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## Liability of a Trustee for Torts of His Servants

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## NOTES

### LIABILITY OF A TRUSTEE FOR TORTS OF HIS SERVANTS

The recent case of *Clauson v. Stull*<sup>1</sup> has raised some interesting questions relative to the liabilities incurred by a fiduciary through the torts of his agents or servants.<sup>2</sup> The statements of the case are dicta merely, as the problems discussed were not in fact before the court for decision, but the thoughts expressed, when considered with reference to other decisions, give some definite indication of the probable holding of our Supreme Court when such questions are presented to it for determination.

There are three primary questions to be considered. First: Is a trustee liable in his individual capacity for the torts of his servants? Second: Is a

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<sup>1</sup>331 Pa. 101, 200 A. 593 (1938).

<sup>2</sup>The language throughout this note applies equally to all fiduciaries although the term "trustee" will be the one most frequently used.

trustee liable in his representative capacity for the torts of his servants? Third: If the latter is true, is recovery directly against the estate or is it solely a right enforceable by the trustee by way of exoneration or reimbursement? The ramifications of these questions are myriad; hence, this note will be limited necessarily to an examination of the elements to be considered in answering these queries either in the affirmative or the negative.

Case law and text authority agree that the primary liability for torts of a trustee's servant is upon the trustee as an individual.<sup>3</sup> A fair statement of this general rule is:

"A trustee is liable in his individual and not in his official capacity for the torts of himself and his servants employed in the execution of the trust, irrespective of his right to reimbursement."<sup>4</sup>

This was the rule of the common law and has been retained throughout the years as the fundamental principle.<sup>5</sup> The theory is that when the trustee or his agent or servant commits a tort he steps out of the line of his duty; in other words, insofar as he commits a wrong he does not represent the estate, and therefore, it should not be held liable.<sup>6</sup> Sometimes it is stated that the corpus of the estate should be held intact for the beneficiaries, and that the trustee should not be allowed to dissipate it by the wrongdoing of himself or his employees.<sup>7</sup> As will be noted later, however, the soundness of this position is impaired somewhat by those cases which permit reimbursement of the trustee under certain conditions.<sup>8</sup> Another difficulty in the way of holding the trustee officially liable for the torts of his servants seems to have been that the law courts, being concerned solely with the question of legal ownership, did not recognize the trust relation or the trust estate,<sup>9</sup> and when a suit was brought by a third person the only other party in the picture was the trustee in his individual capacity as owner of the legal title.<sup>10</sup> The question of the trustee's personal negligence or of his right to reimbursement out of the estate simply were not relevant.

Recognizing the harshness of this primary rule and the injustice wrought by it, the courts gradually came to recognize certain exceptions to it. For

<sup>3</sup>Bogert: *Trusts and Trustees*, sec. 731; 26 R. C. L., p. 1319, sec. 178; 65 C. J., sec. 524; *Louisville Trust Co. v. Morgan*, 180 Ky. 609, 203 S. W. 555 (1918); *Fisher v. McNeely*, 110 Wash. 283, 188 Pac. 478 (1920); *Prager v. Gordon*, 78 Pa. Super. 76 (1921).

<sup>4</sup>65 C. J. sec. 524; *Louisville Trust Co. v. Morgan*, 180 Ky. 609, 203 S. W. 555 (1918).  
<sup>5</sup>44 A. L. R. 640-642 and cases there cited.

<sup>6</sup>44 A. L. R. 638.  
<sup>7</sup>*Prager v. Gordon*, 78 Pa. Super. 76 (1921); *Louisville Trust Co. v. Morgan*, 180 Ky. 609, 203 S. W. 555 (1918); 44 A. L. R. 638.

<sup>8</sup>See text *infra* at notes 11-13.  
<sup>9</sup>*Schmidt v. Kellner*, 307 Ill. 331, 138 N. E. 604 (1923); *Parmenter v. Barstow*, 22 R. I. 245, 47 A. 365 (1900).

<sup>10</sup>In *re Lather's Will*, 243 N. Y. S. 366 (1930); *Fisher v. McNeely*, 110 Wash. 283, 188 Pac. 478 (1920); *Schmidt v. Kellner*, 307 Ill. 331, 138 N. E. 604 (1923).

example, it has been held that "where a person creates a trust and charges the trustee with certain specific duties, in the carrying out of which it is contemplated certain results will follow, then the trust estate is liable for such contemplated results."<sup>11</sup> Likewise, it has been held that where an active trust is created and the trustee is charged with carrying on a business, the trust estate may be held liable for negligence of the trustee and his employees,<sup>12</sup> especially where the management of the trust estate is under the supervision and control of the cestuis.<sup>13</sup> It also has been held that the rule could not be enforced in the face of specific provisions in the trust instrument relieving the trustees from individual liability for the torts of themselves and their servants.<sup>14</sup> These exceptions, and certain other considerations in particular cases, have in recent years been the basis of a trend away from the old rule toward one allowing recovery against the trustee in his representative capacity.

Because of the strict regard of the law for the preservation of the trust corpus intact, the trustee was for years not even granted a right of reimbursement out of the estate where he had himself committed no wrong.<sup>15</sup> Judicial recognition of a right to indemnity on the part of the trustee is of recent origin.<sup>16</sup> A case showing the ultimate in the modern trend, and perhaps the correct answer from the standpoint of logic, is the case of *Ewing v. Foley*.<sup>17</sup> Following directions in testator's will the executors erected a building. Due to no personal fault or negligence on their part their agent negligently caused the undermining of an adjacent property. The injured party sued the trustees in their representative capacity, and the court held that recovery would be allowed against the trustees as such, with recovery directly against the estate, rather than against the trustees with a right on the part of the latter to be reimbursed out of the estate. The court asserts this to be a case of first impression in the Texas courts, finds only English cases in support of their doctrine, and admits that the majority of American jurisdictions hold to the contrary. In brief, the reasoning is that where, in pursuance of testamentary directions, a trustee without personal fault incurs liability to a third person for the tort of his servant, said trustee should be entitled to indemnity out of the corpus of the trust estate, and to avoid circuitry of action said recovery will be allowed against the trust estate directly in a suit against said fiduciaries in their

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<sup>11</sup>Ross v. Moses, 175 S. C. 355, 179 S. E. 757 (1935).

<sup>12</sup>Wright v. Caney River R. Co., 151 N. C. 529, 66 S. E. 588 (1909); Smith v. Coleman, 100 Fla. 1707, 132 So. 198 (1931); Ireland v. Bowman, 130 Ky. 153, 113 S. W. 56 (1908); Birdsong v. Jones, 222 Mo. App. 768, 8 S. W. (2d) 98 (1928).

<sup>13</sup>Wright v. Caney River R. Co., 151 N. C. 529, 66 S. E. 588 (1909); Ross v. Moses, 175 S. C. 355, 179 S. E. 757 (1935).

<sup>14</sup>Prinz v. Lucas, 210 Pa. 620, 60 A. 309 (1905).

<sup>15</sup>3 Bogert: Trusts and Trustees, sec. 731.

<sup>16</sup>43 Harvard Law Review 1122 (1930).

<sup>17</sup>115 Tex. 222, 280 S. W. 499 (1926).

representative capacity. There are few cases either in American or foreign jurisdictions which go this far. Some purport to, but on closer examination they can all be distinguished.

It is submitted that there are very few good discussions of the problem in the reported cases. One of the best appears in *In re Lather's Will*,<sup>18</sup> a New York case. Here again, the court admits that this is a case of first impression in that state on the question of whether or not a trustee is entitled to reimbursement out of the trust estate for damages recovered against him for the tort of his servant. It is therein said:

"Some element of personal fault is recognized as the only basis for charging a trustee with negligence of an agent employed in the administration of the trust estate. The personal and fiduciary nature of a trust relationship prevents a trustee from delegating to another the management and control of the trust estate or duties requiring the exercise of his own personal discretion. But, where the duties are of a purely ministerial nature, or of a type he could not reasonably be expected to perform personally, a trustee has the right to employ such assistance as may be necessary for the proper execution of the trust."<sup>19</sup>

If, then, this right exists, the trustee ought to be protected from liability where he exercises the power with due care and diligence.<sup>20</sup> Continuing, the New York court says:

"The cases against the proposition of reimbursement all weave around the thought that the corpus must not pay for the 'careless act' of the trustee, or through the 'negligence' of the trustee or the trustee's 'own neglect' or 'willful wrong' or his 'own negligent act.' But, if the trustee acted without personal fault, the law of our state should permit him to be indemnified out of the trust funds or estate which he represents. Equity as a court of conscience will refuse to apply the strict common law doctrine. . . . The trustee has gained nothing, and the trust estate has lost nothing through his personal negligence. Reimbursement on these facts is the only reasonable thing."<sup>21</sup>

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<sup>18</sup>243 N. Y. S. 366 (1930).

<sup>19</sup>*Id.* at page 375.

<sup>20</sup>Hale's Estate, 9 Pa. Dist. R. 389 (1900).

<sup>21</sup>243 N. Y. S. at page 375 (1930).

This line of reasoning seems meritorious and worthy of consideration. Incidentally, the case clarifies the prior New York law on the subject as set forth in *McCue v. Fink*,<sup>22</sup> *Kellogg v. Church Charity Foundation*,<sup>23</sup> and *Gatti-McQuade Co. v. Flynn*.<sup>24</sup> The final conclusion, so far as New York is concerned, is that where the trustee has acted without personal fault he is entitled to reimbursement out of the trust estate. The third party injured, however, must sue the trustee individually, leaving him to assert his right to reimbursement against the estate, if possible.<sup>25</sup>

This question of the right of the trustee to reimbursement out of the estate on certain conditions is one of the problems left open by the case of *Clauson v. Stull*.<sup>26</sup> Recognizing that any expression given on the subject would be dictum purely, Justice Maxey proceeds to cite a paragraph from *Corpus Juris*,<sup>27</sup> and then notes briefly the holdings of the four cases there cited.<sup>28</sup> *Smith v. Coleman*<sup>29</sup> recognizes the general rule of personal liability but is within an exception previously noticed — where a trustee is charged with carrying on a business, the trust estate should bear the loss. Such a case will not frequently arise. *Birdsong v. Jones*<sup>30</sup> is to the same effect. That was a case where the will provided that trustees were to manage and carry on a newspaper business. *Wright v. Caney River Ry. Co.*<sup>31</sup> is to the same general effect. There, too, an active trust was created. The fourth case is *Ireland v. Bowman*.<sup>32</sup> The case is definitely not authority for any general proposition allowing the trustee a general right to reimbursement when he is without fault. The case was one resulting from the maintenance of a dam. The dam was adjudged a nuisance, and recovery was allowed against the trustee as such for its maintenance. However, it is necessary to notice that the dam had been erected by testator at its present height, and the trustee had been directed to maintain it. This, then, was a case of a testator expressly directing the trustee to commit a tort, and obviously the trust estate should bear the loss. Such a case will not frequently arise. In each of these four cases the trustee was allowed to indemnify himself out of the trust estate, but none of these cases is authority for recognizing a general right to such reimbursement, since each time the court has been careful to

<sup>22</sup>45 N. Y. S. 242 (1897).

<sup>23</sup>112 N. Y. S. 566 (1908).

<sup>24</sup>140 N. Y. S. 135 (1913).

<sup>25</sup>In re Lather's Will, 243 N. Y. S. 366 (1930).

<sup>26</sup>331 Pa. 101, 200 A. 593 (1938).

<sup>27</sup>65 C. J. sec. 524, page 660.

<sup>28</sup>*Smith v. Coleman*, 100 Fla. 1701, 132 So. 198 (1931); *Ireland v. Bowman*, 130 Ky. 153, 113 S. W. 56 (1908); *Birdsong v. Jones*, 222 Mo. App. 768, 8 S. W. (2d) 98 (1928); *Wright v. Caney River R. Co.*, 151 N. C. 529, 66 S. E. 588 (1909).

<sup>29</sup>100 Fla. 1707, 132 So. 198 (1931).

<sup>30</sup>222 Mo. App. 768, 8 S. W. (2d) 98 (1928).

<sup>31</sup>151 N. C. 529, 66 S. E. 588 (1909).

<sup>32</sup>130 Ky. 153, 113 S. W. 56 (1908).

bring the case within an exception to the old rule not allowing such indemnification. It is submitted that there are apparently two cases from American jurisdictions which could be cited as authority for the proposition that whenever there is no personal fault on the part of the trustee he is entitled to be reimbursed out of the estate. These cases are those already mentioned — one in New York<sup>33</sup> and one in Texas.<sup>34</sup>

There are two cases in the English reports bearing on our problem. In *Benett v. Wyndham*,<sup>35</sup> decided in 1862, during the proper course of administering a trust, the trustee ordered certain trees felled. Woodcutters usually employed on the estate undertook the job. Through their carelessness a limb fell and injured a passerby. Recovery was had against the trustee and he sought reimbursement out of the trust estate. Said the court:

"The trustee appears to have meant well, to have acted with due diligence, and to have employed a proper agent to do an act the directing of which to be done was within the due discharge of his duty. The agent makes a mistake, the consequences of which subject the trustee to legal liability to a third party. I am of opinion that this liability ought, as between the trustee and the estate, to be borne by the estate."<sup>36</sup>

This doctrine was followed later in *In re Raybould*<sup>37</sup> which went a step further and allowed recovery directly against the trust estate under such facts, in order to avoid circuity of action.<sup>38</sup>

This is the extent of the reported cases directly deciding that there is a general right to reimbursement on the part of a trustee. There are just a few other obiter expressions from United States courts which might be noticed as showing the trend of judicial opinion. In *Ferrier v. Trepannier*<sup>39</sup> there is a statement to the effect that had it been before the court it would have been held that where, due to no personal fault, injury is caused to a third person, the trustee can be recovered against in his representative capacity. Also, in *Powers v. Massachusetts Homeopathic Hospital*,<sup>40</sup> a Federal case, Judge Lowell indicates by way of dictum that "the law on this point is so plain that no case can be found in the Massachusetts reports expressly sanctioning the payment from a private trust fund of damages for a tort committed in the administration

<sup>33</sup>In re Lather's Will, 243 N. Y. S. 366 (1930).

<sup>34</sup>Ewing v. Foley, 115 Tex. 222, 280 S. W. 499 (1926).

<sup>35</sup>4 De G. F. & J. 259, 45 Eng. Repr. 1183 (1862).

<sup>36</sup>Id. at page 263, 45 Eng. Repr. at page 1185.

<sup>37</sup>(1900) 1 Ch. 199.

<sup>38</sup>Id. at page 202.

<sup>39</sup>24 Can. S. C. 86 (1895).

<sup>40</sup>109 Fed. 294 (1901).

of trust property, though the practice must be of weekly occurrence in this city of Boston."<sup>41</sup>

There is equally little authority on the proposition that where the trustee has a right to exoneration or indemnity the action can be brought by the injured party directly against the trust estate. This now seems to be the English rule,<sup>42</sup> and it has, as before noted, been recognized in only one American jurisdiction.<sup>43</sup> There are several other cases from American jurisdictions apparently allowing recovery directly against the trust estate,<sup>44</sup> but these cases should be distinguished, for they are from states where the distinction between actions at law and in equity has been abolished.<sup>45</sup> It is assuredly the majority opinion that such suit cannot be maintained directly against the trust estate.

The Restatement of Trusts recognizes the general rule of individual liability of the trustee. Section 264 reads:

"The trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be liable if he held the property free of trust."

and comment b. of that section specifically says that the section includes liability incurred through torts of agents or servants. Section 247 of the Restatement, comment b., adopts the broad rule laid down in Texas, New York and England. It reads:

"Where a tort to a third person results from the negligence of an agent or servant properly employed by the trustee in the administration of the trust, and the trustee is not personally at fault, although the trustee is liable to the third person, he is entitled to indemnity out of the trust estate."

Section 266 holds that:

"A person to whom the trustee has become liable cannot reach trust property in an action at law against the trustee, although the liability was properly incurred by the trustee in the course of the administration of the trust."

Section 267 provides that in certain classes of cases a person to whom the

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<sup>41</sup>Id. at page 300.

<sup>42</sup>In re Raybould, (1900) 1 Ch. 199.

<sup>43</sup>Ewing v. Foley, 115 Tex. 222, 280 S. W. 499 (1926).

<sup>44</sup>Wright v. Caney River R. Co., 151 N. C. 529, 66 S. E. 588 (1909); Ireland v. Bowman, 130 Ky. 153, 113 S. W. 56 (1908).

<sup>45</sup>Schmidt v. Kellner, 307 Ill. 331, 138 N. E. 604 (1923).

trustee has incurred a liability can, by a proceeding in equity, reach the trust property.<sup>46</sup>

Where will Pennsylvania stand when these problems are presented for decision? The first one, as to personal liability of a trustee, has already been decided. In *Prager v. Gordon*<sup>47</sup> the court said:

"For any cause of action arising through the negligence of an executor or trustee in managing an estate such executor or trustee is personally liable, and the action must be brought against him in his individual capacity. Certainly he has no authority committed to him in his official capacity to do wrong, and because the act is wrongful, it follows it is in excess of his authority."<sup>48</sup>

This, of course, does not dispose of the problem of the right of the trustee to indemnity out of the trust estate where the liability to a third person has been incurred through no personal negligence of himself as trustee. This question has never been decided by our Supreme Court. However, the fact that in *Clason v. Stull*<sup>49</sup> the court takes note of certain cases allowing the trustee reimbursement, and does not criticize them, may be some evidence that Pennsylvania will allow the trustee to be indemnified out of the trust estate *at least* when the case can be brought within these well-recognized exceptions. It is to be hoped, however, that our Supreme Court will go even further, and will recognize the general rule that where the liability is incurred without any personal negligence on the part of the trustee, the trustee will, as a general rule, be entitled to reimbursement from the trust estate. Such a rule would have the support of reasoning, if not of case precedent, and since are courts are labeled courts of justice, it does not seem an untoward step or one which would work hardship, to adopt this general principle.

Will Pennsylvania allow a suit at law directly against the trust estate in those cases where the trustee is entitled to reimbursement? The language used in *Prager v. Gordon*<sup>50</sup> would suggest a negative answer here, but it is submitted that this result is questionable. Pennsylvania has always administered equitable doctrines in the law courts, and further, our Supreme Court would not be without precedent in allowing such a suit directly against the trust estate in a law court. In *Prinz v. Lucas*<sup>51</sup> the suit was brought by the injured party directly against the trust estate. The action was assumpsit. It is true that in

<sup>46</sup>These circumstances are set out in sections 268-271 inclusive.

<sup>47</sup>78 Pa. Super. 76 (1921).

<sup>48</sup>*Id.* at page 79.

<sup>49</sup>331 Pa. 101, 200 A. 593 (1938).

<sup>50</sup>78 Pa. Super. 76 (1921).

<sup>51</sup>210 Pa. 620, 60 A. 309 (1905).

that case the terms of the trust instrument specifically provided that no responsibility whatever should result to the trustees by reason of the negligence of their agents, and that all such liability should be borne solely by the trust estate. It would seem, however, that the case could be safely cited as authority for the proposition that under "certain circumstances" suit will be allowed at law directly against the trust estate. What more equitable "certain circumstances" could there be than those exemplified by the situation where, through no personal fault of his own, a liability devolves upon the trustee by reason of the negligence of his agent or servant? Whether or not the Supreme Court will adopt such reasoning is a matter of speculation, but, even if such reasoning is not adopted, it would seem that such suit could properly be allowed on the ground of avoiding circuitry of action.

In conclusion, it is submitted that regardless of what or how many general rules are laid down on this subject, probably more cases than not will be decided without reliance on them, for the reason that frequently there will be some provision or other in the trust instrument itself which will control or guide the court to the proper conclusion. The above propounded rules, however, seem the most reasonable for those situations where nothing is contained in the trust instrument indicating where the burden of tort responsibility shall lie.

ROBERT MCK. GLASS