1933 *Present:* **Drieberg J. and de Silva A.J.**

HAYLEY *et al. v.* NUGAWELA.

160—D. C. (Inty.) Kandy, 40,294

Trustee—Action on contract entered into as trustee—Personal libability—Decree entered against defendant as trustee—Right of defendant to compel judgment-creditor to levy execution against trust property—Trustee under Buddhist Temporalities Ordinance not a corporation.

Where a trustee contracts as trustee and judgment is entered against him as such, he is not entitled to compel the judgment-creditor, who seeks to execute the judgment against him personally, to levy execution instead on the trust property.

The mere use of the words "as trustee" in a contract is not sufficient to execute personal liability.

A trustee appointed under the Buddhist Temporalities Ordinance is not a corporation.

THIS was an action to recover the value of cement delivered to the defendent on a contract entered into by him as the Diyawadana Nilame and Trustee of the Dalada Maligawa. The action was not defended and judgment was entered against the defendant on March 3,

1931. In the caption of the plaint the defendant was described as the Diyawadana Nilame, and Trustee of the Maligawa, and in the first paragraph of the plaint, it was expressly averred that he was sued in that capacity, and he was so described in the decree.

On March 26, 1931, the plaintiffs-appellants issued writ and the Fiscal reported that the defendant was possessed of no property. Thereafter the plaintiffs re-issued writ on serveral occasions and seized the defendant's allowance as member of the State Council.

On May 25, 1932, the defendant moved that the prohibitory notice or the seizure of his salary be recalled and the plaintiffs be directed not to proceed against the defendant in his personal capacity. The learned District Judge allowed the motion and the plaintiffs appealed from the order.

Choksy (with him *D. W. Fernando*), for plaintiffs, appellants.—In law a trustee cannot sue or be sued in his capacity as trustee. He has not a representative capacity like that of an executor or administrator. He is not an agent of the trust. He is personally liable, although he has a right of indeminity against the trust property, for expenses incurred in the *bona fide* execution of this trust. (*Maraliya v. Gunasekera* [1].)

A creditor of a trustee has no direct right to claim payment out of the trust estate even though the debt was incurred in the execution of the trust. He has firstly the personal liability of the trustee that arises from the general principle of contract, and secondly the equitable right of being put in the place of trustee against the assets of the trust. (*In re Johnson: Shearman v. Robinson* [2].)

A trustee cannot contract so as to exclude personal liability. (*Muir v. City of Glasgow Bank* [3], *Watliny v. Lewis* [4], *Williams v. Hathaway* [5], *Farhall v. Farhall* [6].) He may by contracting in adequate language limit his personal liability to the extent to which he has a right of recourse to the trust property. (*Muir v. City of Glasgow Bank* (*supra*), *Gordon v. Campbell* [7].

The trustee of a Buddhist temporality is not a corporation. Where the Legislature intends to make a trustee a corporation with power to contract as such, it makes express provision for it. In the Co-operative Societies Ordinance, 1921, section 17, and the Nuwara Eliya Board of Improvement Amendment Ordinance, 1921, section 4, the Legislature has expressly made the trustee a corporation.

H. V. Perera (with him *Ranawake*), for defendant, respondent.—The trustee of a Buddhist temporality is a corporation. It is a creature of statute with all the attributes of a corporation—perpetual succession, power to sue, and the liability to be sued in the name of trustee (*8 Halsbury s. 164*). Even if it is not a corporation, it is a *quasi*-corporation (*Ex parte The Newport Marsh Trustees* [8]). Where trustee is a corporation the property of the corporation and not the property of the person constituting it would be liable in execution for a contract entered into by the trustee in his corporate capacity.

[1] *(1921) 23 N. L. R. 261.*
[2] *L. R. 15 Ch. Div. 548.*
[3] *(1879) 4 A. C. 337.*
[4] *(1911) 1 Ch. 414.*
[5] *6 Ch. Div. 544.*
[6] *(1877) L. R. 7 Ch. App. 123.*
[7] *1 Bell's App. 428.*
[8] *(1848) 16 Simons's Reports 346.*

Section 30 of the Buddhist Temporalities Ordinance excludes the personal liability of a trustee of a Buddhist temporality for costs for any act *bona fide* done by him. If the liability of the trustee is always personal then the exemption from personal liability for costs makes the section meaningless. Even in the case of an ordinary trustee there may be a contractual limitation of liability. It may be agreed that satisfaction of the debt should be out of a particular fund (*Muir v. City of Glasgow Bank* (*supra*)).

Watling v. Lewis (*supra*) can be distinguished. It was dissented from In *re Robinson's Settlement : Gant v. Hobbs*[1].

Where trustee dies the action must be against next trustee, not the legal representatives of the deceased trustee.

If decree is against the trustee personally all that can be seized is property over which he has a disposing power, that is his own property, not trust funds. Where the trustee limits his liability in order to make the trust estate liable, the plaintiff must state expressly that he is suing the defendant as trustee apart from the mere description of him as trustee. Plaintiff in this case may have sued personally. He has elected to sue on the basis of a contract made in the capacity as trustee.

Choksy, in reply.—Section 17 of the Buddhist Temporalities Ordinance provides for the election of "one or three trustees" for every temple. If trustees so appointed are a corporation then they are a corporation aggregate and must as a general rule act under its Common Seal. (*8 Halsbury, p. 309.*) The Ordinance makes no provision for a seal.

May 31, 1933. DRIEBERG J.—

The respondent, who is the Diyawadana Nilame and Trustee of the Dalada Maligawa, entered into a contract on March 15, 1929, with the appellants for the purchase of 2,400 casks of cement to be delivered in instalments between April and December, 1929. He was described in the contract as the Diyawadana Nilame and Trustee of the Dalada Maligawa. As provided in the contract the respondents drew on him two bills of exchange, each for Rs. 3,090, which he accepted but failed to meet. He later made certain payments and this action was brought to recover Rs. 3,799.46, the balance due from him. He did not defend the action, and on March 3, 1931, judgment was entered against him.

In the caption of the plaint he was described as the Diyawadana Nilame and Trustee of the Dalada Maligawa, and in the first paragraph of the plaint it was averred expressly that he was sued in that capacity, and he is so described in the decree.

On March 26, 1931, the appellants issued writ and the Fiscal reported that the respondent was possessed of no property. On August 3, 1931, as the result of a notice on him under section 219 of the Code, the respondent filed a list of property. I take it this is the paper on page 62 of the record, undated, signed by the respondent's proctors. It mentions as available for seizure and sale, Temple Hill estate of 68 acres 1 rood 19 perches, situated at Panwillatenne in the District of Kandy; it was

[1] (*1912*) *1 Ch. Div. 717.*

not stated whether it was Maligawa property or property of the respondent, but in his affidavit of May 16, 1932, the respondent says that in response to the section 219 notice he disclosed property of the Maligawa sufficient to meet the claim of the appellants. The appellants did not proceed against this land, and on November 24, 1931, they moved for a notice on the respondent under section 12 of the Insolvent Estates Ordinance of 1853. The notice was allowed and on December 23, 1931, there is a note that the notice was served. Failure to comply with this notice would amount to an act of insolvency. On December 2, 1931, the appellants re-issued writ and on several occasions seized the respondent's allowance as a member of the State Council. This went on until May 25, 1932, when the respondent moved that the prohibitory notice for the seizure of his allowance be recalled and that the appellants be directed not to proceed against the respondent in his personal capacity. This was the first time that the respondent claimed such immunity. The first appellant, Mr. C. P. Hayley, in his affidavit of June 4, 1932, makes it clear that the respondent treated this as a personal liability of his. The respondent raised no objection until May, 1932, to the seizure of his allowance. The appellants deferred taking proceedings under the Insolvency Ordinance on the promise of the respondent to settle the claim and he did not object to the appellants in the meantime seizing his allowance. He produced a letter to the appellants from Mr. D. E. Weerasooriya, Proctor, of February 16, 1932, stating that the respondent was devising a scheme for a satisfactory settlement with all his creditors and that this scheme would be submitted to the appellants before the 20th of that month. In September, 1931, he asked for time to pay, tendering as security an estate of his which however proved to be valueless owing to existing encumbrances. If the respondent under a mistaken view of the law thought he was personally liable and submitted to execution, that should not bar him from now denying his personal liability, if it be that he is not personally liable. The learned District Judge allowed the motion of the respondent of May 25, 1932, and the appellants appeal from that order.

The question before us is whether when a trustee contracts as trustee and is sued and has judgment entered against him as such, he can compel the judgment-creditor who seeks to execute his judgment against him personally to levy execution instead on the trust property. There is comparatively little local authority on the point. In *Maraliya v. Gunasekera*[1] the trustees of a certain body named the Saddarmodaya Society, who were the defendants, mortgaged property with the trustee of a Buddhist temple. The question for decision was whether the successor of that trustee could maintain an action on the bond. It was held that he could, but in the course of argument counsel for the defendants asked that judgment should be entered against them as trustees and that they should be freed from any personal liability. Sir Anton Bertram C.J. dealing with this request said, " It is impossible to concede this. They are personally liable on the bond, which also, though not quite logically, makes them liable as sureties. The law knows nothing of the idea of a trustee suing or being sued in his capacity of trustee.

[1] *(1921) 23 N. L. R. 261 on p. 265.*

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." This principle was referred to and approved in *Abadda v. Abadda*[1].

It is clear on the decisions in England that persons to whom a trustee has incurred liability have no original or direct right to claim payment out of the trust estate, and it follows therefore that the trustee cannot compel them to resort to the trust estate for payment. Most of the cases deal with business carried on by an executor under the authority of the will, the executor having then the character of a trustee. The principle on which liability of the trust estate is based is clearly explained in *In re Johnson: Shearman v. Robinson*[2] which deals with and explains earlier cases on the point. It was a case of a creditor of a business carried on by an executor under directions in the will. Jessel M.R. there stated that the creditor had the personal liability of the executor and also a right to be put in his place against the assets. The first right is his general right by contract because he trusted the executor or trustee and he has a personal right to sue him and to get judgment and make him a bankrupt. The second right he said " is a mere corrollary right as in those numerous cases in equity in which persons are allowed to follow trust assets. The trust having been devoted to carrying on the trade it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities ". If the trustee has no right to be indemnified and paid out of the trust property for the reason that he himself is indebted to the trust in a larger amount, then " the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee ". The same result follows if the liability incurred by the trustee is not one authorized by the trust.

It was contended for the respondent that the effect of his contracting expressly as trustee was to negative a personal liability; this cannot be, for a liability as trustee is a personal liability as explained in *In re Johnson: Shearman v. Robinson (supra)*.

It may be well to deal with the cases in which the manner in which a trustee can contract so as to exclude personal liability has been considered In *Watling v. Lewis*[3] there was an arrangement regarding the estate of two persons who were partners. The defendants as executors and trustees of the will of one entered into an agreement with the beneficiaries under the will of the other partner to pay the amount of a mortgage and to keep them indemnified from all claims by the mortgagee. The mortgage was one created by the partners but under the arrangement the land, and with it the liability on the mortgage, was to be taken over by the estate of the partner of which the defendants were trustees. The words of the deed were that the defendants " as such trustees, but not so as to create any personal liability on the part of them hereby jointly and severally covenant ". Warrington J. said that in such a case the question was whether the words " as trustees " merely limited the liability of the

[1] *(1927) 29 N. L. R. 255.* [2] *L. R. 15 Ch. Div. 548.*

[3] *(1911) 1 Ch. 414.*

covenantors or whether they in terms destroyed it altogether. An illustration of the former is afforded by the case of *Williams v. Hathaway*[1] where the vicar of a parish church and the incumbent entered into a contract for the building of a church, binding themselves as long as they should be entitled to apply a certain fund but "not to bind either of themselves after he or they should have ceased to be entitled to apply such fund". It was there held that the words limited the liability of the trustees and did not destroy their liability altogether. Dealing with the words of the covenant in *Watling v. Lewis* (*supra*) Warrington J. said "Now, in the case before me, do the words beginning 'as trustees' effectually limit the liability of the covenantors, or do they in terms destroy it altogether? In my opinion they destroy it altogether. In the first place the words referring to personal liability are 'but not so as to create any personal liability'—that is, no personal liability of any kind is to be created by this covenant. Then do the preceding words 'as trustees' show that the words that follow are not to be construed so widely as to destroy the personal liability altogether? Those words 'as such trustees' in a covenant of this sort have, in my view, no effect at all. A covenant by a man 'as a trustee' does not render his trust estate liable; it is a covenant by himself. It is exactly as if an executor entering into an obligation not merely in respect of some debt of his testator, but in respect of some obligation which he in his capacity as executor has himself undertaken since the death of the testator, covenants 'as executor' to pay. That is a covenant by himself. It was pointed out by Williams J. in *Williams on Executors*, referred to and cited in *Farhall v. Farhall*[2], that that is a covenant the only possible judgment on which must be *de bonis propriis*. So here the covenant by the defendants 'as trustees' is a covenant by them. The expression, therefore, 'as trustees' does not in my judgment in any way effectually limit the liability which the words of the covenant purport to create. The result is, I think, that first there is a covenant to pay the money and to indemnify the plaintiff, and that the parties have attempted to qualify that covenant by using words the effect of which, if effect is to be given to them, would be to destroy their personal liability. That being so, the words they have used can have no effect at law, and the liability remains."

I can find no reference in *Watling v. Lewis* (*supra*) to the earlier case of *Muir v. City of Glasgow Bank and Liquidators*[3] decided by the House of Lords in 1879. In that case certain trustees accepted as part of the trust estate shares in the bank, signing the deed of transfer as 'trust disponees' and accepting the stock 'as trust disponees as aforesaid'. In the register of shareholders they were entered 'as trust disponees' for the beneficiaries who were named. The liability of the shareholders, which was on the basis of a co-partnership, was unlimited. The bank suspended payment with great liabilities. It was held that the trustees were personally liable for all calls on them in respect of the stock they held. The decision proceeded to some extent on considerations regarding the liabilities of shareholders in such undertakings and it was held that a shareholder in the bank could not become a partner with a limited

[1] *6 Ch. Div. 544.* [2] *(1877) L. R. 7 Ch. App. 123.*

[3] *(1879) 4 A. C. 337.*

liability, or with any other liabilities than such as were borne in common by all the partners, and that the directors had no power to enter into a contract with shareholders which would limit their liability in the manner claimed. On the question whether the words used were sufficient to exclude personal liability is was observed by Lord Cairns that there was nothing to prevent a trustee by appropriate words from stipulating that he will make payment, not personally, but out of trust funds. Reference was made in this connection to *Gordon v. Campbell*[1], a Scotch case, the report of which is not available. From the reference to it in *Muir v. City of Glasgow Bank* (*supra*) it appears that trustees borrowed money for the purpose of the trust, granting a heritable bond over the trust property to secure the loan. They bound themselves '*qua trustees only*'. It was held that they were not personally liable. Lord Cairns said that this was such a case as he referred to where the contracting parties could stipulate excluding personal liability. But regarding the words 'as trust disponees', it was held that they did no more than mark the stock as the property of the particular trust and that they did not as in *Gordon v. Campbell* (*supra*) amount to an exclusion of personal liability. Lord Penzance said that " to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him, it would be necessary to show that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject matter—the intention of the parties to that contract was apparent that his personal liability should be excluded; and that although he was a contracting party to the obligation the creditors should look to the trust estate alone."

The question arose again incidentally in *Robinson's Settlement : Gant v. Hobbs*[2]. There trustees borrowed money and executed a mortgage in which they covenanted 'as such trustees but not otherwise' to repay the money. The lender was an unregistered money lender. Warrington J. held that in the circumstances the lack of registration did not effect the plaintiff's claim; on the question of the liability of the trustees he held, following his own decision in *Watling v. Lewis* (*supra*), that the words 'as such trustees but not otherwise' were repugnant to the covenant and void and that the trustees were personally liable. In appeal *Muir v. City of Glasgow Bank* (*supra*) and *Gordon v. Campbell* (*supra*) were cited and the Court was asked to overrule the decision in *Watling v. Lewis* (*supra*). The decision of the Court of Appeal proceeded on the ground that the whole of the transaction was void by reason of the non-registration of the lender's business under the Money Lender's Act; it was therefore not necessary to decide the question of the nature of the liability of the trustees. The only reference to it is in the judgment of Buckley L.J.; he said that that as the case might be taken to the House of Lords he felt he should express his opinion on the point, and his opinion was that it was such a case as Lord Cairns in *Muir v. City of Glasgow Bank* (*supra*) said was an express stipulation to exclude personal liability and of which *Gordon v. Campbell* (*supra*) was an illustration; the covenant he said was not one that bound the trustees personally.

[1] *Bell's App. 428.*

[2] *(1912) 1 Ch. Div. (C. A.) 717.*

Can it be said, to use the words of Lord Penzance in Muir's case, that on a proper interpretation of the contract viewed as a whole, its language, its incidents, and its subject matter, that the intention of the parties was to exclude the personal liability of the trustee? In my opinion the agreement cannot be so interpreted. The parties used no words as in *Gordon v. Campbell* (*supra*) and the case of *Robinson's Settlement* (*supra*). The respondent merely contracted as trustee. In *Muir v. City of Glasgow Bank* (*supra*), Lord Penzance, while recognizing the right of a trustee by express stipulation to exclude personal liability, said, "But meanwhile it will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability on those debts by merely showing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to show, in addition, that the creditors of the concern knew all along the capacity in which he acted.

"The case of an agent who acts for others is, of course, entirely different. His contracts are the contracts of his principal; and the liabilities from which, as a general rule, he is personally exempt, fall upon his principal who acted through him."

But even where there is an agreement to exclude personal liability it does not necessarily follow that it must be excluded. In Muir's case Lord Hatherley, dealing with a claim of a trustee that personal liability was excluded, said "But when a person says that you must see whether the person with whom he is dealing had power to deal with him on these terms". We have no proof of the purpose for which these goods were ordered. If as the learned District Judge suggests it was for the purpose of erecting a new building in the Maligawa premises, a question will arise whether that is one of the purposes set out in section 20 of the Buddhist Temporalities Ordinance of 1905, to which alone the income of the Maligawa can be applied. The respondent asks that the Court should order execution to be levied on the immovable property of the Maligawa without any proof before it that the contract was one for the purposes of the Maligawa and, if so, for a purpose authorized by the Ordinance. He asks that this should be allowed for the reason only that he has contracted as trustee and has been sued as such.

The respondent therefore is personally liable on this contract. It is not possible in these proceedings to give effect to the appellants' right, if they have such a right in the circumstances of this case, to be put in place of the trustee against the trust estate by subrogation. The appellants do not ask for this and I can find no case where a trustee has been allowed to compel a creditor to proceed against the trust property; this is a right which a creditor may exercise if he so desires. When such a right is sought to be exercised it must necessarily be in a proceeding in which all parties interested in the trust are represented, for it is only in such a proceeding that the right of the trustee to be indemnified can be determined and there can be no question of subrogation where this does not exist. Where a creditor has been allowed to claim by way of subrogation it has been in proceedings of this nature.

It was allowed in *Watling v. Lewis (supra)* and *Dowse v. Gorton*[1] which were administration suits to which all persons interested in the trust were parties. In *In re Raybould: Raybould v. Turner*[2], which was an action of another nature, Byrne J. allowed it on the ground that he had before him all the parties interested in defending the trust.

It is not possible in these proceedings to say whether the respondent is entitled to be indemnified for the cost of the cement bought from the appellants. The learned District Judge suggests the possibility of it being used for the purpose of the new building in the Dalada Maligawa grounds. As he remarks, there is no proof of this but he thought he was entitled to presume that the trustee bought it for a legitimate purpose. I cannot agree with the trial Judge that this is a presumption which can be drawn under section 114 of the Evidence Ordinance. It is sufficient to say that there is no proof that it was used for this building and even if it was, it does not necessarily follow that it is an expense for which the respondent has a right to be indemnified. These are matters which can only be determined in proceedings such as I have mentioned.

I agree with my brother de Silva that the trustee is not a corporation. The appeal is allowed. The order of the District Court of September 12, 1932, is set aside. The appellants are entitled to proceed with execution against the respondent personally. The respondent will pay the appellants the costs of this appeal and of the proceedings in the District Court consequent on his motion of May 25, 1932.

DE SILVA A.J.—

The facts of this case are set out fully in the judgment of my brother Drieberg, and I need not repeat them. As stated by him the question before us for decision is, whether when a trustee contracts as trustee and is sued and has judgment entered against him as such, he can compel the judgment-creditor who seeks to execute his judgment against him personally to levy execution instead on the trust property. When a party contracts with a trustee he has as a general rule the same rights against the trustee as though the latter were not a trustee at all. If the trustee has a right to be indemnified by the trust estate in respect of the liability incurred by him to another party then the latter has, in addition, a right to be placed in the trustee's place against the assets of the trust estate. This additional right can be asserted only in proceedings in which the administration of the trust is being dealt with, with notice to all parties interested in the trust. The Court must be satisfied in such proceedings not only that the trustee is liable to the party contracting with him, but also that the trustee has a right of indemnity against the trust estate in respect of such liability. If, for instance, it is found on going into accounts that the trustee is the debtor of the estate, then the person to whom he is liable will have no right against the estate itself. Again if the transaction entered into by the trustee is such that no right of indemnity arises, for example, if the transaction is one unauthorized by the trust, then the creditor has only the personal liability of the trustee.

[1] *(1891) A. C. 190.* [2] *(1900) 1 Ch. 199.*

These principles are to be found in the judgment of Jessel M.R. in *In re Johnson: Shearman v. Robinson*[1] which was decided in 1879, and which reviewed earlier decisions.

The position being generally as I have set out above, the question arises by what means and to what extent a trustee can limit the liability I have referred to. In the case of *Robinson's Settlement: Gant v. Hobbs*[2] where the trustees contracted 'as trustees but not otherwise' Buckley L.J. relying on the cases of *Muir v. City of Glasgow Bank*[3], and *Gordon v. Campbell*[4], held that the trustee had not incurred 'personal liability'. In the case of *Muir v. City of Glasgow Bank* (*supra*) (a House of Lords decision) Lord Cairns thought that an executor who contracted 'as executor and as executor only' had not incurred similar liability, and in *Gordon v. Campbell* (*supra*) the position of trustee, who contracted 'as trustees *qua* trustees only' was held to be the same. I venture to think that all that was decided in these cases was that trustees who contract in adequate language can protect their private property in that their liability is limited to the extent to which they have a right of recourse to the trust property. Once they redeem their liability to the creditor to such extent they are not liable any further. I venture to think also that to the extent indicated their liability was personal and that the creditor could not have proceeded against the trust estate except in the manner I have set out in paragraph 1. Lord Blackburn in *Muir v. City of Glasgow Bank* (*supra*) said "I have myself no doubt that if individuals enter into a contract because they are trustees, and for the benefit of the trust, it would be prudent in them to stipulate that, though they bind themselves to see that the trust funds are properly applied to fulfil that contract, their contract shall extend no further, and that they will not be personally liable to make good the deficiency, if any; and if they express such a limitation with sufficient clearness, and the other contracting party (being *sui juris*) accepts such a limited engagement, he cannot call on the trustees to do more than to fulfil that limited engagement".

However that be, it appears from the cases I have referred to that the mere use of the words 'as trustees' in a contract, although they make clear to the parties the capacity in which trustees contract, places no limitation whatever on their ordinary liability. Lord Penzance in *Muir v. City of Glasgow Bank* (*supra*) said "But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to show that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject matter—the intention of the parties to that contract was apparent that his personal liability should be excluded."

The words 'as trustee' do appear on the face of the contract and on the face of the decree. No attempt was made by the defendant to ask for a decree limiting his liability. It is clear that he was acting or purporting to act in the capacity of a trustee, but there is nothing as far

[1] *(1880) 15 Ch. D. 548.*
[2] *(1912) 1 Ch. D. 717.*
[3] *(1878-9) 4 Appeal Cases 337.*
[4] *1 Bell's App. 428.*

as I can see in the language, incidents and subject matter of the contract and decree which limits his liability. The soundness of the principle of law involved is illustrated by the facts of this case. The defendant has filed a list of temple property and he contends that this property is liable to execution and that his private property is not. The defendant did not contest the claim. Even if he had contested it I doubt whether the scope of this action would have permitted an examination of the question whether the defendant has a right of indemnity against the temporalities of which he is trustee in respect of the transaction he has entered into with the plaintiffs. It is vital for the proper protection of the Buddhist temporalities that this question should be fully explored by a competent Court in proper proceedings before they are held to be liable. There may be other difficulties in issuing execution against the temporalities (as the defendant has invited the Court to do) but into these I need not enter as I am of opinion, for the reasons given, that on the decree in this case no execution can issue against the trust estate.

A point was made in the course of the argument that the words 'as trustee' appear not only in the contract but also in the decree. In the reported cases which we have considered the words never occurred in a decree. I do not think this makes any difference. As I have said before trust property can be made liable only in proceedings dealing with the administration of the trust, in which the accounts of the trustee are gone into, in which it appears that the trustee is not a debtor of the estate and that he is entitled to an indemnity from the trust estate. The position of a creditor against the trust estate can never be higher than that of the trustee, and the position of the trustee must be explored in proper proceedings with notice to all parties interested before a creditor of the estate is allowed to reach trust property. Now the proceedings under consideration are not of this nature and it appears to me clear that no decree entered in these proceedings can affect trust property even though the defendant is described 'as trustee'. This description will only entitle the creditor to pursue his claim against the trust property in other proceedings if in fact he finds that the conditions necessary for such pursuit exist. Whether he does so or not the personal liability of the trustee remains unimpaired, and the trustee cannot prevent a creditor from proceeding against him personally.

One other point was dwelt upon in the course of the argument. Section 30 of the Buddhist Temporalities Ordinance, No. 8 of 1905, enables the trustees to sue and be sued as trustees. The section reads:— "It shall be lawful for the trustee to sue under the name and style of 'trustees of (name temple)' for the recovery of any property vested in them under this Ordinance or of the possession thereof, and for any other purpose requisite for the carrying into effect the objects of this Ordinance. They shall also be liable to be sued under the same name and style, but shall not be personally liable in costs for any act *bona fide* done by them under any of the powers or authorities vested in them under this Ordinance."

The question was considered whether this section and the Ordinance as a whole made the trustees a corporation with power to contract as such. If it does, then the property of the corporation and not the property of

the persons constituting it would be liable in execution when trustees enter into a transaction in a corporate capacity. In the first place it is to be noted there is no express provision such as is to be found in the Societies Ordinance, 1891 (section 9 (1)), the Co-operative Societies Ordinance, 1921 (section 17), the Nuwara Eliya Board of Improvement (Amendment) Ordinance, 1924 (section 4), and a number of other Ordinances making the trustees a corporation. Such provision is not absolutely essential so long as the intention to create a corporation is evident from the Ordinance (*8 Halsbury, p. 320*). Is such an intention evident ? Section 17 of the Ordinance provides for the election of 'one or three trustees' for every temple. If trustees so appointed are a corporation then they are a corporation aggregate and " can as a general rule only act or express its will by deed under its common seal " (*8 Halsbury, p. 309*), but the Ordinance does not provide for such action. No seal is provided. The non-existence of a seal in the case of a body alleged to be a corporation, though not conclusive is cogent evidence against incorporation (*8 Halsbury, p. 309*). Then again if the trustees are to be regarded as a corporation the only properties possessed by it would be the temporalities. The view that the trustee is a corporation would therefore take away from the temporalities the protection ordinarily afforded by law to trust property, namely, that the right of a creditor of a trustee against trust property is no higher than that of the trustee. The corporation could incur a debt, and the temporalities would be made liable without the interposition of an inquiry by Court as to whether or not the debt was properly incurred on behalf of the trust estate. I do not think the legislature can be presumed to have taken away this protection from the Buddhist temporalities when, as it appears from the Ordinance, it has not done so by express provision.

For these reasons I think the appeal must be allowed with costs.

Appeal allowed.