

who were likely to be the closer relatives of a testator that the New York Decedent Estates Commission recommended a change in the usual common law rule which imposed the burden of taxes as administration expenses on the residue.⁴⁷ In making this recommendation, it is not surprising that this commission accepted the dictum in *Edwards v. Slocum*,⁴⁸ in which the federal court followed the New York courts' rule that the federal tax was payable out of the residuary estate, but recognized it as a state judicial regulation, not a federal statutory direction.⁴⁹ The court said that the Federal Government does not care who pays the tax; "if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."⁵⁰

Trusts—Powers and Obligations of Trustees—Personal Liability of Trustee upon Contract within Powers as Trustee—[Montana].—The defendant trust company was required by the terms of the trust to support the trustor's daughter for life. This daughter became an invalid in 1933 and from that time until her death was cared for by her step-sister, with the consent of the defendant trustee. The step-sister assigned her claim for these services to the plaintiff, who brought suit against the defendant personally. On the defendant's demurrer the suit was dismissed by the trial court, and, on appeal to the Supreme Court of Montana, *held*, that a trustee is not personally liable upon contracts within his authority as trustee and may be sued only in his representative capacity. Judgment affirmed. *Tuttle v. Union Bank & Trust Co.*¹

This decision is contrary to the rule followed in most states that a trustee is personally liable upon contracts within his authority unless he has stipulated to the contrary,² and it appears to be the first case in which the trustee's personal liability has been denied in the absence of a specific statutory basis for liability in his representative capacity.³ While the court relied in part on a Montana statute⁴ declaring a trustee

are satisfied. . . . The tax is a pecuniary burden or imposition laid upon the estate. . . . In its nature it is superior to the claims of the residuary legatee. Since *neither the Act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate.*" (Italics added.) See also *Matter of Hamlin*, 226 N.Y. 407, 124 N.E. 4 (1919).

⁴⁷ Combined Reports of Commission to Investigate Defects in Laws of Estates 338 (reprint ed. 1928-33); 1 Paul, *op. cit. supra* note 21, at § 13.54. "In many cases estate taxes have completely exhausted the residuary estate, and those whom that testator desired most to benefit have received nothing." Greely, *op. cit. supra* note 39, at 309.

⁴⁸ 264 U.S. 61 (1924), affirming *Edwards v. Slocum*, 287 Fed. 651, 653 (C.C.A. 2d 1923), where Judge Hough said, "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax: it announces the sum and demands payment from the executors. . . ."

⁴⁹ *Edwards v. Slocum*, 287 Fed. 651, 655 (C.C.A. 2d 1923).

⁵⁰ *Ibid.*, at 653. This rule has been recently expressed in *Northern Trust Co. v. Harrison*, 125 F. (2d) 893 (C.C.A. 7th 1942).

¹ 119 P. (2d) 884 (Mont. 1941).

² *Peysen v. American Security Trust Co.*, 70 App. D.C. 349, 107 F. (2d) 625 (1939); *Kincaid v. Hensel*, 185 Wash. 503, 55 P. (2d) 1050 (1936); 3 *Bogert, Trusts and Trustees* § 712 (1935).

³ Notes 27 and 28 *infra*.

⁴ Mont. Rev. Code Ann. (Anderson & McFarland, 1936) § 7914; see § 7968, which provides that ordinarily an agent is not personally liable to third persons.

to be a "general agent for the trust property," it recognized that the language of the statute did not clearly abolish the trustee's personal liability since a trust estate cannot be a principal.⁵ Furthermore, under an identical statute⁶ the California courts have found the trustee personally liable.⁷ Accordingly, the court in the instant case sought to justify its decision on additional grounds.

Under modern code practice, the court observed, the rule of personal liability is an anachronism, although it was necessary when law and equity were separate. The law courts were reluctant to recognize the existence of the trust and viewed the trustee as the sole owner of the trust property.⁸ They concluded, therefore, that no one would be liable at all⁹ if the trustee was not personally liable for the debts of the trust. At the same time the law courts hesitated to issue execution against the trust property because the cestuis que trustent were not before the court and their interests were not protected.¹⁰ While the courts of equity were procedurally equipped for a direct action against the trust estate, they would ordinarily decline jurisdiction because the creditor had an adequate remedy at law—his right to a personal judgment against the trustee. It was therefore necessary for the creditor to bring an action at law to secure a personal judgment against the trustee, and thereafter for the trustee to seek reimbursement from the trust estate on his accounting or in a separate suit in equity. The court in the instant case, in refusing to permit the trustee to be sued personally, observed that this undesirable circuitry of action is unnecessary today because under modern code practice there is no substantial objection to an action at law against the trustee in his representative capacity.¹¹ But most courts still refuse to sanction a judgment against the trustee in his representative capacity in an action at law,¹² and the limitations on a creditor's right to bring a suit in equity against the trust estate still obtain.¹³

A creditor, however, cannot be sure of his right to obtain even a personal judgment against the trustee without considerable investigation. The trustee may avoid personal liability by a stipulation in the contract with the third person that he is not to

⁵ *Taylor v. Davis*, 110 U.S. 330, 335 (1884); *Lazenby v. Codman*, 28 F. Supp. 949 (N.Y. 1939).

⁶ Cal. Civ. Code (Deering, 1941) § 2267.

⁷ *Hall v. Jameson*, 151 Cal. 606, 91 Pac. 518 (1907); *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695 (1897); *Duncan v. Dormer*, 94 Cal. App. 218, 270 Pac. 1003 (1928). "It is not believed that these peculiar statutes have materially changed the law . . . as far as the personal liability of the trustee is concerned." 3 *Bogert, Trusts and Trustees* § 712, at 2108 (1935).

⁸ *Duvall v. Craig*, 2 Wheat. (U.S.) 45, 57 (1817).

⁹ *Taylor v. Davis*, 110 U.S. 330, 335 (1884).

¹⁰ In an action against the trustee, the law court had no way of considering questions between the trustee and the cestuis, as e.g., whether the expenditure was a proper one within the terms of the trust. *Ferrin v. Merrick*, 41 N.Y. 315 (1869); *O'Brien v. Jackson*, 167 N.Y. 31, 33, 60 N.E. 238, 239 (1901). Had the court issued such an execution, its enforcement would have been enjoined by the equity court for this reason. *Stone, A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee*, 22 Col. L. Rev. 527, 540 (1922).

¹¹ *Tuttle v. Union Bank & Trust Co.*, 119 P. (2d) 884, 888 (Mont. 1941); cf. *Stitzer v. Whittaker*, 3 Neb. Unoff. 414, 91 N.W. 713 (1902).

¹² *Kirchner v. Muller*, 280 N.Y. 23, 19 N.E. (2d) 665 (1939); *Wolf v. Schiff Trust and Savings Bank*, 276 Ill. App. 527 (1934).

¹³ 2 *Scott, Trusts* § 267 (1939).

be personally liable,¹⁴ by a similar provision contained in the trust instrument,¹⁵ or by a contract of indemnity between the trustee and the beneficiaries.¹⁶ Moreover, it has been indicated that a trustee threatened with a personal judgment may bring a suit in equity to prevent the judgment being obtained and to compel the liability to fall on the trust property, or the cestuis, or upon such other party as the court may consider the appropriate bearer of the burden.¹⁷

Even where the creditor is able to sue the trustee personally, the rule of personal liability is of doubtful advantage to him. Where the trustee is able to pay the claim out of his own resources, it may be easier for the creditor to collect a judgment against the trustee, especially if the latter is a trust company, than to collect a judgment against the trust estate.¹⁸ But where the trustee is unable to pay, although the creditor may then bring a suit in equity against the trust estate,¹⁹ in some jurisdictions he must go through the formality of exhausting his remedy at law,²⁰ and opinion is also divided as to whether the creditor's claim against the trust estate should be made subject to any defenses the estate may have had to the trustee's suit for reimbursement, had the trustee paid the claim.²¹ Finally, the rule of personal liability may be disadvantageous to the cestuis que trustent. Since the rule may compel the trustee to conduct two suits,²² it will tend to make the fees charged by trustees higher than they otherwise would be.²³

These difficulties are reflected in the modern trend away from the rule of personal

¹⁴ *Taylor v. Davis*, 110 U.S. 330 (1884); *Jessup v. Smith*, 223 N.Y. 203, 119 N.E. 403 (1918). However, in some instances parol evidence is admissible to determine the intent of the parties, *Brown v. Smith*, 73 F. (2d) 524 (C.C.A. 2d 1934), noted in 34 Mich. L. Rev. 121 (1935), while in others the intent must be clear on the face of the instrument, *Hall v. Jameson*, 151 Cal. 606, 91 Pac. 518 (1907).

¹⁵ *Gibson v. Charter Oak Ins. Co.*, 142 U.S. 326 (1892); *Gwin v. Fountain*, 159 Miss. 619, 644, 126 So. 18, 22 (1930). Contra: *Allegheny Tank Car Co. v. Culbertson*, 288 Fed. 406 (1923).

¹⁶ 3 Bogert, *Trusts and Trustees* § 718, at 2139 (1935). Where it is impossible to obtain a personal judgment against the contracting trustee because he has died or left the jurisdiction, most courts allow the creditor to sue the trust estate. 3 Bogert, *Trusts and Trustees* § 718, at 2141 (1935). But see *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695 (1897).

¹⁷ 3 Bogert, *Trusts and Trustees* § 718, at 2133-34 (1935), citing *Hobbes v. Wayet*, 36 Ch. Div. 256, 259 (1887).

¹⁸ A trust company would ordinarily have available a greater amount of liquid assets than would a trust estate.

¹⁹ *Trotter v. Lisman*, 199 N.Y. 497, 92 N.E. 1052 (1910); 3 Bogert, *Trusts and Trustees* § 716 (1935).

²⁰ 18 Cornell L. Q. 134 (1933).

²¹ *Downey Co. v. 282 Beacon Street Trust*, 292 Mass. 175, 197 N.E. 643 (1935); 2 Scott, *Trusts* § 268 (1939); *Stone*, op. cit. supra note 10, at 536 (suggesting that in this situation it would be appropriate to allow the judgment at law against the trustee to be satisfied out of the trust property); 3 Bogert, *Trusts and Trustees* § 716 (1935).

²² In addition, the trustee is required to carry the burden of the debt until he is able to complete his suit for reimbursement.

²³ 3 Bogert, *Trusts and Trustees* § 718, at 2139 (1935).

liability.²⁴ Even while law and equity were separately administered, a few decisions permitted the creditor to bring contract actions directly against the trust estate.²⁵ This procedure has been more frequently followed in cases dealing with liability for torts of the trustee.²⁶ Several states have enacted statutes allowing the trustee to be sued in his representative capacity,²⁷ and the Uniform Trust Act²⁸ provides: "Whenever a trustee shall make a contract which is within his powers, . . . and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and . . . judgment . . . shall be collectible [by execution] out of the trust property."

The abandonment of the personal liability rule seems desirable because of the general policy that the liabilities resulting from the ownership of property ought to be borne by the holders of the beneficial interests in it.²⁹ However, although a trustee is like an agent in most respects, he is charged with at least one responsibility that an agent does not ordinarily have—that of determining the extent of the ability of his "principal," the trust estate, to pay—and it may be suggested that at least in cases where the trustee was actually at fault in this respect, he should be charged with the resulting deficiency.³⁰

²⁴ Scott, Trusts § 271A (1939).

²⁵ *Wylly v. Collins*, 9 Ga. 223 (1851); *Manderson's Appeal*, 113 Pa. 631, 6 Atl. 893 (1886); *Yerkes v. Richards*, 170 Pa. 346, 32 Atl. 1089 (1895). However, these actions appear to have been considered as alternatives to—not in lieu of—the right of judgment against the trustee personally.

²⁶ *Ireland v. Bowman & Cockrell*, 130 Ky. 153, 113 S.W. 56 (1908); *Smith v. Coleman*, 100 Fla. 1707, 132 So. 198 (1931); *Ewing v. Foley, Inc.*, 115 Tex. 222, 280 S.W. 499 (1926). In this field, the desire to release the trustee from personal risk, particularly with respect to non-negligent "business torts," is more apparent.

²⁷ Conn. Gen. Stats. (1930) § 5640; R.I. Gen. Laws (1938) c. 486, § 20; Ga. Code (1933) § 108-505; N.D. Laws (1927) c. 273; Pa. L. Ann. (Purdon, Supp. 1941) tit. 20, § 1171; see the Uniform Negotiable Instruments Law § 20, 5 U.L.A. 137 (1936).

²⁸ Section 12, 9 U.L.A. 718 (1942), has now been adopted in Louisiana, La. Gen. Stat. Ann. (Dart, 1939) § 9850.52; North Carolina, N.C. Code Ann. (Mitchie, 1939) § 4035(o); Nevada, Nev. L. (1941) c. 136, § 11; and Oklahoma, Okla. Stat. (Harlow, Supp. 1942) § 9240r.

²⁹ *In re Lincoln Trust Co.*, 9 F. Supp. 643, 645 (Neb. 1934); 3 *Bogert, Trusts and Trustees* § 718 (1935); Scott, Trusts § 271A.1 (1939).

³⁰ In this connection see Conn. Gen. Stat. (1930) § 5640, which allows the creditor to sue the trustee for any deficiency.