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Liability of the Trustee Estate for Torts of the Trustee

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LIABILITY OF THE TRUST ESTATE FOR TORTS OF THE TRUSTEE

The general theory of responsibility for torts committed in the administration of trusts has been accorded almost universal recognition.[1] Tort actions must be brought against the trustee personally,[2] and a personal judgment against him cannot be enforced by an execution on the trust property.[3] Although this general rule has been subjected to certain exceptions,[4] there have been few, if any, unqualified contrary decisions.[5] Several jurisdictions, however, appear to have reached a contrary result by legislation.[6]

If the tort creditor finds it impossible to satisfy his personal judgment against the trustee, he may then proceed against the trustee's right of exoneration,[7] provided the trustee has such a right. The right to exoneration is a right to be indemnified for personal obligations properly incurred in the administration of the trust. It permits the trustee to appropriate from the income

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[1] There is, however, a certain amount of confusion in the authorities on many ramifications of this question. Note (1926) 44 A. L. R. 637; Stone, *A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee* (1922) 22 COL. L. REV. 527.

[2] Boston Beef Packing Co. v. Stevens, 12 Fed. 279 (C. C. S. D. N. Y., 1882); Wahl v. Schmidt, 307 Ill. 331, 138 N. E. 604 (1923); Louisville Trans. Co. v. Morgan, 180 Ky. 609, 203 S. W. 555 (1918); O'Malley v. Gerth, 67 N. J. L. 610, 52 Atl. 563 (1902); Parmenter v. Barstow, 22 R. I. 245, 47 Atl. 365 (1900); Note (1926) 44 A. L. R. 637.

Similarly, actions or contracts made by the trustee in his representative capacity must be brought against the trustee personally. Allegheny Car Co. v. Culbertson, 288 Fed. 406 (N. D. Tex., 1923); Johnson v. Leman, 131 Ill. 609, 23 N. E. 435 (1890); McGovern v. Bennett, 146 Mich. 558, 109 N. W. 1055 (1906); Fehlinger v. Wood, 134 Pa. 515, 19 Atl. 746 (1890); McIntyre v. Williamson, 72 Vt. 183, 47 Atl. 786 (1900); Note (1912) 40 L. R. A. (N. S.) 201.

[3] Zehnbar v. Spilman, 25 Fla. 591, 6 So. 214 (1889); Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87 (1904); Feldman v. Preston, 194 Mich. 352, 160 N. W. 655 (1916); O'Brien v. Jackson, 167 N. Y. 31, 60 N. E. 238 (1901).

[4] *In re* Hunter, 151 Fed. 904 (E. D. Pa., 1907); Ireland v. Bowman, 131 Ky. 153, 113 S. W. 56 (1908); Wright v. Railway Co., 151 N. C. 520, 66 S. E. 588 (1909); Note (1926) 44 A. L. R. 637.

[5] Kerr, *Liability of the Trust Estates for Torts of the Trustee's Servants* (1927) 5 TEX. L. REV. 368. Stone, *op. cit. supra* n. 1, at 529, cites some cases as contrary, which, however, appear to be distinguishable. Kerr, *op. cit. supra.*

[6] Statutes in four states (Cal., N. D., S. D., and Mont.) provide that a trustee is a general agent for the trust property, and that his acts, within the scope of his authority, bind the property as the acts of an agent bind his principal. CAL. CIVIL CODE (Deering, 1923) § 2267; N. D. COMP. LAWS ANN. (1913) § 6305; S. D. COMP. LAWS (1929) § 1220; MONT. REV. CODE (Choate, 1921) § 7914.

[7] Dantzler v. McInnis, 151 Ala. 293, 44 So. 193 (1907); Scott, *Liabilities Incurred in Administration of Trusts* (1915) 28 HARV. L. REV. 725; Stone, *op. cit. supra* n. 1.

or corpus of the trust an amount sufficient to pay such obligations.[8] It does not exist, however, in those cases where the act resulting in the tort amounts to a violation of the trustee's duties, or where the tort is wilful or malicious.[9]

The right to exoneration is an equitable, and not a legal, asset, and so available to the creditor only through a creditor's bill of equity.[10] The general rule is that such a proceeding cannot be brought before the exhaustion of all legal remedies.[11] Thus it is usually held that the right of exoneration cannot be reached if the trustees is solvent and within the jurisdiction.[12]

In 1930, apparently for the first time, the West Virginia Supreme Court of Appeals dealt with the question of liability for the torts of trustees.[13] Land which was held in trust by the defendants had become unsafe by reason of a defect in its electrical system, and plaintiff's decedent, a tenant of the trustees, was electrocuted. The court adhered to the general rule, disallowing an action brought against the trustees in their representative capacity.[14] Thus a tort creditor could reach the estate only through the trustee's right to indemnity.

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[8] Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118 (1889); Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492 (1891); Matter of Ungrich, 201 N. Y. 415, 94 N. E. 999 (1911); Stone, *op. cit. supra* n. 1, at 527. In some instances, the trust estate being inadequate, the trustee who has paid may have reimbursement from the *cestui que trust* personally. Scott, *op. cit. supra* n. 7. The right of reimbursement is generally regarded as superior to the claims of creditors of the *cestui que trust.* Perrine v. Newell, *supra.*

If the tort is committed by the trustee's agent, the trustee is liable on principles of agency. Baker v. Tibbetts, 162 Mass. 468, 39 N. E. 350 (1895); O'Toole v. Faulkner, 29 Wash. 544, 70 Pac. 58 (1902); Wahl v. Schmidt, *supra* n. 2. If he has used due care in employing the agents, he has a right of exoneration. Bennett v. Wyndham, 4 De G. F. and J. 259 (1862); (1930) 43 HARV. L. REV. 1122, 1124.

Use of the term "right" has been criticised by Stone, *op. cit. supra* n. 1, who regards it as a "power" to be exercised for the benefit of the creditors as well as of the trustee. An English case supports his view. *In re* Richardson, (1911) 2 K. B. 705.

[9] Scott, *op. cit. supra* n. 7; Stone, *op. cit. supra* n. 1.

[10] Hampton v. Foster, 127 Fed. 468 (D. Mass., 1904); O'Brien v. Jackson, *supra* n. 3; Stone, *op. cit. supra* n. 1.

[11] Trotter v. Lisman, 199 N. Y. 497, 92 N. E. 1052 (1910); Stone, *op. cit. supra* n. 1, at 530, 531.

[12] Johnson v. Leman, *supra* n. 2; Scott, *Cases on Trusts* (1931) 596n. *Cf:* Wilson v. Martin-Wilson Company, 151 Mass. 515, 24 N. E. 784 (1890).

[13] Massey v. Payne, 109 W. Va. 529, 155 S. E. 658 (1930); discussed (1931) 17 VA. L. REG. 395.

[14] It is intimated by the court that control by the beneficiaries over the trustee would allow the estate to be held directly. What amount of control would be necessary is not clear. The trustees in this case were owners of ⅝ beneficial interest in the land.

After this decision the plaintiff sued the trustees personally, joining their agent, who had been in charge of the land. The trustees were dropped on

What seems to be the closest approach to a clear-cut judicial departure from the established rule is the comparatively recent case of *Ewing v. Foley.*[15] In that case a trustee, employing capable engineers, was erecting a building for the purpose of carrying out a charitable trust. During the work of excavation, a building on an adjoining lot was damaged, and a judgment therefor, given by a lower court against the trustee in his representative capacity, was upheld by the Texas Supreme Court.

The result in that case is a desirable one, conforming to the views of numerous writers.[16] In the first place, the usual method of reaching the trust estate for tort liability, even when successful, is circuitous. It is out of accord with the modern tendency to eliminate technical difficulties. The trust estate, as has been pointed out, will, even under the established rule, ultimately bear the loss for most of the trustee's torts. There seems to be no good reason why it should not be held in the first instance.[17] Adjustment between the estate and the trustee, in the settlement of accounts, could, usually, be effected out of court, and should not be of concern to a third party with a just cause of action.

In the second place, there is no assurance that the general rule will always permit even the most deserved recovery. The tort may be of a character for which the trustee has no right of exoneration.[18] Further, if the trustee is behind in his accounts the deficiency will be set off against his indemnity rights, and the latter may be entirely extinguished.[19] Under either of these cir-

a plea in abatement, for defective service of process, and judgment was given against the agent. This judgment was settled by three beneficial owners, who then successfully prosecuted a suit to recover a contribution from the representative of a fourth beneficial owner, deceased. Payne v. Charleston Nat. Bank, 164 S. E. 252 (W. Va., 1932); (1932) 39 W. VA. L. Q. 79.

[15] 115 Tex. 222, 280 S. W. 499, 44 A. L. R. 627 (1926).

[16] Stone, *op. cit. supra* n. 1; Kerr, *op. cit. supra* n. 5; Note (1926) 44 A. L. R. 637.

[17] One reason frequently suggested is that the trust fund, from its very nature, should be kept intact, despite the acts of trustees. Parmenter v. Barstow, *supra* n. 2. This idea, however, has been repudiated, in effect, by cases giving the trustee a right of reimbursement. Note (1926) 44 A. L. R. 638, 681. The objection that courts of law look only to the legal owner and do not recognize the trust relation is of little significance in a code pleading state and even in a common law jurisdiction there is no reason why the estate cannot be bound by a judgment against the trustee in his representative capacity.

[18] *Supra* n. 9.

[19] Wilson v. Fridenberg, 21 Fla. 386 (1885); King v. Stowell, 211 Mass. 246, 98 N. E. 91 (1912); Stone, *op. cit. supra* n. 1.

A further pertinent question is suggested by the ability of the trustee to release his right to exoneration. Gillon v. Morrison, 1 De G. & S. 421 (1847). Would this cut off the right of creditors to reach the trust estate?

cumstances, were the trustee insolvent also, the claims of the plaintiff would ordinarily go unsatisfied.[20]

Wilfulness or maliciousness of the trustee's tort should, of course, be a bar to recovery against the estate, except, perhaps, to the extent that the estate is enriched by the tort.[21] The condition of the trustee's accounts, however, or the mere negligence of the trustee, should not be allowed to defeat a just cause of action. It is only in the field of trusts that the law has permitted an economic enterprise to be conducted without imposing on the capital and property employed therein the risk of tort liability. If a choice must be made between the tort creditor and the estate, it seems, barring wilfulness or maliciousness on the part of the trustee, that the loss should fall upon the estate, for it is the "real party" in interest, and it will receive all the benefit if any profit arises from the trustee's acts.

Thus it seems that a third party, suing for a tort committed by a trustee in the administration of his trust, should have a choice between a suit against the trust estate and one against the trustee. The former would be an action against the trustee in his representative capacity, with an execution levied directly on the trust property.[22]

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[20] Scott, *op. cit. supra* n. 7.
[21] *Supra* n. 9.
[22] Ewing v. Foley, *supra* n. 15. See also, Stone, *op. cit. supra* n. 1; Kerr, *op. cit. supra* n. 5.