

1945, there is no occasion to extend the principle in order to sustain the disposition which the testator sought to make. See *First-Central Trust Co. v. Clafin*, (Ohio C. P.) 73 N. E. (2d) 388.

The answer to the second question certified by the Probate Court depends upon the theory adopted in sustaining the testamentary disposition. See Scott, *op. cit.*, s. 54.3; 1 Bogert, *Trusts & Trustees*, s. 106; Shattuck, *Estate Planners' Handbook* (1948) s. 14. Under the doctrine of incorporation by reference, it might be thought necessary to establish a testamentary trust. Cf. Shattuck, *Inter Vivos Trust in Massachusetts*, 26 B. U. L. Rev. 437, 457, 458. However, the proposed disposition is equally sustainable according to the view that the *inter vivos* trust is a fact "having significance apart from the disposition of the property bequeathed," which may be relied upon to control such disposition without violation of the Statute of Wills. Scott, *op. cit.* p. 300. Under this view, which we are satisfied to adopt, it is possible to carry out the testator's expressed preference that the residue shall become a part of the *res* of the *inter vivos* trust, to be administered by the trustees under powers derived from it, rather than the will. There "then . . . seems to be no reason why the payment or transfer should not be regarded as the exact equivalent of any other outright payment of a devise or bequest." Shattuck, *Inter Vivos Trust in Massachusetts*, *supra*, 458. See also, *Matter of Rausch*, 258 N. Y. 327, 331. Thus the executors may pay the legacy to the trustees of the *inter vivos* trust, taking their receipt therefor, and no occasion arises for the establishment of a testamentary trust, or for invocation of our statutes relating to the appointment of trustees.

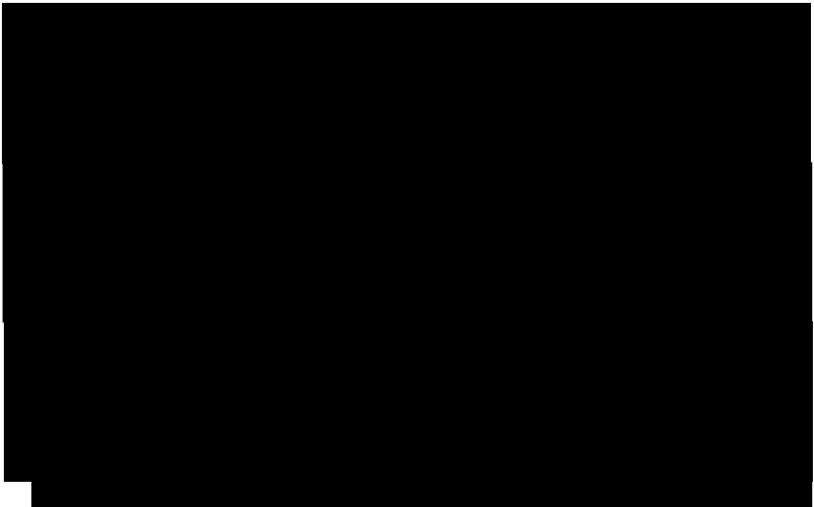
The first question certified is accordingly answered in the affirmative and the second in the negative.

Case discharged.

KENISON, J., was absent: the others concurred.

Hillsborough, }
May 3, 1949. } No. 3775.

RICHARD M. YORK & a. v. STANLEY MISIAK & a.



Morris D. Stein for the plaintiffs.

Leonard G. Velishka and *Alvin A. Lucier* (Mr. Lucier orally), for the defendants.

BLANDIN, J. An examination of the record discloses evidence to warrant the Court's general finding of a right of way between twelve and fifteen feet wide in favor of the plaintiffs across designated portions of the defendants' premises. Since prior to the issue of the decree no special findings or rulings were requested or made, this finding, impliedly including all subsidiary findings necessary to sustain it, must be upheld. *Hope Shoe Company v. Company*, 89 N. H. 178, and cases cited; *New Hampshire Savings Bank v. Bank*, 93 N. H. 326.

It is doubtful if the Court intended to decree anything other than an easement appurtenant acquired by prescriptive use, however, if the parties wish further clarification they may petition the Superior Court since the defendants' present objection to the failure of the Trial Justice to make more specific findings and rulings comes too late. *Cotton v. Stevens*, 82 N. H. 105. See also, *Sisters of Mercy v. Hooksett*, 93 N. H. 301, 310.

Decree affirmed.

All concurred.