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doubt, was void, and the law allowed the vendors ample time in which to have it set aside. But the appellant does not rest upon the sale; he takes his stand on the long possession following the sale, and the effect of that possession is not displaced by reference to its origin. So far as I can discover, the Act contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

For these reasons I am of opinion that the appeal should be allowed and that the suit should be dismissed with costs throughout.

Appeal allowed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. *December 2.*

JAMSHEDJI CURSETJEE TARACHAND, PLAINTIFF, *v.* SOONABAI AND OTHERS, DEFENDANTS.*

Trusts to perform Muktad ceremonies, validity of—Tenets of Zoroastrian faith—Nature and meaning of Muktad ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors.

Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktad, Baj, Yejushni, and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the rule of law forbidding perpetuities.

The Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktad ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion.

The performance of the Muktad ceremonies is a *religious duty* imposed on the Zoroastrians by the proved tenets of the religion they profess.

The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual, for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the sovereign, for

* O. C. J., Suit No. 341 of 1907.

good government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt that the performance of these ceremonies is an act of Divine Worship in its highest and truest sense.

The monies paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

According to the belief prevailing amongest the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator.

A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law, or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow, another Judge's *findings of fact based on the evidence recorded by him*, when the evidence that may be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion.

Limji Nowroji Banaji v. *Bapuji Ruttonji Limbuwalla*[1], not followed.

DINBAI, widow of Jehangir Cursetji Likimna, otherwise known as Tarachand, a Parsee, on the 21st day of December 1871 made a settlement of certain moveable and immoveable properties belonging to her, and appointed her sons Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand and her son-in-law Sorabji Hormusji Bottlewala, all since deceased, the trustees thereof. The deed of settlement provided *inter alia* that the trustees and the survivors or survivor of them and the executors and administrators of such survivors should stand possessed of and interested in all the immoveable and moveable properties therein more particularly mentioned and thereby settled upon certain trusts, that is to say, "in trust to receive the interest and income thereof and to pay the same to Dinbai during her life, and after her death upon trust to purchase or set apart out of the

(1) (1887) 11 Bom. 441.

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said trust funds promissory notes of the Government of India for the sum of Rs. 15,000 bearing interest at 4 per cent. per annum and to pay the annual income thereof to each of them the said Cursetji Jehangir Tarachand, Merwanji Jehangir Tarachand and Hormusji Sorabji Bottlewal la and after the death of any of them to his or their executors or administrators alternately in regular rotation every third year in the order named above to enable him or them to defray the expenses of annual Muktad ceremonies of the dead members of the family in both sects of Shanshaya and Kadmi".

The deed of settlement made provision for the payment of certain sums of money to the persons and for the purposes therein mentioned and then proceeded "and to pay and divide the net residue thereof unto and between the said Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand, their executors, administrators and assigns in equal shares".

Cursetji Jehangir Tarachand died on the 15th of December 1887 at Bombay leaving a will, dated the 17th January 1887, whereby he appointed his wife Bai Meherbai Cursetji Tarachand the sole executrix thereof. As this will was after the death of the testator lost or mislaid, the High Court of Bombay granted on the 15th March 1888 probate of the draft thereof to Bai Meherbai until the original will was produced.

Bai Meherbai died at Bombay on the 16th February 1900 without fully administering the assets belonging to the estate of Cursetji Jehangir Tarachand. On the 3rd August 1900 letters of administration with the said draft will annexed of the un-administered property, property and credits of Cursetji Jehangir Tarachand were granted by the High Court at Bombay to the plaintiff as one of the sons and one of the two surviving residuary legatees named in the will of the said deceased limited until the original will was produced.

The settlor Bai Dinbai died on the 5th March 1889. At the time of her death Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand were living and after her death they continued to manage the moveable and immoveable properties mentioned in the deed of settlement. In the course of such management they, in pursuance of the terms of the settlement,

set apart out of the trust-properties in their hands Government promissory notes of the value of Rs. 15,000 for the purposes of the Muktad ceremonies in the settlement directed to be performed.

Bai Dinbai left a will dated 15th July 1886 whereby she appointed the said Cursetji Jehangir Tarachand, Merwanji Jehangir Tarachand and Sorabji Hormusji Bottlewalla executors. As the said Cursetji had predecesed the executrix the will was proved by the surviving executors on the 18th May 1899. After the death of Bai Dinbai, the said Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand, as the surviving trustees of the settlement, went on paying the interest of the said Government promissory notes of Rs. 15,000, alternately each year to (1) Bai Meherbai, the executrix of the will of Cursetji Jehangir Tarachand, until her death in the year 1900 and after that with the implied consent of the plaintiff as administrator to Bai Ratanbai, the eldest daughter of Cursetji Jehangir Tarachand; (2) to Sorabji Hormusji Bottlewalla until his death, which took place on the 31st August 1902, and after his death to his executors; and (3) to Merwanji Jehangir Tarachand until his death, which took place on 15th March 1905.

Since the death of Merwanji Jehangir Tarachand his executors, who held the said Government promissory notes, have not paid the income thereof to any one, as they entertained doubts as to the validity of the trust declared in respect of the said notes.

About the end of the year 1890 the whole of the estate of Bai Dinbai was administered and the whole trust properties under the deed of settlement were properly distributed, except the Government promissory notes which were set apart according to the deed of settlement. By an Indenture dated 16th April 1891, Merwanji Jehangir Tarachand, Meherbai, widow and executrix of Cursetji Jehangir Tarachand, and the 3rd, 4th, 5th, 6th, 7th, 8th, 9th defendants hereto passed a release in favour of Merwanji Jehangir Tarachand and Sorabji Hormusji Bottlewalla, the executors and trustees abovenamed, with the proviso at the end thereof excluding the Government promissory notes of Rs. 15,000 from the operation of the release, in the event of the trusts being found or declared to be inoperative or void.

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The 1st and 2nd defendants were the executrix and executor, respectively, of the last will and testament of Merwanji Jehangir Tarachand. The 3rd, 4th and 5th defendants were the daughters of Bai Maneckbai, the eldest daughter of the deceased settlor Bai Dinbai. Defendants 6, 7, 8, and 9 were the daughters of Bai Bachubai, the youngest daughter of Bai Dinbai. Defendants 10 and 11 were the surviving executors of the last will and testament of Sorabji Hormusji Bottlewalla. The 12th defendant was the Advocate General.

The plaintiff therefore filed this suit and obtained an originating summons on the 18th April 1907 for the determination of the following questions:—

(1) Whether the trusts declared in respect of Government promissory notes for Rs. 15,000 mentioned in the plaint are valid?

(2) If the trusts abovenamed are valid, who are the persons entitled to get the interest on the said notes and to perform the Muktad ceremonies?

(3) If the trusts abovenamed are void, who are the persons entitled to the Government promissory notes for Rs. 15,000 and the interest which has accrued and will accrue due thereon.

(4) Whether the agreement embodied in the release of the 16th December 1891 and referred to in paragraph 12 of the plaint is not binding on all the parties hereto?

(5) Whether in the event of the said trusts being held to be void the first and second defendants herein are not liable to account for the promissory notes of Rs. 15,000 and the interest thereon?

J. K. Tarachand, for the plaintiff.

Kanga, for defendants 1 and 2.

Bahadurji, for defendants 10 and 11.

The summons was argued in chambers on 29th June 1907, when the learned Judge (Davar, J.) adjourned it into Court for further evidence and argument and made the Advocate General a party.

J. K. Tarachand, for the plaintiff:—Muktad ceremonies are ceremonies for the benefit of the dead. I refer the Court to the following cases:—

Limji Nowroji Banaji v. *Bapuji Ruttonji Limbuwalla*[1]; *Cowasji N. Pochkhanawalla* v. *R. D. Setna*[2]; *Dhunbaiji* v. *Nawroji Bomanji*[3]; *Cowasji Byramji Gorewalla* v. *Perrozbai*[4]; *Maneckji Edulji Allbless* v. *Sir Dinsha Maneckji Petit*[5]; *Dadina* v. *The Advocate General*[6]. These are all the cases, and they decide that trusts in favour of Muktad ceremonies are void all creating perpetuities.

See also *Dady* v. *Advocate General*[7].

I say that the trust is void on the basis of these cases as offending against the law of perpetuities.

[Davar, J.—Show me that this rule applies to Parsis.]

We must refer to 43 Eliz., ch. 4, to see what bequests are charitable.

Naoroji Beramji v. *Rogers*[8] decides that the rule against perpetuities applies to Parsis.

[Davar, J.—In order to prove your case you must prove that the English law applies to Muktad. The Rule of Perpetuity is English Law; so far as succession goes it may apply to Parsis, but can you say that it applies to foreign religious institutions?]

The common law applies to India and there are certain exceptions with regard to Hindus and Mahomedans, but there is nothing to exempt the Parsis, see *Yeap Cheah Neo* v. *Ong Cheng Neo*[9]. This is enough to shift the onus on to the other side. If they allege any custom I shall be allowed to call evidence to contradict that custom.

Kanga, for defendants 1 and 2:—I represent the trustees, the executrix and executor of Merwanji Tarachand. There is no dispute as to the facts, the trustees are willing to carry out the

(1) (1887) 11 Bom. 441.
(2) (1895) 20 Bom. 511.
(3) (Unreported) Suit No. 565 of 1889.
(4) (Unreported) Suit No. 281 of 1892.
(5) (Unreported) Suit No. 96 of 1892.
(6) (Unreported) Suit No. 49 of 1895.
(7) (1905) 7 Bom. L. R. 324.
(8) (1867) 4 Bom. H. C. R. (O. C. J.) 1.
(9) (1875) L. R. 6 P. C. 381.

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trust and place themselves in the hands of the Court. The Parsi law has been in an undecided state since the decision of *Naoroji Beramji* v. *Rogers*(1), which applies English law to Parsis. In Bombay Parsis are governed by the Charter, in the Mofussil they are governed by Bombay Regulation IV of 1827. There are four cases in which the English law has not been applied to Parsis. These cases are:—*Dhanjibhai Bomanji* v. *Navazbai*(2) where the law of advancement was held not applicable to Parsis, *Peshotam Hormasji Dastoor* v. *Meherbai*(3) where infant-marriage though not valid in English law was held by Scott, J., to be valid among Parsis, *Mithibai* v. *Limji Nowroji Banaji*(4) where Bayley, J., held that the rule in Shelly's case does not apply to Parsis, and *Byramji Bhimjibhai* v. *Jamsetji Nowroji Kapadia*(5). It is rather difficult to say what is the law and by what law Parsis are governed. Jardine, J., is not supportable when we consider the literature of the community. The Transfer of Property Act makes the Law of Perpetuity applicable to Parsis but not to Hindus and Mahomedans. Section 17 of that Act saves perpetuities for the advancement of religion and charity. In England all religious trusts have been regarded as charitable. There Roman Catholic and other religious trusts were forbidden on some State exigency. Before the Reformation trusts for the souls of the dead were valid, but afterwards they were forbidden as being superstitious: see Statute 1 Ed. VI, Ch. 14. In England no religious trusts have been held void on the ground of perpetuity as being for superstitious purposes or for non-charitable objects.

Jardine, J., relies on *Cocks* v. *Manners*(6), but that case had nothing to do with religion. In the same case there is a bequest to certain sisters of charity and that was held valid. See *Colgan* v. *Administrator-General of Madras*(7). In England these gifts have been held valid not as religious but as gifts to certain voluntary association.

In *Yeap Cheah Neo* v. *Ong Cheng Neo*(8) it will be seen that the Judge had the idea of superstitious uses in his mind.

(1) (1867) 4 Bom. H. C. R. (O. C. J.) 1.
(2) (1877) 2 Bom. 75.
(3) (1883) 13 Bom. 302.
(4) (1881) 5 Bom. 516.
(5) (1892) 16 Bom. 630.
(6) (1871) L. R. 12 Eq. 574.
(7) (1892) 15 Mad. 424.
(8) (1875) L. R. 6 P. C. 381.

Trusts for masses are valid in Ireland but not in England. There are decisions to say that Judges are not to decide that one religion is better than another, *Mokoond Lal Singh* v. *Nobodip Chunder Singha*[1]. In England trusts can be grouped under the following heads: (1) Forbidden Religious Trusts; (2) Superstitious Religious Trusts; (3) Valid Religious Trusts; (4) Gifts to Voluntary Associations; (5) Trusts for erecting, repairing or maintaining monuments or tombs.

(1) With Forbidden Religious Trusts we are not concerned, for the Proclamation of 1857 gives full liberty of religion.

(2) The doctrine of superstitious uses does not apply to India. *Advocate-General* v. *Vishvanath Atmaram*[2], *1 Ed. VI, Ch. XIV*, only applied to trusts then created. Later trusts are void because of the invalidity due to that Statute. *Dominus Rex* v. *Lady Portington*[3] affords a clue as to what is meant by superstitious uses. *Attorney-General* v. *Calvert*[4] shows that the spirit of that statute was carried on after the Reformation. I rely on four lines at p. 260. On the question of masses the cases are very few, see *West* v. *Shuttleworth*[5], *In re Elliott*[6], *The Attorney-General* v. *The Fishmongers' Company*[7], *In re Fleetwood*[8], *Heath* v. *Chapman*[9], *In re Blundell's Trusts.*[10]. *West* v. *Shuttleworth*[5] and *Heath* v. *Chapman*[9] are doubted by the Master of Rolls in *In re Michel's Trust*[11] and see Snell's Equity, 12th Edition, pages 124-125. *Das Merces* v. *Cones*[12] is an authority showing that the doctrine of superstitious uses is not recognized in India. This is followed in *Andrews* v. *Joakim*[13], see also *Joseph Judah* v. *Aaron Judah*[14], *Khusalchand* v. *Mahadevgiri*[15], *Rupa Jagshet* v. *Krishnaji Govint*[16].

(1) (1898) 25 Cal. 881.
(2) (1835) 1 Bom. H. C. Appx. ix.
(3) (1755) 1 Salkeld 162.
(4) (1857) 23 Beav. 248.
(5) (1835) 2 M & K 684.
(6) (1891) 39 W. R. 297.
(7) (1839) 2 Beav. 151.
(8) (1880) 15 Ch. D. 594.
(9) (1854) 2 Drew. 417.
(10) (1861) 30 Beav. 360.
(11) (1860) 28 Beav. 39.
(12) (1864) 2 Hyde. 65.
(13) (1869) 2 Ben. L. R. (O. C. J.) 148.
(14) (1870) 5 Ben. L. R. (O. C. J.) 433.
(15) (1875) 12 Bom. H. C. R. 214.
(16) (1884) 9 Bom. 169.

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(3) Valid Religious Trusts. These are trusts of Protestants. The cases are *Baker* v. *Sutton*(1), *Townsend* v. *Carus*(2), *Parbati Bibee* v. *Ram Barun Upadhya*(3).

Section 17 of the Transfer of Property Act and 43 Eliz., c. IV, both say that bequests to religion are valid.

A gift: for the maintenance of religious ceremonies is a good gift: *Turner* v. *Ogden*(4). A legacy towards establishing a Bishop in His Majesty's dominions in America was held good in *Attorney-General* v. *The Bishop of Chester*(5). In *Attorney-General* v. *Lawes*(6) a direction to pay into a certain bank a yearly sum of £100 for the maintenance and support of the Irvingites was held valid. In *Thornton* v. *Howe*(7) a trust for printing and circulating religious works was held to be valid.

Straus v. *Goldsmid*(8) is a case very like the present case. This decided that a bequest to enable persons professing the Jewish religion to observe its rites is good.

Trusts for all religions are valid charitable trusts provided they are not opposed to morality or positively harmful to the State. An instance of a trust held void as being contrary to the policy of the law is *De Themmines* v. *De Bonneval*(9).

(4) Gifts to Voluntary Associations in perpetuity are not valid, see *Cocks* v. *Manners*(10) which is relied on in *Limji Nowroji* v. *Bapuji Ruttonji Limbuwalla*(11). If the object of the association is private the trust is bad but where it is public it is good. *Carne* v. *Long*(12) decided that a gift to a public library is not charitable. See the Encyclopœdia of Laws, vol. XI, p. 314, under the head of "Roman Catholic" where all these cases are collected. *Pease* v. *Pattinson*(13) decided that trust for the relief of sufferers by a certain colliery accident is void. In *In re Sheratons Trusts*(14) a bequest to the Sassoon Mechanic Institute was held void.

(1) (1836) 1 Keen 224.
(2) (1844) 3 Hare 257.
(3) (1904) 31 Cal. 895.
(4) (1787) 1 Cox. Eq. C. 316.
(5) (1785) 1 Bro. Ch. Ca. 444.
(6) (1849) 8 Hare 32.
(7) (1862) 31 Beav. 14.
(8) (1837) 8 Sim. 614.
(9) (1828) 5 Russ. 238.
(10) (1871) L. R. 12 Eq. 574.
(11) (1887) 11 Bom. 441.
(12) (1860) 2 De G. F. & J. 75.
(13) (1886) 32 Ch. D. 154.
(14) (1884) W. N. 174.

In re Clark's Trust[1] decided that a bequest in aid of a society for raising funds for the benefit of persons in sickness was void.

The Attorney-General v. *The Haberdasher's Company*[2] relied on by Jardine, J., in *Limbuwalla's* case[3] is more a commercial case than a religious case.

(5) Gifts for erecting, repairing and maintaining tombs are not valid: see Snell's Equity, p. 113 (12th Edition). *In re Rickard*[4] laid down that a bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and his family, is void as a perpetuity. *Hoare* v. *Osborne*[5] decided a gift for the repair of a vault was void. See Shephard, J., in *Colgan* v. *Administrator-General of Madras*[6], *Fisk* v. *Attorney-General*[7], *Fowler* v. *Fowler*[8], *Dawson* v. *Small*[9], Tudor on Charities and Mortmain, Ch. V, section 4, p. 131 (4th Edn.). These bequests are held void because they do not advance religion.

Indian legislation seems to include religious purposes in the word charity. This is borne out by section 17 of the Transfer of Property Act. In the Act VI of 1890, section 2, there is a definition of charity. In Wilson's Mahomedan Law, 2nd Edn., page 393, the distinction between religion and charity is explained. We have to distinguish the three Indian cases. *Colgan* v. *Administrator-General of Madras*[6] is a decision on Masses and proceeds on the principle of *West* v. *Shuttleworth*[10] and is therefore of very little use. As to what is a mass, see *Attorney-General* v. *Delaney*[11]. In *Colgan* v. *Administrator-General of Madras*[6], Shephard, J., was of opinion that trusts for masses should be held valid but he followed *Yeap Cheah Neo* v. *Ong Cheng Neo*[12] and held them void. *Yeap Cheah Neo* v. *Ong Cheng Neo*[12] can be distinguished. The question is are these religious ceremonies pious uses or

(1) (1875) 1 Ch. D. 497.
(2) (1834) 1 My. & K. 420.
(3) (1887) 11 Bom. 441.
(4) (1862) 31 Beav. 244.
(5) (1866) L. R. 1 Eq. 585.
(6) (1892) 15 Mad. 424 at p. 436.
(7) (1867) L. R. 4 Eq. 521.
(8) (1861) 33 Beav. 616.
(9) (1874) L. R. 18 Eq. 114.
(10) (1835) 2 M. & K. 684.
(11) (1875) I. R. 10 C. L. 104 at p. 107.
(12) (1875) L. R. 6 P. C. 381.

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religious uses? In *Limbuwalla's* case[1] they are held to be pious uses.

Bahadurji for defendants 10 and 11, the surviving executors of Sorabji H. Bottlewalla, one of the three trustees of the original deed of settlement:—The suggestion in *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[1] that Parsis are governed by English law has no authority for its support. All the Judges who decided cases about Baj Rojgar trusts have worked from the Christian point of view and they could not dissociate themselves from the view of the pious ceremonies of the Christian Church. Toleration of religion is the basis of the English Rule here. (1780) 21 George III, ch. 70, sections 17 and 18, said that Courts in India should have regard to the religious usages and customs of the natives of India.

37 George III, ch. 142, section 12, is very similar. 4 George IV, c. 71, High Court Rules, page 13. The policy from the earliest time seems to be to grant entire freedom in respect of religion to the natives of India. Westropp, J., in *Naoroji Beramji* v. *Rogers*[2] says that the Parsis are governed by English law. I submit that law contemplates equality and freedom of religion, see Letters Patent, High Court Rules, page 67, cl. 19. Bombay Regulation IV of 1827, section 26, relates to the mofussil. According to these statutes the Parsis in the mofussil are governed by the law of India as to usage and custom but not the Parsis in Bombay who are governed by the English law, and he has only to step out of the jurisdiction of this Court to establish such a trust as is now in dispute as valid. If a trust does not come within the spirit of 43 Eliz, c. 4, it can be upheld as valid within the jurisdiction of this Court. I propose to cite a series of cases to show that the High Court here has not followed consistently the principle laid down in *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[1]. Prior cases are the following:—*Ardaseer Cursetjee* v. *Perozeboye*[3] decided that so far as the ecclesiastical side of the Court was concerned the English law did not apply to Parsis. *Homabaee* v. *Punjeabhaee*

(1) (1887) 11 Bom. 441. (2) (1867) 4 Bom. H. C. R. (O. C. J.) 1.
(3) (1856) 6 Moo. I. A. 348.

Dosabhaee[1], *Modee Kaikhooscrow Hormusjee* v. *Cooverbhaee*[2] laid down that there is the restraint upon the testamentary power of disposition by a Parsee, page 153 of Sorabjee Bengali's book on Parsee Acts. In *Mithibai* v. *Limji Nowroji Banaji*[3] a reference is made to *Gheesta's* case where an illegitimate son was held entitled to succeed to his father's share following the Hindu principle. *Mihirwanjee Nuoshirwanjee* v. *Awan Baee*[4] referred to in *Avabai* v. *Jamasji Jamshedji*[5].

There is another case *Mancharsha Ashpandiarji* v. *Kamrunisa Begam*[6] which decided that English law did not apply in its entirety to Parsis; and see Bayley, J.'s judgment in *Jivandas Keshavji* v. *Framji Nanabhai*[7]. *Bai Maneckbai* v. *Bai Merbai*[8] decided that section 7 of the Statute of Frauds applies to Parsis. Fulton, J., in *Navroji Manockji Wadia* v. *Perozbai*[9] and in *Shapurji* v. *Dossabhoy*[10] Batchelor, J., said that the law governing the Parsis in the mofussil is the customary law of the Parsis modified by justice, equity and good conscience.

So far therefore as religion is concerned there is no established Church in India as there is in England and we have here perfect freedom of religion. I mean by "established Church" the Church as established and maintained by the State. The doctrines of the Established Church of England are always the considerations entered into whenever there is a contest on religious matters, but here there is no particular church maintained by the State. See Ilbert's Government of India, pp. 256—259, 53 Geo. III, clause 155, section 33, 3 and 4 Will. IV, ch. 85, sections 92—102 and see also West, J.'s observation in *Fatmabibi* v. *The Advocate-General of Bombay*[11].

As to the cases decided in the Bombay High Court the decree in the case of *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[12] was practically a consent decree. (Read at p. 447.) The

(1) (1835) 5 Suth. W. R., p. c. 102.
(2) (1856) 6 Moo. I. A. 413.
(3) (1881) 5 Bom. 506.
(4) (1822) 2 Borr. Bom. Rep. 231.
(5) (1866) 3 Bom. H. C. R. (A. C. J.) 113.
(6) (1868) 5 Bom. H. C. R. (A. C. J.) 109 at p. 114.
(7) (1870) 7 Bom. H. C. R. (O. C. J.) 45.
(8) (1881) 6 Bom. 363.
(9) (1898) 23 Bom. 80 at p. 87.
(10) (1905) 30 Bom. 359 at p. 362.
(11) (1881) 6 Bom. 42 at p. 50.
(12) (1887) 11 Bom. 441.

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evidence I shall produce will show that the ceremonies are for the public benefit of all Zoroastrians. Benefit is derived by the whole community. If evidence had been given before Jardine, J., he would have been of the opinion that the bequests were not for the benefit of individuals or of families but of the whole community. In *Wadia's case*[1] there was not contest; it was a friendly suit. *Gorewalla's Case*[2], *Wadia's Case*[1], *Hodiwalla's Case*[3], *Allbless' Case*[4], *Marker's Case*[5], all followed *Limbuwalla's Case*[6]. I refer to the Irish cases for the performance of Masses.

[DAVAR, J.:—I should like to know any case where English law applies to Parsis in respect of religion.]

The Statute of Mortmain does not apply to India; therefore if any question on religion arises it should be judged from the standpoint of the English law prior to the Reformation. See Tudor on Charities and Mortmain, 4th edition, p. 4, 23 Henry VIII Ch. 10, 1 Edward VI Ch. 14, 9 and 10 Vict. Ch. 5, 23 and 24 Vict. Ch. 134, section 1, Theobald on Wills, 6th edition, pp. 350—353. Gifts to perform Masses would be void as being superstitious. See Tudor, p. 8. 9 and 10, Vic. Ch. 59, referred to Jews, 1 Will. and Mary, Chapter 18, referred to Roman Catholics and Dissenters, 2 and 3 Will. IV, Ch. 115 and 23—24 Vic. Ch. 134, section 1 referred to Roman Catholics. A bequest to a Jew to observe the rites of that religion was held valid in *Straus* v. *Goldsmid*[7]. This was before 9 and 10 Vic. 159. *In re Michel's Trust*[8]. If the Parsis are not governed by English law then the rule against perpetuities does not apply so far as religious trusts are concerned. Once the religious liberty is granted then the rule against perpetuities has no application even if such religious trusts are not for the public benefit. If these trusts are for the public benefit then it matters little by what law we are governed, but even if they are not for the public benefit, then as the rule against perpetuities does not

(1) Suit No. 565 of 1889.
(2) Suit No. 281 of 1892.
(3) Suit No. 267 of 1890.
(4) Suit No. 96 of 1892.
(5) Suit No. 49 of 1895.
(6) (1887) 11 Bom. 441.
(7) (1837) 8 Sim. 614.
(8) (1860) 28 Beav. 39

apply the trusts are valid. Hindus and Mahomedans can make private religious trusts which are valid: *Mullick* v. *Mullick*[1], *Juggut Mohini Dossee* v. *Mussumat Sokheemoney Dossee*[2], *Fatmabibi* v. *The Advocate-General of Bombay*[3], *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*[4].

If I establish that the performance of Muktad ceremonies amounts to an act of divine worship, then although if it is a perpetuity the trust would be good. I wish to establish five propositions: (1) The doctrines of the Zoroastrian religion enjoin the performance of Muktad ceremonies. (2) The performance of these Muktad ceremonies amounts to the performance of an act of religious or divine worship. (3) According to the doctrines of the Zoroastrian religion the performance of Muktad ceremonies results in public benefit, either temporal or spiritual, and that it is believed to bring divine blessings not only on the party performing these ceremonies or his household but upon the whole community and on the world at large. (4) Muktad ceremonies, or at all events the essential parts of such ceremonies, can only be performed by priests. (5) Payments received by the priests for the performance of such ceremonies form a portion of their ordinary income and means of livelihood.

A devise to charitable and pious uses generally was held good in *Attorney General* v. *Herrick*[5]. In *Powerscourt* v. *Powerscourt*[6] a devise to trustees to lay out at their discretion 2,000£ "in the service of my Lord and Master." was upheld. *Townsend* v. *Carus*[7] decided that a bequest for spiritual purposes was good. *Farquhar* v. *Darling*[8] upheld a devise "to the poor and the service of God." In *Turner* v. *Ogden*[9] it was held that a bequest for preaching a sermon on Ascension Day, for keeping the chimes of the Church in repair, and for a payment to be made to the singers in the gallery of the Church are all bequests to charitable uses within 43 Eliz.

(1) (1829) 1 Knapp 245.
(2) (1871) 14 Moo. I. A. 289.
(3) (1881) 6 Bom. 42.
(4) (1868) 2 Ben. L. R. (O. C. J.) 11 at p. 47.
(5) (1772) 2 Amb. 712.
(6) (1824) 1 Molloy 616.
(7) (1844) 3 Hare 257.
(8) [1896] 1 Ch. 50.
(9) (1787) 1 Cox, Ch. Cas, 316.

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In *The Commissioners for Special purposes of Income Tax* v. *Pemsel*[1] Lord Macnaghten discussed the meaning of the word charity. Story's Equity, 2nd edition, page 790, section 1155.

Payments made to clergy for the performance of religious services have been held to be good gifts as tending to the advancement of religion: *Robb and Reid* v. *Dorrian*[2]; *Thornber* v. *Wilson*[3].

Trusts for the performance of Muktad ceremonies stand on the same footing as gifts for Masses for two reasons:—(i) All religions in India are on the same footing: *Das Merces* v. *Cones*[4]. This case was followed in *Andrews* v. *Joakim*[5] which decided that a bequest in a will of a sum of money for the performances of Masses in Calcutta was valid. *O'Hanlon* v. *Logue*[6] overruling *Attorney-General* v. *Delaney*[7] decided that a bequest for masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not. (ii) There is no application of the doctrine of superstitious uses in India just as there is no such application in Ireland: *Advocate-General* v. *Vishvanath*[8]; Tudor on Charities and Mortmain 4th edition, page 791, *Attorney-General* v. *Hall*[9].

Prior to the Reformation of 1823 bequests to perform Masses were held valid in England and Ireland, but since 1823 private and public masses were distinguished and bequests for private masses were held to be void. *The Commissioners of Charitable Donations and Bequests* v. *Walsh*[10] decided that trusts for Masses held in public or private were valid trusts. *Attorney-General* v. *Delaney*[7] decided that Masses in public were valid on the ground that they tended to the edification of the congregation but trusts for Masses held in private are void.

Padsha:—This was overruled thirty-one years after by the same Judge in *O'Hanlon* v. *Logue*[6].

(1) [1891] A. C. 531 at p. 583.
(2) (1877) I. R. 11 C. L. 292 at p. 297.
(3) (1855) 3 Drew. 245.
(4) (1864) 2 Hyde. 65 at p. 71.
(5) (1869) 2 Ben. L. R. (O. C. J.) 148.
(6) [1906] 1 I. R. 247.
(7) (1875) I. R. 10 C. L. 104.
(8) (1855) 1 Kom. H. C. Appx. ix.
(9) [1897] 2 I. R. 426 at p. 447.
(10) (1819) Ir. 7 Eq. 34 (note).

The performance of Masses amounts to an act of divine worship which is believed by those belonging to the faith to bring benefits and blessings, spiritual or temporal, to the public at large within the spirit of 43 Eliz. See Palles C. B.'s judgment in *O'Hanlon* v. *Logue*[1] at pages 274-276 and FitzGibbon L. J.'s judgment at page 280 and Holmes L. J. at page 286.

The test is the belief of the testator or settler as to the spiritual or other benefits. This Muktad ceremoney is an act of religious worship which amounts to an act of praise, adoration and thanksgiving involving a petition for benefits both temporal and spiritual on all Zoroastrians and all good people belonging to all other communities, including always a prayer for the ruling Sovereign of the country and for good government by him.

Webb v. *Oldfield*[2] decided that a bequest of perpetual rents of property to two Vegetarian Societies was good. FitzGibbon, L. J., there says that the essential attributes of a legal charity are that it should be unselfish, public, benevolent or philanthropic. *Cross* v. *London Anti-vivisection Society*[3] decided that societies for the suppression and abolition of vivisection are charities. *Yeap Cheah Neo* v. *Ong Cheng Neo*[4] turns upon *West* v. *Shuttleworth*[5]; it referred to Penang where there was no native population when the British settled there. In India there was a population whose customs and usages had to be taken into consideration. In *West* v. *Shuttleworth*[5] no evidence of custom was taken; it was decided not on facts but on the English Statutes. See also *Cary* v. *Abbot*[6].

In *Colgan* v. *Administrator-General of Madras*[7] though the Judges say that the law of superstitious uses does not apply to England still they follow *West* v. *Shuttleworth*[5].

As to the ceremonies which are performed during the Muktad days they amount to an act of divine and religious worship and result in benefits to the community and also to the world at large, and I cite passages from the Zoroastrian Scriptures to prove

(1) [1906] 1 I. R. 247.
(2) [1893] 1 I. R. 431.
(3) [1895] 2 Ch. 501.
(4) (1875) L. R. 6 P. C. 381.
(5) (1835) 2 M. & K. 684.
(6) (1802) 7 Ves. 490.
(7) (1892) 15 Mad. 124.

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that Muktad ceremonies are enjoined in the Farvardin Yast which is dedicated to all Furohurs. As to Furohurs see Sacred Books of the East, Vol. 23, page 179. Farvashis are the same as Furohurs. There is a distinction between Fravashi and Ravan: Haugh's Essay on Parsis, 3rd Edition, page 206. (Civilization of the Eastern Iranians in ancient times by Geiger, Vol. 2, page 113; Zarathastra and Zoroastrianism by Rustomji Edulji Dastur Peshotam Sanjana, page 242.) The ceremonies enjoined during the Muktad days are based on paragraphs 49-52 of the Farvardin Yast, see Sacred Books of the East, Vol. 23, page 192. These are the only references as far as Avesta literature is concerned, but there are other references in Pehlvi Dinkard, Vol. 37, Secred Books of East, page 17. There are further references in Bahman Yast (Vol. 5 of Sacred Books of the East, page 208.) That refers to the 11th century A. D. (See also Shayast La-Shayast (what is worthy and what is not worthy to be done), Vol. 5 of Sacred Books of the East, page 351, paragraph 31; Sad Dar Book, Vol. 24 of Sacred Books of the East, page 264, written in the 16th century; Patet Pashemani Spiegle's Avesta, page 157, paragraph 18.)

The next question is what are the usual and essential ceremonies performed on these Muktad days?

According to some people five ceremonies are essential,; according to others these are four: (i) Afringan, (ii) Baj, (iii) Satum, (iv) Farokshi, (v) Yezeshne.

(i) Afringan consists of prayers expressing nothing but praise, adoration and love for the Almighty and the Furohurs. It is divided into three parts: (*a*) Afringan Dibache, the introduction and the most important part because it contains universal prayer and is universally said, (*b*) Afringan proper, (*c*) Afrin or benediction. Of Afringan proper there are in all eleven kinds. Afringan Ardafarvash, Afringan Dahaman, Afringan Surosh, are performed during the Muktad days. Afringan Dahaman is taken from the sixtieth chapter of Yasna.

(ii) Baj ceremonies consist of recitals of chapters 3—8 of Yasna in Vol. 31 of the Sacred Books of the East, pages 207—230. Verses 5, 6, 8, chapter VIII, page 229, are very important.

(iii) Satum, *i. e.*, praise, see Yasna, chapter XXVI, page 278, clauses 1, 2, 5. Mr. Kanga's Khordah Avesta pages 382—391.

(iv) Furrokshi ceremony begins with Satum and the whole of the Farvardin Yast follows: Sacred Books of the East, Vol. 23, pages 179—230. Furrokshi is a ceremony for all the Furohurs. Farvardin Yast is a portion of it and a Yast which is dedicated to all Farohars.

(v) Yezeshne is said to be the highest and most solemn of all the ceremonies performed during the Muktad days and consists of the whole of the Yasna of 72 chapters which includes 17 chapters of Gathas, chapters 3—8 of the Baj, chapter 60 of Afringan, and lastly part of the Satum: see Vol. 31 of Sacred Books of the East, page 195. Yasna and Yezeshne are the same.

As to the application of English law to Parsis I omitted to cite a case important as showing what the Privy Council said. *Rani Bhagwan Kuar* v. *Yogendra Chandra Bose*[1].

Padsha for the Advocate-General:—Trusts for the performance of Muktad ceremonies are not void because of the prohibition on the ground of superstitious uses. As to what are superstitious uses see Bacon's Abridgment, Vol. 1, page 581 (5th edn.), Chapter on Mortmain and Superstitious Uses. Muktad ceremonies have nothing to do with the souls of the dead but with their Furohurs and the Furohurs of the dead. The doctrine of superstitious uses relates only to the souls of the dead and would not apply to Muktad ceremonies even though it were in force in India. Superstitious use is defined in Tudor (edition of 1906), page 4. All religions not subversive to morality are tolerated in India. Dr. Whitley Stokes, Vol. 1, page 390, note to section 105 of Succession Act, says that there is no prohibition in India of what English lawyers call superstitious uses. And at page 839, note 6, he says "In India a trust for what English lawyers call superstitious uses, *e. g.*, saying Masses for the dead, may be valid": *Das Merces* v. *Cones*[2], *Andrews* v. *Joakim*[3], *Advocate-General* v. *Vishvanath*[4],

(1) (1903) L. R. 30 I. A. 249 at pp. 253—255.
(2) (1864) 2 Hyde. 65.
(3) (1869) 2 Ben. L. R. (O. C. J.) 148.
(4) (1855) 1 Bom. H. C. Appx. ix at p. xv.

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Colgan v. *Administrator-General of Madras*[1], followed in *Kaleloola Sahib* v. *Nuseerudeen Sahib*[2], all these cases show that the doctrine of superstitious uses does not apply to India, and if trusts for Masses have not been held valid it is not because of superstitious uses but on the ground of perpetuity. Though it might possibly be held that the English Civil law applied to Parsis as in *Naoroji* v. *Rogers*[3], yet the religious law of England since the Reformation has not been held to apply to India. It was held in *Mitford* v. *Reynolds*[4] and in *Mayor of Lyons* v. *East India Company*[5] that the statutes of Mortmain have not been extended to India. These were followed in *Yeap Cheah Neo* v. *Ong Cheng Neo*[6]. Superstitious uses were created by the Reformation: see Tudor, page 4. Jarman on Wills, Vol. 1, page 163 (5th edn.), 23 Henry VIII, Ch. 10, 1 Edward VI, Ch. 14, *Reg.* v. *Commissioners of Income Tax*[7]. The English Judges followed those statutes and extended their policy. Trusts to say Masses were held to be good religious trusts before the Reformation: see the arguments of Browne, K. C., in *O'Hanlon* v. *Logue*[8] at pages 248—254 and Coke on Lyttleton, Vol. 1, sec. 169 (19th edn.). The rule of perpetuity was in vogue at the time also but still such trusts were held valid. I argue therefore that even if we are governed by the common law of England and apply the same to our religious trusts and even if it is held that our Muktad ceremonies resemble Masses still such trusts according to the common law prevailing in England prior to the Reformation would be held valid.

In re Michel's Trust[9] shows that the English law though it relaxed its severity in other matter still it retained its severity with regard to trusts to say Masses for the repose of the dead.

The question then is what Religious Law would apply to India. *Naoroji* v. *Rogers*[3] lays down that only as to civil rights English law would apply; as to religious trusts whether it is or

(1) (1892) 15 Mad. 424.
(2) (1894) 18 Mad. 201.
(3) (1867) 4 Bom. H. C. R. (O. C. J.) 1.
(4) (1841) 1 Phil. 185.
(5) (1836) 1 Moo. I. A. 175.
(6) (1875) L. R. 6 P. C. 381.
(7) (1888) 22 Q. B. D. 296 at p. 310.
(8) [1906] 1 I. R. 247.
(9) (1860) 28 Beav. 39.

is not good must be decided by a secular judge upon the evidence of witnesses professing the same faith as the settlor or testator. In *Yeap Cheah Neo* v. *Ong Cheng Neo*[1] English law was applied because no evidence as to the customary law of the Chinese was taken. This case was referred to by West, J., in *Fatmabibi* v. *The Advocate-General of Bombay*[2]. In *O'Hanlon* v. *Logue*[3] FitzGibbon, J., says the secular Court must act upon evidence of the belief of the members of the Community concerned. In India all religions stand on an equality except that Episcopal and Presbyterian Churches have some benefits from the Indian Revenue: 53 Geo. III, Chapter 155, section 33; Ilbert's Government of India, pages 256—259; *Advocate-General* v. *Vishvanath*[4]. The *Lex Loci* applies where the country acquired is inhabited until the Crown or Legislature changes it.

The next point is to show that a religious trust is a charitable trust. In *Baker* v. *Sutton*[5] Lord Langdale M. R. says "all the cases with one exception go to support the proposition that a religious purpose is a charitable purpose". This was followed in *Townsend* v. *Carus*[6], a very important case, and the judgment of the Vice-Chancellor is very instructive. In that case a bequest to trustees to pay monies to certain societies having regard to the glory of God, in the spiritual welfare of his creatures, was held a good religious purpose. *Powerscourt* v. *Powerscourt*[7] cited in *In re Darling*[8] where a gift by will "to the poor and to the service of God" was upheld as a good charitable gift. *Attorney-General* v. *Pearson*[9]; *Commissioners for special purposes of Income Tax* v. *Pemsel*[10].

Muktad ceremonies are acts of religious and divine worship and they also form an important source of remuneration to the priestly class; in other words, they are for the benefit of the Ministers of the Parsi religion. Such a benefit is clearly within the definitions of religious or charitable uses in section 105 of the Indian Succession Act. *Magistrates of Dundee* v. *Presbytery*

(1) (1875) L. R. 6 P. C. 381 at p. 395.
(2) (1881) 6 Bom. 42 at p. 50.
(3) [1906] I I. R. 247 at p. 279.
(4) (1855) 1 Bom. H. C. Appx. ix.
(5) 1836) 1 Keen 224 at p. 233.
(6) (1843) 3 Hare 257.
(7) (1824) 1 Molloy 616.
(8) [1896] 1 Ch. 50.
(9) (1817) 3 Mer. 353.
(10) [1891] A. C. 531.

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of Dundee[1] upheld a gift for the benefit of the ministers of the presbyterian religions of a particular town. In *Grieves* v. *Case*[2] a gift for the mainteanance of preaching ministers was held good. *Middleton* v. *Clitherow*[3], *Gibson* v. *Representative Church Body*[4], Tudor, page 54.

There are two points of resemblences between Muktad and Masses; both are addressed to a large congregation and parts of the ceremony of both can only be performed by priests. The Parsi religion stands on the same footing as the Roman Catholic religion does in Ireland. Therefore the Irish cases are important. I rely on the evidence of the high priests.

J. K. Tarachand for the plaintiff in reply:—The Zoroastrian religion is the religion revealed by God to Zoroaster and then promulgated by him. Interpretations by priests or interested person are not part of the Zoroastrian religion. The Gathas do not say anything about Farvashis. Muktad ceremonies are not religious ceremonies but ceremonies sanctioned by custom which arose after the Farvardin Yast was written which was long after the religion had been revealed to Zoroaster. What is custom is not religion. Section 50 of Farvardin Yast asks for prayers on the Furohurs themselves and not on God or anyone else. (Sacred Books of the East, Vol. 23, page 56, sections 8—11; Vol. III of Khordah Avesta, section 21.) The Muktad ceremonies are not, and were never intended to be, for the benefit of the souls of the dead. This is an erroneous belief and engendered in the minds of the ignorant Parsis by priests for the purpose of putting money into their own pockets. The evidence in *Limbuwalla's* case[5] shows clearly the difference between Furohurs and the souls of the dead (see Jardine, J.'s judgment at page 446). I submit Jardine, J., was right and that he had the proper evidence before him.

In *Allbless'* case[6] the Advocate General did not object to the matter being re-opened. The question is does the English law apply to a perpetual trust for the performance of Muktad cere-

(1) (1861) 4 Macq. 228.
(2) (1792) 4 Bro. Ch. Cas. 67.
(3) (1798) 3 Vesey 734.
(4) (1881) 9 L. R. Ir. 1.
(5) (1887) 11 Bom. 441.
(6) (Unreported) Suit No. 96 of 1892.

monies. *Maclean* v. *Cristall*[1] gives a history of how English law was introduced into India. The Court must decide whether, and what part of, the law applies to this case. The element of public benefit is wanting although it may be a religious trust, although it may be necessary to employ a priest to perform the ceremonies, although it might amount to an act of divine worship, still the trust would be bad in law as offending against the rule of perpetuity: Transfer of Property Act, sections 14—17. There must be present the element of public benefit. If a trust is for the advancement of religion it would be for the public benefit, but every religious trust is not for the public benefit: Queen's Proclamation, Ilbert's Government of India, page 572, *Commissioners for special purposes of Income Tax* v. *Pemsel*[2], *Dolan* v. *Macdermot*[3], *Jeffries* v. *Alexander*[4], *Morice* v. *The Bishop of Durham*[5], *Attorney-General* v. *Delaney*[6], *O'Hanlon* v. *Logue*[7], Tudor on Charities, page 87, *Yeap Cheah Neo* v. *Ong Cheng Neo*[8]. In *Thornton* v. *Howe*[9], *In re Michels' Trust*[10], *Straus* v. *Goldsmid*[11] and *Turner* v. *Ogden*[12], the trusts were for the public benefit. The statute of superstitious uses merely made these existing trusts void and afterwards the Courts would not uphold the trusts of the same nature. The doctrine of superstitious uses made trusts illegal but did not make them non-charitable. If the trusts are illegal but charitable the doctrine of Cypres would apply. I sumbit that the Court is bound by the decision in *Yeap Cheah Neo* v. *Ong Cheng Neo*[8]. *O'Hanlon* v. *Logue*[7] was not a decision of the highest Court of appeal nor were the Judges who decided it unanimous.

I further submit that the trust is impossible of performance because certain objects are unascertainable; therefore the trust is void for uncertainty both as to the ceremonies to be performed and the time at which they are to be performed. The Parsis

(1) (1849) P. C. C., 75 at p. 85.
(2) [1891] A. C. 531.
(3) (1865) L. R. 5 Eq. 60.
(4) (1860) 8 H. L. C. 594 at p. 648.
(5) (1804) 9 Vesey 399 at p. 406 and (1805) 10 Vesey 522 at p. 542.
(6) (1875) I. R. 10 C. L. 104.
(7) [1906] 1 I. R. 247.
(8) (1875) L. R. 6 P. C. 381.
(9) (1862) 31 Beav. 14.
(10) (1860) 28 Beav. 39.
(11) (1837) 8 Sim. 614.
(12) (1787) 1 Cox. Ch. Ca. 316.

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have lost their Calender; according to some, the new year commences in September, others say it commences in August, and others again say it begins on the 21st March. The commencement of the year being unascertainable the last ten days of the year cannot be ascertained. The Farvardin Yast directs that these ceremonies be performed at the end of the Parsi year.

I further say this trust is void as being opposed to public policy. See Sir Charles Farran's notes. The Legislature was approached to make such trusts valid and after due consideration came to the conclusion that these trusts are void by not passing any legislation to disturb the judgments. The Court should therefore uphold these decisions.

DAVAR, J.—Dinbai widow of Jehangir Cursetji Likimna, otherwise known as Tarachund, a member of the Parsi community of Bombay, on the 21st of December 1871 executed an Indenture of Trust whereby she appointed her two sons Kharsetji and Merwanji and her son-in-law Sorabji Hormusji Bottlewalla Trustees and conveyed to them certain immoveable and moveable property belonging to herself upon Trusts which are therein set out. All the three original Trustees are dead. The first defendant is the widow, and executrix of the will, of Merwanji one of the original Trustees. The plaintiff is the son and administrator with the will annexed of the property and credits of his late father Kharsetji who was another original Trustee. Defendants Nos. 10 and 11 are the surviving executors of the will of Sorabji Hormusji Bottlewalla the third Trustee under the Settlement made by Dinbai.

The portion of the Trusts created by Dinbai with which the Court is concerned in this case is in the following terms:—

"In trust to receive the interest and income thereof and to pay to the said Bai Dinbai during her life time and after her death upon trust to purchase or set apart out of the said Trust Funds Promissory Notes of the Government of India for the sum of Rs. Fifteen Thousand bearing interest at the rate of four per centum per annum and to pay the annual income thereof to each of them the said Kharsetji Jehangir Tarachund, Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachund and after the death of any of them to his or their Executors or Administrators alternately in regular rotation every third year in the order named above

to enable him or them to defray the expenses of annual Muktad ceremonies of the dead members of the family in both sects of Shenshai and Cudmees."

Dinbai died on the 6th of March 1889. Previous to her death she executed a will bearing date the 15th of July 1886. By the said will she directed that certain silver utensils which were in her possession and which are used in the performance of the Muktad ceremonies should be kept in trust by her executors and each of the Trustees of the Settlement of 1871 were to be allowed to use the same for the purposes of the Muktad ceremonies. The Executors of the will were the same as the Trustees under the Trust Settlement of 1871. Kharsetji predeceased Dinbai. Sorabji died on the 31st of August 1902. The third Trustee Merwanji died on the 15th of March 1905. After Dinbai's death the Trusts in respect of the Muktad ceremonies were carried out up till the death of Merwanji in 1905. The first defendant is in possession of the Government Paper of the nominal value of Rs. 15,000 mentioned in the Trust deed of 1871 and the silver utensils mentioned in the will of Dinbai. The Muktad ceremonies were admittedly not performed in the year 1906. The plaintiff filed the suit and obtained an originating summons for the purpose of having certain questions arising under the Trust Deed settled by the Court. The first of these questions is:—

"Whether the Trusts declared in respect of the Government Promissory notes for Rs. 15,000 mentioned in the plaint are valid."

This originating summons first came on for hearing before me in Chambers on the 22nd of June when counsel for the parties appearing at the hearing took it for granted that I would follow the decision of Mr. Justice Jardine in *Limji Nowroji* v. *Bapuji Ruttonji*[1] declaring Trusts for Baj Rojgar and Muktad ceremonies to be invalid. In recent years I had, however, occasions to consider that case, commonly spoken of as *Limbuwalla's* case, and I entertained grave doubts as to the correctness of the application of the rule against perpetuities to trust relating to Muktad and Baj Rojgar ceremonies prevailing amongst the Parsis

(1) (1887) 11 Bom. 441.

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professing the Zoroastrian religion. I had weighty reasons for declining to follow that decision and desiring to judge for myself whether the doubts I entertained were well founded. At this hearing the only question that I was asked to consider was raised by Mr. Kanga for the 1st and 2nd defendants who contended that the plaintiff's claim was barred by limitation. This contention was based on the decision of Mr. Justice Candy in *Cowasji N. Pochkhanawalla* v. *R. D. Setna*(1) and on the assumption that the Trust in question in this suit was bad in law. On my expressing my unwillingness to follow the previous decision referred to above Mr. Bahadurji who appeared for defendants 10 and 11 was instructed immediately to say that he would be prepared to support the Trust. The matter was after some argument adjourned to the following contested Chamber day and came on again for further hearing on the 29th of June when I adjourned the summons into Court for evidence and argument and directed that the Advocate-General be added as a party defendant. At the hearing in Court Mr. Kanga for defendants 1 and 2, Mr. Bahadurji for defendants 10 and 11 and Mr. Padsha for the 12th defendant, the Advocate-General, combined forces and waged uncompromising war in favour of the Trust against the plaintiff whose counsel Mr. Tarachand bore the brunt of the attack with remarkable courage and attempted with much ability to uphold his contention that the Trust created by Dinbai for the performance of Muktad ceremonies was not a Charitable Trust and was bad in law as offending against the Rule forbidding perpetuity.

It is not easy to learn or understand the true meaning and import of the ceremonies involved in the comprehensive word Muktad or Dosla. Though a Parsi myself it took me considerable time before I could correctly understand the real meaning and nature of the ceremonies—their origin and effect—and the true aim and object of the performance of those ceremonies during the Muktad days. As the case progressed before me I realised how much patient labour must have been involved on the part of counsel for all parties before they were able to place the

(1) (1895) 20 Bom. 511.

case before me in the manner in which it was placed before the Court and not a little credit is due to the solicitors who worked and laboured to instruct them so efficiently.

Before I proceed to consider the main point in the case it is necessary that I should deal with the contention of Mr. Tarachund forcibly pressed upon me by him that I was bound to follow the decision of Mr. Justice Jardine more especially as other Judges had followed the same in other cases.

Sitting on the Original Side of this Court I concede at once that I am bound ordinarily to follow the judgment of another Judge when he has decided a question of law—or laid down certain principles of practice or procedure—or judicially construed any provision of the law prevailing in the country. But surely there the matter must end. Is a single Judge bound to follow another Judge's *findings of facts based on the evidence recorded by him*, when the evidence that may be available before the Judge in a later case may be fuller and more reliable and may tend to lead him to a different conclusion? I am fully aware that one of the maxims governing a Judge in administering justice is :— "*Omnis innovatio plus novitate perturbat quam utilitate prodest.*"—"Every innovation occasions more harm by its novelty than benefit by its utility."

This Judicial Rule "Stare Decisis" is discussed at page 69 of the first volume of the 21st Edition of Blackstone's Commentaries where it is said :—

"It is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of *exception*, where the *former determination is most evidently contrary to reason; much more if it be contrary to the divine law.* But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is *manifestly absurd* or *unjust*, it is declared,

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not that such a sentence was *bad law*, but that it was *not law*, that is, that it is not the established custom of the realm, as has been erroneously determined."

The course I thought fit to adopt in this case was not adopted without the most anxious consideration. I have carefully studied every line of the judgment of Mr. Justice Jardine. I have carefully perused the proceedings in the case and studied the learned Judge's notes of the arguments addressed to him by counsel and the evidence recorded by him. The more I have thought over the case the more convinced I have felt that his "*determination is most evidently contrary to reason and is clearly contrary to the divine law*" as it prevails amongst the believers of the Zoroastrian tenets. It is a decision which to my mind is "*manifestly unjust.*"

The error of the judgment of Mr. Justice Jardine is proved to demonstration by the evidence both oral and documentary recorded in this case. As this is the first case that came before the Court, and as the judgment is reported in the authorised reports of our Courts, as other learned Judges have accepted the finding as correct and followed it, I think it is very necessary to examine the circumstances under which the parties to that suit obtained the decision, and see whether the learned Judge was not misled into arriving at an erroneous conclusion by the way in which the case was placed before him.

The plaintiff, as the Committee of the estate of a lunatic, goes before the Chamber Judge and applies for leave to join certain other parties in stating a case for the opinion of the Court under section 527 of the Civil Procedure Code. In support of his application he made an affidavit in which he states as follows:—

"(3) The said Testator set apart the income of the said one-third share in the said Khetwady Bungalow for the performance in perpetuity of certain Private Religious Ceremonies, namely, the Baj Rojgar ceremonies, the consecration of the Nirungdin, the recitation of the Yajusni, and the annual Ghambar and Dosla ceremonies,"

"(6) I am *advised* that the devise of the said one-third share in the said Khetwady Bungalow is void as being in perpetuity and not for a charitable use."

On the plaintiff being authorised to state a case for the opinion of the Court, a case is submitted to the Court wherein it is stated that the plaintiff as such committee as aforesaid and the first four defendants contend that the devise is void as being in perpetuity and not for a charitable use, and that failing the trust the plaintiff and the first four defendants were entitled to the property in equal proportions. The fifth defendant was the mother of the first four defendants and executrix of the will of their father. The sixth defendant was the Advocate-General.

It does not appear from the proceedings who advised the plaintiff and the other parties that the ceremonies in question in the case were private religious ceremonies and that the devise was void in law. At the time the case was submitted to the Court and previously thereto the solicitor acting for the parties could not possibly have done so, as it is proved in this case that he could have known nothing or next to nothing about the nature of the ceremonies. If a case was submitted to counsel the advice would be valueless in that the counsel advising would probably know less than the solicitor preparing the case. The same solicitors who appeared for the plaintiff appeared for the first five defendants. The Advocate-General knowing nothing about the real nature of the Trusts in his capacity as Advocate-General, said nothing, but submitted himself to the orders of the Court but in his capacity as counsel he appeared for the first five defendants instructed by the same solicitors as represented the plaintiff and supported the plaintiff's case. Only one witness was examined in the case.

A lurid light is thrown on how the plaintiff's solicitor within a quarter of an hour educated himself on questions that have cost me many days' concentrated attention to understand and in what manner the only witness was examined before the learned Judge in the course of half an hour or so, by the following passage in the evidence of the same witness Mr. Jivanji "Jamsetji" Mody when examined before me :—

"In the *Limbuwalla* case Mr. Wadia of Messrs. Wadia and Ghandhy came to me and asked me to explain certain ceremonies. The interview lasted for quarter of an hour. Some day subsequently I was asked by a clerk to come to Court. He said the Judge might wish to ask me some question.

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"I demurred to go in that way without notice, but eventually I was persuaded and I came to Court after the tiffin hour. I was very shortly examined. I was given no opportunity to explain my evidence and convey the right impressions to the Judge. Mr. Justice Jardine's decision came to me and many others as a surprise."

The learned Judge's note book affords very instructive reading and shows how the case was engineered at the hearing. Mr. Lang appeared for the plaintiff. The acting Advocate-General, Mr. Macpherson, appeared for the first five defendants. These parties had joined hands to defeat the Charity and divide the spoils. Counsel who appeared in the case could know nothing about the Scriptures and the Ritual of the Zoroastrian religion. They must necessarily depend upon the materials supplied to them in their briefs. Stray passages from Dr. Haug's "Essays on Parsis" and the late Mr. Dossabhai Framji's book were read before the Court. Mr. Jivanji Mody was put in the box and such questions as suited the parties were asked. There was no one present to defend Charity or to explain and elucidate the passages read on the evidence given. Cases which have scarcely any applicability to the trusts in question were cited and a spirit of happy unanimity and perfunctoriness seems to have pervaded the discussion of a question of the most vital importance to a whole community, and the combined efforts of the parties led the Judge into forming conclusions that are manifestly erroneous.

The learned Judge observes in his judgment (at p. 447):—

"From the evidence of the priest and the reference made to Dr. Haug's learned Essays, I come to the opinion that the benefits which, according to the belief of the Parsis, result from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Frohars or prototypes of the dead."

The learned Judge then goes on to say that the objects of these trusts bear analogy to devise of property to "maintain Tombs of deceased relatives" or for a "gift to private company." The judgment ends up by saying:—

"There has been no conflict, the parties being of accord that the devise is void, and the Advocate-General, as representing the Charity, leaving them in the hands of the Court."

The evidence of the only witness in the case—on a point of such vital importance to a whole community—would not occupy more than one side of foolscap sheet and at the end of the evidence I find a note :—

"As counsel for defendants the Advocate-General supports Mr Lang's case, as Advocate-General he leaves the case to the Court."

From a perusal of the records and proceedings in this case one would be led into the belief that the Zoroastrian religion had no Sacred Books, no Scriptures, no religious literature of antiquity or authority—that Scriptures written in Gatha, Avesta, Pehlvi and Pazund languages which distinguished scholars of the civilized world had laboured to translate and explain for many years never existed, but that the Zoroastrian religion solely depended on a German Doctor's Essays on Parsis and Mr. Dossabhai Framji's interesting book delineating manners and customs prevailing amongst the Parsis and the Bombay Gazetteer. Not a single text from the Scriptures seems to have been cited, not a single book of authority is referred to, not a word appears to have been said as to whether the performance of these religious ceremonies were enjoined by the Scriptures of Zoroastrianism, not a hint is given as to the origin and meaning of the various ceremonies. The only party before the Court—the Advocate-General—whose duty it was to protect the Charity—if of course valid in law—was left in ignorance of the true nature of these ceremonies and he never made an effort to defend the Trust because he must have believed that what was stated in his brief for the defendants for whom he appeared must have been correct, and I have no doubt whatever that those who instructed counsel in the case must in their ignorance have believed that they were putting forth correct instructions.

It never seems to have struck any one in the case that the Trust in question was a religious trust—that it was a trust in "advancement of religion" and as such in law necessarily a charitable trust. It never seems to have struck any one to look at the prayers that are ordinarily recited at the performance of the ceremonies in question to find out whether those prayers

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did not amount to an act of divine worship. The real point in the case was never placed before the Court. The true intent, purport and meaning of the ceremonies required to be performed during the Muktad days were never so much as mentioned, much less explained to the Court. Authoritative translations of the Zoroastrian Scriptures contained in the "Sacred Books of the East" and other works of Oriental scholars were not submitted to the Court for its consideration. Not only evidence which was available in abundance was not given, but the one witness who was examined had no opportunity of explaining or elaborating his answers, but was confined to answers to questions which appear to be framed to suit the purposes the parties had in view. A decision obtained under circumstances such as I have set out can hardly command the confidence of the other parties affected by it. If the community so gravely affected by the decision had a chance of placing all the materials available at the disposal of the Advocate-General —the official guardian of all charities—had he been in a position to put the case fully and fairly before the Court—if anything like what is possible to be said in support of the Trust had been said and considered by the learned Judge trying the issue—if there had been some one before the Court who was interested in supporting the trust and had made even an attempt to do so, I might have hesitated before making up my mind to refuse to follow the decision in the case. I feel very strongly that Mr. Justice Jardine was misled into coming to the conclusions he did and that the judgment in the case was improperly obtained. I do not use the expressions "misled" and "improperly obtained" in any sense offensive to the parties concerned in the case. I have no doubt they acted according to their lights, but it seems to me it would be a very perverse mind that can—after reading the evidence and exhibits recorded in this case—still maintain that Mr. Justice Jardine's conclusions as regards the Muktad, Baj and other like ceremonies are correct. I will conclude the consideration of this case by recording that I feel that if I had merely followed this judgment and declined to Judge for myself I would have been guilty of shirking a duty cast upon me by my office.

I am told that this is not the only case on the subject of trusts in respect of Baj, Muktad and other like ceremonies; that since February, 1887, when Mr. Justice Jardine decided *Limbuwalla's* case discussed above, there have been other cases and that other Judges have come to the same conclusions. The records of the Prothonotary's office have been most carefully searched and every case relating to Muktad and Baj Rojgar ceremonies has been mentioned and discussed before me. In fairness to the plaintiff, who relies on these cases, and in fairness to myself and the course I have adopted, I feel that it is necessary to consider each one of these cases separately—though the review of these cases must necessarily be much shorter than that of *Limbuwalla's* case, which was the first of its kind, and which I am clearly of opinion is responsible for the results of every subsequent case. While writing this judgment I have the pleadings, proceedings, notes of counsel's argument and of evidence, all before me, and although it has taken me considerable time to do so, I have carefully considered and scrutinised every paper important or unimportant in *all* these cases. I will take the cases in their chronological order.

The first case that came before the Court after the decision of Mr. Justice Jardine in *Limbuwalla's* case[1] was *Dinbai* v. *Hormusji Dinsha Hodiwalla*[2]. It is generally spoken of as *Hodiwalla's case*. A Parsi of Surat by his will directed that the income of the residue of his property should be spent in the performance of religious ceremonies affecting the deceased members of his family. He left a mother, who was the plaintiff in the case, and a widow, with whom evidently he was on bad terms and whom he had disinherited by his will—she was the fifth defendant—the first four defendants being the executors of the will. The plaintiff contended that the trust created by the will was void and that she and the fifth defendant, the mother and the widow, were entitled to the residue. Two of the executors did not appear at the hearing—the other two submitted themselves to the Court and the fifth defendant supported the plaintiff's contention. The Advocate-General was no party to the

(1) (1887) 11 Bom. 441. (2) (Unreported) Suit No. 267 of 1890.

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suit but he appeared before Mr. Justice Farran, who heard the case, as counsel for the plaintiff. The Advocate-General cited Mr. Justice Jardine's decision in *Limbuwalla's* case[1], which by then was reported in I. L. R. 11 Bom., referred to the case of *Yeap Cheah Neo* v. *Ong Cheng Neo*[2], which was relied on by Mr. Justice Jardine, mentioned section 105 of the Indian Succession Act, and then examined the testator's brother as the only witness in the case. The witness purports to explain what was meant by "outlays relating to the dead." He mentions Muktad, Baj, etc. His evidence-in-chief consists of seven sentences and his cross-examination of two more short sentences. Mr. Justice Farran gave no judgment but merely recorded a decree declaring that the bequests in the will were void and that the plaintiff and the fifth defendant were entitled to the residue of the estate. It cannot even be pretended that Mr. Justice Farran brought his mind to bear upon the main question in the case. He assumed that *Limbuwalla's* case was rightly decided and merely followed it.

The next case is *Dhunbaiji* v. *Nowroji Bomonji and others* known as *Wadia's* case[3]. Although it was filed before the *Hodiwalla* case discussed immediately before this—it was heard and decided after that case. It involved very complicated questions of devolution of property. It was heard by Mr. Justice Farran also and a decree was passed on the 7th of March 1891. The questions in the suit arose out of an instrument in writing bearing date the 15th of February 1826. It is not necessary for the purposes of this case to go into any other matters in the suit except that portion that relates to the Trust created in favour of Muktad and Baj ceremonies. Para. 8 of the plaint states :—

"By the said writing the expenses of the Baj Rojgar and Muktad ceremonies of the said Nusservanji Dadabhai, Navrozbai, Dadabhai and Jaiji, and the members of the family of the said Nusservanji and Navrozbai *together with those for the maintenance* of the *Fire Temple at Nargore*, were directed to be paid out of the income of the Warehouse at Modikhana and the oart adjoining Churniwadi, and since the date of the said writing such expenses have been paid out of the said income."

(1) (1887) 11 Bom. 441. (2) (1875) L. R. 6 P. C. 381.
(3) (Unreported) Suit No. 565 of 1889.

The first issue in the case was :—

"Whether the bequests and charitable trusts are binding and ought to be carried out."

The sixth issue was :—

"Whether in the events which have happened the plaintiff is not entitled to have the charitable and religious trusts carried into effect."

Mr. Justice Farran begins his judgment by saying :—

"Though the property at stake in the suit is not of great value and the *friendly spirit* in which the cause has been contested shows that its decision is not of great moment."

Referring to the Trusts, he says :—

"Trusts for the performance of Muktad and Rojgar ceremonies have been decided not to be charitable Trusts : *Limji* v. *Bapuji*, I. L. R. 11 Bom. 441. That case has been *frequently followed* and is binding on a single Judge as an authority. The trusts, therefore, not being charitable are void as offending against the law which forbids perpetuities. The fact that the plaintiff and her mother carried out these trusts for a long series of years does not entitle the plaintiff to go on doing so against the wishes of the rest of the descendants of Mithibai."

The findings on the first and sixth issues recorded are in the negative and for the defendants. This case shows that Parsis, as early as 1826, were settling property in perpetuity for the performance of Muktad and Baj Rojgar ceremonies. The passage from the judgment I have set out shows that in this case also the same learned Judge, who heard the previous *Hodiwalla's* case[1] has followed Mr. Justice Jardine's decision in *Limbuwalla's* case[2] without bringing his own mind to bear on the question of these trusts. But the most *startling* part of the case is a portion of the decree which runs as follows :—

"This Court doth declare that the religious and charitable trusts in respect of the Baj Rojgar and Muktad ceremonies *and the maintenance of the Fire Temple* in the town of Nargore in the plaint mentioned are invalid and inoperative and the same are hereby set aside."

The maintenance of the Fire Temple, as I have shown above, is referred to in the plaint. It is not referred to in Mr. Justice Farran's judgment and the discovery of the declaration in the decree that the Trust for the maintenance of the Fire Temple at

(1) (Unreported) Suit No. 267 of 1880. (2) (1887) 11 Bom. 441.

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Nargore is invalid and inoperative will come as a cruel surprise to the counsel for the plaintiff. When in the course of his argument he urged that Trust for Baj and Muktad ceremonies were not trusts in advancement of the Zoroastrian religion, I asked him to give me some instances of trusts that, according to him, would be really in advancement of the Zoroastrian religion, he instanced a trust for the maintenance of a Fire Temple. It seems to me that the attention of the learned Judge, who in this case was considering many complicated questions of devolution of property, was never drawn to this portion of the trusts. The omission of any reference to this branch of the trust where he sums up the provisions of the writing of 1826 in the beginning of his judgment and merely mentions Baj Rojgar and Muktad ceremonies, lends support to my surmise that this particular question could never have been argued before him. I refuse to believe that any Judge of this Court would deliberately declare that a Trust created by a Parsi for the maintenance of a Fire Temple is invalid and inoperative. It appears in the decree because the Judges have nothing to do with the drawing up of decrees unless the parties are at variance and the minutes are spoken to before the Judge passing the decree.

Before leaving the discussion of this case, I should like to say that the statement of Mr. Justice Farran that the decision in *Limbuwalla's* case[1] has been "frequently followed" appears to be erroneous. There was no case between this and *Limbuwalla's* case except *Hodiwalla's* case[2], where the same learned Judge followed Mr. Justice Jardine. Mr. Bahadurji challenged the plaintiff's counsel to produce any other case and a strict search in the Prothonotary's office has failed to find any.

The fourth case relating to Baj Rojgar and Muktad trusts is what is known as *Gorewalla's* case—*Cowasji Byramji Gorewalla* v. *Peerozbai and others*[3]. In this case an attempt was made to uphold the trusts by all the parties other than the first defendant. The trusts were created by a will which was not executed or deposited as required by section 105

(1) (1887) 11 Bom. 441. (2) (Unreported) Suit No. 267 of 1890.
(3) (Unreported) Suit No. 281 of 1892.

of the Indian Succession Act. An attempt was made to show that the properties were devised to charity before the will, but the attempt failed, the Court holding that there was no such valid devise previous to the will. There was more evidence given in this case than was given before Mr. Justice Jardine, but it was all oral evidence unsupported by any scriptural texts or quotations. Mr. Justice Parsons, who heard the case, delivered an oral judgment, notes of which exist. The following passages occur in these notes:

"Purposes of alleged Trust are six in number—

(1) Asodat (presents to priests),
(2) Supply of sandalwood to temples,
(3) Performance of Baj Rojgar and Muktad ceremonies,
(4) Distribution of alms to deformed,
(5) Outlays on death of relations, and
(6) Good and charitable acts.

Of those only numbers 1, 2 and 4 can be held legal and valid."

"Baj Rojgar and Muktad are only prayers for the death *which have been held to be invalid purposes* by several decisions of the Court and evidence in the case shows the correctness of the decisions. Outlays on deaths of relations are mere private expenses, neither public nor charitable, and other good acts is too vague and indefinite an expression to denote anything."

"The bequest, however, is void as the will was not executed or deposited as required by section 105 of Act X of 1865."

The question as to which, if any, any of the purposes were charitable seems to have been one of academic interest in the case in view of the fact that owing to the will not being executed and deposited in the manner required by section 105 of the Indian Succession Act all bequests for a religious or charitable use would be void.

The *several decisions* referred to by the learned Judge are only the decisions in the three cases I have discussed previous to this.

Plaintiff's counsel argued that in this case at all events the Court considered the evidence and he points to the words "the evidence in this case shows the correctness of the decision." I have read that evidence; it is very meagre and very incomplete. It is not supported by a single quotation from a reference to the

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scriptures. It seems to me, however, that in this case it was really not necessary to find on the evidence at all, and the finding really never affected the result, as the bequests were void for non-compliance with the requirements of section 105 of the Indian Succession Act. The predominating factors influencing the finding, however, were the "several decisions of the Court" which the learned Judge had in mind.

However be it, it cannot be argued that I am bound to follow this finding—if finding it be—on the evidence recorded in that case, when fuller and far more satisfactory evidence was available in the case before me.

The fifth case in which the question of Baj Rojgar and Muktad ceremonies came up before the Court for consideration was *Maneckji Edulji Allbless and others* v. *Sir Dinsha Manockji Petit and others*[1]. It is known as the *Allbless* case, and was heard by Mr. Justice Bayley. In the course of the hearing the learned Judge has recorded the following note:

"The Advocate-General says he understands Parsi community are not satisfied with that decision...(referring to 11 Bom. 441) and that he will not object to its being reconsidered."

Evidence has been recorded in this case and much of what I have said as to the evidence in the previous case also applies to the evidence in this case.

In this case the settler had set aside Government Paper of the nominal value of twenty-five thousand, and directed that the income thereof should be used for the purpose of perfoming Baj Rojgar and Muktad ceremonies and also for the purpose of giving "Dinners of Feasts to the indigent poor Parsees and Eranees or Persian Parsees respectively who may be disabled by age, blindness or other infirmity of body or mind and who may for the time being be residing in the charitable buildings or asylums provided for them at or near Malabar Hill near the Towers of Silence". The learned Judge delivered an oral judgment on the 16th of April 1895, and passed a decree declaring "that the Trusts declared in the said Indenture of the 30th day of June 1880 as to Promissory Notes of the Government of India of the

(1) (Unreported) Suit No. 96 of 1892.

nominal value of Rs. 25,000 *are wholly void.*" Thus the remarkable result achieved by reconsidering the decision of Mr. Justice Jardine is not only that the Trusts for Baj Rojgar and Muktad ceremonies are void but that a Trust created by a Parsee for feeding the indigent, blind and infirm members of his community, who, by reason of their misfortunes and afflictions, would be inmates of the charitable houses provided for them by their community are also void. This decision requires much understanding, and it is very unfortunate that no authentic note of the judgment exists amongst the records of the Court. The plaintiff's counsel has furnished me with notes of the judgment taken by counsel, and what they show makes it still harder for me to reconcile what the learned Judge is taken down as having found on the evidence with what he decided. One thing is quite clear. The main ground of his decision was the judgment of Mr. Justice Jardine. The following are some of the notes taken by counsel:

"Sanjana's evidence showed that ceremony *is for benefit of whole community* but especially and primarily for relations of deceased persons."

"*The public benefit is extremely small.*"

"The ceremonies are primarily and principally for the dead and *incidentally for the whole community.*"

"As to feeding of poor attempt has been made to separate the benefit but in my opinion the feeding provision stands or fails with the whole bequest of 25,000 rupees. Witness said: Feeding is part of the ceremony following at end of the ceremony."

"As to Baj Rojgar ceremony—trust is void by virtue of Indian Law Reports 11 Bom. 441."

"Decision of Farran, J., in 565 of 1889 following above case though unreported as stated by counsel."

"*I follow* 11 *Bombay* and hold that the ceremony is a private one, and the feeding a part of the same occasion as the Baj Rojgar ceremonies and the trust for Rs. 25,000 fails and forms part of the settler's estate."

Here we have the first faint indication that the ceremonies were for the *benefit of the whole community*, though the learned Judge thought the benefit was only incidental and that *there was public benefit*, although in the opinion of the Court the benefit was extremely small.

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The next case is spoken of as *Markur's* case—*R. R. Dadina* v. *Advocate-General and others*[1]. It arose out of two Trust deeds executed by the late Mr. Framji Markur, and amongst the very many questions that arose, the questions of the validity of Trusts in respect of Baj and Muktads was one. I have perused with care the evidence in the case and Mr. Justice Candy's long judgment on the various points arising therein. With reference to the question I am now considering this is what he says:

"In *L. N. Banaji* v. *Bapuji Ruttonji*, 11 Bom. 441, Mr. Justice Jardine held that trusts for the purposes of performing the following ceremonies were not valid charitable trusts. The ceremonies were:

Baj Rojgar, Consecration of Nirungdin, Recitation of the Yejushni, Annual Ghambars and Dosla ceremonies.

The only witness called in the suit on this part of the case was Mr. Hormusji Chichgur, a solicitor of this Court."

Now Mr. Hormusji Chichgur was a layman and never pretended to be a Pehlvi, Zend or Avesta scholar, and his evidence is of the most formal description, mostly directed to explain what the Navjote (Investiture of Sacred Thread) ceremony was. He, however, had the courage to tell the Court that the decision in *Limji Noworoji Banaji* v. *Bapuji Ruttonji Limbuwalla*[2] "caused a great shock." Mr. Justice Candy had no better materials placed before him than was before Mr. Justice Jardine and he merely followed that learned Judge's decision.

The seventh and last case, Suit No. 468 of 1895—*Cowasji N. Pochkhanawalla* v. *Rustomji Dossabhoy Setna*—was also heard by Mr. Justice Candy. It is reported.[3] The only question argued in the case was one of limitation and on that question the learned Judge, in passing, remarks: "In February 1887 there has been a decision of the Court, *L. N. Banaji* v. *Bapuji*[2], that the objects of such a Trust were not valid charities."

These seven cases that I have discused above are all the cases that came before the High Court between 1887 and now. The

(1) (Unreported) Suit No. 49 of 1895. (2) (1887) 11 Bom. 441.
(3) (1895) 20 Bom. 511.

question does not seem to have arisen previous to 1887. These are cases the decisions in which I am asked to follow. When carefully examined, it is clear that in all the cases that succeeded *Limbuwalla's* case[1] the learned Judges have followed Mr. Justice Jardine's decision. When read in the Law Report, where it is published, that judgment at first sight impresses the reader. It tells one how a head priest had expounded and explained the ceremonies, and the result that follows is of course correct if the learned Judge's finding of fact as to the real nature and true meaning of the ceremonies is correct. I have no hesitation whatever in saying that the evidence, both oral and documentary, recorded in the present case *demonstrates* beyond any doubt that the learned Judge was led by the parties to that suit possibly unintentionally but undoubtedly *led* into an error in believing that trusts for Baj and Muktad ceremonies were not charitable trusts and as such exempt in law from the application of the rule against perpetuities. In one or two subsequent cases an attempt was made to supply the deficiency in the evidence so palpably apparent in the first case—but the attempt was so feeble—the additional evidence so slender—the further materials supposed to be placed before the Court were so meagre, that it is no wonder that the learned Judges thought it safer to follow than to disturb what they took to be settled law. Studying the evidence with care in the *Gorewalla*[2] and *Allbless*[3] cases, it becomes quite evident that the whole fault lay at the door of those instructing counsel, for judging from the questions put and the answers elicited from the witnesses, it seems that although witnesses evinced anxiety to lead counsel on the right track, counsel took the witness away into matters which did not affect the real question before the Court. It seems to me amazing that no one in all the cases took the trouble to go to the original sources—the scriptures of the religion, to which the ceremonies belonged—to the sacred writings that are most undoubtedly authoritative, and—to the original texts founding the ceremonies and enjoining the performance thereof. The most important portions of the scriptures of the Zoroastrian religion of the ancient Persians are all translated

(1) (1887) 11 Bom. 441. (2) (Unreported) Suit No. 281 of 1892.
(3) (Unreported) Suit No. 96 of 1892.

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into English by eminent Oriental Scholars and are all contained in the volumes of the "Sacred Books of the East" edited by Professor Max Muller. These Books are easy of access and a complete set is in our Law Library, and yet it is a most inexplicable circumstance that these books have never been touched and nothing in them ever placed before the learned Judges who heard seven successive cases. These cases contain indication that the Parsi "community was not satisfied with the decision" in the case of *Limji Noworoji Banaji* v. *Bapuji Ruttonji Limbuwalla*[1] that "it caused a great shock," and yet it is a most remarkable circumstance again that it never struck those affected by the decision to approach the Advocate-General—put the case properly before him—put him in funds to fight the case on its true merits, and if necessary take it to the Appeal Court. No Advocate-General, if properly approached, would have refused to lend the whole weight and authority of his position in making a fight in favour of the charity.

The decisions of all the previous cases have been based on the evidence placed before the Court in each instance. On the evidence the learned Judges came to the conclusion that the Trusts were not charitable in the legal sense of the term and that they transgressed against the rule which forbids perpetuities. These decisions are based on findings of facts, on the evidence given in each particular case. It would be sufficient for me to say that it is quite open to me to judge for myself and find on the evidence tendered before me. If, however, it is necessary for me to say, I am prepared to say that in my opinion the "former determination" of Mr. Justice Jardine and the other decisions based on that determination appear to me, in the words of Blackstone, in the passage cited above, to be "evidently contrary to reason and clearly contrary to the Divine Law," according to the beliefs of the community professing the Zoroastrian religion, and that they are "manifestly unjust," and I refuse to follow them.

The only question before me in this case is: Is the Trust created by Dinbai for the performance of Muktad ceremonies a

(1) (1887) 11 Bom. 441.

Charitable Trust in the legal sense of the word charitable, and, as such, exempt from the application of the rule against perpetuities? For the proper determination of the question it is absolutely necessary that in the first instance the true nature and meaning of these ceremonies should be clearly understood, and I will first consider what are Muktad or Dosla ceremonies, before discussing the law applicable to Trusts for the performance of these ceremonies. Three members of the community, of established reputation for great learning and original research in the Scriptures of the Zoroastrian religion, have been examined before me, and numerous passages from the original writings dating from the most ancient times have been cited, explained and put in at the hearing of the suit. Wherever the correctness of any statement of these witnesses was challenged or doubted, they were able to refer to the original texts in support of their statements. From the evidence given before me at the hearing, it appears that the Zoroastrian religion is a revealed religion. It was revealed to Zoroaster or, as he is sometimes called, Zarthustra by Ahura Mazda the Supreme Being, who, according to scripture, was the only self-created Being. The celestial Hierarchy consists of six Amasha Sapentas or Amshaspunds. Ahura Mazda himself is sometimes spoken of as the Chief Amesha Sapenta, in which case they would be seven. The Amesha Sapentas are referred to in the Scriptures as the Bountiful Immortals. Then come thirty-three Izuds. Before bringing into existence the material creation, Ahura Mazda brought into being Furohurs or Fravashis, and these Fravashis helped the Almigthy in bringing into existence all material creation. According to the Avesta Scriptures, the first man created was Gayomard, also known as Kayomard. Either he or his great-grandson Hooshung was the founder of the Peshdadian dynasty. Historians have not been able to say during what period of time this dynasty reigned over Persia.

This dynasty was followed by the Kaianian Dynasty which was founded by Kai Kobad. One of the Kings of this dynasty was Kai Gustasp, otherwise called Kai Vistasp. In the Scriptures of Zoroastrian religion he is mentioned and referred to. Zoroaster flourished in the reign of this King. The religion revealed by Ahura Mazda to Zoroaster was by Zoroaster

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communicated to King Vistasp and was then promulgated amongst the people. Oriental scholars and historians have not been able to fix with any certainty the period of the reign of King Kai Vistassp. Many are inclined to fix the period at five or six thousand years before Christ. Dr. Haug believes Zoroaster flourished about 1100 B. C. Whereas Professor Darmesteter believes that he flourished somewhere about 600 B. C. This, however, is the latest date fixed by any historian or Oriental scholar and all that can be said with some amount of certainty is that Zoroaster lived and flourished considerably before 600 B. C. Some of the scriptural writings and prayers, however, are shown to be much older than 600 B. C. For instance, the Farvardin Yast is said to have been written about 1500 B. C. and the sounder opinion seems to be that Zoroaster flourished long before 600 B. C. The Kaianian Dynasty was followed by the Achamenian Dynasty. During the reign of the last King of this dynasty, Alexander the Great conquered Persia. It is believed that a great portion of the Avestaic literature was burnt or lost during this invasion and conquest of Persia. Tradition has it that Alexander himself set fire to a library containing Zoroastrian scriptures, but many Oriental scholars believe that this is an unjust slur cast on the conqueror of Persia. However that may be, the fact remains that about this period a great portion of the scriptural literature of the ancient Persians was lost or burnt. The period which followed the conquest of Persia by Alexander was, so far as the Zoroastrians were concerned, a period of darkness—during which the religion suffered considerably. After the dark ages, came the Parthian Dynasty. During the reign of one of the kings of this dynasty the religion of Zoroaster began to revive, and in the reign of the first King Ardashir Babegan of the Sassanian Dynasty which followed the Parthian Dynasty, Zoroastrianism became the religion of the King and of the Empire of Persia. In the reign of Ardashir Babegan, Zoroastrianism became the religion of the State—its scattered scriptures were collected—the Avestan writings were translated into the Pehlvi language, and commentaries were written. The original scriptures that were lost were about this time rewritten and reproduced by men whose forefathers had committed them

to memory and in that way transmitted them from father to son. One of the Sassanian Kings that followed Ardashir Babegan was Shapur the Second. The greatest Dastur known to the Zoroastrians of all ages—Dasturan Dastur Adarbad Maharesh-pund—flourished in his reign. Shapur the Second reigned over Persia from 309 to about 380 A. D. and during this period the Great Dastur composed and wrote the Patet Pashemani, Duva Nam Satayoshni, Tun Darosti and other prayers, and almost all the Afrins. This great apostle of the Zoroastrian religion is regarded with the highest reverence by all true believers of the Zoroastrian faith and the prayers composed by him are at this day recited and regarded with the very greatest of veneration by the Parsis professing the Zoroastrian faith.

Zoroastrianism flourished in Persia with varying fortune till the persecution of Mahomedans drove the majority of those that professed that religion out of their ancient home. A body of Persians professing the Zoroastrian religion were compelled by reason of religious intolerance and persecution to leave Persia about 1200 years ago. They first took refuge in Kohistan, where they remained for about 100 years—they then went to the Isle of Ormuz, where they remained for about 19 years. They then came to Diu, near Kattyawar, and remained there for about 15 years. From Diu they came to Sanjan, and there they settled down for very nearly 700 years. From Sanjan they spread over various places in the Gujarat district and their principal head-quarters now are Bombay, Naosari and Surat. A sprinking of Parsis are to be found in several villages in Gujarat. They derive their present name Parsi from Fars, in Persia, from which place they originally came to India.

It was their staunch adherence to their own religion and their refusal to adopt the religion of their Mahomedan conquerors that was the cause of all the sufferings they had to undergo. They preferred to leave their country and exile themselves to a foreign land rather than give up the religion of their forefathers. They have persevered in their religious beliefs, preserved their old institutions and customs and have in the country of their adoption continued to follow the ancient religion of their

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ancestors. One of the most solemn ceremonials enjoined by the religion promulgated by Zoroaster is the performance of certain religious ceremonies during the Muktad days. The Muktad days are otherwise known as Dosla or Farvardgan days. These Farvardgan days are days that are sacred to the Furohurs.

Before proceeding with the consideration of the ceremonies themselves, it is very necessary to have clear conception of what the Furohurs are, according to the Zoroastrian scriptures. The Furohurs are constantly referred to in the Sacred Books of the Zoroastrians, and are the same as Fravashis. "Furohur" is the modern Persian name. Fravashi is the corresponding Avestaic name. In *Limbuwalla's* case[1] Mr. Justice Jardine says :—

"According to Dr. Haug these *Furohurs* were originally the departed souls of ancestors, comparable to the *pitras* of the Brahmins and the *manes* of the Romans. Now they are regarded as Guardian Angels, each being of the good creation having one."

That this is an error is shown in the case both by the oral evidence of the witnesses examined before me as well as by copious quotations from the original scriptures. The same error that Dr. Haug commits is also committed by Professor Darmesteter, who in his Introduction to the Farvardin Yast, says :—

"The Fravashi is the inner power of every being that maintains it and makes it grow and subsist. Originally the Fravashis were the same as the Pitris of the Hindus or the Manes of the Latins, that is to say, the everlasting and deified souls of the dead."

All the three witnesses in this case are profound scholars of the Zoroastrian scriptures, whose opinions are entitled to far greater weight, agree in saying that what is stated above by Professor Darmesteter and Dr. Haug is erroneous, and they have quoted passages from the original scriptures in support of their views. Dastur Darab in his evidence says :—

"In his introduction to the Farvardin Yast, Professor Darmesteter says that the Fravashis were originally the same as the Pitris of the Hindoos or Manes of the Latins. This, according to my opinion, is incorrect; it is merely the conjecture of Professor Darmesteter. According to the Avesta the idea of Fravashis is that they are Spiritual Existences which were brought into being by the Almighty *before* he created the Universe. They came into

(1) (1887) 11 Bom. 441 at p. 446.

being *before* all material creation, every man born or unborn has a Fravashi of his own, according to the Avesta. After the birth of the man or woman his or her Fravashi watches over his actions and guides him to the right path. The Fravashi protects him or her from all evil. After death the Fravashi goes to heaven, and the soul, according to his deeds, goes to heaven or hell as it deserves. According to Zoroastrianism the Fravashi is not responsible for the man's good or bad actions. The soul is responsible for all acts committed in life. Inanimate objects have their Fravashis too. The Fravashi aids both animate and inanimate objects—animate objects in their moral and physical development, inanimate objects in their growth and development."

"Furohurs are *not* souls of the dead. They are totally different Entities. Souls of the dead are known as Ravan. Ravan is the Persian word for the soul of the dead. The Avestaic word for the soul of the dead is Uravan."

Ervad Jivanji Mody confirms this. He says:—

"The Fravashis are *quite distinct* from the souls of the dead or from the souls of the living. Fravashis and souls are not identical in *any* respect * * * the souls and Furohur are two distinct Entities. That appears from various parts of the Zoroastrian scriptures."

The witness then points out several passages, which are put in and marked Exhibits Nos. 22, 23 and 24 in support of his statement, and then goes on to say,

"There are similar passages in various religious books making similar distinctions between the soul (Ravan) and Furohur. A human being is said to possess *both* soul *and* Furohur. The function of the Furohur during a human being's life is to guide the soul in paths of virtue. After a man's death the soul meets with the consequences of its actions in the world. The Furohur mixes with the other Furohurs of the world or goes to its abode in Heaven."

Ervad Sheriarji Bharucha, who followed Mr. Jivanji Mody, confirmed the views of the previous witnesses. That the view of the total distinction between the soul and the Fravashi of a human being is absolutely correct appears from the following original scriptural passages placed before the Court.

"And (having invoked them) hither, we worship the spirit and conscience, the intelligence *and Soul and Fravashi of those holy men and women* who early heard the lore and Commands of God."

(Yasna Ch. 26, para. 4, "Sacred Books of the East," Vol. 31, page 278, Exhibit No. 18.)

"We present hereby and we make known, as our offering to the bountiful Gathas which rule (as the leading chants) within (the appointed times and seasons of the Ritual, all our landed riches, and our persons, together with our

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very bones and tissues, our forms and forces, our consciousness, our *Soul and Fravashi.*"

(Yasna Ch. lv, para. 1, "Sacred Books of the East," Vol. 31, page 294, Exhibit No. 22.)

"Yea, I desire to approach the Fravashis of the Saints with my praise, redoubted (as they are) and overwhelming, the Fravashis of those who held to the ancient lore, and Fravashis of the next-of-kin; and I desire to approach towards *the Fravashi of mine own Soul* in my worship with my praise."

(Yasna Ch. xxiii, para. 4, "Sacred Books of the East," Vol. 31, page 273, Exhibit No. 23.)

"All pure Heavenly Yazatas we praise—all earthly Yazatas we praise—*we praise our own Souls—We praise our own Fravashi.* Come hither to help me, O Mazda. The good, strong, holy Fravashis of the pure we praise."

(Khorsed Nyaz—Spiegel's "Avesta" volume iii, p. 7, Exhibit No. 24.)

These are not by any means the only or solitary passages in the holy writings showing that the soul is entirely different and distinct from the Furohur. Ahura Mazda Himself, the Creator of the Universe, has a Fravashi of his own. In Chapter 26 of the Yasna, paragraph 2, we find this passage :—

"And of all these prior Fravashis, we worship here the Fravashi of Ahura Mazda, which is the greatest and the best, the most beautiful and the firmest, the most wise and the best in form, and the one that attains the most its ends because of Righteousness." ("Sacred Books of the East," Vol. 31, page 278.)

Paragraphs 85 and 86, Chapter 24 of the Farvardin Yast (Exhibit No. 2) ("Sacred Books of the East," Vol. 23, page 200) shows that not only are there Fravashis of human beings, but there are Fravashis of the Holy Creation and of inanimate objects, such as fire, water, sky, plants, the earth, etc.

By far the best description of what is the true conception of the Zoroastrian religion regarding Furohurs that I have come across is contained in Naib Dastur Rustomji Peshotan Sanjana's very learned book "Zarathustra and Zarathustrianism in the Avesta," at page 242. He says there :—

"Before proceeding further it would be useful to say a few words about the signification of the term Fravashi, that so often occurs in our Sacred writings. The word is derived from Fra—forward, and vared, or vakhsh—to grow, to increase, to advance or to cause prosperity. Fravashi is then, that animating power in a being which causes growth, increase,

advancement or prosperity. The Avesta tells us that all beings including Ahura Mazda Himself, have got their own Fravashis. The earth, the fire, the sky, the water, the plant, the animal, the Blessed Shrosh, the truest Rashna, Mithra, Mathra-Sapenta, and all other things, either material or immaterial, have been endowed with that power which tends to preserve and promote their well-being. Man also possesses it. . . . The Fravashis of living holy men are more powerful than those of the departed. From the former the world derives benefit directly, whereas from the latter only indirectly through their good example and influence. . . It is through the Holy Fravashis that the earth, the water, the plant, the animal, and all other things, both animate and inanimate, are preserved and promoted in this world."

With reference to this quotation, I think it is necessary to mention that for every statement made therein the learned author has cited authority in his footnotes. Professor Darmesteter seems to suggest that the conception of Furohurs as given in the above passages is a conception of a later date, for in his introduction to the Farvardin Yast, after saying that the Furohurs are the same as the Pitris of the Hindus and Manes of the Latins, he goes on to say :—

"In course of time they found a wider domain and not only men but goods and even physical objects, like the sky and the earth etc., had each a Fravashi."

There is only one remark to be made in connection with the opinion of Professor Darmesteter about this conception of Fravashis having come into existence in later times and that is that it is entirely contradicted by the original scriptures from which I have quoted passages above. The witnesses in this case who aver emphatically that this opinion is erroneous and that the souls of the dead and the Furohurs are totally different and distinct and have nothing in common, are supported by original scriptural texts. Para. 76 of the Farvardin Yast ("Sacred Books of the East," Vol. 23, p. 198) proves that the Fravashis were brought into being and were already in existence before the Almighty created this world. The para. runs :—

"They are the most effective amongst the creatures of the two Spirits, they the good, strong, beneficent Fravashis of the faithful, *who stood holding fast when the two Spirits created the world*, the good Spirit and the evil one."

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It is true that in that portion of the original Gathas that remains to us there is no reference to the Fravashis, but Ervad Sheriarji points out that the earliest reference to the Fravashis is in the Haptang Yast, which is a portion of the Yasna. It is written in the Gatha dialect, and therefore, he contends, it must have been written very near the time that the Gathas were written. The plaintiff's counsel was throughout the hearing most ably assisted in the conduct of his case by men who have made a study of the scriptures relating to the Zoroastrian religion, but he was not able to cite one single text or passage which could even remotely support the theory that Furohurs and souls of the dead were one and the same thing. This theory is the foundation on which the judgment of Mr. Justice Jardine is based in *Limbuwálla's* case[1]. After a perusal of the evidence recorded in this case—principally the evidence from the Scriptures themselves—I do not think there is any possible room to doubt the conclusion that the theory that Furohurs and souls are the same or have anything in common is wholly and absolutely fallacious. That this is the conviction forced upon the mind of the counsel for the plaintiff himself after a study of the subject, seems to be fairly clear from the following questions he put to Dastur Darab.

Question—"Those who have read the Scriptures know the difference between Fravashis and Souls, but is it not a general belief amongst those who have *not* read the Scriptures that Muktad ceremonies bring benefit to the Souls of their deceased relatives?"

Answer—"They believe that the Souls are pleased. They believe that *one* of the benefits is that the Souls get pleasure and satisfaction."

Question—"Was the distinction between Fravashis and Souls, *which is so well known now*, generally known amongst the Parsis 30 years ago?"

Answer—"It was known, but I cannot say what was generally known 30 years ago."

Once it is established that the Fravashis were created before the world and came into existence before any human being was created, it is impossible to believe that they are the same as the souls of the dead. Besides, how is it possible to conceive that the Fravashis of Immortal Amasha-Sapentas, or Archangels, and

(1) (1887) 11 Bom. 441.

Izuds, or Angels, and the Fravashis of inanimate objects, like the sky, earth and water, be the same as the souls of the dead. The clear and lucid exposition of the real nature and meaning of what the Furohurs are according to the religion of Zoroaster that has been given by the witnesses in this case, supported by original texts, destroys the very foundation on which the whole fabric of *Limbuwalla's* case[1] is constructed.

Having seen what the Furohurs are according to the scriptures of the Zoroastrians, I think it is necessary here to examine shortly what those scriptures are that have remained to us at the present day and are available to us for authoritative reference. It appears from the study of the literature now available to us that in the most ancient times when Zoroastrian religion came into existence, there were 21 Nasks (books) of the Avesta scriptures. All except about a fifth part of these holy writings are lost. What remains to us of the original 21 Avesta Nasks are the Vendidad, the Yasna, the Visparad, and the Khordeh Avesta. Of these the oldest are written in the Avesta language, the next in antiquity are written in the Pehlvi language, and then come those that are written in the Pazund language.

The *Vendidad* is a Code of 72 Religious, Social and Moral Laws of the ancient Iranians, and it also contains an enumeration of sins and their punishment both here and hereafter.

The *Yasna* or Yejusni consists of 72 chapters. The five Gathas form part of the Yasna chapters. The Gathas are hymns expressing philosophical thoughts on the teachings of the Prophet Zoroaster and on the good Spirits the Amasha-Sapentas and the Izuds that work with the Deity. The Yasna contains invocations to the various Izuds and describes their several functions. It also contains liturgical directions and prescribes the Ritual to be observed at the performance of certain ceremonies.

The *Visparad*, consisting of 23 chapters, mostly contains invocations to the Amasha-Sapentas and the Izuds.

The *Khordeh Avesta* contains Afringans, Ghes, Nyaz, Yasts, Patets, Afrins and certain other prayers.

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Besides the Nasks that remain to us we have various other books of antiquity and authority which are accepted by the Zoroastrians as forming a part of their religious scriptures.

One of such books is the *Dinkard*. It is the compilation of Dastur Atro Froba, and is ascertained to be written a thousand years before now. Dastur Darab has already translated a portion of this work and he is engaged now in translating other portions of it. Dr. West's translation of the Dinkard is in the 37th volume of the "Sacred Books of the East" and is prefaced by an exhaustive Introduction giving the nature and character of the composition. Dr. West says: "It is evident that the compiler intended, in the first place, to give merely a very short account of the general contents of each Nask, to be followed by a detailed statement of the particular contents of each chapter, etc."

Another work of authority is *Shayast La Shayast*, meaning the Proper and Improper. Its translation in English is in the fifth volume of the "Sacred Books of the East." The Introduction describes it as "a compilation of miscellaneous laws and customs regarding sin and impurity with other memoranda about ceremonies and religious subjects in general." Dastur Darab points out a reference in the book to the Hasparam Nask, which existed originally in the Avesta language, as showing that the author had drawn his materials from the original Nasks before they were lost, because the Hasparam Nask is one of the original Nasks that are now lost to us. Shayast La Shayast was written about the end of the Sassanian dynasty—in the middle of the 7th century Anno Domini.

Another ancient compilation which is regarded as a book of authority relating to the Zoroastrian religion is the *Sad Dar*, which literally means a hundred subjects. Its age and authorship is lost in antiquity. Its English translation appears in the 24th volume of the "Sacred Books of the East" and the introduction states that it is generally accepted as a work of "important authority" and contains a "convenient summary of many of the religious customs handed down by Pehlvi writers."

The Nirungistan is another book relating to Zoroastrian scriptures. It is a Pehlvi composition and its author is unknown.

It came into existence some time between 226 B. C. and 600 A. D. "The whole book," says Ervad Sheriarji, "is a ceremonial code, or rather a manual or guide book for priests. The book deals with the duties, functions and rules relating to the Ervads or ordained Priests." This book is published by the Parsi Punchayat, and Dastur Darab has written an introduction and given the various meanings of the words in the original texts.

These, according to the evidence given before me, are the principal authoritative scriptural writings, governing the Zoroastrian religion.

I will now consider what are the Muktad, Dosla or Farvardigan days. All these three expressions refer to the same thing. The three fundamental beliefs of Zoroastrianism, or the three Essentials of Zoroastrian religion as Ervad Jivanji Mody calls them, are :—

(1) Belief in the existence of One God—Ahura Mazda;

(2) Belief in the Immortality of the soul; and

(3) Belief in the responsibility hereafter for good and bad acts done on earth.

The Zoroastrian religion as revealed to Zoroaster by Ahura Mazda and communicated by Zoroaster to King Vistasp and his other disciples, contemplates no sects or sections; the community of believers in Zoroastrianism are all Mazdyasnians. Through a mistake in the calendar, however, there is a difference of opinion amongst the Parsis of the present day as to the date when their year ends and the new year commences. The larger section, the Shenshais, believe that their new year commences in the middle of September, while the smaller sect, Kadmis, believe that the new year commences a month earlier. There is no other difference between the sects so far as religious beliefs are concerned. The Zoroastrian year consists of twelve months each of thirty days. But at the end of each year occurs five Intercalary days which are known as Gatha Ghambars. These are the holiest days of the year. The winter ended the old Iranian year. The Muktad ceremonies are enjoined to be performed at the end of the year. The majority of Parsis in India regard eighteen days as Muktad or Farvardigan days. Dastur

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Darab thinks the first and the last two days are not really Farvardigan days, but that real Farvardigan days are fifteen—namely, the last five days of the last month of the year—the five Gatha Ghambar days, and the first five days of the new year. Ervad Jivanji also says that according to the common practice prevailing amongst Parsis both in Bombay and the Mofussil, Farvardigan days are eighteen. A very small minority of the Parsis of the present day are, however, of opinion that the real Farvardigan days are only ten, and they say the first five days of the new year are not really Farvardigan days. How this difference arose is fully explained in Ervad Jivanji's book, an extract from which is Exhibit No. 25. However that may be, there is no question that the Farvardigan days whether they be eighteen, fifteen, or ten according to each individual's honest beliefs, are days which are regarded by Zoroastrians as days of the greatest sanctity. There are very few outward ritualistic practices amongst the Parsis. The principal form of profession of faith—the discharge of the religious duties and obligations—the main observance of religious rites,—consists in reciting prayers and having prayers recited by their Mobeds or Priests.

All witnesses agree in saying that the Farvardigan days form the most important festival in the Zoroastrian calendar, and that the ceremonies performed during the Farvardigan days form the most important ritual of the Zoroastrian religion. They agree in saying that the performance of the Muktad ceremonies during the Farvardigan days is enjoined by the Zoroastrian religion—that those ceremonies are acts of great religious merit—they form the most important portion of their divine worship, and that according to the beliefs of those that profess the religion the performance of the Muktad ceremonies not only brings down the blessings of the Almighty on the party performing them and his household but on the whole community, be they Zoroastrians or non-Zoroastrians—their King and his Satraps, and on the whole universe. They are ceremonies that involve praise, adoration, propitiation, recognition and worship of the Supreme Being from all his creatures here below. The non-performance of the Muktad ceremonies is, according to the scriptures, a sin which is taken into account

when, after death, a man's good and bad actions are weighed and reward or punishment is meted out to the soul.

It must be remembered that what I have summarised above are statements made by three of the most eminent living oriental scholars and profound students of Avestaic—Pelhvi and Pazund—literature relating to Zoroastrian religion. In what they have said they are in entire accord with one another and for every statement made by them they have quoted chapter and verse from the original scriptures.

It is said that Mr. Justice Jardine's finding in *Limbuwalla's* case[1] "that the benefits which, according to the belief of the Parsis," resulting "from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Furohurs or prototypes of the dead," is in accordance with the belief prevailing amongst the Parsis of the present day. The plaintiff's counsel points to the phraseology of the settlement in the present case: "Annual Muktad ceremonies of the dead members of the family in both sects Shinshais and Cudmis." It is possible that from the fact that the dead of a party performing the ceremony being incidentally remembered during the recitation of some of the prayers, the ignorant and the illiterate members of the community may have formed an erroneous belief that the Muktad ceremonies are performed merely for the benefit of the souls of the dead. It has not, however, been seriously argued before me that the Court is bound to be guided by erroneous impressions produced on the minds of ignorant members of the Parsi community. One has only to read the very clear and convincing evidence given in the case and to refer to the scriptural passages placed before the Court to come to an unhesitating conclusion that the Muktad ceremonies performed during the Farvardigan days have *nothing whatever* to do with the souls of the dead and have not the least tendency of conferring any benefits on the souls of the dead members of a family. The ceremonies enjoined to be performed during the Farvardigan days are not in any way connected with the souls of the dead and the suggestion that they are

(1) (1887) 11 Bom. 441 at p. 447.

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is contradicted by the scriptures and the tenets of the Zoroastrian religion. All the ceremonies for the souls of the dead are performable on certain days calculated from the date of the death. We have first, ceremonies performed for the benefit of the souls of the dead for the first three days, and on the fourth or Charum day. Then follow the Dasma, or the tenth-day ceremony, next the Massisa, or the thirtieth-day ceremony—next the Chhumsi, or the sixth-monthly day ceremony, and then the Varsi or the anniversary of the day of death. In some families the anniversary ceremony is performed for several subsequent years. All ceremonies after the first three days are more or less commemoration ceremonies; for if the scriptures are true, nothing that one can do affects the soul or redounds to its benefit after the fourth day. According to the beliefs of the Zoroastrians founded upon their ancient scriptures, the soul of the dead remains in the place where death takes place for the first three days. On the dawn of the fourth day the soul ascends and reaches the Chinwad Bridge. There the Angels weigh its good deeds and its evil acts during its sojourn on earth, and if the good deeds outweigh the bad ones by certain Cetrs, the soul is allowed to cross the bridge and enter the abode of Heaven. If, however, its sins outweigh its good deeds by certain Cetrs it is thrown from the bridge into hell below. On the fourth day reward or punishment is meted out to the soul and the *Judgment is irrevocable.* There is nothing in the scriptures for the redemption of the soul after the final judgment of the fourth day. How then can it be said that any ceremony or prayers performed or recited after the fourth day can tend towards or can be intended for the benefit of the soul? That the Muktads have no connection with the souls of the dead, is, I think, also clear from the fact that the time of their performance has no reference to the date of the death of individuals.

If the belief exists in the minds of some that Muktads are intended for the benefit of the souls of the dead, it clearly is an erroneous belief for which there is no foundation whatever, and can only exist amongst the ignorant and the illiterate. In the Zoroastrian religion no days during the year are as holy as the Farvardigan days and no ceremonies so sacred as the Muktad

ceremonies. The observance of the Farvardigan days and the performance of the Muktad ceremonies is enjoined by the Zoroastrian scriptures. Paragraphs 49 to 52 of the Farvardin Yast show that the Zoroastrians are asked to perform certain ceremonies during the Farvardigan days.

The Farvardin Yast is written in the Avestaic language, and its earliest age is said by some scholars to be 1500 B. C.; whilst others give 600 B. C. as the date when it came into existence. Dastur Darab and Professor Max Muller are of opinion that the former date is correct.

This Yast is dedicated to the Furohurs and is a glorification of the powers and attributes of the Furohurs in general. On the Farvardigan days the Furohurs "come and go through the Borough—they go along for ten nights asking this:"—(Para. 49.)

"(50). Who will praise us? Who will offer us a sacrifice? Who will meditate upon us? Who will bless us? Who will receive us with meat and clothes in his hands and with prayer worthy of bliss? Of which of us will the name be taken for invocation? Of which of you will the soul be worshipped by you with a sacrifice? To whom will this gift of ours be given that he may have never-failing food for ever and ever?" (Exhibit No. 1.)

Paragraphs 49 to 52 and the concluding paragraphs, more particularly paragraph 157, of the Farvardin Yast, have been very fully discussed before me. Great light is thrown on the meaning of paragraph 50 by the explanatory Exhibit No. 20. It seems from the evidence of the witnesses that all the ceremonies performed during the Farvardigan days take their origin from para. 50; and the concluding paragraphs show that if a Zoroastrian performs these ceremonies the Furohurs "will leave the house satisfied and carry back from here hymns and worship to the Maker Ahura Mazda and the Amesha Sapentas." Exhibit No. 20 is a transcript of the original paragraph into Gujarati characters and then the meaning and the indication of each expression is explained in English. All the witnesses say that Exhibit 20 gives a correct exposition of the meaning of para. 50 of the Farvardin Yast. The plaintiff's counsel complained that it was prepared for the purposes of this case. His original information was that it was prepared by Ervad Sheriarji, but he

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subsequently ascertained that it was prepared by the Advocate-General's Solicitor, Mr. Vimadalal. Nobody ever pretended that it was not prepared for the purposes of the suit.

All I can say of it is that it has been extremely helpful to me in understanding the true spirit of the paragraph, and evidences both knowledge and learning in the party who prepared it.

When the Furohurs come down to the earth during the Farvardigan days and ask for the performance of the ceremonies as mentioned in para. 50 of the Farvardin Yast, they go on to say;

(51) "And the man who offers them up a sacrifice with meat and clothes in his hands, with a prayer worthy of Bliss, the Awful Fravashis of the Faithful satisfied, unharmed and unoffended, bless thus :—

(52) "May there be in this house flocks of animals and men! May there be a swift horse and a solid chariot! May there be a man who knows how to praise God, and rule in an assembly, who will offer us a sacrifice with meat and clothes in his hand and with a prayer worthy of bliss."

There can be no doubt that the performance of certain ceremonies during the Farvardigan days is enjoined as the duty of every true Zoroastrian by Ahura Mazda himself. In the Bahaman Yast, para. 45, Ahura Mazda, speaking directly to Zoroaster, reveals to him in a prophetic spirit that the Farvardigan ceremonies will not be performed with the same devotion they should be performed in the troublous times in the future.

He says to the Prophet :—

(45) "And they practise the appointed feasts of their ancestors, the propitiation of Angels, *and the prayers and ceremonies of the season Festivals and Guardian Spirits* in various places, yet what they practise they do not believe in unhesitatingly ; they do not give reward lawfully and bestow no gifts and alms, and even those they bestow they repent of again." (Exhibit No. 5).

This passage is explained by Dastur Darab as follows :—

"Farvardigan is one of the appointed feasts referred to in the passage; instead of 'appointed' I would translate the text as 'established.' The original text is Nihatak in Pehlvi, which means established by revelation and followed by the Ancients. The Farvardigan ceremonies are ceremonies which are appointed by the Deity Ahura Mazda and it is the duty of every true Zoroastrian to perform the ceremonies during the period fixed for them. The 'prayers and ceremonies of the season festival' referred to in

the passage are the Ghambars and the prayers and ceremonies of the 'guardian spirits' are the prayers and ceremonies said and performed during the Farvardigan days."

The Bahaman Yast, in which this passage occurs, is the Pehlvi translation of the original Avestaic text, and is dedicated to Bahman, who is one of the Ameshá Sapentas. The original Avestaic text is lost, but a translation in Pehlvi has been preserved. The age of the Bahaman Yast is the same as that of the Farvardin Yast. In the Introduction to its translation at page 50 of Vol. V of the "Sacred Books of the East," it is stated that the Bahaman Yast "professes to be a prophetic work in which Ahura Mazda gives Zoroaster an account of what was to happen to the Iranian nation and religion in the future." Farvardigan days and Muktad ceremonies are also referred to in the Dinkard (see Exhibits Nos. 3 and 4); in the Shayast La Shayast (see Exhibit No. 6); and in the Sad Dar (see Exhibits Nos. 7 and 8). There is also a reference to the Farvardigan days in the Patet Pashemani (see Exhibit No. 9). Though the temptation to set out all these passages and comment on them is great, I feel that there would be no limit to this judgment if I yielded to the temptation. Dastur Darab in his evidence has given very clear explanations of these passages, and I must content myself by merely recording that the various passages from the scriptural writings placed before the Court and explained by the witnesses leave no doubt in my mind that the Farvardigan days are the days appointed for the performance of the Muktad ceremonies—that the performance of those ceremonies is enjoined by the religion of Zoroaster—that it is a duty cast on every Zoroastrian by his religion to perform Muktad ceremonies—that the performance of those ceremonies is an act of great religious merit which brings to the man who gets them performed Hathim or Great Reward (Exhibit No. 7), and that the non-performance of them is a great or what is always spoken of as a Bridge Sin (Exhibit No. 8). Exhibit No. 9 is a passage from Patet Pashemani (Prayers of Penitence) wherein the non-observance of Farvardigan days and the non-performance of the ceremonies prescribed for those days are referred to as sins for which the man praying expresses his penitence.

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The usual ceremonies to be performed during the Farvardigan days are five in number; (1) The various kinds of Afringans with the Debache preceeding them and the Afrins following them; (2) Baj; (3) Satoom; (4) Furrokshi; and (5) Yejusni. Of these, the Afringans, Baj and Satoom ceremonies are compulsory and must be performed. Dastur Darab thinks the Furrokshi ceremony must also be performed, but Ervad Jivanji says it is performed by some and not by others. Yejusni is a very complicated, long and expensive ceremony, and only the well-to-do members of the community can afford to have them performed and it is optional with Zoroastrians to perform it or not. The Debache of the Afringans precede all the Afringans. It is an invocation of all the Furohurs including those of the persons who are specially mentioned on the occasion. In the Debache, the priests mention the name of the town or city where the prayers are recited and they pray for plenty, joy, victory and happiness. The plenty, joy and happiness prayed for is for the inhabitants of the town or city, and the victory prayed for is the victory of the Sovereign over all his enemies. Ervad Jivanji, in the course of his evidence has told the Court that the benefit or help that is asked of the Furohurs in the prayers offered during the Farvardigan days is asked not only for the individual who invokes such help and asks for such benefit, not only for the whole Zoroastrian community, but for all human beings. Here it may be mentioned that in *all* the prayers recited by a Zoroastrian he never prays for himself alone. He prays for the community and for all peoples quite independently of their being Zoroastrians or otherwise. He is utterly unselfish when he approaches the Almighty and asks for His blessings. He asks them for all, he prays for universal joy, universal prosperity and for the well-being of all men of good life.

The English translation by Bleek of the Debache to the Afringans is given in the third volume of Spiegel's Avesta and marked as Exhibit No. 10 in the case. The different Afringans are described at some length by Dastur Darab in his evidence, and I do not think it is necessary to discuss them here except perhaps to refer to the Afringan Ghambhar, which is not included in any of the Yasts, and which contains prayers for the

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Sovereign. Paragraphs 14 to 18 of this Afringan Ghambhar, which is Exhibit 14 in the case, contain solemn prayers for the Sovereign of the country, and for all his Satraps and Vice regents. As translated by Dastur Darab, the prayers begin with the following sentence :—

"In the name of Ahura Mazda the resplendent and glorious, I bless with my prayers the Rulers of the country the Chief of all Rulers of the country."

The prayers then go on to invoke the blessings of the Creator on the Sovereign, and on all his representatives. They contain supplications for his health and his happiness, and pray for his long reign and for victory over all his enemies. These four paragraphs are recited at the end of every *Afringan* and Dastur Darab says that,

"This Blessing on the Rulers and the Chief of the Rulers is quite independent of the Rulers or the Chief Ruler of the Rulers being a Zoroastrian or not. This blessing, whenever recited, would apply to our King Emperor and all subordinate Rulers under the Empire."

Ervad Sheriarji in his cross-examination said,

"It is not correct that in that passage (Exhibit No. 14) Zoroastrian Sovereign is meant. It means any Sovereign—any good Sovereign who reigns wisely, justly and well."

Referring to the same paragraphs, Ervad Jivanji Mody in his cross-examination said :—

"Reading the passage at page 371 (Exhibit No. 14) I say that this does not refer to a Zoroastrian Sovereign alone. It means any Sovereign or Ruler. The passage was recited at the Allbless Bag on the occasion of the Coronation of our present Sovereign, and that shows that every Zoroastrian has understood it in the sense that it refers to Sovereign not necessarily Zoroastrian."

After the Afringan follow the Afrins. They are not the same, like the Debache, but vary with different Afringans. Shortly stated, Afrins are invocations to God to make men pious and virtuous, to send down His Blessings on all mankind. All the five ceremonies are described and explained in Dastur Darab's evidence and I do not propose to discuss them here separately.

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All the ceremonies referred to above have to be performed by priests. From the most ancient times a distinct and separate class, the priests, have existed amongst the Iranians, and their only source of livelihood is the fees they receive from their lay brothers for the performance of religious ceremonies. Some of the officiating priests observe the *Burushnoom*, and they alone can perform certain ceremonies, whereas the ordinary officiating priests who do not observe the Burushnoom are entitled to perform certain other ceremonies. A certain number of descendants of the priestly class have taken to earning their livelihood in other walks of life, and this class is known amongst the Parsis as Athornans. Messrs. Padshah and Kanga, who have rendered such valuable help in this case are, *for instance*, distinguished members of that class. Zoroastrian liturgical ceremonies are divided into two classes, the inner and the outer liturgical ceremonies. The inner liturgical ceremonies can only be performed in an Agiary or Atash Behram, and only by priests who have gone through the Burushnoom, and are observing all its requirements. The outer liturgical ceremonies are ceremonies which can be performed outside an Agiary or Atash Behram, that is, at the private residences of the members of the community, and can be performed by priests who are not observing the Burushnoom. The main distinction is not so much in the place as in the priest performing the ceremony, for even the inner liturgical ceremonies may be performed in a private residence if there is a separate place which is cleansed, purified, and temporarily consecrated for the performance of those ceremonies—but in no event can they be performed by any priests other than those who are observing the Burushnoom. The inner liturgical ceremonies are the Yejushni, Baj, Vendidad and Visparad. The outer liturgical ceremonies are the Afriingans, Furrokshi and Satoom.

An officiating priest must go through the Nahan and Martab ceremonies. No layman is allowed to go through these ceremonies—the man going through these ceremonies must be a member of the priestly class.

Ervad Sheriarji says :

"From the most ancient times—from the time of Herodotus, the priests as a separate class have existed amongst the Zoroastrians. They were called

the Magi, and in the performance of religious ceremonies the presence of a Magus was always necessary. There is historical evidence of this in existence. Herodotus wrote about the customs prevailing amongst the Zoroastrians in his own times, which was 400 B. C." See Rawlinson's Herodotus, Vol. I, pages 217 and 218.

Dastur Darab, in the course of evidence, said that with the exception of Baj and Yejusni a layman may perform the other ceremonies if he is very poor. He said if a man can afford it he must employ a priest, because a priest is supposed to be more pious and is more conversant with the ceremonies. This led to a little misunderstanding, which was cleared up when Dastur Darab explained that what he meant was that it is a duty cast upon every Zoroastrian to get these or some of these ceremonies performed by the priests during the Muktad days, and that the non-performance of them was a great sin. Where a Zoroastrian is so situated that no priest is available or where he is so poor that he cannot afford to employ a priest, rather than not have them performed he ought, in the opinion of the witness, to try and perform them himself. He admitted that he had never known a layman perform these ceremonies. Whatever may be Dastur Darab's opinion on this point, the fact remains that from the most ancient times the Magi in the olden times and the Mobeds or priests in the more recent times, have always performed these ceremonies, and the scriptures of the Zoroastrians contemplate that they shall be performed by the priests. For instance, the very Debache of the Afringan shows that that ceremony is performed by the priest, for, at the very outset, the priest says :— 'I have performed the offering. I have offered the Daruns. I now offer the Mayazd."

No layman could say : "I have performed the offering and I have offered the Daruns."

It has been the universal practice existing amongst the Zoroastrians for centuries that all the Muktad ceremonies should be performed by the priests and to this there never has been known a single exception.

The priests, as a rule, are wholly dependent for their livelihood and for the maintenance of themselves and their families on

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the fees they get from their lay brethren for the performance of their religious ceremonies. The Farvardigan days being continuous—the Muktad ceremonies being regarded as the most sacred—and this period being the most holy amongst the Zoroastrians, the priests during these days make a far larger income than they do at any other period during the year. The fees received during the Muktad days are one of the principal sources of a priest's income during the year. The observance of the Muktad holidays helps very considerably towards the maintenance of the priestly class.

The observance of the Farvardigan days and the performance of the Muktad ceremonies have come down to the Parsis of the present day from times immemorial. That these Farvardigan days were observed in the ancient times in Persia, Ervad Jivanji proves by Exhibit No. 26. It seems that in the year A. D. 575, Emperor Justin of Rome sent an embassy to King Noshirwan of Persia, otherwise known as Khooshroo the first. The Persian King asked the embassy to wait, as he was then engaged in observing the Farvardigan days.

Exhibit No. 27 is an extract from the works of an Arabic author named Alberuny, who flourished about 1000 A. D. This passage shows that the Muktad ceremonies were well known and duly performed by the Zoroastrians at and previous to the time the Arabic author wrote his "Chronology of Ancient Nations."

We have seen in the *Wadia* case that as far back as 1826 a Parsi created a Trust for the performance of Muktad ceremonies.

Besides the recitation of prayers during the performance of the various Muktad ceremonies—fruit, flowers, cooked food and Darun or consecrated bread and clothes, are used in the performance of some of these ceremonies. Ervad Jivanji in his cross-examination explains the object. He says :—

"The original object of using food and clothes was to prepare food and clothes and distribute them amongst the poor. Fruits and flowers are also used in the performance of the ceremonies. The idea is that the party praying says: 'These are some of thy best gifts to us, O God, and we place them before you and offer them to you as our humble offerings.' The food and clothes are offered to all forming the Celestial Hierarchy—the Almighty—*the Amesha Sapentas* -the Izuds and the Furohurs. The food

is *not* offered to the souls of the dead, but to the Fravashis and other Higher Intelligencies. Clothes are consecrated only in the Baj ceremony. Cooked food, flowers and fruits are placed before the priests performing the Baj—the Afringan and the Satoom ceremonies, and only consecrated bread (Darun) is used in the performance of the Yejushni ceremony."

The evidence recorded in the case covers many points both of importance and interest, but it is not possible to discuss all of them within the limits of a judgment which I am afraid is already too long, and I must leave the evidence to speak for itself and proceed to summarise my findings thereon. In considering the evidence, it must be remembered that the witnesses who give evidence before the Court were speaking from the scriptures written in dead languages—they were elucidating many very abstruse and elliptical passages—and they were giving the results of patient and laborious research over a vast amount of literature written in the ancient languages. The perfect unanimity prevailing amongst them lends great weight to their depositions, and there can be no doubt that their evidence is perfectly accurate and thoroughly reliable.

I find from the evidence that the Farvardigan days are the most holy days during the Zoroastrian year, and that the performance of Muktad ceremonies during the Farvardigan days is enjoined by the scriptures of the Zoroastrian religion. In para. 20 of the Farvardin Yast, Ahura Mazda commands Zoroaster in times of danger or difficulty to invoke the help of the Furohurs—who are the active helpmates of the Creator and with whose assistance he wages a continuous and successful war against the Evil Spirit.

These Furohurs come down to the earth and express a desire for the performance of certain ceremonies during the Farvardigan days. These expressions of desire on the part of the holy Furohurs have been interpreted to be commands which a faithful Zoroastrian is bound to obey. The ceremonies to be performed are indicated by the Furohurs, and the followers of the Zoroastrian religion have, from the most ancient times, been known to perform these ceremonies and to recognise the non-performance of them as a sin for which they ask forgiveness in the penitent-

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tial prayers—the Patet Pashemani. In the ancient religious writings the Farvardigan days are constantly referred to. They are the Season festival—the most sacred festival in the Zoroastrian calendar. It is established by historical evidence that these ceremonies were performed in ancient Iran from the most olden times, and the Parsis after their domicile in India have continued to perform them. The performance of the Muktad ceremonies is, I find, a *religious duty* imposed upon the Zoroastrians by the proved tenets of the religion they profess.

I further find that the ceremonies themselves are acts of religious worship. They include worship, praise and adoration of the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the Sovereign, for good Government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt, on the evidence before the Court that the performance of these ceremonies is an act of *Divine Worship* in its highest and truest sense.

I also find that the moneys paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

I also find that, according to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live, and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator. Every right-minded human being—be he a Zoroas-

trian, Christian, Mahomedan, Hindoo or Jew, believes in the efficacy of prayers prescribed by the religion he professes, and even the most indifferent and callous of them approaches the Almighty and resorts to prayers in times of sickness, difficulty or distress. Any doubt or scepticism as to efficacy of prayers addressed to the Almighty would be, to my mind, an unmistakeable sign of debased and degraded human nature.

Having found the facts as set out above the only question that now remains to be discussed is whether the Trust created by Bai Dinbai for the performance of Muktad ceremonies is valid in law. Ever since Westropp, J., delivered the judgment of the Appeal Court in *Naoroji Beramji* v. *Rogers* [1], wherein he said that the law uniformly applied to Parsis *and their property* before the legislation of 1865 was English law and that the law applicable to *that particular case* was English law (see pages 11 and 12 of the Report), it has been the fashion at the bar to assume, that English law applied to Parsis in *all* matters. In the early stages of the case I expressed some doubt as to whether English law applied to the customary religious rites and ceremonies of the Parsis and to their religious institutions. Mr. Bahadhurji has been at great pains to discuss before me almost every Parsi case both before and after the decision I have referred to, and the discussion has been most valuable as showing that it is by no means correct to make an unqualified statement that English law applied to Parsis in *all* matters as would appear from various decisions of our Court since Westropp, J., decided the case of *Naoroji* v. *Rogers* [1] in which it was held that in those cases English law did not apply to the Parsis. See *Dhanjibhai* v. *Navazbai* [2]; *Mithibai* v. *Limji Noworoji Banaji* [3]; *Peshotam* v. *Meherbai* [4]; *Byramji Bhimjibhai* v. *Jamsetji Nowroji Kapadia* [5]; and *Shapurji* v. *Dossabhoy* [6]. However interesting or important this discussion may be, on a fuller consideration of the case now before me, I have come to the conclusion that for

(1) (1867) 4 B. H. C. R. (O. C. J.) 1.
(2) (1877) 2 Bom. 75.
(3) (1881) 5 Bom. 506: on appeal (1881) 6 Bom. 151.
(4) (1888) 13 Bom. 302.
(5) (1892) 16 Bom. 630.
(6) (1905) 30 Bom. 350.

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present purposes it is wholly unnecessary to discuss this question here. I will proceed with the consideration of the question as to whether this is a valid Trust in law or not on the basis that English law applied to this trust. Once the nature of the ceremonies for which the trust is created is clearly understood the question of law presents no difficulty whatever.

At the outset it is as well to observe that the English law of Mortmain does not extend to British India. For this the Privy Council decision in the case of the *Mayor of Lyons* v. *East India Company* (1), is a very clear authority.

In England the Statute I of Edward VI., Chapter 14, known as "The Act for Chantrie's Collegiate" made certain existing religious trusts void and on the analogy of that Statute all trusts that followed the passing of that Statute and were analogous to those declared void by it were also held to be void. This policy of the Law is spoken of as the Doctrine of Superstitious Uses, and it is well established by a series of decisions, that this doctrine is not extended to India and has no application to Trusts relating to religion created in India. See *Advocate-General* v. *Vishvanath Atmaram*(2); *Andrews* v. *Joakim*(3); *Joseph Ezekiel Judah* v. *Aaron Hye Nusseem Ezekiel Judah* (4); and *Yeap Cheah Neo* v. *Ong Cheng Neo* (5).

It is quite clear that it cannot be argued that the Trust in this case is void because it falls under the Doctrine of Superstitious Uses. It is argued, however, that the Trust is bad because it offends against the Rule of Law which forbids the locking-up of property in perpetuity. The rule against perpetuity, there is no doubt, is a well-established Rule of Law and is enforced in India, as in England, with equal rigour. In *Cooper* v. *Laroche*(6) Vice-Chancellor Malins says: "there is no rule of law in England more absolute than that all property, whatever may be its nature, real or personal, must be absolutely vested in some person, and be alienable within a life in being and twenty-one years after."

(1) (1836) 1 Moo. I. A. 175.
(2) (1855) 1 Bom. H. C. R. Appx. ix.
(3) (1869) 2 Ben. L. R. (O. C. J.) 148.
(4) (1870) 5 Ben. L. R. (O. C. J.) 433.
(5) (1875) L. R. 6 P. C. 381.
(6) (1881) 17 Ch. D. 368 at p. 372.

Section 14 of the Transfer of Property Act now enacts this rule as substantive law in India. It is, however, an equally well-established Rule of Law that this rule against perpetuities does not apply to Charitable Trusts. This exception to the rule is reproduced in section 17 of the Transfer of Property Act which enacts that the restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the *Advancement of Religion*—Knowledge—Commerce—Health—Safety or any other object beneficial to mankind. Although the Transfer of Property Act does not apply to the Trust in this case, its provisions are the reproduction of the Law as it existed before the Act was framed and passed, and are a useful guide in considering the question before me.

This exception in favour of Charitable Trust, is fully recognised in English law. In *In re Bowen*[1] Stirling, J., says :—

"Property may be given tc a charity in perpetuity."

In Tudor on Charities and Mortmain, 4th Edition, at page 131, it is said :—

"This exception from the rule against perpetuities is well established. It is founded upon grounds of public policy, and is essential to the useful existence of Charitable Trusts."

"In order, however, to have the benefit of the exemption from the rule against perpetuities, a Trust must be charitable within the meaning which the law assigns to that term."

Tudor, at page 35 of the 4th edition, most admirably sums up the result of numerous authorities as to what in law is the meaning of Charity, in the following passage :—

"The word 'charity' has a technical meaning in English law, which can now only be defined by a reference to the Statute 43 Eliz. ch. 4." Its preamble enumerates "a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as 'a sort of index or chart. The objects enumerated in the preamble have in fact been treated as instances, the result being that 'those purposes are charitable which the statute enumerates or which by analogies are deemed within its spirit or intendment.' There is, moreover, one thread which connects the whole of the objects enumerated thereby, namely, 'the consideration whether, in order to fall within the Act, the gift was, as had been said, a gift for general public use which extended to the poor as well as to the rich'."

(1) [1893] 2 Ch. 491 at p. 494.

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One of the purposes which have been held charitable within the language or spirit of this preamble is "advancement of religion."

In England on a review of the cases relating to Religious Trust, it will be found that Religious Trusts or Trusts relating to religion have been held void either as being forbidden by law or as falling under the doctrine of superstitious uses. In England there is an established Church. In India we have no established Church. By some of the older statutes churches for certain denominations of Christians were established in India and supported from the revenues of the country, but that was merely for the purpose of encouraging Christians to go out to the country and for the convenience of such Christians as came and settled either temporarily or permanently in India. In this country we have unfettered religious toleration. Every one is entitled to profess openly the religion he believes in. In the eye of the Law in India all religions are alike, and it follows therefore that each religious community professing a particular religion, and for the matter of that each member of such community, is entitled as of right to do anything that to him may seem right for the maintenance and advancement of the religion which the community or individual member thereof professes and follows.

Now, is this a Charitable Trust in the legal sense of the word Charitable? Mr. Justice Chitty in *In re Foveaux*, (1) says:—

"Charity in law is a highly technical term. The method employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done *is to consider each case as it arises, upon it own special circumstances.* To be a charity there must be *some* public purpose—something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice."

This case is useful on other points in the present case, and therefore I think it would be convenient to notice that it was

(1) [1895] 2 Ch. 501 at p. 504.

here held that societies for the suppression and abolition of vivisection were charities within the legal definition of the term Charity. The learned Judge concluded his judgment by observing:—

"The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would, *in fact*, be benefited is a question on which I think the Court is not required to express an opinion."

Having regard, then, to the technical meaning ascribed to Charity in law, I propose now to consider a few cases which throw light on the question now before the Court, showing what Religious Trusts are held to be good Charitable Trusts, and as such exempt from the application of the rule against perpetuities. It must be remembered that in England, after the Reformation, persons who differed from the established religion—such as Protestant Dissenters, Roman Catholics and Jews, were held to be obnoxious to the law, everything that was calculated to have for its object the propagation of the rights of a religion not tolerated by the law was included in the comprehensive expression "superstitious use," and all gifts for superstitious purposes or uses were held to be contrary to the Policy of the Law and therefore illegal. Those cases, therefore, in the English Reports declaring religious trusts of various kinds to be invalid, as being trusts for superstitious uses, have no application whatever to the present case. Religious Trusts in India have a much greater analogy to Religious Trusts in Ireland since the disestablishment of the Church in that country in 1869 by 32 and 33 Victoria, chapter 42. Of course, in later years in England many enabling and relieving Acts have been passed, and many disabilities against those who are not members of the established Church have now been removed, but still these relieving Acts do not repeal the whole law of Superstitious Uses, and the doctrine still holds sway—although in the present time to a limited extent even in England.

A large number of authorities on many points closely connected with the question in this case have been cited before me, but as I said before, I propose to discuss only a very few

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of them, with a view to see what trusts in connection with religion, religious observances, and religious and other beliefs have been held valid in England and Ireland.

In *Powerscourt* v. *Powerscourt*(1), a Testator by his will devised £ 2,000 to Trustees in trust to lay out the sum at their discretion until his son came of age, "in the Service of my Lord and Master, and I trust Redeemer."

This bequest was held to be a good and valid bequest to charity and was ordered by the Court to be carried into effect. This is an Irish case, but in 1895 in the case of *Farquhar* v. *Darling* (2), Mr. Justice Stirling refers to this case with approval and follows it. There the Testatrix bequeathed the residue of her property "to the poor and to the *service of God*." Mr. Justice Stirling in giving judgment says :—

"I have to construe this will according to the ordinary meaning of the language as used by English testators ; and I think that when 'the service of God' is spoken of as it is in this will, no one so construing the expression would hesitate to say that service in a religious sense was intended."

The learned Judge then quotes a passage from the judgment of Lord Manners, L. C., in *Powerscourt* v. *Powerscourt*(1) and concludes his judgment in these words :—

"It has not been disputed before me that a bequest for religious purposes is a good charitable bequest ; and, on the authority of the case to which I have just referred, as well as upon my own view of the true construction of the will, I hold that the residuary estate is well given to charitable purposes."

In *Webb* v. *Oldfield* (3), a Testator devised a portion of a perpetual yearly rent to two Vegetarian Societies in equal moieties for the use of the said societies, to be paid to them for ever.

The Master of the Rolls held that the objects of those Societies might be fairly described as charitable within the principle of decided cases, and that there was a valid gift to the two societies in equal moieties, and the Court of Appeal affirmed the decision.

(1) (1824) 1 Molloy 616. (2) [1896] 1 Ch. 50.
(3) [1898] 1 I. R. 431.

In *Straus* v. *Goldsmid* [1], the Court in England had before it the will of a Testator professing the Jewish religion. He bequeathed a third of the residue of his estate to the Rulers and Wardens of the Great Synagogue in the City of London, with directions to them to utilise the interest and dividends of the said third of the residue every year on the eve of Passover in distributing, at least amongst 10 worthy men . . . to purchase meat and wine fit for the service of the two nights of Passover. The Vice-Chancellor held that the bequest, being intended to enable persons professing the Jewish religion to observe its rites, was good, and the Trust was upheld.

In *Attorney-General* v. *Stepney* [2], a bequest of the residue of personal estate for the "increase and improvement of Christian knowledge and promoting religion," was held by Lord Eldon to be good charitable bequest, as it had for its object a General charitable purpose of promoting Christian knowledge.

In a later case, *Baker* v. *Sutton* [3], the Master of the Rolls, Lord Langdale, refers to this case and follows it. In this case the testator made a bequest of the residue of his personal estate for "such religious and charitable institutions and purposes within the Kingdom of England as in the opinion of the testator's trustees should be deemed fit and proper." The Master of the Rolls, in the course of his judgment, observes (at p. 233) :—

> "All the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose. In the *Attorney-General* v. *Stepney* (3). . . Lord Eldon assumes throughout his Judgment, *that a religious purpose was a charitable purpose* . . . I am of opinion that the bequest, in the present case, for such religious and charitable institutions and purposes as the trustees should think fit, is a good charitable gift."

Townsend v. *Carus* [4] is another case in which a Testatrix bequeathed a legacy to Trustees "upon trust to pay, divide or dispose thereof, unto or for the benefit or advancement of such societies, subscriptions or purposes, having regard to the Glory of God in the spiritual welfare of His creatures, as they shall in their discretion see fit." This gift was construed to be a gift

(1) (1837) 8 Sim. 614.
(2) (1804) 10 Ves. Jun. 22.
(3) (1836) 1 Keen 224.
(4) (1843) 3 Hare 257.

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for religious purposes, and as such valid and restricted to such purposes. The Vice-Chancellor refers in his judgment to the case of *Baker* v. *Sutton*(1), which I have discussed immediately above, and says :—

"If this is a bequest for religious purposes, I think I am bound to hold it a charity within the decided cases. The cases referred to in *Baker* v. *Sutton* (1), and that case itself, are sufficient authorities on this point."

Another very instructive case is that of the *Attorney-General* v. *Lawes*(2). In that case the testatrix by her will gave directions to her executors "to pay unto Messrs. Drummonds, Bankers, a clear yearly sum of £100 for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines, or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman-Street."

This bequest was held by the Court to be a valid charitable bequest of a *perpetual* annuity. The Vice-Chancellor, at the close of counsel's argument, observed that the bequest was not the less a charitable bequest from the fact that it was given *for the benefit of a limited class of persons*—that it was not the number of the objects which made the distinction between a public and private charity—that it was not the less a charity because it was confined to those members of a particular class of persons who were subject to certain grievances and not to the class at large.

In Re Michel's Trust (3) is a case of great use in considering the question now before the Court. The testator, Abraham Michel a Jew, by his will bequeathed so much money as would produce £10 a year upon trust to pay the said sum of £10 every year to three persons to learn in their Beth Hammadrass or College two hours daily—and on every anniversary of the Testator's death to say the prayer called in Hebrew "*Candish*," which is a

(1) (1836) 1 Keen 224. (2) (1849) 8 Hard 32.
(3) (1860) 28 Beav. 39.

short Hebrew prayer in praise of God and expressive of resignation to His will. Many of the disabilities relating to Jews residing in England were removed by 9 & 10 Vic. c. 59, s. 2, which provided that "from and after the commencement of this Act Her Majesty's subjects, professing the Jewish religion in respect to their schools—places for religious worship, education and charitable purposes, and the property held therewith, shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to, and not further or otherwise." Although the testator died in 1821 the case does not seem to have come before the Court till 1865. The Master of the Rolls, Sir John Romilly, held that the statute had a retrospective effect and applied to this will. The bequest was sought to be defeated by the residuary legatee on the ground, first, that "the gift was void as a superstitious use, as an anniversary or obit, and was similar to praying for the testator's soul"; and, secondly, on the ground that the gift was invalid as "tending to a perpetuity." In delivering judgment, the Master of the Rolls made the following very important observations:—

"I have no doubt of the validity of this bequest, and it is therefore the duty of this Court to carry it into effect . . . I see nothing in the bequest which is superstitious . . . *If it be part of the forms of their religion*, that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question . . . . I think that this is a valid gift for the benefit of a Jewish charity."

I will next consider the very peculiar case of *Thornton* v. *Howe*[1]. In this case the Testatrix Ann Essam bequeathed the residue of her estate both real and personal, in trust, "for printing, publishing and propagating the sacred writings of Joanna Southcote." The Heiress-at-Law of the Testatrix filed a Bill for a Declaration that the trust was void in law. She charged that the writings of Joanna Southcote. . . purport to declare, maintain or reveal that she was with child by the Holy Ghost and that a second Messiah was about to be born of her body, and that her

(1) (1862) 31 Beav. 14.

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writings were of a blasphemous and profane character, and that the trust was for the propagation of doctrines subversive of or contrary to the Christian religion. The Master of the Rolls, Sir John Romilly, before giving Judgment, himself studied the works of Joanna Southcote. He came to the conclusion that she was a foolish ignorant woman, of an enthusiastic turn of mind. He said he had found much in her writings that in his opinion was very foolish, but there was nothing in them that was likely to make persons who read them immoral or irreligious, and he declined to declare the devise of the testatrix as invalid by reason of the tendency of the writings of Johanna Southcote. In the course of his Judgment the Master of the Rolls has made some very weighty observations, which are of considerable importance in this case. He says (at p. 19):—

"I am of opinion, that if a bequest of money be made for the purpose of printing and circulating works of a religious tendency, or for the purpose of extending the knowledge of the Christian religion, that this is a charitable bequest. . . . the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void . . . But if the tendency were not immoral, and *although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation*, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests."

Lord Macnaghten in the great Judgment he delivered in the House of Lords in the case of the *Commissioners for special purposes of Income Tax* v. *Pemsel*[1], says:—

"That according to the law of England a technical meaning is attached to the word 'charity' and to the word 'charitable' in such expressions as 'charitable uses,' 'charitable trusts' or 'charitable purposes,' cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or Trusts form a distinct head of equity. Their distinctive position

(1) [1891] A. C. 531 at p. 580.

is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void. . . . In Ireland, though neither the Statute of Elizabeth nor the so-called Statute of Mortmain extended to that country, the legal and technical meaning of the term 'charity' is precisely the same as it is in England."

His Lordship then goes on to enunciate the four principal heads under which he divides charities. He says:—

"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; *trusts for the advancement of religion*; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

I have merely referred to the cases cited above and culled out passages from the various judgments and set them out without any comment of my own; firstly, because I am oppressed by a feeling that this judgment is already exceeding the length to which an ordinary judgment should go; and secondly, because it seems to me that the importance and the applicability of these cases to the present one are so obvious that they require no comment from me.

There is one other case of paramount importance but, before I refer to it, I think it would be convenient here shortly to notice the cases on which the plaintiff's counsel relies in support of his contentions against the validity of the Trust in this case.

The case on which Mr. Tarachand chiefly relies is that of *West* v. *Shuttleworth*[1]. In this case the testatrix directed several sums of money to be paid to several Roman Catholic priests and chapels and desired that they might be paid as soon as possible after her death so that she might have the benefit of their prayers and Masses. These bequests formed one branch of the case. The other branch related to a bequest of the residue of her property to Trustees upon trust to pay £10 each to the ministers of certain specified Roman Catholic chapels for the benefit of their prayers for the repose of her soul and that of her deceased husband, and the remainder was directed to be appropriated in such a way, as the trustees might judge best, as would be calculated to promote the knowledge of the Catholic Christian

(1) (1835) 2 My. & K. 684.

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religion amongst the poor and ignorant inhabitants of two towns in the County of York mentioned by the testatrix. These bequests were attacked on two grounds. It was contended that the legacies to the priests and chapels were void as being for superstitious uses, and it was argued that the gift of the residue was also void in law as being for the express purpose of promoting the Roman Catholic religion. As there has been a difference of opinion between counsel as to the precise grounds on which this case was decided, I cannot do better than give the grounds of the decision in the words of the Master of the Rolls in the Judgment itself. He says (at p. 697):—

"There can be no doubt that the sums given to the priests and chapels were not intended for the benefit of the priests personally, or for the support of the chapels for general purposes, but that they were given, as expressed in the letter, for the benefit of their prayers for the repose of the testatrix's soul and that of her deceased husband; and the question is, whether such legacies can be supported.

"The legacies in question, therefore, are not within the terms of the statute of Edward VI, but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in *Duke*, been decided to be *within the Superstitious Uses* intended to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void."

These words can leave no room for doubt that the legacies in question forming the first branch of the case were held to be void as being gifts for superstitious uses "although not coming within the statute relating to superstitious uses." See *Yeap Cheah Neo* v. *Ong Cheng Neo*[1]. The question involved in the second branch of the case, relating to the gift of the residue, involved the consideration of the provision of Statutes 2 & 3 Will. IV, c. 115. The Master of the Rolls, after discussing the provisions of the statute and certain decided cases, said that they left no doubt in his mind of the validity in law of the gift of the residue. How the decision of this case, holding the gifts to priests and chapels void because they were construed to be gifts for superstitious uses, can help the plaintiff in this case, I fail to understand. As shown above, the doctrine of superstitious uses

(1) (1875) L. R. 6 P.C. 381.

has no applicability whatever to religious trusts in this country, and I must confess I see nothing in this case to help the plaintiff in his contentions. If anything, this case is indirectly of use to the contentions of the defendants, because, in the first place the bequest of the residue for promoting the Roman Catholic religion is held valid, and the words of the Master of the Rolls lead one to believe that if the gifts involved in the first branch were "intended for the benefit of the priests personally or for the support of the chapels for general purposes," the result might have been different. I can understand the plaintiff's counsel's reasoning if he merely wishes to make use of the case as showing that a gift for prayers for the repose of the soul of the donor or those connected with the donor is bad in law. It is not necessary for the purposes of the case to consider that question at all. Nobody has argued before me that gifts for the purpose of saying prayers for the repose of the souls of the dead are good gifts in law. The whole force of the defendant's fight is directed towards proving that the present Trust is *not* a trust for the purpose of saying prayers for the repose of the souls of the dead, and I think they have succeeded in proving that beyond a shadow of doubt.

The next case on which Mr. Tarachand relied was that of *Heath* v. *Chapman*[1]. In this case there were trusts declared for certain Roman Catholic chapels, for saying Masses and requiems for the souls of donor and for other souls, and for the souls of the "poor dead" and for other pious purposes. It was held that gifts for Masses, etc., for the dead were superstitious and void—that the pious uses could not—as religious uses—be separated from the others and were therefore also bad, and that the words pious uses could not be construed charitable uses—consequently the property given to these uses went to the Residuary Legatee of the donor. *West* v. *Shuttleworth*[2] was in this case followed. This case again does not help the plaintiff in the least, for the same reasons as apply to *West* v. *Shuttleworth*.[2]

The case of *West* v. *Shuttleworth*[2] is often cited and is referred to in many subsequent cases, and before leaving the consider-

(1) (1854) 2 Drew 417. (2) (1835) 2 My. & K. 684.

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ation of the case and passing on, it would be interesting to note that in *In re Blundell's Trusts*,[1] twenty-five years after its decision, Sir John Romilly, Master of the Rolls, expresses doubts as to the soundness of that decision in the following words:—

"I expressed my difficulty, in the case referred to, as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality; but I think the decided cases too strong, and that the House of Lords alone can alter the settled law. It is clear that I must act on *West* v. *Shuttleworth*[2], which I cannot overrule."

The next case relied on by Mr. Tarachand is that of *Colgan* v. *The Administrator-General of Madras* [3]. This was a case in which the Court had to consider the disposition made by an Armenian lady by her will, and the Appeal Court in Madras held that a bequest for perpetual Masses for the benefit of the soul of the testatrix and for souls in purgatory was void as infringing the rule against perpetuities. This case was decided in 1892. The same remarks that I have made with reference to *West* v. *Shuttleworth*[2] and *Heath* v. *Chapman*[4] apply to this case. This case is also open to the further remark that after the decision in 1906 of the case of *O'Hanlon* v. *Logue*[5] by the Court of highest jurisdiction in Ireland—to which case I will presently refer—it seems to me now to be quite certain that the decision in this case that bequests in perpetuity for the celebration of Masses are void is not good law, and no Court in India will or can follow the case or regard it as a correct decision on this subject.

The last case on which the plaintiff's Counsel relies and which is his sheet anchor, is the case of *Yeap Cheah Neo* v. *Ong Cheng Neo*[6]. As the case is treated by Mr. Justice Jardine in *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[7] as an authority in "approaching the question of law," I think it is desirable to consider with care what bearing this decision of their Lordships of the Privy Council has on a

(1) (1861) 30 Beav. 360 at p. 362.
(2) (1835) 2 My. & K. 684.
(3) (1892) 15 Mad. 424.
(4) (1854) 2 Drew 417.
(5) [1906] 1 I. R. 247.
(6) (1875) L. R. 6 P. C. 381.
(7) (1887) 11 Bom. 441.

trust created by a Parsi in India. The testatrix whose will was under consideration was a Chinese lady who had taken up her residence in Penang in the Straits Settlement. This tract of country was ceded by a Native Prince in or about 1807 to the East India Company. It was then wholly uninhabited. The Company built a fort and a town, and a number of Chinese, Malays and Indians settled there. The place had no original or indigenous peoples of its own and consequently there were no customs or usages which could be said to have been in vogue amongst the people of the land. Amongst the points decided by the Privy Council in the case, those that are supposed to affect the question in the present case are two, namely:—

(1) That a devise of two plantations in which the graves of the family were placed, to be reserved as a family burying-place and not to be mortgaged or sold, was void as a devise in perpetuity and (2) that a direction that a house for performing religious ceremonies to the testatrix and her late husband be erected, was void, as being a devise in perpetuity, which was not for a charitable use.

Mr. Justice Jardine, referring to *Yeap Cheah Neo* v. *Ong Cheng Neo*[1], says:—

"Their Lordships' observation appears applicable to Parsis in Bombay. 'In this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for Masses for the dead, or as the Christian of any Church who may have devised property to maintain the tombs of deceased relatives.'"

A careful perusal of the paragraph at page 396 of the report from which this sentence is picked out, shows conclusively that what their Lordships said was that, according to English Law prevailing *in England*, the gifts they were considering would be analogous to gifts for Masses or for the upkeep of tombs, and such gifts being gifts merely for pious uses would be void *as being gifts for Superstitious Uses*. That this is without doubt so will be seen by the observations of their Lordships which immediately precede the sentence in question. They say:—

"The performance of these ceremonies is considered by the Chinese to be a pious duty . . . . The dedication of this Sow Chong House bears a close analogy to gifts to priests for Masses for the dead. Such a gift by a Roman

(1875) L. R. 6 P. C. 381.

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Catholic widow of property for Masses for the repose of her deceased husband's soul and her own, was held in *West* v. *Shuttleworth*(1) not to be a charitable use, and although not coming within the statute relating to superstitious use, to be void."

The concluding sentence of their Lordships in this paragraph is—

"All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to *such objects*."

These and similar gifts, although not falling strictly within the letter of the statute of Edward VI, have nevertheless been held void as in *West* v. *Shuttleworth*(1), as being within the spirit and intendment of the statute, and being analogous to those mentioned in the statute, fell within the purview of the Doctrine of Superstitious Uses, which took its origin from the statute and became applicable to certain trusts for pious uses on grounds of public policy. This doctrine has *no applicability whatever* to trusts in India, and therefore, with great deference to the learned Judge, I venture to say that their Lordships' observation in *Yeap Cheah Neo* v. *Ong Cheng Neo*(2) quoted by him, has *no* applicability to Parsis in Bombay or to the trusts created by them.

That it was possible that their Lordships' decision might have been different if they had evidence before them proving the usage and customs prevailing amongst the Chinese community at Penang, appears from the observations in the judgment at page 395, where they say :—

"The devise of the two plantations. . . is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a Charitable use. The weight of authority is against a devise of this nature being so held in the case of an *English* will; and the only point, therefore, requiring consideration can be, whether there is anything in Chinese usages with regard to the burial of their dead, and in the arrangements for that purpose at Penang, which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations nowhere appears, and it may be they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the kind adverted to, and of the extent of these plantations, their Lordships feel unable to say that the decree on this point is wrong."

(1) (1835) 2 My. & K. 684. (2) (1875) L. R. 6 P. C. 381.

Side by side with *Yeap Cheah Neo* v. *Ong Cheng Neo*[1], Mr. Justice Jardine refers to *Fatmabibi* v. *The Advocate-General of Bombay*[2]. In his judgment in that case Mr. Justice West refers to *Yeap Cheah Neo* v. *Ong Cheng Neo*[1], and it is most instructive to notice his observations as to that case and its applicability to trusts in India. At page 50 of the report his Lordship observes :—

"As to the ultimate trust for constructing wells and aiding marriages and pilgrimages, the case of *Neo* v. *Neo* shows that the rule against perpetuities extends to a Colony where the English Law is enforced *only so far as that law is adapted to the circumstances of the community*, because it is regarded as having its foundation in principles of general application. But it is subject to exception in the case of 'Charities' liberally construed as objects 'useful and beneficial' to the community. But useful and beneficial in what sense? The Courts have to pronounce whether any particular object of a bounty falls within the definition; but they must in general apply the standard of *Customary Law* and *common opinion amongst the community to which the parties interested belong*."

The same principle enunciated by Mr. Justice West in this case found expression in the much earlier case of *Kojahs and Memons*[3], and this principle ought, I think, always to be kept in mind by the Courts in India, dealing with trusts and settlements created by those communities in India, who are not covered by the exception created by statute in favour of Mahomedans and Gentoos, and to whom English law is promiscuously applied.

Before finally leaving *Limbuwalla's* case[4] I ought to notice another passage in the judgment, where Mr. Justice Jardine says :—

"The other object, viz., the acquiring by a few private persons of benefits through the protection of the Furohurs seems to me to resemble a gift to a private company and therefore not a gift to a charitable use."

The learned Judge relies on the cases of *Cocks* v. *Manners*[5], and the *Attorney-General* v. *Haberdashers' Company*[6] as authorities for the above passage. In the first of these cases the Court had to deal with gifts to two chapels, a convent and a

(1) (1875) L. R. 6 P. C. 381.
(2) (1881) 6 Bom. 42.
(3) (1847) P. C. C. 110.
(4) (1887) 11 Bom. 441.
(5) (1871) L. R. 12 Eq. 574.
(6) (1834) 1 My. & K. 420.

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society of sisters of charity, and in the second case the gift was to a company in London "for increase of their stock of corn" It is very difficult to find where the resemblance of trusts for Muktad ceremonies with gifts to private companies comes in, but it seems to me that the whole difficulty has arisen from the fact that the learned Judge was led into forming erroneous views as to the real nature and objects of the trusts he had before him.

In the course of the trial much has been said before me about Masses in Ireland and gifts for saying Masses for the repose of the souls of the dead, and it appears to me to be very useful here to consider how the Courts have treated those gifts. The gradual but radical change that has come over the Courts when considering the questions relating to gifts for the celebration of Masses is most remarkable. The law relating to religious trusts prevailing in Ireland ought really to be the law applicable to religious trusts in India. In Ireland, as in India, there is no established Church, and all religious creeds are alike in the eye of the law. It is, therefore, to the Irish cases that we must look for help and they have a far greater applicability to religious trusts in India than some of the English cases relating to the same subject. It is not necessary to refer to cases earlier than *Attorney-General* v. *Delaney*[1]. This and the two subsequent cases I propose to refer to give fairly elaborate and exhaustive summaries of the statute and case law relating to religious trusts in both England and in Ireland.

In the course of an elaborate judgment delivered by him in *Attorney-General* v. *Delaney*[1], Chief Baron Palles held that trusts for the celebration of Masses in private were invalid, as not being charitable, but expressed a very strong opinion that if the trust had been for the celebration of Masses in public, the trust would have been a good and valid charitable trust in the eye of the law. His colleagues on the Bench—Barons Fitzgerald, Dowse and Deasy—were not prepared to go to the length the Chief Baron had gone, and guarded themselves by declaring that they must not be taken as holding that the opinion expressed

(1) (1875) I. R. 10 C. L. 104.

by the Chief Baron was the judgment of the Court. The Court in this case contented itself by saying that they left the question as to whether a trust for Masses directed to be celebrated in public would or would not be a valid charitable trust, open, to be decided whenever it may arise. Twenty-two years afterwards it did arise in the case of the *Attorney-General* v. *Hall*[1] wherein a Bench consisting of Lord Ashbourne, the Lord Chancellor of Ireland, and Lords Justices FitzGibbon, Barry and Walker, held that "a bequest to a Roman Catholic priest, to be applied for Masses to be celebrated publicly in a specified Roman Catholic Church in Ireland for the repose of the testator's soul, is a valid charitable bequest."

Thus, what the Chief Baron Palles had expressed as his opinion was pronounced to be a judicial finding nearly a quarter of a century afterwards.

But by far the most remarkable advance in the law was made in the great case of *O'Hanlon* v. *Logue*[2]. By a curious coincidence it happens that Chief Baron Palles was a member of the Bench which decided this case—the other Members being Lord Chancellor Walker and Lords Justices FitzGibbon and Holmes. In the whole discussion before me, and amongst the numerous authorities cited before me, I consider that this case is by far the most important and has the closest bearing on the question I am now considering. The testatrix in this case devised and bequeathed all her property to trustees upon certain trusts, the ultimate trust being "to sell and invest the proceeds and to pay the income thereof from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of Masses for the repose of the souls of my late husband, my children and myself." The Court, after a most elaborate and exhaustive argument, overruled *Attorney-General* v. *Delaney*[3], thirty-one years after its decision, and held:—

"That a bequest for Masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not."

(1) [1897] 2 I. R. 426. (2) [1906] 1 I. R. 247.
(3) (1875) I. R. 10 C. L. 104.

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What are Masses is fully explained in *Attorney-General* v. *Delaney*(1), and some extracts from the prayers recited during the celebration of the Masses are given in that case. Though commonly these prayers are supposed to be recited for the repose of the souls of the dead, a perusal of them will show that, very much like the prayer said by the Parsi priests during the Muktad ceremonies, they are prayers involving a sacrifice to God, invoking blessing on mankind, and including worship of the Creator. They are prayers offered to God to propitiate His anger, to return thanks for His benefits and to bring down His blessings upon the whole world. The celebration of the Masses is, like the celebration of the Muktad ceremonies, an Act of Divine Worship, and the performance of Masses helps to maintain the priestly class, the moneys paid to them for Masses forming a portion of their ordinary income and means of livelihood.

No apology is necessary for transcribing here certain passages from the judgments delivered in this case; first, because those passages have the closest and the most important bearing on the present case; and secondly, because they contain sentiments and thoughts the most ennobling that humanity could utter. The Lord Chancellor, in the course of his judgment, says (at p. 259) :—

"There are some legal propositions germane to the case for which it would be mere pedantry to cite authority:—(*a*) That in speaking of what is 'charitable' we use the word in the artificial sense, which is derived from the statute 43 Eliz. c. 4; (*b*) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit; (*c*) that a gift for the advancement of 'religion' is a charitable gift: and that in applying this principle, the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contain nothing contrary to law. All religions are equal in the eye of the Law. . . . Whether the subject of the gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality."

(1) (1875) I. R. 10 C. L. 104.

Chief Baron Palles, in the course of his judgment, after reviewing all the English and Irish authorities, goes on to say (at p. 270):—

"The acts of worship of a Church are admitted, by all theistic religions, to tend to discharge, to some extent, the debt due to God by the general body of the faithful, and to bring down upon them temporal and spiritual benefits. But these acts must be performed by ministers of that Church; and thus the gifts are in a two-fold manner charitable—first, and principally, by reason of the piety which is the essence of the gift to God, the gift which is to be applied to His Divine Worship; and secondly, by the mode in which it is to be so applied, *viz.*, in the maintenance and support of the ministers by whom the acts of worship are to be performed."

That there is a most striking resemblance between the ceremonies performed and prayers recited during the Muktad days and the performance of Masses will appear from the following passage in the Chief Baron's judgment (at p. 274):—

The Service of Mass "is an act of divine worship of the Church, an offering of praise, adoration, and thanksgiving, involving a petition for benefits temporal and spiritual, for all the faithful alive, whether present or absent."

This is exactly what the witnesses have said with regard to the Muktad ceremonies, with perhaps this addition, that the prayers recited by the Zoroastrian priests are more altruistic, and the petition for benefits is not confined to the faithful but is universal.

The Chief Baron goes on to say (at p. 275):—

"The existence of a divine service is essential to all religions; and equally essential is the existence of a privileged class, a priesthood or a class of ministers, by whom that divine service shall be celebrated, on behalf of the Church. The divine service of the particular religion must be defined by the doctrines of its own religion. Without those doctrines it cannot exist as a divine service. Without a knowledge of those doctrines, the spiritual effect of the service cannot be understood. Consequently, the effect of the divine service cannot be known, otherwise than from the doctrines of its religion, coupled with a hypothetical admission of their truth. But *the advancement of any theistic religion is charitable, and such advancement may result from an increased number of the celebrations of i divine service.* Therefore the charitable nature of a divine service must when the religion is not an established one) depend upon the character of the act, not objectively, but according to the doctrines of the religion in question.

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In the course of the argument before me it has been strenuously contended that the performance of the Muktad ceremonies results in no public benefit; that it merely has a tendency to put money in the pockets of the priest, and that the recitation of the prayers and the compliance with all the solemn rituals accompanying the performance of the ceremonies have no real efficacy and do not result in any benefit of a public nature. This identical question is dealt with by the Chief Baron, and the contention is refuted in the most effectual manner. He says (at p. 276):

"But when it (the Law) knows those doctrines, although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it *objectively* and as a fact, unless it also knows that the doctrines in question are true. But it never can know that they are objectively true, unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so, but it is contrary to the principle that all religions are now equal in the law. It follows that there must be one of two results: either—(1) the Law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit; or, (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is.

"The first alternative is an *impossible* one. The law, by rendering all religions equal in its sight, did not intend to deny that which is the basis of, at least, all Christian religions, that acts of divine worship have a spiritual efficacy. To do so would, virtually, be to refuse to recognise the essence of all religion.

"The other result must, therefore, necessarily ensue. It must ascertain the spiritual efficacy according to the doctrines of the religion in question; and if, according to those doctrines, that divine service does result in public benefit, either temporal or spiritual, the act must, in law, be deemed charitable."

Now, in this case it is proved beyond doubt that according to the doctrines of the Zoroastrian religion the performance of the Muktad ceremonies is enjoined—that it is the duty of all Zoroastrians to have these ceremonies performed. The Court has before it the knowledge what ceremonies are obligatory and what are optional—the Court has before it the prayers ordained to be recited during the ceremonies—the Court has before it the evidence of witnesses proving that these ceremonies have to be performed by priests who are paid for doing so and such honoraria as they receive form a portion of their income, and are their

ordinary means of livelihood. The Court is then in a position to judge how far the witnesses are right, when they say the performance of such religious ceremonies amounts to an Act of Divine worship which is believed by the community to bring down to the world both temporal and spiritual benefits—not only on those that perform the ceremony—but on the whole community—on their country and their Sovereign—on all mankind—on the Universe. If this is the belief of the community—and it is proved undoubtedly to be the belief of the Zoroastrian community—a secular judge is bound to accept that belief—it is not for him to sit in judgment on that belief—he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be in advancement of his religion and for the welfare of his community or of mankind, and say to him, "You shall not do it." This Court can only judge of the efficacy of such gifts in procuring public benefits by the belief of the donor and of the community to which he belongs—the belief of those who profess the religion—the ordained ceremonies of which the donor desires performance.

Lord Justice FitzGibbon, speaking on the point, says (at p. 279) :—

"In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the Church or denomination, or body, who profess it, the secular Court must act upon evidence of the belief of the members of the community concerned. It *can* have *no* other guide upon that subject.

"The exclusiveness, the vagueness, or the self-sufficiency of principles religiously held by particular creeds, whether they rest on dogma, or on conscience, cannot exclude those who profess any lawful creed from the benefits of charitable gifts.

"It would be strange, indeed, if bequests for the promotion of total abstinence, or even vegetarianism; for the maintenance of a place of worship, or of a minister, for a small congregation of peculiar people; for the dissemination of the works of Joanna Southcote; or for the prevention of cruelty to animals, should be held, as they have been, to be charitable objects, if a provision by a Roman Catholic, for Roman Catholics, for the celebration of the Mass, more especially in Ireland, where 'Superstitious Uses' are not *mala prohibita*, were to be excluded from that category."

To this I would add that it would be stranger still in a country like India, where superstition abounds, where each community is

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by the Crown left free to profess what religion it pleases—from where the doctrine of superstitious uses is rigorously excluded, where trusts of lands and moneys in perpetuity for idols and similar trusts are recognised and enforced by the Courts—that a Parsi professing the Zoroastrian religion should be precluded from making a gift for the performance of religious rites and ceremonies which he is enjoined by the religion he professes to perform, and the non-performance of which, according to his religion, is a great sin. Why should he be precluded from setting apart a portion of his property and devoting it to a purpose which he believes would result in benefits to himself, his family and his community—in promoting the religion he professes and saving his descendants from committing a sin should circumstances place them in a position of inability to perform these ceremonies for want of means. On this point in the same case Lord Justice FitzGibbon, a Protestant Judge, observes (at p. 280):—

"Speaking with all reverence of a faith which I do not hold, touching the very 'Mystery of Godliness', I could not impute to any individual professing the Roman Catholic religion that he regarded a gift of money for Masses as a means of securing from such a Sacrifice a private and exclusive benefit for himself alone, as being much less than blasphemy; and, as I understand the proved doctrine of the Church, it would certainly be heresy. But the hope or belief that, in some shape or form, here or hereafter, a man's good works will follow him—an ingredient of selfishness in that sense—enters into almost every act of charity; and if the act is done in the belief that it will benefit others; for example, in the belief that he that gives to the poor lends to the Lord, it can be none the less charitable because the giver looks for his reward in heaven."

Lord Justice FitzGibbon ends his judgment by saying:—

"The fruition of faith, 'the evidence of things not seen', is hidden from humanity. It is not within the power of any earthly tribunal to entertain the question whether these propositions are true. But it is for us to decide that belief in their truth is part of the faith of the members of the Church which has laid them down."

Speaking of the belief of the Roman Catholics in the efficacy of the performance of Masses being benefits to the community, Lord Justice Holmes says (at p. 286):—

"A temporal Court in Ireland, having no authority to decide for itself whether it was true or not, must take as its guide the belief of the Church of which the testatrix is a member."

I would like here to say that so far as I am concerned, I have scarcely ever come across a case in a Court in another country bearing closer resemblance to facts and contentions of a case before our Courts than the case of *O'Hanlon* v. *Logue*[1] bears to the present case. It must be remembered that it is decided by the tribunal having the highest jurisdiction in a country in which religious matters bear remarkable analogy to this country—Ireland like India having no established Church, no State religion, and where the doctrine of superstitious uses has no application. It is decided as recently as 1906, its pronouncements are clear and emphatic; there is no element of doubt or a note of uncertainty in the judgments pronounced; every case of importance on the subject, ancient or modern, is carefully considered and the question before the Court finally and definitely settled. Judgments such as those pronounced in this case must command the respectful attention of other Courts deciding similar questions. This case alone is sufficient to set at rest all doubts and remove all difficulties in the decision of this case, and enables me to answer the question before me—

> "Whether the Trust declared in respect of the Government Promissory Notes for 15,000 Rupees mentioned in the plaint are valid."

in the affirmative with considerable confidence. I hold that Trusts and bequests of lands or money—for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktad, Baj, Yejushni and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the Rule of Law forbidding perpetuities.

The only other question to be considered is as to costs. The plaintiff is a member of the Bar, and as such he has conducted his own case. At the end of the case he intimated to me that he does not propose to saddle the trust funds with his own fees. This is generous of him. I ought here to say that throughout the whole case the attitude of the plaintiff was most correct. He did not come to the Court for the purpose of dividing the Trust estate. His share in the funds would have been so small that it would not have been worth his while troubling about it if his

(1) [1906] 1 I. R. 247.

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motive had been merely to share in the division of the funds. On the very first day the matter came on before me, he expressed his perfect willingness to have the matter decided against him, which, of course I had no power to do in the face of the decision in 11 Bombay and in the absence of any materials before me. He came to Court for directions as the original Trustees had all died, the ceremonies had remained unperformed in the previous year, and the income of the funds remained unutilized. His single-handed but vigorous fight has saved the case from being stigmatised as a one-sided show or a happy-family arrangement. He is entitled to his costs; whether he takes them or not it is for him to decide. Had the other parties, excluding from this expression, of course, the Advocate-General—followed the plaintiff's example as I had hoped they would and offered to bear their own costs, the plaintiff's unselfish offer would have been most useful. When I gave expression to my inclination to give priority to the Advocate-General for his costs a most acrimonious discussion ensued. Mr. Bahadurji vigorously resented the suggestion, and argued—I now find correctly—that there is no precedent for such an order and that it would be a most unusual order to make. Mr. Kanga claimed priority for the costs of his clients and argued that his clients were Trustees, and as such were entitled to have their costs paid out of the funds taxed as between attorney and client. He claimed a lien on the funds for his costs. Mr. Kanga's clients are not Trustees. They are merely the executor and executrix of the will of one of the original Trustee and are in exactly the same position as the plaintiff who is Administrator of the estate of another original Trustee, and the tenth and eleventh defendants, who are executors of the will of the third original Trustee. That his clients are in possession of the Trust property is merely an incident due to the fact that their Testator was the last of the Trustees to die. This circumstance does not alter their position or give them any preferential rights over others as to costs. Mr. Raikes, the Acting Advocate-General whom I directed to be added as a party, has made a successful fight for the Trust and earned the gratitude of all those interested in upholding the Trust, and I would be extremely sorry if his

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costs are not fully recovered from the Trust Funds. I regret I can find no precedent enabling me to give him priority as to his costs. The only order under the circumstances, I can make, is that the costs of all parties appearing before me be paid out of the Trust property—those of the Advocate-General being taxed between attorney and client. Costs to be taxed as if this Originating Summons had been a long cause.

I cannot conclude this judgment without expressing my sense of obligation to the members of the legal profession engaged in this case, most especially to Mr. Bahadurji, for the very valuable assistance they have rendered to the Court throughout the case.

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Attorneys for defendant No. 1:—*Messrs. Pestonji, Rustim & Kola.*

Attorney for defendants Nos. 10 and 11:—*Mr. P. S. Batlivala.*

Attorneys for defendant No. 12:—*Messrs. Jehangir, Gulabbhai and Billimoria.*

B. N. L.

Note:—Italicised words or sentences, occurring in quotations from treatises or documents and embodied in this judgment, indicate that Mr. Justice Davar desired to emphasise those particular words or sentences and do not indicate that they were so italicised in the originals from which the quotations are taken.—EDITOR.

CRIMINAL REVISION.

Before Chief Justice Scott and Mr. Justice Heaton.

EMPEROR *v.* BABULAL KANAIYALAL.*

1908. *July* 17.

Penal Code (Act XLV of 1860), secs. 21, 186—Public Servant—Obstruction to a public servant—Clerk in the cess-collection department of a District Municipality—Bombay District Municipal Act (Bombay Act III of 1901).

A clerk in the cess-collection department of a District Municipality constituted under the Bombay District Municipal Act (Bombay Act III of

* Criminal Application for Revision No. 86 of 1908.