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Trusts--Deposit of Trust Funds in Trustee's Private Account-- Liability of Bank for Subsequent Misappropriation

N. E. S.

West Virginia University College of Law

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general rule which it has laid down in past cases.⁷ Of course, this means a remainderman can recover only the diminution in the market value of his estate in remainder and not of the whole fee.⁸

H. L. W., JR.

TRUSTS — DEPOSIT OF TRUST FUNDS IN TRUSTEE'S PRIVATE ACCOUNT — LIABILITY OF BANK FOR SUBSEQUENT MISAPPROPRIATION. — A guardian received from a prior fiduciary the sum of \$4,210.84 for his ward which he placed in *D* bank in a separate account as guardian. The following day he transferred \$4,000.00 by check to his individual account in *D* bank, which at the time showed an overdraft. That same day he drew \$3,000.00 from his personal account by check and paid it to the cashier to be applied against his personal indebtedness to the bank. *P*, as surety for the guardian, having paid the amount of a judgment obtained by the ward, seeks, by right of subrogation, to recover from *D* the sum of \$3,000.00 which represents the amount received by *D* bank as credits on the guardian's personal indebtedness. *Held*, one judge dissenting, that when money deposited in a bank in a fiduciary capacity is transferred to the fiduciary's individual account, and later used to meet his individual indebtedness to the bank, the bank is liable to the beneficiary; or if the fiduciary's surety has made good the losses to the beneficiary, the surety will be subrogated to the beneficiary's rights. *United States Fidelity & Guaranty Co. v. Hood*.¹

It has been held generally by judicial and text authorities that a bank does not become liable when the fiduciary transfers money from the trust account to his individual account, whether they be in the same bank² or in different banks,³ and a bank is not

⁷ See *Jordan v. City of Benwood*, 42 W. Va. 312, 321, 26 S. E. 266 (1896); *Keene v. City of Huntington*, 79 W. Va. 713, 719, 92 S. E. 119 (1917). See also 3 SEDGWICK, DAMAGES § 947; (1938) 15 AM. JUR., DAMAGES § 109. Concerning the right of a remainderman to recover for the loss of rental value of his property, (1906) 3 L. E. A. (N. S.) 1060.

⁸ To calculate this diminution in the market value of the remainder one determines the diminution in the market value of the whole fee by determining the market value of the land before and after the injury. That diminution is apportioned between the life tenant and the remainderman. The value of the life estate is determined by multiplying its annual rental value by the length in years of the life estate as based on the expectation of life. *Jordan v. City of Benwood*, 42 W. Va. 312, 321, 26 S. E. 266 (1896).

¹ 7 S. E. (2d) 872 (W. Va. 1940).

² 3 SCOTT ON TRUSTS (1939) § 324.3; 4 BOGERT, TRUSTS & TRUSTEES (1935) § 908; *New Amsterdam Casualty Co. v. Robertson & West Coast Nat'l Bank*, 129 Ore. 663, 278 Pac. 963 (1929).

³ 3 SCOTT ON TRUSTS § 324.3; 4 BOGERT, TRUSTS & TRUSTEES § 908; *Cooke's Adm'r v. Loyall*, 150 Va. 336, 143 S. E. 881 (1928); *Empire Trust Co. v.*

liable when it later honors his personal checks drawn on his personal account.⁴ A bank, however, does become liable if it has actual knowledge of the misappropriation⁵ or has notice of such facts as require investigation by the bank as to the authority of the fiduciary to use the funds.⁶

In the instant case, the majority of the court were of the opinion that the bank knew sufficient facts tending to show a breach to put the bank on such notice. The only evidence offered to show this notice was that the fiduciary had paid a part of his individual indebtedness to the bank out of trust funds in his personal account. Other jurisdictions and authorities have reached the same result on similar facts.⁷

The principle to govern the liability of banks for misappropriation by trustees of deposited trust funds seems to be that they are not liable unless they have actually participated in the fraud⁸ or have been put on notice of the misappropriation.⁹ Such notice can often be inferred from the fact that the bank received some pecuniary benefit, as when trust funds are used by the fiduciary to pay his individual indebtedness to the bank. In such case the bank will be liable at least to the extent of the benefit received,¹⁰ and it

Cahan, 274 U. S. 473, 47 S. Ct. 611, 71 L. Ed. 1158 (1927); Kendall v. Fidelity Trust Co., 230 Mass. 238, 119 N. E. 861 (1918).

⁴ 3 SCOTT ON TRUSTS § 24.3; 4 BOGERT, TRUSTS & TRUSTEES § 908; Maryland Casualty Co. v. City Nat'l Bank, 29 F. (2d) 662 (C. C. A. 6th, 1928); Taylor v. Astor Nat'l Bank, 105 Misc. 386, 174 N. Y. S. 279 (1918); Ogden, Adm'r v. Atlantic Nat'l Bank, 276 Mass. 130, 176 N. E. 799 (1931).

⁵ New Amsterdam Casualty Co. v. Robertson & West Coast Nat'l Bank, 129 Ore. 663, 278 Pac. 963 (1929); Allen v. Fourth Nat'l Bank, 224 Mass. 239, 112 N. E. 650 (1916).

⁶ Mass. Bonding & Ins. Co. v. Standard Trust & Savings Bank, 334 Ill. 494, 166 N. E. 123 (1929); Havana Central R. R. v. Central Trust Co. of N. Y., 204 Fed. 546 (C. C. A. 2d, 1913).

⁷ Colby v. Riggs Nat'l Bank, 92 F. (2d) 183 (C. C. A. D. C. 1937); Comments, (1916) 4 VA. L. REV. 153; (1916) 16 COL. L. REV. 341; 4 BOGERT, TRUSTS & TRUSTEES § 912; 3 SCOTT ON TRUSTS § 324.4; Conqueror Trust Co. v. Fidelity & Deposit Co., 63 F. (2d) 833, 838 (C. C. A. 2d, 1933). "When such a joint fund [trust funds mingled in personal account] is drawn upon for a payment to the bank to discharge a mere personal debt to it, the bank takes the money at its peril of having to refund, if in fact the trust deposit is thereby depleted."

⁸ Cocks's Adm'r v. Loyall, 150 Va. 336, 143 S. E. 881 (1928); Veigel v. School Dist. No. 26, Beltrami County, 179 Minn. 423, 229 N. W. 568 (1930); United States Fidelity & G. Co. v. Home Bank for Savings, 77 W. Va. 665, 88 S. E. 109 (1916).

⁹ Colby v. Riggs Nat'l Bank, 92 F. (2d) 183 (C. C. A. D. C. 1937); Tingley v. North Middlesex Sav. Bank, 266 Mass. 337, 165 N. E. 119 (1929).

¹⁰ Havana Central R. R. v. Central Trust Co. of N. Y., 204 Fed. 546 (1913); Conqueror Trust Co. v. Fidelity & Deposit Co. of Md., 63 F. (2d) 833 (C. C. A. 2d, 1933); Germantown Nat'l Bank v. Employers' Liability Assurance Corp'n, 263 N. Y. 654, 189 N. E. 741 (1934).

has been held that it will be liable for all subsequent misappropriations of trust funds in the personal account.¹¹

To make the banks liable to this extent when they have benefited from the misappropriation by the fiduciary is not inconsistent with the broad general principle that misappropriated trust funds may be recovered from one who receives them with notice.¹² To do otherwise would allow one to profit by his own misconduct.

N. E. S.

¹¹ Taylor v. Astor Nat'l Bank, 105 Misc. 386, 174 N. Y. S. 279 (1918); Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759 (1916).

¹² 3 SCOTT ON TRUSTS § 321; 2 *id.* at § 296; 4 BOGERT, TRUSTS & TRUSTEES § 881.