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TRUSTS - WHEN IS THE BENEFICIARY OF A TRUST A NECESSARY PARTY IN A PROCEEDING INVOLVING THE TRUST ESTATE

Charles William Allen
University of Michigan Law School

TRUSTS — WHEN IS THE BENEFICIARY OF A TRUST A NECESSARY PARTY IN A PROCEEDING INVOLVING THE TRUST ESTATE — Two recent cases present the problem of the power of the trustee to represent the beneficiary in proceedings involving the trust estate. In *Hood v. Cannon*,[1] arising in South Carolina, the trustee of an estate, upon merger of *A* bank into *B* bank, had applied to the probate court for permission to exchange *A* bank stock, held by the estate, for *B* bank stock. The court authorized the exchange in an ex parte proceeding to which the beneficiaries were not parties. *B* bank later failed, and the commissioner of banks brought suit against the defendant, the successor trustee, to recover the stockholders' statutory liability. It was held that the ex parte proceeding was void because the beneficiaries were necessary parties. In *Cottman Co. v. Continental Trust Co.*,[2] a Maryland case, the dispute was in equity be-

[1] 178 S. C. 94, 182 S. E. 306 (1935).
[2] (Md. 1936) 182 A. 551.

tween the mortgagor and the mortagee-trustee, each claiming the right to insurance proceeds flowing from an injury to mortgaged property. The mortgagor had repaired the property and the bonds were not in default. The court held that the bond holders, as beneficiaries, were not necessary parties.

The ex parte proceeding in the probate court was considered by the South Carolina court to be an equitable proceeding, so both decisions rest on equity principles. However, the fact situations are vastly different. In the *Cottman* case there could be only two possible views as to the disposition of the insurance proceeds. The mortgagor and the mortgagee-trustee each represented one side of the controversy. Whatever view the beneficiaries might take was represented by one party or the other. The theory of the Maryland decision, which was straightforward and commendable, was that since the beneficiaries' interests were effectively protected they need not be parties. In the *Hood* case the beneficiaries might have claimed that the transfer of the stock should not be effected. Yet in 1929, at the time of the ex parte proceeding, there were probably no evident weaknesses in the financial set-up of *B* bank, for its failure occurred in March, 1933, at a time of nationwide bank failures. In all probability if the beneficiaries had been parties they would not have objected to the transfer. Moreover, it should be assumed that the trustee, as fiduciary, and the court would exercise reasonable business judgment on behalf of the beneficiary, and it would seem that that is all the protection his interest should require. It should be noted that the court was concerned with preserving, not adjudicating, the beneficiaries' interest.

The power of the trustee to represent the beneficiary in actions at law has always been recognized.[3] This power arises as a natural incident to the legal estate, and beneficiaries are neither necessary nor proper parties.[4] However, from an early day it has been a general principle of equity that all persons materially interested in the subject matter of the suit should be parties.[5] One reason for this was the courts' antipathy to determining the rights of a person who had no opportunity to be heard; another reason was to avoid future litigation

[3] Gates v. Bennett, 33 Ark. 475 (1878) (replevin); Pan Coal Co. v. Garland Pocahontas Coal Co., 97 W. Va. 368, 125 S. E. 226 (1924) (trespass on the case); Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554 (1891); Lewis v. Brown, (Tex. Civ. App. 1905) 87 S. W. 704 (trespass).

[4] Sanders v. Houston Guano & Warehouse Co., 107 Ga. 49, 32 S. E. 610 (1899); Lebeck v. Fort Payne Bank, 115 Ala. 447, 22 So. 75 (1896); 2 TRUSTS RESTATEMENT, § 280 (1935).

[5] Palk v. Clinton, 12 Ves. Jun. 48, 33 Eng. Rep. 19 (1805); Caldwell v. Taggart, 4 Pet. (29 U. S.) 190, 7 L. Ed. 828 (1830); Carey v. Hoxey, 11 Ga. 645 (1852).

by settling all rights in the subject matter in one suit.[6] The natural consequence was that this equity rule should be applied in equity actions involving a trust estate. The early English cases support the view, subscribed to even today, that in equity actions involving the trust estate the beneficiaries are generally necessary parties.[7] It is submitted that the reasons for the equity rule do not apply so pertinently, where the action is between the trustee and a stranger and there is no question of distribution of trust assets, or where the beneficiary has no claims inconsistent with those of the trustee.

The courts have recognized an exception to the general rule when the trustee seeks to recover trust property from a stranger.[8] The very object of such an action is the protection of the trust and the preservation of the beneficiary's interest.[9] Nor is there any possibility of the interests of the various parties to the trust conflicting, for all wish to preserve the trust res.[10] Here then, and in other analogous situations,[11] the beneficiary is not a necessary party for he has an adequate representative in the trustee.

[6] STORY, EQUITY PLEADING, 10th ed., § 72 (1892); RUSH, EQUITY PLEADING AND PRACTICE, 3d ed., p. 70 (1919).

[7] Holland v. Baker, 3 Hare 68, 67 Eng. Rep. 300 (1843); Court v. Jeffery, 1 Sim. & St. 105, 57 Eng. Rep. 42 (1822); Osbourn v. Fallows, 1 Russ. & M. 741, 39 Eng. Rep. 284 (1830); Lee v. Silva, 197 Cal. 364, 240 P. 1015 (1925); Beckwith v. Laing, 66 W. Va. 246, 66 S. E. 354 (1909); Ambos v. Glos, 314 Ill. 438, 145 N. E. 639 (1924); Primitive Methodist Church v. Horner, 38 R. I. 530, 96 A. 818 (1916).

[8] Carey v. Brown, 92 U. S. 171, 23 L. Ed. 469 (1875); Newhouse v. First Nat. Bank, (D. C. Ill. 1926) 13 F. (2d) 887; Ashton v. Atlantic Bank, 3 Allen (85 Mass.) 217 (1861).

[9] Ashton v. Atlantic Bank, 3 Allen (85 Mass.) 217 at 220 (1861): "The trustee has no adverse claims against the cestuis que trust, the object of this bill being to more effectively secure their interests."

[10] In Re Straut, 126 N. Y. 201 at 211-212, 27 N. E. 259 (1891): "In the action . . . by these trustees there was no question between them and the beneficiaries and no question between the beneficiaries themselves. . . . If the purpose of the action had been . . . to determine rights as between the beneficiaries themselves or as between the trustees and beneficiaries then it would have been necessary to bring them in as parties. . . ."

[11] (a) Trustee seeking to restrain a tort to trust realty: Kellogg v. King, 114 Cal. 378, 46 P. 166 (1896); Smith v. City of Portland, (C. C. Ore. 1887) 30 F. 734; Dalton v. Hagelet, (C. C. A. 9th, 1910) 182 F. 561.

(b) Action for use and occupation: Wolfe v. Mayer, 171 Minn. 98, 213 N. W. 549 (1927).

(c) Action to recover res from predecessor trustee: In re Lane's Will, 11 Del. Ch. 122, 97 A. 587 (1916); Warren v. Howard, 99 N. C. 190, 5 S. E. 424 (1887).

(d) Suit by a stranger to set aside the trust: Kerrison v. Stewart, 93 U. S. 155, 23 L. Ed. 843 (1876); Johnson v. Curley, 83 Cal. App. 627, 257 P. 163 (1927).

There are, at the other extreme, cases where clearly the beneficiary must be a party to protect his interest. Thus he is a necessary party when his interests are adverse to those of the trustee,[12] or to those of the other beneficiaries.[13] An absent beneficiary is afforded no security by the trustee's presence as a party in these situations.

Between these relatively easy extremes lie the mass of cases. The beneficiary has been held a necessary party to a bill to foreclose a mortgage held by the trust estate.[14] Yet a contrary result should be reached, for it is clearly analogous to a suit to reduce to possession the trust property. Foreclosure is a more effective securing of the beneficiary's interest, and at least one of the leading cases can be explained in the light of its particular facts.[15] Cases where the trustee seeks specific performance of a contract held by the trust estate are in accordance with the foreclosure decisions;[16] and by the same reasoning it would seem they are not consistent with the doctrine subscribed to here. Certain peculiar features of many cases have influenced the courts to require that the beneficiary be a party. These cases stand as the best evidence that the real test, as to whether the beneficiary must be a party, is whether his interests are fully protected. Fraud, or the possibility of it on the part of the trustee, will mean that the beneficiary must be a party.[17] Any suspicion that the trustee has exceeded his authority will lead the court to require that the beneficiary be a party.[18] Not only are the beneficiaries necessary parties when it is essential as a safeguard of their rights, but also when it will aid the

[12] Nevitt v. Woodburn, 190 Ill. 283, 60 N. E. 500 (1901); Barbee v. Penny, 172 N. C. 653, 90 S. E. 805 (1916).

[13] Lee v. Taylor, 186 App. Div. 199, 174 N. Y. S. 203 (1919), where one beneficiary seeks distribution of the corpus and a serious question of interpretation is whether the other beneficiaries get it all, if in fact there is any trust.

[14] Plum v. Smith, 56 N. J. Eq. 468, 39 A. 1070 (1898); Dunn v. Seymour, 11 N. J. Eq. 220 (1856); Martin v. Frank, 259 Ill. App. 417 (1930). Contra: Central Trust of New York v. Burton, 74 Wis. 329, 43 N. W. 141 (1889); Busch v. City Trust Co., 101 Fla. 392, 134 So. 226 (1931), and like cases are not good authority since, expressly or impliedly under the deed, the trustee was given broad powers.

[15] Plum v. Smith, 56 N. J. Eq. 468 at 473, 39 A. 1070 (1898). Where the trustee as an individual owns the property held as security for the fund, "the trustee occupies an anomalous position which awakens the court's serious and jealous attention."

[16] Beckwith v. Laing, 66 W. Va. 246, 66 S. E. 354 (1909); People's Bank & Trust Co. v. Gregory, 347 Ill. 397, 179 N. E. 856 (1932). *Contra*: Simson v. Klipstein, 88 N. J. Eq. 229, 102 A. 242 (1917), and like cases are of doubtful authority as precedents since the trustee was granted broad powers.

[17] Snelling v. American Freehold Land Mtg. Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160 (1899); Cowen v. Adams, (C. C. A. 6th, 1897) 78 F. 536.

[18] Barbee v. Penny, 172 N. C. 653, 90 S. E. 805 (1916); People's Bank & Trust Co. v. Gregory, 347 Ill. 397, 179 N. E. 856 (1932).

court in the determination of the issues. Thus two cases are contrary to the weight of authority that the beneficiary need not be a party to an action to recover trust property.[19] In the one case the issue was whether it was in fact a trust account and free from attachment, in the other the presence of the beneficiaries might open up valid defenses. It is submitted that these factors subconsciously influenced the courts' decisions.

"Real party in interest" statutes have no effect upon the problem. The statute applies whether the cause of action is at law or in equity.[20] It does not require that the real party in interest be the beneficial owner, and the legal title holder may sue at law.[21] Most "real party in interest" statutes have an express exception allowing the trustee of an express trust to sue alone without joining the beneficiary.[22] The exception resulted from the desire to make perfectly sure that the right was preserved to the trustee.[23] Thus there is no question when the trustee brings an action at law.[24] Nor has the statutory exception in any way changed the situation in regard to actions of an equitable nature.[25] The statutory authority of the trustee to sue is regarded merely as a legislative assertion of the exception to the general equity rule.

The beneficiary, then, should not be a necessary party if he is adequately represented by the trustee,[26] or if a complete determination of the controversy can be had without him.[27] The trustee's presence as a party must insure that the beneficiary's interest will be safeguarded as effectively as if he himself were a party. It would seem that the trustee could adequately represent the beneficiary unless there is a clash of interest between them or between the beneficiaries inter se.[28] In all other cases, absent peculiar features, he should not be a neces-

[19] Cunningham v. Bank of Nampa, 13 Idaho 167, 88 P. 975 (1907); Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1909).

[20] Fireman's Ins. Co. v. Oregon R. R., 45 Ore. 53, 76 P. 1075 (1904).

[21] Illinois Central Ry. v. Hicklin, 131 Ky. 624, 115 S. W. 752 (1909); CLARK, CODE PLEADING 97 (1928).

[22] See 3 BOGERT, TRUSTS AND TRUSTEES, § 592 (1935).

[23] CLARK, CODE PLEADING 97, 118 (1928).

[24] Perkins v. Gross, 26 Ariz. 219, 224 P. 620 (1924); Fransham v. Tow Bros., 196 Iowa 1082, 196 N. W. 71 (1923); Simon v. Trummer, 57 Ore. 153, 110 P. 786, 123 P. 60 (1910); Waterman v. Chicago, M. & St. P. Ry., 61 Wis. 464, 21 N. W. 611 (1884); Haag v. Turney, 240 App. Div. 149, 269 N. Y. S. 317 (1934); Bamberger v. Morris, 144 Misc. 4, 257 N. Y. S. 696 (1932).

[25] Mitau v. Rodan, 149 Cal. 1, 84 P. 145 (1906); Sampson v. Mitchell, 125 Mo. 217, 28 S. W. 768 (1894).

[26] 2 PERRY, TRUSTS, § 873 (1929).

[27] 2 TRUSTS RESTATEMENT, § 280 (1935).

[28] 3 BOGERT, TRUSTS AND TRUSTEES, § 593 (1935).

sary party. Nor should it be forgotten that the trusteeship is a fiduciary relationship with respect to the beneficiary. If several beneficiaries may sometimes represent the interests of others,[29] then the fiduciary should be allowed to do so in a proper case. Unquestionably the trend of the courts is to extend the power of the trustee to represent the beneficiary.[30] Yet the courts can be more lenient in extending the trustee's representation of the beneficiary in legal proceedings, and still in no way jeopardize his interests.

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[29] Day v. Devitt, 79 N. J. Eq. 342, 81 A. 368 (1911); Piatt v. Oliver, (C. C. Ohio, 1840) 19 Fed. Cas. No. 11,115, 2 McLean 267.

[30] Silverstein v. First Nat. Bank of Birmingham, (Ala. 1936) 165 So. 827; Zion Church v. Parker, 114 Iowa 1, 86 N. W. 60 (1901); Wright v. Conservative Inv. Co., 49 Ore. 177, 89 P. 387 (1907); Hord v. Bradbury, 156 Ind. 30, 59 N. E. 31 (1901); Welch v. Taylor, 218 Iowa 209, 254 N. W. 299 (1934); In re Crawford's Estate, 293 Pa. 570, 143 A. 214 (1928); Cavers v. Sioux Oil Refining Co., (Tex. Comm. App. 1931) 39 S. W. (2d) 862; Lipavsky v. 16th St. Bldg. Corp., 267 Ill. App. 85 (1932); Birmingham & A. A. R. R. v. Louisville & N. R. R., 152 Ala. 422, 44 So. 679 (1907).