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Survivorship in Joint Bank Accouns, and Wilson v. Ivers

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Other ambiguities may be removed by future legislation—at least the unenforced provisions may be specifically repealed. But, in view of the modifications that have been made in the content of the new act, and of the uncertainties it has created, it would seem that its adherents would have gained more had they simply worded the initiative: "Old age assistance grants, together with other income and resources of the recipient, shall be not less than $40 per month."

VERN COUNTRYMAN.

SURVIVORSHIP IN JOINT BANK ACCOUNTS, and WILSON v. IVERS

Joint bank accounts have given rise to considerable litigation, concerning a number of questions.[1] *A* deposits money in a bank, payable in any part to himself or to *B*, or to the survivor. If *A* draws upon the account, may *B* assert an interest in the money taken, or in property purchased with it? If *B* withdraws money, can *A* reclaim it?[2] If *A* dies must the bank pay *B* because the account is "payable to the survivor," though *B* has no claim of ownership?[3] If *B* is permitted to keep what remains at *A*'s death, is the account subject to estate and inheritance taxes?[4] Do *A*'s creditors have redress against *B*? These are some of the problems presented to the courts. A more common question, and the subject of this Comment, is whether *B* becomes the owner of the account at *A*'s death. Has survivorship been obtained?[5]

None of the cases consulted has held that under no conditions could *B* become the owner of the joint account at *A*'s death. They

[1] This subject is treated by Havighurst, *Gifts of Bank Deposits* (1936) 14 N. C. L. REV. 129; Hemingway, *Joint Tenancy in Bank Accounts* (1931) 10 CHI.-KENT L. REV. 37. Katzenstein, *Joint Savings Bank Accounts in Maryland* (1939) 3 MD. L. REV. 109, and Slater, *Joint Accounts and Trusts Created by Bank Deposits* (1932) 2 BROOKLYN L. REV. 27, discuss the trust theory as it applies to two-party bank accounts. Generally, see Comment (1937) 32 ILL. L. REV. 57; *In re* Edwards' Est., 140 Ore. 615, 14 P. (2d) 274 (1932). Also, PATON'S DIGEST (1926) §§ 1809 *et seq.*; BRADY, BANKING LAW JOURNAL DIGEST (4th ed. 1933) §§ 401 *et seq.*

[2] The *inter vivos* relations arising from joint bank accounts are briefly discussed in Note (1938) 13 WASH L. REV. 230.

[3] REM. REV. STAT. § 3249, authorizing the bank to pay the survivor, is similar to the draft recommended by the American Bankers Association "to clear up any legal doubt concerning the authority of the bank to pay over an account to the survivor." 2 PATON'S DIGEST (1926) § 1809 (a). Today 31 states have adopted statutes similar to this, and only Alabama, Kentucky and Tennessee have no statutes on the subject, per information supplied by the A. B. A.

[4] *Re* the Washington law on this subject, see note 39 *infra.*

[5] That the account is *payable* to the survivor (the normal provision of a joint account agreement) does not mean he may *keep* what he withdraws (a right termed survivorship). *In re* Edwards' Estate, 140 Ore. 615, 14 P. (2d) 274, 277 (1932); Smith v. Planters' Sav. Bank, 124 S. C. 100, 117 S. E. 312 (1923) (dissenting opinion).

have differed as to *how A*'s money can be transformed into a bank credit due *B*. Depending upon the theory favored by the court, *B* must make out the elements of a gift, a joint tenancy, a trust, or a contract between himself and *A*, before he can establish his ownership. Ostensibly, the theory adopted by a particular court controls the requirements for survivorship in joint bank accounts in that jurisdiction. In the following paragraphs these several theories will be briefly reviewed.

(1) Most courts reason that if *B* gains some interest in a joint account to which *A* is the sole depositor, he is the recipient of a gift.[6] Accordingly, they call for evidence of the traditional attributes of a gift—intention and delivery. Present donative intention is a question of fact.[7] The finding of delivery is in a sense impossible, for bank credit is inherently incapable of tradition.[8] But a constructive delivery of some sort is usually accepted. The shortcoming of such substitution is that it seldom fulfills the basic requirement of delivery, relinquishment of control. The usual case is one in which *A* has access to the account, and intends to keep such access until his death.[9] One writer aptly calls this an "Indian gift,"[10] and a few courts have agreed with him that such gifts are incomplete or testamentary, hence invalid.

Other courts have been more lenient towards a claim of gift.[11] Since most of this litigation arises after the death of *A*, it is evident that *A* has not actually taken back his gift, and it is sustained despite the above objections.[12] The apparent reason for this attitude, also evidenced by presumptions in favor of *B* such as are created by joint tenancy statutes, discussed later, is that a strict application of the rules of property law too often defeats the intention of *A*.[13] *A* and *B* are usually close relatives in a relation of mutual confidence. Their

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[6] The writer has come across no case involving a joint account to which both parties contributed, in which the court found a "gift" of the deceased's share to the survivor.

Typical are the remarks of the annotator in L. R. A. 1917C 550, who, rejecting the analysis that *B* was a contract beneficiary, said: "It is believed that such a theory rests upon a misconception of the real nature of the question . . .; property that admittedly belonged to one person at a former time is claimed by another who does not pretend to have parted with any valuable consideration therefor . . . . In such a case either a gift or a trust is a condition precedent to any question (as to *B's* right of ownership)." *Cf.* note 26 *infra.*

[7] But see note 32 *infra.*

[8] SALMOND, JURISPRUDENCE (9th ed. 1937) 406, 407, ". . . there are many rights which can be owned, but which are not capable of being possessed . . . . A creditor, for example, does not possess the debt that is due him; for this is a transitory right which, in its very nature, cannot survive its exercise."

[9] Typical was the attitude of the depositor who told his wife, "Dearie, I have opened a joint account in the Morristown Trust Company with you, and you may draw on it to the full amount; but, if you do, I will give you hell." Morristown Trust Co. v. Capstick, 90 N. J. Eq. 22, 106 Atl. 391 (1919).

[10] Hemingway, *supra* note 1, at 51.

[11] *Ibid.;* Comment (1937) 32 ILL. L. REV. 57, 61, n. 41, 42.

[12] *E.g.*, First Nat. Bank v. Mulich, 83 Colo. 518, 266 Pac. 1110 (1928). *Cf.* Maine Savs. Bank v. Welch, 121 Me. 49, 115 Atl. 545 (1921).

[13] A good example is Daly v. Pac. Sav. & Loan Assn., 154 Wash. 249, 282 Pac. 60 (1929), discussed *infra*, p. 111.

banking arrangements are informal. The courts and legislatures are willing to give effect to the intention of *A*, though it be testamentary in essence, and despite the absence of effective delivery, because the rules of gift law seldom fit the facts, and seem to subserve no useful purpose. *B* should have no need to assert that his right comes from a gift, so long as there is a more rational explanation of how survivorship is created in joint bank accounts.

(2) Another theory upon which *B* often asserts his interest in the account is joint tenancy. A joint tenancy resulted at common law from a devise or conveyance of land from *A* to *B* and *C* without any "restrictive, exclusive or explanatory" words. Each became possessed of a complete estate, subject only to the co-use of the other, and when one died, the other, freed from interference, was sole tenant. The heirs of him who died took nothing. This survivorship was the prominent characteristic of joint tenancy and was the reason for its being favored while feudal incidents burdened descent of land. Its hardship on the heirs of the first deceased has long since brought joint tenancy into judicial and legislative disfavor. Nevertheless, joint tenancy has modernly been applied to personalty as well as to realty, and many courts will enforce a contract between *A* and *B* whereby they make themselves "joint tenants" of property.[14]

A few states have enacted statutes declaring particular joint bank accounts to be held in joint tenancy. Washington's REM. REV. STAT. §3348 (3) (limited to mutual savings banks) is typical:

> "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 . . . shall become the property of such persons as joint tenants. . . . The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence . . . of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor."[15]

A few courts have held independently of statute that particular joint bank accounts were owned in joint tenancy.[16]

On the contrary, courts which have appraised the requirements of common law joint tenancy critically have invariably held it inapplic-

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[14] 2 TIFFANY, REAL PROPERTY (3d ed. 1939) § 418; 33 C. J. 904.

[15] Arkansas, Nebraska, New York and West Virginia have statutes similar to this. 2 PATON'S DIGEST (1926) § 1809 (a) lists other states with statutes referring to joint tenancy in bank accounts.

It is noteworthy that at least one state has redefined ownership, abandoning orthodox estates in property. CALIF. CIVIL CODE (Deering, 1937) §§ 669 *et seq. Id.* §§ 682, 683 so alter the meaning of joint tenancy as to make California decisions of little or no authority on this subject in other jurisdictions.

[16] Quigley v. Quigley, 85 F. (2d) 300 (App. D. C. 1936); Att'y-Gen. v. Clark, 222 Mass. 291, 110 N. E. 299 (1915), outlined note 44 *infra;* N. J. Title Guaranty & Trust Co. v. Archibald, 90 N. J. Eq. 384, 107 Atl. 472 (1919), *the reasoning in which was negatived on appeal,* 91 N. J. Eq. 82, 108 Atl. 434 (1919). *Cf.* Miller v. Am. Bank & Trust Co., 71 Colo. 346, 206 Pac. 796 (1922), which arrived at this result without referring to a controlling statute, COLO. COMP. LAWS (1921) § 2692.

able to joint bank accounts.[17] These requirements seem, among other things, to preclude the grantor (who would be the contributor of the money, by analogy) from being a party to the account, since at common law no one could grant himself a joint interest in his own property. At best he would need a conveyance more artful than the terse deposit agreement form. Likewise, the customary right of either party to withdraw any or all of the deposit during the lifetime of the other is incongruous with joint tenancy. It amounts to a privilege of ouster in that its exercise would sever the property. Since only by analogy is ownership of a chose in action made to coincide with the incidents of land tenure, these inconsistencies make the analogy between joint bank accounts and joint tenancy inapt.[18]

A consequence of adopting joint tenancy to explain survivorship in joint bank accounts is that other parties to such accounts desiring the incident of survivorship must ostensibly conform to the requirements of joint tenancy, which presents "some of the most artificial rules of subtle distinctions of the ancient common law."[19]

The numerous statutes reflecting traditional antipathy towards joint tenancy have been rationalized, generally, so as not to affect "joint tenancy" in bank accounts.[20] This is sometimes said to be because survivorship is achieved by "grant, deed, or contract," rather than by operation of law.[21] More likely it is because courts recognize that joint accounts are not actually joint tenancies within the meaning of the statute.

It is apparent that the courts and legislatures adopting joint tenancy as applying to joint bank accounts, impressed with the coincident joint ownership and survivorship, "have not been insistent upon all the niceties of the situation, and have disavowed any intention of searching for defeating technicalities in order to overthrow the manifest intention of the parties. The decisions seem to indicate that quasi joint tenancies and quasi estates by the entireties suffice."[22] It seems accurate to say that there are now two meanings of joint tenancy, one an estate in orthodox property law, the other an interest and right

[17] Staples v. Berry, 110 Me. 32, 85 Atl. 303 (1912); Marble v. Jackson, 245 Mass. 504, 139 N. E. 442 (1923); Burns v. Nolette, 83 N. H. 489, 144 Atl. 848 (1929); N. J. Title Guaranty & Trust Co. v. Archibald, 91 N. J. Eq. 82, 108 Atl. 434 (1919), cited *supra* note 16; *see* Ill. Trust & Sav. Bank v. Van Vlack, 310 Ill. 185, 141 N. E. 546, 549 (1923) (dissenting opinion).

[18] The employment of joint tenancy to explain survivorship might be justified if that were the only available theory, but while survivorship is historically associated with joint tenancy, a number of courts have enforced deposit contracts effecting it independently of joint tenancy. See discussion of contract theory, *infra*, p. 109-110.

[19] 7 R. C. L. 813. An example of such rules is the requirement of a fourfold unity of interest, title, time and possession, which requires ". . . that anything which creates a distinction (between tenants) either severs the joint tenancy or prevents it from arising." CHALLIS, REAL PROPERTY (3d ed. 1911) 367.

[20] *E.g.*, Washington's REM. REV. STAT. § 1344, "Survivorship Between Joint Tenants Abolished," as interpreted in Wilson v. Ivers, 4 Wn. (2d) 477, 104 P. (2d) 467 (1940), discussed *infra*, p. 112.

[21] Comment (1937) 32 ILL. L. REV. 57, 63, n. 46; Malone v. Sullivan, 136 Kan. 193, 14 P. (2d) 647 (1932) *semble*.

[22] *In re* Edwards' Estate, 140 Ore. 431, 14 P. (2d) 274, 277 (1932).

of survivorship in a joint bank account.[23] It appears too late to argue with the courts about their choice of words, but the choice seems unfortunate, inappropriate, and confusing, as well as unnecessary.

(3) The few cases which have held ordinary joint bank accounts, worded "payable to either or the survivor", to be in trust seem clearly wrong in principle.[24]

"Tentative trust" savings accounts are a means to achieve survivorship through another form of bank account. *A* puts money in the bank "in trust for *B*," retaining the right to draw; at *A's* death, what remains becomes *B's* separate property. The device obviously contradicts the rule against testamentary trusts, and few jurisdictions give it effect.[25] Washington has not recognized it.

(4) Another theory by which the shift of ownership in a joint account may be explained is that the parties' interests in the joint bank credit arise solely out of contract. The bank account is primarily a contract of debt. A court might interpret that contract according to *A's* intention in making it in such form as to give *B* a right of withdrawal. Whether *B* had a right to the money drawn by him, or to the balance as survivor, would depend upon whether "it appears from the terms of the promise [by the bank] in view of the accompanying circumstances that the purpose of (*A*) in obtaining the promise of all or part of the performance thereof [payment to *A* or *B*, or the survivor] is to make a gift to *(B)*. . . ."[26] However, this application of the donee beneficiary doctrine has not been articulately made the basis of decision in any of the cases read.[27]

Several courts have implied a contract for survivorship between the

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[23] More and more "joint tenancy" is treated as interchangeable with joint accounts permitting survivorship. Bankers early adopted the term joint tenancy (as in Burns v. Nolette, 83 N. H. 489, 144 Atl. 848 (1929)), and headnote writers (see headnote 2, First Nat. Bank v. Lawrence, 212 Ala. 45, 101 So. 663 (1924), and compare the opinion), textbook authors (see reference to MICHIE, note 46 *infra*), encyclopaedia editors (see heading, 9 C. J. S. § 286), and digest compilers have all continued using it indiscriminately. Such usage has undoubtedly affected judicial opinions.

[24] 1 SCOTT, TRUSTS (1939) § 58.6(3); 1 BOGERT, TRUSTS (1935) § 47, cases cited n. 97.

[25] This doctrine is recognized in RESTATEMENT, TRUSTS (1935) § 58. Cases and jurisdictions adopting it are noted in 1 SCOTT, TRUSTS (1939) § 58.3, n. 5.

[26] Adapted from RESTATEMENT, CONTRACTS (1932) § 133 (1a), defining a donee beneficiary. Donee beneficiary contracts, though they violate the common law notions of privity, are now generally enforced. 2 WILLISTON, CONTRACTS (Revised ed. 1936) § 357. But there is resistance. The postulate that "rights of property may arise simultaneously with the making of a contract, and may be enforced by the owner though he was not a party to the contract" has presented intrinsic difficulty to lawyers and judges. *Id.*, p. 1031. An example is Decker v. Fowler, 199 Wash. 549, 92 P. (2d) 254 (1939). See Shattuck, *Donee Beneficiaries—Decker v. Fowler* (1939) 14 WASH. L. REV. 312.

This theory might apply to joint accounts whether *A* deposited alone, or both *A* and *B* contributed. In the latter case the court might infer separate contracts with the bank, each partially for the benefit of the other depositor.

[27] Of these cases only *In re* Edwards' Estate, 140 Ore. 431, 14 P. (2d) 274 (1932) has suggested this theory as applicable. The cases which have permitted survivorship on a contractual theory though *B* has contributed nothing to the account, have not made their position clear. Malone v. Sullivan, 136 Kan. 193, 14 P. (2d) 647 (1932); Chippendale v. N. Adams

depositors, where they both contributed to the account.[28] If they intended that the survivor should have what remained, their surrender of the conditional right of survivorship, each to the other, would apparently be sufficient consideration for any alteration they desired to make in their respective rights to the credit created.[29] Some new joint account agreements contain form contracts between the parties to the account, where survivorship is desired. The use of such contracts would largely eliminate the uncertainty in respect to survivorship which attends most joint accounts.

By either of these contract theories the intention of the depositor is alone of importance. Extraneous rules of property law need not be considered or followed in determining survivorship.[30] The deficiency of the implied contract theory is that it neglects the numerous joint accounts to which *A* alone deposits. Here, it is urged, the donee beneficiary doctrine provides a complementary theory by which to dispose of such cases according to the intention of *A*.

(5) Some courts have decided that, regardless of theory, the intention of the deceased depositor alone should govern the question of survivorship. This most often happens when the court is faced with facts inconsistent with the theory advanced by the survivor, and the intention of the deceased is plain that *B* should have what remains.[31]

Sav. Bank, 222 Mass. 499, 111 N. E. 371 (1916); N. J. Title Guaranty & Trust Co. v. Archibald, 91 N. J. Eq. 82, 108 Atl. 434 (1919); Deal's Adm'r. v. Merchants' & Mechanics' Sav. Bank, 120 Va. 297, 91 S. E. 135 (1917).

[28] First Nat. Bank v. Lawrence, 212 Ala. 45, 101 So. 663 (1924); *In re* Edwards' Estate, 140 Ore. 431, 14 P. (2d) 274 (1932); Wilson v. Ivers, 4 Wn. (2d) 477, 104 P. (2d) 467 (1940), discussed *infra*, p 112. A number of decisions purporting to accept a contractual theory *re* survivorship have left to conjecture whether a contract was implied between the depositors, or a promise had been secured to them jointly (the survivor of joint-obligees has the right to enforce performance), or each had secured a promise from the bank for the partial benefit of the other.

None of the cases read discussed any conflict between such a contract and the Statute of Wills, presumably because such rights are said to be created *in praesenti*.

[29] That intention of the depositors in these cases should govern, rather than the language of the deposit agreement, seems clear. Such agreement is between depositors and bank, not between the depositors themselves. Therefore its language, (*e.g.*, terming the account one in joint tenancy) is not binding as between the depositors or their representatives, though it may be indicative of intention. Again, because the customary extent of the transaction between bank and depositors is for both parties to the account (regardless of whether both deposit) to sign a *signature identification* card to which a form agreement is inconspicuously appended, it seems manifestly unfair for the law to imply an ancillary contract between *A* and *B*, even if consideration can be found, if *A* has indicated a contrary intention, and if the signatures can be interpreted as having been made for purposes of identification only. "Acceptance must be unequivocal in order to create a contract." RESTATEMENT, CONTRACTS (1932) § 58. *But see*, and note the harsh result of, Hill v. Badeljy, 107 Cal. App. 598, 290 Pac. 637 (1930).

[30] It does not follow that the formality of a contract for *B*'s benefit may be dispensed with, nor that the rules regarding gifts are always inappropriate. See the discriminating opinion in Perry v. Leveroni, 252 Mass. 390, 147 N. E. 826 (1925).

[31] Good examples are First Nat. Bank v. Mulich, 83 Colo. 518, 266 Pac. 1110 (1928) (gift denied); Burns v. Nolette, 83 N. H. 489, 144 Atl. 848 (1929) (joint tenancy denied).

It is notable that intent to achieve survivorship is a requirement of all the cases,[32] and that most courts have compromised other requirements of their various rules to give effect to *A*'s intention that *B* have what is left of the account at *A*'s death.

The remainder of this Comment is concerned with several Washington cases involving survivorship in joint bank accounts.[33]

In *Daly v. Pacific Savings & Loan Association*,[34] *A* made *B*, his son, a party to his savings account with defendant association, which in its by-laws provided that the survivor in such a case might be paid the balance of the account. *A*'s intention was that *B* should have whatever he drew from the account, and should have the balance at *A*'s death. After *A* died his widow successfully resisted *B*'s claim to the proceeds of the account. *B* argued that the account had been in joint tenancy, and that for various reasons the statute abolishing survivorship in joint tenancies did not apply, but the court said: "If (*B*) acquired any interest in the account, the moneys therein having been deposited by *(A)*, it was by reason of gift," and that a gift could not be found where *A* reserved the right of withdrawal.[35]

[32] "No formula of words is sufficient." Hemingway, *supra* note 1, at 44; Notes (1938) 13 WASH. L. REV. 230; (1937) 17 BOST. U. L. REV. 494.

But note that though intention is a question of fact, the difficulty of finding a distinct transaction manifesting it, and the barrier raised by such statutes as Washington's REM. REV. STAT. § 1211, forbidding a party in interest to testify as to any transaction between himself and the deceased, have made necessary frequent recourse to the language of the bank form, and to presumptions. As to presumptive intention there is little uniformity. Note (1933) 2 FORT. L. J. 207 sets out a plausible rule developed in Canada.

[33] The Washington court has considered joint accounts:

(1) Where *A* alone deposited, and *B* survived:
Winner v. Carroll, 169 Wash. 208, 13 P. (2d) 450 (1932); Daly v. Pac. Sav. & Loan Assn., 154 Wash. 249, 286 Pac. 60 (1929).

(2) Where both *A* and *B* contributed:
Wilson v. Ivers, 4 Wn. (2d) 477, 104 P. (2d) 467 (1940); Toivonen v. Toivonen, 196 Wash. 636, 84 P. (2d) 128 (1938); Meyers v. Albert, 76 Wash. 218, 135 Pac. 1003 (1913).

(3) Where REM. REV. STAT. § 3249, cited *supra* note 3, was concerned:
Wilson v. Ivers, 4 Wn. (2d) 477, 104 P. (2d) 467 (1940).

(4) Where REM. REV. STAT. § 3348(3), cited *supra* note 15, was concerned:
Wilson v. Ivers, 4 Wn. (2d) 477, 104 P. (2d) 467 (1940); Toivonen v. Toivonen, 196 Wash. 636, 641, 84 P. (2d) 128, 130 (1938); *in re* Bush's Estate, 195 Wash. 416, 423, 81 P. (2d) 271, 274 (1938) (fraud and undue influence found); Nelson v. Olympia Fed. Sav. & Loan Assn. (extending the rule of this statute to savings and loan assns.), *In re* Peterson's Estate, Winner v. Carroll, all cited *infra*.

(5) Where REM. REV. STAT. § 1344, cited *supra* note 20, was concerned:
Wilson v. Ivers, 4 Wn. (2d) 477, 104 P. (2d) 467 (1940); Nelson v. Olympia Fed. Sav. & Loan Assn., 193 Wash. 222, 225, 74 P. (2d) 1019, 1020 (1938); *In re* Peterson's Estate, 182 Wash. 29, 32, 45 P. (2d) 45, 47 (1935); Winner v. Carroll, 169 Wash. 208, 215, 13 P. (2d) 450, 452 (1932).

[34] 154 Wash. 249, 286 Pac. 60 (1929).

[35] The court adopted the categorical rule stated in Meyers v. Albert, 76 Wash. 218, 135 Pac 1003 (1913), that where only one person deposits money in a joint account "title to the account does not pass . . . to the one to whom the right to draw is jointly extended," without distinguishing that case as one where no intention of gift was shown. In referring to

Winner v. Carroll[36] also concerned a joint savings account to which *A* alone deposited money, this time in a mutual savings bank. The court literally interpreted REM. REV. STAT. § 3348 (3)[37] to mean that such an account became the property of the survivor as a joint tenant, and survivorship obtained as a statutory exception to REM. REV. STAT. § 1344, which abolished survivorship in joint tenancies. In re *Peterson's Estate*[38] ratified this interpretation in refusing to permit taxation of any part of a joint account as belonging to the deceased depositor's estate.[39]

Only a few months ago the court decided *Wilson v. Ivers.*[40] Mr. and Mrs. Ivers had deposited community funds[41] in two ordinary joint checking accounts. The signature cards stated as is customary that either party or the survivor might withdraw, and after her husband's death, Mrs. Ivers did withdraw both accounts. The children sought an accounting of the money as community property, but the court held that it had become Mrs. Ivers' separate property. This is the first decision upholding survivorship in an ordinary joint bank account in this state.

Unfortunately the theory employed is obscured. The court stressed the facts that the deposits were of community property, and were made by both husband and wife. Whether the same result would have been reached in the absence of these facts is not made clear, but the emphasis upon them does restrict the authority of the case.

Secondly, the opinion does not make clear whether *A* and *B* were joint tenants or parties to a contract for survivorship. It concludes from general authority that the parties have the power to mutually contract for survivorship, yet holds that they create a joint tenancy in the funds, to which survivorship is incident, without attempting a distinction.[42]

If the survivorship was held to be an incident of joint tenancy, our court extended the theory incorporated in REM. REV. STAT. § 3348 (3).[43] The court purports to follow general rules, and presumably would require no more of the depositors than is required in other jurisdictions accepting joint tenancy in bank accounts. That both

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Kennedy v. Kennedy, 154 Wash. 249, 252, 282 Pac. 60, 62, the Daly case intimated the possibility of joint tenancy in joint accounts.

[36] 169 Wash. 208, 13 P. (2d) 450 (1932).

[37] Set out in part *supra* p. 107.

[38] 182 Wash. 29, 45 P. (2d) 45 (1935).

[39] *Cf.* Nelson v. Olympia Fed. Sav. & Loan Assn., 193 Wash. 222, 74 P. (2d) 1019 (1938). REM. REV. STAT. § 11201 (1937) authorizes taxation as though whatever *A* contributed to the account had belonged to *A* and been bequeathed to *B*.

[40] 4 Wn. (2d) 477, 104 P. (2d) 467 (1940).

[41] At least the court so treated them; a part was the separate property of the survivor.

[42] Other decisions which are authority for the possibility of a contract for survivorship between the depositors, where statutes prevent survivorship in joint tenancy, have not termed the relation a joint tenancy. Malone v. Sullivan, 136 Kan. 193, 14 P. (2d) 647 (1932); Wisner v. Wisner, 82 W. Va. 9, 95 S. E. 802 (1918). First Nat. Bank v. Lawrence, 212 Ala. 45, 101 So. 663 (1924); and *in re* Edwards' Estate, 140 Ore. 615, 14 P. (2d) 274 (1932), plainly distinguish the two concepts.

[43] Set out in part *supra* p. 107.

depositors in *Wilson v. Ivers* had an equal interest in the funds deposited (it being community property) does not seem important—other courts have not required that each "joint tenant" have an equal interest in the money before it is deposited.[44] Nor does the fact that a contract was implied between the parties seem important. None of the few jurisdictions which recognize joint tenancy in joint accounts, so far as noted, have required a contract between the tenants. Nor could one be implied in the instances where all the money deposited was *A's*. If our court now recognizes joint tenancy in bank accounts, presumably *A* can deposit money in a joint account so that *B* may have a present interest and right of survivorship, contrary to dictum in an earlier case.[45] That what was recognized in the *Wilson* case was not orthodox joint tenancy is implicit in the holding that REM. REV. STAT. § 1344, purporting to abolish survivorship in joint tenancies, has no bearing upon the case.[46]

If the survivorship was held to be the result of a contract between the parties to the account, different conclusions prevail. Consideration becomes requisite as between *A* and *B*. Here the contract, if any, was implied—the only basis for it was the deposit agreement forms, one of which read, "Deposits entered herein are payable to either *(A)* or *(B)* or the survivor . . .," a clause common to most joint accounts.[47] From it the court inferred that the depositors intended the survivor to have for his own what remained of the account. Such an interpretation is plainly based upon a presumption of intention. It is questionable whether the court would have inferred a like intention from such dubious evidence had the depositors not been husband and wife, and their deposits not commonly owned. Why those circumstances impelled the court to make the presumption is not apparent, and it is conjectural what the court will look for in determining whether a contract for survivorship is implied. No reason appears why a written contract between the depositors, supported by consideration, would not achieve survivorship, regardless of the relation of the parties or the relative contributions to the account, were the contract theory the one adopted by the Washington court.

There is language in *Wilson v. Ivers* to support either of these views.[48] Because the first embroils the court in a confusing conflict of terminol-

[44] See cases cited *supra* note 16, *Cf.* Att'y-Gen. v. Clark, 222 Mass. 291, 110 N. E. 299 (1915), where two sisters contributed equally to a joint account intending that it, like their other property, should be held in joint tenancy, and did nothing inconsistent with common law joint tenancy in the account.

[45] See note 35 *supra.*

[46] It is also noteworthy that the passages from 7 AM. JURIS. 299, quoted as stating the general rule, refer to "joint ownership," not "joint tenancy." Nor do the three cases cited in the other reference, 5 MICHIE, BANKS AND BANKING (1932) 99 ("It is settled law that joint tenancies with the incident of survivorship obtain as to . . . bank deposits."), give weight to that proposition. It seems probable that the court adopted "joint tenancy" as interchangeable with joint accounts permitting survivorship. See suggestion *supra* note 23.

[47] See note 5 *supra.*

[48] The court said, "We are of the opinion that, as to this deposit, the parties contracted to, and did, create a joint tenancy of the funds with the right of survivorship." Elsewhere it stated, "Nor is there any question involving the construction, or the extension of the effect, of any statute

ogy and authority, the second theory is more appealing, if not better bolstered by the opinion.

Apart from the theory involved, the result of *Wilson v. Ivers* seems undesirable in two particulars. The rule most courts have followed, and to which this opinion subscribed, is that survivorship should not be permitted unless that was *A*'s intention. Yet the court, having no evidence of such intention, presumed it from a clause common to every joint account—"Deposits entered herein are payable to either *(A) or (B),* or the survivor . . . ."—printed on the signature identification card. It is submitted that such interpretation leaves every joint account open to the claim of the surviving party, unless there is admissible evidence of the deceased's contrary intention, and that a better policy would be to permit survivorship, by whatever theory, only where *A*'s actual intention is that *B* own what remains of the joint account at *A*'s death.

The other criticism is that this decision apparently diminishes the effectiveness of the community property system. If the deposits made by *A* and *B* had remained community property, the right of survivorship effected by an implied contract was contradictory with REM. REV. STAT. § 6894, which requires that such contracts be in writing, witnessed and acknowledged. If, as the court says, the rights of *A* and *B* were fixed *in praesenti* as joint tenants, the accounts were at no time community property. Apparently (unless the court was resorting to fiction) joint deposits of community funds cease to be community property when deposited so as to become the property of the survivor. It is submitted that this result is so radical, especially because it affects many accounts, that the court should have made certain that the parties not only wished survivorship, but intended to end their community property in the funds deposited, before deciding that such a departure had been made.

Naturally this decision has encouraged attempts to make joint account agreements which will permit survivorship.[49] But bankers and lawyers would do well to act upon it with caution, for the questions raised by *Wilson v. Ivers* make it much less definitive than it appears.

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relative to joint tenancy. It is purely a question of contract operating *in praesenti* upon the rights of parties to certain property."

[49] On the strength of this decision many banks in Washington have drawn new deposit agreements designed to achieve survivorship as between parties to joint accounts with them. Some are limited to community property deposited jointly by husband and wife, but most make no reference to the relationship of *A* and *B*, or to previous ownership of the money. Some are in terms of joint tenancy, others are not.