Lennart Vernon Larson, Liability of Trustees in Texas, 3 Sm L.J. 135 (1949)
https://scholar.smu.edu/smulr/vol3/iss2/2

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LIABILITY OF TRUSTEES IN TEXAS

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INTRODUCTION

A PRIMARY characteristic of a trust relation is the separation of legal and equitable title to property. The situation is one in which one or more persons, called trustees, hold legal title to property, real or personal, tangible or intangible, in trust to administer for the benefit of another person or persons, called beneficiaries or cestuis que trust. The beneficiaries may have concurrent or successive rights to enjoy the benefits of the trust; in either event, collectively they have the equitable (or beneficial) title, as distinguished from the legal title vested in the trustee or trustees.

The separation of legal and equitable title which occurs in a trust transaction has many important consequences. Indeed, the bulk of the law of trusts may be said to consist of rules and doctrine derived by following the separation idea to its logical conclusions. One aspect of the law of trusts which is shaped in marked degree by the separation principle is the liability of trustees in contract and in tort. It is proposed here to explain the rules and policy governing liability of both private and charitable trustees as developed in Texas. The effect of recent legislation will, of course, be considered.

LIABILITY OF PRIVATE TRUSTEES

In Contract. It is a well-settled rule that a trustee who does not limit his responsibility is personally liable on his contracts.1 This is true as well where the contract is a proper one in the administra-

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1 3 BOCERT, TRUSTS 711-713 (1946); 2 SCOTT, TRUSTS 261, 262 (1939); RESTATEMENT, TRUSTS §§ 261, 262, (1935).
tion of the estate as where the contract is beyond the trustee's
authority. The liability attaches whether the trustee is known to
be acting in that capacity or not.

Texas cases have recognized and applied the rule imposing
personal liability upon the trustee. In Connally v. Lyons\(^2\) defendant
was a court-appointed trustee of a business. Plaintiff sued for
personal judgment against defendant and recovered. The court
stated:

"That such trustees should be held personally liable is reasonable,
because they have in their own hands the means wherewith to reimburse
themselves, and should not assume a debt for the benefit of an estate of
which they have the sole benefit and control, without prospect of funds
for payment thereof. . . . Purchases by trustees, when made in obedience
to the trust, impose upon them a personal liability. The seller must
look to them for payment, and they must look to the trust estate for re-
imbursement. . . . Although the plaintiffs knew that the defendant was
conducting the mercantile business of which he had the control and
management as trustee for the benefit of the persons mentioned in the
[trust] conveyance . . . and charged the goods when sold . . . [to the
trading name under which the trust business was conducted], the de-
fendant was nevertheless personally liable to the plaintiffs for the price
of the goods . . . Since the trustee was personally liable, it was not neces-
sary that the beneficiaries should be made parties to the suit."

Three other decisions have declared trustees personally liable on
their contracts, and in one of these the successful plaintiff was
a beneficiary of the trust.\(^4\)

Personal liability was imposed upon the trustee for his con-
tracts at an early day because in the absence of special legisla-
tion the law courts could not contrive any other type of liability.
In many instances the person contracting with the trustee did not

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\(^2\) 82 Tex. 664, 18 S. W. 799 (1891).
\(^3\) Id. at 670, 671, 18 S. W. at 800, 801.
\(^4\) Longhart Supply Co. v. Zweifel, 39 S. W. (2d) 959 (Tex. Civ. App. 1931); J. P.
Webster & Sons v. Utopian Confectionery, 254 S. W. 123 (Tex. Civ. App. 1923); Head
v. Porter, 240 S. W. 685 (Tex. Civ. App. 1922). In the first case cited defendant was
trustee under an assignment for benefit of creditors, and plaintiff was a creditor-
beneficiary who sold goods to the trustee after the assignment occurred.
know of the trust, and there was firm ground in basic contract principles to hold the trustee personally. Even if defendant were known to be a trustee, the courts were unwilling, in the absence of statute, to recognize him as anything other than a natural person with the usual legal liabilities. This unwillingness prevented levy of execution upon the trust corpus. The trustee did not own the corpus beneficially, and his personal creditors, including those with whom he dealt in the course of proper trust administration, could not reach the corpus. This was something of an anomaly: the trustee held legal title to trust property, he was personally liable for debts incurred in proper trust administration, but the trust property was not subject to levy in satisfaction of these debts.

A trustee has, of course, rights against the trust estate where he finds himself personally liable on a contract entered into in the course of proper trust administration. Broadly speaking, he has a right of indemnity out of the trust estate, which embraces the rights of exoneration and reimbursement. Exoneration entitles the trustee to use property in discharging properly incurred obligations. Reimbursement entitles him to be paid out of trust property for disbursements made in behalf of the trust estate. The right of indemnity is secured by a lien which can be asserted against trust property before it is transferred to the beneficiaries. It is to be emphasized that these rights exist only as to contracts properly entered into and that they are diminished to the extent that the trust estate has claims against the trustee.

If the trustee has a right of reimbursement but the corpus is insufficient to repay him, the trustee must suffer the loss. Certainly, the beneficiaries are not liable unless they were parties to the original contract or agreed to indemnify the trustee. The

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53 BocerT, Trusts 712 (1946); 2 Scott, Trusts 266, 308, 308.1 (1939); Restatement, Trusts §§ 266, 308 (1935).
6 3 BocerT, Trusts 718 (1946); 2 Scott, Trusts 244, 244.1, 244.3, 245, 246 (1939); Restatement, Trusts §§ 244-246 (1935).
7 Everett v. Drew, 129 Mass. 150 (1880); Coffman v. Gates, 110 Mo. App. 475, 85
immunity of the beneficiaries from suit on debts incurred by the
trustee is a consequence of the separation of the legal and equit-
able title to the trust property. It is clear that a trustee should
think twice before incurring obligations which exceed the trust
corpus, even though the obligations may be perfectly proper in
the course of trust administration.

A major reason advanced for holding the trustee liable per-
sonally and denying direct recourse against the trust estate is the
desire to protect the interests of the beneficiaries. This end is
thought achieved by compelling the trustee to defend a suit which
imposes personal liability and to seek reimbursement if judg-
ment is obtained and satisfied out of his property. Presumably,
the trustee will be diligent to defend the suit, since his right of
reimbursement may be challenged in whole or in part by the bene-
ficiaries when he presents his accounts.

An express agreement that the trustee is not personally liable
is valid and does not contravene public policy, but a unilateral
declaration of nonliability, not known to the other party to a con-
tract, has no effect. Mere knowledge by one party that the second
part to a contract is a trustee will not excuse the latter from per-
sonal liability. And, generally, designation of a party in the
contract instrument as a "trustee" is only descriptio personae and
does not affect his normal personal liability.

In special situations grounds may be found for allowing suit
in equity against the trustee in his official capacity and against
the trust estate. One of these is that in which the trustee contracts

S. W. 657 (1905); 3 Bogert, Trusts 718, 721 (1946); 2 Scott, Trusts 249, 275 (1939); Restatement, Trusts §§ 249, 274, 275 (1935).


against personal liability and the obligation is incurred in the course of proper trust administration. *Beggs v. Fite*\(^1\) is illustrative, although it did not involve an equitable suit. Certain disinherited heirs sued to annul a will under which defendants were named as executors and trustees. Defendants contracted with Slay and Simon, attorneys, to represent them in the proceedings, and, subsequently, a large fee was earned. Plaintiff sued Slay and Simon for debt and sought to garnishee defendant executors and trustees for effects held for or owing to Slay and Simon. In discussing the contract between defendants and Slay and Simon the Texas Supreme Court said:

"This... contract was oral, and was made with Tina Brooker et al. in their representative capacities as trustees and executors of the J. N. Brooker estate. In this contract it was expressly agreed that Tina Brooker et al. were each and all contracting as trustees and executors, and were binding themselves only as such, and that they were not contracting personally at all, or binding themselves personally in any way. In other words, the legal effect of the terms of this later contract was to bind the estate of J. N. Brooker, deceased, and also to bind the makers on the part of such estate in their representative capacities as trustees and executors of such estate only."\(^2\)

Judgment for defendants was affirmed because they had been served personally and not in their capacities as executors and trustees. If defendants had been served in their representative capacities, the great likelihood is that they would have been obliged to pay to plaintiff out of the trust estate the debt owed to Slay and Simon.\(^3\)

Considerable authority may be found that in special situations


\(^2\) Id. at 48, 49, 106 S. W. (2d), at 1040.

\(^3\) On this point the court of civil appeals declared: "We think such trustees are subject to garnishment. The funds of the estate in their hands are not in custodia legis. ... The trustees employed these attorneys and agreed to pay them only out of the funds of the Brooker estate. The agreement of Slay & Simon that they would seek compensation only from a particular fund in the control of the trustees does not alter the fact that within those limits the trustees are obligated to pay." (79 S. W. (2d) at 643).
an equitable action may be brought by a creditor against a trustee in his representative capacity and the trust property reached: where the trustee is insolvent and personal judgment against him has proved, or will prove, fruitless; where the trust instrument provides expressly that obligations incurred in trust administration are to be paid from trust assets, or where explicit provision is made for indemnification of the trustee on such obligations; where the trust corpus is a business; where the trust estate has increased or benefited from the contract; or where the trustee contracts expressly that his right of indemnity against the trust estate may be reached. Some of these situations are complicated by the principle that the creditor's right is derived from the trustee's right of indemnity and is defeated if the trustee, because of other defaults, has no such right.

The nature of the situations indicates a trend in the direction of finding a reason for allowing direct recourse to trust funds by creditors. Where the law remedy against the trustee personally is inadequate, one can hardly maintain the position that the trust corpus should remain beyond reach. Where the settlor expresses himself that trust funds should be used to pay obligations properly incurred by the trustee, his wish should be followed, as it would be with respect to other instructions in the trust instrument. Where the trust corpus is a business, one may argue that normal liabilities should be imposed upon the business property. To the extent that the corpus is increased, at least, it should be answerable on a contract claim. Where the trustee contracts to give the creditor his right of indemnity (or contracts against personal liability), it is no great step to allow a direct proceeding against the trust res. In jurisdictions combining law and equity less difficulty is encountered in permitting recourse against the trustee in his representative capacity and against the trust estate.

A few jurisdictions have dispensed with the necessity of finding

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special circumstances and have adopted the rule that the trustee may be served in his official capacity and the trust fund reached directly.\textsuperscript{15} Usually the adoption has come about through legislative enactment. Texas is a jurisdiction in which the rule was adopted without the aid of statute. In a tort case decided in 1926,\textsuperscript{16} presently to be discussed, the Texas Supreme Court held that trustees could be sued in their representative capacities and the trust property levied upon directly. It is inconceivable that a different rule would have applied to contract cases. However, no case involving the application of this rule to contract liability reached the appellate courts.

The Texas Trust Act\textsuperscript{17} permits suit against a trustee in his official capacity, and the comment has been made that in this respect the prior Texas law was not changed.\textsuperscript{18} Section 19A of the Act states that whenever a trustee enters into a proper contract and a cause of action accrues against him, he may be sued “in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible by execution out of the trust property.” In the action “the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff’s claim.” Section 19C preserves the personal liability of the trustee if the contract does not exclude such liability. The addition of the words “trustee” or “as trustee” after the signature of a trustee is to be deemed “prima facie evidence of an intent to exclude” personal liability of the trustee.

Section 19B sets up procedural safeguards for the protection of beneficiaries. Plaintiff cannot secure judgment unless within thirty days after beginning his action (or within such other time as the court may fix) and more than thirty days before obtaining judgment he notifies each beneficiary of the existence and nature

\textsuperscript{15} 3 Bocert, Trusts 712 (1946); 2 Scott, Trusts 271A, 271A.1 (1939).
\textsuperscript{18} Boyles, Texas Trust Act 6 Tex. B. Jour. 149 (1943)
of the action. The notice must be given by mailing copies thereof by registered mail. The trustee is under a duty to furnish the plaintiff with a list of beneficiaries and their addresses upon written request, and notification of these parties constitutes compliance with the section. Any beneficiary may intervene and contest the right of the plaintiff to recover.

It is noteworthy that plaintiff’s recourse against the trust fund is independent of whether or not the trustee would have a right of reimbursement if he paid the judgment. There is little or no justification for frustrating the claim of an innocent creditor because the trustee has been guilty of breaches of trust which would cancel out his right of indemnity if he paid the claim. The innocent creditor cannot be expected to know of the breaches, and to decide the success of his claim on the basis of their existence vel non seems technical and arbitrary.

Also noteworthy is the change in the common law rule that the addition of words such as “trustee” or “as trustee” to a signature is a mere descriptio personae. Under the statute the words are prima facie indicative of an intent to exclude personal liability.

In Tort. The rules governing liability of a trustee in tort parallel to a considerable extent those governing his liability in contract. The trustee, whether known as such or not, is liable personally for torts committed in the course of trust administration, and the trust fund cannot be reached. Where the trustee himself commits the tort, no difficulty is felt in holding him responsible personally. Where his agent or servant commits the tort, one may feel a hesitancy to hold the trustee personally, since he is not in the position of a man conducting a business for private profit. But it is well-settled that respondeat superior applies, and the general opinion has been that there is no sufficient reason for relieving

19 Smith v. Rizzuto, 133 Neb. 655, 276 N. W. 406 (1937); Parmenter v. Barstow, 22 R. I. 245, 47 Atl. 365 (1900); Kirchner v. Muller, 280 N. Y. 23, 19 N. E. (2d) 665 (1939); 3 BOGERT, TRUSTS 731 (1946); 2 SCOTT, TRUSTS 264 (1939); RESTATMENT, TRUSTS § 264 (1935).
a private trustee from liability for the acts and omissions of his subordinates.

A trustee has a right of indemnity (exoneration and reimbursement) from the trust estate with respect to torts committed in the course of trust administration, provided that he has not been at fault personally.\textsuperscript{20} This may well occur where the tort is committed by a servant or agent and the trustee has not been at fault in directing, participating in, or ratifying the tortious act or in hiring or retaining the tortfeasor. It may also occur in certain instances where tort liability is imposed upon the legal owner of property without fault on his part.\textsuperscript{21}

If trust funds are adequate to indemnify the trustee, no injustice is worked in holding the trustee liable personally for torts committed without his fault. But if the funds are inadequate, an argument may be made against liability in excess of the available funds. The argument has been unsuccessful, and one of the risks assumed by the trustee is that he may incur tort liability which exceeds the value of the trust res. The situation is comparable to that in which the trustee enters into contract which may result in an obligation exceeding the amount of available trust funds.

The question whether trustees can contract in such a way as to relieve themselves from personal liability for tort was presented in \textit{Fisheries Co. v. McCoy}.\textsuperscript{22} Plaintiff was injured through the negligence of defendant trustees in failing to afford him with safe appliances and a reasonably safe place in which to work. When he accepted employment, plaintiff acknowledged the nonliability of the individual defendants and agreed to look to the assets of the trust only for any debts or damages. Plaintiff recovered a $20,000 judgment against all the defendants, which was affirmed.

\begin{footnotes}
\footnotemark[20]\textsuperscript{20} Bocert, \textit{Trusts} 734 (1946); 2 Scott, \textit{Trusts} 247, 264 (1939); Restatement, \textit{Trusts} § 247 (1935).


\footnotemark[22]\textsuperscript{22} 202 S. W. 343 (Tex. Civ. App. 1918), \textit{writ of error dismissed}.\end{footnotes}
on appeal. The court of civil appeals discussed the contract signed by plaintiff in the following terms:

"We shall take it for granted that there is a general rule that trustees and partners can, by previous contract, exempt themselves from personal liability for contracts and torts, and consider whether such a contract, when made with an employe for exemption from personal liability for negligence of other employes to him, has the effect of making the trustees or partners his masters only in their official or representative capacity and not as individuals. The question, we believe, resolves itself into whether trustees or partners can by contract alter the legal status which the law gives them, and such question must be answered in the negative. Under the law, trustees and partners are persons. They may describe themselves as trustees or partners in making contracts, and sign as trustees and partners, and yet it is their personal contract. They have no separate legal entity as trustees or partners. When they employ a person they are his masters. They may say in a contract with him that they are not his masters, and that the trust estate or partnership estate is his master; but property and funds cannot be his master. There must be persons, natural or artificial. In this case there is no corporation, so Munn and Moody were masters personally, regardless of how explicitly they might have expressed an intention to employ only in a representative capacity."22

The court pointed out that limited liability for contracts and torts can be achieved by taking advantage of the laws relating to incorporation and the formation of limited partnerships. No peculiar merit could be found in the trust or partnership enterprise involved in the case such that the contract provision should be allowed to modify a liability normally incident to a master and servant relationship. Accordingly, the provision was held contrary to public policy and void.

Authority exists that in special situations the trustee can be sued in equity in his representative capacity and the trust corpus reached:23 where the trustee is insolvent and the law remedy against

22 Id. at 348.
23 Smith v. Coleman, 100 Fla. 1707, 132 So. 198 (1930); Birdsong v. Jones, 222 Mo. App. 768, 8 S. W. (2d) 98 (1928); 3 Bogert, Trusts 732 (1946); 2 Scott, Trusts 267-271 (1939); Restatement, Trusts §§ 267-271 (1935).
him is inadequate; where the trust instrument provides expressly that obligations incurred in trust administration are to be paid from trust assets, or where explicit provision is made for indemnification of the trustee on such obligations; where the corpus of the trust is a business; or where the trust estate has increased or benefited from the tort. The reasons for allowing direct recourse in these situations are similar to those operating in the comparable contract situations. Again, the tort claimant’s recourse is regarded, in some of the situations, as derived from the trustee’s right of indemnity and limited to that extent.

A few jurisdictions allowed direct recourse against the trustee, as such, and his estate, apparently without limitation to special circumstances. Texas was one of these, and no statute was relied upon to reach this result. In *Ewing v. Wm. L. Foley, Inc.*28 defendant executors and trustees were erecting an eight-story building in Houston. Defendants’ agents negligently undermined plaintiff’s building, causing the northeast wall to crash and fall. Defendants were not personally negligent. Plaintiff sued defendants personally and in their official capacities and recovered judgment for $18,500. The trial court directed that execution be levied upon the trust estate because the trustees would have a right of indemnity if they paid the judgment. The Texas Supreme Court affirmed this judgment saying:

"The holding that a trustee, in cases where he is not chargeable with personal fault or negligence, may legally be reimbursed out of the trust estate for such damages as may be recovered against him, is in effect a holding that in such cases the trust estate is itself liable for such damages, and, since the trust estate is so liable, we think our practice allows it to be proceeded against in a suit brought directly against the trustee in his representative capacity."27

28 *In re Hunter*, 151, Fed. 904 (E. D. Pa. 1907); *Miller v. Smythe*, 92 Ga. 154, 18 S. E. 46 (1893); *In re Raybould*, (1900) 1 Ch. 199; 2 *BoCt's, TRUSTS* 432 (1946); 2 *Scott, TRUSTS* 271A, 271A.2 (1939).


27 *Id.* at 234, 280 S. W. at 502, 503.
The court reviewed various authorities and asserted that the rule adopted was supported by the common law. It argued that where the trustee has exercised care and prudence in selecting agents, has acted in good faith, and has been guilty of no personal negligence or fault, "it would be a harsh and most unjust result that would hold the trust estate free from liability and would hold him personally liable for damages for the torts of such agent, with no right of indemnity or reimbursement out of such estate." In many instances, said the court, the rule "would wholly defeat recovery for the injury done when the trustee or trustees were insolvent or without funds." These arguments seemed based on the fallacious premise that the rule imposing personal liability denied the right of indemnity to guiltless trustees and forbade recourse against the trust estate where the trustees were insolvent.

All the authorities cited by the Texas Supreme Court to support its holding in the Foley case were examined and found wanting in an article written some twenty years ago. The writer concluded, however, that "the result of the case is a progressive one, but rather than conforming to, it seems to depart from the common law, and is supported on reasoning rather than authority." Certainly, if the beneficiaries have an opportunity to protect their interests, there would seem to be a marked policy advantage in avoiding circuity of action and allowing direct recourse against trust funds.

Section 21 of the Texas Trust Act appears to codify the law of the Foley case and affords some clarification. Personal liability of the trustee for torts committed by him or his agents and servants is preserved in Section 21D. Section 21A allows suit against the trustee in his representative capacity and collection from the trust property (1) if the tort was a common incident of the kind of activity in which the trustee was properly engaged for the trust;

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28 Id. at 228, 280 S. W. at 500.
29 Ibid.
30 Kerr, Liability of the Trust Estate for Torts of the Trustee's Servants 5 TEx. L. Rev. 368 (1927).
or (2) if the tort was not a common incident of such activity and neither the trustee nor any officer or employee was guilty of actionable negligence; or (3) if the tort does not fall in classes (1) or (2) and increases the value of the trust property. As to the third situation, collection may be had only to the extent of permanent increase in the value of the property.

Section 21B eliminates the necessity for proving, as a condition precedent to bringing suit against the trustee in his representative capacity, that the trustee would have a right of reimbursement if he paid the tort claim. The Act takes the view that loss by a trustee of his right of indemnity for tort liability because of breaches of trust is irrelevant to the question whether the tort claimant may reach the trust estate. Section 21C requires that notice be given to all beneficiaries of a trust before judgment is obtained against the trustee in his official capacity. The provisions for written demand for names of beneficiaries, for time limits, for notification, and for the right of beneficiaries to intervene are similar to those set forth in Section 19, dealing with contractual liability of trustees.

Section 20 is closely related to Section 21 and provides for the trustee's right of indemnity. The trustee has a right of exoner-ation or reimbursement (1) if the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust; or (2) if the tort was not such a common incident and neither the trustee nor any officer or employee was guilty of actionable negligence. It is to be observed that in the first situation the trustee's right of indemnity apparently is not barred by his negligence or fault. If the tort does not fall within either of the two situations, the trustee has a right of exoneration or reimbursement only to the extent that the trust property has been increased in value because of the tort.

Satisfaction is to be expressed with the rules and principles incorporated into Sections 19, 20 and 21 of the Texas Trust Act. The personal liability of the trustee in tort and in contract re-
mains, but there is added the remedy of suit against him in his representative capacity. Circuity of action is avoided, and the beneficiaries are afforded the opportunity to intervene. Internal consistency is to be seen in Sections 20 and 21 in that the situations in which a trustee can claim a right of indemnity for personal liability for tort are exactly the situations in which he can be sued in his representative capacity.

**LIABILITY OF CHARITABLE TRUSTEES**

*In Contract.* A charitable trustee is liable in contract in the same way as is a private trustee. He is liable personally, whether known to be a charitable trustee or not, and whether the contract is a proper one in the course of trust administration or not. If the contract is a proper one, the charitable trustee has a right to indemnity from the trust estate. And the charitable trustee can contract expressly against personal liability. It appears that the trust res can be reached by a contract creditor in the same special situations where such recourse can be had against private trust funds. No reason appears that a charitable trustee’s contractual liability should be different in nature from that of a private trustee.

Only one Texas case deals with the contractual liability of charitable trustees, and it suggests that trust funds devoted to particular charitable purposes cannot be reached for debts incurred in transactions unrelated to the particular charitable purposes. In the case plaintiffs, agents for the Methodist Episcopal Church South, bought land and established the Waco Female College. Plaintiffs sued the church (a voluntary association), members of the church, five incorporated colleges, and trustees of the colleges for reimbursement in the amount of $37,000. The church held no property in its own name, but property was held

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31 2 Bogert, TRUSTS 402 (1935); 3 Scott, TRUSTS 403 (1939); RESTATEMENT, TRUSTS §§ 403 (1935).

for its use by charitable corporations and boards of trustees. Plaintiffs recovered judgment for $37,000 against the church, its members, and trustees of the Waco Female College, but with a direction that levy should be made upon church property only and not upon property of the individual members. On appeal the judgment was reversed. The Methodist Episcopal Church South, as a voluntary association, could not be sued. The individual members and the colleges could not be sued because plaintiffs were not their agents. Nothing was left of the Waco Female College property. There remained the possibility of reaching property of individual Methodist churches. Also, it appeared that property was held by certain trustees for school and church purposes in behalf of the Methodist Episcopal Church South and the Northwest Texas Conference. With respect to these possibilities the court said:

"In our opinion, the verdict of the jury makes it clear that the church now holds no property directly connected with the enterprise for which the indebtedness of appellees was incurred; that it holds no property as a general fund of the association, which might be charged in equity with this debt; but that all of the property controlled by it, or held for its use, is charged with particular charitable uses, separate and distinct from the Waco Female College, and which cannot be lawfully diverted from the purposes for which it was donated."

Generally, a charitable trustee cannot be sued in his official capacity and trust property levied upon in satisfaction of a judgment on contract, in the absence of special circumstances. In Texas, however, if one can believe that private trustees could be sued in their representative capacities on contract obligations, the same should have been true of charitable trustees. This seems to be confirmed in the Texas Trust Act.

Section 19 has already been discussed as providing for suit

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33 Id. at 255, 78 S. W. at 736.
34 2 BOGERT, TRUSTS 402 (1935); 3 SCOTT, TRUSTS 403 (1939); RESTATEMENT, TRUSTS § 403 (1939).
35 See text at notes 16 and 26 supra.
against a trustee in his official capacity on contract obligations. The section is not limited in terms to private trustees. Section 19B directs that notice of action be given to the Attorney General and to any corporate beneficiaries in the case of charitable trusts. The Attorney General and the corporate beneficiaries are authorized to intervene and contest the suit. One cannot question that charitable trustees can be sued in their representative capacities in contract actions.

In Tort. A charitable trustee is liable personally for tort only if he has been at fault in directing, participating in or ratifying a wrongful act or omission or has been at fault in hiring or retaining an employee. If he has not been at fault, he is not liable personally. He is not liable for the torts of his agents and servants because respondeat superior does not apply. Neither he nor any other private individual stands to gain from the administration of the trust (often he serves without compensation), and thus a main ground for holding a principal or master for the wrongs of his agent or servant is missing. People would be discouraged from acting as charitable trustees if they were held for torts without personal fault.

There is general agreement on these propositions bearing on the trustee’s personal liability, but on the question of suing the trustee in his official capacity and reaching the trust corpus the cases are characterized by diversity and confusion. Some courts extend complete immunity to the charitable trust so long as the trustee has not personally been at fault. If such fault is shown, the trust res can be reached as well as the private property owned by the trustee. Other courts allow suit against a charitable trustee in his official capacity for all torts and extend no exemption.

Most courts allow to charitable funds a qualified immunity from suit, depending on the situation of the plaintiff. If the

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36 Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855 (1906); Welch v. Frisbie Memorial Hospital, 90 N. H. 337, 9 A. (2d) 761 (1939); 2 Bogert, Trusts 401 (1935); 3 Scott, Trusts 402-402.2 (1939); Restatement, Trusts § 402 (1935); Appleman, The Tort Liability of Charitable Institutions 22 A. B. A. J. 46 (1936); Note 20 Tex. L. Rev. 505 (1942).
plaintiff is a beneficiary of the charitable trust, he is commonly denied recourse against the trustee in his official capacity and against the trust property, unless the trustee has been personally at fault. If the plaintiff is a third party unconnected with the charity, he is commonly permitted to reach the trust res. If the plaintiff is an employee of the charity, the tendency is to permit recovery and levy upon the trust fund. The cases are complicated by the fact that in most of them charitable corporations are involved as distinguished from charitable trustees. However, it is said that a charitable trustee is in the same comparable position as a charitable corporation (a legal entity) and that the rules governing tort liability of both are the same.  

The origin of the immunity of charitable trusts from tort liability has been traced to an early decision and certain dicta of the English courts. The decision and the dicta have been overruled, but the doctrine has flourished and had strong support in American law. Several reasons are advanced for allowing absolute or qualified immunity. The "trust fund" theory is that the corpus should not be diverted from the charitable purposes impressed upon it by the settlor. Charitable donors would be discouraged from their good works if they understood that their gifts could be reached to pay tort claimants. *Respondeat superior* is not applicable because it is based on the idea that the principal is making a private gain from the acts of his agents and servants and should therefore be liable for their wrongs. Suit may be brought against the individual agent or servant; the fact that he is judgment proof is irrelevant, since the law does not guarantee a solvent judgment debtor. Municipal corporations in performing the same functions and achieving the same ends as charitable trustees are deemed to be acting in a governmental capacity and

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are allowed immunity from tort claims. Charitable trustees are in a position to urge that they should have the same immunity. If a beneficiary of the charity is plaintiff, it is said that he waives any claims for tortious injuries. It is said, too, that the beneficiary "initiates" the course of conduct which leads to his injury. Finally, there is a fear that if charitable trustees and corporations are made subject to suits in tort, the bars will be down and they will be fair game for all manner of tort claimants, good and bad. Private corporations and public utilities can stand this, but not charities.

The reasons for immunity have been pretty well exploded. If the "trust fund" theory is valid, then there would seem to be no basis for recourse against the corpus, as is commonly allowed, when the trustee has been personally at fault. It is not clear that charitable donors expect their gifts to be immune from the hazards of normal legal liability, and such gifts have not disappeared in jurisdictions denying immunity. The argument may well be made that a trustee in administering the business of a charitable trust ought to be liable in that capacity in the same way as a private owner. Charities will be stimulated to exercise all the care required of private persons. Respondeat superior is not based entirely on the assumption that private gain is to ensue from the actions of agents and servants. A tort claimant is no less injured because the tortfeasor was an agent or servant of a charity. He is compelled to make an unreasonable contribution to the charity in being denied the right to bring an action.

Municipal corporations are not an apt subject for comparison because they have attributes of sovereignty when acting in a governmental capacity, and special considerations, among them historical, are applicable. Besides, the immunity from suit is broader than that extended to charities: it operates upon all classes of tort claimants (beneficiary, employee or third party), bars suit upon

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contract as well as tort, and is not affected by the fact that an executive officer has been at fault in selecting the tortfeasor as an employee. The waiver theory can only be urged against a complaining beneficiary, and it seems unrealistic in the case of a paying beneficiary or a beneficiary who is unconscious or incompetent. Indeed, waiver is a pure fiction where severe injury or death is suffered by reason of negligence or other fault of employees of a charity. One may query whether a beneficiary or a charity "initiates" the course of conduct which leads to injury.

The danger of many unwarranted suits is probably exaggerated. Charities do not stand in the same light as private corporations and public utilities, and sympathy for the alleged victim of wrong would be balanced by due regard for the public interest in charitable trusts. In sum, the arguments for making charities liable in the same way as private individuals may be epitomized in the expression that "charity begins at home"; care should first be taken of those with whom the charity comes into tortious contact as it goes about its ministrations.

Texas cases adopted the view that charitable corporations and trustees should be allowed a qualified immunity from suit on tort claims, and most or all of the arguments already stated have been advanced. The qualified immunity allowed, however, is different in its details from that prevailing in most states.

Beneficiaries of a charitable trust cannot sue in tort unless the trustee (or corporation) was negligent in hiring or retaining the employee committing the wrong. All of the Texas cases have involved hospitals, and this result has been reached even though plaintiff was a paying patient. The character of the defendant

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raises the immunity, and a paying patient may receive some benefits (facilities and services) which are available and compensated for only because of the charitable gift. Defendant has the burden of proving that it is a charitable corporation (or charitable trustee), since the facts are peculiarly within its knowledge. It appears that evidence of negligence committed by an employee is insufficient of itself to impose liability upon a charitable trustee or corporation, since such evidence has no tendency to prove negligence on the part of the trustee or corporation "in the failure to prescribe proper rules of government or in the selection or retention of the offending . . . [employee]." In other words, the burden of proof is on the plaintiff to show negligence in selection or retention.

*St. Paul's Sanitarium v. Williamson* was a case in which the evidence was held sufficient to sustain a judgment that negligence had occurred in the selection of an agent. Plaintiff's wife, a paying patient, was operated upon in defendant hospital. The head nurse gave a general direction to the kitchen to send a bottle of hot water to the room assigned to plaintiff's wife. A girl of twelve or fourteen years, employed in the kitchen, put the bottle under the cover on the bed and left. Plaintiff's wife was brought in and put to bed in an unconscious condition. Two student nurses were successively in charge of the patient, and the bottle of hot water was finally discovered when plaintiff's wife began squirming with pain. Plaintiff sued and recovered damages for severe injuries and burns suffered.

The court of civil appeals in affirming the judgment below recognized that the authorities were divided on the question of extending immunity to charitable institutions for tortious injuries to employees and third parties. As to beneficiaries who are injured the court said:

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"There is yet another line of cases that do not concede entire exemption from the rule of respondeat superior, nor yet bring such institutions entirely within the rule, but hold to the rule that charitable institutions, such as appellant, in respect to the negligence of physicians, nurses, and servants, who are said not to be the agents of the institution, are liable only when it appears that the institution failed to exercise ordinary care in the selection and retention of such employees, and that in the application of the rule it is immaterial whether the patient upon whom the injury was inflicted be a beneficiary of the charity of the institution or one who is paying full consideration for his or her care and nursing."

In Hotel Dieu v. Armendarez the Texas Supreme Court held that a religious corporation was liable to an employee for injuries sustained because of breach of duty owed in a master-servant relation. Defendant operated a hospital, and plaintiff was employed in the laundry. Plaintiff’s hand was drawn into the revolving rollers of a mangle while she was releasing some entangled garments. Defendant was found negligent in failing to warn plaintiff of the dangers incident to operation of the mangle and in failing to instruct her how to release entangled clothes. The court did not discuss the policy of allowing immunity to a charitable corporation but contented itself with the statement that the question had been correctly decided below. The court of civil appeals had said:

"The law of master and servant, involving the duties it imposes on the master and his liability for injuries resulting from the nonobservance of such duties, permeates and reaches every situation in the affairs of men in which that relation is assumed.... [H]ad this corporation derived no revenues from its operations, and [were] the funds which enabled it to carry on its benefactions... derived, not from its beneficiaries, but from endowments or contributions, it would not in our opinion make a particle of difference in its attitude to the law with reference to its legal duties and liabilities to persons in its service as employees. It was an incorporated body, chartered by its own volition, endowed with power to employ servants, and with the capacity to sue

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45 Id. at 39.
and to be sued. This being so, defendant would be liable for injury sustained by its employees due to the negligence, if any, of itself, its managing officers, or agents or vice principals, which is the case presented here."

The question of liability of a charity to a third person was decided in *Southern Methodist University v. Clayton*. Plaintiff sued for injuries sustained by his wife when a temporary bleacher in defendant's football stadium collapsed. Defendant's employee was found negligent in permitting the bleacher to be overcrowded, in failing to brace it, and in constructing it of defective materials. But no assertion or proof was made that defendant had been negligent in hiring or retaining the employee in question. In denying recovery to plaintiff the Texas Supreme Court relied upon and quoted from a South Carolina decision:

"...[T]he exemption of public charities from liability in actions for damages for tort rests not upon the relation of the injured person to the charity, but upon grounds of public policy, which forbids the crippling or destruction of charities which are established for the benefit of the whole public to compensate one or more individual members of the public for injuries inflicted by the negligence of the corporation itself, or of its superior officers or agents, or of its servants or employees. The principle is that, in organized society, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity. The law has always favored and fostered public charities in ways too numerous to mention, because they are most valuable adjuncts of the state in the promotion of many of the purposes for which the state itself exists.""}

Elsewhere the Texas court said that charitable funds must be devoted to charitable purposes, that the principle of *respondeat superior*, if applied, would endanger the existence of charitable

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\[145 S. W. at 1031.\]


\[Vermillion v. Woman's College of Due West, 104 S. C. 197, 88 S. E. 649, 650 (1916).\]
institutions, that the guilty employee could be sued, and that the law does not undertake to provide solvent defendants. It was indicated that if defendant had been negligent in selecting or retaining the employee causing the injury, defendant would have been liable. Thus, the liability of charitable trustees or of a charitable corporation in tort is the same whether plaintiff is a beneficiary or a third party. A later decision rejected the argument that if the charitable corporation is operating at a profit for a period of time, its immunity from liability ceases.

Two comparatively recent cases deny immunity from tort liability where the alleged charitable corporation never functions as such. Plaintiffs sued for wrongful eviction from their room and recovered actual and exemplary damages. The court declined to give defendant "the benefits vouchsafed to charitable institutions when it has never engaged in charity or benevolence of any kind so far as the record shows, but is engaged in operating a rooming house for profit just as would any individual or group of owners engaged in the same business."

It is of interest to note that the Foley case actually involved trustees who were erecting a building the income from which was to be devoted to the maintenance and operation of a charitable hospital. This point was not mentioned in the opinion of the Supreme Court and perhaps was not raised. The point was argued, however, in the lower courts, and the court of civil appeals took the position that the charitable trustees could not claim immunity from liability:

49 Scott v. Wm. Rice Institute, 178 S. W. (2d) 156, 157 (Tex. Civ. App. 1944), write of error refused: "Such contingent fund is as much a part of the assets of Rice Institute as its general fund, and as much devoted to the purpose of the Institute. A charity corporation does not have to be unfortunate or unskilful in the management of its activities or finances in order to enjoy such immunity. And this case is governed by the ruling in the Southern Methodist University case. . . ."


51 188 S. W. (2d) at 698.

52 Discussed at note 26 supra.
"It will not do here to say... that it would thwart the purpose of this endowment for a hospital, that is, would oppose the will of the founder of the trust, to pay from its funds damages caused by the tortious and negligent acts of his representatives, or their agents, for two reasons: (1) The endowment fund itself was in this instance in no true or direct sense actually involved; (2) the will of an individual may not exempt property from the operation of the general laws of the land.

"The wrongful act here recovered for was merely an incident of the construction by the executors, acting directly through their agent, of an office building intended solely for money-making purposes, the construction of which for those purposes was expressly contemplated and authorized by the testator. Only its net income after deduction of the cost of construction and the expenses of operation was to constitute a fund for charity, and no reason is perceived for not regarding the liability allowed as any other expense of construction. In all fairness and justice it must be assumed that the testator himself anticipated the incurring of necessary cost, as well as reasonably probable incidental injuries to others, in the erection of such a building in the heart of the business district of a populous and busy city."\textsuperscript{53}

Speculation may be indulged whether or not the opinion of the court of civil appeals is valid in the light of the Southern Methodist University decision. Football games in university-owned stadia have commercial aspects in a very definite sense, and one may question that a distinction can be drawn between such enterprises and the operation of an office building. If there is no distinction, then the Southern Methodist University decision forecloses the possibility of suit for tort committed in the course of any business a charity may choose to operate. However, a distinction may be drawn in that football spectacles are commonly regarded as part and parcel of university life, the opinions of learned educators to the contrary notwithstanding. There is basis for this view in that the program of health and physical education is promoted and the university generally (including the learned educators) benefits from the enriching effects of football. It may be that commercial

\textsuperscript{53} 239 S. W. at 254. Elsewhere it was emphasized that the office building "was never to be used for and had no other connection with a hospital than to raise funds to support it, and was built for the estate for that purpose..." (At p. 253.)
activities carried on at locations physically separate from the situs of the charity and having no relation to the charity except giving financial support are not enveloped with immunity from liability for tort. To carry this thought one step further, it may be that only the assets used in the commercial activities can be reached by tort claimants.

The difference in tort liability of private trustees and charitable trustees and the distinctions made among beneficiary, employee and third party plaintiffs may be wiped out by the Texas Trust Act. Section 2 defines “trust” for the purpose of the Act as an “express trust only” and excludes certain transactions not material here. Manifestly, express trusts include private and charitable trusts. Sections 20 and 21, dealing with tort liability of trustees and their right of indemnity, speak of “trusts” and make no mention of “charitable trusts.” The inference may be drawn that the sections are applicable to both private and charitable trusts. Sections 20 and 21 are almost verbatim copies of Sections 13 and 14 of the Uniform Trusts Act. Omitted, however, from Sections 20 and 21 is the following provision which appears in both Sections 13 and 14:

"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."

A strong inference arises that the Texas Legislature intended, by this omission, to make the sections applicable to charitable trusts.

Contrary arguments of great weight can be marshalled. The rules governing tort liability affect property rights and have an important bearing on the operations of charitable trusts. One would expect that if so drastic a change were intended as to put charitable and private trustees on the same footing, something explicit to this effect would have been stated. The Texas Trust Act is derived from the Oklahoma Trust Act, the Uniform Trusts Act,

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the Uniform Fiduciaries Act, the Uniform Principal and Income Act, the Uniform Trustees Accounting Act, and the Restatement of Trusts, and the first source is said to have contributed heavily. The omission of the provision quoted above may not be significant if one considers that the legislative process, involving study of various uniform laws and the writing of a new act incorporating parts of these laws, was a complicated one. The omission may not have been as purposeful as at first face it appears.

Section 19 of the Texas Trust Act, dealing with contract liability, provides expressly for charitable trusts. Notice of suit must be given to the Attorney General and to any corporate beneficiary, and they are given the right to intervene. The absence of any such provisions in Sections 20 and 21 is conspicuous. One may infer that these sections do not contemplate a tort situation involving a charity. An explanation opposing the inference is that Section 21 was taken from Section 14 of the Uniform Trusts Act, and, of course, the latter section said nothing about charitable trusts because a subdivision (quoted above) negatived the idea that the law governing charitable trusts was being changed. This explanation does not refute, however, that the remainder of Section 14 (which is the whole of Section 21) was originally written not to apply to charitable trustees. For example, Section 14.4 (Section 21D) makes the trustee liable personally for any tort committed by him or his agents or employees, and application of this provision to innocent charitable trustees would be a surprising reversal of the common law rule.

Charitable corporations are different in their legal nature from charitable trustees. They are legal entities and are at once trustees and beneficiaries of their assets. It is not clear that the Texas Trust Act is applicable to them, although Section 4 includes in the definition of “trustee” corporate as well as natural persons. If Section

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55 Moorhead, The Texas Trust Act 22 Tex. L. Rev. 123 (1944). The Oklahoma Trust Act, Okla. Acts 1941, c. 4, is based on the Uniform Trusts Act and omits the provisions declaring that the existing law concerning liability of charitable trustees for torts is to remain unchanged. No case has been decided on the question whether or not the liability of charitable trusts for tort has been modified.
21 applies to charitable trustees but not to charitable corporations, then the law will operate differently as to two institutions which previously were treated alike. One may doubt that the Texas Legislature intended to put charitable trustees and charitable corporations on different bases in so far as tort liability is concerned. Of course, if the Texas Trust Act is construed to apply to charitable corporations, the force of this argument is lost.

One may express the hope, for reasons stated earlier, that charities will eventually be put on the same basis as private individuals with reference to tort liability. But it is doubtful that the Texas Trust Act has effectuated this reform. One may hazard the opinion that the tort liability of charities has not been altered to conform with the law of private trusts because the Texas Trust Act is not explicit to this effect, because such a change should not be declared on the basis of omission from one of the sources of the Act, and because on its face Section 21 is different from Section 19 in failing to provide for charitable trusts. These reasons have great force. The countervailing arguments and explanations have strength, too, but some of them have the weakness of being based on what may be termed speculative inferences from what was done with sources of the legislation.

**Conclusion**

The quest for certainty in the law is constant and unending. No one expects that all trust problems have been solved by the Texas Trust Act. But a great many of them have. The provisions governing liability of trustees in contract and in tort have gone a long way in settling rights and clarifying procedures. Unquestionably, new problems will appear because the capacity of lawyers and clients to involve themselves in new situations seems limitless. A question which should have been left clear was whether or not the liability of charitable trustees for tort should continue as it was before the Texas Trust Act was passed. Charities are widespread, and the wait probably will not be long before the question will be presented to the courts.