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Banks and Banking--Joint Accounts--Further Application of Statutory Presumption of Gift (Marrow v. Moskowitz, 230 App. Div. 1 (1st Dept. 1930))

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sents in opinion in which Merrell, *J.*, concurs. National City Bank of New York v. Waggoner, 230 App. Div. 88, 243 N. Y. Supp. 299 (1st Dept., 1930) *aff'd* without opinion 254 N. Y. —— (1930).

Courts of equity are frequently called upon to adjust property rights where property which has been stolen or procured by devious means has passed through more than one hand. The doctrine uniformly applied is that where property has been wrongfully misapplied or a trust fund wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner.[1] "Equity only stops the pursuit when the means of ascertainment fails, or the rights of *bona fide* purchasers for value, without notice of the trust, have intervened." [2] In tracing funds, as in the principal case, the form which the moneys take may change and the successive changes render the pursuit difficult, but they do not, however, suffice to render it unavailing. Money may be traced into and through a deposit account, notwithstanding the fact that the specific money may go into the bank's general funds.[3] The fact that checks payable out of such funds are certified does not prevent the application of the rule; certification cannot have any greater effect in curbing its operation than would payment.[4] The allegations of the complaint charge the Central Bank with knowledge of the fraud by which the certifying bank came into possession of the funds and of the rightful ownership in plaintiffs. The funds were impressed with a trust in favor of plaintiffs when deposited with the Chase Bank and the absence of the conventional relation of trustee and *cestui que* trust between the Central Bank and the plaintiffs is no obstacle to holding that bank as trustee of the fund. The pronouncement of the Court is in accord with equitable principles to grant relief by construing the relationship between the true owner of property and a party who wrongfully obtains ownership to be one of trust.

R. L.

BANKS AND BANKING—JOINT ACCOUNTS—FURTHER APPLICATION OF STATUTORY PRESUMPTION OF GIFT.—Deceased had opened a savings bank account in the joint names of herself and the respondent. Later she closed the account and deposited the money withdrawn to a new account in her own name. Shortly before her death, desiring

[1] Story, Eq. Jur., sec. 1258; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504 (1887); Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205 (1893); Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152 (1877); see, also, Note (1930) 4 St. John's L. Rev., 239.

[2] Newton v. Porter, *ibid.*, at 139; Perry, Trusts, sec. 829.

[3] Van Alen v. American National Bank, 52 N. Y. 1 (1873); Importers & Traders Nat. Bank v. Peters, 123 N. Y. 272, 278, 25 N. E. 319 (1890).

[4] Weiss v. Haight & Freese Co., 152 Fed. 479 (C. C. D., Mass., 1907).

to reinstate the joint account, she delivered the passbook for the individual account to the plaintiff and directed her to take the necessary steps for the re-establishment of the account in the joint form. Owing to the reluctance of the bank to make the change, the money was still in the individual account when the depositor died. By a vote of three to two the Appellate Division affirmed the judgment of the Supreme Court, holding plaintiff entitled to the deposit. In the view of the majority of the court, the closing of the joint account by the depositor could in no way affect the plaintiff's interest in the fund, she not having consented to the withdrawal. Evidence tending to show that the deceased opened a joint account for convenience only and with no intention of creating a joint tenancy, *Held,* properly excluded in view of the conclusive presumption of gift set up by section 249 (3) of the Banking Law. Marrow v. Moskowitz, 230 App. Div. 1, 242 N. Y. Supp. 523 (1st Dept., 1930).

The first sentence of subdivision 3 makes a joint deposit in the statutory form presumptive evidence, during the joint lives of the parties, of the intent to create a joint tenancy of the funds deposited.[1] The last sentence making the presumption of joint tenancy irrebuttable after the death of either party was the subject of interpretation in a prior litigation between the parties to this action.[2] Although that decision was not controlling here, inasmuch as the deposit in this action was not in existence at the time of the depositor's death, as was the case in the former suit, the Court in the instant case leaned heavily on the interpretation of the statute therein in coming to its conclusion that the statute applied even though the joint account had been closed long before the death of the depositor. The reason for such reliance is difficult of comprehension in view of the following excerpts from the concurring opinion of Chief Justice Cardozo, in that case. Explaining the meaning of the statute, he says, "The plain implication is that as between the depositors themselves, the form of the deposit gives rise to a presumption and nothing more, but that after the death of either, *leaving a deposit then subsisting,* the presumption becomes conclusive as to the title of the survivor." [3] (Italics ours.) And, again, considering the situation which arises on the death of either party, he further says, "The presumption is no longer subject to be rebutted, the form, in the words of the statute, becomes conclusive evidence of the intention * * * when one of the depositors dies *with the deposit still intact.*" [4] (Italics ours.)

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[1] Laws of 1914, ch. 369; Clary v. Fitzgerald, 155 App. Div. 659, 140 N. Y. Supp. 536 (4th Dept., 1913), *aff'd* without opinion 213 N. Y. 696, 107 N. E. 1075 (1915) (construing old sec. 144 of the Banking Law, Laws of 1909, ch. 10 of which the first sentence of sec. 249 (3) is a restatement limited to savings banks; Moskowitz v. Marrow, 251 N. Y. 380, 167 N. Y. 506 (1929), 4 St. John's L. Rev. 120.

[2] Moskowitz v. Marrow, 251 N. Y. 380, 167 N. E. 506 (1929).

[3] *Ibid.* at 397, 167 N. E. at 512.

[4] *Ibid.* at 399, 167 N. E. at 512.

The existence of a joint deposit is the evidentiary fact which has been raised by virtue of the statute [5] to the status of a presumption. During the joint lives of the parties it may be rebutted, but after the death of either of them the same statute that created the presumption gives it conclusive force. All this is solely by reason of the statute. At common law it has been held that the mere fact that the joint form of deposit was employed, is insufficient, of itself, to establish a gift.[6] In McDonald v. Sargent,[7] decided under the statute, it was intimated that a joint deposit in other than the statutory form might give rise to a presumption that the account was so made for convenience only. Clearly no presumption of joint tenancy arises in the absence of the statutory form, and clearly the statute was never intended to raise a conclusive presumption of joint tenancy in a case where there is no joint deposit, in the statutory form or otherwise, at the time when the presumption becomes irrebuttable.

It is submitted that the dissenting opinion applies the statute in a manner consonant with reason and authority and that, therefore, there being no conclusive presumption in favor of the plaintiff by reason of the inapplicability of the statute, the evidence offered to prove that the joint account was opened for the convenience of the deceased only, should have been received.

J. V. M.

BROKERS—WHEN LICENSE NECESSARY TO RECOVER COMMISSIONS.—Plaintiff held himself out as a real estate broker in the city of New York. Defendant employed him in the usual manner to bring about a sale of his property. Plaintiff ultimately procured a purchaser who accepted the defendant's offer, and thus brought about a sale of the property. At the time of the broker's employment he did not have a real estate broker's license as required by statute,[1] but procured it before he brought the customer to the defendant and before he did any work toward affecting a sale of the property. During all the time that the negotiations took place and when the sale was consummated, he was duly licensed. Plaintiff brought an action to recover his commission. The defense interposed was that the plaintiff had not complied with the statute, and hence, could not collect his commission, a license being a prerequisite to such an action.[2] *Held,* plaintiff was a licensed real estate broker according to the statute and was entitled to his commission. All work done in his capacity as a broker for which he was entitled to compensation, was done while he was licensed. Calhoun v. Banner, 254 N. Y. 325, 172 N. E. 523 (1930).

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[5] Laws of 1914, ch. 369.
[6] Kelly v. Beers, 194 N. Y. 49, 86 N. E. 890 (1909).
[7] 121 Misc. Rep. 437, 201 N. Y. Supp. 429 (1923).

[1] N. Y. Real Property Law, sec. 440-A.
[2] *Ibid.*, sec. 442-D.