Present: Bertram C.J. and Garvin A.J.

1921.

MARALIYA *v.* GUNASEKERA *et al.*

120—D. C. Ratnapura, 3,528.

Buddhist Temporalities Ordinance, 1889—Action by trustee on contracts made by his predecessor—Trustee personally liable on contracts—Trusts Ordinance, 1917, s. 77—Vesting of chose in action on new trustee.

Under the Buddhist Temporalities Ordinance a trustee for the time being can sue on contracts made by his predecessor.

A trustee is not free from personal liability. But if he incurs a liability in the *bona fide* execution of his trust, he has a right of indemnity against the trust property.

A trustee is not entitled to an order that the property belonging to the trust should first be discussed before he is made personally liable.

THE facts appear from the judgment.

Amaresekera (with him *E. G. P. Jayatileke*), for appellants.

A. St. V. Jayawardene, K.C. (with him *D. B. Jayatileke*), for respondents.

December 21, 1921. BERTRAM C.J.—

This is an action on a mortgage bond. The plaintiff is the trustee of a Buddhist temple, and the defendants who are the officers of the Saddaramodaya Society . . . . themselves appear to be trustees. The property which they have mortgaged is property belonging to the society which they represent, and it is vested in them as trustees for the society. They have put the temple trustee to the necessity of proceeding at law, not because they dispute the bond, but because of their sense of the uncertainty of their legal position if they paid the money to him.

The question to be determined is whether the present trustee, who is not a party to the bond, can sue upon it, or whether it is necessary that his predecessor, who executed the bond, should be joined as a party.

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Speaking generally, no one can sue on an instrument to which he is not a party, except by virtue either of representation (as in the case of an executor or administrator), or assignment (as in the ordinary case of *cessio*), or by virtue of some statutory provision (as in the case of an assignee in insolvency).

In the case of trustees, it has always been necessary that on the appointment of a new trustee the trust property should be formally assigned to him. All books of precedents of conveyancing contain forms for such assignments. This was so, and in England is still so, even when the trustee nominated by the instrument of trust is the person for the time being holding a particular office. Where only one of several trustees had vacated his office, the assignment of certain classes of property had to be made to an intermediary, who subsequently re-assigned to the trustees in a body, on the ground that a person could not assign such property to himself. The necessity for this procedure was obviated by the Law of Property Amendment Act, 1859, and the principle of that amendment appeared in section 2 of our own Property and Trustees Ordinance, 1871, and survives in section 115 of the present Trusts Ordinance, 1917. The difficulties created by this principle of law were in England modified by various acts of legislation. Thus, by the Trustee Appointment Act, 1850, provision was made for vesting property held by trustees for religious or educational purposes in the new trustees on their appointment without a special conveyance (compare now our section 113 (2)), and by various other provisions now embodied in the Trustee Act, 1893, provision was made in certain cases by vesting orders or otherwise under which trust property passed to new trustees in the same manner as if the retiring trustee had executed a regular transfer. Similar provisions may now be found in our own Trusts Ordinance, 1917 (see sections 77, 112, and 113). Our own provisions indeed go further than the law of England in this respect (see in particular section 113 (1) and section 77).

Now, the matter in respect of which the present plaintiff sues is known in English law as a chose in action. The idea of a chose in action as a form of property has not been so fully developed in the Roman-Dutch law as in the English law, but it has become definitely naturalized in Ceylon as part of our legal system. It is recognized every day in insolvency and testamentary actions, where the debts due to a bankrupt or to a testator or an intestate are regularly scheduled as part of his property. It was always recognized under English law that trust property might consist of a chose in action. Special provision was made for the vesting of a chose in action in a new trustee under some of the English enactments above referred to, and though there is no express mention of the vesting of choses in action in the sections of our own Trusts Ordinance above referred to (except section 77, where rights in

"rights of suit" are referred to), it must be taken that choses in action are deemed to be recognized as forms of trust property. Otherwise the effectiveness of these sections would be gravely diminished.

A distinction is drawn between this form of property and other forms of property for the purpose of vesting title by inheritance in a judgment of this Court (see *Fernando v. Unnanse* [1]). The distinction is not material for the present purpose, but the judgment is an indication of the fact that a chose in action is recognized as a form of property devolving by inheritance.

I will now proceed to consider the provisions of the Buddhist Temporalities Ordinance, 1905, which relate to this question. Section 19 provides that all contracts and all rights of action arising out of contracts in favour of any temple or any person on its behalf may be enforced by the trustee as though such contract had been entered into with him. This relates only to the first appointments under the Ordinance. There is no corresponding provision with regard to successive trustees. Section 20, however, provides that all property, movable and immovable, belonging or in any wise appertaining to or appropriated to the use of any temple . . . . shall vest in the trustee of the temple. It is clearly intended that such property should vest successively in the trustees for the time being. Section 30 authorizes the trustees to sue under the name and style of "trustees of (*name temple*)" for the recovery of any property vested in them under the Ordinance or of the possession thereof, and for any other purpose requisite for the carrying into effect the objects of this Ordinance.

In spite of the absence of any provision giving the subsequent trustees the same rights of suit on contracts not made with themselves as are given to the first trustees appointed under the Ordinance by section 19, I think there can be no doubt that it was the intention of the Ordinance that choses in action should vest successively in the trustee for the time being holding office under the Ordinance in the same manner as other trust property. The vesting of the choses in action in this manner for each successive trustee carries with it by implication the right to sue upon the document, in which the title of the religious foundation to the chose in action is embodied and defined, even though the person suing was not an original party to the instrument.

There is a previous decision of the Full Court which may seem to have a bearing upon this question, but which, when examined, has very little weight. *Mudalihamy v. Karupanan.*[2] Burnside C.J. dissented from the decision, and both Clarence J. and Dias J. appeared to proceed upon the mistaken assumption that section 19 applies even to contracts made after the Ordinance came into operation. There is also an Indian case cited to

[1] *(1918) 20 N. L. R. 378.*

[2] *(1891) 1 C. L. R. 88.*

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us by Mr. Jayawardene, which seems to require some comment. (*Ramanadhan Chetty v. Katha Velan.*[1]) It was there held that a promissory note executed in favour of a trustee can be sued on by his executor without endorsement or assignment. The trust in question was a public charitable trust to which the Indian Trusts Act did not apply. It was there said: "Broadly speaking, trustees exercise rights and obligations as agents of the trust. The trust being the owner, succeeding trustees derive their rights and office by relation to the trust, and not as the heirs of the last holder of that office. All of them form a chain of representatives in respect of the trust, as was once said by the Judicial Committee." If by this it is meant to suggest that under the English law of Trusts trust property, independently of the provisions of section 75 of the Indian Trusts Act, would devolve from trustee to trustee without a transfer, I would venture to suggest that this dictum must have been uttered without as full a consideration of the subject as it deserves. The analogy drawn in the judgment between trustees and executors and administrators is fallacious. Executors and administrators have a title by representation which trustees have not. The words "the trust being the owner" imply a view of the law of trusts which is foreign to the English law on which the Trusts Ordinance is based. It is that of the personification of what is known as the "foundation." This existed in the Roman law and to some extent in the Roman-Dutch law, and exists to-day in certain systems of continental law, but it is foreign to the English law and to the modern law of Ceylon. See *R. W. Lee, Introduction to Roman-Dutch law, p. 105:* "We no longer attribute any kind of personality to an unincorporated charity, the only persons which come in question being those of the trustees in whom the trust property is vested." The fact that India has no common law may have seemed to the Court in that case to justify the introduction of this foreign principle into the law of India. But we are precluded from doing so by section 118 of our Trusts Ordinance, 1917, which declares: "All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

The decision of the Privy Council referred to in the Indian judgment is not further identified, and it is possible that the expression of opinion there referred to was made in another connection. Under our own Trusts Ordinance, devolution of property on new trustees appointed under that Ordinance is now regulated by section 77, but trustees of Buddhist temples are not appointed under that Ordinance, and the section does not apply to them.

[1] *(1916) 41 Mad. 353.*

A difficulty arises in connection with the position of the defendants. The title deed to the property is made out in their names, presumably as trustees for the property. Mr. Amaresekera asks that judgment should be entered against them in their capacity as trustees, and that they should be freed from any personal liability. It is impossible to concede this. They are personally liable on the bond, which also, though not quite logically, makes them personally liable as sureties. The law knows nothing of the idea of a trustee suing or being sued in his capacity of trustee. He has not a representative capacity like that of executor or administrator. If he incurs a liability in the *bona fide* execution of his trust, he has a right of indemnity against the trust property. Mr. Amaresekera asks us to order that the property belonging to the trust should first be discussed before the trustees are made personally liable. We cannot do this, but I understood Mr. Jayawardene to give the undertaking on behalf of his clients that this course would be taken. With regard to the mortgaged property which is the subject of this action, the mortgage decree will of itself have the effect desired by Mr. Amaresekera.

The trustees are in a further difficulty, that they have mortgaged trust property without obtaining the consent of the Court under section 42 (2) of the Trusts Ordinance. They will, therefore, have to apply to the District Court for relief under section 31, and will no doubt obtain it. Subject to their obtaining this relief, I think that in the circumstances of the case, as the point was a new and obscure one, the legal expenses they themselves have incurred should be payable out of the trust property. The respondents are entitled to their costs in the ordinary way. I would dismiss the appeal, with costs.

GARVIN A.J.—I agree.

Appeal dismissed.