[HIGH COURT OF AUSTRALIA.]

KAUTER AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

HILTON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 8, 9, 17.

Dixon C.J., Williams and Fullagar JJ.

Trust and trustee—Deposits in Savings Bank—Deposits to credit of depositor in trust for named person—Retention of dominion and control—Passbooks—Given by depositor to named person—Named person informed by depositor—Sundry withdrawals and deposits by depositor—Passbooks obtained from and returned to named person—Government bonds—Discussion between depositor and named person—All moneys withdrawn from trust accounts and invested in bonds—Bonds in name of depositor—Receipt therefor handed by him to named person—Inquiry by depositor to have bonds put in name of named person—Death of depositor—Intention to create trust—Claim by named person against depositor's estate—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 7.

Equity will only enforce a trust to the extent to which the intention to create a trust is clear. But this does not mean that a plaintiff who seeks to prove too wide a trust must fail altogether. The court may hold that a less extensive trust has been established than that claimed and in such a case that which has been established will be enforced.

Where a person not only opens an account but hands the passbook to the purported beneficiary and thereafter consults that beneficiary on the basis that the latter is the beneficial owner of the moneys or of some interest in them, the evidence tends strongly towards establishing that the depositor intended to create an immediate trust in favour of that other person. The fact that the depositor reserved a right to revoke the trust would not prevent an immediate trust arising and if the trust was not revoked by the depositor in his lifetime the beneficiary would be just as much entitled to the money as a beneficiary under an irrevocable trust.

The creation of trusts of bank accounts, considered.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

In a suit brought in the equitable jurisdiction of the Supreme Court of New South Wales by Alfreda Hilton against Bertram Kauter and Frederick Kauter, the amended statement of claim was substantially as follows :—

1. The defendants are the executors of the will of the late Michael Francis Hickey.

2. On or about 17th July 1945 the deceased constituted himself a trustee for the plaintiff of two sums totalling £500 and the interest thereon which sum he on that day deposited in a new Commonwealth Savings Bank trust account in the Spit Junction branch of that bank. The account was numbered 43544 and styled—" Frank Hickey—Trustee for Miss Alfreda Hilton ".

3. Subsequently about 27th July 1947 the deceased constituted himself a trustee for the plaintiff of a further sum of £500 and the interest thereon which further sum he paid into the said account at the Spit Junction branch.

4. On or about 2nd October 1946 the deceased constituted himself a trustee for the plaintiff of a further sum of £500 and the interest thereon which sum he on that day deposited in a new Commonwealth Savings Bank trust account at the Crows Nest branch of the bank. The account was numbered 58826 and styled " Frank Hickey—Trustee for Miss Alfreda Hilton ".

5. Subsequently on 31st May 1948 the deceased constituted himself a trustee for the plaintiff of a further sum of £500 and the interest thereon which further sum he paid into the said account at the said branch of the bank.

6. On or about 3rd and 4th March 1948 the deceased constituted himself a trustee for the plaintiff of a further sum of £500 and the interest thereon which sum he deposited by two separate deposits of £136 and £364 in a new Commonwealth Savings Bank trust account in the Chatswood branch of the bank. The account was numbered 56079 and styled " Frank Hickey—Trustee for Miss Alfreda Hilton ".

7. Subsequently the deceased on 31st May 1948 constituted himself a trustee for the plaintiff of a further sum of £500 and the interest thereon which sum he paid into the account at the Chatswood branch.

8. On or about 26th May 1948 the deceased constituted himself a trustee for the plaintiff of a further sum of £500 and the interest thereon which sum he on that day deposited in a new Commonwealth Savings Bank trust account in the Manly branch of the bank.

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The account was numbered 99461 and styled " Frank Hickey—Trustee for Miss Alfreda Hilton ".

9. On or about 18th October 1949 the deceased as such trustee as aforesaid with the consent of the plaintiff withdrew all the trust moneys then standing to his credit as such trustee at the said branches of the bank and invested the total amount so withdrawn, namely, £3,602 10s. 10d. in the purchase by him as trustee for the plaintiff of Commonwealth bonds in a Commonwealth loan which was then closing.

10. At the same time the deceased invested the sum of £2,913 of his own moneys in the purchase of bonds in that loan.

11. On 20th October 1949 the deceased as a result of these transactions held Commonwealth bonds maturing on 15th October 1963 of a face value of £6,500 and on or about that date the deceased declared himself a trustee of those bonds and the income thereof for the plaintiff absolutely.

12. On or about 25th May 1948 the deceased constituted himself a trustee for the plaintiff of the sum of £500 and the interest thereon which said sum he on that day deposited in a new Commonwealth Savings Bank trust account at the Northbridge branch of that bank. The account was numbered 6382 and styled " Frank Hickey —Trustee for Alfreda Hilton ".

13. Subsequently on 21st October 1949 the deceased with the consent of the plaintiff closed this last mentioned account and placed the moneys withdrawn from the Northbridge branch of the bank in a similar trust account numbered 33899 at the Neutral Bay branch of the bank.

14. From time to time after the last mentioned transfer the deceased with the consent of the plaintiff and by way of loan from the plaintiff to the deceased withdrew various sums from the Neutral Bay branch account totalling £126 for which said amount he was indebted to the plaintiff at the time of his death. At the death of the deceased the balance to the credit of the said account was £387.

15. On or about 30th June 1930 the deceased gave to the plaintiff the items of furniture enumerated in the first schedule hereto.

16. On or about Christmas time in the year 1949 the deceased gave to the plaintiff the items of furniture enumerated in the second schedule hereto.

17. Michael Francis Hickey died on or about 27th January 1950.

18. The defendants as executors of the will of the deceased claim that the whole of the Commonwealth bonds of the face value of £6,500 hereinbefore referred to and the balance standing to his

credit in the Neutral Bay branch trust account No. 33899, and the said furniture were beneficially owned by the deceased at the time of his death and have threatened and still threaten to distribute the estate of the deceased on that basis.

The plaintiff claimed :—

1. A declaration that the deceased was at the time of his death a trustee for plaintiff of the said Commonwealth bonds of a face value of £6,500 due 15th October 1963 and all interest accrued thereon since their acquisition by him in October 1949.

2. Alternatively a declaration that the deceased was at the time of his death a trustee for the plaintiff of Commonwealth bonds to the face value of £3,602 10s. 10d. due 15th October 1963 and all interest accrued thereon since their acquisition by him in October 1949.

3. A declaration that the deceased was at the time of his death a trustee for the plaintiff of the sum of £387 standing to his credit in the Neutral Bay branch trust account No. 33899.

4. A declaration that the furniture mentioned in the first and second schedules hereto is the property of the plaintiff and does not form part of the estate of the deceased.

5. A declaration that at the time of his death the deceased was indebted to the plaintiff in the sum of £126.

6. That the defendants be ordered to administer the estate of the deceased in accordance with the foregoing declarations.

7. That in so far as it may be necessary the estate of the deceased may be administered by and under the directions of the Court.

8. That the defendants may be ordered to pay to the plaintiff the costs of the plaintiff of this suit.

9. That the plaintiff may have such further or other relief as the nature of the case may require.

In their statement of defence the defendants severally said substantially as follows :—

In answer to pars. 2, 3, 4, 5, 6, 7, 8 and 12 of the amended statement of claim, that they did not know and were not able to admit that the said Michael Francis Hickey at the times therein mentioned or any of them or at any other time or times constituted himself a trustee for the plaintiff of the sums respectively therein mentioned or of any of them or any other sum or sums of money ; in answer to par. 9 that they did not know and were not able to admit that the moneys therein mentioned or any of them were trust moneys or that those moneys or any of them were trust moneys or that those moneys or any of them were withdrawn by the deceased as a trustee for the plaintiff or with the consent of the plaintiff ;

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in further answer to par. 9 that they did not know and were not able to admit that the moneys therein mentioned or any of them were withdrawn by the deceased from the branches of the bank therein mentioned with the consent of the plaintiff and they further said that they did not know and were not able to admit that the moneys so withdrawn or any of them were invested by the deceased in the purchase by him as trustee for the plaintiff of the Commonwealth bonds therein mentioned; in answer to par. 11, that they did not know and were not able to admit that on the date therein mentioned or at any other time the deceased declared himself a trustee of the bonds therein mentioned and the interest thereon or of any of them for the plaintiff absolutely or at all; in answer to par. 13, that they did not know and were not able to admit that the deceased on 21st October 1949, with the consent of the plaintiff, closed the account therein mentioned; in answer to par. 14, that they did not know and were not able to admit that the sums therein mentioned were withdrawn by the deceased with the consent of the plaintiff and by way of loan from the plaintiff to the deceased and they further said that they did not know and were not able to admit that the deceased was indebted to the plaintiff at the time of his death in the sum of £126 or at all; in answer to par. 15, that they did not know and were not able to admit that on or about 30th June 1930 or at any time the deceased gave to the plaintiff the items of furniture enumerated in the first schedule of the statement of claim or any of them; and in answer to par. 16, that they did not know and were not able to admit that at or about Christmas time in the year 1949 or at any other time the deceased gave to the plaintiff the items of furniture enumerated in the second schedule or any of them.

Issue was joined.

Further facts appear in the judgment hereunder.

B. P. Macfarlan Q.C. (with him *D. A. Staff*), for the appellants. The issue is confined to whether the moneys originally lodged in the various Savings Bank accounts were rightly the subject of a declaration of trust in favour of the respondent. The evidence shows that the deceased grouped all those moneys with his other assets, and there is not any suggestion of those moneys being trust moneys. It may be there was a present intention to benefit the respondent when the respective accounts were opened but whether she was to receive the income is not shown. The onus is upon the respondent to establish the terms of the alleged trust. The deceased was concerned, in the overall picture, with the totality of assets

in the accounts. The respondent was to get what was left in the accounts at the date of the death of the deceased. He drew moneys from those accounts unknown to the respondent. On the evidence the judge below was unable to say how the deceased intended to benefit the respondent. A trust cannot be executed unless it be proved. When the problem is within s. 7 of the *Statute of Frauds* (29 Car. 2, c. 3) it is requisite that the whole of the trust must appear in the writing that the section requires. There must be certainty as to the terms of the trust upon which the trust is held (*Rochefoucauld* v. *Boustead* (1); *Smith* v. *Matthews*; *In the Matter of Matthews' Settlement* (2)). The problem which confronts an equity court in a case such as this is not different from the requirements for proving trusts of land. It is not sufficient for the court to say it is satisfied as to part and is not clear as to the balance. The degree of proof must be the proof of the whole of the trusts. The court is bound to ascertain what are the whole terms of the trust (*Smith* v. *Matthews* (3)). In this case only one trust is involved. If the terms of that trust cannot be determined then those terms cannot be proved and the court cannot execute part of the trust. In such circumstances the law requires that the trust fails. The evidence shows that the benefit which the deceased intended to confer upon the respondent was testamentary. *Young* v. *Sealey* (4) is not a case in point in relation to the facts present in this case. This case is very different from *Russell* v. *Scott* (5) and the cases there dealt with. [He referred to *Teasdale* v. *Webb* (6) and *Commissioner of Stamp Duties (Q.)* v. *Jolliffe* (7).] The deceased linked what he did with what was to happen after his death. It is a matter of some significance that the only dealing with the moneys in the various accounts was by the deceased for his own benefit, and was without the knowledge of the respondent. It is clear and unequivocal that the deceased did not intend to divest himself of his property during his lifetime in favour of the respondent. What was done falls within the decision in *Teasdale* v. *Webb* (6).

C. D. Monahan, for the respondent. The references by the deceased were to the machinery by which the respondent would be able to get the moneys out of the bank after his death. They were machinery conversations and did not in any sense show any

(1) (1897) 1 Ch. 196, at pp. 205-206.
(2) (1861) 3 De G. F. & J. 139, at pp. 149-153 [45 E.R. 831, at pp. 835-836].
(3) (1861) 3 De G. F. & J. 139 [45 E.R. 831].
(4) (1949) Ch. 278, at pp. 284, 287, 288, 291, 294.
(5) (1936) 55 C.L.R. 440, at pp. 448, 453.
(6) (1940) 57 W.N. (N.S.W.) 151.
(7) (1920) 28 C.L.R. 178.

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intention on the part of the deceased that the moneys would not become the property of the respondent until after his death. The visits made together by the deceased and the respondent to the various branches of the bank were made so that when the occasion arose the bank officials would remember and identify the respondent. The immediate needs of the respondent arising after the deceased's death were provided for by him.

[FULLAGAR J. referred to *Brady* v. *Stapleton* (1).]

Either there was an established trust in favour of the respondent of corpus and income put into the bank on each separate occasion, or the deceased intended it to be testamentary. He gave the respondent to understand that she was the beneficial owner of the moneys. Otherwise, it was a long series of deceptions practised by the deceased on the respondent. If he did not intend to give those moneys to the respondent the question arises: why did the deceased open the accounts, sell some of his furniture and bank the proceeds therefrom? The deceased was very reluctant to sell the shares but did so because of the respondent's inability to understand shares, and her dislike or unwillingness to hold shares. It is not denied that there was not any reference to income but the occasion for discussion of the income did not arise. The evidence does not reveal a testamentary intention.

B. P. Macfarlan Q.C., in reply.

Cur. adv. vult.

Dec. 17.

THE COURT delivered the following written judgment:—

This is an appeal by the defendants, the executors of the will of Michael Francis Hickey deceased, from part of a decree of the Supreme Court of New South Wales in Equity (*Roper* C.J. in Eq.) in a suit brought by the plaintiff, the present respondent, against the defendants as executors of the deceased. The decree contains a declaration that the deceased was at the time of his death a trustee for the plaintiff of Commonwealth bonds to the face value of £3,500—due on 15th October 1963, and that the defendants held these bonds and all interest accrued thereon since the date of the death of the deceased on trust for the plaintiff and a further declaration that the deceased was at the time of his death a trustee for the plaintiff of the sum of £387 standing to his credit in an account numbered 33899 with the Neutral Bay branch of the Commonwealth Savings Bank. The object of the appeal is to have these declarations set aside.

(1) (1952) 88 C.L.R. 322.

Michael Francis Hickey, to whom we shall refer hereafter as the testator, died on 27th January 1950. The plaintiff, who is his niece by marriage, became housekeeper to him and his wife in 1929. They were then living in a flat at Neutral Bay. In 1939 Mrs. Hickey went for a trip to England and the flat was vacated and the furniture stored. The testator went to Newcastle but returned to Sydney in June 1939 and took a flat at Cremorne and furnished it after the plaintiff had promised to look after him until he died. He was then about sixty-six years of age and she was about twenty-seven. Mrs. Hickey returned from her trip in September 1939 but did not resume cohabitation with the testator. She sued him for maintenance but the application failed because she had means of her own. The plaintiff stayed on in the flat and looked after the testator doing all the domestic work from 1939 until his death. The testator was a retired builder and had a considerable sum, at least £8,000, invested in shares. The plaintiff gave evidence that early in 1945 the testator, as was his wont, was reading through the share lists in a newspaper and mentioned some shares which were paying good dividends and said they were the shares which he would like to leave her when he died. He said their value would be about £5,000. The plaintiff said not to talk like that, as she might die before him, but he said : " Well, I intend to give you £5,000. So, would you rather have it in shares or in trust account ? " The plaintiff said that she did not understand shares and dismissed the subject.

Nothing was done immediately. But, on 21st May 1945, the testator made a will a copy of which he showed to the plaintiff and said he had not included her in the will because he was going to leave her £5,000 in trust accounts " and if the will is disputed nobody can touch your share, you won't have any death duties to pay, all you have to do is to identify yourself at the bank and you will be able to draw your money if you want it ". The testator said he was going to sell shares as she did not understand shares and that, as he sold them, he would put the money into the bank in trust for her. The testator gave effect to this intention for he opened a number of trust accounts in various branches of the Commonwealth Savings Bank in his name in trust for the plaintiff into which he paid sums of money. He opened the first of the accounts at the Spit Junction branch on 17th July 1945, and £500 was deposited comprising £47 in cash and £453 withdrawn from another account. After he had opened the account the testator came home and called the plaintiff into his study, told her what he had done and said that it was only the beginning of what he

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intended to do. He gave her the passbook and told her to put it away. She thanked him and took the passbook and put it in one of the drawers of her wardrobe. On 2nd October 1946 the testator opened another account at the Crows Nest branch of the bank and deposited £500. When he returned he said he had banked another £500 for her and gave her the passbook. On 27th July 1947 the testator asked the plaintiff for her Spit Junction passbook as he was going to bank another £500 there for her. He did this and returned to the flat. He told the plaintiff that he had done so and gave her back the passbook. On 3rd March 1948 he opened a further account at the Chatswood branch of the bank and deposited £500, the deposit consisting of £364 paid on that day and £136 paid on the following day. He told the plaintiff that he had done so and gave her the passbook. On 31st May 1948 he paid a further £500 into that account and a similar sum into the Crows Nest account and for these purposes borrowed the passbooks from the plaintiff and returned them. On 25th May 1948 the testator opened a further account at the Northbridge branch of the bank, deposited the sum of £500, and gave the passbook to the plaintiff. On 26th May 1948 he opened a further account at the Manly branch of the bank, deposited £500 and gave the passbook to the plaintiff. The testator had a personal account in the Neutral Bay branch of the same bank. The £500 deposited to the credit of the trust account at the Crows Nest branch on 2nd October 1946 appears to have been withdrawn from this account and the deposits to the credit of the trust accounts in March and May 1948 also appear to have been withdrawn from this account after it had been credited with the proceeds of the sale of a large part of the testator's shares.

In October 1949, the testator asked the plaintiff if she would be agreeable to putting the moneys in the trust accounts into Government bonds as a loan was then opening. He said that if she did she could not have better security and the bonds would pay three and one-eighth per cent whereas the bank interest was only two and one-quarter per cent on the first £500. A few days before the loan closed this suggestion was further discussed between the testator and the plaintiff and she said she thought it would be a good idea to put the moneys into loans. A few months before this the testator had told the plaintiff that he had decided to change his will and leave her everything, and he still had about £3,000 in shares, and he wanted to know whether she would prefer to have the shares or should he sell them and put the money into bonds and she again said she did not understand shares.

Towards the end of October 1949, shortly before the loan closed, the testator and the plaintiff decided to put the money in the trust accounts into bonds. They went together to the various branches of the Commonwealth Savings Bank where the trust accounts were and drew out the whole of the moneys and accrued interest and also withdrew certain moneys from private accounts of the testator in other branches of the bank and paid the whole of the moneys so withdrawn for safety into the personal account of the testator at the Neutral Bay branch of the bank. This account was then in credit to £6,505 8s. 0d. and of this sum £6,500 was invested in the loan leaving only £5 8s. 0d. to the credit of the account. The bonds (£6,500 face value) were procured by the manager of the Neutral Bay branch for the testator on his application. The application form provided that interest should be credited to the testator's account at this branch. The bank manager gave the testator a safe custody receipt for the bonds.

When the testator and the plaintiff returned to the flat the testator told the plaintiff that he did not mean to buy the bonds in his name. He meant to buy them in her name and he then handed her the receipt and told her to put it away. He said: "They're yours". The next day the testator and the plaintiff went to the Northbridge branch and withdrew the whole of the moneys, totalling £513 7s. 4d. from that account and paid £513 of them into a new trust account No. 33899 opened by the testator in trust for the plaintiff at the Neutral Bay branch of the bank. This was done after the testator had said the money would be handier there for the plaintiff when he died and she would have to have ready cash. The plaintiff pointed out to the testator that he had put all the money in his private account at the Neutral Bay branch of the bank, except £5 8s. 0d., into the loan and that the moneys in the new trust account at Neutral Bay would have to be used to pay the bills and living expenses until he received some moneys from his shares. The testator said that he would refund these moneys when he got the cheques in from his shares. He said it would not make any difference because it would be all hers in any case. The testator wanted to withdraw even the £5 8s. 0d. from his private account and pay it into this trust account but the plaintiff advised him not to do so because it would close the account and he might need it. Just before Christmas 1949, the testator went to the Neutral Bay branch of the bank to see the bank manager and find out if the bonds could be transferred into the name of the plaintiff. The testator on his return told the plaintiff that the manager was not there but the accountant said that it could be

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done. The testator told the plaintiff that after Christmas he would sell the remaining shares and fix up everything together. But shortly afterwards he became very ill, went into hospital and remained there until he died.

His Honour, in his reasons for judgment, after pointing out that the plaintiff's claim was against the estate of a deceased person and that in such cases the evidence must be scrutinised with care, said that in some respects the plaintiff's claim was sufficiently strong to convince him that effect should be given to it. His Honour said that he accepted the plaintiff's evidence and held that her evidence was sufficient to establish an intention on the part of the testator to declare himself a trustee for the plaintiff of the moneys deposited in the various trust accounts, subject to his reservation of a life interest in them, and thereby to create in each instance a present trust of these moneys. £3,500 of these moneys were withdrawn from the accounts other than the account in the Northbridge branch and invested in bonds and this led his Honour to follow these trust moneys into these bonds and make the first declaration under appeal. The moneys originally deposited at the Northbridge branch were withdrawn and paid into the new trust account at Neutral Bay and it was the moneys standing to the credit of this account at the date of death that are the subject of the second declaration under appeal.

The evidence discloses that the testator withdrew some small sums credited for interest in some of the trust accounts at an early stage and must have obtained temporary possession of the passbooks for this purpose, although the plaintiff does not appear to have been aware that he had done so. This circumstance together possibly with the circumstance that the testator did not deposit the moneys in bank accounts opened in the name of the plaintiff but deposited them in accounts opened in his own name in trust for her so that they remained under his control may have led his Honour to the doubt he said he had " as to whether the deceased intended that the interest upon the money in the account should go to the plaintiff during his lifetime, or as to whether he intended to reserve to himself the right to the interest on the account for the term of his life ". His Honour was not prepared to hold that the plaintiff was entitled to the whole of the bonds worth £6,500. He said : " The plaintiff says that the deceased then stated that the bonds were to be for her. He gave her the safe custody receipt which he had received from the bank. He had invested all the money in the bonds in the one way without reference to any trust in favour of the plaintiff, and so far as they are concerned I am not

satisfied that he intended to constitute himself in any way a trustee of the bonds, although I think that he may very well have intended to give them to the plaintiff. On the other hand, if he did have that intention I do not think that he did do so, and so far as the bonds are concerned there is only an imperfect gift by the deceased, if he had the appropriate intention, and no trust constituted in respect of which he was a trustee. The result is that to the extent of capital moneys withdrawn from the trust accounts, which went into the bonds, the plaintiff is entitled to succeed; also I think that she is entitled to succeed to the extent to which money is found in the remaining trust account, this is the Neutral Bay account, expressed to be in the name of the deceased as trustee for her at the time of his death ".

There is, of course, no equity to perfect an imperfect gift and if the testator did not intend to hold the bonds in trust for the plaintiff but to give them to her the gift would not be perfected without delivery. It may be that the handing of the safe custody receipt to the plaintiff is not sufficient evidence of delivery. On this question we do not express any opinion for there is no cross appeal and the only question before us is whether the two declarations under appeal can be sustained.

In the course of his reasons his Honour said :—" The plaintiff's evidence as to the opening of those accounts would, if accepted, establish, I think, that the deceased intended at the time that they were opened to set up a present trust in favour of the plaintiff. I have some doubt of just what the present trust would have been, but I have no doubt that it was a present trust. The doubt I have is as to whether the deceased intended that the interest upon the money in the account should go to the plaintiff during his lifetime, or as to whether he intended to reserve to himself the right to the interest on the account for the term of his life. In either event, as I say, I think that he intended a present trust on the plaintiff's evidence which I accept. In view of the fact that I have some doubt, I think that I should find against the plaintiff as to the interest and find that the intention really was that the amount of money which was put into the bank, £500 or £1,000 as the case may be, should be hers, subject to his reservation of a life interest in it ". Counsel for the appellants seized upon this passage in his Honour's reasons to submit a novel contention. The submission commenced with a reference to the established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries. It was then said that

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because his Honour had a doubt whether the present trust included a trust of the income of the deposits for the plaintiff during the life of the testator the plaintiff had failed to establish any trust at all. This submission is in our opinion quite fallacious. Equity will only enforce a trust to the extent to which the intention to create a trust is clear. But this does not mean that a plaintiff who seeks to prove too wide a trust must fail altogether. The court may hold that a trust has been established less extensive than that claimed and this is a trust which the court should and will enforce. In support of the submission we were referred to certain passages in the judgments in *Smith* v. *Matthews*; *In the Matter of Matthews' Settlement* (1) and *Rochefoucauld* v. *Boustead* (2) relating to s. 7 of the Statute of Frauds (29 Car. 2, c. 3) in which it is pointed out that the evidence in writing of a trust of land required by the section is evidence of the whole of the terms of the trust. The plaintiff's claim in the present case does not relate to lands but to personalty but it was submitted that by analogy the plaintiff fails to establish any declaration of trust at all unless the court can be certain as to all its provisions. Section 7, as it is pointed out in the cases, does not require that a trust of land should be created by writing. The trust may be created orally. All that the section requires is that the trust so created should be manifested and proved by writing. If the present plaintiff was seeking to establish a trust of land, the fact that she sought to establish that she had an immediate interest in possession would not prevent the court from finding that there was a trust but that it was only a trust in reversion, subject to some intermediate interest and the evidence in writing required by the section would be of the trust so proved.

The next submission on behalf of the appellant was that the evidence as a whole does not establish that any immediate trust was created in favour of the plaintiff by the opening of the various trust accounts and that at the most it established an intention on the part of the testator, whilst retaining the complete beneficial ownership of these moneys during his lifetime, to leave the plaintiff whatever moneys were left in the accounts at the date of his death. It was submitted that this indicated no more than an intention to make a testamentary gift and that such an intention can only be carried out by a duly executed will. If this is the true result of his Honour's findings we would agree. But in our opinion it is not.

(1) (1861) 3 De G. F. & J. 139, at pp. 149-153 [45 E.R. 831, at pp. 835-836].

(2) (1897) 1 Ch. 196, at pp. 205-206.

We think that the true result is that reached by his Honour, namely, that the testator intended to create a present trust and to clothe the plaintiff with all the rights of a *cestui que trust* immediately upon the deposit of the moneys in the various trust accounts or at latest when he told her that the moneys had been deposited for her benefit and handed her the passbooks. An immediate trust would still be created in favour of the plaintiff although the testator intended to reserve to himself the right to withdraw any interest which accrued on the accounts during his lifetime. The evidence does not support the suggestion that all that the testator ever intended to do was to leave the plaintiff whatever moneys happened to be in the trust accounts at the date of his death. It is true that the testator withdrew some of the interest from some of the accounts but these withdrawals would at most lend support to his Honour's doubt whether the trust was an immediate trust in possession or a trust of the capital in reversion. The testator never attempted to withdraw any of the capital except with the consent of the plaintiff. He realized shares against his own judgment because she preferred the money to be in Savings Bank accounts rather than invested in shares which she did not understand. He consulted her with respect to the re-investment of the trust funds in bonds so as to derive a higher interest yield. Some part of the moneys on deposit in the trust account at Neutral Bay were used to pay living expenses, but this was done with the consent of the plaintiff, and indeed at her suggestion. All this evidence is consistent and consistent only with an intention on the part of the testator to create an immediate trust of the moneys as they were deposited in the various trust accounts from time to time.

The issue in dispute on the appeal is essentially one of fact and decisions relating to facts having some distant similarity to the present facts are not of much assistance. We were referred to some of those decisions and in particular to that of *Williams* J. in *Teasdale* v. *Webb* (1). The relevant principles of law are there discussed but the application of these principles to the facts of the present case leads to the opposite conclusion to which his Honour came on the facts then before him. Section 43 of the *Commonwealth Bank Act* 1911-1932 to which his Honour referred in that case is now s. 145 of the *Commonwealth Bank Act* 1945-1953. This section authorizes the opening of trust accounts in the Savings Bank and provides that the Savings Bank may pay any amount standing to the credit of the account to the trustee, and that the receipt of the money by the trustee shall be a discharge to the

(1) (1940) 57 W.N. (N.S.W.) 151.

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Savings Bank. But the section also provides that the Savings Bank may, if it thinks fit, require the consent of the beneficiary before any payment out is made to the trustee and also that, although any person other than the trustee shall not have any claim in respect of any money so deposited, nothing in the section shall relieve the trustee from any liability to account for or apply the money in accordance with law. The effect of *Jolliffe's Case* (1) is that the mere opening of an account under the section by one person in trust for another is not necessarily sufficient to make that person a trustee for the other person. All the relevant circumstances must be examined in order to determine whether the depositor really intended to create a trust. Even where it is held that a trust is intended it is still material to ascertain its terms. The fact that the opening of the account was not communicated to the purported beneficiary may lead to an inference that the trust, if any, was not intended to be irrevocable: *In re Cozens*; *Green* v. *Brisley* (2); *Radcliffe* v. *Abbey Road and St. John's Wood Permanent Building Society* (3). But where a person not only opens an account but hands the passbook to the purported beneficiary and thereafter consults that beneficiary on the basis that the latter is the beneficial owner of the moneys or of some interest in them, the evidence tends strongly towards establishing that the depositor intended to create an immediate trust in favour of that other person. The fact that the depositor reserved a right to revoke the trust would not prevent an immediate trust arising and if the trust was not revoked by the depositor in his lifetime the beneficiary would be just as much entitled to the money as a beneficiary under an irrevocable trust: *Beecher* v. *Major* (4); *Fadden* v. *Deputy Federal Commissioner of Taxation* (5).

The mere fact that the donor intends the trust to take effect in possession upon his death does not make the gift testamentary. As it is pointed out in the joint judgment of *Dixon* J. and *Evatt* J. in *Russell* v. *Scott* (6): "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" (7).

(1) (1920) 28 C.L.R. 178.
(2) (1913) 2 Ch. 478.
(3) (1918) 119 L.T. 512.
(4) (1865) 2 Dr. & Sm. 431 [62 E.R. 684].
(5) (1943) 68 C.L.R. 76, at p. 83.
(6) (1936) 55 C.L.R. 440.
(7) (1936) 55 C.L.R., at p. 454.

The trust proved in the present case is not a trust of the amount which happened to be to the credit of the trust accounts at the death of the testator. If that had been the trust it would have failed in the case of all the accounts, except the Neutral Bay account, irrespective of the question whether such a gift would be of a testamentary nature, because all the moneys had been withdrawn from the other accounts in the lifetime of the testator. The trust that arose on his Honour's finding was an irrevocable trust attaching to the moneys upon their deposit in the trust accounts, although the beneficial enjoyment was postponed until the death of the testator, and it would have been a breach of trust for the testator to have disposed of these moneys apart from the interest without the consent of the plaintiff. The passbooks contain a notice that withdrawals may be made by the depositor personally on production of the passbook and the necessary completed withdrawal form or to the bearer of a completed withdrawal form signed by the depositor and presented with the passbook. The presentation of the passbook is therefore required before any moneys can be withdrawn from an account and the handing of the passbooks to the plaintiff by the testator should have ensured that no moneys were withdrawn from the accounts without her consent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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J. B.