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Property–Joint Tenancy–Rights of Survivorship

W. E. M.
West Virginia University College of Law

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PRoPERTn—Joirr TENANcy—Rights of SuIIvomsm,.—Grantor conveyed certain real property to A, B, C and E. By the deed, A and B as husband and wife took a one-half undivided interest as tenants by the entirety, while C and E took undivided one-fourth interests respectively. The deed specifically stated that upon the death of any grantee, his or her share would vest in the survivors, except that the interest of A and B should first vest in the surviving spouse and upon the death of both, vest in the other survivors. A, the husband, died survived by his wife B, later E died and P, her daughter, seeks partition of the land as the administratrix of E’s estate. P contended that a valid joint tenancy must have unity of time, title, interest and possession, and since A and B had a one-half interest as compared to the one-fourth interests of C and E, that the unity of interest had not been fulfilled, and the result is a tenancy in common with no rights of survivorship in E’s interest in the land. Held, sustaining the lower court’s ruling, that by statute in Florida, grantees may take as tenants in common with such rights of survivorship as are expressly provided for in the deed of conveyance. Even though the grant does not comply with the common law rule of equality of interest, the express provision for rights of survivorship is valid. Winchester v. Wells, 265 F.2d 405 (5th Cir. 1959).

This case exemplifies a rather extreme erasure of the original incidents to a common law estate of joint tenancy. At common law an estate in joint tenancy was created when the grantor or testator conveyed or devised to two or more persons lands or tenements to hold in accordance with the limitations of such an estate, whether in fee, for life, at will or for years. 2 MINoR, REAL PROPERTY § 837 (2d ed. 1928). Such an estate in joint tenancy derived its properties from the unities necessary to its formation. These unities were fourfold: unity of time, unity of title, unity of interest, and unity of possession. The requisite unities necessitated that every joint tenant receive his respective interest at the same time, that title was derived from one act, that the estates granted be of the same interest, that is to say all were in fee, for life or whatever the limitation may have been, and that each had an undivided interest in the entire estate, so that each could hold every part of the whole as if it were his own, yet not to the exclusion or detriment of any other joint tenant. 2 MINor, REAL PROPERTY §§ 839-843 (2d ed. 1928).

At common law there was a presumption of the creation of a joint tenancy when land was conveyed or devised to two or more
persons other than a husband and wife. To create a tenancy in common, it was necessary that the creating instrument state specifically that the estate given was a tenancy in common. 2 MINOR, REAL PROPERTY § 838 (2d ed. 1928).

One of the main differences between a joint tenancy and a tenancy in common was that a joint tenancy carried with it rights of survivorship, while the estates of tenants in common were inheritable. This right of survivorship and to what extent it is attendant to an estate of joint tenancy today is the essence of the decision in the principal case.

The right of survivorship incumbent upon common law joint tenancies has been eliminated in the majority of jurisdictions in the United States today. 4 THOMPSON, REAL PROPERTY § 1786 (perm. ed. 1940). In Florida, the situs of the principal case, the statute provides:

"The doctrine of right of survivorship in cases of real estate and personal property held by joint tenants shall not prevail in this state; that is to say, except in case of estates by entirety, a devise, transfer or conveyance heretofor or hereafter made to two or more shall create a tenancy in common unless the instrument creating the estate shall provide for the right of survivorship; and in cases of estates by entirety, the tenants upon divorce shall become tenants in common." FLA. STAT. ANN. § 689.15 (1944).

In applying this statute to the principal case, the court held that the several grantees of a deed could take as tenants in common with such rights of survivorship as were provided for in the deed. Such an interpretation of this statute permits the effect of a common law joint tenancy, at least as to the incident of survivorship, while eliminating the necessity of the four unities which were mandatory at common law.

The West Virginia law on this subject presents an interesting comparison. In this jurisdiction, as in Florida, the rights of survivorship attendant to common law estates have been altered by statute. W. VA. CODE ch. 36, art. 1, § 19 (Michie 1955) provides:

"When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest shall die, his share shall descend or be disposed of as if he had been a tenant in common."
W. Va. Code, ch. 36, art. 1, § 20 (Michie 1955) provides:

"The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others. Neither shall it affect the mode of the proceeding on any joint judgment or decree in favor of, or on any contract with two or more, one of whom dies."

The net effect of the two above cited sections of the code would seem to bring about a somewhat different result than the conclusion reached under the Florida statute in the principal case. Section 19, supra, does not abolish common law joint tenancies, but it does destroy the right of survivorship as an incident of a joint tenancy. Section 20, supra, provides that section 19 does not apply when it is manifest from the creating instrument that the right of survivorship was clearly intended. Although no particular words are necessary to create a joint tenancy, the use of the words "as joint tenants" is not enough. The right of survivorship must be clearly spelled out in the creating instrument. Wallace v. Wallace, 168 Va. 216, 190 S.E. 293 (1937). The combined effect of these two section, insofar as joint tenancies are concerned, seems to be that the common law joint tenancy is still in effect in this jurisdiction if the right of survivorship is clearly provided for in the creating instrument.

In Neal v. Hamilton, 70 W. Va. 250, 262, 73 S.E. 971 (1912), the court seems to have defined clearly the effect of a creating instrument wherein survivorship is provided. The West Virginia court concluded in that case by saying:

"True in this state as in Virginia the right of survivorship at common law is abolished by statute, but this is not so, if the deed, or as here, the will, expressly limits the estate granted to the survivor. When so limited the grantees or the devisees take joint estates only, subject to all the limitations attaching to such estate at common law."

From what has been said in the latter case, it is evident that the unities required for a valid joint tenancy at common law are still required for such an estate under the West Virginia statute. Interpreting the above quoted language of the court, it might well be argued further that a limitation to the survivor is valid only when the requisites for the common law joint tenancy are met. Thus, no other estate may successfully employ such a limitation in
this jurisdiction. Rights of survivorship are also attendant to tenancies by entirety, but in view of the recent case of Wartenburg v. Wartenburg, 100 S.E.2d 562 (W. Va. 1957), it is presumed that there is no longer such an estate in existence in West Virginia. If the issue in the principal case were presented for adjudication in this jurisdiction, it would seem that the failure to meet the unity of interest would destroy the rights of survivorship, as it certainly would have under the common law rule. TIFFANY, REAL PROPERTY § 283 (new abr. ed. 1940); 48 C.J.S. Joint Tenancy § 3 (1947).

The resulting estates of a tenancy in common are inheritable, therefore P in the principal case could claim the land and defeat the supposed survivorship in the remaining tenants. Since the courts will expend great effort to give full effect to the creating instrument, it is likely that this grant could be given effect by an interpretation that would make all the grantees life tenants with remainder to the survivor.

The above conclusion is not meant to represent a de fide pronouncement of the law on this matter in West Virginia, for there appear to be some questions on this matter as yet not clarified by our court. There is at least a possibility that the West Virginia court may decide that a grant or devise “to A and B with rights of survivorship” would create a tenancy in common with rights of survivorship annexed thereto. Other jurisdictions have held that such an estate may be created. Dover Co-Operative Bank v. Tobin's Estate, 86 N.H. 209, 166 Atl. 247 (1933).

If the language “to A and B, and to the survivor of them” would create a tenancy in common with rights of survivorship in this jurisdiction, what is the effect of the survivorship feature? A serious problem arises in determining if the incident of survivorship under such a grant is at all destructible. In a common law joint tenancy, the right of survivorship could be destroyed easily by a conveyance to a third party. This conveyance destroyed the unities and reduced the interest conveyed to a tenancy in common on which no right of survivorship was incumbent. 2 MINOR, REAL PROPERTY § 849 (2d ed. 1928). Could the same method destroy the survivorship annexed to a tenancy in common? Since there are no unities attendant to such an estate, it is difficult to see how the same rule could be logically applied. If this mongrel estate is to be recognized and given effect, the result is a non-technical joint tenancy with an indestructible right of survivorship. It seems preferable to avoid such violence to the common law estates when
the same result may be reached by a grant or devise "to A and B for life, remainder to the survivor."

Under the present West Virginia law a joint tenancy may still be created replete with all the common law incidents, and it would appear that the holding in the principal case would be contrary had that case arisen in this jurisdiction. Whether a tenancy in common with rights of survivorship may be created in this jurisdiction would seem to be a question in need of an answer.

W. E. M.

ABSTRACTS

Evidence—Res Ipsa Loquitur—"Modern View" Applied.—P, while doing her marketing, selected a carton of D's product and placed it in her push cart. Almost immediately she was struck by flying glass from an exploding bottle of D's product which remained upon the shelf and was not touched by P. The products had been delivered to the market and placed upon the shelf by D's employee. There was no attempt made to prove that the bottle was mishandled by persons other than D's employees. Held, that an inference of negligence arose from the application of the res ipsa loquitur rule, although actual control of the bottle had passed from D. Ferrell v. Royal Crown Bottling Co., 109 S.E.2d 489 (W. Va. 1959).

Generally it may be stated that it is necessary to prove three elements before the doctrine of res ipsa loquitur is applicable: (1) Plaintiff must prove that he was without fault, (2) That he was injured by an instrumentality which was within the exclusive control of the defendant, (3) That the accident would not have happened in the ordinary course of events if the defendant had used due care. Pope v. Edward M. Rude Carrier Corp., 138 W. Va. 218, 75 S.E.2d 584 (1953).

The principal case marks the first time West Virginia has applied the doctrine to bottle explosion cases when the defendant was not in exclusive control of the bottle at the time of the accident.

The principal case followed the so-called "modern view" to the effect that exclusive control by the defendant is not necessary as long as the plaintiff can prove that no person was probably negligent in handling the instrumentality subsequent to its leaving defendant's control.

It is believed that the result of the principal case is just, but perhaps the court should require the plaintiff to prove more than