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## Bills and Notes -- Executors and Administrators -- Personal Liability on Notes for Benefit of Estate

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SATURDAY, JULY 25

Morning Session, 9:30 o'clock

Address—Professor Roscoe B. Turner of the Yale University School of Law. Subject: The Administration of Banking Laws.

Unfinished Business.

Election of Officers.

## NOTES AND COMMENTS

### Bills and Notes—Executors and Administrators—Personal Liability on Notes for Benefit of Estate.

An administrator executed a note for premiums on a fire insurance policy covering property belonging to the estate. His signature was followed by the expression "administrator of" the estate. In a suit by the insurance company on the note, the maker was held personally liable.<sup>1</sup>

Administrators, executors, and trustees<sup>2</sup> are generally held personally liable on notes which they sign, even though they append to their signatures such expressions as "trustee," "executor of X," "administrator of X estate."<sup>3</sup> These expressions are regarded by most courts as mere *descriptions personarum*, and not as an indication of status.<sup>4</sup> The fiduciary is considered not as an agent but as a principal.<sup>5</sup> One reason for this is that common-law courts, during

<sup>1</sup> Home Ins. Co. v. Parks, 156 S. E. 471 (Ga. 1931).

<sup>2</sup> This note will not deal with the execution of notes by agents. For a treatment of that subject, see 1 МЭСЕМ, AGENCY (2d ed. 1914) §1121 *et seq.*; Note (1923) 72 U. OF PA. L. REV. 49.

<sup>3</sup> Hall v. Jameson, 151 Cal. 606, 91 Pac. 518 (1907) (note by "A, trustee"); Harrison v. McClelland, 57 Ga. 531 (1876) (note by administratrix); Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am. Rep. 215 (1876) (note by executor for expense connected with trust); Morehead Banking Co. v. Morehead *et al.*, 116 N. C. 410, 21 S. E. 190 (1895) (note by executrix); Roger Williams National Bank v. Groton Mfg. Co. *et al.*, 16 R. I. 504, 17 Atl. 170 (1889) (note signed "A, B, C, trustees estate of D"); East Tenn. Iron Mfg. Co. v. Gaskell *et al.*, 70 Tenn. 742 (1879) (note by executors); NORTON, BILLS AND NOTES (4th ed. 1914) §33. As to individual liability on bond given by administrator, see McLean v. McLean, 88 N. C. 395 (1882).

<sup>4</sup> Stubbs v. Fourth Nat. Bank of Macon, 12 Ga. App. 539, 77 S. E. 893 (1913) (note signed "A, administrator of estate of B"); Nolin v. Mooty, 29 Ga. App. 97, 113 S. E. 814 (1922) (transfer of note by administratrix); Note (1928) 34 W. VA. L. Q. 397. For a judicial criticism of the general doctrine of *descriptio personae*, see Saul *et al.* v. Southern Seating & Cabinet Co., 6 Ga. App. 843, 65 S. E. 1065, 1067 (1909).

<sup>5</sup> Hall v. Jameson, *supra* note 3. The rule is thus stated by the Supreme Court of the United States in Taylor v. Mayo, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. ed. 163 (1884):

the years in which they were distinct from courts of equity, could not take notice of the trust relationship. Creditors desiring to reach the assets of the fiduciary estate were therefore, except in a few jurisdictions,<sup>6</sup> limited to an equity of subrogation, dependent upon the responsibility of the fiduciary as an individual and upon the state of accounts between him and the estate.<sup>7</sup>

Although, in the absence of court order or authority in the instrument creating the trust, a fiduciary may not mortgage or pledge trust assets, even to secure a legitimate trust debt,<sup>8</sup> he may absolve himself from personal liability by appropriate express language in the instrument, *e.g.*, "as trustee, but not individually," or "as trustee, but not otherwise."<sup>9</sup> Section 20 of the N. I. L.<sup>10</sup> has been construed to relieve the fiduciary from personal liability if he signed in a representative capacity and was duly authorized.<sup>11</sup> If the fiduciary exercises

"When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by contracts he makes as trustee, even when designating himself as such."

<sup>6</sup> BOGERT, TRUSTS (1921) 303-304.

<sup>7</sup> *Norton v. Phelps*, 54 Miss. 467 (1877) (supplies and money advanced for trust estate; trustee became non-resident); *Mitchell v. Whitlock*, 121 N. C. 166, 28 S. E. 292 (1897) (action for goods sold and delivered to trustee); Scott, *Liabilities Incurred in the Administration of Trusts* (1915) 28 HARV. L. REV. 725.

<sup>8</sup> *Shannonhouse v. Wolfe*, 191 N. C. 769, 133 S. E. 93 (1926) (power of trustees of charitable trust to mortgage not sanctioned by language of deed of trust); *Tuttle v. First Nat. Bank of Greenfield*, 187 Mass. 533, 73 N. E. 560 (1905) (denying right of trustee to pledge in absence of authority); BOGERT, *op. cit. supra* note 6, 305-314.

<sup>9</sup> *Thayer v. Wendell*, 1 Gall. (Fed.) 37, Fed. Cas. 13,873 (1812) (covenant by executor, in his capacity as such, but "not otherwise"); *Shoe & Leather Nat. Bank v. Dix et al.*, 123 Mass. 148, 25 Am. Rep. 49 (1877) (note beginning "We, as trustees but not individually, promise," etc., and signed "A, B, C, trustees"); *Morehead Banking Co. v. Morehead et al.*, 116 N. C. 413, 21 S. E. 191 (1895) (note containing phrase "A, executrix of B, but not personally"; not to be confused with case between same parties cited *supra* note 3). As to effect given covenant of trustee when read in connection with deed of trust and order of court having jurisdiction over the trust property, see *Glenn v. Allison*, 58 Md. 527 (1882); as to power of trustee to create charge against trust estate equivalent to his own lien for reimbursement, in favor of another by whom services are rendered, see *Jessup v. Smith et al.*, 223 N. Y. 203, 119 N. E. 403 (1918).

<sup>10</sup> "Where the instrument contains, or a person adds to his signature, words indicating that he signs for and on behalf of a principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative capacity, without disclosing his principal, does not exempt him from personal liability." N. C. ANN. CODE (Michie, 1927) §3001.

<sup>11</sup> *Gutelius v. Stanbon et al.*, 39 F. (2d) 621 (D. Mass. 1930) (note by trustees of realty trust); *Charles Nelson Co. v. Morton et al.*, 288 Pac. 845 (Cal.

this privilege of exoneration, the creditor may subject the trust estate to his claim by a suit in equity; and "to give the creditor a right against the estate it is necessary only that the trustee acted properly in incurring the debt."<sup>12</sup> The so-called Massachusetts business trust accomplishes the immunization of the trustees and beneficiaries from personal liability, and gives direct access to the trust assets, by putting creditors on notice of provisions in the trust instrument.<sup>13</sup>

The general rule illustrated by the principal case might well yield today to a working presumption that when signatures of fiduciaries are thus affixed to bona fide contracts, the intent is the same as when the more amplified wording is inserted.

WILLIAM J. ADAMS, JR.

### Contracts—Liability of Father Under Later Promise for Son's Purchase on Sunday.

Automobile tires were furnished on Sunday to the minor son of the defendant. There was evidence that the father thereafter, on a secular day, promised to pay for the tires, and that he retained and used them. *Held*, even though the original contract be treated as illegal and void, continued use furnished consideration for the subsequent promise, and it was error to grant a nonsuit.<sup>1</sup>

On the question presented by this case there is practically an equal division of authority, a slight majority favoring the result of the decision.<sup>2</sup> The cases allowing recovery may be divided into four

1930) (note by trustees); *First Nat. Bank of Salem v. Jacobs*, 85 W. Va. 653, 102 S. E. 491 (1920) (note by executrix); see *American Trust Co. v. Canevin*, 184 Fed. 657, 661, 663 (C. C. A. 3d, 1911); 1 WILLISTON, *CONTRACTS* (1920) §§311, 312. But such a construction of the section does not seem to be quite logical in view of the fact that a fiduciary has no principal. And it is said in BRANNAN, *NEGOTIABLE INSTRUMENTS LAW, ANNOTATED* (4th ed. 1926) at 176: "Section 20 does not protect him (the trustee or executor) for the estate is not a principal and he is not its agent." The courts that uphold the applicability of the section to fiduciaries seem to do so on the ground that such a construction gives effect to the intention of the parties and is expedient from a business standpoint.

<sup>12</sup> Scott, *op. cit. supra* note 7, at 739, 740. As to the effect of authorization by the will on the power of executor to charge estate, see dicta in *Harris v. Woodard*, 133 Ga. 104, 65 S. E. 250, 252 (1909) and in *Brown v. Fairhall*, 213 Mass. 290, 100 N. E. 556, 557 (1913); NORTON, *op. cit. supra* note 3, 91, n. 78.

<sup>13</sup> *Roberts v. Aberdeen-Southern Pines Syndicate et al.*, 198 N. C. 381, 151 S. E. 865 (1930); Note (1928) 37 YALE L. J. 1103.

<sup>1</sup> *Smith Motor Car Co. v. Goddard*, 156 S. E. 724 (Ga. App. 1931).

<sup>2</sup> *Rosenbloom v. Schachner*, 84 N. J. L. 525, 87 Atl. 99 (1913); *Banks v. Werts*, 13 Ind. 203 (1859); *Williamson v. Brandenburg*, 6 Ind. App. 97, 32 N. E. 1022 (1893). *Contra*: *Troewert v. Decker*, 57 Wis. 46, 8 N. W. 26<sup>d</sup> (1881); *Ladd v. Rogers*, 93 Mass. 209 (1865); Note (1930) 68 A. L. R. 1487.