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JUDGMENTS AGAINST TRUSTEES

JUDGMENTS AGAINST TRUSTEES THEIR FORCE AND EFFECT

Herbert Becker*

In recent years there has been an enormous growth in the creation of trusts of every kind. With the highly efficient organizations 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, in a deed or a common law trust agreement.

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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 every 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.
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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 working 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 Huntt v. Townsend, 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 * * * for all the plaintiff obtained * * * was a lien on the interest of Woolston. If he had none, the plaintiff got none."

In Wright v. Franklin Bank, 59 Ohio State 80, 92, the Court said:

"Judgments against the trustee are not liens 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 John Doe, as trustee is not a lien on real estate which John Doe holds as trustee, it must inevitably follow that such real 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 issued upon a judgment cannot be levied upon not 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 Southern 214 (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 with 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 trustees 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:

If 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 convenanting 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 to 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 never be maintained to reach the estate by making the trustee defendant, but for such purpose resort must be had 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 engagements 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. Stemmons, 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 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 con-
tract with third persons binds himself personally, unless he ex-
acts an agreement from the person with whom he contracts to
look to the funds of the estate exclusively; and this is true re-
gardless 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 concluded 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 judg-
ment. 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 with-
out 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.