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EXECUTORS AND ADMINISTRATORS-POWERS OF EXECUTOR PRIOR TO THE GRANT OF LETTERS TESTAMENTARY

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EXECUTORS AND ADMINISTRATORS—POWERS OF EXECUTOR PRIOR TO THE GRANT OF LETTERS TESTAMENTARY—Testator's will was probated solely for the purpose of passing title to the real estate involved. There was no request for letters testamentary by those named executors in the will, it being alleged that there was no personal estate necessitating administration.[1] Six days prior to the expiration of the statutory period for commencing such an action, plaintiffs, creditors, started a suit against the persons named as executors for the purpose of extending the lien of their debt against the land in the estate. The defendants appeared specially to question the propriety of the action against them. On appeal from the lower court's order requiring them to answer the suit, *held*, affirmed. Defendants are executors for purposes of this suit, and must either answer the complaint or renounce their right to take out letters testamentary. *Cavanaugh v. Dore*, 358 Pa. 183, 56 A. (2d) 92 (1948).

At common law, the authority of an executor to proceed with the administration of the estate of his testator was derived from the will.[2] Accordingly, the will being effective the moment the testator died, it was entirely proper for the executor to collect the assets, pay the debt and legacies—in short, to do

[1] Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 521.

[2] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 590 (1923).

anything he could do after the probate of the will, except to bring suit wherein his derivative title was important.[3] In the latter instance, probate was necessary to furnish authenticated proof of title; but it seems clear, although incapable of proof, that title to the personalty was vested in the executor before probate.[4] An administrator, on the other hand, did not come into being until appointment to the position had been made, though intermeddlers were likely to find themselves labeled executors *de son tort*, and thus held liable for the debts of the decedent.[5] The modern concept of the administration of decedent's estates, under which the title to personal property is deemed to be in abeyance until a representative is appointed and has qualified, has radically changed the common law with regard to the authority of one named in the will as executor prior to his qualification as such.[6] According to present day principles, the only logical difference between an executor and an administrator is in the method by which persons are chosen to fill the respective positions. Yet the decision in the principal case and a few others of similar import would seem to indicate that a nominee of a testator is not entirely without authority to act prior to his appointment by the court. Thus it seems well established that a nominee may bind the estate by receiving notice of dishonor of a note which testator indorsed,[7] though like notice to one subsequently appointed administrator would not bind the estate.[8] Aside from these cases, authority for the proposition in question is lacking.[9] In cases where letters have been issued after the occurrence in question, the court is likely to rely on the more frequently used doctrine of relation, under which the title of a representative is said to relate back to the time of death once he has been appointed, to validate interim acts by the representative.[10] But

[3] 1 WILLIAMS, EXECUTORS, 12th ed., 187 (1930).

[4] See Brazier v. Hudson, 8 Sim. 67, 59 Eng. Rep. 27 (1836), where before probate, the person named executor assigned a lease for years which had been owned by his testator, and then died before probate or the grant of letters testamentary. The court held the assignment valid, the will having been probated before the question arose.

[5] 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 635 (1923).

[6] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 590 (1923); 2 id. 652.

[7] Schoenberger's Executors v. Lancaster Savings Institution, 28 Pa. 459 (1857); Goodnow v. Warren, 122 Mass. 79 (1877); Drexler v. McGlynn, 99 Cal. 143, 33 P. 773 (1893); Harris v. Citizen's Bank & Trust Co., 172 Va. 111, 200 S.E. 652 (1939). Cf. § 98 of the Uniform Negotiable Instruments Law, 5 U.L.A. 431 (1943).

[8] Mathewson v. Strafford Bank, 45 N.H. 104 (1863).

[9] Cases involving the authority of a foreign representative to act in a forum wherein he has not qualified are not deemed in point for the reason that once such person has qualified in one jurisdiction, title to the personalty within the jurisdiction devolves upon him which remains though he leave the forum. Moreover, no distinction is made in such cases between foreign administrators and foreign executors. The cases involving a nominee's power to act decently in burying the decedent and in protecting the assets of the estate, powers generally specifically provided for by statute, are not included for the reason that where such authority is found without the aid of statute, it is deemed that it would not be limited to the case of a nominee alone.

[10] 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., 591 (1930). In this connection, it is interesting to note that two rather recent cases decided in the

where no letters have been issued on which to predicate the relation doctrine, the principal case indicates that in Pennsylvania a nominee has some authority by force of the will alone.

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Superior Court of Pennsylvania, involving a question remarkably like the one in the principal case and arising under the same statute which necessitated plaintiff's action here, reached the same result as was here reached, on the doctrine of relation. The facts differed only in that those sued as executors had taken out letters testamentary soon after the suit was filed. See Beckman v. Owens, 135 Pa. Super. 404, 5 A. (2d) 626 (1939), and Pennsylvania Trust Co. v. Owens, 135 Pa. Super. 409, 5 A. (2d) 628 (1939).