROJI
 MANERJI
 WADIA
 v.
 DASTUR
 KHARSEDDJI
 MANCHERJI,

1. That they brought the suit with the permission of the Court duly obtained under section 80 of the Civil Procedure Code; that the Atash Behram or the fire-temple of the Parsis at Udwada was, with its site and diverse buildings and appurtenances from time to time dedicated for use in connection therewith, vested in the Parsi inhabitants of that town, and they have from time immemorial managed the same and exercised absolute authority in regard to the maintenance and administration thereof as a place of Zoroastrian religious worship and observances.

2. That nine priestly families of the Parsis of the said town of Udwada have as of right and from time immemorial been the special delegates of the Parsi inhabitants of the said town for the purpose of supervising and managing the said Atash Behram, and the plaintiffs were members of some of the said nine families.

3. That the defendants were trustees appointed by and under an indenture dated 2nd September, 1896, and made between Bai Motlibai now deceased of the one part and the defendants and Nasarvanji Jehangir Wadia now deceased of the other part, whereby the said Motlibai assigned to the defendants and Nasarvanji Jehangir Wadia deceased certain securities upon trust for the purposes of the said Atash Behram and also conveyed to them certain lands upon trust to permit the same to be used as a place for public worship by all persons of the Zoroastrian faith and for the celebration of all rites and ceremonies of the Zoroastrian religion as heretofore observed; that the lands so conveyed had been purchased by the said Motlibai and added to the previously existing compound of the Atash Behram, and in the compound so enlarged she erected a new Atash Behram in lieu of the old building; that all this was done with the full concurrence of the Parsi community of Udwada; that on the 30th October, 1894, Motlibai formally made over the new building and the additional land so purchased by her to the said community for the purposes of the said Atash Behram.

4. That Motlibai was from the 30th October, 1894, a bare trustee of the newly purchased land for them and was not competent to convey to the defendants and N. J. Wadia, deceased, any estate or interest in the said lands other than the estate or interest of bare trustees; that Motlibai professed to give to the defendants or at all events the defendants claimed to have, under the said indenture, the right to make rules and regulations for the management of the said Atash Behram.

5. That they denied that the defendants had any such right and that the said indenture was and ought to be declared by the Court to be inoperative so far as it purported to confer any such right on the defendants.

6. That the defendants claiming to act under the said power on or about the 7th day of November, 1896, erected a wall and thereby blocked up a door-way in the east wall of the compound of the building known as Darch Meher and which adjoins the Atash Behram and thereby prevented communication between the Atash Behram and Darch Meher through the said door way and thus caused much inconvenience and hindrance to the priests and others who were

1908.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEJJI
MANCHERJI.

in the habit of passing through the said door-way in the course and for the purpose of religious ceremonies and observances.

7. That the wall in which the said door-way was placed was not situated in the land purchased by Motlibai.

8. That the defendants had no right to block up the door-way. The plaintiffs were entitled to keep and to have it kept open, and the cause of action in respect of the door-way arose on the 7th November, 1896.

9. That the doors of the northern room of the Atash Behram used to remain open night and day. The defendants wrongfully and unjustifiably closed and locked up the two doors in the western wall and one door in the northern wall of the said room marked respectively B, C and D in the plan A from 8 p.m. to 6 a.m. on the 19th November, 1896, and continued doing so every day, thereby causing great inconvenience to the priests and others engaged in and about the Atash Behram.

10. That the plan A annexed to the plaint showed the relative positions of the said Atash Behram and the Darch Meher.

11. * * * * *

12. That the plaintiffs prayed for relief as follows:—

(a) For a declaration that the indenture dated 2nd September, 1896, made by Bai Motlibai could not and did not confer on the defendants and the defendants did not possess any right or title whatsoever to interfere with or in the management or administration of the Atash Behram further or otherwise than by applying the moneys settled by the said indenture for the purposes thereby prescribed, and that so far as the said indenture related to the lands and hereditaments thereby conveyed, the defendants were bare trustees thereof for the Parsi community of Udwada.

(b) For a declaration that the blocking up of the door-way marked E, F in the plan A annexed to the plaint and the closing at night of the three doors marked B, C and D in the plan were wrongful acts and not justified by any right or power vested in the defendants either under the said indenture or otherwise.

(c) For an injunction ordering the defendants and each of them to remove the wall marked G in the plan A built by them across the said door-way E, F so as to restore the said door-way to its former and open condition.

(d) For an injunction ordering the defendants not to close the doors B, C and D or any of them at any time.

(e) For an order perpetually enjoining the defendants not in any way to interfere with or in the management and administration of the Atash Behram further or otherwise than by applying the funds settled by the said indenture to and for the purposes mentioned by it.

The defendants answered—

1. That the Parsi fire-temple or Atash Behram at Udwada was entirely rebuilt, preserved and enlarged by one Dadabhai Pestonji in 1830; that the said

1903.

 NAVROJI
 MANEKJI
 WADIA
 v.
 DASTUR
 KHARSEOJI
 MANCHERJI.

Dadabhai in consideration thereof was entrusted with the possession and complete management of the said temple; that he did the repairs, whitewashing, tile-turning and supplied fuel, oil, sandalwood and incense; that he appointed as his manager and agent thereof under him one of the Dasturs of Udwada, *viz.*, Dastur Dorabji Beheramji.

2. That on the death of the said Dorabji, his son Mancherji Dorabji was appointed manager and agent; that in 1863 the said Dadabhai appointed four other persons along with the said Mancherji as trustees of the said fire-temple and premises.

3. That on the death of Mancherji his son (plaintiff No. 1) was appointed as trustee in his place.

4. That Dadabhai, before his death, appointed his son Merwanji to succeed him as the person who had the right of control and management over the said premises; that the said Merwanji Dadabhai removed the first plaintiff from his position as one of the trustees.

5. That the said right of control was entrusted to Bai Motlibai in consideration of her having entirely rebuilt the said fire-temple; that she was entitled to appoint the trustee defendants trustees of the fire-temple and premises; that Navroji Manekji Wadia, who was one of the trustees, agreed to their continuing trustees after Motlibai's death; that the matters complained of were done with the consent of all the trustees and of Merwanji Dadabhai who represented the original rebuildier and preserver of the fire-temple; that their action had the approval of the great bulk of the Parsi community.

6, 7. That the plaintiffs were not entitled to maintain the suit in accordance with the provisions of section 30 of the Civil Procedure Code on behalf of the whole Parsi community of Udwada; that the plaintiffs did not show any such right in them; that there were many Parsis in Udwada who controverted the allegations made by the plaintiffs and who were opposed to the relief prayed for and that no cause of action had accrued to the plaintiffs in their own right.

8. That they did not admit the allegations made in paragraph 1 of the plaint, *viz.*, that the fire-temple of Udwada was vested in the Parsi inhabitants of that town and that such inhabitants had managed the same; that they contended that the Parsi inhabitants in common with the rest of the Parsi community at large had hitherto enjoyed and were entitled to enjoy only the right of Zoroastrian religious worship and observances in the said fire-temple and its appurtenant buildings.

9. That they did not admit that certain nine Parsi priestly families of Udwada had as of right and from time immemorial and as special delegates of the Parsi inhabitants of that town supervised and managed the said Atash Behram. They contended that the said nine families had enjoyed and were entitled to enjoy the rights of rendering due service to the *kebla* or the sacred fire enthroned and kept burning night and day in the said Atash Behram or fire-temple; that beyond that they had enjoyed no other special right in connection with the fire-temple and that defendant was a member of the said nine families.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHAHSEDJI
MANCHERJI.

10. That they admitted the allegations made in paragraph 3 of the plaint except the allegation that the new Atash Behram with the new piece of land purchased by Motlibai was formally made over to the Parsi community of Udwada on the 30th October, 1894. They contended that the new Atash Behram with its lands and buildings continued vested in possession in Motlibai until the date of the indenture, that is, 2nd September, 1896, and that since that date the said properties had become vested in them as mentioned in the indenture; that the new Atash Behram building was erected with the consent of the late Dadabhai Pestonji Wadja, the founder of the old fire-temple, but not with the concurrence of the Parsi community of Udwada, as in the plaint alleged; that the Parsi community of Udwada had no voice whatever in the erection of the new fire-temple, though it was no doubt erected at their request, for their benefit and use, as also for the benefit of all other Parsis.

11. That Motlibai was not a bare trustee of the said newly purchased land for the Parsis of Udwada after the 30th October, 1894; that she held and stood possessed of the land until the same was conveyed to the defendants and that the defendants had accordingly held the same and were entitled so to hold it as of right.

12. That the said indenture was valid and binding on all persons in respect of all matters and promises dealt with therein and was not in any way in excess of the rights and authority belonging to the settler of the said trust property; that neither the plaintiffs nor any other persons were entitled to have any provision of the indenture declared null and void or inoperative; that they (defendants) were entitled to make rules and regulations for the management of the Atash Behram; that Motlibai had power to invest the defendants with such authority, a power inherent in the very conception of the endowment made by her.

13. That the wall on the east of the Daroh Meher belonged to the Atash Behram; that the door-way in dispute was opened about seven years ago with the permission of the then managers and trustees of the Atash Behram; that it rested entirely with the said managers and trustees how long to keep the door-way open and how long to keep it closed according as they found it expedient and that the door-way was so managed until it was blocked up.

14. That an unjustifiable attempt was made interfering with the defendants' right to keep the door-way closed or open according as the defendants found it necessary; that the doors were affixed to the compound wall by means of posts driven into the ground and thus the closing of the doors was rendered impossible by Sir Binsha's people; that by such action the Atash Behram was exposed to great insecurity; that for the due safeguarding of the interests of the Atash Behram they blocked up the door-way by raising a wall on the land belonging to the Atash Behram.

15. That the closing of the door-way was in no way calculated to occasion inconvenience or hindrance to the officiating priests or any members of the Zoroastrian community; that the plaintiffs, who did not profess themselves to be the trustees of the Daroh Meher, had no right to complain of the closing of the

1903.

 NAVROJI
 MANEKJI
 WADIA
 v.
 DASTUR
 KHARSEDAJI
 MANGHEZJI.

door-way and that the question whether the door-way was rightfully or wrongfully closed up could not be adjudicated upon in this suit and that the trustees of the Darch Meher had employed the plaintiffs as tools in their hands to attain objects of their own.

16. That the compound wall in which the door-way opened was the property of the Atash Behram ; that alterations, additions and repairs were made to the wall by Motlibai.

17. That the plaintiffs had no right to have the same door-way kept open or to deal with and exercise right of control over it.

18. That the three doors marked B, C and D in the map A have been closed at night for the better protection and security of the Atash Behram and of the utensils and other articles belonging to the Atash Behram ; that the same was being done for a much longer time than the plaintiffs allege and that by so closing the doors at night no hindrance whatever was caused to the use of the Atash Behram for which it was intended ; that the closing of the doors was calculated to ensure due protection of the things of the Atash Behram and to prevent evil-minded people from making away with valuable things therefrom ; that the plaintiffs were not entitled to interfere with the due management of the said property and to require the defendants to keep the same doors open night and day.

19. The map A was wrong and inaccurate and it wrongly showed the wall which contained the disputed door-way as being the property of Darch Meher.

20. That the plaintiffs were not entitled to the reliefs (a), (b), (c) and (d) as claimed by them ; that Motlibai had not acted in excess of the rights and powers possessed by her.

21. That the very nature of the settlement of the funds and proper application thereof necessarily demanded the exercise of the powers the defendants have hitherto exercised and that such exercise was quite legitimate and proper.

22. That the plaintiffs were not entitled to impeach any portion of the indenture as invalid or inoperative without making the legal representatives of Motlibai parties to the case.

23. That the Court had no jurisdiction to entertain the suit, for it fell within the purview of section 539 of the Civil Procedure Code, nor was the suit maintainable without the consent of the Advocate General of Bombay.

24. That the plaintiffs ought to pay *ad valorem* Court-fee according to the costs of the fire-temple which amounted to upwards of Rs. 12,500, and that the suit should be dismissed and costs of the defendants should be awarded.

The following is the material portion of the trust-deed executed by Motlibai in favour of the trustees :—

And whereas the said Motlibai is desirous of setting apart a fund of rupees sixty-one thousand for the due maintenance of the said buildings and the performance and observance of the rites and ceremonies hereinafter mentioned And whereas with that intent the said Motlibai hath with the consent of the trustees (testified by their being parties to and executing these presents) trans-

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

ferred into the joint names of the trustees and delivered into their hands before the execution of these presents the securities specified in the second schedule hereunder written (which at the date hereof are of the market value of rupees sixty-seven thousand and four hundred) to be held by them upon the trusts in that behalf hereinafter declared And whereas the said Motlibai is also desirous of conveying to the trustees the said plots of land and the said buildings upon the trusts in that behalf hereinafter declared Now this Indenture witnesseth that in pursuance of the said desire the said Motlibai doth hereby voluntarily grant unto the trustees the hereditaments and premises particularly specified in the first schedule hereunder written Together with all buildings and edifices standing thereon (including the buildings so erected by the said Motlibai as aforesaid) and the furniture vessels and utensils now placed therein Together also with the rights and easements and appurtenances to the said premises belonging or enjoyed therewith To have and to hold the said premises unto and to the use of the trustees upon trust at all times to permit the same to be used as a place for public worship by all persons of the Zoroastrian faith and for the celebration of all rites and ceremonies of the Zoroastrian religion as hitherto observed And it is hereby agreed and declared that the trustees shall stand possessed of the securities specified in the second schedule hereunder written and all monies payable thereunder (hereinafter called "the trust-fund") upon trust to apply the net income thereof for or towards all or any one or more of the objects and purposes hereinafter mentioned that is to say :

(a) In the maintenance repairs and general up-keep of the main fire-temple building at Udwarda or any other buildings appurtenant thereto.

(b) In providing oil for the due lighting of the said temple and the outhouses thereto appertaining and in providing sandalwood firewood and incense for feeding the sacred fire.

(c) In the performance and observance of the Jassan ceremony on each anniversary day of the installation of the sacred fire Iran Shah which falls on the seventeenth day of the second month of every Zoroastrian Shenshai year.

(d) In the performance and observance of the Baj or ceremonies on each anniversary day of the death of the late Manekji Navroji Wadia (the husband of the said Motlibai) which happens on Mehr the sixteenth day of Ardibehest the second month in every Zoroastrian community Shenshai year and on each anniversary of the death of the late Jehangirji Nasarvanji Wadia (the father of the said Motlibai) which happens on Deptin the twenty-third day of Aban the eight month in every Zoroastrian Shenshai year.

(e) And generally in making arrangements for the perpetual turning for the sacred fire it being the pious desire and intention of the said Motlibai that the said fire-temple shall for all time to come hold the sacred fire Iran Shah and remain open for worship to all devout persons of the Zoroastrian faith And it is hereby further agreed and declared that it shall be lawful for the trustees to frame rules and regulations for the due government of the said trust premises with power from time to time to rescind or alter the

same and the rules for the time being and if thought necessary to substitute new rules and regulations in lieu thereof and it is hereby further agreed and declared that if in any year the whole of the income of the trust funds shall not from any cause whatever be applied for the objects and purposes aforesaid or any of them the trustees shall accumulate the surplus or residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in any of the securities hereinafter mentioned provided that the trustees shall have full liberty at any time if they think fit to apply the whole or any part of such accumulations as if the same were part of the income arising then in the current year.

The findings of the Subordinate Judge are embodied in the judgment of the Chief Justice. He passed a decree in the following terms :—

I therefore declare (a) that the defendants do not possess any right nor title whatever to interfere with or in the management or administration of the sacred fire called the Iran Shah and the Atash Behram buildings together with all affairs connected with the sacred fire and its property, funds, income, buildings, presents, &c., further or otherwise than

1. By repairing the Atash Behram buildings and providing the priests and worshippers with further accommodations for religious purposes with the monies settled by the indenture, Exhibit 141, provided that in doing so they (defendants) do not go against the wishes of Motlibai as expressed in the indenture and against the long established practice followed on such occasions.

2. By supplying *kathi* (fuel), sandalwood and other things necessary for feeding, worshipping and maintaining the sacred fire when they are allowed to do so, by the heirs and representatives of Merwanji Wadia.

3. By supplying oil for lamps and giving pay to Zadikus, servants, employed in the Atash Behram.

4. By seeing that the main Atash Behram building and the other buildings and open spaces including the compound walls attached to it are used for religious purposes, provided that in doing so, they (defendants) do not go against the religious practice and prejudices of the Udwada Anjuman and other worshippers.

5. By seeing that the censor and other things placed by Motlibai or the defendants as her trustees in the Atash Behram are used and duly taken care of. If there is a chance of a dispute between them and the officiating priests regarding the safety or indiscreet use of the things, it will rather be advisable on their (defendants') part to keep away the thing with the permission of Udwada Anjuman than enter into litigation with the priests.

6. By seeing that the rites and ceremonies mentioned by Motlibai in the indenture, Exhibit 141, paragraph 12, are duly performed through the priests officiating in the Atash Behram.

7. By keeping in a room the furniture and other things supplied by Motlibai or by them as her trustees, which are not of daily use, provided that they do not shut out the Udwada Anjuman from the use of the furniture, &c., and the room.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANOHERJI.

1903.

NAVROJI
MANEJI
WADIA
vs.
DASTUR
KHARSEJI
MANCHERJI.

8. By applying the funds in their hands for the religious and charitable purposes mentioned in the indenture, provided that in doing so, they (defendants) do not invade the right of the plaintiffs and other members of the Udwada Anjuman.

I also declare that so far as the indenture relates to the lands and hereditaments thereby conveyed, the defendants are bare trustees thereof for the Parsi community of Udwada.

I also declare (b) that the acts of the defendants, *viz.*, blocking up the door-way E, F and the closing at night of the three doors B, C and D shown in the plan, Exhibit 273, were wrongful acts and not justified by any right nor power vested in the defendants, either under the indenture, exhibit 141, or otherwise.

I also order (c) that the defendants and each of them do remove the wall built by them across the door-way E, F which wall is marked G in the plan, Exhibit 273, so as to restore the said door-way to its former open condition.

I further order (d) that the defendants and each of them do refrain from closing the doors B, C and D shown in the plan, Exhibit 273, at any time and I further order (e) that the defendants do refrain perpetually from interfering with or in the management of the sacred fire and the Atash Behram buildings, properties, income, &c., otherwise than as shown in the first relief (a) granted to the plaintiffs.

The defendants do bear their own costs and do pay the costs of the plaintiffs.

The defendants appealed.

Inverarity (and *Lowndes*, with *Nanu* and *Hormusji*), for the appellants (defendants):—We contend that the property mentioned in paragraph 1 of the plaint does not vest in the Parsi community of Udwada and the nine priestly families are not the delegates of the Anjuman. We disclaim any right over the ceremonial portion of the temple work. What we claim is that the land and the buildings are vested in us as well as the right to manage them. We have a right to take precautions for the protection of the valuables in the temple.

The next question is whether the sacred fire is the subject of ownership. Our case is that if it belongs to anybody, it belongs to the whole Parsi community at large. The Iran Shah is not a judicial person in the sense in which a Hindu idol is considered to be so. We do not dispute and never have disputed that the nine priestly families are the only persons entitled to officiate at the fire and to take the offerings and perquisites generally offered for the performance of ceremonies in the temple.

[JENKINS, C. J.:—The plaintiffs' main contention refers to the closing of the door in the compound wall.]

Sir Dinsha Petit built the Dareh Meher. His trustees really wish it to be declared that the wall belonged to him and they have put forward the plaintiffs to do so. Motlibai, when she rebuilt the fire temple, purchased certain lands and made additions to the temple. Thereupon the heirs of Dadabhai, who were in management of the temple property, transferred all the rights which Dadabhai possessed to Motlibai and thenceforward she continued the management till she made the trust-deed. Motlibai did not make a gift in favour of any one of the lands she purchased. Supposing she had become insolvent before she made the trust-deed of 1896, the property would have passed to the Official Assignee. The dedication by Motlibai was to the whole Zoroastrian community and not only to the community at Udwada. The very fact that she appointed the trustees shows that she had reserved her proprietary rights over the temple as founder and did not intend to make a gift to any one. We contend that the property all along vested in Motlibai and there was nothing to prevent her from taking it back: *Doe d. Howard v. Pestonji*.⁽¹⁾ Having regard to the provisions of the Transfer of Property Act, which is applicable to the case, Motlibai could not make a gift of the property except by a registered deed, and that being wanting, the ownership remained in her. In any event Motlibai had reserved her rights as founder and she was entitled to make any arrangement she chose with respect to the property.

[JENKINS, C. J. :—But not so as to nullify the object of the trust.]

If what we have done is inconsistent with the trust-deed, then the Advocate General would be a necessary party to the suit. The plaintiffs' chief complaint is that they are put to great inconvenience on account of the closing of the door. This is a matter of detail which the Court cannot go into. (Documentary evidence discussed). There is no documentary evidence that the Anjuman or its committee ever interfered in the management of the building. The only evidence is that after the formation of the committee some rules were framed relating entirely to the

1903.

 NAVROJI
 MANEKJI
 WADIA
 v.
 DASTUR
 KEAREEJIJI
 MANCHREJI.

(1) (1852) Perry's O. C. 535.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

ceremonial part of the work. There is no evidence that the holy fire belonged to the Anjuman at Udwada.

[JENKINS, C. J. :—How is it capable of ownership ?]

We submit it is not. But if it is, then it belonged to the whole Parsi community at large. The finding of the Judge on this point is repugnant to the feelings of all Parsis. The plaintiffs' case is that they can take the fire wherever they chose. We do not dispute their right to worship the sacred fire and appropriate the offerings. The Judge has confounded the right to the fire and the right to the building.

[JENKINS, C. J. :—We cannot go into these interesting questions. We must look to the cause of action which is the closing of the doors.]

The plaintiffs have claimed a declaration with respect to the doors, but they have not claimed consequential relief. Recently various thefts have occurred, therefore we were justified in closing the doors at night. The plaintiffs want to be free from all control. The following were some of the authorities cited :—59 Geo. III, c. 12, s. 17 ; Lewin on Trusts, p. 605 (Note) ; *Doe d. Higgs v. Terry* ⁽¹⁾ ; *Vestry of Bermondsey v. Brown* ⁽²⁾ ; Dart on Vendors and Purchasers, p. 24 ; *Chilton v. Corporation of London* ⁽³⁾ ; *Lord Rivers v. Adams*. ⁽⁴⁾

Scott (Advocate General, and *P. M. Mehta*, with *H. C. Coyaji*, *K. M. Jhaveri*, and *Mulla and Mulla*), for the respondents (plaintiffs) :—During the course of the arguments and the discussion of the evidence, the following authorities among others were cited :—West and Buhler, p. 554 ; *The Advocate General of Bombay v. David Haim* ⁽⁵⁾ ; *Wardens of Nossa Senhora v. Bishop Hartmann* ⁽⁶⁾ ; *Batten v. Gedye* ⁽⁷⁾ ; *Bombay Gazetteer*, Vol. IX, Part II, p. 215.

Lowndes, in reply.

(1) (1835) 4 Ad. & E. 274, 282.

(2) (1865) 1 Eq. Cases 204, 215.

(3) (1878) 4 Ch. D. 735.

(4) (1878) 3 Ex. D. 361.

(5) (1886) 11 Bom. 185.

(6) (1851) Perry's O. C. 333.

(7) (1880) 41 Ch. D. 507.

JENKINS, C. J. :—This suit relates to the Atash Behram or fire-temple of the Parsis at the town of Udwada, in the Pardi Taluka of the Surat District. The plaintiffs are three Parsi inhabitants of that town, and they purport to sue on behalf of themselves and all other Parsi inhabitants of Udwada in accordance with the provisions of section 30 of the Civil Procedure Code, which permits one party to sue on behalf of all in the same interest. The defendants are the trustees of an indenture of settlement, dated the 2nd of September, 1896, executed by Bai Motlibai, now deceased, a benefactress of the Atash Behram. The cause of action alleged is, first, that the defendants, claiming to act under a power contained in the indenture of settlement, on or about the 7th November, 1896, erected a wall and thereby blocked up a door-way in the wall of the compound in which the Atash Behram stands; and secondly, that on the 19th October, 1896, the defendants wrongfully and unjustifiably closed and blocked the two doors in the western wall and one door in the northern wall of the Atash Behram, and have continued to do so every day since, thereby causing great inconvenience to the priests and others engaged in and about the Atash Behram. To appreciate the real character of the suit a short narrative of the temple's history is necessary. It is claimed that it is the oldest Parsi temple in India, and undoubtedly its traditional history points to a considerable antiquity. The Subordinate Judge has given a detailed account, which has been accepted as being substantially a correct exposition of tradition, and it is therefore needless now for us to travel over the same ground. It will suffice to say that the building was erected at Sanjan, and in it was located the sacred fire or Iran Shah constructed by the ancestors of the nine priestly families. This fire has ever been regarded by the Parsi community as an object of veneration and reverence and a symbol of the greatest sanctity. Under stress of circumstances the sacred fire was moved from place to place, and ultimately on the 28th October, 1742, it was brought to Udwada. It was first lodged there in a building given for the purpose; then Bhikaji Edalji, a Parsi from Surat, rebuilt the temple; according to some it was later restored by a Parsi named Gazdar, but as to this there is a difference of opinion: it is, however,

1903.

 NAVROJI
 MANEJI
 WADIA
 &
 DASTUR
 KHARSEDJI
 MANCHERJI.

1993.

NATROJI
MANEJI
WADIA
v.
DASTUR
KHAJESDJI
MANCHERJI.

certain that in 1830 Dadabhoy and Mancherji Pestonji Wadia in restoration of the temple then standing erected the building which was re-built by Bai Motlibai in 1894. In the plaint it is alleged that the Atash Behram or fire-temple of the Parsis is, with its site and diverse buildings and appurtenances from time to time dedicated for use in connection therewith, vested in the Parsi inhabitants of the town of Udwada, and they have from time immemorial managed the same and exercised absolute authority in regard to the maintenance and administration thereof as a place of Zoroastrian religious worship and observances, and further that the nine priestly families of the Parsis of Udwada have, as of right and from time immemorial, been special delegates of the Parsi inhabitants of that town for the purpose of supervising and managing the said Atash Behram, and the plaintiffs are members of some of the said nine families. This, then, is the title on which the plaintiffs claim to sue. The defendants, on the other hand, contend that Dadabhoy Pestonji was in 1820 entrusted with the possession and complete management of the temple in return for his having rebuilt, preserved and enlarged the same, and that "the said right of control and management was entrusted to Bai Motlibai in consideration of having entirely rebuilt the temple and added thereto," and that the defendants as the trustees appointed by her have acquired the same right. At the trial of this suit before the Subordinate Judge the following issues were framed:—

1. Do the plaintiffs prove that the fire-temple (Atash Behram) of Udwada is vested in the Parsi inhabitants of that town, and that they or nine priestly families of Udwada as their delegates have from time immemorial exercised absolute authority in regard to the maintenance and administration thereof?
2. Or, as is alleged by the defendants, was one Dadabhoy Pestonji of Bombay invested with the management owing to his having rebuilt, preserved and enlarged the fire-temple since so early as 1830, the nine priestly families being simply bound to render services only to the sacred fire? Has Dadabhoy Pestonji transferred any of his powers of management to the defendants?
3. How far will the dissent of Beramji Pestonji Bharda affect the plaintiffs' right of management, if any?
4. What rights as to possession and management of Atash Behram came to the lady Bai Motlibai when she reconstructed the Atash Behram and appurtenances at large cost?

5. Was she entitled to confer on trustees (defendants) all the powers including that of making rules and regulations for the due government of the trust premises under the indenture A? How far would the indenture bind all the worshippers at the temple?

6. Is the compound wall, the door-way (E, F in the plan annexed to the plaint) in which is now closed, the property of Atash Behram or part of the adjoining Dare Meher? Have the defendants the right to close the door-way?

7. Can the plaintiffs claim any relief with reference to the wall independently of the trustees of the Dare Meher?

8. Are the plaintiffs entitled to have the door-way E, F kept permanently open by reason either of long usage or any right on the score of inconvenience to worshippers?

9. Does the daily closing of the doors B, C and D between 8 P.M. and 6 A.M. interfere with or cause inconvenience to any religious rites performed by the plaintiffs or by the Parsi worshippers in general?

10. Are the plaintiffs entitled to all or any of the reliefs (a), (b), (c), (d), (e) asked in the plaint?

11. Is the suit bad for non-joinder of Motlibai's heirs?

12. Is it bad in its inception for want of the Advocate General's permission or owing to its being brought in an inappropriate form?

13. Is not the plaint sufficiently valued and stamped for the purposes of the Court-fees?

On these issues the learned Subordinate Judge found as follows:—

My finding on the first issue is that the Atash Behram or the sacred fire called the Iran Shah and the building and other property belonging to it have vested in the Parsi inhabitants of Udwada, and that they, or the nine priestly families of Udwada, as delegates of the Parsi inhabitants of Udwada, have exercised absolute authority in regard to the maintenance and administration thereof from the time when the sacred fire was brought to Udwada.

My finding on the second issue is that Dadabhai Pestonji of Bombay who built the old Atash Behram in 1830 was not invested with the management of the Atash Behram owing to his having built and enlarged the fire-temple; that the nine priestly families were not bound to Dadabhai to render services only to the sacred fire and that the said Dadabhai did not transfer any of his powers of management to the defendants.

My finding on the third issue is that the dissent of defendant Behramji Pestanji Bharda will not affect the plaintiffs' right of management.

My finding on the fourth issue is that when Motlibai constructed the new building she acquired the right of seeing that the fire-temple with the compound and other buildings attached to it, together with the censor and other things placed by her in the fire-temple, were used for the purposes for which they were intended to be used; that the buildings were duly repaired at her cost; that the rites and ceremonies intended to be performed on her behalf and at her cost

1903.

NOVROJI
MANDEJI
WADIA
v.
DASTUR
KHARSEDEJI
MANCHEHEJI

1938.

NAVROJI
MANKERJI
WADIA
v.
DASTUR
KHARBEJI
MANGHURJI

were duly performed, and that the things that were not intended for daily use were lodged in a room in the fire-temple under safe and proper custody.

My finding on the fifth issue is that Motlibai was entitled to confer on her trustees the rights or powers mentioned above, and that she was not entitled to confer on her trustees the powers of making rules and regulations for the due government of the trust premises, and that the indenture made by her (Exhibit 141) is not binding on the worshippers so far as it confers rights or powers in excess of those possessed by Motlibai herself.

My finding on the sixth issue is that the compound wall in which the door-way E, F is belongs to the Darch Meher and that the defendants had no right to block up the door-way.

My finding on the seventh issue is in the affirmative, that is, in favour of the plaintiffs.

My finding on the eighth issue is that the plaintiffs are entitled to have door-way E, F permanently kept open, not by reason of long usage, but under the right acquired by them and on the score of inconvenience to the priests and worshippers.

My finding on the ninth issue is in the affirmative, that is, in favour of the plaintiffs.

My finding on the tenth issue is that the plaintiffs are entitled to obtain the reliefs (a), (b), (c), (d) and (e) as shown in the decretal part of this judgment.

My finding on the eleventh issue is that this suit is not bad for non-joinder of Motlibai's heirs.

My finding on the twelfth issue is that this suit is not bad in its inception for want of the Advocate General's permission or owing to its being brought in an inappropriate form.

My finding on the thirteenth issue is that the plaint is sufficiently valued and stamped for the purposes of the Court fees.

The suit, however, must be determined by reference to the causes of action alleged in the plaint, and it appears to us that the learned Judge has somewhat gone beyond these limits. As far as we can, we propose to confine ourselves to those matters that arise out of the causes of action alleged. When it is seen what they are, one can readily appreciate the observation of Khan Bahadur Bananji Behramji (page 122) who says:—"Most of our Parsi community is displeased at the quarrel brought about for this trifling matter by the closing of this door." We sympathise with this view and we can well understand that the Parsi community should view with regret the bitter and costly litigation which the record discloses. But whether it be, as the Advocate General suggested or not, that the true meaning of

this litigation is that it is an endeavour on the part of the 4th defendant (Bharda) to aggrandize his position, using as his tool for that purpose the 1st defendant, Nowroji Wadia, matters not; the parties have declined all suggestion of amicable settlement, and we must endeavour to determine their rights according to law.

We propose then to consider, first, whether the defendants in any way acquired rights which entitled them to do the acts complained of, and if not, then, secondly, whether the plaintiffs have any right to sue in respect thereof.

The defendants' case is that by the deed-of-settlement of the 2nd of September, 1896, "they are fully and properly clothed with authority to make rules and regulations for the efficient and due management of the Atash Behram and all the buildings appurtenant thereto, and that the said Bai Motlibai had power to invest the defendants with such authority—a power inherent in the very conception of the endowment made by her." (Written statement para. 12).

Motlibai, it is argued, by her benefaction became invested with the rights of a founder, and acquired by transmission the rights over the temple and its appurtenances which had previously been in Dadabhai, the restorer who preceded her, and also we presume in all previous restorers of the buildings. In support of this view *Doe d. Howard v. Pestonji*⁽¹⁾ has been cited, but in our opinion that case turned on its own peculiar circumstances and has no application here. According to Dr. Edalji Kharsedji's description of a somewhat excited interview, the defendant, Nowroji Wadia, seems at one time to have advanced even a claim of ownership, for, in the words of this witness, the 4th defendant then began to abuse the Anjuman and said as follows:— "What right have they to *my* Atash Behram? The offerings that are made there are also mine" and beating his breast (*i. e.*, emphatically) he bawled out "mine, mine." Of the terms of the original foundation we have no evidence: it is even uncertain from whom the site of the first building was obtained; for while some of the witnesses depose to a tradition that the spot

1908.
 NOWROJI
 MANEJI
 WADIA
 v
 DASTUR
 KHARSEJJI
 MANEJI.

(1) (1852) Perry O. C. 535.

1903.

NAVROJI
 MANUSJI
 WADIA
 v.
 DASTUR
 KHARSEDIJI
 MANCHERJI.

was given by the Raja of Mandvce, the defendant Bharda denies it (pages 87, 91, 108, 120, 248 and 275 of the printed appeal book).

There is a similar lack of precise information as to the conditions of the subsequent rebuildings, at any rate, until we come to the Wadia restoration of 1830. According to the evidence of Mr. Bamanji Behramji, who appears to have made a special study of Parsi customs and usages, "the man who dedicates the building can look after the building and repair it himself. Any one else can also repair it, as it is thought to be a very pious purpose. If one consecrates the fire himself, he can keep control over the fire also, but this Udwada fire was consecrated by others, and so no one can control it. The person who dedicates a fire temple can see that it is used for the pious purpose for which it is built, and is not used to any other purpose, or is not damaged or injured. Those who built the fire temples at Udwada entrusted them to the Mobeds of the nine families who consecrated the Iran Shah. None of them have kept any rights of ownership over the same after dedicating them to the Iran Shah. This is in reference to the fire temples other than the present one. Motlibai's son Nowroji claims to have some rights over the present fire temple. He can look after the building and repair it, but he cannot do anything else with reference to it. According to our rules of morality, as long as the dedicator wants to repair it he has the preferential right over others. If any one else wants to make any addition to the fire temple with the consent of the Anjuman, he can do so. He cannot control the use of the building by the Mobeds for the religious purposes in any particular way. It is the power of the Mobeds of the nine families, who have kept this sacred fire for so many years, *to control the use of the building.* None of the old donors of the previous fire temples of Udwada controlled the religious ceremonies in reference to the sacred fire. It is the business of the Mobeds who perform the ceremonies there to decide what door is to be closed or kept open and when, and not of the donor of the fire temple. The latter cannot do it." This preferential right of repair thus attributed to a founder corresponds with the usage which, according to Mr. Mandlik, prevails among the Hindus, who allow the same right to the founder and his heirs. But there is no suggestion that Motli-

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

on a site belonging to himself; and Exhibit No. 195, dated the 14th October, 1862, suggests the inference that in rebuilding he to some extent utilized portions of the then existing building. That the temple premises were enlarged on that occasion is probable, but what portion of the present site was then acquired it is impossible to tell. The first question we have to ask ourselves is, whether Dadabhai acquired any rights of property then over that which already formed part of the temple premises. We fail to see how he acquired any ownership. It has been argued before us that the original builder in Udwada must be assumed to have retained the ownership of the building furnished by him for the habitation of the sacred fire and of the site on which it stood, and that these rights passed to each successive rebuilder. But we can find no warrant for any such assumption.

We know of no such course of transmission or devolution in law, and the circumstances manifestly do not invite the application of those legal principles which operate in favour of one who in mistake is allowed to expend money on the property of another.

True money was spent, but "endowments to the sacred fire are looked upon by the Parsis as acts of great piety" is the testimony of Sir Dinshaw Petit (page 240), and "it is very pious," says Mr. Bamanji Beheramji (page 119), "to offer articles to the fire and dedicate buildings also to it." In the piety, therefore, of the act, and the reward that piety was doubtless expected to attract, we have sufficient motive for the expenditure to absolve us from the obligation of speculating what material return Dadabhai Wadia looked for. It may be that the documentary evidence discloses much that is consistent with the recognition of a complete control in Dadabhai over the temple and its appurtenances, but it does not follow from this that Dadabhai was clothed with legal rights entitling him to intervene to the extent he did. It must be borne in mind how matters stood: here was a wealthy benefactor who had done much for the establishment and from whom more might be expected: was it not but natural that every deference should be paid to his wishes, at any rate so long as they did not in the view of the local establishment conflict with the welfare of the temple and its services? We certainly think so. Moreover, it is to be noted that the control Dadabhai

exercised was until 1863 through the Dastur alone, and that when trustees were appointed the persons selected for that purpose included the Dastur for the time being.

No doubt the Dastur Mancherji was deposed from that position, but even then the trustees were chosen from the community of Udwada.

Now let us examine the events that led up to and are connected with Motlibai's restoration. Dadabhai was dead and his son's means did not permit of his doing the work; so in the first instance it was determined by the Anjuman to raise the requisite funds by an appeal to the Zoroastrian public. The subscription list circulated is Exhibit 114 (page 482) and it is in these terms:—

“As to the large building of the Dare Meher appertaining to the holy Atash Behram Saheb (Iran Sha) of Udwada in which at present Atash Behram Saheb (*i.e.*, Sacred Fire) has been installed, and the building of the Nahankhana Dare Meher opposite the same which is in use at present as to the both these buildings the same were got rebuilt and given by deceased Wadiaji Saheb Seth Dadabhai and Seth Mancherji Pestonji Wahadiaji, inhabitants of Bombay, at their own expense in the Yezdezardi Shehenshai year 1199 (A. D. 1829-30). And a large sum for the necessary expenses in connection with the Atash Behram Saheb such as (the expenses of) sandalwood to be used at the time of performing the *Boi* ceremony in all the five *Gehes*, of daily firewood and of the salary of the Jadukhush Mobed (working) in the Dare Meher and for other expenses has been regularly received every year since the said Yezdezardi Shehenshai year 1199 (A. D. 1829-30) up to this day from them and after their (death) from Seth Meherwanji Dadabhai Wahadiaji, the son of (one of) them. And in order to make all the said expenses in such manner as is settled and in order to look after the said buildings, five worthy persons from the Athornan Anjuman (*i.e.*, community of Parsis belonging to the priestly class) of Udwada have been appointed trustees and (the buildings) have been entrusted under their care to the ownership on the Anjuman (*i.e.*, community). The Anjuman (*i.e.*, community) of Udwada are extremely obliged to the said family, generous at heart and staunch in religion, for the same.

“2. Before the buildings (mentioned) above were got built and presented by Wadiaji Saheb, that is to say, at the time when the band of Sanjana Mobeds (*i.e.*, priests) came for the first time to Udwada along with the Atash Behram Saheb, the deceased Behdin (*i.e.*, Parsi layman), Minocher Bahman of Nargol had, at first, got built and presented one small building and thereafter one Zoroastrian of Surat (namely) the deceased Behdin (*i.e.*, Parsi layman), Bhikaji Edalji, had made additions to and got built and presented the same. The help (given) by those generous persons is fresh in the memory of the Zoroastrian Anjuman (*i.e.*, community) of Udwada.

1938.

NAVROJI
MANEKJI
WADIA
c.
DASTUR
KHARSEJJI
MANCHERJI.

1903.

NOVROJI
MANEKJI
WADIA
DASTUR
KHARSEDJI
MANGHERJI.

"3. A long period of sixty years has elapsed since both the buildings mentioned above were built. During the said (period) it was necessary to repair them once (or) twice, which was also in accordance with the request of the Anjuman (*i.e.*, community) got done by Wahadiaji Saheb at his own expenso.

"Both the buildings (mentioned) above having now become very old have been reduced to a condition which requires thorough repairs. It is absolutely necessary to do the same. Not only that, but if (the buildings) remain in the present condition for a longer time there is, may God not so will, a very great danger of the result being any day very dreadful and sad. Moreover, the Anjuman (*i.e.*, community) perceive with regret that it is not that the work can now be managed by making small repairs as (was done) previously and it is not likely that the necessary work can be done by one hand (person). Therefore the Anjuman (*i.e.*, community) of Udwada having taken the opinion of their kind well-wishers in connection with the said extremely necessary work, honour (accept) the proper and sound advice received from those gentlemen, and depending upon the same make a Tharav (*i.e.*, resolution) that for making repairs allow to both the said buildings, especially to the big Daro Meher (building) appertaining to the Atash Behram Saheb, and for making changes suitable to the present time, a list of subscription should be set on foot on behalf of the Zoroastrian Anjuman (*i.e.*, community) of Udwada; that the said list should be circulated amongst generous and religious Zoroastrian gentlemen and that money is necessary for making repairs to both the buildings should be collected. Moreover, in the above work the respected family of the kind Wahadiaji Saheb should be joined with the Anjuman (*i.e.*, community) and the grateful connection of the said religious family with the Anjuman (*i.e.*, community) of Udwada should be continued for ever.

"The kind Wahadiaji Saheb Merwanji has with great pleasure supported the Tharav (*i.e.*, resolution) of the Anjuman (*i.e.*, community) mentioned above and has shown great pleasure at the proper Tharav (*i.e.*, resolution) of the Anjuman to put up any tablet or writing whatever on the said buildings hereafter just as his deceased patrons (*i.e.*, forefathers) had not deemed it proper to put a tablet or any written token whatever bearing their names at the time they dedicated the said buildings to the Holy Kebla of the Atash Behram Saheb and has accepted with pleasure his association with the Anjuman (*i.e.*, community) in the said extremely useful work of great religious merit. Besides that the Anjuman (*i.e.*, community) of this place had great doubts as to accomplishing this difficult work single-handedly, but on account of the person looking to the said Holy Kebla with a staunch faith, the well-wisher of the Anjuman (*i.e.*, community) of Udwada (namely), the illustrious and generous Setji Saheb Sir Dinshaji Manekji Petit, Baronet Saheb, having, with his usual greatness of heart, promised to give with pleasure every possible succour to the Anjuman (*i.e.*, community) in this work of great religious merit and, moreover, on account of this disinterested and illustrious person (having shown) anxious care on every occasion to make out the very first scheme relating to this work of very great religious merit and to see this work accomplished soon, the Anjuman (*i.e.*, community) had, in the life-

time of their well-wisher and leading member of the deceased respected Seth Saheb Manekji Kawasji Damanvala, under his leadership and by his sound advice and in consultation with him, already set on foot this work and after his unfortunate demise the Anjuman (*i.e.*, community) have continued the said work under the leadership of his son Seth Sorabji Manekji Damanvala and are anxious to see the same now carried out.

"To those who may have subscribed at Bombay a receipt bearing the signature of Seth Nasarwanji Beheranji Secretary will be given in respect of the moneys subscribed towards the said fund that may have been recovered and the said moneys will be kept as a deposit with the trustees of the illustrious Parsi Panchayet of Bombay. In the same manner a receipt bearing the signature of Bhai Behramji Pestonji Tajdiarji Bharda will be given in respect of the moneys recovered at Udwada and the said moneys will be credited at the firm of the respected Seth Saheb Manekji Kawasji Damanvala, deceased, with Sorabji Manekji Damanvala under his care, and when a sufficient sum has been collected the same will be remitted from that place from time to time for being kept as (mentioned) above with the trustees of the illustrious Parsi Panchayet of Bombay as a deposit, and after a sum sufficient for the said work has been collected the moneys thus deposited will be utilized.

"After giving publicity to the above facts for the information of the religious gentlemen belonging to the Zoroastrian community, the Zoroastrian Anjuman (*i.e.*, community) of Udwada through the undersigned persons on their behalf most humbly request the Zoroastrian world (community) and entertain an anxious hope that every religious Zoroastrian will give his sympathetic support towards this useful work of religious merit of the first grade (that is) of repairing the holy building of his ancient Kebla, will extend his generous hand and will acquire great religious merit of having given assistance to (the work of repairing) the buildings appertaining to this most ancient Atash Behram Saheb of India." (Commented on.)

Some subscriptions were actually obtained, but ultimately the whole cost of the rebuilding was undertaken by Bai Motlibai. The old building was then pulled down by the Anjuman and sold for Rs. 1,950 (see page 137).

Here it is instructive to follow the documents that passed in reference to the rebuilding by Motlibai. (His Lordship referred to Exhibit 257, 31st January 1903, page 635; Exhibit 124, 22nd April 1893, page 501; Exhibit 123, 31st October 1894, page 499; Exhibit 126, 31st October 1894, page 506; Exhibit 105, 31st October 1894, page 461; Exhibit 188, 20th October 1895, page 514; and Exhibit 137, 26th October 1895, page 512.)

The circumstances under which Bai Motlibai came to rebuild the temple appear from Exhibits 257 and 124. (His Lordship referred to and commented on these Exhibits, pages 635 and 510).

1903.

NOYROJI
MANEKJI
WADIA
2.
DASTUR
KHARSEDI
MANOHERJI.

1902.

NOVROJI
MANEKJI
WADIA
2.
DASTUR
KHARSENJI
MANCHERJI

The result was that the rebuilding was carried out by Bai Motlibai, who considerably enlarged the buildings, purchasing for that purpose additional land.

By October the work was completed, and on the 31st of that month the opening ceremony took place. Motlibai on account of her advanced age was unable to be present, but she was represented on the occasion by her two sons, the defendants N. M. Wadia and N. J. Wadia. An address in Motlibai's name, Exhibit 123, was read. (His Lordship referred to it, page 499.)

We find then (1) it was at the request of the Zoroastrian Anjuman of Udwada that Motlibai undertook the work; (2) the old temple is stated to have been *given* by the Wadias; (3) the new building is presented; and (4) the motive of the gift is explained. An address was also read, signed by the head of the Zoroastrian community of Udwada. (His Lordship referred to Exhibit 126, page 506).

On the temple a tablet was placed bearing a Gujarati inscription, of which following is a translation:—

“The Atash Behram Iran Shah of the Shenshahi Zorthosti Anjuman was consecrated at Shri Sanjan by the first band of Zoroastrians who came from Persia to India in the Yezdezardi year. The Athornan (priestly) class at Udwada attends to the same. The first building for the same was got built at Udwada and presented by Behdin Mancherji Bamanji of Nargol in the Yezdezardi year 1112 (A. D. 1742). The said building was extended and built and presented thereafter by Behdin Bhikaji Edulji, an inhabitant of Surat, in the Yezdezardi year 1121 (A. D. 1751). The same was subsequently extended and rebuilt and presented for the third time by Seths Dadabhai and Mancherji Pestanji Wadia, inhabitants of Bombay, in the Yezdezardi year 1190 (A. D. 1829-30). As the building got old it was this fourth and last time built by Bai Motlibai Maneckji Wadia, an inhabitant of Bombay, daughter of the deceased Seth Jehangir Nasarwanji Wadia, for the benefit of the soul of her deceased husband Seth Maneckji Nowroji Wadia, after purchasing some pieces of land (situate) about the same at a total cost of Rs. . . . and given into the possession of the Anjuman through the trustees of Udwada and the holy Iran Shah Atash Behram was installed in the new building on Meher the 16th day of Ardibehesht, the second month of Shehenshahi Khordad, the third month Kadmi, in Yezdezardi year 1264 (corresponding with the English date the 31st October in the year 1894) and the day of the week. . . .

Mr. Dinska Dorabji Mistri, N. S. A., Architect.”

Here then it is distinctly said that the new building *was given into the possession of the Anjuman*, or into its charge, if we use

the rendering given to similar language in the inscription on Sir Dinshaw Petit's Dare Meher. This language does not point to the retention of any interest or ownership by Motlibai. On the contrary, it is more in harmony with the renunciation essential to the completion of an act of similar piety on the part of a Hindu benefactor.

On the 20th October, 1895, certain Parsi priests of Udwada addressed to Bai Motlibai a document, Exhibit 128 (page 514), in which they speak of the obligation conferred by her on them "by getting a new building built and by *presenting* (the same to us)." The memorial goes on to complain of the conduct of the Udwada committee in placing padlocks and erecting a tablet without taking the opinion of the Anjuman and that the inscription on the tablet was incorrect. It then states that they had given the old building into the charge of Motlibai without a tablet or inscription, and that they should receive it back in the same manner.

To this Motlibai wrote, as a reply, Exhibit 127:—

To Mobed Bhikhaji Diniarji Oonwalla and other Signatories at Udwada.

Written from Bombay by Bai Motlibai, daughter of Jehangirji Nasarwanji Wadiaji, whose blessings be pleased to read. To wit:—As to the memorial written by you Mobeds on Roj the 5th, Maha the 2nd in the Yezdezerdi year 1265 (20th October 1895) I have received the same. In it you have written to the effect that there are some defects in the Atash Behram Saheb premises and the Nahanakhana and (other) premises appertaining to the same at Udwada built by me and you have stated to remove them when they are repaired again. About this I state that I shall do as it pleases me. The Mobeds should not interfere with me in the matter.

And you write further that the old building was entrusted to your Anjuman (community). That statement of yours is quite false. The old building was entrusted to me by the owner thereof Wadiaji Merwanji, who was my relation through his trustees. And it was only after a special condition was made to put up inscription slabs and to build as I like that I consented to get these premises built. And just as Wadiaji Merwanji gave the old premises to the Anjuman through his trustees in the same way I shall make arrangement to give the new premises also through trustees of my selection. There is nothing new therein.

Re the Na(ha)nakhana premises you write in the present memorial that they are built too far on the rear. But I have seen them personally. The same have been approved of by all.

The compound wall of these premises remains to be built. I shall consult my engineer in connection with this and other works. The Dasturs and (other)

1903.

NAVROJI
MANEKJI
WADIA
DASTUR
KHARSEDDJI
MANOHERJI

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSETJI
MANCHERJI.

leading persons at Udwada are more desirous than you are to preserve the privacy of the premises. This is my firm conviction.

Some Mobeds of Udwada who are wanting in sense act improperly in connection with my premises which you even praise and with the Mobeds who perform ceremonies therein. Likewise they wrongly find fault with the service of the sacred Kebla (Fire) which is the very essence of their life and hurt the feelings of those who come from up-country. I am sorry to note this.

But it does not become you poor Mobeds to do so. If you work peacefully and harmoniously you will get your livelihood. And the Zoroastrian who come over to your quarter being pleased you will derive benefit.

And I shall (make) and carry on arrangements in connection with my new premises as it pleases me or I shall get the same made. Please note that. At present this is the only representation.

Dated at Bombay the 26th October in the year 1895.

Please to read the wishes of Motlibai.

On the 2nd of September, 1896, the trust-deed on which the defendants' trustees rely was executed. The parties to it were Bai Motlibai of the one part and the defendants Nowroji M. Wadia, Nusserwanji Wadia, and the defendants Kawasji Kharsetji Jamsetji (now known as Sir Jamsetji Jijibhai), Jeejeebhoy Merwanji Wadia and Byramji Pestonji Bharda of the other part.

Thereby Motlibai conveyed to the trustees the premises described in the first schedule thereto upon trust "at all times to permit the same to be used as a place for public worship by all persons of the Zoroastrian Faith and for the celebration of all rites and ceremonies of the Zoroastrian religion as hitherto observed." It was further declared that the trustees should stand possessed of the securities therein specified, amounting in nominal value to Rs. 61,000, upon the trusts therein declared. And it was thereby further agreed and declared that it should be lawful for the trustees to frame rules and regulations for the due government of the trust premises with power from time to time to rescind or alter the same and the rules for the time being, and, if thought necessary, to substitute new rules and regulations in lieu thereof.

It is by virtue of the powers thus expressed to be vested in them by this deed that the defendants justify their action in the matters of which complaint is made in this suit. The words of the deed are no doubt wide, but even if they were wide enough to cover what has been done, was it within Motlibai's authority

to vest her trustees with those powers? It is, we think, clear that Motlibai's rights could not be increased by any provision contained in that deed; she and her trustees alone were parties; the Anjuman was neither directly or indirectly a party to it, so that so far as it had any rights in the temple it clearly could not be affected. Motlibai's rights, if any, were such as arose from the expenditure incurred by her in connection with the rebuilding of the temple. But what were those rights? There can be no question that when one expends money on the land of another, rights even of ownership may thereby arise in his favour; but for this result certain well-defined conditions must be established, which are absent in this case.

Motlibai knew that the land on which she built was in part at any rate not hers, nor can we see that the Anjuman of Udwada at any time acted in such a way as to encourage in her the belief that she would acquire such rights as would entitle her or any one claiming under her to do that of which the plaintiffs complain. We would even go further and say that the evidence does not satisfy us that Motlibai ever entertained the belief at the time when she undertook the work that she would acquire the rights that are now set up. It is true that she has spent a very considerable sum of money in connection with the temple, but it appears to us that the reasonable inference to draw under the circumstances is that she incurred that expenditure, not in the belief that she was thereby going to gain any proprietary rights or temporal advantage, but that she looked for her reward in the religious merit of the act performed by her, and that appears to us to be a sufficient explanation of her action. It may be that she expected that she and those claiming under her would become entitled to a preferential right to effect any repairs or any restoration that might become necessary, but that is far short of what is now claimed by the trustees.

Now let us for a moment examine somewhat more closely what precisely it is that the defendants have done. In the first place, then, they have built a wall on a part of the temple premises, forming no part of the temple itself. The site of this wall according to the evidence never vested in Motlibai or her trustees, nor is it shown, if that be material, that it ever vested in Dadabhai.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARIBHAI
MANOJIBJI.

1908.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDDJI
MANCHEERJI.

This wall obstructs the passage between the temple and the Dare Meher, which had been in existence from a time prior to any expenditure by Motlibai; it was in fact a disturbance of the state of things existing at the time when Motlibai came on the scene. Though the inconvenience caused by this interruption of the means of communication between the two premises may not be of great moment, still it is an interruption, and is the cause of some inconvenience, and we fail to see what right the trustees had thus to build on property not vested in them. In our opinion it affords no sufficient justification for their action to suggest that it was a necessary precaution for the purpose of protecting the Atash Behram from the petty thefts, of which we have been told, or of preventing the acquisition of right of way, a suggestion that probably owes its origin to the ingenuity of those who have been entrusted with the conduct of the defendants' case. Had the object been to secure the Atash Behram against either of these suggested perils, then the end could have been secured by less drastic methods than those actually adopted. Therefore we hold that the trustees were not justified in erecting the wall in respect of which relief is sought.

Then how do matters stand in relation to the doors which have been closed by the defendants? They are three in number and all afford means of access into the temple. One is in that part of the outer wall of the temple which stands on the site of the old temple wall; the other two are in the wall which stands on property acquired by Motlibai and form no part of the old temple premises. The first of these doors has been throughout referred to as B, the other two as C and D, and we will continue this mode of reference.

We will first deal with B: it is at night time the only means of access from the temple to the well at the south-west corner of the temple compound, and this has been conceded before us by counsel for the defendants in the course of the argument. In the old temple there was a door similarly placed by means of which those officiating in the temple had access to this well. What right then had the trustees to lock the door B and thus interfere with this established means of access? This part of the temple premises was not vested in them, so that they cannot

claim to have done it by right of legal ownership. The free and uninterrupted use of this door seems to us to be necessary for the enjoyment of the temple and its premises in the manner in which the temple has been always enjoyed, and we cannot see that the trustees had any right to disturb that enjoyment. Their rights must be measured by what is required to safeguard the interest of Motlibai and her heirs, and what has been done by them in reference to the door is, in our opinion, in excess of that and therefore unjustified.

The legal position of the other two doors is somewhat different, for the part of the building in which they are stands on land acquired by Motlibai, and conveyed by her to her trustees. But though they stand outside the limits of the old temple site, they do form an integral part of the temple, the privilege of building which was entrusted by the Anjuman to Motlibai. This lady restored the temple as one entire building without distinction as far as one can see between one part and the rest; these two doors were placed in the temple as rebuilt by Bai Motlibai, and presumably were so placed as being necessary to its full and proper enjoyment. No adequate reason has been placed before us in justification of the obstruction, and it appears to us that the defendants' conduct with regard to these two doors has been wrongful.

So it now must be seen whether the plaintiffs are entitled to maintain this suit.

The first argument urged on this point for the defence is that the suit is based on ownership, and that a fluctuating body of persons, such as the plaintiffs claim to represent in this suit, is incapable of property. We are not prepared to assent to the proposition that in this country a body such as we have represented before us is incapable of property, for even if we pass by the alleged ownership of property by a caste as not being definitely established, there can be no doubt that the village community is capable of property, and in Yajnavalkya we have a distinct recognition of ownership by a fluctuating body, for in Chapter II, v. 187, it is said: "whoever appropriates what belongs to the community.....shall be made to forfeit his property and be banished the realm." The commentary in the Mitakshara on

1903.

 NAVROJI
 MANEKJI
 WADIA
 &
 DASTUR
 KHARSEJI
 MANGHERJI.

1923.

NAVROJI
MANEKJI
WADLA
v.
DASTUR
KHAISEDJI
MANOCHERJI.

this verse is, "whoever appropriates what belongs to the community, *i.e.*, anything which is the common property of all the villagers collectively and the like bodies." We take this passage from the *Mitakshara Vyavahara Adhyaya* translated by Mr. Girish Chandra Tarkalankar. Moreover that property may belong to a village is recognized in the Judgment of the Privy Council in *Sivaraman Chetti v. Muthaya Chetti*.⁽¹⁾ But it really is unnecessary to go into this question because it is a mistake to say that the suit is based on ownership alone; from the plaint it is clear this is not so. As we have already pointed out, the allegation in the plaint is not only that the Atash Behram is vested in the Parsi inhabitants of Udwada, but that they have from time immemorial managed the same and exercised absolute authority in regard to the maintenance and administration thereof as a place of Zoroastrian religious worship and observances (paragraph 1).

It is further alleged that the nine families of the Parsis of Udwada have as of right and from time immemorial been the special delegates of the Parsi inhabitants of that town for the purpose of supervising and managing the Atash Behram and the plaintiffs are members of some of the said families.

The point therefore for our determination is whether these allegations do not disclose a sufficient interest to support this suit, and, if so, whether they have been established. In considering the sufficiency of the allegations regard must be had to the character of the suit and to the interests involved and the legal position of those concerned in the litigation.

It apparently is opposed to the notions of the Parsi community that the Iran Shah should be regarded as capable of, or the subject of, ownership; but even if there be difficulty or doubt as to its ownership, it is obvious that there must be some one entitled to protect from improper invasion that, which for brevity, we will call the temple property, and it appears to us that those who can predicate of themselves that they have exercised the management, authority and supervision alleged in the plaint are so entitled.

The Parsi inhabitants of Udwada are, in accordance with a well known usage which prevails in the community, referred to as the Anjuman of that town. The word Anjuman, according to Wilson's glossary, means among Parsis a constituted council or assembly to which all questions regarding their peculiar customs are referred. Now we have evidence in this case of the existence of an Anjuman as an established institution in connection with this Atash Behram as far back as 1831, for on the 31st of January in that year the two Dasturs "on behalf of the Anjuman on behalf of the Atash Behram Saheb of Udepore purchased a Moglai Huq."

On this circumstance the criticism has been passed that it is uncertain what this Anjuman was; whether it consisted of the whole Parsi community, or of the Parsis of Udwada, or of the Mobeds of that town. Be that as it may, it is sufficient for the present purpose that there was as far back as 1831 a distinct recognition of an Anjuman in connection with the Atash Behram at Udwada.

Then in 1843 a letter (Exhibit 107) was addressed to the Dasturs and "*the whole of the Anjuman*" in relation to a gift of utensils to the Dare Meher of the temple.

In 1860 a document, Exhibit 613, was passed, which records an explanation demanded of the Dastur by the *Udwada Anjuman*, and his reply, and an agreement made thereon. Throughout this document the Anjuman is treated as a body capable of action and it is clear that it included both Mobeds and laymen of Udwada.

In 1863 the Dasturs and Mobeds and Behedins, the servants of the Atash Behram Saheb of Shri Udepore, having in *Samast Anjuman* assembled appointed a committee of 16 with a President and vested them with the authorities expressed in Exhibit 92. The Anjuman is thereby recognized as a Panchayet in connection with the Atash Behram, and this implies the existence of a defined body with rights of supervision (His Lordship referred to the document).

By way of comment on this document it has been said that it is concerned with ceremonial rules and regulations and not with property; but conceding that, its importance is that it is a

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEJJI
MANCHERJI.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

record of an act done by the *Anjuman of Udwada* in relation to the Atash Behram, and is an instance of action taken by that *Anjuman* as a recognized body comprising both Mobeds and Behedins. In 1863 Dadabhai addressed a letter, Exhibit 132, to the "*Sahabs of the whole Anjuman at Udwada*" asking that assistance might be given by that body to the trustees appointed by him.

Then in Exhibit 274 we have a khata of the *Udwada Anjuman*, while Exhibit 460 is an account of the expense of tinning the Panchayet utensils, showing that the *Anjuman* was regarded as owning them. On the 1st of February, 1883, a letter (Exhibit 230) was written by Manekji Kavasji to certain individuals, including a Behedin as well as Mobeds, whom he addresses as "the headmen of the *Zoroastrian Anjuman of Udwada*." In the letter the *Anjuman* is referred to as a distinct body and it is said that it would be laid under a great obligation by the starting of a fund for the expenses of fuel, &c., in connection with the Atash Behram.

On the 27th of February, 1888, a document, Exhibit 116, was addressed to Sir Dinshaw Petit, and among the signatories was the fourth defendant. The subject-matter of the letter is Sir Dinshaw's proposal to erect a new building for the performance of religious ceremonial, and in this connection reference is made to the *Anjuman* as affected by Sir Dinshaw's benefaction. On the 14th of July, 1890, there was issued "an appeal to the gentry and the general public of the Zoroastrian community in connection with the holy Atash Behram Sahab of Udwada" and among the signatories is the fourth defendant. This document (Exhibit 114), in giving a brief history of the case, states that "in order to look after the said buildings five worthy persons from out of the *Athornan Anjuman* of Udwada have been appointed trustees and (the buildings) have been entrusted under their care to the ownership of the *Anjuman*. The *Anjuman of Udwada* are extremely obliged to the said family, generous at heart and staunch in religion, for the same."

Exhibit 115, dated the 10th of March, 1890, is the record of the resolution passed by the "Dasturs, Mobeds and Behdins, servants of the Atash Behram Sahab at Udwada in *Samast*

Anjuman, that is, Panchayet assembled." In the resolution reference is made both to Behdins and Mobeds and at page 491 we have a distinction drawn between the Athornan Anjuman and the Behdin Anjuman.

As being also relevant to the status of the *Anjuman* at Udwarda we have been referred to communications that have passed between Sir Dinshaw Petit and the Anjuman in relation to the Dare Meher (see Exhibit 264, 3rd June, 1891, Exhibit 265, 21st August, 1891, Exhibit 266, 17th August, 1891, Exhibit 267, 1st September, 1893, Exhibit 268, 13th September, 1893, Exhibit 269, 25th April, 1894, Exhibit 270, 9th June, 1894, Exhibit 263, 23rd November, 1894). These documents leave no doubt that Sir Dinshaw Petit, a very influential member of the Parsi community, regarded the Anjuman as a body capable of taking charge of the Dare Meher erected by him, and he acts on that footing.

The same idea is to be found in the tablet placed by him in the Dare Meher (Exhibit 471).

Then again the existence of the Anjuman as a body concerned with the Atash Behram is recognized in the letter written by Merwanji to Motlibai on the 31st of January, 1891 (Exhibit 123), and by Motlibai herself in the document, Exhibit 123, read on the occasion of the consecration of the buildings erected by her, and the same view is asserted in the documents, Exhibits 124 and 125, written to Motlibai and her sons.

The inference then that we draw from these materials and on a careful consideration of the whole evidence in the case is, that the Anjuman was the body that really was vested with the control, management and supervision of the Atash Behram and all that appertained to it.

But then it is said that even if that be so we have not that Anjuman before us as plaintiffs; for that body was not made up of the Parsi inhabitants of Udwarda; that it consisted either of the whole of the Parsi community in India, or of those inhabitants of Udwarda who belonged to the priestly families. But we are clearly of opinion that the first of these contentions cannot be supported; the Anjuman which consists of the whole of the Parsis in India is known by the name of Kulle Anjuman, and we can find nothing in the evidence which leads to the conclusion that

1903.

 NAVROJI
 MANEKJI
 WADIA
 &
 DASTUR
 KHARSEDDJI
 MANCHERJI.

1903.

NAVROSI
MANEKJI
WADIA
P.
DASTUR
KHARSEBJI
MANCHERJI.

the Anjuman vested with the control comprised the whole Parsi community.

It only remains to deal with the argument that the Anjuman mentioned in the evidence consists of the members of the nine priestly families of Udwada. There is nothing antecedently improbable in this view; but in fact we find that, whatever may originally have been the case, the priestly families have themselves now recognized the laymen of Udwada as members with them of the managing Anjuman. Even in this suit we find that the plaintiffs, though members of the priestly families, purport to sue on behalf of the laymen as well as of the priests, and we have a complete recognition of the propriety of this view in the unanimous resolution passed by the Parsi inhabitants of Udwada to which we will later refer.

Even if the defendants' contention on this head had been well founded, it would not have helped them, for we think the narrower community for which they argue is completely represented in this suit. We therefore hold that we have before the Court plaintiffs who are competent to sue in respect of the causes of action on which this suit is based.

But then it is objected that the suit must fail, for the plaintiffs have not obtained the consent of the Advocate General as required by section 539 of the Civil Procedure Code. But with regard to the wall and door B it seems to us that this argument must clearly fail, for in regard to them it cannot be said that even the legal property is in the defendants. It is urged however that this answer does not apply to doors C and D: but assuming this to be so, we think the objection cannot be sustained.

The suit in respect even of these doors is not, in our opinion, one which arises out of a breach of trust so as to be within the mischief of the section. It is a suit for the vindication of the right of management which was vested in and actually being exercised by the plaintiffs and those they represent at the date of the obstruction, and it does not appear to us that the suit falls within section 539 merely because those who cause the obstruction happen to have been nominated as trustees by Motlibai.

Before coming to the actual relief to be granted there is one more matter to be considered. The second of the grounds of

appeal to this Court is "that the Judge of the lower Court erred in refusing to hear or excluding evidence which the defendants proposed to give in support of their case."

Having regard to the inordinate volume of the evidence and the length of the trial, we can well understand the reluctance of the Judge to give any further opportunity to the parties of protracting still further this unfortunate litigation. Still if there be evidence that the defendants were entitled to adduce and it was improperly excluded, their objection must prevail. Mr. Inverarity was asked to formulate the points on which he desired to call evidence, and he thereupon mentioned the following:—

1. The acquisition of the site of the Patel's wall by Dadabhai.
2. Parsi usage as to the management of temple.
3. The points (a) to (h) in paragraph 6 of Exhibit 542.*

* Exhibit 542, paragraph 6, points (a) to (h) :

We, the defendants in the above case, beg to state as follows:—

(6) On behalf of the plaintiffs, matters recited hereinbelow in sub-paragraphs have been stated, and along with others they have been considered to be material and witnesses examined on them, and papers presented in respect of them.

(a) The Sacred Fire of Udwada is of the ownership of the nine Sanjan Mobed families of the village, and they have a right to remove it whenever they like.

(b) The building in dispute and much of the costly furniture in it, over which the late Motlibai Sahab has spent lakhs of rupees, as well as the Dareh Meher building of Sir Dinshaji, have been dedicated to the Sacred Fire belonging to them, and therefore those two buildings, together with the furniture therein, have also come into the ownership of those nine families.

(c) The late Motlibai Sahab has given over the new Atash Behram building, together with the costly furniture therein, to the Mobed Anjuman of the village, and, therefore no right of either Motlibai or her Trustees subsists over it, and the trust-deed is invalid to that extent.

(d) The Udwada Anjuman has given full authority to the present plaintiffs, and so they have the power to bring this suit.

(e) The door in dispute, which was placed in accordance with the desire of the Anjuman, could not have been closed by persons without authority like us, the defendants.

(f) Great inconvenience is caused to the Mobeds who perform the ceremonies and the persons who come to pay their respects by closing of the door.

(g) Mobeds of the nine families have the right to sell off, whenever they like, articles worth thousands of rupees, placed in the Atash Behram for special use.

(h) The usage is that the Mobeds performing ceremonies in all the Parsi religious buildings in India, have the authority to determine how such buildings are to be used

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDDJI
MANOHERJI.

1908.

NAYROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

But the ownership of the site of the Patel's wall is immaterial, and we have expressed no positive opinion on it; and further evidence as to the custom at other Atash Behrams was, we think, properly excluded.

Of the several points named in Exhibit 542 we think (a) does not arise in this suit; (b) is not the plaintiffs' case; (c) raises a question of law on which no evidence is therefore necessary; (d) no evidence is required on this point, and even if it had been, it has now become unnecessary in consequence of the meeting at Udwada which has been recently held; (e) this is a question for argument: no further facts are necessary; (f) this point is to be determined by inference from the facts proved; (g) this point does not arise; (h) it would not be right to send back the case for further evidence on this point.

There is a reference in paragraph 6 to various other minor particulars, but counsel for the defendants, though challenged to do so, was unable to specify any other than those with which we have already dealt. We think, therefore, that the second ground of appeal cannot be sustained.

This brings us to the question whether any and what relief should be given to the plaintiffs in this suit; and here it becomes necessary first to refer to a meeting of the Parsi inhabitants of Udwada held under the direction of the Court after the conclusion of the arguments.

It was intimated before us that if the result of this suit were adverse to the defendants, steps would probably be taken to set aside the trusts of the Rs. 61,000 on the ground that in disputing the control which the deed of settlement purported to vest in the trustees, there had been an election against the deed. As this possibly involved risks to the community, on which it had not

and how are the ceremonies to be performed therein. It does not rest with him who builds the building.

The above and various other minor particulars have been brought in by the plaintiffs in this suit, and they have tried to furnish proofs for the same, but we, defendants, say that these statements of the plaintiffs are entirely wrong, and over and above that some of the Mobeds are thinking of removing the Sacred Fire from the building built by the late Bai Motlibai at the expense of lakhs of rupees. We have got very strong evidence to convince the Court in this behalf, and we, thinking it to be very material, are ready to put it before the Court.

had an opportunity of forming or expressing an opinion, we considered it advisable that the matter should be placed before a duly convened meeting of the Parsi inhabitants of Udwarda, and the result has been that unanimous resolutions have been passed substantially in favour of the suit notwithstanding the risk involved.

The report of this meeting has been recorded and no exception has been taken to it; and the report shows that there was no objection by any one at the meeting to the participation of the Behedins in the matter.

And now we come to deal with the relief to which the plaintiffs are entitled in this suit. The relief sought in paragraph (a) of the prayer to the plaint appears to us to go beyond what is required by the cause of action alleged and cannot be properly granted in this suit. In paragraph (b) the plaintiffs ask for a declaration that the blocking up of the doorway E, F and the closing at night of the doors B, C and D were wrongful acts and not justified by any right or power vested in the defendants either under the indenture of settlement or otherwise, and to this we think they are entitled. Then it is asked that the defendants be enjoined to remove the wall built by them across the door-way; but we think that relief is inappropriate seeing that in our opinion the defendants as trustees have no rights in respect of that wall or its site: to give this relief would be like granting a mandatory injunction against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him. We can however enjoin the defendants from closing the doors B, C and D. The relief indicated in paragraph (e) is in our opinion beyond the legitimate scope of the suit. Practically no argument was addressed to us by the Advocate General in support of the relief granted in the lower Court on paragraphs (a) and (e) of the prayer to the plaint and we think the respondents are entitled to their costs of the appeal. The result is that we disallow so much of the decree of the Subordinate Judge as follows directly on the reliefs sought in paragraphs (a) and (e) of the prayer to the plaint and also the injunction granted for the removal of the wall that blocks up the door-way E, F, but in other respects we confirm the decree of the

1908.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHADEERJI
MANOHERRJI.

1903.

NAVROJI
MANEKJI
WADIA
v.
DASTUR
KHARSEDJI
MANCHERJI.

Subordinate Judge with costs as above indicated, so that the respondents will be entitled to their declaration in respect of the blocking up of the door-way E, F and the closing at night of the doors B, C and D, and an injunction against the closing of the doors B, C and D.

Decree varied.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903.
July 30.

SHANKARRAO GANGADHAR AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. RAMJI HARJIVAN (ORIGINAL DEFENDANT),
RESPONDENT.*

*Evidence Act (I of 1872), section 47—Document—Handwriting—Proof—
Witness proving handwriting.*

In proof of a document a witness stated that he was acquainted with the handwriting of the writer, but he was not asked in examination-in-chief any question which would elicit any of the several matters indicated in the explanation to section 47 of the Indian Evidence Act (I of 1872). The witness was not cross-examined on this point.

Held, that the law on the point is correctly stated in Taylor on Evidence to be as follows:—

“A witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.”

It is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to definite conclusion on adequate materials as to the proof of the handwriting.

SECOND appeal from the decision of J. E. Modi, Additional First Class Subordinate Judge of Thána, with Appellate Powers, reversing the decree of B. S. Joshi, Subordinate Judge of Mahád.

The plaintiffs sued to recover from the defendant Rs. 4 for rent of the piece of ground in suit, situate in the *khoti* village of Nagaum in the Mahad Taluka, for the *Shaka* year 1820 (1898-99), together with interest at 12 annas per cent. per month

* Second Appeal No. 672 of 1902.