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Laying the Axe to the Root of the Tree? Shielding a Co-trustee from Liability

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> He searched, beginning with the oldest and ending with the youngest; and the goblet turned up in Benjamin's bag…. Joseph said to them, "What is this deed that you have done?" … Judah replied, "What can we say to my lord? How can we plead, how can we prove our innocence? God has uncovered the crime of your servants. Here we are, then, slaves of my lord, the rest of us as much as he in whose possession the goblet was found."
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> *Genesis* 44:12,15,16 (New JPS Translation, 1985)

> The…objection was…on this general point of breaches of trust and gross neglects of the several directors…that some acts are joint, others separate, and each is answerable only for his own particular acts and neglects … If this be so, it is *laying the axe to the root of the tree* … But it is not so; for where there are many trustees, and some are guilty of one breach and some of others, or where there is a gross negligence, and the loss is so complicated as it cannot be apportioned, I think they are all jointly liable.
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> *Charitable Corporation v Sutton* (1742) 9 Mod 349, 356, 88 ER 500, 504 per Lord Hardwicke C (emphasis added)

I. The Problem of Co-trustee Liability

As the author of Genesis and Lord Hardwicke each suggest in the quotations above, the instinct to hold group members liable for the breach of any one member goes very deep in moral and legal tradition. The mechanism is clear enough: the entire membership of a group falls liable for failing to constrain each and every member from doing the wrong thing. For hundreds of years the courts in England have held that co-trustees are jointly and severally liable for breaches of trust along these lines; but we must be careful to specify what 'joint and several' can mean here, for equity shades the meaning of this concept differently to law. The act constituting a breach of trust might be joint or shared such that all the trustees are seen to commit the wrongful act together as a finding of fact. Alternatively there might be parallel coordinate breaches, where the wrongful act of the one trustee brings a concomitant breach of trust by the others for failing to monitor and restrain, with that latter style of wrongdoing

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registering as a separate legal claim. By holding that one trustee can commit a separate breach of trust by failing to forestall a breach by a co-trustee, the separate and various breaches of the multiple trustees can be accumulated and liability shared between the trustees, even where they do not act jointly. But these two cases – a single breach jointly done on the one hand, distinct breaches accumulated and shared on the other – do not sum to a system of vicarious liability whereby the breach of one actor is ascribed to another. Co-trustees are not agents the one for the other, nor do they as a group personally represent the beneficiaries; co-liabilities are not generated by attribution.

The distinction of co-trustees' joint and several liabilities from the mutual liabilities of partners or agents or directors can blur in practice. The ambiguity emerges most clearly when we examine claims that an 'innocent' co-trustee should not be made liable where an 'active' trustee has received and controlled assets and then loses or degrades those assets through an individual breach of trust. In many such cases the courts have visited primary liability on the active trustee only, and denied the active trustee any claim for contribution from the other co-trustees. The claim of the innocent trustee to avoid liability either directly or through contribution might here be characterised as a *defence*, that is, an independent reason adduced by the defendant when answering a completed claim that explains why a liability that would otherwise exist is undone or mitigated. But such an argument might also take effect as a *denial*, that is, an answer that the essential ingredients of liability are lacking, in that the claimant has failed to make out a case for some active participation on breach or else failure to monitor when such protective behaviour could have been expected. Perhaps we have here a third category, neither denial nor defence exactly, but rather a *dilution* of liability, a claim that *ex post* breach the errant trustee cannot share any (prima facie joint) liability with the innocent trustees via solidary liability afforced by the normal processes of contribution and apportionment because the latter parties are not sufficiently at fault. The dilution model is supported by the phenomenon that co-trustee liability in English law today has been folded into a general legislative duty of care subject to the apportionment rules for multiple tortfeasors. Where distribution of liabilities between wrongdoers is predicated on varying levels of misfeasance and the court splits the burden of liability based on some arithmetic appraisal of fault, the classical distinction between defence or denial may break down; neither category exactly fits, or else a dilution claim inhabits both the defence and denial categories simultaneously. So dilution can be framed as a particular kind of defence against double recovery: 'you may have a claim, but you can't claim against me because you've already claimed against another trustee

(who may not have even a contribution claim against me)'. Or else dilution may take shape as a denial, along the lines that 'you have failed to supply an essential ingredient of the claim you are making, namely the identity of the proper wrongdoer; you have instead selected a person who was not culpable'.[1]

This is hardly simple law. To ease our way into the tangle of historical rules, it may be expedient to begin with the parallel problem of knowing assistance and shared breach of trust by parties who may not each originally be co-trustees, starting with a recent and controversial case of the highest English court.

II. Participatory Liability in the Shadow of Co-trusteeship

In *Central Bank of Nigeria v Williams*[2] a sharply divided Supreme Court held that a party participating in a breach of trust through knowing receipt or dishonest assistance could successfully claim that liability was time-barred by operation of the Limitation Act 1980. Section 21(1)(a) of the Act exempted from limitation a claim by 'a beneficiary under a trust' where there was a 'fraud or fraudulent breach of trust to which the trustee was a party or privy'. To put the rule in positive terms, in such a case an action could be brought by the beneficiary at any distance of time, and limitation could be no defence. But this exception to limitation, it was argued by the majority, did not apply to a stranger participating in a breach of trust: first, because there was no 'true trust' existing prior to breach, but instead a personal accounting relationship that came into existence post breach, as a remedy or liability reacting to the breach;[3] and, secondly and cumulatively, because a participant liability based on breach of trust could sufficiently exist without the head trustee engaging in 'fraudulent breach of trust', as where a crooked solicitor leads an innocent trustee to misallocate trust assets; in such a case the assistant might be fraudulent but not the primary actor. On the majority's reading a *shared* fraud in making the breach was a prerequisite for exclusion of the limitation rules. One strand

[1] I am grateful to Aleksi Ollikainen for discussion of the distinctions in this passage. Similar classificatory problems evoked here are found in other areas of the law, see eg A Dyson, J Goudkamp and F Wilmot-Smith, 'Central Issues in the Law of Tort Defences' in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2014) 3–24.

[2] *Central Bank of Nigeria v Williams* [2014] UKSC 10, [2014] AC 1189.

[3] ibid 1197, 1200, 1206–08 (Lord Sumption). On this reasoning the trustee *de son tort* – that is, the trustee who assumes trust duties by intermeddling in trust affairs – does manage a 'true trust' since the law erects the duties of trust management *ex ante* any breach.

of the reasoning was that Parliament could not have intended the incidence of limitation for stranger participants in a breach of trust to depend on the mind-state of the trustee; ergo participant liability was not covered by the statutory exception. In the end that exception only applied to primary *and* fraudulent breaches of the so-called 'true trusts'.

Reacting perhaps to the minority judges' sharp criticism of this reading of the statute, Lord Sumption JSC in the majority offered this explanation or justification for his narrow interpretation of the statutory exception:

> These words are there to relieve trustees who acted in good faith, including the honest co-trustees of a dishonest trustee. They would be unnecessary if the provision applied to actions against strangers to the trust, because any fraudulent breach of trust must necessarily be one to which the trustee is a party or privy. The inclusion of the phrase makes sense only on the footing that the section applies to actions against trustees and that it was intended to limit the circumstances in which it applied to them.[4]

This passage is worth highlighting. Lord Sumption here acknowledges the orthodox juridical position whereby an innocent trustee would presumptively be liable in full for a dishonest co-trustee's breach on the basis of some version of joint and several liability. The statutory exception was necessary to ensure that that the innocent co-trustee's joint liability for a co-trustee's fraudulent breach could still be shielded by limitation. The fraud of the breaching co-trustee might otherwise colour the legal characterisation of the 'innocent' co-trustees as somehow sharing in the fraud of the other members of the trustee group, and so denying them the benefit of limitation protection. Why this denial of protection would have been a bad thing was not explained. Is it so very innocent for one co-trustee to tolerate, ignore or fail to see the breaches of another trustee when both are subject to a joint liability to execute the trust? It is surely significant that courts have in the past denied that the statutory discretion to excuse a trustee for 'honestly and reasonably' breaching a trust duty[5] can have any application to failures of co-trustees to monitor, even inadvertently;[6] and going beyond that it has recently been held by the Court of Appeal held that any breach of a negligence duty applied to a trustee cannot be classified as 'honest and reasonable' under the exculpatory statutory provision.[7]

Lord Neuberger PSC gave the other majority speech in *Williams*. Agreeing in the main with Lord Sumption's analysis, Lord Neuberger elaborated on the principles governing a co-

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[4] ibid 1209.

[5] Trustee Act 1925, s 61; and see text accompanying nn 27–30.

[6] *Re Turner* [1897] 1 Ch 536, 541–42 (Byrne J).

[7] *Santander UK v RA Legal Solicitors* [2014] EWCA Civ 183 [31]–[32] (Briggs LJ).

trustee's negligence liability as a further reason to insist that fraudulent breach *by the trustee being sued* should be a necessary condition to suspend the normal limitation rule:

> [T]he context of [the limitation] section suggests that a claim against an innocently negligent co-trustee or professional adviser of the fraudulent trustee is not "an action … in respect of … fraud or fraudulent breach of trust". Rather it should be characterised as an action "in respect of [their] negligence". In the case of a co-trustee, this is borne out by what is stated in article 96.1 of *Underhill & Hayton's The Law of Trusts and Trustees*, 18th ed (2010), namely that a trustee "is not vicariously answerable for the … defaults of his co-trustee, but only for his *own* acts or defaults".[8]

This reasoning, which was central to Lord Neuberger's interpretation of the meaning of the statutory exception on which the case turned, raises some fresh puzzles. What could the concept of the 'innocently negligent co-trustee' possibly mean? The judge may have wished simply to contrast a fraudulent or advertently dishonest breach from a non-fraudulent breach, attaching different limitation results to the two categories; but such use of 'innocent' to qualify or explicate 'negligence' would risk redundancy or even incoherence. It is basic that a negligent person cannot sustain an active mind-state purposing to breach the relevant duty of care; in that sense all negligence is inevitably 'innocent' in the sense of 'not dishonest'.[9] But perhaps we can put this puzzling language to one side (along with indiscriminate hybridisations of 'knowing assistance',[10] 'knowing receipt',[11] 'dishonest receipt'[12] and 'dishonest assistance'[13]) as symptoms of judges writing under pressure rather developing new jurisprudence.[14] It may be more fruitful to focus on Lord Neuberger's (largely) correct statement in *Williams* of the basic principle that 'a trustee "is not vicariously answerable for the … defaults of his co-trustee, but only for his own acts or defaults"'.

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[8] *Williams* (n 2) 1221–22.

[9] Lord Clarke SCJ picks up on Lord Neuberger's odd contrast of 'innocently (as opposed to fraudulently) negligent co-trustees' (at 1244) but finds reasons to differ from the majority on alternative grounds of a likely legislative intent to treat at least a dishonest assistant in the same way as fraudulent trustee for the purposes of limitation. Negligence as a mind-state is distinguished from intentionality including deceit and recklessness in P Cane, '*Mens Rea* in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533.

[10] *Williams* (n 2) 1202, 1209–10, 1215, 1228, 1241, 1243.

[11] ibid 1196, 1202, 1203, 1207, 1208, etc.

[12] ibid 1215.

[13] ibid 1215, 1242.

[14] See J Lee, 'Constructing and Limiting Liability in Equity' (2015) 131 *Law Quarterly Review* 39; PS Davies, 'Limitation in Equity' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 313.

III. Vicarious v Shared (Solidary) Liability

Some courts have specified co-trustee liabilities in terms similar to partners or joint tortfeasors engaged in common enterprise, for example Katz J in a recent New Zealand case:

> Trustees' liability is joint and several. As a result, where there are two or more trustees, a creditor can choose to pursue any one of them…. If that trustee is found liable, he or she may then seek a contribution (or in some limited cases, an indemnity) from his or her co-trustee(s).[15]

But this may over-simplify. Co-trustees differ from partners in that they do not by virtue of the trusteeship bestow any kind of mandate on each other to bind each other personally in contract or in agency. Nor can a trustee vicariously be liable for persons who effect breaches of duty sounding in tort unless the trustee is also employing or controlling such a person (whether a co-trustee or not) as a delegate or agent in running the trust business[16] (though statutory indemnities and exemption clauses commonly exist to shield an employing trustee from full vicarious liability for delegates or principal-agent liability, such as section 23 of the Trustee Act 2000, restating earlier legislative rules). But it is also an oversimplification to speak simply of a co-trustee being liable 'only for his own acts or defaults'; and the reason for this is clear. Co-trustees generally do not act on their own in the eyes of the law but rather as a solidary group. Co-trustees are subject to a bespoke form of solidary liability born of their joint tenancy of the trust assets and their joint and collective wielding of trust powers as a unanimous collective.[17] The coordinate joint liabilities of co-trustees may resemble in operation those of partners or directors or other co-agents, but these liabilities do not find their source in shared contractual or tortious duties. They arise from shared titular trustee powers with concomitant shared duties to account, and this can mean that the breaches of any one co-trustee are attributed to all co-trustees as joint actors; a fraudulent breach by one trustee which harms assets held jointly by the co-trustee collective is automatically each and every other trustee's 'own act or default' and each is severally liable for the joint action.[18] That is why it is incorrect to describe joint co-trustee liabilities arising from wrongful exercise of powers as vicarious liabilities.

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[15] *Selkirk v McIntyre* [2013] NZHC 575 [16].

[16] *Mendes v Guedalle* (1862) 2 J & H 259, 70 ER 1054.

[17] See *Luke v South Kensington Hotel Company* (1879) 11 Ch D 121; *Wilson v Moore* (1834) 1 My & K 126, 142–43, 39 ER 629, 635 (Leach MR): 'All parties to a breach of trust are equally liable'; *Taylor v Tabrum* (1833) 6 Sim 281, 282, 58 ER 599.

[18] *Fletcher v Green (No 1)* (1864) 33 Beav 426, 429–30, 55 ER 433, 434 (Romilly MR).

The shared powers model may not even require shared title to assets. There can be trust-like duties without present assets as where there are charges for future property[19] or duties to wield powers so as to constitute a trust.[20] Multiple holders of a power of attorney are another analogue where no joint assets are held. Moreover, trusts jurisprudence makes no distinction between the joint tenancy of trusts and equitable powers when it comes to the *jus accrescendi* (that is, vesting of relevant assets or powers by survivorship).[21] All of this might suggest that a stranger participant, by joining with a trustee to effect a breach of the trust, also becomes by this act of intermeddling a solidary holder of the trust powers him or herself (if not a joint tenant in possession) and thus should be seen as akin to a primary trustee, a kind of 'trust power holder *de son tort*', if that parallel species of liability can be adapted and bent into service.[22] Such a conception of participant liability can help explain why courts continue to deploy gain-stripping, tracing and following remedies against stranger participants despite the personal origin or basis of their liability.[23]

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[19] See J Getzler, 'Assignment of Future Property and Preferences' in J Glister and P Ridge (eds), *Fault Lines in Equity* (Oxford, Hart Publishing, 2012) 73–105.

[20] The unexecuted estate is just one possible example of a duty to constitute a fiduciary fund where the duty itself has fiduciary qualities: see *Commissioner of Stamp Duties v Livingston* [1965] AC 694, 707–14 (PC), (1960) 107 CLR 411, 437–44 per Fullagar J, 448–54 per Kitto J (HCA).

[21] Trustee Act 1893, s 22(1): 'Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.'

[22] An assumption of fiduciary power by an intermeddling solicitor is in effect what North J found in *Mara v Browne* [1895] 2 Ch 69; he expressly eschewed the label 'constructive trustee' to describe the liability, preferring to speak of the intermeddler being a kind of 'partner' of the primary trustee in operating the trust (at 94). His decision was reversed by the Court of Appeal on the point that in the circumstances of the case assumption of trusteeship would have been *ultra vires qua* solicitor-agent ([1896] 1 Ch 199); but this was couched as an evidential finding rather than a rule of law. See discussion of these principles in *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 [131]–[141], where Lord Millett prefers to describe this as the liability of the intermeddler as a '*de facto* trust'; a similar analysis is offered in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 [73]–[84].

[23] *Novoship*, ibid; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 (FCA); C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010) 115–58; PS Davies, *Accessory Liability* (Oxford, Hart Publishing, 2015) 264–69; PS Davies, 'Gain-based Remedies for Dishonest Assistance' (2015) 131 *Law Quarterly Review* 173; J Dietrich and P Ridge, *Accessory Liability in Private Law* (Cambridge, CUP, 2016) 288–303; P Ridge, 'Participatory Liability and the Hallmarks of an "Australian" Equity' in T Bonyhady (ed), *Finn's Law: An Australian Justice* (Annandale, Federation Press, 2016) 68–91. The case of *FHR European Ventures LLP & Ors v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] 1 AC 250 (UKSC) may be distinguished as an instance of proprietary gain-stripping being imposed on a fiduciary office assumed *ex ante* the relevant breach; the decision further that 'true trust' attributes may be attached to non-custodial fiduciary positions. The language of 'true trust' may ultimately be

IV. Nature and Functions of Co-trustee Liability

The ruminations on 'innocent' co-trustees in the *Williams* decision provide a good prompt to revisit the nature and functions of co-trustee liability. This has always been a topic of great practical importance, since the vast majority of express trusts have involved multiple rather than single trustees. The great advantage of multiple trusteeship is the creation of a group functioning as a *universitatis,* a stable 'social integrate' with functional perpetual succession through the accretion of membership over time. Indeed, plural trusts served across the eighteenth and nineteenth centuries as corporation substitutes, and they increasingly provide this function today in an era of post-modern corporate capitalism.[24] Within co-trusteeships an active trustee or minority group of trustees will often take the lead in managing the trust, but if the assets are lost then passive trustees with the means to pay are often called to account. Thus having a group of conjoined trustees insures or guarantees the due performance of the trust by providing sureties, as well as adding managerial skill and reputational capital to the enterprise.[25] Courts of equity developed fine-grained principles distinguishing and balancing between the liabilities of active and passive co-trustees, but this body of law has not been raised in appellate courts nor thoroughly reviewed by jurists for some time; and this lacuna is itself of interest.[26] Perhaps co-trustee liability has diminished in importance because of legislative

misleading as there is no analytical reason to distinguish the custodial fiduciary and the holder of fiduciary power; this is to oppose the analysis offered in S Worthington, 'Exposing Third-Party Liability in Equity: Lessons from the Limitation Rules' in PS Davies and JE Penner (eds), *Equity, Trusts and Commerce* (Oxford, Hart Publishing, 2017) 331–59. It is more difficult to fit into a fiduciary model of constructive trusteeship the Australian rule allowing account remedies to be applied against a thief. See also J Tarrant, 'Property Rights to Stolen Money' (2005) 32 *University of Western Australia Law Review* 234; J Tarrant 'Theft Principle in Private Law' (2006) 80(8) *Australian Law Journal* 531; SB Thomas, 'Thieves as Trustees: The Enduring Legacy of Black v S Freedman & Co Ltd' (2009) 3 *Journal of Equity* 1; J Tarrant 'Thieves as Trustees: In Defence of the Theft Principle' (2009) 3 *Journal of Equity* 170; R Chambers 'Trust and Theft' in E Bant and M Harding (eds), *Exploring Private Law* (Cambridge, CUP, 2010) 223–46.

[24] The literatures on this topic are vast. For some overview see J Getzler, 'Frederic William Maitland – Trust and Corporation' (2016) 35 *University of Queensland Law Journal* 171; J Getzler, 'Plural Ownership, Funds, and the Aggregation of Wills' (2009) 10 *Theoretical Inquiries in Law* 241; LE Ribstein, *The Rise of the Uncorporation* (Oxford, OUP, 2009); RH Sitkoff, 'Trust as "Uncorporation": A Research Agenda' [2005] *University of Illinois Law Review* 31. The interaction of trust-derived fiduciary duties and directors' duties remains a live issue in the interpretation of statutory corporate controls: see *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 [416]–[428] (Edelman J).

[25] C Stebbings, *The Private Trustee in Victorian England* (Cambridge, CUP, 2001) 98–103, 120–27.

[26] The classic study is now nearly a century old: GG Bogert, 'The Liability of an Inactive Co-trustee' (1921) 34 *Harvard Law Review* 483. This invaluable article is encyclopaedic but mashes together the

protection of trustees purporting to cut away the great bulk of joint liabilities,[27] or newer legislation subjecting the old and strict solidary duties to a generalised duty of care that can readily be reduced by exemption clauses.[28] It may also be that many conflicts involving co-trustees are resolved in the shadow of a statutory power whereby trustees may seek relief from the consequences of a breach, at the discretion of the court, if they 'acted honestly and reasonably, and ought fairly' to be excused,[29] though older cases suggested that the discretion should not be exercised in favour of a co-trustee who takes insufficient steps to monitor the active trustee's conduct.[30] Most co-trusteeship battles today find their way to court in the guise of internecine contribution actions where the essential first step of joint liability is likely conceded. But we do not need a bevy of recent litigation to see that the regime of liabilities and defences relevant to co-trustees has much to teach us about the basics of the trust institution.

V. The Evolution of Doctrine: Monitoring and Receipt

The courts early identified a deep dilemma in setting standards of co-trustee liability: on the one hand, joint and several liability arises from the basic duty of all trustees to act unanimously and with full monitoring and control of each other's conduct, so that each stands as surety for the right conduct of the others; on the other hand, it seems harsh to hold co-trustees to account

law of many jurisdictions and time periods into one timeless whole. American jurists studying this area were particularly interested in hybridisation of trust and corporate forms during the Gilded Age and New Deal eras: see Note, 'The Effect of Default by a Joint Trustee' (1923) 23 *Columbia Law Review* 670; Note, 'Trusts – Responsibility of Inactive Co-Trustees in New York' (1928) 37 *Yale Law Journal* 535; American Law Institute, *Restatement of the Law of Trusts* (St Paul, American Law Institute Publishers, 1935) Ch 7 'The Administration of the Trust', I, 399–807; GW Lutes, 'Does a Corporation Acting as a Trustee Hold in Joint Tenancy with its Co-trustee?' (1934) 1 *University of Chicago Law Review* 629; 'W.L.F.', 'Right of Contribution among Co-Trustees' (1936) 22 *Virginia Law Review* 804; GG Bogert, *Handbook of the Law of Trusts and Trustees* (St Paul, West Publishing Co, 1921) 476–95; AW Scott, *The Law of Trusts* (Cambridge, Massachusetts, Harvard University Press, 1940) §224, II, 1184–91. For the Anglo–Commonwealth law, the most detailed coverage is found in DJ Hayton, P Matthews and C Mitchell (eds), *Underhill and Hayton's Law Relating to Trusts and Trustees* 19th edn (London, LexisNexis, 2016) §97.1–§97.30, 1257–69. See also G Williams, *Joint Obligations: A Treatise on Joint and Joint and Several Liability in Contract, Quasi-Contract and Trusts in England, Ireland and the Common-Law Dominions* (London, Butterworths, 1949) §80–§96, 159–76.

[27] Trustee Act 1925, s 30, adapting Trustee Act 1859, s 31 and Trustee Act 1893, s 24 (repealed by Trustee Act 2000), discussed further below.

[28] Trustee Act 2000, s 1 and Sch 1(7), discussed below, text to nn 140–45.

[29] Trustee Act 1925, s 61.

[30] *Re Turner* [1897] 1 Ch 536, 541–42 (Byrne J).

where only one trustee has received and controlled assets and the co-trustees could do little in practice to curb defalcation or other breach of trust. This dilemma reproduced a deeper tension in trust law: there was an obvious demand for high standards of stewardship and accountability in managerial relationships, but there was also a countervailing policy not to attach too great an individual liability to trustees, maybe volunteers, who had done their best. This policy tension crops up over and again in the doctrinal statements of the courts regulating the area of co-trusteeship. Co-trustees must perforce monitor the conduct of an active trustee who controls assets on their behalf, and must not allow a dishonest or incompetent co-trustee effective disposition of assets; but they may plead innocence if assets are received without their knowledge or in circumstances where it was not unreasonable to leave the assets in the control of some other co-trustee.

For an authoritative restatement of the principles of co-trustee liability we can turn to the leading text *Underhill and Hayton*, an earlier version of which was relied upon by Lord Neuberger in the *Williams* passage excerpted earlier. The revision of that cited passage, taken here from the nineteenth edition of 2016, appears as follows:

> Trustees are liable only for their own breaches of duty, and they are not vicariously liable for breaches of trust committed by their co-trustees. However, it often happens that the beneficiaries suffer the same 'damage' as a result of various breaches of trust committed by several trustees, either because the trustees have collectively done an act which entails a breach of duty by each trustee, or because one 'active trustee' has committed a breach of trust while another 'passive trustee' has committed a distinct breach of duty, eg by standing by with knowledge that the other is committing a breach of duty, or by failing to take steps to obtain redress after becoming aware that a breach has been committed. In the event that several trustees are liable for the same damage, their liability is joint and several, with the result that the whole amount of the damage can be recovered from any or all of them.[31]

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[31] *Underhill and Hayton* (n 26) §97.2, 1258. For other concise treatments in the standard works see also B McFarlane and C Mitchell, *Hayton and Mitchell's Commentary and Cases on the Law of Trusts and Equitable Remedies* 14th edn (London, Sweet & Maxwell, 2015) §9–002, 337–38; L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* 19th edn (London, Sweet & Maxwell, 2015) ch 29, 39; J McGhee, *Snell's Equity* 33rd edn (London, Sweet & Maxwell, 2015) [30–001]–[30–009], [30–045]–[30–048]. The American Law Institute's first *Restatement of the Law of Trusts* (n 26) §224, I, 637–639 offers a notably elegant formulation of 'Liability for Breach of Trust of Co-Trustee' that tracks English law:

(1) A trustee is not liable to the beneficiary for breach of trust committed by a co-trustee.

(2) A trustee is liable to the beneficiary, if he

  (a) participates in a breach of trust committed by his co-trustee; or

  (b) improperly delegates the administration of the trust to his co-trustee; or

  (c) approves or acquiesces in or conceals a breach of trust committed by his co-trustee; or

The learned authors go on to note that where one co-trustee bears more than his or her fair share of the payment burden under a joint and several liability, then he or she may seek contribution from other co-trustees with coordinate liability, unless a particular co-trustee has had that liability relieved under the statutory discretion to protect a trustee who has 'has acted honestly and reasonably, and ought fairly to be excused'. The whole passage with its language of 'damage' done by 'several' trustees is quite far from older conceptions of collective accounting responsibilities. Let us see next how these classical principles worked.

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Townley v Sherborne,[32] a Chancery case of 1633, is commonly taken to be the font of principle in this area. A trust of the rents and profits of land was made for an infant Challoner, with some four co-trustees including Townley and Foster appointed to collect the monies and administer the trust. Foster received individually approximately £1700 (equivalent to £4m in today's labour earning terms, or £11m in income value – a vast sum) without accounting for the receipt in the trust accounts. The beneficiary's executor sued Townley as co-trustee to restore the fund to the value of the missing receipts. The Lord Keeper Coventry (counted a mediocre judge by Bulstrode), 'upon mature deliberation' decided the case 'to be of great importance' and so afforced his court with a panel of five common law judges to help him. He next

> appointed presidents to be looked over, as well in this, as in other Courts, if any could be found touching the point in question; whereupon several presidents were produced before them, some in this Court, and some in the Court of Wards, where parties trusted were chargeable onely according to their several and respective receits, and not one to answer for the other; but no president on the contrary was produced to them.[33]

Coventry LK elaborated the doctrine in these words:

> [T]hat where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this Court, to answer for the receits of him so dying or decayed, unless some purchase, fraud or evil dealing appear to have been in them to prejudice their trust; for they being by law joyntenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by.[34]

(d) by his failure to exercise reasonable care in the administration of the trust has enabled his co-trustee to commit a breach of trust; or

(e) neglects to take proper steps to compel his co-trustee to redress a breach of trust.

[32] *Townley v Sherborne* (1633) Bridgman 35, 123 ER 1181 (Lord Coventry LK).

[33] ibid 37, 1182–83. The Trumpian spelling is authentically seventeenth century.

[34] ibid 37, 1183.

The court commended the widespread practice of heads of family vesting land on trust with a group of friends charged to collect income for the support of children, to gather legacies and to protect the family patrimony from debtors. In order to encourage such service the trusted friends should not presumptively be made accountable for each other's receipts:

> [I]f such of these friends, who carry themselves without fraud, should be chargeable out of their own estates for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust.[35]

But here the Lord Keeper may have relied upon a distinct line of authority holding executors who stood in the shoes of testators and were armed with wide individual powers to gather in estates and assign away bequests and legacies.

> And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall by law charge him onely, and not his co-executor: and in that case, equitas sequitur legem [equity follows the law], there having been many presidents resolved in this Court, that one executor shall not answer nor be charged for the act or default of his companion.[36]

Devastavit was an ancient action for waste of an estate in the hands of an individual executor, that began in the ecclesiastical courts of probate, fell to be regulated via Magna Carta as a feudal accounting action in the common law courts, and then washed onto the shores of the Chancery Court due to its superior multipartite accounting procedure. Justice Nye Perram of the Federal Court of Australia in a recent study observed that

> *devastavit* is a manifestation of at least four or five sets of principles: a tort rule – possibly trespass, possibly trespass on the case; a principle relating to the enforcement of judgments; a corollary of a bailment possibly arising from the executor's custody of the estate (at least in respect of personalty); an aspect of an administration action; and, the remedy of the taking of accounts on a wilful default basis.[37]

The law here struck a balance whereby executors (including joint executors) were armed with extensive sole powers of disposal in order to make for effective execution of deceased estates, allied to a penetrating action *in personam* to compensate for any losses caused to the estate or the beneficiaries by misfeasance in the exercise of those powers. It may have been a category error for Coventry LK in *Townley v Sherborne* to search the 'presidents' of every likely court including the courts of probate for basic principles of co-trusteeship, when *devastavit* had a peculiar origin and purpose in the field of control of executors. But Lord Coventry pushed the analogy hard:

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[35] ibid.

[36] ibid.

[37] N Perram, 'The Origins and Present Operation of the Action in Devastavit' [2012] *Federal Judicial Scholarship* 23.

> And it is no breach of trust, to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects then to be troubled with the receit [sic] of the profits.[38]

Another hypothetical given was wrongful assignment of trust assets. Where one co-trustee without authority assigned away the trust estate to an assignee who subsequently lost the assets and became insolvent, then the assigning co-trustee would be liable personally to restore the trust assets,[39] but not so any of the other co-trustees unless they themselves had received any proceeds arising from the assignment. Individual liability thus seemed to be based on one of two aspects: (1) exercising authority over the trust by way of assignment or (2) by receipt, with the two often coinciding. But the passive trustee who neither assigned nor received seemed to be insulated from liability, subject to one important exception:

> [I]f upon the proofs or circumstances the Court be satisfied, that there be dolus malus, or any evil practice, fraud or ill intent in him that permitted his companion to receive the whole profits, he may be charged though he received nothing.[40]

Some judges went further and fastened on formal joint receipt as a sufficient base for joint liability, even if one trustee in reality took in the assets. In 1684 Guilford LK stated: 'Each trustee shall be charged for no more than he actually received; but where they join in receipts, there they shall be all charged'.[41]

The problem of relating liability to level of receipt was discussed again in 1705 by Cowper LK in *Fellows v Mitchell and Owen*,[42] where two co-trustees joined in accepting a sale of a mortgage security. After the sale each received half of the £2000 proceeds with the consent of the *cestui* who was present at the sale; one trustee then declared bankruptcy and his moiety was lost. The *cestui* sued the solvent trustee on the basis of his joining in the sale transaction. The court held the trustee's liability to that portion of the proceeds he had actually received, following *Townley*. The court noted that not all the authorities accepted the principle that receipt should set a cap on liability, but nonetheless upheld the defence in this case, partly on

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[38] *Townley* (n 32) 37–38, 1183.

[39] A later case suggested that the assignor would also have to restore missing profits: *Vandebende v Levingston* (1674) 3 Swan 625, 36 ER 999: 'To charge the assignee of a trustee who comes in by breach of trust alone, or to charge both assignor and assignee with the profits respectively received, is error; for both ought to be liable to the *cestuique trust*, and the assignor must answer the whole if the assignee be a beggar'.

[40] ibid 38, 1183.

[41] *Spalding v Shalmer & St Amond* (1684) 1 Vern 301, 303, 23 ER 483, 483–84.

[42] *Fellows v Mitchell and Owen* (1705) 1 P Wms 81, 24 ER 302.

a *volenti* basis as the *cestui* had himself split the receipt between the two co-trustees, and partly because '[i]t seems to be *substantial* injustice, to decree a man to answer for money which he did not receive, at the same time that the charge upon him by his joining in the receipts, is but *notional*'.[43] It might be different if the differing levels of receipt simply reflected poor control and understanding by the co-trustees, in which case he might be attached on the basis of a presumption that he had indeed received the whole:

> It may be reasonable, where upon the proof it cannot be distinguished, how much was received by the one trustee, and how much by the other, to charge each with the whole. For in such case the trustees are to blame for not keeping distinct accounts. It is like one throwing corn or money into another's heap, where there is no reason that he who made this difficulty should have the whole: on the contrary, because it cannot be distinguished, he shall have no part [that is, each shall be responsible for the whole].[44]

The notion of blameworthiness in accounting could be used to reshape and intensify co-trustee liability, with courts holding that a simple failure to monitor the conduct of active co-trustees was itself a type of default that could expose the passive co-trustee to liability. So much emerges from the famous case of *Charitable Corporation v Sutton*,[45] which is often counted as the foundation of the law of director's duties, decided in 1742 by Lord Hardwicke C. The Charitable Corporation was a very large fund set up by the Crown using money appropriations from consolidated revenue, whose purpose was to extend loans to tradesmen secured by collateral of chattels to be stored in a warehouse. The fund was 'charitable' in that it was not operated to turn a profit but rather to support middling folk during a severe trade downturn, serving as a form of outdoor relief as well as supplying purchasing power in a depressed economy. The collateral being chattels deposited in the warehouse may not have been intended fully to secure the loans but rather served to reduce the moral hazard of debtor default. There was a large governing committee of some 50 trustees or directors, who did very little and certainly failed to monitor the conduct of some five active trustees and their agents who had bilked the fund with fraudulent loans, often without collateral, given to fictitious borrowers. Through such collusive devices the enormous fund was almost entirely depleted. There was good suspicion that the less involved committee men had turned a blind eye or even in some cases actively connived in those frauds. The defence was raised that only where active fraud

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[43] ibid 82–83, 302. To like effect, *Churchill v Lady Hobson* (1713) 1 P Wms 241, 243, 24 ER 370, 371; *Murrell v Cox and Pitt* (1706) 2 Vern 570, 23 ER 971.

[44] *Churchill* (n 43) 82–83, 302.

[45] *Charitable Corporation v Sutton* (1742) 9 Mod 349, 88 ER 500, 2 Atk 400, 26 ER 642 (Lord Hardwicke).

was proved in each individual trustee's case could there be an attribution of liability for the misconduct of the five directing trustees. Lord Hardwicke's sharp and detailed response to this argument was recorded in the Modern report:

> The … objection was, that the nature of this case is such as it is impossible for the Court to decree for the plaintiffs on this general point of breaches of trust and gross neglects of the several directors, for that some acts are joint, others separate, and each is answerable only for his own particular acts and neglects; and from thence there is a general inference, that this case is so complicated, and of such a nature, as is out of the jurisdiction of any Court of Equity. If this be so, it is laying the axe to the root of the tree, and I have been stating all this to no purpose. But it is not so; for where there are many trustees, and some are guilty of one breach and some of others, or where there is a gross negligence, and the loss is so complicated as it cannot be apportioned, I think they are all jointly liable. And I will never establish this, that breaches of trust, or any matters of fraud, are above the reach or out of the jurisdiction of this Court. The King's Courts are to redress every wrong and protect every innocent person; and if the laws do not extend to do this, new and more ample ones will be provided, for two mischiefs are to be avoided: first, not to make it unsafe or too perilous for honest men to accept offices of trust, by making them liable to losses in the execution of them; and secondly, to prevent the frauds of dishonest men in such employments. Therefore at present, as far as I can be certain, I will determine that the conspiracy called "The Partnership of Five, Four, and Three," are answerable in the first degree; but as to the others, I shall not now determine how far they are answerable, but at most it will be only in the second degree: and this method I took in a similar case that was before me the twenty-eighth of May 1739, The Lead Company v. Hall, their treasurer. Their bill was for a satisfaction in respect of frauds committed by Hall, and connived at, or assented to, or acted under by the directors; and I held Hall to be first liable, and if he proved deficient, then the directors. So here I am of opinion, that if it appears any others of the directors, committee-men, or assistants, are liable, it will be only in the second degree, and upon the deficiency of the partnership.[46]

Here a principle of joint and several liability was established, but governed by a rule of recovery akin to the contemporaneous jingle rule in partnership debt whereby recovery would be exhausted against inside partnership funds before resorting to the outside personal estates of the partners.[47]

The more succinct Atkyns report of *Sutton*[48] states the relevant principles as follows. First, passivity by a non-paid trustee might turn out to be a *per se* breach of co-trustees' duties:

> Next as to *mal-feasance* and *non-feasance*. To instance in non-attendance; if some persons are guilty of gross non-attendance, and leave the management intirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it

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[46] ibid 356, 504; cf (1742) 2 Atk 400, 406, 26 ER 642, 645.

[47] The jingle rule is described and explained in J Getzler and M Macnair, 'The Firm as an Entity before the Companies Acts' in P Brand, K Costello and WN Osborough (eds), *Adventures in the Law: Proceedings of the 16th British Legal History Conference, Dublin* (Dublin, Four Courts Press, 2005) 267–88. See also H Hansmann, R Kraakman and R Squire, 'Law and the Rise of the Firm' (2006) 119 *Harvard Law Review* 1335.

[48] *Charitable Corporation v Sutton* (1742) 2 Atk 400, 26 ER 642.

> is no excuse to say that they had no benefit from it, but that it was merely *honorary*; and therefore they are within the case of common trustees. *Vide Coggs* v. *Bernard*, 1 *Salk*. 26.[49]

These comments are cryptic, but seem to indicate that where active participation by co-trustees might be expected due to the nature of the trust enterprise, then failure to so participate is a presumptive breach opening the door to full solidary liability. Concomitantly a bare trust with static assets might not place much demand on the passive co-trustee as 'common trustees' (in Lord Hardwicke's phrase). The reference to *Coggs v Barnard*[50] is significant, for there Lord Holt CJ introduced the Roman concepts of *culpa levis* and *culpa lata*, with differential measures of duty *in abstracto et concreto* to structure the duties of paid and unpaid bailees. In *Sutton* we seem to have a standard of *culpa lata,* gross negligence, but *in concreto*, that is, driven by the expectations due from the specific persons charged with the direction of that particular enterprise. *Culpa lata in concreto* will be a more demanding standard here than in a non-professional or non-commercial context. In other words breach by a paid professional manager or director could be presumed from the simple fact of non-activity:

> But if, upon inquiry before the Master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty.[51]

Lord Hardwicke cited in support a 1733 judgment of Jeckyll MR, which had stated:

> The forbearance of the trustees in not doing what it was their office to have done, shall in no sort prejudice the *cestuy que trusts*, since at that rate it would be in the power of trustees, either by doing, or delaying to do, their duty, to affect the right of others; which can never be maintained.[52]

To sum up, the *Sutton* doctrine is based on wrongdoing by co-trustees in failing to monitor the conduct of active trustees who are left to carry on with misfeasances that a minimal care by colleagues might have stopped. But could joint and several liability be raised in the absence of such neglect? In *Leigh v Barry*[53] in 1747 Lord Hardwicke C revisited the issue and found two alternative paths to liability. The first was individual receipt itself. This rule applied even if the co-trustees did not use an indemnity to negative their individual liability: '*they shall not be liable for the acts of one another*, yet this court will not make them liable for more than each

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[49] ibid 405–06, 644–45.

[50] *Coggs v Barnard* (1703) 2 Ld Raym 909, 92 ER 107 (KB), discussed in the trusts context by J Getzler, 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Oxford, Hart Publishing, 2002) 41–74.

[51] *Sutton* (n 48) 406, 645.

[52] *Lechmere v Carlisle* (1733) 3 P Wms 211, 215, 24 ER 1033, 1035.

[53] *Leigh v Barry* (1747) 3 Atk 583, 26 ER 1136.

has received'.[54] Lord Hardwicke was at pains to make clear that liabilities were capped by levels of actual not notional individual receipt; formal collective receipt where all trustees signed to acknowledge the entrance of an asset into the accounts did not create collective liabilities where one trustee actually took and controlled the asset:

> The court has even gone further; for where they all join in a receipt for money, it will make that trustee liable only who received it, for they are all obliged to join in the receipt; otherwise as to the executors, for there is no necessity for their joining, but may act severally if they think fit.[55]

In other words co-trustees by this rule enjoyed the same protection as executors, and the court ignored the formal requirement of unanimous co-trustee assents to receipt and disbursement in order to reach that position. The other path to liability identified by Lord Hardwicke was contractual, or at least based on assumption of responsibility: 'if the trustees will bind themselves to be liable for the acts of each other, the court will not relieve them',[56] modelling such full joint and several liability on the analogy of co-sureties of a debt. Such an assumed liability did not depend on the level of receipt of each individual trustee: one could be liable for property received and then lost by another.[57] That left open the question as to which words or conduct of trustees amounted to such an assumption of joint and several liability; covenant was clearly sufficient; but what of an informal agreement or a common understanding? In the present case the co-trustees, who were also creditors seeking liquidation of the fund assets, had made a covenant guaranteeing payment in the trust, so in the result each co-trustee was found to have a full joint and several liability. It may be that *Leigh* can be reconciled with the reasoning in *Sutton* not only in its result, but also in its reasoning, in that the co-trustees or

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[54] ibid 584, 1337 (emphasis in original).

[55] ibid.

[56] ibid.

[57] It is tolerably clear that liabilities spoken of here are external, between co-trustees and *cestui*, and not agreements establishing or varying contribution between co-trustees; the interaction of contribution with contract were yet to be explored prior to the decision of Eyre LCB in *Dering v Earl of Winchelsea* (1787) 1 Cox CC 318, 321, 29 ER 1184, 1185 (Exch of Pleas), 'find[ing] that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it'. Doctrinal history of this point is explored in *Zurich Insurance plc UK Branch v International Energy Group Ltd* [2015] UKSC 33, [2016] AC 509; *Lavin v Toppi* (2015) 254 CLR 459 (HCA); *Friend v Booker* (2009) 239 CLR 129 (HCA); *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 (HCA); *Caledonia North Sea Ltd v British Telecommunications plc* [2002] UKHL 4, [2002] Lloyds Rep IR 261; *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 (HL,Sc); *Albion Insurance Co Ltd v Government Insurance Office* (NSW) (1969) 121 CLR 342 (HCA). See also C Mitchell, *The Law of Contribution and Reimbursement* (Oxford, OUP, 2003) §8.23, 164–65; D Heydon, MJ Leeming and PG Turner, *Meagher Gummow and Lehane's Equity: Doctrines and Remedies* 5th edn (Sydney, LexisNexis, 2015) 395–416.

directors in *Sutton* had also signed on to accept full joint and several liability when they took offices in the Charitable Corporation. But that leaves in place the question why Lord Hardwicke emphasised negligence in *Sutton* as the reason for extending liability to every member of the co-trustee group, rather than basing liability on consent or receipt. Analysis of judicial reasons is impeded by the cryptic nature of surviving reports of Lord Hardwicke's opinions; further research into manuscripts (including his judicial notebooks) may cast a brighter light.

In *Ex parte Belchier*[58] Lord Hardwicke C further explained the interaction between joint receipt by co-trustees or executors and undertakings of joint liability. In that case the defendant had taken assignment of her son's estate as trustee in insolvency, and had entrusted a large consignment of tobacco to a broker for sale by auction, who then absconded with the proceeds. The defendant trustee's conduct in delegating to an agent was found to be reasonable and indeed necessary by the trading norms around her, and hence she was not chargeable on the trust account to restore the assets.

> If [the assignee] is chargeable in this case, no man in his senses would act as assignee under commissions of bankrupt. This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own.
>
> Courts of law, and equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.[59]

Lord Hardwicke used the same measure of necessity to justify a trustee delegating receipt or conversion of assets to a delegate or co-trustee, and also explained why executors were treated differently:

> There are two sorts of necessities: 1st, Legal necessity. 2d, Moral necessity.
>
> As to 1st, A distinction prevails where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary.[60]

Thus the co-executor by joining in a receipt that was not legally required, and without himself taking possession or control, was in effect guaranteeing due accounting by the other executor. The decision was soon cited as a leading authority, and was used a century later by Jessel MR

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[58] *Ex parte Belchier; In the Matter of Parsons, Bankrupt* (1754) Amb 218, 27 ER 144.

[59] ibid 219, 145.

[60] ibid.

and Lord Blackburn in constructing a new negligence standard for trustees and moving the law away from stricter account measures for stewardship of assets.[61]

The *Belchier* necessity principle with its harsh rule for executors came to be affirmed many times in the Court of Chancery, and was also applied to any co-trustee who accepted a supererogatory responsibility for the actions of the trustee group. So in *Westley v Clarke* in 1759 Lord Northington LK held:

> it is a general rule in this court, that if executors join in a receipt, they make themselves all liable *in solido*, because it is an unnecessary act, as each executor has an absolute power over the personal assets and rights of the testator. And that the contrary rule holds with respect to trustees; that they are not answerable for joint receipts each *in solido*, but only in proportion to what they actually receive.
>
> But though there are distinctions in the books concerning the acts of trustees and those of executors, according to the cases cited for that purpose, yet those distinctions seem not to be taken with precision, sufficient to establish a general rule; for a joint receipt will charge trustees *in solido* each, if there is no other proof of the receipt of the money.[62]

This implied that co-trustees would presumptively be liable for each other's acts regarding trust assets unless they could establish absence of receipt. Lord Thurlow C doubted this blurring of the line between executors and trustees in a case of 1786, and restated the principle as follows:

> where one executor takes the money but of his own authority, his companion shall not be charged; but if he puts the money into the hands of his companion, he shews he had it in his power to secure it; and that his companion, for some reason, was permitted to obtain the possession of the money.[63]

This principle was used numerous times to make an executor jointly and severally liable for the receipts of another co-executor if the former executor joined in the receipt without taking control, as in effect the non-controlling executor was volunteering his or her own power of receipt to another. The judges sometimes expressed discomfort at the strictness of this rule, especially when contrasted with the lenience showed to non-testamentary co-trustees who had not directly involved themselves in the management of the trust assets.[64] But the strict approach

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[61] *In re Speight; Speight* v *Gaunt* (1883) 22 Ch D 727, (1883) 9 App Cas 1 (HL), analysed in Getzler, 'Duty of Care' (n 50).

[62] *Westley v Clarke* (1759) 1 Eden 357, 360, 28 ER 723, 724.

[63] *Sadler v Hobbs* (1786) 2 Bro CC 114, 116, 29 ER 66, 67.

[64] See *Scurfield v Howes* (1790) 3 Brown CC 90, 29 ER 425 (Arden MR); *Hovey* v *Blakeman* (1799) 4 Ves Jun 596, 31 ER 306 (Arden MR); *Chambers v Minchin* (1802) 7 Ves Jun 186, 198–99, 32 ER 76, 80–81 (Lord Eldon). A laxer approach to 'necessary' deposit is shown in the earlier case of *Attorney-General v Randell* (1734) 21 Vin Abr 354 pl 9 (Lord Macclesfield), where money was deposited with one co-trustee for four years and then lost; the co-trustees were excused on the analogy of an unforeseen failure by a banker. In the later case of *Re Gasquoine* [1894] 1 Ch 470 (CA), an executor allowing sole

won out; in the 1805 decision of *Brice v Stokes* Lord Eldon C restated the rule in still stronger terms that put the onus of proving non-receipt on a co-trustee if the co-trustee was to avoid liability, reverting to Lord Northington LK's speculation expressed earlier in *Westley v Clarke*:

> At Law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him, to shew, that the money, acknowledged to have been received by all, was in fact received by one; and the other joined only for conformity. In the case of executors it has been said, and well said, to be otherwise. An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund; and therefore answerable for the application; as far as it is connected with the particular transaction, in which he joins.[65]

In *Lord Shipbrook v Lord Hinchinbrook* (also decided in that year of 1805)[66] Lord Eldon C extended the principle and held that even where a co-executor had been shown to be the sole recipient of funds, without any sign of receipt by the other executors, then an *ex post* liability could arise by failure to monitor the active holder of the fund. In that case it might have been expected that after a time that the funds would be sent to the due beneficiary, but the active executor seemed unwilling or unable to do so; the legatees then sued the other executor for payment. The co-executor's neglect of the duty to ensure due execution over a period of time attracted full solidary liability such that the non-recipient was required to pay over the requisite equitable debt. The principle was applied still more firmly to normal co-trustees who were supposed to act unanimously to protect trust assets; in a 1790 case where a co-trustee lost trust money by lending it to a friend without security, Lord Thurlow C stated that 'if a trustee will suffer a co-trustee to detain a sum of money belonging to the trust estate, they are both liable'.[67] The doctrine was later extended back into executorships by Langdale MR in 1838, holding that a co-executor who was assured by the *cestui* that he would not be assuming any duty or responsibility by taking the trust office and did not take receipt of any assets was nonetheless accountable if he knew or ought to have known of mismanagement or breach of trust by the other trustee:

> It is important that it should be well understood that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which, by proving the will, he has

receipt to a co-executor was not held liable for loss, as that manner of several control was in the normal course of business.

[65] *Brice v Stokes* (1805) 11 Ves Jun 319, 324–25, 32 ER 1111, 1113; followed in *Langford v Gascoyne* (1805) 11 Ves Jun 333, 32 ER 1116.

[66] *Lord Shipbrook v Lord Hinchinbrook* (1805) 11 Ves Jun 252, 32 ER 1085.

[67] *Keble v Thompson* (1790) 3 Bro CC 112, 29 ER 112.

> undertaken…. he became liable for the performance of the trusts, and for any consequences arising from a breach of them.[68]

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An important extension of the solidary liability principle evoked by Lord Eldon was made by Sir William Grant MR in the insolvency case of *Lingard v Bromley* (1812).[69] The case involved a sale of a property by co-trustees being assignees under a commission of bankruptcy, charged with maximising the value of the bankrupt's estate for the benefit of creditors. Lingard, one of the trustees, took an active role in the business of liquidation, and Bromley, another trustee, passively accepted the other's decisions concerning the estate. A secured creditor proposed the sale of a property in the estate, but on Lingard's prompting the trustees declined to accept the sale and refused conveyance, arguing that they did not necessarily accept the validity of the security claim nor the verity of the instructions issued by those creditors. When the first sale, that would have raised £3400, was thus refused, the creditors won an order enforcing a resale, which only raised £2820. The creditors then successfully sued Lingard for the deficiency of £580, which with added interest and costs rose to the sum of nearly £1140, caused by the denial of the earlier sale under what was now proved to be an authoritative commission. Lingard as trustee paid up in full; he now prayed a Bill in Chancery for 'Account and Contribution', that is, a suit to recover an equal share of the account by contribution from his co-trustee Bromley. Bromley's defence was that Bromley

> acted principally in the Bankruptcy; the Defendants relying on his Representations and Advice; and concurring only in Form; and Evidence was produced of the Plaintiff's Declarations, that he would take the Management of the Law Business upon himself; and, on one of the Defendants observing, that they wished to have nothing to do with Law, that he would bear them harmless, &c.[70]

The report lays out the arguments of two formidable counsel, with Romilly arguing for contribution from Bromley to Lingard and Leach arguing in defence that there was no initial solidary liability for Bromley and hence no possibility of contribution:

> Sir *Samuel Romilly*…for the Plaintiff. This Court is in the Habit of decreeing Contribution and Average between Persons, one of whom has paid the Debt of all; and that Principle applies here; no one of these Persons having a greater Interest than another. The modern Cases on this Head are but few: the Principle being universally admitted; but it was formerly much acted upon…. The Effect of refusing Contribution, leaving one Party, who had paid the whole,

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[68] *Booth v Booth* (1838) 1 Beav 125, 129, 48 ER 886, 888 (Langdale MR). See also *Styles v Guy* (1849) 1 Mac & G 422, 41 ER 1328 (Lord Cottenham); *Underwood v Stevens* (1816) 1 Mer 712, 35 ER 833.

[69] *Lingard v Bromley* (1812) 1 Ves & Beam 114, 35 ER 45.

[70] ibid 115, 45.

> without Remedy, would be the greatest Injustice. Though the Plaintiff took the active Part, they all signed the Petitions.
>
> Mr. *Leach*…for the Defendants. The Proposition, that Contribution and Average constitute a common Head of Equity, where the Demand arises out of Contract, cannot be disputed: but its Application is denied, where a Party is charged with respect to a Tort.
>
> Sir Samuel Romilly, in Reply. If this Case is to be determined upon the Distinction between Tort and Contract, the Consequences will be most prejudicial. In Equity there is no such Distinction: Torts being only known at Law. Suppose a Breach of Trust, committed by one Trustee, selling out Stock, receiving the Amount, and persuading his Co-trustee to join him. In Justice the one receiving ought to pay: but the Decree is against both; and according to this Doctrine, if Payment were enforced against him, who received nothing, there could be no Contribution. If one Trustee by acting and giving Advice to another loses his Right to Contribution, the Effect would be a Premium to Trustees to be idle; as the most active would incur the Responsibility.[71]

Leach here argued that a breach of trust sounds as a primary equitable wrong, to be assimilated to tort and therefore not subject to contribution as the rules then stood. Romilly's rebuttal of the defence holds that it is incoherent to label every breach of a duty, including a breach of the positive managerial duties of trusteeship, as a 'wrong' and then apply the apparatus of common-law tort to that breach; better to acknowledge that co-trustees shared an identical primary equitable duty including a shared duty to give an account and make good in the event of any default however it had come to pass. Sir William Grant MR agreed with Romilly, holding as follows.

> The first Defence made in this Case seems to me to be quite untenable. Where entire Damages are recovered against several Defendants guilty of a Tort, a Court of Justice will not interfere to enforce Contribution among the Wrong-doers: but here is nothing but the Non-performance of a civil obligation. The Lord Chancellor held, in the first Place, that the Assignees were bound to convey; and secondly, that, a Loss being occasioned by their not having conveyed, they were bound to make good that Loss, with the Costs, arising by their Refusal. The Liability therefore is not at all ex Delicto; unless every Refusal to comply with a legal Obligation makes a Party guilty of a Delictum. As to the second Defence, there are, no Doubt, many Cases, in which Persons may be all liable, severally as well as jointly, to indemnify a third Party; and yet ought not in Equity to bear the Burthen equally among themselves. But what are the Circumstances of Distinction between these Persons? It is not alledged, that the Plaintiff derived any exclusive Benefit from the Acts, in which he concurred with the Defendants. Their Refusal produced Loss to others; but no Advantage either to him or them. The Defence is of a Kind, which a Court of Justice is very unwilling to listen to: that, having undertaken a Trust, they abdicated all Judgment of their own in the Performance of it; and did whatever the Plaintiff desired: "without examining" (as they say in so many Words) "into the Matter, or Ground, of the Proceeding." Nothing could be more mischievous than to hold, that Trustees may thus act; and avoid Responsibility by throwing the Burthen upon the Person, in whom they have reposed this blind Confidence. The Case is not, that they abstain merely from interfering; but they enter upon the Trust; make themselves Parties to every Proceeding; give the Sanction of their Names to each Transaction; and now say, they are to be considered as total Strangers; and all, that has been done, is to be taken as the Act only of their Co-trustee. If

[71] ibid 115–16 45.

> this will do to protect them from Contribution, why would it not be sufficient to throw back the Burthen upon the Plaintiff, if the Defendants had been the Persons called upon to pay in the first Instance? It was at first a voluntary Act in them to take the Judgment of the Plaintiff, as a Guide for theirs. There is nothing to shew, that he fraudulently professed that to be his Judgment, which really was not such.… I see nothing sufficient to exempt [the co-trustees] from the Liability to answer for Acts, in which they joined; and to enable them to throw the whole Responsibility for those Acts upon the Plaintiff. He is therefore entitled to the Contribution he prays, with the Costs of the Suit.[72]

Grant MR sets out two conjoined principles: that the duty of trustees is a primary duty of performance that the Court of Chancery will positively enforce, not a secondary duty to correct damage caused by wrongdoing where each trustee is treated severally without sharing of liability or contribution; and that this primary duty requires all trustees to take cognisance of the needs of the trust management and to exercise their own judgments in parallel with the more active trustees, not hiding behind the decision of an active trustee. In other words, every co-trustee must proffer an engaged performance born of the basic duty of account for their shared office, and failure by one is translated into a failure by all that opens the door to contribution and equal bearing of liability.

The strict accounting requirement that each co-trustee should ensure personal knowledge of the state of the assets was soon after restated by Lord Eldon C in the 1818 case of *Walker v Symonds*.[73] Together with *Lingard* this case establishes the classical solidary liability of co-trustees, and is worth investigating closely as a result. The facts as recited in the Bill and Answer were lengthy and tangled, but in essence involved two passive trustees inexperienced in business allowing an active trustee to take funds drawn from a large testamentary estate and invest these in his own business rather than in gilts and land securities as was the regular and proper practice. To leave the assets in one trustee's unsafe hands for many years in this way was a clear breach of trust; and the incidence of solidary liability could not be lessened by the negotiation of a release of the two trustees from their duties by a deed executed with the *cestui que trust* when she reached her majority. This agreement was set aside as the trustees could not inform the *cestui* of the state of the trust management and the location of the assets, and thus had not won her informed consent. Had the deed been valid, then the *cestui* could not have sued for the loss of her share of the estate, and might have been liable for

[72] ibid 116–18, 45–46.

[73] *Walker v Symonds* (1818) 3 Swan 1, 36 ER 751.

contribution if her assent had engineered loss to other innocent *cestuis.*[74] The two passive trustees were therefore charged with restoring the fund when the active trustee lost the assets in a business failure. Lord Eldon acknowledged that a *cestui* could overtly or even by acquiescence waive or excuse a breach of trust or release trustees from their duty, but only with the fullest information. Analysis of the requisite level of trustee duty and ensuing liability was complicated by the fact that different types of trustees had distinct several powers. Trustees in bankruptcy were always to act collectively; but trustee-executors could conceivably have a normal authority to act singly in handling the trust assets. However in neither category did the law excuse co-trustees from the duty to monitor each other's conduct and sustain full awareness of the state of the trust: 'it would be impossible to maintain this proposition, that, because trustees are not aware that they have committed a breach of trust, they are not responsible'.[75] It was particularly egregious for the passive trustees to claim that they 'had a co-trustee who had been guilty of a shameful violation of his duty', but had failed to discover this and exert themselves to put right the breach until it was too late.[76] This restated principles that Lord Eldon had developed earlier to control the managing committees of large joint stock partnerships, where it was an 'Abuse of Trust … that Persons will not according to their Duty attend to the Interest of the Concern'.[77] Lord Eldon in *Walker v Symonds* set the duty to monitor co-trusteeship very high:

> This is a case of great importance to trustees in general, and illustrates the necessity of attending to every word in transactions of this nature. It is one of the cases which convince me at a mature period of my judicial life, that it is impossible [for trustees] to comprehend such questions without minute examination of every fact, and reference to all the documents.[78]

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[74] Lord Eldon's exclusion of the release as lacking informed consent reversed the finding of the trial judge Sir Thomas Plumer MR. Counsel for the plaintiff indeed put the breach of trust almost entirely in terms of failure by the trustees to locate the assets and inability explain to the *cestui* the state of the trust: ibid 58, 772.

[75] ibid 69, 776.

[76] ibid 70–71, 776.

[77] *Carlen v Drury* (1812) 1 Ves & Beam 154, 158, 35 ER 61, 62. The duty of trustee managers of a company to avoid tortious harm to outsiders was also conceived early as a kind of breach of trust bring liability via the person of the corporate servants and their employers the trustees so as to attach to beneficial assets: see *'The Mersey Docks and Harbour Board' Trustees v Gibbs* (1866) 11 HLC 686, 11 ER 1500 (HL).

[78] ibid 74, 777.

The principles set out by Lord Eldon were ratified many times in later case law.[79] But not all judges accepted the strictness of the Eldonian rule. In the 1835 case of *Tarleton v Hornby* in the Exchequer of Pleas[80] the beneficiary interest was harmed not by a transactional delay of the co-trustees causing the value of assets to decay, but rather the reverse – a too-hasty sale by trustees who had failed to seek a high enough price. The beneficiary was a debtor whose estate was placed under administration for bankruptcy. The debtor resented the grant of a commission of bankruptcy over his estate, and sought to undermine the commission by claiming that sales of his assets had been collusive and at undervalue – a mischief often brought before the courts of equity. One particular trustee was sued on the basis of joint and several liability for the shortfall. Scarlett LCB (soon to become Lord Abinger) suggested that no single trustee in bankruptcy could be sued unless all were joined, this because the taking of an account against joint trustees in bankruptcy must intrinsically be a collective act:

> The principle is no doubt just, that mere wrong doers, who have no other connexion with each other than the common injury they do, may be brought to account for their transactions either singly or altogether. It is a familiar principle of law that an action of trespass may be brought either against all the joint trespassers or against each of them singly; it is equally true that at law the joint trespassers cannot sue inter se for contribution. The question is whether these principles apply to the present case and bring it within the rule that where trustees are guilty of a breach of trust they may be sued either jointly or separately, which is the case of Walker v. Symonds (3 Swanst. 75). That case, however, appears to me inapplicable. This bill calls the defendants to account as assignees, and nothing can be done completely in the suit till they do account. It would be unjust to say that one of these persons – who, it is to be recollected, are made trustees by act of Parliament – that one only shall be called upon to give that account, which possibly the other only could justly give. The other might be the very person who could best inform the Master or the other parties upon the subject. This is not like an account required of one specific sum; on the contrary, the assignees are called upon to give an account of joint transactions. If we were to take it pro confesso that the whole of the debts were paid, and that a certain sum remained in their hands, which was misapplied by them, then the case of Walker v. Symonds might require application. In the present case, however, we have not

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[79] *Re Pauling's Settlement Trusts (No 1)* [1962] 1 WLR 86 (Ch D); *McEvoy v Belfast Banking Co Ltd* [1935] AC 24 (HL); *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 (CA); *Fletcher v Collis* [1905] 2 Ch 24 (CA); *Chillingworth v Chambers* [1896] 1 Ch 685 (CA); *Re Brogden* (1888) LR 38 Ch D 546 (CA); *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592; *Farrant v Blanchford* (1863) 1 De GJ & S 107, 46 ER 42; *Mendes v Guedalla* (1862) 2 John & H 259, 70 ER 1054 (KB); *Bright v Legerton* (1861) 2 De GF & J 606, 45 ER 755; *Thompson v Finch* (1856) 22 Beav 316, 52 ER 1130 & 8 De GM & G 560, 44 ER 506 (CA) (discussed below); *Raby v Ridehalgh* (1855) 7 De GM & G 104, 44 ER 41 (QB); *Burrows v Walls* (1855) 5 De GM & G 233, 43 ER 859 (QB); *Macleod v Annesley* (1853) 16 Beav 600, 51 ER 912; *Ex parte James James and James Cushion* (1853) 3 De GM & G 493, 43 ER 193; *Thornber v Sheard* (1850) 12 Beav 589, 50 ER 1186; *Knight v Marjoribanks* (1848) 11 Beav 322, 50 ER 841; *Ex Parte Eyre* (1843) 1 Ph 227, 41 ER 618; *Clough v Dixon* (1841) 10 Sim 564, 59 ER 734; *Lowry v Fulton* (1839) 9 Sim 104, 59 ER 298; *Munch v Cockerell* (1836) 8 Sim 219, 59 ER 88; *Wilson* (n 17) 142–43; *Twyford v Trail* (1834) 7 Sim 92, 58 ER 771; *Stiles v Guy* (1832) 4 Y & C Ex 571, 160 ER 1137 (KB); *Hanbury v Kirkland* (1829) 3 Sim 265, 57 ER 998.

[80] *Tarleton v Hornby* (1836) 1 Y & C Ex 333, 160 ER 135 (Exch of Pleas).

> arrived at that stage of the proceedings, but only at the account. Then the question is whether an uncertificated bankrupt, who has not superseded his commission, but has resisted it, shall be allowed to call his assignees to an account of their proceedings under the bankruptcy; and that has been already decided [against the bankrupt].[81]

The requirement of complete joinder arose in the bankruptcy context to prevent a singling out of one commissioned trustee for a wrongful sale; the same joinder rule was then applied to executors,[82] company directors[83] and charitable trustees.[84] But this rule might be seen purely as adjectival law; once joinder had occurred, so permitting a collective accounting, then the facts establishing joint-several liability might be established so that any single trustee within the defaulting group could be attached, with sharing out of the burden of liability being left *ex post* to the contribution rules.

Sir John Romilly MR restated the Eldonian solidary liability principle in strong terms in the 1855 case of *Trutch v Lamprell*.[85] The court found the defendant trustee liable for putting the proceeds of an authorised sale of trust property into the hands of a co-trustee, who promised to pay the money to the beneficiary once the beneficiary's liabilities had been offset. The beneficiary contested these liabilities but the co-trustee nonetheless retained the money by way of set-off without seeking a judgment. The defendant trustee was held to be fully accountable for the sum retained; the court rejected the defence that the defendant had only been involved with the sale passively, for the sake of conformity, and had no part in the contest between the beneficiary and co-trustee in receipt of the assets. Romilly MR stated:

> This is one of those painful cases which, unfortunately, this Court has constantly to deal with, where trustees, innocent of any desire to benefit themselves, have failed to perform their duties, and the Court is compelled to make them responsible. It is constantly argued by counsel, but the conclusion is as constantly rejected by the Court, that a person who acts is not an active trustee, and is not liable, because he has only acted for conformity's sake. It is a contradiction in terms to say that a trustee who acts is not an active trustee; by taking upon

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[81] ibid 336–37, 137.

[82] *Wilson* (n 17) 142–43 (Leach MR).

[83] See *Seddon v Connell* (1840) 10 Simons 58, 59 ER 534, where joinder was said to be necessary for breach of trust by company directors, but not where the breach was concurrently a tortious fraud.

[84] See *Attorney-General v Daugars* (1864) 33 Beav 621, 624, 55 ER 509–11, where charitable trustees wrongfully applied trust funds to the costs of defending themselves against a suit for breach of duty involving the same trust; those still living were held to be jointly and severally liable, but the court would only attach those joined and appearing in the suit, and left the other co-trustees to be pursued for contribution.

[85] *Trutch v Lamprell* (1855) 20 Beav 116, 52 ER 546.

> himself the office of trustee, and acting, he becomes, in that transaction at least, an active trustee, and is bound properly to perform all the duties appertaining to his office.[86]

Romilly MR and the Court of Appeal again endorsed solidary principles in the authoritative 1856 case of *Thompson v Finch*.[87] Finch stood as co-trustee of a widow's estate together with Hayward, a well-regarded solicitor. On Hayward's advice and with the consent of the *cestui* the two co-trustees authorised the conversion of government stock held on trust into funds for mortgage investment; those sums were collected by Hayward alone and paid on loan to a favoured client of his without taking good mortgage security. A decade passed without Finch (or the *cestui*) raising any questions about the performance of the trust investments, and ultimately the funds were lost. Romilly MR held Finch jointly and severally liable for the whole loss, Hayward having been bankrupted. First, Finch had authorised Hayward to take the converted funds, and the rule 'that a trustee would be liable for his own receipts only, do[es] not apply to a case where a trustee assists or enables another trustee to receive the money'.[88] And, second, Finch had failed to check over a ten-year period if proper real security had been acquired for trust investments, but had accepted without inquiry his co-trustee's undertakings. The consent and quiescence of the *cestui* could not serve as a bar in this case. The correct approach was

> that if a *cestui que trust*, being *sui juris*, having a knowledge of the breach of trust by a trustee, assents to it, or takes no steps to obtain redress for a long lapse of time, he cannot afterwards complain of the breach of trust sanctioned by him, and of which for a great length of time he had not thought fit to complain. But here the case made is not one of notice to the Plaintiff of a breach of trust, but of its performance … it is not the business of a *cestui que trust* to inform a trustee of his duty. It was his duty, without any request, to see that the money had been laid out on proper and sufficient security.[89]

The *cestui* with no ready access to the accounts could not have imposed upon her a duty to monitor the trustees and keep them to their duty; and failure to detect the incorrect investments could not be taken as a ratification in these circumstances.[90]

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[86] ibid 118, 547.

[87] *Thompson v Finch* (1856) 22 Beav 316, 52 ER 1130 & 8 De GM & G 560, 44 ER 506 (CA).

[88] ibid 22 Beav 316, 323, 52 ER 1130, 1132.

[89] ibid 323–25, 1132–33.

[90] On ratification of breach in relation to investment, see *In re Salmon* (1889) 42 Ch D 351 (CA).

Knight Bruce LJ in the Court of Appeal affirmed. Finch's ready belief in Hayward's honest execution of the investments could not morally be condemned; but such complete reliance was nonetheless a ceding of Finch's trustee role to his co-trustee:

> [U]nfortunately it was Mr. Finch's duty to ascertain whether the facts were as he may be taken to have understood them to be. In truth the facts were not so. There was no mortgage at all, or no proper mortgage, and if there had been a mortgage proper in any sense (which there was not) it was an improper proceeding, because it was not in the names of the two trustees.[91]

The appeal judges confirmed that Hayward was discharged of trust liability as a bankrupt, leaving Finch to bear the full liability – and then called for Hayward to be struck off the rolls for his abuse of his position as solicitor in the running of the trust.

By the time of the Judicature Acts 1873–75 the proactive duties of co-trustees to monitor closely each other's conduct had been well established as a core element of due administration. In the 1878 case of *Lewis v Nobbs*[92] the defendant, a friend of a deceased testator, was appointed co-trustee of assets from the deceased estate alongside a solicitor who appeared to be honest and competent. This was a post-execution arrangement so the trustees were no longer serving as executors. They were authorised to invest beyond safe local government stock, and they bought Russian railway bonds, each taking half of the bond instruments into possession. These bearer bonds were disposable by the individual controlling the paper, and the solicitor disposed of the bond and absconded, so that half the value of the investment was lost outright. The defendant trustee also made a loan to the son of a *cestui que trust* at her request, taking a simple promissory note or personal security only; that money also was lost. Hall VC found the defendant liable for both losses. Although the Russian investment was authorised as a general category of investment, it was wrong to arm a single trustee with sole power to dispose, without dual control:

> [T]he Defendant … did not discharge his duty in allowing his co-trustee to retain possession of one half of the bonds, and the course pursued enabled the co-trustee to improperly deal with them. The duty of the trustees was to make an investment in the names of both, so that the bonds should not be transferable without the action of both, or, as the bonds were transferable by delivery, care should have been taken that there could not be any improper disposition of them.[93]

And likewise the trustee was imprudent to have relied solely on the personal credit of the borrower from the family, nor should he have allowed himself to have been influenced by the

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[91] *Thompson v Finch* (1856) 8 De GM & G 560, 564, 44 ER 506, 509.

[92] *Lewis v Nobbs* (1878) 8 Ch D 591.

[93] ibid 594–95.

request of the *cestui* to make the loan to her son, and so he had to replenish those lost funds as well. Hall VC made clear that the defendant had committed no fraud and had done no subjective wrongdoing in relying on others to perform their duty. In order to emphasise the honesty of the ill-fated trustee, Hall VC criticised the plaintiff for making personal imputations against the trustee and applied the sanction of refusing a costs order. In effect Hall VC thereby made the co-trustee jointly and severally liable for the conduct of the co-trustee on a demanding objective standard. The duty of the co-trustee was apparently to mistrust the other co-trustees, put in all reasonable controls that might have curbed any tendency to defalcation, and pay restitution on a but-for causal basis if a defalcation occurred in the absence of control. If this was not vicarious liability in name it was coming very close in effect.

VI. Contribution Rules and Co-trustee Liabilities

After the Judicature Act reforms the solidary liabilities of co-trustees tended to be explored largely via claims for contribution. The first notable case after the Act was *Asshurst v Mason* in 1875.[94] A director of a company who had been allocated unpaid shares wanted to resign his directorship and return the shares, thus to eliminate any future liability. The board led by Asshurst as chairman resolved that the company manager should take those shares to his name on trust for the company, not appreciating that this transaction was *ultra vires*. Asshurst and the board then asked Mason, another director and board member, to take joint title to the shares as co-trustee as this was a more secure practice. Fearing liability Mason objected; 'but upon the express arrangement that his co-directors should hold him harmless against all consequences – "see him through it" – he agreed';[95] the company then entered him on the register as joint owner of the shares on trust. The company became insolvent and Asshurst, prompted by the receiver, sought full payment from Mason of the value of the unpaid shares as the owner, the manager and co-trustee lacked all means to pay. Mason brought suit for contribution from the other members of the board as *cestuis* of a trust who owed him an indemnity for liabilities incurred in his capacity as trustee, and alternatively because of the board's informal guarantee and indemnity. Bacon VC ordered full contribution from all board members, on an equity that was not fully explained. He first 'referred to the legendary case of

[94] *Asshurst v Mason* (1875) LR 20 Eq 225 (VC).

[95] ibid 226.

a suit by a highwayman against his comrade of the road for a partnership account of his share of the plunder' as a kind of *reductio ad absurdum*;[96] but went on to hold that the *ultra vires* nature of the share transaction in this case did not eliminate the board members' equitable duty to contribute when the illegal common project failed and resulted in loss. The assurances offered to and reliance invited from Mason established liability: 'they who have procured his name to be used, who have adopted his name to carry into effect their design, must reasonably contribute to the loss, since loss has happened. That rests upon universal principles'.[97] It was clear that the base of liability was neither contractual indemnity nor co-trusteeship by the board members; nor was it stated that the board members became *cestuis* in lieu of the company;[98] nor could this be an estoppel as the claim was raised as a sword rather than a shield. Perhaps the best interpretation was that the board members had made themselves partners of the co-trustees, making for a participatory liability in the absence of breach. So far as co-trusteeship principles apply, the case signifies an expectation by the courts that a co-trustee who enters into office explicitly refusing solidary liability will nonetheless owe such liability as intrinsic to the office.

Policy reasons to support an onerous and non-avoidable co-trustee duty, and also detailed principles of contribution, were articulated in *Bahin v Hughes* in 1886.[99] In that case one of two trustees of a family trust took the lead in reinvesting funds from low yield municipal bonds into higher yield mortgages. The active trustee, relying on poor advice and without a proper understanding of her trust powers, made an *ultra vires* investment in a mortgage of a leasehold at undervalue and the money was lost. The other trustee had passively stood by during the reinvestment process, but had later written protesting the investment and demanding dual control of future decisions. On being joined in the suit for restitution of the fund the passive trustee claimed in defence that he had not been responsible for the poor investment, and in the alternative that if joint liability did apply then the active trustee should indemnify him, that is, he was exempted from the usual equitable duty of equal contribution as the co-trustees were

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[96] ibid 232. In a note on this point the reporter added: 'The case referred to is that of John Everet v. Joseph Williams, about 1725: see Pothier on Obligations, vol. ii. p. 3; Lindley on Partnership, p. 188. It appears that the Plaintiff, or a highwayman of that name, was hanged at Tyburn, February 1729–30; the Defendant at Maidstone 1735; and the solicitor was convicted of robbery 1735, but reprieved and only transported.' This was contribution with a vengeance.

[97] *Asshurst v Mason* (1875) LR 20 Eq 225, 233-34.

[98] As interpreted by Swinfen Eady J in *Jackson v Dickinson* [1903] 1 Ch 947 (Ch D).

[99] *Bahin v Hughes* (1886) 31 Ch D 390.

not *in pari delicto*. Both defences failed, and full solidary liability with full equal contribution was ordered. Cotton LJ held it was a negligent breach of trust for the one passive trustee to let the fund into the control of another inexperienced and ill-advised co-trustee who misapplied the fund, and hence both were responsible for the ensuing breach of trust. Moreover 'it would be laying down a wrong rule to hold that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee'.[100] Bowen LJ raised a doubt as to whether the post-dated protest of the passive trustee might amount to a *locus poenitentiae*, whereby the active trustee was put on notice that she should either withdraw the poor investment or indemnify her co-trustee; but he did not press his doubts in a formal dissent.[101] Fry LJ vehemently rejected Bowen LJ's supposition that the co-trustees were not *in pari delicto*, and delivered an analysis of co-trustee contribution that was taken by later courts to be definitive:

> [T]he Courts ought to be very jealous of raising any such implied liability as is insisted on, because if such existed it would act as an opiate upon the consciences of the trustees; so that instead of the cestui que trust having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties. Such a doctrine would be against the policy of the Court in relation to trusts.[102]

In the instant case, the active trustee caused loss 'through simple ignorance and want of knowledge', but at the same time the passive trustee could have averted the loss had he used ordinary diligence.[103]

The principle established in *Bahin* was that unequal culpability between co-trustees would only seldom displace the principle of equal contribution by the erection of an indemnity to protect the less culpable co-trustee. Cotton LJ set out some exceptions as follows:

> [T]here are very few cases in which one trustee, who has been guilty with a co-trustee of breach of trust and held answerable, has successfully sought indemnity as against his co-trustee ... Of course, where one trustee has got the money into his hands, and made use of it, he will be liable to his co-trustee to give him an indemnity. ... Now I think it wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the cestui que trust; but, so far as cases have gone at present, relief has only been granted against a trustee who has himself got the

[100] ibid 396.

[101] ibid 397.

[102] ibid 398.

[103] ibid 398; principle affirmed in *Robinson v Harkin* [1896] 2 Ch 415; *Bacon v Camphausen* (1888) 58 TLR 851.

> benefit of the breach of trust, or between whom and his co-trustees there has existed a relation, which will justify the Court in treating him as solely liable for the breach of trust.[104]

The most prominent relationship erecting an indemnity was the case of the solicitor-trustee who instigated a breach of trust. In such cases co-trustees who reasonably relied on the solicitor, whilst liable to the *cestuis*, were presumptively not bound to share equally in the loss with the solicitor for the solicitor's errors of judgment as they had a good claim to rely on the solicitor's professional judgment.[105] However the presumption that the solicitor-co-trustee could not require contribution was displaced where it was shown that the other co-trustees were active participants in the breach and had not simply entrusted decision-making to the expert solicitor. This made it possible for the solicitor to seek contribution from active but not passive trustees.[106]

The important case of *Re Brogden* in 1888[107] put the solidary duty of co-trustees still higher. The court refused indemnity against contribution even where a trustee had actively tried to protect the trust interests against the wishes of his co-trustees. In that case three co-trustees had a responsibility to bring in assets from a family iron firm into the trust fund and raise monies from those assets to pay out legacies. A five-year period was allowed under the testamentary trust before the trustees would have to effect final execution. After the five years had passed the two family members of the trustee group were loath to extract the funds from the firm which was then facing trading difficulties. The third trustee, Budgett, pressed for liquidation and payment over so as to complete execution of the trust, but backed off to avoid a quarrel over the likely disintegration of the family firm. The firm soon went into administration leaving no surplus for distribution; the *cestui que trust* then claimed funds equivalent to the unpaid legacy from the three co-trustees. The two family members of the trust acknowledged their liability, but Budgett claimed indemnity on the basis that he had honestly tried to execute the trust but had been defeated by the lack of will or obstruction of the other

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[104] ibid 395–96.

[105] ibid citing as *locus classicus Lockhart v Reilly* (1856) 25 LJ 697; (1857) 1 De GG & J 464, 44 ER 803. This indemnity rule was upheld in a series of cases suggesting an endemic problem of abuse by solicitor-trustees: see *In re Bell's Indenture* [1980] 1 WLR 1217 (Ch D); *In re Munton* [1927] 1 Ch 262 (CA); *In re Linsley* [1904] 2 Ch 785 (Ch D); *Jackson v Dickinson* [1903] 1 Ch 947 (Ch D); *Head v Gould* [1898] 2 Ch 250 (Ch D); *In re Turner* [1897] 1 Ch 536 (Ch D); *Chillingworth v Chambers* [1896] 1 Ch 685 (CA); *Blyth v Fladgate* [1891] 1 Ch 337 (Ch D); *Re Partington* (1888) 57 LTR 654 (Ch D); *Price v Price* (1880) 1 TLR 626 (Ch D).

[106] *Head* (n 105) 265 (Kekewich J).

[107] *Brogden* (n 79).

two co-trustees. North J in Chancery, and then a strong Court of Appeal, expressing some reluctance, found Budgett equally liable as trustee. Despite the pressures of the family situation and the opposition of his co-trustees, he ought to have pressed for full and prompt execution at the time when the trust was due for completion, bringing legal action to force payments of all legacies. He had failed to act reasonably by backing off until the business had been run down and it was too late to realise the trust assets. According to Lopes LJ: 'No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him'.[108]

Extending the principle established in *Re Brogden,* it has been stated that a co-trustee has both the power and the duty to sue co-trustees in order to prevent or remedy a breach of trust, and may do this in his or her personal capacity without joining the *cestuis* to the action; that is, the co-trustees can sue each other in their own right to ensure the primary performance of the trust, for example by seeking a *quia timet* injunction to safeguard assets, to force specific performance of the trust, and in an extreme case to displace or replace errant co-trustees.[109] A colonial New South Wales case stated interestingly that breach of trust by active co-trustees is 'duplex' – simultaneously a breach of duty owed to *cestuis*, and a breach of duties owed to the other co-trustees who have a 'negative' interest in due performance due to their own exposure to solidary liability upon breach.[110] The co-trustee's action to enforce the trust *inter se* must be distinguished from a suit for equal contribution for the consequences of breach.[111] The analysis differs where it is a *cestui* rather than a co-trustee who insists that the trust duties not be rigorously enforced. In such a case of a *cestui* assenting to breach, a full defence by way of indemnity would be afforded to the co-trustees.[112] In a further variation, the courts have on occasion had to deal with a *cestui* who was also a co-trustee being liable for breach of trust causing loss to the beneficial estate (including loss to the *cestui*'s own assets). The relevant rule, harking back to *dicta* of Lord Eldon in *Walker v Symonds*, was that the *cestui*-trustee had

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[108] ibid 574–75.

[109] *Re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450; *Young v Murphy* [1996] 1 VR 279; *Nicholson Street Pty Ltd v Letten and Lane* [2016] VSCA 157.

[110] *Wentworth v Tompson* (1859) 2 Legge (NSW) 1238, 1241 (Stephen CJ).

[111] *Fletcher v Green (No 2)* (1864) 33 Beav 513, 55 ER 467.

[112] This refers to consent *ex ante*, which binds the beneficiary with regard to each co-trustee. It appears that a *release* or *compromise* of liability *ex post* given by a beneficiary to a co-trustee does not necessarily embrace all co-trustees, depending on their individual position and merits: *Blackwood v Borrowes* (1843) 4 Dr & War 441, 475 (Lord St Leonards); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, n 128 (Gummow J) (HCA).

his or her beneficial interest impounded by the court and charged with the losses to the trust fund; in addition the *cestui*-trustee was barred from seeking contribution from co-trustees up to the value of loss suffered by the *cestui* in that capacity. By so partially barring contribution, a *cestui*-trustee had to give the entire value of his or her trust share over to the innocent *cestuis*, and then pay *pro rata* for any further losses to the trust estate, without sharing in that restitution.[113] A parallel rule held that where a trustee received a personal benefit from a breach of trust, the defaulting trustee had first to contribute the amount of the personal benefit received before equal accounting would be ordered; but such partial indemnity could only protect the other trustees if they had not actively participated in the breach.[114] No contribution could be claimed by a fraudulent trustee where an element of the wrongdoing included fraudulent misrepresentations or fraudulent misconduct towards the co-trustees who themselves did not actively share in the breach of trust.[115] It has been stated more recently in the Commonwealth that co-trustees who participate in a common fraud are likewise disbarred from seeking contribution.[116] These rules preventing contribution claims by persons tainted by fraud have been overtaken in England since 1978 by legislation bestowing a power of 'just and equitable' apportionment on the court with no presumptive bar against a wrongdoer;[117] the details of this apportionment regime, and also statutory apportionment regimes applying to the primary co-trustee liabilities in other jurisdictions,[118] need not concern us here.

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[113] *Booth* (n 68) 888 (Langdale MR); *Birks v Mickelthwait* (1864) 3 Beav 40, 55 ER 426; *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239; *Re Towndrow* [1911] 1 Ch 662; *Chillingworth v Chambers* [1896] 1 Ch 685, 707 (Kay LJ); *Selangor United Rubber Estates v Cradock (No 4)* [1969] 1 WLR 1773 (Ch D); *Goodwin v Duggan* (1996) 41 NSWLR 158 (Handley and Beazley JJA). Where cestuis are not only co-trustees but partners with mutual agency powers, full joint and several liability is rigorously enforced: *Gillespie and Paterson v City of Glasgow Bank and Liquidators* (1879) 4 App Cas 632 (HL).

[114] See *Powlet v Herbert* (1791) 1 Ves 297, 30 ER 352; *Greenwood v Wakeford* (1839) 1 Beav 576, 578, 48 ER 1064, 1065 (Langdale MR); *May v Selby* (1842) 1 Y & C CC 235, 62 ER 869; *Baynard v Woolley* (1855) 20 Beav 583, 52 ER 792; *Butler v Butler* (1877) 5 Ch D 554; *Wynne v Tempest* [1897] 1 Ch 110, 113 (Chitty J); *Re Smith* [1896] 1 Ch 71 (Ch D); *Goodwin* (n 113).

[115] *Belemore v Watson* (1885) 1 TLR 241. In *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 (HCA) at [17] and [143], it is stated that a contribution claim between co-trustees requires that the parties to be *in pari delicto*, and additionally is disbarred by any fraud on the part of the claimant; this risks some imprecision as it is clear enough that a co-trustees with differential levels of fault may still claim contribution from each other.

[116] See also *Selkirk* (n 15); *Goodwin* (n 113); *Belan v Casey* [2003] NSWSC 159; *McNally v Harris* [2008] NSWSC 659; JD Heydon and MJ Leeming, *Jacob's Law of Trusts in Australia* 8th edn (Sydney, LexisNexis, 2016) [21–17]–[21–25], [22–09]; A Gurr, 'Accessory Liability and Contribution, Release and Apportionment' (2010) 34 *Melbourne University Law Review* 481.

[117] Civil Liability (Contribution) Act 1978, ss 1(10), 2(1).

[118] See Wrongs Act 1968 (Vic), Parts IV and IVA (as amended in 2003).

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The last great case in the development of co-trustee liability was *Head v Gould*, decided in 1898.[119] In that case two trustees, each solicitors, held funds and properties on trusts to support a widow for life, with powers to appoint to the three children, and, in default of appointment, to hold for the three children in equal shares. Some but not all of the trust properties were covered by additional powers of advancement. The widow, acting in concert with her daughter, one of the beneficiaries or objects under the trusts, wrote repeatedly to the trustees requesting appointment or advancement of the properties to the mother and to the two adult children to support them in expensive lifestyles commensurate with their social class. The assets were rapidly spent, up to the third share of the properties that were to be preserved in default of appointment for the infant. When the trustees proved unwilling to appoint that last portion of capital into the control of the widow and daughter as well, they were asked to resign from their trust offices and make way for new trustees, being the daughter herself and a compliant junior solicitor. The old trustees acceded to this change, and finding some sale proceeds of trust assets left in their hands, transferred these to the widow as a final appointment as they stepped down from office. Once the new trustees had taken title and control, the last parts of the capital were soon transferred into the widow's control and spent.

The infant son, for whom none of the trust wealth survived, then sued the old trustees for breach of trust or participation in breach, seeking restitution of his third share of the fund. He also sued his sister as new trustee for acting under the control of their mother in order to commit the breach of trust. The daughter claimed she had no real control as trustee and was completely passive and unaware of what her co-trustee had done, shielding behind his status as a solicitor and professional adviser. She with her mother also claimed that the trust wealth had correctly been applied for the advancement of the *cestuis*, including the infant; this claim was rejected on the evidence. Kekewich J further found that the daughter was an untrustworthy witness, was largely under her mother's sway, and had actively worked to extract the trust assets for her own and her mother's unauthorised use. He held that her active role in drawing off her brother's trust share meant she had no automatic indemnity against the solicitor co-trustee's claim for contribution. Kekewich J next found that the old trustees were fully aware that the daughter was under the sway of her mother and that both had a relationship of influence

[119] *Head v Gould* (n 105). Interestingly the Trustee Act 1893, s 11, granting a presumptive power for a co-trustee to be retired from a trust office and discharged from liability, was not discussed in this case.

over the new solicitor-trustee. He further found that the old trustees had acceded to the change of trusteeship out of exasperation, exhaustion and reluctance to continue in an anxious and thankless role, but they were not cognisant that a breach of trust of the sort that happened must follow as a consequence of their resignation from office, and were at no times dishonest. The great question of the case is whether they could be held accountable for the predictable misconduct of the trustees who succeeded them. Kekewich J framed the problem as follows:

> [T]he alleged liability of the former trustees is of vast importance, affecting, as it does, not only the two large classes to one or both of which most men belong, trustees and cestuis que trust, but also all members of the legal profession to which the position and duties of trustees are a source of constant anxiety.[120]

Kekewich J found judicial utterances suggesting that where old trustees knew or contemplated that new trustees appointed to replace them would breach the trust, then that knowledge constituted an ostensible or constructive agency so that the wrongful acts of the new trustees were ascribed as actions of the old trustees themselves; in other words, a vicarious liability continued after the changeover binding the old trustees to accept liability for the acts of the new. But the learned judge preferred to cast the liability not in agency terms but as a part of the primary accounting duties of the old trustees, which duties were breached at the moment they parted with the property with knowledge that this would lead to abuse:

> It is the duty of trustees to protect the funds intrusted to their care, and to distribute those funds themselves or hand them over to their successors intact, that is, properly invested and without diminution, according to the terms of the mandate contained in the instrument of trust. This duty is imposed on them as long as they remain trustees and must be their guide in every act done by them as trustees. On retiring from the trust and passing on the trust estate to their successors – and this whether they appoint those successors or merely assign the property to the nominees of those who have the power of appointment – they are acting as trustees, and it is equally incumbent on them in this ultimate act of office to fulfil the duty imposed on them as at any other time. If therefore they neglect that duty and part with the property without due regard to it, they remain liable and will be held by the Court responsible for the consequences properly traceable to that neglect.[121]

To find negligence, however, the old trustees' act of resignation had to amount to a participation in the ensuing breaches that would be the foreseeable consequence of that resignation. He put the standard thus:

> [I]in order to make a retiring trustee liable for a breach of trust committed by his successor you must shew, and shew clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustee when such retirement and appointment took place. … It will not suffice to

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[120] *Head* (n 105) 267.

[121] ibid 268–69, building on *Webster v Le Hunt* (1860) 8 WR 534, (1861) 9 WR 918 (Ch); *Palairet v Carew* (1863) 32 Beav 564, 55 ER 222; *Clark v Hoskins* (1867) 36 LJ 689, (1868) 37 LJ Ch 561.

> prove that the former trustees rendered easy or even intended, a breach of trust, if it was not in fact committed. They must be proved to have been guilty as accessories before the fact of the impropriety actually perpetrated.[122]

In this case the old trustees, despite their reservations about the daughter, had no reason to believe that the new trustees would breach the trust as they did, and hence were not accountable. They were however accountable for the smaller sum of sale proceeds they had handed over to the widow at the end of their trusteeship; and they could not be excused by the court under statutory discretion as it was not reasonable to entrust any trust assets to the rapacious widow. To show his disapproval of the behaviour of the widow and daughter he refused any cost order against the old trustees.

Head v Gould is almost the last major judicial authority adding to the jurisprudence of co-trusteeship in English jurisprudence. Kekewich J was himself puzzled over the lack of recent litigation or judicial exploration of the problem, offering these ruminations:

> It is strange that so little authority should be forthcoming on a point of such importance, and especially as no one presumes to cast a doubt on the doctrine, which may be regarded as an integral part of accepted legal lore. In former days, when students learned law and practice not only by reading books and attending lectures (means, of course, which cannot be safely neglected), but at least equally as much from the precept and example of a master and animated discussion in the pupil room, doctrines such as this not calling for frequent practical application were passed from one generation to another, and became engrained in the minds of practitioners without being formulated in reported cases unless a precise question was raised between litigants in a concrete form. This possibly explains why, for a doctrine in substance undisputed, there is so little authority to be found. … the few cases cited … are admitted to be all that can be discovered in the books.[123]

One possible answer to the puzzle of missing co-trusteeship was the rise of trustee corporations providing professional fiduciary services governing private and commercial trusts, a process of displacement beginning in the later nineteenth century[124] and accelerating in the past few generations.[125] Another was that privately negotiated indemnity clauses, and then legislative protections modelled on such instruments, had gradually choked off paths to co-trustee liability. We will conclude by examining this aspect.

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[122] *Head*, ibid 273–74. See also YL Tan, 'Must Retiring Trustees be Replaced? (1989) 9 *Legal Studies* 323. Unanimous beneficiaries can also force an inadequate trustee or co-trustee to retire via a court order, subject to discharge of extant liabilities: *Miller v Cameron* (1936) 54 CLR 572 (HCA).

[123] *Head*, ibid 269.

[124] See *Perpetual Executors and Trustees Association of Australia, Limited v Swan* [1898] AC 763 (PC). I am grateful to Mark Leeming for this point.

[125] A recent example of a corporation offering investment trust services and then seeking to use corporate form to limit the directors' liability is afforded in *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 (Edelman J).

VII. The Rise of Indemnity Clauses

It is a commonplace of positive economic analysis that parties will bargain around the extant legal rules to reach a new equilibrium of rights and duties better reflecting their respective interests or power; or else promote optimal shifts in the rules by repeated litigation or lobbying for legislation. This model is complicated in the arena of trusts law as settlors, trustees and beneficiaries are not necessarily or normally in direct contractual privity. Nonetheless, constant negotiation and re-negotiation of liability levels aiming to vary the general law can be seen across the history of trust institutions,[126] including co-trusteeship.

The law reports reveal very early use of indemnity clauses to attempt to shield co-trustees from solidary liability or indeed any liability for less than fraudulent misappropriations. In *Brice v Stokes*, an 1805 case already met in relation to presumptions of liability for joint receipt, we find that a wide indemnity clause was incorporated by a testator into his testamentary trust around 1783, the relevant clause stating that

> his said trustees and executors should not be answerable or accountable for any loss, which might happen, of all or any part of his real and personal estate, so as such loss be not through their wilful neglect or default; and that one of them should not be answerable for the others or other of them, or for the acts, receipts, payments, or defaults of the other or others of them, but each of them for himself and for his own acts, receipts, and defaults, only.[127]

Lord Eldon C managed to read this clause *contra proferentem*, holding that it did not apply where one trustee left monies in the hands of another trustee without monitoring to ensure due accounting and security. The question for the court was 'not, whether the receipt of the money was right, but, whether the use of it, subsequent to that receipt, was right, after the knowledge of the trustee, that it had got into a course of abuse'. He concluded: 'as soon as a trustee is fixed with knowledge, that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those, who ought to take better care of it'.[128] In other

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[126] See R Sitkoff, 'The Economic Structure of Fiduciary Law' (2011) 91 *Boston University Law Review* 1039; J Getzler, 'Legislative incursions into modern trusts doctrine in England: The Trustee Act 2000 and the Contracts (Rights of Third Parties) Act 1999' (2002) 2(1) *Global Jurist Topics* §2; J Getzler, 'Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent' in A Gold and P Miller (eds), Philosophical Foundations of Fiduciary Law (Oxford, OUP, 2014) 39–62; JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625; cf L Smith, 'Contract, Consent, and Fiduciary Relationships' in P Miller and A Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford, OUP, 2016) ch 5.

[127] *Brice v Stokes* (n 65) 320, 1111.

[128] ibid 327, 1114.

words the defendant by failing to control the other trustee had committed an 'act' of breach and a 'wilful default' of trust himself, and the indemnity could not save him.

Chantal Stebbings in her history of nineteenth-century private trusteeship[129] has shown how the newly intensified co-trustee obligations evoked in the time of Lord Eldon C and Sir William Grant MR led to still wider indemnity clauses being incorporated into trust settlements as a common practice. She adduces a typical clause of 1807 from a trust deed, worth reproducing in full:

> [Trustees] shall be chargeable ... only for such monies as they shall respectively actually receive by virtue of the Trusts hereby in them reposed notwithstanding his or their signing or giving any Receipt or Receipts for the sake of Conformity and any one or more of them shall not be answerable or accountable for the others or other of them but each and every of them only for his own Acts Receipts Neglects or Defaults respectively. And that they or any of them shall not be answerable or accountable for any Banker Broker or other person with whom or in whose Hands or Custody any part of the said Trust monies and premises shall or may be deposited for safe custody nor for the insufficiency or deficiency of any Security or Securities Stocks or Funds in or upon which the said Trust Monies and premises ... shall be placed out or invested or for any Misfortune or Loss which may happen in the execution of the ... trusts ... except the same shall happen by or through their or his own wilful Misconduct Neglect or Default respectively.[130]

Despite the sweeping language of such clauses, it seems that all they really achieved was to reverse the burden of proof by requiring beneficiaries to evidence wilful default or direct actions in breach of trust, rather than simply demand a strict account of assets and leave it to the trustee to assert a defence.[131] In courts of equity using bill and answer procedure even this probative effect could be slight. On occasions the judge did not even bother to read around the indemnity clause but simply ignored its existence.[132] In 1854 Sir John Romilly MR stated bluntly: 'The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the steps necessary to secure the fund'.[133] Four years later he repeated the message more urgently when striking down yet another typical indemnity clause defence:

> I am of opinion that this clause does not exonerate a trustee from the consequences of any acts by which the money has been misapplied.
>
> This clause is constantly brought forward to sanction the misapplication of trust moneys; but until it is provided, by the instrument creating the trust, that the trustee shall be liable for no

[129] Stebbings (n 25).

[130] ibid 123.

[131] See *Re Brier* (1881) 26 Ch D 238, 243–44 (Lord Selborne).

[132] See *Pride v Fooks* (1840) 2 Beav 430, 48 ER 1248 (Langdale MR).

[133] *Dix v Burford* (1854) 19 Beav 409, 413, 52 ER 408, 410. See also *Styles* (n 68) (Lord Cottenham).

> breach of trust, provided he does not obtain a personal advantage, I shall not consider the clause as giving a trustee the right or liberty of conniving at a breach of trust.
>
> Even if an instrument containing such an inconsistent clause were brought before me, I express no opinion on the result; but until it is, I cannot allow a trustee to say that it is not his business to act properly in the performance of his duty as trustee. The Defendant is liable, because, by signing the receipt, he has enabled his co-trustee to obtain and misapply the trust money.[134]

The Master of Rolls was in effect identifying an irreducible core of co-trusteeship that no indemnity clause could shave away – the requirement to execute a trust without wilful default or knowing or reckless indifference.

The common clauses may have had little impact in mitigating liability, yet trustees would refuse to serve without them, and by the mid-nineteenth-century such clauses had become a ubiquitous element of trust settlements, serving perhaps as a kind of legal placebo. Finally, Lord St Leonards promoted legislation in 1859 reading an indemnity clause in common form into every trust instrument as a matter of course.[135] Such default clauses added to the complexity of trust interpretation, supervision and litigation but achieved little else. On occasion, a non-standard indemnity might shield from liability, as in the 1861 case of *Wilkins v Hogg* where a clause of a will trust stated 'that any trustee who should pay to his co-trustee, or enable him to receive monies, for the general purposes of the will, should not be obliged to see to the due application thereof, or be responsible by express or implied notice of the misapplication'.[136] Two co-trustees allowed a payment to a third who immediately misappropriated it. Sir John Stuart VC found no carelessness or wilful default in so trusting a co-trustee with an instant receipt, and further held that that the testatrix had specifically authorised and consented to such a vesting. So the indemnity clause was effective. But such enforcement of very wide exemption clauses was exceptional and against the greater tradition of equity jurisprudence, and Stuart VC's decision was quarantined and not followed. It is a shame that this case, lying outside the greater tradition, was revived by Lord Millett in *Armitage v Nurse* in 1997 in order to justify wide trustee exemption clauses excusing normal negligence

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[134] *Brumridge v Brumridge* (1858) 27 Beav 5, 7, 54 ER 2, 3.

[135] Trustee Act 1859, s 31, adopted in similar terms by the Trustee Act 1893, s 24 and the Trustee Act 1925, s 30(1), which latter clause reads: 'A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.'

[136] (1861) 3 Giff 116, 66 ER 346 (VC).

in English law;[137] and used again to even wider effect by the Privy Council in *Spread Trustee Co Ltd v Hutcheson* in 2011 to permit indemnity against gross negligence in a Guernsey trust.[138] On one reading the effect of these modern decisions has been to cut down the irreducible core so as to excuse any conduct falling short of fraud, in the sense of conscious awareness of wrongdoing going beyond what older lawyers described as 'wilful default', or conscious action that breaches duty. This is to fly against the long tradition of control of trusteeship where the judges have been concerned precisely to ensure that co-trustees are required diligently to monitor each other as a central protection of the beneficiaries' rights. It may match a deeper hostility to joint and several liability that is gathering force in the common law world, whereby solidary duties are fragmented into individualised liabilities and apportionment displaces contribution.[139] But these themes take us outside the bounds of this study into a much wider debate about the aims of private law.

VIII. Coda

This story of doctrinal metamorphosis reaches its terminus with the elimination of the common form statutory indemnity and abandonment of the juristic language of wilful default and solidary liability by the Trustee Act 2000. The Act replaces the juxtaposition of relatively strict primary accounting duties with statutory indemnities by erecting in their place a general duty of care applying to trustees in the exercise of all powers and discretions. The duties of the trustee, including the special duties of co-trustees to monitor and control each other, now fall to be measured by a general duty to 'exercise such care and skill as is reasonable in the circumstances',[140] subject to any party-designed clauses exempting such general duty, exemptions that now take their validity from legislative fiat.[141] Free delegation of trust functions now allows co-trustees acting collectively to vest their powers in a sub-set of active trustees, provided this delegation or concentration of powers passes the generic

[137] *Armitage v Nurse* [1998] Ch 241, 253–54.

[138] *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194.

[139] See also T Weir, 'ALL or Nothing?' (2003) 78 *Tulane Law Review* 511; AS Burrows, 'Should One Reform Joint and Several Liability' in N Mullany and A Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (Sydney, Law Book Company, 1998) 102–18.

[140] Trustee Act 2000, s 1.

[141] Trustee Act 2000, Sched 1(7).

'reasonableness' test.[142] The move to such a generalised test was adumbrated in *Re Lucking's Will Trusts* in 1967, where Cross J asked simply if it was unreasonable or negligent[143] for a passive co-trustee to delegate most trust functions to an active trustee and then fail to monitor; the judgment gave no attention to the detailed nineteenth-century rulings cited by counsel, and accorded the co-trustee partial relief from liability based on a metric of fault based on the conventions of the relevant market relationships.[144]

With the embrace of the negligence standard (and putting to one side the remaining operation of contribution rules), the intricate historical law of co-trusteeship in England in a sense came to an end. We no longer ascribe liability to a co-trustee based on a prima facie requirement of due administration of receipts or a duty to monitor, subject to pleas showing some excuse for not so administering or monitoring. It is all about duty of care now, driven forward by the comparative measurement of fault, but also limited by the pervasive contracting out from initial liability. Whether the removal of traditional equitable controls on groups of trustees charged with the stewardship of vast wealth on behalf of banks, mutual funds and pension funds has led to improved performance and discipline after 1967 – or 2007 – is a question that remains to be answered.[145]

Did we lay an axe to the root of the tree?

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[142] Trustee Act 2000, s 11.

[143] Following the rule in *Speight v Gaunt* (n 61).

[144] *Re Lucking's Will Trusts* [1961] 1 WLR 866, 874–78 per Cross J (Ch D).

[145] See further J Getzler, 'Financial Crisis and the Decline of Fiduciary Law' in C Morris and D Vines (eds), *Capital Failure: Rebuilding Trust in Financial Services* (Oxford, OUP, 2014) 193–208, and other essays in that volume; J Armour et al, *Principles of Financial Regulation* (Oxford, OUP, 2016).