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TRUSTS—POSSIBLE EXTENSION OF THE TENTATIVE TRUST DOCTRINE—

The settlor established a trust for the plaintiff, his daughter, appointing a trust company as trustee. The trust deed expressed the purpose of adding to the estate, but no additional property was delivered to the trustee. Later the settlor rented a deposit box from the trust company in the name of the plaintiff by himself as agent and informed its officers that he was creating another estate for the plaintiff for her use later in life, that he would manage the estate, and that he did not want plaintiff to know about the box. From time to time he placed securities in the box along with bonds belonging to the plaintiff. A key to the box with a tag attached, signed by the settlor, instructing the plaintiff that it was the key to her box and for her to deliver the contents to the trustee to add to her trust fund,

was found among his papers at his death. Plaintiff sued the settlor's executors to recover the securities; the court *held* that a valid trust was created, though (1) the transaction was kept secret from the plaintiff, (2) the settlor reserved the income during his lifetime, and (3) the ultimate trust *res* consisted of the securities, originally or subsequently deposited, remaining in the box at settlor's death over which he had had a power of revocation by removal. The court rejected the arguments in support of an attempted *inter vivos* gift. *DeLeuil's Ex'rs v. DeLeuil*, (Ky. 1934) 74 S. W. (2d) 474.

The decision is sustained by the weight of authority in this country in so far as it holds that the owner of property may create a trust by a voluntary declaration to hold it in trust for certain named beneficiaries without delivery of the *res*¹ or notice to the beneficiaries,² that the settlor may reserve the income from the *res* during his lifetime³ and the power to revoke the trust in whole or in part,⁴ though the transaction was not completed in compliance with the statute of wills.⁵ However, some courts would be unlikely to follow the Kentucky court on these facts because of the unlimited power in the settlor to control the details of administration,⁶ which in effect amounts to a testamentary disposition not made in compliance with the statute of wills. The court made frequent reference to The American Law Institute Restatement of Trusts as authority for well recognized trust concepts, but made no reference to section 64 (2), nor to section 65, its exception,⁷ nor was reference made to the New York tentative trust doctrine.⁸ No case has been found in which the doctrine has been extended beyond the savings deposit cases,⁹ but the writer contends that on the facts of this case

¹ PERRY, TRUSTS, 7th ed., sec. 96 (1929); 26 R. C. L. 1182 (1920).

² 26 R. C. L. 1190 (1920); *contra*, *Boynnton v. Gale*, 194 Mass. 320, 80 N. E. 448 (1907).

³ *Cramer v. Hartford-Connecticut Trust Co.*, 110 Conn. 22, 147 Atl. 139 (1929); see Annotation, 73 A. L. R. 209 (1931).

⁴ *Jones v. Old Colony Trust Co.*, 251 Mass. 309, 146 N. E. 716 (1925); *Roche v. Brickley*, 254 Mass. 584, 150 N. E. 866 (1926); 73 A. L. R. 209 (1931).

⁵ 26 R. C. L. 1206 (1920); *Cramer v. Hartford-Connecticut Trust Co.*, 110 Conn. 22, 147 Atl. 139 (1929).

⁶ *McEvoy v. Boston Five Cents Sav. Bank*, 201 Mass. 50, 87 N. E. 465 (1909); *Warsco v. Oshkosh Sav. & Trust Co.*, 183 Wis. 156, 196 N. W. 829 (1924).

⁷ AM. L. INST. RESTATEMENT OF TRUSTS, Tentative Draft No. 1 (1930). The members of the council were divided as to the principle stated in sec. 65, and a majority of those present were opposed to it; they agreed to submit the matter to the other members and to the Eighth Annual Meeting of The American Law Institute. At that meeting a motion in favor of retaining sec. 65 in principle was passed. See 8 PROCEEDINGS OF AM. L. INST. 344, 357 (1930).

⁸ In *re Totten*, 179 N. Y. 112, 71 N. E. 748 (1904). Other jurisdictions in which the tentative trust doctrine obtains are: Maryland [*Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43 (1899)]; Minnesota [*Dyste v. Farmers & Mech. Sav. Bank*, 179 Minn. 430, 229 N. W. 865 (1930)]; and Pennsylvania [*Scanlon's Estate*, 313 Pa. 424, 169 Atl. 106 (1933)]. See discussion of the latter case in 82 UNIV. PA. L. REV. 413 (1934).

⁹ For cases in which an argument might have been made for the extension of the tentative trust doctrine by analogy, see *Ambrosius v. Ambrosius*, (C. C. A. 2d., 1917) 239 Fed. 473; *Elliott v. Gordon*, (C. C. A. 10th, 1934) 70 F. (2d) 9.

the same result could have been reached by extending it. Although the doctrine has been explained as non-testamentary and consistent with general trust concepts,¹⁰ it is considered anomalous and applicable only to the savings deposit cases and criticized as being in direct conflict with the statute of wills.¹¹ As applied in the savings deposit cases, the doctrine has been praised as an effective means of disposing of small sums of money without the inconvenience and expense of making a will¹² and as eliminating the delay and expense of probate proceedings and the danger of making an imperfect will;¹³ its flexibility enables the court more nearly to determine the depositor's intent.¹⁴ It is submitted that if testamentary results can be so easily obtained under the tentative trust doctrine in the savings deposit cases, it should be extended to other personal property, unless the results are not justifiable on grounds of sound public policy at all.¹⁵

A. D. K.

¹⁰ Scott, "Trusts and the Statute of Wills," 43 HARV. L. REV. 521 at 543 (1930); 28 MICH. L. REV. 603 at 606 (1930).

¹¹ Larremore, "Judicial Legislation in New York," 14 YALE L. J. 312 at 315 (1905); Nicklas v. Parker, 71 N. J. Eq. 777, 61 Atl. 267 (1907).

¹² Scott, "Trusts and the Statute of Wills," 43 HARV. L. REV. 521 at 543 (1930).

¹³ Leaphart, "The Trust as a Substitute for a Will," 78 UNIV. PA. L. REV. 626 at 627 (1930).

¹⁴ 81 UNIV. PA. L. REV. 737 at 740 (1933); 82 UNIV. PA. L. REV. 413 at 414 (1934).

¹⁵ Savings Bank Trusts in New York, 37 YALE L. J. 1133 at 1141 (1928); Leaphart, "The Trust as a Substitute for a Will," 78 UNIV. PA. L. REV. 626 at 637 (1930). For arguments against limiting the principle of sec. 65 of RESTATEMENT OF TRUSTS, Tentative Draft No. 1, see 8 PROCEEDINGS OF AM. L. INST. 355 at 357 (1930).