In Search of a Less Tentative Totten

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INTRODUCTION

For more than a hundred years American courts have recognized a financial institutional device that defies easy description. One cannot, with complete comfort, refer to it as a trust. At the same time reluctance is encountered in terming the device as purely an avenue for testamentary disposition. This device has been described primarily in three ways. It is probably best known as a "Totten trust" because of a leading case in which it was recognized, although the case was not of first impression in this country. Because of the institutions in which it is frequently found, it is termed a "savings bank trust," but it is not limited to these particular business organizations. Perhaps the most puzzling name used is "tentative trust" since there is sharp disagreement as to exactly what the adjective "tentative" really means in this application.

The thesis of this article is: (1) the savings bank trust is a singular judicial creation permitted to meet what the courts

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considered to be a special societal need, (2) the need for its existence transcended the normal constraints of the law of trusts and the usual limitations imposed by the Statute of Wills on testamentary dispositions, (3) the entire concept should be re-examined with a more candid recognition of its origin and theoretical bases, (4) much of the controversy and litigation concerning savings bank trusts has arisen in connection with their revocation, and revision of the pertinent law should clarify and limit permissible avenues of revocation and (5) since the device was judicially created, the courts, rather than the legislatures, (except where the concept has been codified) should make the needed revisions that would make savings bank trusts more manageable and still serve the practical needs for which they were initially recognized.

**Definition**

Reduced to its simplest elements, the savings bank trust recognizes certain consequences of an account being opened in a savings bank or similar institution\(^1\) with the account being entered in the following form: "depositor, in trust for beneficiary".\(^2\) The depositor can deal with the account as he pleases during his lifetime, adding to it or withdrawing part or all of it. If the depositor has not revoked the trust, upon his death any balance left in the account is payable to the beneficiary.\(^3\) The

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1. Other organizations in which the practice is recognized include savings departments of commercial banks, savings and loan associations, building and loan associations and credit unions. The concept is also recognized for certificates of deposit issued to the purchaser as trustee for another. Annot. 46 A.L.R. 3d 487, 492 (1972); Note, *Bank Account Trusts*, 49 Va. L. Rev. 1189, 1189 (1963).

The recent New York statute codifying the concept utilizes the following definition of a financial institution: "a bank, trust company, national banking association, federal savings and loan association, savings bank, industrial bank, private banker, foreign banking corporation, a savings institution chartered and supervised as a savings and loan or similar institution under federal law or the laws of a state, a federal credit union, or a credit union chartered and supervised under the laws of a state." N.Y. Estates, Powers and Trusts Law § 7-5.1(c) (McKinney Supp. 1976).

2. Other acceptable forms are: "beneficiary, depositor trustee," "depositor in trust for depositor and beneficiary, joint owners," and "depositor, trustee for depositor and beneficiary, joint owners." Note, *Bank Account Trusts*, Va. L. Rev. 1189, (1963). The courts appear to be flexible in finding the savings bank trust if depositor's intent appears clear; "trust," "trustee" or a variation thereof normally seems to be an essential element of the account description.

3. "Where a person makes a deposit in a savings account in a bank or other savings organization in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death
beneficiary’s knowledge of the deposit is immaterial. Ancillary consequences to the device dealing with revocation, rights of the depositor’s creditors, subjection to needs of a mentally incompetent depositor, and rights of the deceased depositor’s spouse will be considered later as the characteristics of the device are contrasted with the usual law of trusts.

In recognizing the device, great emphasis is placed on the form of the deposit. The provable intent of the depositor controls as to the effect of the account. The heart of the savings bank trust concept turns upon the presumption or inference if he has not revoked the trust.”

Restatement (Second) of Trusts § 58 at 155 (1959).


5. Regardless of any inference or presumption involved, (see note 6, infra) evidence of the depositor’s words or conduct can be admitted to show actual intent. Some of the alternative intentions that may be shown are (1) that the depositor intended to create no trust at all for some private purposes such as evading a limitation on size of accounts, (2) that the depositor intended to create an irrevocable trust, or (3) that the depositor intended to create a trust for a limited purpose. See A. Scott, 1 The Law of Trusts § 58.1 at 520-23 (3d ed. 1967); Note, Bank Account Trusts, 49 Va. L. Rev. 1189, 1190 (1963).

6. Some authorities and courts refer to a “presumption” while others indicate an “inference” is involved. The trier of facts is required to make the deduction of a presumption while the deductive device of an inference may or may not be made by the trier of fact according to his own conclusion. The presumption is mandatory, the inference, permissible. See Note, 39 Calif. L. Rev. 314, 315 (1951).

While there is a basic and important difference in the two deductive approaches, it is not aptly illustrated in this application. Since such a wide range of evidence is admissible to prove the depositor’s intent, the distinction in practice is usually not a decisive one. It has been suggested that if a presumption is involved “the disposition to the beneficiary will be open to successful attack only by affirmative and persuasive evidence of a lack of intent.” Note, 39 Calif. L. Rev. 314, 315 (1951). Compare Kosloskye v. Cis, 70 Cal. App. 2d 174, 160 P.2d 565 (1945) and Brucks v. Home Federal Savings and Loan, 36 Cal. 2d 845, 228 P.2d 545 (1951). See Gulliver and Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1, 33 (1941). Professor Scott appears to use the deductive processes interchangeably. A. Scott, 1 The Law of Trusts, § 58.1 at 520 (3d ed. 1967). It is submitted that “rebuttable presumption” is the better description of the process generally utilized.

In Massachusetts, which recognizes savings bank trusts, several decisions indicate that some evidence beyond the mere form of deposit may be required to establish the intent of the depositor. See Note, Bank Account Trusts, 49 Va. L. Rev. 1189, 1190 (1963), G. Bogert, The Law of Trusts and Trustees § 47 at 365 (2d ed. 1965). Compare, A. Scott, 1 The Law of Trusts § 58.3 at 533-534 (3d ed. 1967).
that the deposit in the prescribed form creates in the absence of provable intent to the contrary. The words of form “A, in trust for B”, standing alone, are the basis for the rebuttable presumption that the depositor intended the effect described above.

Societal Need

While the historical development of the savings bank trust will be briefly treated, it is felt that this development can be best understood in light of the social need that the device was felt to meet. Judicial legislation was less common when the concept was adopted, but it did exist. The Yale Law Journal in 1905 decreed the recognition of the savings bank trust in New York as “judicial arbitration” as distinguished from “scientific administration of the law” in an article dealing with “judicial legislation.” It termed the Totten decision as a “radical innovation” that was difficult to justify.8

Such reactions are not rare when the courts venture into the role of making law thought to be pre-empted by the legislative branch of government. Since the savings bank trust decision concept was contrary to both recognized trust law and the law regulating testamentary disposition, it was deemed to be “judge made” law. A comprehension of the motivation behind this judicial venture into the world of the legislature is essential to an understanding of the legal history of the device.

While legal authorities may disagree as to the legality or theoretical bases of the savings bank trust, there appears to be general agreement as to the end that was to be served. In its simplest form, the reasoning behind the concept can be summarized in the catch-phrase description of the device: “the poor man’s will”.9

The same 1905 Yale Law Journal article that condemned the audacity of the New York Court of Appeals in rendering the Totten opinion praised the result as a “piece of constructive legislation” that “could hardly be too highly praised.” The result of the decision is said to “effectuate a custom that has grown up among the humbler classes” and to be “so desirable” that the author had often advocated legislation enacting the concept.10

Since its inception legal authorities have viewed the savings bank trust as an innoxious means for individuals of modest means to pass money to beneficiaries of their choice after death without the legal expenses of a will, administration and probate, with the attendant delays. The device has been described as filling “the gap between the inter vivos gift . . . and the formal will.”11 Further, the device’s utility was increased by the ease with which the amount to be devolved could be altered.

While any limitation that might be placed on the amount of funds that can be transmitted by a savings bank trust is found in the dollar limitations that the financial institution might have on accounts, there is no restriction on accounts with multiple institutions. Any qualms about the legitimacy of the device are frequently dismissed because the amount of funds involved are small.12 Perhaps this is a throwback to the early concept that it was designed for the “humbler” classes. The distinction is lost today. It has been suggested that a more contemporary name would be “a middle class will”.13 Further, the savings bank trust is praised as “convenient and safe”14 because of the small likelihood of fraud.15

Professor Scott captures the spirit of the justification of the savings bank trust:

In view . . . of the convenience of this method of disposing of comparatively small sums of money without the necessity of resorting to probate proceedings, there seems to be no sufficiently strong policy to invalidate these trusts.16

11. Note, Bank Account Trusts, 49 VA. L. REV. 1189, 1190 (1963); Note, Totten Trust: The Poor Man’s Will, 42 N.C. L. REV. 214 (1963). The effect of recognizing the savings bank trust has been said to “revolutionize devolutionary techniques among an appreciable proportion of the community.” In re Weinberg, 162 Misc. 867, 867-68, 296 N.Y. Supp. 7, 10 (1937). For discussion of the salutary effects of the device, including more prompt payment to the beneficiary, see Gulliver and Tilson, Classification of Gratuitous Transfers, 51 YALE L. J. 1, 39, (1941).


15. “Not only is the amount involved usually comparatively small, but it is easy to identify, and there is no great danger of fraudulent claims resulting from the absence of an attested instrument.” A. SCOTT, 1 THE LAW OF TRUSTS § 58.3 at 527 (3d ed. 1967).

16. Id.
Thus, the recognition of the savings bank trust device was, and is, based on a weighing of divergent policies. The irregularities of the concept, when measured by normal trust law and the Statute of Wills, are out-weighed by the absence of strong objections from a practical viewpoint and the sound social need to be served. Perhaps this is an example of judicial legislation at its best.

History

The first American case, specifically upholding the current concept of a savings bank trust was decided in 1855.17 Later cases accepted the device but characterized the trust as irrevocable, consistent with the usual presumption in the law of trusts. These cases recognized two alternatives for the depositor's intent: no trust or an irrevocable trust.18

The now famous Totten19 decision posed the possibility of a third intent: the desire to create a revocable trust. Further, the decision indicated that the form of the deposit alone served as the basis of a presumption that while the depositor intended to create a trust he intended also to reserve a power to revoke and deal with the trust as he pleased during his lifetime. The court's opinion became the charter of the savings bank trust concept:

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 declaration, such as the 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.20

In the years that followed a growing number of states recognized the basic Totten doctrine.21 The doctrine has been codified in two states,22 but it exists largely by virtue of judicial opinion.

18. A. Scott, 1 THE LAW OF TRUSTS § 58.2 at 524, 525 (3d ed. 1967).
20. Id. at 179 N.Y. at 125, 71 N.E. at 752.
21. At latest count, it appears that eighteen jurisdictions have accepted the common law savings bank trust concept, some in slightly differing forms. For decisions in these jurisdictions see A. Scott, 1 THE LAW OF TRUSTS § 58.3 at 528-530 ft. note 5 (3d ed. 1967) and supp. 1977 at 53, 54.
Financial institutions are not known for their lack of activity in legislative halls and where the doctrine has been recognized they have moved to bring about protective legislation. Because the savings bank trust concept is so solidly based on the depositor’s intent and because the breadth of evidence that can be admitted to demonstrate such intent is so broad, the liability of financial institutions is considerable as they pay designated beneficiaries. To guard against this potential liability, statutes were passed in many states permitting the financial institution, upon the death of depositor, to pay the beneficiary without liability even if the trust has, in fact, been revoked by some means unknown to the institution. These statutes have been held to be merely protective of the institution and not legislative approval of the savings bank concept. It is submitted that if the effort and expense required to enact these statutes had been directed toward codifying the savings bank trust doctrine with clarifying provisions reforming needed portions of the concept, much of the past litigation concerning the device, particularly relating to revocation, could have been avoided. But, alas, that is not the way of the world (or of the legislative process).

Theoretical Concepts

The legal stability of the savings bank trust seems secure. However, the basis for the arrival at this destination has been the subject of divergent judicial views. Indeed, this is not surprising since the acceptance of the concept was based more on fulfilling what was conceived to be a social need, than as a result of legal reasoning. The result established, the courts have used varying means of sustaining it. Perhaps this is a necessary inci-

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23. For a listing of jurisdictions having such statutes and statutory citations see A. Scott, 1 The Law of Trusts § 58.3 at 530, 531 ft. note 7 (3d ed. 1967) and supp. 1977 at 54.

dent to judicial legislation. When the legislature speaks to create law, it needs no greater portfolio than its constitutional mandate. When the judiciary creates new law in an area normally reserved to the legislature, it does not engage in bold Olympian edicts, but usually finds a basis for its decision among existing legal principles already recognized.  

**JUDICIAL RATIONALE OR RATIONALIZATION**

In sustaining the savings bank trusts, courts were faced with two major obstacles, (1) the existing law of trusts and (2) the restrictions placed on testamentary dispositions by the Statute of Wills. Each of these will be dealt with later in the article. Variance with either or both of these existing bodies of law did not greatly trouble the courts as they moved to sustain the savings bank trust concept. The relative gravity of the two areas of variance seemed to influence individual courts as they established the basis for allowing the device. For this reason, the rationale for the device varies between jurisdictions. Fundamental in the differing approaches is the matter of timing. *When* in fact did the device become effective? Was it at the time of the deposit or did it spring into being at the depositor’s death? Inhering in this dilemma is the exact meaning of the

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25. “In the legislative process there is neither beginning nor end. It is an endless free-wheeling experiment, without institutional restraints, that may have rational origins and procedures and goals or that may lack them. In contrast, a judge invariably takes precedent as his starting point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions or, lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it into the often rewoven but always unbroken line with the past.” Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 536, 537 (1977).


27. “The problem immediately arises as to the moment of the creation of this legal relationship termed a tentative trust. To those who contend that the relationship created is essentially a trust, the time of its inception must be the moment the deposit is made or the moment of the last deposit or withdrawal, for they are the only instances at which the depositor evinces any intent upon which a trust can be based. There is authority to the effect that this is the doctrine of the tentative trust as laid down by the New York courts—that a trust is created at the time of the deposit, establishing rights in the named beneficiary subject to a power of revocation. On the other side there are those who consider the tentative trust to be *sui generis*, a mere fiction to obtain a desirable result, and they would stringently limit the trust analogy. Naturally, to them the fiction is not to be indulged in until necessary, i.e., until the death of the depositor. They suggest that no trust is created until then, that no change of legal status is
term "tentative" so handily used by the Totten court. The word is subject to two interpretations. It could mean merely that the trust is revocable by nature. On the other hand, "tentative" is subject to being interpreted as "incomplete".

The first interpretation focuses attention primarily on the device's compliance with the usual law of trusts. Since the savings bank trust is not complete or effective until the depositor's death, the second alternative examines whether or not the scheme can be reconciled with the Statute of Wills.

The theory chosen does not greatly affect the result reached but it is a factor in understanding the judicial opinions in various jurisdictions that sustain the device. Sometimes the theory followed will be a determining factor in the courts' decisions concerning rights of the depositor's creditors, surviving spouse, etc.

The purpose of these comments is not to re-open the question of whether the savings bank trust should be recognized. That question is well settled today. The aim of these remarks is to focus attention on needed judicial reform. It is felt that a brief

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"[A] tentative trust [is] a trust that did not spring into being until the death of the depositor—and vanished the moment of its creation." Note, Tentative Trust Deposits, 39 Dick. L. Rev. 37, 38 (1934).

"It will be seen upon a careful reading [of the Totten decision] that the trust is, in the first place, described as a 'tentative trust', by which we understand a suggested or proposed trust, not completed or consumated. *** It would seem to follow that until the depositor's death the funds are impressed with no trust in the sense that any title thereto, actual or beneficial, vest in the proposed beneficiary. . . ." Matter of U.S. Trust Co., of New York 117 App. Div. 178, 180, 102 N.Y. Supp. 271, 272 (1st Dept. 1907) aff'd without opinion, 189 N.Y. 500, 81 N.E. 1177 (1907). See, G. Bogert, The Creation of Trusts by Means of Bank Deposits, 1 Cornell L. Q. 159, n.86 at 171 (1916).
review of the areas in which the device is *sui generis* will aid in demonstrating that reform should not be restrained in an area of law that at best can be described as unorthodox.

**TRUST LAW**

As a conventional trust, the savings bank trust conforms to many normal concepts, but nevertheless has been termed an "anomaly". The basic elements of a settlor-trustee, res, and beneficiary are easily discerned. For classification purposes, it must be termed an express trust, if it is a trust at all. Intent to create the device, however it is characterized, is evident or arrived at by presumption. The act of creation, whether by declaration or transfer, can be found in the act of deposit, although by some theories the trust itself does not arise until the death of the depositor. Difficulty begins when one seeks to define the exact fiduciary responsibility of the depositor-trustee and the relationship of the trustee to the beneficiary is nebulous, as is a description of the beneficiary's interest. Trusts are generally

31. The Restatement defines a trust as "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." *Restatement (Second) of Trusts* § 2 (1959).


"Unnecessary use of anomalous fictions such as the Totten Trust may prove in the long run to be detrimental in that it opens the door for further erosions of some of the settled doctrines upon which the stability of trust law depends." *Id.* at 140, n.142.

33. *Restatement (Second) of Trusts* § 3 (1959).

34. It should be borne in mind that many authorities feel that the savings bank trust, however it is characterized and described, should not be termed a "trust" at all and that the terminology is the result of stubborn judicial insistence as a handy method of validating the savings bank trust. Wittebort, *Savings Account Trusts: A Critical Examination*, 49 Notre Dame Law. 686, 686 (1974).

"It will be conceded with some reluctance perhaps, but with little doubt, that the average trust deposit is not a trust." *Note, Tentative Trust Deposits*, 39 Dick. L. Rev. 37, 38 (1934).

35. Pertinent to any description of the depositor's legal relationship or duty to the beneficiary or characterization of the beneficiary's interest is the theoretical determination of when the trust relationship arises, i.e., at the time of the deposit or at the time of the depositor's death. See *A. Scott, 1 The Law of Trusts* 58.4A at 541, 542 (3d ed. 1967). See note 27, supra.


"There is no separation of legal and equitable ownership, no fiduciary duty on the part of the depositor arises toward the designated beneficiary, nor is a correlative right created in the beneficiary to compel the trustee to account." *Note, Tentative Trust Deposits*, 39 Dick. L. Rev. 37, 38 (1934).
considered to be irrevocable, unless specifically made revocable.\textsuperscript{36} Obviously, the savings bank trust's basic presumption is to the contrary.\textsuperscript{37} The death of the beneficiary prior to the death of the trustee or settlor does not affect the conventional trust,\textsuperscript{38} yet it ends the savings bank trust.\textsuperscript{39} The mere reservation of a power of revocation does not necessarily subject the trust res to the creditors of a traditional settlor,\textsuperscript{40} yet such access is allowed during the lifetime of the savings bank trust depositor.\textsuperscript{41} If the depositor of a savings bank trust is judged mentally incompe-

The real nature of the interest of the beneficiary is illusive due primarily to the differing theories upon which the savings bank trust is permitted. Some have termed the interest as simply an "equitable" one with enjoyment postponed until the depositor's death. Boyce, \textit{Joint Bank Accounts with Right of Survivorship: A Conceptional Maze}, 6 \textsc{Cap. L. Rev.} 477, 479 (1977). Other characte-


\textsuperscript{37} A. Scott, \textit{1 The Law of Trusts} § 58.1 at 520 (3d ed. 1967); G. Bogert, \textit{The Law of Trusts and Trustees} § 47 at 352-353 (2d ed. 1965).


\textsuperscript{39} A. Scott, \textit{1 The Law of Trusts} § 58.4 at 536-537 (3d ed. 1967); \textit{Restatement (Second) of Trusts} § 58, comment c (1959). It has been suggested that this conclusion is based on the analogy of the doctrine of a legacy lapsing if the legatee predeceases the testator. \textit{See} Gulliver and Tilson, \textit{Classification of Gratuitous Transfers}, 51 \textsc{Yale L. J.} 1, 34 (1941). Such reasoning demonstrates how the differing concepts of what interest the beneficiary has and when it takes effect can affect secondary issues in connection with savings bank trusts. \textit{See generally}, Tabis, \textit{Illinois Totten Trust: The Rights of Legal Representatives of a Beneficiary Who Predeceases the Trustee}, 48 \textsc{Chi.-Kent L. Rev.} 107 (1971).

\textsuperscript{40} A. Scott, \textit{4 The Law of Trusts} § 330.12 at 2613 (3d ed. 1967); \textit{Restatement (Second) of Trusts} § 330, comment o (1959).

\textsuperscript{41} A. Scott, \textit{1 The Law of Trusts} § 58.5 at 543-544 (3d ed. 1967); \textit{Restatement (Second) of Trusts} § 58, comment d (1959). Here again the theory of the nature and timing of the savings bank trust may affect the decision concerning the rights of the creditors. The general rule in this regard is consistent with the "tentative" theory—the account is the depositor's property until his death. If the "revocable trust" theory is followed, the beneficiary's present interest should be protected from the depositor's creditors during his lifetime. This view is followed in Maryland, Fairfax v. Savings Bank of Baltimore, 175 Md. 136, 199 A. 872 (1938). \textit{See} Wittebort, \textit{Savings Account Trusts: A Critical Examination}, 49 \textsc{Notre Dame Law.} 686, 695 (1974) and Richie, \textit{What Is a Will?}, 49 \textsc{Va. L. Rev.} 759, 762 (1963).
tent following its creation, the account can be reached for his needs upon judicial petition by the depositor’s guardian, while there would be no basis for such relief under traditional trust law.

A revocable trust in which the settlor has a beneficial life interest must normally be termed “illusory” as opposed to “real” for a surviving spouse of the settlor to have access to the res when claiming against the will or claiming a statutory share of the estate. Some jurisdictions have imposed different tests in allowing such access to the savings bank trust of the depositor, making the account more accessible to the surviving spouse.

THE STATUTE OF WILLS

Perhaps the most serious objection to the savings account trust is its lack of compliance with the Statute of Wills. Ambulatory by nature and testamentary in effect, savings bank trusts have been rejected in some jurisdictions since they are lacking in the formalities prescribed by the Statute of Wills.

42. A. Scott, 1 The Law of Trusts § 58.4 at 539-540 (3d ed. 1967); Restatement (Second) of Trusts § 58 comment c (1959). This treatment is more consistent with the revocable trust theory in view of the judicial action necessary to reach the account. See Note, Bank Account Trusts, 49 Va. L. Rev. 1189, 1199 (1963) and Note, 26 Minn. L. Rev. 767 (1942).


A recent Illinois case viewed the Totten trust as upheld per se, but required that it yield to the spouse’s claim because of statutory policy which protected the surviving spouse. Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E. 2d 465 (1973), noted in 23 DePaul L. Rev. 1247 (1974) and 50 Chi-Kent L. Rev. 159 (1973).

45. See generally A. Scott, 1 The Law of Trusts, § 58.3 at 528-535 (3d ed. 1967).

46. “[I]n a few states it has been held that the fact that the depositor intends to reserve control over the deposit during his lifetime makes the disposition incomplete prior to his death, with the result that the beneficiary is not entitled to the deposit on the death of the depositor, even though the depositor has not attempted to revoke the trust. In these courts the courts took the view that the disposition is incomplete during the lifetime of the depositor, and that the disposition is therefore testamentary.” A. Scott, 1 The Law of Trusts, § 58.3 at 529-530 (3d ed. 1967). For a listing of these jurisdictions see A. Scott, 1 The Law
However, under both the revocable trust and tentative trust theories there seems to be little doubt that the savings bank trust is testamentary in nature. Under the tentative trust theory, the device takes effect only on death and is patently difficult to square with the Statute of Wills. If the trust is merely revocable by nature, it still fails to meet the standards usually applied to inter vivos trusts in determining if they violate the Statute of Wills.\footnote{The modern inter vivos revocable trust, in which the settlor retains a life interest and various powers of control, has seen a liberalization in some courts' views of the requirements for such a trust being held testamentary and thereby necessitating compliance with the Statute of Wills.\footnote{47} Even under the modern rule a trust will still be held testamentary if no interest passes to the beneficiary prior to the death of settlor, i.e., is only held in trust for such beneficiary. Id. at 694.} The modern inter vivos revocable trust, in which the settlor retains a life interest and various powers of control, has seen a liberalization in some courts' views of the requirements for such a trust being held testamentary and thereby necessitating compliance with the Statute of Wills.\footnote{Even under the modern rule a trust will still be held testamentary if no interest passes to the beneficiary prior to the death of settlor, i.e., is only held in trust for such beneficiary. Id. at 694.} Even under the modern rule a trust will still be held testamentary if no interest passes to the beneficiary prior to the death of settlor, i.e., is only held in trust for such beneficiary. Id. at 694.

\textit{Comment, Matter of Totten—An Anomaly in the Law of Trusts, 6 DePaul L. Rev. 117, 129 (1956).}


The mere power of revocation in an inter vivos trust, even coupled with a beneficial life interest, is not generally held sufficient to invalidate the trust as being testamentary and incompatible with the Statute of Wills. A. Scott, \textit{1 The Law of Trusts} § 56.6 at 473 (3d ed. 1967). Restatement (Second) of Trusts § 57 and § 57.2 (1959). When the settlor's power of revocation and beneficial life interest are added to the settlor's broad powers to treat the trust generally as if it were his own property, the "will-like" quality of the arrangement causes some courts to invalidate the arrangement as testamentary. \textit{Id.}

[In the case of a tentative trust] "the critical quantum of control is reached with the addition of the power in the settlor to do what he wishes with the funds." \textit{Id.}

The reservation of the depositor's right to control the funds, normally an unobjectionable incident of inter vivos trusts, has been extended to the point where it collides with the interest of the beneficiary and raises serious questions as to the certainty of the trust's subject matter." \textit{Id.} at 694.

\footnote{48. Probably the most widely discussed case in which a court refused to strike down such a trust for failure to comply with the Statute of Wills is Farkas v. Williams, 5 Ill. 2d 417, 125 N.E. 2d 600 (1955). In this case the settlor-trustee reserved: (1) the income of the res (stock) for his use (2) the right as trustee to vote, sell, redeem, exchange or otherwise deal with the stock (proceeds from sales inured directly to the settlor), (3) the right to revoke and (4) the right to change the beneficiary. The stock was registered in the name of the settlor as trustee. The beneficiary was to become absolute owner of the stock upon the settlor's death unless the settlor had changed the beneficiary or revoked the trust; written notice to the company was required of either revocation or change of beneficiary. The court upheld the trust as non-testamentary. It is submitted that the approval of the \textit{Farkas} trust was probably based actually on a policy consideration, as distinguished from a technical reason, since the formalities of ...}
effective on the settlor's death. However, if an interest is held to pass to the beneficiary during the settlor's life, the trust is upheld under the liberal rule.\(^4\)

The requirement of finding of an "interest" passing to characterize the trust as non-testamentary has been questioned in the light of legal reality.\(^5\) Even if the requirement is recognized, it is difficult to identify or describe the interest received by the beneficiary of the savings bank trust.\(^5\) Some authorities have contended that the savings bank trust should be sustained because of its similarity to the modern revocable inter vivos trust in which the settlor retains a life interest and broad powers.\(^5\) Others consider the two devices nonanalogous.\(^5\)

Of course, the basic rigidity of the application of the Statute of Wills has been questioned. In this approach, the issue becomes whether a device, testamentary in effect, provides the basic

the arrangement satisfied the fundamental policy requirements undergirding the formalities prescribed by the Statute of Wills. See Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 505-506 (1975).

49. "Holding an interest to pass from the donor to the donee at the inception of the transaction is the usual means by which courts lift transactions with a 'testamentary look' out of the conventional definition of a will and the scope of the statutes of wills." Richie, *What is a Will?* 49 VA. L. REV. 759, 766 (1963).

It is submitted that in the *Farkas* and similar cases the courts are basically carving out another exception to the Statute of Wills. However, they still look to the ancient trust law *sine qua non* of an interest passing to the beneficiary prior to the depositor's death to sustain the trust. *See A. Scott, 1 The Law of Trusts*, § 56.6 at 473 (3d ed. 1967). If such an interest passes, the settlor-trustee is held to have a fiduciary responsibility, helping to validate the arrangement. *Farkas v. Williams*, 5 Ill. 2d 417, 432, 125 N.E. 2d 600, 608 (1955); Richie, *What Is a Will?* 49 VA. L. REV. 759, 764-766 (1963) *Compare* note 27 *supra*.

50. "To nullify such a useful device because of the conception that no interest passes until death is to make an intellectual exercise of the most abstract character predominant, without justification in policy, over social utility and the desires of the individual." Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. J. 1, 39 (1941).

51. "This interest is subject not only to revocation, in whole or in part, by the depositor; it is also subject to partial or complete defeasance as a result of judicially sanctioned invasion of the fund by the depositor's creditors, personal representatives or surviving spouse." Wittebort, *Savings Account Trusts: A Critical Examination*, 49 NOTRE DAME LAW. 686, 692 (1974); *See generally* note 35 *supra*.


53. "The usual inter vivos trust is customarily set out in a detailed written document, to the content and terms of which the settlor and his attorney will normally have devoted much time and thought. . . . But the situation of a bank deposit is quite different. The trust is not stated in any detail, its express terms being confined to the form of the account, sometimes expanded briefly in a supplementary agreement with the bank." Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. JOUR. 1, 37, 38 (1941); *See* Wittebort, *Savings Account Trusts: A Critical Examination*, 49 NOTRE DAME LAW. 686, 692 (1974).
safeguards for which the Statute of Wills was originally designed.  

There has been some effort to square the savings bank trust with the Statute of Wills. Professor Scott, conceding that the trust is "thin", reasons that the trust is established at the time of the deposit but is merely subject to a condition subsequent of revocation rather than a condition precedent of the depositor's death. It has also been argued that the beneficiary receives a present interest "with enjoyment both postponed and tentative" and therefore the trust is not testamentary. Another expression of the same theory is that the beneficiary has a "present, though defeasible" interest when the account is opened, keeping the device from being testamentary in character.

A more realistic analysis is that the savings bank trust is a judicially imposed exception to the normal strictures of the Statute of Wills. Professor Scott's frank statement in 1930


55. "The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent’s testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act." Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489 (1975).

Professor Langbein indicates that the Statute of Wills has the following valid functions: evidentiary, channeling, and cautionary. Id. at 492-496. He concludes that these policies or functions are served in the case of the savings bank trust: "That smallish sums are typically involved bears on the cautionary policy. The channeling policy is well served in the out-of-court routine of bank practice. The cautionary and evidentiary policies are thought to be served by the interview with the bank officer and the execution of the signature card which would seem to discourage hasty and impulsive action and to reduce the danger of forgery, fraud and coercion to a minimum." Id. at 507. See Richie, What Is a Will? 49 VA. L. REV. 759, 763 (1963).


"The Totten trust is functionally equivalent to a will in every respect. . . . Despite some trouble in fitting the Totten Trust into accepted doctrine, the
helps focus attention on reality rather than theory: "It is clear that a similar trust of property other than savings bank deposits would be invalid."  

**The Malestrom of Revocation**

An inherent part of the theoretical foundation of the savings bank trust is its revocability. This quality provides the device with much of the social utility for which it was recognized. Its ambulatory nature gives it the will-like quality that makes it an appealing way to dispose of funds after death. Yet, this aspect of the device has been the storm center of the controversies and attendant litigation that have arisen in connection with such trusts. While the financial institutions may with impunity pay the beneficiary upon the depositor's death, the potential controversy persists. If it can be shown that the trust was revoked prior to the death of the depositor, then the depositor's estate or legatees have a claim for the funds. What was judicially conceived as a simple, uncomplicated and perhaps lawyer-free method of passing wealth is complicated by the multiple avenues of available revocation. This particular aspect of the device has caused the entire concept to be termed a "tenuous and uncertain" method of disposing of property after death.

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"As a practical matter it seems to make no difference whether a transaction with a 'testamentary look' is excluded from the scope of the Statute of Wills on the 'presently passing interest' theory, or by explicitly or implicitly recognizing it as an exception to the conventional definition of a will." Richie, *What Is a Will?*, 49 VA. L. REV. 759, 767 (1963).


60. There could appear here a discussion of revocation in connection with the basic question dividing the two theories concerning the nature of a savings bank trust: i.e., whether the trust arises at the deposit or upon the depositor's death. In theory, under the pure tentative concept there is not technical revocation prior to the trust becoming effective upon the death of the depositor, rather the trust is merely never effective because the condition precedent is never met. However, the courts appear to use revocation terminology rather indiscriminately under either theory; the term will be used herein in the broad sense encompassing either concept of the savings bank trust.


62. Note, 39 CAL. L. REV. 314, 315 (1951). Because of the problems of revocation, and potential revocation, as seen demonstrated in California cases dealing with tentative trusts, Witkin concludes that "the tentative trust created in the
As divided as the courts that accept the savings bank trust concept may be as to the nature and theoretical basis for permitting savings bank trusts, there seems to be almost unanimous agreement, where unaltered by statute, as to how they may be revoked. The recognized basic methods of revocation largely remain unchanged from the original Totten enunciation of the doctrine which is reannounced in the Restatement.

As in its creation, the intent, or presumed intent, of the depositor governs in its ability to be revoked. While a great leap of faith is required to establish the rebuttable presumption of intent to create the revocable savings bank trust, an even broader bound is required to presume that the depositor intended to have all of the avenues of revocation open to him. This latter presumption evidently flows from the initial presumption, since they both supposedly reflect the intent of the depositor; they ostensibly would enure to his benefit, or at least his wishes. It is submitted that it is likely that the depositor in the absence of legal advice or the unlikely counsel of a teller or other official of the institution involved, would reasonably conclude he could only end the arrangement by simply withdrawing the funds, the usual method of dealing with such accounts.

However, the courts, in the absence of credible evidence to the contrary, hold that the savings bank trust can be revoked or terminated by any of several means:

ordinary deposit form is unreliable, and that the formal trust instrument . . . should be used.” B. Witkin, 7 Summary of California Law, Trusts § 18 at 5382 (8th ed. 1974).

63. The notable exception is the Supreme Court of Maryland. The Maryland view will be developed in Efforts at Reform infra.

64. New Jersey and New York have codified the savings bank trust concept and both statutes altered the common law rules of revocation. See n.107 and 108 infra.

65. For a comprehensive consideration of savings bank revocation generally, see Annot. 46 ALR 3d 487 (1972).


67. Restatement (Second) of Trusts, § 58, comment c (1959).


69. While revocation and termination can be technically contrasted, the differences are not material in this context and the terms are used interchangeably in these comments.

1. Withdrawal of funds, with pro tanto revocation as to any amount withdrawn less than the entire amount.71

2. Change of the account designation to eliminate the "in trust" aspect or by designating another beneficiary.72

3. Death of the beneficiary prior to the death of the depositor.73

4. By the depositor's will containing explicit mention of the deposit or by a deposition inconsistent with the deposit (a mere residuary gift will not revoke).74

5. By application to the court by the depositor's guardian when the depositor is adjudged mentally incompetent and the funds are needed for the depositor's care.75

6. Any decisive manifestation of the depositor's intent. No particular formalities are needed and oral statements and inter vivos writings are considered.76

Problem Areas In Revocation

The appropriateness of various modes of revocation available to the depositor, such as withdrawal of funds or change of account designation, is apparent. The unusual revocation by the predeceasing of the beneficiary causes little difficulty since the depositor remains free to retain the funds, name another beneficiary or give the funds to the estate or a relative of the deceased beneficiary. While one might speculate if the depositor intended to be able to revoke the savings bank trust by his will, there can be no doubt as to his latest intent since the testamentary revocation must be specific or inconsistent with the savings bank trust for a revocation to be effected. Perhaps the testamentary nature of the device is sufficient reason for the availability of such revocation by will. However, it is interesting to note that the Uniform Probate Code does not allow revocation of the savings account trust by will.77


73. A. SCOTT, 1 THE LAW OF TRUSTS, § 58.4 at 536-537 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 58, comment c (1959); R. Newman, NEWMAN ON TRUSTS, 78-79 (1955).


76. "[T]he trust is revoked by any words or conduct on the part of the depositor indicating an intention to revoke it." A. SCOTT, 1 THE LAW OF TRUSTS, § 58.4 at 536 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 58, comment c (1959).

77. UNIFORM PROBATE CODE § 6-104.
An avenue of revocation that is perhaps furthest from the depositor's probable intent has been the basis of a major part of the litigation involving the savings bank trust. This avenue of revocation is that described by the *Restatement* as "a manifestation of his intent to revoke the trust. No particular formalities are necessary to manifest such an intention." This very broad and flexible power of revocation has its roots in the *Totten* case which indicated that revocation could be brought about by "some decisive act or declaration of disaffirmance."

Speculation is probably futile as to why such a broad power of revocation was thought a necessary component of the doctrine upholding the device. A likely surmise is the general trust law rule that when a power of revocation is retained by the settlor, but the details of how it is to be exercised are not spelled out in the trust, then the "power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust. Any definitive manifestation by the settlor of his intention that the trust should be forthwith revoked is sufficient."

While hindsight usually provides superior perception, it does not appear that the broad power of revocation by "any words or conduct on the part of the depositor indicating an intention to revoke it" is an essential component of the concept or is necessary to achieve the societal goals attained by recognizing the savings bank trust. The recognition of such a power of revocation has been the occasion of frequent litigation involving the ascertaining of the intent of the depositor and whether such intent is sufficiently manifested or whether the words or conduct are suitably "decisive." Such a power of revocation makes complex a device conceived and approved for its simplicity.

78. *Restatement* (Second) of Trusts, § 58, comment c (1959). "Where the depositor has not manifested an intention to make the trust irrevocable, he may revoke it any way in which his intention to revoke is manifested." *Id.* § 58 Appendix, comment c (1959).

79. *In re Totten*, 179 N.Y. 112, 125, 71 N.E. 748, 752, 70 L.R.A. 711 (1904).

80. *Restatement* (Second) of Trusts § 330, comment i (1959); see A. Scott, 4 *The Law of Trusts*, § 330.7 at 2605 (3d ed. 1967).


82. "Where used for testamentary purposes, such a device is valuable only if it may be used by laymen without the aid of attorneys, and thus the rules of law should be uniform and simple of application. Unfortunately, they are not." Comment, *Disposition of Bank Accounts: The Poor Man's Will*, 53 Colum. L. Rev. 103, 104 (1953).
The basic informality of such a potential power of revocation begets the problems. Since no formalities are prescribed for the revocation and the only criteria specified stipulates that the revocatory act must be decisive, the ambit of potential disagreement and attendant litigation is apparent. Examples of such acts sometimes held to be a revocation are the depositor's oral statements and his inter vivos (as distinguished from direction in a will) written statements. The Statute of Wills traditionally proscribes the variety of problems and disputes that are frequently found in such revocations of savings bank trusts.

An oral declaration of revocation by the depositor theoretically can revoke the savings bank trust. Perhaps because the depositor rarely understands that he has such a power and the general reluctance of the courts to accept testimony of witnesses as to their recollections of such declarations, few cases squarely turn on an oral declaration alone as a basis of revocation. The courts tend to hold such declarations as not being sufficiently decisive and look for other conduct of the depositor confirming such intention to revoke. In such cases the depositor rarely says "I hereby revoke" but rather talks in terms of future intent to revoke, or a desire that another person have the funds or an intent to attend to the revocation by will.

The wide array of evidence that may be sought and utilized in proving a revocation has been describes as follows:

Thus, counsel seeking to establish the revocation will wish to marshal all possible evidence bearing on the settlor's intention, including not only evidence of his written and oral declarations, but also proof of the attendant actions and circumstances tending to confirm the revocatory intent.

83. In a recent (1972) annotation on savings bank trust revocation, the author indicated a failure to discover a single litigated case in which an oral declaration alone had been the basis of finding an intent to revoke. ANNOT. 46 A.L.R. 3d 487, 494 (1972). "[C]ourts are not disposed to allow frail memory of oral declarations to overcome the clear terms of the trusts." Id. at 498.

84. Id. at 501.

85. See In Re Estate of Service, 49 Misc. 2d 399, 267 N.Y.S. 2d 782 (1965); and In Re Estate of Stelma, 25 Misc. 2d 234, 201 N.Y.S. 2d 609 (1960).


88. ANNOT. 46 A.L.R. 3d 487, 498 (1972). The problems that inhere in such evidence have been noted:

"Much of the litigation involving deposits 'in trust' could be avoided by a clear expression of intention by the depositors. Since such persons invariably act without the guidance of counsel and frequently have not clearly formulated in their own mind their wishes it is not surprising that their statements are often vague and indefinite. The testimony . . . as to what the depositor told him is liable to be influenced more by a recently acquired understanding of the essen-
Adding another dimension to the cloudy area of revocation by oral declaration is a series of cases involving the depositor's oral declarations made in conjunction with the execution of his will. In these cases it has been held that oral declarations made at the execution of the depositor's will, coupled with the content of the will, can be sufficient to revoke the savings bank trust. In such cases it was the depositor's conduct in executing the will that made the declaration a sufficiently decisive indicator of the depositor's intention to revoke.

Revocation by inter vivos writing would appear to be less fraught with confusion, but litigation involving such an indication of intent to revoke is almost as varied and numerous as that dealing with revocation by oral declaration. Letters, revoked wills, invalid wills and other writings present a complex web from which the depositor's intention, or lack of intention, to revoke is sought. Again, the question of whether the depositor was actually aware of his ability to revoke in such a manner is a conjecture that may make the courts' task even more complicated.

Letters which tend to be testamentary in nature, while not meeting the requirements of a will, are sometimes held to be a revocation even if they do not clearly express the intent to revoke. Other courts have disregarded the nature of the letter in

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seeking the decisive act of revocation.91

The inter vivos writing in the form of an invalid will poses another facet to the quest for revocatory intent. New York case law refuses to accept the invalid will as in indicator of intent to revoke,92 while the Pennsylvania courts apparently are not deterred in recognizing such a document as an indication of the depositor's revocatory intent.93 The courts in such cases are faced with deciding whether a valid method of revocation (by will) that fails because of lack of formalities can be considered separately as an inter vivos writing for the purpose of revocation.

The question of the effect of a valid will which revokes the savings bank trust, but later itself is revoked has been considered by a California court. In Brucks v. Home Federal Savings and Loan Association94 the court held that the revocation of a savings bank trust by a holographic will was not affected or nullified by a later revocation of the will.

Powers of attorney,95 instructions to the bank96 and contracts97 are examples of other inter vivos writings that have been found to be suitable demonstrations of the depositor's intent to revoke. Further, the depositor's obliterating the name of the beneficiary98 and the use of the passbook as security for a debt99 have been held to be acceptable evidence of intent to revoke. To further complicate the search for the depositor's intent to revoke, the courts have sometimes considered the relationship of the beneficiary to the depositor,100 the depositor's subsequent treatment of the account following the alleged revocation,101 and the physical location of the account passbook.102 Thus, the possibility of revocation of the savings bank trust by any decisive manifestation of the depositor's intent provides a

91. See In re Schiffer's Estate, 142 Misc. 518, 254 N.Y.S. 871 (1931); In re Ryan's Will, 52 N.Y.S. 2d 502 (Surr. 1944).
92. See Estate of Baquiche, 4 Misc. 2d 614, 152 N.Y.S. 2d 146 (1956).
94. 36 Cal. 2d 845, 228 P.2d 545 (1951).
fertile setting for litigation upon the depositor's death. Those who would take the funds in the absence of the device are free to examine the words, writings and conduct of the deceased depositor to seek evidence that the savings bank trust had indeed been revoked prior to the depositor's death.

Efforts At Reform

While the need for reform in limiting the avenues of revocation of savings bank trusts has been recognized in several quarters, actual efforts to bring about reform have been limited. The most powerful forces that might bring about the needed changes, the financial institutions involved, have little in the way of a vested interest in reform. They are protected by statutes exonerating them from liability if they pay the designated beneficiary. Frequently, they have further strengthened their positions by the use of special forms for opening such accounts which further specifically limit or eliminate their liability for paying a designated beneficiary.103

Although the revocation of savings bank trusts by will has not been a prime source of litigation, it should be noted again that the Uniform Probate Code provides that such accounts cannot be revoked by will.104 New York efforts at reform that would have eliminated this avenue of revocation struck a particularly sensitive nerve.105

Remedial legislation codifying the savings bank trust concept frequently has been called for as a solution to the problem.106


105. In 1974 the New York legislature passed legislation codifying the savings bank trust doctrine and limiting the powers of revocation to the total exclusion of revocation by will. Opposition (led by several groups of the organized bar) to the removal of the power of testamentary revocation influenced the Governor to veto the measure. At the next legislative session the measure was again introduced (this time allowing limited revocation by will) and met both legislative and gubernatorial approval. See Fried, Decedents' Estates, 26 Syracuse L. Rev. 311, 315 (1975) and Fried, Decedents Estates, 27 Syracuse L. Rev. 329, 333 (1976).

106. Moynihan, Trusts of Savings Deposits in Massachusetts, 22 B. U. L. Rev. 271, 285-286 (1942); Wittebort, Savings Account Trusts: A Critical Exam-
New Jersey, after a stormy history of litigation involving the savings bank trusts, enacted such legislation. That statute provides that revocation is only permissible during the lifetime of the depositor by the withdrawal of funds and by the pre-deceasing of the beneficiary. It is submitted that the statutory treatment probably closely parallels the depositor's actual conception of his power of revocation.

In 1975 the New York legislature codified the savings bank trust concept and restricted the power of revocation. The new statute provides that during the depositor's lifetime the trust can be revoked only by withdrawal of funds or by express direction in a will. It is significant that this change took place in the jurisdiction that led popular acceptance of the device.

The Maryland courts have been more direct and responsive in dealing with the problems connected with revocation. Not feeling deterred by the judicial precedents of other jurisdictions, they have simply held that revocation is only allowable during the depositor's lifetime and only by withdrawal of the account funds.

JUDICIAL RESPONSIBILITY

The call for legislative reform of the law of savings bank trusts has continued for several decades. Such relief seems un-
likely to be achieved to any marked extent primarily because of the lack of organized interests willing to expend their resources and efforts to bring about the changes needed. The inactivity of legislators cannot be legitimately interpreted as legislative approval of the existing common law rules.\footnote{110}

The solution lies in the judiciary of the jurisdictions recognizing the common law concept of the savings bank trust.\footnote{111} The savings bank trust is a judicial creation. The solution to the litigation-spawning rules of revocation should be provided by the courts, not left to legislators who usually are reluctant to dabble in changing common law rules in the absence of public outcry.\footnote{112} The leadership provided by the Maryland courts should be followed by other jurisdictions.

Since the savings bank trusts are foreign to the law of trusts in many respects and must be considered as a basic exception to

\footnote{110}{"Closely related is an old cliche, never with much truth in it, that is today being rejected on its merits. This was that, after a judge-made rule of law—good, bad, or indifferent—had been announced by decision at some earlier time, and the legislature over a period of years had not by new statute changed the rule (as of course it had the power to do), the legislative silence constituted an approval of the rule, a sort of tacit reenactment of it, giving it a greater force than it originally possessed, and constituting an additional reason against reconsideration and overruling of even an unwise decision. That interpretation of 'legislative silence' is unsound. State legislature make no effort to keep up with the mass of judge-made common law. Their attention is mainly centered on matters having to do with the organization of government, taxation, regulation of utilities, crime and public morality, issues of whatever nature are currently exciting the public." Leflar, \textit{The Great and Common Law}, 30 Ark. L. Rev. 395, 403 (1977).}

\footnote{111}{"In my opinion the Totten trust is the sort of development that can be worked out by the courts rather than by a state statute. The courts can mold and shape and give life and adapt." Note, \textit{Totten Trust: The Poor Man's Will}, 42 N.C. L. Rev. 214, 219 (1963).}

\footnote{112}{"Judge-made rules controlling the rights of parties to private litigation seldom come to legislative attention unless some lawyer-legislator, unhappy because he has lost a case in court, seeks legislative reversal of his own prior defeat. Even that happens less often nowadays than it once did. The fact is that legislators deliberately leave most common law matters to the common law courts. Even if a bill designed to change a common law rule be introduced, most legislators will ignore it, not because they believe the rule should not be changed but rather because the mass of judge-made law should be left to the judges to handle. 'It's their job, not ours,' say the busy legislators. Legislative silence may mean almost anything. Guessing at its meaning is a futile undertaking. Most often it means nothing. At least that is all that it can ordinarily be proved to mean." Leflar, \textit{The Great and Common Law}, 30 Ark. L. Rev. 395, 404 (1977). See Friendly, \textit{The Gap in Lawmaking: Judges Who Can't and Legislators Who Won't}, 63 Colum. L. Rev. 787 (1963).}
the usual requirements of the Statute of Wills, there is no valid reason, other than judicial precedent, for the courts' reluctance to hold that revocation can only be accomplished during the depositor's lifetime by withdrawal of the funds. In a body of law ostensibly based on the presumed intention of the depositor, such a construction would be more closely aligned with the probable intent, or at least comprehension, of the depositor in regard to his power of revocation.

The reluctance of courts to change a basic tenet of the doctrine, espoused by the Restatement, is predictable and perhaps understandable. It is an instance in which courts should recognize their responsibility to correct a basic defect in judicial legislation of long standing. The American Law Institute in its Restatement of Trusts should exert leadership that would facilitate such judicial reform.


114. The overruling of the judicial precedents could be done retroactively or prospectively only. The circumstances indicating prospective judicial modification, as suggested by Justice Traynor, do not appear to be present in this situation. Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hastings L. J. 533, 540-543 (1977).

"A new rule announced in a current decision, apart from being applied in the principal case, can be made applicable to cases tried thereafter only, or only to cases the facts of which occur thereafter, or only to transactions that take place after a named future date, or only after the adjournment of the next session of the legislature (if the court thinks that the subject matter is one that the legislature might wish to deal with now that the judicial decision has called attention to it.) If the new decision involves no overruling, the prospectivity issue does not arise. Most judicial decisions, even overrulings, do not call for prospective treatment. The great majority of judicial decisions involve situations in which there has been no justifiable reliance by anyone on prior contrary law. In those cases, the newly announced rule can be applied across the board, retroactively as well as prospectively. And the prospectivity technique can take care of the remaining small number of reliance cases." Leflar, The Great and Common Law, 30 Ark. L. Rev. 396, 401 (1977).


It must be borne in mind that many jurisdictions have not yet accepted the common law savings bank trust doctrine. Should they elect to do so, an opportunity is afforded to prevent the revocation problems in the savings bank trust's initial recognition.

115. Notwithstanding the significant contributions of the American Law Institute in bringing together and analyzing the law of trusts in its Restatements, it has not been known for its leadership in exerting influence for reform in the field.

"Rather than chart and evaluate the judicial adjustment between conflicting policies, trust theory, so far, has been primarily relegated to the Restatement of rules. The Restatement culs rules from factual situations involving different compromises, states them to be conflicting, and chooses one rule as correct.
Justice Roger J. Traynor catches the spirit of this responsibility in these words:

There are, of course, precedents originally so unsatisfactory or grown so unsatisfactory with time as to deserve liquidation. Unfortunately a court often lacks the forthrightness to bring about their demise. Instead it may pursue the unhappy alternatives of keeping them alive and kicking irrationally or sustaining them half alive. It may blindly follow precedent only because it lacks the wit or the will or the courage to spell out why the precedent no longer deserves to be followed. . . . Courts are often so dismayed by the extent of an unnecessary evil as to retreat into defeatism. The case law has come to such a state, they are want to say, that only the legislature can set things aright. Ironically, judges themselves are all too ready to seize on this rationalization to shift to others the responsibility of overruling judgemade bad law. This is evasion, not mere abstentious avoidance of judicial responsibility. The time is ripe for redress and no one can undertake it more appropriately than the judges themselves. Their inaction speaks louder than words to perpetuate error and confusion.116

Devoid of other alternatives as a ground for decision, courts articulate their decisions in terms of rules, counterrules, exceptions, and conflicting characterizations. The result is not only a maze of conflicting rules, but also a puzzle whether the courts achieve a rational compromise or whether the rule dictated the result. To those dissatisfied with the Restatement's theory and in search of coherence in the judicial process, no alternatives are presently available. Ereli, The Trust: Salvation by Muddle, 12 UCLA L. Rev. 190, 190 (1964).

"Unfortunately, the spirit of reform is not reflected in Trust Restatements. This might be due to the sparsity of concern on the part of commentators. . . . This non-critical attitude toward trust theory has continued to prevail. . . ." Id. at 193-194. See Note, The Theory of the Tentative Trust, 87 U. Pa. L. Rev. 847, 853-855 (1939).


"The common law system could not have survived through the centuries if it had been no more than a method of perpetuating its own past. It has survived and is healthy today because in the hands of wise judges it is a system that calls for growth, one that builds on the past to meet the needs of the present and the future. The system will not tolerate hog-wild innovation, but without innovation, it will die—it would have died long ago. Legislatures can aid the courts in updating the law, but much of the ultimate responsibility rests upon our appellate courts, and specifically, upon the judges who sit on those courts." Leflar, The Great and Common Law, 30 Ark L. Rev. 395, 409 (1977).