and has refused to hold that such a wrongdoer is immune from liability.[14] The defense of infancy, being in law "a shield and not a sword," cannot be pleaded to avoid liability for frauds, trespasses, or torts.[15]

The *Friedhoff* case forms the basis of an extremely modern concept and has, on its face, rejected the old classical approach to infancy. Had the court allowed the defendant driver to exert his infant rights and disaffirm the employment contract, such would have rendered the contract void *ab initio*, completely destroying the employment relationship with the plaintiff. As there was no existing compensation between the plaintiff and defendant, their common employment was the sole factor which made the plaintiff a *passenger* as opposed to a *guest*. By being determined a *passenger*, the plaintiff could escape the requirements of the South Dakota guest statute,[16] and thus, by alleging and proving only ordinary negligence, he would be entitled to recovery. Had the court declared the plaintiff to be a *guest* by allowing the disaffirmance of the contract, the plaintiff would not have recovered because there was no "wilful or wanton misconduct" as required by the guest statute. By allowing recovery, the South Dakota court upheld a tort action arising out of a minor's contract and rejected the defense of infancy.

The treatment accorded to like circumstances by other courts has been strikingly dissimilar. The circuit court in *Friedhoff* had relied on the reasoning in the Michigan case of *Brown v. Wood*,[17] in initially finding for the defendant. In *Brown*, four minors brought suit against a minor driver pursuant to an agreement to pay the driver a stated sum for transportation. An accident occurred; and the driver disaffirmed the transportation-for-hire agreement. The Michigan court upheld this disaffirmance as valid and denied the plaintiffs' recovery on the ground that infancy was a defense to an action in tort based upon a contract.[18] The South Dakota court applied this reasoning in *Tennyson v. Kern*,[19] an automobile accident involving minors, where the court stated:

> If the wrong grows out of contract relations, and the real injury consists in the nonperformance of a contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it as a tort.[20]

The Oregon court, however, rejected the *Brown* decision by holding that once the carrier-passenger relationship comes into being the carrier owes a

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14 W. Prosser, Torts § 128 (3d ed. 1964).

15 Jennings v. Rundall, 8 T.R. 335, 101 Eng. Rep. 1419 (Ex. 1799).

16 S.D. Code § 44.0362 (1950).

17 293 Mich. 148, 291 N.W. 255 (1940).

18 Justice North said: "[T]he fact remains that the status of 'a passenger for hire' is one arising out of contractual relations; and in these tort actions the damages sought arise in consequence of defendant's breach of this contract to carry safely, and to permit recovery is to indirectly enforce the contract obligation of the defendant minor." 293 Mich. 148, 156, 291 N.W. 255, 258 (1940).

19 76 S.D. 136, 74 N.W.2d 316 (1956).

20 *Id.* at 142-43, 74 N.W.2d at 320.

duty to exercise due care.[21] In this instance, the court separated the tort from the contract and held the infant liable in tort for his negligence. The court reasoned that, "the status of the parties exists quite apart from the enforceability of their contract."[22] A 1959 Kansas court applied a different rationale in disallowing a minor's disaffirmance, viewing the transportation-for-hire agreement by the infant as not voidable.[23] The Kansas court found that transportation was a necessity and stated: "We are, therefore, of the opinion that private transportation for the worker is now a necessity and an agreement made by a minor for such transportation is binding and not subject to disaffirmance for the reason of minority alone."[24]

In *Friedhoff*, the court dealt directly with the situation by disallowing the disaffirmance altogether. The court could not have used the approach taken in Oregon because if the tort and contract were separated, the plaintiff would not be entitled to recover because she could not prove the recklessness required by the guest statute. The court mentioned, but made no attempt to embody the Kansas decision relating to necessity. Instead *Friedhoff* has struck a blow at the classical approach to infancy by holding that the minor could not disaffirm his employment contract so as to change the status of the passenger to that of a guest.[25]

Paradoxically, the courts declare the infant mature enough to be held legally responsible for his torts and crimes and, yet, not mature enough to be held legally responsible for those contracts which are often the primary links in the commission of such torts and crimes. *Friedhoff* represents a realistic approach to the theory of disaffirmance by minors in holding that once a relationship between the parties is established, the doctrine may not be applied so as to relieve the minor of his negligence.

DONALD F. NEIMAN

Joint Tenancy—Bank Accounts—FUNDS OF A JOINT TENANT BANK ACCOUNT MAY BE SUBJECT TO CLAIMS FOR THE DECEASED JOINT TENANT'S FUNERAL EXPENSES.—*In re Estate of Stamets* (Iowa 1967).

Five years before his death in 1965, Frank Stamets opened a joint tenant savings account payable to either himself or to Lena Stamets, the wife of Frank's deceased brother, or to the survivor. Only Frank signed the signature card. The administratrix of Frank's estate was his sister Beulah Johnson. She argued that unless Lena signed the agreement on the signature card there was

21 Steenson v. Robinson, 236 Ore. 414, 389 P.2d 27 (1964).
22 *Id.* at 423, 389 P.2d at 29.
23 Ehrsam v. Borgen, 185 Kan. 776, 346 P.2d 260 (1960).
24 *Id.* at 779, 347 P.2d at 264.
25 *See* Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?*, 11 KAN. L. REV. 361 (1963).

no valid contract for Lena's benefit. The trial court found that a joint tenancy with right of survivorship had been established by a valid contract between the decedent and the bank and that Lena was entitled to the funds of the savings account as a donee-beneficiary. On appeal to the Supreme Court of Iowa, *Held*, affirmed. Lena's signature on the signature card was found not to be necessary to preserve her interest as survivor; the deposit was the consideration for the bank's agreement to repay the funds upon the order of Frank or Lena or the survivor. In affirming the district court's decree, the supreme court noted that Lena was required to pay the expenses of Frank's funeral, although she had offered to do so, if she received the funds from the joint tenant account. The implication, by dicta, was that the joint tenant bank account would have been subject to the deceased joint tenant's outstanding debts. *In the Matter of the Estate of Stamets*, —— Iowa ——, 148 N.W.2d 468 (1967).[1]

The possibility of subjecting funds of a joint bank account with the right of survivorship to the claims of a deceased joint tenant's creditors represents a significant departure from prior decisions which have held those funds to be free of the deceased tenant's debts. An explanation of the problem requires a thorough analysis of a joint and survivorship account for the reason that the essential characteristics of this type of account have caused the courts to have conceptual difficulties in finding a workable set of rules by which a survivorship account could be governed.

Joint and survivorship bank accounts have been seized upon as a medium of transferring property to avoid the expense and delay of probate or the necessity of relinquishing all control over the property. Typically, the donor-depositor opens an account in the name of himself and the donee which is payable to either person or the survivor. In this way, the donor is able to make a gift while retaining use of the funds during his life time; upon his death, the funds belong to the donee "free from the claims of the depositor's estate."[2] The joint bank account with the right of survivorship enables a depositor to thereby transmit his property via means outside the forms traditionally used for that purpose; yet, the depositor manifests an intent to give the remaining funds of the account to the survivor. The perplexity of reconciling the depositor's intent with the joint bank account as a disposition of property has been characterized as follows:

> Tribunals pride themselves on their ability to ascertain the transferor's intention when the distribution of property is involved, but when the donor departs from the traditional forms of trans-

1 *See* Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953); Note, *The Right of the Individual Creditor Against the Joint and Survivorship Bank Account*, 42 IOWA L. REV. 551 (1957). In the *Stamets* case the Iowa court, after finding a joint tenant account with the right of survivorship, has indicated that the survivor's right to the funds of the joint tenant account may be subject to the claims of creditors of the deceased joint tenant. For that reason the focus of this discussion will be limited to such claims, rather than those claims arising before the death of one of the joint tenants or those which hinge upon the formation of the account itself.

2 Kepner, *supra* note 1, at 596.

> ferring property courts are placed in a dilemma of trying to effectuate the donor's intention, and at the same time making the transfer conform with one of the recognized means. Sometimes the two cannot be reconciled.[3]

Under the common-law principles of joint tenancy, the survivor was entitled to the entire property, jointly held, free from any claims of the deceased tenant's heirs, creditors, or personal representative.[4] This feature, the right to property upon death of the other joint tenant, has been called the doctrine of survivorship.[5] As a result of dissatisfaction with the doctrine, many states have passed legislation limiting its application to cases where an intent to create the right of survivorship is clearly expressed.[6] Yet, the statutes of other states seem to perpetuate the common-law principle of survivorship by providing that a deposit in the name of two or more persons shall be payable to either or the survivor.[7]

As indicated, in those states which have eliminated or restricted the application of the doctrine of survivorship, there is a presumption that the joint account was created only for purposes of convenience.[8] To overcome this presumption, the courts of these states require an unequivocal expression of intent to create a joint tenancy with the right of survivorship;[9] a showing of intent is not necessary if the joint tenant is the depositor's wife.[10] In contrast are those states whose statutes raise a presumption in favor of an intent to create a joint bank account with the right of survivorship.[11] This presumption may be rebutted by a showing of contrary intent.[12]

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3 Kepner, *supra* note 1, at 597.

4 Wilson co. v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

5 Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932).

6 *In re* Rice's Estate, 281 App. Div. 945, 119 N.Y.S.2d 439 (1953). *See also* IOWA CODE § 557.15 (1966).

7 De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956); Bradley v. State, 100 N.H. 232, 123 A.2d 148 (1956). Although these statutes were enacted for protection of banks, they have been frequently held to fix the property rights of the payees. *In re* Estate of Stamets, 148 N.W.2d 468 (Iowa 1967); Rose v. Kahler, 151 Neb. 532, 38 N.W.2d 391 (1949). States having statutes of the latter type often permit a depositer to create the right of survivorship by transferring the account to himself and another, Barton v. Hooker, 283 P.2d 514 (Okla. 1955); Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944); *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943), or by merely adding another name to his present account, Glessner v. Security-Peoples Trust Co., 166 Pa. Super. 566, 72 A.2d 817 (1950). The fact that one depositor contributes all the funds does not seem to be important. Seng v. Corns, 58 So. 2d 686 (Fla. 1952); Barton v. Hooker, *supra*; *In re* Cochrane's Estate, 342 Pa. 108, 20 A.2d 305 (1941); Glessner v. Security-Peoples Trust Co., *supra*.

8 *In re* Ricisak's Estate, 2 Misc. 2d 717, 150 N.Y.S.2d 380 (Surr. Ct. 1956).

9 Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944); *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943); De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956); *In re* Estate of Bauer, 91 Ohio L. Abs. 162, 191 N.E.2d 859 (Ohio P. Ct. 1962); Barton v. Hooker, 283 P.2d 514 (Okla. 1955); Glessner v. Security-Peoples Trust Co., 166 Pa. Super. 566, 72 A.2d 817 (1950).

10 *In re* Rice's Estate, 281 App. Div. 945, 119 N.Y.S.2d 439 (1953).

11 Scharge v. Schram, 39 F. Supp. 906 (E.D. Mich. 1941); Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W.2d 817 (1950); *In re* Estate of Donleavy, 41 Misc. 2d 28, 244 N.Y.S.2d 730 (Surr. Ct. 1962).

12 *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943). One way of refuting this presumption would be to establish that the joint account was created only for purposes of convenience. Rose v. Kahler, 151 Neb. 532, 38 N.W.2d 391 (1949).

Although intent is probably the dominant factor in determining whether or not the depositor created a joint bank account with the right of survivorship,[13] the courts usually consider the element of intent in terms of the various theories for transferring property. For example, the creation of a joint bank account may raise a presumption of an intent to make an immediate gift.[14] However, certain difficulties arise in trying to fit the creation of a joint bank account within the context of an inter vivos gift. The following language illustrates one court's effort to overcome these difficulties:

> [T]he rules relating to gifts inter vivos cannot be strictly and literally applied in determining whether a joint bank account with right of survivorship has been established. *Thus, the very nature of a joint bank account is such that one essential element of a gift inter vivos is missing—that of surrender of dominion and control by the donor—since each party has an equal right to withdraw the funds on deposit. . . . Nor is the rule as to "delivery" of the gift applicable in this situation. This is so because the thing given is not the money, in specie, on deposit in the joint bank account; it is a gift of an interest in the funds on deposit equal to that of the donor. But we think that the third essential of a gift inter vivos—that of donative intent—is just as relevant to the question here under discussion as it is in cases involving the establishment of a bank account by a person with his own funds in the name of another. . . .*
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> . . . .
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> What primarily needs to be shown in these situations is the donor's intent to give the donee a present right of ownership of a one-half undivided interest in the account.[15]

Further evidence of the difficulty of analyzing a joint bank account within the theory of a gift is shown by another court's dictum that "a valid gift of a joint interest in the account with right of survivorship, was made and effectively delivered to the plaintiff at the time the account was created"; yet the court held that, as long as the essentials of the statute were "present, the right of the survivor does not depend upon the fact of a completed gift."[16]

A similar view "paid lip service" to the gift theory by referring to the joint tenant as a donee, but considered his right to have arisen out of a written agreement. This would seem to indicate that the court was really talking about a contract theory.[17]

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13 *In re* Walker's Estate, 340 Pa. 13, 16 A.2d 28 (1940). In some states a joint tenancy could only be created by establishing unity of time, title, interest and possession. A mesne conveyance to a straw man was necessary to establish the four unities. Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928). However, Iowa and several other states have abandoned this concept of creating a joint tenancy with right of survivorship in favor of an inquiry based on intent. *In re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956); Petri v. Rhein, 257 F.2d 268 (7th Cir. 1958).

14 Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944); Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W.2d 817 (1950); *In re* Cochrane's Estate, 342 Pa. 108, 20 A.2d 305 (1941); Glessner v. Security-Peoples Trust Co., 166 Pa. Super. 566, 72 A.2d 817 (1950).

15 Maier v. Bean, 189 So. 2d 380, 382 (Fla. Dist. Ct. App. 1966).

16 Gray v. Gray, 78 Idaho 439, 447, 304 P.2d 650, 654-55 (1956).

17 Barton v. Hooker, 283 P.2d 514 (Okla. 1955).

In fact, some courts completely reject the gift concept of a joint tenancy[18] and, instead, hold that the rights of the surviving joint tenant arise as a third party beneficiary to a contract between the deceased co-depositor and the bank.[19] This is especially true in those jurisdictions which have abolished common-law joint tenancy but do recognize the rights of survivorship if a depositor has created them by contract;[20] the failure to create a right of survivorship will result in the tenancy being presumed to be only a tenancy in common.[21]

Regardless of which theory is used to explain a joint tenancy bank account, such disposition of funds is not deemed to be testamentary in character, even "though not ripening into full ownership until the death of the donor."[22] Since a joint and survivorship account has been held not to be testamentary in character, it is not subject to the laws of descent and distribution.[23] This factor distinguishes a mere joint account, subject to the laws of descent, from a joint tenancy with the right of survivorship.[24]

The above discussion describes the difficulty of trying to analyze a joint bank account by any of the conventional means of transferring property. Because the depositor does not surrender dominion over the funds, the deposit cannot qualify as a common-law gift. Nor can the joint bank account be construed as a trust for the reason that the intent to enter into such a relationship is lacking on the part of the creator of the account. Also, it fails to qualify as a common-law joint tenancy since the "four unities" (a concept generally regarded as outmoded[25]) necessary for creating such a joint interest are lacking. Even though the surviving joint tenant may be entitled to the funds by virtue of what is termed a third party beneficiary contract between the bank and the deceased joint tenant, the contract does not thereby transfer the funds to the other joint payee as would a conveyance. The joint deposit is not operative as a will because the statutory formalities have not been met. On the other

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18 Arthur v. Witmeyer, 89 Ohio L. Abs. 505, 53 N.E.2d 915 (Ohio Ct. App. 1943).

19 *In re* Estate of Stamets, 148 N.W.2d 468 (Iowa 1967); *In re* Estate of Voegeli, 108 Ohio App. 371, 161 N.E.2d 778 (1959); *In re* Kessler's Estate, 85 Ohio App. 240, 85 N.E.2d 609 (1949). Joint tenancy may also be considered in terms of a trust, tenancy by the entirety, strict joint tenancy, tenancy in common, and sui generis. *See* Kepner, *supra* note 1; Note, IOWA L. REV. supra note 1.

20 Wilson co. v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960); *In re* Estate of Schroeder, 75 Ohio. L. Abs. 555, 144 N.E.2d 512 (Ohio P. Ct. 1957); *In re* Estate of Webb, 49 Wash. 2d 6, 297 P.2d 948 (1956).

21 De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956). *See also* IOWA CODE § 557.15 (1966).

22 *In re* Lewis' Estate, 194 Miss. 480, 494, 13 So. 2d 20, 25 (1943). One reason given is that the surviving joint tenant's rights arose out of a contract. *In re* Estate of Voegeli, 108 Ohio App. 371, 161 N.E.2d 778 (1959).

23 *In re* Kessler's Estate, 85 Ohio App. 240, 85 N.E.2d 609 (1949); *In re* Estate of Schroeder, 75 Ohio L. Abs., 555, 144 N.E.2d 512 (Ohio P. Ct. 1957). Although the joint tenant bank account is not testamentary in character, the Nebraska court has commented that their statute governing joint deposits still "leaves to the depositor the determination of who shall receive the benefits of the act." Rose v. Kahler, 151 Neb. 532, 542, 38 N.W.2d 391, 396 (1949). This appears to be part of the testator's dispositive scheme.

24 *In re* Kessler's Estate, 85 Ohio App. 240, 85 N.E.2d 609 (1949); *In re* Estate of Schroeder, 75 Ohio L. Abs. 555, 144 N.E.2d 512 (Ohio P. Ct. 1957); *see* IOWA CODE § 633.436 (1966).

25 *See* note 13 *supra*.

hand, since the creation of the account is gratuitous, the deposit has the nature of a gift; it is like a will because until the depositor's death, the donee joint tenant is not certain of the amount he will receive; and the depositor's right to withdraw the funds gives the account characteristics of a revocable trust. Thus, the joint bank account must be considered as a tool by which to transfer property, combining some of the features of a gift, a will, a common-law joint tenancy and a revocable trust; it is a new concept which possesses its own independent characteristics.[26]

The right of survivorship is the "grand incident" of the joint tenant bank account.[27] This right has been considered to give the co-depositor a present vested interest at the time the joint account is created.[28] If the joint account was created for the purpose of defrauding subsequent creditors,[29] it may be subject to avoidance.[30] Otherwise, the presumption[31] is that upon the death of the co-tenant, the surviving tenant acquires the "right to the immediate possession, ownership and enjoyment of the entire fund."[32]

The accrual of this right to the balance[33] of the account is subject to inheritance tax,[34] at least to the extent of the donor's contribution to the account.[35] For tax purposes the joint account is listed as part of the assets of the estate,[36] but is actually a non-probate asset.[37]

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26 Kepner, *supra* note 1, at 635.

27 State v. Gralewski's Estate, 176 Ore. 448, 159 P.2d 211 (1945).

28 *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943); De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956); *In re* Estate of Voegeli, 108 Ohio App. 371, 161 N.E.2d 778 (1959); *In re* Kessler's Estate, 85 Ohio App. 240, 85 N.E.2d 609 (1949). Some cases still apply the common-law analogy that at the time the joint account is created, each tenant owns half or part and the whole, *per my et per tout*. *In re* Cochrane's Estate, 342 Pa. 108, 20 A.2d 305 (1941).

29 De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956); Wilson co. v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960). However, mere incurrance of debts by the creator-depositor subsequent to opening the account will not alone destroy a joint survivorship account. De Forge v. Patrick, *supra*. *Cf.* Rupp v. Kahn, 246 Cal. App. 238, 55 Cal. Rptr. 108 (Dist. Ct. App. 1966). While insolvent the deceased joint tenant had taken title in joint tenancy with his wife to realty, sundry notes and trust deeds; the court held such an acqusition to be a conveyance in fraud of creditors and therefore required the assets acquired in joint tenancy to be included as part of the deceased joint tenant's estate. *See also* IOWA CODE § 633.368 (1966).

30 Bradley v. State, 100 N.H. 232, 123 A.2d 148 (1956). Included are attempts to defraud the surviving spouse as well as creditors.

31 *In re* Estate of Donleavy, 41 Misc. 2d 28, 244 N.Y.S.2d 730 (Surr. Ct. 1962). The Iowa court has described this process:

> In a legal sense, his death does not transfer the rights that he possessed in the property to the surviving tenants. Death does not enlarge or change the estate. Death terminates his interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others.

Fleming v. Fleming, 194 Iowa 71, 88-89, 174 N.W. 946, 953 (1919).

32 *In re* Cochrane's Estate, 342 Pa. 108, 111, 20 A.2d 305, 307 (1941). *See* Gray v. Gray, 78 Idaho 439, 304 P.2d 650 (1956); Glessner v. Security-Peoples Trust Co., 166 Pa. Super. 566, 72 A.2d 817 (1950).

33 Gray v. Gray, 78 Idaho 439, 304 P.2d 650 (1956).

34 *In re* Cochrane's Estate, 342 Pa. 108, 20 A.2d 305 (1941).

35 INT. REV. CODE of 1954 § 2040. The courts may be concerned with the entire account as indicated in Estate of Chrysler v. Commissioner, 361 F.2d 508, 510 (2d Cir. 1966); "However, § 2040 is concerned only with beneficial interest possessed by a decedent as a joint tenant. It is apparent from the facts of this case that decedent's interest as a joint tenant was purely nominal."

36 *In re* Estate of Baxter, 412 P.2d 777 (Wash. 1966).

37 *In re* Estate of Schroeder, 75 Ohio L. Abs. 555, 144 N.E.2d 512 (Ohio P. Ct. 1957).

The joint tenant bank account, as a non-probate asset, is not part of the estate. Instead, the whole title vests in the surviving joint tenant who takes the remaining funds free of the debts of the estate,[38] the claims of heirs,[39] the surviving spouse,[40] the funeral expenses and the expenses of administration.[41] Even though a joint tenant may have pledged his interest in the joint account as security for a loan, upon his death that interest ceases to exist, and there is nothing which his creditors may claim.[42]

In contrast, several recent decisions indicate that the surviving joint tenant may be liable for certain claims against the deceased tenant's estate. The Washington court in *In re Estate of Webb* assumed, though not deciding, that "the surviving spouse could prevail over the person with a right of survivorship in the joint account."[43] Also, a New York court in the case of *In re Estate of Donleavy*[44] has held that the surviving joint tenant was liable for the funeral expenses of the deceased tenant. The court's rationale was that a depositor should not be able to place his funds beyond the reach of creditors merely by the nature of the bank account chosen.[45]

Prior law has held that if a joint tenant bank account with right of survivorship is in fact created, the surviving joint tenant takes the remaining funds not subject to any claims other than tax.[46] As recently as 1966 Justice Mason of the Iowa Supreme Court stated, by way of dictum, that "such interest cannot be reached after the joint tenant's death."[47] However, the *Webb*

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38 *In re* Estate of Chadwick, 167 Ohio St. 373, 149 N.E.2d 5 (1958); *In re* Estate of Bauer, 91 Ohio L. Abs. 162, 191 N.E.2d 859 (Ohio P. Ct. 1962); *In re* Estate of Baxter, 412 P.2d 777 (Wash. 1966).

39 Wilson co. v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

40 Melinik v. Meier, 124 S.W.2d 594 (Mo. Ct. App. 1939); *In re* Estate of Bauer, 91 Ohio L. Abs. 162, 191 N.E.2d 859 (Ohio P. Ct. 1962).

41 Bradley v. State, 100 N.H. 232, 123 A.2d 148 (1956); *In re* Kraemer's Estate, 183 Misc. 101, 46 N.Y.S.2d 891 (Surr. Ct. 1944). "Funeral expenses are not strictly a debt of the decedent unless expressly made so by him. However, the common law, and usually the statutes, do make them a first charge against a decedent's estate. Hence, to treat the whole or any part as a general debt would disregard the peculiar and preferred nature of the claim." National Metropolitan Bank v. Gawler's Sons, 168 F.2d 571, 573 (D.C. Cir. 1948). *See also In re* Holems' Estate, 16 N.J. Misc. 402, 1 A.2d 42 (N.J. Orphan's Ct. 1938); *In re* Cohen's Estate, 54 Ohio L. Abs. 9, 86 N.E.2d 727 (Ohio Ct. App. 1948).

42 Hopkins Place Sav. Bank v. Holzer, 175 Md. 481, 2 A.2d 639 (1938); *see also* IOWA CODE §§ 633.425-.426 (1966).

43 49 Wash. 2d 6, 13, 297 P.2d 948, 952 (1956).

44 41 Misc. 2d 28, 244 N.Y.S.2d 730 (Surr. Ct. 1962).

45 The following language illustrates the realistic approach which the court took:

> To say that a depositor may evade his obligations by selecting one form of bank account rather than another is to permit him to accomplish a result which he could not achieve by will. If this is so, the recipient of such an account acquires property beyond the reach of creditors without consideration and solely by reason of either the wife of the decedent or, perhaps, by sheer chance resulting from the decedent's innocent choice of the form of the account. The court is disinclined to sanction such a result and feels that in this area a basis for distinguishing between a Totten Trust account and a joint account consisting entirely of the decedent's money does not exist.

In re Estate of Donleavy, 41 Misc. 2d 28, 33, 244 N.Y.S.2d 730, 735 (Surr. Ct. 1962). *See also In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904).

46 *Cf.* text accompanying notes 38-41 *supra.*

47 Frederick v. Shorman, 147 N.W.2d 478, 484 (Iowa 1966). The right of a creditor of a deceased joint tenant to reach property held in joint tenancy was not before the court since neither tenant was deceased. Instead, the issue was whether there was a joint tenancy which would then permit the creditor of one joint tenant to attach the joint property.

and *Donleavy* decisions and the *Stamets* case would seem to indicate a trend in the other direction and that at least certain claims may be allowed against the funds held by the surviving joint tenant.[48] Subjecting the surviving joint tenant's funds to the claims of creditors (at least to the extent of the deceased tenant's contributions) is the next logical step if one considers: the difficulty of adapting the nature of a joint tenancy to the established means of transferring property; the dispositive discretion which the depositor may exercise (approaching that of testamentation); and the policy of taxing the surviving joint tenant (at least to the extent of the deceased co-depositor's contribution).

MARION E. JAMES

Motor Vehicles—THERE IS A DUTY TO USE AVAILABLE SEAT BELTS WHILE RIDING IN AN AUTOMOBILE.—*Bentzler v. Braun* (Wis. 1967).

Plaintiff was a guest passenger in an automobile driven by Klimmer. The headlights from a stranded automobile temporarily blinded Klimmer, causing him to collide with the rear-end of Braun's car. As a result of the collision, the plaintiff received severe facial lacerations and other injuries. At the time of the accident Klimmer's automobile was equipped with seat belts as required by Wisconsin law; however the plaintiff was not using them. Plaintiff brought suit against Braun and Klimmer. Counsel for the defense requested an instruction to the jury to the effect that if Klimmer's automobile was equipped with seat belts and if the plaintiff was not using them at the time of the accident, then she was negligent; and if her injuries would have been reduced or eliminated by the use of seat belts, then the failure to use them would mitigate damages. The trial court refused the instructions on the ground that the defendant failed to prove a causal relationship between the plantiff's injuries and her failure to use seat belts. Judgment was for the plaintiff. On appeal to the Supreme Court of Wisconsin, *Held*, affirmed. There is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate; however, due to the defendant's failure to prove a causal relationship between the plaintiff's failure to use available seat belts and her injuries, the requested instruction was properly refused. *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

In 1961, Wisconsin became the first state to enact seat belt legislation[1]

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[48] *Cf.* text accompanying notes 43-45 *supra*.

[1] WIS. STAT. ANN. § 347.48 (Supp. 1967) provides:
(1) Safety belts required. (1) It is unlawful for any person to buy, sell, lease, trade or transfer from or to Wisconsin residents at retail an automobile, which is manufactured or assembled commencing with the 1962 models, unless such vehicle is equipped with safety belts installed for use in the left front and right front seats thereof, and no such vehicle shall be operated in this state unless such belts remain installed. (2) Type and manner of installing. All such safety belts must be of a type and must be installed in a manner approved by the motor vehicle department. The department

making seat belts mandatory commencing with 1962 model automobiles. The Wisconsin court has interpreted the statute as requiring merely the installation of seat belts, and not their use.[2] In addition to Wisconsin, twenty-two other states have enacted legislation pertaining to the installation of seat belts;[3] but only one of these states, Rhode Island, demands the actual use of seat belts, and this enactment only applies to drivers of certain public transportation and government vehicles.[4] Therefore, the courts have universally held that there is no statutory duty requiring the actual use of seat belts by drivers or guest passengers.

Regarding the question of whether or not there is a duty based on the common law standard of ordinary care to use available seat belts, most of the courts have concluded that the time has not yet arrived when the ordinary prudent man will always "buckle up," and thus, the failure to use seat belts is not negligence.[5] However, a Texas court in *Vernon v. Droeste*,[6] in finding that the plaintiff's injuries were a direct cause of his failure to fasten his safety harness, impliedly found a common law duty to use such safety devices and thereby found the plaintiff contributorily negligent.

The courts also have had difficulty in finding a causal relationship between the plaintiff's failure to use seat belts and the injuries sustained.[7] But again, in *Vernon v. Droeste*,[8] the plaintiff's failure to use a safety harness was pleaded as a defense. The jury concluded that the plaintiff was guilty of contributory negligence and that ninety-five per-cent of his injuries would have been avoided if he had used the safety harness.

In this area the two problem elements are duty and cause. Regarding the issues of duty and cause, two things must be shown: the conduct on the part of the plaintiff must fall below the standard to which he should conform for his own protection; and the plaintiff's conduct must be a legally contributing cause concurring with the negligence of the defendant in bringing about the plaintiff's harm.[9]

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shall establish specifications and requirements for approved types of safety belts and attachments thereto. The department will accept, as approved, all seat belt installations and the belt and anchor meeting the society of automotive engineers' specifications.

2 Note, *Seat Belt Negligence In Automobile Accidents*, 1967 WIS. L. REV. 288 (1967).

3 IOWA CODE § 321.445 (1966); CAL. VEHICLE CODE ANN. § 27309 (West Supp. 1966); CONN. GEN. STAT. § 14-100a (Supp. 1966); GA. CODE ANN. tit. 68, § 1801 (Supp. 1965); ILL. REV. STAT. c. 95½, § 217.1 (1963); IND. ANN. STAT. § 47-2241 (Burns 1965); MD. ANN. CODE art. 66½, § 296A (Michie 1967); MASS. GEN. LAWS c. 90, § 7 (Supp. 1966); MICH. STAT. ANN. § 9.2410(2) (Supp. 1965); MINN. STAT. ANN. § 169.685 (Supp. 1966); MISS. CODE ANN. § 8254.5 (Supp. 1966); MO. ANN. STAT. § 304.555 (1963); NEB. REV. STAT. § 39-7, 123.05 (Supp. 1963); N.M. STAT. ANN. § 64-20-75 (Supp. 1967); N.Y. VEHICLE & TRAFFIC LAW § 383(a)(g) (Supp. 1967); N.C. GEN. STAT. § 20-135.2 (Supp. 1965); ORE. REV. STAT. § 483.482 (1963); R.I. GEN. LAWS ANN. § 31-23-39 (Supp. 1966); TENN. CODE ANN. § 59-930 (Supp. 1966); VT. STAT. ANN. § 46.37510 (Supp. 1966); W. VA. CODE ANN. § 17C-15-43 (Supp. 1966).

4 R.I. GEN. LAWS ANN. § 31-23-41 (Supp. 1966).

5 Brown v. Kenderick, 192 S.2d 49 (Fla. Dist. Ct. App. 1966); Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967).

6 No. 17, 1705 Dist. Ct. Brazos co., Texas, 85th Jud. Dist. (June 9, 1966).

7 Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. App. Div. 1966).

8 No. 17, 1705 Dist. Ct. Brazos co., Texas, 85th Jud. Dist. (June 9, 1966).

9 RESTATEMENT (SECOND) OF TORTS § 463 (1964).