

It will be seen from the illustrations above that the problem may be resolved into two general rules:

1. Where the tenant, at the time the agreement is made, has no right or justification to terminate the tenancy, a consideration, other than the promise to pay the reduced rental is required;³⁷ and

2. Where the tenant, at the time of the agreement, has the right or power to terminate the existing relationship (or is no longer under any obligation) no new consideration, other than the promise to pay the reduced rental, is required, provided, that if the tenant is still obligated at the time of the agreement, he must give the landlord proper notice, as though he were terminating the tenancy, of his intention to pay only a reduced rental.³⁸

TRUSTS—RETENTION OF CONTROL BY SETTLOR—DOCTRINE OF TENTATIVE TRUSTS.—The concept of tentative trusts adopted in some jurisdictions arises upon the death of a person who has during his life attempted to make a voluntary declaration of trust and at the same time retain control over the *res*, which usually is a bank deposit,¹ with the intention that the balance should pass to the beneficiary upon his death. The donor attempts to accomplish this result by depositing his

Thus, the parties are modifying the existing contract, and a new consideration must be shown.

37. *E.g.*, where the lease for years is still in force, *supra*, notes 19, 20; or where the tenant from year to year seeks his reduction without giving proper notice, *supra*, note 12.

38. *E.g.*, where the new agreement is to take effect on the termination of the existing lease, *supra*, note 31; or where the periodical tenant does give proper notice, *supra*, note 17.

1. *Stevenson v. Earl*, 65 N.J.Eq. 721, 55 Atl. 1091 (E.&A. 1903) involved an employee's deposit fund. Deceased had the right to deposit and withdraw from it during his lifetime and by agreement with the company it was to pay the balance at his death to his wife. Held—Wife had no present interest in the fund during his life and the gift was purely testamentary in character and violates the Statute of Wills.

money in his own name in trust for another,² believing that this will eliminate the necessity of making a will, as the object of his bounty is mentioned on the bank records as the person beneficially interested in the deposit and in the opinion of the depositor, will be able to withdraw the money at his death. But since the donor retains complete control over the deposit during his lifetime and may apply it for his own use, it can not be an effective declaration of trust,³ but is a gift of a testamentary character and is void because it was not made in compliance with the Statute of Wills.⁴ Such an attempted gift made during the life of the donor has been called a tentative trust and would take effect as a valid voluntary trust, if the necessary elements of a gift *inter vivos* had been fulfilled or if the donor by words or acts showed that it was his intention to create a trust.⁵

When the device was first used, the courts without hesitation declared that a mere deposit in the name of *A* in trust for *B* created an irrevocable trust in favor of *B* even though *A* did not deliver the passbook to *B*, on the theory that *A* held the passbook as a trustee for *B* and would be held to account if the money were withdrawn and dissipated.⁶ But before long, it was recognized by the courts that these deposits were being made by persons in the every day course of events for the purpose of circumventing savings bank rules, concealing their

2. *Johnson v. Savings Investment & Trust Co.*, 107 N.J.Eq. 547, 153 Atl. 382 (Ch. 1931), *aff'd.*, 110 N.J.Eq. 466, 160 Atl. 371 (1932). Deceased, a widow, deposited money in a bank in her name in trust for another. Held: The mere deposit of money in a bank as trustee for another without more, even though the supposed beneficiary had possession of the passbook part of the time would not create a gift *inter vivos* or a trust.

3. *Johnson v. Savings Investment & Trust Co.*, *supra*, note 2.

4. 4 N. J. COMP. STAT. 1910, p. 5860.

5. *Mucha v. Jackson*, 119 N.J.Eq. 348, 182 Atl. 827 (Ch. 1936). Father opened a savings account in his name in trust for his daughter when she was one year old. Mother testified that the father had told her after he opened the account that he intended opening it for the daughter so that she would have something when she was ready to start in life. Only withdrawal was \$50 to buy a Liberty Bond in daughter's name. Many deposits represented Christmas and birthday presents to the daughter. Bankbook never delivered to the daughter although it later came into her possession without his consent. Held: Valid trust created because the circumstances of the case showed that it was the father's intention to create an irrevocable trust in favor of his daughter.

6. *Martin v. Funk*, 75 N.Y. 134, 31 Am. Rep. 446 (1878).

wealth or to eliminate the necessity of making a will.⁷ Because of these facts and the desire of the courts to carry out the intention of the depositor not to have his money declared a trust, this concept of tentative trust was first laid down in the case of *In re Totten*⁸ which held that, "A deposit, by one, 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 declaration such as delivery of the passbook 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".

It is impossible to reconcile this concept of tentative trust with the orthodox conception of a trust wherein the settlor must, in addition to his declaration of trust, part with possession of the *res*; or if he retains possession he must treat it as trust property and will be liable for any unauthorized diminution of it. Under a validly declared trust the beneficiary is given a vested interest in the *corpus*, but in a tentative trust the named beneficiary has absolutely no interest in the fund during the lifetime of the settlor. The death of the beneficiary prior to the settlor automatically terminates the tentative trust and his legal representatives have no claim to the fund against the settlor because the beneficiary never had a presently vested interest.⁹ Nor can it be squared with the doctrine of a gift *inter vivos*, which it somewhat resembles, because although there is an apparent donative intent, this can not be ascertained with certainty until the death of the donor because it is subject to revocation by him and further there is no vesting of the title nor delivery of the subject matter to the beneficiary, nor does the donor strip himself of all ownership and dominion over the subject matter. By retaining con-

7. *Beaver v. Beaver*, 117 N.Y. 421, 22 N.E. 940, 6 L.R.A. 403 (1889).

8. *In re Totten*, 179 N.Y.Supp. 112, 70 L.R.A. 711 (1904).

9. *In re U. S. Trust Co. of N. Y.*, 102 N.Y.Supp. 271 (1907). A deposited money in a bank in his own name in trust for B his son who predeceased A. At A's death the fund was not altered. B's wife, as executrix of her husband's estate, claims the amount of the deposit. The tentative trust created by the bank deposit terminated *ipso facto* upon the death of the supposed beneficiary since no interest was ever actually vested in him.

trol, the depositor has the right to revoke the trust by withdrawing all the funds whenever he desires and apply them to his own use or revoke the trust by a bequest of the money in his will.¹⁰ In addition, his creditors have priority over the beneficiary,¹¹ because up until the moment of his death he had the right to withdraw the money for his own use and for this reason the creditors are entitled to it. These results are inconsistent with and unknown to the law of trusts and permit an impairment of the rights of the *cestui quo trust* which the courts ordinarily go to extremes to protect.

New Jersey has refused to follow the rule laid down in the *Totten* case¹² and has held that the mere deposit of a fund in the name of *A* in trust for *B* does not create an irrevocable trust in favor of *B* during *A's* life or entitle *B* to the fund as beneficiary of a trust upon *A's* death.¹³ A trust can be made out of a savings account only when the depositor has unmistakably declared his intention to create a trust or has delivered the passbook, thus depriving himself of control over the deposit.¹⁴ But upon the doing of these acts the concept of tentative trust disappears and it becomes a voluntary declaration of trust which is in effect a gift *inter vivos*.¹⁵ If *A* never during his lifetime by word or act showed that he intended to create a trust for *B*, upon his death there is no presumption that he intended to create a trust for *B* as to the balance¹⁶ and *B* is not entitled to the fund unless he can show that *A* during his life created a trust for him.¹⁷

By refusing to adhere to the New York rule of tentative trusts, New Jersey is guided by the established principles of trust law and by

10. *Walsh v. Emigrant Industrial Savings Bank*, 135 N.E. 897 (1922), 176 N.Y.Supp. 418.

11. *Beakes Dairy Co. v. Berne, et al.*, 112 N.Y.Supp. 529 (1908). Action by creditors of *A* who had deposited money in a bank in his name in trust for his son. Held: Such a deposit does not place his money beyond the reach of his creditors after his death.

12. *In re Totten*, *supra*, note 8.

13. *Nicklas v. Parker*, 69 N.J.Eq. 743, 61 Atl. 267 (Ch. 1905); *Jefferson Trust Co. v. Hoboken Trust Co.*, 107 N.J.Eq. 310, 152 Atl. 374 (Ch. 1930).

14. *Mucha v. Jackson*, *supra*, note 5. *Long Branch Banking Co. v. Winter*, 112 N.J.Eq. 218, 163 Atl. 903 (E.&A. 1933).

15. *Zimmerman v. Nauhauser*, 119 N.J.Eq. 424, 183 Atl. 820 (Ch. 1936).

16. *Nicklas v. Parker*, *supra*, note 13.

17. *Jefferson Trust Co. v. Hoboken Trust Co.*, *supra*, note 13.

the strong policy of this state which prohibits testamentary gifts unless made in accordance with the Statute of Wills¹⁸ This refusal to recognize the doctrine of tentative trusts is based on sound logic as well as good law because there is a definite method for creating trusts, and certain requisites are required to make a gift *inter vivos*; the courts cannot be expected to conjecture as to the donor's intention, as the New York courts do and follow a legally unsound doctrine to carry out an intent which the settlor has inarticulately expressed.

So strong is the New Jersey court's dislike for the tentative trust concept that a recent statute¹⁹ providing that when a deposit is made in a bank in the name of *A* in trust for *B* and no further notice is given in writing to the bank, at the death of *A*, *B* shall be paid the money, was held in *Thatcher v. Trenton Trust Co.*²⁰ not to apply to a tentative trust and thus make it enforceable, but to apply only to trusts which had validly been established in accordance with the usual requirements of a valid trust, and that the primary purpose of the statute was to protect the bank if it paid to the named beneficiary even though the trust may not have been properly established. The Court in an earlier case²¹ reached the same conclusion in interpreting a similar prior statute.²² The Court said further in the *Thatcher* case²³ that if it was the intention of the legislature to establish a trust as to the balance in such accounts, the statute must be clear and certain as it was in derogation of the common law. It is not unreasonable to presume that such was the intention of the legislature because the act was passed shortly after the

18. 4 COMP. STAT. 1910, p. 5860.

19. P. L. 1932, chap. 40, p. 59.

20. *Thatcher v. Trenton Trust Co.*, 119 N.J.Eq. 575, 182 Atl. 912 (Ch. 1936).

21. *Jefferson Trust Co. v. Hoboken Trust Co.*, *supra*, note 13. A deposit made by testatrix as trustee for another held insufficient to create a trust in spite of the statute which the court said was intended merely as a protection to a trust company from liability in the event of its making payment to the person for whom the said deposit was made, or to his legal representatives.

22. 4 N. J. COMP. STAT. 1910, p. 5666, sec. 32: "Whenever any deposit shall be made by any person in trust for another and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the said deposit was made, or to his or her legal representatives."

23. *Supra*, note 20.

Jefferson Trust Co. case,²⁴ but it was so poorly drawn to effect that intent that the Court could not possibly give it that meaning.

The New Jersey courts are on sound ground in refusing to apply this questionable doctrine of tentative trusts merely because funds remain in an account at *A's* death in *A's* name in trust for *B*. It has not worked satisfactorily in New York because at best, in the absence of some unmistakable act by *A* during his lifetime declaring a trust, their conclusion would only be a guess as to what *A's* intention was in respect to the money. The disposition of one's money after his death and the creation of trusts are two subjects which should not be treated on the basis of the facts in the particular case. The law has afforded methods of dealing with these subjects and the courts cannot be expected to do for a person that which he could have accomplished himself.

24. *Supra*, note 21.