Judgments against Trustees - Their Force and Effect

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In recent years there has been an enormous growth in the creation of trusts of every kind. With the highly efficient organization of trust companies, more testators have created trusts by their wills and family settlement trusts by trust agreements inter vivos have become quite common. Subdividers of great tracts of land have found it expedient to market their title through responsible trustees. Various modern inventions of financing real estate transactions, notably land trust certificates, require the medium of a trustee. The ownership of co-operative apartment buildings is most effectively accomplished for the benefit of the co-operative apartment owners by placing the title of the property in a trustee, and lastly, many business enterprises are now being conducted under trust agreements known as common law or Massachusetts trusts. These and a great variety of other transactions are bringing the business world more and more into contact with trustees and the vast amount of business transacted by trustees makes it a matter of practical importance to consider the effect of a judgment against a trustee; how such a judgment is enforced; against whom it may be enforced; and how a trustee may protect himself from personal liability on his trust obligations. An exhaustive search of the books has not disclosed a great abundance of material on this subject, but there is sufficient to be able to make an analysis, which it is hoped may be useful. In passing, it may be said that there is no distinction in regard to the subject under consideration between a trustee under a will, or a common law trust agreement.

For convenience, the subject may be best considered under five sub-heads:

1. Is a judgment against a trustee as such a lien upon the real estate held by the trustee in his capacity as trustee?
2. May real estate held by the judgment debtor in his capacity as trustee be sold under an execution based upon such judgment?
3. Is such a judgment a lien on the real estate of the judgment debtor owned by him in his own right?
4. Is there any form of judgment known to the law under which a judgment creditor may enforce his judgment against the trust estate?
5. How may a trustee protect himself from personal liability on his trust obligations?

**Example**

Let us suppose for example that John Doe, duly acting as trustee with the power to borrow money, in the exercise of his power, borrows the sum of $1,000.00 and signs his name to a note, "John Doe, as trustee." He fails to pay the note, is sued in an action at law, and a judgment is recovered against him "as trustee." As trustee, under the same trust, John Doe holds the title to real estate. The judgment debtor causes execution to issue upon his judgment, levies on the real estate held by John Doe, as trustee, and sells it under the execution. This example will be referred to from time to time to illustrate the various points made in the course of this discussion.

1 and 2

Sub-heads 1 and 2 are so closely connected that they may be discussed practically as one subject. At the very outset it may be definitely stated that the judgment given in our example is not a lien upon the trust property and the trust property cannot be sold at an execution sale.

Before proceeding to a demonstration of these propositions, it is essential to constantly bear in mind that trusts are the subjects exclusively of equity jurisdiction. With this always in mind it is easy to understand the conclusions here reached. In general, then, trust property cannot be subjected to the claims of creditors by proceedings at law. There is excluded from this discussion the matter of judgment liens and execution sales of real estate, the title of which is held by a trustee under a secret trust. Such a title may in Illinois be sold on execution. In this respect the law of Illinois is different from the law of other States. This is due to the wording of
our recording act. Emmons v. Moore, 85 Ill. 308; Home Bank v. Peoria Trotting Society, 206 Ill. 11. Some authorities will be referred to from other jurisdictions where secret trusts were involved, but where there was no recording act. The principles of those authorities are applicable here.

A few quotations from the leading authorities on this subject will serve to illustrate that a judgment against a trustee is not a lien on real estate held by such trustee in trust. Thus in Hunt v. Townshend, 31 Md. 336, the Supreme Court of Maryland, referring to a judgment against trustees, said:

"Such a proceeding is a breach of trust, and a judgment so confessed is not a lien upon the trust property."

In Boardman v. Willard, 73 Iowa 20, the title was in "George F. Woolston, trustee." A judgment was rendered against him as trustee. The Court said:

"The judgment was not a lien upon the lands held by him in trust for another." The holdings of these Courts are further substantiated by the following authorities: 15 R. C. L. 807; Black on Judgments, Sec. 421; Hays v. Reger, 102 Ind. 524; Thomas v. Kennedy, 24 Ia. 397.

It being clear, therefore, that a judgment against a trustee is not a lien on real estate which it was based was incurred for the benefit of the trust estate. If it is the individual obligation of John Doe, or whether the debt upon which it was based was incurred for the benefit of the trust estate. If it is the individual obligation of John Doe, in no event, either at law or in equity, can the trust estate be subjected to the payment of the debt. If, however, John Doe incurred the debt as trustee within his powers and for the benefit of the trust estate, then the trust estate cannot be sold on execution. Indeed this is the law and it will require very few citations to illustrate this.

The leading case is probably Moore v. Stemmons, 119 Mo. Appeal, 162 in which a judgment had been recovered against the trustees in their capacities as trustees. The judgment creditor had caused an execution to be issued and a levy to be made upon the trust property. The proceeding before the Supreme Court was a motion to quash the execution, which was granted. The Court said:

"An execution upon a judgment or decree against a trustee cannot be made to run against trust property."

In Mallory v. Clark, 9 Abbott's Practice Reports, 358, it was said:

"An execution issued upon a judgment cannot be levied upon the trust estate."

In Osterman v. Baldwin, 6 Wall. 122, the Supreme Court of the United States held that no title would pass by a sale of trust property under an execution. The Court said:

"If Holman had the bare, naked, legal title, without any beneficial interest in the property sold, and no possession, nothing passed by the sale."

Other authorities supporting this proposition are Lee v. Wrixon, 37 Wash. 50; Smith v. McCann, 24 How. 398; 1 Freeman on Executions, Sec. 173; 23 C. J. p. 343; 11 Am. and Eng. Encyc. of Law, p. 634; Kleber on Judicial and Execution Sales, Sec. 342; and Hussey v. Arnold, 185 Mass. 202.

The cases referred to do not all involve judgments which run against the debtor as trustee. Some involve judgments against the debtors individually, but as we shall see, there is no difference between these cases in principle, because a judgment against "John Doe" and a judgment against "John Doe, as trustee" have the same force and effect. They are both personal judgments.

Therefore, the mode of enforcing the judgments is the same in this—that neither can be enforced against the trust property by any proceeding at law. In equity, of course, it becomes a matter of importance whether the judgment is based upon the individual liability of John Doe or whether the debt upon which it was based was incurred for the benefit of the trust estate. If it is the individual obligation of John Doe, in no event, either at law or in equity, can the trust estate be subjected to the payment of the debt. If, however, John Doe incurred the debt as trustee within his powers and for the benefit of the trust estate (in accordance with our example given at the outset), while the trust estate cannot at law be subjected to the payment of the debt, yet in equity it can. See Hussey v. Arnold, 185 Mass. 202 and Zehnbar v. Spillman, 6 So. 2d 134 (Fla.). The cases are therefore all in point, regardless of the form of the judgment. Some of the cases referred to involve almost the identical situation stated in our example. It is a remarkable fact that there appears to be no conflict in the cases found on this subject, from which it may be seen that what zeal courts of equity prevent interference with trusts by courts of law and how uniformly courts of law apply the principle of "hands off" to trust estates.

There is another important consideration in this connection, namely, that the rights of the beneficiaries are not and cannot be concluded by a judgment against a trustee. In such a proceeding beneficiaries are not parties. To subject their property to the lien of a judgment or to a sale upon execution based on a
judgment rendered in a proceeding at law in which they had no opportunity to be heard, would require the amendment of several constitutions. Black in his work on judgments in Section 585 says:

"The general rule is that in all proceedings affecting the trust estate, whether brought by or against third persons, the trustee and cestui que trust are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein."

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We may now proceed to consider what effect the judgment rendered in our example will have on the individual property of John Doe. Is the judgment a lien upon John Doe's individual real estate even though it was incurred pursuant to powers given to John Doe as trustee and was for the benefit of the trust estate? The judgment is a lien upon John Doe's individual real estate. This follows from the law that the judgment thus rendered is a personal judgment and, of course, it being a personal judgment, it is enforceable against the individual property of the debtor, John Doe.

Whatever may be the effect of the word "as" when placed before the word "trustee" in the laws of deeds, it is absolutely without force in the law of contracts and judgments. Contracts by or judgments against "John Doe," "John Doe, trustee," or "John Doe, as trustee" have the same force and effect. They are all personal contracts and judgments. In Duvall v. Craig, 2 Wheat. 45, the Supreme Court of the United States said:

"In a trustee "chooses to bind himself by a personal covenant, he is liable at law for a breach thereof in the same manner as any other person, although he describes himself as covenaniting as trustee, for in such case the covenant binds him personally, and the addition of the word 'as trustee' is but a matter of description."

In Dunham v. Blood, 207 Mass. 512, the Court said:

"When a trustee, even if he is authorized to do so, borrows money in behalf of his trust and gives a note 'as trustee' the note is his individual note."


These authorities establish conclusively the proposition that a note or contract signed by "John Doe, as trustee" is his personal note or contract. It follows, therefore, that a personal judgment not only may be, but is the only kind which can be rendered against John Doe. Only three authorities were found which discussed this point. They were Hussey v. Arnold, Zehnbar v. Spillman and Huntt v. Townsend supra. In Hussey's case the Court said:

"Actions at law upon such contracts must be brought against them and judgments run against them personally."

In the Zehnbar case, the Court said:

"It is their personal note and the judgment would be a personal judgment against them or be satisfied out of their own property."

And in the Huntt case, the Court stated:

"Such a judgment can only bind the individual property of the parties who confess it."

The creditor of John Doe, who has secured a judgment against John Doe, as trustee, is therefore, not without remedy. He may collect his judgment against John Doe individually by execution and sale of John Doe's individual property. However, the creditor is not required to sue at law. In our example the creditor had a more direct remedy. He could have subjected the trust estate to the payment of the debt incurred by the trustee by a proceeding in equity against the trust property. To this proceeding in equity the trustee and the beneficiaries would be made parties defendant. In equity the court may subject the trust property to the payment of the debt. Authority, if any be necessary for this point, is found in the few cases on this subject. We quote again from Mallory v. Clark in which the court commented on this remedy in these words:

"An execution of law could not be maintained to reach the estate by making the trustee defendant, but for such purposes the trustee must be made a party to a proceeding in equity."

In Hussey v. Arnold supra, the Supreme Court of Massachusetts said:

"Such debts, if proper charges upon the trust estate, can be paid from it under authority of a court of equity."

In Zehnbar v. Spillman supra, this language occurs:

"In short, the trust property cannot be reached except by a proceeding in chancery to which the cestui que trustent must be made parties."

The creditor's remedy is thus two-fold. He may recover a judgment at law against John Doe, which is enforceable against John Doe's individual property or he may proceed in equity to subject the trust estate to the payment of the debt. The question immediately arises as to John Doe's recourse in the case where a judgment has been recovered against him as trustee and he has been compelled to pay it to avoid an execution sale of his individual property. Needless to say, John Doe, as trustee,
has a remedy against the trust estate. In our example he clearly has a remedy because he had the power to sign the note and incur the debt upon which the judgment was rendered. It is obvious if the creation of the debt was a breach of trust or he had no authority whatever for it, John Doe would have no recourse against the trust property.

The Supreme Court of the United States in Taylor v. Davis supra comments upon this in the following words: "Of course, when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his expenditures out of the estate in his hands and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof."

Another question of interest is whether any form of judgment is known to the law under which trust property can be sold at an execution sale based upon a judgment at law against the trustee. An analogy might be sought in the prevalent form of judgments against receivers, which is made to run against "A, as receiver, to be paid out of the funds held by him as receiver." See McNulta v. Ensch, 134 Ill. 48. A similar form is used in judgments against executors and administrators. But due to the jealous exclusiveness of the jurisdiction of courts of equity over trusts and trustees, no form of judgment can be devised which the courts will recognize as the basis for subjecting trust property to an execution sale.

Judge Storey said in Duvall v. Craig supra:

"It is plain • • • there could have been no other judgment rendered against them (the trustees) for at law a judgment against a trustee in such special capacity is utterly unknown."

In Moore v. Stemmmons, already referred to, the judgment against the trustee contained an express direction for satisfaction of the judgment out of the trust property. This judgment apparently attempted to follow the form of judgments used in cases of receivers. In setting aside the judgment, the Supreme Court of Missouri said:

"An execution upon a judgment or decree against the trustee cannot be made to run against the trust property."

In the Zehnbar case the order for the issue of the execution directed that execution be levied upon and collected out of the trust property. The Supreme Court of Florida expunged the order with these words:

"There is no authority of law for such an order."

In view of these decisions it is safe to assume that a judgment against "John Doe, as trustee" is a personal judgment against John Doe, regardless of any language in the judgment intended to give it any other effect.

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It remains now to consider one more aspect of the subject, namely the manner by which a trustee may protect himself from personal liability in dealing with trust matters and incurring debts on behalf of the trust estate. As has been before shown, to sign a contract or note "as trustee" is to incur merely a personal obligation. But if a trustee should sign a note "As trustee, and not individually," he thereby relieves himself from personal liability and no personal judgment, in fact, no judgment whatever should be rendered against him. Any similar stipulation added to the words "as trustee" to the effect that the trustee shall not be personally liable will protect him. In such case no judgment should be rendered against the trustee, but the creditor must resort to a court of equity and there subject the trust property to the payment of the debt. Of course, as before stated, the trust estate is liable only in the event the trustee had the power to incur the debt or incurred the debt for the benefit of the trust estate. If the trustee, however, even in the face of a stipulation protecting him against personal responsibility, suffers a judgment to be rendered against him at law the judgment would be a personal judgment. The stipulation would be only a defense against the judgment before it is entered. If not asserted, the judgment becomes a valid personal judgment.

This manner of protecting himself against personal liability is specifically recognized by the cases. Thus in Carr v. Leahy, 217 Mass. 440, the court referred to this method as follows:

"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 personally responsible but that the other party is to look solely to the trust estate."

And in Austin v. Parker, 317 Ill. 354, the court said:

"The rule is well settled that a guardian, executor, administrator, trustee, or other person acting in such relation, in a contract with third persons binds himself personally, unless he exacts an agreement from the person with whom he contracts to look to the funds of the estate exclusively; and this is true regardless of whether the charge is one for which the trustee may be reimbursed from the trust estate, as that is a matter wholly between him and the beneficiaries of the trust."
We may now conclude by summarizing the matters herein considered as follows:

(1) If the obligation is created by the trustee within his authority and he properly limits his liability, then the trustee cannot be made personally liable, but the trust estate is liable in equity.

(2) If the obligation is created by the trustee within his authority, but he does not properly limit his liability, then the trustee is personally liable and a judgment may be rendered against him which will be a personal judgment. The trustee, if compelled to pay the judgment, may require the trust estate to reimburse him. The creditor may also pursue the trust estate in equity if he chooses.

(3) If the obligation is created by the trustee without authority, then he is, of course, personally liable and the trust estate can under no circumstances be subjected to the payment of the obligation.

(4) In no event can any of the obligations of the trustee be enforced against the trust estate at law.

THE ROUND TABLE
Its History and Origin

In the fall of 1925 a small number of freshmen met at regular intervals for purposes of review and discussion of the subjects studied in class. This continued for some time and as we delved deeper into law we discovered that all questions could not be solved intelligently with our existing knowledge of jurisprudence. We soon found ourselves debating problems that led us into collateral fields and being only freshmen we realized the necessity of consulting instructors who gladly furnished us with the necessary information.

After a year of experimentation in this method of study we felt that it was extremely beneficial to us and upon entering our second year we were beginning to look around for other earnest students to partake with this little group.

Towards the end of 1926 our contacts were broadened with students as well as teachers and when this group could not agree on a question of law then under discussion some of us consulted Judge Pickett whose solutions satisfied all of us.

As we progressed in our studies we improved in our discussions but at times an impartial observer would find as many different opinions as there were members in this group. Some were then beginning to feel that an adviser who could reconcile our views and who could guide us through the complexities of law was indispensable. Up to this time among those frequently consulted was Judge Pickett and one suggested that perhaps the Judge would consent to be a permanent adviser. He demurred to this on the ground that it might interfere to too great an extent with his regular work in the school. He agreed to do his part, however, in conjunction with other members of the faculty. This favorable arrangement secured, the little group concluded to invite other students who were capable of taking advantage of Judge Pickett's informal little talks which were so ably presented and so enthusiastically received. Enthusiastically because each member expressed his view point openly and honestly without fear of being marked one way or another. And when a student's opinion suggested a point of law the Judge would lead him on until such student would conclude with a definite rule of law which as a result indelibly impressed itself upon the minds of all students.

The next problem facing us was the method of choosing new members into this round table. After a number of ways were suggested we felt that there would be more certainty of obtaining the desired students by referring to their grades and inviting those who had received at least a B plus average.

The first addition was made at the March meeting when the following, all of whom had received credit in the school for approximately 25 semester hours' work, were elected to membership, M. W. Thompson, C. H. Edwards, Donald Wick, Hugh E. Johnson, Arthur Jepson, and Irving S. Toplon.
**Its Aims and Purposes**

The facts and circumstances surrounding the formation of the Round Table having been explained, the purposes inherent in its formation become obvious. Those purposes, as conceived by the members of the groups are elucidated here.

The first and most obvious purpose of the formation of the Round Table is to allow its members an additional opportunity for social contact with their classmates, regardless of fraternity, club, or other affiliations. Friendships will be formed among us which will be lasting. These friendships will be cemented by firm bands of common interest. We are all law students. We all seek further knowledge of the law, which we will be able to get through the Round Table. The acquisition of such further knowledge will be facilitated by participation in a group formed upon a basis of exchange of ideas, especially since our Round Table discussions are presided over by one wise both in substantive and adjective law, and who is ever willing to separate the chaff from the wheat for our benefit. Under such circumstances our ideas of the law will become more definite, and better organized, and, as one's ability to express one's thoughts is in direct proportion to the clarity of the thought, we shall be better able to state our knowledge of the law in clear, concise, convincing form.

It is also anticipated that before very long the Round Table will make its mark on classroom discussion and school work. The Round Table is composed of members of all sections in the school, and with two or three members of the Round Table in each class to delve more deeply into our subjects, other members of the classes will be benefitted by the more comprehensive treatment of that particular branch of the law.

The last, but not the least, result which will follow the formation of the Round Table is that Post Graduate work will be stimulated by membership in the group activities. Experience teaches us that as one's knowledge of a subject increases, the more knowledge one desires on that particular subject. We hope this is no exception. Every member of the Round Table is a potential candidate for a Post Graduate course. These thoughts guided us in the formation of the Round Table.

To build up and maintain an organization, which will be a real and vital force in maintaining the highest scholastic standards of the legal profession, is a task worthy of the best in each and all of us. To that end we dedicate our endeavors.

PETER WALL.

RUSSEL PATTERSON.

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**IF AT FIRST YOU DON'T BELIEVE IT, READ, READ AGAIN**

The mule—he is a gentle beast,
And so is man.
He's satisfied to be the least;
And so is man.
Like man, he may be taught some tricks;
He does his work from eight to six;
The mule—when he gets mad, he kicks;
And so does man.
The mule, he has his faults, 'tis true;
And so has man.
He does some things he should not do;
And so does man.
Like man, he doesn't yearn for style,
But wants contentment all the while,
The mule—he has a lovely smile;
And so has man.
The mule is sometimes kind and good;
And so is man.
He eats all kinds of breakfast food;
And so does man.
Like man, he balks at gaudy dress
And all outlandish foolishness;
The mule's accused of mulishness;
And so is man.

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