

real. Conceivably, the plaintiff might go into the "business" of selling his broadcasting privileges and consequently come into direct conflict with the defendant.<sup>24</sup> Or, as was alleged in the case, the effect of the broadcasting of the races might be to decrease the attendance at the track.<sup>25</sup> This result should warrant relief on the analogy of the trade-name cases involving completely dissimilar goods.

There remains the question of how much of his own the defendant must add to what he has taken from the plaintiff to make the product or result legally his. In the instant case, it may be argued that the defendant transformed the mere observation of the horse race into an exciting broadcast, embroidered with entertaining sidelights and instructive interpretation. But this argument by analogy seems a most far-fetched and hopeless justification for the defendant's appropriation and dissemination of the plaintiff's show.

One final consideration remains. The result of protecting the plaintiff is to promote his acquisition of future income by strengthening his monopoly of the means of acquiring it. Since the ultimate purpose of protecting such monopoly is to encourage the enterprise, the final decision may well turn on the social desirability of the plaintiff's activity. In any event, a matter of such fundamental social importance might well be left for the legislature.<sup>26</sup>

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**Trusts—Liability of Corporate Trustee—Court Order as a Defense to Trustee's Liability—[Texas].**—A corporation deposited securities with the defendant, trustee, and issued participation certificates. The trust indenture contained an exculpatory clause exempting the trustee from liability except for "gross negligence or wilful default." Thereafter, a receiver was appointed for the settlor corporation and he on behalf of 90% of the trust beneficiaries, requested the receivership court to order the defendant to deliver the securities to him. Accordingly, the decree was granted in which it was also provided that the receiver should perform the duties of the original trustee. The defendant, evidently knowing that not all the beneficiaries were represented, *complied* with the court order. Subsequently, the plaintiff, who was a certificate holder, but not one of the 90% represented by the receiver, filed suit for breach of trust against the trustee. *Held*, the beneficiaries are necessary parties to a proceeding that destroys the trust or materially alters its terms. Since the plaintiff was not a party in the receivership court, the decree was no justification for the trustee's action. *Natl Bk. & Tr. Co. v. Bruce*.<sup>1</sup>

The standards measuring the liabilities of a trustee under an indenture have not been clearly defined by the decisions. Writers disagree on whether the standards applicable to the family trustee can be properly applied to the corporate trustee since the

<sup>24</sup> In the United States, broadcasting and motion picture rights have become commercial assets in both amateur and professional sports. Lit. Dig. 33 (Oct. 5, 1935); Lit. Dig. 41 (Sept. 19, 1936); Phillips, Hold 'Em Mike, Sat. Eve. Post 25 (Oct. 17, 1936); Time 85 (Sept. 6, 1937).

<sup>25</sup> Many colleges in the United States do not permit broadcasting of football games on the theory that it cuts into the gate-receipts. Lit. Dig. 41 (Sept. 19, 1936).

<sup>26</sup> See Brandeis, J., dissenting in *International News Service v. Associated Press*, 248 U.S. 215, 248 (1918); *Handler, Unfair Competition*, 21 Iowa L. Rev. 175, 191 (1936).

<sup>1</sup> 105 S.W. (2d) 882 (1937).

latter's function is primarily that of bringing borrower and lender together.<sup>2</sup> In some respects, the two types of trustees are dissimilar: the trustee under an indenture may conclusively rely upon disinterested expert opinion;<sup>3</sup> notice to such a trustee is not necessarily notice to the beneficiary;<sup>4</sup> it may represent conflicting interests;<sup>5</sup> the trust res usually remains in possession of the settlor. In some aspects, however, the trustee under an indenture and the family trustee are alike in that neither, by the inclusion of exculpatory clauses in their contracts, can escape the fundamental obligations inherent in the trust. Thus, the trustee under an indenture probably has to record a mortgage; it must not continue to issue bonds or certificates after knowledge of misapplication of proceeds;<sup>6</sup> it must comply with all prerequisites for authentication of bonds;<sup>7</sup> where trustee has actual knowledge of default, it must notify the beneficiaries if protection of the latter's interests necessitates notice.<sup>8</sup>

The trend in recent decisions is to remove the trustee under an indenture from the position of a mere stakeholder to that of a fiduciary.<sup>9</sup> There is a growing hesitancy to allow the exculpatory clause to immunize corporate trustees for failure to act when protection of the beneficiaries' interests necessitates action. At most, the exculpatory clause will probably serve only to relieve the trustee from the burden of constant watchfulness; it will not immunize for inactivity after knowledge that inaction will result in injury.<sup>10</sup> In New York, for instance, there already has been legislation imposing greater duties and higher standards upon corporate trustees.<sup>11</sup> In terms of federal regulation, the movement has reached its peak in the Barkley Bill now pending in Congress,<sup>12</sup> of which some of the essential provisions are (a) the trustee's interests shall not conflict with those of the beneficiaries except as provided, (b) the trustee shall have active duties *before* default as well as after, (c) establishment of a standard of liability measured by what the prudent man under similar circumstances would do,<sup>13</sup>

<sup>2</sup> 2 Bogert, *Trusts and Trustees* § 789 (1935); 2 Perry, *Trusts* § 760 (7th ed. 1929); Posner, *Liability of Trustee under the Corporate Indenture*, 42 *Harv. L. Rev.* 198 (1929); Posner, *The Trustee and the Trust Indenture*, 46 *Yale L. J.* 737 (1937); McCollom, *S.E.C. and Corporate Trustees*, 36 *Col. L. Rev.* 1197 (1936).

<sup>3</sup> *Hunsberger v. Guaranty Trust Co.*, 150 N.Y. S. 190 (1914), *aff'd* 218 N.Y. 742, 113 N.E. 1058 (1916); *Hazzard v. Chase Nat'l. Bank*, 159 Misc. 57 (1936) 287 N.Y. Supp. 541, *semble*; Posner, 42 *Harv. L. Rev.* at 215 (1929); Barkley Bill, S 2344 75th Cong. 1st Sess., § 7(i) (trustee permitted to rely conclusively upon expert's opinion providing there is no bad faith or gross negligence).

<sup>4</sup> *Westinghouse Electric Mfg. Co. v. B. R. T. Co.*, 291 Fed. 863 (S.D. N.Y. 1922).

<sup>5</sup> Posner, 42 *Harv. L. Rev.* at 229 (1929).

<sup>6</sup> Posner, 42 *Harv. L. Rev.* at 211 (1929).

<sup>7</sup> *Doyle v. Chatham & Phenix Nat'l. Bank*, 253 N.Y. 369, 171 N.E. 574 (1930) (court imposed liability on rationale of negligent representation rather than on theory of a fiduciary relationship); see note, 33 *Col. L. Rev.* 97 (1933).

<sup>8</sup> *Marshall & Ilsley Bk. v. Guaranty Inv. Co.*, 213 Wis. 415, 250 N.W. 862 (1935).

<sup>9</sup> See *Marshall v. Ilsley Bk. v. Guaranty Inv. Co.*, *supra*, note 8. *State v. Comer*, 176 Wash. 257, 28 P. (2d) 1027 (1934); *Hazzard v. Chase Nat'l. Bank*, note 3 *supra*, (where the use of the term "trustee" in indentures was strongly condemned).

<sup>10</sup> 46 *Yale L. J.* 871 (1937) and cases cited.

<sup>11</sup> Laws of 1936, c. 900, adding a new Article §-A to the Real Property Law.

<sup>12</sup> Barkley Bill, *op. cit. supra* note 3.

<sup>13</sup> *Cf.*, *Restat. Trusts* § 174 (1935).

(d) abolition of the exculpatory clause. The instant case fits into the general trend but reaches an extreme position, since liability was imposed for compliance with a court order.<sup>14</sup> The exculpatory clause gave no protection; yet because of such clause some courts may have protected the trustee. But, the adoption of the Barkley Bill abolishing the exculpatory clause, may but need not necessarily result in general imposition of liability for compliance with void court orders.

When, upon advice of counsel, a family trustee complies with a decree which is *obviously* void, liability will probably be imposed, even though such a trustee has acted in good faith and exercised due care in selection of an advisor.<sup>15</sup> It is questionable whether the trustee under an indenture should have a greater obligation towards the bondholders than to use reasonable care in the selection of counsel. Note that the Barkley Bill allows the trustee, in absence of bad faith and gross negligence, to rely upon expert opinion concerning statements in the indenture.<sup>16</sup>

Where, however, any kind of trustee complies with a court order, the validity of which, as in the instant case, may be reasonably questioned, other considerations enter. The trustee's position seems analogous to that of a public officer who acts under an unconstitutional statute. The courts differ as to whether such officer should be liable, but it is submitted that the better view is that which affords immunity.<sup>17</sup> The trustee's position also seems similar to that of a sheriff who after seizing goods under a process which is fair on its face, although prior proceedings have been unlawful, is nevertheless protected.<sup>18</sup> To impose liability on a trustee even though compliance is the result of reliance upon competent counsel would force a trustee to appeal from all adverse decisions in trial courts. Thus, a trust estate could settle its litigation only at a considerable cost in time and money. The result may also tend to encourage inaction on part of trustees, or make them demand provisions for indemnity by the beneficiaries who may be unable to find a willing surety or to finance the surety bond.

<sup>14</sup> It should be noted, however, that liability possibly may have been imposed because the trustee did not inform the receivership court that some of the beneficiaries were unrepresented in court.

<sup>15</sup> *Pierce v. Prescott*, 128 Mass. 140 (1880); (liability of guardian to ward); *In re Ward's Estate*, 92 Conn. 286, 102 Atl. 586 (1917) (semble); *Nat'l. Trust Co. v. Gen. Finance Co.*, [1905] A.C. 373; *Bogert*, 3 *Trusts & Trustees*, § 541 (1935).

<sup>16</sup> Barkley Bill § 7(i), *op. cit. supra* note 3.

<sup>17</sup> *People v. Salomon*, 54 Ill. 39 (1870); *State v. Gardner*, 54 Ohio St. 24, 42 N.E. 999 (1896); *Dodd*, *Cases on Constitutional Law* 90-7 (2d ed. 1937); *Crocker*, *Tort Liability of Public Officers Who Act under Unconstitutional Statute*, 2 So. Calif. L. Q. 236 (1929).

<sup>18</sup> *Mechem*, *Public Offices and Officers* § 769 (1890).