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BILLS AND NOTES -"MASSACHUSETTS" TRUST- LIABILITY OF TRUSTEE UNDER SECTION 20 OF THE N. I. L

BILLS AND NOTES—"MASSACHUSETTS" TRUST—LIABILITY OF TRUSTEE UNDER SECTION 20 OF THE N. I. L.— Plaintiff sued the trustee of a realty business trust in his personal capacity on three notes signed by him as follows: "Robert J. Smith, Trustee of Fair Haven Estates." The notes were given in payment of the purchase price of certain land sold by the plaintiff to the defendant, which was secured by a purchase money mortgage. The indenture of trust under which the business was carried on, and which was recorded, provided that all persons who did business with the organization should look only to the trust funds for reimbursement, and neither the trustee nor the shareholders should be personally liable. Plaintiff's attorney had been employed to draw this trust indenture, and furthermore, he had received plaintiff's warranty deed conveying the land for which the notes were given, which with the mortgage which the attorney received from the defendant referred to the grantee and mortgagor respectively as trustee under the above recorded indenture. The court in affirming a directed verdict for the defendant below, without expressly mentioning Section 20 [1] of the N. I. L., *held*, that while it might be contended that the representative words here used were only *descriptio personæ*, nevertheless parol evidence was admissible between the original parties to show that they did not intend the trustee to be personally liable, and that, furthermore, since the attorney was the plaintiff's agent and had actual knowledge of the limitations imposed by the trust indenture, the plaintiff's rights were limited to the trust estate accordingly. *Brown v. Smith*, (C. C. A. 2d, 1934) 73 F. (2d) 524.

Prior to the passage of the Uniform Negotiable Instruments Law, the position of any trustee who signed a negotiable instrument was exactly the same as his position in signing any other contract.[2] That is, in all relations with third

[1] Section 20 provides:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or 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 character, without disclosing his principal, does not exempt him from personal liability."

[2] 7 UNIV. CINN. L. REV. 288 (1933).

parties the trustee alone was personally liable, but with a right to reimbursement from the trust funds for all authorized expenditures.[3] However, when the trustee was insolvent or out of the jurisdiction, creditors through a bill to reach equitable assets might reach the trust funds in subrogation of the trustee's right of exoneration.[4] While it was possible before the passage of the uniform law for an authorized trustee to escape individual liability through express contract through such words as, "we as trustees but not individually promise to pay," [5] still the courts were very strict and held such signatures as "trustee," [6] "trustees of *X* estate," [7] and "*X* estate by *T*, trustee" [8] as mere *descriptio personæ* which did not absolve him of personal liability. It was undoubtedly the intent of the drafters of the Uniform Negotiable Instruments Law to bring trustees within the scope of Section 20,[9] and some text writers have agreed with this position.[10] Now, by the clear weight of authority a signature, "trustee of —— estate," upon an instrument relieves the signer from personal liability when the expenditure is authorized,[11] while even the signature "trustee" is no longer a mere descriptive phrase, and parol evidence will generally be admitted between the original parties to disclose

[3] 65 C. J., § 1059 (1933).

[4] Norton v. Phelps, 54 Miss. 467 (1877); Scott, "Liabilities Incurred in the Administration of Trusts," 28 HARV. L. REV. 725 (1915). In most jurisdictions the trust estate can only be reached when legal execution against the trustee has been returned *nulla bona*, Trotter v. Lisman, 199 N. Y. 497, 92 N. E. 1052 (1910); 18 CORN. L. Q. 134 (1933), but other courts have held that equity would not require a useless thing to be done, and therefore the trust assets might be levied upon on a mere showing that there were no legal assets in the trustee. Mason v. Pomeroy, 151 Mass. 164, 24 N. E. 202 (1890). It is almost universally held that the creditor may be defeated if the expenditure was not authorized, and he also takes subject to all offsets and indebtedness of the trustee to the trust estate. It has been strongly urged that the creditor should take free from all these defenses. See Stone, "A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee," 22 COL. L. REV. 527 (1922). The only support in the cases for this enlightened attitude arises in Georgia decisions. Wylly v. Collins & Co., 9 Ga. 223 (1851). This position is also preferred with respect to business trusts in SEARS, TRUST ESTATES AS BUSINESS COMPANIES, § 49 (1912).

[5] Shoe and Leather Nat. Bank v. Dix, 123 Mass. 148 (1877); Bank of Topeka v. Eaton, (C. C. A. 1st, 1901) 107 F. 1003. Scott, "Liabilities Incurred in the Administration of Trusts," 28 HARV. L. REV. 725 at 739 (1915), argues that since here the creditor's right is directly against the trust estate and not in subrogation, he should take free from all offsets of the estate against the trustee, but he cites no authority, and King v. Stowell, 211 Mass. 246, 98 N. E. 91 (1912), holds *contra*.

[6] Reiff v. Mullholland, 65 Ohio St. 178, 62 N. E. 124 (1901); Hall v. Jameson, 151 Cal. 606, 91 P. 518 (1907).

[7] Roger Williams Nat. Bank v. Groton Mfg. Co., 16 R. I. 504, 17 A. 170 (1889); Fiske v. Eldridge, 78 Mass. 474 (1859).

[8] Germania Nat. Bank v. Michaud, 62 Minn. 459, 65 N. W. 70 (1895).

[9] See Eaton, "The Negotiable Instruments Law: Its History and Its Practical Application," 2 MICH. L. REV. 260 at 273 (1904), reporting that when the proposed Section 20 was being discussed, some of the commissioners insisted upon the insertion of the words, "In a representative capacity," to avoid the result in Roger Williams Nat. Bank v. Groton Mfg. Co. (supra, n. 7).

[10] BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 5th ed., 272 (1932).

[11] Gutelius v. Stanbon, (D. C. Mass. 1930) 39 F. (2d) 621.

the principal estate which the parties intended to bind,[12] although the cases on this point have not involved the ordinary testamentary trusts. However, a recent Massachusetts case has refused to relieve a trustee under Section 20, who signed as "trustee." [13] Apparently the court was concerned with the common law idea that the trustee represented himself and not the estate in contracting, and that if he was not bound then nobody was bound.[14] Nevertheless, even the Massachusetts court would admit with other courts the trustee's right in a business trust to exempt himself from personal liability under Section 20 by signing in his representative capacity.[15] Such a result would seem to be the only reasonable one, if the trust is to operate as an effective business unit. Knowledge on the part of the payee of a trust indenture expressly exonerating the trustee personally, as in the principal case, is important in establishing the intent of the parties not to charge the trustee personally.[16] So it would seem that the signature in the instant case, supplemented by the knowledge of the trust articles possessed by plaintiff's agent, afforded ample grounds for the court's holding under the Negotiable Instruments Law, though it did not expressly refer to the statute.

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[12] Wilson v. Clinton Chapel African M. E. Church, 138 Tenn. 398, 198 S. W. 244 (1917), church trustees; Amer. Trust Co. v. Canevin, (C. C. A. 3rd, 1911) 184 F. 657, Roman Catholic Bishop; Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738 (1902), trustee for creditors; First Nat. Bank of Salem v. Jacobs, 85 W. Va. 653, 102 S. E. 491 (1920), executor; Riordan & Co. v. Thornsbury, 178 Ky. 324, 198 S. W. 920 (1917).

[13] Magallen v. Gomes, 281 Mass. 383, 183 N. E. 833 (1933). The court pointed out that "the law . . . has not yet gone to the length of giving a *quasi* personality to all property held in trust, so that a signature as trustee to an instrument . . . demonstrates acceptance of a contractual relation to the property rather than with the trustee. . . ." This case is approved in the excellent article in 7 UNIV. CINN. L. REV. 288 (1933).

[14] Taylor v. Davis' Admx., 110 U. S. 330, 4 S. Ct. 147 (1883).

[15] Bowen v. Farley, 256 Mass. 19, 152 N. E. 69 (1926); Adams v. Swig, 234 Mass. 584, 125 N. E. 857 (1920); Gutelius v. Stanbon, (D. C. Mass. 1930) 39 F. (2d) 621.

[16] Adams v. Swig, 234 Mass. 584, 125 N. E. 857 (1920), but see Goldwater v. Oltmann, 210 Cal. 408, 292 P. 624 (1930), with dicta finding the trustee personally liable when the indenture, known to the creditor, merely provided that the trustee should stipulate expressly against personal liability, the trustee having failed so to provide in the notes upon which suit was brought.