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The Corporate Trustee Becomes an Insurer

Ella Graubart

THE CORPORATE TRUSTEE BECOMES AN INSURER

ELLA GRAUBART*

Recently the Supreme Court of Pennsylvania injected into the law of trusts a principle so foreign to the basic concept of the trust relationship, that it becomes important to examine the issues involved.

In the cases before the court[1] a trust company had entered into agreements with its customers, by which it accepted trust funds for investment in such securities as the law of Pennsylvania permitted for the investment of trust funds, and guaranteed the payment of interest at 5% and the return of the principal sum upon notice of revocation of the agreement.

The agreements in the four cases before the court vary in phraseology, but the unmistakable import of each is that the trust company guaranteed a specified rate of interest on the investment, and the return of the cash invested upon revocation of the agreement by either the donor or the trust company.

Under each agreement, the trust company being limited in its investment of the cash received to those securities proper for the investment of trust funds,[2] invested the money received in mortgages.

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*A.B., Hunter College, New York City, 1917; LL.B., University of Pittsburgh Law School, 1927; admitted to practice, 1927; member of the firm of Patterson, Crawford, Arensberg & Dunn, Pittsburgh, Pa.

[1]Robert's Trust Estate, 316 Pa. 545; Whitty's Trust Estate, 316 Pa. 551; Frey's Trust Estate, 316 Pa. 551.

[2]Act of 1917, P.L. 447, Sec. 41a, as amended by Act of 1923, Mar. 19, P.L. 23, Sec 1; 1923, June 29, P.L. 955, Sec. 1; 1929, April 26, P.L. 817, Sec. 1: "When a fiduciary shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession or under his control, and the interest, profits, or income whereof are to be paid away or to accumulate, or when the income of real estate shall be more than sufficient for the purpose of the trust, such fiduciary may invest such moneys in the stock or public debt of the United States; or in the public debt of this Commonwealth; or in bonds or certificates of debt constituting the direct and general obligation of any of the counties, cities, boroughs, townships, school districts or poor districts of this Commonwealth, or in first mortgages on real estate in this Commonwealth, securing bonds or other obligations not exceeding in amount two-thirds of the fair value of such real estate; or in ground rents in this Commonwealth; or in bonds, payable not more than twenty years after date, of one or more individuals, secured by a deed or deeds of unencumbered real estate in this Commonwealth conveyed to a corporation organized under the laws of this Commonwealth and authorized to act as trustees, in trust for the benefit of all such bondholders, but the total amount of any such bond issue shall not exceed two-thirds of the fair value of the real estate securing it, and the trustee shall not be exempted, by contract or otherwise, from responsibility for per-

In one case,[3] the investment was in participations in two mortgages; in the other three cases, the investment was in a mortgage pool managed by the trust company. The pool consisted of mortgages, the principal of which aggregated over five million dollars, the investment representing the funds of testamentary trusts, guardianships, and trusts inter vivos. On the books of the trust company, the interest of each cestui que trust in the pool of mortgages was indicated, as required by statute,[4] and for such interest a certificate would have been issued, if requested by the beneficiary. The law of Pennsylvania permits the investment of trust funds, not only in single mortgages and participations in large mortgages but also in pools of mortgages.[5]

The experience of growing trust companies during the 20 years prior to 1929 had been that the influx of trust money exceeded the withdrawal of trust funds. It was therefore possible at all times to take cash trust funds coming in and awaiting investment, and to pay them to a withdrawing cestui que trust, and to assign the investment of the terminated trust to the new trust estate. For example, if an investment had been made in a three-year mortgage, and the trust terminated or was revoked two years later, although the principal of the mortgage was not payable for another year, the withdrawing cestui que trust was given his estate in cash, which he usually preferred. This was possible only because the trust company had cash in new trusts awaiting investment, and could assign the three-year mortgage to a new trust estate and pay the cash coming from the new trust to the withdrawing cestui que trust.

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forming the ordinary duties of trustees; or in trust certificates, issued by a trust company organized under the laws of this Commonwealth, certifying that the holders thereof are respectively the owners of undivided interests in deposits, with such trust company, of securities in which the trust funds may be invested under the preceding provisions of this clause: Provided, That nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such moneys."

See Latshaw's Estate, 17 D. & C. 27 (Pa.)

[3]Robert's Trust Estate, *supra*

[4]Act of 1925, P. L. 152, amending Clause V of Sec. 29 of Act of 1874, P.L. 73, as reenacted by Act of 1899, P.L. 159, Sec. 1. Clause V provides: "Provided, that every such company shall have the right to clear receipts and payments of trust money in the regular course of business in the same manner as other funds held by it: And provided further that said companies may assign to their various trust estates, participation in a general trust fund of mortgages upon real estate securing bonds, in which case it shall be a sufficient compliance with the provisions of this section for the company to designate clearly on its records, the bonds and mortgages composing such general trust fund, the names of the trust estates participating therein and the amounts of the respective participations, and in such case no estate so participating shall be deemed to have individual ownership in any bond and mortgage in such fund, and the company shall have the right at any time to repurchase, at market value, but not less than face value, any such bonds and mortgages from said fund, with the right to substitute therefor other bonds and mortgages."

[5]See Note 4, *supra*

From this experience, the conviction grew that the trust company could rely on the steady continuance of such conditions, and in the years following the war the trust companies entered into agreements of trust in which the trust company expressly assumed the obligation to pay interest at a specified rate on the investment, and cash upon the termination of the trust, without regard to the income or value of the security itself. For years this practice obtained and the trust companies flourished.

With the years of depression came the collapse of the mortgage investment due to the wholesale default of mortgagors and in addition the end of that influx of trust funds awaiting investment, which had made possible the payment of cash to all beneficiaries upon termination of their trusts. Withdrawing trusts far exceeded incoming trusts. No new cash funds were available to pay outgoing cestuis que trustents.

In the case of testamentary trusts, where investments were made in mortgages and the mortgages could not be immediately converted into cash, a distribution was made in kind to the beneficiary under the statute providing for such distribution.[6]

Where the investment under a testamentary trust was in a participation in a mortgage or in a pool of mortgages, the delivery of a certificate showing the interest of the beneficiary was decreed in lieu of cash.[7]

Likewise, in the case of trusts inter vivos, where there was no express agreement to return anything but the trust res, distribution of the security itself or a cerificate, upon termination or revocation of the trust, was proper. Where the agreement was ambiguous, as for instance where the trust company agreed to return the *funds* upon 90 days' notice, the court interpreted the agreement to mean a return of the investment, and not the return of cash.[8]

But in the cases recently decided, the import of the language was conceded by the parties to mean that cash was intended to be returned upon revocation of the trust agreement. The court accordingly, without reference to the investments, ordered the trust company in each case to pay cash to the withdrawing cestui que trust.

These decisions strike at the fundamental concept of the trust relationship and destroy completely the design of the fiduciary principle.

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[6]Act of 1917, P.L. 49 (e), as follows: "(e) 1. Whenever it shall appear, at the audit and distribution of an estate in the Orphans' Court, that the balance, after payment of debts, includes stocks, bonds, or other securities, which, for reasons satisfactory to said court, have not been converted by the accountants, it shall be lawful for said court to direct distribution of such assets in kind, to and among those lawfully entitled thereto, including fiduciaries."

[7]See Note 4, *supra*

[8]Crick's Estate, 315 Pa. 581.

The law which has developed around the trust concept is founded upon the single postulate that one person holds property belonging to another, for the management of which he owes the highest duty of good faith. Every trust relationship presupposes a res belonging to the owner, which is transferred to another to be managed for the benefit of the owner. This has been the conception of trusts in the English Common Law since uses were first introduced in England by the clergy to avoid the operation of the Statute of Mortmain, and were employed during the Wars of the Roses to prevent the forfeiture of estates for treason. The same concept was known and acknowledged long before in the Civil Law.[9]

There is little in the history of the law of trusts to indicate whether or not trustees have heretofore ever attempted to add to the duties which the law imposed upon them, independent promises of their own. Before the recent development of trusts into vivos, trusts generally arose in wills in which the trustee, usually designated without its knowledge, had no opportunity to make promises; the testator fixed the terms of the trust and the trustee could not vary these. It could accept or renounce the trust, but there was no occasion to make any affirmative promises with respect to the relationship. That was finally fixed by the provisions of the will and the rules of law applicable to the conduct of trustees.

In the ordinary declaration of trust by a living donor, the donor makes the provisions and the trustee merely accepts the trust, and with it the responsibility which the instrument and the law impose upon the trustee.

With the development of trusts inter vivos and the growth of trust companies came the trust agreement, drawn by the trustee, in which the trustee saw an opportunity to increase its "trust business" by making affirmative promises. At first they were merely declaratory of the law applicable to the duties of a trustee, but with the increase of trust business and the anticipation of continuing growth, the trust companies gradually extended their liability until they finally guaranteed or insured the trust investment.

Before discussing the effect of enforcing such agreements against trustees, an understanding of the nature of the promise to pay cash upon termination of the trust is necessary.[10] Although words of guarantee are used in some of the agreements, it is apparent that no guaranty is involved.[11] The trust company

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[9]Perry - Law of Trusts and Trustees, Vol. 1, Sections 2 and 3.

[10]Agreement in *Robert's Case* provides: "IT IS UNDERSTOOD AND AGREED that this trust shall continue until terminated upon thirty days' notice given in writing by either of the parties hereto, and the Trustee shall thereupon pay over, transfer and deliver unto me the said trust estate in cash."

[11]Agreements in *Whitty and Frey Cases* provide: "The second party, in consideration of the terms of the guarantee hereinafter mentioned, guarantees to the first party: (a) *Payment of the principal sum or any part thereof* three (3) months after demand has been made by the first party."

agrees to invest trust funds in such securities as are legal for the investment of trust funds under the statutes. It may invest in government securities or in mortgages, which do not mature for many years. It is not guaranteeing payment by the primary debtor upon maturity of the latter's obligation. It is agreeing to pay the sum invested in the security at any time the donor chooses to revoke the trust, without reference to the maturity of the security in which the trust funds are invested. This is not a guaranty.

Nor is it a surety, for the obligation to pay is not dependent upon the terms of the mortgage or bond in which the trust funds are invested, nor upon the obligor's rights or duties.

Is the promise to pay cash upon revocation of the trust, a contract of insurance? In the cases before the Supreme Court of Pennsylvania, the trust company took the position that these promises were contracts of insurance, basing its contention upon the theory that the engagement was in reality an insurance of the liquidity of the trust investment, and an agreement to make good any loss.[12]

The Pennsylvania court did not accept this view, and held these promises were independent undertakings, and not contracts of insurance. The court said:[13]

> "Its promise to repay has none of the elements of insurance, which, generally speaking, is a contract of indemnity against loss by the act of another."

This definition would exclude many kinds of insurance contracts. The loss for which the insurer indemnifies need not be due to the act of another, but may be any loss occasioned by war, depressions, tornadoes, etc.

But even if we accept the Court's definition, the contracts being considered can readily be made to fit into its pattern. What the trust company was doing was to indemnify in its separate corporate capacity against any loss by itself as Trustee.

But whether or not promises by a trustee to guarantee payment of interest and payment of cash upon revocation of the trusts are contracts of

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[12]Bowers, Executor, v. Lawyers Mortgage Co., 285 U.S. 182, in which the Court said: "Undoubtedly the guarantees contained in the policies and participation certificates were in legal effect contracts of insurance. Tebbets v. Mercantile Credit Guarantee Co., 73 Fed. 95, 97; Guarantee Co. v. Mechanics' Bank & Trust Co., 80 Fed. 766, 772; State ex rel. Peach Co. v. Bonding & Surety Co., 279 Mo. 535, 553, 556; 215 S.W. 20; Peoples v. Potts, 264 Ill. 522, 527; 106 N.E. 524; People v. Rose, 174 Ill. 310 51 N.E. 246; Commonwealth v. Wetherbee, 105 Mass. 149, 160; Shakman v. United States Credit System Co., 92 Wis. 366, 374; 66 N.W. 528; Young v. American Bonding Co., 228 Pa. 373, 380; 77 Atl. 623."

[13]Robert's Trust Estate, 316 Pa. 545.

insurance or independent promises, (why not both?) does not fundamentally alter the problem.

The important factor is that the emphasis on the faithful management and conservation of the trust res, which has always been the primary duty of a trustee, is weakened. If the trustee is bound by such agreements to return the cash placed with it as a trust fund, it does not matter what investment is made. If the agreement provides that the investment must be in such securities as are legal for investment of trust funds, and the trustee disregards this admonition and invests in stock, no one would be injured if the trust company were solvent, because the liability, upon revocation of the trust, to return the full amount of cash invested, transcends and obliterates all other liability. If the stock doubles in value, the well-recognized principle that the accretion belongs to the beneficiary, would undoubtedly be invoked and the agreement to repay the principal in cash would be disregarded. But if a loss incurs from a proper investment, the agreement becomes operative.

We have then the situation that if the trustee, under such an agreement, invests in mortgages or interests in mortgages, and the investment is carefully made and protected by intelligent supervision and solicitous care for the interest of the cestui que trust, the duty of the trustee is not discharged. If the mortgage cannot be liquidated, upon revocation of the trust, the trustee must nevertheless pay cash. If the mortgage can be sold, but for less than the face value, the trustee must pay the difference between the amount invested and the present value of the investment. There is obviously no necessity for careful scrutiny of investments or fidelity in management of the trust res.

True, the trust company will-become the owner of the trust investment, if it must pay cash to the withdrawing beneficiary, but this is a possibility only. And a trustee need not be as careful with its own property as with that of a cestui que trust. The vital aspect of the problem is the weakening, if not the destruction, of the traditional responsibility of a trustee.

An independent promise by a trustee to guarantee the investment made by it, by its very nature destroys the entire law applicable to trusts. It is inconsistent with the trust relationship which exists during the life of the trust; at its termination there emerges a debtor-creditor relationship and the rights of the parties are determined, not by the fidelity with which the trustee managed the trust, but by an independent promise which he made. There lies the dilemma. The independent promise to pay cash completely obliterates the trust relationship on which it is founded.

It seems clear that promises by a trustee to invest trust funds for a donor, and to act as his trustee, and in addition to guarantee the return in cash, upon the revocation of the trust, of the investment, are incompatible promises and injurious to the trust relationship.

When, moreover, the promises are made by a corporate trustee, the incongruity is emphasized.

Banks and trust companies have statutory powers, and under familiar principles are classed as quasi-public institutions, with only those powers which are expressly given them by statute or necessarily implied.[14]

An investigation of the statutes[15] controlling the powers of the trust company involved in the cases before the Supreme Court of Pennsylvania reveals no power to insure trust funds or to indemify donors of trusts for losses in investments. The Act of 1895, P. L. 127, authorizes trust companies "to take, accept and execute trusts of every description not inconsistent with the laws of this State or of the United States . . ."

The Supreme Court held such independent promises as part of the trust relation, and as such not inconsistent with the laws of Pennsylvania.

The authority to execute trusts of every description cannot mean trusts with independent promises of indemnity. For such promises are not the promises of a fiduciary, but the undertakings of an independent promisor. Such obligation is inconsistent with the trust relationship; it is entirely alien to the exercise of fiduciary functions. The assumption of such a liability is certainly not to be implied from the grant of fiduciary powers or the authority to execute trusts of every description. The trust company has assumed a dual role.

The trust company's position from the beginning of the litigation involving these so-called guarantees was that the independent promise was ultra vires. This position had been upheld in other jurisdictions where similar questions arose.[16]

Two pertinent and well-reasoned cases are *Reichert v. Metropolitan Trust Co.*, 262 *Mich.*, 123 (247 *N. W.* 128), decided in March, 1933, and *Knass v. Madison & Kedzie State Bank,* 354 *Ill.* 554 (188 N. E. 836) decided in December, 1933.[17]

In the former case, the trust company guaranteed the principal and interest of bonds secured by mortgages. The court held such guarantees ultra vires and void, there being no express statutory authority for such undertaking, and found it contrary to public policy and hazardous for the trust company to "divert its

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[14]Fletcher on Private Corporations: Section 3422.

[15]Act of 1862, P.L. 116; Act of 1870, P.L. 1012; Act of 1895, P.L. 399; Act of 1907, P. L. 382, Act of 1913, P.L. 971; Act of 1923, P.L. 248.

[16]Federal Land Bank v. Crookston Trust Co., 180 Minn. 319; Greene v. First National Bank, 172 Minn. 310; Peoples National Bank v. So. States Finance Co., 192 N.C. 69 (133 S.E. 415); Nowell, et al. v. Equitable Trust Co., 249 Mass. 585 (144 N.E. 749); Dewey Column & Mon. Works v. Ryan, 206 Iowa Rep. 1100 (221 N.W. 800).

[17]Followed in Hoffman v. Sears Community State Bank, 191 N.E. 280.

funds from lawful corporate purposes to those unlawful and opposed to public policy".[18]

In the latter case, the bank agreed to repurchase first mortgage bonds at any time that the purchasers wished to return them. These contracts were held ultra vires the bank, and against public policy.[19]

The Pennsylvania court refused to sustain the defense of ultra vires, although in the lower court,[20] the opinion had competently and thoroughly commented upon its applicability to quasi-public corporations. The Supreme

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[18]Reichert v. Metropolitan Trust Co., 262 Mich. Rep. 123, at p. 131: "Like other corporations this trust company is a creature of law. It may lawfully exercise no power and authority except that given to it by law. There is nothing either in the charter of the corporation or the statute of its organization which gives it any express power or authority to guarantee the payment of notes, bonds or other obligations. Its implied powers are limited to those necessary to enable it to exercise the powers delegated to it by its charter and the statute providing for its creation. 2 Fletcher on Corporations, p. 1814. It occupies a fiduciary relation to the beneficiaries of the several trusts lawfully reposed in it who are entitled to its protection. 2 Fletcher, p. 1814. It has no right to speculate with the trust funds entrusted to its care."

Again, p. 132: "It would be anomalous if the trust company, by violating the law guaranteeing the payment of bonds, engaging in hazardous speculation, with or without compensation, contrary to its charter, in violation of public policy, when such bonds were purchased by those charged with notice of the trust company's lack of power, could, as against the creditors and beneficiaries of the lawful trusts reposed in and accepted by it, divert its funds from lawful corporate purposes to those unlawful and opposed to public policy."

[19]Knass v. Madison & Kedzie State Bank, 354 Ill. p. 554; at p. 565: "An outstanding characteristic of such an agreement as is before us is that it creates against the bank a contingent liability which cannot be measured or determined in prospect and can be determined day by day only by reading the shifting market value of the particular bonds guaranteed. Such contingent liability is not, and cannot be, accurately reported to the public officers having a right to a report upon the condition of such bank . . . . . Speculation by a banking corporation with the funds deposited with it and its entry into the guaranty or surety business are neither within the principles of sound banking business nor the powers conferred by the statute under which it is organized; yet to insure the price of bonds, as was attempted by this agreement, is nothing short of a guaranty, and possesses an inherent evil not found even in speculation, in that the bank cannot hope to repurchase such bonds while they command a market price higher than that fixed in such agreement, hence no chance of gain exists. The guaranty of such bonds is not a transaction ordinarily and commonly considered to be within the scope of general banking business as that term is commonly used and understood, and cannot be said to come within the power conferred by the statute quoted, to do a general banking business. Nor is such power a necessary incident to the powers granted. Reichert v. Metropolitan Trust Co., 262 Mich. 123, 247 N.W. 128; Federal Land Bank of St. Paul v. Crookston Trust Co., 180 Minn. 319, 230 N.W. 791; First State Bank v. Sanford (Tex. Co. App.) 255 S.W. 640; Farmers' & Mechanics' Savings Bank v. Crookston State Bank, 169 Minn. 249, 210 N.W. 998; Hawkins Realty Co. v. Hawkins State Bank, 205 Wis. 406, 236 N. W. 657. Since this is so, it must be held that under the rule hereinbefore cited such power is prohibited. As often stated by this Court, one dealing with a banking or other corporation having limited and delegated powers is chargeable with notice of those powers and their limitation."

[20]Robert's Estate, 82 Pitts. L. J. 141.

Court was induced by the growing tendency to discount ultra vires to disregard it in these cases.[21] In doing so, it failed to distinguish between private corporations and quasi-public ones having a unique responsibility to the public, in addition to their duty to stockholders.

In the cases before the court there was evidence that trust agreements similar to those before the court had been made by the appellee, covering millions of dollars of trust funds. Clearly, the payment of large sums to withdrawing cestuis que trustents and the assumption of millions of dollars of delinquent mortgages would be detrimental, not only to the capital structure of a financial institution, but in violation of the statutes governing banks and trust companies. Although the bank involved was a large institution, able to assume so heavy an obligation, the result was nevertheless contrary to sound banking practice.

That the defense of ultra vires is available to quasi-public institutions requires no extensive citation of authority, nor extended analysis or argument. The law has always recognized the distinction and although the ultra vires doctrine is disappearing from the law of private corporations, it will not depart, although it may be transformed to a "contrary to public policy" rule in the case of quasi-public corporations.[22]

In Pennsylvania in 1933, codes were drafted and adopted for Private Business Corporations and for Banks and Trust Companies. The code for the former expressly withdraws the defense of ultra vires from private corporations.[23] On the other hand, the Banking Code has no such provisions.[24] As the codes were drawn at the same time and under the same Attorney-General, this difference is indicative of an acknowledgment of the dissimilarity between private and quasi-public corporations, and an affirmance of the doctrine that ultra vires is available to the latter corporations.

Another fallacy in the reasoning of the Supreme Court lies in its application of the rule that where a corporation has received the benefit of a transaction, it may not plead ultra vires. The court held that, as the trustee in the cases before it had received a trustee's compensation, it had received a benefit which estopped it from pleading ultra vires.

The benefit theory is predicated upon a contract under which something of value passes from the promisor to the promisee, and the promisee must deliver the consideration to the promisor, if he wishes to retain the res about which the transaction occurs. There must be a quid pro quo, an exchange by which one party to the contract accepts as its own something belonging

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21Carpenter, Should the Doctrine of Ultra Vires be Discarded?, (1923) 33 Yale Law Journal 49.

22Fletcher on Private Corporations, Section 3422.

23Act of 1933, P.L. 364, Section 303.

24Act of 1933, P.L. 624.

to the other prior to the contractual relationship. Of course the law does not permit such unjust enrichment, and insists upon a reimbursement of the promisor for his loss by an adherence to the contract by the promisee, even if beyond the powers of a corporate promisee.

But how can this theory be satisfactorily applied to a trust relationship? The res about which the relationship extends never passes into the ownership of the trust company. The latter holds it only as an agent, except that it has legal title, but the beneficial ownership, the benefit in the transaction, remains in the donor. The only conceivable benefit to the trustee is its compensation, which, under the agreements in the cases involved, was 5% of income only. This payment was for a service to the res, and was not a receipt of the substance of the contract. It was for a service which the trust company had performed, the receipt of the trust fund, its investment in mortgages, its management, the payment of income to the cestui que trust, etc. There was nothing that formerly belonged to one party which had passed to the other without consideration.

No benefit which it could not lawfully retain without performing its part of the contract was retained by the trust company, making it necessary to perform the contract, though ultra vires.

The court in its opinion merely states the rule without commenting on its applicability to the facts. The distinction was, however, noted in the *Knass* case, supra, where the Supreme Court of Illinois said:

> "But it is said the old bank, having received the purchase price of these bonds, is estopped from setting up the defense of ultra vires . . . Numerous cases of other jurisdictions have been cited to support the contention that the old bank, having received the purchase price paid for these bonds, is estopped to set up the defense of ultra vires without first returning the money paid it. We have seen, however, that these bonds were not the bonds of the bank, and it will be presumed that the mortgagor, a real estate corporation executing the bonds, received the amount paid by claimants, less commissions charged for the sale. At most, if such contention be sound, the bank could not be required to return more than the commissions received, the amount of which is not disclosed by the record."

The Supreme Court in its opinion saw no distinction between the performance of a promise to pay cash and a surcharge for mismanagement. The difference would seem to be fundamental. The former, is a liability assumed in good faith; the latter, a penalty for bad faith. The object of the surcharge is to penalize the trustee, to outlaw mismanagement; in short, to make it impossible for a trustee to survive. How can this objective, which every trustee seeks strenuously to avoid, be compared with a functional performance which a trustee has voluntarily assumed to the extent of millions of dollars?

The court, with a natural impulse to make the trustee pay, because it said it would, has ignored the basic legal principles involved. Although the decision serves at the present time to dissuade trustees from entering into agreements guaranteeing the return of trust funds in cash (which, of course, they would not do under present conditions in any case), it may have a far-reaching and damaging effect with the return of prosperity. If trust companies can, by the promise to return trust funds in cash upon revocation of the trust, play havoc with the investment and in effect treat it as a deposit without adhering to the laws governing the investment of deposits, the harm done by this decision is irreparable. It strikes at the heart of the trust relationship and sets at naught the duty and responsibility of a trustee. It permits the trustee by a blanket promise of indemnity, to treat the trust funds as its own. Not only that; it endangers the money of the public deposited in the banking department of the trust company by exposing it to undreamed of banking hazards. It permits a contingent liability which is not reflected in the statement of the bank's financial condition. It sanctions a gift of money to the beneficiaries of trusts, in return for which the bank receives only delinquent or depreciated investments, and a small compensation.

It is believed that the court, in its preoccupation with the imposition of liability where it had been voluntarily assumed, permitted the basic legal principles involved to become obscured, with the result that Pennsylvania stands alone in approving the assumption by trust companies of a liability to return trust funds in cash, upon demand, regardless of the condition or character of the trust investment at the time of the revocation of the trust.

In arriving at its decision, the court probably considered these transactions as similar to deposits. But, of course, such similarity does not exist. When a depositor leaves his money at a bank, he parts with all title to it and it becomes a part of the assets of the bank to be used and invested as the bank sees fit for the benefit of all the depositors and stockholders. When a donor creates a trust he parts only with the naked legal title; he remains the beneficial owner of the fund or of the investment into which it is converted. The assets of the trust company are not increased and no benefit accrues to it except the earning of a small commission. Should the trust company fail, the depositor is entitled to only a pro rata share of the assets of the bank, whereas the donor of the trust is entitled to his entire investment. In the case of a deposit the bank exercises the right of complete ownership over the fund; in the case of the trust, the trust company acts as a fiduciary only.

It follows that the obligation to repay trust funds in cash, when the investments though proper, are not capable of liquidation, is a heavy obligation for the assumption of which the trust company has received no assets.

The decision of the Supreme Court of Pennsylvania imposing this enormous obligation on the banking facilities of the state is particularly disturbing in view of its previous reluctance to impose similar burdens.

In the recent case of the *Globe Indemnity Company v. Wm. McCullom,*[25] the court definitely took the position that ultra vires contracts would not be enforced. A lumber company had guaranteed the completion of a large apartment building. The court refused to enforce the guaranty, holding that it was beyond the scope of the corporate powers of the lumber company. To enforce it would be to jeopardize its capital and to invite its destruction, said the court.

That case was distinguished from the cases under consideration by the court with the indication that in the lumber company case no benefit was received from the guaranty, but in the trust company cases a benefit was received.

A moment's comparison of the two transactions makes it clear that the benefit which a lumber company receives from guaranteeing the completion of an apartment house for which its lumber is used must be far greater than the 5% commission on income which a trustee receives under a trust agreement.

If "it is inviting destruction" for a lumber company to guarantee the debt of another, is it not far more dangerous for a trust company to expose the capital of the corporation and the money of depositors to the contingent liability of paying cash to beneficiaries of trusts regardless of the condition of the trust estate?

Pittsburgh, Pa. Ella Graubart

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[25] 313 Pa. 135.