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cent. from 14th September till judgment and will be credited with the instalments paid by him with interest from the respective dates of payment at 21 per per cent. on Rs. 1,000 and 24 per cent. on Rs. 50 till judgment. Defendant to pay plaintiff's costs up to 25th July 1907 and the costs which would have been properly incurred in taking a consent decree on the footing of defendant's letter. As to all other costs each party must pay their own.

Attorneys for plaintiff:—*Messrs. Captain & Vaidya.*

Attorneys for defendant:—*Messrs. Craigie, Lynch and Owen.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. September 16.

IN THE MATTER OF THE TRUSTEE'S AND MORTGAGEES' POWERS ACT AND

IN THE MATTER OF HORMASJI FRAMJI WARDEN (DECEASED), HIRJIBHAI BOMANJI WARDEN AND ANOTHER (PETITIONERS).

Will—Gift to charitable purpose—Unnecessary and useless object—Cy-pres doctrine Trust incapable of being carried out at testator's death—Diversion of funds to useful and beneficial purpose—Power of Court.

On the authority of *In re Campden Charities*(1) and of other cases it is clear that when under altered circumstances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor.

Each case in which an application is made to divert charity funds into other channels *cy-pres* must necessarily depend upon its own facts and circumstances and upon the evidences adduced before the Court.

THE facts of this case appear as set out in the judgment.

Padsha for the petitioners.

(1) (1881) 18 Ch. D. 310.

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Raikes (Acting Advocate-General) in person as Advocate-General.

DAVAR, J.:—Hormasji Framji Warden—a Parsi merchant of Bombay—died on the 25th of July 1885 having, previous to his death, executed his will on the 11th of November 1880. By his will the testator, after giving certain legacies, etc., provides as follows:—"My executors and trustees for the time being of this my will shall, if I have not done so myself in my lifetime, purchase an *eligible and commodious* site either at Girgaum or Grant Road without the Fort of Bombay, and shall erect a building and found thereon a *large commodious and comfortable* Hall or apartment for the purposes and uses of Parsis professing Zoroastrian Faith and shall name and style the same (after the name of my venerable deceased father Framji Bomanji Warden) 'The Framji Warden Hall'." For the purpose of building the Hall and providing for it suitable furniture and utensils the testator sets apart a sum of Rs. 55,000. He provides a further sum of Rs. 10,000 for the upkeep and maintenance of the Hall. After the executors and trustees obtained probate of the will they invested a sum of Rs. 55,000 and another sum of Rs. 10,000 in 3½ per cent. Government Loan Notes and deposited the Paper in the Bank of Bombay for safe custody. The account of the first sum was headed "Framji Warden Hall Fund" and of the second sum was headed "Framji Hall Maintenance Fund." The reason for their doing so as given in their petition presented to the late Mr. Justice Tyabji on the 8th of October 1904 is that they found that the sum directed to be spent in building the Hall was found to be "wholly inadequate." In 1900 the trustees say they found a suitable piece of land at Grant Road measuring 4,500 square yards and this land they purchased for Rs. 61,000. This was done 15 years after the testator's death, during which period the funds were considerably augmented by accumulation of interest. As the plot was larger than was required for the Hall and as they got a good offer for a portion thereof they presented the petition I have referred to above and obtained the permission of the Court to sell 950 square yards at the rate of Rs. 18 per

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square yard. Later on they sold a small strip of land admeasuring 67 square yards at the rate of Rs. 31 a square yard. The present trustees now stand possessed of the remaining plot which measures 3,500 square yards approximately and is valued at the rate of over Rs. 30 a square yard. After deducting the price of the land that was purchased and adding the price of the portion of the land sold and the accumulated interest, the amount to the credit of the "Framji Warden Hall Fund" at present is about Rs. 48,500 and "The Framji Hall Maintenance Fund" with accumulated interest now amounts to about Rs. 19,500. The cost estimated of building a large commodious and comfortable Hall is somewhere between ninety thousand and a lakh of rupees. The only fund available for building a Hall is Rs. 48,500.

On the 2nd of February 1907 the present trustees presented a petition to me in Chambers asking me to give my sanction to lease out the land to a Theatrical Company for eight years at Rs. 200 per month to enable the proprietor of the Company to erect a temporary theatre thereon. The trustees hoped that at the end of the eight years by the accumulation of interest on the funds in their hands and the rent which they would recover they would be able to provide a Hall such as the testator contemplated. Twenty-two years had elapsed between the date of the testator's death and this petition, and I was asked to accord my sanction to a scheme which would postpone giving effect to the testator's wishes for another eight years. The proposed scheme did not recommend itself to me and I referred the matter to the Advocate-General asking him to favour the Court with his views and also asked the trustees of the Parsi Panchayet Properties and Funds to give me the benefit of their opinion as to the best means of carrying out the testator's wishes. When the matter came on again before me on the 23rd of March 1907 it was noticed that the Secretary to the Trustees of the Parsi Panchayet Funds in his letter stated that the trustees were of opinion that there were more Halls of the kind contemplated by the testator than the Parsi community required and deprecated the idea of providing another Hall, whereas he pointed out there were other requirements of the community such as hospitals, dispensaries, residences for the poor of the

community which were very badly required by the Parsi community. I made no secret of my own view that a Hall in addition to those already existing would be a superfluity and Mr. Inverarity, who appeared for the petitioners, was also of opinion that, if practicable, the charity land and funds ought to be more beneficially utilised. He asked for time to consult his clients and communicate with the Advocate-General on the subject and I allowed the matter to stand over. After the adjournment the matter appears to have been placed before the Advocate-General, Mr. Basil Scott. On the 9th of April 1907 he wrote to the attorneys of the petitioners that in his opinion the present case was not one in which *primâ facie* the application of the doctrine *cy-pres* was called for. He goes on to say that he is not in a position to judge whether a Hall such as was contemplated by the settlor would be *useless* for the purposes of the Parsi community. He further says that in such matters it is for the Court to decide whether a case has arisen for the application of the doctrine of *cy-pres* or not and then he is good enough to remark that no one could be in a better position than this Court to come to a conclusion upon the point which is likely to give satisfaction to the Parsi community. The Advocate-General concludes by saying that he would offer no opposition if this Court considered that the funds should be applied *cy-pres*. The trustees, after ascertaining that there would be no opposition from the Advocate-General, put themselves in communication with the Secretary of the proposed Parsi General Hospital and after some negotiations the Committee of the Hospital agreed to accept the Charity Funds and utilise them in building and founding an Operation Hall to be called the Framji Warden Operation Hall for Parsis on certain terms and conditions which have proved acceptable to the trustees. They have set forth the whole of the scheme in the first petitioner's affidavit, affirmed on the 18th of July 1907, to which affidavit is also annexed a copy of the Advocate-General's letter to which I have referred above. On the application being made to me in Chambers to sanction this scheme I adjourned the matter into Court for the purpose of recording evidence and I directed copy of the first petitioner's affidavit to be furnished

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to the present Acting Advocate-General inviting him to assist the Court by favouring me with his views when the matter should come on for argument. On the 10th of August evidence was taken and on the 12th of August I have recorded my findings on the evidence. (See my Note Book No. 7 of 1907, page 149.) The witnesses examined before me were men who represented the views of all sections of the Parsi Community and had exceptional opportunities of knowing the wants and wishes of the community. Their evidence left no doubt in my mind that since the death of the testator the accommodation for the performance of marriages and Navjotes, and holding festivities on auspicious occasions or in connection with religious ceremonies such as Jasans and Ghambers which had existed at the time he made his will and before he died has been considerably enlarged, improved and added to and now the Parsi community have already more Halls and places of the kind contemplated by the testator than the Parsis required. All the witnesses were unanimously of opinion that another Hall would be "*useless*" to the community and that moneys expended in erecting another such Hall would be moneys wholly wasted and thrown away. The witnesses were also of opinion that a General Hospital for the exclusive use of the Parsis was a great want in the community, and I found on the evidence that the diversion of these charitable funds would materially help the proposed Hospital for which very nearly ten lackhs are collected from or promised by the members of the Parsi community. Another thing which appeared abundantly clear from the facts placed before me is that a Hall such as the testator contemplated could not possibly be built for another ten years and if the vacant land is not let for those years it would take ten more years before the trustees would have enough accumulation in their hands to build the Hall. The contents of the Advocate-General's letter raised doubts in my mind and although fully sympathising with the desire of the trustees and petitioners to divert the charitable property and funds to some purpose that would be both useful and beneficial to the community of the testator I was most anxious to do nothing that was not permitted by law and which might be a bad precedent

in the future. Those considerations actuated me in inviting Mr. Raikes, the present Acting Advocate-General, to assist me at the argument of the application although Mr. Scott had signified that he would offer no opposition, and he was good enough to appear before me on the 24th of August last without incurring any costs and assisted me by placing before me his views on the subject and I feel indebted to him for this assistance.

The Acting Advocate-General, without desiring to take up any attitude of hostility against the application of the trustees, contended that the *cy-pres* doctrine could only be resorted to when it was found *impossible* to carry out the original directions of the testator that as long as it was *possible* to give effect to the wishes of the testator the Court ought not to allow the charitable funds to be diverted into another channel—and so long as the charity directed by the will *could be carried out* the Court will insist that it should be so carried out and will not allow executors and trustees to say that the charity funds would be so much more beneficially utilised in establishing some charity other than that mentioned in the will of their testator. In support of these propositions the Advocate-General has relied on three cases and it would be desirable to discuss them before proceeding further. Taking them in order of their dates the first of them is the case of *Attorney-General* v. *The Earl of Mansfield* (1) decided in 1826. The point decided in this case was that where a school ought, under the instrument establishing it, to have been a Grammar School for instruction in classics the trustees would not be permitted to convert it into a school for teaching merely English writing and arithmetic. The report of the case is a very long one and I have carefully gone through it. The passage relied on by the Advocate-General is at page 520 and forms part of the observations of the Lord Chancellor, Lord Eldon. He says:—

"But, in giving my judgment, I have no right to look at the propositions, on the one side or the other, as propositions, one of which promises to be more useful to the public than the other; because this Court has no jurisdiction to substitute a better

(1) (1826) 2 Russ. 501.

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proposition for a less useful one, but is bound to carry into execution the trusts of the property, as it finds those trusts to exist."

To understand the true meaning and import of this passage I think it is necessary to read it in the light of and in conjunction with the previous observations of the Lord Chancellor which appear at page 514 of the report. There he says:—

"There have been a great many cases in this Court, undoubtedly, in which when the particular things prescribed to be done could no longer be carried into effect, a change has been made;—a change approaching as nearly as might be, in what can be executed, to that which can no longer be executed; and such change has been sanctioned by the Court; but *if the original trusts are as capable of being executed as this day as at the time of their original creation*, the only question is, whether there was authority to change the nature of the trust?"

In connection with this case the only observation that need be made at present is that the original trust created by the will of Hormasji Framji Warden was wholly *incapable* of being carried out at the time of the death of testator as it is at this date twenty-two years after his death. With the sum of Rs. 55,000 the trustees were utterly unable to acquire a piece of land and build thereon a Hall as they are now unable to build "a large commodious and comfortable Hall" on the land they have acquired with the sum of only Rs. 48,500 which is now at their disposal for the purpose of building a Hall. At the end of another eight or ten years they say they *may* be able to build a Hall if they could succeed in letting the vacant land to some one. If they cannot get a tenant then twenty more years must elapse before they can carry out the testator's original intention.

The next case, cited by the Advocate-General, is that of *Attorney-General* v. *Boucherett* (1) decided in 1858. I do not think this case throws any very useful light on the question now before me. It seems that the settlor of the charity in question in the case by his will directed that Sir Edward

(1) (1858) 25 Beav. 116.

Aschough and his heirs for ever should be "Feoffees in trust and patrons and protectors of the school" which was the object of the charity established by the will. The Attorney-General filed an information against the defendant who claimed to be the heir-at-law of Sir Edward Aschough and as such acted as the visitor and patron of the school—alleging that he was not the heir-at-law and praying that new trustees may be appointed and a scheme may be framed. It appears to have been argued before the Court that the charity would be more effectually and beneficially administered if new trustees were appointed and a scheme framed and the observations of the Master of Rolls are all directed against the suggestion that the charity should be administered by new trustees under a scheme and not by the heir-at-law of Sir Edward Aschough even though the defendant be such heir. The Master of Rolls in his judgment says at page 119:—"If, therefore, a founder of a charity directs that the heirs of a certain person shall be the trustees to administer the charity, so long as they perform the trusts properly, this Court cannot interfere with their discretion in that matter."

The Master of the Rolls undoubtedly does observe "that the Court cannot modify an existing trust;" but it must be remembered that in this case there was no question whatever of the original trusts being carried out and given effect to. In fact the trusts were carried out, the school was established, and no question whatever arose as to the application of the *cy-pres* doctrine and the only question was whether the Court could disregard the testator's express directions as to the management of the trust and appoint new trustees in the place of those appointed by the will. The Master of the Rolls when he speaks of modifying a trust merely refers to a change in its management. As I said before this case throws no light on the question now before me.

The last case referred to by the Advocate-General is the case of *Philpott* v. *St. George's Hospital* [1] decided in 1859. This case and the case of *Re Ashton's Charity* [2], immediately following

(1) (1859) 27 Beav. 107. (2) (1859) 27 Beav. 115.

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it, are very instructive. The Master of the Rolls, Sir John Romilly, having come to what in his own words "would *primâ facie* appear to be opposite conclusions in the two cases" proceeds to explain the principles which in his opinion regulated cases of this description. In the first of these cases a charity was founded for alms-houses for poor men and women reduced by sickness, misfortune or infirmity. A scheme was framed for founding the alms-houses but the Attorney-General desired that an institution in the nature of a hospital should be attached to them. To this the trustees made an *objection* and the Master of the Rolls refused to sanction what appeared to him not to be warranted by the will of the testator. In the following case—*Re Ashton's Charity*—a testatrix made provision for six alms-women and for other charitable objects and she gave the residue of the income to the six alms-women. The income increased very greatly and the question was whether the surplus income should be given to the six alms-women—or whether it should go to the other charitable objects mentioned in the will *or* whether the surplus income should be diverted in establishing some other charity. After directing that a sum of six pounds per annum should be given to each one of the six alms-women and after giving other directions and making other dispositions towards charity the testatrix willed that "the remainder of the rents and profits of the said farm lands and premises should be yearly divided and distributed unto and amongst the six alms-women in the six alms-houses by her built at Dunstable." The Court held that the alms-women were not entitled to the surplus income as the effect would be to defeat the intention of the testatrix by making them cease to be alms-women. It was also held that the other objects of charity were not also entitled to the surplus income but that it was applicable to charity generally and finally it was decided that the foundation of a school was a proper object to which the surplus income could be applied. In laying down the principles on which the Court acts in regulating the application of charity funds the Master of the Rolls states that the Court *will* resort to the *cy-près* doctrine "where a fund is given for *a particular object which entirely fails*" or where the "*charity fails for want of objects.*"

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There is nothing in these cases which in any way is inconsistent with the other authorities which I now propose to consider as to the application of *cy-pres* doctrine to charities established by a will except perhaps that in more modern times the rules laid down in the older cases are a little more relaxed and the Courts entertained applications for the use of powers of the Court under the *cy-pres* doctrine in a more liberal spirit. With the arguments addressed to me by the Advocate-General I agree in the main except that perhaps he puts his case too high when he says that the Court ought not to resort to the doctrine unless the Court is satisfied that it has become *impossible* to carry out the original object of the testator. If the word *impossible* is to be construed in its narrowest sense and if by impossible is meant to convey the impression that the carrying out the original object of the testator is not physically possible under all conceivable circumstances and if it is sought to be argued that then alone the aid of the *cy-pres* doctrine should be invoked, then I am afraid I am not in accord with his views. In cases where the word impossible is used I think it is used in its mose extended meaning. Impossible does not in all cases mean that which it is not physically possible to do In Murray's New English Dictionary based on historical principles, the word is defined as something "that cannot be in existing or specified circumstances," as something "having no possible or real value," and as something "utterly unsuitable or *impracticable*."

A study of modern text-books dealing with the subject of the application of *cy-pres* doctrine to charitable trust and of the cases decided in more modern times both by the English Courts and our Courts in Bombay leads to a clear conclusion that the word "impossible," wherever it is used in deference to the older authorities, is used in the more extended sense as shown above.

The questions for my consideration are under what circumstances will the Court give its sanction to the trustees of a charity authorising them to divert the funds of the charity to objects other than those mentioned by the founder of the charity

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and whether those circumstances have arisen in the present case. The matter before me is one of considerable importance and interest and I propose to consider the law on the subject as it is laid below in authoritative text-books and as expounded in cases decided by the English Courts and our Courts in Bombay.

To begin with, let me turn to a book which though elementary is not the less reliable therefore,—I mean Snell's Principles of Equity. At page 96 (13th edition) I find it stated as follows:—

"Where the literal execution of a specific charitable trust either originally is or afterwards becomes *inexpedient* or *impracticable*, the Court will execute the trust *cy-pres*." It will be noticed that the words used are "inexpedient" or "impracticable" and not "impossible."

In Ashburner's Principles of Equity at page 156 the subject is spoken of as under:—

"Where a gift to charity cannot be carried out in the manner and form intended by the donor, the gift does not necessarily fail . . . . but if the Court can collect from them an overriding general charitable intention, the trust property will be applied to *some* charitable purpose."

Here again there is no indication that the original object of the charity must become impossible of performance before the doctrine of *cy-pres* is called in aid of charity. All that is necessary is that the Court should be satisfied that the original object cannot be carried out in the manner and form intended by the donor.

In Tudor's Charitable Trusts (4th edition) in Chapter V, section 5, this subject is exhaustively treated. At page 141 it is said that the *cy-pres* doctrine would be applied in execution of a charitable trust if "the objects which are named are incapable of being effected;" and at page 142: "The application of the *cy-pres* principle is also required where the object named cannot be carried out."

This subject is also dealt with in Story's Equity Jurisprudence. At page 801 of the second English edition it is stated:—

"Where a charity is so given that there can be no objects, the Court will order a new scheme to execute it . . . and when the specified objects cease to exist, the Court will remodel the charity." At page 809 the learned author while discussing his subject says:—

"How Courts of Equity could arrive at any such conclusion, it is not easy to perceive, unless, indeed, where the nature of the gift necessarily led to the conclusion, that the object specified was a favourite, though not an exclusive, object of the donor."

So far as the English Courts are concerned there seems to be no dearth of decided cases. Most of the cases, however, are cases between the Attorney-General on the one hand and heirs-at-law or next-of-kin of the testator on the other, and the contest has always arisen in those cases by the contention of the latter that by reason of the charity having failed either by failure or want of objects or by the object being against law or incapable of being carried out the funds went back to the testator's estate. Amongst the older cases the case of *Moggridge* v. *Thackwell*,[1] decided in 1802, is a case of great authority. The Lord Chancellor, Lord Eldon, in a very elaborate and interesting judgment discusses the older authorities and says at page 69:—

"I have no doubt, that cases much older than those I shall cite may be found; all of which appear to prove, that if the testator has manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated, shall not destroy the charity; but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."

In no case so far as I have been able to ascertain has this proposition been doubted and dissented from but in subsequent cases the Courts have, if anything, given the most liberal construction to the exposition of the law laid down by Lord Eldon

[1] (1802) 7 Ves. Jun. 36.

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as the result of his consideration of all the then existing authoritative decisions. In 1815 the same Lord Chancellor when delivering his judgment in *Mills* v. *Farmer*(1), referring to this case, says:—

"*Moggridge* v. *Thackwell* was determined entirely by the force of precedents much against my inclination."

In the case of *Mills* v. *Farmer*(1) the testator directed that the residue of his personal estate should be divided for certain charitable purposes mentioned by him and for certain other charitable purposes which he intended to mention later on. He made a codicil, mentioned therein no other charitable purpose and subsequently died never having indicated what other charitable purposes he had in his mind. The Court held that this was a disposition of the residue in favour of charity to be carried into execution by the Court and further held that the Court in executing the trust for charity will *have regard to the objects particularly pointed out by the testator.*

Another case of great interest and importance is the case of *Ironmongers' Company* v. *Attorney-General.*(2) It arose out of a will made in 1723. Legal proceedings commenced in 1833 and did not end till 1844 when the case was finally decided by the House of Lords. The case is reported in its various stages first in 2 Mylne and Keen's Reports, p. 576: then in 2 Craig & Phillips' Reports at 208 and finally in 10 Clark and Finnelly's Reports, p. 908. The progress of this case through its various stages is most instructive reading. The testator in this case gave the income of the residue of his estate upon trust to use a moiety thereof "for the redemption of Britrish Slaves in Turkey or Barbary"—and a quarter of the income "in establishing charity schools in the city and suburbs of London where education is according to Church of England." The remaining one-fourth of the income he gave to the Corporation of Iron Mongers upon certain trusts set out in the will. The moiety of the income set apart for the redemption of British Slaves in Turkey and Barbary accumulated for many years there being no British Slaves to redeem and eventually the

(1) (1815) 1 Mer. 55 at p. 99. (2) (1844) 10 Cl. & Fin. 908.

matter came before the Courts as to how that moiety of income was to be utilised. The House of Lords finally sanctioned a scheme whereby after setting aside a small portion of the funds for the future redemption of British Slaves if there should be any the whole of the accumulations and the income were directed to be utilised in establishing charity schools in England and Wales where education was according to the Church of England. The decision of the case in the House of Lords is most useful as a guide to the Courts as to where the Court should look and what the Court should look to in ascertaining the testator's charitable intentions and objects and to what objects the funds devoted to a charity which has failed for want of objects should be diverted. The Lord Chancellor Lord Lyndhurst (at page 927 10 Clark and Finnelly) says:—

"Let us see what the tendency of his (testator's) charitable inclination was; how it manifested itself. When you find how it manifested itself in disposing of his property, dispose of the charity, the object of which has failed, in a way corresponding with that manifestation."

Referring to the scheme to divert the funds for redemption of slaves into establishing Charity Schools—Lord Campbell at page 929 says:—

"Now I think that that is, if *cy-pres*, at an immense distance from the object that has failed; but still I think it would be by no means for the benefit of the charity to reverse this decree."

The next question that was discussed was whether the charity schools should be restricted to the area "city and suburbs of London" which the testator had indicated for the schools which he directed to be established by his will or whether the area for the schools to be established from the funds belonging to the charity that had failed should be more extended. The Lord Chancellor at page 933 says on this subject:

"It is obvious that one of the testator's great objects was education. We substitute something in lieu of the object which has failed. There was no limit of that to place; . . . . though we limit it to the Church of England, because it is clear he intended that education should be according to the principles of that church."

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That the Courts have not always insisted on being satisfied that the original charity has become impossible of performance before the funds could be diverted into other channels by the application of the *cy-pres* doctrine appears clearly from yet another case of *The Bishop of Hereford* v. *Adams*(1). In that case the Court had before it a will which gave a bequest in trust for the poor inhabitants of several parishes . . . . . to be applied either in money, provision, physic or clothes as the trustees think fit. The fund being very considerable portion of it was on the application of *cy-pres* doctrine used for objects and purposes not expressly pointed out by the will such as instruction and apprenticing of children. The testator's daughter Lady Twysden claimed that all the surplus income of the charitable fund that may remain over after the charitable objects mentioned in the will were fully carried out should be paid over to her The Lord Chancellor speaking of Lady Twysden's claim says at page 329:—

"As to giving the surplus to her, in the present state of the record it is impossible. . . . . Her claim must be on the ground, that the object aimed at is *impracticable in fact*, or, which is the same thing, in law; and, that, the property being undisposed of, she is entitled as next of kin." . . . . "Lady Twysden would have more to do, to get at the surplus, than to say, it could not be practically applied. . . . . If her claim was grounded, not upon the *impracticability*, but upon the *impolicy*, of the object, there will be much more difficulty, before she gets rid of the *cy-pres* doctrine."

The fund being more than sufficient for the original charitable purposes mentioned in the will, the Court sanctioned, in the end, a scheme whereby the surplus funds were directed to other objects such as instruction and apprenticing of children Lord Eldon being of opinion that application of the surplus funds in the proposed scheme being "agreeable to the true construction of the testator's will." It is quite clear from a perusal of this judgment that the Court will call in the assistance of the *cy-pres* doctrine when it finds that the attainment of the

(1). (1802) 7 Ves. Jun. 324.

original objects is "*impracticable in fact*" or where it would be *impolitic* to carry out the original object literally.

The cases cited by the Advocate-General and the cases discussed by me above are more or less ancient cases. In saying this I have not the least desire to minimise their importance. They are valuable guides to the Court considering the same question which was before the Courts deciding these cases. There are many cases on the same subject in more modern times but I do not propose to discuss any of the English cases decided in times more recent except one case because that one is recognised as the leading case on the subject and its importance and authority is never doubted or disputed in any Court. The case I refer to is *In re Campden Charities*. (1) This case is incorporated in Brett's Leading Cases in Modern Equity as a leading case on the subject of the application of *cy-pres* doctrine. Tudor in referring to the judgment of the Master of the Rolls in this case says at page 214 (4th edition):—

"The Judgment of the Jessel M. R. in this case is so important and valuable that no apology is required for quoting it at length."

Before the Court of Appeal this case was most elaborately argued. The judgment of Sir George Jessel reversing the decision of Vice Chancellor Hall is a most lucid and masterly exposition of the principles which ought to govern the Court in deciding questions of the application of the doctrine of *cy-pres*. The Court had before it certain charities established under the respective wills of Viscount and Viscountess Campden made in the years 1629 and 1613 and another charity called "Cromwell's Gift" ascribed by tradition to Oliver Cromwell. The charities were originally directed to be applied "towards the better relief of the most poor and needy people of good life and conversation in the Parish of Kenington" and towards "apprenticing one poor boy or more of the Parish"

The income of the lands devoted to the charities increased enormously and the Charity Commissioners framed a scheme appropriating the income to the following purposes:—

(1) The relief of poor and deserving objects of the Parish in case of sudden accident, sickness or distress;

(1) (1881) 18 C. H. D. 310.

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(2) Subscriptions to dispensaries and hospitals in the Parish;

(3) Annuities for deserving and necessitous persons;

(4) Advancement of the education of children attending elementary schools;

(5) Premiums for apprenticeships and outfits for poor boys of the Parish;

(6) Payments to encourage the continuance of scholars at public elementary schools above the age of eleven years;

(7) Exhibitions at higher places of education; and

(8) Providing lectures and elementary classes.

Power was also given by the scheme to make payments for the instructions of deaf and dumb children. Some of the Parishioners objected to the diversion of the funds for educational purposes.

The Court of Appeal overruling the decision of Vice Chancellor Hall sanctioned the scheme.

The Parishioners had originally petitioned for an alteration of the scheme framed by the Charity Commissioners on the grounds, first, that the scheme diverted to educational purposes a large portion of the income which was originally given for and had always been devoted to elemosynary objects, and, secondly, *that there was no lack of the deserving objects of the charity ready to take under the old mode of applying the income.* It was argued that the scheme varied the nature of the charity which was only permissible where it was clear that the original purpose of the founders could not be attained or carried out and that that was not so in the case before the Court.

It is a noteworthy circumstance that in this case it was never argued that the original mode of expending the charitable funds had become impossible or that the charity had failed for want of objects. The Master of the Rolls in the course of his judgment in the Court of Appeal observes at page 324:—

"The whole of the circumstances of the place have changed... Habits of society have changed, and not only men's ideas have

changed but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete and have fallen into disuse which were prevalent at the times when these wills were made. The change, indeed, has become so great in the case that we are considering, that it is eminently a case for the application of the *cy-pres* doctrine, if there is nothing to prevent its application."

In another place the Master of the Rolls says in his judgment at page 323:—

"In the first place, the scheme is made in pursuance of what is commonly known as the *cy-pres* doctrine, and, in cases like this, it is applied where, from lapse of time and change of circumstances, *it is no longer possible beneficially to apply* the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to *similar* purposes by different means."

In yet another place in his judgment the Master of the Rolls says at page 327:—

"Ought we, sitting here simply to interpret the law, to hold ourselves bound by the words of the will to distribute this large sum of money in doles in this fashion? I think we ought not. As I said before, we must consider not only the change in amount, but the change in circumstances."

In the course of the discussion before me I drew the Advocate-General's attention to this case and to some of the passages I have referred to above. The learned Counsel was not able to point to any more recent cases where the correctness of the principles enunciated in the judgment of the Master of the Rolls have been doubted. It seems to me clear from this case as well as from the other cases that where under altered circumstances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction the Court ought not to hesitate to give its sanction to a scheme which will carry out the

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charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor.

There are not many reported Indian cases on the subject but the case of *Mayor of Lyons* v. *Advocate-General of Bengal* (1) is a leading Indian case on the subject. The Mayor of Lyons as one of the residuary legatees applied for a share in a charity established for the release of prisoners in Calcutta which had failed for want of objects. The residue of the estate was in this instance bequeathed to other charities and it was, amongst other things contended that there was no necessity for the application of the *cy-pres* doctrine as to the charity that failed when the residue of the testator's estate was bequeathed to other charities. The Calcutta High Court held "that the said charitable gift was an absolute charitable gift capable of being applied *cy-pres*; and that the petitioner, as one of the residuary legatees under the will, was not entitled to any of the funds appropriated to that gift." The Privy Council upheld the decision of the Calcutta High Court holding that the *cy-pres* doctrine is not invariably displaced when the residuary bequest is to charity. In delivering the judgment of the Privy Council Sir Montague Smith refers to the cases of *Moggridge* v. *Thackwell* (2) and *Mills* v. *Farmer* (3) which I have discussed in the earlier part of my judgment. Referring to the doctrine of *cy-pres* he says at page 53: "There is no doubt that although strongly disapproved of by Lord Eldon, it was in his time so firmly established, that this great Judge felt himself bound, contrary to his own opinion, to give effect to it." In this case by the application of the *cy-pres* doctrine the funds to the charity that failed were applied to other objects although the testator had devoted the whole of his residue to certain other objects of charity—those other objects being different from the objects to which the funds were diverted by the Calcutta Court.

Let me now turn to our Courts in Bombay and examine what my predecessors and colleagues have been doing when questions

(1) (1876) L. R. 3 I. A. 33. (2) (1802) 7 Ves. Jun. 36.
(3) (1815) 1 Mer. 99.

almost exactly the same as the question now before me were before them. 1907.

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In 1901 Fazulbhai Visram and others filed a suit against the Advocate-General of Bombay and took out an Originating Summons. The suit was numbered 608 of 1901. The plaintiffs stated in their plaint that they were the executors and trustees of the will of one Haji Allarakhia Nathoo—that by the 14th clause of the testator's will they were directed to purchase a piece of land and build thereon a mosque for the use of Khojas and Mahomedans of the Shia Isna Ashre pursuasion—that for that purpose the testator had set apart Rs. 60,000—that after the testator's death a mosque for the use of this sect of Khojas and Mahomedans was built and that there was no need in Bombay for another mosque for the members of the Isna Asari sect. They propose certain alternative schemes for using their testator's moneys for purposes other than those mentioned in the will but akin to those purposes. It is very important to note the language of the questions submitted to the Court for its consideration.

Question (1):—Whether it is *necessary*, *desirable or proper* that the directions contained in clause 14 of the will of Haji Allarakhia Nathoo deceased in the plaint referred to should be strictly carried out.

Question (2):—Whether the literal executions of the trusts in the said clause 14 contained has not *now become inexpedient* and the same ought not to be executed *cy-pres*.

The summons was argued before the late Mr. Justice Starling. On the 7th of October 1901 he recorded evidence which was merely confirmatory of the statements in the plaint and on the following day he made his order. The language of the order again is worth noting:

"Declare that it is *impossible* and *inexpedient* in the existing state of circumstances to carry out the charitable trusts provided for in the clause 14 of the will of Haji Allarakhia Nathoo bearing ate the 24th of November 1898."

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The decree drawn up in terms of the order runs as follows:—

This Court both declare that it is *impossible* and *inexpedient* to carry out the charitable trusts provided for in the 14th clause of the will of Haji Allarakhia Nathoo, dated the 24th of November 1898, in the manner provided in the said clause.

The decree then sanctions a scheme for the diversion of the charitable funds toocther objects akin to the one specifically mentioned by the testator in his will.

I have carefully gone through the proceedings of this case. Nowhere, either in the plaint, in the questions, on in the evidence, is it suggested that the building of the mosque such as the testator had desired his executors and trustees to build, was impossible. It was nowhere suggested either that the funds were inadequate or that it was not possible for any other reason to erect a mosque as directed by the will. All that was urged before the Court by the plaintiffs was that in the present circumstances it was *inexpedient* to build a mosque as one had already been built since the date the testator gave his directions in the will and that therefore it was not *necessary*, *desirable*, and *proper* that the directions in the will should be strictly carried out. In spite of this Mr. Justice Starling by his order and decree declares that it is *impossible* and *inexpedient* to carry out the charitible trusts provided for in the will of the donor. Now in what sense can the learned Judge have used the word impossible? It would I think be impossible for any one to say that the learned Judge could have meant solemnly to declare from the Bench of the High Court that it was impossible in its strictly limited and literal sense to build a mosque in Bombay.

It seems to me to be quite clear that the learned Judge used the word impossible in the more extended and liberal sense and meaning which I have discussed in the earlier part of the judgment and it is equally clear to me that he gave his sanction to the scheme on the ground that a second mosque in Bombay for the Isna Asari sect of Khojas and Mahomedans was not necessary, that it would be at most a superfluous if not a useless institution and that it was not expedient or desirable to compel

the trustees to expend the trust funds in carrying out an object which was no longer useful or beneficial to the section of the community for whose benefit the testator had set apart his moneys.

Let me consider another case which came before one of our own Courts.

On the 12th of October 1905, Nusserwanji Cowasji Shroff and another filed a suit against the Advocate-General of Bombay and various other parties, which suit was numbered 758 of 1905. The plaint stated that one Cowasji Hormusji Shroff by his will, dated the 11th of July 1872, gave and bequeathed to his executors his immoveable property situated at Khetwady Cross Road and known as Hormuzd Bag in trust to be used as charitable property in the same manner as it had been used during his life-time and he set apart out of his estate Rs. 2,000 which he directed should be invested in Government Paper and the income whereof was directed to be used in keeping the premises in repairs. Hormuzd Bag was allowed to be used by the members of the Parsi cummunity for the purpose of celebrating marriage and thread ceremonies and for the purpose of holding Jasan and Ghambár feasts, etc. Paragraph 20 of the plaint is as follows:—

"The plaintiffs say that it is *not desirable* to adhere strictly to the original objects to which the said premises and the said Government Promissory Notes were dedicated or to utilise the same for the said public charitable purposes for which they were originally utilised inasmuch as there is no demand or need for using the same for such purposes and submit that the said premises and notes should be appropriated *cy-pres* to some other charitable purposes for the benefit of members of the Parsi community in Bombay."

By prayer (*f*) of the plaint the plaintiff prayed:—

"That a scheme be framed for the application *cy-pres* of the said premises and the said Government Promissory Notes .... to public charitable purposes for the benefit of the members of the Parsi community in Bombay."

Mr. Basil Scott, the Advocate-General, has endorsed his consent to the institution of the suit—at foot of the plaint. The

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suit first came on for hearing on the 19th of June 1906 before Mr. Justice Scott who was then on the Bench and the plaintiff's counsel were the then and present Acting Advocate-General Mr. Raikes and myself. The first defendant, the Advocate-General, appeared also by counsel. Formal evidence was recorded of the first plaintiff who stated that the premises were not required for the purposes for which they were originally used, namely, the performance of marriages and Navjotes and the holding of feasts in connection with religious ceremonies and expressed a desire that the charitable property should be made over to the Society for providing cheap residences for poor Parsis. Mr. Justice Scott allowed the case to stand over to ascertain if the Society would accept the proposed gift on the terms proposed by the first plaintiff. The case was heard again on the 25th when Mr. Marzban, the Honorary Secretary of the aforesaid Society, was examined and the learned Judge made this order:—

"Order sanctioning the transfer of the Hormuzd Bag to the trustees of the Garib Zarthosti Rehtan Fund subject to the terms and conditions agreed to by the secretary."

This case reached another stage to which I will presently refer but before I do this I must notice that the charitable bequest in this case was identically the same as the bequest in the case now before me. Mr. Scott, who has been for many years the Advocate-General of Bombay, approved of the filing of the plaint with the statement and the prayer I have quoted above. By a curious coincidence he was the Judge who heard the suit. The present Acting Advocate-General Mr. Raikes was associated with me in supporting the plaintiff's case and the Counsel who appeared for him gave his consent to the proceedings and the order of the Court. Where was the impossibility of continuing the maintenance of the Hormuzd Bag as a public place for the performance of marriages and Navjotes and for the holding of Ghambár and Jasan feasts? The only ground on which the sanction of the Court was given was that owing to the existence of other and better places for the same purpose these premises were not now in much request and the charity had become more or less useless and that

there were other objects to which the charitable properties could be diverted with benefit to the community for whose good the donor had established this charity by his will.

Now let us look at the second stage of this case and see if the aspect of the affairs is altered by what subsequently transpired. The decree was made on the assumption that none of the members of the donor's family objected to the diversion of the charitable property as proposed by the plaintiff. In fact the first plaintiff stated to the Court that so far as he knew none of the defendants objected. After the decree some of the defendants came forward and objected to the property passing out of the family and one of them offered to give Rs. 8,000 out of his own pocket, for the purpose of erecting residences for poor Parsis on the charitable property. On the 2nd August 906 the decree was by consent of the plaintiffs set aside and the following order was made by Mr. Justice Scott:—

"By consent refer to the Commissioner to frame a scheme for the future administration of the Hormuzd Bag having regard to the wishes of the settlor and to report *how far the same can be given effect to at the present time and if they cannot be given effect to either wholly or partially* how the property can be *most advantageously* administered *cy-pres* and in reporting let the Commissioner take into consideration the offer of the 4th defendant to erect on the property at a cost of Rs. 8,000 dwellings for the poor Parsis."

Now in this case the first thing to remember is that the property had been for years both during the testator's life-time and after his death in 1872 used for the purposes of performing marriages and Navjotes and for holding Jasan and Ghambár feasts. The evidence was that in later years it was very little if at all used for these purposes for which it was set apart. From the plaint and the first plaintiff's evidence I gather that previous to 1897 the use of Hormuzd Bag was requisitioned on about 50 or 52 days in the year by the Parsi community—that in 1897 the trustees allowed the Parsi Panchayat to use the property for the residence of poor Parsis who had to vacate their premises owing to the prevalence of plague in their houses

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or neighbourhood—that in 1901 the premises were no longer required for segregation purposes and that from that date to the date of the suit the premises had scarcely ever been requisitioned for the uses and purposes for which they were set apart. Can it be said that the objects for which this property had been dedicated had wholly failed and that it had become impossible to give effect to the testator's original directions? The facts in this case and in the one before me, are precisely the same. In both cases the original gift was for the purposes of the performance of marriages, Navjotes, Jasans, Ghambârs, etc. In the middle of 1906 the Court accepted the more formal evidence of the plaintiff that the property could no longer be used *beneficially* for the purposes named by the testator—that it had become useless so far as those purposes were concerned. The Court in the first instance on those allegations sanctioned the transfer of the whole of the trust premises to an existing Parsi charitable institution and on the objection of some of the members of the family remodelled its decree accepting a donation of Rs. 8,000 from one of the parties to the suit—not it must be remembered in furtherance of the original charity—but with the express purpose of converting a part of the premises into quite a different charity. I can see nothing whatever to distinguish this case from the one I am now considering and in my opinion this case is a precedent of great authority from the fact that the presiding Judge had been for many years the Advocate-General of Bombay and as such had jealously safeguarded all charities and had achieved a reputation for being most careful and scrupulous in all cases of charity which came before him in his capacity as Advocate-General.

Let me now consider another case which came on before the Bombay High Court before another Judge. On the 22nd of March 1906 Dady Nusserwanji Dady filed a suit against the Advocate-General and took out an Originating Summons. The suit is numbered 194 of 1906. The plaint states that in 1810 one "Ardesir Dady a Parsi . . . during his life-time devoted a piece of land with a building thereon situated at Mahaluxmi for the use of the Parsi community as a Parab, that is to say, a place where the members of the Parsi community could

njoy rest and could get water free of charge." It is unnecessary to deal in detail with what happened to the Parab. It is sufficient to say that the premises at Mahaluxmi were in 1868 acquired by the Municipality and other premises were substituted and used as a Parab till 1883 when Government acquired the premises under the Land Acquisition Act. The funds belonging to the charity in the hands of the plaintiff at the date of the filing of the suit consisted of 3½ per cent. Government Loan Notes of the nominal value of Rs. 17,500. The plaintiff in his plaint suggests that the funds may be advantageously made over to the trustees of the fund for providing cheap residences for poor Parsis of which fund Khan Bahadur Mancherji Marzban is the Honorary Secretary, in order that the funds may be utilised for erecting a building for residence of poor Parsis a part of which may be used as a Parab.

Paragraph 24 of the plaint runs as follows :—

"The plaintiff is of opinion that a Parab *will not serve any useful* purpose *in these days* and has suggested above the use of a part of the building as a Parab for the sole reason that as the original object of the charity was a Parab—the inclusion of a Parab might be considered necessary by this Honourable Court in sanctioning the above scheme. Should this Honourable Court be of opinion that part of the premises must be used as a Parab the plaintiff will abide by the directions of the Court in that behalf."

The questions submitted to the Court were :—

(1) Whether under the circumstances mentioned in the plaint, the plaintiff can hand over the funds now in his hands representing the Parab charity mentioned in the plaint to the trustees of the fund for providing residences for poor Parsis on the said trustees agreeing or undertaking to apply the said funds towards building and maintaining therefrom residential quarters for the poor and deserving members of the Parsi community at a small or nominal rent to be applied in keeping the premises under good repair.

(2) Whether the plaintiff should stipulate, upon handing over the said funds to the said trustees of the fund for providing

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residences for poor Parsis, that a portion of the building to be erected out of such funds should be set apart for use as a Parab by members of the Parsi community."

The summons came on for argument before Mr. Justice Russell on the 6th of April, 1906. From the learned Judge's notes I find that Mr. Raikes, the Acting Advocate-General appeared for the plaintiff. The first defendant, the Advocate-General, was not represented by Counsel at the hearing and the second defendant, who was a formal party being the executrix of a deceased trustee, did not appear at the hearing. The answer to the first question is "Yes" and to the second question "No."

The decree, after declaring that under the circumstances mentioned in the plaint the plaintiff can hand over the funds in his hands representing the Parab charity to the trustees of the funds for providing residences for poor Parsis, goes on to say:

"And this Court doth further declare that the plaintiff *need not* stipulate, upon handing over the said funds to the said trustees, that a portion of the building to be erected out of such funds shall be set apart for use as a Parab by members of the Parsi community."

Now, can it be suggested that it was impossible to erect and maintain a Parab in the year 1906? Many Parabs existed in former times. They were very small places either standing by themselves or forming a part of larger buildings where fresh water was supplied in a couple of *handas* for washing purposes and a *matla* (earthen pot) for drinking purposes. The funds in the hands of the trustees were quite ample to maintain a good Parab. That it was quite possible to maintain a Parab at the expenditure of only a small portion of the funds is quite clear from the plaint itself, for the plaintiff asks the Court to say if he should stipulate for the use of a portion of the premises to be erected from this fund as a Parab and the Court's answer to that is "No, you need not." Every argument that was urged before me in the case now I am deciding could well have been urged with equal emphasis by the Advocate-General in the case before Mr. Justice Russell, but there was no opposition whatever. I confess I fail to see any distinction between that case and

this. I can quite understand the propriety of Mr. Justice Russell's answers. They are in perfect accord with sound common-sense and I think they are in perfect harmony with the law governing the application of the *cy-pres* doctering prevailing in our times. Although not only was it possible but it was quite easy to erect and maintain a Parab it would have been more or less a useless charity. Although we do not all get fresh water free of charge in Bombay, still the supply of fresh water in Bombay is now so abundant and the means of locomotion by the establishment and growth of railways and tramways have increased and cheapened so much that it would be a very rare occasion when a Parsi wayfarer would be in need of a place to rest and refresh himself by a wash and a drink of water. If the Court had withheld its sanction it would have been tantamount to compelling the trustees to waste the funds of charity in creating and maintaining a most useless institution, whereas the Court's order has helped a charity which supplies a most crying and urgent need for the poor of the community for whose benefit the charity was originally established.

There is another case to which I must shortly refer. Mr. Nanu Narayan Kothare, as the sole surviving executor of the will of Chanda Ramji, filed a suit against the Advocate-General of Bombay and took out an Originating Summons. The suit was numbered 21 of 1907, and is reported in 9 Bombay Law Reporter, page 370. Thet estator had in this case made large gifts to his Thakoreji for the purpose of installing the idol in splendour and performing its Nek Sewa. The Nek Sewa consisted of placing food before the idol and then distributing the same amongst the poor. After setting aside a sum of money for providing a home where the Thakoreji may sit in splendour and another sum from the income whereof the executor thought the Nek Sewa could be efficiently performed, there was a very large sum still available which the plaintiff proposed in the suit should be more beneficially employed by providing benevolent and useful institutions for the benefit of the community to which the testator belonged. The summons was argued before me in January 1907. Mr. Basil Scott, the Advocate-General, told me that he, as representating charity, had no objection to the proposal—the surplus funds were allowed to

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be utilised in giving a large donation to a fund for providing a charitable dispensary for the use of the Cutchi Lohana community—for providing cheap residential quarters for the poor, of the same community and for establishing a Female High School for *all Hindu girls* in Bombay. I refer to this case for the purpose of drawing special attention to the attitude of the Advocate-General. We have enough poor Hindus in Bombay to absorb the income of a much larger sum than was available for the Nek Sewa of the idol by which is merely meant distribution of food amongst the poor. This charity was by no means entirely useless—though indiscriminate increase of this charity may lead to idleness and other undesirable results. My mind was not free from doubt when the matter was argued before me and Mr. Inverarity pressed me to sanction the proposal. I was very much influenced in eventually according my sanction to the plaintiff's scheme by the fact that the Advocate-General, who is the responsible officer whose duty it is to protect and preserve all charities, had nothing to say against the scheme proposed by the plaintiff.

There are other cases decided by our Courts in Bombay similar to those I have discussed above, but I do not think any useful purpose would be served by discussing them. The Advocate-General, when in response to my invitation he discussed this question before me, said he thought the present application ought not to be granted as it might form a dangerous precedent. I do not think it is a question of precedent at all. Each case in which an application is made to divert charity funds into other channels *cy-pres* must necessarily depend upon its own facts and circumstances and upon the evidence adduced before the Court. If it was a question of precedents, then in the Bombay cases I have referred to there are precedents already and in following in the footsteps of Judges like the late Mr. Justice Starling, Mr. Justice Russell and Mr. Justice Scott I think I would be treading on very safe ground.

Another argument urged before me was this. If people charitably inclined come to know that the Courts, after their death, disregarded their wishes and instead of carrying out the charities which they may establish in their life-time or by their

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will, utilised the charity funds for other purposes they would be deterred from giving effect to their charitable inclinations. I think this is erroneous and there is another view which commends itself to my mind. It seems to me that all right-minded charitably inclined people would be encouraged to devote a portion of their wealth to the charities that recommend themselves most to their minds more readily, if they knew that in case after their deaths a particular charity established by them ceased to be useful or became incapable of being continued with any benefit to the objects of his benefaction, that when, in the words of Sir George Jessell, "it was no longer possible beneficially to apply the property in the exact way in which they have directed it to be applied," that in those events the Courts would sanction the employment of the funds set apart by them to other purposes akin to their own but of *real* use and benefit to the objects of their benefaction. We are living in progressive times. Our surroundings, circumstances, and modes of thought, are undergoing changes. What may appear to be crying wants to-day may be useless superfluities in the future. If I may claim to read the Indian mind I would be inclined to say that it would be a great encouragement to a man desiring to establish a charity to feel that if in the future the charity, which now recommends itself to him as most beneficial, became useless and could no longer enure to the benefits of the objects of his benefaction, that then the Courts would give sanction to utilise the property of the charity to such objects akin to his own which would conduce to the real benefit of the parties and communities whom he desires to assist by his charitable donation. He would, in my opinion, be more inclined to devote his property to charity if he felt that the Courts in India would be always alert to see that in the future under altered circumstances his funds would not be wasted on purposes that may become useless and cease to be beneficially employed.

Now what are the circumstances in this case under which the trustees of the late Mr. Hormasji Framji Warden are asking me to give my sanction to their proposal? For twenty-two years they have been unable to give effect to the testator's wishes. It is doubtful if they can do so at the end of eight more years. They

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may be able to build a Hall for the Parsis *then* if they can get a tenant for their vacant land. If not, they must wait for another twenty years from now. Reading the will of the testator in connection with this charitable bequest I find that there were two very clearly defined objects predominating in his mind when he set apart a part of his wealth for the establishment of this charity. One was to perpetuate the name of his late father Framji Warden, the other was to provide an institution which would be useful to the members of his community—Parsis professing Zoroastrian religion—and a Hall, he thought when making his will, would answer that object. On the clearest possible evidence I have found that a Hall such as he contemplated would be wholly useless to Parsi Zoroastrians at the present day.

Would it be reasonable of me by refusing my sanction to compel the trustees to erect a useless building thirty or forty years after the testator's death—a building which nobody wants and which would at best be rarely used? Would such a building serve the purpose of perpetuating the name of the testator's father? I think I would be defeating both the objects of the testator and would be acting in a most unreasonable manner if I withheld my sanction.

Having come to this conclusion, before I give my sanction it is my duty to consider whether the proposal now placed before me is one that is near enough to the original object of the testator. It is proposed to erect in a conspicuous part of the site of the proposed Parsi General Hospital an Operation Theatre and it is to be named The Framji Warden Operation Theatre for Parsis—a tablet is to be affixed to the building commemorating the names of the testator and his father—a marble Medallion of the donor is to be fixed in a conspicuous part of the building—one of the trustees under the testator's will is to be a member of the Executive and General Committees of the Hospital and that during the life-time of one of the present trustees and his successors for fifty years after his death, is to have a right of nominating every year three Parsi patients free of charge. The other details it is not necessary to set out. In my opinion giving effect to these proposals will give effect to

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the testator's wishes as near as can be done. It will perpetuate not only the name of the testator's father but of the testator himself and that in a more marked manner and in connection with a truly charitable and benevolent institution. The testator's object was to provide a Hall for the use of such members of the Parsi community who were not owners or occupiers of large and commodious houses and bungalows and who cannot perform marriage ceremonies and give feasts at their own residences. Such members are the middle class and the poor of the community. Those are the members of the community to whom the proposed Operation Theatre will be of infinitely greater value than an additional Hall of festivities. A man or woman leaving the Operation Theatre after being successfully cured of a disease will remember the names of the testator and his father with much greater reverence and gratitude than a man leaving a festive Hall after a dinner.

It must be remembered that I am not in this instance administering Charity Funds, nor have I got the disposal of them. In giving my sanction to the proposed scheme I ought not to be understood to say that the scheme proposed is one that is most beneficial or most urgently needed for the community. All I say is—that it is as near the original scheme as is possible under the circumstances and effectively carries out the charitable intentions of the donor.

Before concluding I feel it my duty to say that the trustees of the will of Mr. Hormusji Framji Warden have throughout acted in the best interests of the charity and the present trustees are entitled to the gratitude of the Parsi community for having come forward with the present proposal.

The Advocate-General, in the course of his address, asked me to invite him to appeal if my judgment was against him. To a Judge it is always a source of great satisfaction to feel that his judgments are subject to appeal. In cases of doubt or difficulty I always feel gratified when I hear that an appeal has been filed; but I do not think it is right for a Judge to invite a party to file an appeal and I am all the more disinclined to comply with the Advocate-General's wishes in this case as after I heard him and carefully considered his arguments and studied

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the cases on the subject I have no doubt in my mind as to what order it is my duty to make in this case. Such an invitation to appeal would, besides, be liable to be misunderstood—more especially where charity funds are concerned—as an invitation to unnecessary litigation, the effect of which would be to tax charity funds with more costs. If the learned Advocate-General, after considering the previous cases in our Courts in Bombay to which I have referred and to other cases which I have no doubt can easily be found by searching the records of the Prothonotary's office or his own office, still feels that I am in error in making the order I am going to make in this case, he would of course be at liberty to appeal and I feel certain no one will misunderstand his action which can only be dictated by a sense of the duty he has to perform as the Advocate-General of Bombay.

In deference to the wishes of the donor's family I authorise the trustees to set apart Rs. 10,000 for the benefit of the blind and the maimed Parsis and for destitute Iranees as proposed in paragraph 3 of Mr. Hirjibhoy Bomanji Warden's affidavit of the 18th of July, 1907.

I do sanction the whole of the scheme as put forward before me in the same affidavit except that I do not approve of payments by instalments as proposed in clause (*h*) of the scheme as set out in paragraph 5 of the same affidavit. This mode of payment is likely to delay and hamper the construction of the Operation Theatre. Mr. Hirjibhoy will be a member of the Executive Committee and therefore he will have a voice in the matter and the payment of the amount at once will expedite the erection of the Theatre and the commencement of the work of charity.

The trustees to sell the charity land either by public auction or private sale within three months from this date.

All the costs of the petitioners taxed between attorney and client to be retained by them out of the charitable funds in their possession. The Advocate-General has been good enough to incur no costs and it is not necessary to provide for his costs.

I reserve to the parties interested liberty to apply.

Attorneys for petitioners: *Messrs. Jamshedji, Rustamji & Devidas.*