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## Banks and Banking -- Joint Accounts -- Rights of Survivor

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## NOTES AND COMMENTS

### Banks and Banking—Joint Accounts—Rights of Survivor

*A* deposited money in a building and loan association. After his marriage to *B* they went to the Association and had the ledger sheet and passbook changed to read "*A, or wife, B.*" When *A* died intestate, *C*, his son by a previous marriage, brought suit against *B* claiming that the deposit belonged to the estate and not to *B* as survivor. The North Carolina Supreme Court affirmed the lower court's judgment for *C* by holding that when *A* deposits money in an account in the name of *A or B*, in the absence of rebutting testimony of an agreement or a gift, it merely creates an agency in *B* to withdraw such funds and upon *A's* death the agency terminates and the funds become a part of *A's* estate.<sup>1</sup> The case affirms previous North Carolina cases.<sup>2</sup> What is interesting, however, is the fact that when *A* and *B* changed the account they also signed a signature card purporting to be a subscription for optional savings shares for *A or B*, to be held as *joint tenants with right of survivorship*. Because *B* had failed to serve a case on appeal, the Supreme Court stated that it would consider only exceptions presented by the record proper and accordingly considered the exceptions addressed to the conclusions of law made by the trial judge on the facts as found by him. Thus the lower court's finding of fact that the signature card was not executed for the purpose of transferring the old account to a joint account with survivorship rights was held to be conclusive.<sup>3</sup>

This case still leaves open in North Carolina the question concerning the rights of a survivor to an account opened by *A with his own*

<sup>1</sup> *Hall v. Hall*, 235 N. C. 711, 71 S. E. 2d 471 (1952). While other courts do not apply the agency principle to a similar situation, the same result is reached. *Packard v. Foster*, 95 N. H. 47, 56 N. E. 2d 925 (1948); *Pilleppser v. Emigrant Industrial Sav. Bank*, 274 App. Div. 1026, 86 N. Y. S. 2d 133 (Sup. Ct. 1948).

In some states an account opened by a husband in the name of *husband or wife* creates a tenancy by the entirety. *Hoyle v. Hoyle*, 66 A. 2d 130 (Del. Ch. 1949); *State Bank of Poplar Bluff v. Coleman*, 240 S. W. 2d 188 (Mo. 1951); *Alcom v. Alcom*, 364 Pa. 375, 72 A. 2d 96 (1950); *Sloan v. Jones*, 192 Tenn. 400, 241 S. W. 2d 506 (1951).

There is no tenancy by the entirety in personal property in North Carolina. *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366 (1923).

<sup>2</sup> *Redmond v. Farthing*, 217 N. C. 678, 9 S. E. 2d 405 (1940); *Nannie v. Pollard*, 205 N. C. 362, 171 S. E. 341 (1933); *Jones v. Fullbright*, 197 N. C. 274, 148 S. E. 229 (1929) (certificate of deposit), noted in 8 N. C. L. Rev. 73 (1929).

<sup>3</sup> The lower court found that the card was only for subscription of shares which were not issued. An official of the Home Building and Loan states that the card was a signing in respect to the existing account and that the term "Optional Savings Shares" referred to the savings account. The actual shares of the Building and Loan available for subscription are called "Full Paid Income Shares." Recently the Home Building and Loan changed the name "Optional Savings Shares" to "Savings Account."

money in the name of *A* or *B*, payable to either or to the survivor,<sup>4</sup> and, incidentally, the rights of *A* and *B* during the lives of both. Because survivorship as an incident to joint tenancy is abolished in North Carolina,<sup>5</sup> the right to survivorship of a joint bank account must be founded on some other grounds.

The rights of *A* or *B* as a survivor to a joint account have been based on five theories: (1) trust, (2) joint tenancy, (3) statutory presumption of survivorship rights, (4) gift, and (5) contract.

(1) and (2) appear to be theories of the past.<sup>6</sup> The lack of a trust intent and of a trust *res* renders the trust theory inappropriate,<sup>7</sup> and the creation of a survivorship account does not meet the requirements of the common law unities necessary for joint tenancy.<sup>8</sup>

<sup>4</sup>This is the scope of this note. The litigation usually arises in respect to the rights of *A*'s estate against the rights of *B* as a survivor for the balance of the joint account. Thus *A*'s personal representative tries to obtain all the balance and *B* does likewise. There is a noticeable absence of cases where both *A* and *B* have deposited money in the joint account. It can only be surmised that the reason for this is that a personal representative of *A* will only bring an action against *B* when he knows that all the money in a survivorship account was deposited by *A*. Clearly *B* could show consideration from both himself and *A* in creating a contractual right in the survivor when he too has contributed to the account. See *Berreric v. Courtade*, 137 Ohio St. 297, 28 N. E. 2d 636 (1940).

<sup>5</sup>N. C. GEN. STAT. §41-2 (1943, Recompiled 1950); *Wilson v. Ervin*, 227 N. C. 396, 42 S. E. 2d 468 (1947). Survivorship in personal property may be provided for by contract. *Taylor v. Smith*, 116 N. C. 571, 21 S. E. 202 (1895). The above statute abolishes the right of survivorship to real property in joint tenancies in estates of inheritance but does not affect joint estates for life and estates by entirety in such property. *Burton v. Cahill*, 192 N. C. 506, 135 S. E. 332 (1926).

Other States have similar statutes: ALA. CODE ANN. tit 47 § 19 (1940); ARIZ. CODE ANN. § 39-110 (1939); CONN. GEN. STAT. § 7096 (1949) (survivorship as incident to joint tenancy is good if instrument calls for survivorship); FLA. STAT. ANN. § 689.15 (1941); GA. CODE ANN. § 85-1002 (1935) (same as Connecticut, *supra*); IND. ANN. STAT. § 51-104 (Burns 1951) (same as Connecticut, *supra*); ORE. COMP. LAWS ANN. § 70-205 (1940); R. I. GEN. LAWS c. 431 § 2 (1938) (same as Connecticut, *supra*); TENN. CODE ANN. § 7604 (Williams 1934); VA. CODE § 55-20 (1950) (§ 55-21 same as Connecticut, *supra*).

<sup>6</sup>No case based on either of these theories has been found from an examination of cases decided in the past seven years where the formula was merely *A* or *B* or the survivor. However, compare *Hancock v. Savings Bank of Baltimore*, 85 A. 2d 770 (Md. 1952) (*A* in trust for *A* or *B* payable to either or the survivor). This seems to be the standard form for joint accounts in mutual savings banks in Baltimore.

Joint tenancy as spoken of here is the common law tenancy which is created by law and is not to be confused with a statutory joint tenancy as discussed at page 98. See notes 8 and 14, *infra*.

For cases based on these two theories see 7 AM. JUR., Banks §§ 434, 435 (1937).

<sup>7</sup>See *Havighurst, Gifts of Bank Deposits*, 14 N. C. L. REV. 129, 146 where the following observation is made and supported by authority: "A more unusual theory is that of a trust. Some of the cases announcing this doctrine fail to indicate the mechanics of the application; what is the *res* and who is the trustee? It must be that either the depositor, still the owner of the chose in action, in this manner declares himself trustee for the claimant, or the bank is the trustee. It has been pointed out that in any case this is a strained application. The bank as debtor cannot be trustee and in any event the intent to create a trust is hard to find." 8 N. C. L. REV. 73 (1926).

See also 1 SCOTT, TRUSTS § 58.6 (3) (1939); 1 BOGERT, TRUSTS § 47 (1935).

<sup>8</sup>*Strout v. Burgess*, 144 Me. 263, 68 A. 2d 241 (1949); 16 WASH. L. REV. 105, 109; 48 C. J. S., Joint Tenancy § 3 c. (4).

The statutory presumption theory, (3), stems from banking legislation. Today, when *A* makes a deposit for a joint checking or savings account, most banks furnish him with a signature card which must be signed by both parties. These cards expressly provide that the deposit shall be *payable to either or to the survivor*. This is done pursuant to a banking statute which relieves the bank of liability to either of the parties or to their legal representatives on paying either or the survivor.<sup>9</sup> All forty-eight states and the District of Columbia have such a statute. Thirty-six of these do not expressly relate to the rights of the parties or the survivor<sup>10</sup> but at least four of these by judicial interpretation create a presumption that the money is the property of the survivor.<sup>11</sup>

The statutes of thirteen states go further by expressly creating property rights in the joint account.<sup>12</sup> Eight of these thirteen statutes

<sup>9</sup> N. C. GEN. STAT. § 53-146 (1943, Recompiled 1950). "When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this State, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made." Discussed in 9 N. C. L. Rev. 14 (1930).

Even with the above statute, the bank cannot allow the survivor of a joint account to withdraw the balance without retaining a sufficient portion to pay inheritance taxes or interest which would thereafter be assessed under the tax law; and if the account was in the name of husband or wife, twenty per cent must be retained. Failure of the bank to comply with the provision, except under certain stated exceptions, renders it liable for the amount of the taxes and interest. N. C. GEN. STAT. § 105-25 (1943, Recompiled 1950).

<sup>10</sup> ARIZ. CODE ANN. § 51-516 (1939); CONN. GEN. STAT. § 5831 (1949); DEL. REV. CODE § 2270 (1935); D. C. CODE § 26-201 (1940); FLA. STAT. ANN. § 653.16 (Cum. Supp. 1951); GA. CODE ANN. § 13-2039 (1935); IDAHO CODE § 26-1014 (1947); ILL. ANN. STAT. c. 76 § 2 (Cum. Supp. 1951); IND. ANN. STAT. § 18-2001 (Burns 1951); IOWA CODE § 528.64 (1946); KAN. GEN. STAT. ANN. § 9.1205 (1949); KY REV. STAT. § 140.250 (1948); LA. REV. STAT. § 6-32 (1950); MD. ANN CODE GEN. LAWS art. 11 § 102 (1939); MASS. ANN. LAWS c. 167 § 14 (Cum. Supp. 1951); MINN. STAT. ANN. § 48.30 (West 1945); MISS. CODE ANN. § 5205 (Cum. Supp. 1950); MONT. REV. CODES ANN. § 5-528 (1947); NEB. REV. STAT. § 8-167 (1943); NEV. COMP. LAWS ANN. § 473 (1929); N. H. REV. LAWS c. 309 § 20 (1942); N. M. STAT. ANN. § 50-1003 (1941); N. C. GEN. STAT. § 53-146 (1943, Recompiled 1950); N. D. REV. CODE § 6-0366 (1943); OHIO GEN. CODE ANN. § 710-120 (1938); OKLA. STAT. ANN. tit. 6 § 1180 (Cum. Supp. 1949); ORE. COMP. LAWS ANN. § 40-1003 (1940); PA. STAT. ANN. tit. 7 § 819-903 (Cum. Supp. 1951); R. I. GEN. LAWS c. 135 § 3 (1938); S. C. CODE ANN. § 7851 (1942); S. D. CODE § 6.0414 (1939); TENN. CODE ANN. § 5935.1 (Williams Cum. Supp. 1952); TEX. STAT., REV. CIV. art. 342-710 (1947); UTAH CODE ANN. § 7-3-47 (1943); VA. CODE § 6-55 (1950); WYO. COMP. STAT. ANN. § 35-148 (1945).

<sup>11</sup> *In re McIlrath*, 276 Ill. App. 408 (1934) (prima facie contract rebuttable by showing no intention to contract); *Cashman v. Mason*, 166 F. 2d 693 (8th Cir. 1948) (Minn.); rebuttable presumption that it is a gift of a joint interest); *Leverette v. Aimsworth*, 199 Miss. 652, 23 So. 2d 798 (1945) (rebuttable by proof of no intent to create joint ownership); *Parkening v. Haffke*, 157 Neb. 678, 46 N. W. 2d 117 (1951) (survivor takes unless terms of the account are to the contrary).

<sup>12</sup> ALA. CODE ANN. tit. 5 § 128 (2) (Supp. 1951); ARK. STAT. ANN. § 67-

provide a conclusive presumption that the owner intended to vest title in the survivor.<sup>13</sup> Ten of the thirteen create a statutory joint tenancy.<sup>14</sup> Even where there is a conclusive presumption of ownership in the survivor,<sup>15</sup> the fact of joint tenancy is rebuttable *during the lives* of the joint tenants;<sup>16</sup> and in some of the jurisdictions creating joint tenancies and conclusive survivorship rights,<sup>17</sup> the fact of joint tenancy is rebuttable as to any money withdrawn by the survivor during the deceased's life.<sup>18</sup>

It is in those states whose statutes create a conclusive property right in the survivor that the statute plays the dominant role in the cases. Where the statute states no property right, or such right is expressed but rebuttable, then the survivor must then depend on one of the other theories to recover.

521 (1947); CAL. BANKING CODE § 852 (1949); COLO. STAT. ANN. c. 18 § 45 (1935); ME. REV. STAT. 55 § 36 (1944); MICH. STAT. ANN. § 23.303 (Moore 1943); MO. REV. STAT. ANN. § 7996 (1939); N. J. STAT. ANN. § 17:9A-218 (1950); N. Y. BANKING LAW § 134 sub. 3; VT. STAT. REV. §§ 8779, 8780 (1947); WASH. REV. CODE § 30.20.010, 30.20.015 (1950); W. VA. CODE ANN. § 3205 (1949); WIS. STAT. §§ 221.45, 222.12(9) (1951).

<sup>13</sup> (1) *Alabama*. No survivorship case found.

(2) *Arkansas*. *Pye v. Higgason*, 210 Ark. 347, 195 S. W. 2d 632 (1946).

(3) *Colorado*. *Houle v. McMillan*, 83 Colo. 216, 263 Pac. 409 (1928). An expressed contract may be proved which is contrary to the signature card. *Urbancich v. Jersin*, 123 Colo. 88, 226 P. 2d 316 (1950).

(4) *Maine*. Presumption applies only to accounts in name of husband or wife, or in name of parent or child up to \$5000.

(5) *New York*. It may be proved that deceased depositor was incompetent at the time of making the deposit to rebut the presumption. Application of *Hayes*, 279 App. Div. 823, 109 N. Y. S. 2d 144 (Sup. Ct. 1952). This conclusive presumption applies only when the money was deposited in a savings bank and does not apply when made in a commercial bank. *In re Duke's Will*, 108 N. Y. S. 2d 875 (N. Y. Surr. Ct. 1951). See also WASH. REV. CODE § 30.20.010 (1950).

(6) *Vermont*. *Stroh v. Duman*, 84 A. 2d 408 (Vt. 1951).

(7) *Washington*. *In re Iver's Estate*, 4 Wash. 2d 477, 104 P. 2d 467 (1940).

(8) *Wisconsin*. The right of the survivor is by virtue of a contract. *Schwanke v. Gavit*, 219 Wis. 367, 263 N. W. 176 (1935).

California, prior to the 1949 Banking Code (note 12 *supra*), had a statute which provided for a conclusive presumption as in the above states. CAL. GEN. LAWS act 625 § 15a (1937). *Jorgenson v. Dalstrom*, 53 Cal. App. 2d 322, 127 P. 2d 551 (1942). Under this old act it could be proved that the survivor was to hold funds in trust for another. *Jarkich v. Badagliacco*, 75 Cal. App. 2d 505, 170 P. 2d 994 (1946). Also where a confidential relationship could be shown between the survivor and the deceased depositor, a presumption of fraud and undue influence arose. *Sodon v. Lichtenstein*, 244 P. 2d 907 (Cal. 1952). No case could be found interpreting the 1949 statute.

<sup>14</sup> Arkansas, California, Colorado, Michigan, Missouri, New York, Washington, West Virginia, and Wisconsin. The Vermont statute, note 12 *supra*, states that an "absolute joint account" is created.

<sup>15</sup> See note 13 *supra*.

<sup>16</sup> *Cash v. Cash*, 243 P. 2d 115 (Cal. 1952); *Stark v. Central Savings Bank*, 93 N. Y. S. 2d 805 (Sup. Ct. 1949).

<sup>17</sup> Compare notes 13 and 14 *supra*.

<sup>18</sup> *Paterson v. Comastre*, 244 P. 2d 902 (Cal. Sup. Ct. 1952); *Morrow v. Moskowitz*, 255 N. Y. 219, 174 N. E. 460 (1921) (Survivor may take the balance but if he withdrew money during the life of deceased he may have to pay this amount to the estate if it is proved *A* had no intention to create joint ownership in the account); *Munson v. Haye*, 29 Wash. 2d 733, 189 P. 2d 464 (1948).

A survivor who must base his recovery upon the gift theory, (4), runs into technical difficulties. The basic elements of a gift *inter vivos* must be proved—donative intent<sup>19</sup> and delivery.<sup>20</sup> Control over the passbook by *A* may prevent the survivor from taking the balance.<sup>21</sup> Some of the courts realize that only one person can have a passbook at a time<sup>22</sup> and that the actual subject of the gift—money on deposit—cannot be manually delivered.<sup>23</sup> As a result, some courts have streamlined the gift theory by saying that the signing of the signature card by both parties is *prima facie* evidence of a gift.<sup>24</sup> Another traditional problem, however, may face the survivor and upset his *prima facie* case. A showing of a confidential relationship raises a presumption of fraud.<sup>25</sup>

The beauty of theory (5), contract, is that it does not have to depend upon a statute or the interpretation thereof, upon technical requirements such as those relative to gifts,<sup>26</sup> or upon inappropriate property law as concerns the unities of joint tenancies.<sup>27</sup> For these reasons, this theory is being accepted by a growing number of state courts.<sup>28</sup> The contract is found in the words on the signature card. The theory is well expressed in *Hill v. Havens*<sup>29</sup> where *A* changed his bank ac-

<sup>19</sup> *Olive v. Olive*, 231 S. W. 2d 480 (Tex. 1950). Cf. *Bulen v. Pendleton Banking Co.*, 118 Ind. App. 217, 78 N. E. 2d 449 (1948). (Delivery of passbook to checking account is not sufficient to sustain a gift since the depositor does not thereby lose control over the deposit.).

<sup>20</sup> *Ogle v. Barber*, 224 Ind. 489, 68 N. E. 2d 550 (1946). For a discussion of all types of bank account gifts see Havighurst, *Gifts of Bank Deposits*, 14 N. C. L. REV. 129 (1936).

<sup>21</sup> *Packard v. Foster*, 95 N. H. 47, 56 A. 2d 925 (1948).

<sup>22</sup> *In re Fells Estate*, 369 Pa. 597, 599, 87 A. 2d 310, 312 (1952).

<sup>23</sup> State Board of Equalization v. Cole, 122 Mont. 9, 16, 195 P. 2d 989, 993 (1948) (stated that the actual gift is not money but the co-equal right with donor to exercise control over the deposit).

<sup>24</sup> *Drain v. Brookline Savings Bank*, 99 N. E. 2d 160 (Mass. 1951). *Link v. Link*, 65 A. 2d 89 (N. J. Ch. 1949). *In re Fell's Estate*, 369 Pa. 597, 87 A. 2d 310 (1952).

<sup>25</sup> *Nicholson v. Shockey*, 102 Va. 270, 64 S. E. 2d 813 (1951).

<sup>26</sup> *Cuilini v. Northern Trust Co.*, 335 Ill. App. 86, 90, 80 N. E. 2d 275, 277 (1948).

<sup>27</sup> *In re Wilson's Estate*, 336 Ill. App. 18, 35, 82 N. E. 2d 684, 691 (1948). Nor is there any worry concerning the statute of wills. See *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N. E. 371 (1916). The contract creates a present vested interest. *In re Kessler's estate*, 240 Ohio App. 85, 85 N. E. 2d 609 (1949).

<sup>28</sup> *Crabtree v. Garcia*, 43 So. 2d 466 (Fla. 1949); *Guest v. Stone*, 206 Ga. 239, 56 S. E. 2d 247 (1949). (The Georgia court did not allow the survivor to take because a statute allowing a third party beneficiary a remedy was not enacted until after the making of this particular contract); *In re Wilson's Estate*, 336 Ill. App. 18, 82 N. E. 2d 684 (1948); *Hill v. Havens*, 242 Iowa 920, 48 N. W. 2d 870 (1951); *In re Fast's Estate*, 169 Kan. 238, 218 P. 2d 184 (1950); *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N. E. 371 (1916); *Park Enterprises v. Trask*, 233 Minn. 467, 47 N. W. 2d 194 (1951); *Gladieux v. Parney*, 106 N. E. 2d 317 (Ohio 1951); *Langoe v. Gianniki*, 186 Ore. 207, 206 P. 2d 106 (1949).

For notes supporting the theory see: 17 U. CIN. L. REV. 402 (1948); 38 HARV. L. REV. 243 (1924); 32 ILL. L. REV. 57, 70 (1937); 8 N. C. L. REV. 73 (1929).

<sup>29</sup> 242 Iowa 920, 48 N. W. 2d 870 (1951).

count to *A* or *B*, as joint tenants with right of survivorship. In that case the Iowa court said: "It is now the settled law in Iowa that when a definite written agreement . . . is made by a depository bank with its customers . . . such agreement is binding upon the bank and the parties signatory. . . . The contract is that the bank will, in consideration of the funds with it and the creation of a debtor-creditor relation between itself and its depositor, consider them as owners in joint tenancy . . . and that upon the death of either depositor any balance in the account shall become the absolute property of the survivor."<sup>30</sup> The survivor's contractual right is that of a third party beneficiary<sup>31</sup> or a donee-survivor.<sup>32</sup> When the contract is complete, stating that the balance shall be the property of the survivor, parol evidence as to the intention of *A* in creating the account will not be admissible unless there is an allegation of fraud, deceit, duress, or mistake.<sup>33</sup> When both parties are living, the form of the deposit is not conclusive and parol evidence of the intention of the parties is admissible because there is no question of survivorship rights.<sup>34</sup>

This leads to the incidental point concerning the rights of *A* and *B* in dealing with the survivorship account while both are living. Where the property rights of *A* and *B* are determined under statutes creating joint tenancies, there is a rebuttable presumption that each should get one-half; however, *A* may show that there was another agreement concerning the funds<sup>35</sup> or that all the money in the account was his property.<sup>36</sup> Litigation between *A* and *B* under the gift theory would depend

<sup>30</sup> *Id.* at 929, 48 N. W. 2d at 876. Note particularly the court's construction of the joint tenancy contract that the bank will consider the depositors as owners in joint tenancy. Query: Does this actually make *A* and *B* joint tenants with respect to themselves or to creditors or other third parties during the lives of *A* and *B* under the contract theory? *A* and *B* may not have contracted between themselves for a joint tenancy. This would tend to support the theory of the cases in note 34, *infra*, that during the lives of the parties, parol evidence is admissible as to the rights of parties or their existing creditors to show the realities of ownership.

<sup>31</sup> *Rhorbacker v. Citizens Bldg. Ass'n Co.*, 138 Ohio St. 273, 276, 34 N. E. 2d 751, 753 (1941).

<sup>32</sup> This name for the survivor was invented in *Matthew v. Moncrief*, 135 F. 2d 645 (D. C. Cir. 1943).

<sup>33</sup> *Matthew v. Moncrief*, 135 F. 2d 645 (D. C. Cir. 1943); *Cuilini v. Northern Trust Co.*, 335 Ill. App. 86, 80 N. E. 2d 275 (1948); *Hill v. Havens*, 242 Iowa 920, 48 N. W. 2d 870 (1951).

<sup>34</sup> *Harrington v. Emmerman*, 186 F. 2d 757 (D. C. Cir. 1950); *Union Properties, Inc. v. Cleveland Trust Co.*, 152 Ohio St. 430, 89 N. E. 2d 638 (1949). Logically, this seems unsound. If the contract calls for joint ownership with survivorship rights, why should parol evidence as to the intent of *A* in creating the account be excluded when the rights of a survivor are in question but allowed when determining the rights between *A* and *B* during their lives?

<sup>35</sup> *Wallace v. Riley*, 23 Cal. App. 654, 74 P. 2d 807 (1937) (that if *A* should recover from an illness, *B* would transfer his interest in the funds back to *A* on request).

<sup>36</sup> *Stark v. Central Savings Bank*, 93 N. Y. S. 2d 805 (Sup. Ct. 1949).

upon *B*'s ability to prove a gift of a joint interest in the account. If proved, *B* would get one-half;<sup>37</sup> if not, *A* would be entitled to the whole amount. When the rights of *A* and *B* are determined, during their lives, by a court which uses the contract theory in survivorship cases, it would seem that each party should take one-half if the agreement speaks of them as co-owners or joint tenants. But it has been held that the ownership is determined by the person who places the funds in the account.<sup>38</sup>

As a practical matter, the ability of *A* or *B* to withdraw funds deposited by *A* in a joint account during the lives of both depends upon who is in possession of the passbook.<sup>39</sup> To determine the right of *A* or *B* to withdraw from the account, the nature of the account must be determined. Obviously, if no present rights are found in *B*, he would have no withdrawal rights. Assuming that *B* does have an *inter vivos* right to the account, this right may be interpreted in several different ways. When either party draws out the *total amount*, one result is that the joint ownership is traceable to any new account in which the sum withdrawn is deposited, and if the withdrawer predeceases the other, the latter takes the whole amount as survivor.<sup>40</sup> Another result of a total withdrawal is that it severs the joint ownership and the withdrawer is responsible to the other for one-half.<sup>41</sup> A third solution is that each party bears the risk that the other will withdraw the whole amount; and when this is done, it will destroy the interest of the other.<sup>42</sup> Where more than one-half but less than the total amount is withdrawn, it has been held that the money retains its joint character;<sup>43</sup> but where less than one-half was withdrawn, there is no such joint right.<sup>44</sup>

<sup>37</sup> *Goc v. Goc*, 134 N. J. Eq. 61, 33 A. 2d 870 (Ct. Err. & App. 1943).

<sup>38</sup> *Ulmer v. Society for Savings*, 35 Ohio App. 525, 41 N. E. 2d 578 (1942).

<sup>39</sup> Of course if it were a checking account, either party could write a check for the whole amount. This would not necessarily mean that the whole amount would be treated as the property of such withdrawer. See cases in notes 40 and 41 *infra*. No distinction is made by the courts between savings accounts and checking accounts in themselves; but as pointed out in note 19, *supra*, a delivery of a checking account passbook does not meet the delivery requirement of the gift theory.

<sup>40</sup> *State v. Gralowski's Estate*, 176 Ore. 448, 159 P. 2d 211 (1945) (withdrawal made with manifest intention of defeating the co-owner's right). See 26 ORE. L. REV. 114 (1947).

<sup>41</sup> *Clausen v. Warner*, 118 Ind. App. 340, 78 N. E. 2d 551 (1948); *Goc v. Goc*, 134 N. J. Eq. 61, 33 A. 2d 870 (Ct. Err. & App. 1943).

<sup>42</sup> *McLaughlin v. Cooper's Estate*, 128 Conn. 557, 561, 24 A. 2d 502, 504 (1942). This is based on the fact that the deposit agreement states "payable to either".

<sup>43</sup> *Nusshold v. Kruschke*, 176 Ore. 610, 159 P. 2d 819 (1945).

<sup>44</sup> *In re Suter's Estate*, 258 N. Y. 104, 179 N. E. 310 (1932). The court said at page 310: "Joint ownership of a bank deposit does not differ from any other joint ownership. Nothing in the Banking laws prevents one joint owner from destroying the joint ownership in the entire deposit to the extent of his withdrawals of no more than his equal share for his own use. . . ."

The pros and cons and the differences between the above theories are not just academic in respect to North Carolina law on the subject. We have no authority on the rights of a survivor to a joint bank account made payable to the survivor.<sup>45</sup> Justice Barnhill, however, in the principal case furnished a lead when he said:<sup>46</sup> "It may be that in fact the account existing at the time Hall and wife visited the office of the Building and Loan Association was the subject of the *agreement* (italics added) evidenced by . . . [the signature card stating a right of survivorship] . . . and that the *feme* defendant has a valid claim to the balance remaining in the account at the time of the death of her intestate. If so, she has failed to bring up the evidence so as to enable us to review the findings of the judge in the light of all the testimony." Justice Barnhill does not mention whether the agreement should be between *A* and *B* or whether it could be between *A* and the bank for the benefit of *A* and *B*. There is North Carolina authority to the effect that survivorship may be the subject of a valid contract,<sup>47</sup> regardless of the fact that survivorship is abolished as an incident of joint tenancy.<sup>48</sup> Also North Carolina has recognized third party beneficiary contracts.<sup>49</sup> There seems to be no reason why the North Carolina court

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For creditor's rights against money in a joint bank account see: *Park Enterprises v. Trach*, 233 Minn. 467, 47 N. W. 2d 194 (1951); *Sitomer v. North River Sav. Bank*, 196 Misc. 870, 95 N. Y. S. 2d 402 (N. Y. City Ct. 1949); *Union Properties, Inc. v. Cleveland Trust Co.*, 152 Ohio St. 430, 89 N. E. 2d 638 (1949).

For death and gift tax aspect of joint bank accounts see: *Petition of Hanson*, 232 P. 2d 342 (Mont. 1951); *In re Perier*, 122 Mont. 9, 195 P. 2d 989 (1948); *In re Comb's Estate*, 90 N. E. 2d 440 (Ohio 1949); *In re Kleinschmidt's Estate*, 362 Pa. 353, 67 A. 2d 117 (1949); SHATTOCK, AN ESTATE PLANNER'S HANDBOOK §§ 41, 42, 43 (1948); CCH INHERITANCE, ESTATE AND GIFT TAX SERVICE—N. C. STATE TAX § 1570 (7th ed. 1944); *Op's. N. C. Atty. Gen.*, CCH INHERITANCE, ESTATE AND GIFT TAX REPORTER ¶¶ 17, 148; 17, 636 (7th ed. State Current 1950).

<sup>45</sup> In *Hairston v. Glenn*, 120 N. C. 341, 27 S. E. 32 (1897) there was litigation over a survivorship account but the court said that the question of survivorship was not before them because the survivor only claimed one-half of the balance.

In a case litigated over the right to shares made out jointly with right of survivorship, the survivor was not allowed to take the entire amount because of failure to prove a gift *inter vivos* from the deceased. *Buffalo v. Barnes*, 226 N. C. 313, 38 S. E. 2d 222 (1946). A dissent by Justice Barnhill raised the question concerning joint tenancy created by contract. For an analysis of this case see 25 N. C. L. Rev. 91 (1946).

<sup>46</sup> *Hall v. Hall*, 235 N. C. 711, 716, 71 S. E. 2d 471, 474 (1952).

<sup>47</sup> *Jones v. Waldroup*, 217 N. C. 178, 7 N. E. 2d 366 (1940); *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202 (1895).

<sup>48</sup> See note 5 *supra*.

<sup>49</sup> *Canestrino v. Powell*, 231 N. C. 190, 56 S. E. 2d 566 (1949). This case cites practically all the North Carolina cases dealing with these contracts. These cases recognize the right of a third party to sue when a contract is made for his benefit. If the bank paid the money into the estate, the survivor could bring an action for it. If the bank paid the survivor and an action was brought by the personal representative of the deceased against the survivor, the court could easily hold that the survivor has received his benefit under the contract which cannot be defeated.

would not allow the survivor to take the balance as in *Hill v. Havens*, *supra*, whether the contract be for joint ownership with right of survivorship or whether it be for payment to either or to the survivor.<sup>50</sup>

There is a need today for a definite rule by which a person may deposit money in a bank with the assurance that he can make use of the money during his life and that upon his death his wife or some designated person may have funds to live on without waiting for the administration of his estate. A recognition of the contract theory could assure this. If this theory is not followed, then legislation should be passed to make a conclusive right in the survivor.

CHARLES E. NICHOLS.

### Constitutional Law—Freedom of Speech—Motion Pictures

"Expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."<sup>1</sup> Thus the Supreme Court of the United States, in a recent unanimous decision, overturned the thirty-seven year old precedent of *Mutual Film Corporation v. Industrial Commission of Ohio*,<sup>2</sup> and paved the way for a substantial judicial rewriting of the law relating to the official censorship of motion pictures, a practice currently authorized by statute in eight states,<sup>3</sup> and by ordinance in perhaps 75 cities.<sup>4</sup>

The motion picture, from its early years a cause of concern to municipal officials fearful of its potential for evil,<sup>5</sup> was first subjected to

<sup>50</sup> Most North Carolina banks use only the words "payable to either or to the survivor." The Home Building and Loan Association, in addition to this, uses the joint tenancy feature. If the contract theory were followed, the survivor's rights would be the same in either case; but if a dispute developed between *A* and *B* over the account, *B*'s chances would seem to be much better if joint tenancy or joint ownership words were used. See notes 30 and 34, *supra*. For suggestions in drafting joint account signature cards see: 1 PATON'S DIGEST; LEGAL OPINIONS AND BANKING LAW §§ 1810, 1811 (1926).

<sup>1</sup> Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 72 Sup. Ct. 777, 781 (1952).

<sup>2</sup> 236 U. S. 230 (1915), *affirming* 215 Fed. 138 (N. D. Ohio 1914).

<sup>3</sup> Florida, Kansas, Louisiana, Maryland, New York, Ohio, Pennsylvania, and Virginia. For current statute citations, see note 14, *infra*.

<sup>4</sup> Kupferman and O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L. Q. 273, 276 n. 24 (1951); Note, 39 COL. L. REV. 1383, 1385 n. 17 (1939). For a comprehensive view of the development and operation of legal film censorship see INGLIS, FREEDOM OF THE MOVIES (1947); CHAFEE, FREE SPEECH IN THE UNITED STATES 540-548 (1941); ERNST AND LORENTZ, CENSORED: THE PRIVATE LIFE OF THE MOVIES (1930); Note, 64 A. L. R. 505 (1930); Notes, 39 COL. L. REV. 1383 (1939), 60 YALE L. J. 696 (1951); Comment, 49 YALE L. J. 87 (1939).

<sup>5</sup> Motion pictures were invented by Edison in 1889, and first publicly exhibited in 1894. INGLIS, FREEDOM OF THE MOVIES 75 (1947). In 1909 New York banned children under 16 from commercial movie theaters unless accompanied by a parent or guardian. 1 N. Y. LAWS 1909, c. 278. That provision remains a part of the New York law. N. Y. PENAL LAW § 484 (1).

The circumstances under which films are normally shown—the darkened theater, the freedom from outside distraction, the brightly lighted screen—all