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THE LEGAL EFFICACY OF ATTEMPTED METHODS OF AVOIDING PROBATE

Various means have been employed from time to time to avoid the necessity of the probating of estates. Generally speaking, such means have utterly failed to accomplish their purpose.

In considering the reasons for such failures it must be borne in mind that there are two classes whose rights are affected. first, the parties themselves, and, secondly, creditors and the state by reason of its right to inheritance tax.

We are not concerned, to any appreciable extent, with the rights of the state to inheritance tax for the reason that in the absence of the administration of any estate, our legislature has provided quick and summary means for determining the liability of an estate for inheritance tax and the adjustment thereof. The Washington statutes[1] provide: that where no application for administration has been made, or administration had without the payment and determination of the inheritance tax, any person interested may apply to the superior court of the proper county by petition, procure an order fixing the time for hearing thereon, and upon proper service have the matter heard, and if it should appear that the estate is subject to inheritance tax, have the proper appraisement made and the tax levied and collected as in other cases. In any case where the inheritance tax will not exceed three hundred dollars, the supervisor of inheritance tax escheat division may compromise such tax and issue satisfaction therefor without probate proceedings, where the necessary facts are shown by affidavit.

By reason of these statutes we are concerned principally with the rights as between the parties themselves and the creditors of the party making the transfer.

Whatever may be the rights of the parties between themselves

[1] 1929 Session Laws, ch. 205, sec. 4, p. 532.

under various attempted methods of avoiding probate, there is, short of the statute of limitations, no effective way of cutting off the claims of creditors, and clearing title to realty and even personalty therefrom, except by formal probate proceedings, in which notice to creditors is given. That this is so is illustrated in a case[2] in which there was no administration,[3] and the heirs had, subsequent to the death of their parent, without such administration, jointly sold property consisting of a note and mortgage. The court held, notwithstanding a sworn statement that there were no debts, that administration was necessary, the court saying:

> "Since the fact of no debts can be established only by the appointment of an administrator and notice to creditors it follows that there was no proof that there were no debts, and the heirs of the deceased were not authorized to make an assignment of the note and mortgage at the time they did."[4]

The court specifically pointed out, relying on an earlier case[5], that an affidavit or sworn statement as to the non-existence of creditors is in no sense a legally acceptable substitute for formal probate and notice to creditors.

Hence the person interested in avoiding probate, whatever method he pursues, is faced at the very threshhold of his project with the obstacle that no such device is effective as against creditors, the non-existence of whom can only be established by formal probate proceedings, save as to real property where more than six years

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In re Collins Estate, 102 Wash. 697, 173 Pac. 1106 (1918).

[3] While it has been held in cases decided in this state that there is no necessity of formal administration after a long lapse of time "where the estate had already become vested in the heirs and devisees, and where all possible claims against the estate had been paid or were barred by the statute of limitations," (*State ex rel. Speckert v. Superior Court*, 48 Wash. 141, 92 Pac. 942, 1907, and cases there cited), it has been held, distinguishing those cases that "the right to administer upon an estate is a statutory one" (*State ex rel. Mann v. Superior Court*, 52 Wash. 149, 100 Pac. 198, 1909). And in the case cited in footnote 2 the impotency of such an agreement for informal administration is clearly brought out. In any event, such agreements, just like the community property agreements hereinafter referred to in the main text, are of no validity against creditors, the non-existence of whom can be determined only by probate and not by confident belief or affidavit; and, until formal notice to creditors has been given and expired, free dealing with property distributed under such informal agreements is necessarily impeded, as shown in the quotation from the case cited in footnote 2. No purchaser or assignee would care to take such property since his title, until the statute of limitations had run on claims, might be subject to attack by any administrator subsequently appointed.

[4] See footnote 2.

[5] *State ex rel. Mann v. Superior Court*, 52 Wash. 149, 100 Pac. 198 (1909)

have elapsed since the date of death without administration during the intervening period.

Mutual Deeds

One of the most frequent means resorted to for the purpose of avoiding the necessity of probating an estate, particularly where the estate is small, consists principally of the home and is community property, is the execution of what has been aptly termed "mutual deeds." The term "mutual deeds" comprehends all deeds executed by husband and wife whereby the one conveys the real estate to the other with the intention that these deeds shall not be recorded until the death of one of the spouses, whereupon the deed to the survivor is to be recorded and the other deed destroyed.

The Supreme Court of Washington has frequently held such deeds to be utterly void and of no effect whatsoever. The reason for this lies primarily in the fact that delivery is essential to the validity of a deed.

> "It is essential to the delivery of a deed that there be a giving by the grantor and a receiving by the grantee with a mutual intention to pass a present title from the one to the other. It may be made through the hands of an agent and it may be accepted through the hands of an agent, but there must be a mutual intention presently to pass the title. This mutual intention is the cardinal requisite. It is elementary that a deed cannot perform the functions of a will, hence it cannot be effectively delivered after the grantor's death. When, however, the grantor delivers a deed to a third person in escrow to be held until the grantor's death and then delivered to the grantee, the grantor retaining no dominion or control over it, the delivery is valid and an immediate estate is fixed in the grantee at the date of the delivery in escrow, subject to the grantor's life estate."[6]

In the case of an escrow just referred to, by fiction the law regards the delivery as relating back to the time of the passing of the instrument into escrow, and therefore avoids the principle of law which precludes a delivery after death. Delivery cannot be presumed from the finding of the deed among the papers of the grantor after death when the only evidence discloses that the grantor made the deed and intended that some time the grantee should become the owner of the property[7]

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[6] *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042 (1916).
[7] *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240 (1896).

In the case of *Eves v. Roberts*[8] our Supreme Court held that mutual deeds of this character from husband to wife and wife to husband executed by them and placed in a bureau drawer with the intention that the survivor should use and record the one in which he or she was grantee are void for the reason that the one cancels the other.

So, too, in the case of *Bloor v. Bloor*[9] where such deeds were left with a justice of the peace "to keep," for the reason that there could be no mutual intention to presently pass title because it could not be known whether the husband or wife would die first. Likewise in that case our Supreme Court held that such deeds could not be construed together as a contract within the provisions of section 6894 Rem. Comp. Stat. relating to community property agreements between husband and wife.

The fact that such deeds are placed in escrow with some third person does not alter the result since of necessity retention of the dominion is held, because such an arrangement invariably contemplates the return or destruction of the deed of the grantor who survives.

Community Property Agreements

Another means resorted to and coming into greater use as time passes is what has been termed community property agreements. By this is meant an agreement executed pursuant to the provisions of section 6894 Rem. Comp. Stat. to the effect that a husband and wife may jointly enter into an agreement concerning the status or disposition of the whole or any portion of the community property then owned by them or afterwards acquired to take effect upon the death of either, provided, however, that such agreement shall not derogate from the rights of creditors.

There can be no question regarding the validity of such an agreement as between the parties. It is sufficient to effectuate its purpose providing always that community property only may be so disposed of and that only subject to the rights of creditors. Presumptively all property acquired by husband and wife during mar riage is community property Such presumption, however, is not conclusive but is rebuttable. This immediately raises the question in the mind of an examiner of titles as to whether the property was community property or the separate property of the decedent. If

[8] *Eves v. Roberts*, 96 Wash. 99, 164 Pac. 915 (1917).
[9] *Bloor v. Bloor* 105 Wash. 110, 177 Pac. 722 (1919)

the latter, it would, of course, not be affected by such an agreement. In this connection, however, it should be borne in mind that the law does not preclude the husband and wife in such an agreement from agreeing that all of their property, whether theretofore separate or community property, should be deemed and regarded as community property together with any and all property which they or either of them may acquire in the future.[10]

Assuming, therefore, that the property under consideration be community property, there is no question but that such an agreement effectively passes the title thereto to the survivor, but the question invariably remains as to whether such an agreement was in derogation of the rights of creditors. This question is, of course, determined if a period of six years elapses subsequent to the date of the death without administration, for the reason that under the statutes of this state[11] the real property of the decedent is not liable for his debts unless letters testamentary or of administration be granted within a period of six years subsequent to the death. During this period of six years the rights of creditors, of course, may only be conclusively determined through proper probate proceedings.[12] It is for this reason that community property agreements generally fail to accomplish their purpose. Short of the six-year period only probate can clear the title for purposes of sale.

At one time agreements of this character were assailed on the ground of being unconstitutional. That question was definitely decided and their validity upheld by our Supreme Court many years ago.[13]

Corporate Stocks Endorsed in Blank but Not Delivered During Life

Another attempted means of avoiding probate recently arose out of the following state of facts: A husband and wife having several children and being the owners of valuable properties, caused a holding corporation to be organized to which they transferred all such properties, receiving therefore, in corresponding interest, stock of such holding corporation. Thereupon each endorsed the stock certificates in blank and placed them in some convenient place with the intention that, upon the death of either, all of the certificates might be presented to the corporation, which being a close

[10] *Volz v. Zang*, 113 Wash. 378, 194 Pac. 409 (1920).
[11] Rem. Comp. Stat. sec. 1368, as amended in 1929 Session Laws, p. 597.
[12] *In re Collins Estate*, 102 Wash. 697, 173 Pac. 1016 (1918).
[13] *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060 (1904).

corporation, would probably recognize the transfer and cause new certificates to be issued to the survivor. In such case we are again met at the threshhold with the proposition that there has been no valid delivery Of course, if there be no creditors and the inheritance tax be paid after a proper adjudication, the only persons who could question the transaction would be the children or the representative of the deceased parent unless the corporation itself should subsequently become insolvent.

It might be well to refer briefly to the principles involved by reason of the frequency that attempts of this character relating to stock in corporations are made.

> "A completed legal transfer of stock requires (1) an assignment and delivery of the certificate to the transferee, (2) a delivery of the stock to the corporation issuing it, and a notation upon the books of the corporation of the transfer, and a delivery to the transferee of a new certificate of stock in place of the old. The equitable title to stock may be vested in the transferee upon delivery and acceptance by him of the certificate of stock with the intent to transfer it to him and with or without a power to transfer. Such a transfer we hold good between the parties upon the theory that the delivery of the certificate, which is the muniment of title, is a symbolical delivery of the stock. It is well recognized also that there may be a constructive delivery and acceptance, unaccompanied by a manual delivery or actual change of custody, resulting from acts and conduct from dealing with goods when there has been a change in the relations of the parties to the goods."[14]

> "Delivery is essential. It may be either actual by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual manual delivery is either impracticable or inconvenient."[15]

> "A good delivery may aid doubtful words of gift, and unambiguous acts of delivery may be aided by clear words of gift, not, however, dispensing with an actual delivery "[16]

> "The proof of a constructive delivery and acceptance must be clear and unequivocable. Evidence of payment by the corporation of a dividend to the transferee and his acceptance of it would tend strongly to prove a constructive delivery and acceptance of a transfer of stock.

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[14] *DeNunzio v. DeNunzio*, 90 Conn. 342, 97 Atl. 323 (1916).

[15] *Thomas' Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 A. S. R. 848 (1892).

[16] *Teague v. Abbott*, 15 Ind. App. 604, 100 N. E. 27 (1912)

> (The reverse must necessarily follow as a corollary) However good as a transfer of stock between the parties the symbolical or constructive acceptance and receipt may be, it will not affect the rights of creditors or purchasers without notice.''[17]

Referring again to the facts in the case just cited, it will become at once apparent that if an appreciable period of time elapses subsequent to the endorsement of the stock and the passing of the same for future use by the survivor, dividends will probably be declared in the interval and paid to the holder of record on the books of the corporation. This would at once furnish proof of a very strong character to indicate that there never was either an actual or constructive delivery of the stock although endorsed in blank.

In this connection it must not be assumed that where there is an actual delivery, without retention of dominion or control, and endorsement in blank, the subsequent death of the endorser would affect the power of transfer. This principle is clearly set forth, as follows:

> ''Where the assignment and power of attorney are executed in blank the certificate may be transferred from hand to hand by delivery, like a note endorsed in blank, and any holder thereof has authority to fill in his own name as transferee and his own name or another's as attorney and cause the transfer to be registered on the books of the corporation. The right and authority of the holder of the certificate to fill in the blank assignment and power of attorney is not affected by the death of the transferer.''[18]

As an instance of the retention of control, the case of *In re Humphrey's Estate*[19] is illuminating. In that case it was held that an attempted gift of stock by delivering the certificate to the donee on an agreement that all dividends should be payable to the donor during her life, and in case the donee died before the donor the gift should cease, the stock meantime to remain on the corporate books in the name of the donor, is not a gift *inter vivos,* but is an

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[17] *DeNunzio v. DeNunzio, supra.*

[18] 6 Fletcher Corporations, pp. 6310-6311.

[19] *In re Humphrey's Estate,* 191 App. Div. 291, 181 N. Y. Supp. 169 (1920).

act testamentary in its character and hence void, inasmuch as the donor clearly had the power to revoke the gift at any time.

JOINT BANK ACCOUNTS—JOINT STOCK OWNERSHIP

Under the common law, stock jointly owned by two or more people on the death of one of the joint owners becomes the stock of the survivor. Even though a joint owner of stock duly registered as such is without power to dispose of the interest of the other joint owner during the life of both, a transfer made by the survivor before the decease of the joint owner becomes validated upon his death.[20]

This common law principle, however, has been radically changed by our statutes

Section 1344 Rem. Comp. Stat.,[21] which was enacted in 1886, relating to the abolition of survivorship between the joint tenants provides as follows

> "If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend, or pass by devise, and shall be subject to debts and other legal charges, or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenant had been tenants in common. Provided, that community property shall not be affected by this section."

Section 3249 Rem. Comp. Stat., which was enacted in 1917, relating to joint deposits in commercial banks and trust companies, provides as follows

> "When a deposit has been or shall hereafter be made, in any bank or trust company in the name of two or more persons, payable to any of such persons, such deposit or any part thereof, or any interest, or dividend thereon, may be paid to any of said persons, whether the other be living or not, and the receipt or acquittance of the person so paid shall be valid and sufficient release and discharge of such corporation for any payment so made."

Section 3348 Rem. Comp. Stat.,[22] relating to joint deposits in mutual savings banks, which was enacted in 1915, provides as follows

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[20] 5 Thompson on Corporation (3rd ed.) sec. 4059.
[21] See note 34 for construction of this section.
[22] As amended by chapter 123 of the Laws of 1929.

> "After any deposit shall be made by any person in the names of such depositor and another person and in form to be paid to either or the survivor of them, such deposit and any additions thereto made by either of such persons after the making thereof, shall become the property of such persons as joint tenants, and the same, together with all dividends thereon, shall be held for the exclusive use of such persons and may be paid to either during the lifetime of both or to the survivor after the death of one of them, and such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to such savings bank for all payments made on account of such deposit prior to the receipt by such savings bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor."

Section 3721 Rem. Comp. Stat., relating to joint deposits in building and loan associations, which was enacted in 1919, provides as follows.

> "Any association may issue shares to or in the name of two or more persons whether husband and wife or otherwise, withdrawable by any one of such persons, and the receipt of acquittance of any one of such persons shall be valid and sufficient release and discharge to the association for such withdrawals, regardless of the death or disability of any other such joint shareholder."

A comparison of the last three sections relating to joint deposits reveals that in only one, to-wit. that relating to deposits in mutual savings banks, is provision made by the statute that such deposits and additions thereto become the property of the depositors as joint tenants and that the making thereof in such form is conclusive evidence of the intention of both depositors to vest title to such deposits and the additions thereto in the survivor. This section creates a valid joint tenancy, and the whole account goes to the survivor.[23]

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[23] *Conneally v. San Francisco Savings and Loan Society.* 70 Cal. App. 180, 232 Pac. 755 (1924), where a statute identical in terms was held to create survivorship.

The last quoted section has been construed in a recent case[24] not to create a joint tenancy as between the parties, but merely to protect the association in making payment to the survivor. This construction accords with that generally given to such statutes elsewhere.[25] Inasmuch as section 3249 as to joint deposits in commercial banks appears to be identical in purpose, and substantially identical in language with section 3721, it may be safely assumed on the strength of the recent decision that section 3249 will be similarly construed merely to protect the bank and to have no effect on the relation between the depositors.

In the case of *Meyers v. Albert*[26] our Supreme Court said

> "Where an account in a bank (commercial bank) is opened in the name of two persons, the money being supplied by one but each having the equal right to draw upon it, the title to the account does not pass from the one supplying the funds to the one to whom the right to draw is jointly extended."

This language is used in connection with facts disclosing a deposit prior to the enactment of the above section relating to commercial banks, but such language was quoted with approval and a similar holding made in a later case of *Wolfe v. Hoepke*[27] wherein the facts disclose that the deposit was made subsequent to the enactment of said statute.

In each of said cases the Supreme Court expressly held that there was no gift from the one whose money was so deposited in the joint account for the reason that there was no delivery, the one making the deposit retaining present control and dominion over the property or at least partial control over it, which precluded it from being regarded as a gift.

The language just quoted from *Meyers v. Albert,*[28] was again approved in a recent case,[29] in which the court held that a savings and loan association account maintained by a father who caused the name of his son to be placed on the signature card with the statement that "when he died, the balance in the account would

[24] *Daly v. Pacific Savings and Loan Ass'n,* 54 Wash. Dec. 169, 282 Pac. 60 (1929)
[25] See note 12 Minn. Law Rev. 285, 286, note L. R. A. 1917C 550.
[26] *Meyers v. Albert,* 76 Wash. 218, 224, 135 Pac. 1003 (1918).
[27] *Wolfe v. Hoepke,* 124 Wash. 495, 214 Pac. 1049 (1923).
[28] See note 26.
[29] *Daly v. Pacific Savings and Loan Assn.,* 54 Wash. Dec. 169, 282 Pac. 60.

belong to his son," did not by reason of these facts pass to the son, but that the money in the account passed to the father's estate. The court expressly distinguishes a California case[30] in which a written agreement[31] was filed with the bank by husband and wife to the effect that the moneys deposited in the account should, as to each of them, be "joint as to time, title and possession,"—the inherent elements of a technical joint tenancy,[32] which the California court held sufficient to vest the whole account in the survivor. Whether the Washington Supreme Court will recognize the efficacy of such an agreement turns on the construction it will place on section 1344, as hereinafter suggested.[33]

In view of these questions not having been decided by our Supreme Court and the conflict regarding same existing in other states, it becomes at once apparent that, except in the case of mutual savings banks, it is hazardous to employ joint deposits as a means of avoiding probate. The opinion may be ventured that when the question is submitted to our Supreme Court it will probably hold that section 1344 does not apply to cases where the parties by express agreement have provided for survivorship, confining the operation of that section solely to questions of survivorship arising as an incident by operation of law to joint tenancy;[34] and especially

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[30] *Kennedy v. Kennedy*, 169 Cal. 287, 146 Pac. 647 (1915).

[31] In this case the agreement was as follows: "Conditions of deposit account No. 11233: San Francisco, Jul. 26, 1902. We, the undersigned, each for himself and not one for the other, declare that the sums deposited to this account are, and those sums hereafter to be deposited shall be, joint as to time, title and possession, and further declare that they are not and have never been the separate property of either, and said sums are hereby made payable to either of us; and we hereby agree that the receipt of either of us shall be a full acquittance and discharge to the Mutual Savings of San Francisco therefor. Bartholomew Kennedy. Mary E. Kennedy. Witness: W H. Cameron."

The agreement could probably be improved by expressly including words of survivorship, although the court held that survivorship was implied from the words actually used.

[32] 33 Corpus Juris, p. 907· *Mabie v. Whittacker* 10 Wash. 656, 661, 39 Pac. 172 (1895).

[33] See main text in connection with footnote 34. If the agreement is ineffective, the statute could be amended. *See Conneally v. San Francisco Sav. and Loan Assn.*, 70 Cal. App. 180, 232 Pac. 755 (1924).

[34] 33 Corpus Juris, p. 901, *Equitable Loan & Securities Company v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177 (1903) The Washington act of 1886 abolishing joint tenancy is entitled "An Act to Abolish the Right of Survivorship in Estates Held in Joint Tenancy." The act has been cited in several Washington cases, but never upon this point. In *State ex rel. Lincoln v. Superior Court*, 111 Wash. 615, 191 Pac. 805 (1920), the court, without citing the act said (p. 619) "Not only is a tenure by joint tenancy against the spirit of our institutions, but it has been expressly abolished by statute."

that such will be the conclusion of our Supreme Court where the joint deposit is one made in a mutual savings bank since that statute in express terms provides that such deposits shall be conclusive evidence of the right of the survivor thereto. On the other hand, it must be borne in mind that the questions are serious and still open. This of itself should impel one to refrain from adopting these means of seeking to avoid the necessity of probate.

Bearer Securities in Joint Safe Deposit Box

Owners of bearer securities, particularly husbands and wives, seek to avoid probate by depositing such securities in a safe deposit box to which each has joint access, with the thought that upon the death of either the survivor may obtain the securities and retain title and possession thereto as against all the world, save possibly the liability for inheritance tax. There is no doubt that their intention cannot be accomplished since the same principles referred to above relating to delivery apply to such securities so deposited. It should be added that we have no statute relating to this situation and consequently the general principles regarding delivery and retention of dominion and control apply

There are undoubtedly other means which are resorted to for the purpose of avoiding the probation of estates to which no reference has been made in this article. It becomes apparent, however, from the principles of law to which I have referred that in practically all of the means mentioned, there is the constant danger of dispute and consequent litigation. This in itself warrants one in taking the position that, save perhaps in rare and unusual instances, resort should not be had to such means but, on the contrary, succession of property upon death should be accomplished through the regular channels of descent or devise by will and judicial administration.

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