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Harold S. Irwin

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CREATION OF CONCURRENT BANK ACCOUNTS*

HAROLD S. IRWIN**

Concurrent tenancies, i. e., when two or more persons have simultaneous interests in the whole of certain property and no separate interests in distinct parts, have been recognized in realty from the earliest days of the common law. The joint tenancy in real property was a favorite of the early common law feudal tenure system. Tenancies by the entireties between husband and wife, tenancies in common and coparcenary estates were recognized early and used widely as means for holding real property. Through such long continued use as real property tenancies, most of the rules as to the creation of such tenancies and the legal incidents of such after creation have become rather well settled and litigation thereon not very frequent. But the use of such tenancies as a means for holding personal property is of relatively recent origin and many of the pertinent questions are still unanswered and many of the cases contradictory and confused. Too much reliance cannot be placed on the cases dealing with real property and analogies must be drawn with care. Two or more people may occupy readily a piece of ground, but possession simultaneously by two or more of a dollar bill involves serious difficulty.

I propose, then, to talk to you for a little while on how to create effectively joint tenancies with survivorship, tenancies in common and tenancies by the entireties in savings and checking accounts in bank deposits. The coparcenary tenancy may be ignored for it is obsolete and has never been used in Pennsylvania. I shall make no distinction between savings accounts and checking accounts for the cases indicate that no distinction is to be made based on this fact. I shall confine myself to a discussion of the Pennsylvania law in which both you and I are interested particularly.

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**Ph.B., Dickinson College, 1923; M.A., Dickinson College, 1925; LL.B., Dickinson School of Law, 1925. Member of faculty of Dickinson School of Law, 1925-—.

A. Theory on Which Their Creation Is Based

There have been three theories suggested on which the creation of such accounts may be based. First, the theory of a trust. Where A, owning money, deposits it in a bank and has the account made out in the name of A and B, it might be said that A is creating a trust of an interest in the account for B. Suffice it to say that no case in Pennsylvania in any way indicates that the trust theory is used to explain the nature of such concurrent accounts. Second, the theory of a contract. This theory is that where A deposits money in a bank and has the account made out in the name of A and B, A is making a contract with the bank for a consideration paid by him, whereby the bank agrees to pay the amount deposited to A and B, as joint promisees. If B is a party to the contract, he is an ordinary joint promisee of a contractual promise. If B is not a party to the contract, then he would seem to be a third party donee beneficiary of the contract jointly with A, the direct promisee. In either case, the validity of the creation of the account would depend upon the establishing of a contract with the bank and the rules of contract would govern. It has been said in Pennsylvania that the only theory that can be used to support the creation of such accounts is the theory of a gift. (*Crist's Estate,* 106 *Pa. Super.* 571). However, in the case of *Mader v. Stemler,* 319 *Pa.* 374, where the money deposited was that of F alone and the account was made out to "F S or J S" pursuant to a signed agreement by both with the bank, the court seems to rely on the theory that the bank contracted to pay F and J as joint promisees. But the case also contains statements about F's donative intent and delivery and the case likely is to be regarded as one supported on a gift theory. Where the money deposited belongs to both depositors at the time the account is opened, the theory is not that of a gift but properly one that the parties have created a contract with the bank and the essentials of a valid gift need not be present. See *Bailey's Estate,* 86 *Pa. Super.* 322. In *Mori's Estate,* 318 *Pa.* 261, where both parties had separate accounts and both were changed into joint accounts, the court said, "The agreement creating the joint accounts with the right of survivorship was freely entered into by both parties with knowledge of its effect and with adequate consideration." In *Grady v. Sheehan,* 256 *Pa.* 377, the agreement between the parties was sealed but without consideration. The court said that in such a case the delivery element required in the gift situation need not be present to make the bank account validly created. Here, however, the court went on to hold that the writing was testamentary in nature and the money was given to the decedent's administrator. Under the most recent Supreme Court cases, all the validly created bank account cases could be supported on the theory of a gift and it is doubtful if Pennsylvania has recognized anything but the gift theory in the creation of concurrent accounts, except by dicta.

B. Creation of Accounts by Gifts

Practically every case in Pennsylvania dealing with concurrent accounts has involved facts showing that one of the parties has been the owner of the fund and has created or attempted to create an interest in another without such other furnishing any consideration therefor. The *Bailey* and *Mori* cases, cited supra, are exceptions to this as are a few of the tenancy by entireties cases. In the latter situation, however, this factor is immaterial. Hence we shall discuss the creation of such accounts on the gift theory as used by our courts.

1. Essentials of a Valid Gift

The elements of a valid gift of personalty are expressed in numerous cases in Pennsylvania. The cases dealing with gifts generally all use language such as the following:—"A gift requires: (1) an expressed or manifested intent to give, then and there, in praesenti; (2) such delivery of the subject matter of the gift to the donee as will divest the donor of all dominion thereover and invest the donee with such dominion. Where manual delivery of the subject matter is impracticable, then there may be a so-called constructive or symbolical delivery which will satisfy the delivery requirement. Since a bank account creates an intangible chose in action, manual delivery is impracticable and a constructive or symbolical delivery will suffice." Let us examine the bank account cases to determine what the courts require to satisfy these requirements. In discussing the cases, I will treat separately cases dealing with joint tenancies between persons not husband and wife, tenancies in common and tenancies by entireties between husband and wife.

2. Joint Tenancies Between Persons Not Husband and Wife

Three distinct lines of cases can be discerned in a study of joint bank account cases in Pennsylvania. While the courts have not yet admitted that these three distinct attitudes exist, we believe that a close study of the cases will justify the conclusion we have drawn. Since these differing attitudes or emphases of the courts are largely chronological in order, we will label them (a) The Early Attitude, (b) The Intermediate Attitude, and (c) The Present Attitude.

(a) The Early Attitude

Let us first recall that we are discussing the Pennsylvania cases for the purpose of determining what must be done to satisfy the requirements of a valid gift of interest in a joint bank account, namely: (1) Intent to give then and there; (2) Such delivery, constructive or symbolical in the case of bank accounts, as will divest the donor of dominion and invest the donee therewith.

The early attitude is exemplified best by the foundation case of *Flanagan v. Nash*, 185 *Pa.* 41 (1898). There B G withdrew money from a separate account and deposited it in another account in the joint names of "B G and N," this

being done in the presence of the intended donee, N. On the signature card signed by both were the words "Either to draw" and the book was stamped "Either party to draw and in case of death of either of them, the survivor shall have full power to withdraw the deposit as if the same had been duly transferred to such survivor." There was no evidence that the entry on the books was made in pursuance of any direction given by B G. After the death of B G, N claimed the deposit.

The court held that the attempted gift was incomplete and that no title as joint tenant vested in N. The reason given was: "The decedent never parted with her title in her lifetime and hence there was no delivery of the subject of the alleged gift. She had the right to draw out the whole of the money up to the moment of her death, and *for that reason* she still held her title to the money. It never passed away from her while she lived and therefore, there was no delivery." (Italics added). This is a clear cut holding that the retained right of the donor of an interest in the joint account to withdraw funds on her (the donor's) separate check was not a divestiture of control by the donor and investing the donee with control sufficient to constitute a delivery. This view, if continued, would be fatal to the creation by way of gift of an interest with the donor in a joint bank account at least where the donor retained the right to separately check against the fund.

Another case illustrating this early attitude that delivery is not made because of retained dominion of the donor is *Tearpoak v. Tearpoak,* 85 *Pa. Super.* 470 (1925). This was a joint account between father and son with neither having the right to separately check against the account. It was argued by the son that the donor had lost control or dominion because he could not withdraw the fund without the signature of the other joint tenant. The court held that the donee must have complete control and he did not have such, since the donor's signature was necessary to withdrawal. It was said that there was no gift since complete control or dominion was not given to the donee and the gift was therefore incomplete for lack of delivery.

The viewpoint of these cases did not remain the law of Pennsylvania or we could not have today an effective joint tenancy by way of gift in bank accounts. No case has ever overruled the *Flanagan* case, but it has been explained on other grounds, which other grounds, however, were not the basis of the decision.

(b) The Intermediate View

The next attitude of our appellate courts on joint bank accounts is exemplified by the leading case of *Mardis v. Steen,* 293 *Pa.* 13 (1928). There M deposited certain money in an account in the names of "M or S." On the signature card, signed by both and witnessed, was this endorsement, "It is agreed and understood that any and all sums that may from time to time stand to this account, to the

credit of the undersigned depositors, shall be taken and deemed to belong to them as joint tenants and not as tenants in common; and in case of the death of either, the bank is authorized and directed to deal with the survivor as sole and absolute owner thereof." M died and S withdrew the fund, which was then claimed by the representative of M.

The court in sustaining the ownership of S as surviving joint tenant in the bank account again stressed the necessity of delivery to the validity of a gift. But the court held that where a manual delivery was not practicable, transfer could be made by assignment or by other writing or token which would indicate a present intent to pass a right of possession to the donee. The court expressly held that the right of checking by either one alone did not make the gift incomplete. This right was held to be analogous to a right of revocation which does not alter the status of the parties. This, then, is of necessity a reversal of the position taken in the *Flanagan* case, although the court did not admit that it was reversing this position of the *Flanagan* case. It distinguished the *Flanagan* case, holding that in that case there was no evidence of agreement, either oral or in writing, other than the mere fact of joint deposit, and this was held to be insufficient.

As a result of this case there could be a valid joint tenancy in a bank account notwithstanding a reserved right even of separate checking in the donor.

This intermediate line of cases emphasizes the necessity of a writing signed by the donor as being the constructive delivery required where manual delivery is impracticable. In *Reap v. Wyoming V. T. Co.*, 300 *Pa.* 156 (1930) there was a writing lodged with the bank signed by the donor ordering the deposit to be made into a joint one with survivorship and with a right of separate checking against the account, and the gift was sustained. In *Crist's Estate,* 106 *Super.* 571 (1932) there was no signed writing but the account was made into a joint one at the instance of the intending donor. This case distinguishes the *Reap* case as being one with a signed writing and therefore sufficient to satisfy the delivery element. In *Gallagher's Estate,* 109 *Pa. Super.* 304 (1933) the account was made a joint one at the direction of the donor G, with G signing the signature card, it later being signed also by the donee, W. The court stated that the distinction between the *Flanagan* case where the gift was held incomplete and the *Mardis* case where the gift was held complete was the absence or presence of written evidence of a transfer of the deposit. In *Mori's Estate,* 318 *Pa.* 261 (1935) there was a written agreement, with sufficient consideration, signed by both and written into the pass book. The court held the signed writing to be sufficient, saying that the *Reap* case in 300 *Pa.* 156 was controlling and almost identical.

Mader v. Stemler, 319 *Pa.* 374, is a valuable case illustrating this intermediate viewpoint which seems to require a writing signed by the donor to constitute sufficient delivery to make the gift valid and effectual. It may be said here that

all of the cases holding the accounts to be effectively established under this viewpoint will also be sustained under what we shall discuss later as the present attitude of our courts. In this *Mader* case there were two accounts in different banks and both were changed into joint accounts of the donor and donee. The one was "F S or J S" and the other "F. H. S. or H. S." The one account was held to be an effective joint tenancy with survivorship and the other an ineffectual attempt to create such. In the effective one there was an agreement on the signature card signed by both, "The sums deposited in this account belong to F. S. and J. S. jointly, it being understood that each may withdraw upon his or her individual order during joint lives, and we hereby direct the Co. to pay any balance remaining on death of either of us to the survivor." In the other account there was no written agreement signed by F. S., the account being merely changed on the ledger sheet of the bank and on the pass book. The court said: "There is no evidence that would support a gift executed by assignment or by other writing which would indicate a present intention to pass a right of possession to the donee." In both cases the purpose and intent of the father were undeniably the same, but in the one case adequately prepared bank officials enabled the intention to be carried out and in the other carelessness of the bank, doubtless inadvised by its attorney, frustrated the intention of the donor.

Possibly the latest case emphasizing this intermediate viewpoint requiring a signed writing delivered to the donee or to the bank to satisfy the delivery requirement of gifts in bank account joint deposits is *Culhane's Estate,* 133 *Pa. Super.* 339 (1938). Here there was an agreement signed by both and under seal, "We declare we are joint owners in joint tenancy of the money now or hereafter deposited in the E. Trust Co.—either may draw—and at death of either, survivor shall be absolute owner of the balance as surviving joint tenant." It was expressed that the agreement was not revocable except by concurrence of both. This was held to be a validly created joint account with survivorship relying largely on the *Mardis* and *Reap* cases, discussed above. This case also illustrates the blundering of some misguided lawyer or bank official. Subsequent to this agreement, the parties made another signed agreement declaring that the parties, who were not husband and wife, owned the account as tenants by the entireties. This was held, of course, not to create a tenancy by the entireties and not to invalidate the prior agreement which controlled.

(c) The Present Attitude

The present attitude of the Supreme Court is shown in two recent opinions, both written by Justice Drew. Both deal with the question of the effectiveness of an attempted gift of an interest in a joint deposit—one with a bank account proper and the other with mortgage trust certificates which are treated exactly as though they were joint bank accounts. May we repeat the elements of a gift as set out by all the pertinent Pennsylvania cases?

(1) *An Intention to Give Then and There.* In all of the cases up to this point, there has been little or no discussion of this element of a gift, it being assumed that the fact of joint deposit sufficiently indicated an intention to give a joint tenancy interest in the bank account. (2) *Such delivery,* constructive or symbolical, since manual delivery is impracticable, as would divest the donor of dominion and invest the donee therewith. The *Flanagan* and *Tearpoak* cases were decided on the lack of dominion in the donee necessary to a valid gift. The *Mardis, Reap* and other cases cited were decided on the lack of presence of a signed writing constituting the necessary constructive delivery required, the dominion idea of the earlier cases being impliedly overruled.

Now for the first time the emphasis shifts to the intent-element necessary to make a valid gift and no attention is given at all to the delivery requirement. Mr. Justice Drew draws a new line of distinction between the earlier cases, between those which support the gift and those which invalidate the gift. The Justice, without saying so in as many words, seems to believe that the question is not at all one of delivery but merely one of intention to give.

The first of these cases is *Zellner's Estate,* 316 *Pa.* 202 (1934). Here L had a bank account in his name and had it changed at his direction to read "L or P," who was his daughter. There was no writing signed by L given to the bank or to his daughter setting out the creation of the joint account. Hence under the intermediate view just discussed, the necessary element of constructive delivery was lacking for we have the mere creation of a joint account which under all the cases to date is not an effectively created joint tenancy in the account.

There was some oral evidence on the part of the cashier to show the purpose or intention of L in creating the account and some evidence by P, which was refused by the lower court. Some of this evidence was to the effect that the intention of L was to create a joint account merely for the sake of his own convenience, so that he would not have to come to the bank to draw out money and there was no intention to make his daughter owner of an interest therein as joint tenant. This led the court into a discussion of the intention of the alleged donor. The court held that the evidence here was insufficient to show an intention of the father to give the daughter a present interest in the fund. With this conclusion on the facts of the case there can be but little disagreement. But the court, gratuitously, felt impelled to draw a distinction again between the line of cases upholding the creation of joint accounts and those not sustaining the creation of joint accounts. This line of distinction, unfortunately, is not that expressed in the earlier cases and we have a new explanation for the decisions reached in the former cases. The learned justice says that the distinction was that in the cases upholding the joint account, there was sufficient affirmative evidence that it was the intention of the parties that the account should be so held. The cases in which the joint accounts were not sustained are all explained on the ground

that the evidence was insufficient to show any intention to give to the party whose name was added any present beneficial interest in the fund. While the *Zellner* case is decided correctly and possibly correctly on this intention basis, the line of distinction drawn, we believe, is a new one and one that ignores entirely the element of delivery which heretofore had been decisive.

This view is retained and iterated in *Wilbur Trust Co. v. Knadler*, 322 *Pa.* 17 (1936). Here money belonging to M was deposited in a bank and mortgage trust certificates issued. The relation was held to be the ordinary debtor-creditor relation that exists in bank accounts and not trustee-beneficiary. The certificates were issued at the depositor's direction to "M or L," a son; others to "M or D," a grandson; others to "M or L," a granddaughter. Later M directed that all be endorsed to read "M or E," who was his wife. After M's death, the son and grandchildren claimed an interest in the certificates. The court held that they were not entitled to any interest therein. The basis of the decision might have been that there was no delivery by any signed writing or other token sufficient to make a valid gift in joint tenancy or tenancy in common. It also might have been held that the directed change in indorsement to M or E was an appropriation of the fund by M within his reserved power as indicated by the "or" in the original certificates. Neither delivery nor power of appropriation was mentioned by the court. The court repeats its view first enunciated in the *Zellner* case that the question is one solely of the manifested intention of the alleged donor. The court lays down the rule that a deposit by one of his own money in an account in the names of himself and another is not of itself sufficient, in the absence of affirmative evidence to that effect, to indicate an intention on the part of the depositor to vest in the added party a joint beneficial interest in the fund with right of survivorship. The court concedes, however, that the added party would have been empowered to receive payments due under the certificates during the life of the depositor but that there was no irrevocable interest vested in them.

The latest case expressing this present day view is *Stevenson's Estate*, 33 *D. &C.* 18 (1938). It deals with building and loan stock which was changed from registration in the name of J who paid for it to "J and/or W." The claim was asserted that this created a tenancy in common. The court admits that all the cases where concurrent tenancies in other than husband and wife had been sustained, there was written evidence of the intention to create such. The court, however, says that oral evidence would be sufficient if adequate in character although there was no sufficient evidence here.

See also to the same ultimate effect where there is a mere deposit and nothing more, which would be invalid either on intent or delivery, *Mauser v. Mauser*, 326 *Pa.* 257 (1937); *Romig v. Denkel*, 326 *Pa.* 419 (1937); *Taylor v. C. B. & L. Assoc.*, 120 *Pa. Super.* 78 (1935).

The present attitude, then, would seem to be as follows: that if the joint account is shown to have been created by the deposit by A of money belonging

to him, in the names of A and B, this alone is insufficient to show the intention to create a joint tenancy by gift. If this fact be coupled with any other affirmative evidence, oral or written, showing the intention to create a present right of ownership, the account will be held to have been validly created. Whether there is a delivery requirement in those cases where the other affirmative evidence of an intention to give a present right of ownership in the joint account consists of oral evidence merely and what will satisfy that delivery requirement must be left to further elucidation by our Supreme Court.

(d) Right of Survivorship—Tenancy in Common

In almost all of the cases dealing with joint bank accounts, the question of the validity of the creation of the account has arisen after the death of the depositor by the intended or alleged donee asserting ownership of the account by virtue of the right of survivorship. Strangely, cases are entirely lacking in Pennsylvania as to the rights of the parties among themselves during the joint lives, except as such are incidentally referred to by way of dicta in a very few of the cases. See, however, *McEnery v. Nahlen*, discussed later under tenancies by entireties. It is not our purpose at the present time to discuss these rights inter se. We have assumed in the discussion to this point that if the bank account between two parties not husband and wife has been validly created that the right of survivorship exists and the one living the longer will be the owner of the balance. While this result followed in all of the cases in which the creation of the joint account was sustained as being a valid gift, it would be a mistake on our part to assume that every joint account, validly created, must have that incident as a matter of law. Such is not correct for joint accounts without survivorship can be validly created in Pennsylvania although there is no decision dealing with such a tenancy. If such an account without survivorship were created it would be a tenancy in common and on death of the one, not more than half of the balance then remaining would belong to the survivor, the other half belonging to the personal representative of the deceased. It has become axiomatic in our law that the Act of 1812, P. L. 259, 20 P. S. 121, creating a presumption that there is no right of survivorship in concurrent tenancies, not trust titles and not tenancies by entireties, applies to personal property interests as well as real property interests. (see 86 Pa. 125.) Thus in the creation of a joint bank account, where a right of survivorship is desired, this presumption of the Act of 1812 must be overcome by some stipulation that shows an intent to create a right of survivorship between the parties.

In all of the Pennsylvania cases sustaining the right of the survivor to the balance of the account, there will be found that there was a stipulation that the survivor should be so entitled.

Possibly the weakest case on this point is *Bailey's Estate*, 86 *Pa. Super.* 322

(1925), where there were oral declarations "that if anything happens to me, M will get it."

If the account is a joint one and nothing is said about survivorship, will the mere right of separate checking, if it exists, overcome the presumption of the Act of 1812? If the account is validly created in "A or B" which gives a right of separate checking, will the presumption be overcome? No authoritative answer can be given in Pennsylvania for no cases discuss the point and those cases in which the issue might have been raised have gone off on the issue that the asserted gift was not effectively made.

There is out-of-state authority that the word "or" is not sufficient to create a right of survivorship. Analogies from the real property cases suggest that this is the answer to be expected in Pennsylvania. Where such survivorship is desired, it should be expressly provided for in so many words although "as joint tenants and not as tenants in common" has been held sufficient in a realty case. See also *Haggerty's Estate,* 311 *Pa.* 503 (1933) and *Mardis v. Steen,* 293 *Pa.* 13, (1928).

(e) Joint Tenancies as Attempted Testamentary Dispositions

The motivation behind the creation of many joint tenancies with a right of survivorship undoubtedly has been that such are a convenient method for disposing of property on death of a person without the necessity of taking out letters testamentary or of administration and the hiring of attorneys with the consequent expense of both. Then, too, the inheritance tax exemption which existed in such cases in Pennsylvania until the Act of 1936, P. L. 44, also contributed to the desirability of such accounts. Ever since the Act of 1936 the partial exemption from inheritance taxation under that Act may make the joint tenancy with survivorship device a desirable one. The danger inherent in such schemes, however, is the power of checking in the other joint tenant if separate checking rights are provided for and the loss of control by the donor of his property except with the concurrence of the donee if joint checking is provided for in the account.

But it is not our purpose to discuss the economic or social utility of the joint banking account device as a substitute for testamentary dispositions, but to discuss the cases in which the validity of such accounts were attacked because they were testamentary in nature.

The leading case on this feature of joint banking accounts is *Grady v. Sheehan,* 256 *Pa.* 377 (1917). Here there was a joint account set up by G with his money with G and S as joint tenants. There was a sufficient writing lodged with the bank to constitute the necessary delivery. The paper stipulated that either could draw on the fund but the paper further stipulated, going beyond a mere survivorship provision, "I hereby further declare that my intention in so doing is that, *in the event of my death,* the said S . . . shall have full power to unconditionally withdraw the balance of the deposit. . . . Provided, however, that so

much of it as may be necessary for the purpose shall be applied to the payment of my debts and the expenses incident to my last illness and burial." The court in holding for the administrator of G as against the claim of surviving S held that the evident intent was not to vest a present interest in the account but merely to direct what was to be done therewith after the death of the depositor. This was held to be a testamentary paper and not a validly created joint tenancy with survivorship.

Crist's Estate, 106 *Pa. Super.* 571 (1932) in addition to holding that there was no sufficient delivery for lack of a signed writing also held the account to be testamentary in nature. It was said that the intention disclosed by the depositor's actions was to keep the bank account within his control until death, yet not to allow it to pass under the terms of his will so that his wife might be in a position to take against his will.

Culhane's Estate, 133 *Pa. Super.* 339 (1938) holds that a secret intent that the account was to be in lieu of a will was immaterial in the face of the written agreement which declared that they were present joint owners of the money deposited in the joint account. This case is also authority for the statement that an understanding (which was not expressed on the face of the instruments validly creating the joint account) that the donee joint tenant was not to use any funds during the life of the donor was immaterial.

The conclusion to be drawn from these cases is that unless the intention that the joint account is to be effective only at death is shown clearly by the instrument creating it or other clear and convincing evidence, such accounts will not fail as inter vivos gifts and be considered as testamentary devices, and that an agreement that the donee shall not withdraw funds during life is in itself insufficient evidence to condemn the account as testamentary. It goes without saying that if there is a validly created joint tenancy with survivorship, it cannot be affected by the will of the one first dying. See *Rhodes' Estate,* 277 *Pa.* 450 (1923).

In this connection there is one case holding that the creation of an estate with the right of survivorship may be subjected to an inheritance tax as a transfer made in contemplation of death. See *Reynold's Estate,* 23 *D. & C.* 421.

(f) SUMMARY

What should be done by a bank to insure that depositors who indicate a desire to create a joint tenancy with survivorship have created one that will meet the requirements of all the existing cases on the subject? This can be done most readily by preparing the proper type of signature card to be signed by both parties. This should read, "It is agreed by the undersigned depositors and by the X Bank that sums deposited in this account, now or hereafter, belong to the undersigned depositors as joint tenants with the right of survivorship, and not as tenants in common. It is agreed that either may withdraw upon his or her individual order

during their joint lives, (or, if joint checking is desired, substitute, it is agreed that funds shall be withdrawn only upon orders signed by both joint tenants during their joint lives) and that at the death of either any balance remaining shall belong to the survivor as absolute owner by right of survivorship." It should be signed and sealed by both and by the bank although signing by the donor would be sufficient and sealing is not essential although helpful. The ledger sheet of the bank should show the account to be in the joint names with right of survivorship as should the pass book, although neither are essential If the account is stated to be in "A *and* B," joint checking would be required, and if stated to be in "A *or* B," individual checking would be permitted, but the agreement on the signature card should stipulate expressly as to the right of checking.

3. Creation of Tenancy by Entireties Bank Accounts Between Husband and Wife

The problem of validly creating tenancy by entireties bank accounts has never created the troublesome and disputed issues that have arisen in the joint tenancies cases. Practically all of the cases are gift cases but the reserved right of the donor to check against the fund has been considered by the Supreme Court in but one case as interfering with the effectiveness of the gift. Nor has it suggested why the two situations differ on this factor. A gift requires delivery as much between husband and wife as it does between father and son but only one case suggests that delivery is required by a signed writing. An intent to give may exist as readily between brother and sister as between husband and wife, but this intention element has given our courts but little concern. A review of the cases discloses no confusion and almost no contradiction which is a situation devoutly to be desired.

The earliest cases held that the mere taking of a chose in action such as a letter of credit (*Parry's Estate,* 188 *Pa.* 33, 1898) or a mortgage (*Bamberry's Est.,* 156 *Pa.* 628, 1893) created a tenancy by entireties in husband and wife. The earliest bank account case arose as recently as 1905 in *Klenke's Est.,* 210 *Pa.* 572. In this case bank accounts with the husband's money were taken in the names of "H *and* W" and "H *or* W." There was a signed agreement by both creating the accounts and authorizing either to draw. Both accounts were held to be tenancies by the entireties and the separate checking feature, seemingly inconsistent with the unity of control present in such tenancies, was not even considered as preventing a tenancy by the entireties. Here, too, the account "H *or* W" was held to be such a tenancy.

In *Blick v. Cockins,* 252 *Pa.* 56 (1916) bank accounts in both names, subject to separate checking and created by money of the wife, were held to be tenancies by the entireties. Such was treated as a gift by W to H but the elements of gifts

were not discussed. In *Dockey v. Dockey*, 8 *D. & C.* 727 (1926) the wife was allowed to show that $1000 deposited by her in such an account was intended as a loan merely and not as a gift and was allowed to recover the $1000 in a suit against her husband. In *Pa. Trust Co. v. Mischik*, 96 *Pa. Super.* 255 (1929) an account labelled "in account with Annie, Andrew Mischik, either" was held to be a tenancy by entireties without questioning the intent or delivery or dominion. Here Andrew pledged the account for a debt of his own but on his death his wife took by survivorship free of his pledge. In *Milano v. Fayette T. Co.*, 96 *Pa. Super.* 310 (1929) the mere deposit in a joint account was held to be an entirety account and subject only to joint checking since the account was "H *and* W" and separate checking was not provided for by agreement.

The only violently discordant note in the whole line of cases is *Scanlon's Estate*, 313 *Pa.* 424 where Mr. Justice Schaffer applied the rules applying to joint tenancies to tenancies by entireties. While correct in theory the case has since been overwhelmed but not overruled by succeeding cases. Here there was an account opened in the names of "H and W" with joint checking required. There was no written evidence of intention or of delivery other than the mere opening of the account. The court said that there was nothing but the bank card to show an intention to pass a present interest in the fund to her husband and that this alone was an insufficient showing of intention on her part to create an estate in her husband. Relying entirely on the joint tenancies cases the court said it was essential that there be a further expression of intention on the part of the donor as perhaps by delivery of an instrument which shows clearly that the intention was present. In a startling reversion to the *Flanagan* case, the court further said that the fact that both signatures were required for withdrawals showed an intention on the part of the donor to retain control—complete control of the subject matter being necessary in the donee. Here there was no passage of complete control to the husband and hence no tenancy by the entireties. If this case were to control there could be no tenancy by entireties bank accounts by way of gift as there could be no joint tenancy bank accounts under the *Flanagan* holding.

Let us look at the more recent cases on such tenancies. *Wilbur Trust Co. v. Knadler*, 322 *Pa.* 17 (1936) holds that a mere deposit in the names of husband and wife creates a tenancy by entireties. Whether "H *and* W" as in the *Scanlon* case or "H *or* W" produces the same result although the latter in itself permits either tenant by the entirety to separately check against the account. The intention to create such a tenancy is assumed from the fact of deposit in both names and from the fact of marital relationship. Neither delivery nor dominion is discussed nor is the *Scanlon* case referred to by the court. The intention alone is controlling. This is flatly contradictory to the *Scanlon* case.

In *Bostrom v. Nat. Bank*, 330 *Pa.* 65 (1938) the bank ledger sheet carried the husband's name only but the pass book and signature card indicated an

account in both names. Again the court says a mere deposit in the names of "H and W" is sufficient to create a tenancy by the entireties and the bank could not set off a debt owed by the husband alone even though either could draw on separate checks.

Madden v. Trust Co., 331 *Pa.* 476 (1938) contains a lengthy and able review of tenancies by the entireties in general in Pennsylvania. Here the account was stamped on the pass book, "Joint Owners. Payable to either, before or after death of the other." The court concedes that husband and wife may hold as joint tenants or tenants in common but presumptively they hold it by the entireties The court said, "We have held in a long line of cases that bank deposits and similar choses in action, payable to husband *and* wife, or to husband *or* wife, are tenancies by the entireties with all the incidents relating thereto." The right of either to draw on separately signed checks does not prevent it being a tenancy by entireties. An account in the names of husband "or" wife is a tenancy by the entireties. The separate right of checking is a mere agency power given by each to the other in the creation of the estate and is not inconsistent with a tenancy by the entireties. The court assumes that the words "Joint Owners" created a tenancy by entireties and did not discuss intention to give, retention of dominion or delivery.

Geist v. Robinson, 332 *Pa.* 44 (1938) is to the same effect with some additional observations on the law of such accounts. Here again there was no evidence of intention to make a gift other than the mere fact of deposit in the concurrent account and the money had belonged to the husband theretofore, and there was no written evidence of delivery and either could draw. Lack of withdrawals by the donee wife, failure to sign a signature card, the fact that the transfer did not comply with the rules governing passage of title to personalty (gifts) or with the rules of the bank, and the husband keeping the pass book in his exclusive possession were all held to be immaterial and not sufficient to prevent a tenancy by entireties being created.

Werle v. Werle, 332 *Pa.* 49 (1938) says that there is a presumption that a bank account opened in the wife's name with the husband's money is a gift to her and strong evidence is required to rebut it. The rebuttal evidence here was not clear, convincing and unequivocal and did not dislodge the presumption. If the wife did the same thing in the husband's name alone, a trust for her would be presumed. Money deposited in an account in both names was treated as a tenancy by the entireties and an accounting allowed the wife for funds withdrawn therefrom by the husband. The case is important in its implied holding that where the evidence is sufficiently clear, what appears to be a tenancy by the entireties may be shown to be entirely the property of either spouse alone.

Another important case on the right of accounting between husband and wife for funds withdrawn from a tenancy by entireties bank account is *Berhalter v. Berhalter*, 315 *Pa.* 225 (1934).

An interesting and unique case, deciding several points hitherto undecided in Pennsylvania, is the very recent case of *McEnery v. Nahlen,* decided in the Court of Common Pleas of Erie County, No. 304 September Term, 1938, decision filed on February 10th, 1939, and not yet reported. The case involves a concurrent tenancy in stock certificates but the problem, basically, is the same as in the bank account situation. Here H was the owner of certain stock and directed that new certificates be issued in the names of husband and wife. There was testimony that it was H's intention to have the stock placed in "my name and my wife's name the same as my real estate," which was a tenancy by the entireties. When the certificates were returned the husband did not notice that the transfer agent had placed a stamp after his name, reading, "As joint tenants with the right of survivorship and not as tenants in common." (It might be here noted that this seems to be a very prevalent practice of transfer agencies in creating concurrent tenancies in stock certificates, whether between persons not husband and wife or between husband and wife, notwithstanding specific directions that a tenancy by entireties is desired. It has been suggested that this has become the practice because this wording will create a tenancy with survivorship in any state recognizing such in the United States. The use of such terms as between husband and wife is a vicious custom and one that does not normally produce the result intended by the parties. Stock transfer agencies please note. Attorneys might well institute a check of their clients' stock certificates to ascertain if desired tenancies by entireties have been created.) The stock certificate was pledged by husband and wife for a joint debt and then subsequently attached in the hands of the pledgee for a separate judgment debt of the husband. (For a very important case deciding what certificates of stock may and what ones may not be subjected to attachment in Pennsylvania, see *Mills v. Jacobs,* 4 *A. 2nd* 152 (1939)). The court held: (1) That the tenancy created was a joint tenancy with survivorship and not a tenancy by entireties as intended by the husband. (2) That the creation of such tenancy directly by the husband to himself and wife was unobjectionable. (3) That the interest of the husband was subject to attachment for his separate debt and that such attachable interest was a one-half interest.

The case is unique in Pennsylvania in several respects. It is the first case recognizing a joint tenancy with survivorship between husband and wife. *Blease v. Anderson,* 241 *Pa.* 198 recognized a tenancy in common created in husband and wife after marriage and if such is possible, it seems inescapable that where the intent is clearly shown, a joint tenancy with survivorship may be created between husband and wife. In this conclusion the court is correct. It is submitted, however, that under the facts as shown, such intent was not present but that the intent to create a tenancy by the entireties should have been found to exist. The form of the certificate or bank account should not control but should be subject to proof that the more common form of tenancy by entireties was intended. No reliance on the form of the certificate is shown by the creditor and hence no

estoppel is present. The parol evidence rule would not apply to prevent such evidence as between husband and wife or as to the creditor but only as between the parties to the stock certificate contract—the corporation and the husband and wife.

The case is also unique in being the first case presenting the issue of the right of a separate creditor to attach the interest of the joint tenant in the personal property. The court seems to be correct in following the real property analogies and in deciding that a one-half interest was subject to attachment, if the interest is held as joint tenants and not as tenants by the entireties.

The manner in which the tenancy was created is unobjectionable. All of the tenancies by the entireties bank accounts cases were such by transfer from husband to himself and wife or from wife to herself and husband and no question on this issue was ever raised. Vandergrift's Estate, 105 Pa. Super. Ct. 293, decided under the Uniform Interparty Agreement Act of 1927, P. L. 984 would also support such holding.

SUMMARY

What should be done by a bank to insure that depositors who indicate a desire to create a tenancy by entireties bank account with survivorship have created one that will meet the requirements of all the existing cases on the subject? No stipulation in re survivorship is necessary here for the Act of 1812 has no application and survivorship is a legal incident of such a tenancy. Merely opening a joint account and labelling it "H *and* W" if joint checking is desired or "H *or* W" if separate checking is desired will meet the requirements of all the cases but the *Scanlon* case. But this is objectionable in leaving open the question of intention and a throw-back to the *Scanlon* case, while unlikely, would leave such accounts ineffectively created. Again, a properly prepared signature card would suffice even under the *Scanlon* case. The signature card, to be signed by both and by the bank, although the donor's signature should be sufficient, should read: "It is agreed by the undersigned depositors and by the X Bank that the sums deposited in this account, now or hereafter, belong to the undersigned depositors as tenants by the entireties. It is agreed that either may withdraw funds upon his or her individual order during their joint lives, (or, if joint checking is desired, substitute, It is agreed that funds shall be withdrawn only upon orders signed by both tenants by the entireties during their joint lives) and that at the death of either any balance remaining shall belong to the survivor as absolute owner by right of survivorship." Sealing is not essential although possibly helpful. The ledger sheet of the bank should show the account to be in the joint names as tenants by the entireties. No attempt should be made to use the same type signature card for husband and wife and for those not husband and wife as a tenancy by the entireties has different incidents than a joint tenancy, as aptly illustrated in the

McEnery case, supra. An "H *and* W" account would permit only joint checking while an "H *or* W" account would permit individual checking but the agreement on the signature card should stipulate expressly as to the right of checking.

I had hoped to complete this discussion of concurrent bank accounts by a review and analysis of cases dealing with some of the incidents of such after their creation, such as taxability, bankruptcy, accounting inter se, rights of creditors and other problems, but time compels us to await some further opportunity.

CARLISLE, PA. HAROLD S. IRWIN