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THE EFFECT OF A LAND SALE CONTRACT INVOLVING PROPERTY HELD IN JOINT TENANCY

This article has been prompted by the decision of *Buford v. Dahlke*¹ which adds another legal facet to the Nebraska law regarding transactions involving property held in joint tenancy.

**I. Problem Raised By *Buford v. Dahlke***

In 1949, "Ernest R. Dahlke and Laura H. Dahlke, husband and wife" entered into a written contract of sale and purchase whereby they agreed to sell property owned by them as joint tenants to "George N. Chadwell and J. Louise Chadwell, as joint tenants with the right of survivorship." The contract price of $4750 was to be paid partly in cash and the balance in deferred installments payable to "Ernest R. Dahlke and Laura H. Dahlke, husband and wife." The Dahlkes' were not referred to in any capacity or status other than as husband and wife. The vendees had paid $192 to Laura Dahlke after the death of her husband in January, 1951, leaving a balance owing of approximately $2930. The administrator of the estate claimed as an asset one-half of all the money paid or to be paid on the contract after the death of Ernest Dahlke. The wife of the deceased refused to account to the administrator and claimed, by right of survivorship, full ownership of the proceeds of the contract. The vendees maintained that "they should, and they have declared that they would" pay only to the wife of the deceased.

The court held that at the execution of the land sale contract the joint tenancy was destroyed and, by equitable conversion, the real estate was converted into personalty consisting of the land sale contract and the benefits therefrom which were owned by the vendors as tenants in common at the time of the death of Ernest Dahlke. Therefore, the decedent's undivided one-half interest passed to his estate as an asset; the decedent's wife was required to account to the administrator for payments received after the death of her husband; and the vendees were required to make payments divided equally between the administrator and surviving vendor.

This decision is one of first impression in Nebraska insofar as it declares that a joint tenancy is destroyed by a land sale contract which is entered into by all the joint tenants. In this situa-

¹ 158 Neb. 39, 62 N.W.2d 252 (1954).
tion the joint tenancy is not turned into a tenancy in common with respect to the property sold because there no longer is property to which such a type of ownership could attach. The property ownership vests in the purchasers at the time the contract was made. Also, this situation is to be distinguished from the case where one of two joint tenants sells or conveys his interest to a third person. Such a transaction operates to sever the joint tenancy and thereby cause such third person and the other original joint tenant to hold the property as tenants in common, each owning an undivided one half interest.

A. PROCEEDS HELD BY TENANTS IN COMMON

The tenancy in common which the court speaks of as being created in the Buford case does not attach to the real estate sold but rather to the property resulting from the equitable conversion, namely, the land sale contract and benefits accruing therefrom. But why was this property declared to be held under a tenancy in common and not under a joint tenancy?

The continued existence of a true joint tenancy requires that there be present each of the four co-existing common law unities of time, title, interest and possession and a loss of any one of these unities destroys the joint tenancy. In the Buford case the land sale contract destroyed the unities of title, interest and possession by the very fact that the right of ownership and possession were contracted away by both joint tenants. Thus, any joint tenancy in the real estate was destroyed. By equitable con-

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2 "It has been frequently and consistently decided by this court, as it is quite unanimously agreed by courts generally, that if the owner of real estate enters into a contract of sale whereby the purchaser agrees to buy and the owner agrees to sell it and the vendor retains the legal title until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser...." Buford v. Dahlke, 158 Neb. 39, 42, 43, 62 N.W.2d 252, 254, 255 (1954).

3 "After the destruction of a joint tenancy by a joint tenant, nothing more than a tenancy in common remains." Anson v. Murphy, 149 Neb. 716, 720, 32 N.W.2d 271, 273 (1948).

4 Buford v. Dahlke, 158 Neb. 39, 44, 62 N.W.2d 252, 255 (1954); Stuehm v. Mikulski, 139 Neb. 374, 377, 297 N.W. 595, 597 (1941). Neb. Rev. Stat. § 76-118 (Reissue 1950) permits one owning property to convey to himself and others in order to create a joint tenancy. Prior to adoption of this statute, this method of conveyancing would not create a joint tenancy because all four of the common law unities of time, title, interest and possession were necessary for its creation. However, the statute does not disturb the rule that, during the jointure, the tenants are required to have one and the same interest resulting from the same conveyance, commencing at the same time and accompanied by individual possession.
version the contract and its benefits, in effect, replaced the real estate, and, therefore, the incidents of a tenancy in common attached with equal vigor to the equitably converted property. This conclusion seems sound for at least two reasons: (1) Where a joint tenancy is the type of ownership held in the real estate and it is destroyed by the loss of one of the four unities, the type of ownership, if any, which will remain, in the absence of language creating any other type of ownership, is at most a tenancy in common. And where all the joint tenants join in the contract to sell their interests, no real estate remains to be held under a tenancy in common. Therefore, it would be illogical and inconsistent to state that a joint tenancy should then attach to completely different property which, by the law of equity, replaces the real estate which the joint tenants no longer own. (2) Furthermore, it would be illogical and inconsistent to attach a joint tenancy to the property replacing the real estate sold since the law does not favor joint tenancies, and, because of this, the courts of Nebraska have flatly stated that joint tenancies may be created only by contracts from which the language is sufficiently clear to indicate that the parties intended to create a joint tenancy. In the Buford case there was no showing that the parties intended that a joint tenancy of the proceeds exist.

B. WHY PARTIES FAVOR JOINT TENANCIES

Though Nebraska law appears to scorn the creation and existence of joint tenancies, it must be recognized that property owners apparently do favor them. This conclusion is based on the estimate that fifty percent or more of the real estate conveyances which are recorded are conveyances in joint tenancy. Many people have conveyed property which they owned as individuals in order to effect joint titles in themselves and others. The bulk of such conveyances are between husband and wife.

Because of the popularity of joint tenancy ownership, especially between husband and wife, Buford v. Dahlke represents a

5 See note 3 supra.
6 Bodeman v. Cary, 152 Neb. 506, 41 N.W.2d 797 (1950); In re Estate of Vance, 149 Neb. 220, 30 N.W.2d 677 (1948); Olander v. City of Omaha, 142 Neb. 340, 6 N.W.2d 62 (1942).
10 See note 8 supra.
situation which might often arise in land sale transactions involving jointly held property.

It is quite understandable that a husband and wife may wish to place property "in both their names." No doubt one major reason for this, in addition to any tax advantages, is that they regard themselves as a marital team or partnership to share equally the enjoyment of the property and, because of this, they want the property to go to the surviving spouse if one should die. With this intent apparent it might be reasonably assumed that a husband and wife holding property in joint tenancy also have the same intention when payments are received on a contract for the sale of the property. If this intent was present in the Buford case, it was defeated by the very contract which the Dahlkes' made as vendors. What then could have been done to effectuate such an intent?

Placing the contract payments in joint tenancy has another benefit from the point of view of the surviving joint tenant. After the death of one joint tenant, the survivor is in a position to accept full payment of the balance of the contract price from the vendee if such payment is tendered. This advantage may be particularly important where the surviving joint tenant is the wife of the deceased and needs the money for her own subsistence and for other dependents. If, however, the payments on the contract are to be paid in the same manner as in the Buford case (i.e. to husband and wife), the administrator will claim one-half of the contract payments and may not agree to a settlement of the balance. Where payments are deferred for several years at a high interest rate, the administrator or executor may wish to continue the contract in order to obtain interest payments as assets to be distributed from the estate.

C. COULD A JOINT TENANCY BE CREATED IN THE LAND SALE CONTRACT PAYMENTS?

A joint tenancy may be created in any property capable of having the incidents of ownership, whether it be real or personal, so long as the joint tenancy is established by contract. Payments made or to be made on a land sale contract would certainly qualify as a type of property capable of being "owned."

The land sale contract involved in the Buford case referred

11 "The relation of and estate of joint tenancies may be created in any kind of personal property that is subject to be held in severalty." In re Estate of Johnson, 116 Neb. 686, 218 N.W. 739 (1928).

12 See note 7 supra.
to the Dahlkes' (vendors) as "husband and wife" and in no other capacity. It would seem that if the contract had been written requiring payments to be made to "Ernest R. Dahlke and Laura H. Dahlke, husband and wife as joint tenants" or "...as joint tenants and not as tenants in common", a joint tenancy in the proceeds of the contract would have been created.

II. Must The Vendee Obtain a Deed From The Surviving Joint Tenant and The Personal Representative?

Assuming that a joint tenancy is created in the land sale contract payments and payment has been made to the surviving joint tenant, there remains for consideration the question of whether the vendee must obtain deeds from both the surviving joint tenant and the personal representative of the deceased joint tenant’s estate in order to gain complete clear title. This question has been the subject of a great deal of discussion since the Buford case was decided. No Nebraska cases have been found which bear directly on the problem. The remainder of this article is devoted to pointing out arguments in an attempt to resolve this question.

Where the surviving vendor is entitled to all of the contract benefits and accepts from the vendee full payment prior to the maximum time that the contract is to be in force, the vendee would then be entitled to his deed from the surviving vendor. Such a deed would convey all interest from such vendor. But to determine whether a deed should be required from the deceased vendor’s estate necessarily depends on whether the estate received any interest which is or could be adverse to that of the vendee.

The land sale contract and its benefits have vested, by survivorship, in the surviving joint tenant and no interest in this property passes to the estate of the deceased joint tenant. The only remaining interest which the estate could claim must be in the legal title held by the vendors as security for the contracted debt. But the "legal title" held by the vendors is, in reality, a fiction of the law. No tangible evidence of the "title" exists. It is a point of the law which has been developed to protect vendors by giving them a remedy which is analogous to that of one who sells land and takes back a mortgage.\[13\] The vendors under a

\[13\] In Sparks v. Hess, 15 Cal. 186 (1860), cited with approval in Hendrix v. Barker, 49 Neb. 369, 68 N.W. 531 (1896), the court stated at 194: "In the present case, the vendors have retained the legal title, and evidently as security for the purchase money. Their position is, in some respects, similar to what it would have been had they executed a con-
land sale contract may, upon breach of contract, treat the contract as an ordinary mortgage and foreclose on it thereby forcing a sale of the property and, under special and peculiar circumstances, the vendor may be granted a decree of strict foreclosure. The legal title, then, is used merely as a means to enforce a debt owing to the vendors. Therefore, it seems only logical and consistent that the means of enforcing the debt should belong to the one to whom the debt is owing, that person being the surviving joint tenant of the contract payments. This being so, the conclusion must necessarily be that the deceased's estate received no interest in the legal title held as security.

It must then follow that a deed to the vendee from the surviving joint tenant would convey good and clear title to the property and no deed would be required from the administrator or executor of the deceased joint tenant.

But where, as in the Buford case, the land sale contract and its benefits are not held in joint tenancy but under a tenancy in

veyance to the vendee and taken from him a mortgage upon the property. A mortgage is in form a conveyance of the legal title, though intended only as security for the debt. Here the title is retained by the vendors for a similar purpose of security. A mortgagee may pursue his remedy at law, or proceed in equity for a sale of the premises. A vendor retaining the title may in like manner sue at law for the balance of the purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree that if the purchaser will not accept the conveyance and pay the purchase money, the premises be sold to raise such money...."


15 "If the vendee or purchaser has not been guilty of gross laches, nor unreasonably negligent in performing the contract, a strict foreclosure should be refused on the ground that it would be unjust, even though the vendee may have been slightly in default in making of a payment. So, for the same reason, a strict foreclosure will be denied where the premises have greatly increased in value since the sale, or where the amount of the unpaid purchase money is much less than the value of the property. On the other hand, if the vendee, without sufficient excuse, fails to make his payments according to the stipulations of his contract, and for an unreasonable time remains in default, the vendor may have a strict foreclosure of the contract for the sale and purchase of the land, unless some principle of equity would be thereby violated." Harrington v. Birdsall, 38 Neb. 176, 186, 187, 56 N.W. 961, 964 (1893). See Warner, Equity—Vendor and Purchaser—Time Stipulations—Forfeitures—Foreclosure, 18 Neb. L. Bull. 281, 287, 288 (1934-35); see also Farmers and Merchants State Bank v. Thornburg, 54 Neb. 782, 78 N.W. 45 (1898).
common and a one-half interest therein passes to the estate of the deceased vendor, deeds from both the surviving vendor and personal representative of the deceased vendor's estate will be required to convey complete title. More than mere inconvenience of requiring the vendee to obtain two deeds in order to gain clear title is involved here. The personal representative of the estate has no authority to execute a deed unless given such authority by an order from the district court of the county in which the land is located.\footnote{Neb. Rev. Stat. § 30-901 (Reissue 1948).} To obtain this order, the vendee will be required to go through the formalities of a court action for which he must pay court costs and attorney's fees, expenses which he probably never expected to arise.

\textit{Conclusion}

In land sale contracts where land held in joint tenancy is to be sold, the prospective vendors should be asked whether, in event of death of one of them, they wish the unpaid proceeds of the contract to vest entirely in the surviving vendor. If the answer is in the affirmative, explicit language to establish a joint tenancy in the contract proceeds should be drafted into the contract.

Present standard legal forms for the sale of real estate do not contain the printed words necessary to create a joint tenancy in the proceeds of the contract. These words must be inserted in order to give effect to any intent to create such a joint tenancy. Therefore, it devolves upon the draftsman of the contract to ascertain the true intent of the contracting vendors and insert the words necessary to create in law that which was intended in purpose.

Lawrence L. Wilson, '55

\footnote{Neb. Rev. Stat. § 30-901 (Reissue 1948). It should be noted, however, that a testator may by the will give his executor a power of sale to dispose of estate property in order that the formalities of a court decree shall not be required. Notwithstanding such a grant of power, it is the feeling of many attorneys that a court order should still be obtained in order to relieve the executor of any possible liability for a wrongful conveyance or sale.}