

THE PARSI PUNCHAYET CASE.

In the High Court of Judicature at Bombay.

SUIT NO. 689 OF 1906.

SIR DINSHA MANOCKJI PETIT AND OTHERS *Plaintiffs.*

vs.

SIR JAMSETJI JEEJEEBHOY AND OTHERS *Defendants.*

JUDGMENT

OF

THE HON'BLE MR. JUSTICE DAVAR.

Delivered Friday, 27th November, 1908.

SUIT No. 689 OF 1906.

SIR DINSHA MANOCKJI PETIT AND OTHERS' *Plaintiffs.*

VS.

SIR JAMSETJI JEEJEEBHOY AND OTHERS *Defendants.*

Coram: Davar J.

JUDGMENT.

THE seven Plaintiffs in the suit are members of the Parsi community of Bombay. They profess the Zoroastrian religion. The five Defendants are also members of the same community and profess the same religion.

The Parsis in India are descendants of a body of Persians who were, about 1200 years ago, compelled to leave their Fatherland owing to religious persecution at the hands of the Mahomedans. This body of Persians, after taking refuge in Kohistan and afterwards in the Isle of Ormus, eventually made their home in India, and at the present time Bombay is their principal headquarters.

Since their advent into India they have continued to follow the religion of their forefathers, and wherever they have settled in any appreciable numbers they have built for themselves Atash Behrams, Agiaries, and Dare Mehers for the performance of their religious worship and the observance of their religious rites and ceremonies and erected Dokhmas for the disposal of their dead according to the dictates of their religion. Their places of worship are ordinarily spoken of as Fire Temples and their Dokhmas as Towers of Silence.

The word Parsi derives its origin from Pars or Fars, a province in Persia, from which the original emigrants came to India. Wherever they have settled, whether in large numbers or small, they have always formed a community of their own, and we have thus the Parsi community of Bombay, of Surat, of Navsari, and several other places all over India. In the present case the Court is concerned with the Parsi community of Bombay.

No authentic record exists as to when the Parsis first came and settled in Bombay, but it seems fairly well established that a small number of them were settled in the Island some time before it was ceded by the Portuguese to the British as a portion of the dowry of Princess Catherine on her marriage with King Charles II in 1668. They continued to inhabit the Island of

They say that their predecessors in office had a right to fill in vacancies and that they had continued to do so for over fifty years, and they submit that this arrangement has worked satisfactorily for all these years and that therefore it should not be disturbed and no scheme should be framed either for the appointment of Trustees or for the administration of the Trust Properties and Funds. This is the first branch of the case.

The other branch of the case involves issues of far greater importance and has caused considerable stir and excitement amongst the Parsi community of Bombay. The Plaintiffs say the Zoroastrian religion not only permits but enjoins conversion of aliens to that faith. They claim that certain of the Properties and Funds now in the possession of the Defendants were originally dedicated by the Founders or Donors for *all* Zoroastrians, and that all Zoroastrians, including those who originally were born in another faith but are subsequently converted to Zoroastrianism, are entitled to the use and benefit of those Funds and Properties. Amongst the Properties the Plaintiffs pick out as being intended for the use and benefit of all Zoroastrians, including converts to that faith, are the five Towers of Silence at Malabar Hill, certain Sagdis and Nasakhanas erected and maintained in connection with those Towers, and the Godavara Agiary. They also claim that such converts are entitled to participate in and have the benefit of the "Fund for carrying the dead bodies of all Zoroastrians to the Towers of Silence." They further contend that the Trust Deed of the 25th of September, 1884, mentioned in their plaint either contains wrong declarations of Trust or that the interpretation put by the Defendants on those declarations is wrong, and they pray for a declaration by this Court that the Trusts contained in that Deed, so far as they relate to at least three Dokhmas, Sagdis, and Nasakhanas, are *ultra vires* and void in so far as they differ from the original Trusts, and they ask for the ascertainment and declaration by the Court of the real Trusts on which these Properties are held.

The Defendants deny that the declarations of Trusts contained in the Deed of 1884 are either *ultra vires* or void, and they further deny that such declarations of Trusts differ from the original Trusts. They contend that the intention of the Founder or Endower of the Trust in respect of each one of the Properties and Funds was to found or endow such Trusts for members of the Parsi community professing the Zoroastrian religion and not for persons converted to that faith—such converts never being at any time within the contemplation of such Founder or Endower. The Defendants have contended before us that although the religion promulgated by Zoroaster contemplated conversion, the Parsis ever since their settlement in India

have never sought or encouraged the conversion of aliens to their faith and that the persons who founded or endowed those religious institutions or contributed funds for religious and charitable objects never contemplated the possibility of any outsider being converted to Zoroastrianism and claiming the benefit of those Institutions or Funds. They maintain that even though a property or a fund may be endowed or dedicated in general terms for the benefit of Zoroastrians, Mazdyasnans, Zarhosti Anjuman, Zoroastrian Anjuman or other similar terms, such terms, within the meaning and intention of the Founders, included only members of the Parsi community professing the Zoroastrian religion and that a person born outside of the community but converted to Zoroastrianism was never within the contemplation of the Founders of these religious charities. In paragraph 14 of their written statement the Defendants state in explicit terms who are regarded as members of the Parsi community and as such entitled to the benefits of the Charitable Funds and Institutions founded and endowed by the various members of the community. They are, in the first instance, the descendants of the original Persian Emigrants who came to India in consequence of Mahomedan persecution and who profess the Zoroastrian faith, and secondly, the descendants of Zoroastrians who remained in Persia but who come and settle in India either temporarily or permanently and profess the Zoroastrian faith. This latter class are commonly known as Irani Parsis. In addition to these two classes they say an exception has been made in favour of a third class of persons and these are the children of Parsi fathers by alien mothers. Though exception in favour of this class has been made, they say, since ancient times, such exception has not been viewed with favour by the Parsi community, and the Defendants add that they have not disputed the right of such offsprings of Parsi fathers in deference to the usage obtaining from ancient times. This class, however, is very very limited.

These, shortly, are the contentions of the parties to this suit, which is a suit under Section 539 of the Civil Procedure Code, the Advocate General's consent having been obtained previous to its being filed. After the suit appeared on my Board, an application was made to me by the Plaintiffs' Counsel, under Rule 63, that I should report to the Chief Justice that the suit could be more advantageously heard by a Bench of two Judges. This application was not opposed by the Defendants' Counsel. The object of the application was to avoid the expense and delay of an appeal in this country and to take the case straight to His Majesty's Privy Council if the two Judges hearing the suit agreed in their judgment and any of the parties desired to appeal against that judgment. Having regard to the importance

of some of the issues involved in the case, I welcomed the suggestion that the suit should be heard by two Judges and accordingly reported the application to the Chief Justice, who was good enough to associate with me my learned brother Mr. Justice Beaman to hear the case. Before I proceed further, I feel it my duty to record here my grateful appreciation of the valuable help I received from my learned Colleague in dealing with many complicated questions of admissibility and relevancy of the evidence tendered before us during the prolonged hearing of this suit, and I regard his association with me in the trial of this suit as a peculiar privilege. It is, I think, also necessary to state here that, in dealing with the questions of admissibility and relevancy of the evidence tendered before us, we have construed the section of the Evidence Act and Rules of Evidence in a spirit of liberality—admitting in most cases the evidence tendered—as we felt that where the case is to be finally dealt with by a Tribunal in another country it would be both safer and wiser to record the evidence and leave it to the final Tribunal of Appeal to accept it or reject it as may appear right to the Court.

Although at the trial a great many issues were raised and a great many points of more or less importance were discussed before us, it appears to us that there are two main questions in the case :

(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 ;

and

(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.

In the Defendants' written statement, in paragraph 4, it is contended that it was not alleged that the right of the Plaintiffs in many of the properties mentioned in the plaint has been denied and therefore they submitted that the plaint disclosed no cause of action in the Plaintiffs. This contention was elaborated by Mr. Strangman in the course of his argument. It was argued by him, and I think with great force, that the Plaintiffs are all admittedly members of the Parsi community professing the Zoroastrian religion and that their rights in the participation of all the benefits of the Institutions,

Properties, and Funds in the possession of the Defendants have not at any time been questioned, and that therefore they were not entitled to maintain the suit so far as the second branch of it was concerned. The force of this argument will become clearer when the circumstances under which the suit came to be filed are taken into consideration.

In the year 1903, Mr. R. D. Tata, the 6th Plaintiff in the suit, married a French lady in Paris. He brought her to Bombay and got one of the Shenshai High Priests, Dastur Kaikhooshroo Jamaspji, to perform the Navjot ceremony, thereby investing her with Sudra and Kusti—the sacred shirt and girdle which are the outward symbols worn by those who profess the Zoroastrian religion. He then went through with her the marriage ceremony, according to the rites and forms observed by Parsis. He then claimed that his wife had become a Parsi, professing the Zoroastrian religion, and that as such she was entitled to participate in all the charitable and religious Funds and Institutions of the Parsis. He claimed that she was, amongst other things, entitled to enter all Fire Temples and on her death she was entitled to have her body taken to the Towers of Silence. This created great uproar amongst the bulk of the Parsi community. Committees were appointed, public meetings were held, and it was eventually resolved by the Parsi community in a general meeting assembled that the lady was not entitled to the privileges or rights that were claimed on her behalf. The Defendants issued certain notifications which led to correspondence between the Solicitors of Mr. Tata and his friends on the one side and the Defendants on the other. This correspondence is annexed to the plaint and marked A and is Exhibit A 78 in the suit. This correspondence took place in May—June, 1905. This suit was filed in November, 1906. It appears that prior to the filing of this suit some members of the Parsi community had been regarding with disfavour the practice of the Trustees filling up vacancies in their ranks. The other Plaintiffs in the suit appear to be some of the members of the community who had doubts as to whether the Defendants were validly appointed Trustees and had a right themselves to fill up vacancies. They appear to be personal friends of the 6th Plaintiff and probably sympathised with him in the unfortunate position in which his wife was placed. They joined hands with him in filing this suit, which has for its double object the ascertainment of the real position of the 6th Plaintiff's wife and of the Defendants.

After the investiture and marriage of Mrs Tata, a Rajput lady, in a much humbler sphere of life, who had children by a Parsi, got herself similarly invested with Sudra and Kusti. The whole fight, so far as the second

branch of the case is concerned, is in connection with these two ladies—really speaking, the fight was on behalf of the French wife of the 6th Plaintiff : the other lady we heard very little of and was merely mentioned incidentally. Mr. Strangman's contention before us was that the Court ought not to go out of its way and at the bidding of people whose rights are not challenged or disputed ascertain and define the rights of people who are not before the Court. He contended, and I think rightly, that the decision in this suit would not bind the two ladies ; and that if the Defendants succeeded in their contentions on this head, there was nothing to prevent any one of these two ladies filing another suit against them. He submitted that these two ladies, who were the only people whose rights were denied, were not parties to this suit, and we should decline to adjudicate upon their rights in their absence and behind their backs. As I have observed before, there appears to me to be a good deal of force in these arguments of the Defendants' Counsel and they demand very careful consideration. These contentions, however, affect the second branch of the case only, and it is desirable to defer discussion in respect of these contentions till we come to consider that part of the case which relates to the rights of converts.

At the hearing before us, in addition to the rather lengthy oral evidence called by the parties, a large number of documents have been put in as Exhibits and a great number of passages were read from various books—such as Dictionaries, Histories, Encyclopædias and Journals of various Societies. Also, we were given the benefit of the impressions of various travellers who had visited India and Persia at different times. I do not think that any of these have been very helpful in forming our opinions on the various questions that were argued before us. The statements made in books of Travels were in many cases hopelessly inaccurate and misleading. For instance, in two of the books from which passages were read to us for our edification, there were fanciful pictures of the Towers of Silence with roofs at the top where four full length corpses were being shown in the act of being devoured by vultures. In another book, written by a Captain Alexander Hamilton, at page 161, I found this passage :—

They (*i.e.*, the Parsis) watch the corpse all day till one of the eyes is pecked out. If the bird begins with the right eye, they rejoice and feast; but if with the left they mourn and lament for the ill-fortune of the Defunct's soul, for they attribute future happiness to the right eye and misery to the left."

Both the illustrations and the passage I have given above are typical of the hopelessly incorrect and imaginary character of many passages cited to

us from books supposed to contain authoritative description of the manners, customs, and usages prevailing amongst the Parsis in ancient times.

The ancient documents put in before us as Exhibits are more useful. They extend over many years. Out of the documents available to them at the present time, both parties have put before us such of them as they thought would assist us in deciding the questions that arise in the case. I have gone through every one of these Exhibits with care and attention and the study of them has absorbed the best portion of the summer vacation that followed the conclusion of the hearing of this case. Within the limits of a judgment, it is impossible to refer to or discuss each Exhibit separately, and I propose to refer to only a few of the more important ones. All these Exhibits, however, taken together and carefully studied, are sufficient to enable me to come to conclusions which leave *my* mind, at all events, free from all doubts.

A great many side issues were discussed before us, and in the course of the arguments a large number of cases were cited to the Court. These again have taken considerable time to study, but in view of the conclusions I have arrived at, only a very few of these cases have any bearing on the two important questions before us in the suit.

Validity of the Defendants' appointment as Trustees.

I will now proceed to discuss the first of the two principal questions :— Are the Defendants validly appointed Trustees of the Funds and Properties belonging to the Parsi Panchayet and now in their possession and under their management, and are they entitled to fill up vacancies in their ranks as they occur ?

The consideration of this question mainly depends upon the documentary evidence recorded by the Court. To appreciate the present position of the Defendants, it is necessary to see how the body known as Trustees first came into existence, and for that purpose it becomes necessary to correctly appreciate the constitution and position of that ancient body—now defunct—which was formerly known as the Parsi Panchayet. The history of the origin of the Panchayet—the vicissitudes it underwent during its existence and its eventual demise—is to be gathered from the documents before us. This evidence is necessarily of a fragmentary description.

The Panchayet, as I understand the meaning of the word, is a body composed of some of the wealthy, influential, and elderly men of a community or a caste. Such an institution was wholly unknown to ancient Persians. It is an institution that is essentially Indian. The original Persian

Emigrants, after undergoing great hardships and sufferings, eventually found a peaceful home in India. The Hindus extended to them a friendly welcome, and, out of gratitude for the kindly consideration shown to them, the Persians seem to have shown great anxiety to do nothing to wound their feelings or hurt their susceptibilities. As time passed, they adopted many of the customs and usages of their Hindu brethren and copied some of their Institutions. Amongst the Institutions they copied was the system of entrusting the power of regulating the internal Government of their community in all social and religious matters to a Committee of a few headmen of their community. Such a Committee has been known in India from the most ancient times as the Panchayet. The most powerful weapon in the hands of the Panchayet for enforcing their orders and behests has always been the power of excommunication, which means exclusion from all benefits which a member of the caste is entitled to and ostracism from all social functions and religious rites. We are at present concerned with the Parsi Panchayet as it existed in Bombay. As the Parsis began settling in Bombay and their numbers began to increase, they found it necessary to have some sort of constituted authority to govern the internal affairs of their community, and to check—and if necessary punish—social, moral, and religious transgressions on the part of individual members of their community. They regarded themselves in exactly the same position as one of the numerous Hindu castes by whom they were surrounded. They were in official documents spoken of as the “Parsi caste.” See Exhibit A98. Although the Panchayet is long dead and although the small community of Parsis that first settled in Bombay over 250 years ago has now grown into a large, wealthy, and by no means an unimportant community of Bombay, they have, for all practical purposes, remained to-day what they were when they first settled in Bombay—a caste amongst the many castes that exist in this City. One of the absolute essentials of the constitution of the Panchayet of a caste is that its members should be elected by the whole of the caste in a meeting assembled. There is no reliable evidence before us as to when exactly the Parsi Panchayet first came into existence and how the first Panchayet was elected. Speaking of the Parsi Panchayet, the late Mr. Dossabhoy Framji in his “History of the Parsis,” at page 217 of Volume I, says that the *first* Parsi Panchayet was a self-constituted body. This statement can only be based on surmise. The documents placed before us as the result of elaborate and laborious research by both sides negatives this assumption. The Panchayet exercised certain powers of correction and had the right to impose penalties and inflict punishment on the delinquent members of the caste. Such powers can only be delegated to them by the consent of the caste, and I think no caste would submit to the exercise of those powers unless such

powers were exercised by those alone who were chosen by the body of the caste to perform the functions of the Panchayet. It does not recommend itself to my mind that 5, 10, or 15 persons getting together can say we elect ourselves the Panchayet and we will govern the members of our community, and I do not think any community would render obedience to or submit itself to the orders of such a body. The essential element of a Panchayet is the delegation of authority by the people of a community to its chosen headmen. The documentary evidence before us as to subsequent election of members of the Panchayet negatives the assumption that the body in its inception was a self-constituted body.

As much argument was addressed to us on this point, I think it is desirable to examine a few of the principal documents placed before us to see what they establish. That the Panchayet existed long before 1778 is evidenced by the fact that in that year certain parties, styling themselves "the Managers of the Panchayet of Parsis at Bombay," presented a petition to Governor Hornby, wherein they complain: "certain low Parsis who are ignorant of the Rules of our religion are going to infringe the same." They say they desired to prevent the same and were unwilling to trouble justice every time, and therefore they pray that they should be permitted to shame these people in the Panchayet "by beating them with a few shoes agreeably to their Crime." On the 5th of July, 1778, Governor Hornby empowers the Petitioners, amongst other things, to beat the delinquents with shoes, but they are told that they should not inflict any other corporal punishment. A copy of the petition and the answer thereto appears at page 219 of the 1st Volume of Mr. Dossabhoj Framji's book. This seems to be the first formal official recognition of the powers of the Panchayet.

Previous to the year 1787, there seems to have arisen a violent controversy between the Priests and the laymen of the community with reference to the Priests refusing to give their daughters in marriage to the boys of the Behedins or laymen. The disputes assumed such grave proportions that Government had to interfere and appoint a Commission to bring about a satisfactory settlement of those disputes and one of the results was that the Parsi community were asked to submit to Government the names of 12 Priests and 12 laymen, and out of these 24 Government in 1787 selected 6 Priests and 6 laymen to form the Panchayet. In the whole history of the Panchayet, this is the only instance when the powers of appointing members of the Panchayet were exercised by the Government, and it is quite clear that Government had to step in and interfere because the community was at that time divided by violent dissensions and it was not possible for the Parsis themselves to nominate members of their Panchayet.

The next incident in the history of the Panchayet is evidenced by Exhibit B in the case. This Document contains the Minutes and Resolutions of a Meeting of "The Entire Parsi Anjuman." Amongst other things, that meeting, which was held on the 4th of March, 1818, resolved as follows:—

"The *Entire Anjuman* having this day assembled here it is resolved as follows:—Hereafter a Panchayet consisting of 18 persons made up of 12 Behedins and 6 Mobeds is to be appointed for hearing family disputes relating to our community and to decide the same. Accordingly the undermentioned 18 gentlemen have been appointed Adhikaris of the Panchayet."

And then follows the names of the 18 persons appointed at the meeting. From the preamble to the Resolution it appears that after the death of some of the members of the Panchayet appointed by Government in 1787 their sons stepped into the places of their fathers, but this can only be regarded as an unwarrantable usurpation of position which they had no right to occupy. The power to appoint was vested in the Anjuman and was to be exercised at a meeting of the Entire Anjuman as appears to have been done in this instance.

Exhibit C evidences the Minutes of another meeting of "*the whole of the Parsi Anjuman* (community) of *Bombay*," held on the 2nd of July, 1818. At that meeting it was resolved that as Andhiaroo Hormusji Dorabji Laskari, one of the 18 Adhikaris appointed previously, had gone to China for the purposes of trade, Dastur Edalji Dorabji Sanjana was appointed in his place at that meeting. Exhibit A47 again shows that vacancies were filled up at another meeting of the "whole of the Anjuman" held in 1823. The Resolution passed at that meeting is as follows:—

"Further, Parsi Nowroji Meherji and Punthaki Dorabdaru Framji, who sat and were members of the Panchayet, have become denizens of Paradise. In order to sit in the Panchayet in their place, *the whole of the Anjuman* have appointed Parsis Jamsetji Jijibhoy and Hormusji Dorabji to sit in the Panchayet.—The 15th of October in the year 1823."

This Resolution is signed by Wadia Bomanji Hormusji and forty-six other members of the community.

The next incident of interest during the existence of the Panchayet is evidenced by Exhibit A59. On the 8th of June, 1836, Wadiaji Nowroji Jamsetji, a member of the Panchayet who seems to have been dissatisfied

with the way the Punchayet was doing its work, tenders his resignation. He says :—

“ At present many improper things take place in our community and no arrangement whatever is made to prevent the same.”

In the course of circulation, this letter reaches Framji Cowasji Banaji, another member of the Punchayet. On the 10th of June, 1836, he makes a long Minute on his colleague's resignation and tenders his resignation also : in the course of his Minute he enumerates many abuses that seems to have crept in the community and which were allowed to pass unpunished. That Minute is important on the other branch of the case, but on the subject at present under discussion it is important as showing that the resignation is tendered to *the Anjuman*. Framji Cowasji Banaji at the end of his letter says :—

“ I inform you the members of the *Anjuman* as follows :—When all of you gentlemen call the *Anjuman's* meeting be good enough to make my request known to them which is to the effect that the *gentlemen of the Anjuman* should relieve me from the Punchayet's work and that they should entrust the said work to some other person.”

* * *

“ By writing the above short note Wadiaji Nowroji has begged permission of the members of the *Anjuman* to resign the post.”

The Document shows that it is to the *Anjuman* the resignation is tendered, and this is done because it was the *Anjuman* who appointed them members of the Punchayet.

The tender of resignations by two of their prominent colleagues and their emphatic protests against the abuses which had been allowed to creep in, seem to have roused the other members into activity. They called a meeting of the “ whole Punchayet,” and the meeting was held on the 23rd of June, 1836, and at that meeting one of the Resolutions passed ran as follows :—

“ Fourth is this. That in our Punchayet the members are very few, and whenever any work is to be done, several members do not attend and therefore the work of the *Anjuman* is not done soon ; and therefore it is resolved to-day that, in addition to the old members, other new members, making in all 37 men, are appointed and their names will be made public at the place where the *Anjuman will meet* and then they will be entered in the Book.”

The Minutes of this meeting and the Resolutions passed thereat are recorded in Exhibit A64. From this Exhibit it seems the procedure followed was that the names of the additional members were selected by the members of the Panchayet and those names were to be submitted to a meeting of the community to be subsequently held. If the Anjuman or community in a general meeting assembled approve of the nomination, then these persons would be appointed members of the Panchayet by that meeting and their names would thereafter be recorded in the Dufturs of the Anjuman as elected members of the Parsi Panchayet.

This Document, Exhibit A64, is important also in another way. There was a considerable difference of opinion between the parties as to when the Panchayet ceased to exist. Mr. Dossabhoy, in his history at page 236, Volume I, says it passed away in 1836. Mr. Jiwanji Mody in his evidence says it ceased to exist in 1862. Mr. Mody's statement is correct. He speaks after a careful study of ancient documents in the possession of the Defendants and the reasons he gives for his statement are sound. That Mr. Dossabhoy is evidently under a misapprehension is clear from the fact that, far from dying in 1836, the Panchayet in June of that year adds new strength to its body by resolving to elect more numbers, raising their number to 37, and thereby adding to the efficiency of their work and making an effort to perform their duties more expeditiously. This Exhibit A64 established that the Panchayet, far from dying in 1836, had roused itself to a sense of its duties and expressed its determination to discharge those duties more efficiently and expeditiously than they had hitherto done. For many years previous to 1865, the Parsis had been agitating for special legislation. Government gave them this legislation in the shape of the Parsi Marriage and Divorce Act and the Parsi Intestate Succession Act. Both these Acts came into operation in April 1865. It was known long before this time that special legislation was coming into operation. When these Acts came into force the duties of the Panchayet ceased, and it is more than probable, as Mr. Mody states, that the Panchayet died in anticipation of this legislation coming into operation. That the Panchayet did not die in 1836, but was leading a fairly robust and active existence till at all events 1860, is again conclusively established by Exhibit No. 69. This is a pamphlet giving an account of what happened at a meeting of the leading members of the Parsi community held at the bungalow of Maneckji Nusserwanji Petit on the 5th of April, 1860. It seems that the Panchayet had been subjected to considerable adverse comments, and attacks were made against it in newspapers, and in order to explain their action and the work done by them, the members of the Panchayet called a meeting of the leading members of the community. At that meeting Mr. Sorabji Jamsedji Jijibhoy

read a long explanation which with certain extracts from their records were subsequently published in pamphlet form by the Panchayet. Reading this pamphlet, Exhibit No. 69, one cannot but come to the conclusion that the Panchayet was very much alive in 1860.

That the right to nominate members of the Panchayet belonged to the whole community and that such right was exercised by the Anjuman of the Parsis is clear from another set of Exhibits put in before the Court. It appears that in or previous to 1843, the acts of the Parsi Panchayet were being adversely criticised. To refute these adverse criticisms and give a true explanation of the acts of the Panchayet, a work was published in the year 1843 entitled *Kholasa-e-Panchayet* (explanations of the Panchayet). The author of this book veiled his identity under the anonym of "A servant of God and a follower of the Mazdiyesni Faith." The anonymity evidently did not long continue, and it is admitted on all hands that the author of this book was the first Parsi Baronet Sir Jamsedji Jijibhoj, the grandfather of the first Defendant. Exhibits A48, A49 and A50 are extracts from this book.

Exhibit A48 is an extract from page 255 of this book. Here Sir Jamsedji describes how a member of the Panchayet was elected. After stating how the community met on the 4th of March, 1818, and elected 18 persons as members of the Panchayet, he says :—

"And whenever any of these Sahebs die another is appointed in his place, and whenever the Panchayet meets for any purpose whatever at that time it announces to the Anjuman as follows :—
'Such and such a person has died. Such and such a person has from this day been appointed in his place a member of the Panchayet on behalf of the Anjuman. Do you approve of that appointment.' Thereupon out of the members present at the meeting some number says: 'Yes, Sir, we approve of it. Appoint him a member.' That fact is then entered in the Panchayet's books and the signatures of all those present there are taken thereon. Then that person becomes a member of the Panchayet."

Exhibits A49 and A50 are two other extracts from page 258 of the same book, the *Kholasa-e-Panchayet*. In the former Sir Jamsedji says :—

"Therefore in the place of the remaining 5, new members are to be appointed *at a meeting of the Anjuman*. But they are not yet appointed according to the *ancient custom*."

In the latter extract, Sir Jamsedji, speaking of these five persons nominated by the Panchayet to fill up vacancies, says :—

“ But they remain unadmitted, as, according to the old Rules of the Panchayet, their appointments are not noted in the book of the Panchayet after making the usual proclamation *before the Anjuman.*”

In or about February, 1856, Mr. Nowroji Fardunji, the Secretary of the Parsi Law Association, delivered a speech before a Sub-Committee of the Association. That speech is preserved and is before us in the shape of Exhibit A51. In that speech, referring to some of the persons who then claimed to be members of the Panchayet, he says :—

“ Many of these gentlemen cannot be called members of the Panchayet of our Anjuman (community) because our nobility and gentry have not, by convening a small or large meeting of the Anjuman according to our old practice, appointed them as members of the Panchayet, and, on their appointment having been made, their names have not been entered in our Panchayet’s Duftur (Record) according to our old practice.”

The same gentleman, Mr. Nowroji Fardunji, in giving his evidence before the Parsi Law Commission on the 31st of March, 1862, says :—

“ The old Panchayet used to be elected at a general public meeting held in some sacred place—as a Fire Temple
It was a popularly elected body The mode of filling up vacancies was usually this. The surviving members proposed new ones and if there seemed no objection they were duly elected. Their election was ratified by the *Parsi community*, and such ratification was signed and certified in the book kept for that purpose.” (See Exhibit Q.)

Lastly, Exhibit A54 is a letter addressed by the late Bomanji Jijibhoi, written to the members of the Sir J. J. Baronet Institution and the members of the Zoroastrian Anjuman on the 11th of October, 1859, wherein he refers with approval to the claim made by “ many gentlemen of the Zoroastrian Anjuman,” who said that “ the *right* of appointing a member of the Parsi Panchayet belonged to the *Zoroastrian Anjuman.*”

There is one other document that I must refer to before I conclude my examination of some of the more important documents relating to the subject now under discussion. The document I refer to is Exhibit U—the Trust Deed relating to immoveable properties—got, prepared, and executed by the

Defendants' predecessors in office on the 25th of September, 1884. This is an important document, on which the Defendants have placed great reliance throughout the hearing. One of the recitals of the Deed is in the following terms :—

“ And whereas for very many years the management of the social and religious affairs and the settlement of religious, matrimonial, and other social disputes of and between Parsis in Bombay were entrusted *by the community* to a Panchayet or Committee *selected* from amongst the most influential or leading members of the community.”

After this admission on the part of the Defendants' predecessors in office in 1884 that the entrustment of Power and Authority to the Panchayet was by the *community*, it is, I think, hardly open to the Defendants to contend—as was contended by Mr. Strangman on their behalf—that the practice of submitting to the Anjuman the name of the member to be appointed to fill a vacancy in the Panchayet had, in the words of Mr. Strangman, “died out prior to 1843.”

There are many other documents before us, the effect of which is also, directly or indirectly, to establish that the Parsi Panchayet of Bombay was a body elected by the entire Anjuman—in other words, the whole community. There are, of course, as is usual, instances at times of the rights of the Anjuman being disregarded, but such instances cannot affect what seems to me to be the established usage of the community. On the evidence before the Court, I hold that it is proved that amongst the Parsis of Bombay, after their settlement in the Island, there was a usage to elect a few headmen from amongst them to act as members of their Panchayet, the numbers of men so elected varying from time to time as it seemed fit to the Anjuman. The ancient usage prevailing amongst them proved before us was that, on a vacancy occurring, the surviving members nominated or selected the name of a successor. Such name was submitted for election at the next meeting of the members of the community, and if such name was approved of by such meeting he was elected a member of the Panchayet. His name was then entered in the *Dufturs* of the Anjuman and thereafter he was recognised as a duly-appointed member of the Parsi Panchayet of Bombay. It is, I think, established beyond all doubt that the *right* of electing members of the Panchayet always was in the general body of the Parsi community of Bombay.

Having considered how the Parsi Panchayet came into existence—what was its constitution and what were its powers; having seen how its members were elected and by whom they were elected, it becomes necessary now to see how Trustees of the Funds and Properties belonging to the community came first into existence and how the present Defendants came to assume office as Trustees.

It appears that, previous to the year 1823, there were no Trustees. The members of the Panchayet or some or one of them used to act as the custodian of the Funds of the community and the immoveable properties that existed then were also managed by them in conjunction with the other leaders of the community. In 1823, the Funds amounted to about Rs. 18,000, the bulk of which was in the possession of Wadiaji Hormusji Bomanji. Although he had agreed to pay 6 per cent. interest, he actually allowed 9 per cent. interest on these Charity Funds. In November, 1823, he desired to be relieved of the responsibility of keeping these Funds any longer, and accordingly, on the 21st of November 1823, he addressed a letter to “the Akabars of the Panchayet and the entire Anjuman” asking them to take away the moneys that were with him and deposit them elsewhere. This letter is Exhibit A52. On this letter reaching Mr. Framji Cowasji Banaji, he, on the following day, writes a letter to his colleagues of the Panchayet suggesting that they should all meet and “should forthwith appoint 3 members so that those members for the period of one year should look after these moneys.” In this letter—Exhibit A53—Framji Cowasji Banaji makes various other suggestions as to how these Funds are to be deposited and how the Trustees are to act, etc. Exhibit A55 is a record of the proceedings of the meeting of the whole Panchayet held on the 28th of November, 1823. At this meeting, 4 of the members of the Panchayet—Wadiaji Hormusji Bomanji, Framji Cowasji Banaji, Wadiaji Nowroji Jamsetji, and Jamsetji Jijibhoy—were appointed “Trustees for the purpose of taking care of the Panchayet moneys.” They were to receive the moneys from Wadiaji Hormusji and deposit the same with Messrs. Remington Crawford & Co., a well known firm, then, of merchants in Bombay; and accordingly on that day they received from Wadiaji Hormusji the sum of Rs. 15,863. It was at this meeting also resolved that all sundry sums of moneys that may come in from time to time were to remain with Framji Cowasji as a deposit. That out of those sums he was to meet sundry expenses, and when the sums so collected amounted to a thousand rupees he was to add the sum to the deposit account with Messrs. Remington Crawford and Co.

In conformity with these Resolutions, a sum of Rs. 18,062 was, in the beginning of December, 1823, deposited with Messrs. Remington Crawford & Co., who accepted the deposit on certain terms and agreed to pay 5 per cent. interest and not charge their usual commission on receipts and payments, as appears from their letter to Jamsetji Jijibhoy in reply to his letter to them, both of which letters are Exhibits A56. These documents show very clearly how Trustees of the Parsi Panchayet Funds came into existence for the first time in 1823. These 4 gentlemen, although they were appointed Trustees of the Funds alone, seem to have managed all the immoveable properties belonging to the community. Previous to 1823, the immoveable properties belonging to the Parsi community according to Mr. Mody were the Towers of Silence land at Malabar Hill with three Towers therein, namely, Mody's Tower, Maneckji Seth's Tower, and the Anjuman's or Panchayet's Tower. There was on that land also a Sagdi in connection with the Towers, known as Maki Shroff's Sagdi and a Sagdiwalla house. Besides these, the only other property previous to 1823 was the Fort Nasakhana. A Sagdi is a roofed structure intended for people who accompany a corpse to the Towers to rest, wash their hands and faces and say their prayers in. Sagdis are also used for Parsis to congregate in and recite their prayers on certain days held sacred to the dead. A Nasakhana is a house where iron biers and other requisites for carrying the Parsi dead to the Towers are kept and where the corpse bearers reside. The four Trustees appointed in 1823 practically became Trustees also of these immoveable properties. Thus it seems to me to be established beyond all reasonable doubt that, according to ancient usage, the Panchayet was appointed by the whole Anjuman, that is, the general body of the Parsi inhabitants of Bombay assembled in a meeting; that till 1823 the possession and management of the Funds and Properties of the Anjuman was in the Panchayet; and that in 1823 they appointed four of themselves as Trustees ostensibly of the Funds but practically of both the Funds and Properties. This appears to have been done for their own convenience and for more effective control of the Funds. The object of appointing Trustees, as appears from the documents before us, seems to be to have some duly authorized persons empowered to demand and get in many religious and charitable donations announced at Uthmana or third day ceremonies of dead Parsis and on other auspicious and inauspicious occasions, which, in many instances, were never paid and became lost to the community. Up to 1851, there was no formal document, such as a Trust Deed evidencing the appointment of Trustees vesting the Funds and Properties in them, empowering them to manage the same, and defining the Trusts and the uses for which these Funds were subscribed and to which these properties were dedicated. In

1850, the necessity for such a Trust Deed seems to have occurred to the members of the Panchayet, and a Circular, dated the 12th of July, 1850 (Exhibit A66), was issued by the then Secretary of the Panchayet addressed to the "Shethias of the Panchayet." That Circular states that it was "extremely necessary to make a Trust Deed of the Funds of the Parsi Panchayet," but that there was a "difficulty in preparing the said Trust Deed in the names of twelve Adhikaries;" that therefore it was "intended to make the same in the name of five or seven Sahebs" and these Sahebs are invited to name the persons they wish to have appointed as Trustees under the Deed. The Circular states that the Trustees at that date were :—

- (1) Sir Jamsedji Jijibhoy, Kt., (2) Wadiaji Nowroji Jamsetji, (3) Framji Cowasji Banaji, and (4) Wadiaji Bomanji Hormusji.

It will thus be seen that out of the four persons appointed Trustees for one year in 1823, three had continued to be Trustees till 1850. The fourth Trustee, Wadiaji Hormusji Bomanji, died on the 12th of March 1826, and, as appears from Exhibit A58, his son Bomanji Hormusji was appointed to "look into our Panchayet business." This document is a letter, dated the 5th of May, 1826, addressed to the Parsi Anjuman of Surat by the "whole Anjuman" of Bombay. It is not quite clear from this whether Bomanji was appointed merely a member of the Panchayet or whether he was also appointed a Trustee in his father's place, but from Exhibit A66 it appears that he succeeded his father as a Trustee and was acting as a Trustee in 1850.

On the 22nd of October, 1851, another Circular was issued and with it a Draft Deed of Trust was circulated for approval of the members of the Panchayet. This Circular is Exhibit A67.

On the 4th of December, 1851, a Trust Deed of the Funds and Securities was executed. Framji Cowasji Banaji had, in the meanwhile, died on the 12th of February, 1851—after the date of the first Circular Exhibit A66 and before the Trust Deed of 1851 was executed. By this Deed, which is marked Exhibit A42 in the case, five members of the then Panchayet were appointed Trustees of the Funds and Securities of the Parsi Panchayet.

One of the recitals of this Deed is extremely important. It runs as follows :—

"Whereas no Deed or Deeds of Trust has or have been executed concerning the said Trust Funds and Securities, but it is now considered desirable that certain new Trustees should be appointed and that these presents should be executed for the

purpose of distinctly defining their duties and of *conferring all necessary powers for appointment of new Trustees* and for dealing with the said Trust Funds, etc.”

It will be observed that here, for the first time, the idea of conferring upon the Trustees the power of appointing New Trustees takes birth. This idea is given effect to by a Proviso in the Deed, which runs thus :—

“ Provided always and it is hereby agreed and declared between and by the parties to these presents that if the said Trustees in and by these presents nominated or either of them or any future Trustee or Trustees to be appointed as hereinafter is mentioned shall die or be desirous of being discharged of and from, or refuse or decline or become incapable to act in the Trusts or Powers hereby in them reposed or to them given as aforesaid, then and in such case and when and so often as the same shall happen it shall be lawful for the surviving or continuing Trustees or for the Executors or Administrators of the last surviving Trustee by any Deed or Deeds, instrument or instruments in writing, signed and sealed and delivered by them, him or her from time to time to *nominate*, substitute, or appoint one or more person or persons to be a Trustee or Trustees in the stead or place of the Trustee or Trustees so dying or being abroad or desiring to be discharged or refusing, declining or becoming incapable to act as aforesaid.”

I have set out this clause in the Deed of 1851 at full length to show what wide and comprehensive Powers are conferred by the Deed on the Trustees to fill up a vacancy in their ranks whenever one occurs. This is the foundation of the Defendants' case and this is the provision in the Deed which the Plaintiffs most vigorously attack. The signatories to the Deed are six persons, presumably members of the then Panchayet, and these six people appoint five of themselves Trustees of the Funds and Securities belonging to the community, and purport to confer complete and absolute power on these five individuals and their successors to fill up all vacancies amongst themselves. Had these six persons the right to confer such powers and had these five persons the right to arrogate to themselves the powers which this Deed purports to confer on them? The answer is obviously in the negative, and even Mr. Strangman, who argued this part of the Defendants' case with great confidence, was constrained to admit that if a suit had been filed in or before 1851, the Court would have granted a scheme for the nomination of new Trustees as vacancies should arise. It is

possible that this power of appointment was inserted in the Deed with the best of intentions as was argued before us, but that cannot affect the question as to the legality or validity of such an act. The members of the Panchayet owed their existence to the Anjuman—they derived their authority from the Anjuman. They had, in the first instance, no right whatever to appoint Trustees in any manner binding on the community. The appointment, in the first instance, was clearly for the purposes of their own convenience. The mere appointment of Trustees was, in a sense, the delegation of their own duties to a smaller number of their body. That may be justifiable ; but they had not a shadow of a right to confer on those whom they elected the power of for *ever* excluding everybody else from having a voice in the future election of Trustees. The insertion of this power in the Deed is wholly unjustifiable. The members of the Panchayet were the appointees of the community. The community never conferred on them any powers with regard to its Funds and Properties other than those of managing the same while they served on the Panchayet. The community evidently was never consulted when they appointed some of themselves as Trustees. They had no right or power to appoint their own successors in the Panchayet itself. They had themselves no legal right to appoint Trustees of property that belonged to the community, and they had certainly no right whatever to confer on others the power which they themselves never had. This Trust Deed is the foundation on which the Defendants' legal advisers base their present case.

Let me here examine the arguments addressed to the Court by the Defendants' Counsel in support of his contention, that the Defendants are validly appointed Trustees of the Funds and Securities, ~~in~~ in the first instance, I will take their case as to immoveable properties later on. We have seen that in 1823, when Trustees were first appointed, the Funds amounted to about Rs. 18,000. In 1851, by means of additions and accretions to the existing Funds and the creation of new Funds, the amount in the hands of the Trustees had increased to a lac and-a-half. This sum belonged to 15 different Funds which were in existence at the date of the Deed of 1851. The particulars of these 15 Funds are given in Exhibit No. 54. With further additions and accretions of interest, etc., the amount to the credit of these 15 Funds at present is somewhere about six and-a-half lacs of rupees. Mr. Strangman argued that the worst that the Court can do is to declare that the Defendants are not validly appointed Trustees as to these six and-a-half lacs of rupees, but as to the rest he said, with considerable emphasis, "the Court can't touch us." What is the rest ? and why can't the Court touch the Defendants as to the rest ? It seems that between 1851 and 1871, 23 other

Funds came into existence, particulars whereof are given in Exhibit No. 59. On the 16th of September, 1871, another Trust Deed, Exhibit A44, was executed. One of the Funds mentioned in the 3rd Schedule of this Trust Deed is the Fund for carrying dead bodies of all Zoroastrians to the Towers, in which Fund, the Plaintiffs contend, all converts to Zoroastrianism are entitled to participate. Between 1871 and the present time, two hundred and odd more funds have come into existence, the particulars whereof are given in Exhibit No. 60. The amount to the credit of all the Charitable and Religious Funds of the Parsi community at present exceeds 53 lacs of rupees. Mr. Strangman argues that it is a matter of no consequence whether the Trustees were validly appointed or not in 1851. Since 1851, they have exercised the rights of appointment conferred by the Deed of 1851. The public, he says, must have known this because till 1846 the Trustees published the accounts of their management in a newspaper—the “Bombay Samachar”—and since then up to the present time in separate books. These accounts were published under the names of different Trustees, which from time to time showed that the Trustees were not the same. It was, he says, also known to the community, because at times there were articles in Gujerati newspapers which showed that the surviving Trustees were filling up vacancies. On these materials, it is argued that the Court must hold that every single member of the community who has given donations to the various charities established for the benefit of the community or given funds to inaugurate new benefactions must have been fully cognisant that the Trustees for the time being to whom these moneys were entrusted had a right to appoint or were appointing successors and filling up vacancies. On the assumption that each one of the donors knew this, the Court is asked to hold that when the donors gave their moneys to the Trustees for the time being, each one of them by implication conferred on the Trustees the power to nominate the successors of those of them who died or retired. At all events the Court must—Mr. Strangman urged—hold that these donors of all Funds that came into existence after 1851 intended to confer on the Trustees the power of appointment for which he was making this vigorous fight. This line of argument did not impress either my learned brother Beaman or myself in the least, and we noticed that Mr. Strangman seemed surprised that we should be so little impressed with what appeared to him and to his learned colleagues such sound reasoning. Now, in the first place, the assumption the Court was asked to make seemed to me to be entirely unwarranted by the facts proved before us. I do not, in the first instance, think that one in a thousand Parsis ever cared to read the voluminous accounts published by the Trustees. The

Trustees have always been men of the highest integrity and social position. They have been always men who commanded the respect and confidence of the community. They have all through administered the Charitable Funds with such efficiency that there never was at any time any complaint against their management. They were always good men and absolutely trustworthy. Members of the community may have noticed—probably they did know—that they filled up vacancies amongst themselves, but whoever cared to enquire whether they had the right to do so or not? I venture to think not one Parsi in ten thousand. On the happening of an auspicious or inauspicious event in his family, when a member of the community felt inclined to contribute Funds to existing Charities or to establish a new Charity or to found a separate benefaction, he found that there was a body of good and honest men who were already in possession of the Funds of the community. They were possessed of an establishment and an organisation for giving effect to all charitable donations, and had hitherto administered the charities of the community to the community's entire satisfaction. What more did he want? Send the moneys to them and express to them the object of his benefaction and the way in which the funds were to be used, and he was quite content to leave the rest to them. Of the hundreds and hundreds of donors of sums, large or small, not one, I venture to think, when making his donation, ever thought of the Trustees' powers of appointment. They assumed that what they had been hitherto doing in the past, they had legal right and power to do; and when entrusting their moneys to existing Trustees, they could not have had the remotest notion of conferring on them any powers in addition to those that they may have had. These funds have grown to their present proportions by innumerable donations, small and large. I doubt if there is any single family of Parsis in Bombay who has not at one time or another contributed sums of money—may be large, may be small—to some one or more of these Funds. These donations are mostly made in memory of the dead and are generally announced at the third day ceremony. It seems to me preposterous to conceive that when a Parsi contributed Rs. 5 or Rs. 5,000 to some Parsi Charity and sent the moneys with a covering letter to people who he had no reason whatsoever to believe were not validly appointed Trustees of the Panchayet Funds, that at that moment he sat down and solemnly said to himself "I am entrusting my moneys to people who are Trustees of Panchayet Funds. I know the survivors of them are appointing successors to their dead colleagues. I constitute them Trustees of my money, and I intend that so far as my contribution is concerned they should have the same powers they have hitherto exercised, no matter whether they legally had or have the powers or not."

In the first place, there is no warrant for any such assumption of intention on the part of the donors as Mr. Strangman asked us to make; and, secondly, supposing there was such an intention, what does it matter as long as the donors did not carry out those intentions and actually confer those powers?

Mr. Strangman next relied on the fact that the appointments of new Trustees were, in his own words, "frequently notified in the Press." Assuming that they were, does it follow that all or any of the donors necessarily read them; and assuming that every member of the Parsi community read these notices, how was he to know that the appointment by the Trustees was an exercise of a right or power which they *never had*? The very natural presumption every reader would make—and every Parsi for a long time in all probability did make,—was that the Trustees in some way had legal authority to do what they were doing. It is only the very close investigation of many ancient documents that discloses the fact that no such powers as the Trustees claimed were ever validly or legally conferred upon them.

Then again, the learned Counsel said newspapers had commented on the appointments made by the Trustees, and in support of this statement he has put in half a dozen extracts from articles published in Gujerati newspapers. They are Exhibits Nos. 62, 63, 64, 65, 87 and 88. These are from publications between 1859 and 1901. Half a dozen articles in the course of 42 years do not err on the side of excessive publication and do not prove any very active discussion; but again, assuming that every Parsi read those articles, what does it prove? Supposing a Parsi read a newspaper article adversely commenting on an appointment made by the Trustees and stating that they had no power to make any such appointment, what would an ordinary prudent Parsi say to himself? He would say, "These newspapers throw doubt on the Trustees' authority to appoint a new Trustee, but surely these doubts must be thrown merely to start an useless discussion to fill up their columns, or these articles are inspired by some one who bears ill-will to the Trustees. They are men of the highest respectability—they occupy very high positions in life—they command the respect and confidence of the community, surely it is not possible to conceive that such men would do what would be very wrong if the newspaper comments are correct. They would be the last persons to deprive the community of its right to appoint Trustees and arrogate to themselves the right which they have not got." An ordinary, right-thinking, prudent Parsi would argue in the way I have indicated, and say, "I

refuse to believe the newspapers when they throw doubts on the Trustees' authority. If these Trustees claim the right, surely they must have good grounds for doing so."

The Deed of 1851 was there. That Deed contained the power of appointment. The obvious inference to them would be that the then members of the Panchayet would not have got the power inserted in the Deed, and that the then Trustees would not have accepted the Trusts with those powers unless there was good ground and legal authority for doing so.

The whole fabric of this portion of the Defendants' case is based on the Deed of 1851. That Deed affords no foundation whatever for the fabric, and, like all structures based on no foundation or a foundation that at best is not substantial, it must crumble. The powers sought to be conferred by the six members of the Panchayet on five of themselves were powers that they had no right to confer, and nothing that is subsequently done can validate an act which in its inception was invalid and unauthorised.

The right to appoint members of the Parsi Panchayet according to ancient usage has been satisfactorily proved to have been in the Parsi community. The community never expressly delegated to the Panchayet the power to appoint Trustees. The members of the Panchayet were mere delegates of the community, and if they exercised any powers they must be taken to have derived those powers from those who appointed them their delegates. The Defendants' Counsel, however, argues the Trustees have exercised those powers of filling up vacancies rightly or wrongly for nearly sixty years. Why deprive them of this power now? The answer is to be found in the case of the *Attorney-General vs. Dalton* reported in 13 Beavan, page 141. The facts of that case are, in many respects, very similar. If anything, the facts in this case are clearer against the Defendants and less lost in obscurity than in the English case. In the course of his judgment, Lord Langdale the Master of the Rolls, says:—"The principal question litigated was by whom new Trustees to be added to the Rector and Church Wardens ought (when required) to be appointed, it being contended on behalf of the Informant (the Attorney-General) that the new Trustees should be nominated by the rate-payers of the Parish: while the Defendants now claiming to be Trustees contend that the right of nominating new Trustees (when required) belongs to the surviving Trustees without the intervention of the Parishioners at large."

As in this case, the surviving Trustees in that case had been for some years nominating new Trustees; but it was contended that that was contrary

to the original usage. The Master of the Rolls in his Judgment gave effect to the fact that the estate was purchased from Funds belonging to the Parish, and was managed, although not regularly, by the Parish at vestry meetings; that there was distinct evidence of new Trustees being appointed, at all events, at *one* vestry meeting; and that several Deeds contained recitals that the new Trustees were appointed by the Parishioners and inhabitants of the Parish in vestry assembled. The Court finally held that "a mode of nomination contrary to former usage . . . but acted upon only at a subsequent period cannot affect the right of the Parishioners, if the nomination was with them;" and that, in such circumstances, the Court "ought to be guided by the earliest evidence of usage, and *rather* presume that what was then done, and so long afterwards continued to be done was rightly done." It was held in that case on circumstances—not so strong or clear as in this case—that the Defendant Trustees had not been duly appointed.

Before I go on to consider the position of the Defendants with reference to the immoveable properties, I think it would be more convenient to discuss here another contention of the Defendants' Counsel, which applies to both moveable and immoveable properties. 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 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 and 24 Victoria, Chapter 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 and 23 Victoria, Chapter 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 Coutes to Parsons*, L. R., 34 Chancery Division, p. 370, 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, 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. . . .

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, Plaintiffs’ 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." There, again, were those that 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.

I will now consider the Defendants' position with regard to the immoveable properties of which they claim to be Trustees. To this part of the case somewhat different considerations apply. It is necessary to consider, in the first place, how each one of these properties was acquired by or for the Parsi community. As shown before, the only immoveable properties that belonged to the Parsi Panchayet previous to 1823 were a large piece of land at Malabar Hill, with three Towers of Silence, a Sagdi, and a Sagdiwala's house standing thereon and the Fort Nasakhana. Between 1823 and 1884, the Parsi Panchayet acquired other properties. Some were given as Gifts to the Panchayet for the benefit of the community and some were purchased by them from the General Charitable Funds and another Fund known as the "Fund for expenses in connection with the Towers of Silence." The properties that were acquired by purchase were pieces of land adjoining the land on which the Towers stood. It appears that the Panchayet was desirous of extending the compound of the Towers, thus ensuring greater seclusion for the Towers and avoiding as far as possible the chance of people of other religions—commonly spoken of as Durwands—from settling on adjoining lands or building houses in the vicinity of the Towers. As opportunities offered, they acquired pieces of land contiguous to the land on which the Towers

stood and added the same in the original compound. All these pieces of land now form one large piece of ground and there is nothing at present to show separately the different small pieces of land added from time to time—except the various documents evidencing the acquisition of these pieces of land. Since 1823, two other Towers and two other Sagdis have been built on the original land. Previous to 1884, there was no General Deed covering all these properties in the possession of the Trustees—I use the word Trustees for convenience, meaning thereby the people who from time to time claimed to be Trustees and were in possession and management of the Punchayet Properties. I will continue to use the word in that sense. There were, prior to 1884, a great many Deeds and Conveyances relating to the various properties in their possession, and whenever new Trustees had to be appointed there was considerable trouble and expense. Long previous to 1884, it was felt that a General Trust Deed, covering all the properties in the hands of the Trustees, would be very desirable; and after considerable delay, on the 25th of September, 1884, the then Trustees executed a comprehensive Trust Deed which is marked Exhibit U in the case. The first Schedule to the Deed describes the properties covered by the Deed. They are 26 in number. The whole of the Towers of Silence property is shown on a plan annexed to the Deed, and which is separately put in this suit and marked Exhibit No. 5. That plan shows separately the various pieces of lands acquired from time to time and added to the main block, and these pieces are marked with different letters of the Alphabet.

The question for consideration now is, are the Defendants properly and validly appointed Trustees of all or any of these properties? As the Defendants' Counsel has argued with great confidence this part of the case and told us that his clients "were advised that the position of the Defendants as Trustees was unassailable," and as we wholly differ from the views of the Defendants' legal advisers, pressed with great insistence upon us, it is but fair that, instead of dealing with the question in a general or summary way, I should deal with each property separately and examine the Defendants' claim to be Trustees of each one of them separately.

It would be as well to mention at the outset that Mr. Strangman has conceded that as to those properties that were purchased either out of the General Charity Fund or the Towers Expenditure Fund, the result must be the same as the result as to those Funds. I have held that as to all the Funds the Defendants are not validly appointed Trustees, and therefore there is nothing to be said as to those properties.

By far the most important of the 26 properties of which the Defendants claim to be Trustees is the property 1stly described in the Schedule to Exhibit U and marked A on the plan Exhibit No. 5. 'This property' consists of a piece of land that measures 79,000 sq. yards. On that piece of land are all the five Towers of Silence and the three Sagdis. All other properties are insignificant compared with this property. With reference to this property there are no documents or Title Deeds on which the Defendants can rely in support of their claim to Trusteeship. They and their predecessors have been for many years the custodians and managers, it is true, of this property : the accounts of this as well as other immoveable properties undoubtedly appear in the books of the Trustees ; but the bare question before the Court is—are the present *Defendants* validly appointed Trustees of this property ? Who appointed *them* Trustees ? The answer is, their predecessors in office. Were those that appointed the Defendants themselves Trustees ? Had they any power to appoint the Defendants ? Where did they get the power in the exercise of which they purported to appoint the Defendants Trustees ? There is no convincing or satisfactory answer to any of these questions that can in the least degree favour the Defendants' contentions. All that was urged before us was : "The Defendants are validly appointed Trustees of other properties : they and their predecessors have managed all these properties for years and years to the satisfaction of everybody. Why disturb existing arrangements." Further examination will, I think, show that the contentions as to the validity of their appointment to other properties is not correct, except, perhaps, as to two very small pieces of barren land. The other arguments may be very potent ones if we were here merely considering the desirability or advisability of disturbing existing arrangements. We are asked to adjudicate upon rights. We have to decide what is the *legal* position of the Defendants as regards these properties. We have to decide who has the legal right to appoint Trustees. The Plaintiffs say : "We, as members of the Parsi community, have a right to have a voice, as all other members of the community, in the election of the Trustees to the Funds and Properties that belong to our community." Can the Court entertain considerations of convenience and set aside the rights of others if those rights are in them ? There is no foundation whatever for the Defendants' claim to be Trustees of this property marked A on Exhibit No. 5, and their predecessors who purported to appoint them had not a shadow of a right to do so.

The property 2ndly described in the Schedule to Exhibit U is the Sagdiwala's house and is marked B on plan Exhibit No. 5. The property 3rdly described is the Fort Nasakhana. There are no documents in connection with these properties, and the same considerations apply to them as apply

to the 1stly described property. The first of these is a small house for the residence of the keeper of the Sagdi and the second is a house for the storing of biers and for the residence of corpse-bearers. They are properties merely ancillary to the main property—the Towers of Silence.

The property 4thly described in the Schedule to Exhibit U is the Baharkote Nasakhana. There is only one document that could be produced in connection with this property and that is Exhibit A36. This property is a Gift to the community made long before 1849 by a member of the Patell family. It appears from the tablet quoted in Exhibit A36 that it was re-built in 1849. It was never formally conveyed to the Trustees; but, on the 30th of October, 1873, the Executors of Dadabhai Rustomji Patell, who had got the Nasakhana re-built in 1849, for the nominal consideration of Rs. 5, released and relinquished all their claim, if any, to the property in favour of the then Trustees. I do not think it is possible to contend that this document appointed the Defendants' predecessors in office Trustees and conferred on them power to appoint their successors. Such an appointment could only be made and such powers could only be conferred by the donor, and he was dead years before the date of Exhibit A36—the release by the Executors passed on the 30th October, 1873.

The property 5thly described in the Schedule to Exhibit U is the Fire Temple known as the Godavra Agiary. The documents relating to this property are Exhibits Nos. 6, 7, and 8. From these documents it appears that, for the consideration of Rs. 8,001, a lady named Cursedbai, on the 1st of June, 1826, conveyed to "those who sit in the full Panchayet on behalf of the whole Anjuman" a piece of land with a house standing thereon. This house was converted into and consecrated as an Agiary. It is shown from the books of the Panchayet that the costs of acquiring and converting the property were defrayed partly by moneys collected from the Parsi community by public subscriptions and partly from the Funds of the Anjuman in the hands of the Panchayet. The subscriptions amounted to Rs. 6,072. The present Agiary stands on the land acquired from Cursedbai and another piece of land. It seems that on the 20th of December, 1852, Sir Jamsetji Jijibhoy purchased—in the name of his nominee, one Pestonji Manekji, from one Bachoobai—a piece of land with a house standing thereon and adjoining the Agiary for the sum of Rs. 6,075. On the 25th of May, 1854, Pestonji Manekji, by an endorsement on the conveyance in his favour, transferred and conveyed the property to Sir Jamsetji Jijibhoy. It further appears that Sir Jamsetji, after acquiring the adjoining property, died on the 14th of April, 1859, and his sons and Executors of his Will carried out their father's

original intention by pulling down the original Agiary and the adjoining house and building thereon a new and more commodious Agiary. On the 13th of September, 1876, the surviving Executors conveyed the new Agiary to the then Trustees by a Conveyance which is marked Exhibit No. 8. This Conveyance gives power to the Trustees to join in a scheme that was then in contemplation, to have a General Trust Deed relating to all the Panchayet Properties prepared and executed and to include this property in the intended General Trust Deed. It also confers upon the Trustees the power to fill up vacancies when the same may occur.

It seems to me that the Executors of Sir Jamsetji's Will had no legal right whatever to confer on the Trustees of 1876 the power of appointing their successors and filling up vacancies. The original piece of land and building were acquired by the community with moneys with which Sir Jamsetji had nothing to do. He had no rights over the original Godavra Agiary as it stood till his death. If he chose to acquire adjoining property for the purpose of adding to the original Agiary, and if his Executors chose to carry out their father's charitable intentions and added the land to the Agiary property and rebuilt the Agiary, surely, that gave them no rights over the charitable Institution. The addition of land and reconstruction of the building were highly meritorious acts, no doubt; but what Sir Jamsetji and his Executors gave must be taken to be mere accretion to the charity, and cannot alter the original conditions of the charity or give them any rights or powers over or in regard to that charity. The Godavra Agiary was the Agiary of the Parsi Anjuman. The Parsi Anjuman alone could appoint Trustees for the Agiary, and the Parsi Anjuman alone could confer such Powers on the Trustees as to the Anjuman may seem just.

The property 6thly described in the Schedule to Exhibit U is the Chowpatty Dharamsala. It is marked C on plan Exhibit No. 5. The two documents which relate to this property are Exhibits Nos. 9 and 10. Exhibit No. 9 is a Conveyance and Deed of Trust executed by one Cursetji Cowasji in favour of the members of the Parsi Panchayet on the 8th of June, 1838. After reciting that the said Cursetji Cowasji, by a meeting dated the 28th of June, 1835, had made a Gift of this property to the Parsi Panchayet, this document formally conveys the property to certain parties as Trustees and gives them the power of nominating their successors. It happens, however, that all the Trustees mentioned in this Deed, on whom this power of appointment was specifically conferred, died without exercising that power. The second document relating to this property is Exhibit No. 10, which is a Conveyance, dated the 22nd of June, 1874, by the Executors of the last

surviving Trustee under the former Deed to the then Trustees of the Funds and Properties of the Parsi Panchayet. In this Deed, the Executors purport to confer on the Trustees the same powers as the former Deed conferred on the original Trustees. Had the Executors of the last surviving Trustee any right to confer on the then Trustees of the Panchayet Property the power of appointing their successors? Reliance was placed on *In re Morton & Hallett*, L. R., 15 Chancery Division, p. 143, and *In re Cunningham & Frayling*, L.R., 1891, 2 Chancery, p. 567.

In the first of these cases, Sir George Jessel, the Master of the Rolls, held that the customary heir of a surviving Trustee was competent to execute a Trust for sale. This decision was affirmed on appeal and was followed by Stirling J. in the second of the cases cited. I have studied these cases and I do not find anything in those cases to lend support to the proposition that the Executors of a Trustee can confer upon strangers a power which their Testator alone had the right to confer. In this case there was no question of a Trust to sell, and the consideration which weighed with the Master of the Rolls *in re Morton and Hallett*—that a decision the other way would, in his own words, “be a serious matter, indeed, in the case of an immense number of Titles”—does not arise in the present case. Here we have the donor of a charity appointing Trustees and conferring on them the power of appointing their successors. This power the Trustees do not choose to exercise during their lifetime. The power was a power conferred on them personally. They could not, even in their lifetime, have delegated that power to any one else, much less therefore could the Executors of the Will of one of them exercise such a power and appoint new Trustees. I must, therefore, hold that the Defendants are not validly appointed Trustees of this property. ×

Before I leave the consideration of this property, I should like to set out the following recital in the Deed of the 22nd of June, 1874, Exhibit No. 10. It says:—

“Whereas the said *Panchayet* of the Zarthost sect mentioned in the said hereinbefore-recited Indenture of the 8th of June, 1838, now consists and for many years past has consisted of five persons only under the style of the Trustees of the property of the Parsi Panchayet at Bombay, who have exercised and do continue to exercise a joint and undivided control, etc., etc.”

This recital shows what confusion of thought as to their real position reigned in the minds of the Defendants’ predecessors in office in 1874. They thought that, in their compact body of five, the Panchayet which we know ceased to exist about 1862 still existed in 1874.

The properties 7thly, 8thly, and 9thly described in Schedule to Exhibit U are marked, respectively, D, E, and F on the plan, Exhibit No. 5. These are three vacant pieces of land in the vicinity of the Towers purchased from the moneys of the General Charitable Fund and must be treated on the same footing as that Fund. The details of their acquisition appear in the evidence of Mr. Mody, and it is unnecessary to discuss them, beyond stating that if the Defendants are not validly appointed Trustees of that Fund—as I have held they are not, they cannot be said to be validly appointed Trustees of these properties, no matter what powers their predecessors conferred on, or arrogated to, themselves in the documents relating to these pieces of barren land.

The properties 10thly and 11thly described in Exhibit U and marked G and H on Exhibit No. 5 were conveyed to the Trustees by way of Gift by the Deed of the 22nd of June, 1874, Exhibit No. 19. These are also two vacant pieces of land in the vicinity of the Towers, and the Deed of Gift specifically confers on the Trustees the power of appointing their successors and filling up vacancies in their ranks. Of these two properties, the Defendants are undoubtedly validly appointed Trustees, and these are properties in respect of which, in the words of Defendants' Counsel, "the position of the Defendants is unassailable and the Court cannot touch them," unless the Court chooses to interpose its powers on the authority of the *Attorney-General v. The Dedham School*, reported in 23 Beavan, p. 350, a matter which I shall revert to later on.

The property 12thly described in Exhibit U and marked I on Exhibit No. 5 is also a vacant piece of land in the vicinity of the Towers which Jiwaji Maneckji made over to the Trustees as a free Gift in 1866. He died without having formally conveyed the land, and the Executors of his Will—Mr. Shapurji Jiwaji and his late brother Nowroji—by a Deed, dated the 22nd of June, 1874, which is Exhibit No. 20, formally conveyed the land to the then Trustees. The donor never conferred on the Trustees the power of appointing their successors, and even the Deed of 1874 does not purport to confer any such powers, the result being that the Defendants can make out no title to be Trustees of this property.

The 13thly-described property in Exhibit U is marked J on Exhibit No. 5. The only document in connection with this property is Exhibit No. 21, which purports to be a Conveyance and a Deed of Trust and was executed on the 15th of December, 1874. From this document it appears that Nowroji Jamsetji Wadia made a free Gift of this property to charity and handed it over "to the Parsi Punchayet" as far back as 1842. He executed

no Deed of Gift or Conveyance. Thirty-two years afterwards, two sons and a grandson of the donor execute a Conveyance and purport to confer on the then Trustees power to appoint their successors. These people had no right whatever to confer any such powers. The property had passed out of their family and had been in possession of the Trustees for over thirty years, and it is difficult to conceive why such a Conveyance was obtained. It may have been obtained for better security or greater caution, but the executants of the Deed had no right whatever to confer the powers of appointment they purport to confer on the Trustees of 1874.

The property 14thly described in Exhibit U and marked K on the plan Exhibit No. 5 is another piece of vacant land which the late Jamsetji Nusservanji Dady gave as a free Gift to charity in "commemoration of the name" of his father, and conveyed the same to the Trustees by a Deed of the 23rd of January, 1875, Exhibit No. 22. The donor confers no power on the Trustees to appoint their successors, and the appointment of the Defendants as Trustees of the property must therefore be treated as invalid.

One Andhiaroo Rustomji Sorabji Sethna made a Gift of the property 15thly described in Exhibit U for the benefit of the Parsi community. This property is the Churniwady Nasakhana, and was conveyed to the Trustees by the Deed of the 9th of December, 1852, Exhibit No. 23. By this Deed, the donor confers the right of appointing new Trustees on the *Parsi Panchayat* of Bombay. The Parsi Panchayet never made any appointment during its existence, but the Trustees on the 22nd of June, 1874, executed a Deed which is Exhibit No. 24. One of the recitals in the Deed is so remarkable that I cannot resist reproducing it here. It runs thus :—

"And whereas the power of appointing new Trustees contained in the said hereinbefore recited Indenture of the 9th of December, 1852, hath hitherto been unexercised and the premises subject to the Trust thereof are now vested in the said Sir Jamsetji Jijibhoy (party hereto) as the sole surviving Trustee of the said Indenture ; and whereas *the said Parsi Panchayet of Bombay now consists of and is represented by the following persons*, that is to say, Sir Jamsetji Jijibhoy (party hereto), Hirjibhoy Hormusji Sethna, Merwanji Framji Panday, Cursetji Fardoonji Parukh, and Dinsha Manockji Petit. And whereas the said Sir Jamsetji Jijibhoy, Hirjibhoy Hormusji Sethna, Merwanji Framji Panday, Cursetji Fardoonji Parukh, and Dinsha Manockji Petit, *as constituting and representing the Parsi Panchayet of Bombay*, are now

desirous to exercise the power in that behalf given to them by the said hereinbefore recited Indenture of 9th December, 1852, to appoint," etc., etc.

By this Deed they appoint themselves Trustees of this property. The statement in the recital—that the Parsi Panchayet then, that is in 1874, consisted of the persons mentioned there—is palpably incorrect. The Defendants' Secretary has told us that the Panchayet ceased to exist at the latest in 1862, and before us the Defendants' Counsel has deliberately and emphatically denied that his clients are the successors of the old Panchayet. As I stated before, the ideas and conceptions of the Defendants' predecessors were in the most hopeless confusion as to their real position, and they assumed all sorts of powers and privileges which they had no right whatever to do. With reference to this property, the donor conferred the right of electing new Trustees on the Parsi Panchayet; and neither the Defendants, nor their immediate predecessors, were so elected by the Parsi Panchayet, and they cannot therefore claim to be properly-appointed Trustees of this property.

The properties 16thly and 17thly described in Exhibit U are vacant pieces of land added to the Towers of Silence property and are marked L and M on the plan, Exhibit No. 5. They were both purchased out of the General Charitable Fund, and the Defendants' position with respect to these properties is the same as their position with respect to that Fund.

The 18thly-described property in Exhibit U is another piece of vacant land added to the Towers' property. It is marked N on the plan, Exhibit No. 5, and the only document produced before us relating to this property is a Deed of the 31st of May, 1873, Exhibit No. 30. This document is of use only in so far as it traces the history of this piece of land. It appears to have been originally purchased in 1831 by Jehangir Nusserwanji Wadia and his son-in-law Maneckji Nowroji Wadia. Maneckji died on the 14th of November, 1837. Shortly before his death, he transferred his interest in the land to Jehangir. In 1839, Jehangir made a Gift of this property for charitable purposes to the Trustees of the Parsi Panchayet with the consent and approbation of all the members of his and Maneckji's family. In the year 1839, actual possession of the land was made over to the Trustees, and the same remained in their possession ever since. Jehangir died in 1843. Previous to his death, Jehangir made a Will whereby he appointed his widow Maneckbai and his daughter Motlibai the executrices thereof and his heiresses. The Trustees, in 1873—thirty years after the death of Jehangir—asked Maneckbai and Motlibai to formally convey this property to them, and they do so by this Conveyance of the 31st of May, 1873. Motlibai's

son, Mr. Nowroji, and the late Mr. Nusserwanji join in the Conveyance. This Deed purports to confer power of appointing their successors on the Trustees. In 1873, neither Manockbai, Motlibai, nor her sons had any interest whatsoever in the property. Jehangir had parted with possession of this property 34 years before the date of the Conveyance, and all the executing parties executing the Deed in 1873 had nothing in them to convey and transfer. They had no right to appoint Trustees to this property, and certainly had no right whatever to confer power of appointing succeeding Trustees. The Defendants' claim to be Trustees of this property is therefore bad.

Properties 19thly, 20thly, 21stly, 22ndly, and 23rdly described in Exhibit U are all vacant pieces of land added to the compound of the Towers of Silence. They are marked on Exhibit No. 5 O, P, Q, R, and S. They were all purchased with the moneys taken out of the "Fund for Expenditure in connection with the Towers of Silence." This Fund is No. 26 in Exhibit No. 60, and was started in 1875 by inviting subscriptions from the Parsi public. If the Defendants are not validly appointed Trustees of this Fund, they are not Trustees of these properties. It may be mentioned here that the conveyance in connection with property 20thly described conveyed another piece of land also to the Trustees. This they subsequently exchanged for property 25thly described in Exhibit U. This piece of land is marked U on the plan, Exhibit No. 5, and must fall in the same category as the other properties bought from Fund No. 26.

The 24thly described property in Exhibit U is another piece of vacant land in the vicinity of the Towers and is marked T on the plan, Exhibit No. 5. This piece of land was made over to the then Trustees as a Charitable Gift by the 2nd Plaintiff by a Conveyance of the 15th of November, 1883, Exhibit No. 39. The donor confers no powers on the survivors to appoint a successor in the place of a deceased or retiring Trustee. The donor Sir Cavasji Jehangir is before us and keenly contests the assumption of such powers by the Trustees.

I have dealt with the 25thly described property, and the last property that remains to be considered is property 26thly described in Exhibit U and marked V on Exhibit No. 5. This is also a piece of vacant land in the vicinity of the Towers and was conveyed to the Trustees as a free Gift to charity by the late Muncherji Framji Cama by a conveyance of the 14th of August, 1884, Exhibit No. 41. It contains no power of appointment of successors, and I find that the Defendants are not validly appointed Trustees of both the 24thly and 26thly described properties.

I have now dealt with all the immoveable properties comprised in the General Trust Deed of 1884. There are some properties acquired after 1884, but the Court is not concerned with them in this suit. It has been argued before us that, in some of the Conveyances executed by the donors of some of these properties, they have expressly authorised the Trustees to join in the scheme for a General Trust Deed that was in contemplation and to include those properties in the General Deed, and by that Deed, declare any other powers or Trusts not inconsistent with the original Deeds; and that the power of appointing successors contained in the General Trust Deed is one of such powers which the Trustees had authority to confer, it not being inconsistent with the original Trusts. This argument is neither sound nor convincing. The mere authority to join in and include charitable properties in a General Trust Deed and the general clause as to limiting and declaring other Trusts and Powers consistent with the original Trusts and Powers cannot possibly empower the Trustees for the time being to arrogate to themselves an entirely new and most important power which the donor did not think fit to confer on them. The assumption of such a power is wholly inconsistent with the absence of such power in the original Deeds, and the insertion of such a power in the General Trust Deed of 1884 is, to my mind, wholly inoperative and ineffective.

It was further argued before us that the power of appointment inserted in the Deed of 1884 was usually inserted in all Trust Deeds of charitable properties, and reliance was placed for this proposition on a passage in Tudor, at page 316. I find great difficulty in accepting that passage as a correct enunciation of what usually happens in Trust Deeds of charity property, more especially as the two cases *On* which the passage is based—*in re* 52 of George 3, Ch. 101, 12 Simons' Reports, page 262, and *re* Conyer's Grammar School, 10 Hare, Supplement, page 5—do not at all justify the statement. It appears that the only authority for the statement is the case *re Pickering's Charity*, where the Court authorised the Trustees themselves to fill up vacancies "as formerly." It is possible that in that solitary case ancient usage may have induced the Court to confer on the Trustee this power; but it seems to me that, in the case of large charities, it would be the duty of the Court to see that there should be some responsible electorate for the appointment of new Trustees, and the Court will not approve of any hole and corner arrangement for such appointments. It seems to me that, in all cases where the donors of charitable bequests or gifts have not provided for the appointment of new Trustees, those vitally interested in the charities and its due and effective

administration should have some voice in deciding to whom the administration of such charities should be entrusted.

Even at the risk of appearing tedious, I have gone through this portion of the case with a certain amount of minuteness, because I felt that it was due to the Defendants and their legal advisers that they should have our reasons fully for our conclusions, in view of the fact that this portion of the case has been fought out on behalf of the Defendants with great persistence, and has occupied a much greater portion of our time than the other and far more important part of the case.

After the case had proceeded to a certain stage, the Court suggested to the parties a compromise on the lines indicated by the Court. One of the terms of the suggested compromise was that the Court should declare the Defendants not validly appointed, but, under the powers vested in the Court, would appoint them Trustees for life and order a scheme to be framed for the future appointment of Trustees in the place of dying or retiring Trustees. The Defendants' Counsel absolutely refused to consider this suggestion, and candidly told us that his clients had been advised that "their position was unassailable," and that they would be guilty of breach of Trust if they consented to give up the right of the survivors to appoint a succeeding Trustee in the place of a retiring or dying Trustee. If that is the legal advice they got, no blame whatever can attach to the Defendants for the persistent, prolonged, and vigorous fight they have made in preserving to themselves a right which seems to me to be of no value. If the position contended for had been that each Trustee had the right by Deed or Will to nominate his successor, it might have been a power of some value; but the right fought for was the right of the survivors. Their Counsel explained that they were desirous of seeing that the families that gave the largest donations to these charities should be represented on the Board of Trustees. This appeared to me to be very feeble; for where is the guarantee that, after Sir Jamsetji Jijibhoy or Mr. Bomanji Petit, the survivors will appoint a member of the Jijibhoy or Petit family, whereas if there was a scheme it may possibly provide for such representation. When we made our suggestion, Mr. Strangman complained that we had not heard the Defendants' case sufficiently on this head, and having regard to the fact that he was entirely guided in the conduct of this case by his eminent leader, as he repeatedly told us, we gave him the amplest latitude and heard him to the fullest extent. We regret to have to say that, if there was any little lurking doubt in our minds as to the impression formed by us, that was completely removed; and the more we heard the Defendants' side of the case on this head, the more convinced we felt that they had no case whatever.

It is a source of very great satisfaction to me to find that in the conclusions I have arrived at on this portion of the case, my learned brother Beaman entirely concurs.

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."

In the course of his opening, no doubt, in the heat of advocacy, Mr. Lowndes did comment on one or two incidents in the case in forcible language, with a view to show that some of the Defendants' acts amounted to legal misconduct, but as soon as Mr. Strangman began opening his case and complained that some of these observations had proved offensive to his clients, Mr. Lowndes, with that conspicuous candour which has always distinguished his career at the Bar, without hesitation and most unreservedly, withdrew everyone of such of his statements as may have been taken to reflect on the Defendants, and specifically stated that his clients asked for the removal of the Defendants only on the ground of invalidity of their appointment. Our declaration—that the Defendants are not validly appointed Trustees—means their removal from office, but this is only due to technical defects in the appointment of themselves and their predecessors before them. Their administration of large Charitable Funds and their management of properties devoted to charity have been so fair and faultless that not a complaint has been heard against them, and not a note of dissatisfaction sounded during the whole time they have been in office. But for the unfortunate controversy which forms the subject matter of the other branch of this case, no one—not even the Plaintiffs, I think—would have thought of filing a suit and challenging

the validity of their appointment. Just let me turn for one moment and consider who are the men the Court is constrained, on merely technical grounds, to remove from office.

The first Defendant, who, to our great regret, died soon after the hearing of this case concluded, was the grandson of that great Parsi Sir Jamsetji Jijibhoy, the first Parsi Baronet. He was practically the founder of those religious and charitable Institutions amongst the Parsis which have now reached such large proportions. The members of his family have contributed most munificently to those Funds and Charities which are now under our consideration. On the 1st Defendant succeeding to the family estates and title in 1898, he was unanimously appointed by the Parsi community, in a public meeting assembled, their head and leader, and during his life commanded the respect and esteem of the community of which he had been the elected head for nearly ten years. Who could have been a fitter man to be Chairman of the Board of Trustees to Parsi Charities than the titular head of the Batliwala family. The third Defendant is now the only surviving grandson of the late Sir Jamsetji Jijibhoy, the first Parsi Baronet.

The second Defendant is the present head of the Allbless family—a family known for its many benefactions to the Parsi community. His mature experience and wisdom would be of the greatest value in the management of the various Funds and Institutions in the hands of the Trustees.

The fourth Defendant is a member of the Cama family. We are told he is the largest landowner in Bombay: that may be a very small qualification for being a Trustee; but there are other considerations—such as his position in the community, his knowledge of business matters, his known zeal in the welfare of the community—all which make him an extremely desirable Trustee of Charitable Funds and Institutions.

And, lastly, there is Mr. Bomanji Petit, the fifth Defendant, who, though last in the list of the Defendants, is foremost in the estimation of the Parsi community. He is the only surviving son of the late Sir Dinsha Petit, to whom the Parsi community must ever feel indebted for some of the most princely benefactions during his life-time. Mr. Bomanji, following in the footsteps of his father, is recognised as one of the greatest benefactors of the Parsi community at the present day.

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 Trustee 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 Panchayet, and we order that all Trust Funds and Properties do vest in them.

Soon after the death of the 1st Defendant, the other Defendants have filled up the vacancy amongst them by appointing the 1st 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 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 *amra* 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 Panchayet, 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

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.

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, 23 Beavan, p. 350, 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.

Conversion to Zoroastrianism.

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 benefit of the Parsi community, with which the Court is not 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 3rd and 4th paragraph 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 declaration 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 challengad *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 redressed. In Lord Halsbury's Laws of England "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 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 6th Plaintiff'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 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 damaged 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 unjustifiable. 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 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 operation. 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 ~~a certain~~ 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 *Thakersing Dewraj vs. Herbhun Nursey*, I. L. R., 8 Bombay, 432, 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 8 Bombay, 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, deduces at page 487 of his book 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 the 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 having 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 represents 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 and 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 Plaintiff 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 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 that they will do no injustice to anybody, as our judgment in this case cannot possibly bind those who now claim to be Converts or 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 Parsis 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 lifetime 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-pledged 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 ever 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.

The very first witness called on behalf of the Plaintiffs is Mr. Pestanji Framji Bhownagree, a Government employè in the Secretariat, getting a hundred rupees a month as his salary. He is 52 years of age, and came to Bombay from Surat when he was 23 years old. He has since visited his home at Surat off and on during the holidays. When at Surat, he lived with his father and grandfather in their family house. Most, if not the whole, of this witness's evidence is based on what the elder members of his family told him, and in my opinion this evidence is worthless ; but we admitted this and other similar evidence on the authority of what their Lordships of the Privy Council say at page 251, Law Reports, Indian Appeals, Vol. 27. After

I had recorded this evidence, I found that it fell precisely under the category of evidence against which their Lordships wished to guard when they said: "But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay." When the statements made by this witness were subjected to cross-examination, without exception, every one of his statements which were in any way material to the questions before the Court were a "mere repetition of hearsay." Mr. Lowndes, when he pressed us to admit this and other similar evidence, tried to bring it under the ruling of the Privy Council by saying that the evidence of the witness was the expression of his independent opinion based on hearsay. In order to make the evidence fall within the ruling mentioned above, Mr. Lowndes framed his questions to make it appear to the Court that the witness was giving his opinion; and after he got this witness to say that he had formed an opinion and that that opinion was that *he thought* it was customary amongst his community to convert aliens into the Zoroastrian religion, he launched him into pure unadulterated hearsay of the most unreliable description by asking the witness to give his reasons and grounds for his opinion, and to cite instances on which he had formed his very reliable and independent opinion. Let us for one moment look into that evidence and see what it amounts to. He said, in his family there were four individuals who were converted Juddins. They were Jivi and Rupli, Rustom and Jina. Rustom and Jina were the sons of Jivi. Rustom married first Rupli, then a woman called Dhunbai, and then a third wife named Awabai. He had a son named Temulji, who was a stationmaster at Bhynder. The witness talked very glibly about these peoples' conversions, their death, their funeral ceremonies, and their disposal in the Towers of Silence; but, in the end, it turned out that he knew very little personally of what he was talking, for he said—almost at the beginning of his cross-examination—"I personally know nothing about any conversion." When first examined, he said: "I don't know who the father of Jina and Rustom was." In cross-examination, referring to these two persons, Jina and Rustom, he said: "I have no idea as to who their father was or when or where they were born." In answer to the Court, he said: "The children of Jivi were born in my grandfather's house * * * Jivi's husband *was also purchased* by my grandfather. He lived in my grandfather's house, but I had not seen that man * * *. I don't recollect what the name of Jivi's husband was. Perhaps my grandfather or father did tell me the name, but I don't recollect."

His evidence came to a close on the 14th of February. Some days afterwards, the Defendants having made enquiries and gathered information, their Counsel applied for permission to recall the witness and he was further

cross-examined on the 24th of February. He was asked about the *namgahran* of his family. A *namgahran* literally means a record of names. Amongst Zoroastrians, it is customary when a priest recites prayers in a Parsi house to invoke blessings on the souls of the dead members of the family ; and most families have a sort of book in which the names of the dead members of the family are recorded. It is usual to couple the names—with the name of the father or husband—and use the word “Behedin” or “Ervadin” between the two names. The family priest would know the *namgahran* of his employer by heart, and the witness probably knew that although the *namgahran* of his family was not then forthcoming, it did exist and there would be people who would be able to recite it, so he had to admit that Rustom’s father in the *namgahran* was mentioned as Sorabji. This witness then said : “ I did not know Sorabji. I heard that he had been converted 100 or 125 years ago. Sorabji was the husband of Jivi . . . I did not remember about Jivi’s husband when I gave evidence.”

The statement in the last sentence quoted by me, I refuse to believe. He was pressed on the point of Jivi’s husband and deliberately pretended ignorance. He knew the object of the questions, as may be gathered from the following answer he gave to the Court :—“ I know that Parsis in the Surat district kept Dubris as mistresses. In Surat itself Parsis did keep Dubris but not in their houses.”

The witness knew perfectly well that he was being cross-examined with a view to find out whether this woman Jivi was not the mistress of one of the male members of his family, and whether this progeny—Rustom and Jina—were not the children of such relationship. He deliberately introduced the saving clause “ but not in their houses ” to guard against any presumption of paternity against his ancestors. It was only when he was cornered that he admitted about Sorabji ; and then again he tried to belittle the importance of his admission by suggesting—I think, purely out of imagination—that Sorabji was himself a Convert.

Unless these persons were the progeny of either the witness’s own grandfather or some other male member of the Bhownagree family, the story told by this witness is preposterous. A man may buy a low-caste Hindu girl from famine-stricken people for domestic service, but he does not go buying a husband also for her, as this witness wished us to believe at first. Then, again, he does not allow these purchased waifs to breed in his house and submit himself and his family to the nuisance of having Dubra infants brought up in the house. What can be the object of investing Dubra children with Sudra and Kusti, getting them married, and taking them to the Towers at the

expense of the family. Surely this witness was much too intelligent to believe that his ancestors would do all these things for the children of a Dubri woman, brought as a sort of domestic slave and fed in the house in return for work done! It is to my mind quite clear that Sorabji was either an ancestor of this witness—some elderly male member of the Bhownagree family, or that Sorabji was a fictitious name given to the younger members of the family to screen the delinquencies of some male member of the witness's family.

Before I proceed to discuss any further the evidence of other witnesses who gave somewhat similar evidence, I would like here to explain how, as I understand it from the evidence, the Parsis came to make an exception in the case of children born of Parsi fathers by alien mothers.

In the olden times, the Parsis were a poor community. A great many of those that settled in Bombay and the larger cities of Gujerat had to go out into the interior for the purpose of earning their livelihood by some sort of trade or service. Some of those that went out had no wives, and others who had wives found it most inconvenient to take them with them to the remote parts where they served, so they left them in their native places where their families were settled, either with their own families or the families of the wives. While in these remote villages—far from their homes and their families, some of these Parsis took to having unlawful intercourse with women whom they took into their quarters as their mistresses. The women whom they could persuade to live with them were necessarily from the poorer and the lower classes. In the Districts of Gujerat, a low caste of Hindus, known as Dubras, abound, and most of the Parsis settled in remote villages took to themselves mistresses from this caste. It was not unusual in those days for Parsis, in some of the cities of Gujerat, to introduce Dubra women in their houses ostensibly as servants and subsequently treating them as their mistresses. Alliances such as these sometimes resulted in the birth of children. The father naturally did not wish to desert them, but usually got some friendly priest to perform the Navjot ceremony on them during their young age and thus smuggled them into the community. Though this course of conduct nowhere received the sanction of the community openly, the people who became aware of this, shut their eyes and no noise was made about the matter. When the fathers returned to their native places and to their families, they brought these children with them; and although they were allowed to pass as

Parsis, their birth was always regarded as tainted. The reason for regarding such children with favour and allowing them to be invested with Sudra and Kusti, was that they were taken to be children born in the faith of their fathers and therefore they were not regarded as Juddins. They were the children of Parsi *boon* (*i.e.*, seed); they were children of Parsi *olad* (*i.e.*, origin) and therefore in some cases the mere performance of the Navjot ceremony and the investiture of Sudra and Kusti by a priest, without any other ceremonies, was considered sufficient to let them in. These children in time grew up and begot families. These original half-breeds and their families were always regarded with a certain amount of disapprobation by the community. The class of people descended from Dubra mothers is extremely limited. They are getting extinct. As the Parsis progressed in education, wealth, and civilization, the moral influences brought to bear on delinquencies such as I have described were so powerful, that instances of keeping mistresses and having children by them became very very rare, till, in the more modern times, they have become almost extinct. The evidence in this case, however, shows that Surat was the stronghold of these Dubri-bred Parsis, and there are still some families of this kind who are known by the name of "Parvara houses," as appears from the evidence of Surat witnesses examined in the case.

Another witness, Mr. Khushrubhai Nusserwanji, Khan Saheb, also hails from Surat, and he gave somewhat similar evidence to that given by the witness, Mr. Bhowagree. His evidence is also more or less a repetition of hearsay, but he spoke of two Dubra Converts in his family, named Jivaji and Hiri, who were supposed to have been bought by his grandfather from famine-stricken people and were brought up in his family. He said he knew these two and attended their funerals. This is the witness from whom a good deal of evidence is extracted as to the easy morality of some of the Surat Parsis. He told us of the instance of Parvara families in Surat: he told us that Parsis in villages kept Dubris as mistresses, but not in Surat itself; but he had to admit that Framji Sorabji Ghandy, of Surat, did keep a low-caste Hindu woman (a *Mochan*) as his mistress. He qualified his statement by saying that respectable Parsis did not keep mistresses, and gave it as his opinion that the man who kept the *Moches* woman was not a respectable man *because* he kept a mistress in his house.

Of the conversion of these two Dubras, Jivaji and Hiri, whom he knew and who were brought up in his house, he knew nothing. He said they were converted before his time—before his birth. He does not know for certain whether these two were brought or merely taken into the house.

They both died in the house, and on behalf of his father, who had been bedridden, he defrayed their funeral expenses. Hiri had been married to another Dubra Convert, named Hiraji, and brought up her children in the house of the kind old gentleman who had taken her in out of charity. This witness appeared to me to be perfectly well acquainted with the real position of Jivaji and Hiri in his family, and he was prepared to conceal that from the Court. He evidently knew what to expect in cross-examination. He anticipated what was to come by telling the Court that in his family it was customary to recite the names of good and faithful servants of the family in prayers. This was to account for the names of the Dubra Converts in the family *namgahran*. The attempt to explain away the presence of their names in the *namgahran* was weak in the extreme, in the face of the fact—which, under stress of cross-examination, he had to admit—that this man, Jivaji, used the name of the witness's grandfather, Darasha, as that of his father and that he was generally known as Jiva Darasha. This is how he tried to explain this very significant fact :—“ Jivaji had no father, and therefore when he had to give his name as the owner of the gymnasium at the time of the City Survey, he gave the name Jivaji Darasha.” The witness cannot mean that Jivaji had no father. What he means is that there was no father who acknowledged him as his son. He admits that he knows of no other family that include servants' names in the *namgahrans*, and I refuse to believe him when he says their names in the *namgahran* are merely there as the names of faithful servants. I am afraid I must here record my belief, in spite of the violent protestations of Mr. Khushrubhai, against such an assumption, that the two Dubras he spoke of, Jivaji and Hiri, were the children of the family. His own evidence leaves no doubt about this in my mind. By putting Darasha's name after his own, Jivaji claimed Darasha as his father, and neither Darasha or any members of his family seem to have done anything to stop Jiva for using Darasha's name as that of his father. The fact that he and Jivi were brought up in the family, that Hiri was married and brought up her children in the house, that all their expenses were paid by the family, that they were allowed to be taken to the Towers of Silence on their death, all these circumstances lead one to the conclusion that is irresistible, that they were children of the family, born of a Parsi father. There was an element of comicality when, in re-examination in the hands of a more sympathetic Counsel than Mr. Strangman, this witness solemnly protested that it was both sinful and false to suggest that the Dubra and Dubri he had been speaking of were the illegitimate children of some member of his family. He solemnly proclaimed that his ancestors were respectable religious people, who said their prayers five times a day. I would have preferred not to have

said anything that might prove offensive to this witness and his family, but when he chooses to give evidence in a judicial proceeding, it is the duty of the Court to judge of that evidence; and his own evidence could, in my opinion, lead to no other conclusion than the one to which I have arrived.

This witness's evidence is useful in one other respect, which, I think, had better be noted here before I pass on. It shows that even in Surat, the stronghold of Dubri-born Parsi Converts, there is an objection to taking such people to the ordinary Towers where Parsi corpses are disposed of and their bodies used to be placed in an old and dilapidated Tower that had fallen into disuse for ordinary Parsi purposes.

The Plaintiffs attempted to prove that there was, at least, one instance known of an entire alien—a person born of both non-Zoroastrian parents—who was admitted into the Zoroastrian faith and enjoyed all the rights and privileges of a born Zoroastrian. They called five witnesses to prove this one instance. They examined Soonabai, a girl alleged to be born of Hindu father and mother; they called her husband Byramji; they called Furdoonji Hotelwalla, who arranged for her marriage with his wife's brother Byramji; they called Nowroji Lalina, one of the priests who performed her marriage; and lastly, they called Dhunjishaw Motabhai Vakil, the gentleman who was supposed to have taken the Hindu girl when she was 3 or 4 and brought her up and converted her to Zoroastrianism. This witness Dhunjishaw is an Hospital Assistant, in the service of the Nawab of Cambay, getting only Rs. 140 a month. He has been in such service for sixteen years. Before that he was in charge of a hospital for five years in the Junagadh State. He says, while he was at Junagadh, a Bawa came to the hospital suffering from cough and fever. He was accompanied by his daughter 3 or 4 years old. Her name was Sunder. The Bawa told him that his wife had died on the way to Junagadh. The Bawa died in the hospital, and the hospital peon reported to him that there was no one to take care of the child and it was crying. Dhunjishaw says he gave orders that she should be made over to some man of the Hindu religion who would be willing to take charge of her. Then we have the astounding statement that, in a city like Junagadh, "none such was found," with the result that he took pity upon her and kept her in his own house. This charitable gentleman undertakes the burden of taking over the child of a wandering Hindu Bawa, because no Hindu was found who would either take her or put her in some charitable Hindu Institution. His salary is now Rs. 140. Twenty odd years ago, it was possibly smaller. He is burdened with a family of his own, but that does not deter him. He not only takes this little parentless Hindu waif, but he

suddenly develops a wealth of affection for the child. He admits treating her as his own daughter. He brings her up with his own children, dresses her as his own children, teaches her Gujarati and the prayers of his own religion, and gets her to be admitted into the Zoroastrian faith by having her Navjot ceremony performed with that of his own children. The child is given a Parsi name and is trained to address him with the affectionate appellation of *bavuji* (father). His disinterested benevolence does not end here. He knew there were two Parvara families at Surat. He knew one Furdoonji, who belonged to one of these two families. He calls him all the way to Cambay from Surat, and asks him to find a suitable husband for this girl, who had by then grown up. Furdoonji arranges for the marriage of this girl with his wife's brother Byramji. The marriage is celebrated at the expense of Dhunjishaw, who gives the bride a small dowry and she is now settled in life at Surat.

Dhunjishaw was by no means a truthful witness. He was confronted with his own letters, written to Mr. Sheriarji Bharucha and Mr. Jiwani Mody (Exhibits N and Nos. 2 and 3). They are not straightforward letters, and contain a statement about the child's father and mother dying of cholera, which does not harmonise with his evidence in this case. He made an untruthful statement about the reply he got from Mr. Jiwani Mody. His whole conduct towards this girl Soonabai, every action of his in connection with her, all the proved circumstances relating to this girl's life, point to her being something a great deal more to Dhunjishaw than Dhunjishaw is willing to admit. It is most difficult to believe that a Parsi living away from his native place, in a Native State, by no means in affluent circumstances, should deliberately impose upon himself the burden of bringing up the child of a man who casually turns up in his hospital and dies. Surely there must have been plenty of Charitable Institutions and numbers of Hindus at Junagadh willing to rescue the child of a Bawa from want or starvation ! Would the Hindu Mahajan of Junagadh allow a child of a Hindu Bawa to be brought up in a Parsi house and make no effort to rescue it from alien hands ? Soonabai herself says she has a recollection that before going to Dhunjishaw's house she used to live in the vicinity of his dispensary at Junagadh. She does not remember with whom she was living. This contradicts Dhunjishaw's story about the sick father bringing the child with him to the hospital. I am inclined to believe that this woman's recollection is correct. She probably lived with her mother in the vicinity of Dhunjishaw's dispensary, where Dhunjishaw kept her mother and visited her. The witnesses Byramji, Furdoonji, Nowroji, and Soonabai herself can give

no evidence as to the origin of this woman. Dhunjishaw alone knows the truth, and that truth it seems to me is that during his residence in the Native States he formed a liaison with some woman who gave birth to this child. He brought Soonabai up as his own daughter, because I believe Soonabai was, as a matter of fact, his own daughter.

While on Furdoonji's evidence, I think I ought to set out here a passage in his evidence which throws a flood of light on the morality of the people of Surat and explains the conduct of the Plaintiffs in going to Surat in search of their evidence on this head of their case. After stating that his mother, who is still alive and living with him, is a Kharwa woman, he says :—

“It is a common thing in Surat for Parsis to keep alien women as their mistresses. . . . Many people keep Dubris as mistresses at Surat. Even rich people do that. People worth lacs of rupees are in the habit of doing this. Even if they have their wives they still keep mistresses. . . . For the last forty years, I have been settled at Surat. It has been a very common thing during the time I have been at Surat for rich Parsis to keep Dubri women as mistresses.”

I think that I ought not to pass on to the consideration of other evidence without noticing certain incidents which Soonabai has deposed to, incidents which, if true—and I have no doubt they are true—reflect no credit on the Plaintiffs' case.

This woman Soonabai is a permanent resident of Surat now. She is 25 years of age. The last time she was in Bombay, before she came to give evidence in the case, was when she was 12 or 13 years old. The Plaintiffs bring her to Bombay for the purpose of giving evidence and put her up in Panday's Dharamsalla at Churni Road. In the course of her examination, she said :—

“In Bombay I have attended Fire Temples. I have been into the Anjuman's Atash Behram, the newly-built one. I have also been to the Wadiaji's Atash Behram. I have also been to the Kadmi Atash Behram, near the Railway line, opposite to Panday's Dharamsalla, where I am now staying. No objection was made to my going in . . . I came to Bombay fifteen days ago. I came in obedience to a witness summons. Before that I came to Bombay with Dr. Dhunjishaw when I was a child 12 or 13 years old. Never came after that till now.

I do not remember if I was ever taken to the Atash Behram then. That was my only visit to Bombay before this. The visits to the Atash Behrams that I spoke of were all after I was served with a subpoena and after I came to Bombay this time. . . . On the Hamkara of Ardibehesht, I visited two Fire Temples, and next day I visited the Kadmi Atash Behram."

One of the questions before the Court is the right of a converted Juddin to enter Atash Behrams and Agiaries. That right is claimed in this suit in connection with a very modest Institution, the Godavra Agiary. This woman, according to the Plaintiffs, is wholly a Juddin, born of both non-Zoroastrian parents. This woman is made deliberately to visit all the three Atash Behrams in Bombay in the course of two days after she came to Bombay under a subpoena to give evidence in this case, and then the Plaintiffs instruct their Counsel to examine the woman on her visits. Each one of the Plaintiffs must have known perfectly well that such visit would be regarded by the great bulk of the Parsi community as a sacrilege, if she was an entire alien as they say. They must have known that such visits would wound the feelings of the major portion of the community. They must have known that if any one had known that this woman was born of Juddin parents, as they say she was, she would never have been allowed to enter the precincts of any one of these Fire Temples, in spite of the Navjot ceremony being performed on her and in spite of her putting on a Sudra and Kusti. It would be idle to disguise the fact that this woman was made to go into the Fire Temples purely for the purpose of *creating* evidence in the case. It would be idle for the Plaintiffs to shirk their responsibility for the proceeding. They have lent their names to the case and they have entrusted the conduct of their case to responsible Solicitors, and their Counsel was deliberately instructed to examine the witness on these visits to the three most sacred Fire Temples in Bombay. I cannot sufficiently express my sense of disapprobation of tactics such as these.

I have referred to all the witnesses called by the Plaintiffs for the purpose of proving that there have been instances of an entire alien or Juddin being converted into the Zoroastrian faith and admitted into the Parsi community, except one; and this one I have purposely left last for discussion, as he is by far the most important witness called on behalf of the Plaintiffs from their standpoint. This witness is Sorabji Bomanji Punthaky, a Parsi priest from Surat.

Before I proceed to discuss the evidence given by this witness, I ought here to explain the constitution of the Parsi priesthood. The community of Zoroastrians is divided into two classes—Mobeds and Behedins—that is, priests and laymen. A Mobed must be the son of a Mobed. A Behedin can never become a Mobed. To be a Parsi priest he must be born of a father who is a priest. The Mobeds at one time objected to give their daughters in marriage to Behedins, and this had led to very heated controversy in the community as is shown in this case. Although, at the present time, there is no active restriction, the Mobeds generally confine the marriage of their children amongst their own class. A Mobed's son may take to any other walk of life : he is not restricted to his father's profession. He may take to other occupations in life : when he does this he is known as Athornan. A Behedin's son, however, can never be a Mobed. It will thus be seen that a man born of a Mobed father becomes a Mobed by right of his birth. No qualifications—moral, religious, or educational—are required of him. He takes religious training under his father or other male relations, and when he arrives at the age of discretion, he follows his father's profession as a full-fledged priest. A certain number of priests go through the higher religious purificatory ceremony known as Burushnum. They are then qualified for the performance of certain ceremonies which are known as Inner Liturgical ceremonies. Priests who have gone through the Burushnum alone can perform these ceremonies. The other ceremonies, which are known as Outer Liturgical ceremonies, are performed by the ordinary Mobed. The Navjot is one of the Outer Liturgical ceremonies of the Zoroastrian religion. It is a ceremony whereby a Zoroastrian-born child, usually between the age of 7 and 9, is invested with Sudra and Kusti—the sacred shirt and girdle which are the outer symbols of the profession of the Zoroastrian Faith. One Mobed alone can perform this ceremony. The Plaintiffs contend in this suit that the mere performance of the Navjot ceremony on a Juddin is sufficient to make him or her a full-fledged Zoroastrian, and entitle him or her to all the benefits of all charities established for the benefit of Zoroastrians. The priestly class amongst the Zoroastrians of India, as a rule, consists of respectable, religious, conscientious, God-fearing men ; but, as is common amongst all communities, there are some black sheep amongst them who are always ready to subordinate their consciences to mundane considerations and do almost anything for money, and the plaintiffs' witness, Sorabji Bomanji Punthaky, is a typical instance of the latter class. If the Plaintiffs' contentions were to prevail, the Parsi community would be entirely at the mercy of such men as this one ; for it would be open to him to inundate the community with thousands of undesirable aliens. He himself says, one priest is

sufficient to perform the Navjot ceremony and that the priest wants nobody's permission to do so. If I have formed a low estimate of this man's morality and honesty, he himself is responsible for it. He has made no attempts to disguise his true character, and has by his evidence enabled the Court to form a true estimate of his moral conceptions. I extract below a few of the sentiments he gave expression to, showing his conception of morality in life, from, I presume, his priestly point of view :—

“I have given instances of Parsis keeping alien women as their mistresses. One was of the Liquor Contractor and the other of the Priest Faramdaroo. It is not an uncommon thing for Parsis to keep alien women as their mistresses. Whether it is reputable or not is the business of the man who keeps the woman. *Where is the disrepute of keeping women like that?* Many do it. . . . It is a common thing for Parsis to keep Dubri women as their mistresses at Surat and elsewhere in the Districts. It was very common at first and it prevails to a certain extent now.” “It is common amongst *Parsi Priests* to keep alien women as their mistresses. They ought not to do it. *It leads to adverse comment.*”

In my opinion, this man libelled the Parsi community of Surat and his own class when he said this practice was common amongst them. It is possible, as I have said before, that some Parsis in the districts of Gujerat, and possibly some Parsis in Surat itself, indulged in this disreputable practice ; but to say that it is common practice is, I think, to libel the whole Community. And as to Priests, there has been nothing whatever before us to show that their class indulged in the vice this witness attributes to them. This is the only man who has attempted to besmirch his own class before the Court. My object, however, in quoting the above extract from the witness's evidence is to show that, in his opinion, there is no disrepute attaching to men who keep low-caste Hindu women in the way he has described, and that his only objection to priests doing the same is that it would lead to adverse comment. That his own conscience in religious matters, when they touch his pocket, is as elastic as his sense of social morality is also clear from his own evidence. Speaking of a Parsi who wanted this witness to invest two children of his Mahomedan mistress—by, according to him, a Mahomedan

husband—he said he refused to do it as the father of the Parsi told him not to do so. He goes on, however, to say :—

“ If he had come to me and asked me again and *made proper arrangement for payment* to me, I would have done it. *The work of he who pays is always done* So far as I was concerned, it was a matter of money—of fees.”

Translated in plain language, the witness admitted he was, for money considerations, prepared to do any work, however dirty. At least, that is how I read his evidence. This was the man on whose evidence the Plaintiffs relied to prove, in the words of the witness himself, that it had been the custom for a long time in his Community to convert aliens to the Zoroastrian religion. After having expressed his “independent opinion,” within the ruling of the Privy Council case I have referred to before now, this witness began his evidence by giving instances which he said were well known to him. He was then made to give what appeared to be carefully prepared evidence, intended to corroborate the witnesses Bhownagree and Khusrubhai. He began talking about things as if he knew them personally, but it was soon discovered that many incidents he spoke of were told to him by somebody else. Speaking of converts in the Bhownagree family, he said: “The *children* of these original converts were invested with Sudra and Kusti in my presence.” He spoke of other similar incidents as if he knew all about them personally. At the end of the case, in answer to the Court, he said: “With the exception of the investiture ceremony of Temulji, I was not present at the ceremony of the investiture of any of the Dubras of whose conversion I have spoken.” Then, again, he spoke of a Mahomedan woman being converted to Zoroastrianism and married to a Mr. Rustomji Vakeel, of Surat, under the name of Cooverbai. The witness himself is 68 years old. This conversion he said took place 60 or 70 years ago and he heard about it 50 years ago. Dhunjisha Motabhoy Vakeel, who was examined in connection with the conversion of Soonabai, happened to be a member of the Vakeel family of Surat. He said Rustomji Vakeel was his father’s brother, and he gave a flat contradiction to the statement that Cooverbai was a converted Mahomedan. He said she was a pure Parsi lady.

This witness, after making a statement that many Mahomedans had been converted to the Zoroastrian religion, proceeded, in support of his statement, to give, in great detail, the story of the conversion of two children born

of Mahomedan mother and father. He said one Framji Bhicaji Ross, otherwise known as Framji Bhicaji Erava, returned from Delhi to his native place Surat, bringing with him his Mahomedan mistress, named Begum. She had with her two children—a girl 5 years old and a boy 3 years old. This, he said, was about 20 or 22 years ago. Framji was anxious to have these children invested with Sudra and Kusti and asked the witness to perform their Navjot, but Framji's father opposed such a proceeding and told the witness not to do it. Other people also, he says, told him not to do it, as they were "not the children by a Parsi father." In fact, Begum herself, he said, had told him that they were children of a Mahomedan, who was dead. Witness said Framji's father said to him :—

“ They are not the children of my son, and therefore you should not perform the ceremony.”

On this he refused to perform the Navjot ceremony. It is in connection with this incident that the witness said that if Framji had made it worth his while he would have done it, for the "work of he who pays is always done." The witness then goes on to say Framji took the children to Udwarda and had them there invested with Sudra and Kusti, and they were thereafter named Cooverbai and Dhunjisha.

The whole story told by this witness was proved to be a tissue of the most impudent falsehoods. His evidence was concluded on the 17th of February. It received wide publicity through the daily newspaper reports. The Defendants, on receiving certain information, applied to have this man recalled, and he was examined again on the 6th of April, with reference to the story he told of the children of Framji's mistress Begum. He knew that he had been found out and his attempts at explaining away the falsehoods he had uttered were most futile. Certain documents were produced, and the witness had to admit that Framji's father had died 7 or 8 years before Dhunjisha, the younger of the two children, was born. The whole story of Framji's father dissuading the witness from performing the Navjot ceremony was pure invention. He tried to explain this by saying that when he talked of Framji's father he was referring to Framji's younger brother, Adurji. That this is again deliberately untrue is clear from the fact that Adurji could not have said to him as he deposed : "They are not the children of my son."

The whole story about investiture at Udwarda turned out also to be a myth ; for, when asked if he was prepared to deny that these children he

spoke of were invested with Sudra and Kusti at Neemuch, he replied in the negative and said :—

“Somebody told me—it was a Mobed who told me—that the investiture took place at Udwada. I do not remember the name of the Mobed. He is dead now many years.”

Exhibit No. 85, the marriage certificate of Dhunjisha, shows that he was the acknowledged son of Framji. There is nothing whatever before us to show that those children of Framji that the witness spoke of, *viz.*, Dhunjisha and Cooverbai, were not Framji's own children born in lawful wedlock of a Parsi wife.

This was the principal witness amongst the witnesses called on behalf of the Plaintiffs to prove the usage supposed to be prevailing amongst the Parsis of admitting Juddins into their religion. This was their chief man to prove the custom alleged to exist amongst the Parsis by giving evidence of concrete instances. Witnesses like Bhownagree and Khusrubhai had the merit of saying what they actually believed, however erroneous that belief might have been. This witness, Sorabji Bomanji Punthakey, invented lying stories and told wilful untruths. I have no doubt he acted upon the principles which he pithily summarised in the single sentence “The work of he who pays is always done,” which remark was followed immediately by a very candid query : “Why should I do work without payment?”

I am quite sure this witness is quite incapable of doing any work for anybody without payment. Coming all the way to Bombay from Surat ; stopping in Bombay and giving lengthy evidence—mostly evolved out of his own imagination ; subjecting himself to annoying cross-examination, was all very anxious work, which it would be contrary to the avowed principles of this witness to undertake and go through without adequate payment. Who paid him ?

This is all the oral evidence the Plaintiffs called to prove concrete instances of conversion of Juddins. When the learned Counsel commenced to call this evidence, we were told that the Plaintiffs had a very large body of this class of evidence. This evidence was recorded for five days. On the morning of the 18th of February, Mr. Lowndes made an appeal to us of which the following is my note :—

“Mr. Lowndes asks the Court to help him to decide whether he should call now other evidence of the same nature as the evidence he has called, or reserve the same and call his witnesses, if necessary, as rebutting evidence.”

“ The Court declines to express any opinion at this stage and leaves Counsel to exercise his own discretion.”

“ Mr. Strangman suggests that Mr. Lowndes should, at all events, complete his evidence on the instance of the convert Soonabai.”

Mr. Lowndes acted up to Mr. Strangman's suggestion, called only such evidence as completed the incident of Soonabai's conversion, and stopped calling any further evidence of witnesses who had formed “ independent opinion ” based on concrete instances. The case was heard till the 13th of April, but we had no more witnesses of the class I have been discussing. No application whatever was made to call any evidence in rebuttal. If Counsel was correctly instructed to state to us that the Plaintiffs had more evidence of the kind they called before us, it seems to me the exercise of very wise discretion on their or their legal adviser's part to have abstained from calling it. This evidence was in the main valueless and in part false. If anything, it accentuated the correctness of the Defendants' case, where they said those who were hitherto admitted into the Zoroastrian religion were all known to be born of Parsi fathers. It has not established one single instance of a Juddin—that is, an entire alien, one born of both non-Zoroastrian parents—being ever invested with a Sudra and Kusti and admitted into the fold of the followers of Zoroaster.

The Plaintiffs relied on certain historical instances as proving the admission of Juddins into the Zoroastrian religion. These historical instances were three :—

- (1) The conversion of three learned Hindu Pandits whose names are mentioned in the Dhup Nirang.
- (2) The conversion of the Emperor Akbar.
- (3) The conversion of certain men, women, and children of Mazagon, who were admitted into the religion by the late Dustoor Jamaspji in the year 1882.

The first one of these three instances relied on by the Plaintiffs is the oldest. The whole fabric of this historical instance of the supposed conversion of three Brahmin Pandits to Zoroastrianism is based on a passage in the Dhup Nirang. Its translation by Anquetil du Perron in the prayer is as follows :—

“ I invoke here the pure and happy soul of Mobed Hemdjiar Ormuzdiar (son of) Herbed Rahmiar. I invoke the pure and

happy soul of Mobed Neriosang (son of) Daval. I invoke the pure and happy soul of Biopendet, (son of) Djesalpendet (brother of) Schobulpendet." (Printed Books, Part I, p. 226.)

Anquetil du Perron says that the three last names are the names of three Hindu Pandits, Bio, Djesal, and Schobal, who were converted to Zoroastrianism. It is not very clear from the translation whether the invocations are to the souls of all three, or only to that of the first one, the others being merely the recital of the names of the father and brother of the first. The reference to this passage in Expert Committee's Report (Exhibit No. 1) is equally vague. Several learned men who have been examined in this case have been questioned on this point. By some scholars these Pandits are supposed to have been converted 400 or 500 years ago; by others 1200 years ago. Mr. Sheriarji Bharucha says, Anquetil du Perron puts the period when these Pandits flourished as the same when Neriosang flourished, and tradition has it that Neriosang was amongst the original emigrants from Persia to whom Jadav Rana of Gujerat gave permission to settle in India. The latter opinion seems to be the better opinion. The conjunction of Neriosang's name with these three names lend support to the suggestion that when the Dhup Nirang prayers were composed, the names of great men, who had flourished in those days about the same time, were named together in the invocations. It seems that, at one time, it was taken for granted that what Anquetil du Perron had said about these three men being Hindu Pandits and converted to Zoroastrianism was correct, and the religious experts who framed their report assumed this statement to be correct. Since signing the report, however, Mr. Jivanji Mody, the Secretary to the Trustees of the Panchayet Funds and Properties, who was one of the Defendants' principal witnesses, has changed his opinion on this as on other points in the case, and he has submitted to the Court several theories against Anquetil du Perron's statement that these Pundits were converted to Zoroastrianism. He finds from his research that these three names are not known to Sanskrit scholars as those of Hindu Pandits of those days. He thinks Anquetil du Perron was misled into believing them to be Hindus. He thinks it is possible they were learned Parsis and called Pandits. This is not by any means an improbable suggestion. A learned Mahomedan is a Moola, a learned Hindu is a Pandit, and a Hindu learned in the Shastras is a Shastri. Parsis have been known by the surname of Moola, and Mr. Jivanji Mody showed an instance of a Parsi spoken of in a book as a Shastri. I have had recently before me Marathi literature in which the present Secretary of State for India is spoken of as Pandit Morley. This is, however, an alternative suggestion made by Mr. Mody, which, I

think, is probably the correct explanation of this passage in the Dhup Nirang. It is very likely that these three men were good men, who had rendered great services to the Zoroastrians in their early days of settlement in India. If they were contemporaries of Nariosang, they may have been men who were prominent in giving the wanderers a home in a strange land and in extending them a kindly welcome in this country. In grateful remembrance of these kindly services, their names were most probably inserted in the Dhup Nirang by the Dustoor who composed those prayers. It is extremely difficult to believe that this handful of homeless strangers, so soon after they were permitted to make their home in a foreign country, should have succeeded in converting to their own religion three eminent and learned Hindu Brahmins. Anquetil du Perron appends a note to his translation of this passage which is very suggestive. He says :—

“These three *Dustoors* were Brahmins converted to the religion of Zoroaster, but whom the fear of the Rajahs obliged to hide their conversion.”

How then, if their conversion was a secret, did Anquetil du Perron come to know of it. From the mere fact that at the end of the three names the word Pandit was affixed, I am not prepared to hold that they are the names of three Hindu Pandits ; and from the mere fact that their names appear in the Dhup Nirang, I am not prepared to hold that they were converts to Zoroastrianism, assuming, for argument's sake, that they were Hindus. The mere fact that a name appears in the prayers of the Zoroastrians, does not prove that the bearer of that name was a Zoroastrian ; for Mr. Jivanji Mody has conclusively proved before the Court that the name of Firdusi Tooshi is also recited in the Dhup Nirang. No one can seriously suggest that Firdush Tooshi was a converted Zoroastrian. Assuming that the three names in the Dhup Nirang are the names of three Brahmins, the presence of those names is most easily explained. A Zoroastrian is nothing if he is not altruistic in his prayers. His prayers are not confined to asking for blessings on himself, his family, and his community. His prayers include invocations and petitions for benefits, both spiritual or temporal, for all Zoroastrians, for all holy and virtuous men of all communities ; his prayers invoke blessings on his sovereign, on his village, on his country, on the universe ; they comprise the names of all good and great men whose souls are invoked for the good of all mankind. One favourite mode amongst the Zoroastrians of acknowledging and for ever remembering the good work of a great man, is to include his

name in his prayers, and such a distinction it is not necessary, as far as I know, to confine to Zoroastrians alone. Whereas I find great difficulty in entertaining the theory that Bio Pandit, Djsul Pandit, and Schobul Pandit were Brahmins converted to Zoroastrianism—a theory for which there is absolutely no foundation, I have no difficulty in believing that they were good men who had rendered services to distressed Zoroastrians when they landed in this country, driven from their own home by religious persecution; and that, in gratitude for their kindness, the Zoroastrians of the day introduced their names in their prayers, so that themselves and succeeding generations of Zoroastrians may for ever cherish their memory.

The second historical instance of alien conversion to Zoroastrianism is that of the Emperor Akbar. I confess I feel a difficulty in discussing this part of the Plaintiffs' case with any gravity. Six otherwise sober and sensible people solemnly instruct their Counsel to urge—in support of their contention that it is customary and usual amongst Zoroastrians to convert aliens—that the Emperor Akbar was a converted Zoroastrian. And the equal solemnity with which some of the learned witnesses asserted and others contradicted the suggestion that Akbar was a Zoroastrian bordered on the ridiculous. Mr. Behramgor Tehmurus Anklesaria gravely told the Court that, from his researches, he had come to the conclusion “that at a certain period of his life Akbar had become a *Parsi* and a Zoroastrian.” He, however, immediately destroyed the fabric built on his researches by saying, in the very next breath, that Akbar could not be said to have lived and died a *Parsi*, because he was buried. Says the witness, the first act of a convert would have been to build a *Dokhma* and Akbar never built one. Thus, to his evident satisfaction, the witness proved that his conclusion—arrived at from his researches—was wrong. Mr. Jivanji Mody, in his book on “*Parsi at the Court of Akbar*” gave currency to the theory of Akbar's conversion, and a book called “*Akbar Charitra*” contained a ballad to the effect that Akbar was invested by *Dustoor Meherji Rana* with *Sudra* and *Kusti*. It seems to me that, in a fit of religious fervour, some irresponsible people, extolling the merits of the Zoroastrian religion, started the canard that even the great Emperor Akbar was once a convert to Zoroastrianism. This fable evidently tickled the fancy of enthusiasts, who gave currency to it and embellished the story by adding details as their fancy suggested. Mr. Jivanji Mody and others gave currency to the story, and, never dreaming that some day it would be used against the interests of the very religion he was extolling, allowed himself to be led into the use of language which justifies an impression that he was expressing his own belief in the story. He now, however, stoutly combats the theory of Akbar having ever been a Zoroas-

trian. Whether Mr. Jivanji Mody and others expressed their belief in the story or not, the fact remains that Akbar lived and died a professed Mahomedan. Had a great Emperor like Akbar become a Zoroastrian at any period of his life, his very first acts would have been the building and consecration of Atash Behrams and Dokhmas; and if there is any, the smallest, foundation for the story that Akbar had embraced Zoroastrianism, responsible historians would have recorded it as an event of very great importance.

The third historical instance on which the Plaintiffs rely, far from being shadowy and unsubstantial as the first two, is based on facts. There ought to be no dispute as to what the real facts were, for they are recorded in great detail by the late Dustoor Jamaspi Minochurji, who, every one of the witnesses who were asked about it say, was a man of the highest integrity, honour, and truthfulness. In the year 1882, Dustoor Jamaspi, one of the two head priests of the Shenshai section of the Parsi Community, invested nine persons—five females and four males, whose ages ranged from 35 to 77—with Sudra and Kusti in the presence of a large number of leading Parsis. The other high priest, Dustoor Peshotan—between whom and Dustoor Jamaspi there always existed great rivalry and unfriendliness—issued handbills and distributed them amongst the people assembled as soon as the Navjot ceremony was over, stating that as he was not aware what ceremonies had been performed by Dustoor Jamaspi in admitting Juddins in the Zoroastrian religion, he would not allow the newly-admitted men and women in his Atash Behram. He subsequently published a pamphlet stating therein what, according to him, were the necessary ceremonies to be performed before admitting Juddins into the Zoroastrian religion. Dustoor Jamaspi published a pamphlet in refutation of Dustoor Peshotan's brochure, in which he most emphatically resented the application of the word Juddins to the people he had invested with Sudra and Kusti. Part I of this pamphlet is Exhibit No. 90 in the case. In that part, Dustoor Jamaspi gives the whole history of the case and publishes copy of a Petition, addressed by the people whom he had admitted to Zoroastrianism, to the Trustees of the Parsi Punchayet Funds and Properties on the 19th of May, 1881. It appears from Dustoor Jamaspi's pamphlet that there were at Mazagon eleven persons—men, women, and children—who had been for a long time observing all the religious forms of Zoroastrianism and dressing as Parsis, but who had remained uninvested with Sudra and Kusti. Their existence was well known to the Parsi community of Bombay for some time, and some years previous to 1882, the late Mr. Merwanji Framji Panday interested himself in their behalf and offered to have them invested with

Sudra and Kusti; but these people, who belonged to a very humble sphere of life—the men earning their livelihood by working in the Docks—were frightened into a belief that the orthodox portion of the community would subject them to personal violence and forcibly divest them of Sudra and Kusti; so they abstained from taking advantage of the offer. Sometime afterwards, however, they presented the petition to the Trustees to which I have referred. In this they solemnly asserted that they were all born of Parsi fathers, that they were all of true Parsi *olad*, and that they were desirous of being invested with Sudra and Kusti and of being formally admitted into the Zoroastrian religion. The Trustees took no action on the petition, but about 200 leading Parsis interested themselves on their behalf and collected a fund. They approached Dustoor Jamaspji to admit these people. Dustoor Jamaspji thereupon instituted very strict enquiries and satisfied himself that all these eleven people were of Parsi *boon* (બુન)—that is, they were all offsprings of Parsi fathers. It was after he was satisfied that what these people had stated about their Parsi origin was true that Dustoor Jamaspji, in the presence of an assemblage of Parsis, in a public place and in the most open manner, invested nine out of the eleven persons with Sudra and Kusti. The remaining two were children of 5 and 2, and had not arrived at the age when they could be invested. This is the correct history of what were spoken of as Mazagon converts. They were in no sense Juddins. They were born of Zoroastrian fathers. They professed the Zoroastrian religion as soon as they arrived at the age of discretion. They observed all the outward forms of the religion of their fathers. They prayed for admission into the religion of their fathers at the dying request of one of themselves, who said: “I will be buried, but you try and get admission into the religion of our fathers;” and after full enquiries, when the Dustoor was satisfied that every one of them was of Parsi *olad*, they were admitted to the religion of their fathers.

Mr. Jivanji Mody, who is fully conversant with what has happened in the Parsi community, says with reference to this event as follows:—

“The Mazagon cases took place in 1882. After those cases, Dustoor Peshotan, one of the high priests, published a pamphlet finding fault with Dustoor Jamaspji, who performed the ceremonies, for not having performed *all* the proper ceremonies. Dustoor Peshotan complains of no Burushnum being performed before the Navjot ceremony. He contends that the Reemun (રેમન) Burushnum ought to have been first performed, then the investiture ceremony should have been performed, and then the great nine nights' Burushnum should have been performed.

Dustoor Jamaspji, in the Mazagon cases, *gave the great Burushnum of the nine nights to the people whom he admitted in this Zoroastrian faith.* Dustoor Jamaspji wrote and published a pamphlet in reply to Dustoor Peshotan. Dustoor Jamaspji argues at page 78 of his pamphlet that the Reemun Burushnum is not necessary."

A little later on Mr. Jivanji Mody said :—

"In 1882, Dustoor Peshotan published his pamphlet referring to the Mazagon cases. He treated those people as Juddins. The pamphlet is headed "Explanation of the ceremonies that should be performed for the admission of Juddins to the Zoroastrian religion." At page 4, you find that by Juddins, Dustoor Peshotan means children of Parsi fathers by alien mothers."

I have detailed at some length the controversy between two high priests as to what are the ceremonies necessary for admitting children of a Parsi father by an alien mother, as the question is of importance on another point which I propose to discuss later. It is difficult to give the exact meaning of the word Juddin. Literally, the word signifies a person belonging to another religion. There is no question that a person born of both non-Zoroastrian parents is a Juddin, but I do not think Dustoor Peshotan was right in calling the children of a Parsi father and an alien mother Juddins. For present purposes, it is sufficient to point out that the three historical instances do not in any way help the Plaintiffs. Defendants have never denied that children of Parsi fathers have been admitted before now—no doubt, in some instances, without their undergoing the nine nights' Burushnum ; and the admission of the Mazagon peoples loses all its importance for the Plaintiffs the moment it is established that the persons admitted were the offspring of Parsi fathers. The details given by Dustoor Jamaspji in his pamphlet with reference to each one of the nine persons whom he admitted proves beyond all doubt that they were, every one of them, the offspring of Parsi fathers.

Although the admission of these illegitimate offspring of Parsis by Juddin mothers was allowed, it must not be supposed that such proceedings met with the approval of the Parsi community. Several Exhibits in the case show that there were frequent protests against such proceeding and that the leaders of the community deplored these occurrences and tried to prevent them. A careful perusal of Exhibits A59 and A64 will demonstrate the fact that the admission of such offspring was not approved of by the community. On the 8th June, 1836, Wadiaji Nowroji Jamsedji wrote a letter

to his colleagues of the Parsi Punchayet tendering his resignation. On the letter of resignation going in the course of circulation to Framji Cowasji Banaji, he made a very lengthy minute on it on the 10th of June, 1836, also tendering his resignation. This letter of Wadiaji Nowroji and the minute of Framji Cowasji Banaji are Exhibit No. A59.

It appears that in consequence of these two communications, a meeting of the whole Punchayet was held on the 23rd of June, 1836, and certain Resolutions were passed at that meeting. Those Resolutions are Exhibit A64.

In his minute, Framji Cowasji Banaji complains as follows :—“ When you gentlemen did not at all put a stop to such bad acts of adultery, and when you left those acts unpunished, and when we *did not bring into force also the arrangements which we had made* before at our meeting at Wadiaji Hormusji's house with regard to the children born by such bad (improper) acts, then such bad acts went on increasing.”

The arrangement here referred to appears from A64 to be a Resolution passed by the Punchayet in Samvat year 1886 (A.D. 1829-1830). It is recited in the Resolution passed on the 23rd of June, 1836, which runs as follows :—

1st is this :—The new Regulation passed in Samvat year 1886 (A.D. 1829-1830), on the subject of *not* taking into the religion the children by kept-women, was read out before all the Sahebs, and it was resolved that whatever advice is deemed fit must be given to the priests who have at present invested the children by kept-women with the sacred shirt *without the permission of the Punchayet and without holding the Burushnum* and without using Nirangian.”

The long minute of Framji Cowasji Banaji is a most indignant condemnation of the immorality prevailing in the community at this time. He says :—

“ Those who have their wives desert them, and, keeping females of other castes as their mistresses, they pass their lives in their houses and they bring into our religion bad, *i.e.*, illegitimate children, born of their womb, and thus bring your holy Zoroastrian religion into disgrace.”

It will thus be seen that, although the admission of the offspring of alien mothers born out of wedlock were admitted into the religion, the Parsi community did not look upon such admissions with anything like approval. The utterance of Framji Cowasji Banaji must be taken to represent the voice of the Community, for in those days the members of the Panchayet were the chosen heads and leaders of the Community, and they voiced the sentiments and feelings of all members of the Community, both young and old. In those old days, education had not advanced sufficiently to enable the younger members of the Community to believe that they were wiser than their grandfathers, and were born with a mission to correct the errors of their elders.

It appears that the main reasons which actuated those who advocated the admission of these children born of Parsi fathers was that persons in whose veins Zoroastrian blood flowed should not be allowed to live and die without having the benefits of the religion of their fathers, and that a Zoroastrian's offspring should not be allowed to be buried or burnt after death as a Durvand. It was felt that this course appeared to lend countenance to immoral connections, but that was a lesser evil compared to the sin of allowing a Parsi's child to go through life without Sudra and Kusti and be burnt or buried after death.

Old men—men who have spent their whole lives in Bombay, learned men, men most intimately acquainted with the history of the Parsi community of Bombay, the high priest of the Parsis, Dustoor Darab Sanjana—have all been examined in the case. Not one has ever heard of a single Juddin being admitted into the Parsi community of Bombay. From the earliest times of their settlement in Bombay up to the present day, there never was known a single instance of a Juddin being admitted into the Zoroastrian religion by the investiture of Sudra and Kusti. There has not been one authentic instance of such admission proved to have taken place even anywhere out of Bombay. Every Charitable Fund and Religious Charitable Institution in the possession of the Defendants came into existence sometime after the Parsis definitely settled in Bombay and made it their home. No person other than a Zoroastrian, born of Zoroastrian parents, and children born of Parsi fathers duly admitted in the religion, has ever had the benefit of any one of these Funds or Institutions. The Navjot ceremony of the French lady, the 6th Plaintiff's wife, was the first instance of such a ceremony being performed in connection with a Juddin. When a Parsi uses the word Juddin, when designating a person professing a religion other than his own, he does it in no offensive sense. Some of the greatest admirers of the Zoroastrian religion have been Juddins. Some very learned

men of Europe have studied Zoroastrian Scriptures, as few Parsis have studied them. They have expounded the Scriptural writings of the Zoroastrians, translated them, and written most learned treatises on them. These are all Juddins, but they are Juddins whom the Parsis revere, whose friendships while living were most prized by the learned men of the Parsi community, and whose memories are reverently cherished by all Zoroastrians. The religion of Zoroaster teaches its followers to look upon all religions which are based on a belief in God—a belief in future existence—and which inculcates purity of thought, purity of words, and purity of deeds—with veneration. Therefore, when I refer to these two ladies, the French wife of the 6th Plaintiff and the Rajput lady as Juddins, I mean not the slightest disrespect to them. The word merely signifies born in a religion other than the religion of Zoroaster.

It is said—and said with great show of reason—if the Zoroaster religion permits—nay, enjoins—the conversion of those who are aliens to the religion, what is the objection to the admission of those aliens who desire to be converted to the Zoroastrian faith?

That is not the real question before us. The question before us is much narrower. It is merely this:—*If a Juddin is admitted to the Zoroastrian religion, is he or she entitled to participate in the benefits of the Charitable Funds of the Parsi Community and to be admitted to the benefits of the Religious and Charitable Institutions of the Parsis?*

As, however, the first and broader question has been argued at considerable length before us as preliminary to the real question in the suit, it is desirable shortly to discuss it.

When the controversy consequent on the Navjot ceremony of the French lady arose, there was intense excitement amongst the Parsi community. Meetings were held, Committees were appointed, and learned men from the Community were selected as experts, to report on the various religious controversial questions that arose. The Committee of Experts made their report, which is Exhibit A87. On this report, Mr. Lowndes, for the Plaintiffs, has placed great reliance. This report says that not only is there nothing in the sacred books to prohibit persons professing other religions from being admitted into the Zoroastrian religion, but that the Zoroastrian religion enjoins such conversions. I have proceeded throughout this judgment on the assumption that this is correct, and I purpose to consider the questions before the Court on that basis. The Zoroastrian religion is a revealed religion. It was revealed by the Supreme Being Ahura Mazda to

Zarthost. Scholars differ as to the period when Zoroaster flourished, but they are agreed that he flourished in the time of Kai Vistasp, one of the Kings of the Kyanian Dynasty. The religion revealed to Zoroaster was by him communicated to King Vistasp, who promulgated it amongst his people. It seems to me that all revealed religions must necessarily enjoin proselytisation, for otherwise how is the religion to progress beyond the prophet to whom it is revealed? Whether in the ancient times Zoroastrians attempted to proselytise the non-Zoroastrian people of Persia is not known; but those professing this religion, except for a short time when it was State religion, did not have a very prosperous time in Persia. The history of the Zoroastrian religion and its scriptural literature I have set out more fully in my judgment in the Muktdad Trust Case, 10 Bombay Law Reporter, page 417. It is sufficient for present purposes to say that religious persecutions became so intolerable in Persia that a large band of those professing the Zoroastrian religion left their homes and the country of their birth, and after various vicissitudes found at last a peaceful home in India. This was 1200 years ago. They spread over the principal cities of Gujerat as they increased in numbers, and some of them came and settled in Bombay somewhere about 250 years ago. It is with the descendants of the Zoroastrians who came to India that this Court is concerned, more especially with that part of the Community which settled in Bombay. Did they attempt to proselytise the people of India? Let us see what the learned experts, on whose report the Plaintiffs rely, say:—

“After the defeat of Yezdezerd, the Zoroastrians began to fly. They were not able to preserve their religion in their own native land with freedom. In Hindustan, they enjoyed the freedom of their religion under the rule of foreign kingdoms with difficulty. Under these circumstances, when it was difficult for themselves to preserve their own religion, how can they teach the said religion to others and how can they spread the same amongst others? Therefore, after their advent to Hindustan, their attempt to spread their own religion amongst others ceased, and it was to some extent natural.”

Dustoor Darab Peshotan Sanjana, the high priest of the Parsis, and the head priest of one of their most ancient Atash Behrams in Bombay, whose father and ancestors have been high priests before him and who was a member of the Expert Committee and has signed the report, was examined before us and he said:—

“With the exception of Mrs. Tata and the Rajput lady, I have heard or known of no conversions of entire aliens to Zoroas-

trianism in Bombay. I have heard or known of no instance of such conversion anywhere in India since the advent of the Parsis to India from Persia, except of these two ladies. There were no conversions, because at first there were difficulties in the way of the emigrants who found a safe refuge in India. Jadav Rana, of Gujerat, gave them refuge under certain conditions. Those conditions were not favourable to converting his subjects or anyone else in India to Zoroastrianism. During the first century of their settlement in India, the emigrants who settled in India had great difficulties in preserving their own people from going away from their own religion—they had great difficulty in preserving their religion and performing their religious rites and ceremonies, and safe-guarding their religious books. . . . It was felt besides that it would have been ingratitude towards the Rana who had given them refuge to try and convert his subjects.”

The fact of the matter is that for years and years after they obtained a foothold in India, their position in the country was most precarious. They were allowed to land and settle in the country on sufferance. They had no claims on the Gujerat Chief who allowed them to settle in the country. They had no Funds, no Dokhmas, no Atash Behrams or Agiarics. The observance of their own religious rites and the performance of the ceremonies enjoined by their religion must for years have been matters of the greatest difficulty. Who were they to convert : their then enemies the Mahomedans—the people whose persecution had driven them out of their fatherland—or the Hindus, the subjects of the Ruler who had given them refuge ? If they did attempt anything of the kind, the chances would have been that they would have had to go in search of another place of refuge.

It is all very well for the Parsis to say we did not attempt to convert Hindus to our faith, because it would have been ungrateful of us to do so. This may sound well ; but, if the truth is told, they made no attempts because they knew not only the utter hopelessness of any such attempt, but they knew further that any such attempt would have been so seriously resented that it would have resulted in ruin to the Community, living in the country on sufferance, and whose further countenance in the country depended on the good will of the ruling classes, the Hindus. Far from trying to proselytise, the Parsis, as years went on, adopted a great many of the customs and usages of the Hindus, and so adapted themselves to the ways of the people they lived amongst, that they earned their good will. As they increased

in numbers and prospered, they began building Dokhmas, Atash Behrams, and Agiaries in various places where they settled in large numbers ; but centuries had to elapse before they were able to do this. Although Parsis came to India 1200 years ago, most of their religious institutions came into existence in comparatively recent times. From the earliest days of their advent into India up to the present day, anything like even an attempt to proselytise other people and induce aliens to become Zoroastrians is wholly unknown. Although Parsis are now settled in various parts of India, and as communities are in many places both influential and wealthy, no instance is known of any Parsi ever attempting to induce a Juddin to become a Zoroastrian. Even when, at the earnest desire of fathers, children born of alien mothers were allowed to be invested with Sudra and Kusti, it was done more in a spirit of toleration, and that, too, not without a growl from a section of the community.

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.

During the progress of this case, it was abundantly clear that the Parsi community of Bombay, as a whole, most strenuously objected to the admission of Juddins. We made great efforts to bring this suit to a termination in an amicable manner. My learned brother Beaman indicated the lines of a fair settlement. One of the terms we suggested was that the Defendants might treat the case of these two ladies as exceptions and admit them to the benefits of the Funds and Institutions in even a limited form, and the Community of Parsis may then make what rules and pass what resolutions they like for future events. The Defendants said they could not agree to any such course without being guilty of breach of trust, unless they obtained the sanction of the Community. We adjourned the hearing of the case to enable them to do so. The late Sir Jamshedji exerted himself to put the matter before a Public Meeting of the Community, but the result was the unanimous refusal to accede to our suggestion. The Plaintiffs' Counsel said this was due to a "wave of fanaticism," and in an unguarded moment said that the Public Meeting was composed of the "riff-raff" of the Parsi community. Such an imputation against the composition of the meeting had apparently nothing whatever to justify it, and was calculated to give great offence, but I feel sure that the learned Counsel never intended to give any offence or seriously meant what he said.

The fact, however, remains that the community of Bombay Parsis, as a whole—with the exception of a most microscopic minority—are most unmistakeably opposed to the admission of Juddins into their fold, and the reasons are most obvious. Who are the people that are most likely to ask for admission? Generations may elapse before a well-born, well-educated, and cultured person like the French lady would ask for admission; but throw the door open and thousands of undesirable aliens—such as Bhangis, Mahars, Kahars, and Dubras—will seek admission; and men of the stamp of the Plaintiffs' witness, Sorabji Punthakey, are always ready to perform their Navjot ceremony for a small monetary consideration. The Funds of 50 odd lacs of rupees, richly-endowed Institutions for poor Parsis, comfortable homes for the blind and infirm, Dispensaries, Sanitariums, Convalescent homes, would attract many thousands of the most objectionable people. Plaintiffs say there should be no restrictions to the admission of all Juddins. If their contentions are to prevail, the ruin of the Community would be accomplished in as many days as it has taken generations to attain to that position of prominence and prosperity which the Parsis of India have now achieved. When Sorabji Punthakey was cross-examined on this point, his attempts to explain the position he took up were most puerile and even he had not the grace to stop short at Sweepers and Lalias. Not so Mr. Sheriarji Bharucha, who, for eleven years, was the paid agent of the Rahanu Maye Mazdyeshni Sabha. His mission in life, in his own words, is "*to reform religion, correct superstitions, and disseminate religion according to the ideas of the Sabha.*" This witness is undoubtedly a learned man, but his zeal for reforming religion led him into giving some very disingenuous answers when he was asked about the conversion of sweepers and other people of that kind. A man may launch himself on a mission of expounding his religion and disseminating that religion as found in its scriptures, but there must be something radically wrong with the religious preceptions of a man who starts on a campaign of "*reforming religion and disseminating it according to the ideas of a Sabha.*"

Mr. Sheriarji Bharucha, in support of the Plaintiffs' case, said:—

"Any single priest may convert. He is not bound to make any enquiries, and he is not under any obligation to take anybody's permission."

He followed this by admitting that amongst Parsi priests there are many poor and unscrupulous men—black sheep he called them. He never seemed to realise that he was putting the whole Community at the mercy of such black sheep when he advocated wholesale conversion without enquiry

and without permission of any responsible person. He would admit Mahars and Bhangis to Atash Behrams and allow their bodies after death to be taken to the Towers, but he would insist on Bhangis giving up their dirty work first before being admitted to the Fire Temples. He then institutes an analogy between a Bhangi and a Nassesalar. He bases most of his opinions on the Ravayats, which, in another case, he said, were compilations of third-rate authority. His conception of religious writings, however, are quite as peculiar as his other opinions. Referring to the answers recorded in the Ravayats, he says they would be binding if they are conformable to our Avesta, and if they were reasonable, then alone they were considered binding. He then makes this remarkable statement :—

“ If I find any of the Ravayats to conform to religion according to *my opinion*, then I consider them good authorities.”

This witness admits that during the whole time he has lived in Bombay, “ he has never known any instance of any effort being made by his co-religionists to convert an entire alien.” He also says : “ The practice of conversion has not been in vogue since the Parsis came to India.” But, nevertheless, he sees no objection to converting all the Sweepers, Mahars, and Dubras of Gujerat to the Zoroastrian religion ! The evidence of a witness such as this, however great may be his learning, does not help the Court, and such blind and erratic advocacy is not likely to help the cause advocated. This witness, more than any one else, has succeeded in demonstrating to my mind how very unreasonable is the attitude adopted by the Plaintiffs on the question of the conversion of Juddins.

Centuries of association with their Hindu brethren have made the Parsis entertain the same feelings towards a Hindu of the lower castes as the Hindus themselves entertain. The Zoroastrian religion inculcates doctrines of purity and teaches cleanliness at every turn. Parsis, however poor, have never taken to occupations which may bring them in contact with unclean things. There is no Parsi—and there never has been a Parsi—who has followed the occupation of a Sweeper, a Barber, a Butcher, or a Shoemaker. Though in all other matters they have lived on terms of great friendship with their Hindu and Mahomedan fellow-subjects, in religious matters they have been most singularly nervous of any association of any kind with Durvands. This word again is not used in any offensive sense. To a Zoroastrian, his best friends amongst Europeans, Hindus, or Mahomedans are as much Durvands from a religious point of view as the humble Hamal or Massal who serves in his household. No Durvand is ever admitted inside of a Zoroastrian's Atash Behram, Agiary, or Dare Meher. No Durvand is allowed to remain

in the edifice where Muktrad ceremonies are being performed. No Durvand is allowed to go beyond a certain limit in the grounds of the Towers of Silence. No Durvand is allowed to look in when any of their religious ceremonies are being performed; and this feeling is carried to such an extent that the most honoured guests who are sometimes invited to witness a marriage ceremony are not allowed to have their chairs on the carpet over which the chairs of the bride and bridegroom are placed. Even at the present day, as Dustoor Darab told us, "an old-fashioned Parsi will not drink water touched by a Juddin, and he will not eat food cooked or prepared by him."

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 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.

Mr Jivanji Mody says :

“ The Towers . . . would be defiled if an alien's body is taken in, because of the associations, sentiments, and religious feelings of the Community, which are attached to the place as a sacred place.”

It is under these circumstances that the communities of Zoroastrians in India object to the conversion of aliens. It may have been one of the tenets of the Zoroastrian Community to convert aliens. When, anywhere between 5,000 and 10,000 years before Christ, Zoroaster promulgated the religion revealed to him, circumstances must have existed that made this necessary or desirable. We have no knowledge of what other religions existed then : the scriptures that exist talk of such religions as then existed as Dewa Yeshna, which may mean Idolatry, or worship of some one other than the Supreme Being. It must be remembered that the greater portion of the original and authentic Scriptures of the Zoroastrians—the Avesta Nasks—are lost and are not available to modern scholars. All except about a fifth part of these holy writings are lost, and no one knows what the behests of the prophet were in those scriptures that were lost. Reliance in this case is placed on the Ravayats. The Ravayats are not, in any sense, authoritative scriptural writings of the Zoroastrian religion. According to the Plaintiffs' own witness Sheriarji Bharucha, they are writings of which one may make use, if it suits one's purposes. If it agrees with one's ideas of what the religion dictates, act on it ; if it does not conform to one's opinion and appears to him unreasonable, reject it. The Ravayats are supposed to be questions sent from India to Persia in comparatively recent times, and answers to such questions sent by men who are supposed to have understood the religion better than those who sent the questions down to them. The three Ravayats on which reliance is placed are Exhibits E1, E2, and E3. One, at least, of the statements made in the question put in the first of these three Ravayats seems to me to be so startling that one hesitates to place much reliance on the accuracy of these Ravayats. It says that not only were Durvands invested with Sudra and Kusti, but they prepared Daroons for Ghambar and other ceremonies, and these used to be consecrated. Only a Zoroastrian could understand the gross improbability of such a thing having happened. However, this discussion is not of much importance, as I am proceeding on the basis that conversion of aliens is permitted and enjoined by the Zoroastrian religion. The usage of twelve centuries, however, proves that, under their altered circumstances—away from their fatherland, amidst

surroundings never within the contemplation of the Prophet when he promulgated his religion—the enjoyment to propagate the Zoroastrian religion amongst aliens has fallen into complete disuse. It is now sought to put in force this ancient ordinance of the religion to proselytize aliens, and to disregard the custom and set at naught the usage of the community prevailing amongst them for many centuries. The Plaintiffs seek the assistance of the Court, relying on the Ravayats and a report of a Committee of Experts selected from the Zoroastrian Community. Surely, if these documents are relied on as authorities, the person on whose behalf such assistance is sought must comply with the requirements laid down in these documents. Take first Exhibit No. 1—an important extract from the Expert Committee's report. Only those persons who, “with good object and pure intention . . . after showing their fitness to be considered as Zoroastrians,” desire to be admitted, then they may be admitted; but such admission must depend on a most important condition being fulfilled, and that is that such admission should be allowed “if no harm of any kind whatever could be done to the Zarthosti Mazdyasnans themselves.”

Who is to be the judge of “good object” and “pure intention” of the candidate and of his or her “fitness to be considered as a Zoroastrian?” Surely, not—as the Plaintiffs contend—the solitary priest who, according to their expert witness Sheriarji, is not bound to make any inquiries or ask anybody's permission? And, above all, who is to judge that, by such admission, no harm of any kind whatever could be done to the Zarthosti Mazdyasnans themselves? Surely, not that some solitary priest to whom a silver rupee may be dearer than the welfare of the Community.

Take the Ravayats and let us see what they lay down. The first Ravayat (Exhibit E1) is to this effect:—

“We say that the Mobeds (priests) and Behedins (laymen) should first take into consideration the religion and the tenets of the religion and the safety of their own persons and property, in order that (by so doing) they may not suffer any sort of harm. After being satisfied with regard to the aforesaid matter, if they buy Juddin's children and having taught them Avesta, if they take them into the good Mazdyasnan religion, then that is a great meritorious act.”

The second Ravayat relied on (Exhibit E2) says :—

“ If that person properly observes the tenets of the religion and puts faith in the religion, and if the good religion does not suffer harm (by such person coming into the religion), then it is lawful and proper to admit such person into the religion.”

If the persons on whose behalf the Plaintiffs have carried on this fight were before us, we might have been in a position to say whether, in the first instance, in the case of those persons, all the conditions laid down by the very documents they rely on have been fulfilled. How is the Court to make any declaration of any kind whatever in favour of persons who are not before the Court, and in the total absence of any information whatever as to whether the conditions preliminary to their admission were fulfilled ?

Fatal as this objection seems to me to be to the Plaintiffs' case, this is by no means the only infirmity. One of the questions submitted to the Expert Committee was : “ What are the ceremonies that should be performed ? ” To this question the Expert Committee give a very clear and definite reply at page 10 of Exhibit A87 :—

There are to be three ceremonies : 1stly, after a year's probation from the date of the written application of the candidate, he or she, after undergoing the purifying ceremony of Nahan, is to be invested with Sudra and Kusti in the same way as an ordinary Zoroastrian child ; 2ndly, the candidate is then to be given the Burushnum ; and 3rdly, the candidate is to be then reinvested with Sudra and Kusti. This report is signed by ten experts, including both the high priests of the Parsis, one of whom performed the Navjot ceremony of the 6th Plaintiff's wife. Three of the signatories, however, make additional minutes. Mr. K. R. Kama thinks the restrictions rather deterrent and the probation period too long, and Messrs. Sheriarji Bharucha and Behramgore Anklesaria think that the mere Navjot ceremony—the first of the three ceremonies mentioned in the report—is sufficient. Mr. K. R. Kama has not been examined before the Court. Mr. Sheriarji Bharucha and Mr. Behramgore Anklesaria have both been examined before us. Sheriarji is the accredited apostle of the Society, whose express aim is to *reform* religion and disseminate it according to the views of the Society of which Mr. K. R. Kama is, I believe, the head, and the opinions of those whose convictions are based not on what the tenets of a religion are, but what, according to their view, they should be, cannot command much attention in a Court of Law. Mr. Anklesaria candidly told the Court that his opinions were based on his reading of books only.

We find, however, that seven out of ten experts in the report relied upon by the Plaintiffs, including *both* the high priests, deliberately lay down that the three ceremonies, including the Burushnum, are essential to the proper admission of a Juddin to the Zoroastrian faith.

We find from Exhibit A64 that, as far back as 1836, in a Resolution passed by the whole Panchayet, the "holding of the Burushnum" is stated as a ceremony necessary for investing the children of Parsi fathers by kept-women.

We also find from the published pamphlets of both the late high priests, Dustoor Jamaspji and Dustoor Peshotam, that, although they were divided in their opinion as to whether Reemun Burushnum was or was not necessary, they are agreed that the nine nights' Burushnum was a ceremony essential to the admission even of those whose fathers were Zoroastrians; and Dustoor Jamaspji actually made the whole nine of the Mazagon people go through the Burushnum of the nine nights. The sons of both these high priests are the present high priests of the Parsis, and both of them have signed the report of the Expert Committee.

What is of still greater importance is that one of the very Ravayats on which the Plaintiffs base their contentions is very clear and explicit on the point. Exhibit E3 says :—

"If such *goolams* (slaves) and *kamjuks* (female slaves) have their faith in the good religion, then it is incumbent that they should be taken into the religion by investing them with Kusti, and when they become clever, well conversant with the tenets of the religion, and firm in their religious faith, *they shall be given Burushnum* (they shall be made to undergo the Burushnum ceremony).

The Plaintiffs base their case on the question of conversion on the Expert Committee's report and on the Ravayats. These documents are the foundation on which they have built their case. Can it lie in their mouths to say :— "We will rely only on such portions of them as suits our case and we will repudiate the rest." If they rely on documents they must take them as a whole, and it seems to me quite obvious from the materials available to the Court that, according to the dictates of the Zoroastrian religion as expounded in the Expert Committee's report and the Ravayats, and from the evidence, both oral and documentary, one of the essential ceremonies neces-

sary for the admission of a Juddin into the Zoroastrian religion is that of the nine nights' Burushnum. The Expert Committee is most emphatic in its opinion ; for, immediately after naming the three ceremonies, they say :—

“ Such Candidates alone (ઉપેક્ષાર્થે) who are admitted to the din (religion) after the performance of ceremonies *in this way* shall be entitled to all the rights as a Zoroastrian.”

While this question was being discussed, Mr. Lowndes pointed out to us that the nine nights' Burushnum was a ceremony that was extremely inconvenient for a grown-up female to go through. It is possible that the undergoing of this ceremony, in so far as it may involve the candidate going through certain forms, might not conform to some people's ideas of decency, but that is a matter that we are not concerned with. If a party chooses to enter a particular religion, he or she must go through the prescribed ceremonials, however irksome they may be. It must also be remembered that two of the Mazagon females whom Dustoor Jamaspji invested were, respectively, aged 29 and 19 ; and if they, who claimed to be descended from Parsi fathers, had to undergo the Burushnum of nine nights, how could a Juddin desiring to be converted to Zoroastrianism be said to be properly converted if he or she does not go through this purificatory ceremony ?

Dustoor Kaikhushru was called by the Court and asked a few questions. The circumstances under which he was called and not allowed to be cross-examined are recorded in my note book. As both parties did not choose to call him, and as he was not cross-examined, I have thought it best to refrain from making any comment on his evidence.

On the question of whether it is usual and customary to convert Juddins to Zoroastrianism, the Plaintiffs' Counsel relied on a great many books, such as books written by historians and travellers and journals of Societies, dictionaries, gazetteers, encyclopædias, etc. As a counterblast to this, the Defendants' Counsel produced other books of a similar nature. I have expended a great deal of my time in going over the passages relied on by both sides, and I consider the whole of the time so spent absolutely wasted. Most of the statements made in those books are about as accurate as the statement of modern travellers who spend a few weeks in the country and then feel competent to write books and newspaper articles about the manners and customs, the feelings and sentiments of the peoples of India. Even the article on the Parsis in the “Bombay Gazetteer” is full of inaccurate and misleading statements. One sample will suffice : it says the Persian emigrants

in India had forgotten their origin and their country. It would be wasting one's breath to point out how utterly absurd this statement is. We were told the article was compiled by the late Income Tax Collector of Bombay, Mr. Sirvai, and Mr. Bomanji Behramji Patell. I refuse to believe that Mr. Bomanji Patell, the author of the "Parsi Prakash," could write such sorry stuff as is to be found in the article. I doubt if the late Mr. Sirvai wrote it. How any Parsi can write some of the things that are to be found in the article passes my comprehension. Mr. Sirvai was dead, but when the suit was heard Mr. Bomanji Behramji Patell was alive and well, and he was not called to prove that the statements relied on by the Plaintiffs in the "Gazetteer" were correct. It is true that Mr. Lowndes had continuously expressed his belief that the Defendants intended to call him as their witness. Why the Defendants did not do so, is one of a few things in the conduct of the Defendants' case which I do not understand, but it must be remembered that fully a week before the Plaintiffs closed their evidence, Mr. Inverarity announced that he did not intend to call Mr. Bomanji Patell. The Plaintiffs closed their case on the 29th of February, whereas I find from my notes that on the 22nd of February, Mr. Inverarity definitely stated that he did not intend to call Mr. Bomanji Patell as his witness. It was quite open to the Plaintiffs to have called him and they did not choose to do so.

I have derived no assistance whatever from the books of travel, histories, dictionaries, journals of societies, and various other publications cited before us, and I do not propose to spend any time in noticing any of them.

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 1200 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 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 benefit of *persons professing the Zoroastrian religion.*”

They say that the Trusts 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 the 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 :—

1stly.—The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

2ndly.—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.

3rdly.—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.

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 6th 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 Pars or Fars, a

province in Persia, from which the original Persian emigrants came to India. Several witnesses corroborate this. One witness, Mr. Jamsetji Dadabhai 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 Pars, 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 significance 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 6th 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 expressions : “ 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 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 Complaint, 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 have established new charities have, in order to avoid all possible misunderstanding and to leave 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 Panchayet (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 donors 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 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 manifesting 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 *Maneckbai v. Merbai*, I. L. R., 6 Bombay, 363, 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 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 Trust 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 I, 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 *Rochefoucault v. Boustead*, L. R. Chancery Division, 1897, page 196, 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* and *Smith v. Mathews*, says:—

"According to these authorities, it is necessary to prove, by some writing or writings, *signed by the Defendants*, not only that 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 Defendants 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 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 obstacles 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, *Rochefoucault v. Boustead* 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 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 *Rochefoucault v. Boustead* 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 :—

“ 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 this 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 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 Godavra Agiary.

The documents relating to these properties consist of extracts from the “ Parsi Prakash,” Tablets, Letters, Anjuman Patras Advertisements in Newspapers, Addresses, Panchayet Resolutions, etc.

These contain various expressions, from which we are asked by Plaintiffs' Counsel to hold that the donors and founders intended Juddin Converts to be included amongst the beneficiaries.

I think it would be desirable here, in the first instance, to set out the documents relating to each of these properties and the expressions relied on by the Plaintiffs, and then consider what those expressions mean and were intended to mean.

Of the five Towers of Silence, the first that was built is known as Mody's Tower. It was built and consecrated in 1670. There is no docu-

ment whatever in existence relating to this Tower, and the only reference we find to it is in Exhibit Y (an extract from the "Parsi Prakash"), and that extract contains no expressions giving any indication whatever as to for whose use the Dokhma was built.

The next Tower, known as Maneckji Sett's Tower, was built and consecrated in 1756. The only Exhibit relating to this Tower is an extract from the "Parsi Prakash," Exhibit V. It merely says the Tower was built in consequence of a "great rise in the Zoroastrian population of Bombay." There is no document in existence in connection with this Tower.

In 1778, a third Tower, known as Anjuman's Tower, was erected and consecrated. There are no documents also in connection with this Tower. There is a tablet on it: a copy of the inscription on it is Exhibit Z. It says nothing as to for whose use this Dokhma was built. An extract from the "Parsi Prakash," Exhibit A1, with reference to this Dokhma, merely says:—

"The entire Zoroastrian Anjuman caused the Dokhma to be built."

The fourth Tower was built in 1832, and is known as Banaji's Tower. There are a good many documents, mostly informal, put in in connection with this Tower. They consist of letters, a tablet, an Anjuman Patra, and Advertisements in connection with its consecration ceremony. They are marked Exhibits A8, A9, A10, A11, A12, A13, A14, A15, A16, A17, and Nos. 71 and 72. The expressions used therein are "the entire Zoroastrian Anjuman," "people of the Zoroastrian community," "people of the Mazdiasnan religion," "persons of the Mazdiasnan religion," "the whole Anjuman," "the people of the Holy Zoroastrian Community of Bombay," "Dastoor, Mobeds, Herbuds, and Behedins of the Mazdiasnian religion of the Holy Zoroastrian Community."

The only document of any importance or formality is Exhibit A11, the Anjuman Patra or address to the Community, read by the founder, Framji Cowasji Banaji, on the occasion of the consecration ceremony. He says therein:—

"Now from to-day the Dokhma has been opened for being used in accordance with the tenets of the Mazdiasni religion *by the people of the Anjuman* (community) *of the Mazdiasni faith.*"

The fifth and the last Tower was built by Cowasji Edalji Bisni in the year 1844. The documents relating to this Tower are letters, advertisements, a tablet, a Resolution of the Panchayet, and an address. They are

Exhibits A18, A19, A20, A21, A22, A24, A25, A26, and A27. The expressions used are :—

“Entire Zoroastrian Anjuman of Bombay,” “all Zoroastrians,” “persons of the Firka of the pure and the best Mazdiasni religion,” “people of the whole Zoroastrian Anjuman,” and “the Holy Zoroastrian Community of Hindustan.”

This is the Tower referred to in paragraph 33 of the Defendants’ Written Statement, and in respect of which the founder stipulated that it should *not* be used for bodies of Parsees on whom inquests had been held, or whose bodies had been subjected to *post-mortem* examination or brought from outstations and brought into contact with non-Zoroastrians.

We next come to the three Sagdis. The first Sagdi, known as Muki Shroff’s Sagdi, was built in 1795, and there are no documents in existence relating to this building. The only exhibit in connection with it is Exhibit A28—an extract from the “Parsi Prakash,” which says that it was for the use of Zoroastrians.

The next is Saher’s Sagdi, built in 1830. The only Exhibits in connection with this building are a tablet and an Anjuman Patra. The tablet, Exhibit A30, says that this Sagdi was built for “the use of the Anjuman of the Zoroastrian people” and was given in charge of “the Anjuman of the Zoroastrian Community.” The Anjuman Patra, Exhibit A29, says that it was for “the use of the people of the Mazdiasni religion.”

The third Sagdi was built by the late Sir Dinshaw Petit in 1873. The Exhibits relating thereto are A31, A32, A33, A34, and A35, and consist of letters, a tablet, and Anjuman Patras. In Sir Dinshaw’s own letter, Exhibit A31, there are no expressions or words of any importance. In the reply by the Trustees, Exhibit A32, the words used are for the “use of the Zoroastrians.” In the Anjuman Patra, A33, dated the 7th October, 1873, the language used is : “I have built the said Sagdi for the use of the Khas-va-Aam of the Zoroastrian Anjuman.” On the Tablet, Exhibit A34, the words are :—“For the use of the Zoroastrian Anjuman.”

In connection with the Fort Nasakhana there are no documents.

There is only one document relating to the Baharkote Nasakhana, Exhibit A36. It recites that originally it was given “in charity for being used for the purposes relating to the Zoroastrian Community,” and it says there is a Tablet in it on which the words are “for being used by the Zoroastrian Anjuman.”

There are no documents relating to the Sagdiwala's house. With reference to the Godavra Agiary, there are two Exhibits before us. Exhibit A38 is an Anjuman Patra of April, 1860, which recites that, in 1825, the Atash Adran Saheb premises "were opened for the entire Zoroastrian Community" On the Tablet, A39, the words are "for the performance of divine worship for the entire Zoroastrian Community.

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 *Pirka* 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 expression 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 Gujerat.

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 proselytization, 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 139, 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*, 3 Atkyn's Reports, page 135, 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 the design of the Deeds should take effect rather than the contrary.

“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 Justice Hale—and the law commends the *astutia*—the cunning “—of the 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*, reported in 1 Drury and Warren's Reports, page 353, Lord Chancellor Sugden, at page 368, 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 and is reported in 2, House of Lords' Cases, 837. Lord Campbell, at page 863, lays 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*, 23 Beavans' Reports, page 350, says:—

“What the Court look 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*, 3 Hurlston and Coltman's Reports, page 458, 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 the 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 intent and scope of the Instrument, or unless 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 Gujerat, who would, no doubt, be attracted to the *Holy Mazdiasni religion* by reason of the *55 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 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. Jiwaji 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 Navsari, 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 ~~un~~auspicious 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 Gujerat, 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 benefitted by the Founders of these benefactions.

What has been the usage prevailing amongst the Parsis ? They have been in India for over 1200 years. The Plaintiffs' side have spared no expense or labour to prove that it is the usage amongst the Parsis to convert Juddins and admit them to their religion. How have the efforts of the Plaintiffs succeeded ? They had to resort to witnesses like Sorabji Punthakey

to prove instances of conversion. I think I am doing no injustice to the Plaintiffs when I say that they realized that their efforts hopelessly broke down. It was stated they had more evidence of the same kind. Why did not they call it? But supposing, for one moment, that the instances the Plaintiffs' witnesses spoke of, inclusive of the two converted Negroes—who, I believe, existed in Sorabji's imagination alone, would that prove usage in a large community spread over many centres of India? The attempt to prove that it was customary amongst the Parsis to convert Juddins hopelessly broke down, and it appeared to me that it was deliberately, and at the same time most wisely, abandoned. Then, is the usage proved by such instances as the supposed conversion of Akbar to Zoroastrianism at some time of his life, or by the supposed secret conversion of three learned Pandits mentioned in the Dhup Nirang? The Plaintiffs form a powerful combination—powerful in the possession of wealth, influence, and position; and if they so hopelessly failed to establish, to the satisfaction of the Court, one single instance of an authentic conversion of a Juddin to Zoroastrianism, it is not an unfair presumption that they failed—not for want of means to procure evidence, if it existed, and not for want of strenuous efforts; they failed because they attempted to prove a usage that never existed.

Then let us examine what were the tenets of the Founders. There is not the smallest difficulty in ascertaining the tenets of the Founders. Take Exhibit No. 73. It is a letter written to a Parsi at Poona by the whole Anjuman of Bombay on the 17th of June, 1824. It is written in the name of the whole Anjuman of Bombay and signed by the then most leading members of the Community. It says:—

“Without the permission of the Bombay Panchayet, (you) shall not give permission to any man, whose wife may be living, to marry a second wife; (you) shall not give permission to any woman (whose husband may be living) to marry a second husband; and (you) shall not give permission to invest with the sacred shirt the child by a woman of alien creed.”

Take Exhibit No. 74. It is a letter addressed by Cursetji Maneckji, a member of the Panchayet, to his colleagues, on the 10th of August, 1826. It seems that a Parsi gentleman had a Parsi servant, named Navla, who put on a Sudra on a woman of an alien creed and kept her in his house. The master of this man was ordered to “get the Londi's (slave's) Sudra taken off by the hand of the said servant Navla.” Mr. Cursetji calls a meeting of his colleagues to consider the conduct of this man, and after reciting the order to take off the Sudra and liberate the Londi, he says:—“We, all the persons

“sitting in the Panchayet, together shall tell the said Parsi servant Navla what we may think necessary to tell him, so that *no one may do such a thing again.*”

The same letter refers to a boy about whose origin there seemed to be some doubt and suggests inquiries into the matter.

It appears further, from Exhibit No. 75, that in the year 1828 immorality amongst the men of the Community was on the increase, and the question of what are called “outside children,” that is children by alien mothers, was being discussed. In a letter written on the 12th December, 1828, by Wadiaji Nowroji Jamshedji to Framji Cowasji and Jamsedji Jijibhai, he indignantly complains that some people invest such children without the permission of the Panchayet, and when other people ask for permission, it is withheld. He deplors the uncertainty respecting the children born of alien mistresses and says :—

“Therefore, in accordance with what was decided by Wadiaji Jamsedji, give public notice to the Community, and whenever there are such children, do not give permission at once to take them (in the Community), you make a firm *bundobust* at once. When a male of the Zoroastrian Community is seen with any female of alien creed, then *excommunicate him, and at his death he should not be put in the Tower of Silence even.* Then they will take care; and if you make such strong *minutes* while sitting in the public, then this matter can be remedied after great trouble.”

The agitation against admitting children born of Parsi fathers by alien mothers seems to have continued, and the suggestions in this letter were eventually carried out; for it appears from Exhibit No. 76 that the whole Parsi Community, “rich and poor, young and old,” met at a Fire Temple on the 11th of August, 1830, and passed most drastic Resolutions against the admission of such children. The Resolutions recite that much harm was caused to the religion by taking into it the children by kept-women, and therefore it was definitely decided that thenceforth no such children were to be invested with Sudra and Kusti, and the pains and penalties of excommunication and other punishment are prescribed against the priests who may *stealthily* invest such a child. Any family who harboured such a child is ordered to be also excommunicated. One has to read the Resolutions to realise how intense must have been the feeling in 1830 against the admission of even children by Parsi fathers.

From Exhibit No. 77, which contains an account of a meeting of the Panchayet held on the 29th of July, 1835, it appears that a Parsi brought an infant illegitimate child of his to his relations in Bombay and, representing that it was a Parsi child, got the usual ceremonies performed and had the child carried to the Tower. The account states how the Tower had to be re-purified, how the Burushnum of the officiating priest was taken as broken, and how the whole family of the Parsi was excommunicated, so much so that the priests were prohibited to perform any religious ceremonies in connection with that family.

That the Resolutions passed in 1830 by the Anjuman were not dead letters, but were rigorously enforced, is evident from Exhibit No. 78, which shows that, in two instances, where it was proved that illegitimate children of Parsis were invested by priests, the Panchayet, at their meeting held on the 28th of June, 1836, resolved to call a meeting of the Anjuman to have all the priests and the Parsis concerned excommunicated.

From Exhibit No. 89, it appears that at a meeting of the Panchayet, held on the 20th of July, 1850, it was resolved that certain priests, who invested the illegitimate children of a Parsi by his mistress of another creed, should be punished by being prevented from performing any function in any of the Fire Temples, which practically means deprivation of the means of earning livelihood as priests any longer.

In the earlier part of my judgment, I have referred to two Exhibits, A59 and A64. They are also helpful in proving what the tenets of the acknowledged heads or leaders of the Community were. On this point, the Exhibit oldest in date is Exhibit No. 79, which is an account of a Panchayet meeting, held on the 17th of August, 1818, given in the "Parsi Prakash." It appears that a Parsi brought an illegitimate daughter of his from Thana and begged the permission of the Panchayet to allow the child to be invested with Sudra and Kusti. This permission was given after considerable difficulty, and it was resolved that thenceforward no child of a Parsi by an alien wife was to be invested without the permission of the Panchayet.

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 restricted by making the previous permission of the Panchayet necessary, but later on the feeling against such 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, *à 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.

If the Plaintiffs believed that the tenets of the Founders were as was stated by their Counsel, why did they not venture to come forward and give evidence in support of their contention? Not one single Plaintiff of the seven on the record came forward to give evidence in the case, and I venture to think that if what was urged on their side was their belief, they could have given valuable evidence on their own behalf.

Take, for instance, the 1st Plaintiff, Sir Dinshaw Petit. His grandfather, whose name—a name revered and cherished by every member of the Community—he bears, was the Founder of one of the Institutions in question in the suit. The old Baronet and the members of his family have made most munificent donations to some of the Charitable Funds. A palatial Sanitarium for Parsis and an Orphanage for Parsi boys owe their origin to the 1st Plaintiff's family. The first Baronet was alive till within a very few years from now. He was alive years after the 1st Plaintiff attained to years of

discretion. As grandson and heir, he must necessarily have been in constant touch with his grandfather. Who could have deposed to what the tenets of the late Sir Dinshaw Petit, the Founder of one of the Sagdis and one of the largest contributors to Parsi charities, were with greater knowledge and authority than the 1st Plaintiff. If he could have told the Court that the tenets of his grandfather were in favour of Juddin conversions; that his grandfather approved of admitting Bhangis into the Parsi Community; that he had no objection to Dubras being converted to Zoroastrianism and their dead bodies carried to the Towers of Silence; that he would have looked upon a Mahar Zoroastrian attending religious ceremonies at Atash Behrams with himself with approval, he would have advanced the case of the Plaintiffs much more efficiently than it was advanced by the evidence of witnesses such as Sorabji Punthakey and Sheriarji Bharucha, called on behalf of himself and his co-Plaintiffs.

Take, again, the case of the 2nd Plaintiff, Sir Cowasji Jehangir, who bears the name of his great uncle and adoptive father—a name always honoured in the Community. The late Sir Cowasji contributed largely to Parsi charities. The present Sir Cowasji has himself given a piece of land adjoining the Towers to the Parsi Community. What were the tenets of the late Sir Cowasji, and what are his own tenets? Surely, when Counsel on Plaintiffs' behalf succeeded in letting in a large amount of hearsay evidence on the ground that his witnesses had formed independent opinions from what they had heard, the 2nd Plaintiff, even if he had no personal knowledge of his adoptive father's tenets, could still not pretend that he had not formed some opinion about the tenets of the late Sir Cowasji from what he must have heard of his convictions, opinions, and beliefs. Did the late Sir Cowasji hold as his tenet that Durvands and Juddins, Bhungis and Dubras, should be admitted into the Community, and have access to Fire Temples, and be carried after death to the Towers, and generally participate in his benefactions? Why does not the 2nd Plaintiff state what he surely must know?

The 3rd Plaintiff's grandfather, the late Mr. Byramji Jijibhai, has endowed many permanent charities, some of which are purely Parsi charities. Was it his intention to give the benefit of the Parsi charities to Juddin Converts? Why did not Mr. Rustomji Nanabhoy Byramji Jijibhai give the Court the benefit of his evidence?

The tenets of the Founders of the Charitable Institutions in question could, with great advantage, be ascertained from the tenets of the Founders of similar Institutions in other places. I find that the late Mr. Nusserwanji Tata, the grandfather of the 4th Plaintiff, built and consecrated a Tower of

Silence at Navsari. A full description of the ceremony of laying its foundation in 1877 and of its subsequent consecration in 1878 is given in the book very largely used before us at the hearing—Parsee Dharamsthalo.

I find from the same book that in 1884 Mr. Nusserwanji Tata built and dedicated to charity a Parsi Agiary at Bandora.

What were his tenets? If a grandson cannot tell us that, who can? Surely he knew. And yet Mr. Ratanji Jamsetji Tata, the 4th Plaintiff, did not favour the Court with his evidence!

Mr. Jivanji Mody, in his evidence, made a telling point against the Plaintiffs by stating that the French wife of the 6th Plaintiff, who is a prominent member of the Tata family, was not allowed to enter the Agiary built by the head of the family at Bandora. Who could have given an effective answer to this, if not true, than the 4th Plaintiff? He might also have told us whether there was any objection to the body of a Juddin Convert being disposed of in the Tower built by his grandfather at Navsari. Plaintiffs' Counsel appealed to the Court and asked: "Now that this lady had eschewed her own religion and adopted Zoroastrianism, where was she to go for religious worship; and, in the event of her death, where was her body going to be disposed of?" The obvious answer seems to be: "Why should she not make use of the very Institutions founded by the late head of the family of which she has become a member. The Bandora Agiary and the Navsari Tower, founded by the late Mr. Nasserwanji Tata, should be at her disposal, if the contentions of the 4th Plaintiff, Mr. Ruttonji Jamsedji Tata, are correct. He gave us no opportunity of ascertaining from him what the tenets of his grandfather were—tenets which surely he must know."

The grandfather of the 5th Plaintiff, the late Mr. Framji Nusserwanji Patell, was a prominent member of the Parsi Community, and so was his father. It might have thrown some light on the questions before us if he had taken the trouble to enlighten the Court as to their tenets.

The 7th Plaintiff, I believe, belongs to the priestly class. He could have shed some light on the tenets of his forefathers, and generally of the priestly class of the Parsis, if he had wished to do so.

I am constrained to believe that if the Plaintiffs' case on this head was based on convictions, they would have come forward and given evidence, and their absence can lead only to one very clear conclusion: they knew the tenets of their forefathers, they knew the tenets of the Founders; those tenets they knew were not the tenets their Counsel contended they were; *

they abstained from venturing to go into the witness-box, because they knew their evidence could not help their case—they knew their evidence would be destructive of the contention put forward on their behalf.

It is quite plain that the first five and the 7th Plaintiff had a grievance against the Defendants on the question of the appointment of Trustees. They believed the Defendants were not validly appointed Trustees and had no right to fill up vacancies amongst themselves.

The 6th Plaintiff had a grievance against the Defendants, because he believed they acted in a spirit of partisanship in excluding his wife. He proposed to fight the Defendants. The other Plaintiffs sympathised with him, and, in a spirit of chivalry, agreed to join him in the fight if the fight included their grievance; and hence a combination of two suits into one and a combination of two sets of Plaintiffs actuated by different considerations.

With the 6th Plaintiff, Mr. Ratanji Dadabhai Tata, I have the keenest sympathy. His conduct has been throughout open, straightforward, and manly; and it has cost me no little regret to be driven to conclusions which defeat the claims he makes on behalf of his wife. After marrying the lady, he brought her to India, and she went through the forms of admission into the Zoroastrian religion. He obtained the approval to his wife's admission, though in guarded terms, from Mr. Jivanji Mody and from Dastoor Darab, the two principal witnesses for the Defendants, on this part of the case, as will appear from their letters, Exhibits A96, A97, and A101.

The social reasons they now urge against her admission seem to me to be frivolous. If social reasons urged by these witnesses were the only reasons urged against her admission, I should have felt no hesitation in summarily brushing them aside. Besides their being too trivial, the Court in adjudging of the rights of parties would not be governed merely by social reasons such as were urged by the witnesses.

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 1200 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 usage of those professing the religion?

In *Peshotan Hormusji Dastoor v. Meherbai*, I. L. R., 13 Bombay, page 302, 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 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 marriages.

“*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 seventy 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 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 *Shirinbai v. Khursetji*, I. L. R., 22 Bombay, page 430, by our late Chief Justice Sir Charles Farran and Mr. Justice Hosking.

There 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 Counsels' 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. I will now record my findings on the issues:—

I find the 1st Issue in the negative.
 Ditto 2nd Issue ditto.
 Ditto 3rd Issue ditto.

On the 4th Issue, I find that the Deed of the 25th of September, 1884, is a valid Deed of Trust and contains therein correct declarations of Trusts. The power, however, of appointing successors to dying or retiring Trustee or Trustees becoming incapable, which the Deed purports to confer on the Trustees thereby appointed, is invalid.

My finding on the 5th Issue is in the negative. The powers created or conferred by the Deed of the 4th of December, 1851, Exhibit A42, are not invalid, except the power conferred on the Trustees thereby appointed to appoint successors to dying or retiring Trustees, or to Trustees becoming incapable.

My finding on the Issue No. 6 is practically contained in my finding on the 4th Issue. None of the powers created or conferred by the Deed of the 25th of September, 1884, are invalid, except the power thereby conferred on the Trustees of appointing successors to those who may die, retire, or become incapable.

I find Issue 7 in the affirmative.

Issue No. 8 raises "no material proposition of fact or law" as contemplated by Section 146 of the Civil Procedure Code, and I decline to answer the same.

The same answer which I have given to Issue No. 8 applies to Issue No. 9. Besides this, the Court is not in a position to say what the Parsi Community or the Plaintiffs were aware of with respect to the aforesaid Deeds of Trust.

I find Issue No. 10 in the negative.

Ditto Issue No. 11 in the affirmative.

My finding on Issue No. 12 is in the affirmative.

I find on the 13th Issue that the Defendants are not validly appointed Trustees of any of the Properties or Funds comprised in the two Trust Deeds, Exhibit U and Exhibit A42, except properties 10thly and 11thly described in Exhibit U.

My answer to the 14th Issue is that there is no necessity for framing any scheme with regard to the administration of any of the Trust properties, the Trusts declared in the two Trust Deeds being the true Trusts in respect of these properties. It is, however, necessary to have a scheme framed for the appointment of new Trustees to fill up vacancies as they may occur amongst the Trustees.

I find the 15th Issue in the negative.

I refuse to answer Issue No. 16. It is not framed as an Issue ought to be framed, and is not capable of being answered without going into a great many details of lengthy pleadings.

My finding on the 17th Issue is in the negative.

I answer Issue No. 18 in the negative. Till the claim was first asserted on behalf of the 6th Plaintiff's wife, no one other than persons comprised in the three classes mentioned in paragraph 14 of the Defendants' Written Statement is proved to have claimed to be entitled to the benefits of the Trusts comprised in the Deed of the 25th of September, 1884.

I find Issue No. 19 in the affirmative.

My answer to Issue No. 20 is in the negative, with regard to both questions in the Issue. I find that the Defendants have not been guilty of any misconduct whatever in the discharge of their duties as Trustees during the whole time they have been in office as such Trustees.

I find on Issue No. 21 that the Deed of the 25th of September, 1884, is binding on the Plaintiffs, except as to the power of appointment of Trustees thereby conferred on the Trustees appointed thereunder.

My answer to Issue No. 22 is that the Defendants are not validly appointed Trustees.

I refuse to answer Issues Nos. 23, 24, and 25 for reasons given in my answers to Issues Nos. 8 and 16.

Issue No. 26 is so framed that it is not possible to answer it concisely, except by referring to my Judgment, wherein I have held that the Plaintiffs are not entitled to maintain this suit so far as it seeks construction of the Deed of 1884.

I decline to answer Issue No. 27 for reasons given in my answers to Issues Nos. 8 and 16.

Issue No. 28 raises a very important question in the suit and which might have been more explicitly raised. My answer is: The Defendants have correctly described the constitution of the Parsi community in paragraph 14 of their Written Statement.

I decline to answer Issue No. 29 for the reasons given in my answers to Issues Nos. 8 and 16.

Issue No. 30 is answered in my judgment. It is so framed as to be incapable of being concisely answered.

As to Issue No. 31, I find that the Deeds have been long acted on, and they should be upheld in all respects, except as to power of appointment of new Trustees, which power has not been validly conferred on the Trustees appointed by the said Deeds.

Issue No. 32 cannot be answered. The Court has no means of knowing what the majority of the Parsi community do or do not approve of.

I refuse to answer Issues Nos. 33, 34, and 35 for reasons given in my answers to Issues Nos. 8 and 16.

My answer to Issue No. 36 is in the negative.

The question of costs alone now remains to be disposed of.

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' 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 4th Plaintiff, who bears his proportionate share of responsibility as to costs, the whole risk and responsibility is on the 6th 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 6th 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, 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.