North Dakota Law Review

Volume 33 | Number 2 Article 12

1957

Real Property - Joint Tenancy - Contract for Sale by All Joint Tenants Severs Joint Tenancy

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that a lawful business does not constitute a nuisance per se.[19] A business not a nuisance per se should not be perpetually enjoined from operating, but only from operating as a nuisance in fact. If the facts can be altered the businessman should be allowed to change and remove those elements which would make it a nuisance in fact under an interlocutory decree.

RONALD SPLITT.

REAL PROPERTY — JOINT TENANCY — CONTRACT FOR SALE BY ALL JOINT TENANTS SEVERS JOINT TENANCY. — Husband and wife contracted to sell land which they held in joint tenancy without specifying how the proceeds were to be held. While the agreement was still executory the husband died intestate, whereupon his estate claimed one-half the proceeds due on the contract. In an action in equity seeking a declaration of rights as to the proceeds the Supreme Court affirmed the decision of the lower court and *held* that a contract for deed executed by both joint tenants who had not specified how the proceeds were to be held, effected a severance of the joint tenancy. The doctrine of equitable conversion applied to convert the estate into personalty which was held by the husband and wife as tenants in common with no right of survivorship. *In Re Baker's Estate,* 78 N.W.2d 863 (Iowa 1956).

In Iowa as in the majority of jurisdictions, joint tenancies are disfavored.[1] Hence a conveyance to two or more parties, in the absence of expressed intent to create a joint tenancy, results in the creation of a tenancy in common.[2] The existence of the joint tenancy depends on the presence of the four unities of time, title, interest, and possession.[3] If any of the unities are destroyed, during the lifetime of the joint tenants the estate is severed, thus extinguishing the right of survivorship.[4]

The court in the instant case reasoned that a conveyance by one joint tenant to a third party effects a severance of the joint tenancy. They then concluded that as a necessary corollary the joint tenancy is severed where both joint tenants enter into a contract to sell all their interest, even though they retain legal title,[5] although it has been held in another jurisdiction that the execution of a contract for the sale of land by all joint tenants, does not of itself effect a severence.[6]

It is arguable that if equitable conversion is applicable to the situation in the instant case it does not effect a severance of the joint tenancy, since it does not

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19. State *ex rel.* Ammerman v. City of Philippi, 136 W. Va. 120, 65 S.E.2d 713 (1951) (tire recapping); Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368, (1937) (auto wrecking establishment); Chambers v. Cramer, 49 W. Va. 395, 38 S.E. 691 (1901) (blacksmith shop); The Central National Bank v. City of Buckhannon, 118 W. Va. 26, 188 S.E. 661, 662 (1936) (dictum) (service station).

1. Switzer v. Pratt, 257 Iowa 788, 23 N.W.2d 837 (1946); Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334 (1927); De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733, 736 (1956) (dictum).

2. Iowa Code § 557.15 (1950); N. D. Rev. Code § 47-0206 (1943).

3. Gau v. Hyland, 230 Minn. 235, 41 N.W.2d 444, 447 (1950) (dictum). *But see* Conlee v. Conlee, 222 Iowa 561, 269 N.W. 259 (1936) (Wherein Iowa apparently repudiates the "unity test" in favor of an "intent of the parties test.").

4. Gau v. Hyland, 230 Minn. 235, 41 N.W.2d 444, 447 (1950) (dictum).

5. See *In re* Sprague's Estate, 44 Iowa 540, 57 N.W.2d 212 (1953) (Which is apparently distinguishable from the instant case in that there was a will involved and it was stipulated that the proceeds were held as tenants in common—here there was no will nor any other provision for the proceeds.)

6. Chartier v. Simon, 250 Wis. 642, 27 N.W. 752 (1947). *Contra,* Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954).

disturb any of the four unities. The legal title is in the vendors, though it be merely a security interest, so that it could not be said that the unity of title has been disturbed. If the unity of title remains unchanged then necessarily, so does the unity of time. Mere legal title although in the nature of a security interest is an interest capable of being held in joint tenancy.[7] Although the interests of each joint tenant have been reduced they remain equal – therefore unity of interest is maintained. Since physical possession is not required in a property interest to be capable of being held in joint tenancy,[8] unity of possession would not appear to be changed. Some jurisdictions hold that equitable conversion does not apply so as to sever the joint tenancy, where all the joint tenants execute a contract for deed.[9]

The rule in the instant case may give rise to a problem where the vendee of a land contract defaults. Since joint tenancies are disfavored,[10] the rescinding of the contract by the vendors in case of default would probably not restore the joint tenancy, but a tenancy in common would result.[11] It is submitted that the better rule would be that severance does not occur when joint tenants execute a contract for deed. Under such rule, default by the vendee and repudiation by the vendors would leave the joint tenancy intact.

Although the question here involved has never been decided in North Dakota, it should be noted that the North Dakota Bar Association has taken cognizance of the problem.[12] Their recommendation anticipates the holding of the instant case, by requiring the executor of the deceased joint tenant to join with the survivor in a conveyance of the entire fee.

RALPH E. KOENIG.

TAXATION – MISTAKE OF FACT – RECOVERY OF EXCESS PAYMENT. – Plaintiff, public utility corporation, received 1200 tax statements from various governmental sub-divisions in one year. Statement of the defendant county contained erroneous computation due to the misplacing of a decimal point in the assessment by the defendant township. As a result plaintiff paid $30,659.36 personal property taxes in excess of the amount owed. Plaintiff sued the defendants to recover the excess amount of taxes paid without benefit of a statute authorizing refunds. The Supreme Court of Michigan, two justices dissenting, reversed the decision of the lower court and *held* that the amount of excess taxes paid without protest was a voluntary payment and could not be recovered in the absence of statutory provision therefore. *Consumer Power Co. v. County of Muskegon,* 78 N.W.2d 223 (Mich. 1956).

In the absence of statute, courts have not favored suits for the refund of taxes,[1] but have allowed recovery for overpayment due to mistake in ex-

7. *In re* Abdullah's Estate, 214 Wis. 336, 252 N.W. 158 (1934) (interests of joint mortgagees); Williams v. Jones, 175 Wis. 380, 185 N.W. 231, 233 (1921) (dictum) (existence of joint tenancy based on parties intent).

8. See Thornbug v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893).

9. Watson v. Watson, 5 Ill.2d 526, 126 N.E.2d 220 (1955) (alternative holding); *In re* Estate of Jogminas, 246 Ill. App. 518 (1927); Detroit Security Trust Co. v. Kramer, 247 Mich. 468, 226 N.W. 234 (1929).

10. Cases cited note 1 *supra.*

11. See Swenson and Degnan, *Severance of Joint Tenancies;* 38 Minn. L. Rev. 466, 482 (1954).

12. See N. D. Bar Ass'n. Title Examination Standards § 1.12.

1. See State *ex rel.* Kresge v. Howard, 357 Mo. 302, 208 S.W.2d 247 (1948); 9 Miami L. Q. 237 (1955).