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RECENT CASES

EVIDENCE: RIGHT TO COUNSEL—Justice White in his dissenting opinion in *Escobedo v. Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), said that this decision appears to be another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from individuals suspected of crime, whether involuntarily made or not. Are Justice White's fears justified or will the Supreme Court limit the rule set out in the *Escobedo* case to the facts of the case?

As a suspect in the shooting of his brother-in-law, Danny Escobedo was arrested but released on a writ of habeas corpus. Later in the month, he was arrested again. The petitioner requested to see his attorney at this time and continued requesting to see his attorney throughout the subsequent interrogation by the police. Escobedo's attorney was present at the police station but was refused permission to see the petitioner. During the interrogation, the petitioner made statements which implicated him with the murder. At the trial, a motion was made to suppress the incriminating statements, and this motion was denied.

The standard which the United States Supreme Court applied in determining the admissibility of the incriminating statements was:

. . . [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult

with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory to the States by the Fourteenth Amendment,' (citation omitted) and no statement elicited by the police during the interrogation may be used against him at a criminal trial. (12 L. Ed. 2d at 986)

The *Escobedo* case is the third case since 1963 which has extended the right of the accused to counsel under the Sixth Amendment of the Constitution. *Gideon v. Wainwright*, 372 U. S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), held that every person accused of a crime, whether state or federal, is entitled to a lawyer at his trial. The case of *Massiah v. United States*, 377 U. S. 201, 12 L. Ed. 246, 84 S. Ct. 1199 (1964), extended the right to counsel even further by holding that the accused has a right to counsel from and after the finding of the indictment.

June 22, 1964, was the date that the *Escobedo* case was decided. There have already been at least 59 state supreme court decisions which have discussed the application of this new standard established by the *Escobedo* case. The cases are split as to how far the right to counsel has been extended.

In *People v. Dorado*, 40 Cal. Rptr. 264, 394 P. 2d 952 (1964), the California Supreme Court said:

We hold, in the light of recent decisions of the United States Supreme Court, that, once the investigation focused on defendant, any incriminating statements given by defendant during interrogation by the investigating officers becomes inadmissible in absence of counsel and by the failure of officers to advise defendant of his right to an attorney and his right to remain silent. (394 P. 2d at 953)

The court felt that the *Escobedo* case was not limited to its facts. It said that the accused does not have to actually request to be allowed to speak to his attorney. The effect of this standard, as the California court interprets the *Escobedo* case, is that the constitutional right to counsel precludes the use of any incriminating evidence unless this right is intelligently waived, and no waiver can be presumed if the investigating officer does not inform the suspect of his right to counsel or his right to remain silent. This writer believes that this is the most liberal interpretation to date.

The more conservative application is expressed by the Pennsylvania Supreme Court in *Commonwealth v. Coyle*, 415 Pa. 379, 203 A. 2d 782 (1964), wherein it said:

. . . [W]e do not interpret *Escobedo* to mean that, counsel must immediately be afforded one taken into custody, under all circumstances, particularly where none was requested. The mere fact that appellant was unrepresented by counsel during the questioning does not invalidate admissions made against interest. (203 A. 2d at 794)

The Pennsylvania court seems to limit the application of the rule set out in the *Escobedo* case to where the suspect requests counsel and such request is denied. The exclusionary rule, by this interpretation, will not apply if the accused does not request the right to see his attorney, even if he is ignorant of his right to do so.

Many state supreme courts distinguish their case from *Escobedo* on the facts. For example, the Maryland Supreme Court in *Mefford v. State*, 235 Md. 497, 201 A. 2d 824 (1964), said that an essential element in the *Escobedo* case was missing. In the *Mefford* case, the police advised the defendant of his right to remain silent. The court felt that this was all a lawyer would advise the defendant; so, there was no violation of the defendant's constitutional rights.

This writer believes that there is little merit in this position. It would be unrealistic to assume that the Supreme Court believed that Escobedo's lawyer did not advise him of his right to remain silent sometime before the statements, which the court excluded, were made.

Virginia, before the *Escobedo* case, did not consider the absence of counsel to be of great importance when incriminating statements were elicited. In *James v. Commonwealth*, 192 Va. 713, 66 S. E. 2d 513 (1951), the defendant was charged with receiving stolen goods. The defendant objected to the introduction of testimony by the sheriff and his deputy as to statements made by a person who was under arrest and not advised as to his legal rights when the statements were made. The court said that there was no merit to either contention and that the confession was admissible in absence of any inducement, threat, or promise of reward or hope thereof held out by person in authority, even if made while under arrest. The court did not feel any necessity of discussing the failure to advise the person of his legal rights.

In *Ward v. Commonwealth*, 205 Va. 564, 138 S. E. 2d 293 (1964), the accused was tried for murder. Before any statements were elicited from the accused, the officers advised him that anything he said would be used against him and that he had a right to consult an attorney. The defendant thereafter voluntarily made a confession. The court said that there was no rule of law which requires an arresting officer to close his ears to statements voluntarily made by a person in his presence. In distinguishing this case from *Escobedo* the court said:

In that case defendant was refused the right to talk with counsel after counsel arrived at the place where defendant was being detained, and at no time was Escobedo advised of his constitutional rights. Such are not the facts in the case at bar. Even under the strict rules laid down by the Supreme Court the

statements in this instance would, in our opinion, be admissible. (205 Va. at 572, 138 S.E. 2d at 299)

Any theory at this time as to how far the Supreme Court will follow its policy of excluding statements made by the accused would be pure conjecture. However, no matter how far the Supreme Court goes in construing the right to counsel, the police will be severely limited as to what they can do in interrogating suspects. As Justice White said, "The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become a suspect."

FRANK E. LYNCH

TORTS: COVENANTS NOT TO SUE—There is no doubt that in Virginia a "release" of one joint tort-feasor, by a person having an action against them, releases all of the joint tort-feasors. This is true even where there is an explicit reservation of rights evidenced in the agreement as regards the remaining joint tort-feasors. This statement has been reiterated many times in Virginia cases and is apparently adhered to today. *Ruble v. Turner*, 2 Hen. & M. (12 Va.) 38 (1808); *Bland v. Warwickshire Corp.*, 160 Va. 131, 168 S. E. 443 (1933); *Shortt v. Hudson Supply and Equipment Company, etc.*, 191 Va. 306, 60 S. E. 2d. 900 (1950).

However, it is the sole object of this note to examine the covenant not to sue, relate it to these and more recent cases, and attempt to determine its standing in Virginia.

In the case of *Ruble v. Turner*, *supra*, the court reiterated the common law rule that a "release" of one joint tort-feasor released all. The court refers to both

the "release" and the "accord and satisfaction," saying finally that the instrument in itself indicates a satisfaction with the tort-feasor. So even though the court frequently refers to the instrument as a release, the opinion leaves very little doubt that the case was decided on the basis that the plaintiff had an accord and satisfaction with the joint tort-feasor.

In the case of *Bland v. Warwickshire, supra*, the sole question was whether an absolute release, not under seal, of one joint tort-feasor, which contains a reservation of the rights against the other tort-feasors, operates as a release of all of the tort-feasors. The court stated in a brief opinion that "after a careful review of the question the Court is of the opinion that the doctrine laid down in *Ruble v. Turner, supra*, should be adhered to."

In the more recent case of *Shortt v. Hudson Supply and Equipment Company, supra*, the plaintiff had given, for a substantial consideration, an instrument which said in part, "It is expressly understood that this is a covenant not to sue and not a release." The court stated the general rule of law that a covenant not to sue, as distinguished from a release, does not operate to discharge the covenantee's claim against the other tort-feasors. Then the court cited *Ruble, supra*, and stated that the plaintiff in that case "having effected an accord and satisfaction with one tort-feasor, his claim against the others responsible for his injuries was discharged" and indicated that this case came directly within the holding of the *Ruble* case, *supra*. (Emphasis supplied.) The court went on to say that it was the satisfaction of the claim by one of the tort-feasors and not the form of the instrument that extinguished the claim of the plaintiff.

The court in *Shortt, supra*, indicated that even though the instrument signed by the plaintiff did not indicate that the consideration was accepted as full satisfaction of the claim against the tort-feasor, that under the circumstances it was plain that the sum was paid and ac-

cepted with this in mind. It appears that the court felt that there had been an accord and satisfaction which would operate to extinguish the claims against the tortfeasors, regardless of the instrument involved.

In the most recent case on this subject, *Lackey v. Brooks*, 204 Va. 428, 132 S. E. 2d 461 (1963), a lessor of tractor-trailer trucks covenanted not to sue the lessee for damage to the leased vehicles. As a result of a collision, one of the vehicles was damaged and the estate of the lessee's employee, who was alleged to have negligently operated the vehicle, was sued by the lessor.

The lower court stated in regard to the agreement that "this is in the nature of a covenant not to sue," then cited *Shortt, supra*, and said that the release of one joint tort-feasor released all the joint tort-feasors, including the employee. However, the Supreme Court of Appeals reversed and said that "[b]y the great weight of authority, a covenant not to sue one joint tort-feasor, as distinguished from a release, does not operate to discharge the covenantor's claim against other joint tort-feasors," and that upon the same principle, ". . . a bare covenant not to sue the master for the tortious act of the servant is not a bar to an action against the servant for the latter's tortious conduct."

The questions facing the court were whether the instrument was a covenant not to sue and, if so, to whom the covenant ran. The court seemed to have little trouble finding that the instrument was a covenant not to sue, and stated that the latter question was the critical one, holding that the covenant did not run to the employee. For the purpose of this note the ruling of the court that the instrument was a covenant not to sue is accepted, and the question now is, if it can be established that an instrument is in fact a covenant not to sue, what is its effect?

The court in *Lackey, supra*, regarded it as settled, on

the authority of *Shortt, supra*, that the covenant not to sue would not release the claims of the covenantee against other tort-feasors. Therefore, from a consideration of this case, and the others mentioned, it appears that the covenant not to sue has, as a practical matter, a new status in Virginia law. From my observations it appears that a covenant not to sue will be held to be a valid instrument in the law of Virginia, if, upon consideration of the instrument and the amount paid, the court finds that the circumstances do not indicate that there was an accord and satisfaction as regards the amount paid by the covenantee, or a release. This holding would place Virginia in the majority because there are only a few jurisdictions today in which it is impossible to settle with one tort-feasor without releasing another; Prosser, *LAW OF TORTS*, §46, (3rd ed. 1964).

These cases say that a release, even though it contains a reservation of the rights of the injured party, will operate to release all joint tort-feasors, and they also say that an accord and satisfaction with one will release the others. In addition, in the light of *Lackey v. Brooks, supra*, the cases now indicate that a covenant not to sue, without an accord and satisfaction, will allow the injured party to continue to prosecute his action against the remaining joint tort-feasors. Note that this statement of the law deals with a very limited situation and does not touch the problem of whether or not there has been an accord and satisfaction, nor does it deal with the problem of whether the court will construe an instrument as a covenant not to sue or a release. These problems must still be overcome before the rule of law will apply.

THOMAS N. NANCE

DOMESTIC RELATIONS: JURISDICTION TO AWARD CUSTODY OF CHILDREN—F and M and their four children lived in Jasper, Indiana. F deserted M and children on July 25, 1959, and moved to Mississippi where he cohabited with N, an unmarried female, who in time gave birth to F's illegitimate son. In 1960, F and N and their son established residency in Nansemond County, Virginia, where they were residing when M, on February 8, 1962, filed suit in the Nansemond County Circuit Court against F praying for an *a vinculo* divorce on the ground of desertion. The circuit court granted M an absolute divorce and the custody of the four children, together with support money for the children, alimony, and counsel fees for herself. At no time was M or any of the four children a resident of or domiciled in the state of Virginia and not one of the children was physically present within Virginia so as to afford a jurisdictional basis for determining custody. On the evening preceding the trial and the morning of the trial, three of the children were in Suffolk, Virginia, but thereafter they immediately returned to their home in Indiana.

In *Gramelspacher v. Gramelspacher*, 204 Va. 839, 134 S. E. 2d 285 (1964), the Supreme Court of Virginia, in a unanimous decision, affirmed the circuit court, holding that with reference to custody of children the proceeding was in personam so that personal jurisdiction over both parents was all that was required to give the court jurisdiction to award custody. This decision is one of first impression in Virginia.

There is a considerable conflict of authority as to what is required for jurisdiction to award custody of children. Some courts hold that a child must be domiciled within the state before that state has jurisdiction to award custody. See Annot., 9 A. L. R. 2d 434 (1950). Other courts use as a sole test, or add as an alternative basis for custody jurisdiction, the physical presence of the

child within the state. Some of these cases deem it necessary that such physical presence constitute actual residence. *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624 (1925). A third view followed by *Gramelspacher, supra*, which states this view to be the weight of authority today, establishes custody jurisdiction upon the personal jurisdiction of both parents. See Annot., 4 A. L. R. 2d 7 (1949).

Essentially there are two theories upon which to base the prerequisites for custody jurisdiction. The first is that the court acts for the state as an interested party, or *parens patriae*, to provide for the welfare and interests of the child. The second is that the court acts as a disinterested person and determines the in personam rights of the parents. *Payton v. Payton*, 29 N. M. 618, 225 Pac. 576 (1924). The first of these two theories supports the domicile test and the actual physical presence or residence test of custody jurisdiction, while the second supports the personal jurisdiction of both parents test.

Underlying the domicile test is the idea that a custody award affects the domestic status of the child, jurisdiction over whom rests only with the state of the child's domicile.

Since custody of a child by one parent carries with it domicil and a domestic status, jurisdiction to give the child to one parent or the other depends in principle on the domicil of the child . . . and a decree for custody rendered in a state where the child is not domiciled is void for lack of jurisdiction. (2 BEAL, CONFLICT OF LAWS §144.3 (1935))

As the state of a child's domicile is especially interested in the child's welfare, it would seem that the courts of that state should have power to determine the child's custody, but this is not necessarily a sound reason for holding that the state of domicile alone has jurisdiction.

If a child resides in one state and has his domicile in another state, the court at his actual residence may be much more competent to designate the person entitled to his custody than the court at his legal domicile. It is for this reason that some courts require physical presence or residence as a prerequisite for custody jurisdiction. As Justice Cardozo said in *Finlay, supra*:

The jurisdiction of a state to regulate the custody of infants found within its territory . . . has its origin in the protection that is due to the incompetent or helpless. (Citations omitted) For this, the residence of the child suffices though the domicile be elsewhere. (148 N. E. at 625)

The distinction between mere physical presence and residency is primarily a matter of intention. Therefore, the distinction is often difficult to make, especially in the case of an infant. Often a court, in passing on its jurisdiction to award custody of a child that is physically present though domiciled elsewhere, is motivated by the doctrine of *parens patriae* to hold that it has jurisdiction, thus enabling it to provide for the best interests of the child.

It seems that the first theory for custody jurisdiction, which says that the court is acting on behalf of the state as *parens patriae* to provide for the best interests of the child, better supports the actual physical presence or residence test than it does the domicile test. This is particularly so where the test of domicile is based on the patriarchial concept of the family.

Under the second theory, which bases judicial power to determine custody on the personal jurisdiction of both parents, the state's interest is merely nominal, as it does no more than supply the machinery for the peaceful settlement of a dispute.

This theory is based on the premise that custody is primarily a question of parental rights and that the court is simply making a determination as to which parent, at the particular time, has the best claim to the child. (*Wallace v. Wallace*, 320 P. 2d 1020, 1024 (1958))

Each of the three tests which are used to determine custody jurisdiction has its merits, but to say any one is an *exclusive* test of jurisdiction is to ignore important considerations involving a child's welfare that may arise in certain factual situations not within the scope of the particular test used. In such a situation jurisdiction will be denied where the child's interests should be protected and provided for.

But if a degree of flexibility is maintained as to the test adopted, to best protect the interests of an infant where the issue of custody is involved a state could apply, depending on the factual situation involved, either of the three tests in determining if jurisdiction exists to award custody. The idea here is that if any of the tests are satisfied, a state has a sufficient social interest in the welfare of the child to justify its courts in concerning themselves with his custody.

It is hoped, therefore, that the Virginia court will not, should this question arise at a later date, consider *Gramelspacher* as having closed the door on the possibility of applying the other tests. For the decision itself would not seem to preclude the court from holding that the other tests were applicable, if it felt that the child's welfare would thus best be served, and this writer feels that such an interpretation of *Gramelspacher* would be highly desirable.

ROBERT E. GILLETTE

AGENCY & PARTNERSHIP: JOINT ADVENTURES

—What constitutes a “joint adventure” in Virginia, and if it is found to exist, what is the legal significance of that relationship as opposed to the partnership?

It may be stated as a general rule that where two or more persons are engaged in a joint adventure in business, each is liable on the contracts and for the torts of the other which are incurred by one while acting within the scope and purpose of the enterprise. For the tort liability, see Annot., 51 A. L. R. 2d 107. The case of *Smith, Adm’r. v. Grenadier*, 203 Va. 740, 127 S. E. 2d 107, decided in 1962, may answer two questions which existed in Virginia prior to this case. The first, upon which there were earlier decisions but some confusion, is the question of what constitutes a joint adventure. The second, being a question answered in Virginia for the first time by this decision, is whether one joint adventurer is liable for the torts of the other.

The relationship of joint adventure is closely connected with that of partnership. In Virginia, prior to the adoption of the Uniform Partnership Act in 1918 there were no cases holding joint adventures. This was due to the fact that what would constitute a joint adventure today would have constituted a partnership at common law. That is, both consist of an association of two or more persons to conduct a business for profit or mutual benefit. Cases so holding for a partnership in Virginia prior to the Uniform Partnership Act are *Jones v. Murphy*, 93 Va. 214, 24 S. E. 825 (1896), and *Miller v. Simpson*, 107 Va. 476, 59 S. E. 378 (1907).

In *Jones, supra*, where three persons joined their efforts to sell the land belonging to one of them and agreed to split the profits upon consummating the sale, the court held this constituted a partnership. It should be noted that the land was owned by only one member of the venture. Then, in *Miller, supra*, where one person supplied the store and goods, the other provided his serv-

ices, and they agreed to split the profits, the court held a partnership. Again, note that only one person owned the property. In both of these cases there was no agreement as to joint ownership of the property of the enterprise.

Subsequently, the Uniform Partnership Act was adopted in Virginia in 1918, which defined a partnership as “. . . an association of two or more persons *to carry on as co-owners* a business for profit.” (Emphasis added.) Va. Code Ann. §50-6 (Repl. Vol. 1958). It may be contended that this statutory definition merely codified the common law definition of partnership because at common law, where a partnership was found to exist, co-ownership of the property was implied by law. See *Jones and Miller, supra*. However, the Virginia Supreme Court of Appeals took the view that the statute required co-ownership of the property in order to find the existence of a partnership, as the following two cases will illustrate.

In the case of *Walker Co. v. Burgess*, 153 Va. 779, 151 S. E. 165 (1930), two persons agreed that one would provide the lots and capital and the other would provide the labor for construction of houses thereon, which, after completion, would be sold and the profits divided between them. In an action by a creditor of one against the other to recover for the materials supplied, the court held that no partnership was established as co-ownership of the property was absent.

In *Cullingworth v. Pollard*, 201 Va. 498, 111 S. E. 2d 810, decided in 1960, where two persons agreed to enter the “used-car” business, one providing the capital and the other operating the business in his name, the court again held no partnership, saying, “the essential element of ‘co-ownership’ of the business as contemplated by §50-6, *supra*, is lacking.”

Thus, where the element of co-ownership was lacking in the agreement of two persons to engage in a business enterprise together, how could a third party who con-

tracted with one of the parties bind the other? The course taken in Virginia has been that of joint adventure.

The first case in Virginia to clearly hold a joint adventure was that of *Horne v. Holley*, 167 Va. 234, 188 S. E. 169, decided in 1936. The facts of this case did not involve any co-ownership or lack of that element, but it can be noted that the definition of joint adventure stated by the court did not include any requirement of co-ownership of the property:

“A joint adventure has been aptly defined as a ‘special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.’ 33 C. J., page 841, Section I.” (167 Va. at 239, 188 S. E. at 171)

This definition has been followed and cited by subsequent Virginia cases involving questions of joint adventure. See *Pollard & Bagby, Inc. v. Morton G. Thalhimer, Inc.*, 169 Va. 529, 533, 194 S. E. 701, 702 (1938); *Jones v. Galleher & Co.*, 187 Va. 602, 604, 47 S. E. 2d 333, 336 (1948).

The case of *Jones v. Galleher & Co.*, *supra*, added to the definition established in *Horne, supra*, by stating that “the scope of the enterprise as to which they must exercise good conduct and square dealing is, however, to be found in their contract.” This implies that the undertaking need not be specific but may be of any nature on which the parties agree.

This development of the law of joint adventures now brings us to *Smith, supra*, the case under consideration and the most recent case in Virginia on the subject. The facts in the case, material to the joint adventure question, were that Rainwater and Grenadier entered into an agreement whereby Grenadier would contract to purchase construction equipment and in return for the use

of this equipment Rainwater would make the installment payments for Grenadier. Grenadier was obligated on the contract of purchase, and when the equipment was fully paid for it was to remain his alone. Rainwater, in the use of this equipment was negligent, causing the death of an infant. The infant's administrator brought his action against both Grenadier and Rainwater as joint adventurers. The trial court found Rainwater liable but struck the evidence as to Grenadier. The Supreme Court of Appeals reversed and remanded, holding that the factual situation was such that a jury could find a joint adventure existed.

The holding in this case clearly illustrates that co-ownership is not an element of joint adventure as here the property was owned solely by one person. And, by comparing this case with those decided before the adoption of the Uniform Partnership Act, it is plain that there is no distinguishing feature between this case and those which held the relationship a partnership. And yet, the factual situation of this case would clearly not be held a partnership in Virginia today.

This conclusion may also be readily reached by comparing the definitions of joint adventure with that of partnership. Rowley, in his treatise on partnership sets forth the following as the two most often cited definitions of joint adventure:

... a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.

An association of two or more persons to carry out a single business enterprise for profit. (2 ROWLEY, PARTNERSHIP, §52.2 at 464, 2d ed., 1960)

Contrast these with the statutory definition of partnership:

... an association of two or more persons to carry

on as co-owners a business for profit. (Va. Code Ann. §56-6 (Repl. Vol. 1958))

The only differentiating feature between this definition of partnership and those of joint adventure is the element of co-ownership.

The conclusion to be reached by the development of the law of joint adventures in Virginia is that if the existence of a partnership is precluded only because the statutory requirement of co-ownership can not be met, then the parties may still have a joint adventure.

The question remaining to be answered by future cases in Virginia is what is the legal significance of a joint adventure as opposed to a partnership. The Virginia Supreme Court of Appeals has held that the liability of joint adventurers *inter se* is the same as for partners. See *Horne, supra*. The court has further held that each joint adventurer is a party to the contract made by one as each is the agent for the other when acting within the scope of the enterprise. See *Wiley N. Jackson Co. v. City of Norfolk*, 197 Va. 62, 87 S. E. 2d 781 (1955). And now, in *Smith, supra*, the court has held that each joint adventurer is liable for the torts of the other committed within the scope of the enterprise.

It would appear at this point that the practical effect of the decisions on joint adventures is to make inoperative the statutory requirement of co-ownership for a partnership. Where the element of co-ownership is lacking, so as to prevent the establishment of a partnership, the court may simply hold a joint adventure and then impose the same liabilities as in a partnership. It remains for future decisions to determine if the Virginia Supreme Court of Appeals will distinguish the legal significance or consequences of a joint adventure from those of a partnership.

HENRY WOODROW CROOK, JR.

JOINT BANK ACCOUNTS: MAY THE SURVIVOR TAKE?—Where the deposit by a person is in the name of himself and another, not his wife, the presumption is that it was done for the purposes of convenience only. . . . 38 C. J. S. *Gifts* §50 (1943)

It seems to be well settled that a bank account may be so fixed that two persons shall be joint owners thereof during their lives, and the survivor take on the death of the other. This may depend upon the terms of the deposit, that is the contract made with the bank, or upon the intention of the depositors as disclosed by their declarations, oral or written. (*King, Ex'x. v. Merryman, Adm'x.*, 196 Va. 844, 858, 86 S. E. 2d 141, 148 (1955))

The preceding statements used by the court in *King, supra*, summarized the law in Virginia as to joint bank accounts of persons, not husband and wife. This case involved a joint bank account held by Dotson and his daughter, Mrs. King. On her father's death, Mrs. King, as executrix of his estate, did not account for the funds remaining in the bank account as part of the estate. The other children of Dotson excepted to this accounting, and it was found by the Commissioner of Accounts, the circuit court, and finally the Supreme Court of Appeals that neither the contract with the bank nor the actions and declarations of Dotson showed any intent that Mrs. King as survivor was to take the balance of the deposit on his death.

After the court had handed down this decision, there remained this question in the minds of many lawyers: If a situation did arise where there was a clear intent on the part of the decedent that the funds remaining on deposit after his death should go to the surviving co-depositor, would the court allow the survivor to take? This question arose because such a holding would seem to violate the strict position which Virginia has held against will substitutes. The answer to this question was

given by the recent decision of *Stevens v. Sparks, Ex'x.*, 205 Va. 128, 135 S. E. 2d 140 (1964).

Edward Stevens and his wife Dora had lived separate and apart for the thirty years preceding his death in 1958. About 1930, Vivian Sparks, a nurse, had come to Stevens' home for the express purpose of caring for his elderly brothers and sisters. In 1941, Stevens executed his last will and testament whereby he devised and bequeathed all of his property to Miss Sparks and named her as executrix of his estate. In 1948, he executed a codicil to his will by which he devised his residence to Miss Sparks. Later in 1948 he conveyed the residence to her in fee simple by deed.

In 1948 and 1950 Stevens opened three joint bank accounts in his name and that of Miss Sparks "as joint tenants with right of survivorship, and not as tenants in common." At Stevens' death there remained \$28,-381.03 on deposit in the three accounts.

Mrs. Stevens renounced her husband's will and elected to take such share of his estate as she would have been entitled to had he died intestate. She alleged that the joint accounts in the names of Stevens and Miss Sparks were assets of her husband's estate.

Miss Sparks as executrix of Stevens' estate filed a bill in chancery seeking the aid and guidance of the court with respect to this particular claim. The court heard testimony by a friend of Mr. Stevens to the effect that Stevens had told him on several occasions that he wanted Miss Sparks to have the money that he had placed in the joint accounts and that this had been his purpose in opening the accounts. The chancellor ruled:

. . . that the presumption that the bank accounts were placed in the names of Stevens and Miss Sparks, as a matter of convenience, was conclusively rebutted by the evidence adduced; that Stevens' intent in making the deposits was 'established be-

yond question'; that decedent's estate had no claim or interest in the accounts, and that the accounts passed to Miss Sparks according to contract. (*Stevens v. Sparks, Ex'x., supra*, at 132)

This decision was affirmed by the Supreme Court of Appeals.

Though *Stevens, supra*, set forth no new rule of law as to joint bank accounts, its importance lay in the fact that the court used the law set forth in *King, supra*, and for the first time found that on its facts *Stevens, supra*, was a case in which the presumption of a joint bank account existing for convenience only had been successfully rebutted, allowing the surviving depositor to take.

Though there are numerous legal problems which can arise from a situation in which a joint bank account is opened in the names of two people, not husband and wife, the one question which prompted this note was whether a holding such as the one in the *Stevens, supra*, which allowed the surviving co-depositor to take, created a situation in which the other depositor had done a testamentary act without satisfying the requirements of Virginia's statute of wills, Va. Code Ann. §64-51 (1950). The answer to this question can be given simply by saying that such a holding does not create a situation in which a testamentary act has been done without compliance with the Virginia Statute of Wills. The reason for this is that the law in Virginia on joint bank accounts is based on the "contract" theory, which is illustrated by the Virginia cases dealing with joint bank accounts.

The law in Virginia on joint bank accounts began with the case of *Deal's Adm'r. v. Merchants and Mechanics Savings Bank*, 120 Va. 297, 91 S. E. 135 (1917). The facts in this case were as follows: Mrs. Deal asked a friend to deposit her money in a bank because she didn't expect to live long, and she wanted the money to go to

her sister, Ellen C. Holland, when she died. The friend assured her that he could deposit the money so that it would go to her sister at her death. He subsequently deposited the money "on savings account to the credit of 'Martha S. Deal or Ellen C. Holland.'" The court in holding that Ellen Holland as survivor was entitled to the funds in the account said:

We are of opinion that, under the facts of this case, the effect of the deposit by Mrs. Deal to the joint credit of herself and her sister was to create a contract relation between the Bank and the two joint depositors, under which the amount to the credit of the account became the property of Ellen C. Holland as the survivor of decedent and herself.

. . . [W]hen the deposit in this case was made by Mrs. Deal for the joint benefit of herself and Mrs. Holland, in legal effect a loan was made by decedent and Mrs. Holland to the bank, and the bank was the debtor to them, and they creditors of the bank, to the amount of such deposit. It was a pure contractual relation and no question of gift or trust arises in determining the rights of the parties under such a contract. (*Deal's Adm'r. v. Merchants and Mechanics Savings Bank, supra*, 298-299)

The court in *Deal, supra*, relied upon the language of the Massachusetts case of *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N. E. 371 (1916). After *Chippendale, supra*, the Massachusetts court later modified its view by holding that the surviving co-depositor could not take unless the decedent had shown an intention to make a gift of the funds to the survivor.

It was not until *King, supra*, in 1955 that the problem of joint bank accounts came before the Supreme Court of Appeals of Virginia. In this case, the court cited *Deal, supra*, mentioned the further developments in the law of Massachusetts and arrived at the conclusion that

where a joint bank account was opened in the name of two people, not husband and wife, the presumption was that it was opened for convenience only, but this presumption could be rebutted if an intention to make a gift of the funds could be shown by the terms of the contract with the bank or by the oral or written declarations of the depositors, and if the presumption was successfully rebutted, the survivor could take.

Though the fact that the survivor takes the funds may be considered by some as a gift by the other depositor to take effect at his death, *i.e.*, a testamentary act, it is saved from being considered as such because the "... gift is effected through the instrumentality of the contract between the bank and the depositors." (*King, Ex'x. v. Merryman, Adm'r., supra* at 852)

What conclusions, then, have been reached by this note and what purpose can it serve?

The primary conclusion reached is that since Virginia adheres to the "contract" theory of joint bank accounts, allowing the surviving depositor to take does not create a situation in which the decedent has done a testamentary act outside of the Virginia Statute of Wills.

Since this conclusion has been reached, no valid argument can be raised against the holding in *Stevens, supra*, and executors and administrators must now beware when they find their decedent was a co-depositor in a joint bank account, because the funds remaining on his death may be assets in his estate, or they may be the property of the surviving depositor; and the controlling factor as to whether they are assets of the estate or not may hinge entirely on the amount of evidence the surviving depositor can bring forth to show the decedent intended to make him a gift of the funds remaining in the account on the decedent's death.

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