ARRANGEMENTS *INTER VIVOS* AS SUBSTITUTES FOR WILLS

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Various reasons may prompt an owner of property to avoid testate or intestate succession to his property on his death. He may wish to reduce to a minimum the amount of property out of which provision may be made by a testator's family maintenance order or a family provision order. He may desire secrecy in the matter of his estate. He may wish to be assured that an object of his bounty will be able to enjoy his property without being delayed by probate formalities.[1] Arrangements designed to give effect to these wishes will be ineffective if they are required to be evidenced in the manner prescribed by the wills legislation and they are not so evidenced. Arrangements calling for that formal evidence are commonly described as testamentary arrangements. It is the purpose of this article to survey certain arrangements *inter vivos* which on the death of an owner of property confer legally enforceable benefits on another person and to consider why they are testamentary or non-testamentary. It is not proposed to deal with secret trusts. They have been considered elsewhere.[2] Nor will there be any consideration of joint ownership apart from joint banking accounts.

Covenant for Post Mortem Disposition.

A desire to confer an enforceable benefit on another after the owner's death may be effected by the owner covenanting that his personal representative will pay money or transfer property.

This will create a liability on the estate which will have priority over the claims of persons eligible to apply for a testator's family maintenance order or family provision order in those jurisdictions which provide that the order may affect only the net estate. A covenant of this kind will not normally provide a means of avoiding estate, probate or succession duties because most jurisdictions disallow as a deduction so much of a liability as was not incurred for an adequate consideration.

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1. It might be thought that the foregoing enumeration of reasons for making such arrangements should include the desire to avoid estate, probate or succession duties. Generally it will be found that any arrangement *inter vivos* which might be adopted in lieu of a will and which involves a shifting of interest or enjoyment on the death of the person making the arrangement is not effective to remove the property from his dutiable estate.
2. E.g. Sheridan, English and Irish Secret Trusts (1951) 67 L.Q.R. 314.

Such a covenant need not be in the form required by the Wills Act in order to be valid. In *Fletcher* v. *Fletcher*[3] Ellis Fletcher by a voluntary deed made in 1829, covenanted with five trustees that if his natural sons, John and Jacob, or either of them survived him, his personal representative would within twelve months after his death pay £60,000 to the trustees to be held upon certain trusts for the natural sons when they attained the age of twenty-one years. By his will made in 1834 the covenantor disposed of his estate upon certain trusts for the benefit of his wife, his two natural sons and his three illegitimate children.

After the covenantor's death one of the natural sons filed a bill in Chancery claiming payment of £60,000 out of the covenantor's assets. The surviving trustees had declined to take proceedings. As one of the arguments against the plaintiff's claim it was said that the deed was a testamentary paper. Sir James Wigram, V.-C., rejected this argument. He appears to have distinguished some earlier authorities on the ground that the covenantor in this case had not reserved a general power of revocation. The question whether the determinative factor is the presence or absence of a general power of revocation will be considered later. What is now important is the recognition that a promise, the performance of which could not be demanded before the covenantor's death, is not on that account a testamentary arrangement.

On the other hand, if the instrument containing the covenant is intended to be inoperative until the covenantor's death it is testamentary.[4] If the deed be delivered in escrow until the covenantor's death it is testamentary.[5]

Thus there is a contrast between a deed containing promises not to be performed until death which is yet operative from the date of its delivery and a deed which is not operative until the covenantor's death. In what sense is the former operative?

The obligation created by a promise in a deed may be unilateral or bilateral. A deed can be a bilateral contract, operative as the promise under seal of each party. Where the promise is bilateral the doctrines developed in relation to obligations arising from agreement will be relevant in determining the operation of the promise. Thus, the doctrine of anticipatory breach arising from repudiation of the promise or impossibility of performance brought about by the act of the party will be applicable. Where this doctrine is applicable it can be seen that the deed containing the promise will be operative before performance is due. Where the deed purports to create only the unilateral obligation of one party without being dependent on the

3. (1844) 4 Ha. 67; 67 E.R. 564.
4. *In the Goods of Morgan* (1866), L.R. 1 P. & D. 214; *Foundling Hospital* v. *Crane* [1911] 2 K.B. 367.
5. *Foundling Hospital* v. *Crane* [1911] 2 K.B. 367.

assent of any other party the doctrine of anticipatory breach would seem to be equally applicable to enable the covenantee to sue for damages if the covenantor repudiated his promise or disabled himself from performing it. Decisions upholding unilateral covenants that the covenantor's personal representative would transfer property and allowing that such covenants can operate from the time of making can only be explained on the basis that the doctrine of anticipatory breach applies to unilateral covenants.

Some judges have suggested that the sole test of whether an instrument is testamentary is whether the instrument is revocable.[6] It has been said, however, that the true test is whether one may gather either from the terms of the instrument or from the accompanying circumstances that it was intended to be testamentary.[7]

The distinction between a presently operative covenant, which is not testamentary, and a will, which is testamentary, does not lie in the revocable nature of a will. Even if the law regarded a will once made as being irrevocable a presently operative covenant still would not be testamentary. The distinction is that the testator ordinarily intends the will to have effect only on his death.

Accepting that the existence of a power of revocation is not the essential test, the question has been raised whether a covenant that property will be transferred on death which is subject to a power of revocation may still be not testamentary. It is said in Salmond and Williams on Contracts[8] that if such a power is not otherwise objectionable it should not make the instrument testamentary.

In Salmond and Williams the view is put that the reservation of a power of revocation is not repugnant to the nature of a deed simply as such. The learned authors point out that such a power could not be reserved in a common law conveyance whether by feoffment or deed of grant.[9] This was not because the reservation of the power was incompatible with the nature of a deed, but because it did not accord with the common law conception of interests in property. Where the deed was concerned with something to which the common law conception of interests in property did not apply a power of revocation could be reserved. They instance a deed containing dispositions operating under the Statute of Uses.[10] They conclude that the fact that a deed is a contract would not seem to render a reservation of a power of revocation invalid.[11]

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6. *Fletcher* v. *Fletcher* (1844), 4 Hare 67; 67 E.R. 564 *per* Wigram V.-C.; *Jeffries* v. *Alexander* (1860), 8 H.L.C. 594 at 644; 11 E.R. 562 at 581 *per* Lord Campbell L.C.; *Re Reid*, 5 Q.L.J. 120 at p. 123 *per* Griffith C.J.
7. *Re Carile* [1920] V.L.R. 427 at p. 436 *per* Cussen J.
8. (1945 edn.) 19.
9. They refer to Co. Litt. 237*a*.
10. They refer to Sheppard's Touchstone 524-5.
11. They support this conclusion by referring to Co. Litt. 237*a* where it is said that a power of revocation may be validly reserved on a covenant to stand seised to uses. See also Touchstone 524.

The objection to this conclusion is that a promise is an expression of intention by the promisor that his future conduct shall be in accordance with his present expression, irrespective of what his will may be when the time for performance arrives.[12] However, the category of illusory promises is not so wide as to extend to all promises conditional on some fact or event that is wholly under the promisor's control. There is an illusory promise only if the words leave their speaker an unlimited option: if they do not purport to limit his future action in any way.[13]

The distinction between illusory promises and promises which give the promisor only a limited option is at the heart of *Beyer* v. *Beyer*,[14] a Victorian case on a covenant not to be performed before the covenantor's death. By an indenture G.H. covenanted (*inter alia*) that on his death his legal personal representative would sell to W.J. and C.H., the shares in a family company which G.H. might own at his death or over which he might then have an option. W.J. and C.H. covenanted that they or their respective legal personal representatives would purchase the shares. The indenture was not executed in accordance with the Wills Act. It was argued that because there was nothing in the deed to prevent G.H. from disposing of all his shares in his lifetime the position was the same as if he had expressly reserved a power of revocation and that, therefore, the indenture was testamentary. Pape J. rejected the argument. The case is explicable in terms of illusory promises or unlimited options. The covenantor (or his personal representative) did not have an unlimited option. Under his covenant he was privileged to dispose of all shares in his lifetime and in that event his personal representative was privileged not to sell any shares but the covenant did not leave the covenantor (and his personal representative) privileged to retain shares until his death and privileged not to sell them.

Must the restraint of the promisor's future freedom be substantial before it can be said that he does not have an unlimited option? Suppose that C covenants that his personal representative will transfer a certain parcel of shares after the covenantor's death but the covenantor reserves power to revoke his promise wholly or partially by giving notice before his death. C's option is between transferring the shares and giving notice. If the option had been between transferring the shares and not transferring the shares the promise would have been illusory. In a bilateral contract the cost to C of one of his alternatives, namely, the giving of notice, although slight, would seem to be sufficient to constitute an agreed consideration.[15] Since it

12. Corbin on Contracts, s. 16.
13. *Ibid.*, s. 149.
14. [1960] V.R. 126.
15. Corbin on Contracts, s. 163.

does not leave the promisor with an unlimited option the covenant is a real promise. If that be so, the position should be the same whether the deed is a bilateral or unilateral contract. Accordingly, the statement that the reservation of a power of revocation will make the covenant testamentary may have to be limited to those cases where the covenantor has an unlimited power to refuse performance.

Creation of a Trust during Settlor's Life.

A planned disposition of interests after the owner's death can be made by a settlement providing for successive interests, some of which are to be affected by the settlor's death. By reserving to himself a life interest with a power to consume capital or a power to revoke by deed, the settlor may ensure that he retains control of the trust property in his lifetime. There will be no taxation advantage in setting up such a trust. If the trust is revocable in such a way as to benefit the settlor, the income of the trust may be assessed for income tax as if it were income derived by the settlor.[16] The estate, probate or succession duty legislation of most jurisdictions will provide that the property the subject-matter of such a settlement is to be deemed to form part of the settlor's dutiable estate.

The only advantages of a settlement would seem to be the exclusion of the property in the settlement from the estate of the settlor for purposes of testator's family maintenance or family provision and avoidance of publicity.

In some other common law countries in which such settlements are more frequently made than in Australia, the settlor commonly makes a will providing that his estate is to pass to the trustees of his settlement to be held on the trusts set out in the settlement. If the settlement is not subject to any power of revocation or modification the settlement may be incorporated by reference into the will. To be so incorporated the settlement would have to exist when the will is made and the reference in the will to the settlement would have to be sufficiently precise. If the settlor makes his will in this way, he may lose the advantage of absence of publicity in relation to his affairs since the Court of Probate has a discretion to require production and deposit of the document which is incorporated into the will.

Where the settlement is subject to a power of modification by the settlor and he makes a will passing his estate into the settlement, the position is more complex. If the will refers not only to the extraneous document but also to some possible future modifying document, the attempt to incorporate by reference may fail altogether. Under the doctrine of incorporation by reference, evidence outside the will is

16. Income Tax and Social Services Contribution Assessment Act, 1936-1963 (C'th.), s. 102.

admissible to prove the extraneous document when the will refers to a then existing and identifiable document. But the doctrine will not justify the admission of evidence to prove a document coming into existence after the will is made. In *In re Jones*[17] the testator by his will directed his trustees to pay a legacy of £1,000 to the "Tettenhall College Investment Trustees appointed or to be appointed under special declaration of trust for the benefit of Tettenhall College or otherwise as therein contained executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute." He executed a deed poll of even date by which he declared the trusts on which the amount was to be held. There was thus a reference to an existing ascertainable document, or to a document which might in the future be substituted therefor. One contention was that the reference to the future document should be disregarded and that the existing document should be incorporated in the will. On the other hand, it was argued that the whole gift was invalid. The ascertainment of the testator's testamentary intention depended upon evidence outside the will both in regard to documents existing at the time of the will and to those coming into existence thereafter and since that evidence could not be admitted about the latter, it ought not to be admitted about the former. Simonds J. held that he was not entitled to disregard the second alternative. Where evidence was not admissible to make clear the whole testamentary intention, it was not admissible to make clear part of it. Thus, it was immaterial whether a subsequent document existed or not and the legacy failed.

If in the will there is a clear reference to a then existing and identifiable document, evidence may be given as to the contents of that document. If, once incorporated, the extraneous document discloses that the testator regards himself as having a power to modify its provisions otherwise than by a properly attested codicil, this does not affect the incorporation of the document into the will. It will be incorporated in the form it assumed at the date of the will and subsequent unattested modifications will be ignored. This appears from *In re Edwards' Will Trusts*.[18] By his will the testator gave his residuary estate to the trustees of a settlement of the same date to be held by them "upon the trusts and subject to the powers and provisions therein declared and contained so far as such trusts, powers and provisions are subsisting and capable of taking effect". By the settlement a small sum, one hundred pounds, had been settled upon trust for such persons or purposes as the settlor should by memorandum direct and in default of direction upon trust for such persons for such purposes as one of his trustees in his absolute and uncontrolled discretion

17. [1942] Ch. 328.
18. [1948] Ch. 440.

should think fit. Subject to these provisions the trustees were to hold on trust for certain individuals. Over a year later the testator, by memorandum, directed his trustees to pay substantial sums from the trust fund. At the time of the memorandum the trust-fund was still only £100 and was insufficient to provide the sums required by the memorandum. Subsequently, the testator made a number of codicils. At first instance, Jenkins J. held that the whole attempt to incorporate the settlement in the will failed. The Court of Appeal, however, held that the settlement was incorporated by reference but that its provisions relating to future memoranda should be disregarded. Thus, the individual beneficiaries designated in the settlement took the residue of his estate. This decision was arrived at by Lord Greene, M.R. without relying upon the qualification contained in the will that the trusts of the settlement were incorporated only so far as such trusts were subsisting and capable of taking effect.[19]

It is to be noted that the settlement in this case related to the small sum of one hundred pounds. The Court of Appeal seems to have regarded it as being only a nominal settlement. It was a fair inference that the settlement came into existence solely to aid the settlor's testamentary plans. If the settlement had been substantial and had created interests in beneficiaries it might have been arguable that the settlement, being a document having significance independent of the testator's will, did not require the doctrine of incorporation by reference to enable it to play a part in determining the beneficiaries under the will. As a document having legal effect independent of the will, documents amending it after the will would not be solely for the purpose of amending the will and would not require execution as codicils. It should not matter that the power of revocation or modification of the settlement rests with the testator. In *Stubbs* v. *Sargon*[20] a devise on trust (*inter alia*) to divide property between the persons who should be in co-partnership with the testatrix at her death was held valid on the ground that the testatrix's act in entering into a partnership would not be a testamentary act.

JOINT BANKING ACCOUNT.

Suppose that X deposits money in a bank on terms that the money may be withdrawn by either X or Y and that on the death of either the survivor may withdraw the balance in the account. If X dies before Y and there is a balance in the account there appears to be an enlargement of Y's interest.

19. The testator made three codicils after making the memorandum. There might have been scope for argument that the codicils republished the will so as to incorporate the settlement and the memorandum in a manner similar to the solution adopted in *In the Goods of Lady Truro* (1866), L.R. 1 P. & D. 201. Argument on this point is not disclosed by the report.

20. (1838), 3 Myl. & Cr. 507.

The bank, if it has a clear enough mandate, may get a clear discharge from Y but will Y be beneficially entitled to the balance?

In joint accounts of this kind there is a primary question as to whether the depositor has made the arrangement merely for his own convenience and with no intention of providing anything for the other person if he should survive. If this is the position and the depositor dies first the survivor does not have a beneficial interest in the account.[21]

If the depositor intends that amounts withdrawn by the other person during their joint lives should be used by that other person for his own purposes there can be no suggestion that the intention to benefit him if he should survive the depositor is testamentary.

If, however, the depositor intends to benefit the other person only by giving him the balance (if any) in the account if and when the depositor dies first there appears to be a question whether the intention is testamentary.

If the arrangement is valid it provides a form of "poor man's will" without the delays associated with the obtaining of a grant of probate. Moreover, if the arrangement is effective the balance in the account will not be part of the depositor's estate liable to depletion by a testator's family maintenance order or family provision order. There will ordinarily be no saving of estate, probate or succession duty because under most revenue legislation the beneficial interest held by the depositor as a joint owner immediately before his death will be part of his dutiable estate.

The High Court of Australia has decided in favour of the efficacy of such joint accounts. In *Russell* v. *Scott*[22] an elderly spinster, who was a woman of some means, was assisted in her business dealings by one of her nephews. When she was seventy-four years of age she opened a joint account with the Commonwealth Savings Bank of Australia in the names of herself and the nephew. To do this she had withdrawn from an account in the same bank the total amount standing to her credit. She deposited that amount to the credit of the joint account. The money in the older account had been made up of interest which accrued from time to time on certain Commonwealth bonds and of dividends from shares. The joint account continued to be fed from these two sources, the nephew not contributing anything at any time. It was arranged that both should sign withdrawal forms.[23] The nephew kept a supply of withdrawal forms signed by the aunt. He added his signature and, as the occasion required, he withdrew cash which he applied in discharging the aunt's liabilities.

21. *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328.
22. (1936), 55 C.L.R. 440.
23. (1935), 35 S.R. (N.S.W.), at p. 423.

Approximately two years after the joint account was opened the aunt died. She had made a will under which, after making certain bequests to charity, she had given the residue of her property to the nephew and another person in equal shares. At the date of her death a sum amounting to nearly £1,400 was standing to the credit of the joint account. A dispute arose as to who was entitled to this sum. The nephew claimed that he was entitled. The other beneficiary under the will claimed that the amount belonged to the estate of the aunt and that it should be shared between the nephew and himself. The nephew claimed that he, as the survivor, was entitled to the balance of the joint account because the aunt, in her lifetime, had expressed an intention to give him the balance at her death if he should survive her.

Under statutory rules governing joint accounts opened in the Commonwealth Bank of Australia, the balance to the credit of the joint account vested in the nephew as the survivor. Thus he was entitled, as against the Bank, to withdraw the money from the Bank.

In the Supreme Court of New South Wales Nicholas J.[24] decided that the money formed part of the aunt's estate. He said that in law the balance remaining in the joint account at the death of the aunt became vested in the nephew as the survivor. He found that there was evidence of an intention on the part of the aunt to benefit the nephew, apart from the benefit conferred by the will, and, as far as the balance remaining at the death of the aunt was concerned, to rebut the presumption of a resulting trust arising from the manner in which the joint account had been made up. He held, however, that the attempted gift was ineffective because the benefit the aunt sought to confer on the nephew after her death was of a testamentary character.

An appeal was taken to the High Court where a bench of four justices were unanimous that the gift was effective. They held that the aunt's intention that her nephew should enjoy the balance if he survived her was not a testamentary wish required to be evidenced by a properly executed will. It had been argued against the validity of the gift that the aunt's intention was that while retaining full beneficial property in a corpus, immediately upon her death some other person should succeed to property to which he was not before entitled either absolutely or contingently. The aunt's reservation of enjoyment during her life in respect of what both withdrew was relied upon as supporting this. However, as explained by Dixon and Evatt JJ., the nephew had been given his right of survivorship at the time when the aunt opened the joint account. Whatever rights at law accrued to the nephew as the result of the account being opened were held by him on a resulting trust for his aunt while she lived but that resulting

24. *Scott* v. *Russell* (1935), 35 S.R. (N.S.W.) 414.

trust did not extend beyond her lifetime. On his surviving her the resulting trust ended. The theory on which the judgments proceed is that the beneficial interest apparent in the nephew upon his surviving the aunt was an interest conferred on him by her at the time she opened the account. Viewed in this light, her intention was not testamentary. Starke J. drew an analogy with 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, which is not testamentary.

The judgments in relying on the doctrine of resulting trusts proceed upon the assumption that the aunt and the nephew both had common law rights in contract against the bank. It is not readily apparent as to how the nephew acquired common law rights against the bank.

If the aunt, after withdrawing the money from the older account, had made a gift of part of the cash to the nephew and they had then deposited their cash in a joint account, both the aunt and nephew would obtain contractual rights against the bank. But this was not done and it would be unusual for it to be done. The aunt herself opened the joint account. The legal nature of a joint account opened by one depositor is obscure. The problem has been fully discussed elsewhere.[25] If only the depositor supplies consideration for the bank's promise how does the other person acquire rights against the bank?

Is the depositor to be taken to be assigning a legal chose in action to himself and the other person jointly? In theory, a person who already has an account with a bank may assign his rights against the bank to another by the procedure derived from the Judicature Act 1873, section 25 (6).[26] It would have to be an assignment in writing which is absolute and not by way of charge and written notice of the assignment would have to be given to the bank. Thus, a depositor with a sole account might assign his rights against the bank to himself and another jointly.[27] This would be an unusual course because the bank would normally require the sole account to be closed and the creation of the new account would involve a novation rather than an assignment. It may be doubted whether assignment of choses in action provides the explanation.

Lord Atkin has suggested the agency theory. In *McEvoy* v. *The Belfast Banking Co.*[28] a father who had deposited £10,000 with a bank and who had received a deposit receipt in his name desired to alter the arrangement so that the deposit receipt could be put in the

25. The Nature of a Joint Account (1937), 14 Canadian Bar Review 457.
26. Paget's Law of Banking, 6th edn., 1961, 79.
27. If he does so the case will attract the principles applied in *Standing* v. *Bowring* (1885), 31 Ch. D. 282. Those principles will not apply, however, if the transaction is not an assignment of pre-existing property.
28. [1935] A.C. 24.

names of himself and his son, payable to either or the survivor. The bank in meeting his wishes issued a new deposit receipt by which it acknowledged receipt of £10,000 from the father and the son and which bore the notation "Payable to either or the survivor". On the father's death the executors of his will were permitted by the bank to withdraw the sum of £10,000. The son later sued the bank to recover that sum as having been wrongfully paid to the executors.

One of the bank's defences was that the son had not acquired any legal claim against the bank. The son was a third party to a contract made between the father alone and the bank. In relation to this defence Lord Atkin said:

> "The suggestion is that where A deposits a sum of money with his bank in the names of A and B, payable to A or B, if B comes to the bank with the deposit receipt he has no right to demand the money from the bank or to sue them if his demand is refused. The bank is entitled to demand proof that the money was in fact partly B's, or possibly that A had acted with B's actual authority. For the contract, it is said, is between the bank and A alone. My Lords, to say this is to ignore the vital difference between a contract purporting to be made by A with the bank to pay A or B and a contract purporting to be made by A and B with the bank to pay A or B. In both cases of course payment to B would discharge the bank whether the bank contracted with A alone or with A and B. But the question is whether in the case put B has any rights against the bank if payment to him is refused. I have myself no doubt that in such a case B can sue the bank. The contract on the face of it purports to be made with A and B, and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract. If A has actual authority from B to make such a contract, B is a party to the contract ab initio. If he has not actual authority then subject to the ordinary principles of ratification B can ratify the contract purporting to have been made on his behalf and his ratification relates back to the original formation of the contract."[29]

Lord Atkin was prepared to find that the father contracted as an agent for the son. Before, however, ratification is possible the supposed agent must have purported to contract as agent. Lord Thankerton referred to this limitation of the doctrine of ratification.[30]

Probably the most apt theoretical basis on which the beneficiary acquires rights is the trust theory. Where the depositor intends to benefit the other person he is receiving the promise of the bank as trustee for the other person. It is, of course, possible for a depositor to open a trust account by declaring expressly that he receives the promise of the bank on trust for a beneficiary. There is no reason in

29. [1935] A.C. at p. 43.
30. *Ibid.* at p. 52.

principle why a trust should not be implied if the depositor intends to benefit the other person.

It may be contended that decisions such as *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*[31] prevent the implication of such a trust. Those decisions, however, do not prevent the implication of a trust if it can be seen that the promisee intended to benefit the third party. It may also be contended that the promisee should not be treated as a trustee in a situation where there is no evidence that he intended to undertake the duties of a trustee. This argument is reminiscent of the arguments that an intending donor of property which he has attempted to give could not be treated as having declared a trust. It is now accepted that an intending donor of property may be treated as a trustee for his donee before the legal title has passed.[32] He is a constructive trustee and as such he does not come under all the inhibitions affecting an express trustee. Accordingly, the recognition of the interest of a beneficiary in a joint account should occasion no more difficulty in equity that the recognition of an intended donee's interest under a gift which, though satisfying the test in *Milroy* v. *Lord*,[33] is not fully consummated according to ideas of common law.

If an implied trust is the true basis of the beneficiary's rights against the bank the resulting trust doctrine would not apply in the manner described in *Russell* v. *Scott.* In *Russell* v. *Scott* the depositor was thought to be a beneficiary under a resulting trust rather than a trustee. Under the third-party contract theory the depositor would be the trustee. But the ideas which underlie the presumptions of resulting trust and advancement should ensure the utility of the presumptions in cases where it is not clear whether the depositor intended to contract as trustee for the other person. If the other person is related to the depositor so as to be a natural object of the depositor's bounty an intention to benefit may be more readily inferred.

Where the depositor is at liberty to withdraw the whole amount without reference to the other person there may still be a trust: the depositor's power to withdraw the amount or to reach a new agreement with the bank would be comparable with a power of revocation and a revocable trust is always enforceable in equity while it subsists.[34] If the promise is really held in trust the beneficiary may then enforce the promise, making the promisee-trustee, if necessary, a defendant in an action against the promisor.

31. [1933] A.C. 70.

32. *Re Rose* [1952] Ch. 499.

33. (1862), 4 DeG. F. & J. 264; 45 E.R. 1185.

34. *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.* (1956), 95 C.L.R. 43 at pp. 67-8 per Fullagar J.

If the joint account be explained on the theory of a trust, will it still be possible to say that the kind of arrangement discussed in *Russell* v. *Scott* is not testamentary?[35] It would be necessary to say that the depositor at the time of contracting with the bank intends that his personal representative will be bound by a trust in favour of the other person. Probably, by analogy with the reasoning of Starke J. in *Russell* v. *Scott* the depositor holds the promise on trust for himself during his lifetime with power to discharge the promise, and on trust for the other person if the depositor is survived by that other person and the promise is still undischarged. On this view the other person derives his interest at the time the contract is made. The difficulty with this analysis and that in *Russell* v. *Scott* is that it is very difficult to demonstrate that the third party has any enforceable rights during the depositor's lifetime. In *Fletcher* v. *Fletcher*[36] the beneficiaries would presumably have equitable rights to the benefit of the trustee's common law action if the covenantor committed an anticipatory breach. But in the joint account situation of the kind in *Russell* v. *Scott* the third party beneficiary is not intended to have any standing to enforce any claim against the bank until the depositor dies. Whether he can be regarded as having any enforceable rights against the depositor is not clear. If the depositor has power to enter into new arrangements with the bank or to close the account it is difficult to imagine any action on the part of the depositor which could be regarded as a breach of an obligation.[37] For the same reason it is hard to imagine that the beneficiary would ever be able to claim to protect his interest against another person inducing the depositor to commit a breach of contract. It may be doubted therefore whether the supposed beneficiary has any interest before the depositor dies. Accordingly, there seems to be nothing to keep the kind of account considered in *Russell* v. *Scott* out of the category of testamentary arrangements. If this kind of transaction is thought to be of such social utility as to justify a departure from the ordinary methods of proof of testamentary intention, legislation appears to be necessary.

35. The House of Lords in *McEvoy's Case* did not advert to this aspect of the arrangement.

36. *Supra.*

37. An attempted assignment of the account by the depositor might constitute a breach.