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Joint Tenancy in Washington Bank Accounts

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JOINT TENANCY IN WASHINGTON BANK ACCOUNTS

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A PROMISE to repay money upon demand may be made to the lender or to more than one promisee. The lender may be said to be the owner of the promise or the chose in action, but the fact that there are two or more promisees does not make them joint promisees or joint owners of the chose in action. Although the debtor is liable only for the total amount he promises to pay, the promisees are severally entitled to payment, if the promise is to pay either of them.[1] When the promisees are named as depositors and the debtor is a bank, recent legislation provides that the deposit is "the property of such persons as joint tenants with the right of survivorship."[2] Prior legislation had made similar provision for mutual savings banks[3] and savings and loan associations.[4] This 1951 statute covers national and state banks, trust companies, and all banking institutions subject to the state supervisor of banking. It applies to both savings and commercial accounts. What is this statutory creature, the deposit owned in joint tenancy with right of survivorship?

Absent statutory provision, a contract creating a bank account payable to either of two or more persons, has a very limited effect in Washington. The right to be paid conferred by the contract is not the same as ownership of the obligation to pay, and is not a power to obtain title to the funds realized by drawing on the account. If *A* deposits his funds and the bank agrees to pay *A* or *B*, although *B* has the power to reduce the balance or liquidate the account, he has no other interest in the account and no interest, except possession, in the funds realized from the reduction of the credit.[5] The only effects of the contract are to alter the form of *A*'s assets into a bank credit and to give *B* the power to reduce or exhaust that credit. The bank credit belongs to the one who furnished the consideration for it, even if the contract with the bank entitles another to draw upon that credit.

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[1] RESTATEMENT, CONTRACTS § 128 (1932).

[2] Wash. Laws 1951, c. 18, p. 36, approved February 19, 1951.

[3] REM. REV. STAT. § 3348 (3) [P. P. C. § 316-45]; Wash. Laws 1915, p. 568, *reenacted* Wash. Laws 1929, p. 280.

[4] REM. REV. STAT. (1945 Supp.) § 3717-159 [P. P. C. 45 § 453-29]; Wash. Laws 1933, p. 729; Wash. Laws 1945, p. 671.

[5] Myers v. Albert, 76 Wash. 218, 135 Pac. 1003 (1913); Wolfe v. Hoefke, 124 Wash. 495, 214 Pac. 1047 (1925); Daly v. Pacific Savings and Loan Ass'n, 154 Wash. 249, 282 Pac. 60 (1929).

Assets used to establish or maintain a bank account may be owned severally, or by tenancy in common, or as community property. In Washington, tenancy by the entireties is superseded by the community property system, and joint tenancy has in practical effect been converted into tenancy in common by the statutory provision that "if partition be not made between joint tenants, the parts of those who die first shall . . . descend, or pass by devise, and shall be subject to debts . . . and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common, provided, that community property shall not be affected by this act."[6] Thus, if the contract with the bank creates a chose in action owned in the same way as the funds used to purchase it, bank credits may be severally owned, or they may be assets owned in common, or they may be community assets. The agreement of the bank to pay any person named as depositor does not alter the ownership of the credit. If such a person did not furnish any of the consideration for the obligation of the bank, he might be considered merely an agent of the owner to collect from the bank.

An act of 1917 applicable to national banks, state banks, and trust companies provides for the bank to pay either of two or more persons, named as depositors, even after the death of one of them, where the deposit was in their names as depositors and payable to any of them.[7] A 1915 statute makes similar provision for mutual savings banks, where the deposit is made in the name of the depositor and another person, and in form to be paid to either or the survivor of them.[8] The effective language is quoted below, italicizing the terms of the 1915 act that are not repeated in the 1917 act, and bracketing the additional terms in the 1917 act:

> . . . may be paid to *either during the lifetime of both or to the survivor after the death of one of them* [any of said persons, whether the other be living or not], and such payment and the receipt or acquittance of the *one to whom such payment is made* [persons so paid] shall be *a* valid and sufficient release and discharge *to such savings bank for all payments made on account of such deposit prior to the receipt by such savings bank of notice in writing not to pay such deposit in accordance with the terms thereof* [of such corporation for any payment so made].

Thus the "agent for collection" is by statute given power to collect even after the death of the real depositor, the one who purchased the

[6] REM. REV. STAT. § 1344 [P. P. C. § 681-1].
[7] REM. REV. STAT. § 3249 [P. P. C. § 309-59]; Wash. Laws 1917, p. 293.
[8] See note 3 *supra*.

bank credit. But the 1917 statute did not confer upon him any interest in the chose in action other than the power to collect.[9]

The 1915 mutual savings bank statute, however, goes further in giving rights to the survivor. And similar language is employed in the 1951 act[10] applicable to savings and commercial deposits in national and state banks, trust companies, and all banking institutions subject to the state supervisor of banking. The italics below show language in the 1915 act not repeated in the 1951 act, and the brackets show new language in the 1951 act:

> . . . The making of *the* [such] deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such *savings* bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor.

Thus the common law rule that the ownership of an asset is not changed by the contract of deposit with a bank, converting the asset into a bank credit, has been altered. If the contract names two persons as depositors and makes the obligation payable to either or survivor, a survivorship interest is created. The 1915 mutual savings bank statute was applied in *Winner v. Carroll.*[11] In that case Winner opened two accounts by transfer of his credit from other accounts. The contract made the accounts payable to Winner or Carroll or the survivor. Carroll did not contribute to them, but after Winner's death closed them and did not account for the proceeds to anyone. Winner's brother sued Carroll. The court held that under the statute Carroll had the right to the balance at Winner's death. Thus the statute not only protects the bank in its payment of the survivor according to the terms of the contract, but invests the contract with an effective intent to give the survivor complete ownership of the balance at the death of the first decedent. This case should be determinative of the effect of the parallel 1951 statute.

These statutes contain further language in conjunction with the language quoted above, which seems to alter the common law rule even further. This language is quoted below, using italics for terms exclusively 1915, and brackets for 1951:

> . . . such deposit and any additions thereto made by either of such persons after the making thereof, shall become the property of such persons as

[9] *In re* Ivers, 4 Wn.(2d) 477, 104 P.(2d) 467 (1940).
[10] See note 2 *supra.*
[11] 169 Wash. 208, 13 P.(2d) 450 (1932).

joint tenants [with the right of survivorship], and the same, together with all *dividends thereon* [interest thereof, in the case of savings accounts], shall be held for the exclusive use of such persons and may be paid to either during the lifetime of both or *to* the survivor after the death of one of them. . . .

What is the significance of providing that the prescribed form of deposit (making the account payable to either or survivor) creates a joint tenancy of the account? It would seem to mean, for example, that if *A* makes the deposit in the names of *A* and *B*, payable to *A* or *B* or survivor, the contract with the bank not only gives *B* the right to payment of the account but constitutes an assignment to *B* of an interest as joint tenant of the obligation of the bank. Similarly, if *A* deposits funds of the community of *A* and *W*, his wife, naming *A* and *B* as depositors, *B* would obtain the same interest. Or if *A* deposits funds contributed by *A*, *C*, and *D*, naming *A* and *B* as depositors, *B* would obtain the same interest. The interest of *B* as joint tenant with *A* is equal to that of *A*. If *B* assigns his half-interest in the account to *X*, does *X* become a tenant in common of it, thus defeating survivorship, or does the statutory provision of survivorship still apply? To put it another way, if *B* then survives *A* and terminates the account, must he respond to a claim by *X* for half the funds so realized? Or, if *A* survives *B*, does the inter vivos assignment to *X* cut down *A*'s survivorship rights to half of the balance at the death of *B*? If the statutory provision for survivorship, which is dependent upon the form of the contract with the bank, is controlling, then one of the rights of a joint tenant, that of severance, is missing.

Another question arises concerning the provision that the persons named as depositors are joint tenants. The form of the contract, and the acquittance provisions protecting the bank, confer upon either of the tenants the power to reduce the chose in action to possession by drawing on the account. If the exercise of this power be regarded as analogous to ouster of the other co-tenant, it is inconsistent with his rights of partition, an incident of co-tenancy at common law. Perhaps the solution here is to regard the funds so realized as held for both tenants, where they are in excess of half of the balance in the account.

If choses in action are considered as subjects of property and capable of being held in joint tenancy, it would appear that by its contract the bank conveys the chose to the persons named as depositors, thus conferring upon the tenancy unity of time and title. If the tenancy is a

true joint tenancy, the requisite unity of interest would result by the terms of the statute. The several rights to payment, however, cast some doubt upon the unity of possession. Moreover, a question as to the unities of time and title is presented when the name of a new depositor is added to an account. This occurred in *Nelson v. Olympia Federal Savings & Loan Ass'n.*[12] This case involved the application of the savings and loan association statute enacted in 1933.[13] Larson opened the account in his own name in 1924. Deposits and interest were added for ten years. In 1934 he changed the account to Larson or Nelson, executing an instrument that recited ". . . this is now a joint account, withdrawable by either party, regardless of death or disability of the other party." Larson died. The court said that they had been joint tenants, and held that Nelson was entitled to the balance as against Larson's administrator, following the *Winner* case.[14] Since the 1933 act was not retroactive,[15] it must be assumed that the 1934 account was treated as an entirely new obligation of the bank. However, since there was probably no new consideration, the result seems strained. If the obligation of 1924 be regarded as continuous, Nelson's title was derived from a separate conveyance and at a different time.

The suspicion that the persons named as depositors are not true joint tenants is supported not only by the difficulties outlined above, but by what the court said in the *Winner* case: "that a joint tenancy, once created, is irrevocable; that a deposit in the form prescribed by the statute raises the presumption of a joint tenancy, but that the presumption may be rebutted by evidence of a contrary intention if asserted during the lifetime of both depositors; that after the death of either depositor the presumption becomes conclusive."[16] The conclusiveness of the presumption after the death of a depositor, when taken with the holding that the survivor is entitled to the balance at death, seems to mean no more than the right of survivorship in that balance, without reference to the inter vivos interests in the account. Likewise, the statement that the joint tenancy, once created, is irrevocable, seems to mean that as to the balance at the death of the first decedent the tenancy, unlike a common law joint tenancy, cannot be

[12] 193 Wash. 222, 74 P.(2d) 477 (1938).
[13] See note 4 *supra.*
[14] See note 11 *supra.*
[15] Tacoma Savings and Loan Ass'n v. Nadham, 14 Wn.(2d) 576, 128 P.(2d) 982 (1942).
[16] 169 Wash. 208, 216-217, 13 P.(2d) 450, 453 (1932). The quotation is a summary of the majority and concurring opinions in Moskowitz v. Marrow, 251 N. Y. 380, 167 N. E. 506, 66 A. L. R. 870 (1929), which the court approved.

converted into a tenancy in common; or the right of the survivor cannot be defeated by the assignment of an interest in the account. That is, the statute creates a right of survivorship in the balance upon survival, but because it cannot be defeated by assignment, the preceding "estate" is not a joint tenancy in the common law sense, there being no rights of severance. Further, a deposit in the form prescribed by the statute raises only a presumption of whatever kind of joint tenancy there is.

Thus it is clear that the statutes create a right of survivorship arising from the form of the contract with the bank. It has been held that for purposes of taxation this right arises at the time that contract is made, and not at the death of the first decedent.[17] That case goes upon the theory that each of the two tenants has a complete interest in the whole of the account, and upon the death of one of them the other obtains no new interest. In fact, all of the foregoing cases involving a question as to the application of these statutes refer to the interest of the persons named as depositors as a joint tenancy, and consider these statutes as qualifying the statute that abolishes survivorship as an incident of joint tenancy.[18] One case[19] even uses that statute to decide that the form of the contract with a savings and loan association, prior to the 1933 savings and loan statute, does not determine the rights of the persons named as depositors, instead of using the well established common law rule.[20] However, in all of these cases the only question raised was as to the balance at the death of the first decedent. In none of them did the court have to deal with the question of inter vivos withdrawals.

Munson v. Haye[21] was a case of the application of the 1933 savings and loan statute to inter vivos withdrawals. Mrs. Munson deposited community funds with a savings and loan association, under a share purchase agreement naming Mrs. Munson and her husband as joint holders. Mrs. Munson subsequently terminated the account and established a new one in the names of herself and Haye, on the basis of an instrument signed by her, which directed the association to pay Haye the entire balance including interest. Mrs. Munson died, survived by her husband, who claimed the fund as executor. Haye had terminated the new account and established one for the same amount in her own

[17] *In re* Peterson's Estate, 182 Wash. 29, 45 P.(2d) 45 (1935).
[18] See note 3 *supra.*
[19] See note 15 *supra.*
[20] See cases cited in note 5 *supra.*
[21] 29 Wn.(2d) 733, 189 P.(2d) 464 (1948).

name exclusively, after the death of Mrs. Munson. The statute at that time provided:

> Two or more persons may jointly become members in an association and such persons shall enjoy the same rights as though the shares had been issued to an individual member and unless written instructions to the contrary are given . . . any of such persons may exercise the rights of ownership, transfer and withdrawal incidental to such ownership without the other joint holders joining therein, and in the event of death, the survivor or survivors may exercise all rights incidents to such stock. . . .[22]

In the *Nelson* case[23] the court held that this statute provides for survivorship in savings and loan accounts as does the 1915 statute for mutual savings accounts, and said that the parties are joint tenants. Nevertheless, Mr. Munson, as executor of the estate of Mrs. Munson, won. When Mr. and Mrs. Munson jointly became members in the association, any presumption that they were joint tenants would be destroyed by the fact that community funds were deposited. "Clear, certain, and convincing" evidence would be required to establish that they "intended to change the status of community property by giving to either the right to appropriate all or any part of the account to his or her own use and to divest the other of all interest in the part so appropriated." As previously pointed out, such a right would itself be inconsistent with the rights of the other joint tenant at common law, if its exercise is regarded as analogous to an ouster. So far as this case goes, the holding is in line with the older authority that the contract with a bank or savings institution does not determine the rights of the parties in the account. Although the statute alters that rule as to the balance at the death of the first decedent, it creates no more than a presumption as to the balance as of any previous time. This presumption is rebutted by showing where the funds came from. The account has the same status as the funds used to create it.

If the same rule is applicable alike to community funds, separate funds and funds owned in common, the so-called "joint account" statutes[24] do not authorize the creation of a joint tenancy as at common law but only a right of survivorship and a presumption that the account is owned in equal shares. This right of survivorship is the right to the balance existing at the death of the first decedent. This presumption is

[22] See note 4 *supra.*

[23] See note 12 *supra.*

[24] See notees 2, 3, and 4 *supra.* The current savings and loan statute, enacted in 1945. specifically states that the parties are joint tenants with right of survivorship, in accordance with the *Nelson* case, note 12 *supra.* The *Munson* court said that the change in language is immaterial.

rebuttable and is applicable only to inter vivos withdrawals. The presumption is rebutted by showing the source of the credit with the bank or savings institution. Thus in effect the contract with the bank or savings institution creates a right of survivorship as a matter of property ("conclusive evidence" of intent to vest title in the survivor) and a rule of construction as to inter vivos rights. But the rule of property as to inter vivos rights remains as before the statutes: the contract of deposit does not operate as a gift of any interest in the account to the co-depositor other than the right to draw on the account.

If the interest in the account cannot be assigned by one of the parties in such a way as to convert the "joint tenancy" into a tenancy in common, and if the power of either party to liquidate the account is equivalent to ouster of a co-tenant, the joint tenancy created by these statutes is not a common law joint tenancy,[25] and the statute abolishing survivorship as an incident thereof is unaffected by the commercial and savings account statutes. Nor is it essential to the right of survivorship that there be a joint tenancy.[26]

Assuming that the statutes authorize only the creation of a right of survivorship and presumption of inter vivos ownership in equal shares, there is not a reintroduction of the doctrine of survivorship as an incident of joint tenancy to the extent that commercial and savings deposits are involved, but there may be posed a question of policy in connection with the statute of frauds and the statute of wills. Is a contract with a bank or savings institution, authorizing payment to either of several persons, adequate memorial of intent to vest in them equal ownership of the credit in the absence of other evidence? The question is unimportant because of the probability that evidence of the source of the credit would be forthcoming. Is such a contract authorizing payment to the survivor of the balance at the death of one of the parties sufficient memorial of intent to vest in him the ownership of that balance? The ease of earlier withdrawal and termination of the account makes the right of the survivor very ambulatory. The court has viewed the creation of similar contractual rights as testamentary and required the formalities of a will.[27] But the legislature has by these statutes resolved

[25] "This right [to make withdrawals] violates the essential character of a joint tenancy or an estate by the entirety. The estate created by these deposits was at most analagous to a joint tenancy, and was not a joint tenancy in the accurate meaning of these words." Marble v. Treasurer, 245 Mass. 504, 139 N. E. 442, 443 (1923).

[26] Burns v. Nolette, 83 N. H. 489, 144 Atl. 848, 67 A. L. R. 1051 (1929).

[27] Decker v. Fowler, 199 Wash. 549, 92 P.(2d) 254 (1939); 14 WASH. L. REV. 312 (1939).

the question in favor of the contract with the bank or savings institution. Their aim, in the words of Mr. Justice Cardozo, is "not to cramp intention, but to give it power to prevail."[28]

[28] Moskowitz v. Marrow, 251 N. Y. 380, 167 N. E. 506, 512, 66 A. L. R. 870 (1929).