

June 2014

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Recommended Citation

Kane, Kathleen M. (1932) "Trust Funds--Conversion--Information Sufficient to Put Bank on Inquiry," *St. John's Law Review*: Vol. 6 : No. 2 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol6/iss2/12>

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of one of them, is confined to cases where an apparent sign of servitude exists on the part of one of them in favor of the other; * * * or, where the marks of the burden are open and visible."

From a review of the cases, wherein the courts have held that an easement arose by implication, it would seem that the unexpressed intent of the parties is given effect. Without benefit of a writing or a parol agreement the courts bring into being a new and distinct legal interest in land, an easement. The easement is implied in order that justice might be done, and is based on a principle dear to equity, *i.e.*, the enforcement of a parol agreement in cases of partial performance. But even here, where the court seeks to right an injustice, there are certain technical rules which are enforced. The easement must be open and visible, it must be strictly necessary, the necessity must be a continuing one, and the purchaser and seller must have intended that the easement pass with the title. The question is, "Did the parties as reasonable men intend the easement to continue after the conveyance of one parcel and the retention of the other." If they did, the easement continues in favor of the grantor. But where, as in the principal case,²⁶ the easement was not open and visible and was not expressed in writing, no easement accrues to a subsequent grantee, even though his grantor may have had one.

RAYMOND C. WILLIAMS.

TRUST FUNDS—CONVERSION—INFORMATION SUFFICIENT TO PUT
BANK ON INQUIRY.

The courts have ever been zealous to protect the corpus of a trust estate for the *cestui que* trust or the beneficiary. They have held the trustee liable for his negligent acts, which though not wilful, have caused depreciation or loss of the funds entrusted to his care and have demanded of him ordinary care and prudence in administering the trust.¹

The first well-known principle of equity in this respect is that trust funds are to be kept separate from the private funds of the trustee and must be deposited in an account showing the fiduciary character.² For failure to comply with this mandate of the law, the trustee himself is held liable, and good faith is no defense to an action

²⁶ *Supra* note 19.

¹ *Ewing v. Wm. L. Foley, Inc.*, 115 Tex. 222, 224, 280 S. W. 499, 500 (1926). "As a general rule, one accepting the duties and responsibilities of a trustee, is charged with the use of ordinary care and prudence in administering the trust." *In re Kline*, 280 Pa. St. 41, 124 Atl. 280 (1924).

² *In re Stafford*, 11 Barb. 353 (N. Y. 1851); *Otto v. Van Riper*, 164 N. Y. 536, 58 N. E. 643 (1900).

against him for loss of such funds through the failure of the bank in which he had deposited them in such a way as not to show their fiduciary character.³

The courts have gone a step farther and have held the trustee liable for loss of funds, through failure of the bank, where such funds at the time the trustee was appointed, were on deposit to the credit of the estate and which he permitted to remain on deposit without investing, as directed by his order of appointment. *In re Knight's Estate*⁴ it was held that since there were no recurring demands on the estate which required the trustee to keep the money on deposit, by permitting the fund to remain dormant, where the order appointing him provided "said fund shall be securely invested by the trustee," he was negligent in his duty toward the beneficiary.

All these precautions and restraints have been placed on the trustee to insure to the beneficiary, not only the exercise of perfect good faith but also the business acumen and active business ability of the trustee to discharge his duties in the same manner and to the same extent as if he were acting for himself.⁵

Approaching the question of preservation of trust funds from another angle, that of the third party, this problem presents itself. To what extent is a depository liable for the misappropriation of the funds by the trustee, and what degree of care must it exercise in accepting for deposit, funds which it knows to be of a fiduciary character? What facts are sufficient to put it on inquiry and what degree of care and diligence is required of it, where it should have known, if inquiry had been made, that the funds being dissipated are trust funds?

In the often cited case of *Bischoff v. Yorkville Bank*,⁶ one H. F. W. Poggenburg, as executor of the will of Josephine F. Schneider, deposited monies of the estate in the Bowery Bank in the name of "Estate of Josephine F. Schneider, by H. F. W. Poggenburg, executor." He, as an individual, had at that time a deposit account with the Yorkville Bank. Poggenburg, over a period of time, drew twenty-nine checks payable to the Yorkville Bank signed "Estate of Josephine F. Schneider, by H. F. W. Poggenburg, executor," and the Yorkville Bank collected the same and deposited the proceeds to his individual account. Out of these monies the executor

³ *In re Clark*, 104 Okla. 245, 230 Pac. 891 (1924).

⁴ 4 N. Y. Supp. 412 (1888).

⁵ *Clay v. Thomas*, 178 Ky. 199, 198 S. W. 162 (1917).

⁶ 218 N. Y. 106, 112 N. E. 759 (1916), *mod'f'g* 170 App. Div. 679, 156 N. Y. Supp. 563 (1st Dept. 1915); in this case the court quotes with approval the statement of law contained in *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916 (1912): "The principle governing the defendant's liability is that a banker who knows that a fund on deposit with him is a trust fund, cannot appropriate that fund for his personal benefit, or, where charged with notice of the conversion joins in assisting others to appropriate it for their private benefit, without being liable to refund the money if the appropriation is for a breach of the trust."

paid three promissory notes owned by the Yorkville Bank and the balance he checked out for his personal purposes. The Appellate Division held the Bank of Yorkville liable for all the monies withdrawn, both those in payment of the promissory notes and those used for the executor's personal purposes. The Court of Appeals modified the judgment of the Appellate Division and held the Bank of Yorkville liable for the monies drawn out of his personal account (which the bank knew were partly trust funds) from the time the first promissory note was paid to it, holding that at that time only, did the bank know that Poggenburg had appropriated the trust funds to his personal benefit. It was held,

"A fiduciary may legally deposit the trust funds in a bank to his individual account and credit. Knowledge on the part of the bank of the nature of the funds received and credited does not affect the character of the account. *The bank has the right to presume that the fiduciary will apply the funds to their proper purposes under the trust.*"

"Inasmuch as the defendant knew that the credits to Poggenburg created by the proceeds of the checks were of a fiduciary character and were equitably owned by the executor, it had not the right to participate in a diversion of them from the estate or the proper purposes under the will. Its participation in a diversion of them would result from either (a) acquiring an advantage or benefit directly through or from the diversion, or (b) joining in a diversion in which it was not interested, with actual notice or knowledge that the diversion was intended or was being executed, and thereby becoming privy to it."

"A bank does not become privy to a misappropriation by merely paying or honoring the checks of a depositor drawn upon his individual account in which there are, in the knowledge of the bank, credits created by deposits of trust funds. The law does not require the bank, under such facts, to assume the hazard of correctly reading in each check the purpose of the drawer, or, being ignorant of the purpose, to dishonor the check. *The presumption is, and, after the deposits are made, remains until annulled by adequate notice or knowledge, that the depositor would preserve or lawfully apply the trust funds.* The contract, arising by implication of law, from a general deposit of moneys in a bank, is that the bank will, whenever required, pay the moneys in such sums and to such persons as the depositor shall direct and designate. Although the depositor is drawing checks which the bank may surmise or suspect are for his personal benefit, it is bound to presume, in the absence of adequate notice to the contrary, that they are properly and lawfully drawn."

A few years later in the case of *Fidelity & Deposit Co. of Maryland v. Queens County Trust Co.*,⁷ in a decision in which Judge Cardozo concurred, the Court still adheres to the principle laid down in *Bischoff v. Yorkville Bank*,⁸ that a bank, by the mere fact of accepting for deposit in the individual account of a trustee, checks payable to him personally and signed by him in his fiduciary capacity, does not participate in the misappropriation of the funds where the bank does not in any way benefit by the conversion. However, it was held that the surrounding facts were sufficient to put the bank on inquiry and the first sign of the new trend of opinion is manifested: that a bank under circumstances sufficient to put it on inquiry will be held liable even though it does not benefit by the conversion.

This idea of placing greater liability on banks gains impetus from a line of cases, slightly different in form from the preceding cases, and at a later period distinguished from them, on the ground that in these cases the endorsement is forged or signed without authority. In these cases it was held that where an officer of a corporation, indorsed to himself checks received by the corporation and drawn to its order as payee,⁹ such an indorsement was not within the power of the agent¹⁰ and that the consequences were those that follow where an indorsement has been forged.¹¹ The bank receiving the deposits collected paper for the account of its depositor, though the depositor had neither title to the paper nor power in the existing situation to confer title on another. In a very substantial sense it had facilitated the conversion, for the drawee bank which would probably have refused payment to the delinquent agent coming in person and asking payment over the counter, might be expected to confide in the indorsement and warranty of a bank collecting for his account.¹²

In the case of *Whiting v. Hudson Trust Co.*¹³ an attempt was made to stem the rising tide of opinion that banks should be liable for participating in, or assisting another, in the conversion of trust funds, and holds their liability to exist only where a forgery has been committed and the bank did not get title to such funds. The opinion, written by Judge Cardozo, reiterates the principle laid down in

⁷ 226 N. Y. 225, 123 N. E. 370 (1919), *rev'g* 174 App. Div. 160, 159 N. Y. Supp. 954 (2d Dept. 1916).

⁸ *Supra* note 6.

⁹ *Wagner Trading Co. v. Battery Pk. Nat. Bank*, 228 N. Y. 37, 126 N. E. 347 (1920); *Much Co. v. Security Bank of N. Y.*, 176 App. Div. 842, 163 N. Y. Supp. 277 (1st Dept. 1917).

¹⁰ *Manh. L. Ins. Co. v. F. S. S. & G. S. F. R. R. Co.*, 139 N. Y. 146, 34 N. E. 776 (1893); *Bank of N. Y. N. B. Ass'n v. Am. D. & T. Co.*, 143 N. Y. 559, 38 N. E. 713 (1894); *Ward v. City Trust Co. of N. Y.*, 192 N. Y. 61, 84 N. E. 585 (1908); *Porges v. U. S. Mortgage & Trust Co.*, 203 N. Y. 181, 96 N. E. 424 (1911).

¹¹ *Standard S. S. Co. v. Corn Exch. Bank*, 220 N. Y. 478, 116 N. E. 386 (1917).

¹² *Nat'l Park Bank of N. Y. v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632 (1889).

¹³ 234 N. Y. 394, 138 N. E. 33 (1923).

Bischoff v. Yorkville Bank,¹⁴ that a bank is not liable by the mere fact of accepting for deposit in a special personal account checks made payable to a trustee, as such. In the instant case a trustee deposited in a "special" account, a check certified by drawee bank, drawn by depositor as attorney in fact for another, to himself as trustee. He later withdrew the funds from the "special" account and used them for his personal purposes. The opinion distinguished this case from the cases where an indorsement had been forged and declared that the rule that a bank facilitating the conversion by an agent, officer or trustee of his principal's funds, by accepting for deposit and by its indorsement collecting checks drawn on other banks, to which the depositor had neither title nor authority to confer title on others, is a strict and sometimes harsh rule, and is not to be extended. The opinion held,

"The cases imposing liability in such circumstances laid down, however, a strict and at times a harsh rule, and are not to be extended. They would not reach a case where the instrument has been collected according to its tenor for the account of the very person who is there named as payee. The transactions of banking in a great financial center are not to be clogged, and their pace slackened, by overburdensome restrictions."

However, the case of *Weissman v. Banque de Bruxelles*,¹⁵ swings the pendulum again and we are on the side holding a bank liable for its negligence through which a conversion of trust funds has been accomplished. This is again the case of an indorsement without authority. The check involved was payable to the corporation and endorsed in the corporate name by its president without authority and mailed to the Belgian bank and received by it for collection and credited to the personal account of the corporation's president. The Belgian bank forwarded the check to a bank in Washington, D. C., for collection and received and credited the corporation's president with the proceeds thereof and thereafter the corporation's president withdrew the amount from the bank for his own use.

"The defendant bank collected paper for the account of its depositor although the depositor had neither title to the paper nor power in the existing situation to confer title on it. No business man of intelligence would cash the check for Bensusade (the corporation's president) without notice of the probability that he was assisting Bensusade to convert corporation funds to his personal use. * * * Banks are constantly taking chances in their business transactions and here the bank took the chance

¹⁴ *Supra* note 6.

¹⁵ 254 N. Y. 495, 173 N. E. 837 (1930).

of being held liable for aiding Bensusan in converting the funds of his corporation when it collected the check for him."

And, finally, the case of *Richard H. Clarke v. Public National Bank and Trust Co. of New York*,¹⁰ decided by the Appellate Division, 1st Department, in which the committee of an incompetent received a series of twenty-six checks, payable to him as committee of the incompetent. He indorsed these checks individually and deposited them in his personal account and later withdrew the monies for his personal uses. The defendant bank accepted these checks and collected the proceeds from the United States Government, United States Veterans' Bureau, and credited to the personal account of Louis Rosenhaus (the committee of the incompetent, David Rosenhaus). The Appellate Division held that the bank was required to exercise ordinary care and should have inquired at the time of the deposit of these checks in the individual account of Louis Rosenhaus whether or not the checks were the individual funds of Louis Rosenhaus or were for him in a fiduciary capacity. It was held that the bank was put on inquiry,

"The defendant bank having been placed on its inquiry by the form of the checks, which were manifestly trust funds held by a committee, it was its duty to inquire from Louis Rosenhaus as to his authority to deposit the checks to his individual account."

"Not inquiring as to the authority of Louis Rosenhaus to deposit the checks in question in his individual account, we think it was derelict in its duty, and upon conversion of the proceeds of the checks by Louis Rosenhaus, the defendant bank aided and abetted in said conversion by accepting the checks for deposit in the individual account."

From these many cases and opinions, fluctuating as they do, between holding a bank liable and holding it free from liability, we arrive at the conclusion that there are two distinct sides to this question. One, favoring greater liability for banks, holds that where a bank receives for collection a check payable to a trustee in a fiduciary capacity, which he endorses individually, does not confer title on the bank receiving it, since he has not authority nor power in this respect, the bank participates and aids in the conversion and for its negligence is liable to the defrauded estate. It has been put on inquiry and must inquire. The other side, favoring the lesser liability for banks, holds that where a trustee, deposits trust funds in their fiduciary character, and later withdraws them, making them payable to himself personally, the bank receiving such checks for deposit in

¹⁰ N. Y. L. J., Jan. 19, 1932, at 323.

his individual account is not obliged to make inquiries as to the trustee's authority in this respect but is held free from liability until such act or acts of the trustee give actual notice to the bank of the misappropriation of the funds when it must then inquire as to the disposition being made of the trust funds, or for its failure so to inquire, it will be held liable to the trust estate.

KATHLEEN M. KANE.

ARBITRATION—EFFECTIVE METHOD OF SETTLING DISPUTES.

The legal term "arbitration" has been defined as the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties and called arbitrators or referees.¹ Mutual promises are a sufficient consideration for agreements to arbitrate.² It is essential that a controversy exist, for in the absence of such, an attempted arbitration would be no more than an idle gesture.³

Arbitration as a form of settlement of controversies is an ancient practice existing at the common law⁴ and finding statutory sanction in this state in the early part of the 19th century.⁵ Under the common law rules an agreement to arbitrate was legal in New York and damages were recoverable for a breach thereof⁶ but specific performance of the promise would not be enforced;⁷ nor could the agreement be pleaded in bar of an action.⁸

At the present time arbitration in New York State is well provided for and regulated by statutes which govern both the principles

¹ 1 WORCESTER, DICTIONARY, 3 Bla. Com. 16; BLACK, LAW DICT. (2d ed. 1910); BOUVIER (Baldwin's Student's ed. 1928); Garr v. Gomez, 9 Wend. 649, 661 (N. Y. 1832); Matter of Berkowitz v. Arbib & Houlberg, 230 N. Y. 261, 270, 130 N. E. 288, 290 (1921).

² Curtis v. Gokey, 68 N. Y. 300 (1877); Wood v. Tunnickliff, 74 N. Y. 38 (1878); Green-Shrier Co. v. State Realty & Mortgage Co., 199 N. Y. 65, 92 N. E. 98 (1910).

³ N. Y. ARBITRATION LAW, L. 1920, c. 275, art. 2, §2; Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 404 (1911); Matter of Checker Cab Mfg. Corp. v. Heller, 241 N. Y. 148, 149 N. E. 333 (1925); Webster v. Van Allen, 217 App. Div. 219, 216 N. Y. Supp. 552 (4th Dept. 1926).

⁴ N. Y. Lumber & Woodworking Co. v. Schneider, 15 Daly 15 (N. Y. 1888); Titus v. Scantling, 4 Blackf. 89 (Ind. 1835); Miller v. Brumbaugh, 7 Kan. 343 (1871).

⁵ 2 REV. STAT., pt. 3, c. 8, tit. 14, §§1-25, pp. 541-545 (1829); Matter of Webster v. Van Allen, *supra* note 3 at 221, N. Y. Supp. at 554.

⁶ Haggert v. Morgan, 5 N. Y. 422 (1851).

⁷ *Ibid.* People *ex rel.* Union Ins. Co. v. Nash, 111 N. Y. 310, 18 N. E. 630 (1888); Finucane v. Bd. of Education, 190 N. Y. 76, 82 N. E. 630 (1907); Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 293, 169 N. E. 386, 389 (1929).

⁸ *Supra* note 6; Finucane v. Bd. of Education, *ibid.*