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TRUSTS-EXECUTORS AS TRUSTEES-EXISTENCE OF A RES SUFFICIENT TO CONSTITUTE A TRUST

TRUSTS—EXECUTORS AS TRUSTEES—EXISTENCE OF A RES SUFFICIENT TO CONSTITUTE A TRUST—Testator provided in his will that $35,000 of the estate be set aside in trust for the life of his widow. *E*, executor of the estate, being named trustee, posted bond, and, while heavily indebted to the estate, attempted to transfer the trust fund to himself as trustee from himself as executor by means of a check upon the estate payable to himself as trustee, which he endorsed and deposited to the credit of his own personal account in the same bank upon which it was drawn. The probate court, treating the check as a valid segre-

gation of the trust fund, discharged the executor and his sureties. During the next six years *E* paid the widow the legal rate of interest regardless of the fact that he never thereafter segregated any fund for the trust or opened an account in the bank as trustee, and in his annual reports to the court merely recited that the trust fund was invested with his own funds. His trustee in bankruptcy, claiming that no trust was ever created, sued to recover certain securities pledged to *E's* surety on the trustee's bond. *Held,* by these transactions *E* became trustee of the trust. *In re Wittwer's Estate,* 216 Wis. 432, 257 N. W. 626 (1934).

The case is undoubtedly correct in the ultimate result that was reached, but it does not clearly appear upon what grounds the decision has been placed. The court seems to be of the opinion that an actual trust was set up on the facts presented, but the mechanics by which the res was deemed to come into existence are vague. The court probably went upon the theory that the trust had been established by the concurrence of two factors: the intent of the individual to become trustee of the trust, as evidenced by his actions, and the presence of the fund in his personal account, as a result of the deposit and honoring of the check, upon which his intent could operate.[1] Under ordinary circumstances this approach would probably be open to some question because of the lack of certainty with regard to the subject matter.[2] Nevertheless, cases do exist which hold a valid trust to be established where the alleged setttlor did no more than show an intent to be a trustee of a certain interest in his bank account,[3] and, while they have been considered as going rather far,[4] the instant case certainly goes no farther. Whether the court intended to follow these exceptional decisions or considered the situation before it as a special exception to the general rule requiring a separation of the res, because of the accompanying circumstances and the clearly expressed trust intent, can only be speculated.[5] Proceeding on this general theory, the mere fact that the estate had no assets in the bank to cover the check, of which there is some indication, would not seem to make any difference in the final

[1] As to the establishment of a trust under such circumstances, see 1 BOGERT, TRUSTS AND TRUSTEES, §§ 45, 47 (1935).

[2] The general rule is that where the res is an interest in particular things which form a part of a mass, a division and setting aside of the subject matter is to be required. Hickok v. Bunting, 67 App. Div. 560, 73 N. Y. S. 967 (1902); Dick v. Harris Exr., 145 Ky. 739, 141 S. W. 56 (1911).

[3] In re Leigh's Estate, 186 Iowa 931, 173 N. W. 143 (1919); Crawford's Appeal, 61 Pa. 52, 100 Am. Dec. 609 (1869); In re Esbach's Estate, 197 Pa. 153, 46 A. 905 (1900); Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 21 Am. St. Rep. 693 (1891).

[4] 1 BOGERT, TRUSTS AND TRUSTEES, § 111 (1935); and cf. Hickok v. Bunting, 67 App. Div. 560, 73 N. Y. S. 967 (1902).

[5] That the situation is considered exceptional is apparent from related cases. Consider, for example, the case which holds that where the individual has assets in his personal account, which he has been administering in one fiduciary capacity, no separation of the funds need be made to take up a second fiduciary duty in relation to that fund, State ex rel. Lynch v. Whitehouse, 75 Conn. 410, 53 A. 897 (1903); or those cases which hold that where an individual seeks to transfer assets from himself in one capacity to himself in another he may do so by any unequivocal act indicating an intent to hold in the new capacity, Davis Admr. v. Hall, 86 Vt. 31, 83 A. 653 (1912), 40 L. R. A. (N. S.) 136 (1912), Ann. Cas. 1915B 1187.

conclusion.[6] Had the court not found it expedient to pass upon the establishment of a trust, it would seem that other grounds also existed to justify the ultimate result. The honoring of the check might have been held to create assets of the estate in the hands of the individual which thereafter he would be presumed to hold and would be chargeable with in that capacity in which he ought of right to hold them.[7] Or again, unless the terms of the bond were unusually restricted the court might have held that the sureties on the trustee's bond were liable for the breach of the trustee's duty to collect funds from himself when the time for the commencement of the trust had arrived,[8] and on this theory also it would not seem to make any difference that the estate had no assets at any time, other than the fiduciary's debt.[9] It may be, however, that this last approach, open to other courts, was considered closed to the Wisconsin court by an earlier decision.[10]

J. B. B.

[6] The honoring of the check, it is believed, could be considered as a loan by the bank of that sum to the estate, which sum so loaned became as much a res as though the fund had originally come from the account. Once the initial step is taken, that the res could exist by the mere change in book entries and by the action of the trustee in manifesting an intent to treat the trust as established, it would seem unimportant from what source the fund originally came.

[7] Fenton v. Hall, 235 Ill. 552, 85 N. E. 936 (1908); Citizens' Nat. Bank v. Sharp, Admr., 53 Md. 521 (1879); 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3rd ed., § 177 (1923).

[8] Pierce v. Prescott, 128 Mass. 140 (1880); State ex rel. Hospes v. Branch, 134 Mo. 592, 36 S. W. 226 (1896). It should be noted that the existence of this duty on the part of the individual as trustee does not discharge the sureties on the bond of the individual as executor. State ex rel. Lynch v. Whitehouse, 80 Conn. 111, 67 A. 503 (1907).

[9] State ex rel. Hospes v. Branch, 134 Mo. 592, 36 S. W. 226 (1896); State ex rel. Lynch v. Whitehouse, 80 Conn. 111, 67 A. 503 (1907).

[10] Thompson's Estate, 212 Wis. 172, 248 N. W. 167 (1933).