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Since the Supreme Court of Ohio, in 1926, decided the case of *Cleveland Trust Company v. Scobie*[1] the validity of the joint and survivorship bank account as a means of passing assets from one person to another at death has become securely established in Ohio. Despite its serious shortcomings from an estate planning standpoint,[2] the device is an extremely popular means of holding modest family assets. Widespread use has inevitably resulted in many practical problems incident to disputes between living co-depositors, between creditor and depositor, between the representative or heirs of the deceased depositor and the survivor, and otherwise. Gradually, these matters are becoming clarified, but in many respects the law of Ohio is still unclear.

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Acceptance of the survivorship feature in bank accounts followed by some years the pronouncements of Ohio courts which recognized the right of survivorship, the *jus accrescendi,* in real property. In 1826, a hundred years before the *Scobie* case, the Supreme Court of Ohio in *Sergeant v. Steinberger*[3] stated flatly that estates in joint tenancy did not then exist in Ohio; that the *jus accrescendi* "is not founded in principles of natural justice, nor in any reasons of policy applicable to any society or institutions. But, on the contrary, it is adverse to the understandings, habits and feelings of the people."[4] The deed in question contained no words expressing the right of survivorship. However, in 1842, in *Lewis v. Baldwin,*[5] the Supreme Court of Ohio upheld the right of survivorship under a deed to Charles R. Baldwin and Mary Jane Baldwin "jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns." The Court said that the survivor held title "not upon the principle of survivorship, as an incident to joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed."[6]

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1. 114 Ohio St. 241, 151 N.E. 373 (1926).
2. Consideration of the joint and survivorship bank account with respect to problems of federal gift and estate taxation is not within the scope of this article.
3. 2 Ohio 305 (1826).
4. *Id.* at 306.
5. 11 Ohio 352 (1842).
6. *Id.* at 355.

Thus, with respect to real property, the Ohio courts approved the right of survivorship when expressly spelled out, but refused to sanction the common-law estate in joint tenancy which incorporated the right of survivorship without expressing it.[7]

Not until *In re Estate of Hutchison,*[8] decided by the supreme court in 1929, was there a full statement by that court of the Ohio view with respect to joint tenancies. In that case the court upheld the right of survivorship with respect to stock certificates where the words of survivorship were spelled out. Stressing the contract between the parties, the court refused to view the arrangement as a testamentary disposition. By the strong language of its opinion, the supreme court did much to make the general principles theretofore established for deeds of real property a part of the general law of property of the state.

Probably because of unusual fact situations, none of the early bank account cases reached the supreme court, and none made valuable contributions to this area of the law.[9] On the legislative side, the principle of survivorship was recognized by statutes which protected banks[10] and savings and loan institutions[11] in paying funds to the surviving depositor when the contract of deposit between the bank or savings and loan institution and its depositors provided for such payment. The statutes were not primarily concerned with rights between depositors, or of strangers to the contract, but were designed to protect the paying institution.

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7. Farmers' & Merchants' Nat'l Bank v. Wallace, 45 Ohio St. 152, 12 N.E. 439 (1887); Tabler v. Wiseman, 1 Ohio Dec. Reprint 497 (Dist. Ct. 1852). For an analysis of the development of the right of survivorship in Ohio see Martin, *The Incidents of Survivorship in Ohio,* 3 OHIO ST. L.J. 48 (1936).

8. 120 Ohio St. 542, 166 N.E. 687 (1929).

9. Nixson v. Snyder, 1 Ohio L. Abs. 408 (Ct. App. 1923); Dempsey v. Brighton Bank & Trust Co., 14 Ohio App. 170 (1921); Guitner v. McEowen, 99 Ohio App. 32, 124 N.E.2d 744 (1918); *In re* Estate of Morgan, 30 Ohio C.C. Dec. 101 (Ct. App. 1918); Sullivan v. Sullivan, 12 Ohio L. Rep. 224 (Cin. Super. Ct. 1914).

10. 101 Ohio Laws 120 (1910). This enactment, which has been slightly changed, is now contained in OHIO REV. CODE § 1105.09: "When a deposit is made in any bank or trust company transacting business in this state, in the name of two or more persons, payable to either or the survivor, such deposit or part thereof or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not, and the receipt or acquittance of the person paid is a sufficient release and discharge of the bank for any payments so made."

11. 99 Ohio Laws § 28 (1908) (now OHIO REV. CODE § 1151.19): "A building and loan association may receive money on deposit or stock deposits from any persons, firms, corporations, and courts, or their agents, officers, and appointees but shall not pay interest thereon exceeding the legal rate. When such deposits are made to the joint account of two or more persons, whether adults or minors, with a joint order to the association that such deposits or any part thereof are to be payable on the order of any of such joint depositors, and to continue to be so payable notwithstanding the death or incapacity of one or more of the persons making them, such account shall be payable to any of such survivors or order notwithstanding such death or incapacity. No recovery shall be had against such association for amounts so paid and charged to such account."

The Scobie Case

With only the foregoing meager background of case and statutory law, the supreme court in 1926 was called upon to decide the case of *Cleveland Trust Company v. Scobie*.[12] The facts were these:

Jerome Green opened a savings account at the bank in his name and the name of his sister, Annie Richardson, which was marked, "either may draw, balance at death of either payable to survivor." Both signed the signature card. The money deposited was all Green's. He left the passbook at the bank, and Mrs. Richardson never had possession of it and never used the account. Green wrote Mrs. Richardson a letter in which he told her he wanted her to have the balance in the account in the event of his death. After Green's death his administrator sued the bank to recover the balance in the account.

The trial court found that the money had all belonged to Green; that he intended to retain dominion and control over it during his lifetime; that there was no gift of the account, either *causa mortis* or otherwise; and that accordingly the administrator was entitled to the funds in the account. The court of appeals, one judge dissenting, affirmed the decision of the trial court, also on the ground that no gift had been made, and that the deposit in the account was an attempted testamentary disposition, invalid because not executed with the formality of a will.

The supreme court reversed the court of appeals. Judge Allen wrote the unanimous opinion of the court, which largely discounted the "gift" theory. She said that this could not be a gift of funds in specie because title passed from the depositor, Green, to the bank and the bank became Green's debtor in the amount of the deposit. Hence, the question was not whether Green made a gift of the fund in specie, but whether he created in his sister a joint interest in the deposit equal to his own. The court thought that although Green retained control, it was not exclusive control, and that by doing all he could to place the account within his sister's joint authority, Green, by contract, created in his sister a present joint interest in the account equal to his own, although subject to Green's right of termination.

The court refused to place significance upon the failure to deliver the passbook, which, of course, would be material to the issue of whether a gift had been made. The court said:

> . . . [U]pon deposit of an account the bank is constituted a debtor, and when the depositor orders the bank to pay himself or another upon order of either party, notifies the second party of the completed transaction and secures her signature evidencing assent to the arrangement, he has created in the second party by contract a joint interest in his right to the deposit equal to his own.[13]

12. 114 Ohio St. 241, 151 N.E. 373 (1926).

13. *Id.* at 253, 151 N.E. at 377.

The *Scobie* case, by definitely holding that the funds in the joint and survivorship account passed directly to the survivor upon the death of the first depositor to die, and were not part of the decedent's estate, thus became the landmark case in Ohio. The *result* of the *Scobie* case was of fundamental importance. Unfortunately, the logic by which the court reached its decision was not clear. The court ruled out the gift approach, but spoke of "donative intent." The court said that Green "created" a joint interest in the account "by contract." But it also said the transaction was consummated by delivery of the passbook, and it cited various cases involving gifts. Although the *Scobie* case is generally believed to have removed Ohio from the list of "gift theory" states, perhaps the court was only saying that there was not a gift of money in specie, but a gift of a vested interest which had been created by contract. It is a confusing decision.

After the Scobie Case

In *Oleff v. Hodapp*,[14] the theory of the *Scobie* case was employed despite the fact that the surviving joint depositor had been convicted of the murder of the other joint depositor. A majority of the court was not impressed by the argument that payment to the surviving depositor in such circumstances would offend public policy. The court observed that any nullification of the contract would have to be made with the same formality as the original contract.[15]

In the *Scobie* case the passbook was left with the bank, presumably being available at all times to either joint depositor. In *Sage v. Flueck*,[16] the creator of a three-party account retained possession and control of the passbook. Frances Schmitt opened an account in her own name and in the name of her brother, Theodore Schmitt, and her sister, Catherine Flueck, "payable to either or the survivor." During Frances' life, Theodore was allowed to make three withdrawals and one was made in the signature of all three depositors. After Frances' death, Theodore and Catherine each withdrew part of the very substantial balance. Frances' will left everything to Theodore, but without mentioning the account. Her executor sued Catherine Flueck to recover the amount she had withdrawn after Frances' death. The trial court directed a verdict for the defendant, but the court of appeals reversed on the ground that "there was no delivery of the bank book and no consideration for the promise." The supreme court in turn reversed the court of appeals.

14. 129 Ohio St. 432, 195 N.E. 838 (1935).

15. Judge Williams dissented for reasons of public policy, noting that each depositor had only a relative right to withdraw while both lived, but that after the murder, the wrongdoer, under the majority's view, had an absolute right to withdraw, thus clearly benefiting from the murder. *Id.* at 446-47, 195 N.E. at 844.

16. 132 Ohio St. 377, 7 N.E.2d 802 (1937).

The court said that the signature card and the passbook constituted a contract of deposit, an executed contract requiring no consideration.

> Under this contract of deposit, Frances Schmitt created and vested in Theodore and Catherine, *in praesenti,* a joint interest in the deposit, equal to her own . . . .[17]

The court appeared to rest its decision on the intention of the "creator" of the account as manifested by the contract of deposit. It thought the intention to be clearly expressed and held that oral testimony to contradict such written expression of intention was incompetent.

Thus, if there is no ambiguity in the terms of the deposit contract, under *Sage v. Flueck* the survivorship right expressed in such a contract can not be attacked by parol evidence of a contrary intention.

Sage v. Flueck clarified and strengthened the rule of the *Scobie* case, but it did so by departing entirely from any considerations of gift. As in *Oleff v. Hodapp,* the court emphasized the creation of a present vested right by the contract between the depositors. Therefore, the decisions in the *Scobie* and *Sage v. Flueck* cases put Ohio in the column of those states which have adopted the "contract" theory rather than the "gift" theory of joint and survivorship accounts.

However, in a strong dissenting opinion in *Rhorbacker v. Citizens Building Association Company,*[18] Judge Turner challenged the view of the court that the beneficiary of the contract of deposit (*i.e.,* the survivor) need not be a party to the contract. In that case, Floy L. Walker, a depositor in a building and loan association, directed the association to withdraw funds from his account and to issue a certificate of deposit payable to himself "or Mrs. Sceva Stinebaugh Walker or survivor. . . . This certificate may be placed inside my savings account passbook which I left at your office for safe-keeping. . . . I would not wish her advised of this transaction on my part unless she survived me."[19] Mrs. Sceva Stinebaugh Walker signed no signature card; in fact, she knew nothing of the deposit until after Floy Walker's death.

A majority of the court took the position that Mrs. Walker's participation in the contract was not necessary; that the contract between Floy Walker and the association created an immediate joint and equal interest in the certificate; that no consideration was necessary between the Walkers; and that Mrs. Walker was entitled to the

17. *Id.* at 381, 7 N.E.2d at 804. Further, the court, citing Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935), stated that the present vested interest could in no way be affected by the laws of descent and distribution. Moreover, exclusive possession of the passbook by the creator of the account was held to be "a material circumstance but not decisive of the rights of the parties concerned." Sage v. Flueck, 132 Ohio St. 377, 382, 7 N.E.2d 802, 804 (1937).

18. 138 Ohio St. 273, 34 N.E.2d 751 (1941).

19. *Id.* at 274, 34 N.E.2d at 752.

proceeds of the certificate. The court said that such a transaction "possesses some of the characteristics of a contract for the benefit of a third person, with respect to which this court has evinced a liberal attitude in allowing the third person to enforce the contract."[20]

But Judge Turner, with whom Judge Bettman concurred, protested that the majority opinion pushed the contract theory a step farther than previous Ohio cases warranted; that theretofore joint and survivorship accounts had been held not to be testamentary in character "on the theory that *at the inception of the deposit a contract was entered into between the persons to whom the deposit was made payable.*"[21] Judge Turner quoted a telling paragraph from the opinion of the court in the case of *In re Estate of Fulk,*[22] where the court said: "The issue here concerns not the bank but the contractual relationship of John and Ida Fulk with each other . . . . John Fulk takes by virtue of the contract. He and Ida Fulk were joint promisees, each agreeing that the other could withdraw the entire amount."[23]

Judge Turner further suggested that although in the *Scobie* case the court had rejected the gift theory in favor of a "present vested interest" contractual theory, in fact, most of the cases cited by the court had been decided on a gift basis.

There can be no doubt that Judge Turner's dissent spotlighted a significant change in the court's attitude toward joint and survivor accounts, and his analysis of the inconsistencies in the court's rationale of such accounts makes eminent good sense.

Possession of the Passbook

It should be noted that where the right of survivorship is clearly spelled out, the matter of the retention of the passbook has been given less and less importance by the courts. This, of course, is consistent with the contract theory. Possession of the passbook is very relevant to the issue of a gift, but having departed from the gift theory the courts need be less concerned with who had possession of the passbook. In the *Scobie* case, the passbook was left with the bank; in *Sage v. Flueck,* the creator of the account retained possession; in the *Rhorbacker* case, the certificate of deposit was left at the bank, but the bank was adjured not to let the other depositor (the survivor) know it; and in *In re Estate of Hatch,*[24] the passbook was delivered to the survivor the day after the account was created. In each instance, the right of survivorship prevailed.

20. *Id.* at 276, 34 N.E.2d at 753.

21. *Id.* at 277, 34 N.E.2d at 753 (dissenting opinion).

22. 136 Ohio St. 233, 24 N.E.2d 1020 (1940). No words of survivorship appeared in the contract. See note 44 *infra* and accompanying text.

23. *Id.* at 239-40, 24 N.E.2d at 1023.

24. 154 Ohio St. 149, 93 N.E.2d 588 (1950).

In *Vollmer v. Vollmer*,[25] the contract with the bank, which contained a survivorship agreement, required both depositors (husband and wife) to sign withdrawals. Despite the fact that the husband at all times kept the passbook in his safe deposit box, to which he alone had access, the court upheld the surviving wife's right to the funds, dismissing the retention of the passbook as being a natural precaution.

Particular emphasis was given to the intention of the parties *at the time the contract was entered into* in *In re Estate of Hatch*.[26] Mrs. Hatch had had an account in her own name for some time. She had her daughter's name added to the account, both signing cards expressing a right of survivorship. *The next day,* the passbook was delivered to the daughter, and on that day, Mrs. Hatch, who was bedfast, told her daughter to pay Mrs. Hatch's funeral expenses from the account, give "Aunt Ella" $500, and divide the balance between the daughter and her sister. On exceptions to the executor's inventory, which included the account in Mrs. Hatch's estate, the probate court, the court of appeals, and the supreme court all held the account to be no part of the estate. The supreme court said that at the time the contract of deposit was signed, without condition or reservation, "the manifest intention was to establish a joint and survivorship account then and there, in accordance with the wording of such agreement and binding on the bank when brought to its notice."[27] Thus, Mrs. Hatch was not allowed to change her mind, although she could have terminated the agreement by withdrawing all the money. Following, as it did, the theory of the *Scobie* case, the court could have reached no other conclusion.

Are the Words of Survivorship Conclusive?

Although, as has been seen, the courts of Ohio have insisted that no right of survivorship exists unless it is created by contract, there have been instances in which words of survivorship expressed in a deposit contract have been held ineffective. Also, there have been instances in which survivorship rights have been implied although they were not expressed.[28] This apparent anomaly is, of course, not a legal fallacy, because contracts of deposit are no different from other contracts in that they are subject to the defenses of fraud, mistake, and duress. More important, however, is the fact that through-

25. 47 Ohio App. 154, 190 N.E. 588 (1933).

26. 154 Ohio St. 149, 93 N.E.2d 585 (1950).

27. *Id.* at 153, 93 N.E.2d at 587.

28. See notes 46-53 *infra* and accompanying text. Subsequent to the writing of this article, the Ohio Supreme Court in *Fecteau v. Cleveland Trust Co.*, 171 Ohio St. 121 (1960) held that evidence is admissible to show the "real intent" of the parties with respect to withdrawals during the lives of both depositors, even though the bank account was carried in the names of two persons jointly. [Ed.]

out the decisions, from *Scobie* on, there is a disposition to determine the *intent* of the parties at the time the contract was entered into. If the survivorship feature is spelled out in unambiguous language, the parol evidence rule is, of course, a strong obstruction to any effort to contradict the express terms of the agreement.

In *Schmitt v. Schmitt*,[29] John Schmitt, in the midst of marital difficulties, opened two joint and survivorship savings accounts, each with a different nephew, with deposits of his own money. After John's death, each nephew assigned the account to John's daughter, Barbara, and she withdrew the money. His widow, as administratrix, sued to recover the money from Barbara.

The court considered the testimony of the parties and concluded that there was no evidence of an intention to give either nephew a vested interest during the uncle's life, but only a right to take after death. The court said the *Scobie* case applied only where there was an intention to transfer a present vested interest in the account. The court, not unreasonably, saw only an effort to circumvent the rights of the surviving spouse. However, the court did suggest that if the decedent had entered into a bona fide joint and survivorship account with Barbara, it could not have been attacked, irrespective of the motive.

In *Held v. Myers*,[30] a man about to go to a hospital for observation, but not anticipating death, added, in joint and survivorship form, the name of an old friend to his account and gave him the power to sign, at the suggestion of an officer of the savings and loan association. The court of appeals, affirming the trial court, held that the funds belonged to the decedent's estate, not to the survivor. The court held that under the *Scobie* case, there must be an intention to transfer a present interest, and no such intention appeared. The friend's name was added simply as a matter of convenience. The court also said that evidence of family feelings and relationships was admissible to assist in the determination of the decedent's intention. The court, citing a decision in which a deed of trust was impressed on real estate,[31] held that parol evidence was admissible to show the existence of a trust.[32]

Fraud in the inducement of a deposit contract is also sufficient to upset the right of survivorship. In *Steiner v. Fecycz*,[33] where the evidence showed that the survivor obtained the agreement of the de-

29. 39 Ohio App. 219, 177 N.E. 478 (1928).

30. 48 Ohio App. 131, 192 N.E. 540 (1934).

31. Boughman v. Boughman, 69 Ohio St. 273, 69 N.E. 430 (1903).

32. See Note, 6 OHIO ST. L.J. 1954 (1940), where it is suggested that only by construing the *Scobie* case as one of gift could the court in *Held v. Myers* justify the admission of evidence to show that the testator did not intend to pass a property interest when he opened an account in joint and survivorship form. See also *In re* Estate of Voegeli, 108 Ohio App. 371, 161 N.E.2d 778 (1959).

33. 72 Ohio App. 18, 50 N.E.2d 617 (1942).

ceased to change his account to joint and survivorship form through a false representation that the funds would be used solely for funeral and burial expenses of the deceased, the court impressed a trust in favor of the estate of a deceased depositor on the balance in the account. The court, in *Ferguson v. Deuble,*[34] applied constructive trust principles in an action between living co-depositors. And in *Hovanec v. Ondak,*[35] it was held that the trial court properly admitted evidence to the effect that a joint and survivorship account of mother and daughter had been created solely for the purpose of paying the mother's funeral expenses.

In *Fayen v. Cleveland Trust Company,*[36] to determine ownership of an account for the purpose of set-off, the court stated that the signature card was not conclusive and admitted evidence of surrounding circumstances. So also, evidence bearing on the competency of the depositor at the time the account was created is admissible.[37]

On the other hand, in a brief *per curiam* opinion, the Cuyahoga County Court of Appeals in *Kipp v. Kipp,*[38] said bluntly: "[T]he rights of the parties to a joint and survivorship deposit account are based wholly upon contract and no terms or conditions not expressed in the contract are implied or recognized."[39]

Thus, the confusion with respect to "contract" or "gift" is reflected in the application of the parol evidence rule. If the matter is treated solely and purely as a contract matter, and the contract is unambiguously expressed, then the parol evidence rule should prevent proof of a contrary intent. On the gift theory, however, intention is vital, and parol evidence is admissible to establish such intention.

The tendency of many courts has been to fall back upon talk of gifts and of intention of the parties to justify the admission of parol evidence to accomplish what may, in particular instances, be a just result, *i.e.,* the negativing of the express provision for survivorship. In view of the diversity of approaches used by the courts, one can hardly say, despite the holding in *Kipp v. Kipp,* that the language of survivorship in the deposit agreement is irrebuttable.

Whatever may have been the basis of the reasoning in the various cases, there can be no doubt that in the absence of special circumstances which would vitiate or modify the deposit contract, funds in an account in two names, where the deposit is clearly expressed to be payable to the survivor on the death of one depositor, pass to the survivor entirely independent of the decedent's estate. This is the general proposition, now well established in Ohio, but like any general

34. 27 Ohio L. Abs. 533 (Ct. App. 1938).
35. 124 N.E.2d 774 (Ohio Ct. App. 1955).
36. 9 Ohio Supp. (N.E. Reporter) 148 (C.P. 1942).
37. Richardson v. Richardson, 28 Ohio L. Abs. 497 (Ct. App. 1938).
38. 101 N.E.2d 782 (Ohio Ct. App. 1950).
39. *Ibid.*

rule, it has its exceptions. Supposedly well established rules of law sometimes stretch and twist under the pressures of strongly felt personal interests and special fact situations.

Accounts Where No Survivorship Expressed

In General

If, as indicated by the discussion above, it is necessary to "spell out" the right of survivorship in order that such a right shall exist, what then of accounts in two or more names where no words of survivorship exist? Accounts are sometimes opened in the names of "John Smith or Mary Smith," with no more explanation, or in the names of "John Smith or Mary Smith, either may draw," or "John Smith and Mary Smith, both signatures required."[40]

In *Bauman v. Walter*,[41] one Celia Walter had deposited $15,000 of her own money in a bank in two accounts, one in the name "Mr. or Mrs. Edwin M. Walter," and the other in the name "Celia Walter or Edwin Walter." She retained possession of both passbooks. Before any money was withdrawn, Edwin Walter murdered Celia. The common pleas court and the court of appeals held that he was entitled to one-half of the balance in each account. However, the supreme court held that the funds in the accounts belonged to the estate of the deceased wife. The court said that where there is no evidence of the ownership of the money deposited, it may be proper to presume that the depositors have equal interests. Here, however, it was conceded that all the money had belonged to the wife. If the husband were to be entitled to any part, some part of the money or of the bank's obligation must have passed somehow from the wife to the husband. Here, the wife retained the passbook and retained all her original right to withdraw. There was no transfer for consideration; no bequest; and there was no gift; nor was there a contract or promise to pay the surviving depositor (as in the *Scobie* and *Sage* cases). Thus, the wife's contractual right to payment was not extinguished by her death. The husband had no property interest as to rights not withdrawn during the wife's life, and his rights could be no greater after her death than before.

This carefully reasoned decision distinguished the *Scobie* case on the basis of the different kind of contract involved. But, because of the facts, it necessarily had to leave open the question of the husband's rights if he had in fact been given access to the passbook and had, perhaps, been able to make some withdrawals during his wife's

40. An account in the name of John Smith, on which Mary Smith is authorized to draw, is a simpler case if it appears that John may at any time revoke the authority; this is actually a simple power of attorney. Such a "may draw" authority is frequently used as a precaution in case of a possible emergency, such as the serious illness of the owner of the account, or temporarily, when the owner is away on a trip.

41. 160 Ohio St. 273, 116 N.E.2d 435 (1953), *cert. denied*, 347 U.S. 947 (1954).

life. The implication is that if such were the case, a property interest would have been transferred to him during his life. How to measure that interest in the absence of a contract for payment to the survivor would be a difficult question.

In an earlier case, *In re Estate of Fulk*,[42] the account in question was represented by a certificate of deposit reciting that "John or Ida Fulk had deposited in the Sunbury Savings and Loan Company . . . dollars to self or to whom the same be assigned." There were no words of survivorship, but the probate court admitted testimony to the effect that the funds represented the joint earnings of the depositors over many years and that at the time the account was opened, the secretary of the savings and loan association had told the depositors that the word "or" indicated the funds would belong to the survivor upon the death of either. The supreme court held that this evidence was properly admitted to explain an ambiguity and that the funds should pass to the survivor. This case was distinguished by Judge Taft in the *Bauman* case on the ground that the evidence had established an account payable to one or the *survivor*.[43]

In re Estate of Fulk thus indicated that if no words of survivorship are expressed, parol evidence is admissible to establish the intention of the parties in that respect. The case is of further interest because of the passing comment made by the court on a theory followed in some jurisdictions, but apparently not adopted in Ohio, that in joint accounts of husband and wife there is a presumption that the right of survivorship exists, but not in other two-name accounts.[44]

In *Bender v. Cleveland Trust Company*,[45] a husband who had an account in his own name for twenty years added his wife's name, telling the bank's manager that it was simply a matter of convenience as it was hard for him to get to the bank. The account was marked simply, "either may draw," on the ledger and passbook. The wife withdrew the balance a week before the husband's death. In the dispute between the survivor and the estate of the deceased husband, the supreme court, affirming the court of appeals, held that in the absence of a provision for survivorship, it is necessary to look for the prerequisite of a gift *inter vivos*, namely, a completed delivery. The court thought that the circumstances had indicated no intention at all to make a completed gift — there was no delivery coupled with an intention to pass the property as a gift. In fact, the court thought the words "either may draw" expressly excluded any survivorship feature. The court held that the wife's action in withdrawing the funds constituted her a constructive trustee.

Bauman v. Walter, *In re Estate of Fulk*, and *Bender v. Cleveland*

42. 136 Ohio St. 233, 24 N.E.2d 1020 (1940).
43. 160 Ohio St. 273, 278-79, 116 N.E.2d 435, 438 (1953).
44. 136 Ohio St. 233, 237, 24 N.E.2d 1020, 1022 (1940).
45. 123 Ohio St. 588, 176 N.E. 452 (1931).

Trust Company have one thing in common: In each case the court felt it necessary to look to the surrounding circumstances to determine the intention of the parties. The gift question, so pointedly minimized in the *Scobie case,* continued to be considered by the court, with the result that one can only conclude that the "present vested interest" theory, with its attendant disregard of the gift question, is limited to cases where the right of survivorship is expressed or can be shown by strong parol evidence.

There have been a number of lower court decisions involving accounts where no right of survivorship was expressed. The fact situations which give rise to such cases are, of course, unlimited, and for that reason some of the lower court cases may serve as guides or indications of probable interpretations to be placed on the supreme court decisions in cases involving varying facts.

Survivorship Implied Though Not Expressed

In a few cases, the courts have been willing to find a right of survivorship, even though none was expressed in the contract of deposit.

Thus, in *In re Estate of Shangle,*[46] it was held that certificates of deposit purchased by a husband, payable to him or his wife, passed to the wife at the husband's death, where at the time of purchase the husband had told the bank that he wanted his wife to be able to draw the money after his death. The court thought this sufficient to establish a right of survivorship by contract. Similarly, in *In re Estate of Burns,*[47] the court, after citing *In re Estate of Hutchison,*[48] found sufficient evidence of a contract in Burns' conversation with his banker, his wife, and others, indicating that he wanted to provide for his wife after his death by means of the certificates of deposit in question. The court said the transaction must be measured by all the circumstances which surrounded the preparation and delivery of the certificates, not by what was done with them afterward.

A little different twist appeared in the case of *Bowerman v. Bowerman,*[49] where the husband and wife had in their home a cash fund, representing earnings from their tourist home, a farm, and other sources, in which each deposited money and from which each drew money as the occasion warranted. The court thought that each had created in the other a power coupled with an interest — "the power to appropriate for his or her own use . . . any part of the joint fund. . . ."[50] This power did not terminate with the death of one of the owners of the fund; it was irrevocable by contract; and the sur-

46. 32 Ohio L. Abs. 621 (Ct. App. 1930).
47. 21 Ohio L. Abs. 148 (Ct. App. 1935).
48. 120 Ohio St. 542, 166 N.E. 687 (1929). See note 8 *supra* and accompanying text.
49. 67 Ohio App. 425, 35 N.E.2d 1012 (1941).
50. *Id.* at 428, 35 N.E.2d at 1014.

vivor was entitled to all the fund. One judge dissented on the ground that there was no evidence to prove any right of survivorship.[51]

Parol evidence was held admissible to establish a right of survivorship in a case where it was claimed that the bank employee had inadvertently failed to add the words "or survivor" to the deposit agreement. In another case, a bank employee's testimony that the purchaser had said he wanted either depositor to be able to get the money was held sufficient to establish a right of survivorship.[53]

Thus, if survivorship language expressed in the agreement is occasionally ineffective, conversely, in certain circumstances, the right of survivorship accrues although not "spelled out." This result can be reached logically by treating the deposit contract as ambiguous so as to admit parol evidence to clarify the ambiguity and, thus, establish a contract for survivorship. This does no violence to the "contract" theory. But, as has been seen, the same result is sometimes sought to be reached by finding an intention to make a gift. This is inconsistent with the contract theory, but ends in the same result.

The Presumption of Equal Ownership

In *Bauman v. Walter,*[54] heretofore discussed,[55] the court indicated that a presumption of equal ownership in an account may be justified where there is no evidence of the ownership of the funds deposited. As will be seen, this may lead to complications with respect to the collection of taxes[56] and the claims of creditors,[57] but it makes sense if there is actually no such evidence. The bank, faced with the dilemma of to whom to pay the funds in the account, may protect itself by asking the survivor and the representative of the decedent's estate to sign the withdrawal, but this solution will not be available when a dispute arises between the parties as to ownership of the funds.

Frequently cited is the case of *Foraker v. Kocks,*[58] in which a certificate of deposit issued in the name of "Bernard or Catherine Noon or either of them," and a United States bond in the name of "Bernard Noon and Catherine Noon" were held to belong equally to the survivor and to the decedent's estate. The court could find no words of survivorship or any intention to create such a right, though it did suggest that the right could arise through "declarations to the bank" or through "notations." The *Foraker* case was followed in *In re*

51. *Id.* at 431, 35 N.E.2d at 1015 (dissenting opinion).
52. Smith v. Ross, 29 Ohio L. Abs. 553 (Ct. App. 1939).
53. Hittle v. Gagle, 78 N.E.2d 764 (Ohio Ct. App. 1948).
54. 160 Ohio St. 273, 116 N.E.2d 435 (1953).
55. See note 41 *supra* and accompanying text.
56. See note 83 *infra* and accompanying text.
57. See notes 69-79 *infra* and accompanying text.
58. 41 Ohio App. 210, 180 N.E. 743 (1931).

Estate of Thatcher,[59] where the depositors, a husband and wife, died within three days of each other. The court held that half belonged to the estate of each, there being no evidence to destroy the presumption that they held the accounts as tenants in common. In *Baker v. Dollar Savings and Trust Company,*[60] the husband added his wife's name to his account, but with no words of survivorship. The funds deposited represented the husband's wages. The court of appeals affirmed the judgment of the common pleas court, dividing the account equally. A similar division was ordered in *In re Chittock's Estate,*[61] where the savings account was in "either may draw" form.

Related Problems

Two-name bank accounts, in survivorship form and otherwise, exist in Ohio by the hundreds of thousands. Inevitably, they cause certain recurring problems, some capable of solution on the basis of decided cases, others requiring practical "rule of thumb" solutions. The balance of this article will be concerned with some of those problems.

Conflicting Testamentary Provisions

A good deal of confusion and bitterness occasionally arises because the provisions of a will conflict with the terms of the bank account. John Smith may have added his son Tom's name to his account, making it joint and survivor, and thereafter may decide he would rather favor his daughter, Jane. So he provides in his will that Jane shall have all his money in the bank, or he may even refer to the specific account. The groundwork has now been laid for a first class family feud. This, of course, is the result of thoughtless planning, or of pure carelessness, or, more likely, of a layman's misunderstanding of the nature of the joint account and its legal consequences.

Under Ohio law, the account would not ordinarily be part of John's estate, but would belong entirely to Tom upon John's death. In *Gladieux v. Parney,*[62] the testator devoted an entire paragraph in a codicil to his will to a futile effort to change the right to receive the proceeds of a savings account and of government bonds which were in survivorship form:

> My savings deposits and my United States bonds are in my name and that of my wife. That is money that belongs entirely to me, and the bonds also represent my own money. I am sure my wife would not want any of this nor would I want any of her funds and I direct said deposits

59. 30 Ohio N.P.(n.s.) 515 (P. Ct. 1933).
60. 15 Ohio L. Abs. 385 (Ct. App. 1933).
61. 106 N.E.2d 320 (Ohio P. Ct. 1952).
62. 93 Ohio App. 117, 106 N.E.2d 317 (1951).

> and the proceeds from said bonds be placed in the body or residue of my estate and be divided as specified in said Item V of my will.[63]

The court of appeals had no difficulty in holding that the survivorship account went directly to the survivor. It ruled to the contrary as to another account in which no survivorship rights were expressed, holding the evidence insufficient to establish a right of survivorship. With respect to this latter account, the court said that the codicil was merely a self-serving declaration, not in any way tending to establish the actual ownership or title to the accounts and bonds.

In *Bennett v. Bennett*,[64] it was held that neither the deposit contract of a joint and survivorship account nor the terms of a life insurance policy could be changed by a stipulation in the residuary clause of a will.

On any contract theory, of course, these decisions are incontestably correct, if there was no ambiguity in the contract. However, it is interesting to contemplate whether the language of a will could be used to clarify an ambiguity, or perhaps to assist in determining the intention of the deceased depositor. If as much emphasis is to be placed on intention as has previously been done, would not the language of a will, executed with proper solemnity, be the very best evidence of intention?

The "Half and Half" Statute

Another complication incident to the right of survivorship is the application of the so-called "half and half" statute, Ohio Revised Code section 2105.10, which controls the descent and distribution of identical property held at death by the relict of a deceased husband or wife, which property was received from the deceased spouse "by deed of gift, devise, bequest, descent or by an election to take. . . ."[65]

That no part of the money which came to the relict by means of a right of survivorship is controlled by the statute was established by *Berberick v. Courtade*.[66] The court quite properly held that the

63. *Id.* at 119, 106 N.E.2d at 318.

64. 70 Ohio App. 187, 45 N.E.2d 614 (1942).

65. OHIO REV. CODE § 2105.10. "When a relict of a deceased husband or wife dies intestate and without issue, possessed of identical real estate or personal property which came to such relict from any deceased spouse by deed or gift, devise, bequest, descent, or by an election to take under section 2105.06 of the Revised Code, such estate, real and personal, except one-half thereof which shall pass to and vest in the surviving spouse of such relict, shall pass to and vest in the children of the deceased spouse from whom such real estate or personal property came, or their lineal descendants, per stirpes. If there are no children or their lineal descendants, such estate, except for the one-half passing to the surviving spouse of such relict, shall pass and descend as follows:

> (A) One-half to the heirs of such relict . . .
>
> (B) One-half to the parents of the deceased spouse from whom such real estate or personal property came . . .
>
> (C) If there is no parent surviving, to the brothers and sisters . . . of such deceased spouse . . . ."

66. 137 Ohio St. 297, 28 N.E.2d 636 (1940).

funds represented by certificates of deposits and accounts in survivorship form passed by virtue of the contract and not by deed of gift.

The same reasoning was employed in *Riley v. Keel*,[67] despite the fact that the widow had erroneously included in her husband's estate the certificates of deposit which properly passed directly to her as survivor, and also in *Schwaigert v. Vitzhum*,[68] where the widow cashed joint and survivorship certificates of deposit after her husband's death and purchased a new certificate in her name alone.

Such holdings seem to be practically mandatory under the prevailing theory in Ohio that the right of survivorship arises as a matter of contract, rather than upon principles of gift. At least in the "half and half" cases, the courts have chosen to ignore the talk of gifts which confuses many of the opinions in Ohio, and, instead, have held strictly to the contract theory.

Rights of Creditors to Reach a Joint Account

Some very practical problems arise in connection with efforts of creditors to reach funds on deposit in joint accounts. Most frequently, they are precipitated by the use of the proceeding in aid of execution, by far the commonest means of enforcing a judgment in Ohio. If *A* has a judgment against *B* and has reason to believe *B* has money on deposit, *A* will promptly take steps to garnishee the bank. If *B* does have funds on deposit, and they stand in his name alone, *A* will have no trouble getting an order in aid of execution, under which the bank will pay the funds to the court for distribution to *A*. But if *B* has only an account in joint and survivorship form with his wife, *C*, and the court issues such an order, the bank will be understandably reluctant to turn over the funds for distribution to *A* unless it knows that *C*'s rights are protected. The bank is, of course, in no position to determine the interests of the respective depositors in the account. It may ask *C* to release any interest that she might have in the funds which are the subject of the garnishment and to agree that the funds may be paid in accordance with the court order. If *C* agrees, the problem dissolves. But if *C* refuses to waive her rights in the account, the bank may very well feel required to refuse to honor the order of the court. The plaintiff, *A*, then has the right to sue the non-complying garnishee bank under section 2715.33, Ohio Revised Code, which authorizes judgment against the garnishee.[69] At this

67. 84 Ohio App. 313, 85 N.E.2d 123 (1946).

68. 2 Ohio Supp. (N.E. Reporter) 241 (P. Ct. 1938).

69. OHIO REV. CODE § 2715.33. "If the garnishee fails to appear and answer as required by section 2715.29 of the Revised Code, or if he appears and answers and his disclosure is not satisfactory to the plaintiff, or if he fails to comply with the order of the court to deliver the property and pay the money owing into court, or to give the bond required in section 2715.32 of the Revised Code, the plaintiff may proceed against him by civil action. Thereupon such proceedings may be had as in other actions. Judgement may be rendered in favor of the plaintiff for the amount of property and credits of the defendant in possession of the garnishee,

point, the garnishee bank has lost its status as mere witness and has become a party to a direct action against it.

Because the bank has no direct interest in the funds at issue, a bill of interpleader seems ideally suited to permit the proper parties to argue the ownership of the funds. Accordingly, under the authority of Ohio Revised Code section 2307.29,[70] if the bank is sued, it may file an affidavit of interpleader and ask that both depositors be made parties defendant in its place. Once service is made upon the depositors, the bank may then, pursuant to an order of the court, pay the funds into the court and drop quietly out of the picture.

The use of interpleader in such situations seems to be well recognized in Ohio.[71] However, in one case,[72] the right to interplead failed because of a failure to obtain service on the parties in interest. This is a very real, but unavoidable, weakness in the interpleader device. It not infrequently occurs that one of the joint depositors has departed for parts unknown, leaving creditor and bank in a state of frustration. The funds on deposit may, as a result, be indefinitely impounded, and, thus, be of no use to anyone.

No serious attack has been made in Ohio on the right of the bank to interplead in cases of this kind. Certainly, a just result is best achieved by putting the real contestants in court. However, it is not inconceivable that the right to interplead could be attacked on the theory that the bank has a contract with its depositors and must pay the funds only as contracted. For example, in a dispute between the survivor and the administrator of the deceased depositor, the survivor might well claim that the bank was contractually bound to pay only him and that it could not avoid that duty by paying the funds into court. Or, perhaps, in an action by a creditor of one depositor

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for what may appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee."

70. OHIO REV. CODE § 2307.29. "Upon affidavit of a defendant before answer in an action upon contract, or for the recovery of personal property, that a third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of it as the court directs, the court may make an order for the safekeeping, payment, or deposit in court of the subject of the action, or its delivery to such person as it directs, and also an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant. If, having been served with a copy of the order by the sheriff or such other person as the court directs, such third party fails to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If he appears he shall be allowed to become defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for its payment, deposit, or delivery."

71. This was the procedure followed in the leading case on the rights of creditors to reach a joint account, Union Properties, Inc. v. Cleveland Trust Co., 152 Ohio St. 430, 89 N.E.2d 638 (1949); see note 74 *infra* and accompanying text. See also Dempsey v. Brighton Bank & Trust Co., 14 Ohio App. 170 (1921), and Buckeye State Bldg. & Loan Co. v. Fridley, 9 Ohio L. Abs. 293 (C.P. 1930), where there were disputes between the survivor and the estate of the deceased depositor.

72. Falk v. Security Sav. & Loan Co., 54 Ohio App. 395, 7 N.E.2d 668 (1936).

against the bank to enforce an order in aid of execution, the other depositor could object to the bank's interpleader on the ground that the bank was thus trying to escape contractual liability to him. He might further argue that by the terms of section 2307.29[73] interpleader is available only in an action on contract or for the recovery of personal property. The creditor's action against the bank is certainly not based on contract, nor is it one for the recovery of personal property.

Whether interpleader or some other procedure is used to bring the matter before the court, the ultimate question is essentially this: if *A* has a judgment against *B*, and *B* has a joint account with *C*, what part of the account can *A* reach in enforcement of his judgment?

In *Union Properties, Incorporated v. Cleveland Trust Company*,[74] the supreme court furnished a good part of the answer to this question by holding that the creditor could reach only that part of the account "owned" (presumably, "contributed") by the judgment debtor. The plaintiff had a judgment against one of two depositors and, to enforce the judgment, commenced a proceeding in aid of execution, naming the bank as garnishee. The bank refused to comply with the order in aid of execution and, when sued, obtained an order of interpleader, making both depositors substituted defendants in the bank's place. The evidence showed that the other joint depositor, the wife of the judgment debtor, had contributed all the money in the account. The court held that the husband's creditor could not reach the funds in the account.

The court distinguished the cases which concerned survivorship rights and said:

> Here, we are concerned wholly with a subsisting deposit intact and the rights, intention and attitude of the depositors with respect thereto during their joint lives. In our opinion, in controversies like the present one involving the deposit and arising during the joint lives of the depositors, the form of the deposit should not be treated as conclusive on the subject of joint ownership and the door should be opened to evidence that the deposit was in truth made and maintained on a different basis. In other words, the "realities of ownership" may be shown.[75]

The court relied principally upon a New York case, *Moskowitz v. Marrow*,[76] which involved not the rights of a creditor, but a dispute between the survivor and the estate of the deceased joint depositor. This case turned upon the fact that the decedent, who had created the account, had at one time directed the bank not to honor withdrawals by the other depositor. Mr. Justice Cardozo clearly stated that

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73. See note 70 *supra*.
74. 152 Ohio St. 430, 89 N.E.2d 638 (1949).
75. *Id.* at 434-35, 89 N.E.2d at 640-41.
76. 251 N.Y. 380, 167 N.E. 506 (1929).

the case before the court concerned only one thing: the title of the surviving depositor.

The authority cited by the supreme court in the *Union Properties* case is slim at best. Whether the case stands for a just principle seems questionable. Should not one who obtains the benefits of a joint account (the convenience, the avoidance of testamentary formality, the freedom from probate entanglements) assume also some burdens? It is hard to reconcile *Cleveland Trust Company v. Scobie*[77] and *Sage v. Flueck*,[78] and other cases in which it was held that each depositor has a present vested interest in the whole account, with a conclusion that that interest cannot be reached by a joint depositor's creditors, to the extent he can show it originated with the other depositor. It seems only fair that if the judgment debtor has free access to the funds in the account, his creditors should have the same right. It may well be asked whether this is an unwitting extension of the spendthrift trust theory to a new field.

It is interesting that the court of appeals held directly to the contrary in an unreported case, *Moreland-Cormere Apartments, Incorporated v. Parsons*.[79] The court affirmed without opinion the holding of Judge Lausche that the creditor could step into the shoes of the judgment debtor so far as the right to funds in the joint account was concerned; hence, all the funds in the account could be reached by the judgment creditor of but one of the depositors.

Although garnishments of joint bank accounts are everyday occurrences, the *Union Properties* case appears to be the only one that has reached the Supreme Court of Ohio. This may possibly be explained by the relatively small amounts of money at issue in most of the cases. By making the creditor's right to recover depend upon proof of ownership of the funds in the account, the supreme court has probably effectively discouraged many new cases.

A large bank having numerous accounts must consider as one of the unavoidable hazards of doing business the handling of the many orders in aid of execution served upon it. Attachments and creditor's bills are less frequently used, but restraining orders to tie up bank accounts have become almost "standard operating procedure" in divorce cases, and the Internal Revenue Service has moved into the picture with increasing use of the notice of federal tax levy to reach funds in bank accounts of delinquent taxpayers.

Restraining Orders in Divorce Cases

A very practical problem to banks is that posed by the distraught husband or wife who notifies the bank not to allow any further with-

77. 114 Ohio St. 241, 151 N.E. 373 (1926).

78. 132 Ohio St. 377, 7 N.E.2d 802 (1937).

79. No. 16309, Ohio Cuyahoga County Ct. App., 1938, *affirming* No. 458092, Ohio Cuyahoga County C.P., 1937.

drawals from a joint account by the other spouse. Such "marital difficulty" problems may arise from a telephone call, from a hasty appearance at the bank, from a letter, or even from the good offices of a sympathetic neighbor. Inevitably, the other depositor soon appears at the bank and demands some money from the account, or wants to close it, emphatically asserting his right to draw, as plainly provided in the passbook and on the signature card. "To pay or not to pay" is immediately a delicate problem, unilluminated by any Ohio case law. The resolution of this problem is usually an adamant refusal to pay either depositor unless both sign the withdrawal order. This action can be supported upon two theories: (1) that the deposit contract is a three-party contract which has been breached by one of the parties, thus fixing rights as of that time; and (2) that in a dispute between living depositors, actual ownership of the funds in the account becomes a matter of proof. In neither case is the bank in a position to decide the rights of its depositors.

In *Union Trust Company v. Hutchison*,[80] which involved a dispute between the survivor and the estate of the deceased depositor, the court indicated that although by statute the bank is protected in paying to the survivor, it cannot blithely do so in the face of a protest by the heirs at law, and that it would pay at its peril. The same rule would no doubt apply during the lives of the depositors.[81]

Informal attempts to tie up funds in a joint account (or even in an account in one name only) frequently precede the filing of a divorce case and the attendant temporary restraining order.[82] In Cuyahoga County such temporary restraining orders are granted almost automatically "as prayed for," *i.e.*, in the language of the prayer of the petition. The restraining order may be against the depositor alone, but usually it is against the bank and the depositor. In many instances, however, commercial accounts are excepted on the theory that such an account is necessary to the defendant's business. No special problems arise respecting joint accounts, except that occasionally the plaintiff's restraining order may result in impounding a joint account on which the plaintiff also intended to draw. Again, the bank is in no position to determine ownership of the fund and will hold the entire account even though it means refusing withdrawals by the person who obtained the restraining order in the first instance. This is a rule of reason, reserving to the court the right to determine the interests of the parties in the account.

80. 27 Ohio App. 284, 161 N.E. 222 (1927).

81. See Ferguson v. Deuble, 27 Ohio L. Abs. 533 (Ct. App. 1938) and *In re* Estate of Fox, 36 Ohio L. Abs. 349 (P. Ct. 1942), both holding that in a dispute between living co-depositors, proof must be had to determine the ownership of each in the account; see also Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923 (1938), wherein a joint judgment against both depositors was upheld where one depositor had improperly placed in the account, with full knowledge of the other, funds which rightfully belonged to the plaintiff.

82. Under the authority of OHIO REV. CODE § 3105.20 (1953).

The Federal Tax Levy

The increasing use by the Internal Revenue Service of the tax levy as a means of reaching funds in the taxpayer's bank account poses problems similar to those created by the order in aid of execution. Section 6331 of the Internal Revenue Code of 1954 authorizes the collection of a delinquent tax "by levy upon all property and rights to property" belonging to the taxpayer. Section 6332 requires any person in possession of, or obligated with respect to, property subject to levy and upon which a levy has been made to surrender such property upon demand. In practice, the Internal Revenue Service serves upon the bank a brief "notice of levy" which informs the bank that all moneys or other obligations owing from the bank to the taxpayer are levied upon and seized, and that demand is made for the amount necessary to satisfy the liability, or any lesser amount the bank may have.

Immediately, the question arises as to what effect such a levy has upon funds in a joint account. The Internal Revenue Service has ruled that:

> A joint checking account is subject to levy only to the extent of a taxpayer's interest therein, which will be determined from the facts in each case. Where one of the persons in whose name a joint account has been established can prove that the funds deposited therein are his sole property, no levy can be made on such funds to satisfy an outstanding tax liability of the other. Factors bearing on the question of the extent of a taxpayer's interest in such an account include the nature of the tenancy created under State law; the source of the funds deposited; the intent of the person opening the joint account; and whether in actual practice the account was under the control of one party even though the other had authority to withdraw funds from the account.[83]

Thus, if funds in the account are all the property of the taxpayer, they should be turned over to apply on the tax liability; but funds not belonging to the taxpayer should be retained. As in the case of the order in aid of execution, the bank is in no position to determine the respective rights in the fund, and it cannot safely turn over funds in which someone other than the taxpayer may have an interest. It can, of course, ask the other depositor for a release, *i.e.*, for consent to pay the funds to the Internal Revenue Service. But if this consent is refused, it would seem that the bank would have no alternative but to invite suit and thereafter to interplead.

Incompetence of One of the Depositors

If two persons have a joint account and one of them thereafter is adjudicated an incompetent, it becomes necessary to determine the ownership rights of each in the account. The guardian of the incompetent is, of course, entitled and required to take charge of his ward's

83. Rev. Rul. 187, 1955-1 CUM. BULL. 197.

share of the account. It is well established that the guardian cannot continue to hold the account unchanged, *i.e.*, merely substitute his name for that of the incompetent.

In *Abrams v. Nickel,*[84] it was held that an adjudication of lunacy and the appointment of a guardian for one of two parties to a joint and survivorship account terminated the agreement. The court stated that from the date of the appointment of the guardian, the incompetent depositor ceased to have authority over the account, and that the guardian was entitled to whatever interest the incompetent had in the account. However, the guardian could not become a joint owner, and could not continue the arrangement.[85] The court further held that each of the depositors had a complete interest in the entire account and that, in the absence of extraordinary circumstances, there must be an equal division of the account. The implication is that if proof of contribution in some other ratio could be made, the division would be made accordingly.

In *Ulmer v. Society for Savings,*[86] a husband and wife had a joint and survivorship account. After the wife became incompetent, her guardian brought an action asking for an equal division of the account, and obtained such a ruling in the trial court. The court of appeals held that the finding was contrary to the manifest weight of the evidence, there being no testimony that the wife ever owned any of the deposits made. The court said that if an account must be terminated, it is equitable that each depositor should receive what he put in, unless the evidence shows that a gift was intended. Here, the husband had not had an opportunity to prove who owned the funds.

The court distinguished *Abrams v. Nickel,* in which the depositors were landlady and boarder, on the ground that the equal division in that case was ordered "in the absence of extraordinary circumstances" and that in the instant case the marital relationship and duties constituted "extraordinary circumstances."

Abrams v. Nickel was also distinguished in *In re Estate of Jones,*[87] in which the court held that where the joint and survivorship account was but part of an agreement that one of the parties to the account would render services to, and care for, the other, and would be entitled to the funds in the account upon the other's death, the appointment of a guardian for such other one could not operate to destroy the vested right which the first party had in the account. The

84. 50 Ohio App. 500, 198 N.E. 887 (1935).

85. See also Chockley v. Jensen, 104 Ohio App. 399, 140 N.E.2d 909 (1957), which held that where, because of the mental instability of a person, his funds are placed in a joint account under a contract of deposit requiring his signature and the signature of another designated as trustee, the delivery of the bankbook by the trustee to the owner, followed by an immediate redelivery of the same to the trustee, does not constitute a gift inter vivos of the funds in the account by the owner to the trustee.

86. 41 N.E.2d 578 (Ohio Ct. App. 1941).

87. 122 N.E.2d 111 (Ohio Ct. App. 1952).

appellate court held that the trial court erred in excluding evidence of the agreement and in holding that the appointment of the guardian for the one depositor terminated the interest of the other in the account. Certainly, there were present here the "extraordinary circumstances" for which *Abrams v. Nickel* reserved an exception.

Consistent with the aforementioned cases, it was held in *In re Guardianship of Mayforth,*[88] that as between the guardian of one depositor and the other depositor, extrinsic evidence is admissible to establish the facts as to the ownership of each, but, absent evidence to the contrary, the presumption is that their interests are equal.

A potential question, apparently not adjudicated in Ohio, lies in the use, in joint account contracts in savings and loan associations, of language derived from Ohio Revised Code section 1151.19, and analogous previous sections, authorizing payment to either depositor of all or any part of the account "notwithstanding the death or incapacity of the undersigned."[89] No case apparently has yet tested this language where one of the depositors has become incapacitated. It seems hard to believe that if the "incapacity" were mental and a guardian were appointed, that the courts would permit transfer of the entire interest in the account to the other, more fortunate, depositor.

It will be noticed that the foregoing cases do not answer the problem presented when one of the parties is known to be incompetent in fact, but when there has been no adjudication and no guardian appointed. Certainly, there can be no division of the account without competent parties to agree to it. The incompetent cannot write valid checks or give binding receipts; but what of the competent party — can he go on as before, drawing from the account at will, perhaps even closing it out? It would seem that if the bank knew one of the depositors was in fact incompetent, common prudence would require it to pay neither depositor until a guardian had been appointed to represent the rights of the incompetent. The fact that the reported cases concern situations where guardians had been appointed should not be taken as supporting a proposition that actual incompetency, without adjudication, can be disregarded.

The Treatment of Government Bonds

In passing, it is interesting to note that despite careful Treasury Department regulations concerning the issuance and payment of government bonds,[90] the survivorship feature has given rise to a few cases in our courts.

The leading Ohio case is *In re Estate of Di Santo,*[91] where the

88. 1 Ohio Supp. (N.E. Reporter) 87 (P. Ct. 1935).

89. See note 11 *supra;* Ryan v. Henney, 20 Ohio L. Abs. 518 (Ct. App. 1935).

90. Treas. Reg. pt. 315 (1957).

91. 142 Ohio St. 223, 51 N.E.2d 639 (1943).

supreme court held that Series D bonds registered in the name of one person, payable on death to a second person, became the property of the second on the death of the first, and were no part of the estate of the first person, who was the purchaser. The court approved and followed *Rhorbacker v. Citizens Building Association Company.*[92] Judge Turner, who had dissented in the *Rhorbacker* case, said that that case "must now be accepted as declaring the applicable law in this state, to wit, that the proceeds of a contract made for the benefit of a third party are not subject to administration in the estate of the donor but belong to the person for whose benefit the contract was made."[93] The court stated that it is necessary to look to the contract between the donor and the issuer, rather than to any contract between the beneficiaries. The Treasury Department regulations governing payment[94] were expressly incorporated in the terms of the bonds and thus became part of the contract. Accordingly, the bonds were held payable to the named beneficiary, as provided by the regulations.

This holding appears to supersede that in *Foraker v. Kocks,*[95] where bonds were registered in the names of a husband and wife, with no expression of survivorship rights. The court in that case held that regulations of the Treasury Department recognizing the survivor as the proper party to whom transfer should be made exist for the convenience of the United States government "and cannot confer title in the liberty bond, or create a contract of survivorship in the bond in the State of Ohio, where a contract of survivorship is not presumed."[96] It does not appear whether the Treasury Department regulations were expressly incorporated in the bond, but the inference must be that they were not.

Binding force was given to Treasury Department regulations in *Waltenberger v. Pearson,*[97] *In re Taylor's Estate,*[98] and *Laufersweiler v. Richmond.*[99] But in *Gladieux v. Parney,*[100] the court refused to take judicial notice of government regulations where no evidence thereof was offered, and refused to find a right of survivorship where none was expressed on the face of the bonds. Similarly, in *Waltenberger v. Pearson,*[101] the court said that in the absence of a showing of Treasury regulations to the contrary, bonds issued in two

92. 138 Ohio St. 273, 34 N.E.2d 751 (1941), discussed in note 18 *supra* and accompanying text.

93. *In re* Estate of Di Santo, 142 Ohio St. 223, 228, 51 N.E.2d 639, 641 (1943).

94. Treas. Reg. 315.17, 6 Fed. Reg. 2199 (1941).

95. 41 Ohio App. 210, 180 N.E. 743 (1931); see note 58 *supra* and accompanying text.

96. *Id.* at 220, 180 N.E. at 746.

97. 81 Ohio App. 51, 77 N.E.2d 491 (1946).

98. 18 Ohio Supp. (N.E. Reporter) 62 (P. Ct. 1943).

99. 8 Ohio Supp. (N.E. Reporter) 76 (P. Ct. 1942).

100. 93 Ohio App. 117, 106 N.E.2d 317 (1951); see note 62 *supra* and accompanying text.

101. 81 Ohio App. 51, 59, 77 N.E.2d 491, 496 (1946) (dictum).

names, with no survivorship right expressed, would be presumed to be owned half by each.

Application of the Ohio Inheritance Tax

While the balance in a joint and survivorship bank account is not ordinarily subject to administration in the estate of the first depositor to die, it may be subject to both the Federal Estate Tax and the Ohio Inheritance Tax. Under the former, the tax is imposed on the entire balance at the time of death, except to the extent that the survivor can show he contributed to the fund.[102]

Some confusion, now fairly well resolved, has in the past attended the application of the Ohio Inheritance Tax law to joint and survivorship accounts.[103] This confusion may commence in the mind of the layman when he is told that the account is not part of the decedent's estate and will pass directly to the survivor, free from the delays of administration, but that it is nevertheless subject to inheritance tax. Practically, the survivor first encounters difficulty when he learns that, regardless of how small or how large the account is, the bank cannot turn it over to him until he obtains a "tax release."[104] This unavoidable requirement may seem to him to be entirely contrary to previous assurances that he would be entitled to the balance in the account "without going to court."

Under the Ohio statute, when property is held in joint and survivorship form, the accrual of the right to immediate ownership or possession and enjoyment of property by reason of the death of one "shall be deemed a succession taxable under this section, in the same manner as if the enhanced value of the whole property belonged absolutely to the deceased person, and he had bequeathed the same to the survivor by will . . . ."[105]

In *Tax Commission v. Hutchison*,[106] which concerned the taxation of several joint and survivorship accounts representing the common contributions of a husband and wife, it was held that one-half of the balance in the account was the taxable "enhanced value." The court said that by reason of the death of one depositor, there accrued to the other an exclusive right to the entire fund which she did not theretofore possess. The court, in upholding the state's claim that one-half was subject to tax, rejected the argument that, because the survivor had a right to consume the entire estate before as well as after the death of the other depositor, no additional right accrued to her.

102. INT. REV. CODE OF 1954, § 2040.

103. See Douglas, *Survivorship as Succession Under the Ohio Inheritance Tax*, 24 U. CIN. L. REV. 87 (1955).

104. OHIO REV. CODE § 5731.42 (Supp. 1959).

105. OHIO REV. CODE § 5731.02 (Supp. 1959).

106. 120 Ohio St. 361, 166 N.E. 352 (1929).

In *Tax Commission v. Reeves,*[107] one-half the value of jointly owned bonds was taxed, there being some evidence of an *inter vivos* gift, and in *In re Combs,*[108] where by far the larger proportion of the account had been contributed by the husband, that proportion was taxed in his estate. In *In re Kirkham's Estate,*[109] the court held that the taxable enhanced value was that portion of the account which, by reason of the death of one of the joint depositors, had accrued to the surviving owner or owners in excess of the contribution made by the survivor. The duty was on the survivor to prove his contribution.

This rule still prevails in Ohio except as to accounts of husbands and wives, which long have been the subject of controversy. In 1957, the legislature amended the taxing statute[110] by adding the following sentence to the provisions for taxation of property in joint and survivorship form:

> . . . provided when the persons holding said property jointly are a husband and a wife, the survivor shall be deemed to have a succession taxable to the extent of one-half the total value of the property without regard to enhancement.

Before this amendment, the practice had been changed from time to time, there being some reluctance to treat the property of husbands and wives in the same way as other jointly owned property. For a time, by reason of an agreement of the probate judges,[111] it was customary to tax only one-half the total value of the property, but later in some counties the procedure was to assess the tax on the entire balance at death, giving the surviving spouse the privilege of filing exceptions to establish the respective contributions of the depositors. The new amendment seems to settle the question by arbitrarily stating that half is taxable, regardless of whether the husband or the wife contributed the funds in the account. Although the justice of such a rule is open to question, at least, it has the virtue of definiteness.

Another interesting facet of the tax situation was revealed in *In re Estate of Williams,*[112] where it was held that the amount of the debts and allowances (the widow's year's allowance[113] and property exempt from administration)[114] exceeding the assets of the estate could not be deducted from the joint and survivorship accounts in determining the inheritance tax, and that the widow could not change this result by waiving her right to the survivorship property. Thus, it is apparent that the use of the joint and survivorship account may

107. 11 Ohio L. Abs. 154 (Ct. App. 1931).
108. 90 N.E.2d 440 (Ohio Ct. App. 1949).
109. 6 Ohio Supp. (N.E. Reporter) 293 (P. Ct. 1941).
110. OHIO REV. CODE § 5731.02 (Supp. 1959).
111. At their meeting in 1951. This was approved by the Tax Commissioner.
112. 138 N.E.2d 189 (Ohio P. Ct. 1956).
113. OHIO REV. CODE § 2117.20.
114. OHIO REV. CODE § 2115.13.

possibly result in more, rather than less, inheritance tax in at least one circumstance.

CONCLUSION

By the slow process of judicial decision, a fairly well defined theory has evolved in Ohio which makes acceptable the fact that, by reason of survivorship, ownership of funds in a bank can pass at death from one person to another without the slightest trace of testamentary formality. This general principle is now solidly established. Despite the problems which sometimes arise (and which have occasionally required some illogical decisions to resolve them), the joint bank account appears to be a permanent part of our financial landscape.

It is, however, a device peculiarly susceptible to careless use. Aided and abetted by the ubiquitous rubber stamp, the tendency is to treat all joint accounts as survivorship accounts, without any serious consideration as to whether the intended purpose requires the survivorship feature. Most of the litigated cases concerning joint accounts could have been averted by careful choice, first, of the type of account, and second, of language clearly establishing the desired account. Where the survivorship feature is appropriate, it is a simple enough matter to provide for it in clear and unambiguous language. The account in two names, without the right of survivorship (the "either may draw" account) leads to litigation and its use should be discouraged. The addition of an authorized signer under a simple power of attorney (the so-called "may draw" authority) is a particularly useful device, especially for elderly persons who may suddenly become incapacitated, but it should be clearly differentiated from the survivorship account.

The proper type of account to be used in each case should be determined in the light of the principal purpose sought to be accomplished, the tax consequences, the possibility of involvement in creditors' claims, and the possible incompetence or incapacity of one of the depositors. The joint account has disadvantages as well as advantages. It should never be considered a substitute for a properly drawn will. Judiciously used, however, it can be a very useful tool.