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BILLS AND NOTES - SIGNING IN REPRESENTATIVE CAPACITY - PERSONAL LIABILITY

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RECENT DECISIONS

BILLS AND NOTES — SIGNING IN REPRESENTATIVE CAPACITY — PERSONAL LIABILITY — Defendant, while acting as trustee of the Catholic Diocese of Cleveland, an unincorporated religious association, executed to the plaintiff negotiable promissory notes in the following forms: (1) "Ninety days after date, for value received for The Calvary Cemetery . . . we promise to pay . . . [Signed] Joseph Schrembs, Bishop of Cleveland. Calvary Cemetery Association, By: J. T. B., Treas." (2) "Six months after date, for value received for Sacred Heart of Mary Church . . . we promise to pay . . . [Signed] Councilmen: A. S.; L. F.; V. J. H.; H. S. Z.; Joseph Schrembs, Bishop of Cleveland; F. T. K., Pastor." *Held,* defendant signed in a representative capacity and is not personally liable on either note, since Section 20 [1] of the Negotiable Instruments Law has changed the common-law rules.[2] *George D. Harter Bank v. Schrembs,* 55 Ohio App. 116, 9 N. E. (2d) 154 (1936).

Motivated largely by consideration of practicality, there has been a recent willingness on the part of the courts to include, despite some theoretical objections, the private trustee within the classification of "representative capacity," and thus release him, when properly authorized, from personal liability on negotiable paper.[3] Similar treatment has been accorded executors and administrators, receivers, and the "agents" of a "Massachusetts trust." [4] There is more confusion where a party purports to represent an association which is unincorporated.[5] On the one hand has been arrayed the common-law rule that an agent

[1] "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] The court decided that the representative capacity was indicated by the phrase "value received *for*" and allowed further explanatory parol evidence. On the back of the notes was a recording by the chancellor of the Diocese of Cleveland.

[3] Supporting the view that the trustee is not logically within the section are Scott, "Liabilities in the Administration of Trusts," 28 HARV. L. REV. 725 at 738 ff. (1915); 9 N. C. L. REV. 443 (1931); 7 CIN. L. REV. 288 (1933). Indicating that the statute has probably changed the common law rule are 27 YALE L. J. 686 (1918); 18 CAL. L. REV. 563 (1930); 33 MICH. L. REV. 766 at 773 (1935). The difficulties of the problem are well discussed in 44 YALE L. J. 898 (1935). See also 28 YALE L. J. 613 (1919); WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 862-864 (1929); 21 GEORGETOWN L. REV. 93 (1932).

[4] See 9 MINN. L. REV. 666 (1925), receivers; 9 TEX. L. REV. 299 (1931), business trusts; Jones, "Liability of Those who Sign Negotiable Instruments in a Representative Capacity," 10 TEMPLE L. Q. 55 at 62-64 (1935). See also 34 MICH. L. REV. 121 (1935) and the discussion of the "Massachusetts trust" problem in Hamilton v. Young, 116 Kan. 128, 225 P. 1045 (1924) and annotation thereof in 35 A. L. R. 502 (1925).

[5] *Cases holding representative liable:* Eliason State Bank v. Montevideo Baseball Assn., 160 Minn. 341, 200 N. W. 300 (1924) (agent was not authorized to sign note but released from liability because defective authority was known to payee); Vorachek v.

or representative who acts for a legally non-existent principal, since some effect must be given the contract, necessarily binds himself,[6] which, it is argued, has not been changed by Section 20.[7] "If he signs on behalf of a non-existent principal or a principal without capacity to give authority, his action is equivalent to signing without authority for a principal who is capable of acting for himself," [8] and the representative then becomes liable within the express provisions of the section. The more numerous decisions to the contrary find basis for exonerating the representative of the unincorporated body by calling him a trustee; [9] by relying on statutes which enable suits by or against the associa-

Anderson, 54 N. D. 891, 211 N. W. 984 (1927) (N. I. L. not mentioned), noted in 26 MICH. L. REV. 566 (1928); Phillips & Co. v. Hall, 99 Fla. 1206, 128 So. 635 (1930) (plaintiff was a holder in due course); Catlett v. Hawthorne, 157 Va. 372, 161 S. E. 47 (1931) (N. I. L. not mentioned); Burress v. Banks, 50 Ga. App. 561, 179 S. E. 139 (1935) (semble). *Cases holding representative not liable:* American Trust Co. v. Canevin, (C. C. A. 3d, 1911) 184 F. 657; Wilson v. Clinton Chapel African Methodist Episcopal Zion Church, 138 Tenn. 398, 198 S. W. 244 (1917); Seasongood & Mayer v. Riddle, 18 Ohio App. 88 (1923); Alexander v. Wright, 135 Okla. 96, 274 P. 480 (1929); First Nat. Bank of Pennsboro v. Delancey, 109 W. Va. 136, 153 S. E. 908 (1930); Hawthorne v. Austin Organ Co., (C. C. A. 4th, 1934) 71 F. (2d) 945. Cf. Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738 (1902); Kerby v. Ruegamer, 107 App. Div. 491, 95 N. Y. S. 408 (1905); Chelsea Exchange Bank v. First United Presbyterian Church, 89 Misc. 616, 152 N. Y. S. 201 (1915); Tampa Investment & Securities Co. v. Taylor, 272 Ill. App. 541 (1933).

[6] At common law the agent or representative was personally liable. Chick v. Trevett, 20 Me. 462, 37 Am. Dec. 68 at 69 (1841); Evans v. Lilly & Co., 95 Miss. 58, 48 So. 612, 21 Ann. Cas. 1087 at 1088 (1909); Burton v. Grand Rapids School Furniture Co., 10 Tex. Civ. App. 270, 31 S. W. 91 (1895); Phoenix Ins. Co. v. Burkett, 72 Mo. App. 1 (1897). See annotations and collected cases in 109 Am. St. Rep. 372 at 374 (1906); 69 L. R. A. 255 at 257 (1906); 42 L. R. A. (N. S.) 18 (1909); 21 Ann. Cas. 1088 (1911); 7 A. L. R. 222 (1920); 41 A. L. R. 754 (1926); 61 A. L. R. 241 (1929).

[7] The argument is more by wishful implication than decision. Two cases, Vorachek v. Anderson, 54 N. D. 891, 211 N. W. 984 (1927) and Catlett v. Hawthorne, 157 Va. 372, 161 S. E. 47 (1931), ignored the statute altogether. It got no more than a cursory glance in Eliason State Bank v. Montevideo Baseball Association, 160 Minn. 341, 200 N. W. 300 (1924), where it does not clearly appear whether the body was unincorporated or not, and where the agent was in fact acting without its consent and was released on another ground. The court in Phillips & Co. v. Hall, 99 Fla. 1206, 128 So. 635 (1930), primarily on the basis of the North Dakota and Minnesota omissions of the statute, concluded perfunctorily that it was inapplicable.

[8] Phillips & Co. v. Hall, 99 Fla. 1206 at 1215, 128 So. 635 (1930). The thought is repeated in Catlett v. Hawthorne, 157 Va. 372, 161 S. E. 47 (1931), where the trustees who signed the note were "estopped" to claim that the creditor should look only to church funds for payment and there was no evidence that he had agreed to look only thereto.

[9] American Trust Co. v. Canevin, (C. C. A. 3d, 1911) 184 F. 657; Wilson v. Clinton Chapel African Methodist Episcopal Zion Church, 138 Tenn. 398, 198 S. W. 244 (1917); Alexander v. Wright, 135 Okla. 96, 274 P. 480 (1929); First

tion in its own name [10] or other legislation which gives it a quantum of legal personality so that it may be regarded as a principal; [11] by finding an express agreement on the part of the payee not to hold the representative personally; [12] or knowledge by the payee of the material facts upon which the defective authority is predicated.[13] These theories in result may allow recovery against the association as such, or against the signer in his representative capacity, or the instrument conceivably may bind no one.[14] While such latter conclusion may at times be justified, it would seem that normally the statute should not be interpreted so as to relieve both non-existent principal and unauthorized agent.[15] Nevertheless, it should not be forgotten "that an aggregation of men, which performs acts, incurs liabilities, and owns property as a body, has in fact a personality which cannot be completely ignored by the law without introducing confusion and injustice in practical affairs." [16] The present decision affords no difficulty since

Nat. Bank of Pennsboro v. Delancey, 109 W. Va. 136, 153 S. E. 908 (1930); Hawthorne v. Austin Organ Co., (C. C. A. 4th, 1934) 71 F. (2d) 945.

[10] Seasongood & Mayer v. Riddle, 18 Ohio App. 88 (1923); Hawthorne v. Austin Organ Co., (C. C. A. 4th, 1934) 71 F. (2d) 945.

[11] In Wilson v. Clinton Chapel African Methodist Episcopal Zion Church, 138 Tenn. 398, 198 S. W. 244 (1917), the state statutes allowed a church to hold land and authorized trustees to take title. The court reasoned that such power to hold land carried with it the implied power to build thereon, which gave authority to make necessary building repairs. The church was thus liable as an entity for a note made for such repairs. The religious body had the statutory power to make contracts under Virginia law in Hawthorne v. Austin Organ Co., (C. C. A. 4th 1934) 71 F. (2d) 945.

[12] Such was alleged in Alexander v. Wright, 135 Okla. 96, 274 P. 480 (1929), which was decided on the pleadings. Cf. Chas. Nelson & Co. v. Morton, 106 Cal. App. 144, 288 P. 845 (1930).

[13] Cf. Roberts v. Aberdeen-Southern Pines Syndicate, 198 N. C. 381, 151 S. E. 865 (1930); Baker v. James, 280 Mass. 43, 181 N. E. 861 (1932); Annis v. Pfeiffer, 278 Mich. 692, 271 N. W. 568 (1937), noted in 36 MICH. L. REV. 320 (1937). There are suggestions to this effect in the principal case, 9 N. E. (2d) 154 at 156.

[14] As, for example, where the payee, with knowledge of all the facts, misconceives the law as to the agent's capacity to bind his principal, after agreeing not to hold him personally. See 36 MICH. L. REV. 320 (1937).

[15] "No one," as the Virginia court graphically phrased it, "should be permitted to whistle creditors down the wind." Catlett v. Hawthorne, 157 Va. 372 at 377, 161 S. E. 47 (1931). There appears to be some danger of this in the intimation in Hawthorne v. Austin Organ Co., (C. C. A. 4th, 1934) 71 F. (2d) 945 at 950, that the makers of the note could not be held as members of the unincorporated association because that would violate section 18 of the statute which provides for liability only as to parties who signed the instrument. It was with this that Justice Parker took issue in his dissent, "The designation of the signers of the notes as trustees of the congregation cannot be used to relieve defendants from liability on the ground that it discloses that they were acting as agents for a disclosed principal and at the same time be ignored as disclosing the principal for whom they were acting." (71 F. (2d) 945 at 952.) It would seem from the opinion, however, that the majority contemplated liability on the association in a direct suit against it, for the payment of which the trustees might be liable as members to a contributive amount.

[16] Hawthorne v. Austin Organ Co., (C. C. A. 4th, 1934) 71 F. (2d) 945 at 950. The same is voiced in Seasongood & Mayer v. Riddle, 18 Ohio App. 88 (1923).

it is expressly indicated that the defendant would be liable in his capacity as trustee.[17]

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[17] George D. Harter Bank v. Schrembs, (Ohio App. 1936) 9 N. E. (2d) 154 at 156. It also appears that the lower court offered to treat the association as an entity and enter judgment against it on the notes, which was refused by the plaintiff.