JURIS BENJAMINS (*Defendant*) .....APPELLANT;

AND

CHARTERED TRUST COMPANY, Administrator with the Will annexed of the Estate of Antons Benjamins (*Plaintiff*) .....RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Husband and wife domiciled in Latvia—Joint will—Bank accounts in Switzerland and England—Whether separate property of wife and thus available for distribution amongst her heirs or whether joint property of herself and her husband so as to entitle his heirs to a one-half interest therein.

A B and his wife E B, who were separate as to property in accordance with a contract made at or before the time of their marriage, executed a joint will in 1937. By para. II of the will it was provided that, apart from certain specified property, all property should be the joint property of the spouses. Both testators were domiciled in Latvia where A B died in 1939 and from whence his wife was transported to Russia where she was presumed to have died in 1941. In 1926 E B had adopted her sister's son, the defendant in this case. A B, who had three children of a previous marriage, did not join in this adoption. In 1933 A B and E B deposited certain funds in a joint account in a bank in Zurich, Switzerland, and in 1939, some time before the death of her husband, E B alone opened an account in London, England. In 1948 the defendant obtained payment of the funds from the bank account in Zurich and in 1950, on probate of the will of E B, he obtained, as her executor, payment of the funds from the account in London.

The defendant came to Canada in 1952. On February 18, 1960, the Surrogate Court of the County of York granted letters of administration with the will annexed of the estate of A B to the plaintiff trust company. In an action for an accounting and payment of moneys received by the defendant, the plaintiff claimed that one half of the proceeds of the bank accounts should have been paid to those entitled under the will of A B. The action was allowed and the Court of Appeal dismissed an

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

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appeal from the trial judgment, subject to a minor variation in the method of taking the accounts thereby directed. The defendant further appealed to this Court.

The appeal was argued on the assumption that under the law of Latvia an item of property which was owned jointly by the testator and testatrix would on the death of either of them belong one half to the survivor and one half to the estate of the deceased, and it was accepted by both the Courts below that the terms of a marriage contract providing that the husband and wife should be separate as to property could be validly revoked under Latvian law so as to make the property of each the joint property of both.

Held (Cartwright J. dissenting in part): The appeal should be dismissed.

Per Martland, Judson, Ritchie and Spence JJ.: The moneys deposited in Zurich were placed in a joint account, and, notwithstanding the provisions of the "Contract Respecting a Joint Account Held Jointly and Severally" entered into between the depositors and the bank, these moneys were to be treated as belonging to the testator and testatrix in equal shares.

On the death of A B *his* will became effective to control the disposition of a one-half interest in any property which was at that time jointly held by himself and his wife. *In the Goods of Raine* (1858), 1 Sw. & Tr. 144; *Re Duddell, Roundway v. Roundway,* [1932] 1 Ch. 582; *Re Creelman, McIntyre v. Gushue et al.,* [1956] 2 D.L.R. 494; *Re Kerr,* [1948] O.R. 543, referred to.

The question of whether the London bank account was so jointly held depended upon the construction to be placed on the second paragraph of the will. This paragraph was not only descriptive of the understanding existing between husband and wife at the time of preparing the will as to joint ownership of certain property therein referred to, but it also manifested the intention of both of them that on the death of each his or her will was to be treated as an effective disposition of one half of such property. The words "as regards our estate . . ." which occurred at the beginning of the paragraph were to be construed as meaning "as regards the estate hereinafter disposed of" and the words "all other property except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us . . ." were sufficiently broad to include moneys on deposit in a bank in the names of either the testator or the testatrix or both of them.

In the absence of evidence of any Latvian law to the contrary the will was to be construed in accordance with the provisions of s. 26(1) of *The Wills Act,* R.S.O. 1960, c. 433. The contention that the second paragraph of the will was concerned with the recital of facts rather than the disposition of property and that it should be construed without reference to the provisions of s. 26(1) of *The Wills Act* failed. The said paragraph was descriptive of the understanding of the husband and wife as to the nature of the interest of each of them in "the real and personal estate comprised in" the dispositions which were the subject of the succeeding paragraphs, and unless a contrary intention could be found in the language of the will it was to be construed as though it had been executed immediately before the death of A B.

Likewise, the contention that the second paragraph was to be treated as referable only to property owned at the date of the will because the provisions declaring the estate to be "the joint property of both of us" were phrased in the present tense and that there were no words which

expressly included the after-acquired property of either of the parties also failed. The employment of the present tense in conjunction with a general description of property did not of itself constitute evidence of a "contrary intention" within the meaning of s. 26(1) of *The Wills Act*, and no language could be found in the will which limited the joint estate created by the second paragraph to personal property owned by the testator and testatrix at the date when the will was made.

Re Ingram (1918), 42 O.L.R. 95, referred to.

Per Cartwright J., *dissenting in part*: With regard to the moneys deposited with the bank in Zurich the conclusion arrived at in the Courts below was correct.

As to the ownership of the moneys in the bank account in London, E B had the sole legal title to this chose in action and the onus of proving that A B was entitled to any interest in it lay upon the plaintiff. The latter's claim was based upon the terms of para. II of the will. However, construed in the manner most favourable to the plaintiff which its words would bear para. II was an acknowledgement by each of the spouses that all property then standing in the names of either or both of them (with the exception of the property expressly excluded) was the joint property of both. No contract between the spouses as to the ownership of property acquired after the date of the will was established and there was no ground for holding that A B was entitled to any equitable interest in the London account. There was no room for the suggestion that the will of E B bequeathed any interest in this fund to A B.

At the date of the death of A B and at the date of the death of E B the latter was the person solely entitled both at law and in equity to the moneys in the London bank account.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Schatz J., subject to a minor variation in the method of taking accounts thereby directed. Appeal dismissed, Cartwright J. dissenting in part.

J. T. Weir, Q.C., and *B. H. Kellock*, for the defendant, appellant.

R. S. Joy, Q.C., and *W. D. Lessmann*, for the plaintiff, respondent.

CARTWRIGHT J. (*dissenting in part*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of Schatz J., subject to a minor variation in the method of taking the accounts thereby directed.

The questions raised on this appeal are as to the ownership of sums of money on deposit in two bank accounts, one of 743,000 Swiss francs which stood to the credit of

[1] [1964] 1 O.R. 47, 41 D.L.R. (2d) 98.

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Antons Benjamins and Emilija Benjamins in the Swiss Bank Corporation in Zurich, Switzerland, and the other of $110,000, U.S. funds, which stood to the credit of Emilija Benjamins in the Swiss Bank Corporation in London, England.

By the judgment in appeal it was declared that the respondent is entitled to one half of the amount in each of these bank accounts and the appellant was ordered to account accordingly.

Antons Benjamins was born in 1861 in Latvia. He had three children of a first marriage, Marta, Anna and Janis. Janis died in Russia in 1942. Marta and Anna are living. Antons and his second wife, Emilija, were married in 1922. At that time both of them were domiciled in Latvia and they continued to be domiciled there until their deaths. At or before the time of their marriage public notice was given pursuant to the civil laws of Latvia that the parties had entered into a mutual marriage contract by which community of property was repealed. In consequence of this each spouse would be entitled to his or her separate property.

At the time of the marriage Antons Benjamins was an undischarged bankrupt and was employed by Emilija in a publishing business owned by her.

In 1926 Emilija Benjamins adopted the appellant who was the son of her sister and who was then eight years old. Antons Benjamins did not join in this adoption. Emilija Benjamins had no other children.

The business enterprises in which Antons and Emilija were engaged prospered and prior to the outbreak of war in 1939 they appear to have been possessed of considerable wealth.

On January 23, 1933, Antons and Emilija Benjamins executed a contract with the Swiss Bank Corporation in Zurich. This document is headed "Contract respecting a joint account held jointly and severally". It is signed by Antons Benjamins, Emilija Benjamins and the bank. The evidence is silent as to the source of the money deposited in this account. The contract provides *inter alia* that:

> 2. Each of the aforementioned joint and several depositors and joint and several creditors is entitled to dispose, solely and without restriction, of the securities deposited and of the existing credit balances; the signature of one of the entitled parties is sufficient to give to the depository legally

valid full and final discharge. In the event of the decease of one of the entitled parties, the disposal right of the deceased is extinguished: it does not, therefore, pass to his heirs or to his testamentary executors. The surviving entitled party/parties is/are exclusively empowered forthwith to dispose of the deposit and the accounts mentioned in the manner as aforedescribed and to give to the depository legally valid full and final discharge.

On May 5, 1937, Antons and Emilija signed a will contained in one notarial document. The document was executed in Riga, in the Latvian language. A translation into English accepted by the parties was marked as Exhibit 2 at the trial. The following statement is contained in this document:

> Emilija Benjamins acted without the assistance of her husband Antons Benjamins on the basis of the marriage contract regarding the separation of property, presented to me in the original, executed between the said married couple Benjamins at the office of A. Meike, Notary of Riga.

It will be necessary to refer to other provisions of this document hereafter.

On April 6, 1939, Emilija Benjamins deposited in the Swiss Bank Corporation in London, England, the sum of 110,000 United States dollars in her name alone.

On June 14, 1939, Antons Benjamins died. His will was not admitted to probate because of a contest between his surviving wife and the children of his first wife. In 1941 Emilija Benjamins was arrested during the occupation of Latvia by Russia and was deported to Russia. She is assumed to have died in a U.S.S.R. prison camp shortly thereafter.

In 1944 the appellant escaped from Latvia. He proceeded to England in 1947. In 1948 the appellant obtained payment of 743,000 Swiss francs out of the account in the Swiss Bank Corporation in Zurich, Switzerland. On January 16, 1950, probate of the will of Emilija Benjamins was granted to the appellant by the High Court of Justice (Probate Division) in England and as her executor he obtained payment of the sum of $110,000 in American funds from the account with the Swiss Bank Corporation in London, England. It has not been suggested that the Bank was not entitled to make payment of these amounts to the appellant.

The estate of Emilija has been administered by paying one third of the net proceeds of the two bank accounts to

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the appellant's mother and two thirds to himself in his personal capacity. The respondent claims that one half of the proceeds of the bank accounts should have been paid to those entitled under the will of Antons Benjamins.

The appellant came to Canada in 1952. On February 18, 1960, the Surrogate Court of the County of York granted letters of administration with the will annexed of the estate of Antons Benjamins to the respondent. On April 17, 1961, the respondent commenced this action.

The judgments below are based largely on the effect of the wills contained in one notarial document executed by Antons Benjamins and Emilija Benjamins on May 5, 1937.

Following the opening recitals this document commences with the words:

> We, the married couple Antons Benjamins and Emilija Benjamins, nee Simsons, hereby express our Last Will in the form of the following Testament. I, The life work of both of us is the publication of the daily newspaper "Jaunakas zinas" and the weekly journal "Atputa". Working jointly we have developed and equipped these publications so as to form large press establishments with many branch offices. It is our express wish that this our life's work shall be continued in the same manner and spirit as hitherto and also that it shall continue to be an undivided and united enterprise.

There follow elaborate provisions for the carrying on of this publishing enterprise during the life of the surviving spouse and thereafter, which do not appear to have any direct bearing on the questions raised on this appeal.

The next paragraph reads as follows:

> II. As regards our estate, we hereby verify that only the two villas which are situate at No. 15 Juras iela, Majori, in the town of Regas Jurmala, namely the original villa and the villa now added to it, bought from Elizabete Rozite, which form one unit for mortgage purposes, are the separate property of Emilija Benjamins nee Simsons. On the other hand, all other property, except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us, irrespective of whether this property is registered in the name of one or both of us, and irrespective of whether our various publishing undertakings, enterprises and subsidiary branches should have hitherto been managed, concessioned and registered in the name of one or both of us. This appears, inter alia, from the 4 agreements executed between us in 1922 before the Notary Meike, namely a) the agreement relating to the immovable property No. 29.L Kaleju iela, Riga, and the immovable property No. 12 Audeju iela, Riga; b) the agreement relating to the printing works and book-binding plant, situated at No. 29.L Kaleju iela, Riga; c) the agreement relating to the "Jaunakas zinas" publishing undertaking and d) the agreement relating to the business premises at No. 12 Audeju iela, Riga,

but we consider it expedient to state here the said facts in case the agreements should be lost, and to elucidate that the same applies to all our subsequent undertakings, that is to say, that each of us owns an undivided half of all the undertakings.

Paragraph III, which follows, reads:

III. I, Antons Benjamins, appoint as my heirs to my entire present and future estate immovable and movable, wheresoever the same be situated and of whatsoever it may consist; 1) My wife Emilija Benjamins nee Simsons, to whom upon my death pass a) the undivided half share belonging to me in the immovable property known as "Valdeki" situated in the Kandava commune, together with the entire livestock and inventory, installations, equipments and all appurtenances, including the new farms acquired from various persons, parcelled off from the Aizdzire estate, which have not so far been registered in our—Antons and Emilija Benjamins—names, as well as my undivided half share in the furnishings and other movable property existing at "Valdeki", with the request that after my death, when Emilija Benjamins shall become the sole owner of "Valdeki" the economic condition and form of "Valdeki" shall be maintained as hitherto as a model agricultural farm; b) the undivided half share of the furnishings, works of art and household utensils in our joint flat at No. 12 Krisjana Barona iela, Riga, and generally all other movable property existing at the premises No. 12 Kr. Barona iela, Riga, and in additional all private motor cars; c) one undivided fourth share of the remaining property, movable and immovable, also including all our publishing undertaking, enterprises, etc. but subject to the reservation that this one undivided fourth share shall, upon the death of my wife Emilija Benjamins, nee Simsons, pass into the possession of the children of my own flesh namely in the first instance into the possession of my two daughters Anna Kuplais nee Benjamins, and Marta Cakste, nee Benjamins, but only if Anna Kuplais and Marta Cakste, or either of them separately, have by then resumed and maintained amicably polite relations with my wife Emilija Benjamins; in the opposite case, the said undivided one fourth share, or as the case may be, one undivided eighth share shall in their place devolve on my son Janis Benjamins.

There follow provisions for determining whether "amicably polite relations" have been established and the paragraph continues:

2) My son Janis Benjamins, to whom after my death passes a further two quarters share (See III, Section 1, clause c) of all my residuary estate after deduction of the bequests to Emilija Benjamins under III, Section 1, clauses a and b, and 3) my daughters Anna Kuplais, nee Benjamins, and Marta Cakste nee Benjamins, to whom passes after my death the last one quarter share (See III, Section 1, clause c and III, Section 2), namely to each fifty per cent of such one quarter share, that is, to each a one eighth share. Consequently on my death the children of my own flesh shall inherit a three quarter share in my entire estate after previous deduction of those objects which according to the aforesaid are bequeathed directly and unconditionally to my wife Emilija Benjamins, besides which in respect of this share I substitute the legal heirs of my children in accordance with the legal provisions regarding inheritance, . . .

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Paragraph IV opens with the words:

> IV. I, Emilija Benjamins, nee Simsons, appoint as my heirs in respect of my entire estate, both present and future, immovable and movable, wherever it may be situated and of whatever it my consist: 1) My adopted son Georgs, alias Juris Benjamins, to whom, upon my death passes: a) the immovable property known as "Valdeki" . . .

This clause continues in words similar to those in cl. III (1)(a) but has added at the end the sentence:

> And if I, Emilija Benjamins, should predecease my husband Antons Benjamins then this inheritance would be reduced to a half of what has been enumerated above.

The paragraph continues:

> b) The whole of the furnishings, works of art and household utensils of our joint flat at No. 12, Krisjana Barona iela, Riga, and, generally, all other movable property existing at the premises No. 12 Kr. Barona iela, Riga; and c) two thirds of the whole of my residuary estate, and 2) my sister Anna Aichers, nee Simsons, and her minor son Peteris Aichers, to whom upon my death passes jointly the remaining one third share of the whole of my estate, with the exception of the property mentioned under IV Section I clauses a and b, but subject to the following provisions:

There follow in this paragraph and in para. V directions as to the administration of the one-third share given to Anna and Peteris Aichers which are not relevant.

Paragraph VI deals with the appointment of guardians and the revocation of earlier wills and contains the statement, quoted earlier in these reasons, as to the marriage contract regarding the separation of property.

It is common ground that as both Antons and Emilija Benjamins were at all times domiciled in Latvia, where Exhibit 2 was executed, the law of Latvia should govern the construction of this document.

The statement of claim contains no allegations as to what is the law of Latvia. The statement of defence makes reference to Latvian law in paras. 9, 11 and 13 which read as follows:

> 9. From time to time, including the time of the opening of the above-mentioned account or accounts and depository, Emilija Benjamins transferred thereto monies from her deposit in Berlin and from her property in Latvia left to her separate control by her marriage agreement and the property reserved to her by Latvian law as the proceeds of her work.
>
> 11. The creation and maintenance of the said accounts and depository in Switzerland and England and the addition of monies thereto were prohibited by Latvian law and no lawful transfer or assignment or disposition by will or otherwise in respect thereof was permitted by law either in Latvia or by Latvian citizens and the parties so doing subjected themselves

to fines, imprisonment or in the alternative to loss of civil rights. Both Emilija and Antons Benjamins were Latvian citizens and therefore they did not intend the joint will referred to in paragraph 12 infra to embrace the Swiss bank accounts or depository or any other foreign property because a disclosure of their existence either to the Notary, by publication of the will or by the acts relating to probate required on the death of each testator, would subject the survivor or the estate of the deceased testator to the penalties mentioned above.

13. The said will did not include within its terms the monies and securities of Emilija Benjamins outside Latvia, nor did it cause the transfer of any property of the wife to the husband because he predeceased her, nor did it include the account and depository in the Swiss Bank Corporation because it was regulated by its own special contract, nor did it cause any transfer inter vivos of the property abroad because it was the wife's separate property inalienable under Latvian law in favour of her consort by a declaration in the manner of this will.

On this state of the pleadings three experts, two called by the plaintiff and one by the defendant, were examined and cross-examined as to the law of Latvia and in both Courts below findings were made with regard to that law. The findings made in the Court of Appeal were stated by Aylesworth J.A. as follows:

Much evidence was given at trial in respect of the Latvian law relating to the questions in issue between the parties. I shall state in my own words the following propositions which would appear to emerge from that evidence:

(1) Joint property is held in equal shares by the owners with no right in law by survivorship.

(2) No evidence is admissible to alter or explain, the meaning of a will or the intention of the parties unless the will is ambiguous.

(3) All dispositions which do not contradict law or common sense shall be interpreted in a manner so as to keep to the extent possible the testament in force.

(4) Capacity of persons to contract is regulated by the law of the domicile. If as the result of a marriage contract the parties had separate property this could be altered by a later agreement or by a will.

(5) Under the old Latvian code in force prior to January 1st, 1938, in the absence of an anti-nuptial contract to the contrary there was community of property between two married people.

(6) Unless there was an agreement to the contrary the coming into force of the new code on January 1, 1938, did not alter the status of married people and the regime of separate property or community of property, whichever was the case, continued.

(7) If as a result of marriage contract or otherwise, spouses have separate property, it may become joint by a term in the will to that effect.

(8) The right of ownership of Antons Benjamins or Emilija Benjamins and their respective heirs to the moneys and assets deposited in the Swiss Bank Corporation in Zurich, Switzerland, and the Swiss Bank Corporation in London, England, did not depend upon the contracts entered into by the depositors with the banks and could be made the subject of contract between Antons and Emilija without the bank being a party thereto.

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I find it somewhat difficult to discover any sufficient basis in the pleadings to warrant the making of these findings; however, I did not understand either counsel to question the first of them and the appeal was argued on the assumption that under the law of Latvia an item of property which was owned jointly by Antons Benjamins and Emilija Benjamins would on the death of either of them belong one half to the survivor and one half to the estate of the deceased; in other words, that the result would be the same as if in Ontario the item of property had been owned by the spouses as tenants in common. For the purposes of this appeal I accept that assumption.

With regard to the moneys deposited with the bank in Zurich I agree with the conclusion arrived at in the Courts below. Those moneys were deposited in the joint names of the spouses. There is no evidence as to the source of the moneys and *prima facie* they would belong equally to both. I agree with the view of the learned trial judge that the document, Exhibit 4, quoted in part above, defines the rights of the depositors or the survivor of them to withdraw the funds deposited and the right of the bank to make payment and that it does not deal with the ownership of those funds as between the depositors. I agree with the learned trial judge that the decision of this Court in *Niles v. Lake*[1] is applicable. I base my judgment in this regard not on the terms of the will, Exhibit 2, but on the absence of evidence to rebut the presumption that the moneys belonged to the two depositors in equal shares. In my opinion the appeal in regard to this account fails.

Turning now to the question of the ownership of the moneys in the bank account in London, as has already been stated, this account was opened in the name of Emilija Benjamins alone. The relationship between her and the bank was that of creditor and debtor. The bank knew no one else in the transaction and clearly it could pay the moneys on deposit to no one other than Emilija; she had the sole legal title to this chose in action and the onus of proving that Antons Benjamins was entitled to any interest in it lay upon the respondent.

In answer to a question put by the bench in the course of the argument in this Court counsel for the respondent stated that the plaintiff's claim was based upon the terms

[1] [1947] S.C.R. 291, 2 D.L.R. 248.

of para. II of the joint last will executed on May 5, 1937, which has already been quoted.

The learned trial judge held, on the evidence of the experts as to the law of Latvia, that the will contained no agreement express or implied that it should be irrevocable by either spouse. This finding was not challenged before us. It is in accordance with the law of Ontario, the applicable principles of which are clearly stated in the reasons of Schroeder J., as he then was, in *Re Kerr*[1].

The learned trial judge went on to hold that there was no ambiguity in the language of the will and that it was agreed "that the word 'joint' as used in connection with 'property' means 'equally', that is that each owns an individual half and with no right of survivorship".

The learned trial judge construed the words in para II, "all other property, except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us irrespective of whether this property is registered in the name of one or both of us" as meaning "all the property of the parties of whatsoever kind and wheresoever situate".

The reasons of the learned trial judge dealing with the bank account in London conclude as follows:

> I am therefore finding that the intention of the testators was that the Will should refer to and dispose of all their property as it is described in paragraph III and IV of the Will in the following words:
>
> . . . my entire present and future estate immovable and movable, wheresoever the same be situated and of whatsoever it may consist.
>
> Having reached this conclusion it is then necessary to determine whether the expression in this Will of such an intention is capable of overriding and revoking the separate property provisions of the marriage contract. The plaintiff's expert witness Liepins expressed the opinion that this word had "constitutive" effect, that is, that it created rights, but he was unable to support this opinion by reference to any specific section of the Latvian Civil Code. However the evidence of the defence expert Rusis indicating that a verbal agreement when reduced to writing can create rights and that if the parties signed a written statement indicating their agreement as to ownership of property, it would create rights.
>
> From 1922, the date of the marriage contract, to 1937, the date of the Will, it is clear there had grown up a large and prosperous business enterprise, bringing a substantial improvement in the financial position of the parties. In 1933 a deposit account in *both names* was opened in a Swiss Bank. From these facts and the general intention throughout the Will, I

[1] [1948] O.R. 543.

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conclude that there was an agreement between the husband and wife, reduced to writing in the Will, and that this was sufficient to and did override and revoke the marriage contract.

I should refer to a submission by Mr. Weir that the issues here must be considered as of June, 1939, the date of the death of Antons Benjamins, this being the date when his Will took effect. I do not accept this view. The funds in question are those in existence after the death of both parties and are subject to a disposition according to a document signed by the wife (as well as the husband) taking effect on her death. From the conclusions above mentioned, it therefore follows that the bank account in London, England is property to be disposed of according to the Will, namely equally between the testator's estates.

The effect of the evidence of the witness Rusis which the learned trial judge accepted is simply that if two parties make a binding oral contract and later sign a written acknowledgment or declaration that they have made such a contract the contract can be enforced. This does not appear to me to differ from the law of Ontario.

Aylesworth J. A., who gave the reasons of the Court of Appeal, was in substantial agreement with the learned trial judge. He construes para. II of the will, "coupled with the mutual intention to be derived from the whole contents of the will in respect of the estate and property embraced therein" as indicating that there was a prior oral agreement between the spouses that, with the exception of the properties referred to in para. II as being the separate property of Emilija, all property owned by either of them should become the joint property of both and that this agreement applied not only to all property owned at the date of the will but to all property acquired by either thereafter.

Aylesworth J. A. agreed with the view of the learned trial judge that the words of the will were free from ambiguity and that extrinsic evidence of the intention of the parties was rightly excluded.

In rejecting the argument of counsel for the appellant that para. II contains no words of promise and that none should be implied, Aylesworth J.A. says:

> However, if it be necessary to read into clause II words of promise to make it effective by Latvian law to carry out the intention of the parties then I would not hesitate to do so and would give to the clause the same effect as though it had included an express promise on the part of each of the parties to transfer to the other an equal right, title and interest in all property then possessed or any time thereafter possessed by them or either of them with the exception only of property expressly excluded in the clause.

With the greatest respect, I find myself unable to agree with this or with the effect which the Courts below have ascribed to para. II, on which alone is founded the respondent's claim to a share in the London account.

I have already quoted, perhaps at undue length, from the provisions of the will.

In considering para. II it will first be observed that it is not of testamentary character, it contains no words of gift of anything to anyone. It is a recital of facts, and, in my view, of presently existing facts, as to the extent and ownership of items of property.

The first sentence states that two villas *are* the separate property of Emilija. The next sentence states that "all other property except of course purely personal property such as clothes, jewellery, etc. *is* the joint property of both" irrespective of the name or names in which any particular item is registered. The third sentence states that the facts set out in the second sentence appear, *inter alia,* from four notarial agreements executed by the spouses in 1922, which are itemized, and concludes:

> but we consider it expedient to state here the said facts in case the agreements should be lost and to elucidate that the same applies to all our subsequent undertakings, that is to say, that each of us *owns* an undivided half of all the undertakings.

Were it not for the presence in the second sentence of para. II of the words "except of course purely personal property such as clothes, jewellery, etc." I would have inclined to agree with the submission of counsel for the appellant that the second and third sentences have reference only to undertakings of a business nature and I am far from satisfied that this submission should be rejected, but, for the purposes of this appeal, I am prepared to accept the view of the Courts below that the meaning of the word "property" as used in para. II is not so limited. I cannot however accept the view that the paragraph refers to property to be acquired after the date of the will.

The words which I have italicized in the above summary of the provisions of para. II are all in the present tense. It is argued that this is of little significance because by the law of Ontario (and there was neither plea nor proof that the law of Latvia differs on this point) the will is to be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it

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had been executed immediately before the death of the testator, unless a contrary intention appears by the will. With respect, it appears to me that this rule of construction is irrelevant to the question which we have to decide. The rule finds its usual application in determining whether a will disposes of property owned by the testator at the date of his death which he did not own at the date of the will. It does not assist in deciding whether the testator or some other person was the owner of a particular item of property. The question is not whether Antons' will disposed of his interest in the London account, it is, rather, whether Antons had any interest in that account to dispose of. The following observation in *Hawkins on Wills,* 2nd ed., at p. 22, is supported by the authorities:

> The words "with reference to the real and personal estate comprised in it" mean "so far as the will comprises dispositions of real and personal estate".

There are no words of disposition in para. II; those used elsewhere in the will must be considered in due course.

Argument was directed to the use of the word "subsequent" in the final sentence of the paragraph. It is used only in connection with the word "undertakings". This adjective means "later in time than" and, in my view, the "subsequent undertakings" referred to are those entered into by the spouses since the agreements of 1922 up to the time of the signing of the will. To hold, as the Courts below appear to have done, that these words include all future undertakings would seem to require the insertion of the words, italicized below, so that the clause would read:

> and to elucidate that the same applies *and shall apply* to all our subsequent *and future* undertakings, that is to say, that each of us owns *and shall own* an undivided half of all the undertakings.

The absence of any words of futurity in para. II has added significance when it is observed that in the opening words of para. III, which follows immediately, future property is expressly referred to. The words are:

> I, Antons Benjamins, appoint as my heirs to my entire present and future estate

The opening words of para. IV are similar. When the testator and testatrix intended to deal with future property they said so.

I am unable to find in para. II of the will, either standing alone or read as it must be in the context of the whole will, any words of promise as to property to be acquired thereafter by either of the spouses. The will was obviously prepared by a skilful draftsman and I find it difficult to suppose that if the parties had intended it to operate as a contract whereby each agreed to settle all property thereafter acquired by either of them upon both of them jointly plain words would not have been used to effect this result.

Construed in the manner most favourable to the respondent which its words will bear para. II is, in my opinion, an acknowledgement by each of the spouses that all property then standing in the names of either or both of them (except the two villas and "purely personal property") is the joint property of both. Proceeding on the assumption (which I make for the purposes of this appeal) that this is the correct construction of para. II, the facts from which the ownership of the bank account in London must be determined are the following : (i) in 1922 when the spouses were married the husband was an undischarged bankrupt and the wife was possessed of substantial property; (ii) on May 5, 1937, the spouses were possessed of numerous business enterprises, the farms making up "Valdeki" and, no doubt, other properties including the moneys in the bank account in Switzerland and, subject to the exceptions mentioned above, acknowledged that all the property of either of them was the joint property of both; (iii) the terms of the will recognized, and proceeded on the basis, that the spouses were separate as to property, although at the date of the will the separate property of Emilija consisted only of the two villas and "purely personal property"; (iv) on April 6, 1939, Emilija deposited $110,000 in the bank account in London in her name alone and that sum was standing to her credit when Antons died on June 14, 1939; (v) there is no evidence as to the source of the $110,000.

I have used above the form of expression that Emilija Benjamins deposited the $110,000 in the bank in London. The evidence is silent as to how or by whom this deposit was made but the combined effect of para. 11 of the statement of claim and para. 10 of the statement of defence is to state that it was made by Emilija. I regard this fact as unimportant. Improper conduct is not presumed and there is nothing in the record to suggest that Emilija would

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or did take any money which belonged in whole or in part to Antons without his knowledge and consent. The evidence of Anna Aichers tendered at the trial on behalf of the appellant was to the effect that Antons had stated in her presence and that of Emilija that this account was to belong to Emilija but this evidence was rejected by the learned trial judge as inadmissible. Because of the view I take, upon the evidence that was admitted, as to the ownership of this fund, I do not find it necessary to decide whether this evidence of Anna Aichers was rightly rejected and I disregard it.

Neither in the pleadings nor in the evidence is there anything to suggest that the answer to the question as to the ownership of the money in the London bank account would be different under the law of Latvia from that which should be given under the law of Ontario, which does not differ, in this regard, from the law of England.

The situation then is that Emilija, at the date of Antons' death, had the sole legal ownership of these moneys. There is no evidence that any of the moneys deposited belonged to Antons or were supplied by him or that they were the joint moneys of the spouses; but even had there been such evidence the presumption of a resulting trust, which, but for the relationship between them, would then have arisen from the fact that moneys belonging in whole or in part to Antons had been deposited in the name of Emilija, would be rebutted by the circumstance that the latter was the wife of the former; in the absence of further evidence the law would presume a gift by the husband to the wife. This presumption of gift would in turn be capable of being rebutted by evidence but there is no evidence in the record to rebut it. I have already given my reasons for holding that no contract between the spouses as to the ownership of property acquired after the date of the will was established and I can find no ground for holding that Antons was entitled to any equitable interest in this fund.

In the passage from his reasons, quoted above, the learned trial judge mentions as one of the grounds supporting the conclusion at which he arrived that the account opened in Switzerland in 1933 was in both names. With respect, this circumstance seems to me to point in the opposite direction as indicating that when the parties wanted an account to belong to them jointly they opened it in the names of both and not of one only.

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There is no room for the suggestion that the will of Emilija bequeathed any interest in the London bank account to Antons. Had it done so the benefit conferred would have lapsed on his death. In the clearest terms her will leaves her entire estate to the appellant and to Anna and Peteris Aichers.

Since Emilija was the sole legal owner of the London bank account the onus of proving that Antons had some equitable interest in it lay upon him, or his personal representative, and it may be observed in passing that there is nothing in the record to shew that the money deposited in the account did not consist of the proceeds of the sale of the villas or of the jewellery, which in any view of the case, were the separate property of Emilija.

I conclude that at the date of the death of Antons Benjamins and at the date of the death of Emilija Benjamins the latter was the person solely entitled both at law and in equity to the moneys in the London bank account.

During the argument in this Court counsel for the appellant submitted that, if the respondent should be held entitled to a share in either bank account on the ground that Emilija in her lifetime and after her death the appellant were bound to pay the same to Antons or to his estate as a matter of contract, the appellant should be allowed to plead the Statute of Limitations, and asked leave to amend the statement of defence accordingly.

Since in my view the respondent's action fails as to the London account it is necessary for me to consider this application in regard to the bank account in Switzerland only.

As appears from what I have said above, it is my view that Antons in his lifetime and after his death his estate were entitled to one half of the money in the bank account in Switzerland because Antons and Emilija were joint owners of it without any right of survivorship. When the whole fund came into the hands of the appellant he held one half of it as a constructive trustee for the estate of Antons and it is on that basis that he is liable to account. On this view the statute would not assist the appellant as he still retains or has converted to his own use the half of the fund which should have gone to Antons' estate. I would refuse the application to amend the statement of defence. I think it only fair to the appellant to add that the

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record indicates that he acted throughout in the *bona fide* belief, which turns out to have been mistaken, that on the death of Antons this account became the sole property of Emilija.

It remains to consider one further matter raised by counsel for the appellant. He submits that in taking the account directed by the judgment the Master should take into consideration any amounts which the appellant has been called upon to pay to any taxing authority in respect of the income received by him on that part of the fund which should have been paid over to the estate of Antons. In my opinion there is not sufficient evidence in the record to enable us to deal with this question and it should be left to be dealt with by the Master when the relevant facts and figures are before him.

In the result, I would dismiss the appeal as to the bank account in Switzerland and allow the appeal as to the bank account in London. I would direct that the formal judgment at the trial, as amended by the judgment of the Court of Appeal, be further amended so that para. I thereof shall read:

> 1. This Court doth declare that the plaintiff is entitled to one-half of the amount standing to the credit of Antons Benjamins and Emilija Benjamins in an account in the Swiss Bank Corporation in Zurich, Switzerland, as of the date of the receipt of such moneys by the defendant, and doth order and adjudge the same accordingly.

and so that cl. (*a*) of para. 2 thereof shall read:

> (*a*) The amount of the one-half share of the plaintiff in all moneys and assets received by the defendant in respect to the account referred to in paragraph 1 hereof, after deducting therefrom one-half of such amount as the Master may find to have been reasonably incurred by the defendant in getting into his hands all such moneys and assets, the resulting net amount of the one-half share of the plaintiff to be hereinafter referred to in this paragraph as the "net amount".

As my view as to the ownership of the London bank account is not shared by the other members of the Court, nothing would be gained by my stating what order as to costs I would have proposed had my view been accepted.

The judgment of Martland, Judson, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—The circumstances giving rise to this litigation have been fully described in the reasons for judgment

of my brother Cartwright which I have had the benefit of reading and I will endeavour not to repeat them to any greater extent than is necessary to make my meaning clear.

The late Antons Benjamins and his wife, Emilija, who were separate as to property in accordance with a contract made at or before the time of their marriage, executed a joint will on May 5, 1937, para. II of which reads in part as follows:

> As regards our estate, we hereby verify that only the two villas which are situate at No. 15 Juras iela, Majori, in the town of Rigas Jurmala, namely the original villa and the villa now added to it . . . which form one unit for mortgage purposes, are the separate property of Emilija Benjamins nee Simsons. On the other hand, all other property, except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us, irrespective of whether this property is registered in the name of one or both of us, and irrespective of whether our various publishing undertakings, enterprises and subsidiary branches should have hitherto been managed, concessioned and registered in the name of one or both of us. This appears, inter alia, from the 4 agreements executed between us in 1922 . . . .

There follows a description of the property to which these 4 agreements relate and the paragraph then concludes by saying:

> . . . but we consider it expedient to state here the said facts in case the agreements should be lost, and to elucidate that the same applies to all our subsequent undertakings, that is to say, that each of us owns an undivided half of all the undertakings.

Both testators were domiciled in Latvia where Antons Benjamins died on June 14, 1939, and from whence his wife was transported to Russia where she is presumed to have died in 1941.

The question at issue in this appeal is whether certain moneys deposited in bank accounts in Zurich, Switzerland and London, England were the separate property of Emilija Benjamins and thus available for distribution amongst her heirs or whether they were the joint property of herself and her husband so as to entitle his heirs to a one-half interest therein.

The funds deposited in Zurich were placed in a joint account with the Swiss Bank Corporation on January 23, 1933, more than four years before the will was drawn, and for the reasons stated by the Court of Appeal for Ontario

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as well as those stated by my brother Cartwright, I am of opinion that, notwithstanding the provisions of the "Contract Respecting a Joint Account Held Jointly and Severally" entered into between the depositers and the bank, these moneys are to be treated as belonging to the testator and testatrix in equal shares.

The London account was opened in the name of the wife alone three months before the death of the husband and two years after the will was drawn and the question of whether or not the heirs of Antons Benjamins became entitled to a one-half interest in these funds in my opinion depends almost entirely upon the construction to be placed on the second paragraph of the will.

As has been pointed out by my brother Cartwright, this appeal was argued on the assumption that under the law of Latvia an item of property which was owned jointly by the testator and testatrix would on the death of either of them belong one half to the survivor and one half to the estate of the deceased, and it has been accepted by both the Courts below that the terms of a marriage contract providing that the husband and wife should be separate as to property could be validly revoked under Latvian law so as to make the property of each the joint property of both. The question to be determined is whether under the true construction of the present will the testator and the testatrix intended to achieve and did achieve this end with respect to the funds of unknown origin deposited in the wife's name in the London account.

In the course of the reasons for judgment which he delivered on behalf of the Court of Appeal, Alyesworth J.A. stated the issues in the following terms:

> The rights of the respondent as administrator with the will annexed to the estate of Antons Benjamins depend primarily on the interpretation and effect in law of the will of the late Antons Benjamins and Emilija Benjamins made in 1937 *and from that standpoint it is necessary for the Court initially to determine the rights of the late Antons Benjamins immediately following his death.* Nevertheless the action brought by the respondent in form and in substance is for an accounting by the appellant of all assets of the estate of the late Antons Benjamins had and received by the appellant and for all profits derived by the appellant from the use of any and all such assets. Disposition of the issues thus raised is the realistic and far from simple task with which the court must concern itself.

The italics are my own.

The effect to be given to such a will as this is described in Halsbury's Laws of England, 3rd ed., vol. 39 at p. 846 where it is said:

> A joint will is a will made by two, or more, testators contained in a single document, duly executed by each testator and disposing either of their separate properties or of their joint property. It is not, however, recognized in English law as a single will. *It is in effect two or more wills; it operates on the death of each testator as his will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own will and* on the death of the survivor, if no fresh will has been made, it is admitted to probate as the disposition of the property of the survivor.

The italics are my own.

These observations are based on such authorities as *In the Goods of Raine*[1]; *Re Duddell, Roundway v. Roundway*[2]; they received the express approval of Doull J. in *Re Creelman, McIntyre v. Gushue et al.*[3], and the acceptance of the principle so stated is implicit in the decision of Schroeder J. in *Re Kerr*[4].

Having regard to all the above and in the absence of any evidence of a contrary rule prevailing under Latvian law, I think it is to be accepted that on the death of Antons Benjamins *his* will became effective to control the disposition of a one-half interest in any property which was at that time jointly held by himself and his wife.

The question of whether the London bank account was so jointly held depends as I have indicated upon the construction to be placed on the second paragraph of the will. In my view this paragraph is not only descriptive of the understanding existing between husband and wife at the time of preparing the will as to joint ownership of certain property therein referred to, but it also manifests the intention of both of them that on the death of each his or her will is to be treated as an effective disposition of one half of such property.

In this regard I adopt the following passage from the reasons for judgment of Mr. Justice Aylesworth:

> The facts that the parties had knowledge of the existence and effect of the marriage contract and the terms thereof at the time the will was made, and that they made the declaration appearing in clause II, coupled

[1] (1858), 1 Sw. & Tr. 144.
[2] [1932] 1 Ch. 585 at 592.
[3] [1956] 2 D.L.R. 494 at 499.
[4] [1948] O.R. 543.

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with the mutual intention to be derived from the whole contents of the will in respect of the estate and property embraced therein—all these considerations afford sufficient evidence to infer that there was a prior oral agreement between the spouses; in other words it was understood and agreed between them that their respective estates including "all other property" save as expressly excepted in clause II of the will, should be the joint property of both from and after the date of the will.

I am of opinion also that the words "as regards our estate . . ." which occur at the beginning of the second paragraph are to be construed as meaning "as regards the estate hereinafter disposed of" and that the words "all other property except of course purely personal property such as clothes, jewellery, etc. is the joint property of both of us . . ." are sufficiently broad to include moneys on deposit in a bank in the names of either the testator or testatrix or both of them.

The only question remaining to be determined is whether the language of the second paragraph is to be treated as relating only to the property owned by the Benjamins at the time when the will was made, or whether it is to be so construed as to include property thereafter acquired by either of them.

I agree with my brother Cartwright that in the absence of evidence of any Latvian law to the contrary the will is to be construed in accordance with the provisions of s. 26(1) of *The Wills Act*, R.S.O. 1960, c. 433 which read as follows:

> 26(1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

This section has been interpreted as applying only "in so far as the will comprises dispositions of real and personal estate" (see Hawkins on Wills, 2nd ed., p. 22, *Re Karch*[1], *per* Middleton J. at 511 and 512, *In Re Chapman, Perkins v. Chapman*[2], *per* Vaughan Williams L.J. at 435), and it is contended that the second paragraph of the present will is concerned with the recital of facts rather than the disposition of property and that it should accordingly be construed without reference to the statute. In my view, however, the paragraph in question is descriptive of the understanding of the husband and wife as to the nature of the interest

[1] (1921), 50 O.L.R. 509. [2] [1904] 1 Ch. 431.

of each of them in "the real and personal estate comprised in" the dispositions which are the subject of the succeeding paragraphs, and unless a contrary intention can be found in the language of the will it is to be construed as though it had been executed immediately before the death of Antons Benjamins.

It is also contended on behalf of the appellant that the second paragraph is to be treated as referable only to property owned at the date of the will because the provisions declaring the estate to be "the joint property of both of us" are phrased in the present tense and that there are no words which expressly include the after-acquired property of either of the parties, but the reference to "all other property except of course purely personal property . . ." is general rather than specific and the principle to be applied appears to me to be well summarized in the decision of Middleton J. in *Re Ingram*[1], at p. 97 where it is said:

> The true principle is happily stated by Spragge, C.J.O. in *Vansickle v. Vansickle* (1884), 9 A.R. 352, 354: "I take the proper course to be, to read the will assuming that the testator had read it immediately (using that word as meaning very shortly) before his death, and that, seeing nothing in it that he desired to change, and knowing that it would be read as the then expression of his will and intention, he had chosen to leave it as it was, although, if the rule of construction had been otherwise, and his will was to be read as expressing his intention at its date, he would, when reading it shortly before his death, have made alterations which—the rule being as it is—he judged not to be necessary. This of course can only be where a contrary intention does not appear by the will itself".
>
> From all the cases two other general principles can be deduced. *First, when the words used to describe either real or personal property given are general, they will pass all property which falls within the words used, looking at the will as though executed immediately before death.* Second, when the property given is specifically described, the specific description is not enlarged by the statutory rule of construction.

The italics are my own.

In my opinion, the employment of the present tense in conjunction with a general description of property does not of itself constitute evidence of "a contrary intention" within the meaning of s. 26(1) of *The Wills Act,* and with the greatest respect for those who may hold a different view, I am unable to find any language in the will which limits the joint estate created by the second paragraph to personal

[1] (1918), 42 O.L.R. 95.

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property owned by the testator and testatrix at the date when the will was made.

For these reasons as well as for those contained in the reasons for judgment of Aylesworth J.A. I agree with the conclusion which he expressed in the following language:

> I conclude that at the time of the death of Antons Benjamins he had the right to one-half of the moneys and securities on deposit in the Swiss Bank Corporation in Zurich, Switzerland and to one-half of the moneys on deposit in the name of Emilija Benjamins in the Swiss Bank Corporation in London, England. It is not suggested that subsequent to his death his rights changed in any way up to the date of the receipt by the appellant of all the moneys and securities in both bank accounts.

When the funds in both bank accounts came into the hands of the appellant he held one half of them as constructive trustee for the estate of Antons Benjamins and I adopt the reasoning of my brother Cartwright with respect to the *Statute of Limitations* in this regard. It is on this basis that the appellant is liable to account, and I agree with Aylesworth J.A. that the accounts and inquiries should be taken in accordance with the directions given in the order granted by Mr. Justice Schatz subject to the amendment made by order of the Court of Appeal for Ontario. I agree also with Mr. Justice Cartwright that, in taking the accounts, the question of whether consideration should be given to any amounts which the appellant has been called upon to pay to any taxing authority in respect of the income received by him on the fund, is one which should be left to be dealt with by the master when the relevant facts and figures are before him.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting in part.*

Solicitors for the defendant, appellant: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

Solicitors for the plaintiff, respondent: Taylor, Joy & Baker, Toronto.