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Homestead: Conveyance by One Spouse Joined by Himself as Attorney in Fact for the Other Spouse

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Pringle: Homestead: Conveyance by One Spouse Joined by Himself as Attorney

through its only means of action, the same individual. In finding that the defendant corporation did not act, the Circuit Court relied on the forms utilized. Each step was considered without reference to its relation to the object or purpose of the entire transaction. This approach to tax problems, first adopted in *Isham v. United States*,[9] has received some recent support[10] and has the questionable merit of certainty not dependent upon the exercise of judicial discretion, the function of courts being reduced to that of checking forms and labels. A necessary result of the adoption of this approach to tax litigation is the extension of the sphere of permissive avoidance.

Discovery of the realities of the transaction is the announced goal of the advocates of both approaches, but they would travel different paths.[11] One would follow form; the other, substance. That the latter approach was adopted in the *Court Holding Co.* case seems obvious. Taxation of the corporation under this doctrine is not inevitable, but the determination in the *Court Holding Co.* case that the corporation had acted was not a finding of fact, but rather the decision of the case after considering the law and the policy applicable.[12] By treating it as a finding of fact and basing a distinction thereon, the court in the principal case has, in effect, rejected the doctrine of *Commissioner v. Court Holding Co.*

JOHN B. ORR, JR.

HOMESTEAD: CONVEYANCE BY ONE SPOUSE JOINED BY HIMSELF AS ATTORNEY IN FACT FOR THE OTHER SPOUSE

Knowlton v. Dean, 31 So.2d 58 (Fla. 1947)

The plaintiff and her husband owned their homestead as tenants by the entirety. The husband gave plaintiff a power of attorney which by its terms expressly allowed her to dispose of all his interest in the homestead. The husband then disappeared and did not return. Plaintiff and

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[9]17 Wall. 496 (U. S. 1873).

[10]Magill, *Sales of Corporate Stock or Assets,* 47 COL. L. REV. 707 (1947).

[11]*See* Louisville Trust Co. v. Glenn, 65 F. Supp. 193, 198 (W. D. Ky. 1946).

[12]*See* Guinness v. United States, 73 F. Supp. 119 (Ct. Cl. 1947).

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her daughter moved out of the home and rented it. Two months later plaintiff on behalf of herself and her husband entered into a contract to sell the property to the defendants, who later refused to perform. Plaintiff asked for and was awarded a decree for specific performance. On defendants' appeal, HELD, that the homestead had been abandoned. Decree affirmed.

Once a homestead has been abandoned, it is no longer subject to the restrictions placed upon alienation of homesteads.[1] Plaintiff, having shown an abandonment by her husband and by herself, was clearly able, using the power of attorney, to execute a deed to property owned by herself and her husband as tenants by the entirety.[2] Since the court found an abandonment, it left undecided the question of whether one spouse may convey homestead land held by the entirety with a deed joined in by himself as attorney in fact for the other spouse. This question is dealt with in the following discussion.

The few reported decisions of other jurisdictions under homestead provisions similar to those in effect in Florida indicate that, where one spouse owns the entire estate, neither can convey a homestead by a deed joined in by himself as attorney in fact for the other under a general[3] or special[4] power of attorney. Where there is a special power, however, one jurisdiction, taking a more liberal view, has held effective a deed executed in this manner provided that the power was jointly executed, and acknowledged by the wife.[5]

Even if the Florida Court, when presented with this problem, rejects the liberal view permitting alienation under a specific power, a distinction might be made between a homestead owned by one spouse and a homestead owned by the entirety. When the homestead is held by the entirety, the entire estate passes on the death of one spouse to the survivor by operation of law with no restrictions against alienation;[6] the children have no

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[1]Miller v. West Palm Beach Atlantic Nat. Bank, 142 Fla. 22, 194 So. 230 (1940); Lanier v. Lanier, 95 Fla. 522, 116 So. 867 (1928).

[2]FLA. STAT. 1941, §708.09 (Supp. 1945).

[3]Gagliardo v. Dumont, 54 Cal. 496 (1880); Wallace v. Travelers Insurance Co., 54 Kan. 442, 38 Pac. 489 (1894). *Contra*: Oregon Mortgage Co. v. Hersner, 14 Wash. 515, 45 Pac. 40 (1896) under WASH. GEN. STAT. §1446.

[4]Keeline v. Clark, 132 Iowa 360, 106 N. W. 257 (1906).

[5]Jones v. Robbin, 74 Tex. 615, 12 S. W. 824 (1889); Warren v. Jones, 69 Tex. 462, 6 S. W. 775 (1888).

[6]Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932).

inheritable interest[7] such as they have when one spouse owns the entire estate in the homestead.[8] Therefore, some of the reasons usually given for restricting alienation of homesteads (the protection of the widow and children[9] and the general protection of the home[10]) lose their importance when the homestead is held by the entirety.

Consideration, however, must be given to the fact that, although held by the entirety, the property is still a home, and the members of the family have an interest in its preservation. Moreover, there is no case either making or rejecting a distinction for purposes of alienation between a homestead owned by one spouse and a homestead owned by the entirety; and it is quite possible that the Florida Court would not find the distinction persuasive enough to warrant a relaxation of the protective restrictions on alienation. The words of the Florida Statutes may be of some aid. They provide that a spouse may, using a power of attorney from the other spouse, execute a deed to property held by the entirety,[11] but immediately following this provision there is a general caveat[12] that this law[13] shall not be construed as dispensing with the joinder of husband and wife in conveying homestead property. No exception is made for a homestead owned by the entirety, and the language is sufficiently broad to cover all homesteads without regard for the manner in which they are held. While the caveat refers to *joinder* and not *physical joinder* there is, nevertheless, a possible inference arising from the language that if the estate is a homestead, no matter how held, joinder by power of attorney in an instrument of alienation would be insufficient.

GEORGE O. PRINGLE

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[7]*Ibid.*
[8]FLA. STAT. 1941, §§731.05(1) and 731.27 (Supp. 1945).
[9]Thomas v. Craft, 55 Fla. 842, 46 So. 594 (1908).
[10]Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925).
[11]FLA. STAT. 1941, §708.09 (Supp. 1945).
[12]FLA. STAT. 1941, §708.10(5) (Supp. 1945).
[13]FLA. STAT. 1941, §§708.08 and 709.09 (Supp. 1945).