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Jus Accrescendi

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Jus Accrescendi

With the Norman conquest and as an element of the feudal system, which followed, there came into England the doctrine of ownership by joint tenancy. Under this tenure each tenant held *per my et per tout,* by the half and by all: each had an undivided moiety of the whole, not the whole of an undivided moiety. A "grand incident" of joint estates was "survivorship" among the individual tenants, *jus accrescendi,* under the theory of which, upon the death of one, full title remained in the survivors, and, ultimately, sole ownership in the last survivor. When the tenants, however, were husband and wife they did not hold jointly, not *per my et per tout,* since under common law, husband and wife were one person, could not hold by moieties, *per my,* but held *per tout.* Consequently, neither husband nor wife could dispose of part without the consent of the other, and the whole remained to the survivor.[1] This applied to personal estate, as well as real estate.[2]

With the growth of liberty and extension of individual rights of property came the abridgement of the authority of the sovereign and a modification of the old feudal tenures. With the great body of the common law, feudal tenures were brought to the American colonies. Moved by the freedom acquired through the Revolution and exercising the new-born security in life and property, the citizens of the republic soon craved release from the fetters of European civilization and custom. Early in the life of

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[1]Blackstone, Commentaries, v. 2, 182, 183.

[2]Id. 399; Jack's Ex'rs v. Arnold, 1 Grant 405; Sloan's Estate, 254 Pa. 346, 349, and cases there cited.

the republic, equity began crowding and modifying the scope and effectiveness of ancient tenures. In 1812, in the case of *Caines v. Grant, 5 Binney 119, at page 122,* Yeates, J., speaking for the Supreme Court of Pennsylvania, said: "In ancient times, courts of law favoured joint-tenancies, in order to prevent the splitting of tenures and services. *1 Wms. 21* * * * * Courts of equity however, had long before been favourable to tenancies in common, wherever they could lay hold of any words to construe it so, from its being a greater equality, a better provision, and preventing estates from going by accident contrary to the intent". In the same case, (p. 125), Breckenridge, J. said: "There would seem to me to be some reason for the right of survivorship, in the case of joint property, in a personal chattel, such as a horse or a servant. But whatever reason there may have been for the principle in the case of real estate, *under feudal tenures,* it would seem to be weakened considerably from what it once was. In England, from whence we derive our jurisprudence, there has been long a leaning against it. It is even termed *odious;* and no wonder; for that the longest liver should take all, can be reasonable only where the tenant dying first, has left no issue to be provided for. But this *jus accrescendi,* or right of survivorship, takes place to the exclusion of even immediate issue, as well as the right of dower".

These expressions indicate the growing tide of sentiment against holding by a title so insecure and uncertain and so obnoxious to a freedom-loving people. The Act of March 31, 1812,[3] removed from joint estates (trust estates excepted) the "grand incident" of survivorship. Relative to the change and the motives impelling it, the remarks of Tilghman, C. J., in *Bambough v. Bambough, 11 S. & R. 191, 192,* made in 1824, are pertinent: "The doctrine of survivorship was so little known to people in general, and so abhorrent to their feelings, when known, that it was thought best to get rid of it, at once. The courts had long been struggling against it, but were unable, without a dangerous

[3] 5 Smith 395; Stewart's Digest, Vol. 2, page 2031.

prostration of established principles, to go as far as they wished. The aid of the legislature was, therefore, necessary". Since husband and wife can not be joint tenants, this legislation did not affect the estate held by them. Although they are two natural persons, they are but one person in law, and, upon the death of either, the survivor takes no new or additional estate.[4] This characteristic of the estate by entireties has not been removed or modified by the so-called Married Women's Acts.[5] It still prevails that neither, without the assent of the other, may abridge the rights or tenure of the other.[6]

It is noteworthy that in *Hetzel v. Lincoln, 216 Pa. 60,* it is held (1) that the Married Women's Act of June 8, 1893,[7] is not applicable; (2) that, notwithstanding the conveyance to husband and wife "jointly", they held by entireties and not "jointly" or in common, and (3) that "whatever may have been the intention of the husband", (in conveying to the wife an "undivided one-half"), "the right of the wife was fixed by the deed from Reed", while, *Blease v. Anderson, 241 Pa. 198,* still holding (1) that that Act "does not abolish or affect estates by entireties * * * * where the grant *expressly or in effect* creates such an estate", decides (2) that "the expressed intention of the grantor to the contrary" (of an estate by entireties) does render operative and effective that Act as to the wife's power to receive and hold otherwise than as theretofore, and is determinative of the character of the estate held by the husband and wife, grantees. We reach the conclusion, as indicated in *Gasner v. Pierce, 286 Pa. 529, 531,* that (1) an estate by entireties having been established, unity of person of husband and wife still exists, and the so-called Married Women's Acts are inapplicable; and the further conclusion (2) that the intent of the grantor, as gathered from his conveyance, is determinative of the estate held by his

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[4]Stuckey v. Keefe's Ex'rs, 26 Pa. 397.

[5]O'Malley v. O'Malley, 78 Pa. Super. Ct. 10, 13; Gasner v. Pierce, 286 Pa. 529, 531.

[6]Beihl v. Martin, 236 Pa. 519, 527.

[7]P. L. 344.

grantees, and (3) that, an estate other than by entireties being intended, the said Acts apply.

The rights under this estate are not affected by National Bankruptcy Acts[8] nor by Federal Inheritance Tax laws where the estate is recognized by the laws of the State.[9]

Where husband and wife hold real estate by entireties, either may lease, but both are entitled to the rent. Collection by either works an acquittance of the tenant. Each is under presumed authority to act for the other, and is accountable to the other for the rents collected.[10]

This right to lease and collect is not an incident of the estate, but arises from such an incident, namely, that the rent belongs in its entirety to each and not exclusively to either, and, both being one, either may receive for both.[11]

While joint estates were thus stripped of a distinguishing attribute, *jus accrescendi,* many have since sought the benefit of that attribute through the estate by entireties. Purged of the odium of general applicability, the right of survivorship was accepted as a desirable attribute to a title held by husband and wife. Inalienability by one alone, full protection against debts of individual tenants, avoidance of the necessity of transfer under administration laws, exemption from State and Federal inheritance taxes, and a sense of security in title, were elements in the preservation of this ancient tenure.

It was soon accepted as a safe and comfortable haven for the husband and wife embarking upon life's journey. It was also soon discovered that reckoning must be had with storms and adverse currents. Under our jurisprudence divorce was recognized. Since the original estate knew no divorce, it was in no sense affected by divorce, but continued until the death of either husband or wife.[12]

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[8]Snowberger v. Hartman, 11 D. & C. 713.

[9]U. S. v. Prov. Trust Co., Circuit Court of Appeals, 3rd Circuit, No. 4009, decided Oct. 4, 1929.

[10]Gasner v. Pierce, 286 Pa. 529, 535.

[11]O'Malley v. O'Malley, 272 Pa. 528, 532, 533.

[12]Alles v. Lyon, 216 Pa. 605, 606.

It now appeared that the estate was more secure than understood or, in many cases, than desired. To relieve this locking of title, in the case of divorce, legislation was again sought. Acts of Assembly followed as follows: May 24, 1923,[13] May 13, 1925,[14] and May 10, 1927.[15]

The reasons enumerated moved others, not husband and wife, to procure for themselves the same advantages. What formerly had been an incident to a joint estate, was now made the object of testamentary disposition and of contract. In 1854 it was held,[16] as to *"jus accrescendi"*: "It may cease to exist as an incident, and yet be legally created as a principal". Under the devise there considered (to three "as joint tenants and to the survivors and survivor of them, and the heirs of said survivor") it was held that survivorship attached to the title under the devise, not incidentally, but by express grant, and notwithstanding the Act of 1812.[17] In *Jones v. Cable, 114 Pa. 586,* the devise was to two sons, "to them as long as they do live, and after their death to their children". Upon this was based the ruling that survivorship may arise by *necessary implication* from the will. Such necessary implication, however, does not arise from the fact of a devise to two or more persons, *nominatim*.[18] No intendment will be made to establish such implication, but it must arise fairly from the terms of the will.[19]

To the same purpose, parties sought by contract, what no longer resulted as incident to joint estates. In *Redemptorist Fathers v. Lawler, 205 Pa. 24,* it was held that the intent, as revealed by the contract, was determinative of the right of survivorship, and that the covenant to hold

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[13]P. L. 446.

[14]P. L. 649.

[15]P. L. 884.

[16]Arnold v. Jack's Ex'rs, 24 Pa. 57.

[17]Semble, see Kerr v. Verner, 66 Pa. 326; McCallum's Estate, 211 Pa. 205.

[18]Kennedy's Appeal, 60 Pa. 511, 516; Goldstein v. Hammell, 236 Pa. 305.

[19]McVey v. Latta, 4 W. N. C. 524; Sturm v. Sawyer, 2 Pa. Super. Ct. 254.

"as joint tenants and not as tenants in common", sustained such right. Likewise, where the contract provided "to be our joint property and become the property of the survivor."[20] Caroline McIntosh and her niece, each owning separate real estate, conveyed to a third person, who reconveyed all to them as joint tenants with the right of survivorship. Caroline McIntosh having died, title was held to have vested in her niece at the date of the deed and not at the aunt's death.[21]

Courts have been frequently called upon to determine ownership of bank deposits and other personal property, upon claims made under this right of survivorship. The prospect of burdensome levies upon estates under Federal and State inheritance tax laws and the constant extension of the scope of these laws have impelled many to resort to holding property under a title immune to such levies and control. The loss or waste of time, the seemingly unwarranted costs of, and the annoying litigation and uncertainties incident to transfers under administration laws, drew others into the same haven. Many and varied attempts have followed, intended to hold and pass intact the estate of the ancestor to the chosen beneficiary and to circumvent what to them appear to be iniquitous and unwarranted laws.

Relative to bank deposits and the right of withdrawal and ownership thereof, the rulings of our courts appear to have uniformly been: If the deposit stands in the names of two or more, under an agreement amounting to a bare power to withdraw, the power terminates at the death of the grantor, and survivorship does not attach. If, however, the deposit is subject to an agreement providing, expressly or by necessary implication, for survivorship, that right attaches.[22] Under a contract like that in *Mardis v. Steen,* with the additional provision that decedent's *debts* and *funeral expenses be first paid,* it was held in *Grady v. Sheehan, 256 Pa. 377,* the deposit belonged not to decedent's sister,

[20] Leach's Estate, 282 Pa. 545.
[21] McIntosh's Estate, 289 Pa. 509.
[22] Mardis v. Steen, 293 Pa. 13.

whose name it bore, but to decedent's personal representative. In *Flanagan v. Nash, 185 Pa. 41,* the deposit stood in the names of decedent and another and was subject to the notation "Either to draw". There appeared, though with no indication of approval or authorization by decedent, notations as to ownership. Held, the property of the decedent's estate and not of the survivor.

Though decided on another point, *Strause's Est., 75 Pa. Super. Ct. 276,* involved a bank deposit in the names of "Esther M. Hain or Margaret Strause". Testimony was submitted establishing a covenant to hold to the survivor and the deposit was awarded to Margaret Strause. The deposit was shown to have represented proceeds of real estate sold by mother, life tenant, and daughter, remainderman.

The deposit stood in names of " James - - or Margaret - - ", brother and sister. James died. Parol evidence of his declaration as to survivorship was produced. The deposit was awarded to Margaret.[23]

Relative to deposits held by entireties, we find:

In *Pa. Trust Co. v. Mischik, 96 Pa. Super. Ct. 255,* a bank deposit "In account with Annie, Andrew Mischik, either", husband and wife, was awarded to the wife, upon the death of the husband, notwithstanding the husband had deposited $1200.00, had given his judgment note, assigned the savings account as collateral, and delivered the pass book. Citing authorities, the court concluded: "Neither can divest himself or herself of any part without in some way infringing upon the rights of the other. - - - Neither - - had the right to - - pledge the account for - - debt".

Under authority of *Milano, et ux. v. Trust Co., 96 Pa. Super. Ct. 310,* it should be noted that a deposit in the names of husband *and* wife, may not be withdrawn, by either, during the life of the other, in the absence of an agreement providing for such withdrawal.

Where funds thus held were withdrawn by one and

[23]Bailey's Estate, 86 Pa. Super Ct. 322.

bonds purchased, the bonds were held the property of the survivor.[24]

Certificates of deposit taken by a husband payable to "himself *or* wife", at his death were decreed to his widow, the survivor.[25]

Whether the deposit stands to husband *and* wife, or to husband *or* wife, they hold under rights of survivorship. If *or*, either may draw in the lifetime of the other, but the undrawn balance belongs to the survivor.[26]

"It is an old and well-established maxim that *Jus accrescendi inter mercatores locum non habet.*[27] This doctrine has been modified in some jurisdictions, where, as in New York,[28] *jus accrescendi* is regarded as including a partner's right to survivorship to goods and chattels of the partnership, at least *until the close of liquidation.* With us it is held that the surviving partner "becomes the agent of the defunct firm for the purpose of disposing of its assets, paying its debts, and settling it up, and for this purpose the title to such assets is vested in him - - ".[29]

Thus we note that the one-time odious tenure, *jus accrescendi,* though scored and limited, has again, in answer to the exigencies of the times, swung back into a position of usefulness, an effective answer to many demands of modern legislation.

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[24]Blick v. Cockins, 252 Pa. 56.

[25]Sloan's Estate, 254 Pa. 346.

[26]Klenke's Estate, (No. 1), 210 Pa. 572, 574.

[27]Lindley on Partnership, *340; Rowley on Partnership, sec. 126.

[28]In re Capria's Estate, 151 N. Y. Supp. 385, 386.

[29]Shipe's Appeal, 114 Pa. 205, 207; Wainwright v. Marine Nat. Bank, 72 Pa. Super. Ct. 221.

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