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No Survivorship from Joint Tenancy of Safe Deposit Box

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being within the provisions of the statute prohibiting implied covenants.

Assuming that it is to the advantage of the oil and gas interests in Wyoming to be assured of the status of the doctrine of implied covenants, and still have the judicial definition as to the nature of an oil and gas lease remain unchanged, the solution may be found by examination of statutory provisions of other states. Some states²⁵ have solved the problem of implied covenants by expressly providing for protection of the lessor through statutory enactment. An example of such legislation is illustrated by Arizona. It has provided an administrative remedy for the landowner in which a state commissioner is given the power to prescribe and enforce rules and regulations governing the drilling, casing, and abandonment of oil and gas wells, as well as being empowered to forfeit leases for the failure of the lessee to develop the tract within six months after the lease, if it is determined that there is oil and gas in paying quantities.²⁶ The simplest solution would be the method employed by the Michigan legislature when it realized that its statute,²⁷ reading the same as Wyoming's statute excluding implied covenants, would be a bar to implied covenants in oil and gas leases. The legislature simply amended the statute, adding the words, "except oil and gas leases," thus preserving the judicial definition of the interest created by an oil and gas lease, and availing the doctrine of implied covenants to the oil and gas lessor of that state.²⁸ In this same manner, any doubt as to the status of the implied covenant or the interest created by the oil and gas lease in Wyoming could be easily resolved.

THOMAS W. RAE

NO SURVIVORSHIP FROM JOINT TENANCY OF SAFE DEPOSIT BOX

The case of *Hartt v. Brimmer*¹ presented for the first time in Wyoming a fact situation calling for a decision of the effect of a joint tenancy of a safe deposit box upon ownership of the contents. That case involved the question of the ownership of valuable stock certificates contained in a safe deposit box. The deceased had been sole lessee of the box, and about nine months after he had made out his will, his wife became co-lessee of the box. The contract with the bank contained the following provision: "As joint tenants with right of survivorship and not as tenants in common." After the husband's death, the wife claimed to be the sole owner of the property in the box because of the survivorship clause in the contract. The executors of the estate contended that there could be no

25. Burns Annotated Ind. Stat., § 4859 (1934); Ky. Rev. Stat., § 353.040 (1948); Ariz. Rev. Code, §§ 2493, 2495 (1928).

26. See note 25, *supra*.

27. See note 14, *supra*.

28. Mich. Comp. Laws, § 565.5 (1948).

1. *Hartt v. Brimmer*, — Wyo. —, 287 P.2d 638 (1955).

joint tenancy with an accompanying right of survivorship unless the four common law unities of time, title, interest, and possession were present. The court held that the wife was a joint tenant in the deposit box but not in the contents. It did not determine the contention of the executors, and as a result, the case left two problems unresolved as to such a situation. The first is whether the four unities are necessary to create a joint tenancy in the property in the deposit box, and the second is what evidence will be conclusive to establish the joint tenancy.

In discussing these problems, it is desirable to have a general understanding of the history of joint tenancies. At common law joint tenancies were favored by the courts, but today tenancies in common are presumed.² The reason for the change stems from the fact that one of the main incidents of a joint tenancy is the right of survivorship, and this feature of survivorship does not accompany a tenancy in common. The courts believe that the survivorship has been unwittingly attached to property by the creation of joint tenancies, thereby cutting off the heirs, and to get away from what many times produces an unjust result, the courts carefully scrutinize the evidence to determine whether the parties actually intended to set up a joint tenancy.³

Keeping in mind this brief background of the attitude of the courts toward survivorship, an examination of the cases confronted with problems similar to those presented in the *Hartt* case is in order. If the deposit agreement specifically states that the contents of the box shall be joint property, the overwhelming majority of cases have permitted survivorship.⁴ In these cases the problem was whether the parties could by agreement fasten survivorship to effects kept in a safe deposit box. Some of the cases have indicated that the agreement itself is conclusive on the issue of survivorship,⁵ while other cases have sustained the joint tenancy when the facts showed nothing to rebut the agreement.⁶ However, even when the contract refers to ownership of the contents, a few cases have denied survivorship because of evidence tending to show that no survivorship was intended.⁷ In one case the joint tenancy was disallowed because a paper written by the decedent found in the box stated that the property found therein was to be distributed among three parties including the co-lessee of the box.⁸ Another case would not allow survivorship because evidence showed that the property was purchased solely by one of the parties, and

2. In re Hutchinson's Estate, 120 Ohio St. 542, 166 N.E. 687 (1929); Murray v. Gadsden, 91 U.S. App. D.C. 38, 197 F.2d 194 (1952).

3. In re Jirovec, 285 Ill. App. 499, 2 N.E.2d 354 (1936).

4. Young v. Young, 126 Cal. App. 306, 14 P.2d 580 (1932); Brown v. Navarre, 64 Ariz. 262, 169 P.2d 85 (1945); re Koester's Estate, 286 Ill. App. 113, 3 N.E.2d 102 (1936); re Gaines's Estate, 15 Cal.2d 255, 100 P.2d 1055 (1940).

5. Young v. Young, 126 Cal. App. 306, 14 P.2d 580 (1932); re Gaines's Estate, 15 Cal.2d 255, 100 P.2d 1055 (1940).

6. Brown v. Navarre, 64 Ariz. 262, 169 P.2d 85 (1946); re Koester's Estate, 286 Ill. App. 113, 3 N.E.2d 102 (1936).

7. Black v. Black, 199 Ark. 609, 135 S.W.2d 837 (1940); Clevidence v. Mercantile Home Bank & Trust Co., 355 Mo. 904, 199 S.W.2d 1 (1947).

8. Black v. Black, 199 Ark. 609, 135 S.W.2d 837 (1940).

there was no evidence to show a gift.⁹ Two conclusions can be drawn from these cases. One is that the courts were not concerned with the requirement of four unities. Even the cases that denied survivorship, did so on the basis of evidence rebutting the agreement rather than a lack of the four unities. Another conclusion is that although an agreement referring to the contents may not always be conclusive, it is very good evidence to create a right of survivorship. It should also be pointed out that the court in the *Hartt* case approved the rule that a joint tenancy in contents could be created by express agreement.¹⁰

When the leasing agreement does not specifically refer to the ownership of the property in the box, the cases seem to be in hopeless conflict concerning the evidence the courts consider in determining whether there is a right of survivorship. The clear majority of courts construe the agreement to mean only that the parties jointly leased the box, and the leasing agreement has no effect on the contents.¹¹ In many of the cases, shared use of the box did not play a very important role.¹² Apparently joint tenancy in the box is just a factor to show unity of possession, when the four unities are required in a particular jurisdiction. Courts in denying survivorship pay attention to failure to prove delivery when ownership is based on a gift theory.¹³ Other cases have held that physical delivery to the donee, and the subsequent placing of the contents in the deposit box by the donee was sufficient to satisfy the requirement of delivery.¹⁴ This problem of delivery has never been adequately solved by the courts. The deposit of contents in a place as available to the donor as to the donee is at least as consistent with non-delivery as with delivery. At least one court refused survivorship because the donor still had a key to the deposit box.¹⁵ However, in other cases the fact that the donor had a key did not upset the gift.¹⁶ To be absolutely safe, one donor gave both keys to the donee.¹⁷

The declarations of decedent concerning his intent in placing contents in a safe deposit box are important considerations, but usually not con-

9. *Clevidence v. Mercantile Home Bank & Trust Co.*, 355 Mo. 904, 199 S.W.2d 1 (1947).
10. *Hartt v. Brimmer*, _____ Wyo. _____, 287 P.2d 638 (1955).
11. *In re Bauernschmidt's Estate*, 97 Md. 35, 54 Atl. 637 (1903); *re Brown*, 86 Misc. 187, 149 N.Y.S. 138 (1914); *Wohleber's Estate*, 320 Pa. 83, 181 Atl. 479 (1935); *Millman v. Streeter*, 66 R.I. 341, 19 A.2d 254 (1941); *Richard v. Richard*, 141 N.J. Eq. 579, 58 A.2d 544 (1948); *In re Dean's Estate*, 68 Cal. App.2d 186, 155 P.2d 901 (1945).
12. *Trautz v. Lemp*, 329 Mo. 580, 46 S.W.2d 135 (1932); *re Wilson's Estate*, 404 Ill. 207, 88 N.E.2d 662 (1949); *In re Squibb's Estate*, 95 Misc. 475, 160 N.Y.S. 826 (1916).
13. *Trautz v. Lemp*, 329 Mo. 580, 46 S.W.2d 135 (1932); *Bolles v. Toledo Trust Co.*, 132 Ohio St. 21, 4 N.E.2d 917 (1936); *Taylor v. Taylor*, 292 Mich. 95, 290 N.W. 341 (1940).
14. *Beaumont v. Beaumont*, C.A.3d N.J., 152 F. 55 (1907); *Wakefield v. Wakefield*, 37 Cal. App.2d 648, 99 P.2d 1105 (1940).
15. *In re Bauernschmidt's Estate*, 97 Md. 35, 54 Atl. 637 (1903).
16. *Reeves v. Lyon*, 224 Iowa 659, 277 N.W. 749 (1938); *Beaumont v. Beaumont*, C.A.3d N.J., 152 F. 55 (1907).
17. *Graham v. Barnes*, 259 Mass. 534, 156 N.E. 865 (1927).

trolling.¹⁸ However, one case did allow survivorship seemingly based entirely on a statement of deceased that his wife was to have the property in the event of his death.¹⁹ A few courts will not admit declarations of the deceased,²⁰ but from the type of evidence considered in the safe deposit box cases, it is clear that parol evidence is generally admissible to show the intention of the parties. Apparently the parol evidence rule presents no problem in Wyoming, for oral evidence was admitted in the *Hartt* case to determine intention.²¹

Actually a prime consideration seems to be the specific items of property in the deposit box. When the contents consist of money, the courts are reluctant to allow survivorship, even when statements written by the decedents found in the boxes indicate that the money belongs to the survivors.²² Indicia of ownership and change of ownership, such as the registration of stocks and bonds and their indorsement in blank have a great effect. Where bearer bonds are involved,²³ or where the bonds are purchased by the deceased solely in his name,²⁴ survivorship is usually denied. If the donor reserves the income from bonds, this is not inconsistent with a gift, and if the donee receives the income, it gives strength to his claim.²⁵ The courts are more disposed to allow survivorship in registered bonds, when the bonds are payable in the alternative.²⁶ This attitude is in line with the majority rule concerning United States bonds, which sustains survivorship when the bonds are registered in the names of two individuals in the alternative.²⁷ The fact that the bonds are purchased solely with the funds of the deceased co-owner does not affect the right of the surviving co-owner to sole ownership.²⁸

Conflicting holdings have been the rule when stock certificates have been the *res* in the deposit box. If the certificates are in the name of only the deceased, survivorship is usually denied.²⁹ However, if the certificates are in an envelope with the survivor's name on it, many courts permit survivorship even though only the deceased's name appears on the certificate itself.³⁰ In the *Hartt* case survivorship was denied partly because the

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18. *Gilkinson v. Third Ave. R. Co.*, 47 App. Div. 472, 63 N.Y.S. 792 (1900); *Albrecht v. Slater*, 289 Mo. 352, 233 S.W. 8 (1921).
 19. *Lilly v. Schmock*, 297 Mich. 513, 298 N.W. 116 (1941).
 20. *California Trust Co. v. Bennett*, 33 Cal.2d 694, 204 P.2d 324 (1949).
 21. *Hartt v. Brimmer*, _____ Wyo. _____, 287 P.2d 638 (1955).
 22. *Taylor v. Taylor*, 292 Mich. 95, 290 N.W. 341 (1940); re *Wilson's Estate*, 404 Ill. 207, 88 N.E.2d 662 (1949); re *Bashford's Estate*, 178 Misc. 648, 34 N.Y.S.2d 678 (1942).
 23. Re *Wilson's Estate*, 404 Ill. 207, 88 N.E.2d 662 (1949); re *Brown*, 86 Misc. 187, 149 N.Y.S. 138 (1914).
 24. *Wohleber's Estate*, 320 Pa. 83, 181 Atl. 479 (1935); *Clevidence v. Mercantile Home Bank & Trust Co.*, 355 Mo. 904, 199 S.W.2d 1 (1947).
 25. *Beaumont v. Beaumont*, C.A.3d N.J., 152 F. 55 (1907).
 26. *Reeves v. Lyon*, 224 Iowa 659, 277 N.W. 749 (1938); re *Wilson's Estate*, 404 Ill. 207, 88 N.E.2d 662 (1949); *Stephens v. First National Bank of Nevada*, 65 Nev. 352, 196 P.2d 756 (1948).
 27. *Lee v. Anderson*, 70 Ariz. 208, 218 P.2d 732 (1950); *Lemon v. Foulston*, 169 Kan. 372, 219 P.2d 388 (1950).
 28. *Lemon v. Foulston*, 169 Kan. 372, 219 P.2d 388 (1950).
 29. In re *Bauernschmidt's Estate*, 97 Md. 35, 54 Atl. 637 (1903); *Bolles v. Toledo Trust Co.*, 132 Ohio St. 21, 4 N.E.2d 917 (1936).
 30. *Wakefield v. Wakefield*, 37 Cal. App.2d 648, 99 P.2d 1105 (1940).

certificates were solely in deceased's name.³¹ The court reasoned that if a joint tenancy were intended, the deceased could easily have indorsed the certificates. Survivorship has been allowed when indicia of ownership is clearly shown by making out the certificates in the names of two individuals as joint tenants.³² However, in one case the deceased continued to vote the stock by himself, and on this ground survivorship was not allowed.³³

Concerning the four unities, most of the cases sustaining survivorship did so even though one or more of the unities were lacking.³⁴ It is apparent that when survivorship is based on a joint tenancy created by a gift of a partial interest, the requirement of four unities cannot be met. Even in the cases denying survivorship, lack of the unities was not the basis for the holdings.³⁵ In one case an attempted transfer of stock originally owned by one of the parties into a joint tenancy was disallowed, because the property lacked the unities of time and title.³⁶ The court suggested that the stock should have been transferred to a straw-man and then back to the parties in joint tenancy. To satisfy the requirements of unity, one owner of stock surrendered his certificates and had new ones issued to him and his wife as joint tenants.³⁷ It might be well to note that a Wyoming case involving a joint bank account permitted survivorship although the unities apparently were not present.³⁸ However, the question of whether the four unities are required was not an issue in the case.

It was not the purpose of this article to devise any clearcut method of creating a right of survivorship in the contents of a safe deposit box. However, from the cases a few general observations can be made, which may help to avoid some of the various pitfalls connected with the problem of survivorship. In constructing the deposit box agreement, a reference should be made to the effect that the contents are held in joint tenancy. This is particularly important if the box contains money or chattels. If the property consists of stocks or bonds, the certificates should specify that the parties hold as joint tenants. This appears to be almost conclusive evidence of survivorship. When survivorship is based on a gift theory, physical delivery to the donee is suggested. Possession of all keys by the donee is desirable, if the circumstances will permit. Conveyance of the articles to a straw-man and reconveyance to the parties is advisable to satisfy the unities requirement. If the suggestions mentioned which apply to a given situation are followed, the probabilities are that a right of survivorship will be upheld.

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31. *Hartt v. Brimmer*, _____ Wyo. _____, 287 P.2d 638 (1955).

32. *Manning v. United States National Bank*, 174 Ore. 118, 148 P.2d 255 (1944).

33. *Trautz v. Lemp*, 329 Mo. 580, 46 S.W.2d 135 (1932).

34. *Lilly v. Schmock*, 297 Mich. 513, 298 N.W. 116 (1941); *Wakefield v. Wakefield*, 37 Cal. App.2d 648, 99 P.2d 1105 (1940); *Young v. Young*, 126 Cal. App. 306, 14 P.2d 580 (1932); *Brown v. Navarre*, 64 Ariz. 262, 169 P.2d 85 (1946).

35. *Millman v. Streeter*, 66 R.I. 341, 19 A.2d 254 (1941); *Richard v. Richard*, 141 N.J. Eq. 579, 58 A.2d 544 (1948).

36. *Strout v. Burgess*, 33 Me. 241, 68 A.2d 241 (1949).

37. *Manning v. United States National Bank*, 174 Ore. 118, 148 P.2d 255 (1944).

38. *In re Jansen's Estate*, _____ Wyo. _____, 284 P.2d 1086 (1955).