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Property--Presumption of Intent to Confer Upon Wife Right of Survivorship Only, in Chose in Action Taken in Joint Names of Spouses Where Husband Furnishes All Consideration--Not Applicable Where Wife Transferor (Matter of Polizzo, 308 N.Y. 517 (1955))

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PROPERTY—PRESUMPTION OF INTENT TO CONFER UPON WIFE RIGHT OF SURVIVORSHIP ONLY, IN CHOSE IN ACTION TAKEN IN JOINT NAMES OF SPOUSES WHERE HUSBAND FURNISHES ALL CONSIDERATION—NOT APPLICABLE WHERE WIFE TRANSFEROR.—The decedent owned a mortgage which she transferred, through a third party, to herself and her husband who paid no consideration. The husband predeceased his wife but, before his death, assigned his interest to the respondent who now claims such interest from the wife's estate. The Court *held* that the wife's transfer created a joint tenancy,[1] thereby vesting a present interest in the husband which the respondent took by assignment as tenant in common. The presumption that a husband intends merely to create a right of survivorship in his wife, where he transfers personalty to himself and his wife who pays no consideration, is inapplicable where the wife is the transferor. *Matter of Polizzo,* 308 N.Y. 517, 127 N.E.2d 316 (1955).

At common law a married woman's personal property usually would vest absolutely in her husband whether it was acquired before marriage or during coverture.[2] The basis for this rule was the doctrine of unity of husband and wife under which the wife's legal existence was deemed to merge with that of her husband.[3] However, with respect to her choses in action a wife had a contingent interest—a right of survivorship which she retained if her husband failed to exercise his power to reduce them to possession during coverture.[4] Choses in action held in their joint names likewise conferred such an interest on the wife.[5] It was presumed that by taking title in this form, the husband intended to confer this benefit upon her.[6]

During the nineteenth century, many states enacted married woman's acts which gave wives legal capacity to own personal property as if they were sole.[7] Since their enactment, some jurisdictions have held that a chose in action taken in the names of husband and

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[1] The habendum clause of the mortgage read, ". . . to the successors, legal representatives *the survivor, such survivor's heirs, assigns. . . .*" (emphasis added).

[2] Ryder v. Hulse, 24 N.Y. 372, 377 (1862) (dictum); see 2 BLACKSTONE, COMMENTARIES 433 (6th ed. 1774); 1 WALSH, PROPERTY 704 (1947).

[3] Whiton v. Snyder, 88 N.Y. 299, 303 (1882) (dictum); see 2 BLACKSTONE, COMMENTARIES 433 (6th ed. 1774); 2 KENT'S COMMENTARIES 128-29 (5th ed. 1844).

[4] For example, recovering on, or assigning a chose in action constitutes reducing it to possession. Westervelt v. Gregg, 12 N.Y. 202, 206 (1854) (dictum). In reference to his absolute power to do so, see Ryder v. Hulse, *supra* note 2 at 377; 2 BLACKSTONE, COMMENTARIES 433 (6th ed. 1774).

[5] Roman Catholic Orphan Asylum v. Strain, 2 Bradf. 34 (N.Y. Surr. Ct. 1851); Coates v. Stevens, 1 Y. & C. 66, 160 Eng. Rep. 28 (Ex. 1834); Borst v. Spelman, 4 N.Y. 284, 288 (1850) (dictum).

[6] See Borst v. Spelman, *supra* note 5; Roman Catholic Orphan Asylum v. Strain, *supra* note 5.

[7] See Fruhauf v. Bendheim, 127 N.Y. 587, 28 N.E. 417 (1891); Allen v. Hamilton, 109 Ala. 634, 19 So. 903 (1896); Johnson v. Stillings, 35 Me. 427 (1853).

wife, where the husband pays the sole consideration, presumptively confers an equal interest in the wife (as a gift from the husband).[8] The common-law presumption that he intended to confer upon her survivorship only has been considered abrogated by these statutes.[9]

In New York, however, despite the enactment of a married woman's act, the common-law presumption has continued to be applied in such a situation.[10] It does not negate the effect of the married woman's act,[11] but is merely a factual presumption of what it is deemed would be the probable intent of a husband under such circumstances.[12] In some cases, where the presumption was applied, the husband retained exclusive possession of the chose in action subsequent to the transfer and received all moneys paid in respect to it.[13] However, exclusive control by the husband does not appear to be necessary for the presumption to arise.[14] It is clear that there are only three prerequisites to the application of the presumption of survivorship: (1) the marital status, (2) the taking of the chose in action in the spouses' joint names, and (3) the furnishing of all the consideration by the husband.[15] From such a transaction, the cases conclude that the husband probably intended only a right of survivorship to vest in the wife, and, absent evidence to the contrary, the presumption prevails.[16] The husband may destroy his wife's right to

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[8] See, *e.g.*, Powell v. Metz, 55 So.2d 915 (Fla. 1952); Radabaugh v. Radabaugh, 109 Ind. App. 350, 35 N.E.2d 114 (1941); Matter of Loesch, 322 Pa. 105, 185 Atl. 191 (1936).

[9] See Matter of Garland, 126 Me. 84, 136 Atl. 459 (1927).

[10] See Matter of Kane, 246 N.Y. 498, 159 N.E. 410 (1927); Sanford v. Sanford, 45 N.Y. 723 (1871); Matter of Kennedy, 186 App. Div. 188, 173 N.Y. Supp. 607 (3d Dep't 1919). *Contra,* Brosnan v. Gaffney, 209 App. Div. 430, 204 N.Y. Supp. 846 (2d Dep't 1924).

[11] Belfanc v. Belfanc, 252 App. Div. 453, 456, 300 N.Y. Supp. 319, 323 (3d Dep't 1937) (dictum), *aff'd mem.*, 278 N.Y. 563, 16 N.E.2d 103 (1938); see West v. McCullough, 123 App. Div. 846, 108 N.Y. Supp. 493 (2d Dep't 1908), *aff'd mem.*, 194 N.Y. 518, 87 N.E. 1130 (1909).

[12] Matter of Kane, *supra* note 10; Matter of Blumenthal, 236 N.Y. 448, 452, 141 N.E. 911, 912 (1923) (dictum); Matter of Albrecht, 136 N.Y. 91, 95, 32 N.E. 632, 633 (1892) (dictum).

[13] See, *e.g.*, Sanford v. Sanford, *supra* note 10; Matter of Larmon, 212 App. Div. 273, 208 N.Y. Supp. 491 (3d Dep't 1925); West v. McCullough, *supra* note 11.

[14] See Matter of Blumenthal, *supra* note 12 at 452-53, 141 N.E. at 912; Matter of Kennedy, *supra* note 10.

[15] See Matter of Kane, 246 N.Y. 498, 159 N.E. 410 (1927); Matter of Blumenthal, *supra* note 12 at 452, 141 N.E. at 912; Matter of Albrecht, *supra* note 12 at 95, 32 N.E. at 633; Belfanc v. Belfanc, *supra* note 11 at 456, 300 N.Y. Supp. at 323, *aff'd mem.*, 278 N.Y. 563, 16 N.E.2d 103 (1938).

[16] Matter of Blumenthal, *supra* note 12 at 452, 141 N.E. at 912; Matter of Albrecht, *supra* note 12 at 95, 32 N.E. at 633 (dictum); Belfanc v. Belfanc, 252 App. Div. 453, 456, 300 N.Y. Supp. 319, 323 (3d Dep't 1937) (dictum), *aff'd mem.*, 278 N.Y. 563, 16 N.E.2d 103 (1938).

the whole interest upon survivorship by disposing of the chose during his lifetime, even though she has not consented.[17]

The Court, in the instant case, regarded the problem presented as one of first impression. However, a similar issue was presented in *Prygocki v. Prydatko*.[18] In that case, the executrix of the husband's estate sought to recover on an instrument in which the defendant acknowledged his indebtedness to the decedent and his wife. The defendant and the deceased's wife claimed that the consideration for the instrument moved solely from the wife. The court denied the plaintiff's motion for summary judgment on the ground that "[t]he presumption is that she did this with the intention that upon her death title thereto, if still in the joint names, should pass to the survivor." [19] That court rested its conclusion exclusively on the presumption which had theretofore existed where the husband furnished the sole consideration. The opinion does not discuss any evidence purporting to manifest intent to create a survivorship interest.

The Court in the instant case, viewing the presumption in favor of a surviving husband as merely a vestige of the common law, refused to apply it in behalf of the wife and reached an opposite result from that in the *Prygocki* case, stating that the transfer ". . . would have created a present joint tenancy had they been unmarried . . . [and in the absence of evidence as to intent] the same kind of tenancy was created, notwithstanding their marital relationship." [20] The presumption was considered inapplicable in this situation since husbands never suffered the same incapacity for holding personalty as did wives. Nor did the Court consider the habendum clause as requiring a different result. It was felt that though the words, "the survivor, such survivor's heirs," might possibly indicate an intent to confer survivorship only, ". . . the very same clause makes the assignment run to 'assigns of the party of the second part,' and *that language expresses the transfer of a present interest. . . .*" [21]

The Court seems to be correct in determining that the common law provided the original setting for this presumption. However, this fact was considered forty-seven years ago in *West v. McCullough*,[22] and it in no way caused the court in that case to hesitate in applying the presumption. Despite its origin, the presumption of survivorship has been well established and is recognized as effectuating the probable purpose of these transactions.[23] The taking of

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[17] See Matter of Kane, *supra* note 15 at 504, 159 N.E. at 412; Sanford v. Sanford, 45 N.Y. 723 (1871); Belfanc v. Belfanc, *supra* note 16.

[18] 105 N.Y.S.2d 205 (Sup. Ct. 1951).

[19] *Id.* at 208.

[20] Matter of Polizzo, 308 N.Y. 517, 521, 127 N.E.2d 316, 318 (1955).

[21] *Id.* at 522, 127 N.E.2d at 318 (emphasis added).

[22] 123 App. Div. 846, 108 N.Y. Supp. 493 (2d Dep't 1908), *aff'd mem.*, 194 N.Y. 518, 87 N.E. 1130 (1909).

[23] See cases cited notes 10, 11 and 12 *supra*.

title in the manner herein discussed has been recognized as a device whereby a spouse may effect what amounts to a testamentary disposition.[24]

In view of the basis upon which the presumption rests, it is submitted that the Court should have applied it if there was no evidence of an intent to create a present one-half interest in the husband. If the transferees were strangers to each other, there would be no reason to suppose that the intent was to create such right of survivorship. But where they are husband and wife, it is submitted that such an intent has been justifiably presumed. During their joint lives, spouses may, and usually do, enjoy mutually the benefits of property owned by one or the other. For all practical purposes, the funds realized upon a chose in action owned by one of the spouses would find their way to the family purse. It seems reasonable, therefore, to presume that the transfers herein discussed are motivated by concern for the future welfare and security of the surviving spouse. If, in a given case, it is claimed that a gift of a present interest was intended, it is not unreasonable to require evidence of such an intent in order to rebut the presumption.

TORTS — BATTERY ACTION AGAINST FIVE YEAR OLD CHILD UPHELD.—The plaintiff brought an action against a five year old for battery. The defendant moved a chair and seated himself therein. As the plaintiff was about to sit where the chair had been, defendant attempted to place the chair under her. He was unable to do so and the plaintiff sustained injury. On appeal from a judgment for the defendant, the Supreme Court of Washington remanded, *holding* that, if the defendant had knowledge to a substantial certainty that the plaintiff would attempt to sit down, he would be liable for battery. *Garratt v. Dailey,* 146 Wash. Dec. 186, 279 P.2d 1091 (1955).

Generally, infants are liable for their torts.[1] However, if the tort contains some element which is necessarily wanting in an infant, he will not be liable.[2] Because liability is ordinarily imposed without regard to the moral quality of the act,[3] tender years, of itself, is no

[24] See Belfanc v. Belfanc, 252 App. Div. 453, 300 N.Y. Supp. 319 (3d Dep't 1937), *aff'd mem.,* 278 N.Y. 563, 16 N.E.2d 103 (1938).

[1] See, *e.g.,* Bullock v. Babcock, 3 Wend. 391 (N.Y. Sup. Ct. 1829); Huchting v. Engel, 17 Wis. 237 (1863); see COOLEY, TORTS 120 (3d ed. 1906).

[2] Stephens v. Stephens, 172 Ky. 780, 189 S.W. 1143, 1145 (1916) (dictum); Swoboda v. Nowak, 213 Mo. App. 452, 255 S.W. 1079, 1082 (1923) (dictum); see PROSSER, TORTS 1086 (1941).

[3] See Ellis v. D'Angelo, 116 Cal. App.2d 310, 253 P.2d 675 (1953).