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LIABILITY OF THE TRUST ESTATE ARISING OUT OF TRUSTEE'S CONTRACTS WITH THIRD PERSONS

By Rubin Tepper

I. *Introduction*

In the course of administration of a trust, obligations may be incurred to third persons. These obligations may arise as a result of the ownership of the property held in trust, out of torts committed by the trustee or his servants, or out of contracts made by the trustee. The scope of this article will be limited to a consideration of the latter, and more specifically to the rights and remedies, legal and equitable, of the person to whom a liability is thus incurred.[1]

Where a trust fund is used to carry on a business, or there is trust property being managed and maintained by a trustee, there are three sources from which a contract creditor might satisfy his claim: (1) trustee's individual property; (2) the trust estate, and (3) the *cestui's* individual property under the trust or outside the trust. The questions immediately arise: to what extent is the trustee personally liable; can the trust estate be reached; how far may he beneficiaries be personally liable?

A general rule[2] in the law of trusts is that a trustee is a principal and not an agent for the *cestui que trust.*[3] As to the latter, in California and many other jurisdictions, where there has been no actual or potential reservation to them of various powers of control over the trustees, no direct personal liability can be imposed on them.[4] This leaves us with the problem as to the liability of the trustee and the trust estate.

II. *Personal Liability of Trustee*

The weight of authority is that the trustee becomes personally liable on the contract, notwithstanding it being an entirely proper contract, and entered into for the benefit of the trust estate.[5] It is immaterial that the third person

[1]It is believed that such analysis, though necessarily narrowed because of the practical problems of research and analytical treatment in a field offering almost unlimited case and text material, will still serve to embrace the problems of liability in the broader aspects, at least insofar as the same theories apply to creditors' remedies. For the same reason, there is no attempt at an exhaustive citation of authorities, but only enough to provide points of departure for those who wish to delve further into the matters raised.

[2]See comment note, 139 A. L. R. 127, 134, that although usually stated as a rule of law, the whole matter of rights of parties is basically one of reasonable construction of the particular contracts.

[3]Taylor v. Davis, 110 U. S. 330, 28 L. Ed. 163; Everett v. Drew, 129 Mass. 150.

[4]Betts v. Hackathorn (Ark. 1923), 252 S. W. 602; Goldwater v. Oltman (1930), 210 Cal. 408, 292 P. 624; Rest., Trusts, sec. 274. *Cf.*, Hardoon v. Belilios (1901), A. C. 118.

[5]Duvall v. Craig (1817), 2 Wheat. 45, 4 L. Ed. 180; Taylor v. Davis, *supra;* Cullinan v. Mercantile Trust Co. (1926), 80 Cal.App. 377, 252 P. 647.

knew the trust existed or that the trustee was acting in a representative capacity.[6] The mere fact that the trustee signed the contract in his representative capacity is ordinarily held not of itself sufficient to relieve him of personal liability. This common-law view is succinctly stated in a leading case, *Taylor* v. *Davis*,[7] where the court said:

> "A trustee is not an agent. An agent represents and acts for his principal who may be either a natural or artificial person. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise, the contract is therefore the personal undertaking of the trustee. . . ."

The court then goes on to say (again in accord with the general rule modified):

> "If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be . . . responsible, but that the other party is to look solely to the trust estate."

In the earlier law, there was no doubt that the obligations so incurred were regarded as resting solely upon the trustee personally. The fact that he was trustee and not the beneficial owner was regarded as irrelevant so far as his relations with third persons were concerned. In matters of "external" administration of the trust, the trustee was regarded the owner, and as to contracts made by the trustee, he and he alone was responsible for their performance, although they were made for the benefit of the trust estate.[8] Thus, the Restatement of Trusts, section 261:

> "The trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent that he would be liable if he held the property free of the trust."

And in the following sections[9] the trustee's personal liability is spelled out, with the aforementioned exception where, by the contract, it is provided that he shall not be personally liable.

The courts of law recognized the trustee only as an individual, and did not regard him as a juristic person in his representative capacity. Consequently, contract creditors could sue the trustee in an action at law, obtain judgment against him personally, and levy on his individual property; but they could not, any more than an individual creditor of the trustee, levy on the trust estate.[10] An action at law could not be maintained against *the*

[6] Scott, Trusts, sec. 262.

[7] See note 3, *supra;* also, Bogert, Trusts and Trustees, secs. 302, 712.

[8] Scott, Trusts, sec. 261

[9] Rest., Trusts, secs. 262, 263.

[10] Scott, Trusts, p. 1472.

trustee in his representative capacity. If the trust property were levied upon, it was necessary to invoke the aid of equity to restrain the sheriff and the judgment creditor from proceeding with the judgment sale. Equity would be here acting to protect the interests of the *cestui que trust,* because only in equity was the trust recognized as such. Also left to the courts of equity was the question whether the trustee's liability was permanent or was ultimately to be shifted to the trust.

As a result of statutory law, in a few states[11] a contract creditor may sue the trustee in his representative capacity in an action at law and collect his judgment from the trust estate. The existence of a statute, however, authorizing an action at law against the trust estate has been held not to exclude personal liability of the trustee,[12] an example of the general reluctance of courts of law in recognizing the trust estate as a legal entity.

III. *Exclusion of Personal Liability*

A. In General

If the trustee is unwilling to make himself personally liable upon a contract made by him in the administration of the trust, he may contract in such a way as to exclude personal liability.[12(a)]

This view was not accepted at once, nor by all jurisdictions. For instance, even as late as 1911, English courts[13] seem to hold for personal liability in spite of an express exclusionary provision in the contract, on the ground that the provision was repugnant to the promise, and that if the trustee were not liable the contract would be illusory. The Taylor case, *supra,* also deemed the contract the personal undertaking of the trustee, for "unless he is bound, no one is bound, for he has no principal." However, this is a complete *non sequitur,* for as we shall see, when such a contract is made it is implied that the trust estate will be liable, and the third person can enforce the contract by a proceeding in equity to reach the trust estate. It does not follow that merely because the trustee is not personally liable the third person has no enforceable claim. In fact, later cases indicate the English courts now recognize this,[14] and numerous American cases also hold the trustee may

[11]Conn. Gen. St. 1930, sec. 5640; Ga. Code 1933, secs. 108-406; Pa. 20 P. S., sec. 1171.

[12]Larson v. Sylvester, 282 Mass. 352, 359, 185 N. E. 44; Tebaldi Supply Co., Inc. v. MacMillan, 292 Mass. 384, 198 N. E. 651.

[12(a)]In all these cases, it is assumed that the contracts are properly made under a power existing in the trustee. Where the trustee acts beyond his powers, and excludes personal liability, the obligee who contracted without knowledge of the ultra vires character of the contract may be limited to an action for breach of implied warranty of authority to make the contract, or to quasi-contractual relief. See 3 Bogert, Trusts and Trustees, secs. 724, 725.

[13]Watling v. Lewis (1911), 1 Ch. 414.

[14]In re Robinson's Settlement (1912), 1 Ch. 717, 728.

so contract as to relieve himself of personal liability. In the leading case of *Jessup* v. *Smith,* 223 N. Y. 203, 119 N. E. 403 (1918), the plaintiff, having been retained by the trustee who was unable to pay the fees of counsel, agreed to render professional services and look to the estate for payment. The trial court held the services were beneficial to the trustee personally, and not to the estate. This was affirmed at the Appellate Division on the ground that the contract bound the client, Smith, personally, but the Court of Appeals reversed, J. Cardozo stating that the services were beneficial to the trust, and the trustee, in such circumstances, "has the power, if other funds fail, to create a charge, equivalent to his own lien for reimbursement, in favor of another by whom the services were rendered," and the plaintiff could maintain a suit against the trustee in his representative capacity. This precise issue was admitted by the Taylor case, *supra,* the court apparently not being aware of the contradiction existing between that point and the foregoing conclusion that no one would be bound if the trustee were not.

A great deal of case law in this matter has grown up around the difficult question as to whether a provision in the contract is so worded as to be sufficient to relieve the trustee of personal liability. Some courts have insisted upon a strict application of the rule, and refused to excuse the trustee unless the parties contracted expressly to exempt the trustee. They would follow the rule only when the trustee signed "as trustee but not individually," or where the third person expressly agreed to look to the trust estate only. Thus, even where the contract was signed in such a way as to indicate it was made for the benefit of the trust estate, as where the trustee added "trustee" or "as trustee" to his signature or his name in the body of the instrument, many cases [excluding those involving negotiable instruments (see below)] have held those words were merely *descriptio personae,* and hence, "surplusage" in spite of the fact that a reasonable interpretation of the terms would lead the ordinary intelligent businessman to suppose the parties plainly understood trustee was not to be personally liable.[15] Those cases have treated the situation as though there were a clear and rigid rule of law. Yet, by the better view, if in any manner it appears from the contract, construed in the light of the attending circumstances, personal liability was not intended, a contrary conclusion should be, and has been, reached.

The idea of endowing a person or group of persons with plural legal personalities is not new to the law. Yet according to the traditional view, the trustee as trustee was in no sense a different person from the trustee as an

[15]See Prof. Warren's critical comments in his book, "Corporate Advantages Without Incorporation" (1929), p. 861; also, Scott, Trusts, sec. 263; 3 Bogert, Trusts and Trustees, sec. 731; 138 A. L. R. 155.

individual.[15(a)] It was true that at common law an executor might be subject to liability in his capacity as executor, and it was possible to obtain a judgment against him *de bonis testatoris.* The executor was regarded as "continuing" the personality of the testator, and claims against the testator could be enforced in an action against the executor in his representative capacity. But even in the case of an executor, a suit against him in his representative capacity would not lie on obligations incurred by him after the death of the testator.[16] Similarly in the case of a trustee, no action at law could lie against him in his representative capacity. Thus, there was an insuperable difficulty in reaching the trust property through an action at law.

The true distinction, however, between an action against the trustee personally and one against him "as trustee" seems to be that the former is an action to charge the *person* who is trustee, while the latter is really a suit to reach the trust property, and is in no other sense a proceeding against the trustee at all.[16(a)]

According to the "fiction" or "concession" theory of a juristic person—which derived from the Roman and civil law, and has been incorporated into Anglo-American jurisprudence—the artificial person was created by the law and placed in the category of natural persons, with the intention of providing an easy and convenient arrangement of certain common commercial interests, but subject to certain legal consequences in order to protect public and private interests.

> "Men are social beings in the sense that no undertaking can be carried out to any large extent without some kind of social cooperation. The conditions of such cooperation may have to be settled at law."[17]

Thus we witness the development of the separate corporate entity doctrine, as aggregates of capital became more and more necessary in economic enterprise. With the decline of individualism, new concepts such as "character" and "motive" came to be attributed to the separate legal entity, and a school adopting a theory of realism developed. This theory treated the juristic entity as something akin to a human personality, in addition to and distinct from the separate will and character of the individuals who constituted the physical basis of the corporate entity.[18] Whichever theory of juristic personality prevails today, we may nevertheless conclude that the

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[15(a)]Scott, Trusts, sec. 266; Bogert, Trusts and Trustees, sec. 712.

[16]Scott, Trusts, sec. 266.

[16(a)]139 A. L. R. 127.

[17]Vinogradoff, "Juridical Persons," 24 Columb. L. Rev. 594.

[18]Dewey, "Historic Background of Corporate Legal Personalities," 35 Yale L. J. 655; but *cf.* the enemy alien corporation cases and one-man corporation cases, where the law, as it were, goes behind the pure abstraction of the artificial entity.

common law doctrine of no dual legal personality in the trustee has lost its force.[19]

In addition to recent decisions in law, the courts of equity long gave recognition to the trustee in his representative capacity, and to the beneficial interests created in the *cestui que trust.* Contract creditors could maintain a suit in equity to reach the trust estate, subject to certain qualifications discussed below.

B. Statutory Authority

The adoption of section 20 of the Negotiable Instruments Law[20] illustrates an effort to apply the idea of a dual legal personality to negotiable instruments. It embraces the business concept of the trustee as representative of the estate and as not liable personally for the trust obligation.[21] In California, that section has been expressly held applicable to business trusts.[22] However, even under the provisions of section 20, *supra,* some cases have held the trustee personally liable upon a negotiable instrument, in spite of signatures indicating he signed in a representative capacity. Other more liberal courts have permitted oral evidence to prove the payee was not to hold the trustee personally.

In several states, by statute,[23] an action at law can be maintained against a trustee in his representative capacity, and judgment can be rendered against him in that capacity, enforceable only out of the trust estate. It should be noted, however, that this procedure is followed only where the trustee contracted in the proper administration of the trust.

The Uniform Trusts Act, proposed by the National Conference of Commissioners on Uniform State Laws, also permits an action at law against the trustee in his representative capacity, provided the beneficiaries are given

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[19]Compare the statement by Justice Hand in a New York case: "Under the law of New York, no action may be maintained against a trustee as such, any more than against a director, a freight agent, a lawyer, a jockey, as such; the law of that state does not apparently recognize multiple personalities," Vass v. Conron Bros., 59 F. 2d 969, 970 (C. C. A. 2d, 1932) with Matter of Rausch (1932), 258 N. Y. 327, 331, 179 N. E. 755, 756, where J. Cardozo observed "in the view of the law, a corporation as an individual and a corporation as a trustee are two different and separate personalities."

[20]California Civil Code, sec. 3101: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized. . . ." See also Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108 (1907), 42 Harv. L. Rev. 977, 1007 (1929).

[21]Brannan, Negotiable Instruments Law (5th ed., 1932), 272, 273: "The framers of the act, having added 'or in a representative capacity', must have intended the section to apply to trust situations as well as to ordinary agency relationships."

[22]Chas. Nelson v. Morton (1930), 106 Cal. App. 144, 288 P. 845; 2 Bogert, Trusts and Trustees, n. 13, sec. 308, p. 990.

[23]See note 11, *supra;* also N. D. L. Rev. Code. 1943, sec. 59-0213; 60 Okla. St. Ann., sec. 174; 20 P. S. Pa. 1171; R. I. Gen. L. 1938, c. 529, sec. 1.

an opportunity to intervene. Section 12(3) of the Uniform Trusts Act allows a creditor to hold the trustee personally liable if the contract doesn't exclude personal liability, but the addition of the word "trustee" or the phrase "as trustee" is deemed *prima facie* evidence of an intent to exclude the trustee from personal liability. The Uniform Trusts Act has been adopted in six states.[24]

An interesting problem is created by section 2267 of the California Civil Code. It provides:

> "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal."

Does this mean that the common law rule of personal liability unless stipulations are made exempting such liability, is abrogated in California? If the trustee is an agent, this is implied. *Taylor* v. *Davis, supra,* stated the rule that the trustee is not an agent, and this language has been cited with approval in California despite section 2267.[25]

The California Annotations to section 261, Restatement of Trusts, point out that no decisions construing the provisions of section 2267 of the California Civil Code materially vary the principles of personal liability. It is there noted that the language of the section is literally that of the 1865 Field Committee draft of the proposed Civil Code for New York, and that it could not have been the intention of the committee to introduce the concept of the trustee as "agent" since it was not apparent from their notes. However, although some California decisions[26] appear to adhere to the common law doctrine, the conflict with section 2267 is not alluded to in the cases. In fact, one such case, *Goldwater* v. *Oltman,* a Massachusetts trust case, recognized that an agreement against personal liability might be implied and need not be expressed.

In *Purdy* v. *Bank of America Nat'l T. & S. Assn.* (1935), 2 Cal. 2d 298, 40 P. 2d 481, an action by trust beneficiary against the bank for the amount of deposit credited by defendant's predecessor bank on a trustee's note for money borrowed, the bank was held justified in appropriating the deposit, under a proper exercise of a banker's lien, and under section 2267, the

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[24]La., Nev., N. C., Okla., S. D., Tex.

[25]The then Dean Harlan F. Stone, discussing the attitude of the courts on this issue, criticizes the use of the word "agent" (among other terms) where that "agent" has no principal who may be legally obligated for his acts, as an anomalous and only superficially appropriate use of the term. Stone, "A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee," 22 Columb. L. Rev. 527 (1922); Scott, Trusts, pp. 1540-41.

[26]Goldwater v. Oltman, *supra; Andrews v. Horton* (1935), 8 Cal. App. 2d 40, 47 P. 2d 456; Zimmer Constr. Co. v. White (1935), 8 Cal. App. 2d 672, 47 P. 2d 1087.

trustee as agent, had the right to incur the debt represented by the overdraft and to make the notes covering them. The note writer in 23 California Law Review 538, comments on the principal case as of significance because it is the first California case squarely holding that under section 2267 the contracts of a trustee, acting within the scope of his authority, create a direct obligation upon the trust estate, thus rendering inapplicable the common law rule that unless they contain an express provision to the contrary, the contracts of a trustee are his personal obligation and do not bind the trust estate. The writer adds: "Conversely, it would seem that section 2267 should operate to relieve the trustee of personal liability, although this question is not decided by the . . . case." But this is the very question involved. If trust estate liability is recognized, is the trustee free from personal liability?

The lower court in the Purdy case,[27] in considering section 2267, said: "The section is a mere statutory statement of an equitable principle." The upper court, although reversing on the issue whether implied authority existed to bind the trust estate, did no more than establish that the trust property might be reached without a suit in equity, the creditor having a direct claim where the liability was properly incurred by the trustee, and without regard to the trustee's personal liability, or to the state of the trustee's accounts with the trust estate.

A recent Montana case, *Tuttle* v. *Union Bank & Trust Co.* (1941), 119 P. 2d 884, 139 A. L. R. 129, is appropriately discussed at this point, since it was decided partly on a statute which was copied from the Field Code in California.[28] In that case, the defendant was sued personally and not as trustee, although the action purported to be upon a contract made or ratified by defendant within its powers as a testamentary trustee. The plaintiff contended that unless in the contract a trustee specifically limits his liability to the extent of the trust estate, the trustee becomes personally liable thereon. The court, in sustaining defendant's demurrer for failure to state a cause of action against defendant personally, said:

> "[Although] ordinarily one does not perform an act both as an agent and as principal[29] . . . the meaning of [Sec. 2267] seems clear enough. Its effect must be either that the trust estate is to be considered an entity chargeable as a principal for the acts of the trustee, its agent, or that the legal incidents of the trustee's authorized acts, so far as the parties are concerned, are the same as those which would attach to an agent's authorized transactions for his principal.[30] In either view, it seems quite evident that *in order to give*

[27]Cal. Dist. Ct. of App. (1934), 32 P. 2d 672.

[28]Mont. Rev. Code, 1935, sec. 7914; see, also, N. D. Comp. L. 1913, sec. 6305; S. D. Code, 1939, sec. 59.0209.

[29]See Calif. Civ. Code, sec. 2343.

[30]Rest., Agency, secs. 144, 146, 156, 320, 328.

reasonable effect to the statute, we must hold . . . that the trustee is not personally liable but that the remedy is an action against it as trustee (emphasis mine—R. T.), and that a judgment against it in that capacity is limited in its application to the trust estate."[31]

Returning to the problem heretofore raised, whether by virtue of section 2267 in California, the trustee is free from personal liability on a contract entered into in the administration of the trust, in the absence of stipulations in the contract exempting him from personal liability, it is submitted that the cases cited in support of the comment in the California Annotations, Restatement of Trusts, are not conclusive. For example, in *People* v. *Sischo* (1939), 31 Cal. App. 2d 345, an action brought to collect tax delinquencies from defendants, a trust estate, and against the trustees individually and as trustees, the lower court sustained the demurrer insofar as the defendants were individually named, reversed on appeal, the upper court citing the Goldwater case, *supra,* as a leading California case holding trustees personally liable where the contract fails to stipulate the exemption, and applying the Goldwater decision to tax delinquencies. But, as already pointed out, the Goldwater case does obliquely recognize that there may be an implied agreement with creditors to exclude the trustees from personal liability. Could it not be argued that section 2267 is embodied in all contracts made by trustees with third persons in the proper administration of the trust? The Tuttle case, *supra,* construing an identical statute, does apparently apply agency law. If the California decisions do not, the alternative interpretation remains that the statutory remedy is not a destruction of the common law rule, but simply an enlargement of the equitable relief secured by a representative suit. (See 3 Bogert, Trusts and Trustees, p. 2108.)

IV. *Trust Liability*

What remedies has the contract creditor when he cannot proceed against the trustees personally? He must necessarily depend upon such liability as might lawfully be created against the estate. The weight of authority prevented the creditor from reaching the trust estate in an action at law. Although in code states the procedural difficulties in permitting an action at law against a trustee in his representative capacity are removed, the substantive problem still remains whether, and to what extent, a contract creditor should be permitted to obtain satisfaction out of the trust estate. The writers on this subject are unanimous in their criticism of the common law authority

[31]The court also based its decision on the fact that the difficulties in the common law doctrine, originating in procedural complications resulting from the diversity of legal and equitable remedies and the failure to recognize the multiple legal personality of the trustee, are eliminated by the joining of law and equity under the codes.

which prevented a direct right against the trust property, and allowed only a derivative right through a suit in equity.[32] Dean Stone's comment is typical:

> "There is today no other situation where one may assume to carry on any type of economic enterprise without imposing on the capital embarked in it the cost of compensating for its expense or for the tortious acts committed by those who are engaged in carrying it on."

The courts of equity did attempt to assist deserving creditors, where the trust estate was benefited and the remedy against the trustee personally was either excluded or inadequate. They did so, recognizing that a suit against the trustee in his representative capacity[33] was not necessarily dependent on the juristic personality of the trustee. However, the courts were not agreed as to the theory or theories which would justify a recovery out of the trust estate, or as to the circumstances under which, or the extent to which, such recovery might be had.

The theories on which courts attempted to reach the trust property were: (1) the theory of subrogation; (2) the "conferred benefit" theory, and (3) the "binding contract" theory. The latter theory has been largely dealt with in the preceding remarks. Where the third party is to look only to the trust estate either because of the terms of the trust instrument or of stipulations in the contract, a suit in equity was maintainable against the trustee in his representative capacity, and it was immaterial whether the trustee was solvent or not, since he was not personally liable. According to one theory, the "power to charge" theory, such a contract gives the creditor a direct claim against the trust estate, and if the liability is properly incurred by the trustee, the creditor can reach the trust property whether or not the trustee was in default to the estate on other matters. This is the theory of the Purdy case, *supra,* where, although the trustee had misappropriated the money, it was held the lender could recover against the trust estate.

However, under another view, the contract does not give the third person a direct claim, but merely exempts the trustee's individual property from liability. Under this theory, the creditor can reach the trust property only to the extent that the trustee is entitled to exoneration, so that if the trustee is in default to the trust, the contracting party is precluded from reaching the trust property to the extent of such default.[34]

The terms "right of reimbursement" and "right of exoneration" are used to describe rights of the trustee against the trust estate, arising out of his administration of the property. The trustee is said to have a "lien" or

[32] 18 Cornell L. Q. 134; 28 Harv. L. Rev. 725; 22 Columb. L. Rev. 527; 27 Cal. L. Rev. 432.
[33] This is a misnomer actually, since no separate legal personality exists to be "represented."
[34] Scott, Trusts, pp. 1524-25.

"right of reimbursement" on both the income and the corpus of the estate to secure his claims, and also a "right of exoneration," i. e., a right not to be compelled to discharge liabilities out of his individual property. These terms are inaccurate, in that it is difficult to speak of a "right" without a corresponding duty on the part of some other person or persons (assuming the *cestui que* is not personally liable), or of a "lien" upon property legally owned by the lienor. Nevertheless, the courts have used these terms to describe assets of the trustee to which a contract creditor may be subrogated in equity, to compel the application of such assets to his claim against the trustee. This is the subrogation theory of recovery, or more accurately, of equitable execution.

This theory was invoked because it recognized that ultimately, the liability for contracts made by the trustee in the proper administration of the trust should be borne by the trust estate. The tendency today is to regard the trustee as not the owner of the trust property despite his legal title thereto, but simply its administrator, even where the rights of persons other than the beneficiaries are concerned.[34(a)] Aside from compensation for services, the trustee does not benefit personally from its administration. Any benefits from his contracts with third persons ultimately go to the beneficiaries of the trust. It is logical and equitable, therefore, to impose on the trust estate those economic burdens which are incidental to its proper administration.[34(b)] The statement "the trust estate is liable" might be open to the objection that the courts engage in a metaphysical personification of the estate—whereas legal relations are supposed to exist only between persons, and not between persons and things. However, the statement is purely figurative, and the fiction is maintained solely for its convenience in the effective administration of justice. All that is intended by the expression is that the contract creditor can maintain a suit in equity against the trustee to compel him to apply the trust property to the discharge of liabilities arising under the contract. In other words, the third person can maintain a suit in equity against the trustee in his representative capacity.

In most jurisdictions, a bill by the creditor would be allowed only upon a showing that relief against the trustee personally was impossible, for such reasons as insolvency, beyond the jurisdiction, etc. Some cases required a judgment be first obtained against the trustee and execution returned *nulla bona,* but because equity should not compel the creditor to do a useless thing, most decisions permit equitable execution without the circuitous method

[34(a)]Scott, Trusts, sec. 261.
[34(b)]3 Bogert, Trusts and Trustees, sec. 718.

mentioned.[35] Massachusetts courts permit a bill in equity without proof of trustee's insolvency, because the exhaustion of legal remedies is not a condition precedent to equitable execution.

But one difficulty with the derivative theory of subrogation is that where it is followed the creditor may fail because the trustee has no right of indemnity. Assuming a situation where the trustee has contracted against personal liability and there is no statute permitting an action against the trust estate, or the creation of a lien, the creditor would be remediless where the trustee is in default to the trust estate in an entirely independent matter for an amount equal to or exceeding the amount of the creditor's claim. A further difficulty is the cumbersome method of an accounting to determine whether or not the trustee has a right of exoneration from the trust estate.

It was because of this greater privilege of the trustee that the former Dean Stone was led to renounce the reimbursement theory of recovery in favor of the more direct "power to charge" theory,[36] which allows the trust estate to be expressly obligated by the trustee's contract. The trustee who is unwilling or unable to incur personal liability is here permitted to create a charge equivalent to his own lien for reimbursement, in favor of third persons who render services or otherwise give value to the trust.

The explanatory comment in Restatement, Trusts, section 271, indicates that although it is an equitable remedy it has eliminated some of the objectionable features of the usual derivative remedy.[37] The remedy is available whether or not there is a provision in the trust agreement permitting an exclusion of personal liability clause in the contract, and it is also available where the trustee may be in default and not entitled to indemnity. The remedy is limited to cases where the contract was made in the proper administration of the trust, but it is not defeated even where no benefit was conferred upon the estate.

> "Where a person, not acting officiously or gratuitously, has conferred a benefit upon the trust estate, he can, by a proceeding in equity, reach the

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[35]Prof. Scott, in his article, "Liabilities Incurred in the Administration of Trusts," 28 Harv. L. Rev. 725 (1915), distinguishes between the right of exoneration and the right of reimbursement. He indicates that equitable enforcement of the obligation under the former can be sought only by the trust creditors, not by the trustee's private creditors; while on the other hand, where the trustee has paid the trust creditor out of his private assets, the right of reimbursement can be reached by trustee's private creditors.

[36]See Rest., Trusts, sec. 271; Jessup v. Smith, 223 N. Y. 203, 119 N. E. 403; Cullinan v. Mercantile Trust Co., *supra;* 3 Bogert, Trusts and Trustees, sec. 715.

[37]Prof. Scott's article, *supra,* indicates that the "power to charge" theory is derived from the trustee's right of exoneration. But *cf.* Dean Stone's article, where it is pointed out that since no personal judgment can be taken against the trustee, because of the stipulation that he shall not be personally liable, it is difficult to see what "right" of exoneration there can be. This action by courts of equity in compelling the exercise of trustee's power is a clear recognition that the power does not exist for the benefit of the trustee alone. In this regard, see Gilbert v. Penfield (1899), 124 Cal. 244, 56 P. 1107.

trust property and apply it to the satisfaction of his claim to the extent to which the trust estate was benefited."[38]

This is the expression of the "conferred benefit" theory. The relief given under it is based on the general principle that one person shall not be unjustly enriched at another's expense. The contract creditor is here not precluded from obtaining satisfaction out of the trust estate by the fact that the trustee is not entitled to indemnity. The right is direct, not derivative. It is available although the trustee has exceeded his authority in incurring the liability. California is in accord.[39] However, this direct right is not recognized in all jurisdictions. In a few cases, recovery has been allowed by a direct right based on the prevention of unjust enrichment, but mainly on grounds of social policy, without the support of any adequate analysis of the relation of the parties on which a right on behalf of the creditor could be based.[40]

V. *Conclusion*

The modern tendency is to make the trust estate responsible for contracts properly made by the trustee. The procedural difficulties have been largely removed by joinder of law and equity, and by statute. The substantive difficulties tend to disappear in the recognition of the trustee as a juristic person to whom direct attachment of liabilities is applied. This is largely a question of public policy, which depends as much on the method of historical jurisprudence as on the method of analytic jurisprudence, in the reasonable distribution of liabilities and rights of the parties involved. It is possible that much of the rationale for shifting liability to the trust estate was due to cases of insolvency of trustees. Today, the solvency of trustees is more or less guaranteed by the very nature of the modern trustee, often a large trust company or a trust department of a bank. In the event of their insolvency, the trust estate would likewise be much reduced in value, if not completely exhausted. The policy of casting the economic burden resulting from a breach of the trustee's contract with third persons onto the trust estate rather than onto the creditor, by sanctioning a resort to the estate, is in line with the policy of the law in other legal relationships, that an economic enterprise should bear its own burdens. Perhaps, under varying conditions of trust administration, the tendency may shift back, or even reach beyond, to the beneficiaries.

[38]Scott, Trusts, sec. 269.

[39]Irvine v. MacGregor (1927), 203 Cal. 583, 265 P. 218.

[40]Miller v. Smythe (Ga., 1893), 92 Ga. 154, 18 S. E. 46. A covenant in a lease of the trust property was breached by the trustee lessor, who neglected to make necessary repairs, with consequent injury to plaintiff lessee. Plaintiff was allowed to recover in a suit brought against trustee in his representative capacity. Legal remedy was not exhausted.