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JOINT TENANCY-EFFECT OF WORD "JOINTLY"-PAROL EVIDENCE AS TO INTENT

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JOINT TENANCY—EFFECT OF WORD "JOINTLY"—PAROL EVIDENCE AS TO INTENT—The common law rule was well settled that a conveyance to two or more, not husband and wife,[1] made them joint tenants, not tenants in common, unless language was used to show an intent that they were not to be joint tenants. The reason[2] for such a rule having passed, the modern rule is to the opposite effect—two or more conveyees, with certain exceptions,[3] are presumptively tenants in common. The Illinois statute, for example, declares that "no estate in joint tenancy in any lands . . . shall be held or claimed under any grant . . . unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate . . . shall be deemed to be in tenancy in

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[1] They normally became tenants by the entirety.

[2] The reason usually given for the early preference for joint tenancies was keeping the seisin entire. Several seisins, as in tenancies in common, meant several services, a situation not desired, at least by those to whom the tenurial services were due.

[3] Conveyances to husband and wife, to executors, to trustees, and to mortgagees. See Mich. Stat. Ann. (1937) § 26.45. The Illinois statute excepts only conveyances to executors and trustees.

common. . . ."[4] The Michigan statute, though differing a bit in expression, is to the same effect. It states that "all grants and devises of lands, made to two or more persons, except as provided in the following section,[5] shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."[6] It will be noted that the Illinois statute in terms requires that the estate shall be "declared to pass, *not in tenancy in common*, but in joint tenancy" in order to create a joint estate. The court there has held, however, that it will suffice to state that this conveyance is to the conveyees "as joint tenants"; it is not necessary that the negative be expressed.[7]

Several courts have held that a joint tenancy is not created by a conveyance to two "jointly."[8] In one case[9] the court pointed out that tenants in common and coparceners hold "jointly" until a severance is effected; in other words, the word "jointly" bears a popular meaning applicable to almost any type of concurrent ownership in which all the co-owners have a common right of possession.[10] The chief quality of joint tenancies is the so-called "right of survivorship," and it has accordingly been held that when in a conveyance to two or more it appears that on the death of one his share is to inure to the survivors, a joint tenancy has been created. Thus in a Wisconsin case[11] involving a deed in which the grantees were stated in an introductory paragraph

[4] Ill. Stat. Ann. (Smith-Hurd, 1934) c. 76 § 1. Ill. Rev. Stat., 1874, c. 30 § 5 formerly contained the same language.

[5] See note 3, supra.

[6] Mich. Stat. Ann. (1937) § 26.44; C. L. 29, § 12964. Many states have statutes of the same purport. In a few states joint tenancies simply are not recognized. See Sergeant v. Steinberger, 2 Ohio 305 (1826). But Cf. In re Hutchison's Estate, 120 Ohio St. 542, 166 N.E. 687 (1929). In Connecticut the court refused to allow the right of survivorship, the most outstanding characteristic of joint tenancy. Whittlesey v. Fuller, 11 Conn. 337 (1836). Cf. Allen v. Almy, 87 Conn. 517, 89 A. 205 (1913). Apparently in Iowa there is strong judicial policy against joint tenancies. See Albright v. Winey, 226 Iowa 222, 284 N.W. 86 (1938).

[7] Englebrecht v. Englebrecht, 323 Ill. 208, 153 N.E. 827 (1926).

[8] Mustain v. Gardner, 203 Ill. 284, 67 N.E. 779 (1903); Doran v. Beale, 106 Miss. 305, 63 S. 647 (1913); Overheiser v. Lackey, 207 N.Y. 229, 100 N.E. 738 (1913); Fries v. Kracklauer, 198 Wis. 547, 224 N.W. 717 (1928).

[9] Mustain v. Gardner, supra. The court said: "The word 'jointly,' found in the devise, cannot be accepted as sufficient to show, clearly and explicitly, that the testator intended that the estate devised should possess the attribute of survivorship."

[10] In Case v. Owen, 139 Ind. 22, 38 N.E. 395 (1894), it was held that a joint tenancy was created by a conveyance to two "jointly." The Indiana statute declares that conveyances to two or more shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the conveyees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy. The court thought that to hold the conveyance under examination to have created a tenancy in common would mean a complete rejection of the word "jointly."

[11] Weber v. Nedin, 210 Wis. 39, 242 N.W. 487, 246 N.W. 307, 686 (1932).

to be "Thomas Nedin and Sofi Nedin, his wife, and to the survivor of either," it was held that a joint tenancy had been created.[12] The court distinguished *Fries v. Kracklauer* in which the grantees were designated, also in an introductory paragraph naming the parties, as "Elizabeth Fries and Anna Kracklauer, jointly."[13] The granting clause, however, ran to "the parties of the second part, and to their heirs and assigns forever."[14] In that state, then, the word "jointly" does not, without more, sufficiently indicate an intent that a right of survivorship shall exist as between two conveyees.[15]

An interesting case in which the word "jointly" was deemed sufficient, under the circumstances of its use, to create a joint tenancy is *Murray v. Kator*.[16] In that case the grant was to "the parties of the second part." In the opening paragraph of the deed, however, the parties of the second part were stated to be "Catherine Smitherman and Margaret Smitherman, 'heirs' jointly of the same place," etc. The word "jointly" was inserted over a caret apparently ofter the rest of the paragraph had been written. The court concluded that a joint tenancy was created, saying, "The word 'jointly' was inserted for some purpose. None other can be gleaned from the word used when read with the remainder of the deed than an intent on the part of the grantors to create an estate in joint tenancy." No doubt this is, as said by the court in a later case,[17] "a borderline case." The court then added the caution that "it is not to be taken as a base from which new and distant frontiers may be flung."

We come now to the very recent decision of the Michigan court in *Taylor v. Taylor*.[18] The case turned on the character of the coownership created in two grantees, the granting clause of the deed being a conveyance to the "parties of the second part, their heirs and assigns forever," the introductory paragraph, however, designating the

[12] The Wisconsin statute states, as does the Michigan statute, that "all grants to two or more persons shall be construed to create estates in common and not estates in joint tenancy unless expressly declared to be in joint tenancy."

[13] Note 8, supra.

[14] When the court said in the Fries case that the words "their heirs and assigns," clearly negatived any idea of survivorship, surely the court was on doubtful ground. It was safer when it said that "the word 'jointly' may be considered here to have been evidently used in the popular or common understanding rather than as a technical legal phrase.

[15] In Ames v. Cheyne, 290 Mich. 215, 287 N.W. 439 (1939), it was concluded that the survivorship quality of a joint tenancy was indestructible, hence partition denied when a joint tenancy was created by words, "as joint tenants and not tenants in common, and to the survivor thereof." The case is fully discussed in 38 MICH. L. REV. 875 (1939).

[16] 221 Mich. 101, 190 N.W. 667 (1922).

[17] Smith v. Caswell, 278 Mich. 209, 212, 270 N.W. 270, 271 (1937).

[18] (Mich., 1945) 17 N.W. (2d) 745.

parties of the second part as the two grantees "jointly." The question was whether the widow of one of the grantees was entitled to a one-fourth interest, or whether, on the other hand, the two grantees were joint tenants thus leaving the entire ownership in the survivor. Affirming the lower court, it was held that the deed created a tenancy in common and that the widow, therefore, was the owner of a one-fourth interest.

In the light of the authorities the decision would seem clearly right; but some wholly unnecessary observations by the court will, it is believed, plague the court perhaps for years.

The deed was prepared by a Wisconsin part-time [19] lawyer, and the parties to the deed had resided in that state for some time. On behalf of the surviving grantee it was claimed that the language of the deed was plain and unambiguous. The widow, however, urged that the testimony of the circumstances surrounding the preparation and execution of the deed should be admitted to show the intent of the grantor. To this it was replied that if such testimony was admissible, the grantor's intent must be judged by the law of Wisconsin. The reviewing court approves the admission of the testimony and seems to agree with the contention that the grantor's intent, so far as thus disclosed, was to be interpreted in the light of Wisconsin law. It is concluded, however, that there was no proof that a technical joint tenancy was intended, also that on this point the Wisconsin law was not unlike that of Michigan. The court definitely recognizes that the effect of a purported conveyance of land is to be determined by the law of the state, where the land lies; "But in ascertaining the intent of the grantor," the court added, "and the knowledge in the minds of the parties and the attorney who prepared the deed, all of whom were for many years residents of Wisconsin, consideration should be given to the laws of that state where the circumstances took place."

Much has been written regarding the troublesome question as to the use of parol evidence in interpreting written instruments. Mr. Wigmore discusses the problem with his accustomed penetration and clarity,[20] contrasting what he calls the "clear meaning" and the "liberal" rules.[21]

Detailed consideration of this phase of the Parol Evidence Rule is out of place here. It will suffice to observe that while courts no doubt would unanimously agree in the abstract that it is desirable that every effort should be made to find and carry out the real intentions of parties

[19] The rest of his activities were in a defense plant.

[20] See WIGMORE, EVIDENCE, 3d ed., § 2460, et seq. (1940).

[21] The much abused word "liberal" is here used in the sense of wider latitude. Under the "clear meaning" rule, generally speaking, parol evidence is admissible only when the written terms are ambiguous. Under the contrasting rule there is no such limitation.

to written instruments, parol evidence is notoriously untrustworthy,[22] particularly when offered some time after the events with which it deals. Whenever rights of third parties are or may be affected there is an additional reason for reluctance to consider parol evidence as to what the document really means. A writer in the *University of Chicago Law Review* has cogently pointed out the reasons why courts should go slow in admitting parol evidence as to the sense in which terms were used in a writing when the rights of a bona fide purchaser are involved.[23]

When the litigating parties in a dispute depending upon the construction of a document are the parties thereto or their representatives there can be little, if any, criticism by them of efforts by the court to get at the sense in which the written words were used, even the resort to parol evidence, providing the court scrutinizes such evidence critically. But when the rights of other parties may be affected, whether they are bona fide purchasers or not, obviously other considerations are entitled to weight. It takes no lively imagination to perceive the inevitable brake upon commercial transactions[24] and land deals if prospective purchasers of commercial paper or of land have to take the risks of speculation as to what may be the interest of their vendors if, should litigation ensue, the apparent meaning of some vital document is to be overridden by parol proof as to what the written words mean.

[22] The weakness in parol testimony are well stated by the Maine court in a case in which it ruled that such testimony was not admissible in an action on a promissory note by the payee therein, to show that defendants signed the note in a representative capacity rather than as individuals. The court said: "It is better that a careless or ignorant agent should sometimes pay for his principal, than to subject the construction of valid written contracts to the manifold perversions, misapprehensions, and uncertainties of oral testimony." Sturdivant v. Hull, 59 Me. 172 (1871). It would, of course, be misleading to fail to point out that not all courts in such cases have been as strict as the Maine court.

[23] 5 UNIV. CHI. L. REV. 656 (1937).

[24] In note 22 one situation involving commercial paper was mentioned. Another one in which the courts have even more generally closed the door to parol evidence is that of the irregular or anomalous indorser. The Uniform Negotiable Instruments Law declares (Sec. 63) that "A person placing his signature upon an instrument other than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Such appropriate words must be in writing, a part of the instrument. Overland Auto Co. v. Winters, 277 Mo. 425, 210 S.W. 1 (1918). To be sure the word "clearly" is used in the statute, but the statute regarding joint tenancies in reversing the common law presumption, states that the co-ownership shall be a tenancy in common unless "expressly" declared to be in joint tenancy. Another significant decision relating to commercial paper is M. J. Wallrich Land & Lumber Co. v. Ebenreiter, 216 Wis. 140, 256 N.W. 773 (1934), in which it was concluded that words as clearly indicating a guaranty as an indorsement must be taken to constitute the latter because the presumptive conclusion of the statute had not been overcome.

Let us suppose that *X* has under consideration the purchase of a half interest in land owned by *H* and *W*, husband and wife. A title examination shows that the land was conveyed to *H* and *W* "jointly." The title examiner, mindful of the language used in the *Taylor* case, would have to tell *X*: "So far as one can tell from the deed you may safely buy from *H*, for that word "jointly" is not sufficient to make *H* a tenant by the entirety. But there is the possibility now, under the pronouncements of our Supreme Court, that in litigation that word "jointly" may be held to have been used by the grantor as meaning 'as tenants by the entirety,' and I have no way of finding out whether any such proof is adducible." If the *Taylor* case in its dictum is to be accepted, surely the title examiner has reason to be doubly cautious in his advice. Not only will title examiners have to be mindful of the possibilities in the use of the word "jointly" but of almost any other word or combination of words in the last entry in the abstract and in those for a considerable time prior thereto.

Even more puzzled must be the title examiner when he has to consider a conveyance executed in another state. In Indiana, as pointed out above, a deed to two grantees "jointly" makes them joint tenants; in Wisconsin and in most states it does not. That is, it does not of its own force. The title examiner, then, in such instances must satisfy himself as to the law of the state of execution even though he knows perfectly well that it is the law of the state where the land lies that governs the sufficiency and effect of conveyances thereof and, what is fully as important, he further realizes that any lawyer, worthy of the name, in Indiana or Wisconsin, in preparing a deed of Michigan land, would familiarize himself with the Michigan law before choosing the language of the intended conveyance and draw the deed accordingly.

Of course, it is not intended here to urge that in no case involving the effect of a deed should parol evidence be taken into account, that is, so long as the offered evidence does not involve assertions by a party to the transaction as to what he meant by the words used. In cases involving, as did the *Taylor* case, the kind of co-ownership that was created by the words used in the deed it must be remembered that a statute must be considered. As pointed out above, the American statutes generally have reversed the earlier presumption as to the effect of a conveyance to two or more. To create a joint tenancy it must "expressly" appear that such was the intent. This would seem fairly to mean that if the language used is doubtful or ambiguous, it must be concluded that no joint tenancy arose. As said by the Pennsylvania court in another type of case, "The Negotiable Instruments Act itself provides that a qualified or conditional acceptance must be 'in express terms to vary the effect of the bill.' 'Express terms' can mean only what it says: terms that are clear, unambiguous, definite, certain, and unequivocal. They

must convey to the mind of any reasonable person taking the draft the one and only conclusion that payment was subject to the qualification therein set forth or to extraneous matters. Nothing must be left to inference, conjecture or supposition."[25]

Surely the word "jointly," as used in the *Taylor* case, was far from unambiguous. One has difficulty in seeing how it could be declared to have "expressly" created a joint tenancy or, for that matter, a tenancy in common. In such situation surely proper construction and application of the statute would mean that it was the latter. In effect, then, any parol testimony to make it the former would be flying into the very teeth of the statute. To be sure, the evidence offered was primarily to show that it was a tenancy in common; but if admissible one way it surely was the other as well.

When the question as to meaning of terms arises in a suit on a simple contract one cannot reasonably quarrel with a doctrine that gives considerable elasticity in the admission of parol evidence to show what the parties really meant by the words used. In such situations the question almost always is between the parties or those who have stepped into their shoes. As to wills it is pertinent to observe that in the probate proceedings the meaning of the terms in the document is commonly determined, directly or indirectly, and that becomes matter of record. As to deeds, however, as has been pointed out above, other factors are involved. It is submitted that as to them, courts should be exceedingly reluctant to admit parol evidence.

R.W.A.

[25] International Finance Co. v. Philadelphia Wholesale Drug Co., 312 Pa. 280, 167 A. 790 (1933).