old rule. But even were Ohio courts in general to espouse one or both of these limitations the Ohio employer would still stand to gain more protection through the use of an express covenant than by reliance upon an implied covenant, as the latter has been restricted in *Curry* v. *Marquart*.[41] JOHN R. YOUNG

[41] 133 Ohio St. 77, 11 N.E. (2d) 868 (1938).

TRUSTS

RESERVATION OF POWERS IN A LIVING TRUST

The Supreme Court of Ohio has recognized the validity of living trusts in a recent case which represents a complete reversal of the court's former attitude toward these devices.[1] Due to the great number of living trusts now existing in this state, as well as elsewhere, and to the great degree of convenience that may be achieved through the continued recognition thereof, a discussion of the development of the problem in Ohio does not seem inappropriate. To attempt a review of all the decisions in this country dealing with the subject would result in a work too lengthy for the purposes for which this article is intended. This discussion, therefore, shall be directed chiefly to the development of the law in Ohio and references to authority outside the state shall be made only for the purpose of comparison and contrast.

In October of 1913, one Thomas H. White conveyed certain real and personal property to the Cleveland Trust Co., giving the trust company broad powers in the matter of investment and reinvestment and unrestricted power to manage as if the absolute owner, but retaining for himself the net income for life and such of the principal as the trustee should deem necessary. White was to have free use of the realty and was to pay the taxes thereon, was to have the right to demand from the trustee a transfer of voting rights in certain stocks, and was to have the right, subject to the trust company's approval, to revoke the trust. The agreement further stipulated that after the death of White the property was to be held in trust for certain named individuals. On the same day, White executed a will devising all of the property to the trust company to be disposed of according to the terms of the trust agreement. Mr. White died in 1914. In January of 1934, the trust company brought an action under section 10504-66 of the General Code for a construction of the so-called trust agreement. The Common Pleas court of Cuyahoga County held the trust agreement was testamentary in

[1] *Cleveland Trust Co.* v. *White*, 134 Ohio St. 1, 15 N.E. (2d) 627 (1938).

character which in legal effect created a mere agency that was terminated by the death of Thomas H. White. Two of the interested beneficiaries perfected an appeal to the Court of Appeals for the 8th District and procured a ruling that the powers reserved to the settlor were not inconsistent with the validity of the trust.[2] Upon granting of a motion therefor, the case was certified to the Supreme Court which affirmed the judgment of the Court of Appeals.

The Supreme Court, speaking through Judge Zimmerman, announced the proposition that an otherwise effective trust was not rendered nugatory by the reservation to the settlor of the following rights and powers: (1) The use of the property and the income therefrom for life; (2) the supervision and direction of investments and reinvestments; (3) the amendment or modification of the trust agreement; (4) the revocation of the trust in whole or in part; (5) the consumption of principle. Relying on sections 57 and 361 of the Restatement of the Law of Trusts, the court said that if an effective trust was created during the settlor's lifetime the disposition did not become testamentary because there was to be no application of the property until after his death. "One who constructs a valid present trust, providing for a life estate in himself with a further trust in favor of other beneficiaries on his death, grants to such beneficiaries an immediate equitable title in remainder, and the arrangement is not of a testamentary nature."[3]

Such a holding is unexpected in view of two earlier rulings of the Ohio Supreme Court in which a contrary doctrine was announced. The first of these cases was *Worthington, Admr.* v. *Redkey*.[4] In that case, the settlor, by a writing, transferred to a trustee a sum of money, "in trust," to be distributed to certain named charities after his death and reserved to himself the power of revocation. On the same day he made a will leaving out the legatees named in the trust agreement. In holding the trust invalid, Chief Justice Davis said that "if the money has not irrevocably passed out of his control to the donees, or to a trustee for them, then this writing is, at best, no more than an ineffectual testamentary disposition."[5] At the time this case was decided, there existed sufficient authority elsewhere in the United States to justify the court in reaching the opposite conclusion,[6] and with the exception of an apparent inconsistency among the decisions in Massachusetts and one or two other cases, noted hereafter,[7] the majority of American jurisdictions have

[2] *Cleveland Trust Co.* v. *White*, 24 Ohio L. Abs. 629 (1937).
[3] *Cleveland Trust Co.* v. *White*, 134 Ohio St. 1, 15 N.E. (2d) 627 at pp.7-8.
[4] Ohio St. 128, 99 N.E. 211 (1912).
[5] *Ibid.*, at pp. 135-6.
[6] *Stone* v. *Hackett*, 12 Gray 227 (Mass. 1858); *Lines* v. *Lines*, 142 Pa. 149, 21 Atl. 809 (1891); *Brown* v. *Spohr*, 180 N.Y. 201, 73 N.E. 14 (1904).
[7] See note 16, *infra*.

adopted a rule *contra* to that of the *Redkey* case, a rule announced in the leading case of *Stone* v. *Hackett*.[8]

At the time of the *Redkey* decision, the trust companies in Ohio were administering a great many living trusts the validity of which would be denied if ever tested in the courts on the basis of the *Redkey* case. To avoid this contingency, the trust companies exerted sufficient pressure on the legislature to secure an amendment to section 8617 of the General Code. At the time the Redkey case was decided, that section read: "All deeds of gifts and conveyances of goods and chattels, made in trust to the use of the person or persons making them, shall be void and of no effect."[9] In 1921, an amendment became effective which provided that a trust for the *exclusive* use of the creator was void but that the creator could reserve to himself "any use of power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend or revoke such trust, and such trust shall be valid as to all persons,"[10] except that any beneficial interest reserved could be reached by creditors and that creditors could compel the exercise of the power of revocation "to the same extent and under the same conditions that such creator could have exercised the same."[11] Since this amendment made only trusts for the *exclusive* use of the creator void, if the trust provided that the property go to another after the death of the settlor it was not for the exclusive use of the settlor and therefore not void, and an entering wedge was created whereby the court could modify its ruling in the *Redkey* case.

The first test of the effect of this amendment came in 1928 in the case of *Union Trust Co.* v. *Hawkins*. There the settlor delivered to the trust company certain property and reserved to herself the net income, and the right to alter, to withdraw the principal and to revoke. By a supplemental agreement, made subsequent to the amendment of section 8617, she disposed of the property after her death. In an opinion by Chief Justice Marshall, the Supreme Court held that, since the settlor reserved the right to modify and revoke, there was not, at common law, a full and complete transfer and that the transaction was testamentary in character, basing the decision on the authority of the *Redkey* case. On rehearing, however, this opinion was withdrawn and another opinion substituted therefor in which the trust was held valid on the basis of section 8617 as amended.[12] In his second opinion in the case, Marshall

[8] *Supra*, note 6.
[9] Ohio G. C., sec. 8617 (1921).
[10] Ohio G. C., sec. 8617 (1939).
[11] *Ibid.*
[12] *Union Trust Co.* v. *Hawkins*, 121 Ohio St. 159, 167 N.E. 389 (1930). For a more detailed discussion of this case, see Rowley, in 3 Cin. L. Rev. 361 (1929).

held to his common law view and decided in favor of the validity of the trust only on the basis of the statute. He said that the words contained in the amended statute, "and such trust shall be valid as to all persons," were susceptible of the interpretation that the trust was valid as to heirs and next of kin, and that it might operate as a devolution of property after death without being executed with the formalities of a will. "It is quite certain that it has been so regarded and trust agreements have been made since that amendment to such an extent as to have become a rule of property. Large estates have been distributed on the faith of their validity and in accordance with the expressed wish of the creators. These distributions should not be disturbed at this time upon a doubtful interpretation of ambiguous legislation."[13] Although a somewhat strained construction of the statute was applied, a desirable and convenient result was reached.

Bearing in mind, then, the early denial of the validity of such trusts as seen in the *Redkey* case, along with the fact that but for section 8617 the validity would have been denied again in the *Hawkins* case, the result in the recent *White* case is surprising, particularly if considered in the light of certain statements made by Judge Zimmerman. "Certain language in the *Hawkins* case, unnecessary to a decision on the ground adopted by the court, (the statute) is to the effect that in the absence of a statute permitting it, a valid trust cannot be recognized where the settlor reserves the right of revocation. Such expression is opposed to the rule announced by all the courts of last resort in other jurisdictions which have spoken on the subject, and cannot be regarded as controlling in Ohio, irrespective of Sec. 8617."[14] So the court has swung around from the *Hawkins* case and has adopted the view of *Stone* v. *Hackett*, thereby virtually overruling the *Redkey* case.

Judge Zimmerman has, in the opinion of the writer, announced a desirable doctrine and one which is amply supported by reputable American authority.[15] Living trusts provide a convenient method for the

[13] *Ibid.*, p. 180.

[14] *Cleveland Trust Co.* v. *White*, 134 Ohio St. 1, 15 N.E. (2d) 627 at p. 11.

[15] In jurisdictions outside Ohio there seems to be little trouble in holding trusts valid where the settlor has reserved only the income for life and a power of revocation. But as other powers are reserved, the problem becomes more difficult and it becomes a question of degree whether the settlor has created a trust or a mere agency. The cases in any one jurisdiction are, however, fairly consistent, with the exception of Massachusetts where there exists an apparent inconsistency. Although Massachusetts is the jurisdiction of *Stone* v. *Hackett*, that court held in *McEvoy* v. *Boston Five Cents Savings Bank*, 201 Mass. 50, 87 N.E. 465 (1909) that the retention by the settlor of the right to be paid such sums as she should demand during her life and the retention of the power to revoke, coupled with a general absence of powers in the named trustee, makes the disposition after the death of the settlor invalid as testamentary. This is a leading case on reservations sufficient to defeat a trust and is relied on and followed in *Warsco* v. *Oshkosh Savings and Trust Co.*, 183 Wis. 156, 196 N.W. 829 (1924). It is, however, difficult to reconcile with the Massa-

handling and devolution of property, and since creditors are sufficiently protected by the provision in section 8617 permitting them to compel a revocation, there would seem to be no objection to recognizing them.

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chusetts cases of *Davis* v. *Ney*, 125 Mass. 590 (1878) where a trust was held valid where the settlor reserved the right to draw such sums as he should desire during his lifetime, this power being treated the same as power to revoke, and with *Jones* v. *Old Colony Trust Co.*, 251 Mass. 309, 146 N.E. 716 (1925) where validity was upheld even though the settlor reserved the power to revoke, modify or change. The only possible distinction between the cases is that drawn by the *Jones* case on the ground that the "nominal trustee" in the *McEvoy* case had none of the ordinary powers of the trustee and was in substance and effect only an agent of the donor. Aside from the situation in Massachusetts, there are few inconsistencies and there appears to be a definite trend toward the rule applied in the *White* case and in *Stone* v. *Hackett*. For a carefully studied review of most of the American cases on this subject, see 38 Yale L.J. 1135 (1929) and 73 A.L.R. 209 (1931).