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JOINT SAVINGS BANK ACCOUNTS IN MARYLAND

By Alvin Katzenstein*

Joint bank accounts involve complex legal and practical problems. An officer of one of the larger savings banks in Baltimore estimated to the present writer that approximately two-thirds of the savings accounts in his institution were established in some type of joint deposit form.1 This is no doubt typical of the situation in all banks. Naturally, many legal problems can arise in connection with a special device so frequently utilized. The most typical form is the joint deposit in trust, which is now generally used.

The desire to achieve various results by one decisive stroke has led to the popularity of these accounts. Two aims, in particular, seem to have been dominant in the mind of the layman. The desires to keep independent individual control during life and to provide a right of survivorship to a certain person after death2 are, in the main, the most frequent objectives.

The first attempts to gain these results were made by trying to create a gift through the wording of the account. Though appropriate wording would achieve the desired control during life, the gift was held to be ineffective to create survivorship after death.3 The form of a tenancy by the entirety produced just the opposite result.4 It achieved survivorship, but did not allow complete individual control during life. The trust form of a joint bank account was found to be the only method to obtain the desired results of control during life and right of survivorship in the desired

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1 This article deals only with problems arising out of savings bank accounts and does not purport to deal with any other type of bank account.
2 This is to avoid the delay and expense in the distribution of estates that are involved in Orphans’ Court procedure.
4 *Infra circa* notes 61-70.
party after death. The use of such form, however, has had certain interesting effects upon the rights of creditors, setoff, and taxation of the individual interests in such accounts. There may be other effects not yet litigated.

It is the purpose of this article to trace the development of the law that has reached the above results, and to treat the collateral problems that have arisen. The cases seem naturally to divide into those dealing with: (1) gifts of bank accounts; (2) the tenancy by the entirety in bank accounts; (3) the use of the trust device to accomplish what the other devices failed to achieve; and (4) collateral problems of rights of creditors, set-off, liability of the bank, and taxation.

Gifts

The first attempts to create rights in a savings bank account in some one other than the original owner of the money were made in the form of a gift, through the wording of the account. Efforts were also made to transfer a savings account by delivering the bank book, but these attempts were always subject to the law governing gifts of a chose in action because the actual money itself was never manually transferred. Hence, an understanding of the development of the law of gifts of choses is essential as a necessary preliminary to an analysis of the bank account cases.

A recent and excellent article by Professor Paul Bruton has developed that topic along the following general lines. Originally choses in action were not transferable at all, either gratuitously or for a consideration. The doctrine of delivery was first worked out with reference to the transfer of tangible chattels. It was firmly established before choses in action became assignable that an irrevocable gift of personal property could be made only by written assignment

6 *Infra circa* notes 71-83.

6 Bruton, *The Requirement of Delivery as Applied to Gifts of Choses in Action* (1930) 39 Yale L. J. 837. This article is closely followed not only because of its excellence but because of its recent citation and approval by the Court of Appeals of Maryland in Brooks v. Mitchell, *infra* note 46.

7 The earliest case holding that a chose in action may be assigned by delivery of a written instrument is Jones v. Selby, Prec. Ch. 300 (1710), where it was held that Exchequer Talties were proper subjects of a gift *causa mortis*.
properly executed and delivered, or by delivery of the res, with intention to make a gift.  

Commercial needs and the difficulty of regulating transfers of property on a possessory basis, however, soon gave rise to the transferability of choses in action. A tendency arose to accept other evidence, equally indicative of the intent to give, in lieu of actual transfer of possession. This tendency to qualify the requirement of actual delivery of possession first appeared in the theory of constructive delivery. The delivery of a key to a chest would substitute for the actual delivery of the property in the chest, for this was a transfer of the means of acquiring possession of the property given.

In 1744, Lord Hardwicke, in Snelgrove v. Bailey, gave the first discussion of the doctrine of delivery as applied to choses in action. That case involved a gift causa mortis of a bond delivered to the defendant. The gift was upheld by the Chancellor who said: "You cannot sue at law without a bond; for though you may give evidence of a deed at law that is lost, yet you cannot of a bond, because you must make profert of it".

Having held that a good gift causa mortis could be made of a bond by delivery, the court was soon presented with a similar problem. Eight years later in Ward v. Turner the question arose, before the same Chancellor, as to whether a delivery of receipts for certain South Sea annuities (the annuities themselves being owned by the donor but being in the custody of a third party) would constitute a valid gift causa mortis of the annuities. Essentially the question presented was how far the new laws permitting assignments of choses in action would qualify the old rules of delivery. The Court held the gift incomplete. In speaking of Snelgrove v. Bailey, Lord Hardwicke said:

"It was argued, that there was no want of actual delivery there or possession, the bond being but a chose

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[8] The two leading English cases standing for this proposition are Irons v. Smallpiece, 2 B. and Ald. 551 (1819), and Cochrane v. Moore, 25 Q. B. D. 57 (1890).
in action; and therefore there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go farther: and I chuse to stop there. But I am of opinion that decree was right, and differs from this case; for though it is true, that a bond, which is specialty, is a chose in action, and its principal value consists in the thing in action, yet some property is conveyed by the delivery; for the property is vested; and to this degree...the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert in Cur."

The Chancellor then continued to discuss constructive delivery and pointed out that the delivery of a key to bulky goods had been held to be a delivery of the possession, because it was the way of coming at the possession, or to make use of the thing, and therefore the key is not a symbol which would not do.

Concerning this, Mr. Bruton pointed out:14

"The reasoning of the case can be fully understood only by considering it in the light of the law as it then existed. By the rule of profert, mentioned in the decision, it was required, when suit was brought upon a sealed instrument, that the instrument itself should be presented in court as part of the pleadings.15 Profert was not excused if the instrument were lost or could not be procured, for the equitable doctrine permitting the proof of lost documents had not yet been fully recognized by the law courts. Under these rules of law it was not difficult to draw the analogy between the delivery of the bond and the delivery of the key. The former transferred control or dominion over the thing given quite as effectively as the latter. Transfer of the bond absolutely deprived the donor of the legal means of enforcing the chose represented by it."

As further suggested by Mr. Bruton:16

"Ward v. Turner formulated the doctrine which was the starting point for the law of delivery in gifts of

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14 Bruton, op. cit. supra, n. 6, 842.
15 The rule of profert and its development into the so-called best evidence rule is discussed in 2 Wigmore, Evidence (2nd Ed. 1923) Sec. 1177.
16 Op. cit. supra n. 6, 842.
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choses in action. The case stands for two propositions which have been of tremendous importance in the development of the law. (1) It held that delivery, in the sense of transfer of control, was as necessary in gifts of choses in action as it was in gifts of tangible property. Proof of donative intent alone was as ineffectual in one type of case as in the other. (2) Since the delivery required was transfer of control, the case determined the kind of a delivery which would satisfy this test as applied to a chose in action. Only the transfer of a document which would deprive the donor of the means of enforcing the chose would satisfy the test.”

Shortly after this decision its whole basis was swept away when the rule of profert was supplanted by the “best evidence rule”. The latter is a rule by which all writings are the best evidence of their own contents and they must be introduced to prove matters covered by their provisions unless they have been lost or destroyed, or their absence is otherwise satisfactorily accounted for. The effect of this, in Mr. Bruton’s estimation, was to make “the requirement of delivery in gifts of choses in action mean nothing more than the transfer of an instrument which is the complete and best evidence of the obligation assigned and is required to be presented or surrendered to the obligor as a condition to the obli g’or’s duty to perform.”

Thus, the basis of the law of gifts of choses in action was established to the extent it bears relation to our discussion. The early treatment of the topic by the Court of Appeals of Maryland ante-dated of course, the views of Mr. Bruton. *Ward v. Turner* was construed to have decided that a delivery of the thing intended to be given is essential to the perfection of the gift and the tendency of the Court was seem-

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17 It is to be noted that the delivery of the bond in *Snelgrove v. Bailey* deprived the donor of the means of enforcing the chose, while the delivery of the receipts in *Ward v. Turner* did not. The two cases may thus be distinguished by the common law rule of profert.

18 This reasoning is said to be in error by Williston, *Gifts of Rights Under Contracts in Writing by Delivery of the Writing* (1930) 40 Yale L. J. 5. However, the distinction between *Ward v. Turner* and *Bailey v. Snelgrove*, pointed out by Bruton, supra n. 6, seems to this author to be the more logical and is supported by the Maryland Court of Appeals in *Brooks v. Mitchell*, 163 Md. 1, 161 Atl. 261 (1932), treated infra circa notes 46-60.

19 Pennington v. Gittings, 2 G. and J. 208 (1830); Bradley v. Hunt, 5 G. and J. 58 (1832).

20 Ibid.
ingly to accept that as the settled rule, and to restrict *Snelgrove v. Bailey* to its actual facts. This seemed the trend even though they were mutually dependent upon the same background for their existence.

In the following discussion of gifts, the two problems of (1) a gift through the wording of the account and (2) a gift through the physical donation of the bank book will be considered together for purposes of clarity.

The first case involving a gift of money deposited in a bank was *Gardner v. Merritt*.[21] The grandmother of complainants deposited during her life various sums of money in the Savings Bank of Baltimore to the credit of complainants, having caused accounts to be opened in the bank in the name of each of them, as a minor, and containing immediately after the name of the infant, the words, "subject to the order of Susanna A Merritt". The Court of Appeals, in deciding that the money belonged to the infants, said the entry in the book was to be interpreted with reference to the language of the by-law of the bank.[22] The Court then proceeded to link that by-law with the wording in the pass book and the two were interpreted by a thorough inquiry into the facts of the case. The facts showed that the delivery of the deposits to the bank was a perfected gift to the infants. The control retained by the donor was for their benefit and not such control as would leave the donor a *locus poenitentiae* and thus invalidate the gift. Though this case was not faced with the same objections that were deemed fatal to *Ward v. Turner*, still the court was liberal in finding a delivery to the infants despite the control retained by the donor.

However, the Court did not long adhere to the method of construing words in a pass book, as adopted by the previous case. Four years later, in *Murray v. Cannon*,[23] the Court refused to uphold a purported gift of a savings bank deposit. A deposit with the Savings Bank of Baltimore read "James Cannon, subject to his order, or the order of his

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[21] 22 Md. 78 (1870).
[22] The by-law read: "Guardians and parents may deposit for the benefit of their wards and children and subject the deposits to the control of the guardians or parents."
[23] 41 Md. 466 (1874).
daughter, Mary E. Cannon". Upon the death of James, Mary claimed that her father, in his lifetime, had given her the book of deposit with the money credited therein, to be held by her in trust for herself, and her brothers and sisters. The administratrix claimed the money in the bank as belonging to the estate of James Cannon. That claim was upheld. The Court reviewed the general law of gifts by reiterating: 24

"To perfect a gift, the delivery of the thing intended to be given is indispensable. There must be a parting by the donor with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus poenitentiae*, there cannot be a perfect and legal donation."

The language of the Court seemingly outlawed the theory of a constructive gift. Mention was made of the fact that Mary Cannon was acting as the agent of her father, and that the agency was revoked by his death. 25 However, the Court said that the question was settled by *Gardner v. Merritt* and that:

"It cannot be insisted after the decision in that case, that James Cannon had parted with legal dominion and control over money standing in his name in the bank, because it was there subject to his order or the order of Mary E. Cannon. On the contrary, it was his as absolutely as it would have been hers, if the deposit had been made in her name, subject to the order of James Cannon and had so continued in the bank up to the time of his death."

The question also arose as to whether the delivery of the pass book to Mary Cannon could be said to operate as a

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24 41 Md. 466, 476.
25 Carey v. Dennis, 13 Md. 18 (1859).
26 41 Md. 466, 477.
27 This interpretation of *Gardner v. Merritt*, as authority for allowing the words in the deposit book to control, seems erroneous. That case was authority for just the opposite conclusion because very little stress was placed upon the wording of the account but much importance was given to the actual situation. The Court there said, "In every case the general purpose and intention of the donor, and *not the use of one particular term or another* will decide the question of whether a party does or does not take in a fiduciary capacity." However, without a complete inquiry into the factual situations, Murray v. Cannon stated that James Cannon had not parted with legal dominion and control over the money because of the wording of the account. *Cf. Gorman v. Gorman*, 87 Md. 338, 39 A. 1038 (1898) *infra* n. 31.
delivery to her of the money in question, and it was decided that it could not. This branch of the case was held to be within the decision of Ward v. Turner. The Court reiterated the facts of that case and stated its holding to be that "the delivery of the receipts was not a delivery of the annuities, as they could only be delivered by a transfer or something equivalent. So, in this case the delivery of the book of deposit did not constitute a delivery of the money which it is claimed was the thing intended to be given, because its delivery could not be affected in that way". No discussion, reasoning, or reference to the intention of the parties was made. There was merely the reiteration of the oft-repeated, well-worn dogma, "the delivery of the thing intended to be given is indispensable to perfect a gift".

Murray v. Cannon, then, is authority for two points: (1) the donor does not part with dominion and control over an account standing in his own name in a bank and subject to his own order, by making it also subject to the order of another, and (2) the delivery of a savings bank book of deposit does not constitute a delivery of the money.

In Taylor v. Henry, the form of deposit was somewhat different from that used in Murray v. Cannon. The pass book read, "Joseph Henry, Margaret Taylor, and the survivor of them, subject to the order of either". The evidence showed that Joseph Henry deposited his own money in the bank in that form at a time when he was in feeble health and contemplating a sea voyage. After his death Margaret obtained the bank book and drew out the entire balance. The administrators of Joseph Henry then filed a bill for an accounting. Margaret Taylor claimed the deposit vested in her by survivorship according to the terms and effect of the deposit. The Court discussed the requisites of a gift and reached the conclusion that Margaret Taylor was simply constituted an agent with power to draw money from the bank to meet some supposed or apprehended emergency that might possibly arise.

Taylor v. Henry clearly lays down the rule that where a deposit is made by one person in the name of two persons

28 41 Md. 466, 477.
29 48 Md. 550 (1878).
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(one of whom is the original owner) subject to the order of either, there is no gift of the funds by the original depositor to his joint owner. To quote the Court: 30

"To make such a gift complete there must be an actual transfer of all right and dominion over the thing given by the donor plus an acceptance by the donee or some competent person for him; and it is essential to the validity of such gift that it should transfer the property at once and completely. Until the gift is then made perfect, a locus poenitentiae remains".

In such a deposit the donor always retains the power to draw out the money because the account is subject to his order. He does not, therefore, divest himself of dominion and control over the fund, and the gift is invalid. The terms of the entry themselves do not import an actual present donation by the donor to the donee, so the words, "to the survivor of them" are impotent.

The only means of reconciling this case with Gardner v. Merritt is to realize that the latter case deals with a deposit for the benefit of a minor under the by-laws of the bank, and must be regarded as the exception to the rules laid down by Murray v. Cannon and Taylor v. Henry. These two cases decided that as long as the money originally belonged to the donor, and it continued to be subject to his right of withdrawal, there could be no gift and no right of survivorship in the donee through the mere wording of the account. This became the basis of many later Maryland cases with similar or slightly different facts. 31

30 48 Md. 550, 557.
31 a. Conser v. Snowden, 54 Md. 175 (1880), decided that a gift of an order on a bank for money on deposit in a savings account was not a good gift of the money where the donee did not have the bank book and the donor died before he got it.
   b. Second National Bank of Baltimore v. Wrightson, 63 Md. 81 (1885). A deposit in the name of the husband, payable to the husband or wife did not authorize payment of the money to the wife after the death of the husband. However, it is to be noted that the above point was not argued. It was conceded. The main point argued dealt with the reformation of the certificate of deposit.
   c. Dougherty and Reilly v. Moore, et al., 71 Md. 248, 18 A. 35 (1889). A deposit in the name of husband and wife and the survivor, subject to the order of either, was held not to be a gift even though later an entry was made by which the husband gave the money in the account to his wife. However, after the entry the husband continued to draw money out of the account. "There can be no gift as
The effect of the delivery of a bank book on the ownership of the fund it represents was next dealt with by way of dictum in Whalen v. Milholland. It was purely dictum because the Court found that the testimony failed to show a delivery of the book, but nevertheless the treatment the question received is of interest because of the general im-

long as the donor retains the control and dominion over the sub-
ject of the gift.” 71 Md. 248, 252. Another deposit in the name of
the husband, subject also to the order of himself or his wife with
the same additional entry was also held not to be a valid gift.

read “Henry Hedrick and his wife, Anna Hedrick, subject to the order
of either or the survivor.” The husband died and it was found that
the money originally belonged to the wife. Therefore there was no
valid gift and the estate of the husband was not entitled to the
money.

account in the name of Theresa McConnell was later changed to a
joint account in the name of Theresa McConnell and her niece, “joint
owners, payable to the order of either or the survivor.” The pass
book was always retained by Theresa McConnell until her death,
when both the niece and Theresa McConnell’s executor claimed the
fund. Upon a bill of interpleader being filed by the bank it was held
that the money belonged to the executor and not to the niece. Much
stress was placed both upon the intention of the parties and the
facts of the case, and there was little or no reliance upon the word-
ing of the account to determine ownership. Thus, in that respect,
the Court has gotten away from Murray v. Cannon. It was con-
tended that the words “joint owners” made the fund the joint prop-
erty of the two persons. But the Court said, 87 Md. 338, 349, 350
“we cannot close our eyes to all the other evidence in this case and
give effect alone to two words in the entry.”

f. Savings Bank of Baltimore v. McCarthy, 89 Md. 194, 42 A.
929 (1899) Plaintiff made deposits in a savings bank in the names of
her nieces, then infants, subject to her order. She was not then
 guardian and did not intend to give them the money. Held: No gift,
and depositor was entitled to draw out the money.

g. Whalen v. Milholland, 89 Md. 190, 43 A. 45 (1899). Elizabeth
O’Neill had a savings account in her own name which was closed and
another opened in the name of “Elizabeth O’Neill and Mary Whalen.
Joint owners. Payable to the order of either or the survivor.” Upon
the death of Elizabeth O’Neill it was decided that the account passed
to her executor and not to the joint owner. There was no valid gift.
The words “joint owners” do not restrain the depositor from with-
drawing the money and therefore there was a locus poenitentiae and
no valid gift.

h. Colmary v. Fanning, 124 Md. 548, 92 A. 1045 (1915). A sav-
ings deposit in the name of “Sadie Colmary, also subject to the order
of A. H. Colmary, either or the survivor” did not constitute a gift
to A. H. Colmary of the money deposited in the bank by Sadie Col-
mary. Here the Court indicated the way in which one member of a
joint bank account may be the donee of the fund by saying, 124 Md.
548, 565, that “the entry did not, without a surrender of the bank
book to him for the purpose of enabling him to withdraw the money
for his own use, amount to a gift by her of the money deposited in
that account to him.”

52 89 Md. 190, 43 A. 45 (1899) supra n. 31.
The following conclusions were reached: (1) that where the terms of the deposit did not purport to create an interest as donee in the claimant, the delivery of the book did not transfer the ownership of the money on deposit;83 (2) that mere possession of the book, worded "A and B joint owners. Payable to the order of either or the survivor", whilst a fact to be weighed in deciding the question as to who owns the fund, was not conclusive evidence of ownership.84 On the basis of this, the Court went on to say:85

"Where it appears that the original owner purposely deposited the funds to his and another's credit as joint owners, retaining the pass book so as to continue his dominion over the money; a distinct unequivocal delivery of the book to the other person named as co-owner, with the intention to part with the ownership and make an irrevocable gift of the fund and an acceptance of it by the donee, would pass the whole interest therein to the donee, because there would then be no inconsistency between the legal effect of the entry on the book, and the right in which the donee of the book could claim the deposit, and there would no longer be a locus poenitentiae in the original owner".

The conclusion of the dictum was correct, but the method that the Court used to reach its end was but a begging of the question. The wording of the account was made determinative of the question of whether the delivery of the bank book represented a gift of the funds in the bank. But, if the Court had been willing to recognize the doctrine of symbolic delivery, as later carried forward by Mr. Bruton,86

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83 Based on Murray v. Cannon, 41 Md. 466 (1874) supra circa n. 23. It seems that the basis of distinction existed in the fact that in Whalen v. Milholland the wording of the account specifically made the two persons whose names appeared on the pass book "joint owners", while in Murray v. Cannon they were not so named; therefore the terms of the deposit did not purport to create an interest as donee in the claimant because of the lack of the words, "joint owners" in the latter case.

84 Based on Gorman v. Gorman, 87 Md. 338, 39 A. 1038 (1898), supra n. 31. Because of the necessity of proving not only delivery but also intention, this statement may be explained as merely reiterating the fact that in order to sustain a valid gift an intention to make the gift must be proved and mere delivery of the subject of the gift without requisite intention is not sufficient.

85 89 Md. 199, 206.

86 See supra circa n. 18. This doctrine was later recognized in Maryland in Brooks v. Mitchell, infra n. 46.
so as to allow delivery of the "best evidence" to be sufficient delivery for a gift, there no longer would have been a locus poenitentiae in the owner even if he gave his bank book away to one who was not a joint owner. Thus the wording on the account need not have been the determining factor.

Both the first and second propositions of Whalen v. Milholland represented the efforts of this and previous courts to reconcile Murray v. Cannon with the weight of authority in this country. In doing so they failed to take cognizance of the fact that there were two questions in Murray v. Cannon. First, did the wording of the account create an interest in the donee; and second, did a delivery of the book effectually deliver the funds in the bank? As to the second question, the answer was "no", predicated not upon any wording of the account book, as is suggested by the Milholland case, but solely upon the misinterpretation of Ward v. Turner. The effect of this was seemingly to hold that a symbolical delivery was not valid; and that in order to have a gift of a chose in action, the thing desired to be given must itself be transferred. This rule was to be explained away in a later Maryland decision as resting on the common law need for "profert"; but the Court was not yet ready in Whalen v. Milholland to take the jump, when it could support itself by the nature of the account involved.

At this early date, it was not yet taken into consideration that a Savings Bank book has a peculiar character in that it is the only security the depositor has as evidence of his debt. The book is ordinarily the only instrument by which the money can be obtained and its possession is thus some evidence of title in the person presenting it to the bank. Therefore, as the main questions involved in the validity of a gift are the intention of the donor and whether or not he has a locus poenitentiae, presupposing

87 "The great weight of authority supports the proposition that a gift of Savings Bank deposits by delivery of the pass book is a valid and complete gift of the money." Whalen v. Milholland, 89 Md. 199, 207, 43 A. 45 (1899).
89 Whalen v. Milholland, 89 Md. 199, 43 A. 45 (1899).
an adequate delivery, it would seem to be more logical to say that for these very reasons a gift of a Savings Bank deposit book with the appropriate intention, is a gift of the funds it represents, than to base the validity of the gift on the type of wording used in the account. When a depositor gives away his savings bank book with the intention of divesting himself of control and dominion over the fund in the bank, he is giving away the sole tangible evidence he has of his interest in the account. It is but a recognition of this to say that he has no locus poenitentiae when the book has been given away with the intention of making a gift of the account.

The next case in which the question whether the gift of a Savings Bank Deposit book was a gift of the funds it represented was Jones v. Crisp. The account was opened by Frederica Crisp on August 15, 1904 in the name of “Frederica Crisp in case of death subject to the order of Evan Jones.” In October, 1904, four months before the death of Frederica Crisp, she gave the pass book to Evan Jones. At her death the bank filed a bill of interpleader and the court directed that the fund be paid to the administrators of the estate of Frederica Crisp, as the property of the deceased intestate.

The court rightly decided, in line with the earlier Maryland cases, that the entry itself did not create any interest in the account in the intended donee, Evan Jones. By the terms of the entry itself, the donor retained absolute control and dominion over the fund during her lifetime. Thus a locus poenitentiae remained and the gift was not made perfect.

However, the Court went on to say that under the facts and circumstances of this case the delivery of the book of deposit by the alleged donor, and the possession of it by the donee at the time of the death of the donor, did not operate to make a valid and complete gift inter vivos of the fund in question. To support this proposition the court blandly cited Murray v. Cannon and Whalen v. Milholland,

40 109 Md. 30, 71 A. 515 (1908).
and said: 42 "the delivery of the book of deposit in this case, with the entry therein, 'in case of death subject to the order of the donee,' did not constitute a delivery of the money, because the delivery of the fund was limited 'in case of death' of the donor. The possession of the book, was entirely consistent with the form of the entry in the book, because the donee could not withdraw the money.' The Court concluded: 43 "it is very clear, we think, that she did not intend to part with the possession and dominion over the property." This author is unable to perceive the clarity of the donor's intent from the court's statements. What the Court failed to consider was that the reason they held the donee could not withdraw the money was their failure to recognize the validity of the gift under the rule of symbolic delivery later sustained in *Brooks v. Mitchell.* 44

The Court seems to have adopted the dictum in *Whalen v. Milholland* and applied it to the present facts. The problem of whether a gift of a Savings Bank deposit book was a gift of the fund represented by the book was answered by looking at the entry in the pass book and deciding that the form of the entry was entirely consistent with the donee's possession of the book because the donee could not withdraw the money and therefore there was no valid gift. It is submitted that the consistency of the entry with the possession is only a slight indication of the intention of the donor in allowing the possession to get to someone other than himself, and that therefore such conclusive stress should not be placed on the wording of the account in holding valid or invalid a proposed gift.

The Court again failed to differentiate between two essentially different problems. To repeat, these are, first, did the wording of the pass book effectuate the gift; and second, did the delivery of the book effectuate the gift? The latter question should be answered in the affirmative if there were an intention to give away the fund even though the wording of the account was insufficient for that purpose. The intention of the donor cannot properly be found by

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42 100 Md. 30, 35.
43 Ibid.
44 See discussion supra circa n. 39 and infra circa n. 46-60.
looking at the wording of the pass book entered at a time prior to the date at which the intention is significant. The intention should be found as of the date on which the book is delivered.

Five years later, the Court took a step forward when it clearly recognized the right of a sole owner of a bank account to give it away. In *Frentz v. Schwarze* the donor gave the bank book to the donee, signed a declaration in writing of her desire to vest the ownership of the account in the donee, and executed an order on the bank for the payment of the fund to the donee. The Court entered into very little discussion of the law of gifts but merely upheld the donation by saying, "Every method available to the donor under the circumstances for divesting her own interest in the fund and consummating the gift was in fact employed."

In the latest case on the question, *Brooks v. Mitchell*, the Court completed its tedious trek toward acceptance of the modern doctrine of symbolic delivery as being applicable to delivery of a savings bank book. The facts were that Alton Brooks had $5,600 in a savings account in the Baltimore Trust Company. After his death a black satchel containing a pass book for the deposit was found in the Mitchell home where Alton Brooks lived prior to his death. Testimony revealed that on the night before he went to the hospital, he had in his room a black and brown suitcase. Pointing to the black one, he said to Mrs. Mitchell, "Judith, I am giving you the black suitcase and that suitcase contains a life insurance policy. If I die, take that and bury me. Everything else you find in that suitcase is yours." She then took the suitcase and put it in her bedroom. This was done in the presence of Alton Brooks. Upon the death of the latter, Mrs. Mitchell filed a bill of complaint in which she prayed that the deposit be declared to be her sole property. She claimed a gift *causa mortis* of the bank book and the fund it represented. The gift was upheld and judgment was rendered for Mrs. Mitchell.

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122 Md. 12, 89 A. 439 (1913).
46 163 Md. 1, 161 A. 261 (1932).
Here the question was squarely presented whether the sole owner of a savings bank account could effectually give away that account through the gift of the savings bank deposit book. The Court first discussed the problem of delivery and reached the conclusion that the delivery of the bank book was more than merely symbolic and said:

"his (referring to Alton Brook's) language and conduct at the time Mrs. Mitchell took possession of the suitcase, when considered in connection with his declarations both before and after that event, indicating an intent consistent therewith, were sufficient proof of delivery". Therefore assuming that there was a sufficient delivery of the bank book, the remaining question is whether that was a delivery of the fund of which the book was evidence.

With this question in mind the Court turned to Murray v. Cannon and said that upon the authority of Ward v. Turner and upon its facts it had held that the delivery of the book of deposit was not a delivery of the money. But they said:

"The case is unsatisfactory as a precedent for several reasons; first, because the condition upon which the reasoning in Ward v. Turner was based no longer exists; second, because the mere delivery of the bank book to Mary E. Cannon was not in itself evidence of a donative intent because the circumstances under which she came into possession of the book are not referred to in the opinion."

Approving of the line of reasoning adopted by Professor Bruton the court concluded that:

"The vital and important thing decided by Ward v. Turner was that there could be no valid delivery of a

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47 163 Md. 1, 17.
48 It is well to notice here that the Court now approaches Murray v. Cannon by a different method than that used in the Whalen v. Milholland dictum, where the former case was sought to be reconciled on the basis of the wording of the account.
49 163 Md. 1, 14.
50 Apparently, the court referred to the abolition of the rule of "profert" and the development of the best evidence rule as discussed in Bruton, supra circa n. 13. The rule of profert was no doubt the distinction between Ward v. Turner and Snelgrove v. Bailey, supra circa notes 10, 11, 12.
51 Ibid.
52 163 Md. 1, 14, 15.
gift mortis causa unless there was an actual tradition of it, or of some token or evidence thereof, the loss of which completely deprived the donor of any control over it, as in Bailey v. Snelgrove where the delivery of the bond made it impossible for the donor to enforce his rights under it so long as it remained in the possession of the donee."

It was recognized that the only case directly in point in this state (Murray v. Cannon) points the other way but that no reason was assigned for that conclusion other than the decision in Ward v. Turner. However, the Court decided that Ward v. Turner with Bailey v. Snelgrove did not support, but was opposed to, the conclusion in Murray v. Cannon, for it was held in the former cases that the actual tradition of some token or evidence of a gift, the loss of which would deprive the donor of any control over the gift, was a sufficient delivery. And the loss of a savings bank passbook would deprive the donor of any control over the deposit evidenced by it quite as effectually as the loss of the bond in Bailey v. Snelgrove deprived the donor in that case of control over his rights by the obligor. Therefore the court that decided Murray v. Cannon was wrong in basing its decision so squarely on Ward v. Turner without inquiring into the reasons behind the holding.33

The conclusion was finally reached that:34 "It is apparent from an examination of the cases that the uniform policy of this Court, in applying the doctrine of constructive delivery to gifts, whether mortis causa or inter vivos, has been to adhere to the rule as stated in Bailey v. Snelgrove and Ward v. Turner rather than to the construction placed upon those cases in Murray v. Cannon."

In summarizing the Maryland cases that have dealt with gifts of savings bank accounts, we see that two major problems have been presented: first, the effect of the wording of the account; and second, the effect of the donation of the pass book or certificate to another without the produc-

33 The Court failed to discuss (1) that part of the dictum in Whalen v. Milholland, supra n. 31, that made an effort to reconcile Murray v. Cannon, supra n. 23, and (2) the case of Jones v. Crisp, supra n. 40, that seized upon that dictum as authority.

34 163 Md. 1, 18.
tion of which the fund cannot be withdrawn. As to the former, our Court of Appeals has uniformly held that where money is originally owned by one person and deposited in a savings account subject to the order of two or more persons (including the original owner but not in trust form), and the depositor does not give away the pass book with the intention of giving away the fund in the bank, there is no perfected gift and thus no right of survivorship in the alleged donee upon the donor’s death. The reason for that is obvious. The owner of money can by his own act voluntarily part with his ownership of it only by gift, payment or bequest. Such a deposit as has just been named is obviously neither a bequest nor payment, for it possesses none of the characteristics of either. It cannot be a gift to the other person mentioned in the bank book because if the depositor retains the book, and the account is subject to his order, he retains complete dominion over the fund. There can be no perfected gift where the supposed donor reserves a locus poenitentiae, and a locus poenitentiae is always reserved when the alleged donor may at any moment withdraw the fund from the bank.55

As to the second problem, the gift of the bank book, the law governing it has developed in a very definite pattern, clearly showing the trend of the Court of Appeals of Maryland to a more liberal construction of the old harsh rules of delivery as relating to choses in action. The first Maryland case56 definitely decided that a gift of the bank book was not a gift of the funds in the bank. Later cases attempted to reconcile the first case by looking at the wording of the account and thereby holding valid a gift to the co-owner.57 With but few retrogressions,58 the progress of the Court was definitely marked and the next step was to validate a gift of a bank account where the owner, in writing, indicated his desire to transfer the account and then did everything within his power to do so, except to manually transfer

55 Brewer v. Bowersox, 92 Md. 567, 48 A. 1060 (1901); subject to the exception of Gardner v. Merritt, 32 Md. 78 (1870), supra n. 21.
56 Murray v. Cannon, 41 Md. 466 (1874).
57 Dictum in Whalen v. Milholland, supra circa n. 31.
the funds. Finally, *Brooks v. Mitchell* clarified the law and relegated the previous cases to oblivion by allowing the owner of a bank account to transfer it by delivering the bank book to a third party when proof of this was accompanied by sufficient evidence of the intention to make a gift.

While Maryland thus was pointed toward accord with the modern law of gifts, the problem of accomplishing control during life plus informal transfer at death to a desired survivor was not completely solved by the gift device. It is possible, of course, for the property to go to the desired survivor by gift of the bank book. But, to take advantage of this the fortuitous moment to relinquish control must be selected; and also, the risk must be run of the Court’s construction on the intention to make the gift.

**Tenancy By Entirety**

During the course of events set out above survivorship without single control during life had been accomplished by creating tenancies by the entirety. An estate by entirety is defined as an estate held by husband and wife by virtue of title acquired by them jointly after marriage. It exists mainly with regard to real property. While there is a division of opinion about it, Maryland very definitely takes the stand that a tenancy by the entirety may be created in personalty.

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55 Frentz v. Schwarze, 122 Md. 12, 89 A. 439 (1913) *supra* circa n. 45.

56 It may be possible, however, to argue that *Brooks v. Mitchell* is only determinative of the right of a sole owner of a savings account to give away the account by a gift of the bank book; and where the account is in the name of two persons as “joint owners”, the original owner of the fund can only give that fund, by way of a gift of the bank book, to the co-owner, because if given to someone other than the joint owner, the inconsistency between the gift and the wording of the account would prevent the attempted gift from being effectuated. It is submitted, however, that such an argument should not be sustained because of the reasons stated by the author in the text and because of the fact that where a sole owner gives away his bank book with the intention of giving away the funds in the bank there is just as much an inconsistency between the claim of the donee and the wording of the account as exists when one of two joint owners gives away the bank book to someone other than the co-owner.


The most important incidents of this tenancy are that (1) property held by husband and wife as tenants by the entireties cannot be taken to satisfy the several and separate debts of either tenant and (2) the survivor of the marriage, whether the husband or the wife, is entitled to the whole and that this right cannot be defeated by a conveyance by the other to a stranger, as in the case of a joint tenancy.

Thus, in *Brewer v. Bowersox* it was held that where a certificate of deposit stated that a bank "has this day received of Jacob or Emily Bowersox $1,981.72 which sum, with the interest thereon at three per cent per annum will be paid to them or their order at sixty days notice" a tenancy by the entirety was created and on the death of the husband the money went to the wife. The depositors were disjunctively named in the certificate but the money was expressly made payable only to the two or the order of the two, and these two persons were in fact husband and wife. The creation of a tenancy by entireties does not depend on the words employed in making a conveyance or a gift to husband and wife; but it is because a conveyance or gift is made to two persons who are husband and wife, and since in the contemplation of the common law they are but one person, they take and can only take, not by moieties, but the entirety.

Thus, through the medium of the tenancy by entirety, a right of survivorship can be created in a surviving spouse; and this right of survivorship cannot be destroyed except by the joint act of the two. However, even though survivorship is incidental to that type of tenancy, still it has its limitations and disadvantages. It can only exist between

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64 Annapolis Banking and Trust Co. v. Neilson, 164 Md. 8, 164 A. 157 (1932).
65 Tiffany, Real Property (1920) Sec. 165.
66 92 Md. 567, 48 A. 1060 (1901). The husband deposited money in a bank in another state in the names of himself and wife, subject to the order of either. His wife received from him the certificate for this sum, and she afterwards caused the same to be collected by a bank in Maryland, upon her own indorsement alone, and deposited the amount in the bank which issued therefor a certificate. The wife kept possession of that certificate until after her husband's death, when the fund was claimed by his administrator.
husband and wife. Also it would seem to be necessary for the savings account to be subject to their joint order. Even if consent in advance is obtained for the account to be subject to the order of only one, or of either one; still, it is submitted, such a practice would prevent the existence of the tenancy, as it would violate the underlying theory of the unity of person of the husband and wife. Such a practice would seem to imply that that unity did not exist and that each spouse was not seized of the whole or the entirety, but only of a moiety. There is but one estate and, in contemplation of law, it is held by but one person. Where the consent of the other spouse is not obtained, it is clear that no part of the estate can be disposed of so as to affect the right of the non-consenting spouse.

Thus, the advantage of survivorship, through the device of a tenancy by the entirety, is obtainable only at the expense of having a joint control of the account during life.

Trusts

Until 1899 no one method had been devised by which the owner of a savings bank deposit could retain control of it during his life and still provide automatic disposition of it through survivorship at death. The number of cases that arose prior to that date signified the great need for an answer. The solution was found through the use of the trust.

In Milholland v. Whalen, Elizabeth O'Neill had opened a savings account in the Metropolitan Savings Bank with the following entry: "Metropolitan Savings Bank, in account with Miss Elizabeth O'Neill. In trust for herself and...

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69 In Brewer v. Bowersox, supra n. 67, much importance is attached to the fact that the certificate was worded so as to require the joint order of husband and wife before the money could be drawn. Also, in Baker v. Baker, supra n. 68, the fund was subject to the joint order of husband and wife.

70 Massachusetts, in Milan v. Boucher, et al., 285 Mass. 590, 189 N. E. 576 (1934), and Michigan, in In re Farmers' and Merchants' Bank of Grand Rapids, 221 Mich. 243, 190 N. W. 698 (1922) decided that where deposits may be withdrawn by either the husband or the wife such a state of facts is not consistent with a tenancy by the entirety. Just the opposite has been decided by Pennsylvania, in Gelst, et al. v. Robinson, 1 Atl. (2d) 153 (Pa. 1938); and Arkansas, in Dickson et al. v. Jonesboro Trust Co., 154 Ark. 155, 242 S. W. 57 (1922).

71 89 Md. 212, 43 A. 43 (1899).
Mrs. Mary Whalen, widow, joint owners, subject to the order of either; the balance at the death of either to belong to the survivor.” The bank book was retained by Miss O’Neill and she drew out various sums during her life. After her death the bank filed a bill of interpleader when both Miss O’Neill’s executor and Mrs. Whalen claimed the funds. A judgment was rendered in favor of Mrs. Whalen.

This was the first time the Maryland Court of Appeals was ever faced with a trust of a savings bank deposit. The Court, after a review of what it considered the applicable trust principles, found no objection to the vesting of the money in the survivor.

Thus the way was opened and the path made clear to accomplish that which had never been done before. The owner of money was allowed to set up one device by which he controlled the fund during his lifetime, and yet at his death it belonged to the co-owner without any formality whatsoever.

Certain rules for handling the device have appeared in the cases. The entry itself, unexplained, is probably a sufficient declaration of trust if it indicates an intention to establish a trust. This, however, may be rebutted. It is not necessary that the cestui que trust should be notified of the declaration or establishment of the trust. It is not necessary that the money be a new deposit; the form of an old account may be changed without withdrawal and redeposit. Possession by the depositor of the bank book

72 The only previous Maryland case which discussed trusts in relation to joint bank accounts was Taylor v. Henry, 48 Md. 550 (1878), where the Court dismissed the contention that a trust existed by finding that the evidence did not sustain it.

73 Just so long as the owner controls the bank book, he controls the fund even though the account is subject to the order of either party, infra circa n. 131.

74 Infra circa notes 86-77.

75 Ibid.

76 Smith and Barber v. Darby, 39 Md. 268 (1874); Milholland v. Whalen, 89 Md. 212, 43 A. 43 (1899).

77 Sturgis v. Citizens National Bank, 152 Md. 654, 137 A. 378 (1927). Sturgis deposited money in a savings account in the following form: “J. T. M. Sturgis and M. B. Foulke, in trust for both, subject to the order of J. T. M. Sturgis, the balance at the death of either to go to the survivor.” This was later changed so as to be subject to the order of either. This change was made only by an entry on the bank ledger. On the death of Sturgis, his wife attempted to annul the trust but was unsuccessful.
in no way detracts from the force of the entry; because it is a possession by the trustee and does not denote that no beneficial interest had been given to the cestui que trust.\textsuperscript{78} Also, the trust is not rendered void by the appointment of a beneficiary as trustee.\textsuperscript{79} The validity of the trust does not depend upon any certainty of a balance remaining at the death of the settlor.\textsuperscript{80} The settlor may have a right to revoke, and his right of revocation exists in his right to withdraw the money and thus entirely wipe out the account.\textsuperscript{81} The form of the entry may be varied from that used in \textit{Milholland v. Whalen} so that the account may be made subject to the order of only one person,\textsuperscript{82} or subject to a

\textsuperscript{78} Minor v. Rogers, 40 Conn. 512 (1873); Milholland v. Whalen, 89 Md. 212, 43 A. 43 (1899).
\textsuperscript{79} Milholland v. Whalen, 89 Md. 212, 43 A. 43 (1899).
\textsuperscript{80} See Selling v. Selling, 151 Md. 536, 548, 135 A. 376 (1926); Schaefer v. Spear, 148 Md. 620, 129 A. 598 (1925). In the latter case an account was opened in the name of Hattie B. Burton “in trust for herself and Louis Schaefer, joint owners, subject to the order of either, the balance at the death of either to belong to the survivor.” Mrs. Burton withdrew the whole fund during her lifetime. At her death, it was claimed by her executor and the joint owner, so the bank filed a bill of interpleader. It was held that by the terms of the trust it was only the balance in the account at the death of either to which the survivor was to be entitled. There was in fact no balance in the account when Mrs. Burton died because, as permitted by the terms of the deposit, she withdrew the whole fund during her lifetime.
\textsuperscript{81} Ghingher v. Fanseen, 166 Md. 518, 172 A. 75 (1934); Hopkins Place Savings Bank v. Holzer, — Md. —, 2 Atl. (2nd) 639 (1938); see Restatement, Trusts (1935) Vol. 1, Sec. 330, and comments thereto; Schaefer v. Spear, 148 Md. 620, 129 A. 598 (1925). Restatement, Trusts (1935) Vol. 1, Sec. 58, Comment b provides for the revocation of a savings bank trust by other methods than the withdrawal of money, such as a disposition by will of the depositor in favor of someone other than the beneficiary. It is uncertain whether the Court of Appeals of Maryland would recognize such a revocation. A revocation could have been but was not recognized in Hopkins Place Savings Bank v. Holzer. See discussion \textit{infra} circa n. 115. The pledge of the bank book by the husband, under the Restatement rule, might easily have been regarded as a revocation of the trust by the depositor husband. Cf. \textit{In re Murray's Estate}, 143 Misc. 490, 256 N. Y. Supp. 816 (Sur. Ct. 1932); Matter of Siegelbaum, N. Y. L. J. March 1, 1933, at 1228 (Sur. Ct.).
\textsuperscript{82} See \textit{Littig v. Mt. Calvary Church}, 101 Md. 494, 61 A. 635 (1905). Mrs. Littig opened an account with the bank which read, “Mount Calvary Protestant Episcopal Church, subject to the order of Kate Littig, trustee, $500.” At the death of Mrs. Littig, the fund was ordered to be held by her executors, subject to the trust.
\textsuperscript{b} Stone v. National City Bank of Baltimore, 126 Md. 231, 94 A. 657 (1915). Mrs. S. Hunter deposited money in a savings account in the following form: “The National City Bank of Baltimore. In account with Sarah Hunter, or Sara Helneman, in trust for both, joint owners, subject to the order of Sarah Hunter, the balance at the death of either to go to the survivor.” Mrs. Hunter died and it was decided that a valid trust was created with a right of revocation reserved, and the money belonged to Sara Helneman at the death of Mrs. Hunter.
joint order," or possibly in any form to suit the convenience of the parties that does not violate a rule of law. Thus *Milholland v. Whalen* became the foundation for a rapid development of our modern law of joint bank accounts in trust form.84

c. Bollack v. Bollack, 169 Md. 407, 182 A. 317 (1935). A savings account read “Peter Bollack in trust for himself and Eva M. Bollack, joint owners, subject to the order of Peter Bollack, balance at the death of either to belong to the survivor.” A valid revocable trust was created.

82 *Gimbel v. Gimbel*, 148 Md. 182, 128 A. 891 (1925). Mary Gimbel had three separate savings accounts in the joint names of herself and each of three children. Except for the change in the name of each child, these deposits read, “In trust for Mary Gimbel and Frederick Gimbel, joint owners, subject to the order of both only, the balance at the death of either to belong to the survivor.” It was found that there was no intention to create a trust so none was held to exist.

81 *Milholland v. Whalen*, 89 Md. 212, 43 A. 43 (1899), supra circa n. 71; *Littig v. Mt. Calvary Church*, 101 Md. 494, 61 A. 635 (1905), supra n. 82; Mulfinger v. Mulfinger, 114 Md. 463, 79 A. 1089 (1911). In the last case, Eva Mulfinger had each of her two individual deposits transferred to her credit, “in trust for herself and Maggie M. Mulfinger” (granddaughter) “Joint owners subject to the order of either, the balance at the death of either to belong to the survivor.” Later the granddaughter drew out the entire balance of one account and half of the other for her own benefit. The grandmother sued, but judgment was rendered for defendant. The Court decided that a valid trust had been created and the rights of the beneficiary were fixed.

In *Colmary v. Fanning*, 124 Md. 548, 92 A. 1045 (1915), Mrs. Colmary opened a savings account which read, “Mrs. Sadie McS. Colmary, in trust for herself and A. H. Colmary, joint owners, subject to the order of either, the balance at the death of either to belong to the survivor.” The evidence showed that no trust was ever intended so none was held to exist. In *Coburn v. Shilling*, 138 Md. 177, 113 A. 761 (1921), a savings account was opened in the name of, “J. Dunn, in trust for himself and C. Coburn, joint owners, subject to the order of either, the balance at the death of either to belong to the survivor.” It was decided that the presumption in favor of the validity of the trust was not rebutted and the money belonged to C. Coburn on the death of J. Dunn.

In *Reil v. Wempe*, 145 Md. 448, 125 A. 738 (1924), Wempe had his personal account in the name of “Margaret Reil in trust for herself and George H. Wempe, subject to the order of either, the balance at the death of either to belong to the survivor.” It was decided that “a complete and irrevocable trust was established and on the death of Wempe the money went to Margaret Reil.” It is submitted that the term “irrevocable” is not used here in its usual sense as the account was subject to the order of either. Thus, Wempe could have withdrawn the money at any time before his death and the trust would have then been revoked. See *Gimbel v. Gimbel*, 148 Md. 182, 128 A. 891 (1925) supra n. 83; *Sturgis v. Citizens National Bank*, 152 Md. 654, 137 A. 378 (1927) supra n. 77; *Foschia v. Foschia*, 158 Md. 69, 148 A. 121 (1929). In the last named case a savings account was opened in the name of “John Foschia, in trust for self and Domenico Foschia, joint owners, subject to the order of either, the balance at the death of either to belong to the survivor.” The presumption in favor of the trust was rebutted when it was proved that no trust was intended and the co-beneficiary named on the bank book did not get the fund.

In *McDevitt v. Sponseller*, 160 Md. 497, 154 A. 140 (1931), a savings account read “James B. Sponseller, in trust for himself and Lucy E. Spon-
The important factor to be considered in the establishment of these accounts is the intention of the settlor. It is his act which originates the trust and it is the intention with which he does the act that is material. This intention may be manifested in many ways, one of which is the wording of the account itself. There are two classifications of accounts; first, the situation where the words "trust" or "trustee" are used; and second, where there is no mention of those magic symbols. What is the result of their presence or absence? Professor Bogert states that it might be assumed that the deposit of money in a bank with the use of the word "trust" would lead to the establishment of a trust. However, he continues to point out that because the trust deposit form is so often used for purposes other than the creation of a trust, the majority of courts hold that the claimant must show by other facts than the mere deposit that his object was the creation of a true trust.

seller, joint owners subject to the check of either, balance at the death of either to belong to the survivor." The trust was sustained and at the death of James B. Sponseller the money passed to Lucy E. Sponseller. See also Bollack v. Bollack, 169 Md. 407, 182 A. 317 (1935) supra n. 82; and Dougherty v. Dougherty, — Md. —, 2 Atl. 2d 433 (1938), where a savings account was in the name of one McHugh as trustee for himself and F. P. Dougherty . . . "balance at death of either to belong to the survivor." Formerly the named survivor had been Leo Dougherty and after McHugh's death Francis voluntarily changed the account to himself as trustee for himself and his brother, Leo; but, subsequently substituted his wife as survivor. Bill of complaint was filed alleging that the funds were intended by the grantor to be for the benefit of the P. Dougherty Co., a body corporate. This bill of complaint was dismissed because the evidence was not sufficient to indicate that the settlor intended any trust for the benefit of the corporation. And see Mathias v. Fowler, 124 Md. 655, 93 A. 298 (1915), where the account read, "The Union National Bank of Westminster in account with W. R. Fowler or Wm. A. Mathias or either of them." It was argued that a trust was intended. However, it was decided that the evidence failed to show any intent to transfer a present interest so no trust existed. See infra n. 129.

s5 This is implicit in the series of cases, supra n. 84.

s6 1 Bogert, Trusts and Trustees (1935) Sec. 47.

s7 Taxation, rules of the bank limiting the amount which any one individual may keep on deposit, the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire to veil or conceal from others knowledge of their pecuniary condition would be among the reasons for using it for other purposes.

s8 This statement seems to imply that the mere use of the word "trust" is not sufficient of itself to create a trust. However, in all the cases which Professor Bogert cites to support his statement, no decision was found which was rendered on the wording of the account alone. There was always evidence introduced to show an intention not to create a trust. See Bogert supra n. 86, 204, n. 12.
In Maryland, the cases would seem to indicate that the entry in the bank book containing words of trust raises the presumption of a trust. Milholland v. Whalen said, "The entry unexplained, is a sufficient declaration of trust, because it indicates an intention to establish a trust, but this may be rebutted." Such a statement is self-explanatory. In a case where no evidence is offered by either side other than the introduction of the bank book with the usual form of trust deposit, the claimant under such trust should not have to show his position by any facts other than the mere deposit. This would seem to result from the repetition of the above statement from Milholland v. Whalen in many later cases. Its latest pronouncement appeared in Dougherty v. Dougherty where the Court said:

"Where an account is entered to one in trust for himself and another, as joint tenants, subject to the order of either, balance if any at the death of either to belong to the survivor, a presumption instantly arises that upon the death of one of the tenants, the survivor takes title to any balance remaining in the fund, and the burden is upon any third person who alleges that a different result was intended by the settlor to prove that fact."

Only two Maryland cases could be construed as casting doubt upon such a conclusion, Austin v. Central Savings Bank, and Pearre v. Grossnickle. In the former case

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89 Md. 212, 216.
90 This would seem to be contrary to Professor Bogert's statement, but in light of the facts of the cases used by Professor Bogert to support his statement, it is submitted that Maryland is not contrary to the weight of authority. In both jurisdictions the mention of the word "trust" is merely presumptive evidence of the existence of a trust. Such an entry is sufficient to shift the burden of evidence to the party claiming that no trust exists.
91 Repeated in Littig v. Mt. Calvary Church, 101 Md. 404, 61 A. 635 (1905) supra n. 82; Mulfinger v. Mulfinger, 114 Md. 465, 79 A. 1059 (1911), supra n. 84; Stone v. National City Mank of Baltimore, 126 Md. 231, 94 A. 657 (1915), supra n. 82; Farmer v. Farmer, 137 Md. 69, 111 A. 64 (1920); Coburn v. Shilling, 138 Md. 177, 113 A. 761 (1921), supra n. 84; Rell v. Wempe, 145 Md. 448, 125 A. 738 (1924), supra n. 84; Gimbel v. Gimbel, 148 Md. 182, 128 A. 891 (1925), supra n. 83; Foschia v. Foschia, 158 Md. 69, 148 A. 121 (1929), supra n. 84; McDevitt v. Sprouse, 160 Md. 497, 164 A. 140 (1931), supra n. 84; Bollack v. Bollack, 169 Md. 407, 182 A. 317 (1935), supra n. 82.
93 126 Md. 139, 94 A. 520 (1915).
94 139 Md. 274, 115 A. 49 (1931).
the deposit was merely in the form of "E. D. Loane, trustee" and it was stated that\textsuperscript{95} "the mere use of the word 'trustee' is not sufficient of itself to create a trust. If no intent to create a trust appears, none will be held to exist regardless of the use of the form of the words used". However, in view of the fact that this type of entry is so indefinite, it is submitted that the case is not contrary to the previously stated Maryland rule but states a rule of law in itself as applicable to an indefinite, vague declaration of trust. In \textit{Pearre v. Grossnickle} the donor ordered the bank to change his personal account to a joint account. No mention was made of a trust, but the bank entered the account in the trust form on its own initiative. It was again stated that the mere use of certain magic words was not sufficient of itself to create a trust. If no intent appeared, none would be held to exist regardless of the words used.

It should be observed that the proof in these two cases embraced facts other than the clear entry of a trust on the bank book. And it would seem that they represent the type of situation to which Professor Bogert's rule, mentioned above, is appropriately applicable. If this is true, in light of the other Maryland cases, it can be said that the rule of this State is that where the words "trust" or "trustee" are used, with the knowledge of the settlor, in a complete and clear declaration in the bank book, a presumption will exist that a valid trust was intended by the settlor and the burden of going forward with the evidence will be upon the party claiming no trust. Successful rebuttal, however, has occurred in several cases.\textsuperscript{96}

In cases where there were no words of trust present in the phrasing of the account,\textsuperscript{97} although the trust theory was argued, there have been no definite statements as to

\textsuperscript{95}126 Md. 139, 144; quoted from Taylor v. Henry, 48 Md. 550 (1878).
\textsuperscript{96}Colmary v. Fanning, 124 Md. 548, 92 A. 1045 (1915), \textit{supra} n. 84; Coburn v. Shilling, 138 Md. 177, 113 A. 761 (1921), \textit{supra} n. 84; Gimbel v. Gimbel, 148 Md. 182, 128 A. 891 (1925), \textit{supra} n. 83; Foschia v. Foschia, 158 Md. 69, 148 A. 121 (1929), \textit{supra} n. 84.
\textsuperscript{97}Taylor v. Henry, 48 Md. 550 (1878) (\textit{Held: no valid trust}, \textit{supra} n. 84; Mathias v. Fowler, 124 Md. 655, 93 A. 298 (\textit{Held: no valid trust}, \textit{supra} n. 84; Baker v. Baker, 128 Md. 32, 90 A. 776 (1914) (Valid trust created).
presumption and burden of proof. It seems logical to state, however, that in view of the presumption existing with the use of the words "trust" or "trustee"; where those words are not present, no presumption as to a trust will exist and the burden of proof and of coming forward with the evidence will rest on the party claiming a trust to show the requisite intention of the donor. This intention may be gathered from express statements of intent, acts of the depositor other than express statements, and the circumstances of the deposit.98

Once it has been ascertained, to the satisfaction of the court, that the donor intended to establish a trust the next step is to inquire into the form of the agreement to see if any of the orthodox rules of trusts have been violated.

The greatest theoretical obstacle to such a trust of a savings bank deposit is its testamentary character. In the creation of any trust, the owner of property may intend to create a trust of the property either by transferring it to another person as trustee or by declaring himself trustee of it. In either event, if the beneficiaries do not acquire any interest in the property prior to his death, the transaction is clearly testamentary and invalid unless there is a compliance with the requirements of the Statute of Wills.99

Although frequently difficult of application, the theoretical distinction between a deed to a trustee and a transfer by will to a trustee is easily stated. The deed has an immediate operative effect to pass a present or future interest in property either vested absolutely, vested subject to being divested, or contingent. The will has no immediate operative effect. It passes a property interest only at the death of the testator, if the will is left in effect until that date.100 The question is, generally, not whether the grantor intends to accomplish, by a conveyance inter vivos, similar practical effects to those which a will would have produced, but whether the theory and mode of operation of the instrument is testamentary or otherwise. Conveyances which operate inter vivos are not turned into wills because they

98 Bogert, supra n. 86, Sec. 47.
100 Bogert, supra n. 86, Sec. 107.
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effect a distribution of the grantor's property in anticipation of his death and relieve him from the trouble of making a will.\textsuperscript{101} There may, however, be such a retention of powers of management and control in the settlor, as well as of enjoyment during his life, that the courts must look through the inter vivos trust form in order to forestall evasion of the policy of the Statute of Wills. Therefore it is necessary to inquire into the general rules of construction used to differentiate a trust from a will and to see how those rules apply to a trust of a savings bank deposit, if at all.

It has been generally accepted that the settlor of a trust may reserve a beneficial life estate and also a power to revoke and modify the trust during his life and the trust will not be construed to be testamentary.\textsuperscript{102} However, where not only a beneficial life estate and a power to revoke and modify the trust are reserved, but there is reserved also a power to control the trustee as to the details of the administration of the trust so that the trustee is the agent of the settlor, the disposition, so far as it is intended to take effect after his death, is testamentary and is invalid unless the requirements of the statutes relating to the validity of wills are complied with.\textsuperscript{103} If the settlor should declare himself trustee and reserve not only a beneficial life estate and a power to revoke and modify the trust, but also a power to deal with the property as long as he lives, the intended trust is testamentary and fails unless executed with the formality of a will.\textsuperscript{104}

When that limitation is applied to the usual trust of a savings bank deposit it is easily seen that the deposit is testamentary in character in the great majority of cases. Let us examine the usual entry which appears, "X Bank, in account with A. In trust for A and B, joint owners, subject to the order of either; the balance at the death of either to belong to the survivor." Here A is the settlor and as

\textsuperscript{101} Ibid.

\textsuperscript{102} Restatement, Trusts (1935), vol. 1, Sec. 57 (1); Jones v. Old Colony Trust Co., 251 Mass. 309, 146 N. E. 716 (1925); Bogert, supra n. 86, Sec. 103.

\textsuperscript{103} Restatement, Trusts (1935) Vol. 1, Sec. 57 (2); Bogert, supra n. 86, Ch. 6; McEvoy v. Five Cent Savings Bank, 201 Mass. 50, 87 N. E. 465 (1909); Scott, supra n. 98, 529, n. 27 ff.

\textsuperscript{104} Restatement, Trusts (1935) Vol. 1, Sec. 57 (3).
such he reserves to himself all the attributes of complete ownership. He can enjoy the income from the corpus during his life, or he may use up the corpus completely. He can withdraw it from the bank, invest it, sell the investment and redeposit the proceeds. Yet, on his death, it will go to his selected beneficiary without formality. In essence, he has complete dominion over the fund in that he may revoke, modify, manage, and control.

Because of this accomplishment of complete control during life and passage to a desired beneficiary on his death, the “tentative” trust (as labeled by the Restatement) was condemned in some cases as violative of the Statute of Wills.\(^{105}\) It may be sustained, despite its obvious violation of the policy of the Statute of Wills either upon the technical basis that in form at least, all interests passed inter vivos,\(^{106}\) or upon a frank recognition that an exception to the normal rule was being engrafted to satisfy the demands of social policy.\(^{107}\)

It is generally accepted that a similar trust of property other than a savings bank deposit would be invalid.\(^{108}\) Therefore, these savings bank trusts should be regarded in no other light than as an exception to the usual rule regarding testamentary trusts. Such was the position of the Restatement of Trusts, but only after considerable reflection.\(^{109}\) The exception, however, is based on sound social policy in order to allow control of small sums of money during life and yet to facilitate the testamentary disposition of them without requiring the formalities of the Statute of Wills and the attendant expense of probate. The chances for fraudulent and inequitable results are almost negligible because the recording of the transaction on the books of the bank provides easy methods of identification.


\(^{106}\) This seems to be the position of the Maryland cases.

\(^{107}\) Restatement, Trusts (1935) Vol. 1, Sec. 58; Scott, \textit{supra} n. 99, 543.

\(^{108}\) Bogert \textit{supra} n. 86, Secs. 47, 103; Scott, \textit{supra} n. 99, 529, 543.

\(^{109}\) Restatement, Trusts (1935) Vol. 1, Sec. 57 (3). See Tentative Draft No. 1, Sec. 65 and explanatory note thereto.
The objection to the trust of a savings bank deposit, because of its effect as a will, has never been fully considered by the Court of Appeals of Maryland. The Court has never sought to differentiate it from any other type of trust and has seemingly regarded it as unobjectionable from the point of view of its being testamentary, upon the technical statement that an inter vivos trust is validly created. At this late date, the binding precedent of forty years recognition is not likely to be overcome; and the "tentative" trust, no matter how justified, has taken its place in Maryland as an appropriate aid to the man of moderate means in handling his savings bank accounts. An appreciation of its unusual character, however, might have helped the Court in handling the collateral problems next considered, and might yet be of value in the treatment of such problems in the future.

Collateral Problems

Rights of Creditors

Within the past year two cases have been decided on the rights of third persons to reach the corpus of a "trust" savings bank deposit in order to satisfy the debt of one of the co-owners. The first was Fairfax v. Savings Bank of Baltimore\(^\text{110}\) where Mary Fairfax, plaintiff, was injured and recovered a judgment of $5,000 against Howard E. Brazier. The latter had a savings account in the Savings Bank of Baltimore in the form of "Howard E. Brazier, in trust for self and Nellie M. Brazier, joint owners, subject to the order of either, balance at death of either to belong to the survivor." An attachment was issued on the judgment and laid in the hands of the bank as garnishee. A second attachment was laid in the hands of Howard E. Brazier as trustee, garnishee. Both attachments were held to be ineffective.

The basis of the decision may be briefly summarized as being threefold: first, the interest of the debtor was uncertain and contingent on survivorship and therefore not

\(^{110}\) Md. —, 199 A. 872 (1938).
within the scope of the Code section; second, both husband and wife had contributed to the corpus of the trust and therefore it is not within the "tentative" trust doctrine of the Restatement of Trusts; and, third, the right of withdrawal existed in both beneficiaries and whether it shall be exercised depends wholly upon the individual will of each severally motivated. A creditor of one cannot make this election, nor compel the debtor to act, because to do so would destroy the right of survivorship that existed in the co-beneficiary as well as the latter's right to withdraw the entire amount in the absence of the debtor's doing so first.

The first and third reasons of the Court are the result of the application of formal trust rules to a device that is by nature informal. They are applicable only because the Court failed to recognize that it was dealing with a situation that is different from the ordinary trust.

Ostensibly these two bases for the decision are in conflict with the Restatement of Trusts. The latter, however, is somewhat uncertain in phraseology and the Court distinguished it from the instant case by means of the sec-

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111 "Any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Md. Code, Art. 9, Sec. 10.

112 The husband and wife had both contributed from their own personal fortunes to buy real estate as tenants by the entirety and the present trust fund represented the proceeds of a loan upon that real estate.

113 Restatement, Trusts (1935) Vol. 1, sec. 58: "Where a person makes a deposit in a savings account in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death, if he has not revoked his trust." Restatement, Trusts (1935) Vol. 1, Sec. 58, Comment a: "... Such a trust is called a 'tentative' trust;" Restatement, Trusts (1935) Vol. 1, Sec. 58, Comment c: "Although creditors of the settlor cannot reach the trust property merely because he has reserved a power of revocation, creditors of a person who makes a savings deposit upon a tentative trust can reach his interest, since he has such extensive powers over the deposit as to justify treating him as in substance the unrestricted owner of the deposit. So also, on the death of the depositor if the deposit is needed for the payment of his debts, his creditors can reach it. So also, if it is needed it can be applied to the payment of his funeral expenses and the expenses of the administration of his estate, if he has not sufficient other property which can be applied for these purposes."

114 Ibid.
second reason. Thus the way was left open for the application of the Restatement rule, at least when the debtor originally owned the funds.

The other case dealing with the rights of third persons to reach a trust of a savings bank deposit to satisfy a debt of one of the co-owners is Hopkins Place Savings Bank v. Holzer,115 where a husband and wife had a savings account which read "John H. Holzer, in trust for himself and Elizabeth H. Holzer, joint tenants, subject to the order of either, the balance at the death of either to belong to the survivor." The husband withdrew money from this account without the knowledge of his wife but later deposited a sum equal to that which was withdrawn. In order to raise funds for this re-deposit the husband borrowed the money from the bank in which the money was deposited and as security gave the bank physical possession of the pass book without the knowledge of his wife. He signed no withdrawal slip or order. After the husband died the wife attempted to withdraw the money and on refusal of the bank to make payment, she brought suit and judgment was rendered in her favor.

The decision was based mainly on the knowledge of the bank as to the terms of the deposit and the rule that one joint owner cannot pledge the interest of his other joint owner as security for a debt without the consent of that other joint tenant.

Though this case may be distinguished from the Fairfax case on its facts, yet the same essential principles are involved in that both cases deal with the rights of third parties to satisfy a debt of one beneficiary out of the corpus of a joint trust account. Where the Fairfax case left the way open for applying the Restatement rules under proper factual conditions, as to a creditor claiming prior to the death of his debtor, the Holzer case seems to block a creditor claiming subsequent to death as allowed by Sec. 58c. Under that section, "creditors of a person who makes a savings deposit upon a tentative trust can reach his interest * * * on the death of the depositor if the deposit is

needed for the payment of his debts.” The loan of $4,100 was made to the husband, was immediately deposited into the trust account, and remained there until his death.

Although the Court made no reference to the Restatement in this case, its refusal to allow the bank’s claim would seem to be contrary to the above stated principle of 58c, unless there can be said to be a distinction between the bank, as creditor, and all other creditors, or unless the case rests upon the way in which it arose (i.e., the bank had not attached, but was resting on a lien based on a pledge of the bank book). It might be observed that the Court made no effort to use its second reason from the Fairfax case and ascertain the source of the fund. To do so would have indicated that the fund belonged to the husband debtor and would have provided no distinction from the Restatement rule.

Thus we are left in doubt whether the Maryland Court is definitely repudiating Section 58c of the Restatement as to the rights of creditors in “tentative” trusts of savings accounts, or whether it is setting up the above two cases as special situations. In any event, in both of these cases, and in the set-off cases the court has refused to deviate from the results called for by the technical trust rules.

It is submitted that orthodox rules should not be applied to situations that are unorthodox per se. Courts should not lose sight of the hybrid origin of the savings bank trust. The “tentative” trust of a savings account was held valid to allow the owner of money to control it during his lifetime and then pass it on to a designated beneficiary at his death, although to do so violates the policy of the Statute of Wills. Essentially a testamentary disposition is allowed to operate as an inter vivos trust to effect a definite social policy—to facilitate the handling of sums of money on deposit in a savings bank that could be handled so expeditiously in no other way. A trust of a savings deposit

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116 And cf. supra n. 81.
117 Supra circa notes 119-125.
118 Supra circa notes 99-109.
was never intended to be used as a device to defraud creditors.

Rules of law should be formulated to cope with this unorthodox form of trust in order to further the interests of society. This should not necessarily be done by comparing it to the analogous orthodox situation. Hence if a beneficial social result in a future case calls for piercing the trust shield in a given case, it is to be hoped the courts will accept the door which the Restatement seems to leave open.

**Set-Off.**

Occasionally banks cease operation holding both a deposit and a debt due the bank by the depositor. A sole owner of a savings account has been allowed to set off his deposit against his promissory note held by the bank after the latter became insolvent. This, however, does not present the same situation as is presented when the deposit is in some type of joint account. How this problem of set-off was to be handled when applied to the "tentative" trust of a bank account, or to any joint account was first presented to the Court in *Ghingher v. Fanseen.* There the depositor tried to set off a claim against an insolvent bank in the form of a deposit made by him in his own name "in trust for" himself and wife, as "joint owners, subject to the order of either, the balance at the death of either to belong to the survivor," against the bank's claim against him individually. The set-off was not allowed. The question presented was whether or not the two claims possessed that quality of mutuality essential to give the depositor the right to have his interest in the fund set off against his debt to the bank.

The depositor had a dual interest in the account. He was a trustee and also a cestui que trust, who, if he survived the other beneficiary, would become entitled to so much of the fund as remained in the deposit at that time, and who could withdraw any part or all of said fund upon his own individual order or demand. His interest as trustee could

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119 Colton v. Drover's Building Assoc., 90 Md. 85, 45 A. 23 (1899).
120 166 Md. 519, 172 A. 75 (1934). The case is also of interest because it holds in effect that a suit for recovery of a trust deposit could not be maintained by one of the co-beneficiaries individually. See Union Trust Co. v. Mullineaux, 173 Md. 124, 131, 132, 194 A. 823 (1937).
not be set off against his personal indebtedness because the demands were not mutual and in the same right. A claim held in a representative capacity cannot be set off against a personal debt of a representative such as a trustee or an executor.\textsuperscript{121} To hold otherwise would allow the trustee to pay his own debts with trust property.

The interest of the depositor in the account as a cestui que trust could not be set off against his personal indebtedness because the fund remained subject to the terms of the trust upon which the deposit was made. The terms of that deposit created a valid, revocable or "tentative" trust.\textsuperscript{122} As such, either beneficiary had the right to withdraw the money at any time, but until it was withdrawn it remained subject to the terms of the trust. The mere power to withdraw the fund was not accepted as equivalent to an actual withdrawal thereof. Therefore, until the fund was withdrawn the claimant merely had an interest which was likely to be wiped out at any time by the withdrawal of the fund by the co-owner.

The right of the bank to claim a set-off was presented to the Court in \textit{People's Bank of Denton v. Turner}.\textsuperscript{123} Having a sum of money on deposit in its savings department in the names of "Annie E. Turner or Florence E. Thompson, or survivor," the bank claimed a right to set-off against its liability on the deposit a note of Mrs. Thompson's in a larger amount. Miss Turner attempted to withdraw the whole amount and the bank refused, claiming its right of set-off. A suit for the full amount of the deposit resulted in

\textsuperscript{121} Cohen v. Karp, 143 Md. 208, 211, 122 A. 524 (1923); Brown v. Stewart, 1 Md. Ch. 88 (1847). An interesting trust illustration is Hagerstown Bank & Trust Co. v. College of St. James, 167 Md. 646, 176 A. 276 (1935) where depositor could not set off against his deposit a mortgage debt which it owed to bank as trustee.

\textsuperscript{122} Milholland v. Whalen, 89 Md. 212, 43 A. 43 (1899). \textit{Supra} circa n. 84. In \textit{Matter of Totten}, 179 N. Y. 112, 125, 71 N. E. 748, 752 (1904) the New York theory of "tentative" trusts is expounded as follows: "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

\textsuperscript{123} 169 Md. 430, 182 A. 314 (1936).
Miss Turner's favor and the bank was denied its right of set-off.

This was based on the fact that, "separation, for ascertaining of a right of set-off which the bank might have against either one, could be worked out only by external evidence," and that "evidence seemed to indicate that Miss Turner was the sole owner".\(^{124}\)

Though the trustee beneficiary may not be entitled to set off the trust deposit against his individual debt, yet when the trustee beneficiary actually allows the set-off and the co-beneficiary apparently acquiesces over a lengthy period of time, the latter cannot dispute the set-off after such apparent acquiescence. This was the doctrine decided in *Union Trust Co. v. Mullineaux*.\(^{125}\) The deposit was: "In account with Ervin Mullineaux, in trust for self and Lillie Mullineaux, joint owners, subject to the order of either, the balance at the death of either to belong to the survivor." The bank set-off against the account the previously unpaid note liabilities of the trustee beneficiary. It was held that under the circumstances, this could not be disputed by the co-beneficiary.

It is submitted that the results of *Ghinger v. Fanseen* and *Union Trust Co. v. Mullineaux* are reached because of the application of the technical rules of trust from which the Court has seemingly refused to deviate. The problem of set-off as applied to a joint trust account may be said to be analogous to the rights of creditors to reach the same type of deposit, in that the fundamental distinction between the ordinary trust and the trust of a savings account is a factor that should be taken into consideration in both instances.

### Liability of the Bank

The bank itself may find it necessary to decide whether or not it will incur any liability by paying or not paying funds in a savings account to a joint owner. In *Metropolitan Savings Bank v. Murphy*,\(^{126}\) Michael Murphy deposited money in a savings account first in his own name and later

\(^{124}\) 169 Md. 430, 432.

\(^{125}\) 173 Md. 124, 194 A. 823 (1937).

\(^{126}\) 82 Md. 314, 33 A. 640 (1896).
in the names of himself and his wife, "subject to the order of either, the balance at the death of either to belong to the survivor." After opening this account, the husband made no withdrawals therefrom and upon his death the bank paid the deposit to the surviving wife. The administrator of Michael Murphy claimed the money as belonging to the estate, but it was decided that the money could not be recovered from the bank. This case, however, was not a direct suit for the funds in the account; it involved the right of the bank under the contract of deposit. The Court said, "the only question which we are now called on to decide is, had the bank authority in law to make such payment?" This question was answered in the affirmative.

The holding of this case was seemingly codified by the passage of a statute which relieves a bank from liability after it has paid the funds in the account, or any part thereof, to either of joint owners, whether the other is living or not.

This statute was first construed in Metropolitan Savings Bank v. Appler where the bank paid the deposit to one of two cestui que trustent even though that party did not present the bank book. Upon suit by the other cestui que trust the bank was held liable for the amount so paid out without the production of the bank book in violation of the rules and by-laws of the bank as printed on the pass book. The statute was construed to have no application where a provision in the pass book requires its production when money is withdrawn and such provision is disregarded. This provision of the Code has also been interpreted as to have no bearing on the question of whether or not a gift of the fund has been perfected.

127 This is the basis of distinction used in Gorman v. Gorman, 85 Md. 636, 37 A. 363 (1897) where the Court said, in referring to Metropolitan Savings Bank v. Murphy: "Here there is no question as to the right of the bank under the contract of deposit, but the object is to ascertain who is the legal and true owner of the fund. It may well be that as between the depositor and the bank, perhaps the entry in the bank book might be conclusive; and if the bank had paid the money according to the terms of the entry, it might be protected; but as between the depositor or her executor and the appellant the entry is not conclusive."

128 Md. Code, Art. 11, Sec. 76.

129 151 Md. 571, 135 A. 373 (1926).

130 Mathias v. Fowler, 124 Md. 655, 677, 93 A. 298 (1915) supra n. 84.
Taxation

Prior to 1935 there was no inheritance tax on property passing to the father, mother, husband, wife, children, or lineal descendants of the deceased. In that year a tax of one per cent was levied on property passing to the above named persons.\textsuperscript{132} Property was specifically taxed which passed "to or for the use of, in trust or otherwise," persons other than collateral heirs. In that same year the collateral inheritance tax was raised from five to seven and one-half per cent.\textsuperscript{133} At the Extraordinary Session of the Maryland Legislature in 1936 the one per cent tax was retained on property passing to persons other than collateral heirs\textsuperscript{134} and the seven and one-half per cent tax on property passing to collaterals was also retained.\textsuperscript{135} In 1937\textsuperscript{136} it was enacted that "any interest legal or equitable of any surviving spouse . . . in any moneys on deposit in the names of husband and wife passing to such surviving spouse" shall not be subject to an inheritance tax.

Opinions of the Attorney General state that money passing to one of two tenants by the entirety is exempt from this one per cent tax.\textsuperscript{137} If, however, the money is in the name of the husband, in trust for himself and his wife, a question may arise as to the applicability of the tax on the death of the husband. It is submitted, however, that the wording of the statute\textsuperscript{138} is sufficiently broad to exempt moneys passing to the survivor under such an account.\textsuperscript{139} It is of interest to note that the 1937 act\textsuperscript{140} specifically states that "in cases of joint tenancy where the interests are not otherwise specified or fixed by law, the interest passing shall be determined by dividing the value of the property by the number of joint tenants".\textsuperscript{141}

\textsuperscript{132} Md. Code Supp., Art. 81, Sec. 104 A.
\textsuperscript{133} Md. Code Supp., Art. 81, Sec. 105.
\textsuperscript{134} Md. Acts, 1936, Ch. 124, Sec. 104A.
\textsuperscript{135} Md. Acts, 1936, Ch. 124, Sec. 105.
\textsuperscript{136} Md. Acts, 1937, Ch. 189, Sec. 105A.
\textsuperscript{137} 22 Ops. A. G. Md. 662 (1937). This would also be true in a joint tenancy where the joint tenants are husband and wife.
\textsuperscript{138} Md. Acts, 1937, Ch. 189, Sec. 105A.
\textsuperscript{139} 22 Ops. A. G. Md. 705, 749, 788 (1937).
\textsuperscript{140} Md. Acts, 1937, Ch. 189, Sec. 105A.
\textsuperscript{141} Md. Acts, 1937, Ch. 189, Sec. 105A. exempted legacies not exceeding $100 from collateral and direct inheritance taxes.