1968 *Present :* Siva Supramaniam, J., and Tennekoon, J.

Dr. T. B. COORAY (Archbishop of Colombo), Appellant, *and*
M. P. V. MATHES, Respondent

S. C. 739/64(F)—D. C. Negombo, 719/Spl.

Trusts—Charitable trust—Devise of immovable property to a Church—Incapacity of the Church itself, not being a juristic person, to be vested with title to the property—Disclaimer of trust—Stage at which a trust can be disclaimed—Co-trustees—Effect of a disclaimer by one of them—Effect of settlement of an action by a co-trustee—Claim for vesting order—Considerations applicable—Necessary parties—Prescription—Inapplicability to a charitable trust—Trusts Ordinance (Cap. 87), ss. 10, 76 (2) (a), 111 (1) (c), 112 (1) (i)—Civil Procedure Code, s. 473.

A testarix devised a land by her Will the initial terms of which declared that the land "shall go over and belong to the Apostle St. Peter's Church at First Division, Hunupitiya". The Will went on, however, to provide that the land was to be "in charge of" three named executors and that the Church was entitled to receive only the profits from the executors and their heirs; the enlargement of the mere right of the Church to receive the profits to a right to the land itself was to take place only on the failure of heirs and descendants to the three executors.

The petitioner-appellant, the Archbishop of Colombo, instituted the present action (*a*) for a declaration that he was the trustee of the trust created by the Will, and (*b*) for a vesting order in his favour under section 112 of the Trusts

Ordinance on the ground that "it is uncertain in whom the legal title to the said property is now vested". He also alleged that there was a disclaimer of the trust by one of the trustees on behalf of all the trustees. The respondent, who was an heir of one of the executors, counterclaimd that he was the lawful trustee or for a vesting order in his favour.

Held, (i) that, even assuming that there was a direct and immediate bequest of the land to St. Peter's Church, the bequest could not operate to vest the property in the Church, because the Church was not a juristic person. Neither the Church as such nor the *de facto* trustee of that Church was vested with title to the property.

(ii) that the Will not only created a charitable trust for the benefit of the congregation of the Church, but also designated the three executors as the persons in whom the legal estate was to be vested immediately after the death of the testatrix for the purpose of carrying out the trust.

(iii) that under the law relating to trusts a person can disclaim a trust only at the stage when he has the option of accepting or disclaiming; he cannot do so *after* accepting or entering upon the office. This is also implicit in section 10 of the Trusts Ordinance.

(iv) that where there are co-trustees, a disclaimer of the trust by one of them vests the trust property in the other trustees—section 10 (5) of the Trusts Ordinance.

(v) that when a co-trustee intends to settle an action so as to bind all the other co-trustees, section 473 of the Civil Procedure Code requires that all of them should be made parties to the action.

(vi) that long possession by the appellant of the land belonging to the charitable trust could not give prescriptive title to him as against the legal trustees—section 111 (1) (c) of the Trusts Ordinance.

(vii) that the appellant's claim to a vesting order must fail for the reason that it was not uncertain in whom the title to the trust property vested.

(viii) that even if this was a case in which it could be said that it was uncertain in whom title to the property vested, the claim of the heirs of the executors must be preferred to those of the appellant. In such a case, the principle enacted in section 76 (2) (*a*) of the Trusts Ordinance in relation to the appointment of new trustees would be applicable in considering an application for a vesting order under section 112 (1) (i).

(ix) that the respondent's claim to be sole trustee or to a vesting order could not be uphold in an action in which the other heirs and descendants of the three original trustees were not made parties.

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with *Mark Fernando* and *B. Eliyatamby*, for the petitioner-appellant.

C. Ranganathan, Q.C., with *Annesley Perera*, for the respondent.

Cur. adv. vult

July 22, 1968. TENNEKOON, J.—

The Petitioner-Appellant Dr. Thomas Benjamin Cooray, Archbishop of Colombo, petitioned the District Court of Negombo, praying that (*a*) he be appointed trustee of the trust created by the Last Will of one Clara Pinto ; this part of the prayer was subsequently amended by substitution of the word "declared" in place of the word "appointed", (*b*) for a vesting order, and (*c*) for permission to sell the trust property for the benefit of the trust. The proceedings in the District Court were confined to (*a*) and (*b*) of the prayer, inquiry in relation to (*c*) being deferred until a final determination on (*a*) and (*b*) of the prayer.

The Will which had been executed on 18.1.1900 was admitted to probate in 1902. It contained a devise of an undivided one-sixth share of Madampella Watta in terms which are reproduced later in this judgment. At the time of the execution of the Will a partition action relating to the land in question was pending in the District Court of Negombo (D.C. 1713). The testatrix died before final decree was entered and by the time probate was granted to her Will the undivided 1/6 share had been converted into a divided lot depicted as lot 6 in Plan No. 6/126 made by A. E. Vanroyan in extent A. 48 R. 0 P. 10.

The devise was in the following terms :—

"I hereby ordain that all the movable and immovable properties wherever situate belonging to me and which shall come over to me hereafter and which I acquired and which I may acquire by my own exertions shall go over after my death in the following manner :—

Firstly :.....

Secondly : The one-sixth (1/6) share belonging to me by right of marriage from the land called Madampellawatta situate at Madampella shall go over and belong to the Apostle St. Peter's Church at First Division Hunupitiya aforesaid in the following manner, to wit :—This portion of land shall be in charge of the two executors hereunder mentioned and the said Mihindukulasuriya Juwan Pinto Muhuppu and they shall spend out of the income derivable therefrom for the improvements of the same and for other necessary works for improvement connected therewith and shall give over all the remaining income to the said Church and if one or more of the said three persons die the survivor or survivors shall give over to the said Church the income of the said portion of land in the said manner and after death of the said three persons the heirs of the said three persons or of two of them or of one of them shall take charge of the said portion of land and shall give over the income as aforesaid to the Church and shall go on improving the said portion of land and if there be no heir or descendant to them the said portion of land shall devolve on the said Church and shall be held and possessed for ever by the said Church ; but the same shall not be alienated in any manner. .....

I do hereby appoint the said Mihindukulasuriya Patabendige Juwan Fernando and Mihindukulasuriya Patabendige Anthony Mathes as executors or managers for the due fulfilment of the matters of this Last Will and Testament."

There is no evidence as to who possessed the land in question in the years following the death of the testatrix, but there is certainly nothing to suggest that it was possessed by the Church or by the Archbishop of Colombo or anyone else on its behalf. However in or about 1937 the then Archbishop of Colombo sued one Laurie Mathes in D.C. Negombo Case No. 9998 alleging that the latter had been in possession of the land for about 9 years and praying for an accounting. Upon an objection taken to the right of the Archbishop of Colombo to sue upon the rights purported to have been devised in the Will to the "Church of St. Peter" the Supreme Court held that the Archbishop as *de facto* trustee of the Church of St. Peter could maintain the action. See *Masson v. Mathes* [1]. Kretser J. (with whom Moseley and Keuneman JJ. agreed) said in the course of his judgment :—

> "It seems to be too narrow a view to take to interpret the legacy as a bequest of a chose-in-action. ..... In the present case it is fairly arguable that the property vested in the church with the management in the person designated, upon failure of whom even this right would pass to the church. But, even assuming the position taken up by Mr. Perera (counsel for Laurie Mathes) that the property vested in the persons designated upon trust for the church, what was the right of the church ? The position would be that once the fruits had been sold and the expenses deducted the beneficial interest in the money that was left belonged to the church. That money was corporeal property and the fact that in order to ascertain the exact amount an accounting was necessary does not affect the right."

The District Court in pursuance of the Supreme Court's decision directed Laurie Mathes to account for the profits derived from the land and writ was subsequently issued for the recovery of a sum of Rs. 1084/47 from the defendant Laurie Mathes. Thereafter in or about May 1941 a settlement was arrived at, which was recorded in the following terms :—

> "1. The plaintiff agrees to waive the amount due by the defendant in respect of writ issued in the above case under the following conditions :—
>
> 2. The defendant undertakes to hand over to the plaintiff or his agent the Procurator General of the Archdiocese of Colombo the full management, control and absolute possession without any disturbance or interruption from any one, of the land called Madampollewatta which was so far looked after by the defendant for himself, and for and on behalf of the other trustees. The defendant further undertakes for himself and on behalf of the other trustees not to interfere in any way

[1] *40 N. L. R. 562.*

with the plaintiff or his agent the said Procurator General or his successor or successors in office as regards the control and management of the estate."

From the date of this settlement the Archbishop of Colombo has been in possession of the land. In or about 1963 the Archbishop made arrangements for the sale of the property in blocks, apparently without having obtained any authority to do so from court. The respondent Victor Mathes who is a son of Anthony Mathes (named in the Will as one of the Executors) claiming to be lawful trustee of the said land took strong objection to the proposed sale. Thereupon the Archbishop instituted the present action in the District Court of Negombo for a declaration that he is the trustee and for a vesting order under section 112 of the Trusts Ordinance on the ground that "it is uncertain in whom the legal title to the said property is now vested". The appellant also alleged in support of his claim that the respondent Victor Mathes is about 60 years and has shown no interest in the trust until he protested against the proposed sale and that he had never undertaken the trust and had therefore by his conduct disclaimed the office of trustee in respect of the land in question. The respondent counterclaimed (*a*) a declaration that he, Victor Mathes, was the lawful trustee or for a vesting order in his favour.

At the inquiry it was conceded by counsel for the appellant that apart from the respondent Victor Mathes who is a son of Anthony Mathes "there are other descendants who are heirs of the trustees (sic.)" and the following issues were framed, the first being suggested by counsel for the petitioner and the second by counsel for the respondent:

1. Is the petitioner entitled to a vesting order as prayed for?
2. Is the respondent entitled to (*a*) a declaration as prayed for in para. (*c*) of the objections, (*b*) a vesting order?

The learned District Judge after enquiry dismissed the application of the petitioner-appellant and allowed the respondent's application for a vesting order.

The claim for a vesting order by the petitioner-appellant rests upon the averment that it is uncertain in whom title to the property is vested.

It is to be noted that neither the petitioner-appellant nor any of his predecessors in the office of *de facto* trustees of St. Peter's Church at any time claimed that legal title to Madampelle Watta was vested in him. In fact such a claim cannot, it seems to me, be sustained. Even if it is assumed (and as will appear hereafter there is little justification for such assumption) that there was a direct and immediate bequest of the land "to St. Peter's Church, Negombo", the bequest cannot operate to vest the property *in the Church* because the Church is not a juristic person; see the cases of *Ambalavanar v. Kathiravelu*[1] and *Buddharakkita Thero v. Wijewardena*[2]. The bequest itself must no doubt be construed as a

[1] *27 N. L. R. 15 at 20.* [2] *(1960) 62 N. L. R. 49 at 51 (P. C.)*

gift for the purposes of the named institution ; it is a valid charitable trust for the benefit of that section of the public who worship at St. Peter's Church and constitute its congregation. Our courts have consistently refused to hold in cases where a charitable trust is created by a gift of land to an unincorporated religious foundation, that the *de facto* trustee of that foundation is automatically vested with legal title to the property and becomes the trustee. See the two cases mentioned above and *Wijewardene Nilame v. Naina Pulle* [1]. On the contrary in *Ambalavanar v. Kathiravelu* this court held that where by a deed *inter vivos* a person who is owner of property purports to transfer it to a temple, the effect of his doing so is to *constitute himself a trustee* for the purpose of religious worship to be carried on at the temple ; the document is in fact a declaration of trust and the dominium remains with the dedicator and passes on his death to his heirs subject to the trust.

In the present case there is no deed *inter vivos* but a Will in which the trust is declared. It is not possible to regard the testatrix as having constituted herself the trustee because the Will takes effect only after her death. Has she then designated the persons who are to be vested with title to the property subject to the trust ? For reasons stated earlier neither the Church as such nor the *de facto* trustee of that Church is vested with such title. Has the testatrix designated the trustees in whom legal title is to vest upon her death ? Indeed under the terms of the Will quoted earlier there is no bequest even to the Church as such to take place *immediately after the death of the testatrix.* The purported gift of the land to the Church is postponed during a period in which three named persons (hereinafter for convenience of reference referred to as the three executors) and their heirs shall be " in charge of " the land with the right to receive the income thereof, to carry out improvements with the income and to give over to the Church any balance remaining in their hands. The expressions " go over after my death in the following manner " and " go over and belong to the Apostle St. Peter's Church in the following manner " occurring in the Will are merely anticipatory and summary statements of what is about to be stated in fuller terms in the words that follow. It seems to me that the words—

> " and if there be no heir or descendant to them the said portion of land shall *devolve* on the said Church and shall be *held and possessed for ever* by the said Church..... "

are a clear indication that the purported bequest to the " Church " as such was to take place not immediately upon the death of the testatrix but upon the fulfilment of the condition " if there be no heir or descendant to them ". The enlargement of the mere right of the Church to receive the profits to a right to the land itself is to take place only on the failure of heirs and descendants of the three executors. In this view of the matter there is much to be said for the view pressed upon us by

[1] 1 C. W. R. 167

counsel for the respondent that there is a bequest in the Will in the first instance to the three executors subject to the trust mentioned. The obligations to collect the income, apply it for improvements to the land and to pay over the remainder to the Church are obligations clearly and unmistakably placed upon those three persons; in these circumstances it would be illogical to construe the terms of the Will as creating a trust and reposing a confidence in the three executors and at the same time to hold that legal ownership of the property was not intended to be vested in them for the purpose of carrying out those obligations. Further the provision for devolution on the Church occurring when there are *no heirs or descendants* of the three executors is indicative of an intention on the part of the testatrix to bequeath the property in the first instance to the three executors subject to the trust. The reference to "heirs or descendants" of these three persons is a strong indication of the testatrix having in contemplation the passing of the *title* to the property from them to their heirs; this view is further strengthened by the presence of a provision for the property "to *devolve* on the Church" only upon the failure of that line of succession.

For the reasons stated above I am of the opinion that the Will not only created a charitable trust for the benefit of the congregation of the Church of St. Peter's, Negombo, but also designated the three executors as the persons in whom the legal estate is to be vested immediately after her death for the purpose of carrying out the trust. The functions of these trustees extend to the management of the property, the collection of the income and the improvement of the property coupled with the duty of paying over any balance to the Church. In terms of the Will the discretion as to the ways in which such profits are to be spent for the benefit of the Church is not left to the trustees. That discretion is to be exercised by the *de facto* trustee of the Church of St. Peter's, i.e., the Archbishop of Colombo. The right of the Archbishop of Colombo to receive such moneys from the trustees for the purpose of applying it to the benefit of the Church was recognised in *Masson v. Mathes* (supra).

It is then urged by the appellant that even if the Will is construed as constituting the three executors and their heirs as trustees in the first instance, the settlement entered into in 1948 between the then Archbishop of Colombo and Laurie Mathes in D. C. Negombo 9993, has had the effect of a disclaimer by all the trustees and that the office of trustee was thereby rendered vacant. Under the law relating to trusts a person can disclaim a trust only at the stage when he has the option of accepting or disclaiming; he cannot do so *after* accepting and entering upon the office. "A trustee who has accepted cannot afterwards disclaim it" Snell—Principles of Equity, 25th Edn., p. 139. This is also implicit in section 10 of the Trusts Ordinance. Further there is nothing

to show that Laurie Mathes was the only trustee at the date of the settlement. The very words of the settlement suggest there were others. Nor is there any material to justify the contention that he was acting for all the trustees. Even a valid disclaimer by Laurie Mathes could only have had the effect of vesting the property in the other trustees; see section 10 (5) of the Trusts Ordinance. Further it seems to me that if the settlement was intended to bind all the trustees, it was necessary to have made them all parties to the action in which the settlement was entered into. Section 473 of the Civil Procedure Code enacts that " when there are several trustees, they shall all be made parties to an action by or against one or more of them ". That course not having been adopted the settlement of 1941 can have no effect on the legal position under the Will. It is only an arrangement regarding the management of the property which is not binding on all the trustees. Nor can the petitioner-appellant's possession of the property from 1941 onwards defeat a claim by the legal trustees—See section 111 (1) (*c*) of the Trusts Ordinance.

The petitioner-appellant's claim to be declared trustee must for the reasons set out earlier fail. His claim to a vesting order must also fail for the reason that it cannot be said that it is uncertain in whom the title to the trust property is vested. Even if I am wrong in thinking that the Will clearly vested the property in the three named persons and their heirs, it seems to me that there is a clear indication in the Will that the property should at all times be managed by these three persons and their heirs until such time as there is " no heir or descendant to them ". The court should, in these circumstances, have regard to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust. This principle is enacted in section 76 (2) (*a*) in relation to the appointment of new trustees and I think it would be equally applicable in considering application for a vesting order under section 112 (1) (i) of the Trusts Ordinance. Thus even if this is a case in which it can be said that it is uncertain in whom title to the property vests, the claims of the heirs of the executors of the Will and of Juwan Pinto Muhuppu must be preferred to those of the Archbishop of Colombo. It is perfectly natural that the testatrix wished to have the trust administered by persons intimately connected to her and her family so that there would be a recognition both in this world and elsewhere as to the source from which the charity proceeds.

Accordingly on any view of the terms of the Will the petitioner-appellant's claim to a vesting order must fail.

It remains to consider the correctness of the learned District Judge's decision to the effect that the respondent is entitled to a vesting order. The respondent himself in filing objections prayed both for a declaration that he is trustee and for a vesting order. Both parties have accepted the fact that there are besides the respondent himself other heirs and descendants of the two executors and of Juwan Pinto Muhuppu. It seems to me that the respondent cannot succeed in a claim to be sole trustee in an

action in which the other heirs and descendants are not made parties; equally a claim for a vesting order in favour of the respondent alone should not be considered favourably in an action in which no opportunity is afforded to the other heirs and descendants of the three original trustees to have their say. The question whether the respondent should be declared sole trustee or should have a vesting order in his favour alone can only be considered in a properly constituted action in which the other heirs and descendants of the original trustees (who in law would be the trustees now), are made parties.

For these reasons I would set aside the learned District Judge's finding that the respondent is entitled to a declaration that he is the trustee and to a vesting order. Subject to this variation in the order of the learned District Judge the appeal is dismissed. There will be no order for costs.

SIVA SUPRAMANIAM, J.—I agree.

Appeal mainly dismissed.