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THE NATURE OF A JOINT ACCOUNT

A deposits $1000 in the X Bank and takes from the Bank a deposit receipt which states (a) that the sum of $1000 has been received from A, or A and B, and (b) that the sum is "repayable to either" or "repayable to either or the survivor."[1] Assuming that it can be shown (i) that A intends B to take beneficially and not as a mere agent of A,[2] and (ii) that A does not intend B to be without any interest in the fund until the death of A, so as to make the transaction an attempted and hence ineffectual testimentary disposition,[3] may B claim the money on the death of A? If so, upon what theory?

If on the death of A the X Bank pays B, it gets a good discharge from A's executors; for its mandate from A was to pay either A or B. Suppose, however, the executors of A sue B for the money so paid to him by the X Bank, on the ground that the deposit to the joint account of A and B gave no rights to B; or, to put the same point in another way, suppose the X Bank refuses to pay B, or instead of paying B pays the executors of A, and B sues the X Bank for the money; can B ever be successful?

Until the recent judgment of Lord Atkin in *McEvoy* v. *The Belfast Banking Co.*,[4] the answer was "yes." Up till then the problem had always been treated as one of resulting trust, to be solved by an extension of the rules applicable to the case where A gratuitously transfers the legal title to stock or other

[1] *In re Harrison, Day* v. *Harrison* (1921), 90 L. J. Ch. 186; *McEvoy* v. *The Belfast Banking Co.*, [1935] A. C. 24. For a more complicated form of words expressing the same idea see *McLean* v. *Vessey*, [1935] 4 D.L.R. 176 (P.E.I.)

[2] *E.g.*, where B is A's wife and is to draw on the account for household expenses, *Rioux* v. *Rioux* (1922), 53 O.L.R. 152, or is managing her husband's affairs during his illness, *Marshal* v. *Cruttwell* (1875), 44 L.J. Ch. 504; L.R. 20 Eq. 328.

[3] *Everly* v. *Dunkley* (1912), 27 O.L.R. 414.

[4] [1935] A.C. 24.

personal property into the joint names of A and B.[5] To apply these rules, which are no more than detailed applications of a principle of universal operation—"a man gives nothing away" —it was necessary to ask two questions only. Question 1: Is A closely related to B, *e.g.*, is he B's father or B's husband, or are they "strangers"? If closely related, there is a "presumption of advancement", a presumption that A intended B to take beneficially: if "strangers", there is a presumption of resulting trust from B to A, a presumption that A's purpose in making the transfer was some other than to benefit B. Question 2: Is the presumption, whether of advancement or of resulting trust, rebutted by the evidence? A multitude of Ontario cases and the two English cases on gifts by joint account prior to 1935 alike assume that this technique is as applicable to a deposit of money in a bank by A, or A and B, to the joint account of A and B as it is to a transfer of stock in the books of the company by A from the name of A into the joint names of A and B.[6]

But the two situations are wholly different. When A transfers the stock to A and B, the legal title to the stock passes by the mere act of transfer from A into A and B as joint tenants. If A intends B to take beneficially, B gets the stock because A's transfer gave him the legal title to it and there is no reason for depriving him of it. If, however, A does not intend B to take beneficially, the act of transfer has nevertheless vested in B a legal title which can only be taken away from him by the remedial device of a finding that B holds that legal title in trust for A, the resort to Equity being imperative. But when A deposits $1000 to his own account in the X Bank, A does not own the money he has deposited; he passes the legal title to the $1000 to the bank and takes in exchange from the bank a mere promise, a contract to pay A $1000 when called upon to do so. If all that A has is a promise by the X Bank to pay A $1000, we must cease to talk property and talk contracts instead, remembering that it is a fundamental rule of the English law of contracts that no person may sue upon a contract but he from whom the consideration has moved. With the result that when A deposits $1000 in the X Bank in the joint names of A and B to be repaid to A or B or the survivor of them, only A who gave the consideration is entitled to sue the bank on its contract

[5] *E.g.*, *Standing* v. *Bowring* (1885), 31 Ch. D. 282.

[6] For Ontario cases see FALCONBRIDGE, BANKING AND BILLS OF EXCHANGE, (5th ed.) 320; the English cases are *Marshall* v. *Cruttwell* and *In re Harrison*, *supra*.

to pay $1000. If A does not intend B to take beneficially, there is no need to invoke the doctrines of resulting trust in order to restore the money to the estate of A; for B has no legal title to need the control of a court of Equity. Further—and this is far more important—if A intends B to take the benefit of the contract by A with the X Bank, B, having paid nothing for the promise cannot sue upon it.

It is plain therefore that the rule of English contract law which requires a promisee to have paid for the promise to him, when coupled with the characterization of a deposit of money in a bank as a purchase by the depositor of a promise from the bank to pay him an equivalent amount, renders impossible the gift of money by A to B through the medium of a joint account in the names of A and B. It is equally plain, however, that this type of gift is commonplace in banking practice and must consequently be upheld for some legally valid reason. The orthodox and accepted solution by analogy to transfers of stock into the joint names of A and B has been shown false. To what other theories may a court resort?

Lord Warrington, with whom concurred Lords Macmillan and Thankerton, refused in the *McEvoy Case* to cast any doubt upon the validity of an established banking practice, but refused also—and no doubt wisely—to assign any clear reasons for their decision.[7] Lord Atkin in his separate judgment admitted that a bank deposit was contractual in nature and to avoid the resultant difficulty resorted to that *fons et origo* of bad fictions, the law of agency. "The contract on the face of it," said he, "purports to be made with A and B, and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract. If A has actual authority from B to make such a contract, B is a party to the contract ab initio. If he has not actual authority then subject to the ordinary principles of ratification B can ratify the contract purporting to have been made on his behalf and his ratification relates back to the original formation of the contract."[8] Although on the facts of the case Lord Atkin decided against B, he expressly rests his decision upon the law of ratification of an agent's contract. For he held that since B had, with full knowledge of the terms of the deposit receipt taken by A, permitted the executors of A to use the money in carrying on the business which was to come

[7] *McEvoy* v. *The Belfast Banking Co.*, [1935] A.C. 24 at pp. 49-51.
[8] *S. C.* at p. 43.

to him, and that for the space of ten years after the original contract by A and four years after the attainment of majority by B, B could not now turn round and ratify the contract so as to put the executors into a false position into which he was responsible for leading them. But Lord Thankerton laid his finger on a fundamental flaw in any application of the ratification theory to a situation like this when he pointed out that "the father did not purport to act as agent for his son in making the contract, so as to make the son a contracting party, but that the father alone contracted with the bank, though for the benefit of the son as a third party."[9] Agency, that is, is a question of fact and the facts of the case did not point to A constituting himself an agent for B. Who, indeed, ever heard of a donor purporting to act in the subordinate capacity of agent for his donee in making a gift to him? The truth is that when A deposits money to the joint account of A and B with the intention of making a gift to B, he intends (a) an act of benevolence to B (b) by means of a direct gift; he certainly does not intend (a) to establish the commercial relation of agent and principal between himself and B, and (b) then to enter into a contract with the Bank as agent of the aforesaid B, who is no more than the object of his benevolence.

Is it permissible here to resort to another well-tried fiction, that of a trust of a chose in action? Can we say that when A deposits $1000 in the X Bank in the names of A and B "repayable to either or the survivor," A, and A alone, holds a claim against the X Bank for $1000, but if the evidence shows that A intended B to have the benefits of it by right of survivorship, he should be treated as if he had declared himself trustee of his claim so as to hold his legal title to it in trust for A and B as joint cestuis que trust with right of survivorship? No doubt the courts have applied this fiction to less worthy cases;[10] but it seems to be well settled (a) that the courts do not now look with favor even on express declarations of trust,[11] (b) that Equity will not now torture an imperfect gift into a declaration of trust, or, to put the matter more explicitly, if A intends to confer a benefit on B by a method which turns out to be legally ineffective, the court will not give effect to it by applying to

[9] *S. C.* at p. 52.

[10] See A. L. Corbin, *Contracts for the Benefits of Third Persons* (1930), 46 L.Q.R. 12: and notes in 12 Can. Bar Rev. 183, 665.

[11] "In each case where a declaration of trust is relied on the Court must be satisfied that a present irrevocable declaration of trust has been made." *In re Cozens, Green* v. *Brinsley*, [1913] 2 Ch. 478, 486, per Neville, J. Reported cases in which declarations of trust are upheld are now rare compared with eighty to one hundred years ago.

the transaction another method which although open to A was not in fact employed by A.[12] When A deposits money to the joint account of A and B, he does not intend to undertake the duties of an express trustee; he intends a direct gift to B, and this imperfect direct gift should not be turned into a perfect but wholly fictional declaration of trust.

Is the ordinary case of deposit to joint account capable of being treated as an assignment by A to A and B under the Judicature Act? Can we say that when A deposits $1000 in the X Bank in the joint names of A and B "repayable to either or the survivor," (i) A acquires, by reason of the contract between himself and the X Bank, the legal title to a chose in action, value $1000, and (ii) A simultaneously transfers the legal title to his newly created piece of property, the chose in action, to A and B jointly. Assignment to A and B jointly is precisely what A intends: for he intends to make a direct gift of his right, which is in fact a contract right, and "assignment" is no more than the technical term which lawyers reserve for the transfer of that intangible piece of property which they call a chose in action. But since it is probable that a gratuitous assignment of a legal chose in action cannot be made otherwise than under the Judicature Act, it becomes necessary to determine whether the circumstances of a typical deposit to joint account are such as to satisfy the requirements of that Act.

The written contract purporting to be made between A and B and the X Bank, and signed by A, that is invariably taken on these occasions satisfies the requirements of the Act (a) that the assignment be by writing under the hand of the assignor, and (b) that express notice in writing be given to the debtor. It is immaterial that as far as B is concerned the transfer is gratuitous, for it has been decided that the Act has improved the position of a donee of a legal chose in action so as to enable him to sue at law in his own name as assignee without regard to whether or not the assignment was for value.[13] But the Act only applies to an "absolute assignment . . . not purporting to be by way of charge only": is this assignment "absolute"? The deposit by A to the joint account of A and B is certainly not an assignment "by way of charge only": B

[12] See *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, per Turner, L. J.; and 15 Halsbury (2nd ed) p. 739, footnote (q) for a list of some of the cases in which the proper formalities of a present gift not having been observed, the attempt to establish a declaration of trust has failed.

[13] *Re Westerton, Public Trustee* v. *Gray*, [1919] 2 Ch. 104.

gets, not "a mere right to payment out of the particular fund,"[14] but the whole title jointly with A to the whole fund. Nor does the fact that A retains a beneficial interest in the fund prevent the assignment being absolute: where A assigns his claim against X to B for collection, the assignment to B is "absolute" within the meaning of the Act.[15] Here may be made a serious objection that the Act applies only to cases where A makes an out-and-out transfer to B, puts himself out of control and B wholly in control of the fund: that when A deposits $1000 to the joint account of A and B, the essence of the transaction is that A may tomorrow if he so wishes draw out every cent without rendering himself liable to B, his donee: that consequently a deposit to joint account cannot be an "absolute" assignment. The objection may, however, be answered in either of two ways. First, the Act says nothing about an out-and-out transfer. The purpose of requiring an assignment under the Act to be "absolute," as opposed for instance to conditional, is to prevent a creditor embarassing his debtor by "splitting" the claim against him so as to render it difficult for him to decide to whom he is legally bound to pay it;[16] but A's transfer of his claim to A and B jointly cannot embarass the bank in this manner, for neither A nor B can sue the bank for anything except the whole of the fund, and payment by the bank to either discharges the bank from its liability to both. Second, even if the Act does require an out-and-out transfer, the deposit by A to the joint account of A and B effects just that. It is quite true that A can draw out every cent from the account; but that is only natural for A never transferred anything to B except joint creditorship with A. But A has irrevocably transferred his title to A and B jointly: surely the bank would not retransfer the money back again to A's own private account without the consent of B, for by the act of transfer A has destroyed his old sole title to the claim and created instead a joint title in himself and B.[17]

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[14] *Tancred* v. *Delagoa Bay and East Africa Rail Co.* (1889), 23 Q.B.D. 239, 242.

[15] *Comfort* v. *Betts*, [1891] 1 Q.B. 737.

[16] *Durham Brothers* v. *Robertson*, [1898] 1 Q.B. 765 at p. 773: *Re Williams, Williams* v. *Bell*, [1917] 1 Ch. 1.

[17] *Cf. Standing* v. *Bowring* (1885), 31 Ch. D. 282, where A transferred stock by deed without the knowledge of B into the joint names of A and B and it was held that, apart from the doctrines of resulting trust, A could not dispose of the stock without the consent of B.

Conclusion

Doubt has recently been thrown upon the right of B to claim money deposited by A in the X Bank to the joint account of A and B by way of gift. Every one will agree with Lord Atkin that an argument which casts such a doubt is "inconsistent with well-established banking practice and likely to impair the confidence in deposits made in joint names," and "not attractive hearing for customers or potential customers of the bank".[18] Unfortunately the judgments of the three concurring Law Lords and the separate judgment of Lord Atkin in the *McEvoy Case* have only increased that doubt. The writer has therefore examined four legal theories upon which B might acquire the right that common sense and convenience alike demand that he should have. Three of them have been dismissed as unsound: (i) the orthodox theory which extends to a joint account the principles applicable to a transfer of stock into the joint names of A and B: (ii) the theory of Lord Atkin that A, the depositor-donor, enters into a contract with the X Bank as agent for B the donee, which contract B may subsequently ratify: (iii) the theory that A in depositing the money declares himself trustee of his claim against the bank for himself and B as joint cestuis que trust. The fourth theory, that in depositing the money A simultaneously makes a contract with the bank and assigns his claim against the bank by writing under the Judicature Act to himself and B jointly, is no less fictional than the others, but it is preferable to them in that, so far as the writer can see, it does not run counter either to the intention of A or to any positive rule of law. Its novelty and complexity, however, render it a little suspect, and the writer submits it, and then with some diffidence, 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. When are we going to have third party beneficiary contracts?

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[18] *McEvoy* v. *The Belfast Banking Co.*, [1935] A.C. 24, 43.