St. John's Law Review

Volume 25, December 1950, Number 1 Article 9

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data necessary to prove the value of his inventions or even that it has been used. The Government is permitted to withhold evidence detrimental to national security.[50] Some suggestions to remedy this problem have been made; for example, an *in camera* type of proceeding.[51]

The problem of evaluating the invention is an equally difficult one. While the question "how much is an atomic bomb worth?" is hardly indicative of the problem to be faced, the complexities of fixing a price are certain to be great. The entire industry is so new, its methods and equipment so different,[52] that a standard for reasonable payment will be difficult to establish. There is no basis for comparison. Perhaps cost accounting procedures will be of some assistance in weighing improvement inventions. The wisdom of a Solomon will be needed in evaluating basic inventions.

Conclusion

This summary is far from being a complete catalog of the problems of the inventor in the field of atomic energy. The Atomic Energy Act has, if nothing else, increased the complexity of the already intricate patent law. Perhaps the Act serves best as an illustration of a law of physics, that, to every action, there is an opposite reaction. Technology has spawned the atomic industry, and in return, technology has had its own traditions imposed upon.

The Right of a Surviving Spouse to Attack an Illusory Transfer — Totten Trusts

When the common law rights of dower and curtesy were abolished in New York State,[1] Section 18 of the Decedent Estate Law was enacted with the intent and purpose of increasing the interest of a surviving spouse in the property of the deceased. In the place of these former rights, the survivor was given a personal right of election to take his or her share as in intestacy against, or in the absence of, a provision in the testator's will. This section, amounting, in effect, to a statutory limitation on the power of an owner of

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[50] Pollen v. United States, 85 Ct. Cl. 673, 58 F. Supp. 653 (1937); 62 Stat. 977, 28 U. S. C. 2507 (1948).

[51] Boskey, *supra* note 28, at 445-6.

[52] For an illustration of the complicating factors, see the Commission's Eighth Semi-Annual Report, pp. 3-161 (1950).

[1] N. Y. Real Property Law §§ 189, 190.

real or personal property to direct the mode of distribution of his net estate subsequent to his death, invalidates, as to the surviving spouse upon his or her election, a will which fails to make the specified minimum provision for his or her benefit.[2]

The Decedent Estate Law applies only to property owned by the decedent at the time of his death. If the decedent during his lifetime sold, made a gift of, or destroyed, in whole or in part, any of his property, it cannot be a part of his estate and hence is without the scope of the statute. Section 83 determines those who share in intestacy and decrees the amount of each distributee's share. If a will effectively disposes of all of the testator's property, none but the named beneficiaries have an interest in the estate. To this there is one exception. A testator may disinherit any of his relatives, save his surviving spouse, since Section 18 gives the latter a right to take an intestate share against or in the absence of a testamentary provision.

It has always been an accepted principle of law that legatees had no expectant interest in personal property owned by the decedent during his lifetime but disposed of by him prior to his death. As far as real property was concerned, prior to 1930 in New York there existed the archaic rights of dower and curtesy. Because of the confusion created by these rights and because of the clouds which they cast upon many titles, it was deemed advisable to abolish them. Thus, freer alienation of real property was promoted and titles were rendered more marketable. To compensate for the interest that a spouse would lose as a result of this change in the law, a new right was created by Section 18 of the Decedent Estate Law.[3] Specifically, this new section gave a surviving spouse an absolute right of election to take a portion of the deceased spouse's estate in both realty and personalty. Of course, the electing spouse must establish that the property in question is actually a part of the estate. Consequently, one of the problems that arises is that of determining what part of the estate was absolutely disposed of during the decedent's lifetime. In the ordinary case, there is no difficulty because the decedent, while alive, either has or has not completely divested himself of the title as well as the beneficial incidents of ownership. In either case there is no difficulty in determining the assets of the estate. But in the instance where the decedent during his lifetime transfers a part of his interest in property, while retaining some beneficial right, the problem becomes acute. In the case of *Newman v. Dore*,[4] the decedent left a will containing a provision for a trust for his wife equal to her intestate share in his real and personal property. After the execution of the will, he executed trust agreements by which, in form, he transferred to trustees all his real and personal property.

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[2] Matter of Lavine, 167 Misc. 879, 4 N. Y. S. 2d 923 (Surr. Ct. 1938).

[3] See Report of the Commission to Investigate Defects in the Law of Estates 12, 13.

[4] 275 N. Y. 371, 9 N. E. 2d 966 (1937).

He reserved to himself the enjoyment of the entire income for life and a right to revoke the trust at will. In general, the powers granted the trustees were made "subject to the settlor's control during his life," and could be exercised "in such manner only as the settlor shall from time to time direct in writing." [5] The court, looking at substance rather than form, held the trusts to be illusory transfers intended only to conceal the effective retention by the settlor of the property which in form he had conveyed. That is sufficient to render it an unlawful invasion of the expectant interest of the wife created by Section 18. Whether a transfer is susceptible to attack by a surviving spouse depends upon the following test laid down by the court in the *Newman* case: Has the decedent in good faith divested himself of ownership of his property? If this question is answered in the negative, the transfer will be declared illusory. Would there be bad faith if the donor's motive in transferring his property was to die penniless and consequently leave no estate to support the surviving spouse? Apparently not; for the good faith required by the statute merely requires that the decedent *absolutely* divest himself of the incidents of ownership by some form of *inter vivos* conveyance.[6] Where there is a trust created in which the settlor reserved rights so extensive that the alleged trustee is merely an agent of the settlor and, in legal effect, merely a custodian without discretion and without authority, the transfer will be held illusory and the surviving spouse will be given the option to attack it.[7] The rule in the *Newman* case has not been confined to trusts but has been applied to any illusory transfer made during decedent's lifetime.

A question has been raised as to the right of the surviving spouse to attack a "totten trust" [8] on the ground that it is an illusory transfer. When a depositor puts money in a savings bank [9] in the form of a trust account, *e.g.*, "*A* in trust for *B*," [10] whether a "totten trust" has been created is largely an evidentiary problem. Vann, J., speaking for the Court of Appeals in 1904, stated the following rules to be applied to such an account: "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 or.

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[5] *Id.* at 377, 9 N. E. 2d at 968.

[6] Hart v. Hart, 194 Misc. 162, 81 N. Y. S. 2d 764 (Sup. Ct. 1948), *aff'd*, 274 App. Div. 1036, 85 N. Y. S. 2d 917 (1st Dep't 1949).

[7] President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N. Y. S. 2d 375 (Sup. Ct. 1940), *modified*, 260 App. Div. 174, 21 N. Y. S. 2d 232 (2d Dep't 1940).

[8] Matter of Totten, 179 N. Y. 112, 71 N. E. 748 (1904).

[9] The rules above stated have never been applied to commercial bank accounts.

[10] For a thorough and analytical discussion of the history and interpretation of rules relating to savings bank trusts, *see* Matter of Vaughan, 145 Misc. 332, 260 N. Y. Supp. 197 (Surr. Ct. 1932).

declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without 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." [11] In a "totten trust" all the earmarks of a valid trust will be found with the possible exception of the necessary element of intent. Intent is difficult to ascertain since this form of account is frequently used with a motive far removed from that of creating a trust.[12] A "totten trust" will be inferred only when no contrary intent is shown. Of course, in a case where there is evidence of a real intent to create an actual trust the courts will give effect to the trust by protecting the beneficiaries' interests.[13] Such intent might be shown by a delivery of the pass book to the beneficiary.[14]

With these basic concepts regarding "totten trusts" in mind, the question presents itself as to whether they are illusory. Prior to the enactment of Section 18 of the Decedent Estate Law, it was settled that a "totten trust" was not a part of the decedent's estate; [15] therefore, it was not subject to statutes affecting distribution of property on death, and only the beneficiary was permitted to claim the proceeds. The beneficiary's claim could only be attacked on the ground that a valid "totten trust" had not been created and evidence would have to be adduced to show that the decedent-depositor's intent was other than that of a donor of a gift to the beneficiary.[16] After the enactment of Section 18 a question arose as to the right of a surviving spouse to assail a validly established "totten trust" for being illusory in that it is revocable during the depositor's lifetime, during which time he may treat the funds as his own. In the case of *Murray v. Brooklyn Savings Bank*,[17] in which the deceased died intestate, the Appellate Division, First Department, gave a negative answer to the question, holding: (1) that since the widow based her claim on Section 18 exclusively, she must fail because the decedent left no will. To rely exclusively on Section 18 there must be a will. (2) To permit the widow to have the trust declared invalid would

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[11] Matter of Totten, 179 N. Y. 112, 129, 71 N. E. 748, 758 (1904). The common law rule above enunciated has been codified to the extent that a bank is given a statutory defense if it makes payments to the beneficiary. N. Y. BANKING LAW § 239, subd. 2.

[12] Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940 (1889). Some examples of contrary motives are: to avoid taxation; or because the rules of the bank limit the amount which any one individual may deposit; or because of a desire to obtain high rates of interest where there is a discrimination based on the amount of deposits; or because of the desire to conceal one's wealth.

[13] Thomas v. Brevoort Savings Bank of B'klyn, 275 App. Div. 724, 87 N. Y. S. 2d 411 (2d Dep't 1949).

[14] Matter of Smith, 177 Misc. 601, 31 N. Y. S. 2d 603 (Surr. Ct. 1941).

[15] Matter of Rosso, 146 Misc. 746, 262 N. Y. Supp. 861 (Surr. Ct. 1933).

[16] See note 12 *supra*.

[17] 258 App. Div. 132, 15 N. Y. S. 2d 915 (1st Dep't 1939), *reversing* 169 Misc. 1014, 9 N. Y. S. 2d 227 (Surr. Ct. 1939).

allow other intestacy distributees to share in the principal to the exclusion of the beneficiary even though they were not entitled to the protection of Section 18. Unfortunately, this decision was never appealed and the question remained open as to whether the widow would have prevailed had she merely acted to set the trust aside as illusory and as a fraud upon her rights, rather than basing her claim wholly on Section 18. The court agreed that, under the decision of *Newman v. Dore*,[18] a "totten trust" is an illusory transfer because it reserves to the depositor all the attributes of ownership during his lifetime with nothing vesting in the beneficiary until the depositor's death. At a later date in the case of *Krause v. Krause*[19] the Court of Appeals settled the point that where there is a will, a "totten trust" may be invalidated by the surviving spouse. The holding was to the effect that such trusts are illusory and within the doctrine of *Newman v. Dore*.[20] However, the question raised by the *Murray* case, *i.e.*, could they be attacked in the absence of a will, was not answered. In *Schnakenberg v. Schnakenberg*[21] the Appellate Division, Second Department, expressly rejected the view taken by the First Department that there must be a will in order for the surviving spouse to attack a transfer as illusory and as a fraud upon her rights under Section 18. "A widow may have no right to elect pursuant to the Decedent Estate Law (§ 18) and yet may rely upon it in support of her action to set aside a revocable trust as illusory where the very purpose of the decedent in so conveying was to avoid its application." [22] This case did not involve a "totten trust." In *Burns v. Turnbull*,[23] another case not involving a "totten trust," the Appellate Division, Second Department, again set aside a trust as illusory even though the decedent died intestate. The Court of Appeals affirmed this decision.[24]

In *Marano v. Lo Carro*[25] a transferee contended that plaintiff's action to set aside a transfer of stock by decedent must fail because decedent had died intestate. He relied on the *Murray* case but the Special Term decided in favor of the plaintiff basing its decision on the affirmance by the Court of Appeals of *Burns v. Turnbull*.[26] This Special Term decision was upheld on appeal to the Appellate Divi-

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[18] See note 4 *supra*.

[19] 285 N. Y. 27, 32 N. E. 2d 779 (1941), *reversing* 259 App. Div. 1057, 21 N. Y. S. 2d 341 (4th Dep't 1940), *reversing* 171 Misc. 355, 13 N. Y. S. 2d 812 (Sup. Ct. 1939).

[20] See note 4 *supra*.

[21] 262 App. Div. 234, 28 N. Y. S. 2d 841 (2d Dep't 1941), *affirming* 176 Misc. 312, 27 N. Y. S. 2d 272 (Sup. Ct. 1941).

[22] Schnakenberg v. Schnakenberg, 262 App. Div. 234, 236, 28 N. Y. S. 2d 841, 843 (2d Dep't 1941).

[23] 266 App. Div. 779, 41 N. Y. S. 2d 448 (2d Dep't 1943), *reversing* 37 N. Y. S. 2d 380 (Sup. Ct. 1942).

[24] 294 N. Y. 889, 62 N. E. 2d 785 (1945).

[25] 62 N. Y. S. 2d 121 (Sup. Ct. 1946), *aff'd*, 270 App. Div. 999, 63 N. Y. S. 2d 829 (1st Dep't 1946).

[26] See note 24 *supra*.

sion, First Department. Thus it would seem that the First Department now agrees that *Burns v. Turnbull* overrules its decision in the *Murray* case. Although these cases did not involve "totten trusts," it takes no great imagination to see that the doctrines there enunciated would apply with equal force when a "totten trust" is involved. In *Krause v. Krause*[27] they were held illusory. Therefore, under *Burns v. Turnbull* the surviving spouse has a cause of action to set them aside even though the decedent died intestate.

The second reason advanced in the *Murray* case for refusing to give the surviving spouse a right to attack a "totten trust," that to do so would allow other relatives (not entitled to statutory protection) to share in the principal of the trust to the exclusion of the beneficiary, is readily resolved. Why not permit the surviving spouse to invade the bank deposit and take whatever share of it he or she may be entitled to under Section 18? However, the remainder should go to the beneficiary of the trust rather than become a general asset of the estate. Succinctly stated, the "totten trust" should be declared illusory and invalid only in so far as the surviving spouse is concerned. As against all other parties the beneficiary should still retain his rights. In a recent Special Term decision[28] the beneficiaries were declared the owners of the bank deposits with the qualification that the "totten trust" was subject to the right of the surviving spouse to have the fund treated as part of the estate but only for the purpose of computing her statutory portion.

At the present time in New York, a surviving spouse may be disinherited only by means of an *inter vivos* conveyance in compliance with the *Newman v. Dore* ruling. Thus, an absolute gift or trust agreement will effectuate a disinheritance. The efficacious use of a "totten trust" to accomplish the same result will also depend upon its "absolute" quality. For example, if the depositor were to deliver the pass book to the beneficiary, the surviving spouse would have no grounds for challenging the beneficiary.[29] Pursuant to Section 239, subdivision 3 of the New York Banking Law,[30] a joint savings account may be used to achieve the same result. This statute creates a conclusive presumption that where money has been deposited in a savings bank[31] and a joint tenancy created, *e.g.*, "*A* or *B*, pay

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[27] See note 19 *supra*.

[28] Steixner v. Bowery Savings Bank, 86 N. Y. S. 2d 747 (Sup. Ct. 1949).

[29] Thomas v. Brevoort Savings Bank of B'klyn, 275 App. Div. 724, 87 N. Y. S. 2d 411 (2d Dep't 1949).

[30] ". . . the deposit in such form [joint tenancy] shall . . . be conclusive evidence, in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor."

[31] Inda v. Inda, 288 N. Y. 315, 43 N. E. 2d 59 (1942), *affirming* 263 App. Div. 925, 32 N. Y. S. 2d 1008 (4th Dep't 1942), *affirming* 32 N. Y. S. 2d 1001 (Sup. Ct. 1941) (holding that the statute has no application to deposits in form of joint tenancy when left in a commercial bank rather than a savings bank).

either or survivor," on the death of one of the named parties all of the rights of ownership vest in the survivor. By judicial decision,[32] it is immaterial that an illusory transfer has taken place as long as the account has been made in full compliance with the Banking Law. However, it should be noted that the Law Revision Commission has recommended the amendment of this statute[33] to make the presumption a rebuttable one. Should such an amendment be enacted by the legislature, this type of savings bank account will in all probability have the same status as a "totten trust" where the rebuttable presumption was created by decisional law.[34] Joint accounts also would be subjected to the right of a surviving spouse who might complain of their illusory nature.

DUTIES AND LIABILITIES ARISING FROM BANK-DEPOSITOR RELATIONSHIP

The relation existing between bank and depositor is generally said to be that of debtor and creditor.[1] It is contractual in nature[2] and while the relationship is not that of trustee and cestui que trust,[3] greater rights and obligations exist than are found in a mere debtor and creditor relation.[4] The New York Court of Appeals has stated

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[32] Inda v. Inda, *supra* note 31.

[33] 1950 LEG. DOC. No. 65(Q), 1950 REPORT, N. Y. LAW REVISION COMMISSION.

[34] The presumption, that the depositor intended that the avails of a savings bank account in trust form should become the property of the beneficiary on the depositor's death, is not a true presumption of law but is a mere inference of fact subject to rebuttal by contrary evidence. *In re* Herle's Estate, 165 Misc. 46, 300 N. Y. Supp. 103 (Surr. Ct. 1937).

[1] Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371 (1891); Bank of British North America v. Merchants' National Bank of the City of New York, 91 N. Y. 106 (1883).

[2] ". . . the law implies a contract on the part of the defendant to disburse the money standing to the plaintiffs' credit only upon their order and in conformity with their directions." Shipman v. Bank of the State of New York, 126 N. Y. 318, 327, 27 N. E. 371, 372 (1891).

[3] The Buchanan Farm Oil Company v. Woodman, 1 Hun 639 (N. Y. 1874).

[4] "Ordinarily, the relation between a bank and its depositors is that of debtor and creditor . . . . However, a bank deposit is more than an ordinary debt, and the depositor's relation to the bank is not identical with that of an ordinary creditor." Hubbs, J., in Gibraltar Realty Corporation v. Mount Vernon Trust Company, 276 N. Y. 353, 356, 12 N. E. 2d 438, 439 (1938). "The relation between bank and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque." London Joint Stock Bank, Ltd. v. Macmillan, [1918] A. C. 777, 789.