Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Ibrahim Esmael and others v. *Abdool Carrim Peermamode and others; and of Ibrahim Esmael and others* v. *Aboo Bakar Mamode Taher and others, from the Supreme Court of Mauritius; delivered the 3rd July* 1908.

Present at the Hearing:
LORD MACNAGHTEN.
LORD ATKINSON.
SIR J. H. DE VILLIERS
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Sir J. H. de Villiers.*]

These are consolidated Appeals from a Judgment of the Supreme Court of Mauritius setting aside two instruments by which provision was made for the management of the chief Mahomedan Mosque at Port Louis and for the administration of certain properties held in connection therewith. The history of the Mosque goes back to the year 1852. In that year nine Mahomedan merchants purchased two properties in Queen Street "for the whole Mahomedan Congregation of the Island of Mauritius" of which they declared themselves to be "les fondés de pouvoirs spéciaux." By the deed of purchase the purchasers, declaring themselves to be the mandataries of the other Mahomedans, prohibited any alienation of the properties and declared that the land was to be devoted to no other uses than the erection of a building consecrated to the Mahomedan worship. On the properties so purchased a small mosque was

I (22)55211. [31.] 100.—7/08. Wt. 243. E. & S. A

erected about the year 1853. From time to time adjoining properties were bought by Mahomedan merchants, the purchasers declaring that they bought as well for themselves and in their own names as for the whole Mahomedan congregation. As the Mahomedan community increased in numbers and in wealth, the Mosque was enlarged and embellished, until it became the chief place of Mahomedan worship in the Island. It is admitted on both sides that the worshippers in the Mosque belonged to the School of Soonees, and that they mainly consisted of three classes, known as the Cutchee Maimans, the Hallaye Maimans, and the Soortees. These were all immigrants, or descendants of immigrants, from India, and they derived their distinctive names from the localities from which they came. Thus the Cutchees were inhabitants, or descendants from inhabitants, of Cutch, the Hallayes were descendants from inhabitants of Hallal, also called Kattiawar by some of the witnesses, and the Soortees were descendants from Mahomedans of Surat, or adjacent parts of Guzerat. At the time when the congregation was first formed and the Mosque erected, the overwhelming majority belonged to the Cutchee class. Merchants of that class took a great interest in their religion, and probably contributed the greater part of the funds required for the purchase of the land and the erection of the Mosque, but, as already pointed out, they purported to act on behalf of the whole congregation. In 1877 two additional properties were bought, and in the deeds of purchase the purchasers—for the first time in the history of the Mosque—declared that the purchases had been made on behalf of the Cutchees, and that a committee of Cutchees was to administer the property thus bought and all the other properties belonging to the Mosque. Similar declarations were made upon the subsequent purchases of some additional

properties. As to this, the learned Judges in the Court below, in the reasons for their Judgment, say:—"This new departure—it has been "admitted by Counsel for the Defendant "Cutchees—was dictated by a fear that the "Soortees, who were increasing in numbers, "wealth, and power, might claim a right to "interfere in the management of the Mosque and "its adjunct property under the broader terms "of the previous purchases." The practice of purchasing on behalf of the Cutchees only was not, however, consistently followed in the subsequent purchases, for on the 16th October, 1884, the attorney of one Aboo Taleb, a Hallaye, in purchasing an additional property at a judicial sale for 24,000 rupees, declared that the purchase was made "for and on behalf the Mussulman congregation." Until the present dispute arose, the direction of the Mosque and the administration of its affairs were practically in the hands of Cutchees only. In the year 1903 93 Cutchees belonging to the congregation executed a notarial deed by which they formed themselves into a Society consisting only of Cutchee Mahomedans, the objects of which were stated to be to assist distressed Cutchees and other poor persons of whatever religion, and to provide instruction for children. They further declared that they brought into the Society in full ownership the different properties to which reference has been made, and they appointed a committee of management with very extensive powers, including those of selling and letting the properties of the Society other than the Mosque and its accessories and the land on which it stands. They also stipulated that none but Cutchee Mahomedans should become members of the Society or have a voice in the management of its property. By another deed of the same date the same 93 Cutchees entered into an agreement for the administration

of the Mosque and the funds appertaining thereto, from which administration all but Cutchees were excluded. The Society formed under the first-named deed was incorporated by Proclamation issued by the Governor under the provisions of Ordinance No. 22 of 1874. Before the Society was formed, some of the principal Hallaye members of the congregation were asked to join, but they refused, because as a condition of so joining they would have to class themselves as Cutchees, which they obviously could not do, and because they disapproved of the manner in which it was proposed to deal with the assets set apart for the religious uses of the congregation. As to the Soortees, they were not asked at all to join in the execution of the deeds. After the deeds had been executed, separate actions were brought in the Supreme Court of Mauritius by Hallaye and Soortee members respectively of the congregation to have it declared that the societies formed by the deeds were null and void, and to have a scheme settled for the management of the religious foundation. The actions having been consolidated, the deeds were set aside in so far as they purported to give to the Cutchees the exclusive administration as of right of the Mosque and its accessories, and a scheme was substituted for the portion thus set aside, by which three representative Soortees and one representative Hallaye were ordered to be added to the committee of seven Cutchees provided for by the deeds. Against that Judgment the Defendants have appealed.

The evidence taken in these cases has been most voluminous, but it has been so fully, carefully, and ably dealt with by the learned Judges of the Court below that it will be unnecessary for their Lordships to do more than briefly refer to the leading facts. The outstanding fact in both

cases is that the founders of the Mosque drew no distinction between Cutchees, Hallayes, and Soortees, but devoted the property to the religious uses of the whole Mahomedan congregation. The majority have always been Cutchees, but from the first there were a few Hallayes, and, within a few years after the establishment of the congregation, some Soortees were added to their number, and they have considerably increased of recent years. The richest members of the congregation were undoubtedly the Cutchees, and they contributed individually in proportion to their means, but considerable contributions were made in the aggregate by Soortees as well as Hallayes. After a time a system was introduced by which a rate, "pour l'église," of two cents was levied on every bag of grain sold wholesale by leading merchants of the congregation. In this manner it came about that the Cutchees raised the greater part of the church funds, but some Hallaye merchants also raised money in that way. The burthen of the rate probably fell on the purchasers, who, for the greater part, were Europeans, but among the purchasers were also many Hallaye and Soortee members of the congregation. The money thus raised was not kept apart as a separate fund, but seems to have been mixed with the general fund of the Mosque. As regards the administration of the affairs of the Mosque, it was left in the hands mainly, if not entirely, of Cutchees, but their Lordships agree with the Judges of the Court below that this was done because they were leading merchants occupying a recognized position in the commercial world, and not because they belonged to any particular class of Mahomedans.

In this view of the facts, the question arises whether, by the law of Mauritius, the Plaintiffs, as members of the congregation and habitual worshippers in the Mosque, are entitled to be

relieved against deeds which deprived them and all other Hallayes and Soortees, for all future time, of all share in the management of the Mosque, and vested the ownership of the Mosque and all properties accessory thereto in a newly formed society from membership of which they were excluded. An objection was taken on appeal, which had not been raised on the pleadings, that the Plaintiffs had no right to institute the action in the absence of His Majesty's Procureur and Advocate-General, who is alleged to exercise in the Colony functions corresponding to those of the Attorney-General in England as representative of the Crown and Guardian of its rights and prerogatives. No authority was, however, cited before their Lordships to show that, in a case like the present, the joinder of such a functionary was required by the law of Mauritius. The objection, if valid, ought to have been taken before the Mauritius Court, and it really was not pressed before their Lordships. As there is nothing to show that any prerogatives of the Crown are prejudiced by the Judgment, their Lordships are not prepared to advise that it should be disturbed merely on the ground that the Crown had not been made a party to the actions. The Governor has by Proclamation incorporated the Society called into being by the deeds, but if the deeds are not such as can be maintained consistently with the legal rights of the Plaintiffs, the Crown would appear to have no interest in maintaining them.

Upon the question whether the Plaintiffs have any rights whatever in respect of the future management of the affairs of the Mosque, the Defendants rely, in the first place, upon the provisions of the 210th Article of Ordinance 6 of 1838. That Article reads as follows :—

"No association of more than fifteen persons of which the object shall be to meet every day or on

fixed days for the consideration of any religious or political subject (pour s'occuper d'objets religieux ou politiques) can be formed unless with the sanction of the Government and under such conditions as the public authority shall deem necessary to impose on such society."

The 212th Article imposes a penalty of 200 rupees for a contravention of the 210th Article. The contention is that the congregation was a wholly illegal association, and that consequently none of its members could have any right of action in respect of any acts that are detrimental to their interests as such members. It is remarkable that such a contention should be set up after the congregation has been in existence for more than half a century, during which period no prosecution appears to have taken place against any of its members for having joined in an illegal association. It probably never entered the minds of the authorities that a congregation formed for the purposes of prayer and religious worship was necessarily an association the object of which was "pour s'occuper d'objets religieux "ou politiques." Be that as it may, in the arguments of the Defendants' Counsel, which are fully reported in the Record, not a word was said as to the illegality of the association in the sense of its being criminal. The argument there was—and this argument has been repeated before their Lordships—that under the Civil Code, which is in force in Mauritius, the technical right to hold property cannot be vested in a religious community which has not been authorized by the State, because without such authorization it has no legal existence. Now, although it is quite true that under the French law such a community does not constitute a "civil person," yet it has been held, according to Sirey (*Recueil Général*, 1858, p. 225), that such a community forms among the members

of which it consists a society *de facto* which renders those forming part of it responsible for the engagements which they have made in its interest, whether those engagements result from contract or quasi-contract. This qualification shows that the rule laid down in the Code has not always been carried out to its logical conclusions. No case has been cited in which any French court has refused, under circumstances analogous to the present, to grant relief to the aggrieved members of an unauthorized religious community against their fellow-members. The position which has arisen in the present case is unique, and it is no wonder that Counsel for the Defendants had to admit in the Court below that they could not find any law in Mauritius to meet the case. The Defendants, in order to legalize their position as members of a religious community, had obtained a charter of incorporation, but in the deeds defining the rules of their new association certain other members of the congregation were excluded from membership, not because they were not *de facto* members of such congregation, but because they did not belong to that particular class which, owing to special circumstances, had, up to that time, had the almost exclusive management of the affairs of the Mosque. The result of allowing these deeds to stand would be that, however the Hallayes or Soortees might hereafter increase, or the Cutchees might decrease, in numbers, wealth, and importance, the Cutchees will be entitled to dispose of all the property except the Mosque proper, and the two other classes will have no voice whatever in the management of the Mosque or of the properties accessory thereto. The Defendants say that it was necessary to legalize the position of the congregation by reason of the difficulties necessarily attendant upon the

administration of the immovable properties by an unincorporated body. But the only association which could claim to be legalized was the congregation on whose behalf the Mosque had been founded. If a portion of the congregation chose to form a new association, they had no right to transfer all the property to such new association and exclude the rest of the congregation from membership and from participation in the management of the affairs of the Mosque. If, therefore, the Supreme Court, in the exercise of its equitable jurisdiction, had set aside the deeds and gone no further, their Lordships would have had no hesitation in advising His Majesty that the Appeals should be dismissed.

Unfortunately, however, the Court, in its laudable anxiety to effect a complete settlement of the dispute, set aside the deeds in part only, and for the portion thus set aside substituted a scheme which, pending the formation of an incorporated society of all Soonee Mahomedans, was to regulate the management of the affairs of the Mosque. Under this scheme the Committee of Management was increased in number from seven to eleven, and it was ordered that of the four additional members three were to be representative Soortees and one a representative Hallaye. The Court, however, reserved the right of modifying the composition of the committee and system of administration as the Court might deem just or necessary from time to time, either *proprio motu* or upon application of any Soonee Mahomedan holding a licence to trade. The result is that the scheme of management upon which the existing Charter of Incorporation is based has been superseded in part only by another scheme the nature of which will vary as circumstances might, in the opinion of the Court, from time to time require. It is not quite clear from the Judgment whether the Charter of Incorporation

was intended to remain in force to the extent to which the deeds were upheld. If it was intended that the Charter should remain in force with the variations introduced by the Court, the difficulty would arise that the Ordinance No. 22 of 1874, under which the Charter was granted, expressly enacts that the rules and regulations embodied in any Charter shall not be altered or repealed except by a certain proportion of the total number of members, and then only after confirmation by the Governor in Council. If it was intended that the Charter should no longer have any operation, it is difficult to conceive how the Judgment of the Court, establishing a fresh scheme of management, could legalize an unauthorized religious community. The Court admitted that it had no power to grant letters of incorporation, but the Judgment practically attempts to legalize one scheme of management in substitution for another scheme, which had been authorized by Charter. If the Court had contented itself with setting aside the deeds as null and void, the Charter, which is founded on one of those deeds, would have become inoperative, but the Judgment, as actually pronounced, would encounter innumerable legal difficulties in its execution. There is a further objection to the order, namely, that there is not sufficient evidence to show that the number of members of committee allotted to the Hallayes and Soortees respectively is in due proportion to their numbers and importance, relative to the Cutchee members of the congregation. It was admitted by the learned Judges that until the date of the execution of the impugned deeds, the Cutchee managers had satisfactorily administered the affairs of the Mosque, and there seems no reason to fear that, if matters are replaced *in statu quo ante*, the affairs of the Mosque

will be maladministered. It would certainly be in the interest of all concerned that the question of future management should be placed on a satisfactory footing by means of an amicable settlement. If the members of the congregation, including Hallayes, Soortees, and Cutchees, could agree upon a scheme of management by which due effect is given to the relative importance of the three rival classes, there would probably be no difficulty in obtaining a Charter of Incorporation giving effect to the settlement. But until the parties themselves come to such an agreement, it is, in the view of their Lordships, impossible for the Court, with due regard to the existing law of Mauritius, to frame a scheme that is entirely free from legal objections.

The result is that their Lordships will humbly advise His Majesty that the Judgment appealed from should be confirmed in so far as it cancels the two Agreements of 1903, and in so far as it orders the Defendants to pay the costs, but that the Appeal should be allowed in so far as the said Judgment purports to make special provision for the administration of the Mosque and appurtenances, and the properties and revenue thereof.

The parties will respectively bear their own costs of these Appeals.