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JOINT OWNERSHIP OF CORPORATE SECURITIES IN NORTH CAROLINA

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At the common law, the distinguishing incident of a joint tenancy was the right of survivorship existing between the joint tenants.[1] This right, however, outlived its original social purpose with the decline of the feudal tenure system,[2] and was deemed alien to the spirit of the early United States. Accordingly, the right of survivorship as an incident of joint tenancy was abolished in North Carolina by statute in 1784.[3] Now codified as section 41-2 of the North Carolina General Statutes, that statute provides that:

> In all estates, real or personal, held in joint tenancy, the part of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common.[4]

Despite the 1784 statute, our supreme court early ruled that parties to a contract may expressly provide for a right of survivorship as to jointly owned property. In *Taylor v. Smith*,[5] two sisters had been given a promissory note in settlement of their father's estate. The jury found from the evidence that the sisters had orally

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[1] BLACKSTONE, COMMENTARIES ON THE LAW 334-35 (Grant ed. 1941).

[2] The old common law favored joint tenancies, as against other classes of concurrent ownership, because its policy was adverse to the division of tenures, and the consequent multiplication of feudal services and the weakening of the feudal relation. In joint tenancies, this did not occur to any great extent, since the tenants were one person so far as the lord was concerned. With the practical abolition of tenures, the reason for such policy ceased. . . .
TIFFANY, REAL PROPERTY § 284 (abr. ed. 1940).

[3] Act of 1784, ch. 204, § 6. Most states have statutes or judicial decisions similar in effect, though some accomplish the same end by presuming a tenancy in common unless a contrary intent appears or an estate in joint tenancy is expressly declared. See discussion in text accompanying notes 43-84 *infra*.

[4] A proviso to the statute recognizes the right of survivorship for purposes of winding up a partnership business and is covered in more detail by the UNIFORM PARTNERSHIP ACT § 25(2), codified in North Carolina as N.C. GEN. STAT. § 59-55. See 2 LEE, NORTH CAROLINA FAMILY LAW § 125 (3d ed. 1963) [hereinafter cited as LEE].

[5] 116 N.C. 531, 21 S.E. 202 (1895).

agreed that if either should die without a living heir, the survivor would take the note. The supreme court affirmed a judgment on the verdict for the surviving sister on the ground that the parties had entered into a contractual right of survivorship supported by mutual consideration,[6] pointing out that

> the Act of 1784 . . . abolishes survivorship where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship.[7]

The contractual right of survivorship recognized in *Taylor v. Smith* obtains, of course, only where it is found that a valid and subsisting contract exists between the parties,[8] a matter not always readily susceptible of proof. Modern day efforts to establish survivorship interests between joint owners typically arise in a non-commercial, gratuitous context, *i.e.,* between persons closely related by kinship or affinity. In these instances, joint ownership is intended to serve as a convenient substitute for a testamentary disposition.[9] This is especially so as to joint checking and savings accounts, devices frequently used by persons of relatively modest

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[6] When the two sisters agreed with each other to hold the note, in which each had an individual moiety as joint tenants subject to the right of survivorship, these mutual rights of survivorship, when once created, were assignable equities, constituting mutual considerations sufficient to support the agreement.
Id. at 535, 21 S.E. at 204.

[7] *Ibid.* This analysis of the effect of N.C. GEN. STAT. § 41-2 (1950) has been reaffirmed by the court on many occasions. See, *e.g.,* Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947); Jones v. Waldroup, 217 N.C. 178, 7 S.E.2d 366 (1940).

[8] See note 6 *supra.* Co-owners of property can be deemed to have contracted with reference to provisions affecting their rights of which they were not aware. In Ervin v. Conn, 225 N.C. 267, 34 S.E.2d 402 (1945), the court held that federal regulations incorporated by reference into United States Government Series D Bonds governed disposition of the bonds upon the death of one of the co-owners. See 2 LEE § 127. The *Ervin* rule is in accord with judicial decisions in most states as to co-owned United States Government bonds. However, a small minority of cases hold that the United States Treasury Regulations are for the protection of the Government and do not control the rights of the co-owners *inter partes.* See Annot., 37 A.L.R.2d 1221 (1954). These latter decisions have been overruled by the United States Supreme Court's decision in Free v. Bland, 369 U.S. 663 (1962).

[9] For a discussion of a related device used in some states for this purpose, see Christopher, *Totten Trust: The Poor Man's Will,* 42 N.C.L. REV. 214 (1963).

means. The same is true, to a lesser extent, of joint ownership of corporate securities. Fortunately, the status of the former type of "poor man's will" has been resolved by statute in North Carolina.[10] Unfortunately, however, attempts by the unsophisticated and uninformed layman to create a valid right of survivorship in another person with reference to corporate securities is, under the present status of the law in North Carolina, very unlikely to be successful.

I. The Problem

In the typical transaction, Bascom Businessman and his wife pool their separate incomes or he is the sole generator of family income. Over a period of years, it becomes difficult, if not impossible, to separate the commingled funds of Bascom and his wife and they never have occasion to think in such terms, at least absent domestic difficulties. Bascom learns of a sound investment or the ever-present "hot tip" and directs a broker to request issuance of the stock to himself and his wife as "joint tenants with right of survivorship and not as tenants in common," or conveys this desire to the broker in less artful terms. Some brokers in North Carolina, under direction from their legal counsel, either decline to request issuance in this manner or advise against it. If, however, the stock is so issued, Bascom probably, for the sake of convenience, has the certificate sent to his office, where he keeps it with his other personal papers. Alternatively, the stock may be issued, not in the names of Bascom and his wife, but in the name of the brokerage house, which will hold the certificate under the terms of an account card. Less frequently, unlisted securities in closely held family corporations will be gratuitously transferred by principal stockholders into joint ownership with members of their family, without consultation with any legal or financial counsel.

In any close approximation of the above factual situations, the unsettled status of North Carolina law might well cause the personal representative of the transferring or purchasing joint tenant to contest the validity of the purported right of survivorship. Such challenges frequently result in difficulties, both legal and personal, between the surviving joint tenant and residuary legatees or heirs in intestacy and inevitably result in perplexed and unjustly blamed

[10] N.C. Gen. Stat. § 41-2.1 (Supp. 1965), enacted in 1959 and broadened by amendment in 1963. See discussion in Part III *infra*.

attorneys, securities brokers and corporate fiduciaries serving as executor, administrator and trustee. All these parties, upon reflection, are uncertain of their respective rights and responsibilities. Why?

The first case in which the North Carolina Supreme Court considered the question of joint ownership of corporate securities was *Jones v. Waldroup*.[11] In that case, decedent had owned seventy-four shares of Blue Ridge Savings and Loan Association stock in his own name. He had executed a paper writing that stated: " '[F]or value received, I hereby transfer, set over and assign to R. M. Waldroup [decedent], or Mrs. Hattie L. Waldroup [defendant], either or the survivor, all my right, title and interest' " in the stock.[12] Decedent's administrator brought suit against the defendant, decedent's widow, contending that the document executed by decedent created only an agency in the defendant to have the certificates transferred on the books of the corporation during decedent's lifetime. Defendant testified that she had kept the Blue Ridge certificates in her private desk at home.[13] She had also alleged ownership of the stock on the ground, supported by uncontroverted evidence, that the stock had been purchased with her funds. The trial judge instructed the jury that it should find for defendant if the stock was purchased with her funds. The jury returned a verdict for defendant.

On appeal, the supreme court reversed. The court first recognized that a joint tenancy in personalty can be created by contract

[11] 217 N.C. 178, 7 S.E.2d 366 (1940).

[12] *Id.* at 180, 7 S.E.2d at 367. It is generally held, at common law and under the UNIFORM STOCK TRANSFER ACT §§ 1, 9 (N.C. GEN. STAT. §§ 55-75, -83), that transfer on the books of the corporation is not necessary to a completed gift. See, *e.g., In re* Antkowski's Estate, 286 Ill. App. 184, 3 N.E.2d 132 (1936); Bolles v. Toledo Trust Co., 132 Ohio St. 21, 4 N.E.2d 917 (1936); *In re* Connell's Estate, 282 Pa. 555, 128 Atl. 503 (1925); 12A FLETCHER, PRIVATE CORPORATIONS § 5684 (perm. ed. rev. repl. 1957). Moreover, endorsement of the certificate or separate assignment to the donee is unnecessary to a completed gift if delivery is made of the certificate to the donee or his agent. See, *e.g., In re* Antkowski's Estate, *supra*; Bolles v. Toledo Trust Co., *supra*; *In re* Connell's Estate, *supra*; 1 CHRISTY, TRANSFER OF STOCK § 53 (1958). *Contra,* cases cited in 1 CHRISTY, *supra* at 7:5 n.3. Compare Scottish Bank v. Atkinson, 245 N.C. 563, 96 S.E.2d 837 (1957). See generally Modesett, *Application of the Uniform Stock Transfer Act to Gifts of Stock,* 20 ROCKY MT. L. REV. 67 (1947).

[13] The court did not regard this testimony as being violative of the "Dead Man's Statute," now N.C. GEN. STAT. § 8-51 (1953), citing Thompson v. Onley, 96 N.C. 9 (1887).

—"either bilateral agreement or gift"[14]—citing *Taylor v. Smith.* The court construed the document executed by decedent "as creating a common ownership in the property which is its subject until one of them should die, with the right of survivorship."[15]

Also involved in *Waldroup* were stock certificates in two other associations, originally registered in each instance by decedent as "R. M. Waldroup" but later re-registered at his request in the name of "R. M. Waldroup or H. L. Waldroup." Defendant testified that she had possession of these certificates also. An official of one of the associations testified that the letter requesting re-registration stated that " 'I want both names so if anything should happen the other would cash in without the usual red tape.' "[16] As to these certificates the supreme court stated:

> The title of the stock might be by assignment, without reference to registry on the books of the company—which is good *inter partes*—following which the legal title might be perfected by such registry and delivery of the certificates. . . . But this is by no means an exclusive method of transfer. It may be done by direction of the holder and owner of the stock upon the books of the company which, followed by delivery, or a surrender of the dominion of the certificates to the transferee, would make the title complete. . . . The position of the defendant here is even stronger, because Waldroup required the issue of new stock to himself or wife, which was so registered upon the books of the company, under his instructions, under circumstances which might be evidence of a gift *inter vivos,* creating an estate for the common enjoyment of himself and wife, with the right of survivorship upon the death of one of them.[17]

Obviously, the thrust of the court's opinion in *Waldroup* was that it was confronted with the question of whether decedent had made a completed gift of the stock. So viewing the case, the court emphasized that evidence of donative intent had been offered in the form of testimony as to decedent's statements to third persons and that delivery had been shown by defendant's testimony as to her possession of the certificates after re-registration or assignment.

The precedential value of *Waldroup* as a gift case is, however, weakened by the recognition in the opinion that defendant had

[14] 217 N.C. at 187, 7 S.E.2d at 371.
[15] *Id.* at 187-88, 7 S.E.2d at 371.
[16] *Id.* at 182, 7 S.E.2d at 368.
[17] *Id.* at 188, 7 S.E.2d at 371 (citations omitted).

alternatively alleged, and offered evidence in support thereof, that the certificates had been purchased by decedent with her funds. Thus, the court could have based a decision upholding defendant's ownership of the stock on the ground of a resulting trust.[18] Indeed, in a later analysis of its decision in *Waldroup,* the court emphasized this aspect of the case.[19]

The court in *Waldroup* avowedly left unanswered the pivotal question of whether transfer on the books of the corporation into the names of both proposed joint tenants would conclusively or presumptively establish the crucial elements of a gift—evidence of donative intent and delivery. Any doubt as to the court's opinion on that question was, however, removed by its 1946 decision in *Buffaloe v. Barnes,*[20] where the issue was squarely and unavoidably presented to the court for the first time.

In *Buffaloe,* decedent purchased stock in Carolina Power and Light Company, directing that the stock be issued to "David T. Barnes [decedent] and Rossie Mae Barnes [decedent's niece] as joint tenants with right of survivorship and not as tenants in common."[21] Decedent's executor instituted suit for a declaratory judg-

[18] See, *e.g.,* Wise v. Raynor, 200 N.C. 567, 157 S.E. 853 (1931); Wachovia Bank and Trust Co. v. Black, 198 N.C. 219, 151 S.E. 269 (1930); Deese v. Deese, 176 N.C. 527, 97 S.E. 475 (1918). Examination of the briefs on appeal reveals that counsel for both parties viewed the principal issue as whether a resulting trust was justified on the facts of the case. See Brief for Appellant, p. 12; Brief for Appellee, p. 15.

[19] In *Waldroup's case* . . . the evidence tended to show that all the stock was purchased by Dr. Waldroup with his wife's money. That evidence was sufficient to sustain the verdict to the effect that his estate was not entitled to the stock. *Harris* v. *Harris,* 178 N.C. 7. . . . Very likely the jury answered the issues in *Waldroup's case* . . . as it did because of the evidence to the effect that the wife's money was used to purchase the stock.

Buffaloe v. Barnes, 226 N.C. 779-80, 39 S.E.2d 599, 600, *denying rehearing* of 226 N.C. 313, 38 S.E.2d 222 (1946).

[20] 226 N.C. 313, 38 S.E.2d 222, *rehearing denied,* 226 N.C. 778, 39 S.E.2d 599 (1946).

[21] Since Carolina Power and Light Company is a North Carolina corporation, a potentially troublesome conflict of laws problem was avoided. At common law, a distinction was made between a share in a corporation, which was the ownership of a portion of the entity, and the share certificate, which was simply the physical representation of the shares. Under the Uniform Stock Transfer Act and the Uniform Commercial Code, however, the shares are merged into the certificates so that the certificates themselves become in effect the shares. See, *e.g.,* Lockhart v. Dickey, 161 La. 282, 108 So. 483 (1926); Salmon v. Moore, 238 Miss. 459, 118 So. 2d 867 (1960); Mills v. Jacobs, 333 Pa. 231, 4 A.2d 152 (1939). The adoption of the Uniform Stock Transfer Act or the Uniform Commercial Code in every

ment as to ownership of the stock, joining as defendants decedent's niece and the residuary legatees. Upon an agreed statement of facts it appeared that the certificates were delivered to decedent; that he placed them in his safety deposit box; that he had paid the consideration for the stock; that the niece had endorsed a dividend check over to him; and that, in the words of the court, "nor [was there any] agreement between the parties in relation to the stock."[22] The niece contended that there had been a gift *inter vivos* of the stock and that upon her uncle's death she became sole owner by survivorship. The residuary legatees contended that the niece was entitled to only one-half of the stock, on the theory that section 41-2 of the North Carolina General Statutes converted a joint tenancy into a tenancy in common and that, by virtue of the partition statute, section 46-42, the decedent had retained the right to partition and, hence, had never relinquished control over the property to the extent of his interest therein.[23]

The superior court held that the stock was the sole property of the niece. On appeal by the residuary legatees, the supreme court, in a decision from which two justices dissented,[24] held that the agreed facts were insufficient to support the superior court's conclusion. The court pointed out, however, that the residuary legatees had conceded the niece's ownership as to one-half of the stock, and modified the judgment accordingly. Justice Devin, speaking for the divided court, stated that:

> The general rule is that where the owner or purchaser of shares of stock has the certificate therefor issued in the name of another, and so registered on the books of the corporation, though retain-

jurisdiction has virtually eliminated any distinction between share and certificate, although local changes in these uniform acts may cast some doubt upon the generality of this proposition. The modern rule, however, seems to be that when stock in a corporation created under the law in one state is transferred in another, the law of the state of the transfer governs the transaction and the resulting rights of the parties *inter se*. Mylander v. Chesapeake Bank, 162 Md. 255, 159 Atl. 770 (1932); GOODRICH, CONFLICT OF LAWS § 162 (4th ed. 1964). Since Carolina Power and Light Company is a North Carolina corporation and the purchase by David Barnes took place in this state, the court was not called upon to accept or reject this rule. Presumably, however, our court would follow the majority rule.

[22] 226 N.C. at 317, 38 S.E.2d at 225.

[23] This concession by the residuary legatees was, it would seem, unnecessary and unwise, for if there were no completed gift, the niece would not be entitled to even one-half of the stock.

[24] Barnhill, J., dissented and was joined by Sewell, J.

> ing possession of the certificate, nothing else appearing, the transaction is regarded as a gift completed by constructive delivery. . . . But the rule is otherwise where the name of another is inserted in the certificate for the owner's convenience . . . or where the donor has not divested himself of right and title to the stock and of all dominion and control over it.[25]

The court concluded that upon the agreed facts there was insufficient evidence of (1) intent to make a present gift and (2) donative intent, to find as a matter of law that an *inter vivos* gift of the stock had been made.

Turning first to the question of intent to make a present gift, the court emphasized that:

> The interest in the stock which might accrue to Rossie Mae Barnes depended upon a contingency. The donor retained possession of the certificates, the evidence of title, and received the dividends. Though the certificates were in the names of both as joint tenants, the testator had the right at any time to segregate his interest therein by partition. G.S. 46-42 . . . . The right of control over the shares of stock at least as to one-half interest therein was retained by the testator.[26]

The court's conclusions are, to say the least, anomolous, in light of its recognition of the general rule that transfer on the books of the corporation constitutes constructive delivery even though the donor retains possession of the certificates. What is accomplished by conceding that delivery is established by transfer on the books but then holding that transfer, standing alone, is insufficient evidence of intent to make a present gift even though no evidence negating such intent is introduced?[27] Even more difficult to fathom is the court's treating the donor's rights under the partition statute as a continuation of his dominion over the stock. As the dissent pointed out,[28] the right of partition exists even though the donor joint tenant is not in physical possession of the certificates. Thus,

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[25] 226 N.C. at 318, 38 S.E.2d at 226 (citations omitted).

[26] *Id.* at 319, 38 S.E.2d at 226.

[27] See analysis in 25 N.C.L. REV. 91 (1946), noting the instant case.

[28] [T]he fact that the testator had the right to petition for partition has no bearing on the question of delivery and does not vary the general rule that transfer on the books of the company constitutes constructive delivery. It resided in the testator so long as he lived whether he held the certificate or not and without regard to the portion of the purchase price paid by him. The estate created and not the retention of the certificate gave him the right.
226 N.C. at 324, 38 S.E.2d at 230.

the donor joint tenant would, in a sense, retain dominion and control over at least one-half of the stock even though the certificates are tenant of his right to partition in order to remove a "dominion" in the possession of the donee. To carry the court's position to its logical extreme would require an express waiver by the donor joint which is merely incidental to the relationship between the parties. Certainly such a requirement would pass unnoticed by all donors other than those advised by able legal or financial counsel and would result in frustration of the donor's intent.

As to the lack of donative intent appearing from the agreed facts, the court observed that

> donative intent . . . is not conclusively established by the use of words in the face of a certificate of stock purporting to create a joint tenancy with right of survivorship. To determine the requisite intent to make a present gift of a joint interest requires consideration of all the facts attendant upon the creation of the purported interest.[29]

In considering a number of cases from other jurisdictions, the court discussed at some length the Oregon case of *Manning v. United States Nat'l Bank*.[30] In that case, a husband surrendered his solely owned bank stock and ordered a new certificate issued to him and his wife "and upon the death of either, the survivor of either." Both spouses signed a receipt for the stock at the bank, and the husband took the certificate, telling his wife " 'I will put this away.' "[31] The Oregon court held that an inter vivos gift had been made. Our court quoted from *Manning* as follows:

> There is uncontradicted oral evidence tending to indicate that the stock was transferred with donative intent, but we consider the written instruments decisive on that issue . . . . the execution of the joint receipt constitutes evidence of delivery to and acceptance by both.[32]

Our court's reliance on *Manning* is especially interesting in light of its previous observation that there was "no agreement between the parties in relation to the stock."[33] The same statement may be made of the factual situation in *Waldroup* insofar as there was not

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[29] *Id.* at 320, 38 S.E.2d at 227.
[30] 174 Ore. 118, 148 P.2d 255 (1944).
[31] *Id.* at 125, 148 P.2d at 259.
[32] 226 N.C. at 320, 38 S.E.2d at 227, quoting from the *Manning* case, 174 Ore. at 131-32, 148 P.2d at 261.
[33] See text accompanying note 22 *supra*.

a written agreement executed by both parties. Rather, decedent had made a unilateral assignment of the stock certificates formerly held in his own name. Thus, if *Waldroup* is to be regarded as a gift case, it becomes fairly certain that, absent a written agreement by both parties to the gift providing for survivorship, our court would require transfer on the books of the corporation accompanied by evidence of donative intent, intent to make a present gift, and delivery to the donee indicating relinquishment of control by the donor, in order to establish a right of survivorship by a completed inter vivos gift.[34] This analysis is supported by the court's further elaboration of its decision in *Buffaloe* in its later memorandum decision, expressly stated not to be binding on the court, denying a rehearing of the case.[35] Conversely, it would seem that, if the donor

[34] If this be the law, it is squarely opposed to what the dissenting opinion regarded as the majority and preferable rule, stated in the dissent as follows:

> The stock as transferred on the books of the company creates an estate for the common enjoyment of the joint tenants with the right of survivorship upon the death of either. When the testator directed that it be purchased and so transferred he put it beyond his power to recall the gift or to sell, pledge, or give it away without the consent of the other joint owner.
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> "There is a complete gift of corporate stock where, by the direction of its owner, it has been transferred to the donee on the books of the corporation, and a new certificate issued in the name of the donee, or a certificate is issued in the first instance in the name of the donee, although the certificate so issued is retained by the donor or the corporation and not delivered to the donee." Cases cited, Anno., 99 A.L.R. 1080. Wherever it has been held to the contrary, decision was made to turn upon some additional, unusual circumstance which definitely disclosed that the donor at the time had no present intent to make a gift.

226 N.C. 313, 323-24, 38 S.E.2d 222, 229 (dissenting opinion). It should be pointed out, however, that the dissent's statements apply more specifically to stock issued in the donee's name alone.

The North Carolina Supreme Court has never decided a case involving the above question with reference to corporate securities or bank accounts. However, in Copeland v. Craig, 193 S.C. 484, 8 S.E.2d 858 (1940), the South Carolina Supreme Court was called upon to determine, under North Carolina law, the effectiveness of such a transfer. In that case, the donor had surrendered a certificate for one hundred shares of stock in Statesville Cotton Mills, receiving in return a certificate for ten shares in his name and a certificate for ninety shares in the name of his daughter. He retained possession of both certificates until his death and received three of the four dividends paid during that time. The South Carolina court concluded that the law of North Carolina did not prohibit the finding that registration was sufficient to pass title of the securities to the daughter even though the donor retained possession of the certificate. This case was decided before the North Carolina Supreme Court rendered its decision in the *Buffaloe* case. *Quaere* whether the *Copeland* decision would have been the same in light of the *Buffaloe* case.

[35] In the case before us, there is no claim to ownership under a

and donee execute a survivorship agreement with reference to the jointly owned stock, as was done in *Manning,* there is no necessity of producing further proof of the elements of a completed gift. Indeed, it is arguable that the parties have then created a joint tenancy with right of survivorship by contract rather than by gift.

The above analysis is supported by our court's holdings in the joint bank account cases that have come before it. Between 1921 and 1952, five cases involving joint bank accounts were considered by the court.[36] In each of these cases, the account was registered in the name of *"A* or *B,"* with no explicit reference to a right of survivorship, and all deposits to the account were made by the decedent. In each case, the court held that the account belonged to the estate of the decedent on the ground that a completed gift had not been made until the donee joint tenant exercised his or her agency to make withdrawals, which agency was revocable at any time by the donor and which terminated upon the donor's death.[37]

The court's 1956 joint bank account decision in *Bowling v. Bowling*[38] was the first such case in which the court considered the effect of an express agreement for survivorship. In *Bowling,* however, the court talked of contract rather than gift and upheld the survivorship provision as to two accounts for which the parties had signed a signature card, even though there was no showing as to who had made deposits to the accounts. The court simply stated that "since the parties have contracted and agreed that the savings

bilateral agreement, but only by gift *inter vivos.* . . . A joint tenancy in stock with a provision for survival of ownership, where the donee retains custody of the stock, nothing else appearing, in our opinion, does not meet the definition of a gift *inter vivos.* The possession of of a joint tenant is not that exclusive, absolute, and unconditional possession contemplated in a gift *inter vivos.*

226 N.C. 778, at 780, 39 S.E.2d 599, at 600 (1946).

[36] Hall v. Hall, 235 N.C. 711, 71 S.E.2d 471 (1952); Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940); Nannie v. Pollard, 205 N.C. 362, 171 S.E. 341 (1933); Jones v. Fulbright, 197 N.C. 274, 148 S.E. 299 (1929); Thomas v. Houston, 181 N.C. 91, 106 S.E. 466 (1921). See 31 N.C.L. REV. 95 (1952); 8 N.C.L. REV. 73 (1929).

[37] See 2 LEE § 176. In comparing the holdings in these cases with *Waldroup,* it is interesting to note that, in *Waldroup,* where certain of the certificates had been registered in the name of "R. M. Waldroup or H. L. Waldroup," there was additional evidence of a completed gift and the court analyzed the case in terms of a gift rather than a revocable agency. It was not deemed necessary by the court that the donee tenant obtain a re-transfer on the books of the corporation and obtain registration in the donee's name alone, an act analogous to withdrawal of funds from a joint savings account.

[38] 243 N.C. 515, 91 S.E.2d 176 (1956). See 35 N.C.L. REV. 75 (1956).

accounts . . . were held by them 'as joint tenants with right of survivorship, and not as tenants in common,' the right of survivorship existed."[39] However, another joint account involved in the case had been opened by the surviving co-owner but no signature card had been executed by the parties. There was no evidence concerning the source of deposits other than that the initial deposit was made from another joint account payable to "Dr. and/or Mrs. W. W. Bowling or the survivor." The court held that one-half of the account belonged to the estate of the deceased joint tenant, even though the survivor had usually had physical possession and control of the passbook and had made all the withdrawals.

The court's emphasis on the need of an executed signature card, notwithstanding the designation of the account, was most forcefully made in a 1960 bank account case, *Wilson County v. Wooten.*[40] In that case, the court held that the surviving co-owner under a joint savings account covered by signature card was entitled to the balance in the account, to the exclusion of creditors of the decedent's insolvent estate, even though the decedent had made all the deposits to the account. The court did not discuss the effect, if any, of the right of the joint tenants to partition the account, a point agonized over in *Buffaloe,* nor did it discuss the question of consideration for the "contract" on the part of the surviving joint tenant, as it had in *Taylor v. Smith.*

If our court is to be consistent, it would seem clear that, based upon the more recent bank account cases,[41] the court would have to hold, if ever presented the question, that the execution of a brokerage account card or a similar agreement between the parties themselves would conclusively establish the right of survivorship regardless of which tenant had furnished the funds, had cashed dividend

[39] 243 N.C. at 520, 91 S.E.2d at 180.

The leading modern case involving joint bank accounts is Matthew v. Moncrief, 135 F.2d 645 (D.C. Cir. 1943). Vinson, J., surveyed cases from many states and pointed out that, where signature cards had been executed by both tenants, the joint tenancy was upheld by some courts on a contractual theory, while other courts have upheld it as a completed inter vivos gift.

[40] 251 N.C. 667, 111 S.E.2d 875 (1960).

[41] See also Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961). In that case a wife sued her estranged husband for one-half of the money in bank accounts registered in joint names with explicit provision for right of survivorship. The court held that while a right of survivorship could be created by contract, such contracts were not enforceable by the alternate against the bank while both parties were living.

checks or had retained custody and control of the certificates.[42] Until such a result is obtained from the court, however, attorneys, personal representatives, brokers and securities owners must assume that inquiry is necessary as to the details of the transfer to determine the source of the funds and the circumstances of the transfer, in order to determine after the fact whether a completed gift had been made. If, in the course of such inquiry, it appears that there is no signed agreement, it would be a rare factual situation indeed that would still permit the conclusion, based upon evidence that would be admissible in litigation, that a completed gift had been made. Such uncertainty discourages the use of joint tenancies with right of survivorship in corporate securities, a device that could be of genuine usefulness in handling the personal affairs of many persons.

II. Approaches of Other Jurisdictions

A. In General

The uncertainty surrounding the creation of a joint tenancy in corporate securities in North Carolina is found in few other jurisdictions. Many states have approached the problem directly and by statute have made clear the status of this form of ownership.[43] In others, the courts have upheld gifts in factual situations indistinguishable from *Buffaloe,* even though such a result was not compelled by rules of law peculiar to the jurisdiction.[44]

Most states, including those in which the courts have upheld gifts of survivorship interests in stock, have made judicial or legislative inroads on the right of survivorship that was the prime incident of a common law joint tenancy. Though three different approaches have been utilized, the basic result is the same in all. The first approach—the North Carolina approach—has been a legislative abolition of the right of survivorship as an incident of joint

[42] If shares of corporate stock are desired with the right of survivorship, it would seem that a good way to achieve this result would be to register the shares on the books of the corporation in the names of "A and B as joint tenants with the right of survivorship and not as tenants in common" and then proceed to spell out expressly in a separate agreement signed by both co-owners, the right of survivorship. Any kind of real or personal property may be held as joint tenants with the right of survivorship under the provisions of an express contract.
2 Lee § 126, at 119.

[43] See text accompanying notes 65-74 *infra.*

[44] See text accompanying notes 53-63 *infra.*

tenancy. The North Carolina statute provides that all property so held shall descend and vest upon the death of the first dying tenant as if held as tenants in common.[45] Only four states—Georgia, Pennsylvania, South Carolina and Tennessee[46]—have enacted similar statutes. The courts in each state, however, have held that a right of survivorship can be added to a joint estate by contract between the parties.[47] As in *Taylor v. Smith*,[48] the problem is to determine what constitutes a sufficient contract.

The statutes in a majority of states, however, simply presume that every joint tenancy is a tenancy in common.[49] A typical example of statutes following this approach is that of the District of Columbia:

> Every estate granted or devised to two or more persons in their own right, including estates granted to husband and wife, shall be a tenancy in common, unless expressly declared to be a joint tenancy; . . . .[50]

Under such statutes, the presumption of tenancy in common is rebutted by clear evidence of a contrary intent. Each court must decide for itself what facts suffice to give this "clear evidence."

In still other states, the courts themselves have ruled that a joint tenancy may be created only by "express language" and "clear

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[45] N.C. GEN. STAT. § 41-2 (1950).

[46] See GA. CODE ANN. § 85-1002 (1955); PA. STAT. ANN. tit. 20, § 121 (1950); S.C. CODE § 19-55 (1962); TENN. CODE ANN. § 64-107 (1955).

[47] See Equitable Loan & Sec. Co. v. Waring, 117 Ga. 599, 44 S.E. 320 (1903); *In re* Wright's Estate, 348 Pa. 76, 34 A.2d 57 (1943); Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953); Runion v. Runion, 186 Tenn. 25, 207 S.W.2d 1016 (1947).

[48] 116 N.C. 531, 21 S.E. 202 (1895).

[49] The jurisdictions adopting such statutes are: Alabama, ALA. CODE, tit. 47, § 19 (1958); Arizona, ARIZ. REV. STAT. ANN. § 14-204 (1956); California, CAL. CIVIL CODE § 683; District of Columbia, D.C. CODE ANN. § 45-816 (1961); Florida, FLA. STAT. ANN. § 689.15 (1944); Hawaii, HAWAII REV. LAWS § 345-2 (1955); Idaho, IDAHO CODE ANN. § 55-104 (1948); Illinois, ILL. ANN. STAT., ch. 76, § 2 (Smith-Hurd Supp. 1964); Indiana, IND. ANN. STAT. § 51-104(a) (1951); Kansas, KAN. GEN. STAT. ANN. § 58-501 (Supp. 1961); Kentucky, KY. REV. STAT. §§ 381.120, 381.130 (1960); Maryland, MD. ANN. CODE, art. 50, § 9 (1964); Montana, MONT. REV. CODES ANN. §§ 67-308, -313 (1962); Nevada, NEV. REV. STAT. § 111.085 (1959); New Jersey, N.J. STAT. ANN. § 46:3-17 (1940); Oklahoma, OKLA. STAT. ANN., tit. 60, § 74 (1963); Rhode Island, R.I. GEN. LAWS ANN. § 34-3-1 (1956); South Dakota, S.D. CODE § 51.0212 (Supp. 1960); Texas, TEX. PROB. CODE § 46 (Supp. 1964); Virginia, VA. CODE ANN. §§ 55-20, -21 (1959); Washington, WASH. REV. CODE § 64.28.010 (Supp. 1963); West Virginia, W. VA. CODE ANN. §§ 3539, 3540 (1961).

[50] D.C. CODE ANN. § 45-816 (1961).

intent."[51] The Supreme Court of Errors of Connecticut has stated the presumption as follows:

> It needs only be mentioned that in this State joint tenancies are not favored in the law, and that even when a joint tenancy is created it does not, as at common law, carry with it the incident of survivorship. If the latter factor is to be joined to the estate created, it must be done by a definite provision in that regard.[52]

In such a jurisdiction, each case must be examined on its facts to ascertain whether the requisite intent exists.

B. Judicial Decisions

The three approaches set forth above are basically similar. In each, the question for decision is whether the parties so clearly intended to create a joint tenancy with right of survivorship that their actions can be said to constitute a "contract" or the requisite "clearly expressed intent." In the *Buffaloe* case, the North Carolina Supreme Court took the position that, absent a contract, the right of survivorship can be established only when the elements of an inter vivos gift are present. Of the three elements—intent, delivery and acceptance—the element of delivery and the resulting lack of dominion has proved most troublesome to the court. The court's difficulties have not, however, been compelled by the facts in the gift cases before it nor by the North Carolina statutory background. Indeed, several courts in other states, faced with indistinguishable facts and similar rules of law, have found the requisite delivery and upheld the joint tenancy with survivorship.

In the Maryland case of *Allender v. Allender*,[53] a father placed shares of stock in his closely held corporation in his name and the

[51] This judicial presumption appears to have been adopted in the following jurisdictions: Connecticut: Houghton v. Brantingham, 86 Conn. 630, 86 Atl. 664 (1913); Delaware: Shore v. Milby, 31 Del. Ch. 49, 64 A.2d 36 (1949); Iowa: Stonewall v. Danielson, 204 Iowa 1367, 217 N.W. 456 (1928); Massachusetts: Battles v. Millbury Sav. Bank, 250 Mass. 180, 145 N.E. 55 (1924); Mississippi: Cross v. O'Cavanagh, 198 Miss. 137, 21 So. 2d 473 (1945); Missouri: Opinion of the Attorney General, July 21, 1950; Nebraska: *In re* Estate of Johnson, 116 Neb. 686, 218 N.W. 789 (1928); New Hampshire: Pierce v. Baker, 58 N.H. 531 (1879); New York: Overheiser v. Lackey, 207 N.Y. 229, 100 N.E. 738 (1913); Oregon: Manning v. United States Nat'l Bank, 174 Ore. 118, 148 P.2d 255 (1944); Wisconsin: Farr v. Trustees of Grand Lodge, 83 Wis. 446, 53 N.W. 738 (1892).

[52] State Bank & Trust Co. v. Nolan, 103 Conn. 308, 317, 130 Atl. 483, 486 (1925).

[53] 199 Md. 541, 87 A.2d 608 (1952).

names of each of his four children "jointly and to survivor." Making no mention of this act to his children, he placed the newly issued certificates in his safe deposit box and continued until his death to receive the dividends on all shares and to exercise all voting rights. Upon his death, his widow brought suit to set aside the transfers. The Maryland Court of Appeals held that the surrender of the old certificates and the issuance of the new ones was an act sufficient to effect a completed transfer of the interest to the decedent's children. The court found all the elements of an inter vivos gift.[54] Donative intent was seen in the act of a father putting equal number of shares jointly in his name and the name of each of his children. Delivery was accomplished when decedent placed the newly issued certificates in his safe deposit box since, in the eyes of the court, the possession of one joint tenant is the possession of both. The remaining element of a gift—acceptance by the donees—was presumed since the transfer was beneficial to them. The fact that the donor retained the certificates, voted the shares, received the dividends and had a statutory right of partition was not sufficient to vitiate the effectiveness of the gift. Said the court: "In the instant case it is clear that the donor retained no legal control over the devolution of the joint interest at his death and no power to revoke or undo what he had done, ..."[55]

On similar facts, the South Dakota court upheld a daughter's rights of survivorship in stock her father had had issued in their names "as Jt. Wr. of Surv & not as tenants in common."[56] After finding donative intent from the facts and stating that acceptance was to be presumed in a gift from parent to child, the court said:

> Although donor retained possession of the certificate, he surrendered his exclusive dominion and control thereof when he had

[54] The court of appeals regarded the question as whether a present gift to the children had been consummated and did not even refer to the Maryland statute governing the creation of joint tenancies. That statute, substantially unchanged in its current form, provides that no joint estate shall be a joint tenancy unless "it is expressly provided" in writing that such is intended. MD. ANN. CODE art. 50, § 9 (1964).

[55] 199 Md. at 549, 87 A.2d at 612. Compare with this rationale, the language of the North Carolina court in *Buffaloe,* quoted in text accompanying note 26 *supra.*

[56] Bunt v. Fairbanks, 134 N.W.2d 1 (S.D. 1965).

This case was decided under S.D. CODE § 51.0212 (Supp. 1960), which provides, in pertinent part: "A joint tenancy interest is one owned by several persons in equal shares, by a title created by a single . . . transfer, when expressly declared in the . . . transfer to be a joint tenancy . . . ."

> ownership placed in defendant and himself. Nothing more remained to be done to make the gift complete and absolute. It was irrevocable. Each co-owner had an equal right to possession of the certificate and since they could not both have manual possession at the same time, possession by one cotenant is, in contemplation of law, possession of both.[57]

In the case of *In re Johnson's Estate*[58] the decedent obtained certificates of deposit in four banks made to himself or his wife and placed them in his safe deposit box. Although the wife knew of their existence, she never had possession of the certificates. The Nebraska court held that Mrs. Johnson was the owner of the certificates of deposit by virtue of her right of survivorship, emphasizing the transferor's intent rather than delivery:

> In those cases in which the question is disposed of on the gift theory a long technical discussion is engaged in as to whether or not there could be a delivery sufficient to meet the common-law requirement of a gift where the donor retained possession of the certificate of deposit or the passbook; . . . . Practically all of such decisions finally turn on the question of the intention of the donor, and that is the rule in this state.[59]

Still another rationale is presented in the Ohio case of *In re Hutchison's Estate*.[60] Decedent purchased twenty-five shares of stock with funds taken from a joint bank account. The shares were registered in the name of him and his wife "as tenants in common of individed equal interests for their respective lives, remainder in the whole to their survivor." In an action to determine the effectiveness of this registration, the Ohio court considered the problem as one of contract:

> The problem is therefore reduced to the simple question whether the parties have used apt language to express their purpose, and, if so, whether the contract is valid and enforceable under the laws of this state.
>
> It would be difficult to frame language which would be more apt,

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[57] 134 N.W.2d at 3.

Again compare the language of the North Carolina Supreme Court quoted in text accompanying note *26 supra*.

[58] 116 Neb. 686, 218 N.W. 739 (1928).

[59] *Id.* at 688, 218 N.W. at 740. Compare Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956); Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960). In these bank account cases, our court departed from its previous rationale of agency and gave effect to the intent of the depositor by allowing survivorship where the intent was clearly expressed.

[60] 120 Ohio St. 542, 166 N.E. 687 (1929).

> and which would more clearly express an intention by each of the parties to make an irrevocable grant of his undivided one-half interest in the stock to the other, to take effect upon the death of either.[61]

With reference to the validity of the contract, the court said: "If . . . a donor or grantor, by the operative words of the gift or grant, clearly expresses an intention to give the right of survivorship, such words will not be disregarded."[62] A valid right of survivorship was found to have been created.[63]

These cases represent but four of the jurisdictions that have judicially considered and approved the creation of a right of survivorship in corporate securities.[64] The rationales of the courts differ. Some emphasize the elements of an inter vivos gift; some emphasize the donor's intent; others analyze the question as one of contract. Other states, however, perhaps fearful of these diverse and ofttimes conflicting rationales or perhaps too impatient to await judicial decisions, have enacted statutes designed to furnish more definite guidelines in this area.

C. Existing Legislation

The types of statutes enacted are almost as numerous as the legislatures enacting them, but a representative example is that of Ohio:

> A joint estate with the incidents of a joint estate as at common law, including the right of survivorship, may be created in shares by executing and delivering a certificate therefor to two or more persons with the words "as joint tenants" or "as joint tenants

[61] *Id.* at 545, 166 N.E. at 688-89.

[62] *Id.* at 552, 166 N.E. at 691.

[63] Compare this result with the action of the North Carolina Supreme Court in the *Bowling* case. There securities were registered in the name of "William W. Bowling and Mrs. Agnes Paulk Bowling, as joint tenants with right of survivorship and not as tenants in common." With no discussion of their action, the court awarded one-half of the securities to each party. A right of survivorship was recognized, however, in bank accounts the signature cards of which contained identical language.

[64] The other jurisdictions having such holdings include: Colorado: Eisenhardt v. Lowell, 105 Colo. 417, 98 P.2d 1001 (1940); Illinois: Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962), 51 ILL. B.J. 826 (1963); Iowa: Hyland v. Standiford, 253 Iowa 294, 111 N.W.2d 260 (1961); Missouri: Bunker v. Fidelity Nat'l Bank & Trust Co., 335 Mo. 305, 73 S.W.2d 242 (1934); Wisconsin: Zander v. Holly, 1 Wis. 2d 300, 84 N.W.2d 87 (1957).

with right of survivorship and not as tenants in common" following their names . . . .[65]

In a straightforward manner, this statute declares that the use of certain specified words will create a joint tenancy with right of survivorship. The creation of this tenancy is not elective; the use of the statutory phraseology creates a right of survivorship whether or not intended. For the unsophisticated purchaser of stocks, such a statute may produce property rights totally foreign to his intent. In spite of this danger for those who unknowingly register securities in joint names at the advice of friends or acquaintances, this statute has the virtues of certainty, simplicity and clarity. There is no ambiguity in its language and the rights of parties under it are well defined. Perhaps because of these virtues, this type of statute is found in several other jurisdictions.

In Colorado, the statute is quite similar,[66] except it is expressly provided that the words "joint tenancy" or "joint tenants" will suffice; words of survivorship are not required. The Arkansas statute[67] states that stock certificates issued to two or more persons with the word "or" between the names shall be held in a joint tenancy with right of survivorship. This statute is declared to be applicable only to Arkansas corporations, but it is believed that its policy would apply to the corporate securities of foreign corporations.[68]

The Michigan statute[69] provides that stock certificates registered in the name of persons who are husband and wife shall be held as joint tenants with right of survivorship. No provision is made for persons other than husband and wife. Since corporate securities are most commonly held jointly by husband and wife, however, such a limited statute eliminates much uncertainty.[70]

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[65] OHIO REV. CODE ANN. § 1701.24(D) (Page 1964).

[66] COLO. REV. STAT. ANN. § 76-1-5 (1963).

[67] ARK. STAT. ANN. § 64-225 (Supp. 1963).

[68] See Jensen v. Houseby, 207 Ark. 742, 182 S.W.2d 758 (1944). See also VA. CODE ANN. § 13.1-434 (1964) (same jurisdictional limitation).

[69] MICH. STAT. ANN. § 26-211 (1957). This section provides: "All bonds, certificates of stock, . . . or other evidences of indebtedness hereafter made payable to persons *who are husband and wife*, . . . shall be held by such *husband and wife* in joint tenancy unless otherwise therein expressly provided, . . . with full right of ownership by survivorship in case of the death of either." (Emphasis added.)

[70] In those states recognizing tenancy by the entireties in personal property, the problems created by joint ownership of corporate securities is similarly alleviated. Jurisdictions recognizing such estates are Arkansas,

Like the basic Ohio statute, the Maine legislature provided that shares registered in two or more names "as joint tenants or under language indicating the intention that said property be held with the right of survivorship" shall be deemed a true joint tenancy.[71] The legislature recognized, however, that it would be desirable to achieve uniformity between shares purchased prior to the statute and those purchased afterwards. Accordingly, the statute provides that shares issued *before* the effective date of the statute could be brought under its provisions by filing with the corporation or its transfer agent an agreement stating a desire to be subject to its provisions.[72] This eliminates possible questions of impairment of contracts, but still allows present stockholders to benefit from the provisions of the statute should they so desire.

Whereas the Ohio statute and its variants provide that the use of certain words or phrases will automatically give rise to a joint tenancy, the New Mexico approach is clearly different. That statute provides:

> An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants, to two or more persons and to the survivors of them and the heirs and assigns of the survivor, or to two or more persons with right of survivorship, shall be *prima facie evidence* that such property is held in a joint tenancy and shall be conclusive as to purchasers or encumbrancers for value. In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same.[73]

Such a statute successfully avoids the objection raised to the absolute statutes previously discussed. Under Ohio law, for example, securities registered with the words "joint tenants" are deemed to be held in such tenancy. Under the New Mexico statute, however, the shareholder who inadvertently agrees to such registration or whose shares are so registered by a well-meaning transfer agent could introduce evidence at a later time to rebut the presumption of joint tenancy. Unfortunately this opportunity to rebut the presumed right of survivorship is also available to any disgruntled heirs

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Delaware, District of Columbia, Florida, Massachusetts, Maryland, Pennsylvania, Tennessee and Vermont. See Rogers, *Joint Ownership of Corporate Stock*, 13 U. PITT. L. REV. 498 (1952).

[71] ME. REV. STAT. ANN. tit. 33, § 42 (1954).

[72] ME. REV. STAT. ANN. tit. 33, §§ 43, 44 (1954).

[73] N.M. STAT. ANN. § 70-1-14.1 (1961). (Emphasis added.)

or creditors. The mere presence of this opportunity can stimulate long and costly litigation even though there is little reason to believe the presumption will be rebutted.

A Wyoming statute[74] provides that, upon the death of a person who held any property as a joint tenant, any person interested in the property may file an affidavit in the county where the property is located describing the property and the instrument creating the joint estate and certifying under oath to the death of the joint tenant. The next section then provides:

> Each affidavit aforesaid, whether heretofore or hereafter signed, sworn to and recorded, substantially in compliance with the provisions of this act, [§§ 34-98, 34-99] shall constitute *prima facie evidence* that all facts recited therein are true for the purpose of such legal effect as may result therefrom by operation of law.[75]

The statute does not, however, contain any provision concerning the legal consequences of such ownership. Interested parties still must determine the legal rights established under the instrument creating the joint estate. In making such a determination, it is *prima facie* established only that the instrument is in existence and that one of the joint owners is deceased.

In at least one state, Illinois, the courts have seized upon a statute seemingly unrelated to the question and made it applicable. Chapter 76, section 2(b) of the Illinois statutes[76] provides that, where securities are registered in two or more names as joint tenants with right of survivorship, a corporation and its transfer agents may, upon the death of one of the tenants, treat the survivor as sole owner of the securities. Such statutes are relatively common,[77] but by their terms seem only to protect the corporation from liability and not to govern the rights of parties *inter se*.[78] In the case of

[74] WYO. STAT. ANN. § 34-98 (1959).

[75] WYO. STAT. ANN. § 34-99 (1959). (Emphasis added.)

[76] ILL. ANN. STAT., ch. 76, § 2(b) (Smith-Hurd Supp. 1964).

[77] See, *e.g.*, ARIZ. REV. STAT. ANN. § 10-175.01 (1956); CAL. CORP. CODE § 2414; N.C. GEN. STAT. § 55-59(3) (1965); TEX. REV. CIV. STAT. ANN. art. 1302-6.04 (Supp. 1964); WASH. REV. CODE ANN. § 23.01.225 (Supp. 1965).

[78] Similar statutes have been enacted to allow a bank to pay the balance of a joint account to the survivor of the depositors without liability. See, *e.g.*, ILL. ANN. STAT. ch. 76, § 2(a) (Smith-Hurd Supp. 1964); N.C. GEN. STAT. § 53-146 (1965). Decisions under such statutes generally hold that they are solely for the protection of the bank and do not affect the rights of the depositors between themselves. See, *e.g.*, Jones v. Fulbright, 197 N.C. 274, 148 S.E. 229 (1929). A similar rationale would probably apply to the stock statutes.

Frey v. Wubbena,[79] however, the Illinois court regarded the statute as establishing a statutory method of creating a joint tenancy. In the *Frey* case, stocks had been registered in the name of a father and his daughters. After his death, his second wife attempted to set aside the purported joint tenancies. In denying her action, the court said:

> A statutory right of survivorship exists and we think it unnecessary to follow the principles of common law joint tenancy whether an agreement has been signed by the parties or not. The registration of stock ownership upon the books of the corporation in appropriate statutory language is sufficient to vest legal title, subject to divestment if the circumstances surrounding the transaction warrant it.[80]

Later Illinois cases have followed this decision,[81] creating a rule of law that almost certainly extends the statute beyond the intent of the Illinois legislature.

In only four of the fifty states are there substantial roadblocks to the creation of joint tenancies with right of survivorship in corporate securities; North Carolina is one of the four.[82] In some jurisdictions, the creation has been sanctioned by judicial decisions

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[79] 26 Ill. 2d 62, 185 N.E.2d 850 (1962).

[80] *Id.* at 69, 185 N.E.2d at 854-55.

[81] See Houswerth v. Gill, 40 Ill. App. 2d 281, 189 N.E.2d 409 (1963); Lytle v. Northern Trust Co., 39 Ill. App. 2d 372, 188 N.E.2d 743 (1963); In the Matter of Estate of Cronholm, 38 Ill. App. 2d 141, 186 N.E.2d 534 (1962).

[82] The other three states are Louisiana, Texas and Washington. In Louisiana, the attorney general has ruled that joint tenancies with right of survivorship are invalid because there is no statutory authority for its existence, because it would violate the formalities required for wills, and because it would defeat the civil law system of forced heirs. See 1944-46 LA. OP. ATT'Y GEN. 104 (1946). The problems in Texas and Washington arise out of the community property system there in force. Texas passed a statute attempting to solve its problem but constitutional difficulties have arisen and are as yet unresolved. See Orgain, *The Texas Joint Tenancy in Corporate Shares: Problems of the Stock Transfer Agent,* 16 BAYLOR L. REV. 99 (1964). A 1963 Washington statute permits the creation of a joint tenancy by written instrument, WASH. REV CODE ANN. § 64.28.010 (Supp. 1965), but recent legislation effectively emasculates it. The 1965 legislature enacted a statute protecting a corporation from liability in treating jointly issued stock as a valid joint tenancy if the surviving spouse submits, among other things, an affidavit to the effect that the shares were community property, that no proceedings have been begun or are contemplated to probate a will of the decedent, and that all creditors have been satisfied, WASH. REV. CODE ANN. § 23—.—[34] (Supp. 1965), effective midnight, June 31, 1967. Since such an affidavit will almost certainly be required by the corporation before making transfer, only those few persons meeting its requirements may obtain transfer without long and difficult processes.

that, by various rationales, have approved such estates.[83] In other states, statutes in numerous variations govern the creation and incidents of a joint tenancy in stocks.[84] The stockholders, attorneys, fiduciaries and brokers in North Carolina can wait and hope that the next decision of our supreme court will approve the creation of a survivorship interest in corporate securities by some reasonable and practicable method. A more certain and a more immediate solution can be attained, however, in the form of a legislative enactment.

III. Suggested Legislation for North Carolina

A legislative proposal frequently represents a value judgment by its proponents that any existing judicial decisions on the subject are unsatisfactory, either in their clarity or in the result obtained. Such value judgments abound in suggesting a legislative definition of the rights of persons seeking to own corporate securities as joint tenants with right of survivorship. Is such ownership desirable? If so, what inter vivos incidents, if any, should attach to such ownership? What rights should creditors of one of the joint tenants have in the jointly owned securities? Like the joint bank account, the joint tenancy of corporate securities is an effort to establish a new form of ownership to accomplish the intent and desires of the parties. As is frequently the case, the "new wine" does not easily fit into the "old vessels" of established legal principles and rules of law.

Fully realizing these problems, the authors suggest the following legislative means by which those persons who desire to own corporate securities as joint tenants with right of survivorship can be assured of accomplishing that end, while having clearly specified their rights and those of their creditors in the jointly owned securities.

> Section 1. *Corporate securities held in joint tenancy with right of survivorship.*—(a) The registration of certificates of stock in corporations, corporate bonds, corporate debentures and other corporate securities, not including shares in building and loan associations, in the name of two or more parties as "joint tenants" or "joint tenants with right of survivorship" or "joint tenants with right of survivorship and not as tenants in com-

[83] See cases cited note 51 *supra.*
[84] See statutes cited notes 65-77 *supra.*

mon" shall be deemed to create a joint tenancy with reference to the securities so registered having the incidents set forth in subsection (b) of this section. This section shall be applicable even though said securities may have been transferred directly by a person to himself with another or other persons.

(b) A joint tenancy in corporate securities created under this section shall have the following incidents:

(1) Upon any partition under Article 4 of Chapter 46 of the General Statutes of securities held as joint tenants under this section, or upon a sale of any such securities, said securities or the proceeds therefrom shall be divided among the parties in proportion to their contribution to the purchase price thereof. In the event their respective contributions are not determined, the securities or proceeds therefrom shall be deemed owned by both or all equally.

(2) During the lifetime of both or all the parties:

(a) All cash dividends or interest payable with reference to said securities shall be their separate property to the extent of the interest to which each of said parties would be entitled upon a partition under subsection (1);

(b) All stock dividends or dividends in kind payable with reference to said securities shall be held as joint tenants under this section;

(c) All dividends or interest with reference to said securities shall be made payable or issued jointly unless the parties authorize the corporation to make such payments or issuance otherwise;

(d) All voting rights with reference to said securities shall be exercised by all the parties subject to the provisions of G.S. 55-69(f).

(e) All transfers of said securities shall be made by joint act of all tenants.

(3) During the lifetime of both or all the parties, said securities shall be subject to the respective debts of the parties to the extent of the interest to which each of the parties would be entitled upon a partition under subsection (1). In the event a portion of said securities are subjected to the debts of one or more of the parties, the remaining securities shall continue to be held as joint tenants under this section.

(4) Upon the death of either or any tenant, the survivor or survivors shall become the sole owner or owners of the remaining securities. Where two or more tenants survive, the proportionate share of the decedent shall be allocated to the survivors in equal shares.

(c) This section shall be subject to the provisions of law applicable to transfers in fraud of creditors.
(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-11 and 105-24 relating to the administration of the inheritance laws or any provisions of the law relating to inheritance taxes.
(e) This section shall not be deemed exclusive; securities not registered in conformance with this section shall be governed by other applicable provisions of law.
(f) The provisions of this section shall not apply to any securities registered as provided in subsection (a) which were issued prior to the effective date of this section, unless the persons in whose names said securities have been issued shall execute and file with the corporation issuing such securities or with its transfer agent or registrar an agreement indicating that this section shall apply.
A written agreement in substantially the following form shall be sufficient to secure the application of this section:

> We, ..., ... and ....., owners of ..... shares of (*specify security*) of (*specify corporation*), represented by certificate number(s) ....., hereby agree that our ownership in the above-mentioned securities shall be as joint tenants with right of survivorship in accordance with North Carolina General Statutes Section .....

This ..... day of ....., 19.....
.....(SEAL)
.....(SEAL)
.....(SEAL)

Section 2. *Effective date.*—This Act shall become effective on ....., 19.....

Those familiar with the North Carolina bank account statute[85] will find much similarity between that legislation and the above proposal. The authors feel that the legislative policy decisions found in the bank account statute are generally sound, representing a fair and practical balancing of the competing interests of the depositors and their creditors. Changes from the mechanics and policy decisions of that statute are occasioned by the intrinsic differences between bank accounts and corporate securities and the circumstances under which they are utilized.

The touchstone of the proposed statute is its provision in subsection (a) that the act of registering corporate securities on the

[85] N.C. GEN. STAT. § 41-2.1 (Supp. 1965).

corporate books in the names of two or more persons as "joint tenants" or "joint tenants with right of survivorship" or "joint tenants with right of survivorship and not as tenants in common" establishes a joint tenancy between those persons as to the securities. The equivocal registration of securities only in the names of two or more persons without the words set forth in the statute does not create a joint tenancy. Shares in building and loan associations are not covered by the statute, since they are included within the definition of "deposit account" in our bank account statute.[86]

The concluding sentence of subsection (a) avoids a potential problem created by rigid application of the common-law principles relating to creation of a joint tenancy. Two of the vital unities of the joint tenancy at common law are those of time and title.[87] Accordingly, many courts have held that a conveyance from *A* to "*A* and *B* as joint tenants" creates a tenancy in common.[88] Our supreme court does not appear to have ruled on this question, though it has recognized that one spouse can convey realty to both spouses without the intervention of a third party "strawman" and create a tenancy by the entireties.[89] The 1957 General Assembly confirmed the court's holding.[90] The concluding sentence of subsection (a) insures that no question will arise as to the propriety of transfer and re-registration of corporate securities directly from the name of one owner to himself and one or more other joint tenants.[91]

Subsection (f) of the proposed statute adopts the salutary purpose of the comparable Maine statute[92] in avoiding any possible objection that application of the statute to jointly registered securities acquired prior to enactment of the statute would be an unconstitutional impairment of the vested contractual rights of one or more of the parties.[93] In order to make the statutory incidents of

[86] N.C. GEN. STAT. § 41-2.1(e)(2) (Supp. 1965).

[87] Burton v. Cahill, 192 N.C. 505, 135 S.E. 332 (1926); 4 THOMPSON, REAL PROPERTY § 1777 (repl. ed. 1961).

[88] See cases collected in Annot., 44 A.L.R.2d 595 (1955); 4 THOMPSON, *op. cit. supra* note 87; 8 DE PAUL L. REV. 422 (1959); 48 MICH. L. REV. 1034 (1950).

[89] Woolard v. Smith, 244 N.C. 489, 94 S.E.2d 466 (1956).

[90] N.C. GEN. STAT. § 39-13.3 (Supp. 1965).

[91] The same legislative end would be accomplished by amending § 39-13.3 of the General Statutes to include conveyances of personalty.

[92] See text accompanying note *72 supra.*

[93] See Trustees of Dartmouth College v. Woodard, 17 U.S. (4 Wheat.) 518 (1819). *But see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). See generally Schmidt, *Constitutional Limitations Upon Legislative*

joint ownership of corporate securities applicable to securities issued in joint names prior to enactment of the statute, the owners must execute and file with the corporation or its transfer agent or registrar an agreement indicating their desire and intent to subject their relationship to the statutory provisions. Such a procedure appears simpler and more meaningful than a formalistic re-registration without change in named owners made after the statute becomes effective. Subsection (f) sets forth a suggested form of the agreement required, its essence being an adequate description of the securities and a reference to the statute. Since the effective date of the statute is so important, section two specifies that date to assist those many persons who will be interested in the statute but who will be unfamiliar with the general statutory provision that an act becomes effective thirty days after the adjournment of the General Assembly session in which the act is passed.[94]

Subsection (b) sets forth the incidents of a joint tenancy established under subsections (a) or (f).[95] The basic policy of the North Carolina bank account statute is followed, with some modifications and elaborations. The incidents of the joint tenancy are self-explanatory, though an analysis of the underlying policy decisions would seem appropriate. Basically, the statute declares that joint ownership of corporate securities is ambulatory until the death of one of the tenants—*i.e.*, that the survivor[96] receives only those

Power To Alter Incidents of the Shareholder's Status In Private Corporations, 21 ST. LOUIS L. REV. 12 (1935).

[94] N.C. GEN. STAT. § 120-20 (Supp. 1965).

[95] In the event a wife furnishes a portion of the purchase price of securities held jointly with her husband, compliance with the privy examination requirements of § 55-12 of the General Statutes is not necessary. The 1957 General Assembly deleted any reference in that statute to the "personal estate" of the wife. Moreover, as Professor Lee has pointed out, our supreme court had previously held that the statute did not extend to transfers of personalty by the wife to her husband. See 2 LEE § 110.

[96] In the event of the simultaneous death of the joint tenants, § 3 of the Uniform Simultaneous Death Act, codified in N.C. GEN. STAT. § 28-161.3 (Supp. 1965), provides that each tenant's pro rata share of the jointly held property shall pass as though that tenant had survived. This method of division conflicts with the usual dispositive scheme of the proposed statute, which is based upon each tenant's contribution to the purchase price of the securities. However, the difficulties that would be encountered in proving respective contributions where all the joint tenants were dead are so great that the application of the Uniform Act seems a practical solution. A testator or settlor frequently makes a contrary provision with regard to presumed survivorship, a right recognized by § 6 of the Uniform Act. N.C. GEN. STAT. § 28-161.6 (Supp. 1965). One usually thinks of this presumption as affecting only property that passes under the dispositive instrument in

securities that were jointly owned at the time of the deceased tenant's death and had not been partitioned between the parties or subjected to claims of the deceased tenant's creditors during his lifetime.[97] Partition and segregation of a joint tenant's respective interest can be by a voluntary sale or by partition proceedings under section 46-42 of the General Statutes. Upon such partitions, the tenants are not entitled to pro rata distribution based upon their respective legal interests, as in partition of a common law joint tenancy[98] or termination by divorce of a tenancy by the entireties.[99] Rather, distribution between the parties is based upon their respective contributions to the purchase price of the securities. A statutory presumption of equal ownership is applicable absent satisfactory proof of unequal contributions. Thus, the distributive shares of joint owners of corporate securities are determined by the same principles found in the decisions of our supreme court relating to joint bank accounts.[100]

Subsection (b)(2) governs the rights of the joint tenants *inter partes* as to income from the securities, voting rights and transfer of the securities. Since cash dividends or interest payments on

question. However, one writer has suggested that a properly drafted clause could change the statutory presumption as to property that did not pass under the instrument if it were presumed that the tenant or tenants other than the testator or settlor survived. See 15 WYO. L.J. 229 (1961).

[97] Upon death of a joint tenant, the survivor will seek transfer on the books of the corporation. N.C. GEN. STAT. § 55-59(e) (1965) permits, but does not require, corporations to regard the surviving tenant or tenants as absolute owner of the securities. Section 55-59(i) extends this authority to the corporation's transfer agent and registrar, if any. However, under § 55-59(k), the corporation is not relieved from breach of any contract to which it is a party in so acting. Joint registration under the proposed statute would certainly constitute such a contract between the corporation and the registered owners.

[98] See Skidmore v. Poplin, 261 N.C. 713, 136 S.E.2d 99 (1964); 63 C.J.S. *Partition* § 219 (1950).

[99] McKinnon, Currie & Co. v. Caulk, 167 N.C. 411, 83 S.E.2d 559 (1914). "The two former spouses become equal cotenants, without inquiry as to who paid the original purchase price of the property. Even though one of the former spouses paid the entire purchase price, each becomes entitled to an undivided one-half of the whole . . . ." 2 LEE § 120, at 94.

[100] See, *e.g.*, cases cited in note 36 *supra*. The bank account statute does not purport to affect the rights of the tenants *inter partes* during their joint lives. See Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961). N.C. GEN. STAT. § 105-206 requires every person "owning" intangible personal property to file an intangibles tax return. Shares of stock are specifically included in such property by N.C. GEN. STAT. § 105-203. For the purposes of this tax each tenant would report and pay tax on that share of the securities to which he would be entitled on partition, or which his creditors could reach.

corporate securities are usually not reinvested, such payments are regarded in theory as a partition of that portion of the jointly owned securities, so that each tenant is entitled to his separate proportionate share of such payments. However, since stock dividends or dividends in kind, such as corporate assets or securities in other corporations, usually continue to be owned by the parties, the statute proposes that such accretions be, in effect, added to the original securities and held as joint tenants. The exercise of voting rights by the tenants will be governed by section 55-69(f) of the General Statutes. That section provides that if only one joint tenant acts, his act binds all, but if more than one act, the majority governs. In case of even splits, the vote is also split.

Determining the proper interest of a joint tenant's creditors in his share of the jointly owned property during his life necessitates another major policy decision in drafting the statute. Should the jointly-owned property be beyond the reach of creditors of an individual tenant, as in the case of a tenancy by the entireties,[101] or should the property be subject to such claims and, indeed, the tenancy destroyed by execution on the property, as in the case of a common law joint tenancy?[102] Subsection (c) of the proposed statute recognizes that tenancies established under its provisions are subject to the laws relating to fraudulent conveyances.[103] However, those remedies are frequently not available to creditors whose claims arise after the creation of the tenancy.[104] Therefore, in keeping with the purposely ambulatory intent imputed to the parties under the proposed statute, subsection (b)(3) provides that a tenant's proportionate share of the securities are subject to his debts, regardless of whether such debts arise before or after establishment of the tenancy. However, to prevent a dissolution of the joint tenancy as to all the securities upon a partition and sale at the instance of a creditor as to only a portion of that tenant's interest in the securities, the concluding sentence of subsection (b)(3) provides that any securities remaining after a creditor's sale shall continue to be held

[101] Grabenhoffer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963); 2 LEE § 116.

[102] Woolard v. Smith, 244 N.C. 489, 94 S.E.2d 466 (1956) (dictum); 4 THOMPSON, *op. cit. supra* note 87, § 1780.

[103] N.C. GEN. STAT. § 39-15 (Supp. 1965).

[104] Aman v. Smith, 165 N.C. 224, 81 S.E. 162 (1914).

as joint tenants.[105] Obviously, after such a sale, the share of the debtor-tenant would be reduced proportionately.

Under the bank account statute, the deceased owner's pro rata share of the unwithdrawn deposits in the joint account continues after his death to be subject to his individual debts to the extent the assets in his probate estate are insufficient to satisfy the same.[106] The depository institution must pay to the deceased depositor's legal representative his pro rata share of the account and then may pay the remainder to the surviving joint owner.[107] However, the amount properly needed by the legal representative to satisfy governmental and creditors' claims cannot be established with certainty until administration of the estate has been completed or, arguably, until the six-month period of notice to creditors has elapsed.[108] Technically, therefore, any remaining balance should not be paid to the surviving depositor by the legal representative for a substantial period of time.

If the mechanics of the bank account statute were followed with reference to corporate securities, the long and tedious process of security transfer would be enormously complicated. Joint bank accounts are widely used as a repository of cash reserves and, in the case of persons of modest means, frequently constitute the only sizable and readily accessible assets for the satisfaction of creditors' claims. Creditors, therefore, have a substantial interest in the availability of bank accounts for satisfaction of their claims, even though they have not been diligent in pursuing the debtor while he was still alive. By contrast, few persons invest in corporate securities, whether individually or jointly owned, without having cash reserves that are reasonable in light of their financial circumstances and

[105] Subsection (b)(3) of the proposed statute is comparable to N.C. GEN. STAT. § 41-2.1(b)(3) (Supp. 1965). Note, however, that the latter statute does not expressly provide that the right of survivorship continues to attach to the remaining account after a portion of a tenant's interest in the account is subjected to the claims of his creditors.

[106] N.C. GEN. STAT. § 41-2.1(b)(3) (Supp. 1965).

[107] The bank account statute as originally enacted included only accounts between husband and wife. The 1963 General Assembly amended the statute to make it applicable to deposit accounts "in the name of two or more persons." N.C. GEN. STAT. § 41-2.1(a) (Supp. 1965). Prior to this amendment, the statute's provision in subsection (b)(3) relating to post-mortem creditors' rights merely stated that "upon the death of either husband or wife, the survivor becomes the sole owner of the entire unwithdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights."

[108] N.C. GEN. STAT. § 28-47 (Supp. 1965).

readily available for satisfaction of creditors' claims. Creditors, therefore, have less justifiable interest in being permitted to pursue jointly held securities for satisfaction of their claims after the death of a joint tenant than in having available to them joint bank accounts. Perhaps because of this analysis, only two jurisdictions apparently have enacted statutes subjecting jointly owned securities to the deceased tenant's debts.[109] Weighing these considerations, the proposed statute does not recognize any right of creditors of a deceased tenant to satisfy their claims out of the jointly held securities.

Under the North Carolina inheritance tax laws, the death of a joint tenant constitutes a taxable event to the surviving joint tenant to the extent the deceased tenant furnished a portion of the purchase price of the securities.[110] Accordingly, subsection (d) provides that the inheritance tax laws, especially sections 105-11 and 105-24 of the General Statutes, are applicable to joint tenancies created under the proposed statute.[111]

Finally, subsection (e) of the proposed statute recognizes that joint tenancies in corporate securities may be established in ways other than those set forth in subsections (a) and (f). Thus, the door remains open for judicial recognition of a valid joint tenancy where the parties have agreed that securities registered in only one of their names shall be held jointly *inter partes*. However, given practical statutory means for creation of a joint tenancy, such secret agreements should not be encouraged by recognition thereof in the statute.

IV. Conclusion

Possibly no fact illustrates so well the expansion of the American economy and the increased individual wealth of our citizenry as the large increase in the number of persons holding corporate securities. With this increase has come a proliferation of problems re-

[109] S.B. 338, Wash. Sess. Laws 1965; Wis. Stat. Ann. § 230.48 (Supp. 1965).

[110] N.C. Gen. Stat. § 105.2(9) (1965); 32 N.C. Opp. Att'y Gen. 189 (1954). See also Int. Rev. Code of 1954, § 2040.

[111] Transfer agents generally require inheritance tax waivers before transferring corporate securities, whether or not registered in joint names. Since under most wills the executor is required to pay all inheritance tax from the residue, he would normally be the applicant for the waiver. If he refused to do so, however, the surviving tenant would seek the waiver, to be granted by the Commissioner under whatever terms he might see fit.

lating to the ownership of securities. More and more frequently, the attorney, the corporate fiduciary and the stockbroker find themselves forced to deal with jointly held securities or with persons desiring to own securities jointly. Questions are inevitably raised as to the type of estate created and its incidents. To those questions the North Carolina attorney can give only tentative and qualified answers.

Definitive answers to the problems raised by joint ownership of corporate securities may be achieved by two routes. Interested parties may await a decision from our supreme court, hoping for clarification and solution of the problem. Such a case, however, may not be soon in coming and the decision when rendered may not completely answer the questions raised in daily practice. The better route, in the authors' opinion, is to seek legislative action. To this end, this article has suggested a proposed statute for enactment by the General Assembly of North Carolina. The authors recognize that the suggested solution presented herein involves several policy decisions on which there will be differences of opinion, such as whether the ownership should be pro rata or proportionate to consideration furnished, or whether or not a creditor should be able to reach the interest of a deceased tenant. They urge, however, that some legislative action be taken to alleviate the present problems involved in the creation of joint tenancies of corporate securities and to define more clearly the incidents of such ownership.