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NOTES AND RECENT CASES

THE TRUSTEE'S AGENT'S DUTY TO THE TRUST ESTATE

In 1927 the defendants, a firm of solicitors, were employed to prepare a declaration of trust in favor of the vicar of the Church of Holy Trinity, Kingsway, London. One of the two named trustees,¹ the Reverend William Stewart MacGowan, was also the vicar of Holy Trinity; as trustee, Doctor MacGowan employed the defendants as agents. Having invested the fund (£900) in an approved mortgage chosen by their principal, nine years later the defendants were directed by him to secure from the mortgagor a remittance of £200. They did so, forwarding a check for that amount to Doctor MacGowan. Shortly thereafter, Doctor MacGowan sent to the defendants his personal check for £200, with an instruction to purchase certain stocks for him personally. They complied with this instruction. After the death of his co-trustee in 1937, Doctor MacGowan directed the defendants to obtain the remaining £700—to pay £300 to his son, Andrew MacGowan; and to invest the remainder in more of the same stocks for him personally. The defendants again executed their principal's instructions without question. Shortly after Doctor MacGowan's death,

¹ So far as this litigation is concerned, the other trustee, a Mr. Streater, is unimportant.

the succeeding vicar of the Church of Holy Trinity brought action against the defendants, seeking to charge them as constructive trustees. *Held*: The defendants were not liable. The defendants were not liable because they had done only what their principal had told them to do. The legal principle invoked by the court was that an agent who has acted only as such owes a duty only to his principal. In the absence of a consciously fraudulent participation in their principal's breach, or a conversion of the fund to their own use, agents are available as defendants only in an action by the principal. *Williams-Ashman v. Price and Williams*.²

This conceptual inaccessibility of an agent of a trustee has been advanced often by the English courts in similar cases. In *Barnes v. Addy*,³ for example, the court held that agents were immune to action by anyone but their principals "unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."⁴ This court further circumscribed the character of the agent's legal responsibility in *Blundell v. Blundell*,⁵ where it was held that an agent is "not liable as a constructive trustee unless there are facts *brought home to him* which show that to his knowledge the money is being applied in a manner which is inconsistent with the trust."⁶

Some English judges have doubted the wisdom of a blanket immunity for agents of trustees; yet, even while admitting that an agent is in certain circumstances personally liable for his conduct, these courts have moved but little, if at all, from the position taken in *Barnes v. Addy*. Thus, in *Morgan v. Stephens* it is admitted that complete immunity for agents might result in the "grossest frauds;"⁷ nevertheless, the court restricted liability to cases in which the agent "knew the trusts."⁸ Knowing the trusts, the court has said in the instant case,⁹ means that the facts of *both* trust and breach thereof must be brought home to him.

² [1942] 1 Ch. 219, 226, 228.

³ L.R. 9 Ch. App. 244 (1874).

⁴ *Ibid.*, at 251-52. The following cases illustrate the rule established in *Barnes v. Addy*: *Brinsden v. Williams*, [1894] L.R. 3 Ch. 185; *In re Barney*, [1892] L.R. 2 Ch. 265; *In re Spencer*, 51 L. J. 271 (Ch. 1881); *In re Blundell*, L. R. 40 Ch. 370 (1889); *Gray v. Johnston*, L. R. 3 H.L. 1 (1868); *Keane v. Roberts*, 4 Madd. 332 (Ch. 1819).

⁵ L. R. 40 Ch. 370 (1889).

⁶ *Ibid.*, at 381 [italics added].

⁷ 3 Giff. 226 (Ch. 1861).

⁸ *Ibid.* Accordingly, though holding that an agent need not have been chargeable with all or a part of the trust fund in order to be liable to someone other than his principal, this court has nonetheless adhered to the postulate that an agent's duty arises only *after he has been made aware*, not only of the trusts, but that a breach has occurred or is about to occur. It appears, therefore, that the agent has no positive legal duty to acquaint himself with the nature or extent of his principal's authority, even after he learns that a trust estate is involved.

⁹ Though the defendants had the trust deed in their safe, an averment by them that they had forgotten its contents was sufficient in the eyes of the court to characterize them as ignorant. *Williams-Ashman v. Price and Williams*, [1942] 1 Ch. 219.

The sentiment motivating the foregoing view of an agent's liability seems well expressed in the following statement made by Sir. W. M. James, L. J.: "I have long thought . . . that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious."¹⁰

Similar sentiment¹¹ doubtlessly has been responsible for the legislation¹² which has limited the duty to the trust estate of banks,¹³ issuing stock-corporations,¹⁴ transfer agents,¹⁵ and third persons generally,¹⁶ dealing with a trustee. But legislatures have failed to deal expressly with the duty to the trust estate of agents employed by trustees. In America, as in England, this is a matter of judge-made law. The rulings evolved in the American courts differ markedly, however, from those which prevail in the English decisions.

American courts generally have not been preoccupied in these cases with the traditional immunity of an agent acting as such.¹⁷ As Sir W. M. James might have been voicing the attitude which stimulated the English view, so, perhaps, Professor Mechem was articulating the notion which is responsible for the contrary view adopted in America: "The fact that the agent acted in good faith, supposing the principal had a legal right to have done what was done, is no defense."¹⁸ He who intermeddles with property not his own must see to it that he is protected by the authority of one who is himself, by ownership or

¹⁰ Barnes v. Addy, L. R. 9 Ch. App. 244, 255-56 (1874).

¹¹ 3 Scott, Trusts §§ 321-26 (1939); Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454 (1921); 4 Bogert, Trusts and Trustees § 910 (1935).

¹² The statutes are collected in 4 Bogert, Trusts and Trustees §§ 901, 905 (1935).

¹³ Uniform Fiduciaries Act §§ 5-10, 9 U.L.A. 297, 305-13 (1942); 47 Yale L. J. 299 (1937); 47 Yale L. J. 994 (1938); 4 Bogert, Trusts and Trustees §§ 908-12 (1935); 3 Scott, Trusts § 324.5 (1939); Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454, 480 ff. (1921).

¹⁴ Uniform Fiduciaries Act § 3, 9 U.L.A. 303 (1942); 4 Bogert, Trusts and Trustees § 902 (1935); 3 Scott, Trusts § 325 (1939).

¹⁵ Note 14 supra; Stark v. National City Bank, 278 N.Y. 388, 16 N.E. (2d) 376 (1938); In re Guardianship of Lutz, 362 Ill. 631, 1 N.E. (2d) 55 (1936).

¹⁶ Uniform Fiduciaries Act § 2, 9 U.L.A. 302 (1942); 4 Bogert, Trusts and Trustees § 901 (1935); 3 Scott, Trusts §§ 321, 326.1 (1939); Trustee Act 1925, 15 George V, c. 19, § 14; 4 So. Calif. L. Rev. 72 (1930).

¹⁷ But see Knowlton v. Fourth-Atlantic Nat. Bank, 264 Mass. 181, 162 N.E. 356 (1928).

¹⁸ With this statement compare the one made by Lord Selbourne, in Barnes v. Addy, L.R. 9 Ch. App. 244, 254 (1874): "his . . . advice to his client . . . prove(s) that he thought that was all which he, as solicitor, was bound to do." (See also the very similar statements made by the judge in the principal case, Williams-Ashman v. Price and Williams, [1942] 1 Ch. 219, 222-25.) This reveals an attitude toward the obligations of an agent far different from that evinced in Professor Mechem's statement. Lord Selbourne applies the subjective test of intent, apparently because there is no objective legal obligation; Professor Mechem avers that the duty is externally imposed, and that the good faith of the agent is irrelevant. See notes 22 and 24 infra.

otherwise, clothed with the authority he attempts to confer."¹⁹ American courts are similarly unimpressed with the argument that a profit from the breach is prerequisite to liability for participation therein.²⁰

In *Proctor v. Norris*,²¹ an example of the stricter American rule, an attorney was held liable when at the request of his principal, who held a major interest in two corporations, he applied a check drawn as treasurer of one firm to the debts of the other. While admitting the good faith of the defendant,²² the court nevertheless held that the form of the check provided such notice of other interests that the defendant was duty bound to examine his principal's authority before complying with his requests. Likewise, in *Steele v. Leopold*²³ a broker whose client's account was registered in his fiduciary identity was held liable to the beneficiary when the fund was wasted in ensuing speculations. Here again the motive or state of mind of the agent was not regarded as relevant;²⁴ liability was predicated on the failure of the defendant to examine his principal's authority²⁵—the failure, that is, to execute a duty acquired by virtue of the notice²⁶ that he was dealing with funds held in a fiduciary capacity.²⁷

¹⁹ 1 Mechem, Agency § 1456, at 1077 (2d ed. 1914). —The Restatement of Agency § 428, Comment b (1933), recognizes that a sub-agent has a duty to the principal (hence an obligation to examine the agent's authority), though strictly speaking there is no privity between these parties; *Petersen v. Lyders*, 139 Cal. App. 303, 305, 33 Pac. (2d) 1030, 1031 (1934) ("there is no insistence in the law of agency in this state that there be a privity of contract between the principal and the subagent to authorize the principal to proceed against the subagent as a beneficiary in fact of the contract of agency between the agent and the subagent"); 1 Mechem, Agency § 1321 (2d ed. 1914); 2 *ibid.* § 2058.

²⁰ *Proctor v. Norris*, 285 Mass. 161, 165, 188 N.E. 625, 626 (1934); *New Amsterdam Casualty Co. v. Robertson*, 129 Ore. 663, 278 Pac. 963 (1929); 4 *Bogert, Trusts and Trustees* § 868 (1935); 1 Mechem, Agency § 1456 (2d ed. 1914); *Scott, Participation in a Breach of Trust*, 34 *Harv. L. Rev.* 454 (1921).

²¹ 285 Mass. 161, 188 N.E. 625 (1934).

²² *Ibid.*, at 164: "the defendant, though acting honestly and though ignorant as to whether that company was a corporation or not, could easily have discovered the truth."

²³ 135 App. Div. 247, 120 N.Y. Supp. 569 (1909); *Tierney v. Coolidge*, 308 Mass. 255 259-60, 32 N.E. (2d) 198, 200 (1941).

²⁴ 135 App. Div. 247, 257, 120 N.Y. Supp. 569, 578 (1909): "He [the executor] and the brokers apparently acted openly and in good faith."

²⁵ *Ibid.* The rule in *Steele v. Leopold* is applied in the following cases: *Whitford v. Moehlenpah*, 196 Wis. 10, 219 N. W. 361 (1928); *National Surety Co. v. Manhattan Mortgage Co.*, 185 App. Div. 733, 174 N.Y. Supp. 9 (1919); *Hart v. Goadby*, 138 App. Div. 160, 123 N.Y. Supp. 166 (1910); *Safe Deposit Co. v. Cahn*, 102 Md. 530, 62 Atl. 819 (1906); *English v. McIntyre*, 29 App. Div. 439, 51 N.Y. Supp. 697 (1898); *Leake v. Watson*, 58 Conn. 332, 20 Atl. 343 (1890); *Shaw v. Spencer*, 100 Mass. 382 (1868).

²⁶ For a discussion of what constitutes notice sufficient to raise a duty of inquiry in these and similar cases, see 4 *Bogert, Trusts and Trustees* §§ 894, 902 (1935).

²⁷ In *Titcomb v. Richter*, 89 Conn. 226, 93 Atl. 526 (1915), the Connecticut court refused to hold a broker liable when a devastavit resulted from speculations with a fund deposited by a client in his name as trustee. In claiming that the mere registration of an account in one's name as trustee is not a reliable indication that trusts are actually involved, the court seems to have attempted to shift to the English position that the facts must be brought home to the

Taking these cases as representative of at least an important tendency in the American common law, there is a strong likelihood that the defendants would have been liable had they been tried in an American court.²⁸ For the agent has been warned in the American decisions that even when simply executing his principal's commands, his legal status does not secure him from all attacks. The view in England being different, the problem of evaluation is provoked.

The English position accords well with the recent legislation, reducing generally the duty to the trust estate of those dealing with a trustee. Under the Uniform Fiduciaries Act,²⁹ a banker, a transfer agent for stocks, or one paying money for goods or land to a trustee, is liable only when he knew he was taking part in a breach, made a personal gain from the breach, or had actual knowledge of facts which made it an act of bad faith for him to act as he did.³⁰ Apparently this legislation was stimulated by the necessity for facile administration of trust estates.³¹ If the importance of security in transactions is conceded to be greater than protection of *cestuis que trust*, there seems to be no reasonable basis for withholding from an agent of a trustee the protection supplied by the Uniform Fiduciaries Act to other persons dealing with a trustee. Indeed, the strong reasons³² underlying the conceptual immunity of an agent who acts within his authority afford both provocation and justification for extending the statutory protection to agents of trustees.

TORT LIABILITY OF A CHARITABLE CORPORATION

The plaintiff, a paying patron at a ball game sponsored by the defendant, was injured when a row of bleachers collapsed. Against the defendant's plea that it was immune from tort liability as a charitable corporation, the plaintiff

agent. But since this court expressly declined to overrule *Leake v. Watson*, 58 Conn. 332, 20 Atl. 343 (1890) (brokers held liable because they had actual knowledge that they were dealing with fiduciaries, though they did not know the terms of the trusts), it would seem that the court admitted the general rule of liability should follow when the agent has *actual* knowledge that trust funds are involved. The view of notice adopted by the Connecticut court in *Titcomb v. Richter* is approved by the California court in *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 311, 163 Pac. 47, 49 (1917), but is adversely criticized in 29 Harv. L. Rev. 232 (1915); *Shaw v. Spencer*, 100 Mass. 382, 393-94 (1868). For a general discussion of this question, see 4 Bogert, *Trusts and Trustees* §§ 894, 902 (1935)

²⁸ Unquestionably, the defendants were aware that their principal was a trustee; again, there is no doubt of their knowledge that trust funds were involved. Not only had the defendants themselves drawn up the declaration of a trust, but they had it at all times in their safe. *Williams-Ashman v. Price and Williams*, [1942] 1 Ch. 219, 221.

²⁹ 9 U.L.A. 297 (1942).

³⁰ Notes 12-16 *supra*.

³¹ Note 11 *supra*.

³² Consider this statement made by Lord Selbourne in *Barnes v. Addy*, L.R. 9 Ch. App. 244, 252 (1874): "If those principles were disregarded [*viz.*, that an agent is liable only when he has profited by or has acted despite actual knowledge of the breach], I know not how anyone could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees."