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Wills--Inclusion of Totten Trust in Testamentary Disposition Deemed Confirmation (Matter of Phipps, 125 N.Y.S.2d 606 (Surr. Ct. 1953))

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upon the entry of the escaped convict into the decedent's truck, a recovery would have been allowed under a recognized exception to *Mitchell v. Rochester Railway,* that is, immediate physical injury.[26] On the other hand, had the injury occurred at any subsequent time within the unaccounted-for forty-five minute period, recovery would have been denied. But whether liability was imposed because the injury was immediate or whether a new exception has been added to the *Mitchell* rule does not clearly appear.

It is submitted that the Court should limit the immunity of the state when liability arises from a breach of the aforementioned concept of duties owed to the general citizenry, for which no liability is imposed, by allowing recovery where a foreseeable harm to a particular individual or group of individuals is involved.

One of the primary reasons for requiring immediate physical injury to permit recovery for psychic injury was to discourage litigation of unfounded claims where there existed a lack of evidence showing a causal relationship between the act complained of and the injury itself. However, with the recent advancements in medico-legal processes, the evidentiary obstacles may be more easily surmounted. It would appear, therefore, that the courts should abandon the requirement of immediate physical injury where the stimulus is only psychic in nature.

WILLS — INCLUSION OF TOTTEN TRUST IN TESTAMENTARY DISPOSITION DEEMED CONFIRMATION.—Testator opened a bank account in his own name in trust for his secretary. The same account was later bequeathed to the secretary. The widow, exercising her right of election, sought contribution from the bank account, claiming it to be part of the estate under the will. The Surrogate *held* that the bank account is not subject to the widow's right of election because the will was a confirmation of the trust, not a revocation. *Matter of Phipps,* 125 N.Y.S.2d 606 (Surr. Ct. 1953).

In 1904, the celebrated case of *Matter of Totten* upheld the validity of a deposit ". . . by one person of his own money, in his own name as trustee for another. . . ." [1] Such a deposit, commonly referred to as a Totten trust, is tentative in nature. It does not become absolute until the gift is completed during the depositor's lifetime by

[26] Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 170 N.Y. Supp. 994 (2d Dep't 1918); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914).

[1] 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904). See the discussion of these trusts in 1 SCOTT, TRUSTS 360 (1939).

some unequivocal act or declaration such as transfer of the bank book to the beneficiary.[2] If the depositor dies before the beneficiary without revocation, or without some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance.[3] As long as the trust remains tentative, the depositor may destroy it, either by some act during his lifetime,[4] or by a decisive testamentary disaffirmance.[5] A Totten trust may be invalidated at the instance of the depositor's widow on the *affirmative* showing that the purported transfer is illusory.[6] However, "[t]here is nothing illusory about a Totten trust as such." [7] Where the estate is inadequate, the trust may be invaded to pay the debts [8] and funeral expenses [9] of the depositor.

The courts have found no difficulty in settling questions which arise under any of these categories. A problem arises, however, when the court is asked to *imply* a testamentary revocation from an equivocal act or declaration of the testator. Here, the intention of the testator alone governs. Thus, a testamentary revocation was found to have been intended where the testator made certain monetary bequests which could not have been carried out without revoking the Totten trust.[10] Conversely, no revocation has been implied in cases where the testator, without mentioning the account in his will, made a monetary bequest to the beneficiary of the Totten trust.[11] Further,

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[2] *See* Matter of Totten, *supra* note 1 at 126, 71 N.E. at 752; Morris v. Sheehan, 234 N.Y. 366, 368, 138 N.E. 23 (1922).

[3] *See* Matter of Totten, *supra* note 1 at 126, 71 N.E. at 752.

[4] See, *e.g.*, Matthews v. Brooklyn Sav. Bank, 208 N.Y. 508, 102 N.E. 520 (1913) (deposits withdrawn and placed in another account); Hessen v. McKinley, 155 App. Div. 496, 140 N.Y. Supp. 724 (1st Dep't), *aff'd mem.*, 209 N.Y. 532, 102 N.E. 1104 (1913) (deposits completely withdrawn).

[5] Moran v. Ferchland, 113 Misc. 1, 184 N.Y. Supp. 428 (Sup. Ct. 1920); Matter of Schrier, 145 Misc. 593, 260 N.Y. Supp. 610 (Surr. Ct. 1932).

[6] The transfer will be illusory if it is ". . . intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed." *Cf.* Newman v. Dore, 275 N.Y. 371, 381, 9 N.E.2d 966, 969 (1937); Marano v. Lo Carro, 62 N.Y.S.2d 121 (Sup. Ct.), *aff'd mem.*, 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946).

[7] *See* Matter of Halpern, 303 N.Y. 33, 38, 100 N.E. 2d 120, 122 (1951).

[8] Beakes Dairy Co. v. Berns, 128 App. Div. 137, 112 N.Y. Supp. 529 (2d Dep't 1908); Matter of Weinberg, 162 Misc. 867, 296 N. Y. Supp. 7 (Surr. Ct. 1937).

[9] Matter of Reich, 146 Misc. 616, 262 N.Y. Supp. 623 (Surr. Ct. 1933) (beneficiary held entitled to proceeds of Totten trust less amount necessary to pay creditors and reasonable funeral and administration expenses).

[10] Walsh v. Emigrant Industrial Sav. Bank, 106 Misc. 628, 176 N.Y. Supp. 418 (Sup. Ct. 1919), *aff'd mem.*, 192 App. Div. 908, 182 N.Y. Supp. 956 (1st Dep't 1920), *aff'd mem.*, 233 N.Y. 512, 135 N.E. 897 (1922); Matter of Mannix, 147 Misc. 479, 264 N.Y. Supp. 25 (Surr. Ct. 1933) (will directed that the testatrix's funeral expenses be paid, a burial plot and headstone purchased, and that a sum be set aside for Masses); Matter of Beagan, 112 Misc. 292, 183 N.Y. Supp. 941 (Surr. Ct. 1920).

[11] Meehan v. Emigrant Industrial Sav. Bank, 213 App. Div. 807, 208 N.Y. Supp. 325 (1st Dep't), *aff'd mem.*, 241 N.Y. 564, 150 N.E. 556 (1925).

it has been held that the creation of a testamentary trust naming as *cestui* the beneficiary of an inter vivos trust (which was not a Totten trust, however) does not revoke the latter.[12]

The question of implied revocation was presented to the Court in the instant case. Apparently, the Surrogate relied on *Matter of Rosso* [13] as controlling authority for the proposition that the testamentary disposition confirmed the trust. It is to be noted, however, that the trust in the *Rosso* case had been perfected during the depositor's lifetime by delivery of the bank book to the beneficiary. Hence, the situation involved a completed gift which could not have been affected by any dispositive provision. Any statements made by the court, therefore, concerning testamentary confirmation, were merely dicta. The case of *Wait v. Society for Political Study of New York City* [14] offers a much sounder basis for the present holding. It was there held, on facts similar to those of the instant case,[15] that the beneficiaries took as *cestuis que trustent,* and not as legatees. The court sustained its ruling on the ground that there was no evidence to rebut the presumption that the trust became absolute upon the depositor's death. The decision in the instant case could be upheld on the same ground, without considering the question of confirmation. Nevertheless, the Court's conclusion, that a confirmation was intended, is the only reasonable one under the circumstances.

It must be presumed that all men act with a purpose. The testator, in the present case, would have accomplished nothing by revoking the trust. He would merely have taken the money out of the trust, placed it in the estate, and then bequeathed it to the very same beneficiary. On the other hand, there is a good reason why the depositor would confirm the Totten trust by mentioning it in the will. The most obvious motive behind such confirmation would be the testator's desire to reaffirm the intent which he apparently had at the time he created the Totten trust.[16]

No only is the present determination in accord with prior decisional law, but it appeals to reason as well. A contrary decision would have thwarted the testator's obvious intention. Such an interference with one's right to dispose of his own property as he sees fit would be wholly unwarranted.

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[12] Irving Bank-Columbia Trust Co. v. Rowe, 213 App. Div. 281, 210 N.Y. Supp. 497 (1st Dep't 1925).

[13] 146 Misc. 746, 262 N.Y. Supp. 861 (Surr. Ct. 1933).

[14] 68 Misc. 245, 123 N.Y. Supp. 637 (Sup. Ct. 1910).

[15] In the *Wait* case, five Totten trusts were established. Three of the accounts were bequeathed to the beneficiaries, while the other two were not mentioned in the will.

[16] *See* Kelly v. Beers, 194 N.Y. 60, 63, 86 N.E. 985 (1909).