THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

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CASE AND COMMENT

JOINT BANK ACCOUNTS — TESTAMENTARY DISPOSITION — RESULTING TRUST.—The nature of a joint account was considered in these pages about a year ago,[1] and it was pointed out that there was considerable difficulty in fitting a donee's rights in a joint bank account into existing legal classifications. Quite frequently the right of a survivor of two or more persons in whose joint names a deposit account stands, is spoken of as though it were right of property. As Professor Willis has pointed out, this is erroneous, and although the courts have not given any clear exposition of the theory on which rights in a joint account depend, it seems self-evident that if A deposits money which belongs to him in the names of A and B, the courts are willing to recognize that B has a contractual right against the bank. Whether this contractual right can be supported on any orthodox grounds of contract is not the question to be considered here. In *McEvoy* v. *The Belfast Banking Company*,[1A] the House of Lords refused to cast any doubt on the validity of such banking practice, and hence we can start with the assumption that when A deposits money in a bank "repayable

[1] Willis, *The Nature of a Joint Account* (1936), 14 Can. Bar Rev. 457.
[1A] [1935] A.C. 24.

to either himself or B or the survivor", A has in effect created, in his lifetime, a contractual right in B against the bank. It is important to state this elementary proposition, in order to understand clearly the problem which arises in many cases concerning the nature of A's act in conferring this right on B from the standpoint of a possible infringement of the Wills Act. If one regards the subject matter of the gift from A to B as "money", it may often appear that where A does not intend B to have the "money" until his (A's) death, A's act of attempting to pass this "money" to B other than by will, is an infringement of the Wills Act and consequently invalid.

This view is one which has been taken in several Canadian cases. For example, in *Hill* v. *Hill*,[2] a father having $400 on deposit in a bank to his credit, procured from the bank a deposit receipt for this amount payable to himself or his son "or either or the survivor". The understanding between the father and son was that the money should remain subject to the father's control while living and that whatever was left at his death should belong to the son. In view of this evidence Anglin J. held that the purpose of the father

> was by this means to make a gift to his son . . . . . in its nature testamentary. As such it could only be made effectually by an instrument duly executed as a will. The father retaining exclusive control and disposing power over the $400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. This is, in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual.

It will be noticed that the court speaks of a disposition of "money" throughout the judgment. So also in *Shortill* v. *Grannan*,[3] a New Brunswick court adopted much the same reasoning and held that so long as the person whose money was placed in the joint account retained control of the fund in his lifetime, an intention that the son should receive the money after his death was a testamentary act and invalid unless executed in conformity with the Wills Act.[4] Opposed to these cases there is the decision of the Ontario Court of Appeal in *Re Reid*,[5] in which case a son had deposited his money in the joint

[2] (1904), 8 O.L.R. 710.
[3] (1920), 55 D.L.R. 416.
[4] See also *Re Daly*, *Daly* v. *Brown* (1907), 39 Can. S.C.R. 122 and particularly Maclennan J. at pp. 148, 149; *Everly* v. *Dunkley* (1912), 27 O.L.R. 414, particularly the judgment of Clute J. at p. 429 where he speaks of the absence of an intention "to make a present gift of any part of the property in the money so on deposit"; *Smith* v. *Gosnell* (1918), 43 O.L.R. 123.
[5] (1920), 50 O.L.R. 595.

names of himself and his father, and by the terms of the document addressed to the bank there was a right of withdrawal by either or the survivor. It was understood that the father was not to draw any money during his son's lifetime but that the son could draw anything he needed. The majority of the Court of Appeal upheld this gift to the father, holding that the gift was complete in the lifetime of the son; that a joint ownership had been created in the lifetime of the son, to which was attached as an incident the right of survivorship; but that the son might have rendered the gift ineffectual, by what was tantamount to revocation, in using the monies on deposit. Hodgins J.A. dissented from the majority, holding that the situation disclosed in *Re Reid* was similar to that in *Hill* v. *Hill* and was an attempt to make a testamentary gift.

In view of this difference of opinion, the recent decision of the High Court of Australia in *Russell* v. *Scott*,[6] is of particular interest, because it is one of the very few cases which makes the proper analysis of conferring rights in a chose in action as distinguished from rights to "money". In addition, some twelve Canadian cases are considered,[6A] and the view stated in such a case as *Hill* v. *Hill* is expressly discountenanced.

The facts in *Russell* v. *Scott* were as follows. An elderly lady had a sum on deposit in a bank. The lady, being advanced in years, had at several times lost some of her savings bank forms, and as a precautionary method to assist her in handling her affairs, it was agreed that a bank account should be opened in the names of the lady and her nephew. Into this account money standing to the credit of the lady's account was transferred and subsequent deposits were made by the lady herself. By the terms of the joint account the money was payable to either the aunt or her nephew or the survivor. The evidence was quite clear that the account was intended to be, and actually was, used solely for the purpose of supplying the aunt's needs during her lifetime. It was agreed between the aunt and her nephew that the balance remaining in the account at the

[6] (1936), 55 C.L.R. 440.

[6A] *Schwent* v. *Roetter* (1910), 21 O.L.R. 112; *Weese* v. *Weese* (1916), 37 O.L.R. 649; *Re Reid* (1920), 50 O.L.R. 595; *Mathews* v. *National Trust Co.*, [1925] 4 D.L.R. 774 (Ont.) are cited in support of the view adopted by the Australian court. *Hill* v. *Hill* (1904), 8 O.L.R. 710; *Van Wart* v. *Synod of Fredericton* (1912), 5 D.L.R. 776 (N.B.); *Re Daly: Daly* v. *Brown* (1907), 39 Can. S.C.R. 122; *Shortill* v. *Grannan* (1920), 55 D.L.R. 416 (N.B.); *Stadder* v. *Canadian Bank of Commerce*, [1929] 3 D.L.R. 651 (Ont.); *Southby* v. *Southby* (1917), 38 D.L.R. 700 (N.B.), are cited as containing "much reasoning directed against the conclusion which commends itself to us."

aunt's death would belong to her nephew. On these facts it was argued that the opening of the account was an attempt to make a will in a manner inconsistent with the Wills Act, and the nephew should not be entitled to the balance on deposit at the aunt's death. This view was given effect to by the trial judge. The High Court of Australia, however, held that the nephew was beneficially entitled on the death of his aunt.

The joint judgment of Dixon and Evatt JJ. is particularly interesting in the light of Canadian case law. They state at the beginning that the opening of the account created the relation of debtor and creditor between the nephew and the bank, and that the debt owing was a debt fluctuating in amount, and while the aunt was a joint creditor with her nephew in her lifetime, at common law the chose in action accrued to the survivor. It was then argued that the relation between the aunt and nephew not being such as to raise a presumption of advancement, the nephew's right at law was held on a resulting trust for the benefit of the aunt's estate. The court admitted the doctrine of resulting trust but indicated that it was always subject to rebuttal, and that the evidence in the present case indicated that the legal right in the chose in action, which had already passed to the nephew, was intended by the donor to be his own beneficial interest. There was therefore in their view, and in the view of the entire court, no equity to defeat the donor's intention. It had been argued that "in rebutting the resulting trust the appellant proved the case against himself", and that as the aunt did not intend any beneficial interest in the money on deposit to pass until her death she could only do this by will. This is the argument which has had considerable success in the Canadian courts and in an Irish decision of *Owens* v. *Greene*,[7] which was much relied upon in the Australian case. With regard to this argument 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 a 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

[7] [1932] I.R. 225.

> 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 life time, 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.

In other words, if the donor in these cases creates a contractual right in the donee in his lifetime, which right, by law, carries 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.[8]

It may sound plausible to say that as the donor retained the beneficial interest in the "money" until her death, a disposal of this beneficial interest after her death must be made by a will. On the other hand if the subject of the gift is regarded as the chose in action against the bank, it will be seen that the beneficial contractual right of survivorship was created at the time the joint account was made. This should not be regarded as a testamentary act. As the Australian court pointed out, this result is the prevailing view in the United States,[9] and it is submitted that the result reached by the Australian court is the view which should prevail in Canada. Promises to leave property on death have been uniformly enforced without any objection that they are testamentary.[10] If the opening of the joint account creates a contractual duty on the part of the bank to pay money on the death of the donor to the donee, it would likewise seem that the corresponding contractual right should be respected as a present gift inter vivos.

C. A. W.

[8] Commenting on the argument of Kennedy C.J. in *Owens* v. *Greene*, [1932] I.R. 35 at pp. 237, 238, Dixon and Evatt JJ. stated at p. 455: "We should say that, by placing the money in the joint names, the deceased did then and there and by that act give a present right of survivorship. At law this was so and in equity too. But in equity . . . . . the deceased might defeat the right by withdrawing the money."

[9] See 38 Harv. L.R. 244.

[10] *Fentos* v. *Emblers* (1762), 3 Burrow 1278.

DEFAMATION — "PASSIVE PUBLICATION" — PRIVILEGE — JOINDER OF ACTIONS.—It may be doubted whether any judicial definition of defamation yet attempted is completely exhaustive. It has varyingly been put as the disparagement of a man's good name, matter which tends to expose man to public hatred, contempt or ridicule, and in other ways.[1] Application of the principle embodied in the definition is not always simple.

In *DeStempel* v. *Dunkels*[2] the jury found the words "Victor is a Jew hater" defamatory, but the trial judge would have treated them as not being capable of a defamatory meaning.[2A]

In *Byrne* v. *Deane*,[3] the trial judge held the words "he who gave the game away" to be defamatory of a person who had informed the police of the crime of operating gambling machines in a club house. The majority in the Court of Appeal held the words not to be defamatory, as signifying, in their natural and ordinary meaning, nothing more than that the plaintiff had informed the police of a crime. Greer L.J. agreed with his colleagues that if this was the significance of the words in their natural and ordinary meaning, they were not defamatory, but in his view the words signified that the plaintiff had been lacking in loyalty to his fellow club members, and for this reason he regarded them as defamatory.

In the case of *Edgeworth* v. *New York Central Railroad Co.*,[4] the words complained of were contained in a letter notifying the plaintiff of his discharge from the employ of the defendant; "your misconduct with a lady passenger on train" . . . . . and "on account of your misconduct with this passenger". The contention of the defendant was that these words imputed nothing more than an infraction of the company's rules and regulations, which the plaintiff admitted. The trial judge was of opinion that the words in their ordinary, prima facie meaning were defamatory, and the jury found a verdict for the plaintiff. In the Court of Appeal, Riddell J.A. said that the language of the letter "in its natural interpretation at least suggested sexual impropriety". Latchford C.J.A. agreed, and Fisher J.A., while dissenting on other grounds, nevertheless was of opinion that the words "carry an implication of immorality on the part of the plaintiff".

It is to be observed that in none of these cases did the question of innuendo become a clear issue. The words com-

[1] See GATLEY, LIBEL AND SLANDER, 2nd ed., pp. 1 and 2.
[2] [1937] 2 All E.R. 215.
[2A] At p. 217.
[3] [1937] 2 All E.R. 204.
[4] [1936] 2 D.L.R. 577.

plained of were in all three cases disposed of upon what was considered to be their ordinary meaning.

Is the test of defamation what the words actually conveyed to the persons to whom they were published, or what a jury considers their ordinary meaning or "natural interpretation"? Surely the former is the correct test.[5] In the *Edgeworth Case*, however, the persons to whom publication was alleged to have been made swore that the words in question conveyed to them only that the plaintiff had committed an infraction of the defendant's rules, and did not suggest immorality to them. Even on this evidence the trial judge held that the plaintiff had made out a case to go to the jury, and the majority of the Court of Appeal appears to have approved this view.

What constitutes publication of a libel? It is "the making known the defamatory matter after it has been written to some person other than the person of whom it is written".[6] But "there are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication".[7] For example, in the case of *Hird* v. *Wood*,[8] an unknown person had suspended a placard between two poles on the roadway near a gate leading into certain grounds. There was no evidence as to who had written the words on the placard or who put it on the roadway, but it was proved that the defendant took up his position near the placard and remained there for a long time sitting on a stool and smoking a pipe, and that he continually pointed at the placard with his finger and thereby attracted to it the attention of all who passed by. On appeal, it was held that this constituted evidence of publication by the defendant.

In *Byrne* v. *Deane*, the two defendants, male and female, were directors and proprietors of a "proprietary club", i.e., a club in which the proprietors remain in possession of the club. They were the lessees and occupiers of the club premises. Without the consent of the female defendant, who was the secretary of the club, no one had the right to hang reading matter on its walls. Someone, presumably a member, hung on the wall a lampoon containing the words,

[5] Lord Hobart, in *Fleetwood* v. *Curley* (1620), Cro. Jac. 557, says: "The slander and damage consists in the apprehension of the hearers." See also *Sadgrove* v. *Hole*, [1901] 2 K.B. 1.

[6] Lord Esher M.R. in *Pullman* v. *Hill*, [1891] 1 Q.B. 524 at p. 527.

[7] Slesser L.J. in *Byrne* v. *Deane*, *supra*, at p. 210.

[8] (1894), 38 Sol. Jo. 234.

> But he who gave the game away,
> May he byrnn in hell and rue the day.

It was proved that though the defendants had not put the verse on the wall, the female defendant was aware of its presence in a position where it could be read by anyone who came into the club, whether a member thereof or not. The Court of Appeal unanimously held that the trial judge was right in finding publication by the female defendant, and the majority held also that he was right in finding publication by the male defendant, on the ground that the latter must have had knowledge of the presence of the lampoon and of its defamatory meaning. Being entitled to remove it, and choosing rather to allow it to remain, both defendants were parties to its publication.

The extent of this principle of what may be described as "passive publication" is thoroughly investigated by Greene L.J. who said :

> Now, on the substantial question of publication, publication, of course, is a question of fact, and it must depend on the circumstances in each case whether or not publication has taken place. It is said that, as a general proposition, where the act of the person alleged to to have published a libel has not been any positive act, but has been merely the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that, in some circumstances, a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances, he may be doing so. The test, it appears to me, is this : having regard to all the facts of the case, is the proper inference that, by not removing the defamatory matter, the defendant really made himself responsible for its continued presence in the place where it had been put? As an example of a case which would fall on one side of the line : suppose somebody with a mallet and a chisel carved on the stonework of somebody's house something defamatory, and carved it very deeply, so that the removal of it could be effected only by taking down the stonework and replacing it with new stonework. In a case of that kind, it appears to me that it would be very difficult, if not indeed impossible, to draw the inference that the volition of the owner of the house had anything to do with the continued presence on his stonework of that inscription. The circumstance that to remove it would require very great trouble and expense would be sufficient to answer any such aspersion.[9]

Byrne v. *Deane* was a case of libel and the Court of Appeal does not consider the application of the principle of "passive publication" to the realm of slander. *Quaere* if there can be similarly "passive publication" of a slander? If the defendants

[9] [1937] 2 All E.R. at p. 212.

had permitted the use of the club premises for the known purpose of enabling a member to defame the plaintiff orally, would they have been guilty of publication?

Knowledge seems to be an essential element of "passive publication". It is difficult to see upon what principle the owner of property could be held liable for publication of a libel hung upon his premises unless, being aware of it, he refrained from removing it. Owners of vacant lots enclosed by fences which invite the attachment of libelous posters should avoid knowledge of their use for that purpose.

The *Edgeworth Case* raises interesting questions in regard to publication:

1. If the persons to whom the plaintiff alleges the libel was published, testify that in their estimation the plaintiff was not thereby defamed, has the plaintiff shown publication?

2(a). Is dictation to a stenographer, in the ordinary course of business, of defamatory matter, and her transcription thereof for the signature of the dictator, and the filing of a copy thereof in the letterbook in the usual course, publication?

(b). If so, is it publication of libel or slander?

The first question was not discussed by the majority in the Court of Appeal, and their tacit answer may, therefore, be taken to be in the affirmative. Fisher J.A. expressly took the contrary view. Having regard to the undoubted principle that the onus of proving publication rests upon the plaintiff, it would seem that Fisher J.A. took the sounder view.

Both parts of the second question were likewise passed over by the majority of the Court of Appeal, but were fully dealt with by Fisher J.A., who treated *Pullman* v. *Hill*[10] as now overruled by *Osborn* v. *Boulter*.[11] In the latter case the English Court of Appeal held that, having regard to the exigencies of modern business and the necessity for stenographic transcription and the preservation of copies of letters in copy-books, the dictation and the filing will not destroy privilege. The majority of the Court further held that in any event dictation, if publication at all, must be publication of slander and not of libel. The majority view was adopted for Ontario in the same year by the Court of Appeal in *Lawrence* v. *Finch*.[12] This is also *Salmond's* view.[13] *Quaere*, whether it is publication of the

[10] [1891] 1 Q.B. 524.
[11] [1930] 2 K.B. 226.
[12] (1930), 66 O.L.R. 451.
[13] SALMOND, TORTS, 7th ed., p. 530.

libel if the stenographer reads over her transcription before handing it back to the dictator for signature?

In the light of *Osborn* v. *Boulter, Puterbaugh* v. *Gold Medal Manufacturing Co.*,[14] and *Moran* v. *O'Regan*[15] must be regarded as overruled insofar as they may be decisions of fact. Similarly, *Edmondson* v. *Birch & Co. Ltd.*[16] and *Harper* v. *Hamilton Retail Grocers Ass'n.*[17] are good law. While these decisions apply the principle of modern business only to companies, the principle nevertheless appears to be equally applicable to individuals engaged in business under similar conditions.[18]

It was admitted in the *Edgeworth Case* that the communication was privileged. Accordingly, the action could only succeed if the privilege were destroyed by malice on the part of the defendant.[19] Furthermore, the onus of proving actual malice rests upon the plaintiff.[20] Nevertheless, Riddell J.A., although expressly finding that "the document complained of, though ill-advised and unjustifiable, does not seem to have been in any respect the result of malice", entirely ignored the question of privilege and found that the plaintiff was entitled to succeed.

In *DeStempel* v. *Dunkels*,[21] a claim for damages for slander was joined in the same action with a claim for damages for wrongfully and maliciously inducing a third party to commit a breach of contract with the plaintiff by dismissing the latter from his employ. The action was tried by a jury to whom ten questions were submitted, the two claims being kept clearly separated in the questions. The jury found for the plaintiff on both claims, awarding £200 damages on the first claim, and £6000 damages for inducing the breach of contract. The trial judge entered judgment only for the latter amount, being of opinion that, on the authority of *Jones* v. *Jones*,[22] there was no evidence to support the jury's finding that the defamatory words were spoken of the plaintiff in relation to, or in the way of, his trade.

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[14] (1904), 7 O.L.R. 582, reversing 5 O.L.R. 680.
[15] (1907), 38 N.B.R. 189.
[16] [1907] 1 K.B. 371.
[17] (1900), 32 O.R. 295.
[18] See *Boxsius* v. *Goblet Frères*, [1894] 1 Q.B. 842. It appears to be the view of Fisher J.A. in the *Edgeworth Case*.
[19] *Adam* v. *Ward*, [1917] A.C. 309; *London Association* v. *Greenlands*, [1916] 2 A.C. 15; *Dickson* v. *Wilton* (1859), 1 F. & F. 419.
[20] *Cowles* v. *Potts* (1865), 13 W.R. 858; *Caulfield* v. *Whitworth* (1868), 18 L.T.R. 527; *Somerville* v. *Hawkins* (1851), 10 C.B. 583; *Hebditch* v. *MacIlwaine*, [1894] 2 Q.B. 54.
[21] *Supra*.
[22] [1916] 2 A.C. 481.

The joinder of causes is interesting. In *Bilbrough* v. *The Board of Education of the City of Toronto and Guest*,[23] the plaintiff joined in the one action claims against the Board for a declaration as to the invalidity of a resolution dismissing him from the employ of the Board and an order for payment of arrears of salary and damages for libel, with a claim for damages for slander against the defendant Guest. This action does not appear to have gone to trial.

Edgeworth brought separate actions against the New York Central Railroad Company for damages for libel and damages for wrongful dismissal, and they were separately tried. The plaintiff's Jury Notice in the action for wrongful dismissal was struck out by the judge who dismissed the action.[24] It is interesting to speculate how the action would have been tried if Edgeworth had joined both claims in the same action. The libel case must have been tried by a jury,[25] who must render a general verdict.[26] Actions for wrongful dismissal, on the other hand, should, semble, be tried without a jury.[27]

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NEGLIGENCE—RES IPSA LOQUITUR.—In commenting on the decision of the Ontario Court of Appeal in *Hutson et al.* v. *United Motors Service Limited*,[1] we called attention to the fact that *res ipsa loquitur* seemed to have been treated by the Court as imposing a burden on the defendant of disproving negligence and of establishing, in effect, inevitable accident. On appeal to the Supreme Court of Canada,[2] the decision of the Ontario Court of Appeal was upheld on the facts, but Sir Lyman Duff C.J.C., with whom Davis J. concurred, took the opportunity of discussing the application of the maxim. He stated that, "broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff".[3] This was the view which we suggested

[23] [1934] O.W.N. 44.
[24] [1935] O.W.N. 366.
[25] The Judicature Act, s. 54.
[26] Secs. 61, 62.
[27] *St. Andrew's College* v. *Taylor* (1922), 23 O.W.N. 171.
[1] [1936] O.R. 225. See a comment in (1936), 14 Can. Bar Rev. 514.
[2] [1937] 1 D.L.R. 737.
[3] At p. 738.

appeared to be taken in the English authorities,[4] although certain doubts had been raised by some observations of Lord Wright in *Winnipeg Electric Company* v. *Geel.*[5] Sir Lyman Duff C.J.C. indicated, however, that in certain cases, "by force of a specific rule of law", the maxim *res ipsa loquitur* may have the effect of requiring the defendant to prove inevitable accident. *Winnipeg Electric Company* v. *Geel* was one of these cases and dealt with the imposition by statute of the burden of disproving negligence on a defendant. As Duff C.J.C. indicated, there may be such specific rules found in the case law as, for example, the instance he gives of a ship in motion running into a ship at anchor.[6] The result seems to be a general rule in which the ultimate burden of establishing negligence remains throughout on the plaintiff, subject to exceptions. It is extremely difficult, if not impossible, to state what those exceptions are, or whether the category of exceptions is closed or is subject to expansion, not only by statute (which of course is undeniable), but also by judicial decision. It is probable that the most that can be said is that the "cases where *res ipsa loquitur* applies may vary enormously in the strength, significance and cogency of the *res* proved".[7]

C. A. W.

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SUCCESSION DUTY — NEGOTIABILITY OF BANK DEPOSIT RECEIPT—SITUS.—The recent decision of the Supreme Court of Canada in *The Provincial Treasurer of Manitoba* v. *Bennett et al.*,[1] holding a deposit in a Winnipeg Bank under a deposit receipt not liable to succession duty in Manitoba, turns upon the exception of negotiable instruments to the rule as to the situs of simple contract debts. This case appears to extend the scope of this exception as stated in *Crosby* v. *Prescott.*[2] The basis for the decision is difficult to discern without some study, but there seems to be nothing in the learned judgment of Rinfret J., to justify the section of headnote in the Dominion Law Reports which reads :

[4] See Lord Dunedin in *Ballard* v. *North British Railway Company*, [1923] S.C. (H.L.) 43; *The Kite*, [1933] P. 154. And see 14 Can. Bar Rev. at pp. 518 *ff.*

[5] [1932] A.C. 690 at p. 699.

[6] See *The "Merchant Prince"*, [1892] p. 179.

[7] See Evatt J. in *Davies* v. *Bunn*, [1936] Argus L.R. 411, noted in 15 Can. Bar Rev. 45.

[1] [1937] 2 D.L.R. 1.

[2] [1923] S.C.R. 446.

> A certificate or receipt of deposit, payable to the holder "or order", is a negotiable instrument under the Bills of Exchange Act notwithstanding that it provides for notice of withdrawal against interest if the money is withdrawn within a certain time.

On the contrary, it was said that it was not necessary for the purposes of this case to bring the deposit receipt within the strict definition of "negotiable instruments" found in the Bills of Exchange Acts or as regarded by custom and usage of the English mercantile world.

The facts in *Crosby* v. *Prescott* were, that Mrs. Crosby was domiciled in the State of Massachusetts. She died there, leaving in her estate several promissory notes payable to herself which were not endorsed. The Court of Appeal for Manitoba held, and it was affirmed by the Supreme Court of Canada, that the executors of Mrs. Crosby's estate need not take out ancillary letters of administration in Manitoba to maintain an action against the maker of the note, who resided in Manitoba. Mignault J., in his judgment,[3] quotes the following from *Dicey's Conflict of Laws*:[4]

> When bonds, again, or other securities, e.g., bills of exchange, forming part of the property of a deceased person, are in fact in England and are marketable securities in England, saleable and transferable there by delivery only, without its being necessary to do any act out of England in order to render the transfer valid, not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England.

The promissory notes in this case were held to be within the type of security referred to in this quotation from Dicey, and the situs of the documents was held to be in the State of Massachusetts.

In the *Bennett Case*, Russell M. Bennett, a resident of Minneapolis in the State of Minnesota, deposited $50,000.00 in a Bank in Winnipeg, Manitoba, and received the following receipt from the Bank, which was in his possession at the time of his death several months later.

[3] At p. 455.
[4] 3rd ed., p. 344.

THE ROYAL BANK OF CANADA
INCORPORATED 1869

$50,000.00 No. 9209

Winnipeg, Man., August 15th, 1934

RECEIVED from Russell M. Bennett the sum of Fifty Thousand 00/100 .....Dollars which this Bank will repay to the said RUSSELL M. BENNETT or order with interest at the rate of 2½ per cent per annum until further notice. Fifteen days notice of withdrawal to be given and this Receipt to be surrendered before repayment of either Principal or Interest is made.

No interest will be allowed unless the money remains in the Bank . . . one . . . months.

This receipt is negotiable.

For THE ROYAL BANK OF CANADA,

"J. H. STAFFORD" -ST
Manager.

"F. S. PURSE" PU
Accountant.

The Province of Manitoba claimed succession duty on this deposit. Subsection 1 of section 8 of the Manitoba Succession Duty Act reads:[5]

> All the property situate within the province passing to a person for any beneficial interest shall be subject to duty on the dutiable value thereof.

An examination of the receipt given by the Bank reveals two facts of importance. One is that the stipulation as to the rate of interest is qualified, and the other is, that the receipt declares itself to be negotiable. Neither the Supreme Court of Canada nor the Manitoba Court of Appeal attempted to bring this receipt within the meaning of the term "negotiable instrument" as found in the Bills of Exchange Act. Trueman J.A. of the Manitoba Court of Appeal relied upon the doctrine of estoppel arising from the representation of negotiability upon the document.[6] He said: "It seems to me plain enough that the negotiability of this instrument in no wise depends on the law merchant or the common law or on fitting the instrument within the definition of a bill of exchange. It is negotiable by virtue of the estoppel resulting from its own representation."[7]

Estoppel is not relied upon in the judgment of the Supreme Court delivered by Rinfret J. To use the term "estoppel" with

[5] 1934, Manitoba Statutes, c. 42.
[6] 44 Man. R. 63.
[7] At p. 69.

reference to the nature of an instrument considered from the standpoint of a third and independent party (such as a taxing body), where such a party does not rely upon or is not influenced by any representation, appears to be confusing. To say that the bank in this case would be estopped from denying that the receipt was negotiable to any party receiving the document in good faith, is quite different from stating that the document possessed the attribute of negotiability in itself. In the one case negotiability is an attribute which the document assumes by reason of the relationship of the parties; in the other case, negotiability is an attribute inherent in the document.

In the opinion of the Supreme Court the important question in this case was "whether the deposit receipt now in question could be regarded as an instrument of such a nature that it was capable of being reduced into possession by the executors in Minneapolis." It was said to be unnecessary to bring the instrument within the strict definition of the term "negotiable instrument" as found in the Bills of Exchange Act or as regarded by custom and usage in the English mercantile world, as the exception cited in the above quotation from Dicey was said not to be confined to "negotiable instruments" within the restricted meaning of the word.

Cases and authorities were quoted to the effect that the essential requirements of a document to come within this exception are, (1) that the instrument is created of a chattel nature, and (2) that it is capable of being reduced into possession in the place where the instrument is found.[8]

The Court proceeded to find that this receipt was capable of being reduced into possession for all material purposes by the executors in Minneapolis, and when so reduced became "a marketable security saleable and, after endorsation, transferable by delivery only". The cases and authorities appear to justify the decision. The extent to which the Court depended upon usage to support this finding, is difficult to determine. This case turns upon a narrow point, as the number of documents which are not negotiable within the meaning of the Bills of Exchange Act or according to the Law Merchant, custom and usage, but are capable of being transferred by endorsation and delivery, must be few.

L. T. REINOEHL.

Manitoba Law School.

[8] *Attorney-General* v. *Bouwens* (1838), 4 M. & W. 171; *Crosby* v. *Prescott, supra;* STORY, CONFLICT OF LAWS, par. 517; WESTLAKE, PRIVATE INTERNATIONAL LAW, p. 126.