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# Recent Decisions: Joint Tenancy: Partition and Dower

Joseph E. Tierney III

the distributive chain." The Code does not purport to affect vertical privity, but instead leaves the problem to the courts.

Many courts have done away with the requirement of vertical privity in certain situations.[18] Courts, when faced with the problem of whether a manufacturer is liable to a remote vendee or other third persons, state that there is liability whether or not privity of contract exists. Courts have done away with vertical privity by judicial decison, and it is believed that they would have done the same with horizontal privity in absence of section 2-318.

The rigidity of the statute as presently drafted produces interesting anomalies. For example, *Prinsen v. Russos*,[19] where plaintiff (a traveling companion of the purchaser of an infected ham sandwich) failed for want of privity to recover from the seller, has been criticized for many years as unjust; yet the decision would presumably not be changed under the presently drafted section 2-318. One cannot help but conclude that the statutory drafting of section 2-318 was not in harmony with developing case law throughout the country. The Wyoming legislative decision to broaden the Code to include all people reasonably expected to use the goods seems sound in that it clearly delineates a definite policy decision abolishing privity as a requirement. To enact a statute which must rely on a case by case approach defeats the intent of the Code. The Code should present to the community a clear and lucid statement of the law in order to avoid any undue litigation.

JEREMIAH HEGARTY

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**Joint Tenancy: Partition and Dower**—Martin and Stella Jezo had been married for forty-two years when Martin filed an action for legal separation and division of the estate, and Stella counterclaimed for legal separation. Both causes of action were dismissed on the trial court's finding of condonation, but Martin was given leave to amend his complaint to seek partition of jointly owned assets in land and joint bank accounts valued at $430,000. In that complaint, Martin alleged as follows:

> The plaintiff contributed approximately 80% toward the acquisition of the foregoing described property and real estate, and the defendant contributed approximately 20% thereof. The title to such property was placed in joint name for purposes of convenience and was not intended to transfer actual ownership. The division of ownership should be in proportion to the con-

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[18] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1932); Foley v. Coca-Cola Bottling Co. of St. Louis, 215 S.W. 2d 314 (Mo. Ct. App. 1948).

[19] 194 Wis. 142, 215 N.W. 905 (1927).

> tribution made by each of the parties in the acquisition of such jointly owned assets.[1]

In her answer, Stella denied these allegations and in her own behalf alleged that she had "a dower interest in all the real estate in question."[2] These allegations and how the court dealt with them in *Jezo v. Jezo*,[3] both in the original opinion and in the per curiam opinion filed in denying a motion for rehearing, are the subject of this article.

I

On August 26, 1963, Judge Landry of the Circuit Court of Milwaukee County handed down a decision and opinion in which he made the following comment:

> The fact that title to the property bears the description of joint property does not compel the court to find that the property is so held in fact. Property jointly held is presumed to be joint property, but that presumption is rebuttable.[4]

He held, however, that the presumption had not been rebutted, that the property was held in joint tenancy and, therefore, that it must be divided equally. Moreover, Judge Landry ignored Stella's claim of dower entirely.

On appeal, in the original opinion, the supreme court nowhere suggested that Judge Landry had been wrong in holding that the land was held in joint tenancy. Indeed, in stating the rule of the case as to the shares of each at partition, Justice Dieterich said:

> The rule is, therefore, that the interests of *joint tenants* being equal during their lives, a presumption arises that upon dissolution of the joint tenancy during the lives of the cotenants, each is entitled to an equal share of the proceeds. This presumption is subject to rebuttal, however, and does not prevent proof from being introduced that the respective holdings and interests of the parties are unequal.[5] (Emphasis added.)

Similarly, on the dower question:

> Since the partition will have the effect of extinguishing the dower and curtesy interests of the parties in the instant action, these interests must be taken into consideration by the trial court in arriving at an equitable division of the *joint estate*.[6] (Emphasis added.)

It appeared from the original opinion that the supreme court had held that (1) shares at partition of a joint tenancy need not be equal but rather may be in proportion to the contribution of each to the con-

[1] Second Amended Complaint, count 2, para. 11, Brief for Appellant, p. 124, Jezo v. Jezo, 23 Wis. 2d 399, 127 N.W. 2d 246, *motion for rehearing denied*, 23 Wis. 2d 406a, 129 N.W. 2d 195 (1964) (per curiam).

[2] Answer, para. 6, *id.* at p. 127.

[3] Note 1 *supra.*

[4] Brief for Appellant, p. 112.

[5] 23 Wis. 2d at 405, 127 N.W. 2d at 250.

[6] *Id.* at 406, 127 N.W. 2d at 250.

sideration for the property, and (2) there could exist an inchoate dower interest in land held in joint tenancy.

Yet in the per curiam opinion rendered in denying appellant-plaintiff's motion for rehearing, the court specifically stated that it recognized that dower does not attach to lands held in joint tenancy for lack of an "estate of inheritance" in either of the joint tenants, and that property in fact held in joint tenancy must be divided equally at partition.[7] The court stressed that what it had meant in the first place was that in a partition action the equity court could look behind the *form* of the tenancy to determine the *substance* of what was intended by the parties; in effect, that in a partition action the equity court could *reform* the deed. It is to be noticed that the court did not use the term "reform" or any of its derivatives at all in the opinion. Yet a fair reading would lead one to believe that the court was thinking of something at least analogous to reformation. After taking note of the fact that husband and wife often take property in joint tenancy without contemplating the legal effects, the court said that "the presumption that a true joint tenancy was intended may be rebutted by evidence showing a different intention."[8]

Several observations seem to be in order: (1) the real issue in the case was not the *nature* of a joint tenancy, but rather whether a joint tenancy existed between Mr. and Mrs. Jezo; (2) the position taken by the supreme court on rehearing is identical to that taken by Judge Landry in all respects save one; namely, what will be evidence of an intention to create something other than a joint tenancy.[9] Further on, this point will be discussed more thoroughly.

## II

The impact of the court's opinion in *Jezo v. Jezo* could be felt in three areas of the law: (1) the partition and reformation actions, (2) joint tenancy creation, and (3) the disposition of inchoate dower at partition. Each of these areas will be discussed in order.

At common law, it was the rule that in a partition action the court of equity would not undertake to settle questions of disputed title;[10] this was the rule in Wisconsin, at least where there was an adequate legal remedy available.[11] In 1938, however, in the case of *Hayden v. Newman*,[12] the court held the common law rule abolished by section

[7] 23 Wis. 2d at 406c, 129 N.W. 2d at 197.
[8] *Id.* at 406b, 129 N.W. 2d at 196.
[9] Both courts are as one on the key issue: the court of equity in a partition action may go behind the description of title, find another intent, and, in effect, reform the deed to fit that intent.
[10] 2 AMERICAN LAW OF PROPERTY §6.25, at 109 (Casner ed. 1952).
[11] Derry v. McClintock, 31 Wis. 195 (1872); Hardy v. Mills, 35 Wis. 141 (1874); and subsequent cases.
[12] 229 Wis. 316, 282 N.W. 2d 66 (1938), in which the court specifically mentions cases cited note 11 *supra* as overruled.

276.05 of the Wisconsin statutes which provides in part that "in all actions for partition the court may try and determine *all questions of conflicting or controverted titles. . . .*" (Emphasis added.) It is to be recalled that the plaintiff, Martin, in the previously quoted paragraph of his complaint, did raise the issue of title by suggesting that although he put the property in their joint name, he did not have the intention to create a joint tenancy. He thus pleaded facts sufficient to bring a claim based upon questioning title within the realm of extended jurisdiction granted to the court in a partition action by section 276.05. In effect, what the court allows the plaintiff to bring is a combined partition and reformation action, if the latter term can accurately be used to describe the remedy which the court permits.

The grounds relied upon by the court for this "reformation" were ignorance of the legal effect of joint tenancy and consequent implications which did not conform to the intent of the parties. If what the court had in mind was reformation of the deed, the court would seem to be directly overruling the 1958 case of *Breeden v. Breeden.*[13] In that case, a son and his mother signed, as joint tenants, a deed for a farm purchased by the son in order that if the son should die, the mother would take the land. When, in preparing to sell the land, the son discovered that Polk county had put a lien on the land for old-age assistance rendered to his mother, he sought reformation of the deed contending that he did not understand this to follow from his having put the land in joint tenancy with his mother. In sustaining the lower court's dismissal of the son's complaint, the court cited *La Rosa v. Hess*[14] and said:

> The fact that parties to a contract do not foresee all the legal consequences of their acts does not establish mutual mistake. Very few contracts would exist as written if reformation could be had merely by showing that some parties thereto did not have in mind at the time of execution all the legal implications and consequences of their choice of language.[15]

Whatever force remains, in the area of reformation, in the doctrine that "ignorantia jures non excusat" after *Shearer v. Pringle*[16] seems to have been destroyed by *Jezo v. Jezo.*

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[13] 6 Wis. 2d 149, 93 N.W. 2d 854 (1958).
[14] 258 Wis. 557, 46 N.W. 2d 737 (1951).
[15] 6 Wis. 2d at 152, 93 N.W. 2d at 856.
[16] 203 Wis. 164, 233 N.W. 623 (1930), 71 A.L.R. 1302. The court in *Shearer* quoted with approval, followed, and cited numerous cases which followed Wisconsin Marine & Fire Ins. Co. Bank v. Mann, 100 Wis. 596, 76 N.W. 777 (1898). In *Mann,* the court distinguished between an "error in the contract itself resulting from ignorance of the law" and a "mistake in the legal meaning attributable to words used to express a contract," allowing reformation in the latter instance but not in the former. *Id.* at 617, 76 N.W. at 785. How much room such a distinction actually leaves the equity court to refuse to reform where there has been error of law is doubtful. In commenting upon *Shearer* in 7 WIS. L. REV. 45, 48 (1931), a case note author suggested that "Wisconsin

It was suggested previously that the only important difference between the position of the supreme court on rehearing and that of Judge Landry, and therefore the reason for reversal, involved what would be considered evidence tending to rebutt the presumption in favor of joint tenancy raised by the instruments of title. From his decision, Judge Landry would appear to have been of the opinion that evidence of unequal contribution to the consideration for the property did not tend to rebut this presumption, while the supreme court was of the opposite view. But in taking that view, the court was careful to note that "evidence of unequal contributions by way of money or services is a factor to be considered but is not necessarily controlling."[17] The reason for this is that there might be an intention on the part of the party making the greater contribution to make a gift of the amount by which his contribution exceeds one-half of the acquisition cost. Therefore, where the contributions of the parties to what property is to be held in joint tenancy are unequal, it might be wise to give some indication of a gift intention in the conveyance or specify in some detail the incidents of joint tenancy in order that the intention of the parties to create a joint tenancy might be clear.

The court also discusses the question of the disposition of an inchoate dower right at partition. Partition, of course, may be either in kind or by sale. If in kind, then the basic rule is this:

> As a result of the partition, the right [inchoate right of dower] becomes attached to the part set off to be held in severalty by the husband or his grantee holding the moiety subject to this right of dower.[18]

The court suggested on rehearing, in what should not be regarded as any more than dicta, an alternative procedure for disposing of an inchoate dower right where partition is in kind: the trial court may bar the wife's inchoate right of dower under section 276.05 of the Wisconsin statutes and make an award in the nature of owelty to compensate her for the loss of that right under section 276.42. Justice Hallows in his dissent, suggests that the per curiam opinion might deny the wife compensation for her inchoate dower if partition was made by sale. This does not appear to be the case. In the original decision the court cited section 276.36, specifically providing for compensation to the wife out of the proceeds of the partition sale for the inchoate right of dower lost at the sale because the property becomes personalty.[19] If the court

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no longer distinguishes between mistake of fact and mistake of law as a basis for equitable relief." Cases such as Breeden v. Breeden, *supra* note 13, and La Rosa v Hess, *supra* note 14, prove this statement premature. But perhaps *Jezo* makes this statement true today.

[17] 23 Wis. 2d at 406b, 129 N.W. 2d at 196.

[18] 40 AM. JUR. *Partition* §127, at 107. See also 101 Am. St. Rep. 866 (1904).

[19] The Wisconsin Supreme Court has never discussed, as such, *how* §276.36 is to

had intended to change its position on this matter, presumably it would have given more indication of that fact than it did. Thus, the inconsistency that Justice Hallows points to seems to be no more than, as he himself described it, "an apparent inconsistency."

III

On remand the trial court will be called upon to decide for the second time what property is joint property and to dispose of inchoate dower in whatever it holds is not joint property. The supreme court's decision has given the trial court clearer outlines for performing both of these tasks. In permitting a combined partition and reformation action, if the use of the latter term is correct, the court has done no more than follow the clear dictates of section 276.05 of the statutes and the interpreting case law; but in permitting reformation on the grounds it has, the court has moved startlingly close to the doctrine of reformation whenever the language of the instrument leads to unintended consequences, of reformation for all purposes.[20] It is more than possible, however, that this case will be found in the annals of forgotten cases, of opinions not written to be referred to but written to meet peculiar circumstances.

JOSEPH E. TIERNEY III

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be applied. But computation of the value of an inchoate dower right was discussed in Share v. Trickle, 183 Wis. 1, 197 N.W. 329 (1924), 34 A.L.R. 1016, although §276.36 (then Wis. Laws 1848, §3134) was not mentioned. *Caveat*: the method of computation suggested in that case would seem to apply to dower as a life estate rather than as the fee interest it became in 1921.

[20] For example, would the wife take by right of survivorship or would the husband's heirs have the right to question the title, as the husband was held to have in this case.