to decide these charges and counter charges *it is absolutely necessary to determine which is the correct book of canons, for the plaintiffs founded their charges on Ex. B. P. = Ex. 18 in O. S. No. 94 of 1088 and the defendants took their stand on Ex. 26 = Ex. A in O. S. No. 94 of 1088. Issue No. 13 was directed to determine that question. Issue No. 16 is concerned with the conclusions to be drawn from the findings on issues Nos. 14 and 15. The plaintiffs cannot be permitted to use issue No. 16 as a general issue not limited to the subject matter of issues 14 and 15, for that will be stretching it far beyond its legitimate purpose.*

36. Re. (iib): This ground raises the question of the Patriarch's right to Ressissa. Ressissa is a voluntary and not a compulsory contribution made by the parishioners. Ex. F. O. which records the proceedings of the Mulanthuruthy Synod held on June 27, 1876, refers to a resolution providing, inter alia that the committee that is to say, the committee of the Malankara Association, will be responsible to collect and send the Ressissa due to His Holiness the Patriarch. This may suggest that some Ressissa was due to the Patriarch. But in paragraph 218 of Ex. DY which is the judgment pronounced by the Travancore Royal Court of Final Appeal on July 12, 1889, it is stated that no satisfactory evidence had been adduced before the court as to the payment of Ressissa to the Patriarch by the Committee in Malankara, that the evidence on record was very meagre and inconclusive and that it was open to doubt whether it was payable to the Metropolitans in this country or to the Patriarch in a foreign country. Ex. 86, which records the proceedings of the meeting of the Malankara Association held on September 7, 1911, refers to a resolution forbidding maintaining any connection with Patriarch Abdulla II and presumably in consequence of this resolution the payment of the Ressissa to the Patriarch was stopped. The interpleader suit (O. S. No. 94 of 1088) was filed in 1913. If non-payment of Ressissa could be made a ground of attack, it should have been taken in that suit and that not having been done, it cannot now be put forward according to the principles of constructive res judicata. Besides, the provisions of paragraph 115 of the impugned constitution (Ex. A. M.) require every Vicar in every parish Church to collect only two chukrums from every male member who has completed 21 years of age and to send it to the Catholicos. This does not forbid the payment of Ressissa to the Patriarch, if any be due to him and if any parishioner is inclined to pay anything to the Patriarch who is declared in c. (i) of this very constitution to be the supreme head of the Orthodox Syrian Church. In any case, according to the canons relied upon by each of the parties, namely Ex. B. P.=Ex. 18 of O. S. No. 94 of 1088 produced by the plaintiffs or Ex. 26=Ex. A in O. S. No. 94 of 1088 insisted upon by the defendants, the non-payment of Ressissa does not entail heresy. Even if the question involved in ground (iib) is not covered by the previous

decision in the interpleader suit (O. S. No. 94 of 1088) the question has, on the foregoing grounds to be decided against the plaintiff respondent.

37. Re. (iii): This is really not a charge but a statement of the conclusion which the plaintiff-respondant desires to be drawn from the other charges formulated above. Accordingly the point has not been pressed before us and nothing further need be said about it.

38. Re. (iv): An attempt is made by learned counsel for the respondents to make out that what was referred to in the interpleader suit (O. S. No. 94 of 1088) was the ordination of a Catholicos where as in the present suit reference is made to the establishment of a Catholicate and further that in any case the Catholicate of the East referred to in the plaint in the present suit is an institution quite different from the Catholicate which was the subject matter of discussion in the interpleader suit (O. S. No. 94 of 1088). We do not think there is any substance whatever in this contention. A reference to paragraphs 30 and 31 of the written statement clearly indicates that the institution of Catholicate, which is relied upon by the defendants, is no other than the Catholicate established in Malabar in 1088 by Patriarch Abdul Messiah. This position is accepted by the plaintiffs themselves in their grounds of appeal Nos. 13, 15, 17, 18, and 27 to the High Court of Travancore from the decision of the District Judge of Kottayam in this case. Issues Nos. 14 and 15 as well as the judgment of the District Judge in this case also indicate that the subject matter of this part of the controversy centred round the Catholicate which had been established by Abdul Messiah in the year 1088. Before the argument advanced before us there never was a case that the impugned constitution (Ex A.M.) had established a Catholicate of the East. The purported distinction sought to be drawn between the ordination of Catholicos and the establishment of a Catholicate and a Catholicate established by Abdul Messiah in 1088 and the Catholicate of the East created by the impugned constitution (Ex. A. M.) and which is sought to be founded upon as a new cause of action in the present suit, appears to us to be a purely fanciful afterthought and is totally untenable.

39. For reasons stated above we have come to the conclusion and we hold that the case with which the plaintiffs have come to court in the present suit is that the defendants thad become heretics or aliens or had gone out of the Church by establishing a new Church because of the specific acts and conduct imputed to the defendants in the present suit and that the charges founded on those specific acts and conduct are concluded by the final judgment (Ex. 256) of the High Court of Travrancore in the interpleader suit (O. S. No. 94 of 1088) which operates as res judicata. The charge founded on the fact of non-payment of Ressissa, if it is not concluded as constructive res judicata by the previous judgment must, on merits, and for reasons already stated, be

found against the plaintiff-respondent. We are definitely of the opinion that the charges now sought to be relied upon as a fresh cause of action are not covered by the pleadings or the issues on which the parties went to trial, that some of them are pure afterthoughts and should not now be permitted to be raised and that at any rate most of them could and should have been put forward in the earlier suit (O. S. No. 94 of 1088) and that not having been done, the same are barred by res judicata or principles analogous thereto. We accordingly hold, in agreement with the trial court, that it is no longer open to the plaintiff-respondent to re-agitate the question that the defendant-appellant had ipso facto become heretic or alien or had gone out of the Church and has in consequence lost his status as a member of the Church or his office as a trustee.

40. In the view we have taken on the question of res judicata it is not necessary for us to discuss the further question whether this suit is founded on the same cause of action as that on which O. S. No. 2 of 1104 was founded or whether by allowing that suit to be eventually dismissed for default the plaintiffs can under the relevant provisions of the Travancore Code of Civil Procedure corresponding to O. 9, R. 9 of our Code of Civil Procedure maintain the present suit."

(emphasis mine)

187. The Supreme Court then considers the question whether the appellant before it had been validly elected as trustee by the Malankara Association. For that purpose, it considered the question of the validity of the meeting in which he was elected, namely the meeting held on December 26, 1934 at the M. D Seminary, Kottayam. There the learned Judges come to the conclusion that the High Court's decision with respect to the matter was based partly on a mis-reading of evidence and partly on the non-advertence to important material evidence bearing on the question and to the probabilities of the case. In their opinion, the M. D. Seminary meeting was properly held with notice to all the churches and the appellant before them was validly appointed as the Malankara Metropolitan and as such became the ex-officio trustee of the church properties. In this view, as pointed out earlier, the judgment of the Kerala High Court was set aside, the decree of the trial court dismissing the suit was restored and the two suits stood dismissed with costs throughout. It may be pointed out here that along with this appeal, a petition filed under Article 32 of the Constitution by 8 persons belonging to Catholicos party praying for a writ of certiorari or other appropriate order or direction of writ for quashing the judgment and decree passed by the High Court in the case had also been disposed of. The Petition was not pressed and was dismissed without costs.

After the Supreme Court Case:-

188. After the decision of the Supreme Court, attempts were made by well meaning persons on both sides to have peace in the church and to bury the hatchet. It would appear that Metropolitans on both sides and the leading members of the clergy and laity were unanimous to have peace accepting as they are bound to the decision rendered by the

Supreme Court. There was acceptance by the Patriarch of the Catholicos and Malankara Metropolitan. The Catholicos accepted the Patriarch subject to the constitution. It would appear that there was a re-allotment of all the dioceses in the Malankara Church and as the combined strength of Metropolitans slightly exceeded the number of dioceses, in some cases two Metropolitans were appointed for the same diocese, one being senior and the other assistant depending upon their seniority. Apparently some peace was seen to be established. However, there was no acceptance as such of the constitution framed by the Catholicos group by the Patriarch and according to the Patriarchal party, even assuming that he had accepted it there is no indication that the various churches in Malankara which were supporting him had accepted it for the administration of the churches. To bind the parish churches, according to the Patriarch group the Pothuyogam of each church should accept it. Finally it would appear that the main differences between the parties which were apparently seen to be settled had not been really settled at all. These existing differences have led to the filing of the various suits which have again come up before the civil courts for adjudicatio n.

Finality or otherwise of the decision in 1946 T. L. R. 683:-

189. Before going into the points at issue between the parties in O. S. No. 4 of 1979, I think I should first dispose of the contention raised by Mr. Easwara Iyer, one of the counsel appearing for a party on the Patriarch group. He rather strongly pressed that really finality had attached to the decision of the Travancore High Court reported in 1946 T. L. R. 683 and the Supreme Court's decision in 1954 directing the rehearing of the appeal by the High Court and all subsequent proceedings ending with the decision of the Supreme Court in 1958 K. L. T. 721 were without jurisdiction.

190. With due respect to the counsel, I am afraid his plea is based on a misconception of law and I have no hesitation to overrule his contention. The Travancore Full Bench decision was rendered on 8-8-1946. The decision of the Travancore High Court was no doubt subject to no right of further appeal. The High Court could review its decision on a proper application to it within the time allowed by law subject to the limitations imposed by the Travancore Code of Civil Procedure in matters of review. An application for review was duly filed in that Court on 22-8-1946 well within the time limit for such application. The Travancore High Court also ordered notice in the matter on 4-12-1947. Travancore and Cochin integrated to form the United State of Travancore and Cochin by a Covenant entered into by the Rulers of the two States with the concurrence and guarantee of the Government of India in May 1949, the new State as per the Covenant coming into existence on 1st July, 1949. Under Article XI of the Covenant, until a constitution framed or adopted by the Legislature comes into operation, the Raja Pramukh created by Article IV of the Covenant, was given the power to make and promulgate ordinances for the peace and good Government of the new State which ordinance shall for the space of not more than six months from its promulgation, had the like force of law as an Act of Legislature, to be controlled or superseded by any such Act. Accordingly the Raj Pramukh of the new State, made

Ordinance No. II of 1124 coming into force from 7-7-1949 for the establishment of a High Court and matters connected with the constitution and functions of such High Court. Under Section 5 of the Ordinance the High Court for the new State was established. Section 8 of the said Ordinance specifically provided that all proceedings commenced prior to the coming into force of the Ordinance in either of the High Courts of Travancore and Cochin shall be continued and depend in the High Court as if they had commenced in the High Court after such date. It also provided that any order made by either of the existing High Courts in any such proceedings as aforesaid, shall, for all purposes, have effect not only as an order of that court, but also as an order made by the High Court.

191. In the light of the above proceedings the review petition was validly continuing in the new High Court when the Indian Constituent Assembly adopted and enacted on 26-11-1949 the Constitution of India. Travancore-Cochin was one of the new States of India—a Part B State. Under Article 214 read with Article 238 (12) the High Court of the United State of Travancore and Cochin became the High Court of Travancore-Cochin. Articles 132 to 136 provide for right of appeal to Supreme Court. Provision was also provided regarding pending suits, appeals or proceedings in the Federal Court of India, pending appeals and petitions in the Privy Council, and appeals and petitions pending before the authority functioning as the Privy Council in a State specified in Part B of the first schedule to the constitution, in Article 374 (2), (3) and (4). Article 374 (2), (3) and (4) could usefully be extracted here :-

"374 (1).....

(2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court.

(3) Nothing in this Constitution shall operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court within the territory of India in so far as the exercise of such jurisdiction is authorised by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect as if it were an order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on Such Court by this Constitution.

(4) On and from the commencement of this Constitution the jurisdictton of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to,

and disposed of by, the Supreme Court."

192. It is true that any appellant has a vested right of appeal to a particular forum as per the existing law on the date of suit. That right is a substantive right and although it could be exercised only if there was an adverse decision, the right is governed by the law prevailing at the commencement of the suit and the right consist of successive rights of appeal from court to court which constitute one proceeding. Such a right could only be taken away by a subsequent enactment either expressly or by necessary intendment. See **Colonial Sugar Refining Co. Ltd. v. Irving** ((1905) A.C.369).; **Garikapati Veeraya v. N. Subbiah Choudhry and Others** (1957 S. C. R. 488 = A. I. R. 1957 S. C. 540).

193. While a right of appeal in respect of a pending matter may conceivably be treated as a substantive right vesting in the litigant on the commencement of the action, no such vested right to obtain a determination with the attribute of finality can be predicated in favour of a litigant on the institution of the action.

See Indira Sohanlal v. Custodian of Evacuee Property, Delhi and others (A. I. R. 1956 S. C. 77).

194. It may be that when a legal determination is made which may be final and no proceedings are initiated under the existing law, if there be provision for review, for review of such decision, a subsequent conferment of power by a statute for appeal or revision against such determination unless specifically so provided cannot be restrospective affecting the finality of the determination. And such finality will accrue only when the determination is made and not when the proceedings for such determination is effected. The Privy Council dictum in **Delhi Cloth and General Mills Co. Ltd. v. Income Tax Commissioner, Delhi** (A. I. R 1927 P. C. 242) could be understood in that manner. There the Privy Council said:-

> "Their Lordships can have no doubt that provisions, which, if applied retrospectively would deprive of their existing finality orders, which, when the statute came into force, were final, are provisions which touch existing rights".

195. There is always the difference between a case where by the operation of the previous law, the order has become final and the case where the repealed law cannot operate on the subsequent stages of a pending application. See **Niranjan Singh v. Custodian, Evacuee Property** A. I. R. 1961 S. C. 1425 and **Bishambhar Nath v. State of U. P.** (A. I. R. 1966 S. C. 573) (where Justice Shah speaking for the court doubts certain observations in A. I. R. 1961 S. C. 1425 in regard to the legal fiction introduced by Section 58 (3) of Central Act 31 of 1950).

196. I would here also refer to the decision in **Nathoo Lal v. Durga Prasad** (A. I. R. 1954 S. C. 355). Note (a) of the Head Note to the case may be usefully extracted here:

> "Plaintiff preferred a second appeal to the High Court of Jaipur. The appeal was allowed. The defendant applied for a review of this judgment. Meanwhile the Jaipur High Court had become defunct and the review was heard by the Rajasthan High Court as successor to the Jaipur High Court under the High Courts Ordinance and was partially allowed on the 5th of April 1950 and the decree was accordingly amended. It was

against this judgment and decree passed after the coming into force of the Constitution of India that the present appeal had been preferred to the Supreme Court by leave of the Rajasthan High Court under Art. 133 (1) (c) of the Constitution:

Held that the only operative decree in the suit which finally and conclusively determined the rights of the parties was the decree passed on the 5th of April 1950 by the Rajasthan High Court and that having been passed after the coming into force of the constitution of India the provisions of Art. 133 were attracted to it and it was appealable to Supreme Court provided the requirements of that Article were fulfilled. The Code of Civil Procedure of the Jaipur State could not determine the jurisdiction of Supreme Court and had no relevancy to the maintainability of the appeal." It will be instructive to quote paragraphs 5 and 6 of the decision in **Keshavlal** v. **Mohanlal** (A. I. R. 1968 S. C. 1336).

"(5) The suit out of which this appeal arises was filed by the respondent on July 22, 1958; it was decided on October 28, 1961; the appellate court decided the appeal on February 25, 1963 and the Amending Act 18 of 1965 came into effect on June 17, 1965. The High Court exercised the jurisdiction invested by Act 18 of 1965 in respect of a judgment which had become final a long time before that Act. It is true that this Court in Indira Sohanlal v. Custodian of Evacuee Property, Delhi 1955-2 S. C. R. 1117 = (AIR 1956 SC 77) distinguished the judgment of the Judicial Committee in the Colonial Sugar Refining Co. Ltd's Case, 1905 AC 369 and observed at p. 1133:

".... it appears to be clear that while a right of appeal in respect of a pending action may conceivably be treated as a substantive right vesting in the litigant on the commencement of the action – though we do not so decide - no such vested right to obtain a determination with the attribute of finality can be predicated in favour of a litigant on the institution of the action. By the very terms of Section 5-B of East Punjab Act XIV of 1947 finality attaches to it on the making of the order. Even if there be, in law, any such right at all as the right to a determination with the attribute of finality, it can in no sense be a vested or accrued right. It does not accrue until the determination is in fact made, when alone the right to finality becomes an existing right as in....."

In Indira Sohanlal's case, 1955-2 SCR 1117=(AIR 1956 SC 77) the court was dealing with a case in which by amendment of statute, the finality which would but for the amendment have attached was taken away before the order was made. This Court in Dafedar Niranjan Singh v. Custodian Evacuee Property (Punjab), (1962) 1 SCR 214= (AIR 1961 SC 1425) distinguished Indira Sohanlal's case, 1955-2 SCR 1117= (AIR 1956 SC 77) and held that an order which had become final under a provision of the law could not be affected retrospectively under an Amending Act so as to deprive the order of its finality acquired under the original provision. In Dafedar

Niranjan Singh's case, (1962) 1 SCR 214= (AIR 1961 SC 1425) an order releasing the property in dispute was passed by the Custodian of Evacuee Property under Patiala Ordinance No. IX of 2004 Samvat. No appeal was filed against the order of the Custodian and it became final on that account. The order was however set aside by the Custodian in exercise of jurisdiction under S. 58 (3) of the Administration of Evacuee Property Act 31 of 1950. This Court held that since the order had become final in exercise of the jurisdiction subsequently conferred, in the absence of any positive indication giving Section 58 (3) retrospective operation, the finality of the previous order could not be taken away.

(6) Counsel for the respondent relied upon a judgment of this Court in Moti Ram v. Suraj Bhan (1960) 2 SCR 896= (AIR 1960 SC 655) in which following Indira Sohanlal's case, 1955-2 SCR 1117= (AIR 1956 SC 77) it was held that the High Court could, in exercise of jurisdiction under an Amending Act enacted after the litigation was commenced, set aside an order which according to the law in force at the date when the litigation was commenced, was not subject to the jurisdiction of the High Court. In Moti Ram's case, (1960) 2 SCR 896= (AIR 1960 SC 655) an application for eviction of the appellant from a shop was made in August 1956 under Section 13 of the East Punjab Urban Rent Restriction Act, 1949. An appeal was provided under Section 15 of the Act from the order of the Rent Controller, and sub-section (4) of Section 15 provided that the decision of the appellate authority, and subject only to such decision, the order of the Controller shall be final. By Amending Act 29 of 1956 which came into force on September 24, 1956, the High Court was empowered to call for and examine the records relating to any order passed under the Act for satisfying itself as to the legality or propriety of such order. The landlord's application was dismissed by the Rent Controller and in appeal the appellate authority confirmed the order. Thereafter on the application of the landlord the High Court reversed the order. This Court rejected the contention that the High Court had no jurisdiction to entertain the revision application under Section 15 (3) as amended. The decision brought before the High Court in exercise of its revisional jurisdiction under Section 15 (5) of the amended Act was delivered on August 19, 1958, after the amendment of the Act on September 24, 1956. On the date on which it was made, the order had acquired no finality, for it was subject to an order which may be passed in a revision application which may be filed before the High Court under the amended Act. Moti Ram's case, (1960) 2 SCR 896=(AIR 1960 SC 655) has, therefore, no application to this case."

The principle can succinctly be stated as follows. An order, which on the date it is made is final, gives rise to vested rights; and a subsequent change in law giving rise to new right of appeal or revision

is presumed not to affect the finality of orders already made. But the right to finality does not vest or accrue until the making of the order; and, therefore, if new right of appeal or revision is conferred before making of the order, although after institution of proceedings, the right of appeal or revision is available against all orders subsequently made. If a new Act provides that the orders made under the old Act are deemed to be made under the new Act as if it were in force on the day when the orders were made, the orders though made under the old Act will become appealable or revisable under the new Act. Thus a retrospective change in law may enable a court to review its earlier decision and to modify it even in the absence of an express conferral of such power and a retrospective statute may by implication without using express words, invalidate an order previously made.

I97. In regard to 1946 T. L. R. 683, an application for review was admitted and notice ordered therein. That was a pending proceeding when the Travancore Cochin State came into existence and also when the constitution came into force. Under the law constituted, proceedings commenced prior to the coming into force of that law in either the High Courts of Travancore and Cochin had to be continued and proceeded in the new High Court as if they had commenced in that High Court. From the order dismissing the review petition passed by the High Court, appeal was taken to the Supreme Court, as such appeal would lie in view of the coming into force of the constitution. Such appeal that was taken and consequent proceedings which followed are not vitiated by any way by lack of jurisdiction. Therefore 1946 T. L. R. 683 could not have any finality as urged by Mr. Easwara Iyer. The suit had been finally concluded only by the Supreme Court decision rendered in 1958. Whether the review application could have been proceeded with, had been considered by the Supreme Court in the appeal before it on special leave when the Travancore Cochin High Court had dismissed the review petition on 21st December, 1951. A contention had been taken up before the Supreme Court then that the effect for setting up a common High Court for the United States of Travancore and Cochin had made the earlier review application infructuous. The Supreme Court said:-

> "The application for review was properly made to the Travancore High Court and the Travancore High Court had to decide whether to admit or to reject the application. The judgment to be pronounced on the application for review did not require, under any provision of law, to be confirmed by the Maharaja or any other authority. It was a proceeding properly instituted and was pending on the 1st July 1949 and consequently under section 8 of Ordinance No. II of 1124 had to be continued in the High Court of the United State as if it had commenced in the said High Court after the coming into force of the said Ordinance. The application for review was rejected by the High Court. If, however, the High Court had admitted the review then such admission would have had the effect of reviving the original appeal which was properly filed in the Travancore High Court under section 11 of the Travancore High Court Regulation (IV of 1099). That appeal, so revived, having been

commenced prior to the coming into force of Ordinance No. II of 1124 would, under section 8 of that Ordinance, have had to be continued in the High Court of the United State as if it had commenced in that High Court after such date.

The position would be the same if on appeal before the Supreme Court, the Supreme Court now admitted the review, for, upon such admission the appeal filed in the Travancore High Court would be revived and then, having been commenced in the Travancore High Court and continued in the High Court of the United State by virtue of section 8 of Ordinance No. II of 1124 the appeal so revived would under section 8 of the Act of 1125, have to be continued in that High Court as if it had commenced in that High Court after the coming into force of that Act. In other words, the old appeal, if restored by the Supreme Court, would, by the combined operation of section 8 of Ordinance II of 1124 and section 8 of the Act of 1125, be an appeal pending in the High Court of the United State. Under the present constitution Travancore-Cochin has become a Part B State and under Article 214 of the Constitution the High Court of the United State of Travancore-Cochin has become the High Court of the Part B State of Travancore-Cochin and shall have the jurisdiction to exercise all the jurisdiction of and administer the law administered by the High Court of the United State.

Such appeal must, accordingly be disposed of under section 25 of the last mentioned Act. That Section does not require any confirmation of the judgment passed on the rehearing of the appeal by the Maharaja or Rajpramukh or any other authority. Assuming, however, that the appeal if restored will have to be governed by section 12 of the Travancore High Court Regulation (1Vof 1099) even then the provisions of section II would have to be applied "as far as may be" and it may well be suggested that the portion of section II which requires the confirmation by the Maharaja, would, in the events that have happened, be inapplicable. Hence the review application had not become infructuous."

The question of res judicata:-

198. A very important question arising in these suits is how far the final decision rendered on certain questions in respect of the same questions which are covered by issues in the present suit. After a consideration of all relevant aspects of fact and law on the matter, I am afraid both the parties have taken up rather extreme positions at different ends and I have to reject their contentions on the same. I am formulating independently the points which according to me are covered by the earlier decisions which cannot be reopened in these proceedings.

199. As regards the decision in the Seminary Case–Ext. B74– the majority decision of the Royal Court of Appeal, there may not be much difficulty. The conclusion in that case which is of validity here can be extracted from para 347 of that judgment:

"that the Ecclesiastical Supremacy of the See of Antioch over the Syrian Church in Travancore has been all along, recognisd and acknowledged by the Jacobite Syrian Community and their

Metropolitans; that the exercise of that supreme power consisted in ordaining, either directly or by duly authorised Delegates, Metropolitans from time to time to manage the spiritual matters of the local Church, in sending Morone (Holy oil) to be used in the churches in this country for Baptismal and other purposes and, in general supervision over the spiritual government of the Church; that the authority of the Patriarch has never extended to the government of the temporalities of the Church which, in this respect, has been an independent Church; that the Metropolitan of the Syrian Jacobite Church in Travancore should be a native of Malabar consecrated by the Patriarch of Antioch, or by his duly authorised Delegates and accepted by the people as their Metropolitan to entitle him to the spiritual and temporal government of the local church ..."

It will be necessary also as to what the learned Judges meant by the word "accepted by the people as their Metropolitan". Very pointedly the learned Judges (in para 244 of Ext. B74) state that the contention of both the parties in that suit that acceptance by the people is necessary for a Bishop duly consecrated and appointed by the Patriarch to become Metropolitan of the local church seemed to be a new idea and was probably due to a precaution on their part to prevent foreigners sent out by the Patriarch from assuming the management of the temporalities of the Church without the consent and against the wishes of the community. I have referred to this aspect when discussing the history of the church. The judges in Ext. B74 state that acknowledgement by the people was thought of as the best and safest substitute to adopt. How is the acceptance to be found out? In that case, taking due note of the fact that Mar Joseph Dionysius' claim had the support of Mulanthuruthy Synod where representatives of 102 churches had attended and that the rival claimant Mar Thomas Athanasius had taken up the position actually to the effect that he did not consent to a decree being passed in favour of a party that had the majority on his side (Para 308 of Ext. B74), the Judges said that Mar Joseph Dionysius had been accepted by a large majority of the people as the Metropolitan of the Syrian Church in Travancore and that acceptance had given him a right to the Government of the temporal affairs of the Church. It might also be noted that the suit itself was for the recovery of the movable and immovable properties of Kottayam Seminary, belonging to the Jacobite Syrian Christian Community of "Malayalam" with those shown in a separate schedule as those worn and used by the successive Metropolitans of the community. The learned Judges also say in Ext. B74 "Nor is a meeting necessary for rhe purpose of expressing submission to or acceptance, of a duly ordained Bishop as Metropolitan. It is implied if no opposition is offered by the majority of the community". (Para 291-Ext. B74)

200. Now we will go into the Vattippanam Case where the final judgment is the one reported in 45 T. L. R. 116 (the judgment rendered after reviewing to some extent the decision rendered in 41 T. L. R. 1). Though it had been very strongly contended by Mr T. N. Subramonia Iyer and Mr. John appearing for the parties on the Patriarch's side that the findings in 41 T. L. R.1 on questions

which had been declared to be excluded from the consideration of the rehearing when the review petition was allowed by the Travancore High Court and about which in the final jndgment in 45 T. L. R. 116, Chief Justice Chatfield said (at page 139):-

> "The plaintiffs on the other hand have failed to show that any of the questions which have been declared to be excluded from consideration at the rehearing are inseparably connected with those questions and thereupon in disposing of this appeal the excluded questions will not be referred to",

are res judicata, I find it difficult to agree with them. No doubt their plea is supported fully by the decision of the Full Bench of this Court in the Samudayam Case 1957 K. L. T. 63. There Sankaran J. as he then was, said at page 103:

> "In the final judgment after review the question of natural justice alone was considered and decided and this means that the earlier finding on the question of canons, which was a matter directly and substantially in issue in the suit, was accepted as correct even for the purpose of the final decision on the question of natural justice. Thus by implication the finding on the question of the canons forms an integral part of the final decision in 45 T. L. R. 116 because, without maintaining that finding, the question of natural justice could not have arisen at all. A finding on a question which is so vitally and intimately connected with the final decision passed in the suit, will operate as res judicata just as the final decision itself in a subsequent suit where the same question is raised between the same parties or those claiming under them. The decisions in **Kaveri Ammal** v. **Sastri Ramier** (I. L. R. 26 Madras 104) and in **Mota Holiappa** v. **Vithal Gopal** (I. L. R. 40 Bombay 662) are in support of this position."

Sankaran J. further added:-

> "In another view of the matter also, the finding recorded in 41 T. L. R. 1 on the question of the canons accepted by the Malankara Church as binding on it, must be held to be conclusive and final for the purpose of this suit also. The order on the review petition expressly stated that such a finding must be taken as binding. That order was confirmed by another order passed on a petition to remove the said restriction. These orders were passed by the final court after fully hearing the parties. Apart from the question as to the validity or correctness of those orders, the fact is there that they have become final as between the parties to that suit which was a representative suit."

201. As a decision of the Full Bench of this court, Justice Sankaran's observations would have been binding on me but for the reason that the judgment as such was set aside by the Supreme Court. Basically I find it difficult to agree with the reasoning of Justice Sankaran. The plea against the Catholicos and his adherents had been dismissed on the ground of violation of the principles of natural justice in the matter of excommunication of Mar Geevarghese Dionysius and his followers. This was on the alternative plea raised by them. It was at one time thought that the test

of res judicata was whether the finding was embodied in the decree. This however is not correct for res judicata is a matter of substance and not of form. It is the right of appeal which indicates whether the finding was incidental or necessary. If the plaintiffs' suit is wholly dismissed, no issue decided against the defendant can operate as res judicata against him in a subsequent suit, the decree being wholly in his favour. See in this context:

Thakur Magundeo v. **Thakur Mahadeo Singh and another** (I. L. R. (1891) **18 Cal. 647.**) and **Ramasami Reddi** v. **Thalawasal Marudai Reddi and others** (I. L. R. (1924) 47 Mad. 453.)

202. The two questions that had been finally decided by the judgment in 45 T. L. R. 116 were:

(i) The ex-communication of Mar Geevarghese Dionysius was invalid because of the breach of the rules of natural justice in that he was not apprised of the charges against him and he had not been given a reasonable opportunity to defend himself;

(ii) that the defendants 1 to 3 in that suit (the then Catholicos and his adherents) had not become heretics or aliens or had not set up a new church by establishment of the Catholicate by Abdul Messiah.

203. The first question is clear in itself. In regard to the second question how the answer was arrived at by the judges can be seen from their own words:-

Chatfield C. J.

> "In the Canon" of Nicea" as given on both Exhibits A and XVIII there is express provision for a great "Metropolitan of the East" who was to have power like the Patriarch, to consecrate Metropolitans in the East. All that can be urged against the 1st defendant therefore is that he cooperated with one who was not a valid Patriarch when the latter was doing acts which could only be done by a Patriarch or at the worst that he caused this unlawful Patriarch to do such acts. It is conceded by the defendants that if Abdullah had done these acts there would have been no objection. Therefore the whole matter resolves itself into a personal dispute between two claimants to the Patriarchate in which it is said, the 1st defendant deserted the Patriarch who had created him Metropolitan and supported his rival. Such conduct might amount to an ecclesiastical offence for which the offender could be deprived by his ecclesiastical superior but it could not be an offence for which the civil courts could try him or express any opinion as to his guilt. In addition it is extremely hard to ascertain on the evidence before the court that the person recognised by the 1st defendant as Patriarch had no claims to be regarded as such. The possible existence of two Patriarchs at the same time is recognised by the Canon irrespective of any dispute as to matters of faith. It is true that one of them should sit idle but as to what will happen if he does not but does such acts as consecrating Morone or ordaining Metropolitan there are no means of knowing. It may be that in such cases the acts done will not be ab initio invalid and may become fully valid if recognised by the

Senior Patriarch. All this is mere surmise. But the defendants' attempt to found an inference of fact from a contrary surmise is not to be accepted. At the present time it is admitted that both Abdulla and Abdul Messiah are dead and that a new Patriarch rules at Antioch. No recognition that can have been given to either of the former rivals can materially affect the church at present. In the circumstances it cannot be said that the church to which the defendants 1 to 3 belong is a different church from that for which the endowment now in dispute was made."

Joseph Thaliath J.:

"There is another aspect of the case also to be considered. Sir. C. P. Ramaswamy Aiyar contended that even if it is found by the court that the excommunication of the 1st defendant is invalid, since he, after excommunication, had openly revolted against the authority of the Patriarch Abdulla, who was the lawful Patriarch in the Jacobite Church and accepted Abdul Messiah, a rival Patriarch, the 1st defendant should be considered to have become an alien or schismatic, that such a person ceased to possess the faculties of a Metroplitan, and that hence he can no more act as a trustee of the Jacobite Church in Malabar. This raises the question whether we can adjudicate upon an alleged ecclesiastical offence as long as there has not been any declaration by the lawful ecclesiastical authorities relating to the same matter. This is, indeed, a question of considerable difficulty."

Parameswaran Pillai J.

"The last argument of Sir C. P. Ramaswami Iyer was that, by accepting Abdul Messiah as the Patriarch of Antioch, the 1st defendant and his adherents constituted themselves into a different church separate from the Malankara Church. He has, therefore, become a Schismatic and if he is allowed to draw the funds they will be diverted from their original purpose.

I have considered this aspect of the case very carefully and have come to the conclusion that there is no substance in this contention. The 1st defendant has not denied the authority of the Patriarch of Antioch and therefore he remains the Metropolitan Trustee of the Malankara Church and he claims to draw the money on behalf of that Church. At best what he did was, when Abdulla and Abdul Messiah both claimed to be the Patriarchs of Antioch, he acknowledged the latter as the true Patriarch in perference to the former. If he was wrong in this he has committed a spiritual offence for which his spiritual superiors might punish him in a proper proceeding. This court has nothing to do with his spiritual offence."

203. Now we come to the last of the series of cases, the Samudayam Case. According to the counsel for the plaintiffs (party array in O. S. No. 4 of 1979 is being referred to here) Mr. Narayanan Poti, the Supreme Court by reversing the decision of the High Court in 1957 K. L. T. 63, has restored in toto the judgment Ext. A16. According to Mr. Poti, that

would be evident from four points.

(1) That the Supreme Court did not discharge or reverse any of the findings of the trial court.

(2) It did not hold that any of the findings of the trial court was not necessary for deciding the suit.

(3) The Supreme Court repelled every contention put forward by the respodents there to sustain the High Court decision and

(4) It reversed the High Court judgment in full and restored the trial court decree also in full.

204. In this connection Mr. Poti would point out that in the plaint in the Samudayam Suit Ext. A15, the various acts of the Catholicos partisans are enumerated and characterised as repudiation of the Patriarch. Ext. A15 contained a prayer for a declaration that the plaintiffs therein were the lawful Malankara Metropolitan, priest trustee and lay trustee respectively. There was the further relief claimed for injunction for restraining the first defendant therein from doing any act in his professed capacity as Catholicos or Malankara Metropolitan. Alternate request for suing in their personal capacity as members of the community has also been made, with the necessary application under Order 1, Rule 8. Such permission had also been granted. 37 issues were framed by the trial judge and duly answered. The learned counsel would submit that when the Supreme Court set aside the High Court jndgment and restored the trial court's decree, the whole findings in Ext. A16 have to be taken to be revived. Each such finding is binding on members of the Malankara Jacobite Syrian Church. Mr. Poti would also contend that the findings in the Samudayam suit cannot be taken to constitute res judicata only in respect of the common properties. That is because Ext. A15 made a direct challenge to the first defendant in that suit to hold the office of the Metropolitan and he had been asked not only to surrender the properties but also the insignia of his office. An injunction was also prayed for in Ext. A15 for restraining him from doing any act in his professed capacity as Catholicos or as Malankara Metropolitan.

205. It is certainly true that the test of res judicata is the indentity of title in the two litigations and not the identity of the actual property involved in the two cases. See

A.I.R. 1953 S.C. 33
A.I.R. 1971 S.C. 442
A.I.R. 1963 S.C. 385 and
A.I.R. 1965 S.C. 948 (last para).

Nor could there be any controversy with the principle so clearly stated by Spencer Bower on Res Judicata-para 193 at page 152.

> "Where the decision sets up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such

thing as a res judicata by implication."

206. It may not be correct to state that a judgment can be evidence only of the facts decided. It may be conclusive evidence "not merely of the facts directly decided, but of those facts which are....necessary steps to the decision", (Coleridge J. in R. V. Hartington, Middle Quarter (Inhabitants) (1885) 4E.& B.780) but the term "necessary steps to the decision" is in the sense that they are so "cardinal to it that, without them, it cannot stand". Unless they are such necessary steps, the rule fails.

207. I am afraid Mr. Poti learned counsel for the plaintiffs casts the net rather wide when he states that the Supreme Court should be taken to uphold every finding in Ext. A16. Reading the Supreme Court judgment as a whole, it would indicate that the court was of the view that plaintiffs in the Samudayam Case should fail (i) if the suit is looked at based on the plaintiffs' title as trustees, if they do not establish their title as trustees by showing their valid election, (ii) on the basis of their representative capacity as members of the Malankara Church, if they fail to prove (a) that the defendants in that suit had become heretics or aliens or had set up a new church going out of the Malankara Church or (b) that the defendants had not been validly elected as trustees by the Malankara Association. The Supreme Court finds that the defendants in the suit had not become heretics or aliens to the church or gone out of the church on the basis of res judicata because of the earlier decision in 45 T. L. R. 116. In view of this, as the defendants therein are not outside the church, the plaintiffs' election as trustees becomes defective as notice had not been given to churches on the Catholicos side. In regard to election of defendants 1 to 3 as trustees, the Supreme Court on the evidence comes to the conclusion that notice has been given to all churches. A reading of the Supreme Court judgment in full indicates that the court was of the view that on the basis of these findings the suit should be dismissed and hence the High Court judgment was set aside and the decree of the trial court restored. In the circumstances it is rather hollow to contend that all the findings of the learned District Judge had been accepted by the Supreme Court. For the disposal of the appeal it was not necessary to go into the other questions. The various observations of the court in paragraphs 34 to 38 of the Supreme Court judgment which I had extracted at the early stage of this judgment are only to pinpoint that the new charges that were sought to be relied upon as a fresh cause of action were not covered by the pleadings or issues on which the parties went to trial. When the Supreme Court judgment states in para 35 of the judgment that "in order to decide these charges and counter charges it is absolutely necessary to determine which is the correct book of canons," they were only pointing out the necessity of issue 13 in the suit on the basis of the pleadings in the case, independent of the contention of res judicata on the basis of 45 T. L. R. 116. The court was not at all endorsing the finding of the District Judge on the issue but only refuting the contention raised on behalf of the respondents before them that issue 13 reflected the plea on the new charges which were not before the Travancore High Court in the earlier case. A judgment cannot be taken to mean more than what it says

either expressly or impliedly. I have no hesitation in holding that the Supreme Court decision is res judicata only on the points it has been specifically dealt with. It might be noted that the High Court had set aside the trial court judgment. The Supreme Court took the view that the suit could be dismissed on the points it positively noted and decided and hence did not go into the other questions. On the basis of the findings the Supreme Court had positively entered into, other findings which the trial court had entered into was unnecessary for consideration. This certainly does not mean that the decision of the High Court on the other points will stand. The judgment of the High Court is set aside. The other points are open for decision in this case. The instance where A. I. R. 1966 S. C. 1332 and A. I. R. 1947 Oudh 74 were rendered are not parallel to the present case and therefore could have no application. As regards individual churches and the application of the Supreme Court decision to such institutions and their properties, I will discuss the matter under the heading "Individual Churches" and I here only point out what Justice Raman Nair, as he then was, said in A. S. No. 269 of 1969, "The Supreme Court case like its precursor the interpleader suit O. S. No. 94 of 1088 instituted by the Secretary of State in the District Court, Trivandrum, was concerned with the Jacobite Church as a whole, (in other words, the entire community or denomination, represented since the Mulanthuruth Synod of 1876 A. D., by a body constituted by that Synod and known as the Jacobite Syrian Christian Association, popularly known as the Sabha).

Parish Churches – Their relationship with Malankara Church (Sabha) – Are they independent trusts or integral parts of the whole Malankara Church with no claim to a separate existence?

208. The above is the next question that I will have to resolve in tackling the issues in the case. Both the sides –the Catholicos side and the Patriarch side have taken up totally conflicting stand with regard to this. The case on the Catholicos side as reflected in the plaint in O. S. No. 4 of 1979 is that each church when founded becomes a constituent of the Malankara Church, a well established religious community administered by and under the authority of the Malankara Metropolitan. The Parish Churches are subject to rules and regulations of the Sabha and its constituent churches. The parishioners of each church are beneficiaries qua the membership of the Sabha and its constituent churches. It is on this idea that the Bharanaghatana of 1934-**Ext. A2** and the subsequent amendments-Ext. A9 in 1954 and Ext.A1 in 1967 were passed and they are binding on the Sabha and the constituent churches.

209. The defendants - the Patriarch side however take the contention that each individual parish church belongs to the respective parishioners and they are autonomous and self governing units. They do not become except in the matter of spiritual guidance, a constituent of the Sabha and the administration in the church is vested in the Pothuyogam. The Parish Churches are in a way independent trusts, no doubt guided and controlled in spiritual matters by the Malankara Sabha which itself in spiritual matters have to look up to

the Patriarch of Antioch. The Malankara Metropolitan has full control of temporalities of the Malankara Church (Sabha) as such, which means trusteeship of the common properties of the Jacobite Community of Kerala. It will be wrong to say that the temporal, ecclesiastical and spiritual powers of administration are with Malankara Metropolitan. If the individual churches do not conform to the spiritual discipline of the religious hierarchy, they may be entitled to sever their links with those churches. The 14th defendant while reiterating the same contentions adds that the founders of each Parish Church intended it to be administered by its own parishioners in all matters temporal, ecclesiastical and spiritual subject to the supremacy of the Patriarch of Antioch and the system of government in each church is neither presbyterian nor episcopal but congregational. Neither the Malankara Association which is only a conference of the Parish Churches nor its President, the Malankara Metropolitan has any supervision, control or governmental authority of any kind over the Parish Churches. The Malankara Association has no authority to frame rules or regulations for the individual churches or the diocesan trusts. According to this defendant the provisions of the Bharanaghatana are ultra vires and in conflict with the rules, principles and doctrines existed in the church.

210. Mr. Poti in support of the contention raised by his clients would point out that the other side is in confusion with regrd to the nature of a Public Religious Trust. In a private trust the beneficial interest is vested absolutely in one or more individuals who are or could be ascertained with a certain time and to whom therefore it will be competent to control, modify or determine the trust. The duration of such trust can be extended by the period allowed by the rule against perpetuations. A public or charitable trust on the other has for its object the members of an uncertain and fluctuating body and the trust itself is of permanent character. These trusts have as their object some purpose recognised by law rather than human ceste qua trust. Object or purpose therefore is of the fundamental concept in a charitable trust. (Pages 7, 8 and 17-18 Lewin on Trusts - 16th Edition). When a charity has been founded and trusts have been declared, the founder has no power to revoke, vary or add to the trusts. This is so irrespective of whether the trusts have been declared by an individual or by a body of subscribers or by the trustees. Therefore, Mr. Poti would urge that the defendants are fundamentally wrong in assuming that the Parish Churches founded or established long ago, some times several centuries ago, as an integral part of the Malankara Orthodox Syrian Sabha belong absolutely to the parishioners of any given time or date to be dealt with by them as they choose. According to him they have been established as an indelible part of the Sabha in accordance with and in conformity to the rules of the Sabha for worship of God in the faith of the Sabha. In support of his plea, Mr. Poti relied on many of the passages in the evidence of D. W.2, a leading witness for the Patriarch side. He had said:-

"ക്രമാശ ചെയ്യപ്പെട്ട പള്ളിയും ക്രമാശ ചെയ്യപ്പെടാത്ത പള്ളിയും, സഭയി
ലെ സ്ഥാപനമാണു". അവസാന നിയമങ്ങൾക്കു് അനുസൃതമായി തീരു

പ്പെടേണ്ടതാണു്."

At another place he had said:–

"സഭയിൽപെടാതെ പള്ളി ഉണ്ടാകാൻ സാദ്ധ്യമല്ല. സഭയുടെ വിശ്വാസം പാലിക്കാനും ആത്മാക്കളുടെ രക്ഷക്കാവശ്യമായ ക്ലേശകരം നിർവ്വഹിക്കാനുമാണു് പള്ളികരം. ആ സ്ഥിതിക്കു സഭയിൽ പെടാതെ പള്ളി ഉണ്ടാവുക അസാദ്ധ്യമാണു്."

At an early part of his deposition D. W. 2 had said:-

"ഒരാൾ സഭയിലെ അംഗമായി തീരുന്നതു് എങ്ങിനെയാണു്? (Q) പ്രായമുള്ള ആളാണെങ്കിൽ വിശ്വസിച്ചു മാമൂദീസ ഏറ്റും, കുഞ്ഞുങ്ങളാണെങ്കിൽ മാമൂദീസ പ്രാപിച്ചും സഭയിലെ അംഗമായി തീരുന്നു. (Ans.) അങ്ങിനെ അംഗമായി തീരുന്നതു് ഒരു പ്രത്യേക ഇടവകയിലേക്കാണോ? (Q). സഭയിലാണു് അംഗമായി തീരുന്നതു്. എന്നാൽ ആ ശിശുവിന്റെ മാതാപിതാക്കൾ ഏതു ഇടവകയിലാണോ ആ ഇടവകയിലെ അംഗത്വം കിട്ടുന്നു. (Ans.)

The learned counsel for the plaintiffs would also place strong reliance on the contention taken up by Abraham Mar Clemis, a Metropolitan on the Patriarch side in his written statement in O. S. No. 62 of 1973– Ext. A191. No doubt, it was said of the Knanaya Samudayam Bharanaghatana and individual Knanaya Churches, but Mr. Poti would point the statement would reflect the true principle with regard to the Malankara Church and its constituents individual churches. Paragraph 18 of Ext. A191 states:-

"Plaintiffs or any parishioner of any other Church in the Knanaya Diocese is not competent to impeach, ignore or act against the constitution of the Samudayam. The averment in the plaint that constitution of the Samudayam is not binding on Ranni Valiapally and its parishioners is not correct and tenable. The case of the plaintiffs that Ranni Valiapally or any other Church in the Knanaya Diocese was to be governed by a constitution passed by the parishioners of that particular Church is opposed to the basic principles of the Samudayam Church and it is also opposed to Canon law, practice and precedents. If such a course is allowed to be practised, no Christian Samudayam can exist and the meaning of the term Samudayam becomes illusory. The Edavakayogam of a parish church is neither competent nor entitled to frame a constitution for the management and administration of that particular Church. The establishment of a Church can be only with the consent and co-operation of the Metropolitan as the Metropolitan alone is invested with the right and authority to have it so established and administered, for the same of the Samudayam."

Mr. Poti would also contend that illustrations of the previous exercise of powers by the Metropolitan over the individual churches, the conduct of the parties especially of the conduct of all the churches of both sides after December 1958 were clear indication of the fact that the parish churches were inseparable and integrated parts of the Malankara Sabha as a whole. Mr. Poti would emphasise here that the decretal paragraph 347 in Ext. B74 judgment would declare that the spiritual and temporal Government of the local church is vested in the

Malankara Metropolitan and the word church has been used in the sense of the entire body of church and not as confined to some common properties. He would also point out that the plaintiffs in the Cochin Royal Court Case had contended that the Malankara Metropolitan was entitled to appoint vicars and priests to the churches and to remove them, that the election of the kaikars by the yogam was subject to confirmation by the Metropolitan, that the kaikars had to submit to him true and faithfully accounts of the receipts and disbursements of the income of the churches after having read the same at the yogam etc. That suit was decreed as sued for in the following terms:-

> "That the plaint churches, and properties are therefore subject to the spiritual, temporal and ecclesiastical jurisdiction of the first plaintiff as the Metropolitan of Malankara for the time being. We, therefore direct that subject to the approval of His Highness the Raja, the decree of the lower court be reversed, and one drawn up as sued for, except with regard to the Kymuthoo amount the claim to which has not been pressed."

211. For his contention that the parish churches are under the administrative control of the Metropolitan, Mr. Poti points the church in Malankara is an Episcopal Church. Nor was a contrary intention ever taken until some unfortunate observations were made in the judgment of a Division Bench of this Court in A. S. No. 269 of 1960 which is marked in this case as Ext. B322.

212. Mr. Thaikad Subramonia Iyer, appearing for some of the defendants, who are all on the Patriarch side however eloquently put forward the plea that based on a historical survey of the Malankara church, it will be erroneous to make an inference that the Malankara Church is a pure episcopal church. Episcopalism is defined in the New English Dictionary of Historical Principles (By Sir John Munray, Vol. III, Part I, page 245) as "Theory of Church Polity which places the supreme authority in the hands of episcopal or pastoral orders". The same dictionary has given the definition of congregationalism as follows (in Vol. III Part II):

> "A system of ecclesiastical polity which regards all legislative, disciplinary and judicial functions as vested in the individual church or local congregation of believers."

Mr. Subramonia Iyer would point out that whether the church in Malankara belongs to any of the two categories or to a mixture of the two can be decided only by examining the history, activities and conduct of the people. The learned counsel would refer to the origin of congregationalism as given in Chambers Encyclopedia, Vol. IV - page 13:

> "Congregationalism is the doctrine held by churches which put emphasis on the autonomy of the individual congregations. Congregationalism has for its sign manual the words of Jesus:
>
> "Where 2 or 3 are gathered together in my name, there am I in the midst of them."

Its policy is at once highest and most natural organisation of the life of the Christian Church. Like Episcopacy and presbyterianism it finds its origin in the New Testament, holding that Apostolic Churches were

gathered churches, and that these (as always) local churches preceded, churches more highly organised. It is thus claimed that congregationalism is inevitable because wherever the Gospel is preached to non- Christians and those who respond come together for worship, fellowship and service they by an implicit or explicit covenant from, form a church, though they have no Bishop or Presbyter, minister or officer, nothing but faith in Christ and the desire to serve him, his presence making them competent to perform all church functions. Apostolic Christianity was thus organised in local churches. So were those won from Paganism by missionaries. In some of those cases from their organisation has come or may come later, but the primary, simplest or most natural form is "congregational". "Though St. Thomas in A. D. 51-52 came to Malabar, made converts to Christianity and ordained two men as Arch-deacons the first episcopa who came here was with Thomas of Cana. This Bishop, Joseph Episcopa of Ura was sent under the direction of Eusthathius Patriarch of Antioch. Thomas gave up his secular calling and devoted himself entirely to the church (Para 53 of Ext. B74). Mr. Subramonia Iyer would urge that till 1654 the spiritual affairs were mostly looked after by foreign Metropolitans who never interfered in the temporal affairs of the church though they may have spiritually ruled the church. Ext. B74 in Para 65 gives the following quotation from Dr. Buchanan:-

> "The European priests were yet more alarmed when they found that these Hindu Christians maintained the order and discipline of a regular church under episcopal jurisdiction and that for 1300 years past, they had enjoyed a succession of Bishops appointed by the Patriarch of Antioch. "(Dr. Buchanan- Page 201).
>
> Mr. Subramonia Iyer would assert that even after 1654 there is no evidence to show that the Metropolitans interfered in the temporal administration of local or individual churches.

213. No doubt, a central organisation came into existence in 1876 in the name of Malankara Jacobite Syrian Association which gave an opportunity for the individual churches for co-operation and fellowship in common matters. But there is no evidence to indicate that the local churches had surrendered their autonomy or gave any ecclesiastical authority to the Association. No doubt in spiritual matters the church was supervised by the Metropolitan who however himself was subject to the Patriarch of Antioch in that sphere.

214. Mr. Subramonia Iyer and Mr. P.P. John, learned counsel on the Patriarch side, in this connection referred to certain documents which on the face of it would indicate that in temporal matters the church is not an episcopal church. **Ext.B310** of 17-11-1969 is a sale deed executed by the Metropolitan of Angamali to the managing committee of St. Thomas Jacobite Syrian Church of Parur. On the basis of the decision by the Badrasana council and Badrasana Pothuyogam the Metropolitan executed the deed. The Managing Committee of St.Thomas Church after due enquiry agreed to purchase for a consideration of Rs. 53,5000. What the learned counsel on the Patriarch side would emphasise is that the purchaser church is a church in the Angamali diocese and the vendor Metropolitan at that time accepted as the Metropolitan of that diocese. The Metropolitan has

to sell a property of the diocese to a church which can be termed as a constituent church. This is said to be indicative of the fact that the constituent churches are not such an integrated part of the diocese or of the Malankara Church and the trust by which the parish church is established is legally distinct from the Malankara Church Trust as a whole. This would not be the case in a purely episcopal church. The udampadies and the constitutions of some of the churches are also referred to by the learned counsel in support of the contention that the parish church has an independent existence quite apart from the Malankara Church as a whole and these independent churches are not such an integral part of the common Trust. The documents referred to are **Ext. B328** dated 29-11-1094 relating to St. George Church at Kadamattom, **Ext. B329** dated 8-6-1105 relating to the same church, **Ext. B326**, constitution of the Vadakara Jacobite Syrian Church, **Ext. B 259**, constitution of the Jacobite Syrian Church at Parur passed in a Pothuyogam presided over by the Metropolitan on 11-3-1116, **Ext. B269** constitution of the Mulanthuruthy Mar Thoman Church framed by the court in O. S. 1 of 1124, **Ext. B305**, Constitution of the Marthamariam Church at Pampady passed on 10-8-1914, **Ext. B304** constitution of Marthamariam Church, at Tiruvarpu, **Ext. B27** of the Angamali Akaparambu Jacobite Church, **Ext. B303** constitution of Kallumgathara Cheria Pally and **Ext. B194**, constitution of Nadamel Jacobite Syrian Church at Tripunithura. The contention is that the clauses in these deeds are pointers to the independent powers of the pothuyogam of the churches in temporal matters and with regard to it there could be no interference by the Diocesan Metran or by the Malankara Metropolitan or by the Catholicos.

215. It is also very strongly urged by Mr. Subramonia Iyer that the proceedings of the Mulanthuruthy Synod is clearly reflective of the independent status of the individual local churches. The very first resolution passed at the Synod requested each individual church to execute agreements confirming the faith (Page 8 of Ext. B168). He would also in this connection refer to the fact that both Patriarch Peter III and Patriarch Abdulla sought to obtain udampadies from each individual church. According to him, if the church in Malankara is episcopal, the Patriarch would not have tried to get such agreements from each parish church. In that case the Patriarch should have been satisfied with the agreements executed by the Metropolitans in his favour for they would have been in full control of the temporalities of each church.

216. The learned counsel also relied on the following decisions of the courts:

(1) 10 T.L.R. 12
(2) 13 T.L.R. 101
(3) 20 T.L.R. 171
(4) 23 T.L.R. 171 F.B.
(5) 26 T.L.R. 148
(6) 21 T.L.J. 1137
(7) Ext.B110 (Cochin Royal Court)
(8) Ext. B323 (Chatfield C. J. & P. K. Narayana Pillai J.) and
(9) Ext.B322 (of the Kerala High Court—Justice P. T. Raman Nair & Justice T. C. Raghavan)

I would now examine these cases.

10 T.L.R. 12 (Thomman Francho Kathanar and 2 others v. Ittiavira Mani Kathanar and 3 others).

This arose out of a suit by representatives of a church (Roman Syrian Church) for recovery of another church together with the articles used at divine worship therein. Plaintiffs' claim rested on a purchase from the members of a family who are alleged to have taken a prominent part in building and endowing the church sold. The Travancore High Court—a Full Bench—held that the materials used in religious worship are, by all systems of law extra commercium. The court also said that the fact that a party granted a site and contributed largely towards the building of the church will not confer on his family any special right of interest in the church or its endowments. It was further held that a Bishop is not empowered by law to sanction the transaction or sale of a church and its endowments independently of the kykars and congregation.

217. I do not think this decision would be of much help for resolution of the point at dispute. No doubt it indicates that even in the case of a church where the religious hierarchy's powers are of the widest amplitude and depth as in the Roman Catholic Church, the kykars and the congregation are not of that little importance that they could be totally ignored by the Bishop.

13 T.L.R. 101 (Kunjamman Kurien Kathanar v. Ummamen Geevarghese Kathanar & Others).

In this case the representatives of the parishioners of a Jacobite Syrian Church sued the defendants for recovery of specific immovable property on the ground that it belonged to the church and was lost subsequently by theft in 1050. The defendants denied the right of the plaintiffs to the articles and set up a plea of pledge by the late Mar Athanasius who was (or claimed to be) the supreme ecclesiastical authority of the Jacobite Syrian Church in Malabar. The court said that even if the alleged pledge was true it cannot be a proper defence to the plaint claim. The pledge was not made on behalf of the plaint church nor were the representatives of the plaint church parties to or cognizant of the transaction. The Metropolitan had no right to use the temporalities of the church for his own individual use. If he dealt with these articles for his own use, his act amounted to a misappropriation or conversion and the plaintiffs who were entitled to the possession of the articles as part of the peraphernelia of the church of which they are trustees could sue for the properties within the time allowed by the law. This to a certain extent is helpful to the defendants' contention that the parish church has got an individuality of its own as represented by its kaikars distinct from the church used in the wide sense of "sabha".

20 T. L. R. 131

I do not think this decision would be of any help in this case and I am not referring to the case.

23 T. L. R. 171 Titus Mar Thoma, Metropolitan & 3 others v. Mar Dionysius Metropolitan and 2 Others)

The facts and decision in this case could best be given as summarised in the head note of the case:-

"The Syrian Christian church at Maramannu was one of the

churches under the jurisdiction and control of Mar Mathew Athanasius who was consecrated Metropolitan of Malankarai by the Patriarch of Antioch. The entire congregation attached to the church though for a considerable time they followed the Jacobite faith subsequently abandoned the old faith, accepted the principles of the "Reformed Faith" and the congregation as well as Mar Mathew Athanasius repudiated the supremacy of Antioch. In a suit brought by the Religious head of the Jacobite faith more than 25 years after the acceptance by the congregation of the new faith for a declaration that he and his successors in office are alone entitled to appoint priests for conducting religious services in the plaint church, and also for an injunction prohibiting the religious head of the Reformed Faith from conducting services in this church and from appointing priests of the altered faith, on the ground that the church in question having been a foundation subject to the See of Antioch was invested with a trust in favour of the Jacobite faith, wherein it was contended that the suit was barred by lapse of time and also that the suit was not maintainable as the entire congregation had abandoned the old faith and had followed the new faith for a long time.

Held by the majority that though the congregation attached to the church had changed their old faith and had accepted and followed the new faith for more than 25 years since they were not trespassers and as they or their predecessors had come into possession lawfully under the trustees the suit was not barred by limitation by virtue of the provision in section 10 of the Travancore Limitation Regulation whose terms differ from those of the corresponding section of the British Indian 'Regulation.'

** "Held however also, by the majority following the decision reported in 18 T. L. R. 83 that whatever may have been the character of the original foundation, since for a considerable time (more than 25 years in this case) the original faith had been abandoned and an altered faith had been accepted and followed by the entire congregation, the church was invested with a trust in favour of the latter faith and that therefore the suit by the plaintiffs could not be allowed".

Chief Justice Sadasiva Iyer in para 8 of his judgment says:-

** "In the Chengannur church case, the majority of the Full Bench held that where the whole congregation had acquiesced for 23 years between 1053 and 1076 in an amicable arrangement by which each party had the benefit of the church in alternate weeks, a modified trust in favour of both parties in supersession of the original trust in favour of one party alone had come into existence. The present case is a much stronger one as the original trust had been completely ignored by every body and the new religious doctrines and rituals alone were in full force for at least 25 years before this suit brought in the end of 1078. I cannot accept the contention of

Mr. John that though none of the parishioners of this church had or wanted the benefit of the old trust for 25 years, the parishioners of other Jacobite Churches in Malankarai were also beneficiaries of this trust and hence, there was no alteration by the cestuique trustant as a body as was the case in 2 Madras 249. But unless we overrule the Full Bench decision in the Chengannur church case which decided that the parishioners of each parish were the sole cestuique trustants of the parish Church and that they could unanimously (by conduct or acquiescence or mutual agreement) change the trust provided the changed trust is not for an illegal or immoral purpose. If we caray Mr. John's contention to its logical conclusion, the Romo-Syrians who remained faithful to Rome when the other Christians of this coast joined Antioch can claim all churches then existing as irrevocably wedded to Rome and the Nestorians might make a similar claim against both".

** (These portions were added as per order of Court dated 11th June 1980 after hearing the cases posted for to be spoken to).

218. Here the majority follow a decision of another Full Bench of a Travancore High Court in 14 T.L.R. 83 basing their conclusion on I.L.R. 2 Madras 295 and I.L.R. 15 Madras 241 which in their turn refer to Attorney General V. Bunce (6 Eq. L.R. 563)

26 T. L. R. 148:- (Geevarghese Kathanar and others v. Mar Dionysius Metropolitan and Others)

219. This is the next case that came up for consideration. This suit was an off shoot of the Seminary Case. The plaintiffs, members of the Jacobite party of the Syrian Christians owing allegiance to the Patriarch of Antioch as the supreme spiritual head sued the defendants, members of the Mar Thomaite Party, also sometimes then called the Reform Party, followers of Mar Thoma Athanasius for a declaration of their right to the plaint church, for an injunction restraining defendants 3 and 4 from officiating as priests therein and also for damages for interfering with the plaintiffs' use of the church. The evidence in the case showed that for more than 12 years before the date of the suit, the defendants had been openly asserting the title of the anti Jacobite party to the plaint church adversely and to the knowledge of the Jacobite party and had been in possession of the church to the exclusion of the plaintiffs' party. There overruling plaintiffs' contention that no question of adverse possession would arise in the light of section 10 of the Travancore Limitation Regulation, a Division Bench of the Travancore High Court, Chief Justice M. Krishnan Nair and Justice Ramachandra Rao, held that the plaintiffs' suit was barred by limitation, the plaintiffs' right to the church having become extinguished under section 28 of the same regulation. How Section 10 becomes inapplicable, I find it rather difficult to understand in view of the fact that both the plaintiffs and the defendants were members of the same church in the first instance and when the defendants had contended that even if the church was originally a Jacobite Church, the

nature of the trust has changed and it had become an anti Jacobite Church and therefore the suit was barred by adverse possession and limitation. The parishioners who had come as additional defendants in the suit had supported the other defendants. Probably the decision was based on the following statements in the judgment:-

> "There is no allegation in the plaint that the plaint church became vested in the third defendant or any other defendant, or that the third defendant or any other defendant was trustee for any specific purpose and there is also no evidence showing that any of the defendants was a trustee of the plaint church. In fact, no attempt was made by the plaintiffs either in the pleadings or in the evidence to bring the case within the exemption cotemplated in section 10."

220. Before going to the other two cases relied on behalf of the Patriarch side, I would refer to a valid contention raised by Mr. Poti, learned counsel on the Catholicos side (I am using the expressions Patriarch side and the Catholicos side in the broad fashion in which it is now commonly understood in the State, those who swear by the Antiochean Throne and their opponents certainly noting that there is now a Catholicos ordained by the Patriarch also) that a vital mistake had crept in I. L. R. 2 Madras 295 which had been followed in 14 T.L.R. and 23 T. L. R. I will extract below Mr. Poti's submission in regard to this aspect made in his characteristic, analytical and lucid style. While I completely agree with him in this submission, I will for reasons which I will presently state, that may not make much of a difference in the reliance on those Travancore decisions in the consideration of the question of the status of the individual churches. Mr. Poti said of I. L. R. 2 Madras 295:-

> "In this Madras case relianee has been placed upon a previous Madras decision citing **Attorney General v. Bunce** (1868) 6 Equity 567). A look at the Equity Case will show that it is no authority for the proposition that the parishioners as a body could change the faith to faith different from that of the founders and still remain the proper objects of the charity. Once a charity is founded for the benefit of persons following a particular faith neither the authors of the charity nor the trustees as a body, nor the entire body of the congregation can effect any change in faith. This is an accepted and settled proposition of law – vide Tudor on Charities – Pages 131, 132 & 446. Vide **Att. Gen.** v. **Pearson** 36 E. R. 135. Lord Eldon said:- "If any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus manifest, were intended by the founders, I apprehend that they are seeking to do that which they have no power to do, and which neither they, nor all the other members of the congregation, can call upon a single remaining trustee to effectuate."
>
> Also vide Att. Gen. v. Kell and Att. Gen. v. Bovill cited at Tudor Page 131.
>
> This is obviously so because when a public charitable trust

is founded it is intended for the benefit of future generations howlow-soever, so that at no particular date would there be a group of persons who can claim to be absolutely entitled to the properties so as to entitle them to divert the properties from the original trust. At Page 73 of Underhill on the 'Law of Trusts and Trustees' (13th Edn.) he says:

"However, the crucial difference surely is that no absolutely entitled members exist if the gift is on trust for future and existing members, always being for the members of the association for the time being. The members for the time being cannot under the association rules appropriate trust property for themselves for there would then be no property held on trust as intended by the testator for those persons who some years later happened to be the members of the association for the time being."

This principle worked hardship in cases where non-conformists had separated from their mother Church and built their own Church and followed their own doctrines for several years. After a long time had elapsed from the foundation, it was found by the courts extremely difficult on oral evidences to determine with any certainty which was the doctrine followed by the founders in any particular case. Owing to this unsatisfactory position the Non-Conformist Chapels Act, 1844 was enacted. This Act provided that in respect of religious trusts where the deed of trust or other judgment or document did not specify the particular faith for which it was founded the usage in the Church for 25 years prior to the date of the suit shall be conclusive evidence of the fact of that usage being the one for which the trust was founded. This is a statutory presumption of an irrebuttable nature applied to: (a) religious charities only, (b) the absence of any trust deed or other document evidencing the faith of the founder and (c) 25 years usage prior to the suit being treated as conclusive on the question of the object of the charity. So the importance lies in the fact that the statute itself gives the utmost importance to the faith for which the charity was founded and the statutory provision is only a rule of evidence applicable in cases where the trust deed or other document does not contain an indication of the faith of the original founders. This matter has been dealt with in Tudor on Charities, Page 209 and in the footnote 2 at that page the author says that in the 5th edition of his book the relevant sections of the Non-Conformist Chapels Act has been extracted at Page 114-115. The same is said at Page 174 of Picarda's Law Practice relating to Charities. In Att. General v. Bunce the court applied this statutory presumption because the court could not find any mention of the particular faith in the Wills in question. It also said that, as for several years there has been no other person in the parish avowing a different faith, these facts will sustain even a case of cypres.

Obviously this is no authority for the proposition that the entire congregation can change the faith".

(From the written submission given by the counsel)

221. I quite agree with Mr. Poti in this respect that in a public charitable or religious trust, the entire beneficiaries as such at an existing time cannot change the faith. And the Travancore and the Madras cases concerned might have made a mistake with regard to that if it is taken they have so held. But the question is apart from the congregation's lack of power to change the faith are not the Travancore Cases indicative of the fact that in respect of administration of church apart from faith, the congregation was exercising a decisive voice, may be the only voice. We will look into the subsequent cases.

222. And also apart from the statutory provision in the Non-Conformist Chapels Act, if there is lack of positive evidence to show what the founder of the church had in view when the church came to be built, what should the court do? It will not be easy to say with distinctness and precision what the religious principles were of those who founded the church in question. As pointed out by the Cochin Royal Court of Appeal in **Ext. B110**

> "The only safe criterion by which we can form an idea of the trust imposed upon the church is to see what was the acknowledgement by the people as a body of the religious tenets, formularies and church Government observed in the church for a long series of years before the community became dissentient amongst themselves."
> (Last sentence in para 38 of Ext. B110)

Ext. B323

223. This case which related to the management of the affairs of the St. George's Church, Puthupally and its properties, arose out of a suit filed by the parishioners of the church against those in actual management of the church for accounts etc. It had been apparently contended there by the first defendant that he was in management as per the provision of an Udampady executed in favour of the Patriarch and he was accountable only to him. Chief Justice Chatfield said there:-

> "The Patriarch is not the absolute owner of St. George's Church, Puthupally and its properties but there is a trust of those properties in favour of the parishioners ot the Church'"
> (emphasis mine)

Concurring with Chief Justice Chatfield's view, Justice P. K. Narayana Pillai said:-

> "In order to distinguish the church in question, the appellant relies on two Udampadies.....The executants of Exhibit II are but a few of the parishioners. If they executed in their individual capacity, it is not binding on the other parishioners. If on the other hand, they purported to act in a representative capacity their authority to take the steps has not been made out."

224. This decision certainly proceeds on the basis of the exclusive right of the parishioners in respect of the temporalities of the local church.

A. S. No. 269 of 1960 of the Kerala High Court – Ext.B322

225. The next decision relied on by the Patriarch side in regard to their stand on the individual churches is a decision of a Division Bench of this Court in A. S. No. 269 of 1960 of this Court, which is marked as Ext. B322 in the case. This decision is after the judgment of the Supreme Court in the Samudayam Case and Justice Raman Nair, as he then was, speaks at the outset of the decision (he rendered the judgment on behalf of the Division Bench consisting of himself and Justice Raghavan):-

> "Even when that suit was pending the fight had been carried– and it is still being carried by the rival parties, with a fore-thought worthy of a better cause, to individual churches and their properties, the general pattern followed being for the party for the time being victorious to assert that the Jacobite Church was an episcopal church so that the temporalities of all the individual affiliated churches, if we may use that expression, vested in the bishop or the metropolitan (by which honorific title the bishops of this particular church seem to be kown), and for the party for the time being defeated to aver that the church was more or less a conregational church in matters temporal so that the temporalities of the individual churches vested, not in the Metropolitan, but in the parishioners of each church. The present suit is one such battle fought over an affiliated church, the St. George's Jacobite Syrian Christian Church, pudupally, and its properties."

The learned Judge then said:–

> "As we have already indicated, the previous suits were concerned with the Jacobite Church as a whole and its propertles, not with individual churches of the Jacobite faith or their properties excepting that the Cochin case was concerned with certain individual churches of which the suit church was not one – see in this connection the observation in Rt. Rev. Poulose Athanasius v. Moran Mar Basselios Catholicos (1946 T. L. R. 683 at page 774) to the effect that that suit was not concerned with the rule or practice relating to the properties held by different churches under the same bishop but was concerned only with the properties belonging to the former diocese of Malankara which subsequently became divided into several dioceses. To the extent that the former suits were representative suits the parties thereto were the members of the entire Jacobite Syrian Christian community, not, as in the present case, the parishioners of the suit church. It would appear from what is said at page 806 of Rt. Rev. Mar Poulose Athanasius v. Moran Mar Basselios Catholicos (1946 T. L. R. 683) that the plaintiffs in the Samudayam suit sued on behalf of themselves and of the body of the Jacobite Syrian Christians belonging to the Patriarch's party and that the contesting defendants therein, belonging to the Catholicos's party, were sued in a representative character. But, although the dispute in the present suit has arisen out of the faction between the

Patriarch's party and the Catholicos's party, the suit is in no sense a suit between the members of the Patriarch's party and the members of the Catholicos's party. The suit is a representative suit brought under section 72 of the Travancore Civil Procedure Code on behalf of all the parishioners of the church, and the defendants are sued only in their personnel capacities and not as representing the members of the Catholicos's party. If, therefore, the suit church and its properties have a separate identity as alleged by the plaintiffs, what has been said or decided in the previous cases relating to the Jacobite Church seems to us irrelevant excepting to the extent that any question arises regarding that church in which case the decision might be relevant under section 13 of the Evidence Act or even, if **res judicata** had been pleaded, as constituting **res judicata**."

The Bench then considers the decision of the Travancore Case about the same church, the judgment in respect of which is marked as Ext. B323 and states:-

"Whether or not that finding is **res judicata** in the present suit we need not stop to consider, for, notwithstanding to extreme position taken in the pleadings, both parties are now prepared to accept that finding and to proceed on the basis that the church and its properties constitute a trust in favour of the parishioners of the church. The dispute is now confined to the right to the management of this trust."

I would now quote in extension paras 12 to 17 of the judgment which will be of great relevance to the question in hand.

"12. Turning next to the M. D. Seminary meeting of 1934 and the constitution, Ext. P26, passed at that meeting, we are by no means satisfied that that meeting had any authority to frame a constitution for the suit church. That was a meeting of the Sabha, constituted as we have seen, by the Mulanthuruthu Synod of 1876, a synod convened by Patriarch Peter III to curb the powers of the metropolitans by vesting powers in the congregation; and it was for this purpose that the Sabha was constituted to represent the congregation. The suit church was admittedly founded long before that, and, admittedly, its properties and their management have all along vested in trustee elected by the parishioners although the appellants would have it that these trustees derive their authority not from their election by the parishioners but by reason of their acceptance by the Metropolitan, which, even according to them, invariably follows. It would thus appear that the suit church was an autonomous unit so far as temporal matters were concerned, the power of management being vested in trustees elected by the parishioners. In order to vest the Sabha with the power to frame a constitution binding the suit church it must first be shown that this autonomy was surrendered to the Sabha. No evidence of any kind has been adduced to show that there was any such surrender, neither the

proceedings of the Mulanthuruthu Synod nor those of the M. D. Seminary meeting are in evidence in the case, and, although we have been taken through extracts of those proceedings in the judgments in other suits — which as we have already said cannot be taken as evidence in the present suit — our attention has not been drawn to anything in these extracts which makes out a surrender of the autonomy of the suit church to the Sabha.

13. Reliance is placed on the observations of the Supreme Court in **Mar Basselios Catholicos** v. **Mar Poulose Athanasius** (1954 K. L. T. 385 at 387) and **Moran Mar Basselios Catholicos** v. **Avira** (1958 K. L. T. 721 at 723) to the effect that the Malankara Syrian Christian Association was formed at the Mulanthuruthu Synod "to manage all the affairs of the churches and the community". The Samudayam suit in which those observations were made was, as we have seen, concerned only with the Jacobite Church and not with individual churches of the Jacobite faith. Whether or not the word, "churches" in the plural in the observations in question, instead of the word, "church" in the singular, was deliberately used so as to include within its scope all the individual churches of the Jacobite faith, we do not think that these observations in the introductory part of the judgments setting forth the historical background of the dispute can be regarded as findings relevant in the present case. We might also add that while the Supreme Court held in **Moran Mar Basselios Catholicos** v. **Avira** (1958 K. L. T. 721) that the M. D. Seminary meeting of 1934 was a duly convened and valid meeting of the Sabha, their Lordships said nothing in that decision about the competene of the Sabha to frame a constitution for the individual affiliated churches or about the validity or applicability of the constitution, Ext. P26, in relation to such churches.

14. It is pointed out that notice of the M. D. Seminary meeting of 26-12-1934 went to all the individual churches including the suit church (Ext. D28 dated 3-12-1934 being the notice to the suit church) and that the Edavaka Yogam of the suit church having sent three representatives to the meeting with full power to vote on their behalf as shown by the proceedings, Ext. D19 dated 23-12-1934, are bound by the constitution, Ext. P26 which as Ext. D27 dated 26-12-1934 the minutes of the M. D. Seminary meeting show, was unanimously adopted at that meeting. We do not think that there is much substance in this contention. In the first place, both sides have proceeded on the basis that the suit church and its properties constitute a trust of which the parishioners of the church are the beneficiaries, and, while it would be a perfectly intelligible rule that the beneficiaries of a trust should elect the trustees, whether the beneficiaries have the right to frame a constitution for the trust or to empower some outside agency to do so seems open to question. In the absence of any rules of the founda-

tion, that would appear to be a matter for the court. That apart, it does not appear that the Edavaka Yogam which deputed three representatives to attend the M, D. Seminary meeting and vote on their behalf authorised the meeting to frame a constitution for the suit church or their representatives to vote in respect of such a constitution. Ext. D28 dated 3-12-1934 is the notice issued by the Catholicos to the suit church stating that a meeting of the Sabha would be held on the 26th December 1934 and asking the suit church to send three representatives, a priest and two laymen, to the meeting with full power to express their opinion on the matters mentioned in the agenda appended to the notice. There are five subjects mentioned in the agenda and the fourth is, "To pass the Bharanaghatana passed by the Association Managing Committee." The evidence shows that no copy of the constitution passed by the managing committee was sent to the suit church, and, in the context, the Bharanaghatana referred to could only have meant the Bharanaghatana of the Sabha which Ext. P26 indeed is. But that the constitution so framed would contain a chapter relating to the management of the individual churches of the faith could not have been within the contemplation of the Edavaka Yogam of the suit church when they sent their representatives to the M. D. Seminary meeting, and it is significant that the constitution, Ext. P26, was never accepted by the Edavaka Yogam, an attempt made six years later to secure the acceptance of the Edavaka Yogam ending in failure as shown by the minutes Ext. P2 dated 7-2-1116 (22-9-1940) of a meeting of the Yogam.

15. We might, in this connection, point out that all the affiliated churches are members of the Sabha entitled to send three representatives to participate in all meetings of the Sabha. The fact that the representatives of the Individual churches were summoned to the M. D. Seminary meeting and did attend and participate in that meeting is therefore no indication that the meeting was competent to take any decision in respect of the affiliated churches and their properties.

16. Ext. P26 was passed by the Sabha in December 1934 and it is said that the very fact that the present suit was brought only nine years later is an indication of acquiescence in and, therefore, of acceptance of, Ext. P26. We do not think that it is any such indication. In fact, Ext.P2 to which we have already referred, proves the contrary. The reason why the present suit was not brought earlier is not far to seek. The management of the temporalities of the suit church was the subject-matter of the previous suit, O. S. No. 100 of 1091, and, in the course of the final decree proceedings in that suit, the court had ordered the election of two trustees in place of the removed trustee, and it was thus that defendants 3 and 4, who were the persons so elected, became trustees. That matter, regarding the appointment of the trustees, was finally

dispossd of only in 1118 (1942-43), and the present suit was brought soon after that.

17. We hold that it has not been established that the temporalities of the suit church and therefore the management of the trust is vested in the Metropolitan or that the rules in Ext. P26 are the rules of the trust."

The different nature of the powers of the parishioners and the Metropolitan are well brought out in the following passage in the judgment:-

"So far as the second part is concerned, the evidence on both sides is to the effect that the temporalities of the church are to be administered by trustees elected by the Edavakakkars and accepted by the metropolitan. The evidence further shows that the trustees have to submit their accounts to the Metropolitan who approves them and sends them back. The vicar and other priests of the church are also elected by the Edavakakkars and are ordained and appointed by the Metropolitan. Whether the theoretical source of the trustees' powers of management is the election by the Edavakakkars or the acceptance by the metropolitan, we need not stop to consider, but there is no evidence to show that the Metropolitan has any authority in respect of the temporalities of the church beyond the acceptance of the trustees elected by the Edavakakkars and the passing of the accounts submitted by the trustees. These are duties of a mere supervisory nature, and we uphold the finding of the court below that the properties of the trust are to be managed by the Kaikars or trustees elected by the Edavakakkars and that the rights of the bishops and other ecclesiastics with regard to the temporal matters of the church are only supervisory in nature—visitatorial powers, the court below has named them. We might add that it is not disputed that, in respect of spiritual and ecclesiastical matters relating to the church, complete authority is vested in the bishop and his ecclesiastical superiors."

226. The manner in which the controversies in the suit in which the appeal to this Court arose where Ext. B322 judgment was rendered, was finally settled, which was sought to be proved by production of some additional documents at the time of hearing cannot in any way detract any segment in the force of the reasoning by which the court had come to the conclusion about the nature of the individual churches, the manner of its administration and in whom it vested etc.

227. Though bound by the common spiritual discipline it is apparent that the parish churches were considered to be rather independent units in the Malankara Church. That the Jacobite Church in Malankara is not a purely episcopal church is clear from the fact that even in regard to the ecclesiastical head ship of the Malankara diocese as a whole the people's acceptance was considered a relevant factor. This insistence on acceptance by the people, the Travancore Royal Court judgment Ext. B74 points out was probably due to a precaution on their part to prevent foreigners sent out by the Supreme Head of the Church, the Patriarch from assuming the management of the tempo-

ralities of the church without the consent and the wishes of the community. The various constitutions of the individual churches produced in the case are indicative of the supremacy of the parishioners of the church in the matter of the administration of the temporalities of the church. That the wishes of the parishioners of a church even in the matter of acceptance of the Metropolitan is given emphasis in the petition which Mar Joseph Dionysius sent to the Madras Government which is quoted in extension both in Ext. B74 and Ext. B110 judgments of the Travancore and Cochin Royal Courts of appeal respectively. There the Metropolitan pointed out;–

> "That in a recent case before the High Court of Madras, well known as the Royapuram Church Case, where the congregation were divided some adhering to the Vicar Apostolic and some to the Goanese Jurisdiction, the High Court directed that the wishes of the community should be ascertained by voting; the votes were taken by Sir Adam Bittleston, and, in conformity with the views of the majority, the funds and the Church were handed over to the Vicar Apostolic party.
>
> That in two of the Syrian Churches within the Cochin State where a similar difference of opinion existed in 1860, the then Resident of Travancore, Mr F. N. Maltby and the Dewan Shungoonny Menon, adopted the same measure as that referred to in the immediately preceeding paragraph (16) for an adjustment of such difference, as will be seen from the last communication appended to the enclosure; and be it noted, such a measure met all objects to be desired."

The Metropolitan in the last paragraph of his petition prayed for the issue of a proclamation,

> "simply declaring that each and every one of the Syrian Christians are at liberty to openly profess their adherence to, and subject themselves to the jurisdiction of, the Bishop of their own choice without any lay restraint upon their moral obligations, and adding that if there be any division of opinion as to such choice, commissioners be appointed to ascertain the wishes of the majority of the Syrian Christians attached to each church,.....etc.
> (Para 197 of Ext. B74 & Para 27 of Ext. B110.)

228. The independent status of the individual churches is also brought out in the resolutions of the Mulanthuruthy Synod presided over by the Patriarch Peter III.

> (1) That the people of each parish should execute and register deeds of covenant binding themselves to be subject to and never transgress the mandates of the See of Antioch; that they should be guided and controlled in all spiritual matters by the Apostolic See of Antioch; that they should accept and be guided by books of Canons and rules prescribed by the Patriarch.
>
> (2) That a Fund, out of public subscriptions in their community, should be formed for the purpose of meeting the expenses of litigation etc. to settle the disputes that had

arisen between them and the followers of the opposite party as well as for the purpose of augmenting the common funds intended for the improvement of the community; that a committee known as Syrian Christian Association should be established with the Patriarch as Patron and the Metropolitan as President to administer the fund as well as to regulate the affairs of the Church;

(3) That the Committee had full authority subject to the supervision of the See of Antioch to administer the Fund to regulate the affairs of the Church and to alter the existing rules and frame new rules etc.

(4) That the Committee should collect and remit Ressisa to the Patriarch.

(5) That the Metropolitan, Mar Dionysius as President of the Association should carry on all litigation regarding religious and social matters of the Church."

(Para 285 of Ext. B74)

229. Otherwise why the people of each parish asked to execute and register deeds of covenant binding themselves to the See of Antioch. And the resolutions are also pointers to the fact that the Syrian Christian Association was established with Patriarch as Patron and Metropolitan as President to administer the Common Trust Fund of the Malankara Church to regulate the affairs of the Church. The Association cannot interfere with the temporalities of the Parish church. Nor could the Metropolitan either as President of the Association or ecclesiastical head do that. No doubt in the matter of spiritual supervision the Metropolitan's powers are there. The Travancore decisions are reflective of the true legal position and I have no hesitation with due respect in endorsing what Mr. Justice Raman Nair, as he then was, said in Ext. B322. This can very well explain why the then Catholicose--first defendant in O. S. No. 111 of 1113 stated in para 21 of the annexure of his written statement (Ext. B307):-

"21. പട്ടിക 26-ാം നമ്പർ വസ്തു ആലപ്പുഴ പള്ളി ഇടവകക്കാരുടെ വകയും പള്ളി മുതലായ കെട്ടിടങ്ങളും ടി ഇടവകക്കാരുടെ പണം കൊണ്ട് പണിയിച്ചിട്ടുള്ളതും അതുകൊണ്ട് ആ ഇടവകക്കാരുടെ കൈവശം ഇരിക്കുന്നതുമാകുന്നു. വാദികൾക്ക് ഇതിന്മേൽ യാതൊരു അവകാശവും ഇല്ല."

230. The decision in the Samudayam suit finally rendered by the Supreme Court cannot be a bar to the plea taken by the Patriarch side in these suits regarding individual churches or their properties. What was the exact scope of the Supreme Court decision, I have discussed earlier. And as Justice Raman Nair pertinently pointed out in Ext. B322 the previous suits were concerned with the Jacobite Church as a whole and its properties and not with the individual churches of Jacobite faith or their properties.

Canons:-

231. One of the prime questions that had been put forward before me by the learned counsel on both sides, based on an issue raised in O. S. No. 4 of 1979 is, what is the true book of canons which is accepted by the Malankara Church as a whole. As was correctly pointed out by the learned District Judge in Ext. A16, his judgment

in the Samudayam suit the determination on questions of this nature can come within the cognizance of a civil court only to the extent such decision will affect rights to properties or other civil rights between the parties to the suit on the matters involved in the action. Section 9 of the Code of Civil Procedure confines the court's jurisdiction to matters of a civil nature and it is not part of the civil court's duty to determine a religious doctrine unless it is so essential for the purpose of a right to property or office or such other right of a civil nature. And the District Judge again rightly said in Ext. A16 it is an almost impossible task of laying down which is the correct or genuine version of the Hudaya Canons compiled by Bar Hebraeus which canons admittedly bind the Jacobite Church. In Ext. A16, the learned Judge observed:-

> "183. Though the question as to which version of the canons is the correct and genuine one was argued at great length by both sides at the close of the argument it was conceded by the defendants' advocate Mr. T. J. Mathew that the determination of this issue either in the broad aspect as indicated by the wording of the issue or even within the limited sphere of the questions and matters specified above, is unnecessary for the purpose of this suit. Though the plffs, advocate Mr. Ananthapadmanabha Iyer was not prepared to freely concede this matter, he too was not able to urge any argument to support the position that this issue in the broad aspect or in the limited aspect is one that should be decided by this court."

He had earlier said:-

> "179. As regards the first of the above two questions it is conceded by both sides that the canons (either BP or XXVI) do not contain any provision as to what conduct if any would amount to schism etc., and whether the holding on to a particular tenet or tenets, would amount to schism, heresy or going out of the church or not. Nor is there any provision in Ext. BP or XXVI to the effect that the failure to accept the particular version of the canon as the correct and genuine version of the Hudaya canon will amount to schism, heresy etc., or will render the particular member or members of the church liable to any ecclesiastical penalty involving punishment like excommunication, expulsion from church, loss of membership or separation from the church."

However, we find the court going into the question as to whether Ext.BP or Ext. XXVI in that case, (corresponding to Ext.B161 or Ext. A206 here) has ever been authoritatively accepted by the Patriarch of Antioch or the whole Jacobite Church or the Malankara Church as the correct and genuine version of the Hudaya Canons of Bar Hebraeus and whether the one or the other version should be or can be held to be the version binding on the whole Jacobite Church or the Malankara Church.

232. As in respect of most of the questions arising in the suit both the parties have taken extreme positions on this matter also and in support of their view depend purely on one or other of the earlier

decisions in the Vattipanam Case or the Samudayam suit and their binding nature in this action. The Patriarch side naturally would say that the finding in respect of the Canons in 41 T. L. R. 1 conclude the parties, the review resulting in 45 T. L. R. 116 being expressly limited to only some points specifically excluding among others the finding on the 'Canons'. The Catholicos side would put it that the matter stands finally decided by Ext. A16 judgment which according to them stands confirmed by the Supreme Court decision. According to me, both the parties are in error and there is no earlier decision on the question of canons which now binds this court.

233. As far as 41 T. L. R. 1 is concerned, I need only reiterate what I said about it in my discussion on the subject of 'res judicata'. Adverse findings against a successful party to the litigation will not constitute res judicata in a subsequent suit between the same parties. Mr. Poti, learned counsel for the plaintiffs had placed before me the following decisions in support of this principle which, according to me, represent the true legal position.

1. A. I. R. 1922 P. C. 241.
2. A. I. R. 1977 Mad. 25
3. A. I. R. 1974 Raj. 21
4. A. I. R. 1968 All. 282
5. A. I. R. 1974 Pat. 1 and
6. A. I. R. 1956 Nag. 273.

I do not consider it necessary to go into authorities closely. Suffice to say, the position as put forward by Mr. Poti is fairlly wel settled. I need here quote the following passage from Spencer Bower on Res Judicata-in para 215 at page 186 of the Second Edition of the book.

> "Not every finding of fact in a judge's judgment, not every issue of fact determined by a judge or jury, is res judicata between the parties in later proceedings. Thus, a decision of fact or law against the party in whose favour the substantial dispute was ultimately decided will not find an estoppel in a later proceeding; and this because it cannot have been necessary to the substantive decision." (emphasis mine).

I need not add that we will have to take 41 T. L. R. 1 with 45 T. L. R. 116 for finding out the substantive decision.

234. As regards the Supreme Court decision that also I have dealt with rather elaborately earlier as to how far it could have been said to have confirmed the findings in Ext. A16. I have found in definite terms that it cennot be said at all that the findings in Ext. A 16 as a whole have been affirmed by the Supreme Court. I have explained the scope and ambit of paras 34 to 38 of the Supremc Court judgment where the court only examines whether the new charges put forth by the learned counsel for the respondents- plaintiffs in that suit had any basis in the pleadings in the case. When the Supreme Court observed that in order to decide these charges and counter charges it is absolutely necessary to determine which is the correct book of canons and that was why issue 13 came into the picture, the court was not considering the correctness of the decision on the said issue. The court was only answering the contention raised by the

respondents' counsel that issue along with issue 16 indicated that the charge on the basis of the acceptance of the wrong canon was in the pleadings and came within the scope of the two issues. The court did not examine the correctness or otherwise of the findings on those issues which the trial court had to take a decision in view of the contentions of the parties but rested its decision on the question whether the defendants therein had become heretics or aliens or had gone out of the church by establishing a new church because of the specific acts and conducts imputed to the defendants in that suit on res judicata based on the decision in 45 T. L. R. 116. I would reiterate what I said earlier in this judgment that a judgment cannot be taken to have decided more than it decides expressly or impliedly. At the risk of repetition I want to make my finding on the question clear.

235. Now I have to go into the question as to what is the correct book of canons. I might state that in this case there is lack of positive evidence on the question for the court to come to a firm conclusion. No doubt in a civil action decisions will have to be arrived at on the basis of preponderance of probabilities but that does not mean that in the absence of clear evidence the court can come to a decision on the basis of conjectures and surmises. I have noted the elaborate discussion on the question on the evidence before the respective courts in 41 T. L. R. 1, Ext. A16 and 1957 K. L. T. 721. I will not be justified as such in going into the evidence which had been adduced in those cases and not actually before me. Nor could I say that as in the majority of cases a particular view has been taken that would be the correct view as long as it is not made out, that the findings therein bind me.

236. Any how I will examine the findings on the question entered into in 41 T. L. R. 1 and Ext. A16. In 41 T. L. R. 1, the Full Bench of Travancore High Court points out that Ext. 18 in that case (Ext. BP in the Samudayam Case=Ext. B161 here) was filed on the side of the plaintiff in the first Arthot Case (Ext. B 110 is the judgment of the Cochin Royal Court of Appeal in that case). The Full Bench further points out that Ext. 18 bears on it endorsements of its having been produced in other cases, such as O. S. No. 1402 of 1063, Quilon District Munsiff's Court, Sessions Case No. 9 of 1069, Quilon District Court and the Muvattupuzha Summary Case No. 1 of 1087 and O. S. No. 66 of 1088, Trichur District Court. The Court then said that it was not so much concerned just then with these endorsements of production of Ext. 18, as with the fact of its production in the first Arthot case as an exhibit on the side of then plaintiff- Metropolitan Mar Joseph Dionysius. The next Metropolitan Mar Gheevarghese Dionysius was a witness on the side of Joseph Dionysius in the Arthot Case. And strangely Mar Gheeevarghese Dionysius who had appeared on the plaintiffs' side as a witness in the Arthot Case contended in the subsequent case in which he was a party that Ext. 18 is a fabrication. The Court speaks of the halting nature of the evidence given by Mar Gheevarghese Dionysius regarding Ext. 18 as produced in the Arthot Case. The court refuses to believe his evidence that he did not remember or had no knowledge what the canon book that was produced in the Arthot Case was and