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SOME PROBLEMS IN ADMINISTRATION OF ESTATES

FREDERICK B. McCall*

The Clerks of the Superior Court, in carrying out their duties as judges of the Probate Courts in North Carolina, are confronted with many problems in connection with the probate of wills and the administration of decedents' estates. They must decide difficult questions, the answers to which are not always made clear either by the case or statutory law by which they purport to be governed. In the effort to clarify some problems which had been giving them trouble in the administration of decedents' estates, the Clerks submitted to the writer, for discussion at their 38th annual convention held in July, 1956, in Chapel Hill, several questions of interest and importance to them. This paper is the result of an attempt on his part to answer such questions.¹

The first question submitted was as follows:

I. What procedure should be followed in admitting a will to probate when the subscribing witnesses are dead and there is no proof that they signed in the presence of the testator?

This is a good question—one not directly or clearly answered by the North Carolina law. First, let us examine the statutes. G. S. § 31-3.3 subsection (d) requires that "the attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other." G. S. § 31-18.1 provides that an attested written will, executed as provided by G. S. § 31-3.3, may be probated in the following manner: "Sub-section (3). If the testimony of none of the attesting witnesses is available, then a. Upon proof of the handwriting of at least two of the attesting witnesses whose testimony is unavailable, and b. Upon compliance with sub-paragraphs c. and d. of paragraph (2) of this section." Sub-paragraphs c and d read as follows: "c. Upon proof of the handwriting of the testator, unless he signed by his mark, and d. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will."

Sub-paragraph (c) of G. S. § 31-18.1 (2) provides that "The testimony of a witness is unavailable within the meaning of this section when

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¹ The answers are, for the most part, confined to and directed toward the fairly narrow administration problem raised by the particular question submitted. Hence, no attempt has been made to discuss, definitively, all of the legal ramifications of, for instance, joint wills, joint bank accounts, equitable conversion, etc. This paper, on the whole, retains the same informality of discussion that obtained when it was read to the Clerks of Court in Conference.
the witness is dead, out of the State, not to be found within the State, insane or otherwise incompetent, physically unable to testify or refuses
to testify."

In our case, where the testimony of the witnesses is unavailable
because they are dead, G. S. § 31-18.1—in summary—provides that the
testator’s will may be probated upon proof of the handwriting of the
testator, unless he signed by his mark; upon proof of the handwriting of
the two dead witnesses; and upon proof of such other circumstances as
will satisfy the clerk as to the genuineness and due execution of the will.

Assuming that the handwriting of the testator and that of the dead
witnesses can be proved, how can it be shown that the witnesses signed
in the presence of the testator? This is the crux of our question. Sub-
paragraph (b) of G. S. § 31-18.1 (3) provides that “Due execution of
a will may be established, where the evidence required by subsection (a)
is unavoidably lacking or inadequate, by testimony of other competent
witnesses as to the requisite facts.” (Emphasis added.) The attorney
who drew the will or any other competent witness could testify that the
dead attesting witnesses signed in the testator’s presence. But suppose
there are no other competent witnesses who could testify to this fact?
Here the statute does not speak; nor does the case law of North Carolina.
Did the legislature intend that an otherwise apparently valid will signed
by the testator and attested by two witnesses whose handwriting can be
proved should not be allowed to qualify for probate? If so, why the
rather elaborate provisions for probate of the will where the witnesses
are rendered unavailable by death? A partial answer may be found in
sub-paragraph (2) d where the statute adds: “Upon proof of such other
circumstances as will satisfy the clerk . . . as to the genuineness and due
execution of the will.” (Emphasis added.) What are “such other cir-
cumstances” as will satisfy you that the will was genuine and duly
executed?

Dean Mordecai in his Law Lectures2 says: “The validity of the will
does not depend solely on their [the witnesses’] testimony. If their
memory so fail that they forget their attestation, or they be so wanting in
integrity as to wilfully deny it, the will ought not to be lost, but its due
execution and attestation should be found on other credible
evidence.3 The proof of the handwriting of such of the subscribing witnesses as may
be dead, and other facts and circumstances may be shown to establish the
will.”4

A potent “other fact or circumstance” to be considered by the Clerk
in determining the genuineness and due execution of the will is the

2 Mordecai’s Law Lectures 1264, 1265 (1916).
3 Citing Mayo v. Jones, 78 N. C. 402 (1878) and Boone v. Lewis, 103 N. C. 40,
9 S. E. 644 (1889).
4 Citing Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089 (1913).
presence of an attestation clause. This clause usually recites that the
testator declared "the foregoing instrument to be his last will and testa-
ment in the presence of us, who, at his request and in his presence, and
in the presence of each other, have subscribed our names as witnesses."

While an attestation clause is not necessary for the validity of a
will, the use of such which recites all the required formalities of execution
may aid in the establishment of the will at probate or contest.\(^5\) As you
know, the burden is upon the propounder to prove due execution of the
will, which includes the genuineness of the instrument.\(^6\) However, in
sustaining this burden of proof, the propounder may be aided by certain
presumptions. Let some of the authorities speak. Redfearn on Wills\(^7\)
says: "A proper attestation clause, to a duly signed and attested will . . .
raises the presumption of the legal execution. Where there is a proper
attestation clause to a will, a prima facie case of execution is made by
proving the signatures of the testator and the subscribing witnesses, or
by proving the actual signing by them, and this proof may be made by
persons other than the attesting witnesses. A proper attestation clause,
with the strong presumption of law as to proper execution which it
raises would be of great value in a case where the witnesses were dead,
or could not remember or denied some of the formalities of execution,
and where the propounder was thus dependent on other witnesses and
circumstances to prove the due execution of the will." (Emphasis added.)

In Corpus Juris it is said: "Where . . . in proceedings for the probate
of an instrument as a will, it appears to have been duly executed as such,
and the attestation is established by proof of the handwriting of the
witnesses or otherwise, although their testimony is not available . . . it
will be presumed in the absence of evidence to the contrary that the will
was executed in compliance with all the requirements of law\(^8\) including
those relating to publication, attestation in the presence of the testator
. . . and hence the burden of adducing evidence to the contrary rests on
one contesting or resisting the probate. This is especially true where the
will contains a formal attestation clause, for such a clause is presumptive
evidence of the facts which it states. The presumption is, however, one
of fact and not of law, and may be rebutted by evidence . . . but clear and
satisfactory evidence is required to negative the presumption."\(^9\) (Em-
phasis added.)

I have been unable to find any North Carolina cases dealing with the
recitals in the attestation clause as raising presumptions in favor of the
proper execution of a will. However, this very fact may indicate that

\(^6\) Dulin v. Dulin, 197 N. C. 215, 148 S. E. 175 (1929); In re Fuller's Will,
189 N. C. 509, 127 S. E. 549 (1925).
\(^7\) Redfearn, Wills and Administration of Estates in Florida 100 (2d ed.
1946).
\(^8\) Citing cases from about 25 jurisdictions—none from North Carolina.
\(^9\) 68 C. J., Wills § 749 (1934).
many wills have been probated on the basis of such presumptions without objection. It would seem that the handwriting of the testator and of the dead witnesses having been shown, and it having been recited in the attestation clause that the witnesses signed in the presence of the testator—if no evidence to the contrary is offered—you could safely proceed to probate the will in common form. This action would certainly be within the spirit of the statute: "Upon proof of such other circumstances as will satisfy the clerk as to the genuineness and due execution of the will."

"But," you may ask, "suppose there is no attestation clause—then what?" Then the presumption of due execution is somewhat weaker, but I think that, nothing to the contrary appearing, you would still be justified in probating the will on the evidence proving the signatures of the testator and the witnesses. Atkinson on Wills\(^1\) says: "While due execution of the will is evidenced by the mere fact that the witnesses have signed the same,\(^1\) at least in some jurisdictions the presumption is much stronger if there is a proper attestation clause."

Only one case has been found in North Carolina which touches upon the problem—In re Thomas' Will.\(^2\) That case involved a caveat proceeding in which the original will had been lost. The propounders offered in evidence the portion of the record of wills containing the will and the probate. The caveator's objection to the reception of this evidence was sustained. It was shown, apparently without exception, that when the instrument was offered for probate in common form one of the subscribing witnesses had testified to having subscribed the same as witness, and another, who was not a subscribing witness, testified that the signature of the other subscribing witness was in his own proper handwriting. This, with the proof of the death of Thomas, the other subscribing witness, was the entire evidence offered on the issue. There was no evidence offered as to the handwriting of the testatrix, and Associate Justice Avery, denying the probate, said in his opinion: "The propounders failed to produce any witness who had seen the signature of Ada W. Thomas [the testatrix] to the original will or the signature of either of the witnesses or that would testify as to their genuineness." At the time of the caveat both of the witnesses to the will were dead. The Court, in upholding the caveat, said that Section 2136 of The Code—now G. S. § 31-3.3 as to the witnesses signing in the testator's presence—must be construed with Section 2148 of the Code—now G. S. § 31-18.1—as to the manner of proving the handwriting of witnesses; therefore, said the Court: "In order that the proofs should be sufficient to justify the clerk in recording the paper in the book of wills, and to make such

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\(^{10}\) Atkinson, Handbook on Wills 347 (2d ed. 1953).

\(^{11}\) Citing in footnote 8, Wigmore on Evidence § 1512, and stating: "Some cases assert that this creates a presumption of due execution."

\(^{12}\) 111 N. C. 409, 16 S. E. 226 (1892).
record *prima-facie* evidence of its due execution by the testator, it was essential not only that S. J. Gooch [the witness who simply attested to the handwriting of the dead witness] should have deposed to the genuineness of the signature of J. W. Thomas, but that he or Sally F. Gooch [the living witness] should have deposed that he ‘subscribed’ in the presence of the testatrix. The probate then being insufficient to justify entry of the paper on the will book for the temporary protection of the estate . . . it must follow that what purported to be the proof and the will itself as entered on the book were not competent as evidence for any purpose whatever. . . .”

In this case it will be noticed that there was an attempt to prove, in a caveat proceeding, the probate of the will in common form on the basis of an inadequate record—the original will having been lost. Since in the caveat proceeding the will must be proved de novo, the evidence was properly excluded. Also, as I have pointed out before, the propounders in the caveat proceeding had failed to produce any witness who had ever seen the signature of the testator to the original will or the signature of either witness, or would testify as to their genuineness. Failure of proof of these facts in themselves would prohibit probate of the will. Thus it will be seen that the case does not on its facts fall within the purview of our original inquiry. Nor does it appear in the case whether or not there was an attestation clause. Until the Supreme Court passes upon the problem directly posed by your query, I think you might safely operate on the basis of the solutions I have proposed.

The second question submitted to me was as follows:

II. Joint wills; when a joint will has been probated as to one of the testators, what procedure should be followed upon the death of the other testator several years later?

In *Ginn v. Edmundson*, our Court defined a joint will in these words: “A joint will is a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or their separate property treated as a common fund, to a third person or persons, and a mutual or reciprocal will is one in which two or more persons make mutual or reciprocal provisions in favor of each other.”

In *Clayton v. Liverman*, our Court held that a will jointly executed by two sisters could not be probated either as a joint will or as their separate wills, upon the ground that such a will was novelty and unknown to the laws of this country. However, this case was later over-

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13 Id. at 416, 16 S. E. 226, at 228.
14 Wells v. Odom, 205 N. C. 110, 170 S. E. 145 (1933).
15 173 N. C. 85, 91 S. E. 696 (1917).
16 19 N. C. 558 (1837).
ruled by the Court in *In re Davis' Will*. In his Law Lectures Dean Mordecai puts it this way: "It was formerly held that a paper writing purporting to be the joint will of two persons and executed by them, was not valid, either as the joint will of the two, or the separate will of either. But that case is overruled, and it is now held that such a paper may be probated as the will of the respective parties as and when they respectively die."  

Atkinson on Wills after stating that joint wills formerly were not recognized as valid, says: "Even today a joint will which expressly or impliedly does not become effective until the death of the survivor is invalid. However, in the absence of this factor, there is no reason why the joint will cannot be regarded as the will of each co-testator and probated twice, once at the death of each. This is the modern and generally accepted view." And in *In re Cole's Will* our Court states: "It has been uniformly held that on the death of one of the testators the will thus executed may be admitted to probate as his last will and testament so far as it disposes of his property."

In the absence of contract based upon a consideration, such wills may be revoked at pleasure. Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor.

Assuming then, that neither party to the joint will has revoked it—when one of the testators dies, the will, as to the disposition of his property, if it has been validly executed, can be probated as his will. Then when the survivor dies the will is re-probated as his will. Obviously, the same witnesses will have to be used in the probate of the will of each. If one or both of the witnesses has died in the interim between the first probate and the second, then the statute prescribes the procedure to be followed as to the second probate. In the absence of contest, it would seem that your record of the first probate containing the affidavits of the same witnesses should materially assist you in the probate of the will as that of the surviving testator.

The case of *In re Cole's Will* presents an interesting situation in which the will could not be re-probated as the will of the survivor. The will was the joint will of a husband and wife—written by the husband in his own handwriting and found among his valuable papers at his death—and signed by both of them. After ordering the payment of their debts and providing for decent burial and the erection of headstones at their
graves, the joint will left everything to the Raleigh Methodist Orphanage. The will was probated as the holographic will of the husband—the signature of the wife being treated as surplusage. Obviously, since the wife did not write the will it did not comply with the statutory requirements as to a holographic will—for two people could not write such a will—and therefore it could not be re-probated as her will. After the death of her husband she did execute another will of her own in which she devised all her property according to the intention expressed by herself and her husband in the will in question. The Court said: "If, however, she had executed a will devising the property to other parties, this would not invalidate this instrument as the will of her husband."

The third question submitted to me was as follows:

**III. Under what circumstances does the doctrine of equitable conversion apply to the proceeds of the sale of lands or personalty by executors or administrators?** Under what funds should such proceeds be accounted for and distributed?

This question was so broad and general in its scope, I had to call on your fellow clerk, Mr. W. E. Church, for an interpretation as to what you had specifically in mind; and I am indebted to him for his help.

In *Clifton v. Owens*\(^\text{170 N. C. 607, 87 S. E. 502 (1915).}\) will be found a good discussion of equitable conversion. The Court said, in part: "Equitable conversion is a change of property from real into personal or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. 'Nothing,' it has been said, 'is better established than this principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will or by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money or money land. . . . In order to effect a conversion, it may be stated generally that, in a trust the direction to convert must be imperative, and in a contract the agreement must be binding. In a trust created by will or otherwise the duty to convert must be mandatory and not left merely to the option or discretion of the executor or trustee, and this imperative quality may be impressed upon the trust either expressly or by the use of direct words of command or impliedly or indirectly by a disposition of the property on such limitations as necessitate a change in character of it. 'If a testator devises land to be sold, or orders or directs that the
same shall be sold, it is obvious that it is the imperative duty of the
trustees [or executors] to make the sale. They have no discretion in the
matter. . . . This is the plainest case of conversion.' Bispham's Equity,
p. 426.\textsuperscript{27}

Tiffany says: "In order that the doctrine of equitable conversion may
apply, it is necessary that there be an absolute obligation to convert, either
immediately or at a future time, and it is not sufficient that there is a
request or expression of desire to that effect, or a power to convert, with
a discretion in the trustee or executor to whom the power is given, or in
other persons, as to whether it shall be exercised."\textsuperscript{28}

Resuming the general discussion of equitable conversion, in \textit{Clifton v.
Owens},\textsuperscript{29} Judge Walker said: "So it is said the doctrine of conversion is
not confined to those testamentary dispositions only in which imperative
words are used or wherein limitations which can only be effectuated by
a conversion exist. It is to be applied to all those cases in which a
general intention of the testator is sufficiently manifested to give the
property to the donee in a condition different from that in which it exists
at the time when the will goes into effect. A mere testamentary power
of sale, vested in executors to sell real estate, will not work a conversion;
but if to the power there is added a direction, a conversion will be
effected. There must be an intent to convert, either express or implied.
The question always is—Did the testator intend to give money or to give
land, and has that intention been sufficiently expressed? Once arrived at
the intention, by proper rules of interpretation, and the property will
then be considered as impressed with that character which the testator
designed it should have when it reached the hands of the beneficiary. . . .
The effect of this doctrine of equity is that the court carries out the
principle in all its consequences. Thus, money directed to be turned into
land descends to the heir; and land directed to be converted into money
goes to personal representatives; money belonging to a married woman
which is directed to be converted into land is liable to a husband's curtesy;
. . . and in many other cases the enjoyment of the property will be
determined by the rules applicable to it in its changed, and not in its
original, state. . . .\textsuperscript{30} The correlative doctrine of reconversion is well
understood to be the imaginary process by which a prior constructive
possession is annulled and taken away, and the property restored, in
contemplation of equity, to its original actual quality, or where the direc-
tion to convert is revoked by act of law, or by the parties entitled to the
property, which they may elect to do, but where there are several bene-

\textsuperscript{27}Id. 607, at 613, 614, 87 S. E. 502, at 505.
\textsuperscript{28}1 TIFFANY, REAL PROPERTY § 297 (3d ed. 1939).
\textsuperscript{29}170 N. C. 607, 614, 613, 87 S. E. 502, 505, 506 (1915).
\textsuperscript{30}For a later case discussing these principles, see McIver v. McKinney, 184
N. C. 393, 115 S. E. 399 (1922).
ficiaries they must all, as a general rule, unite in the election in order to make it effectual.” That all the beneficiaries must unite in electing a reconversion was reiterated by our Court in *Seagle v. Harris.*\(^{31}\) The exercise by all of the beneficiaries of the right to take the land prevents the exercise of the power of sale by the executor who is directed by the will to sell the land and divide the proceeds.\(^{32}\) Such election would not legally interfere with the testator’s intentions, since an absolute gift of the proceeds from the sale of the property is a gift of the property itself.

I have set forth the above generalities concerning equitable conversion in the hope that perhaps they will help to clarify your thinking on the subject.

As we have seen, the difficulty of determining whether or not a will commands equitable conversion depends often upon the construction of the testator’s intention expressed therein.

As suggested by Mr. Church, some borderline cases arise which may give you trouble. One case is clear, however, by statute. If there is an intestacy, where land is sold to make assets to pay the debts of the estate, so much of the proceeds of the sale as is necessary to pay the debts is treated as personal assets,\(^{33}\) but the surplus of the proceeds goes to the decedent’s heirs as realty in the same manner as if the land had not been sold.\(^{34}\) In other words, the realty is converted into personalty only for the specific purpose of paying the debts of the decedent. It would seem that the same result would follow if a testator in his will ordered the executor to sell sufficient land to pay his debts. The devisees would take any surplus funds derived from the sale as realty under the will.

A more difficult question arises, when, in a partition proceeding, it becomes necessary to sell the land and during the pendency of the partition proceeding one of the tenants in common dies and the question arises as to the disposition of the share of the proceeds due the deceased tenant. Is it still real property for the purposes of dower and descent to the heirs or is it personal property subject to the widow’s year’s allowance and distributable to his next of kin? In other words, does the sale operate as an equitable conversion of the land into personalty? The question is a troublesome one and I have had difficulty in finding a direct answer thereto. I shall give you my solution of the problem for whatever it is worth.

Our Court has held that G. S. Chapter 46 dealing with partition, applies to compulsory or judicial partition. It does not apply to partition by agreement.\(^ {35}\) G. S. § 46-22 provides that: “Whenever it appears by

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\(^{31}\) 214 N. C. 399, 199 S. E. 271 (1938).


\(^{33}\) N. C. GEN. STAT § 28-57 (1950).

\(^{34}\) N. C. GEN. STAT. § 28-58 (1950).

\(^{35}\) 73 N. C. 132 (1875).
satisfactory proof that actual partition of lands cannot be made without injury to some or all of the parties interested, the Court shall order a sale of the property described in the petition, or any part of it.” We start with real property owned by two tenants in common; one, or both of them, wants his share in severalty in the real property. The Clerk finds as a question of fact that the land cannot be physically divided without injury to the parties. He thereupon issues an order that the property be sold and the proceeds divided proportionately among the owners of what was real property. Does this compulsory order of sale work an equitable conversion of what was realty into personalty for all purposes? I take the position that it does not. The conversion takes place by virtue of court order and not necessarily by the consent of the parties. By virtue of G. S. § 46-15 the wife's right of dower or the widow's dower is preserved to her in the partition proceeding. The statute provides that “on decree of sale, the interest on one third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of 6% on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds.” (Emphasis added.) Our Court has held that the wife is a proper party to the partition proceedings with the right to be heard when the lands are sold for division to protect her contingent interests in the proceeds of the sale, but she has no right to resist the plaintiff's right to partition nor challenge the power of the Court to order sale for partition. Obviously then, the sale does not convert the realty into personalty for the purpose of defeating the wife's dower. After a portion of the proceeds of the sale is set aside to take care of the widow's dower, is the surplus money to be distributed as personalty among the decedent's next of kin or does it go to his heirs as it would have had it remained real property? I am of the opinion that it would go to heirs as realty according to the canons of descent. Although I have found no North Carolina case in point, some clues to the answer may be found in McLean v. Leitch. In that case the Court cited the Illinois case of Smith v. Smith, and quoted therefrom as follows: “When partition is among the heirs of a deceased ancestor, the purpose of the sale is the distribution of the proceeds among the owners of the undivided interest in the land. Such proceeds, therefore, remain impressed with the character of real estate for the purpose of distribution.” Also the Court quoted from In Wentz' Appeal, a Pennsylvania case to this effect: “The money derived from a sale of land in a partition proceedings is never real estate, any more in law than in fact,
but for a certain purpose and within a certain limit it is to be treated as real estate; that purpose is to preserve the quality of the estate, so that it will vest in the persons who would be entitled to it had it remained unconverted, and the limit is the first transmission." It could be argued, therefore, that the money derived from the sale would go to those entitled to the realty had it not been sold. Obviously, once the sale is confirmed and the money distributed, the recipients thereof hold the proceeds as personal property. In Tiffany on Real Property the writer says: "In case of a sale of land for the purpose of partition, while the proceeds of the sale obviously belong to those who previously held title to the land, such proceeds have the character of personalty and not of realty, except in some jurisdictions, as regards the share of one not sui juris." This seems to confirm my last preceding statement.

G. S. § 33-32 covers so fully questions as to the proceeds of sales of the ward's property in the hands of the guardian, I do not believe any discussion on my part is necessary.

Another question submitted by you was as follows:

IV. G.S. § 58-213; what would be the proper distribution of the proceeds of group life insurance payable to the estate of the deceased when other assets are insufficient to satisfy all debts of the estate?

I think the answer to this question is pretty clear. The statute, in part, provides: "... nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the employee for the payment of debts." In other words, group insurance (unlike other insurance) payable to the estate of the insured employee is not liable for his debts—even though all the other assets are insufficient to pay them. It seems that the insurance proceeds, if there is a will, would go to those persons specifically designated to take them; or if no persons are so designated, the proceeds, absent a contrary intention, might pass under the residuary clause. If the decedent dies intestate, the proceeds being personalty—should pass under the Statute of Distributions, G. S. § 28-149, to those entitled to take thereunder. This is a case where the decedent's creditors may have to suffer—so far as this special fund is concerned—even as they may have to suffer where the only funds available in the estate are those recovered for the decedent's wrongful death.

The final question brought to my attention was as follows:

41 Tiffany, Real Property § 306 (3d ed. 1939).
V. How should joint bank accounts be handled upon the death of one of the joint owners, when there is no survivorship provision contained in the joint account agreement?

Finding an answer to this question is a difficult task since the various courts do not agree upon any one legalistic category into which to place joint bank deposits or accounts. Some try to work out the problem on the basis of a gift; others on the basis of a trust; and still others on the basis of a third-party beneficiary contract with the bank. Lurking in the background to add confusion to the courts' thinking is the old real property concept of what constitutes a joint tenancy and the incident of survivorship attached thereto. The North Carolina Court, as we shall see, attacks the problem primarily from the gift angle—particularly where the deposit is made in the names of A or B with no express provision for survivorship. As Mr. Neil Sowers says, in a law review comment on the problem: "With the law in this confusion it was only natural that the banks should seek protection when they were asked to pay the survivor according to the terms of the account." Accordingly, a statute—G. S. § 53-146—was enacted in North Carolina in 1917 as follows: "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 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." Statutes of this type are generally held to be for the protection of the bank and are not determinative of contests between the donor's personal representative and the surviving donee.

The applicability of G. S. § 53-146 to a given case was tested in Jones v. Fulbright. In that case a husband deposited money in a bank on time deposit taking a certificate of deposit in his own name, payable to himself or his wife on return of the certificate properly endorsed. It was held, in an action between the husband's administratrix and the wife's executrix, not to constitute a gift inter vivos of the deposit to the wife, but the mere appointment of the wife as the husband's agent to withdraw money, which agency terminated at the death of the husband. Hence, judgment for the husband's administratrix. The defendant contended that the deposit was made in the names of both husband and wife, was payable to either, and upon the death of the husband was payable to the wife, and cited G. S. § 230—now G. S. § 53-146—in support of his

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44 8 N. C. L. Rev. 73, 74, 75 (1929).
45 For a good discussion of this statute, see 9 N. C. L. Rev. 14 (1930).
46 ATKINSON, HANDBOOK ON WILLS 171 (2d ed. 1953).
47 197 N. C. 274, 148 S. E. 229 (1929).
contention. The Court held that "this section applies only when the deposit is made in the names of two persons, payable to either, or payable to either or the survivor. The certificates show that the deposits were made, not in the names of two persons but in the name of S. V. Pickens only." Whether if the deposits had been made in the names of both the husband and wife, payable "to either or" without words of survivorship, the surviving wife would have been entitled to the money, the Court does not say. In such a case, the statute, by its wording, would seem to apply to authorize the bank to pay the fund to the surviving wife.

Following *Jones v. Fulbright*, came the case of *Nannie v. Pollard*\(^{48}\) in which T. J. Nannie deposited a sum in the bank's savings department to the account of "T. J. Nannie or Bessie M. Nannie." This continued to be the form of the deposit up to the death of T. J. Nannie. The Court held that in the absence of rebutting evidence the person making a deposit in a bank is deemed to be the owner of the fund; that the deposit did not constitute a gift *inter vivos* of the fund; that the right of the wife to withdraw money was only an agency conferred upon her by her husband, revocable upon his death; that upon his death his administrator was entitled to the fund. No mention was made of the statute, but *Jones v. Fulbright* was cited in support of the result reached.

Again, in *Redmond v. Farthing*,\(^{49}\) the wife brought suit against her husband's administrator to recover, after his death, the balance of a savings deposit in a Durham bank which deposit was in the following form: "In account with W. P. Redmond or Mrs. Jennie Redmond." The deposits had been made from time to time by Mr. Redmond but Mrs. Redmond contended that a large portion of them had been derived from the sale of her personal property and also from proceeds of the sale of lands held by her individually and by her and her husband as tenants by the entirety. The defendant's answer admitted only that the deposits had been made, and denied the plaintiff's allegation of an agreement existing between the plaintiff and her husband that the survivor was to take the balance upon the death of one of them. The Court denied the plaintiff's motion for judgment on the pleadings, on the authority of *Nannie v. Pollard* and *Jones v. Fulbright*, that in the absence of rebutting evidence, the husband-depositor was owner of the fund, and that again there was a revocable agency. The Court said: "The appellant ... virtually concedes that G. S. § 230 [G. S. § 53-146], in the light of *Jones v. Fulbright* and *Nannie v. Pollard*, has no application to the case at bar in view of the fact that it appears from the admissions in the pleadings that the deceased husband made the deposits." Thus far, therefore, it would seem that if the deposit is made by only one of the

\(^{48}\) 205 N. C. 362, 171 S. E. 341 (1933).

\(^{49}\) 217 N. C. 678, 9 S. E. 2d 405 (1940).
parties in an account to \( A \) or \( B \), the revocable agency theory applies and the decedent's personal representative is entitled to the fund. In this case it will be noticed that under order of court the bank paid the amount of the deposit into the office of the clerk and the husband's administrator was substituted for the bank as party defendant.

In *Hall v. Hall*\(^{50}\) the Court held that where a man has a deposit in a building and loan association changed upon his marriage to the names of himself or wife, the effect is to constitute the wife an agent with authority to withdraw the funds during the lifetime of the husband, which agency is revoked by his death, and such change does not constitute a gift *inter vivos*. It was so held even though the ledger heading showing the deposit had been changed to read "J. E. Hall, or wife, Lukie R. Hall," and Hall's passbook was changed in the same manner. The fact that he also signed a written subscription for blank shares of stock which when issued were to be held for the account of himself and his wife with right of survivorship did not warrant a finding of a right of survivorship in the account since it did not appear that the subscription agreement was executed for the purpose of transferring the account into a joint account, there being no evidence of record that the agreement related to the existing account. As a result of the holding, the wife, who, as administratrix had after payment of debts, etc., listed the balance as a disbursement to herself individually, had to disgorge one-half of it to her son, the other distributee of her intestate husband. The Court, however, intimated that the wife might have been entitled to the entire deposit if she had shown sufficient evidence to connect the subscription agreement with the deposit.

The latest case to raise the question of the status of joint accounts is *Bowling v. Bowling*.\(^{51}\) The Court was concerned with four different accounts, with reference to the proper disposal of which the wife, as administratrix, had asked the Court's advice. The first was a savings account opened with the building and loan association by the wife in the following manner: "Mrs. Agnes P. Bowling &/or Dr. W. W. Bowling." In opening this account she transferred money belonging to her in another bank and also money derived from a joint account with her husband in another bank, with respect to which she had the right of withdrawal. As to this first account there was no independent record of the source or identification of deposits or the disposition of the withdrawals therefrom.

The second account was an optional savings account opened in the name of: "Bowling, Dr. W. W. or wife, Mrs. Agnes P. Bowling" which was signed by both of them and an agreement was made with the bank

\(^{50}\) 235 N. C. 711, 71 S. E. 2d 471 (1952).

\(^{51}\) 243 N. C. 515, 91 S. E. 2d 176 (1955). For a comment on this case and a more detailed analysis of the legal implications of joint bank accounts see Note, 35 N. C. L. Rev. 75 (1956).
that all moneys and accumulations thereon were held for their account "as joint tenants with right of survivorship and not as tenants in com-
mon."

A third account was opened on substantially the same terms, with no independent record of the source of deposits.

In addition to the savings accounts above described there was, in the estate, a certificate for 125 shares of common stock in a life insurance company, registered as follows: "William W. Bowling and Mrs. Agnes Paulk Bowling, as joint tenants with right of survivorship and not as tenants in common."

The Supreme Court upheld the lower court's decision that as to the first account and the insurance stock the wife was entitled to one-half each of the funds and stock—this, since there was no evidence sufficient to establish whether the deceased's estate or the wife was the sole owner of the entire funds of the account or the shares of stock. The Court said: "Under the laws of this jurisdiction, nothing else appearing, money in the bank to the joint credit of husband and wife belongs one-half to the husband and one-half to the wife," citing Smith v. Smith.52 By the phrase, "nothing else appearing," the Court meant that where there is no evidence of an intention to make a gift, the principle of equality of division followed.53

The Supreme Court also upheld the lower court's decision as to accounts two and three: that by survivorship the wife took the entire proceeds of both accounts. This result was predicated on the basis of the contractual agreement of husband and wife that the personal property should be held by them "as joint tenants with right of survivorship and not as tenants in common."

I have dwelled at length on these cases in order to give you a picture—perhaps a confused one—of the state of the law pertaining to joint bank accounts. It seems pretty safe to assume that if either party—husband or wife—deposits money in a joint account payable "to A or B" with no express provision—usually indicated on the deposit card of the bank signed by both of them—for a joint tenancy with right of survivorship, the North Carolina Court—no contrary evidence appearing—will treat the deposit as a revocable agency, revoked by the death of the original depositor. The decedent's personal representative will be entitled to the deposit as against the survivor. If the deposit certificate shows the deposit was made in the names of two persons, the bank will be protected if it pays the balance to the survivor. However, the Court has made it clear in Bowling v. Bowling, just discussed, that if the deposit card is signed by both the parties and they have expressly agreed that the de-

52 190 N. C. 764, 130 S. E. 614 (1925).
posit shall be held by them as joint tenants with right of survivorship, and not as tenants in common, the survivor, by contract, is entitled to the money on deposit. In that case the Court raised no question as to whether or not the the formalities required by G. S. § 52-12—regarding contracts between husband and wife affecting the corpus or income of the wife's real or personal estate for more than three years—would have to be observed in this type of contract between themselves and the bank in order to bind the wife's estate in the event she should predecease her husband. Some attorneys and some of the clerks of court are of the opinion that the formalities required by the statute should be complied with; but, for the present at least, the question remains unanswered.

In the case of joint bank accounts it would seem to be the duty of the decedent's personal representative, immediately after his qualification, to investigate the bank records to determine the status and nature of the deposit and then proceed accordingly. As has been said, the statute is for the protection of the bank, and does not preclude action between the personal representative and the payee to determine the status of the deposit as an asset of the decedent's estate. If the bank has not already paid the account to the survivor, it should, upon the clerk's order, hold the account until the issue of ownership is settled.

Clearly, a remedial statute is badly needed in view of the unsettled state of the law with regard to joint bank accounts. As a matter of fact, such a statute was submitted to the 1953 and 1955 legislatures by the General Statutes Commission, but was defeated each time it was introduced because the legislature felt that the joint bank account could be used as a device to defeat the creditors of the depositors. "Arguments that present court decisions recognize the right of joint owners of personalty to create the right of survivorship by contract, and that consequently the proposed legislation would do no more than make clear a way of doing that which can now be done, but which cannot be done with sufficient certainty, did not satisfy a majority of the members of the House where the bill was defeated." There seems to be a growing popular demand for the enactment of a statute not only to remove some of the uncertainties now prevailing in the law with reference to joint bank accounts but also to facilitate the use of such accounts in order to

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64 The statute requires that such contracts be in writing; that the wife's acknowledgment and privy examination be taken; and that the certifying officer incorporate in his certificate a statement of his conclusions of fact as to whether or not said contract is unreasonable or injurious to the wife.
65 N. C. GEN. STAT. § 53-146 (1950).
66 Senate Bill 29.
67 House Bill 65.
68 This statement was made by Mr. William F. Womble, an attorney of Winston-Salem, N. C., in a paper on joint bank accounts read by him at the thirty-seventh Annual Conference of the Association of Superior Court Clerks in Asheville, N. C., July 7, 1955.
pass the account to the survivor of the joint depositors. Obviously such a statute will have to be carefully drawn to obviate the serious objection already raised to this type of legislation. In any event, we do not believe that the joint bank account, utilized mainly for convenience by husband-and-wife depositors, is intentionally employed by them as a device for defrauding or defeating their creditors.