Ottawa 1968
Sept. 16
Sept. 23

BETWEEN:

EDWIN GOEGLEIN ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Gift tax—Sweepstake winnings of husband deposited in joint account of husband and wife—Whether presumption of gift to wife rebutted—Onus of proof—Income Tax Act, secs. 111, 124(4)(b).

In 1964 appellant won $150,369 in the Irish Hospitals' Sweepstake and deposited that sum in a joint savings account that had been previously opened in a bank in Brockville, Ontario in the names of himself and his wife. It was the understanding of appellant and his wife that she would draw on the account only if something happened to prevent him from doing so or if he died.

Held, dismissing an appeal from a gift tax assessment, appellant had not satisfied the onus of rebutting the presumption of law that he made an advancement by way of gift to his wife of a half interest in the sum deposited.

Conway v. M.N.R. [1966] Ex.C.R. 64, referred to.

Held also, the wife's interest in the sum deposited vested in her immediately on deposit.

APPEAL from gift tax assessment.

C. S. Bergh and *M. J. O'Grady* for appellant.

R. D. Janowsky for respondent.

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JACKETT P.:—This is an appeal from an assessment for the taxation year 1964 for gift tax under Part IV of the *Income Tax Act* in the sum of $11,389.52.

During that year, the appellant received the sum of $150,369.06 as the holder of a winning ticket in the Irish Hospitals' Sweepstake and deposited that amount in a joint savings account that had been previously opened in the names of the appellant and his wife in the Canadian Imperial Bank in Brockville, Ontario.

On these facts, the respondent took the view that the appellant had made a gift to his wife in the amount of $75,184.33 within the meaning of that word as used in section 111 of the *Income Tax Act,* which reads as follows:

> 111. (1) A tax shall be paid as hereinafter required upon the gifts made in a taxation year by an individual resident in Canada or a personal corporation.
>
> (2) For the purpose of this section, "gift" includes a transfer, assignment or other disposition of property (whether situate inside or outside Canada) by way of gift, and without limiting the generality of the foregoing, includes
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> (*a*) the creation of a trust of, or an interest in, property by way of gift, and
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> (*b*) a transaction or transactions whereby a person disposes of property directly or indirectly by way of gift.

It is common ground between the parties that, as the deposit had the effect of making the appellant and his wife the joint creditors of the bank for the amount of the deposit there is a gift by the appellant to the wife of the amount of her interest unless the wife's interest is subject to a resulting trust in favour of the appellant, and that, having regard to the relationship between them, the onus is on the appellant to show that the deposit was made in circumstances that gave rise to such a resulting trust.

I have examined all the authorities to which I have been referred and I can do no better than to adopt the statement of the applicable law contained in a passage to be found in my brother Thurlow's judgment in *Conway v. M.N.R.*[1] at pages 70 to 72, which reads as follows:

> As I understand it the principle upon which the beneficial ownership of property held jointly by two or more persons is determined, where the property has been contributed by one of them alone, is that while at law the title is vested in the joint holders, if valuable

[1] [1966] Ex C.R 64.

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consideration has not been given therefor by the other or others, they, in equity, hold on a resulting trust for the contributor of the property, except in cases in which the contributor intended to make a gift of some interest in the property to the other joint holder or holders Where a gift is intended (or perhaps as some cases indicate, to the extent to which a gift is intended) such other joint holders are not trustees and the equitable title follows the legal title. The intention to make such a gift may appear either from express declaration by the contributor to that effect or from circumstances but where a transfer is made by a husband to his wife or by a father to his child whether jointly with himself or otherwise a gift is presumed until the contrary is shown. Thus in *In re Estate of Hannah Mailman,* [1941] S C R 368, Crocket J speaking for the majority of the Supreme Court said at page 374:

> "That both law and equity interpose such a presumption against an intention to create a joint tenancy, except where a father makes an investment or bank deposit in the names of himself and a natural or adopted child or a husband does so in the names of himself and his wife, is now too firmly settled to admit of any controversy. This presumption, of course, is a rebuttable presumption, which may always be overborne by the owner's previous or contemporaneous oral statements or any other relevant facts or circumstances from which his or her real purpose in making the investment or opening the account in that form may reasonably be inferred to have been otherwise. In the absence, however, of any such evidence to the contrary the presumption of law must prevail. That is the clear result of such leading English cases as *Dyer v. Dyer* (1785) 2 W. & T.'s Leading Cases, 8th ed. 820; *Fowkes v. Pascoe,* (1875) 10 Ch. App. 343; *Marshall v. Crutwell* (1875) L R. 20 Eq. 328; *In re Eykyn's Trusts* (1877) 6 Ch D. 115; *Bennet v. Bennet* (879) 10 Ch.D. 474, and *Standing v. Bowring* (1885) 31 Ch.D. 282. This principle has been uniformly recognized in Canada wherever the courts have been required to adjudicate upon claims depending upon the creation of a joint tenancy or gift of a joint interest when the owner of the money involved has made investments or bank deposits in his own and another's names."

It will be observed that in this passage Crocket J. also referred to *Fowkes v. Pascoe, In re Eykyn's Trusts* and *Standing v. Bowring* and in my opinion these cases are not inconsistent with the view that when the transfer is a gift a joint ownership by the husband and the wife of the capital at least, even if not, in all cases, of the income as well, exists during the joint lives. That such a joint ownership exists from the time of the transfer is I think implicit in the following statement of Crocket J. which follows at page 375 the passage already quoted:

> "There have been many such cases, particularly in Ontario and New Brunswick. Some of these involved disputes between the executor or administrator of a deceased father and a surviving son or daughter, and other disputes between the executor or administrator of a deceased husband and his surviving widow, where the presumption is in favour of a joint tenancy or a gift of a joint interest for the benefit of the child or of the wife, as the case may be."

The same appears from the statement of Kellock J. in *Niles v. Lake,* [1947] S.C.R. 291 at page 311:

> "The mere transfer into the joint names or purchase in joint names is sufficient to constitute joint ownership with its attendant right of survivorship. As put in Williams on Personal Property, 18th Ed., p. 518:
>
> > 'If personal property, whether in possession or in action, be given to A and B simply, they will be joint owners***. As a further consequence of the unity of joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property.'"

So far as the capital is concerned, I therefore reject the submission that in a case of this kind the wife is presumed to have no interest in the joint property during the joint lives.

Moreover, while the basis for the decision in *Re Hood,* (1923) 1 Ir. R. 109, that the husband was entitled to the income of the joint property during the joint lives does not appear from the judgment, a possible explanation, which would not I think apply today, is suggested in the judgment of the Lord Chancellor Brougham in *Dummer v. Pitcher,* (1833) 2 My. & K. 262; 39 E.R. 944, where at page 273 he said:

> "It was further contended that the circumstance of the testator's power over this *chose in action* continuing after the transfer and up to his death differs this from the case of advancement to a child. But there is a great fallacy here, as it seems to me. The testator's power may have continued, but in what capacity? As husband, and in the exercise of his marital right."

On the other hand in decisions on gifts of joint interests other than by a husband to his wife the right of the donor to the income during the joint lives appears to have rested on what was presumed in the circumstances to be the intention of the donor at the time of the making of the gift (*vide Fowkes v. Pascoe,* [1875] L.R. 10 Ch. App. 343, at page 351). No doubt circumstances may be conceived in which such an inference might also be drawn in the case of a gift of a joint interest by a husband to his wife. Under present day law relating to the legal capacities and rights of married women in the absence of either direct or circumstantial evidence of what the intention was I can see no sufficient reason for raising with respect to income any different presumption from that applicable in respect to the capital but whether there is a different presumption or not it is clear that it is rebuttable and must yield to the proper inference to be drawn from the circumstances of the particular case.

and in a passage on page 74 of the same judgment, which reads as follows:

That the presumption is not to be taken lightly appears from *Shephard v. Cartwright,* [1954] 3 All E.R. 649, where Lord Simonds said at page 652:

> "Equally it is clear that the presumption may be rebutted, but should not, as Lord Eldon said, give way to slight circumstances."

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In *Conway v. M.N.R.*, the question was one as to whether there had been a gift by a husband to his wife in his lifetime by depositing sums of money in a joint bank account in both their names, or whether the whole beneficial interest was still in the husband at the time of his death so that it became subject to estate tax. While this is a question of gift tax, as it appears to me, the question to be answered is the same as that which had to be answered in the *Conway* case, namely, whether the relevant evidence rebuts the presumption that the husband intended to advance or benefit the wife by making her a legal owner of the money in question.

There is one substantial difference between the *Conway* case and this case in that here the husband, as well as the wife, was still available to give evidence as to his intention when he made the deposit. Unfortunately, they have both reached an age where, admittedly, their memories do not serve them as well as they might. I should also mention that, as their evidence was taken on commission, I have not had the advantage of observing them when they were giving their evidence. I do not suggest that I have any doubt whatever as to their credibility, but I do think that I would have better appreciated what meaning they meant to convey by some of their answers if I had been present and heard the answers as they were being given. I might also have been able to ask for further explanation of certain answers that I find ambiguous.

Two things seem to me to be clear from a careful reading and re-reading of the evidence of the appellant and his wife.

In the first place, as between the appellant and his wife, he was the manager of their financial affairs. I think it is clear that, regardless of any technicality as to whether money belonged to the appellant or his wife or to the two of them jointly, she relied on him completely, as long as he was available for the purpose, to take all necessary action and to make all decisions about their financial affairs, and he accepted the role that she thus confided in him. To adopt the words of Lord Chancellor Brougham in *Dummer v. Pitcher, supra,* the appellant had complete "power" over their money "As husband, and in the exercise of his marital right".

Secondly, I think it is clear that both the appellant and his wife had a basic understanding of the nature of a joint bank account. They both knew that, once the money was in such an account, the wife had a right to make withdrawals just as much as the appellant had, although she would not, in ordinary circumstances, have thought of doing so. Both the appellant and his wife appreciated that that was the legal position during their joint lives. Furthermore, the appellant recognized that the wife was entitled to have access to the bank book and she in fact did have access to it.

It is against the fact that both the appellant and his wife realized that the wife had a continuing right to draw money from the joint account that one must, in my view, appreciate their evidence as to the purpose of putting the appellant's money into such an account. As I understand the evidence, after reading it as a whole and as carefully as I can, it comes to this: the money was put into a joint account so that the wife could use it as and when the necessity arose for her to do so either because something had happened to make it impossible for him to act himself during his life or by reason of his death. It was well understood that she would not exercise her rights as long as he was available to play his accustomed role, but they both appreciated that she did have the right to draw money so that she could do so if it became necessary.

Had the appellant and his wife contemplated only the possibility of the wife drawing on the account when the appellant was not available during his lifetime, it might have been thought (although I do not think that I would so decide) that the joint account was a mere convenience for the management of his affairs during his lifetime. However, it seems clear to me that both of them regarded the account as having been adopted to put the wife in the same position with regard to the money upon his death as it put her in the event of his being "knocked out" during his life. That being so, it seems clear to me that their concept of the account was one that, while expressed in layman's language, is, in essence, one of beneficial joint ownership.

As far as any particular intention concerning the deposit of the sweepstake monies is concerned, there is no suggestion that there were any contemporary declarations or other manifestations of intent. All that we have is that, when the appellant was pressed, in 1968, to say what his

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intention was in 1964, he said that he intended to "Put it in my name". I cannot conclude that this is a layman's way of saying that, when he put it in their joint names, he intended that his wife should not have the same interest in it that he obviously knew that she had in other moneys in the account, having regard particularly to the absence of any expression contemporaneously of any such exceptional arrangement. My inference from all the evidence is that, in the emotional disturbance involved in winning a prize of such magnitude, the appellant had no thought at the time except that he would put the moneys into the bank account where he put all other money that ought to be put in the bank for safekeeping. It seems clear that in the absence of a formulated intention not to advance his wife, the law attributes an intention to him to do so when he made her a legal owner of the money; I cannot find any evidence in his subsequent filing of a gift tax return prepared on an inconsistent basis to rebut this presumption. All it suggests to me is that he did not fully understand the legal implications of what he had done.

The appellant took two positions in the alternative to his main position that there was no gift. Having regard to the view that I have taken of the facts, I can deal with each of them in a sentence. I find that the wife's interest vested immediately so that there can be no question of applying section 124(4)(*b*). I have heard no evidence that would support a partnership interest of the wife in the sweepstake winnings at the moment that they were received.

For the above reasons I conclude that, by the deposit of the money in question in their joint bank account, the appellant conferred a beneficial interest in the money on her. That being so, and no question having been raised as to the amount of the assessment, the appeal must be dismissed with costs.