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TRUSTS - TORT LIABILITY OF TRUSTEE IN HIS REPRESENTATIVE CAPACITY

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TRUSTS — TORT LIABILITY OF TRUSTEE IN HIS REPRESENTATIVE CAPACITY — Plaintiff brought suit to recover damages for injuries allegedly sustained because of the unsafe condition of a hotel building owned and operated by the defendant trustee. The trustee was an insolvent bank and trust company in the hands of the state superintendent of banks, who was also joined as defendant. The prayer was for a "judgment against the defendants in their fiduciary capacity toward the trust." On appeal of the lower court's judgment

sustaining defendants' demurrer, *held*, that the trustee could be sued in his representative capacity. *Carey v. Squire*, 63 Ohio App. 476, 27 N. E. (2d) 175 (1939).

The general rule is that a trust estate is not directly liable for torts committed by the trustee.[1] A well-recognized exception permits the tort creditor, when he is unable to obtain satisfaction from the trustee directly, to be subrogated to the trustee's right of indemnity against the trust estate by means of a suit in equity.[2] A more recent inroad on the general rule is illustrated by the principal case, which is the latest of a growing body of decisions supporting the proposition that, in certain instances, the trust estate may be directly subjected to liability for torts of the trustee by a suit against the trustee in his representative capacity.[3] Such a representative suit has been allowed (1) when the trust instrument implied that liabilities incurred in the administration of the trust should be discharged out of the trust estate,[4] (2) where the trust estate has benefited by the tort and the trustee was not personally at fault,[5] (3) when the tort is committed by the trustee while acting within the scope of his duties in carrying on a business according to the terms or intent of the trust instrument, and the trustee is insolvent and not personally at fault,[6] and (4) where the tort of the trustee is committed while acting under the control or supervision of the beneficiaries of the trust.[7] Certainly it is a sound proposition that the estate should bear the burden when it has been benefited by the tort,[8] or where the

[1] 2 SCOTT, TRUSTS 1499 (1939); 3 BOGERT, TRUSTS AND TRUSTEES, §§ 731, 732 (1935); 2 TRUSTS RESTATEMENT, §§ 266-267 (1935).

[2] 2 SCOTT, TRUSTS 1505-1506 (1939); 3 BOGERT, TRUSTS AND TRUSTEES, § 732 at p. 2169 (1935); 2 TRUSTS RESTATEMENT, § 268 (1935).

[3] Annotation, 127 A. L. R. 687 (1940); 2 SCOTT, TRUSTS 1533-1534 (1939).

[4] Birdsong v. Jones, 222 Mo. App. 768, 8 S. W. (2d) 98 (1928), affd. 225 Mo. App. 242, 30 S. W. (2d) 1094 (1930); Prinz v. Lucas, 210 Pa. 620, 60 A. 309 (1905); Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S. W. 56 (1908).

[5] Newell v. Hadley, 206 Mass. 335, 92 N. E. 507 (1910); Whiting v. Hudson Trust Co., 234 N. Y. 394, 138 N. E. 33 (1923). The trustee had no right of indemnity in these cases because he was in default to the estate.

[6] Dobbs v. Noble, 55 Ga. App. 201, 189 S. E. 694 (1937), managing and renting a building; Smith v. Coleman, 100 Fla. 1707, 132 So. 198 (1931), noted in 29 MICH. L. REV. 1102 (1931), operating a laundry; Wright v. Caney River R. R., 151 N. C. 529, 66 S. E. 588 (1909), operating a railroad; Birdsong v. Jones, 222 Mo. App. 768, 8 S. W. (2d) 98 (1928), affd. 225 Mo. App. 242, 30 S. W. (2d) 1094 (1930), operating a newspaper; Miller v. Smythe, 92 Ga. 154, 18 S. E. 46 (1893), managing and renting a building; Ross v. Moses, 175 S. C. 355, 179 S. E. 757 (1935) (court recognizes this exception to the general rule); Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S. W. 499 (1926), constructing a building.

[7] Wright v. Caney River R. R., 151 N. C. 529, 66 S. E. 588 (1909); Ross v. Moses, 175 S. C. 355, 179 S. E. 757 (1935) (court recognizes this exception to the general rule).

[8] 2 SCOTT, TRUSTS 1519-1520 (1939); Stone, "A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee," 22 COL. L. REV. 527 (1922). See opinion of Cardozo, J., in Whiting v. Hudson Trust Co., 234 N. Y. 394 at 409, 138 N. E. 33 (1923).

settlor evidently intended the estate to be so bound. Moreover, when the trustee is under the control of the beneficiaries, by analogy to the law of agency, it seems reasonable to subject the estate itself to liability. To hold the estate liable for torts committed by the trustee in conducting an active business, comprising the trust res, is also sound if the torts are of such a nature that they are considered the usual incidents of expense in that business, and if the trustee is insolvent, precluding satisfaction of the claim against him personally.[9] The principal case falls in this classification. The innocent third party cannot be made whole by subjecting the assets of the insolvent trustee to liability, so the court permits payment of the judgment from the assets of the trust.[10] The plaintiff avoids the time and expense of suing the insolvent trustee at law and then having to proceed in equity to be subrogated to the trustee's right of indemnification against the estate. In some circumstances the plaintiff would have no remedy if a suit at law were denied, because the trustee might not have any right of indemnity.[11] Although the courts of only a few states permit a trust estate to be reached directly by a tort creditor, the principal case is an indication that the proposition is gaining ground.[12]

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[9] Smith v. Coleman, 100 Fla. 1707, 132 So. 198 (1931), noted in 29 MICH. L. REV. 1102 (1931).

[10] 63 Ohio App. 476 at 478, 27 N. E. (2d) 175 (1939).

[11] See cases cited in note 5, supra.

[12] Annotation, 127 A. L. R. 687 (1940).