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DEEDS - CONSTRUCTION WHERE GRANTEES TAKE "JOINTLY"

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DEEDS — CONSTRUCTION WHERE GRANTEES TAKE "JOINTLY" — Land was conveyed to plaintiffs' ancestor and defendant by deed. The granting clause read: "hereby convey to Isaac . . .and Alice. . ."; the habendum clause:

"Said real estate being taken by said grantees jointly . . . to have and to hold . . . to the said grantees, their assigns, heirs, and devisees forever." The heirs of Isaac, who died intestate, filed a partition petition; Alice, claiming as surviving joint tenant, answered and also started an action to quiet title. A statute provided that "Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed." [1] *Held,* the language in the deed did not overcome the statutory presumption of creation of tenancy in common. *Albright v. Winey,* (Iowa 1939) 284 N. W. 86.

The early common-law presumption that two or more grantees in the same deed were joint tenants yielded in time to the more equitable presumption that they were tenants in common,[2] and this shift is concretely embodied in statutes in most of the states.[3] From these statutes arises the practical problem of determining what language suffices as an expression of "contrary intent" to overcome the prevailing presumption. For anyone concerned with drafting a deed it would be adequate to recognize that the simple formula, "as joint tenants and not as tenants in common," seems quite clearly always to avoid operation of the statute.[4] But the problem is more difficult when it is necessary to look in retrospect to determine from words already and irrevocably written whether a joint tenancy or tenancy in common was created. Where "jointly" has been used alone, some courts have construed the deed as creating a joint tenancy [5] and others have said that the grantees were tenants in common.[6] Apparently the significant factor is not merely the wording of the instrument but rather the set of surrounding circumstances indicating the intent with which the grantor used the particular language; hence, a more studious regard for factual variations can effectively nullify the suggestion of out and out conflict.[7]

[1] Iowa Code (1935), § 10054.

[2] This interesting development was probably due to the inexorable pressure of economic forces which eliminated feudal tenures and incidentally the special advantages of joint tenancy. BREWSTER, CONVEYANCING, § 151 (1904).

[3] These statutes, in general, either (1) reverse the old presumption, (2) destroy survivorship as an incident of joint tenancy, or (3) expressly abolish joint tenancy. The first is the most common; some legislatures have enacted both the first and second types; only Georgia and Oregon, apparently, have completely abolished joint tenancy. BREWSTER, CONVEYANCING, § 151 (1904). In Sergeant v. Steinberger, 2 Ohio 305, 15 Am. Dec. 553 (1826), the presumption of tenancy in common was applied even in the absence of any statute.

[4] Shipley v. Shipley, 324 Ill. 560, 155 N. E. 334 (1927) ("with full rights of survivorship and not as tenants in common"); Morris v. McCarty, 158 Mass. 11, 32 N. E. 938 (1893), ("as tenants by the entirety and not as tenants in common").

[5] Case v. Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253 (1894); Murray v. Kator, 221 Mich. 101, 190 N. W. 667 (1922).

[6] Davis v. Smith, 4 Harr. (4 Del.) 68 (1843); Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779 (1903); Taylor v. Stephens, 165 Ind. 200, 74 N. E. 980 (1905); Cohen v. Herbert, 205 Mo. 537, 104 S. W. 84 (1907); Doran v. Beale, 106 Miss. 305, 63 So. 647 (1913); Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738, Ann. Cas. 1914C, 229 (1913).

[7] In Taylor v. Stephens, 165 Ind. 200, 74 N. E. 980 (1905), for example, testator expressly provided that if any of the grantees died, "his share [was] to descend to the heirs of his body, if any, if not, to the survivors." The fact that the

Where the devise was referred to as the devisees' "joint property," it was held not to be an express declaration of a joint tenancy.[8] But where the conveyance called the grantees "joint tenants," several courts have determined that a joint tenancy was created.[9] If the grant is "to A and B with right of survivorship," the feature of survivorship is generally preserved, but on varied theories.[10] Although courts have differed with the instant case as to the effect of the use of "jointly" [11] and of the fact that a lawyer drew up the instrument,[12] the decision seems reasonable, for it is unlikely that the parties to the settlement intended to make any individual shares of the inheritance subject to the survivorship element of joint tenancy.

will was not drawn by a lawyer was considered significant in Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738, Ann. Cas. 1914C 229 (1913). The grantees in Murray v. Kator, 221 Mich. 101, 190 N. W. 667 (1922), were daughters of the grantors and "jointly" was inserted by means of a caret, facts which the court especially emphasized. In Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779 (1903), and Davis v. Smith, 4 Harr. (4 Del.) 68 (1843), the words, "their heirs and assigns," were included, which the dissenter in the Overheiser case singled out as a distinguishing element. And in the instant case the deed was drawn by an experienced lawyer as part of a settlement among children whose father had died intestate.

[8] Rodney v. Landau, 104 Mo. 251, 15 S. W. 962 (1891).

[9] The negative words, "and not as tenants in common," are said to add nothing. Coudert v. Earl, 45 N. J. Eq. 654, 18 A. 220 (1889); Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N. E. 827 (1926); Stonewall v. Danielson, 204 Iowa 1367, 217 N. W. 456 (1928).

[10] Such words have been held to create (1) a joint tenancy, as in Weber v. Nedin, 210 Wis. 39, 242 N. W. 487, 246 N. W. 307 (1933); or (2) a tenancy in common for life with a contingent remainder to the survivor, as in Finch v. Haynes, 144 Mich. 352, 107 N. W. 910, 115 Am. St. Rep. 447 (1906); or (3) a tenancy in common in fee simple with a shifting use or executory devise to the survivor, as in Mittel v. Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655 (1890). In Illinois, survivorship is abolished as an incident of joint tenancy, so that a provision for right of survivorship is not regarded as showing intent to create a joint tenancy. 8 WIS. L. REV. 287 (1933); 18 MINN. L. REV. 79 (1933).

[11] Case v. Owens, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253 (1894).

[12] Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738, Ann. Cas. 1914C 229 (1913).