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Trusts--Power of Revocation--Various Methods

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car for his master, the very same negligence must be imputed in an action against a third party.¹⁸

This author suggests that the rights and liabilities of a master should be no more nor less than if he were merely a passenger.¹⁹

The West Virginia Supreme Court of Appeals, however, has adhered to the majority rule despite its shortcomings. In *Divita v. Atlantic Trucking Co.*,²⁰ the court stated that since it was undisputed that the servant was acting for and in behalf of the master plaintiff at the time of the accident, any contributory acts of the servant were imputable to the master-plaintiff.

Although the decision of the Minnesota court rejecting such a rule was limited to automobile cases in which the plaintiff was the master, the decision may be indicative of a future trend in discarding the general theory of imputed negligence. However, as was indicated in the court's opinion, they may continue to be a minority of one.

William Douglass Goodwin

Trusts—Power of Revocation—Various Methods

Decedent prior to death executed two written trust agreements on bank accounts whereby the decedent was named trustee of the separate accounts and certain beneficiaries were designated. The trusts were, by express terms, declared to be revocable. Subsequently, decedent executed a will in which she specifically bequeathed the bank accounts to persons other than the beneficiaries under the trust agreements. The lower court held that the two bank accounts were revocable declarations of trust, not tentative or Totten trusts, and that the will did not revoke such trusts. *HELD*, affirmed. Where a depositor sets up bank accounts in his own name as trustee by means of written agreements specifically stated to be revocable, such trusts are absolute inter vivos trusts, not Totten trusts, and unless the power to revoke by will is specifically

¹⁸ Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 *FORDHAM L. REV.* 156 (1951).

¹⁹ *Ibid.*

²⁰ *Divita v. Atlantic Trucking Co.* 129 W. Va. 264, 40 S.E. 324 (1946).

reserved, the subsequent disposition of the accounts by will is ineffective. *Estate of Anderson*, 217 N.E.2d 444 (Ill. 1966).

Where a trust is created by a written instrument the settlor has the power to revoke the trust only if he has reserved that power in the trust instrument.¹ There are several different methods of exercising this power of revocation. The general rule regarding these various methods of revoking trust instruments are stated by Professor Scott to be, "Where the settlor reserves the right to revoke the trust under certain circumstances, he can revoke it only under those circumstances."² Within this general rule there are four situations more often presented to the courts for judicial solution.

The first of these occurs when the settlor makes a broad statement reserving the power to revoke without specifying the manner or means to effect such revocation. In such a situation the majority of courts hold that a trust containing a general power of revocation can be revoked only by an act taking effect during the lifetime of the settlor.³ Under this rationale an attempted revocation by will fails.⁴

On the other hand, the settlor may provide the trust can be revoked only by will. When these facts are present a general devise of the settlor's estate will not operate to revoke the trust unless the settlor clearly demonstrates an intention to revoke in his will.⁵

The reservation of the power of revocation for life precludes a revocation by will, the theory being that since a will speaks at death, the execution of a will revoking a trust during the settlor's lifetime constitutes merely an intent to revoke at some future time.⁶

Finally, the settlor may provide for the revocation of the trust by means of a written instrument delivered to the trustee or other designated person. The courts generally hold that such instrument must be written and delivered during the settlor's life, and that

¹ Peoples Nat'l Bank v. Pedes, 229 S.C. 167, 92 S.E.2d 163 (1956); Restatement (Second), Trusts § 330 (1959); Contra, CAL. CIVIL CODE § 2280.

² 3 SCOTT, TRUSTS § 9.14 (2d ed. 1956).

³ Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1887); Merchants Nat'l Bank v. Weinold, 22 Ill. App.2d 219, 160 N.E.2d 174 (1959).

⁴ Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1965).

⁵ Old Colony Trust Co. v. Gardner, 264 Mass. 68, 161 N.E. 801 (1928).

⁶ Brown v. International Trust Co., 130 Colo. 543, 278 P.2d 581 (1954).
Leahy v. Old Colony Trust Co., 326 Mass. 49, 93 N.E.2d 238 (1950).

an attempted revocation by will is ineffective.⁷ In this area there is some doubt whether the written instrument required can be provided by the settlor's delivering his will during his lifetime. One court expressly left this point undecided.⁸ and in another case the will was said to be effective as a written instrument if delivered before the settlor's death.⁹ In the latter case, however, the settlor had provided for revocation by will in addition to revocation by written instrument. Where the will is not delivered until after the death of the settlor it is well settled that any attempted revocation by will is ineffective, even though the will directs such delivery.¹⁰

A further means of revocation is by the insertion of a clause in the trust instrument which reserves to the settlor, as trustee, the unrestrained right to invade the trust corpus. He is given the right as trustee to sell, redeem, exchange or otherwise deal with the trust corpus, and upon sale or redemption the trust shall be terminated as to the corpus sold or redeemed and the proceeds of such sale or redemption shall go to the settlor's own personal account.¹¹ In other words, the settlor may remove assets at his own discretion and the trust is effectively revoked with respect to that portion of the corpus withdrawn.

Although trusts containing such a clause have been challenged as illusory¹² and testamentary in contravention of the Statute of Wills,¹³ the majority of the courts have held that the right to invade corpus, even where the settlor is both the trustee and the life beneficiary, will not render the trust invalid.¹⁴ The rationale of the courts when upholding trusts containing the reservation of rights over the corpus which would seem tantamount to ownership is twofold.

⁷Gall v. Union Nat'l Bank, 203 Ark. 1000, 159 S.W.2d 757 (1942); Cohn v. Central Nat'l Bank, 191 Va. 12, 60 S.E.2d 30 (1950); In Re Lachlan's Trust, 24 Misc.2d 323, 193 N.Y.S.2d 408 (1959).

⁸Union Trust Co. v. Watson, 76 R.I. 223, 68 A.2d 916 (1949).

⁹First Nat'l Bank v. Oppenheimer, 230 Ohio P. Ct. 19, 190 N.E.2d 70 (1963).

¹⁰In Re Lyon's Estate, 164 Pa. Super 140, 63 A.2d 415 (1949).

¹¹Investor's Stock Fund, Inc. v. Roberts, 179 F.Supp 185 (1959), *aff'd* 286 F.2d 647 (9th Cir. 1961); Farkas v. Williams, 5 Ill.2d 417, 125 N.E.2d 600 (1955); Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956). See generally Annot., 32 A.L.R.2d 1270 (1958).

¹²*Ibid.* See also, Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E. 2d 60 (1961).

¹³Roberts v. Roberts, 286 F.2d 647 (9th Cir. 1961).

¹⁴1 BOGART, TRUSTS AND TRUSTEES § 104 (2d ed. 1962).

First, in answer to the argument that the transfer is illusory, the statement is made that the trust will be valid as long as the settlor has relinquished some incidents of ownership. Where the settlor is bound by the terms of the trust instrument so that the ultimate beneficiaries, usually the remaindermen, would have a cause of action against the settlor-trustee should he deal with the corpus in a manner inconsistent with the terms of the trust instrument, this will satisfy the requirement that the settlor part with property rights.¹⁵ The quantum of control retained by the settlor is considered incidental, since by reserving a general power of revocation the settlor would possess identical control. Where a right of revocation is retained a settlor can always revoke the entire trust if he is unsatisfied with the administration of the trustee or his benefits under it.¹⁶

When the issue is raised that the reservation of all controls over the trust by the settlor until his death makes the trust a substitute for a will and therefore invalid, the majority of courts have held that the trust will not be considered testamentary unless the death of the settlor is a condition precedent to the vesting of the beneficiaries' interests.¹⁷ The fact that enjoyment is dependent upon survivorship will not render the trust testamentary.¹⁸ Furthermore, as a rule of construction the courts will construe a condition in the trust instrument as subsequent rather than precedent because of the preference in favor of vested interests.¹⁹

In some cases trusts containing extensive powers of management and invasion of corpus have failed, but this would seem to occur only where the surviving spouse in challenging the trust has pleaded and proved actual fraud in regard to the marital rights,²⁰ or the transfer was illusory.²¹ In the absence of actual fraud, and where

¹⁵ *Farkas v. Williams*, 5 Ill.2d 417, 125 N.E.2d 600 (1955); *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961) (corporate trustee not mere agent).

¹⁶ *Roberts v. Roberts*, 286 F.2d 647 (9th Cir. 1961).

¹⁷ *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N. E.2d 60 (1961); *Alexander v. Zion Bank*, 4 U.2d 90, 287 P.2d 665 (1955) (express condition of survivorship).

¹⁸ *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961).

¹⁹ *United Building and Loan Ass'n v. Garrett*, 64 F.Supp. 460 (W.D. Ark. 1945).

²⁰ *In Re Montague's Estate*, 403 Pa. 558, 170 A.2d 103 (1961); 51 Nw. U.L. Rev. 113 (1956).

²¹ *Newman v. Dore*, 275 N.Y. 371, 9 N.E. 2d 966 (1937); *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

the cestui has received a vested interest at the time the trust was created, a settlor may retain broad powers over the trust without rendering the transfer illusory or testamentary.²²

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²² *Burnet v. First Nat'l Bank*, 12 Ill. App.2d 514, 140 N.E.2d 362 (1957); *State v. Felton*, 172 Ohio St. 540, 179 N.E.2d 60 (1961); *Ridge v. Bright*, 244 N.C. 345, 93 S.E.2d 607 (1956).