

Maine court has become the first of final impression to make blood test evidence conclusive. This is not true. Actually we have the logical next step from the earlier decision, requesting "believable evidence"²⁰ that the tests were inaccurate and refusing to subsume the reasons why the jury has not accepted the "M-N" test results.

Of what probative force is blood evidence in Maine today? There is no reason to think it has become conclusive to the extent that a putative father is innocent as a matter of law upon testimony of a serologist to that effect. This may be concluded to be the present state of the law in Maine: where respondent has been excluded serologically, the component parts of the evidence of exclusion become the entire controversy. If, by credible evidence, doubt is thrown on the skill of the examiners or the validity of their conclusions, the serological indications of non-paternity are rejoined by the other evidence and given only such weight as the jury choose. The further significance of the case awaits a determination as to what quantum of discrediting evidence the Maine court will require to affirm a verdict of paternity in the face of an apparently conflicting medical fact.

It is doubted whether this is the landmark decision for which the medico-legal writers have called, *i.e.*, upon testimony of non-paternity by a blood expert with some sort of official certification, a directed verdict to that end.²¹ It is further doubted whether such a decision soon will be forthcoming in Maine. A procedure which would so greatly restrict the force of cross-examination is properly viewed with caution.

DIXON F. SPIVY

PERSONAL PROPERTY—DEPOSIT OF FUNDS IN A BANK TO THE JOINT CREDIT OF DECEASED DEPOSITOR AND SURVIVING DONEE—PAROL EVIDENCE RULE AS APPLIED TO DEPOSIT OF FUNDS IN NAME OF DEPOSITOR AND ANOTHER.—Crandall and defendant Watts went to the plaintiff bank, signed, executed, and filed with it an instrument wherein they agreed with each other and with the bank that all deposits made therein by either of them should

20. *Jordan v. Mace*, 69 A.2d 670, 673 (Me. 1949). Three justices, it might be noted, were now sitting who were not present 15 months earlier for *Jordan v. Davis*, note 19 *supra*.

21. Note, 1 MERCER L. REV 266, 278 (1950) Also see note 4 *supra*.

be owned by them jointly and with right of survivorship, and subject to check by either of them. After Crandall's death, the bank filed a bill of interpleader naming as defendants Watts, the survivor, and Birlew, the executor of Crandall's estate, each of whom claimed money in the account established by the deceased in his lifetime. The evidence showed that all deposits were made by deceased. The passbook remained at all times in his possession and all checks written against the account, prior to his death, were written by him. After his death, defendant Watts on one occasion stated that the money in the account belonged to Crandall. Defendant objected to the introduction of any parol evidence tending to contradict the terms of the deposit agreement. In her appeal she contended that the deposit agreement was a written contract, the terms of which could not be varied by parol evidence.

On these facts, the Kansas City Court of Appeals held in *Commerce Trust Co. v. Watts*¹ that proof of the deposit raised a presumption that the donee survivor would take absolute title upon the donor's death, but that the presumption could be overcome by any competent evidence including parol evidence.² In affirming judgment for the executor, the court said that there was substantial evidence from which the trial court could have found, as it did, that it was not the intent of either party to the deposit contract that title to the account, upon Crandall's death, should vest in the appellant. In support of the decision reliance was based upon the applicable Missouri statute.³

In jurisdictions having no statute applicable to the rights of a

1. 222 S.W.2d 937 (Mo. App. 1949).

2. A similar rule was announced by the same court in *Weber v. Jones*, 222 S.W.2d 957 (Mo. App. 1949) decided nine days before the *Watts* case.

3. The applicable statute in Missouri is MO. REV. STAT. ANN. §7996 (1939), which provides, in part: "When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of both, or to the survivor after the death of one of them, and such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit in accordance with the terms thereof." Similar sections from other chapters of the Missouri Code apply to trust companies (§8070) and building and loan associations (§8257.55).

surviving joint depositor, the donee has established his interest on the theory of gift,⁴ contract,⁵ or trust.⁶ However, the cases frequently reveal an ambiguity of language from which it is difficult to determine on which of the common law theories the court is proceeding. If the right of survivorship is expressly provided by the terms of the deposit agreement, it is generally held that the prima facie presumption in favor of a gift.⁷ In many jurisdictions this holding is strengthened by a statute making a deposit of money in the names of the owner and another in an account payable to either or survivor either presumptive⁸ or conclusive⁹ evidence of an intention to create a joint tenancy. Even in those jurisdictions which have a statute it is not always clear

4. The majority of jurisdictions approach the problem of the joint bank deposit from the analogy of gifts of ordinary chattels. See *BROWN, PERSONAL PROPERTY* §65 (1936).

5. It has been held that the instrument creating the joint account sufficiently imports a consideration to support a valid contract between the bank on one hand and the deceased and surviving donee on the other. *McManis v. Keokuk Savings Bank and Trust Co.*, 239 Iowa 1105, 33 N.W.2d 410, (1948); *In re Murdock's Will*, 238 Iowa 898, 29 N.W.2d 177 (1947). Some courts have upheld the transfer by resort to the third party beneficiary analogy, treating the arrangement as a contract between the donor and the bank, which the donee may enforce, although he has given no consideration. *Sullivan v. Hudgins*, 303 Mass. 442, 22 N.E.2d 43 (1939); *Rohrbacker v. Citizens Bldg. Ass'n. Co.*, 40 N.E.2d 157 (Ohio 1941).

6. "There has been considerable puzzlement on the part of the courts respecting the development of a legalistic formula for upholding the interest of a survivor in a voluntary joint tenancy account maintained without the concomitant of a delivery. Some courts, in fact the majority, adopt in the absence of statute, the theory of a gift where such intent can be shown. Others sustain the interest of a survivor on the theory of the creation of a trust. Whichever theory is accepted, the general tendency is to take a liberal view of the transaction and to devise a way of effectuating the intent without scrupulous insistence on technical correctitude." *Wallace v. Riley*, 23 Cal. App.2d 654, 74 P.2d 807, 810 (1937) (dictum).

7. *Commercial Trust Co. v. White*, 99 N.J. Eq. 119, 132 Atl. 761 (1926); *McLeod v. Hennepin County Savings Bank*, 145 Minn. 299, 176 N.W. 987 (1920); *Kelley v. Beers*, 194 N.Y. 49, 86 N.E. 980 (1909). *Contra*: *Appeal of Garland*, 126 Me. 84, 136 Atl. 459 (1927). *BROWN, PERSONAL PROPERTY* §65 (1936).

8. *Mississippi Valley Trust Co. v. Smith*, 320 M. 989, 9 S.W. 2d 58 (1928); *Ball v. Mercantile Trust Co.*, 220 Mo. App. 1165, 297 S.W. 415 (1927). The Michigan statute was amended in 1937 to provide, expressly, in accordance with the previous construction of the Michigan courts, that the making of a deposit in statutory form should, in the absence of fraud or undue influence, be "prima facie evidence . . . of the intention of such depositors to vest title to such deposit . . . in such survivor or survivors." *Frank v. Schultz*, 295 Mich. 714, 295 N.W. 374 (1940). See *MICH. COMP. LAWS* c. 487.703 (1948).

9. See *CAL. GEN. LAWS, Banks and Banking, Act 652, Art. I, §15a* (Deering, 1944); *LAWS OF NEW YORK, Banking Law, §239, sub.3* (Thompson, 1939).

whether the court is treating the problem as one of gift, contract or statute.

In 1915 the portion of the section of the Missouri statute quoted below was copied *in haec verba* from an identical statute then in force in New York.¹⁰ This New York law was construed in *Clary v. Fitzgerald*,¹¹ where it was held that the statutory presumption was rebuttable. The St. Louis Court of Appeals in *Ball v. Mercantile Trust Co.*¹² said that the legislature not only adopted the statute itself, but also the construction given to it by the state of its origin.¹³ As to the effect of the statute, the court said:

The statute cited, *supra*, fixes the interests of the depositors as those of joint tenants and absent competent testimony of a contrary intention, it gives to the deposit, in the form named, the value of raising a presumption of an intent to make an immediate gift.¹⁴

Thus it appears that Missouri adopted the rule of rebuttable presumption rather than the rule of conclusive presumption which obtains in some of the jurisdictions either by statute or decision in this class of cases.

Since the enactment of the statute, Missouri courts have consistently followed the decision in the *Clary* case.¹⁵ In *Ball v. Mercantile Trust Co.*, *supra*, it was held that parol evidence is admissible for the purpose of showing the intent of the donor even where the deposit is made by a written contract signed by both the donor and donee, as in the case under discussion.

10. The New York statute was subsequently amended by the addition of a sentence *which does not appear in Missouri* providing: "The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor." The statute, as amended, was construed in *Moskowitz v. Morrow*, 251 N.Y. 380, 167 N.E. 506 (1929), to be conclusive of the right of the survivor to take the balance on hand, at the death of his co-tenant, but only in actions to which the survivor or the bank was a party.

11. 155 App. Div. 659, 140 N.Y.S. 536 (1913), *aff'd without opinion*, 213 N.Y. 696, 107 N.E. 1075 (1915).

12. 220 Mo. App. 1165, 297 S.W. 415 (1927).

13. See 3 SUTHERLAND, STATUTORY CONSTRUCTION §5209 (3rd ed., Horack, 1943).

14. 220 Mo. App. 1165, 1174, 297 S.W. 415, 418 (1927).

15. In *Commonwealth Trust Co. v. Du Montimer et al.*, 193 Mo. App. 290, 183 S.W. 1137 (1916), the court said there was no authority in Missouri directly bearing upon the question, but upheld the right of the donee-survivor on common law principles.

Similarly, under the statute applying to trust companies,¹⁶ extrinsic evidence was considered in an action of interpleader to determine ownership of a joint deposit after the death of one of the joint tenants.¹⁷ Other Missouri cases have affirmed the rule that the statutory presumption is rebuttable.¹⁸

Appellant in the *Watts* case relied heavily on *Matthew v. Moncrief*.¹⁹ In that case Chief Justice Vinson of the U.S. Supreme Court made an exhaustive review of the conflicting decisions while Associate Justice of the U.S. Court of Appeals for the District of Columbia. He said in that opinion that a review of the decisions convinced the court that "the lack of judicial harmony is largely superficial" and "results from a failure to differentiate the decisions factually."²⁰ . . . We think it highly significant that we could discover no case *wherein both parties had signed an instrument which contained language of joint account and a survivorship clause where the right of the donee-survivor was denied.*"²¹

In deciding the *Watts* case, the Kansas City Court of Appeals indicated that "it was impressed with the logic" of the *Moncrief*

16. Mo. REV. STAT. ANN. §8070 (1939).

17. *Mississippi Valley Trust Co. v. Smith*, 320 Mo. 989, 9 S.W. 58 (1928). This case held that the statute announced a rule of evidence and so was applicable to accounts opened before its enactment.

18. *In re Geels Estate*, 143 S.W.2d 327 (Mo. App. 1940); *Melinek v. Meier*, 124 S.W.2d 594 (Mo. App. 1939); *Schnur v. Dunker*, 38 S.W.2d 282 (Mo. App. 1931).

The presumption is said to be a weak one. *Armbruster v. Armbruster*, 326 Mo. 51, 31 S.W.2d 28 (1930); *Mineau v. Boisclair*, 323 Mich. 87, 34 N.W.2d 556 (1948). *Contra*: *Link v. Link*, 3 N.J. Super. 39, 65 A.2d 89 (1949); *Greener v. Greener et al.*, 212 P.2d 194 (Utah 1949). The latter case requires "clear and convincing" evidence to overcome the presumption of gift.

It cannot be denied, however, that there is considerable authority in other jurisdictions *contra* to the Missouri decisions. No attempt is here made to review the many conflicting cases, but by way of illustration, attention is called to the following: *Cullani v. Northern Trust Co.*, 335 Ill. App. 86, 80 N.E.2d 275 (1948) (the deposit card is a contract between the bank and both depositors and the survivor takes not as donee, but under the contract negotiated between himself and the bank); *In re Juedel's Will*, 280 N.Y. 37, 19 N.E.2d 671 (1939) (upon death of one of the depositors in joint bank account presumption of joint tenancy becomes conclusive in survivor's favor as to money left in account), and *Jorgensen v. Dahlstrom*, 53 Cal. App.2d 322, 127 P.2d 551 (1942) (where the agreement creating the joint account is unambiguous, parol evidence is inadmissible). It is to be observed that both New York and California have statutes which make the presumption in favor of the donee conclusive. (See note 8, *supra*).

19. 135 F.2d 645 (D.C. Cir. 1943).

20. *Id.* at 646.

21. *Id.* at 648.

case, but then went on to cite Missouri cases establishing the view that parol evidence is admissible to rebut the statutory presumption even under the facts of that case.²²

Another factor yet to be considered is the applicability of the parol evidence rule in this case of cases.²³ Appellant in the *Watts* case contended that the deposit agreement constituted a written contract,²⁴ and that therefore the parol evidence rule was applicable. The court takes an indecisive stand on this question and says:

Whether or not the rule in joint deposit cases should be, or should continue to be, an exception to the general rule governing written contracts, is a question that we believe should be addressed to the Supreme Court, in view of the present state of the decisions in this state on the subject.²⁵

It is first to be observed that the parol evidence rule is a rule of substantive law which, when applicable, defines the limits of a contract.²⁶ Thus, it is obvious that the parol evidence rule could not apply except in a jurisdiction where the basis of the decisions is the finding of a contract in the deposit agreement.

22. *Accord*, as to holding that presumption in favor of survivor is rebuttable: *Link v. Link*, 3 N.J. Super. 295, 65 A.2d 89 (1949); *Greener v. Greener, et al.*, 212 P.2d 194 (Utah 1949); *Mineau v. Boisclair*, 323 Mich. 64, 34 N.W.2d 556 (1948); *In re Lewis' Estate*, 194 Miss. 408, 13 So.2d 20 (1943) (dictum).

23. As illustrative of cases involving deposits where the depositors signed statements or agreements, and in which parol evidence was admitted, without evident consideration of the bearing of the parol evidence rule on its admissibility, see *Lester v. Guenther*, 134 N.J. Eq. 53, 33 A.2d 815 (1943); *Rauhut v. Reinhart*, 22 Del. Ch. 431, 180 Atl. 913 (1935); *Bedirian v. Zorian*, 271 Mass. 191, 191 N.E. 448 (1934); *In re Reynolds' Estate*, 163 N.Y.S. 803 (Surr. Ct. 1916).

24. "It is believed that such a theory rests upon a misconception of the real nature of the question or contest. It must be remembered that the contest in the cases at hand is between the estate of the original owner and the survivor (in a few cases the contest is between the owner and his co-depositor). In other words property that admittedly belonged to one person at a former time is claimed by another who does not pretend to have parted with any valuable consideration therefor. If the contest were between the depositors and the bank, it may be true that the depositors, even the one other than the original owner, could stand on the contractual relation thus created by the deposit in this form, or that the bank, having paid the fund to one other than the original owner, might defend an action by the original owner on the ground that it had complied with its contract in such payment; but the real contest is not between the depositors and the bank, the bank is a mere stakeholder; the contest is between the depositors themselves. In such a case either a gift or a trust is a condition precedent to any question arising under the tenancy created by such a deposit." Note, 1917 C. L.R.A. 551. See dissent in *Illinois Trust and Savings Co. v. Van Vlack*, 310 Ill. 185, 141 N.E. 546 (1923), for a similar criticism.

25. 222 S.W.2d 937, 939 (Mo. App. 1949).

26. 3 WILLISTON, CONTRACTS 631 (Rev. ed. 1936).

It is apparent from the language of the *Ball* case and succeeding decisions that the Missouri courts have, with the aid of the statute, in effect applied the gift theory since in each case it is the donor's intent which is the subject of inquiry. If the Missouri cases have been correctly decided on the theory of gift rather than the theory of contract,²⁷ then it follows that the issue as to the parol evidence rule in these joint deposit cases is a spurious one in Missouri.

In the light of this analysis it would seem that the Kansas City Court of Appeals properly admitted parol evidence in the *Watts* case. When a similar case is presented to the Supreme Court, it is believed that the rule of the *Watts* case should be affirmed.²⁸

RALPH K. SOEBBING

STATE AND LOCAL TAXATION—INSTALLATION OF ELEVATORS IN BUILDING TAXABLE UNDER STATE SALES TAX—EFFECT OF TITLE RETENTION CLAUSE AND DESIGNATION OF ELEVATORS AS PERSONAL PROPERTY.—Relator-Otis Elevator Company brought certiorari against the State Auditor of Missouri in the circuit court to review the assessment by the auditor of a 2 per cent sales tax levied under Sections 11407 (b) (g) and 11408 Revised Statutes of Missouri, on intrastate sales of tangible personal property. The trial court quashed the Auditor's finding and he appealed to the Supreme Court, where in an opinion in Division 2, the trial court's judgment was affirmed in part and reversed

27. "The right of a codepositor to funds deposited by the owner thereof in an account in the name of the owner and the codepositor, has, in several states, been upheld on the theory that under the contract between the depositors and the bank, the codepositor is entitled to the deposit on the death of the original owner of the funds deposited. It seems clear, however, that in such case there must be an intention on the part of the original owner of the funds to make a gift to the other joint depositor. Even assuming the existence of a third party beneficiary contract, the depositor other than the one originally owning the money is the donee of a property interest.

"The contract may supply the formalities necessary to render a gift effective. And it may be evidence of intent to make a gift. But it cannot in reason conclusively show an intent to make a gift so as to preclude showing that the deposit was made in this form for some other purpose." 7 AM. JUR. BANKS §436.

28. The Missouri Supreme Court in *Gordon v. Erickson et al.*, 356 Mo. 272, 201 S.W.2d 404 (1947) held that the evidence was insufficient to defeat the survivor's rights, but is it clearly implied that evidence is admissible to show the donor's true intent. The statute apparently was not considered.