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Court of Appeals

STATE OF UTOPIA

NEW YORK UNIVERSITY SCHOOL OF LAW

TRUST COMPANY OF UTOPIA, as Trustee,
Plaintiff-Appellant,

against

JANE K. DURFEE, as Executrix,
Defendant-Respondent.

BRIEF FOR THE APPELLANT

NORMAN ARKOWITZ,
HARRY BALTERMAN,
MAX M. KAMPELMAN,
Counsel for Appellant.

Argued before:

HON. PETER M. DALY,
Justice, New York Supreme Court.

HON. SIMON H. RIFKIND,
Judge, United States District Court.

WALTER W. LAND, Esq.,
Director, Trust Division, American Bar Ass'n.

April 22, 1942.

Court of Appeals

STATE OF UTOPIA

NEW YORK UNIVERSITY SCHOOL OF LAW

TRUST COMPANY OF UTOPIA,
as Trustee,
Plaintiff-Appellant,

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JANE K. DURFEE, as Executrix,
Defendant-Respondent.

BRIEF FOR THE APPELLANT

Statement of Facts

Henry Durfee, having successfully withstood the depression, determined to retire and allow a trustee to manage his affairs. Accordingly, in 1935 he deposited with Plaintiff, The Trust Company of Utopia, securities of the aggregate value of $150,000, approximately one-half of his fortune. He deposited these securities under a trust indenture, whereby Plaintiff as trustee was to hold the title, and pay the income to the settlor for life, and on his death to divide the principal into three equal parts. Then to pay the income from the first part to his widow, Jane K. Durfee, during her life, and then the principal to his cousin; the income from the second part to his sister, Helen D. Lourie, during her life, and then the principal to his cousin; and the third part outright in three equal parts to

his widow, his college, and his church. Under the terms of the trust indenture the settlor reserved the right to modify, amend, alter or revoke it, in whole or in part, or to add or withdraw any securities, money, or other property at any time by an instrument in writing duly signed, executed, and delivered to the trustee. In 1936, the settlor made and executed his last will and testament naming his wife, Jane K. Durfee, as executrix, providing for the payment of his debts and expenses, and the residue of his estate to the Trust Company of Utopia as trustee to be added and administered in accordance with the trust already established with it. In 1937, pursuant to his reserved powers, the settlor amended the provisions of the trust by changing the name of one of the beneficiaries from his college to his law school. In 1938, he again amended the trust, pursuant to his reserved powers, by adding additional securities of the value of $50,000 to the trust fund.

Henry Durfee died in 1941, leaving him surviving a widow and her two children from a former marriage. Thereafter the will was admitted to probate. There was approximately $200,000 in the *corpus* of the trust and $100,000 in the estate. The trustee claims title, as such, to the $100,000 of the estate to add to the trust fund according to the terms of the will. The widow, as executrix, resists this claim, relying on the doctrine against the incorporation of an unattested writing into a will, and the fact that the trust agreement could not act as a testamentary disposition, first, because it and its amendments were not attested in accordance with statutory requirements, and secondly, because the reserved powers of the settlor would allow him to change his testamentary dispositions without changing his will.

The Surrogate awarded the $100,000 to the executrix, as widow and sole heir of deceased. From this decree the trust company appeals.

Introductory Analysis

It is the contention of the Appellant herein that the Surrogate in the court below erred in holding the devise to the Trust Company of Utopia invalid and in awarding the residuary estate of Henry Durfee to his widow, the respondent herein. On the ground that the trust created by Henry Durfee is a valid *inter vivos* trust and is an instrument of full legal significance, Appellant maintains that since an incorporation by reference of a document having an independent legal significance into a will is permitted by law, the trust agreement herein, as amended, should be incorporated into the will of Henry Durfee. It is also submitted that even if it be held that the trust agreement, as amended, cannot be incorporated by reference, the testamentary disposition is valid nevertheless, as resort may be made to the trust so as to carry out the intent of Durfee as expressed in his last will and testament. In addition, it should be pointed out that the real party in interest in the instant case is not the widow, who is adequately provided for, but her two children who will get $25,000 apiece on their mother's death only if she wins; and not the trust company, but the testator's cousin and the deserving charitable institutions which would benefit under the trust on its termination, if the widow loses.

POINT I

The trust created by Henry Durfee is a valid *inter vivos* trust and is an instrument of full legal significance.

It is well established in law that a trust agreement wherein the settlor reserves the right to modify, alter, amend, or revoke it, is a valid *inter vivos* trust and is not testamentary in character requiring an attestation in accordance with the statutory requirements for the execution of wills.

Van Cott v. *Prentice,* 104 N. Y. 45 (1887);
Robb v. *Washington & Jefferson College,* 103 App. Div. 327, aff'd 185 N. Y. 485 (1906);
Pinckney v. *City Bank Farmers Trust Co.,* 249 App. Div. 375 (1937).

In *Brown* v. *Spohr,* 180 N. Y. 201, 209 (1904), the rule was enunciated that there are four elements essential to the creation of a valid trust:

(1). a designated beneficiary;

(2). a designated trustee;

(3). a fund sufficiently identified to enable title thereto to pass to a trustee; and

(4). the actual delivery of the fund to the trustee with the intention of passing title.

Durfee by his indenture of 1935 designated the beneficiaries, designated the trustee, identified the fund and delivered the fund to the trustee so as to pass title to it. Since we have here the four essential elements of a valid trust it cannot be alleged

that the trust was invalid at its inception. The only possible contention that can be advanced with regard to the trust is that it is testamentary in character and therefore invalid because not executed in accordance with statutory requirements. It is submitted that any contention of this type is unfounded in law and cannot be sustained.

Thus in *Pinckney* v. *City Bank Farmers Trust Co.,* 249 App. Div. 375, the claim was, as here, that the trust was testamentary in form and that the deed therefore constituted a testamentary disposition of property, invalid because not executed in accordance with the statutory requirements for wills. In that case the deceased on July 2, 1928 created a trust and on June 23, 1930 executed his last will and testament. By the trust agreement and the supplement thereto, he assigned to the trustee personal property of the value of more than $40,000, "together with any and all additions thereto or substitutes therefor" in trust to pay the net income to the settlor for life, and upon his death, if the trust be not revoked, to set up other trusts from the *corpus* and make distribution as directed. The trust instrument reserved in the settlor the right to direct the retention and sale of securities, as well as the right to modify and revoke the trust. The instrument was neither executed nor attested in accordance with the statutory requirements for wills. By his will the deceased gave his residuary estate to his wife and directed that the trustees be allowed and required to carry out the provisions of the trust theretofore committed to it. In an action wherein the trust was attacked by the next of kin of the deceased on the ground that it was testamentary in character and therefore invalid, the court in upholding its validity declared (p. 377):

"* * * there is no support in the authorities for appellant's claim, viz., that the right to revoke, and the lesser powers reserved, were destructive of the trust, and render the instrument testamentary. Such reservations are not inconsistent with a valid trust."

Accord:

Van Cott v. *Prentice,* 104 N. Y. 45 (1887);
Robb v. *Washington & Jefferson College,* 103 App. Div. 327, aff'd 185 N. Y. 485 (1906).

Section 18 of the Decedent Estate Law gives a surviving spouse a personal right of election to either take under the will or to take his or her share of the estate as in the case of the intestacy of the deceased spouse. This section was enacted to assure the surviving spouse the right to a beneficial enjoyment of one-third of decedent's property, which is the minimum he or she would have received had the decedent died intestate. Its sole purpose was to protect a spouse against disinheritance.

In Re: Moore's Estate, 165 Misc. 683 (1937);
In Re: Clark's Estate, 169 Misc. 202 (1938).

In *Newman* v. *Dore,* 275 N. Y. 371 (1937), the deceased, recognizing the statutory rights of his wife under a previously existing will, executed trust agreements by which, in form, he transferred to trustees all his real and personal property. He reserved, however, the enjoyment of the entire income for life and in addition reserved not only the

power of revocation but also full control over the trustees and the investments. The wife being excluded as a beneficiary of the estate by the setting up of the trusts contested a suit brought by a beneficiary of the trust to compel the trustees to carry out the terms of the trust.

The New York Court of Appeals, basing its decision on the fraud and trickery employed by the decedent so as to deprive the widow of her statutory rights declared the trust to be illusory and an unlawful invasion of the wife's statutory interest. The court, however, assumed without deciding, that except for the provisions of the Statute, the trust would be valid.

Under no circumstances can it be established that the trust herein of Henry Durfee possessed a background of fraud and trickery and was employed to deprive the settlor's widow of her statutory rights in the estate. On the contrary Henry Durfee did not intend, nor did he, with the creation of the trust, deprive his wife from inheriting from his estate. In fact she was well provided for. The trust agreement and the will were executed as part of a complete scheme of disposition of his estate with ample provision for his wife's welfare. Therefore the principle enunciated in *Newman* v. *Dore* has no application to the case at bar and the conclusion is inescapable that the trust agreement herein as created in 1935 and as it existed from time to time and at the date of death of the testator was a perfectly valid document of full legal significance.

POINT II

Since an incorporation by reference of a document having an independent legal significance into a will is permitted by law, the trust agreement herein, as amended, should be incorporated by reference into the will of Henry Durfee.

Under the doctrine of incorporation by reference, an unattested instrument existing at the time a will is executed may become a part of the will by incorporation provided the testator so intended and the will refers to and identifies it as an existing document.

Matter of Rausch, 258 N. Y. 327 (1932);
Thompson, *Wills,* 2nd Ed., 1936, Sec. 106,
Pp. 137, 138 and cases therein cited;
68 Corpus Juris, Sec. 268 and cases therein cited.

A progressive and evolutionary exposition of the establishment, decline and reestablishment of this doctrine will be found in the cases of the State of New York in which the question has arisen. As a result of the better considered cases in that state there has been evolved what is today the generally accepted test of "independent legal existence" of the instrument attempted to be incorporated into the will. If this test is met, incorporation will be allowed.

In the leading case of *Matter of Rausch,* 258 N. Y. 327, 332, the requirements necessary to satisfy this test have been set forth as follows:

1. Reference must be to a document or something equivalent thereto;
2. The document must be in existence at the time of the making of the will;
3. The tests of identification must be precise and definite.

To use the words of the Restatement of the Law of Trusts and a host of law review writers, the rule is simply thus:

> "A testamentary reference is valid if the facts or documents so referred to have legal force and significant existence independent and apart from their status in the will."

18 N. Y. U. L. Q. Rev. 284 (1941) and the authorities therein cited;
Restatement of Trusts, Sec. 54.

It is respectfully submitted to this Court that the trust agreement of Henry Durfee, as created in 1935, and as it existed as amended on the date of the testator's death, meets the established and accepted tests, comes under the accepted rule and hence is the proper subject of an incorporation by reference.

A. Under the law as it exists today, a valid *inter vivos* trust agreement is the proper subject of an incorporation by reference.

The courts have constantly permitted and have upheld reference in wills to valid *inter vivos* trusts although the terms of the trust were not set forth in the will and although the trust agreement was not executed in accordance with testamentary requirements.

Thus, in *Matter of Rausch,* 258 N. Y. 327 (1932), Herman Rausch executed a trust agreement with the New York Trust Company of New York City on April 15, 1922. The trust agreement assigned to the trustee specified shares of stock to be applied by the trustee for the support of Rausch's daughter. It also stated that by a will previously made, the grantor had set apart for her use a sixth of his residuary estate, to be held by the Trustee as an addition to and part of the trust estate and to be administered as a part thereof in accordance with the directions of the trust indenture.

On November 25, 1927, Rausch executed a will whereby he gave one-fifth of his residuary estate "To the New York Trust Company of New York City, to be held by said Trust Company in trust for the benefit * * *" of his daughter, "under the same terms and conditions embodied in the Trust Agreement made between myself and the said New York Trust Company, dated April 15, 1922, the principal to be disposed of as contained in the said agreement, and which agreement is hereby made part of this my will, as if fully set forth herein."

After Rausch's death, objections as to the validity of the will were made by the next of kin of the deceased. The lower court held the will valid. The Appellate Division reversed (234 App. Div. 626), and held that as to a fifth of the residuary estate there had been a violation of the rule forebidding the incorporation of unattested documents into a will by reference. On appeal to the Court of Appeals, the Appellate Division was reversed and the will held valid and not in violation of the rule (258 N. Y. 327). Per Cardozo, *Ch.J.,* the court stated (p. 331):

> "The rule against incorporation, well established though it is, is one that will not be carried to 'a dryly logical extreme' (*Matter of Fowles,* 222 N. Y. 222, 233). It is one thing to hold that a testator may not import into his will an unattested memorandum of his mere desires and expectations, his unexecuted plans (*Booth* v. *Baptist Church of Christ,* 126 N. Y. 215, 247). It is another thing to hold that he may not effectively enlarge the subject matter of an existing trust by identifying the trust deed and the extent and nature of the increment."

The court then proceeded to set forth the test, cited *supra,* page 9, as the one to be applied in order to determine whether a given document could properly be incorporated into a will by reference (p. 332).

The court then declared in no uncertain terms (p. 333):

> "The rule against incorporation is not a doctrinaire demand for an unattainable perfection. It has its limits in the considerations of practical expediency that brought it into being. Here the identification of the donee is itself an expression of the gift, the discovery of the one being equivalent to the ascertainment of the other."

Accord:

Matter of Bremer, 156 Misc. 160 (1935);
Matter of Andrus, 156 Misc. 268 (1935);
Matter of Tiffany, 157 Misc. 873 (1935);
Matter of Comey, 173 Misc. 377 (1940);
Swetland v. *Swetland,* 102 N. J. Eq. 294, 140 Atl. 279 (1928);
Estate of Willey, 128 Cal. 1, 60 Pac. 471 (1900);
Linney v. *Cleveland Trust Company,* 30 Ohio App. 345, 165 N. E. 101 (1928).

As a result of these cases, the law as it exists today, clearly recognizes that a valid *inter vivos* trust agreement is the proper subject of an incorporation by reference.

B. The trust agreement of Henry Durfee, as amended, is the proper subject of an incorporation by reference.

The question as to whether amendments to a trust agreement incorporated by reference into a will, which amendments were made after the execution of the will, can likewise be incorporated, has never been adjudicated by the Court of Appeals of the State of Utopia. This court is, therefore, in the enviable position of having the opportunity to analyze the decisions of other jurisdictions and accept for its own only those which will meet the needs of the State of Utopia. The fact that other jurisdictions may consider themselves bound by a rule of law holding that such amendments cannot be incorporated into a will is not conclusive as far as this court is concerned.

This prohibition in other jurisdictions is primarily based on the reluctance of the courts to permit unattested documents to change the contents of a formally executed will. The reason for this prohibition becomes clear in the light of the following analysis of the problem.

At early common law, most wills and testaments were made orally. Writing, however, soon began to come into frequent use and in 1540 the English Statute of Wills was passed. While this statute gave a person owning real property full power by law to dispose of this property by a will in writing, there were still no formal requirements as to an execution of a will.

As writing came into general use, the danger of fraud in a will without any formalities as to its execution became apparent. The case of *Cole* v. *Mordaunt,* 1675 (stated in note to *Mathews* v. *Warner,* 4 Ves. Jr. 186, 31 Eng. Rep. 96) vividly brought the possibility of fraud to the attention of the courts. As a result, the Statute of Frauds was passed in 1676.

Thus, for the sole purpose of preventing fraud, all devises of lands and tenements were required to be in writing and signed by the devisor or some other person in his presence and by his express directions. It also had to be attested and subscribed in the presence of the said devisor by three or four credible witnesses. These same requirements with later modifications subsequently became a part of American Law.

It can readily be seen, therefore, that the prevention of fraud was a primary consideration in the law of wills. This court undoubtedly well recognizes the wisdom of preserving that consideration in the State of Utopia. At the same time, however, both common law and modern law recognize another primary consideration of co-equal importance —that of ascertaining and carrying out the intent of the testator wherever possible. Thus, in *Robinson* v. *Martin,* 200 N. Y. 159, 164, it was stated:

> "Where, upon inspection of the will and upon a consideration of relevant facts and circumstances, an intent is apparent, all rules to the contrary must yield; provided that intent does not offend against public policy * * *"

and again in *Matter of Rooker,* 248 N. Y. 361, it was held that such intent, if it can be discovered, is paramount and controlling and will prevail despite established rules or principles of testamentary construction to the contrary.

In the light of the past history of the law of wills, it is readily seen that the sole purpose of allowing one to make a will was to give effect to his wishes as to the disposition of his property after death. Thus, the carrying out of those wishes together with the protection of a testator from fraud being practiced on him became the very essence of public policy everywhere.

Since, therefore, the carrying out of the wishes and the intent of the testator is one of the aims of public policy, a construction of a testator's will which would render that intent valid is always to be preferred over one which would render it invalid. A court, whenever it possibly can do so, should struggle to preserve the testamentary intent of the testator and should surrender to nothing short of absolute compulsion. Before arriving at a decision, the facts and surrounding circumstances of each case should be carefully weighed and considered. Carefully thought out testamentary provisions or plans should not be swept aside in a frantic and entirely illogical effort to establish invalidity. A court should rather endeavor to uphold and effectuate the clearly expressed intent of a testator and that is all that appellant is asking this court to do. The intent of the testator is clear —it is that the trust agreement as it existed on the date of his death should be incorporated into his will. Combining this clarity of intent with the fact that there is no question as to the genuineness of the will, the trust or the amendments, how can there be any valid or weighty objection to allowing the incorporation sought? The trust and its amendments were all duly executed formal documents of independent legal significance—there is not the slightest scintilla of evidence of an attempt to thrust upon the testator herein any instruments

that are not his own. The question of fraud has not been raised and in fact cannot be raised.

Appellant is not asking this court to lay down any sweeping general rule which would open wide the door to the practice of fraud and deceit on a testator. Appellant only claims that the relevant facts and circumstances of this case demand an incorporation of Durfee's trust agreement into his will as the agreement existed on the date of his death. By allowing such an incorporation, this court will by no means be acting contrary to, or in offense of, the established public policy of this state but will in fact be acting in a definite furtherance of such public policy.

POINT III

Even if it be held that the trust agreement, as amended, cannot be incorporated by reference, the testamentary disposition to the trustee is valid nevertheless, as resort may be made to the trust so as to carry out the intent of the testator as expressed by his will.

If this court should hold that the trust agreement of Durfee, as amended, is not the proper subject of an incorporation by reference, the testamentary disposition to the trustee is valid nevertheless, as the trust agreement can be referred to as an extrinsic fact of independent legal significance for the purpose of ascertaining and carrying out the intent of the testator as expressed in his will.

It is an established principle, quite axiomatic and needing little citation of authority, that in interpreting a will, the cardinal rule of construction

is to so construe it as to carry out the intent of the testator. It is equally well recognized that the intent of a testator, if not readily ascertainable from the will itself, can be ascertained by the reference to extrinsic evidence.

Matter of Clendenin, 175 Misc. 585 (1940);
Matter of Martin, 255 N. Y. 248, 254 (1931);
Bauman v. *Steingester,* 213 N. Y. 328 (1915).

The propriety of applying this doctrine so as to give effect to the bequest to the appellant herein is clearly expounded by Professor Scott in 1 Scott, *Trusts,* Secs. 54.2 and 54.3:—

> *"Where disposition is determined by facts of independent significance.* * * * Even though a disposition cannot be fully ascertained from the terms of the will, it is not invalid if it can be ascertained from facts which have significance apart from their effect upon the disposition in the will. Indeed it is frequently necessary to resort to extrinsic evidence to identify the objects or the subject matter of a disposition."

* * *

"If the original trust was created by a written instrument and the settlor in his will bequeaths other property to the same trustee 'upon the trusts declared in a certain deed of trust' bearing a certain date executed by the settlor, there are two possible grounds for upholding the testamentary trust, although the terms of the trust are not set forth in the will. In the first place, the deed of trust may be held to be incorporated in the will by reference. In the second place, it may be held that the terms of the trust

> are ascertainable from facts having significance apart from their effect upon the disposition of the property devised or bequeathed in the will."

The situation in the case at bar is squarely in point with this proposition. The ultimate takers of the testator's property are not identified in the dispositive provision of his will; that provision identifies a trust agreement. By reference to that agreement the identity of the persons to whom the property is to be distributed after the decedent's death may be ascertained. Whether that original agreement is or is not amended in accordance with the reserved powers is of no significance; and it is also of no significance whether, if amended, the amendment is executed before or after the execution of the will. The amended instrument stands on the same level of dignity as the original trust agreement—there is still one trust that is being dealt with—the original one as amended. The trust as it existed on the date of the testator's death is beyond question a fact which has significance apart from its effect upon the property devised or bequeathed by the will.

That this proposition is not all theory, but is in fact sound law, is readily perceived from a close analysis of the cases of:

Matter of Piffard, 111 N. Y. 410 (1888);
and
Matter of Fowles, 222 N. Y. 222 (1918).

In the *Piffard* case, the testator in his will gave one-fifth of his estate to his daughter. By codicil he added a provision, providing in substance, that in case of her death before him, the legatees under her will should be deemed to be the legatees under

his own insofar as one-fifth of his estate was concerned. The daughter died before her father and after the subsequent death of the father the validity of the provision in the codicil was questioned. Since the case was one involving a power of appointment, the court was confronted with the rule that a power created by will lapses if the donee of the power dies before the maker of the will. The application of this rule would make the provision invalid. So also, by strict interpretation, the doctrine of incorporation by reference could not be applied because there was no reference to a previously existing document. Nevertheless, the court declared the provision valid and held that the daughter's will might be referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom, and the proportions in which, the one-fifth should pass by the father's will. Thus the court did nothing more than to refer to an extrinsic document of independent significance in order to ascertain and carry out the intent of the testator.

In the *Fowles* case, the same problem was involved. In order to carry out the intent of the testator the court would have to refer to a will of the testator's wife which was not necessarily in existence at the time of the execution of the testator's own will and that was exactly what the court did. The decision was not based on the rules governing powers of appointment—neither was it based on the rules governing incorporation by reference. It was based on something else and that something else was the reference to extrinsic matter of independent legal significance. The court, in fact, found it quite fit to express the opinion that "Some reference to matters extrinsic is inevitable."

Accord:

Condit v. *De Hart,* 62 N. J. L. 78, 40 Atl. 776 (1898).

The very same principle is involved in the case now before this court. The language used by the testator herein is clear and explicit and the intent of the testator is obvious. He desires his property to go to the Trust Company of Utopia to be used by it for the benefit of the persons designated as beneficiaries of the trust. This intent should certainly be given effect and can be done so by just referring to an extrinsic document of independent legal significance—the trust agreement as it existed on the date of death of the testator. As has been pointed out elsewhere in this brief, there is no opportunity for fraud or mistake here. There is no chance of foisting upon this testator a document which fails to declare his purpose. Once identify the amended trust and you ascertain the intent of the testator. Once the intent of the testator is ascertained, it should be given effect and carried out.

It is submitted to this court that in questions of this type it is always the character of the extrinsic evidence that is of importance. If reference can be made to a will of another so as to ascertain and carry out the intent of a testator, reference can certainly be made to a trust agreement executed by the testator himself for that very same purpose. One is just as solemn an instrument as the other and one has just as much independent legal significance as the other. On reason and authority, therefore, the conclusion is inevitable that the bequest to the Trust Company of Utopia can be, and should be, given effect as a valid bequest.

POINT IV

The decree of the Surrogate should be reversed, and the residuary estate consisting of $100,000 should be awarded to the Trust Company of Utopia as trustee.

Respectfully submitted,

NORMAN ARKOWITZ,
HARRY BALTERMAN,
MAX M. KAMPELMAN,
Counsel for Appellant.

C O U R T   O F   A P P E A L S

STATE OF UTOPIA

New York University School of Law

GOLDMAN,
Plaintiff-Appellant,

-against-

PEPSODENT CORP.,
Defendant-Respondents.

BRIEF FOR RESPONDENTS

Max Kampelmacher,

Norman N.Arkowitz,
Counsel for Respondents.

U.S.

April 5th, 1941

Sharfman } Monday
Simion

Briefs by Mond 28th
Trial Thur 1st

Statement of Facts

Goldman owned a five story building on Times Square N.Y.C. Using a standard form lease, Goldman leased the roof and space above to Pepsodent Corp. for two years from Jan.1, 1931 at $5,000 a year. The space was to be used for a large electric sign, advertising the corporation's products. Goldman reservedcthe right to enter in the roof and make any repairs necessary to preserve the building. Otherwise, the corporation was to have the exclusive privilege of using the roof for display purposes and of entering on the premises to make changes or repairs. The corporation erected at its own expense a large electric sign which cost $10,000. It was securely bolted to the structural steel frame of the building. In December, 1932, the Camel Cigarette Corp. approached Goldman and offered to take the space for five years. Goldman answered that he had not yet heard what the Pepsodent Corp. wanted to do. On January 10th, the Pepsodent sign was still in place and no word had been received by Goldman from the Pepsodent Corp. Goldman consequently wrote the Pepsodent Corp. that he elected to treat the Pepsodent Corp. as hold-over tenants for another year. The Pepsodent Corp. replied that it had no wish to continue. The dark sign continued in place until May and was then removed by the Pepsodent Corp. Goldman refused

several offers to re-let the premises because the lease agreement gave him no right to re-let for the benefit of the Pepsodent Corp. On January 2nd, 1933, Goldman brought an action for $5,000. for one year's rental. The case was presented to the court without a jury on an agreed statement of facts, and from a decision rendered for the defendant, the plaintiff appealed.

Introductory Analysis

The respondents will prove that, although a standard form lease was the instrument used by the parties, the agreement entered into, under the facts and circumstances of the case before us, did not constitute a lease, but a license. An agreement whereby the owner of property gives another the privilege of using a part of that property for certain stated purposes, namely, the erection and maintenance of a sign for advertising purposes, without a right of possession in the premises, does not create the relation of landlord and tenant.

The respondents will also show that, even if the agreement was a lease, and not a license, the failure to remove the sign did not, as a matter of law, create a holding over. There is no basis, therefore, upon which the appelant can maintain an action for a full year's rental.

POINT I

THE AGREEMENT BETWEEN THE PARTIES IS NOT A LEASE, BUT A LICENSE.

The plaintiff brings an action against the defendant for a year's rental as a holdover tenant. In order for him to maintain this action, he must prove the existence of a landlord and tenant relationship between the parties. If the agreement between the parties is not a lease, but a license, or an easement, or a simple agreement, then the failure to remove the sign at the expiration of the term does not constitute a holding over. (Chase v. 2nd Ave. R.R. Co., 97 N.Y. 384; Goldsmith v. Outdoor Advertising Co., 264 N.Y.S. 189.) The question, therefore, whether this contract between the parties is a lease or not.

In order for this agreement to be construed as a lease, and the defendant as a tenant, an estate in land must have been created, to the exclusion of all other parties. If merely the privilege of using the land for a stated purpose is given, then, in spite of the words, "let" and "lease", no legal tenancy is created. (Reynolds v. Van Beuren, 155 N.Y. 122; Lewis v. Baxter Laundries, 236 N.W. Rep. 239; United Merchants Realty and Improvement Co. v. N.Y. Hippodrome, 133 App. Div. N.Y. 582; Goldman v. N.Y. Advertising Co., 29 Misc. N.Y. 133; Taylor v. R.C. Maxwell Co., 31 Fed. (2), 711; Realty Advertising and Supply Co. v. Richard Hickson, 184 N.Y. App. Div. 168)

In United Merchants Realty and Improvement Co. v. N.Y. Hippodrome, 133 App. Div. N.Y. 582, the contract was very similar to the one under discussion. In that case, the defendant had access to the roof during business hours for the purpose of erecting and maintaining an advertising sign. The plaintiff reserved the right to enter on the roof and make any improvements it might require. In his discussion of the language used, Judge Ingraham said,

> "The fact that the words, "lease" and "let" were used is not conclusive evidence of a lease. The essential element of a lease of real property is lacking. The defendant acquired no right of possession of the property, but simply a right to erect an advertising sign upon the plaintiff's building with a right of access to the sign when erected. Defendant never was in possession of plaintiff's property, but merely acquired the privilege of entering on the property to erect and maintain the sign.... Failure to remove the structure, when it is doubtful whether the defendant had a right to remove without plaintiff's consent, is not a holding over or continuing in possession of plaintiff's property which entitles plaintiff to continue the arrangement for another year." (underscoring ours).

In Reynolds v. Van Beuren, 155 N.Y. 120, the defendants were advertisers using the sign for the purpose of displaying printed advertisements before the public. They were neither owners nor tenants of the building on which the sign was erected. In commenting on this agreement, Judge O'Brien says,

> "While this paper is called a lease, it is manifestly nothing more than a mere license by the tenant in possession to the defendants to go on the roof of the building.... It conveys no interest or

> estate whatever in the realty and no possession or right of possession to the building, or any part of it."

In Goldman v. N.Y. Advertising Co., 29 Misc. N.Y. 133, the contracting parties used the form of a landlord-tenant lease, whereby the defendants "leased" the westerly wall of the plaintiff's house for one year for advertising purposes. Speaking for the court, Justice Leventritt, in holding that no landlord and tenant relationship existed between the parties, even though the instrument had the appearance of a lease, said,

> "The relation of landlord and tenant did not exist. The contract between the parties was not one for the possession or profits of lands or tenements. Under it no estate or interest passed to the defendant. No possession or right of possession to the realty or any part vested in the defendant. The ... agreement merely gave it (Defendant) the authority to do one particular act on the plaintiff's property and no other..... It had the right of occupation only to the extent of displaying the advertisements of its patrons. Clearly the instrument was not a lease, (Taylor, L. &. T. 8th Edition, Section 14; McAdam L.& T. 2nd Edition, 48,51; Lowell v. Strahan, 145 Mass. 1,12) and consequently the alternative liability attaching to one holding over under a demise cannot be fastened on the defendant.
>
> "It is unnecessary for the determination of this appeal to decide whether the paper in question created a license or an easement, or was merely a simple contract between the parties. It is sufficient that it was not a lease.... Regarding it as a license irrevocable for one year, no rights or duties devolved on the defendant upon the termination of that period."
> (underscoring ours)

In Walsh's, The Law of Property, 2nd Edition, Sect. 148, the author sayd that a tenancy is an estate in land.

> "A tenant has something more than a mere privilege or license; he has ownership exclusive and as against all the world, including his landlord, and if this be absent in any disputed case, the relationship of landlord and tenant does not exist."

In the case at bar, the defendant did not have the exclusive ownership of the premises as against all the world, but merely the "exclusive privilege of using the roof for display purposes, and of entering on the premises to make changes or repairs." The defendant did not, therefore, have "something more than a mere privilege" which was necessary to constitute a tenancy. The defendant could not use the roof for anything but the stipulated purpose. Were he a tenant, he could certainly have used the roof in any lawful manner that he wished. The agreement in this case, however, gave the defendant no such rights. He could not, for instance, use the roof to take a sun bath or to watch a parade. The defendant had no estate in the land. He was not even allowed unrestricted access to the roof. On the contrary, he is said to have access thereto only "to make changes and repairs". His use was restricted to the single exclusive privilege described in the agreement.

In Lewis v. Baxter Laundries, 236 N.W. Rep. 239, it was held that a writing purporting to "let and lease and give" exclusive permission to erect and maintain signs on a roof, was a license, not a lease.

In May v. Breunig, 120 N.Y. 98, it was held that a contract for the right to place signs on the building of another does not create the relation of landlord and tenant. So also in Realty Advertising Co. v. Richard Hickson, 184 N.Y. App. Div. 168; Taylor v. R.C. Maxwell Co., 31 Fed (2) 711;Baseball Publishing Co. v. Bruton, 119 A.L.R. 1518; Gaertner v. Donnelly, 296 Mass. 260.

In Goldsmith v. Outdoor Advertising Co., 264 N.Y.S. 189, the plaintiff gave to the defendant the right and privilege to erect and maintain signboards... on the roof of premises owned by her, reserving in her the right of access. The agreement expired in July, and the sign was not removed until August. Here it was held that, disregarding the provision that "this is a license, not a lease", the agreement would have been held to be a license, and as such, the rule as to the effect of holding over does not apply.

In Walsh's, The Law of Property, 2nd Edition page 240, Section 150, he says,

> "A license is a mere privilege or permission given by the owner of land authorizing another to enter and to use or occupy the land or part or it for any special purpose.... Ownership and dominion over the land has not been given to him, but has been retained by the owner."

Then, in Section 151, Walsh goes on to say,

> "The distinction between a license and a tenancy is clearly illustrated by the so called advertising cases, the right to use a wall or to erect and maintain a sign for advertising purposes being given by an instrument in the form of a lease."

The plaintiff reserved the right to enter onto the roof and make repairs at any time, and no right of entry is conferred on the plaintiff for a breach of any of the covenants. When all these elements of the contract are considered, it is impossible to conclude that the purpose was to convey to the defendant an estate in the property. If there was a lease, there must have been a subject matter devised. It surely was not the roof, for the plaintiff reserved the right to enter upon the roof at any time and make repairs and to exclude the defendant therefrom except so far as access to the roof was necessary to erect and maintain the sign.

An analysis of the contract, therefore, discloses no substantial grounds of distinction between this case and the cases cited. For example, if the signboard had already been erected, there would be nothing in the language different from the Reynolds or Goldman cases. There is no distinction in principle between a contract granting a right to affix a sign to a wall or a contract granting a right to place advertisements on a billboardand a contract granting a right to put the sign up. There is no legal distinction between placing and maintaining a sign on a roof and placing and maintaining a sign on a wall. In each case the owner of the land grants to the so called tenant not an estate in the property, nor an interest that would entitle the tenant to

maintain ejectment, but a mere contractual privilege to do something on the realty.

To say that this defendant had an estate in the land is to say that it was a necessary party to actions affecting the realty, that it might maintain ejectment, that it would be entitled to an award in the event of condemnation. The contract contemplated no such rights.

For all of the above reasons, the respondent maintains that this agreement constituted a mere license, and not a lease, and therefore the respondents are not liable for a year's rental as hold-over tenants.

POINT II

ASSUMING, BUT NOT CONCEDING, THAT THE AGREEMENT IS A LEASE AND NOT A LICENSE, THE FAILURE TO REMOVE THE SIGN DID NOT, AS A MATTER OF LAW, CREATE A HOLDING OVER.

A tenant must retain the property in the manner in which it was meant to be used, or he cannot be considered to be a hold over. In the case at bar, the defendant erected an electric sign at a cost of $10,000. on the roof of a building on Times Square. It is common knowledge that the chief purpose of electric advertising displays on Times Square is to attract the attention of the crowds of passersby at night. During the Day, Times Square is nothing more than an average mid-town business district. But the electric displays

of Times Square at night are known throughout the world. It is for these dazzling signs that Times Square has become famous.

Therefore, it is only reasonable to assume that the main purpose of the particular sign in question was to shine at night on the throngs of sight see-ers and theatre goers attracted by the lure of Times Square at night. We find, however, that the sign had been darkened and hence was unnoticeable at night for the entire period during which the plaintiff maintains that the defendant held over. By no stretch of the imagination could this be considered as using the premisesin the manner in which they were intended to be used. Thermere character of the sign was such that the defendants did not, in leaving it, retain possession of the premises as a matter of law.

If the plaintiff's theory of the case be sound, then the defendant was the lesse of the entire roof. And yet, how can it be treated as holding over merely because it left a sign on a part of the roof. Whether the act of a tenant leaving his property on the premises amounts to a holding over, depends on the extent of the property so left, and its relation to the building. The mere leaving upon the premises of certain property belonging to the defendant did not, of necessity, constitute a holding over.

In Canfield v. Harris, 225 N.Y.S. 709, it was said,

> "To give the landlord the right to treat a tenant who holds over after the expiration of a definite term for a year or years as a tenant for another year, there must be actual retention of the premises by the tenant. Whether the tenant's mere leaving of the property on the premises after the expiration of the lease entitles the landlord to another year's rent is usually a question of fact for the jury to decide."

> "While a holding over might constitute strong evidence of an intent to renew or extend a lease, yet, where there is, as in this case, no intention shown to renew or extend, the occupancy is merely a tenancy at will." Sargent v. Reed, 128 Me. Rep. 269.

In Myers v. Beakes Dairy Co. 122 App. Div., N.Y., 710, it was said that,

> "a landlord alleging a tenant held over is under a burden of establishing that fact, and that the possession of the tenant was a continuation of the possession acquired under the lease."

BROOME-CLINTON CO. V. WOLTZER 144 N.Y.S. 768; Excelsior Steam Power Co. v. Halstead, 5 App. Div. N.Y. 124; Frost v. Akron Iron Co., 1 App. Div, N.Y. 449; Smith v. Marfield, 9 Misc. N.Y. 42; Mager v. Barrett, 139 App. Div. N.Y. 172;

Judge Ingraham, in United Merchants Realty Co. v. N.Y. Hippodrome, 133 App. Div. N.Y. 582, said,

> "Under the circumstances heredisclosed, whatever may be said to be the relation between the parties during the continuance of the agreement, the fact that the defendant did not remove the bulletin board from the top of plaintiff's building during the time the agreement was in force was not a holding over of the premises which entitled the plaintiff to elect to continue the agreement for another year."

Would anyone say that a tenant of a building who had left a sign on the wall must be held, as a matter of law, to retain possession? Does any different rule apply to the tenant who had left a sign on the roof? Clearly, from the foregoing cases, it does not appear to be so. Therefore, assuming, but not conceding, that there was a relation of landlord and tenant, the plaintiff could not recover, as a matter of law, for a year's rental, for the sign was not used in the manner in which it was intended to be used.

POINT III

RESPONDENTS SUBMIT THAT FOR THE FOREGOING REASONS, THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,
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April 5th, 1941.