Michigan Law Review

Volume 52 | Issue 7

1954

CREATION OF JOINT RIGHTS BETWEEN HUSBAND AND WIFE IN PERSONAL PROPERTY: II

R. Bruce Townsend
Indiana University, Indianapolis Division

CREATION OF JOINT RIGHTS BETWEEN HUSBAND AND WIFE IN PERSONAL PROPERTY: II*

R. Bruce Townsend†

3. *Language Which Will Create Joint Tenancy, Entireties or Right of Survivorship*

THE net effect of the general legislation pertaining to the creation of joint tenancy has been to make lawyers sensitive to language expressing an intent to create joint tenancy, tenancy by the entireties and other types of survivorship rights which may or may not fall within the foregoing concepts. And so the law has busied itself with the task of giving technical meanings to words used by members of the public in their efforts to create joint rights in property—a task that has not been fully appreciated by people who acquire personal property from bankers, brokers, clerks and the like in the course of day-to-day business transactions where practices do not conform to the thinking of lawyers.[180] For example, suppose that *H* and *W* have been happily married over a period of years in which time property has been accumulated in their joint names—probably with the expectation or understanding that present enjoyment is to be shared by both and that upon death it will pass to the survivor. If real estate has been acquired it is quite probable that the rights of the parties were designated with the assistance of legal counsel. A good lawyer would cause the grantees to be described, "*H* and *W* as joint tenants (tenants by the entireties), with right of survivorship and the other incidents of that legal estate, and not as tenants in common (and not in community)."[181] This, no doubt, would come fairly close to the

* Part I and the Appendices referred to herein appeared in 52 MICH. L. REV. 779, April 1954.—Ed.

† Associate Professor of Law, Indiana University, Indianapolis Division.—Ed.

180 That the choice of language may be difficult for a lawyer, see Alexander v. Alexander, 154 Ore. 317, 58 P. (2d) 1265 (1936) (joint ownership agreement drawn by party who was a lawyer failed for indefiniteness). In general see note 178.

181 This form seems to meet all technical objections. Thus the parties are designated in the conjunctive (as distinguished from the disjunctive) form, eliminating any question of power in either to defeat the rights of the other. The words "joint tenants" meet the requirement of statutes requiring joint tenancy to be expressed. Words of "survivorship" meet the effect of laws disfavoring or abolishing this incident of the estate. The words "other incidents of that legal estate" make it clear that a technical joint tenancy (or tenancy by the entireties) is intended in preference to the possibility of a life estate with cross remainders. The words "and not as tenants in common" categorically reject the statutory preference for this type of dual ownership and fulfill the requirements of several of the laws that tenancy in common be negated. In some of the community property states it is preferable to negate community in view of a presumption that community continues in property acquired with community assets. Language meeting all or most of these requirements is not uncommon. Illustrative cases where personal property was acquired in the names of

intent of the person establishing the relation, and would achieve the lawyer's objective by creating a legally recognized and predictable type of relation that should eliminate future litigation. On the other hand one might expect quite a different picture with respect to jointly acquired personal property. A study of the case law reveals that one may anticipate with some accuracy the general types of language habitually chosen to describe purported dual owners of personal property. Thus title to the family automobile may have been taken in the names of "*H* and *W*" or "*H* or *W*." It is quite possible that *H* may have opened a bank account under the names of "*H* or *W*"; another in the names of "*H* or *W*, payable to the survivor"; and still another in the names of "*H* or *W*, jointly." Stock may have been acquired by the parties as "joint tenants." Various combinations of the foregoing words are not uncommon.[182] Consequently, semantics has become one of the important obstacles making the creation of joint

the parties "as joint tenants with right of survivorship and not as tenants in common": Ferrell v. Holland, 205 Ark. 523, 169 S.W. (2d) 643 (1943) (building and loan share); Eisenhardt v. Lowell, 105 Colo. 417, 98 P. (2d) 1001 (1940) (stock); Clausen v. Warner, 118 Ind. App. 340, 78 N.E. (2d) 551 (1948) (savings account); MacLennan v. MacLennan, 316 Mass. 593, 55 N.E. (2d) 928 (1944) (stock); Kehl v. Omaha Nat. Bank, 126 Neb. 695, 254 N.W. 397 (1934) (bank deposit); Manning v. United States Nat. Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944) (issuance of stock requested in this form, but issued with right of survivorship only); Mardis v. Steen, 293 Pa. 13, 141 A. 629 (1928) (checking account). Compare Steinmetz v. Steinmetz, 130 N.J. Eq. 176, 21 A. (2d) 743 (1941) (bank deposit in form of "joint estate to us as joint tenants and not as tenants in common"). Language identifying the parties as "joint tenants" plus words of "survivorship" is not uncommon and should leave no doubt as to the creator's intent. E.g., Denker v. Lloyd, 118 Ind. App. 509, 79 N.E. (2d) 658 (1948) (savings account); In re Fast's Estate, 169 Kan. 238, 218 P. (2d) 184 (1950) (savings and loan account); Duling v. Duling's Estate, 211 Miss. 465, 52 S. (2d) 39 (1951) (safe deposit box agreement). The parties often are described as holding "jointly" plus words of "survivorship." E.g., Matthew v. Moncrief, (D.C. Cir. 1943) 135 F. (2d) 645 (building association deposit in names of parties or "joint owners . . . to the survivor"); Brown v. Navarre, 64 Ariz. 262, 169 P. (2d) 85 (1946) (safe deposit box agreement); McLeod v. Hennepin Co. Sav. Bank, 145 Minn. 299, 176 N.W. 987 (1920) (savings account); Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935) (building and loan account).

A good example of a form eliminating the difficulties in a community state will be found in Collier v. Collier, 73 Ariz. 405 at 410, 242 P. (2d) 537 (1952) (*H* and *W* signed indorsement upon joint tenancy deed reciting, "The above deed is accepted and approved by the Grantees; it being their intention to acquire said premises as joint tenants with the right of survivorship, and not as community property or as tenants in common").

[182] The general lack of information as to the proper kind of language graphically appears in cases involving joint minded parties who acquire different assets in varying joint ownership forms. E.g., Roach v. Plank, 300 Mich. 43, 1 N.W. (2d) 446 (1942) (three bank accounts in different forms); Block v. Schmidt, 296 Mich. 610, 296 N.W. 698 (1941) (mortgages, bank account, realty and shares of stock held in different forms); Clevidence v. Mercantile Home Bank & Tr. Co., 355 Mo. 904, 199 S.W. (2d) 1 (1947) (bank account, safe deposit box and note and mortgage in different forms); Boyle v. Dinsdale, 45 Utah 112, 143 P. 136 (1914) (cashier agreed to open joint account if other banks had done so for depositor); Estate of Hounsell, 252 Wis. 138, 31 N.W. (2d) 203 (1948) (realty, note, mortgage, savings account and checking account held in different forms).

ownership in personal property more than an ordinary hazard. Hence, there is a pressing need for an underlying legal policy reconciled to the latitude of words customarily employed by the public with the objective of creating joint survivorship rights in personalty.

Legislative influence upon the choice of words. There can be no doubt that the main purpose of the general statutory provisions disfavoring joint tenancy was to furnish a rule of construction where the transfer to several persons fails to indicate the type of estate intended. Where the parties are named in the simple conjunctive form ("*H* and *W*") an intent to create tenancy in common will be inferred by force of the statute,[183] except in those states committed to the common law policy of favoring tenancy by the entireties.[184] From this point on, they do not provide much assistance in telling what language must be used to create joint tenancy. The statutes in all but eight of the states with such laws, however, purport to allow joint tenancy or survivorship rights to be created where a specified type of language is employed in the instrument creating the relation. Unfortunately, a careful analysis will reveal fantastic literal inconsistencies. Thus

[183] E.g., Koehring v. Bowman, 194 Ind. 433, 142 N.E. 117 (1924); Wait v. Bovee, 35 Mich. 425 (1877); Semper v. Coates, 93 Minn. 76, 100 N.W. 662 (1904); Central Trust Co. v. Street, 95 N.J. Eq. 278, 127 A. 82 (1923); Matter of Albrecht, 136 N.Y. 91, 32 N.E. 632 (1892); Nunner v. Erickson, 151 Ore. 575, 51 P. (2d) 839 (1935). Cf. Kilpatrick v. Kilpatrick, 176 N.C. 182, 96 S.E. 988 (1918). In general, see cases cited in connection with the discussion of general statutory provisions. In the community property states the rights of the parties are controlled by presumptions which in turn may depend upon the character of the funds used to make the purchase. See note 70. The cases seem to be divided as to whether or not parol evidence may be admitted to show that joint tenancy or survivorship was intended. Parol excluded: Bouska v. Bouska, 159 Kan. 276, 153 P. (2d) 923 (1944); Gagnon v. Pronovost, 96 N.H. 154, 71 A. (2d) 747 (1949). Parol admitted: Osborne v. Osborne, 325 Ill. 229, 156 N.E. 306 (1927); Roach v. Plank, 300 Mich. 43, 1 N.W. (2d) 446 (1942); Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895); Holohan v. Melville, 41 Wash. (2d) 380, 249 P. (2d) 777 (1952). In England, where joint tenancy is favored, parol is admitted to show that tenancy in common was intended. E.g., Palmer v. Rich, [1897] 1 Ch. 134; Harrison v. Barton, 1 Johns & Hem. 287, 70 Eng. Rep. 756 (1860).

[184] E.g., Dime Trust & Safe Deposit Co. v. Phillips, (D.C. Pa. 1929) 30 F. (2d) 395 (stock, bonds and savings deposit); Dickson v. Jonesboro Trust Co., 154 Ark. 155, 242 S.W. 57 (1922) (checking account); In re Giant Portland Cement Co., 26 Del. Ch. 32, 21 A. (2d) 697 (1941) (stock); Rauhut v. Reinhart, 22 Del. Ch. 431, 180 A. 913 (1935) (mortgage); Merrill v. Adkins, 131 Fla. 478, 180 S. 41 (1938) (promissory note); Brewer v. Bowersox, 92 Md. 567, 48 A. 1060 (1901); Boland v. McKowen, 189 Mass. 563, 76 N.E. 206 (1905) (mortgage); Simon v. St. Louis Union Trust Co., 346 Mo. 146, 139 S.W. (2d) 1002 (1940) (bank deposit and promissory note); In re Estate of Greenwood, 201 Mo. App. 39, 208 S.W. 635 (1919) (promissory note); Estate of Parry, 188 Pa. 33, 41 A. 448 (1898) (letter of credit). Cf. Campbell v. Campbell, 167 Tenn. 77, 66 S.W. (2d) 990 (1934) (bequest to "*H* and *W* jointly").

[185] Omitted.—Ed.

in sixteen states an intent to establish "joint tenancy"[186] will rebut the preference for tenancy in common. The laws in these states do not, however, provide that words of "survivorship" or other language will create a technical joint tenancy. In seven jurisdictions the acts stipulate that if an express provision is made for "survivorship"[187] the parties will hold as joint tenants. But these provisions also do not say what the effect will be when the parties are described as "joint tenants" or in other language which does not emphasize the incident of survivorship. A few statutes indicate that joint tenancy will arise when the parties are designated as "joint tenants" and with right of "survivorship,"[188] leaving an absurd but possible inference that the preference for tenancy in common will continue unless both are employed. Four statutes recognize joint tenancy when the transfer expressly declares that the parties are "joint tenants and not as tenants in common,"[189] creating doubt where the transfer employs one expression without the other. Less confusion arises from the laws in six states which contemplate that joint tenancy may be created either by words describing the relation as in "joint tenancy," or with right

[186] The states are Arkansas, California, District of Columbia, Kansas, Maryland, Michigan, Minnesota, Missouri, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota and Wisconsin. See Appendix II, col. 3. These statutes are patterned after the New York law which reads as follows: "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy. . . ." N.Y. Real Property Law §66.

[187] Alabama, Arizona, Florida, Kentucky, Maine, Virginia and West Virginia fairly fall within this category. See Appendix II, col. 3. The Alabama statute does not, however, refer to "joint tenancy" as its subject. The Indiana statute pertaining to personal property probably belongs within this group. It provides: ". . . the survivor of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument." Ind. Ann. Stat. (Burns Repl., 1951) §51-104.

[188] The Illinois statute pertaining to personalty purports to abolish the incident of survivorship "except . . . where . . . an intention to create a joint tenancy in personal property with the right of survivorship. . . ." Ill. Rev. Stat. (1953) c. 76, §2. It seems that mere words of survivorship, alone, will create a joint tenancy. Illinois Trust & Sav. Bank v. Van Vlack, 310 Ill. 185, 141 N.E. 546 (1923). The Indiana act applying to real estate favors tenancy in common unless expressed that the parties "shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy." Ind. Ann. Stat. (Burns Repl., 1951) §56-111. Fortunately the statute has not been literally construed. Mundhenk v. Bierie, 81 Ind. App. 85, 135 N.E. 493 (1922) ("jointly" created joint tenancy). The statute in Mississippi does not apply where "it manifestly appears from the tenor of the instrument, that it was intended to create an estate in joint-tenancy or entirety with the right of survivorship. . . ." Miss Code Ann. (1942) §834. But case law says that words of survivorship, alone, will create joint tenancy. Wolfe v. Wolfe, 207 Miss. 480, 42 S. (2d) 438 (1949).

[189] Colorado, Delaware, Illinois and New Jersey. See Appendix II, col. 3. The words of these statutes have been re-written by decisions holding that an intent to create joint tenancy may be effective without negating tenancy in common. Coudert v. Earl, 45 N.J. Eq. 654, 18 A. 220 (1889); Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N.E. 827

of "survivorship."[190] Two of these stipulate that the word "jointly"[191] also will manifest an intent to create joint tenancy. Tenancy in common is rebutted simply by the expression of a "contrary intent" under the Iowa law,[192] in New Mexico where it is clearly expressed that the property "shall be held by both parties,"[193] and the same result apparently is achieved by the Idaho statute when the parties are described as holding a "joint interest."[194] Provision is made for the creation of entireties rights by the statutes of five states where it is otherwise disfavored, but the type of language required is neither consistent nor clear. Montana legislation states that conveyances "to tenants in estates by entirety" will pass to the survivor where "the right of survivorship" is contained in the grant.[195] Entireties ownership is authorized in Kentucky[196] and West Virginia[197] when "survivorship" is provided for, in Mississippi when an intent to create "entirety with the right of survivorship" appears from the tenor of the instrument,[198] and in Oklahoma where a "tenancy by the entirety" is declared.[199]

There can be no doubt that the laws in eight states have had a profound effect upon the judicial attitude toward the type of language necessary to create the various forms of joint ownership. In these states[200] (Georgia, North Carolina, Oregon, Pennsylvania, South

(1926). Cf. Short v. Milby, 31 Del. Ch. 49, 64 A. (2d) 36 (1949) (deed to brother and sister "jointly and not as tenants in common" created a joint tenancy). But see In re Kwatkowski's Estate, 94 Colo. 222, 29 P. (2d) 639 at 640 (1934); Cookman v. Silliman, 22 Del. Ch. 303, 2 A. (2d) 166 at 167 (1938).

190 Massachusetts, Montana, New Hampshire, Rhode Island, Utah and Vermont. See Appendix II, col. 3.

191 Massachusetts and Vermont. Compare also the language of the Rhode Island statute. Appendix II, col. 3.

192 See Appendix II, col. 1 and col. 3.

193 N.M. Stat. Ann. (1941) §75-111. A subsequent statute in New Mexico provides that a conveyance or mortgage of real estate designating the parties " 'as joint tenants' shall be construed to mean that the conveyance is to the grantees as joint tenants, and not as tenants in common, and to the survivor of them and the heirs and assigns of the survivor." Id., §75-134 (Supp. 1951). It would appear that this provision is cumulative with the earlier provision which applied to a "grant or bequest" of real estate.

194 The meaning of this statute is obscure. It says: "Every interest created in favor of several persons in their own right is an interest in common, . . . unless declared in its creation to be a joint interest. . . ." Idaho Code (1948) §55-104. An earlier statute provides: "Every interest in real estate . . . constitutes a tenancy in common, unless expressly declared in the grant or devise to be otherwise." Id., §55-508.

195 Mont. Rev. Code Ann. (Repl., 1953) §67-310.

196 Ky. Rev. Stat. (1953) §381.050. See Appendix II, col. 4.

197 Appendix II, col. 3.

198 Appendix II, col. 3, and set forth at note 188.

199 Appendix II, col. 3.

200 See Appendix II, col. 3. "Joint tenancy" is made the "subject" of all the statutes with the exception of Texas where the law operates against "joint owners." An Arkansas statute applying to real estate prefers tenancy in common "unless expressly declared in such

Carolina, Tennessee, Texas and Washington) joint tenancy literally is abolished in Georgia and Oregon, and the survivorship incident to the estate of joint tenancy likewise is positively eliminated by the statutes in the other six. In North Carolina, Oregon, Pennsylvania[201] and Tennessee,[202] the statutes are inapplicable to tenancy by the entireties which is favored by North Carolina[203] and Oregon[204] only with respect to interests in real property. But in all of the eight states it has been held that joint tenancy, or a survivorship estate analogous to joint tenancy can be created where the instrument of transfer manifests an intent to do so. This conclusion, however, has not been reached without pain. Thus words of "survivorship" have been held sufficient to pass the property to the surviving owner,[205] but writers of opinions are cautious to make it appear that the conclusion does not violate the terms of the statute abolishing "joint tenancy" or the survivorship incident of "joint tenancy." This is done by the crafty device of making it seem that the survivorship could result either as an incident of "joint tenancy" or on the supposition that the parties hold a life estate in common with contingent remainder to the survivor.[206] The impression is inescapable that the authors of these

grant or devise to be a joint tenancy." Ark. Stat. Ann. (1947) §50-411. Another statute provides, "All survivorships of real and personal estate are forever abolished." Id., §61-114. If the two statutes can be reconciled, it seems that the latter would be applicable to personalty. Cf. Sessions v. Peay, 19 Ark. 267 (1857) (holding that the statute did not apply to choses in action). It has been held, however, that joint tenancy in personalty may be created where an intent to do so is expressed. Ferrell v. Holland, 205 Ark. 523, 169 S.W. (2d) 643 (1943) (where court cited only the statute pertaining to real estate).

201 Ownership by the entireties is favored by Pennsylvania in personal property. See note 135.

202 Ownership by the entireties is favored by Tennessee in personal property. See note 98.

203 See note 138.

204 See note 102.

205 E.g., Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 44 S.E. 320 at 353 (1903); Jones v. Waldroup, 217 N.C. 178, 7 S.E. (2d) 366 (1940) (savings and loan association stock providing for survivorship); Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895) (survivorship agreement established by parol); Erickson v. Erickson, 167 Ore. 1, 115 P. (2d) 172 (1941) (realty granted to *B* and *S* "not as tenants in common, but with right of survivorship"); Manning v. United States Nat. Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944) (stock issued in names of *H* and *W* with right of survivorship); Leach's Estate, 282 Pa. 545, 128 A. 497 (1925) (oral agreement to hold library by survivorship); Arnold v. Jack's Exrs., 24 Pa. 57 (1854); McLeroy v. McLeroy, 163 Tenn. 124, 40 S.W. (2d) 1027 (1931) (deed to brother and sister "and to the survivor"); Shroff v. Deaton, (Tex. Civ. App. 1949) 220 S.W. (2d) 489 (bank account in names of *H* and *W* "as joint tenants with right of survivorship and not as tenants in common"); Chandler v. Kountze, (Tex. Civ. App. 1939) 130 S.W. (2d) 327 (realty); Matter of Ivers, 4 Wash. (2d) 477, 104 P. (2d) 467 (1940) (bank account in names of *H* and *W* as a "joint and several account . . . death . . . shall not affect the right of the other to withdraw").

206 The best illustration of this type of reasoning is Erickson v. Erickson, 167 Ore. 1, 115 P. (2d) 172 (1941). "*Erickson v. Erickson* is not only proof that hard cases make

opinions are so impressed by the distasteful task of choosing between a nasty type of interminable future interest and an act of judicial statutory amendment that they are led into a near breach of judicial function by deciding neither. Ultimately, decisions in these states must face the question of what precisely the rights of the parties are.[207] This problem was very recently reviewed by the Washington court in *Holohan v. Melville*[208] where words of survivorship unqualifiedly were held to create a technical estate of joint tenancy although only the question of survivorship was involved. A problem of another sort

bad law, but that hard cases can sometimes make no law at all." O'Connell, "Are Joint Tenancies Abolished in Oregon?" 21 ORE. L. REV. 159 at 167 (1942). Apparently, the Oregon court has never determined exactly what kind of ownership is created. E.g., Langoe v. Giannini, 186 Ore. 207, 206 P. (2d) 106 (1949) ("contract by joint tenancy"); State v. Gralewski's Estate, 176 Ore. 448 at 457, 159 P. (2d) 211 (1945) (". . . it is obvious that a joint bank account does not have all the incidents of a joint tenancy at common law"). Other illustrative cases: Wilson v. Ervin, 227 N.C. 396 at 399, 42 S.E. (2d) 468 (1947) (". . . since the abolition of survivorship in joint tenancy . . . the right of survivorship in personalty, if such right exists, must be pursuant to contract and not by operation of law or statutory provision"); Teacher v. Kijurina, 365 Pa. 480 at 488, 76 A. (2d) 197 (1950) ("It is perhaps a confusion of terms and an inaccuracy to say that a joint tenancy in real estate may still be created; it is more accurate to say that the *right of survivorship may be engrafted* on a dual estate which might otherwise be a tenancy in common"). See Watts v. Stanton, 28 Tenn. App. 381 at 385, 190 S.W. (2d) 617 (1945) (statute "abolishing joint tenancies, did not prevent a deed or will from vesting in two or more persons a life estate with a contingent remainder to the survivor or survivors"). Cf. 38 MICH. L. REV. 875 at 882 (1940). See also the cases in note 205.

A similar result is reached in several of the states without joint tenancy legislation. See notes 162-166. For a case where "survivorship" language was construed in a deed as testamentary, see Pope v. Burgess, 230 N.C. 323, 53 S.E. (2d) 159 (1949).

[207] Since most of the cases involve questions of survivorship, few have been called upon to decide the inter vivos incidents of the estate created. In State v. Gralewski's Estate, 176 Ore. 448, 159 P. (2d) 211 (1945), the court was able to side-step the issue of whether or not the relation of the parties to a joint bank account was terminated by withdrawals of one. It has been decided in Pennsylvania that "joint tenancy" language plus a provision for "survivorship" will create a technical joint tenancy between persons who are not husband and wife. Angier v. Worrell, 346 Pa. 450, 31 A. (2d) 87 (1943) (estate severable, so that one-half interest could be reached by individual creditors). Cf. American Oil Co. v. Falconer, 136 Pa. Super. 598, 8 A. (2d) 418 (1939) (bank deposit in name of *M, S* and *D* "jointly, and upon the death of either of them, in the survivor"—held garnishment by S's creditor terminated the "joint tenancy").

[208] 41 Wash. (2d) 380, 249 P. (2d) 777 (1952) (acquisition of realty by "*A* and *B*" held in joint tenancy upon the basis of a prior oral agreement for survivorship). It is quite possible that the result of this decision was repudiated by the following Washington legislature which substantially re-enacted the statute purporting to abolish the survivorship incident of joint tenancy with a policy statement that the law was passed "in the interest of affirming by law the general prevailing view as to the effect" of the prior statute, and "to remove some uncertainties as to the application of existing laws relative thereto resulting in confusion." Wash. Laws (1953) c. 270 (preamble). In addition the new statute provides that "survivorship by agreement or otherwise as a principle and as an incident of . . . tenancy by the entireties is abolished. . . ." However, the right of husband and wife to enter into written and acknowledged survivorship agreements with respect to community property is expressly preserved. Compare Wash. Rev. Code (1951) §26.16.120. Consequently the principle of the Holohan case may not be affected to the extent that it applies to community property.

arises when title is taken by the parties as "joint tenants" without further language indicating that the property is to pass to the "survivor." In the six states abolishing the *incident* of survivorship attached to the estate of joint tenancy, a technical argument is possible that the transaction falls within the statute since no provision is made for survivorship. A lower court decision in Pennsylvania has so held.[209] In Georgia and Oregon where "joint tenancy" and not the incident of survivorship is abolished it would seem that an intent to create "joint tenancy" would rebut the statute.[210]

Fortunately, judges have not been inclined to pay close attention to the nice wording of the general legislation authorizing the rebuttal of the preference for tenancy in common. However, decisions in the states with statutes abolishing joint tenancy or the incident of survivorship should be appraised with extreme caution. The strict sanctions imposed by these laws have caused the courts to search with greater care for words which will take the transfer out of the statute. Speaking generally, the confused provisions of all the laws may have been an important factor in inducing the lack of general understanding as to the type of language necessary to create joint tenancy, and tenancy by the entireties in states where it is not favored. A composite picture of these provisions tends to indicate that the description of dual owners as "joint tenants," with right of "survivorship" or any language negating tenancy in common should be sufficient to create joint tenancy. Hence this may be either cause or justification for the general belief that any language describing the parties other than in the simple conjunctive form will establish joint tenancy with the incident of survivorship.

The public has become extremely fond of the bank account as a device for joint ownership, and to meet this demand bankers have

[209] Howell v. Kline, 156 Pa. Super. 628, 41 A. (2d) 580 (1945). Cf. Watts v. Stanton, 28 Tenn. App. 381, 190 S.W. (2d) 617 (1945) (deed to *H* and *W* "by entireties" did not pass to the survivor because survivorship words were not used—transfer occurred during period of Tennessee history when entireties was not favored). But cf. Alexander v. Shapard, 146 Tenn. 90, 240 S.W. 287 (1922) (deed reformed to read as "tenants by the entireties" where title taken in names of "*H* and *W*" —transfer occurred during period of Tennessee history when entireties was not favored). See Free v. Sandifer, 131 S.C. 232 at 237, 126 S.E. 521 (1925) ("The word 'joint', as to the ownership, was not mentioned, nor is the word 'survivor' to be found in the will. Both of these are apt words for the creation of an estate in joint tenancy"). A transfer describing the parties as "joint tenants and not as tenants in common" is sufficient to pass the property to the survivor. Redemptorist Fathers v. Lawler, 205 Pa. 24, 54 A. 487 (1903).

[210] Cf. Holbrook v. Hendricks Estate, 175 Ore. 159, 152 P. (2d) 573 (1944) (absence of the words "joint owners" or "joint tenants" in deposit agreement negated probability of gift).

played no small role in the choice of language.[211] As a consequence, legislation lobbied by the banking interests, chiefly to provide protection to the bank in making payment to either, or the survivor of dual depositors,[212] has influenced bankers in the selection of words employed to identify the rights of joint owners. This legislative policy was pursued from state to state without serious thought to uniformity, and with the monstrous consequence that the statutes adopted came to sanction and promote joint deposits in linguistic forms which varied not only from state to state, but between statutes pertaining to different kinds of banking institutions within a single jurisdiction. The almost unbelievable end product of this short-sighted selfish legislative policy is set forth in an appendix[213] with the suggestion that a case for uniform legislation there has been made out. That draftsmen of these statutes gave but casual thought to the kind of ownership created by the language approved appears from the fact that only one statute contemplates that a bank account may be held by the entireties.[214] Several statutes, however, make special provision

[211] This, of course, follows from the fact that the form for the deposit agreement is almost always prepared by the bank. E.g., Harrington v. Emmerman, (D.C. Cir. 1950) 186 F. (2d) 757; Saddler v. Nat. Bank of Bloomington, 403 Ill. 218, 85 N.E. (2d) 733 (1949) (where safe deposit agreement construed against bank for this reason); Park Enterprises, Inc. v. Trach, 233 Minn. 467, 47 N.W. (2d) 194 (1951); Green v. Comer, 193 Okla. 133, 141 P. (2d) 258 (1943). The official who executed the joint agreement is more often than not a material witness either in explaining the meaning of doubtful words or in establishing the issues controlled by the law of gifts. E.g., Bowen v. Holland, 182 Ga. 430, 185 S.E. 720 (1936) (bank officers gave opinion as to the legal effect of instrument); O'Brien v. Biegger, 233 Iowa 1179, 11 N.W. (2d) 412 (1943). See note 178.

A study of the deposit forms used by financial institutions in Indianapolis receiving deposits shows that all but five employ joint ownership signature cards or rubber stamps by which such rights are designated on the signature cards. Language of the forms varies.

[212] Compare Landretto v. First Trust & Sav. Bank, 333 Ill. 442, 164 N.E. 836 (1928); Manta v. Kahl, 348 Ill. App. 373, 108 N.E. (2d) 781 (1952); Sawyer v. The National Shawmut Bank, 306 Mass. 313, 28 N.E. (2d) 455 (1940) with National City Bank v. Harbin Elect. Joint-Stock Co., (9th Cir. 1928) 28 F. (2d) 468; Gish Banking Co. v. Leachman's Administrator, 163 Ky. 720, 174 S.W. 492 (1915). For the difficulties with which banks must contend, see the extreme case of Saddler v. Nat. Bank of Bloomington, 403 Ill. 218, 85 N.E. (2d) 733 (1949) (safe deposit box agreement naming *H* or *W* as lessees did not protect bank which allowed *W* to enter). Corporations have a similar problem when it comes to dealing with joint owners of stock, especially in paying dividends. E.g., Hurley v. Southern Cal. Edison Co., (9th Cir. 1950) 183 F. (2d) 125 (corporation "stuck" for payment of dividends to grandmother joint tenant). Oddly, but few statutes will be found furnishing corporations other than financial institutions protection for payment to one of several joint owners. Compare Ill. Rev. Stat. (1953) c. 76, §2; Ohio Rev. Code (Baldwin, 1953) §1701.34(D). For an excellent discussion of this problem as it relates to negotiable instruments, see "Discharge of Joint-Payee Instruments," 1 STANFORD L. REV. 730 (1949).

[213] See Appendix III.

[214] Mass. Laws Ann. (Supp. 1953) c. 170, §15 (shares of cooperative banks may be held in "the names of husband and wife as tenants by the entirety").

for husband-wife ownership.[215] Out of this legislation grew the practice of describing the rights of dual depositors in the various words employed by the statutes with particular emphasis to language in the simple alternative form ("*H* or *W*"), "jointly," "with right of survivorship," "joint tenants" and various combinations of these expressions. It is quite reasonable to suppose that the use of this kind of language in banking circles has had a profound effect upon the general public in other property transactions. The slovenly policy the United States Treasury has pursued in describing the rights of dual owners in savings bonds lends some credence to this suggestion.[216]

Effects of language describing the parties as "tenants by the entireties." Because most people who acquire property jointly do not anticipate the full consequences of taking title in their joint names, the task of adjusting their rights has been left largely to the legal profession. The common law approached this task conceptually by classifying the various types of joint ownership. In categorizing husband-wife ownership as "tenancy by the entireties" a term was invented by legal minds which neither reflected nor gained popular usage.[217] Hence it is relatively uncommon to find joint owners of personal property designated in terms legally descriptive of this estate. In states where entireties is favored in real and personal property it is quite obvious that reference to the parties as "tenants by the entireties" will be given literal effect[218] if the parties are husband and

[215] Ky. Rev. Stat. (1953) §289.140(2) (shares of building and loan association in names of husband and wife and the survivor); Me. Rev. Stat. (1944) c. 55, §36 (statute making form of account conclusive of survivorship rights applies only to husband and wife, parent and child); Mich. Stat. Ann. (1943) §23.547 (building and loan association shares issued to "a husband and wife or to any two or more persons"); Mont. Rev. Code Ann. (1947) §7-144 (shares of building and loan associations "in the name of two or more persons, whether husband or wife or otherwise"); Okla. Stat. Ann. (1951) tit. 6, §118-o (deposit in bank or trust company in names of husband and wife, parent and child or brothers and sisters "payable to either, or payable to either or the survivor"); S.D. Code (1939) §7.0206 (building and loan association stock issued "to a husband and wife"); Wyo. Comp. Stat. Ann. (1945) §36-108 (shares of building and loan associations "whether husband or wife or otherwise" withdrawable by either).

[216] The regulations permit savings bonds to be registered in the names of two persons in the "co-ownership form" ("*A* or *B*"), and in the "beneficiary form" ("*A*, p.o.d. *B*"). TREAS. DEPT. CIRC. 530, §§315.4,(a)(2), (3) (6th rev., Feb. 13, 1945). Although it is declared that the "form of registration . . . will be considered as conclusive of such ownership interest," no definition is given to the inter vivos rights of dual owners as between themselves other than the provisions for right of survivorship, the procedures for redemption, and limited transfer. Id., §315.2.

[217] It was not until relatively modern times that "entireties" was classified as such. See note 53. Undoubtedly the word was chosen to express the unity of husband and wife. Freeman v. Belfer, 173 N.C. 581 at 582, 92 S.E. 486 (1917) ("It dates from the Garden of Eden . . ." and the court then proceeded to quote from the Bible).

[218] E.g., Berhalter v. Berhalter, 315 Pa. 225, 173 A. 172 (1934) (checking account "by entirety" with authority of bank to honor checks of either). Description of the parties

wife.[219] However, tenancy by the entireties is disfavored in a total of 31 jurisdictions,[220] and in six[221] of the states preferring this kind of ownership the rule is not extended to personal property. Consequently, two serious legal problems may arise in any one of these 37 jurisdictions where transfers to husband and wife label their interests as "tenants by the entireties."

First, the courts of each of these states must ultimately determine whether or not tenancy by the entireties can be created where an intent to do so has been expressed. There is almost a total dearth of authority upon this question. Statutes in five of these states (Kentucky, Mississippi, Montana, Oklahoma and West Virginia) make it fairly clear that tenancy by the entireties is not prohibited where proper language is employed.[222] Several decisions elsewhere will be found holding that a technical tenancy by the entireties will be recognized where the parties are described as holding by the "entireties."[223]

as tenants by the "entireties" will not be given literal effect where the transfer violates the so-called "four unities rule." E.g., Edge v. Barrow, 316 Mass. 104, 55 N.E. (2d) 5 (1944) (deed from *H* to *H* and *W* created joint tenancy).

[219] Apparently, tenancy by the entireties cannot be created between persons who are not husband and wife. A description of joint transferees as "husband and wife" or otherwise indicating marital status, alone, will not be construed as creating joint tenancy. Loper v. Loper, (Del. Super. 1934) 170 A. 804; Spanier v. Spanier, 120 Ind. App. 700, 96 N.E. (2d) 346 (1951); Donnelly v. Donnelly, 198 Md. 341, 84 A. (2d) 89 (1951); Cristia v. Cristia, 317 Mich. 66, 26 N.W. (2d) 869 (1947); Casini v. Lupone, 8 N.J. Super. 362, 72 A. (2d) 907 (1950); Bell v. Little, 204 App. Div. 235, 197 N.Y.S. 674 (1922); Merit v. Losey, 194 Ore. 89, 240 P. (2d) 933 (1952); Teacher v. Kijurina, 365 Pa. 480, 76 A. (2d) 197 (1950); McKee v. Bevins, 138 Tenn. 249, 197 S.W. 563 (1917); Hynes v. Hynes, 28 Wash. (2d) 660, 184 P. (2d) 68 (1947). But cf. Matter of Eysel, 65 Misc. 432, 121 N.Y.S. 1095 (1909), affd. 147 App. Div. 911, 132 N.Y.S. 1127 (1911) (bank account and promissory note in names of persons who lived as man and wife passed to the survivor). See also cases cited in note 236. Designation of the parties as husband and wife may create an estoppel as against third persons. Stone v. Culver, 286 Mich. 263, 282 N.W. 142 (1938).

[220] These states are Alabama, Arizona, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. See discussion, notes 92-169.

[221] These states are Indiana, Michigan, Oregon, New York, New Jersey and North Carolina.

[222] These statutes are discussed at notes 195-199. The Mississippi statute applies only to realty. See Appendix II, col. 2, and compare note 79. That entireties may be created in these states where a purpose to do so is expressed, compare: Hoffmann v. Newell, 249 Ky. 270, 60 S.W. (2d) 607 (1932) (deed to *H* and *W* "with the right of survivorship"); Irvin v. Stover, 67 W.Va. 356, 67 S.E. 1119 (1910) (deed to *H* and *W* "as a homestead . . ."); Vasilion v. Vasilion, 192 Va. 735, 66 S.E. (2d) 599 (1951) (deed to *H* and *W* "as tenants by the entireties, with right of survivorship as at common law"). See Wolfe v. Wolfe, 207 Miss. 480, 42 S. (2d) 438 (1949); In re Marsh's Estate, 125 Mont. 239, 234 P. (2d) 459 (1951). See notes 116-120 for further decisions.

[223] Bloomfield v. Brown, 67 R.I. 452, 25 A. (2d) 354 (1942); Alexander v. Shapard, 146 Tenn. 90, 240 S.W. 287 (1922) (deed reformed to create entireties at a time when entireties disfavored under married women's property law). Cf. Frank v. Patton, 251 Mich.

On the other hand, although occasional dictum will be found indicating that entireties is a legal impossibility,[224] only three decisions were discovered where this conclusion actually was reached. One of these, *In re Ray's Will*,[225] arose in Wisconsin where entireties is generally rejected in all kinds of property. *Davis v. Davis*[226] was decided in 1953 in South Carolina, a state with legislation abolishing the survivorship as an incident to joint tenancy and previously committed to a rule disfavoring tenancy by the entireties. The third, *Winchester-Simmons Company v. Cutler*,[227] concerned a bequest of bonds to "*H*, and wife, *W*, as husband and wife by the entireties" in North Carolina where entireties ownership is otherwise preferred in the case of real property. In states where entireties has been rejected as an indirect consequence of the married women's and community property laws, it would be unfortunate to assume that such a severe consequence should be reached as would deny to the parties the voluntary enjoyment of a type of ownership particularly suited to the marriage status. In support of a contrary conclusion it might be argued that tenancy by the entirety imposes a kind of restraint upon alienation inasmuch as both parties must join in a transfer of the property. But in view of the fact that this type of restraint gives social and economic protection to the family unit for only the period of marriage it is difficult to find legal precedent for striking it down.[228] In those states where

557, 232 N.W. 211 (1930); Matter of Ackler, 168 Misc. 623, 6 N.Y.S. (2d) 128 (1938) (mortgage taken in names of husband and wife "as tenants of the entirety" passed to the survivor). But cf. Scholten v. Scholten, 238 Mich. 679, 214 N.W. 320 (1927); Watts v. Stanton, 28 Tenn. App. 381, 190 S.W. (2d) 617 (1945) (partition decree to *H* and *W* "by entireties" at period in Tennessee law when entireties disfavored). In Ridgley v. Ridgley, 256 Mich. 359, 239 N.W. 354 (1931), a bank account was held by *H* or *W* as "joint owners of the entirety, payable to either or the survivor." *H* withdrew the money and gave it to his brother. The court avoided a decision as to what the rights of *W* were.

[224] E.g., First Nat. Bank v. Lawrence, 212 Ala. 45, 101 S. 663 (1924); Swan v. Walden, 156 Cal. 195, 103 P. 931 (1909); McDonald v. Senn, 53 N.M. 198, 204 P. (2d) 990 (1949). Kipp v. Kipp, (Ohio App. 1950) 101 N.E. (2d) 782. Compare Fay v. Smiley, 201 Iowa 1290, 207 N.W. 369 (1926) (deed to *H* and *W* by *H* "as tenants by the entirety and not as tenants in common" did not create a right of survivorship on alternative grounds that estate was abolished and that transfer violated the "four unities" rule).

[225] 188 Wis. 180, 205 N.W. 917 (1925).

[226] (S.C. 1953) 75 S.E. (2d) 46 (deed to "*H* and wife, *W*, as tenants by the entirety, and the survivor of them").

[227] 194 N.C. 698, 140 S.E. 622 (1927).

[228] It has been held that provisions impairing the right of one joint tenant or owner to terminate the relation does not constitute an unreasonable restraint on alienation. Hedricks v. Beam, 241 Ala. 618, 4 S. (2d) 176 (1941) (partition prohibited between life tenants and remaindermen until death of former); Peyton v. Wehrhane, 125 Conn. 420, 6 A. (2d) 313 (1939) (will creating joint tenancy prohibited severance); Rosenberg v. Rosenberg, 413 Ill. 343, 108 N.E. (2d) 766 (1952) (agreement by tenants in common not to partition); Swannell v. Wilson, 400 Ill. 138, 79 N.E. (2d) 26 (1948) (*H* and *W* held realty in joint tenancy—under property settlement *H* gave up his right to defeat *W*'s survivor-

entireties ownership is favored in realty but not in personalty there is no possible ground for defending the result of the *Cutler*[229] decision. Decisions making this distinction between personal and real property are founded upon the dubious supposition that husband and wife could not own property jointly at common law—a supposition which is no longer important.[230] To convert the questionable premise of these decisions into a rule of absolute prohibition would produce the grossest type of discrimination against apartment dwellers and families whose savings are invested in some type of property other than real estate.[231]

A second problem may arise in giving meaning to "entireties" language in those jurisdictions where the estate either is disfavored or prohibited. In states merely *disfavoring* the entireties relation there should be little doubt that a transfer to *H* and *W* "by the entireties" or "as tenants by the entireties" is sufficient to indicate that a technical meaning was intended.[232] Since the rule disfavoring entireties usually is inferred from the married women's or community property laws, the general statutes prescribing the language necessary for the creation of joint tenancy have no literal application. Some difficulty, however, is suggested in Kentucky, Mississippi, Montana and West Virginia[233] where statutes authorize creation of tenancy by the entireties when "survivorship" is declared in the creating instrument. Because the word "entireties" standing alone is a technical term without common meaning it seems reasonable that it should be given its legal meaning without requiring accompanying words of survivorship.

ship without her consent); Legro v. Kelley, 311 Mass. 674, 42 N.E. (2d) 836 (1942) (survivorship agreement between owners of stock prohibiting disposal except to the other). Cf. Guenther v. Roche, 238 Iowa 1348, 29 N.W. (2d) 222 (1947) (devise prohibiting partition until death of life tenant). *Contra,* Smith v. Smith, 290 Mich. 143, 287 N.W. 411 (1939) (provision in deed to father and son as joint tenants restraining conveyance by one without the other held void).

[229] See note 227.

[230] Most of the states recognizing entireties, today, give both parties equality of control over the property. See notes 65-68.

[231] Other illustrations will be found where the law has maintained artificial distinctions between personal and real property which originated with an agrarian economy. A good example appears in the various homestead laws which took root in the days of westward expansion. "State Homestead Exemption Laws," 46 YALE L.J. 1023 at 1040 (1937) (recognizing that these laws fail to give protection to the apartment dweller). Consequently, courts have been put to the frustrating task of deciding such questions as, for example, whether or not the family house-trailer comes within the protection of these laws. Compare Gann v. Montgomery, (Tex. Civ. App. 1948) 210 S.W. (2d) 255; 1950 WIS. L. REV. 350, with In re Foley, (D.C. Neb. 1951) 97 F. Supp. 843.

[232] E.g., see Fay v. Smiley, 201 Iowa 1290, 207 N.W. 369 (1926) (deed naming *H* and *W* as tenants by the entireties to Iowa real estate drafted in New York where the estate is a familiar occurrence).

[233] See discussion at notes 195-198, and cases cited at note 222.

Assuming that tenancy by the entireties is held to be *abolished* within a particular jurisdiction, the court may be faced with the dilemma of fixing some meaning to words describing husband and wife in "entireties" terms. Peculiarly, the *Ray*[234] case held that entireties language demonstrated an intent to create joint tenancy with the right of survivorship, the *Davis* decision[235] construed the words "as tenants by the entirety, and the survivor of them" as establishing a tenancy in common for life with some kind of indestructible remainder to the survivor, while it was found in *Winchester-Simmons Company v. Cutler*[236] that tenancy in common was intended. One can be quite safe in assuming that persons who employ such language—even in states where the estate is prohibited—must have been sufficiently acquainted with the legal consequences of the terminology so that a type of joint ownership other than tenancy in common was intended. Tenancy by the entireties generally is classified with or as a special type of joint tenancy, chiefly because both carry the incident of survivorship.[237] Consequently, a construction favoring joint tenancy over tenancy in common is not unreasonable. This conclusion is verified by a group of cases holding that transfers to unmarried couples "as tenants by the entireties" will create joint tenancy with the accompanying incident of survivorship.[238] A construction which finds that

[234] See note 225. This case held that joint tenancy was created for purposes of inheritance taxes. The effect of the decision is weakened by the fact that joint tenancy between husband and wife is favored under the Wisconsin joint tenancy statute. See note 112. Matter of Ackler, 168 Misc. 623, 6 N.Y.S. (2d) 128 (1938) (survivorship reasoned as a matter of construction).

[235] See note 226.

[236] See note 227.

[237] See note 7.

[238] Mitchell v. Frederick, 166 Md. 42, 170 A. 733 (1934) (deeds); Morris v. McCarty, 158 Mass. 11, 32 N.E. 938 (1893) (deed to parties "as tenants by the entirety and not as tenants in common"); Lilly v. Schmock, 297 Mich. 513, 298 N.W. 116 (1941) (survivorship rights sustained by testimony of bank officer that donor intended that safe deposit box should be held "as joint tenants by the entireties"); Frederick v. Southwick, 165 Pa. Super. 78, 67 A. (2d) 802 (1949) (deed); Maxwell v. Saylor, 359 Pa. 94, 58 A. (2d) 355 (1948) (deed). Cf. Johnson v. Landefeld, 138 Fla. 511, 189 S. 666 (1939) (voidable marriage); Thornton v. Pierce, 328 Pa. 11, 194 A. 897 (1937) (created either joint tenancy or tenancy in common). *Contra:* Peer v. Ashauer, (Mo. App. 1937) 102 S.W. (2d) 764 (devise to sisters); Perrin v. Harrington, 146 App. Div. 292, 130 N.Y.S. 944 (1911). Where "entireties" language is accompanied with words of "survivorship" the transfer is construed as creating joint tenancy or a right of survivorship. Pye v. Higgason, 210 Ark. 347, 195 S.W. (2d) 632 (1946) (bank deposit by uncle and niece); Kent v. O'Neil, (Fla. 1951) 53 S. (2d) 779 (deed); Michael v. Lucas, 152 Md. 512, 137 A. 287 (1927) (deed); Jackson City Bank & Tr. Co. v. Fredrick, 271 Mich. 538, 260 N.W. 908 (1935) (deed); Estate of Richardson, 229 Wis. 426, 282 N.W. 585 (1938) (deed). Some courts have allowed reformation of "entireties" words into "joint tenancy." Scott v. Grow, 301 Mich. 226, 3 N.W. (2d) 254 (1942) (deed described parties as "tenants by entireties and not as joint tenants"); Sheedy v. Stein, 101 N.Y.S. (2d) 773 (1950) (deed). In attacking the validity of a deed by a mother to her children as "tenants by the entirety"

parties hold a tenancy in common for life with contingent remainder to the survivor carries with it the objection that a type of feudal restraint upon marketability arbitrarily is imposed in deference to the power retained by joint tenants to terminate the uncertainty of survivorship.[239]

Language affirming or negating "tenancy in common." As previously pointed out, reference to co-owners conjunctively ("*H* and *W*"), in absence of other terms defining the right of the parties, ordinarily will create a tenancy in common with the exception of transfers to husband and wife in jurisdictions where entireties is favored.[240] In the latter group of states, tenancy by the entireties is not preferred as a rule of property in the sense that husband and wife cannot own personalty or realty as tenants in common. Although there may have been some doubt at one time in early American history[241] it is now firmly settled that the rule is one of construction only. Consequently, language describing married people as "tenants in common" is effective to rebut entireties and create a tenancy in common.[242] Likewise, any other manifestation that the parties are to hold severable rights will accomplish the same result.[243]

A problem of some greater difficulty arises in connection with words negating tenancy in common. It is not uncommon practice on the part of conveyancers to employ this language in their efforts

it was claimed by counsel that the use of such language evidenced that the mother was of unsound mind. This argument, however, was rejected by the Indiana Appellate Court in Baker v. McCague, 118 Ind. App. 32, 75 N.E. (2d) 61 (1947). A transfer may be set aside where it has been induced without knowledge of the invalidity of a marriage and which is concealed by the other party. E.g., Schwarz v. United States, (4th Cir. 1951) 191 F. (2d) 618; Hutson v. Hutson, 168 Md. 182, 177 A. 177 (1935). Cf. Thomas v. Doyle, (D.C. Cir. 1950) 187 F. (2d) 207 (deed to parties as "joint tenants").

239 See notes 288, 289.

240 See notes 183, 184.

241 E.g., Stuckey v. Keefe's Exrs., 26 Pa. 397 (1856). It is doubtful that this was justified as a principle of the common law. Cf. Doe ex dem. Dormer v. Wilson, 4 B. & Ald. 303, 106 Eng. Rep. 948 (1821) (husband and wife held a joint life estate with contingent remainder in the survivor). In general, see FREEMAN, COTENANCY AND PARTITION §§71-72 (1874).

242 E.g., Godman v. Greer, 12 Del. Ch. 397, 105 A. 380 (1918); Carroll v. Reidy, 5 D.C. App. 59 (1894); Dodds v. Winslow, 26 Ind. App. 652, 60 N.E. 458 (1901); Davidson v. Eubanks, 354 Mo. 301, 189 S.W. (2d) 295 (1945); Pentek v. Pentek, 117 N.J. Eq. 292, 175 A. 623 (1934); Fulper v. Fulper, 54 N.J. Eq. 431, 34 A. 1063 (1896); Rinios v. Tritsch, 363 Pa. 127, 69 A. (2d) 120 (1949).

243 E.g., Keller v. Keller, 338 Mo. 731, 92 S.W. (2d) 157 (1936) ("share and share alike"); Eason v. Eason, 159 N.C. 539, 75 S.E. 797 (1912) ("each one-half interest"); Blease v. Anderson, 241 Pa. 198, 88 A. 365 (1913) (different proportions granted to *H* and *W*); Myers v. Comer, 144 Tenn. 475, 234 S.W. 325 (1921) ("jointly and severally in equal moieties"). Cf. Fruzynski v. Radler, 23 N.J. Super. 274, 93 A. (2d) 35 (1952) ("joint and several" bank deposit); Miner v. Brown, 133 N.Y. 308, 31 N.E. 24 (1892).

to make it clear that joint tenancy or survivorship is intended.[244] Literally, statutes in four states seem to impose this requirement as a condition to the creation of joint tenancy, but these provisions, fortunately, have been given a broad meaning so that a positive intent to create joint tenancy or survivorship rights will rebut the preference for tenancy in common.[245] Consequently, one is quite safe in predicting that no court would require negative language as a condition to the creation of joint tenancy, tenancy by the entirety or other survivorship rights.[246] However, the conservative practice of employing such words "and not as tenants in common" may lead to trouble when less experienced people undertake to define the rights of dual owners in this manner without a clear or positive description of the type of interest intended to be created. Thus suppose a bank deposit is opened in the names of *H* and *W* "not as tenants in common" without more. In entireties states this surely would be sufficient to establish tenancy by the entireties.[247] In other jurisdictions that favor tenancy in common it is conceivable that some trouble might be encountered in reconciling these words with the literal provisions of statutes allowing joint tenancy to be created by affirmative words expressing "joint tenancy," "survivorship" and the like. Lawyers generally would agree that joint tenancy or tenancy by the entireties is the jural opposite of tenancy in common. Therefore it would be reasonable to construe "not as tenants in common" as meaning joint tenancy or tenancy by the entireties. It is likely that most states, unfortunately, would prefer joint tenancy,[248] for the reason that entireties is reduced to what seems to be a third level of preference, apparently upon the assumption that the estate was abolished by the married women's and community property laws.

Language describing the parties as "joint tenants." It is very general practice to identify dual owners of real and personal property

[244] Usually language negating tenancy in common is accompanied with affirmative words expressing survivorship or joint tenancy. See note 181.

[245] The states are Colorado, Delaware, Illinois and New Jersey. See note 189.

[246] In states where "joint tenancy" words are construed as insufficient to rebut legislation abolishing the survivorship incident of joint tenancy, words negating tenancy in common are adequate to show that "survivorship" was intended. Redemptorist Fathers v. Lawler, 205 Pa. 24, 54 A. 487 (1903).

[247] Cf. Dutcher v. Van Duine, 242 Mich. 477, 219 N.W. 651 (1928) (deed to *H* and *W* "jointly and not as tenants in common").

[248] This conclusion is based upon the cases holding that "survivorship" language will create joint tenancy between husband and wife in most state which do not favor entireties. Compare cases cited in note 275 with notes 277-278. In community property states, it is conceivable that "not as tenants in common" might mean "as community." Cf. Henderson v. Henderson, 59 Ariz. 53, 121 P. (2d) 437 (1942) (deed to *H* and *W* as joint tenants negated community property).

as "joint tenants" or in "joint tenancy," a practice no doubt stemming from careful efforts to rebut the statutory preference for tenancy in common. One who is trained to think conceptually might believe that these are words of art which signify an intent to create a technical estate in joint tenancy as distinguished from tenancy in common or by the entireties. Legislative and judicial attitudes toward joint and marital ownership, however, have produced legal consequences which vary from state to state and are, or may be, inconsistent with this assumption.

It is quite clear that language referring to joint owners as "joint tenants," standing alone, is adequate to rebut the statutory preference for tenancy in common in the majority or possibly all of the states.[249] The bulk of the statutes literally provide that an expressed intent to create "joint tenancy" is enough.[250] But legislation outlawing[251] the "survivorship" incident of "joint tenancy" may cause some courts to hold that reference to the parties as "joint tenants" is insufficient to fall within the literal command of the laws. This construction has been accepted in Pennsylvania as between parties who are not husband and wife.[252] A similar interpretation of statutes disfavoring joint tenancy is conceivable, if unreasonable, in those jurisdictions where words of "survivorship" are specified as necessary to defeat the preference against joint tenancy.[253] No cases, however, were found supporting such a limited construction.[254] It is not unreasonable to suppose that "joint tenancy" carries an inference that the common law incident of survivorship was intended. It appears that "joint tenancy" has gathered a popular meaning in accordance with this inference, a matter of particular significance in construing transfers of personal property where less skilled hands are responsible for the choice of language.

A pronounced cleavage of opinion as to the meaning of "joint tenancy" exists in the entireties states. Some proceed upon the conviction that the intent of married people accords with the technical

[249] E.g., Irvine v. Helvering, (8th Cir. 1938) 99 F. (2d) 265 (stock); Socol v. King, 36 Cal. (2d) 342, 223 P. (2d) 627 (1950) (realty); Stonewall v. Danielson, 204 Iowa 1367, 217 N.W. 456 (1928) (oral agreement to hold in "a joint tenancy"); Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N.E. 827 (1926) (realty).

[250] See notes 186, 190, 192-194.

[251] See note 200.

[252] See note 209.

[253] For these states see notes 187-188.

[254] No cases were found in these states where the construction of "joint tenancy" language, alone, was brought in issue. Cf. Holland v. Holland's Exr., 238 Ky. 841, 38 S.W. (2d) 967 (1931) (will naming devisees "jointly" created either class gift or joint tenancy so that interest of those predeceasing the testator passed to the survivors).

distinction that lawyers would make between joint tenancy and tenancy by the entireties, with the consequence that acquisitions by husband and wife as "joint tenants" will create a technical joint tenancy.[255] Peculiarly, most of these states disfavor entireties ownership in personal property,[256] thus indicating that a luke-warm attitude toward this kind of ownership may have affected the thought processes of judicial interpretation. On the other hand, many of the states are disposed to the view that "joint tenancy" language must be considered in light of the over-all policy which favors tenancy by the entireties. Therefore, either upon the basis that "joint tenancy" is a term which has to laymen a common meaning associated with marital ownership, or upon the technical ground that the language has a generic connotation which includes entireties where the parties are husband and wife, these courts hold that an estate by the entireties is thereby created.[257] Apparently, this view had been adopted in Kentucky,[258] Mississippi[259] and Virginia,[260] although entireties is not

[255] Tait v. Safe Deposit & Trust Co., (4th Cir. 1934) 70 F. (2d) 79 (proceeds from realty invested in stock as "joint tenants and to the survivor"); Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893) (deed to *H* and *W* "in joint tenancy"); Kolker v. Gorn, 193 Md. 391, 67 A. (2d) 258 (1949) (deed to *F*, *H* and *W* as "joint tenants"—reformation of deed, however, allowed to establish entireties in one-half); Taylor v. Lowencamp, 104 N.J. Eq. 302, 145 A. 329 (1929) (deed to *H* and *W* "as joint tenants and not as tenants in common"); Jooss v. Fey, 129 N.Y. 17, 29 N.E. 136 (1891); Schwab v. Schwab, 280 App. Div. 139, 112 N.Y.S. (2d) 354 (1952); State v. Parmalee, 115 Vt. 429, 63 A. (2d) 203 (1949) (stock in names of *H* and *W* "as joint tenants with right of survivorship and not as tenants in common"). Jurisdictions which do not favor entireties ownership generally construe "joint tenancy" as creating a technical estate in joint tenancy. E.g., Peters v. Alsup, (D.C. Hawaii 1951) 95 F. Supp. 684; Olander v. Omaha, 142 Neb. 340, 6 N.W. (2d) 62 (1942); Draughon v. Wright, 200 Okla. 198, 191 P. (2d) 921 (1948) (deed to *H* and *W* "as joint tenants with the right of survivorship"); Van Ausdall v. Van Ausdall, 48 R.I. 106, 135 A. 850 (1927).

[256] The states which disfavor entireties ownership in personalty are Indiana, Michigan, New Jersey, New York, North Carolina and Oregon.

[257] Heath v. Heath, (D.C. Cir. 1950) 189 F. (2d) 697 (deed); Commissioner v. Hart, (6th Cir. 1935) 76 F. (2d) 864 (Michigan contract to sell realty owned by *H* and *W* as "joint tenants"); Settle v. Settle, (D.C. Cir. 1925) 8 F. (2d) 911 (deed to *H* and *W* "and the survivor of them as joint tenants"); Childs v. Childs, 293 Mass. 67, 199 N.E. 383 (1935) (contract to sell realty which was deeded to "*H* and *W* in joint tenancy and to survivor of them"); Hoag v. Hoag, 213 Mass. 50, 99 N.E. 521 (1912) (deed to *H* and *W* "as joint tenants" and to "survivor"); Hoyt v. Winstanley, 221 Mich. 515, 191 N.W. 213 (1922) (deed to *H* and *W*, "his wife, as joint tenants"); Collum and Main v. Rice and Hough, 236 Mo. App. 1113, 162 S.W. (2d) 342 (1942) (checking account in names of *H* or *W* as "joint tenants" with right of survivorship). Compare Kleinschmidt Estate, 362 Pa. 353, 67 A. (2d) 117 (1949), where a deed was made out to "*H*, *W* and *D* as joint tenants with the right of survivorship and not as tenants in common." The court held that this created a technical joint tenancy, but indicated that if the instrument had designated the marital relation (e.g., "husband and wife") one-half would have been held by the entireties. This distinction also was made by Hoyt v. Winstanley, supra.

[258] Laun v. De Pasqualte, 254 Ky. 314, 71 S.W. (2d) 641 (1934) (deed to *H* and *W* "as joint tenants so long as they both should live with fee simple title in the survivor").

[259] Burroughs v. Gorman, 166 Va. 58, 184 S.E. 174 (1936) (deed to *H* and *W* as "joint tenants with common law right of survivorship").

otherwise there preferred. Statutes in Kentucky and Mississippi authorize tenancy by the entireties when an intent to provide for "survivorship" is expressed.[261] Since "joint tenancy" carries with it the incident of survivorship it is not difficult to reason that the statutory requirements have been met. It is plausible, too, that since the estate expressly is authorized by legislation, judges may have become reconciled to the useful purpose served by a type of ownership keyed to family needs. The rule which assigns to the words "joint tenancy" a meaning of "tenancy by the entireties" may be somewhat baffling, but it demonstrates that words take on meanings only with reference to the setting in which they are used. The fact that the question is determined in a jurisdiction where entireties is a tried and accepted institution no doubt is significant. To the lawyer who is concerned with a choice of language for creating joint tenancy as distinguished from entireties, words negating the latter ("and not as tenants by the entireties") should do the job.[262]

Language describing the parties as holding "jointly" or as "joint" owners. The word "joint" is greatly overworked as a referrent to the character of ownership acquired by persons who take title in their dual names. Everyone is familiar with the so-called "joint bank account," an expression revered in the banking business.[263] To lawyers, the term has a generic meaning that includes tenancy in common, joint tenancy and, where husband and wife are involved, tenancy by the entireties.[264] It has other technical meanings in the law as well.[265]

[260] Bird v. Stein, (D.C. Miss. 1952) 102 F. Supp. 399 (deed to *H* and *W* as "joint tenants and not as tenants in common").

[261] See notes 196, 198.

[262] Franz v. Franz, 308 Mass. 262 at 267, 32 N.E. (2d) 205 (1941) (deed to *H* and *W* as "joint tenants" reformed to read "as joint tenants but not as tenants by the entireties").

[263] See Appendix III and notes 214-215 for banking statutes applying to "joint" accounts. The forms used by six Indianapolis financial institutions were found to designate the parties as "joint" owners, but usually other words providing for "survivorship" or negating tenancy in common also were employed.

[264] "Joint ownership does not mean joint tenancy alone; partners and tenants in common are joint owners though not joint tenants." Lynch v. Murray, (5th Cir. 1943) 139 F. (2d) 649 at 651. Throughout this paper the words "joint" or "jointly" are used in the generic sense. Many decisions will be found where the judge without quoting from the language used by the parties will speak of them as holding "jointly" or as "joint" owners. E.g., Conard v. Conard, 5 Cal. App. (2d) 91, 41 P. (2d) 968 (1935) (accounts referred to in record "as 'joint accounts' "); Strauss v. Strauss, 148 Fla. 23, 3 S. (2d) 727 (1941); Fox v. Maurer, 178 Ore. 64 at 69, 164 P. (2d) 417 (1945) (". . . since the plaintiff and all counsel refer to the account as a 'joint account', we shall deem that such was its nature"); Pfaffinger v. Seeley, 134 Ore. 542, 291 P. 1015 (1930); Edwards v. Edwards, 117 W.Va. 505, 185 S.E. 904 (1936) (court referred to "jointly" owned property as such throughout the opinion, assuming apparently that it was held as joint tenants or tenants in common without resolving the doubt which it assumed).

[265] The law of contracts makes a distinction between "joint," "several" and "joint and several" promisors and promisees. CONTRACTS RESTATEMENT §111 (1932). Some owner-

But to most people who hold title in their "joint" names it is quite probable that the expression is used with the foggy notion that it will create equal rights with the accompanying incident of survivorship. This, at least, is a reasonable supposition in the case of transactions involving personal property where lawyers seldom give assistance.[266]

The law, however, has not been sufficiently pliable to adjust its views to those of the laity. Here again, judicial consequences may be predicated upon the basis of statutory and common law attitudes toward joint tenancy and tenancy by the entireties, attitudes which are often opposed to the thinking of the general public. In states where entireties is disfavored, or in cases involving transfers to persons who are not husband and wife, most courts are inclined to hold that the words do not clearly rebut the preference for tenancy in com-

ship rights in contracts may depend upon these distinctions which are not too clear. Most states have "joint" obligation statutes enacted for the purpose of avoiding procedural restrictions upon suits against joint obligors. In general see 2 WILLISTON, CONTRACTS §336, p. 978 (1936). Laws in California and South Dakota provide that "a right created in favor of several persons, is presumed to be joint, and not several." Cal. Civ. Code (1949) §1431; S.D. Code (1939) §47.0105. At common law the survivor of "joint" obligees retained the power to collect and bring suit upon the obligation, and in some states this power is still recognized. E.g., Perry & Minor v. Perry's Executor, 98 Ky. 242, 32 S.W. 755 (1895); Semper v. Coates, 93 Minn. 76, 100 N.W. 662 (1904); Hand v. Heslet, 81 Mont. 68, 261 P. 609 (1927); Ehrlich v. Mulligan, 104 N.J.L. 375, 140 A. 463 (1928); Pollock v. House & Hermann, 84 W.Va. 421, 100 S.E. 275 (1919) (surviving joint lessee proper party to sue on lease); Hill v. Breeden, 53 Wyo. 125, 79 P. (2d) 482 (1938). See cases cited at notes 84 and 85. These cases hold that the right of survivorship is recognized only for procedural reasons. It is sometimes stated that one "joint" obligee may release or discharge the obligation. E.g., Dewey v. Metropolitan Life Ins. Co., 256 Mass. 281, 152 N.E. 82 (1926); Hamrick v. Lasky, (Mo. App. 1937) 107 S.W. (2d) 201 (entireties obligation); WILLISTON, CONTRACTS §343, p. 1014 (1936). This rule has not always been followed. Liner v. Commercial Nat. Bank, 85 Ga. App. 278, 69 S.E. (2d) 119 (1952); National City Bank v. Harbin Elec. Joint-Stock Co., (9th Cir. 1928) 28 F. (2d) 468; Stickler v. Ryan, 270 App. Div. 962, 61 N.Y.S. (2d) 708 (1946) (*H* could discharge only his one-half of joint mortgage where court confused this rule with statute creating preference for tenancy in common). Compare cases cited at note 66.

[266] Occasionally judges find that the words "jointly" or "joint" mean joint tenancy when it is established that the instrument was executed by laymen. Householter v. Householter, 160 Kan. 614, 164 P. (2d) 101 (1945) (deed drafted by lay probate judge created joint tenancy). Compare Albright v. Winey, 226 Iowa 222, 284 N.W. 86 (1939) (fact that lawyer drew deed caused court to find tenancy in common); Taylor v. Taylor, 310 Mich. 541, 17 N.W. (2d) 745 (1945) (fact that part-time lawyer who also worked in defense plant drafted deed caused court to find tenancy in common). For the same reason such words have been construed to create entireties. Dutcher v. Van Duine, 242 Mich. 477, 219 N.W. 651 (1928). Other courts hold that "jointly" means to non-lawyers tenancy in common. Overheiser v. Lackey, 207 N.Y. 229, 100 N.E. 738 (1913) (will prepared by layman created tenancy in common); Matter of Haddock, 170 App. Div. 26, 55 N.Y.S. 630 (1915).

mon.[267] A few cases dissenting from this view will be found,[268] and a few others find in the term an ambiguity or equivocation calling for parol proof of the inconclusive circumstances of the transaction.[269] Often the words "jointly" or "joint owners" are accompanied by language negating tenancy in common or providing for "survivorship" in which case the additional terminology will be construed as creating joint tenancy.[270] In jurisdictions preferring tenancy by the entireties as a rule of construction, the words "joint" or "jointly" are not construed as indicating that joint tenancy was intended, but the underlying policy favoring entireties is respected.[271]

[267] Davis v. Smith, (Del. Err. & App. 1843) 4 Harr. 68 (deed to grandsons); Mustain v. Gardner, 203 Ill. 284, 67 N.E. 779 (1903) (devise to daughter and wife); Albright v. Winey, 226 Iowa 222, 284 N.W. 86 (1939) (deed to brothers and sisters); Doran v. Beale, 106 Miss. 305, 63 S. 647 (1913) (deed to husband and wife); Cohen v. Herbert, 205 Mo. 537, 104 S.W. 84 (1907) (devise to daughters); Wunderlich v. Bleyle, 96 N.J. Eq. 135, 125 A. 386 (1924) (devise to daughters); Overheiser v. Lackey, 207 N.Y. 229, 100 N.E. 738 (1913) (devise to daughters); Matter of Snell, 173 Misc. 282, 17 N.Y.S. (2d) 510 (1939) (bequest to *H* and *W* "jointly" created tenancy in common—result would have been different if will had been drafted by a lawyer); Fries v. Kracklauer, 198 Wis. 547, 224 N.W. 717 (1929) (introductory part of deed referred to daughters "jointly"). Cf. Helvering v. Miller, (2d Cir. 1935) 75 F. (2d) 474 (stock in names of *H*, *W* and children referred to parties as "joint holders"). Where the word "jointly" is accompanied by words of severalty the rule favoring tenancy in common will be applied. In re Kwatkowski's Estate, 94 Colo. 222, 29 P. (2d) 639 (1934) (devise to *H* and *W* "jointly and severally"). Cf. Taylor v. Stephens, 165 Ind. 200, 74 N.E. 980 (1905) ("equally and jointly").

[268] First Nat. Bank v. Lawrence, 212 Ala. 45, 101 S. 663 (1924) (savings deposit in names of *H* or *W* as their "joint property" either to draw); Mundhenk v. Bierie, 81 Ind. App. 85, 135 N.E. 493 (1922) (remainder devised to daughters "jointly"); Householter v. Householter, 160 Kan. 614, 164 P. (2d) 101 (1945) (different devises to different parties employed the term "jointly" five different times); Holland v. Holland's Exr., 238 Ky. 841, 38 S.W. (2d) 967 (1931) (devise to sisters "jointly"); Murray v. Kator, 221 Mich. 101, 190 N.W. 667 (1922) ("jointly" inserted by interlineation in deed to daughters); Napolitano v. Manhattan Sav. Bank, 50 N.Y.S. (2d) 861 (1944), ultimately affirmed upon this point, 295 N.Y. 727, 65 N.E. (2d) 430 (1946) (savings account in names of "*H* jointly with *W*" a joint account within purview of banking statute). See Free v. Sandifer, 131 S.C. 232, 126 S.E. 521 (1925). Joint tenancy legislation in several states literally provides that "jointly" will create joint tenancy. The states are Massachusetts, Vermont, possibly Rhode Island, and Idaho. See notes 191, 194.

[269] See cases cited at note 266. The need for certainty in property transactions speaks out against a rule allowing the meaning of an instrument to be determined on the basis of who wrote it. Cf. 43 MICH. L. REV. 1180 at 1185-1186 (1945) (emphasizing that such should be the case where third persons are involved). But cf. 37 MICH. L. REV. 1318 at 1320 (1939). This especially is true where survivorship is in issue after one of the parties is dead and at a time when other evidence is likely to be unreliable.

[270] E.g., In re Fritz' Estate, 130 Cal. App. 725, 20 P. (2d) 361 (1933) (savings account "joint property with right of survivorship"); Short v. Milby, 31 Del. Ch. 49, 64 A. (2d) 36 (1949) (deed to *B* and *S* "jointly and not as tenants in common"); In re Ward's Will, 124 Misc. 292, 208 N.Y.S. 413 (1925) (devise to *W* and *D* "jointly and to the survivor of them"). A large percentage of the cases involving personal property contain transfers in this form. Illustrative cases will be found in note 181. See Holbrook v. Hendricks' Estate, 175 Ore. 159, 152 P. (2d) 573 (1944).

[271] Simons v. Bollinger, 154 Ind. 83, 56 N.E. 23 (1900) (deed to *H* and *W* "jointly"); Splaine v. Morrissey, 282 Mass. 217, 184 N.E. 670 (1933) (bank deposit in "joint name

Language providing for "survivorship." Much of the litigation involving dual ownership concerns transactions in which specific provision is made for survivorship, thus attesting that this is probably the most important objective of those who take property in their joint names.[272] Language employed to achieve this purpose usually specifies that the parties hold "with right of survivorship," "to the survivor of them" or other words fairly implying that the one who lives the longest should take all. An excellent example appears in the case of United States savings bonds issued in co-ownership form ("*H* or *W*") under regulations providing that the "surviving" co-owner will be recognized as the sole and absolute owner.[273] Likewise, bank

of himself and his wife with the right of survivorship"); Goethe v. Gmelin, 256 Mich. 112, 239 N.W. 347 (1931) (deed to "*H* and *W* jointly"); Dutcher v. Van Duine, 242 Mich. 477, 219 N.W. 651 (1928) ("jointly and not as tenants in common"); Milligan v. Bing, 341 Mo. 648, 108 S.W. (2d) 108 (1937) (deed to *H* and *W* "jointly"); Yates v. Richmond Trust Co., (Mo. App. 1920) 220 S.W. 692 (stock in names of *H* and *W* "jointly"); Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 A. 624 (1938) (bank deposit in names of "*H* or *W* as joint owners"); Campbell v. Campbell, 167 Tenn. 77, 66 S.W. (2d) 990 (1934) (bequest to *H* and *W* "jointly"). Words of severalty will create tenancy in common. Myers v. Comer, 144 Tenn. 475, 234 S.W. 325 (1921) ("jointly and severally in equal moieties"). In Wisconsin where joint tenancy is favored between husband and wife, "joint" language should not interfere with this presumption. Aaby v. Citizens Nat. Bank, 197 Wis. 56, 221 N.W. 417 (1928) (note payable to *H* and *W* jointly); Bassler v. Rewodlinski, 130 Wis. 26, 109 N.W. 1032 (1906).

[272] Words of survivorship often accompany other language showing that a specific type of joint tenancy was intended. See cases cited at note 181.

[273] TREAS. DEPT. CIRC. 530, §§315.4(a)(2), 315.45(c) (6th rev., Feb. 13, 1945). Ordinarily a savings bond does not provide for survivorship upon the face of the instrument. It has been held that the regulations providing for survivorship may be incorporated by reference, but only when the regulations are pleaded. Gladiux v. Parney, 93 Ohio App. 117, 106 N.E. (2d) 317 (1951). While most of the cases hold that the beneficial interest in savings bonds passes to the surviving co-owner, very few have been forced to characterize the type of ownership retained by the co-owners during their joint lifetimes. Cases holding that bonds taken by husband and wife as "co-owners" are owned as tenants by the entireties: In re Smulyan, (D.C. Pa. 1951) 98 F. Supp. 618; Alcorn v. Alcorn, 364 Pa. 375, 72 A. (2d) 96 (1950). Cf. Terral v. Terral, Admx., 212 Ark. 221, 205 S.W. (2d) 198 (1947); Rader v. First Nat. Bank, (Fla. 1949) 42 S. (2d) 1. Cases holding that "co-owners" hold an equal present interest but without defining the precise nature of that interest: Guldager v. United States, (6th Cir. 1953) 204 F. (2d) 487 (creditors of *H* could reach his undetermined interest in the bonds); Simon v. Schaetzel, (10th Cir. 1951) 189 F. (2d) 597 (*H* and *W* equal owners so that creditors of *H* could reach only one-half); Chambless v. Black, 250 Ala. 604, 35 S. (2d) 348 (1948) (for purposes of inheritance laws bonds passing to surviving wife a part of her "separate" estate); Taylor v. Schlotfelt, 218 Ark. 589, 237 S.W. (2d) 890 (1951) (donor's guardian could not cash bonds except for support—two judges dissented on ground that donee had a contingent interest conditional on survivorship and survivorship after bonds matured); Chase v. Leiter, 96 Cal. App. (2d) 439, 215 P. (2d) 756 (1950) (bonds held in community under terms of joint and mutual wills); In re Damon's Guardianship, 238 Iowa 570, 28 N.W. (2d) 48 (1947) (*H*'s guardian could not cash bonds); Nott v. Nott, 325 Mass. 756, 89 N.E. (2d) 14 (1949) (court partitioned bonds to which *H* and *W* made equal contributions); In re Manfredini, 13 N.J. Super. 258, 80 A. (2d) 445 (1951) (bonds held "jointly"); Link v. Link, 3 N.J. Super. 295, 65 A. (2d) 89 (1949) (in inter vivos dispute *H* allowed to recover one-half of bonds); Waltenberger v. Pearson, 81 Ohio App. 51, 77 N.E. (2d) 491

deposits in "survivorship" form are sponsored by legislation authorizing the creation of joint bank accounts.[274] Most courts are inclined to see in these words a conscientious effort to circumscribe the statutory policy favoring tenancy in common. Consequently, words of survivorship usually are regarded as compatible with, and expressive of, an intent to create a technical joint tenancy.[275] In jurisdictions where

(1946) (co-owners held as tenants in common upon the ground that they were designated as "*A* and *B*" rather than "*A* or *B*" as prescribed by the regulations). A substantial number of cases find no inter vivos rights in the donee for lack of evidence establishing the essentials of gift. E.g., Baskett v. Crook, 86 Cal. App. (2d) 355, 195 P. (2d) 39 (1948); Mendenhall v. Mendenhall, 116 Ind. App. 545, 64 N.E. (2d) 806 (1946) (divorce proceedings); Iowa Methodist Hospital v. Long, 234 Iowa 843, 12 N.W. (2d) 171 (1943). Cf. Zorich v. Zorich, 119 Ind. App. 547, 88 N.E. (2d) 694 (1949) (postal savings certificate). State inheritance taxes sometimes are assessed on the character of inter vivos interests held by the parties. These, usually, depend upon the issue of gift. E.g., State Board of Equalization v. Cole, 122 Mont. 9, 195 P. (2d) 989 (1948); Meyers Estate, 359 Pa. 577, 60 A. (2d) 50 (1948). But cf. Connelly v. Kellogg, 136 Conn. 33, 68 A. (2d) 170 (1949). In Littlejohn v. County Judge, (N.D. 1953) 58 N.W. (2d) 278, an outright gift from the donor co-owner to the donee was upheld. But cf. In re Brown's Estate, 122 Mont. 451, 206 P. (2d) 816 (1949).

[274] See statutory language set forth in Appendix III and notes 214-215.

[275] E.g., Young v. Young, 126 Cal. App. 306, 14 P. (2d) 580 (1932) (bank deposit in names of *H* or *W* "or to the survivor of us"); Hirsch v. Bartels, (Fla. 1950) 49 S. (2d) 531 (partnership agreement that upon death the business should "belong to the surviving one"); Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334 (1927) ("with full rights of survivorship, and not as tenants in common"); Richardson v. Richardson, 121 Ind. App. 523, 98 N.E. (2d) 190 (1951) (deed to *A, B, C* and *D* "in equal proportions and in case of the death of any one . . . to the surviving grantees"); Hruby v. Wayman, 230 Iowa 653, 298 N.W. 639 (1941) (deed to *H* and *W* "or to the survivor of either"); Murphy v. Michigan Trust Co., 221 Mich. 243, 190 N.W. 698 (1922) (bank deposit in names of *H* and *W* payable to "either or survivor"—decided under banking statute); Czajkowski v. Lount, 333 Mich. 156, 52 N.W. (2d) 642 (1952) (bank account payable to *M* or *S* "or the survivor"); Bowditch v. Atty. Gen., 241 Mass. 168, 134 N. E. 796 (1922) (testamentary trust to named persons "and the survivors and last survivor of them"); Wolfe v. Wolfe, 207 Miss. 480, 42 S. (2d) 438 (1949) (deed to *H* and *W* "and the survivor of them"); Able-Old Hickory Bldg & Loan Assn. v. Polansky, 138 N.J. Eq. 232, 47 A. (2d) 730 (1946) (savings and loan shares in names of "*H* and *W*, his wife or survivor"); Franklin Nat. Bank v. Freile, 116 N.J. Eq. 278, 173 A. 93 (1934) (mortgages to *H* and *W* "or the survivor of either"); Matter of Cotter, 159 Misc. 324, 287 N.Y.S. 670 (1936) (mortgage assigned to *A* and *B* "or the survivor of them"); Dewey v. Brown, 133 Misc. 69, 231 N.Y.S. 165 (1928) (deed to *A* and *B* "survivor to take"); Kilgore v. Parrott, 197 Okla. 77, 168 P. (2d) 886 (1946) (deed to *H* and *W* "and in the event of the death of either, then the survivor"); Washington Trust Co. v. Thomas, (R.I. 1919) 107 A. 203 (stock in names of "*A* and *B*, in a joint account with *C*"—held by parties as "joint ownership"); Armstrong v. Hellwig, 70 S.D. 406, 18 N.W. (2d) 284 (1945) (deed to *H* and *W* "and the survivor of them"); McLeroy v. McLeroy, 163 Tenn. 124, 40 S.W. (2d) 1027 (1931) (deed to *A* and *B* "and to the survivor"); Holohan v. Melville, 41 Wash. (2d) 380, 249 P. (2d) 777 (1952); Weber v. Nedin, 210 Wis. 39, 242 N.W. 487 (1932), revd. 210 Wis. 39, 246 N.W. 307, concurring opinion at 686 (1933) (deed to "survivor of either"). *Contra,* Harmon v. Christopher, 34 N.J. Eq. 459 (1881) (devise to three parties "to the survivor of them, and to the heirs and assigns of such survivor" created a contingent remainder in survivor—case has not since been followed in New Jersey). See also cases cited at note 236. Words of survivorship sometimes are inferred where a life estate is created in or reserved by two or more in "their" joint names, thus establishing a joint tenancy for life. E.g., Green v. Brown, 37 Cal. (2d) 391, 232 P. (2d) 487 (1951);

entireties ownership is preferred between husband and wife the inclusion of a provision for survivorship does no more than reinforce what the law would otherwise imply.[276] Several decisions in Kentucky[277] and Virginia[278] have construed these words as establishing tenancy by the entireties (as distinguished from joint tenancy) although the estate otherwise is disfavored. The effect is to give entireties ownership a constructional priority over joint tenancy in states where marital ownership has gained a position of popular and legal eminence.

Use of survivorship language or variations of it, however, has sometimes led lawyers and judges to find hidden meanings in the omission of words clearly defining the inter vivos rights of the parties. The prejudice against joint tenancy and tenancy by the entireties

Lowery v. Madden, 308 Ky. 342, 214 S.W. (2d) 592 (1948); Bank of Greenbrier v. Effingham, 51 W.Va. 267, 41 S.E. 143 (1902). Cf. Cookman v. Silliman, 22 Del. Ch. 303, 2 A. (2d) 166 (1938) (possibility of reverter); Burton v. Cahill, 192 N.C. 505, 135 S.E. 332 (1926) (statute abolishing joint tenancy applied only to estates of inheritance). *Contra,* Free v. Sandifer, 131 S.C. 232, 126 S.E. 521 (1925).

Words of survivorship as between two or more devisees or distributees named in a will sometimes are construed as anti-lapse provisions, and not as creating joint tenancy. E.g., Cross v. Cross, 324 Mass. 186, 85 N.E. (2d) 325 (1949); Moore v. Lyons, 25 Wend. (N.Y.) 119 (1840) (remainder to named persons to "the survivors"); Matter of Walker's Will, 277 App. Div. 811, 97 N.Y.S. (2d) 82 (1950); Matter of Duffy, 143 Misc. 421, 256 N.Y.S. 743 (1932). Cf. In re Estate of Close, 330 Ill. App. 231, 70 N.E. (2d) 730 (1947); Union Mutual Assn. v. Montgomery, 70 Mich. 587, 38 N.W. 588 (1888) (life insurance policy). But cf. Rady v. Staiars, 160 Va. 373, 168 S.E. 452 (1933).

[276] O'Boyle v. Home Life Ins. Co., (D.C. Pa. 1937) 20 F. Supp. 33 (life insurance policy payable to "survivor"); Hagerty v. Hagerty, (Fla. 1951) 52 S. (2d) 432 (checking accounts in names of *H* or *W* with right of "survivorship"); Annapolis Banking & Trust Co. v. Neilson, 164 Md. 8, 164 A. 157 (1933) (deed to *H* and *W* "and survivor"); Splaine v. Morrissey, 282 Mass. 217, 184 N.E. 670 (1933) (bank deposit payable to the "joint names of himself and his wife with right of survivorship"); Phelps v. Simons, 159 Mass. 415, 34 N.E. 657 (1893) (bequest of stock to *H* and *W* "and to the survivor of them"); Joerger v. Joerger, 193 Mo. 133, 91 S.W. 918 (1906) (deed to *H* and *W* "and to the survivor of them"); Matter of Kugel, 192 Misc. 61, 78 N.Y.S. (2d) 851 (1948) (Florida bank account); Alcorn v. Alcorn, 364 Pa. 375, 72 A. (2d) 96 (1950) (savings bonds); Kensington National Bank v. Sampson, 149 Pa. Super. 43, 26 A. (2d) 115 (1942) (insurance policy on lives of *H* or *W* or "survivor"); Mullens v. Mullens, 161 Tenn. 165, 29 S.W. (2d) 261 (1930) (deed to *H* and *W* "jointly" and to the one that "survives"). Words of survivorship will create joint tenancy in Wisconsin where this estate is favored by statute. Estate of Hounsell, 252 Wis. 138, 31 N.W. (2d) 203 (1948) (various types of property, some of which provided for survivorship); Central Wis. Trust Co. v. Schumacher, 230 Wis. 591, 284 N.W. 562 (1939) (stock in names of *H* and *W* "or survivor").

[277] Francis v. Vastine, 229 Ky. 431, 17 S.W. (2d) 419 (1929) (deed to *H* and *W* "for their joint lives, with remainder in fee to the survivor"). Cf. Harris v. Taliaferro, 148 Ky. 150, 146 S.W. 22 (1912) (deed to *H* and *W* "or the survivor"—court did not characterize estate as joint tenancy or entireties). But cf. Haynes v. Barker, (Ky. 1951) 239 S.W. (2d) 996 (deed to *H* and *W* "jointly with right of survivorship" characterized as creating joint tenancy). A transfer to *H* and *W* for "their lives" is held by the parties as a life estate in entireties. McCallister v. Folden's Assignee, 110 Ky. 732, 62 S.W. 538 (1901). But cf. Osborne v. Hughes, 219 Ky. 116, 292 S.W. 748 (1927).

[278] Allen v. Parkey, 154 Va. 739, 149 S.E. 615 (1929) (reciprocal provisions for contingency of survivorship in deed).

has been more or less directly responsible for a search into other concepts of legal ownership. Thus a few decisions will be found where transfers to two or more persons accompanied by survivorship language has been interpreted as creating a life estate in both parties with indestructible cross-remainders over to the survivor.[279] Michigan is probably the leading state in which this amazing construction has consistently prevailed.[280] As recently as 1952, a transfer to "*A* and *B* or the survivor of them" was held to create a tenancy in com-

[279] Mittel v. Karl, 133 Ill. 65, 24 N.E. 553 (1890) (deed to *H* and *W* and "the survivor of them, in his or her own right"); Papke v. Pearson, 203 Minn. 130, 280 N.W. 183 (1938) (deed reformed to conform to intent to create contingent future estate); Arthur v. Arthur, 115 Neb. 781, 215 N.W. 117 (1927) (deed to *H* and *W* "and the survivor of them" created a joint tenancy for life which could be partitioned, with indestructible remainder to the survivor); Jones v. Waldroup, 217 N.C. 178 at 187, 7 S.E. (2d) 366 (1940) (stock in the names of "*H* or *W*, either or the survivor" created "common ownership . . . until one of them should die, with right of survivorship"); Sage v. Flueck, 132 Ohio St. 377, 7 N.E. (2d) 802 (1937) (bank deposit in the names of *T* or *B* "payable to either or the survivor" created a contract right under which both retained full power of control with remainder to the survivor); Erickson v. Erickson, 167 Ore. 1, 115 P. (2d) 172 (1941) (deed to two sons not as tenants in common but "the fee shall vest in the survivor" created a tenancy in common for life with contingent cross-remainders to the survivor). But cf. Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334 (1927). Where the question of survivorship, only, is at issue, courts often expressly or implicitly refrain from defining the character of the estate. E.g., Crabtree v. Garcia, (Fla. 1949) 43 S. (2d) 466 (bank account payable to "either or the survivor" fixed the "right of survivorship"); Withers v. Barnes, 95 Kan. 798, 149 P. 691 (1915) (deed to *A* and *B*, "or the survivor"); Forney v. Farmers Mut. Fire Ins. Co., 181 Minn. 8, 231 N.W. 401 (1930) (deed to *H* or *W* "or the survivor of either"); Block v. Schmidt, 296 Mich. 610, 296 N.W. 698 (1941) (ten items with various verbal provisions for survivorship); Matter of Conklin, 259 App. Div. 432, 20 N.Y.S. (2d) 59 (1940) (mortgage to *H*, *W* and *S* or "survivor" created "ownership with survivorship"); Manning v. United States Nat. Bank of Portland, 174 Ore. 118, 148 P. (2d) 255 (1944) (stock issued to *H* and *W* and "upon the death of either, the survivor of either, is owner" created "right of survivorship"); Wisner v. Wisner, 82 W.Va. 9, 95 S.E. 802 (1918) (bank account payable to *H* or *W* "or the survivor" described as creating "survivorship . . . by contract and not as one pertaining to joint tenancy as at common law"). Cf. Greiger v. Pye, 210 Minn. 71, 297 N.W. 173 (1941). Where a transfer is made directly from one party to both some courts hold that the creation of joint tenancy or entireties is forbidden by the "four unities" rule. To give effect to survivorship words a number of courts have construed the transfer as creating a joint tenancy or tenancy in common for the life of both with a contingent remainder to the survivor. E.g., Anson v. Murphy, 149 Neb. 716, 32 N.W. (2d) 271 (1948); Dutton v. Buckley, 116 Ore. 661, 242 P. 626 (1926).

[280] E.g., Ames v. Cheyne, 290 Mich. 215, 287 N.W. 439 (1939) (deed to parties as "joint tenants and not as tenants in common and to the survivor thereof"—held right of survivorship could not be defeated by one party); Jones v. Snyder, 218 Mich. 446 at 447, 186 N.W. 505 (1922) (deed to *A*, *B*, *H* and *W* "as joint tenants, and their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivors or survivor of them" created "joint tenancy for life in the grantees with a contingent remainder in fee simple to the survivor"). The Michigan cases upon the matter of language are a mysterious lot. Compare Ludwig v. Bruner, 203 Mich. 556, 169 N.W. 890 (1918) (note and mortgage to *H* and *W* as "joint tenants" insufficient to create a right of survivorship); Lober v. Dorgan, 215 Mich. 62, 183 N.W. 942 (1921) (mortgage to *H* and *W* "as joint tenants, with sole right to the survivor" passed to survivor); Scholten v. Scholten, 238 Mich. 679, 214 N.W. 320 (1927) (note to *H* and *W* "by entireties" passed to survivor); Forler v. Williams, 242 Mich. 639, 219 N.W. 641 (1928) (note to *H* and *W* "or the survivor" passed to survivor).

mon for life with the remainder to the survivor[281] which, unlike joint tenancy, cannot be severed by one of the parties.[282] If language used purports to separate the life interests of the parties from that passing upon the death of one, the cases are more likely to find this type of future interest. Thus if the transfer designates that the parties hold an interest for "life" or that a "remainder" passes to the survivor an intent to separate a life estate from a remainder in fee occasionally will be inferred.[283] It is, perhaps, not unfair to suggest that a tenancy in common with contingent cross-remainders is a kind of thing that would occur only to a "long shot" future interest lawyer peculiarly skilled in an art which reached its peak in the days of British feudalism.[284] Technically, some policy justification for giving words of

[281] Rowerdink v. Carothers, 334 Mich. 454, 54 N.W. (2d) 715 (1952).

[282] To the student of feudal legal history, it is possible to reason that a transfer construed as creating indestructible remainders to the surviving co-owner creates one of several possible technical estates. The parties may hold (1) a tenancy in common for their lives, with a contingent remainder to the survivor, (2) a joint tenancy for the life of the longest liver, with a contingent remainder to the survivor, or (3) a fee simple in common with a shifting use or limitation to the survivor. In general see Davis v. Davis, (S.C. 1953) 75 S.E. (2d) 46; 38 MICH. L. REV. 875 (1940); 18 MINN. L. REV. 79 (1933). Most of the cases holding that a joint tenancy is not created by survivorship language or variations of it proceed upon theory (1), above. See notes 279-281, 283.

[283] E.g., In re Brown, (D.C. Ky. 1932) 60 F. (2d) 269 (deed to *H* and *W* "during their joint lives as tenants in common, with remainder in fee simple to survivor of them"); Blodgett v. Union & New Haven Trust Co., 111 Conn. 165 at 166, 149 A. 790 (1930) (direction that securities "to stand in my husband's name as well as my own, so that, in the event of my dying suddenly, it may pass to him immediately without any legal formalities"); Douds v. Fresen, 392 Ill. 477 at 478, 64 N.E. (2d) 729 (1946) (devise to *A* and *B* "as tenants in common and by entireties with the right of survivorship it being my intention that said devisees and legatees shall hold said property as tenants in common with the absolute fee to said property vesting in the survivor"); Cover v. James, 217 Ill. 309, 75 N.E. 490 (1905) (deed to *H* and *W* with separate sentence providing that the other to have the whole of said property without "litigation" in case of death of either); Rowland v. Rowland, 93 N.C. 214 (1885) (deed to *A* and *B* and their heirs as tenants in common, "and upon the death of either one of them to the survivors and his heirs"); In re Estate of Hutchison, 120 Ohio St. 542, 166 N.E. 687 (1929) (stock in names of *H* and *W* "as tenants in common of undivided equal interests for their respective lives, remainder in the whole to their survivor"); Lewis v. Baldwin, 11 Ohio Rep. 352 (1842) (deed to *H* and *W* "jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns"); Thompson v. Turner, 186 Tenn. 241, 209 S.W. (2d) 25 (1948) (deed provided for separate one-half interests to *H* and *W* over which each was given control and upon the death of one "survivor to become the sole owner"). Michigan holds that words of "survivorship" tacked on to "joint tenancy" will create what appears to be a joint ownership for life with indestructible remainder to the survivor. Ames v. Cheyne, 290 Mich. 215, 287 N.W. 439 (1939). This construction has not been followed elsewhere. E.g., In re Davis' Estate, 88 Cal. App. (2d) 704, 199 P. (2d) 755 (1948); Sanderson v. Everson, 93 Neb. 606, 141 N.W. 1025 (1913).

[284] ". . . a joint life estate with contingent remainder to the survivor, is of such an unusual nature that before a court would be justified in holding such an estate had been created, clear and unambiguous language to that effect would have to be used." Hart v. Nagasawa, 218 Cal. 685 at 689, 24 P. (2d) 815 (1933); Mulvanity v. Nute, 95 N.H. 526, 68 A. (2d) 536 (1949) (will devised property to son and sister as "joint tenants," and in separate sentence a provision was made that they should have "the right . . . to occupy the premises during their lifetime, and, upon the decease of one, the title to vest in the survivor").

survivorship such a meaning may be found in the general run of the joint tenancy legislation. In states where joint tenancy or the incident of survivorship attached to that estate has been "abolished" it took some ingenuity to discover means for circumventing the severe sanction of the legislation.[285] Many of the statutes disfavoring joint tenancy literally make exception where an intent to create "joint tenancy" is expressed,[286] causing a possibility of doubt where words expressing but one incident of joint tenancy—survivorship—are used.[287] But on the whole it would seem that these technical arguments would not get enthusiasm from laymen who are generally responsible for the choice of language in the case of transactions involving personal property. Joint tenancy has an appealing quality in that either party retains a separate power to end the relation.[288] Entireties has the advantage that it is confined to the duration of the marital relation.[289] It is only a reasonable assumption, therefore, that only one who believes that he retains divine powers to visualize future events or a future interest lawyer goaded by the pride of his own specialized learning would discover in words of survivorship or language of similar import an intent to create a joint life estate with contingent cross-remainders.[290]

One further complication arises in connection with language providing for survivorship. The creation of a joint tenancy or entireties relation by way of gift from one of the owners to himself and the other is subject to qualification by some of the technical requirements of the law of gifts. In many states proof that the donor did not intend to pass a present subsisting interest in the property to the donee

285 With but few exceptions, states straining to find that survivorship creates an indestructible remainder are those in which joint tenancy or survivorship is abolished by statute or as a result of common law decision without the aid of legislation. See cases cited at notes 161-165, 200-208; 38 MICH. L. REV. 875 at 882-883 (1940). The same result is reached in some states to circumvent the requirement of the "four unities" rule where a transfer is made directly from one of the parties to himself and another as joint tenants or tenants by the entireties. Illustrative cases are set forth in note 279.

286 States with such statutes are collected in note 186.

287 Cf. Papke v. Pearson, 203 Minn. 130, 280 N.W. 183 (1938).

288 E.g., Hammond v. McArthur, 30 Cal. (2d) 512, 183 P. (2d) 1 (1947).

289 In the United States, Arkansas, Michigan, and Pennsylvania were the only states in which the entireties was not converted to tenancy in common by absolute divorce. Statutes in these states now provide that the relation is terminated by divorce. Ark. Stat. Ann. (1947) §34-1215 (court given power to dissolve entireties into tenancy in common); Mich. Stat. Ann. (1937) §25.132; Pa. Stat. Ann. (Purdon, Supp. 1953) tit. 68, §501.

290 Cf. 38 Mich. L. Rev. 875 at 884 (1940). Compare Davis v. Davis, (S.C. 1953) 75 S.E. (2d) 46, where the court registered disdain for the feudal estate of entireties, but held that a type of feudal tenure was created which the court was unable specifically to define.

will defeat the gift.[291] Occasionally, courts are struck with the idea that words of survivorship manifest a testamentary intent, i.e., that the donor intended the donee to acquire a vested interest only in the event the latter should survive.[292] Unfounded as this inference may be when property is taken or held in the names of both parties, it has often been of critical influence where the donor is named as transferee with separate provision that the property pass to the other in the event the beneficiary survives. Probably the best example of this spurious designation is the "P. O. D." form established by the Treasury for the ownership of United States savings bonds. Bonds are issued to the purchaser in his name, alone, with directions to pay on death ("P. O. D.") to a named beneficiary.[293] Many cases regard

[291] Reid v. Cromwell, 134 Me. 186, 183 A. 758 (1936) (stock registered in the names of donor and donee "and the survivor" recovered by donor's guardian); Nashua Trust Co. v. Mosgovian, 97 N.H. 17, 79 A. (2d) 636 (1951).

[292] Cerny v. Cerny, 152 Fla. 333, 11 S. (2d) 777 (1943). Cf. Dover Co-operative Bank v. Estate of Tobin, 86 N.H. 209, 166 A. 247 (1933) (donees name added to bank stock "for the purpose of giving [donee] the entire account if the [donee] survived her"); Pope v. Burgess, 230 N.C. 323, 53 S.E. (2d) 159 (1949) (words of survivorship in introductory sentence of deed showed testamentary intent); Holbrook v. Hendricks' Estate, 175 Ore. 159, 152 P. (2d) 573 (1944) (absence of the words "joint owners" or "joint tenants" negated probability of gift). Cases of this sort indicate that the omission of words of grant (which are almost never used in the case of transfers of personal property) may be the cause of the trouble. Cf. 38 Mich. L. Rev. 875 at 883 (1940).

[293] TREAS. DEPT. CIRC. 530, §315.4(a)(3) (6th rev., Feb. 13, 1945). "Upon proof of such . . . survivorship, the beneficiary will be recognized as the sole and absolute owner of the bond. . . ." Id., §315.46(c). The state courts in which the problem has arisen, with a few exceptions, have held that the bonds pass to the survivor by force of federal contract and federal law. E.g., In re Estate of DiSanto, 142 Ohio St. 223, 51 N.E. (2d) 639 (1943); Franklin v. Pope, 81 Ga. App. 729, 59 S.E. (2d) 726 (1950); In re Marsh's Estate, 125 Mont. 239, 234 P. (2d) 459 (1951). *Contra:* Sinift v. Sinift, 229 Iowa 56, 293 N.W. 841 (1940); Winsberg v. Winsberg, 220 La. 398, 56 S. (2d) 730 (1952) (gift revoked by after born son); Union Nat. Bank v. Jessell, 358 Mo. 467, 215 S.W. (2d) 474 (1948) (*W* recovered from surviving son, where bonds purchased by *H* "P.O.D." son, upon proof of joint and mutual will between *H* and *W*); Decker v. Fowler, 199 Wash. 549, 92 P. (2d) 254 (1939). As a matter of fact, many of the litigated cases dealing with savings bonds in the "P.O.D." form have been concerned with situations where one spouse has used this device to defeat the other's right of inheritance or community. E.g., Davies v. Beach, 74 Cal. App. (2d) 304, 168 P. (2d) 452 (1946); Succession of Geagan, 212 La. 574, 33 S. (2d) 118 (1947); Union Nat. Bank v. Jessell, 358 Mo. 467, 215 S.W. (2d) 474 (1948); Ibey v. Ibey, 93 N.H. 434, 43 A. (2d) 157 (1945), 94 N.H. 425, 55 A. (2d) 872 (1947); Reynolds v. Danko, 134 N.J. Eq. 560, 36 A. (2d) 420 (1944); Hart v. Hart, 194 Misc. 162, 81 N.Y.S. (2d) 764 (1948); Matter of Jacoby, 188 Misc. 785, 61 N.Y.S. (2d) 235 (1946); In re Kalina's Will, 184 Misc. 367, 53 N.Y.S. (2d) 775 (1945); Deyo v. Adams, 178 Misc. 859, 36 N.Y.S. (2d) 734 (1942); Matter of Karlinski, 180 Misc. 44, 38 N.Y.S. (2d) 297 (1942), revd. on rehearing, 180 Misc. 44 at 49, 43 N.Y.S. (2d) 40 (1943); Makinen v. George, 19 Wash. (2d) 340, 142 P. (2d) 910 (1943). Few decisions will be found concerned with the rights of the parties before death. Since the regulations give the owner the exclusive power to cash the bonds it is probably safe to predict that the regulations did not intend to give the beneficiary any vested rights during the lifetime of the principal owner. Cf. In re Bartlett, (D.C. N.Y. 1947) 71 F. Supp. 514 (bonds passed to principal owner's trustee in bankruptcy); In re Kuhr's Estate, 123 Mont. 593, 220 P. (2d) 83 (1950) (bonds in names of *H* "P.O.D." *W* not subject to inheritance tax on *W*'s

this type of language as testamentary in character since no present or vested interest in the property ostensibly is transferred as required by the law of gifts.[294] Others, by one means or another, treat the transfer

estate where *H* retained possession). But cf. In re Wyche, (D.C. La. 1943) 51 F. Supp. 825 at 828 (". . . both lawyers and the court itself are unable to cite authority for seizing and selling bonds of this character . . ."); Tabola v. Wholey, 75 Cal. App. (2d) 351, 170 P. (2d) 952 (1946) (beneficiary allowed to show that bond wrongfully purchased with partnership assets). However, it is possible that the principal owner may create a present interest in the beneficiary by delivery of the bond to him. Cf. Atchison v. Weakley, 350 Mo. 1092, 169 S.W. (2d) 914 (1943); Reynolds v. Danko, 134 N.J. Eq. 560, 36 A. (2d) 420 (1944). It is quite possible, too, that bonds registered in the name of the donee "P.O.D." donor create a present interest in the donee, and an indestructible contingent right of survivorship in the donor and donee. Inheritance Tax Div. v. Chamberlain Estate, 21 Wash. (2d) 790, 153 P. (2d) 305 (1944) (bonds registered in the name of donee "P.O.D." donor—for tax purposes the court held donor retained a reversionary interest which was not subject to inheritance tax upon his death only because the life expectancy of the donee was greater). Cf. Parkinson v. Wood, 320 Mich. 143, 30 N.W. (2d) 813 (1948) (bonds purchased by father in name of daughter passed to daughter by way of present gift). But cf. Watwood v. Steur, 89 Cal. App. (2d) 620, 201 P. (2d) 460 (1949) (creditor of principal owner allowed to reach bond to exclusion of beneficiary upon evidence which failed to show that latter furnished consideration). Parenthetically, it should be pointed out that the Treasury Regulations prohibit "transfers" of bonds. TREAS. DEPT. CIRC. 530, §315.11 (6th rev., Feb. 13, 1945). Cases in the state courts are about evenly divided as to whether or not this forbids transfers by way of gift. E.g., compare Marshall v. Felker, 156 Fla. 476, 23 S. (2d) 555 (1945) with Brown v. Vinson, 188 Tenn. 120, 216 S.W. (2d) 748 (1949). See also 38 MINN. L. REV. 401 (1954). Consequently, it is possible that an interest other than a testamentary right cannot be retained or established in the beneficiary. Cf. Reynolds v. Reynolds, 325 Mass. 257, 90 N.E. (2d) 338 (1950) (court refused to uphold trust agreement by beneficiary son); Matter of Hager, 181 Misc. 431, 45 N.Y.S. (2d) 468 (1943) (gift of bond to third persons ineffective to cut off rights of surviving beneficiary). Query, whether indisputable rights are created where both parties contribute to the purchase of savings bonds taken in the "P.O.D." form?

[294] E.g., Smith v. Eshelman, 235 Ala. 588, 180 S. 313 (1938) (donor delivered note to donee over indorsement "in event of death pay to [donee]"—passed to donee upon the theory of a gift causa mortis); Johnson v. Hilliard, 113 Colo. 548, 160 P. (2d) 386 (1945) (written assignment of bonds to donee "in case I pass away"); Webster v. St. Petersburg Fed. Sav. & Loan Assn., 155 Fla. 412, 20 S. (2d) 400 (1945) (various accounts in the form "*T* or in case of death *B*"); Guest v. Stone, 206 Ga. 239, 56 S.E. (2d) 247 (1949) (bank deposit to donee "beneficiary in case of death"); Zimmerman v. Fawkes, 70 Idaho 289, 219 P. (2d) 951 (1950) (donor mailed stock to *B* and in letter stated, "They will be mine as long as I live and after I am gone they are yours"); Crowell v. Himes, 117 Ind. App. 56, 69 N.E. (2d) 135 (1946) (lease providing that personal property was to pass to lessee on death of lessor held testamentary—provision construed severable from lease transaction); Pomerantz v. Pomerantz, 179 Md. 436, 19 A. (2d) 713 (1941) (savings deposit in name of donee "subject to the order of donor"); Mercantile Bank v. Haley, (Mo. App. 1944) 179 S.W. (2d) 916 ("No checks signed by" donee joint owner "until after death of" donor); Young v. McCoy, 152 Neb. 138, 40 N.W. (2d) 540 (1950) (bank deposit in name of donor "P.O.D. sister"); Stevenson v. Earl, 65 N.J. Eq. 721, 55 A. 1091 (1903) (corporate savings fund payable in event of death to wife); McCarthy v. Pieret, 281 N.Y. 407, 24 N.E. (2d) 102 (1939) (mortgage naming mortgagee and "in event of the death" of the mortgagee to named beneficiaries); Wescott v. First and Citizens Nat. Bank of Elizabeth City, 227 N.C. 39, 40 S.E. (2d) 461 (1946) (donee shall be "eligible to receive the money only after I have been deceased for five years"); Tensfield v. Magnolia Petroleum Co., 134 Okla. 38, 272 P. 404 (1924) (stock purchase plan in which donor reserved right to change beneficiary); Smith v. Benj. Franklin Sav. & Loan Assn., 156 Ore. 541, 68 P. (2d) 1045 (1937) ("in case of emergency I hereby authorize you to honor the signature of my sister"); Jonte v. English, 171 Okla. 291, 40 P. (2d)

as creating or reserving a life estate in the donor with a vested remainder, or a remainder contingent upon survivorship in the donee.[295] Many of the problems arising in connection with the dual ownership of personal property originate with the amateur draftsman who frequently uses language of this kind. The law has done an ugly job of handling the situation, a fact which may be attributed to the

646 (1935) (donee given right to check with donor); Onofrey v. Wolliver, 351 Pa. 18, 40 A. (2d) 35 (1944) (joint tenancy bank deposit agreement carried handwritten notation, "Pay to Daughters only after death of mother"); Helper State Bank v. Crus, 95 Utah 320, 81 P. (2d) 359 (1938) ("in case of death pay to" donee—subsequent outright gift to donee proven); Pope v. Burlington Savings Bank, 56 Vt. 284 (1883) (bank deposit payable to donee but donor reserved sole right to withdraw during his lifetime); Tucker v. Simrow, 248 Wis. 143, 21 N.W. (2d) 252 (1946) (statement signed by depositor directing bank to pay certain portions to named beneficiaries "in case of death"). Cases of this kind proceed upon the theory that the donor by implication retained an unrestricted power of revocation. Where the power of revocation expressly is limited or restricted there is considerable uniformity in upholding the transaction. Cf. Estate of Howe, 31 Cal. (2d) 395, 189 P. (2d) 5 (1948) (very exhaustive annotation at 1 A.L.R. (2d) 1178). An irrevocable remainder interest usually is held to be effectuated where the property or evidence of indebtedness is delivered to the donee or control is surrendered to a third person. E.g., compare Chapple's Estate, 332 Pa. 168, 2 A. (2d) 719 (1938) with Innes v. Potter, 130 Minn. 320, 153 N.W. 604 (1915).

[295] Robinson's Women's Apparel v. Union Bank & Tr. Co., (D.C. N.Y. 1946) 67 F. Supp. 395 (seller of goods contracted for payment to named beneficiary in the event seller died—passed to survivor, but inter vivos rights of donor and donee not clearly defined); Candee v. Connecticut Sav. Bank, 81 Conn. 372, 71 A. 551 (1908) (bank ordered to pay donee subject to donor's "use" during latter's lifetime—constituted reservation of income in donor's life); Murphy v. Haynes, 197 Ky. 444, 247 S.W. 362 (1923) (bank deposit by *W* with notation "to go to *H* at her death" created irrevocable trust with remainder to *H*); Pure Oil Co. v. Bayler, 388 Ill. 331, 58 N.E. (2d) 26 (1944) (*H* and *W* conveyed *H*'s realty to "the survivor in fee simple"—created contingent remainder in *W*); Grant Trust and Savings Co. v. Tucker, 49 Ind. App. 345, 96 N.E. 487 (1911) (bonds delivered to cashier with written instructions "in case of my death deliver to *B*" created a trust with life estate in donor, remainder to *B*); In re Estate of Conner, 240 Iowa 479, 36 N.W. (2d) 833 (1949) (bank deposit in form "*T* or *B*, survivor"—parol established that *T* retained a life interest in income); Baker v. Baker, 123 Md. 32, 90 A. 776 (1914) (deposit in names of five children over names of donor and wife "payable at our death to above children" created a trust under which donor and wife retained a life estate); Batal v. Buss, 293 Mass. 329 at 331, 199 N.E. 750 (1936) (deposit by *A* in names of "*A* or *B*, either or survivor"—court stated that "it stands on the same footing as a reservation of income for life"); Wahl v. Wahl, 357 Mo. 89, 206 S.W. (2d) 334 (1947) (stock re-issued to donor "during his life and upon his death" to donee created vested remainder in donee); Lewis' Estate, 139 Pa. Super. 83, 11 A. (2d) 667 (1940) (donor by letter directed bank deposit "to be made a joint account with my son, the money to be drawn only in case of my death—created vested remainder in son). For a case where the rights of donees were made subject to a condition other than survivorship, see Ford v. Ford, 270 Mich. 487, 259 N.W. 138 (1935) (account provided that in case of the death of donor it should be paid to nephew and niece or "survivor" and "in either case the sum shall not be paid until they are each 21 years of age"). In Ogden v. Washington Nat. Bank, 82 Ind. App. 187, 145 N.E. 514 (1924) a notation was added to the donor's bank account, "in case of my death [donee] to ck." The account passed to the surviving donee upon the theory of a gift causa mortis in view of evidence that the account was changed by the donor shortly before an operation which proved fatal. Cf. Helper State Bank v. Crus, 95 Utah 320, 81 P. (2d) 359 (1938) ("in case of death, pay to [donee]"—parol established subsequent outright gift to donee).

uncertain condition of common law source materials concerned with the establishment of future interests in personal property.[296] It is quite probable that a person who causes, for example, a bank account, bonds or stock to be payable to a named beneficiary in case of his death actually intended to reserve a complete power of revocation—a scheme falling within the present statute of wills. That he had constructed a type of future interest impairing the free use and transfer of what is generally regarded as a liquid asset would be a severe shock to most people of moderate means.[297] If this is true, and if the practice has become widespread, there may be a real need for the law to work out a method by which a person can make a testamentary provision for his spouse or his near relatives through the normal channels by which personal property transfers are effectuated.[298] This, no doubt, was the real objective of the Treasury regulation which provides for payment to the surviving beneficiary named in savings bonds.[299] A similar purpose has been achieved by the ordinary life insurance contract.[300] The dubious relation arising from the so-called "savings bank" or "Totten" trust has made some progress in this direction.[301] These institutions, uncertain as they are under

[296] This may have been due to the fact that permanent investment in personal propetry was uncommon except through the formal trust. Cf. 7 HOLDSWORTH, HISTORY OF ENGLISH LAW, 2d ed., pp. 469-470, 477, 478 (1937). Thus in some states it is held that a deed granting a remainder to others in personal property is void where the grantor reserves a life estate. Nixon v. Nixon, 215 N.C. 377, 1 S.E. (2d) 828 (1939).

[297] People of means ordinarily would employ the formal trust. There is indication, too, that these people may often prefer a power of revocation. E.g., King, "A Reappraisal of the Revocable Trust," 19 ROCKY MT. L. REV. 1 (1946) (concluding that the problems involved in creating a revocable trust are ones of "great discretion").

[298] See Mechem, "Why Not a Modern Wills Act?" 33 IOWA L. REV. 501 at 518-520 (1948).

[299] See note 293.

[300] Although the right of the beneficiary to prevail under the contract of life insurance is now well settled by decision and statute, a serious doubt remains in legal minds as to the validity of provisions in a paid up or investment policy where the insured reserves a power of revocation. Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 182 S.W. (2d) 624 (1944) (annuity insurance policy passed to beneficiary); Toulouse v. New York Life Ins. Co., 40 Wash. (2d) 538, 245 P. (2d) 205 (1952) (paid-up endowment policy passed to named beneficiaries—with much disagreement by members of the court). In the Toulouse case, one of the dissenters reluctantly observed, "The result of the majority opinion will be to permit a contract between a bank and its depositor to the effect that, if the depositor dies before his account is closed, the bank shall pay the balance to X, Y and Z." Id. at 554.

[301] Under this doctrine a bank account opened in the name of the "donor in trust for donee" presumptively creates a revocable or "tentative" trust during the donor's lifetime but passes to the donee in absence of evidence to the contrary. E.g., Brucks v. Home Federal Sav. & Loan Assn., 36 Cal. (2d) 845, 228 P. (2d) 545 (1951) (unpublished letter contradicting trust did not defeat rights of beneficiary on ground that intent therein expressed was nullified by a subsequent will); Hale v. Hale, 313 Ky. 344, 231 S.W. (2d) 2 (1950) (donee prevailed, but not as to funds withdrawn by deceased donor); Abruzzese v. Oestrich, 138 N.J. Eq. 33, 47 A. (2d) 883 (1946) (decided under statute); Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904) (leading decision with very great following).

the statute of wills as it is now understood, are pointing the way toward new reforms in the law of property.[302] It is doubtful that much damage has been done to the basic purpose of the statute of wills which is the prevention of fraud. These and many of the transactions involving transfers of choses in action and chattels emanate from dealings with third, disinterested persons who are present to dissipate the possible danger of fraud, particularly where the interests of the parties are described in written form.[303]

Effect of alternative language ("H or W"). In search for satisfactory words describing the rights of joint owners of personal prop-

But cf. Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E. (2d) 748 (1946) (bank account expressly provided for power of revocation and payment to beneficiary on donor's death—held parol was inadmissible to defeat surviving donee's rights). In general see 1 BOGERT, TRUSTS AND TRUSTEES §47, p. 306 (1951). This device is often treated in much the same manner as a will. The trust may be revoked by a subsequent will on the part of the donor. E.g., Matter of Beck, 260 App. Div. 651, 23 N.Y.S. (2d) 525 (1940). *Contra,* Bradford v. Eutaw Savings Bank, 186 Md. 127, 46 A. (2d) 284 (1946) (donor made specific bequest to other parties). It cannot be used by a husband to defeat the wife's right of inheritance. Mushaw v. Mushaw, 183 Md. 511, 39 A. (2d) 465 (1944); Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941); 64 HARV. L. REV. 1367 (1951) (excellent discussion of New York decision). But cf. Matter of Halpern, 303 N.Y. 33, 100 N.E. (2d) 120 (1951) (trust not illusory where evidence fails to establish uncompleted gift in donor's lifetime). The corpus may be reached by creditors. Matter of Matthews, 175 Misc. 524, 24 N.Y.S. (2d) 249 (1940) (debts and funeral expenses of donor paid from trust to the exclusion of surviving beneficiary). *Contra,* Fairfax v. Savings Bank of Baltimore, 175 Md. 136, 199 A. 872 (1938), 52 HARV. L. REV. 318 (1938) (deposit by *H* in trust for *H* and *W* as "joint owners, subject to the order of either" with right of survivorship could not be attached by *H*'s creditors—law review note likened trust to tenancy by the entirety). Where the settlor becomes incompetent the trust may be revoked only where needed for support. E.g., In re Guardianship of Overpeck, 211 Minn. 576, 2 N.W. (2d) 140 (1942).

The tentative trust, however, is a dangerous institution for estate planning purposes because of the unsettled status of the law governing the rights of the parties. In some cases the trust is construed as irrevocable where evidence, aside from the deposit itself, is introduced to show that a gift of a present interest in trust was intended. E.g., Matter of Farrell, 298 N.Y. 129, 81 N.E. (2d) 51 (1948) (holding that beneficiary of trust was not required to turn over deposit to guardian of insane donor since the trust was irrevocable because donor had delivered pass book to beneficiary). On the other hand, the trust may be defeated by parol evidence showing lack of gift intent. E.g., Passaic Nat. Bank v. Taub, 137 N.J. Eq. 544, 45 A. (2d) 679 (1946) (*H* deposited money in the names of "*H, W*; either or survivor, in trust for *D*"—held that account passed to *H*'s receiver in light of evidence to the effect that *H* was the only party who had made use of the funds). The tentative trust has withstood litigation in New York and a few other jurisdictions, but its place has not yet been secured upon a wide geographical basis. Cf. "The Theory of the Tentative Trust," 87 UNIV. PA. L. REV. 847 (1939).

302 A few other sporadic cases will be found where a surviving donee is allowed to take under transfers in which the donor retained what was regarded as an absolute power of revocation. E.g., First Nat. Bank v. Mulich, 83 Colo. 518, 266 P. 1110 (1928) ("I hereby request that my checking account be made joint with my brother . . . for him to check on only in case of my death"); In re Koss, 106 N.J. Eq. 323, 150 A. 360 (1930) (donor reserved right to withdraw funds under stock purchase plan providing for payment to beneficiary in "event of . . . death").

303 In general see the very excellent analysis by Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L.J. 1 (1941).

erty the public has introduced the simple but troublesome conjunction, "or." Not infrequently title is taken in the form, "H or W," without more. Often the parties are named alternatively followed by terms referring to them as "joint tenants," "jointly," "with right of survivorship" and the like or various combinations of these forms.[304] Use of this kind of language is confined to choses in action where dual owners are named disjunctively at the insistence of cautious obligors, so that payment to or dealings with one of the obligees will be binding upon both.[305] The practice has become standardized in the banking business, a practice sponsored by the universal adoption of legislation giving banking institutions protection where deposits are paid over the signature of either party.[306] As a consequence the conjunction

[304] It is not uncommon to find the troublesome expression "and/or" in transfers naming joint owners. E.g., Crossman v. Naphtali, 160 Fla. 148, 33 S. (2d) 726 (1948); Bulen v. Pendleton Banking Co., 118 Ind. App. 217, 78 N.E. (2d) 449 (1948); Matter of Hoffman, 175 Misc. 607, 25 N.Y.S. (2d) 339 (1940); Williams v. Thornton, 160 Tenn. 229, 22 S.W. (2d) 1041 (1930). On this problem, see 45 YALE L.J. 918 (1936). Occasionally the words "jointly and severally" will be found. E.g., In re Kwatkowski's Estate, 94 Colo. 222, 29 P. (2d) 639 (1934) (created tenancy in common); Fruzynski v. Radler, 23 N.J. Super. 274, 93 A. (2d) 35 (1952) ("joint and several" account); Matter of Estate of Ivers, 4 Wash. (2d) 477, 104 P. (2d) 467 (1940) (created joint tenancy where words of survivorship also used).

[305] In general see cases cited at notes 66, 212 and 265. It has been suggested that a bank or obligor would be justified in paying either of several obligees named in the alternative irrespective of knowledge that one of the obligees has objection. See Southern Cal. Edison Co. v. Hurley, (9th Cir. 1953) 202 F. (2d) 257. Compare further, Smith v. Merchants Nat. Bank of Leominster, (Mass. 1953) 115 N.E. (2d) 143 (bank safely made payment of check drawn by deceased joint depositor under statute authorizing payment of checks presented to bank within 10 days after death of depositor). It is quite possible, however, that the bank or obligor is not justified in paying one of the parties in such a case, and in any event would be protected by withholding payment and interpleading the parties. Cf. Perdue v. State Nat. Bank, 254 Ala. 80, 47 S. (2d) 261 (1950) (bank refused payment of savings deposit in names of *H* or *W* to *H*'s guardian, notified *W*, refused payment to her and then interpleaded the parties—held, interpleader was proper after rehearing and with two dissents); Pratt v. First Nat. Bank of Fayette, 243 Ala. 257, 9 S. (2d) 744 (1942) (surviving wife re-deposited funds in her name from joint account in obligor bank—held, bank properly interpleaded wife and *H*'s administrator); Schwartz v. Sandusky County Sav. & Loan Co., 65 Ohio App. 437, 30 N.E. (2d) 556 (1939) (savings and loan company paying *H* after demand by *W* responsible to *W* to extent of her actual interest); Uzarski v. Union Nat. Bank, 152 Pa. Super. 433, 33 A. (2d) 459 (1943) (bank refused to pay deposit in names of *H* or *W* to latter—held that *W* could recover from the bank in assumpsit only by joining husband, but case suggested that bank might be liable in tort for refusal to honor her checks drawn on a joint checking account). Many of the banking statutes authorize banks to withhold payment of a joint account where written notice so directing is given by one of the parties. E.g., N.Y. Banking Law (1950) §§134-(3), 171(3), 239(3), 310(6), 394(1), 453-a. Cf. Esling v. City Nat. Bank & Trust Co., 278 Mich. 571, 270 N.W. 791 (1936) (bank justified in withholding payment upon unwritten telephone notice); Napolitano v. Manhattan Sav. Bank, 50 N.Y.S. (2d) 861 (1944) (bank liable for one-half of deposit withdrawn by *H* after notice from *W* to stop payment).

[306] Practically all of the banking statutes apply to accounts payable to "either," and all provide that payment to either will discharge the banking institution. The statutes are collected in Appendix III and notes 214-215.

has earned what appears to be a popular meaning associated with joint tenancy or tenancy by the entireties. Bankers speak of "'or' accounts" as constituting survivorship accounts.[307] The word is used in many other commercial transactions. United States savings bonds are issued in this form.[308] The Uniform Negotiable Instruments Law recognizes alternative payees.[309] As a matter of fact, there is some indication that automobile titles often are acquired in the disjunctive.[310] Judicial reaction to this practice, again, has not been consistent and on the whole has been quite unsympathetic or oblivious to the workings of the non-legal mind. In many states "or" has been converted into a word of treacherous meaning.

Where title is taken in the simple disjunctive form ("H or W") without further definition of the rights of joint owners, the law is likely to characterize their estate in accordance with the underlying legislative or common law policy toward joint tenancy or tenancy by the entireties. Thus states favoring tenancy by the entireties in personal property with but one exception treat the expression as consistent with, and effective to create entireties ownership.[311] Mass-

[307] Interviews with banking institutions in Indianapolis revealed that many refer to the joint survivorship account as the "or" account. In fact some institutions enter the names of the parties in the form of "*H* or *W*" on the assumption that this creates a joint survivorship account. Cf. Bowen v. Holland, 182 Ga. 430, 185 S.E. 720 (1936) (as to bank account in names of "*H* or *W*" bank officers testified that "they thought that the certificate as drawn has the legal effect to make it payable to *H* or *W* or the survivor"); In re Estate of Hittle, 51 Ohio Abst. 282, 78 N.E. (2d) 764 (1948) (testimony of banker to this effect sufficient to establish a right of survivorship).

[308] Bonds issued in the co-ownership form are issued in the names of the parties, "*H* or *W*." The regulations further provide for a right of survivorship. See note 273.

[309] Uniform Negotiable Instruments Law §8(5) (providing that an instrument may be made payable to "one or some of several payees"). The act does not specifically provide for several indorsees, indorsement by several payees, or discharge by one of several payees. At common law an instrument payable in the alternative was non-negotiable. Musselman v. Oakes, 19 Ill. 81 (1857). Under the uniform law a note payable to "*A* or *B*" may be negotiated by *A*, alone. Voris v. Schoonover, 91 Kan. 530, 138 P. 607 (1914).

[310] A sampling of title registrations in Indiana shows that almost half of the automobiles titled in dual names are in this form. See note 5. Compare Wills v. Shepherd, (Mo. App. 1950) 231 S.W. (2d) 843 (automobile titled in names of "*H* and/or *W*"); In re Griffith, (Del. 1953) 93 A. (2d) 920 (*W*, who was *H*'s guardian, accountable for proceeds from automobile owned by entireties).

[311] Brewer v. Bowersox, 92 Md. 567, 48 A. 1060 (1901) (bank deposit with additional words of survivorship); State Bank of Poplar Bluff v. Coleman, (Mo. App. 1951) 240 S.W. (2d) 188 (checking account); Wills v. Shepherd, (Mo. App. 1950) 231 S.W. (2d) 843 (automobile certificate of title in names of "*H* and/or *W*"); Craig v. Bradley, 153 Mo. App. 586, 134 S.W. 1081 (1911) (promissory note payable to "*H* and *W* or either of them"); Alcorn v. Alcorn, 364 Pa. 375, 72 A. (2d) 96 (1950) (United States savings bond in names of "*H* or *W*"); Wilbur Trust Co. v. Knadler, 322 Pa. 17, 185 A. 319 (1936) (mortgage); Sloan v. Jones, 192 Tenn. 400, 241 S.W. (2d) 506 (1951) (bank deposit); Smith v. Haire, 133 Tenn. 343, 181 S.W. 161 (1915) (bank deposit). Cf. Cross v. Pharr, 215 Ark. 463, 221 S.W. (2d) 24 (1949) (bank deposit with additional provision for survivorship); Hoyle v. Hoyle, 31 Del. Ch. 64, 66 A. (2d) 130 (1949) (bank account with additional words of survivorship); Hagerty v. Hagerty, (Fla. 1951)

achusetts, however, holds that the use of alternative language will convert what would otherwise be a tenancy by the entireties into a joint tenancy.[312] This apparently is reasoned from the premise that the husband retains full control over entireties property during his lifetime as he did at common law. Hence a title which purports to give the wife equality of control is at war with one of the usual characteristics of the estate. This logic, however, is opposed to the accepted idea that one spouse may act as agent for the other[313] and certainly is in irreconcilable conflict with the spirit of the married women's property laws which have given her equality in the dominion over entireties assets in most of the states where the estate is recognized.[314] In jurisdictions where entireties is no longer held in esteem or in transactions concerned with parties who are not husband and wife, many courts are inclined to hold that alternative language is inadequate to rebut the preference for tenancy in common.[315] How-

52 S. (2d) 432 (checking account with additional words of survivorship); Seedhouse v. Broward, 34 Fla. 509, 16 S. 425 (1894) (mortgage to "*H* or *W*"); Cullum v. Rice, 236 Mo. App. 1113, 162 S.W. (2d) 342 (1942) (checking account with additional words of joint tenancy). In Wisconsin where joint tenancy is favored between husband and wife transfers to "*H* or *W*" will create joint tenancy. In re Hounsell's Estate, 252 Wis. 138, 31 N.W. (2d) 203 (1948) (savings and checking accounts); Central Wisconsin Trust Co. v. Schumacker, 230 Wis. 591, 284 N.W. 562 (1939) (various securities). Likewise, a chose in action purchased by the husband in the names of "*H* or *W*" will pass to the surviving wife under the peculiar New York rule favoring the right of survivorship where the husband furnishes the consideration. E.g., In re Rice's Estate, 119 N.Y.S. (2d) 439 (1953) (bank account).

[312] Milan v. Boucher, 285 Mass. 590, 189 N.E. 576 (1934) (holding that *H* could trace withdrawals by wife and recover one half of the proceeds). Cf. Nott v. Nott, 325 Mass. 756, 89 N.E. (2d) 14 (1949) (court ordered partition of joint savings account and savings bonds). To the extent that entireties can be created in personal property, the Michigan court has taken the same view toward alternative language. Guldager v. United States, (6th Cir. 1953) 204 F. (2d) 487 (savings bond in names of "*H* or *W*" could be reached by *H*'s creditors to the extent of his apparently undefined interest therein); Murphy v. Michigan Trust Co., 221 Mich. 243 at 245, 190 N.W. 698 (1922) ("The words 'payable to either' do not square with the idea of a tenancy by entireties but do pointedly relate to a joint tenancy"). Compare further, In re Marsh's Estate, 125 Mont. 239, 234 P. (2d) 459 (1951).

[313] E.g., Collins v. Croteau, 322 Mass. 291, 77 N.E. (2d) 305 (1948) (wife acted as husband's agent with reference to entireties realty).

[314] See notes 65-68.

[315] Harvey v. United States, (7th Cir. 1950) 185 F. (2d) 463 (stock certificates payable to "*H* or *W*," "either *H* or *W*," and "*H* and/or *W*"); Dalton v. Keers, 213 Cal. 204, 2 P. (2d) 355 (1931) (contract to purchase real estate by two persons who were not husband and wife); In re Kwatkowski's Estate, 94 Colo. 222, 29 P. (2d) 639 (1934) (bequest); Collyer v. Cook, 28 Ind. App. 272, 62 N.E. 655 (1902) (note payable to "*H* or *W*" created tenancy in common); Petition of Hanson, 125 Mont. 174, 232 P. (2d) 342 (1951) (promissory notes to "*H* or *W*"); Abel v. Lowry, 68 Nev. 284, 231 P. (2d) 191 (1951) (promissory notes to "*H* or *W*"); Newitt v. Dawe, 61 Nev. 472, 133 P. (2d) 918 (1943) (note and mortgage to "*H* or *W*"); Whelan v. Conroy, 126 N.J. Eq. 607, 10 A. (2d) 636 (1940) (various securities in names of "*H* or *W*" held in common in absence of proof of party furnishing consideration); Matter of Kimball, 124 Misc. 181, 207 N.Y.S.

ever, a very substantial number have awakened to the fact that the disjunctive is commonly associated with the creation of joint tenancy or survivorship rights, and in deference to this knowledge find in the term "or" an ambiguity or equivocation. Consequently parol evidence is admitted to show whether or not the person responsible for the expression intended to create joint tenancy or survivorship rights.[316] A few decisions, usually based upon banking legislation which so provides, hold that the simple disjunctive creates a technical joint tenancy.[317] The diversity of judicial interpretations accorded this word

757 (1924) (liberty bonds in names of brother "or" sister); Waltenberger v. Pearson, 81 Ohio App. 51, 77 N.E. (2d) 491 (1946) (savings and loan account in names of "*T* or *B*"); Foraker v. Kocks, 41 Ohio App. 210, 180 N.E. 743 (1931) (certificate of deposit payable to "*H* or *W*"); Mauser v. Mauser, 326 Pa. 257, 192 A. 137 (1937) (bank account in names of "*H* or *W* or son" held in common); Obradovich v. Walker Bros. Bankers, 80 Utah 587, 16 P. (2d) 212 (1932) (savings account and certificate of deposit in names of "*H* or *W*" held in common—both parties contributed to consideration). See Southern Cal. Edison Co. v. Hurley, (9th Cir. 1953) 202 F. (2d) 257.

316 First Nat. Bank v. Lawrence, 212 Ala. 45, 101 S. 663 (1924) (either husband or wife authorized to make withdrawals from checking account); O'Brien v. Biegger, 233 Iowa 1179, 11 N.W. (2d) 412 (1943) (savings account in name of "*H* or *W*"); Chippendale v. North Adams Sav. Bank, 222 Mass. 499 at 503, 111 N.E. 371 (1916) (words added to donor's account, "may be drawn by his sister"—held, ". . . this means that the deposit may be withdrawn by her at any time, i.e. before or after the death of [the brother]"); Menger v. Otero County State Bank, 44 N.M. 82, 98 P. (2d) 834 (1940) (survivorship presumed between married people where savings account opened in names of "*H* or *W*"); In re Reynold's Estate, 163 N.Y.S. 803 (1916) (survivorship established by parol where checking account opened in names of uncle "or" niece); Jones v. Waldroup, 217 N.C. 178, 7 S.E. (2d) 366 (1940) (stock in names of "*H* or *W*" passed to surviving wife who furnished funds for purchase); Royston v. Besett, 183 Okla. 643, 83 P. (2d) 874 (1938) (savings and loan certificates issued to "*H* or *W*" held to be "strong evidence of their desire to establish a right of survivorship"); In re Estate of Fulk, 136 Ohio St. 233, 24 N.E. (2d) 1020 (1940) (certificate of deposit in names of "*H* or *W*" to which both had contributed); In re Estate of Hittle, 51 Ohio Abst. 282, 78 N.E. (2d) 764 (1948) (certificates of deposit in names of donor "or" great-niece passed to survivor upon basis of bookkeeper's testimony); Pruett v. First Nat. Bank of Temple, (Tex. Civ. App. 1943) 175 S.W. (2d) 658 at 662 (checking account in names of mother "or" son passed to surviving mother who furnished funds—"this deposit slip together with the agreements or statements of the parties thereto were admissible to prove the terms of the contract partly in writing and partly oral"); Columbia Trust Co. v. Anglum, 63 Utah 353, 225 P. 1089 (1924) (checking account in names of "*H* or *W*" passed to survivor upon parol proof of agreement to that effect); Deal's Admr. v. Merchants & Mech. Savings Bank, 120 Va. 297, 91 S.E. 135 (1917) (savings account in names of donor "or" sister showed intent to create a right of survivorship). Cf. Bowen v. Holland, 182 Ga. 430, 185 S.E. 720 (1936); Roach v. Plank, 300 Mich. 43, 1 N.W. (2d) 446 (1942); In re Estate of Collins, 76 Ohio App. 323, 64 N.E. (2d) 262 (1945) (parol evidence defeated gift); Ogle v. Barker, 224 Ind. 489, 68 N.E. (2d) 550 (1946) (checking account in names of "*H* or *W*"); Hill v. Havens, 242 Iowa 920, 48 N.W. (2d) 870 (1951). In Greenwood v. Commissioner of Internal Revenue, (9th Cir. 1943) 134 F. (2d) 915, a savings account in the names of "*H* or *W*" created a joint tenancy apparently because the pass book was placed in a safe deposit box opened in the names of the parties as joint tenants.

317 Cases holding that survivorship is presumed upon the basis of banking legislation: Houle v. McMillan, 83 Colo. 216, 263 P. 409 (1928) (certificate of deposit in names of donor "or" donee); Shearin v. Coleman, 201 Miss. 193, 28 S. (2d) 841 (1947) (checking account in names of "*H* or *W*"); Dyste v. Farmers & Mech. Sav. Bank, 179 Minn. 430,

"or" suggests a possible need for further extra-legal examination into the forces which cause businessmen and members of the public to make such wide use of it. It is quite obvious that those cases allowing parol proof of the parties' intent open the door to litigation, unfair settlements, and most important of all uncertainty at a time when proof becomes more difficult after one of the owners has died.[318] Where husband and wife are involved, solution of the problem is simplified by the rule adopted in the entireties states that resolves on the basis of an accepted social policy.

The use of alternative language has led to one further problem in the creation of joint rights. A legal belief sometimes is expressed that a disjunctive reference affects the powers and rights of joint owners although otherwise the transfer would be sufficient to indicate that tenancy in common, joint tenancy or entireties was intended. Thus suppose that a bank account is opened in the names of "*H* or *W* as joint tenants with right of survivorship." Or suppose that the parties are described simply as "*H* or *W*" in a state preferring entireties. To what extent does the addition of the word "or" add or detract from the rights of the parties? Overwhelmingly, the courts hold that the disjunctive creates a form of revocable agency which gives protection to the obligor and third persons relying upon what is construed as a power in either to deal with the property, but which does not free the one who uses the power from a duty to account to the other. Thus if the property is held by husband and wife as tenants by the entireties, either party retains the power to make withdrawals but is accountable for the proceeds which retain their character as entireties property.[319] The effect of the rule is illustrated by two Pennsylvania

229 N.W. 865 (1930) (savings account in names of grandfather "or" donee); In re Lewis' Estate, 194 Miss. 480, 13 S. (2d) 20 (1943) (checking account in names of "*H* or *W*"); Scriven v. Scriven, 153 Neb. 655, 45 N.W. (2d) 760 (1951) (bank deposit in form "Mr. or Mrs. *T*"); Rose v. Kahler, 151 Neb. 532, 38 N.W. (2d) 391 (1949) (mother "or" daughter); McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N.W. (2d) 599 (1942) (bank account in names of "*T* or *A* and *B*"). Some of the banking statutes do not apply to deposits in the "or" form without further provision for "survivorship." See Appendix III and particularly note punctuation of statutes. Betker v. Ide, 335 Mich. 291, 55 N.W. (2d) 835 (1952). Cf. Murphy v. Wolfe, 329 Mo. 545, 45 S.W. (2d) 1079 (1932); In re Orrico's Estate, 52 N.Y.S. (2d) 818 (1945). In Waltenberger v. Pearson, 81 Ohio App. 51, 77 N.E. (2d) 491 (1946), a United States savings bond in the names of "*T* and *B*" did not pass to the survivor upon the basis of the regulations which prescribed that the co-owners be named in the alternative.

318 E.g., compare O'Brien v. Biegger, 233 Iowa 1179, 11 N.W. (2d) 412 (1943) (involving testimony under "dead man's" statute); Roeser v. Ryckman, 121 Minn. 56, 140 N.W. 126 (1913) (donee could not testify under "dead man's" statute).

319 In re Griffith, (Del. Ch. 1953) 93 A. (2d) 920 (amounts withdrawn by *W* from entireties bank account while *H*'s conservator passed to surviving *H*); Hoyle v. Hoyle, 31 Del. Ch. 64, 66 A. (2d) 130 (1949) (wife who withdrew bank deposit required to

decisions involving entireties accounts payable to "either" husband or wife. In *Madden v. Gosztoni Savings & Trust Company*[320] the bank was released by a waiver in reorganization proceedings signed by the husband alone. In *Berhalter v. Berhalter*[321] a wife who had withdrawn all the funds from a checking account was required to account to the husband for the funds withdrawn. The result usually is no different where the property is held in joint tenancy,[322] except

account to *H*); Alcorn v. Alcorn, 364 Pa. 375, 72 A. (2d) 96 (1950) (wife who cashed savings bond required to account to husband); Feltz v. Pavlik, (Mo. App. 1953) 257 S.W. (2d) 214 (*W* allowed to trace funds withdrawn by deceased *H* and given to his brother). Cf. Cross v. Pharr, 215 Ark. 463, 221 S.W. (2d) 24 (1949); State Bank of Poplar Bluff v. Coleman, (Mo. App. 1951) 240 S.W. (2d) 188; Sloan v. Jones, 192 Tenn. 400, 241 S.W. (2d) 506 (1951); Hagerty v. Hagerty, (Fla. 1951) 52 S. (2d) 432. There may be some doubt that alternative language will protect third persons other than the obligor who deals with one of the parties upon the basis of this apparent agency. Cf. Kensington Nat. Bank v. Sampson, 149 Pa. Super. 43, 26 A. (2d) 115 (1942) (surviving wife entitled to benefits of life insurance policy payable to "*H* or *W* . . . to the one surviving" although *H* had assigned the policy as security for a loan); Seedhouse v. Broward, 34 Fla. 509, 16 S. 425 (1894) (*H* and *W* required to join in suit upon mortgage running to them as "*H* or *W*").

[320] 331 Pa. 476, 200 A. 624 (1938).

[321] 315 Pa. 225, 173 A. 172 (1934) (in this case the wife's conduct was treated as an offer to terminate the entireties relation; hence, the husband was allowed to recover one half of the fund for his own use). Cf. Gallagher Estate, 352 Pa. 476, 43 A. (2d) 132 (1945) (*H*'s estate required to account for whole of entireties bank account withdrawn by *H* without *W*'s knowledge and while *W* insane).

[322] Cases holding that surviving joint tenant retains a right of survivorship in funds withdrawn by deceased party without former's consent or knowledge: Matter of Harris, 169 Cal. 725, 147 P. 967 (1915) (leading California decision); Daniels v. Harney, 111 Cal. App. (2d) 400, 244 P. (2d) 773 (1952), on second appeal, Daniels v. Baldwin, 115 Cal. App. (2d) 487, 252 P. (2d) 351 (1953) (one of latest of many decisions following Harris case); Matter of Johnson, 351 Ill. App. 111, 113 N.E. (2d) 590 (1953) (surviving co-owner of savings bond allowed to trace money received by deceased's conservator who cashed bonds); Siemianoski v. Union State Bank of South Chicago, 242 Ill. App. 390 (1926) (joint tenancy not terminated by *H*'s withdrawal of joint bank account—new account established with fund passed to surviving wife); Clausen v. Warner, 118 Ind. App. 340, 78 N.E. (2d) 551 (1948) (surviving wife allowed to trace funds withdrawn by soldier husband from joint savings account); In re Damon's Guardianship, 238 Iowa 570, 28 N.W. (2d) 48 (1947) (guardian of deceased co-owner of savings bonds charged with proceeds as against claim of surviving co-owner); Asche v. Matthews, 136 Kan. 740, 18 P. (2d) 177 (1933) (funds from joint bank account withdrawn by *W* passed to surviving *H*); Bruso v. Pinquet, 321 Mich. 630, 33 N.W. (2d) 100 (1948) (trust impressed upon jointly owned property misappropriated by deceased wife); Ridgley v. Ridgley, 256 Mich. 359, 239 N.W. 354 (1931) (*W* recovered joint deposit withdrawn by deceased *H* and given to latter's brother—extent of *W*'s interest not determined); Crowell v. Milligan, 157 Neb. 127, 59 N.W. (2d) 346 (1953) (surviving donee allowed to trace funds to new account but limited by lowest subsequent balance in new account); In re Estate of Scott, 148 Neb. 182, 26 N.W. (2d) 799 (1947) (surviving nephew impressed trust upon bonds which originally had been registered in names of aunt "or" nephew and changed as a result of false representations to nephew); Matter of Klenk, 165 App. Div. 917, 150 N.Y.S. 365 (1914), aff'd. 214 N.Y. 715, 108 N.E. 1098 (1915) (proceeds from joint account misappropriated by *W* passed to surviving *H*); O'Connor v. Dunnigan, 158 App. Div. 334, 143 N.Y.S. 373 (1913), aff'd. 213 N.Y. 676, 107 N.E. 1082 (1914) (where wife withdrew whole account, proceeds retained by her passed to surviving husband); Nusshold v. Kruschke, 176 Ore. 697, 159 P. (2d) 819 (1945) (surviving *W* recovered proceeds of

insofar as additional complications arise from the power of either party to convert the relation into a tenancy in common.[323]

joint bank account withdrawn and deposited by *H* with third person); State v. Gralewski's Estate, 176 Ore. 448, 159 P. (2d) 211 (1945) (surviving joint tenant allowed to trace proceeds of joint bank account); Culhane's Estate, 334 Pa. 124, 5 A. (2d) 377 (1939) (surviving joint depositor entitled to proceeds of amounts received by deceased in liquidation of deposit); Estate of Abddulah, 214 Wis. 336, 252 N.W. 158 (1934) (surviving wife not allowed to impress trust upon promissory note purchased by *H* with funds from joint tenancy bank account but could recover from *H*'s estate in conversion—amount which *W* could recover not stated). Cases allowing recovery of one half of fund or property in inter vivos litigation between the parties: Newlon v. Newlon, 310 Ky. 737, 220 S.W. (2d) 961 (1949); Nott v. Nott, 325 Mass. 756, 89 N.E. (2d) 14 (1949) (court partitioned co-ownership savings bonds and bank accounts); Ludwig v. Montana Bank & Trust Co., 109 Mont. 477, 98 P. (2d) 379 (1939); Link v. Link, 3 N.J. Super. 295, 65 A. (2d) 89 (1949) (*H* allowed to recover one half of co-ownership bonds); Goc v. Goc, 134 N.J. Eq. 61, 33 A. (2d) 870 (1943) (*H* who withdrew savings account accountable to *W* for one half); Michaels v. Michaels, 69 N.Y.S. (2d) 668 (1946) (*W* accountable for one half of money withdrawn from joint tenancy account); Comella v. Comella, 68 R.I. 275, 27 A. (2d) 348 (1942) (*H* established one half interest in realty purchased with funds from joint tenancy account by *W*); Duffy v. Reddy, 64 R.I. 127, 11 A. (2d) 1 (1940) (*W* accountable to *H* for one half of funds withdrawn from joint bank account); Perdue v. State Nat. Bank, 254 Ala. 80, 47 S. (2d) 261 (1950) (bank could refuse payment by interpleading joint owners); Vassar v. Vassar, 142 Me. 150, 48 A. (2d) 620 (1946) (*H* denied recovery against *W* who withdrew joint account for reason that account established to defraud creditors); Czajkowski v. Lount, 333 Mich. 156, 52 N.W. (2d) 642 (1952) (donor establishing bank account in names of donor "or" donee with provision for survivorship estopped to deny that donee held one half as against latter's garnisheeing creditor); First Trust Co. of Lincoln v. Hammond, 140 Neb. 330, 299 N.W. 496 (1941) (guardian of joint owner who withdrew required to account); Nichols v. Metropolitan Life Ins. Co., 137 Ohio St. 542, 31 N.E. (2d) 224 (1941) (joint owner had no power of withdrawal that would allow bank to use fund in set off); Schwartz v. Sandusky County Sav. & Loan Co., 65 Ohio App. 437, 30 N.E. (2d) 556 (1939) (*W* recovered from savings and loan association where latter had paid husband after *W* had notified it of her interest). Cf. In re Renz' Estate, (Mich. 1953) 61 N.W. (2d) 148 (theory that bank account was subject to inheritance tax because donor retained a power of revocation rejected); Boehmer v. Boehmer, 264 Wis. 15, 58 N.W. (2d) 411 (1953) (neither *W* nor *H*'s guardian could withdraw funds from savings account in names of "*H* and/or *W*" without a court order).

[323] Most cases hold that withdrawals by one of the parties from an "or" account does not terminate the joint tenancy in absence of agreement or an intent to that effect expressed to the other. See cases cited at note 322. A few, however, have determined that such conduct terminates the joint tenancy so that the parties become tenants in common without right of survivorship in the proceeds. Milan v. Boucher, 285 Mass. 590, 189 N.E. 576 (1934); Stout v. Sutphen, 132 N.J. Eq. 583, 29 A. (2d) 724 (1943) (*H* withdrew funds from joint bank account when *W* insane—held, joint tenancy severed and *H* accountable for one half to *W*'s estate); Steinmetz v. Steinmetz, 130 N.J. Eq. 176, 21 A. (2d) 743 (1941) (*W* withdrew joint bank account when *H* insane—held, joint tenancy severed and *W* accountable for one half to *H*'s estate). Cf. Tinkham v. Tinkham, 112 Ind. App. 532, 45 N.E. (2d) 357 (1942); Abrams v. Nickel, 50 Ohio App. 500, 198 N.E. 887 (1935). In New York it apparently is the rule that joint tenancy is severed by withdrawals of less than one half by one of the parties. Matter of Sutter, 232 App. Div. 45, 248 N.Y.S. 624 (1931), affd. 258 N.Y. 104, 179 N.E. 310 (1932) (upon withdrawal of less than half by donor-joint tenant, that remaining in bank deposit passed to the other who survived); Petition of Cummings, 66 N.Y.S. (2d) 799 (1946) (surviving joint tenant withdrew less than half of bank account—remainder passed to him). It is also the rule in New York that withdrawals by the donor is evidence of non-gift intent. E.g., Walsh v. Keenan, 293 N.Y. 573, 59 N.E. (2d) 409 (1944).

A few courts, however, are inclined to read into the words "or" or "either" an intent to create a property power thus leading these courts in one of two directions. On some occasions a gift from the donor to himself and the donee is defeated where the donor retains possession of the property—ordinarily a certificate of deposit, a savings pass book or other instrument—which must by its terms or by custom be presented for payment. It is reasoned that by retaining the practical means for controlling the fund, plus what is construed as an absolute power to use it as he sees fit, the donor has not complied with one of the formalities of the law of gifts—delivery or manual tradition.[324] Note that this result is achieved only by putting technical

In Munson v. Haye, 29 Wash. (2d) 733, 189 P. (2d) 464 (1948), community funds had been deposited in a joint account and the wife thereafter withdrew the whole account. The court held that although the banking statute created a presumptive right of survivorship, the account was held in community during the lives of parties, so that upon the wife's death the property passed as community. Justice Schwellenbach dissented upon the basis that the power of withdrawal gave the wife power to convert the community to her separate estate. But compare In re Hickman's Estate, 41 Wash. (2d) 519, 250 P. (2d) 524 (1952).

[324] Cases holding that gift failed because of lack of delivery: Clark v. Young, 246 Ala. 529, 21 S. (2d) 331 (1945) (certificate of deposit in names of husband and wife); Conard v. Conard, 5 Cal. App. (2d) 91, 41 P. (2d) 968 (1935) ("joint accounts" under which *H* retained possession of pass books); Hudson v. Bradley, 176 Ark. 853, 4 S.W. (2d) 534 (1928) (certificate of deposit in simple alternative form); Crossman v. Naphtali, 160 Fla. 148, 33 S. (2d) 726 (1948) (building and loan certificate); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927) (checking account); People's Bank v. Turner, 169 Md. 430, 182 A. 314 (1936) (savings pass book); State Board of Equalization v. Cole, 122 Mont. 9, 195 P. (2d) 989 (1950) (savings account and war bonds—no present transfer for inheritance tax purposes); Jones v. Fullbright, 197 N.C. 274, 148 S.E. 229 (1929) (certificate of deposit in names of "*H* or *W*"); People's Sav. Bank v. Rynn, 57 R.I. 411, 190 A. 440 (1937) (savings account withdrawn by donor); Smith v. Planters' Sav. Bank, 124 S.C. 100, 117 S.E. 312 (1923) (certificate of deposit in names of donor "or" donee); Sawyer v. Mabus, 107 S.C. 369, 92 S.E. 1029 (1917) (certificate of deposit payable to donor "or" donee); Williams v. Thornton, 160 Tenn. 229, 22 S.W. (2d) 1041 (1930) (promissory note to "*H* and/or *W*"); Reese v. First Nat. Bank, (Tex. Civ. App. 1946) 196 S.W. (2d) 48 (certificate of deposit in names father "or" daughter—court indicated that result would be different where a non-negotiable instrument was involved); Rice v. Bennington Co. Sav. Bank, 93 Vt. 493, 108 A. 708 (1920) (certificate of deposit). Cf. Winslow v. McHenry, 93 Minn. 507, 101 N.W. 799 (1904) (certificate of deposit in names of "*H* or *W*"). Compare cases in note 325 emphasizing lack of delivery. The cases cited above represent a minority view.

The view that sufficient control is not surrendered as a consequence of the donor's power of revocation often appears in the cases involving joint safe deposit boxes. Cf. Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 A. 637 (1903) (donee wife had key); Tomayko v. Carson, 368 Pa. 379, 83 A. (2d) 907 (1951) (declarations that donor had given donee key to box insufficient to establish delivery); Weber v. Harkins, 65 R.I. 53, 13 A. (2d) 380 (1940) (donor kept key). In these cases, however, the donor does not retain exclusive control over the property inasmuch as either party has free access to the box, unless a retention of the only key may serve such purpose. Delivery sometimes is found upon the basis of the delivery of a key to the donee. Rule v. Fleming, 85 Ind. App. 487, 152 N.E. 181 (1926). Cf. Williams v. McElroy, 35 Ga. App. 420, 133 S.E. 297 (1926); Graham v. Barnes, 259 Mass. 534, 156 N.E. 865 (1927) (contents and keys delivered to donee); Dickson v. Dickson, (Mo. App. 1937) 101 S.W. (2d) 774 (*H* placed note

meaning into disjunctive phraseology—a meaning quite opposed to the majority rule which treats the words as creating but an agency relation without subtracting from the property rights of the joint owners. A court that does this must also assume that either party having possession of the instrument has an absolute power to do with the property as he chooses. Thus suppose *H* wishes to establish a joint tenancy savings deposit, and pursuantly he causes his account to be entered in the names of "*H* or *W*, as joint tenants with right of survivorship." He then causes the pass book to be delivered to *W*. Or assume that both have contributed equally to the account and that *W* retains possession of the book. The foregoing reasoning would lead to the conclusion that *W* retains the indiscriminate power of making withdrawals without being accountable to her husband—a conclusion which would shock most joint owners, at least in absence of positive proof that an outright gift of the whole was intended.[325] Joint possession in these cases is a practical impossibility.[326] Aside from the question of delivery, a peculiar twist to this thinking process has developed in many jurisdictions as to the supposed intent of the donor who acquires choses in action in the simple alternative form

indorsed to *W* in joint box). A substitute for delivery is recognized by some courts where both parties sign the safe deposit box agreement. E.g., Brown v. Navarre, 64 Ariz. 262, 169 P. (2d) 85 (1946) (both *H* and *W* retained keys); Estate of Gaines, 15 Cal. (2d) 255, 100 P. (2d) 1055 (1940); Duling v. Duling's Estate, 211 Miss. 465, 52 S. (2d) 39 (1951). Cf. Tyrrell v. Judson, 112 Neb. 393, 199 N.W. 714 (1924) (joint safe deposit agreement signed by donor and sister passed on theory of gift causa mortis although donor kept the key). *Contra,* Millman v. Streeter, 66 R.I. 341, 19 A. (2d) 254 (1941) (keys delivered to donee, but no gift). The subject of delivery will be considered in a separate article. Note, however, that language plays no small role in the matter of delivery and gift intent.

[325] Occasionally cases will be found where the donee is given possession of the property and the donee's rights are sustained upon the theory of an outright gift. E.g., Earnest v. Earnest, 26 Ala. App. 260, 157 S. 885 (1934) (certificate of deposit payable to donor "or" daughter); Ruch v. First Nat. Bank of Three Rivers, 326 Mich. 52, 39 N.W. (2d) 240 (1949) (gift of savings pass book upheld in inter vivos dispute between donor and donee); State Bank v. Johnson, 151 Mich. 538, 115 N.W. 464 (1908) (delivery of certificate of deposit effectuated an outright gift causa mortis as well as a gift of a joint interest); Littlejohn v. County Judge, (N.D. 1953) 58 N.W. (2d) 278 (donee-co-owner of savings bonds became absolute owner upon delivery); In re Estate of Kamrath, 114 Neb. 230, 206 N.W. 770 (1925) (certificate of deposit in names of donor "or" daughter delivered to the latter); In re Estate of Hittle, 51 Ohio Abst. 282, 78 N.E. (2d) 764 (1948) (right of surviving donee sustained either on theory of joint tenancy or upon basis of outright gift where certificate of deposit payable to donor "or" donee was delivered to the latter).

[326] If exchange of possession between joint owners were to serve as a criterion for a change of ownership the parties would be without means to manage their property. E.g., compare Whitelock v. Whitelock, 156 Md. 115, 143 A. 712 (1928) (*H* and *W* owned note and mortgage by entireties, and *W* indorsed and delivered note to *H*—held, entireties relation not terminated) with Gugle v. Gugle, 83 Ohio App. 85, 78 N.E. (2d) 585 (1948) (stock held in names of donor and donee as joint tenants and upon donor's death stock found in her possession indorsed by donee in blank—held, facts established title in donor).

("*H* or *W*"). Omission of survivorship words or language defining the character of their dual ownership is construed merely as creating a type of agency in the donee. Hence the presumption prevails that no gift was intended, and the rights of the donee depend upon his ability to produce parol proof that a present vested interest was intended by the donor.[327] This rule apparently is founded upon the

[327] Cases holding that no interest passed to the donee where the parties were designated simply as donor "or" donee: Denigan v. Hibernia Sav. & Loan Soc., 127 Cal. 137, 59 P. 389 (1899) ("*H* or *W*"—surviving donee had possession of pass book); Robinson v. Mutual Sav. Bank, 7 Cal. App. 642, 95 P. 533 (1908) (donor "or" friend who assisted former in banking transactions—donor kept passbook); Gibson v. Industrial Bank, (D.C. Mun. App. 1944) 36 A. (2d) 62 (bank account in names of "husband or brother or wife" passed to surviving wife, but no gift to surviving brother proved); Bolton v. Bolton, 306 Ill. 473, 138 N.E. 158 (1923) (note taken in names of "*H* or *W*"—possession of wife found to be for convenience in making collections); Ogle v. Barker, 224 Ind. 489, 68 N.E. (2d) 550 (1946) (checking account in names of "*H* or *W*"—no evidence of gift); Main's Appeal, 73 Conn. 638, 48 A. 965 (1901) (accounts in names of mother and daughter with provisions that payable to both—"void because not made in legal form"); Murray v. Cannon, 41 Md. 466 (1875) (savings account payable to father or daughter—pass book delivered to daughter held not to be an indispensable instrument); Farris v. Farris Eng. Co., 7 N.J. 487, 81 A. (2d) 731 (1951) (bank account in names of "*W* and/or *H*"); Commercial Trust Co. v. White, 99 N.J. Eq. 119, 132 A. 761 (1926), affd. 100 N.J. Eq. 561, 135 A. 916 (1927) (bank accounts in names of donor "or" donee created no interest in donee—others providing for joint tenancy with survivorship passed to surviving donee); Morristown Trust Co. v. Capstick, 90 N.J. Eq. 22, 106 A. 391 (1919) (checking account in names of "*H* or *W*"); Browne v. Sieg, 55 N.M. 447, 234 P. (2d) 1045 (1951) (checking account); Matter of Bolin, 136 N.Y. 177, 32 N.E. 626 (1892) (bank account in names of mother "or" daughter—"The only presumption would be that the depositor so arranged for the purposes of convenience . . ."); Redmond v. Farthing, 217 N.C. 678, 9 S.E. (2d) 405 (1940) (savings account opened by *H* in names of "*H* or *W*" with proceeds from entireties real estate); Nannie v. Pollard, 205 N.C. 362, 171 S.E. 341 (1933) (checking account); In re Estate of Collins, 76 Ohio App. 323, 64 N.E. (2d) 262 (1945) (bank account in names of donor "or" donee—court distinguished cases where husband and wife were involved); Hickman v. Barrett, 175 Okla. 262, 52 P. (2d) 40 (1935) (certificate of deposit payable to order of donor "or" son-in-law—court emphasized lack of delivery to latter); Isherwood v. Springs-First Nat. Bank, 365 Pa. 225, 74 A. (2d) 89 (1950) (mother caused names of mother "or" daughter to be entered on savings pass book); Kata Estate, 363 Pa. 539, 70 A. (2d) 351 (1950) (savings account in names of donor "or" brother passed no interest in absence of other proof); Zellner's Estate, 316 Pa. 202, 172 A. 715 (1934) (savings account opened in names of father "or" daughter); Providence Inst. for Sav. v. Carpenter, 18 R.I. 287, 27 A. 337 (1893) (bank account in names of donor "or" donee failed to establish a trust for the latter); Holman v. Deseret Sav. Bank, 41 Utah 340, 124 P. 765 (1912) (checking account in names of donor "or" donee—pass book delivered to donee); Wolfe v. Hoefke, 124 Wash. 495, 214 P. 1047 (1923) (savings and loan account under which either donor or niece had a right to draw); Meyers v. Albert, 76 Wash. 218, 135 P. 1003 (1913). Cf. Roeser v. Ryckman, 121 Minn. 56, 140 N.W. 126 (1913) (certificate endorsed by donor to donor "or" wife); McGillivray v. First Nat. Bank of Dickinson, 56 N.D. 152, 217 N.W. 150 (1927) (certificates of deposit issued to donor "or" donee family friend—court indicated that cases involving husband and wife were distinguishable). The cases cited above should be very carefully compared with those cited at note 315, where parties named in the simple alternative held as tenants in common, and those cited at note 316, where they were found to hold as joint tenants or with right of survivorship. The cases often confuse problems of gift with the question of what type of estate was created. States in which entireties ownership of personal property is preferred generally favor both entireties and gift. E.g., Geist v. Robinson, 332 Pa. 44, 1 A. (2d) 153 (1938) (account in names of "*H* or *W*" opened by *H*—"inten-

belief that the simple disjunctive is used to establish agency only. No doubt joint bank accounts and choses in action serve the convenience of family members. But the availability of language by which an agency relation can be clearly established is sufficient to rebut the supposition that something more was not intended.[328]

On other occasions alternative language has given some judges a mental picture of two children over an ice cream soda, each with a straw—the one who sucks the hardest getting the most.[329] The latest

tion to create the entirety is assumed"). Compare cases cited at note 311. But cf. Murphy v. Wolfe, 329 Mo. 545, 45 S.W. (2d) 1079 (1932) (court was confused because account in names of "*H* or *W*" was not within the literal terms of banking statute); Hilke v. Bank of Washington, (Mo. App. 1952) 251 S.W. (2d) 963 (garnishee bank protected in paying out account in names of "*H* or *W*" to *H*'s creditor—*W*, however, did not contest bank's action).

328 For example most banking institutions employ separate signature cards for opening agency accounts. A number of cases will be found where the form of the account more or less clearly shows that agency alone was intended. E.g., In re Colbert's Estate, 101 N.Y.S. (2d) 666 (1950) (power of attorney from which court deduced that no gift of bank account was made); Munday v. Federal Nat. Bank, 195 Okla. 120, 155 P. (2d) 526 (1945) (ledger carried names of donor "or by" donee—withdrawal checks signed by donee in donor's name "by" donee); Smith v. Benj. Franklin Sav. & Loan Assn., 156 Ore. 541, 68 P. (2d) 1045 (1937) ("In case of emergency I hereby authorize you to honor the signature of my sister"—created agency relation only). Some cases will be found where the alleged donor opens a bank account in the name of the donee with an added provision that the donor may make withdrawals at will. This has been held to establish but an agency relation in the donee. Pomerantz v. Pomerantz, 179 Md. 436, 19 A. (2d) 713 (1941) (no gift where pass book not delivered to donee); Leverette v. Ainsworth, 199 Miss. 652, 23 S. (2d) 798 (1945) (checking account in name of donee with notation "subject to check by [donor] at any time" on its face showed agency relation only); Edmonds v. Perry, 62 Nev. 41, 140 P. (2d) 566 (1943) (bank account in name of donee over her signature, with notation, "This a/c also subject to withdrawal by [donor]"—parol admitted to show agency relation and no gift to donee). Writers in the field of agency have shown considerable concern over the written language and the admissibility of parol to show whether or not principal or agent are bound as such on one side as against the claims of a third party on the other. E.g., MECHEM, OUTLINES OF AGENCY, 4th ed., §§292-391 (1950). Seldom has effect of language been probed with respect to the creation of agency rights in disputes between principal and agent only. Cf. BRITTON, BILLS AND NOTES 179 (1943) (casually suggesting that problem is solved by analogy to cases involving disputes with third parties).

329 Kornmann v. Safe Deposit & Trust Co., 180 Md. 270, 23 A. (2d) 692 (1942) (savings bank trust by "*H*, in trust, for himself and *W*, joint owners, subject to withdrawal by either"). Cf. Roach v. Plank, 300 Mich. 43, 1 N.W. (2d) 446 (1942) (donee withdrew funds before donor's death); Bowerman v. Bowerman, 67 Ohio App. 425, 35 N.E. (2d) 1012 (1941) (money held by *H* and *W* under agreement by which either had complete access). A number of opinions are written upon the theory (without actually deciding) that a provision in a joint ownership agreement providing for payment to either gives either party an absolute power to use the fund. E.g., First Nat. Bank v. Lawrence, 212 Ala. 45, 101 S. 663 (1924); McLaughlin v. Estate of Cooper, 128 Conn. 557, 24 A. (2d) 502 (1942) (used as theory for imposing inheritance tax); Erwin v. Felter, 283 Ill. 36 at 39, 119 N.E. 926 (1918) ("the mother or daughter were equally entitled to withdraw the entire deposit"); Marble v. Treasurer & Receiver General, 245 Mass. 504, 139 N.E. 442 (1923) (leading case where bank deposit payable to "either or the survivor" taxed upon theory that either party had a complete power to use the fund); Johnson v. Nourse, 258 Mass. 417, 155 N.E. 457 (1927) (conservator of one joint owner could not

manifestation of this idea appears in a recent Minnesota decision, *Park Enterprises, Inc. v. Trach,*[330] where the husband's creditors were allowed to reach the entire bank account in the names of husband or wife. However, the language of the deposit was extraordinary in that it expressly provided that "each depositor shall have complete and absolute authority over said account . . . and may withdraw all or any part." Aside from ice cream sodas, this kind of ownership without some limitation is not much less revolting than the law of the jungle.[331] But cases suggesting that alternative words give either party a power of dissipation without accountability cannot be wholly ignored. They cast in bold relief the general problem of exactly what are the expectations of joint owners who take property in a form ostensibly authorizing either to deal with it. It is a generally known fact that joint checking or savings accounts between husband and wife (and possibly parent and child) often are held with the under-

recover pass book since latter had right to withdraw whole); In re Marsh's Estate, 125 Mont. 239, 234 P. (2d) 459 (1951) (savings bonds could be cashed by one co-owner to exclusion of other); Burns v. Nolette, 83 N.H. 489, 144 A. 848 (1929) (since either donor or donee retained a power of withdrawal, court held that a vested interest passed to the latter). Cf. Lynch v. Murray, (5th Cir. 1943) 139 F. (2d) 649 at 651 (bank account likened to "a conveyance of real estate to two parties as joint owners but with a provision that either should have the right to convey"). *Contra,* Milan v. Boucher, 285 Mass 590, 189 N.E. 576 (1934). Overwhelmingly this construction is rejected by cases where the inter vivos rights of the parties were put in issue. See cases cited at notes 319-323. It is remotely possible that alternative language might be construed to create a power of revocation in the donor which terminates upon his death. Cf. First Nat. Bank of Aurora v. Mulich, 83 Colo. 518, 266 P. 1110 (1928) ("I hereby request that my checking account be made joint with my brother . . . for him to check on only in case of my death"—created a vested survivorship interest in brother subject to donor's power of revocation). This conclusion sometimes is reached upon the basis of parol proof. E.g., MacLennan v. MacLennan, 316 Mass 593, 55 N.E. (2d) 928 (1944) (*H* held power of revocation of property acquired in joint tenancy form, but upon his death the property passed to the surviving wife); In re Geel's Estate, (Mo. App. 1940) 143 S.W. (2d) 327 (testimony that donor intended to receive interest and control of joint account created revocable trust). Cf. Gibbons v. Gibbons, 296 Mass. 89, 4 N.E. (2d) 1019 (1936) (*H* recovered possession of funds withdrawn by *W* from joint bank account upon parol proof that he intended to retain full control during his life); Moreau v. Moreau, 250 Mass. 110, 145 N.E. 43 (1924) (*W* recovered proceeds from *H* who had withdrawn funds from account in names of *H* or *W* with a provision for survivorship upon proof of understanding that *W* was to retain full control in her lifetime).

[330] 233 Minn. 473, 47 N.W. (2d) 197 (1951). In a companion decision the lower court had allowed the garnishee to reach only one half of the account, and because no appeal was taken by the creditor the judgment was allowed to stand. Park Enterprises, Inc. v. Trach, 233 Minn. 467, 47 N.W. (2d) 194 (1951).

[331] It appears from subsequent events that the Minnesota court has become lost in the jungle. Cf. Vesey v. Vesey, 237 Minn. 295, 54 N.W. (2d) 385 (1952) (*W* encouraged *H*, who was suffering from heart disease, to exercise with the result that he died—held, that whole of the joint and several bank account passed to *H*'s estate on ground that *W* feloniously prevented him from taking advantage of the power each held to withdraw the whole).

standing that both may apply the fund to family purposes.[332] As a general rule household expenses of husband and wife are paid from their joint checking account. It is a fair deduction, therefore, that alternative language generally serves as a means for dispensing limited authority over joint property held by family members—especially husband and wife.[333] It is unreasonable to suppose that such words are

[332] This fact has been established or recognized in the case law. Swofford v. Swofford, 327 Ill. App. 55, 63 N.E. (2d) 615 (1945) (evidence established that wife could make withdrawals from joint account for family use); Beckman v. Beckman, 328 Mass. 250, 103 N.E. (2d) 228 (1952) (evidence established that joint account opened by mother with son with qualification that parents were to have control over it "if the family circumstances became such that the money was needed for family purposes"); Buckley v. Buckley, 301 Mass. 530, 17 N.E. (2d) 887 (1938) (evidence established that wife could make withdrawals for "household and family purposes"); State Bank of Poplar Bluff v. Coleman, (Mo. App. 1951) 240 S.W. (2d) 188 (withdrawals from entireties bank account to pay family bills approved); Van Inwegen v. Van Inwegen, 4 N.J. 46, 71 A. (2d) 340 (1950) (*H* not accountable for proceeds of joint deposit used for household and family expenses); Kaufmann v. Kaufmann, 166 Pa. Super. 6, 70 A. (2d) 481 (1950) (*W* not required to account for funds withdrawn from entireties bank account and used for necessaries including rent, food, clothing and medical expenses). Cf. Earnest v. Earnest, 26 Ala. App. 260 at 262, 157 S. 885 (1934) (although gift of certificate of deposit in names of father "or" daughter established, court pointed out that "they knew she could be trusted to use it for the common good . . ."); Baker v. Cailor, 206 Ind. 440, 186 N.E. 769 (1933) (*W* allowed to reach entireties realty for support); Saylor v. Cox, 302 Ky. 631, 195 S.W. (2d) 298 (1946) (*H* not accountable for proceeds from jointly owned realty used to pay household expenses); Collier v. Benjes, 195 Md. 168, 73 A. (2d) 21 (1950) (joint checking account owned by partners charged with current expenses incurred before death of one of the partners); Brell v. Brell, 143 Md. 443, 122 A. 635 (1923) (*H* not accountable for proceeds from entireties realty used to pay living expenses); Peterson v. Swan, (Minn. 1953) 57 N.W. (2d) 842 (living expenses properly paid from joint account by *W*). But cf. Russell v. Meyers, 316 Mass. 669, 56 N.E. (2d) 604 (1944). In Ambruster v. Ambruster, 326 Mo. 51 at 72, 31 S.W. (2d) 28 (1930), the husband had invested the proceeds of a modest joint account in what became a prosperous undertaking establishment. The judge (who obviously was a married man) was inspired to make the following comment: "Taking a common sense view of the matter, if a husband and wife have a joint bank account, either or the survivor to draw, and therefrom he buys a suit of clothes or an automobile, or she a dress or some jewelry, it would seem forced and unnatural to say the purchaser becomes a trustee for the other spouse as to a joint interest in the property. An accounting of the multitude of transactions that would arise in the family relation would be complicated indeed. The very fact that each is given the separate right to draw on the account would seem equivalent to a sort of standing permission to appropriate parts of the fund from time to time, especially considering the provisions in the statute giving either party the right to terminate the drawing privilege by giving notice to the bank."

[333] The cases cited in note 332 tend in this direction. Aside from those cases where mutual agency is expressed in the language of the transfer or by express or implied agreement between the parties, experience has demonstrated a real need for legal rules which will imply or presume that husband and wife retain both separate and joint powers over jointly owned property to (1) apply the property to family needs where other funds are not available, and (2) to exercise normal managerial functions in the use, collection and preservation of the property. This subject will be treated in a subsequent paper. By way of illustration compare In re Griffith, (Del. Ch. 1953) 93 A. (2d) 920 (*H* under a duty to maintain entireties home); In re Giant Portland Cement Co., 26 Del. Ch. 32, 21 A. (2d) 697 (1941) (holding that one joint owner could not vote entireties stock); Beard v. Beard, 185 Md. 178, 44 A. (2d) 469 (1945) (in accounting for joint property *H* could not deduct joint funds expended for living expenses—at least while he was working);

used with the design that either party should have an absolute power to apply the property to his own obligations or benefit to the exclusion of the other, as was done in the *Trach* case.[334]

A possible solution for the language problem. Uncertainty and conflict distinguish the case law concerned with the refinements of language necessary to create the various joint estates in personal property. Uncertainty prevails because many states have not yet had the opportunity of construing all types of phraseology commonly employed to designate the rights of joint owners. Many precedents are confined to real estate conveyances where less tolerance toward a choice of terminology can be justified on the ground[335] that the selection is made by lawyers or persons more skilled than those responsible for a choice of words in transactions involving personalty. A negligible number of the majority of states disfavoring tenancy by the entireties actually have decided the effect of an expressed intent to create the estate. Few cases have carefully scrutinized statutes disfavoring, but permitting joint tenancy—statutes which are seething with potential literal meanings quite contrary to common understanding. Usages relating to joint ownership of personalty and falling outside the literal composition of these laws have sprung up. For example, the effect of language naming the parties as "joint" owners, providing only for "survivorship," or describing them in the alternative ("*H* or *W*") has not been challenged in the appellate courts of many jurisdictions. All of this uncertainty is an invitation to unnecessary and expensive litigation in an area where predictability would best serve the interests of that group inclined toward joint ownership—married people.

Conflict between the various states is discouraging because it can be traced to a conflict of policy toward marital joint ownership. In one group, language purporting to create joint rights is defined in an atmosphere of prejudice initiated by the wave of anti-survivorship legislation commencing in 1784[336] and spreading to almost every state. Except for this legislatively inspired bias against survivorship, it is doubtful that the married women's property laws would have

Gallagher Estate, 352 Pa. 476, 43 A. (2d) 132 (1945) (either *H* or *W* has power to act in entireties matters "provided the fruits or proceeds of such action inures to the benefit of both"); Schroeder v. Gulf Refin. Co., 300 Pa. 397 at 404, 150 A. 663 (1930) (release of tort claim for injuries to entireties property by *H* "was ineffective, for the joint estate could not thus be destroyed without the agreement of both").

334 See note 330.

335 See notes 178, 266, 269.

336 For the origin of these statutes see note 170.

been translated as eliminating tenancy by the entireties, for the married women's acts did not literally or in spirit fully dictate this result. Some of the statutes opposing the creation of joint tenancy or joint survivorship specifically include husband and wife. It is significant, however that most do not. In the other group of states, tenancy by the entireties is preferred with the result that most of the serious problems of interpretation have there been eliminated. The rule of these states is justified by usage and accepted social objectives. Both before and since 1784 joint ownership has served as a recognized institution for married people, assuring security to the surviving spouse. The widespread inclination of married people to hold their property in joint tenancy or tenancy by the entireties typifies the mutual trust and confidence which is basic to the family. Except for the oblique effect of the anti-joint tenancy legislation which may be defensible as between strangers, it is difficult to justify opposition to efforts of married persons to create joint survivorship rights in their property. As a testamentary device joint tenancy or tenancy by the entireties does no real violence to the policy of the wills act or the law requiring administration of decedents' estates. Creditors have learned to transact their business with both husband and wife upon the supposition that some or much of their property may be held jointly and will pass to the survivor. Children (with the possible exception of those by a prior marriage[337]) have long since become accustomed to the fact that ours is not a society founded upon such concepts as primogeniture and the like. Moreover, the family unit ordinarily is maintained by the surviving spouse who owes a duty of support to minor children[338] and through whom their right of inheritance normally is channelled.

The writer believes that a model statute fixing preference for joint

[337] The Hansel and Gretel story often is re-told in litigation involving a surviving step-parent and the children of his or her deceased spouse. E.g., Hill v. Havens, 242 Iowa 920, 48 N.W. (2d) 870 (1951); Scherzinger v. Scherzinger, 280 Ky. 44, 132 S.W. (2d) 537 (1939) (step-mother donee had lived with donor 38 years and borne him three children); Vesey v. Vesey, 237 Minn. 295, 54 N.W. (2d) 385 (1952) (children charged that step-mother feloniously induced *H*, who suffered with a weak heart, to commit indiscretions leading to his death). Cf. Hill v. Breeden, 53 Wyo. 125 at 131, 79 P. (2d) 482 (1934) (in view of contemplated marriage by surviving mother children "thought that they should have something out of the estate of . . . their father"). Probably the only solution to this domestic problem is competent and sympathetic legal advice directed toward the estate planning of parties contemplating such a marriage. In speaking of an antenuptial joint tenancy agreement the court in Neneman v. Rickley, 110 Neb. 446 at 451, 194 N.W. 447 (1923) pointed out, "Such a contract is in favor of marriage and, especially in the case of persons of mature years possessing property, and having children by a former marriage, tends to prevent discord and unhappiness in the marital relation."

[338] In most states minor children are neither forced heirs nor have a claim for support against the estate of their deceased parent. 30 N.C. L. REV. 417 (1952). Unlike a will

ownership with an accompanying incident of survivorship would eliminate most problems of construction where personal property is acquired by or transferred to husband and wife. Thereby the law would be brought in closer touch with the real expectations of those who most commonly take title in this manner. Because entireties is the one joint estate designed for marital ownership, it provides the most satisfactory basic pattern for such a law. In states where the estate is recognized it usually carries incidents limited by the marriage and having the tendency to perpetuate the relation. In the hope that it will provoke further constructive thought, an outline of the basic pattern such a law might take is sketched below.

1. A single transfer to, or acquisitions by husband and wife in the names of both, or in which they are described either conjunctively, disjunctively, as joint tenants, as tenants by the entireties, as joint owners, jointly, jointly and severally, not as tenants in common, with right of survivorship, or in combinations of these terms should be included within the constructional preference adopted by the statute. In this way language customarily employed to identify joint rights of husband and wife in chattels and choses in action would both be approved and defined.

2. The means should be made clear by which husband and wife can create what is recognized as a tenancy in common where such words are used. It is not unusual for the parties to acquire unequal interests in property, and when the transfer shows that such is the case tenancy in common would probably harmonize with the objectives of those concerned.

3. Most laymen are not familiar with the incidents of joint tenancy other than that the property passes to the survivor. For this reason it seems doubtful that joint tenancy as a concept for husband and wife ownership should be perpetuated except insofar as one or some of the incidents distinguishing it from entireties[339] are commanded by the transfer.

which, in some states, is revoked by the birth of a child, the right of survivorship attached to joint tenancy or entireties remains unimpaired. E.g., Mayhew v. Wilhelm, 249 Mich. 640, 229 N.W. 459 (1930) (while pregnant, wife caused realty to be transferred to herself and children by prior marriage as joint tenants—after-born child defeated).

339 The principal differences between the two estates are: Joint tenancy can be converted into tenancy in common by conduct on the part of one, while entireties, for most purposes, may be terminated only by the assent of both. Joint tenancy continues through divorce, whereas this event converts the entireties relation into a tenancy in common. In general, see Phipps, "Tenancy by Entireties," 25 TEMPLE L.Q. 24 (1951).

4. For reasons extremely technical, it is remotely conceivable that a lawyer might advise the parties to hold property as joint tenants or as tenants in common for life, with a contingent remainder or shifting use to the survivor. A purpose to do so should be tolerated only where the remainder or right of survivorship expressly is made indefeasible. Because divorce has the effect of converting entireties into a tenancy in common thus assuring the parties of separate marketable interests at a time when partition is necessary to clear the air of bad feeling, a construction favoring entireties is recommended.

5. The community property states present peculiar problems arising out of the priority accorded community ownership and in the distinction drawn between this and separate property. Where joint property is taken with community funds or where the source of the consideration cannot be proved it may be necessary in these states to invoke a preference or presumption for community ownership unless words accepted in that locale as rebutting community are chosen. To the extent that joint property is acquired with separate funds, the general rule of priority for entireties might be workable. Further investigation into the practices and motives of married persons for acquiring property in their dual names with community and separate funds may lead to other possible solutions.

6. For commercial reasons experience has demonstrated the desirability of working out a means whereby third persons doing business with but one joint owner can be assured of his authority to exercise the incidents of ownership. For this reason joint owners often are designated in the alternative, or, in the case of choses in action, either may be given a power to receive payment. Much uncertainty could be eliminated by legislation protecting obligors and third persons who deal with one of the parties holding under such a title. This device universally is used in the banking business. Its extension, for example, would benefit corporations who sometimes run into practical difficulties in paying dividends, re-issuing certificates, and in recognizing voting privileges of joint owners.[340] At the same time a rule making it clear that an alternative power in both thus to deal with the property has no effect upon the rights of the parties inter se or the duty of one to account to the other would concur with general understanding and tend to maintain harmonious relations be-

[340] Alternative ownership of stock is frowned upon by those engaged in the stock business. E.g., HANDBOOK ON TRANSFER OF SECURITIES 5 (1949) (published by A. G. Becker & Co., brokers).

tween the parties. It also should be made clear that alternative language will not serve as a deceptive legal device for defeating gift intent.

7. The belief is not uncommon that joint tenancy or tenancy by the entireties is employed as a testamentary device. This is indicated where title to personalty is taken in the name of the donor with a provision that it is to pass to the donee in the event of the former's death (e.g., "*H*, p. o. d. *W*"). A similar motive is indicated when both are named as owners with the donor, alone, retaining a power of revocation. A useful purpose would be served if the rights of the parties in these cases were clarified. As between husband and wife there seems to be no real objection to validating a right of survivorship in the donee.[341] This could be done by treating the transfer as a recognized testamentary transfer, but eliminating the requirement of administration. Accordingly, people induced by testamentary motives who are now compelled to resort to joint tenancy or tenancy by the entireties would be afforded a convenient, legitimate means for accomplishing their purpose. The effect, also, would be to supersede the dubious, so-called tentative trust.[342]

Other formalities governing the creation of joint rights in personalty as the result of gift, mutual consideration or agreement, restrictions upon the admissibility of evidence under the "dead man's" statutes and the statute of frauds, and the peculiarities of the "four unities" rule remain to be reckoned with at another time.

[341] See note 298. Special statutes in several states authorize accounts in financial institutions to be carried in the name of the depositor "payable at the death of the depositor" to a named beneficiary. Compare Iowa Code Ann. (Supp. 1953) §534.21 (beneficiary takes subject to rights of creditors—applicable to building, and federal savings and loan associations); N.J. Rev. Stat. Cum. Supp. (1950) §17:9A-217 (not to "impair the rights, if any, of creditors of the depositor"—applicable to banks); id., (1938-1948) §17:13-20 (applicable to credit unions); Utah Code Ann. (1953) §7-7-12 (building and loan associations).

[342] See note 301. Such a statute might well embrace other close relatives if adequate protection is given to creditors, the surviving spouse and minor children.