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.

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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

delivery. It is well settled that in order to have a gift inter vivos, there must be delivery. *Ambler* v. *Boone*, 3 Ohio App. 87 (1914); *Eschen* v. *Stiers*, 10 F(2) 739 (1926). Delivery does not necessarily mean the manual tradition of the chattel or article. The requirements of delivery may be completely fulfilled by actual delivery, constructive delivery, or symbolic delivery. *Wheeler* v. *Wheeler*, 43 Conn. 503 (1876). See Mechem "The Requirements of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments." 21 Ill. L.R. 341, 457, 568 (1927); also see 24 Col. L.R. 767 (1924). A documented chose may be delivered by actual handing over of the instrument or by a deed of gift purporting to transfer the chose to the donee. *Flander* v. *Blandy*, 45 Ohio St. 108, 12 N.E. 321 (1887); *Wright* v. *Bragg*, 106 F. 25 (1901). See 25 A.L.R. 642; 40 A.L.R. 508, and Scott's Cases on Trusts, p. 158.

Concluding that the proposed gift of the note failed in the principal case because of lack of delivery, the court might have found a self declaration of trust, provided the facts warranted such a finding. It is elemental that consideration is not necessary to the creation of a trust. *Ex Parte Pye*, 18 Ves. 140 (1811); Perry, Trusts, Sec. 96; 14 Cal. L. Rev. 188 (1925). There must be intent to create a trust, however, coupled with a declaration either express or implied to establish an *in praesenti* self declaration of trusts. *In Matter of Brown*, 252 N.Y. 366, 169 N.E. 612 (1930); *Poff* v. *Poff*, 128 Va. 62, 104 S.E. 719 (1920). Therefore it might possibly be argued in the principal case that the mother intended to make a self declaration of trust for her son. Evidence of intent to create the trust might possibly have been found by the fact that the mother made the son payee of the note, plus her statement at the time. In *Love* v. *Francis*, 63 Mich. 181, 29 N.W. 843, 6 Am. St. Rep. 290 (1886), the court declared that naming the heirs payees of a note raised a beneficial interest in them immediately, and the one holding possession thereof did so merely as trustee. This decision was followed by *Pohl* v. *Fulton*, 86 Kan. 14, 14, 119 Pac. (1911), where the court held that a trust was created for a son who was mentally unfit to control the note, possession remaining in the mother, who was the donor.

This suggestion, that an imperfect gift may be interpreted to be a self declaration of trust, finds some support in the cases, although this clearly is the minority view in United States and England. *Morgan* v. *Mallison*, L.R. Eq. 475 (1870); *Williamson* v. *Yager*, 91 Ky. 282, 15 S.W. 660 (1891); *Harris Banking Co.* v. *Miller*, 190 Mo. 640, 89 S.W. 629 (1905); *Love* v. *Francis*, *supra*. See *Dewey* v. *Barn-*

house, 83 Kan. 17, 109 Pac. 1081 (1910); also Bogert, TRUSTS AND TRUSTEES, Sec. 205.

In a majority of the jurisdictions no sympathy is extended to the disappointed donees, and the courts refuse to torture an imperfect gift into a self declaration of trust. *Milroy* v. *Lord*, 4 De G.F.&J. 264 (1862) Perry, Trusts, sec. 96; Ames, 130 n.; 133 n.; 37 Yale L.J. 836 (1928); *Young* v. *Young*, 80 N. Y. 422, 36 Am. Rep. 634 (1880). In Vol. 1, TRUSTS AND TRUSTEES, sec. 205, Professor Bogert says, "There is no reason why courts should distort the donor's state of mind, or substitute a device which he never intended to employ." This language is employed because the strict requirements of a trust are not fulfilled by the facts, as in the principal case, which established an imperfect gift. It is settled law in Ohio, in line with the clear weight of English and American authority, that a self declaration of trust is dependent upon the donor's intention to create a trust, *Flanders* v. *Blandy*, *supra*; *Richards* v. *Delbridge*, L.R. 18 Eq. 11 (1874); see *Whitehead* v. *Bishop*, 23 Ohio App. 315, 155 N.E. 565 (1925); *Poff* v. *Poff*, *supra*.

The majority of courts refuse to abate the strict legal essentials of a valid gift inter vivos. They feel that the donee is a mere volunteer who has no enforceable rights in either equity or at law, so therefore he is not put in any worse position. The mere making the donee payee of the note, without delivery does not create an enforceable right, because, in the first place, the gift fails, and, secondly the trust fails, the requirements of a self declaration of trust not being met. *Belshodrodsky* v. *Kuhn*, 69 Ill. 547 (1873); *Fanning* v. *Russell*, 94 Ill. 386 (1880); *Raesner* v. *Bohne*, 76 Ind. App. 114, 129 N.E. 490 (1921); *Riddle* v. *Henderson*, 124 Wash. 31, 213 Pac. 480 (1923). See *Jones* v. *Jones*, 201 S.W. 557 (Mo. App., 1918).

In comparing the above two practices we must realize that under the majority doctrine one volunteer is preferred over another. Usually the cases are between the heirs and the donees and if the imperfect gift cannot be construed as a trust then the heirs are given the property. In this view the intention of the donor is not heeded or considered. It is beyond a question of doubt that the donor intended that the donee have the gift, although he failed to come up to legal requirements to make a gift. Therefore the minority view seems to prefer the disappointed donee rather than the heirs. It construes the imperfect gift to be a trust, and in that way gives effect to the donor's intention.

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