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Joint Banking Account of Husband and Wife in Pennsylvania

The rapidly increasing use by husband and wife of the medium of a single banking account to care for the needs of both justifies some study of this device and its legal consequences. Since tenancies by entireties are recognized in Pennsylvania in personalty as well as in realty, in choses in action as well as choses in possession, the situation at once suggests this species of property holding. Whether or not these deposits do create such tenancies with the incidents attached by law thereto will be discussed herein.

Not the least of the inducements leading to the creation of tenancies by entireties is the immunity that such property enjoys from the reach of legal process used for the collection of debts of either husband or wife. Not even the expectancy of survivorship is subject to judicial sale on a judgment secured against one of the tenants. The property can be reached only by those creditors who have joint claims against both tenants. This exemption is a necessary conclusion from the general principle that nothing can be taken in execution and sold as the property of a debtor except property over which the debtor has the right of disposition by sale or otherwise.¹ A necessary correlary of this principle would seem to be that if the debtor has such right of disposition, such property can be taken in execution for his debts. To these principles there can be no valid dissent. In a true tenancy by entirety there can be but joint control in disposing of the property and hence it is exempt from execution for the debts of the individual tenants.

These principles are clearly applicable to one character of single banking account created by or in the names of husband and wife. If the single account be created in the

¹Beihl v. Martin, 236 Pa. 519 (1912); impliedly overrules McCurdy v. Canning, 64 Pa. 39 (1870); Alles v. Lyon, 216 Pa. 604 (1907).

names of husband *and* wife, presumptively a tenancy by entireties is created.² This tenancy has not been abolished by the Act of March 31, 1812,³ nor affected by the acts relating to the rights of married women. If in such account there is no agreement that it shall be subject to being drawn on by either, the law will automatically apply the rule of joint control in tenancies by entireties, and only checks signed by both will work an acquittance of the bank.

Such a case is the recent one of *Milano v. Fayette Title and Trust Co.*, 96 Pa. Super. Ct. 310 (1929). There the account was in the names of husband and wife. The bank honored the check of the husband alone and was later sued for refusal to honor a check signed by both. The latter check was refused on the ground that the prior check of the husband had exhausted the account. The court correctly held that the account was a tenancy by entireties and that there could be no disposition of the account by the act of one only.

The other character of single account that is encountered more frequently presents more difficult problems. Such accounts are those in the names of husband *or* wife, or if in the names of husband *and* wife, there is an agreement in the creation of the account, that either may draw thereon. This type may or may not be accompanied, in addition, by a stipulation that the fund is to become, on the death of one, the property of the survivor. Do these accounts create tenancies by entireties with the resulting exemption from execution attachment for the debts of one or do they create some other character of holding that has no such exemption as an incident? If it does create a tenancy by entireties, will the law remove the exemption from involuntary disposition for debts of one since the tenants have by agreement removed the necessity of joint disposition of the account when voluntarily done?

Can there be a concurrent holding by husband and wife other than as tenants by the entireties? That they might

²Parry's Estate, 188 Pa. 33 (1898).

³5 Sm. L. 395; 2 Purdon (13th ed.) 2031.

hold interests in severalty created in them when husband and wife has long been recognized.⁴ For many years, the cases were uniform and without exception, that there could be no concurrent holding by husband and wife, of any property created in them while married, other than a tenancy by entirety. They could not hold as tenants in common nor as joint tenants no matter how clearly such intention was expressed.⁵ The reason invariably given was that such was an unalterable rule of law founded on the rights and incapacities of the matrimonial union. It was said that if such a holding were a tenancy in common, it could have none of the chief incidents of such tenancy:—right to compel partition; liability to reciprocal actions of waste and of account; liability to an action of ejectment; the husband could not sell free of dower of the wife; the wife could not sell her interest at all without the consent of her husband. Such an estate was a legal impossibility. There was but one person in the eyes of the law—not the two necessary for a tenancy in common or joint tenancy.⁶

With the dawn of the new century some doubt was expressed by the Supreme Court as to the correctness of this holding due to the weakening of the marital unity fiction by the Married Women's Property Acts.⁷ The Court, per Mitchell, J., said that the severance of this unity destroyed the reason for the rule. It was left as an open question whether husband and wife might not hold in common, if that were the actual intent.

A later case still allowed the question to remain unsettled, finding that if such were the rule, the intention

⁴Young's Estate, 166 Pa. 645 (1895). Here there was an assignment of a mortgage to husband and wife "as tenants in common". By a strained construction of the assignment, it was held that each took a one-half interest in severalty. See also Rhode's Estate, 232 Pa. 489 (1917).

⁵Johnson v. Hart, 6 W. & S. 319 (1843); Stuckey v. Keefe's Executors, 26 Pa. 397 (1856); Diver v. Diver, 56 Pa. 106 (1867); McCurdy v. Canning, 64 Pa. 39 (1870); and many other cases.

⁶Stuckey v. Keefe's Executors, 26 Pa. 397 (1856).

⁷Merritt v. Whitlock, 200 Pa. 50 (1901).

was not sufficiently shown by conveying to a husband and wife "jointly".⁸

In the case of *Blease v. Anderson*,⁹ there was a conveyance to a husband and wife and the deed expressly provided "that there is hereby conveyed to the said William Anderson an undivided ten-fifteenths part and an undivided two-fifteenths part to the said Rhoda Anderson", the latter already being a tenant in common with the grantor of an undivided three-fifteenths part. The Court said, "At no time since the recent legislation conferring full competency upon married women to take and hold real estate as their individual property, have we ruled that *a conveyance to husband and wife granting distinctly defined, undivided parts or individual estates to each*, must be construed to create an estate by entireties notwithstanding the expressed intention of the grantor to the contrary; far from so holding, all our decisions upon the subject point in the other direction. In the case at bar we concur in the conclusion reached by the learned court below that the grantees did not take by entireties but that each took an individual interest or estate in the property in question, as particularly provided in the deed".

It has been suggested that due to the italicized words, (the italics are our own), the case is authority only for cases with its peculiar facts, i. e., cases where distinct parts are granted to each or where one is already a tenant in common of the property. With this suggestion, we cannot agree. The case discloses that it was the intention of the grantor that controlled. The method adopted was merely one of several that might have been used with like results. It can also be said, that if the marital unity does not prevent the husband and wife from holding as tenants in common in one instance, it cannot in another where the same intention is differently expressed. The case is clearly authority for the statement that the legal unity has been so far severed by recent legislation that husband and wife

⁸Hetzel v. Lincoln, 216 Pa. 60 (1906).

⁹241 Pa. 198 (1913) per Moschzisker, J.

may hold as tenants in common if such be the intention. If they may take as tenants in common, surely they may take as joint tenants if such be the intention. Such is the law of other states with similar legislation.¹⁰ *Blease v. Anderson* has apparently not been referred to in Pennsylvania since it was decided. It has been cited by one court in another jurisdiction.¹¹

We may conclude then, that in Pennsylvania, whether or not a concurrent ownership by husband and wife is a tenancy by entireties, a tenancy in common or a joint tenancy depends on the intention shown in the creation of such ownership. The presumption will still exist that concurrent ownership of property is to be a tenancy by entireties unless the contrary is shown. Those cases decided prior to 1913 that held that the expression "jointly" was insufficient to prevent a tenancy by entireties from arising,¹² would doubtless continue to be the law to-day, especially in view of the loose usage of the term "jointly".¹³ Many of the other cases can no longer be considered as authority.¹⁴

Where a bank account is created in the names of husband and wife, with an agreement that either may draw, what is the effect of the *Blease* case? One of the most important incidents of a tenancy by entireties is the absence of separate control. If the parties stipulate, in the creation of an estate, that one of the vital ear-marks of such a tenancy is not to be present, but that instead one of the legal incidents of a tenancy in common or joint tenancy is to be present, can there be any doubt that they are

¹⁰*Taylor v. Lowencamp*, 145 Atl. 329 (N. J. 1929); *State v. Rahl*, 124 S. E. 566 (N. C. 1924); *Myers v. Comer*, 234 S. W. 325 (Tenn. 1921).

¹¹*Goodman v. Greer*, 105 Atl. 380 (Del. 1918), where it is cited as holding that husband and wife may hold as tenants in common. This case is an excellent one reviewing the authorities in various states, all reaching the same conclusion.

¹²*Hetzel v. Lincoln*, 216 Pa. 60 (1906) and others.

¹³*Pa. Trust Co. v. Mischik*, 96 Pa. Super. Ct. 255, at 258 (1929).

¹⁴*Stuckey v. Keefe's Executors*, 26 Pa. 397 (1856) and others.

thereby intending to create a joint tenancy rather than one by entireties? The matter lies completely in their hands and they impress upon the ownership a vital characteristic of a joint tenancy.¹⁵ Their intention should control.¹⁶ Suppose they stipulate for separate checking and call it a tenancy by entireties? As usual, the name it is called should not control but the legal intention as shown by the separate control.

One objection that may be pressed against such a conclusion is that the Act of March 31, 1812,¹⁷ will then affect the joint tenancy and remove the right of survivorship. But the mere fact that such will be the case is not a valid objection. Such was the purpose of the Act. The Act, moreover, does do more than raise a presumption against such survivorship, leaving the parties free to stipulate for the presence of such a right.¹⁸ Those accounts stipulating for separate checking and making provision for survivorship will thus create a joint tenancy with survivorship. Several of the recent cases may be easily explained on this ground, although it is true that several contain expressions that such a holding is one by entireties.¹⁹ If there be particular solicitude for this right of survivorship as between husband and wife, it might be held, and surely with no more straining than in many of the cases already decided under

¹⁵See *Marble v. Jackson*, 139 N. E. 442 (Mass. 1923) for an objection to calling it a joint tenancy. The objection is the ability to end the tenancy without consent by withdrawing all of the funds. But such consent has been given at the creation. The case is inconclusive and calls the estate a "quasi" joint tenancy.

¹⁶See *Watts v. Horn*, 30 Pa. Dist. Repts. 325 (1920). In this case the Allegheny County Court holds that unity of control and unity in conveying or encumbering it are vital requisites of a tenancy by entireties. Such being absent, it was not such a tenancy and was subject to attachment on a judgment against one only.

¹⁷5 Sm. L. 395; 2 Purdon (13th ed.) 2031.-

¹⁸*Arnold v. Jack's Admr.*, 24 Pa. 57 (1854); *Redemptorist's Fathers v. Lawler*, 205 Pa. 24 (1903) and *Mardis, Adm'rx. v. Steen*, 293 Pa. 13 (1928). See also *Yard's Appeal*, 86 Pa. 125 (1878).

¹⁹*Donnelly's Estate*, 7 Pa. County Court Repts. 196 (1889); *Blick v. Cockins*, 252 Pa. 56 (1916); *Klenke's Estate*, 210 Pa. 572 (1905); *Sloan's Estate*, 254 Pa. 346 (1916).

the Act of 1812, that since this right of the survivor to the whole of the property has been present in all concurrent holdings of husband and wife prior to 1913, the bare fact that the joint tenants are husband and wife is sufficient to rebut the presumption created by the Act. This secures to them survivorship and separate control but does not permit the free use of the funds immune from execution by individual creditors. We merely suggest this possibility and do not advocate it. It should be held, logically, that survivorship is not present unless it is provided for in the creation of the account.

Another situation already suggested is where the account is in the names of husband *or* wife and nothing is said about separate checking. We would reach the same conclusion as where it was in the names of husband *and* wife with a stipulation for separate checking. Certainly the use of the word "or" sufficiently discloses an intention to allow the account to be drawn on by either, it is a concurrent holding, and should create a joint tenancy.²⁰ Parties should not be permitted to choose those incidents of a tenancy that they think desirable and reject those at their pleasure that are undesirable to them. Getting separate control, they should hold their interest subject to execution by separate creditors. Why may either withdraw the whole deposit at will and yet a creditor not be able to attach the same? Certainly the law is not attempting to create another kind of "spendthrift trust" for husband and wife, although if immunity from execution is allowed it will be such in essence. No valid reason for such an anomaly can be seen. The conclusions outlined above seem to meet that objection.

It is interesting to note that another method of approach has been used in a recent case on the last character of account discussed. In *Penn'a Trust Co. v. Mischik*, 96 Pa. Super. Ct. 255 (1929) there was a savings account in the

²⁰Kennedy's Appeal, 60 Pa. 511 (1869) inadvertently speaks of a tenancy under the Act of 1812 as a tenancy in common. There is a real distinction between joint tenancies and tenancies in common and the Act does not make such into tenancies in common.

names of "Annie, Andrew Mischik, either". They were husband and wife. The Court concluded that the account was held as tenants by the entireties. It was then decided that being such a tenancy it was not subject to the separate control of one but could be affected only by a joint act. The Court, at the conclusion of the case, called the wife a *joint tenant*, not using the term in its literal significance. Instead of calling the account a joint tenancy and subject to separate checking, it was held a tenancy by entireties without the right of separate checking. Such a holding is preferable to one holding it a tenancy by entireties and yet permitting separate checking. We can see no justification, however, for ignoring the clearly expressed intention to permit separate checking by the use of the word "either". The intention should control and surely the word "either" is not superfluous. The construction should be toward other tenancies than one by entireties, if possible.

The Supreme Court cases on this subject have all been concerned with the question of survivorship and not with the attempts of a creditor to attach the account. In one case, the lower court was affirmed *per curiam* and it had used the expression, in dealing with a case of husband and wife but "subject to the order of either or the survivor", joint owners and *joint tenants with survivorship*.²¹ In another, deposits in the names of husband and wife and husband or wife were both treated as tenancies by entireties for the purpose of survivorship.²² In another securities were held in the joint names and they were held to belong to the survivor.²³ The Supreme Court has never had presented to it for decision cases dealing with the rights of attaching creditors as to such accounts and their holdings as to survivorship are therefore not conclusive on our problem.

A Superior Court case intimates that a valid contract may be made to relieve a tenancy by entireties of the pe-

²¹Blick v. Cockins, 252 Pa. 56 (1916). Italics added.

²²Klenke's Estate, 210 Pa. 572 (1905).

²³Rhode's Estate, 277 Pa. 450 (1923).

cular incident of joint control.²⁴ The case is very inconclusive and does not discuss the real effect of such an agreement as possibly making it a joint tenancy.

The specific problem here considered has been before several lower courts for decision. As might be expected, the courts have not been unanimous in their answer to the problem. All, however, disclose a keen appreciation of the anomaly of permitting individual checking with immunity from attachment for individual debts.

The first case holding such an account subject to individual debts was that of *Watts v. Horn*²⁵ arising in Allegheny County. The account was in the names of husband and wife, subject to withdrawal on the check of either or both. Judgment was secured against the husband and execution attachment served on the bank as garnishee. The bank then permitted withdrawal of most of the balance on a check of the wife alone. The court, relying on an Indiana case,²⁶ held that unity of control and unity in conveying or encumbering it were essentials of a tenancy by entireties; that since such unities were lacking by reason of the right of disposition given to each in the creation of the account, it could not be a tenancy by entireties. The court adopted the test of dispositive power to determine liability to attachment and held that the attachment was valid although it did not decide whether the account was a tenancy in common, joint tenancy or interests in severalty. The same court, in a later case,²⁷ impliedly confirms the previous holding. Here the account was held to be a tenancy by entireties, the agreement being "to pay out on check on receipt of us". The court says the result would have been different had the account been subject to the individual check of either.

The Lackawanna County Court has reached the same

²⁴Fredrick's Estate, 54 Pa. Super. Ct. 535 (1913).

²⁵30 Pa. Dist. Repts. 325 (1920).

²⁶Chandler v. Cheney, 37 Ind. 408.

²⁷Osterling v. Van Arsdale, 70 Pitts. L. J. 971 (1922).

conclusion.²⁸ Here the account was in the names of husband *or* wife. It was held that the account was subject to the check of either; that it was not a tenancy by entireties and that the amount of a note made by the husband could be charged against the account.

The earliest lower court decision on the subject held that such an account was exempt from attachment for the debt of one alone.²⁹ The case arose in Philadelphia County. The account was in the joint names of husband and wife; either could draw thereon and survivorship was provided for in the agreement with the bank. It was held that this created a tenancy by entireties and that it was not subject to attachment for the debts of the husband alone. It will be noted that the case was decided when our decisions were all to the effect that husband and wife could hold concurrently only as tenants by entireties. It is an excellent example of what we contend is a joint tenancy with survivorship created by agreement.

The decision making out the best case for such an account creating a tenancy by entireties arose in Washington County.³⁰ The Court makes an objection to our theory, that appears at first glance to be unanswerable. Cummins, J., says, "the fact that neither husband or wife can dispose of any part is not the criterion to determine whether, when they hold jointly, they hold by entireties, but is a consequence which necessarily follows when they take jointly". The use of the word "jointly" is unfortunate as tending to confusion of ideas. The word "concurrently" is free from this objection. The objection that we are using a result of an established tenancy to determine whether such tenancy exists would be real were the foundation for the objection substantial. As clearly shown by the decision, that basis is that the existence of a tenancy by entireties is not a matter of intention but necessarily follows by operation of

²⁸Pilewsky v. Dickson City National Bank, 24 Lack. Jurist 9 (1922).

²⁹Donnelly's Estate, 7 Pa. County Court Repts. 196 (1889).

³⁰Zelt v. Washington National Bank, 4 Pa. Dist. and County Repts. 746 (1923).

law from unity of person. It also states that husband and wife can not be tenants in common or joint tenants but if they held jointly (concurrently) they must be tenants by the entireties. These basic principles utterly ignore the existence of the case of *Blease v. Anderson*. That such is not the law today is too clear for argument. Hence the basis on which the case and its objections to our arguments rests is entirely mythical, since whether it is to be a tenancy in common, a tenancy by entireties or a joint tenancy is solely a matter of intention. The law annexes to each tenancy certain legal characteristics. These cannot be accepted or rejected at the will of those creating the interest. In determining the intention as to the character of tenancy created what safer criterion could possibly be used than looking at which of these immutable incidents they have stipulated shall be present?

This case also says that assent to the disposal of the concurrent property by one only, may be by parol and may be made before as well as at the time of disposal. The argument must be that there is really joint and not individual control of the account in such cases. The argument is unique but untenable. When husband and wife join in a conveyance of realty held as tenants by the entireties neither one is thereby assenting to separate disposition by the other. Which is assenting and which is separately controlling? The argument ignores actualities. It is exactly what it appears on its face to be—joint control. The rules in respect to such tenancies first developed in real property tenancies and such rules were taken over bodily when such tenancies were recognized in personalty. If it is joint control in realty, it requires a similar method in personalty. Joint control is required and not mere assent to separate disposition by the other tenant. If the rule be as asserted by the Court, will the law permit assent to be given to separate voluntary disposition and deny the validity of the assent as to involuntary disposition? If assent be given to separate voluntary disposition does the law not automatically make such assent available to creditors?

Certainly the entire policy of the law, with rare exceptions such as the "spendthrift trust", is that where one has power of disposition generally, the property is also subject to process in favor of creditors.³¹ Hence the decision rests on fallacious reasoning and should not be followed.

The only other case found discussing the problem arose in Dauphin County in 1924.³² This involved an account on which either husband or wife could draw. By considering the principles involved, the Court thought that the account could not be one by the entireties. The Court felt constrained, however, to follow what it conceived the necessary results of Supreme Court decisions³³ and held that the account was owned as tenants by the entireties and as such was not subject to attachment for a debt of the husband alone. The Court failed to consider the effect of *Blease v. Anderson*, which was decided after the first Supreme Court case relied upon by the Court. As has been suggested, the effect of the *Blease* case on situations of this character has never been considered by the Supreme Court nor has the problem been presented except on the issue of survivorship. This lower court case, then, affirms our conclusions on principle and its following of supposed Supreme Court cases to the contrary which were not dealing with the same problem is of questionable soundness.

In still another case³⁴ the account was in the names of husband *or* wife. The husband attempted to assign part of the account as collateral security for the payment of money borrowed. The Court held that the account was a joint deposit (apparently meaning a tenancy by entireties) with right of survivorship and denied validity to the assignment. The same objections may be made to this decision

³¹Beihl v. Martin, 236 Pa. 519 (1912).

³²Williams v. Bross, 4 Pa. Dist. & County Repts. 496 (1924).

³³Klenke's Estate, 210 Pa. 572 (1905); Sloan's Estate, 254 Pa. 346, 349 (1916); also citing Fredrick's Estate, 54 Pa. Super. Ct. 535 (1913) and Donnelley's Estate, 7 Pa. County Court Repts. 196 (1889).

³⁴Roka v. Wilbur Trust Co., 10 Dist. & County Repts. 94 (1927).

as to several of the cases before discussed.³⁵

In a case arising in another jurisdiction,³⁶ a deed was made to husband and wife, "jointly and severally in equal moieties". The issue was the right of the survivor to claim the whole estate. The Court said that it was either a tenancy in common or a joint tenancy, not deciding which one of the two. This was unnecessary as there was no survivorship in joint tenancy. The case would seem to express the law of Pennsylvania today in a similar situation.

In summary, we conclude:—that husband and wife may hold concurrently as tenants in common or joint tenants; that in single bank accounts of husband and wife where the right of separate checking is provided and where the account is husband *or* wife, that a joint tenancy is thereby created; being such, it is subject to attachment for the debts of either; and that the appellate decisions apparently to the contrary are not controlling on this problem. If such be not the conclusions of the courts, the situation can be made tolerable only by action of the legislature in making such accounts subject to execution attachment for separate debts.

³⁵ Ignores intention of parties to have separate control as shown by use of word "or"; fails to consider effect of *Blease v. Anderson*.

³⁶ *Myers v. Comer*, 234 S. W. 325 (Tenn. 1921).

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