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Joint Tenancy—Joint Deposits—Rights of Adminsitrator Against Survivor

on the dollar. Although the receipt of dividends after such unauthorized procedure would be effective to constitute an estoppel to contest the validity of the sale by the trustee in bankruptcy, still it is very unfortunate that the Circuit Court of Appeals did not specifically denounce the practice as being contrary to law, for the silent acquiescence in it may lead other bankruptcy courts and referees into serious error. G. W. S., '33.

JOINT TENANCY—JOINT DEPOSITS—RIGHTS OF ADMINISTRATOR AGAINST SURVIVOR.—Deceased had deposited sums of money with a bank, receiving in return time deposit certificates payable to the order of herself. Some time later she came to the bank and told the cashier she wanted to arrange it so that her husband could get the money in case she died. The cashier then cancelled the old certificates and made out a new one "payable to the order of herself . . . or . . . her husband." After her death a dispute arose as to whether the money belonged to her husband or to the administrator of her estate. *Held,* that it passed directly to her husband by right of survivorship. *Murphy v. Wolfe* (Mo. 1932) 45 S. W. (2d) 1079. In dealing with the Missouri statute providing that when a deposit is made in the name of the depositor and another and in form to be paid to either or the survivor it becomes their joint property and on the death of either is payable to the other, [R. S. Mo. (1929) sec. 5400], the Court held that this statute did not apply in the principal case because of the narrow construction placed on that statute in previous cases by the Missouri courts. In order to come within the purview of the statute, as construed by these earlier decisions, the deposit must be made *in form* to be paid to either or the survivor of them. *Ambruster v. Ambruster* (1930) 326 Mo. 51, 31 S. W. (2d) 28; *Mississippi Valley Trust Co. v. Smith* (1928) 320 Mo. 989, 9 S. W. (2d) 58. Consequently the decision is based on the common law, that is, non-statutory law.

When money is deposited by *A* to be paid to *"A or B,"* there is a wide divergence of opinion among the courts as to *B*'s right of direct survivorship on the death of *A*. *B*'s right to the money has been sustained or denied on the basis of one of four theories, the gift theory, trust theory, testamentary theory, or joint-tenancy theory. The majority of decisions hold that in order to sustain *B*'s right to the fund without its passing through administration, the transaction in creating *B*'s interest must constitute a gift. *Commercial Trust Co. v. White* (N. J. Eq. 1926) 132 Atl. 761; *McLeod v. Hennepin County Sav. Bank* (1920) 145 Minn. 299, 176 N. W. 987; *Pearre v. Grossnickle* (1921) 139 Md. 274, 115 Atl. 49; *Wolfe v. Hoefke* (1923) 124 Wash. 495, 214 Pac. 1047. Some decisions have held that even though there is not sufficient delivery to constitute a gift, it may be sustained as a trust. *Connea v. San Francisco Sav. & L. Soc.* (1924) 70 Cal. App. 180, 232 Pac. 755; *Ladner v. Ladner* (1921) 128 Miss. 75, 90 So. 593. The soundness of this theory is questionable in view of the modern view that equity will not create a trust out of an imperfect gift.

Howard v. Dingley (1922) 122 Me. 5, 118 Atl. 592. Still other courts have refused to sustain *B*'s right of survivorship on the ground that the transaction is an attempted evasion of the Statute of Wills in passing an interest in property to arise upon death without doing so through the medium of a will signed and witnessed according to the requirements of the law. *Howard v. Dingley, supra; Grady v. Sheehan* (1917) 256 Pa. 377, 100 Atl. 950. A fourth group of cases, which is rapidly growing in number, holds that all that is necessary to sustain *B*'s right of survivorship is that *A* intended to create a present joint tenancy with the attributes of that relationship. *Deal v. Merchants & M. Sav. Bank* (1917) 120 Va. 297, 91 S. E. 135; *Wisner v. Wisner* (1918) 82 W. Va. 9, 95 S. E. 802; *Chippendale v. North Adams Sav. Bank* (1915) 222 Mass. 499, 111 N. E. 371. In addition to the conflict among all the cases as to which theory is applicable to the problem, there is much disagreement among those cases adhering to the gift theory as to the degree or kind of delivery and passing of title required to effectuate a gift of such an interest, some courts strictly requiring all the elements of delivery and acceptance required for the gift of ordinary chattels, *Godwin v. Godwin* (Miss. 1926) 107 So. 13, while others practically dispense with the necessity of any real delivery. *McLeod v. Hennepin, supra.* A most interesting feature of the decisions is that not unfamiliar phenomenon—oscillation from one theory to another by courts of a single jurisdiction. For instance, in the case of *Chippendale v. North Adams Sav. Bank, supra,* the Massachusetts court seemed to commit itself to the joint-tenancy theory; but in the later case of *Bradford v. Eastman* (1918) 229 Mass. 499, 118 N. E. 879, it enunciated the gift theory. Moreover, the courts frequently do not make it clear on which basis the case is decided. It is not unusual to find courts requiring only an intention to create a joint tenancy or joint interest, although speaking in terms of gift. See *Commonwealth Trust Co. v. Du Montimer* (1916) 193 Mo. App. 290, 183 S. W. 1137; *Hallenbeck v. Hallenbeck* (1915) 103 App. Div. 107, 93 N. Y. S. 73. Most of the confusion in this field would have been eliminated if the courts had from the beginning recognized the true nature of the relationship. *A* simply gives a sum of money to *X*, the bank, which thereby becomes the debtor. The debtor is told to pay the money to either *A* or *B*. *A* and *B* thereby become joint tenants, or joint owners, of the chose in action. Nor is there anything in this contrary to the spirit of either the Statute of Frauds or the Statute of Wills. The purpose of these statutes was to guard against frauds and perjuries, not merely to enable an executor or administrator to receive a commission. There is nothing in this transaction which makes any peculiar opening for fraud. This is the view of the decisions adhering to the joint-tenancy theory, holding that the depositor need only be shown to have intended to create a joint tenancy in the account or deposit. The principal case is only another among a rapidly-increasing number of decisions taking this preferable view.

The decision is to be welcomed also for its effect in crystallizing the law in Missouri. First, it reiterates the prior holding that to come within the

operation of the statute of Missouri the account or certificate must be made "in form" payable to either or survivor; if a case is within this requirement the statute creates a presumption that the depositor intended to create a joint interest. As to those cases not affected by the statute, the Missouri Courts of Appeals have in the past wavered between the joint-tenancy basis and the gift basis. See *Craig v. Bradley* (1910) 153 Mo. App. 586, 134 S. W. 1081; *Commonwealth Trust Co. v. Du Montimer, supra; Martin v. First Nat. Bank* (1921) 206 Mo. App. 629, 227 S. W. 656. The Supreme Court of Missouri seems to have settled the matter by its statement that the burden which the survivor must sustain at the trial to establish the gift of a joint interest in a deposit with the resultant right of survivorship is that of proving merely the depositor's "intention of creating a joint tenancy . . . with the right of survivorship." The fact that the depositor's main purpose in changing the account to a joint one was that the other party should receive it directly on her death without its passing through administration will not prevent the survivor from receiving it on the death of the depositor. *Murphy v. Wolfe,* above.

J. D. F., '32.

NEGOTIABLE INSTRUMENTS—CONDITIONAL DELIVERY—PAROL EVIDENCE—"MERGENCE" CLAUSE.—In the case of *J. B. Colt Co. v. Gregor* (Mo. 1931) 44 S. W. (2d) 2 the defendant had purchased a carbide plant from the plaintiff under a contract which declared expressly that the contract covered all agreements. When the Company had accepted the contract, the defendant executed a note for the purchase price, in accordance with the terms of the contract, and delivered the note to the Company's agent upon an oral understanding that the defendant was to keep the machine a year and that, if it proved unsatisfactory, he could reject it and have his note back. The machine proved entirely unsuitable. In this suit on the note, the defendant sets up a three-fold defense based upon failure of consideration, breach of warranty, and conditional delivery. The case was actually litigated upon the third defense alone. The trial court admitted over plaintiff's objection parol evidence of the conditional delivery. *Held:* Since the contract was complete on its face and provided that it covered all agreements, it was error to admit parol evidence of the condition.

As the Supreme Court of Missouri admits the proposition that as between the original parties parol evidence is admissible to show a conditional delivery of the instrument and a failure of the condition is too well established to be doubted. This has been codified by the Negotiable Instruments Act, section 16. See R. S. Mo. (1929) sec. 2645. The decision is hardly more than an arbitrary determination that this principle is inapplicable where the negotiable instrument arises out of a contract which has a so-called "mergence" clause.

It is doubtful whether the process of judicial legislation ought to be exercised to attain such a result. It has been repeatedly said by the courts that,