

Tort Liability of the Trust Estate: Toward Direct Recovery

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law actions generally depends upon the nature of the action.⁹⁶ To obtain the order the affiant need only allege a proper cause of action; whereas, in equity actions, the extrinsic fact of the defendant's non-residency or pending departure must be shown.⁹⁷ While arrests in actions at law also are discretionary,⁹⁸ this has not been deemed a satisfactory safeguard. Failure of the judge to inquire into the veracity of affidavits has been thought to render faith in the discretion of the court a mere substitute for reliance upon the mythical universally honest plaintiff.⁹⁹ That criticism is not equally applicable to equity actions. Proof of the existence of the extrinsic facts appears to provide the protection necessary to supplant any failings in the discretionary power of the court. The wisdom of a statute which leaves to the court an area in which to exercise its discretion, flexible enough to provide bona fide petitioners with the redress permitted by law, and yet at the same time, staunch enough to uphold justice, would seem to be unquestionable. Its lawful use should be spared for the exceptional case which demands its application.



TORT LIABILITY OF THE TRUST ESTATE: TOWARD DIRECT RECOVERY

The Problem

Recently, because of a negligent act, a man lost the tip of his nose. The negligence was committed by an employee of an executor of a decedent's estate. Several persons were sued for damages but, upon final adjudication of the action, only one person was held liable, namely, the faultless executor in his individual capacity.¹ One of the intermediate courts, which heard the case, commented as follows: "This is a strange case. The real owner of the business in which the accident occurred, the estate, was never brought in as a party to the action. The real negligent party . . . has been absolved. . . . [T]he executor . . . who was admittedly not personally negligent has been made solely responsible merely because he happened to be one of the

tions at law except that in equity actions the order can be granted only by the court. PRASHKER, N. Y. PRACTICE § 343 (2d ed. 1951).

⁹⁶ N. Y. CIV. PRAC. ACT § 826.

⁹⁷ N. Y. CIV. PRAC. ACT § 827.

⁹⁸ Frank v. Tuthill, 241 App. Div. 720, 270 N. Y. Supp. 28 (1st Dep't 1934); Gelles v. Rosenbaum, 141 Misc. 588, 252 N. Y. Supp. 827 (Sup. Ct. 1931).

⁹⁹ See 12 REP. JUDICIAL COUNCIL OF STATE OF N. Y. 337, 342 (1946); Note, 12 ALB. L. REV. 17, 37 (1948). The failure of the judiciary properly to perform its function hardly can be ascribed as a defect in the statute.

¹ Johnston v. Long, 30 Cal. 2d 54, 181 P. 2d 645 (1947).

executors." ² This is indeed a woeful commentary on the sad state of the law concerning the tort liability of fiduciaries ³ and the interests which they represent. It illustrates clearly the harsh burden imposed by law upon those who would don the fiduciary's cloak; more important, it points up the limited field of recovery afforded a tort claimant whose only recourse is against the fiduciary as an individual.

The purposes of this note are three: (1) to present the law upon which the "strange case" was decided; (2) to indicate the various attempts which have been made to avoid the consequences which it illustrates; and (3) to offer an approach to the end that such "strange cases" shall have no place in the decisional law of the future.⁴

Some Basic Concepts

Even a cursory examination of this facet of the law would reveal certain seemingly fixed and inexorable rules. That the trustee is always liable individually would seem settled;⁵ that he is also liable for the torts of his servants on the theory of *respondet superior* would seem beyond question;⁶ and that the trust estate never, except in isolated instances, bears any direct tort liability would sound unerring.⁷ But the rationale of these principles is not so apparent, and, when closely examined, appear archaic and anachronistic. Moreover, in their operation, they frequently work hardship and produce inequities unflattering to the system of law within which they survive.

Various reasons have been ascribed for the existence of the immunity of the trust estate. It has been said that the trust fund should not be dissipated, to the detriment of the *cestuis*, by the tortious conduct of the trustee.⁸ Moreover, it has been reasoned that the estate should not bear the burdens of an *ultra vires* act, never contemplated nor authorized by the settlor.⁹ These reasons, however, are secondary and stem from an older and far more deeply entrenched principle of the common law, to wit, nonrecognition of the estate as a legal entity to which a necessary concomitant is the nonrecognition

² *Johnston v. Long*, 171 P. 2d 538, 544 (Cal. 1946).

³ Note that for the purposes of tort liability the courts treat executors as ordinary trustees. See *Johnston v. Long*, 30 Cal. 2d 54, 181 P. 2d 645, 649 (1947), and cases cited therein.

⁴ Other materials noting and discussing the problem are: Stone, *A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee*, 22 COL. L. REV. 527 (1922); Fuida and Pond, *Tort Liability of Trust Estates*, 41 COL. L. REV. 1332 (1941); see Notes, 44 A. L. R. 637 (1926), 127 A. L. R. 687 (1940).

⁵ 2 SCOTT, TRUSTS § 264 (1939).

⁶ *Ibid.*

⁷ *Id.* § 261.

⁸ *Parmenter v. Barstow*, 22 R. I. 245, 47 Atl. 365 (1900).

⁹ *Plimpton v. Richards*, 59 Me. 115 (1871).

of the representative capacity of the trustee.¹⁰ This principle lay in the very nature of the trust relation, and in the history of its development throughout the years.

At early common law, because of the socio-economic structure of the feudal system, the Law courts refused to recognize the interest of the beneficiary of a trust.¹¹ The trust relationship, in the eyes of those courts, was nonexistent. Thus the estate was not considered a legal entity.¹² Consequently, no cognizance was taken of the fiduciary, as such,¹³ since a person could not represent a thing which, in legal contemplation, did not exist. The only person whom the courts would recognize, therefore, was the person seized of the trust property,¹⁴ to wit, the trustee in his individual capacity.¹⁵

This doctrine of nonrecognition of the estate as a legal entity exists today,¹⁶ and since an action *ex delicto* is one at law, the tort claimant must bring his suit in a law court, where a trustee can be sued only in his individual capacity.

The gross inequity of immunizing the trust estate is that the shield is erected to the detriment of an unredressed tort claimant, and occasionally at the expense of an innocent fiduciary against whom the aggrieved party must proceed if he is to recover anything. For the tort claimant, this latter remedy may often be an illusory one. Frequently, the fiduciary's pecuniary resources are inadequate to compensate for the injury done. In such case, the aggrieved party receives only partial redress. Should the trustee be insolvent, the tort claimant is remediless.¹⁷ It is true that both the estate and the tort claimant are innocent parties, but it is the estate which puts its employees in the position which makes damage possible. Thus, by the application of the basic and just principle that as between two innocent parties, he ought to suffer who originally commissioned the instrumentality, it would seem to follow that the estate should bear the ultimate burden.¹⁸ The existing law, however, is contrary to such a conclusion.

¹⁰ 2 SCOTT, TRUSTS § 271A (1939).

¹¹ 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 414 (1937).

¹² *Id.* at 418.

¹³ *Id.* at 414.

¹⁴ *Id.* at 415.

¹⁵ To say that the Law courts fail to recognize the estate as a legal entity while at the same time recognizing the trustee's ownership of the estate's assets is fallacious. If it were true, a tort judgment creditor of an insolvent trustee could satisfy the judgment out of the estate assets. In disallowing this, therefore, the Courts of Law, do in fact, at least to some extent, recognize the separate existence of the trust. See Fulda and Pond, *supra* note 4, at 1334.

¹⁶ See *Johnston v. Long*, 30 Cal. 2d 54, 181 P. 2d 645, 650 (1947).

¹⁷ Stone, *supra* note 4, at 528.

¹⁸ See Note, 44 A. L. R. 637, 638 (1926).

Judicial Inroads

Recognizing the impropriety of steadfast adherence to the rule of immunity, the courts in a minority of jurisdictions have placed certain limitations upon its operation.

1. Reimbursement of the trustee and the tort claimant's subrogation thereto

The cloak of immunity afforded the trust estate for so many years was first pierced by an English court in 1862.¹⁹ That tribunal permitted a faultless trustee, who had previously paid a judgment procured against him by a tort claimant to be reimbursed from the trust estate. The theory of recovery may be explained as follows: Assume that a trustee, with due diligence and within the scope of his authority, hires a servant to perform a duty in the administration of the trust. A third party, injured by the negligence of the servant, sues for damages and recovers a judgment against the trustee in his individual capacity. If the latter pays the judgment, he may subsequently sue the estate in equity for reimbursement and, upon proof that he has paid the prior judgment and that he was personally without fault, may be indemnified from the trust fund.²⁰

Proceeding one step further, it has been held that a tort claimant can reach the trust estate by subrogation to the trustee's right of reimbursement.²¹ Thus, if a trustee is operating a business for the trust and someone is injured thereby, the latter sues the trustee individually for damages and recovers. If the judgment remains unsatisfied, the creditor may then proceed against the trust estate in equity. If he can prove that the trustee has a right of indemnity against the estate, the creditor will be given the benefit of this right and will have his claim paid from the trust property.²² The English court that initiated this doctrine thought it practical since it eliminated ". . . the double process of [the tort claimant] suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate."²³

2. Direct action independent of the trustee's right of reimbursement

The essential result of reimbursement and subrogation thereto is to place upon the trust estate the ultimate burden of liability. Some courts, however, have reached the same result by employing a different, but even more direct, method. Thereunder, the tort claimant is allowed to disregard the trustee in his individual capacity and to

¹⁹ *Benett v. Wyndham*, 4 De. G. F. & J. 259, 45 Eng. Rep. 1183 (Ch. 1862).

²⁰ *Ibid.*; *Matter of Lathers*, 137 Misc. 226, 243 N. Y. Supp. 366 (Surr. Ct. 1930).

²¹ *In re Raybould*, [1900] 1 Ch. 199.

²² *Ibid.*

²³ *Id.* at 202.

proceed against the trust estate in the first instance. The existence of a right of reimbursement in the trustee is not a prerequisite to recovery. The earliest semblance of this direct method of attack is found in the *dictum* of a case decided in England in 1866, wherein it was stated: "It is much more reasonable . . . that the trust or corporate property should be amenable to the individual injured because there is then no failure of justice. . . ." ²⁴

The case of *Miller v. Smythe* ²⁵ evidenced the first definite step in the development of this reasoning in the United States. In that case the trustee acting for the estate agreed to keep in repair a store belonging to the estate. Failure to keep the store in repair caused the damage for which the plaintiff sought recovery in an action at law. ²⁶ The court held the trust estate liable ". . . because the trust estate obtained the benefit of the contract made by the trustee. . . ." ²⁷ This theory was further advanced by another case decided in 1908. ²⁸ There, an action was brought to compel defendants, *as trustees*, to remove a dam (trust property) from a navigable stream and also for damages previously sustained by operation of the dam. The defense was that since the dam was being operated by defendants as trustees pursuant to a will, they could only be liable personally, if at all. In sustaining a demurrer to this defense, the court declared, ". . . the trustees are answerable *as trustees* for any damages which they may have done by the maintenance of the nuisance." ²⁹ Similar thoughts have been expressed elsewhere. Thus in *Smith v. Coleman*, ³⁰ the court stated ". . . where an active trust is created and the trustee is charged with the duty of carrying on a business, the trust estate may be held liable for the negligence of the trustee or his employee. . . ." ³¹

In another case, ³² an estate was held liable where the trust indenture contained an exculpatory clause which saved harmless the trustee from personal liability. The judgment was based on the ground that the settlor clearly manifested an intention that any loss should be assumed and borne by the estate.

²⁴ *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686, 733, 11 Eng. Rep. 1500, 1518 (1866).

²⁵ 92 Ga. 154, 18 S. E. 46 (1893).

²⁶ The action at law was permitted by statute. GA. CODE § 108-501 (1933): "Any person having a claim against any trust estate . . . of which a court of equity would render said estate liable, may collect and enforce the payment of such claim in a court of law."

²⁷ *Miller v. Smythe*, 92 Ga. 154, 18 S. E. 46, 47 (1893).

²⁸ *Ireland v. Bowman & Cochrell*, 130 Ky. 153, 113 S. W. 56 (1908).

²⁹ *Id.* at 57.

³⁰ 100 Fla. 1707, 132 So. 198 (1931).

³¹ *Id.* at 204.

³² *Prinz v. Lucas*, 210 Pa. 620, 60 Atl. 309 (1905). In *Birdsong v. Jones*, 222 Mo. App. 768, 8 S. W. 2d 98 (1928), on essentially the same facts, the court in holding the trust estate liable said of the exculpatory clause: "[t]his clearly shows an intention on the part of the testator to make the trust estate liable for such liabilities. . . ." *Id.* at 101.

Another tort claimant also recovered a judgment directly from an estate where the active management was in the hands of the *cestuis que trust* and the trustees were, in fact, no more than agents.³³ In *Carey v. Squire*,³⁴ the court held the trust directly liable simply because recovery could be had from no one else.

Thus it has been that in the presence of special circumstances,³⁵ courts have occasionally discarded the traditional theory of non-recognition, and allowed suit directly against the estate even in a court of law.³⁶

Evaluation of the Judicial Solutions

The above method of subrogation to the trustee's right of reimbursement is, in fact, a fiction. Reimbursement necessarily contemplates a previous expenditure. It would follow that the right of reimbursement cannot arise until the trustee has paid a judgment against him. Yet in these cases the court allows subrogation despite the fact that the trustee has paid nothing from his personal estate. Indeed, in some instances, a judgment has not even been procured against the trustee in his individual capacity.³⁷ Albeit this method is derived from reasoning not wholly consonant with strict logic, the courts have, nevertheless, applied it in the past and apparently will continue to do so in the future. Thus, an analysis of the shortcomings of the procedure is in order.

If the trustee were previously in arrears to the estate in a sum exceeding that for which the creditor seeks recovery, the right of reimbursement would never come into existence;³⁸ hence the creditor would be remediless. Thus, the creditor is deprived of a remedy because of an event entirely unrelated to the occurrence which gave rise to his claim. Furthermore, the right of reimbursement is contingent upon the absence of personal fault in the trustee.³⁹ If he is

³³ *Wright v. Caney River Ry.*, 151 N. C. 529, 66 S. E. 588 (1909).

³⁴ 63 Ohio App. 476, 27 N. E. 2d 175 (1939).

³⁵ The special circumstances were: a statute, see note 26 *supra*; a nuisance, see note 29 *supra*; exculpatory clauses, see note 32 *supra*; trustees were mere agents, see note 33 *supra*; no other available remedy, see note 34 *supra*. *Smith v. Coleman*, 100 Fla. 1707, 132 So. 198 (1931), was the only case wherein the trustee's mere negligence sufficed to move the court to discard the concept.

³⁶ It was the opinion of Dean, later Chief Justice, Stone that the problem of the unsatisfied tort judgment creditor could be solved by decisions such as these, and the courts of equity could and should provide the creditor with a remedy out of the assets of the estate, where he appears otherwise remediless. Stone, *supra* note 4, *passim*.

³⁷ *Ewing v. W. L. Foley, Inc.*, 115 Tex. 222, 280 S. W. 499 (1926).

³⁸ *Cf. Wilson v. Fridenberg*, 21 Fla. 386 (1885); *Mason v. Pomeroy*, 151 Mass. 164, 167, 24 N. E. 202, 204 (1890). The Massachusetts court stated: "If it should prove, finally, that there was nothing to which he [the trustee] was entitled, then the plaintiffs would fail on the merits . . ."

³⁹ See note 20 *supra*.

personally at fault (and therefore not entitled to indemnity), no recourse can be had against the estate. Even if the trustee is entitled to reimbursement, the creditor may still be subject to the defense that he has not exhausted his legal remedies before proceeding against the assets of the estate.⁴⁰

In addition, if the creditor seeks to reach the trust estate he must sue the trustee in his representative capacity and "[s]uch a procedure would involve a trial in the same action of both the tort liability and whether the nature of the tort was such as to entitle the trustee . . . to reimbursement, out of the estate, which might entail an undesirable clash of interests between the trustee in his individual capacity and in his representative capacity."⁴¹ Furthermore, in the cases allowing recovery through subrogation to the right of reimbursement, there exists a hiatus in the reasoning upon which this theory is based. Assuming that the creditor may be subrogated to the trustee's right of reimbursement, this prospective right could not arise unless the trustee were capable of paying the creditor out of his private estate; thus, if the trustee were insolvent, the right would never arise. It is noted, therefore, that if, in such case, the creditor is unable to collect from the trustee, he is remediless.⁴² Moreover, although the subrogation procedure, when first promulgated was said to alleviate the problem of circuity of action,⁴³ it merely shifted the burden. Multiplicity of suits still exists since now two actions by the claimant are necessary for recovery from the estate. Thus, although the claimant had been given some relief, he is, at the same time, given the extra burden of instituting two actions.

In summary, reimbursement is the primary right against the estate; subrogation is only a consequence of that right. The latter cannot arise unless the former exists. By substituting the creditor for the trustee, the creditor derivatively enjoys the primary right. This right, however, has for its paramount purpose the adjustment of relations between the trustee and the estate and not those between the creditor and the estate. This has been ascribed as the basic reason for the limited application of the doctrine of subrogation.⁴⁴

In view of all these shortcomings it seems evident that the subrogation method provides little or no solution to the dilemma of the claimant.

On the other hand, if the estate's assets were subject to direct attack, the problem would be eliminated. It is submitted that this procedure is the sounder of the two methods considered above be-

⁴⁰ *Dantzer v. McInnis*, 151 Ala. 293, 44 So. 193 (1907); *Huselton & Co. v. Durie*, 77 N. J. Eq. 437, 77 Atl. 1042 (Ch. 1910); *cf. Trotter v. Lisman*, 199 N. Y. 497, 501, 92 N. E. 1052, 1053 (1910).

⁴¹ *Kirchner v. Muller*, 260 N. Y. 23, 28, 19 N. E. 665, 667 (1939).

⁴² Editorial, 106 N. Y. L. J. 1060, col. 3 (Oct. 16, 1941).

⁴³ *In re Raybould*, [1900] 1 Ch. 199, 202.

⁴⁴ *Fulda and Pond*, *supra* note 4, at 1348.

cause it makes the tort claimant's rights against the estate completely independent of any defenses which the estate might have against the trustee. Accordingly, a fact unrelated to his claim (such as the trustee's prior arrearage)⁴⁵ cannot bar recovery against the estate. Moreover, the circuity of action inherent in the subrogation method is eliminated, since the tort claimant may, in the first instance, proceed against the estate. Query: Can this procedure be feasibly adopted on an extensive scale by judicial decision alone or would it require legislative enactment?

If this method is to be so adopted, the three reasons for refusing to impose liability upon the estate would have to be ignored. One theory, it will be remembered, is that the trust funds should be held intact for the beneficiaries and not allowed to be dissipated by unlawful acts.⁴⁶ The soundness of this position is seriously impaired by those cases permitting reimbursement,⁴⁷ since those decisions clearly recognized the ultimate liability of the trust estate for unlawful acts. Another is that the trustee, when he commits a tort, steps outside of his line of duty and, therefore, does not represent the estate.⁴⁸ This theory, however, necessarily implies the existence of a superior force which establishes the course of duty. In this light, the theory is strikingly similar to the relationship of principal and agent. In the field of agency, however, it is well settled that a principal is responsible for the torts of his agent; and this rule persists even though the principal may have expressly forbidden the act.⁴⁹ Certainly, in such case, the agent has overstepped the line of duty, yet, the courts, with utmost facility, hold the principal liable.⁵⁰

The more difficult obstacle to overcome is the historical concept of nonrecognition of the trust estate as a legal entity, a necessary concomitant of which is nonrecognition of the representative capacity of the trustee.⁵¹ Although this seemingly insuperable barrier has

⁴⁵ See note 38 *supra*.

⁴⁶ *Parmenter v. Barstow*, 22 R. I. 245, 47 Atl. 365 (1900).

⁴⁷ Note, 44 A. L. R. 637, 681 (1926).

⁴⁸ *Plimpton v. Richards*, 59 Me. 115 (1871).

⁴⁹ *MECHEM, AGENCY* § 499 (3d ed. 1923).

⁵⁰ *Weis, Tort Liability of Executors and Administrators in Pennsylvania*, 11 *PITT. L. REV.* 96, 101 (1949).

⁵¹ Most jurisdictions do not recognize the trustee in his representative capacity and hold the trustee personally liable. *Brown v. Floyd*, 163 Ala. 317, 50 So. 995 (1909); *Stockman's State Bank v. Merchant's & Stockgrowers' Bank*, 22 Ariz. 354, 197 Pac. 888 (1921); *Johnston v. Long*, 30 Cal. 2d 54, 181 P. 2d 645 (1947); *Rapaport v. Forer*, 20 Cal. App. 2d 271, 66 P. 2d 1242 (1937); *Schmidt v. Kellner*, 307 Ill. 331, 138 N. E. 604 (1923); *Kirchner v. Muller*, 280 N. Y. 23, 19 N. E. 2d 665 (1939); *Keating v. Stevenson*, 21 App. Div. 604, 47 N. Y. Supp. 847 (1st Dep't 1897); *Moniot v. Jackson*, 40 Misc. 197, 81 N. Y. Supp. 688 (Sup. Ct. 1903); *Dunlap v. Robinson*, 12 Ohio St. 530 (1861). It is also interesting to note that in these same jurisdictions under essentially the same circumstances, a receiver has been held liable in his representative capacity and the claim satisfied from the receivership funds. *Ferrell v. Ross*, 200 Ala. 90, 75 So. 466 (1917); *McNulta v. Lockridge*, 137 Ill. 270,

been overcome by some courts in cases allowing recovery from the estate through a suit against the trustee as such, still the theory was, with but one exception,⁵² discarded *only* when there were special circumstances present. It would seem that if the procedure is to be accepted more widely than it has been heretofore, one cannot look to the courts for relief. The rule is many hundreds of years old and, although its abridgement is much to be desired, the principal of stare decisis presents an impasse to its complete abrogation. It would seem, therefore, that any extensive change would have to be wrought by the legislature.

Statutory Solutions

That a statutory solution is entirely within the realm of possibility is ably demonstrated by a reference to the statutory modifications of the immunity rule, which have been effected in some states. In Michigan, for example, a trustee of a decedent's estate, authorized to carry on the business of the deceased, is absolved from personal liability and recovery may be had against him in his representative capacity.⁵³ Recent legislation in Pennsylvania,⁵⁴ entirely new to the statutory law of that state, provides that a court may authorize the representative of an estate to continue the business of a decedent for the benefit of the estate and that the court may provide for the extent of liability of the estate or the representative for obligations incurred in the operation of the business. One writer believes that pursuant to this section and on the authority of *Prinz v. Lucas*,⁵⁵ the Pennsylvania courts can hold a trust estate liable for the torts of the representative, there being nothing in the statute to prevent such a result.⁵⁶

These statutes clearly nullify the impossibility of recognition of the estate as a legal entity. They are, however, operative only with

27 N. E. 452 (1891); *Cardot v. Barney*, 63 N. Y. 281 (1875); *Meara's Administrator v. Holbrook*, 20 Ohio St. 137 (1870). These cases, however, differ fundamentally from those involving the tort liability of the trust estate. "Such receivers are in no sense the owners of the property, and they have no legal title to it. The property is in the court for its management and administration, and the receiver is an officer of the court The servants . . . are employed by him solely in his official capacity . . . and they do not in any way represent him personally." *Keating v. Stevenson*, 21 App. Div. 604, 607, 47 N. Y. Supp. 847, 849 (1st Dep't 1897). But see *Fulda and Pond*, *supra* note 4, at 1336, wherein the authors criticize the distinction between receivers and trustees.

⁵² See note 35 *supra*.

⁵³ MICH. COMP. LAWS § 720.156(2) (1948). "Whenever a fiduciary continues the business of a decedent . . . the fiduciary shall not be personally liable . . . (1) for any claims, . . . either *ex delicto* or *ex contractu* . . . Provided, however, that nothing herein contained shall relieve the fiduciary from liability for the fiduciary's own . . . willful misconduct. . . ."

⁵⁴ PA. STAT. ANN. § 320.504 (Purdon, 1950).

⁵⁵ 210 Pa. 620, 60 Atl. 309 (1905).

⁵⁶ Weis, *supra* note 50, at 102.

respect to decedents' estates and thus are too limited in their scope to provide an adequate solution to the subject problem. It is believed, however, that an adequate legislative solution is presently available. It finds expression in the Uniform Trusts Act.⁵⁷

The applicable section of the Act gives the estate a legal personality and recognizes the trustee in his representative capacity.⁵⁸ Although the prefatory note to the Act states that the right to recover is derivative,⁵⁹ subdivision two of Section 14 provides that the plaintiff, in order to recover, need not prove that the trustee was entitled to reimbursement. The tort claimant may thus recover independently of the trustee's rights against the estate.⁶⁰

⁵⁷ 9A UNIFORM LAWS ANN. 337 (1951). The Act has been adopted in: Louisiana, Nevada, New Mexico, South Dakota, North Carolina, Oklahoma and Texas. See chart, 31 TRUST BULLETIN 28, 29 (Sept. 1951). Section 14 provides:

Tort Liability of Trust Estate.—1. Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that (1) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property. If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

2. In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

3. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustee shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

4. The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in Section 13.

5. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees.

⁵⁸ UNIFORM TRUSTS ACT § 14(1).

⁵⁹ 9A UNIFORM LAWS ANN. 334, 335 (1951).

⁶⁰ See Fulda and Pond, *supra* note 4, at 1352, wherein the authors feel that

Relief is afforded even though the trustee was personally at fault provided the act was a "common incident" of the business. What is a "common incident" will require discriminating judicial determination.⁶¹ It has been said that intentional torts of the trustee would not be a "common incident."⁶² On the other hand it has been maintained that an intentional wrong might be included, provided the trustee was acting within the scope of his authority.⁶³ To include the latter in the "common incident" phrase would seem more consonant with the general purpose of the statute which is to provide the tort claimant with a wider range of relief.

The claimant still retains his cause of action against the trustee individually since the Act also provides that the trustee may be held personally liable.⁶⁴ Since the fiduciary could be held liable if the estate is exonerated, the trustee may be less diligent in attempting to disprove the estate's liability.⁶⁵ The Act would militate against such a result by providing that the *cestuis* must be notified of the action and may intervene to protect their interests.⁶⁶

Conclusion

Perhaps one of the most firmly entrenched policies of the law is that an entity, which employs others, must bear the ultimate burden of tort liability arising from acts of the employees.⁶⁷ Failure to dis-

although Section 14(2) of the Act states that the action is to be independent of the trustee's right to reimbursement since the prefatory note emphasizes the derivative nature of the action, Section 14(2) is "irreconcilable." It is submitted, however, that the language of Section 14(2), clearly expressed, negates the contrary connotations of the prefatory note. It is felt that the jurisdictions adopting the Act may quite justifiably and expediently interpret Section 14(2) as the solution to our problem. See *Wright v. Caney River Ry.*, 151 N. C. 529, 66 S. E. 588 (1909). "It is true . . . that a trust fund cannot be subjected to legal liability by reason of the torts of the trustee or his agent and employes; but this doctrine ordinarily exists in the case of passive trusts, or when active in those instances where the power and duties of the trustee are so defined and restricted by the law, or the provisions of the instrument under which he acts, that the principle of imputed responsibility similar to that which obtains in the case of principal and agent does not and cannot prevail." *Id.* at 589. This case has been cited for the proposition that the Uniform Trusts Act, in permitting the tort creditor to sue the trustee in his representative capacity, is in accord with the rule of *Wright v. Caney River Ry.*, *supra*. See Note, 17 N. C. L. REV. 327, 398 (1939).

⁶¹ Rowley and Vanneman, *The Uniform Trusts Act*, 5 OHIO ST. L. J. 145, 159 (1939).

⁶² *Id.* at 158.

⁶³ Fulda and Pond, *supra* note 4, at 1351.

⁶⁴ UNIFORM TRUSTS ACT § 14(4).

⁶⁵ Nylund, *The Uniform Act Relating to Trusts*, 16 CHI. KENT. REV. 81, 100, 101 (1938).

⁶⁶ UNIFORM TRUSTS ACT § 14(3).

⁶⁷ See Braswell, *Charities—Liability for Torts of Employees*, 30 N. C. L. REV. 67, n. 1 (1951).

card the ancient concept of nonrecognition of the trust estate has made this economic enterprise an exception to this policy. Beginning in 1893 with *Miller v. Smythe* up to the year 1951, when New Mexico became the seventh state to adopt the Uniform Trusts Act, there has been a very definite trend toward the imposition of primary liability upon the trust estate. By so doing the potential liability in the operation of the active trust will be borne in the same manner as that of practically every other type of commercial enterprise. It is submitted that such alignment is in complete accord with modern legal policy.⁶⁸



REAL ESTATE BROKERAGE UNDER UNILATERAL TYPE LISTINGS,
WHERE THE CUSTOMER ACTS TO DEPRIVE THE BROKER
OF HIS COMMISSION

This note concerns the plight of the real estate broker in cases where, being under a mere unilateral listing employment, he finds that a customer to whom he has shown property has, subsequently, in order to save the amount of the commission, dealt clandestinely with the seller. In order to fully understand the reasons for the existence of this problem and properly to evaluate the legal approaches toward its solution, one ought to be familiar with the real estate brokerage business and more particularly the practices prevailing under unilateral type listings. An attempt, therefore, shall first be made to illustrate some of the more practical incidents of unilateral listings, to explain why those listings are indispensable to the real estate brokerage business, and then to depict the resultant abuses for which the law has yet failed to grant a remedy.

Unilateral Listings

The broker falls within a class of agents known as special agents; that is, he is an agent employed merely to perform certain specific

⁶⁸ ". . . there is . . . no other situation [other than an active trust] where one may assume to carry on any type of economic enterprise without imposing on the capital embarked in it the cost of compensating for its expense or for the tortious acts committed by those who are engaged in carrying it on. Not only has this been the traditional policy of the law in the application of the doctrine of *respondeat superior*, but we have in recent years seen a very marked extension of it by workmen's compensation acts, the underlying principle of which is that the economic enterprise should carry the burdens of loss occasioned by the tortious acts of those engaged in it." Stone, *supra* note 4, at 529.