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landowners would also discourage the practice in some cases of allowing the taxes to run on land that is not likely to be sold for lack of buyers at the tax sale, in the hope of a settlement at a later time, through a consent foreclosure proceeding, for a smaller amount than the taxes due. If the lien were placed on the owner, as well as on the land, the loss through this process to the state might be lessened. The threat of a personal action for the payment of the unpaid real estate taxes should increase the number that are paid, especially on vacant land in undeveloped areas, the principal class of land on which it has been found profitable in some instances to allow the taxes to accrue.

While the use of the personal method of the enforcement of a tax claim will hardly end all nonpayment of taxes, it may possibly act as some deterrent to the most flagrant violators of the tax law, those who look at it as a speculation, hoping to, in effect, discount their property tax by allowing it to accrue, and by means of a friendly foreclosure proceeding, aided by the highly technical process to obtain a merchantable title to land without the consent of the former owner, reduce the amount of tax they pay. The in personam method of enforcement may be of some aid in acting as a deterrent to this.

ADMISSIBILITY OF PAROL EVIDENCE TO SHOW NON-DONATIVE INTENT IN JOINT BANK ACCOUNTS

The problem of admissibility of parol evidence has been discussed by many courts in the past with seemingly basic disagreements in regard to the special situation where the evidence is submitted to dispute the existence of a joint bank account.

The factual situation prevalent in most of these instances has one depositor, called a donor, supplying the funds and executing a joint bank account with another, called a donee-survivor. Both parties sign an agreement appearing on a signature card at the time of opening the account whereby they agree with the bank that either party or the survivor is entitled to draw funds from the account with the account being the joint property of the two depositors, and finally, the sole property of the survivor upon the death of one of the joint owners. There is no dispute when the donor-depositor is the survivor, since the funds were originally his, but a dispute often arises between the donee-survivor and the executor of the donor's estate upon the death of the donor-depositor as to whether the intent was to open up a joint account with survivorship rights, or whether the intent was for some other reason, such as convenience.

The disagreement among the states, therefore, takes the form of whether parol evidence may be allowed to show this other intention or whether the agreement on the signature card is conclusive evidence of the inten-

tion to create a survivorship relationship in the joint account. This disagreement is based in some instances upon differences in the form of the agreement signed by the parties,[1] in others upon interpretation of statutes relating to the situation,[2] and in still others upon judicial pronouncement of that state's common law.[3]

The greatest disagreement, however, appears to be in the District of Columbia[4] and Illinois[5] where the courts have reversed themselves in a period of only a few years, finally allowing such evidentiary material to be submitted as an exception to the parol evidence rule. This reversal is even more noteworthy in Illinois since the same jurist has written both contradictory opinions.

In some instances, the form of the agreement upon the signature card is different than in others, such difference in form sometimes being the controlling factor in the court's decision as to the admissibility of parol evidence of intention contrary to the presumed intention from the agreement itself. However, in two jurisdictions, New York (before their Banking Act)[6] and New Jersey,[7] where the form of the agreement was of the "special type" (an agreement each with the other and with the bank), parol evidence was allowed by the courts to attempt to disturb the presumption of joint tenancy in the bank account. Another jurisdiction where a dispute arose over admissibility of parol evidence to dispute a contract of this type was Pennsylvania, where it was held in a recent decision,[8] that since the contractual agreement was of the "special form," it was conclusive of the intent of the parties, and no parol evidence could be admitted to dispute it.

The "usual form" of the agreements used on the signature cards (the account to be theirs in joint tenancy, subject to the order of either or the

[1] Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W. 2d 817 (1950); In re Furjanick's Estate, 375 Pa. 484, 100 A. 2d 85 (1953).

[2] Esling v. City Nat'l Bank and Trust Co., 278 Mich. 571, 270 N.W. 791 (1936); Ambruster v. Ambruster, 326 Mo. 51, 31 S.W. 2d 28 (1930); Marrow v. Moskowitz, 255 N.Y. 219, 174 N.E. 460 (1931); Jorgenson v. Dahlstrom, 53 Cal. App. 2d 322, 127 P. 2d 551 (1942).

[3] Murray v. Gadsden, 197 F. 2d 194 (App. D.C., 1952); Matthew v. Moncrief, 135 F. 2d 645 (App. D.C., 1943); In re Murdoch's Estate, 238 Iowa 898, 29 N.W. 2d 177 (1947); In re Schneider's Estate, 2 Ill. App. 2d 560, 120 N.E. 2d 353 (1954); Cuilini v. Northern Trust Co., 335 Ill. App. 86, 80 N.E. 2d 275 (1948).

[4] Murray v. Gadsden, 197 F. 2d 194 (App. D.C., 1952); Matthew v. Moncrief, 135 F. 2d 645 (App. D.C., 1943). See also Harrington v. Emmerman, 186 F. 2d 757 (App. D.C., 1950).

[5] In re Schneider's Estate, 2 Ill. App. 2d 560, 120 N.E. 2d 353 (1954); Cuilini v. Northern Trust Co., 335 Ill. App. 86, 80 N.E. 2d 275 (1948).

[6] In re Reynolds' Estate, 97 N.Y. Misc. 555, 163 N.Y. Supp. 812 (Surr. Ct., 1916).

[7] Kelly v. Kelly, 135 N.J. Eq. 75, 37 A. 2d 288 (1944).

[8] In re Furjanick's Estate, 375 Pa. 484, 100 A. 2d 85 (1953).

survivor) makes no express mention of any agreement between the parties themselves, the contractual agreement being between the two parties and the bank. This is the form of the signature card agreements which the courts in the various jurisdictions interpreted in deriving their conclusions as to the admissibility of parol evidence to disrupt the presumption of joint tenancy.

The decision in the case of *Matthew v. Moncrief*[9] was a pronouncement of the law expounded by the late Chief Justice Vinson when he was an Associate Justice of the United States Court of Appeals for the District of Columbia. In this case, Justice Vinson made a nationwide analysis of the law on the question and arrived at what he considered a logical conclusion in denying the admissibility of parol evidence. In a unanimous opinion, it was held by the court that the signature card agreement was on its face conclusive evidence that the donor-depositor intended a joint account with survivorship rights, and although parol evidence was available to the effect that the donee-survivor understood that the intent of the donor was a joint account for convenience only, such evidence was inadmissible. The court here was of the opinion that since the contract was in itself conclusive and complete on its face, no parol evidence could be admitted to change the intent expressed by the contract—this because of the parol evidence rule, which allows such evidence only in cases of fraud, undue influence, or mistake.

This decision was overruled nine years later by the same court in the case of *Murray v. Gadsden*,[10] where the court held unanimously that parol evidence was admissible to show an intent contrary to that presumed from the agreements on the signature cards. The court here stated:

> This is a salutary exception to the parol evidence rule, because a court of equity should not permit the rule to defeat the admitted, or clearly proved intention of the parties. It should be remembered too that a writing which is called a contract is merely a memorial of the parties' agreement. It is simply evidence of the agreement and, if it be clear that it does not accurately reflect what the parties had agreed upon, monstrous injustice would be done by forcing upon them a contract which they had not actually made. . . . This exception to the parol evidence rule . . . permits inquiry into the real purpose of the parties . . . and amendment of the writing to accomplish that purpose.[11]

The court concluded in very concise terms that when an allegation of contrary intent is made, parol evidence is admissible to show that the intent of the signers was contrary to the presumption arising from the agreement. If a variance of intent was found, the court could reform the written agreement to express the actual intention of the parties. This court expressly overruled the prior *Matthew* case, stating that this exception to

[9] 135 F. 2d 645 (App. D.C., 1943).

[10] 197 F. 2d 194 (App. D.C., 1952).

[11] Ibid., at 201.

the parol evidence rule was apparently overlooked and should have been recognized and applied. We find, therefore, that the present law of the District of Columbia allows parol evidence to rebut the presumption of a joint tenancy bank account with right of survivorship.

The situation in Illinois is quite comparable to that in the District of Columbia since the case of *Cuilini v. Northern Trust Co.*[12] was decided on the basis of the agreements on the signature cards being a conclusive, irrebuttable contract of joint tenancy and survivorship between the parties, and the recent case of *In re Schneider's Estate*,[13] which overruled the *Cuilini* case, was decided upon the same logical analysis as the *Murray* case. The court in the *Cuilini* case follows the strict parol evidence rule to the effect that where the writing is unambiguous on its face and definitely sets up a joint tenancy situation with survivorship rights, no parol evidence will be admissible to show that a contrary result was intended unless, of course, fraud, undue influence, or mistake is alleged. Justice Lewe appeared quite satisfied with the results of the exhaustive review of the decisions made by Justice Vinson in the *Matthew* case, and concludes that the *Cuilini* case is another restatement of the weight of authority. The parol evidence offered in this case was that of the donee-survivor who was called as an adverse witness and testified to the fact that the intention of the donor-depositor was to open a joint account for convenience, and not one with present and survivorship rights in the two parties. These facts are quite similar to those in the *Matthew* case where the survivor also knew that there was no intention that she should eventually become the sole owner of the funds in the joint account, but due to the inadmissibility of the parol evidence showing this, she was "forced" to accept same.

Justice Lewe, in the *Schneider* case, apparently became impressed with the more equitable view of the situation as expounded in the *Murray* case, and in the court's decision accepted the reasoning of that case and stated that the law in Illinois was now to the effect that in situations of this type where a donor-depositor opens a joint banking account with a donee-survivor, the agreement signed by the parties on the signature card is no longer conclusive evidence of the intent. The admissibility of parol evidence protects the equitable rights of the parties and removes the injustice which would be present if the contrary decision were upheld. The court also likens the strict contract theory, which it rejects, to the significance of the written word at early common law, and states:

> . . . if the formal word was given, a party was bound, however unrighteous the circumstances may have been under which he gave it.[14]

[12] 335 Ill. App. 86, 80 N.E. 2d 275 (1948).

[13] 2 Ill. App. 2d 560, 120 N.E. 2d 353 (1954). [14] Ibid., at 566 and 356.

Four states have enacted legislation on this question with slightly different results appearing therefrom in judicial interpretation.[15] The New York statute,[16] upon which the other statutes were apparently based, is limited to joint savings accounts and is silent in regard to other forms of joint banking accounts, while the statutes enacted by the other states apply to all joint banking accounts. New York court decisions are, however, in line with the *Murray* and *Schneider* cases in their results when the bank account was other than a savings account.[17] These courts treat the signed agreements on the signature cards as rebuttable presumptions of intent to execute a joint account with survivorship rights, and parol evidence is admitted to rebut the presumption.

The court in the case of *Marrow v. Moskowitz*[18] interprets the New York statute on joint savings accounts in the same manner that the California courts interpreted the California Statute.[19] The interpretations are to the effect that where both parties to the joint bank account agreement are alive, the presumption of intent to institute a joint tenancy with rights of survivorship can be rebutted by parol evidence. However, where the donor-depositor has died, the prior rebuttable presumption becomes conclusive, and no parol evidence will be admitted to disturb the survivor's resulting ownership of the money remaining in the account except for the allowable grounds, under the parol evidence rule, of fraud, duress, or mistake.[20]

A California Appellate Court discussed the situation from a very specialized aspect in the case of *Jarkieh v. Badagliacco*.[21] The donor-depositor had died and the executor of the donor's estate alleged a trust. The court recognized that the joint account agreement was conclusive when one party had died, but allowed parol evidence to establish the trust. Their opinion was to the effect that the conclusive presumption of legal title vesting in the survivor would not be disturbed if a trust were proved. The establishment of the trust by parol evidence would still leave the legal title vested in the survivor, but such legal title would be held in trust for the use of another.

The Missouri Statute[22] was interpreted by the court in the case of

[15] California, Michigan, Missouri and New York.

[16] N.Y. Banking Law (McKinney, 1950) §§ 134, subd. 3, 394, subd. 1.

[17] In re Dreschler's Estate, 282 App. Div. 4, 121 N.Y.S. 2d 128 (1953); In re Golden's Estate, 129 N.Y.S. 2d 855 (Surr. Ct., 1954); In re Fisher's Will, 183 N.Y. Misc. 792, 50 N.Y.S. 2d 894 (Surr. Ct., 1944).

[18] 255 N.Y. 219, 174 N.E. 460 (1931).

[19] California Banking Code (Deering, 1949) § 852.

[20] Paterson v. Comastri, 39 Cal. 2d 66, 244 P. 2d 902 (1952); Jorgenson v. Dahlstrom, 53 Cal. App. 2d 322, 127 P. 2d 551 (1942).

[21] 75 Cal. App. 2d 505, 170 P. 2d 994 (1946).

[22] Mo. Rev. Stat. (1949) § 363.740.

Ambruster v. Ambruster[23] to mean that parol evidence would be admissible to rebut the presumption of a joint tenancy with survivorship rights. This was reiterated by the court in the case of *Commerce Trust Co. v. Watts*[24] by way of dicta. The agreement in the *Watts* case was of the "special form" and no parol evidence was allowed, but the court indicated that where the agreement was not so explicit, parol evidence would be allowed to rebut the presumption.

The Michigan Statute expressly states that signing such an agreement on the signature cards is prima facie evidence of the joint tenancy and survivorship thereby allowing parol evidence to show a contrary intent.[25] The Michigan court has so held in the case of *Esling v. City Nat'l Bank and Trust Co.*[26]

The states of Arizona and Iowa appear to be the only jurisdictions remaining in the United States where the agreement signed on the signature card is considered an absolute contract, and no parol evidence is admissible except where fraud, duress, or mistake is alleged. This point of view was succinctly set forth in the case of *In re Murdoch's Estate*[27] where the Iowa court stated:

> We view the present writings, so-called signature cards in the same light: Under our rules of construction, in the absence of a plea of fraud, duress, or mistake, we are bound by the plain and expressed terms of the agreement. Extrinsic evidence tending to change this expressed intent, is not competent.[28]

Two later cases Iowa reaffirm this view.[29] The court in the case of *Hill v. Havens*[30] explained that while the two previous decisions arose from actions at law, and the one directly in question arose from an action in equity, since equity follows the law, the resulting decision is the same. The Arizona court held quite similarly in the case of *Sheridan v. Kleeman.*[31]

The Utah Supreme Court in a series of cases before it, has come to a conclusion quite similar to that arrived at by the California and New York courts. The Utah courts hold that where the donor-depositor has died, the presumption of joint tenancy with survivorship rights is conclusive and no parol evidence is admissible. However, during the lifetimes of

[23] 326 Mo. 51, 31 S.W. 2d 28 (1930).

[24] 360 Mo. 971, 231 S.W. 2d 817 (1950).

[25] Mich. L. (1948) § 487.703.

[26] 278 Mich. 571, 270 N.W. 791 (1936).

[27] 238 Iowa 898, 29 N.W. 2d 177 (1947).

[28] Ibid., at 903 and 179.

[29] Hill v. Havens, 242 Iowa 920, 48 N.W. 2d 870 (1951); McManis v. Keokuk Sav. Bank and Trust Co., 239 Iowa 1105, 33 N.W. 2d 410 (1948).

[30] 242 Iowa 920, 48 N.W. 2d 870 (1951).

[31] 75 Ariz. 319, 256 P. 2d 558 (1953).

both depositors, such parol evidence, as well as any other clear and convincing evidence, could be used to overcome the presumption.[32]

The courts of New Jersey have held for many years that signed agreements appearing on signature cards merely indicate that a joint account had been opened in the names of the two parties.[33] The agreements also raised the rebuttable presumption that a joint tenancy with survivorship had been intended by the parties. These courts, therefore, held that parol evidence was admissible at any time to overcome the presumption. This view has also been held by courts in Delaware,[34] Massachusetts,[35] Ohio,[36] Oregon,[37] and Pennsylvania,[38] with the Supreme Judicial Court of Massachusetts perhaps giving the best analysis of the reasons for their stand in the case of *Ball v. Forbes*.[39] The court stated:

> It is settled that while the contract of deposit is conclusive as between the parties and the bank, and that the contract with the bank takes the place of delivery ordinarily required, and that a present gift could thus be made if that result was intended even though the deceased retained control of the books evidencing the deposits, nevertheless, as between the survivor and the representative of the estate of the deceased, it is still open to the latter to show by attendant facts and circumstances that the deceased did not intend to make a present gift of a joint interest in the account, and that the mere form of the deposit does not settle the matter.[40]

Thus it is seen that a majority of the courts ruling on this situation have adopted the more reasonable view allowing the introduction of parol evidence to ascertain the intent of the parties. This seems to be the more logical holding, for it is quite difficult to comprehend how a court can decide the intention of the involved parties one way, when one of the litigants, the donee-survivor, is able to testify to the contrary. It seems rather unusual to realize that given a certain set of facts, money may be forced on an individual when he readily admits he is not entitled to receive it, but, as we have seen by the *Matthew* and *Cuilini* cases, such a situation can arise in the few jurisdictions disallowing the introduction of parol

[32] Greener v. Greener, 116 Utah 571, 212 P. 2d 194 (1949); Neill v. Royce, 101 Utah 181, 120 P. 2d 327 (1941); Holt v. Bayles, 85 Utah 364, 39 P. 2d 715 (1934).

[33] Lester v. Guenther, 134 N.J. Eq. 53, 33 A. 2d 815 (1943); Trenton Sav. Fund Soc. v. Byrnes, 110 N.J. Eq. 617, 160 Atl. 831 (1932); Kaufman v. Edwards, 92 N.J. Eq. 554, 113 Atl. 598 (1921); Link v. Link, 3 N.J. Super. 295, 65 A. 2d 89 (1949).

[34] Rauhut v. Reinhart, 22 Del. Ch. 431, 180 Atl. 913 (Orphans Ct., 1935).

[35] Drain v. Brookline Sav. Bank, 327 Mass. 435, 99 N.E. 2d 160 (1951); Ball v. Forbes, 314 Mass. 200, 49 N.E. 2d 898 (1943).

[36] Steiner v. Fecycz, 72 Ohio App. 18, 50 N.E. 2d 617 (1942).

[37] State v. Gralewski's Estate, 176 Ore. 448, 159 P. 2d 211 (1945); Holbrook v. Hendrick's Estate, 175 Ore. 159, 152 P. 2d 573 (1944).

[38] Dempsey v. First Nat'l Bank of Scranton, 359 Pa. 177, 58 A. 2d 14 (1948); Glessner v. Security-Peoples Trust Co., 156 Pa. Super. 56, 39 A. 2d 165 (1944).

[39] 314 Mass. 200, 49 N.E. 2d 898 (1943). [40] Ibid., at 202 and 900.

evidence. As has been stated before, the trend seems to be towards allowing such evidence, and it would seem that eventually the remaining courts which have not as yet ruled on this question should have no trouble when such a question arises, as the rule herein advocated seems clearly to be the more rational view.

CHARITABLE INSTITUTIONS–IMMUNITY FROM TORT LIABILITY

American courts seem to be drawing further and further away from the idea that charitable institutions should not be held liable in tort actions.

Ever since 1871, when the idea that a charitable institution might be immune from liability for its torts was first introduced into our system of laws, this concept has created such a divergence of legal opinion that it would seem to be almost irreconcilable as a basic legal concept.

The theory is simply that these institutions, such as hospitals, churches, YMCA's, universities and the like, because they exist mainly on donated trust funds and supposedly are not interested in making a profit, should be exempt from the application of general tort rules which otherwise would be applied.

HISTORICAL FALLACY

A brief glance at the history of the immunity doctrine will show that possibly with a little more research on the part of our early American jurists, the doctrine might never have appeared at all in the United States.

The doctrine declaring charitable institutions[1] immune from tort liability was first declared in this country in *McDonald v. Massachusetts General Hospital*,[2] where in sole reliance upon the English case of *Holliday v. St. Leonard*[3] the court held that the funds of a charitable hospital could not be diminished by a charity patient's claim for damage resulting in unskilled treatment by the house surgeon, if due care had been exercised in selecting the surgeon. Nine years later, in 1885, in *Perry v. House of Refuge*,[4] again solely on the strength of a second early English case[5] the

[1] The majority of the cases herein discussed involve the tort liability of charitable or non-governmental corporations as distinguished from governmental charities. Cases involving the tort liability of the trustee of an unincorporated charitable trust have been included in so far as they present questions peculiar to the liability of the trust as distinguished from the liability of the trustee as an individual.

[2] 120 Mass. 432, 21 Am. Rep. 529 (1876).

[3] 11 C.B. N.S. 192, 123 E.R. 169 (1861). This case involved an action against the vestry of a parish. The court said this was a public body, clothed with a public trust, and refused to sustain an action for injury caused by a defect in a highway under its control.

[4] 63 Md. 20, 52 Am. Rep. 495 (1885).

[5] The decision was based on the case of Heriots Hospital v. Ross, 12 Clark & F. 507, 8 E.R. 1508 (1846), involving an action for wrongful exclusion from the benefits of the defendant charity, and not for personal injury inflicted in its operation.