TRUSTS

Incorporation of Amendable Trust Into a Will.

On June 1, 1926, the decedent entered into a contract with the Toledo Trust Company, defendant here, establishing a trust of $15,000, the benefits of which were reserved to himself for life, to his wife for life if she survived him and upon her death the trust res was to be distributed to his daughter. He reserved the right to revoke, alter or amend the trust. Two days later the testator executed his will containing a residuary devise to the Toledo Trust Co. of certain properties which were to be managed in accordance with the terms of the prior trust agreement. Nine days later he executed a supplemental trust adding two new beneficiaries but otherwise specifically confirming and ratifying the provisions of the original. The supplemental agreement was not executed in conformity with the Statute of Wills. The lower court held that the supplemental agreement was valid and the original trust modified accordingly. On appeal, however, it was held that since the original trust was incorporated by reference into the will, it could be modified only by an instrument properly executed as a will and hence the supplemental trust was invalid. *Koeninger* v. *Toledo Trust Co.*, 18 Ohio Abs. 241, 3 Ohio Op. 345 (1934).

From the earliest use of the doctrine of incorporation by reference it has been held that an extrinsic document so incorporated becomes a part of the will itself. *Tonnele* v. *Hall*, 4 N.Y. (4 Comst.) 140 (1850); *Milledge* v. *Lamar*, 4 Desaus. 617 (S.C.) (1816). But a will cannot be revoked in part or in toto by another instrument unless that instrument be executed with the formalities prescribed for the execution of a will. Ohio General Code Sec. 10504-47.

In *Swetland* v. *Swetland* 102 N.J. Eq. 294, 140 Atl. 279 (1928), the testator, by a residuary clause in his will, gave property to a trustee to be disposed of in accordance with the terms of a previously executed inter vivos trust. The devise was held valid as an addition to the trust. The New Jersey Court did not emply the doctrine of incorporation by reference but said in regard to the residuary devise, "By it the testator merely added property to a trust fund established by him years before the execution of his will." Following this view to its logical conclusion we have a bequest to a trustee upon terms which are to be ascertained from extrinsic facts having significance apart from their effect upon the disposition of the property so devised. Somewhat the same view was taken in the case of *In re Locke*, 258 N.Y. 327, 179 N.E. 755, 80 A.L.R. 98 (1932). Also the English Court of Chancery, upon similar

facts, has reached the same conclusion as reached in the Swetland Case. *Hindle* v. *Taylor*, 5 P.M. and G. 577 (1885); *In re Marquis of Bristol*, 1897 L.R. 1 Ch. 946. Another line of authority in England is based upon the theory that the residuary devise of the will creates a second and distinct trust, testamentary in nature, the terms of which are to be ascertained by reference to the first trust. *In re Walpole*, 1903 L.R. 1 Ch. 928; *In re Beaumont*, 1913 L.R. 1 Ch. 325. The effect of either theory upon the present case would be to make the supplemental trust a valid one.

The question of the validity of the incorporation by reference was not presented by either party to the case nor was it discussed by the court. Incorporation by reference is expressly permitted under Sec. 10504-4 of the Ohio General Code. But the will itself must refer to the paper to be incorporated in such a way as to show testator's intention to incorporate such instrument into his will and to make it a part thereof. Page on Wills, Sec. 164; *Thomas* v. *Hobson*, 10 O.C.C. (N.S.) 351, 30 O.C.C. 214 (1907); *Miller* v. *MacKenzie*, 23 O.N.P. (N.S.) 158; 31 O.D. (N.P.) 497 (1920). A document can be given effect as incorporated only in case such appears from the face of the will to have been the wish of the testator. Rood on Wills (2nd Ed.) Sec. 250. In the present case the testator devised property to the Toledo Trust Company, "to be managed and disposed of in accordance with the terms and provisions of a certain trust agreement * * * known as Trust No. 170." Substantially the same language raised a valid incorporation by reference in *In re Willey*, 128 Cal. 1, 60 Pac. 471 (1900). But in the Swetland Case where the same words were employed the doctrine of incorporation by reference was disregarded since the case was decided upon other grounds. We suggest that in the present case there is a question as to whether the testator intended to incorporate into his will as a part thereof the original trust agreement. The language of the residuary devise would allow of the construction, as in the Swetland Case, that the testator merely intended to make an additional bequest to an existing trust.

The case is one of first impression. Any of several theories could form the basis of a decision.

(1) Incorporation by reference of an alterable trust amounts to an attempt to give to the testator the power to dispose of his property by an instrument not duly executed as a will, and hence such a trust cannot be incorporated by reference. *Atwood* v. *Rhode Island Hospital Trust Co.*, 275 Fed. 513 (1921), certiorari denied in 275 U. S. 661 (1922). However, there was a strong dissent in the Atwood Case and the major-

ity of later cases have refuted the doctrine. *Industrial Trust Co.* v. *Colt*, 45 R.I. 334, 121 Atl. 426 (1923); *In re Willey*, 128 Cal. 1, 60 Pac. 471 (1900).

(2) An inter vivos trust, though added to by a testamentary devise, does not become a part of the will or take its character, but remains a trust and as such may be altered or amended. The Swetland Case and the English authorities by disregarding the doctrine of incorporation by reference have followed this line of reasoning.

(3) An incorporated instrument is merged with the incorporating instrument only in respect to those provisions of the former which are not inconsistent with the provisions or requirements of the latter. A revocable trust, therefore, would merge with a will in all respects except that of revocability. This provision being inconsistent with the requirements of a will would not become a part of the will but would stand by itself as applicable to the trust only. Revocability could then be achieved by an instrument not executed as a will. Courts have not applied this theory but it is worthy of suggestion.

(4) The power to revoke or amend, unless exercised by a testamentary instrument, is inconsistent with the principles of a will and by incorporating by reference into a will the document in which such power is reserved, the power is waived.

In the instant case the court has chosen to follow the latter line of reasoning and ample authority is to be found for this position. A discussion of the case is found in 9 University of Cincinnati Law Review 279, May, 1935.

JOSIAH T. HERBERT.

INTERPRETATION OF AN IMPERFECT GIFT AS A SELF DECLARATION OF TRUST.

At the maturity of a note, the payee directed the debtor, her father, to make a new note payable to her 12 year old son, the plaintiff in this action. At the time of making the note the mother said, "If anything happens to me, I want Pop to pay it to Ted." The new note was non-interest bearing and payable at the maker's death. The mother never handed over the note to the plaintiff, but he secured possession of it at a later date. The plaintiff filed claim in the Probate Court of Tuscarawas County against the maker's estate for the amount of the debt. The court disallowed the claim, holding that there was no gift from the mother to the son. *E. R. Ehrhart* v. *E. Coslett, Exr.*, 3 Ohio Op. 364 (1935).

The court in the above case decided that the gift failed for lack of