It is a close question under the facts of the principal case whether defendant's liability should parallel that of a vendor or that of a newspaper. The Missouri court decided that, in view of the nature of the services rendered as an advertising company, defendant's liability should be determined by the rules of law applicable to a broadcasting company or a newspaper. Although the advertising company voluntarily transmitted the printed matter, like a distributor it did not compose, edit, or print what it transmitted. Like the distributor it could have exercised control over the publication of the libel only by refusing to transmit the printed matter at all. Like the distributor it could do so only if it were conscious of the libel. Why should consciousness be presumed in the case of the advertising company though not in the case of the distributor? If the advertising company had mailed a 500-page catalogue instead of a brief circular, would the analogy between its activities and those of a distributor have been more persuasive?

On the other hand, so far as it is a question of the nature of the activities, it seems as justifiable to hold defendant liable for publication in the principal case as it does to hold a broadcasting company liable for the transmission of defamatory interpolations made *ad libitum*.[11] Moreover, each may insure itself against loss by increasing rates, or by requiring surety contracts of those who use its facilities.

The trend in most fields of tort law has been away from liability without fault.[12] Yet, in the light of recent decisions, it seems that there is a countertendency to increase the application of strict liability in the field of libel and slander.[13] It has been argued that such a development is in line with good public policy, on the grounds that the protection of the individual from loss through defamation of character is socially more important than the protection of corporations from loss accruing from liability for innocent publications of a libel.[14] L. E. M.

TRUSTS—TENTATIVE TRUSTS—JOINT BANK ACCOUNT PAYABLE TO EITHER OR SURVIVOR—[Missouri].—The deceased opened a joint bank account for herself and the defendant payable to either or survivor. Deceased retained possession of the pass book, drew the interest during her lifetime, and made one withdrawal, which she later redeposited. Plaintiff, administrator of

---

of a libel, or not in any way connected with or responsible for its being composed and written or printed. Odgers, *Libel and Slander* (6th ed. 1929) 132-140. When such a person innocently communicates a libel, it is sometimes said that there was an unconscious publication for which there is no liability. See: Odgers, *Libel and Slander* (6th ed. 1929) 132; Becker v. Brinkop (1935) 230 Mo. App. 871, 78 S. W. (2d) 538; Restatement, *Torts* (1938) sec. 581, comment c; Harper, *Torts* (1938) 505, sec. 237.

11. Cf.: Vold, Basis for Liability for Defamation by Radio (1935) 19 Minn. L. Rev. 611; Vold, Defamatory Interpolations (1940) 88 U. of Pa. L. Rev. 249.

12. See Harper, *Torts* (1938) c. 1; Holmes, *The Common Law* (1881) 94.

13. See supra note 7.

14. Cf. Vold, Basis for Liability for Defamation by Radio (1935) 19 Minn. L. Rev. 611.

deceased's estate, suing to recover concealed assets of the estate, claimed that the bank account was not a joint account in spite of its form because the deceased had not intended it to be such. *Held:* Although the presumption in favor of joint ownership in the fund, arising from Section 5400 of the Revised Statutes of Missouri (1929), was rebutted, the transaction amounted to a parol trust created by the deceased in favor of defendant. *In re Geel's Estate.*[1]

The court based its decision on an intention, found from the words and acts of the deceased, to create a parol trust, which it called a trust "in a manner tentative." The beneficial interest thus created in defendant, the court said was revocable at the will of deceased during her life, but became absolute and irrevocable at her death. This is the first time that a Missouri court has recognized the "tentative trust" doctrine. It is true that the phrase was used in *Frank v. Heimann*,[2] in discussing a bank account deposited by "*A* as trustee for *B*", but the court there held that *A's* frequent deposits and withdrawals prevented any implication of an intent to create a trust.

The "tentative trust," which is also known as the "Totten Trust," was a development of three New York cases.[3] The Missouri court's recognition of the doctrine in the instant case consists wholly of the phrase," in a manner tentative," for there is no discussion of the doctrine. However, the usual form of a "tentative trust" account is "*A* as trustee for *B*," while, in the principal case, the deposit was in the more doubtful form of "*A* and *B* payable to either or survivor." The decision must mean that this language will be read as "*A* as trustee for *B* and *B* as trustee for *A*." *A fortiori*, "*A* as trustee for *B*" would be held a "tentative trust."

The decisions concerning the interest of the survivor in a joint bank account reveal a good deal of conflict both in result and in theory. Those courts which have rejected altogether the "tentative trust" doctrine do not, of course, apply it to joint savings accounts.[4] Some courts uphold joint

1. (Mo. App. 1940) 143 S. W. (2d) 327.
2. (1924) 302 Mo. 334, 258 S. W. 1000.
3. In Martin v. Funk (1878) 75 N. Y. 134, 31 Am. Rep. 446, the court held that a savings bank deposit established by "*A* in trust for *B*" created a trust in favor of *B*, although *A* neither communicated to *B* her intention to create a trust nor delivered the pass book to *B* during *A's* life. This case was reversed by Beaver v. Beaver (1889) 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531. Fifteen years later, in Matter of Totten (1904) 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, the court pronounced these deposits to be revocable trusts—the depositor intending to reserve the power to control the account during life but intending that there be created upon death an absolute trust in the balance of the deposit.
4. Mathias v. Fowler (1915) 124 Md. 655, 93 Atl. 298; Norway Savings Bank v. Merriam (1895) 88 Me. 146, 33 Atl. 840; Bath Savings Institution v. Fogg (1906) 101 Me. 188, 63 Atl. 731; Maine Savings Bank v. Welch (1921) 121 Me. 49, 115 Atl. 545; Howard v. Dingley (1922) 122 Me. 5, 118 Atl. 592; Towle v. Wood (1881) 60 N. H. 434, 49 Am. Rep. 326; Stevenson v. Earl (1903) 65 N. J. Eq. 721, 55 Atl. 1091; Jefferson Trust Co. v. Hoboken Trust Co. (1930) 107 N. J. Eq. 310, 152 Atl. 374; McGillivray v. First Nat'l Bank (1927) 56 N. D. 152, 217 N. W. 150; Darling v. Mattoon State Bank (1926) 189 Wis. 117, 207 N. W. 254.

bank deposits as gifts,[5] as trusts,[6] or as contracts.[7] The Missouri courts will enforce a parol trust[8] of a joint interest in a bank deposit as well as a gift *inter vivos*,[9] even where the donor has retained possession of the pass book.[10] The problem is complicated in Missouri by statutes which declare that banks and trust companies shall pay to the survivor of a joint bank account the funds on deposit at the death of the joint tenant.[11] These statutes, however, were passed to protect the banks and trust companies[12] and, as between the survivor and the estate of the deceased joint tenant, create only a rebuttable presumption that the survivor is to receive the funds.[13]

Considering that the form of the deposit in the instant case, "*A* and *B* payable to either or to the survivor," does not indicate an intention to create a trust, it is possible that the court turned an imperfect gift of a joint interest into a "tentative trust" in order to achieve a result which it considered desirable.

E. A. D.

---

5. Kauffman v. Edwards (1921) 92 N. J. Eq. 554, 113 Atl. 598; Marston v. Industrial Trust Co. (R. I. 1919) 107 Atl. 88. See Ferry v. Bryant (1935) 19 Tenn. App. 612, 93 S. W. (2d) 344.

6. Bell v. Moloney (1917) 175 Cal. 366, 165 Pac. 917; Williams v. Savings Bank (1917) 33 Cal. App. 655, 166 Pac. 366; George v. Daly City Bank (1927) 83 Cal. App. 684, 257 Pac. 171; Murphy v. Haynes (1923) 197 Ky. 444, 247 S. W. 362; McDevit v. Sponseller (1931) 160 Md. 497, 154 Atl. 140; Ladner v. Ladner (1922) 128 Miss. 75, 90 So. 593.

7. Deal's Adm'r v. Merchants' and Mechanics' Savings Bank (1917) 120 Va. 297, 91 S. E. 135, L. R. A. 1917C 548; Chippendale v. North Adams Savings Bank (1916) 222 Mass. 499, 111 N. E. 371.

8. Mississippi Valley Trust Co. v. Smith (1928) 320 Mo. 989, 9 S. W. (2d) 58. Harris Banking Co. v. Miller (1905) 190 Mo. 640, 89 S. W. 629, followed in Northrip v. Burge (1914) 255 Mo. 641, 164 S. W. 584 and in Rollestone v. National Bank of Commerce (1923) 299 Mo. 57, 252 S. W. 394, framed the test for a valid parol trust in personalty: a declaration of trust by the settlor, a definite subject matter, and a definite object or beneficiary. Cf. Citizens National Bank v. McKenna (1913) 168 Mo. App. 254, 153 S. W. 521, and Coon v. Stanley (1936) 230 Mo. App. 524, 94 S. W. (2d) 96.

9. For a gift *inter vivos* there must be an intention to give, unconditional delivery of the property given to the donee, and acceptance by the donee. In re Soulard's Estate (1897) 141 Mo. 642, 43 S. W. 617. Cf. Eschen v. Steers (C. C. A. 8, 1926) 10 F. (2d) 739.

10. Commonwealth Trust Co. v. Du Montimer (1916) 193 Mo. App. 290, 183 S. W. 1137 (valid gift of a joint interest in a bank account even where the donor retained possession of the pass book).

11. R. S. Mo. (1929) secs. 5400 (banks), 5464 (trust companies).

12. Mississippi Valley Trust Co. v. Smith (1928) 320 Mo. 989, 9 S. W. (2d) 58; Schnur v. Dunker (Mo. App. 1931) 38 S. W. (2d) 282.

13. Ball v. Mercantile Trust Co. (1927) 220 Mo. App. 1165, 297 S. W. 415; Bunker v. Fidelity Nat'l Bank and Trust Co. (1934) 335 Mo. 305, 73 S. W. (2d) 242; Melinik v. Meier (Mo. App. 1939) 124 S. W. (2d) 594. But cf. Schnur v. Dunker (Mo. App. 1931) 38 S. W. (2d) 282.