CHAPTER 14

Survivorship Devices

1. JOINT TENANCY IN REALTY

In the few cases involving this arrangement, the transfer was sustained.[1] In these cases the equities favored the transferee. In *Hoeffner* v. *Hoeffner*,[2] for instance, there were factors militating against the widow as well as points in favor of the surviving joint tenant. At the time the spouses were divorced, the wife had received a substantial sum from her husband. After the divorce, the husband sold an apartment building, taking back a purchase money mortgage. The couple again married each other. Subsequently, the mortgage was foreclosed, with the deed being made out to the husband and his daughter as joint tenants. In sustaining this transfer against the widow's claim, the court stressed the fact that the transferee (the daughter) had furnished the money with which the husband had originally purchased the property. Likewise, in *Schmidt* v. *Rebhann* [3] the equities appeared to be against the claimant, in this case a widower. He had separated from the decedent after a year of marriage and had not attempted a reconciliation for the more than nine years that preceded her death. The transferee was a woman friend who had cared for and performed services for the decedent.

Survivorship devices such as joint tenancy are in great general use. Creation of a joint tenancy with right of sur-

[1] *But see* Mottershead v. Lamson, 101 N.Y.S.2d 174, 176 (Sup. Ct. 1950). Here the court held that the surviving husband had stated a cause of action to have the wife's transfer of her realty into joint tenancy set aside as illusory "since, by the joint tenancy created, the decedent had an undivided half interest in the premises which could be alienated, together with a potential right to the entire estate. . . ." See also the cases concerning partnership interests, *infra,* pp. 231–235.

[2] 389 Ill. 253, 59 N.E.2d 684 (1945).

[3] 108 N.Y.S.2d 441 (Sup. Ct. 1951), 117 N.Y.S.2d 840 (1952).

vivorship is still possible in most states; [4] and there are indications that such an arrangement has mushroomed in popularity [5] in recent years, especially in its personal property manifestations.[6] One great advantage of joint tenancy, for example, is that the property concerned passes to the surviving tenant free of the requirements of probate and administration.

Policy-wise, however, the popularity of this device for "nonevasive" purposes should not excuse its occasional use as a weapon for evasion of the widow's share. The "reliance interest" of the surviving tenant is normally insufficient to preclude application of our statutory formula. The donee does not obtain the decedent's interest until the decedent's death; and the donee may predecease the decedent, with the entire interest accruing to the decedent. This uncertainty as to the potential "double or nothing" interest of the donee tends to discourage improvements and sales by the donee in the lifetime of the decedent.

Under our statutory formula the surviving tenant would be

[4] Joint tenancy has not always been popular. The early common law favored it "because the divisible services issuing from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied, by joint tenancy, as they must necessarily be upon a tenancy in common." (2 Bl. Comm. *193). With the passing of feudalism joint tenancy fell into disfavor. The hardship to heirs and creditors of the joint tenant engendered a presumption of tenancy in common. Most American states adopted a presumption against the *jus accrescendi,* the right of survivorship; and some state legislatures abolished joint tenancies. See in general, Atkinson, WILLS 164–72 (2d ed. 1953).

[5] But joint tenancy is no longer regarded with starry-eyed approval in estate planning. It does not necessarily decrease death duties or post-mortem publicity. Basye, "Joint Tenancy, a Reappraisal," 30 CALIF. S. B. J. 504 (1955); Knecht, "Joint Ownership Reappraised," 88 TRUSTS & ESTATES 416 (1949); Marshall, "Joint Tenancy, Taxwise and Otherwise," 40 CALIF. L. REV. 501 (1952); Rudick, "Federal Tax Problems Relating to Property Owned in Joint Tenancy and Tenancy by the Entireties," 4 TAX L. REV. 3 (1948).

[6] Stephenson, "Joint ownership of property" (Study No. 7, Third series—Studies in Trust Business), 25 TRUST BULL. 25 (1945). See discussion, *supra,* pp. 16–17. *Cf. Report of the Committee on Community Property and Jointly Held Titles to Real Property,* 1952 Proceedings of the American Bar Association Section of Real Property, Probate and Trust Law, p. 40.

liable for contribution up to the value of the entire property.[7] The donee's contribution would, of course, first be gauged on the value of the property passing by survivorship; then, if that proves insufficient, on the value of the entire property. Where land was purchased jointly by the decedent and the surviving tenant, the widow's claim would be restricted to the amount of property attributable to the consideration paid by the decedent spouse.[8]

2. Joint Bank Accounts

The failure of the American courts and legislatures to develop a coordinated approach to the evasion problem is clearly apparent from the cases dealing with joint bank accounts. The joint bank account, like the Totten trust, is a "poor man's will"; [9] yet it has proved well-nigh invulnerable to attack by the poor man's widow.

Most states have legislation authorizing transmission of funds, free of probate and administration, by means of a joint bank deposit with appropriate words of survivorship.[10] Ab-

[7] A statute that merely affects revocable transfers would restrict the widow's claim to the decedent's interest in the property. In Longacre v. Hornblower & Weeks, 83 D.&C. 259 (Pa. 1952) the 1947 statute Pa. Stat. Ann. tit. 20, §301.11 (1950) discussed *supra,* p. 138, was held applicable to a joint tenancy established by the husband even though no power of revocation was formally reserved. The court said that such power inheres at common law; and the widow was held entitled to treat the joint tenancy as testamentary to the extent of one half thereof.

[8] The widow's claim catches only voluntary transfers. See Suggested Model Decedent's Family Maintenance Statute §1(d), *infra,* Chap. 22.

[9] On the substantive law aspects, see Havighurst, "Gifts of Bank Deposits," 14 N. C. L. Rev. 129 (1935); Katzenstein, "Joint Savings Bank Accounts in Maryland," 3 Md. L. Rev. 109 (1939); Kepner, "Joint and Survivorship Bank Account," 41 Calif. L. Rev. 596 (1954); Rutledge, "Joint Tenancy in Washington Bank Accounts," 26 Wash. L. Rev. 116–24 (1951); Slater, "Joint Accounts and Trusts Created by Bank Deposits," 2 Brooklyn L. Rev. 27 (1932); Willis, "Nature of a Joint Account," 14 Can. B. Rev. 457 (1936); Notes, 53 Colum. L. Rev. 103 (1953); 3 Chitty's Law J. 17 (1953).

[10] Stephenson, "Joint Ownership of Property with Right of Survivorship, 25 Trust Bull. No. 1, 25 (1945); 1 P-H Wills, Estates, and Trusts Service ¶1014; 45 Bank. Law J. 733, 813, 897; Note, 32 Ill. L. Rev. 57, 63 (1937).

sent such legislation, there is no presumption that a deposit by a spouse in the name of himself and a third party will constitute the third party a joint owner; in fact, there is some uncertainty [11] as to the doctrinal basis of the survivor's claim. It is hard to find an inter vivos gift when there has been no delivery of the pass book. And the lack of clear intent to create a trust militates against use of the trust doctrine. Nevertheless, a few courts have validated the transaction on one or the other, or a combination,[12] of these two theories. A more plausible rationale is that the privilege of survivorship springs from a contract between the two parties concerned and the bank, whether or not a joint estate be created thereby.

The printed form usually states that A or B may make withdrawals during A's lifetime; but there may be a written or oral understanding that only A may withdraw, that only B may withdraw, or that neither A nor B may withdraw.[13] Frequently, the joint bank account is merely an arrangement of convenience to enable the donee to withdraw the funds of the account from time to time for the benefit of the decedent.[14] Probably the normal case, however, is one in which the depositor has access to the account and intends to retain access until death.[15]

[11] Due in part to lingering vestiges of the real property origin of the device.

[12] In Sturgis v. Citizens National Bank of Pocomoke, 152 Md. 654, 137 Atl. 378 (1927), the language used was "John T. M. Sturgis and Montrue B. Faulke, in trust for both, joint owners, subject to the check of either, balance at the death of either to go to the survivor." No signature card was ever procured for the donee. Held, valid as against the widow. Also see cases cited in Atkinson, WILLS, 167–69 (2d ed. 1953).

[13] See discussion of these alternatives in comment by Austin W. Scott, Jr., "Joint Bank Accounts—Gifts and Transfers in Trust," 24 ROCKY MT. L. REV. 133 (1951).

[14] Thus in Estate of Dean, 68 Cal. App. 2d, 155 P.2d 901 (1945) the object of the depositor was to have a representative who would have access to the box during her illness, and also in the event of her death; see also Note, 37 ILL. B. J. 212 (1948).

[15] "Dearie, I have opened a joint account in the Morristown Trust Company with you and you may draw on it to the full amount, but if you do, I will give you hell." Morristown Trust Co. v. Capstick, 90 N.J. Eq. 22, 24, 106 Atl. 391, 392 (1919).

Regardless of theory – and sometimes in spite of theory – the courts have been tolerant of the joint bank account. We may expect this attitude to continue as long as the device performs a useful and popular function.[16] This may explain, although it cannot justify, the judicial reluctance to permit invasion of the account by the surviving spouse.

The widow's chances are slim, unless she can demonstrate that the account lacked "reality," or that it was testamentary.[17]

[16] See p. 16, *supra*. It is a common practice for banks to encourage the use of this device when new accounts are opened, particularly when a husband and wife are concerned; and the bank clerks concerned may be unaware of the legal implications of a joint bank account; see Comment, 32 CALIF. L. REV. 301, 310 (1944). It is possible that many people have the mistaken notion that they gain immunity from inheritance taxation or post-mortem publicity; see note 5, *supra*.

[17] *Favoring the surviving "tenant," as against the surviving spouse:* Holmes v. Mims, 1 Ill. 2d 274, 115 N.E.2d 790 (1953) (joint account accumulated by earnings of husband and "bigamous" second wife); Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944); Whittington v. Whittington, 205 Md. 1, 106 Atl.2d 72 (1954) (husband transfers accounts in trust for himself and donee, as joint owners, with equal withdrawal privileges and right of survivorship; passbooks retained); Sturgis v. Citizens National Bank of Pocomoke, 152 Md. 654, 137 Atl. 378 (1927) (terms of the account similar to terms in the Whittington case, *supra*); Stewart v. Barksdale, 63 So.2d 108 (Miss. 1953) (savings and loan association; either party given right to withdraw in whole or in part); Melinik v. Meier, 124 S.W.2d 594 (Mo. App. 1939) (evidence that the donee had deposited some of his own money); Lorch's Estate, 33 N.Y.S.2d 157, 168, (Surr. Ct. 1951); Hart v. Hart, 194 Misc. 162, 165, 81 N.Y.S.2d 764 (Sup. Ct. 1948), *aff'd without opinion,* 274 App. Div. 1036, 85 N.Y.S.2d 917 (1st Dep't 1949); In re Sturmer's Estate, 277 App. Div. 503, 101 N.Y.S.2d 25 (4th Dep't 1950) (commercial accounts); Inda v. Inda, 32 N.Y.S.2d 1001 (Sup. Ct. 1941) *aff'd without opinion,* 263 App. Div. 925, 32 N.Y.S.2d 1008 (4th Dep't 1942), *aff'd,* 288 N.Y. 315, 43 N.E.2d 59 (1942); Matter of Glen, 247 App. Div. 518, 288 N.Y. Supp. 24 (1st Dep't 1936) (joint bank account between husband and husband's brother sustained as against widow, claiming under contract by husband to will her four-fifths of his estate); Guitner v. McEowen, 99 Ohio App. 32, 125 N.E.2d 744 (1954); Orth v. Doench, 309 Pa. 240, 163 Atl. 450 (1932); Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933) (equities strongly in favor of validity); *cf.* Milewski v. Milewski, 351 Ill. App. 158, 114 N.E.2d 419 (1953) (maintenance proceeding); Estate of Morstatt, N. Y. L. J. 1 Feb. 1952, 4 P-H Wills, Trust, & Estates Service, ¶2885.35 (Surr. Ct. 1952); Matter of Perlmutter, 199 Misc. 330, 98 N.Y.S.2d 968 (Surr. Ct. 1950); Estate of Jagodzinska, 52 N.Y.S.2d 341 (Surr. Ct. 1945) *modified,* 272 App. Div. 660, 74 N.Y.S.2d 628 (4th Dep't 1947) (commercial account; no surviving spouse); Matter of Kalina, 184

The New York case of *Inda* v. *Inda*[18] is typical. Here the husband died leaving a wife and ten children. Five years before death he had opened two savings bank accounts: one in the name of a fictitious person and his daughter-in-law, entitled "joint account, either or the survivor may draw"; the other in the names of a fictitious person and the son, "pay to either or the survivor of them." The trial court found that the husband "always treated these accounts as his own sole property," that he retained the pass books and that he never intended to divest himself of ownership. Nevertheless, the provisions of the New York banking law were held to govern;[19] the deposit in the statutory form was deemed con-

Misc. 367, 370, 53 N.Y.S.2d 775, 778 (Surr. Ct. 1945) *appeal dismissed,* 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946) (dicta).

There appears to be no case permitting the spouse to set aside or invade an otherwise valid joint bank account. Whenever the spouse does prevail, it is on the ground that the account lacked "reality." Hamilton v. First State Bank, 254 Ill. App. 55, 59 (1929) (certificates of deposit; see Chap. 14, note 17, *supra*); Inda v. Inda, *infra,* note 18 (widow prevails as to joint account in commercial bank; no appeal); Matter of Mooney, *infra,* note 24.

[18] Inda v. Inda, 32 N.Y.S.2d 1001 (Sup. Ct. 1941), *aff'd without opinion,* 263 App. Div. 925, 32 N.Y.S.2d 1008 (4th Dep't 1942), *aff'd,* 288 N.Y. 315, 43 N.E.2d 59 (1942), noted in 27 CORNELL L. Q. 569 (1942), 52 YALE L. J. 656 (1952).

[19] The New York statute dealing with joint deposits in savings banks in the stipulated form declares that on the death of one of the parties the presumption of joint tenancy is conclusive. N.Y. Banking Law, §239(3). No such presumption exists for deposits in commercial banks; *id.* §134(3); see also *id.* §394(1). "[T]he husband must be careful whether he deposits his account in the bank with the brass doors or in the bank with the bronze doors." Note, 27 CORNELL L. Q. 569, 573 (1942). Frequently state legislation of this sort has been passed at the instance of banks, merely to protect them in the event of payment to the survivor. But these statutes tend to buttress the judicial predilection in favor of the right of survivorship; *cf.* Dyste v. Farmers & Mechanics Savings Bank, 179 Minn. 430, 435, 229 N.W. 865, 867 (1930). Notwithstanding the provisions of the local Banking Act equity could impose a trust, in the widow's favor, on the donee of any unreasonably large inter vivos transfer; *cf.* cases dealing with United States savings bonds, *infra,* p. 227; also see note, 52 YALE L. J. 656, 659 (1943).

In the Inda case, note 18, *supra,* the widow prevailed as to a third account, not in a savings bank. There being no "conclusive" presumption here, the decedent was deemed not to have intended to establish a joint account—probably because he retained the passbook. *But cf.* In re Lorch's Estate, 33 N.Y.S.2d 157 (Surr. Ct. 1941), where a similar transfer was sustained against attack by the surviving spouse.

clusive evidence of the intention of both depositors to vest title in the survivor.

Unreasoning application of the "reality" doctrine to joint bank accounts is found even in jurisdictions that avowedly use the "control" rationale when dealing with revocable inter vivos trusts. It will be recalled that the highest court in Ohio has twice permitted a widow to reach such transfers, even when the decedent had not made excessive formal retention of control over administration of the trust.[20] In each case the power to revoke, coupled with the income for life, was deemed to give the decedent such "control" and "dominion" over the trust *res* as to bring the transfer within the policy ambit of the elective share. But it would seem that the policy underlying the Ohio elective share varies with the type of transfer concerned. Where the joint bank account is employed, the emphasis shifts to the "reality" of the transfer, not to retention of control. A case in point is the recent Court of Appeals decision in *Guitner* v. *McEowen*.[21] Here the decedent husband established a joint savings account in the name of himself and his sister, with right of survivorship. The account was sustained against the widow, seemingly on the reasoning that a device effective for other purposes is effective against the widow. The court noted that the account was "irrevocable," and that "the delivery of the passbook was further evidence . . . that decedent did not retain any control or interest in the account at variance with the terms under which it was opened." Nevertheless, evidence was also admitted that the decedent said to the donee "you or I, any one, can draw that money"; and the president of the bank testified that the decedent could have withdrawn the funds without presentation of the passbook. In these circumstances, the distinction between a revocable trust and a "poor man's

[20] Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944) (discussed pp. 79–83, *supra*); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd*, 147 Ohio St. 437, 72 N.E.2d 378 (1947) (discussed pp. 83–87, *supra*).

[21] 99 Ohio App. 32, 124 N.E.2d 744 (1954).

will" seems a thin one. In either instance the decedent has effective control.[22]

The widow may of course have the account set aside as being testamentary if no interest is created in the donee until death. This result has been reached where the co-tenant had no right of withdrawal until the death of the depositor.[23] And, even if the right of withdrawal is granted, the widow may still be able to prove that the arrangement lacked "reality" – that there was no intent to confer a benefit on the other party.[24] "We cannot close our eyes," said a judge over half a century ago, "to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership." [25] In considering intention, the relation and dealings between the parties will be relevant, as well as evidence indicating a purpose other than to benefit the claimant co-depositor.[26] The merits of the widow's claim – *qua* widow – should be irrelevant; any heir has a like privilege of demonstrating lack of "reality."

Nashua Trust Co. v. *Heghene Mosgofian,*[27] although not involving a surviving spouse, is instructive. Here the bank's form indicated that both parties were to sign the signature

[22] In the Guitner case the decedent did not have the exclusive power to "revoke"; both the decedent and the surviving joint tenant could have withdrawn the funds in the decedent's lifetime: whereas in the Bolles case the trust could have been revoked only by the settlor. This distinction, however, does not seem material enough to preclude application of the "control" doctrine to joint bank accounts. *But cf.* In re Lorch's Estate, 33 N.Y.S.2d 157, 168 (Surr. Ct. 1941).

[23] *Cf.* Onofrey v. Wollifer, 351 Pa. 18, 40 A.2d 35, 155 A.L.R. 1074 (1944) (surviving spouse not involved).

[24] *E.g.,* Matter of Mooney, N. Y. L. J. 9 Oct. 1950, 2 P-H Wills, Estates, & Trusts Service, ¶1282, *appl'n for rehearing denied,* 102 N.Y.S.2d 416 (Surr. Ct. 1950) (savings account and checking account).

[25] Andrews, J., in Beaver v. Beaver, 117 N.Y. 421, 430, 22 N.E. 940, 942 (1889).

[26] For citations to cases involving these factors, see Note, 53 COLUM. L. REV. 103, 107, note 34 (1953).

[27] Nashua Trust Co. v. Mosgofian, 97 N.H. 17, 79 A.2d 636 (1951), noted in 25 TEMPLE L. Q. 388 (1952); also see Cournoyer v. Monadnock Savings Bank, 98 N.H. 385, 102 A.2d 910 (1953) (survivor living in Canada).

cards. But the decedent supplied neither the signature nor the address of the co-depositor, nor did he inform the co-depositor of the existence of the account. The co-depositor, his brother, lived in Turkey, and was left a part interest in the account by the decedent's will. It was held that the brother did not receive any inter vivos interest in the account.[28]

3. Joint Safe-Deposit Box

There appears as yet to be no case involving this device as a means of defeating the widow's share, either as an extra-legal and unsanctioned substitute for a will, or on the doubtful theory that a survivorship interest is created.[29] We may attribute the dearth of litigation to prudence on the part of the decedent spouse. If legal advice is taken, the opinion is likely to be that the joint safe-deposit box is neither "bullet-proof" [30] nor even worth the risk, in view of the variety of

[28] Kenison, J., dissenting, urged inter vivos validity on a third party contract basis. With unusual candor, he remarked:

> "Joint bank deposits payable to the survivor are in extensive use today by persons of small means who wish a designated relative or a member of the family to own the deposit at their death although the donor retains the bankbook, and makes all the deposits and withdrawals. In most cases where there is litigation, the results show the common denominator to be one of frustrated intention. . . . Either the deceased depositor has not done enough to satisfy the classical doctrine of a gift *inter vivos* or, if he has, he is charged with violating the Statute of Wills. Refreshing exceptions to this result have been few and far between. . . . One reason for this situation is that the doctrine of gifts *inter vivos* is not flexible enough to work effectively when applied to the modern joint bank account as used today. The only successful surviving depositor is very apt to be the one that this court does not get its hands on."

97 N.H. 17, 21, 79 A.2d 636, 639 (1951). See also Murray v. Gadsen, 197 Fed. 2d 194 (D.C. Cir. 1952) (extensive discussion of the joint bank account device); Whalen v. Milholland, 89 Md. 199, 43 A. 45, 44 L.R.A. 208 (1899).

[29] *But cf.* Hayes v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926) (colorable transfer).

[30] As was mistakenly said of the revocable trust by the corporate fiduciary in Merz v. Tower Grove Bank and Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939).

other expedients that achieve the desired result with a minimum of loss of control or income. The device merits a brief examination, however: it may be a battleground of the future; and it exemplifies the strain placed on the statutory share by the development of new social usage, new substitutes for the will.

The joint safe-deposit box has come into use only in the last century. It has probably displaced the "strongbox" as a repository of valuables. But legal doctrine has not yet adjusted to this new phenomenon.[31] Does the fact that articles are found in a safe-deposit box shared by the decedent and another indicate that title is in the survivor? Probably not: but can we be sure? The relationship between the co-depositors and the bank smacks of a bailment or a rental arrangement. Nevertheless, the banks and other institutions in the business of "renting" these boxes usually require the applicants to sign a card loosely referred to as a "joint tenancy" card.[32] The object, of course, is to protect the bank from liability when it releases the contents, particularly in the event of death of one of the "tenants." The card generally provides for access by either party and by the survivor, and may in addition contain language of joint tenancy. The cases to date have been reluctant to find a joint tenancy, even when the language of joint tenancy is used.[33] This is sensible, as it is likely that in the usual case neither the co-lessees nor the bank clerk fully appreciate the significance of the fine-print terminology on the card.[34] And serious difficulties occur if the incidents of joint tenancy are to be applied to property that was in the box for a short period, then withdrawn and pos-

[31] In general, see an excellent annotation in 14 A.L.R.2d 948 (1950) by R. F. Martin; Atkinson, WILLS, 160, (2d ed. 1953).

[32] See Comment, 32 CALIF. L. REV. 301 (1944) distinguishing between "joint access" cards, joint tenancy cards, and cards merely stating the parties are "co-renters."

[33] See cases cited in Atkinson, *op. cit., supra,* note 31, pp. 166–67.

[34] "An inquiry as to the ideas of safe deposit clerks in various banks in the Bay area was undertaken by the writer. Not one of them could tell the incidents of a joint tenancy." Comment, 32 CALIF. L. REV. 301, 310 (1944).

sibly sold to third parties. The chief doctrinal difficulty lies in finding the requisite element of "delivery" in creating a gift to the co-lessee; but a few cases have held that the arrangement is evidence of a gift to the surviving co-lessee.[35] There is little legislation on the topic.[36]

The case of *Lowry* v. *Florida National Bank of Jacksonville,*[37] although not involving a surviving spouse, shows how the evasion problem might arise. The decedent, a man in his sixties, wished to give property to the daughter of a friend, without the publicity attendant on giving her a legacy. Stating that he thought he could "work something out," he later handed to the claimant daughter an envelope containing a number of coupon bonds. He then rented a safety-deposit box in the name of the claimant. He was deputized to enter the box, and both parties had a key. The envelope, bearing the claimant's name, was placed in the box, and the claimant did not again enter the box until decedent's death seven years later. In the meantime, decedent had used the box for other purposes and had clipped the coupons. The court held that the claimant's title to the bonds had been established.[38]

The ultimate judicial reaction to this everyday practice is not yet known. Strong and strange medicine it is that declares a joint tenancy solely on the basis of the language in the card supplied by the banks.[39] To condone defeasance of the widow's share on that doctrinal basis would be even less defensible.

[35] See Annot., 14 A.L.R.2d 948 (1950). Further difficulties may ensue if the parol evidence rule is applied to prevent the parties concerned from explaining their actual understanding of their conduct. 1944 ANNUAL SURVEY OF AMERICAN LAW 839; 1949 *id.* 741; Kahn, "Joint Safe Deposit Boxes," 37 ILL. B. J. 212 (1949).

[36] *Cf.* Mich. Stat. Ann. §23.1123 (title to contents is unaffected; either "renter" may remove contents).

[37] 42 So.2d 368 (Fla. 1949).

[38] In this case the language of the rental card does not appear to have been a factor. The trial court, although "impressed with the frankness and sincerity of the witness," had held the physical delivery of no consequence since not intended to be effective until the death of the donor.

[39] *Cf.* Annot. 14 A.L.R.2d 948, 954 (1950). *But cf.* Atkinson, 167.