

Matter of Totten - An Anomaly in the Law of Trusts

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months later when the broker had not yet sold the property, this mortgagor, under threat of foreclosure, reconveyed to the mortgagee. This was held to constitute a sale within contemplation of the parties, and the mortgagor-seller had to pay a commission though he had received no consideration for his irrevocable offer. Suffice to say, the equities are not always with the broker. A resurgence of the doctrine of consideration to render a promise binding might better "effectuate justice between the parties."

The basic fallacy in this area is the supposition that the owner bargained for the broker's efforts, or that these efforts constitute an acceptance of the owner's offer. It is submitted that this is contrary to the agreement, and to the owner's promise, which would reward only success, regardless of verbiage about "services." "The acceptance of a unilateral contract must be by all the acts contemplated by the offer."⁵⁹

⁵⁹ *Bartlett v. Keith*, 325 Mass. 265, 90 N.E. 2d 308, 310 (1950).

MATTER OF TOTTEN—AN ANOMALY IN THE LAW OF TRUSTS

The term Totten Trust¹ is a familiar one.² A comprehension of the meaning of the term exists in the minds of the majority of lawyers to varying degrees. Yet, the very danger of the Totten Trust lies in this vague familiarity which leads to various misconceptions.

Many lawyers feel that the Totten Trust is the law throughout the land, and that it is certainly the law in their particular jurisdiction, though the question may never have been litigated. There are those who accept it as a valid trust without question, completely overlooking its transgression of many of the settled concepts of trust law. Oftentimes, bank accounts for more than a single person are indiscriminately labeled as Totten Trusts.³

The purpose of this discussion is to dispel the misunderstandings and doubts concerning the Totten Trust. The analysis of this anomaly⁴ in the

¹ *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

² The Totten Trust is often referred to as a "tentative trust" also.

³ See footnote 30 for a treatment of the problem.

⁴ In 1905 the case *Matter of Totten* was thought to be judicial legislation. For example, one author said:

"This decision has been widely commented upon by legal journals and, so far as the writer is aware, has been unanimously disapproved. It is inconsistent with earlier authorities in the State of New York. It introduces a serious anomaly into the law of trusts; indeed, a trust that is revocable at the will of the creator can hardly be said to be a trust at all. It impugns the policy of the statute of wills, by permitting a disposition of property to take effect only after death, without following the testamentary requirements. On the other hand, as a piece of constructive legislation the decision could hardly be too highly praised. It effectuates a custom which has grown up among the hum-

history and law of trusts will involve a complete coverage of the area, including an analysis of states adhering to the doctrine, states which have rejected it, and states which have never considered it.

BACKGROUND TO THE LAW OF TRUSTS

I. HISTORY

Uses and Trusts were introduced into England shortly after the Norman conquest.⁵ Maitland suggests that the first general employment of trusts would be as uses in the thirteenth century when lands were conveyed to be held to the use of the Franciscan Friars, who by the laws of their order were not allowed individually or as a community to own property.⁶ By the fifteenth century, the custom of conveying land to uses had become so common that during the reign of Henry V (1413-1422), it has been said, that the greater part of land in England was held in use.⁷ By this method, tenants could avoid the exactions of their lord, forfeitures and dower could be avoided, creditors could not reach the cestui que, and religious corporations could hold land in spite of the mortmain acts.⁸ At first, these trusts or uses were purely honorary and not enforceable in any court of law because of the rigidity of early English law.

bler classes of people who, in placing their money on deposit in trust for other persons, often intend to retain the right to use it, principal as well as interest, during life, but that whatever remains at the time of death shall go the *cestuis que trust*. Under the law as it stood the estates of depositors, who as trustees had drawn money from accounts, would be liable to refund the same to the *cestuis que trust*. The validation of the business custom in question seems so unobjectionable, indeed so desirable, that the writer has on various occasions advocated the enactment of a statute on just the lines laid down in the Matter of Totten. He did not believe that a court would venture upon such a radical innovation and it is difficult to justify it as an exercise of judicial power." 14 Yale Law Journal 312, 315 (1905).

⁵ There has been some conflict among the authorities as to the derivation of the trust. Some scholars believed that the trust evolved from the Roman *fidei-commisum*. Story Eq. Juris. §§ 966, 967 (1918). Pomeroy, Eq. Juris § 976-978 (1918).

More recently however the authorities have agreed that the trust evolved from the German *treuhand* or *Salmon*. Holmes, Early English Equity, 1 L. Quart. Rev. 162 (1885); Ames, Origin of Uses & Trusts, 2 Select Essays in Anglo-American Legal History, 739, 740 (1893); Maitland, The Origin of Uses, 8 Harv. L. Rev. 127, 136 (1894). It also has been suggested that the *Wakf* or *Waqf* which is the equivalent under Moslem law of a charitable trust, gave rise to the English use or trust. Khadduri & Liebesny, 1 Law in the Middle East, 212-218 (1955). Consult Newman on Trusts, 4-9 (2nd Ed. 1955) for the trust concept in other legal systems.

⁶ Maitland, The Origin of Uses, 8 Harv. L. Rev. 127, 130 (1894).

⁷ Digby, History of Law of Real Property, 320 (1950). The words "use" and "trust" are often employed as synonyms. However there was a distinction at common law. A trust which was active or special, that is, one where the trustee had duties to perform was properly called a "trust." When the trust was passive and the trustee had no duties to perform, it was called a "use." Also see Ecclesiastical Origin of the Use, 10 Notre Dame L. Rev. 353 (1935).

⁸ See 1 Bogert, Trusts & Trustees, 13 (1951).

There could be no remedy at law unless a writ could be found to fit your case and no such writ existed for the beneficiary of a trust or use. Thus, the trustee of the property could do with it as he wished and the beneficiary was helpless to stop him.⁹ However, with the development of the Court of Chancery, the uses and trusts became enforceable, since in Chancery, equity and fairness ruled and not technicality.¹⁰

In 1535, the Statute of Uses¹¹ was passed, the object of which was to convert the equitable interest of the *cestui que use* into a legal interest. This was passed to prevent the loss of feudal rights by the landlords; obviate fraud on creditors, alienees, doweresses and tenants by the curtesy; and injure the religious orders which were the beneficiaries of uses.¹² The statute expressly did not apply to personal property and was held, upon interpretation, to apply only to passive trusts or uses, thus leaving Chancery free to enforce active trusts.¹³ All these interests which were unaffected by the Statute of Uses, and which were recognized and enforced by Chancery, became more commonly known as "trusts" and form the basis of our modern system of that subject.¹⁴

II. DEFINITION

The difficulty with defining a trust¹⁵ has led many authors to list its characteristics rather than to attempt a definition. The following characteristics are to be noticed: (1) a trust is a relationship; (2) it is a relationship of a fiduciary character; (3) it is a relationship with respect to property, not one involving merely personal duties; (4) it involves the existence

⁹ Ames, Lectures on Legal History 236, 237 (1893). Holdsworth IV History of English Law 407 (1922).

¹⁰ Ames, Origin of Uses and Trusts, 2 Select Essays in Aug. 6—American Legal History, 741, 742 (1893).

¹¹ 27 Henry VIII (1535), C. 10.

¹² Jenks, Short History of English Law 99 (1949). Also see Holdsworth, Causes Which Shaped The Statute of Uses, 26 Harv. L. Rev. 108, 121 (1912).

¹³ In Tyrrels' Case, Dyer 155 (1557), the statute was held not to apply to a use on a use. For a discussion of the effect of the Statute of Uses, see 1 Bogert, Trusts and Trustees § 5 (1951).

¹⁴ See 17 Mich. L. Rev. 87 (1918) for a discussion of the reasons for the survival of the trust.

¹⁵ The Restatement of Trusts adopts the definition that it is "a fiduciary relationship with respect to property subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Rest., Trusts § 2 (1935). Bogert defines a trust as a "fiduciary relationship in which one person holds a property interest for the benefit of another, Bogert, 1 Trusts and Trustees § 1 (1951). Walter G. Hart, after considering and criticizing all the important definitions since 1734, defines a trust as "an obligation imposed, either expressly or by implication of law, whereby the obligor is bound to deal with the property over which he has control for the benefit of certain persons, of whom he may himself be one, and any one of whom may enforce the obligation." What Is a Trust? 15 L. Quart. Rev. 301 (1899).

of equitable duties imposed upon the holder of the title to the property to deal with it for the benefit of another; and (5) it arises as a result of a manifestation of intention to create the relationship. The combination of these things characterizes the notion of the trust as that notion has been developed in the Anglo-American law.

III. CLASSIFICATION

Trusts, in respect to the ways in which they arise, are divided into (1) express trusts, (2) resulting trusts, and (3) constructive trusts.¹⁶ Express trusts come into being because the parties concerned have formed the actual intent that they shall arise and have expressed that intent in written or spoken words or otherwise and have made the requisite property transfers. Resulting trusts occur where the courts presume or infer from certain acts that the parties intended a trust to exist, although the parties expressed no such trust intent directly and may not actually have it. Constructive trusts are imposed by chancery on the holders of legal or equitable titles as means of accomplishing justice and preventing unjust enrichment. The scope of this discussion shall be hereafter limited to the express trust.

IV. CREATION

The principal methods of creating an express trust are generally treated according to the following enumeration: (1) a declaration by the owner of property that he holds it as trustee for another person; (2) a transfer inter vivos by the owner of property to another person as trustee for the transferor or for a third person; (3) a transfer by will by the owner of property to another person as trustee for a third person; (4) an appointment by one person having a power of appointment to another person as trustee for the donee of the power or for a third person; (5) a promise by one person to another person whose rights thereunder are to be held in trust for a third person.¹⁷ These methods of creation shall become important in a subsequent discussion of the validity of the legal results of the *Matter of Totten*.

¹⁶ This classification is adopted in the Restatement of Trusts in Section 2 (1935). 1 Scott on Trusts § 2.1 (2nd ed., 1956), also adopts the classification. Cf. Bogert 1 Trusts and Trustees 7 (1951). Bogert classifies trusts into two main groups, express trusts and implied trusts with two subdivisions under each main heading. Private and charitable trusts are under the heading of express trusts while resulting and constructive trusts are subheads under implied trusts. Some authors have classified trusts into four groups, namely, express, implied, resulting and constructive. They feel that an implied trust exists because the parties used certain language which does not clearly create a trust, but is construed by the courts to have that intent. Lewin, Trusts, 16, 82 (14th ed., 1888); Perry on Trusts § 112 (7th ed., 1889).

¹⁷ See Rest., Trusts § 17, (1935); 1 Scott on Trusts § 17-17.5 (2nd ed., 1956); 1 Bogert, Trusts and Trustees, § 41-80 (1951).

V. ELEMENTS

The authorities agree that there must be four distinct elements in every private express trust. They have been enumerated as follows: (1) there must be an intent to create a trust; (2) there must be a trustee; (3) there must be a res; (4) there must be a cestui que trust. These are determined by asking four questions: (1) Is a trust intended? (2) Who is trustee? (3) Of what is he trustee? (4) For whom is he trustee?¹⁸

VI. REVOCATION OF A TRUST

It is important to note in the discussion of the Totten Trust that the ordinary trust is irrevocable by the settlor, unless he demonstrates his desire for a power of revocation. This reservation of a right of revocation does not invalidate a trust¹⁹ since the exercise of the right to revoke operates as a condition subsequent.²⁰ Further, it has been said that "unless it can be gathered from the language used by the settlor or from the circumstances that he intended to reserve a power to revoke the trust, the trust is irrevocable."²¹

VII. TESTAMENTARY DISPOSITION

A trust may often involve the post-mortem distribution of property and, as such, is commonly known as an inter vivos trust.²² In effect, it is a disposition of property generally accomplished by a will.²³ By definition, a will is "the expression, in the manner required by law, and operative for no purpose until death."²⁴ It would seem that an inter vivos trust falls under this definition and, therefore, to avoid fraud, should comply with the formalities required by the Statute of Wills.²⁵ The law here makes a

¹⁸ The settlor of a trust is the person who intentionally causes the trust to come into existence. The trustee is the person who holds the title for the benefit of another. The trust property is the property interest which the trust holds, subject to the rights of another. The beneficiary is the person for whose benefit the trust property is held or used by the trustee. See 1 Bogert, *Trusts and Trustees* § 1 (1951).

¹⁹ *Jones v. Clifton*, 101 U.S. 225, 229 (1879).

²⁰ The recognition of the validity of rights of revocation in trusts presents no difficulty when one considers that rights of re-entry for condition broken and rights for revocation in obsolete deeds are now recognized in England and the United States. Tiffany, *Real Property*, § 681 (3rd ed., 1939).

²¹ 3 Scott on *Trusts* 2393 (2nd ed., 1956).

²² See 1 Scott on *Trusts* § 56 (2nd ed., 1956).

²³ The trust does have two of the three important qualities of a will: It can be revocable and it has the "hereditary" quality, i.e., it appoints someone to represent the settlor after his death to carry out his intentions. The trust lacks the ambulatory quality of a will. II Pollock & Maitland, *History of English Law* 315 (2nd ed., 1903).

²⁴ Gardner, *Wills* 1 (2nd ed., 1916).

²⁵ "The legislatures have presumably balanced the hardship to the intended beneficiaries which occurs where there is an intention to create a trust, against the hardship

distinction. If the transferor succeeded in divesting himself *in praesenti* of the interest he wished to transfer, the Statute of Wills is in no way involved. But, if he retained an interest which upon his death was to go to another, his effort was testamentary and the statute must be complied with. Therefore, there must be found a valid transfer *inter vivos* in order to uphold the trust. It is here that the problem arises, since, in each case, the court must decide whether or not the combined effect of all the powers, rights, control and dominion reserved by the settlor is such as to leave him virtually the owner of the property and the trustee his mere agent. It must decide what extent of control is sufficient in the settlor to nullify the purported technical vesting of legal title in the trustee. It must also draw the line between a valid *inter vivos* trust and an attempted testamentary disposition.²⁶ A later discussion of the Totten Trust indicates that this line is not clearly drawn.²⁷

THE MATTER OF TOTTEN

I. FACTUAL SITUATION

The factual situation which has created the problems of the Totten Trust now confronting the courts arises when a person makes a deposit in a savings bank or in the savings department of a bank or trust company in his own name "in trust" for another. The depositor simply designates himself on the deposit card as trustee for the named beneficiary. Somewhat analogous situations arise when the deposit is made in some other form, but with the intention of giving an interest in the deposit to another. These situations arise when the deposit is made in the name of the depositor and he subsequently makes an assignment of it to another,²⁸ when the

which would result from making false claims; and in order to prevent the making of false claims they have required that the disposition should be evidenced in a certain formal manner." 1 Scott on Trusts § 55.9, 420 (2nd ed., 1956).

²⁶ The instruments, in the words of Mr. Justice Holmes in *Bromley v. Mitchell*, 155 Mass. 509, 30 N.E. 83 (1892), have a "testamentary look" and the line must be drawn somewhere.

²⁷ Because the Totten or tentative trust circumvents the Statute of Wills, dispensing with the necessity for probate or administration, it has often been referred to as the "poor man's will." Newman on Trusts 77 (2nd ed., 1955).

²⁸ This is a question of the gift of a choses in action which will be incomplete unless the donor delivers the savings bank book to the donee or delivers a deed of gift. If the gift is imperfect the courts generally do not declare a trust, *Eschen v. Steers*, 10 F. 2d 739 (C.C.A. 8th, 1926); *Knickerberg v. Hoff*, 201 Ark. 63, 143 S.W. 2d 560 (1940); *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047 (1908); *Trubey v. Pease*, 240 Ill. 512, 88 N.E. 1005 (1909); *First and Tri-State National Bank & Trust Co. v. Caywood*, 95 Ind. App. 591, 176 N.E. 871 (1933); *Sinift v. Sinift*, 229 Iowa 56, 284 N.W. 91, 293 N.W. 841 (1929, 1940); *Frazier v. Hudson*, 279 Ky. 334, 130 S.W. 2d 809 (1939); *Rock v. Rock*, 309 Mass. 44, 33 N.E. 2d 1973 (1941); *Detroit Bank v. Bradfield*, 324 Mich. 124, 36 N.W. 873 (1949); *State ex rel. Union National Bank of Springfield v. Blair*, 350 Mo. 622, 166

deposit is made in the name of another,²⁹ and when the deposit is made in the name of the depositor and another jointly.³⁰

II. THE PROBLEM

The problem then arises whether the depositor has created a trust, and, if so, the kind of trust. The answer to this problem will be solved by a scrutinization of the settlor's intention in setting up the trust. This question has been previously referred to in this discussion as the first element to be considered in the examination of a trust in the determination of its validity.³¹ The possible intentions of the depositor when he makes the deposit "in trust" for another may be (1) to create an irrevocable trust; (2) not to create a trust; (3) to create a revocable trust.³² The courts must determine this intention by examining the evidence of it or by conjecturing in the absence of it. The remainder of the discussion shall be devoted to an analysis of these possible intentions as presented by the facts of each case.

III. THE HISTORY IN NEW YORK

The history of the New York decisions must first be studied if one is to acquire an intelligent grasp of the situation since it is here that the court decided *The Matter of Totten*. The early cases doubted that a deposit in a savings bank "in trust" for another created a trust if there was no evidence of an intention to create a trust other than the mere form of the deposit. There was even conjecture whether a trust resulted without a delivery of the bank book to the *cestui que trust*. However, it was held in *Martin v. Funk*³³ that the depositor's retention of the bank book was not inconsistent with the creation of a trust since it was only natural to expect

S.W. 1085 (1942); *Matter of Solot*, 50 N.Y.S. 2d 401 (1944); *Hagerott v. Davis*, 73 N.D. 532, 17 N.W. 26 (1944); *Ratcliff v. Lee*, 200 Okla. 253, 192 P. 2d 843 (1948); *Allshouse's Estate*, 304 Pa. 481, 156 Atl. 69 (1931); *Taylor v. Staples*, 8 R.I. 170, 5 Am. Rep. 556 (1865); *Mathews v. Drew*, 106 Vt. 245, 172 Atl. 638 (1934).

²⁹ This is neither a trust nor an assignment of a chose in action. It is consideration paid to the bank for its promise to pay the amount of the deposit to another party. 1 Scott, § 58.6 (2nd ed., 1956).

³⁰ This is generally not the creation of a trust but the payment of consideration to the bank for its promise made to the depositor and the other party. Although no question of the law of trusts is involved, the courts sometimes speak in the terminology of trusts. But it should be noted that there may be the intent to create a trust for a third person. *Jarkieh v. Badagliacco*, 75 Cal. App. 2d 505, 170 P. 2d 994 (1946).

³¹ The other elements for the creation of a trust are obviously present. The depositor's claim against the bank is specific trust property. He has communicated his declaration to a third party. The beneficiary is definite and identified.

³² See Rest. Trusts, § 58, comment a (1935) which adopts the language of the *Totten* case.

³³ 75 N.Y. 134, 31 Am. Rep. 446 (1878).

a trustee to retain it. The court further stated that communication to the beneficiary is unnecessary to the creation of a trust. It should be observed that the court concerned itself with the questions of the creation of a trust and whether it was irrevocable. The case is only authority for the conclusion that a trust of a savings bank deposit can be created without delivery of the bank book to the beneficiary and without communication to him of the intention to create a trust if there was evidence of the depositor's intention to create a trust other than the mere form of the deposit.

The Court of Appeals of New York eleven years later in *Beaver v. Beaver*³⁴ held that, when the deposit was in fact made in the name of another and not in the name of the depositor as trustee for another, that even if the deposit had been made in the name of the depositor in trust for the other that the mere form of the deposit alone was insufficient to raise an inference that the depositor intended to create a trust. The court still assumed that it was either a question of no trust or an irrevocable trust. Then, fifteen years later, the New York Court of Appeals decided the case of *Matter of Totten*.³⁵ The court there held that, in the absence of evidence that an irrevocable trust was intended or that no trust at all was intended, there arose an inference from the mere form of the deposit that the depositor intended to create a revocable trust. Thus, the court recognized that there are not merely two possible alternatives, but that there is a third—a revocable trust.

IV. AN ANALYSIS OF THE ACCEPTANCE OF THE TOTTEN TRUST AT THE STATE LEVEL

The situation of a deposit in the bank by the depositor in trust for another in the absence of other evidence as to the intention of the depositor has resulted in a division of courts as to the formation of a trust.³⁶ A num-

³⁴ 117 N.Y. 421, 22 N.E. 940 (1889); 137 N.Y. 59, 32 N.E. 998 (1893).

³⁵ "After much reflection upon the subject, guided by the principles established by our former decisions, we announce the following as our conclusion: A deposit by one person of his own money in his own name as trustee for another standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act on declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary in that revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." 179 N.Y. 112, 125, 71 N.E. 748, 752.

³⁶ There is even a division of authorities on the conclusion to be drawn from the cases. "In most states . . . the inference is that the depositor intended to create a trust but to reserve power to revoke it at any time," Scott, § 58.1, 478 (2nd ed., 1955). "The tendency is to hold that the depositor impliedly intends to reserve a power of revocation by act inter vivos or by will," Bogert, 1 Trusts and Trustees, § 47, 327 (1951). "When funds are deposited in the name of the depositor in trust for another person,

ber of courts, following the decision of the Totten case, have held that there is an inference that the depositor intended to create a revocable trust.³⁷ There is also some authority for the proposition that there is an inference of the creation of an irrevocable trust.³⁸ Furthermore, some few cases hold that there is an inference that the depositor did not intend to create any kind of a trust.³⁹

A problem again results when there is evidence to be considered by the court. The evidence will be important when it conflicts with the prevailing tendency of the state. The states which follow the theory of the Totten case and presume a revocable trust from the mere bank account in trust for another will be confronted by a conflict when the evidence shows that the depositor either intended no trust or an irrevocable trust. In contrast, those states which hold that there is an irrevocable trust, will be presented with a conflict when there is evidence of either no trust or a revocable trust. Lastly, those states that hold there is no trust must find evi-

there arises, according to the law of a few states, a trust which, being revocable, is merely tentative." Newman on Trusts, 76 (1955).

"The weight of authority, however, appears to be in support of the doctrine that the mere fact of such a deposit, standing alone, does not establish an irrevocable trust during the lifetime of the depositor, but a tentative trust merely, which is revocable at the will of the depositor until he dies or completes the gift in his lifetime by some unequivocal act or declaration showing that the creation of a trust was intended." 7 Am. Jur. 438.

³⁷ In the absence of evidence of a different intention of the depositor, the new fact that a deposit is made in a savings bank is the name of the depositor "as trustee for another person is sufficient to show an intention to create a revocable trust" Rest., Trusts, § 58, Comment a (1935). "... we hold that neither the retention of the passbook, the absence of notice to the beneficiary, nor the withdrawals from and additions to the deposit had the effect of disproving an intention on the part of the depositor to create a trust; and we further hold, in harmony with the overwhelming weight of authority, that the deposit here involved is presumptively a tentative trust, and in the absence of evidence to rebut this presumption the beneficiary is entitled to the fund." Wilder v. Howard, 188 Ga. 426, 4 S.E. 2d 199, 202-203 (1939). See also Walso v. Lat-
 ternier, 140 Minn. 455, 168 N.W. 353 (1918), 143 Minn. 364, 173 N.W. 711 (1919); Nicklas v. Parker, 69 N.J. Eq. 743, 61 Atl. 267 (1905) aff'd 71 N.J. Eq. 777, 71 Atl. 1135 (1907); Fiocchi v. Smith, 97 Atl. 283 (N.J.Ch., 1916). Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904). "This conclusion is in accord with the doctrine of tentative trusts which has been developed in New York, where litigation of trust bank accounts has been much greater than with us." Scanlon's Estate, 313 Pa. 424, 169 Atl. 106, 108 (1933), noted in 82 U. Pa. L. Rev. 413; Banca D'Italia and Trust Co. v. Giordano, 154 Pa. Super. 452, 36 A. 2d 242 (1944); Krewson Estate, 154 Pa. Super. 509, 36 A. 2d 250 (1944).

³⁸ "The rule of the Totten Case does not appeal to us with favor." Cazallis v. Ingraham, 119 Me. 240, 110 Atl. 359, 363 (1920); Rose v. Osborne, 133 Me. 497, 180 Atl. 315 (1935).

³⁹ "In order to make oneself trustee for another of property held by the settlor, everything must be done to end the absolute dominion of the settlor." Mulloy v. Charlestown Five Cents Savings Bank, 285 Mass. 101, 188 N.E. 608, 610 (1934); Hogarth-Swann v. Steele, 294 Mass. 396, 2 N.E. 2d 446 (1926). See Beaver v. Beaver, 117 N.Y. 421, 22 N.E. 940 (1889), 137 N.Y. 59, 32 N.E. 998 (1893).

dence of an irrevocable trust. This distinction is important and must be remembered in the analysis of evidence which is to follow.

Evidence which indicates no trust was intended shows that the deposit was made in his own name as trustee for another merely for a private and different purpose of the depositor. A depositor's statements at the time of the deposit that he intended no trust is receivable as part of the *res gestae* and carries great weight.⁴⁰ The supposed beneficiary's statements that no trust was intended, made with knowledge of the deposit,⁴¹ or that the deposit was made for the purpose of receiving higher interest rates and not as a trust⁴² is receivable as strong evidence that the depositor intended no trust. The depositor's act of obliterating the words of trust from the bank book indicates that he had no intention of creating a trust.⁴³ A deposit subsequent to the death of the named beneficiary indicates no trust but a mere form of convenience of the depositor.⁴⁴ The fact that the depositor has used the interest accruing upon the deposit for his personal benefit has some tendency to show that the depositor intended no trust, and considered along with other facts has led to a decision that there was no trust.⁴⁵ The use by the depositor of the account as his only active account for the transaction of his business is strong evidence against a trust.⁴⁶ Failure to indicate the trust intent by notice, delivery of the book, or in some other manner, is strong evidence that no trust was intended if this occurs before the death of the named beneficiary.⁴⁷ Further,

⁴⁰ *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994 (1904); *Connecticut River Savings Bank v. Albee's Estate*, 64 Vt. 571, 25 Atl. 487 (1893); *Malley's Estate v. Malley*, 69 R.I. 407, 34 A. 2d 761 (1943). But the testimony is inadmissible if the depositor is dead. *Tierney v. Fitzpatrick*, 195 N.Y. 433, 88 N.E. 750 (1909); *Matter of Bunt*, 96 Misc. 114, 160 N.Y. Supp. 111 (1916); *In re Peaman's Estate*, 163 N.Y. Supp. 800 (1917); *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994 (1903); *Ray v. Simmons*, 11 R.I. 266, 23 Am. Rep. 447 (1875); *Connecticut River Sav. Bank v. Albee's Estate*, 64 Vt. 571, 25 Atl. 487 (1893); *Bradford v. Enton Sav. Bank of Baltimore City*, 186 Md. 127, 46 A. 2d 284 (1946); *In re Ryan's Will*, 52 N.Y.S. 2d 502 (1944).

⁴¹ *Barefield v. Rosell*, 177 N.Y. 387, 69 N.E. 732 (1904); *Devlin v. Hinman*, 34 App. Div. 107, 54 N.Y. Supp. 496 (1898); *Moschetti v. De Cubellis*, 66 R.I. 463, 20 A. 2d 253 (1941).

⁴² *Matter of Mueller*, 15 App. Div. 67, 44 N.Y. Supp. 280 (1897).

⁴³ *In re Bulwinkle*, 107 App. Div. 331, 95 N.Y. Supp. 176 (1905).

⁴⁴ *Ibid.*

⁴⁵ *Macy v. Williams*, 83 Hun. 243, 31 N.Y. Supp. 620; *aff'd* 744 N.Y. 701, 39 N.E. 858 (1895); *Garvey v. Clifford*, 114 App. Div. 193, 99 N.Y. Supp. 555 (1906); *Thomas v. Newburgh Sav. Bank*, 73 Misc. 308, 130 N.Y. Supp. 810; *aff'd* 147 App. Div. 937, 132 N.Y. Supp. 1148 (1911).

⁴⁶ *Rambo v. Pile*, 220 Pa. 235, 69 Atl. 807 (1908).

⁴⁷ *Cunningham v. Davenport*, 147 N.Y. 43, 41 N.E. 412 (1895); *Haux v. Dry Dock Sav. Inst.*, 2 App. Div. 165, 37 N.Y. Supp. 917; *aff'd* 154 N.Y. 736, 49 N.E. 1097 (1896); *In re Bulwinkle*, 107 App. Div. 331, 95 N.Y. Supp. 176 (1905); *Garvey v. Clifford*, 114 App. Div. 193, 99 N.Y. Supp. 555 (1906); *Matter of United States Trust Co. of New*

the depositor's allowance of the account to stand as a trust account after the death of the supposed beneficiary⁴⁸ or an addition to the account after his death⁴⁹ does not show a complete trust. It may also appear from the evidence that the deposit was made in order to evade a statute or by law of the bank limiting the amount of the deposits permitted to individual depositors, or to conceal the true ownership of the deposit.⁵⁰

The evidence may also show that the depositor intended to create an irrevocable trust. A statement by the depositor to a third person of his intention to make the trust irrevocable constitutes strong evidence of irrevocability.⁵¹ A notification by depositor to the beneficiary that the deposit has been made in trust form shows a strong indication of an irrevocable trust⁵² but this may be rebutted by other facts in the case.⁵³ A de-

York, 117 App. Div. 178, 102 N.Y. Supp. 271 (1907); *In re Duffy*, 127 App. Div. 74, 111 N.Y. Supp. 77 (1908); *In re Smith's Estate*, 40 Misc. 331, 81 N.Y. Supp. 1035 (1903); *In re Thompson's Estate*, 85 Misc. 291, 147 N.Y. Supp. 402 (1914); *Rambo v. Pile*, 220 Pa. 235, 69 Atl. 807 (1908). *Contra*: *Bishop v. Seamen's Bank for Savings*, 33 App. Div. 181, 53 N.Y. Supp. 488 (1898). And see *In re Kive's Estate*, 139 Misc. 273, 248 N.Y. Supp. 677 (1931); *In re Vaughan's Estate*, 145 Misc. 332, 260 N.Y. Supp. 197 (1932).

⁴⁸ *Garvey v. Clifford*, 114 App. Div. 193, 99 N.Y. Supp. 555 (1906). *Rambo v. Pile*, 220 Pa. 235, 69 Atl. 807 (1908).

⁴⁹ *In re Bulwinkle*, 107 App. Div. 331, 95 N.Y. Supp. 186 (1905).

⁵⁰ *Koslosky v. Cis*, 70 Cal. App. 2d 174, 160 P. 2d 565 (1945); *Foschia v. Foschia*, 158 Md. 69, 148 Atl. 121 (1930); *Brabook v. Boston Five Cents Saving Bank*, 104 Mass. 228, 6 Am. Rep. 222 (1870); *Parkham v. Suffolk Savings Bank*, 151 Mass. 218, 24 N.E. 43 (1890); *Cleveland v. Hampden Savings Bank*, 182 Mass. 110, 65 N.E. 27 (1902); *Robertson v. Parker*, 287 Mass. 351, 191 N.E. 645 (1934); *Frank v. Heimann*, 302 Mo. 334, 258 S.W. 1000 (1924); *Rambo v. Pile*, 220 Pa. 235, 69 Atl. 807 (1908); *Peoples Savings Bank v. Webb*, 21 R.I. 218, 42 Atl. 874 (1899); *Malley v. Malley*, 69 R.I. 407, 34 A. 2d 761 (1943). See also *Stamford Savings Bank v. Everett*, 132 Conn. 92, 42 A. 2d 662 (1945); *Merigan v. McGonigle*, 205 Pa. 321, 54 Atl. 994 (1904). Compare *Schauberger v. Tafel*, 202 Ky. 9, 258 S.W. 953 (1924).

⁵¹ *Miller v. Clark*, 40 Fed. 15 (C.C.D. Conn., 1889), appeal dismissed 138 U.S. 223 (1891); *Sayre v. Weil*, 94 Ala. 466, 10 So. 546 (1891); *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69 (1873); *Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43 (1899); *Mucha v. Jackson*, 119 N.J. Eq. 348, 182 Atl. 827 (1936); *Eagles Building & Loan Association v. Fiducia*, 135 N.J. Eq. 7, 37 A. 2d 116 (1944), *aff'd mem.* 136 N.J. Eq. 117, 40 A. 2d 627 (1945); *Provident Institution for Savings v. Bolton*, 140 N.J. Eq. 1, 52 A. 2d 833 (1947).

⁵² *Kuck v. Raftery*, 117 Cal. App. 755, 4 P. 2d 552 (1931), noted in 4 *Detroit L.J.* 93; *Genish v. New Bradford Institution*, 128 Mass. 159, 35 Am. Rep. 365 (1880); *Alger v. North Ed Savings Bank*, 146 Mass. 418, 15 N.E. 916 (1888); *Scrivens v. North Easton Savings Bank*, 166 Mass. 255, 44 N.E. 251 (1896); *McCaffrey v. North Adams Savings Bank*, 244 Mass. 396, 138 N.E. 393 (1923); *Burteau v. Lavalley*, 284 Mass. 276, 187 N.E. 628 (1933); *Matter of Pierce*, 132 App. Div. 465, 116 N.Y. Supp. 816 (1909); *Matter of Cohen*, 90 N.Y. Supp. 2d 776 (1949); *McGary Estate*, 355 Pa. 232, 40 A. 2d 350 (1946); *Atkinson, Petitioner*, 16 R.I. 413, 16 Atl. 712 (1889); *Slepkow v. McSoley*, 54 R.I. 210, 172 Atl. 328 (1934). See *Matter of Gron*, 62 N.Y. Supp. 2d 392 (1936). *Cf.* *O'Hara v. O'Hara*, 291 Mass. 75, 195 N.E. 909 (1925).

⁵³ *Peterman's Estate* 56 D. & C. 365 (Pa., 1946); *Ingels Estate*, 372 Pa. 171, 92 A. 2d 881 (1952), noted in 26 *Temple L. Q.* 468 (1953), 14 *U. Pitts. L. Rev.* 627 (1953).

livery of the bank book by the depositor to the beneficiary also indicates an intention of an irrevocable trust⁵⁴ but it may be shown that the delivery was to the beneficiary for safekeeping purposes only.⁵⁵

V. CONFLICT WITH THE STATUTE OF WILLS

The previous discussion of the effect of the Statute of Wills as an attempted trust which passed no present interest indicated that this attempted trust failed because it did not comply with the wills act. This law becomes important when a deposit is made in trust for another and the court has declared that there exists a power of revocation in the depositor. There is no problem if the court has held that there is no trust created by the deposit since the disposition fails on trust principles and not on those of wills. On the other hand, if there is an inference or evidence of the creation of an irrevocable trust, there is again no question as to the effect of the Statute of Wills since the disposition is not testamen-

⁵⁴ *Emanuelson v. Delle*, 8 Conn. Supp. 180 (1940); *Scanzo v. Morano*, 284 Mass. 188, 187 N.E. 552 (1933); *Harrington v. Donlin*, 312 Mass. 577, 45 N.E. 2d 953 (1942); *Long Branch Banking Co. v. Winter*, 112 N.J. Eq. 218, 163 Atl. 903 (1933); *Trust Company of New Jersey v. Farawell*, 127 N.J. Eq. 45, 11 A. 2d 98 (1940); *Hickey v. Kahl*, 129 N.J. Eq. 233, 19 A. 2d 33 (1941); *Davlin v. Title Guarantee and Trust Co.*, 229 App. Div. 269, 241 N.Y. Supp. 712 (1930), *aff'd* 255 N.Y. 559, 175 N.E. 312 (1930), *Hanigan v. Wright*, 233 App. Div. 82, 251 N.Y. Supp. 651 (1931), *aff'd* 257 N.Y. 602, 178 N.E. 813 (1931); *Matter of Farrell*, 298 N.Y. 129, 81 N.E. 2d 51 (1948). Noted in 17 *Fordham L. Rev.* 295 (1948), 37 *Georgetown L.J.* 281 (1948), 47 *Mich. L. Rev.* 727 (1949), 35 *Va. L. Rev.* 272. *Imperatrice v. Imperatrice*, 77 N.Y. Supp. 2d 437 (1947), *aff'd mem.* 298 N.Y. 549, 81 N.E. 2d 95 (1948); *Matter of La Brasche*, 301 N.Y. 718, 790, 95 N.E. 2d 404 (1950), *aff'g* Application of Siverson, 276 App. Div. 1025, 95 N.Y. Supp. 2d 591 (1950); *Tibbitts v. Zink*, 231 App. Div. 339, 247 N.Y. Supp. 300 (1931); *Larkin v. Greenwich Savings Bank*, 241 App. Div. 874, 271 N.Y. Supp. 288 (1934); *Matter of Rosso*, 146 Misc. 746, 262 N.Y. Supp. 861 (1933). *Matter of Smith*, 177 Misc. 601, 31 N.Y.S. 2d 603 (1941); *Knast Estate* 66 D. & C. 383 (Pa., 1949); *Gobeille v. Allison*, 30 R.I. 525, 76 Atl. 354 (1901).

⁵⁵ *Greeley v. Flynn*, 310 Mass. 23, 36 N.E. 2d 394 (1941), noted in 30 *Georgetown L.J.* 104 (1941); *Johnson v. Savings Investment and Trust Co.*, 110 N.J. Eq. 466, 160 Atl. 371 (1932); *Mathews v. Brooklyn Savings Bank*, 208 N.Y. 508, 102 N.E. 520 (1913); *Matter of Bowen*, 156 Misc. 435, 282 N.Y. Supp. 290 (1935), *aff'd* without opinion, 247 App. Div. 708, 774, 286 N.Y. Supp. 1005 (1936); *Thomas Brevoort Savings Bank*, 275 App. Div. 724, 87 N.Y.S. 2d 411 (1949); *McKeever v. Empire Trust Co.*, 270 N.Y. Supp. 494 (1934); *Matter of Slobiansky*, 152 Misc. 232, 273 N.Y. Supp. 869 (1934). *Bearinger's Estate*, 336 Pa. 253, 9 A. 2d 342 (1939). But the exclusive possession of the bank book by the beneficiary, sole heir and next of kin does not show the existence of an irrevocable trust. *In re Duffy*, 127 App. Div. 74, 111 N.Y. Supp. 77 (1908). Delivery of the bank book to a third person also may indicate an irrevocable trust. *Peck v. Scofield*, 186 Mass. 108, 71 N.E. 109 (1904); *Martin v. Martin*, 46 App. Div. 445, 61 N.Y. Supp. 814, appeal dismissed 166 N.Y. 611, 59 N.E. 1126; *Scallan v. Brooks*, 54 App. Div. 248, 66 N.Y. Supp. 591 (1900), *Robinson v. Appleby*, 69 App. Div. 509, 75 N.Y. Supp. 1, *aff'd* 66 N.E. 1115, 173 N.Y. 626 (1902). But other facts may also overcome this indication of irrevocability. *Latten v. Van Ness*, 107 App. Div. 393, 95 N.Y. Supp. 97, *aff'd* 77 N.E. 1190, 184 N.Y. 601 (1905).

tary since the depositor has passed a present interest to the beneficiary. But the problem does arise in the situation of the revocable trust since the depositor has not only power to revoke and modify the trust so long as he lives but also the power to act as he likes with respect to the trust property.

As might be expected, the decisions of the courts which recognize a bank account in trust for another as a revocable trust are split on the issue. New York has decided the question in favor of the trust in a multitude of decisions, and has awarded the deposit to the beneficiary at the death of the settlor.⁵⁶ Following the lead of New York, the decisions of ten other jurisdictions have upheld the saving bank deposits as valid trusts not in violation of the Statute of Wills.⁵⁷

However, a few states have held that the fact that the depositor intends to retain control over the deposit during his lifetime makes the disposition testamentary, therefore violative of the Statute of Wills, with the result that the beneficiary is not entitled to the deposit, even though the settlor has not attempted to revoke the trust.⁵⁸

The problem among the states is further complicated by statutes, which have been passed by the majority of states, providing that whenever a deposit is made in a savings bank by one person in trust for another, with

⁵⁶ *Matter of Halpern*, 303 N.Y. 33, 100 N.E. 2d 120 (1951), noted in 15 Albany L. Rev. 254 (1952); *Matter of Ellis*, 178 Misc. 491, 34 N.Y.S. 2d 884 (1942) aff'd mem. 264 App. Div. 846, 36 N.Y.S. 2d 187 (1942); *Mahnken v. Seybolt*, 143 Misc. 874, 257 N.Y. Supp. 622 (1932); *Estate of Timko*, 150 Misc. 701, 270 N.Y. Supp. 323 (1934); *Hoppe v. President and Directors of Manhattan Co.*, 154 Misc. 745, 278 N.Y. Supp. 26 (1935); *Matter of McCann*, 155 Misc. 763, 281 N.Y. Supp. 445 (1935); *Matter of Denison*, 157 Misc. 385, 284 N.Y. Supp. 705 (1935); *Matter of Loeffler*, 97 N.Y.S. 2d 450 (1950); *In re City Savings and Loan Ass'n*, 123 N.Y.S. 2d 852 (1953).

⁵⁷ *Kosloskye v. Cis*, 70 Cal. App. 2d 174, 160 P. 2d 565 (1945); *Brucks v. Home Federal Savings and Loan Ass'n*, 36 Cal. 2d 845, 228 P. 2d 545 (1951); *Cressy v. Fisher*, 16 Conn. Supp. 391 (1949); *Delaware Trust Company v. Fitzmaurice*, 27 Del. Ch. 101, 31 A. 2d 383 (1943), aff'd *Creemish v. Delaware Trust Co.*, 27 Del. Ch. 374, 38 A. 2d 463 (1944); *Wilder v. Howard*, 188 Ga. 426, 4 S.E. 2d 199 (1939); *Hale v. Hale*, 313 Ky. 344, 231 S.W. 2d 2 (1950); *Littig v. Mt. Calvary Church*, 101 Md. 494, 61 Atl. 635 (1905); *Bollack v. Bollack*, 169 Md. 407, 182 Atl. 317 (1935); *Greeley v. Flynn*, 310 Mass. 23, 36 N.E. 2d 394 (1941); *Walso v. Latterner*, 140 Minn. 455, 168 N.W. 353 (1918), 143 Minn. 364, 173 N.W. 711 (1919); *Dyste v. Farmers and Mechanics Savings Bank*, 179 Minn. 430, 229 N.W. 865 (1930); *Coughlin v. Farmers & Mechanics Savings Bank*, 199 Minn. 102, 272 N.W. 166 (1937); *Scanlon's Estate*, 313 Pa. 424, 169 Atl. 106 (1933); *Pozzuto's Estate*, 124 Pa. Super. 93, 188 Atl. 209 (1936); *Krewsen Estate*, 154 Pa. Super. 509, 36 A. 2d 250 (1944); *Shapley Trust*, 353 Pa. 499, 46 A. 2d 277 (1946); *Mace v. Fulton County Nat. Bank*, 79 D. & C. 325 (Pa., 1951); *Ingels Estate*, 372 Pa. 171, 92 A. 2d 881 (1952). See *In re Scott's Estate*, 96 F. Supp. 290 (D.D.C., 1951).

⁵⁸ *Nicklas v. Parker*, 69 N.J. Eq. 743, 61 Atl. 267 (1905), aff'd 71 N.J. Eq. 777, 71 Atl. 1135 (1907). It should be noted that subsequent statutory modifications in New Jersey place it in general accord with the *Totten Case*. *Fleck v. Baldwin*, 141 Tex. 340, 172 S.W. 2d 975 (1943), aff'g *Baldwin v. Fleck*, 168 S.W. 2d 904 (Tex. Civ. App., 1943).

the bank receiving no further notice from the depositor, that the bank may pay the deposit to the beneficiary on the death of the trustee.⁵⁹ The interpretation placed upon these statutes by the courts have indicated that the purpose of the statute is merely to protect the bank if it makes payment to the beneficiary.⁶⁰

VI. THE POSITION OF ILLINOIS

There is no question but that the formula of the "Totten Trust" is present in Illinois.⁶¹ A depositor in a bank or saving and loan association designates himself on the deposit card as trustee for a named beneficiary. The depositor still retains complete control over the account so long as he lives and may withdraw, deposit, or close out the account at will.⁶² Upon the death of the depositor-trustee, the named beneficiary receives the funds so deposited. In effect, this is a Totten Trust and yet, strangely enough, that case has not been litigated at the appellate level in Illinois courts.⁶³

Therefore, if the issue is placed squarely before the courts in Illinois,⁶⁴ they will find themselves confronted with three problems: (1) What is

⁵⁹ The following states have such a statute: Alabama, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁶⁰ The Illinois decisions on the subject will be analyzed in detail in a later section of this comment.

⁶¹ The following are some of the banks which issue deposit cards in the Totten Trust form: (1) Continental Illinois National Bank and Trust Co. of Chicago. Form 4-C-63; City National Bank and Trust Co. of Chicago. Form NN-6; Harris Trust & Savings Bank. Form B-373.

⁶² The typical form provides: "All deposits in this account are made for the benefit of . . . (name of beneficiary) . . . (residence) . . . (relationship) . . . (date of birth) . . . (birth place) to whom or to whose legal representative said deposits or any part thereof, together with the interest thereof, may be paid in the event of death of the undersigned trustee . . . [S] Trustee." See the various forms as listed in footnote 61, *supra*. It is interesting to note that there is no express reservation of revocation by the depositor-trustee in these forms.

⁶³ In *Helfrich's Estate v. Commissioner of Internal Revenue*, 143 F. 2d 43 (1944), there was a savings accounts trust which the commissioner contended was "Totten" or "tentative" and hence invalid or at best, *revocable*. The court, in a decision which we shall consider, rejected the contention and found a valid irrevocable trust. The Illinois Annotations of Rest. Trusts, § 58 (1941), reveals no cases directly on point in Illinois. A check with some officers of Chicago banks revealed that there has been some litigation involving the issue of the Totten Trust. This litigation, however, was minor and inconsequential and hence is unreported. Also see 23 Univ. Chi. L. Rev. 301 (1956).

⁶⁴ This could most easily occur if a suit arises between the trust beneficiary and a third person claiming an interest in the estate of the deceased depositor-trustee. There are many other conceivable situations, i.e., *Helfrich's Estate v. Commissioner of Internal Revenue*, 143 F. 2d 43 (1944).

the intention of the depositor in making the deposit?⁶⁵ (2) Is the trust invalid as a testamentary disposition that does not comply with the Statute of Wills?⁶⁶ (3) What is the interpretation of the Illinois statutes which provide that a bank will be protected if it pays the deposit to the beneficiary on the death of the trustee?⁶⁷ These problems shall receive separate treatment in the succeeding paragraphs.

As stated before,⁶⁸ the intention of the depositor when he makes a deposit in his own name in trust for another may be: (1) to create an irrevocable trust;⁶⁹ (2) not to create a trust;⁷⁰ (3) to create a revocable trust.⁷¹ In Illinois, as far back as 1892,⁷² it was said that "where the deposit is in the name of a third person, and there is no delivery of the bank book, the title to the fund does not pass to such person *in the absence of any declaration of trust*⁷³ or circumstances showing an intention to vest title."⁷⁴ In a later case,⁷⁵ the court said, "It has been said in many cases, particularly where the ownership of bank accounts has been in controversy that *the mere form of the account*⁷⁶ will not be regarded as sufficiently establishing the intent of the person making it to create a trust in behalf of another."⁷⁷ These two statements raise the following questions: What is a "declaration of trust"? What is the "mere form of the account"? The court, in using the term "declaration of trust," could have intended that a deposit "in trust" for another would meet this requirement and form a trust. However, an analysis of the case shows that the court intended that "declaration of trust" is to have the same meaning as was indicated in a leading New York case on savings accounts trusts.⁷⁸ In *Beaver v. Beaver*,⁷⁹

⁶⁵ This problem is discussed nationally under Matter of Totten, Section IV of the text *supra*.

⁶⁶ This problem is discussed nationally under Matter of Totten, Section V of the text *supra*.

⁶⁷ See footnote 59 for states with similar statutes.

⁶⁸ See Matter of Totten, Section II of the text *supra*.

⁶⁹ *Cazzallis v. Ingraham*, 119 Me. 240, 110 Atl. 359 (1920).

⁷⁰ *Mulloy v. Charlestown, Five Cents Savings Bank*, 285 Mass. 101, 188 N.E. 608 (1934).

⁷¹ *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

⁷² *Telford v. Patton*, 144 Ill. 611 (1892).

⁷³ Italics added. ⁷⁴ *Telford v. Patton*, 144 Ill. 611, 625 (1892).

⁷⁵ *Bolton v. Bolton*, 306 Ill. 473, 138 N.E. 158 (1923). ⁷⁶ Italics added.

⁷⁷ *Bolton v. Bolton*, 306 Ill. 473, 485, 138 N.E. 158, 163 (1923).

⁷⁸ *Beaver v. Beaver*, 117 N.Y. 421, 22 N.E. 940 (1889). *Telford v. Patton* relies upon and quotes directly from this case. *Beaver v. Beaver*, besides holding that no trust was created by the mere form of the deposit, also held that either an irrevocable trust was created or no trust was created. The case was subsequently overruled by *Matter of Totten* which held a trust was created by the mere form of the deposit and that it was revocable.

⁷⁹ *Ibid*.

the New York court indicated that, even if a deposit had been in the name of the depositor in trust for another, the mere form of the deposit was insufficient to raise an inference that the depositor intended to create a trust. Thus, the language in the later Illinois decision⁸⁰ is completely in conformity with the earlier case and *Beaver v. Beaver*.⁸¹ This interpretation of the "mere form of the account" and "declaration of trust" leads to the theoretical conclusion that Illinois would find no trust created from the Totten Trust formula alone.⁸²

However, if the court did find a trust created from the mere form of the account,⁸³ it would then be faced with the problem of whether, in the absence of express language, it is a revocable or an irrevocable trust. It would have to choose between the thought of *Beaver v. Beaver*,⁸⁴ which held that there is either an irrevocable trust created or no trust, and *Matter of Totten*, which held there is a third choice, namely, the revocable trust. Illinois has consistently held that when a trust has been perfectly cre-

⁸⁰ *Bolton v. Bolton*, 306 Ill. 473, 138 N.E. 158 (1923). This case relies on two earlier New York cases which state the rule followed in *Beaver v. Beaver*, namely, *Kelly v. Beers*, 194 N.Y. 49, 86 N.E. 980 (1909), and *In re Bolin*, 136 N.Y. 177, 32 N.E. 626 (1892).

⁸¹ 117 N.Y. 421, 22 N.E. 940 (1889).

⁸² The term "theoretical conclusion" is used because the question is open to conjecture on the following grounds: (1) The Illinois decisions which hold that no trust is created from the mere form of the account relied on New York decisions which have since been overruled by "*Matter of Totten*." Thus, it might be argued that since the cases upon which the Illinois law stands have been overruled, the Illinois cases themselves are overruled; (2) In *Helfrich's Estate et al. v. Commissioner of Internal Revenue*, 143 F. 2d 43 (1944), a valid, irrevocable trust was created by a savings accounts instrument. The court quotes from *Gurnett v. Mutual Life Ins. Co. of New York*, 356 Ill. 612, 191 N.E. 250 (1934), as stating the requirements of a valid Illinois trust, "To constitute a valid trust of personal property, there must be a declaration by a person competent to create it, a trustee, designated beneficiaries, a certain ascertained object, a definite fund or subject-matter, and its delivery or assignment to the trustee." The case merely indicates the form of the deposit alone as the "declaration of trust" and there is no further evidence of intent shown. If there was no evidence other than the "mere form of the account" no trust should be created under Illinois law. Yet, the question was completely ignored in this case and a valid, irrevocable trust was created. The court does, however, cite a Massachusetts case, *Wasserman v. Commissioner*, 139 F. 2d 778 (1944) where there was *other evidence* besides the "mere form of the account" and a trust was created. *Albert v. Albert*, 334 Ill. App. 440, 80 N.E. 2069 (1948) follows the reasoning and quotes from *Helfrich's Estate* as to the creation of a valid irrevocable trust. There is no question raised as to "the mere form of the account" but the case indicates more evidence of intention to support the declaration of trust on the deposit instrument. Whether the issue was missed, ignored, or taken care of by other evidence of intention in these two cases, is open to conjecture. Thus, there is the possibility in Illinois that the "mere form of the account" may create a trust; (3) The courts may interpret the Illinois statutes protecting a bank which pays the beneficiary on the death of a depositor, as creating a Totten Trust. Ill. Rev. Stats. (1955) c. 16½, § 23 c. 32, § 770 (b); (4) The courts may just adopt the Restatement of Trusts § 58 (1935) viewpoint which is a codification of the Totten Trust.

⁸³ This would only be one step in the recognition of the "Totten Trust."

⁸⁴ 117 N.Y. 421, 22 N.E. 940 (1889).

ated, it is not revocable at the will of the party who created it, unless he has expressly reserved the power of revocation.⁸⁵ Whether Illinois would make an exception in the cases of savings accounts trusts is hardly probable. In connection with this problem, it would be well to consider two decisions⁸⁶ which cast some light upon the situation. *Helfrich's Estate v. Commissioner of Internal Revenue*⁸⁷ has the distinction of being the only case which mentions the Totten Trust in connection with Illinois law. In this case there were two trustees and several instruments, one of which provided: "During the lifetime of the trustees and the survivor of them, all moneys now and hereafter deposited in said accounts may be paid to or upon the order of the trustees, or either of them, and upon the death of the survivor of the trustees all moneys deposited in said account shall be payable to or upon the order of the beneficiary."⁸⁸ The commissioner contended that the trust was "Totten" or "tentative" and therefore invalid or at best revocable.⁸⁹ The court found a valid irrevocable trust and not a "Totten" or "tentative" trust. It said: "The present case is distinguishable from the *Totten* cases on several grounds. Separate trust instruments were executed here and another trustee besides the settlor was included. Neither practice is common to Totten trusts. . . . Furthermore, the language of the instrument itself clearly negatives any right of withdrawal or revocation in the settlor when it provides that "all moneys now and hereafter deposited in said account may be paid to or upon the order of the trustees. . . . No provision is made for the settlor to withdraw in his own name."⁹⁰ In *Albert v. Albert*,⁹¹ there was an instrument purporting to be a declaration of trust,⁹² which provided: "During the lifetime of the trustee all money now and hereafter deposited in said account shall be paid to or upon the order of the trustee and, upon the death of the trustee, all moneys deposited in said account shall be payable to or upon the order of the beneficiary, or to his legal representative. . . . The trustee

⁸⁵ *Trubey v. Pease*, 240 Ill. 513, 88 N.E. 1005 (1909); *Light v. Scott*, 88 Ill. 239 (1878); *Fry v. Pence*, 261 Ill. App. 218 (1931); *Harris Trust and Savings Bank v. Morse*, 238 Ill. App. 232 (1925). This is in accord with the general rule of Trusts. See *Historical Background*, section VI of the text, *supra*. The cases following *Matter of Totten* make an exception in the cases of savings accounts. They "imply" a power of revocation.

⁸⁶ *Helfrich's Estate et al. v. Commissioner of Internal Revenue*, 143 F. 2d 43 (1944); *Albert v. Albert*, 334 Ill. App. 440, 80 N.E. 2d 69 (1948).

⁸⁷ 143 F. 2d 43 (1944).

⁸⁸ *Ibid.*, p. 43.

⁸⁹ The commissioner seems to have felt that the Totten Trust would be invalid under Illinois law but that there was a possibility of its being recognized. Thus, the wording of his contention.

⁹⁰ 143 F. 2d 43 (1944).

⁹¹ 334 Ill. App. 440, 80 N.E. 2d 69 (1948).

⁹² The problem as to whether this "declaration" alone was enough to create a trust is discussed in footnote 82, *supra*.

represents that there is existing no agreement in respect to said account, except as herein set forth."⁹³ There was, in fact, a separate instrument reserving the power of revocation. The court found a valid irrevocable trust. Though the *Helfrich* case pays lip service to the Totten Trust and indicates that it might possibly exist under Illinois law, it rather evasively avoids that question and finds an irrevocable trust. The language of both decisions in finding that irrevocable trusts were created by the savings accounts instruments is a very strong indication that Illinois will not recognize a revocable trust without an express reservation of revocation by the depositor. Thus, it would seem that a "tentative" or Totten Trust could not exist in Illinois under the theory of an "implied" reservation of a power of revocation by the depositor-trustee.

But if Illinois were to recognize the doctrine of Totten trust, there would arise the problem of "testamentary disposition."⁹⁴ As a general rule, the creation of a trust is testamentary if no interest passes to the beneficiary before the death of the settlor.⁹⁵ As seen before,⁹⁶ the whole problem centers around the powers, rights, control and dominion reserved by the settlor. Are they such as to leave him virtually the owner of the property and the trustee his mere agent?⁹⁷ If these principles are applicable to savings banks trusts, it is quite arguable that they are testamentary dispositions and that, since there is no compliance with the formalities required by the Statute of Wills, the beneficiary would not be entitled to the deposit on the death of the depositor.⁹⁸

Thus, it will be important to determine where Illinois draws the line between a valid inter vivos trust and an attempted testamentary disposition in regard to the "control" of the settlor.⁹⁹ The history of Illinois courts in this respect indicates a definite liberal tendency in upholding trusts

⁹³ 334 Ill. App. 440, 445, 80 N.E. 2d 69, 72 (1948).

⁹⁴ As explained before, no question of testamentary disposition will arise if the intention of the depositor is shown to be to create an irrevocable trust or no trust at all. See *Matter of Totten*, Section V of text *supra*.

⁹⁵ See 1 Scott on Trusts, § 53 (2d Ed., 1956).

⁹⁶ See *Matter of Totten*, Section V of text *supra*.

⁹⁷ Some authorities feel that the problem of testamentary disposition is largely ignored by the courts when considering savings accounts trusts. See 39 Dickinson L. Rev. 36 (1934); 1 Scott on Trusts, § 58.3 (2d Ed., 1956).

⁹⁸ The customary savings-accounts trust allows the depositor to retain complete control over the account as long as he lives. He may deposit, withdraw or close out the account at will and he may change the beneficiary by making out a new deposit card. See footnote 62 *supra*.

⁹⁹ *Farkas v. Williams*, 5 Ill. 2d 417, 25 N.E. 2d 600 (1955). The court, while admitting that inter vivos trusts have a "testamentary look" and that the "line must be drawn somewhere," did not feel the point had been reached in that case.

where the settlor retains a large measure of control.¹⁰⁰ The latest and leading case on this point is *Farkas v. Williams*.¹⁰¹ There, Farkas as settlor and trustee, reserved to himself as settlor the cash dividends of the stock for his own personal account and use. He reserved the right as trustee to vote, sell, redeem, exchange or otherwise deal with the stock. He also reserved the right to revoke the trust or change the beneficiary. However, Farkas did register the stock in the name of Farkas as trustee for the beneficiary. This indicated that Farkas intended to assume those obligations set out in the instrument as well as those fiduciary obligations implied by law. Also, on the death of Farkas, the beneficiary would become the absolute owner unless Farkas changed the beneficiary or revoked the trust, which was not to be effective as to the company until written notice was delivered to it. These are not the rights of an absolute owner for he can do with his property as he will without securing the approval of or notifying anyone and without being held to the duties of a fiduciary while doing so. The court, in balancing these factors and recognizing the liberal trend of Illinois said: "It is obvious that a settlor with the power to revoke and to amend the trust at any time is, for all practical purpose, in a position to exert considerable control over the trustee regarding the administration of the trust. For anything believed to be inimicable to his best interests can be thwarted or prevented by simply revoking the trust or amending it in such a way as to conform to his wishes."¹⁰² The court then lists some of the powers a settlor might reserve which could render a trust testamentary and states: "Actually any of the above powers could readily be assumed by a settlor with the reserved power of revocation through the simple expedient of revoking the trust, and then, as absolute owner of the subject matter, doing with the property as he chooses."¹⁰³ Finally, the court looked to the purpose of meeting the formalities required by the Statute of Wills, namely, to prevent fraud. Here, there was clearly no fraud since the stock was issued in compliance with the written declaration of trust, in the name of Farkas as trustee for Williams. For these reasons, the court found a valid inter vivos trust, and leave for consideration the effect of this decision on the testamentary disposition problem of the Totten Trust.¹⁰⁴ The Farkas trust is similar to a savings deposit trust in

¹⁰⁰ See *Gurnett v. Mutual Life Ins. Co.*, 356 Ill. 612, 191 N.E. 250 (1934); *Bear v. Milliken Trust Co.*, 336 Ill. 366, 168 N.E. 349 (1929); *Kelly v. Parker*, 181 Ill. 49, 54 N.E. 615 (1899).

¹⁰¹ 5 Ill. 2d 417, 125 N.E. 2d 600 (1955).

¹⁰² *Farkas v. Williams*, 5 Ill. 2d 417, 430, 125 N.E. 2d 600, 607 (1955).

¹⁰³ *Ibid.*

¹⁰⁴ Though some New York cases speak of the Totten Trust as arising upon the death of the depositor, this comment shall proceed under the theory that the trust arises at the time of the deposit. That is, that the trust is subject to a condition subsequent of revocation rather than a condition precedent of the depositor's death.

many ways. The settlor in both instances, besides retaining a life interest, can destroy the trust by revoking or consuming the corpus. Realistically, the beneficiary's interest in either case amounts to a mere expectancy. The formal documents executed in the Farkas trust are more elaborate and extensive than those customarily used in a savings accounts trust but theoretically they are the same. Therefore, by analogy, it would seem that Illinois would follow the theory of the *Totten* case so far as the problem of testamentary disposition is concerned. From the language in the *Farkas* case, it would seem that Illinois courts would desire to effectuate the settlor's intent. They do not want to frustrate that intent with technicalities. Thus, as long as the courts can find any limitation on the settlor, they will most probably reject the argument of testamentary disposition and find a valid inter vivos trust.¹⁰⁵ Thus, it would seem that if a Totten Trust can be created in Illinois, it will not be held invalid as a testamentary disposition.

The final problem to be considered by the Illinois courts in regard to a Totten Trust is the interpretation of two statutes¹⁰⁶ which could conceivably lead to recognition of the tentative trust. As far back as 1921, an act in relation to the payment of deposits in trust was approved by the Illinois legislature:

If a deposit is made with any corporation doing a banking or trust business by one person in trust for another, the name and residence of the person for whom it is made shall be disclosed, and it shall be credited to the depositor as trustee for such person; and if no other notice of the existence and terms of a trust has been given in writing to such corporation, the deposit, or any part thereof, together with the interest thereon, *may*,¹⁰⁷ in the event of the death of the trustee, be paid to the person for whom said deposit was made, or to his legal representative.¹⁰⁸

While the wording of this statute could be reasonably interpreted as recognizing the tentative trust, there has not yet been any litigation in Illinois concerning this theory. In 1955, another statute,¹⁰⁹ passed as part of the Illinois Savings and Loan Act, goes a little further and provides:

If one or more persons opening or holding a withdrawal capital account shall execute a written agreement with the association providing that the account

¹⁰⁵ This limitation would probably come in the form of the deposit. By referring to himself as "trustee," the depositor has bound himself in that fiduciary capacity. One must also remember that small sums are involved which are easy to identify and there is no great danger of fraud. Also the public policy behind the "poor man's will" has to be considered, viz., the elimination of probate.

¹⁰⁶ Ill. Rev. Stats. (1921) c. 16½, § 23; (1955) c. 32, § 770 (b).

¹⁰⁷ Italics added.

¹⁰⁸ There has been no litigation at all on this statute since 1936. Ill. Rev. Stat. (1921) c. 16½, § 23.

¹⁰⁹ Ill. Rev. Stat. (1955) c. 32, § 770 (b).

shall be held in the name of such person or persons as trustees for one or more persons designated as beneficiaries, the account and any balance thereof which exists from time to time, shall be held as a trust account and unless otherwise agreed between the trustees and the association: (1) Any such trustee during his life time may change any of the designated beneficiaries by a written direction accepted by the association; and (2) Any such trustee may withdraw or receive payment in cash or check payable to his personal order and any payment or withdrawal shall constitute a revocation of the agreement as to the amount withdrawn; and (3) Upon the death of the last surviving trustee the person or persons designated as beneficiaries who are living at the death of the last surviving trustee *shall* be the holders of the account (as joint *owners* with right of survivorship if more than one) and any payment to the *holder* or any such holders shall be a complete discharge of the association's obligation as to the amount so paid.¹¹⁰

Some states have interpreted similar statutes as merely protecting a bank if it makes payment to the beneficiary.¹¹¹ In states where a revocable trust of the deposit is invalid as a testamentary disposition, it has been held that the statute does not validate the disposition.¹¹² In states where the Totten Trust is recognized it has been said that "the principle of law laid down in *Matter of Totten*, was later made a part of the banking law."¹¹³ From an analysis of these cases, it would seem that the interpretation of such statutes protecting banks follows the policy of the particular state in regard to a tentative trust. Thus, if a state recognizes the Totten Trust, the banking statute adopts the Totten Trust principle. If a state does not recognize the Totten Trust, they interpret the statute as being there solely for the protection of the bank and that the rights of the depositor and of the beneficiary are not affected. No state has seen fit to interpret this type of statute of itself as giving rise to a Totten Trust. Proceeding under this theory, it would seem that Illinois would not recognize these statutes as an enactment of the Totten Trust unless such trust was first judicially recognized in this state.

There is some indication that the legislature may have intended the latter statute¹¹⁴ to be an enactment of the Totten Trust. The 1921 act¹¹⁵ states the bank "*may*" pay the beneficiary. The 1955 act¹¹⁶ states the account "*shall*" be held as a trust account and that the beneficiaries "*shall*" be the holders of the account as joint "*owners*" and payment to the "*holder*" shall be a discharge. The use of the words "shall," "owners," and

¹¹⁰ Italics added.

¹¹¹ *Alger v. North End Savings Bank*, 146 Mass. 418, 15 N.E. 916 (1888).

¹¹² *Jefferson Trust Co. v. Hoboken Trust Co.*, 107 N.J. Eq. 310, 152 Atl. 374 (1930).

¹¹³ In *Hendersons Estate*, 198 N.Y. Supp. 799, 800 (1923). See also *Walso v. Latterner*, 140 Minn. 455, 168 N.W. 353 (1918).

¹¹⁴ Ill. Rev. Stat. (1955) c. 32 § 770 (b).

¹¹⁵ Ill. Rev. Stat. (1921) c. 16½ § 23.

¹¹⁶ Ill. Rev. Stat. (1955) c. 32 § 770(b).

"holder" indicate that the intention of the legislature may have been to enact the Totten Trust. Further evidence of this intention may be gathered from the fact that this act repealed the Savings and Loan Act of 1919¹¹⁷ but did not repeal a portion enacted in 1939¹¹⁸ which specifically was directed to limiting the liability of the association in paying the proceeds of trust accounts to fiduciaries and beneficiaries. A second section whose sole object was to protect the associations from liability would be redundant.

From the foregoing analysis it can be seen that the Illinois courts can either follow the standard interpretation of such statutes by other states and thus find that the Totten Trust is not enacted by this statute or they can engage in statutory construction to find that the Totten Trust is enacted by the statute.¹¹⁹

CONCLUSION

The theory behind trusts as evidenced throughout history¹²⁰ is in apparent conflict with the theory behind the Totten Trust. The trustee has always held the legal title for the *cestui que trust* who has always enjoyed the benefits of the trust. The Totten Trust places the legal title and the benefits in the trustee.¹²¹ Therefore, the Totten Trust is in conflict with the definition of a trust.¹²² Technically, it cannot be classified as an express trust, resulting trust or constructive trust.¹²³ Nor can it be said that it arises by any of the principal methods of trust creation.¹²⁴ Further, the

¹¹⁷ See Ill. Rev. Stat. (1955) c. 32 § 944.

¹¹⁸ Ill. Rev. Stat. (1955) c. 32 § 953.

¹¹⁹ This latter interpretation hardly seems probable when one considers legislative intent. The legislature would have come out in more positive terms employing the language of § 58 of the Restatement of Trusts or of the Totten case had such been their intent. It seems more probable that the real reason for the enactment of this statute lies in the legislature's knowledge that the "tentative trust" does not exist in Illinois and that the courts will so hold. In view of the thousands of savings accounts trusts in Illinois in the form of tentative trusts, they wanted to provide definite and adequate protection for the banks.

¹²⁰ See Historical Background, Section I of text supra.

¹²¹ It could be argued that the beneficiaries' enjoyment is merely postponed. This is not true, however, because the beneficiaries' interest in a Totten Trust is little than a mere expectancy.

¹²² See Historical Background, Section II of text supra. There is no fiduciary relationship. There are no equitable duties on the trustee to deal with it for the benefit of another. It is hard to see how it arises as a manifestation of intention to create the relationship.

¹²³ See Historical Background, Section III of text supra. The only conceivable category in which to place the Totten Trust is the express trust. Technically the Totten Trust lacks the requisites of property transfer and express declaration of intention to create a trust.

¹²⁴ See Historical Background, Section IV of text supra.

technical elements of a trust are not present.¹²⁵ The Totten Trust also violates the ordinary presumption against revocability in the law of trusts.¹²⁶ Finally, it violates the Statute of Wills.¹²⁷ For these reasons, the Totten Trust has been called a "serious anomaly" and a piece of "judicial legislation."¹²⁸

Thus, we are left to consider the total effect of this "fiction," this "poor man's will," this "tentative" or "Totten" trust.¹²⁹ The first important observation to be made is that the doctrine is law in only a few states.¹³⁰ Many states have specifically rejected the doctrine.¹³¹ Many states have not as yet passed upon the doctrine.¹³² The total effect of the doctrine when considering all states may be summarized in the word "confusion." For example, confusion exists in the states which recognize the doctrine because it is fiction. This is illustrated if a creditor of the beneficiary attempts to attach the account,¹³³ if the depositor disposes of the deposit by

¹²⁵ See Historical Background, Section V of text *supra*. Though it may be argued that the depositor is the trustee, that the account is the trust res and that the beneficiary is clearly named, it is hard to satisfy the requirement of intention.

¹²⁶ See Historical Background, Section VI of text *supra*. Some authorities feel that this "implied" power of revocation is not an extreme step. They feel that if the depositor intended a trust at all, it seems rather clear that he intended a revocable trust. See C. W. Leaphart, 78 U. of P. L. Rev. 626 (1930).

¹²⁷ See Historical Background, Section VII of text *supra*. Some authorities feel that the courts tend to ignore this problem in savings accounts trusts. See 39 Dickinson L. Rev. 36 (1934). One must also consider this issue in the light of the recent liberal trend evidenced by such cases as *Farkas v. Williams*, 5 Ill. 2d, 417, 125 N.E. 2d 600 (1955).

¹²⁸ Wilbur Larremore in 14 Yale L. J. 312 (1905). Most authorities choose to treat the Totten Trust as a fiction. The application of the trust idea to bank deposits is useful in arriving at a final solution of the problem. In other words everybody knows that the trust deposit is not a trust, but they will treat it as if it were a trust. By this method they may effectuate the intent of the depositor and realize the object of the deposit. As has been said, the mind is baffled by conflicting forces and grasps at an admittedly erroneous conception for the purpose of clarifying its reasoning and effecting a desired objective." 39 Dickinson L. R. 37, 38 (1934).

¹²⁹ These are some of the various terms employed by the authorities in describing the savings accounts trust.

¹³⁰ The doctrine is law only in California, Delaware, Georgia, Kentucky, Minnesota, Pennsylvania, New York and Texas.

¹³¹ See footnotes 38, 39, *supra*.

¹³² These states are probably in the majority.

¹³³ In *Kelly General Finance Co.*, 16 D. & C 435 (Pa.) the court refused to permit a creditor of the beneficiary of a trust account to attach the fund: "The case before the court may be disposed of on the ground that, though the deposit is in form a trust deposit, it is in fact not so, because the depositor has made withdrawals from time to time from her funds, treating it as her own; or, if not withholding her withdrawals her deposit in the form made could be construed to be a declaration of trust in favor of the beneficiary, she revokes it by her claim to it filed in this case." This case indicates that the equitable and legal title are in the depositor and also shows the confused thinking of the courts in trying to solve a problem of reality. It should also be noted

a will,¹³⁴ or if the beneficiary dies before the depositor.¹³⁵ This same confusion arises among those courts which hold that the trust arises upon the making of the deposit,¹³⁶ while others hold that it does not arise until the death of the depositor.¹³⁷ The tentative trust theory has led to interminable litigation, as shown by the New York cases.¹³⁸ Further speculation exists in states like Illinois¹³⁹ which have not as yet passed upon the issue. The existence of a savings account trust in this unpredictable situation forces the legislature to pass statutes protecting banks,¹⁴⁰ places the depositor in a precarious position in regard to his account,¹⁴¹ and generally jeopardizes the law of trusts.¹⁴²

Against this confusion one must weigh the advantages of the Totten Trust:

1. An avoidance of inheritance taxes.
2. There are no formalities connected with its creation in contrast to a will.
3. The incompetency of the creator of a trust is not subject to as great an attack as the incompetency of the testator of a will.
4. The trust does not incur the great expense and delay that is connected with the administration of estates.

The advantages are ostensibly beneficial to a great number of depositors and banks. But so long as social policy is held to be inferior to the settled

that a creditor of the depositor may attack the fund. In *Re Reich's Estate* 146 Misc. 616, 262 N.Y. Supp. 623 (1933).

¹³⁴ See *Scanlon's Estate*, 313 Pa. 424, 169 Atl. 106 (1933). In *Re Mannix Estate* 147 Misc. 479, 264 N.Y. Supp. 24 (1933). In these cases the court held that a contrary will revoked the tentative trust. It would seem that the "fiction" always yields to reality.

¹³⁵ *Rambo v. Pyle*, 220 Pa. 235, 69 Atl. 106 (1908). The executor of the cestui que trust and the administrator of the trustee both claimed the fund. It was awarded to the latter.

¹³⁶ *Coughlin v. Farmers and Mechanics Savings Bank*, 199 Minn. 102, 272 N.W. 166 (1937); *Pozzuto's Estate*, 124 Pa. Super. 93, 188 Atl. 209 (1936). Under this theory the trust is initiated at the time of the deposit subject to a condition subsequent of revocation.

¹³⁷ *Matter of Slobiansky*, 152 Misc. 232, 273 N.Y. Supp. 869 (Surr. Ct., 1934); *Matter of Kelly*, 151 Misc. 277, 271 N.Y. Supp. 457 (Surr. Ct., 1934). Under this theory the beneficiaries' rights remain inchoate until the depositor's death. It has been suggested that the Restatement of Trusts adopts this theory. See 87 U. of Pa. L. Rev. 852 (1939). Under this theory it must be clearly seen that the deposit is testamentary since the depositor's death is a condition precedent to the creation of the trust.

¹³⁸ See cases cited 1 Scott on Trusts, 477-510 (1956).

¹³⁹ See *Matter of Totten*, Section VI of text *supra*.

¹⁴⁰ See footnote 59 *supra*.

¹⁴¹ For example the depositor may deposit his money thinking he has established a revocable trust and have the courts decide it is irrevocable. The beneficiaries' creditors may be able to reach the account. Various difficulties may be envisioned.

¹⁴² Unnecessary use of anomalous fictions such as the Totten Trust may prove in the long run to be detrimental in that it opens the door for further erosions of some of the settled doctrines upon which the stability trust law depends.

principles of trust law the courts will continue to remain divided as to acceptance of the Totten Trust theory.

TAXABILITY OF ILLEGALLY ACQUIRED FUNDS

Does illegally obtained money or property constitute taxable income to the person so obtaining it? This area of the income tax law has been a source of great discomfort to the federal courts and has been the subject of considerable judicial divergence.

The initial consideration is, simply stated, whether or not illegally received funds meet the requirements of "gross income," according to the Internal Revenue Acts—as that term is interpreted by the federal courts. The decisions further raise a question at times as to the motivation of the government; that is, does the federal government seek to tax a given type of receipt as a matter of policy, to punish those who participate in illegal activities? This discussion, however, will center mainly on the question first presented, that is, are illegal gains taxable?

EARLY DECISIONS (1919-27)

In a 1919 case, *Rau v. United States*,¹ the defendant insurance agent embezzled moneys which were delivered to him to be paid as insurance premiums, and the court held that defendant had committed a larceny, and therefore, the money so received was not subject to taxation under the Revenue Act.²

In 1926, there were two cases in which the decision in the *Rau* case was attacked. *Steinberg v. United States*³ held that profits from the sale of liquor in violation of the law were taxable income. The court, in discussing the applicable provision of the Internal Revenue Act,⁴ said that since the phrase, "gains and profits from any source whatever," was used in the statute, as contradistinguished from the term "income," there was no doubt that Congress meant to include all species of gain, no matter how immoral or vicious the method of acquiring the same might be.

The case of *United States v. Sullivan*,⁵ in opposing the *Rau* case, presents a concise and persuasive argument, by showing the trend in the history of national income tax legislation. The court quoted from the first income tax law to be passed under the Sixteenth Amendment of the federal Constitution,⁶ where it was provided that the net income of a taxable person

¹ 260 Fed. 131 (C.A. 2d, 1919).

² Revenue Act referred to here was the Act of 1916.

³ 14 F. 2d 564 (C.A. 2d, 1926).

⁴ Internal Revenue Act, 1921, at § a, 42 Stat. 238 (1921).

⁵ 274 U.S. 259 (1927). ⁶ Internal Revenue Act, 1913, at § b, 38 Stat. 167 (1913).