[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (QUEENSLAND) . . . . . Appellant;
Respondent,

AND

JOLLIFFE . . . . . Respondent.
Petitioner,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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Brisbane, *June* 22.

Sydney, *Aug.* 14.

Knox C.J., Isaacs and Gavan Duffy JJ.

Trust and Trustee—Declaration of trust—Bank deposit—Savings Bank—Queensland Government Savings Bank Act 1916 (*Qd.*) (7 *Geo. V. No.* 17), *secs.* 7, 34; *Schedule, secs.* 12, 13, 15, 65.

The *Queensland Government Savings Bank Act of* 1916 provides, by sec. 12 of the Schedule, that no person shall have more than one account in the Bank, but that the section shall not prevent any person from having (*inter alia*) additional accounts in his own name in trust for other persons.

The respondent, who had an account in his own name in the Bank, without any intention of making a gift to his wife but solely for the purpose of procuring interest which would otherwise not have been paid, opened another account as trustee of his wife. On opening this account he made a declaration, as required by the Act, that he desired to become a depositor as the *bonâ fide* trustee of his wife. The account was opened under the style "Mrs. Hannah Jolliffe—Edwin Alfred Jolliffe, Trustee," and interest was credited to the account.

Held, by *Knox* C.J. and *Gavan Duffy* J. (*Isaacs* J. dissenting), that the respondent was not concluded from averring that he was not trustee of the moneys paid by him into that account, and therefore, his wife having died intestate, that such moneys did not form part of her estate.

Williams v. *McIntosh*, 9 S.R. (N.S.W.), 391, disapproved.

Per Knox C.J. and *Gavan Duffy* J.: By the use of no form of words can a trust be created contrary to the real intention of the person alleged to have created it.

Per Isaacs J.: (1) The declaration made by the respondent was an unambiguous declaration of trust, and the result thereof could not be affected by subsequent evidence of his then undisclosed intention. (2) The evidence of his undisclosed intention in this case was in effect to establish the respondent's own dishonesty, on which he ought not to be permitted to rely.

Decision of the Supreme Court of Queensland (*Lukin* J.) affirmed.

APPEAL from the Supreme Court of Queensland.

During the lifetime of Hannah Jolliffe, who died on 2nd January 1918 intestate, her husband, Edwin Alfred Jolliffe, who already had an account in his own name in the Queensland Government Savings Bank, opened an account in the same Bank in the name and as trustee of his wife. In doing so, he made a declaration that he was desirous of becoming a depositor in the Bank as the *bonâ fide* trustee of Hannah Jolliffe. Into that account were paid only money belonging to Jolliffe. After the death of his wife, Jolliffe withdrew such money. Subsequently letters of administration of his wife's estate were granted to him, and the Commissioner of Stamp Duties assessed him, as administrator of the estate, for duty, including in the assessment the money withdrawn from the account in his wife's name.

On appeal by way of petition to the Supreme Court under sec. 50 of the *Succession and Probate Duties Acts* 1892-1915 (Qd.), by Jolliffe, against the assessment of the Commissioner, *Lukin* J. found on the evidence that, in opening the account, Jolliffe did not intend to make a gift to his wife of the money paid into it, but that the money was placed in the account for the sole purpose of procuring interest on the money that he believed would not be procurable from the Savings Bank if placed in his own name. His Honor therefore declared that the money did not form part of the estate of the intestate, and allowed the appeal.

From that decision the Commissioner now, by special leave, appealed to the High Court.

Other material facts appear in the judgments hereunder.

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Macrossan, for the appellant. The provisions of sec. 12 of the Schedule to the Act and the declaration made by the respondent preclude him from averring that he was not a trustee of the money in question for his wife. When he signed the declaration he unequivocally and irrevocably instituted himself trustee. [Counsel referred to *Williams* v. *McIntosh* (1); *Rider* v. *Kidder* (2); *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Wright* (3); *Garrett* v. *L'Estrange* (4); *Gascoigne* v. *Gascoigne* (5).]

Graham and *McDonald*, for the respondent. There must be an intention to create a trust (*Underhill on Trusts*, 7th ed., p. 44; *Field* v. *Lonsdale* (6)). The appellant must show that the wife had a beneficial interest in the moneys. [Counsel also referred to *Godefroi on Trusts*, 4th ed., p. 56.]

Macrossan, in reply. The Act provides that "no person shall have more than one account"; the judgment of *Lukin* J. says he may.

Cur. adv. vult.

Aug. 14. The following judgments were read :—

KNOX C.J. AND GAVAN DUFFY J. (read by KNOX C.J.). This is an appeal by the Commissioner of Stamp Duties from so much of the order of *Lukin* J. made on 15th March 1920 as declared that "the sum of £906 14s. 2d. which stood in the Queensland Government Savings Bank to the credit of Edwin Alfred Jolliffe as trustee for the intestate did not form part of the estate of the intestate."

It appears that during the lifetime of the intestate (Mrs. Jolliffe), her husband, the respondent to this appeal, opened an account in the Queensland Government Savings Bank in the name of "Mrs. Hannah Jolliffe—Edwin Alfred Jolliffe, Trustee," and paid into such account £900 of his own moneys. After the death of Mrs. Jolliffe, but before obtaining letters of administration to her estate, the respondent withdrew this money, with the accrued interest, from the Savings Bank, and appropriated it to his own use. The appellant, the

(1) 9 S.R. (N.S.W.), 391.
(2) 10 Ves., 360.
(3) 23 C.L.R., 185.
(4) 13 C.L.R., 430.
(5) (1918) 1 K.B., 223.
(6) 13 Beav., 78.

Commissioner of Stamp Duties, claimed duty on this sum as portion of the estate of the intestate, and, *Lukin* J. having overruled the contention of the Commissioner, special leave to appeal against his decision was sought. In granting special leave to appeal, this Court imposed the condition that the argument of the appellant on the appeal should be limited to the question " whether the effect of the *Queensland Government Savings Bank Act of* 1916 and the written documents in evidence conclude the respondent from averring that he was not trustee of the money in question " ; and it is on this footing that the appeal has proceeded. Consequently we are bound to assume for the purpose of the appeal that it was not the real intention of the respondent to make a gift to his wife, but that the money was placed in the account for the sole purpose of procuring interest which the respondent believed would not be procurable from the Savings Bank if the money were placed in his own name, *Lukin* J. having thus found the facts on the evidence which was given orally before him. The appellant, in order to succeed on this appeal, must show that the money belonged to the intestate, and consequently forms part of her estate.

In our opinion the finding of *Lukin* J. on the facts is an insuperable obstacle to the appellant in seeking to establish this proposition, which postulates that a trust was created by the respondent in favour of his wife. We know of no authority, and none was cited, which would justify us in deciding that by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it. In our opinion the law is accurately stated in *Lewin on Trusts*, 11th ed., at p. 85 : " It is obviously essential to the creation of a trust, that there should be the *intention* of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean to create a trust, the Court will not impute a trust where none in fact was contemplated."

In the case of *Williams* v. *McIntosh* (1) *Simpson* C.J. in Eq. appears to have been of opinion that the provisions of sec. 38 of the New South Wales *Government Savings Bank Act* 1906 have the effect of creating a statutory trust as against a person

(1) 9 S.R. (N.S.W.), 391.

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depositing money under its provisions ostensibly as trustee for another person although he in fact intended to retain the money for his own benefit. If that view were correct, it would govern the present case; but we think the statute in that case, as in this, does not create a trust against the intention of the depositor, though it may entitle the Bank to treat him as holding himself out as merely a trustee.

Knox C.J. Gavan Duffy J.

In our opinion the appeal should be dismissed with costs.

ISAACS J. Edwin Alfred Jolliffe, as administrator of the estate of his late wife, Hannah Jolliffe, appealed to the Supreme Court under sec. 50 of the *Succession and Probate Duties Acts* against an assessment of the Commissioner under that Act. The Supreme Court (*Lukin* J.) allowed the appeal. The only portion of that decision now in controversy is as to a sum of £906 14s. 2d., which at the time of the wife's death is taken as representing the amount of principal and interest standing in the Queensland Government Savings Bank, to the credit of an account styled "Mrs. Hannah Jolliffe—Edwin Alfred Jolliffe, Trustee." The Commissioner obtained leave to appeal against the decision which the Supreme Court gave in the administrator's favour. The leave limited the appellant to one contention, which, as regarded by this Court, is as follows: Assuming that if regard be had to the whole of the evidence before the Supreme Court, including the verbal testimony of the husband, he had no intention in fact of creating a trust in favour of his wife, the finding that there was no such intention in actual fact cannot be impeached, yet having regard to the Act which includes the regulations and rules under which it is worked, and having regard also to the relevant documents, the question is whether, nevertheless, a complete and binding trust had not in law been created by him in favour of his wife.

It is necessary to have careful regard to the way in which the account was established. Edwin Alfred Jolliffe had money of his own in the Bank of Australasia. In May 1917 he opened an account in the Commonwealth Bank of Australia in the name of his wife, but arranged that he could draw on the account as he pleased.

There is no doubt that he established this account for his own purposes, to delude his creditors. On 15th July he paid into this account £1,000 of his own money from the Bank of Australasia. It remained in the new account until 17th September 1917, when he drew out two sums each of £500. One of those sums he paid into an account in the Queensland Government Savings Bank. That account was in his own name, thus: "Edwin Alfred Jolliffe, Coachbuilder." The account had been opened in March 1914, but only very small sums had been paid in, and the amount standing to his credit, immediately before the payment in of the £500, was £2 14s. 2d. So that the large payment gave him a credit of £502 14s. 2d. His pass-book which shows plainly it was an ordinary personal account contains the printed memoranda amounting to business rules, and possibly regulations, of the Savings Bank as they existed in 1914. Rule 7, as there printed, states that in such a case no interest was then payable except on £500. But before September 1917, namely, in January 1917, this amount of £500 was altered to £1,000, and of this, by sec. 34 (to be presently quoted), Jolliffe must be deemed to have had notice when he opened the trust account. Jolliffe swore orally that on 17th September he understood £500 was the limit. Apparently the learned Judge acted in part on that statement, notwithstanding sec. 34 of the Act. Rule 3 states that "a depositor cannot hold more than one account in his own name except as trustee." Now, as to the second sum of £500 withdrawn from the account in the Commonwealth Bank to the credit of Mrs. Jolliffe, it was paid into a new account opened in the same Savings Bank on that day, the account in which it remained until after the wife's death.

Before stating what was done, reference must be made to some provisions of the Act and the Regulations thereunder, and also further reference to the Rules of the Bank as printed in the pass-books.

Sec. 7 of the Act gives force to the provisions of the First Schedule, and enacts that they may be added to by the Governor in Council. Sec. 12 of the Schedule provides that "Subject to this Act no person shall have more than one account in the Bank." Then follows a proviso that "this section shall not prevent any person having,

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bonâ fide, in addition to his own account, (*a*) accounts in his own name in trust for other persons." The section adds that "the Commissioner shall not be liable in respect of the performance of any trusts relating to a trust account; and the receipt of the trustee shall be a sufficient discharge to the Commissioner for any payment from any such account: Provided that" (I italicize this provision) "*the Commissioner may, if he deems it advisable, require the signature of both the trustee and the cestui que trust before any payment is made.*" Sec. 13 enacts that interest shall not be allowed on any amount above £1,000 to the credit of any one account, with exceptions immaterial here. Sec. 15 says: "Deposits and interest payable thereon may be withdrawn on application in the prescribed form by the depositor or the person legally entitled to claim on his behalf." Sec. 34 of the Act empowers the Commissioner of the Bank, with the approval of the Governor in Council, to make regulations for carrying out the Act, and enacts that all depositors shall be deemed to have notice of the regulations.

Reg. 9 provides for a pass-book and the entry of every deposit therein by an officer, and that the book is to be given to the depositor and retained by him as primary evidence of the receipt of the deposit. Reg. 15 allows interest on deposits up to £1,000 at 3½ per cent. Reg. 65 prescribes forms for opening various accounts: form 1 is for a single personal individual account; form 2, for a joint account; form 3, for a depositor whose name alters on marriage; form 4, for a marksman depositor; and form 5 is headed "Declaration to be signed by the trustee of a depositor." The separateness of the form indicates that it is only to be used where, as in sec. 12 of the Schedule, the person actually depositing the money is "*bonâ fide*" opening the account "in his own name in trust for" another person. The heading of form 5 indicates that the cestui que trust (called in No. 11 of the rules in the pass-book the "trustor") is the real beneficial depositor, though for the purposes of machinery the trustee is permitted to act as depositor.

This was the form which, with the emphatic addition of the words "solemnly and sincerely," was signed by Jolliffe; the form reading as follows:—"I, Edwin Alfred Jolliffe, of Brisbane, do solemnly and sincerely declare that I am desirous of becoming a depositor in the

Queensland Government Savings Bank *as the bonâ fide Trustee of Mrs. Hannah Jolliffe*, of Brisbane. I append the following as *my usual signature*, and I do hereby agree that my deposits in the said Savings Bank be managed in accordance with the Act and Regulations made in that behalf.—(Usual signature) Hannah Jolliffe, p.p. E. A. Jolliffe.—Signed by *the Trustee*, in my presence, this 17th day of September 1917—J. Slaughter." (I italicize what I consider specially important words, the effect of which will be presently referred to.) Thereupon the account styled "Mrs. Hannah Jolliffe—Edwin Alfred Jolliffe, Trustee," was opened, he paying in £500 to its credit and receiving a pass-book in which the account was so described. On 15th October he paid in another £400 to the credit of this account, and another £400 to the credit of his own personal account—a fact which shows clearly, if actual knowledge is material, that he then at all events knew of the new regulation as to the limit of £1,000 for interest. His wife died on 2nd January 1918. On 28th February he drew out £400, and on 20th March he drew out £500. The withdrawal form is not in evidence; but it must be assumed to have been *as trustee*, for according to the Act, Regulations and Rules it could not properly have been withdrawn by him in his own personal right. On 2nd May 1918 letters of administration were granted to the husband. He submitted accounts of the estate, and the Commissioner claimed of Jolliffe, as administrator, that the £906 14s. 2d. was properly part of the estate. Jolliffe, occupying a position in which his interest conflicted with his duty, denied that the sum was part of the estate of which he was the administrator, but stated that it was his own personal money. His own account on 31st January 1919 is this: "I placed the moneys in my own name as 'trustee for Mrs. Jolliffe,' for the purpose of obtaining interest thereon, and Mrs. Jolliffe was not even aware of the existence of the account, nor was she entitled to any of the moneys." It is plain that if Jolliffe's statement, still adhered to, be true, he was committing what *Lukin* J. justly termed an "illegal act." It was on that assumption a deliberate scheme to deceive and defraud the Queensland Government.

In *R.* v. *Littledale* (1) *Law* L.C., in a somewhat similar case, said

(1) 12 L.R. Ir., 97, at p. 100.

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of the depositor: "I call his purpose *dishonest*, because, as Lord *Brougham* says, in *Stewart* v. *Gibson* (1), 'there is *dolus malus* in evading the positive enactments of the municipal law.'" That is evasion "in the sense of deliberately trying to escape from the consequences of an Act though coming within it." The immoral character of it would have been admitted by *Palles* C.B. on his reasoning in *Littledale's Case*.

The present claim of the Commissioner cannot, however, be rested on estoppel between him and the administrator, because Jolliffe as the administrator is one personality and Jolliffe himself is another, and Jolliffe personally is not a party to the proceeding. It is, of course, an extraordinary result that Jolliffe could get interest from the Government on the basis of the money being his wife's money and defeat the Government's claim to treat it as his wife's property for probate duty. The result must, however, depend on the legal result of what Jolliffe did as between him and his wife. Before *Lukin* J. and before us Jolliffe occupied the unenviable position of an administrator opposing, in his own personal interests, the interests of the estate he nominally represents. *Lukin* J. decided in favour of the personal right of Jolliffe, and against his trust estate, on the ground that Jolliffe had satisfied the Court that he had no actual intention of benefiting his wife. The learned Judge so held on both the verbal and the documentary evidence.

The question for us is: What is the legal effect of what Jolliffe actually did on 17th September and 15th October 1917 whatever his own secret and undisclosed intention was? So far as the conclusions arrived at by the learned primary Judge rest on demeanour, I propose to say nothing adverse; but, so far as they were thought to be consistent with the documents and the uncontroverted circumstances, they are still open to consideration. It is essential to bear in mind that this is a case of trust, and not of gift. The question, as I view it, is whether what Jolliffe did was in itself an explicit declaration of trust; and, if it was, whether any evidence of secret intention is admissible to contradict the effect of such a declaration. As I have the misfortune to differ from my two learned brethren in

(1) 7 Cl. & Fin., 707, at p. 729.

a very vital matter of equity jurisprudence, I venture to state how I arrive at my conclusions.

I begin with Lord *Nottingham's* celebrated judgment in *Cook* v. *Fountain* (1), which he called "the greatest case in Court" (2). The Lord Chancellor says (3):—"Express trusts are *declared* either by word or writing; and these *declarations* appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the Court, upon consideration of all the circumstances presumes there was a *declaration*, either by word or writing, though the plain and direct proof thereof be not extant." I take it from that judgment, which the learned Lord Chancellor regarded as fundamental and as a guide to future decisions (2), that the Court searches for a "declaration" of trust: if it finds an express declaration, there is an end of the matter; but if not, then it examines the evidence to see whether such a "declaration" should be presumed. And the basic principle on which the distinction is made is that equity operates on the conscience. While it enforces a conscientious duty, it is not hasty in assuming it. It would be morally improper to fasten on a man's conscience the obligation of a trust of his property for another, where he has not undertaken it. It is just as improper morally to permit a man who has openly undertaken such a trust to escape his conscientious obligation by reason merely of a secret mental reservation not to fulfil what he has openly undertaken. An open declaration of trust is therefore an expression of intention that is final and beyond recall. Other acts and conduct have to be examined to see how far they are its equivalent, because the declaration of a trust, except where some statute intervenes, is not necessarily formal. These considerations, in my opinion, are at the root of *Cook* v. *Fountain* and of later decisions.

The principle is thus stated by Lord *Cranworth* in *Jones* v. *Lock* (4): "If I *say*, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration." The question, said the Lord Chancellor, is "has there been *a declaration of trust*?" If the transaction by

(1) 3 Swans., 585.
(2) 3 Swans., at p. 589.
(3) 3 Swans., at p. 592.
(4) L.R. 1 Ch. 25, at p. 28.

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which the trust is created is *complete*, the property has passed without more (*Collinson* v. *Pattrick* (1); *Ex parte Pye* (2); *Kekewich* v. *Manning* (3)). It is not necessary to use the words "I declare myself a trustee," so long as the expressions actually used do convey in the circumstances in which they are used that the person using them considers himself a trustee or adopts that character. See per *Wood* V.C. in *Dipple* v. *Corles* (4), and see *Richards* v. *Delbridge* (5). *Turner* L.J. said in *Milroy* v. *Lord* (6) that the transfer of the property becomes effectual in any one of three ways: if the owner (1) actually transfers the property to the beneficiary, (2) transfers it to a trustee for the purposes of the settlement, or (3) *declares* that he himself holds it in trust for those purposes. If a trust is seriously *declared* in explicit and direct terms, there is an end of the matter; for the declaration is the "creation of the trust" referred to by *Lewin*, 12th ed., at p. 88. There is an exception to which I shall refer, but apart from that the rule holds. It is the "declaration" of trust upon which equity fastens. In *M'Fadden* v. *Jenkyns* (7) *Wigram* V.C. said: "A declaration of trust purports to be, and is in form and substance, a complete transaction, and the Court need not look beyond the declaration of trust itself, or inquire into its origin, in order that it may be in a position to uphold and enforce it." On appeal Lord *Lyndhurst* L.C. said (8):—"The testator, in directing Jenkyns to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. *It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff.*" The intention to create a trust is self-evident from the fact of the declaration, and is no more to be denied than is the intention of a grantor to execute a conveyance to be denied after he has in fact executed it. A declaration of trust is, in the eye of a Court of equity, equivalent to a legal transfer of the property (*Collinson* v. *Pattrick*), and, once the declaration is established, it may be said *Finis coronat opus*.

There is, as I have stated, an exception recognized—not without

(1) 2 Keen, 123.
(2) 18 Ves., 140.
(3) 1 DeG. M. & G., 176, at p. 192.
(4) 11 Ha., 183, at p. 184.
(5) 18 Eq., 11.
(6) 4 DeG. F. & J., 264, at p. 274.
(7) 1 Ha., 458, at p. 462.
(8) 1 Ph., 153, at pp. 157-158.

some opposition—in the case of creditors' deeds. In such a case it is rather an apparent than a real exception ; for it is considered transparent from the inherent nature of the transaction that the person executing the deed, though he calls the assignees "trustees," means "agents or attorneys." It is by subsequent events that a trust arises if at all. (See *Johns* v. *James* (1).) Where, however, a trust—not for creditors—depends upon implication from circumstances, and not from an express statement of the trust, it is always a question with what actual intent the acts or words relied on were done or used. Just as intention alone will not constitute a trust obligation, so mere conduct without such intention is ineffectual to impose it, or, as *Lewin*, 12th ed., at p. 88, says, to "impute" it. The distinction, in this respect between an express and an implied trust is indicated in *Story's Equity Jurisprudence*, sec. 980. Both have to be proved. In some cases presumptions aid the proof of intention, and may be rebutted ; in others it has to be proved independently.

In *Field* v. *Lonsdale* (2) Lord *Langdale* M.R. apparently thought that the conduct relied on to create the trust was so far indirect as to require some affirmative proof of intention, the case not being one where that would be presumed. It will be noticed that *Rider* v. *Kidder* (3) was relied on in argument. The learned Master of the Rolls, in his very brief judgment (4), considered that the form of the declaration of trust made "a remarkable difference" in respect of the reservation of power of disposition, conserving to the actual depositor, as one of two joint depositors, the unrestricted liberty to withdraw the money. Sec. 33 of the Act of 9 Geo. IV. c. 92 appears to have been construed by Lord *Langdale* as conferring that personal right on the actual depositor. In this respect, there is a vital difference between it and sec. 12 of the Schedule to the Queensland Act. I am disposed not to regard the decision in that case as one to be applied as a principle. It does not purport to do more than apply to the circumstances of a particular transaction, as these were understood by the Court and under a particular enactment, principles otherwise established. I have regard to those

(1) 8 Ch. D., 744, particularly at p. 749.
(2) 13 Beav., 78.
(3) 10 Ves., 360.
(4) 13 Beav., at p. 81.

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recognized principles in the determination of this case, and, in my opinion, the circumstances of the present case are distinguishable from those of *Field* v. *Lonsdale* (1), as they were determined or assumed by the learned Master of the Rolls.

In cases of indirect or implied trusts, the question of the intention of control of the property by the alleged trustee has frequently arisen; that is, for the purpose of determining whether the necessary "intention" existed. The judgment of *Wood* V.C. in *Vandenberg* v. *Palmer* (2) explains this thoroughly. If control inconsistent with the intention of creating a trust is retained, the implication of such intention is necessarily excluded. If, however, the control retained is *quâ* trustee, the suggested intention is assisted. The references in that case (3) to *Hughes* v. *Stubbs* (4) are illuminative.

In the present case, looking at the documents by the light of the relevant law and the directions of the Bank and the uncontroverted circumstances, which include the Bank's acting on Jolliffe's direction in treating the account as one in trust for Mrs. Jolliffe, there appears to me to be a distinct declaration by Jolliffe that he deposited and held the deposit of £500 in trust for his wife; that is a trust *eo nomine*, to use the expression of *Lewin*, 12th ed., at p. 124. Then, was the evidence of secret intention admissible? I may observe that there has been no case of "revocability" or "revocation" set up here, even if it were maintainable, but I mention it to indicate that I have not overlooked it. It has been, and is merely, a question of original constitution of a trust.

In my opinion there are three reasons for rejecting the oral evidence of intention. The first is that, as I have explained, once a clear declaration of trust is made, that is an effectual vesting of the property in equity in the beneficiary. Mr. *Maitland* in his lectures on *Equity*, at p. 44, puts it very succinctly. He says:—"At this moment I declare to you by word of mouth that I constitute myself a trustee of this watch for my eldest daughter. There is already a perfect trust in the technical sense." A technical or quasi-technical term has, in the present case, been used, a term of an unequivocal nature having a settled result with every one of the

(1) 13 Beav., 78.
(2) 4 K. & J., 204.
(3) 4 K. & J., particularly at pp. 215-216.
(4) 1 Ha., 476.

certainties necessary for that result: the declaration has been made without mistake as to the nature of the act done, and, in my opinion, it is not open to Jolliffe to affect the result by subsequent evidence of his then undisclosed intention, contrary to the unambiguous declaration he made. An instance of the inadmissibility of such evidence to contradict express declarations of trust is found in *Maitland*, at p. 79, where the learned author says: "If I convey to A 'upon trust' and declare no trust, A can not produce evidence that I did not mean to make him trustee." That statement, if true —and it is supported by reference to *Lewin*, there quoted—indicates that there is no such sweeping rule that, whatever words are used, it is always sufficient, in order to negative a trust, that an actual though undisclosed intention not to create a trust should be proved. The second reason for not admitting the evidence, though by no means so radical as the first and third, is that parol evidence is not available to contradict a written document. I cannot believe that, for instance, a solemn deed of trust or a will can be open to the reception of parol evidence, not of mistake as to its nature, or as to any condition of execution, or as to undue influence or other well understood causes of ineffectiveness, but merely of personal secret intention not to do what the document purports to effect. The third reason against admitting the evidence is based on public policy.

Having regard to the terms of the Act, the Regulations and the Rules, to his declaration, to his separate account, to the way in which his so-called "usual" signature—usual, that is, for trust purposes, because his personal signature in relation to his own account must have been entirely different,—the only possible interpretation which could be attached by the Bank, or any one else for that matter, to his actual words was that they amounted to an express declaration that Jolliffe was in reality only trustee of the money for his wife. The Bank, and any other person acquainted at the time with the facts of the transaction and *assuming it to be honest*, would inevitably have regarded them as a direct admission by Jolliffe that he was simply trustee for his wife in regard to the money. No man can protect himself from the consequences of his own acts, intentional and deliberate, including the natural conclusions to be drawn from

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them, by afterwards setting up his secret intention to defraud or break the law. Where he is not prosecuting a claim, he may not be made liable on the mere ground of illegality *inter alios*, but I unfortunately differ from my learned brethren in this, that I am of opinion that if his own words and acts, properly interpreted, assuming them honest, would establish his liability, he cannot escape that liability by relying on his own mental turpitude. "*No man shall set up his own iniquity as a defence, any more than as a cause of action*," said Lord *Mansfield* in *Montefiori* v. *Montefiori* (1)—a dictum approved by Lord *Cranworth* L.C. in *Jorden* v. *Money* (2). In that situation Jolliffe undoubtedly stands. No other honest interpretation could be placed on his acts than his actual and veritable trusteeship. In setting up the fraudulent intention here, he is doing so for the purpose of *setting up his title* in opposition to his acts just as much as if he were suing for the money. What difference could it possibly make as between the present parties if Jolliffe had left the money still in the Bank? Compare the fraudulent "secret intention" in fact of the brother in *Corea* v. *Appuhamy* (3).

It is plain, and has been conceded in argument, that communication to the wife was not necessary to perfect the transaction; nor was it necessary to evince the intention. On the contrary, had Jolliffe told his wife that he had placed the money there nominally but not really for her, the case might have been stronger for him. But he said nothing to her on the subject, and the matter must rest upon his acts and words, taken in their surroundings.

In my opinion, shortly stating it, the actual words used are, in the circumstances, equivalent to the words "I hereby declare myself to be trustee for my wife." If he had used those words, there would, as I read the cases, have been an end of the matter. There would have been an immediate transfer in equity of the property —a trust executed, as Lord *Cranworth* says, and "equivalent," to use Lord *Langdale's* expression in *Collinson* v. *Pattrick* (4), "to a transfer of the legal interest in a Court of law."

As to control of the fund, the law (including in that the Act, Regulations and Rules) provides (rule 11) that, when a trust account

(1) 1 W. Bl., 363, at p. 364.
(2) 5 H.L.C., 185, at p. 212.
(3) (1912) A.C., 230, at p. 236.
(4) 2 Keen, at p. 134.

is opened, the trustee or trustees only can operate upon it, and, in case of the death of the trustee, the account vests in the executor, if there be probate, but if not, the written consent of the *trustor* must be obtained to the appointment of the new trustee, unless the trustor is of tender age. The rule adds: "*If so desired, the account may be vested in the trustor.*" In case of withdrawals, the pass-book should be produced, though provision is made for its absence. Reference has already been made to sec. 15 of the Schedule. The legal position on 15th September 1917, immediately after the payment in of the £500, and down to the date of the withdrawals, was this: Jolliffe had physical control of the book, and the physical power and legal right to withdraw the money but not the complete legal right to interest because it was subject to the legal right of the Commissioner to have the signature of the wife. But, that control and power and right, such as it was, was not in his own *private* personal right but as *trustee*. That is the vital point. He received the money, it is true, but as trustee for his wife's estate, and, in my opinion, he is bound to account for it to the estate. That position of trusteeship he made the basis of his claim for interest, otherwise unobtainable—at least in part.

His claim in Court is that all along he was perpetrating what he must have known to be a fraud: that he all along had the secret intention of repudiating the trust he averred. If, after completely in form and for a purpose now effectuated, the law permits him to deny the effect of his explicit statement of trusteeship—to deny it, that is, as against his wife's estate—merely because of his secret inconsistent mental attitude, then there is no security for any declaration of trust however formal and explicit. Let any voluntary trustee, or, indeed, if secret *intention* is always essential, any trustee whatever only establish—perhaps after his cestui que trust's death—that his supposed intention was a sham, the more fraudulent it appears, the more conclusive would be his case, and the trust fails.

In my opinion, Edwin Alfred Jolliffe did completely on 17th September 1917 constitute himself trustee for his wife of the sum of £500, and subsequently of the sum of £400, and she could in her lifetime have enforced the trust. I have arrived at this result independently of a decision that I am about to refer to, which,

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however, is strongly confirmatory of my conclusions. The case of *Williams* v. *McIntosh* (1), which was referred to by *Rich* J. on the application for leave to appeal, was decided on an enactment more closely resembling the Queensland Act than the statute of Geo. IV. The reasoning of *A. H. Simpson* C.J. in Eq. is in line with the English authorities.

In my opinion, the appeal should be allowed.

Appeal dismissed with costs.

Solicitor for the appellant, *W. F. Webb*, Crown Solicitor for the State of Queensland.

Solicitors for the respondent, *Atthow & McGregor.*

(1) 9 S.R. (N.S.W.), 391

[HIGH COURT OF AUSTRALIA.]

BERGL (AUSTRALIA) LIMITED . . . APPELLANT;
PLAINTIFF,

AND

THE MOXON LIGHTERAGE CO. LIMITED . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1920.

BRISBANE, *June* 22, 23, 25.

Knox C.J., Isaacs and Gavan Duffy JJ.

Carrier—Lighterman—Contract—Lightering goods—Liability for loss or damage—Unseaworthiness of vessel—Negligence—Exemption from liability for insurable risks.

The defendant, a lighterage company, agreed to lighter the plaintiff's goods upon (*inter alia*) the following conditions :—" The rates are for conveyance only. Every reasonable precaution will be taken to ensure the efficiency of craft used for the service, also for the safety of the goods whilst in craft, but