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Miscellaneous—Husband and Wife As Joint Tenants'

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discretion of the executive officer having power to grant some kind of discharge."[39] Since the Governor as Commander in Chief had power to discharge, and since the commanding general was the Governor's subordinate, the Court of Appeals refused to go back of the document to determine whether or not the Governor in fact commanded the action.[40]

The Appellate Division had relied heavily on *People ex rel. Smith v. Hoffman*,[41] which had held that a determination by a military board as to a National Guard *officer's* fitness was a judicial finding, subject to civil court review. The Court of Appeals distinguished the case, on the ground that the State Constitution requires a trial and findings (that is, a judicial process) for removal of an officer,[42] but there is nothing similar in the Constitution or statute as to enlisted men, and the regulations provide only for a "recommending" board, saying nothing about hearing or findings. A second ground of distinction was that the officer's case involved an involuntary separation while this case involved a voluntary application for discharge, with discretion in the military authorities as to the kind of a discharge to be granted.

While distinguishing *Smith v. Hoffman*, the Court of Appeals did support the rule of law expressed therein. If the board, dealing with the discharge has the duty not of advising the Governor but of making an adjudication, certiorari will lie.[43] However, if the board is merely "an agency created to advise the governor as commander in chief," and the Governor can act regardless of the recommendation, then certiorari will not lie.[44] Since the latter part of the rule was found applicable here, there could be no judicial review of the discharge.

A contrary decision would open the door of the Court to review of all National Guard discharges. This could become a sizeable undertaking, especially in the light of new compulsory military reserve legislation. The case does point out a need for safeguards for part time soldiers against arbitrary action by the Guard which will unjustly affect the civilian part of their lives. However, this would seem to be an administrative problem and not a judicial one.

Husband and Wife As Joint Tenants

In re Polizzo's Estate[45] involved an assignment of a bond and mortgage by a

39. *Reid v. United States*, 161 F. 469, 472 (S. D. N. Y. 1908), *appeal dismissed* 211 U. S. 529 (1909).

40. The Court concedes that the Governor probably did not actually order the particular discharge, but nevertheless the power to discharge is the Governor's power and therefore free from review.

41. 166 N. Y. 462, 60 N. E. 187 (1901).

42. N. Y. CONST. art. XII, § 6.

43. 166 N. Y. 462 at 471, 60 N. E. 187 at 189.

44. *Id.* at 468, 60 N. E. at 188.

45. 308 N. Y. 517, 127 N. E. 2d 316 (1955).

wife, through an intermediary acting as a conduit only, to her husband and herself and to the survivor's heirs and assigns. The question was whether the husband acquired a present joint ownership in the bond and mortgage or only a right of survivorship.

"Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be joint tenancy."[46] This applies only in the absence of evidence of a clear intent as to the type of interest created.[47] The section applies to personal property as well as real property.[48] There is no tenancy by the entirety in personal property.[49] However, when a chose in action, whether a bank account,[50] a bond,[51] a bond and mortgage,[52] stock,[53] or other investment in personality was owned originally by the *husband* and he assigned it to himself and wife during marriage, or if he furnished the consideration and arranged to have it made over to himself and his wife, then a presumption is applied, in the absence of proof of the contrary, that the husband intended that his wife have a survivorship right only, and not present ownership of one-half or of any other part. In *Moskowitz v. Marrow*[54] it was said: "This rule presents an exception if not an anomaly in the law of property and is applicable only in the case of a gift by a husband to his wife of property or moneys belonging solely to himself."[55]

The Court of Appeals supported the Appellate Division, which had held that the original assignment by the wife created a joint tenancy, with the husband and wife each thereafter owning an undivided half interest in the bond and mortgage, and that the husband's assignment of his half interest was effective to terminate the joint tenancy, after which the husband's assignee and the wife were owners in common.

The majority's reasoning was that if the couple had not been husband and wife at the time of the assignment of the mortgage to them, they would have

46. N. Y. REAL PROPERTY LAW § 66.
47. *Overheiser v. Lackey*, 207 N. Y. 229, 100 N. E. 738 (1913); *McGrane v. Wiener*, 268 App. Div. 789, 49 N. Y. S. 2d 23 (2d Dep't 1944).
48. *Matter of Kimberly*, 150 N. Y. 90, 44 N. E. 945 (1896); *Matter of Blumenthal*, 236 N. Y. 448, 141 N. E. 911 (1923).
49. *Matter of Albrecht*, 136 N. Y. 91, 32 N. E. 632 (1892); *Matter of McKelway's Estate*, 221 N. Y. 15, 116 N. E. 348 (1917); *Matter of Blumenthal, supra* note 48.
50. *West v. McCullough*, 123 App. Div. 846, 108 N. Y. Supp. 493 (2d Dep't 1908), *aff'd* 194 N. Y. 518, 87 N. E. 1130 (1909). Cf. N. Y. BANKING LAW § 239 239(3).
51. *Matter of McKelway's Estate, supra* note 49.
52. *Matter of Albrecht, supra* note 49; *Belfanc v. Belfanc*, 252 App. Div. 453, 300 N. Y. Supp. 319 (3rd Dep't 1937), *aff'd* 278 N. Y. 563, 16 N. E. 2d 103 (1938)
53. *Matter of Kane's Estate*, 246 N. Y. 498, 159 N. E. 410 (1927).
54. 251 N. Y. 380, 167 N. E. 506 (1929).
55. *Id.* at 391, 167 N. E. at 514.

become joint tenants with the right of survivorship, and with the further right in each of them to terminate the joint ownership and create a tenancy in common by conveying his or her interest to a third party.[56] The presumption as to the husband-to-wife transfer was seen as a vestige of the common law rule that a husband owned all his wife's personality, and that thus, when he purported to pass to her an interest in his own personality, he could not have intended to give her anything greater than a right of survivorship.[57] Since this historical theory is seen as having no impact on a modern-day transfer, the court refused to extend the presumption applicable in a husband-to-wife transfer to a wife-to-husband transfer, in the absence of proof that the actual intent was to establish a right of survivorship only.

The dissenters would have enlarged the coverage of the presumption, so that proof of a gift by the wife of property solely belonging to her would make out a prime facie case of a joint tenancy, with a right of exclusive present enjoyment in the wife and a right of survivorship in the husband. Fairness was seen as dictating equal treatment for married women, especially when there was no reason for establishing a double standard. The historical theory argument was rejected, since the presumption was seen as based on the lack of consideration.[58] If the majority's decision is merely a step in the removal of the vestigial presumption admittedly an anomaly in the law of property, then it certainly is justifiable. However, if the presumption is to be retained in the husband-to-wife transfer, then the majority can be credited only with the creation of a new source of confusion by applying a double standard based solely on which spouse transfers the property.

Conflicts—Domestic Relations

Where a contractual transaction has elements in different jurisdictions, the New York courts have used various approaches to determine which law is to be applied: that of the jurisdiction where the contract was made; that of the place of performance; that intended by the parties; or that of the jurisdiction in which are grouped the significant contacts.[59] The Restatement of Conflict of Laws states that the law of the place of making should govern the validity of the contract and

56. *Matter of Suter's Estate,* 258 N. Y. 104, 179 N. E. 310 (1932).
57. *West v. McCullough, supra,* note 50.
58. 308 N. Y. at 523, 127 N. E. 2d at 320: "Surely an inquiry into who paid the consideration has not the rights under the slightest relation to married women's property rights under the common law. Rather it seeks a clue as to the donor's intent. Without proof of different intent, it can not be assumed that such donors intended to give their spouses such control over the donated asset that he or she may alienate one half of it without the permission of the spouse who supplied the sole consideration for the asset. Such an assumption ignores the unity of the marital relationship."
59. See *Jones v. Metropolitan Life Insurance Co.,* 158 Misc. 466, 286 N. Y. Supp. 4 (1936), for a partial review of the cases.