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Some New Concepts of the Joint Bank Account

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decision. It seems that only through experience will the work product doctrine become more defined, and its application more uniform.

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SOME NEW CONCEPTS OF THE JOINT BANK ACCOUNT

Entering a bank, A deposits money in a savings account and instructs the teller to list the depost in the passbook and on the bank records as standing to the account of "A *or* B." This situation as well as the equally common situations where deposits are made to the account of "A *and* B," "A *and/or* B," and "A *and* B *or the survivor,*" as well as other variant forms, presents complex and baffling questions of law which have lately been engaging the attention of courts, practitioners, and legal scholars.[1] The critical inquiry in most instances is as to the nature of the interests held by A and B in the funds which have been deposited. Is there a right of survivorship so that if either A or B dies the surviving depositor is entitled to all the money? Does B possess a right of present withdrawal with regard to the funds on deposit? Do the foregoing arrangements violate the Statute of Wills? It is widely agreed that the answers to these questions depend primarily upon the intention of the depositor,[2] but a question may arise as to what evidence is material to show this intent.[3] On the other hand, if the dispute arises over the existence of a right of survivorship, it is possible to find cases saying that intent to create such a right is insufficient standing alone, and that compliance with the requirements for creation of a joint tenancy — *i. e.*, that the joint tenants must share the unities of time, title, interest, and possession — must also be shown.[4]

1. See generally Bogert, *The Creation of Trusts by Means of Bank Deposits*, 1 Cornell L. Q. 159 (1916); Jones, *The Use of Joint Bank Accounts as a Substitute for Testamentary Disposition of Property*, 17 U. Pitt. L. Rev. 42 (1955); Kepner, *The Joint and Survivorship Bank Account — A Concept Without a Name*, 41 Calif. L. Rev. 596 (1953); Townsend, *Creation of Joint Rights Between Husband and Wife in Personal Property*, 52 Mich. L. Rev. 779 (1954); 1957 U. Ill. L. F. 655.

2. Kennedy v. Kennedy, 169 Cal. 287, 146 Pac. 647 (1915); *In re* Murdock's Estate, 238 Iowa 898, 29 N.W.2d 177 (1947); Napier v. Eigel, 350 Mo. 11, 164 S.W.2d 908 (1942); McGillivray v. First Nat. Bank, 56 N.D. 152, 217 N.W. 150 (1927); Reel v. Hansboro State Bank, 52 N.D. 182, 201 N.W. 861 (1924); King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955).

3. See *In re* Murdock's Estate, *supra*, note 2, at 179; Kowal v. Sang, 318 Mich. 312, 28 N.W.2d 113, 117 (1947); Olander v. City of Omaha, 242 Neb. 340, 6 N.W.2d 62, 64 (1942).

4. See Appeal of Garland, 126 Me. 84, 136 Atl. 459, 464 (1927); Wright v. Knapp, 183 Mich. 656, 150 N.W. 315, 316 (1915); *In re* Gerling's Estate, 303 S.W.2d 915, 917 (Mo. 1957); *In re* Walker's Estate, 340 Pa. 13, 16 A.2d 28, 29 (1940); *In re* Lower's Estate, 48 S.D. 172, 203 N.W. 312, 315 (1925).

Still other cases declare that whether this technical joint tenancy has been created is immaterial[5] and the fact that the deposit was entered in the name of A *and* B, instead of A *or* B, does not change the effect of the deposit.[6]

The courts of this country have struggled to discover whether a joint bank account, sometimes called a "poor man's will,"[7] is a gift, a trust, a contract, a joint tenancy, or a testamentary disposition.[8] Most courts have found it necessary to select one of the foregoing theories to justify the results reached,[9] and in so doing may have to rely heavily on extrinsic evidence establishing the intent of the depositor.[10]

Much of the resulting confusion on this subject stems from an apparent carry-over of the common law requirements of joint tenancy into that field where, as will presently appear, those requirements are basically inappropriate and unsuited to modern conditions

I. THEORIES OF CREATION OF JOINT BANK ACCOUNTS

A. *Contract.* The courts have employed the contract theory to achieve two basic results: (1) where the creation of the joint bank account appears to be a donative transaction, the theory that the deposit of funds constitutes a contract between donor and bank for the benefit of the donee and excuses the donor from the necessity of making actual delivery of the subject-matter of the gift to the donee;[11] (2) where both donor and donee sign the deposit card, it is held that a contract between the two is thereby created and determines their right to the account.[12]

The first suggested application above supports the survivorship incident of joint bank accounts on the principle that an inter vivos gift is present,[13] revocable at any time by and within the lifetime of the depositor.[14] However, the danger exists that such a transaction

5. *In re* Baker's Estate, 76 N.W.2d 863 (Iowa 1957); New Jersey Title Guarantee & Trust Co. v. Archibald, 61 N.J. Eq. 82, 108 Atl. 434 (1919).

6. *In re* Meehan, 59 App. Div. 156, 69 N.Y.Supp. 9 (1901); see Clary v. Fitzgerald, 155 App. Div. 659, 140 N.Y.Supp. 536, 539 (1913).

7. See *In re* Edward's Estate, 140 Ore. 431, 14 P.2d 274, 276 (1932).

8. See First Nat. Bank & Trust Co. of Fargo v. Green, 66 N.D. 160, 262 N.W. 596, 597 (1935); Kepner, *supra* note 1 at, 635.

9. *Compare* Gray v. Gray, 78 Idaho 439, 304 P.2d 650 (1956), *with* Hawkins v. Thackston, 225 S.C. 445, 79 S.E.2d 714 (1954).

10. An example of this is *In re* Murdock's Estate, 238 Iowa 898, 29 N.W.2d 177 (1947).

11. First Nat. Bank of Aurora v. Mulich, 83 Colo. 528, 266 Pac. 1110 (1928); Castle v. Wrightman, 303 Mass. 74, 20 N.E.2d 436 (1939); Dunn v. Houghton, 51 Atl. 71 (N.J. Eq. 1902); *In re* Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935).

12. Bishop v. Bishop's Ex's, 293 Ky. 652, 170 S.W.2d 1 (1943); Cleveland Trust Co. v. Scobie, 114 Ohio St. 241, 151 N.E. 373 (1926).

13. Castle v. Wrightman, *supra* note 11; Dunn v. Houghton, *supra* note 11.

14. Davis v. Lenawee Co. Savings Bank, 53 Mich. 163, 18 N.W. 629 (1884); see Dunn v. Houghton, *supra* note 11 (Power of withdrawal remains in party who retains the

may be testamentary in nature and thus void under the Statute of Wills where the donee gets no present interest in the subject-matter of the gift.[15] Many cases have failed because of the donor's exclusive retention of control over the funds.[16] But the North Dakota Court has held that a joint tenancy is not an estate of inheritance, and a joint tenant who dies leaving a surviving tenant has no interest which he may devise.[17]

The second suggested application of the contract theory, which appears the sounder of the two, establishes a contract between the depositors[18] with the survivor entitled to the deposit on the basis of this contract.[19] The basic elements of contractual obligations — offer, acceptance, and consideration — must be shown to establish the validity of any contract.[20] Offer and acceptance in virtually all instances may be implied as the executory contract, *i.e.*, the account, must exist before there can be a dispute. As to the problem of consideration, one court said that the act of depositing is an execution of the contract, and consideration is dispensed with.[21] Novation has been another approach.[22]

B. *Gift.* Another theory upon which the validity of a joint bank account may be asserted supports the survivorship interest on the ground that an inter vivos gift is a condition precedent. The use of this type of transfer to create a joint interest in a bank account has been recognized in a number of jurisdictions. It is a donation of a partial interest in the form of the present right to withdraw together with the right of survivorship.[23] The donor has as a result of the gift created a joint interest in the property.[24] The cases uniformly hold that the relinquishment of exclusive control of the account satisfies the requirement of delivery. They require that there be an

bankbook, and this in effect allows the depositor to revoke donee's interest) "There is no principle of law which makes the mere placing of money or property in another's name an irrevocable gift to that person."

15. Appeal of Main, 73 Conn. 638, 48 Atl. 965 (1901); see Manufacturers Nat. Bank of Detroit v. Schirmer, 303 Mich. 598, 6 N.W.2d 908, 911 (1942); Mardis v. Steen, 293 Pa. 16, 141 Atl. 629, 630 (1928).

16. Davis v. Lenawee Co. Savings Bank, *supra* note 14; Ruffalo v. Savage, 252 Wis. 175, 31 N.W.2d 175 (1948).

17. *In re* Kaspari's Estate, 71 N.W2.d 558 (N.D. 1955). Also Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E.2d 684 (1945).

18. Additional cases along this line are: Chippendale v. North Adams Sav. Bank, 222 Mass. 499, 111 N.E. 371 (1915); Sage v. Fluck, 132 Ohio St. 377, 7 N.E.2d 802 (1937); Tacoma Savings & Loan Ass'n v. Madham, 14 Wash.2d 576, 128 P.2d 982 (1942).

19. *In re* McIlrath, 276 Ill. App. 408 (1934); see 4 Corbin, Contracts § 783 (1951).

20. See generally 1 Corbin, Contracts, §§ 22-192 (1951).

21. Cleveland Trust Co. v. Scobie, *supra* note 12, at 375.

22. Deal's Adm'r v. Merchants & Mechanics Sav. Bank, 120 Va. 297, 91 S.E. 135 (1917).

23. State Board of Equalization v. Cole, 122 Mont. 9, 195 P.2d 989 (1948); Burns v. Nolette, 83 N.H. 489, 144 Atl. 848 (1929); First Nat. Bank & Trust Co. of Fargo v. Green, *supra* note 8.

24. Burns v. Nolette, *supra* note 23.

actual delivery where possible,[25] but in the case of bank accounts where such delivery is not possible, they require that (1) donative intent be present accompanied by (2) a symbolical delivery, the delivery of the passbook of the savings account to the donee.[26] Other cases hold that the execution of the contract with the bank satisfies the requirement of delivery.[27] There is a close relation between these cases and adjudications utilizing the contract theory.

North Dakota follows the weight of authority in asserting that the donor may retain the account, but in order that a valid inter vivos gift be created, the donee must be given an immediate and absolute interest therein.[28] One court has very aptly summarized the situation by observing that "There can be no doubt that the owner of personal property has the right to give it away in whole or in part. Consequently he can give a joint ownership to another."[29]

C. *Trust.* As has been pointed out, the courts in applying the gift theory will deny the donee any right to the joint account where no valid inter vivos gift was created due to want of delivery. But notwithstanding the failure of delivery the courts have on occasion sustained the donee's interest on the theory of trust.[30] The reason for the distinction is that the settlor of a trust may by a declaration of trust create rights in the beneficiary without the additional requirements of delivery necessary in the case of an inter vivos gift.[31] Since the settlor has the legal title to the account and is merely creating an equitable interest in the beneficiary, there is no need for a transfer of the title; all that is necessary is a declaration of trust or some act other than the mere deposit[32] all of which are admissible as evidence in establishing the depositor's intention.[33]

It is to be very carefully noted, in order to avoid confusion, that this deposit does not amount to the typical type of trust as the lawyer knows it. In other words, it is not a deposit made in trust for another, *i. e.*, A in trust for B, but rather a joint account upheld as a trust on the theory that the form of the account shows the in-

25. See, *e. g.*, Beach v. Holland, 172 Ore. 396, 142 P.2d 990, 993 (1943).
26. Beach v. Holland, *supra* note 25.
27. Perry v. Leveroni, 252 Mass. 390, 147 N.E. 826 (1925); Dunn v. Houghton, *supra* note 11.
28. First Nat. Bank & Trust Co. of Fargo v. Green, *supra* note 8.
29. Industrial Trust Co. v. Scanlon, 26 R.I. 228, 58 Atl. 786, 787 (1904).
30. Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370 (1898); Bath Savings Institution v. Fogg, 101 Me. 188, 63 Atl. 731 (1906); Milholland v. Whalen, 89 Md. 212, 43 Atl. 43 (1899); Hoboken Bank for Savings v. Schwoon, 62 N.J. Eq. 503, 50 Atl. 490 (1901).
31. *Ibid.*
32. See Hoboken Bank for Savings v. Schwoon, *supra* note 30, at 493; Bogert, *supra* note 1.
33. See Powers v. Provident Institution for Savings, 124 Mass. 377, 379 (1878); Hoboken Bank for Savings v. Schwoon, *supra* note 30, at 493; Scott, Trusts § 58.1 (1939).

tent to give a donee an equitable interest therein, *e. g.*, A in trust for A and B, joint owners, subject to order of either, the balance at death of either to belong to the survivor.[34] It is to be observed that the depositor's withholding of the bank book allows him to control the fund, even though the beneficiary is a joint owner.[35] That the depositor occupies a close relationship to the beneficiary may be considered as having some evidentiary value in favor of trust intent.[36]

The greatest obstacle to the creation of such a trust in a joint bank account is its testamentary character. It is true that an interest must pass to the beneficiary before the death of the trustee; otherwise a trust is invalid for failure to meet the requirements of the Statute of Wills.[37] Equally, where the trustee transfers property in trust and reserves a beneficial life interest as well as a power to control, modify, and revoke the trust, it must fail as being testamentary.[38]

For this reason, the trust was condemmed in some cases as violative of the Statutes of Wills.[39]

Generally speaking, however, the joint bank account in trust has been sustained on the reasoning that a present interest is given to the beneficiary.[40] But the *Restatement of Trusts*[41] takes a more realistic view in recognizing that an exception to the normal rule is being employed in such cases to satisfy the demands of social policy. The exception is based on a policy of allowing such a settlor to control small sums of money during life and yet dispose of them without meeting the formalities of the Statute of Wills.

One writer has suggested that the most serious objection to the trust theory is the fact that had the depositor actually desired to

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34. This form has been upheld by a number of courts, and is probably a proper form for use by attorneys.

35. *E. g.*, Milholland v. Whalen, *supra* note 30, wherein A had opened a savings account in X bank with the following entry: "X bank, in account with A. In trust for herself and B, joint owners, subject to the order of either; the balance at the death of either to belong to the survivor." The bankbook was retained by A and she drew out various during her life. The court held that B had a survivorship interest. So A was allowed to set up a device by which she controlled the fund during her lifetime, and yet at her death it belonged to the co-owner.

36. See Meislohn v. Meislohn, 56 App. Div. 566, 67 N.Y.Supp. 480, 482 (1900) (child); Harrison v. Totten, 53 App. Div. 178, 65 N.Y.Supp. 725, 726 (1900) (grandniece).

37. Restatement, Trusts § 56 (1935).

38. *Id.* at § 57(3).

39. Springdale Nat. Bank v. Ward, 122 Me. 227, 119 Atl. 529 (1923); Nicklas v. Parker, 69 N.J. Eq. 743, 61 Atl. 267 (1905).

40. This seems to be the view of the Maryland cases. See Scott, Trusts §§ 56.6, 57.6 (1939).

41. § 58 (1935).

create a trust, he could have opened the account in trust form, rather than in joint and survivorship form.[42]

D. *Joint Tenancy.* The phrase "joint tenancy," when applied to joint bank accounts, means different things in different jurisdictions depending upon the status of this particular estate in the jurisdiction involved. In those jurisdictions which maintain the common law form of joint tenancy, a joint bank account will not constitute the depositors joint tenants, inasmuch as the four unities of time, title, interest, and possession must be shown before a joint tenancy may be created.[43]

These courts point out that the source of the title of the donor and time of acquisition appear to be different from that of the donee.[44] While it may be argued that a deposit in the names of donor and donee amounts to a conveyance and reconveyance, a device used to meet the requirements of unity of time and title, these courts impliedly repudiate this argument. Since even in the event of a change in a bank deposit, the novation by the bank in acknowledging a joint obligation when previously its obligations was several does not constitute the sources of either the donor or donee's title.[45]

A more serious objection to the common law form of joint tenancy is that there is no real unity of interest.[46] This is true in the cases in which the depositor shows that he did not intend to make a gift of the account, and that the account was in joint form for the depositor's own convenience.[47]

It should be observed, however, that the number of jurisdictions which require the traditional four unities in the creation of joint bank accounts has declined noticeably in recent years. Examination reveals four types of legislation which have been enacted in regard to joint tenancies:

(1) The type in which the opening of a joint and survivorship account creates a joint tenancy.[48]

(2) The type under which a conveyance to two or more persons creates a tenancy in common, unless intent is found to create a

42. Kepner, *supra* note 1, at 599.

43. Appeal of Garland, *supra* note 4 [modified by statute, Me. Rev. Stat. c. 59 § 40 (1954)]; *In re* Lower's Estate, *supra* note 4 [modified by statute, S.D. Code c. 51.0212 (1960 Supp.)].

44. See Appeal of Garland, *supra* note 4, at 465; *In re* Lower's Estate, *supra* note 4, at 315.

45. See, *e. g.*, Appeal of Garland, *supra* note 4, at 465.

46. This argument is used in Staples v. Berry, 110 Me. 32, 85 Atl. 303, 305 (1912).

47. In such an event a bank may by virtue of a bank protection statute permit withdrawals by either of the named persons without liability. This type of statute does not fix property rights between the parties, but exists merely for the protection of the bank. North Dakota banks are given this protection by N.D. Cent. Code § 6-03-66 (1961).

48. Ark. Stat. § 67-521 (1947); Mo. Rev. Stat. § 362.470 (1949); Neb. Rev. Stat. § 663.010 (1959).

joint tenancy.[49] This type of statute creates a presumption against joint tenancy, but does not prohibit it.[50]

(3) The type under which the right of survivorship as an incident to joint tenancy is abolished.[51] However, intent to create the right of survivorship will be honored under this type of statute.[52]

(4) The type which has totally abolished the joint tenancy.[53] Under this type of statute, right of survivorship must be expressed[54] on the theory that the parties are tenants in common for life, with remainder to the survivor[55]

As a general rule, if a joint tenancy is recognized in realty it will also exist in the case of personalty. Conversely if it is not recognized in realty it will be found not to exist with regard to personalty.[56]

It is readily seen after studying these varient forms of statutes that legislation has generally supplanted the unities, and relies instead on the depositor's intent for the purpose of creating a joint tenancy.[57]

E. *A New Concept.* The objections to the aforestated theories have been summarized as follows by Kepner: "The joint bank account does not qualify as a common law gift, because the donor does not surrender dominion. It is not a trust, because there is on intention on the part of the depositor to enter into such relationship. Neither is it a common law joint tenancy, because the four unities essential for creating this joint interest are lacking. While the parties may enter into a contract providing for the payment of the funds, the contract itself does not operate as a conveyance of the funds from one joint payee to the other joint payee. It is not a will, because it does not comply with the statutory formalities.

"The joint and survivorship bank account transaction is a combination of all of the methods of transferring property listed in the

49. See *infra*, note 65. As seen, North Dakota has adopted this type of statute.

50. Crabtree v. Garcia, 43 So.2d 466 (Fla. 1949); *In re* Fast's Estate, 169 Kan. 238, 218 P.2d 184 (1950).

51. Ariz. Rev. Stat. § 41-204 (1956); N.C. Gen. Stat. § 41.2 (1950); Ore. Comp. Laws Ann. § 70-205 (1940); Tenn. Code § 64-107 (1956); Wash. Rev. Code ch. 11.04, § .070 (1957); W.Va. Code §§ 3539, 3540 (1955).

52. Beach v. Holland, *supra* note 25.

53. Ga. Code Ann. § 85-1002 (1955); see Blodgett v. Union & New Haven Trust Co., 111 Conn. 165, 149 Atl. 790, 791 (1930); Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636, 638 (1940); Foracker v. Kocks, 41 Ohio App. 210, 180 N.E. 743, 745 (1931).

54. See Foracker v. Kocks, *supra* note 53, at 745.

55. See Blodgett v. Union & New Haven Trust Co., *supra* note 53, at 791.

56. See Kepner, *supra* note 1, at 602.

57. It should be noted that Me. Rev. Stat. c. 168, § 13 (1954) provides that all of the attributes and incidents of a common law joint tenancy are retained. But c. 59, § 40 makes an exception thereto; *viz.*, all joint accounts opened in banks, savings banks, and trust companies will be honored although technical joint tenancies are not in law or fact created.

preceding theories. It partakes of the nature of a gift because it is gratuitous. It is like a will in that the beneficiary is not certain of the amount of the donation until the depositor's death. It is similar to a joint tenancy because of the creation of joint interest. It has some of the characteristics of a revocable trust. Since the joint account combines in part all the features of gifts, wills, joint tenancies, and revocable trusts it is a new concept possessing independent characteristics of its own. It should be recognized as such."[58]

II. PROPERTY PURCHASE WITH JOINT FUNDS

The case of *In Re Harris*[59] states that personal property acquired with funds held in joint tenancy retains the same character (is held in joint tenancy) in the absence of an agreement indicating a different intention. The *Harris* doctrine has been followed with some consistency,[60] though not without misgivings,[61] particularly in California where it originated and also in other jurisdictions.[62] This doctrine apparently has become a rule of property in California.[63]

There is a distinction if the property purchased is real or personal. In re *Harris' Estate*[64] points out that when real property is purchased with joint tenancy funds, each party owns an interest in the realty as his separate property, thus they become tenants in common of the land. The *Harris* decision offers no explanation for this result, but the codes themselves reveal the answer. Most states have enacted statutes providing that a grant or devise to two or more persons creates a tenancy in common unless an intent to create a joint tenancy is expressly declared.[65] Further, an estate of joint

58. Kepner, *supra* note 1, at 635.

59. 169 Cal. 725, 147 Pac. 967 (1915); in support of this contention the court relied upon an earlier decision, Kennedy v. Kennedy, 169 Cal. 287, 146 Pac. 647 (1915), that held that the intent of the parties should supercede all other factors in establishing survivorship.

60. *In re* Hoeffin's Estate, 1 Cal. Rptr. 942 (1960); Security—First Nat. Bank of Los Angeles v. Stack, 32 Cal. App.2d 586, 90 P.2d 337 (1939) (where an argument to the contrary existed); Wallace v. Riley, 23 Cal.App.2d 654, 74 P.2d 807 (1937); *In re* Harris' Estate, 9 Cal.2d 649, 72 P.2d 873 (1937).

61. See generally 28 Calif. L. Rev. 224 (1940).

62. Hahn v. Ironbound Trust Co., 94 N.J. Eq. 123, 118 Atl. 744 (1922). *Accord,* Harrellson v. Barks, 326 S.W.2d 351 (Mo. 1959).

63. Lager v. Erickson, 13 Cal. App.2d 365, 56 P.2d 1287 (1936) (Concurring Opinion).

64. 9 Cal.2d 649, 72 P.2d 873 (1939). See also 28 Calif. L. Rev. 224 (1940).

65. Ariz. Rev. Stat. § 33-431 (1956); Ark. Stat. Ann. § 50-411 (1947); Cal. Civ. Code § 683 (1956); Colo. Rev. Stat. Ann. § 118-2-1 (1953); D.C. Code § 45-816 (1940); Del. Code Ann. § 25-701 (1953); Fla. Stat. § 689.15 (1959); Hawaii Rev. Code § 12781 (1945); Idaho Code § 55-104 (1949); Ill. Rev. Stat. ch. 76, § 1 (1945); Ind. Stat. Ann. § 56-111 (Burns 1951); Iowa Code Ann. § 557.15 (1950); Kan. Gen. Stat. Ann. § 58-501 (Supp. 1959); Ky. Rev. Stat. § 381.130 (1953); Me. Rev. Stat. ch. 168, § 13 (1954); Md. Code Ann. art. 50 § 13 (Flack 1951); Mass. Ann. Laws ch. 184, § 7 (1958); Mich. Stat. Ann. § 554.44 (1948); Minn. Stat. Ann. § 500.19-2 (1947); Miss. Code § 834 (1942); Mo. Rev. Stat. § 442.450 (1949); Mont. Rev. Code § 67-310 (1947); Nev. Rev. Stat. § 111.060 (1957); N.J. Rev. Stat. Ann. § 46:3-17 (1937); N.M. Stat. Ann. § 70-1-14 (1953); N.Y. Real Prop. Law § 66; N.D. Cent. Code §§ 47-02-06, 47-02-08 (1961); Ore. Rev. Stat. §§ 93.180, 105.820 (1957); R.I. Gen. Laws § 34-3-1

tenancy in realty cannot be created by oral agreement,[66] as may be the case in personal property.[67]

A joint bank account may not be terminated except by mutual agreement of the parties,[68] and withdrawal by one cotenant without the consent of the other, does not change the interest of the others.[69] Since the interest is not destroyed, the residue,[70] and the withdrawn funds if used for a common benefit,[71] should retain the characteristics of the joint fund and belong to both.[72] The case of *Armbruster v. Armbruster*[73] points out that if the parties had a joint interest in a bank account, they ought to have a like interest in property in which the joint funds are invested, if nothing else appears, and would negative the idea that such withdrawals were severed from the joint estate. If the funds used to purchase personal property can be *traced* to the original account, then the personal property purchased retains the same characteristics as the joint account.[74]

However, a cotenant withdrawing funds for the purpose of misappropriating them necessarily destroys the joint tenancy in the process.[75] A party may withdraw a moiety of the funds without accountability; if more is withdrawn, the other party has the right to follow the funds withdrawn or the property purchased.[76] However, the intent or understanding of the parties, as gathered from all the circumstances, is controlling, and consent may thus appear to withdrawal of a portion of the fund and investment in the name of one of the parties. Such consent will preclude the following of the funds withdrawn.[77]

III. TAXATION OF JOINT BANK ACCOUNTS

A. *Federal Gift Tax.* As has been shown, a gift of money may be placed in a bank account for the joint benefit of donor and donee,

(1956); S.D. Code § 51-0214 (1939); Utah Stat. Ann. § 57-1-5 (1953); Vt. Code Ann. § 18-3401 (1953); Va. Code §§ 55-20, 21 (1950); W. Va. Code § 3539, 40 (1955); Wis. Stat. Ann. § 230.44 (1957).

66. Wheeland v. Rogers, 20 Cal.2d 218, 124 P.2d 816 (1942) (Discussing statute).

67. Opp v. Frye, 70 Cal.App. 478, 161 P.2d 235 (1945).

68. Siemewski v. Union State Bank of South Chicago, 242 Ill.App. 390 (1926).

69. Waters v. Nevis, 31 Cal.App. 511, 160 Pac. 1081 (1916); when one cotenant withdraws funds from a joint account, he becomes an agent of the other, *In re* Culhane's Estate, 334 Pa. 124, 5 A.2d 377 (1939); *In re* Schley's Estate, 271 Wis. 74, 72 N.W.2d 767 (1955).

70. Commercial Trust Co. v. White, 89 N.J. Eq. 119, 132 Atl. 761 (1926).

71. Werle v. Werle, 332 Pa. 49, 1 A.2d 244 (1938).

72. Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 Atl. 624 (1938).

73. 326 Mo. 51, 31 S.W.2d 28 (1930). Accordingly, if joint tenancy property is sold, the proceeds, in absence of contrary intention, retain the characteristics of the property from which they were acquired. Fish v. Security—First Nat. Bank, 31 Cal.2d 378, 189 P.2d 10 (1948).

74. Crowell v. Milligan, 157 Neb. 127, 59 N.W. 346 (1953).

75. *In re* Sutter's Estate, 245 N.Y. Supp. 636 (1930).

76. Jackenthal v. Jackenthal, 139 N.Y.S.2d 697 (1955).

77. Dickson v. Jonesboro Trust Co., 154 Ark. 155, 242 S.W. 57 (1922).

and that such a gift may be supported as an inter vivos gift[78] or a gift in trust form[79] depending upon the intent of the depositor. Such a gift of intangible personal property is complete to give the donee an interest either when the contract was entered into[80] or when the bankbook was delivered to the donee.[81] The question then arises as to how and when the gift tax is applied to the donation.

The main purpose of the gift tax law is to compensate for the estate tax that would have been payable on the donor's death. The theory is that if the gift had not been made, the property given would have constituted part of the donor's taxable estate when he died.[82]

Section 2511 of the Internal Revenue Code provides "that the gift imposed shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.[83] The joint bank account is clearly within the all-inclusive terms of this code provision, as illustrated by the following example: "if A creates a joint bank account for himself and B (or similar type of ownership by which A can regain the entire fund without B's consent), there is a gift to B when B draws upon the account to his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A."[84] It is obvious that the evil which the regulation is aimed to preclude is the assertion of liability to payment of a gift tax when no gift was effectuated, as in the case where the entire fund was withdrawn by the donor.

The same principle applies to a gift in trust form. Hence, if a donor transfers property to himself as trustee and retains no beneficial interest in the trust property and no power over it to change the beneficiary, then the gift is complete and is subject to gift tax.[85] Conversely, when the donor retains power of revocation, *i. e.*, power to change the beneficiary, then the gift tax is not payable.[86]

Where the question arising in gift tax litigation is whether there has been a completed gift inter vivos, the court must correlate the

78. Burns v. Nolette, *supra* note 23.
79. Milholland v. Whalen, *supra* note 30.
80. Castle v. Wrightman, *supra* note 11; Perry v. Leveroni, *supra* note 27; Dunn v. Houghton, *supra* note 11.
81. Beach v. Holland, *supra* note 25.
82. 3 P-H 1960 Fed. Tax. Serv. ¶ 125,010.
83. The tax is a personal liability on the donor, is an excise upon his act of making the transfer, and is measured by the value of the property conveyed. Galt v. Commissioner, 216 F.2d 41, 51 (7th Cir. 1954).
84. Treas. Reg. § 25-2511-1(h)-4 (1959); Commissioner v. Walston, 168 F.2d 211 (4th Cir. 1948).
85. Treas. Reg. § 25-2511-2(g) (1959).
86. Treas. Reg. § 25-2511-2(c) (1959).

gift tax with the estate tax, and if the gift is incomplete from the viewpoint of the estate tax it must be regarded as incomplete for purposes of the gift tax.[87] To illustrate, a gift tax need never be paid where the value of the account was included in A's estate and an estate tax was paid on it.

B. *North Dakota Gift Tax.* There is no gift tax imposed in North Dakota.[88]

C. *Federal Estate Tax.* It is apparent that if joint estates were not subject to the estate or succession tax, an owner of property could avoid the tax by having his property transferred to himself and those who would otherwise be his legatees and devisees as joint owners with the right of survivorship.

The pertinent provisions of the Internal Revenue Code in reference to estate taxes on joint interests provide:

> The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants by the decedent and any other person, or deposited, *with any person carrying on the banking business,* in their joint names and payable to either or the survivor, except such part thereof as any be shown to have originally belonged to such other person and never to have been received by the latter from the decedent for less than an adequate and full consideration: *Provided,* that where such property or any part thereof, or part of the consideration with which such property was acquired by such other person from the decedent for less than an adequate and full consideration, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided Further,* that where any property has been acquired by gift, bequest, devise, or inheritance, by the decedent and any other persons as joint tenants, then to the extent of the value of a fraction part to be determined by dividing the value of the property by the number of joint tenants.[89] [Emphasis added.]

To illustrate: if A, the decedent, (donee) has given consideration for one-half the value of the account, such one-half value shall be included in his estate. If A has not given any consideration, no part of the value of the account shall be included in his gross estate.

If A, B, and C are joint tenants as a result of a devise, bequest, gift, or inheritance from D, then A, the decedent, will have included in his estate one-third of the value of the account.

Int. Rev. Code § 2040 specifically covers a deposit of money held jointly.[90]

87. Higgins v. Commissioner, 129 F.2d 237 (1st Cir. 1942).
88. 2 CCH 1960 Inh., Est. & Gift Tax Rep. (7th ed.) ¶ 2600.
89. Int. Rev. Code of 1954 § 2040.
90. Treas. Reg. § 20.2040-1(b) (1959).

D. *North Dakota Estate Tax.* The North Dakota Code provides that:

> "The gross estate of a decedent shall include the value of interests in property held as a joint tenant, or deposited in banks or other institutions in the joint names of the decedent and any other person, and payable to either or the survivor. In any such case the value of the decedent's interest shall be determined by dividing the value of the entire property by the number of joint tenants, joint depositors, or persons interested therein."[91]

This provision is supplemented by a regulation, however, wherein it is stated that estate tax is imposed only "provided the decedent contributed toward the acquisition of property so held or deposited or acquired by gift, bequest, devise, or inheritance."[92]

North Dakota law would seem to correspond to the Internal Revenue Code in that a determination should be made as to the amount of contribution made by a decedent in assessing the proportion of the account which should be included in a decedent's estate for tax purposes. Whether this regulation is valid, however, seems unsettled. This is illustrated by In re *Berzel's Estate,*[93] where the Supreme Court of North Dakota included one-half of the value of a joint account in a decedent's gross estate for tax purposes as dictated by the terms of the North Dakota Code. The court, in its opinion, made no mention of contribution under the regulation aforestated.

It follows that when a decedent has made a gift in trust and has reserved power to change the beneficiary the entire account is included in his estate. "Whenever a decedent has reserved unrestricted power of revocation of any trust created during his lifetime, such trust shall be considered as part of his estate and shall be taxed accordingly."[94]

The decedent may transfer his interest during his life as an inter vivos gift. In such an event, no part of the interest previously held is includible in his gross estate for tax purposes.[95]

This transfer must, however, be made over two years prior to death or it may be considered a gift in contemplation of death and consequently will be includible in the gross estate,[96] in the absence of showing that the gift was not in contemplation of death.

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91. N.D. Cent. Code § 57-37-06 (1961).
92. 2 CCH 1960 Inh., Est. & Gift Tax Rep. (7th ed.) ¶ 1570.
93. 101 N.W.2d 557 (N.D. 1960).
94. N.D. Cent. Code § 57-37-08 (1961).
95. Littlejohn v. County Judge, Pembina County, 79 N.D. 550, 58 N.W.2d 278 (1953).
96. N.D. Cent. Code § 57-37-04 (1961).

IV. CONCLUSION: NEED FOR LEGISLATIVE REFORM

One author has suggested that legislation be passed requiring depositors to provide on each deposit card or certificate in prominent language and understandable terms the legal effects of a joint and survivorship account.[97] The first form would provide that only the donor could withdraw funds from the account, and upon his death the residue of the account would vest with the survivor. The second form would be essentially an account for the benefit and convenience of the depositor, but there would be no survivorship clause, and the balance of the account would go to the donor's estate upon his death. The third form would allow both tenants to withdraw, with the balance of the account to go to the survivor. This last form is in general use today. By using the three separate and distinct forms, the donor's intent would be more easily ascertainable, although use of a form would not necessarily be conclusive, and the courts would still have authority to find a different intent on the part of the depositor if necessary.

Another solution advanced is the adoption of the Model Joint Bank Account Statute.[98] This act would replace the many different and conflicting statutes within the present day codes and would give certainty to the laws of joint bank accounts.

The joint and survivorship bank account is a new technique for transfering property. It needs a new name so that it will not be confused with the common law joint tenancy. By renaming the account, the law would be relatively free of the confusion caused by common law technicalities. At present it is improbable that the donor can insure ownership of funds in the surviving donee upon the donor's death. The need for corrective legislation is apparent, and necessary to insure the rights of the parties.

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APPENDIX

MODEL JOINT BANK ACCOUNT STATUTE

Section 1. This act shall be known as the Joint Bank Account Gift Law.

Section 2. A deposit made in any banking institution doing business in this state, in the names of two or more persons and payable to either or the survivor, may be paid to either during their

97. Jones, *supra* note 1, at 52.
98. Kepner, *supra* note 1, at 636. See appendix for complete reproduction of the Model Joint Bank Account Statute.

joint lives and to the survivor upon the death of either. The receipt or acquittance of the person so paid shall be a valid release and discharge to the bank for any payment so made.

Section 3. The opening of the account in joint and survivorship form, upon written application of the depositor, witnessed by an officer or authorized employee of the bank, shall in the absence of fraud, undue influence or lack of mental capacity on the part of the depositor, be conclusive evidence of the depositor's intention to make a gift to the survivor of the balance remaining in the account at the depositor's death.

Section 4. The person furnishing the funds for the account may withdraw any of such funds during his lifetime, free from any claims of the depositor, except such claims that may arise by reason of a rule of law other than expressed in this act.

Section 5. Deposits in a joint and survivorship account shall be subject to the debts of either party to the extent that such depositor has contributed to the account.

Section 6. A joint and survivorship account is not severed by a judicial declaration of incompetency. A guardian of either of the parties may withdraw from the account up to the total amount that his ward has contributed to the account; provided such funds are needed for the ward's maintenance; and provided further that the ward has no other property that may be used without causing hardship to a spouse, parent, brother or sister or other person dependent upon the ward for support.

Section 7. For the purpose of determining the statutory rights of a surviving spouse, any funds that shall pass to the survivor upon the death of the party furnishing the funds shall be treated as though the survivor acquired the balance of a specific devise in the depositor's will.

Section 8. A deposit made in the name of two persons, payable to either, but which makes no provision for survivorship, may be paid to either until the death of the depositor, and thereafter to the depositor's estate. The receipt or acquittance of the person so paid shall be a valid release, and discharge to the bank for any payment so made, provided such payment is made before the receipt of a written notice from the depositor or a legal representative of his estate notifying the bank not to pay.

Section 9. The opening of the account in joint form without a provision for survivorship shall be conclusive evidence, in the absence of fraud or mistake, of the depositor's intention to open the

account for his convenience only, and not for the purpose of making a gift to the co-depositor. The funds shall belong exclusively to the depositor, subject only to claims arising under other rules of law. Nothing contained in this section shall prohibit a reformation of the account upon a showing of fraud or mistake.

Section 10. The law shall apply to all accounts opened subsequent to its adoption. A depositor may subject an account opened prior to the date of this law to the provisions of this act by executing a new signature card, witnessed by an officer or authorized employee, on any day after the adoption of this law.

Section 11. All laws inconsistent with the provisions of this act are hereby repealed.

Section 12. This act shall become effective immediately.

THE NORTH DAKOTA SMALL LOANS ACT

In an outburst of commercial recognition uncommon to this agricultural state the legislature of North Dakota in its 1959 session brought forth a series of measures concerning the regulation of consumer credit. The hastily drawn Retail Installment Sales Act, passed during the 1957 session, was comprehensively amended.[1] A measure was enacted regulating one of the newer commercial innovations, the revolving charge account,[2] and the small loan industry of North Dakota was legalized under a North Dakota Small Loans Act.[3] This article will concern itself with the latter enactment, and with the background and history necessitating its passage.

I. GENERAL BACKGROUND

The small loan business, or the preferred term since it has reached maturity — the consumer finance industry — has become an important factor in the economy of the United States. As of July 1960 its outstanding credits totaled over four billion dollars.[4] While this shows an amazing increase over the past several decades keeping pace with general installment credit,[5] the rate of increase at present indicates a leveling off and financial maturity.[6]

Much of the credit for the development of the neighborhood

1. N.D. Laws 1959, c. 268, amending N.D. Rev. Code § 51-13 (1957 Supp.). The original was apparently based on a motor vehicle statute and expanded to include all goods, making for incongruities and commercially inapplicable sections.
2. N.D. Laws 1959, c. 350 (service charge not to exceed 1½% per month on the outstanding indebtedness).
3. N.D. Laws 1959, c. 136.
4. *Financial and Business Statistics*, Fed. Reserve Bull., Sept. 1960, p. 1047. Outstanding installment credit among consumer finance companies totals $4,035,000,000.
5. *Ibid.*
6. *Consumer Credit Expansion*, Fed. Reserve Bull., April 1960, p. 3.