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REAL PROPERTY-CONSTRUCTION OF DEEDS-EFFECT OF PHRASE "AND/OR SURVIVOR" FOLLOWING NAMES OF GRANTEES

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REAL PROPERTY—CONSTRUCTION OF DEEDS—EFFECT OF PHRASE "AND/OR SURVIVOR" FOLLOWING NAMES OF GRANTEES—The receiver of a bank deeded land "to Alfred Carothers and Delarma Hackett, or survivor." Plaintiff, Hackett's grantee, brought an action for construction of the deed. On appeal, *held*, the deed conveyed a moiety to each for life with remainder to the survivor in fee, and neither grantee, by a conveyance during his lifetime, could cut off the contingent remainder. *Rowerdink v. Carothers*, 334 Mich. 454, 54 N.W. (2d) 715 (1952).

In denying defendant's contention that the deed created a common law joint tenancy, the court affirmed a line of cases culminating in *Ames v. Cheyne*,[1] and expressly refused to alter its position taken therein. There can be no doubt that Michigan recognizes the common law joint tenancy[2] even though the common law rule relating to the creation of such estate has been modified by statute.[3] The statute is similar or identical with those adopted in many other jurisdictions, and requires that deeds of lands to two or more persons be construed to create estates in common unless "expressly declared to be in joint tenancy." The construction given this statute is that the law merely has raised a presumption against joint tenancies, and in one instance insertion of the word "jointly" after the names of the grantees was held sufficient to create a joint tenancy under the statute, the intent to create an estate other than in common being inferred.[4] It is also clear that in Michigan, where a joint tenancy has been created, a conveyance by one party destroys the right of survivorship and creates a tenancy in common.[5] Thus a construction of the deed in the principal case that a joint tenancy was created would not have been precluded by the statute. The court, rather than relying upon a lack of words sufficient to rebut the statutory presumption, did not even consider the phrase "or survivor" in that context or in the context of actual intent, but laid down what it calls "a law of real property as to the right of survivorship." In other words, when the phrase "and/or the survivor" is used in a deed, the parties are considered, as a matter of law, not to have intended to rebut the statutory presumption against joint tenancies, but to create an indestructible right of survivorship. While Michigan is not alone with respect to its holding on this point, there is certainly adequate authority to the contrary in which it is held that use of the phrase "and/or the survivor" is descriptive of one of the chief incidents of a joint tenancy and is therefore sufficient to rebut a statutory presumption. When so viewed, the language results in creating a joint tenancy in fee. The relative merits of the two positions have been extensively discussed before and to cover them here would be largely repetitious.[6] While the Michigan view seems the less desirable from the point of view of policy or logic, it is now evident that any attempt to reverse it will be unsuccessful. One argument against reversal is that the rule laid down may have been relied upon by now in the drafting of deeds, but it seems improbable that anyone intending to create as peculiar

[1] 290 Mich. 215, 287 N.W. 439 (1939). See also Jones v. Snyder, 218 Mich. 446, 188 N.W. 505 (1922); Finch v. Haynes, 144 Mich. 352, 107 N.W. 910 (1906); Schulz v. Brohl, 116 Mich. 603, 74 N.W. 1012 (1898).

[2] Smith v. Smith, 290 Mich. 143, 287 N.W. 411 (1939); Murray v. Kator, 221 Mich. 101, 190 N.W. 667 (1922).

[3] 3 Mich. Comp. Laws (1948) §554.44.

[4] Murray v. Kator, supra note 2.

[5] Smith v. Smith, supra note 2.

[6] See comment on Ames v. Cheyne, 290 Mich. 215, 287 N.W. 439 (1939), in 38 MICH. L. REV. 875 (1940), for a complete analysis of the authority on the question.

an estate as a cotenancy for life with a contingent remainder in the survivor will rely upon a single ambiguous phrase to carry out his purpose.[7]

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[7] It is submitted that it is still open to the court to take a middle ground position which might well prove more equitable and certainly more flexible than the alternative adopted in the principal case. Where there is uncertainty as to the meaning of terms in a deed, the court can properly consider the circumstances of its preparation and execution, as well as the situations, acts, conduct, and dealings of the parties thereto. Bice v. Holmes, 309 Mich. 110, 14 N.W. (2d) 800 (1944); Farabaugh v. Rhode, 305 Mich. 234, 9 N.W. (2d) 562 (1943); Murray v. Kator, supra note 2. The phrase "and/or the survivor," taken alone, is certainly ambiguous. It is suggested that its effect may be limited by affording it only the weight of a presumption and considering it in conjunction with the intent of the parties as expressed or implied elsewhere. If it thus appears that the parties used it with the intent of creating a joint tenancy, then it may be given that effect. If it appears that it was used with the intent of creating an indestructible right of survivorship, it may be given that effect. If no intent is expressed or can be inferred elsewhere, then and only then would the effect of the phrase be conclusive—a presumption unrebutted. While this method of handling the situation may be criticized as contributing to the uncertainty of land titles, it would have the advantage of avoiding results clearly unintended by the parties to the deed. It is submitted that the presumption raised should be the intent to create a joint tenancy, but Michigan's holding to the contrary now seems firmly entrenched.