THE OPENING OF A JOINT BANK ACCOUNT — A TRANSLATION WHICH MAY BE IN SUBSTANCE, IF NOT IN FORM, TESTAMENTARY

by

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1. INTRODUCTION

'[A] covenant to leave property by will may not be defeated by a disposition which, though technically *inter vivos*, is substantially testamentary. [This] qualification was not, however, applicable in [*Palmer* v. *Bank of N.S.W.*[1]]. X [the third party, stranger to the covenant by the testator] could draw on the joint bank account during her lifetime. The position may have been different if it had been provided that X had no access to the account until the testator's death'.[2] It is this latter, fairly tentative, suggestion which will be discussed herein.

For the suggestion[3] to be correct, to which viewpoint the present writer subscribes, it must be that:

(a) although the opening of a joint bank account is NOT a testamentary act requiring execution in the form provided by the relevant jurisdiction's succession law for such actions;[4]

(b) it can, when viewed in the light of a promise to leave property at death to a person other than one of the joint owners of the account, be sufficiently testamentary in substance to run counter to, and constitute a breach of, such a promise.

It is submitted that the combined effect of *Russell* v. *Scott* and *Palmer* v. *Bank of N.S.W.*, and the cases referred to with approval in the latter, support such a conclusion.

2. *RUSSELL* v. *SCOTT*

This case conclusively determined that the opening of a joint bank account in the name of two (or more) persons as joint owners thereof, and even where only one of the persons concerned was to contribute to the joint account and only that person was to have the benefit of the proceeds in the account during his/her lifetime, but where the survivor was to have both the legal and beneficial title thereto at the death of

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1 (19763 7 A.L.R. 671; (1976) 50 A.L.J.R. 320.

2 I. J. Hardingham, M.A. Neave, and H. A. J. Ford, *Wills and Intestacy in Australia and New Zealand*, (1983) at p. 306.

3 *I.e. cf.* Hardingham, Neave, and Ford (*Supra*).

4 *Russell* v. *Scott*, (1936) 55 C.L.R. 440.

the first to die of the two persons in whose name the account was opened, was not a testamentary transaction operating in favour of the survivor. Even where the survivor had held no beneficial title to the money in the account during the lifetime of the other joint tenant, and sole contributor to the account, the transaction was valid to pass full title to the proceeds therein to the survivor, without the need for the transaction to have been executed in the manner prescribed for the execution of testamentary documents.

By opening the account (or purchasing the chose in action from the bank) in their joint names as joint tenants, the legal title to the chose in action was thereupon created in both joint tenants. The right of survivorship is simply an incident of this relaitonship, created at the time time of opening the account *i.e.* by an *inter vivos* transaction.

Of course, establishing a legal title in both parties at that time says nothing about the equitable or beneficial entitlement to the proceeds of the account. The High Court agreed that, generally speaking, in the absence of the presumption of advancement, the 'volunteer' in this situation — the joint legal owner who did not contribute to the proceeds in the account — would hold the legal title thereto upon a resulting trust for the other joint owner — the one who did contribute to these proceeds — and in whom the equitable or beneficial title would be vested. In such a situation, upon the death of the joint owner holding the equitable title, the survivor would hold the legal title thereto — under the doctrine of survivorship — as trustee for the estate of the deceased.

However, although it was clear that the presumption of advancement did not operate in the case before it, the High Court held that there was sufficient evidence to show that the trust arrangement in operation with respect to the account was one in which the party contributing thereto had an equitable interest as to the whole of the proceeds for life, only, and that, upon her death, the survivor was to hold both the legal and equitable title to the whole of the proceeds — *i.e.* he would become the absolute owner thereof. Thus, the trust arrangement was in the nature of 'to X (the one contributing to the account) for life, with the remainder to Y (the one not so contributing) absolutely at the death of X' — on the facts as they eventuated — *viz.* X's death occurring before that of Y. Starke J. drew an analogy with, '... a voluntary settlement vesting property in trestees for the benefit of the donor for his life and after his decease for the benefit of the other person'.[5] Even if the trust had contained a power of revocation, he would have held that it was 'not testamentary' since it would still have taken effect immediately upon its execution, and would not have been postponed until after the donor's death.[6] Again, then, execution in the manner prescribed for testamentary documents would not be required. The rest of the High Court agreed.

5 Ibid, at p. 448.
6 Ibid.

The issue that still remains to be examined, however, is whether a voluntary trust of this kind (*i.e.* in which the donor takes a life interest only) may be characterized as being sufficiently testamentary in substance to be in breach of a covenant by the donor to leave the property he or she owns at death to a person other than the person taking the remainder interest under the trust.

3. *BIRMINGHAM* v. *RENFREW*[7]

In the course of his judgment in this case upon the effect of an agreement to execute mutual wills, where one of the parties thereto had died without revoking the agreement, Dixon J. observed that, 'No doubt gifts and settlements *inter vivos*, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition *inter vivos* is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage, upon condition that at his death the residue shall pass as arranged . . .'[8]

With this, Latham C.J. agreed, saying, *inter alia* that, 'In the present case the promise by the husband was a promise to leave his property to certain persons by will, including such property as his wife might leave him by her will, less, as my brother Dixon has explained . . ., such amount of that property as he might have *bona fide* disposed of during his lifetime'.[9]

Some support for phrasing this qualification in this way is to be found in *Gregor* v. *Kemp*.[10] Here, a mother was bound by the terms of a covenant to marriage articles, executed in consideration of her eldest son's marriage, to leave by will a quarter of her estate to such son, his executors or administrators. Fearing that her son might die and that the property would fall into the hands of her daughter-in-law, (or the daughter-in-law's family) the mother purported to give away some £1,000 in cash to her own daughter and grandchildren, shortly before her death. It was argued that this sum of £1,000 should properly have formed part of the mother's estate at her death (and, so, a quarter of it should have passed to the son, his executors or administrators). The court agreed that the covenant did not prevent the mother from making *inter vivos* dispositions of her property, provided she did not dispose of her estate, '. . . on purpose to defeat the covenant'.[11] It was held that the gifts of money had been made with, '. . . the clear intention to defeat the covenant'.[12] The court went on to say that the gifts would also fail if treated as *donationes mortis cause*, since such gifts, '. . . a day or two

7 (1936) 57 C.L.R. 666.

8 Ibid, at p. 689.

9 Ibid, at p. 677.

10 (1722) 3 Swan. 482; 36 E.R. 926.

11 Ibid, at p. 483; 926.

12 Ibid.

before death and particularly to the executors of the woman's estate[13] could not be allowed, [as] it seems to have the air of a will. Otherwise articles of this nature will signify nothing'.[14] The primary ground for the decision is consistent, it is submitted, with the view of Dixon J. (and of Latham C.J.) in *Birmingham* v. *Renfrew*, but such appears to be no longer the law in Australia, as shall shortly be seen. Whether *Gregor* v. *Kemp* establishes that *donationes mortis cause* are contrary to such a covenant as is herein being considered will be adverted to in due course.

4. *PALMER* v. *BANK OF N.S.W.*

This case concerned both a joint banking account and an agreement to leave by will, property in a specified manner. In view of *Russell* v. *Scott*, it was not argued that the opening of the joint account was a testamentary transaction requiring for its validity execution in the manner prescribed for wills and other testamentary documents.

What was at issue was whether the *inter vivos* establishment of the joint account, the legal and equitable title to which was certainly intended (on the facts as they occurred — and were no doubt expected to occur —) to be vested in the surviving stranger to the covenant concerning the testamentary disposition of property, was a breach of this covenant. There was evidence, which was accepted, that the person who had covenanted to leave by will his property at death in a certain way had opened the joint account in his own name and that of the stranger to the covenant with the intention of defeating the covenant — *i.e.* by depleting his estate at death by the amount he contributed during his lifetime to the joint account. It was argued that this was not a *bona fides* transaction and was not permitted under the terms of the prior agreement. *Birmingham* v. *Renfrew* was claimed to support this contention. Furthermore, it was submitted, since the covenantor retained, along with the other joint tenant, an interest in the proceeds in the joint account during his lifetime, the transaction would fail under the doctrine established in such cases as *Fortescue* v. *Hennah*,[15] *Logan* v. *Wienholt*,[16] *Jones* v. *Martin*,[17] *Turner* v. *Jennings*,[18] *and Bennett* v. *Bennett*.[19] Both submissions were rejected by the High Court.

a) *The* bona fides *Argument*

Although conceding that *Gregor* v. *Kemp* supported the submission that an *inter vivos* gift made with the intention of defeating the promise relating to the testamentary disposition of property was a breach of such

13 Who held money on trust for the infant grandchildren.

14 (1722) 3 Swan. 482, at p. 483; 36 E.R. 926 at p. 927.

15 (1812) 19 Ves. J. 66; 34 E.R. 443.

16 (1833) 1 Cl. & F. 611; 6 E.R. 1046.

17 (1798) 5 Ves. J. 267; 31 E.R. 582.

18 (1708) 2 Vern. 612; 23 E.R. 1000.

19 [1934] W.N. (E) 177.

promise, Barwick C.J. (with whose judgment Gibbs, Stephen, and Mason JJ. agreed) held that cases since then had rejected this view.

> These later cases[20] recognized that, in order that a transaction *inter vivos* be in breach of a promise to leave by will, it must be of a testamentary nature. It was that nature of the transaction which constituted the breach of the promise. Nowhere in these cases is the mere intention to reduce the value of the estate which will pass by will said to be a breach of such a promise . . . .[21]
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> . . . . If a promisee desires to prevent such a disposition, the promise itself must be larger than simply a promise to leave by will . . .
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> . . . . In my opinion, it is the testamentary nature of the transaction *inter vivos* which makes it a breach of a promise to leave by will, not the intention with which it is effected . . .
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> . . . . When in [*Birmingham* v. *Renfrew*] Dixon J. spoke of 'gifts and settlements *inter vivos* . . . . calculated to defeat the intention of the compact', he no doubt had in mind gifts and settlements which were either testamentary in nature or which were in contravention of the terms of the particular contract, spelled out of the expressions actually used, bearing in mind the circumstances in which it was made.[22]

That the present writer has every doubt that this was intended by Dixon J. is, of course, now quite beside the point.[23] The explanation of what he meant, as given by the High Court in *Palmer* v. *Bank of N.S.W.*, is now the authority to be applied. So, what of the testamentary nature of the *inter vivos* transaction ?

b) Inter Vivos *Transactions Testamentary in Nature*

Before considering the law enunciated on this aspect of the case, the facts relating to the joint account in *Palmer* v. *Bank of N.S.W.* must be briefly mentioned. Unlike the joint account in *Russell* v. *Scott*, here both parties contributed to the money in the account and both were entitled to make withdrawals therefrom, although it seems that only the deceased may have in fact done so. There was clear evidence of an intention that the survivor was to have absolute title (*i.e.* both legal and equitable) to the account at the death of the first of them to die. The High Court then, had no difficulty in holding that any presumption that might otherwise have arisen (*i.e.* that the 'stranger' would hold the 'covenantor's' contributions to the account on a resulting trust, after the covenanter's death, for the deceased estate) had been rebutted in the circumstances of the case, notwithstanding the inapplicability of any presumption of advancement. Neither, on the facts, was there any trust

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20 I.e. *Fortescue* v. *Hennah, Logan* v. *Wienholt, Jones* v. *Martin, Turner* v. *Jennings*, and *Bennett* v. *Bennett* (*supra*).

21 On this, see *infra* at n. 34.

22 (1976) 50 A.L.J.R. 320 at p. 324.

23 But see further on this at n. 34, *infra*.

operating in favour of the covenantor during his lifetime, as had been the case in *Russell* v. *Scott*.

> Of course, there may be a resulting trust if money is put in the name of a stranger, there being no presumption of advancement. But nothing is clearer than, if it is established that a beneficial interest was intended to be created in the stranger, no resulting trust is created. [T]he case of the joint purchase of property, with unequal contributions of the purchase money, bears no analogy whatever to the case of a joint account unequally fed but with the right of each of the parties to it to withdraw the whole. The nature of the joint account in this case and the circumstances in which it was created, including the express provision for survivorship, in my opinion, leave no room whatever for a resulting trust in either party to the account as to any part of it . . . .[24]

His Honour had already declared that the stranger (Mrs Brooks) was 'plainly not' a volunteer and that, '. . . the only right or interest which the deceased had in the money to the credit of the account' was 'derived from the fact that he was one of the persons in whose names the account jointly stood'.[25] Thus, this was not a situation in which the deceased, '. . . in opening and contributing to the joint account was reserving to himself any interest in the joint account. His interest and entitlement to any money standing to the credit of that account was derived exclusively from the terms of the joint account and as one of the persons in whose name it stood'.[26]

Although this was sufficient to dispose of the appellant's argument in *Palmer* v. *Bank of N.S.W.*, for the purposes of this article it is necessary to consider further the notion of any *inter vivos* transaction in which the deceased did retain at least a life interest; for such, said the High Court, would have been a breach of the covenant found in *Palmer's* case.

5. THE OLD CASES CITED IN *PALMER* v. *BANK OF N.S.W.*

a) *Donatio mortis causa*

One of the essential prerequisites for the creation of a valid *donatio mortis causa* is that the gift must not be intended to become absolute unless and until the self-contemplated death of the donor takes place.[27] Should such death not occur, the purported gift is ineffectual. Accordingly, it may also be revoked by the donor during his or her lifetime.

Because of this element of control during lifetime retained by the donor, and the fact that the donor's title to and enjoyment of the subject of the *donatio* is imperfect prior to, and pending, the donor's death, it was held in *Gregor* v. *Kemp*,[28] as an alternative ground for the decision already arrived at by the court therein, that a *donatio mortis*

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24 Ibid, at p. 322.

25 Ibid.

26 Ibid, at p. 323.

27 Hardingham, Neave, and Ford, *op. cit.*, at p. 16; W. A. Lee, *Manual of Queensland Succession Law* (1975) at p. 19.

28 (1722) 3 Swan. 482; 36 E.R. 926.

causa to a daughter and grandchildren was a breach of the donor's previous covenant to leave half of the property she died possessed of to her son. The earlier case of *Turner* v. *Jennings*[29] supported this view.

In that case, a freeman of the City of London had, shortly before his death, made a gift of part of his personal estate to the children of his deceased son. According to the then prevailing custom of London, half of such a deceased freeman's personal estate should have passed at his death to his surviving daughter. The Court held, as a secondary ground for its decision, that the gift was a *donatio mortis causa* and, '... invalid against the custom'.[30]

Despite the seeming correctness of the view of a *donatio mortis causa* taken in these cases, it is not possible to declare categorically that such transactions are breaches of a covenant to dispose of property in a certain (and contrary) testamentary manner. This aspect of *Gregor* v. *Kemp* received less than enthusiastic endorsement from Barwick C.J. in *Palmer* v. *Bank of N.S.W.* when he remarked:

> It may be that in the circumstances of the case the actions of the mother in *Gregor* v. *Kemp* (*supra*) might possibly have been regarded as in substance testamentary. But I have no need here to consider whether such a conclusion would have been correct.[31]

b) Inter vivos *Gifts in Which the Donor Retains a Life Interest*

In all five of the earlier English cases[32] cited by Barwick C.J. in *Palmer* v. *Bank of N.S.W.* as authority for the proposition that an *inter vivos* gift to a stranger, which was testamentary in substance if not in form, would be a breach of a covenant to leave property at death by will to the covenantee, the deceased covenantor had settled property *inter vivos* on strangers to the covenant, but had retained at least an equitable life interest in the property for himself. In each case, Barwick C.J. concluded, it was this retention of an interest in the property which was held to render the transaction a breach of the covenant (or custom).

In *Turner* v. *Jennings*, the deceased freeman had settled (prior to his death) much of his personal estates on trust for himself for life and then for his infant grandchildren. The trust for the grandchildren was held to fail as being contrary to the custom of the City of London previously mentioned. Similar results in cases of covenants to leave property possessed at death by will were reached in the other four cases.

Both *Jones* v. *Martin* and *Fortescue* v. *Hennah* concerned marriage covenants to leave property equally to the covenantor's children. In both, the covenantor settled property during his lifetime so as to favour one of his children, but in each case he retained a life interest in the

29 (1708) 2 Vern. 612; 23 E.R. 1000.

30 Ibid at p. 613; 1000. The primary reason for the decission will be discussed later.

31 (1976) 50 A.L.J.R. 320 at p. 324.

32 See n. 20, *supra*.

settled property (or, in *Jones* v. *Martin*, the stock purchased by the favoured son with the money settled on him by his father). In each case the *inter vivos* settlement was held to be in breach of the prior marriage covenant because of the retention by the settler of a life interest therein.

'If he means to be partial and will give a preference', said the Court in *Jones* v. *Martin*,[33] and cited with approval in *Fortescue* v. *Hennah*,[34] '... he must give against himself and not make a reversionary gift. He should immediately feel himself so much of the poorer for his gift. To allow him to be partial in any way short of an immediate and absolute gift in his lifetime ... will furnish perpetual opportunity for subterfuge and schemes to defeat the covenants, which ought to be honorably observed'.

The reason for insisting on an 'immediate and absolute gift' given by the settlor 'against himself' is seen in the following observation:

> Against a diminution of his property by absolute gift during his lifetime, his own interest and convenience form a pretty good security; not so where, without any diminution of his own enjoyment, he exercises a merely posthumous bounty, though by an irrevocable instrument [in his lifetime] .... Every disposition should be excluded which is in effect testamentary though not such in point of form.[35]

Similarly, in *Logan* v. *Wienholt*, the *inter vivos* transaction of the deceased were held to be in breach of his covenant to one S.C. to give her '... by will or otherwise .... so much in money or in valuable effects as he should by will give or bequeath to any of his next of kin or to any other person whatsoever'.[36] It was held that:

> All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to [the above covenant], in which real estate or personal property the obligor retained a life interest, were to be [treated as being] in the nature of testamentary dispositions [and] to be considered in equity, for the purpose of giving effect to the true intent of the agreement, as

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33 (1798) 5 Ves. J. 27; 31 E.R. 582 at p. 586.

34 (1812) 19 Ves. J. 66 at pp. 72-3; 34 E.R. 443 at p. 445.
But in this case an intention to give a preference was also thought to be required in addition to the reservation of the life estate. 'The case of *Jones* v. *Martin* is certainly one of an intended fraud upon the covenant that was shown by other circumstances besides that of the reservation of the dividends by the father during his life; ... but I di not collect [from the case] that the latter circumstance, the reservation of the dividends, would of itself have been considered sufficient'. — ibid. This aspect of the case(s) seems not to have been noticed by Barwick C.J. in *Palmer* v. *Bank of N.S.W.* The above statement from *Fortescue* v. *Hennah* seems to be more in accord with the more obvious meaning of Dixon J's comment on the 'qualification' to absolute use and right of disposal in *Bermingham* v. *Renfrew* (*supra*) than with Barwick C.J.'s explanation thereof. In courts lower than the High Court, however, the issue would appear to be no longer debatable, in view of *Palmer* v. *Bank of N.S.W.*

35 5 Ves. J. 276; 31 E.R. 582 at p. 586.

36 (1833) I Cl. & F. 611 at p. 613; 6 E.R. 1046 at p. 1047.

> if the said property and estates had been given or devised by the obligor's will.[37]

It should be noted that only such transactions in which the 'obligor' retained and interest were so treated.

Finally, in *Bennett* v. *Bennett*, although no express trust was therein created over the property in question and no reservation of a life interest in favour of the grantor in it was expressly declared, the Court relied on evidence of the intention with which the *inter vivos* gifts were made to conclude that what appeared to be (and at law were) absolute gifts of property by a man to his mistress were in fact gifts to her to be held on trust for him until his death and only to be hers in equity thereafter. Accordingly the 'gifts' were held to have been made in breach of the man's covenant to his wife to leave her his estate by will at his death.

> .... [H]e cannot defeat his covenant by any disposition that is testamentary either in form or by its nature, for instance by a gift of property reserving to himself a life interest.... The evidence shows that when he assigned the copyrights, although he intended her to be the ostensible owner of them, his intention was to retain the revenues, and he did in fact receive them.... Nor did he intend that she should have an absolute power of disposition over [other property 'given' to her] without [his] consent.... The gifts must be treated as being in the nature of testamentary dispositions and [can] not be allowed to defeat the covenant with his wife.[39]

6. CONCLUSION

It is submitted that, had the arrangement concerning the joint bank account in *Palmer* v. *Bank of N.S.W.* been the same as that operating in *Russell* v. *Scott*, then this *inter vivos* transaction of purchasing the chose in action from the bank in the joint names of the covenantor and the stranger to the covenant, but retaining therein the exclusive use of the account by the covenantor during his lifetime, would have been a breach of the covenant in *Palmer's* case. It will be remembered that Starke J., in *Russell* v. *Scott*, had indicated that the arrangement therein was analogous to, '... a voluntary settlement vesting property in trustees for the benefit of the donor for his life and after his decease for the benefit of another'.[38] He had then gone on to declare that such a settlement was not testamentary. This was said, however, for the purpose of deciding that the transaction did not require for its validity execution in the manner prescribed for testamentary documents, such as wills. According to the series of cases cited with approval in *Palmer* v. *Bank of N.S.W.*, however, such a transaction is sufficiently testamentary in substance to render it a breach of the kind of covenant previously entered into by the deceased in that case.

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37 Ibid at p. 611; 1046.

38 E.g. An entry in his diary indicated that, in relation to the rights in his plays assigned to his mistress, '... [t]he income, if any, from the plays will come to me as usual, but she will be the owner'; — [1934] C.N. (E) 177 at p. 178.

39 Ibid at p. 178.

The settlor in *Russell* v. *Scott*, in setting up the joint account, but stipulating for it to be used exclusively for her own benefit during her lifetime, was clearly, it is submitted, providing for there to be 'no diminution of [her] own enjoyment' in the money therein.

According to the cases of *Jones* v. *Martin* and *Fortescue* v. *Hennah*, to do this is to dispose of property in a manner which is, '. . . in substance testamentary'. It would, thus, have been contrary to the covenant in *Palmer* v. *Bank of N.S.W.*

The somewhat tentative suggestion of Hardingham, Neave, and Ford[40] with which this article commenced is thus substantiated.

40 See n. 2, *supra*.