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is unnecessary to examine its correctness, as it cannot carry the appellant's case further for the conduct of L. V. Marakayar and the fourth defendant would not amount to more than an attempt to escape the liability that a decree against the third defendant as representing the firm would cast on them. Mr. Anantakrishna Ayyar for the appellant relies also on the fact that the third defendant made a counter-claim in the suit, but this again can be referred only to his representative capacity. We must hold that the plaintiff is not entitled to the decree he asks for against the first, second and fourth defendants. We dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. November 10 and 24.

AMBALAM PAKKIYA UDAYAN (FIRST DEFENDANT), APPELLANT,

v.

RIGHT REV. J. M. BARTLE, S.J., D.D., AND TEN OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 10), RESPONDENTS.*

Church—Prevailing form of worship for sixty years, primâ facie *the original form—Right to manage—Usage alone not the test—Canon law may be invoked - One trustee cannot eject another—Repudiation by one trustee, good ground for his removal—Removal, amendment of plaint for, allowed, to avoid further litigation—Civil Procedure Code (Act XIV of* 1882) *sec.* 30—*Defendants on record objecting to represent others—jurisdiction of court to allow—Limitation Act (IX of* 1908), *sec.* 10—*No limitation against one holding properties as trustee—Whole income used, evidence of dedication of lands —Evidence Act (I of* 1872), *sec.* 57—*Only proof of notorious facts of public history dispensed with.*

When it is found that for a period of more than sixty years before the defendants' (parishioners') secession, the Roman Catholic form of worship prevailed in their parish church the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro-Chaldean at the inception.

As to the right of management of a particular Roman Catholic Church, and its properties, besides usage, other things, such as the rights of ecclesiastical authorities according to the canon law can be looked to, though in some churches on the West Coast, parishioners have more or less control over the management of the properties. A single trustee is not entitled to recover possession of the

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* Second Appeal No. 982 of 1909

properties appertaining to the trust from another trustee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust.

Even if the defendants or some of them were once entitled to be trustees along with the Vicar.

Held, that they by their secession from the Catholic Church and by their repudiation of the trusts of the institution which in law works a forfeiture of their office disentitled themselves to hold the office of trustee and that they had in law no answer to a suit for their removal.

Marian Pillai v. *Bishop of Mylapore* [(1894) I.L.R., 17 Mad., 447], followed.

Even if they offered to return to their allegiance to the Romish Church, it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee.

Even if the plaintiff had not asked for the removal of the defendants, an amendment to that effect can be allowed in order to avoid future litigation and in the interests of the trust.

A plaintiff may be allowed to sue certain defendants under section 30, Civil Procedure Code (Act XIV of 1882), as representing certain others in spite of the objection or refusal of the defendants on record to represent the others, the consent of the defendants on record not being necessary.

In re Andrews v. *Salmon* [(1888) Weekly Notes, 102], followed.

Where a defendant claims to hold certain properties as a trustee and not as his own, there is no period of limitation within which a suit must be brought to recover them on behalf of the trust [Limitation Act (IX of 1908), section 10]. The right to the properties of the trust must go with the right to the office of trustee.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram* [(1900) I.L.R. 23 Mad., 271 (P.C.)] and *Gossami Sri Gridharji* v. *Romanlalji Gossami* [(1890) I.L.R., 17 Calc., 3 (P.C.)], followed.

The fact that the entire income of certain properties has always been utilised for a church is very good evidence that the properties belong to it.

No deed of endowment is necessary to prove a dedication of certain properties in favour of a trust.

Under section 57, Evidence Act, the Court could dispense with evidence only of what may be regarded as notorious facts of public history, and cannot treat letters though 75 years old without any sort of legal proof, as proof of where certain missionaries were living or when they died.

"Taylor on Evidence," tenth edition, volume II, paragraph 1785, and "Wigmore on Evidence," volume III, section 1699, referred to.

SECOND APPEAL and memorandum of objections against the decree of F. H. HAMNETT, the acting District Judge of Madura, in Appeal No. 409 of 1908, presented against the decree of S. RAMASWAMI AIYANGAR, the Subordinate Judge of Madura East, in Original Suit No. 34 of 1906.

The facts of this case appear fully in the judgment.

T. R. Ramachandra Ayyar, *T. R. Krishnaswami Ayyar* and *M. Subrahmanya Ayyar* for the appellant.

J. L. Rozario and *K. R. Subrahmanya Sastri* for first and second respondents.

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BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The suit in this case was instituted by the Bishop of Trichinopoly and the Vicar of the Church of Three Kings in the village of Pallithamam in the district of Madura for a declaration that the church and its properties have been dedicated to, and stand impressed with trusts for the worship of God in accordance with the doctrine and discipline of the Roman Catholic Church, that the second plaintiff is the trustee of the church and its properties subject to the supervision and control of the first plaintiff and for possession of the same from the defendants, who unlawfully took possession about the year 1902 or 1903. The defendants are Christians of the village who, according to the plaintiffs were formerly Roman Catholics, but who seceded from their allegiance to the Roman Church about the year 1902 and became members of the Syro-Chaldean Church. The plaint alleges that the defendants never had any right of management over the church or its properties while they were in communion with the Church of Rome. Leave was obtained to implead the defendants as representing all the Christians of the Pallithamam village. The defendants denied that the church was ever dedicated to worship according to Roman Catholic doctrines, or that the villagers ever were followers of Roman Catholicism, or that Romish priests ever officiated in the church. They also denied the plaintiffs' right of supervision and management and pleaded that the villagers themselves were the trustees and managers. They admitted that they were using the incomes of certain lands set out in schedule II of the plaint for the expenses of the church, but denied that the lands themselves belonged to it. They contended that the claim for the recovery of certain moveables mentioned in the plaint was barred by limitation. The Subordinate Judge who tried the suit found that the choir of the church was constructed under the directions of Father Bertrand, a Roman Catholic priest, about the year 1839 and that it was dedicated for Roman Catholic worship. He held that the Vicar was entitled to manage the church and its properties under the supervision of his ecclesiastical superiors and passed a decree for possession as prayed for except of the lands which, he held, were not proved to belong to the church though the income was utilised for the church. He came to the conclusion that the defendants' contention that they never

were Roman Catholics, was absolutely false and that they seceded from Romish allegiance about the year 1902. The District Judge confirmed the decree of the Subordinate Judge except with regard to the moveables the claim to which he held to be barred. The first defendant preferred this Second Appeal and the plaintiffs have filed a memorandum of objections with respect to the lands and the moveables. The case has been argued at great length for the appellant, but we have come to the conclusion that the findings of the Lower Courts as to the nature of the trust to which the church and its properties were dedicated must be upheld. We also accept the finding of the Lower Courts that the Christians of Pallithamam were not the only persons entitled to worship in the church, and that the Christians of other surrounding villages were also entitled to do so. On this finding it is not contended for the appellant that the defendants would be entitled to have the trusts of the institution altered so as to convert the church into one for carrying on worship according to the tenets of the Syro-Chaldean faith. The decision in *Bishop Mellus* v. *The Vicar Apostolic of Malabar*(1) would admittedly not be applicable to such a state of things. It is contended that the findings mentioned above are not legally sustainable. The admission of a number of documents, put in for the plaintiffs as evidence, is impeached as contrary to the rules of evidence. It is urged that Exhibits A and G, which are printed letters of the Jesuit Fathers, were admitted without any sort of legal proof and used as evidence of facts which are not matters of public history. This argument is in part well-founded. The Subordinate Judge observes that Exhibit A series consisting of printed letters of the priests of the Jesuit Mission in the Madura district, dated about seventy-five years ago, are books of reference under section 57 of the Evidence Act, and that they may be relied on with reference to "the matter of the history of Christianity and especially of the Roman Catholic Mission which is surely a matter of public interest." The rule of law as stated may not be open to exception but in applying it, he did not restrict himself strictly to their admission to prove facts of public history. The letters of the Jesuits were regarded in the Ramnad partition case as evidence of the history

(1) (1879) I.L.R., 2 Mad., 295.

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of the Madura district and of the Ramnad Zemindari, but it would be going too far to hold that they could be relied on to prove where certain particular missionaries were living or when they died. The court can dispense with evidence only of what may be regarded as notorious facts of public history. See: Taylor on Evidence, tenth edition, volume II, paragraph 1785 and Wigmore on Evidence, volume III, section 1699. With regard to B and C series and some other documents the principal objection urged is that they should not have been received as there was no satisfactory explanation for the non-production of their originals; but we are of opinion that this is a matter in which much weight should be attached to the opinion of the court trying the suit in the first instance, and we should be slow to reject evidence admitted by that court after satisfying itself that the party adducing secondary evidence was not in a position to produce the originals. There was evidence that the plaintiffs were not aware where the originals of these documents were, if they were in existence at all. There was nothing to show that this statement was incorrect. We must hold that the Subordinate Judge was not wrong in admitting them. Although we are of opinion that the letters A series were used to prove facts which they could not legitimately be used to prove we do not think we should interfere with the findings of the Lower Courts on that account as they were referred to only to prove that certain missionaries were living at Pallithamam when the church was being built and interested themselves in its construction. We do not think that the exclusion of these letters would have affected the conclusion arrived at by the Lower Courts. It is further contended that the evidence does not show that the church in question came into existence for the first time in 1839, that there is no evidence what ritual was being followed before that year, and that therefore the use of it for worship according to the Syro-Chaldean form cannot be condemned as contrary to the original trusts of the institution. But, when it is found that for a period of more than 60 years before the defendants' secession the Roman Catholic form of worship prevailed the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro-Chaldean at the inception and of this there is admittedly not a shred of evidence. We must therefore hold that the declaration

that the church was dedicated to the worship of God according to Roman Catholic ritual and that it is subject to the jurisdiction of the Bishop of Trichinopoly was rightly granted. We have now to deal with the question of the right to the management of the church and its properties. Mr. Ramachandra Ayyar for the appellant, strongly contends that the decision of this question must depend upon the proof of the usage with reference to the particular church and that the Lower Courts have not rested their finding on the usuage of the institution, but upon the rights of the ecclesiastical authorities according to the Canon law. The learned pleader in our opinion is not correct in the position taken up by him that the right of management could not be established except by proof of usage. With regard to a Hindu religious foundation, usage is what determines the right of trusteeship in the absence of any direct evidence to prove the rules established by the founder, but it must be remembered that the Hindu law prescribes no special rules with respect to the management of religious institutions. There is no reason for holding that the Canon law cannot be invoked as a guide in deciding questions respecting temporal rights in Roman Catholic Churches. It is no doubt the case that in some churches on the west coast the parishioners have more or less control over the management of the properties, but we are not concerned with the question how far the Canon law may be modified by the usage of any particular church in this country. Our attention has not been drawn to any authority in support of the broad proposition contended for by the appellant. On the evidence too, the Subordinate Judge found that the plaintiffs were in possession of the church and its properties till February 1902, and were then dispossessed by the defendants. The keys of the church building itself were in the custody of an officer styled Koil Pillay and he was appointed by the Vicar. We can find no reason for not accepting that finding. The moveable properties of the church must also be held to have been in the Vicar's possession till February 1902. With respect to the funds of the church consisting chiefly of fees and offerings derived from worshippers, the plaintiffs' witnesses admitted that they were kept and expended by three of the parishioners, but said that they did so with the permission and under the control of the Vicar. The

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Subordinate Judge apparently accepted this statement, though he does not expressly say so. The District Judge's finding is not very clear on this point. He considered it unnecessary to decide whether the Vicar was the sole trustee or not, as he was of opinion that the Vicar, who was at least one of the trustees, was entitled to sue for the recovery of the properties of the trust. He considered that the defendants used probably to exercise some sort of control over the church funds and that they might have some right in the trusteeship. The Judge is mistaken in his view that a single trustee is entitled to recover possession of the properties appertaining to the trust from another trustee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust.

The position of the defendants is not quite clear. They do not say that they are entitled to elect certain of their members and, if so, how many, to manage the trust along with the Vicar. But we think that the defendants by their conduct have in any event disentitled themselves to hold the office of trustee. They have seceded from the Roman Catholic religion and repudiated the trusts of the institution. There can be no doubt that they could have no answer to a suit for their removal. See *Marian Pillai* v. *Bishop of Mylapore*(1). Even if they offered to return to their allegiance to the Romish Church, it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee. It is contended that, as the plaintiffs have not asked in their plaint for the removal of the defendants from the trusteeship, we ought not in this suit to direct their removal. We think we might hold that a complete repudiation by a trustee of the trusts on which he is bound to hold the properties committed to his charge for the benefit of others would work a forfeiture of his office so as to entitle the court to decree his eviction from the properties in his possession. No authority to the contrary has been cited at the hearing. The plaintiffs are desirous of avoiding further litigation for getting a relief which they are undoubtedly entitled to. We consider it unnecessary to decide definitely whether there is any substance in the technical objection of the appellant as we are prepared to direct

(1) (1894) I.L.R., 17 Mad., 417.

an amendment of the plaint by the addition of a prayer for the removal of the defendants from the management of the trust properties, if necessary. It remains to notice an argument of Mr. Ramachandra Ayyar that the defendants on the record refused to defend the suit on behalf of the other Christians of the village of Pallithamam and that the decree is therefore not binding on the whole community of Christians in that village. But under section 30 of the Code of Civil Procedure the Court has the power to allow a plaintiff to sue some persons as representing themselves and others having the same interest in the subject matter of the suit. The consent of the defendants on record is not necessary to enable the Court to do so. In *In re Andrews* v. *Salmon*(1), KAY, J., made the necessary order though the defendants actually on record objected. If a different view were held, it would be in the power of parties to prevent a plaintiff from availing himself of the benefit of section 30, Civil Procedure Code.

We dismiss the Second Appeal with costs. We direct the plaint to be amended in the manner mentioned above.

The Memorandum of Objections relates to the claim to the lands described in schedule II to the plaint and to the moveables. The District Judge disagreeing with the Subordinate Judge dismissed the claim for moveables on the ground that it was barred by limitation. We entirely fail to see how the plea of limitation could be upheld when the defendants admitted that the properties belonged to the church and claimed to hold them as trustees and set up no right of their own to them. The right to the properties of the trust must go with the right to the office of trustee. See *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(2) and *Gossami Sri Gridharji* v. *Romanlalji Gossami*(3). The claim must therefore be allowed and the plaintiffs will have a decree for all the properties referred to in schedule III attached to the plaint (amended as per order of the Court in *Bartle Ambalam* v. *Pakkiya Udayan*(4).

With respect to the lands both courts have held that they do not belong to the church, but the facts found or admitted are inconsistent with this conclusion. It is admitted that the entire income has always been utilised for the church which is very

(1) (1888) Weekly Notes, 102.
(2) (1900) I.L.R., 23 Mad., 271 (P.C.)
(3) (1890) I.L.R., 17 Cal., 3 (P.C.)
(4) Civil Mis. Petition No. 597 of 1912.

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good evidence that the lands belong to it. It is further admitted that the Government revenue has been paid out of church revenues and that in the accounts kept by the defendants (Exhibit V) the lands are described as belonging to the church. The first defendant in his evidence and one of his witnesses admitted that they belonged to the church. The District Judge was under the impression that the plaintiffs were bound to prove some deed of endowment dedicating them to the church or their actual possession of the lands. This is clearly wrong. The fact that the patta is in the name of the first defendant who does not claim it as his own, is no evidence of any title in the villagers. The defendants have no evidence to prove their title and the facts admitted necessarily prove both title and legal possession in the church. The decrees of both Courts must therefore be modified by directing that the plaintiffs be put in possession of the lands claimed in the plaint. The plaintiffs are entitled also to mesne profits from the date of plaint to this date and further mesne profits up to the delivery of possession. The Subordinate Judge will hold an enquiry into the question of the amount of mesne profits and pass a decree for the amount he may find the plaintiffs entitled to. The plaintiffs are entitled to the costs of the memorandum of objections also.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

NARAYANA KUTTI GOUNDAN (FIRST PLAINTIFF), APPELLANT,

v.

PECHIAMMAL *alias* MAHALI AMMAL AND TWO OTHERS (DEFENDANTS NOS. 1 AND 2 AND SECOND PLAINTIFF), RESPONDENTS.*

1911. November 29 and December 29.

Mortgage—Redemption by reversioners after foreclosure decree—Subrogation—Transfer of Property Act (IV of 1882), sec. 91.

While a sale in execution under a mortgage decree was in progress plaintiff (a stranger) paid the decree-amount into court on behalf of some of the reversioners to the property.

Held, that though the mere payment of a mortgage debt by a stranger will not entitle him to the mortgagee's rights by subrogation, yet here under

* Second Appeal No. 1095 of 1910.