# ORIGINAL CIVIL.

*Before Mr. Justice Davar and Mr. Justice Beaman.*

SIR DINSHA MANEKJI PETIT, BART., AND OTHERS, PLAINTIFFS, *v.* SIR JAMSETJI JIJIBHAI, BART., AND OTHERS, DEFENDANTS.*

1908. *November 28.*

*The Trustees and Mortgagees Powers Act (XXVIII of 1866), section 34—Non-applicability to Charitable Trusts—Indian Trusts Act (II of 1882), sections 1, 2—Statute of Frauds (29 Ch. ii, C. 3), section 7—Civil Procedure Code (Act XIV of 1882), section 539—Religious or Charitable Trusts—"Further or other relief", meaning of—Parsis—Conversion among Indian Zoroastrians—Juddins—Convert not entitled to certain religious and charitable institutions of Parsis.*

The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did the Indian Evidence Act entirely superseded it.

*Held by* DAVAR, *J.*:—Section 539 of the Civil Procedure Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs which are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.* (*a*) the appointment of new trustees, (*b*) vesting trust property in the trustees, and (*c*) settling a scheme. But the reliefs asked for in the second branch of the case, namely, the ascertainment and declaration of what are the trusts, the rectification of the trust deeds, a declaration that the defendants have either wrongly declared the trust in the deeds or wongly interpreted the trusts therein, do not fall under any of the five heads mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads.

A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1882.

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Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed.

A well-established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

*Peshotam Hormasji Dustoor* v. *Meherbai*(1); and *Bai Shirinbai* v. *Kharshedji*(2) followed.

Although the conversions of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin, the Zoroastrian Community of India has never attempted, encouraged, or permitted the conversion of Juddins to Zoroastrianism.

Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranis from Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

*Held by* BEAMAN, *J.*:—The decision of a suit under section 539 of the Civil Procedure Code, 1882, is not only binding on the parties to it, but to all persons affected by it.

The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e. g.*, removing fraudulent trustees, restraining a breach of trust, and so forth.

Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust.

The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular

(1) (1888) 13 Bom. 302. (2) (1896) 22 Bom. 430.

language, it has found current expression in the term Pârsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organisation.

Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time.

It was not the intention of the founders of the trusts in question to extend their benefits to any one who was not in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father.

THE plaintiffs, as members of a body known as the Zoroastrian or Zarthosti or Mazdiyasnan Anjuman which includes all Parsis in Bombay professing the Zoroastrian (otherwise called the Mazdayashni) religion, brought this suit under section 539 of the Civil Procedure Code (Act XIV of 1882) against the defendants who were Trustees of the Funds and immoveable properties of the Parsi Panchayat.

In their plaint the plaintiffs alleged that there were numerous rich endowments consisting of property both moveable and immoveable devoted to various charities and religious purposes for the benefit of persons professing the Zoroastrian religion. These properties were in the possession and control of the defendants who claimed to be Trustees of such properties by virtue of divers deeds of appointment executed under powers of appointment purporting to be created or conferred by a Deed of Trust dated the 4th of December 1851 and by a Deed of Trust dated 25th September 1884.

They contended that the said powers were altogether invalid, that the powers of appointment of Trustees of all the said properties had always been vested in the general body of Zoroastrians in Bombay, that the defendants, against whom no charges of misconduct were made, were not validly appointed trustees of any of the said properties and they claimed that

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trustees thereof should be appointed under a scheme framed by the Court.

The plaintiffs said that amongst the said immoveable properties were five Dokhmas or Towers popularly known as the Towers of Silence situate on Malabar Hill, Bombay, with certain other buildings connected therewith known as Sagdis, and also a Nasakhana or corpse-bearers' house situate at Agiari Mohalla, Baharkote, outside the Fort of Bombay. These properties were, the plaintiffs claimed, built for the use and benefit of all persons professing the Zoroastrian faith including converts to that faith. They further contended that the trust deed of the 25th September 1884 purported to declare the trusts in terms at variance with the trusts and purposes for and to which the same were originally provided and dedicated, the said properties being declared by the said deeds (according to the defendants' recent construction thereof) to be held for the use only of persons being Parsis by descent and also professing the Zoroastrian religion, whereas the plaintiffs believed that at the time the said deed was prepared and executed there was no intention to exclude from the benefit of the said trusts any person professing the Zoroastrian faith.

The plaintiffs prayed (*a*) for a declaration that the defendants were not validly appointed trustees of either the moveable or immoveable properties referred to and that the powers of appointment of new trustees purporting to be created or conferred by the two deeds of trusts of the 4th of December 1851 and the 25th of September 1884 were void and of no effect; (*b*) for a declaration that the power of appointment of new trustees of all the said properties had always been vested in the general body or Zoroastrians in Bombay and that the same should be exercised in accordance with such scheme as the Court might approve of; (*c*) for a declaration that the declarations of trust contained in the trust deed of the 25th September 1884 of or in respect of three of the Dokhmas and the Sagdis and the Nasakhana referred to above were *ultrá vires* and void in so far as they differ from the original trusts thereof; (*d*) that the trusts upon which the said properties were held might be ascertained and declared.

In their written statement the defendants stated that until the year 1903 there was no case known to the Parsi community of a person whose father was not of the Zoroastrian religion claiming to be a convert to the Zoroastrian religion. In 1903 the wife of the 6th plaintiff a French lady was invested with the sacred shirt and thread and claimed to be a convert to the Zoroastrian religion. The defendants declared that this suit was brought by the plaintiffs for the purpose of claiming for the said French lady rights in the properties mentioned in the plaint which she was not entitled to and they submitted that the plaintiffs were not entitled to maintain this suit in the interests of a person who was not a party to this suit. Further the defendants denied that they were not validly appointed trustees of either the moveable or immoveable properties and they denied that the power of appointment of new Trustees created or conferred by the two deeds of trusts of the 4th December 1851 and 25th September 1884 were void and of no effect. They denied that the powers of appointment of new Trustees of all the properties had always been vested in the general body of Zoroastrians in Bombay; that the declarations of trust contained in the deed of the 25th September 1884 of or in respect of the Dokhmas and Sagdis and the Nasakhana mentioned in the plaint were *ultra vires* and void as alleged and that the said declarations of trust differed from the original trusts thereof. They contended that it was quite unnecessary to frame any scheme for the administration of the properties as the whole Parsi community including the plaintiffs were well satisfied with the management by the defendants of the charitable properties of which the defendants were the trustees.

Further the defendants contended that whenever the terms "Zoroastrians," "Mazdiyasnan," "Zarthosti Anjuman," "Zoroastrian Anjuman" or other similar terms have been used by persons founding or endowing or wishing to found or endow any trust for the religous and charitable purposes referred to in the plaint, the intention of the founder or endower using such terms was to found or endow such trust for members of the Parsi community professing the Zoroastrian religion and not for persons converted to the Zoroastrian religion

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who were not in the contemplation of such founder or endower; that the Parsi community had always been regarded as consisting of (1) the descendants of the original emigrants from Persia into India at the time of the persecution by the Mahomedan Conquerors of Persia of the followers of the Zoroastrian religion who profess the Zoroastrian religion; (2) the descendants of the Zoroastrian in Persia who were not amongst the original emigrants but who are of the same stock and have since that date from time to time come to India and have settled here either permanently or temporarily and who profess the Zoroastrian religion; and (3) of children of a Parsi father by an alien mother who profess the Zoroastrian religion; that no one is entitled to the benefit of the trusts of which the defendants were the trustees except members of the Parsi community as defined under the three heads above mentioned.

At the trial 36 issues were raised and a great many points were discussed but the two main questions in the case were :—

(1) Whether the defendants are validly appointed Trustees of the properties and funds of the Parsi Panchayet, and whether, in the event of death or resignation of one or more of them they have the right of filling up such vacancy or vacancies as they occur.

(2) Whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the religious Institutions and Funds mentioned in the plaint and now in the possession and under the management of the defendants.

*Lowndes* with *Scott*, Advocate-General, *Padshah, F. S. Talyarkhan* and *F. P. Talyarkhan* for the plaintiffs.

There are really two main points in issue: (1) What are the trusts and who are entitled to the benefits of them? (2) Are the defendants validly appointed Trustees? We charge no misconduct in the general sense against the defendants. We only charge them with legal misconduct. They are biassed and do not represent the whole community.

We say that the trusts are held for the benefit of all Zoroastrians who claim them. The sole test is the following of the

Zoroastrian religion. According to the defendants they have absolutely unlimited discretion to admit or not a person to the benefit of the Trusts.

*Strangman* with him *Inverarity, Raikes* and *Kanga* for the defendants.

The plaintiffs cannot maintain the suit as framed. No right of theirs is attacked. They are fighting for persons who are not before the Court. The decree in this suit will not bind those who are not parties to it.

*Lowndes* in reply.

DAVAR, J.—[His Lordship after setting out the facts of the case went at great length into the history of the various trusts, and continued :—]

It was contended that, whatever may be the position of the defendants with regard to Funds and Properties that came into existence prior to 1866, their position as Trustees was "unassailable" with regard to all Funds and Properties that came into existence and in the possession of their predecessors after the 24th of October, 1866, on which date the Trustees and Mortgagees Powers Act, being Act XXVIII of 1866, came into force, and reliance was placed on section 34 of that Act.

This contention is certainly one that requires very careful consideration, and we have most anxiously considered the arguments addressed to us on this head by Counsel on both sides.

Section 34 of this Act gives power to Trustees, under certain circumstances, to appoint other persons as their co-trustees in the place of a Trustee dying, resigning, leaving British India for more than six months, or becoming unfit or incapable to act as Trustee. The first question with reference to this Act that arises for consideration is: Does the Act apply to Charitable Trusts? Although this Act came into operation as far back as 1866, there seems to be no authoritative decision on this point. It must be remembered that the tendency of legislature in India has been, as far as possible, not to disturb by special legislation existing usages and customs of the people of the country and not to interfere with their public, religious, and charitable

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institutions. The considerations that apply to charities in India are wholly different from those that apply to charities in England. The Indian Trusts Act II of 1882 specifically exempts from its operation all public or private, religious or charitable, endowments. No such exemption is specifically made in this Act of 1866, but the wording of the Preamble seems to negative the idea of its applicability to Charitable Trusts.

Then, again, the provisions of this Act are taken verbatim from two English Statutes. The first nineteen sections—sections 32 to 36 and sections 38, 44 and 45—are taken from 23 & 24 Vic. c. 145, known as Lord Cranworth's Act.

Sections 20 to 30, section 31 with the omission of the last clause, and sections 37, 39, 40 to 43 are taken from 22 & 23 Vic. c. 35, known as Lord St. Leonard's Act.

Neither of these Acts, so far as we can see, have ever been held to apply to Charitable Trusts. They find no place in Tudor's Charitable Trusts; and, in answer to Mr. Lowndes' argument, no English case was pointed out to us where these Acts have been held to apply to Charitable Trusts. Mr. Strangman cited *In re Coates to Parsons*[1], but that is a case under the Conveyancing Act and throws no light whatever on the question. It is a remarkable circumstance, as I have observed before, that the question is not covered by any authority. I have never known this question raised in our Courts, and myself and my predecessors in office who sat in Chambers have on several occasions given opinion, advice, or directions to Trustees of Charitable Properties under section 43 of the Act on the assumption that the Act applied to Charitable Trusts as well as to all other Trusts. Now, however, that the question is elaborately argued before us, we have come to the conclusion that the Trustees and Mortgagees Powers Act XXVIII of 1866 does not apply to Charitable Trusts.

Another answer to the defendants' contentions, based on section 34 of the Trustees and Mortgagees Powers Act, is that that section is no longer of any legal force. Section 2 of the Indian Trusts Act II of 1882 expressly repeals, amongst other sections,

(1) (1886) 34 Ch. D. 370.

this section 34 of the Trustees and Mortgagees' Powers Act. The Indian Trusts Act was made applicable to the *Bombay Presidency* in 1891, and since then, at all events, section 34 has ceased to have any force. But it is contended that section 1 of the Indian Trusts Act says:—"Nothing herein contained . . . . applies to public or private, religious or Charitable Trusts." Therefore the repealing section does not apply to Charitable Trusts. To hold this would, I think, lead to endless confusion. It would mean that whereas Trustees of private Trusts have no longer the power to appoint their colleagues in substitution or succession to those that retire, die, or become incapable, Trustees of Charitable Trusts would still retain that power,—a conclusion which is obviously undesirable and one which the Legislature could never have intended. We are of opinion that the saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows. The words of the section are unqualified and absolute, and provides that "the Statute and Acts mentioned in the schedule shall be repealed in the territories to which this Act . . . extends." We must therefore hold that section 34 of the Trustees and Mortgagees Powers Act is repealed wholly, and that there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity.

But assuming, for one moment, that the Trustees and Mortgagees Powers Act applies to Charitable Trusts, and also assuming that the repeal of the section does not operate so far as Charitable Trusts are concerned, and that the section is in full force and is applicable to the present case—does it help the defendants? The section, shortly put and omitting the clauses that are not very important, provides as follows:—

"Whenever any trustee, either original or substituted, . . . shall die, etc. . . . it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person . . . then for the surviving and continuing trustee . . . by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, etc. . . ."

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Mr. Strangman argued before us that, so far as the Funds were concerned, the covering letter which accompanied each donation was an "Instrument creating the Trust." When these letters were tendered, plaintiff's Counsel objected to their being admitted as exhibits unless they were properly stamped. In a separate written judgment which the Court delivered on the 6th of April, 1908, we have fully discussed the typical letters tendered, and held that these letters, which were subsequently put in and marked Exhibit No. 84, were not "Instruments creating the Trust," so that *that* clause of the section goes out of consideration. But even if these letters were Instruments creating the Trusts, let us now consider the other clauses of the section and see if they help the defendants' case. Whom did the defendants succeed? Was the person in whose place each one of the defendants was elected either an "original or substituted Trustee"? We have held that the power of appointment conferred on the original five Trustees was bad. Assuming that the original five Trustees were properly appointed Trustees, those that followed them were certainly not Trustees and could not be included in the expression, "Any Trustee, whether original or substituted." Then, again, were those who nominated the present defendants "surviving or continuing Trustees?" Surely not. If the power conferred on the original Trustees by the Deed of 1851 was bad, every subsequent appointment of Trustees was bad, and no one that assumed office as Trustee after the original five Trustees could be said to be a Trustee. The successors of the original five Trustees—assuming that those five were validly appointed—were appointed by people who had no right to appoint them Trustees, and therefore in the eye of the law they were not Trustees. Not one of the original five Trustees was alive when the present Trustees were appointed.

It was argued that, in some instances, Funds were given to the then Trustees by name. That was on the erroneous assumption that they were validly appointed Trustees and could make no difference as to their real status.

Regarded from every point of view, the contentions of the defendants' Counsel, based on section 34 of the Trustees and Mortgagees Powers Act, appear to us to be wholly untenable.

[His Lordship again dwelt at considerable length on the evidence bearing on the first branch of the case, and stated his conclusion as follows—]

We hold that the defendants are not validly appointed Trustees of any of the Funds enumerated in the three Schedules, Exhibits Nos. 54, 59, and 60.

We also find that they are not validly appointed Trustees of any of the properties comprised in the General Trust Deed of 1884, Exhibit U, except properties 10thly and 11thly described in the Schedule to the Deed.

Having adjudicated on what we consider to be the legal rights of the parties, speaking both for my learned colleague and myself, we feel it our duty here to record that we have been drawn to these conclusions with much regret and great reluctance; and in holding that the defendants are not validly appointed Trustees of the Punchayet Funds and Properties, we should not be taken to cast the smallest reflection on their integrity or honour. The plaintiffs themselves, at the very threshold of the case, in their plaint, have specifically stated that they "make no charge of misconduct against any of the defendants." The very first sentence of my notes of Mr. Lowndes's opening for the plaintiffs is:—"I charge no misconduct in the ordinary sense of the term."

These are the persons whom we are constrained to remove from office, but, in order to show our appreciation of them and their work in the exercise of the jurisdiction we have over public charities and of express authority conferred on this Court by sections 35 and 45 of the Indian Trustees Act, XXVII of 1866, we appoint the surviving defendants Trustees of all the Funds and Properties dedicated or devoted to Parsi charities and known and spoken of as Funds and Properties of the Parsi Punchayet, and we order that all Trust Funds and Properties do vest in them.

Soon after the death of the first defendant, the other defendants have filled up the vacancy amongst them by appointing the first defendant's only son in the place of his father. We think this is very injudicious conduct on the part of the defendants, as their

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act may have tended to embarrass the Court. We find, however, that the choice of the new Trustee is not open to any objection. The present Sir Jamsetji has been, at a public meeting of the Parsi community, unanimously appointed the head or મુખ્ય of the Parsi community, and is elected to the same position as his father occupied amongst his own people, and we appoint him as one of the Trustees jointly with the surviving defendants, and direct that the Trust Funds and Properties do vest in him jointly with his co-Trustees.

We do this because our findings will necessitate our referring the matter to the Commissioner for the purpose of framing a scheme for the appointment of new Trustees and it must necessarily take a long time to frame and sanction such a scheme. We think, therefore, that it is expedient to appoint Trustees immediately, and that cannot be done under the present circumstances without the assistance of this Court. We also think that these appointments, at all events, should not be for a limited period but must be for life. Till the scheme is framed and comes into operation, the Court will have to fill in any vacancies that may arise in the meanwhile.

Our decree on this part of the case will be to declare that the surviving defendants are not validly appointed Trustees of all the Funds and Properties of the Parsi Punchayet, except properties 10thly and 11thly described in the Trust Deed of 1884, Exhibit U; but that the Court appoints them, together with the present Sir Jamsetji Jijibhoy, Trustees for life of those Funds and Properties and vests all the Trust Funds and Properties in them.

We refer this matter to the Commissioner to frame a scheme for the appointment of a Trustee in the place of any one of the present Trustees dying, resigning, leaving Bombay for a period longer than six months, or more, or becoming incapable of performing his duties. Such scheme, after being framed, should be submitted to the Advocate-General for his approval and then be brought before this Court for final sanction. The Advocate-General will be at liberty to appear and make any suggestion he may desire to make to the Court when the scheme comes up for sanction.

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If, instead of it being referred to the Commissioner, either of the parties desire to refer the framing of a scheme to a Committee of Members of the Parsi Community, we give them liberty to apply to us on notice to the other party.

We could, if we choose, include in the scheme the 10thly and 11thly described properties. The case of the *Attorney-General* v. *The Dedham School*(1), is a direct authority enabling the Court to do so. Sir John Romilly, the Master of the Rolls, in that case held that though improper conduct was not even alleged against the Governors, that was a proper case for a scheme for the purpose of putting all the Funds and Properties under "one uniform system of management." We, however, do not desire to interfere in this manner. If the defendants desire it, they may continue to be Trustees of these two properties. We have no doubt, however, that if, in the end, we are held to be right in our conclusions and the order for framing a scheme is put into operation, the defendants will consent to include these properties in the scheme.

I now turn to the consideration of the second branch of this suit; and here I must speak for myself, as my learned brother, who is in entire accord with my conclusions on the first part of the case, may possibly not be in accord with some of the conclusions to which I have arrived on this part of the case.

The question for decision, involved in this branch of the case, is by far the more important of the two main questions in the suit. This question between the plaintiffs and defendants is, as defined in the earlier part of this judgment:—

"Whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the Religious Institutions and Funds mentioned in the plaint and now in the possession and under the management of the defendants."

Besides the religious and charitable Institutions under the management and control of the defendants, there are numerous other Institutions in Bombay, such as Atash Behrams, Agiaries, Dare Mehers, Sanitariums, etc., dedicated to the use and for the benefits of the Parsi community, with which the Court is not

(1) (1857) 23 Beav. 350.

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concerned, as they are under the control and management of the donors—their successors or other Trustees. In fact the Court is not concerned even with *all* the Institutions and Funds in the possession and management of the defendants: for the plaintiffs' Counsel, at the hearing, has narrowed down his demands on behalf of the Converts to Zoroastrianism, whose cause the plaintiffs have so warmly espoused in this suit, and confined his contention to the Dockmas, Sagdis, Nasakhanas and the Godavra Agiary, and to only one fund—the one for carrying the dead bodies of *all* Zoroastrians to the Towers of Silence.

The plaintiffs contend that the Zoroastrian religion not only permits but enjoins the conversion of aliens born in another faith, and that the moment an alien is invested with a Sudra and Kusti, after undergoing the Navjot ceremony at the hands of a Parsi priest, he or she is invested with all the rights and privileges of a born Zoroastrian and is entitled to the benefits of all religious and charitable Institutions and Funds that exist for the benefit of the Zoroastrian community. They say the defendants have threatened to exclude such Converts from the benefits of the Funds and Institutions under their control and management, and they have instituted this suit as the champions of such Converts, to obtain from the Court a declaration that such Converts are entitled as of right to participate in the benefits of the religious and charitable Institutions and Funds established for the use of all Zoroastrians.

Although this portion of the suit is *one* of the two main branches of the suit, for all practical purposes, this suit is really a consolidation of two suits. The two branches have nothing whatever in common with each other. The two questions in the suit are wholly distinct and separate from each other. Each branch is a suit by itself. Entirely different considerations apply to each of the two branches. Counsel for both parties have divided their arguments under two distinct heads. There is scarcely an argument or consideration which is common to both branches. The two questions stand apart and are independent of each other. The two branches are practically two separate suits, quite independent of each other; and I propose

to treat the question involved in this branch of the suit as if it had been raised in a suit separate and independent of a suit involving the question of the validity or otherwise of the Trustees' appointment.

In the third and fourth paragraphs of their written statement, the defendants raise a question which, in my opinion, goes to the very root of this part of the plaintiffs' case. In paragraph 3, they question whether the plaintiffs are entitled to maintain the suit in the interests of a person who is not a party to the suit, and in paragraph 4 they say :—

The plaintiffs do not allege in the plaint that any rights of theirs in any of the properties referred to in their plaint have been denied. The defendants submit that the plaint discloses no cause of action in the plaintiffs.

In other words, the defendants contend that the plaintiffs are not entitled to maintain the suit in respect of the reliefs they pray for in this branch of their case. The questions that arise for consideration on this plea of the defendants are many and varied. Are the plaintiffs, collectively, or individually, entitled to the relief or reliefs they claim? Have they or any of them a right of action against the defendants? Have they any cause of action against the parties whom they have brought before the Court? Have they disclosed any such cause of action in their plaint? Have any of their rights been denied, infringed, or threatened to be infringed? Have the defendants been guilty of such acts as would entitle the plaintiffs, jointly or singly, to maintain an action against them? Have they suffered any wrong which calls for a remedy? If they are not entitled in their personal capacity,—individually or separately—to maintain this portion of their suit, does the consent of the Advocate-General to institute this suit—obtained in accordance with the provisions of section 539 of the Civil Procedure Code—make any difference in their position? Are they entitled to the relief or reliefs they claim?

Before entering upon the consideration of these questions, it would be useful to ascertain exactly what is the relief they claim. Shorn of all technicality and divested of all legal phraseology, the plaintiffs ask for nothing more than a bare declara-

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tion that an individual born in an alien faith, but subsequently converted to Zoroastrianism, is entitled to all the benefits of all the religious and charitable Funds and Institutions which exist for the benefit of the Zoroastrian community, and which are under the control and management of the defendants. The prayers on this head are (c), (d), (e), (f) and (h). At the hearing, however, all that we were asked to do was to ascertain the real Trust on which the Funds and Properties in question were dedicated, to declare such Trust, and, if necessary, to rectify the Trust Deeds of 1851 and 1884 according to the decision of the Court. Are the *plaintiffs* entitled to these reliefs? Are *they* entitled to maintain this suit in pursuit of the reliefs they claim? My answer to these questions is in the negative. The plaintiffs are, every one of them, born of Parsi parents, and born in the religion of their forefathers. They all profess the Zoroastrian religion. They are undoubtedly entitled to enter the Godavara Agiary, and make as much use of it as any other Parsi is entitled to make. They are clearly entitled to participate in every Fund that exists for the benefit of all Zoroastrians, including the Fund for carrying all Zoroastrians to the Towers of Silence. They are entitled, as of right, to have their bodies disposed of in the Towers on their death. Has any one challenged *their* rights? Has any one disputed these privileges? Has any one even remotely or indirectly suggested that *they* are not entitled to those rights? Have the defendants denied to *them* any single one of their rights and privileges? Have the defendants done or said anything which, by any stretch of imagination, may be taken to be an invasion or an infringement of *their* rights? Have *they* a wrong to remedy or a grievance to redress? To all these questions, there is but one answer, and that is an emphatic negative. The word "relief" necessarily implies the pre-existence of a "wrong." To have that wrong redressed in a Court of Law is the privilege of every subject of the Crown. That wrong can be redressed by an action. The right of action is vested in the person that is wronged. An action is a legal proceeding, whereby a person demands his rights, which may be denied or infringed or threatened to be infringed, and claims to have those rights enforced and to have his wrongs re-

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dressed. In Lord Halsbury's Laws of England (Vol. 1 page 2) "an action, according to the legal meaning of the term," is defined as "a proceeding by which one party seeks in a Court of Justice to enforce some right against, or to restrain the commission of some wrong by, another party." In the same paragraph, defining an action, it is stated :—

"More concisely it may be said to be 'the legal demand of a right' . . . . It implies the existence of parties, of an alleged right, *of an alleged infringement thereof* (either actual or threatened), and of a Court having power to enforce such a right."

In this action, we have the parties, we have their rights, and we have the Court having power to enforce those rights, but where is the infringement, either actual or threatened? It is no use whatever disguising the fact that the plaintiffs have not come before the Court to claim or enforce *their own rights,* redress *their own wrongs,* or remedy *their own grievances.* The fight is not on their own behalf but on behalf of the sixth plaintff's wife. With this lady is brought in another Rajput lady, of whom we have heard but very little. What the defendants in effect have done is to publicly notify that they will not allow these two ladies to participate in the benefits of the Funds and Institutions under their management. Although the resolutions and notifications in the pleading mentioned are in general terms, and refer to all aliens who may be converted to the Zoroastrian faith, they are undoubtedly aimed at these two ladies, who claim to have been admitted into the Zoroastrian faith. The action of the defendants was taken in obedience to the behests of the whole community, in a public meeting assembled; and such behests, the defendants rightly submit, they were bound to carry out. It is not therefore the rights of any of the plaintiffs that are infringed or threatened. Nobody knows—neither the plaintiffs nor the defendants—whether the Rajput lady desires to go to the Godavara Agiary, or to be carried to the Towers of Silence after death, but we do know that the French lady claims those rights, or rather, to be more accurate, the plaintiffs say she claims them—for I really do not know whether she does so or not. She is not before us as a party; she was not before us as a witness; and even her husband, who is a party to the suit and

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attended the Court during most of the hearings, has not chosen to tell us whether his wife is really desirous of going to the Godavara Agiary, or, in the remote contingency of her dying in this city, of being conveyed to the Towers of Silence.

Are the plaintiffs entitled to carry on a fight on somebody else's behalf when that somebody does not come before the Court—does not ask for redress—does not appeal to the Court for its assistance? She is an entire stranger to this action. She has abstained from seeking the assistance of the Court and the *abstention appears to me to be intentional and deliberate*. Although the defendants have taken this point in their written statement and raised a distinct issue thereon, and although the point was pressed by their Counsel in the course of the hearing, no application was made, either before or even at the hearing, to add the lady as a party plaintiff. Is this Court to go out of its way and render assistance to a party who does not seek such assistance? Are we here to listen to discussions the value of which, as far as this suit is considered, are, in my opinion, purely academic; and exercise our powers in favour of a party or parties who do not ask us to do anything of the kind; and declare and adjudicate upon the rights of people who are not before us - and *that* at the bidding of other people whose rights are not infringed or threatened and who have themselves no wrongs to redress and no grievances to remedy?

"*Actio non datur non damnificato*" is a maxim of law which governs that branch of the law which deals with the rights of subjects to maintain actions at law. "An action is not given to him who is not injured."

The plaintiffs in this case, either collectively or individually, are not in any way injured or damnified by the action of the defendants. The Resolutions and Notifications published by the defendants have not injured the plaintiffs or invaded *their* rights. *They* have no complaint to make on their own behalf. All they say is: "The defendants have announced their determination to deprive converts to Zoroastrianism of certain rights and privileges of participating in Properties and Funds under their management. We are of opinion that their action is unjustifi-

able. We ask the Court to declare that the defendants are guilty of wrongful conduct. They have threatened to infringe the rights of two ladies, and their conduct amounts to an invasion not only on the rights of these two ladies, but of others who may in the future embrace Zoroastrianism." We, sitting here, have not heard that these two ladies claim any such rights as the plaintiffs claim for them in this suit. The plaintiffs know nothing whatever about the Rajput lady; and, as to the French lady, none of the plaintiffs have taken the trouble of telling us that this lady has felt hurt at the action of the defendants, or has expressed a desire to participate in the Charitable Funds and Properties administered by the defendants.

The great mischief of entertaining actions of this kind would be that, besides laying the defendants open to all sorts of action at the instance of people who *have no wrongs to remedy* and no rights to vindicate, the judgment of the Court would not be binding on those very parties on whose behalf the action is filed. It is quite clear that the rights and remedies of these two ladies would not, in the least, be affected by our judgment in this suit. Assuming that, on the merits, this Court decided adversely to the contentions of the plaintiffs, there is nothing to prevent any one of these two ladies, or both of them, *filing suits against* the defendants for the ascertainment and declaration of those very rights which we are asked to adjudicate upon in their absence and behind their backs. They would very rightly say: "We were not heard in support of our claim and we are not bound by what the Court did in our absence." The parties supposed to be injured by the action of the defendants have not invoked the assistance of this Court, and I am of opinion that the Court ought not to go out of its way and pronounce its judgment on the rights of people who are not before the Court, at the bidding of people who must be regarded as mere strangers.

It is, however, argued that the plaintiffs having obtained the previous consent of the Advocate-General to the institution of this suit under the provisions of section 539 of the Civil Procedure Code, they, as persons interested in the Trusts created for public religious, and charitable purposes, are entitled to maintain the

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suit, even though they may not have been entitled to maintain the same in their individual or personal capacities. It is contended that the defendants are guilty of breach of trust in the administration of the charities entrusted to them, and that the plaintiffs, as persons interested in the Trusts, are entitled to maintain this suit under section 539 of the Civil Procedure Code.

It seems to me that section 539 is wholly inapplicable to this portion of the suit, and the consent of the Advocate-General makes no difference whatever in the status of the plaintiffs. It is to my mind wholly immaterial whether the consent of the Advocate-General was or was not obtained for the institution of this part of the suit. Section 539 is very limited in its scope and operations. It contemplates the institution of a suit to "obtain a decree" for reliefs that are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of this section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.*, (*a*) the appointment of new trustees, (*b*) vesting Trust Property in the trustees, and (*c*) settling a scheme. It cannot be pretended that the reliefs asked for in this branch of the case—namely, the ascertainment and declaration of what are the trusts, the rectification of the Trust Deeds, a declaration that the defendants have either wrongly declared the trusts in the deeds or wrongly interpreted the trusts therein—fall under any of the five heads mentioned in section 539 of the Code. This branch of the case is most clearly not a suit instituted for obtaining a decree (*a*) for appointing new trustees, (*b*) for vesting property in the trustees, (*c*) for declaring the proportions in which its objects are entitled, (*d*) for authorising any trust property to be sold, mortgaged, or exchanged, and (*e*) for settling a scheme of management. The words "further or other relief" that follow must necessarily be construed to refer to reliefs "*ejusdem generis*" and not to reliefs wholly outside those specifically defined under these five heads.

Because the plaintiffs have a good cause of action to institute a suit for obtaining certain reliefs under section 539, and they institute that suit to obtain such reliefs, after obtaining the

Advocate-General's consent, they have no right to smuggle into it another suit claiming other reliefs wholly different from those contemplated in the section, and then contend that they are entitled to maintain the whole suit, simply because they choose to consolidate two suits into one—one clearly within the purview of the section, the other wholly outside of it.

Reliance was placed on the case of *Thackersey Dewraj* v. *Hurbhum Nursey* (1), but a careful study of it will show that there is nothing in the decision that militates against the view I take of the position of the plaintiffs in this suit. In that suit it was held that it did not fall either under section 30 or section 539 of the Code. It was there held that "if the plaintiffs had any right of action, it was a complete right of action *vested in each of them*. They sued as subscribers to the temple and devotees of the idol, and as such each had a right to complain of mal-administration." It was further held that "any person interested in the proper observance of a religious endowment may sue in his own name to have the Trust property administered." That suit mainly related to mal-administration of certain funds whereby large sums were lost.

The nature of the plaintiffs' complaint in this suit is quite different. They complain of no mal-administration of charity Funds or Properties in which they are interested. By the action of the defendants, the plaintiffs—either as subscribers to the Funds or as devotees of the temples or as participators in the benefits of the charitable institutions—are not in the least degree damnified or injured. All they say is : "defendants threaten to commit a breach of their duty whereby *somebody else* will be injured." Let that somebody come forward and complain. The learned Judge trying the suit in *Thackersey* v. *Hurbhum Nursey* (1) to which I have referred, held that section 539 of the Code is permissive or directory and not mandatory, and that it did "not prohibit a private suit."

Mr. Mulla, in his commentary on section 539 of the Civil Procedure Code (2nd edn.), deduces at page 487 of his book

(1) (1884) 8 Bom. 432.

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the following proposition as the result of the authorities he cites there :—

"Suits brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right, are not within the section."

I am in entire accord with this proposition. I am of opinion that it correctly defines the scope of the section. This is undoubtedly a suit for the purpose of remedying an alleged infringement of an individual right, and, as such, is clearly not within the section.

This section contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. It seems to me very clear that "interest" of the parties here contemplated must be the "interest" that is threatened or infringed. Otherwise the result may be the infliction of grave injustice on parties who are not before the Court and who are not heard.

It was contended before us that, this being a suit with the consent of the Advocate-General, the Court was competent to adjudicate upon the rights of converts to Zoroastrianism. Assuming that the decision is against the contentions put forward by plaintiffs, the converts would naturally say :—"We are not bound by your decision : we never asked you to adjudicate on our rights. You never heard us. You don't know what documents we have in our possession in addition to what the plaintiffs produced before you. What right had the Court to decide questions relating to our rights in our absence, behind our backs and without giving us a hearing ?"

Even if the view I have taken as to the scope of section 539 was erroneous and assuming that the suit fell within the scope of that section, I would still hold that it was badly constituted and was not maintainable, the plaintiffs not have the "interest" contemplated by section 539. The object of having relators in a suit in the name of the Advocate-General, and of having plaintiffs who have an "interest in the trust" in a suit with the Advocate-General's consent, is to have in the suit parties who

are interested in asserting the rights and in redressing the wrongs for which the suit is filed. The converts whose rights we are asked to adjudicate upon have never been heard by us: they have never had a chance of putting their case before us: no one represented them; the Advocate-General knows nothing of their case; they never had a chance of putting their cases before the Attorneys or Counsel appearing for the plaintiffs. These are considerations that ought to govern our action on principle. It may be that the plaintiffs have presented to us the case of the converts in its best aspect, but the question whether this part of the suit is maintainable by them is a question of principle, and I feel that we ought to regard it from that point alone.

Regarding this branch of this suit, as a suit it is either a suit under section 539 or it is a private suit. As shown above, the reliefs claimed are clearly outside of the scope of operation of that section, and the suit cannot be said to be a suit under section 539. If, then, that section has no applicability, it must be treated as a private suit. As a private suit, the plaintiffs not being the persons damnified, they have no right to maintain it.

Regarded from either point of view, I come to the conclusion that the plaint discloses no cause of action in the plaintiffs; that the plaintiffs have no cause of action whatever against the defendants; that they have no right of action in them to claim the reliefs they do; and that they are not entitled to maintain this branch of the suit.

I would therefore dismiss this part of the suit, and find against the plaintiffs on the issues which raise the question of their right to maintain this suit.

So far as I am concerned, I might stop here and refrain from finding on the merits of the questions raised in this part of the case. Such a course, however, is, I think not open to me. Although my mind on the point I have discussed is free from doubt, it is possible that I may be wrong in the conclusions I have arrived at. Having regard to what I have said above, I am most averse to say anything on the merits. I feel that it would be most unfair to the parties, whose fight the third

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parties carried on before us, to express my findings on the merits in the absence of the parties whose rights are affected. I feel, however, at the same time, that it would be a disastrous thing for the parties if the case is sent back some months hence to find on all issues, in the event of my finding on the preliminary point being found to be erroneous. There has been an enormous expenditure of time, labour, and money in this case. I think it is extremely desirable that this litigation should reach the final Court of Appeal in as complete a form as possible. These considerations compel me to enter into a full discussion of all the points argued before us. However adverse my findings may be to the converts, I feel that they will do no injustice to anybody, as our judgment in this case cannot possibly bind those who now claim to be converts of those who may make a similar claim hereafter.

Even if I had come to a different conclusion on the technical point of law I have discussed above—even if, in the end, it is found that my conclusions on the point are erroneous—so far as I am concerned, my decision on the merits leads to the same result.

The plaintiffs are not content to base their case merely on the ground that the Zoroastrian religion not only permits but enjoins conversion: they go further, and contend that it has been usual and customary amongst Paris to admit Juddins—that is, persons born in another faith—into their religion. They say that such Juddins, on being admitted into the Zoroastrian faith, became not only *Zoroastrians* but *Parsis*; and that such converted Parsis have been always allowed to be carried to the Towers of Silence on their death, and that during their life-time they have entered all places of religious worship, such as Atash Behrams, Agiaries, and Dare Mehers, as a matter of right.

The plaintiffs' contentions shortly put are:—It is both usual and customary for Parsis to admit Juddins into their religion and give them all the benefits of all religious Funds and Institutions endowed or dedicated for the benefit of their own people.

They further contend that by the mere performance of the Navjot ceremony by a Parsi priest, thereby putting on a Sudra

and Kusti on the person of a Juddin, he makes him or her a full-fledged Zoroastrian without any other religious ceremony.

The defendants dispute the correctness of these contentions: they say that, although the Zoroastrian religion permits of conversion into the faith, the Parsis, ever since their advent into India, have not admitted a Juddin into their fold; that no entire alien, that is, a person born of non-Zoroastrian parents, has even been admitted into the faith. They admit, however, that children born of a Zoroastrian father by an alien mother have been allowed to come into their fold by the performance of the Navjot ceremony, by investing such children with the Sudra and Kusti.

In order to controvert the contentions of the defendants that it is not customary to admit Juddins or entire aliens, into the Zoroastrian faith, and that even if the religion enjoined conversion, such tenet of the religion had fallen into utter disuse and that long-continued usage prevailing amongst the Parsis prevented the admission of Juddins to Zoroastrianism, the plaintiffs called certain witnesses who professed to give some concrete instances of conversions of Juddins into Zoroastrianism. It will clear the ground and facilitate further discussion if I deal with this evidence, in the first instance, and record my findings thereon. [His Lordship then proceeded to examine the oral evidence on the point in detail and then went on as follows :—]

Under these circumstances, while I find that although the conversion of Juddins is permissible amongst Zoroastrians, I also find that such conversions are entirely unknown to the Zoroastrian communities of India; and far from it being customary or usual for them to convert a Juddin, the Zoroastrian communities of India have never attempted, encouraged, or permitted the conversion of Juddins to Zoroastrianism. [His Lordship again discussed evidence and continued—]

The last resting-place of the Parsis—the Towers of Silence—are regarded by them with sentiments of the utmost reverence. They are regarded as places of the greatest sanctity. When a new Tower is built it is consecrated with most elaborate religious ceremonies. Thousands of people travel long distances to be present at the consecration. Such presence is regarded as a pious act of great religious merit. Once the Tower is

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consecrated, none but a Nassesalar can enter it; and the Nassesalars lead a life of exclusion from the members of the community in various ways. The dead body of a Zoroastrian is regarded with peculiar veneration. On death the body is washed and purified and then handed over to the corpse-bearers, who recite prayers over it and clothe it in pure white linen. After the Suchukvani ceremony is performed, no one could touch it, not even the nearest relatives. Before being taken from the house for being carried to the Towers, other solemn ceremonies are performed; relatives and friends—and, in the case of a well-known person, all leading members of the community—assemble and prostrate themselves before the body when they are taking their last look. The face is covered up and then the body starts on its journey to the Towers. No Juddin or Durvand is allowed to look at a dead body after the purificatory ceremony is performed, much less touch it. Many a time it has happened that when a faithful servant of a European is dead, his master, entertaining kindly feelings towards him and wishing to have a last look at his faithful servant, goes to the house of the dead, only to find that his request is, with many explanations and excuses, refused. The bodies of persons who have suffered capital punishment, the bodies of suicides, and the bodies of people on whom *post-mortem* examinations are held, are supposed to be contaminated and not fit to be put in the same Dokhma as the bodies of ordinary Zoroastrians, because their bodies after death have been touched by Durvands. In Bombay, there is a separate place for these bodies known as Chotra. In other places, if there is no Chotra, some unused Dokhma which has fallen into disrepair is used for disposal of these bodies, as was said to be done at Surat.

[His Lordship went into an examination of the literature extant on the subject and arrived at the following conclusions—]

To sum up this part of the case, on the question of conversion the conclusions which I have arrived at on the evidence before the Court are:—

I.—That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents,

II.—That although such conversion was permissible, the Zoroastrians, ever since their advent into India 1,200 years ago, have never attempted to convert anyone into their religion.

III.—That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India.

IV.—That the Parsi community of Bombay, at a Public Meeting, held on the 16th of April, 1905, expressed its disapproval of any conversions being allowed, and are strongly opposed to any such conversion in the present times, and resolved henceforth not to admit even the children of Parsi fathers by alien mothers. See Exhibit F.

V.—That, although conversion is permissible by the religion, there are certain conditions which the candidate must fulfil before becoming eligible for admission. The conditions are that it must first be satisfactorily established that he or she, in applying for admission, is animated by a good object and actuated by pure intentions, in other words, that he or she seeks admission from religious convictions and not from other considerations: and further, that the candidate is in all other respects fit to be admitted to the Zoroastrian faith.

VI.—That such an admission of a person born outside of the religion is only permissible if it is established that by such admission "no harm of any kind would be done to the Zarthosti Mazdiyasnans themselves."

VII.—That the ceremonies necessary to be undergone by the candidate for admission are (*a*) Navjot, (*b*) Burushnum, and (*c*) a repetition of the Investiture ceremony of Navjot after Burushnum.

VIII.—That only those persons who have undergone these three ceremonies are entitled to the full rights and privileges of a Zoroastrian.

The only question of importance on this part of the suit that now remains to be considered is the general question raised by the plaintiffs, *as to who are the parties entitled to the benefits and uses of the Charitable Funds and Institutions now in the*

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*possession and under the management of the defendants.* The contentions of both sides are fully set out in the pleadings. The plaintiffs say:—

"There exist numerous rich endowments, consisting of property, both moveable and immoveable, devoted to various charitable and religious purposes for the benefits of *persons professing the Zoroastrian religion.*"

They say that the trust declared by the Trust Deed of the 25th of September 1884, are in terms "at variance with the trusts and purposes for and to which the same were originally provided and dedicated."

The plaintiffs believe that, "at the time the said Deed was prepared and executed, there was no intention by the terms thereof to exclude from the benefits of the said Trusts *any person* professing the Zoroastrian faith." They complain that the defendants had interpreted the trusts in a manner which would exclude from the benefits of the trusts persons born in other religions and subsequently admitted into the Zoroastrian religion; and they pray that, in so far as the trusts declared by the Deed of 25th of September 1884, differ from the original trusts, they may be declared *ultra vires* and void; that the true trusts on which the charitable properties are held may be ascertained and declared; that the deed of 1884 may be construed; and that it may be declared who are entitled to the benefits of such of the trusts as may be held to be valid.

The defendants contend that the only persons entitled to the benefit of the Funds and properties are:—

*First.*—The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

*Secondly.*—The descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

*Thirdly.*—The children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion.

Shortly put, the plaintiffs say: Every Juddin admitted into the Zoroastrian religion is entitled, as a matter of right, to all

the benefits of all the Charitable Funds and Institutions in the defendants possession.

The defendants say: The parties entitled to the benefits of the Funds and Institutions under their control are persons who are Parsis who are the descendants of the Zoroastrian emigrants from Persia; their Iranee co-religionists who may come and settle either temporarily or permanently in India; and the children of Parsi fathers born of alien mothers, if they are admitted in, and profess, the Zoroastrian religion.

As the question is raised in a general form, I will discuss it on the assumption that the converts to Zoroastrianism, whose rights the plaintiffs assert and the defendants deny, are properly admitted into the Zoroastrian religion, after the performance of all the ceremonies which, according to the Ravayats and the experts, are necessary for the due admission of a Juddin to Zoroastrianism.

The Trust Deed of 1884 declares that the properties covered by that Deed were for the use and benefit of "the members of the Parsi community professing the Zoroastrian religion." This is the only declaration which the plaintiffs say is at variance with the original trusts declared by the founders and donors. They say, either this declaration is wrong, or the interpretation put upon it—that the trusts are confined to Parsis, thereby meaning persons of Zoroastrian descent—is wrong. They contend that a Juddin, by being converted to Zoroastrianism, becomes a "member of the Parsi community professing the Zoroastrian religion," and as such is a beneficiary under the trusts. In the alternative, they say, if this contention of theirs as to the correct interpretation is wrong, then the declarations of trusts are at variance with the intentions of the original donors and founders and the Trust Deed should be rectified by the Court.

A great deal of time and energy were expended on the argument as to the exact meaning and significance of the word Parsis, and as to whether the words *Parsis* and *Zoroastrians* mean the same thing and designate the same persons, or whether there is any distinction in the individuals designated by the terms Parsis and Zoroastrians.

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I confess this question has never, at any time, presented any difficulty to my mind: a Zoroastrian is a person who professes the Zoroastrian religion. A Zoroastrian need not necessarily be a Parsi. Any one who professes the religion promulgated by Zoroaster—be he an Englishman, Frenchman, or American—becomes a Zoroastrian the moment he is converted to that Faith. But how can he become a Parsi? It was argued that the sixth plaintiff's wife was now a Parsi. Supposing a Parsi lady becomes a Christian and marries a Frenchman, can it be said that she had become a Frenchwoman. And if she adopts Christianity and marries an Englishman, does she become an Englishwoman? One has only to see how the word Parsi came into existence and what it was meant to designate to realize that the word Parsi has only a racial significance and has nothing whatever to do with his religious professions. Mr. Dossabhoy Framji in his "*History of the Parsis*," says the word takes its derivation from Pers or Fars, a province in Persia, from which the original Persian emigrants came to India. Several witnesses corroborate this. One witness, Mr. Jamsetji Dalabhai Nadershah, who has visited Persia and studied the cuniform inscriptions in Persia, throws more light on the subject. He says:—

"In the Assyrian records I find the earliest mention of the word Pers. The word is applied to the country called Fars and to the people of that country . . . The word originally used for a province was applied to the whole country of Iran (Persia) later on. The word Pers in the Babylonian inscriptions was first used to indicate the country, and then it came to indicate the inhabitants of that country."

It will thus be seen that the word Parsi, when used in India could only mean the people from Pars. When the emigrants from Persia settled in India, the people around them probably knew little of their religion but they knew they came from Pers or Fars, and they called them Parsis. Thus, all the descendants of the original emigrants came to be known as Parsis. A Parsi born must always be a Parsi, no matter what other religion he subsequently adopts and professes. He may be a Christian Parsi, and he may be any other Parsi, according to the religion he professes; but a Parsi he always must be. The word Zoroastrian simply denotes the religion of the individual: the word Parsi

denotes his nationality or community, and has no religious significances whatever attached to it. To my mind, the distinction between the two terms, Zoroastrian and Parsi, is most clearly defined when one sets about carefully examining the real meaning of the two expressions; but before the French wife of the sixth plaintiff proposed to be converted to the Zoroastrian religion and claimed to have become a Parsi, I doubt if anyone ever cared to make the smallest distinction in the use of the two words. Before 1903, no one ever gave a thought to this distinction. As late as 1872, in a legislative enactment (Act III of 1872) the manifestly unmeaning expression "Parsi religion" is used to designate the Zoroastrian religion. Surely, there is no Parsi religion in existence. What, however, was intended to be conveyed by the expression was the religion generally professed by the Parsi community. To my mind, the expression "Parsi religion" is as meaningless as the expression: "English religion," "French religion," or "Dutch religion." Before the controversy in connection with the French lady arose, no one had the remotest idea that a Zoroastrian could be anybody other than a member of the Parsi community. For centuries, the only people who in India professed the Zoroastrian religion were the members of the Parsi community born in the religion of their forefathers. No one had for twelve centuries ever made an attempt to convert persons professing other religions. Proselytising was wholly unknown amongst them. No one preached the religion or attempted to teach it to an alien. There was not an instance known either in modern or ancient times, of anybody but a Parsi who professed the Zoroastrian religion. The Zoroastrian religion was professed by the Parsis alone in India; and small wonder, therefore, if the expressions Zoroastrians and Parsis came to be loosely used, as if the two words meant one and the same thing. In 1884, it was not within the contemplation of any one that, in the near future, converts to Zoroastrianism would come into existence, and neither the English Solicitor who drafted the Deed of the 25th of September, 1884, nor those who instructed him to prepare the Deed, and who subsequently executed the same, had the remotest conception of such a class or such an individual as an alien Convert to Zoroastrianism

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coming into existence; and therefore there could be no possible object in intentionally declaring wrong trusts or trusts at variance with the intentions of the donors and founders. In fact, in paragraph 12 of their plaint, the plaintiffs themselves say that, in declaring the trusts as they are declared in the Deed of 1884, there was no intention "to exclude from the benefit of the trusts any person professing the Zoroastrian faith," meaning thereby Juddin converts to Zoroastrianism. This, at all events, is an admission that there was no intentional wrong declaration of trusts in the Deed of 1884. Till 1903, the two expressions, Parsis and Zoroastrians, were used most promiscuously to mean one and the same thing. When the members of the Parsi community professing the Zoroastrian religion were sought to be designated, some used the word Parsis and some used the word Zoroastrians. Since the controversy, some persons who established new charities have, in order to avoid all possible misunderstanding and to have no room for doubt, used the expression Parsi Zarthosti. This is by no means a new combination. As far back as 1836, Framji Cowasji Banaji uses the expression "Parsi Zoroastrian" in his letter to his colleagues of the Punchayet (Exhibit A59). Many witnesses were questioned on the subject and they were all unanimous that Parsis and Zoroastrians were used as synonymous terms and conveyed the same meaning. Plaintiffs' witness, Mr. Sheriarji Bharucha, says:—

"I would use the two terms Parsis and Zoroastrians as synonymous terms. This is the way in which these terms have always been used and are still used. As soon as the word Parsi is used, the only idea suggested is that he is a Zoroastrian."

Beram Sheriar, an Irani priest, another of the plaintiffs' witnesses, says:—

"Some Mahomedans in Persia call us Parsis; some call us Zarthostis. The word Parsis is in common use in Persia. It means Zarthosti. Mussulmans in Persia use the word Parsis commonly to designate our people—the Zarthostis."

Another of the plaintiffs' witnesses, Mr. Jamsedji Dadabhai Nadersha, points out how the words Parsi and Zoroastrian are used indiscriminately in certain Pehlvi and Persian works. The defendants' principal witness, Mr. Jivanji Mody, says:—

"In India, the word Parsis or Zoroastrians has the same signification."

The Parsi high priest, Dustoor Darab, says:—

"The two terms Parsi and Zoroastrian are synonymous, because in India we have made no conversions. Every one in India knows that they are convertible terms."

This discussion as to the exact meaning and signification of the words Parsi and Zoroastrian was addressed to us on the question as to whether, if the trusts declared in the Deed of 1884, were correctly interpreted by the defendants and those declarations excluded Juddin converts, such declarations were not at variance with the intentions of the donor and founders of the charities. It so happens that there are no documents, either in original or in copies, existing at present with reference to some of the immoveable properties; in the case of other immoveable properties, the defendants have amongst their records copies of original documents. Mr. Lowndes, for the plaintiffs, correctly contended that in cases where no originals or copies of any documents evidencing the trusts in connection with a particular property existed, the question for whose benefit that particular charity was established must be gathered, to use his own words, "from usage and tenets of the founders." He contended that the question for the Court to ascertain was "What were the intentions of the founders of these various charities as to persons who were to benefit by them," He argued: "Where words are ambiguous, you must look at the tenets of the founders." And he claimed the right of proving copies and tendering them in evidence, contending that the documents were "admissible for the purposes of ascertaining the meaning of the words Parsis and Zoroastrians." I have here reproduced the arguments of the learned counsel in his own language as I find them in my notes made at the time.

These arguments appeared, both to my learned brother and myself, to be absolutely sound; but what was the attitude adopted by the defendants? Their counsel contended that section 7 of the Statute of Frauds, XXIX of Charles II, Chapter III, was in force in British India, and that under the provisions of that section, copies of documents evidencing trusts of immoveable properties were neither *proveable* nor *admissible* in evidence.

This position, adopted by the defendants, appeared to me to be most extraordinary. They admitted that they were trustees

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holding a large number of immoveable properties on certain Charitable Trusts for the benefit of their community. They were in possession of copies of documents evidencing those trusts. They were not in a position even to suggest that those copies were not genuine and authentic. In fact, they knew that they were authentic and genuine copies. They were subsequently proved to be such before us. The records in their possession which contained the copies were not their property but were the property of the Parsi community. They knew that a question of the greatest importance to their Community was being dealt with by the Court. Their obvious duty as trustees, it seemed to me, was to place all available materials in their possession and at their disposal before the Court and to assist the Court to come to a correct decision. Instead of that they made a determined effort to keep back important documents, by pleading a section of an English Statute of 1677! We felt, however, that if the defendants had a legal right to withhold these documents, they were entitled to do so, and that the Court was not concerned as to whether the attitude the defendants were advised to adopt was a correct attitude for trustees of large public charities to adopt; and we had to listen to long and learned arguments on this point with the result that we held that there was no substance in the defendants' contentions. I do not propose to wander through the labyrinth of legal authorities which were cited before us, for in my opinion the defendants' contentions on this head could be very shortly and summarily disposed of.

Section 7 of the Statute of Frauds runs thus:—

"VII. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

It was argued on behalf of the defendants that, under this section, no trusts of immoveable properties could be proved, unless the trusts were manifested and proved by some writing signed by the settlor or founder. In other words, the defendants contended that the plaintiffs could prove no trusts whatever of

some of these immoveable properties held by them as there were not in existence original documents signed by the founders themselves manifested or proving those trusts. This contention came to this, that the trusts of immoveable properties, in respect of which there were no documents signed by the original founders, were, in the words of the Statute, "utterly void and of none effect." It appears that in 1881, in the case of *Bai Maneckbai* v. *Bai Merbai*(1), Mr. Justice West held that the Statute of Frauds applied to "the inhabitants of Bombay," and he thought also to the Parsis. I do not think it is necessary to go into the question argued before us, whether the Statute of Frauds really ever did apply to India. Assuming that Mr. Justice West was right, what happened was that, in the following year, the Legislature simplified matters when they passed the Indian Trusts Act by repealing section 7 of the Statute by section 2 of that Act. The learned Counsel for the defendants, however, contended that inasmuch as section 1 of the Indian Trusts Act provided that nothing therein contained applied to public or private religious or charitable endowments, the repealed section still applied to Charitable Trusts and was only repealed so far as it related to private trusts. This argument, if true, leads to some manifestly absurd situations. If correct, it means that the Legislature deliberately removed a legal enactment which, might have proved a powerful instrument for the purpose of defeating trusts in the hands of dishonest trustees, so far as private trusts were concerned, and yet left all public Charitable Trusts open to this infirmity.

If, for instance, a man conveys two of his immoveable properties to trustees on trusts, one for the benefit of his family and the other for public charitable purposes; executes two Trust Deeds and registers them; and then by some mischance the two Trust Deeds are lost, burnt, or destroyed, the beneficiaries of the family trust could always prove the trust by the copy from the Registrar's records; but inasmuch as the copy relating to the public Charitable Trusts is not signed by the party "who is by law enabled to declare the trusts"—which, according to Mr. Strangman's argument, means the founder and no others—the

(1) (1881) 6 Bom. 303.

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Charitable trust becomes "utterly void and of none effect." I put this view to the learned Counsel and he said that that was the law. I decline to believe that the Legislature intended anything so manifestly absurd and so repugnant to one's common sense. In my opinion, the saving clause in section 1 of the Indian Trust Act has no applicability to the repealing section that immediately follows, and that section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act of 1882.

That this view is correct appears also from "A Collection of Statutes relating to India," published in 1899, under the authority of the Government of India. In Volume I, Appendix 1, at page 490, I find it distinctly stated that sections 7 to 11 of XXIX of Charles II, Chapter III, are repealed by section 2 of the Indian Trusts Act of 1882.

There is, I think, another equally effective answer to the objection based on section 7 of the Statute of Frauds. Do the words "the party who is by law enabled to declare such trust" mean only the founder and no one else, as contended on behalf of the defendants? I think not. In *Rochefoucauld* v. *Boustead*[1], where the defendant pleaded section 7 of the Statute of Frauds as a defence to a suit in which a declaration was sought that he had purchased certain immoveable property as a trustee for the plaintiff, the Court of Appeal held that the letters signed by the defendant himself were sufficient to satisfy the requirements of the Statute. Lord Justice Lindley, in delivering the judgment of the Appeal Court, after citing *Forster* v. *Hale*[2] and *Smith* v. *Matthews*[3], says (at pages 205-206):—

"According to these authorities, it is necessary to prove, by some writing or writings *signed by the defendant*, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing *in the first instance*: it is sufficient if the trust can be proved by some writing *signed by the defendant*, and *the date of the writing is immaterial*."

The Court of Appeal also admitted parol evidence in addition to the defendant's letters, "holding that other evidence was

(1) [1897] 1 Ch. 196.
(2) (1798) 3 Ves. 696.
(3) (1861) 3 D. F. & J. 139.

admissible in order to prevent the Statute from being used in order to commit a fraud."

Now, in this case, the commission of a fraud was, of course, farthest from the defendants' intentions. It is hardly conceivable that the defendants desired to contend that the trusts in respect of those Towers of Silence in respect of which there are no documents at all, and the trusts of other properties in respect of which there are no documents signed by the founders, were therefore "utterly void and of none effect." It appears to me that all that their legal advisers intended to do was to put obstacle in the way of the plaintiffs' proving what they said they could prove by a reference to the documents in the defendants' possession, namely, that the founders of the charities to which these copies in defendants' possession related were intended for the benefit of all Zoroastrians, including Juddin converts.

However that may be, *Rochefoucauld* v. *Boustead* [1] is authority for holding that admissions of being trustee and what those trusts were—contained in the letters of the trustee himself, the defendant in the case—were sufficient to satisfy the provisions of section 7 of the Statute of Frauds, and that it is immaterial at what date such writings came into existence.

I am of opinion, therefore, that in this case the Trust Deed of the 25th of September 1884, would satisfy the provisions of the Statute, even if the 7th section had not been repealed. The defendants' predecessors in 1884 were "persons enabled by law to declare" that they held certain immoveable properties in trust and also to declare what those trusts were. They did so by the Trust Deed of 1884. The question between the parties is whether, if their interpretation of the Deed of 1884 is correct, the trusts they declared were in accordance with the original trusts as intended or declared by the founders, or whether they were at variance with the trusts declared or intended by the founders. In order to ascertain this, it was necessary that we should have before us all such documents as were properly proveable and admissible under the provisions of the Indian

(1) [1897] 1 Ch. 196.

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Evidence Act, and we accordingly allowed the plaintiffs to prove and put in copies of the various documents relating to the foundation of various Charitable Institutions. The persistence with which this point was pressed seems very extraordinary, in the face of the fact that the defendants themselves, in paragraph 25 of their Written Statement, submit the question "whether persons in whose possession and under whose control the said properties were, were not entitled to declare the trusts thereof as they did by the said Deed of the 25th of September 1884."

Further, it appears to me, on a careful study of the section, that, in spite of the concluding words "shall be utterly void and of none effect," the section is really one that regulates procedure, and that, even if it did apply to India at one time, the enactment of the Indian Evidence Act would supersede this section of the Statute. The scheme of the section is undoubtedly to regulate how trusts were to be proved in a Court of Law, and the concluding words merely denote what the result should be if a particular mode of proof was not available. What Lord Justice Lindley says in his judgment in *Rochefoucauld* v. *Boustead* (1) lends support to this view. Referring to the contention, that the Statute of Frauds had no application to lands in Ceylon, Lord Justice Lindley says (at page 207):—

"The Statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this: it regulates procedure here, not titles to land in other countries."

I am inclined to hold that section 7 of the Statute of Frauds was mainly intended to regulate procedure, and that it never applied to this country at any time; but, even if it did, I hold that the Evidence Act, when it came into force, entirely superseded it. The Legislature, however, without waiting, and in order to avoid complications—on the assumption that his view was correct—repealed the section as soon as they found that Mr. Justice West thought it applied to the inhabitants of Bombay and to the Parsis. Possibly, the view was correct. I have not gone into the question very fully, because I hold that

(1) [1897] 1 Ch. 196.

if it did apply, it was wholly repealed by the Indian Trusts Act of 1882, both as regards Public and Private Trusts. I also hold that the Trust Deed of the 25th of September 1884, fully satisfies the provisions of section 7 of the Statute of Frauds, even if it had not been repealed and was still in force as regards Public Charitable Trusts.

The immoveable properties in respect of which we have to ascertain what the real trusts are, in order to find out whether Juddin converts were intended to be included amongst the beneficiaries, are the Five Towers of Silence at Malabar Hill and the three Sagdis, the Sagdiwala's house, the Fort and Baharkote Nasakhanas and the Godavara Agiary. [His Lordship enumerated those documents and proceeded :—]

These are all the documents relating to the immoveable properties dedicated to charities which are the subject-matter of the contentions between the parties, and after carefully going over every one of these documents, I have set out in full, I believe, every expression relied on by the plaintiffs in support of their contentions, that these expressions were intended to include all Juddin converts to Zoroastrianism.

The language used in all these documents is, to my mind, most clear and unambiguous. The people for whose benefit these institutions were established, the persons for whose use these religious establishments were founded, *were the members of the Zoroastrian Community of Bombay.* The expressions most frequently used are "Zoroastrian population of Bombay," "the Zoroastrian *Anjuman,*" "the people of the Zoroastrian *Community,*" "the people of the *Anjuman of the Mazdiasni faith,*" "the whole *Anjuman,*" "the Holy Zoroastrian *Community* of Bombay," "the Dustoors, Mobeds, Herbuds, and Behedins of the Mazdiasnian religion of the Holy Zoroastrian *Community,*" "the entire Zoroastrian *Anjuman* of Bombay," "persons of the *Firka* of the pure and best Mazdiasnian religion," "the Zoroastrian *Community* of Hindustan," and "the Khas-va-Aam of the Zoroastrian *Anjuman.*"

The utmost stretch of imagination cannot convey to my mind the impression that the Founders, when they used the expres-

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sions set forth, meant or intended to include amongst the objects of their benefaction, the Lalias of Bombay, the Dubras from Surat, and the Bhangis, Mahars, and Kahars of Gujarát.

A Juddin may become a Zoroastrian, but how he ever could possibly become a member of "the Holy Zoroastrian *Anjuman of Bombay*," or be one of "the members of the Zoroastrian *Community of Bombay*," or become one of "the *Anjuman* of the Mazdiasni faith," passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders: the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially, and not include him in the general description of the community of his then existing co-religionists and their descendants. It would be a most violent presumption to make —a presumption utterly unjustified by the circumstances existing at the time when these institutions were founded—that the possibility of a Juddin convert to Zoroastrianism was ever present to the minds of these founders and that they intended to include him.

I have not the smallest doubt that if the contingency of an alien being ever admitted into the religion had been present to the mind of the founders as being even most remotely possible, they would have made special provisions *to exclude* them. The conditions made by Bisni, when handing over his Tower to the Anjuman, are typical of the feelings entertained by religiously-inclined Parsis of those days. It was only such Parsis as were most religiously inclined and were devout followers of the tenets of the religion as they understood them then, that would found and endow such institutions as those the Court is dealing with now. And if they objected to even a Parsi corpse touched by Durvands being disposed of in the Towers of Silence—if they considered that the corpse of a Parsi was polluted by having a *post mortem* performed on it, or by even an inquest held on it, or by being brought from upcountry through Durvand Agency --

how could they be expected to have contemplated a Durvand's body being disposed of in the Towers; for, no matter what five or ten thousand years ago the Zoroastrian religion laid down as to proselytisation, their ideas since their advent into India had crystalized into the belief that a Durvand's touch, or even his gaze, was enough to defile a Parsi corpse, and if such a corpse is not allowed to be carried to the Towers for disposal and is placed on a Chotra or an unused Tower, how could they be supposed to have contemplated the possibility of a Durvand corpse being carried to the Towers so zealously guarded from even the approach of a Durvand? A Durvand Zoroastrian was a being who never *entered* their thoughts.

To my mind, the language is clear and unambiguous. The plaintiffs, however, argue, that the language is capable of including and does include, Juddin converts. In interpreting documents, there is abundant authority for saying that the Courts must so construe documents that, when the intentions of the donors and founders are clearly ascertainable, they must be given effect to. I will assume, for the sake of argument, that the language of the document is ambiguous, meaning thereby that it is such that it is capable of both interpretations—the one urged by the plaintiffs and the other contended for by the defendants. In that case the documents should be interpreted according to certain well-established canons of construction.

In Tudor's Charitable Trusts, page 169 (4th edn.), the result of the authorities is summed up as follows:—

"If the intention is expressed in the instrument of foundation . . no difficulty arises. When, however, it is not so expressed, or is expressed in ambiguous terms, recourse must be had to extrinsic circumstances, such as the known opinions of the founder . . . contemporaneous usage, or the like, for determining who are the objects of the charity."

In *Smith* v. *Packhurst*,(1) Lord Chief Justice Willes says:—

"Before I proceed to the questions, I shall lay down some general rules and maxims of the law, with respect to the construction of deeds; first, it is a maxim that *such* a construction ought to be made of deeds *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

(1) (1742) 3 Atk. 135.

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"Another maxim is that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor . . . . . we have no power, indeed, to alter the words or to insert words which are not in the deed; but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible: These maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale, and the law commends the *astutia*, the cunning of Judges in construing words in such a manner as shall best answer the intent: the art of construing words in such manner as shall destroy the intent may show the ingenuity of Counsel, but is very ill-becoming a Judge."

In the case of the *Attorney-General* v. *Drummond*,(1) Lord Chancellor Sugden, says:—

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means."

This case went to the House of Lords, *Drummond* v. *The Attorney-General*(2) where Lord Campbell, laid down this rule:—

"In construing such an instrument, you may look to the usage to see in what sense the words were used at that time; you may look to contemporaneous documents . . . to see in what sense the words were used in the age in which the deeds were executed."

Sir John Romilly, Master of the Rolls, in *Attorney-General* v. *The Dedham School*,(3) says:—

"What this Court looks at, in all charities, is the original intention of the founder, and . . . . . this Court carries into effect the wishes and intentions of the founder of the charity."

While looking at the various authorities laying down general rules of construction, I came across a case which goes further than any case I have ever known. In this case, *Fowell* v. *Tranter*(4), Baron Bramwell says:—

"The plaintiffs labour under this difficulty, that they admit the natural and grammatical meaning of the words to be against them. The golden rule of construction is, that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or *unless*

(1) (1842) 1 Dr. & W. 353 at p. 368.
(2) (1849) 2 H. L. C. 837 at p. 863.
(3) (1857) 23 Beav. 350 at p. 355.
(4) (1864) 3 H. & C. 458.

*there be some very cogent reason of convenience in favour of a different interpretation."*



I have referred to this last case only for the purpose of showing to what lengths Courts will be prepared to go to carry out the intentions of the parties in the Instruments that come before the Court for construction. In the view I have taken of the meaning of the expressions used in the Instruments before the Court in this case, it is unnecessary to invoke the assistance of the rule laid down by Baron Bramwell. If, however, the "natural meaning" of the words used had been differently construed, if the natural meaning had been what the plaintiffs contended for, I should not have hesitated to hold that in the present case there are many "very cogent reasons of convenience in favour of a different interpretation." The reasons would not only be cogent reasons, but they are, to my mind, very imperative reasons. If the interpretation sought to be put upon these instruments by the plaintiffs was to prevail, the plaintiffs would succeed in encompassing the disintegration and ruin of the whole Parsi community. We were told by the learned counsel for the defendants that the Parsis were proud of the fact that there were no street beggars and professional prostitutes amongst the Parsi community and the community took care of its own paupers and cripples. If the plaintiffs' contentions prevailed, the community would very soon have no reason to boast of these characteristics of their race, and the Parsis would soon cease to exist as a *community* by reason of the rapid invasion of all pauper Sweepers and Dubras of Gujarát, who would, no doubt, be attracted to the *Holy Mazdiasni religion* by reason of the *fifty-three lacs of rupees* in the possession of the defendants, and the other advantages of belonging to the Anjuman of the Holy Zoroastrians of Bombay. It must be remembered that the question must not be judged from the standpoint that, in the present instance, the plaintiffs are fighting for the admission of an educated and cultured lady, belonging to one of the most civilized nations of Europe. That is a mere accident. If the Court had to take into consideration "cogent reasons of convenience," it would necessarily have to consider what would be the immediate and natural result of reading the documents

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in a way which would throw open the door to general and promiscuous admissions of converts.

As, however, I have said before, there is no necessity, so far as I am concerned, for departing from the ordinary rules of construction. As Mr. Jiwanji Mody pointed out in his evidence, the Parsis of India constitute distinct communities at the various places where they have settled down. We have the Parsi Anjuman of Bombay, the Parsi Anjuman of Surat, the Parsi Anjuman of Navsári, the Parsi Anjuman of Calcutta, of Madras, and even of such places as Cambay and Ootacamund, where there are only a very very limited number of Parsis. When establishing Charitable Institutions, or endowing Funds for religious or charitable objects, the ruling idea appears always to be that it is for the benefit of the community of the place where the Institution is founded or the Fund is endowed. Wherever Parsis settle down in a place in sufficient numbers to feel the want of a Tower or an Agiary or Fund for maintaining an establishment of corpse-bearers, they founded these Institutions either by general subscriptions amongst themselves, or some wealthy charitably-inclined Parsi founded them at his own expense. The Institutions and Funds are for the use and benefit of the community of that place. New comers, who settle permanently in the place, contribute towards the upkeep of the Institutions and add to the Funds according to their means on all auspicious and inauspicious occasions. When some co-religionist visits the place, he is, as a matter of course, allowed to use the Agiary of the place, and if he should die in the place, he would be carried to the Tower of Silence of that place; but unless he has settled down in the place, he is not a member of the Anjuman of that place. Supposing a party of Parsis was travelling in Gujarát, they would all be allowed, without question, to go into the Atash Behram or Agiary of the places they visit, to say their prayers, to make their obeisance to the Sacred Fire, and present sandalwood to the Fire Temple, and make money presents to the priests attached to the Institutions. If some one of the party died, his corpse would be carried to, and disposed of in, the nearest available Tower. The mere extension of those privileges do not make them the members of a particular

Anjuman of a particular place. The Institutions and Funds that are the subject-matter of contention in this suit, were all of them endowed and founded for the *Parsi Community of Bombay* and every expression used conveys but one meaning, *viz.*, that they are for the use and benefit of the members of that community.

On this subject, it is important to remember that we are not asked to construe formal documents founding the Institutions. They are more or less informal documents, relating in some way to the Institutions, none formally founding any one of them, such as a deed of conveyance or a declaration of trust.

It is also of importance to remember that, in many instances, there are no documents at all. For instance, there are no documents relating to three of the most ancient Towers out of five; there are no documents relating to one of the Sagdis; there are no documents relating to the Fort Nasakhana and the Sagdiwalla's house; and the only document relating to the Baharkote Nasakhana is a release passed by the executors of the founders, years after the death of the founder.

How is the Court to ascertain the Trust relating to these Institutions, which are the greater portion of the Institutions in question in the suit? By ascertaining the usage prevailing in the community and by the tenets of the founders. The Court must ascertain the intentions of the founders, by first ascertaining what has been the usage prevailing in the community and what were the tenets of the founders of those charities. That is what the learned counsel for the plaintiffs has himself urged. I entirely concur in this view, and am willing to apply those tests to find out who were the objects intended to be benefited by the founders of these benefactions. [His Lordship referred to certain documentary evidence at this point and continued—]

The facts to be gathered from these Exhibits appear to be that, in the early part of the last century, Parsi children by alien mothers were allowed to be invested with Sudra and Kusti without much difficulty, but when the evil grew, there was opposition to this practice, and at first such practices were sought to be

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restricted by making the previous permission of the Punchayet necessary, but later on the feeling against admissions grew stronger and it was resolved not to admit such children at all, and various pains and penalties were prescribed for those who transgressed the Resolutions passed by the Anjuman.

The defendants called a number of leading members of the Parsi community—members of well-known Parsi families who had made contributions to some of the Charity Funds. They all said it was never their intention that Juddin converts should profit by their benefaction; in fact, they said such a class was not present to their minds till the present controversy arose. If this is true of present times, *a fortiori* it must be true of remoter times and of people of former generations, who appear to be much more fervent, not to say bigotted, in their religious beliefs and observances than Parsis of the present day.

All the materials available for the purpose of ascertaining the tenets of the Founders tend to show that they never could have intended their benefactions to be for the use of Juddin converts. One can gather the tenets of the Founders by ascertaining the tenets of their predecessors, their contemporaries and their descendants; and taking all the surrounding circumstances of the times into consideration I find that all the indications most unmistakably point out that the idea of admitting a Durvand to their religion must at all times have been repugnant to the Parsis of the olden times. It is only on the advent of "reformers of religion," such as Mr. Sheriarji and possibly the birth of the reforming Subbha he served, that has instilled this idea of Durvand conversion in the minds of a very small section of the community.

For the reasons I have recorded above, I come to the conclusion that even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the Funds and Institutions now under the defendants' management and control; that these were founded and endowed only for the members of the Parsi community; and that the Parsi community

consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who come to India, either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

I ought not to conclude the consideration of this branch of the case without referring to two cases relating to Parsis, decided by our Courts, which have, I think, a most important bearing on the present question. The plaintiffs say: the Zoroastrian religion permits and enjoins conversion, therefore admit Juddins. The defendants say: the usage of 1,200 years is not to admit such Juddins, although the religion may allow of such admission. What is to prevail? The tenets of the religion or the ancient uage of those professing the religion?

In *Peshotam Hormasji Dustoor* v. *Meherbai*[1] the late Mr. Justice Scott held that usage must prevail over tenets. He says:—

"The Zoroastrian system would seem not to have contemplated marriage in infancy. The marriage ceremony of *Ashirvad* includes a prayer (the *nikah*), or exhortation to the parties, which would be senseless if it were not addressed to persons capable of matrimonial union in every sense. The Zend Avesta contains many passages which exclude the idea of infant marriage . . . . .

"*But custom seems to have wandered from the pure doctrine of the Zend Avesta; and the law, whether English or Persian, can only be applied subject to any well-established usage.*

"When the Parsis settled in Western India eleven hundred and sixty years ago, they probably brought with them a system, both of law and custom, from Persia. But it was all unwritten, and gradually fell into desuetude, and this mere handful of Persian strangers gradually and naturally adopted much of the law and usage that obtained in the Hindu community, in whose midst they were forced to dwell."

The effect of this judgment is that, although—according to the tenets of the Zoroastrian religion, as gathered by the learned judge from the Zend Avesta, the Ravayats of which he speaks as the opinions sent by the wise men of Persia and from other

(1) (1888) 13 Bom. 302 at p. 311.

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sources—infant marriages were not permissible or legal, a usage had sprung up amongst the Parsis of performing infant marriages, and he allowed usage to prevail over the tenets of the religion and held an infant marriage to be legal and binding, though not permissible or legal according to the tenets of the Zoroastrian religion.

This judgment of Mr. Justice Scott was approved of and followed in *Bai Shirinbai* v. *Kharshedji*(1), by our late Chief Justice Sir Charles Farran and Mr. Justice Hosking.

These are very clear authorities for holding that a well-established and ancient usage prevailing amongst a community must over-ride such of the tenets of their religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

The result is that I hold that the plaintiffs are not entitled to any of the reliefs claimed by them in this branch of their case, and I would dismiss their suit so far as it seeks relief on all points relating to the conversion of Juddins and their right to participate in the Charitable Funds and Institutions in the possession and under the management of the defendants.

I think I have dealt with every point of any importance raised by both sides. The transcript of the very excellent shorthand notes of counsel's address, taken down verbatim by the Court shorthand writer, Mr. Nakra, has been of great assistance to me in keeping before my mind every point argued before us by Counsel on both sides.

[His Lordship recorded findings on issues and went on :—]

The defendants throughout the hearing before us attached far greater importance to the question of the validity of their appointment and their right to appoint their own nominees in the place of their dying or retiring colleagues. The larger portion of the time occupied in the hearing of this suit was taken up by this part of the case. On this branch of the case the plaintiffs have succeeded. Although the plaintiffs have lost on the second branch of the case, they succeeded in defeating the defendants'

(1) (1896) 22 Bom. 430.

contentions based on the Statute of Fraud, the argument of which took up a great deal of our time. The questions raised in this part of the suit were of greater importance and by no means free from difficulty. The questions involved were bound to be raised sometime or another. It is very unfortunate that the suit is not so constituted as to settle these questions finally; but I think the Court's pronouncements on the questions raised will serve some useful purpose and may avert all further litigation. It has not been a secret from us that with the exception of the fourth plaintiff, who bears his proportionate share of responsibility as to costs, the whole risk and responsibility is on the sixth plaintiff. Having regard to the letters written to him by Mr. Jivanji Mody and Dastoor Darab and to the circumstances under which certain ceremonies were performed in connection with his wife, I do not think the sixth plaintiff has by any means been fairly treated. He has made an honest manly fight, and I feel that if he had to suffer in pocket it would be a very grave injustice to him.

Then as to the defendants' costs. Apart from the question as to whether they were wise in giving so much prominence to the fight on their right to appoint successors and trying to cling so tenaciously to the privilege of bringing in their own nominees, I feel that they were not personally responsible for the state of affairs as it existed before the suit. It was their predecessors who arrogated to themselves the right and conferred it on their successors and the late Sir Jamsetji, in the course of a discussion before us, told us that he and his colleagues would not have fought this question if they had not felt that the attempt to oust them was due to ill-will against them and made for the purpose of humiliating them before the community. This may have been an erroneous impression,—probably it was erroneous; nevertheless, it was genuine and was communicated to us with a good deal of honest feeling. As trustees they have rendered valuable services to the community in the most disinterested manner, and their administration of the Trust properties has been absolutely faultless. They must have their costs as trustees.

My order as to costs would be that the costs of the plaintiffs, taxed as between party and party, and those of the defendants,

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taxed as between attorney and client, be paid out of the Charitable Funds in the possession of the defendants. If the plaintiffs and the defendants agree as to which Fund or Funds the costs should come out they should be paid out of such Fund or Funds. Otherwise the matter must be mentioned to us, and we will either decide the question or refer it to the Commissioner.

I cannot conclude this judgment without expressing my sense of obligation to Messrs. Lowndes and Strangman for the very valuable assistance they rendered to the Court during the hearing of this case.

BEAMAN, J.:—On the first part of the case, I am in complete agreement with my learned colleague. We had thoroughly discussed it, laid down the main lines of our reasoning upon every material point, and settled our conclusions before we separated in April. All that then remained to be done was to embody the results of these discussions in a judgment upon that branch of the case. I have only now to gratefully acknowledge the masterly manner in which my brother Davar has given methodized and exhaustive expression to our joint conclusions.

It was not, however, by any means clear, at the end of the case, that we were wholly agreed upon the various questions involved in the second part of the case. When I left India, in April, I did not feel prepared to adopt, in their entirety, what I then understood to be my brother Davar's reasoning and conclusions upon the rights of converts to Zoroastrianism to participate in the benefits of the Charitable Funds administered by the defendant trustees. It was therefore understood that we should deliver separate judgments on this head. But it was also understood that, in the time which must elapse before we could meet and deliver judgment, we would give unremitting attention to the principal points and to each other's views upon them, so that, if possible, we might, after all, avoid the necessity of any difference of opinion, even of pronouncing separate judgments. A considerable amount of correspondence passed between us, and since my return we have further elaborately discussed the whole evidence and every argument which has occurred to us, or been suggested to us by Counsel, for and against the right

of converts to participate in the benefits of the Funds. In addition to these personal conferences, I have carefully studied the elaborate second part of Davar, J.'s judgment; and while I am doubtful still whether we look at all parts of the complicated question eye to eye, it is a source of great satisfaction to me, that I am able to agree with the main conclusion. Perhaps I am led to that result by slightly different trains of reasoning, but that is comparatively unimportant. I think I do not flatter myself when I say that the criticisms I freely offered have led to the modification of many parts of my learned brother's judgment, and have thus made it easier for both of us to take common ground and give to the principal question an unanimous answer. But I have felt, and I have understood too, that this was my brother Davar's wish, that I ought to add a few observations of my own, before disposing of the question which aroused so much feeling in the Parsi community of Bombay. I shall make those observations as short as I can; they will, indeed, take the form of a few supplementary comments upon Davar, J.'s judgment. My object will be to make it as clear as I can, in the fewest and simplest words, why I, too, hold that the Trustees were right in excluding converts from the benefits of their Trust Funds and Properties. But I hope that the relative brevity of my contribution will not be accepted as a measure of the time and thought I have bestowed upon the case. It would have been easy for me, in the ample leisure of my recent holiday, to have gone with the utmost minuteness into every detail: I refrained from doing so,—first, because I hoped that we might end by agreeing as substantially we now do; secondly, because I am sure, that the true ground upon which our conclusion rests is, while a very sure, yet a narrow ground, the character and limits of which admit of short and easy statement.

Before I come to that, I must deal with a preliminary legal objection which has occasioned my learned brother and myself much anxious thought, very grave difficulty, and—speaking for myself—real and serious doubt.

It arises in this way. In the Deed of 1884, the Trusts are declared for the benefit of all members of the Parsi community

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professing the Zoroastrian faith." Now, when those words were used, we must remember two things: First, they were used by an English draftsman, who surely had not the slightest idea—could not have had, unless prophetically gifted, the faintest premonition—of the use to which they would be put or the trouble to which they would give rise. No practical question had been raised about what did, or might, constitute membership of "the Parsi Community:" whether the qualifications were solely religious, or solely racial, or a mixture of both. The draftsman thought, as probably every one else thought at that time, that the Parsi community was a phrase of sufficiently precise and definite connotation; and that there never could be any question about the class denoted. Secondly, the qualifying words "professing the Zoroastrian faith" were inserted not to exclude converts *to*, but converts *from*, the Holy Zoroastrian faith. About that there can be no serious doubt; and, if not expressly admitted, it was impliedly admitted during the progress of this case, over and over again. The Parsis of Bombay were beginning to be exercised in mind over the cases of converts to Christianity; and they naturally wished to make it clear that no such converts, though originally of the Parsi community, would be allowed to share the benefits of the Funds and Properties.

So far all went well. It was only when the sixth plaintiff married a French wife, who openly professed the Holy Zoroastrian faith and was publicly and formally received as a convert into the Zoroastrian religious communion, that the jealous bigotry of the orthodox was aroused, and all the possibilities involved in the acceptance of such a fact began to be vividly realized. In the ferment which followed, the Trustees threw their weight on the side of local Parsi orthodoxy. Finally, they publicly announced, as Trustees of virtually the whole public religious establishment of the Parsi community of Bombay, that they would not extend the benefits of their funds to converts, or allow converts, the use of their places of worship and burial. Thereupon seven members of the Parsi community of Bombay obtained the consent of the Advocate-General and brought this suit

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with the object, *inter alia*, of getting a declaration out of the Court that converts were entitled to all the benefits of the Trusts administered by the defendants. There is no convert amongst the seven plaintiffs; for all the purposes of this branch of the case, their rights are fully admitted. And the defendants contend that they cannot maintain this suit for or on behalf of unascertained and undefined persons. Put in the simplest, least technical language, that is what this preliminary objection comes to. My brother Daver, after, as I have the best reason to know, very long and very anxious consideration, has been forced to the conclusion that the objection is well founded and that the suit, so far as this relief is sought, must fail. I need scarcely say that I entertain the highest opinion of my learned colleague's learning and ability, that his mature conclusions thus painfully reached must and do command my respect, and that should I feel bound to dissent from them, it would only be with the utmost diffidence and a lively sense that I am on extremely debateable ground. First, I want to clear the air of some high-sounding and justly-venerated phrases. Chief of these are, that no Court could, without abhorrence, decide against parties who have had no opportunity of being heard before it. Secondly, that even if we were to depart so far from fundamental principles of the administration of justice, the decision, if against the converts and in favour of the Trustees, would be utterly nugatory, as it would not bind those who were not parties to the suit. I may, I hope, humbly say that no Judge is more desirous than I am of doing justice—no Judge can be more sensitive than I am to any breach of sound judicial principle. And if I do not feel that abhorrence which I understand my learned colleague feels, at the bare idea of deciding this question on the present array of parties, which does not include a single convert, I think there must be a reason and a reason not very difficult to find. We must not, I think, allow reason to be drugged by sonorous phrases, or our judgments to be so overweighted by a splendid and time-honoured maxim, that we cease to be able to discriminate between cases in which it is, and cases in which it really is not, applicable. Sometimes it is not easy to correctly discriminate. It may as in the present case, need searching analysis. But, in every case, we

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must carefully scrutinize the actual facts, before we apply any wide generalization to them; and we must be sure, before we consent to do so, that the result will not be to defeat, rather than further, the true object, to attain which the generalization has been formulated.

Now, if I thought for a moment that by deciding in this case—and on the abundent materials which have with unremitting industry and consummate ability, been collected and laid before us—against the right of converts to share in these Trusts, there was the least, the remotest chance of doing injustice to any convert now in existence or yet to be born, I should go wholeheartedly with my learned brother, and say emphatically "I will be no party to such a decision." But are we not allowing ourselves, in making such a supposition, to be carried away by the sound of familiar words? Here we have wealthy and representative men of the Parsi community coming forward to fight for the right—a right which may fairly be treated as an abstract right—of all converts, present and future, to share in certain public charities. They spend money like water to have this question thoroughly thrashed out; they retain the most eminent men at the Bar; everything which human ingenuity can do is done to make out the strongest possible case for the converts. It is not as though any particular convert could have a case of his own. The question has to be answered by reference to matters finally settled before any person now living was born. It is as certain as anything in human affairs can be, that no convert yet to be made could have anything more to say to any Court on his own behalf than has been so ably said for the whole of his class (if it is strictly correct to speak of potential and future converts as a class), at the instigation and expense of these plaintiffs. If it were conceivably possible that at a future day some fresh convert were able to lay before the Court materials which have not been laid before us, that, I apprehend, could only be by the connivance and assistance of old Parsi families who at the present time belonging to the orthodox party, have intentionally kept those materials hidden from us. But that is so unlikely a contingency that, except for the purpose of re-enforcing an academic argument, it seems

to me that it might be wholly ignored. Now, I understand that my learned brother, who has felt the pressure of this argument so strongly, admits (for its limited purpose) that had there been one convert joined with the seven plaintiffs, the argument would have had the bottom knocked out of it and would have been utterly annihilated. If that is so, and it clearly must be, it is easy to show that the high ground it takes is, in fact and truth, utterly illusory and untenable. Let us suppose, for example, that one of the alleged converts of the lowest class had been made a party plaintiff—some illegitimate child of a Dubri woman. Is there any human being who can seriously contend that such an addition to the array would have strengthened the plaintiff's case, or made a decision of the Court, adverse to converts generally, less unjust to all reputable converts yet to be born and made? If it is abhorrent to any Judge's sense of justice to decide against parties who have not been heard, that abhorrence ought not to be capable of being so easily removed. Yet, for the purposes of this argument only, I repeat, it would have been completely and effectually removed, if, for example instead of making Sonabai a witness she had been made a party. What would have been the real, the substantial difference? Absolutely none. She has already told us everything she knows. She claims to be a convert; she has been examined and cross-examined. Because she is not a party, it is suggested that we should be violating the best traditions of justice by now deciding against the right of converts to share in these charities. If she had been a plaintiff, we might have come to the same decision on exactly the same materials, without a qualm. I confess that this seems to me hyper-sensitiveness. Again, it has been suggested that in the absence of a convert-party-plaintiff, we have no guarantee against this suit being, from beginning to end, collusive. How are we to know, I am asked, that this is not a deep plot, concocted between the plaintiffs and the defendants, to obtain a decision, barring the rights of converts? The short answer to that is that the learned legal gentlemen in charge of the plaintiffs' case are hardly likely to have countenanced, in the first instance, and to have spent themselves as they did in brilliant and persist-

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ent efforts to make good a collusive case, and a case which they must have known to be collusive. Of course, that objection is not seriously pressed against this particular case; it is merely brought upon the general question of principle. No one who has taken any part in this case, no one who has attended the hearings or read the reports really doubts for a moment that everything which money, talent, and energy could do has been done for the converts, far more than any one—or any dozen of them—could have done for themselves. So far, then, as there is any risk of doing injustice to persons not before the Court goes, I cannot, speaking for myself, treat that risk here seriously. If in any suit of this kind, joining single convert, would have enabled us to decide the question, and in the event of our decision being against the rights of converts to share in the funds would have made our decision binding on all converts present and future, I think, notwithstanding the impressive and imposing line of argument I have been dealing with, we might with the lightest hearts have held ourselves free to give the same decision, in a suit framed as this suit was framed, upon the materials collected by the plaintiffs, resting confidently assured that any number of actual converts added would not have helped us to a fuller or better and fairer understanding of the collective case or individual cases on which their joint or several claims rested. So, too, when it is contended that, if we were to decide this question in a suit constituted as this suit is constituted, our decision would not bind any one who was not a party to it, we must be quite sure that that is so, before we give such final and far-reaching effect to the argument; for this really begs the whole question. Concisely put, that question is:- Whether this relief can be obtained, at all in a suit under section 539? Of course, if it cannot, then *cadit quæstio*; for this suit is under section 539, and under no other section. Obviously, then, if this relief is not of the kind contemplated by the section, we cannot give it in this suit. But this, though interlaced with the argument upon general principle which I have just dealt with, is really quite a distinct argument. It has to be faced. The point is subtle and difficult. No authority seems to cover it. If it should turn out that the relief is of a kind which might be sought and

awarded in a suit under section 539, then we do away at once with the second of the first-mentioned general objections; for an Advocate-General's suit under that section does, I apprehend, bind every one, and a decision in such a suit—that the Trust did not contemplate the admission of converts—would be final and decisive of the rights of all converts, present and future. And further, it must, I think, be admitted, that if this relief could be claimed in a suit under section 539, then the addition of a single convert to the array of plaintiffs would remove the last objection to the view that the decision in such a suit would bind all converts. But I have already shown, I hope, that that objection has no substance, is purely sentimental and academic —at any rate, for the purposes in hand; that the addition of a convert would not have thrown the millionth part of an additional ray of light on the vexed question—would, in fact, have been no more than a purely formal and deferential compliance with a most salutary principle. I shall in a moment have occasion to point out a much more substantial reason, than any reason of that kind could be for adding a convert to the array of plaintiffs, against doing so. But first let me consider very carefully whether the contention that no relief of this kind can be obtained in a suit under section 539 is sound. We heard a great deal during the argument about "rectification" and "construction." It seems to me to be hinted, if not clearly stated, that, while the rectification of a Trust Deed might possibly be asked in an Advocate-General's suit, Courts could only be asked to construe by persons who were directly interested in the construction they wished to get. Now, I do not think there is so much magic in the words "construction" and "construe," or any such sharply-defined distinction (for the purposes of this argument) between construction and rectification. However that may be, I am now more concerned to see whether what the plaintiffs really want the Court to do, is what the Court can do when a suit under section 539 is brought before it. It will, of course, be at once observed that that section, after an introduction containing very general words—as, *e.g.*, "whenever the direction of the Court is deemed necessary for the administration of any such Trust,"—goes on to say that the plaintiffs may obtain a

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decree for five specified objects, after which come the words "or granting such further or other relief." And it is, I understand, the opinion of my learned brother that the relief we are now concerned with does not fall within any of those five objects and cannot be included under the following words. Those, it is said, must be read as *ejusdem generis*. I confess that this is a most serious difficulty, and if my learned brother is right, as he very likely is, there is an end of the matter. I am not myself—and never have been—much in love with the *ejusdem generis* rule. It is too vague. If it means anything more than a tautologous re-affirmation of what has gone before, it must mean so very much more. What is relief of the like kind? Certainly not of a kind so like as to be practically identical. That would make the words mere surplusage. I should be disposed to think they meant such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in a suit of this kind. As, for example, removing fraudulent trustees, restraining a breach of the trust, and so forth. The words I have already quoted seem to me to be peculiarly applicable to the concluding words, "such further or other relief." "When the direction of the Court is deemed necessary for the due administration of the trust," then any person interested in the trust can come in and ask for such directions. Now what direction could be deemed more necessary for the due administration of such a trust as this, than a clear enunciation of the true scope and object of the Trust Funds and Properties? We have the beneficiaries divided on a question—and a very difficult question—of principle, namely, whether the Funds and Properties were intended for the use of converts. Some say they were, others say they were not. The Trustees took up a strong partisan attitude, and announced publicly that in their opinion they were not; and further declared that they will enforce that view, whether the rest of the community like it or not, by excluding all converts. Here is a fundamental question of principle affecting the whole scope of the trust. It is not really a question of the right of this or that convert, but so stated a profoundly religious question which may be assumed to lie at the root of all great public religious endowments. Any

person who believes that his religion enjoins proselytising, and wishes to spread it and make converts, might, it seems to me, without any undue straining of language, be said to be directly interested in ascertaining whether the monopolists of the whole local religious endowments were right or wrong in declaring that they would not allow converts, whatever the religion might say about it, to use those places of worship and burial, or to have the benefit of the Funds. Let us look for a moment at what would be the practical consequences of adopting the view which has commended itself to my learned brother. No suit for this kind of relief will lie under section 539. Very well. Then there are only two other suits possible: one, the ordinary suit; the other a *quasi* public suit under section 30. But those are private suits, in the important particular that the decision in them would not bind anyone who was not a party. Nor, as was suggested, do we derive any assistance from section 437. I will prove this shortly and conclusively. Let us suppose this case reversed. Let us suppose that the trustees had decided to admit, instead of to exclude, converts of every nation, caste, and creed. Now, there can be no doubt, I think, that any orthodox Parsi, who objected to worshipping with the so-called Bhangi converts, would have a very real and substantial grievance. But if he could not bring a suit under section 539, to get the matter set at rest, once for all, what must he do? He cannot use section 437, for *ex hypothesi*, as the most cursory perusal of the language of that section will show, it would land the suit in an *impasse* and a glaring *reductio ad absurdum*. We should have the trustees brought into Court to ask the Court to make them undo just what, in defiance of the sense of the community, they had resolved to do. The Trustees would want to let the converts in—the converts who could be the only defendants would want to come in; and yet the trustees (if that section is to be used) would have to ask the Court to order them to keep them out. This is plainly absurd. Then, are the aggrieved orthodox party to bring private suits? If they do, no convert is a party: it will be a suit between them and the trustees, and there will at once be a failure of the cause of action. If they add as many converts as they can find, still the decision will only bind the

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parties. And precisely the same if the suit is brought under section 30. There might not be more than two or at most ten converts alive. If they were joined under section 30, then of course they would all be bound by the decision. But the day the decision was pronounced, another half score of converts might be made, and the trustees might say: Well, we don't know anything of these people: they may have new and special claims; we are going to admit them; and so *ad infinitum*. The unfortunate orthodox party would have to be bringing suit after suit, till they and the trusts and all concerned were utterly ruined. Just the same if the case stands as it does now—there could be, there can be, no finality. Surely, it could not have been the intention of the Legislature to expose great public charities to eternal litigation. But if not, then it must have been the intention of the Legislature to have questions of this kind settled once and for all by a suit under section 539. If that was the intention of the Legislature, as I can hardly help thinking that it was, let me revert to the point whether it is necessary—or for that matter lawful—to join one of the unascertained X class, to establish the principle for which they represent the suit is brought, as a party plaintiff. The difficulty I adverted to, and which I still feel to be a real difficulty, pointing clearly to the true nature of a suit of this kind, is that a suit can only be brought under section 539 by a party interested in the trust—"any two or more persons having an interest in the trust." Now, it is clear that the object of the suit I am dealing with is to have it judicially determined whether converts *qua* converts (not whether this or that individual convert has any individual right) *are* or *are not* interested in the trust. To join them or any one of them as party plaintiffs would beg the whole question in issue. One section of the beneficiaries says converts are interested in the trust; another body says they are not. It seems to me that if that is a question proper to be agitated in a suit under section 539 at all, it must be agitated by persons who are admittedly interested in the trust, and are really fighting not for individuals but for a great principle of administration. These are some of the principal reasons which have led me—though, I have

already said, with the utmost deference and respect to my learned brother Davar—to dissent from his finding on this preliminary issue. I believe that we have the power, at the instance of the plaintiffs in a properly-constituted suit—as I also believe this for this purpose to be under section 539—to go into the question whether the Founders of the trust intended that it should be for the use of converts as well as those born in the Parsi faith.

I cannot help adding that I think it would have been better if the legal advisers of the defendants had pressed this preliminary issue on us for decision when the case began. They may undoubtedly well reply: "We took the point in our written statement; we raised it in our issues; what more could we do?"

But that is not such a complete answer as at first sight it appears. When the case opened, we had to listen, as the practice is, to the pleadings read at a great rate. These were immediately followed by a string of thirty-six issues—many of an involved and technical kind. These we had to take down as fast as we could, and in such circumstances it is utterly impossible for a Judge to take in the full significance, or, for that matter, a tenth part of the significance, of the case which is being made. Here, the moment the issues were down and before—speaking for myself—I had had time to give a thought to them, Mr. Lowndes got up, and, on behalf of the plaintiffs, protested against the practice of counsel for the defendants framing the issues and flinging them like this at the Court. He added that, in his opinion, there were really only one or two material issues (amongst which this one was of course not included) to which the attention of the Court need be directed. And he asked us to frame issues on these lines for ourselves and to neglect the thirty-six issues which had just been read to us. To this, my brother Davar—who has had very great experience at the Bar before he was elevated to the Bench—replied that all who frequented the Original Side Courts knew what the practice was; that it was well established; that defendants were always allowed the freest hand in framing issues; but that, as the case went on, a very large percentage of

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them dropped out and were never heard of again. All this time counsel for the defendants sat by and made no comment. And it was after this protest by Mr. Lowndes, and my learned brother's answer to it— an answer which, looking back on it, I think distinctly invited contradiction, if, as it has turned out, there were included in this long list of issues, issues other than those which Mr. Lowndes told us were the only material issues —that the trial began. Davar, J., had intimated that we might take it that many of these issues were in accordance with the usual practice, merely raised *ex majore cautela*. He had intimated that, as usually happens, we did not expect to hear more of a large percentage of them. We had had our attention drawn to all that the plaintiffs' counsel thought material. The defendants heard all this. They must have known that we did not realize that there was among these issues a very serious preliminary objection to going on with the suit on the understanding stated by Mr. Lowndes. Then was the time, it seems to me, for the defendants' learned counsel to inform us that, whatever might often happen, here there was a preliminary objection, not raised at all *ex majore cautela*, but an objection which the defendants contended would be fatal to this, which was, when the suit began, by far the most important part of the whole case. Had counsel told us then precisely what the nature of the objection was; had counsel insisted, as I think they ought to have insisted, upon our disposing of it as an issue of law *in limine*, we could have heard all that was to be said about it in a few hours, at the most, and have then given our decision upon it. Had that decision been in favour of the defendants, there would have been an end of the suit. For it is almost certain that at that time the plaintiffs would not have gone on with the issue dealt with in the first part of my learned brother's judgment, if the sixth plaintiff had known that the one question in which he was vitally interested could not be decided. Either the plaintiffs would have amended their plaint and got a proper array of parties, or the whole litigation would have been brought to a summary end. But the course which the defendants took has led, in the case of my learned brother—and might have led in the case of both of us—to this most unsatisfactory result. After spending

months of time and thousand of rupees; after inflaming the passions of the whole community and flooding the Court with unsavoury evidence; after squandering the moneys of the trust as well as those of private individuals who believed, and had every reason to believe, that the Court was enquiring into this question of the converts, we are told, that we really have no power to deal with that at all, and we are very likely told so quite rightly. Now, I do think that the Court has a right to expect that, when leading counsel are engaged in a great case, a point so vitally important as this point has turned out to be, shall not be kept in reserve for a single hour. I think we ought to have been told, the moment the issues were read, that the defendants confidently relied on this point; that the defendants relied on that issue as one that would prove fatal to the plaintiffs' claim in respect of the convert question: and that, being purely a legal preliminary issue, the defendants insisted upon the Court dealing with it *in limine*. As it is, the whole of my brother Davar's otherwise valuable and instructive judgment on this part of the case is merely *obiter*; and, of course, if he is right, any thing which I may have to add is *obiter* too. I cannot help thinking that this is deplorable. It may be the fault of the system, it may have been largely our own faults. I certainly do not wish to shirk any part of the responsibility which may fairly be mine. But it is clear that counsel and judges are very differently situated at the beginning of a heavy case. Counsel presumably know every in and out of it. Counsel know the strong and the weak points. A judge must come to every case with a perfectly open mind, and he is at a great disadvantage, where the case is extremely complicated, if counsel will not help him in every way with the utmost candour.

Having now partially cleared the ground, I will deal as shortly as I can with the main question. To understand the question itself and the manner of its development before us, we must turn again to the Trust Deed of 1884. Here, as I have said, the trustees declare themselves to be trustees of practically the whole public religious establishment of the Bombay Parsis, for the benefit of "members of the Parsi community professing the Zoroastrian faith"; and later, when it was sought to introduce

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a foreign convert, they construed the terms of that declaration in such a way as to exclude from the benefits of their trust all who were not born of Parsi parents or who did not come within the definition of Irani Parsis; and further, they limited Parsi parentage to the father, thus excluding children of a Parsi woman by a foreign father. To this the plaintiffs demur. They contend, in the first place, that the trustees have wrongly declared the Trust in the phrase I have quoted; in the next, that if that phrase correctly declares the scope and objects of the trust, the defendants have wrongly construed it. The plaintiffs say that the phrase may be unobjectionable in itself, but its real meaning includes all who become members of the Parsi community by conversion and thenceforward profess the Zoroastrian faith. In other words, that the Parsi community means nothing else, and consist of no other persons than those who profess the Parsi or Holy Zoroastrian religion. And the plaintiffs propose to prove this contention by leading evidence of the practice from old times of the Bombay Parsis in this respect, as well as any and all evidence throwing any light upon the true intention of the Founders of these Trusts at the time of their foundation. This course was at once and strenuously resisted. The defendants contended that the Statute of Frauds was a conclusive bar, and that the plaintiffs could not go behind the Deed of 1884. I may say at once that my learned brother and myself fully discussed the elaborate arguments which were addressed to us for days together on this point. We have read and duly considered all the authorities. And long before the case ended, we were agreed that the defendants' contention was unsustainable. I shall content myself with saying now that I entirely concur in what has fallen from my learned brother in disposing of this objection. He has expressed—admirably if I may say so—our joint views, with the principal reasons upon which we rest that part of our decision. I would only add, avoiding technicalities and using the simplest words, that where a body of persons solemnly declare in a formal Deed that they hold properties and money on trust; where they further declare the objects of that trust, as they understand them; where they are in possession of whatever documentary evidence there may be accompanying the foundation

of the trust and showing what was the intention of the Founders, it appeared to me, and still appears to me, preposterous that they should seek to prevent the Court from obtaining, whencesoever it can, by parol or writing, proof of what the Founders of these trusts really meant. The defendants say they meant one thing: the plainsiffs say they meant another. The defendants say that the plaintiffs may not prove their allegation because of the provision of section 7 of the Statute of Frauds. In effect they say: We are the final authorities by reason of that Statute: we are the only people who can now decide what the object of the settlors was. There is nothing in the case law, as far as I can see, to warrant such an obviously perverted application of the Statute of Frauds. So applied, it might well, indeed, be called a Statute of Frauds: not as a Statute to hinder, but to further, fraud. In my opinion, the Statute—or, let me say, the section of the Statute on which the defendants rely—is no longer applicable, if it ever was applicable, to this country. And I am also quite clear that, even if that section is applicable, its requirements are amply satisfied on the authority—to cite one case only—of *Rochefoucauld* v. *Boustead*(1), by the facts of the present case. I have not and never had any doubt that the course proposed by the plaintiffs is not only a proper course, but the only course we ought to follow. We have to decide—if we have to decide anything—whether the trustees have rightly understood and given effect to the objects of those who entrusted the properties and moneys to their keeping. How are we to do this, if not by searching exhaustively into the past, and weighing whatever evidence may be there found throwing light on the intentions of the Founders? The defendants avow themselves trustees, and it is not for the trustees, who are virtually charged with—as I understand it—a breach of trust, to shelter behind the Statute of Frauds and say to their accusers: "You may not prove anything at all behind our own construction of the trusts committed to us." Doubtless, having brushed aside a technical bar— which, I think, should never have been interposed—we are still to be strictly guided by the rules of evidence. We are not

(1) [1897] 1 Ch. 196.

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so to extend our enquiry as to take in mere hearsay, or any matter which ought not to be the material of proof in a Court of Law. That is a distinction which, after our interlocutory ruling on the technical plea, seemed to me to be ignored and to have given rise to some dissatisfaction in the minds of those learned gentlemen who had the onerous and responsible duty of conducting the defendants' case. And in many instances I, speaking for myself, felt that we were going much too far afield, and encumbering our record with what was not, strictly speaking, evidence at all. But my learned colleague thought, that, in a case of this kind, we should always err—if we must err—on the side of liberality. And very likely he was right. It is after all easy, when a case is finished, to sift out the good from the bad evidence. It is not so easy to do this in the stress and heat of the actual enquiry. If, on close examination, our record shows that we have let in a good deal of useless, or even irrelevant matter, I am sure that my learned brother's able and exhaustive judgment will show that we have not given any weight to that portion of the evidence.

Starting, then, from the *causa causans* of this litigation—the words of the Deed of 1884 and the subsequent construction put upon them, the plaintiffs' case—put summarily and syllogistically, as I understand it—is, all these trusts are public religious endowments and charities. They were founded not for racial or tribal, but for religious purposes. The founders *ex hypothesi* intended them—since they are not only part of but virtually the whole public religious establishments of the Parsis—for the benefit of all professing the faith of that community. Who, then, profess that faith ? Can it be said that only those who are born in it profess it ? Certainly not. For we can easily prove (and this has since been admitted over and over again before us) that the Zoroastrian religion was originally a proselytising religion; that its tenets not only permit but energetically enjoin the making of converts. It, therefore, follows that, where a religion notoriously enjoins conversion, and where devout members of that religion found public places of worship and burial for the use of those who profess that religion, they must have contemplated—they must be deemed to have contemplated—

converts to the religion participating in the benefits of such endowments. Any other view leads at once to this practical absurdity, that you have a great religion ordering conversion, and yet refusing to allow converts any lot or part in its public religious communion.

That is, I believe, a fairly accurate statement of the plaintiffs' main argument. It is an extremely powerful and convincing argument. For many months, reflecting over the whole case, I was inclined to accede to it. I was greatly pressed by its simple logic. And I may add that I do not think it gained anything from the oral evidence which was led by the plaintiffs to supplement it, and to show that not only was this conclusion *à priori* irrefutable, but that the practice of the Community was consistent with it. The *à posteriori* line of demonstration almost at once showed signs of inherent weakness; these rapidly accumulated, till the able and indefatigable counsel for the plaintiffs himself awoke to the rather obvious pitfalls in his path, and appealed to the Court to help him to decide whether he should go on with this kind of evidence. We, of course, could say nothing; and Mr. Lowndes rather abruptly stopped calling his convert evidence. That evidence has been fully dealt with by my brother Davar. With the exception of one or two semi-mythical cases—as, for instance, the Habshis—it must be perfectly plain to every one who heard the evidence given, or who has taken the trouble to study it since, that it had nothing to do with conversion in the sense in which we are asked to deal with that question. Admitting illegitimate children, or, for that matter, adopted waifs—to put the most charitable construction possible on some of the instances—into the Parsi faith and communion, is altogether different from allowing adult conversion from one faith to another. By far the strongest instance was that of Sonabai. And even if we concede that all those who have given evidence about her have told the truth, and nothing but the truth, what does it amount to? She may have been smuggled in infancy into a Parsi family, and brought up as a daughter of the house, duly invested with the Sudra and Kusti, and married to a Parsi. Thenceforward she may have been allowed to worship in the Fire Temples. But who was to know anything about her real origin?

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Having regard to the rest of the evidence, it becomes only too plain that illegitimate children of Parsi fathers were in the same way smuggled into the Community, especially in the mofussil, where the Parsis were scattered and under little or no communal control. If any orthodox Parsi, after Sonabai was grown up, had entertained suspicions, he would probably have quieted them by assuming that she was a natural child of her adoptive father. There was too much dirty linen of this kind, in too many reputable Parsi families, for any one to be over eager to wash it all in public for the sake of a doubtful principle. As to what happened when Sonabai came to Bombay to give evidence, the same considerations apply. I do not doubt she did frequent some of the Fire Temples in Bombay. But, dressed as a Parsi woman, who was to know anything about her? I do not say, of course, that had the priests known, they would at once have turned her out. That would be going too far yet, and begging the question raised by this part of the evidence. For the plaintiffs' case is that because she was a convert, she was allowed free access to the public places of worship. All that I can yet feel justified in saying to that is that I do not see how any one was to know whether she was a convert or not. It would, of course, have been different had she, before entering, announced herself as a Hindu converted to Zoroastrianism. But nothing of that sort is alleged. Suppose we in England were as strict as the orthodox Parsis in Bombay are, how could anyone in, say, St. Paul's Cathedral, know whether every quiet and orderly member of the congregation had the requisite qualifications? I consider the whole of the oral evidence touching alleged conversions in Surat and other places utterly worthless. No doubt, had it been possible for the plaintiffs to prove a well-established custom in conformity with the precepts of their religion, of making converts and admitting them to full religious communion, this would have done them great service. But the failure to prove this does not, in my opinion, do them anything like proportionate disservice. Indeed, I think too much stress has at various times been laid upon usage. I thought from the first that when the plaintiffs had established the propositions,—(*a*) that the Zoroastrian religion

enjoined conversion, (b) that the properties and funds in suit constituted virtually the whole public religious establishment of Zoroastrianism in Bombay, it lay rather on the defendants to show that converts were not entitled to participate in the benefits of that establishment. But the plaintiffs went cheerfully on at once to try to convince us that many converts had, from time to time, in comparatively recent times, been made and admitted to the Temples and Towers. So far from proving anything of the kind, all that that evidence has revealed is that many mofussil Parsis kept alien mistresses, had illegitimate children by them and brought up those childern as orthodox Parsis. Now, the defendants have admitted all along that the bastard children of a Parsi father are eligible and may be admitted to the Zoroastrian communion. So far, then, as the oral evidence goes, the plaintiffs were very soon seen to be beating the air. It is true that this evidence was meant to prove conversions in the proper sense of the word; but no one can seriously contend that it does do so. What the defendants deny is the right of any foreign convert, in whose veins no Parsi blood runs, to become a member of the Parsi community, and as such to share in the benefits of their public religious and charitable endowments. And I cannot say that the oral evidence discloses any instance of the kind contemplated, or any instance remotely resembling it. Again, I must insist upon the distinction between conversion of the kind we really have to deal with, and adoption in infancy. One solid reason is that while, in the first case, all the circumstances would be at once known, in the second, it must always be a matter of real doubt whether the adopted infant was really of foreign extraction or an illegitimate child of a Parsi father. And when we are asked to decide whether converts *qua* converts, as distinguished from bastard children of Parsi fathers, are entitled to share in these trust properties, such evidence as the plaintiffs have offered us—oral evidence, I mean—is seen at once to be utterly valueless. This is not necessarily so when we come to consider the documentary evidence. That stands on quite another footing. But, while I think of it, I will shortly deal with one point which seems to have obtained undue prominence at some stages of

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this long litigation. I may be wrong, but I think the defendants relied, and strongly relied, upon what they called the long, uninterrupted, and uniform usage of the Parsis in India to the contrary. And, speaking here with the utmost deference and respect, I think that that consideration had some weight with my learned brother. With me it carries absolutely none. What is the position? The defendants admit that their religion enjoins the making of converts. But they say that, since the Parsi emigration from Persia some twelve hundred years ago, the Indian Zoroastrians, commonly known as Parsis, have never carried out that religious precept. And they rely on the absence of all conversions, in the proper sense of the word, to prove a custom abrogating one of the fundamentals of their religion. In this connection, reference will probably be made to a case decided by Scott J. some years ago, in which it was held that long-established usage overrode the canon law. The Zoroastrian religion forbade, as the learned Judge held, infant marriage. But the Indian Zoroastrians were shown to his satisfaction to have uniformly practised it. He accordingly decided in favour of infant marriage. That no doubt was a very proper and just decision in the circumstances of the case. But how does it bear on this question? I do not think it has any bearing at all. There is a perfectly plain and intelligibe distinction between a positive or affirmative, and a so-called merely negative custom or usage. The latter is not, in strictness, a usage or custom at all. It is, as soon as the proposition is fairly stated, clearly absurd to reason from mere non-use to the contrary affirmation. The Zoroastrian religion enjoins making converts. But for many years we have not made converts. Therefore, although we still profess that religion and revere all its essentials, we rely on a custom of not making converts, to abrogate the positive commands of our religion. That is what the defendants would say on this point, and it only needs to be stated to be set aside as absurd. There cannot be a custom of not doing a thing. Circumstances may have combined to render it undesirable or impossible, and so a practice may have fallen into desuetude. But as long as the cardinal dogmas of the religion itself have remained unchanged, their efficacy, where, as here it is freely admitted, cannot be

impaired, much less destroyed, by inability or unwillingness to obey them. It is as much the duty of every pious Zoroastrian to-day to make converts as it was in the remote past. As a general abstract proposition, I think that is self-evident.

Now, let us look a little closer into the origin and justification of the alleged negative custom. The most orthodox, the most bigotted, champions of the defendants' case are agreed here. We did not make converts, they say, since we came to India, because we could not. That naive explanation is, of course, perfectly true. But what of its effect upon the use to which this inability is now sought to be put? Look at the facts. The Zoroastrians were expelled from Persia, or fled from Persia, before Mahomedanism. Those who reached India were a scattered remnant. They were only too glad to receive an asylum, to be allowed to live in peace and profess their ancient faith. In such circumstances, the idea of proselytising was impolitic and impracticable. They had enough to do to preserve their own faith, their own little society, against the impact of great surrounding forces (which, if not actively hostile, were not altogether sympathetic), religious and social. The danger which the early Indian Zoroastrians had to face, was the danger of being absorbed into the masses among whom they sojourned: their chief care must have been to maintain the purity of their own faith and the traditions of their own people. Any attempt at proselytism in those days would have invited reprisals. It would have been—regarding them as a body politic—politically suicidal. They were the strangers: they were the weak and broken fugitives. Of course, they did not seek to make converts: all they desired was that their own people should not be converted. Because, under these conditions, there is no trace of any proselytising actively for centuries—until, owing to the influence of many other evident causes, the essentially religious had been superseded by an essentially caste spirit when another and equally potent explanation begins to emerge—no inference can fairly be drawn that a local custom against making converts had grown up.

Yet, in the records and documents before us, there is ample evidence, I think, to show that although no practical effect was

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given to it for reasons of policy, the idea of conversion was quite familiar to the whole Indian Zoroastrian community and frequently formed the subject of elaborate references, hypothetical cases, and controversial treatises. I shall have a word or two to say on that later. I will now dismiss the point I have been discussing with this observation, that while the absence of any well-accredited instance of a genuine conversion has, in my opinion, little or no bearing—as usage or custom negativing the canon law—on the plaintiffs' *a priori* case, the fact may, and probably will, give rise to considerations of some importance when we try to ascertain what the intentions of the founders of these trusts were at the time they founded them. And this clearly invites a precise statement of *the real question we have to answer. That question is not, whether the Zoroastrian religion permits conversion, but whether, when these Trusts were founded, the Founders contemplated and intended that Converts should be admitted to participate in them.* Too much stress cannot be laid on this, because the first question really does not arise, while the second is the only question that does arise on this part of the case. It may at once be said that the Zoroastrian religion does admit—even does enjoin—conversion. That cannot be and has never been categorically denied. It is true that the so-called learned men who have come before us to support the defendants' case have wasted hours of our time in puerile attempts to gloss away the plain letter of the law. But that must be attributed partly to invincible bigotry which proverbially dulls the sharpest wits, and partly to a natural stupidity and want of training in clear thought, which prevented witnesses of the type of Mr. Modi from disentangling his own ravelled thoughts and opinions. Passing over these interminable silly sophistries, and admitting that Zoroastrianism enjoins conversion, we are only one step—and that not, in the result, a very important step—on the way to our conclusion.

Here I will take up another point which occupied days and days, seemingly turning on the connotation of the words Parsi and Zoroastrian, but really going deeper, and touching the root of the whole matter. Put shortly, the plaintiffs say that Parsi is a term of primarily religious connotation, the defendants that it

is a term of primarily racial or tribal connotation. We were referred to dozens of books, not a passage in one of which helped or could have helped to an intelligent solution of the difficulty. Everyone speaking loosely knows the facts, as well as everybody else. When on those facts a peculiarly subtle question arises, which was certainly never present to the minds of any of these amiable savants and travellers, their casual and unconsidered use of this term or of that is in iteslf worthless, while such observations as some of them made upon scraps of custom, never rise above the level of the ordinary traveller's tale. The case had been much better, not to say shorter, without that mass of pedantic rubbish. The Indian Parsis, as everyone admits, came to India from Persia. They were soon locally designated Parsis, because they came from Fars, or Pars, or Persia. Applied to them by the peoples of India, this term simply denoted place of origin. They would not have called themselves Parsis, any more than at first their fellow Persians who had not come to India with them would have called them Parsis. And in this connection it is interesting to note that, in the twenty to thirty passages referring to these properties which have been discussed at great length—early dedications by the Indian Zoroastrians themselves—the word Parsi does not once occur. In all probability, Parsi was a name which no Parsi would have recognised or thought of applying to himself or his people in any special tribal or national sense, when first their exiles landed in India. Then the question arises whether, at that time, it could have any meaning for the community, whether it signified any national as opposed to religious bond? I should say probably not. And it is just here that the significance of the contention dives below the surface verbal definition to the root of the matter, namely, had this body of exiles any common distinguishing bond, marking them off from others and constituting them a peculiar people, except the bond of religion? When they landed in India they were the only people in all that vast and teeming Continent who professed the Holy Mazdiasnian faith. Was it not the profession of, and adhesion to, that faith which consolidated them and made of them a separate people? Or were they a separate people because, in the loose

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geographical notions of those who were not of their faith, they had come from Pars? Looked at from either point of view, they were foreigners. The outsider might have chosen to label them, for purposes of identification, by a term denoting their place of origin. But what did they themselves regard as their bond of union? Was it the religion for which they had fought, and been exiled, to preserve which they had sought refuge in a strange land, just as the Pilgrim Fathers carried their religion to the free air of America; or was it some national or tribal sentiment, originating in and inseparable from the place of their birth? The answer to this, in those remote times, is, I think, clear and certain. What feeling of patriotism could have survived? There are still, and there then were of course, numerous Zoroastrians in Persia. But amongst themselves, Indian Zoroastrians do not call them Parsis, but Iranis. The fact that the Indian Zoroastrian immigrants were, rightly or wrongly, supposed to have come exclusively from the Province of Fars, amply accounts for the fact that the people among whom they settled labelled them Parsis. But we are concerned now rather with the way in which they regarded themselves. They owed no allegiance to any Persian King: they had no special civil or religious rights as Persians: they had no special political characteristics as Persians—less still of course merely as men from Fars. What they did have was a very special, elevated, and ennobling religion—their own exclusive religion as far as India was concerned, in the practice and profession of which they stood apart from all the alien races by whom they were surrounded. They were in much the same case as the Jews—a peculiar people, with no country of their own, no separate national life of their own, owning allegiance to no Parsi or Zoroastrian temporal sovereign, guests on sufferance of races, of peoples, who had nothing whatever in common with their religious organization. They did not know themselves, I have no doubt as Parsis, in any national sense, if in any sense at all, but as members of the Zoroastrian community in India. And if that is correct, does it not follow that the original bond of union between these settlers was the bond of religion, not of nation? Here we must not forget that while there may be a plain absence of anything

like what we understand by National or Patriotic feeling, its place is not infrequently taken by a tribal feeling. And it may be contended that, while the first immigrants of the Zoroastrian faith were united primarily by a common religion, they were also united as a tribe, which was a tribe because it remained the sole repository of the one true faith. And once the tribal sentiment comes into being, it cannot be doubted or denied that in appropriate circumstances, it will develop to a degree of exclusiveness exceeding anything which is truly national. That is a consideration which must not be lost sight of and may be noticed later. But it is probably incorrect to describe the first Zoroastrian immigrants as a Persian or even a Zoroastrian tribe. So far from that being the case, they were the shattered remnants of a great nation. Usually what has had a complete and national organization on a grand scale does not, on disintegration, break up *into* tribes. We have no Greek, or Roman, or Peruvian tribes. But here again it may be necessary to distinguish between the integral factors of the whole national Unit, to see whether the predominant factors are temporal or religious. In the latter case, the break up of the Nation or Empire—its overthrow by infidels or barbarians—might force those who survived and still regarded their old religion as their chief national treasure to carry it off with them, and, where the environment required, constitute themselves a kind of tribal guardians of this sacred possession.

The importance of applying a searching analysis to the use of the terms Parsi and Zoroastrian from the earliest times is obvious. If, as the plaintiffs contend, Parsi means—and never at any time meant anything more than—a person professing the holy Zoroastrian faith, then any person professing that faith, and formally admitted into it, would *ipso facto* be a Parsi and a member of the Parsi Community. Such a person would, under the express terms of the Trust Deed of 1884, be entitled to share in all the benefits of these Trust Properties. If, on the other hand, Parsi means something more than this, if it means one of the tribe of immigrants from Pars, then it follows that mere conversion to Zoroastrianism will not make—say, a Frenchman—a Parsi, or entitle him to be considered a member of

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the Parsi community, or to share in the benefits of these Trusts. In the latter case, the plaintiffs fall back upon another, and really a much stronger, line of argument. They say that the insertion of the words " members of the Parsi Community, etc." in the Deed of 1884 were unauthorized and at variance with the intentions of the founders. I have already observed that those are the words of an English draftsman who could not possibly have foreseen the trouble they were to cause. I have said that they were chosen to exclude converts from, not converts to, Zoroastrianism. And I do not think that, in view of the plaintiffs' second line of attack, they really need the elaborate verbal criticism which has been spent over them. But I do think that the underlying contention is fundamental, namely, that mere conversion makes a man or woman a full member of the Parsi—or call it if you please Zoroastrian—Community, and entitles him or her to all the benefits of the Trusts instituted for the public religious worship of that Community. I think that the words in the deed are not very important, because when we turn back to the earlier documents, we shall find that the Founders of all these trusts never used the word Parsi, but invariably spoke of Zoroastrians, those of the good Mazdiasnian faith, or members of the Holy Zoroastrian Community, and so forth. And the real question is not to distinguish between the modern connotations of Parsi and Zoroastrian, but to ascertain what the founders meant when they dedicated these properties and moneys to Zoroastrians or members of the Zoroastrian Community. Still I have thought it right to point out what I conceive to have been the true origin, connotation, and application of these terms, when they first appear side by side. In my opinion, Parsi was first used by outsiders to describe to each other—by reference to the place of origin—this strange new people. Outsiders could not, of course, have known, and presumably cared little, about the religious tenets of such immigrants. They were foreigners, and they came from Persia. Enough then to describe them as Parsis. Among the Parsis themselves the case was altogether different. They had no reason to be proud of their place of origin, they had nothing to look for from Persia. But they had their religion. They were

first and last Zoroastrians, irrespective of the fact that persecution had driven Zoroastrianism out of Persia. As time went on, no doubt the tribal sentiment grew and throve, and there was super-imposed upon the first simple bond of a common religion, the bond of a common tribal descent. So that, as the community prospered and acquired wealth and importance, it accepted the popular name of Parsis, as though it really were a national or tribal distinction. And along with this secularizing process, went a corresponding weakening of the original religious tie, so that, I dare say, it is quite true to-day to say that it is more accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organization—than it would be to define them as men and women professing the Holy Zoroastrian faith.

And that makes it the more unfortunate that the Trust Deed of 1884, drafted by an Englishman, should be expressed as it is. For, when we come to compare it with the earlier documents, one thing is plain, that whether the defendants have put the right construction on disputed words or not, those words ought not to have been used. It would have been much better to follow the language of the founders at the time they dedicated these trusts to public religious uses. Had that been done, we should have been spared a great deal of refined, and on the whole, profitless argument, and we should also have been spared the useless labour of following counsel through dictionary definitions, and the tales, opinions, and gossip of more or less well qualified savants and travellers.

If I were to find that it was the intention of the founders of these trusts - using the words "for the use of the Anjuman of the Zoroastrian Community" or "for all those of the pure Mazdiasnyian faith," and so on—to include in their benefactions genuine converts to Zoroastrianism, then I should not feel the slightest hesitation in saying that the Trustees had no right to substitute for such words popular language like "the members of the Parsi Community," still less to construe those popular terms in such a way as to exclude persons whom the founders meant to include.

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Before going on further, right into the heart of the matter, I may as well clear away some possible confusion. When we were engaged upon the evidence offered to prove that converts were frequently made, some discussion arose as to what constituted a convert, or, in other words, whether any specific ceremonies were necessary. As the case went on, it became more and more clear to my mind that too much attention was being bestowed upon this point. When it was first suggested, the defendants at once uncompromisingly refused to go on with it. They told us, in the plainest language, that their case was converts or no converts. They did not care to go into distinctions between the making of this or that convert. Conceding that a convert was made in the most approved and perfect manner, they still denied that he was entitled to the benefits of their funds. For my part, I at once, and finally, accept that position. It is simple and reasonable, and it shuts the door on what might have been long enquiries into ancient ritual that appeared to me likely to lead to no good result. It cannot, however, be denied that, while everyone admits that, theoretically, the Zoroastrian religion enjoins the making of converts, the leading "experts" for the defendants, from the time of the Select Committee's report, have endeavoured very strenuously to introduce certain qualifications. The most general of these has, strictly speaking, nothing to do with this point, though it is apt to be confused with it—I mean the condition upon which all these religious leaders insist, that such conversions should not do harm to the good religion. That is an opportunist gloss upon sound religious doctrine which, I think, a sound Churchman would find it hard to defend upon any but the plainest secular grounds of expediency. The fact that it has gained and held the prominence it has throughout this case, is a convincing proof, if any were needed, of how completely the pure religious sentiment has been subordinated to the caste or tribal sentiment of the present day community. Further than this, however, strenuous efforts were made at various stages of the case to convince us, that no conversion could be a real effectual conversion, unless the convert went through certain ancient, ceremonial, and purificatory rites. Now, I do not propose to go

into that question at all. We have here a very simple issue. The defendants say, let your convert be converted and admitted in any way you please; impose upon him the strictest ordeals known to your ritual; and we still say that he is not entitled to share in the benefits of our trusts. That being the defendants' position, it is superfluous to go into the question what constitutes a valid, from the religious stand-point, conversion. But I cannot refrain from making one observation. The extreme orthodox party, who are most jealous of the prestige and exclusiveness of their community, appear to think that were this a question for us to decide, we ought to lay it down that what is called the nine nights' Burushnum ceremony is indispensable. And in adopting this line, I have not the slightest doubt they are honestly actuated by zeal for their religion and the desire to keep it as select and unpolluted as possible. But, surely, they must see that they are taking a mistaken course. If that were an indispensable condition precedent of conversion, the only practical result would be to throw the door open to the lowest, least refined, least desirable class of converts, while shutting it in the face of all reputable persons who, out of sincere conviction, desired admission to the Holy Zoroastrian faith. I find it difficult to believe that any cultured adult foreigner could bring himself to submit to this extremely primitive ceremony of initiation, while certainly no grown cultured woman, who wished to join the Zoroastrian faith, could conceivably be asked to do so. It is only people in the lowest stages of development who could be at all likely to consent to go through such an initiation, and those are precisely the kind of converts zealous Zoroastrians do not wish to make. Everything, therefore, in the record which deals with degrees, if I may so style it, of conversion—every question and answer about what ceremonies are necessary and what ceremonies are unnecessary—seem to me now to be wholly irrelevant. I shall not say another word about them.

I have now to make one or two remarks upon the documentary evidence relating to conversions in the past. We have three leading instances: (1) the Pandits, (2) Akbar, and (3) the Mazagon converts. The first is, more or less, mythical. I do not think I

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can go quite so far as my learned brother in disposing of it. He attaches more weight than I am able to do to the learning and researches of Mr. Modi. I can only say for myself that such additional researches as he made, while the case was in progress, served no other purpose than to convince me that his mind was so obsessed by the cause he had at heart, that he was utterly incapable of reasoning or even thinking correctly. Of course, it is possible, as my learned brother suggests, that these Pandits were Parsis; or that if they were not Parsis, they were good men who had helped the early settlers, and were therefore remembered in their prayers. Those are quite possible explanations. But taking the evidence about them as it stands, I should have been inclined to say that it did show that these Pandits became Zoroastrians. But the time is so remote that the point has little practical importance. It may amuse the curious, it may interest the scholar, but it does not, I think, throw much light on the question we have to answer.

There seems to be a pretty deeply-rooted and widely-spread tradition among the Parsis that some of the Navsari priests went to Akbar's Court and converted him. Whether he really was converted or not has, of course, only a secondary and comparatively unimportant bearing on the present case. But there is a good deal in this connection which does directly bear upon it and is not unimportant. We have to bear in mind that the defendants' case is, that conversions in India, since the Parsi immigration, are altogether unknown. None, they say, have occurred. We have never tried to make any. And the practice, enjoined by the founder of our religion, has fallen into total desuetude. That is one thing, and as a reply to it, the fact that Akbar was converted, if he was, would be a telling reply. But we have to carry this line of opposition further, as I have already indicated, when we come to consider, after preparing the way carefully, the cardinal question: "What had the founders in their minds when they created these trusts?" It would help the defendants greatly to be able to say—as, indeed they do say with dogged insistance—that not only were no conversions ever made, but that the idea of making converts never occurred to any of the Indian Zoroastrian Community,

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and it is in answer to this that the evidence about Akbar is so important. For what do we find? Not only, as I have said, a widely-spread tradition, popular ballads, extolling the achievement as the crowning glory of the Bombay Parsis, but Mr. Mody himself—the most bitter uncompromising opponent of conversion, the root and branch representative of orthodoxy—even he writes an elaborate treatise, or, one might say, almost a book, to prove that the priests of Navsari are fairly entitled to the credit of having converted the Emperor Akbar. After making all possible allowances for priestly *esprit de corps* and for the exuberances of learned authorship, I cannot help thinking that this leaves Mr. Modi in a delicate position. When, from time to time, in the course of his cross-examination, he was confronted with his own written and published opinions, I think he must have bitterly regretted that he ever set up to be a learned author. Not only in this instance, but in many others—right up to the time when the storm broke, Mr. Modi, with guileless indiscretion, went on committing himself to opinion after opinion, from all of which he had of a sudden to resile, with almost startling agility and vehemence! That is one of the many misfortunes of being a popular author. Of course, when Mr. Modi was writing these books and expressing as a recognized sacerdotal authority—these opinions—he allowed himself to be carried away by the impulse of the moment. Engrossed in the fascinating task of flattering the vanity of his co-religionists, he expends his learning and talents in a brochure proving that certain godly priests of Navsari converted Akbar, or, at any rate, if they did not quite convert him, certainly no one else did, and they, at any rate, were entitled to all the glory and credit of the attempt. I will not say that Mr. Modi had not the honesty—because like many other worthy fanatics he is probably as honest as he is perverse on his particular hobby, but I will say that Mr. Modi had not the wit—to take the only possible course by which he could have extricated himself from the embarrassing consequences of his too exuberant authorship with dignity and credit. Instead of telling the simple truth, that he had taken up these subjects without the least idea that they would ever have more than a scholarly and academic interest, and committed himself

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to opinions which, when brought to the test of a shattering concrete case, he could no longer maintain, he made the most pitiable efforts to show that he was perfectly consistent with himself, and that his "Yea" of to-day was his "Nay" of yesterday. I suppose few witnesses of equal eminence, character, and I hope, I may add, sincere honesty, have made a more deplorable exhibition of themselves in the witness-box than Mr. Modi. But the point of all this is, not whether Akbar was or was not converted a century or two ago, but that right up to the present time one of the leading scholars and ecclesiastical lawyers of the Parsi community of Bombay, so far from saying that such a conversion was contrary to the tenets—or, for that matter, the practice of the community—set himself elaborately to appropriate the merit of, let us say, the attempt to convert Akbar to his own co-religionists. Two most important facts emerge: (1) that the idea of converting aliens had not become extinct; and (2) that some, at least, of the religious leaders of the community regarded it favourably within a very short time of this controversy breaking out.

The case of the Mazagon converts is useful for the same purposes. It is, in my opinion, quite immaterial to enquire whether they were converted, or, for that matter, whether they were capable, in the broad general sense, of becoming converts. It may be that they were all illegitimate children of Parsi fathers. What is important and material is, that in their case, in quite recent times, two eminent Parsi Divines engaged in a heated controversy as to what ceremonies were, and what were not, essential to conversion. This shows, again, with convincing clearness, that conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time. Scattered about the voluminous papers which have been laid before us, there is plenty of evidence to support this view. In the case of one alleged disreputable convert, we find the leaders of the community objecting, not on the broad ground that no conversions could or ought to be made, but on the much narrower ground that his conversion had not been notified to the Anjuman or that the proper ceremonies had not been performed. Again we have the Ravayats or *Responsa prudentium.* These are

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answers sent by the heads of the Zoroastrian community in Persia, to questions put to them on points of religious dogma, ritual, and so forth by Bombay Parsis. Both questions and answers show, with unmistakeable clearness, that the question of making converts,—both in the abstract, as a general question, and, more concretely, as to who were fit and proper to be made converts and how they ought to be made—was very much alive over the whole period to which we need confine our investigations. It is true that the Ravayats may not command much respect. That is not the point. The point is that questions were put by pious men about conversion, and answers were received from the heads of the Official Hierarchy in Persia, which most certainly did not deny that conversions could or ought to be made. As to the qualifications, I am not now concerned with them. Nothing in what I may call the official or expert part of the case creates a very high opinion of the intelligence of the good, devout gentlemen who had to some extent the consciences of the Zoroastrian community in their keeping. But it is undeniable that, rightly or wrongly, they, as well as the recipients of the Ravayats, were fully alive to the possibility of conversions; and, with certain reservations of a secular rather than a religious kind, were quite ready to sanction and approve them. In the face of all this evidence, it is idle for the defendants to contend to-day that the idea of conversion, although an integral part of their revealed and accepted religion, had fallen so completely into disuse, that no member of the Bombay Parsi or Zoroastrian community could ever have dreamed of regarding it as a practical and living question.

Before proceeding to develop and explain the final ground on which I rest my conclusion, I must guard against being thought to have looked too much to the consequences of any decision we might give: in other words, to have allowed the expediency to outweigh the rights of the case. *The question, as I understand it, is a simple question, being, in effect whether the defendants have virtually committed the breach of trust, by excluding from the benefits of the trusts persons whom the founders meant to include.* It appears to me, though I express this opinion with diffidence, that any extension or limitation of the

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scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is really a breach—and a very serious breach—of trust. If I am right so far, it would follow—as I held in disposing of the preliminary issue—that this is quite a proper case to be dealt with in a suit under section 539 and that the issue raised is a direct issue of right which will not allow of the introduction of any collateral considerations of what might be profitable and what might be injurious to the community. If the founders of the trusts really meant them to include converts, then the Court would assuredly have to declare that the trusts are meant for converts, even though that decision might have, as was often said in the course of the trial, what the community at large now feel to be disastrous consequences. A Judge has no business with sentiment. He has only to decide upon the evidence before him what are the legal rights in issue. Nevertheless, where, after fully considering all that evidence, the issue remains fairly doubtful where there is no decisive preponderance in the one scale or the other, no doubt a Court might then, and then only, allow its mind to turn to ulterior considerations of the kind I have mentioned. Let me now, once more and for the last time, state the conditions of the problem we have to solve. *We are to ascertain what the intentions of the founders of these trusts were.* We are to put ourselves as nearly as we can in their place, to study the history of the Indian Zoroastrians, tracing the operation of all the influences which must have been brought to bear upon them in their new environment, and more particularly endeavouring to obtain a clear idea of the stage the community as a community of foreign immigrants had reached when these trusts were founded. We have then to study again such documents as are available to us, manifesting in their own words what the founders did intend ; and we have to construe those documents, not necessarily, with absolute verbal literalness, but in the light of contemporary sentiments, as far as that has been made clear to us. It is by this process, and this process alone, I think, that in a case of this kind we can hope to get at, or even near, the truth.

I am quite ready to start with the assumption that the plaintiffs make, namely, that when the Zoroastrian exiles fled from the Mussulman persecution, they brought with them to India, as their common bond—and practically their only common bond—their ancient religion. I will go further and add that, at that remote time they would probably have not only approved but welcomed converts if—to use the phrase that has so often since been repeated—those converts would do no harm to the good religion. They needed help, they needed countenance, they needed, above all things, powerful allies. And no allies were likely to be better disposed to them than such as had been converted to their own faith. They were not then a dominant, but a servient, timid, and scattered people, the mere remnant and struggling fugitives of an overturned kingdom. They were in a strange land, surrounded by strange peoples, professing an unknown religion. In these circumstances, it is easy to understand that while they dared not proselytise, they would have been only too glad to welcome influential converts from Hinduism and Mahomedanism. And this, I have no doubt, is the real explanation of the Pandits and the Akbar story. But two main causes must have been steadily at work to re-mould, and by degrees altogether to transform, the attitude of the community towards conversion. The first, and no doubt the most powerful of these, was the immemorial Indian caste sentiment, with which the whole atmosphere in which they lived was charged. The second was their own growing prosperity. This had a natural and inevitable tendency to reinforce the pressure of the caste principle and to accelerate its growth. Caste must always be more acceptable to a high, than to a low, order in its organization. In proportion as the Indian Zoroastrians were able to compare themselves and their circumstances freely, without apprehension, with the peoples about them with whom they came into the most direct and frequent contact, and from whom they were most likely to receive the infusion of new racial and social strains, it is almost certain that the caste idea must have struck a deeper and deeper root, and coloured all their relations with the indigenous Indians in their neighbourhood. This is not a merely fanciful speculation. I think it is as

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certain a fact as any which could be proved *a posteriori* before us by evidence; and all the evidence which has been laid before us does, in my opinion, conclusively establish it. I cannot too strongly insist upon this substitution of a caste for a religious basis of the organization of the Indian Zoroastrians, because that is the ground upon which *I have, after long and anxious reflection, felt that our common decision can be most securely founded.* While theoretically adhering to their ancient religion and consistently avowing its principal tenets—including, of course, the merit of conversion as a theological dogma, they erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to me to have as distinctly a caste meaning, as essentially a caste connotation, as that used to denominate any other great Indian caste. This, of course, by analogy only; but yet by an analogy that was forced upon the Indian Zoroastrians by the circumstances and conditions in which they found themselves, and by adaptation to which their corporate existence was alone made possible, therefore by an analogy which was both imperative and inevitable. Skipping the intermediate stages, the slow steps of this transforming process—skipping I say, from the beginning twelve hundred years ago to the end to-day, revealed in the defendants' written statement, we need go no further for a complete and unanswerable vindication of the truth of this theory. The first glance at the defendant's definition of members of the Parsi community professing the Zoroastrian faith, satisfied me, once for all, that the basis of the controversy had shifted, and that we were not really concerned with a religious, but with a caste question. If that is so, we must obviously re-adjust our perspective, rearrange the principles applicable, above all prepare ourselves to adopt different criteria in testing the rival cases. The neat logical syllogism with which the plaintiffs opened and upon which they were never able to improve is now seen to require material modifications. It is so—undeniably it is so. The defendants, expressing as we now know the orthodox Parsi view, are prepared to overlook immorality, bastardy—anything but alienage.

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They are ready to admit any and every Irani Zoroastrian about whose antecedents they cannot possibly know anything. But they will not admit the purest, most blameless foreigner, of whose character and conduct they may have the completest assurance. They will admit all the illegitimate children of Parsi parents, begotten of prostitutes or kept-mistresses, but they will not admit the noblest, most exemplary foreigner. Why? Because a foreigner is outside the caste, and caste is an institution into which you must be born. Of the modern Parsi they say emphatically *nascitur non fit.* This is not religion, it has nothing to do with religion: it is essentially distinctly irreligious: but it is pure unadulterated oriental caste. This is so plain that I do not apprehend any unbiassed and competent person would dream of contradicting it. Then, what is the consequence? That, too, is equally plain. We have here, what in its origin was not but has undoubtedly become a caste and a singularly powerful, influential, and, in every sense, a superior caste. And our duty is to find out from the materials before us, if we can the period at which the caste sentiment, as the predominant factor of the organization of the Indian Zoroastrians, substituted itself for the religious sentiment. Put in another way: if, at the time these Trusts were founded, the religious sentiment was still decisively predominant, then I think the plaintiffs' contention would be sound, and for my part I should be disposed to give effect to it; but if by that time caste had so far overridden early religion as to have become the decisively predominant factor of the Indian Zoroastrian organization, we should have to apply quite different criteria, and I think that the defendants' contention would correctly express the intention of the founders. The Indian Zoroastrians had been settled in their adopted country, roughly, for a thousand years before the period with which we are directly concerned. During the whole of that time, they had been exposed to the powerful impact of all sorts of social and religious conceptions, yet they were not absorbed. They emerge to-day as distinctive and peculiar a people relatively to the peoples, infinitely out-numbering them, as when they first landed. They have kept their ancient faith pure and undefiled,

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and it is only in our own day, with the great inflation of their wealth and increased facilities of communication with the western world, that we are able to see any disposition at all to relax the rigour of what must have been throughout that period the strongest conservative caste spirit. Immorality there was, and, in the circumstances, of course must have been; but there was never any open public recognition of the slightest deviation from the most rigid caste principle. It is also to be noted that, however liberal they might have been when first they came to India, the Indian Zoroastrians were precluded—by the very means which they, growing in numbers and influence, adopted for the preservation of their own caste purity—from dissipating and losing themselves in the vast ocean of Hinduism about them. Caste again. Just as now that they have assimilated in every sense the caste idea, and made it the bulwark of their tribal or caste unity, so they were themselves hemmed in by it. They could not have entered the societies about them, because those societies were caste societies and refused to allow anyone who was not born into them within the pale. The very air they breathed for a thousand years was heavy with caste: caste was the condition of all social existence. As a caste, they might hope to preserve and improve their own status; as anything else, they could only expect rapid disintegration, and dissipation on the lowest levels, as unclassified outcastes and pariahs. Yet, of course, there must have been a long conflict between the religious and the caste sentiment, between the claims of religion and the claims of society. They had to serve God, but they also had to serve, to some extent, mammon, or there would shortly have been none of the faithful left to uphold the Holy Mazdiyasnian faith. As we have seen, even to this day, and regarded rather as a theoretical than a practical question, the terms on which conversions are permissible and commendable have been the constant subject of more or less academic discussion. But as a matter of fact, few if any genuine conversions have ever been made; and, so far as our information goes, the conversion of Mrs. Tata is the very first instance of a genuine open conversion of a person in every respect fitted to be a credit and an ornament to the community. I mean, of course, in recent times,

and in circumstances which admit of no doubt or uncertainty. We cannot be sure whether Akbar was converted. In all probability he was not. The Pandits take us back to the dark ages, where myth and legend have free play. All the other alleged instances may be dismissed as cases of illegitimate children or adopted children, or, at the highest, cases of persons smuggled in as converts. Now that the question is fairly brought to the test, where every circumstance, every condition is perfectly well known; where there is not a word to be said against the lady; where she was openly and with great pomp and ceremony received into the communion by one of the leading high priests of Indian Zoroastrians, what do we find? All the learning which used to be spent on the academic discussions I have referred to is thrown to the winds, and the very professors and doctors—who were ready enough when the question was abstract, and in the air, to allow that conversion under certain conditions and with some reservations was commendable—are unanimous in withstanding the attempt to give this new convert full rights of religious communion and sepulture. All this is mere frippery and shallow sophistry. Either admission can be obtained to the Parsi community by conversion, or it cannot. It is simply puerile to pretend, for instance, that the admission of such a refined and cultured lady as Mrs. Tata would do harm to a religion which opens its doors to all sorts and conditions of bastard children. It is still stupider to resist her claims on the ground that she was not duly admitted. She was publicly admitted by a person corresponding in our religion, let us say, to the Archbishop of York: every one knew of it: leading citizens, English as well as Parsi, were invited to be present at the ceremony. The priest who ought to know says that she was fully and regularly admitted. I really had no patience with the quibblings of the learned men who spoke for the defendants, and, while evading the plain direct point, spent hours of our time in trying to reconcile their own absurdly irreconcilable inconsistancies. The real, the plain point was simply this, that notwithstanding anything in their sacred writings, notwithstanding their own published utterances to the contrary, notwithstanding the Ravayats, notwithstanding

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everything, they took their stand not on religion but on caste, and when it came to a practical test, denied that anyone could become a member of the Parsi community except by birth. That in a nutshell was the whole case for the defendants, and exasperatingly though it was presented to us, curiously enough, in the end, I think, that it is a good case and must prevail.

In saying this I must be understood to limit myself strictly to the Trust Funds and Properties, which are the subject-matter of this suit. I do not want to make any general pronouncement or to go one step further than I am obliged. Perhaps, then, I should say that I think—as I shall now shortly, and I trust conclusively, show—it was not the intention of the founders of these Trusts to extend their benefits to anyone who was not in the most rigid caste sense a Parsi, that is, born into the community of the Indian Zoroatrians and born of an Indian Zoroastrian father.

Let us now briefly examine the contemporary documents relating to the immoveable properties, the language of which afforded Mr. Lowndes materials for his most strenuous, impressive, and forcible arguments. These have been set forth in my brother Davar's judgment, and I shall therefore confine myself to what appears to me to be pertinent comment upon them. They are twenty-eight in number. I will just quote the material words of each: (1) "Need of another Dokhma in consquence of the great rise of the Zoroastrian population of Bombay." (2) "The entire Zoroastrian Anjuman." (3) "For the people of the Zoroastrian Community." (4) "For the use of the people of the Mazdiasni religion." (5) "For the people of the Mazdiasni religion." (6) "In accordance with the tenets of the Mazdiasni religion," by the "people of the Anjuman of the Mazdiasni faith." (7) "Persons of the Mazdiasni religion." (8) "Whole Anjuman." (9) "People of the Holy Zoroastrian Community of Bombay." (10) "People of the Zoroastrian Community." (11) "Dasturs and Mobeds and Hurbeds and Behedins of the Mazdiasni religion of the Holy Zoroastrian Community." (12) "Dasturs and Mobeds and Hurbeds and Behedins of the Mazdiasni religion of the Holy Zoroastrian Community." (13) "In the service of the entire Zoroastrian Anjuman of Bombay." (14) "To the Anjuman for the use of all

Zoroastrians." (15) "People of the *firka* of the pure and the best Mazdiasni religion." (16) "By the people of the whole Zoroastrian Anjuman." (17) "Holy Zoroastrian Community of Hindustan." (18) "For the use of the Zoroastrians." (19) 'For the use of the people of the Mazdiasni religion.' (20) "For the use of the Anjuman of the Zoroastrian people." (21) "Anjuman of the Zoroastrian Community." (22) "For the use of the Zoroastrians on the land of the Anjuman." (23) "Khas-o-Am of the Zoroastrian Anjuman." (24) "For the use of the Zoroastrian Anjuman." (25) "Relating to the Zoroastrian Community." (26) "For being used by the Zoroastrian Anjuman." (27) "For the entire Zoroastrian Community." (28) "By the entire Zoroastrian Alum (world)." It is evident that several of these are couched in the most general terms, and it is principally on these that the plaintiffs rely. Others, and a larger number, contain expressions indicating that the caste spirit was active, such as the Zoroastrian community, and the constant reference to the Anjuman. But in not one do we find the word Parsi. In their own solemn religious utterances, the Indian Zoroastrians had not, even so late as this, thought of designating themselves, or their religious communion, by the popular caste appellation of Parsi. Such a term in such a connection would probably have had no meaning for them. On these expressions the plaintiffs have argued that the various religious endowments were clearly intended by the founders for all genuine professors of the Holy Zoroastrian or Mazdiasni faith. And there are among these extracts some that certainly support that contention. Here it is said: "We know that the Holy Mazdiasni religion recommended the making of converts: we have before us contemporaneous proof of what the founders of these Trusts really meant. They say that the trusts are created, not for born 'Parsis'—a word with which they were not familiar—but for all members of the Holy Zoroastrian Church. And since that Church enjoined conversion, they must have contemplated the extension of those benefactions to converts, who, properly admitted, would, of course, profess the Holy Mazdiasni religion." That is a reinforced form of the original syllogism, which I own carried the very greatest weight with me throughout the entire case,

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Still, it will not do to be carried away by one or two isolated phrases. We must first appreciate the collective effect of the whole, if we are to gain anything like a correct insight into the minds and intentions of those who used them. And in doing this, I think that it may fairly be said that the cumulative effect of all these expressions is rather in favour of the view, that the prevalent idea at that time was to provide the community with suitable places of public worship and burial and to place those Institutions under the control of the communal Anjuman. This term Anjuman, with its allied notion of "panchayet," deserves attention. In the first part of his fine judgment, my learned brother has traced these Institutions from their birth in India to the period where one of them, at any rate, vanished. Both, however, suggest an assimilation of the prevalent Indian sentiments relating to caste and the management of caste and communal affairs. The Anjuman is the tribal or caste body politic. Amongst Mussulmans, whence the term must come, there is, of course, strictly speaking, no caste in the Hindu sense, and the Anjuman came to be identified with representative committees of responsible elders and so forth. But it implies control by the whole body, when used as it is used in these inscriptions and documents. And in Western India, even Mussulman ideas have been deeply tinged by infusion from the customs and sentiments of the Hindu population. It is not therefore in the least surprising that the Zoroastrian Anjuman should have given birth to the Parsi Punchayet, the latter of course being essentially a caste institution and working the development of the caste sentiment. The question is how far—at the date of those foundations, say, 150 years ago—the caste had superseded the early religious sentiment? We are not now dealing with an antiquity so remote that all events and personages in it are obscured by the haze of vast lapses of time. The Community of 1750 could not have been so every different from the community of to-day. The sentiments which animated it are probably very much the same—substantially as the sentiments which animate the Parsi community to-day. If anything, we should ordinarly expect the latter to be more, not less, liberal. Of course, it is not safe to generalize too rashly on such points. All sorts of conflicting

interests may have come to the surface: changed conditions may have given birth to changed notions of policy. But if I am right in believing that, long before the foundation of these trusts, the Parsis had virtually become a caste, saturated with caste prejudices, then it is certain that natures reared in that atmosphere do not change rapidly. It takes long periods, and the continuous pressure of an altered environment, to eradicate the bigotry of caste. Two hundred years ago, the Indian Zoroastrians, though by no means as advanced in culture and wealth and status generally as they are to-day, were still a people who might well be proud of themselves. They still retained, in all its purity, the religion of their fathers; they commanded universal respect as honest, law-abiding citizens; above all they prided themselves on the "theoretical," at any rate, purity of their morals and the uniform thrift of their people. It has often been said that in no other Eastern community are so few beggars and prostitutes to be found. In a word, they had by that time very good reason to respect themselves as a community, to be jealous of themselves as a caste, and to dislike intensely the idea of contamination by too close social intercourse with the inferior classes of the Hindu population. Such I take to be an indisputably true picture of the Indian Zoroastrian community about one hundred fifty years ago. And the question is, whether leading men of that community, men of conspicuous piety, would have intended to open the doors of their churches and burial towers to any and every one who might choose, for whatever motives, to profess the Holy Zoroastrian faith, and had money enough to get some venal priest to formally admit him into the fold. It is not as though the admission of converts could have been effectively regulated by the sense of the community. It has become abundantly plain in the course of this enquiry that the priesthood have practically a free hand. And while, as a body, they probably do not compare unfavourably with the priesthood of any other great religion, it cannot be denied that there are many among them who would not hesitate to sell their priestly functions to any good bidder. My learned brother has dwelt forcibly on this aspect of the case. And no one—while we have little or nothing to do with

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it as merely revealing a possible consequence of deciding in favour of converts—can deny it has a direct bearing upon the central question, what was in the minds of the founders of these trusts? Would they have been blind to such a vital consideration? Would they, proud of their people, religious community, caste, call it what you will, have left it at the mercy of any unprincipled priest? How strongly the cast sentiment has entered into—how completely it has obliterated—the original religious sentiment in this important matter, has been made plain to me over and over again in the course of this suit. We learn with what fierce jealousy the Indian Zoroastrians observe the complicated rights of burial, or rather exposure of the dead on their Towers. We hear of priestly, and for that matter family, restrictions, which are virtually universal in many of the smaller details of life, as well as at the celebration of its great events. And all these are clearly the growth of a highly-developed caste spirit. Looked at from this and not from the purely religious point of view, it would be sacrilege—the worst kind of profanation—to allow any Juddin—that is, a person of another religion, literally but really born outside the caste—to participate in the most preliminary of the death ceremonies. It would undoubtedly horrify the orthodox Indian Zoroastrian to allow such an one in his Fire Temples. It would be idle to tell him that he had been formally admitted to the Holy Religion. That might appeal to his reason, but his caste instincts would at once rebel. To test this we have only to suppose that, instead of a well-bred cultured European lady, the proposed convert had been a Bhungi. No amount of religious conviction, no sincerity of belief, however profound, could, in the eyes of the Indian Zoroastians—brought up as they have been for generations under the influence of caste prohibitions—purge such an one of the inherited taint of his foul caste, or make him an acceptable fellow worshipper in their Temples. Of that no one who has heard the evidence in this case, who is acquainted with the sentiments of even the most liberal and advanced sections of oriental society, could entertain the smallest doubt. It seems to be reserved for the Christian missionary alone, in this country, to invite into his communion the lowliest, the most

despised, the very scum of Eastern humanity. But, then, the Christian Church has never come under the dominance of caste. It developed in the West, among free peoples, and it has remained—in its proselytising enterprises, at any rate—truly Catholic. The same cannot, of course, be said for Zoroastrianism. And the Bombay Zoroastrians are the last people in the world, it would appear, to put forward any such claim. The furthest that the most liberal of them seem disposed to go is that, if undesirable converts of that kind must be made, they must be segregated, for purposes of worship and burial, from those who are born into the faith. In other words, while conversion, as a religious dogma, is not denied, it, as every other social and religious observance, must fall under the rigid regulation of caste. It may, of course, be said that these are the sentiments of to-day, while we are to ascertain the sentiments of one hundred fifty years ago. In the interval, the community has expended, has flourished, grown wealthy, and politically influential. There are many reasons to-day, which did not exist a century-and-a-half ago, why the Zoroastrians of Bombay should wish to keep themselves to themselves and sternly repel any external invasion. To some extent, that is of course true. The learned gentlemen who gave evidence for the plaintiffs afforded some examples of the lengths to which partially informed opinion will go in the direction of social precaution. We were told, amongst other things, that one reason why the conversion of aliens to the Holy Zoroastrian faith was no longer permissible in Bombay, if it ever had been was that unscrupulous European women would pretend to be converts, in order to marry eligible Parsi young men, and so there would not be enough husbands to go round. The Parsi maidens we were told would be deserted; and one high priest even assured us that, owing to this lamentable tendency, he knew of a Parsi virgin of forty still looking out in vain for a husband. This is the merest absurdity. No doubt, the point of view shifts with circumstances. What might have been thought desirable in a struggling and not too influential community, might be thought very undesirable after that community had progressed and stepped into the first rank. And I am quite sure that the good men who founded these Trusts, even if they had, when the matter

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was fully laid before them, declared that they did not wish them to be available to converts, would never have had recourse to such unsubstantial reasons in support of their decision. Let us now suppose that these men when they were founding the trusts had had the question fairly and squarely put to them: "Do you intend that these Towers of Silence and these Fire Temples shall be used by converts as well as members of the Holy Zoroastrian community? What would their answer have been? We have abundant evidence to show with what disapproval the better class—the class from whom these founders came—regarded the lax morals of the Mofussil Parsis. It was not only because that conduct was irreligious—though that, too, doubtless weighed with them—but because it was lowering to the status of the community. Keeping Dubri mistresses and having Dubri children, was not only shocking to the correct Zoroastrian, as a marital offence—an offence, too, against his religion—but because the Dubri woman belonged to a very low caste. It may be very well doubted whether at that time the same disapproval would have been extended to intermarriages —real marriages—with men of equal or superior rank. The early history of the Parsis, or rather the Zoroastrians, shows conclusively that such marriages often did occur, and that no one dreamed of stigmatizing them as religious sins. But that was before the community had become a caste, while still the Zoroastrians were a nation; and the alliances were with people of their own or higher rank. At the time, however, that these trusts were founded, it was hardly likely that any Parsi would intermarry with superior races, while there was a constant and growing danger that he might intermarry with inferior castes. Probably the founders of these trusts would at first have replied, as all the priests and doctors have consistently replied: "By all means let converts use our Endowments, if they are converts who will be a credit to us." But that would not have done. It would have had to be explained to them that they must admit all or none. And they would instantly have realized that for one Akbar who was ever likely to become a convert, there were a hundred Dubras or Bhungis. And with that terrible possibility before their eyes, no one can doubt—I am sure

that I do not doubt—that they would unhesitatingly have replied : "No converts, then, on any terms."

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As helping us to a better understanding of the mental attitude of the men who used the expressions we are considering at the time they used them, we may turn with advantage once more to the undoubted fact that, whether the Zoroastrian religion recommends making converts or not, the circumstances in which the Zoroastrian refugees found themselves on reaching India put all idea of giving practical effect to any such recommendation out of their heads, so that, as time went on, except as a theological dogma, and in a few cases, like those of the Pandits and Akbar, genuine conversion, as a religious duty, had fallen into such complete desuetude, and any variant of it that did come up for discussion had so invariably turned upon the moral expediency of the particular case, that moral expediency, again always resolving itself into ultimate caste considerations, and the instances being almost invariably of extremely undesirable persons, whom the better sort wanted to exclude, that it may quite fairly be argued the use of very general language, which, by its terms, taken literally, would seem to include, all converts, does not necessarily mean that any such notion was definitely before the minds, or much less intended by those who used that language. When, 150 years ago, leading members of the Indian Zoroastrians talked about dedicating Temples and Towers to the Zoroastrian community, or for the benefit of all of the Holy Mazdiasni faith, we must reflect how those ideas presented themselves to the speakers. For many hundreds of years the Zoroastrian community in India had meant one thing—and one thing only to them—their own select people. And the Holy Mazdiasni faith, as far as they knew, was professed by that select body and by them alone. The religion—originally the principal, if not the only social and tribal bond—had long since been converted also into a distinctive caste badge. Being a member of the good religion was doubtless at that time synonymous with being a member of what we may now, I think, fairly call the Parsi caste. The subject of conversion was unquestionably, as a theoretical dogma, recurrently in the air, but it was growing constantly to be more and more imperatively conditioned by purely caste consi-

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derations. As I have said, I think it likely that had these founders of the trusts been asked whether they were prepared to accept converts, they would have replied that they would not object to duly-accredited and approved converts. And what they would have had in mind was a regular convocation of Elders on each case as it arose, to decide whether the person proposed was eligible and desirable, much as members are admitted into an exclusive club. Had they been further told that this would be impossible, that they must choose between accepting any convert or none—that accepting any meant accepting all converts indiscriminately; and had it been further pointed out to them that the probabilities were immensely in favour of hundreds of the most undesirable people, for every single desirable person, offering themselves for conversion; looking to the constitution of the society, its attitude towards Dubras, its attitude towards the surrounding inferior Hindu castes, I cannot doubt for a moment that they would have unhesitatingly said that, whatever might be the abstract religious dogma, they meant *their* benefactions for their own people, the members of the Indian Zoroastrian community, that is to say, those who, as in the case of every other close caste, were born into it. It is difficult for any Englishman—probably impossible for any English Churchman who has not been for years in close intimate contact with Orientals of all religions and castes—to put himself into the place of men situated as the founders of these trusts were situated. We must find it hard to realize or even faintly appreciate the sense of repulsion which orthodox Zoroastrians would feel at the bare idea of their places of communal worship, much worse their sacred Towers of Silence, being invaded by persons whose very proximity in the streets, or on the thresholds of private dwellings, had for generations been regarded as a contamination. No English Christian would think of regarding a place of worship desecrated, because a genuine believer happened to have come from a base trade; still less would he deny to such an one rites of Christrian burial in a Christrian cemetery. But in the Zoroastrian community, the conditions are widely different. There, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound

up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical; and there is only this difference, that a modern orthodox Parsi would shrink with infinitely greater loathing and horror from admitting to his Temples and Towers a person whose presence was a social contamination, than he would from admitting him to his table and the freedom of his family circle. No respectable Parsi would dream of eating with, say, a Bhungi. It would seem to him utterly impossible to do so; it would defile him in what is really as an essential caste sentiment. But that defilement would infinitely be worse—more irreparable and far reaching—if it touched the sacred sources of the whole communal and caste existence—the ancient places of pure religious worship.

Now, if we were to hold upon the strength of scattered phrases irrespective of the conditions of the community, leading members of which used them that the original Zoroastrian religion enjoined the making of converts, and therefore since these endowments were dedicated to the use of all of the pure and good faith, therefore they were open to all converts indiscriminately, we should undoubtedly profoundly shock the sentiments of the whole community. There might be a constant stream of the lowest and most despised persons pouring into it, and in the estimation of all good Zoroastrians polluting the Temples and Towers. We should be inviting the immediate disruption of the whole ecclesiastical establishment. Genuine Zoroastrians would feel that the venerated seats of their ancient religion were desecrated past redemption, and no longer fit to be used by those of the old faith. Their position in this matter seems to me quite simple, and, in view of the considerations I have been discussing, quite intelligible. They say, we do not object to proselytising fanatics—if there be any such among us—making converts to Zoroastrianism. But if they do, they must provide separate Temples and Towers for their use. These are our Temples and our Towers. Never since their foundation have they been desecrated by the admission, to our knowledge of a single person who was not one of us—that is, of our caste, born into it, and brought up in it. And it has grown to be an integral part of our religious and social organization that these Temples

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and Towers shall for ever remain consecrated exclusively to the religious and ritual uses of such persons, and such persons only. Destroy that belief, and you sever all the bonds of our caste cohesion: we must cease to be what we have so long-prided ourselves on being—a chosen and peculiar people.

"That is what, in effect, we have been told over and over again in the progress of this case: and it does, I believe, fairly represent what the founders of these benefactions really felt, and would have unqualifiedly expressed, had they been called upon categorically to do so. They did not guard against the present peril, because it never occurred to them. This, shortly, is the ground upon which I have come to the conclusion that, while the Zoroastrian religion certainly did originally recommend making converts, it was not the intention of the founders of these Trusts to throw them open indiscriminately to any and every convert. And for the purposes of this case that is tantamount to holding that they did not intend to throw them open to any converts.

We have heard a great deal of the usages and tenets of the religion as practised at the time these trusts were created. What I have said—though by no means an exhaustive statement of all the case contains on this head—will, I think, suffice to show how I have considered and disposed in my own mind of that line of reasoning. I therefore concur with my learned brother in his conclusion on the second, as well as upon the first, part of the case. I concur with my brother Davar's formal findings on the issues, unless any modification in respect of any one of them may be clearly required by what I have said in the foregoing judgment, and with the exception of his finding upon the preliminary legal objection. Upon that, as I have stated at length, I have felt myself forced to an opposite conclusion. I hold that the suit lies as framed for the particular relief, and that that relief could be granted to the plaintiffs in the suit—if to such relief or reliefs they were found entitled.

I entirely agree with the order which my learned brother proposes to make for costs, particularly that the plaintiffs should, under the circumstances of the case, have all their costs out of one or more of the trust Funds.

I cannot close without expressing my deep sense of gratitude and obligation to my brother Davar for the immense amount of labour he has spared me. All the drudgery of the case fell on his shoulders. I was in the relatively favourable position of an undistracted listener. He has laboured unremittingly, not only to make the record a full and true record of every detail, down to the minutest that either party submitted to us, but afterwards to co-ordinate the unwieldy mass of materials thus collected, to shape every part of the case, and to bring every important point with all the materials relating to it, before my mind, often back to my recollection. In the constant, often long and arduous, discussions we have held orally and in writing over points upon which we doubted whether we agreed, my brother Davar has shown the most consistent and conspicuous courtesy, patience, and open-mindedness. And it is a source of the deepest gratification to me that, after all, I have found myself able to agree with him on every main point. My acknowledgments, too, like his, are due to the eminent counsel, who, with so much industry, brilliantly presented the opposing cases, as ably, as thoroughly, and as worthily as the great occasion demanded.

Attorneys for the plaintiffs: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

Attorneys for the defendants: *Messrs. Craigie, Lynch & Owen.*

B. N. L.

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*Note.*—Italicised words or sentences, occurring in quotations from treatises or documents and embodied in the judgment of Mr. Justice Davar, 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.—Ed.