

tions where the public is directly or indirectly involved. It is quite obvious that the courts are not anxious to settle the law in this respect as they refrain from passing on the principle whenever possible. As a result, the status of the doctrine in Ohio is not clearly established. Perhaps, however, this condition of the law is not necessarily undesirable. In some jurisdictions the doctrine has oscillated between acceptance and rejection. An instance of such a practice is shown by two decidedly conflicting statements from the Supreme Court of Pennsylvania. In 1868 the court ruled, "It is elementary law, that in equity a decree is never of right but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing . . . If in conscience the former should appear, he will refuse to enjoin."²² Yet, only a quarter of a century later, the same court said, ". . . a refusal of an injunction upon the ground that plaintiff cannot suffer as great a loss from discontinuance of the nuisance as defendant would from its interdiction would be as far removed from equity as can be. There is to my mind no more offensive plea than that by which one seeks to justify an act injurious to his neighbor on the ground of its advantage to himself."²³ If the adoption of a definite rule as to the principle of balancing the equities necessitates such diametrically opposed viewpoints when only slightly different fact patterns are being considered, perhaps the Ohio courts are prudent in not definitely declaring the law, and thus being better able to base their decisions on the particular facts of the case.

L. B. C.

Trusts

STATUS AND LIABILITY OF AN EXECUTOR WHO IS ALSO A TRUSTEE.

Testator, by will, appointed his wife and one Nixon executors of his estate, and specifically listed the acts they were authorized to perform in that capacity. Testator also named his wife and Nixon trustees of the residue of the estate for the benefit of the deceased's children. The appointees qualified as executors and gave

²² Richard's Appeal, 57 Pa. 105, 98 Am. Dec. 202 (1868).

²³ Evans v. Readin Chemical Fertilizing Co., 160 Pa. 209, 20 Atl. 702 (1894).

bond as such. Seven years later the executors qualified as trustees, and two years thereafter filed their final account as executors. The executors resigned as trustees, and the successor trustee brought suit, complaining of unauthorized acts of the executors which had excessively depleted the estate between the date of their qualification as executors and their qualification as trustees. The executors justified their acts, contending that they acted in the dual capacities of executors and trustees; while the successor trustees alleged that the acts were unlawful because the fiduciaries were acting solely as executors and not as trustees. In the Probate Court the contention of the successor trustee was upheld.¹

Where a will creates a trust, and appoints someone other than the executor to execute the trust, there is little difficulty in separating the duties of the two. The duties of the executor are normally temporary and constitute the administration of the deceased's estate. In the absence of statute, the executor's duties are limited to (1) reducing to possession the personal property of the testator, (2) paying testator's debts, (3) paying legacies, and (4) distributing any surplus among testator's next of kin. The trustee's duties, on the other hand, are permanent, and their nature and extent depend on the terms of the trust. When, however, as frequently occurs, the executor is also named testamentary trustee, perplexing problems are raised as to whether these two fiduciary functions must be kept separate, and, if so, what is the necessary distinction.

The functions of the "combined fiduciary" may be successive, as in the principal case, where an express trust of the residue of the estate was created; or simultaneous, when a specific portion of the estate is to be segregated to the trust. In the latter case the general rule is that the devise or bequest is taken by the executor as trustee immediately and the same never becomes assets, unless needed in the administration of the deceased's estate.³

In the case of the successive functions, most courts agree that as to funds first received by the fiduciary as executor, liability in that capacity continues until some "notorious and unequivocal act" indicates a change.⁴ This view seems readily applicable to the facts

¹ *In Re Emswiler's Estate*, 7 Ohio Sup. 199 (1941).

² 1 SCOTT, TRUSTS (1939) § 6; *In Matter of Kohler*, 231 N. Y. 353, 132 N. E. 114 (1921); *Ryder v. Loyn*, 85 Conn. 245, 32 Atl. 573 (1912).

³ *In Re Crawford*, 21 Ohio C. C. 554, 11 Ohio C. D. 605 (1901).

⁴ 3 BOGERT, TRUSTS AND TRUSTEES (1935) § 583; *Joy v. Elton*, 9 N. D. 428, 83 N. W.

of the *Emswiler* case. The executors, unable to show any notorious or unequivocal act of assumption of the trustee's functions prior to the performance of the acts complained of, would obviously be liable as executors. Whether particular acts are sufficient to achieve the transition of the property from assets to trust res should depend on the circumstances of the particular case.⁵ Something more than mere mental decision by the executor-trustee is required.⁶ He should by some unequivocal act set apart and mark the trust res.

A few states, under statutes requiring the filing of a bond by a trustee, have made the filing of such a bond a necessary condition precedent to the assumption of the trustee's status, even where the executor has performed such a notorious and unequivocal act as was required by the general rule. Courts adopting this view proceed on the general theory that since only a bonded trustee is authorized, the executor is liable as such until he has furnished bond for his position as trustee. More specially, the bases of these courts' decisions are either (1) that no discharge of the executor can be predicated upon turning the sum over to an unbonded trustee, which act has been considered a breach of duty of the executor,⁷ or (2) that title may not vest in the fiduciary as trustee until bond as such has been given.⁸ This statutory approach was not available to the court in the *Emswiler* case since our G. C. 10506-4,⁹ adequate to support this theory, was not enacted till after the performance of the acts complained of.

A third approach to the fact pattern of the principal case is represented by determinations that a change of status takes place by operation of law whenever a person holds funds in one capacity and is

875 (1900); *Hobbs v. Cunningham*, 273 Mass. 529, 174 N. E. 181 (1930); *Ellyson v. Lord*, 124 Iowa 125, 99 N. W. 582 (1904); *Cluff v. Day*, 124 N. Y. 195, 26 N. E. 306 (1891).

⁵ 16 L. R. A. (N. S.) 205; 3 BOGERT TRUSTS AND TRUSTEES (1935) § 583.

⁶ Mere cessation of executor's functions held insufficient: *In Re Higgins' Estate*, 15 Mont. 474, 39 Pac. 506 (1895); *Hail v. Cushing*, 9 Pick. 395, 408 (Mass. 1830); *Jones v. Atchison*, 150 Mass. 304, 23 N. E. 43 (1889). Court order directing a transfer to oneself as trustee insufficient: *Bellinger v. Thompson*, 26 Ore. 320, 37 Pac. 714 (1894); *Ellyson v. Lord*, 124 Iowa 125, 99 N. W. 582 (1904). Judicial discharge of executor held sufficient: *Cluff v. Day*, 124 N. Y. 195, 26 N. E. 306 (1891); *State v. Noll*, 189 S. W. 582 (Mo. 1916).

⁷ *White v. Ditson*, 140 Mass. 351, 4 N. E. 606 (1885); *M. I. T. v. Atty. Gen.*, 235 Mass. 288, 126 N. E. 521 (1920).

⁸ *Karel v. Pareles*, 161 Wis. 598, 155 N. W. 152 (1915); 1 PARRY, TRUSTS & TRUSTEES (7th Ed. 1929) § 262-3.

⁹ 116 Ohio Laws 385 (1932).

under a duty to turn them over to himself in another capacity.¹⁰ The adherence to such a rule has been limited, with few exceptions,¹¹ to cases where no loss to the beneficiaries is threatened, on the theory that it is inequitable to use a fiction to deprive them of that security. The foregoing limitation would prohibit this theory's application to the facts of the principal case, but in the decision of such formal questions as the capacity to sue, this view has been resorted to.

Though the result of the *Emswiler* case appears to be satisfactory and in accord with the majority opinion, it does conflict with what Scott describes as the "better view,"¹² supported only by the Massachusetts courts.¹³ The proponents of this view declare that if the acts of the executors involved are such as the executors were authorized to perform as trustees, but not as executors, the executor would not be liable. The acts would be treated as having been done by the executor as trustee. Although it would have been more regular for them to have qualified as trustees, the Massachusetts courts reason that they were the persons to whom the property in their charge, both real and personal, was given by the will, and who had the right as trustees to make the expenditures.¹⁴ The objection under that situation would be fully answered by the fact that after they became trustees, they, in that capacity, ratified their acts as executors.

The facts of the *Emswiler* case do not disclose the presence of sureties in this action, but the possibility of their appearance in such a suit prompts reference to a concomitant problem: Will the surety on an executor's bond be held liable for his acts as trustee? In some states the sureties in such a situation will not be held liable, though the acts of the executor as trustee be performed while he is acting as executor, and before the execution of the generally required "notorious act of transfer."¹⁵ These courts are satisfied if the executor has in fact entered upon his duties as trustee. The great weight of authority, however, would hold the surety responsible in such a case,

¹⁰ 16 L. R. A. (N. S.) 205; *Woolley v. Price*, 86 Md. 176, 37 Atl. 644 (1897); *Anderson v. Earle*, 9 S. C. 460 (1877); *State v. Hearst*, 12 Mo. 365 (1849).

¹¹ *State v. Cheston*, 51 Md. 352 (1879).

¹² 1 Scott, *Trusts* (1939) § 6.

¹³ *Little v. Little*, 161 Mass. 188, 36 N. E. 795 (1894); *Springfield Nat'l Bank v. Couse*, 288 Mass. 262, 192 N. E. 529 (1934).

¹⁴ *Springfield Nat'l Bank v. Couse*, 288 Mass. 262, 192 N. E. 529 (1934).

¹⁵ *Drake v. Price*, 5 N. Y. 430 (1851); *Hinds v. Hinds*, 85 Ind. 312 (1882); *In Re Qunby*, 84 N. J. Eq. 1, 92 Atl. 56 (1914).

adopting what is sometimes referred to as the Massachusetts rule.¹⁶ The courts adopting this view would hold that the liability of the executor's surety continues until the executor has openly and notoriously entered upon the performance of his duties as trustee, and that it is not enough that his duties as executor have in fact been completed. Ohio would probably follow the latter reasoning, as much of our probate law is taken from the laws of Massachusetts.¹⁷

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¹⁶ *White v. Ditson*, 140 Mass. 351, 4 N. E. 606 (1885); *Gratson v. Ruggles*, 17 Me. 137 (1840); *Hall v. Cushing*, 9 Pick 395 (Mass. 1830); *Perkins v. Moore*, 16 Ala. 9 (1849).

¹⁷ *ROCKEL, OHIO PROBATE PRACTICE* (4th Ed. 1923) 1124.

