Perhaps the only way out of this labyrinth, at least where both internal and external restrictions are involved, is to make the standard turn in every case on the Secretary's defense in an action for wrongful denial of a passport. If the Secretary claims the denial is grounded on protection of the nation's security the court may well require a showing of a "clear and present danger" or some similar standard to uphold the denial of a passport. If, on the other hand, the defense is that to grant a passport would impair the conduct of foreign affairs the court's competence should be limited to a determination of whether or not the denial was "reasonably related to the conduct of foreign affairs." In the last analysis, perhaps, the basic political process must be relied upon to compel the Secretary to answer the charge in good faith.\textsuperscript{155}

Judge Wyzanski has advanced two considerations which seem particularly appropriate from the standpoint of legislative policy: (1) If through travel controls criticism of American policy abroad is prevented, we tacitly take responsibility for that which is "uncensored"; (2) Our international status would be improved by allowing our citizens freely to speak abroad—this policy best sells a tradition of liberty. Consult Wyzanski, Freedom To Travel, 190 Atlantic Monthly, No. 4, at 66 (Oct., 1952). Constitutional rights and passport procedures have been recently the subject of hearings of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. \textit{N.Y. Times}, p. 22, col. 3 (Nov. 16, 1955).

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BANK ACCOUNTS: TRANSFER OF PROPERTY AT DEATH

I. THE JOINT AND SURVIVORSHIP ACCOUNT—ADMISSIBILITY OF PAROL EVIDENCE

"The familiar joint bank account has had an uneasy career in the courts,"\textsuperscript{1} because the joint bank account with right of survivorship, to which one party has contributed all the funds,\textsuperscript{2} resists characterization as either a gift or a contract.\textsuperscript{3} There is a lack of that divestment of control over the res of the account required for the finding of an executed inter vivos gift,\textsuperscript{4} and there is a problem in finding consideration to support a transfer of funds from the donor to the donee by contract.\textsuperscript{5} Yet characterization as gift or contract affects the result in a con-

\textsuperscript{1} Schaefer, J., in Estate of Schneider, 6 Ill. 2d 180, 183, 127 N.E. 2d 445, 447 (1955).

\textsuperscript{2} Most of the cases involve an account to which total contribution was made by one depositor. This party is usually called the donor or donor-depositor, even though the transaction is not always cast in terms of gift. The terms donor and donee will be used throughout to denote the parties to the joint account. For the origin of this terminology see Matthew v. Moncrief, 135 F. 2d 645 (App. D.C., 1943).

\textsuperscript{3} The account is upheld by a variety of theories: Contract, Hill v. Havens, 242 Iowa 920, 48 N.W. 2d 870 (1951); Gift, State Board of Equalization v. Cole, 122 Mont. 9, 195 P. 2d 989 (1948); Trust, McDevit v. Sponseller, 160 Md. 497, 154 At. 140 (1931).

\textsuperscript{4} Consult Cleveland Trust Co. v. Scobie, 114 Ohio 241, 151 N.E. 373 (1926). The question of delivery, in that case regarded as delivery of funds, can more accurately be thought of in terms of a gift of a chose in action against the bank that creates a joint and survivorship interest in the donee. See page 294 infra.

\textsuperscript{5} Estate of Schneider, 6 Ill. 2d 180, 127 N.E. 2d 445 (1955); see also Estate of Edwards, 140 Ore. 431, 14 P. 2d 274 (1932) (discussing problem of consideration where both depositors
test over ownership of funds between the estate of the donor and the donee-survivor: Courts generally reach contrary results in admitting parol evidence to vary the terms of the deposit agreement depending on their adoption of a gift or a contract theory. This comment will examine the two theories, with emphasis on Illinois law, and consider them in terms of their effect on the application of the parol evidence rule.

The nature of the survivorship right is identical to that in a common law joint tenancy. The surviving joint depositor is entitled to the funds remaining in the account at the time of the death of the other depositor, to the complete exclusion of the deceased depositor’s estate. While the nature of the survivorship interest is clear, the question of when it is an incident of a joint bank account has given the courts difficulty. In Illinois requisites for the creation of a joint bank account with right of survivorship are established by statute.

had contributed to the account). The problem of consideration is relevant only as between the account holders. The position of the bank is controlled by statute. Ill. Rev. Stat. (1955) c. 76, § 2(a) at note 10 infra.


8 3 Holdsworth, History of English Law 126 (1923). But the account cannot be thought of in terms of joint tenancy for “[t]he four unities [time, title, interest and possession] of the common-law joint tenancy, the notion of an undivided moiety in each joint tenant, and the difficulty of applying the common-law concept of joint tenancy to a fluctuating res have caused difficulties.... [T]he relationship established by a joint bank account is not that of joint tenancy, but rather is one which is governed by the provisions of the agreement between the bank and the depositors.” Schaefer, J., in Estate of Schneider, 6 Ill. 2d 180, 183, 184, 127 N.E. 2d 445, 447, 448 (1955).

9 E.g., Spikings v. Ellis, 290 Ill. App. 585, 8 N.E. 2d 962 (1937). The survivorship interest has escaped even the Internal Revenue Bureau, and is not subject to lien for the unpaid income tax of the decedent. Tooley v. Commissioner, 121 F. 2d 350 (C.A. 9th, 1941). But for conditions where the estate will be held see Reinecke v. Commissioner, 220 F. 2d 406 (C.A. 8th, 1955) (fraudulent attempt to avoid payment of taxes).

10 The statute provides: “When a deposit in any bank or trust company transacting business in this State has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any part thereof of any interest or dividend thereon may be paid to any one of said persons whether the other or others be living or not, and when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made.” Ill. Rev. Stat. (1955) c. 76, § 2(a). Under this statute it has been held that the survivorship right will exist only upon execution of a jointly signed written expression of the intent of the parties. Doubler v. Doubler, 412 Ill. 597, 107 N.E. 2d 789 (1952). Previously the appellate courts had held that joint signature was not necessary to creation of the survivorship right. Johnson v. Mueller, 346 Ill. App. 199, 104 N.E. 2d 651 (1952); Vaughan v. Millikin National Bank, 263 Ill. App. 301 (1931). The Doubler case represents a tightening of
However, a recent Illinois decision indicates that compliance with the statutory requirements does not insure the creation of the survivorship interest. *Estate of Schneider* involved a conflict between the surviving donee-depositor and the estate of the donor-depositor. There the account had been opened in compliance with the statutory requirements. Both parties had signed a signature card which provided that “one signature only [is] required for withdrawal” and that the account was to be held “as joint tenants with right of survivorship and not as tenants in common.” The court held that this agreement created a mere presumption that the joint account with right of survivorship had been created. The estate could rebut this presumption by coming forward with evidence showing that the donor did not intend the funds to be jointly owned, or that survivorship was not intended. However, the burden of persuasion to show that the donor intended to make a gift remained on the donee-survivor. As this burden could not be sustained, the funds were awarded to the estate.

The *Schneider* case was a departure from previous Illinois law since it held that to create a joint bank account with right of survivorship there must have been a gift, and that the court may consider all material evidence bearing on the intent of the donor to make a gift. Previously the joint bank account had been thought of in terms of contract, and the parol evidence rule was believed to apply. Under the contract theory the testimony which led the court in the *Schneider* case to conclude that no survivorship interest was intended would have been excluded, and the funds would have gone to the survivor.

The contract rationale had its inception in *Erwin v. Felter*, and was devised to circumvent holdings, based upon an interpretation of statutes existing at that time, that there could be no joint tenancy in personal property. *Illinois the requirements needed for creation of the survivorship incident. But the statute is drafted in two clauses and it could be construed so that joint signature would be required only for acquittal of the bank.*


14 283 IlI. 36, 119 N.E. 926 (1918).


16 Joint tenancy with right of survivorship was abolished in all property by the Act of January 13, 1821, Ill. Rev. Stat. (1845) c. 56, § 1, and reinstated as to realty by the Act of July 1, 1827, Ill. Rev. Stat. (1845) c. 24, § 5. The implication was that joint tenancy in personality was not allowed and the cases cited at note 15 supra so held. Both of these statutes have been repealed. Ill. Rev. Stat. (1919) c. 76, §§ 5, 6.
Trust and Savings Bank v. Van Vlack extended the authority of the Erwin case and said that "evidence of the inconsistent [to the contract] words or acts of the parties is not competent." The implication of characterizing the joint bank account in terms of contract was that the rights of the depositors would be determined by rules applicable to written contracts generally. This implication, together with the dictum of the Van Vlack case quoted above, led the appellate court in Cuilini v. Northern Trust Co., a survivorship contest where both depositors had signed a deposit agreement, to exclude parol evidence inconsistent with the terms of the contract.

In rejecting the Cuilini decision, the court in the Schneider case refused to allow the survivor to claim a direct contract right on the grounds that there was no consideration to support a transfer of the funds from the donor to the donee. Recovery could not be allowed on the theory that the deposit agreement was a third party beneficiary contract for "that . . . begs the question by assuming that the contract is for the benefit of the beneficiary." Since a transfer to the survivor by bequest would be testamentary in nature and invalid under the Statute of Wills, the court concluded that the survivor's interest could exist only as a result of an executed inter vivos gift.

Some courts have overcome the problem of consideration to support the contract between the donor and the donee by holding that execution of the deposit agreement creates and vests equal rights, with survivorship, in all the deposit-

17. 310 Ill. 185, 141 N.E. 546 (1923).
18. Ibid., at 192, 548.
20. But cf. Johnson v. Mueller, 346 Ill. App. 199, 104 N.E. 2d 651 (1952), where parol evidence was admitted to determine the intent of the depositors. The case is distinguishable because it involved certificates of deposit, and, more important, there was no jointly signed deposit agreement providing for survivorship.
22. 6 Ill. 2d 180, 184, 127 N.E. 2d 445, 448 (1955).
23. Some courts have had difficulty with the testamentary aspect of the survivorship account and have declined to uphold the account because of its seeming violation of the Statute of Wills. E.g., People's Savings Bank in Providence v. Rynn, 57 R.I. 411, 190 Atl. 440 (1937). This point is not controlling in the Schneider case but could be if the intent of the donor appeared to be to make a transfer taking effect only at his death. It could be argued that the effect of the statutes controlling the joint and survivorship account would be to remove this account from the purview of the Wills statute. See note 10 supra and note 50 infra.
24. The court then cited Bolton v. Bolton, 306 Ill. 473, 138 N.E. 158 (1923), to show that the facts and circumstances surrounding the transaction may be inquired into to aid in ascertaining the intention of the parties. That case is distinguishable because it did not involve a written agreement purporting to take the place of delivery. See note 49 infra.
tors. Since the contract is executed no consideration is needed. Other courts do not discuss the problem of consideration flowing between the donor and the donee, and regard the deposit of funds with the bank as sufficient consideration to support the contract between the bank, the donor, and the donee. Under either theory the contract is held to be determinative of the rights of all the parties thereto, and since it is a clear expression of the depositor's intent to own the funds as joint tenants with right of survivorship, parol evidence is not admitted. The pre-Schneider Illinois cases did not discuss the problem of consideration. Yet the contracts in these cases could be regarded as executed contracts that directly determined the rights and duties of the parties. The problem of consideration can thus be solved, and no reason is seen why the contract theory ought to have been overruled in favor of the gift theory.

The survivor in the Schneider case is not a third party beneficiary because he is a party to the contract, and a direct promisee of the bank. The fact that the words of the bank's promise are directed to the survivor brings him "in privity," and prevents him from being a stranger or "third party" to the contract. The difference between a third party beneficiary contract and a contract in which the consideration comes from one other than the moving promisee is not great, for the "third party" is a beneficiary of the contract, and the "promisee" is a bene-

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27 Hill v. Havens, 242 Iowa 920, 48 N.W. 2d 870 (1951). In an appropriate case the account might be upheld as a contract creating a present right to future enjoyment of the funds in the donee on consideration of the donee's promise to transact the donor's banking business until his death. See Armstrong v. Morris Plan Industrial Bank, 282 Ky. 192, 138 S.W. 2d 359 (1940) (account upheld on contract theory where consideration was prior service of donee). This idea is perhaps implicit in the statement of the dissent in the Schneider case that "there is nothing to negate the fact that Schneider, while remaining cognizant of the convenience of the arrangement, may still have intended [the survivor] to have the money remaining in the account upon his death just as the instruments provide." 6 Ill. 2d 180, 194, 127 N.E. 2d 445, 452 (1955).


29 See note 12 supra.

30 Of course it may be argued that this executed contract is merely a means of effecting a gift by way of novation. Consult 4 Corbin, Contracts § 914 (1951). No essential difference appears between this and making the transfer of the chose by means of a gratuitous written assignment, see note 49 infra, and no real difference in application of the parol evidence rule should appear. The executed contract theory seems to be a shorthand way of adopting the policy of regarding the execution of the deposit agreement as conclusive of the intent of the parties.

31 Consult Tweedale v. Tweedale, 116 Wis. 517, 93 N.W. 440 (1903) (conveyance of property by A to B in part consideration for B's promise to C to pay him $100.00 held to create enforceable contract right in C); 4 Corbin, Contracts § 779 (1951); Rest., Contracts § 75 (2) (1932).
In cases involving either contract the essentials of proof are the same: it must be shown that the survivor was intended to have a benefit under the contract.\textsuperscript{3} Thus the court's remarks directed to the unacceptability of the third party beneficiary contract\textsuperscript{4} may be taken as directed to the unacceptability of the contract where the survivor is a promisee and the consideration flows from the donor. In rejecting the beneficiary rationale necessary to support either type of contract, the court is saying that even if the survivor proved the existence of the deposit agreement, in order to claim as a beneficiary of the contract (or of the donor) he would have to assume that the contract was made for his benefit. Since the point for determination was for whose benefit was the contract made, the court said that this assumption begs the question and defeats the survivor's argument. Implicit in this statement is the conclusion that the deposit agreement does not show an intent on the part of the donor to constitute the donee a joint owner of the funds with right of survivorship. But the survivor should be allowed to prove that the donor intended to benefit him; and if the court is to admit parol evidence, it must decide that the deposit agreement is not a clear expression of the donor's intent to create a joint ownership with right of survivorship in the donee.\textsuperscript{5} While it is thus clear that the court could have phrased its decision in terms of a beneficiary type contract, it is doubtful that the application of the parol evidence rule would have been thereby changed. Essential to recovery as a donee beneficiary is a showing that the donor intended to make a gift to the donee.\textsuperscript{6} Presumably the same evidence admitted under the gift theory adopted by the court would be admissible here.\textsuperscript{7}

The gift theory, adopted in the \textit{Schneider} case, differs from the contract theory in that it requires the survivor to show in a clear and convincing manner that the donor intended to give him a chose in action against the bank that would entitle him to a joint and survivorship interest in the funds. In order to resolve the problem of delivery,\textsuperscript{8} the gift must be of a contract right against the bank, and not of the funds themselves, because retention of a right in the donor

\textsuperscript{3} Corbin, Contracts § 779, 782 (1951).

\textsuperscript{4} Ibid. § 776; Rest., Contracts § 133 (1) (a) (1932).

\textsuperscript{5} See text at note 22 supra.

\textsuperscript{6} For a discussion of the relationship of intent and the jural act see 9 Wigmore, Evidence § 2413 (3d ed., 1940). The law cannot examine the \textit{will} of the donor, nor should it place sole reliance on the act itself if the consequences appear unreasonable. But it is not unreasonable to presume that the donor intended the donee to have a joint and survivorship interest in the funds when the deposit agreement contains the words "joint tenants with right of survivorship" to describe the ownership of the depositors. Carrying out the suggestions of note 68 infra would strengthen the case for holding the donor to his act in the absence of mistake, fraud, or duress, and discourage litigation.

\textsuperscript{7} E.g., Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931) (donee beneficiary contract to be construed in light of \textit{all} attendant circumstances).

\textsuperscript{8} See note 4 supra.
to withdraw the funds is a retention of control that would defeat the creation of a gift even if the donor's intent to make the gift were clearly demonstrated. 49

The joint bank account is a creature of both contract and gift. 40 These two factors interact to the extent that the gift theory depends on contract for creation of the subject of the gift and for evidencing delivery. 41 In the application of the contract theory the donee receives something for which he does not pay. This interdependence makes a characterization exclusively in terms of either contract or gift quite artificial. However the account is characterized, no difference in the application of the parol evidence rule should result. 42 The question to be determined is the same in either event: Did the donor intend the donee to hold a joint and survivorship interest in the funds? Courts adopting the contract theory generally regard the execution of a deposit agreement providing that the depositors shall hold the funds "as joint tenants with right of survivorship" as conclusive of this question of intent, and do not admit parol evidence to vary the terms of the contract. 43 Courts adopting the gift rationale often admit parol evidence, 44 apparently on the theory that execution of the deposit agreement is a substitute for the manual delivery usually required in a gift of a chattel. 45 Since parol evidence is admitted to explain and determine the purpose of delivery, 46 the same evidence is admitted to explain and determine the purpose of the writing. 47 But delivery is not required as an end in itself; it is rather based on policy

39 Estate of Waggoner, 5 Ill. App. 2d 130, 125 N.E. 2d 154 (1955) (must be an absolute and irrevocable parting with all future and present dominion over res in order to effect valid inter vivos gift).

40 Consider Kepner, The Joint and Survivorship Bank Account: A Concept Without a Name, 41 Calif. L. Rev. 596, 635 (1953), where it is suggested that the joint bank account is so anomalous as to be sui generis.

41 Castle v. Wightman, 303 Mass. 74, 20 N.E. 2d 436 (1939) (deposit agreement held to take place of delivery).

42 Accordingly some courts that accept the gift theory do not admit parol evidence. Consult Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W. 2d 817 (1950) (executed deposit agreement providing funds to be owned "as joint tenants with right of survivorship" held conclusive of question of intent to make gift); State Board of Equalization v. Cole, 122 Mont. 9, 195 P. 2d 989 (1948) (execution of deposit agreement creating account payable to either or survivor settles question of donative intent); Furjanick Estate, 375 Pa. 484, 100 A. 2d 85 (1953) (no parol evidence on question of donative intent in presence of written agreement).

43 Cases cited at note 28 supra.


45 See note 41 supra.

46 E.g., McIntosh v. Fisher, 125 Ill. App. 511 (1906).

47 Extrinsic evidence could be admitted to show that the act was not intended to have jural effect. Thus as it can be shown that no contract was intended because of jest, it can be shown no gift was intended because of a desire on the part of the donor to increase insurance coverage for the account, see note 55 infra, or that a mere agency relationship was contemplated. But this logic can be attacked by pointing up the distinction between showing a lack of intent to achieve any jural effect (for which parol evidence can be admitted) and showing no intent to achieve a particular jural effect, for which parol evidence cannot be admitted unless
that seeks to: (1) make clear to the donor the nature of his act, (2) make the nature of the act clear to contemporary witnesses and (3) give to the donee something to show as evidence of his claim. No substitute for delivery should be required to do more; and it is arguable that if the donor executes an instrument that achieves these three objectives, thus clearly expressing his donative intent, he should be held conclusively to his act. The gloss of judicial logic compels no conclusion; the Illinois Court was not bound to admit parol evidence even after its repudiation of the contract theory.

The new Illinois Savings and Loan Act, passed since the *Schneider* decision, presents another argument for regarding the execution of a written agreement providing for payment to either depositor or the survivor as conclusive of the rights of the parties in any contest involving deposits in Savings and Loan Associations. The statute provides:

If two or more persons opening or holding a withdrawable capital account shall execute a written agreement with the association providing that the account shall be payable to any or the survivor of them, the account, and any balance thereof which exists from time to time, *shall be held by them as joint owners with right of survivorship* and, unless otherwise agreed, any payment by the association to any of such persons shall be a complete discharge of the association's obligation as to the amount so paid. [Italics supplied.]

It is difficult to argue that this provision merely provides for acquittal of the association, as the emphasized words are not essential to achieve this purpose. The effect is not clear from the terms of the agreement. Parol evidence can be admitted to show if the deposit agreement was to have jural effect, but not to show what that effect was intended to be. This must be determined from the face of the writing, and, if unambiguous, parol evidence will be excluded. See note 42 supra. It might be held that the writing was not clear as to the intent to make a gift, and better results would be achieved if the Schneider rule were so limited. Ingenious drafting of deposit agreements might obviate the rule. See note 68 infra.


The question is whether or not parol evidence will be admissible to vary the terms of a written gratuitous assignment of a chose in action when the words of the writing clearly import intent to make a gift. This question has not received much consideration outside the context of joint bank accounts, see note 42 supra, but in the case of *Mahan v. Plank*, 289 Fed. 722 (C.A. 7th, 1923), where a gift was evidenced by a letter, it was held that the letter itself would furnish the decisive test as to whether or not a gift inter vivos was established. While the relationship of the parties, the reasonableness of the gift, or the subsequent or contemporaneous acts of the parties could help explain any ambiguous language of the letter, they could not change the rights of the parties as fixed by the letter.

If the provision cannot satisfactorily be construed in two clauses, one providing for acquittal of the association and one determining the ownership of the funds, it may still be argued that this type of ownership is a condition to the bank's acquittal, and if the condition is not met the bank will not be free of liability. Since the statute plainly says the bank is to be free of liability, it must also say that the condition of ownership is fulfilled upon execution of the written agreement. The words of this statute should be compared with those of Ill. Rev. Stat. (1955) c. 76, § 2(a) at note 10 supra.
If the words mean anything they mean that the property rights of the depositors
are determined by the terms of the deposit agreement. The words of the statute
suggest that the court should not apply the Schneider rule to accounts covered
by the provisions of the new Savings and Loan Act.52

The joint bank account with right of survivorship is widely used to pass
property on death without the formality of a will and to avoid the expense and
delay of probate proceedings.53 The popularity of the joint account can be at-
tributed to the combination of joint life withdrawal power and the right of sur-
vivorship. Convenient availability of funds is coupled with certainty of immedi-
ate passing to the survivor of the balance in the account at the death of the
donor. There is a need for certainty in any instrument that has the effect of
transferring a testamentary interest.64 The Schneider rule, admitting parol evi-
dence in the survivorship contest, has destroyed this certainty and limited the
efficacy of the joint bank account when used to effect what is in reality a testa-
mentary intent.

The court in the Schneider case probably admitted parol evidence because of
a belief that injustice would result when a joint account with right of survivor-
ship is opened by depositors having no testamentary intent, but who use the
account for agency or other purposes.55 Admitting parol evidence protects the

52 But a series of events in New Jersey serves as an example of what may be done with
such statutes. A similar provision was there enacted in 1948. N.J.L. (1948) c. 67, § 217,
N.J.R.S. (Cum. Supp., 1950) 17: 9A–217 (applying to pay on death accounts). This was held
to establish no conclusive presumption of ownership in the survivor in the case of Fruzynski
v. Radler, 23 N.J. Super. 274, 93 A. 2d 35 (1952) (involving a joint account). The legislature
thereupon amended the statute to provide for a conclusive presumption of ownership in the
17: 9A–217 (B). The amended statute has not yet been construed by the courts, but the legis-
lative intent would seem fairly clear. The 1948 statute applicable to joint bank accounts,
N.J.R.S. (Cum. Supp., 1950) 17: 9A–218, was worded more strongly than § 217, and it is sur-
prising that the survivor did not attempt to rely on it in the Fruzynski case. § 218 was amended
at the same time as § 217 and now provides that the monies remaining in the account at the
death of the donor "shall... vest solely and indefeasibly in the survivor." N.J.R.S. (Cum.

53 "Bank accounts in this form are opened not infrequently by the simple and the humble." Cardozo,
J., in Moskowitz v. Marrow, 251 N.Y. 380, 398, 167 N.E. 506, 512 (1929) (holding
survivor's ownership conclusive on death of donor); In re Wilkin's Will, 131 N.Y. Misc. 188,
226 N.Y. Supp. 415 (Surr. Ct., 1928); Havighurst, Gifts of Bank Deposits, 14 N.C.L. Rev.
129 (1936). An example of the conceptions of one donor-depositor can be seen from an ex-
amination of Kittredge v. Manning, 317 Mass. 689, 59 N.E. 2d 261 (1945), where the donor
said, "I want Nora to have that money. You know, a bank account with two names is iron
clad." (Emphasis supplied.) Ibid., at 691, 262.

54 Consult Rheinstein, The Law of Decedents' Estates c. 17 (1955) (on the subject of the
testamentary instrument); Havighurst, op. cit. supra note 53, at 159 admits it desirable to re-
gard the question of intent, after the death of one of the parties, as conclusive on the form of
deposit agreement.

55 Russell and Frather, Legal Aspects of Savings Accounts, 19 U.S. Savings and Loan
League Legal Bulletin 1 (1953), points out this agency misuse and recommends that a power of
attorney be used instead. The account is also used to avoid bank regulations of one sort or
another, Havighurst, op. cit. supra note 53, at 131, and to obtain increased insurance coverage
agency depositor at the expense of destroying certainty in the operation of the
right of survivorship. But the agency intent can be effected in many ways, while the joint account with right of survivorship is the only account that
couples the present right of joint withdrawal with the right of survivorship.
Derogation from the use for which the account is uniquely qualified will result
if the certainty necessary to effective operation of the right of survivorship is
destroyed.

It might be argued that provisions of Illinois law authorizing banks to pay
funds in a trust account to a named party on the death of the depositor are
better adapted for use to effect a quasi-testamentary intent than a joint bank
account with right of survivorship. Whether or not the rights of the named party
are considered conclusive, this account is not an effective substitute for the
joint bank account. While the trust account may be satisfactory to a depositor
who can afford to place funds both in an account solely for testamentary pur-
poses and in another account for present joint withdrawal, it is not adapted for
use by those of more modest means who must combine the right of present joint
withdrawal with the quasi-testamentary power of disposition.

The dissent in the Schneider case suggested that if the rights of the survivor
were not to be regarded as conclusive upon the death of the donor the rule of the
Schneider majority might be improved by applying different rules of evidence.
The rule announced in the Schneider case places the burden on the survivor to

(Supp., 1955). The insurance coverage does not depend on the state of the account between
the depositors in that the funds may have been a mere gift from donor to donee. Conner v.

E.g., Russell and Prather, op. cit. supra note 55, at 18, where power of attorney pro-
visions are made on the face of the individual account card. Thus a simple and readily avail-
able means of creating an agency relationship is provided without the objectionable survivor-
ship provisions.

(1955) c. 32, § 770(b)(c).

Consult Savings-Account Trust—Validity Under Illinois Law, 23 U. of Chi. L. Rev. 301
(1956).

69 6 Ill. 2d 180, 188, 127 N.E. 2d 445, 450 (1955).

An example of the implications of the Schneider rule in other areas of joint bank account
law is found in its possible effect on the operation of the Illinois Inheritance Tax Law which
conclusively requires inclusion of a pro rata share of the funds in the estate of a deceased
joint depositor regardless of the amount of actual contribution to the account. Ill. Rev. Stat.
(1955) c. 120, § 375 (5). The estate will be taxed the same amount, in any given case, whether
the decedent contributed more or less than a pro rata share of the funds. A tax loss to the
donee's estate would occur in the event the donee predeceased the donor. This loss might be
avoided by showing, under the rule of the Schneider case, that no joint and survivorship
account was intended, and that therefore the tax ought to be levied only on the donor’s estate at the time of his subsequent death.

Extension of the presumption rule to inter vivos contests would affect Brown v. First
National Bank, 271 Ill. App. 424 (1933), which held that a creditor by merely showing the
fact of a joint account in the name of his debtor and another had not made out a prima facie
show in a clear and convincing manner that the donor intended the funds to be jointly owned. This must be done by proving that the donor intended a gift of an interest in the funds to the donee, a task that may be very difficult.61 The dissent suggested that once the survivor had proved the execution of the deposit agreement the estate should carry the burden of persuasion that no joint ownership was intended.62 The difference between the two rules might, however, be negligible, as evidence sufficient to rebut the presumption of joint ownership or survivorship would probably be sufficient in many cases to persuade the trier of fact that no joint and survivorship ownership was intended.63

Another alternative to the Schneider rule would be recognition of a distinction between conflict over ownership of the funds during the joint lives of the depositors and a conflict after the death of one. This distinction is recognized in New York where it is held that the usual rebuttable presumption of joint tenancy becomes conclusive as to all funds remaining in the account at the time of the death of either depositor.64 This presumption remains rebuttable as to any funds withdrawn by either of the parties before the death of the other.65 This case as to his right to attach the account. Consistency would now require the debtor-depositor, upon the creditor showing the execution of the joint deposit agreement, to come forward with evidence showing that no joint account was intended, or that he had not actually contributed to the account. In the absence of such a showing the creditor should be allowed to attach up to one-half the funds in the account. Consult Murphy v. Michigan Trust Co., 221 Mich. 243, 190 N.W. 698 (1922).

61 The donee is not allowed to testify in his own behalf where the adverse party is the executor, administrator, heir, legatee, or devisee of any deceased person. Ill. Rev. Stat. (1955) c. 51, § 2. Rothwell v. Taylor, 303 Ill. 226, 135 N.E. 419 (1922) (donee not competent to testify to acts and words of donor after death of donor).

62 See Greener v. Greener, 116 Utah 571, 212 P. 2d 194 (1949) (agreement conclusive unless attacked on grounds of fraud, mistake or other incapacity, or unless shown by clear and convincing proof that the parties intended instruments to have different effect from that expressed).

63 Professor McCormick points up the fact that those who attempt to avoid the working of the parol evidence rule are generally the lower economic classes, and where the trial is to the jury the outcome would be influenced to favor the "underdog" to the depreciation of written agreements that fairly express the intent of the parties. Another factor is the suspected disinclination of the jury to evaluate fairly the unreliability of the oral testimony of interested parties. McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, 41 Yale L.J. 365, 366 (1932). Basic to determination of the proper application of the parol evidence rule is an empirical evaluation of actual use of the joint and survivorship account. Cursory inquiry seems to indicate that the majority of depositors are aware of the implications of the survivorship provisions, and often are motivated to use the account by the very presence of this incident. The courts should not jeopardize the position of those depositors on the basis of their acquaintance with the pathological occurrence.


65 Ibid. This is true of funds held in savings banks, N.Y. Banking Law (McKinney, 1950) § 239(3), but not of those held in commercial banks or trust companies. See N.Y. Banking Law (McKinney, 1950) § 134(3). The conclusive presumption applies only in the absence of fraud or undue influence. The origin of this distinction applicable on the death of one of the depositors may be traced to Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).
distinction was recognized by implication in previous Illinois case law. Parol evidence was admitted to show relative ownership of the funds during the joint lives of the parties, and was thought to be excluded after the death of one of the depositors. The New York rule assures certainty in the passage of the survivorship interest without affecting the inter vivos rights of the parties.

A possible improvement of the New York rule would be statutory definition of different types of deposit agreements with a requirement that banks furnish these forms before being released from liability for payment to one of the depositors. These cards should be drawn with prominent language on their face that explains in understandable terms what the effect of deposit of the funds and signature of the agreement would be. If the conclusiveness of the execution of an agreement creating the right of survivorship has been objected to on the grounds that the term "joint tenants with right of survivorship" is not understandable to the layman, this objection would be met by these new forms. Parol evidence would be excluded in the absence of fraud, duress or mistake.

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Cases cited at note 13 supra.

See notes 10 and 50 supra. "Unfortunately, many institutions have been exceedingly lax in the opening of [joint and survivorship] accounts, and it is largely through the failure of such institutions to properly advise their customers of the implications of the several types of accounts and their failure to take proper precautions initially which has given rise to the unseemly amount of litigation on the subject." Russell and Prather (counsel for United States Savings and Loan League), op. cit. supra note 55, at 8. The article states that a transfer from the donor to a third party and then to the bank to be held for the donor and the donee as "joint tenants with right of survivorship and not as tenants in common and not as tenants by the entirety" will improve the chances of creating a valid joint and survivorship account. This is on the theory that the four unities of time, title, interest and possession will then be found to give effect to the donor's intent. See ibid., at 10, 22. The futility of such subtlety is apparent. A more profitable approach would be to devise a card that expressed the donative intent so clearly that a child could understand. The result of this would be to force the Illinois Court to decide whether the Schneider case stands for the proposition that no deposit agreement, however clear, would be operative to exclude parol evidence, or only that the type of card found in the case itself was not sufficient to achieve that end.

A statement in large clear type to the effect that the party should not execute this card unless it is intended that his co-depositor should take all the funds upon his death, to the exclusion of his wife and children, would do away with much of the misuse of the joint and survivorship account. Three types of account would suffice to clear confusion: (1) One in which both parties have a present right of withdrawal with the right of survivorship to either, for both convenience and testamentary intent; (2) One in which each has a present right to withdraw, but with the survivorship right in the donor only, to effect the agency intent; (3) One in which the donee has no present right of withdrawal but obtains the funds upon the death of the donor, to effect the testamentary intent. Consult Disposition of Bank Accounts: The Poor Man's Will, 53 Col. L. Rev. 103, 116 (1953), where additional cards to create pay on death and trust accounts are suggested. The above-mentioned three accounts correspond to the former conception of the joint and survivorship account, an individual account with power of attorney, and a trust account. Since these accounts can all be created at the present time, the real force of the statute would be to define them more clearly and require banks to furnish the standard forms with explanation.
II. THE SAVINGS-ACCOUNT TRUST—VALIDITY UNDER ILLINOIS LAW

Numerous savings accounts in Illinois banks or savings and loan associations have been established by depositors designating themselves on the deposit card as trustee for a named beneficiary.\(^1\) By so doing the depositor-trustee retains complete control over the account as long as he lives; he may deposit, withdraw, or close out the account at will, and he may change the beneficiary by making out a new deposit card.\(^2\) For more than thirty years\(^3\) the institutions holding funds so deposited have paid them to the designated beneficiary upon the death of the depositor-trustee, but there is no explicit Illinois authority which upholds these savings-account trusts\(^4\) by declaring the beneficiary's interest even presumptively secure from attack by persons claiming an interest in the estate of

\(^1\) An officer of a large Chicago bank estimated that the bank had "many thousands" of savings-account trusts and that the same situation would be found in all large Chicago banks. In one savings and loan association it was estimated that approximately one-third of its 50,000 accounts were trust accounts. Strangely, the trust account appears to be less extensively used in the smaller neighborhood banks in Chicago.

\(^2\) Of course the depositor-trustee may amend the trust so as to make it irrevocable or to restrict his interest or control. A more restrictive trust of a savings deposit may also be created at the time of opening the account. Consult 1 Bogert, Trusts and Trustees § 47 (1951); 89 C.J.S., Trusts § 54 (1955). This comment, however, is concerned only with the validity of the "standard" revocable savings-account trust.

\(^3\) The savings-account trust was officially recognized in Illinois in 1921 when the legislature passed a statute designed to protect banks from liability if they paid the balance in the trust account to the beneficiary on the death of the depositor-trustee. The statute provides: "If a deposit is made with any corporation doing a banking or trust business by one person in trust for another, the name and residence of the person for whom it is made shall be disclosed, and it shall be credited to the depositor as trustee for such person; and if no other notice of the existence and terms of a trust has been given in writing to such corporation, the deposit or any part thereof, together with the interest thereon, may, in the event of the death of the trustee, be paid the person for whom said deposit was made, or to his legal representative." Ill. Rev. Stat. (1951) c. 16j, § 23. Ill. Rev. Stat. (1955) c. 32, § 953, enacted in 1939, provides similar protection for savings and loan associations. Consult also note 27 infra for text of the new Savings and Loan Act.

These statutes have never been interpreted by the Illinois courts. The few cases which have interpreted very similar statutes in other states have held that the statutes did not establish any rights in the beneficiary—they merely absolved the paying institutions from liability to persons claiming an interest in the estate of the depositor-trustee. Consult 1 Bogert, Trusts and Trustees § 47, at 323 n. 62a (1951); 4 Powell, Real Property § 571, at 436 nn. 33 and 34 (1954).

\(^4\) Widespread interest in the savings-account trust was stimulated by the decision in Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904) in which the New York court held that: "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." Ibid., at 125, 752. Since then the savings-account trust has been sanctioned by many courts (authorities cited note 5 infra) and by the Restatement of Trusts, § 58 (1935).
the deceased depositor-trustee.\(^5\) This comment will examine a recent Illinois case and the new Savings and Loan Act\(^6\) which, while not dealing expressly with the problem, indicate that the savings-account trust may well be a valid inter vivos trust in Illinois.

The savings-account trust has been attacked on several technical grounds: (1) It is an illusory inter vivos trust because the control over the corpus of the trust retained by the depositor is so great as to bar an effective vesting of a present interest in the beneficiary;\(^7\) (2) This control of the deposit retained by the depositor and the fact that the beneficiary's interest is contingent upon his surviving the depositor render the savings-account trust inherently testamentary and void, therefore, for failure to comply with the statute of wills;\(^8\) (3) Because the settlor could have had bad other reasons for establishing a savings-account trust, his intent to vest an interest in the beneficiary is equivocal and should not, therefore, be presumed.\(^9\)

\(^5\) The validity of the savings-account trust probably will have to be tested by a suit between the trust beneficiary and some other person claiming an interest in the estate of the deceased depositor-trustee. Though the banks and savings and loan associations have a great interest in the determination of this question, they have no justiciable interest due to protective legislation. Consult statutes cited note 3 supra and note 27 infra.

In states in which the validity of the savings-account trust has been tested, it has generally been upheld to the extent that the beneficiary has on the death of the depositor-trustee a presumptive right to the balance in the account, subject to rebuttal by evidence that the depositor did not intend to vest any interest in the beneficiary. Kosloskye v. Cis, 70 Cal. App. 2d 174, 160 P. 2d 565 (1945); Delaware Trust Co. v. FitzMaurice, 26 Del. Ch. 101, 31 A. 2d 383 (1943), mod. on other grounds by Crumlish v. Del. Trust Co., 27 Del. Ch. 374, 38 A. 2d 463 (1944); Wilder v. Howard, 188 Ga. 427, 4 S.E. 2d 199 (1939); Hale v. Hale, 313 Ky. 344, 231 S.W. 2d 2 (1950); (joint deposit stated to be in trust for depositor and beneficiary) Bollack v. Bollack, 169 Md. 407, 182 Atl. 317 (1935); Cazallis v. Ingraham, 119 Me. 240, 110 Atl. 359 (1920); Walso v. Latterner, 143 Minn. 364, 173 N.W. 711 (1919); Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904); In re Scanlon's Estate, 313 Pa. 424, 169 Atl. 106 (1933); Malley's Estate v. Malley, 69 R.I. 407, 34 A. 2d 761 (1943).

A few states treat the bare form of the deposit as ambiguous and insufficient to justify a presumption of a valid trust, Hogarth-Swann v. Steele, 294 Mass. 396, 2 N.E. 2d 446 (1936); Fleck v. Baldwin, 141 Tex. 340, 172 S.W. 2d 975 (1943).


Consult 1 Bogart, Trusts and Trustees § 47, at 323 n. 62a (1951); 89 C.J.S., Trusts § 67 (1955).


\(^7\) Criticism is more usually directed to the combination of control and survivorship requirement because of the prevailing liberal views on retention of control by the settlors of trusts. Analysis of the retained control also arises in connection with original trust intent, note 9 infra, revocation of the trust, note 19 infra, and rights of third parties to the deposit, note 34 infra. Consult 1 Bogert, Trusts and Trustees § 47, at 318 nn. 50-54 (1951).

The courts have paid relatively little attention to the testamentary difficulties in the savings-account trust. Cf. Packard v. Foster, 95 N.H. 47, 56 A. 2d 925 (1948). In the main it has been the commentators who have raised this objection, consult 1 Bogert, Trusts and Trustees § 47, at 335 n. 94a, § 104 (1951); Scott, Trusts and the Statute of Wills, 43 Harv. L. Rev. 521, 542 (1930). Compare The Theory of the Tentative Trust, 87 U. of Pa. L. Rev. 847 (1939).

\(^8\) Other possible uses of the trust account, depending on state statutes and local banking policy, are to avoid limits on the size of savings deposits, to obtain greater interest on small
The problem of the control retained by the settlor in the savings-account trust should not cause difficulty in Illinois. In *Kelly v. Parker*\(^\text{10}\) the Illinois Supreme Court upheld a three-party trust of real estate in which the settlor retained a life interest in the use and income; a power to let, demise, mortgage, sell and convey in fee or less (the settlor retaining a right to the proceeds); and a power of revocation. Despite the retention of virtually complete control over the disposition of the corpus, it was held that the conveyance vested a present interest in the beneficiary. This tendency to find a present vesting despite the retention by the settlor of virtually complete control in the three-party trust context has received undeviating support in Illinois.\(^\text{11}\) In 1955, in *Farkas v. Williams*,\(^\text{12}\) the Illinois Court extended that liberal tendency to include a declared trust even though the cases could be distinguished on the theory that conveyance of title to a third party is a manifestation of an intent to convey some interest to the beneficiary which is absent where the settlor retains title as trustee.\(^\text{13}\)

The *Farkas* case was a suit by the administrators of the estate of the deceased settlor-trustee against the trust beneficiary to determine the validity of a declared trust in shares of a mutual investment fund. The settlor retained a life interest in the income and the power as trustee “to vote, sell, redeem, exchange, or otherwise to deal in or with the stock.”\(^\text{14}\) The trust was to terminate as to any portion of the stock sold or redeemed, the settlor to retain the proceeds. The settlor also had the power to change the beneficiary or to revoke the trust at any time upon formal notice to the investment corporation.\(^\text{15}\)

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\(\text{10}\) 181 Ill. 49, 54 N.E. 615 (1899).


\(\text{12}\) 5 Ill. 2d 417, 125 N.E. 2d 600 (1955).

\(\text{13}\) Consult 1 Scott, Trusts § 57.6 (1939).

\(\text{14}\) Farkas v. Williams, 5 Ill. 2d 417, 420, 125 N.E. 2d 600, 602 (1955).

\(\text{15}\) In determining that there was a valid trust intent, the court emphasized this requirement of notice, arguing that its presence divested the settlor-trustee of complete freedom to deal with the stock as his own. In fact, an absolute owner would also have to notify the company of any proposed lifetime disposition of the shares since redemption is the customary and
beneficiary before the settlor-trustee would automatically terminate the trust. Believing that these powers were realistically no more pervasive than those held by the settlor in a revocable three-party trust such as Kelly v. Parker, 18 the Illinois court sustained the beneficiary's interest. 17

The Farkas trust is strikingly similar to a declared trust of a withdrawable capital account in a savings and loan association or of a savings account in a bank. 18 If a depositor declares that he holds the account in trust for a named beneficiary, the interests of the depositor-trustee and the beneficiary are substantially identical to those created in the Farkas trust. 19 The settlor in both situations, besides retaining a life interest, can destroy the trust by revoking or consuming the corpus. Realistically, the beneficiary's interest in either case amounts to a mere expectancy.

The provision for automatic termination of the trust in the event that the easiest method of transferring shares in open-end mutual investment companies. Consult, for example, Prospectus, Investor's Mutual, Inc. (Jan. 10, 1955). The settlor-trustee in the Farkas case, therefore, lost no freedom of inter vivos disposition by establishing the trust. He did, however, lose the power to dispose of the shares by will, which he could have done without notifying the company if he were the absolute owner. Consult note 19 infra.

18 131 Ill. 49, 54 N.E. 615 (1899).

17 The court said: "It is obvious that a settlor with the power to revoke and to amend the trust at any time is, for all practical purposes, in a position to exert considerable control over the trustee regarding the administration of the trust. For anything believed to be inimicable to his best interests can be thwarted or prevented by simply revoking the trust or amending it in such a way as to conform to his wishes." Farkas v. Williams, 5 Ill. 2d 417, 430, 125 N.E. 2d 600, 607 (1955).

18 In the Farkas case the Illinois Court relied upon United Bldg. and Loan Ass'n v. Garrett, 64 F. Supp. 460 (D. Ark., 1946), a case involving a declared trust of a savings and loan share certificate, as most closely approximating the Farkas trust. It should be noted, however, that under Illinois law a certificate like the one in the Garrett case is in some degree dissimilar to a withdrawable capital account in a savings and loan association. The holder of the latter does not have all the attributes of a stockholder. His account entitles him to membership with voting rights, but his account is not subject to attachment for the debts of the association. Ill. Rev. Stat. (1955) c. 32, §§ 741, 762(c) and 763. Withdrawals can be made, a right not accorded to the holder of a Garrett-type certificate, though the holder of the withdrawable capital account is not considered the creditor of the association. Ill. Rev. Stat. (1955) c. 32, §§ 763 and 773(f). This last is the principal distinction between a withdrawable capital account and a savings account in a bank—the holder of a savings account is considered a creditor of the bank. Cicero State Bank v. Crowley, 115 F. 2d 1022 (C.A. 7th, 1940); People v. McGraw Electric Co., 375 Ill. 241, 30 N.E. 2d 903 (1940).

19 A possible distinction may arise concerning the manner of revocation. In the Farkas trust the settlor-trustee could not have revoked the trust in his will whereas revocation of savings account trusts by will has generally been held effective. A mere residuary bequest without more is ineffective to revoke a savings-account trust, but a specific bequest of the deposit or a bequest which will be ineffective without use of funds in the trust account has been held to revoke the trust. Consult Manner and Suificiency of Revocation of Tentative ("Totten") Trust of Savings Bank Account, 38 A.L.R. 2d 1243, at § 8 (1954). Generally, a trust instrument like the Farkas agreement which reserves the power to revoke in a specified form is only exercisable during the settlor-trustee's lifetime. Consult 3 Scott, Trusts § 330.8 (1939); Exercise by Will of Trustor's Reserved Power To Revoke or Modify Inter Vivos Trust, 18 A.L.R. 2d 1010, 1014 (1951).
beneficiary predeceases the settlor\textsuperscript{20} raises the statute of wills problem.\textsuperscript{21} The fundamental dogma is that any disposition inherently testamentary in character must comply with the statute of wills. The virtually complete control retained by the settlor over the corpus plus the survivorship provision exposes the savings-account trust to the argument that its establishment is really a testamentary act.\textsuperscript{22} The Farkas trust had a survivorship clause, but in addition to finding a present vesting, the court also met the non-compliance with the statute of wills argument by pointing out that the purposes of the statute of wills—which are to minimize the possibility of fraud, forgery, and coercion, and to foster an awareness in the testator of the gravity of his act\textsuperscript{23}—were adequately accomplished by the detail and formality surrounding the execution of the trust instrument.

The Farkas case could be distinguished from the savings-account trust on this ground: the formal documents executed in connection with holding the shares of the mutual investment corporation as a trustee were somewhat more elaborate and extensive than those customarily used in a savings-account trust.\textsuperscript{24} On the other hand, the standardized, simple form used in the savings-account

\textsuperscript{20} The form of the trust agreement used in Chicago banks is as follows: "All deposits in this account are made for the benefit of... (name of beneficiary)... (relationship)... (date of birth)... (birth place) to whom or to whose legal representative said deposits or any part thereof, together with the interest thereof, may be paid in the event of death of the undersigned trustee. .../s/Trustee." The wording of this form is clearly derived from the statute quoted in note 3 supra and it is open to the argument that the use of the words "or whose legal representative" means that survivorship of the beneficiary is not required, thus diminishing the statute of wills problem. It is more likely, however, that these words were meant to apply to a situation in which the beneficiary was incapacitated, as practice and common understanding negate this contention. The Restatement of Trusts states that the death of the depositor "terminates" the trust, § 58 comment (b) (1935). Consult also 1 Bogert, Trusts and Trustees § 47, at 326 (1951); 4 Powell, Real Property § 571, at 435 n. 29 (1954); Manner and Sufficiency of Revocation of Tentative ("Totten") Trust of Savings Bank Account, 38 A.L.R. 2d 1243, at § 3 (1954). The Savings and Loan Act leaves no doubt that survivorship is required as it provides for payment to beneficiaries "who are living at the death of the last surviving trustee." Ill. Rev. Stat. (1955) c. 32 § 770(b)(3).


\textsuperscript{22} Consult 1 Scott, Trusts §§ 56.6 and 57.6 (1939).

\textsuperscript{23} Consult 1 Bogert, Trusts and Trustees § 104 (1951).

\textsuperscript{24} The Illinois Supreme Court cautioned in the Farkas decision that it did not intend to uphold every purported revocable inter vivos trust: "For the reasons stated, we conclude that these trust declarations... constituted valid \textit{inter vivos} trusts and were not attempted testamentary dispositions. It must be conceded that they have... a 'testamentary look.' Moreover, it must be admitted that the line should be drawn somewhere, but after a study of this case we do not believe that point has here been reached." Farkas v. Williams, 5 Ill. 2d 417, 433, 125 N.E. 2d 600, 608 (1955). Consult note 19 supra, for another possible ground for distinction between the Farkas trust and the savings-account trust.

\textsuperscript{25} The form of the trust agreement used in Chicago banks is set forth in note 20 supra. The savings and loan associations presently use a more detailed trust agreement though its implications are the same. Its greater formality and detail may be intended as proof that the depositor-trustee's intent was unequivocal. Consult Russell, The Signature Card Should Fit the Purpose, 21 U.S. Savings and Loan League Legal Bulletin 1 (1955).
trust perhaps provides better evidence of the depositor's intention and understanding, and the participation of the institution would tend to assure that the disposition was carefully and seriously made.  

The argument can also be made that the new Savings and Loan Act removes the savings and loan trust account from the operation of the statute of wills. Section 770(b)(3) provides:

Upon the death of the last surviving trustee the person or persons designated as beneficiaries who are living at the death of the last surviving trustee shall be the holders of the account (as joint owners with right of survivorship if more than one) and any payment to the holder or any of such holders shall be a complete discharge of the association's obligations as to the amount so paid [italics added].

Though this section appears to have been primarily intended to protect the association from liability on paying out the account, it could also be interpreted as giving the designated beneficiary at least a presumptive right to the deposit. The use of the words owners and holder so suggests, and furthermore, the new act repealed the Savings and Loan Act of 1919 but did not repeal a portion enacted in 1939 which was specifically directed to limiting the liability of the association in paying the proceeds of trust accounts to fiduciaries and beneficiaries. A second section whose sole object was to protect the associations from liability would be redundant.

The interview with an officer of the bank or savings and loan association when a new account is opened should provide the depositor with an awareness of the consequences of using the trust form of account and protect against fraud or forgery. The identity of a person subsequently attempting to change the form of an account or the name of a beneficiary could be checked against the recorded signature of the depositor on the signature card. An oral or written declaration of revocation which is not delivered to the institution may create an opportunity for forgery or fraud as some courts have viewed such conduct as evidence of a revocation. Consult Manner and Sufficiency of Revocation of Tentative ("Totten") Trust of Savings Bank Account, 38 A.L.R. 2d 1243, at §§ 7 and 9 (1954). A codification of the savings-account trust should consider limits on the methods of revocation to insure against fraud or forgery. Consult N.J. Rev. Stat. (1954) § 17:9A–216(1) and (3).

The portion of section 770 of Ill. Rev. Stat. (1955) c. 32 which precedes paragraph (b)(3) provides: "(b) If one or more persons opening or holding a withdrawable capital account shall execute a written agreement with the association providing that the account shall be held in the name of such person or persons as trustees for one or more persons designated as beneficiaries, the account and any balance thereof which exists from time to time, shall be held as a trust account and unless otherwise agreed between the trustees and the association: (1) Any such trustee during his lifetime may change any of the designated beneficiaries by a written direction accepted by the association; and (2) Any such trustee may withdraw or receive payment in cash or check payable to his personal order and any payment or withdrawal shall constitute a revocation of the agreement as to the amount withdrawn..."  

Banking legislation similar to section 770 of the Savings and Loan Act does not exist. Compare the protective bank liability statute note 3 supra. Amendments to the banking laws are subject to a referendum by Illinois voters, which makes changes difficult. Ill. Const. Art. XI, § 5. A new banking statute is presently awaiting approval by referendum, but it retains substantially the same protective bank liability clause and incorporates no other changes on this subject. Ill. Rev. Stat. (1955) c. 16 1/2, § 145 eff. Jan. 1, 1957, subject to adoption at referendum election.

Consult authorities cited note 5 supra and note 33 infra.

The argument that the savings-account trust ought not to be sustained because the settlor might well have intended something other than vesting an interest in the beneficiary can be met in two ways. First, it can be argued that the extensive use of the savings-account trust in Illinois over the past thirty years without litigation indicates that in the vast majority of cases the depositor-trustee knew what he was doing when he designated himself as trustee and that he intended to pass some interest to the named beneficiary even if only an expectancy. Second, the Illinois Court could well adopt the solution used in other jurisdictions of declaring that the mere form of the deposit will not be conclusive but only presumptive evidence of the settlor's intention to convey an interest which may be rebutted by parol evidence. This last device would prevent injustice whenever it could be shown that the depositor-trustee did not intend to give any interest to the designated beneficiary. It would, of course, decrease the simplicity of operation of the savings-account trust, but it would seem far better to suffer the limited number of suits likely to arise than to cast into doubt the validity of the thousands of existing accounts which have gone unchallenged.

Other problems have arisen from the use of the savings-account trust. The surviving spouse has interjected statutory marital claims, and creditors of the depositor have claimed a right to the trust proceeds. Their rights may be determined by reference to the experience of other jurisdictions. These problems

31 Consult note 9 supra.
32 Consult authorities cited note 5 supra.
33 The Illinois courts may well feel bound on this issue by Estate of Schneider, 6 Ill. 2d 180, 127 N.E. 2d 445 (1955), which held that because joint bank accounts are established for a number of reasons, the mere wording of the agreement setting up the joint account was not conclusive evidence of the donor's intent to establish a survivorship interest. In other words, parol evidence was admissible to show that donor did not intend that the other party should have survivorship right to the account. In actual fact there is very little difference between a savings-account trust and a joint account because where only one party has deposited in the account, banks and savings and loan associations generally will not pay out to the order of the donee unless he has physical possession of the bank book or is willing to execute an indemnification agreement. This means that with a joint account the donor has substantially the same control over the account that the depositor-trustee has in a savings-account trust, although technically the donee of a joint account may withdraw from the account at will whereas the beneficiary of a trust account has no right to the account before the death of the depositor-trustee.
34 The right of a surviving spouse to the trust proceeds usually depends on whether the trust was merely a device to defeat the wife's interest with the husband retaining control. Newman v. Dore, 275 N.Y. 371, 9 N.E. 2d 966 (1937); In re Halpern's Estate, 303 N.Y. 33, 100 N.E. 2d 120 (1951). An Illinois decision on a depositor-trustee's wife's claim to a savings-account trust may be controlled by Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. 2d 75 (1944), in which it was held that a wife had a marital right where the trust was a mere device by which the husband did not part with absolute control. Consult 1 Bogert, Trusts and Trustees § 47, at 18 n. 83 (Supp., 1954); 4 Powell, Real Property § 570, at 434 n. 25 (1954). The rights of creditors to priority over the beneficiary in the trust proceeds has been litigated favorably to the creditors. Consult 1 Bogert, Trusts and Trustees § 47, at n. 61a (Supp., 1954); 4 Powell, Real Property § 570, at 434 nn. 22-24 (1954).
and those of establishing the settlor's intent and revocation could be most efficiently handled by a codification similar to that of New Jersey.35

Finally it may be urged that the savings-account trust is a useful device because of the simplicity of its operation over other forms of estate transfer.36 It eliminates many expenses of administration, and it provides a simple solution to routine problems of cash management and estate transfer.


36 A minimum of nine months is required to wind up an estate in which a will is involved. Ill. Rev. Stat. (1955) c. 3, § 242. A contest may postpone distribution for a number of years. Distribution under the Illinois "small estates" provision is of limited use because its relatively informal procedure is available only for estates of less than $1,000.00. Ill. Rev. Stat. (1954) c. 3, § 478.

VOTING ELIGIBILITY UNDER NLRA § 9(c)(3) OF UNREPLACED ECONOMIC STRIKERS SUBJECT TO DISCHARGE FOR WRONGFUL CONDUCT

Section 9(c)(3) of the National Labor Relations Act, as amended,1 provides, in part, that "[e]mployees on strike who are not entitled to reinstatement shall not be eligible to vote" in a representation election. The Court of Appeals for the District of Columbia was recently called upon to make the first judicial determination of the impact of this provision on the voting eligibility of non-replaced strikers guilty of misconduct during a strike.2

While an economic3 strike against the Union Manufacturing Company was in progress, an election was held to determine whether the American Federation of Hosiery Workers, A.F. of L., was to be certified as the employees' bargaining representative. The company challenged the voting eligibility of a number of the strikers on the ground of their misconduct4 during the strike. The disputed

3 The NLRB has distinguished between "unfair labor practice" strikes, i.e., strikes provoked or prolonged by an employer's unfair labor practice, and "economic" strikes, i.e., strikes called to obtain economic benefits such as changes in wages, hours or other working conditions. See NLRB v. A. Sartorius & Co., 140 F. 2d 203 (C.A. 2d, 1944). The primary importance of the distinction is in its bearing on an employer's right to replace strikers. An employer is at liberty permanently to replace "economic" strikers. E.g., NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938). In contrast, strikers in an "unfair labor practice" strike are entitled to reinstatement even if they have been replaced. E.g., Wheatland Electric Cooperative, Inc. v. NLRB, 208 F. 2d 878 (C.A. 10th, 1953), cert. denied 347 U.S. 966 (1954). Unless otherwise indicated, ensuing discussion will have reference to "economic" strikes and strikers.
4 Judge Danaher's dissenting opinion states that the strikers were charged with "debarment, violence, mass picketing, and generally lawless conduct on the picket line." Union Mfg. Co. v. NLRB, 221 F. 2d 532, 537 (App. D.C., 1955), cert. denied 349 U.S. 921 (1955). Such acts of misconduct, if proven, are sufficient to warrant a denial of reinstatement. NLRB v. Perfect Circle Co., 162 F. 2d 566 (C.A. 7th, 1949) (debarment); NLRB v. Ohio Calcium Co.,