1909.
November 26.

[FULL BENCH.]

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

ABDUL AZIZ *v.* ABDUL RAHIM *et al.*

D. C., Colombo, 26,976.

Muhammadan mosque — Trustee — Possessory action — Requisites of "possession."

A person appointed by the congregation of a Muhammadan mosque as "trustee" for a term of years, whose duties and powers are defined by the rules framed by the congregation, and who is controlled in the exercise of his powers by an "assembly" elected by the congregation, is not entitled to maintain a possessory action.

The Roman-Dutch Law requires the plaintiff in a possessory action to have had quiet and undisturbed possession for a year and a day ; and the requisites of possession are the power to deal with the property as he pleases, to the exclusion of every other person, and the *animus domini*, *i.e.*, the intention of holding it as his own.

APPEAL from a judgment of the Acting Additional District Judge of Colombo (G. S. Schneider, Esq.).

This was a possessory action brought by the plaintiff against the defendants. The plaintiff in this case claimed to be trustee of the mosque at Maradana, and he alleged that he was in the quiet and undisturbed possession thereof for over five years prior to June 21, 1908, and that on that date the defendants unlawfully entered upon the said mosque and ejected him from the control and management of the said mosque.

The plaintiff was appointed trustee under the following "Rules and Regulations for the Management of the Mosque," which were adopted by the congregation at a public meeting held on October 10, 1902 :—

General Rules.

"1. All affairs appertaining to the Maradana mosque shall be controlled and supervised by a Committee of fourteen members elected every five years by the congregation from their members for the purpose, and that Committee shall be called 'the Mussalmans' United Assembly,' and referred to in the following rules and regulations as 'the assembly.' Five members to form a quorum.

"2. The congregation shall appoint one of the assembly as the trustee and one as assistant trustee of the Maradana mosque, one as the chairman and one as vice-chairman, and one as the secretary of the assembly, each for a period of five years.

"3. The assembly shall give written authorities or directions to the trustee and the assistant trustee in the name of the congregation to transact all business connected with the mosque, and such written authorities shall be signed by not less than five members of the assembly. The assistant shall be authorized to succeed the trustee on his demise or dismissal, to assume all his powers, and to transact all business connected with the mosque as a lawful trustee for the remainder of the period for which the deceased or dismissed trustee was appointed.

"4. It shall be the duty of the trustee—

"(*a*) To take charge of the lands and houses and all movables belonging to the mosque, and to collect the income, rents, and issues thereof.

"(*b*) To keep clean and in repair the mosque, and the houses, lands, and premises belonging to the mosque.

"(*c*) To attend to and make the repairs of houses, movables, and immovable premises belonging to the mosque.

"(*d*) To lease the houses, lands, and premises belonging to the mosque, such lease not to extend beyond a period of two years, and the conditions, terms, and provisions to be submitted to and approved by the assembly.

"(*e*) To spend out of the income towards repairs and defraying other incidental expenses.

"(*f*) To appoint and pay the Mohideen.

"(*g*) To inquire into disputes and differences of the priest Mohideen and members of the congregation in respect of the congregation, mosque, the worship carried on therein, and other matters connected with the mosque.

"9. There shall be a stamp of the trustee, and it shall be in custody of the trustee."

Rules for the Guidance of the Trustee and Assistant Trustee.

"1. All items of income and expenditure shall be entered by the trustee in books set apart for the purpose, and such books shall be produced by him for inspection whenever required by the assembly.

"2. The trustee shall furnish the assembly with a half-yearly balance sheet, which shall be audited by two members appointed for the purpose.

"3. All moneys shall be deposited in the Savings Bank till such time as there will be sufficient funds to open an account in the National Bank of India or any other bank in Colombo.

"4. All such accounts shall be opened by the trustee in his capacity as trustee of the Maradana mosque. All cheques shall be signed by the trustee and the stamp thereto affixed. On the trustee ceasing to be trustee by reason of his death, dismissal, or any other

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cause, the moneys in deposit in the Savings Bank or the National Bank of India or any other bank shall be transferred to the credit of the succeeding trustee.

" 5. All documents shall be dated and bear the stamp of the trustee of the Maradana mosque, which stamp shall be under lock and key and in the possession of the trustee only, and shall not be entrusted to any one else.

" 6. All receipts issued by the trustee shall bear an impression of the stamp as well as his signature.

" 7. No receipt for house rent paid shall be considered valid unless it bears the signature of the trustee as well as his stamp.

" 8. No house or portion of the mosque premises shall be leased by the trustee without the consent of the assembly aforesaid.

" 9. The trustee shall personally inspect the mosque and premises belonging to the mosque which may require repairs.

" 10. The trustee shall first take the approval of the assembly in writing before starting any work of which the cost is above Rs. 250. In any case where money above this sum has been spent by the trustee without the sanction in writing of the assembly, the trustee shall himself pay such sum as exceeds the sum of Rs. 250.

" 11. The trustee may give a power of attorney to his assistant trustee to recover rents, attend to judicial matters connected with the mosque, and the houses, lands, premises, and movables belonging to the mosque.

" 12. The assistant trustee, when holding the power of attorney, or at any other time, shall not spend any trust money whatever of the mosque without a written sanction of the trustee.

" 13. In any case where money has been so spent by the assistant trustee without the written sanction of the trustee, the assistant trustee shall himself pay and make good such sum.

" 14. All disputes concerning the Mohideen and the priests shall, in the first instance, be referred to the trustee, and if the trustee think any matter grave enough to be submitted to the assembly, he shall call a meeting of the assembly to consider the matter, and their decision shall be final.

" 15. All charges against the levvai (priest) shall be decided by the assembly, and such decision shall be final. The dismissal of the priest shall in all cases be in the hands of the assembly, who shall announce their selection of his successor at a meeting of the congregation called for that purpose.

" 16. The trustee shall be allowed a personal allowance of Rs. 20 per mensem."

The defendants, *inter alia*, pleaded that the plaintiff's appointment as trustee ended on June 18, 1908, and that the first defendant was duly appointed trustee by the congregation, and that the first defendant accordingly on June 18 assumed duty as trustee, and that [paragraph 9 (*a*) of the answer] " the plaintiff having been

himself a party to the 'rules,' and the first defendant having been appointed to succeed him, also under the said rules, the plaintiff was estopped from claiming any right to act as a trustee as against the first defendant after June 18, 1908, or to exercise any right as such trustee in respect of the mosque and premises."

At the trial the defendants suggested the following issue:—

(4) Is the plaintiff estopped from claiming to act as trustee as against the first defendant for the reasons stated in paragraph 9 (*a*) of the first defendant's answer ?

The District Judge rejected the issue, as he thought that it (fourth issue) was irrelevant to a possessory action, inasmuch as it involves the question of plaintiff's title to possession.

After trial judgment was entered for plaintiff.

The first defendant appealed.

Walter Pereira, K.C., S.-G. (with him *H. A. Jayewardene*), for the first defendant, appellant.—It is clear that under the Roman-Dutch Law it is only a person who possesses property *ut dominus*, or, in other words, who enjoys the *possessio civilis*, who is entitled to bring a possessory suit. The present plaintiff calls himself a trustee. *Qua* trustee he cannot be said to have the *possessio civilis*, but if the rules governing his appointment are looked at, it will appear that he is no more than a mere servant or agent.

Van der Linden, in his chapter on Possessory Actions, indicates at the very outset the nature of the possession necessary to entitle a person to bring an action for the *mandament van complainte*, which is the same as the interdict *unde vi*. He says (*bk. I, ch. XIII., sec. I*) possession is the actual retention of a thing with the purpose of keeping it for oneself. Simple possession without this object is insufficient, and he instances the case of lessees, attorneys, agents, and depositories as persons who cannot in a legal sense be said to possess the thing they detain.

One of the earliest local cases is that of *MacCarogher v. Baker*.[1] There the plaintiff had been placed in charge of a coffee estate. He had more than the powers of a mere superintendent. He was an agent with plenary powers, and De Wet C.J. and Clarence J. held that his possession, if it could be said that he had any possession at all, was not such as to entitle him to maintain a possessory suit. Dias J. in dissenting relied entirely on certain passages in chapter XIII. of Van der Linden, but he apparently overlooked the definition of "possessor" given by Van der Linden in the same chapter.

In *Perera v. Fernando*[2] Withers J. clearly indicates that the possession necessary to enable a person to maintain a possessory suit is physical detention *plus* the *animus rem sibi habendi*, or, in other words, the *animus domini*.

[1] (*1883*) *Wendt 253.*

[2] (*1892*) *1 S. C. R. 329.*

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Then, there is the case of *Tissera v. Costa*,[1] in which it was held that the possession necessary to entitle the possessor to the interdict *unde vi* should be possession *ut dominus*, and that hence a *muppu* of a Roman Catholic Church had no right to maintain a claim for that interdict.

The case of *Alim Saibo v. Cadersa Lebbe*[2] is still more in point. That was the case of a Muhammadan priest who had for many years not only officiated in the mosque as priest, but had administered its funds and entered into contracts in connection with the affairs of the mosque, and generally had charge of the mosque and its property. The Supreme Court held that even he had not possession *ut dominus*, and he could not hence maintain a possessory action.

As against all this authority the only case that might be cited on the other side is that of *Changarapillai v. Chelliah*.[3] That case is against the weight of the very authorities cited in it in support of the decision. The case appears to have been decided more on grounds of expediency. Bonser C.J. relied largely on *Ahamado Lebbe v. Semberem*,[4] but clearly that case was not a claim for the interdict *unde vi*. Beyond the statement that the decision of the Court below was affirmed, there is no judgment in the case, but from an observation made by Rowe C.J. in the course of the argument, it is clear that it was not treated as a mere possessory action. The Chief Justice observed that the defendant might have justified his action in ousting the plaintiff by evidence of his right to do so. Evidence of right and title is inadmissible in actions for the interdict *unde vi*. Bonser C.J. further relies upon a passage in *Voet* (*VI., 1, 29*), where it is laid down that *economi* were allowed to bring an action *rei vindicatio* in respect of the churches in their charge. That, however, is a very different thing from the interdict *unde vi* based on possession only. It was apparently a special rule of convenience. The right of the *economi* was dependent upon an express rule, or rather express modification of an existing rule, and not based upon any principle, and cannot therefore be extended to include also the right to maintain a claim to the interdict *unde vi*. Wendt J. partly relied on the case of *Mascoreen v. Genys*.[5] There the Court held that precarious possession was sufficient to entitle the possessor to maintain an action against strangers as distinguished from those claiming right under whom the plaintiff himself claims right. The decision rests on somewhat obscure authority, but it is not necessary to pause to consider it, inasmuch as the defendant in the present action is not a stranger, but claims to derive his authority from the very congregation to which the plaintiff claims to owe his.

Maasdorp in his *Institutes* (*vol. II., p. 14*) defines *possessio civilis*, and adds it is the physical detention of a corporeal thing by a person

[1] (*1889*) *8 S. C. C. 193.*
[2] (*1889*) *9 S. C. C. 4.*
[3] (*1902*) *5 N. L. R. 270.*
[4] (*1858*) *3 Lor. 28.*
[5] (*1862*) *Ram. 195.*

with or without any claim of right with the intention of holding it as his own, to which the law has given its sanction by interposing the legal remedies or interdicts for its protection.

The Supreme Court has held that a lessee might maintain a possessory suit against his lessor.[1] This decision does not appear to have the support of original authority. A lessee has all his remedies on the contract of lease; but it is not necessary to enter into a discussion of the soundness of this decision, because it went on the assumption that in Ceylon a lessee on a notarial lease was *pro tanto* owner. There is no principle there that would apply to the case of a trustee or other agent or servant.

Counsel also cited *3 Burge, p. 4; Grotius, Introduction, 2, 2, 2; Voet, Casie Chitty's trans., p. 183; Voet 5, 1, 87; Voet 14, 2, 1; Van Leeuwen (Kotze's trans.), vol. I., p. 198.*

Bawa (with him *Sampayo, K.C., and F. M. de Saram*), for the plaintiff, respondent.—*MacCarogher v. Baker*[2] proceeded on the footing that the plaintiff had no possession *ut dominus*. Possession of a co-owner was not then considered sufficiently exclusive. Dias J. thought in that case that plaintiff could maintain a possessory action. That case is, besides, no authority, as it was not argued before the Full Court.

In *Tissera v. Costa* plaintiff had no possession at all according to Clarence J.

Alim Saibo v. Cadersa Lebbe may have been rightly decided. *Qua* priest the plaintiff would not be entitled to a possessory decree. A trustee has such possession as is defined by Van der Linden (p. 183).

Ahamado Lebbe v. Semberem[2] is a Full Court decision, and is binding.

The reason why when a servant is evicted he cannot bring a possessory action is because there is a master who has been dispossessed by the dispossession of the servant; the master could bring the possessory action. The same reason would not apply to the representative of a large and indeterminate class of persons. To deny here the possessory remedy to the trustee would be to deny the remedy altogether.

Changarapillai v. Chelliah[3] and *Sivapragasam v. Swaminatha Aiyar*[4] are in point; they decide that a person in the position of the plaintiff is entitled to a possessory decree.

Counsel also referred to *Saravanamuttu v. Sinnappa Aiyar;*[5] *Canagasabai v. Sinnetamby;*[6] *Casie Chitty's Voet, p. 49;* and *Voet 43, 16, 3.*

Walter Pereira, K.C., S.-G., in reply.

Cur. adv. vult.

[1] *(1895) 1. N. L. R. 217; (1884 6 S. C. C. 61.*
[2] *(1858) 3 Lor. 28.*
[3] *(1902) 5 N. L. R. 270.*
[4] *(1905) 2 Bal. 49.*
[5] *(1906) 10 N. L. R. 52.*
[6] *(1859) 3 Lor. 290.*

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The plaintiff states in his plaint that he was the trustee of a mosque at Maradana and of the garden whereon it stands; that as such trustee he had the control and management of the premises, and was in the quiet and undisturbed possession thereof in trust for the said mosque for more than five years before June 21, 1908, on which date the defendants unlawfully and forcibly ousted him, and that they are now in possession; and he claims to recover possession and damages.

The first defendant answered that the plaintiff was trustee as stated in the plaint, but that his trusteeship ended on June 18, 1908, and denied that as such trustee he had the control and management of the premises, or was in quiet and undisturbed possession. He also said that from time immemorial the mosque with the premises attached to it was used for Muhammadan worship, and was in possession of the members constituting the congregation who have worshipped there; that in October, 1902, at a general meeting of the congregation, at which the plaintiff was present as a member of the congregation, rules were unanimously passed for the purpose of regulating the affairs of the mosque, and it was decided that there should be a committee of fourteen members elected every five years for the purposes aforesaid, and that a trustee should be appointed for those purposes; that at that meeting the first defendant was appointed trustee, and acted as such for a few months, and then resigned on June 19, 1903, and the plaintiff was elected by the congregation as his successor for five years ending on June 18, 1908, and accepted the office for that term and subject to the said rules; that on June 5, 1908, the congregation again met and appointed the first defendant as trustee to succeed the plaintiff, and he accordingly on June 18 assumed duty as trustee. He denied that he ousted the plaintiff or took forcible possession. The other defendants made substantially the same defence.

We have in evidence a copy of the "Rules and Regulations for the Management of the Maradana Mosque, adopted by the Congregation of the Maradana Mosque at a Public Meeting on October 10, 1902." They provide that all affairs appertaining to the mosque shall be controlled by fourteen members of the congregation elected for that purpose every five years; these fourteen are called "the assembly." The congregation is to appoint one of the assembly as the trustee of the mosque, and one as assistant trustee, each for five years. The assembly is to give written directions, signed by five members, to the trustee to transact all business connected with the mosque; and the assistant is to succeed the trustee "on his demise or dismissal." The duties of the trustee include the following: To take charge of the lands and houses and movables belonging to the mosque, and to collect the rents and income; to keep the mosque and the lands and houses in repair; to grant leases for not more than two years,

" the conditions and terms and provisions to be submitted to and approved by the assembly." At the end of the " General Rules " come some " Rules for the Guidance of the Trustee and Assistant Trustee." They provide for the event of " the trustee ceasing to be trustee by reason of his death, dismissal, or any other cause ": that " no house or portion of the mosque premises shall be leased by the trustee without the consent of the assembly " ; and (Rule 11) that he may give a power of attorney to his assistant trustee to recover rents and attend to judicial matters connected with the mosque and its property. These rules were signed by the plaintiff, and he says that he intended to observe them.

The ouster of which he complains was on June 21. His first term of five years expired on June 18 ; but he says in his evidence that he was re-appointed before the expiration of that term, and that after his re-appointment he continued to be trustee under the same rules. No details are given as to the authority by which he claims to have been re-appointed. He admitted that at a meeting of the congregation held on June 5 the first defendant was appointed the trustee, but he says that that meeting was held for a different purpose ; and the Judge did not allow the first defendant's counsel to go further into the question of the rival appointments. The Judge thought that this was simply a possessory action, and that the only issues were whether the plaintiff had had possession for a year and a day, and whether he was ousted ; and he therefore disallowed questions as to the validity of the appointments.

The first defendant deposed that he was duly appointed trustee from June 19, 1908, in accordance with the rules at a meeting held on June 5. Up to the date of the ouster the plaintiff claimed to be and was in fact in charge and occupation of the mosque and its property as trustee under the rules. He claimed to be so under his first appointment until June 18, and after that date under his re-appointment. I have quoted those portions of the rules which seem material, as showing the powers and duties of the trustee. He is appointed by the congregation; his duties and powers are defined in the rules ; and in the exercise of them he is in some respects controlled by the assembly.

The question is whether on these facts the plaintiff had such " possession " as entitles him to maintain a possessory action, or was the " possession " that of the congregation alone or of the assembly alone. The District Court held that he had such possession. The first defendant appeals.

The Roman-Dutch Law requires the plaintiff in a possessory action to have had quiet and undisturbed possession for a year and a day ; and the requisites of " possession " are the power to deal with the property as he pleases, to the exclusion of every other person, and the *animus domini*, *i.e.*, the intention of holding it as his own. Possession must be based both on intention and on

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physical occupation; but the occupation may be through an agent. *Maasdorp's Grotius 2, 2, 2; Juta's Van der Linden, p. 98; Maasdorp's Institutes of Cape Law (vol. II.), p. 12; Kotze's Van Leeuwen, bk. I., p. 198.*

Mascoreen v. Genys [1] was a possessory action by a priest against a man who had turned him out of possession of a church. The Court in a short judgment said that the defendant asserted and ought to have proved that he turned the plaintiff out by order of the bishop, and that as he had not done so, and was a mere wrongdoer, the plaintiff could maintain the action against him. This does not seem to decide anything as to the plaintiff's right to maintain a possessory action.

In *MacCarogher v. Baker* [2] a plaintiff who had been in occupation of an estate as manager and agent for the owner was held not to be entitled to maintain a possessory action.

In *Perera v. Sobana* [3] it was held by Burnside C.J. and Dias J. that a lessee can maintain a possessory action against his lessor on being forcibly dispossessed by his lessor during the continuance of the term. The Chief Justice, quoting from *Voet*, said that a *colonus* or an agent or slave by and through whom the owner possesses cannot have a possessory action, because he does not "possess" but only holds as agent of another, but that a tenant for a term who has exclusive possession as against his landlord and every one else during the term can maintain such an action.

In *Tissera v. Costa* [4] the plaintiff was a *muppu* appointed by the priest, and as such he kept the key of the church, recited prayers in it, received offerings and the produce of the church grounds, and expended the money for church purposes, and generally surpervised the affairs of the church under the direction of the priest when there was one. Held, by Burnside C.J. and Clarence J., that his possession was essentially that of an agent or caretaker, and that he could not maintain a possessory action.

Alim Saibo v. Cadersa Lebbe [5] was a possessory action; the plaintiff had been for thirty-five years the officiating high priest of a mosque, and as such had administered its revenues, appointed subordinate officers, and executed contracts and leases for and on behalf of the congregation; the defendants had forcibly dispossessed him, and they pleaded that before the ouster the congregation had interdicted him from officiating. Burnside C.J. and Dias J. held that the plaintiff's possession of the mosque was not *ut dominus* but on behalf of the congregation, and that he could not maintain a possessory action.

Changarapillai v. Chelliah [6] was a possessory action, in which the plaintiff was, as the District Judge found, the manager of a Hindu

[1] *(1862) Ram. 195.*
[2] *(1883) Wendt 253.*
[3] *(1884) 6 S. C. C. 61.*
[4] *(1889) 8 S. C. C. 193.*
[5] *(1889) 9 S. C. C. 4.*
[6] *(1902) 5 N. L. R. 270.*

temple and its property. Bonser C.J. and Wendt J. were of opinion that if the plaintiff, who was called the manager, had the control of the fabric of the temple and of the property belonging to it, his possession was such as to entitle him to maintain the action, and the case was sent back for evidence as to the exact nature of the plaintiff's interest. Bonser C.J. thought that the remedy of a possessory action was a beneficial one, and that the Court should not seek to narrow its operation, but rather to enlarge it, and his judgment would almost do away with the rule that in such actions the plaintiff's possession must have been *ut dominus*. He refers with approval to *Ahamado Lebbe v. Semberem*,[1] and thinks that the proposition that if the possession was not *ut dominus* the action is not maintainable is inconsistent with the judgment in that case; but that case was merely an action by a Mohideen of a mosque against a trespasser who had ejected him, and who offered no evidence in defence of his conduct, but merely denied the plaintiff's title; not a word was said about its being a possessory action or about the nature of the plaintiff's possession. It may be that a person whose possession is not *ut dominus*, but *precario* or without any title or pretence of title, can maintain an action to recover possession from one who has ejected him; but in such an action the defendant may prove that he has a better title than the plaintiff, whereas in a possessory action no defence is allowed except that the plaintiff has not had possession for a year and a day, or that he was not ousted by the defendant.

In *Sivapragasam v. Swaminatha Aiyar*[2] the plaintiff was for several years in possession of a temple and of its property as manager; it was proved that the defendants dispossessed him otherwise than by process of law; and upon that, Pereira J., quoting apparently with approval *Changarapillai v. Chelliah*, held that the plaintiff was entitled to a possessory decree, and Wendt J. concurred.

These authorities are not all reconcilable. But we must take the rule to be as it is stated above from Grotius and the other authorities on Roman-Dutch Law. We may give it a liberal or a narrow construction, but only the Legislature can "enlarge" it in the sense of extending it to cases which it does not cover. A lessee under a valid lease from the owner is *dominus* or owner for the term of his lease; he is owner during that term as against all the world, including his lessor. And I think that it is possible that a trustee may be owner for the term of his trusteeship; he may have a good title to possession during that term as against all the world, including those who appointed him; it is a question of fact whether he is in that position or not; it depends on the terms and conditions under which he holds as trustee.

The plaintiff deposed in his examination-in-chief that his appointment ended on June 18. If the defendants had refrained from

[1] *(1858) 3 Lor. 28.*

[2] *(1905) 2 Bal. 19.*

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cross-examination, there would have been no evidence that he had or thought that he had any title to possession at the date of the ouster. But the cross-examination elicited his statement that he was re-appointed before the end of his term. The Judge says nothing about that. If we hold, as perhaps we ought to do, that this meagre statement is sufficient proof that he was re-appointed, we must then decide whether he had under his two appointments such possession as is requisite for a possessory action.

The rules under which he held provide in two places for the event of the dismissal of the trustee, without saying anything as to the circumstances under which he may be dismissed. Perhaps the intention of the parties was that the trustee, if he duly performed all the duties of the office, should be entitled to hold it during the term for which he was appointed; just as a manager of a business appointed by a merchant for a definite term may be entitled to hold the appointment for the whole of the term if he performs his part of the bargain. But, even so, I think that his possession is only that of those who appointed him, and who have, in some circumstances at any rate, the power to dismiss him; just as the possession of business premises by the manager of the business is that of his employer. His position was very like that of the plaintiff in *Alim Saïbo v. Cadersa Lebbe*,[1] the decision of which seems to me to be in accordance with the Roman-Dutch Law; and if the decision in the last two cases above quoted is inconsistent with it, I prefer to follow the former.

My opinion is therefore that the plaintiff was not the owner of the mosque against all the world during the term of his trusteeship, but only the agent for certain purposes of the congregation who had appointed him, and who might under some circumstances have dismissed him. He was not entitled to maintain a possessory action; but in an action by him to recover possession it would be open to the defendant to set up any other defence, besides the two which are allowed in a possessory action. The decree of the District Court should be set aside; but I think that the case should go back for trial of the fourth issue, which was suggested by the defendant's counsel, but rejected by the Judge. The respondent should pay the costs of the trial up to date and of the appeal.

MIDDLETON J.—

To arrive at a sound conclusion as to whether a person is entitled to maintain what is known as a possessory action under the Roman-Dutch Law, it is necessary to arrive at a decision as to what is the right of possession which will found such an action.

Van der Linden (*Henry's translation, p. 183*) defines possession as the actual retention of a thing with the purpose of keeping it for

[1] (*1889*) *9 S. C. C. 1.*

one's self, and says that a lessee or an attorney or agent or depositary or person to whom anything is committed in charge cannot in a legal sense be said to possess the thing in question.

Van Leeuwen (*Kotze's translation, bk. I., p. 198*) says: "Possession is only a bare and naked apprehension and detention of a thing with the intention of using it as one's own. It consists in this, that a person having so possessed anything or right for a year and a day is entitled to retain the possession until somebody else who disputes his possession has lawfully established his right of property.

Grotius (translated by *Herbert, p. 69*) defines possession as the actual tenure or holding of anything with intent to retain it to ourselves in exclusion of any other.

Maasdorp (*vol. II., pp. 13 and 14*) says: "In other words, it is the physical detention of a corporeal thing by a person, whether with or without any claim of right, with the intention of holding it as his own, to which the law has given its sanction by interposing certain legal remedies or interdicts for its protection, in case of its being interfered with by other persons. But it is essential to the existence of possession that there should at one time or another have been both such detention or occupation and such intention present together at one and the same time. The intention must also absolutely be to hold the thing for one's self and not for another; for a lessee, a person who has a thing on loan, or a depositary cannot in strict law be said to possess, or, if he possesses at all, he possesses not for himself, but in the name of the owner. It follows from the above definition of possession, and the fact that it can only exist where there is a holding for one's self, that only those things are capable of being possessed which are capable of being owned, and that only those persons are competent to possess who are competent to own property, as to which points we shall treat further on."

The interdict *unde vi* does not lie to tenants of houses, *coloni* tenants of lands, or agents and other like persons (*Voet 43, 16, 3; Casie Chitty, p. 183*), except if the *dominus* is absent in exceptional cases and is unable to sue. The interdict *unde vi* lies to persons possessing *aut vi aut clam aut precario*, even against the *dominus* when they have been ejected by him by violence (*Voet, ubi supra*). So much so that it lies to a person ejecting the *dominus*, if the *dominus* has ejected him after an interval (*ubi supra*). It does not lie to a person who never possessed in intention or physically (*Voet 43, 16, 4; Casie Chitty, p. 185*).

In *MacCarogher v. Baker*[1] it was held by the majority of the Court, Dias J. dissenting, that a person who was in possession as agent of an owner was not entitled to maintain a possessory action upon ouster, but that the right to do so was in the owner.

[1] (*1883*) *Wendt 253.*

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In my opinion the test of the right to bring a possessory action lies in the Court's view of the *animus domini* with which the person ejected holds the property. It is necessary that the *animus* should be of an exclusive personal *possession ut dominus*, not for or on behalf of another, but for one's self.

In my opinion a trustee can never be said to be holding *ut dominus* for himself, but necessarily on behalf of those for whom he is trustee. I am not prepared to admit that in every case where the action *rei vindicatio* lies, the so-called lesser right to a possessory action must of necessity be included and implied. The right to bring a possessory action depends on proof of possession for the time limited, and the *animus* of the person possessing, while the action *rei vindicatio* depends on a proof of right and title to maintain the action. It is an action to assert *dominium*, while the other is to assert *possessio*. *Voet, bk. VI., tit. 1, section 29*, as translated by *Casie Chitty, p. 272*, says, in regard to things sacred, that a *quasi dominium* was allowed to persons in the position of *economi* stewards and other like persons.

It is difficult from the report of *Ahamado Lebbe v. Semberem* [1] to gather if the action there was a purely possessory action, or if it was not vindicatory as against alleged wrongdoers, in which case I see no reason to say that a plaintiff who proved he had been appointed Mohideen of a mosque and had held the office for twenty years by and with the consent of the congregation was not entitled to succeed as against mere wrongdoers, though I doubt his right to succeed in a possessory action.

In *Changarapillai v. Chelliah*,[2] in which Bonser C.J. approves of the case in *3 Lorenz*, he speaks of the lesser remedy of a possessory action following *a fortiori* from a right to bring the vindicatory action, but, with great respect for that learned Judge, I gather that there may be a *quasi dominium* such as that he refers to, which, though it might enable a person to maintain a vindicatory action, would not confer on him such possession for himself as is *primâ facie* required for the maintenance of the possessory action.

In the present case the plaintiff's right of possession *ut dominus* is traversed in the answer, and he is alleged to be a trustee holding over possession after the expiration of his term of trusteeship. The plea is in effect that he is not holding *ut dominus* for himself, but at the most in a representative capacity, though that is denied by the averment of holding over, and the question whether the plaintiff's possession is such as would entitle him to maintain the present action is definitely raised by the first issue.

In *Alim Saibo v. Cadersa Lebbe*,[3] Burnside C.J. and Dias J. held in the case of a Lebbe, who was also proved to have administered the lawful affairs of a mosque, that his possession was representative

[1] *(1858) 3 Lor. 28.* [2] *(1902) 5 N. L. R. 270.*
[3] *(1889) 9 S. C. C. 4.*

and not *ut dominus*. This case is not noticed in the judgment of Bonser C.J. and Wendt J. in *Changarapillai v. Chelliah, ubi supra*, which appears to over-rule it in principle without the authority to do so, both being two Judge cases.

In *Mascoreen v. Genys* [1] the Supreme Court held that a Roman Catholic incumbent turned out of possession by another person alleged to be appointed by the bishop to succeed him had a right to a possessory decree as against a wrongdoer. In that case the plaintiff had clearly the intention of possessing for himself *virtute officii*, and had no representative capacity.

In the case of *Tissera v. Costa* [2] the Supreme Court, Burnside C.J. and Clarence J., again held in the case of a Roman Catholic *muppu* that to maintain a possessory action the possession relied on by the plaintiff must be a possession *ut dominus* and not a possession on behalf of others.

In *Canagasabai v. Sinnetamby* [3] the manager of a *madam* was held entitled to succeed in a vindicatory action as against other claimants.

In *(1885) 7 S. C. C. 27* it was held that the officiating priests of a temple might maintain a possessory action, if they proved they had such possession as in law would entitle them to maintain it.

In *10 N. L. R. 52* the manager of a Hindu temple was in a vindicatory action declared entitled to maintain an action to vindicate his rights as manager.

In *2 Balasingham 49* the action was by a person who claimed to vindicate his title as manager and proprietor of a Hindu temple, who was held to fail in his claim thus laid, but allowed to succeed as though in a purely possessory action. The facts may have disclosed that he held *animo domini* for himself, but otherwise I do not think the judgment can be supported; but I think the case was decided on the authority of *Changarapillai v. Chelliah*, which I, with great deference to the learned Chief Justice who delivered the principal judgment, think cannot be supported by the Roman-Dutch Law, unless the temple manager there was in fact a proprietor, or hereditary descendant of the original proprietor, or a person who had some claim to hold for himself and not representatively.

In *6 S. C. C. 61* a very important decision was given, declaring a lessee presumably under a notarial lease to have the right to maintain a possessory action. There is ground for this, inasmuch as a tenant during the term of his lease holds as a *dominus* for himself on the footing of a *pro tanto* alienation. It seems to me, therefore, that the learned Solicitor-General was correct when he asserted that the only case he had to meet as decided against his contention was *Changarapillai v. Chelliah, ubi supra.*

[1] *(1862) Ram. 195.*
[2] *(1889) 8 S. C. C. 193.*
[3] *(1859) 3 Lor. 290.*

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A strong argument also in his favour, I think, is that a claim in reconvention appears not to lie upon the interdict *unde vi*, so that if Mr. Bawa's contention is correct, as the Solicitor-General argued, an agent of the *dominus* ejected might obtain a possessory decree against the *dominus*.

But although *Voet 43, 16, 5* (*Casie Chitty, p. 187*), says it does not matter whether the persons ejecting have any right or not, and that the interdict *unde vi* is given even against the *dominus* who ejects forcibly, it is only so given, in my opinion, in favour of a person who professes to have or has *possessio* for himself.

It would appear also (*Voet 43, tit. 17, num. 2, Casie Chitty, p. 199*) that the interdict *uti possidetis* would not be granted to agents themselves or *coloni* tenants and others having detention in the name of another or being in possession for the sake of custody.

The Roman-Dutch Law seems to recognize a *quasi dominium*, which would support a vindicatory action (*Voet, bk. VI., tit. 1, 19; Casie Chitty, pp. 34–35*) but not a *quasi possessio civilis*, which would support the interdict *unde vi* or *uti possidetis* so far as I can ascertain, as the possession must be for one's self, not representatively.

In my opinion, therefore, the first issue must be answered in the negative, and I hold the plaintiff in this case, who in the pleadings appears to be a trustee, is not entitled to succeed in a possessory action. I would therefore set aside the judgment of the District Court in so far as it orders the grant of a possessory decree in favour of the plaintiff, with costs up to date in both Courts. I should, however, be inclined to permit the action to proceed as a vindicatory one, upon the necessary amendment of the pleadings in that direction.

WOOD RENTON J.—

The question at issue in this case is whether the plaintiff-respondent, who claims to be trustee of the Muhammadan mosque at Maradana, is entitled to bring a possessory action against the first defendant-appellant, who also claims to be the duly appointed trustee of the mosque, and who, together with the second, third, and fourth defendants, has ousted the respondent from the control and management of the premises. The ouster was forcible. The respondent had had the control and management of the mosque for more than a year and a day prior to the ouster of which he now complains. The case comes, therefore, within the first part of section 4 of the Prescription Ordinance, No. 22 of 1871, and the respondent is entitled to the redress that he seeks, if, within the meaning of the proviso to that section, the facts satisfy " the other requirements of the law as respects possessory cases." The appellant contends that the respondent was at no time other than the agent or servant of the mosque; that at the date of the alleged ouster his term of office had expired, the appellant having been duly

appointed in his stead; and that, even if it had still been current at that date, he had not such a possession as would enable him in law to maintain the present action. The learned District Judge, following certain decisions of the Supreme Court, to which I will refer particularly hereafter, has held that, as the position of the respondent is that of a "trustee" who is vested with the legal estate, in so far as such vesting is consistent with *res divini juris*, in trust for the congregation, he can maintain a possessory action.

After careful consideration I have come to the conclusion, on the facts that the respondent had the control and management of the mosque during his term of office, solely as the agent or servant of the congregation, and, on the law, that under these circumstances he is not entitled, even if he has been duly re-appointed, and still less, of course, if there has been no such re-appointment, to a possessory remedy.

The respondent was appointed under the rules and regulations for the management of the Maradana mosque adopted by the congregation at a public meeting held on October 10, 1902. It is to these rules then that we must look for the purpose of determining his legal position. They begin by providing that all the affairs appertaining to the mosque shall be controlled and supervised by an assembly of fourteen members, elected for five years by the congregation (Rule 1). The congregation is also to appoint one of the assembly as trustee for a period of five years, and to give written authority and direction to the trustee to transact all business connected with the mosque (Rules 2 and 3). The powers and duties of the trustee are defined in Rule 4. He has "(*a*) to take charge of the lands and houses and all movables belonging to the mosque, and to collect the rents and issues thereof; (*b*) to keep clean and in repair the mosque and the houses, lands, and premises belonging to the mosque; (*c*) to attend to and make the repairs of houses, movables, and immovable premises belonging to the mosque; (*d*) to lease the houses, lands, and premises belonging to the mosque, such lease not to extend beyond a period of two years, and the conditions, terms, and provisos to be submitted to and approved by the assembly; (*e*) to spend out of the income toward repairs and defraying other incidental expenses; (*f*) to appoint and pay the Mohideen; (*g*) to inquire into disputes and differences of the priests, Mohideen, and members of the congregation, in respect of the mosque, the worship carried on therein, and other matters connected with the mosque." Special rules for the guidance of the trustee require him to enter all items of income and expenditure in books set apart for the purpose (Rule 1); to furnish the assembly with a half-yearly balance sheet (Rule 2), which is to be audited by two members appointed for the purpose; to lease no house or portion of the mosque premises without the consent of the assembly (Rule 8); and to take the approval of the assembly in writing before starting any work of which the

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cost is above Rs. 250 (Rule 10). The trustee is enabled to give a power of attorney to an assistant trustee, for whose appointment the rules also provide, to recover rents, and attend to judicial matters connected with the mosque and its property (Rule 11). Disputes concerning the Mohideen and priests, although referred in the first instance to the trustee, are, if considered by him sufficiently grave, to be submitted to the assembly (Rule 14). Charges against the priests are to be finally decided by the assembly, and the dismissal of a priest is in all cases to be in the hands of that body (Rules 14 and 15). It appears to me that, under these provisions, the trustee is merely an agent or servant of the congregation. He is elected by that body. He derives his authority, and receives his directions, from the assembly in its name. His powers of leasing are strictly limited; he requires the approval in writing of the assembly before undertaking any considerable work; he is placed under a strict and periodical liability to account. Even in the case of disputes, over which he has jurisdiction, he is expected to refer serious matters to the assembly, and he has no power to deal with charges against a priest or to dismiss him. Whatever powers of control or management the trustee so appointed may have, he exercises them, in my opinion, *alieno nomine*, within the meaning of Roman and Roman-Dutch law.

Under the Roman law the remedy applicable to a case of forcible dispossession was the interdict *unde vi*. Although it was not necessary for the purposes of that interdict that the plaintiff should have had *civilis possessio*, in the sense in which Savigny has interpreted that term, as meaning a possession capable of being converted, under the strict Civil Law, into full ownership by usucapion; it was essential that he should have had, at the time of ouster, juridical possession of the property in dispute, in the sense of an intention to exclude every one else from its possession (*Savigny on Possession, book IV., section 42; Sohm's Institutes of Roman Law, pp. 232–233*). If he held it *alieno nomine*, merely as the agent or servant of some one else, he had no claim to the remedy. In Roman-Dutch Law the nearest analogy to the interdict *unde vi* is to be found in the *mandement van spolie*. It is clear that, for the purposes of that remedy also, the possessor must have been holding possession in his own right, and must not have merely had a bare detention of the thing in the name of another. See *Voet 43, 16, 3*, and *Maasdorp, 2, p. 26*, and there are numerous other authorities to the same effect. On the text of the pure Roman-Dutch law itself, I think that the respondent is not entitled to maintain this action.

I come now to examine the local decisions cited in the argument in appeal. We may put aside at once the class of case of which *Perera v. Sobana* [1] may be taken as an example, in which it has been held that the lessee has the right to bring a possessory

[1] *(1884) 6 S. C. C. 61.*

suit against the lessor on being forcibly dispossessed by the latter during the term. It is true that *Voet* (*bk. 43, 16, 3*) classes the *colonus* with the agent or slave as being incapable of resorting to the interdict *unde vi* (and see *Van der Linden, Henry's translation, p. 183*). But there is a wide difference between the modern lessee and the Roman *colonus*, who, although personally free, was, in the later empire, part and parcel of the estate to which he was attached. It has been held in South Africa (see *Maasdorp, vol. II., p. 26*), in spite of the Roman-Dutch texts to which I have just referred, that a lessee is entitled to the *mandament van spolie*. I think that the decisions to the same effect in Ceylon are sound, and there is nothing in our present judgment that can conflict with them. If there had been a long and unbroken series of authorities recognizing the right of persons in the position of the respondent, to bring such an action as this, it might well be that we ought not now to interfere with it. But the authorities are, in fact, conflicting. In *Ahamado Lebbe v. Semberem*[1] it was held that the Mohideen of the mosque could maintain an action of trespass against a wrongdoer. In the course of the argument in that case, Rowe C.J. said that the Mohideen was more than a servant, and seemed to him to be more an officer or a trustee. This decision, as far as it goes, turns on the fact of the defendant having been a trespasser. The same observation applies to the case of *Mascoreen v. Genys*,[2] where the *ratio decidendi* was that as the defendant had failed to prove that he had turned the plaintiff, a Roman Catholic minister, out of the management of a certain church by the orders, as he alleged, of the Roman Catholic Bishop of Jaffna, he was practically in the position of a mere wrongdoer. *Canagasabai v. Sinnetamby*[3] was an action *rei vindicatio*, and the only question before the Court was whether the plaintiff who claimed the land in dispute as belonging to a *madam* had made out his title to the property as against the defendant, who asserted an independent title to it. The only authorities bearing directly upon the point are the decisions of Bonser C.J., concurred in by Wendt J., in *Changarapillai v. Chelliah*,[4] and of Wendt J. and Pereira A.J. in *Sivapragasam v. Swaminatha Aiyar*.[5] In both of those cases it was held in effect that if the manager of a Hindu temple has the control of the fabric of the property belonging to it, and the reasoning, if good, is of course applicable to the case of a Muhammadan temple—his possession is such as will enable him to maintain a possessory suit. On the other hand, there are authorities directly in point. In *MacCarogher v. Baker*[6] the plaintiff was the agent for B, the owner of an undivided half share of two estates, and the executor of M, the owner of the other. He came out from England at B's request to take charge of the estates, and continued with B's consent in

[1] (*1858*) *3 Lor. 28.*
[2] (*1862*) *Ram. 195.*
[3] (*1859*) *3 Lor. 290.*
[4] (*1902*) *5 N. L. R. 270.*
[5] (*1905*) *2 Bal. 49.*
[6] (*1883*) *Wendt 253.*

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the sole occupation and management of them, himself finding all necessary funds for their upkeep. Having been deprived of his possession of the estates by the agent of the defendant, he brought a possessory action, seeking to be restored to the possession of an undivided half share of them. Clarence J. and Dias J. having differed as to whether this action was maintainable in respect of B's half share, the question was referred without further argument to De Wet A.C.J., who adopted the view of Clarence J., that as the plaintiff's occupation of that half share had been in the character of agent for B, the right to maintain a possessory action in respect of it was not the plaintiff's, but B's. In *T'issera v. Costa* [1] the question at issue was whether the plaintiff, as *muppu* of a certain Roman Catholic church, could recover possession of that church and its premises from the Vicar-General, and a priest, who, he alleged, had forcibly ousted him therefrom. Burnside C.J. and Clarence J. held that the action was not maintainable. In *Changarapillai v. Chelliah* Bonser C.J. distinguished that case as follows: "The *muppu*, who appears to be a kind of beadle, has no control over the fabric of the church, and was only a caretaker entrusted with the custody of certain movables, a very subordinate servant, whose duty it was to keep the church clean, but who had no sort or kind of possession either on behalf of himself or anybody else." I think that this passage rather understates the position of the *muppu* as defined in the evidence, but in any event the *ratio decidendi* was that the *muppu's* possession was *alieno nomine*. In *Alim Saibo v. Cadersa Lebbe* [2] Burnside C.J. and Dias J. held that the plaintiff, who had for many years officiated as priest of a Muhammadan mosque, had received the contributions of the faithful, had administered the funds of the mosque, had entered into contracts on behalf of the congregation, and generally had had the charge of the affairs of the mosque as its religious head, could not maintain a possessory action in respect of the mosque property. Here, again, the *ratio decidendi* was that the plaintiff's possession of the mosque was only a possession on behalf of the congregation. Bonser C.J. in *Changarapillai v. Chelliah* [3] disapproved of this decision, and stated his view of the law thus: "It seems to me that if the plaintiff, who is called the manager of the temple, has the control of the fabric of the temple and of the property belonging to it, he has such possession as would entitle him to maintain an action, even though he makes no pretence of claiming the beneficial interest of the temple or its property, but is only a trustee for the congregation who worship there." Whatever may be the rights of the precarious owner as against strangers, I am unable to assent to the view expressed by Bonser C.J. in the passage just cited in such cases as *Changarapillai v. Chelliah* [3] and the present.

[1] *(1889) 8 S. C. C. 194.* [2] *(1889) 9 S. C. C. 4.*
[3] *(1902) 5 N. L. R. 270.*

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I should myself have been disposed to hold that the respondent's action should be dismissed *simpliciter*, with all costs here and in the District Court. But I will not dissent from the view of the rest of the Court that an opportunity should be given to the respondent to vindicate his rights, if any, as the alleged manager of the temple as against the present appellant. I express no opinion as to whether or not such an action is maintainable under the circumstances of this case. The appellant should, I think, have all costs up to date.

Appeal allowed; case remitted.