THE EFFECT OF JOINT BANK ACCOUNTS

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Coincident with the rapid expansion in the past century of the use of banking facilities generally has been resort to the use of joint bank accounts. The use of such accounts is not founded on any expressly permissive legislation or rules of banking practice, but has grown automatically — with the acquiescence of the banks and of our legislative bodies — as a convenient method of permitting two or more persons recourse to the same deposits in one account. Indeed, even to-day, there is but little legislation on our statute books referring directly to this commercial banking practice. The courts, in deciding legal difficulties that arise, must of necessity refer to, and be guided by, the common-law and equitable principles which have been propounded by jurists in deciding previous difficulties brought before the courts.

The object of this article is to consider the circumstances in which such difficulties have arisen, to summarize, compare and examine the various principles applied by the courts in arriving at a solution to the difficulties, and to recommend constructively a few possible improvements with respect to the use of joint accounts and to the law governing them.

A joint bank account, as it is commonly understood to-day, is an account opened with a bank in the names of two or more persons jointly.[1] Incidental to the opening of the account is the issuing of an instruction by either one or both persons — more usually by both — to the bank directing it to honour cheques drawn by either of these persons.[2] It has become the usual practice to incorporate this instruction in a printed form provided by the bank concerned. In some instances the form purports to be something more than a mere directive to the bank, but this aspect of my subject will be dealt with more fully later. The original, and subsequent, deposits to the account may be made either by one of the persons in whose name it is opened, or, as is less frequently the case, by both. It is not unusual for the original deposit to be effected by a transfer of either a portion or all of the moneys represented in an already existent account.

[1] For the purposes of this article it will be assumed that two persons only subscribe to a joint account. The general principles applicable when the number exceeds two are precisely the same.

[2] The form, in most cases, requires also the signature of witnesses.

In the case of practically all joint accounts one of the parties has made all the deposits.[3] In joining the other party with him, the sole contributor's intention has been usually:

(a) to give the beneficial right to the moneys deposited to himself and the other jointly and severally, with a beneficial right to the other to such moneys as are to the credit of the account at his decease; or

(b) for convenience, to join another with him, who may act as his agent in withdrawing moneys from the account; or

(c) to retain the beneficial right to the moneys in himself during his own lifetime, but to give to the other all right to the moneys on his death;[4] or

(d) to give to the other a gift of the beneficial use of the moneys deposited, subject to revocation (which could be effected by his withdrawing the moneys himself).

The task of the courts in deciding the rights of parties to moneys represented in joint accounts has in each instance involved an attempt to ascertain the contributor's intention under one or other of these classes.

It might prove advantageous at this stage to consider for a moment the nature of a joint account and the legal relationship between banker and client. In respect to the latter, it has been firmly established by our courts that the relationship between banker and depositor is that of "debtor and creditor". The depositor has a contractual right against the bank. There is no question of a "right in property" to the money deposited. Thus, on a deposit of $100 to a depositor's account at a bank, the legal title to that amount passes to the bank. The depositor takes in exchange from the bank a mere promise, a contract to pay him $100 when called upon to do so. Riddell J. A. in *Stadder* v. *Canadian Bank of Commerce*[5] has put it thus:

> When one deposits money in a bank, he ceases to be the owner of it or of any interest in it; the bank is not trustee or agent of the customer in respect of the money so deposited; it may lend it, spend it, hide it in a napkin, bury it or throw it into the lake, and the customer has nothing to complain of. All that the bank owes to the customer is to have enough money to pay him when he calls for it, and to pay him in full and without delay. No one has any doubt as to these trite doctrines since *Foley* v.

[3] Hence, where it is apparent that one person has made all deposits with the intention of benefitting the other party to the account, the terms "donor" and "donee", respectively, will be used below in referring to them.

[4] In some instances it is apparent that use has been made of a joint account in an attempt to escape the payment of succession and death duties. *McEvoy* v. *Belfast Banking Co.*, [1935] A.C. 24, provides an illustration of this.

[5] [1929] 3 D.L.R. 651.

Hill (1848), 2 H.L.C. 28, 9 E.R. 1002; *Joachimson* v. *Swiss Bank Corp.*, [1921] 3 K B. 110, is not much more than a commentary on this; and the discussion there is as interesting as instructive.

With respect to the nature of joint accounts, Mr. John Willis[6] has dealt most fully with the legal grounds for upholding joint banking transactions in an article published just over a decade ago in the Canadian Bar Review.[7] The author there examines four legal theories upon which the non-depositing party to a joint account may acquire the contractual right that accrues automatically to the depositor himself in the case of a single account. After examining them in detail, Willis dismisses three as unsound, *viz*:

(i) the orthodox theory that extends to a joint account the principles applicable to a transfer of stock into the joint names of two persons;

(ii) the theory of Lord Atkin in *McEvoy* v. *Belfast Banking Co.* (*supra*) that the depositor enters into a contract with the bank as agent for the other person, which contract that other may subsequently ratify;

(iii) the theory that, in depositing the money, the depositor declares himself trustee of his claim against the bank for himself and the other party as joint cestuis que trust.

He prefers to accept a fourth theory, namely, that the depositor simultaneously makes a contract with the bank and assigns his claim against the bank by writing under the Judicature Act to himself and the non-depositor jointly.

Willis indeed admits the fictional aspect of all four theories, even of the one he prefers to accept; but, in a plea for third party beneficiary contracts, he states that his submissions are made "only because of a conviction that no long time can elapse before a court will be faced with the problem of how to give, not good, but any legal grounds at all for upholding a transaction which is every day entered into without question". It is to be noted that the theory supported by Willis was first established judicially by the Australian Court of Appeal in *Russell* v. *Scott*, decided in the same year.[8] No Canadian court has as yet endorsed it.[9]

Turning to the various types of actions which have resulted from the use of joint accounts, these may be divided into three classes:

[6] At that time lecturer at the Dalhousie Law School.
[7] (1936), 14 Can. Bar Rev. 456.
[8] (1936), 55 Comm. L.R. 440.
[9] True, it was referred to by the court in one of our latest cases, *Niles* v. *Lake*, [1946] 2 D.L.R. 177, but there the form itself was decisive of the action.

A. Those brought subsequent to the death of one of the parties to a joint account, and in which it is the object to ascertain the rights of the surviving party as against the estate of the deceased. Indeed the majority of cases are to be classed under this head. In most instances the action is brought by one of the following: the surviving party, the personal representative of the estate of the deceased or his next-of-kin or legatee, or, as in some instances, the bank concerned on an interpleader summons.

B. Those in which it is sought to ascertain the rights of the parties to moneys deposited as between themselves during the lifetime of both parties.

C. Those in which a judgment creditor seeks to attach moneys in a joint bank account to the credit of a judgment debtor and another.

With respect to A, Harrison J. in a New Brunswick case, *Bourque* v. *Landry*,[10] further re-classifies cases of this nature "according to the dispositions of the moneys", *viz.* where:

(a) joint ownership with benefit of survivorship was found;[11]

(b) there was a resulting trust;[12]

(c) there was an attempted testamentary disposition.[13]

In the majority of cases of this class it has been found necessary to determine between (a) and (b) and, in doing so, the courts have found it most convenient to rely on the application of the general equitable presumptions applicable to cases where one party has taken a purchase in, or transferred stock into, the joint names of himself and another. Thus it is stated in 15 Halsbury (2nd ed.), page 715:

> Where a person buys property and pays the purchasemoney, or part of it, but takes the purchase in the name of another, who is neither his child, adopted child, nor wife, there is *prima facie* no gift, but a resulting trust for the person paying such money or part. . . The rule

[10] (1936), 10 M.P.R. 108.

[11] *I.e.*, *In re Young* (1885), 28 Ch. D. 705; *Re Ryan* (1900), 32 O.R. 224; *Craig* v. *Cunningham* (1919), 53 N.S.R. 117; *Re Hodgson* (1921), 67 D.L.R. 252; *Mathews* v. *National Trust Co., Ltd.*, [1925] 4 D.L.R. 774; *Bourque* v. *Landry* (*supra*); *Armsworthy* v. *MacDonald*, [1942] 1 D.L.R. 110; *Re Willson*, [1942] 3 D.L.R. 569; *Niles* v. *Lake*, [1946] 2 D.L.R. 177.

[12] *I.e.*, *Sproule* v. *Murray* (1919), 48 D.L.R. 368; *Radcliffe* v. *Bank of Montreal*, [1919] 2 W.W.R. 887; *Fidler* v. *Barnes* (1937), 11 M.P.R. 254; *Re McKay*, [1938] 1 D.L.R. 581; *Re Mailman*, [1941] 3 D.L.R. 449; *Perry* v. *Kierstead* (1943), 16 M.P.R. 486.

[13] *I.e.*, *Hill* v. *Hill* (1904), 8 O.L.R. 710; *Smith* v. *Gosnell* (1918), 43 O.L.R. 123; *Shorthill, Executor*, v. *Grannen* (1920), 47 N.B.R. 463; *Re Potter* (1926), 29 O.W.N. 327; *McKnight, Executor*, v. *Titus* (1933), 6 M.P.R. 282; *Re O'Donnell, Maritime Trust Co.* v. *Morgan*, [1938] 3 D.L.R. 770. Cases of this class fall naturally also under class (b) above.

> applies to the case of a purchase taken in the joint names of a person paying the money and of the other, and to the case of a voluntary transfer of stock or shares into the name of another jointly with the transferor. . . Where a husband or father invests money in the joint names of himself and his wife or child it is presumed that the survivor is intended to have the investment.[14]

As pointed out by many eminent jurists, such presumptions are rebuttable. Indeed, in a great many cases where the presumption has been that a gift was intended, evidence has been admitted which has conclusively shown that the account had been placed in joint names merely for the sake of the convenience of the actual depositor.[15] In all such cases the courts have held that the moneys were held by the survivor under a resulting trust to the estate of the deceased. Proof of one or more of the following circumstances *inter alia* has been held in various cases to constitute a sufficient rebuttal: the incapacity of the depositor to attend at the bank and make withdrawals on his own behalf,[16] an understanding between the parties that only the depositor is to draw cheques against the account,[17] possession of the bank pass-book,[18] the existence of another separate account in the name of one or other of the parties, ignorance of one of the parties of the existence of the joint account.[19]

In many cases of this class the courts have either explicitly discounted the feasibility of applying the presumptions mentioned previously or have simply neglected to consider them. *Re Daley* (*supra*) is an example of just such a case. There Davies J. said at page 131:

> There is no general governing principle applicable to questions of the kind I am now considering. In every case it is a question of

[14] Application of the "presumption" theory has, of course, led to consideration of the term *in loco parentis*. This has been rather fully discussed in *Bourque* v. *Landry* (*supra*) and *Radway & Shortt* v. *Radway*, [1938] 2 D.L.R. 578.

[15] *I.e.*, *Re Daley* (1907), 39 S.C.R. 122; *Southby* v. *Southby* (1917), 38 D.L.R. 700; *Usher* v. *Barnes* (1921), 48 N.B.R. 358; *Ross* v. *Canadian Bank of Commerce*, [1927] 3 D.L.R. 1056; *Stadder* v. *Canadian Bank of Commerce* (*supra*); *McLean* v. *Vessey et al.*, [1935] 4 D.L.R. 170; *Re McKay* (*supra*); *Robertson* v. *Batchelor*, [1939] 1 D.L.R. 255 and 760; *Plater* v. *Brealey*, [1939] 2 D.L.R. 767.

[16] *I.e.*, *Vanwart* v. *Diocesan Synod of Fredericton* (1912), 42 N.B.R. 1; *Marshall* v. *Crutwell* (1875), L.R. 20 Eq. 328.

[17] *I.e.*, *Hill* v. *Hill* (*supra*).

[18] *I.e.*, *Thorne* v. *Perry* (1900) 2 N.B. Eq. R. 146; *Bourque* v. *Landry*, *Re Mailman* and *Re McKay* (*supra*).

[19] In some cases, *i.e.*, *Freeman and Wootton* v. *Johnston* and *Re Willson* (*supra*), the purported attempt by one of the parties to dispose of the moneys in a joint account by his will has been held inadmissible in showing that his intention was to retain in himself the beneficial right to the moneys he had deposited. But see *Re McKay* (*supra*) where such evidence was admitted, as being corrobative of other evidence as to his intention.

> intention to be gathered from the special facts and circumstances and the family relations or otherwise of the parties.[20]

In effect there is little difference between the principle of applying the presumptions stated and the principle enunciated by Davies J. The logic employed in either instance is the same and in no case could there conceivably be an absolute lack of circumstantial evidence as to the depositor's intention, thus enabling the giving of absolute effect to one or other of the presumptions applicable. In practice application of the "presumption" theory has probably had the effect of encouraging the courts to compare to too great a degree the contractual rights involved in these banking transactions with the rights in property involved in straight investments, transfers of stocks, and the like.

It remains to deal with those cases falling in the third class; *i.e.*, those in which the courts have seen an attempted testamentary disposition on the part of the actual depositor and have ruled that a trust in the moneys accrued at his death must result to his estate. In most such cases evidence of the circumstances has made it apparent that there was no intention on the part of the depositor that the other party to the account should have any beneficial interest in the moneys deposited during his lifetime, but apparent, too, that it was his intention that the other party should benefit in respect of such moneys at his death. It is in this type of case that the decisions of the courts have been most inconsistent, and perhaps here can be seen especially the need for the more definite clarification of the legal rights of the parties to a joint account urged by Mr. Willis in his article.

Examination of the decisions would indicate that our courts have been floundering in all the mass of rules respecting the distinctions (real and imaginary) between donationes mortis causa, gifts inter vivos and attempted testamentary dispositions. They have indeed managed to establish the most fictional differences between cases in which the facts, and undoubtedly the intent of the parties, have been practically identical. In some cases the court has managed to show that the gift was good inter vivos, in others that the Wills Act had been infringed, thereby invalidating the natural effect of a joint account (*i.e.*, survivorship), while in yet others the gift has been distinguished as being a donatio mortis causa and quite valid.[21] It is suggested that this confusion has resulted to a great extent from the mistaken practice of our courts to which reference has been made — that of considering the

[20] Other examples are *Usher* v. *Barnes* and *Robertson* v. *Batchelor* (*supra*).
[21] *Thorne* v. *Perry* (*supra*); *In Re Korvine's Trusts*, [1921] 1 Ch. 343; *Re Reid* (1921), 64 D.L.R. 598.

rights of the parties to the property in the moneys deposited, rather than the contractual rights which are assigned on the opening of a joint account.

An Australian court has dealt with this matter most soundly, in *Scott* v *Russell*,[22] in which it determined the rights of a nephew, on the death of his aunt, to moneys in an account in their joint names. By careful reasoning it was shown there that, even though the depositor intended to reserve to himself the beneficial interest in the moneys during her lifetime, yet "if the donor created a contractual right in the donee in his lifetime, which right, by law, carried with it the right of survivorship, there is no infringing the Wills Act by allowing the beneficiary to cut off any equitable interest that might arise by way of resulting trust by proving the intention of the donor to make a gift when the joint account was created".[23]

In their arguments in that case, Dixon and Evatt JJ. used the following language:

> Law and equity supply many means by which the enjoyment of property may be made to pass on death. Succession post mortem is not the same as testamentary succession. But what can be accomplished only by the will is the voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased. This was not true of the chose in action created by opening and maintaining the joint bank account. At law, of course, it was joint property which would accrue to the survivor. In equity, the deceased was entitled in her lifetime so to deal with the contractual rights conferred by the chose in action as to destroy all its value, namely, by withdrawing all the money at credit. But the elastic or flexible conceptions of equitable proprietary rights or interests do not require that, because this is so, the joint owner of the chose in action should in respect of the legal right vested in him be treated as a trustee to the entire extent of every possible kind of beneficial interest or enjoyment. Doubtless a trustee he was during her lifetime, but the resulting trust upon which he held did not extend further than the donor intended; it did not exhaust the entire legal interest in every contingency. In the contingency of his surviving the donor and of the account then containing money, his legal interest was allowed to take effect unfettered by a trust. In respect of his jus accrescendi his conscience could not be bound. For the resulting trust would be inconsistent with the true intention of that person upon whose presumed purpose it must depend.

This case and a comparison of the reasoning followed in it has been dealt with most thoroughly by Dr. Cecil A. Wright in a

[22] (1936), 55 Comm. L.R. 440. In this case some twelve Canadian cases are considered and the view stated in such a case as *Hill* v. *Hill* (*supra*), concerning an infringement of the Wills Act, is expressly discountenanced.

[23] The words are those of the author of the case comment referred to later.

comment in the Canadian Bar Review.[24] The author there submits that "the result reached by the Australian court is the view which should prevail in Canada", and with that the writer is in complete accord.

Now let us look at those cases falling within class B (*supra*), *i.e.*, where the action has been brought not for a declaration of the rights of a surviving party as against the estate of the deceased, but for a declaration of the rights as between the parties themselves. Such cases are comparatively less numerous and it might prove more expedient to examine representative cases in turn, rather than to attempt to classify them under various heads.

In the Nova Scotia case, *Craig* v. *Cunningham*,[25] a husband had deposited money in a bank to the credit of an account kept in the names of himself and his wife "both or either". Here the wife had withdrawn certain moneys from the account by cheque and had invested the proceeds in mortgages, which she took in her own name. On her death the husband sought possession of the mortgages, contending (unsuccessfully) that the wife had had no beneficial interest in the moneys deposited and consequently no right to make withdrawals from the account except on his behalf.

In the Ontario case, *Southby* v. *Southby*,[26] a joint account stood in the names of husband and wife, practically all deposits to the account having been made by the husband. Certain difficulties having arisen between the two, the wife sought a declaration to the effect that she was entitled to half the money in the account as her own. The trial judge felt that she was so entitled, basing his decision largely on the effect of the form signed by both parties and directed to the bank. The form belonged to class (a) (*infra* at page 1113). The decision was reversed however on appeal, the Court of Appeal being of the opinion that the evidence showed that the wife had been joined in the account merely for the convenience of the husband. Of the instrument creating the joint account Meredith C.J. had the following to say at page 702:

> But this writing is in no sense a contract between the parties to this action; it is merely a direction to the bank, in the form of a letter addressed to the bank's manager at its branch in which the account was opened; and is wholly in a printed general form, prepared and supplied by the bank, for its own protection only; it is none the less evidence against the defendant, as an admission made by him, but as an admission only.

[24] (1937), 15 Can. Bar Rev. 371.
[25] (1919), 53 N.S.R. 117.
[26] (1917), 38 D.L.R. 700.

It is interesting to note, too, that in this case certain small savings made by the wife had been deposited by herself to the account; but the mere fact that such contribution had been made did not serve to establish for the wife any beneficial right to any portion of the moneys in the account. Again Meredith C.J. may be quoted (from the same page):

> The law is quite clear — the Court will not prevent a husband from giving his wife what profit she can make out of his cows, poultry, etc., as 'but a reasonable encouragement to the wife's frugality', especially where there is 'no creditor of the husband to contend with': *Slanning* v. *Style* (1734), 3 P.Wms 334, especially at pp. 338, 339; but savings by her out of moneys allowed for household expenses, etc., do not become hers without his consent (unless they are living apart): Eversley on Domestic Relations, 2nd ed., p. 294; *Barrack* v. *McCulloch* (1856), 3 K. & J. 110.

Similarly, in the New Brunswick case, *Usher* v. *Barnes*,[27] the account had been in the joint names of husband and wife, the husband having made the only deposit. The wife, believing that the money belonged to her, withdrew the whole and had it deposited in the name of her niece. Here it was held, by Hazen C.J., that the evidence showed that the husband had not intended the wife to have any beneficial interest in the money deposited and that the niece, the defendant in the action, must account to him for the money that had been deposited in her name. In his judgment Hazen C.J. commented on the fact that, although there had been up to that time many cases in which claims had arisen with regard to survivorship, when moneys have been deposited in joint accounts in circumstances similar to those involved in the case before him, he could find no case in which the question had arisen before the death of one of the parties to whose credit the moneys were so deposited and in which the question of survivorship did not exist.[28]

Hill v. *Bank of Hochelaga*[29] was a case again where an account had stood in the joint names of husband and wife. The wife claimed all the funds credited to the account, but the bank had refused payment of her cheque. It later paid out various sums drawn on the account by the husband. In an action brought by the wife against the bank for the amount of her cheque, it was held by the court that it was liable to her for that amount.

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[27] (1921), 48 N.B.R. 358.

[28] In both *Southby* v. *Southby* and *Craig* v. *Cunningham* (*supra*) the actions had been brought before the courts after death of the wife, but the questions there had actually involved her beneficial right to funds represented in the account during her lifetime. Possibly Hazen C.J. had overlooked this.

[29] [1921] 3 W.W.R. 430.

Again in *Stadder* v. *Canadian Bank of Commerce*,[30] an Ontario case, an account had stood in the joint names of husband and wife. The latter was admitted to a mental institution and, upon his direction to the bank, the money in the account was paid to the public trustee on behalf of the wife. On her recovery she deposited the money in the bank to the joint credit of herself and two kinswomen. It having been established that the husband had intended the joint account only for his own use (the wife having been joined for convenience), his estate was held entitled to the return of the money.

In another Nova Scotia case, *Carroll* v. *Carroll*,[31] a husband had sent to his wife money saved out of his earnings, which was "to be saved for their old age" and which she deposited to an account in their joint names. In an action brought later by the husband against the wife for return of the moneys sent, the court held that the money belonged to them equally and that she must account to him for such savings, within her possession, including any gifts or transfers made by her of such property.

It remains to consider those cases falling within class C., *i.e.*, where a judgment creditor seeks to attach moneys in a joint bank account to the credit of the judgment debtor and another. In a Canadian case, *Empire Fertilizers Ltd.* v. *Cioci*,[32] which went on appeal to the Ontario Supreme Court, it was held that that right exists. The reasoning of the trial judge, which was endorsed by the Court of Appeal, was that "if the judgment debtor had given to the judgment creditor a cheque signed by the former alone on the bank, for the amount owing by him on the judgment, the bank, on presentment of such cheque for payment, would have had to pay it. The trial judge could see no reason why the judgment creditor should not have recourse to garnishee proceedings to compel such an appropriation of the funds as was within the power of the judgment debtor himself at the time of the issue and service of the garnishee summons on the bank.

The judgment handed down by the English Court of Appeal four years later in *Hirschorn* v. *Evans* (*Barclays Bank Limited, Garnishees*)[33] seems to conflict with the decision given in the Ontario case. The principle under consideration was the same in both instances, although the circumstances varied to some extent.

[30] [1929] 3 D.L.R. 651.
[31] [1937] 2 D.L.R. 314.
[32] [1934] 4 D.L.R. 804.
[33] [1938] 2 K.B. 801.

In the *Hirschorn* case the facts, as reported in the headnote, were as follows. A husband and wife had opened a joint account with a bank in February 1935 upon the terms that the signature of either would be a sufficient discharge for the repayment of moneys deposited in the bank. The wife had received in 1930 a legacy of £1000 which she had handed to her husband to be used in his business. In January 1936 Hirschorn, who had supplied building materials to the husband for use in his business, recovered judgment against him. On January 15th, 1938, a garnishee summons was served upon the bank attaching so much of the debts due from the bank to the judgment debtor as would satisfy the debt of approximately £15 due to Hirschorn under the judgment. On that day the bank had no account in their books in the name of the husband, but they had the joint account of husband and wife (then amounting to approximately £114). The bank, considering that the garnishee summons did not attach any part of their debt on the joint account, honoured cheques drawn on the joint account with the result that by February 22nd the account was overdrawn and there was no balance left.

On the hearing of the garnishee summons on February 22nd, the county court judge held that the money in the joint account was the sole property of the husband and that it was a debt due to the husband by the bank. He accordingly gave judgment for the plaintiff against the garnishee. On appeal, the Court of Appeal held that there was no evidence upon which the trial judge could find that the money in the joint account belonged solely to the husband. But it is the further dictum of the court that is interesting. It was further held by Slesser and McKinnon L.JJ. that, inasmuch as the debt which the bank owed was not a debt due to the husband alone but to him jointly with his wife, it could not be attached to answer the judgment against him. From this view Greer L.J. dissented, being of the opinion that the garnishee order was the equivalent of a cheque drawn upon the bank by the husband.

An excellent insight into the nature of a joint account is to be derived from examining the reasoning employed by the concurring judges. Slesser L.J. stated:

> I entertain no doubt that if the bank had failed to meet its obligations the rights under this account could only have been exercised by both the persons, the husband and the wife, joining in whatever claim might be appropriate under the account.

In support of this assertion he quotes Bowen L.J. in *MacDonald* v. *Tacquah Gold Mines Co.*:

> Where money is due on a covenant made with two persons jointly by which it is to be paid to such two jointly, no one of those two has any right to that money without the other of them.[34]

and, further on, Fry J. in the same case:

> I adhere to what was said by this Court in *Webb* v. *Stenton* (1883), 11 Q.B.D. 518 as to the word 'indebted' in that rule. Then can it be said that the defendant company was indebted to the judgment debtor when they were indebted to him and another person jointly only? It seems clearly it cannot, and that the words of the rule are not applicable to such a case. If they were, the result would be to enable a judgment creditor to attach a debt due to two persons in order to answer for the debt due to him from the judgment debtor alone, which would be altogether contrary to justice.

Perhaps more specifically on the point in issue, McKinnon L.J. quotes Pollock B. in *Beasley* v. *Roney*:

> The debt owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to the judgment debtor alone, and where it is only due to him jointly with another it cannot be attached.[35]

In respect to the pertinent question of whether or not the debt in the circumstances here is in effect a debt due to two persons jointly, Slesser L.J. states in the *Hirschorn* case:

> Now, what is said here is this, that in so far as each of these persons has the right to demand payment of the money in the account under the specific authorization to accept the signature of either of them, that this account is in its nature several as well as joint. I am unable to accept that view. It seems to me that it amounts to no more than this; the bank are under an obligation to meet the demand at any time of either the husband or the wife, and to that extent when that demand is dishonoured the bank would be responsible for failure to meet that payment. If the argument here for the judgment creditor be well founded, it would follow that the bank would be in this dilemma, that the whole account being sterilized owing to the operation of this Order, they would be unable to meet the demands of the wife which she is entitled under the contract with the bank to make, because that would be prevented by an order which, on the face of it, applies only to the husband. I cannot think that any such position arises merely because each party may, as regards a specific cheque, create a specific debt in relation to that matter.
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> I think one has to look at the account as a whole, and, looking at the account as a whole, I think it is in the nature of a joint account on which the bank are jointly liable to both parties, and consequently, the garnishee summons is misconceived in stating that the bank are indebted to the said judgment debtor in the sum there stated, whereas, in reality, they are jointly indebted both to the judgment debtor and to his wife.

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[34] (1884), 13 Q.B.D. 535, at p. 539.
[35] [1891] 1 Q.B. 509, at p. 512.

The view that a garnishee summons is the equivalent of a cheque drawn by a judgment creditor indeed merits the most serious consideration; but the writer is inclined to accept in preference the majority opinion of the court in the *Hirschorn* case. The view that the debt is several as between the depositors but joint as against any stranger most strongly commends itself.[36]

The usual practice in opening a joint bank account is for the parties or one of them to sign a form provided by the bank. It would seem that there exists no concrete principle as to the effect to be given to the wording of the form. In some cases no weight whatsoever has been attached to the form, in so far as it evidences any intention as between the parties themselves; in most of these it has been considered merely a directive to the bank, employed primarily for the protection of the bank itself.[37] In others, a certain degree of effect has been given the form in deciding ownership of funds in an account — but only as supporting other evidence of family circumstances, relationship, etc.[38] In yet a third group, absolute effect has been given to the form signed by the parties, even to the extent of ruling out the admission of parol evidence which tends to conflict with the written document.[39]

It is not difficult to appreciate why no concrete principle can be stated by the courts, when it is realized that the various types of form employed have been almost as numerous as are the banks with which accounts are placed. The forms used may be classified roughly as follows:

(a) those which are signed by both parties and purport to state that the parties (i) jointly and severally agree with the bank and with each other that all moneys from time to time deposited may be withdrawn by one of the signatories, and each of the signatories thereby irrevocably authorizes the bank to accept from time to time, as a sufficient acquittance for any amounts withdrawn, any receipt, cheque or other document signed by any

[36] The *Empire Fertilizers* case and *Hirschorn* v. *Evans* differed in this respect: in the former evidence had shown conclusively that the beneficial right to all moneys represented in the account was in the husband, whereas in the latter there existed the possibility of the wife having some beneficial right through contribution of her legacy to the husband. The great danger in applying the principle established in the former case is shown by the fact that in the case of a very large proportion of joint accounts only one party to it has the right to draw on the money beneficially (though both parties, it is true, have the bare legal right under the contract with the bank).

[37] *I.e.*, *Bourque* v. *Landry* and *Re Mailman* (*supra*).

[38] *I.e.*, *Clark* v. *Clark et al., Executors* (1909), 4 N.B. Eq. R. 237 and *Schwent* v. *Roetter* (1910), 21 O.L.R. 112.

[39] *I.e.*, *Vogler* v. *Campbell* (1913), 14 D.L.R. 480; *Plater* v. *Brealey*, *Armsworthy* v. *MacDonald*, *Freeman and Wootton* v. *Johnston*, and *Niles* v. *Lake* (*supra*). Also see the dissenting judgment in *Re Mailman* (*supra*).

one of the signatories, without any further signature or consent of the other, and (ii) thereby agree that death of one of the signatories shall in no way affect the right of the survivor to withdraw all moneys deposited.[40]

(b) those in which the parties in addition purport to agree (i) that all moneys deposited shall be and continue the joint property of the signatories with right of survivorship, and (ii) that each of the parties, in order to constitute effectually the joint deposit account, thereby assigns and transfers to the signatories jointly any and all moneys deposited;[41]

(c) those corresponding to class (b) but under seal.

It is true that in a very few cases no printed form had been tendered the bank, but in lieu thereof merely a written personal note or letter had been given the bank by one or other of the parties.[42]

In very few cases has a form under seal been used, but *Niles* v. *Lake* is an example of one such case.[43] There, even though it was apparent that the two sisters in whose joint names the account had stood did not realize the full import of the agreement they were signing, the court nevertheless gave absolute effect to the form and refused to admit conflicting parol evidence as to the allegedly true intention of the actual depositor. One of the members of the court did point out that no effort had been made to plead *non est factum* in respect to the sealed instrument — which would indicate that even in cases of this nature the effect of the sealed instrument might conceivably be discounted. In that case Roach J.A. stated:

> In my opinion the agreement is decisive of the question. . . The rule [as to varying a deed] is stated in 10 Halsbury (2nd ed.), p. 146 as follows: 'The effect of executing a deed is that the party, whose act and deed it is, is conclusively bound by the intention or consent expressed therein; he is, as a rule, estopped from averring and proving by extrinsic evidence that the intention or consent so expressed was not in truth his intention or consent, or that there are reasons why he should not be obliged to give effect to the intention or consent so expressed. This is equally the case whether the deed be expressed to operate as a conveyance of property or as a contract or otherwise.'

With reference to the class (b) type of form, Laidlaw J.A. said in *Niles* v. *Lake*:

[40] As in the case of the printed form provided at present by the Bank of Montreal.

[41] As in the form provided by the Canadian Bank of Commerce.

[42] *I.e.*, *Everly* v. *Dunkley* (1912), 8 D.L.R. 839; *Schwent* v *Roetter* and *Re McKay* (*supra*).

[43] *Supra.* No Canadian banks as a rule require to-day the deposit form agreement under seal. Where it is placed under seal it would probably be at the instance of the parties.

> But in the case now under consideration the agreement is in plainly different terms. It cannot properly be regarded as a mere compliance with bank requirements, nor as an authority only for the withdrawal of moneys from the account by either of the parties to the agreement. It expressly declares the title and ownership of the moneys on deposit, and the relationship of the parties to the account. To treat the document as a mere authority for the operation of the account would require complete disregard of those provisions showing the nature of the account and the clear intention of the parties that the moneys in it are to be joint property.[44]

But in many cases the court has been of the opinion of Harrison J. in *Bourque* v. *Landry* (*supra*), where he stated at page 109;

> In the consideration of cases of this kind, while the instrument containing the joint account agreement and direction to the bank no doubt establishes the title to the money in law it does not determine the rights of the parties in equity. In fact in most of the cases of this kind little weight is given to the bank form used for opening these accounts, such form being considered rather a direction to the bank than an agreement between the parties as to the ownership of the money deposited.

Indeed in almost all cases on joint accounts the court has had something to say about the effect to be given to the printed deposit form, but it is hardly feasible to give all the conflicting views here. The writer is inclined to favour the view endorsed by Harrison J. If a reason for so doing need be given, it is because in but very few instances can the signatories to a joint-account deposit form be shown to have been cognizant of the legal effect of what they were signing. In most instances they will have considered the signing merely as a necessary technical prerequisite to the opening of the account.

Conclusion

We have seen from the foregoing that the use of joint bank accounts has frequently given rise to difficulties and that no absolutely firm principles have been propounded — nor could possibly be propounded — for the guidance of our courts in arriving at judicial solutions to the resultant problems with which they are confronted. It should perhaps be pointed out, however, that the number of actions arising from the use of such accounts has been extremely small in proportion to the number of accounts in existence over the past sixty or seventy years.[45]

[44] Actually, as already pointed out, the form there was under seal, but Laidlaw J.A.'s remarks quoted here were in reference to the effect of the actual contents of the form.

[45] It is obvious that in the case of most joint accounts where the parties are closely related (*i.e.*, husband and wife or father and son, as is so often the

We have seen, too, that the legal actions involving joint accounts have been of three main types:

(a) those in which the courts have been called upon to determine the beneficial ownership of moneys in an account on the death of one of the parties to it:

(b) those in which the courts have been called upon to decide the rights of the parties as between themselves; and

(c) those in which the question has concerned the liability of a joint account to attachment for the debts of one of the parties.

It was indicated at the beginning of this article that an attempt would be made to set forth several recommended changes with respect to the use of joint accounts. The writer would submit the following:

1. *Use of a standard deposit agreement form by all banks.* We have seen previously that the courts have tended to attach varying degrees of weight to the form signed by the parties and directed to the bank, depending to a certain degree on the contents of the form in each instance. It has also been pointed out that each bank has provided a form differing — in some cases fundamentally — from that provided by the next. Surely the provision of a standard form for use by all banks would eliminate at least some of the difficulty experienced by the courts in determining the intention of the original depositor in those actions where that is necessitated. The form — for which, it is suggested, provision could be made in an amendment to the Bank Act — might even contain certain questions aimed at ascertaining the intentions of the parties, to be answered by each of them.

2. *The enactment of further legislation protecting banks.* It is obvious that the multiplicity of forms referred to has been caused mainly by an individual effort on the part of each bank to devise a form which will give to itself the required protection in joint banking transactions. Through the medium of an amendment to the Bank Act, the protection sought might very well be provided.

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case) and the donor dies, even though a trust might result to that party's estate, the other is in most instances the beneficiary under the will of the deceased, or at least his next-of-kin, and would benefit directly in any event. Hence, a contest over the ownership of moneys in such an account is very improbable.

3. *Recognition by our courts of the view given in the dictum of Dixon and Evatt JJ. in the Australian case, Scott* v. *Russell, in respect to dispositions under joint accounts infringing the Wills Act.* Alternatively, its recognition might well be enforced specifically by an appropriate amendment to the various provincial Wills Acts. To-day a man in perfectly good faith may make very considerable deposits to a joint account in the names of himself and his son, with the understanding between them, either express or implied, that the son is to have the use of the money only after his death. Some of our courts might possibly manage to show that the gift was a good donatio mortis causa, or even a good gift inter vivos, but it is more probable that it would be considered an attempted testamentary disposition. In the latter case the moneys might conceivably go to some other person as a residual bequest, thus completely defeating — though, in the opinion of the writer, quite unjustifiably in law — the real intention of the father.

4. *The familiarizing of bank customers with the effect of a joint account prior to its establishment.* This could only be effected by the banks themselves. It is suggested that a responsible bank employee be required to explain the nature of the transaction to persons intending to open a joint account. In many instances, especially where another person is to be joined for purposes of convenience only, it should be realized that a sometimes better alternative is provided in the practice of keeping an account in the one name, but giving a power of attorney to the other to enable him to draw cheques on behalf of the depositor. It is probable that few bank customers are aware of the existence of this alternative method. Its use, as an alternative to joint account transactions, would avoid many of the difficulties now arising.

It would be absurd to hope that the adoption of these recommendations would serve to eliminate all the difficulties arising from the use of joint accounts; but their adoption should prove a step in the right direction.