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Anthony R. Appel

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crimes, only those solicitations are criminal which are expressly made so by statute.³⁹

W. H. Hitchler.

³⁹Ex parte Chase 1 Pac. (2d) 60; 6 Pac. (2d) 577; Cole v. S. 14 Okla. 18, 166 Pac. 1115, L.R.A. 1918A 94. In these states it "often happens that solicitations which would be criminal are considered non-criminal because of statutory omission." Curran, 17 Minn. Law Review 511. There is no general federal statute against solicitations. U. S. v. Galleanni 245 Fed. 977. It has been suggested that statutes should be passed making it a crime to offer to commit or to assist in committing a crime. Such statutes exist in France, Italy, and Germany. Blackburn, 40 West Va. Law Quar. 150.

THE LIABILITY OF A TRUSTEE FOR MISCONDUCT BY HIS COTRUSTEE

The different situations in which the question of liability of a trustee for misconduct of his cotrustee has arisen, have been classified as follows:

- (a) Those in which the inactive trustee has done nothing but passively allow his cotrustee to assume exclusive possession of the trust property.
- (b) Those in which the sole basis of the inactive trustee's alleged liability is an affirmative act on his part giving the active trustee exclusive possession.
- (c) Those in which there is an entrusting of possession by positive or negative conduct and, in addition, a failure to supervise the administration of the trust after the cotrustee has taken exclusive control.
- (d) Those in which the entrusting of possession was followed by notice to the inactive trustee of a possible specific danger to the trust fund and thereafter by continued inaction by the passive trustee.¹

This is an attempt to determine the rules which the Pennsylvania courts have applied in these four situations. The main test which has been applied is whether the trustee was guilty of negligence. In *Nyce's Estate*² Judge Bell, delivering a lower court opinion, which was subsequently affirmed per curiam, in discussing the Pennsylvania attitude as to the liability of trustees, said: "It is said to be the harshest demand that can be made in equity, to compel a trustee to make up a

¹Bogert's Trusts and Trustees, Volume 3, Section 584, at page 1845.

²*Nyce's Estate*, 5 W. & S. 254, at page 255 (1843).

deficiency, where the money does not come into his hands. In such a case, equity will not charge him unless he has been guilty of negligence so gross as almost amounts to fraud." There are various other descriptive statements in the cases to the effect that a cotrustee is liable if he is negligent.³

The general rule as to fiduciaries was expressed by Chief Justice Sterrett in the *Myer* case⁴: "As a general rule, it is well settled that executors and general trustees are liable only for the amount that comes into their hands, and they are not held responsible for the acts of each other, except where there is fraud⁵ or supine negligence."⁶ If the trustee has been guilty of negligence in permitting his cotrustee to squander the trust property his liability is conditioned on the inability of the other to answer for himself because of insolvency.⁷

A. WHEN A TRUSTEE PASSIVELY ALLOWS A COTRUSTEE TO ASSUME POSSESSION

The mere fact that one allows his cotrustee to assume possession of the trust property does not make him liable for the other trustee's misconduct in the absence of a warning as to possible misconduct, unless there is a duty to see that the property is properly invested. Thus, in *Graham's Estate*, Stewart, J. said: "As trustee he had a right to receive this money with the assent of his cotrustees, and its mere receipt with their acquiescence gives rise to no inference of *dolus malus* on their part, or malfeasance on his."⁸ In *Stell's Estate* the fact that the cotrustee managed the whole of the trust property did not cause the trustee to be liable,⁹ and in *Fesmire's Estate* permitting the cotrustee to retain possession of the money received in satisfaction of a mortgage did not impose liability on the trustee.¹⁰ Where one trustee managed the entire trust estate but gave the cotrustee notes for an amount which he held uninvested, it was held that failure by the cotrustee to sue on these notes for the money did not make him liable for the money in possession of the

³*Stell's Appeal*, 10 Pa. 149 (1849) at page 153 says the cotrustee becomes liable "only when his culpable negligence has permitted his companion to squander and dissipate the trust property." His duty is one of "good faith and reasonable diligence," *Fesmire's Estate*, 134 Pa. 47 at page 85, 19 A 502 (1890). He is to be charged "only for his own receipts or for supine negligence," *Jones's Appeal*, 8 W. & S. 143 at 150 (1844). Not liable except "where there is fraud or supine negligence," *Myer v. Myer*, 187 Pa. 247 at page 251, 41 A 24 (1898).

⁴187 Pa. 247 at 251, 41 A 24 (1898).

⁵*Pim v. Downing and Stalker*, 11 S. & R. 66 (1824). Where one trustee consents that the other misapply the trust fund, particularly where he has it in his power to secure it, he is responsible.

⁶As to what relationships may be used as determining liability of a trustee, *Jones's Appeal*, 8 W. & S. 143 (1844) at page 147 says, "Parents, guardians, executors, receivers, and all who manage the estates of infants, are responsible as trustees, and held to the same diligence; but for participation in the acts of their colleagues, the liability of executors is peculiar."

⁷*Stell's Appeal*, 10 Pa. 149 at page 153 (1849).

⁸18 Pa. 344 at page 356, 67 A 458 (1907).

⁹10 Pa. 149, (1848).

¹⁰134 Pa. 67, 19 A 502, (1890). But failure to supervise the reinvestment thereof did impose liability.

trustee¹¹ in view of the fact that he was under no duty to call for the notes.¹² There is also a statement by Chief Justice Gibson in *Jones's Appeal*: "The appellant, therefore, is not chargeable merely for having declined to meddle with the moneys in the first instance."¹³ Justice Gibson also pointed out that trustees are appointed for different purposes and that it is therefore proper for one to conduct financial matters and another to manage the real estate. A circumstance which has been given consideration in formulating the rule which permits one trustee to have possession of the trust property is the place of residence of the trustees and cestuis.¹⁴ In *Coxe v. Kriebel*¹⁵ it is held that a trustee is not liable for the principal of a mortgage collected and embezzled by his cotrustee.

B. WHEN A TRUSTEE, BY AFFIRMATIVE ACT, GIVES A COTRUSTEE POSSESSION

When a trustee has possession, or with the cotrustee has joint possession, the general rule is that the trustee may, by affirmative act, put the cotrustee in possession of the property, without incurring liability for the cotrustee's subsequent misconduct.¹⁶

Thus it has been held that the assignment of a mortgage by two trustees to a cotrustee¹⁷, the delivery of bonds for collection and some of the money of the trust funds, to be used for the cestui, to a cotrustee¹⁸ and the handing over of a part of the trust fund,¹⁹ are not acts which will, in themselves cause the trustee to be liable for the subsequent misconduct of the cotrustee. But the one who hands over the trust property is under a duty to use reasonable care to inquire into the "sufficiency" of his cotrustee when he makes the delivery.²⁰ Mere handing over of possession does not relieve the trustee of his duty to supervise thereafter.²¹

C. DUTY TO SUPERVISE AFTER A COTRUSTEE HAS TAKEN EXCLUSIVE CONTROL

The general rule is that there is a duty on the trustee to supervise the administration of the trust after the cotrustee has taken exclusive control. In some

¹¹The trustee was a reputable ship-builder and the cotrustee was his clerk.

¹²*Birely's Estate*, 7 Pa. Dist. 395 (1898).

¹³*Jones's Appeal*, 8 W. & S. 143 (1844).

¹⁴*Fesmire's Estate*, 134 Pa. 67, 19 A. 502 (1890) and *Appeal of Hatch*, 12 A. 593 (1888).

¹⁵*Coxe v. Kriebel*, 323 Pa. 157, 185 A. 770 (1936).

¹⁶*Appeal of Hatch*, 12 A. 593 (1888) a lower court case which was affirmed per curiam. The court said that they were securities which required the attention of someone to look after.

¹⁷*Fesmire's Estate*, 134 Pa. 67 (1890).

¹⁸*Appeal of Hatch*, 12 A. 593 (1888).

¹⁹*Myer v. Myer* 187 Pa. 247 (1898).

²⁰*Clark's Appeal*, 18 Pa. 175 (1851).

²¹*Donnelly's Estate*, 11 Pa. Dist. 211, (1902), "That a trustee is not relieved from responsibilities for moneys which he has collected by paying them over to his cotrustee, and that if he should so pay he will be accountable for the acts and defaults of the party securing them is so well settled. . . ." This is a correct statement but does not conflict with the view that the mere handing over of possession does not make the trustee liable.

instances the duty is greater than in others. The determination of liability is largely dependent on the circumstances of the case and therefore some of the cases will be briefly stated.

In *Fesmire's Estate*²² there were three trustees who had invested some of the trust funds in a mortgage. Kerper represented to his cotrustees that the owner of the land wished to pay off the mortgage and have the mortgage satisfied. Fesmire and Magargal, the cotrustees executed an assignment of the mortgage to Kerper. Kerper embezzled the money received upon satisfaction of the mortgage. Fesmire and Magargal were held liable because they were under a duty to see that the money was invested again and neglected to perform this duty.

In *Weldy's Appeal*²³ A and B were trustees of C and D. A and B agreed to divide the trust fund so that each would have a part thereof and that A would use the part he had for C and B would use his part for D. B subsequently became insolvent, and D, for whom, according to the agreement, B had been acting, sought to hold A liable. The court, in holding A liable said: "We can, therefore, without hesitation say, that as the executors, (trustees) in this case, disobeyed the injunction of the will to invest the fund . . . and divided that fund between themselves, there was such a neglect of a joint duty as rendered them liable, the one for the other, for any loss or misapplication of that fund, or any part of it."

*Jones's Appeal*²⁴ indicates that in some cases the trustee is under only a slight duty to supervise. Jones had evidently been appointed to look after the realty and Levering to manage the finances. Jones therefore permitted Levering to manage the money. The court in holding that Jones was not liable for the misconduct of Levering said: "But it seems that he acted with extreme caution and singular discretion in leaving the management of the moneys to one who was better qualified for it, and whose wealth afforded greater security against loss from insolvency." From this statement the conclusion might be drawn that, if an individual were appointed trustee with a trust company as cotrustee, the individual would not be under a duty to supervise the cotrustee in the financial management.

In *Myer v. Myer*²⁵ there were two trustees each of whom had managed a part of the trust funds under an agreement similar to the one in the *Weldy* case. When one trustee became insolvent the cestui sought to make Myer, the other trustee, liable because he did not inquire where Buckwalter had the money invested. The court in holding that Myer was not liable said, "In view of the fact that appellee (Myer) neither knew nor had any reason to believe that Buckwalter was not good

²²134 Pa. 67 (1890).

²³102 Pa. 454 (1833). A similar case to the same effect, in *Ducommun's Appeal*, 17 Pa. 268 (1851).

²⁴8 W. & S. 143 (1844).

²⁵187 Pa. 247 41 A. 24, (1898).

for appellant's share . . . it would be unjust to hold him liable for funds in the hands of his cotrustee."

The failure to make or require a prompt investment of the fund in accordance with the terms of the will is such negligence as to make one trustee liable for the default of his cotrustee.²⁶ It has been suggested that such failure is equivalent to a wilful breach by the trustee.²⁷ Nor does the fact that a coexecutor had the custody of the bonds, collected the interest, and had the entire charge of the business, excuse an executor for failure to invest, upon the settlement of the estate funds which were thereafter to be held in trust by the coexecutors.²⁸

A very recent case, *Coxe v. Kriebel*,²⁹ indicates some acts the failure to do which are not sufficient to make the trustee liable. "A trustee who has confidence in the integrity of his associate would not ordinarily make trips to the recorder's office to ascertain whether a mortgage had been satisfied. Nor should he be legally required to do this, or to make inquiries of the mortgagor, or examine the private books of his fiduciary on pain of being denied the right to repudiate the latter's breach of trust."

D. NOTICE OF POSSIBLE SPECIFIC DANGER

When the entrusting of possession of the trust fund is followed by notice to the inactive trustee of a possible specific danger to the trust fund, and thereafter the trustee remains inactive he is liable for the misconduct of his cotrustee. *Adams's Estate*³⁰ is the leading case on this point. H. Carlton Adams and Robert Adams Jr. were appointed trustees of a trust created by Robert Adams. They accepted the funds jointly and proceeded to administer them jointly. Securities in which the trust funds were invested were kept in a box in the Western National Bank of Philadelphia to which each of the trustees had access. In 1896 H. Carlton Adams discovered that the securities were missing. Robert Adams Jr. had taken them out and was about to misapply them, but upon being discovered returned them. Thereafter Carlton did nothing to prevent a repetition of this. He could easily have made the presence of both of them at the box requisite to the opening thereof but failed to do so and, therefore, when nine years later, Robert took the securities and misappropriated them, it was held that Carlton was liable because he did not exercise reasonable diligence after the "warning" in 1896.

In *Jones's Appeal*³¹ it was sought to charge Jones with negligence in failing to call for securities when suspicions of his cotrustee excited him. The suspicions

²⁶*Beatty's Estate*, 214 Pa. 449, 63 A. 675 (1906).

²⁷*Estate of William Hilles*, 13 Phila. 402 (1880) says, "His (trustee's) omission to see that an act enjoined by the testator had been performed caused the same injury which would have followed a voluntary participation in the acts of the defaulting trustee."

²⁸*Strong's Estate*, 160 Pa. 13, 28 A. 480 (1894).

²⁹323 Pa. 157, 85 A. 770 (1936).

³⁰*Adam's Estate*, 221 Pa. 77, 70 A. 436 (1908).

³¹8 W. & S. 143.

were "very slight." It was held that his inquiry as to the disposition of the money and the colleague's answer that the whole was invested in bonds, secured by a mortgage on a landed estate, was sufficient action to prevent liability, particularly when the cotrustee's "truth had never been doubted."

It has been held that where a trustee has made untiring efforts to have his cotrustee turn over the trust funds, he is not liable when the cotrustee absconds, the cestuis having recommended that he should not employ drastic methods.³²

In conclusion, the viewpoint of the Restatement of Trusts on this question is set forth in Section 224.

Liability for Breach of Trust of Cotrustee.

1. A trustee is not liable to the beneficiary for a breach of trust committed by a cotrustee.
2. A cotrustee is liable to the beneficiary, if he
 - a. participates in a breach of trust committed by his cotrustee; or
 - b. improperly delegates the administration of the trust to his cotrustee; or
 - c. approves or acquiesces in or conceals a breach of trust committed by his cotrustee; or
 - d. by his failure to exercise reasonable care in the administration of the trust has enabled his cotrustee to commit a breach of trust; or
 - f. neglects to take proper steps to compel the agent to redress the wrong.

Anthony R. Appel.

THE FAMILY EXPENSE STATUTE OF 1848

The Act of April 11, 1848¹ provides: "In all cases where debts may be contracted for necessaries for the support and maintenance of the family of any married woman, it shall be lawful for the creditor, in such case, to institute suit against the husband and wife for the price of such necessaries, and after obtaining a judgment, have an execution against the husband alone; and if no property of the said husband be found, the officer executing the said writ shall so return, and thereupon an *alias* execution may be issued, which may be levied upon and satisfied

³²Stewart's Estate, 21 Pa. Dist. 635, (1906).

¹1848, P. L. 536 Sec. 18; 48 P. S. 116.