COMMENT ON RECENT DECISIONS

BILLS AND NOTES—NEGOTIABLE INSTRUMENTS LAW—LIABILITY OF TRUSTEE SIGNING IN REPRESENTATIVE CAPACITY—[Missouri].—Action against the trustees of a common-law or Massachusetts trust on a negotiable promissory note. The trustees signed the note in their "representative capacity," and within the authority conferred upon them by the trust instrument. *Held*, that the trustees were exempt from personal liability on the note under section 2649 of the Negotiable Instruments Law, which provides that "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."[1]

A trustee is personally liable on all contracts entered into by him for the benefit of the trust estate.[2] This is true whether he acts in accordance with the will or deed of settlement or under the directions of the court.[3] However, if he can find a willing third party, the trustee may contract in such a manner as to exclude personal liability.[4] A clause, to be given this effect, must *expressly* stipulate against personal liability most *unequivocally*.[5] The majority of jurisdictions hold that the signature of the trustee in his "representative capacity" does not have this effect.[6]

In so far as applicable, therefore, the Negotiable Instruments Law changes this rule, and relieves a properly authorized trustee who discloses the estate for which he is acting.[7] This result is stated to have been the intention of the framers of the Law.[8] A possible interpretation of this section is that it does not apply to equitable trusts,[9] since there is nothing

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1. Williams v. Shulte et al. (Mo. App. 1937) 103 S. W. (2d) 543.

2. 3 Bogert, *The Law of Trusts and Trustees* (1935) 2105-6, sec. 712; Miller, Franklin and Co. v. Gentry (Mo. App. 1935) 79 S. W. (2d) 470; Mitchell v. Whitlock (1897) 121 N. C. 166, 28 S. E. 292.

3. 3 Bogert, *op. cit.*, 2106, sec. 712; Scott, Liabilities Incurred in the Administration of Trusts (1915) 28 Harv. L. Rev. 725, 725. For cases dealing specifically with the liability of the trustee of a common-law or Massachusetts trust see 65 C. J., Trusts (1928) 1104-1106, sec. 1059 b.

4. 3 Bogert, *op. cit.*, sec. 714.

5. Ibid.; King v. Stowell (1912) 211 Mass. 246, 98 N. E. 91; Koken Iron Works v. Kenealy (1900) 86 Mo. App. 199.

6. 4 Bogert, *op. cit.*, 2266, sec. 772; Webster v. Switzer (1884) 15 Mo. App. 346; Taylor v. Mayor (1883) 110 U. S. 330, 335, 4 S. Ct. 147, 150, 28 L. ed. 163, 165; Carr v. Leahy (1914) 217 Mass. 438, 105 N. E. 445; contra, 4 Bogert, *op. cit.*, 2267, sec. 772; Mobley v. Childs (1931) 172 Ga. 723, 158 S. E. 579; Neptune v. Paxton (1896) 15 Ind. App. 284, 43 N. E. 276.

7. Williams v. Shulte (Mo. App. 1937) 103 S. W. (2d) 543, 544 and cases cited; Hamilton v. Young (1924) 116 Kan. 128, 225 Pac. 1045, 35 A. L. R. 490.

8. 4 Bogert, *op. cit.*, 2272, sec. 775; Brannon, *The Negotiable Instruments Law* (5th ed. 1932) 272, sec. 20; 1 Williston, *Contracts* (1936) sec. 312.

9. As distinguished from other forms which have many incidents of the equitable trust, e. g., common-law or Massachusetts trust, trustee of a deed of trust, executor, etc.

in the section to change the common-law concept that such a trustee is not an agent, but a principal, and "represents" only himself.[10] The words "representative capacity," however, have been construed to be broad enough to cover any situation in which an individual does not act in his personal behalf.[11]

Where a note is signed "X, trustee," the courts have split in determining whether extrinsic evidence is admissible to disclose the "representative capacity."[12] The weight of authority holds that as between the original parties to the instrument and those with notice, the trustee may disclose by extrinsic evidence an intent to sign in his "representative capacity" rather than individually.[13] By this evidence, the trustee relieves himself of personal liability on the note.[14] The minority of jurisdictions, however, refuse to permit outside evidence to show a signing by the agent or trustee in a "representative capacity," but hold him personally liable on the instrument.[15]

Where the trustee of an equitable trust contracts in behalf of the trust estate, an action cannot be brought upon that obligation against the trust estate or the beneficiary thereof.[16] The reason is that the trust or trust property is not a legal person. The beneficiary is not a party to the contract, and the trustee is not an agent for him, or for the trust estate.[17] The trustee is himself a principal, and the only person whom the court of law recognizes as an obligor on the contract.[18] If the creditor, however, is

10. In 4 Bogert, *op. cit.*, 2271, sec. 775, the author advanced this possibility from an *a priori* standpoint; Comment (1935) 34 Mich. L. Rev. 121.

11. Williams v. Shulte (Mo. App. 1937) 103 S. W. (2d) 544 where it was said: "If it did not intend to exempt a trustee as well as an agent, the clause 'or in a representative capacity' and the clause 'or as filling a representative character' would have no useful purpose to serve." Supra, note 10.

12. Prior to the Negotiable Instruments Law, the courts were in conflict upon this issue: some held that the word "trustee" or "agent" was merely *descriptio personae;* the majority of jurisdictions, however, allowed parol evidence to show the true character of the signing, unless the opposite party was a holder in due course. R. S. Mo. (1929) sec. 2649, cited in the text, does not expressly say whether the agent must indicate his "representative capacity" upon the instrument itself, or merely to the other party. Hence the same conflict still exists under the Negotiable Instruments Law.

13. Comment (1917) 27 Yale L. J. 686; American Trust Co. v. Canevin (C. C. A. 3, 1911); Megowan v. Peterson (1902) 173 N. Y. 1, 65 N. E. 738; Hunting Finance Co. v. Young (1928) 105 W. Va. 405, 143 S. E. 102; Riordan and Co. v. Thornsbury (1917) 178 Ky. 324, 198 S. W. 920 (1917); Brannon, *The Negotiable Instruments Law* (5th ed. 1932) 174-177, sec. 20.

14. Supra, note 7.

15. Rudolph Wurlitzer Co. v. Rossman (1916) 196 Mo. App. 78, 190 S. W. 636; Sparks v. Dispatch Transfer Co. (1891) 104 Mo. 531, 15 S. W. 417; Second Nat. Bank of Akron v. Midland (1900) 155 Ind. 581, 58 N. E. 833; Magallen v. Gomes (1933) 281 Mass. 383, 183 N. E. 833; Brannon, *op. cit.*, 156-159, sec. 20.

16. 3 Bogert, *op. cit.*, 2105-2107, sec. 712.

17. 3 Bogert, *op. cit.*, 2107, sec. 712; Taylor v. Mayo (1883) 110 U. S. 330, 335, 4 S. Ct. 147, 150, 28 L. ed. 163, 165; Conally v. Lyons (Tex. App. 1891) 18 S. W. 799.

18. 3 Bogert, *op. cit.*, 2106, sec. 712; Robinson v. Springfield Co. (1885)

unable to obtain satisfaction from the trustee, he may, by a bill in equity, reach the trust assets, and compel the application of it to the authorized claims against the trustee.[19] Where the trustee contracts against personal liability, therefore, it has been held that the creditor may sue the trustee as trustee on the agreement, and then receive satisfaction out of the trust estate.[20] In the common-law or Massachusetts trust, the creditor may, under any circumstances, sue the association directly, since it is regarded for purposes of suit as a legal entity.[21]

Since the instant case is one of first impression in our jurisdiction, it is well to note its consequences so as to be able to deal with trustees and trust estates accordingly.

M. J. G.

CONSTITUTIONAL LAW—CHILD LABOR AMENDMENT—RIGHT OF STATE TO RATIFY AFTER REJECTION—REASONABLE TIME FOR ACTION—[Kentucky].—In a recent decision,[1] the Court of Appeals of Kentucky has declared ineffective the attempted ratification by the state legislature of the Child Labor Amendment.[2] The grounds upon which the conclusion of the court was reached were: (1) that a state legislature, having once rejected an amendment to the federal Constitution and certified such rejection to the Secretary of State of the United States, cannot later ratify; (2) that when more than one-fourth of the state legislatures have rejected an amendment it becomes dead (irrespective of whether or not notices of rejection have been certified to the Secretary of State) and resubmission by Congress is necessary to validate subsequent state action upon it;[3] that even assuming

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21 Fla. 203; Hussey v. Arnold (1904) 185 Mass. 202, 70 N. E. 87; Gates v. Avery (1901) 112 Wis. 271, 87 N. W. 1091.

19. 3 Bogert, *op. cit.*, sec. 725.

20. Id. at sec. 715; Scott, supra, note 3, 731-732. In Jessup v. Smith (1918) 223 N. Y. 203, 119 N. E. 403, 404, Justice Cardozo said that the trustee has the power to create a charge equivalent to his own lien for reimbursement, in favor of the other who renders services under such a contract.

21. R. S. Mo. (1929) sec. 728 and 729 expressly so provide; Note (1920) 7 A. L. R. 612, 629.

1. Wise v. Chandler (Ky. 1937) 108 S. W. (2d) 1024.

2. In 1926 the General Assembly of Kentucky adopted a resolution rejecting the amendment and its action was certified by the governor to the Secretary of State of the United States. On January 13, 1937, a special session of the general assembly adopted a resolution of ratification. See Acts of fourth special session, 1937, ch. 30. Suit was brought to enjoin the governor from certifying to the Secretary of State. The petition was later amended to compel the governor to notify the secretary that the ratification en route, was to be of no effect and to warn him of the pendency of this action.

3. The Kentucky court quotes a letter published in the American Bar Association Journal, July, 1934, by Mr. Frank Grinnell in which he says, "Since the Constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification, and it sems to follow that the rule must work both