[HIGH COURT OF AUSTRALIA.]

RUSSELL . . . . . APPELLANT;
DEFENDANT,

AND

SCOTT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936

SYDNEY
April 30;
May 1;
Aug. 12.

Starke, Dixon, Evatt and McTiernan JJ.

Gift—Title by survivorship—Resulting trust—Presumption—Rebuttal—Aunt and nephew—Joint banking account—Deposits by aunt only—Balance at death of aunt—Intention to benefit nephew.

An elderly lady and her nephew opened a joint account in the Commonwealth Savings Bank by the transfer of a large sum from an account in the lady's name. The nephew, who assisted his aunt in all her matters of business, did not contribute to the account, which was kept in funds by payments from the aunt's investments. The account was used solely for the purpose of supplying the aunt's needs. Moneys for this purpose were withdrawn by the nephew as required, the withdrawal slips being signed by both the aunt and the nephew. When the account was opened the aunt told the nephew and others that any balance remaining in the account at her death would belong to the nephew, and it was found as a fact that the aunt intended her nephew to take beneficially whatever balance stood to the credit of the account at her death. Upon his aunt's death the nephew claimed the balance of the account.

Held that the presumption of a resulting trust in favour of the aunt and her estate was rebutted; the nephew's legal right by survivorship to the balance of the account prevailed and was not the subject of any resulting trust.

Decision of the Supreme Court of New South Wales (*Nicholas* J.): *Scott* v. *Russell*, (1935) 35 S.R. (N.S.W.) 414; 52 W.N. (N.S.W.) 159, reversed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Percy Eric McDonnell Scott, a beneficiary under the will of Katie Russell, deceased, against Percy John Russell, executor of the will and also a beneficiary, for a declaration that certain moneys claimed by the defendant as a gift to him by the deceased in her lifetime formed part of the estate of the deceased.

The following statement of facts is substantially as set forth in the judgment of *Nicholas* J. :—

The deceased, who died on 17th January 1934, by her will dated 11th September 1933, after making certain bequests to charities, gave devised and bequeathed the residue of her real and personal property to the defendant, her nephew, and to the plaintiff, and she appointed the defendant executor of her will. At the date of her death the sum of £1,395 12s. 4d. was standing to the credit of an account in the Commonwealth Savings Bank of Australia in the joint names of herself and the defendant, together with £15 8s. interest accrued thereon, and there was also standing to the credit of an account in the name of the defendant the sum of £75 5s., which was the balance then remaining of certain moneys drawn out of the joint account and placed by the defendant to his own credit. The plaintiff claimed that all these moneys formed part of the estate of the deceased. The defendant claimed that they were his. He claimed that in February 1932 a joint tenancy was created by the deceased, and that he as the survivor of the joint tenants was entitled to the balance which remained in the joint account. As to the sum of £75 5s., he claimed that it was the balance of an amount withdrawn by him from the joint account to use for certain purposes of the deceased and that upon her death he was entitled to use it as he thought fit. In his statement of defence the defendant said that he had made certain payments out of the moneys standing to the credit of the joint account and he claimed " to be entitled to the balance thereof as a gift by the said Katie Russell to me in her lifetime." It was not suggested that the defendant gave any consideration for what he received, or that the gift alleged was made at any time other than February 1932. In his particulars the defendant stated

H. C. OF A. 1936. RUSSELL v. SCOTT.

that he did not set up a *donatio mortis causa*. Between 1912 and 1930 he looked after, or assisted in looking after, the property of the deceased, mainly by doing repairs, and from 1930, when his father died, until the death of the deceased he managed her financial affairs and paid her bills. The deceased was a spinster, at the time of her death aged seventy-six years, who for some years prior to her death had lived at a boarding-house at Cremorne, a suburb of Sydney. She was a woman of some means, and when she died the gross value of her estate was estimated at £15,732. From the end of 1931 until her death she never went to Sydney alone. She was usually accompanied by the defendant, who visited her almost daily, and her physical infirmities were such that for some time she found it difficult to move about at all without help. In February 1932 she opened an account with the Commonwealth Savings Bank of Australia in the name of herself and the defendant, by withdrawing from an account which she had in the same bank the total amount standing to its credit, namely, £1,160 2s. 10d., and depositing that sum to the credit of the joint account. The moneys in her own account had been made up of the interest which accrued from time to time on certain Commonwealth bonds and of the dividends from her investments, and the joint account continued to be fed up to the date of the deceased's death from these two sources, the defendant not contributing anything at any time. As to the circumstances in which the joint account was constituted *Nicholas* J. accepted the evidence of the managing clerk for the firm of solicitors which for many years had attended to the legal work of the deceased. The managing clerk said that in February 1932 the deceased had called to see him immediately after she had opened the joint account. She handed him a pass-book in the name of herself and her nephew, the defendant, and told him that "she had arranged that Percy" (the defendant) "would look after her, pay her accounts and any money remaining in that bank would be Percy's." The occasion of the opening of the account was explained by the defendant. He said that in February 1932 the deceased missed several withdrawal forms which she had promised to sign. He was afraid that something had happened and, as he said, "immediately rushed across to town to the bank and discovered that everything was in order." At the bank

he explained to an officer who he was and what was his relationship to the deceased, and then suggested the opening of a joint account, explaining that he had discussed the matter with the deceased some time previously. The bank officer agreed, saying that "it would be a precaution," and the defendant repeated this conversation in some detail to the deceased before accompanying her to the bank, when the joint account was opened. After the opening of the joint account the business relations between the deceased and the defendant remained, in substance, as they had been before. He paid all her bills, allowing her to have a few small sums for pocket money. According to a note in the bank pass-book the account might have been arranged as "both to sign or either to sign." In practice both signed. The deceased signed a number of withdrawal forms, of which the defendant kept a supply. He added his signature and withdrew a sum of cash as occasion required, the cash withdrawn being applied by the defendant in discharging the liabilities of the deceased. The moneys so withdrawn during the period between the date of the opening of the joint account and the date of the death of the deceased amounted to £940. Of this amount, the sum of £100 was withdrawn on 15th January 1934 and paid into an account specially opened by the defendant in October 1933; the sum of £75 5s. claimed by the defendant was the balance of that sum of £100 and of the account. The defendant said he was authorized, and indeed instructed, by the deceased to draw out whenever he saw fit during her lifetime all the moneys remaining in the joint account, and that he undertook to do so at some time when he might regard the deceased as seriously ill.

Nicholas J. held that the moneys referred to in the statement of claim formed part of the estate of the deceased. His Honour said that in law the balance remaining in the joint account at the death of the deceased became vested in the defendant as the survivor of two joint tenants, and the relationship between them had for some time been such as to furnish evidence of an intention on the part of the deceased to benefit the defendant, apart from the benefit conferred by the will, and, as far as the balance remaining at the death of the deceased was concerned, to rebut the presumption

H. C. OF A. 1936. RUSSELL v. SCOTT.

of a resulting trust arising from the manner in which the joint account had been made up. His Honour held that upon the evidence the attempted gift was ineffective, notwithstanding the clear expression by the deceased of an intention to benefit the defendant after her death; that the subject matter of the gift was in equity under the control of the deceased during her lifetime, and the benefit which she sought to confer on the defendant after her death was of a testamentary character: *Scott* v. *Russell* (1).

From this decision the defendant appealed to the High Court.

Mason K.C. (with him *Wickham*), for the appellant. The test is: What was the intention of the deceased as manifested at the time the joint account was opened? Did she intend to do something to operate on her death? or did she intend then to make a gift—subject to a power of revocation in whole or in part—subject to operations on the account during her lifetime? Under clause 23 of Statutory Rule No. 77 of 1928, upon the death of a party to a joint account opened in the Commonwealth Bank of Australia, the balance to the credit of the account vests in the survivor. The onus is upon the respondent to show why the right of survivorship does not apply as between the deceased and the appellant. In the absence of a conflict between law and equity the equitable title follows the legal title. There was an absolute gift to the appellant as joint tenant by the deceased during her lifetime; therefore at her death he became absolutely entitled to the balance standing to the credit of the joint account. The joint account was opened not merely as a matter of convenience for the deceased, but also to confer a benefit upon the appellant. The control of the appellant over the account was not less than that of the deceased (*Re Reid* (2)). The retention of a power of revocation either in whole or in part does not defeat the gift, as the evidence establishes the intention of the deceased to benefit the appellant (*Beecher* v. *Major* (3)). The surrounding circumstances do not disclose a resulting trust in favour of the deceased (*Wheeler* v. *Smith* (4); *Marshal* v. *Crutwell* (5); *Fowkes*

(1) (1935) 35 S.R. (N.S.W.) 414; 52 W.N. (N.S.W.) 159.
(2) (1921) 64 D.L.R. 598.
(3) (1865) 2 Dr. & Sm. 431; 62 E.R. 684.
(4) (1860) 1 Giff. 300; 65 E.R. 928.
(5) (1875) L.R. 20 Eq. 328.

v. *Pascoe* (1); *Standing* v. *Bowring* (2); *Commissioner of Stamp Duties (Q.)* v. *Jolliffe* (3); *Halsbury's Laws of England*, 2nd ed., vol. 15, p. 715, par. 1246). Even if there had been an imperfect gift, the appointment of the appellant as executor perfected the gift (*Strong* v. *Bird* (4); *In re Innes*; *Innes* v. *Innes* (5); *In re Pink*; *Pink* v. *Pink* (6); see also *In re James*; *James* v. *James* (7)). Up to the time of her death the deceased intended that the gift should stand and have effect (*Matthews* v. *Matthews* (8)). This was a gift *inter vivos*, and it does not lose that character merely by reason of the collateral arrangement between the parties as to the withdrawing of moneys from the account. There is no equity attracting the equity jurisdiction to make the moneys in the account moneys belonging to the estate. The right of survivorship applies in favour of the appellant.

Maughan K.C. (with him *Miller*), for the respondent. The evidence supports the finding of the court below that the moneys standing to the credit of the banking account remained the property of the deceased up to the date of her death, and in equity they belonged to her absolutely. In rebutting the resulting trust the appellant proved the case against himself. The subject matter of the gift said to have been made when the joint account was opened was not then in existence. A gift cannot be made of property to come into existence *in futuro*.

[DIXON J. referred to *In re Burroughs-Fowler*; *Burroughs-Fowler's Trustee* v. *Burroughs-Fowler* (9).]

This court should accept the findings of fact made by the judge of first instance. There was no immediate gift to the appellant. Assuming there was a gift made at the time of the opening of the account, that gift was, and could only be, in respect of the moneys then deposited; it did not, and could not, include the moneys subsequently credited to the account. The moneys in the account belonged beneficially to the deceased until her death; therefore the only way she could dispose of them as at her death was by will.

(1) (1875) L.R. 10 Ch. 343.
(2) (1885) 31 Ch. D. 282.
(3) (1920) 28 C.L.R. 178.
(4) (1874) L.R. 18 Eq. 315.
(5) (1910) 1 Ch. 188.
(6) (1912) 2 Ch. 528.
(7) (1935) Ch. 449.
(8) (1913) 17 C.L.R. 8.
(9) (1916) 2 Ch. 251.

H. C. OF A. 1936. RUSSELL v. SCOTT.

The account was treated by both as the deceased's ordinary current income account; at no stage did the appellant use any of the moneys for his own purposes; he simply acted as her agent to withdraw moneys from the account as occasion required. The law is correctly laid down in *Owens* v. *Greene* (1); see also *McDowell* v. *M'Neilly* (2) and *O'Flaherty* v. *Browne* (3). As regards the cases referred to on behalf of the appellant, it is pointed out that there will always be two features, (*a*) that there had been an immediate gift at the time of the deposit or transfer of the property, and (*b*) that the gift was of a definite asset then in existence, and the cases have generally turned on the question whether the donor retained control of the asset during his lifetime or not. For example, *Beecher* v. *Major* (4) is distinguishable because here the deceased retained the beneficial interest in the moneys until her death, and *Standing* v. *Bowring* (5) is distinguishable because there the donor "had intended to completely divest herself of the property." Where a gift is sought to be made by means of a joint account, and the intention is that the donee is only to take on the death of the donor, the gift will not take effect unless it be made in accordance with the provisions of the *Wills, Probate and Administration Act* (*Hill* v. *Hill* (6); *Shortill* v. *Grannan* (7); see also *Basket* v. *Hassell* (8)). *Re Reid* (9) is distinguishable because there one lump sum was actually deposited at the date of the alleged gift, whereas here the bulk of the moneys claimed came into existence at a subsequent date, and the balance remaining at death was not in existence when the alleged gift took place. The judgment of *Hodgins* J. in that case (10) is correct. *Matthews* v. *Matthews* (11) was a case of *donatio mortis causa*. The facts here show that the deceased did not intend in any way to benefit the appellant during her lifetime.

Mason K.C., in reply. The matter should be decided in the light of all the surrounding facts and circumstances (*Fowkes* v. *Pascoe* (12)).

Cur. adv. vult.

(1) (1932) I.R. 225.
(2) (1917) 1 I.R. 117.
(3) (1907) 2 I.R. 416.
(4) (1865) 2 Dr. & Sm. 431; 62 E.R. 684.
(5) (1885) 31 Ch. D. 282.
(6) (1904) 8 Ont. L.R. 710.
(7) (1920) 55 D.L.R. 416.
(8) (1882) 107 U.S. 602; 27 Law. Ed. 500.
(9) (1921) 64 D.L.R. 598.
(10) (1921) 64 D.L.R., at pp. 601-607.
(11) (1913) 17 C.L.R. 8.
(12) (1875) L.R. 10 Ch., at p. 347.

The following written judgments were delivered :—

STARKE J. Miss Katie Russell (whom I shall call the donor) was an old lady of considerable wealth. She had deposited moneys in her own name in the Commonwealth Savings Bank. Into her account with this bank she paid her savings, and out of it she paid her current expenses. But she was not very active, and was somewhat forgetful and careless : she once lost, or mislaid, her savings-bank pass-book, and later several forms for withdrawing money from the bank. The appellant, Percy John Russell, was her nephew, and he attended to her business and other affairs, and treated her with much kindness and consideration. About February 1932, when the donor lost or mislaid some forms for withdrawing money from the savings bank, the appellant inquired at the bank, and found that the forms had not been used. He had some conversation with the manager, or an officer, of the bank on the subject, and it was suggested as a precautionary measure that an account should be opened in the names of the donor and her nephew, the appellant. The donor agreed, and a joint account in her name and that of the appellant was opened with the savings bank. Into this account were transferred the moneys standing to the credit of the old account, and thereafter the donor's savings were paid into the joint account, and her expenses were drawn from that account. Substantially, the appellant operated the account by means of the savings-bank pass-book and withdrawal forms signed by both the donor and himself. Soon after the joint account was opened, the donor saw her solicitor's managing clerk ; she had the pass-book with her, and she told the clerk that her nephew, the appellant, would look after her and pay her accounts, and that any money remaining in the account at her death would be her nephew's. She died in January 1934, leaving a will, whereby she appointed the appellant her executor, and devised and bequeathed all the residue of her real and personal property to the appellant and Percy Eric Macdonnell Scott in equal shares. Percy Eric Macdonnell Scott, the respondent on this appeal, brought an action against the appellant, claiming a declaration that the moneys standing to the credit of the joint account of the donor and the appellant, and also a sum of £75 drawn from the joint account and standing to the credit of

H. C. OF A. 1936. RUSSELL v. SCOTT. Starke J.

the account of the appellant in the savings bank, formed part of the estate of the donor. *Nicholas* J., who heard the action, found that the joint account was opened to protect the donor against the risk of some unauthorized person obtaining and using withdrawal forms signed by her, and that she meant the appellant to have what was left at her death, but that both she and the appellant intended that the account should be used to meet her needs, or to " pay her way," during her life. The learned judge concluded that the balance in the joint account did not pass to the appellant, because the benefit which the donor intended for him was testamentary in its nature and not made in accordance with the formalities required by the seventh section of the *Wills, Probate and Administration Act* 1898 of New South Wales. An appeal is brought to this Court from that decision.

A testamentary disposition can only be made by will. But a disposition which does not require the death of the donor for its consummation is not testamentary. Thus a voluntary settlement vesting property in trustees for the benefit of the donor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary: it takes effect immediately upon its execution, and is not postponed until after the donor's death (*O'Flaherty* v. *Browne* (1); *Glynn* v. *Oglander* (2); *Masterman* v. *Maberly* (3); *Milnes* v. *Foden* (4); *In the Goods of Robinson* (5); *In the Goods of Morgan* (6); *Governors and Guardians of the Foundling Hospital* v. *Crane* (7); *Tompson* v. *Browne* (8)). A person who deposits money in a bank on a joint account vests the right to the debt or the chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship (*Standing* v. *Bowring* (9); *In re Shields*; *Corbould-Ellis* v. *Dales* (10); *Re Reid* (11); *Lindley* on *Partnership*, 7th ed. (1905), p. 380). The vesting of the right and title to the debt or chose in action takes effect immediately, and is not dependent upon the death of either

(1) (1907) 2 I.R., at p. 434.
(2) (1829) 2 Hagg. Ecc. 428, at pp. 432, 433; 162 E.R. 912, at p. 913.
(3) (1829) 2 Hagg. Ecc. 235, at p. 247; 162 E.R. 845, at p. 850.
(4) (1890) 15 P.D. 105, at p. 107.
(5) (1867) L.R. 1 P. & D. 384, at p. 387.
(6) (1866) L.R. 1 P. & D. 214.
(7) (1911) 2 K.B. 367.
(8) (1835) 3 My. & K. 32; 40 E.R. 13.
(9) (1885) 31 Ch. D. 282.
(10) (1912) 1 Ch. 591, at p. 595.
(11) (1921) 64 D.L.R. 598.

of the persons in whose names the money has been deposited. In short it is not a testamentary disposition. There is nothing in the law to forbid a person depositing moneys in the joint names of himself and his family, or strangers: it is a form of gift, the effect of which has been already stated. But "the rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is prima facie a resulting trust for the transferor" (*Standing* v. *Bowring* (1); *Hanbury's Modern Equity* (1935), pp. 210-224).

It is contended, however, that the presumption has been rebutted in the present case. It is "a question of intention, to be gathered from the special facts and circumstances and the family relations or otherwise of the parties" (*Re Daly*; *Daly* v. *Brown* (2); *Owens* v. *Greene* (3)). Now it is clear, I think, on the findings of *Nicholas* J., that the account was originally opened in the joint names, and subsequently operated, for the convenience and protection of the donor: it was to be used for her purposes and her benefit during her life, and not for the purpose of benefiting the appellant whilst she lived. But the balance of the money "left at her death would be" the appellant's, and *Nicholas* J. has found that she meant him to have what was left at her death. The legal right to the moneys was in the appellant by right of survivorship, and, according to the finding, the donor intended the deposit in the joint names so to operate. Even though she was entitled to have the moneys applied for her own uses during the joint lives, still that is not inconsistent with an intention of conferring a benefit upon the appellant if he survived her (*Standing* v. *Bowring* (4)). The finding of the learned judge is not at all improbable, having regard to the relationship of the parties and the special circumstances of the case. It rebuts the presumption of any resulting trust in favour of the donor and her estate of the balance of the moneys in the joint account. Consequently, the legal right of the appellant to the moneys prevails (*Standing* v. *Bowring* (4); *Fowkes* v. *Pascoe* (5); *In re Shields*; *Corbould-Ellis* v. *Dales* (6)). The same result must follow in

(1) (1885) 31 Ch. D., at p. 287.
(2) (1907) 39 S.C.R. (Can.) 122, at p. 131.
(3) (1932) I.R. 225.
(4) (1885) 31 Ch. D. 282.
(5) (1875) L.R. 10 Ch. 343.
(6) (1912) 1 Ch. 591.

H. C. OF A. 1936.

RUSSELL v. SCOTT.

Starke J.

respect of the payments into the joint account subsequently to the opening of the account, and also as to the sum of £75 which was drawn out of the joint account in the lifetime of the donor to provide for her wants and other expenses (*Fowkes* v. *Pascoe* (1)). Lastly, I should add that the deposit on joint account was not a *donatio mortis causa*, and the appellant did not set up such a case.

The appeal should be allowed, and the action dismissed.

DIXON AND EVATT JJ. An elderly lady of some means and her nephew opened a joint account in the Commonwealth Savings Bank. Her moneys only were to feed the account, which was opened by the transfer of a large sum from an account in her own name. Her nephew assisted her in all matters of business and it seems to have been considered safer and more convenient that the moneys she required should be withdrawn upon the signature of both of them. She also desired that her nephew should benefit by having whatever should stand at the credit of the account at her death, and by means of the account she intended to effectuate this desire. But until her death the account was to be used for the purpose of supplying her wants. At her death an amount of £1,395 12s. 4d. stood at the credit of the account, and the question is whether the nephew is beneficially entitled to this sum and to a small sum of £75 which was drawn out and placed to his own account just before her death.

We are thus called upon to decide whether the survivor of two persons opening a joint bank account is beneficially entitled to the balance standing at credit when the other dies, if all the moneys paid in have been provided by the deceased acting with the intention of conferring a beneficial interest upon the survivor in the balance left at his or her death but not otherwise, and of retaining in the meantime the right to use in any manner the moneys deposited.

The contract between the bank and the customers constituted them joint creditors. They had, of course, no right of property in any of the moneys deposited with the bank. The relation between the bank and its customers is that of debtor and creditor. The aunt and the nephew upon opening the joint account became jointly entitled at common law to a chose in action. The chose in action

(1) (1875) L.R. 10 Ch., at p. 349.

consisted in the contractual right against the bank, i.e., in a debt, but a debt fluctuating in amount as moneys might be deposited and withdrawn. At common law this chose in action passed or accrued to the survivor. Indeed it may be said that, in the case of the Commonwealth Savings Bank, the legal right of survivorship is statutory (See Statutory Rule No. 77 of 1928, clause 23).

The right at law to the balance standing at the credit of the account on the death of the aunt was thus vested in the nephew. The claim that it forms part of her estate must depend upon equity. It must depend upon the existence of an equitable obligation making him a trustee for the estate. What makes him a trustee of the legal right which survives to him ? It is true a presumption that he is a trustee is raised by the fact of his aunt's supplying the money that gave the legal right a value. As the relationship between them was not such as to raise a presumption of advancement, prima facie there is a resulting trust. But that is a mere question of onus of proof. The presumption of resulting trust does no more than call for proof of an intention to confer beneficial ownership ; and in the present case satisfactory proof is forthcoming that one purpose of the transaction was to confer upon the nephew the beneficial ownership of the sum standing at the credit of the account when the aunt died. As a legal right exists in him to this sum of money, what equity is there defeating her intention that he should enjoy the legal right beneficially ? Both upon principle and upon English authority we answer, none. English authority is confined, so far as we can discover, to cases of husband and wife. But there is much authority to the effect that where a joint bank account is opened by husband and wife with the intention that the survivor shall take beneficially the balance at credit on the death of one of them that intention prevails, and, on the death of the husband, the wife takes the balance beneficially, although the deceased husband supplied all the money paid in and during his life the account was used exclusively for his own purposes. The first case appears to have occurred in the Court of Probate. In *Williams* v. *Davies* ; *In the Goods of Williams* (1) Lord *Penzance*, as he became, held that the wife took by survivorship a sum paid by her husband into a joint account " as a provision

(1) (1864) 3 Sw. & Tr. 437 ; 164 E.R. 1344 ; 33 L.J. P. 127 ; 10 L.T. 583.

H. C. OF A. 1936. RUSSELL v. SCOTT. Dixon J. Evatt J.

for her." It does not, however, appear whether the husband intended that during his life he should be at liberty to use it himself. But in *In re Pattinson*; *Graham* v. *Pattinson* (1) the facts were that the husband opened a joint account in the names of himself and his wife and alone paid in and withdrew money, using it for purposes of his business. He paid in £700 and, in spite of operating upon the account in the course of his business, he never reduced the balance below that amount. It was proved that he had stated that he opened the joint account with the object of giving his wife after his death an absolute interest in the balance. *Chitty* J. held that the wife was entitled to the balance at credit at the time of her husband's death. On the question of fact whether the husband did intend her to take this balance beneficially, the learned judge said that the circumstance that during her husband's life she had never made use of the account for the purposes of his business, i.e., that she had not been entrusted with it as his agent, went far to show that he had opened it as a joint account in order that his widow might have the benefit on his death.

In *Marshal* v. *Crutwell* (2), where a husband opened a joint account in the names of his wife and himself with power to either to draw cheques thereon, *Jessel* M.R. had decided against the wife's beneficial interest in the balance at her husband's death. He so decided, notwithstanding that, according to the bank manager, the husband had remarked that the balance of the account would belong to the survivor of himself and his wife. But he so decided only because, as he said, looking at the facts as a juryman, he thought the circumstances showed that it was a mere arrangement for convenience and not intended to be a provision for the wife in the event which might happen that at the husband's death there might be a fund standing to the credit of the banking account. If Sir *George Jessel* had found that the husband did intend such a provision, it seems almost certain that he would have considered his widow entitled to the balance beneficially. For he begins his judgment with the legal propositions which would lead to that conclusion. He says :—" As I understand it, the law is this : The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of

(1) (1885) 1 T.L.R. 216.

(2) (1875) L.R. 20 Eq. 328.

stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust" (1).

In *In re Harrison*; *Day* v. *Harrison* (2) a husband transferred a drawing account into the name of himself and his wife with power to either to draw cheques. He did not inform his wife that he had done so and all payments in and withdrawals were made by him. *Russell* J., as he then was, held that the wife was entitled beneficially to the amount standing to the credit of the account at her husband's death. He considered that it was intended by the husband that the moneys standing on current account in their joint names should belong to the survivor. No one disputed that prima facie the wife, as survivor, was entitled beneficially to the credit balance, but it was contended that a contrary intention on the part of the husband appeared (3). *Russell* J. discussed the decision of *Jessel* M.R. in *Marshal* v. *Crutwell* (4) and distinguished it on the fact of intention. In *Guran Ditta* v. *Ram Ditta* (5) there is a dictum of the Privy Council which was probably based upon the decisions we have mentioned. (See also *Gosling* v. *Gosling* (6).)

The fact that these cases arose between husband and wife affects only the burden of proof. In a case where there is no presumption of advancement, satisfactory affirmative proof of an intention to confer a beneficial interest supplies the place of the presumption. Once it appears, as it does in the present case, that a definite intention existed that the balance at the credit of the bank account should belong to the survivor, these cases become, in our opinion, indistinguishable.

In principle there is no reason why, when at law a chose in action accrues to the survivor of two persons in whom it was jointly vested,

(1) (1875) L.R. 20 Eq., at p. 329.
(2) (1920) 90 L.J. Ch. 186.
(3) (1920) 90 L.J. Ch., at p. 189.
(4) (1875) L.R. 20 Eq. 328.
(5) (1928) L.R. 55 Ind. App. 235, at p. 240.
(6) (1855) 3 Drew. 335; 61 E.R. 931.

H. C. OF A. 1936.

RUSSELL v. SCOTT.

Dixon J. Evatt J.

equity should fix the survivor with a resulting trust in favour of the personal representatives of the deceased who furnished the value it possesses, if the joint chose in action was so vested by the deceased with the purpose of imparting beneficial ownership to the survivor on his death. The reason which is assigned for such a resulting trust rests at bottom upon the notion that the deceased, by intending to reserve the right in her lifetime of applying all or any of the money in the account for her own purposes and by continuing in fact to enjoy the use of that money, retained the full beneficial ownership of the property which in law vested in herself and her nephew jointly in consequence of the account standing in the names of both of them. For it is said that the deceased's intention that her nephew on surviving her should take the amount of the bank account is a testamentary wish to which effect could be given only by a duly executed will. This must mean that, while retaining full beneficial property in a corpus, she intended that on her death some other person should succeed to her property in that corpus or to some interest therein to which he was not before entitled either absolutely or contingently, and to which the law gave him no title to succeed. It is only in this sense that an intention to benefit can be said to be testamentary. 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 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 support of the conclusion that the moneys at the credit of the bank account formed part of the deceased's estate, reliance was placed upon *Owens* v. *Greene* (1) and upon some Canadian decisions. In *Owens* v. *Greene* the court reached the conclusion that the survivors were not entitled to the proceeds of certain deposit receipts severally taken by the deceased in their respective names and his own jointly, with power to either to draw. It appeared that, although he treated the moneys as still at his disposal while living, it was his desire that the survivors should be entitled on his death to the moneys represented by the respective receipts. It is not easy to discover from the report which are the steps in the reasoning we have adopted that the learned judges would deny. *Kennedy* C.J. said that the survivors who claimed the deposits might "rebut the presumption of a resulting trust by proving that it was the intention of" the deceased "when putting the moneys to the deposit accounts in the bank, to give" them "respectively, then and there and by that act, a right, that is to say an immediate present right to take the moneys with which he associated their respective names by survivorship (should they survive him), for their own respective use and benefit as surviving joint beneficial owners with him" (2). Consistently with the views we have expressed this statement of the position might be accepted in terms. 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, and as a result of the terms of the contract with the bank, at law too, the deceased might

(1) (1932) I.R. 225.

(2) (1932) I.R., at pp. 237, 238.

H. C. OF A. 1936.

RUSSELL v. SCOTT.

Dixon J. Evatt J.

defeat the right by withdrawing the money. Some of the matters which the judgments mention appear to us to go rather to the question of fact whether the deceased was actuated by a definite intention to confer the beneficial ownership at his death upon the survivor. But, on the assumption that such was his intention, we are unable to agree in the conclusion at which the court arrived. The cases decided in Canada do not follow one line. *Schwent* v. *Roetter* (1), *Weese* v. *Weese* (2), *Re Reid* (3) (Ontario) and *Mathews* v. *National Trust Co.* (4) (Ontario) support the view we have adopted. *Hill* v. *Hill* (5), *Van Wart* v. *Synod of Fredericton* (6) (New Brunswick), *Re Daly* ; *Daly* v. *Brown* (7), *Shortill* v. *Grannan* (8) (New Brunswick) and *Stadder* v. *Canadian Bank of Commerce* (9) (Ontario) appear ultimately to turn on the court's refusal to find the requisite intention in the donor, but contain much reasoning directed against the conclusion which commends itself to us. (See also *Southby* v. *Southby* (10) (New Brunswick).) The view we have adopted accords with the weight of opinion in the United States (See *Harvard Law Review*, vol. 38, pp. 244, 245).

It is, perhaps, desirable to add a reference to *McEvoy* v. *Belfast Banking Co.* (11), because the view taken by the House of Lords of a somewhat similar transaction to that dealt with in *Owens* v. *Greene* (12) and in some of the Canadian cases does not seem to have been affected by the idea that the donor's purpose was testamentary.

For the reasons we have given we think that an erroneous application of this notion is the source of the difficulties which have been felt in the Irish case and in some of the Canadian cases.

The legal and beneficial ownership of the amount at credit of the account on the death of the aunt appears to us to reside in the appellant, and we think the small sum of £75 also belongs to him.

In our opinion the appeal should be allowed and the suit dismissed. The respondent should pay the costs here and below.

(1) (1910) 21 Ont.L.R. 112.
(2) (1916) 37 Ont.L.R. 649.
(3) (1921) 64 D.L.R. 598.
(4) (1925) 4 D.L.R. 774.
(5) (1904) 8 Ont.L.R. 710.
(6) (1912) 5 D.L.R. 776.
(7) (1907) 39 S.C.R. (Can.) 122.
(8) (1920) 55 D.L.R. 416.
(9) (1929) 3 D.L.R. 651.
(10) (1917) 38 D.L.R. 700.
(11) (1935) A.C. 24.
(12) (1932) I.R. 225.

McTIERNAN J. In February 1932 the appellant accompanied his aunt to a bank where moneys stood to her credit and she placed these moneys to a joint account in the name of herself and the appellant. This account was fed solely from the lady's investments and the appellant operated on it by forms signed by both of them. The appellant disbursed the money thus withdrawn in discharging his aunt's liabilities and in providing her with pocket-money. In October 1933 a savings-bank account was opened by the appellant in his own name with money drawn from the joint account, which was also used to replenish it. Moneys were withdrawn by the appellant from the new account solely for the purpose of paying his aunt's accounts. It was found by the Supreme Court that the lady opened the joint account with the intention that the appellant should be entitled to operate on it after her death for his own benefit. This intention was expressed in the words which the court found that she spoke to the managing clerk in her solicitor's office. This witness said: "She handed me a pass-book in the name of herself and her nephew and she told me that she had arranged that Percy would look after her, pay her accounts and any money remaining in that bank would be Percy's." It is clear that the appellant and his aunt became the joint creditors of the bank and, as such, joint owners of a chose in action, the legal interest in which would upon her death accrue to the appellant. The question is whether the appellant as the survivor is under an equitable obligation to exercise his legal right to reduce this chose in action into possession for the benefit of the residuary beneficiaries under her will.

Now under the terms of the assignment to him jointly with the assignor he was bound to exercise the legal rights which he thereby acquired for the purpose expressed by the assignor. His legal interest was saddled with that particular trust during her lifetime. But that trust did not exhaust the interest taken by him as a joint legal owner of the chose in action, and if there was no evidence to rebut the implication of a resulting trust he would be bound to hold the interest unexhausted by the particular trust subject to a resulting trust in favour of the lady or her personal representative. A resulting trust did not arise because it was the intention of the deceased that the appellant should after her decease be entitled to

H. C. OF A. 1936.

RUSSELL v. SCOTT.

McTiernan J.

operate on the account for his own benefit. The legal interest which accrued to him by survivorship was not saddled with a resulting trust in favour of the representative of the deceased's estate and it is not suggested that there is any other trust upon which he is bound to hold his legal rights as survivor. It follows that the respondent, who is one of the residuary beneficiaries, is not entitled either at law or in equity to any share in the realization of the chose in action.

In *Owens* v. *Greene* (1) the evidence was insufficient in the opinion of the court to justify the conclusion that in that case the deceased opened either joint account with the intention that upon his death the legal interest in the chose in action which would accrue by survivorship should be free from a trust for the benefit of his estate.

The conclusion that the appellant is not under any equitable obligation to exercise his legal rights as survivor for the benefit of the residuary beneficiaries is supported by the course of English authority which is traced in the judgment of my brothers *Dixon* and *Evatt*, with which I agree.

The appeal should, in my opinion, be allowed.

Appeal allowed with costs. Decree of the Supreme Court set aside. Suit dismissed with costs.

Solicitors for the appellant, *Makinson & d'Apice.*

Solicitor for the respondent, *L. W. Jones.*

J. B.

(1) (1932) I.R. 225.