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AN INROAD UPON FIDUCIARY INTEGRITY

IT is a principle universally recognized throughout our system of law, that no person shall be permitted to occupy a position of trust and confidence who at the same time is clearly subject to influences hostile to a faithful performance of his trust. There is a rule as old as Christianity, and it has been incorporated into our law from the earliest times, that "no man shall serve two masters; for either he will hate the one and love the other, or he will hold to the one and despise the other." Fiduciary relations can rest upon no foundation but absolute integrity. Once destroy the inviolate sanctity of the trust relation and the moral basis for social institutions will begin to crumble away. The law has, in this particular, been ever vigilant to ward off the least encroachment upon the high standards of conduct exacted from those who hold positions of trust and confidence.

But the temptations to dishonesty are necessarily so great, even under the most favored conditions, that the law will not even permit the trustee to be placed in a situation which has an intrinsic tendency to encourage unfaithfulness. It makes no difference that the trustee may be honest and intend no default. Public policy demands that the temptation itself be removed so far as possible, in order to throw an additional and needed safeguard about the performance of trust duties. An agent may not deal with himself; an agent to sell may not at the same time, and in respect to the same property, be an agent to buy; an executor may not purchase at his own sale; a trustee may not invest trust funds in his own business nor mingle them with his own funds; a judge may not sit in his own case; even a notary may not so much as take an acknowledgment when he has the slightest interest in the subject matter of the instrument. In none of these cases will it suffice to show that no fraud resulted nor loss occurred. The law looks deeper than the immediate results of the particular case; it looks to the underlying tendencies of the situation and pronounces them dangerous and fraught with evil consequences. Therefore it prohibits the situation itself.

In the light of these well recognized principles of legal morality, what answer should be given to the following question, which is the particular subject of the present article?—

May an administrator or executor be permitted to show that he cannot collect a debt due from himself?

An administrator (and for the purposes of this discussion the

term may be considered as synonymous with executor) who is at the same time a debtor, occupies inconsistent and antagonistic positions. As administrator it is his duty to collect the debt; as debtor it is to his interest to avoid its payment. If he can persuade himself as administrator that as debtor he is unable to pay, he may save the amount of the debt. There is no one to question his course. He is the person appointed and designated by law to collect and administer all debts due the estate. No one can sue him. He who owes the debt is the only person authorized to enforce its collection.

A situation such as this would seem to fall clearly within the general principles already outlined. It would seem to be governed by such a case as *Everhart v. Searle*,¹ where the court says: "He that is entrusted with the interests of others cannot be allowed to make the business an object of interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is interested. The danger of temptation from the facility and advantage of doing wrong which a particular situation affords does, out of the mere necessity, work a disqualification."

As a fact there is a hopeless conflict among the cases upon this question. It seems to be an instance of hard cases making much bad law.

¹ The leading case in this country is *Stevens v. Gaylord*.² In this case, which has been cited in almost every case upon the question decided since the year 1814, the court says: "It is well settled, that when the creditor makes his debtor executor, it is a discharge of the action for the debt. * * * It is not always a release or extinguishment of the debt; for it is assets to pay creditors, if wanted for that purpose. It is also assets to pay legacies, or distribute among the next of kin, when the debt is not itself given as a legacy to the executor. It seems more correct to say that although the duty remains in some cases, and for some purposes, yet the right of action is always discharged; because the executor cannot sue himself. * * * The reason, it is obvious, applies with equal force to an administrator. * * * As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor; and the same reason applies to an administrator; as the same hand is to receive and pay, and there is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the

¹ 71 Pa. St. 261.

² 11 Mass. 256.

money to be now in the hands of the party, in his character of administrator. * * * The consequence is that he and his sureties in the administration bond are liable for the amount of such a debt, in the manner as if he had received it from any other debtor of the deceased."

In the following year, in *Winship v. Bass*,³ CHIEF JUSTICE PARKER restated and followed the same rule, and in *Ipswich Mfg. Co. v. Story*,⁴ CHIEF JUSTICE SHAW, in stating the rule, said: "In other words, the debt becomes, *prima facie*, assets in the hands of the administrator or executor, to be accounted for and adjusted in probate account, as assets actually realized." And in *Kinney v. Ensign*,⁵ the same great judge said: "On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself." Later cases in Massachusetts, such as *Benchley v. Chapin*,⁶ *Leland v. Felton*,⁷ *Chapin v. Waters*,⁸ and *Tarbell v. Jewett*,⁹ have established this rule as the settled law of that state.

In Maine the same rule has been announced, upon the authority of the Massachusetts cases. But the qualification noted in *Stevens v. Gaylord*, *supra*, that the debt must be acknowledged, has not met with the approval of that court. *Hodge v. Hodge*.¹⁰

The Supreme Court of South Carolina has followed the same rule. *Chick v. Farr*¹¹ is a very exhaustive review of South Carolina authorities, no less than seventeen cases upon the question being discussed at length, showing that no doubt has ever been entertained in that state as to the correctness of the Massachusetts rule. To the same effect is *Newman v. Clyburn*.¹²

Georgia and Louisiana, in *Thompson v. Thompson*,¹³ *Succession of Bayley*,¹⁴ *Fuselier v. Babineau*,¹⁵ and *Boyce v. Davis*¹⁶ have approved the same doctrine. In Wisconsin, some doubt as to the correctness of the Massachusetts rule was suggested in *Lynch v. Divan*,¹⁷ but that case, in so far as it touched upon that question,

³ 12 Mass. 199.

⁴ 5 Metc. (Mass.) 310.

⁵ 18 Pick. (Mass.) 232.

⁶ 10 Cush. (Mass.) 176.

⁷ 1 Allen (Mass.) 531.

⁸ 110 Mass. 195.

⁹ 129 Mass. 460.

¹⁰ 90 Me. 505.

¹¹ 31 S. C. 473.

¹² 41 S. C. 534.

¹³ 77 Ga. 692.

¹⁴ 30 La. Ann. 75.

¹⁵ 11 La. Ann. 394.

¹⁶ 13 La. Ann. 555.

¹⁷ 66 Wis. 490.

was specifically overruled in *Estate of Robinson v. Hodgkin*,¹⁸ and in Iowa, in the case of *Kaster v. Pierson*,¹⁹ the reasons upon which the rule rests are very clearly stated by the Supreme Court. Finally, the English Court of King's Bench, speaking by LORD TENTERDEN, Chief Justice, expressed its approval of the same doctrine in the case of *Freakley v. Fox*.²⁰

The fact remains to be noted, however, that in these cases the point was never raised as to whether insolvency on the part of the administrator would render the rule inoperative, so as to relieve the sureties on his official bond. In all of them, nevertheless, the rule was stated in general terms.

But the point has been raised in a considerable number of cases, and while many courts have refused to allow this feature to affect the rule, other courts have made an exception under such circumstances. It is here that hard cases have made bad law. Tenderness for the sureties on the administrator's bond has induced many courts to engraft upon a most wholesome rule an exception which lets in just the mischiefs which the rule was designed to keep out.

An exception of this nature holds out a strong inducement to unscrupulous administrators to feign insolvency or to put themselves temporarily in that condition, as a means of perpetrating a fraud upon the estate. Estates of decedents are notoriously subject to be preyed upon by dishonest trustees. They should be guarded by the courts with peculiar care.

The necessity for rigorous rules in this regard has been felt and expressed by many of the courts before which it has been sought to plead insolvency as a ground of exemption from strict accountability. The Supreme Court of Oregon, in *Mason's Estate*,²¹ said on this question: "Every reason for this doctrine [that the debt be deemed realized assets] is strengthened when liability on the ground of the executor's insolvency is sought to be evaded. That is a matter which the beneficiaries of the estate are entitled, under every principle of right and justice, to have determined by the ordinary processes of the law in a proceeding where the debtor does not occupy the conflicting relations of a representative of the estate charged with the duty of diligence in its behalf, and a debtor whose interest it would be to avoid payment. An inquiry of that nature in the county court, sitting for the transaction of probate business, would necessarily be attended with innumerable difficulties, and

¹⁸ 99 Wis. 327.

¹⁹ 27 Ia. 90.

²⁰ 9 B. & C. 130.

²¹ 42 Ore. 177.

would be an unsatisfactory and imperfect substitute for the remedies ordinarily afforded for the collection of debts." Similar language is used by the Supreme Court of Ohio in *McGaughey v. Jacoby*,²² in connection with a very able and thorough discussion of the whole subject.

A particularly vigorous opinion on this question is that in *Treweek v. Howard*,²³ rendered by Department One of the Supreme Court of California in 1895. The court says: "This debt was as money in the hands of the executor, and, as such, was a part of the estate for the due administration of which the sureties became liable, just as they did for the residue thereof. The poverty or riches of the principal, the condition of the estate, where and how invested, were proper subjects of inquiry for the sureties in determining whether or not to become responsible, but cannot be urged as reasons to excuse them from the liability which they assumed. Nor can the representation of their principal as to his financial position, or his failure so to do, avail the sureties. Should such circumstances prevail to release sureties, it is apprehended few would be bound. * * * The case serves to illustrate the wisdom of Solomon, where he says (Proverbs, xi., 15) 'He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure.'" But in spite of this sound and sensible view, so unambiguously expressed, the court, in Department Two, squarely reversed itself only three years later, in the case of *Estate of Walker*.²⁴ Truly sureties are favorites of the law!

In California, as well as in some other states, such as Ohio, New York, and Oregon, the general rule has been deemed of such vital importance that the legislature has put it in the mandatory form of a statute. Nevertheless, the courts in two of these states, have, by construction, so changed the scope and character of the statute as to limit its application to cases of solvent administrators.

Five other states, in whose courts the question has been presented, have squarely asserted the sound doctrine that insolvency on the part of the administrator in no wise militates against the general rule. In Alabama, through a series of no less than ten decisions, that able court has consistently maintained that the fiduciary character of the administrator's position demands a rigid safeguarding of absolute integrity under all circumstances.²⁵ An equally strict construction

²² 54 Ohio St. 487. See also *James v. West*, 67 Ohio St. 487.

²³ 105 Cal. 434.

²⁴ 125 Cal. 242.

²⁵ *Childress v. Childress*, 3 Ala. 752; *Duffee v. Buchanan*, 8 Ala. 27; *Purdum v. Tipton*, 9 Ala. 914; *Whitlock's Adm'r. v. Whitlock's Creditors*, 25 Ala. 543; *Ragland v. Calhoun*, 36 Ala. 606; *Sewell v. Buckley*, 54 Ala. 592; *Flinn v. Carter*, 59 Ala. 364; *Miller v. Irby's Adm'r.*, 63 Ala. 477; *Wright v. Lang*, 66 Ala. 389; *Arnold v. Arnold*, 124 Ala. 550.

of fiduciary morality has been approved by the courts of North Carolina,²⁶ Maryland,²⁷ Kentucky,²⁸ and New Hampshire.

In the state last above named the cases are of especial interest. *Norris v. Towle*,²⁹ was a case in which it was sought to obtain a ruling upon this question, but the court held that the question was not properly before it and wisely refused to pass upon it. But in 1896 the question was directly presented in *Judge of Probate v. Sulloway*,³⁰ and the court said, in the course of its opinion: "He [the Judge of Probate] has authority to determine whether the indebtedness exists, and the extent of it, and there his authority ends. If the debt is admitted or found, the Judge of Probate has no choice—he must charge it to the executor as a part of the assets belonging to the estate. This duty is imperative. He cannot authorize the executor to compromise with himself, nor has he any authority to negotiate and compromise with the executor. It is wise that such should be the law. If it were otherwise it would open a wide door to fraud. 'On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself.' SHAW, C. J., in *Kinney v. Ensign*, 18 Pick. 232, 236." And upon the plea that the bondsmen of the administrator should be permitted to show his insolvency in their own defense, the court said: "In other words, when the executor is solvent and able to pay, and no surety is needed, the surety is responsible for the debt; but when the executor is unable to pay and a surety's liability would be valuable, the surety is not liable." And the court considered this *reductio ad absurdum* a sufficient answer to the plea.

In Pennsylvania, the reporter has introduced some uncertainty as to the doctrine of *Garber v. Commonwealth*,³¹ the only case in that state where the question seems to have been raised.* In his abstract of the argument, after stating the claim of the plaintiff in error, that the administrator, who was a debtor to the estate, could not claim credit before the auditor for his debt, on account of his own insolvency, this statement appears in brackets, "*Per curiam*.—He should have done so for the sake of his sureties." This is all there is in the case relative to the point under discussion, and the

²⁶ *Gay v. Grant*, 101 N. C. 206.

²⁷ *Lambrécht v. State*, 57 Md. 240.

²⁸ *Hickman v. Kamp's Adm'r.*, 3 Bush (Ky.) 205.

²⁹ 54 N. H. 290.

³⁰ 68 N. H. 511.

³¹ 7 Barr, 265.

* In *Eichelberger v. Morris*, 6 Watts (Pa.) 42, and *Simon v. Albright*, 12 S. & R. (Pa.) 429, the general rule was stated.

case is perhaps hardly worthy of mention except for the fact that it has been cited by one or two other courts as an authority for the rule that insolvency is a defense to a debtor who becomes administrator of his creditor's estate.

Prior to the year 1902, the real weight of the authority supporting the limitation of the rule to cases of solvent administrators, was very slight and unsatisfactory. We have already noted the decision of Department Two of the Supreme Court of California, in *Estate of Walker*,³² squarely in opposition to the opinion of Department One in *Treweek v. Howard*.³³ A feeble attempt was made in the later case to distinguish it from the earlier, on the ground that one was an instance of an executor while the other was an instance of an administrator. But the two are substantially in direct conflict, leaving the two departments of that state completely at variance.

Two New Jersey cases, *Harker v. Irick*,³⁴ and *Ordinary v. Kershaw*,³⁵ are frequently cited in support of the qualified rule. Neither case, however, was decided by the highest court of that state. Each was the decision of a single judge, the decision in the *Harker* case being rendered by the Chancellor and that in the other being rendered by the Ordinary. Neither case was appealed. Furthermore, an examination of each case shows the doctrine in this point to be a mere *obiter dictum*.

Although New York has spread the general rule upon its statute books, yet the limitation in question has been announced by the courts of that state. *Baucus v. Barr*³⁶ was a case at Special Term. JUSTICE LANDON, who wrote the opinion, cited only the two New Jersey cases discussed above, the Pennsylvania case of *Garber v. Commonwealth*,³⁷ already referred to, and a Missouri case to be presently mentioned. On appeal to the General Term no cases at all were cited in the opinion affirming the decision below. And on appeal to the Court of Appeals, the case was affirmed without any opinion being written. Furthermore, this formal affirmance was concurred in by a bare majority of the court, EARL, J., dissenting, RUGER, Ch. J., not sitting, and ANDREW, J., not voting.³⁸

The Missouri case just mentioned was *McCarty v. Fraser*.³⁹ It was based expressly upon the peculiar wording of the Missouri stat-

³² 125 Cal. 242.

³³ 105 Cal. 434.

³⁴ 10 N. J. Eq. 269.

³⁵ 14 N. J. Eq. 527.

³⁶ 45 Hun. (N. Y.) 582.

³⁷ 7 Barr, 265.

³⁸ *Baucus v. Barr*, 107 N. Y. 624.

³⁹ 62 Mo. 263.

ute, though the court declared *obiter* that, in its opinion, no matter how the statute might have read, the sureties of an insolvent executor could not have been held liable, "unless indeed the creative faculty be accorded to our lawmakers or the touch of Midas to their enactments."

In Indiana, also, the court has stated an opinion favoring the qualified rule, but it was purely and confessedly *obiter*.⁴⁰

Two cases, one in Vermont⁴¹ and the other in Tennessee,⁴² are authoritative and unequivocal adjudications in support of exempting an insolvent administrator from the operation of the rule. But the Tennessee court cites no cases whatever, and the Vermont court refers only to the cases cited in *Baucus v. Barr* at Special Term, together with an early New York case.

But in the year 1902 appeared the first opinion laying any claim to thoroughness which supported the exemption of insolvent administrators. This was a commissioner's opinion in the case of *In re Howell's Estate*.⁴³ Most of the cases on each side of the question are referred to, and the statements of text writers are liberally quoted. The cases are not analyzed with care, but the case has undoubtedly given much additional strength to the view that if an administrator can convince the Probate Court of his insolvency, he can escape liability for the debt he owes to the estate.

The influence of this Nebraska case has already shown itself, in a very recent decision of the Supreme Court of Michigan. This is the case of *Sanders v. Dodge*.⁴⁴ The court quotes more than half of the long opinion in the Nebraska case, and decides the question on the authority of the reasoning and cases appearing therein.

One other very recent case has announced the same view. The case of *Hickman v. Kamp's Adm'r*.⁴⁵ has already been referred to as supporting a thorough-going application of the general rule, weakened by no limitations. In 1904, in the case of *Buckel v. Smith's Adm'r*,⁴⁶ the court suggested its approval of the rule as qualified, making insolvency of the administrator a defense to an action against his sureties. Curiously, the *Hickman* case is not referred to, and the court says that the question of liability in the case of an insolvent administrator does not seem to have been raised in that state. The case is not particularly well reasoned, and smacks some-

⁴⁰ *State v. Gregory*, 119 Ind. 503.

⁴¹ *Lyon v. Osgood*, 58 Vt. 707.

⁴² *Murray v. Luna*, 86 Tenn. 326.

⁴³ (Nebr.), 92 N. W. 760.

⁴⁴ (Mich. 1905), 103 N. W. 597.

⁴⁵ 3 Bush (Ky.) 205.

⁴⁶ 82 S. W. 1001.

what of *obiter dictum*, inasmuch as the court says that the administrator in fact seemed to have money enough to pay. But it probably indicates the rule which is now to be enforced in Kentucky.

Three states, Nebraska, Michigan and Kentucky, are thus seen to have adopted the qualified rule of liability, within the last four years. The only reason, independent of statute, suggested in any case which advocates that view, is the hardship upon the sureties. This does not seem a sufficient justification for relaxing the safeguards which the law deems so essential for the preservation of the trust relation. The principles of equity prescribe, in the interests of an enlightened public policy, that no person, who occupies a position of trust and confidence, shall be permitted at the same time to sustain such personal relations to the subject matter of the trust, that self-interest can become a direct competitor with the most scrupulous fidelity. Any departure from this wholesome principle is too likely to open the door to fraud.

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