

1887, and the decree-holder obtained no permission to make a fresh application under Civil Procedure Code, s. 373. The District Munsif held that the above circumstance was no bar to the present application, which he accordingly granted. But the Subordinate Judge, on appeal, reversed his order on the authority of *Radha Charan v. Man Singh*(1).

The decree-holder preferred this appeal.

*Ramachandra Rau Saheb* for appellant.

*Parthasaradhi Ayyangar* for respondent.

JUDGMENT.—The ruling in *Radha Charan v. Man Singh*(1) has never been adopted as the correct view of the law in this Presidency, see *Ramanadan v. Periatambi*(2) or in Calcutta and Bombay, see *Wajihan alias Alijan v. Bishwanath Parshad*(3) and *Shankar Bisto Nadgir v. Narsingh Rao Ramchandra*(4)—and we cannot follow it.

The order of the Subordinate Judge must be set aside and that of District Munsif restored. Appellant is entitled to his costs in this and in the Lower Appellate Court.

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## APPELLATE CIVIL.

*Before Mr. Justice Parker and Mr. Justice Subrahmanya Ayyar.*

AUGUSTINE AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MEDLYCOTT AND OTHERS (PLAINTIFFS), RESPONDENTS.\*

1892.  
Jan. 11, 14,  
15, 19.

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*Civil Procedure Code, ss. 15, 539, 578—Evidence Act, ss. 57, 87—Public charitable trust—District Court, jurisdiction of—Books of history.*

A church at Palayur and the property appertaining to it were in the possession of certain of the yogakars or parishioners, who had been elected kaikars or churchwardens, but whose election had since been superseded in favour of three other persons who now sued to recover possession. The plaintiffs were Roman Catholics; and with the three persons above referred to were joined as plaintiffs the Vicar Apostolic, the Vicar appointed to the church by him, and two other persons representing the Roman Catholic yogakars. The defendants were Chaldean Syrian Christians, and with those in possession were joined as defendants the Chor Episcopa, the Vicar appointed to the church by him, and four persons representing the other yogakars.

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(1) I.L.R., 12 All., 392. (2) I.L.R., 6 Mad., 250. (3) I.L.B., 18 Cal., 462.

(4) I.L.R., 11 Bom., 467.

\* Appeal No. 13 of 1891.

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The plaint was framed under Civil Procedure Code, s. 539, and contained, besides a prayer for possession, prayers for a declaration that the church, &c., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. The suit was tried by the District Judge, in whose Court it was instituted, although the defendants pleaded that it was within the jurisdiction of the Subordinate Court, s. 539 being inapplicable. He passed a decree as prayed, holding that the church, &c., was dedicated to the trust stated in the plaint, although it had been diverted from the purposes of that trust for a time. In coming to this conclusion, he referred to a Portuguese work dated 1606, "*India Orientalis Christiana*" published in 1794, and Hough's "*History of Christianity in India*" published in 1839 :

*Held*, (1) that the suit not being one brought by beneficiaries against trustees, nor for any of the purposes mentioned in Civil Procedure Code, s. 539, that section had no application ;

(2) that, although the suit should accordingly have been brought in the Subordinate Court, the District Judge had jurisdiction to try it ;

(3) that the District Judge was justified in referring to the books above referred to ;

(4) that the decree was right, on its appearing that the church, &c., had been held on the above trust from 1599 to 1882 with a doubtful interruption for one year, although the original trust may have been different.

APPEAL against the decree of A. Thompson, Acting District Judge of South Malabar, in original suit No. 1 of 1890.

Suit instituted with the consent of the Advocate-General under Civil Procedure Code, s. 539.

Plaintiff No. 1 was the Vicar Apostolic of Trichur, exercising as such authority over all Romo-Syrian churches (*i.e.*, Roman Catholic churches in which the Syrian rite is observed) within that vicariate ; plaintiff No. 2 was the vicar of one of such churches situate at Palayur ; plaintiffs Nos. 3 to 5 were the kaikars or wardens of that church ; plaintiffs Nos. 6 and 7 were members of the yogam of the church, and they sued as representing all the yogakars or parishioners "remaining in obedience to the faith and discipline of the Church of Rome."

Defendant No. 1, who used the designation of Chor Episcopa, claimed authority over the Palayur church by virtue of his appointment by Bishop Mellus, described in the plaint as a schismatic from the Church of Rome, but stated by the defendants to be the lawfully constituted ecclesiastical authority to whom the Chaldean Syro-Christian community was subordinate in all spiritual matters. Defendant No. 2 was the vicar appointed under his authority. Defendants Nos. 3 and 4 had been elected kaikars by a meeting of the yogam in 1887 at the same time as

plaintiff No. 6, and in October 1889 they had been declared by a magisterial order to be in possession together with him of the church and the property appertaining to it, and to be entitled to retain such possession until evicted by due course of law. The other defendants were members of the yogam of the church and were sued as representing all such yogakars as were not in obedience to the faith and discipline of the Church of Rome. The plaint contained the following paragraphs as to the history and constitution of the church :--

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“ The plaint church, together with all the property appertaining thereto as described in the schedules hereunto annexed, belongs to the yogakars, in trust, to use and cause to be used, the same for the worship of God in the communion and according to the faith and discipline of the Church of Rome, in obedience to the authority on that behalf ordained for the time being by His Holiness the Pope of Rome, and is included within the Vicariate Apostolic of Trichur.

“ In or about the year 1599 the yogakars of the plaint church came into the communion of the Church of Rome ; and from that time until the present, except for a short time hereinafter spoken of, the said church has ever been used for the worship of God in the communion and according to the faith and discipline of the Church of Rome in obedience to the Bishops or Vicars Apostolic or other authority for the time being appointed or sanctioned in that behalf by the Pope of Rome. In pursuance of such faith and discipline the vicar and clergy of the said church, except as is stated in the 6th paragraph herein, have ever been exclusively priests in communion with the said Church of Rome and appointed to the plaint church by the Bishops, Vicars Apostolic, or other authority aforesaid sanctioned in that behalf as aforesaid.

“ For the more convenient management of the secular affairs of the plaint church and properties it has ever been, and still is, the custom of the said yogam, subject to confirmation by and under the authority of the said Bishops, Vicars Apostolic or other authority aforesaid periodically to elect out of their number certain men called kaikars for the purpose of such management. The 3rd to 5th plaintiffs were so elected as kaikars in the month of July 1889 in the place and stead of the 3rd and 4th defendants and 6th plaintiff formerly elected as aforesaid.

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“ In or about the year 1874 the aforesaid Bishop Mellus came to Malabar pretending to have been appointed by His Holiness the Pope to be Metran over the Romo-Syrian churches in Malabar. Deceived by the said Bishop Mellus, certain of the yogakars of the plaint church, in disobedience to the authority of His Holiness, and contrary to the faith and discipline of the Church of Rome, in or about the year 1876, yielded themselves to the authority of the said Bishop Mellus, and so remained until by decrees of the High Court of Madras given in respect of certain other Romo-Syrian Churches in Malabar in like case with the plaint church, it was declared that the said Bishop Mellus had no authority over the said churches; whereupon, in or about the month of September 1886, the yogakars of the plaint church with the then kaikars and the second plaintiff, he then being the vicar of the said church, returned to their allegiance to the Church of Rome by a submission made to the Gubernador of Cranganore, who at that time was the local ecclesiastical superior of the said church under the authority of His said Holiness, and so remained until the 14th July 1889.”

The prayers of the plaint were for declarations that the church was subject to the jurisdiction of the Vicar Apostolic of Trichur; that the yogam held the church, &c., on the trust mentioned in paragraph 3 of the plaint; that plaintiffs Nos. 3 to 5 were the duly appointed kaikars; there were also prayers for possession of the church, &c., and for injunctions against the defendants and their section of the yogam.

The defendants denied the right of the plaintiffs to the reliefs claimed, and alleged as to history and constitution of the church as follows:—

“ The plaint church, together with all the property appertaining thereto, belong, and have ever belonged from the date of its foundation, exclusively to the Chaldean Syrian Christian community in Palayur, Orumanayur, Chavakad, Iringaprom, Guruvayur and other amsoms in British Malabar, and in Ariyannur and Choovallur desoms in Choondapravirthi in the Cochin State; have ever been devoted exclusively to the faith, and have remained in the uninterrupted possession and control of the said community. The said church and its properties have never at any time belonged to the Church of Rome, and have never been

“subject to the temporal or ecclesiastical jurisdiction of the Pope  
 “of Rome or of any authority subordinate to the Pope of Rome.  
 “The plaint church has ever since its foundation followed the  
 “practice, ritual and communion of the Chaldean Church at  
 “Babylon, and has been subject solely to the jurisdiction of the  
 “Patriarch of Babylon in all spiritual matters. But the present  
 “Patriarch of Babylon having been, contrary to custom, ap-  
 “pointed to his office by the Pope of Rome, the said Chaldean  
 “Syrian Christian community do not now hold themselves subject  
 “to his spiritual authority.

“No person other than the said Chaldean Syrian Christian  
 “community and their duly appointed kaikars has any voice in  
 “the temporal concerns of the plaint church.

“The said community of Chaldean Syrian Christians assembled  
 “in yogam elect from among their members annually, or at such  
 “other intervals as they deem fit, three persons called kaikars to  
 “manage the property of the church during their time of office  
 “and to act subject to the directions of the said community in all  
 “matters. The kaikars have never been elected subject to the  
 “confirmaton of any spiritual authority, Roman Catholic or Chal-  
 “dean Syrian.

“The defendants 3 and 4 and sixth plaintiff are the present  
 “kaikars. The third defendant is the present senior or head  
 “kaikar and, as such, in possession of all the title-deeds and  
 “properties of the said church.”

Further, the defence of limitation was raised, and it was pleaded  
 that the suit should have been brought in the Subordinate Court  
 and was wrongly brought under Civil Procedure Code, s. 539.

The District Judge held that the plaintiffs had established  
 their allegations and passed a decree as prayed. In his judgment  
 he referred (in paragraphs 8 and 9) to a Portuguese work by Fra  
 Antonio de Goneca, published at Coimbra in 1606, to the *India  
 Orientalis Christiana*, by Father Paulinus of Saint Bartholemew  
 published in Rome in 1794, and to Hough's *History of  
 Christianity in India*.

The defendants preferred this appeal.

Mr. Norton for appellants.

Mr. Gover for respondents.

JUDGMENT.—The first point taken before us is that the suit is  
 not one within the scope of section 539 of the Civil Procedure

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Code, and hence will not lie in the District Court. The District Judge held that, though the suit was not one for any of the five kinds of relief specially described in that section, the relief sought for came under the words "such further *or other* relief as the nature of the case may require."

It appears to us that the suit is not of the class contemplated in section 539 at all. That section deals with suits brought by beneficiaries against trustees, or for any of the special purposes mentioned in section 539; whereas this suit is brought by persons claiming to be the *de jure* church-wardens entitled to possession of the building against their predecessors in office whose term has expired and who refused to surrender possession and have usurped possession of the church and become trespassers. Plaintiffs Nos. 1 and 2 on the one side and defendants Nos. 1 and 2 on the other are joined in the suit in order to obtain a declaration at the same time as to the purposes of the trust, as to which the defendants, members of the congregation, are not in accord with the plaintiffs.

We are of opinion, therefore, that the suit should have been brought in the Subordinate Court; but we do not think it necessary on that ground to reverse the decree and return the plaint for presentation to the proper Court. The District Court had undoubtedly jurisdiction to try the suit, and we agree with the view taken by the High Courts of Allahabad and Calcutta as to the effect of section 15 of the Civil Procedure Code—*Nidhi Lal v. Mashar Husain*(1) and *Matra Mondal v. Hari Mohun Mullick*(2). In this case the suit has been fully tried on the merits by a Court which had jurisdiction to try it, and it would be manifestly unfair to direct an unnecessary re-trial on account of an irregularity not affecting the merits.

The next point urged is that all the defendants' witnesses were not examined. We find that issues were settled on 30th July 1890, and the suit was then posted for final hearing on 14th October. On 7th October the defendants applied for summonses for 17 witnesses, many of whom were resident in the Cochin State. The trial began on 14th October and continued for several days, but not till 24th October did the defendants ask for an adjournment on the ground that all their witnesses were

(1) I.L.R., 7 All., 230.

(2) I.L.R., 17 Cal., 155.

not present. It was not then stated that the summonses had not been issued, and there is nothing before us to show that they were not issued. The Judge rightly held that the defendants had been guilty of negligence and refused an adjournment. It is true that further time was asked for in September in order to obtain instructions and evidence from the Patriarch of Babylon, but this necessity (if real) does not excuse the defendants in neglecting to summon till too late witnesses who resided in their own immediate neighbourhood. Nor was the necessity for instructions from Babylon mentioned in the petition of 24th October.

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Passing to the merits, it was next objected that the District Judge was not justified under sections 57 and 87 of the Evidence Act in referring to the works spoken of in paragraphs 8 and 9 of his judgment. In this contention also we are unable to agree. Of these works, the first was published more than 200 years *ante litem motam*, the second in 1839, and the third, *India Orientalis Christiana*, was published at Rome in 1794 and is of recognized historical authority. So far, therefore, as these books related to matters of public history, the Judge was justified in referring to them.

With reference to the general history of Christianity in Malabar we may also refer to Logan's *Malabar Manual*. Practically, however, there is no dispute as to the events which led to the Synod of Diamper in 1599, or to the fact that Archbishop Menezes in that year brought the Syrian churches in Malabar into subjugation to the Church of Rome. By decree VIII, session III of that synod the acknowledgment of the Patriarch of Babylon as supreme pastor was expressly forbidden under pain of excommunication. It is true no doubt as pointed out by the District Judge that after the synod several of the Syrian churches reverted to Nestorian doctrines and united themselves to what is known as the Jacobite church; but we may point out that the Jacobite Bishop sent out in 1653 (Mar Ignatius) was sent by the Patriarch of Antioch and not by the Patriarch of Babylon. It appears (*Manual*, p. 209) that the present community of Syrian Christians, not under allegiance to Rome, is at the present day under the Patriarch of Antioch, and we are not referred to any historical work which shows that there is any body of Christians now in Malabar rejecting allegiance to Rome which is under the jurisdiction of the Patriarch of Babylon. It is a significant fact

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that the defendants have never alleged that the Palayur church is under the Patriarch of Antioch, yet that prelate now represents those Nestorian doctrines which were held in Malabar anterior to the Synod of Diamper. It is remarkable that, while the defendants now claim that the trust should revert to the ancient faith, notwithstanding the lapse of time during which the authority of Rome has been impressed upon the trust, they do not claim to be subordinate to the only patriarch who now exercises spiritual jurisdiction in Malabar over congregations professing the Nestorian doctrine.

It was urged that the evidence to show that the Palayur church came under the jurisdiction of Rome at the Synod of Diamper was but meagre. The facts shown, if not many in number, are, however, significant, and there is absolutely no evidence on the other side to show that from 1599 to 1861 the Patriarch of Babylon exercised any jurisdiction over their church. In Hough's *History of Christianity in India*, Vol. II, page 314, published in 1839, reference is made to the arrival of two Carmelite monks on the Malabar Coast in 1657 after the martyrdom of Bishop Attala and to the dissatisfaction of the Jesuits and Portuguese at their arrival. The narrative tells of their arrival at Palayur, one of the parishes in the diocese of Angamale (a Roman Bishopric), and that the cattanar (the rector of the place) concealed himself in order to avoid the unwelcome visitors. This certainly tends to show that at that time Palayur was under the jurisdiction of the Latin Bishops.

There can, we think, be no doubt that the Palayur church, entered in the list of Catholic churches at page 267 of *India Orientalis Christiana*, is the church now in dispute. Palayur is supposed to be one of the most ancient churches in Malabar, and it can hardly be supposed its name would be omitted in such a list. The mark affixed to the name shows that Palayur was one of the churches destroyed by fire by the army of Tippu Sultan.

It is scarcely possible that there can be stronger evidence as to what is really the faith and discipline of any church than the rituals in use in that church. Those in use at Palayur are the Syriac rituals prescribed for the use of the Malabar Romo-Syrian churches, and are printed at the Press of the Propaganda at Rome. Had the church not been Romo-Syrian, it is inconceivable such books would have been either supplied by the Propaganda or



have been allowed to be used in the church by any of the metrans under a schismatic patriarch. It is not even suggested that from 1599 up to the present date any other ritual has been used. The oral evidence likewise points to the inference that up to the coming of Mar Thoma in 1861 the Palayur church was subject to the jurisdiction of the Roman Bishop of Virapoli.

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It is admitted that Mar Thoma was sent by the Patriarch of Babylon in 1861, and that the Palayur church placed itself under him. Whether he came or professed to come with or without the sanction and authority of the Papal See there is no evidence to show; but his stay was short, and he left India in 1862. The defendants contend that after his departure the Palayur church remained under the authority of a metran appointed by the Patriarch of Babylon, while the plaintiffs assert that the church then submitted to the "Gubernador" of Cranganore.

A large number of documents were put forward as showing that the Gubernador exercised jurisdiction over the Palayur church subsequent to 1861 and up to the coming of Bishop Mellus in 1874. It is objected before us in appeal that these documents were not proved and that they were not produced at the right time. No such objections appear to have been taken in the Court below, and the Judge found that their genuineness was proved. A similar objection was taken in the Chittatur case and overruled—*Bishop Mellus v. the Vicar Apostolic of Malabar*(1). The documents unquestionably show that jurisdiction was exercised by the "Gubernador."

It may be noted as curious that the Palayur church did not on the departure of Mar Thoma again submit itself to the jurisdiction of the Bishop of Virapoli. In explanation, it is suggested that discipline was lax, and that so long as the churches did not place themselves under heretical bishops, the Roman authorities were not very particular which Latin Bishop was acknowledged. This explanation is by no means improbable. It was in 1861 that, in accordance with a concordat made between the Vatican and the King of Portugal, commissioners were sent out to define the jurisdiction of the Goanese prelates and the Vicars Apostolic under the control of the Propaganda. It was not, however, until 1887 that the whole of the Roman churches of the Syrian rite

(1) I.L.R., 2 Mad., 295.

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(Palayur included) were handed over to the Vicar Apostolic of Trichur by the Vicar-General of the Portuguese mission at Cranganore (*vide* exhibit T T.\*)

It is then contended that, at any rate, since the arrival of the Bishop Mellus in 1874 the Palayur church has ceased to acknowledge the jurisdiction of the Pope of Rome, and has returned to the Syro-Chaldean faith as it existed previous to 1599. Upon a careful examination of the evidence, we are not prepared to hold that Bishop Mellus came to Malabar in the character of a bishop repudiating the supremacy of the See of Rome. The book marked C C C C † shows conclusively that in 1868 he was a Roman Catholic Bishop, and, as such, published a book which was printed at the Press of the Propaganda at Rome, of which the preface written by himself expressly asserted the supremacy of the Pope and denounced the Nestorian heresy to which he is now alleged to be an adherent. The first defendant admits that this book is now used in the schools under him.

Bishop Mellus was no doubt sent to Malabar by the Patriarch of Babylon. Exhibit D D D D is a certified translation of the Syriac letter of the Patriarch introducing him to the church at Trichur. Nothing can be clearer from that letter than that the patriarch himself at that time acknowledged the jurisdiction of the Roman See. It is quite clear that the real object which the patriarch had at heart was that the Romo-Syrian churches of Malabar should be exempted from the jurisdiction of the Latin Bishops and placed under a bishop of the Syro-Chaldaic rite. For that object he had twice visited Rome, and it is quite clear from what he says that it was not the supremacy of the Pope, but the supervision of the Propaganda which the Romo-Syrian church so strongly objected to. It is apparent from the letter itself that his petition to the Pope was unsuccessful, for he goes on to say that in his capacity of Patriarch of Babylon (no mention is made of the Pope's approval) he sends Bishop Mellus, though he anticipates he will meet with opposition from the Propaganda on his arrival in Malabar. Exhibit XVIII, ‡ which contains the

\* A letter from the Vicar-General, Cranganore, to Bishop Medlycott, dated 24th January 1888.

† Directorium spirituale a Reverendissimo Domino Elia Joanne Mello auctum, printed at the Propaganda in Rome in 1868.

‡ Certified copy of the Proceedings of the Madras Government, Political Department, dated 16th October 1874.

introduction given by the Patriarch to Her Majesty's Consul-General at Bagdad, and is forwarded to the Bombay Government, contains the same complaint against the tyranny of the Roman Propaganda, against which the protection of Her Majesty's Government is requested.

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There is considerable evidence that on first arrival in Malabar Bishop Mellus professed to have come with the authority of the Pope. That authority was, however, soon questioned in a suit brought against him by the Vicar Apostolic of Malabar (*Bishop Mellus v. The Vicar Apostolic of Malabar*(1)) in which the bull which he professed to hold from the Pope was denounced as a forgery. The evidence leaves no doubt that in course of time he was excommunicated by the Pope and was *then* recalled by the Patriarch of Babylon. Before leaving Malabar he appointed the first defendant as Chor Episcopa, but there is nothing to show that this appointment was ever approved by the patriarch, and the validity of any appointment under such circumstances may well be questioned. Exhibit XXIII is the pastoral letter addressed by Bishop Mellus to his flock in 1882 on taking leave of them. It does not allude to the circumstances under which he was undoubtedly recalled, and contains no repudiation of the supremacy of the Pope, but contains an earnest appeal to remain faithful to the ancient Chaldean faith notwithstanding the interference of "foreigners."

The inference, therefore, to be drawn from this evidence is that the Palayur church in submitting originally to the authority of Bishop Mellus never intended to repudiate the supremacy of the Roman See. Dr. Mellus held himself out as long as he could as having come with the sanction of the Pope; when that illusion was dispelled, he set up the plea that the Patriarch of Babylon had the right to appoint him; but he was then recalled by the patriarch. On his departure the yogam and kaikars did no doubt submit themselves for a time to the authority of the first defendant, who now denies the supremacy of the Pope, though there is no evidence that he himself is an adherent to Nestorian doctrines.

That the vicar and the kaikars did again submit themselves to the Pope in 1886, and that Bishop Medlycott did visit and

(1) I.L.R., 2 Mad., 295.

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formally assume jurisdiction over the church there is no reason to doubt. But even had the first defendant held uninterrupted possession since 1882, that fact could make little difference. We have seen that from 1599 till 1882, with the doubtful interruption of one year (1861), the church had been held upon a trust for the worship of God according to the faith and discipline of the Church of Rome, and that being the case, the fact that the Palayur congregation prior to the Synod of Diamper in 1599 may have been Nestorian in doctrine is immaterial. The objects of the original trust, if different, have long since ceased to exist, and the profession for 290 years of the faith, doctrine and discipline of the Roman Catholic Church according to the Romo-Syrian ritual is amply sufficient to impress a trust of that character upon the funds and property of the Palayur church. We have no doubt that the decision of the Judge upon this main contention is right.

Objection was then taken that plaintiffs Nos. 3 and 5 were not duly elected as kaikars. The point does not appear to have been strongly pressed in the Lower Court, and we do not think there is sufficient reason to hold there was any technical informality in summoning the meeting. The plaintiffs, at all events, represent that part of the yogam who are desirous of rescuing the property of the church from men who are seeking to divert the use of the trust to purposes alien to its proper object, and are on that ground entitled to succeed.

We can see no reasonable objection to the form of the decree. The language certainly would not preclude the See of Rome from transferring spiritual or ecclesiastical jurisdiction to any other Vicar Apostolic, and it is quite clear that those members of the yogam who repudiate the objects of the trust have for the time disqualified themselves from the exercise of the right to take part in its management.

The appeal must, therefore, be dismissed with costs.

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