North Dakota Law Review

Volume 29 | Number 1 Article 4

1953

Joint Tenancy - Survivorship among Joint Tenants or Obligees - Acquisition of Property by Feloniously Causing the Death of a Co-Owner

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NOTES

JOINT TENANCY — SURVIVORSHIP AMONG JOINT TENANTS OR OBLIGEES — ACQUISITION OF PROPERTY BY FELONIOUSLY CAUSING THE DEATH OF A CO-OWNER.—At common law, there was no rule that homicide would prevent legal title from passing to a criminal as heir or devisee of his victim.[1] But the idea that no man shall profit by his own wrong has long been a fundamental principle of Anglo-Saxon law.[2] Until comparatively recent years, very few cases had been decided on the question of whether one who feloniously causes the death of another can acquire property from his victim. The dearth of decisions on the subject has undoubtedly contributed to the legislative void that has surrounded the problem since early common law. That judicial chaos has evolved out of the two conflicting concepts mentioned above is readily understandable.

This note is limited primarily to the principle of survivorship as applied to a joint tenant, joint owner or joint obligee who has killed his co-tenant. Different methods[3] of acquiring property by killing a relative or testator have been given exhaustive treatment in other legal publications.[4] These articles advocate the constructive trust solution, which will be detailed later in its application to joint tenants. Moreover, the statutes enacted by a considerable number of states make more adequate provisions in regard to these other methods than they do in cases of joint ownership.[5] As to insurance cases, the courts agree that a beneficiary cannot maintain an action for insurance proceeds after killing the insured.[6]

A joint tenancy is a classification of ownership in which the "Joint tenants have one and the same interest accruing by one and the same conveyance, at one and the same time, and held by one and the same undivided possession."[7] It is very similar

1. *See* Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188, 191 (1927); Note & Comment, 29 Mich. L. Rev. 745 (1931).

2. *See* Barker v. Barker, 75 N.D. 253, 27 N.W.2d 576, 580 (1947); Hanson v. Svarverud, 18 N.D. 550, 120 N.W. 550, 551 (1909); People v. Schmidt, 216 N.Y. 324, 110 N.E. 945, 950 (1915) (defendant not allowed to base appeal on errors in charge propounding his admittedly fraudulent defense).

3. *E.g.*, in relation to the statute of descent, the wills acts, devise, dower and curtesy.

4. See Note, 29 Mich. L. Rev. 745 (1931); Note, 8 N.Y.U.L.Q. Rev. 492 (1931); 44 Harv. L. Rev. 125 (1930).

5. 3 Bogert, Trusts and Trustees 53 *et seq.* (Part 1, 1946) (listing of statutes and their construction).

6. 3 Bogert, Trusts and Trustees 58 n. 64 (Part 1, 1946); Restatement, Restitution §189 (1937) (Murder of Insured or Beneficiary of Life Insurance Policy); see cases cited in Vance, Insurance §117 (3rd ed. 1951).

7. Welsh v. James, 408 Ill. 18, 95 N.E.2d 872, 874 (1950).

to a tenancy by the entirety and for the purpose of this discussion, both types of cases are generally pertinent. However, there is a material difference between a tenancy by the entirety and joint ownership; a single tenant by the entirety cannot alienate his interest or compel a division of the property, but a joint tenant or a joint obligee can sever if he wishes.[8]

The decisions in the several jurisdictions that have dealt with the killing of a co-tenant or co-owner may be divided into three general classifications. (1) Some courts have held that the survivor takes absolutely because he has a complete vested interest by virtue of the original conveyance or contract and gained nothing by the death which he did not already have.[9] (2) New York courts have divested the survivor of all legal title on the ground that to allow him to take would be abhorrent to the rules of equity and justice.[10] (3) Other courts have held that, although the survivor's interest vested by virtue of the original conveyance or contract, he must hold varying portions of the property on constructive trust for the benefit of those who would take the decedent's estate.[11] Constructive trusts have been defined as including "all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title. . . . They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the

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8. See the discussion on tenancies by the entirety in Moynihan, Preliminary Survey of the Law of Real Property 136 *et seq.* (1940).

9. Welsh v. James, 408 Ill. 18, 95 N.E.2d 872 (1950) (real property and bank accounts held in joint tenancy); Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935) (joint bank account); Wenker v. Landon, 161 Ore. 265, 88 P2d 971 (1939) (real property held in tenancy by the entirety); Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W. 108 (1907) (real property held in tenancy by the entirety).

10. *In re* Santourian's Estate, 125 Misc. 668, 212 N.Y.S. 116 (1935) (joint bank account); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y.S. 173 (1918) (real property held in tenancy by the entirety); *cf* Bierbrauer v. Horan, 244 App. Div. 87, 279 N.Y. 176 (1935) (real property and bank accounts held in joint tenancy).

11. Colton v. Wade, 80 A.2d 923 (Del. Ch. 1951) (real property held in tenancy by the entirety); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927) (real property held in tenancy by the entirety); Neiman v. Hurff, 14 N.J. Super. 479, 82 A.2d 471 (1951) (realty held in tenancy by the entirety and personalty held in joint tenancy); Sherman v. Weber, 113 N.J.Eq. 451, 167 Atl. 517 (1933) (realty held in tenancy by the entirety); *In re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952) (real and personal property held in joint tenancy); *cf:* Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464, 467 (1948) (Real property held in tenancy by the entirety. "Indispensable is the prerequisite that decease must be in the ordinary course of events and subject only to the vicissitudes of life."); *see* dissenting opinion in Oleff v. Hodapp, 128 Ohio St. 432, 195 N.E. 838, 841 (1935) (joint bank account).

one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership.[12]

The decisions that fall within the first classification [13] have been criticized because it is claimed that the survivor does gain a real benefit by the death of the other owner. He had no right to remove the uncertainty of who should survive. Before the death of the co-owner, he had only the possibility or probability of succeeding to the whole enjoyment; now he would have the certainty. The slayer should not exercise his right to separate the property by his felonious act of slaying his co-owner, for then he would be taking advantage of his own wrong.

The cases holding that the survivor takes nothing [14] have been criticized on the ground that such decisions violate the constitutional provisions against forfeiture of estates. A forfeiture has been defined as a "Punishment annexed by law to some illegal act . . . in the owner of lands . . . whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong. . . ." [15] Such a conclusion operates as a forfeiture because the survivor is devested of all his rights through commission of the crime. Before the death of the other joint owner, the survivor had a vested right to equal enjoyment during their joint lives and the inchoate right to take the whole by outliving his co-owner.

The third group of cases,[16] which apply the constructive trust, do not interfere with any vested legal rights, yet give effect to the appealing doctrine that a person should not be permitted to profit by his own wrong. The constructive trust doctrine as related to this type of case is applied "Where two persons have an interest in property and the interest of one of them is enlarged by his murder (felonious killing would be better terminology) of the other. . . ." [17] The survivor holds the property that has enlarged his interest in constructive trust for the estate of his co-owner.[18] The courts applying constructive trusts recognize that although the survivor takes by virtue of the original contract or conveyance, he neverthless gains a real benefit by

12. Barnett v. Couey, 224 Mo.App. 913, 27 S.W.2d 757, 761 (1930). For the scope of constructive trusts generally, see 4 Pomeroy, Equity Jurisprudence §§1044-1058a (5th ed. 1941).
13. See note 9 *supra*.
14. See note 10 *supra*.
15. 2 Bl. Comm. *267.
16. See note 11 *supra*.
17. Restatement, Restitution §188 (1937). Parentheses inserted. Most cases do not require that the homicide be murder. See Ames, Lectures on Legal History 311 (1913).
18. Restatement, Restitution §188 (1937).

the death of the other owner. They hold that preventing him from keeping that new benefit is not a forfeiture, but they concur in the view that he should retain what he had before the death.[19] The doctrine is not limited to cases in which the crime was committed for the purpose of acquiring title.[20] All of the cases imposing constructive trusts have involved tenancies by the entirety or joint tenancies.[21]

Some courts have allowed the survivor to retain what ultimately amounts to a one-half interest for his life free of trust, but because he prevented the natural ascertainment of the survivor, they have assumed that the decedent would have survived.[22] In these cases, the whole of the estate descends to the heirs of the decedent upon the death of the slayer. In two cases decided in New Jersey,[23] the courts held that the survivor should have the commuted value of one-half the income for his life expectancy and that the survivorship should be determined according to the comparative life expectancies of the decedent and the survivor.[24] The survivor was given a one-half interest free of trust and a constructive trust was imposed upon the other half in still other cases.[25] In the latter group of cases, the killing was treated as a severance of the joint tenancy. The property was distributed as if there had been a common calamity, killing both tenants simultaneously. It descended as if it had been held formerly by tenants in common, subject to distribution according to the statute of descent.

A significant decision involving joint ownership is *Vesey v. Vesey*,[26] a case recently decided by the Minnesota Supreme Court. In that case there was a contract creating a joint and several bank account giving each joint owner a right to withdraw all the funds from the account. By exercising that right to withdraw, one owner could defeat the interest of his co-owner. The contract further provided that if one joint owner died, the

19. *See* Vesey v. Vesey, 54 N.W.2d 385, 389 (Minn. 1952).

20. *See* Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188, 191 (1927) (husband killed wife who would probably have survived him but for the murder. He retained his interest in property held as an estate by the entirety, taking also legal title to wife's interest as heir, but held wife's interest as constructive trustee for benefit of heirs. Heirs became sole owners on husband's death as heirs of their mother, even if husband did not kill with intent to acquire property.).

21. *See* Vesey v. Vesey, 54 N.W.2d 385, 389 (Minn. 1952).

22. Colton v. Wade, 80 A.2d 923 (Del. Ch. 1951); Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927); *In re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952).

23. Neiman v. Hurff, 14 N.J. Super. 479, 82 A.2d 471 (1951); Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (1933).

24. *I. e.*, the computation is made from standard mortality tables.

25. *E.g.*, Grose v. Holland 357 Mo. 874, 211 S.W.2d 464 (1948); Barnett v. Couey, 224 Mo.App. 913, 27 S.W.2d 757 (1930) *semble* See note 11 *supra*.

26. 54 N.W.2d 385 (Minn. 1952).

other was to become sole owner of the whole of the account. One joint owner was charged with feloniously killing the other. The court said that one joint owner could not gain an indefeasible interest in the account by feloniously causing the death of the other. The uncertainty as to who would have survived or withdrawn all of the funds first was to be resolved against the survivor. Therefore, a constructive trust was imposed upon the entire balance of the account. A Minnesota statute provides that "No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person or receive any interest in the estate of the decedent, or take by devise or bequest from him any portion of his estate." [27] The court considered this statute inapplicable because the surviving joint owner did not take from the estate of the deceased joint owner, but by virtue of the contract of deposit.[28] Therefore, the statute did not bar the survivor from taking the balance of the account and a constructive trust had to be applied.

Such a wide divergence in the use of the constructive trust doctrine prompts an inquiry into the relative merits of the various methods of application. Many courts vary in interpretation when they say that the survivor should retain what he had before the death of the co-owner. The extent of the estate to which the trust should be applied depends to a great extent upon the circumstances of each case. Where the life expectancy of the decedent is substantially less than that of the survivor, a trust might be imposed on a portion of the estate equal in value to an interest in one-half the estate for the decedent's life expectancy plus the value of the victim's chances of surivorship.[29] But if the life expectancy of the decedent greatly exceeds that of the survivor, it might be applied to the entire estate. Such an application was made in the *Vesey* case, but no mention was made regarding the ages or life expectancies of the co-owners. Where the chances of survivorship are nearly equal, a trust may be imposed on one-half of the estate. However, its application to the entire estate might possibly be urged on the ground that every doubt should be resolved against the wrong-doer who has created the doubt. This last proposition might be criticized as imposing a forfeiture. In holding that the wrongdoer should

27. M.S.A. §525.87. Note that this statute does not require a conviction of felonious homicide.

28. *See* Vesey v. Vesey, 54 N.W.2d 385, 388 (Minn. 1952).

29. *Cf.* American Blower Co. v. MacKenzie, 197 N.C. 152, 147 S.E. 829 (1929) (similar formula applied to compute value of wife's inchoate dower right during life of husband).

hold the whole account in constructive trust, as in the *Vesey* case, technically there may be no forfeiture because the slayer still retains the legal title, but he certainly does not retain what he had before the death of his co-owner; that is, he does not retain the right to equal enjoyment during his life. It would seem to be sounder to let the survivor retain his one-half interest for life free of trust.[30]

In order to establish some degree of uniformity, and to establish some definite leading precedents, it might be well to avoid a determination of survivorship according to the life expectancies of the decedent and survivor. The courts could merely assume that the decedent would have outlived the slayer, giving the slayer one-half of the estate free of trust for life, the whole of the property passing to the estate of the decedent upon the slayer's death.[31] The use of mortality tables is only an approximation, and it is impossible to know which of the two would actually have outlived the other. Therefore, the doubt should be resolved in favor of the innocent victim as against the wrongdoer who has deprived him of his chance of surviving.

The principle advocated above will also apply to joint bank accounts if the money may not be withdrawn except on the order of both parties.[32] The situation becomes more complicated if either party may draw out all the money. In some states, by statute or agreement, one party can withdraw all the funds and incur no liability, as under the contract in the *Vesey* case. It would not be a forfeiture to prevent the slayer from taking more than one-half of the money, even if he had the right to withdraw all before the death of the decedent, because the decedent had the same right, and might have exercised it first had it not been for the slayer's unlawful act. Therefore, assuming the decedent would have done so, the doubts may be resolved against the slayer. This may render it permissible to give all the money to the estate of the decedent, justifying the decision in the *Vesey* case. However, the situation is unusual and it may be best to apply a universal rule such as the one enunciated in the preceding paragraph. The fact remains that the decedent did *not* withdraw all the funds before his death. If the wrongdoer held one-half of the property in constructive trust for the benefit of

30. See note 22 *supra*. See Murphy v. Michigan Trust Co., 221 Mich. 243, 190 N.W. 698, 699 (1922) for the contention that the interests of the parties are presumed to be equal unless there is evidence to the contrary.

31. See cases cited note 22, *supra*.

32. See Park Enterprises v. Trach, 233 Minn. 467, 47 N.W.2d 194, 196 (1951) for discussion of the distinction between joint tenancies and joint and several bank accounts.

the heirs of the decedent and the other half for his own use for life, and after his death the whole of the property to vest in the heirs of the decedent, the slayer would still hold substantially the same interest he actually had while the decedent lived. Practically, the same result would be achieved by putting the whole of the estate in constructive trust and giving the slayer a life interest in half of it. This procedure would not be unconstitutional as working a forfeiture of estate[33] or "corruption of blood".[34] The court would not be taking away an estate already acquired, but merely preventing the slayer from acquiring property in an unlawful way.

Of course, the ideal solution would be by statutory enactment. Pennsylvania has provided the most adequate legislation covering the problem.[35] In respect to joint ownership the statute provides: "One half of any property held by the slayer and the decedent as joint tenants, joint owners, or joint obligees shall pass upon the death of the decedent to his estate, and the other half shall pass to his estate upon the death of the slayer, unless the slayer obtains a separation or severance of the property or a decree granting partition."[36] The effect of this rule would be the same as applying a constructive trust to one-half of the estate and giving the slayer a life estate in the other half as outlined above.

The North Dakota statute provides that "No person who has been finally convicted of feloniously causing the death of another shall take or receive any property or benefit by succession, will or otherwise, directly or indirectly, by reason of the death of such person, but all property of the deceased and all rights conditioned upon his death shall vest and be determined the same as if the person convicted were dead when the testator died."[37] The statute will not adequately meet every contingency, but it is superior to many. The result in the *Vesey* case would be different because there was no conviction there, and the North Dakota statute requires a conviction.[38] However, the words "or otherwise" in the North Dakota statute should bring a contractual relation such as a joint bank account

33. See note 15 *supra*.
34. Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908) (there is no "corruption of blood" where rule does not prevent slayer's heirs from inheriting property *already owned* by slayer.).
35. Purdon's Pa. Stat. Ann., Tit. 20, P.S. §3441 *et seq*.
36. Purdon's Pa. Stat. Ann., Tit. 20, P.S. §3446(a).
37. N.D. Rev. Code §56-0423 (1943).
38. See note 27 *supra*. The Minnesota statute states that "No person who felonously takes . . . the life of another shall inherit . . ."

within the statute.[39] It has been contended that the requirement of conviction is not feasible because; (1) the slayer may have committed suicide before he could be convicted, and (2) the statute is sometimes held not to apply to a conviction in a court outside the state.[40]

In conclusion, it is urged that, in the absence of a controlling statute, the application of the constructive trust doctrine best serves to determine the rights of the parties. It is further urged that the most equitable method of applying the constructive trust doctrine consists in allowing the survivor to retain a one-half interest for his life free of trust; putting the other half in constructive trust for the heirs of the decedent, and allowing the whole of the estate to descend to the heirs of the decedent upon the death of the slayer. The most direct remedy would be by legislation, preferably of the type enacted in Pennsylvania, where the same result would be effected as enunciated directly above.

ALBERT M. CHRISTOPHER

MORTGAGES — LIEN AND PRIORITY — REVIVAL OF JUNIOR LIENS. — One of the more notable rarities within the field of property law is the doctrine of the revival of a junior mortgage upon subsequent reacquistion of the property by the mortgagor. The ramifications are readily apparent when one considers the importance of the revival of junior mortgages in connection with examination of abstracts of title, let alone the rights of junior mortgagees, or of subsequent purchasers from mortgagors who have reacquired foreclosed property. A review of the divergent theories and attending aspects formulated through past decisions will reveal a highly interesting state of affairs.

It is recognized that a purchaser at a foreclosure sale, or at a sale authorized by a mortgage,[1] takes a title free of all junior

39. See note 27 *supra*. The Minnesota statute provides that no felonious killer ". . . shall inherit from such person or receive any interest in the estate of the decedent, or take by devise or bequest from him. . .", whereas the words "or otherwise" in the North Dakota statute broaden the scope of those not entitled to take.

40. Harrison v. Moncravie, 264 Fed. 776 (8th Cir. 1920) (wife convicted of killing husband in Kansas allowed to inherit his land in Oklahoma; Kansas statute *not* applied).

1. Scott v. Paisley, 271 U.S. 632 (1926) (statutory power of sale which required no notice by "security" deed holder to subsequent purchaser was held constitutional); Carrington v. Citizens Bank of Waynesboro, 140 Ga. 798, 80 S.E. 12 (1913) (deed to secure payment of loan contained a power of sale); Grove & Fultz v. Loan Co., 17 N.D. 352, 116 N.W. 345 (1908) (foreclosure sale by advertisement under power of sale in mortgage could not be set aside because mortgage was usurious); Reilly v. Phillips, 45 S.D. 604, 57 N.W. 780 (1894) (the court quotes 2 Perry, Trusts §602 saying, "It is a universal rule that a power (of sale) inserted in a mortgage . . . is a power coupled with an interest, it cannot be revoked by any act of the . . . grantee of the power."