Concurrent Estates in Real Property I

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KING EDWARD II WAS MURDERED IN BERKELEY CASTLE on September 21, 1327 under circumstances reminiscent of MacBeth's dispatch of Banquo. William Cole was found guilty of the crime and executed. Land which William and his wife, Joan, owned jointly was forfeited to the King, who then conveyed it to one de Bitterly and his heirs. Joan survived her husband. In a subsequent suit involving the rights of de Bitterly and Joan in the land, the court awarded the entire property to Joan, the surviving tenant. Here is early source material that tenancies by the entireties with their chief characteristic, the right of survivorship, were known in the fourteenth century as they are now, unless affected by statutes or modern judicial thinking.1 The other forms of co-ownership known to the common law were the joint tenancy, the tenancy in common and the tenancy in coparceny.

TENANCY IN COPARCENY

The tenancy in coparceny and the joint tenancy were contemporaries. The former arose under the common law when property descended to female heirs because no male heir survived, or by local custom, when it descended to all male heirs in equal degree.2 The coparceny resembled a joint tenancy in that the tenants together constituted the heir, having for some purposes a single

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2 AMERICAN LAW OF PROPERTY § 6.7 (Casner ed. 1952).
estate which they held as did joint tenants, but without the right of survivorship. It resembled a tenancy in common by being unaffected by the doctrine of survivorship, each coparcener’s distinct but undivided share passing on his death to his heirs or under his will. Coparceny was the only form of co-ownership under which partition could be compelled in an action by one tenant against the other, a remedy which was not available to joint tenants or to tenants in common until a statute was enacted for this purpose during the reign of Henry VIII. This form of tenancy failed to survive in the United States after the Revolution because primogeniture did not prevail and heirs inherited as tenants in common. Today it is seldom referred to as a distinct form of ownership, having been merged with the tenancy in common.

**Tenancies in Common**

The tenancy in common which was recognized in the decided cases as early as the Fourteenth Century differs essentially from the joint tenancy in that there is no right in the survivor or survivors to the whole estate, each tenant being given a distinct, separate and undivided share in a single estate over which he had the power of alienation during his lifetime. If the interest remains undisposed of, it passes at his death under his will or by intestacy. For all practical purposes a tenancy in common is sole and separate ownership of a part of the whole estate that has not, as yet, been set aside. This form of co-ownership may be terminated by partition, voluntarily by deed, and, since the time of Henry VIII, involuntarily by court action.

A tenancy in common can exist at law or in equity in any possessory or future estates of freehold or leasehold; its duration can be limited to last no longer than for one or more stipulated lives, and the share of one need not be the same as the share of the others nor must the fractions of the whole owned by them be equal.

Tenants in common qualify as co-owners because each of them is given that interest in the whole property without which he would remain an owner in severalty: the single right, which he shares with his co-owners, to possess and enjoy the whole property as though he were the sole owner. This right was the chief feature of the tenancy in common. If one co-owner can say to the other “this particular part is mine,” (the north half, for example) he would not be a co-owner because he had a distinct right to possess a distinct parcel, even though the co-owners acquired by the same instrument other interests.

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*31 Hen. 8, c. 1 (1589); 32 Hen. 8, c. 32 (1540).*

*3 Holdsworth, A History of English Law 127 (3rd ed. rev. 1927).*

*4 Powell, Real Property § 601 (1954).*

*5 McGarry & Wade, Real Property 395 (2d ed. 1959).*

*6 See supra note 3.*

*7 See supra note 3.*

*8 See McGarry, op. cit. supra note 6, at 396.*
which were identical.\(^9\) Having this right, the tenant in exclusive possession is necessarily free from liability to his fellow tenants in actions for trespass, for money had or received, or of account, unless he had entered into possession under an agreement made with his cotenants; otherwise, only an actual eviction of his cotenants or an act of destruction (waste) would form the basis of a common law action against the tenant in exclusive possession.\(^{10}\)

**Creation of Tenancies in Common**

The common law courts developed a preference for the joint tenancy which, however, could be overcome by language manifesting an intent to create a tenancy in common.\(^{11}\) Words of exclusion qualifying affirmative words of conveyance were sufficient for this purpose, e.g. "to A and B to hold as tenants in common, and not as joint tenants."\(^{12}\)

In modern times, statutes have reversed this preference in over half of the states; in these states a tenancy in common is the preferred form of co-ownership.\(^{13}\) By this shift in preference, therefore, a tenancy in common is generally created by any inter vivos conveyance or testamentary gift to two or more persons, or by intestate succession by more than one person, unless, as is the case in most jurisdictions, express language in the instrument clearly manifests an intent to create some other form of cotenancy.\(^{14}\) A conveyance "to A and B as joint tenants and not as tenants in common" would clearly rebut the presumption raised by these statutes. On the other hand a considerable amount of litigation has revolved around the meaning of the word "jointly" in an instrument intended to create some form of co-ownership. The majority of the courts which have considered this matter have given to the word "jointly" what they believe to be a non-technical or popular meaning which does not carry the idea of the survivor's right to the whole property. *Mustain v. Gardner*,\(^{15}\) an Illinois case, illustrates this view. By a devise that ran to the testator's daughter and wife "jointly," and "to them and their heirs and assigns forever," the court decided, under a statute which provided that a joint tenancy should not be created "unless the premises, . . . shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy,"\(^{16}\) that a tenancy in common had been created and that the mere use of the word "jointly" did not rebut the presumption of a tenancy in common created by the statute. The court said that, "The word 'jointly,' found in the

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\(^9\) *Id.* at 592, 395.

\(^{10}\) See 2 WALSH & NILES, *CASES ON THE LAW OF PROPERTY* 266 (2d ed. 1957).

\(^{11}\) POWELL, *op. cit. supra* note 5, § 602.


\(^{13}\) The statutes are collected in POWELL, *op. cit. supra* note 5, § 602 n. 12.

\(^{14}\) POWELL, *op. cit. supra* note 5, at 599-600.

\(^{15}\) 203 Ill. 284, 67 N. E. 779 (1903).

\(^{16}\) *Ibid.*
devise, cannot be accepted as sufficient to show, clearly and explicitly, that the testator intended that the estate devised should possess the attribute of survivorship. Tenants in common or coparceners hold the estate ‘jointly’ until a severance is effected.”17 Such statutes are not, of course, rebutted if the word “jointly” is joined with words of severance or distribution, such as “share and share alike” or “equally,” and it was so decided in Re Kwatkowski’s Estate.18 That case involved a devise to two named persons “jointly and severally of all of my real and personal property.”

On the other hand the presumption should be rebutted, as it was by the devise involved in Re Ward’s Will19 if the word “jointly” is combined with survivorship language. In that case the testator devised his real estate to his wife “and my said daughter jointly and to the survivor of them” by a will that had been drawn by an experienced lawyer. The court said that the intention was manifest that the real estate was given to his wife and daughter as joint tenants and not as tenants in common and that the presumption of the statute in favor of a tenancy in common had been overcome. The question in the Ward case was limited to whether a tenancy in common or a joint tenancy had been created and not whether the devisees took as tenants in common with a contingent remainder in fee in the survivor, a construction used by some courts in cases usually arising out of an unsuccessful attempt to create a joint tenancy, either because such estates or their chief attribute, the right of survivorship, has been abolished, or for some reason related to the violation of a rule of law, e.g. the “four unities” rule. The basis of these decisions is the giving effect to the obvious intent of the conveyor or the manifest desire that the survivor of the cotenants take the whole fee.

That a survivorship interest can be attached to a tenancy in common has long been recognized. In the old case of Doe, on the Demise of Sarah Borwell v. Abey,20 the court said a fair construction of the instrument involved was “to treat it as a devise to the sisters as tenants in common with benefit of survivorship, and thereby give effect to all the words. A tenancy in common with benefit of survivorship is a case which may exist, without being a joint tenancy; because survivorship is not the only characteristic of a joint tenancy.”21 A recent example of the failure to use this constructional device is Stuehm v. Mikullshi,22 a Nebraska case, in which the grantor attempted to create a joint tenancy in certain land by a conveyance to himself and his wife “as joint tenants and not as tenants in common.” The deed, in effect, recited that it

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17 Id. at 286, 67 N. E. at 780.
18 94 Colo. 222, 29 P. 2d 689 (1944).
22 159 Neb. 374, 297 N. W. 595 (1941).
was the intent of the parties that in the event of the death of one grantee the other should become invested with the fee simple title. Because the common law prohibited a conveyance of real estate to oneself, and for the further reason that the attempted conveyance violated the “four unities” rule applicable to the creation of joint tenancies, the court held that the deed could not create a joint tenancy as known to the common law, with the right of survivorship. After noting that nothing in the deed or in any act out of which it arose showed that it was not the intent of the parties to create other than a technical joint tenancy, with all of its inherent attributes and incidents, the court said that it was its duty to preserve the “four unities” rule of the common law, even though to do so would defeat the express and manifest intent of the parties. The deed as drafted was of such a character that it was not capable of carrying out this intent. The court did not decide what kind of estate had been created as the instrument was held to be entirely invalid because of an exercise of undue influence. That the court would have held the estate created to have been a tenancy in common is indicated in a later case also involving the failure to create a joint tenancy. The court said, in that case, that “the estate actually conveyed was that of a tenancy in common.”

In the Anson case, the court applied the constructional device and attached a survivorship provision to a tenancy in common. In that case a deed was delivered before a Nebraska statute changed the rule of the Stuehm case. The Nebraska statute was not given retroactive effect. Three tenants in common conveyed real property to five grantees of whom two were also the grantors “as joint tenants and not as tenants in common,” the habendum clause reading, in part, “To have and to hold the above described premises unto the said parties of the second part, their assigns, the survivor of said parties, and the heirs and assigns of the survivor heirs and assigns.” The court held that a technical common law joint tenancy had not been created, chiefly for the same reason as that given in the Steuhm case: the violation of the “four unities” rule. The court said that the estate actually conveyed was a tenancy in common, even though the grantors intended to create a joint tenancy and not a tenancy in common. The court then distinguished the Steuhm case by pointing out that the real contention was whether the survivorship provision could be given effect. The court reasoned that, since the survivorship clause was not necessary if a joint tenancy had been properly created, the grantors must have intended to create a survivorship interest, whatever the estate actually conveyed might be; therefore, the only remaining question for decision is whether a survivorship provision can be attached to a tenancy in common. The court said, “We think that it can.”

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\(^{22}\) Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271 (1948).
\(^{23}\) Id at 718, 32 N. W. 2d at 272.
\(^{24}\) Ibid.
Tenancies in common also arise out of situations created by other than statutory enactment or the violation of a rule of law. Some typical ones are: if one of three or more joint tenants conveys his interest to a fourth party, this latter party becomes a tenant in common with the remaining joint tenants; or if the interest of one of two or more joint tenants is sold at an execution sale pursuant to a judgment lien obtained by a creditor of one tenant, the purchaser at the sheriff's sale becomes a tenant in common with the other cotenants and the joint tenancy is destroyed; or if a conveyance is made to two persons as husband and wife who are not married to each other, a tenancy in common generally results; and if a divorce ends a marriage between tenants by the entireties, they usually become as to the property so held, tenants in common.

In one situation that constantly recurs the technical rules of the common law courts still survive and are applied by some courts to create a tenancy in common in complete disregard of the grantors intent to create a joint tenancy. This situation, already alluded to in the discussion of the Stuehm and Anson cases, arises from a conveyance in which the grantor is one of the grantees. For example, in a conveyance by A “to A, B and C as joint tenants and not as tenants in common,” an obvious attempt to create a joint tenancy is frustrated and a tenancy in common results if the “four unities” rule is applied. In this situation the grantor, having acquired his interest by an instrument dated prior to that which attempted to create the joint tenancy, is held to have created a tenancy in common.

**Joint Tenancies**

A concept underlies the creation of a joint tenancy: a conveyance of land to two or more persons is considered a conveyance to one person, a fictitious unity, unless language in the conveying instrument shows an intent to convey separate and distinct shares. It arises only by purchase, that is, by deed or will or by adverse possession.26

The courts, by a process of *a priori* reasoning from this premise, deduced the chief features of the joint tenancy: the right of the ultimate survivor to the whole property, and the requirement that the co-owners acquire at the same time and by the same title, identical interests in, and the same right to possession and enjoyment of, the entire property. This requirement is embodied in the expression the “four unities,” a term used to explain the general idea that the cotenants must acquire and hold the property as a single owner, a “unity with a community of interest between them.”27 For these reasons the cotenants are said to be seised *per my et per tout*, an expression that has

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27 *Ibid.* A discussion of the “four unities” rule is found *infra.*
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been given various meanings but which is generally used in the United States to express the idea that for the purpose of survivorship each cotenant is seised of the whole property while at the same time being seised of only a part for the purpose of alienation.\footnote{MEGARRY, op. cit. supra note 6, at 391.}

The joint tenancy was the favorite form of co-ownership under the common law. There was a presumption that a joint tenancy had been created if the “four unities” were present and words of severance, indicating that the grantees were to take distinct shares, were absent. This preference grew out of the demands of three feudal groups: the lords, because the ultimate ownership became lodged in one person through the operation of the survivorship doctrine, thereby expediting the exaction of the feudal services; the tenant, because a tenancy in common burdened the land with those incidents of feudal tenure such as relief and wardship, that would not have been the case had the estate been held in joint tenancy and the deceased co-owner had died leaving survivors; and the title searcher, because in abstracting a title to a joint tenancy, his work was limited to a single title. For example, if a tenant in common died leaving seven children, six additional titles sprang into existence which had to be investigated; had the coowners held in joint tenancy, then one title only would continue in the survivors.

On the other hand the preference was otherwise in equity. Aiming at equality, a feature absent if the survivor becomes the absolute owner of the entire property, and not being overly solicitous of the rights of the feudal lords, the equity Chancellors showed a decided preference for the tenancy in common.\footnote{Id. at 400-401; CHESHIRE, REAL PROPERTY 305-308 (8th ed. 1958).} A mortgage, for example, given to two persons jointly was presumed by the law courts to create a joint tenancy. The equity courts took the view that the mortgagees held the property as tenants in common, the survivor being considered a trustee for the personal representatives of the deceased mortgagee.

Right of Survivorship

Under the doctrine of survivorship, when one cotenant dies his estate ends but the cotenancy continues in the survivors or survivor; this process continues until the last survivor becomes the sole owner. Under this doctrine, the survivors take nothing from the deceased cotenant as his successor. On the other hand, they take by virtue of the instrument that created the joint tenancy as part of an inter vivos and not a testamentary transaction; it is the product of a present interest arising out of the joint tenancy and carrying with it, as its chief incident, the right of the survivor to take the whole prop-

\footnote{See 2 AMERICAN LAW OF PROPERTY, supra note 2, § 6.1.}
These conclusions as to the nature of that which the survivors acquire are encompassed in the general idea that each cotenant is looked upon as being the owner of the whole estate from the beginning and that on the death of one cotenant this estate is simply freed from participation by him. Without this right of survivorship a joint tenancy could not exist, a conclusion implicit in the common law rule that a corporation, since it would never die, could not be a joint tenant.\(^3\)

**Alienability of the Right of Survivorship**

The right of survivorship does not interfere with the power of one cotenant to dispose of his interest during his life time; but, in so doing he severs the joint tenancy in so far as his interest as a joint tenant is concerned. If there were only two cotenants, the grantee of the conveying tenant and the other cotenant would hold the property as tenants in common; but if there had been three cotenants, the non-conveying cotenants would continue to hold two-thirds of the property as joint tenants, with the new tenant holding with them as to the remaining one-third interest as a tenant in common. On the other hand, if the joint tenancy remains unsevered, the right of survivorship is not affected in any respect by testamentary dispositions or the laws of intestate succession. Nor is it subject to dower or curtesy rights of the surviving spouse of the deceased cotenant as it is not considered an inheritable estate.

Prior to the adoption of the Uniform Simultaneous Death Act the courts had considerable difficulty in disposing of property in cases arising out of the simultaneous death of joint tenants. This Act is now the law of the great majority of jurisdictions in the United States\(^3\) and its basic idea is that the property of each tenant is to be distributed as though he were the survivor.

In situations arising out of the murder of the deceased cotenant by the surviving tenant, the concept that each owned the whole has been disregarded to some extent and a constructive trust has been imposed "absolutely as to one-half and, subject to the estate for life of the wrongdoer, in the second half."\(^3\)

In a frequently cited case,\(^4\) the court held that the right of survivorship is destroyed by the homicide and the surviving tenant thereafter retains title to his undivided interest as a tenant in common with the deceased's surviving heir. The courts of Michigan\(^5\) and Kentucky\(^6\) have reached the same conclusion. On the other hand, a Kansas court recently refused to interfere with the operation of the survivorship doctrine and gave the entire property to the

\(^{30}\) Megarry, *op. cit.* supra note 6, at 390-391.

\(^{31}\) See Powell, *op. cit.* supra note 5, § 618 n. 45.

\(^{32}\) Id. § 586.


\(^{35}\) Cowan v. Pleasant, 263 S. W. 2d 494 (Ky. 1954).
slayer, reasoning that the surviving tenant acquired the property from the instrument of conveyance and not by virtue of the death of the deceased cotenant.37

The "four unities" rule necessarily arises out of the entity theory behind the creation of a joint tenancy. The "unities" are those of time, title, interest and possession. The absence of one or more of these unities resulted in a tenancy in common, such estate requiring only the unity of possession, a unity common to all forms of co-ownership.

Unity of time means that the interest of the joint tenants must vest at the same time. For example, in a conveyance "to A for life, remainder to the heirs of B and C," and B and C died in A's lifetime at different times, the remaining interest would be held not as joint tenants but as tenants in common. The remaindermen in that situation did not acquire their interests at the same time; again, a conveyance by a sole owner to himself and another, as joint tenants, created a tenancy in common for the same reason, a situation that still requires the "straw man" technique unless changed by decision or statute. Unity of title means that the joint tenants must derive their interests by the same instrument or joint adverse possession; in the conveyance described above the remainder to the heirs meets this requirement.

Unity of interest means that the joint tenants must have the same interests and for the same duration; therefore, a freeholder and a tenant for years could not hold as joint tenants as their interest are of a different nature, nor could one tenant have a one-fourth interest and the other three fourths. Unity of possession means that the tenants have undivided interests in the whole, not divided interests in any part. They all have in common equal rights to possess and enjoy the property.

In many states the "four unities" rule is still prevalent in the law of joint tenancies. The "four unities" must be present at the creation of the estate and at all times during its existence. It is still the general rule that the destruction of a unity destroys the tenancy.38

Creation of Joint Tenancies

Under the common law of concurrent estates, a conveyance or devise to two or more persons created a joint tenancy, unless language in the instrument clearly indicated that a tenancy in common was intended.

In most states in this country, statutes reverse the common law rule in favor of a tenancy in common, unless the instrument expressly declares the estate to be in joint tenancy or clearly or manifestly discloses an intent to create a joint tenancy.39 While the language of the statutes differ, they operate in most

38 See 2 American Law of Property, supra note 2, § 6.2.
39 Id. § 6.3 n. 1; Id. § 6.3 (Supp. 1958, at 4-5).
jurisdictions similarly, it being merely a matter of determining whether the instrument in any way clearly shows an intent to create the joint tenancy, even under statutes which require an express declaration of joint tenancy.

Two cases that illustrate these conclusions are *Coffin v. Short*\(^{40}\) and *Gagnon v. Pronovost*.\(^{41}\) In the *Coffin* case a testator devised and bequeathed his residuary estate to two relatives by name "to have and to hold the same to them or the survivor of them absolutely and forever.” The complainant contended that a joint tenancy was created by the language of the will itself; the respondent contended that the statutory presumption in favor of a tenancy in common was applicable and that the words "or the survivor of them" related to a substantial gift, which was to take effect if either of the two named devisees failed to survive the testator. The statute involved provided that a gift to two or more

shall be deemed to create a tenancy in common and not a joint tenancy, unless it be declared that the tenancy is to be joint, or that the same is to such persons and the survivors and survivor of them, or to them as trustees or executors, or unless the intention manifestly appears that such persons shall take as joint tenants and not as tenants in common.\(^{42}\)

The court noted that the language used indicated that the testator had knowledge of the statutory provision and intentionally used its language and said that a technical joint tenancy had been created chiefly because the "use of the term 'survivor' . . . clearly indicated that there should exist a right of survivorship and all the legal incidents thereof as between the two devisees."\(^{43}\) The court further said that it is not necessary to employ the words "joint tenancy," it being sufficient if the language used accurately describes a joint tenancy. Therefore, the instrument as a whole manifested an intention to create a joint tenancy with its incident of survivorship and came within the statutory exception.

In the *Gagnon* case, a statute similar to the one considered in the *Coffin* case was involved, and the court held that in order to create a joint tenancy, intent to do so must be expressed in the instrument itself by the use of the words of the statutes or by any other language clearly expressing that intent. Consequently extrinsic testimony was inadmissible on the question of intent.

The court in the *Coffin* case concerned itself only with ascertaining whether or not a traditional joint tenancy, as such, was intentionally manifested in the will. The court found the manifestation of intent chiefly in the fact that

\(^{40}\) 106 A. 2d 262 (R.I. 1954).

\(^{41}\) 96 N. H. 154, 71 A. 2d 747 (1950).

\(^{42}\) R. I. GEN. LAWS ch. 431, § 1 (1938).

\(^{43}\) 106 A. 2d 262, 264 (1954).
the testator, in the first clause of the will, provided a home for his niece and then, by the second clause, divided the remainder of his property "equally between his niece and his nephew, 'to have and to hold the same to them or the survivor of them absolutely and forever'..." Nothing was left to strangers and he provided for the right of survivorship to the "survivor of them" indicating that he was not interested in others. From these considerations the court found that the testator had manifested his intent.

The liberal construction given to the statutes involved in the Coffin and Gagnon cases holds true under statutes which require an express declaration of joint tenancy. It is sufficient if the language used in the instrument plainly shows or clearly manifests an intention to create a joint tenancy or in legal effect describe or limit such tenancy; and no certain form of words must be used to come within the statutes.

Conveyances to Persons "and the Survivor of Them"

Instruments intended to transfer land to two or more persons frequently contain these variations of these words: "and the survivor of them" or "with the right of survivorship." These words follow the words designating the grantees by name. Butler has noted that it was Coke's understanding that a lease to two for their lives "and the survivor of them" was intended to create a joint tenancy for life and that the words "and the survivor of them" meant "no more than the Common Law would have implied without them." Butler, on the other hand, warns against the use of such language in attempting to create a joint tenancy in fee, for the reason that "the grant of an estate to two and the survivor of them, and the heirs of the survivor, does not make them joint tenants in fee, but gives them an estate of freehold, during their joint lives, with a contingent remainder in fee to the survivor." This view is in line with the common law rule that words of inheritance are necessary to create a fee simple, and in Butler's example the words of inheritance are used only in connection with the limitation to the survivor. In Vick v. Edwards the effect of such words in a devise to A and B "and the survivor of them, and the heirs of such survivor in trust to sell" was in issue. The court construed the limitation as creating a joint life estate with a contingent remainder in fee to the survivor. Fearne thought that a fee simple had been created, even though words of inheritance had not been used. He took his position in light of the more liberal rule applicable to wills that an indefinite devise creates a fee simple, unless there is language expressing a contrary intent. Fearne found the intent

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44 Id. at 263-64.
45 2 COKE ON LITTLETON § 301 (19th ed. 1832), note by Butler.
46 Ibid.
48 1 FEARNE, CONTINGENT REMAINDERS 357 (10th ed. 1844).
to create a joint tenancy in fee in the provision giving the trustees the power
to sell. Fearne’s view prevailed in the Court of the Kings Bench in two cases.
In one case\(^{40}\) the devise was to three persons “as joint tenants,” and in the
other\(^{50}\) to two persons “jointly,” followed in each by variations of the lan-
guage “and the survivor of them, their heirs and executors forever.” In both
these cases, the court held that a fee simple in joint tenancy had been created,
as the express intention that the devisees should take “jointly” overruled the
limitation of the fee to the survivor alone.

The English court in the case of Quarm v. Quarm,\(^{51}\) decided after the pas-
sage of the Wills Act,\(^{52}\) considered this problem. That Act provided, in effect,
that a devise without words of limitation should be construed to pass the fee
simple, unless a contrary intention should appear by the will. In the Quarm
case there was a devise to the testator’s widow for life, with remainder to his
brother for life, and then a remainder to seven named persons “as joint ten-
ants, and not as tenants in common, and to the survivor or longest liver of
them, his or her heirs and assigns for ever.” The plaintiff, the successor to the
last survivor, claimed the devise created a joint tenancy for life, with a con-
tingent remainder in fee in the survivor, not subject to destruction by uni-
lateral act of the cotenants, as would be the right of survivorship, an incident
to a technical joint tenancy. The defendants contended that the devise created
a common law joint tenancy in fee simple, and that the incident of survivor-
ship, which arises by operation of law, had been cut off by the severance of the
joint tenancy by a conveyance that had been made. The court sustained the
plaintiff’s contention and decided that the limitation had created a joint life
estate with a contingent remainder in fee in the survivor. The language of
survivorship was held to express an intention sufficient to overcome the pre-
sumption of the Wills Act that a fee simple was intended.

The Quarm case was one of two cases principally relied on by the court in
Hunter v. Hunter,\(^{53}\) a recent Missouri case, which involved a devise to the
testator’s “mother... and unto my sister... as joint tenants with the right
of survivorship . . . .” The court said that the language used showed an in-
tention to create a joint estate for life in the mother and the sister with a
contingent remainder in fee in the whole in the survivor. The contention
was made that a joint tenancy in fee had been created though later destroyed
by the mother’s conveyance and converted into a tenancy in common with no
right of survivorship. The court said that the testator’s intention must be
determined from the will itself and not from extrinsic evidence, and noted

\(^{40}\) Goodtitle v. Layman, King’s Bench Trinity Term, 12 Geo. III, discussed in 1 Fearne,
Contingent Remainders 558 (10th ed. 1844).
\(^{42}\) [1892] 1 Q. B. 184.
\(^{50}\) 7 Will. 4 & 1 Vict., c. 26 (1837).
\(^{51}\) 520 S. W. 2d 529 (Mo. 1959).
that the will did not contain express words indicating a joint tenancy in fee. The court held that the statute raising a presumption of a fee was not applicable because of the expressed contrary intention. The court emphasized that, in interpreting wills, effect must be given to all words in the instrument, and, therefore, by giving effect to the words “with the right of survivorship” by the construction adopted, it did so. The court rejected the argument that the words were simply descriptive of the principal incident of a joint tenancy in fee. It would appear, as Professor Eckhardt points out, that the court failed to apply its rule of construction to the key words “as joint tenants” and leaves them without effect, because if only two grantees are named, a joint estate for life of the first to die is really a tenancy in common. Professor Eckhardt further points out that, even if the Quarm decision be considered sound, it is distinguishable from the Hunter decision for the reason that Quarm contains express words which, without difficulty, could be construed as creating a contingent remainder in fee in the survivor. The other case relied on by the court is Jones v. Snyder. That case involved an inter vivos conveyance to three named persons “as joint tenants and to their heirs and assigns, and to the survivor or survivors of them, and to the heirs and assigns of them, forever.” The court held that the deed created a joint tenancy for life, with a contingent remainder in fee in the whole in the survivor. The court accepted the reasoning of the Quarm case and reached its decision by giving effect to the words “survivors or survivor.” The Jones case should also be distinguished from the Hunter case for the same reasons given in distinguishing Hunter from Quarm.

The construction applied in the Jones case is used by the Michigan courts in order to give effect to the presumed intent of the parties. The courts argue that by the use of such language as “the survivor of them and to their heirs and assigns” following the words naming the grantees, the parties must have intended to create something more than a mere joint tenancy and that this “something more” is declared to be a joint tenancy restricted as is a tenancy by the entireties. The use of this construction has been criticized upon the ground that, in many cases, the instruments are drawn by inexperienced persons “who surely did not visualize the possibilities of a joint life estate and contingent remainders” and because such words should be construed as attempts “merely to further rebut the statutory presumption in favor of a tenancy in common,” in those states which recognize joint tenancies but have statutes raising a presumption in favor of tenancies in common.

Weber v. Nedin illustrates the thinking contrary to that of the Michigan

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55 218 Mich. 446, 188 N. W. 505 (1922).
57 210 Wis. 89, 242 N. W. 487, 246 N. W. 307 (1932).
court. This case involved the construction of a grant to two named grantees "and to the survivor." A statute reversing the common law preference for joint tenancies existed and the court held that the phrase "and to the survivor" was sufficient to rebut the statutory presumption. The position of the Weber case has been criticized on the ground that express words of survivorship alone are not sufficient to rebut the presumption against joint tenancies, because survivorship is merely one of the incidents of such tenancies. This criticism is pertinent, especially since "survivorship may be attached to an estate other than a joint tenancy. But it does not imperatively follow that the grantor intended to create a life estate and contingent remainder by the use of a phrase indicating that the survivor is to take." The construction is sound that the words of survivorship are "merely descriptive of one of the chief incidents of a joint tenancy, i.e. the right of survivorship . . ." and that the

estate contended for by appellant—a joint life estate with contingent remainder to the survivor, is of such an unusual nature that before a court would be justified in holding such an estate had been created, clear and unambiguous language to that effect would have to be used. Here there is no ambiguity or uncertainty in the words used. Recently the Michigan court again had this problem before it. The case involved a grant of land to A and B "or survivor." The court adhered to its position that this limitation conveyed a moiety to each for life with remainder to the survivor in fee, which neither grantee could cut off during his lifetime by a conveyance. The court not only maintained its position as the effect of such phrase, but it broadened it in holding that by use of such words in a deed the parties are considered as a matter of law, not to have intended to rebut the presumption, but to create an indestructible right of survivorship. The court did not consider the phrase in the light of the presumption statute or of the actual intent.

The admonition of Butler that in creating joint tenancies in fee, particular care should be taken to avoid the use of words of survivorship is restated by Professor Eckhardt, who, after examining the various form books for the creation of joint tenancies or tenancies by the entireties, warns against the use of such words, especially in Missouri. Such phrases as "to the survivor" and "with the right of survivorship" or their substantial equivalents, he advises, should be omitted.

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58 See Comment, supra note 56, at 881.
61 See 2 COKE ON LITTLETON, supra note 45.
62 Eckhardt, op. cit. supra note 54, at 468.
It would appear that, if a conveyance is made to two or more named persons expressly as "joint tenants" and such words are followed by the words "with the right of survivorship," a common law joint tenancy with its incident, the right of survivorship, is intended, the last quoted words being merely words descriptive of a joint tenancy and especially of its chief feature, the right of survivorship. Such words should not be considered words of purchase. This is the construction which is generally placed upon such language. On the other hand, a grant to named persons as joint tenants "and to the survivor of them" carries with it the reasonable implication that the "survivors" are intended to take directly as purchasers a contingent remainder in fee simple, which interest cannot be defeated by any act of severance by a cotenant. This construction becomes more acceptable if the conveyance runs to the survivor of the named persons, "his heirs or assigns." 63

Whatever may be said about the soundness of the life estate-contingent remainder in fee construction in those jurisdictions which recognize the common law joint tenancy and all of its incidents, it would appear that this construction is particularly sound in those jurisdictions where the joint tenancy, or its incident, the right of survivorship, is abolished; in these jurisdictions, this is the only effect that can be given to the express provision for survivorship, since this provision cannot operate under the statutes to create a joint tenancy in fee with the right of survivorship. The courts harmonize the legislative policy against joint tenancies or the right of survivorship with this constructional device by explaining that "the prohibition of the statutes apply to the creation of a right of survivorship as an incident, but not as a principal." 64 This approach is also sound in those cases where a joint tenancy is attempted but fails, because of the failure to comply with a rule of law. Anson v. Murphy 65 illustrates this position. In this case, the Nebraska court said that a joint tenancy had been intended, as is evidenced by the words "as joint tenants and not as tenants in common" in the conveying clause. But the court saw that the real contention was whether the survivorship clause "to have and to hold the above described premises unto the said parties of the second part, the assigns, the survivors of said parties, and the heirs and assigns of the survivor heirs and assigns," could be given effect. In holding that it could, the court reasoned that, since a survivorship clause was not necessary if a joint tenancy had been properly created, then the grantor must have intended that survivorship exist, whatever the estate actually conveyed might be. The only question left was whether a survivorship provision could be attached to a tenancy in common. The court held that it could and that it was indestructible, except by voluntary action of all of the tenants in common.

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64 Comment, supra note 56, at 882-83.
65 149 Neb. 716, 32 N. W. 2d 271 (1948).
In drafting instruments intended to create concurrent estates care should be taken in the choice of language to be used; and this selection, in turn, depends upon the desires and wishes of the parties. The parties' precise intent is the first determination that should be made before the instrument is drafted. They may intend a technical joint tenancy with the right of survivorship implied by operation of law as an incident thereto, which interest has always been considered as severable by either of the parties or his creditors; or they may intend a tenancy in common for life, with cross remainders for life, with the remainder in fee to the ultimate survivor; or a tenancy in common in fee subject to cross executory limitations between them. There is "a very great distinction between the limitation of survivorship that is involved in a gift of joint tenancy, and the limitation of the word 'survivor' which is annexed to a tenancy in common . . ." in this important respect that "... when a gift to the 'survivor' is annexed to a tenancy in common and not to a joint tenancy, then the limitation takes effect by virtue of the gift, and not by virtue of something involved in a limitation of joint tenancy."68

There is a dictum in Anson v. Murphy that "a survivorship attached to a tenancy in common is indestructible except by the voluntary action of all the tenants in common to so do."67 Yet, on the other hand, a further dictum states this right of survivorship is burdened with the "debts of the deceased tenant in common, a liability which does not exist in the case of a survivorship incident to a properly created joint tenancy." The rights of the cotenants who hold cross contingent remainders dependent upon survivorship "is a confused area at best (and) leaves room for doubt as to whether the court reached the best possible solution."68

**Severance of Joint Tenancies**69

a. Conveyances

Under the common law a joint tenancy was severed by the destruction of one or more of the "four unities."70 A conveyance by one of two joint tenants of his interest in the tenancy to a third party destroyed the unities of time and title and ended the joint tenancy; and, for the same reason, a conveyance by one of three or more joint tenants of his interest in the tenancy severed it to the extent of the interest conveyed. In the latter situation the law considered that the conveyance cut off that share from the joint tenancy and that share

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68 Burns v. Nolette, 88 N. H. 489, 496, 144 A. 848, 852 (1929). This case is pertinent although it involved personal property.
67 See Anson v. Murphy, supra note 23 at 720, 32 N. W. 2d at 273.
68 Ibid.
69 See generally Annot., 64 A. L. R. 2d 918 (1959); Swenson & Degnan, Severance of Joint Tenancies, 58 MINN. L. REV. 466 (1954).
70 See 2 AMERICAN LAW OF PROPERTY, supra note 2, § 6.2.
then was discharged from the incidents of joint tenancy, and passed to the
grantee to be held as a tenancy in common.\textsuperscript{71} The two non-conveying tenants
remained, with respect to two-thirds of the property, joint tenants; but, as
between themselves and the grantee of the other interest, they became tenants
in common. If one of three joint tenants conveyed his interest to the other
cotenants, the grantee cotenant became a tenant in common as to the interest
conveyed but remained a joint tenant as to his original interest.\textsuperscript{72}

Does a conveyance effect a severance and destroy the right of survivorship
if the conveyance is subsequently set aside because made with the intent to
defraud the creditors of the conveyor? That it does was the holding in \textit{Camp-
bell v. Drozdowicz},\textsuperscript{73} a case involving a deed by a husband to his wife of his
interest in a joint tenancy held by them, and a subsequent deed of the prop-
erty by the wife to their daughter. Later a creditor of the husband recovered
a judgment against him, but before a levy had been made the husband died.
The creditor contended that the conveyance was fraudulent and that his
claim should be paid out of the husband's one-half interest; the wife and
daughter, on the other hand, contended that they should prevail whether the
conveyance were held effective or not: if the conveyance were set aside, the
husband had no interest in the property to which the lien could attach; if
the conveyance were held ineffective, the wife should prevail as the survivor,
a judgment lien not being a severance of the tenancy. By holding for the
creditor the court recognized that the joint tenancy had been severed by the
conveyance, at least long enough to permit the judgment lien to attach to the
interest of the conveying cotenant, as tenant in common. The conveyance
worked such a severance that it could not be subsequently revived by the
decision setting aside the deed.

\textbf{b. Leases}

Whether a lease of a term by a cotenant of his interest in a joint tenancy
severs the tenancy is a question that has been debated since the time of Coke
and Littleton. Three views have been developed: one view is that the lease
does not effect a severance, except to the extent necessary to protect the lessee,
and the surviving cotenants will take the entire estate subject to the lease;
another is that a complete severance is effected; and the third view makes the
decisive fact the date of death of the lessor: if the lessor survives the lease and
then dies, his cotenant will take the entire property as the survivor; but, if
the lessor dies during the term of the lease, the severance is complete.\textsuperscript{74}

\textsuperscript{71} Fleming v. Fleming, 194 Iowa 71, 174 N. W. 946, 180 N. W. 206, 184 N. W. 296, error
dismd 264 U. S. 29, 44 S. Ct. 246, 68 L. Ed. 547 (1922).
\textsuperscript{72} Hammond v. McArthur, 30 Cal. 2d 512, 183 P. 2d 1 (1947).
\textsuperscript{73} 243 Wis. 354, 10 N. W. 2d 158 (1943).
\textsuperscript{74} See Comment, 25 CAL. L. REV. 203, 206-09 (1936).
The controversy still exists: Professors Swenson and Degnan favor the view that the conveyance works a complete severance whether a life estate or a term of years is conveyed;75 Professors Niles and Walsh adopt what they consider to be the better view, that is, a lease by one joint tenant works a complete severance of the tenancy because the unity of interest is destroyed;76 and the most recent statement of the English view on this question by Professors Megarry and Wade is to the same effect.77

c. Liens

The interest of a joint tenant may be reached by his creditors by judicial process. But at what stage in the process the joint tenancy is affected is another troublesome question. Is the joint tenancy ended when the lien attaches, or not until the interest has been sold under execution process and the sheriff's deed has been delivered; and what is the effect of any intermediate process, levy or sale, for example, and the death of the debtor-tenant before the expiration of the redemption period expires? These questions indicate the area of doubt.

From the cases it appears that a judgment lien does not sever a joint tenancy, but there is doubt as to whether it is severed by a lien created by levy. If the debtor-tenant dies after the creation of the lien and before execution process had issued, the surviving cotenant will take the property free from the lien, and the same is true if he dies after the levy is made but before sale of the property. 78 Zeigler v. Bonnel79 illustrates the view that a lien does not effect a severance. In this case, the court said that "the interest of the joint tenant terminated upon his death and that after his death there was no interest to levy upon; Van Antwerp v. Horn80 illustrates the view that neither a judgment lien nor the making of a levy of execution upon the interest of a joint tenant-debtor severs the joint tenancy, since the levy gives no greater interest to the judgment creditor than that which he already has. Conclusions seemingly contra to these holdings, for example, Lessee of Davidson v. Heydon,81 Musa v. Segelke and Kohlhaus Co.,82 and especially Campbell v. Drazdowicz83 are either dicta and not direct holdings,84 or, as is pointed out in the Van Antwerp case, are based upon the fact that "the levy upon the real estate was made by seizing the same. It follows that the seizure would of necessity inter-

75 Swenson, op. cit. supra note 69, at 473-75.
76 See 2 American Law of Property, supra note 2, § 6.2.
77 Megarry, op. cit. supra note 6, at 425-26.
78 Swenson, op. cit. supra note 69, at 495-96.
80 390 Ill. 449, 61 N. E. 2d 358 (1945).
81 2 Yeates 459 (Pa. 1799).
82 224 Wis. 432, 272 N. W. 657 (1937).
83 243 Wis. 354, 10 N. W. 2d 158 (1943).
84 Swenson, op. cit. supra note 69, at 495-96.
Concurrent Estates in Real Property

...[but] in this State, the levy on real estate does not deprive the defendant of the use of his property by transferring the possession to the sheriff as in the case of a levy on personal property...

But what is the effect of a sale on the lien? Jackson v. Lacey\(^8\) is charged with holding that joint tenancy is not severed until the period of redemption has expired in which is implicit the conclusion that the time fixed for the severance of the joint tenancy is the delivery of the deed to the purchaser by the sheriff. On the other hand, Ziegler v. Bonnel considers it well settled that the purchase of the interest of a joint tenant at execution sale does not sever the joint tenancy.

Two views exist as to the effect of a statutory lien upon the interest of a joint tenant. In Wisconsin, under a statute which provides that old age assistance benefits should become a lien on all real property, “...including joint tenancy interests...”,\(^8\) benefits paid to a recipient of such aid on request were held to create a lien on the recipient’s interest in a joint tenancy. The Supreme Court of Wisconsin in Goff v. Yauman\(^8\) had difficulty in holding that the county could recover as it was committed to the view that a judgment lien did not prevail over the survivor. The court surmounted the difficulty by taking the position that the statute did not create the lien; the lien was created by the applicant himself, by his applying for and receiving assistance and voluntarily subjecting his property to the security plan of the statute. In the later case of Estate of Feiereisen,\(^8\) the same court squarely held that the survivorship interest was destroyed by the application for and receipt of the assistance and the heirs of the deceased joint tenant was awarded the surplus in value over what was necessary to pay the county. On the other hand an opposite view was taken in Gau v. Hyland\(^9\) by a Minnesota court, which held that the surviving joint tenant took free and clear from the assistance lien. The basis for the decision is that the tenancy is not severed until the tenant is divested of part of his estate and one of the “unities” destroyed. The court rejected the Goff case as being unsound and contrary to the established principles applicable to joint tenancies since the time of Coke.

d. Mortgages

In “title theory” states, which recognize that the mortgage is a conveyance of the property, a severance is effected when one joint tenant mortgages his interest and the joint tenancy is not revived by a reconveyance or payment. But

\(^8\) 390 Ill. 449, 454, 61 N. E. 2d 358, 360.
\(^8\) 408 Ill. 530, 97 N. E. 2d 839 (1951).
\(^9\) 237 Wis. 643, 298 N. W. 179 (1941).
\(^9\) 263 Wis. 53, 56 N. W. 2d 513 (1953).
in a "lien theory" state, which considers a mortgage as creating a legal lien only, divergent views are held.\footnote{See AMERICAN LAW OF PROPERTY, supra note 2, § 6.2.}

Until recently, there was only one clear American holding\footnote{Wilkins v. Young, 144 Ind. 1, 41 N. E. 68 (1895).} that the lien of a mortgage was valid to the extent necessary to protect the mortgagee and that, on the death of the mortgagor, the surviving joint tenant took the property by virtue of the tenancy but, as to one-half of the property, he took only the right of redemption from the mortgage. The position taken on the last point is considered to be wrong on principle because the unity of interest was broken by the mortgage even though the unity of title was not severed.\footnote{See 2 AMERICAN LAW OF PROPERTY, supra note 2, § 6.2.}

On the other hand Wilkins v. Young is satisfactory to Professors Swenson and Degnan, who point out that there is "respectable authority for the idea that the right of survivorship may be 'suspended' during a temporary alienation of part of one joint tenant's interest and revived when the temporary alienation has terminated."\footnote{Swenson, op. cit. supra note 69, at 492.}

Why should a distinction be made between the lien of a mortgage and the lien of a judgment? The unity of interest is severed in both cases. We have noted, that a judgment lien has no severing effect and one recent case squarely comes to the same conclusion.

In People v. Nogarr,\footnote{164 Cal. App. 2d 591, 330 P. 2d 858 (1958).} a decision by an intermediate appellate court in California, a "lien state," a husband and wife held property as joint tenants. The husband alone mortgaged his interest and died before his wife. The court held that the execution of the mortgage did not operate to end the joint tenancy or sever his interest as a joint tenant; therefore, upon his death, his interest having ceased to exist, the lien of the mortgage did not survive. The court refused to follow Wilkins v. Young, pointing out in particular that its decision was based upon two cases from "title state" jurisdictions.\footnote{Id. at 596, 330 P. 2d at 862.}

e. Executory Contracts

An executory contract of sale of real property by one joint tenant creates an equitable interest in the vendee and works a severance of the joint tenancy in equity. The basis of the decisions is the doctrine of equitable conversion with some assistance from the "four unities" rule. If the vendor dies before the conveyance is made, the vendee is entitled to a deed from the vendor's administrator rather than from his heirs.\footnote{Swenson, op. cit. supra note 69, at 475-82.}

If, however, the contract is entered into by both of the joint tenants, a conflict exists as to whether or not the joint tenancy is severed. Two cases in which
the question received considerable attention are Buford v. Dahlke98 and Estate of Baker.99 In both of these cases the courts held that a joint tenancy is ended by the contract to sell, unless a distinct intention to the contrary is indicated. In the Buford case, the administrator of the deceased husband's estate brought an action against the surviving wife, as well as the vendee, to establish title to one-half of the unpaid purchase money. The court held that, if all of the joint tenants had executed the contract to sell and the vendee had gone into possession, the joint tenancy in the realty would have been destroyed even though the vendor retained legal title to the realty as security for the unpaid part of the purchase price. In the Baker case, the court, by a five to four decision, also denied to the surviving wife the entire amount of the unpaid purchase price for the reason that the joint tenancy had been severed by the contract of sale, no contrary intent being found by the majority of the court.

In a recent Oregon case,100 the rule of the Buford and Baker cases was applied to a contract to convey executed by tenants by the entireties. A position contrary to Buford and Baker was taken in Watson v. Watson101 and Hewitt v. Biege102 where the courts declared that the doctrine of equitable conversion would have no application and permitted the surviving joint tenant to take the entire proceeds. The Illinois court which decided Watson v. Watson subsequently considered another aspect of this problem in Illinois Public Aid Commission v. Stille.103 In that case, the court considered the question of how the proceeds are held following a completely executed sale of property by joint tenants. The court expressly adhered to its former decision in the Watson case, but distinguished it on the ground that in the Watson case the contract to sell had not been "fully executed," whereas it had been in the Stille case. The conclusion to be drawn from this case is that where the entire proceeds have been paid, the joint tenancy comes to an end.

END PART I

(To be continued)