Michigan Law Review

Volume 45 | Issue 5

1947

DEEDS--CO-TENANCY--CONVEYANCE BY GRANTOR TO HIMSELF AND WIFE

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DEEDS—CO-TENANCY—CONVEYANCE BY GRANTOR TO HIMSELF AND WIFE—Decedent executed a deed conveying to himself and wife "as joint tenants and not as tenants in common with the right of survivorship." After decedent's death, the surviving spouse, plaintiff in this action for specific performance, entered into a contract to sell the land described in the conveyance to defendants who declined to accept a deed from the plaintiff. Defense, that the conveyance executed by decedent did not create a joint tenancy, therefore plaintiff did not have full title to convey. *Held*, the deed created a joint tenancy with the right of survivorship in the wife, the surviving wife acquiring full ownership on her husband's death. *Switzer v. Pratt*, (Iowa 1946) 23 N.W. (2d) 837.

The principal case graphically illustrates two facets of the problem which the conveyancer faces when he seeks to create a joint tenancy: (1), the mode of conveyance requisite to pass the interest he has sought to carve out, and (2), the language he as a draughtsman is compelled to use to create the kind of legal interest desired. Despite the result in the instant case, it is submitted that the conveyancer failed to solve satisfactorily the first part of the problem, as the execution of the deed resulted in litigation.[1] At common law, a conveyance by the grantor to himself and another in an attempt to create a joint tenancy would fail, on the theory that since a grantor could not convey to himself, his title could not be said to have been acquired at the same time with that of the other grantee, the *sine qua non* of an estate in joint tenancy being the simultaneous conjunction of the four essential unities of time, title, interest and possession.[2] Also, under the facts of the principal case, further difficulty would be added due to the doctrine of the common law that a husband could not convey to his wife.[3] The difficulty in conveying to one's wife has now been largely eliminated by statutes which specifically sanction such a conveyance, but the first obstacle is still a formidable one. If the traditional assumption is made that a grantor cannot convey to himself, then the instant decision is in the face of the still present

[1] The orthodox procedure used by lawyers in handling this kind of transaction, is to have the grantor first convey to a "trusted friend" who in turn deeds it to the original grantor and the other person who is desired to be the co-tenant or joint grantee.

[2] See 1 BLACKST, COMM., Cooley and Andrews 4th ed., bk. 2, pp. 180, 181 (1899).

[3] See for example McCord v. Bright, 44 Ind. App. 275, 87 N.E. 654 (1909).

conceptual notion underlying an estate by joint tenancy that the title of all joint tenants must be acquired simultaneously and from the same instrument.[4] Thus, very few American courts have held clearly, without the aid of statute, that a grantor may create directly a joint tenancy in himself and another.[5] Professor Burby suggests that in the jurisdictions which recognize that a joint tenancy may be thus created the unities of time and title are not essential to the *creation* of a joint tenancy.[6] Surely the decision of the Iowa court in disregarding, without the aid of statute,[7] the seemingly insuperable objection in one person being both the grantor and grantee in the same deed is commendable. If violence is done by the decision to what may have been a desirable property concept in Coke's England, certainly accommodation is made by the application of the principle that courts should effectuate the intent of the parties so that their acts shall have the legal significance intended. As to the equally important question as to what kind of language the draughtsman, in seeking to create a joint tenancy, must choose and use so that it will be appropriate to the creation of the intended estate in the conveyees, the language used in the deed in the principal case—"as joint tenants and not as tenants in common with the right of survivorship" [8]—would seem to

[4] See 4 THOMPSON, COMMENTARIES ON THE LAW OF REAL PROPERTY, § 1776 (1939).

[5] The authorities are adequately discussed in Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928), 62 A.L.R. 514 (1929); Stuehm v. Mikulski, 139 Neb. 374, 297 N.W. 595 (1941).

[6] BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 290 (1943). See also the remarks of Kennison, J. in a recent New Hampshire decision. Therrien v. Therrien, (N.H. 1946) 46 A. (2d) 538, which is a square holding in accord with the principal case and which definitely places New Hampshire among those jurisdictions which do not require the four unities in the creation of joint estates.

[7] See the Uniform Interparty Agreement Act, 9 U.L.A. 426 (1942), adopted in Maryland, Nevada, Pennsylvania, and Utah, which was designed to cover problems as exemplified by the facts of the principal case. It provides in § 1 that "a conveyance, release or sale may be made to or by two or more persons acting jointly and one or more, but less than all, of these persons acting either by himself or themselves or with other persons; and a contract may be made between such parties." [See note 5, AIGLER, BIGELOW AND POWELL, CASES ON PROPERTY 252 (1942)]. But see In re Walker's Estate, 340 Pa. 13, 16 A. (2d) 28 (1940), decided under the Uniform Act as adopted in Pennsylvania.

[8] See 37 MICH. L. REV. 1318 at 1319 (1939) suggesting as a formula "as joint tenants and not as tenants in common." Confusion exists in the cases as to what language in face of the statutory presumption will be considered sufficient to create a joint tenancy. See Albright v. Winey, 226 Iowa 222, 284 N.W. 86 (1939), where the Iowa court held that the language in a conveyance which stated to the grantees "jointly," did not create a joint tenancy. See Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N.E. 827 (1926), where a conveyance to two as "joint tenants" was held to create a joint tenancy. Compare Weber v. Nedin, 210 Wis. 39, 242 N.W. 487, 246 N.W. 307, 686 (1933), with Mustain v. Gardner, 203 Ill. 284, 67 N.E. 779 (1903). See also Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334 (1927). For a case holding that a joint tenancy may be created without declaring that the conveyees shall take as joint tenants, see Kemp v. Sutton, 233 Mich. 249, 206 N.W. 366 (1925). See Hass v. Hass, 248 Wis. 212, 21 N.W. (2d) 398, 22 N.W. (2d) 151 (1946), where the Wisconsin court, bound by precedent that one cannot convey to himself and another, held that the language of the conveyance "as joint tenants during their joint lives and an absolute fee forever in the remainder to the survivor of them," created a tenancy in common

be an adequate formula to avoid the presumption of the common statutory provision [9] that a conveyance to two or more shall be deemed to create a tenancy in common, unless the contrary intention is clearly expressed in the conveying instrument.[10]

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for the lives of both followed by a vested remainder in the survivor; noted in 44 MICH. L. REV. 1144 (1946). While the right of survivorship in a *joint tenancy* is not regarded as a future interest, see 2 SIMES, FUTURE INTERESTS, § 369 (1936) as to the relationship of the joint interest in a class gift with that of co-tenancy.

[9] For classification of American statutes on the subject, see BREWSTER, CONVEYANCING, § 151 (1904). The applicable Iowa statute in Iowa Code (1946) §557.15 which provides that conveyances to two or more persons in their own right create a tenancy in common, unless a contrary intent is expressed.

[10] As the conveyance was one to husband and wife, the question is naturally raised as to why a tenancy by the entireties was not created. While a tenancy by the entireties is not recognized in Iowa [see Hoffman v. Stigers, 28 Iowa 302 (1869)], yet surely such language in a deed executed in jurisdictions which recognize tenancies by the entireties is clear enough to defeat any presumption favoring the creation of that estate. See 2 TIFFANY, THE LAW OF REAL PROPERTY, 3d ed., 221 (1939). But as to whether such action by the grantor husband in conveying to himself and his wife is compatible with the fact that the tenancy by the entireties is based on the concept that the husband and wife are one, compare Ames v. Chandler, 265 Mass. 428, 164 N.E. 616 (1929), with what is submitted to be a more rational result in In re Estate of Mary Vandergrift, 105 Pa. Super. 293, 161 A. 898 (1932). See also Boehringer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930).