

1938

Present : Moseley, Keuneman, and de Kretser JJ.

MASSON v. MATHES.

139—D. C. Negombo, 9,998.

Roman Catholic Church-Property bequeathed to St. Peter's Church-appointment of trustees—Right of Archbishop to sue without vesting order—Trusts Ordinance, s. 112.

The church of St. Peter at Negombo was built on private land and the owners of the land in April, 1864, transferred the land and the buildings thereon to the Archbishop of Goa, the Primate of the East and his successors in office, of the Portuguese Mission of the Roman Catholic Church.

After the Portuguese Mission had withdrawn from Ceylon by arrangement in favour of the present Mission, the Archbishop of Colombo has been in effective control of St. Peter's church and has received its income and generally administered its affairs.

In 1900 C. P. by last will devised a share of a certain land to St. Peter's church and provided that two persons named as executors and J. P. and their successors should be in charge of the land, spend for its improvement and upkeep, and give all the remaining income to the church.

It was established that the persons named in the will regularly gave the income to the Archbishop of Colombo.

In this action the Archbishop as plaintiff claimed that as such he was vested with the care and charge and control of the church and prayed for an accounting from the defendant, who was in possession as a successor.

Held, that the Archbishop of Colombo was entitled to maintain the action as manager of the property and *de facto* trustee.

THE land, on which was built the church of St. Peter at Negombo, was gifted in 1864 by the owners to the Archbishop of Goa and his successors, who were the spiritual chiefs of the Portuguese Mission in Ceylon. This mission was under the patronage of the King of Portugal. In pursuance of an instrument, which was not notarially executed, between the Pope, the King of Portugal and other ecclesiastical personages concerned, the Portuguese Mission handed over the keys and left the

Island. On the invitation of some of the members of the church, the Archbishop of Colombo appointed a Parish priest to that church and since 1888 he has been in effective control of St. Peter's and has received its income.

In 1900 by last will Clara Pinto devised a share of a land to the church of St. Peter, and provided that Juan Fernando, Anthony Mathes, and Juan Pinto and their heirs should be in charge of the land, spend for its improvement and upkeep, and give all the remaining income to the church. For a considerable time the income was handed over to the Archbishop. In 1930, John Fernando who was managing the land was sued by the Archbishop for an accounting. The former contested the rights of the latter, but as judgment went against John Fernando, he handed over the land to the defendant. The present action for an accounting was filed by the Archbishop against the defendant who denied the rights of the plaintiff. The learned District Judge held against the defendant.

H. V. Perera, K.C. (with him *E. B. Wikramanayake*), for defendant, appellant.—The question in this appeal is whether the plaintiff can maintain this action. The grantees of the will of Clara Pinto are liable to account to the church of St. Peter at Negombo. The Archbishop of Colombo is "vested in charge, care and control of the church". If he is the trustee he can maintain this action. The land on which the church was built had been gifted to the Archbishop of Goa and his successors. In pursuance of an agreement it was vested in the Archbishop of Colombo by an instrument which is not notarial and therefore invalid under section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840. Hence the Archbishop of Colombo is not the trustee and cannot maintain this action.

If there is no trustee, one must be appointed. A vesting order could be obtained from the District Judge. Under the law of Ceylon only the Archbishop of Goa can sue. Further, the plaint does not disclose how the title was vested in the Archbishop of Colombo.

[KEUNEMAN J.—Is not the Archbishop of Colombo the *de facto* trustee?]

Yes, but a *de facto* trustee cannot maintain this action. The transference of the temporal powers of the Church is discussed in *The Mannar Church Case*¹. The spiritual rights of the Archbishop of Goa are extinct, but not the rights as trustee. A person cannot prescribe to a trusteeship, nor can charitable trust property be prescribed. In the eyes of the law, there is always a trustee.

The defect in title could not be cured by obtaining a vesting order after the institution of the case, as held in *Thamotherampillai v. Ramalingam et al.*² The Ordinance for the Incorporation of the Roman Catholic Archbishop and Bishops in Ceylon, No. 19 of 1906, was passed to counteract the decision in *Van Reeth v. de Silva*³, which held that as the Archbishop was not a corporation sole, the property of an Archbishop on his death did not pass to his successor in office.

Even if the person in possession had given the income to the Archbishop, it would not constitute a trusteeship.

¹ (1890) 1 S. C. R. 107.

² (1932) 34 N. L. R. 359.

³ (1903) 8 N. L. R. 97.

A. L. J. Croos; *Da Brera* (with him *Kingsley Herat* and S. N. B. *Wijeyekoon*), for substituted plaintiff, respondent.—The plaintiff is not claiming title to the land. It is merely a claim for a legacy. The person who is the head of St. Peter's church is entitled to receive it and it is immaterial whether he is the owner or not. The Archbishop not only exercises spiritual dominion, but also temporal power. Since 1890 the Archbishop was in possession. The land on which the church has been built was given to the Archbishop of Goa and the trust is in favour of all the Catholics in the Island. The Goanese Mission had abandoned the trust and the land was given to the successor in office and the beneficiaries concurred.

The state recognizes the Church—See 11 *Halsbury* (1st ed., p. 356). It was so held in *Godinho v. Mrs. Koning*¹. It was held in *Attorney-General v. Calvert*² that the intention of the testator should be carried into effect as far as possible.

The property belongs to the Church and can be wrested back from an impious possessor by the steward of the Church according to Voet VI.1.29—*Cassie Chitty's Translation* p. 49. A broad meaning must be given to the steward or like person. See *The Baptist Missionary Society Corporation v. Jayawardene*³. A trustee can retire from office according to 28 *Halsbury* (1st ed., p. 111). It was held in *Changarapillai v. Chelliah*⁴, that a manager of a Hindu temple could maintain a possessory action. It was decided in *Mascoreen v. Genys*⁵ that the Christian Church could maintain a possessory action. The rights of a *de facto* trustee are discussed in *Sivapragasam v. Swaminatha Ayar*⁶; *Sidharta Unanse v. Udayara*⁷; *Abdul Azeez v. Abdul Rahiman*⁸. Effect has been given to this view by sections 106, 107, 113 of the Trusts Ordinance, No. 9 of 1917.

Counsel cited *Von Savigny's Right of Possession*, p. 10.

A vesting order under section 112 of the Trusts Ordinance is not necessary in this case.

H. V. Perera, K.C., in reply—The Prescription Ordinance applies to immovable property. The fundamental requirement is that the plaintiff must have title to maintain the action. The Archbishop cannot be the trustee unless he has the legal title. If he is a trustee *de son tort* he has no legal rights. According to *Changarapillai v. Chelliah* (*supra*) a person in charge of the church can bring a possessory action or a vindicatory action as against a trespasser. In that case the manager of the temple was merely trying to regain possession.

The action *rei vindicatio* is defined in Voet VI.1.2—*Cassie Chitty's Translation*, p. 10.

Cur. adv. vult.

December 23, 1938. DE KRETZER J.—

In the early part of the last century there seems to have existed in Ceylon a branch of the Roman Catholic Church known as the Portuguese Mission, which was under the patronage of the King of Portugal and the administrative head of which in Ceylon was the Archbishop of Goa.

¹ (1846) 1843-1855, *Ram. Rep.* 132.

² (1857) 23 *Beavan* 248.

³ (1918) 20 *N. L. R.* 359, at 364, 365.

⁴ (1902) 5 *N. L. R.* 270.

⁵ (1862) 1860-62, *Ram. Rep.* 195.

⁶ (1905) 2 *Bal. Rep.* 49.

⁷ (1919) 6 *C. W. R.* 29.

⁸ (1911) 14 *N. L. R.* 317.

During this period the church of St. Peter at Negombo was built on private land, and the owners of the land transferred "the said portion of garden and the chapel and all the buildings standing thereon" on D 12 of April 22, 1864, to the Archbishop of Goa, "the Primate of the East and his successors in office, and the Vicars Capitular, Metropolitan and Primatial Diocesan", upon trust and subject to the condition that certain burials should be allowed and that he should "permit and suffer the said chapel to be used, occupied and enjoyed as for the public religious worship of God by Roman Catholics in this Island under the right of the Royal patronage".

The present branch of the church had meanwhile begun its work in Ceylon, and at a later date by arrangement between the Pope, the King of Portugal, and the different ecclesiastical personages concerned, the Portuguese Mission withdrew from Ceylon in favour of the present mission and the priest in charge of St. Peter's, having received instructions, handed over the keys and all the temporalities in the presence of the principal members of the Church to "the chief lay officer of the Church, Mihidukulasuriya Domingo Tissera Mooppo", on January 26, 1887—(D 4).

In February, 1888, a number of the members of the congregation "who were (had been) under the spiritual administration of the Archbishop of Goa" addressed a letter (D 8) inviting the Archbishop of Colombo to admit them to His Lordship's spiritual administration. The letter contained this passage:—"As we the parishoners were transferred to the Archdiocese of Colombo in accordance with the decree granted by His Holiness the Pope Leo XIII. of Rome, the Supreme Shepherd of the Holy Church, we while esteeming the said decree do respectfully declare that we remain as long as we live as obedient Catholics to His Holiness the Pope of Rome, the Vicar of Christ, and in the name of His Holiness to Your Grace the Archbishop of Colombo and to all heads appointed by His Holiness to the Archdiocese of Colombo hereafter".

The Archbishop of Colombo accepted the invitation by his letter dated June 6, 1888, in which he recited that by a Concordat concluded between the Holy See and the Crown of Portugal on June 23, 1886, the right of patronage heretofore exercised by the King of Portugal was by mutual consent declared extinct in Ceylon, leaving it to His Holiness the Pope to take such measures as in His wisdom he might consider just for the good of the faithful. He went on to say that the Pope had elevated Colombo to the Archiepiscopal dignity, and that the Titular Archbishop of Cesarea had, by a decree issued on January 2, 1887, "declared the provisional extraordinary jurisdiction of the Archbishop of Goa to be extinct in Ceylon and ordered the Goa clergy in virtue of obedience due to the Holy See to submit to the jurisdiction of the Archbishop of Colombo and the Bishop of Jaffna respectively, an order to which they submitted with the sanction of the Archbishop of Goa". The Archbishop of Goa had on March 21, 1887, declared that "he had no more any jurisdiction in Ceylon". The Archbishop of Colombo, after reciting all these facts, appointed the Very Rev. Fr. Dominic Pulicani, O.M.I., second Vicar-General and Fiscal Procurator, to visit St. Peter's and administer the Sacraments. Rev. Fr. Griaux as Parish Priest,

and the Very Rev. Fr. Pulicani seem to have taken possession of the church, and thereupon Domingo Tissera, to whom it will be remembered the keys had been handed over, brought an action against them and two others named Manuel Costa and Juan Fernando.

The case went up on appeal and the Supreme Court, consisting of Burnside C.J. and Clarence J., decreed that the plaintiff's action should be dismissed. A copy of their judgment has been filed, and it shows that the action had been a possessory action and that it had been dismissed because Domingo Tissera was only a caretaker. This decree was in 1889.

The evidence makes it quite clear that from 1888 the Archbishop of Colombo had been in effective control of St. Peter's and had received its income and generally administered its affairs through the priest of an adjoining church and, for a period, with the assistance of a Committee of church members.

In 1900 by last will Clara Pinto devised a share of the land called Madampellawatte to the "Church of St. Peter's" and provided that Juan Fernando, Anthony Mathes, executors, and Juan Pinto should be in charge of the land, spend for its improvement and upkeep, and give all the remaining income "to the said Church".

The will provided for their successors and, rather inconsistently, ordained that if no heir or descendant remained the said portion of the land was to "devolve" on the church.

The inconsistency, is, in my opinion, more apparent than real but it is unnecessary to consider that question.

It will be noted that this will was drawn in 1900, *i.e.*, eleven years after the judgment of the Supreme Court and thirteen years after the Archbishop of Goa had relinquished jurisdiction and the priest had given over the church and the Archbishop of Colombo had been invited to take charge and had taken charge.

It can hardly be that Clara Pinto was unaware of these facts and that she could have intended her bequest to go to any other than those who were managing the existing church.

It is contended, however, that all she intended, and must be taken to have intended, was to make a bequest to the church, to religion, so to speak, irrespective of who managed the particular church and, therefore, the person entitled to receive the bequest must be ascertained independently of her intention. In the construction of a last will the intention of the testator is of paramount importance and must be given effect to, if it can be ascertained with reasonable certainty, and one is not thrown back on artificial modes of construction, unless the testator's intention is obscure.

The evidence establishes that the persons named in the last will and referred to as managers in its last clause regularly gave the income to the Archbishop of Colombo. One of them, Juan Fernando, was probably one of the defendants in the case against the representatives of the existing Mission. Another of the defendants is said to have been the present defendant's grandfather. Juan Fernando died in 1910. He gave the income to the Archbishop during his life, and at his death a sum of Rs. 7,000 having accumulated in his hands, his widow paid the money to the Archbishop through the witness John Fernando, who took

charge of the land and paid the income to the Archbishop for nearly 20 years and handed it over to his brother-in-law, the defendant. John Fernando was sued in 1930 for an accounting and the action was brought by the Archbishop. He denied the Archbishop's right but judgment went against him and he then handed over the land to his brother-in-law, the defendant. He says he requested the defendant to pay the income to the Archbishop but in fact the defendant did not and the present action was the result.

In this action the plaintiff is the Archbishop of Colombo and in paragraph 6 of the plaint he claimed that as such he was "vested with the care and charge and control of the said church". He prayed for an accounting. The defendant stated that he was in possession since September 3, 1931, denied that the plaintiff was vested with the care, charge and control of St. Peter's, and also made other general denials. He denied that plaintiff could sue him for an accounting even if the plaintiff had the charge and control of the church, and gave certain figures to prove that no balance was left in his hands from the income.

The learned District Judge held in favour of the plaintiff and the defendant appeals. The one point urged on his behalf in different ways was that the bequest to the church was a bequest to the trustee of the church and according to D 12 the trustee was the Archbishop of Goa. There was the risk, it was alleged, of the Archbishop re-establishing his Mission in Ceylon and bringing the defendant to account, and even if that was unlikely still no one but he could sue the defendant until a competent Court had appointed a trustee and by a vesting order had vested the property in that trustee. Meanwhile, presumably, the defendant would take the produce and would not mind doing so since that income would cover his expenses and, presumably, the church would suffer no loss since the expenditure amounted at least to the income.

In my opinion this case can be decided quite irrespective of the question as to whether the trust created by D 12 extended to the length to which Counsel contended it did, but it is due to Counsel to examine his skillful argument on this point.

To begin with, before 1864 title to the land on which the church stood was in private persons. Had that state of things continued it could hardly be contended that Clara Pinto intended that the income from her land should go to those private persons. The fabric of the church would accede to the soil in the absence of agreement but a right of superficies might be acquired by prescriptive user, and by 1900 the fabric of the church as well as the institution known as the church would not belong to the owners of the land, and clearly Clara Pinto's bequest could not be claimed by them but the person in authority or managing the church. The existence of D 12 does not make a difference. The trust was with regard to the land and the fabric—even though the fabric may have been mentioned in order to avoid any question arising as to the legal title.

The trust, therefore, affected the fabric and did not extend to the institution known as the church. It is said that among Roman Catholics it is impossible to separate secular from religious authority, and that may be so, but they may be separated from a legal point of view. The more convincing answer, however, to the claim in favour of the Archbishop

of Goa is the well-established fact that he renounced his trust with the consent and acquiescence of all persons concerned in the trust. It cannot be said any longer that he is the trustee even of the property dealt with in D 12. It is unnecessary to consider the argument that the trust was in respect of his Archbishopric of Ceylon and his successor in office was the Archbishop of Colombo, or the argument that the trust has ended because its object as stated in D 12 can no longer be fulfilled. Who then can bring an action? Commonsense, principles adopted by this Court and found in the Roman-Dutch law, the express provision to be found in section 107 of the Trusts Ordinance, and the intention of the testatrix—all point to the person in actual control of the temporalities of the Church.

In my opinion this case ought to be decided on Clara Pinto's intention and, in my opinion, her intention was that the income should be handed over to the person exercising authority over and managing the church of St. Peter, and that was the Archbishop of Colombo, and for over a third of a century that was how all persons interested in the church regarded the matter. I do not think this eminently sensible and packed view of the matter taken by practical persons should be rejected unless we are obliged to do so by some rule of law.

*Godinho v. Mrs. Koning*¹ this Court held that a deed "*ad pios usus*" was valid and that the plaintiff as the Roman Catholic Missionary at Batticaloa and manager of the church and property thereof could maintain an action on the deed. The judgment citing *Viner's Abridgement* says, "it seems that in ancient times a grant '*deo et Ecclesiae*' was good, or if a man gives '*lands per dedi et concessi ecclesiae de D*' this goes to the person and his successors and this construction now prevails in wills, where the intention only of the deviser is regarded Thus a devise '*Ecclesiae sancti Andreae de E*' would be a good donation by will to the corporation of the person of the said church and his successors, for such description was sufficient in a will to express the person of the church and his successors".

The judgment goes on to say that in Dutch law the distinction in construing between deeds and wills was not recognized and the intention was preferred.

It is rather difficult to understand this decision in every part of it but clearly it held that a bequest to a church was not invalid (it is not argued in this case that it is), and it emphasized that intention was the main thing to be considered and that the manager of a church could maintain an action on such a deed. The decision may seem to regard the church as a corporation but all it does say is that that was the law in ancient times and it uses this statement to justify the holding that such a deed is not invalid. The chief point of interest to us at present is that the manager of the church was allowed to maintain an action on such a deed.

The case is more fully reported in *Morgan's Digest*, p. 472. From this report it appears that certain property was seized under writ as the property of the defendant and that plaintiff claimed it as "the presiding Roman Catholic Missionary in Batticaloa and Manager of the Church and property thereof". It also appears that the conveyance was "unto the Church of Saint de Croos".

¹ (1843-55) *Ram. Rep.* 132.

In *Sillani v. Corea*¹ this Court held that the plaintiff, who was the Roman Catholic pre-administrator of the Southern Vicariate of Ceylon had the right to make appointments, as the evidence established that such appointments had been made by the chief local dignitary of the Roman Catholic Church for the time being, and it said that this right was supported not only by the law of prescription but by the principle that when the Court has to direct what shall be the arrangement of a religious institution, it will, in the absence of express proof of the founder's intentions look to see what has been the usage of the congregation and minister and others officially interested in the subject; and the Court will presume that such usage has been in conformity with the original design. They held, also on the oral evidence, that proprietary right in the temporalities was in the officiating priest and not in the congregation's trustees as contended by the defendants.

This was a case from the District Court of Negombo and was decided in 1866, i.e., before the present Mission took over the work in that district.

*Fernando and others v. The Right Rev. Father Bonjean, Bishop of Medea and Vicar Apostolic of Jaffna*² was an action brought regarding the well-known Madhu Church in the Mannar District by certain persons against the Bishop and Vicar Apostolic, the Missionary Apostolic of the district and another person reported to be dead. The plaintiffs alleged that the church had been built by their ancestors and that they had had prescriptive possession of the land and income, offerings, and furniture of the church, and prayed for ejectment of the defendants. The defendants pleaded that by law and usage the title to the church and the sole right to administer its affairs were vested in the Bishop and that the charge of the church and its income belonged to the officiating priest the second defendant, appointed by the first defendant. The trial Court held for the defendants but ordered that trustees should be appointed to hold the church subject to the right of the officiating priest to use it.

Both parties appealed and this Court delivered its judgment through Morgan C.J., the other Judges being Stewart and Cayley JJ. It held that the plaintiffs had failed to prove their claim; that the evidence as to the building of the existing church was conflicting but it appeared to have been built by a gentleman called Muyce with the assistance of neighbouring villagers and was occasionally visited by the Goanese priests under the authority of the Archbishop of Goa; it refers to a Concordat between the Pope and the King of Portugal followed by a pastoral letter from the Archbishop of Goa, filed in the case previously cited by me, viz., the one in the District Court of Negombo, and states "We do not think it very material to ascertain by whom and out of what funds the church was rebuilt in 1854, because in the absence of any evidence to the contrary, we think it must be presumed that it was the intention of all parties concerned that the new church should be held and managed upon the same footing as the old one and should be subject to the same ecclesiastical rules and discipline Upon the issue as to whose the legal title as to the fabric and the ground on which it stands, and which forms the actual precincts of the church is, we do not think that either side has made out a case entitling it to judgment

. . . After all this question as to the bare fabric of the church and the

¹ (1868) *Ram. Rep.* 201.

² (1872-76) *Ram. Rep.* 168.

ground attached to it does not appear to us of much practical importance. For in whomsoever they are vested, the premises can only be held and possessed for religious purposes, to be carried on in accordance with the doctrine, discipline and usages of the Roman Catholic Church in this Island . . . We must be guided by the principle laid down by this Court in the case (No. 1,421 D. C. Negombo above referred to) that, when the Court has to direct what shall be the management of a religious institution, it will, in the absence of express proof of the founder's intentions look to what has been the usage of the congregation and the ministers and others officially interested in the subject It is true the Roman Catholic Church is not established here but treating it as a religious society resting upon a consensual basis, the Court is bound (as pointed out by the Judicial Committee of the Privy Council in the case of *Brown v. the Curate and Church-Wardens of Montreal*¹, to regard its laws and rules in determining the right of any aggrieved person if these rights relate to a matter of a mixed spiritual and temporal character". The Court held that the usage has always been for the chief spiritual dignitary of the diocese or vicariate to appoint the priests to the mission and to churches belonging to it, and the concordat was considered to have settled the question who were the chief local dignitaries of the Roman Catholic Church here now. The right of appointment was therefore held to be in the first defendant.

The first defendant himself had pleaded that whilst he had the legal right to the income, &c., the income was actually received by the priests, and had desired a declaration accordingly. This Court decreed that the priest for the time being in charge was entitled to receive the offerings and personally to manage and administer the affairs of the church, subject to the control of the Vicar Apostolic of the Vicariate and to the observance of the usages and discipline of the Roman Catholic Church in the Island.

I have dealt with this case at some length not only because it deals with many points which are of interest in the present case but also because it seems to be the latest decision on closely analogous points and has regard to Roman Catholic Churches in particular.

The question which arose in *Melezan v. Savery*² and *Van Reeth v. de Silva*³ was quite different. Those cases decided that title vested in a Roman Catholic Bishop did not pass to his successor in office and as a result Ordinance No. 19 of 1906 was passed.

Mr. Croos Da Brera, himself a Roman Catholic, stated without contradiction, and as far as I know quite rightly, that a Roman Catholic desiring to transfer property for religious uses would transfer it to the Bishop (or Archbishop in the case of the diocese of Colombo). This seems to accord with the evidence in this case, and the Ordinance above referred to seems to confirm this view for it makes no provision for any other case.

We next pass to another aspect of the matter. In *Changarapillai v. Chelliah*⁴ Bonser C.J. drew attention to the Roman-Dutch law which provided that "in the case of property belonging to churches and religious bodies persons called *economi* and other like

¹ 44 L. J. P. C. Cases, p. 1.

² 1 S. C. R. 107.

³ 8 N. L. R. 97.

⁴ 5 N. L. R. 270.

officers could recover property by actions *rei vindicatio*", and he thought that *a fortiori* they could recover it by the lesser remedy of a possessory action. It seems to me that *a fortiori* they could recover something less than the property, viz., the income from it. He thought that certain cases had been decided upon too narrow grounds and explained another as having been brought by too subordinate an officer. He thought that each case must depend upon its own facts and concluded by saying "In the present case it seems to me that if the plaintiff, who is called the manager of the temple, has control of the fabric of the temple and of the property belonging to it, he has such possession as would enable him or even entitle him to maintain an action; even though he makes no pretence of claiming the beneficial interest of the temple or its property, but is only the trustees for the congregation who worship there". The similarity of reasoning between this case and the cases reported in Ramanathan's Reports will at once strike one, and also that the Archbishop is in a stronger position than the manager in the case.

Mr. Perera sought to meet this case by arguing that in Roman-Dutch law a church was *res sacra* and as such public property, and therefore some provision had to be made for the protection of its property, whereas in Ceylon all property of a religious body belongs to some one. He argued that as in modern law it is possible to appoint trustees, therefore the previous law on the subject should not prevail. The fact that trustees may be appointed does not mean that trustees and trustees only may exercise rights in matters concerning the temporal affairs of an ecclesiastical body. He further argued that the passage from Voet referred to actions *rei vindicatio* and to recovery of corporeal property, movable or immovable, and not choses-in-action. It seems to me that this argument is more ingenious than sound. The Roman-Dutch law did not unduly favour technicality. It aimed at doing substantial justice, and no doubt had the present problem being presented it would have dealt with it on the same lines as earlier decisions of this Court have done. It had a habit, like its basis the Roman law, of accommodating itself to the facts of each case.

The accident that the observation occurs in a title dealing with actions *rei vindicatio* does not obscure the principle on which it went and which Bonser C.J. had no difficulty in extending to possessory actions. Besides, the Roman-Dutch law regarded personal actions as movables (*Voet*, 1.8.30, and *Nathan* 436).

It seems to be too narrow a view to take to interpret the legacy as a bequest of a chose-in-action. The Roman-Dutch law would consider the Church's right to be based on a *quasi-contract*. It would be extraordinary if the manager of the property belonging to a religious body could maintain an action for the recovery of property but once he leased it he could not sue for rent as his right was based on contract. In the present case it is fairly arguable that the property vested in the church with the management in the persons designated, upon failure of whom even this right would pass to the church. But, even assuming the position taken up by Mr. Perera 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. Had the parties been agreed that it was, say Rs. 5,000, the action would be to recover Rs. 5,000. I do not see why the right of the manager of property of a religious body to recover its property or income should be restricted in the manner suggested.

There is still another way of looking at the matter, and that is that the Archbishop had exercised control over the property of the church and was in receipt of this income for many years and it is really for the defendant to prove a superior title to the property of the church, and it is at least doubtful that the Archbishop of Goa has any rights or will ever exercise any.

Lastly, I shall deal with a position which seems to be peculiar to our law. I refer to the recognition by the Trusts Ordinance in sections 106 and 107 of the *de facto* trustee. The enactment of these sections was probably due to an extraordinary situation which existed, particularly with regard to Hindu temples, and which gave rise to many difficulties. If one applies the provisions of section 107, as one is entitled to do, there can be no doubt that, though there may be no formal constitution of a trust in the Archbishop of Colombo, all the circumstances of the case prove that such a trust does in fact exist, and on Mr. Perera's one and only contention the Archbishop is entitled to maintain this action.

From whatever angle, therefore, the case is approached the right of the plaintiff seems to be clear and there is no impediment to the intention of the testatrix being given effect to, however convenient it may be to the defendant that a contrary conclusion should be reached.

The appeal is dismissed with costs. The decree entered will stand. Of course the costs of any further inquiry into the accounts will be dealt with by the District Judge.

MOSELEY J.—I agree.

KEUNEMAN J.—I agree.

Appeal dismissed.

