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the judgment within six months as provided by statute.[25] However, in this instance that judgment was void for want of jurisdiction and could be attacked at a later date.[26]

There is also an inference that now the defendants are estopped[27] from raising the jurisdictional point. This seems to be because of the committments of counsel, and also because of the fact that no appeal was made within the six month period provided by statute. The majority of the court seem to mention estoppel not as the basis for their opinion, but rather as dictum. A query could be raised as to whether all the elements necessary to constitute an estoppel are present. Certainly for counsel to wait twenty-nine months for an answer to be filed seems like an unwarranted reliance.

It would appear that the Supreme Court of Montana arrived at the wrong conclusion in the *Sherbourne Case*. Justice Angstman sums up well in this statement:

> "There is no case supporting the essential conclusion that admission of service not exhibited to the court constitutes a return of summons at the time the admission was made."

Waldo N. Spanglo.

[25]R.C.M. 1935, §§9187 and 9732.
[26]State v. District Court of the Ninth Judicial District in and for Gallatin County, (1909), 38 Mont. 166, 99 P. 291, 65 L.R.A. (N.S.) 1098, 129 Am. St. Rep. 636; State v. District Court of the Tenth Judicial District in and for Fergus County (1919), 55 Mont. 602, 179 P. 831. Hodson v. O'Keefe (1925), 71 Mont. 322, 229 P. 722; Ealy v. McGahen (1933) 37 N.M. 248, 21 P.(2d) 84; 3 *Am. Juris.*, Appearances, §22; 50 Corpus Juris 598, (92).
[27]Waddell v. School Dist. No. 2 of Yellowstone County (1925), 74 Mont. 91, 238 P. 884.

INHERITANCE TAX ON JOINTLY OWNED PROPERTY A COMMENT ON IN RE PERIER'S ESTATE[1]

I.

Until recently, the lawyers of Montana were prone to believe that jointly owned property was subject to inheritance tax at 50% of its full market value. The *Perier's Estate* decision has made this line of thought obsolete, and removes what was thought to be a safe technique for minimizing inheritance tax. In place of that simple mathematical formula, the elusive "contemplation of death" concept must now be considered

[1]State Board of Equalization v. Cole (1948) .....Mont....., 195 P.(2d) 989.

whenever an estate contains a joint bank account or real estate held in joint tenancy. Government bonds payable to either of two named persons, while not joint property, present a similar problem.

The factual situation of the principal case is a common one in Montana today. Mae H. Perier was a widow. Her husband died September 7, 1943. Eighteen days later, on September 25, 1943, Mrs. Perier created three joint bank accounts, payable to herself or another named person or the survivor. A fourth such joint bank account was created on September 27, 1943, and a fifth was created on May 22, 1945. Mrs. Perier died on March 11, 1946, age 63 years. She had no children. A cousin was named co-owner in four of the joint bank accounts and a sister as co-owner of the fifth joint account.

Five Series "G" U. S. Savings bonds were purchased by Mrs. Perier on September 1, 1942, one on March 1, 1943, one on August 1, 1943, two on September 1, 1944, and one on July 1, 1944. These bonds were all payable to Mrs. Perier, or, in the alternative, to a person named on the face of the bond. They were kept in decedent's safety deposit box and none of the alternative payees had access to the safety deposit box, or ever attempted to exercise any control over the bonds.

The District Court of Silver Bow County found Sub-section 6 of 10400.1, R.C.M. 1935, applied to the joint bank accounts and to the savings bonds. It accordingly imposed a tax measured by one-half of the joint bank accounts and the savings bonds.

> Sub-section 6 reads as follows: "Joint estates. Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving tenant by the entirety, joint tenant, or joint tenants, person or persons, to the immediate ownership or possession of such property shall be deemed a transfer of one-half or other proper fraction thereof as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants, or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant, or joint depositor, by will, except such part thereof as may be shown to have originally belonged to the survivor and never to have belonged to the decedent."

Upon appeal by the State Board of Equalization, the Supreme Court reversed and held that the entire amount in the joint bank accounts and the full market value of the savings bonds were subject to the inheritance tax. The Court was divided three to two as to the joint bank accounts, but all agreed that the savings bonds were subject to tax at full value. The result of the case is reasonably satisfactory,[2] but the method by which it is reached leaves much to be desired.[3] The majority applied Sub-section 6 to 50% of the joint bank accounts, just as the District Court had done, but went on to apply Sub-section 3 of 10400.1, R.C.M. to the other 50% of the joint bank accounts. As to the savings bonds, the entire court held that Sub-section 6 did not apply at all, but that Sub-section 3 applied on the entire market value. Sub-section 3 reads as follows: "In contemplation of death. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within the state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within three years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without a fair consideration in money or money's worth shall, unless shown to the contrary be deemed to have been made in contemplation of death within the meaning of this section."

II.

Much of the majority opinion, as written by Justice Metcalf, is devoted to determining that a valid gift inter vivos occurred upon the creation of the joint bank accounts, and Justice Angstman's dissent is directed against that proposition. The clash of opinion with regard to the requisites of a

[2]Justice Gibson, in a separate dissenting opinion, is the only member of the court to touch upon the factor of the size of the joint bank accounts. The theory of this comment supports taxing joint bank accounts in full when they are created in contemplation of death. However, the author does believe that Justice Gibson correctly held that contemplation of death should not have been presumed upon the facts of the principal case, since the joint bank accounts were such a small percentage of the total estate. For the sake of brevity, that factor is not discussed in this comment, but it is important as a ground for distinguishing future cases.

[3]Justice Angstman, in a vigorous dissent, notes that the State Board of Equalization had never advanced the theory adopted by the Court.

gift under property law is misleading to the reader because the support given each opinion magnifies the issue to an unwarranted importance. It is here contended that an improper test is thus developed, one that will lead to much additional litigation. It does not give a practicing attorney a satisfactory guide and will lead to unfortunate results.

Confusion inevitably follows when the technicalities of property law are used to test the tax consequences of a transaction.

The United States Supreme Court blazed a more sophisticated trail in the leading case of *Helvering* v. *Hallock*[4] where Justice Frankfurter, speaking for the majority, said "The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated upon a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth." Such a holding eliminates the complexities of property law from the already subtle distinctions in the taxation field.

The opinion of the majority of the Montana Court is here criticized since it is based upon such a controversial rule of property law. The dissenting opinions are no better, since they merely disagree with the interpretation of the property law rule. The majority held that one-half of the joint bank account was taxable under Sub-section 3 by finding (1) that the creation of the joint bank account was a "completed gift," (2) that it was a gift of a one-half interest in the joint bank account, and (3) the gift was a transfer in contemplation of death as the joint bank accounts were created within three years immediately preceding the death of the donor and the presumption thereby raised was not rebutted by the taxpayers. Sub-section 6 was applied to the remaining half of the joint bank accounts.

Justice Metcalf, for the majority, refers to the intention

[4](1940) 309 U.S. 106, 84 L.Ed. 604, 60 S.Ct. 444, 125 A.L.R. 1368.

of the legislature in adopting Sub-section 3 and quotes from the opinion of Chief Justice Hughes in *U. S.* v. *Wells*:[5] "The dominant purpose is to reach substitutes for testamentary disposition and thus to prevent the evasion of the estate tax." Justice Angstman believed the legislative intent was expressed by the enacting of Sub-section 6 dealing specifically with jointly owned property. He stated, "In legal effect, the legislature, by saying that one-half is taxable, has said that the other one-half is not taxable."[6] With all due regard to the opinion of Justice Angstman, it is hereby contended that Sub-section 6 simply adds another string to our tax-gatherer's bow, by calling for a tax on at least an aliquot portion of the property in a proper case.

It is here contended that the purpose of taxing all substitutes for testamentary disposition would have been better carried out if the Court had applied Sub-section 3 to 100% of the joint bank accounts instead of using it for only 50% and using Sub-section 6 for the other 50%. Sub-section 3 could have been used in either of two ways to tax the joint bank accounts on 100% of their total amount—as a transfer in contemplation of death, or as a transfer intended to take effect in possession or enjoyment at or after such death of the transferor.

A careful analysis of the statutes supports this thesis. Section 10400.1[7] calls for an inheritance tax on a transfer of property to any person within the state in certain described cases. Sub-section 3 sets out one of these cases. It imposes the tax

[5](1931) 283 U.S. 102, 51 SCt. 446, 450, 75 L.Ed. 867.

[6].....Mont....., 195 P.(2d) 989, 997.

[7]R.C.M. 1935 §10400.1: "A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation except the state of Montana, or any of its institutions, county, town or municipal corporations within the state, for strictly county, town, municipal or other public purposes, and corporations of this state organized under its laws, or voluntary associations, organized solely for religious, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

(1) By a resident of state.....
(2) Nonresident's property within state.....
(3) In contemplation of death.....
(4) When imposed .....
(5) Transfer under power of appointment.....
(6) Joint estates .....
(7) Insurance part of estate .....
(8) On clear market value—deductions....."

on a transfer of property in contemplation of death or intended to take effect in possession or enjoyment at or after such death. The Montana Supreme Court had difficulty with the word "transfer." The majority felt it was necessary to have a completed gift as required by property law in order to find a transfer. It is here contended that such was not the intention of the legislature when the inheritance tax was enacted.

The word "transfer" is defined by Section 10400.43 R.C.M.[8] as follows: ". . . the word 'transfer' as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein prescribed to each individual, or corporation."

In *Tyler* v. *U. S.*,[9] the Supreme Court stated, "The question . . . is, not whether there has been in the strict sense of that word, a transfer of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result, to be measured, in whole or in part, by the value of such rights. . . ."

In the principal case, the creation of the joint bank accounts resulted in a shifting of an economic benefit from the deceased to a named survivor, and hence, constituted a transfer

[8]R.C.M. 1935, §10400.43: "The words "estate" and "Property" as used in this act shall be taken to mean the real and personal property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and not as the property or interest therein of the decedent, grantor, donor, or vendor, and shall include all personal property within or without the state. The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein prescribed to each individual or corporation. The word "decedent" as used in this act shall include the testator, intestate, grantor, bargainor, vendor, or donor. "Intangible" or "intangible property" when used in this act without other qualifications, shall be taken to include all moneys, stocks, bonds, notes, securities and credits of all kinds, secured or unsecured. The words "county treasurer," "public administrator" and "county attorney," as used in this act shall be taken to mean the treasurer, public administrator, and county attorney of the county in which the district court has jurisdiction of the proceedings."

[9](1929) 281 U.S. 497, 503, 504, 74 L.Ed. 991, 998, 999 50 S.Ct. 356, 69 A.L.R. 758.

for tax purposes, whether or not it was a completed gift according to property law.

"Legislative intent" is a handy whipping post frequently used to support personal opinion as to what the law should be. In the principal case, both the majority and the dissenting opinions claim to be based on legislative intent. It is doubtful that our Montana legislature can be credited with having any definite intention as regards this type of legal problem, but it is here submitted that the best indication of legislative intent is found in Section 10400.43 where the word transfer is defined in the broadest possible language. It indicates an intent to reach all substitutes for testamentary dispositions.

The Montana Court unanimously agreed that the savings bonds were not held in the joint names of two or more persons; hence, Sub-section 6 could not apply. It held "the bonds, then, were the property of the decedent so long as she retained them in her possession."[10] In this instance, the court did not experience the same difficulty with the word "transfer." It observed, "They constituted a transfer of personal property without consideration intended to take effect in possession or enjoyment of the named donees at or after the death of Mrs. Perier and were therefore taxable by Sub-section 3 of section 10400.1, R.C.M. 1935, on their full market value."[11] The court could have used the same method with regard to the joint bank accounts. In the Montana case, *In Re Wadsworth's Estate,*[12] our Supreme Court quoted the language of Chief Justice Hughes in *U. S.* v. *Wells*[13] as follows:

> "The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same catagory, for the purpose of taxation, with transfers intended to take effect at or after death of the transferor. The dominant purpose is to reach substitutes for testamentary disposition and thus to prevent the evasion of the estate tax. . . . There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental conditions, and thus to give effect to the manifest purpose of the statute. . . ."

Since it is the intent of Mrs. Perier at the time of the

[10] .....Mont....., 195 P.(2d) 989, 997.
[11] *Id.*
[12] (1932) 92 Mont. 135, 145, 11 P.(2d) 788, 791.
[13] (1930) 283 U.S. 102, 51 S.Ct. 446, 75 L.Ed. 867.

creation of the joint bank accounts that is important here,[14] we must look to any circumstances which may help determine such intent. The facts show that the first three joint bank accounts were created on September 25, 1943 (18 days after the death of her husband); another was created two days later, and the last joint bank account was created on May 22, 1945. The savings bonds were purchased on various dates, commencing with September 1, 1942 and ending on July 1, 1944. The Montana court found that Mrs. Perier was motivated by the prescribed intent in acquiring these bonds on such dates. It is reasonable to believe that the intent of the donor during this period was the same with respect to the joint bank accounts. The fact that the alternative payees made no withdrawals from the joint bank accounts further supports the contention that they were intended to take effect at or after Mrs. Perier's death.

III.

In spite of our dissatisfaction with the theory adopted by the majority of the court, we must nevertheless consider it the law on the subject and draw our conclusions with respect to the future application of the ruling.

It would now appear that all savings bonds made payable to either of two named persons and kept in the possession of the purchaser, will be taxable in full upon the death of the purchaser.[15] Over half of the savings bonds held by Mrs. Perier were purchased more than three years preceeding her death. They were, nevertheless, taxable as a transfer intended to take effect at or after her death.

Joint bank accounts created within the three year period will be taxable in full unless the statutory presumption can be rebutted. Those created more than three years preceding the date of death may also be taxable in full if the surrounding circumstances indicate that the joint account was created as a substitute for a testamentary disposition. The bodily and mental condition of the decedent will have to be considered in each case. The attitude of the so-called donee will also be im-

[14] *7 Am. Jur., Banks*, §427. To constitute a joint deposit of a gift there must be an intention to make the gift; if there is no such intention, the survivor is not entitled to the fund under the gift theory. For example, the donee acquires no ownership in the fund, or any part of it, where the only purpose of creating the joint account was to enable the donee to draw funds for the benefit of the donor.

[15] The same result would follow where the bonds are payable on death to a named beneficiary.

portant, and where the donee has made no withdrawals or deposits to the joint bank account, it will be difficult to disprove the claim that the joint account was created in contemplation of death, no matter when the joint account was created. The existence and use of other bank accounts might also have a bearing on the problem.

Where the surviving joint payee has made more than nominal deposits and withdrawals, there is less cause for holding that the joint bank account was created in contemplation of death. Withdrawals by the surviving payee will make the problem particularly troublesome in view of the theory adopted by the majority of the Montana Court. To illustrate this point, assume a situation similar to the principal case, but where the donee has withdrawn the full amount prior to the death of the person who made the deposit. Under the theory adopted by the majority, one-half of the amount deposited in the account will be taxable as a transfer in contemplation of death, but there will be nothing in the account at the date of death, so that Sub-section 6 will not be applicable and 50% of the joint account will thereby avoid taxation.

Real estate held by husband and wife as joint tenants is also vulnerable and may be held subject to tax of 100% of its full market value under the theory adopted in the Perier case. If the property was acquired within three years prior to the date of death, and if all of the consideration was advanced by the deceased joint tenant, the statutory presumption will apply. "Contemplation of death" could probably be found present, as a matter of fact, in many instances where the property is acquired more than three years prior to the date of death.

In writing this comment, various views have been cited as to the intention of our legislature in regard to taxing jointly owned property. The problem gave our present Supreme Court much difficulty as evidenced by the three opinions of the judges in the decision in the principal case; the Montana Reports contain other cases decided since the enactment of our inheritance tax statute which involved the same difficulty; and yet, many questions remain in the minds of Montana lawyers as to the legislative intent. Is it the duty of the legislature to read the Supreme Court decisions and determine if their intent is being carried out? If so, silence by the legislature will affirm the present decision. However, a change in membership of the Supreme Court, when the exact legislative intent

is not clear, and the court is split 3-2 on an important statute, may result in a contrary holding in a case similar in facts. It would seem appropriate for our legislature to remove the necessity of speculating as to its intention by amending our inheritance tax statutes. The Federal estate tax rule[16] could be used as a pattern for our inheritance tax on jointly owned property. There are obvious administrative advantages to paralleling the federal rule. We would fall heir to the federal cases interpreting that statute, and it would give us an equitable rule. With our present statutes, as applied in the Perier case, a property owner has nothing to gain and much to lose by holding property in joint tenancy.

Sidney P. Kurth.

[16]Internal Revenue Code, §811. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States. (e) Joint interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

ANIMALS AT LARGE ON THE HIGHWAY

A dearth of Supreme Court decisions exists in Montana on the relative rights of drivers of automobiles and of owners of livestock involved in collisions on the highway, nor are there any Montana statutes directly in point. Consideration is here given to Montana statutes relating to trespassing animals and to decisions in other jurisdictions regarding animals on highways as well as to Montana decisions on related matters to in-