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TRUSTS — TENTATIVE TRUSTS — RIGHT OF SETTLOR TO SET-OFF AGAINST INSOLVENT BANK — Plaintiff brought this bill in equity to compel the receiver of an insolvent bank to set off a deposit against the plaintiff's liability as an indorser on a note, the maker of which was unable to discharge the debt. The account was opened by the plaintiff as "trustee" for his minor son. He had exercised complete control over the account and had made numerous withdrawals for his own purposes. *Held*, set-off denied. The deposit created a tentative trust; and until revocation the son was the equitable owner thereof. Since the right of set-off is determined by the state of affairs at the time of insolvency, the subsequent revocation of the trust (by bringing this bill) would not inure to the plaintiff's advantage for set-off purposes. *Kardon v. Willing*, (D. C. Pa. 1937) 20 F. Supp. 471.

The set-off is an equitable device [1] whereby mutual debts may be applied to effect a discharge of one another. That the mutuality [2] requirement be satisfied it is necessary that the liabilities arise out of transactions where the parties acted in similar capacities. A bank depositor is generally permitted to set off his bank balance against the claims which an insolvent bank may hold against him; [3] and the prevailing opinion would give such right of set-off to an indorser [4] of a negotiable instrument held by the insolvent bank where the maker is unable to discharge the debt. The right of set-off is predicated on claims

[1] 24 R. C. L. 789 at 799 (1919).

[2] 24 R. C. L. 789 at 858 (1919); 80 UNIV. PA. L. REV. 420 at 426 (1932). To the effect that a set-off against a fiduciary is permitted only where the claim arose out of a trust obligation, see PERRY, TRUSTS AND TRUSTEES, 7th ed., § 330 (1929); Kaspar, "The Status of Trust Funds As Claims Against Insolvent Banks," 14 CHICAGO-KENT REV. 127 at 136 (1936); 31 A. L. R. 756 (1924).

[3] 25 A. L. R. 938 (1923); 86 A. L. R. 993 (1933); 4 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 1609 (1919); 5 MICHIE, BANKS AND BANKING, §§ 113-163 at § 152 (1932). Whether interdepartmental claims may be set off against one another, see 42 YALE L. J. 143 (1932); 81 A. L. R. 1509 (1932).

[4] 97 A. L. R. 588 at 593 (1935). Where the maker is solvent or where the indorser has been indemnified, the weight of authority would seem to deny the right of set-off to the depositor. 5 MICHIE, BANKS AND BANKING, § 161 (1932). See AIGLER, CASES ON NEGOTIABLE PAPER AND BANKING 354 ff. (1937).

existing as of the date of insolvency [5] and does not obtain to claims subsequently acquired. Whether, therefore, the depositor [6] in the case of a tentative trust may compel the insolvent bank's receiver to apply the deposit to liabilities owing to the bank would depend on whether the depositor can be said to be the real owner [7] of the claim arising out of the deposit at the date of insolvency. There are two possible theories with respect to the tentative trust.[8] It may be considered as presently creating rights in the named beneficiary subject to a power of revocation; [9] or, on the other hand, it may be considered as really arising at the time of the death of the depositor.[10] The instant case requires the adoption of one of these two theories, and it is submitted that whatever justification the court may have in deciding one way or another should depend on the rights and duties arising out of the situations as declared by the courts. Those jurisdictions which sustain the tentative trust doctrine have held that the existence of the trust is contingent on the survival of the beneficiary,[11] that the trust is revocable by an inconsistent testamentary instrument of the depositor,[12]

[5] 10 MINN. L. REV. 443 (1926); 5 MICHIE, BANKS AND BANKING, § 163 (1932). The majority view would permit a set-off by a depositor even though his obligation is not due at the date of insolvency. 25 A. L. R. 938 (1923); Partch v. Boyle, 197 Iowa 1314, 197 N. W. 35 (1924), annotated in 24 COL. L. REV. 669 (1924). See In re Anthracite Trust Co., 319 Pa. 113, 179 A. 245 (1935), annotated in 10 TEMP. L. REV. 85 (1935).

[6] Compare the principal case with Wilbur v. Mortgage Loan Co., 153 S. C. 14, 149 S. E. 262 (1929), where the facts were very similar. The court held that a set-off by the depositor was permissible, and in support of its conclusion with respect to the nature of the transaction the court cited cases involving tentative trusts where they were regarded as "executory" as distinguished from present interests.

[7] Gordon v. Anthracite Trust Co., 315 Pa. 1 at 4, 172 A. 114, 93 A. L. R. 1160 at 1164 (1934), where the court reviewed its decisions in favor of its policy to look "through the transactions as they appeared on their surface that we might determine the real facts and the true intention of the parties." See the dissenting opinion in Elliott v. Greer Presbyterian Church, 181 S. C. 84 at 100, 186 S. E. 651 (1936).

[8] For general discussions of the tentative trust, see 1 BOGERT, TRUSTS AND TRUSTEES, § 47 (1935); Bogert, "The Creation of Trusts by Means of Bank Deposits," 1 CORN. L. Q. 159 (1916); Leaphart, "The Trust as a Substitute for a Will," 78 UNIV. PA. L. REV. 626 (1930); 9 COL. L. REV. 70 (1909).

[9] Reserving a power of revocation is consistent with the creation of an inter vivos trust. 38 A. L. R. 941 (1925); 26 R. C. L. 1206 (1920); 38 YALE L. J. 1135 (1929), where the writer discusses the varying degrees of control which a settlor may exercise over a trust without impugning its inter vivos character.

[10] It seems that this very problem was presented in Matter of United States Trust Co., 117 App. Div. 178, 102 N. Y. S. 271 (1907), where the court was called upon to decide the effect that the predecease of the named beneficiary had on the existence of the trust. A majority of the court through Scott, J., declared, "until the depositor's death the funds on deposit are impressed with no trust in the sense that any title thereto, actual or beneficial, vests in the proposed beneficiary. . . . as to him the tentative trust remains inchoate and incomplete." 117 App. Div. at 180.

[11] Matter of United States Trust Co., 117 App. Div. 178, 102 N. Y. S. 27 (1907); 1 TRUSTS RESTATEMENT, § 58, comment b (1935).

[12] Scanlon's Estate, 313 Pa. 424, 169 A. 106 (1933), annotated in 82 UNIV. PA. L. REV. 413 (1934); In re Pozzuto's Estate, 124 Pa. Super. 93, 188 A. 209

and that the funds are subject to the claims of the depositor's creditors.[13] It would appear, therefore, although some of the text writers [14] and the Trusts Restatement [15] consider the tentative trust as an inter vivos transaction, that in crucial situations it has not been treated unlike any other testamentary disposition. The instant case raises a question even more fundamental than the facts, at first blush, reveal; to wit, to what extent shall a fiction [16] be extended when the *raison d'être* thereof is not present in the particular fact situation to be decided? It is interesting to conjecture what the court would have decided had the depositor been the insolvent party and the bank had been asserting the right of set-off; and more interesting yet, how the court would have decided had the named beneficiary been an indorser on the same instrument and he had claimed the right of set-off. It is respectfully submitted that many difficulties would be averted, and that greater harmony would obtain in this particular field if the courts were to state as a matter of law, what already exists to a great extent in fact, that the tentative trust is a testamentary disposition, but that because of rather special circumstances it is an exception to the wills statutes.

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(1936) noted in 85 UNIV. PA. L. REV. 646 (1937), where the court held that a will revoking all prior "wills, testaments or writings in the nature thereof," did not revoke a tentative trust. It may be concluded, therefore, that there must be either a specific revocation or a direct inconsistency therewith in order to effect a revocation of the trust by will. A commentator in 42 YALE L. J. 141 (1932) presents the question whether the subsequent execution of an invalid will would revoke a tentative trust. See 12 R. C. L. 969 (1916) and 99 Am. St. Rep. 913 (1904) to the effect that a gift causa mortis has been generally held (in the few cases which have arisen) not to be revoked by a subsequent will.

[13] Matter of Siegelbaum, 89 N. Y. L. J. (Surr. Ct.) 1226 (1933) where Surrogate Wingate frankly states that the tentative trust is "a judicial addition to the mode permitted by . . . the Decedent Estate Law for the transmission of property on death," annotated in 33 COL. L. REV. 548 (1933); 2 TRUSTS RESTATEMENT, § 330, comment o (1935), in setting out the rules with respect to the ordinary inter vivos trust: "Unless it is otherwise provided by statute a power of revocation reserved by the settlor cannot be reached by his creditors"; but the rule is otherwise in the case of the tentative trust. Ibid., § 58, comment b.

[14] 1 BOGERT, TRUSTS AND TRUSTEES, § 47, p. 220 (1935); Scott, "Trusts and The Statute Of Wills," 43 HARV. L. REV. 521 at 543 (1930), although Professor Scott believed, apparently, that it really was a testamentary disposition.

[15] 1 TRUSTS RESTATEMENT, § 58 (1935).

[16] The present writer does not argue that the tentative trust doctrine be expunged from the list of available legal devices because it is a fiction; the balance of convenience weighs too heavily in its favor, as pointed out by Scott. See note 14 supra, and 81 UNIV. PA. L. REV. 737 at 746 (1933). Nor is it argued that it is objectionable as a piece of judicial legislation; for what then is the value of the fiction? But it is contended that the fiction is only a means and not the end in itself. See 39 DICK. L. REV. 37 (1934) for a discussion of this phase of the problem with reference to Vaihinger's "Als Ob" philosophy.