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SAVINGS BANK DEPOSITS AS IRREVOCABLE TRUSTS.

The important case of *In Re Totten*, 71 N. E. 748, recently decided in the Court of Appeals of New York, marks a new departure of that court as regards the incidents of trusts created by deposits "in trust" for some designated beneficiary. In the summary of its decision the Court says: "A deposit in a savings bank 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 until he completes the gift in his lifetime by some unequivocal act or 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 remaining on deposit at the time of the death of the depositor." In this case the Court held that the removal of the fund and the application of it to the depositor's own use amounted to a revocation. The leading New York case hitherto has been *Martin v. Funk*, 75 N. Y. 134, decided in 1878, which held that such a deposit, though for distant relatives of the depositor who knew nothing of the trust until after the depositor's death, created an irrevocable trust. Though somewhat modified by more recent decisions, the authority of that case has not hitherto been disputed. The decision in *Re Totten* gives a thorough review of all the New York cases.

The rule laid down in *Martin v. Funk* seems, in so far as the matter has been adjudicated, to be the law in Connecticut,

Pennsylvania and New Jersey. In *Minor v. Rogers*, 40 Conn. 512, the deposit was held a trust and the beneficiary permitted to follow the funds in the hands of the executors, where the depositor had drawn out all the money and applied it to his own purposes. But in many of the states the rule adopted in Massachusetts in *Brabrook v. Boston Five Cent Savings Bank*, 104 Mass. 228, has been followed, in which the reasoning is practically that now adopted by the New York Court of Appeals. The rule is there laid down that whether the deposit is or is not a trust depends upon the intention of the depositor. Where the fact of the deposit is known to the beneficiary it is held to be strong evidence to establish the existence of a trust. *McCarthy v. Provident Sav. Inst.*, 159 Mass. 527; *Blasdel v. Locke*, 52 N. H. 238. But deposits "in trust" for some named beneficiary are usually made for the purpose of evading the almost universal by-law forbidding more than a specified amount to be deposited in the name of one person. Such an intention the courts hold incompatible with an intention to create a trust, and where the beneficiary is neither party nor privy to the deposit are inclined to deny the existence of a trust. *Brabrook v. Sav. Bk.*, *supra*; *Gardner v. Merritt*, 32 Md. 78; *Kilpin v. Kilpin*, 1 Myl. and K. 533. In all jurisdictions parol evidence is admissible to establish the depositor's real intention. *Northrop v. Hale*, 72 Me. 275; *Ray v. Simmons*, 11 R. I. 266; *Gerrish v. New Bedford*, 128 Mass. 159.

While the decision in *Re Totten* is doubtless based upon business convenience, that case and those following the Massachusetts decisions would seem to be in disregard of many well-established principles of the law of trusts, with which the cases adhering to the strict rule would seem more strictly in accord. It seems a well-settled principle that a person may by an unequivocal declaration that he so holds, constitute himself trustee of any property which he possesses. *Kekewich v. Manning*, 1 D. M. and G. 176; *Ex parte Pye*, 18 Ves. Jun. 140. The question in each case would seem to be, has or has not the depositor created himself a trustee. If he has, the ordinary incidents of a trust attach. The mere fact that he retains the pass book does not affect his relationship, for, as was said in *Martin v. Funk*, whatever control he may retain is exercised as trustee, and the right to exercise it is not necessarily inconsistent with the existence of a trust. According to the great weight of authority when a trust has attached it is irrevocable in the absence of an express power of revocation or of circumstances indicating the retention of such a power. *Perry on Trusts*, Sec. 104. And this is the law in New York, Massachusetts and New Hampshire. It would seem, too, that where the depositor has so deposited money for the purpose of evading some provision of the law, he ought not be permitted to profit by that fact, since equity will always presume an intention to comply with the law where it must decide between two inconsistent acts.

TO WHAT EXTENT A LEGISLATURE MAY DELEGATE ITS POWERS TO
A BOARD OR COMMISSION.

The Supreme Court of Oregon, in the case of *State v. Briggs*, 77 Pac. 750, was recently called upon to decide on the constitutionality of a law prescribing the qualifications for, and regulating the practice of the trade of barber, which was attacked on the ground that it delegated legislative power to the board of examiners. The law in substance provides for the appointment of a board of examiners, defines their powers and duties, among which are the making of by-laws and the prescribing of the qualifications of a barber, declares that it shall be unlawful for any person not registered, to practice the business of a barber, or conduct a barber school, without the sanction of the board and prescribes the penalty for its violation. It is conceded in all the decisions involving this point and by all text writers that more or less of the details necessarily involved in giving the legislative intention the force and effect of law must be left to the administrative authorities. The legislature is in session but a short portion of the year; it cannot legislate for each contingency that may arise, and unless there is some means provided to determine questions of a quasi-legislative character, the law, for the most part, must be inoperative. Nearly all the opinions upon the point in question state, in substance, that "the legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." Thus the question in all cases is to what extent the legislature may make the operation of law depend upon facts and circumstances to be determined by a board appointed for that purpose.

In the case of the *State v. Briggs*, the giving to the board of barber examiners the above powers was held not to be a delegation of legislative authority. Let us take up briefly some of the cases roughly parallel to the above decision, although it is hardly feasible to classify them in any satisfactory way.

The State of South Carolina authorized the Board of Agriculture to determine who should have the right to mine phosphate rock from the property of the state, and to license those whom the board in their discretion thought would work for the best interests of the state. *P. R. Co. v. Hagood*, 30 S. C. 519. The pure food law of Indiana provides that "within ninety days after its passage the board of health should adopt measures to facilitate the law's enforcement, and prepare rules regulating minimum standards of foods, define specific adulterations," etc. *Isenhour v. State*, 157 Ind. 517. Both of these laws were upheld. The federal court decided that the Act of Congress authorizing the Secretary of War to give notice for the alteration of bridges that he believed to be unreasonable obstructions to navigation, and empowering the District Attorney to prosecute parties refusing to comply with such

notice is not unconstitutional, as vesting the Secretary with legislative power. *U. S. v. City of Moline*, 82 Fed. 592. In Massachusetts, the legislature, having the power of determining the qualifications of officers not otherwise provided for in the constitution, has the authority to delegate such power to the civil service commission. *Opinion of Justices to House of Reps.*, 138 Mass. 601.

The legislature has power to confer upon the board of health of a city the authority to enact and enforce ordinances. *Peo. v. Justice*, 7 Hun 214. There are many cases where boards of health have been given the power to prescribe the qualifications of a doctor or dentist, etc., and to decide which colleges should be accredited and which should not. *Hildreth v. Crawford*, 65 Iowa 339; *Ex parte McNulty*, 77 Cal. 164.

Another large class of cases involving the question under discussion arises from the creation of railroad commissions. General laws have been passed for the regulation of rates charged by railroads which delegate to a commission the power to determine what constitute reasonable rates. Such laws have uniformly been held constitutional. *Tilley v. Ry. Co.*, 5 Fed. 641; *Chi. Ry. Co. v. Dey*, 35 Fed. 866; *Ry. Co. v. Smith*, 10 Ga. 694; *Peo. v. Harper*, 91 Ill. 357. The federal courts place great weight upon the fact that the general law granting the board, or commission, power to make rules or regulations, should also declare the violation of such rules or regulations, when promulgated, to be a misdemeanor and prescribe the penalty therefor, instead of giving the board power to declare a violation of the rules a misdemeanor and prescribe the penalty. *Ex parte Cox*, 63 Cal. 21; *U. S. v. Breen*, 40 Fed. 402; *U. S. v. City of Moline*, *supra*.

Though in the above cases questions of a quasi-legislative nature have been quite generally delegated to boards, commissions, and executive officers or departments, yet that power is not without limitations. In Michigan an ordinance which left it within the discretion of a mayor or police officer to regulate processions in the streets of a city was declared unconstitutional "because it leaves the power of permitting or restraining processions and their course to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legislation." *Matter of Frazee*, 63 Mich. 396. Also, where a law or ordinance delegates to a board an unregulated official discretion it is unconstitutional. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9.

In the case of *O'Neil v. Ins. Co.*, 166 Penn. St. 72, it was declared a delegation of legislative authority to direct the insurance commissioner to draw a standard policy to be used by all insurance companies. In the opinion the court gives five reasons why the act is unconstitutional. First, the act does not fix the terms and conditions of the policy, the use of which it commands. Second, it delegates the power to prescribe the form of the policy and the conditions and restrictions to be

added to and made part thereof, to a single individual. Third, the appointee clothed with the power is named only by his official title. Fourth, the appointee is not required to report to the legislature; his report is filed in his own office and never becomes an integral part of the statutes. Fifth, the legislature had no control over the form when filed, and had no knowledge of the act they required all companies to follow, and for the violation of which they prescribed a heavy penalty. The above decision does not seem to have given so much weight as the federal courts to the fact that the general law made the violation of the act a misdemeanor and prescribed a penalty for its violation.

But two states, other than Oregon, have been found to have state laws regulating the trade of barber—Missouri and Nebraska. Each leaves to a board of examiners the determining of the necessary qualifications of a barber and the granting of licenses, but in each state the law is more explicit in its direction of the course to be pursued by the board and in its limitations upon their power than is the Oregon law. The Nebraska law went into effect in 1889 and the Missouri law in 1900.