TRUSTS-ADDITION TO CORPUS BY WILL-NATURE OF BEQUEST

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TRUSTS—ADDITION TO CORPUS BY WILL—NATURE OF BEQUEST—Testator created an amendable inter vivos trust which he amended in 1938, 1940, and 1942. By a codicil to his will, executed in 1945, he left his residuary estate to the trustees of the inter vivos trust to be held according to the terms of that trust as amended. On certification from the probate court, held, the bequest to the trustees was valid, and it was not necessary for the trustees to give bond and account to the probate court as required of trustees of testamentary trusts by statute.\(^1\) *In re York's Estate*, (N. H. 1949) 65 A. (2d) 282.

Bequests to the trustees of previously created inter vivos trusts, to be held subject to the trust terms, have been upheld either on the basis of incorporation by reference or by holding that the existing trust is a fact of independent significance.\(^2\) The difficult issue of the principal case, whether such a bequest creates a testamen-

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\(^1\) 2 N.H. Rev. Laws (1942) c. 363, §1: “Every trustee to whom any estate, real or personal, is devised in trust for any person, shall give bond to the judge of probate, with sufficient sureties, in such sum as the judge may order. . . .”

\(^2\) 1 Scott, *Trusts*, §54.3 (1939). Although the question was not considered in the principal case, the requirements for incorporation by reference make it difficult to sustain a bequest on that basis where the trust is amendable. See Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 3 O. O. 345, 197 N.E. 419 (1934). Amendability of the trust does not invalidate a bequest sustainable by the independent significant doctrine, by the weight of authority: Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); First-Central Trust Co. v. Claflin, (Ohio Com. Pl., 1947) 73 N.E. (2d) 388. Contra: Atwood v. Rhode Island Hospital Trust Co., (C.C.A. 1st, 1921) 275 F. 513; President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S. (2d) 232 (1940).
A document incorporated into a will by reference is considered part of the will.\(^4\) It would seem, therefore, that a will incorporating a trust deed by reference would create a testamentary trust, and that has been the opinion of the few writers who have considered the question.\(^5\) The court in the principal case refuses to sustain the bequest on that basis, but holds that the existing trust has independent significance which controls the disposition without establishing a testamentary trust.\(^6\) Two other cases have reached the same result,\(^7\) both basing their decisions on dicta contained in *Matter of Rausch,*\(^8\) a leading case applying the independent significance doctrine. That case, however, decided only that the bequest was not void under the Statute of Wills, and the nature of the bequest was not in issue. These decisions may have been motivated by the view that subjecting the trustee of an existing inter vivos trust to statutory requirements for testamentary trusts would unduly hamper trust administration. On the other hand, the corpus of the inter vivos trust is swelled by testamentary disposition, and the gift to the trustee is in no sense absolute and unconditional. Therefore, some courts may well feel that the policy reasons for imposing special restrictions on testamentary trusts apply as well where the terms of the trust constitute facts of independent significance as where they are expressed in the will or incorporated by reference.

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\(^1\) PAGE, WILLS 497 (1941); ATKINSON, WILLS 332 (1937).

\(^2\) The problem is likely to arise, as in the principal case, only where testamentary and inter vivos trusts come within the jurisdiction of separate courts, or where other statutory distinctions exist. At common law equity had jurisdiction over both types of trust: Parkman v. Superior Court, 77 Cal. App. 321, 246 P. 334 (1926).

\(^3\) 1 PAGE, WILLS 497 (1941); ATKINSON, WILLS 332 (1937).

\(^4\) Rappaport, “Integrating Instruments of Estate Distribution,” 78 TRUSTS AND ESTATES 571 at 577 (1944); Shattuck, “Some Practical Aspects of the Problems of the Alterable and Revocable Inter Vivos Trust in Massachusetts,” 26 BOST. UNIV. L. REV. 437 at 458 (1946); 1 NOSSMAN, TRUST ADMINISTRATION AND TAXATION 105, 603 (1945).

\(^5\) Principal case at 284.

\(^6\) N.Y. Trust Co. v. Rausch, (N.Y., Nassau Co. S.Ct., 1938) N.Y. LAW JOUR., July 9, 1938, 1 P-H, Unreported Trust Cases, ¶25,438 (1945); Wells Fargo Bank & Union Trust Co. v. Superior Court, 32 Cal. (2d) 1, 193 P. (2d) 721 (1948); 22 So. CAL. L. REV. 205 (1949). Both cases held that statutes giving probate courts jurisdiction over testamentary trusts did not apply to bequests sustained by the independent significance doctrine.

\(^7\) 258 N.Y. 327 at 331, 179 N.E. 755 (1932): “At the execution of this will there was in existence a valid deed of trust whereby a trustee was under a duty to apply the subject matter of the grant to uses there declared. All that the latter will do is to give additional property to the same trustee to be held in the same way. . . . A gift to a trust company as trustees of a trust created by a particular deed identifies the trust in describing the trustee, like a gift to a corporation for the uses stated in its charter. . . . The legacy when given was not the declaration of a trust but the enlargement of the subject matter of a trust declared already.”