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SEVERANCE OF JOINT TENANCIES

ROBERT W. SWENSON** and RONAN E. DEGNAN***

In their casebook on Property, Professors Myres S. McDougal and David Haber have adopted this enviable title for the chapter on concurrent interests: Anachronism Redivivus. These words epitomize rather well the current law relating to joint tenancies. The subject is thoroughly burdened with concepts which might be described as archaic if that were not such an understatement. This Article will examine one facet of joint tenancy law—the right of one tenant without the consent of the other to “sever” the joint tenancy and thereby defeat the “right of survivorship” of the other. As in many other areas of property law, the courts have characterized “severance” with such formulism that there is neither consistency nor clarity in the governing principles.

The nature of the right to sever a joint tenancy is intimately related to the legal metaphysics which surrounds the joint tenancy in general. Any definition of joint tenancy is likely to be so riddled by exceptions that it is tempting to follow Lord Coke’s pattern of discussing it in terms of illustrations. Thus at common law if A conveyed land to “B and C and their heirs,” the grantees were thought to take as one. If they were not husband and wife, they held the fee simple as joint tenants. They were seized per my et per tout, i.e., each was seised of the whole for the purpose of survivorship, and each was seised of a moiety for the purpose of alienation. During the continuance of the jointure, both were entitled to possession. If B died before C, C’s ownership was then exclusive. The possibility which either had to acquire ownership in severalty by surviving was a characteristic of the joint tenancy in its inception. Consequently the survivor took nothing from the deceased tenant. The entity concept of the joint tenancy is thought to have originated in the policy of facilitating the collection by the feudal overlords of the incidents of tenure. A splitting of the ownership into separate undivided interests would have made collection more difficult

*This Article does not consider the so-called “joint” bank account. Further, the writers do not think the bank account cases even analogous; they have religiously excluded them.

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than if ownership theoretically persisted in an entity. There might be several tenants, of course, but the pattern was the same. Coke discussed the joint tenancy in terms of four requirements for its creation, but it has been the words of Blackstone which have found popularity with the American courts. Over and over again, the following appears in the opinions:

“The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.”

These “four unities” stem from the entity concept of the joint tenancy. That they are not always regarded as prerequisites for the creation of a joint tenancy is clear from the cases. The idea, for example, that joint tenants must acquire their title at the same time seems to be a carry-over from the era when livery of seisin was the normal method of transferring ownership. Since livery contemplated a present act, it was impossible for joint tenants as an entity to acquire their interests at different times. However, after the Statute of Uses in 1536, a valid joint tenancy might be created by livery of seisin to X to the use of the children of B then living or thereafter born. The same was true of a devise to joint tenants who could not qualify at the same time. Despite the fact that unity of title ceased to be indispensable to the creation of a joint tenancy, many courts still feel constrained to hold that A may not convey to himself and B as joint tenants by a single conveyance. The modern deed is thought to operate as did livery of seisin so that A cannot be both grantor and grantee. Fortunately a number of courts have abandoned this sort of reasoning.

The other unities are not always adhered to. It may perhaps be possible for joint tenants to possess different estates or different

7. “This analysis has perhaps attracted attention rather by reason of its captivating appearance of symmetry and exactness, than by reason of its practical utility.” Challis, Real Property 357 (3d ed., Sweet, 1911).
8. Williams & Eastwood, Real Property 292-293 (based on 24th ed. of Williams, 1933); Challis, op. cit. supra note 7, at 366.
9. E.g., Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327 (1928); Pegg v. Pegg, 165 Mich. 228, 130 N. W. 617 (1911); Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271 (1948), 28 Neb. L. Rev. 117.
shares, in which case there is no unity of interest.\textsuperscript{11} Unity of possession has not been strictly observed.\textsuperscript{12} There seems to be no exception, however, to the unity of title—the joint tenancy must arise from one act, deed or devise.\textsuperscript{13}

It will be recalled that each of two joint tenants is seised of an aliquot share for the purpose of alienation. If $B$ and $C$ are joint tenants, $B$ may convey his interest to $X$. This was said to result in a severance of the joint tenancy because two of the four unities no longer exist. $X$ and $C$ cannot be joint tenants because they did not acquire their interests at the same time or by the same deed. They are tenants in common which means that except for the coequal right to possession, they are in all respects as though they owned in severalty.\textsuperscript{14} The implication is that a joint tenancy exists not only if the four unities are present when it is created but also only if they continue to exist. The vast majority of American courts make this the test of severance. The immediate reaction to this approach is likely to be: Why be more persistent in requiring a continuation of the four unities than we are in requiring their existence at the time the tenancy is created? The ultimate question will be: Is it possible to formulate something more realistic than the four unities as a yardstick for determining when a severance occurs?

Before the cases dealing with severance are classified, a note on the judicial attitude toward the joint tenancy in general is in order. That policy is bound to influence decisions on severance. The early bias in favor of joint tenancies may have represented a concession to the English landed gentry, as was pointed out above. But it is certain also that the landowner found the tenancy to work to his advantage later in avoiding feudal obligations by the device of the conveyance to uses.\textsuperscript{15} After the burdens of feudal tenures disappeared, the equity courts at least regarded the \textit{jus accrescendi} with disfavor.\textsuperscript{16} Traditionally, the American courts have frowned upon the idea that two persons, unrelated by blood or marriage, may gamble their fortunes on the chance of survivorship.\textsuperscript{17} Except for the few states in which joint tenancies do not exist,\textsuperscript{18} it cannot

\begin{itemize}
  \item \textsuperscript{11} See notes 35-47 infra.
  \item \textsuperscript{12} See notes 39, 44, 106 infra.
  \item \textsuperscript{13} Freeman, Cotenancy and Partition 66 (2d ed. 1866).
  \item \textsuperscript{14} Challis, \textit{op. cit. supra} note 7, at 368.
  \item \textsuperscript{15} Plucknett, Concise History of the Common Law 549 (4th ed. 1948); Williams & Eastwood, \textit{op. cit. supra} note 8, at 51-52.
  \item \textsuperscript{16} 4 Kent Comm. *361.
  \item \textsuperscript{17} For an excellent statement by Yeates, J., see Caines v. Lessee of Grant, 5 Binney 119, 122-123 (Pa. 1812).
  \item \textsuperscript{18} 2 American Law of Property 14-15 (1952). But the courts of those states seem to have little real aversion to survivorship; they readily create
be said that the creation of the joint tenancy is contrary to public policy. True, many states enacted statutes which create a constructional preference for the tenancy in common, but if the proper local formula is used, there is no difficulty encountered in creating the tenancy. The small landowner and his spouse today more than ever before are using the tenancy as a means of avoiding the inconvenience and expense of probate. The current popularity of the joint tenancy has resulted in a noticeable increase in the number of appellate decisions during the last ten years.

The landowner should be aware, however, of the hazards involved in the use of the joint tenancy. The principal one is the right of one tenant to effect a severance and destroy the right of survivorship. If an indestructible right of survivorship is desired—that is, one which may not be destroyed by one tenant—that may be accomplished by creating a joint life estate with a contingent remainder in fee to the survivor; a tenancy in common in simple fee with an executory interest in the survivor; or a fee simple to take effect in possession in the future (springing use). The latter device may be particularly useful since it avoids the creation of a present possessory estate in the person designated to take upon the death of the conveyor. It possesses also the further advantage that in most states it may be made contingent upon the conveyee surviving the conveyor.

I. SEVERANCE BY TESTAMENTARY DISPOSITION, CONVEYANCE OR CONTRACT TO SELL

Testamentary dispositions. It is uniformly held that the right of survivorship will be preferred to an attempted testamentary disposition by one tenant of his interest. The theory is that a

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19. 2 American Law of Property at 11-12.
20. 2 id. at 13-14.
21. E.g., Papke v. Pearson, 203 Minn. 130, 280 N. W. 183 (1938) (deed creating tenancy in common reformed to create contingent springing use); Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271 (1948) (executory interest); Quarm v. Quarm, [1892] 1 Q. B. 184 (contingent remainder).
22. 2 Powell, Real Property §§ 326, 279 (1950); 1 Simes, Future Interests § 150 (1936). For the suggestion that joint tenancies might be abolished altogether since the variety of possible future interests give the landowner sufficient latitude in creating survivorship rights, see Niles, The Law of Estates Since Butler and Kent, 3 Law: A Century of Progress, 1835-1935 199, 233 (1937).
23. Duncan v. Forrer, 6 Binney 193 (Pa. 1813) (rejecting the argument that the will constituted a severance because the local Statute of Wills described a testamentary disposition as “conveying . . . land,” and holding that
severance is effective only if made during the tenant's life and a will does not take effect until after his death. It follows that if the tenant cannot devise his share, he cannot subject it to a lien created by the will. If the tenant devises his interest in the joint property to a stranger and if his spouse, who is the surviving tenant, receives other property under the will, the latter may be estopped to deny the severance if she elects to take under the will.

Inter vivos conveyances. Joint tenants may hold for their lives or for years as well as in fee simple. If a conveyance at common law was made to "B and C for their lives," the implication was that it was an estate which continued for the life of the survivor. A severance of a joint tenancy in a life estate by one tenant would be beneficial to the lessor since it would result in each holding for his own life.

the statute applied only to "devisable lands" and was not intended to alter estates); Nussbacher v. Mandrefield, 64 Wyo. 55, 186 P. 2d 548 (1947). The survivor may, of course, devise his title. His will is effective without repudiation if it is broad enough to include all property owned at the time of his death. Eckardt v. Osborne, 338 Ill. 611, 170 N. E. 774 (1930).

24. A statute providing that death shall sever a joint tenancy influenced the court to construe an ambiguous deed of the type referred to in note 28, infra, as creating an indestructible right of survivorship. But the court declined to name or classify the interest created. Davis v. Davis, 223 S. C. 182, 75 S. E. 2d 46 (1953).

Would a conveyance to the use of a joint tenant's last will sever? Baron Parke thought not: "We will only say that there is no case in point; and we cannot feel satisfied that the mere surrender to the use of a will in the ordinary mode, no will having been made during the continuance of the joint tenancy, can operate to produce a severance." Edwards v. Champion, 3 De G. M. & G. 202, 216, 43 Eng. Rep. 80, 85 (1853). But an earlier judge "apprehended" that it would, though admitting that a will alone would not. Gale v. Gale, 2 Cox 136, 155, 30 Eng. Rep. 63, 71 (1789). We content ourselves with the observation that the question is unlikely to arise. The problem was raised in Reiss v. Reiss, 45 Cal App. 2d 740, 746, 114 P. 2d 718, 722 (1941); see also note 31 infra.


27. A conveyance to "B and C and the heirs of their bodies" might seem to create a joint tenancy in fee tail, but if both were male or both female, since issue would be impossible, they took as joint tenants for their lives with several inheritances. Co. Litt. *283; Challis, op. cit. supra note 7, at 365. If one was male and the other female, apparently the estate would be a special fee tail.

28. Leake, Digest of Law of Property in Land 145 (2d ed. 1909). Challis, op. cit. supra note 7, at 368, contends that the addition of express words of survivorship would be mere surplusage, e.g., "to B and C and to the survivor of them." It would seem that the phrase might be construed to be a contingent remainder in fee. Certainly today it would present a difficult problem of construction in view of statutes which eliminate the necessity of words of inheritance in creating a fee simple. That slight variations in wording may produce different results is well illustrated by Weber v. Nedin, 210 Wis. 39, 246 N. W. 307 (1933) and Haas v. Haas, 248 Wis. 212, 21 N. W. 2d 398 (1945).

29. Challis, op. cit. supra note 7, at 368. Severance of a joint tenancy in a term for years is considered in note 47 infra.
Joint tenants usually, however, own in fee simple. If all join in an inter vivos conveyance, the tenancy is terminated.\(^{30}\) When one tenant conveys to a stranger, whether the conveyance purports to transfer the entire fee or merely his share, the joint tenancy is severed and the remaining tenant becomes a tenant in common with the conveyee.\(^{31}\) The conveyance destroys the unities of time and title. The joint tenancy will not be reestablished if there is a reconveyance to the original joint tenant.\(^{32}\)

If there are two joint tenants, a conveyance by one to the other ordinarily terminates the tenancy.\(^{33}\) The Wisconsin court was presented with something of a dilemma in this connection. In *Campbell v. Drozdowics*,\(^{34}\) H and W, husband and wife, were joint tenants. In fraud of creditors, H conveyed to W, and W later conveyed to their daughter, D. C, a creditor of H, thereafter recovered a judgment against H, but before the levy, H died. C brought suit against W and D for the purpose of having his claim satisfied out of H's original one-half interest on the ground that the transfers were fraudulent conveyances. Defendants contended that they were entitled to prevail whether the conveyance was set aside or upheld. If the conveyance were sustained, H had no property to which the judgment lien could attach; if the conveyance were "set aside," the joint tenancy was reinstated and W would prevail as survivor, a judgment lien not being a severance of the joint tenancy. The court, however, held for the plaintiff on reasoning which is none too clear. Apparently the court felt that by the conveyance to W there was a

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31. Shockley v. Halbig, 24 Del. Ch. 400, 75 A. 2d 512 (1950); Davidson v. Heydon, 2 Yeates 459 (Pa. 1798) (assignment for benefit of creditors); see Jones v. Snyder, 218 Mich. 446, 188 N. W. 505 (1922). To constitute a severance, the deed must be delivered and otherwise effective to convey title. Klaibor v. Klaibor, 400 Ill. 513, 94 N. E. 2d 502 (1950). In Reiss v. Reiss, 45 Cal. App. 2d 740, 114 P. 2d 718 (1941), it was held that a conveyance by one tenant which created a passive use in his favor amounted to a severance. If the use is executed by the Statute of Uses so that the joint tenant is revested momentarily with the legal title, a rather technical question arises whether this is tantamount to a conveyance and a reconveyance or whether the title remains in the conveyee long enough to constitute a severance. Compare Pimbe's Case, Moore 196, 72 Eng. Rep. 578 (1585).
33. At common law the conveyance would be by release rather than livery since each already was seised of the whole fee. Challis, *op. cit. supra* note 7, at 369 n.; Restatement, Property § 29, comment e (1944); see *In re Lorch's Estate*, 33 N. Y. S. 2d 157, 165-166 (Sur. Ct. 1941). In *In re Cotter's Estate*, 159 Misc. 324, 287 N. Y. Supp. 670 (Sur. Ct. 1935), a tenant who purported to convey his "undivided one-half right, title and interest" to the other later contended that his right of survivorship did not pass by the deed. It was held that either there was a destruction of all the unities and therefore a termination of the joint tenancy or there was a merger of the estates which destroyed the original tenancy.
34. 243 Wis. 354, 10 N. W. 2d 158 (1943).
"severance" or "termination" of the joint tenancy in such a way that it could not be revived when the conveyance was set aside. Giving retroactive effect to the adjudication setting aside the conveyance, \( H \) and \( W \) would be regarded as tenants in common. \( C \)'s judgment lien would then, of course, attach to \( H \)'s interest.

It is generally assumed that joint tenants must have the same interest. There is considerable uncertainty as to when there is a destruction of the unity of interest so as to create a severance. Unity will exist at the time the joint tenancy is created. A severance may, however, modify the individual shares. If \( A, B \) and \( C \) are joint tenants and \( A \) conveys his share to \( D \), there is no doubt that \( B \) and \( C \) continue as joint tenants of an undivided two-thirds.\(^9\) \( D \), as tenant in common with \( B \) and \( C \), owns an undivided one-third. But suppose \( A \) conveys merely one-half of his moiety to \( D \). If the original tenancy persists in \( A, B \) and \( C \), their shares would no longer be equal, and the general rule stated above would be subject to an exception. Freeman suggests that the alienation may perhaps create two joint tenancies: one-half in \( A, B \) and \( C \); one-third in \( B \) and \( C \). \( D \) would own one-sixth as tenant in common.\(^{36}\) It would seem that the unity of interest requirement applies only to the interest which is the subject matter of the tenancy. The subject matter may be an undivided interest. The remaining undivided interest may be owned exclusively by one of the joint tenants.\(^{37}\)

Does "unity of interest" mean that both tenants must continue to own the same estate? Will an alteration in the estates (as distinguished from the shares) of the joint tenants effect a severance? The texts state that if \( A \) and \( B \) are joint tenants for their lives and \( B \) acquires the reversion in fee simple, there is a severance because \( B \)'s two estates merge with the result that the two tenants possess different estates. \( A \) and \( B \) are said to be tenants in common for the balance of \( A \)'s life.\(^{38}\) The effect of the severance upon \( A \) is to deprive him of the right to exclusive possession for his life if he survives \( B \).

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35. Or, if \( A \) conveyed his share to \( B \), \( B \) would become a tenant in common as to one-third, but \( B \) and \( C \) remain joint tenants of the balance. Morgan v. Catherwood, 95 Ind. App. 266, 167 N. E. 618 (1929); Walsh, Commentaries on the Law of Real Property 11 (1947). Or, \( A \) might sever the joint tenancy by conveying to \( X \) and with reconveyance make himself and \( D \) joint tenants of the undivided one-third. Smith v. Lombard, 201 Cal. 518, 258 Pac. 55 (1927).

36. Freeman, op. cit. supra note 13, at 64.


38. Radcliffe, Real Property Law 35-36 (1933); Bl. Comm. *186. A fine point, but perhaps it should be said that \( A \) and \( B \) are joint tenants for the life of \( A \). The result is the same. A joint tenancy in a life estate \( pur autre vie \) is possible even though the person whose life is the measurement of the estate is one of the joint tenants. Another way of stating this is that the right
Is there a severance also when one of two joint tenants in fee simple purports to convey an estate less than a fee simple? The California court in *Hammond v. McArthur* held that there was no severance where one joint tenant, A, purported to convey a "full life estate" to his cotenant, B. At B's death, A was entitled to the whole interest by virtue of his surviving. In a case of this type, clarity is not promoted by talking in terms of merger. To say that there is a merger is simply to state a conclusion as to the existence of a severance. Merger will exist or not depending upon whether there is any purpose to be served in regarding the estates as separate interests. But does a severance result because of a break in the unities of interest and possession? In the *Hammond* case, Schauer, J., concurred on the ground that the conveyance did "not destroy any essential element of a joint tenancy." One writer has suggested that the judge may have had in mind that the requirement of unity of interest is actually observed by holding that the joint tenancy continues to exist in the future interest only and that the unity of possession still exists because the possession of "one joint tenant with the consent of his cotenant is the possession of both." The majority opinion, on the other hand, seems to proceed upon the assumption that a severance does not occur unless the parties have indicated an intention to terminate the right of survivorship by doing something which is inconsistent with the right. This test is more desirable than the four unities test. Agreements between joint tenants with respect to the possession of the land should not be held to be inconsistent with the survivorship right.

In the *Hammond* case, suppose A had purported to convey a life estate in his share to X instead of to his cotenant. Since A has the privilege of severing the joint tenancy by conveying in fee simple without B's consent, he may with equal freedom create in
another an estate which is less than a fee simple but which has a potential duration longer than A's own life. The possibility that X's life estate may continue beyond A's death is inconsistent with a complete right of survivorship. There are two possible solutions: either there is a total or a partial severance. The former is the preferable solution. A partial severance would mean that the tenancy is temporarily severed during the existence of the life estate. The joint tenancy continues in the reversion and is revived when the life estate terminates. If X dies before A, or if B dies before A, this theory is easily applied. If X, however, outlives A, it must be concluded either (1) that X's estate terminates upon the death of A, in which case A has merely succeeded in conveying to him a life estate pur autre vie which seems inconsistent with A's freedom of severance, or (2) that X's estate does not terminate but is good as against the survivor. The latter alternative seems inconsistent with the joint tenancy theory of survivorship. The partial severance approach is undesirable because the question of severance cannot be determined until it is possible to ascertain the actual duration of X's estate. Another argument for adopting the complete severance theory is that there is a break in the unity of possession. Unlike the Hammond situation, it is difficult here to say that X's possession is the possession of both cotenants; in the rare case, perhaps the consent of both could be spelled out. The analysis adopted here would also result in finding a total severance whenever one tenant conveys a term for years which has a potential duration greater than the lessor's life. What authority exists is, however, contrary to this position. If both tenants join in a conveyance of that estate, it would not seem that there is necessarily a severance.

The conveyance by one joint tenant of a future interest may also be inconsistent with the continued existence of the right of survivorship. In the leading English case of Clerk v. Clerk, Lady Turner and Arabella Clerk, sisters, were joint tenants. Arabella made a lease of her moiety to her daughter for eighty years to com-

46. 2 Walsh, op. cit. supra note 35, at 15.
mence upon the lessor's death and added, rather ungrammatically, "if the Lady Turner should so long live." The daughter thus received a contingent term for years in futuro. The report of the case states that the joint tenancy is severed and that "the lease of her moiety will be good against the survivor." The decision does not indicate whether there is a total or partial severance. Since the lease was to commence in possession upon the death of the conveying tenant, it would appear that the intention was to destroy the right of survivorship. On the basis of this decision, there seems to be little doubt but that a future interest in fee simple, whether contingent or vested, limited to take effect in possession upon the death of the conveyor would sever the joint tenancy.49 The Illinois court in a well-reasoned opinion has recently so held.50 It is not material whether the future interest is described as a remainder or a springing use. It may also be contingent upon the conveyor dying before the other tenant. This is not inconsistent with the cases dealing with testamentary dispositions because the conveyance of the future interest is a present, irrevocable transfer. It is no more testamentary than any fee to commence in possession upon the death of the conveyor.

Contracts to sell. A valid contract by one joint tenant to convey his interest severs the joint tenancy in equity.51 If the vendor dies before the conveyance is made, the purchaser is entitled to a

49. In Green v. Skinner, 185 Cal. 435, 438, 197 Pac. 60, 61 (1921), it is stated, by way of dictum: "The conveyance will have this effect [to sever the joint tenancy] even though it be but a conveyance of a remainder after the death of the cotenant making the conveyance." The case held that a delivery of a deed to an escrow agent with instructions to hand it to the grantee upon the death of the grantor was not effective against the surviving tenant on the ground that the grantee had no knowledge of the existence of the deed until after the grantor's death. The grantee's acceptance was not given retroactive effect so as to destroy the surviving tenant's claim. This aspect of the case seems unnecessarily favorable to the surviving tenant. If the deed had been delivered and accepted during the grantor's life, the court would have held, as the dictum indicates, that it created a future interest which severed the joint tenancy. An erroneous reading of the case accounts for contrary statements in 2 Walsh, op. cit. supra note 35, at 15; and 2 American Law of Property 11 (1952).


51. Ibid.; Naiburg v. Hendrikson, 370 Ill. 502, 19 N. E. 2d 348 (1939). (These cases involved deeds of land, the title to which had been registered under the Torrens Act. An Illinois statute provided that unregistered deeds of Torrens property operate as contracts to convey). In Kurowski v. Retail Hardware Mut. Fire Ins. Co., 203 Wis. 644, 234 N. W. 900 (1931), H and W were joint tenants. H, engaged in a partnership enterprise with his son, S, orally agreed that the premises should belong to the partnership. It was assumed that there was sufficient part performance to obtain specific performance of this contract. The question of severance arose after W's death, in connection with a fire insurance policy which required that the insured (the partnership) be the sole and unconditional owner. Held, that the insured was the sole owner because there was no severance of the joint tenancy by the
deed from the vendor's administrator rather than from his heir, since the contract works an equitable conversion of the property interests of the parties. After the purchaser secures a conveyance, he is a tenant in common with the original joint tenant.

A new and especially frightening application of severance and the "unities" rule has but recently arisen. It is here treated in detail because the problem is new and because of the grave and wholly unnecessary danger to land titles created by two recent opinions. The latest and worst is *Buford v. Dahlke,* from Nebraska. *H* and *W*, joint tenants, executed an installment contract for deed. The price was less than half paid when *H* died; between his death and the time of suit the vendees had paid to *W* two hundred dollars. The administrator of *H* sued the vendees for one half of the payments due between the time of *H*'s death and the commencement of the action, and for a declaratory judgment that one-half of the future payments were assets of *H*'s estate, payable to the administrator. The court held that at the time of *H*'s death the contract and all interests under it were held in tenancy in common, and that one-half of the then unpaid purchase price was an asset of the estate. Ownership of the retained legal title was not directly involved, but the irresistible implication is that a conveyance by *W* after full payment of the purchase price will not suffice; conveyances will also have to be obtained from the administrator, beneficiaries, heirs or creditors of *H.* The plain holding—relating to the purchase price—will create great practical inconvenience; the clear implication—relating to title—is disastrous. A good many Minnesota titles are based on conveyances executed by a surviving grantor-joint tenant. If the rule of the *Buford* case is sound, those titles are now highly suspect, at best.

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Spadoni v. Frigo, 307 Ill. 32, 35-36, 138 N. E. 226, 227-228 (1923), by way of dictum, seems to indicate that specific performance of a binding contract entered into by one joint tenant is discretionary. It was said that the court will take into consideration the fact that the conveyance would sever the joint tenancy in determining whether to grant specific performance.


52. Under the equitable conversion doctrine, the vendor holds the legal title as security for the payment of the purchase price. This security interest is personal property. The interest of the vendee is treated in equity as real property because he is entitled to compel a conveyance. McClintock, Equity 286 (2d ed. 1948).

53. 62 N. W. 2d 252 (Neb. 1954).
The reasoning upon which this unfortunate result is based is indefensible. It contains the following:

A. The court said that it was important to realize that the doctrine of equitable conversion applied, with the vendees owning the real estate and the vendors personal property. But the question was ownership of a promise to pay money. There is no reason to convert it into personal property—it has never been anything else.

B. Ownership of the title retained for security purposes is another problem. The court said the contract to convey severed even though executed by all of the joint tenants: “They had neither title to the real estate, interest in, nor possession of it after the contract of sale was made.” Even if we assume the validity of the “unities” test, this is erroneous. Considered separately:

1. In the theory of property law, somebody has title, and clearly the vendees have not. And the court expressly says that the vendors retained it. Nothing has happened to it; proportions of ownership are undisturbed. How can there be anything but a “unity of title”?” But “. . . this they held as trustees.” From the earliest recorded examples of feoffments to uses to the modern trust indenture trustees have held legal title as joint tenants with right of survivorship. Trusts can hardly function if they do not.

2. The reason the court finds no unity of interest is that they thought there was no interest at all. Is a security interest no interest? Despite the statement of the court, there is clearly a vital interest remaining in the vendors, and the proportion of ownership—the “unity”—has not been changed.

3. Does unity of possession require actual possession? Certainly not; we can have joint tenancy in a reversion or remainder, and even in a possibility of reverter. Would a lease executed

54. Id. at 257. In Minnesota the interest of the vendor is regarded as real estate. “His interest, spoken of as the fee, is bound by the lien of a judgment against him. . . . He has an interest which he may mortgage . . . , and, it has been said, he is in a strict sense the owner of the land until the purchase price is paid. . . . No one would contend that he could transfer his interest as personality without his wife joining.” In re Consolidation of School Districts, 146 Minn. 403, 405, 178 N. W. 892, 892-893 (1920).

55. 62 N. W. 2d at 257.

56. See 1 American Law of Property § 1.18 (1952); 1 Scott, Trusts § 103 (1939).

57. In Mundy v. Mundy, 296 Mich. 578, 596 N. W. 685 (1941), H had contracted to convey. Thereafter he married and conveyed to himself and W as joint tenants; the court held that W took by survivorship at H’s death. Even Blackstone, who really believed in unities, recognized that a reversion or remainder could be held in joint tenancy. 2 Bl. Comm. *179, 182. Greiger v. Pyle, 210 Minn. 71, 297 N. W. 173 (1941), involved a curious situation. A was a tenant for life; A and B were joint tenants in the remainder. The
by both joint tenants destroy their right of survivorship because their interest—the reversion—is non-possessory?

These reasons given by the court do not bear even a casual examination. In addition to what is said above, they cite a number of cases holding that a contract to convey executed by one joint tenant alone will destroy the right of survivorship. This is the rule without exception,\textsuperscript{58} and it is perfectly sound. The one who executed the conveyance has deprived his co-tenant of any possibility of taking by survivorship. But where both contract to convey, their mutual rights are unchanged. By any test, the result is unsound if based on the reasons given so far. The best test suggested is prejudice to the rights of a cotenant—none has occurred. If intent to sever controls, there is complete absence of any intent to destroy survivorship. If the traditional test of destruction of a unity is applied, we find that no unity has been affected.

The court cited a California case\textsuperscript{59} for the proposition that a conveyance by all joint tenants destroys the joint tenancy. But that was a gratuitous conveyance on trust for another; the grantors retained no interest in the property and received nothing in exchange for it. Of what would they be joint tenants? Another case closer to the point is cited. In 1953 the Iowa court held that a contract for deed executed by both joint tenants destroyed the right of survivorship, and that therefore the interest of the survivor passed under a clause of her will dealing with property of her estate generally and not under a clause disposing of interests she acquired as surviving spouse.\textsuperscript{60} The Iowa court made the unsupported and unconsidered

\textsuperscript{58} See note 51 supra.

\textsuperscript{59} Ball v. Mann, 88 Cal. App. 2d 695, 199 P. 2d 706 (1948).

\textsuperscript{60} In re Sprague's Estate, 57 N. W. 2d 212 (Iowa 1953), 38 Iowa L. Rev. 587. The case is contrary to a prediction in Note, 32 Iowa L. Rev. 539, 541 (1947), though the writer takes the position that the proceeds may be owned as tenants in common while the retained title is subject to survivorship. Iowa Land Title Examination Standard 4.11 takes the position that the vendee must obtain deeds from both the survivor and the administrator, heirs, etc., of the deceased joint tenant. The standard is not directly applicable to the Sprague case because devolution of the purchase price only was there involved. But the standards committee apparently does not recognize the distinction, since the appended Comment says the standard is based on the assumption that the contract contained no provision that the sale proceeds were payable to the vendors as joint tenants. Nor will prudent Iowa lawyers rely upon the distinction in rendering title opinions. The Chairman of the Title Standards Committee of the Iowa State Bar Association regards the Sprague case as "complete vindication" of the standard, though he acknowledges that it has been the subject of criticism. Marshall, Development of Title Examination Standards in Iowa, 38 Iowa L. Rev. 534, 539 (1953). The opinion in Sprague
statement that the contract severed, each thereafter owning an undivided one-half. On the narrow holding that the beneficial interest in the right to receive payment is not subject to survivorship, both courts may be correct; the point is examined below. But to the extent that the cases imply that the legal title as security is severed into a tenancy in common, they are contrary to authority and will create the greatest confusion in land titles.

A pertinent question is whether the promise to pay money is, when acquired by the vendors, subject to a right of survivorship between them. The Nebraska court says that it is not because there are no words in the contract indicating an intention to create survivorship, necessary under Nebraska law. This is a somewhat uncertain point. Littleton, Coke and Blackstone all indicate that the common law presumption in favor of joint tenancy applied to both realty and personalty. The presumption has been generally reversed by statute, but most of the statutes talk the language of real property and appear in code chapters on real property. Do they also apply to personalty? The general tendency is to say that they do, despite the phrasing. The New York statute speaks of “Every estate granted or devised...” New York clearly holds that this covers personalty. Michigan has an identical provision but has solved the problem without reference to the statute; it is there held that the presumption of joint tenancy never applied to chattels.

For a critical comment on the case and the standard, see Note, Iowa Land Title Standards I, 2 Drake L. Rev. 76, 90-91 (1953). Candor compels an admission that both of the writers of this Article were on the Drake faculty at that time; the student author may have been influenced. In re Estate of Jogminas, 246 Ill. App. 518 (1927); Simon v. Chartier, 250 Wis. 642, 27 N. W. 2d 752 (1947); cf. Childs v. Childs, 293 Mass 67, 199 N. E. 383 (1935). A contract which evidences intent to sever will be given that effect. Kozacic v. Kozacic, 157 Fla. 597, 26 So. 2d 659 (1946).

62. Id. § 6.4; Note, 144 A. L. R. 1465 (1943).
63. N. Y. Real Prop. Law § 66.
65. Co. Litt. *182a. Coke notes an exception as to the goods, including "debts" of joint merchants.
67. Id. § 282.
The same language in the Wisconsin statutes has never been construed. The Minnesota section is more restrictive; it applies to "All grants and devises of lands . . ." except mortgages, and devises or grants in trust or to executors. The statute seems not to reach the common law presumption in this state, if any in fact existed. The Minnesota court has not had occasion to decide the question; the only hint is the concluding sentence of Peterson v. Lake City Bank & Trust Co.: "A joint tenancy may exist in personal property, and it may be established by parol though here there is supporting documentary evidence." If the common law presumption prevails, evidence of intent should be unnecessary. This is a very slim hint indeed. Policy argues for a presumption against joint tenancy. An arbitrarily imposed survivorship is as "odious" and "objectionable" now as it was two hundred years ago; it would be unfortunate if the court were deliberately to create a presumption in favor of it today, despite the narrow wording of the statute.

If the common law presumption as to personalty still prevailed generally, the Nebraska case might be distinguished as an aberration of local law. But they seem to be in accord with the majority in holding that the note is owned in tenancy in common. Does this mean that the case is correctly decided, and that Minnesota, for example, should reach the same result? Fortunately, it does not. It was the rule at common law and is the rule today, in Minnesota as elsewhere, that payment to one of several joint obligees discharges the entire obligation, absent fraud and the like. The rule does not depend on any idea of survivorship. Payment to one of the joint obligees during the lifetime of all, before survivorship be-

71. Wait v. Bovee, 35 Mich. 425 (1877). Only over strong protest was the court able to hold, in Lober v. Dorgan, 215 Mich. 62, 183 N. W. 942 (1921), that joint tenancy in personalty was possible at all.

72. Wis. Stat. § 230.44 (1951). See Fiedler v. Howard, 99 Wis. 388, 393, 75 N. W. 163, 165 (1898). In a most curious case, the Wisconsin court held that benefits payable to two persons under an insurance policy were analogous to a devise of land, and therefore within an exception to the statute. Farr v. Trustees of Grand Lodge, 83 Wis. 446, 53 N. W. 738 (1892). See also Abdullah v. Malone, 214 Wis. 336, 252 N. W. 158 (1934) and Williams v. Jones, 175 Wis. 380, 185 N. W. 231 (1921).


74. 181 Minn. 128, 131, 231 N. W. 794, 795 (1930).

75. 2 Corbin, Contracts § 939 (1951).

76. Delaney v. Fritz, 221 Minn. 190, 21 N. W. 2d 479 (1946); Moore v. Bevier, 60 Minn. 240, 62 N. W. 281 (1895); Flanigan v. Seelye, 53 Minn. 23, 55 N. W. 115 (1893).

comes relevant, is effective. The obligees must settle accounts among themselves when all are living, and the executor of a deceased joint obligee may compel an accounting by a survivor who has collected. Neither the Nebraska nor the Iowa court mentioned this rule. It seems inconceivable that they would have reached the results they did if the case had been properly presented. Iowa, in fact, could still reach that result; they did not hold that payment to the survivor would not suffice.

It seems preposterous to suggest that one who is entitled to discharge the obligation by receiving payment is not also enabled to discharge the security interest by executing the warranty deed called for by the contract. And a survivor can, if joint tenancy is still applicable to the legal title retained.

The retained security title is analagous to a purchase money mortgage; despite significant differences, the two are used interchangeably in home and farm financing. *Delaney v. Fritz* settled the identical problem in Minnesota mortgage law. The issue was whether payment of the note to two of three owners of a mortgage discharged the note and mortgage. The court held that it did, entering a permanent injunction against foreclosure. The opinion stated: "Where an undivided debt secured by mortgage is owed to two or more creditors, it may, when due or thereafter, be paid to either or any one of such creditors, and the one or ones to whom it is paid may effectually discharge the debt and mortgage. . . . The rights of the creditors, as between themselves, are not here involved."

While it may well be argued that a mortgage to two or more persons is subject to survivorship under Minnesota law, that conclusion is not necessary to support the *Delaney* case. The mortgagees were all still living, and survivorship between them was irrelevant. Further, the court clearly intimates that an accounting between them may be required.


81. 221 Minn. 190, 21 N. W. 2d 479 (1946). A contract for deed transaction is the equivalent of a purchase money mortgage in Minnesota. See First & American Nat. Bank v. Whiteside, 207 Minn. 537, 542-543, 292 N. W. 770, 774 (1940); Nolan v. Greeley, 150 Minn. 441, 442-443, 185 N. W. 647-648 (1921).

82. 221 Minn. at 191, 21 N. W. 2d at 480.

83. Minn. Stat. § 500.19(2) (1949) expressly excepts mortgages from the statutory presumption in favor of tenancy in common. Wisconsin has found that a note and mortgage were held in joint tenancy because of an identical statute. Fiedler v. Howard, 99 Wis. 388, 75 N. W. 103 (1898). But cf. Williams v. Jones, 175 Wis. 380, 185 N. W. 231 (1921).
This rule is not a peculiarity of Minnesota law. It is the general rule throughout the country. The burden on a mortgagor would be materially increased if he were required to keep track of relationships between the obligees and persons who claim under them. He has promised but a single performance and should not be required to make many. He must know whom to pay and from whom he can get a valid satisfaction of the mortgage. The vendee under a contract for deed requires exactly the same protection, and the same rule must apply to him.

A final observation on the contract for deed cases: if the execution of the contract "severs," will forfeiture of the vendee's interest upon default revive survivorship? A substantial number of Iowa conveyancers will be horrified to find that it does not, if that is in fact the case. But the title quieting business will boom.

Effect of failure to record severance deed. As indicated above, either tenant has the power to sever the joint tenancy by conveying an undivided interest during his life. If the conveyance is not recorded, may the surviving joint tenant claim priority over the grantee of the unrecorded deed? The failure to record, it would seem, will affect the grantee's claim only if the local recording act applies. No doubt a recorded severance deed would be effective against the surviving tenant. Even if unrecorded, it is probably valid since the surviving tenant may not be a "purchaser" under the recording act. He takes under the instrument creating the joint tenancy by virtue of the right of survivorship which existed from the inception of the joint tenancy. He does not take from the deceased tenant. Perhaps a bona fide purchaser from the surviving tenant might be in a better position than the surviving tenant himself. Even if the surviving tenant is a "purchaser," he would not be able to qualify under recording acts which extend their protection only to purchasers who record first.

It is surprising that there is so little authority on these prob-

84. Park v. Parker, 216 Mass. 405, 103 N. E. 936 (1914). The court held that the mortgagees were tenants in common, yet permitted a payment in full to one of them to discharge the note and mortgage. Cober v. Connelly, 20 Cal. 2d 741, 128 P. 2d 519 (1942). See 2 Glenn, Mortgages § 312 (1943). But if one mortgage secures several different obligations, payment to one will not discharge the mortgage or the other obligations. Burnett v. Pratt, 22 Pick. 556 (Mass. 1839); 1 Glenn, Mortgages § 20.02 (1943).

85. In a comment prepared by former students of the authors in a course in Conveyances, it was urged that a bona fide purchaser from the survivor may claim the protection of the recording act. An analogy was drawn to a purchaser from the heir of an owner who had previously conveyed by an unrecorded deed. See The Iowa Title Standards I, 2 Drake L. Rev. 76, 86 (1953). Cf. Pepin v. Stricklen, 114 Cal. App. 32, 299 Pac. 557 (1931).

lems. A number of state bar associations have adopted title standards which permit the title examiner to approve a title based upon a deed from a surviving joint tenant simply by showing that the one tenant is dead and that state and federal inheritance taxes on his estate have been paid. No reference is made to the possibility of the title being defective because of an unrecorded severance. If the title is assumed to be defective, the examiner is thus in the position of having to reject a title because of a defect, the existence of which cannot possibly be discovered. In some states, statutory procedures apparently authorize a proceeding to establish the title of the surviving tenant, but these seem to be regarded as optional by title examiners.

Two Illinois decisions indicate that there is justification for the conclusion that the surviving joint tenant's title is defective if there has been an unrecorded severance deed. The cases involved unregistered deeds to land under the Torrens system (as distinguished from the recording system). The unregistered deed by one joint tenant operated under the Torrens system as a contract to convey. In the earlier case, the court held that the equity represented by the unregistered deed (contract) was valid against the survivor. Since this is a case of first impression, it will serve some purpose to observe the court's reasoning:

"While we have been unable to find any cases on the question of whether survivorship in a joint tenancy is an intervening right, we are of the opinion that it is not. The joint tenancy was severed, in equity, by the contract to convey and the creation of the right to have the deed registered. All that the surviving joint tenant received was a bare legal title. It would be unjust in the extreme to hold that this operated to extinguish the grantee's equitable right. Appellant's right of survivorship was limited by her joint tenant's power of severance. She cannot now be permitted to object to this exercise of that power. Neither is appellant within the class of persons intended to be protected by the Torrens system. It was designed to encourage reliance on the state of the registered title. Appellant has in no way so relied."

The policies outlined by the court are equally applicable to land under the recording system. The recording act, as pointed

87. E.g., Iowa Land Title Standards § 4.4 (1950); Nebraska State Bar Ass'n Proceedings, 1949, 29 Neb. L. Rev. 231, 234 (1949); 21 Utah Bar Bull. 11-12 (Special Number, May, 1951).
90. Id. at 507, 19 N. E. 2d at 351.
out above, may possibly afford protection to a bona fide purchaser from the surviving joint tenant. No authority exists, however, for that conclusion. In view of the fact that joint tenacies are becoming more popular, it would be desirable to remedy this situation by legislation.

Restraints on the power to sever; disabilities. In the absence of an express restraint, courts are reluctant to find equitable grounds for cancelling a severance at the request of the non-consenting tenant.\(^9\) The validity of express restraints on the power of seve-

\(^9\) restraint is of the type commonly called a “disabling” as dis-

\(^9\) tinguished from a “forfeiture” restraint. The former is a mere direction; it purports to make the interest conveyed inalienable without attaching a penalty for attempted alienation. Disabling re-

\(^9\) straints are held to be invalid\(^9\) except in the field of spendthrift trusts. This seems to be the basis for the court’s decision, for it remarked that the “restrictive paragraph was repugnant to the grant and a restraint on the inherent right of alienation and there-

\(^9\) fore void.”\(^9\) This is typical judicial language used in invalidating disabling restraints.

Forfeiture restraints on estates in fee simple are usually avoided on the basis of public policy.\(^9\) If there is a forfeiture restraint on one tenant’s privilege of severing a joint tenancy in fee simple, it is likely to be held void.\(^9\) It is likely also that a forfeiture restraint on the privilege of severing a joint tenancy in a life estate would be upheld. An analogy would be drawn to similar restraints on life estates owned in severalty.

It might be argued that the presence of the restraint indicates that a joint tenancy was not intended to be created. The deed might

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91. Williams v. Williams, 68 R. I. 233, 27 A. 2d 176 (1942). A mother and son owned land in joint tenancy. Relying upon this gift from the mother, the son went into possession, paid taxes, made repairs, etc. Later the mother conveyed to X and secured a reconveyance. The son's bill in equity to compel his mother to execute conveyances to restore the joint tenancy was dismissed. Held, the facts of the case do not support any equitable duty on the mother to refrain from severing.


93. Gray, Restraints on Alienation 91, 134 (2d ed. 1895); Restatement, Property § 405 (1944).


95. Restatement, Property § 406, comment a (1944).

96. Id., comment c (1944).
be construed to create a joint life estate with a contingent remainder to the survivor. This would accomplish the purpose of the restraint which is to provide an indestructible right of survivorship. Since that is not in conflict with any policy of the law, the deed might be reformed to carry out that intention.

A Texas case properly held that a collateral agreement between the joint tenants prohibiting sale by one without the other’s consent will not invalidate a conveyance made in violation of the agreement.

A joint tenant may be under a disability to effect a severance because of some rule of law which prevents him from alienating without the consent of his cotenant or which makes his alienation voidable. A familiar example of the former is found in legislation forbidding the transfer of homestead property without the consent of the owner’s spouse. If the homestead is abandoned, the joint tenancy may be severed without the consent of the cotenant. A conveyance severing the joint tenancy may be set aside by creditors because it is a fraudulent conveyance or because it was procured through the fraud or undue influence of the conveyee. In the latter situation, it is held that the surviving joint tenant has standing to maintain suit to cancel the conveyance.

II. Agreements Between Joint Tenants to Sever

Although a devise by one tenant will not work a severance, joint or mutual wills, executed by both tenants and disposing of the land upon their death according to a plan which is inconsistent with a survivorship right, will sever the tenancy. Here it is the agreement, not the will, that effects the severance.

97. In a case dealing with a legal remainder in joint tenancy in corporate stock, a restraint on alienation was imposed on the joint tenants presumably to obtain management of the corporation by the designated tenants. The restraint was upheld since it was for a beneficial purpose. It was also stated that the restraint was not objectionable because it would not continue for a period longer than the lives of the joint tenants, thus seemingly confusing the rule against restraints on alienation with the rule against perpetuities. Peyton v. Wehrhane, 123 Conn. 420, 6 A. 2d 313 (1939).

98. Fitts v. Stone, 140 Tex. 206, 166 S. E. 2d 897 (1943).


100. Campbell v. Drozdzowicz, 243 Wis. 354, 10 N. W. 2d 158 (1945); see note 34 supra and text thereto; Morgan v. Catherwood, 95 Ind. App. 226, 167 N. E. 618 (1929).


102. In re Wilford’s Estate, 11 Ch. D. 267 (1879); Berry v. Berry’s Estate, 168 Kan. 253, 212 P. 2d 283 (1949). In the latter case, the joint will provided, “We declare it [the will] to be contractual.” Suppose they cancelled the agreement?
Contracts of a non-testamentary nature between the tenants will also accomplish the same result if there is an intention to sever. As might be expected, the cases are not clear on what constitutes a sufficient manifestation of intention to sever. In one case the execution of articles of partnership, although not referring specifically to the joint property, was held to be inconsistent with the continuance of the joint tenancy. The court seemed understandably eager to find a severance because the joint property was not owned by tenants who were within a single family group. On the other hand, an agreement executed in contemplation of a divorce between the tenants was held to be a severance despite the fact that the agreement provided that the property should "remain in joint tenancy . . . until such property can be sold." The effect of the agreement upon survivorship arose before the land was sold. In another case there was held to be a severance by the mutual agreement of the brother and sister even though the severance was contingent upon the happening of an event which did subsequently occur before the question of severance became material.

If the parties expressly state in their agreement that the tenancy shall not terminate, to what extent may the agreement constitute a severance because it destroys one of the unities? Tindall v. Yeats is a leading case. It was urged that there was a destruction of the unity of possession because one tenant gave to the other the right to exclusive possession for his life and the sole right to the profits from the land. The agreement provided that the joint tenancy should not terminate. The court held that a severance did not result as a matter of law. The court seemed to feel that a severance requires a conveyance of an estate in the land of a type which necessarily may endure beyond the life of the conveyor and therefore alter the norm.

104. McDonald v. Morley, 15 Cal. 2d 409, 101 P. 2d 690 (1940). Compare Duncan v. Suhy, 378 Ill. 104, 37 N. E. 2d 826 (1941) to the effect that a post-nuptial agreement prior to a separation of the parties was not sufficiently clear to sever the joint tenancy when it stated that "[B]oth parties . . . agree that each party shall retain his or her one-half interest . . . ."
105. California Trust Co. v. Anderson, 91 Cal. App. 2d 832, 205 P. 2d 1127 (1949). A mother, son and daughter owned stock certificates as joint tenants. The children contracted as follows: "It is hereby agreed that in the event our mother shall predecease both of us, all her estate left at such time shall be . . . divided share and share alike between us." Later the mother, then the daughter died, and there was held to have been a severance. Since no provision was made in the agreement for a severance in the event one of the children should die before the mother, if the daughter had died first, apparently the result would have been different. The case illustrates that the agreement need not contemplate an immediate severance. Cf. Kurowski v. Retail Hardware Mut. Fire Ins. Co., 203 Wis. 644, 234 N. W. 900 (1931), discussed in note 51 supra.
106. 392 Ill. 502, 64 N. E. 2d 903 (1946).
mal right of survivorship. The agreement was tantamount to the creation of a life estate in the one tenant.\textsuperscript{107}

\textit{Severance by acts or conduct of the parties.} A unilateral decision to sever the tenancy, not acted upon by the tenant, does not sever the tenancy.\textsuperscript{108} The commencement of an action to partition is not a severance because the tenant may discontinue the action before judgment.\textsuperscript{109} The cases suggest the possibility of a severance where the parties by a systematic course of dealing have indicated that they regard themselves as tenants in common.\textsuperscript{110} Probably implied in fact contracts and oral agreements are contemplated by these statements. In land cases, this raises questions of the Statute of Frauds, part performance and estoppel, which are so unsatisfactorily dealt with in the few cases which exist that any conclusion would be sheer conjecture.

It remains to consider a few cases dealing with miscellaneous acts held not to constitute a severance. If a husband and wife are joint tenants, a divorce does not sever a joint tenancy because, unlike the tenancy by entireties,\textsuperscript{111} it does not depend upon the continuance of the marriage.\textsuperscript{112} A New York case held that a joint tenancy in cattle was not severed upon the birth of calves since, unlike a conveyance, "the act of birth was an act of nature"\textsuperscript{113} The Wisconsin court, dealing with the effect of murder of one joint

107. See text discussion at notes 38-47 \textit{supra}.
108. Newman v. Youngblood, 394 Ill. 617, 69 N. E. 2d 309 (1946) (the day before her death, the tenant informed her attorney that she had decided to destroy her husband's right of survivorship).
109. Dando v. Dando, 37 Cal. App. 2d 371, 99 P. 2d 561 (1940); Ellison v. Murphy, 128 Misc. 471, 219 N. Y. Supp. 667 (Sup. Ct. 1927). Is there any reason why the tenancy could not be regarded as revived upon the discontinuance of the action if that result is deemed desirable as a matter of policy? To avoid the rather arbitrary result of these cases, the tenant contemplating partition must execute a conveyance to a straw man and secure a reconveyance. Another technicality which might better go unexplained to a layman. See also note 9 \textit{supra} and text thereto. An unappealed decree of partition is a severance even though the sale has not been completed because the purchase price has not been paid by the purchaser at the time the tenant dies. Schuck v. Schuck, 413 Ill. 390, 108 N. E. 2d 905 (1952), 31 Chi-Kent Rev. 270 (1953).
111. 2 Tiffany, Real Property § 436 (3d ed. 1939); 2 American Law of Property § 6.6 (1952).
112. Poulson v. Poulson, 145 Me. 16, 70 A. 2d 868 (1950). This was an action for partition brought by \textit{W} after her divorce from \textit{H}. Held, as a result of partition each is entitled to an undivided one-half interest. The court also held that a statute giving a husband who was awarded a divorce because of the fault of his wife "one-third ... of all her real estate ... which shall descend as if she were dead. ..." did not alter their shares so as to give him an undivided two-thirds interest.
tenant by the other, did not feel inclined "to add murder of a co-
tenant to the approved methods by which one joint tenant may
convert the joint tenancy of the other into some different inter-
est. . . ." The status of the parties was preserved as though the vic-
tim were still alive, and when the wrongdoer subsequently died,
the victim's administrator acquired title by survivorship. Under
the Wisconsin theory, the murderer could sever the joint tenancy
by conveyance immediately after terminating the spouse. It seems
unnecessary to point out that even Blackstone did not contemplate
this development in the law of severance.

III. Mortgaging the Property

Cases turning on the effect of a mortgage executed by one of
the joint tenants are notable principally for their scarcity. Common
learning on the subject is that the mortgage destroys the "unity" of
interest and thereby irrevocably severs the jointure. But the state-
ments are very frequently supported by early cases decided when
a mortgage was a conveyance of the entire estate of the mortgagor,
subject to his right to obtain a reconveyance upon payment of the
debt secured. In 1709 the Chancery found that a severance resulted
from a mortgage executed by a joint tenant for a term of years. But
the reasoning of the court is not based on anything as im-
practical as a destruction of the unities. The very common-sense
explanation given was that a joint tenancy was an odious thing to
a court of equity; survivorship was a disadvantage to a property
owner because it deprived his estate of the property upon his death,
if his cotenant survived. Eighty years later Exchequer announced
a similar conclusion, though by way of dictum. Giving examples
of acts amounting to severance, the court said:

"A mortgage (which is a still weaker case), will also sever the
jointure; but favor is shewn to severance for preventing what in
equity is considered as objectionable, i.e., the survivorship."

Similarly, In re Pollard's Estate, decided in Chancery in 1863,
found that a mortgage executed by one joint tenant had destroyed

114. In re King's Estate, 261 Wis. 266, 52 N. W. 2d 884 (1952), [1953]
Wis. L. Rev. 567. See generally Note, 37 Iowa L. Rev. 582 (1952); 37 Minn.
L. Rev. 71 (1952).
115. See 2 American Law of Property 9 (1952); 2 Tiffany, Real Prop-
erty 210 (3d ed. 1939); 2 Walsh, Commentaries on the Law of Real Property
12-13 (1947).
117. Ibid.
the right of survivorship even though it had been discharged by payment before any of the joint tenants died.

Although these cases were decided at a time when a mortgage might at least have been thought to destroy unities of title and interest, unities are not mentioned and the reasons given by the courts seem eminently sensible. Survivorship might well be thought odious or objectionable when it was imposed arbitrarily on co-recipients of interests in land. The common law presumption in favor of joint tenancy raised a countervailing dislike in the minds of judges.

What seems to be the earliest American case on the subject indicates an equally reasonable approach. In *Lessee of Davidson v. Heydon*, the court held that an assignment for the benefit of creditors worked a severance, effective at least to protect the grantees of the surviving joint tenant, who had not joined in the assignment. Though the court said, "The assignment changes the legal estate, and operates as a severance," it seems an afterthought. The principal explanation given is that the assignment effected the same purpose as the bankruptcy laws, with less expense. Further, the court expressly saved the question of disposition of any surplus over the amount necessary to satisfy the creditors. If the legal estate referred to was changed irrevocably into a tenancy in common the surplus would clearly pass to the personal representative of the deceased assignor; no question worth saving would have existed.

Seven years later, however, another Pennsylvania case held that a mortgage had destroyed survivorship in language which smacks of unities. *Lessee of Simpson v. Ammons* was an action in ejectment by a mortgagee under a mortgage executed by two of three joint tenants; the mortgagors had died without discharging the obligation. The court quite properly granted ejectment, but their disposition of the issue of severance is far from clear. They said:

"As to the first, the court are of opinion that the mortgage was a severance of the jointtenancy. The interest of Baynton and Morgan passed by it, but the interest of Wharton was not affected."

While the result is desirable, the opinion clearly implies that the severance occurred at the time the mortgage was executed. The case, though old and cryptic, has been an important basis for statements that a mortgage totally destroys survivorship at the time

120. 2 Yeates 459 (Pa. 1799).
121. Id. at 463.
122. Id. at 463-463.
123. 1 Binney 175 (Pa. 1806).
124. Id. at 177.
125. See note 115 supra.
of execution. This we think is utter nonsense. But the rule has been assumed and, once assumed, explained on the principal ground that a common law mortgage transferred legal title, thus destroying the unities of title and interest. These unities could not be repaired by a subsequent conveyance, since the title and interest thereby created arose later than the title and interest of the non-mortgaging joint tenant, thus violating the unity of time. 128

There are but a few modern cases dealing with mortgages. Hardin v. Wolf 127 is one of them. A father procured a conveyance to himself and his daughter as joint tenants. To prevent the daughter from conveying her interest or subjecting it to the claims of creditors, he required her to execute a note and trust deed of her interest to secure the note. The note did not represent an actual obligation, however; the purpose was to ward off prospective purchasers from the daughter. The father thereafter brought an action for partition. The court held that he could not obtain it because he had contracted not to partition as long as the daughter provided a home for him. Thus the court's statements that the mortgage did not work a severance because it was not intended to be effective is probably dictum. They did, however, assume that an effective mortgage would sever, and cited for that proposition Lawler v. Byrne, 128 which does contain a statement to that effect. It is an unconsidered dictum, however; severance there was accomplished by a warranty deed. Partridge v. Berliner 129 is another Illinois case which may—but probably does not—hold that mortgage worked a severance. A husband had procured a conveyance to himself and his wife as joint tenants. He executed a conveyance to X for security purposes; X later reconveyed. The court said that the conveyance was a mortgage in effect and worked a severance, the husband and wife thereafter holding in common. The joker is that the husband had intended to give no interest to the wife in the first conveyance; they held as joint tenants to the use of the husband before the mortgage and as tenants in common to the use of the husband after the reconveyance. If this is a holding, it is surely one without significance—the wife was not entitled to partition in any event. The Maryland court has also volunteered the view that a joint tenancy would be severed by a mortgage. 130 But again they neither ampli-

127. 318 Ill. 48, 148 N. E. 868 (1925).
128. 252 Ill. 194, 96 N. E. 892 (1911).
129. 325 Ill. 253, 156 N. E. 352 (1927).
130. See McPherson v. Snowden, 19 Md. 197, 230 (1862). Wolf v. Johnson, 157 Md. 112, 145 Atl. 363 (1929), held that the mortgage could be enforced after the death of the joint tenant-mortgagor; it did not question
fied nor explained the statement, and it was not necessary to the decisions.

There is but one clear American holding on the subject. Wilkins v. Young\textsuperscript{131} might make a good examination question. A husband and wife were joint tenants. The husband executed a mortgage to \( X \) and a will devising the property to \( Y \). He then died without having satisfied the mortgage; the wife died later. Children of the wife brought an action to quiet title against both \( X \) and \( Y \). The court, without exploring other possibilities, held that \( X \)'s lien was valid to the extent necessary for security and that the right of survivorship had effectively passed the equity of redemption to the wife, and ultimately to her heirs. Had the mortgage destroyed survivorship, \textit{i.e.}, completely severed, the equity of redemption would have passed to the devisee, \( Y \).

Walsh describes this approach as "... simply impossible and unthinkable."\textsuperscript{132} One of two positions, he says, must be adopted. Either the mortgage is a mere lien which would expire at the death of the husband because his interest then ceases, or it works a complete severance as to the mortgaged interest by destruction of the unities. "The latter view is sound, while the former view is impracticable and illogical."\textsuperscript{133} Walsh and Niles, writing in American Law of Property, say that the case is wrong on "principle" because the unity of interest was broken.\textsuperscript{134}

With all deference, it seems to us that the case is satisfactory. The "principle" simply will not wash. Of course, there may be reasons other than the "principle" for reaching that result. Walsh suggests that it gives an unfair advantage to the mortgaging joint tenant; if he survives he receives an unencumbered one-half, while if he pre-deceases his cotenant the latter receives an encumbered one-half.\textsuperscript{135} But this is true only \textit{if} the mortgagor dies first and \textit{if} the mortgage has not been satisfied at the time he dies. In other words, the threat Walsh imagines exists, but it may never materialize. If and when it does, we can create a severance to meet the problem. The question can come up in another guise, of course. The mortgagor may default during the lifetime of both of the joint tenants, whether survivorship existed between the co-tenants after the mortgage was executed.

\textsuperscript{131} 144 Ind. 1, 41 N. E. 68 (1895). Wells, \textit{Mortgage by a Joint Tenant - Torrens System}, 9 Aust. L. J. 322, 323 (1936), suggests that a similar result might be reached in Australia.

\textsuperscript{132} 2 Walsh, \textit{op. cit. supra} note 115, at 12.

\textsuperscript{133} \textit{Ibid.} In Walsh, Mortgages §§ 5-6 (1934), he took the position that the lien theory is the only sensible one.

\textsuperscript{134} See 2 American Law of Property 9-10 (1952).

\textsuperscript{135} See Walsh, \textit{op. cit. supra} note 115, at 13.
tenants. But foreclosure will deprive the non-mortgaging owner of no more than will a voluntary sale by the mortgagor. Severance occurs at that time. Again we meet the problem when it arises, without conjuring up imaginary horribles. More sins have been committed in the name of mutuality—basically Walsh's position—than this world dreams of.\

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. It seems to us that substantially the same result will be reached by suspension as is achieved by refusing to decide the question until it is asked. The latter seems more realistic, but there are those who prefer Coke on Littleton to realism.

We do agree that Walsh's alternative position, that the mortgage is a "mere lien" on the interest of the mortgagor and will expire, is undesirable. He points out that the practical effect would be that joint tenants would be unable to mortgage individually because no lender would accept such precarious security. We doubt that the mortgages of individual joint tenants are in much demand in the mortgage market, but there is no reason to erect barriers to whatever alienability is possible.

The difference between a "mere lien" and a conveyance of title resulting in shattered unities has troubled courts as well. Both Maryland and Illinois have attempted to explain their statements that mortgages sever while judgment liens do not on the ground that they observe a title or semi-title theory of mortgages as opposed to a lien theory. More than twenty years ago Sturges and Clark demonstrated that this distinction will not bear scrutiny. There is no evidence that it has acquired vitality since then.

This discussion of the effect of mortgages has assumed a mortgage executed by only one joint tenant. Suppose that the mortgage is executed by all of them? Presumably this transaction has no destructive effect because it does not disturb the proportion of ownership.

136. See 1 Corbin, Contracts § 152 (1950) and McClintock, Equity § 68 (2d ed. 1948) for examples of the harm the mutuality idea has caused in other areas.

137. See Co. Litt. *185a; Challis, Real Property *296; note 47 supra.


140. Sturges & Clark, Legal Theory and Real Property Mortgages, 37 Yale L. J. 891 (1928).

141. The Illinois court, which makes a fetish of severing, made no men-
IV. CREDITOR PROCESS

A problem difficult to separate from mortgages on an analytical basis is that of liens imposed on the interest of one joint tenant by operation of law rather than by consent. Yet seemingly inconsistent results are reached.

The question most commonly raised in the cases is whether a judgment lien on the interest of one joint tenant will sever. There seems to be no exception from the rule that the event which first brings the lien into existence under state practice—rendition of the judgment, docketing, or the like—does not create a severance. The question arises when the debtor-joint tenant dies after creation of the lien and before any enforcement process has been initiated. The surviving joint tenant takes the property free of any claim of the judgment creditor.

It is difficult to see why this situation differs from a mortgage upon which the mortgagor has defaulted. In each case a debt is past due and in each case the debt is secured by a lien upon land. In most states the respective liens are enforced by identical or substantially similar processes. Yet the universal rule is that the judgment lien does not work a severance, while the commonly stated and almost uniformly approved view is that the mortgage does.

The judgment lien can be fortified by a levy on the property. This may or may not help. The Illinois court has decided that it does not. In *Van Antwerp v. Horan* the debtor-joint tenant died after execution had issued and a levy had been made but before sale of the property. The surviving joint tenant sought and secured an injunction against the sale. The court held that the levy did not in any way increase the interest held by the judgment creditor already holding a judgment lien. Since that court was already committed to the view that the interest of the debtor is not diminished by the creation of the initial lien, there was little more to be said. It is questionable whether there is any authority to the contrary.

142. See Gau v. Hyland, 230 Minn. 235, 41 N. W. 2d at 447 (1950). The Minnesota court has cited *Van Antwerp* with evident approval. Gau v. Hyland, supra note 142, at 239, 41 N. W. 2d at 447 (1950). The cases deny that a judgment lien causes a diminution of interest. At best this begs the question, at worst it denies the fact.

143. 390 Ill. 449, 61 N. E. 2d 358 (1945). The Minnesota court has cited *Van Antwerp* with evident approval. Gau v. Hyland, supra note 142, at 239, 41 N. W. 2d at 447 (1950). The cases deny that a judgment lien causes a diminution of interest. At best this begs the question, at worst it denies the fact.

Lessee of Davidson v. Heydon\textsuperscript{445} held that an assignment for the benefit of creditors by one joint tenant worked a severance. But the court added:

"The execution issued on the judgment has the same effect. If Dougherty had died immediately afterwards, a venditioni exponas might have been taken out and the lands sold forthwith, without any scire facias.\textsuperscript{1446}"

The Wisconsin court has indicated an interest in this view. In Musa v. Segelke & Kolhaus Co., holding that a judgment lien alone did not sever, the court explained away a text statement based on the Heydon case by saying that an execution having the stated effect must have issued in order to create a severance.\textsuperscript{1447} The reference is cryptic; the case does not indicate that a lien obtained by levy would—or would not—have that effect in Wisconsin. But a subsequent case implies that it might. In Campbell v. Drozdowicz\textsuperscript{448} a husband and wife were joint tenants. He conveyed to the wife and she in turn to a daughter before judgment was rendered against the husband on February 5; the husband died on February 13. The opinion does not disclose whether a judgment lien existed, but it is clear that no levy had been made. The court affirmed a judgment that the conveyances were fraudulent and avoidable to the extent necessary to satisfy the judgment. At one point in the opinion, the court said,\textsuperscript{1449}

"As the joint tenancy was destroyed and severed upon Drozdowicz's conveyance of his interest to his wife, it was not necessary to also effect a severance by levying an execution on such interest prior to his death."

The words seem clearly to assume that a lien obtained by levy would prevent survivorship from cutting off the lien creditor.

The court goes further, however. It says that in view of the short time—eight days—elapsing between rendition of judgment and death, it would be unreasonable to require an attachment or levy within that brief period to preserve the creditor's right to recover.\textsuperscript{1450} If this be thought to mean that a judgment creditor could

\textsuperscript{1445} 2 Yeates 459 (Pa. 1799). 146. Id. at 463. See Co. Litt. *184b. 147. 224 Wis. 432, 437, 272 N. W. 657, 659 (1937). 148. 243 Wis. 354, 10 N. W. 2d 158 (1943). Other aspects of the case are discussed in the text at note 34 supra. There is something unusual about a case in which the creditor reaches the property only because the debtor made a fraudulent conveyance. 149. Id. at 360, 10 N. W. 2d at 160. In Greiger v. Pye, 210 Minn. 71, 297 N. W. 173 (1941), execution was levied upon the interest of a joint tenant one week before the tenant attempted to convey. The court treats severance as resulting from the sale rather than from the levy, but the choice was not material to the decision. 150. 243 Wis. 354, 361, 10 N. W. 2d 158, 161 (1943).
reach the property by levying upon it in the hands of the survivor.

The writer of a note in the Wisconsin Law Review so construes it; he regards it as an unfortunate dictum which should not be followed. What is probably the correct explanation is that the court was not thinking about severance. The statement is made in response to a suggestion that an action to set aside a fraudulent conveyance cannot be maintained unless execution has been returned unsatisfied. The court was not talking about severance at that point in the opinion.

Thus far, the cases hold that a judgment lien does not sever and that a lien created by levy has no greater effect. The next step in the enforcement process is sale. The only case in point—Jackson v. Lacey again from Illinois—purports to hold that execution sale does not sever. Expiration of the period of redemption is required; actual issuance of a sheriff's deed may be necessary. The case is difficult to understand. H and W were joint tenants. A creditor of H levied on and sold H's interest; W purchased at the sale. W died within the year permitted for redemption, and it is clear that no redemption had been made at the time of her death. Thereafter H sold his interest to another, and the heirs of W claimed a one-half interest in the property on the theory that the sale had severed, destroying survivorship. The only theory on which H could take to the exclusion of W's heirs is that he took her interest by survivorship. But she had two interests, one in her capacity as an original joint tenant and the other as purchaser of H's interest at the sale. H might take her interest as original co-owner by survivorship despite the fact that by his conduct he had materially prejudiced her rights. But no survivorship right could apply to the interest W purchased at the sale, unless she expressly purchased as a joint tenant with her husband. There is no evidence that that was the case. Nor could he take that interest in full under the Illinois law of intestate succession. Yet the vendee of H prevailed.

The only basis on which this case can be explained is that the court omitted to give a highly relevant fact—that H or his vendee redeemed within the period allotted under Illinois law. If so, there would be no reason to sever, and survivorship should still apply. But the language would lead to preposterous results. Suppose that H and W are joint tenants and a creditor of H sells his interest on execution to P. This time H dies within the period of redemption. It would seem that W would prevail over P despite the fact that P

152. 408 Ill. 530, 97 N. E. 2d 839 (1951), 30 Chi-Kent Rev. 189 (1952).
paid value for the interest. This seems an intolerable result, but the language of the Illinois court leads to that. Further, unless a highly important fact is added to those recited by the court, that is exactly the case the Illinois court thought it was deciding. All the cases cited by the court lead up to that situation. None of them hold or intimate that a debtor himself may prevail over his creditors merely because his cotenant has predeceased him.

The court emphasized that the sheriff's deed was considered the severing event in an earlier Illinois case. Thus it may be possible that expiration of the redemption period alone may not suffice. Frequently sheriff's deeds are not obtained for some time after the lapse of the redemption period. But it seems impossible that this purely ministerial act can have any effect on the question of severance.

Under Minnesota practice, the certificate of sale issued by the sheriff at the time of sale is the deed as well; if the debtor or junior lienholders do not redeem within the allotted time the certificate becomes indefeasible. Would the Minnesota court find that the certificate of sale worked a severance? Or would it await the end of the redemption period?

Execution sales of real property are not infrequently set aside because the price bid and accepted was grossly inadequate. Would a court find that the right of survivorship was in force after the sale was avoided, or would the sale be thought to have irrevocably destroyed survivorship? Surely the former view would prevail. As a purely practical observation, it is hard to see how any price bid for the interest of a joint tenant could be said to be inadequate in the light of the present case law. The interest is so uncertain it is worthless.

So far, a judgment lien alone does not destroy the joint tenancy, a lien obtained by levy may but probably does not, and the sole case on the subject says that sale alone does not. The next step, chronologically speaking, is that the certificate of sale has issued and the period of redemption, if any, has expired. There is ample uniform authority that severance has occurred and that the right of

155. Minn. Stat. § 550.22 (1949); Form No. 70, Uniform Conveyancing Blanks, 29 Minn. Stat. Ann. 394 (1947). Professor Stefan A. Risenfeld referred to the interest of the purchaser between sale and expiration of the period of redemption as a "lien-plus."
156. E.g., Johnson v. Avery, 60 Minn. 262, 62 N. W. 283 (1895).
survivorship is wholly destroyed. This result seems perfectly satisfactory.

We have noted before that we find no difference in practical effect between a lien created by mortgage and a lien created by creditor process. Yet there is a clear inclination to give to one effect entirely different from that given to the other. Can this be attributable to differences in the process of creation, in that a mortgage is normally, but not necessarily, executed voluntarily, while judgment, levy and sale usually, but again not necessarily, are taken against the will and over the protest of the debtor? If this is the reason, it seems an unconscious one; with almost no exception the distinction is not found in the cases.

"Almost" in the last sentence is designed to save Goff v. Yau- man, a Wisconsin case. A statute provided that old-age assistance benefits should become liens on all real property, "... including joint tenancy interests ..." of the recipient and remain enforceable "... after transfer of title of the real property by sale, succession, inheritance, or will. ..." Benefits were paid to Emma Goff upon her application, and after her death the county asserted a lien against the interest she held as a joint tenant. The surviving joint tenant sued to cancel the claim as a cloud on her title. The Supreme Court of Wisconsin upheld the claim of the county. They were justifiably troubled by Musa v. Segelke & Kolhaus Co., another Wisconsin case quite plainly holding that a judgment lien did not sever, i.e., that the survivor prevailed over the creditor. So they said that the statute did not create the lien, despite its express language; the lien was created by the application for and receipt of assistance, whereby the recipient voluntarily subjected his real property to the security plan provided by the statute. Thus the transaction is quite like a mortgage, which severs because it is voluntary. They cite the mortgage cases discussed above—but they decline to indicate whether a mortgage would destroy survivorship in Wisconsin!162


159. 237 Wis. 643, 298 N. W. 179 (1941), 134 A. L. R. 952 (1941) and Note.


162. Wis. Stat. § 230.455 (1951) now answers the question—survivorship is not affected by the mortgage, but the interest in the hands of the survivor is subject to the lien. See note 167 infra.
In other words, assistance liens sever because mortgages do, even though mortgages may not.

This seems like a splendid result, despite the devious method used to attain it. The case only slightly implies that the survivor would not take any surplus over the amount needed to discharge the lien, and the issue was not involved in the case. But two things have happened since. One is bad. In *Estate of Feiereisen*\(^{163}\) the court explicitly held that survivorship between the joint tenants was totally destroyed by application for and receipt of assistance, although the argument to the contrary was squarely put to them. The heirs of the deceased recipient took any surplus in value over the amount necessary to repay the county.

The other is good. In 1945 the Wisconsin legislature amended the statute by adding the following:

"Such lien shall not sever a joint tenancy nor affect the right of survivorship except that the lien shall be enforceable to the extent that the beneficiary had an interest prior to his decease."\(^{164}\) The "except" clause clearly preserves the *Goff* rule. The first clause preserves the right of survivorship between the tenants despite the existence of the lien. But what of *Estate of Feiereisen*? This is a legitimate question which gets an unusual answer—the legislature changed the rule of that case before it was ever decided! Prescience like this is rare indeed. But the answer is not facetious; the *Feiereisen* case did not purport to apply the amendment of 1945. It expressly purported to apply what the court thought was the *Goff* rule because the facts thought relevant arose before the amendment.\(^{165}\) The precise holding of *Goff* was not involved in *Feiereisen*; nobody contested the county's lien. But the court thought that because *Goff* severed enough to protect the county, it also destroyed survivorship between the parties. The trap they fell into is one that has deceived many others. It is the concept that either you sever or you do not sever, with no wishy-washy in-between nonsense.

Recall that the Wisconsin court thought that an assistance lien "severed" because it was something like a mortgage, and it was a general rule that a mortgage severed. Paradoxically, they were right because they were wrong. The only modern holding on the effect of a mortgage is *Wilkins v. Young*,\(^{166}\) in which a mortgage

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163. 263 Wis. 53, 56 N. W. 2d 513 (1953).
165. 263 Wis. 53, 56, 56 N. W. 2d 513, 514 (1953).
166. 144 Ind. 1, 41 N. E. 68 (1895). See text note 131 supra.
severed enough to protect the mortgagee but kept the right of survivorship active enough to pass the right of redemption to the survivor. Wisconsin clearly reaches an identical result with old-age assistance liens because of the statute. Further, legislation has resolved the mortgage question in Wisconsin by adopting the Wilkins rule.\textsuperscript{167}

The only other case in the country on this specific point is \textit{Gau v. Hyland},\textsuperscript{169} a Minnesota case holding that the surviving joint tenant took free and clear of a $2,000 assistance lien. To the Minnesota court, the problem was very simple. The transaction, whether voluntary or involuntary, does not sever unless it divests the joint tenant of a part of his estate, thereby doing violence to one of the unities. The whole question was resolved by Sir Edward Coke some time ago. He pointed out that a mere "charge" or "burden" on the interest of one joint tenant did not effect a severance. A lien is a mere charge (though authority for this is \textit{Words and Phrases} and \textit{American Jurisprudence} rather than Coke) and in no sense an interest or estate in land. Thus the lien dies with the expiration of the deceased's interest. "To hold otherwise would impute to the legislature not only a plain misuse of language having a well-settled meaning, but also an incompetency, which the advised use of the language belies."\textsuperscript{169} Further, said the court, the \textit{Goff} case is unsound because it runs counter to rules which have endured from Coke's time to the present day. The court expressly refused to follow it because it was unsound, "... entirely aside from the legislative act overruling it."\textsuperscript{170}

\textsuperscript{167}Wis. Stat. § 230.455 (1951). Wis. Laws 1944-1945, c. 549 § 2 provided:

"No real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to the provisions of chapter 289 or other lien or charge upon the joint tenancy interest of a joint tenant to any joint tenancy shall not defeat the right of survivorship in such joint tenancy, but the joint tenancy interest of such joint tenant to which upon his death the surviving joint tenant succeeds shall be subject to such... [lien]."

\textsuperscript{168}Wis. Laws 1944-1945, c. 143, § 19 struck the erroneously inserted "not."

The judgment lien created by Wis. Stat. § 270.79 (1951) would seem to be an "... other lien or charge..." \textit{Musa v. Segelke & Kohlhaas Co.}, 224 Wis. 432, 272 N. W. 657 (1937), may have been overruled by the statute. But Wis. Laws 1949, c. 364 again amended by striking out "or other lien or charge," and inserting "chapter 49 and" so that the first sentence now reads:

"No real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to the provisions of chapter 49 and chapter 289 upon the joint tenancy interest..."

Chapter 49 creates the old age assistance lien; chapter 289 covers mechanic's and materialmen's liens and a large number of fairly unimportant statutory liens for services. It does not include judgment liens. Is \textit{Musa} still law in Wisconsin?

\textsuperscript{168}230 Minn. 235, 41 N. W. 2d 444 (1950).

\textsuperscript{169}Id. at 242, 41 N. W. 2d at 449.

\textsuperscript{170}Id. at 245, 41 N. W. 2d at 450.
Deciding modern social legislation problems by reference to a book written when the Elizabethan Poor Laws were hot off the press leads to foolish results. And the legislative act did not overrule the *Goff* case, but affirmed it. To the first objection someone may reply that the case involved not only old-age assistance problems but real property law, and that certainty and predictability are important in the latter. We are all for certainty, but the court refused to follow the only case on the subject. Did they thereby promote certainty? There is certainty on the matter now that the case is decided, but, given the opportunity, law might as well be certainly right as certainly wrong.

Other types of involuntary creditor's process which may affect joint tenancies and the right of survivorship include bankruptcy and mechanic's or materialmen's liens. Section 70(a)(5) of the Bankruptcy Act vests in the trustee, as of the date of filing the petition, property which the bankrupt could by any means have transferred. There is no doubt that this includes the interest of a bankrupt joint tenant. Suppose, however, that the trustee elects to abandon the property as not beneficial to the estate. Will the right of survivorship again become effective, or was it irrevocably destroyed when it passed to the trustee? The latter view seems to serve no good purpose; the former is sound. There is an interesting possibility in this. Imagine that a creditor obtains a judgment lien six months before the bankruptcy petition is filed. The lien will not be invalidated by Section 67(a) because it was obtained more than four months prior to bankruptcy. Because the lien is valid, the trustee may elect to abandon the property as over-encumbered and useless to the estate. If the bankrupt thereafter dies before the lien is enforced the survivor will take the property free of the claims of lien creditor and trustee. It is interesting, but there is no evidence that it has ever occurred.

Mechanic's liens are more perplexing and equally uncertain. The Nebraska court recently indicated that a lien for improvements authorized by the wife-joint tenant could not be enforced against the property in the hands of the surviving husband when he had not consented to the improvement and in fact was unaware of it. On the

175. 4 Collier, Bankruptcy 1217, 1223 (14th ed., Moore, 1942).
other hand, Wisconsin provides by statute that a mechanic's lien—as well as a host of other statutory liens—will be effective against the property in the hands of the survivor, but does not destroy survivorship between the parties.\textsuperscript{177}

The suggestion of the Wisconsin court in \textit{Goff v. Yauman}\textsuperscript{178} is that a mortgage is a voluntary transfer while a judgment lien is not, and the cases can be aligned on this basis despite explicit repudiation\textsuperscript{179} of the distinction by the Minnesota court. Other forms of creditors' liens can be fitted into the involuntary category. But what would such an alignment prove? Voluntariness is a relative thing. The free choice of a debtor threatened with immediate ruin if he does not promptly execute a mortgage is probably more restricted than that of a man who light-heartedly borrows money he is unable to repay, and which is certain to wind up as a judgment against him. But to the extent that it exists, it may be a fair index of something frequently fundamental—the intention of the actor. Joint tenancies are created when the parties intend to create them; perhaps they should be destroyed only when the parties intend to destroy them. But there are two objections to this seemingly valid proposition. The first is that actual intent must rarely, if ever, exist. Warranty deeds may evidence some, but mortgages and judgment liens do not. Of course, courts constantly "discover" intent in wills, deeds, contracts, and the like. But intent so discovered is the basis of the second objection: it does not appear on tract indexes or abstracts of title. Marketable is an important element in land ownership and should be promoted whenever possible. One of the primary motives for selection of joint tenancy over other methods of land holding is to avoid the expense and formality of probate proceedings. But this is an illusory gain if quiet-title actions are made necessary to insure marketability. Of course, a substantial number of people—principally lawyers—may think that this is good: joint tenancy is an unwise means of holding land because of the danger of voluntary severance,\textsuperscript{180} inheritance and income tax complications\textsuperscript{181} and the practical though mercenary reason that it spoils

\begin{itemize}
\item \textsuperscript{177} Wis. Stat. § 230.455 (1951). See note 167 supra.
\item \textsuperscript{178} 237 Wis. 643, 645-650, 298 N.W. 179, 180 (1941).
\item \textsuperscript{179} Gau v. Hyland, 230 Minn. 235, 239, 41 N. W. 2d 444, 447 (1950).
\end{itemize}
the probate business. If uncertainty actually discouraged the use of
this somewhat unwise method of land holding we might promote
uncertainty to achieve its abolition. But this is hardly a scientific
means of law making. Further, it does not work. Despite all the
uncertainty, joint tenancies grow more rather than less popular,
and courts more tolerant of their creation.\(^{182}\)

Since joint tenancies do exist, some standard more objective
than actual intent must be devised. The best seems to be that a
joint tenant will not be permitted to take by survivorship if he has
acted to the actual—not merely potential—prejudice of his co-
tenant.\(^{183}\) There is, for example, no need to strike down a right of
survivorship at the time a mortgage is executed because the mort-
gage could, if facts A and B and C concur, harm the non-mort-
gagor. When those facts do occur, we can find a severance. This
kind of determination can be made from facts which appear of
record and are noted in abstracts of title. By this means we can
satisfy the legitimate needs of conveyancers and at the same time
avoid the application of empty concepts like the four unities rule.
In dealing with the relationship between the joint tenants, this is
not a radical suggestion. The actual law is in accord with this kind
of analysis, Walsh and Illinois dicta to the contrary notwith-
standing.

But the law which governs the relationship of involuntary credi-
tors to the joint tenants is at the same time much more clear and
far less satisfactory. There is an inclination to protect the mortgagee
long before he is in any need of aid, while judgment creditors are
denied any assistance. Why is the law so solicitous of a mortgagee,
who presumably entered into the transaction with either knowledge
or means of knowledge at his disposal? He knew he was buying an
uncertain interest, and the law might, without doing substantial
injustice, let him bear the risk.

Contrast this with the unfavorable treatment accorded one who
has far less control over his fate. A common judgment creditor
today is a person injured by the negligent conduct of the debtor.
By definition, he is both an innocent and an involuntary creditor.
Yet the uniform and wide-spread view is that the judgment lien will
not protect him from the early death of the debtor-joint tenant. To
the extent that there is authority dealing with the effect of additional

\(^{182}\) See Therrien v. Therrien, 94 N. H. 66, 68, 46 A. 2d 538, 539
(1946), repudiating the rule that \(A\) cannot convey to \(A\) and \(B\) as joint
tenants. See also Runions v. Runions, 186 Tenn. 25, 207 S. W. 2d 1016
(1948), 1 A. L. R. 2d 242 (1948) and Note.

\(^{183}\) See text at note 44 supra.
steps in the enforcement process, it is discouraging. The time between commencement of an action and the expiration of the period of redemption will rarely be less than three years in a metropolitan area. That is a long time to pray for the continued good health of the debtor. The lien creditor deserves better treatment than he has received to date.

V. CONCLUSION

"Unities" may have had value at one time but they are useless concepts today. The standard explanation for the requirement is that all of the joint tenants were regarded in the eyes of the law as but one individual, who owned from the time "he" acquired title until the last survivor died. Somehow it is thought that this fiction of "oneness" would be too transparent if title, for example, were acquired by co-owners at different times. Yet a single individual may acquire part ownership of a tract at one time and the rest later; hardly anybody supposes that he must therefore be two persons. Little justification is ever given for the existence of the four unities rule; the tendency is to attribute it to blindness on the part of the common law lawyers. Whatever the reasons for the rule may be, these are the results: if one of the unities is lacking at the time two persons become co-owners, they are tenants in common rather than joint tenants; if one of the unities is destroyed after the estate has been created, the joint tenancy is thereby destroyed and they become tenants in common.

A possible evolution of the rule is this. Joint tenancy was the ideal form of co-ownership in the feudal system. Land was kept in large tracts and was thus better able to render services to the lord. Tenancy in common would result in constant subdivision. Joint tenancy was a temporary form of co-ownership, and in a generation the tract would again be held by only one tenant. It is easier to rely on the loyalty of one man than two. These reasons, and perhaps others, made joint tenancy so much preferable to tenancy in common that the latter was completely unknown. What kind of co-ownership then resulted when a unity was lacking? Joint tenancy—there was no alternative. Joint tenancy was more than a presumption, it was a rule of law.

But the rule which so nobly served the ends of feudalism was a burden to its victims. Land ownership was virtually the only form

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of wealth and the major indicia of political and social rank and preferment. Yet only one of the co-owners could pass these things to his heirs. Feudalism declined and the reasons for the absolute rule diminished with it. Another less burdensome form of co-ownership arose, but the presumption was in favor of the older. As time passed and chivalry withered, the newer form of ownership was in fact the most satisfactory. The scope of the presumption had to be restricted. How? Through fiction, the device so popular with common law lawyers. The reason survivorship exists is because all the owners are deemed to be one person. The presumption looks as strong as ever but it finds less and less application. Joint tenancies are harder to create and easier to destroy when once created. Once again owners of property have increased their rights at the expense of the feudal system. It seems more than coincidence that an even more important device for avoiding feudal burdens is developing simultaneously—the practice of transferring real estate to feoffees to uses.¹⁸⁶ Littleton refers to unities in the vaguest terms,¹⁸⁷ and he made a will disposing of real estate enfeoffed to others to his use.¹⁸⁸

Most of this is sheer surmise, of course, but it at least gives some explanation other than pure mystery to the evolution of the unities doctrine. Its day of service is past, however, and it should be retired. American states have, by either statute or decision,¹⁸⁹ abolished the presumption it was designed to restrict. Instead of ameliorating a rule which created an unwanted right of survivorship, it now destroys a survivorship created by the expressed desire of the co-owners. There is currently a great tendency to let clear intention create survivorship, despite an absent unity.¹⁹⁰ But the doctrine persists when the courts are considering the termination of existing joint tenancies.

The explanation most frequently given is that we are "hostile" to survivorship. But the reasons for the ancient hostility have vanished. It is one thing to say that there is a presumption against the creation of survivorship and quite another to say that we must destroy it at every opportunity. American law does not impose survivorship, but there seems to be no particular policy against its voluntary creation or continuance when once created. In any event, the four unities have nothing to do with the question.

One very practical inclination to find a severance arises out of

¹⁸⁷. See, e.g., Littleton, Tenures § 292 (Wambaugh trans. 1903).
¹⁸⁸. Id. at xlvii.
¹⁹⁰. See note 182 supra.
the federal income tax laws. Many cases of survivorship currently being questioned involve lands acquired during the nineteen-thirties at less than half of the present market price. If the property passes by survivorship, the survivor takes with the depreciated original cost as the capital gain basis; if a severance during the lifetime of the co-owners can be found, the property passes to the survivor with the market value at the time of death as the basis. 191 This may result in a substantial tax saving when the survivor sells the property. But this is a recent development; it cannot explain an attitude of one hundred years duration.

The true explanation seems to us to be that courts and writers have not thought seriously about the problem.
