Present: Wood Renton A.C.J. and Ennis J.

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APPUSINNO *v.* BALASURIYA.

169—D. C. Matara, 4,393.

Action by trustee of a Buddhist temple—Expiration of time for which plaintiff was elected trustee—Provisional appointment of same person as trustee for purposes of this case—Appointment irregular—Continuation of action after plaintiff ceases to be trustee—Prescription—Cause of action—Trust.

The plaintiff sued the defendant as trustee of a Buddhist temple for the recovery of a sum of money, but before judgment he ceased to be trustee on the expiration of the term for which he was elected, but he was appointed provisional trustee for the purpose of this action.

Held, that the Buddhist Temporalities Ordinance gave no power to appoint a provisional trustee when the office became vacant by expiration of time, and that the plaintiff had no status to continue the action the moment he ceased to be trustee.

The principle that a case must be decided as at the time of the institution of the suit cannot be applied to this case.

THE facts are fully set out in the judgment of the District Judge (G. W. Woodhouse, Esq.):—

This is an action by the trustee of the Jayamaha temple at Matara to recover a sum of Rs. 550 as "sanghika" property. The money is said to have been left by Dammananda Terunnanse, chief incumbent of the temple in question, and it was decided by all persons concerned that the money should be devoted to the maintenance and improvement of the temple. And, for this purpose, it was handed to Don Mathes Balasuriya, who was at that time the chief dayaka of the temple. At that time there was no trustee, as the Buddhist Temporalities Ordinance had not yet come into operation. When Don Mathes Balasuriya was appointed trustee under the Ordinance, which was proclaimed on November 15, 1889, by virtue of section 20 of the Ordinance, this money vested in him as such trustee.

Don Mathes, however, did not use the money, and at his death the money remained in the box. The executors of Don Mathes's will, who were not themselves appointed trustees for this purpose, handed the box containing this money to Don Mathes's sole legatee, his wife.

Before Don Mathes died a dispute appears to have arisen about the chief incumbency of the Jayamaha temple, and this Court decided in favour of Aggasara against Somananda, the fifth defendant, but the fifth defendant was permitted to continue in residence in the temple. Don Mathes had asked who should have the custody of the money, but the Court did not reply. Clearly the trustee was bound to retain the money until he handed it to his successor.

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It is alleged by the defendants, and admitted by the fifth defendant, that fifth defendant was given the money by Don Mathes's wife. There can be no question that she had no right to give it to fifth defendant, neither had the fifth defendant any right to spend it in building a library or any other thing. The right to dispose of the money rests with the trustee. It appears that the fifth defendant pulled down some rooms and erected a substantial building in their site. By what authority he did it, or whether that was necessary for the improvement of the temple, does not appear. So far as I can see, he appears to have done all this for his own convenience and comfort. Besides, money appears to have been collected from the congregation for the purpose, and there is no account or reliable evidence to show that the buildings were not built entirely out of money so collected. I am not in a position to hold that the Rs. 550 which fifth defendant wrongfully obtained from Don Mathes's widow was employed in the improvement of the temple. In my opinion Punchibaba Hamine's estate must make good the money which is subject of this case; and on the principle known as "following the trust fund," the money is recoverable from every person who derived benefit from her estate.

It must be held that when Punchibaba Hamine chose to take the money out of the box and use it as she did, she "mixed up the trust fund with her own money." That being the case, we must apply the rule laid down by Jessel M.R. in the case *In re Hallett's Estate*,[1] and hold that all disbursements so far out of the estate has been of her own property, and the trustee of the temple has the first claim on any balance that remains of the estate of the deceased Punchibaba Hamine, and if that does not suffice, the trustee can follow the trust fund into the hands of the legatees and even the creditors of the deceased.

The fifth defendant has questioned the right of the plaintiff to maintain this action on two grounds: (1) He has not been duly appointed; (2) he is no longer in office.

As to the first contention, we have it in evidence that plaintiff was duly elected at a meeting of the District Committee by a majority of the members. The meeting appears to have been convened in the manner provided by law. The fact that the notice was signed by only one member does not matter, seeing that the meeting was called at the instance of the committee. I hold that the plaintiff is the duly elected trustee of the Jayamaha temple.

(*a*) As to whether he is at the present moment *functius officio*, although he was elected for a fixed period, which terminated on December 31, 1912, after he instituted this case, I find he has since been re-elected, and for all purposes he is still trustee of the temple.

The question of prescription presents some difficulty. Was the breach of trust fraudulent? If so, prescription does not run. The evidence shows that the widow, Punchibaba Hamine, favoured fifth defendant against Aggasara, who was the chief incumbent. The act of the widow savours of fraud, and one might hold that on that ground the claim is not prescribed. But even in the absence of fraud no prescription begins to run until a cause of action has arisen; so long as the money remained with Mathes, there was no reason to suppose he did not mean to apply it to the purpose it was intended for. Even in the hands of Punchibaba

[1] *13 Ch. D. 696.*

Hamine it remained as a trust fund, and she and fifth defendant were aware that it was such a fund. The cause of action really arose when Punchibaba Hamine failed to hand over the money to the trustee when he demanded it. Clearly, therefore, the claim has not become prescribed.

Let a decree be entered—

(1) As against the executors of the will of the deceased Punchibaba Hamine, making her estate liable for the payment of this sum of Rs. 550 and costs.

(2) If the balance to the credit of the estate be insufficient, the amount or so much of it as has not been satisfied to be recovered from the first, third, fifth, sixth, and seventh defendants with costs.

The action as against the second defendant and these defendants personally is dismissed, because they did not personally benefit under Punchibaba Hamine's will, but they shall have no costs.

A. St. V. Jayewardene, for the first defendant, appellant.

E. W. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

July 8, 1913. ENNIS J.—

In this case three points of law only were argued on the appeal:—

(1) Whether the plaintiff was entitled to maintain the action?

(2) Whether the first defendant should have been substituted?

(3) That the case is prescribed.

The present plaintiff was trustee of the Jayamaha temple at the time he was substituted for the original plaintiff, who previously held the office of trustee. Before the case was concluded the present plaintiff ceased to be the trustee of the temple on the expiration of the term for which he was elected. A few days before judgment, however, he was appointed a provisional trustee for the purpose of the action. In the case of *Weerakoon v. Appuhamy* [1] it was held that the Buddhist Temporalities Ordinance, No. 8 of 1905, gave no power to appoint a provisional trustee when the office became vacant by course of time, and that there was a power to appoint a provisional trustee on the happening only of the events specified in section 34. On the authority of that case the provisional appointment of the plaintiff was void.

It was urged that the action should be dismissed, as the plaintiff could not maintain it. In my opinion, however, as the plaintiff was able to maintain the action at the time he entered the suit, the proceedings to the time he ceased to be trustee are good, and the action should not be dismissed altogether. The principle that a case must be decided as at the time of the institution of the suit seems to me to have no bearing on this point. The action was by an individual as trustee, and the moment he ceased to have that status, he could not continue the action to bring it to determination.

[1] *(1911) 14 N. L. R. 444.*

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On the second point, I am of opinion that the first defendant was rightly substituted. He was one of the executors of Don Mathes Balasuriya, in whose keeping as trustee the sum now claimed was at the time of his death. It passed into the hands of his executors, and from the answer of the first defendant it is clear that he was aware at that time it was trust money, and he would be responsible if he paid it over to the wrong parties, as he did in this case.

The third point is more difficult. It was urged on the authority of *Varliano Brothers v. The Bank of England*,[1] and a statement by Lord MacNaghten in the Privy Council judgment in *Corea v. Appuhamy*,[2] that the entire law of prescription in Ceylon is now contained in Ordinance No. 22 of 1871, which superseded Ordinance No. 8 of 1834, which was enacted "to assimilate, amend, and consolidate the law of prescription of Ceylon." Section 11 of Ordinance No. 22 of 1871 states that "no action shall be maintainable in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of the Ordinance, unless the same shall have been commenced within three years from the time when such cause of action shall have accrued." The Ordinance makes no express mention of prescription against trustees, or even that fraud would take a case out of the operation of the Ordinance. In the present case, however, I do not think I need consider this point, as I am unable to see that the question of prescription can arise. The first defendant was aware of a trust when he took the money found among the effects of the testator, and this being so, no cause of action would accrue until demand for payment had been made and refused. I have looked at the evidence and cannot find that this was done.

In my opinion the temple authorities are much to blame for not taking any steps for many years after the death of Don Mathes to recover the money, and for leaving the office of trustee vacant for long periods. I am unable to agree with the District Judge that the action of Mathes's widow, Punchibaba Hamine, in paying the money to the particular person she favoured as incumbent of the temple, savoured of fraud. There is no evidence that either the executors of Mathes or his widow knew whether the trust was in favour of the temple or of the incumbent. The person the widow thought was the true incumbent claimed the money and she paid him. I can see no reason to doubt the *bona fides* of the executors or of the widow in dealing with the money. In fact, it appears that Mathes himself had doubts as to whom it should be paid, and in some other proceedings asked for the direction of the Court as to its disposal, but no order was made. In the circumstances, I think it fair that the defendants should not be called upon to pay the costs of the plaintiff in the action.

[1] *(1891) 16 A. C. 144, 145.*

[2] *(1911) 15 N. L. R. 77.*

I would set aside the decree of the lower Court and send the case back for the substitution of a trustee in the place of the present plaintiff, and for further proceedings, with the condition that the defendants should not be called upon to pay the costs to date of the plaintiff in the action. I would allow the appellant the costs of the appeal.

WOOD RENTON A.C.J.—

I have had the advantage of reading the judgment of my brother Ennis, and I agree to the order which he proposes.

I would only express the hope that the parties to this wretched litigation, which has been going on since 1908, may have sufficient common sense and good feeling to settle it among themselves without the necessity for any further proceedings in a Court of law.

Set aside.