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Trusts—Retention of Control by Settlor—Testamentary Dispositions

(1921) 289 Mo. 493, 233 S. W. 397; *Havel v. Minneapolis & St. L. R. Co.* (1913) 120 Minn. 195, 139 N. W. 137. The sort of negligence which will outweigh plaintiff's contributory negligence has most often been characterized as "willful and wanton," although the term "gross negligence" has been used in some cases under this rule. *Simon v. Detroit United Ry.* (1917) 196 Mich. 586, 162 N. W. 1012; *Davis v. Saginaw-Bay City Ry. Co.* (1916) 191 Mich. 131, 157 N. W. 390. Therefore the court was reasonably justified in placing "gross negligence," as defined in the opinion, in the same category with willful and wanton negligence as the phrase is used in the cases where the plaintiff's negligence is discounted. The feature of the case which is rather strange, as appears only from the opinion, is the designation of a mere violation of a highway statute as "gross negligence." In the cases supporting the rule excusing contributory negligence, willful misconduct, or misconduct so wanton and in reckless disregard of life and property as to raise a presumption of intention, has been the controlling consideration. In several cases, the violation of a highway statute has been expressly declared not to amount to "gross negligence." *Hopkins v. Droppers* (1924) 184 Wis. 400, 198 N. W. 738; *Ludke v. Burck* (1915) 160 Wis. 440, 152 N. W. 190; *Riggles v. Priest* (1916) 163 Wis. 199, 157 N. W. 755; Huddy, AUTOMOBILES (8th ed.) sec. 364. It would seem that something more is required to constitute gross negligence than the mere fact of driving on the wrong side of the street, since the violation of statutes and ordinances of this type are regularly held to amount only to negligence *per se*. *Cabanne v. St. Louis Car Co.* (1913) 178 Mo. A. 718, 161 S. W. 597; *Yellow Cab Co. v. Carlsen* (1918) 211 Ill. App. 299; *Baird v. Ridgeway* (Tex. Civ. App. 1925) 268 S. W. 1058; *Alexander v. Industrial Board* (1917) 281 Ill. 201, 117 N. E. 1040; Huddy, AUTOMOBILES (8th ed.) sec. 360.

W. V. W., '30.

TRUSTS—RETENTION OF CONTROL BY SETTLOR—TESTAMENTARY DISPOSITIONS.—To what extent may the settlor of a trust wherein the beneficiaries are to take after his death retain control over the property during his life without conforming to the requirements for the execution of a will? Since the practice of entrusting the management of property and its disposition after death to trust companies has become common, the question of the amount of power which the settlor may validly reserve has become increasingly important. A recent Illinois case holds that the reservation to the settlor of the rights to the net income of the property for life, to approve loans made by the trustee, to have his debts paid out of the trust estate, to make a division of the real estate among his children which should bind the trustee, and to revoke or alter the deed in whole or in part, does not make the instrument a testamentary disposition, and void for lack of proper execution. *Bear v. Millikin Trust Co.* (Ill. 1929) 168 N. E. 349.

It is elementary that the fact that the settlor reserves a life estate in the property does not make the disposition testamentary. *Lewis v. Curnutt*

(1906) 130 Iowa 423, 106 N. W. 914; *Scrivens v. North Eastern Savings Bank* (1896) 166 Mass. 255, 44 N. E. 251; *Smith v. Savings Bank* (1887) 64 N. H. 224, 8 Atl. 792. Nor does the additional fact that the settlor reserves the right to revoke the trust. *Bowdoin College v. Merrett* (1896) 75 F. 480; *Booth v. Oakland Bank* (1898) 122 Cal. 19, 34 Pac. 370; *Lewis v. Curnutt*, above. But where the settlor retains other elements of control the question arises whether the court should not declare the instrument incapable of creating a valid trust. There are two reasons for this: first, that such control is reserved to the settlor as to constitute the trustee a mere agent, whose authority is revoked by the death of the settlor, and second, that the instrument is an attempted testamentary disposition without statutory execution. Both are based upon the same factor, the retention of control by the settlor, so they may be considered together.

How completely must the settlor part with the property constituting the trust? The rule was laid down in *Warsco v. Oshkosh Savings and Trust Co.* (1924) 183 Wis. 156, 196 N. W. 829, that "there must be an alienation of the donor's property constituting the trust to the trustee and under such terms that when the trust is executed a benefit accrues to the cestui que trust unless prevented by a condition subsequent resulting from the lawful revocation of the trust. If the donor has full control and dominion over the trust property, so that according to the terms of the trust he can use it as and when he pleases, the trustee becomes his mere agent to hold title to the property, invest, sell, and collect income for him and pay as he directs." Applying this reasoning the court held, "In the present case the only thing the donor parted with irrevocably, and that only in case of his death before the trust property was consumed, was that the remainder should go as directed. But that was an attempted testamentary disposition of property and not made in pursuance of the statute." In a leading case on similar facts, *McEvoy v. Boston Five Cents Sav. Bank* (1909) 201 Mass. 50, 87 N. E. 465, the court in speaking of the settlor declared, "Her rights as beneficial owner during her life were not limited in any material way. . . . The other part of the trust created by the instrument in the present case relates solely to the disposition of the property after the assignor's death. It follows that the only material effect of the instrument was testamentary."

This doctrine of determining the character of an instrument purporting to create a trust by its material effect is now not accepted in most jurisdictions, the leading case against it being *Kelly v. Parker* (1899) 181 Ill. 49, 54 N. E. 615. This case lays down the rule that if an instrument purports to be a deed *in praesenti*, subject to certain reservations, conditions, and trusts, it will be considered a deed *in praesenti* despite the character of the reservations and conditions. See also *Roberts v. Taylor* (C. C. A. 9, 1924) 300 F. 257; *Nat. Newark & Essex Banking Co. v. Rosahl* (1925) 97 N. J. Eq. 74, 128 Atl. 586; *Wilcox v. Hubbell* (1917) 197 Mich. 21, 163 N. W. 497. The rule seems unreasonable, but it may be logically defended. The only estate reserved is a mere life estate; the fee passes according to the terms of the trust. "The powers of revocation and of directing a certain division of the property were only powers, and not estates, and did not enlarge the life estate. His deed conveyed to the grantee all the title he possessed, which was his fee." *Bear v. Millikin Trust Co.*, above. Consequently the deed is considered a good deed *in praesenti*, and its validity cannot be questioned. The case was undoubtedly decided correctly according to the Illinois law as laid down in *Kelly v. Parker*, above, but it is difficult to see how the instrument, both in purpose and effect, was more than a testamentary disposition plus an appointment of an agent to manage the property. See "Testamentary Instrument" 8 Words and Phrases (First Series) 693; 7 Words and Phrases (Third Series) 452.

Let us return to our original problem: How can a person who does not want to make a will provide for the disposal of his property after his death and nevertheless maintain his ability to control and dispose of it during his life? If he makes a trust deed reserving an estate for life and providing that all his property at his death should go as directed, the instrument will be declared testamentary; if he tries to reserve an estate to himself under which he would have the rights he desires to keep, the instrument will be a nullity, for a fee cannot be reserved out of a fee; but if he makes a deed purporting to convey the property *in praesenti*, reserves a life estate, and provides he is to have certain *powers* of control and disposition, most jurisdictions will hold that a valid trust has been created, and, because of a mere difference in words, will effectuate an intention which, if expressed differently, they would have refused sanction. J. A. G., '31.