The Mind of the Juror, by Albert S. Osburn (1937)

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Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol13/iss3/6
Between living parties, if an intent to transfer an interest in the money deposited is proven, or if the presumption of shift of title raised by statute is not rebutted, a presumption that each named depositor owns one-half of the account arises. *In re Farmers' & Merchants' Bank of Grand Rapids*, 221 Mich. 243, 190 N. W. 698 (1922); *Moskowitz v. Marrow*, supra; *Tomkins v. McGinn*, supra.

Does one depositor have the right to pursue the amounts withdrawn by the other, and demand an accounting? The California court in the instant case makes this statement, "Contrary to the canon of the common law, our courts have established the rule that, when money is taken from a joint tenancy during the joint lives of the depositors, property acquired by the money so withdrawn, or another account into which the money is traced, will retain its character as property held in joint tenancy, unless a change in the character has been effected by some agreement between the parties." The rule thus stated is supported by a line of California cases beginning with *In re Harris' Estate*, 169 Cal. 725, 147 Pac. 961 (1915). The effect of the rule is to require restoration to any joint tenancy account unless you can find consent to the withdrawals. This is admittedly contrary to the common law, in which the first consideration is whether a true joint tenancy exists or not, according to the elements or statutes discussed earlier in this note. If a joint tenancy does exist, either party may withdraw a moiety or less without the other's consent. *In re Sutter's Estate*, 138 Misc. Rep. 85, 245 N. Y. S. 636 (1930); *In re Portanda's Estate*, 135 Misc. Rep. 389, 237 N. Y. S. 715 (1929). The amounts thus withdrawn are severed from the joint tenancy and become the private property of the withdrawer. See note 77 A. L. R. 799. If a true joint tenancy is not created due to a lack of some element, the right to demand an accounting for the whole fund still exists in the depositor. *Bruner v. Bruner*, 223 App. Div. 186, 228 N. Y. S. 63 (1928). Also, if more than a moiety is withdrawn, the courts consider an attempt has been made to destroy the joint tenancy, rather than to make a severance, and they then require an accounting for the whole fund. *O'Connor v. Dunnigan*, 158 App. Div. 324, 143 N. Y. S. 373 (1913); *In re Sutter's Estate*, supra. It is submitted that the California court need not state the rule so broadly, as the common law rules would have procured the desired result in most instances. The instant case could have reached the same result by applying the rule of the *O'Connor* case.

A. T. W.

**BOOK REVIEW**

**THE MIND OF THE JUROR.** By ALBERT S. OSBURN. 1937.


Provocative, but wholesomely so, is this penetrating and ably written commentary (of moderate length) on the present state of the administration of justice in the United States. One almost hesitates to denominate the author a layman, because his qualifications as one of the foremost document specialists of all time have taken him, during a period of over forty years, into the courts of
forty-three states and into nearly every province of Canada. So, as Dean Wigmore observes in the introduction to the volume, he is a very wise layman. At the same time, our author enjoys a position of detachment and can view the functioning of our courts with an objectivity perhaps difficult of attainment by the equally well informed advocate.

The volume begins and ends with a vigorous criticism of many features of American procedural law. Sandwiched in, so to speak, are some choice chapters on the effect of prejudice in jury trials, "Human Nature and the Law," "Psychology in the Courtroom," "Tactful Tactics," and the function of the trial lawyer in assembling and presenting the evidence, in cross-examining witnesses, and in summing up. Of these subjects the author's observations are discerning and should be helpful, not only to the tyro, but to the practitioner of experience as well. It is to be doubted whether the advantages of courtesy, tact, and fairness in the courtroom, the purpose and utility of cross-examination, the necessity for the exercise of care and intelligence in planning a successful cross-examination, and the value of restraint and candor in argument have ever been better illustrated and expounded. Nowhere, I think, is more forcibly emphasized the desirability of simple and concise presentation. His own discussion of the psychological influences at work in the courtroom is illustrative of desirably direct and understandable exposition of an elusive and intangible subject.

"A tangled group of long unusual words," he says, "does not necessarily represent an intelligent grasp of this subject or any subject and one is not qualified to tell fortunes or cure diseases merely because he has learned to speak the much overworked word 'complex.' He may 'evaluate' a thing and still be stupid."

In saying the book is provocative, I have reference to Mr. Osburn's pretty severe castigation of the status quo of our procedural rules. In this connection it should be noted that he does not let us forget the often unfortunate results of the adversary nature of the trial of a common law action—the "contentious trial"—and many of the defects he sees in present procedure are due, he thinks, to an "uncontrolled spirit of advocacy." The remedy, he believes, lies largely in the restoration to the trial judge of the right to assist the jury in interpreting and weighing the evidence, though he recognizes that the propriety of such action may depend upon antecedent reforms respecting the manner of selection, the tenure, and the compensation of the judge.

Mr. Osburn assumes rather dogmatically that, in the average civil or criminal trial, all the right is on one side and all the wrong on the other, that counsel for the one side is a paragon of virtue and the other (whom he calls the "lawyer against the facts"), if not a little diabolical, is likely something of a pettifogger, and also that the rules of evidence ("those musty old rules" from "dusty old law books") have their principal utility in assisting the "lawyer against the facts" in preventing the jury from hearing the truth. We fear Mr. Osburn has overlooked a fact which will be verified by every lawyer of experience, namely, (using Wigmore's
phrasing) "that in a great part of civil litigation, it does not happen that all the acts and facts on one side have been wholly right and lawful and all of those on the other wholly wrong and unlawful. There is more commonly a mixture of these qualities in infinitely varying proportions." And even in criminal cases, "the element of wrong is not always found separated from an element of right"—that is to say, it is not always true that a legally guilty criminal defendant is "wholly and indivisibly guilty." Tolstoi has expressed a related idea very well: "One of the most widespread superstitions is that every man has his own special, definite qualities; that a man is kind, cruel, wise, stupid, energetic, apathetic, etc. Men are not like that. We may say of a man that he is more often kind than cruel, oftener wise than stupid, oftener energetic than apathetic, or the reverse; but it would be false to say of one man that he is kind and wise, of another that he is wicked and foolish. Every man carries in himself the germs of every human quality, and sometimes one manifests itself, sometimes another, and the man often becomes unlike himself while still remaining the same man."

In the trial of the average case, the problem is to determine where the preponderance of right lies. The denomination, either before or after this determination, of the counsel on either side as the "lawyer against the facts" is of very questionable validity. And while we can all agree that there is much room for improvement in respect to the rules of evidence, we should hardly be justified in condemning all the rules of relevancy and all the exclusionary rules as archaic and moth-ridden. Theoretically, at least, most of these rules, such as the hearsay rule, are designed to insure the trustworthiness of evidence and thus assist the jury in arriving at a correct and just result. The fact that these rules may have, in practice, broken down here and there scarcely justifies such a comprehensive condemnation.

Yet it must be confessed that the views of such an experienced and well informed lay observer are challenging and should prompt the bar to take a more general interest in the improvement and revision of trial procedure. It is probably true that the author, recognizing the apathy, lethargy, conservatism, or what you will, of the bar generally toward improvement in matters of this kind, chose somewhat deliberately to be provocative and a little annoying in his castigation. He says as much: "Those who see the shortcomings are in duty bound to awaken and even annoy their companions. It may not be possible to do this gently. Violent and radical criticisms and even epithets are sometimes fully justified and books that say these things in a disagreeable way should not at once be condemned without careful consideration." If Mr. Osburn's poignant criticism of present trial practice, the application of the rules of evidence, and current methods of selecting juries seems a little violent and exaggerated, his commentary, nevertheless, should perform a valuable function in urging the profession to improvement before the laity takes matters into its own hands.

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