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NOTES AND COMMENTS

Totten Trust: The Poor Man's Will

X deposits his money in a savings account in a bank or savings and loan association in his own name as trustee for Y. The account reads: "X as trustee for Y." He intends to reserve a power to withdraw any amount he wishes at any time, and also a power to revoke the trust altogether. Y may or may not be aware of the deposit. X retains the passbook. What X is trying to do is to keep complete power over the deposit during his lifetime, with whatever remains at his death to go to Y if Y is then alive. This is known as a "Totten" or tentative trust, the name Totten coming from the style of one of the early cases to recognize such an arrangement as valid.¹

The Totten trust has now been recognized by court decision or statute in a number of states, including California, Delaware, District of Columbia, Florida, Georgia, Kentucky, Maryland, Massachusetts, Minnesota, New Jersey, Pennsylvania, Tennessee, and Washington.² The *Restatement of Trusts* also recognizes it.³ A mere handful of modern decisions reject it.⁴

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

² Brucks v. Home Federal Sav. & Loan Ass'n, 36 Cal. 2d 845, 228 P.2d 545 (1951); Delaware Trust Co. v. Fitzmaurice, 27 Del. Ch. 101, 31 A.2d 383 (Ch. 1943); *In re* Scott's Estate, 96 F. Supp. 290 (D.D.C. 1951); Seymour v. Seymour, 85 So. 2d 726 (Fla. 1956); Wilder v. Howard, 188 Ga. 426, 4 S.E.2d 199 (1939); Hale v. Hale, 313 Ky. 344, 231 S.W.2d 2 (1950); Bollack v. Bollack, 169 Md. 407, 182 Atl. 317 (1936); Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E.2d 748 (1946); Coughlin v. Farmers & Mechanics Sav. Bank, 199 Minn. 102, 272 N.W. 166 (1937); Howard Sav. Institution v. Kielb, 38 N.J. 186, 183 A.2d 401 (1962); *In re* Pavlinko, 399 Pa. 536, 160 A.2d 554 (1960); Leader Fed. Sav. & Loan Ass'n v. Hamilton, 46 Tenn. App. 368, 330 S.W.2d 33 (1959); *In re* Estate of Madsen, 48 Wash. 2d 675, 296 P.2d 518 (1956).

³ RESTATEMENT, TRUSTS § 58 (2d ed. 1959) [Hereinafter cited as RESTAT. TRUSTS]. "Where a person makes a deposit in a savings account in a bank or other savings organization in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust." *Id.* at 155.

⁴ Springvale Nat. Bank v. Ward, 122 Me. 227, 119 Atl. 529 (1923); Bartlett v. Remington, 59 N.H. 364 (1879); Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943); see Fasano v. Meliso, 146 Conn. 496, 152 A.2d 512 (1959).

This trust is upheld as a convenient and safe way of disposing of money, especially small sums. At the death of the depositor (settlor), evidence is admissible to show that the trust was revocable, irrevocable, or that it really was not a trust at all (for example, that the account was placed in this form to deceive the bank or creditors). If there is no evidence other than the words of the deposit card, courts generally rule that the inference favors a revocable trust—Totten.⁵

Under a Totten trust, the surviving beneficiary takes the remaining deposit subject to certain claims. *X*'s creditors can get at the account during *X*'s lifetime and even after his death.⁶ The account is liable for funeral and other estate expenses, at least to the extent that the estate cannot meet these expenses.⁷ There is conflict as to whether the remaining deposit is included in the decedent's estate for purposes of ascertaining the widow's statutory share,⁸ the better reasoning supporting its inclusion, but with her share to be taken first out of other assets. The deposit doubtless counts in the decedent's estate for estate and death tax purposes in the same manner as a revocable trust, due to the amount of control the settlor retains. It is not necessary that the passbook be delivered to the beneficiary, and it is not necessary that he even be aware of the trust.⁹ In fact, delivery of the passbook to the beneficiary may be evidence of an irrevocable trust or of an inter vivos gift, in which case the incidents connected with the deposit would be quite different.¹⁰ In the event of such delivery to *Y*, evidence would be received to show the purpose of the act; thus delivery of the passbook to the beneficiary

⁵ *Wilder v. Howard*, 188 Ga. 426, 4 S.E.2d 199 (1939); *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904); RESTAT. TRUSTS § 58, comment *a* (2d ed. 1959).

⁶ *Matter of Halbauer*, 34 Misc. 2d 458, 228 N.Y.S.2d 786 (Surr. Ct. 1962); *Matter of Palyo*, 187 Misc. 884, 62 N.Y.S.2d 394 (1946); *Matter of Weinberg*, 162 Misc. 867, 296 N.Y. Supp. 7 (Surr. Ct. 1937); RESTAT. TRUSTS § 58, comment *c* (2d ed. 1959). This result is justified on the basis of the amount of control the depositor keeps.

⁷ *Matter of Aybar*, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952); *Matter of Halbauer*, note 6 *supra*; RESTAT. TRUSTS § 58.

⁸ Cf. RESTAT. TRUSTS § 58, comment *e* (2d ed. 1959); *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951). The argument for including the account is that the depositor's control is so great that the account was for this purpose, his property.

⁹ Annots., 157 A.L.R. 925 (1945); 168 A.L.R. 1324 (1947).

¹⁰ If the deposit were held to be a gift the depositor's creditors, wife, etc., would not be able to get at the deposit; further, the depositor would be liable for any withdrawals he made.

will not of itself prevent the deposit from being considered a Totten trust.

Even though there are no withdrawals by the depositor, he may revoke by words or acts that indicate a revocation,¹¹ for example, the depositor's pledging of the passbook on a loan may amount to revocation.¹² He may also revoke by will if it is clear that this was the intent; but if there is no mention of the deposit, a general residuary clause by itself will not act as a revocation.¹³ Where the depositor becomes insane, his guardian can revoke only if necessary for the welfare of the depositor.¹⁴

The Totten trust thus bears a close resemblance to an inter vivos trust in which the settlor is trustee and in which he reserves full right to amend and revoke; the unusual feature in the Totten arrangement is the amount of control the depositor retains. When the settlor of the Totten trust withdraws money for his own use, he is in effect revoking the trust as to that amount (*pro tanto*). Creditors have even greater rights under the Totten trust, for normally creditors of the settlor cannot get at a trust merely because it is revocable or amendable.¹⁵

The fundamental objection to the Totten trust is the charge that it violates the statute of wills, that it is testamentary. This charge is based on the amount of control which the depositor retains.¹⁶ An ordinary inter vivos trust certainly would be in danger

¹¹ *Brucks v. Home Federal Sav. & Loan Ass'n*, 36 Cal.2d 845, 228 P.2d 545 (1951) (unmailed letter revoked); *In re Onody's Will*, 33 Misc. 2d 497, 226 N.Y.S.2d 645 (Surr. Ct. 1962); *Matter of Stelma*, 25 Misc. 2d 234, 201 N.Y.S.2d 609 (Surr. Ct. 1960). Cf. *In re Ryan's Will*, 52 N.Y.S.2d 502 (Surr. Ct. 1944) (unmailed letter not revoked). See Annot., 38 A.L.R.2d 1234 (1954).

¹² *Evinger v. MacDougall*, 28 Cal. App. 2d 175, 82 P.2d 194 (Dist. Ct. App. 1938).

¹³ *Brucks v. Home Federal Sav. & Loan Ass'n*, 36 Cal. 2d 845, 228 P.2d 545 (1951); *Matter of Ludwig*, 207 Misc. 860, 140 N.Y.S.2d 742 (Surr. Ct. 1955); *In re Ryan's Will*, 52 N.Y.S.2d 502 (Surr. Ct. 1944). See also *Matter of Ginsburg*, 27 Misc. 2d 586, 213 N.Y.S.2d 228 (Surr. Ct. 1961) (passbook in safe-deposit box and will leaves contents of safe-deposit box to a third person); *Matter of Athanasiou*, 24 Misc. 2d 12, 202 N.Y.S.2d 675 (Surr. Ct. 1960).

¹⁴ *Simmons v. First Federal Sav. & Loan Ass'n*, 132 F. Supp. 370 (D.D.C. 1955); *Guardianship of Cuen*, 142 Cal. App. 2d 258, 298 P.2d 545 (Dist. Ct. App. 1956); *RESTAT. TRUSTS* § 58, comment *c* (2d ed. 1959).

¹⁵ *Jones v. Clifton*, 101 U.S. 225 (1879). See Scott, *The Effects of a Power to Revoke a Trust*, 57 HARV. L. REV. 362 (1944); Annot., 92 A.L.R. 282 (1934).

¹⁶ The argument that such a trust is testamentary due to the amount of control retained by the settlor may be put another way. Due to the control

if so much control were retained by the settlor, although courts are now more liberal in this respect than formerly.¹⁷ But due to the nature of a savings account, and due to the societal need for and safety of such a simple device for disposing of small sums of money, courts such as those of New York have recognized the Totten arrangement. They simply say that this is a safe and useful method and that it should be upheld. In the *Totten* decision in 1904 the court wrote:

A brief review of the cases will show how the subject has been gradually developed so as to accord with the methods of the multitude of persons who make deposits in these banks It is necessary for us to settle the conflict by laying down such a rule as will best promote the interests of all the people in the state.¹⁸

Professor Scott writes:

In view . . . of the convenience of this method of disposing of comparatively small sums of money without the necessity of resorting to probate proceedings, there seems to be no sufficiently strong policy to invalidate these trusts. Not only is the amount involved usually comparatively small, but it is easy to identify, and there is no great danger of fraudulent claims resulting from the absence of an attested instrument.¹⁹

The validity of the Totten arrangement requires a finding of a present interest in the beneficiary. To be sure, some courts use language which indicates that the beneficiary receives no interest until the death of the settlor, but this is unsound for it does marked violence to the statute of wills; further, in such case a later will would ordinarily revoke the trust. The correct view is that the beneficiary now receives an interest, with enjoyment both postponed and tentative.²⁰ In this light, the argument that the trust is testamentary falls.

retained, no interest in the property passes to the intended beneficiary until the death of the settlor; thus the trust is testamentary and must meet the statute of wills. It is fundamental that to have an *inter vivos* trust, a present interest must now pass to the beneficiary—although enjoyment may be postponed.

¹⁷ See, *e.g.*, *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944); *Ridge v. Bright*, 244 N.C. 345, 93 S.E.2d 607 (1956). (Settlor retained life interest; right to amend, revoke, and change the beneficiary; he was also trustee. Upheld as valid instrument.)

¹⁸ *Matter of Totten*, 179 N.Y. 112, 120, 125, 71 N.E. 748, 750, 752 (1904).

¹⁹ 1 SCOTT, TRUSTS § 58.3 at 484-85 (1956).

²⁰ See *Fasano v. Meliso*, 146 Conn. 496, 152 A.2d 512 (1959). This de-

It should be noted that the Totten arrangement is a trust, not a gift;²¹ also, that it is not the same thing as a joint bank account with right of survivorship. The latter, by contract, may be used in North Carolina to leave money to the survivor;²² but, except in a husband-wife situation which is covered by a recent statute,²³ such accounts are fraught with risk.²⁴ It may also be noted that a number of states, including North Carolina,²⁵ provide by statute that when a deposit is made in a savings bank by one person in trust for a second person, and no further notice is given to the bank as to purpose or intent, the bank may pay the remaining deposit to the beneficiary on the prior death of the trustee. These statutes often have been enacted merely for the protection of the bank, and a number of courts have held that the statute does not validate the payment as between the beneficiary and the representative of the decedent's estate.²⁶ I would think that the North Carolina statute is merely to protect the bank.²⁷

I find no evidence that North Carolina has even considered the Totten arrangement as such. One case,²⁸ and no doubt others, contained a situation where the principles might have been applied but they were not mentioned. The courts themselves have taken the lead in New York and other states in accepting the Totten trust. If the matter is properly presented, I see no reason why the North Carolina courts should refuse to endorse this salutary device. Fur-

cision, in dictum, incorrectly applies the Totten principles, for this was clearly a Totten trust, but the dictum does illustrate the principle that an interest must pass now.

²¹ See *Fasano v. Meliso*, 146 Conn. 496, 152 A.2d 512 (1959) (delivery of passbook to beneficiary).

²² *Bowling v. Bowling*, 243 N.C. 515, 91 S.E.2d 176 (1956).

²³ N.C. GEN. STAT. § 41-2.1 (Supp. 1961)

²⁴ The North Carolina decisions on joint bank accounts with right of survivorship are in confusion. A lawyer takes his reputation in his hands when he advises one without the most careful draftsmanship. *Smith v. Smith*, 255 N.C. 152, 120 S.E.2d 575 (1961); *Buffaloe v. Barnes*, 226 N.C. 778, 39 S.E.2d 599 (1946). Cf. *Wilson County v. Wooten*, 251 N.C. 667, 111 S.E.2d 875 (1960).

²⁵ N.C. GEN. STAT. §§ 53-59 (1960).

²⁶ *O'Hara v. O'Hara*, 291 Mass. 75, 195 N.E. 909 (1935).

²⁷ 9 N.C.L. REV. 13 (1930).

²⁸ In *Wescott v. First & Citizens Nat. Bank*, 227 N.C. 39, 40 S.E.2d 461 (1946) a soldier overseas mailed money to a bank in the state to be placed on savings, and if he died, the money was to go to his grandfather. The soldier wrote the bank that the money was to be a "trust." His language is not quite apt for the typical Totten deposit but the court might well have decided the case on that theory and thereby carried out the wishes and plans for a soldier killed in a foreign land.

ther, I see no reason why our courts would not follow the broad approach of the *Restatement of Trusts* and of the New York courts. There is no basis for a contentious approach.

Assuming that the North Carolina courts accept the Totten trust, the lawyer is faced with the problem of draftsmanship for the deposit. A simple deposit reading "John Doe in trust for Richard Roe" should prima facie establish a Totten trust, subject to the rules of evidence and proof regarding a contrary intent mentioned earlier. To add a variety of provisions on the card regarding right to control, etc., may result in the trust being held to be testamentary. On the other hand it is desirable, I believe, that direct evidence of the Totten intent appear on the deposit card as this may avoid a lawsuit after death. I would add the following in readable size type:

It is the intent of the depositor, John Doe, to establish a "Totten" trust. The depositor is to have full power to withdraw all or part of the funds deposited at any time, and to revoke at any time. On the death of the depositor, if the beneficiary be then living, the bank is authorized to pay the balance in the the account to such beneficiary, such beneficiary to then own the account fully and absolutely.

In my opinion the Totten trust is the sort of development that can best be worked out by the courts rather than by a state statute. The courts can mold and shape and give life and adapt. However, there is enough court history in other states for guidance, and so it may be that a statute would be the safe way out for this state. If there is to be a statute, I would suggest that the exact words of section fifty-eight of the *Restatement of Trusts* be used.²⁰

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Criminal Law—Confessions—Admissibility of Corroborative Evidence

It is the general rule in the United States that a felony conviction may not be based upon a naked extrajudicial confession of guilt, uncorroborated by any other evidence.¹ Most decisions concerning

²⁰ General references on Totten Trust: 1 SCOTT, TRUSTS § 58-58.5; 1 BOGERT, TRUSTS AND TRUSTEES § 47 (1951); Annots., 157 A.L.R. 925 (1945); 168 A.L.R. 1324 (1947).

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¹ See, e.g., *Opper v. United States*, 348 U.S. 84 (1954); *Pate v. State*, 36 Ala. App. 688, 63 So. 2d 223 (1953); *State v. Skinner*, 132 Conn. 163, 43 A.2d 76 (1945). See generally Note, *Proof of the Corpus Delicti Aliunde*