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Although she may be in fault, there are others besides herself to be considered, and it would be unjust and cruel to make them suffer for her misconduct.

On the other hand, when the woman has been only once married there is nobody to be considered but herself and the children, and as the latter are the offspring of the husband, it is probably immaterial, so far as they are concerned, to which parent the property goes, as they would eventually inherit from one or the other."

My conclusion, therefore, is that in the case of a divorce between an *eindaunggyi* couple on account of the wife's adultery the wife loses all her right in the *hnapazon* property.

The result is that the appeal fails and is dismissed with costs.

ORIGINAL CIVIL.

Before Mr. Justice Braund.

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Apl. 9.

MAHANTH SINGH
v.
U AYE AND OTHERS.*

Contract by trustees—Personal liability of trustees contracting—Exclusion of personal liability by express or implied term of the contract—Effect of contracting merely "as trustees"—Indemnity out of the trust estate—Position of executors compared—Creditor's remedies against trustees or executors—Trustee's right of indemnity against trust estate an asset of trustee—Creditor's right to such asset by subrogation—Suit for money against contracting trustees—Change of trustees—Claim against new trustees.

There is, as regards the liability of the contracting parties, normally no difference between a contract to which *A* is a party in his capacity as "a trustee" and one to which *A* is a party in his personal capacity. In either case the opposite contracting party contracts with *A* and with no one else; and, in the absence of an express or clearly implied term of the contract itself that the personal liability of the contracting trustee is to be excluded, no limitation upon *A*'s personal liability arises by virtue only of his being in fact, and by his being described as, a trustee. In either case the trustee

* Civil Regular Suit No. 276 of 1934.

is the contracting person. If he is a trustee he has, or may have, as between himself and the trust estate, a right of indemnity against the trust estate if the contract made, or the liability incurred, is one which he had power to make or incur under the terms of the instrument under which he is a trustee. It is, however, open to a trustee to exclude his personal liability. But that can only be done by an express stipulation to that effect in the contract itself, or in such circumstances as make it quite clear that the parties were consciously contracting upon that basis as part of the contract itself.

In re Johnson, 15 Ch.D. 548 ; *Lumsden* v. *Buchanan*, (1865) H.L. 4 Macq. 950 ; *Muir* v. *City of Glasgow Bank*, 4 Ap. Ca. 337—*referred to.*

Where a creditor obtains a decree against a trustee or an executor with whom he has contracted and such trustee or executor has a right of indemnity against the estate, that right of indemnity becomes one of the assets of the trustee or executor accessible to the creditor, whether by subrogation or otherwise. But the personal liability of the trustee or the executor must first be recognized and only then can any right of indemnity arise upon which the doctrine of subrogation can operate.

Re Blundell, 44 Ch.D. 1 ; *Ex parte Garland*, 10 Ves. 110 ; *Gallagher* v. *Ferris*, 7 L.R. Ir. 489 ; *Jennings* v. *Mather*, (1901) 1 K.B. 108 ; *Re Reybould*, (1900) 1 Ch. 199 ; *Strickland* v. *Symons*, 26 Ch.D. 245—*referred to.*

The four trustees of a pagoda entered into an agreement with the plaintiff whereby the plaintiff undertook to carry out certain building operations in connection with the pagoda. He sued the trustees (and their guarantor) for the price of the work done. During the pendency of the suit the four contracting trustees ceased to be the trustees of the pagoda and new trustees were appointed. Thereupon the plaintiff amended his plaint and substituted the names of the new trustees as defendants in place of the old trustees and proceeded with the suit.

Held, that the plaintiff had no cause of action against the new trustees and that his claim, if any, could only be enforced against the four trustees with whom he had made the contract.

Aiyangar for the plaintiff.

E Maung for defendants 1, 2, 4, 6, 7, 8.

Kyaw Htoon for the 5th defendant.

Kyaw Din for the 9th defendant.

BRAUND, J.—This is a suit by an Indian contractor named Mahanth Singh against the trustees of the Kyaikkasan Pagoda, Thingangyun, and another gentleman the last mentioned of whom is sued as an alleged guarantor. As the suit was first constituted

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by a plaint dated the 19th May, 1934, there were, in addition to the guarantor, four other defendants, U Po Ni, U Hla Bu, U San Hein and U Po Chon. Those four gentlemen were at that date the trustees of the Kyaikkasan Pagoda. In 1935 those four defendants ceased to be the trustees of the pagoda and new trustees were appointed under an order of the Insein District Court in the middle of that year. Upon that happening the plaintiff applied to amend his plaint by striking out the four old trustees and substituting the eight persons who were appointed trustees in their places. The result is that the first eight defendants, as the parties now stand, are the present trustees, having been appointed since the suit began. The date of the contract sued upon is the 1st February, 1933, and was made between the plaintiff of the one part and the four then trustees of the pagoda, *viz.*, the four original defendants to the suit, of the other part.

In those circumstances it occurred to me at a very early stage of the suit to inquire whether there was any cause of action at all as against the first eight defendants as the record now stands. The reply which in effect I received at that stage was that they were being sued "in their capacity as trustees of the pagoda," the liability having shifted from the old trustees to the new trustees. This matter raises in a concrete form a question which I venture to think is the subject of a profound prevailing misconception current in this province and I think it is right, and will be of service to the profession, if I point out wherein, in my view, this misconception lies.

There is, in my view, so far as the liability of the contracting parties goes, no difference between a contract to which *AB* is a party in his capacity as "a trustee" and one to which *AB* is a party in his

personal capacity. In either case the opposite contracting party contracts with *AB* and with no one else; and, as far as I can see, in the absence of an express or clearly implied term of the contract itself in that behalf, no limitation is to be placed upon *AB*'s personal liability by virtue of his being in fact, and by his being described as, a trustee. In either case he is the contracting person. The only difference is that if he is a trustee he has, or he may have, as between himself and his trust estate, a right of indemnity against the estate if the contract made, or the liability incurred, is one which he has power to make or incur under the terms of the trust instrument under which he is a trustee.

The proposition is to my mind one so elementary that, like other elementary propositions, it is difficult to find authority for it. I think, however, that the point becomes clearer if it is considered what sort of a decree can be passed upon such a contract as I have mentioned. As I understand it, except in the single case to which I will refer in a moment, there is no other decree known to the law except a decree against a person or persons or a corporation. If there is a decree against *AB* as a contracting party under such a contract as I have mentioned, it must be a decree against *AB* and I know of no power whatever which could authorise a decree to be passed against *AB* "as a trustee" or "limited to his trust estate." It would almost seem that it is contended that there can be some form of a decree against "the trust estate" as opposed to a decree against a person. The single exception which I have mentioned is the one provided for by statute in the case of executors. That is a statutory exception introduced by section 52 of the Code of Civil Procedure which provides for the distinction long known to the English

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law, drawn in the case of an executor, between a judgment against him *de bonis propriis* and *de bonis testatoris*. Where an executor is sued as executor upon a liability *of his testator* and pleads either *nulla bona* or *plene administravit* then he is entitled to a decree *de bonis testatoris*, that is to say, limited to the assets of the testator. That is reproduced by section 52 of the Code of Civil Procedure which provides :

> "Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased it may be executed by the attachment and sale of any such property."

That case is wholly different in principle from the case of a trustee who contracts. Neither is there any such statutory exception as in the case of an executor. And there is no reason why there should be. An executor stands in a wholly different position. He has, so to speak, inherited by virtue of his office the liabilities contracted, not by himself, but by his testator. A trustee contracts his own liabilities and it matters not in what capacity he contracts them. So far as the opposite contracting party is concerned it would, as a practical matter, bring dealings with a trustee to a standstill if it were necessary for a person so dealing to enquire what the condition of the trust estate was before he entered into a contract with him. If a man contracts with a trustee, in my judgment, he contracts with him as an individual and upon no different footing from a contract with any other individual.

The matter is made even clearer when the remedies of creditors are considered. Even in the case of an executor what are the remedies of creditors ? The case of an executor is an *a fortiori* case. If

an executor (who apart from his administrative functions as executor is in no different position from that of a trustee) contracts debts after the death of his testator, there is, I think, no doubt that he is personally liable, no matter whether the terms of the will authorise him to contract them or not. The only relevance of the question whether he has authority or not is to ascertain whether, as between himself and his estate, he can have recourse to an indemnity. If the testator leaves a business, the remedy of a creditor of the business for a debt contracted after the death is against the executor and not against the estate: *Farhall* v. *Farhall* (1); *Re Morgan, Pillgrem* v. *Pillgrem* (2); *Strickland* v. *Symons* (3); *Re Evans, Evans* v. *Evans* (4) and *Dowse* v. *Gorton* (5). Moreover, the creditor's remedy is by way of a personal action against the executor and not by way of an administration decree against the estate: *Owen* v. *Delamere* (6). An executor carrying on his testator's trade—whether or not the terms of the will authorise it—is personally liable for debts so contracted, although he avowedly acts as executor: *Labouchere* v. *Tupper* (7). It goes so far that in execution of a judgment against an executor upon a debt incurred in the carrying on of the testator's business, the creditor cannot have recourse even to the assets of the estate although they are in the hands of the executor in the course of the carrying on of the business. His remedy is against the executor personally and not in any way against the estate: *Re Morgan, Pillgrem* v. *Pillgrem* (2). And executors accepting new shares in a company

(1) 12 Eq. 98.
(2) 18 Ch.D. 93.
(3) 26 Ch.D. 245.
(4) 34 Ch.D. 597.
(5) 40 Ch.D. 536.
(6) 15 Eq. 134.
(7) 11 Moo. P.C.C. 198.

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are personally liable for calls even though they accept them as executors on behalf of their testator's estate : *Re Leeds Banking Co., Fernside and Dean's* Case (1).

I have I think said enough to show that in the case of an executor, apart from the limited form of judgment which I have already mentioned, there is no such thing as a capacity in him to contract " as executor " apart from his personal capacity. In the case of a trustee the case is in no way different. No question there arises of inheriting an existing debt from a deceased settlor. The debt is incurred by the trustee and by no one else. As I have said before it matters not at all in my view that it is one contracted on behalf of the trust estate any more than it matters that a debt by an executor is incurred on behalf of his testator's estate. If in the course of executing his trust a trustee contracts, he contracts, in my view, as an individual. I do not say for a moment that it is not possible to introduce into such a contract an express stipulation as part of the contract itself that the trustees are not to be liable as individuals and that their liability is to be in some way limited. That is a different matter altogether. But it would have to be, I think, the subject of a special and clearly expressed or implied bargain.

I have said that a creditor's remedy is against the executor or the trustee personally and not against the estate. The right of a creditor to be subrogated to the executor's or the trustee's right of indemnity constitutes no exception to this. Indeed, it is the logical outcome of this principle because it is not until the personal liability of the executor or the trustee has been recognized that any right of indemnity can arise on which the doctrine of subrogation can operate.

(1) (1865) 1 Ch. Ap. 231.

I should not dispute for a moment that, if a decree be obtained against an executor or against a trustee giving rise in such executor or trustee to a right over of indemnity against the estate, that right of indemnity will become one of the assets of the executor or trustee available for the creditor, whether by subrogation or otherwise. It goes no farther than that. *Re Johnson, Shearman* v. *Robinson* (1) ; *Ex parte Garland* (2) ; *Gallagher* v. *Ferris* (3) ; *Strickland* v. *Symons* (4) ; *Re Blundell, Blundell* v. *Blundell* (5) ; *Re Raybould* (6) ; and *Jennings* v. *Mather* (7). This is to my mind so elementary that I should have hardly ventured to make it the subject of a considered judgment but for what I think to be a prevailing misconception, which I have more than once met with.

I desire to cite one or two of the English authorities to which I have been referred by Mr. Kyaw Din which put the matter in clearer language than I could have hoped to employ myself.

In *Muir* v. *City of Glasgow Bank* (8) Lord Penzance speaks thus :

"Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided. A general consideration of this character has, I think, largely pervaded the reasoning upon which the exemption of the Appellants from personal liability has been based and enforced in argument.

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,

(1) 15 Ch.D. 548.
(2) 10 Ves. 110.
(3) 7 L.R. Ir. 489.
(4) 26 Ch.D. 245.
(5) 44 Ch.D. 1.
(6) (1900) 1 Ch. 199.
(7) (1901) 1 K.B. 108.
(8) (1879) 4 App. Ca. 337, 368.

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in the course of which trade debts to third persons arose, could not avoid liability on those debts by merely shewing 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 shew, 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 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 shew 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."

In *Lumsden* v. *Buchanan* (1), Lord Westbury says this :

"By the law of England, if an executor or trustee joins a partnership or Company for the purpose of investing or employing usefully part of the estate of the testator or of the trust, he is personally liable for all the consequences of his engagement ; for the law assumes, and rightly, that he depended on the condition of the assets or trust estate for his own security, and if he acted within the scope of his authority he is left to seek his indemnity from the trust estate or the beneficiaries. And this is both just and expedient. If it were held that persons entering into contracts with a trustee were really contracting, not with the individual, but with the trust estate, it would be necessary to examine the state and amount of the trust property and the powers of the trustee before any contract was entered into ; and the like examination would be equally indispensable after the contract was made ;

(1) (1865) H.L. 4 Macq. 950-952.

for, as the trust estate would be bound, it could not be dealt with or disposed of until the consequences of the contract were ascertained."

I should not, of course, dispute, as I have said, that a case is possible in which a trustee contracting might so express himself that, as a term of the very contract, he expressly excludes his own liability. That is another matter, but it could only arise as an express or implied term of the contract itself and could not possibly, in my view, arise from the mere circumstance that the contracting party is a trustee or is described as such.

In *In re Johnson, Shearman* v. *Robinson* (1) Sir George Jessel M.R. says :

"With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorised by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, 'I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets ; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.' The first right is his general right by contract, because he trusted the trustee or executor ; he has a personal right to sue him and to get judgment and make him a bankrupt."

Those cases I think—all of them decided by great Judges—make the matter as clear as it could possibly be made. They are English cases but I cannot conceive that there is the least difference between the position of a person who contracts in this country and that of one who contracts under the English law unless an express difference is to be found statutorily provided by the Indian Contract Act. I can find no such difference.

(1) 15 Ch.D. 548.

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In the result, therefore, I have come to the conclusion that the case as against the first eight defendants is wholly misconceived. They were not parties to this contract and they never had and they do not now have any liability upon the contract. The fact that the assets of the trust estate are now vested in them is, for the present purpose, quite immaterial. The plaintiff, if he is right in his claim, is a mere creditor of those persons with whom he personally contracted, namely the four original trustees, and he is not a creditor of the trust estate. There is no such thing. Upon that view of the matter the first eight of the defendants to this suit are neither necessary nor proper parties to the suit. An administration of the trust estate may possibly become material hereafter when, in the event of any question of indemnity arising in favour of the four original trustees, they come to enforce it ; but no such question arises at present. In these circumstances, therefore, the suit must be dismissed as against the first eight defendants with costs. I think that these eight defendants were entitled to appear by advocates of their choice. Six of them have appeared by U Aye Maung and in their case I shall assess their costs at twelve gold mohurs. One of them has appeared by U Kyaw Htoon and I shall assess his costs at ten gold mohurs. The remaining one has not chosen to appear and accordingly he has not incurred any costs in the suit and in his case there will be no order for costs.

That brings me, therefore, to the case against the ninth and only remaining defendant ; and a difficult case it is.

[His Lordship then discussed the evidence and held that the 9th defendant was a guarantor and liable as such to the plaintiff.]