CO-OWNERSHIP UNDER VICTORIAN LAND LAW

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If a reason is necessary to explain the writing of an article on the law of real property, the reason is clear: it is that, compared with other areas of the law, there is a dearth of modern legal literature on this subject.[1] The late Professor A. D. Hargreaves, in reviewing the seventh edition of Cheshire's *The Modern Law of Real Property,* stated:[2]

> But our real concern is with the present position of land law studies and with the neglect into which its basic principles have fallen. Before 1926, we relied, and not in vain, on the works of the old conveyancers, men like Challis, Williams and Lightwood. These great men spent their years of practice in the very heart of land law, and their experience, and that of their generation, gave us deep-thoughted books and the culminating virtuosity of the 1925 legislation. Today their successors in Lincoln's Inn live in a world in which the centre of gravity has changed; much, too much perhaps, of the time of the best legal brains is spent in circumventing the planner and the tax-gatherer, worthy objects no doubt, but ephemeral, and on the periphery of things, scarcely likely to direct their thoughts to the basic problems of property law. For the systematic study of these basic problems we must now for the first time look to the new race of academic lawyers. Hitherto, having no separate tradition of their own, the tiny band of academic land lawyers have been content to follow the example of the practitioners, into whose shoes indeed too many of them hope to step.[3] Will they accept the responsibility that is inevitably theirs? Professor Lawson, in his recent Hamlyn Lectures, has shown something of the harvest that can be garnered by a jurist who is prepared to give sympathetic attention to English land law.

I. NATURE AND INCIDENTS OF CO-OWNERSHIP

Co-ownership exists where the same estate in land is simultaneously vested in two or more persons.[4] The estate may be an estate in posses-

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[1] With some noticeable exceptions (for example, Voumard, *The Sale of Land* (1939); Millard, *The Law of Real Property in New South Wales* (6th ed. 1948); Harrison, *Cases on Land Law* (1958),) this is particularly true in Australia.

[2] *'Modern Real Property'*, (1956) 19 *Modern Law Review* 14, 25.

[3] Professor Hargreaves, at this point, in a footnote stated: 'And can one blame them? What future is there for the young lawyer who is prepared to devote his life to the study of the basic principles of land law? How many Chairs in Land Law are there? What encouragement is given to its academic study?'

[4] For an example of the co-ownership of an estate *pur autre vie* see *Ex parte Railway Commissioners (N.S.W.)* (1941) 41 S.R. (N.S.W.) 92. It has not been possible to create an estate tail in Victoria by an instrument coming into operation after 18 December, 1885; Property Law Act 1958, s. 249. However, estates tail created before that date, which have survived to the present day, may exist either at law or in equity. Statute *De Donis* 1285, provided that the intention of the donor should be observed *secundum formam doni* (as expressed in the deed of gift). At common law a limitation

sion or remainder and may be either legal or equitable; indeed, as will be discussed later, co-owners may, in relation to the same estate, be entitled at law as joint tenants, but in equity as tenants in common.[5]

Common law recognized four different types of co-ownership, joint tenancy, tenancy in common, tenancy by entireties and coparcenary. But whatever the method of co-ownership, one feature true of all, is that each co-owner, whether he be a joint tenant or a tenant in common, is entitled, concurrently with the other co-owners, to possession of the whole of the land, although he has no exclusive right to possession of any part. It is this right to possession of the entirety of the land, a right which exists irrespective of agreement with, or the permission of the other co-owners,[6] and which, at common law cannot arbitrarily be determined by order of the court[7] (although it may be suspended by Statute),[8] that is the essential characteristic of all forms of co-ownership: without it there is several, that is separate, and not concurrent ownership; and from it has developed much of the law that regulates the rights of co-owners *inter se* and in their dealings with third parties.

A. The obligations of a co-owner who alone enjoys possession

As a general rule, a co-owner who alone enjoys possession of the common property, the other co-owners being out of possession, is under no obligation, at law or in equity,[9] to pay an occupation rent.

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of land to A and B and the heirs of their bodies had the effect that, during their lives A and B were regarded as joint tenants, but on the death of the survivor their respective heirs took as tenants in common. The right of survivorship precluded the heirs from holding as joint tenants, as this right would have been inconsistent with the Statute *De Donis*. If A and B were, however, capable of intermarriage, the limitation could have been construed as an estate in special tail and thus could have created a joint tenancy. See further *Challis's Law of Real Property* (3rd ed., 1911) 365; Bl.Comm. ii, 192.

[5] The fact that a wall divides two properties, that is, is a party wall, does not necessarily make it the subject of co-ownership. The term 'party wall' may have various meanings, only one of which relates to tenancy in common. Further, if adjoining property owners share the expense of the erection of a dividing wall, and it is built so that the centre of the wall coincides with the boundary line, these facts by themselves raise no presumption of co-ownership: See generally *Walsh v. Elson* [1955] V.L.R. 276, and the cases therein considered. As to a private bridge see *Wright v. Rix* [1955] *Current Law Yearbook* 1179.

[6] *Moisley v. Mahony* [1950] V.L.R. 318.

[7] *In re Tolman's Estate* (1928) 23 Tas. L.R. 29, 30, *per* Crisp J. '. . . But he represents one of the tenants in common, whose rights are as extensive as those of his co-tenants. I have no power to remove him'.

[8] *E.g.* Property Law Act 1958, s. 37, *(Bull v. Bull* [1955] 1 Q.B. 234), and Marriage Act 1958, s. 161. *(Oates v. Oates* [1949] S.A.S.R. 37—husband and wife were tenants in common and an order was made granting exclusive possession of the house to the wife for such time as she remained unmarried and used it as a residence—but now see *Wirth v. Wirth* (1956) 98 C.L.R. 228; *Martin v. Martin* (1959) 33 A.L.J.R. 362).

[9] *Pascoe v. Swan* (1859) 27 Beav. 508; *Luke v. Luke* (1936) 36 S.R. (N.S.W.) 310; *McCormick v. McCormick* [1921] N.Z.L.R. 384, 387, *per* Salmond J., 'I think that the obligations of co-owners to account to each other are the same in equity as at law, and are the same in a partition suit as in other proceedings. . . .' But see *Hill v. Hickin* [1897] 2 Ch. 579.

This rule applies whether the question arises in partition proceedings, in proceedings for a sale in lieu of partition or in administration proceedings,[10] and was formulated, after considering judicial and juristic statements to the contrary, by the court in *Luke v. Luke*[11] where the facts were, *inter alia,* as follows:

> A and B, tenants in common, both occupied the common property until A's death in 1920. From the date of A's death, 1920, to the date of the hearing, 1936, B alone occupied the property.

In a suit for the administration of A's estate, the administrator sought an order for the sale of the property and that B should be charged with an occupation rent. The court made an order for the sale, but rejected the contention that B should be charged with an occupation rent, holding that B had committed no legal wrong but had merely exercised his right to possession. The principle is, therefore, clear: that a co-owner has a right to possession and enjoyment of the entire common property, and simply by its exercise will not be burdened by a claim for compensation at the suit of a co-owner who has failed to exercise his like right. Further, even if the conduct of a co-owner went beyond mere occupation but included the taking of more than his share of the profits accruing from the land, still this, by itself,[12] would not confer upon the other co-owners any remedy at common law, either by an action for an account, or for money had and received.[13] In 1705, to remedy the situation, legislation was enacted[14] providing that an action for an account might be brought and maintained by one co-owner against another, as bailiff, for receiving more than his just share or proportion. In *In re Tolman's Estate,*[15] it was held that, following the law, equity should order accounts in circumstances

[10] *M'Mahon v. Burchell* (1846) 2 Ph. 127; *Henderson v. Eason* (1851) 17 Q.B. 701; *Griffies v. Griffies* (1863) 8 L.T. 758; *Luke v. Luke* (1936) 36 S.R. (N.S.W.) 310; *McMahon v. The Public Curator of Queensland* [1952] St. R. Qd. 197; *McCormick v. McCormick* [1921] N.Z.L.R. 384.

[11] (1936) 36 S.R. (N.S.W.) 310; (1937) 10 *Australian Law Journal* 103; also *McCormick v. McCormick* [1921] N.Z.L.R. 384. In support of the claim to compensation reliance was placed principally upon the following statement in *Halsbury* (1st ed.) xxi, 851: 'where one party has been in exclusive occupation, the court, if desired, will order that he shall be charged with an occupation rent;' and also upon a part of the judgment of Stirling J. in *Hill v. Hickin* [1897] 2 Ch. 579, 580-581. The Court held, *inter alia,* that the cases cited for the passage in *Halsbury's Laws of England* (1st ed.) xxi, 851, were not in its opinion authority for the proposition stated in general terms. *Cf. Halsbury's Laws of England* (3rd ed.) xiv, 502: 'In partition, moreover, an account of rents and profits might be decreed against a co-owner who had been in the possession of whole or of more than his share, but who, on the other hand, might be entitled to a lien for money expended on improvements.' The court further held that the said part of the judgment of Stirling J. was, *inter alia,* an *obiter dictum.*

[12] Other circumstances, discussed *infra,* may confer upon the occupying co-owner an obligation to pay compensation: *e.g.* if the occupying co-owner had been constituted the bailiff or receiver of the other co-owners.

[13] *Peacock v. Hanson* (1864) 3 S.C.R. (N.S.W.) 191.

[14] 4 Anne c. 16, s. 27.

[15] (1928) 23 Tas. L.R. 29; Also *Clegg v. Clegg* (1861) 3 Giff. 322; *Job v. Potton* (1875) L.R. 20 Eq. 84. Further (1928) 2 *Australian Law Journal* 209.

where the applicants did not allege that the defendant had received more than his just share, but merely that they did not know the state of the accounts. By virtue of the Imperial Acts Application Act 1922, the legislation of 1705 is operative in Victoria.

In *Henderson v. Eason*[16] the construction of this Statute was considered:

> A and B were tenants in common of Nash Farm. For five years the farm was occupied by A, who managed it in the usual way and received all the produce which he marketed, retaining for himself the proceeds of sale.

On the death of A, B brought an action for an account against A's executor. The action failed, the court holding that A had not received more than his just share within the meaning of the Statute. Parke, B., in delivering the judgment of the Court of Exchequer Chamber, stated:[17]

> The statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share: and he becomes, as to that excess, the bailiff of the other, and must account.
> But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation, than the other, we have insuperable difficulties to encounter.

The position, therefore, now appears to be that a co-owner must account to his fellows for benefits which he *receives*, as co-owner, from third parties, but not for benefits which he *takes* from the soil as a result of his own exertions.

If, however, the act of a co-owner amounts to the complete destruction of the common property, he will be liable in an action in trespass by the other co-owners.[18] If the destruction is not complete, but only partial, the remedy of the other co-owners lies in the law of waste.[19]

It appears that an action for waste between co-owners would not lie at common law, but was expressly conferred upon a tenant in common by Chapter XXII of the Statute of Westminister II 1285, and later extended to joint tenants.[20] The extent of the liability of a co-

[16] (1851) 17 Q.B. 701. Also *Rees v. Rees* [1931] S.A.S.R. 78. *Cf. Young v. Wilson* [1955] *Current Law Yearbook* 1990. [17] (1851) 17 Q.B. 701, 719.

[18] *Wilkinson v. Haygarth* (1847) 12 Q.B. 837; *Murray v. Hall* (1849) 7 C.B. 441; *Jacobs v. Seward* (1872) L.R. 5 H.L. 464; *Oates v. Oates* [1949] S.A.S.R. 37; also *Huet v. Lawrence* (1948) 41 St. R. Qd. 168. [19] *Murray v. Hall* (1849) 7 C.B. 441.

[20] Co. Litt. 200; *Wilkinson v. Haygarth* (1847) 12 Q.B. 837. But waste did not lie between coparceners, as their remedy was partition, available to coparceners even at common law; Bl. Comm. ii, 188.

owner for waste cannot be stated with any certainty, and indeed, acts of the nature of waste have been interpreted as amounting to an ouster, giving rise to trespass.[21] Further, no Australian case is known where the principles applicable have been discussed. It can, however, be stated that if the conduct complained of amounts to no more than the ordinary enjoyment of the common property (for example, cutting trees or working mines) an injunction will not be granted even though the conduct might have amounted to waste if committed by a limited owner.[22] A co-owner who complains of such conduct has a remedy in that he can seek partition,[23] and further, if the result would be that the other co-owner will receive more than his just share, he may bring an action for an account.[24] Therefore, if the circumstances tend to show that he will be precluded from receiving his share, as for example if the other co-owner is insolvent, an injunction may be obtained.[25] However, equity may intervene by injunction to restrain acts of destruction.[26] It is considered that the repeal of Chapter XXII of the Statute of Westminster II by section 7 of the Imperial Acts Application Act 1922 does not, of itself, preclude a Victorian court from applying the law of waste between co-owners, for the section goes on to provide, *inter alia*, that it shall not affect the validity of any established principle or rule of law or equity, notwithstanding that they may have been in any manner affirmed, recognized or derived by in or from any enactment thereby repealed.

In the circumstances set out below, a co-owner in sole occupation will be liable to pay compensation to the other co-owners. It must, however, be borne in mind that co-ownership, as such, does not create an agency or a partnership between the co-owners; nor does it, by itself, give rise to a fiduciary relationship between them.[27]

[21] *Wilkinson v. Haygarth* (1847) 12 Q.B. 837; this was an action in trespass, the conduct complained of being the digging up and carrying away of turf. Lord Denman, C.J., at p. 845, stated: 'I consider this, therefore, an ouster effected by means of the destruction of the property.'

[22] *Goodwyn v. Spray* (1786) Dick 667; *Martyn v. Knowllys* (1799) 8 T.R. 145; *Murray v. Hall* (1849) 7 C.B. 441; *Job v. Potton* (1875) L.R. 20 Eq. 84; the fact that one co-owner is occupying, not only as co-owner, but also as lessee of the other co-owner, appears in this context to be irrelevant: *Martyn v. Knowllys* (1799) 8 T.R. 145, 146, *per* Lord Kenyon C.J., 'The defendant cannot be in a worse situation by being tenant to the plaintiff of his moiety, than he would have been in, if the plaintiff had not demised to him. . . .' But see *Twort v. Twort* (1809) 16 Ves. 128, where an injunction was granted on the basis that the act complained of was in derogation of the obligations under the lease.

[23] *Goodwyn v. Spray* (1786) Dick 667; *Smallman v. Onions* (1792) 3 Bro. C.C. 621.

[24] *Martyn v. Knowllys* (1799) 8 T.R. 145; *Murray v. Hall* (1849) 7 C.B. 441.

[25] *Smallman v. Onions* (1792) 3 Bro. C.C. 621.

[26] *Hole v. Thomas* (1802) 7 Ves. 589; *Twort v. Twort* (1809) 16 Ves. 128; *Arthur v. Lamb* (1865) 2 Drew. Sm. 428. S. 133 of the Property Law Act 1958 applies only to an estate for life, and, therefore, has no application to co-ownership unless possibly the estate, the subject of the co-ownership, is a life estate.

[27] *Leigh v. Dickeson* (1884) 15 Q.B.D. 60; *Kennedy v. De Trafford* [1897] A.C. 180; *Jones v. Bouffier* (1911) 12 C.L.R. 579; *Rees v. Rees* [1931] S.A.S.R. 78; *Re Marcellos* (1941) 41 S.R. (N.S.W.) 154.

(i) *Where one co-owner has expelled the other co-owner*

If A and B are co-owners of land, and B expels A therefrom, A has three possible remedies. First, it has long been held that he may bring an action for trespass against B. Alternatively, A could bring an action for the recovery of land, and combined therewith, an action for mesne profits[28] (that is damages for wrongfully withholding possession),[29] although he will not be entitled to an order granting him possession to the exclusion of B, as this would be to deny B his right to possession.[30] It appears, however, that if A and B are husband and wife, the tortious nature of the action for the recovery of land[31] will preclude the husband from bringing such an action against his wife, and his remedy would be to take proceedings under section 161 of the Marriage Act 1958.[32] Finally, in a partition suit or in other like proceedings, A may claim an *occupation rent* from B, for it is a legal wrong for B to exclude A from the exercise of his legal rights.[33]

(ii) *Where occupation is taken pursuant to an agreement*

It is clear that, by contract, the co-owners may confer upon the occupying co-owner an obligation to pay compensation. For example, where one co-owner manages the common property by the mutual agreement of all the co-owners and for their common benefit.[34] In such a case, presumably consideration is supplied by the other co-owners agreeing not to exercise their right to possession. A more common example is perhaps where one co-owner grants to the other a lease of his interest. In such a case the occupying co-owner must pay the rent reserved by the lease, not only during the continuation of the term, but also for such period of time as the co-owner occupies *qua* tenant.[35]

[28] *Goodtitle v. Tombs* (1770) 3 Wilson 118; *Murray v. Hall* (1849) 7 C.B. 441; *McCormick v. McCormick* [1921] N.Z.L.R. 384; *Luke v. Luke* (1936) 36 S.R. (N.S.W.) 310.

[29] *Bramwell v. Bramwell* [1942] 1 K.B. 370, 373, *per* Goddard L.J., 'An action for the recovery of land is the modern equivalent of the old action of ejectment. That action was a personal action and could only sound in damages. Then in favour of this class of remedy the courts determined that the plaintiff was entitled to recover as collateral and additional relief possession of the land itself (see *Stephen on Pleading*, 3rd ed., p. 12), but it was in fact always a species of the action of trespass.' In *Kohn v. Bourke* [1953] V.L.R. 7, 10, *per* Coppel, A.-J.: 'In Victoria, an order for ejectment is an order for the recovery of possession, . . .'.

[30] Co. Litt. 199b; *Burrows v. Brownell* (1903) 20 W.N. (NS.W.) 126.

[31] *Supra*, n. 29.

[32] *Bramwell v. Bramwell* [1942] 1 K.B. 370; *Hutchinson v. Hutchinson* [1947] 2 All E.R. 792; *Bendall v. McWhirter* [1952] 2 Q.B. 466; *Short v. Short* [1960] 1 W.L.R. 833; *Brennan v. Thomas* [1953] V.L.R. 111; *Public Trustee v. Kirkham* [1955] Argus L.R. (C.N.) 1079.

[33] *Pascoe v. Swan* (1859) 27 Beav. 508; *Turner v. Morgan* (1803) 8 Ves. 143.

[34] *Anon.* (1684) Skin. 230; as interpreted in *Henderson v. Eason* (1851) 17 Q.B. 701, 721.

[35] *Leigh v. Dickeson* (1884) 15 Q.B.D. 60; *Cowper v. Fletcher* (1865) 6 B. & S. 464; *Rye v. Rye* [1960] 3 W.L.R. 1052; *Parker v. Sell* (1890) 16 V.L.R. 271; *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135.

(iii) *Where there exists between the parties a relationship that calls for the payment of compensation*

The relationship of co-owners *simpliciter,* as has been stated, in general creates no obligation to pay compensation. It may be, however, that the parties have created an additional relationship of, for example, bailiff, agent, trustee or guardian, that obliges the occupying co-owner to pay compensation.[36] The mere leaving, however, of the management of the property in the hands of one co-owner, without more, will not suffice.[37]

The right of a co-owner to bring an action for an account against a co-owner who has received more than his just share has been discussed above.

(iv) *Where the occupying co-owner seeks equity*

If the occupying co-owner actively seeks redress against the other co-owners in equity, then, applying the maxim that he who seeks equity must do equity, the court may require him to pay an *occupation rent.* This could arise where the occupying co-owner seeks compensation for permanent improvements he has made to the common property. In such circumstances an occupation rent is probably determined by having regard to the condition of the property at the date of the commencement of the occupation, notwithstanding that after, and as a result of the improvements, an increased rental might have been obtained.[38] It must, however, be observed that whether an occupation rent is payable depends entirely upon whether the court considers it just and equitable in all the circumstances; it is not automatic. Thus, in *McMahon v. The Public Curator of Queensland:*[39]

> A and B were tenants in common of a dairy farm occupying approximately 623 acres. A erected, at virtually his own expense, a house which he exclusively occupied together with some one-third of an acre of land.

Macrossan C.J., in the circumstances of the case, rejected as inequitable the claim by B for an occupation rent, notwithstanding a claim by the estate of A for compensation for permanent improvements.

B. Compensation for Improvements

In *Leigh v. Dickeson* the rights of a co-owner who has *voluntarily*[40] made improvements or proper repairs to the common property to recover compensation were stated by Cotton L.J., as follows:[41]

[36] Co. Litt. 200b; *McCormick v. McCormick* [1921] N.Z.L.R. 384.
[37] *Rees v. Rees* [1931] S.A.S.R. 78; (1931) 5 *Australian Law Journal* 89.
[38] *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135. [39] [1952] St. R. Qd. 197.
[40] If a co-owner makes improvements to the common property at the request of the other co-owners, in discharge of a common obligation or in pursuance of an agreement to which the other co-owners are parties, his right to compensation is determined by the law of contract. [41] (1884) 15 Q.B.D. 60, 67.

> No remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; . . . There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition.

In *Brickwood v. Young*[42] a claim to compensation by a successor in title of the co-owner who had made the improvements was allowed by the High Court. The Court held that the making of a permanent improvement by a co-owner in sole occupation creates an equity which attaches to the land, analogous to an equitable charge, the benefit of which will run with the land so as to be enforceable at the suit of a successor in title.[43] With greater reason does this equity arise where the improvement is effected by a co-owner who was not in possession at the date of the improvement: for example, an improvement made by a co-owner entitled in remainder during the continuance of a prior life estate.[44] Further, it is immaterial that the co-owner effecting the improvement has an interest in the property other than the estate held in co-ownership.[45]

The equity created by the making of permanent improvements is a passive equity. Its character is such that it cannot be enforced arbitrarily, but only in a suit for partition[46] and for sale in lieu of partition,[47] in administration proceedings when the court is dividing proceeds of sale,[48] or in other judicial proceedings resulting in a dis-

[42] (1905) 2 C.L.R. 387.

[43] Also *In re Jones; Farrington v. Forrester* [1893] 2 Ch. 461, where the heir of the tenant in common who had made the improvements succeeded in a partition suit to a claim for compensation. But contrast *Ruptash and Lumsden v. Zawick* [1956] 2 D.L.R. (2d) 145.

[44] *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135; *Re Byrne* (1906) 6 S.R. (N.S.W.) 532.

[45] *In re Jones; Farrington v. Forrester* [1893] 2 Ch. 461—tenant for life; *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135—lessee.

[46] *Teasdale v. Sanderson* (1864) 33 Beav. 534; *Leigh v. Dickeson* (1884) 15 Q.B.D. 60; *In re Jones; Farrington v. Forrester* [1893] 2 Ch. 461.

[47] *McMahon v. The Public Curator of Queensland* [1952] St. R. Qd. 197; *Noack v. Noack* [1959] V.R. 137.

[48] *In re Cook's Mortgage; Lawledge v. Tyndall* [1896] 1 Ch. 923; *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135. In *Brickwood v. Young* (1905) 2 C.L.R. 387, 395, Griffiths C.J. stated that in *Boulter v. Boulter* it had been held that compensation might be recovered in a suit for administration as well as in a partition suit. This does not, however, appear to be a correct reading of the case. In *Boulter v. Boulter* co-ownership had been created by the will of the deceased, and the trustee of the will obtained an administration decree in pursuance of which the land, the subject matter of the co-ownership, was sold. In an application for an account of moneys

tribution of the value of the common property among the co-owners: for example, in a suit for distribution of money paid on the compulsory acquisition of land.[49] It is said that this equity is a 'defensive' equity. This description is unobjectionable if all that is meant is that the equity cannot be enforced arbitrarily, but only in the above circumstances. But if it carries the implication that the co-owner claiming the equity must occupy the position of defendant in an action, it is open to very grave doubt. It is considered that a co-owner, otherwise entitled to recover compensation, would not, for example, in proceedings for sale in lieu of partition, be precluded from recovery merely by the fact that he instituted the proceedings.

In *Re Byrne*[50] it was argued that this passive equity was limited to tenants in common and had no application to joint tenants. Walker J. rejected this contention, arguing very persuasively that the reason for the creation of the equity was that it would be unjust and inequitable that co-owners should get the benefit of improvements without contributing to their cost; and that there was no reason why this principle should not apply to joint tenants.[51] In support of the equity being limited to tenants in common, it was argued that if a joint tenant died after making improvements, his personal representatives could not make a claim. This case was said to be one of 'great difficulty . . . because it would be attempting to enforce a claim against an estate in which the joint tenant's interest had entirely ceased.'[52] The question could not, of course, arise if the surviving joint tenant and the person beneficially entitled to the estate (or to the residuary estate) are the same, and this is a probable combination. Nor could the question arise unless the joint tenancy existed both at law and in equity. As no death had occurred, the court did not find it necessary to decide this point. The compulsory acquisition of land will not, by itself, sever a joint tenancy,[53] and it is difficult to see how such a question can arise if

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expended in permanent improvements the court, at p. 138, stated, referring to the judgment of Cotton L.J. in *Leigh v. Dickeson*: 'He never, in my opinion, meant to say that the equity was confined to partition suits technically so called, and that if the Court were dividing proceeds of sale in a partition suit, it would recognize the equity, but would disregard it if the division were in an administration suit; . . .'. The decision is, therefore, restricted to the division of proceeds of sale following the death of the person by whose will the co-ownership was created. It is not direct authority in circumstances where the death in question is that of a co-owner. There seems no reason, however, why the same result should not follow upon the death of a tenant in common, but clearly upon the death of a joint tenant the co-ownership is terminated and there can occur no question of the division of proceeds of sale.

[49] *Brickwood v. Young* (1905) 2 C.L.R. 387; *Re Byrne* (1906) 6 S.R. (N.S.W.) 532.

[50] (1906) 6 S.R. (N.S.W.) 532.

[51] Also *Noack v. Noack* [1959] V.R. 137, where a claim for compensation failed, but not upon the ground that the parties were joint tenants. Also *Clark v. Clark* [1961] V.R. 181.

[52] (1906) 6 S.R. (N.S.W.) 532, 536.

[53] *Re Byrne* (1906) 6 S.R. (N.S.W.) 532; *In ex parte Railway Commissioners for New South Wales* (1941) 41 S.R. (N.S.W.) 92.

the circumstances available to a co-owner to enforce the equity are limited to those discussed above.[54] In any event, it is considered that if a joint tenant should die before the occurrence of facts permitting the enforcement of the equity, compensation ought not thereafter, in general, to be recoverable: the right of survivorship is mutual and so equity is satisfied in this way.[55] But it is, however, suggested that equity will not hesitate to give relief if the circumstances are such that it would be unconscionable for the surviving joint tenant not to make compensation. For example, if the surviving joint tenant had dissuaded the deceased from bringing proceedings for sale in lieu of partition by falsely advising that he could effectively devise his interest by will; indeed it may be that in such circumstances the relief of equity would extend beyond the question of compensation for improvements.

In *Brickwood v. Young*[56] the claim to compensation was allowed, the amount payable as compensation being stated to be the amount by which the property had been increased in value due to the permanent improvement.[57] This principle has found expression in other cases, including *Noack v. Noack*,[58] where, in an unanimous judgment, the Full Court, after referring to the principles enunciated in *Leigh v. Dickeson*[59] and *Brickwood v. Young*,[60] stated *dicta*:[61]

> According to these principles a co-owner who improves the common property at his own expense is, in general, entitled upon a partition or sale of the property to an allowance to the extent to which by his expenditure he has enhanced the value of the property.

From the report of *Brickwood v. Young*[62] it does not appear whether the increase in value of the property due to the permanent improvements exceeded the expenditure required to make the improvements. It is difficult, however, to appreciate why the High Court directed an account of the money expended *and* an enquiry as to the extent to

[54] Discussion of *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135, in n. 48 *supra*.

[55] But see *Isaryk v. Isaryk* [1955] O.W.N. 487, where the court held that the extinguishment of the title of a joint tenant did not preclude his right to seek an account from his former co-tenant, if the latter had received (within the limitations period) more than his just share of the rents and profits prior to the date of the extinction of title.

[56] (1905) 2 C.L.R. 387.

[57] The appellant, who was entitled to a one-quarter undivided share, had received one-quarter of the compensation money, and at p. 398 Griffith C.J., stated: 'In my opinion, therefore, the learned Judge ought to have directed an account of the money expended by the appellant or his predecessors in title in permanent improvements on the land since the deed of the 18th May, 1869, and an inquiry as to the extent to which the compensation money paid on resumption was increased by such expenditure, and there should have been a declaration that the appellant is entitled to a lien upon the fund in Court for an amount equal to three-fourths of the amount of such increase.'

[58] [1959] V.R. 137; also, *e.g. Parker v. Trigg* [1874] W.N. 27 and *Watson v. Gass* (1881) W.N. 167 (both of which cases were, however, cited in *In re Jones; Farrington v. Forrester* [1893] 2 Ch. 461), and *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135.

[59] (1884) 15 Q.B.D. 60.

[60] (1905) 2 C.L.R. 387.

[61] [1959] V.R. 137, 146.

[62] (1905) 2 C.L.R. 387.

which the compensation money paid on resumption was increased by the expenditure, unless it was envisaged that they were in some way related. This question could be one of importance: for example, in *Noack v. Noack*[63] the defendant alleged that he expended in moneys and labour a total of £8,700, and by reason thereof the common property appreciated in value by the sum of £9,500, or thereabouts.

In *McMahon v. The Public Curator of Queensland*,[64] Macrossan C.J., following *In re Jones; Farrington v. Forrester*,[65] adopted a different principle and stated:

> It is clear, I think from this, that the amount to which a co-owner making improvements may be entitled against another co-owner in taking the accounts in a partition action, is limited to the actual cost of the improvements, and if the present value of the increment to the property is less than the actual cost of the improvements, he is further limited to that present value.

The principle upon which compensation rests, is that equity considers it unfair that one co-owner should benefit by an improvement made at the expense of the other co-owner, without contributing towards its cost. Normally, the co-owner who, at his own cost, effects the improvement, alone enjoys its benefits. There seems no good reason to allow him to *profit* to the exclusion of the other co-owner, but at the same time there seems also good reason to take general inflationary trends into account. In other words it may be that compensation should be assessed by having regard, for example, to the amount which would have had to be expended in making the improvements had they been made at the date of the hearing, or to the income lost by the co-owner by investing his capital in making the improvements, as opposed to other forms of investment.

Compensation cannot, however, be recovered for repairs in the nature of maintenance the value of which would in any instance be exhausted when renewed, for example the periodic painting of a house,[66] or for repairs which the co-owner was obliged to make in pursuance of a contractual obligation existing between the co-owners,[67] for example in pursuance of the obligations under a lease.[68] Further, an equity will not be created where the co-owner intended the improvements as a gift, for example where a husband makes improve-

[63] [1959] V.R. 137.
[64] [1952] St. R. Qd. 197. Also *Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135, 137, *per* A. H. Simpson C.J. in Eq., 'In no case can the co-owner who has improved the property obtain more than his outlay, though such outlay may have trebled the value of the property. And, on the other hand, the increase in the price obtained is the limit of which he can receive, though his actual outlay may be far larger.'
[65] [1893] 2 Ch. 461.
[66] *McMahon v. The Public Curator of Queensland* [1952] St. R. Qd. 197; *In re Cook's Mortgage; Lawledge v. Tyndall* [1896] 1 Ch. 923.
[67] *In re Holyman* (1935) 30 Tas. L.R. 15.
[68] *E.g. Boulter v. Boulter* (1898) 19 L.R. (N.S.W.) Eq. 135.

ments to land held by himself and his wife as joint tenants and fails to rebut the presumption of advancement;[69] nor will an equity be created where the expenditure is to be regarded as a joint venture, as for example, has been so held where a husband and wife jointly held land and each contributed to the cost of the improvements, at least during such period as the parties were cohabiting.[70] Finally, it may be noted that the entitlement of a co-owner to compensation for improvements which he has made, depends upon the enforcement of an equity. From this two points follow: firstly, that a co-owner seeking compensation may be ordered to pay an occupation rent on the principle that he who seeks equity must do equity;[71] secondly, that, on general principles, the right to compensation will be lost if the other co-owner conveys his interest to a *bona fide* purchaser of a legal estate for value without notice of the situation,[72] though there may be a question whether recourse could be had against the proceeds of sale.

C. Adverse Possession

At common law, long enjoyment did not, by itself, affect the entitlement of a person to possession of land. The Limitation of Actions Act 1958[73] contains provisions whereby after the expiration of fifteen years adverse possession of land by a squatter, the former owner is precluded from bringing an action to recover the land, and his title is thereby extinguished.[74]

It is clear that if A and B squat on land, they can acquire an interest as joint tenants as there will be, *inter alia*, unity of title.[75] But, at common law, unless there had been an actual expulsion, possession of one co-owner was regarded as possession of the other or others.[76] Thus, if A and B were co-owners of land the possession of A was, at common law, regarded also as the possession of B. This could work unfairly in two respects. Firstly, in its application to strangers: if A was in actual possession and B was out of possession, a stranger, X, could not acquire a title against B no matter how long he squatted on the land. Secondly, between the co-owners *inter se*: if for any length of time B was out of possession, and A in actual possession, B's title would not be extinguished. Section 14 (4) of the Limitation

[69] *Noack v. Noack* [1959] V.R. 137; *Clark v. Clark* [1961] V.R. 181.
[70] *Hocking v. Hocking* [1959] S.A.S.R. 1.
[71] *Teasdale v. Sanderson* (1864) 33 Beav. 534; *In re Jones; Farrington v. Forrester* [1893] 2 Ch. 461; *Luke v. Luke* (1936) 36 S.R. (N.S.W.) 310.
[72] *Ruptash and Lumsden v. Zawick* [1956] 2 D.L.R. (2d) 145.
[73] Initially the Real Property Statute 1864 (No. 213 of 1864).
[74] Ss. 8 and 18. The period of fifteen years may be extended, see Part II of the Act, and time runs from the date of the accrual of the right of action, and the existence of adverse possession. See ss. 8-19.
[75] Co.Litt. 278; Bl.Comm. ii, 181. In *McWhirter v. Emerson-Elliott* [1960] W.A.R. 208, the plaintiffs presumably obtained title as tenants in common.
[76] *Fairclaim v. Shackleton*, 2 Black. W. 690.

of Actions Act 1958 provides, in general,[77] that when any one co-owner has been in possession of the entirety of land, or of more than his undivided share or shares, such possession shall not be deemed to have been the possession of the other co-owners, but shall be deemed to be adverse possession of the land.

In *Beaumont v. Hochkins:*[78]

> A brought an action claiming to be entitled to a one-fourth share in certain land. The defendant, B, had been in possession of the land for more than fifteen years, the period required to bar A's action under the legislation then in force, the Real Property Statute 1864.

A claimed that the statute did not apply because he and the defendant were tenants in common. It was argued that the provisions of the statute, which contained like terms to section 14 (4) of the 1958 statute, should be construed as referring only to the first situation discussed above: that is, that, by virtue of the provisions, one co-owner who has not been in actual possession cannot set up against a stranger the actual possession of another co-owner; but that it should not be extended to deal also with the second situation, that is to affect the rights of co-owners *inter se*. Hodges J., following earlier English authority, rejected the argument and held, rightly it is submitted, that the statute applied to both circumstances.

II. TYPES OF CO-OWNERSHIP

Only two forms of co-ownership can today be created under Victorian law, joint tenancy and tenancy in common, although, as will be stated, coparcenary may still come into existence as the result of the continuation of an estate tail created by an instrument coming into operation before 18 December 1885. However, unlike the position under English law,[79] it should be noted that the *legal* estate may be held by tenancy in common (and by coparcenary), as well as by joint tenancy.

A. Joint Tenancy

Coke described a joint tenant as one who *totum tenet et nihil tenet.*[80] In one sense a joint tenant holds the whole, and in another sense he

[77] S. 14 (4): 'When any one or more of several persons entitled to any land or rent as joint tenants or tenants in common have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof or of such rent for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or by any of them but shall be deemed to be adverse possession of the land.' Initially Real Property Statute 1864 (No. 213 of 1864), s. 28.

[78] (1889) 15 V.L.R. 442. Also *re Lawrence; Robertson v. Lawrence* [1943] Tas. L.R. 33; *Power v. McBride* (1884) 1 Q.L.J. 192.

[79] Megarry and Wade, *The Law of Real Property*, (2nd ed. 1959) 403; Cheshire, *The Modern Law of Real Property*, (8th ed. 1958) 318.

[80] Co.Litt. 186a.

holds nothing: he is, with the other joint tenants, jointly seised of the whole estate, the subject of the joint tenancy, and is entitled to the use, possession and enjoyment of the land,[81] subject only to the like rights of the other joint tenants, but at the same time has no individual rights to any part thereof.[82] It seems incorrect to say that a joint tenant *owns* the entirety of the land,[83] as he cannot alone, as a general rule, deal with the whole in a manner binding upon the other joint tenants. For example, it appears that one joint tenant cannot by himself disclaim so as to bind the others,[84] grant an option to purchase binding the others,[85] surrender a lease held jointly (although there seems on principle no reason why he should not be able to surrender his interest, and so create a tenancy in common), or by notice determine a term certain, though he may by notice determine a periodic tenancy.[86]

(i) *Two vital characteristics*

There are two vital characteristics of a joint tenancy, the four unities and the so-called right of survivorship.

(A) FOUR UNITIES

The personalities of joint tenants, so far as they relate to the land, the subject of the joint tenancy, are in all respects indistinguishable.[87] From this is deduced the four unities of a joint tenancy, that is, the unities of possession, interest, title and time. They should not, however, be regarded as conditions necessary to the creation of a joint tenancy, but rather as the natural and necessary results flowing from the basic concept of a joint tenancy.

UNITY OF POSSESSION

This has been discussed above, but it may here be reiterated that every co-owner, a tenant in common as well as a joint tenant, is entitled, concurrently with the other co-owners, to possession of the whole of the land. A co-owner is not, however, exclusively entitled to possession of any part, as this would be repugnant to the nature of co-owner-

[81] Either present or potential.

[82] The nature of a joint tenancy was thoroughly examined by the High Court in *Wright v. Gibbons* (1949) 78 C.L.R. 313. In this case, Dixon J. pointed out that the expression '. . . *totum tenet et nihil tenet*. . . .' had become in Littleton *'per my et per tout'* and had been inaccurately translated in Blackstone as *'by the half and by all'*. As stated by the learned judge at p. 330: '. . . *my*, as it appears now to be agreed, being the *mie* still shown in some French dictionaries as a negative expletive particle, and not *mi*, 'half' as Blackstone seems to have taught many generations of lawyers to believe.'

[83] *Inland Revenue Commissioners v. T. W. Law Ltd* [1950] 2 All E.R. 196.

[84] *Re Schar; Midland Bank Executor and Trustee Co. v. Damer* [1951] Ch. 280.

[85] *Snape v. Snape; London & Manchester Assurance Co. v. Same* [1959] *Current Law Yearbook* 1846.

[86] *Leek and Moorlands Building Society v. Clark* [1952] 2 Q.B. 788.

[87] *Wright v. Gibbons* (1949) 78 C.L.R. 313, 323.

ship, and cannot, therefore, turn out any other co-owner.[88] In this respect it is true to say of tenants in common as well as joint tenants that they are seised *per my et per tout.*

UNITY OF INTEREST

The interest of each of the joint tenants must be the same in nature, extent and duration.[89] For example:

> X, the fee simple owner of Blackacre, conveys a life estate to A and a term of fifty years to B.

A and B do not take as joint tenants. Clearly, the basic notion of a joint tenancy is absent as they are not jointly seised of the same estate. Instead their interests are dissimilar, both in nature (A acquiring a freehold and B a leasehold estate), and duration (A being entitled for his life and B for fifty years).

Similarly, if land is conveyed to A and B, A to take a three-quarter interest and B the remaining quarter interest, they take as tenants in common, for there is no unity of interest.

If, however, land is limited to A and B for life as joint tenants, it is irrelevant that by the instrument of grant either is also given the fee simple estate in remainder. This is apparent if it is recalled that the subject matter of a joint tenancy is an estate; A and B are jointly seised of the life estate, and the additional grant of the estate in fee simple in remainder is, for this purpose, of no more significance than if the additional grant had been of an estate in other land.[90]

UNITY OF TITLE

All the joint tenants should have derived their interest from the same title; that is, under the same document or by the same act of adverse possession.[91]

> If X conveys Blackacre to A and B in fee simple as joint tenants, and A conveys his interest to C, B and C are tenants in common as B acquired his interest from the conveyance by X, while C acquired his interest from the conveyance by A.

As will be discussed below, the conveyance by A operates to sever the joint tenancy.

UNITY OF TIME

The interests of each joint tenant must have vested (in interest or possession) at the same time and by virtue of the same common event.[92] For example:

> Blackacre is conveyed to X for life, remainder to A and B when they

[88] *Bull v. Bull* [1955] 1 Q.B. 234.
[89] Co. Litt. 188.
[90] Litt. s. 285; Bl.Comm. ii, 181, 186.
[91] Co. Litt. 181a.
[92] Co.Litt. 188a; Bl.Comm. ii, 181.

graduate in law. A and B graduate in law in 1957 and 1958 respectively. X dies in 1959.

A and B take as tenants in common as their interests vested at different times.

Limitations contained in a conveyance to uses provide an exception to this requirement, an exception formulated, apparently, with the object of giving effect to the intention of the grantor,[93] and extended to limitations contained in a will.[94] For example:

> X conveys Blackacre to Y in fee simple to the use of H and W for life and after their deaths to the use of their children who attain the age of twenty-one years, in fee simple.

Although the interests of the children of H and W may vest at different times, nevertheless they take as joint tenants.

If the limitation to H and W for life and after their deaths to their children who attain the age of twenty-one years was not contained in a conveyance to uses, but in a common law conveyance, and if children of H and W have attained this age before the determination of the particular estate, then, as stated above, they would take as tenants in common for there is no unity of time. But if by the determination of the particular estate no children have attained twenty-one years, the contingent remainder would not fail but would be saved by section 192 of the Property Law Act 1958:

> 192. (1) Every contingent remainder (created by any instrument executed after the thirty-first day of January One thousand nine hundred and five or by any will or codicil revived or republished by any will or codicil executed after that date) in tenements or hereditaments of any tenure which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder shall in the event of the particular estate determining before the contingent remainder vests be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.
>
> The provisions of this sub-section shall with any necessary modifications apply where a contingent remainder is granted by deed without any use.
>
> (2) A contingent remainder to a son, daughter or child of any person shall in the case of a son, daughter or child born after the death of such person being the father of such son, daughter or child be valid notwithstanding that there are no trustees to preserve contingent remainders after the death of the father and before the birth of such child. This sub-section shall apply to instruments made before or after the commencement of this Act.

This section provides that the contingent remainder to the children

[93] Initially the reason for the exception appears to have been that a use when executed related back to the date of its creation: Co.Litt. 188a; Bl.Comm. ii, 181.

[94] *Kenworthy v. Ward* (1853) 11 Hare 196.

shall be capable of taking effect in all respects as if it had originally been created as a springing or shifting use or executory devise or other executory limitation. It would seem therefore that, if the section applies, the children of H and W to attain twenty-one years, would take as joint tenants.

(B) JUS ACCRESCENDI

Each *joint tenant* is seised of the whole estate, the subject matter of the co-ownership. Thus, if A, B and C are joint tenants of the fee simple estate in Blackacre, they are each seised of the entire estate, subject to the like seisin of the others. A dies and by his will devises Blackacre to X. B and C remain seised of the entire fee simple, but subject now only to the like right of the other. On B's subsequent death, C, therefore, becomes entitled absolutely, because no one but he is seised of the estate.[95]

To state this result it is said that the right of survivorship, the *jus accrescendi,* applies between joint tenants. It seems, however, inaccurate to speak of the interest of one joint tenant *passing* on his death to the other. Although as a practical consequence of the death, considerable benefits do accrue to the survivor in that he alone is now exclusively entitled, it appears that the interest of a joint tenant lacks the capacity to devolve upon that joint tenant's death, and so is thereupon exhausted, neither adding to nor subtracting from the seisin of the surviving joint tenants. As stated by Latham C.J., in *Wright v. Gibbons*:[96]

> If one joint tenant dies his interest is extinguished. He falls out, and the interest of the surviving joint tenant or joint tenants is correspondingly enlarged.

The fact that A devised Blackacre to X is irrelevant.[97] The interest of a joint tenant is no more capable of devolution by will than it is capable of devolving upon an intestacy, and as a will cannot take effect until the death of a joint tenant, it is too late to convert the joint tenancy into a tenancy in common.[98] If the deaths of two joint

[95] Co.Litt. 181a; Blackstone (Bl.Comm. ii, 184) argued as follows: 'For the interest, which the survivor originally had, is clearly not devested [*sic*] by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.'

[96] (1949) 78 C.L.R. 313, 323.

[97] Co.Litt. 185b.

[98] *Swift v. Roberts* (1764) 3 Burr. 1488, 1497. But it has been held that if joint tenants make mutual wills, the survivor will not be entitled absolutely. The joint

tenants occur in circumstances which render the order of death uncertain, section 184 of the Property Law Act 1958, resolving the difficulties that existed at common law,[99] provides that the deaths shall be presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the elder.[1]

The right of survivorship has been described[2] as '. . . the most important incident of a joint tenancy, and unless the right of survivorship exists, the tenancy is not joint.' Moreover, there must here be mutuality,[3] which is satisfied by the fact that, in the natural course of events, there is no certainty who shall die first, notwithstanding that the deaths occur in an unexpected order. For these reasons the common law held that a corporation was incapable of being a joint tenant, either with another corporation or with a natural person.[4] Section 28 of the Property Law Act 1958,[5] however, now provides that a body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual.[6]

In the case of land under the Transfer of Land Act 1958, section 30 (2) provides that two or more persons who are registered as joint proprietors of land shall be deemed to be entitled thereto as joint tenants. Section 50 of the Act provides:

> 50. Subject to this Act upon the death of any person registered with any other person as joint proprietor of any land the Registrar, on the application of the survivor and proof to the satisfaction of the Registrar of the death, shall register the applicant as the proprietor thereof, and thereupon such survivor shall become the transferee of such land and be the registered proprietor thereof.

Thus, if A and B are registered as joint proprietors, on proof to the satisfaction of the Registrar of the death of A, B is entitled to be registered as proprietor.[7] Section 38 of the Act provides, however, that

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tenancy will be severed, not by the operation of the will, but by the agreement preceding the mutual wills and the partial performance of this agreement by their execution: *In re Wilford's Estate* (1879) 11 Ch.D. 267; *Walker v. Gaskill* [1914] P. 192; *In re Lansell, Sandhurst and Northern District Trustees etc. v. Lansell* [1934] V.L.R. 129.

[99] *In re Caire deceased* (1927) unreported; 1 *Australian Law Journal* 306.

[1] The section is not restricted to the circumstances of a common disaster; *Re Watkinson* [1952] V.L.R. 123. *Cf.* Simultaneous Deaths Act 1960 (No. 60 of 1960) W.A.; Intestates' Estate Act 1952, Part I and First Schedule (U.K.).

[2] *In re Robertson and Another* (1944) 44 S.R. (N.S.W.) 103, 105, *per* Roper J.

[3] *In re Chambers* (1925) 21 Tas. L.R. 26; Bl.Comm. ii, 184.

[4] Co.Litt. 190a; Bl.Comm. ii, 184. *In re Usines de Melle and Firmin Boinot's Patent* (1954) 91 C.L.R. 42.

[5] Initially Conveyancing Act 1915, s. 54.

[6] *In the Matter of the Transfer of Land Act 1915 and In the Matter of a Transfer from Balfour and Another to the Public Trustee (of England) and Another* [1916] V.L.R. 397.

[7] The section requires proof to the satisfaction of the Registrar of the death. For an example of an application for the presumption of the death of one joint tenant, *In re Henriksen* [1951] Q.W.N. 49. Also *In re Denis Ernest Sheedy* [1935] Q.W.N. 7. Presumably if the death was not proved to the satisfaction of the Registrar an application to the court could be made pursuant to s. 116.

on the registration of A and B as joint proprietors, the entry 'no survivorship' may be endorsed upon the Register:

> 38. (1) At the time of the registration of every grant in fee to two or more persons in joint tenancy for any public purpose the Registrar shall endorse thereon and on every subsequent certificate of title the words "no survivorship".
>
> (2) Upon the transfer of any land to two or more persons as joint proprietors with the words "no survivorship" endorsed thereon the Registrar shall enter such words in the memorandum of such transfer and also upon any certificate of title issued to such joint proprietors pursuant to such transfer.
>
> (3) Two or more joint proprietors of any land may by writing under their hands direct the Registrar to enter the words "no survivorship" upon the relevant Crown grant certificate of title or instrument.
>
> (4) After the words "no survivorship" have been endorsed or entered pursuant to this section it shall not be lawful for any persons other than the registered proprietors to transfer or otherwise deal with the land without an order of the Court or of the Registrar.
>
> (5) Before making any such order the Court or Registrar may cause notice of the intention so to do to be advertised once at least in one newspaper published in the city of Melbourne or circulating in the neighbourhood of the land, and in such notice shall appoint a time within which it shall be lawful for any person interested to show cause against such order being made.
>
> (6) The Court or Registrar may (but, where any such notice has been given, only after the expiration of the time therein appointed) give the necessary order for the transfer of the land to any new proprietor or proprietors solely or jointly with or in the place of any existing proprietor or proprietors or otherwise give effect to the dealing or make such order in the matter as is just for the protection of any persons beneficially interested in the land or in the proceeds thereof, and on such order being deposited with or made by the Registrar he shall make such entries and perform such acts for giving effect thereto as are necessary.

In *Re Robertson*[8] the Supreme Court of New South Wales considered the interpretation of a provision of New South Wales legislation essentially similar for present purposes to section 38, and held that the words 'no survivorship' were not intended to preclude the right of survivorship and so destroy the joint tenancy. The effect of such an entry, the Court held, was confined to the effect expressly stated in the statute. This seems a correct reading of the section and, applying the reasoning of the New South Wales Court to section 38 of the Transfer of Land Act 1958, if A and B are registered as joint proprietors, and the words 'no survivorship' are entered upon the Register, on the death of A, B becomes absolutely entitled to the legal estate although, pursuant to section 38 (4), it will not be lawful for him (or for anyone else) to deal with the land without an order of the Court

[8] (1944) 44 S.R. (N.S.W.) 103.

or of the Registrar. If at A's death he was also *beneficially* entitled as joint tenant with B, it seems B would be entitled to an order enabling him to deal with the land, and there appears no reason why he could not lodge an application for an order under section 38 simultaneously with an application under section 50 for registration as sole registered proprietor.[9] The object of section 38 is to protect beneficiaries upon the death of a trustee and without affecting the right of survivorship, to preclude the surviving trustee or trustees from dealing with the land without an order. In this way, for example, opportunity is given for the appointment of a new trustee.[10]

(ii) *Alienation*

At common law A could not convey to himself. Nor could he convey to himself and B, as this would result, at common law, in B taking to the exclusion of A; but this transaction can be effected by means of a use, for example if A conveys to X to the use of himself and B.[11] Further, in some circumstances it was doubtful whether A and B could convey to B alone.[12]

Presumably these rules of the common law applied to dealings between joint tenants. It is therefore considered that if A, B and C were joint tenants of the fee simple estate of Blackacre, it appears at least doubtful whether, at common law, A could transfer his interest to himself, or to himself and B, and also whether A and B could transfer their interests to B. In *Parker v. Sell*,[13] however, the Full Court of the Supreme Court of Victoria held that joint tenants could in combination grant a lease to one of their number (a transaction which, it was said, in *Napier v. Williams*, may give rise to 'serious difficulties'[14]), and further that the joint tenant-lessee would be liable on the covenants in the lease, although English authorities later decided this point to the contrary.[15]

The way, however, that A and B can at common law achieve a transference of their interests to B is for A to *release* his interest to B, although if A were to use a grant it would be interpreted as being a release, and, as disclaimer cannot be made by one joint tenant alone, a purported disclaimer executed by one joint tenant may likewise be interpreted as being a release.[16] If A wished to transfer his interest to B and C, the release would operate to extinguish A's interest and so

[9] The Registrar has power to dispense with the advertisement, s. 104 (5).
[10] P. Moerlin Fox, *The Transfer of Land Act 1954* (1957) 32.
[11] *Nelson-Hauer v. Calman* (1956) 73 W.N. (N.S.W.) 449.
[12] Cheshire, *The Modern Law of Real Property* (8th ed. 1958) 659.
[13] (1890) 16 V.L.R. 271. (1944) 17 *Australian Law Journal* 292.
[14] [1911] 1 Ch. 361, 368; Also *Rye v. Rye* [1960] 3 W.L.R. 1052.
[15] *Ellis v. Kerr* [1910] 1 Ch. 529; *Napier v. Williams* [1911] 1 Ch. 361.
[16] *Re Schar; Midland Bank Executor and Trustee Co. v. Damer* [1951] Ch. 280. Nor can one joint tenant alone surrender a term. As to whether one joint tenant can grant an option to purchase binding upon the other joint tenants, see *Snape v. Snape; London & Manchester Assurance Co. v. Same* [1959] *Current Law Yearbook* 1846.

enlarge the interests of B and C,[17] but if A wished to transfer his interest to B only, the release would not operate to extinguish the interest of A (for, as has been stated, this would enure not only in favour of B, but in favour of both B and C), its effect would be to *pass* A's interest to B.[18]

In the case of land under the Transfer of Land Act 1958, however, the Act requires that a transfer of an estate or an interest in land should be effected in accordance with the forms therein prescribed,[19] and, further, that the instrument should be registered in pursuance of the Act,[20] and is not effectual until registered.[21]

Section 72 of the Property Law Act 1958 provides:

> 72. (1) In conveyances made after the thirty-first day of December One thousand eight hundred and sixty-four personal property, including chattels real, may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person.
>
> (2) In conveyances made after the thirty-first day of January One thousand nine hundred and five, freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.
>
> (3) After the commencement of this Act a person may convey land to or vest land in himself.
>
> (4) Two or more persons (whether or not being trustees or personal representatives) may convey, and shall be deemed always to have been capable of conveying, any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party; provided that if the persons in whose favour the conveyance is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance shall be liable to be set aside.

Section 3 (1) of the Transfer of Land Act 1958 provides:

> Except so far as is expressly enacted to the contrary no Act or rule of law, so far as inconsistent with this Act, shall apply or be deemed to apply to land under the operation of this Act; but save as aforesaid any Act or rule of law relating to land, unless otherwise expressly or by necessary implication provided by this or any other Act, shall apply to land under the operation of this Act whether expressed so to apply or not.

Presumably therefore section 72 of the Property Law Act 1958 applies to land under the Transfer of Land Act 1958.

[17] *Re Schar; Midland Bank Executor and Trustee Co. v. Damer* [1951] Ch. 280.

[18] *Wright v. Gibbons* (1949) 78 C.L.R. 313, 323, 324, 331. *Ibid.* 331, Dixon J. examined in detail the rules of the common law relating to the transfer by one joint tenant of his interest to another joint tenant.

[19] S. 45 (1); *Putz v. Registrar of Titles* [1928] V.L.R. 348; *Crowley v. Templeton* (1914) 17 C.L.R. 457. [20] S. 33. [21] S. 40.

In *Rye v. Rye*:[22]

> X and Y owned the fee simple estate in certain land, as tenants in common. Y died and X brought an action for a declaration that the defendant (one of the executors of Y and also one of the registered proprietors of the fee simple estate) was not entitled to occupy any portion of the land. X alleged that he and Y had granted to themselves a tenancy of the land and that the tenancy had vested in him as survivor.

The Court of Appeal found that, on the facts, it was not established that a tenancy had been originally created. However, the Court, construing substantially similar English legislation, was of opinion that section 72 (4) enabled two persons to grant to themselves a lease of land of which they owned the freehold, although such a transaction, as a conveyancing device, was termed 'highly artificial'.[23] Further, that notwithstanding the definition of 'conveyance' in section 18 (1),[24] such a tenancy could be created by parol pursuant to section 54 (2) of the Property Law Act 1958,[25] as that definition was not in terms exclusive or exhaustive.[26] In *Rye v. Rye*[27] the Court was concerned with a tenancy in common, but there is nothing in the case to so restrict it, and section 72 (4), and the other sub-sections of section 72, appear clearly wide enough to apply to both joint tenancies and tenancies in common. Referring, therefore, to the above example of A, B and C being joint tenants of the fee simple estate of Blackacre (and remembering that in section 18 (1) 'convey' is defined to include 'lease'), it is considered that A can, pursuant to section 72 (3) vest his interest in himself: for example, grant to himself a lease. Pursuant to section 72 (2), it is considered that A can transfer his interest to A and B and may thereby create a joint tenancy; or that A can lease his interest to A and B, section 82 of the Property Law Act 1958 enabling B to enforce A's covenants.[28] Further, pursuant to section 72 (4), A

[22] [1960] 3 W.L.R. 1052. But *cf. Thomson v. Nicholson* [1939] V.L.R. 157, on the construction of 'conveyance' in Property Law Act 1928, s. 172. But now see Property Law (Amendment) Act 1959, s. 2. [23] *Ibid.* 1057, *per* Lord Evershed M.R.

[24] S. 18 (1): 'In this Part unless inconsistent with the context or subject matter— . . . "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, disclaimer, release, surrender, extinguishment and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; . . .'.

[25] S. 54 (2): 'Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.'

[26] Also the judgment of Harman L.J. in *Rye v. Rye* [1960] 3 W.L.R. 1052.

[27] [1960] 3 W.L.R. 1052.

[28] 82. (1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

(2) This section shall apply to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other

and B can transfer, or lease, their interest to B. Thus, it follows that if A, B and C are three joint tenants, there are two methods by which A can transfer his interest to B; either he can release his interest to B, or, alternatively, A and B can convey their interests to B pursuant to section 72 (4).[29] Section 72 (4) does not, however, appear to enable A alone to convey his interest to B, as the sub-section requires a conveyance by two or more persons.

Whether the transactions above discussed operate to determine a joint tenancy and to create a tenancy in common is considered below.

(iii) *Death Duties*

On the death of a joint tenant, as has been stated, it is not a question of the survivor succeeding to his interest by devolution; the survivor becomes the sole owner, his interest naturally and necessarily becoming enlarged,[30] the effect of death being merely that the land is discharged from the control of the deceased joint tenant.[31] As death duties are in general assessed on the estate of a deceased, and as a joint tenancy would not, therefore, form part of such estate, both the Commonwealth Estate Duty Assessment Act 1914-1957 and the Victorian Administration and Probate Act 1958 provide that the beneficial interest held by a deceased immediately prior to his death as a joint tenant shall, for the purposes of the particular legislation, be deemed to form part of the estate of the deceased.[32] The Victorian legislation excludes from the 'deemed' provisions the house and curtilage of the matrimonial home of the deceased, and there is no requirement that the joint tenancy must necessarily have existed between husband and wife: where, however, the matrimonial home is comprised in any property which is also used for other purposes, only the part of the property that was used principally for the purpose of the matrimonial home is to be so excluded.[33] Section 18A of the Commonwealth Act contains statutory exemptions from duty and provides for certain deductions, *inter alia,* where the estate passes by right of survivorship to the widow, children or grandchildren of the deceased.[34]

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persons, but without prejudice to any order of the Court made before such commencement.

For the position at common law see *Ellis v. Kerr* [1910] 1 Ch. 529; *Napier v. Williams* [1911] 1 Ch. 361. But see, *Parker v. Sell* (1890) 16 V.L.R. 271, discussed *infra.* Also *Ridley v. Lee* [1935] Ch. 591.

[29] *Nelson-Hauer v. Calman* (1956) 73 W.N. (N.S.W.) 449—s. 24 Conveyancing Act 1919-1954 (N.S.W.)—tenancy in common.

[30] *Earl of Zetland v. Lord Advocate* (1878) 3 App. Cas. 505, 516.

[31] S. 114 of the Administration and Probate Act 1958 precludes dealings with, *inter alia,* shares of the deceased, including shares standing in the name of the deceased jointly with another, without a certificate of the Commissioner; also s. 123. Also Estate Duty Assessment Act *1914-1957,* s. 34 (Cth).

[32] Estate Duty Assessment Act 1914-1957, s. 8 (4) (d) (Cth); Administration and Probate Act 1958, s. 104 (1) (e).

[33] Administration and Probate Act 1958, s. 104 (1) (e).

[34] S. 3 of the Act, the definition section.

It is only the beneficial interest of the deceased that is deemed to be part of his estate; therefore, duty is assessed not upon the whole value of the property, but only upon this beneficial interest.[35]

In general terms, and subject to the detailed provisions of the Acts, it may be said that both the Victorian and the Commonwealth legislation provide that duty is to be recoverable as a debt due to the Crown,[36] and is payable out of the estate by the personal representatives.[37] Where there are no personal representatives, section 34 (3) (d) of the Commonwealth Act provides, *inter alia*, that the surviving joint tenants shall be jointly liable to pay the duty and shall each be liable for the whole, but also confers upon the surviving joint tenants rights of contribution, *inter se*. Section 111 of the Administration and Probate Act 1958 enables the Commissioner to apply to a judge of the Court in chambers in the manner therein specified, where after the expiry of three months from his death, probate of the will or letters of administration of the estate of a deceased person has not or have not been granted or sealed, and the Commissioner has reason to believe that duty would be payable in respect of the real or personal estate of such deceased person.

The question may arise whether a personal representative who has paid duty can recover this duty from the surviving joint tenants. Section 122 of the Administration and Probate Act 1958 contains provisions enabling a personal representative to recover duty paid on any 'notional estate', as defined in the section. Section 122 (2) provides that the section shall apply unless there is a will in which a contrary intention appears.[38] Section 122 (3) provides:

> Where duty on any notional estate has become payable by the executor or administrator, he may recover the amount of the duty on that notional estate from the person to whom that notional estate passed or may retain or deduct the amount out of or from any moneys in his hands belonging to that person.

Section 35 of the Estate Duty Assessment Act 1914-1957 (Cth) provides for the apportionment of duty among the beneficiaries:[39]

[35] *Fadden v. Deputy Federal Commissioner of Taxation* (1943) 68 C.L.R. 76, interpreting earlier Commonwealth legislation; *English Scottish and Australian Bank Ltd v. Commonwealth* (1959) 33 A.L.J.R. 326.

[36] Estate Duty Assessment Act 1914-1957, s. 32 (Cth); Administration and Probate Act 1958, s. 120.

[37] Estate Duty Assessment Act 1914-1957, s. 29 (Cth)—also ss. 34, 35A, 36; Administration and Probate Act 1958, ss. 120, 121. *In the Will and Estate of Cookes* [1960] V.R. 219; *In re Jaeger* [1961] V.R. 14.

[38] *Re Joseph deceased* [1960] V.R. 550; *Re Hoppe deceased* [1961] V.R. 381, and the authorities in both cases discussed. S. 35A of the Commonwealth Act, discussed *infra*, contains no provision analogous to s. 122 (2) of the Victorian Act; but it appears that the absence of such a provision will not preclude the courts from giving effect to the intention of the testator. *Re Joseph deceased* [1960] V.R. 550, and *Re Hoppe deceased* [1961] V.R. 381.

[39] *Inter alia, Re Johnson deceased* [1953] V.L.R. 719; *In re Hall; Roberts v. Hall* [1955] Tas. L.R. 118; *Re Joseph deceased; Joseph v. Equity Trustees Executors and Agency Co. Ltd* [1960] V.R. 550; *Re Hoppe deceased* [1961] V.R. 381.

> Subject to any different disposition made by a testator in his will, the duty payable in respect of an estate, exclusive of so much of the estate as is exempt from estate duty by sub-section (5) of section eight of this Act, shall be apportioned by the administrator among the persons beneficially entitled to the estate in the following manner—
> (a) The duty shall in the first instance be apportioned among all the beneficiaries in proportion to the value of their interests; and
> (b) Where there are any beneficiaries under the will each of whom takes only specific bequests or devises of a value not exceeding Two hundred pounds the duty which under paragraph (a) of this section would be payable in respect of the interests of those beneficiaries shall be apportioned among all the beneficiaries in proportion to the value of their interests:
> Provided that for the purposes of the foregoing provisions of this section, the value of the interests of the widow or widower, children or grandchildren shall be reduced by an amount ascertained in accordance with the provisions of sub-paragraph (i) of paragraph (c) of sub-section (1) of section eighteen A of this Act.

There is no doubt that the interest held by a deceased immediately prior to his death in a joint tenancy comes within the definition of 'notional estate' and 'estate' in the above provisions of the Victorian and Commonwealth legislation respectively. Further there is no doubt that as a practical consequence of the death, benefits do accrue to the survivor, as the interest of the deceased is extinguished. But there is a question whether such an interest, in fact, comes within these provisions.[40] Section 122 (3) of the Administration and Probate Act 1958 provides that a personal representative can recover the amount of the duty from the person to whom the notional estate *passed*, whereas, in actuality, no interest passes but the interests of the surviving joint tenants are merely enlarged. Section 35 of the Estate Duty Assessment Act 1914-1957 (Cth) provides that the apportionment shall be made among the persons *beneficially entitled* and that the duty shall, in the first instance, be apportioned among all the *beneficiaries* in proportion to the value of their interests. In *Re Joseph deceased*[41] the court held that 'beneficiaries' must include those who *take* the notional property and so include a surviving joint tenant. For the reason discussed above, however, to term a surviving joint tenant a beneficiary seems an inappropriate choice of terms; and to enable the apportionment of duty seems an inappropriate procedure when what is required is the right to *recover* the duty from the surviving joint tenants. This view seems to be confirmed by section 35A which contains special provisions to deal with the apportionment of duty in relation to property which passed from the deceased by gift *inter vivos* or settlement, and which also enables the personal representa-

[40] *Cf.* the provisions of the United Kingdom legislation; see generally, *Hanson's Death Duties* (10th ed. 1956), 488 ff.
[41] [1960] V.R. 551, 571.

tives to recover duty assessed in respect of that property as a debt due and payable by the person to whom such property has passed (a term appropriate to the type of property here in issue) or to retain or deduct that amount out of or from any moneys in his hands payable to that person.

Section 36 of the Commonwealth Act provides, in general, that the Commissioner may, if he thinks fit, either of his own motion or at the request of any person to whom any estate has passed on the death of another person, or of any person claiming in his right, accept or cause to be made a separate assessment of duty payable in respect of the interest of such person; further, that the duty so separately assessed shall be charged solely upon the separate estate. Again, however, the section uses the language of an estate *passing* on death.

In *In re Cummings Estate; Cuthbert v. Cummings and Others*:[42]

> A, B and C were held to be three joint tenants of, *inter alia,* certain land. A died and her executor paid both State and Federal duty assessed in respect of the land. A's will contained no provision concerning the payment of duty, and the question before the court was whether the incident of duty should fall upon the estate or whether the duty should be apportioned between B and C, the surviving joint tenants.

The court held, construing similar, though by no means identical,[43] Tasmanian legislation, and the then subsisting Commonwealth legislation, that the duty should be apportioned against B and C, the surviving joint tenants.

In 1960, in *Re Joseph deceased,*[44] the Victorian Supreme Court held that section 122 (3) of the Administration and Probate Act 1958 enabled executors to recover an appropriate amount of duty from the surviving joint tenant, and that section 35 of the Estate Duty Assessment Act 1914-1957 (Cth) would apply. From the report, however, it appears that the question before the Court was only whether a clause in the testator's will expressed a 'contrary intention' within the meaning of these sections, and not whether the sections were in any event applicable to joint tenancies.

In *In re Cummings Estate,* after citing *In the Will of Harper deceased; Harper v. Harper*[45] and *Perpetual Trustee Co. Ltd v. Adams,*[46] Morris A.-C. J. stated:[47]

> These cases established that under sec. 35 the duty is to be apportioned among the persons entitled to the notional estate as well as those entitled to the testamentary estate in proportion to the value of their

[42] (1939) 34 Tas. L.R. 77.
[43] *Inter alia, Estate Duty Assessment Act* 1914-1928, s. 22, (Tas.).
[44] [1960] V.R. 550.
[45] [1922] V.L.R. 512.
[46] [1924] S.R. (N.S.W.) 87; *English Scottish and Australian Bank Ltd v. Commonwealth* (1959) 33 A.L.J.R. 326.
[47] (1939) 34 Tas. L.R. 77, 81.

> interests, but that the executor has no right *"in personam"* against any person in respect of the duty on the notional estate, and no statutory charge; his right being limited to a right after paying the duty to obtain the benefit of the charge given to the Crown and so secure practical indemnification.

The reference in the judgment to the charge given to the Crown is a reference to section 34 of the Estate Duty Assessment Act 1914-1957 (Cth):

> (1) The duty assessed under this Act shall be a first charge upon the estate in priority over all other encumbrances whatever, and there shall not be any disposition of the estate or any part of it until the duty thereon has been paid or the Commissioner, the Assistant Commissioner or a Deputy Commissioner certifies that he holds security for payment of the duty sufficient to permit any specified part of the estate to be disposed of.
> (2) Any person who disposes of any estate or part of it in contravention of this section shall, without prejudice to the recovery of the duty by any other means, be personally liable for the duty.

Section 122 (4) of the Administration and Probate Act 1958 contains a similar provision in favour of a personal representative:

> Upon the application of the executor or administrator, the Court may make an order declaring that he shall have a charge, with a power of sale, over any notional estate for the amount of the duty paid or payable by him on that notional estate, and for the costs and expenses of obtaining the order and of any subsequent proceedings for enforcing the charge and of any subsequent sale.

In *English Scottish and Australian Bank Ltd v. Commonwealth*,[48] the High Court recently held that the expression 'the estate' in section 34 of the Commonwealth Act bears a meaning derived from the provisions of section 8 (3) and (4) thereof, and so clearly can be construed to include the beneficial interest held by a deceased immediately prior to his death as a joint tenant; the expression 'notional estate' in section 122 (4) of the Victorian Act can be likewise construed. But with regard to both, section 122 (4) of the Administration and Probate Act 1958 and section 34 of the Estate Duty Assessment Act 1914-1957 (Cth), it is difficult to appreciate how a charge can be created against this beneficial interest as it is extinguished upon the death of the former joint tenant: unless, possibly, it is, for this purpose, to be deemed to be notionally still existing.

In any event, it appears that under the Commonwealth Act the rights of personal representatives may be defeated by the surviving joint tenant disposing of the property to a *bona fide* purchaser for value of the legal estate because they have no right *in personam* against the surviving joint tenant, and further, cannot deduct the

[48] (1959) 33 A.L.J.R. 326.

amount of the duty from benefits coming to the surviving joint tenant directly under the will. However, if there is such a disposition, if the surviving joint tenant is also a personal representative, he will, presumably, as personal representative, be accountable to the estate for the value of the right so lost.[49]

In 1928[50] the present section 35A was inserted into the Commonwealth Act. This section, as has been stated, deals specifically with property which passed from the deceased by gift *inter vivos* or settlement. The present legislative provisions seem to reflect an imperfect apprehension of the concept of the joint tenancy and a like, appropriate, amendment in both the State and the Commonwealth Acts dealing specifically with joint tenancies could put matters beyond doubt.

B. Tenancy by Entireties

At common law, for many purposes, a husband and wife were regarded as but one person. One effect of this proposition was that if land were conveyed to husband and wife in such a manner that, if they were not married they would take as joint tenants, they took as tenants by entireties.[51] Tenancy by entireties has been described as[52] '. . . the most intimate union of ownership known to the law'. It was a species of joint tenancy applicable only between husband and wife, differing only in that neither spouse could sever the tenancy,[53] thus rendering it unnecessary in circumstances where there existed no evidence of severance to determine whether a joint tenancy or a tenancy by entireties existed.[54]

Married Women's Property legislation was introduced into Victoria by the Married Women's Property Act 1870 which came into operation on 1 January 1871. Sections 3 and 4 of this Act provided:

> 3. Every woman who marries after this Act has come into operation shall notwithstanding her coverture hold all real estate whether belonging to her before marriage or acquired by her in any way after marriage free from the debts and obligations of her husband and from his control and disposition in all respects as if she had continued unmarried.
> 4. Every woman married before this Act has come into operation shall notwithstanding her coverture hold all the real estate her right to which shall arise after this Act shall have come into operation free from the debts and obligations of her husband and from his control or disposition in all respects as if she had continued unmarried, but

[49] *In re Joseph deceased; Joseph v. Equity Trustees Executors and Agency Co. Ltd* [1960] V.R. 550, 570-572, where this problem is fully discussed by Sholl J.
[50] Estate Duty Assessment Act 1928, s. 14 (Cth).
[51] Litt. s. 291; Bl.Comm, ii, 182.
[52] *Challis's Law of Real Property* (3rd ed. 1911), 376, where tenancy by entireties is more fully discussed.
[53] *Registrar-General of N.S.W. v. Wood* (1926) 39 C.L.R. 46; Bl.Comm. ii, 182, where husband and wife are said to be seised *'per tout et non per my'*.
[54] *Queensland Trustees Limited v. Concanon* [1910] St. R. Qd. 162.

> nothing herein contained shall exempt any such property from the operation of any settlement or covenant to which it would have been subject if this Act had not passed or shall prejudice any right or interest to which her husband or any person claiming through him may be entitled at the date at which this Act comes into operation.

In 1884 the Married Women's Property Act 1884 was enacted being based, in substance, upon the English Married Women's Property Act 1882. Section 3 of the Act of 1884 repealed the statute of 1870, but provided, *inter alia,* that such repeal should not affect any act done or right acquired while such statute was in force. Sections 5 and 8 of the Act of 1884 provided:

> 5. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage, including any savings made by her and including any wages earnings money and property gained or acquired by her in any employment trade or occupation in which she is engaged or which she carries on separately from her husband, or by the exercise of any literary artistic or scientific skill.
>
> 8. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent and whether in possession reversion or remainder, shall have accrued before or which shall accrue after the commencement of this Act, including any savings wages earnings money and property so gained or acquired by her as aforesaid.

It should be noted that Section 8 went further than comparable English legislation[55] in applying to property the title to which *should have accrued before* or which should accrue after the commencement of the Act.[56]

In *The Registrar-General of N.S.W. v. Wood*[57] land was conveyed after the commencement of the Married Women's Property Act 1901 (N.S.W.) to a husband and wife in fee simple as tenants by entireties. The majority of the High Court[58] held that notwithstanding the express limitation to the parties as tenants by entireties, they took as joint tenants. Rich J. stated:[59]

[55] Married Women's Property Act 1882, 45 & 46 Vict. ch. 75, s. 5.

[56] But see Real Property Statute 1864 Part IV repealed by Property Law Act 1928. And see *Hutchins v. Cunningham* (1871) 2 V.R. (L.) 236; *In the Will of Hopkins deceased* (1885) 12 V.L.R. 285; *Thomas v. Ormond* (1889) 15 V.L.R. 365; *Oliver v. Glossop* (1889) 15 V.L.R. 805. The Marriage (Property) Act 1956—now s. 157 of the Marriage Act 1958—removed the language of 'separate property' and provided, in general, that the property of a married woman should belong to her in all respects as if she were a *feme sole.*

[57] (1926) 39 C.L.R. 46. As to the Territory of New Guinea, see *Booth v. Booth* (1935) 53 C.L.R. 1.

[58] Isaacs, Rich and Starke JJ. (Knox C.J. and Higgins J. dissenting). The issue in this case was, however, complicated by other legislation.

[59] (1926) 39 C.L.R. 46, 62; *The Mercantile Bank of Australia Limited v. Dinwoodie* (1902) 28 V.L.R. 491.

> In respect of estates and interests acquired during coverture after the commencement of the Married Women's Property Act, it is enacted that the wife is entitled to hold and dispose of all property as her separate property. If this provision applies to an estate which otherwise would be held by tenancy by entireties it operates to destroy its essential characteristic. The wife is to take a separate right of property and is to have a power of alienation which must in addition involve severance. Moreover, the wife is to be capable of acquiring, holding and disposing of real and personal property as a feme sole. Her incapacity as a separate person to hold a separate right was the ground of the unity of property necessary to co-ownership in entireties. There can be no doubt that these provisions apply to all property without exception. The legislation known as the *Married Women's Property Act* is therefore inconsistent with the creation of tenancy by entireties and any attempt to convey or transfer such an estate results in the assurance of a joint tenancy to the spouses.

It appears, therefore, by virtue of the Act of 1870, it has not been possible since 1 January 1871 to create a tenancy by entireties in Victoria;[60] further, it is considered, that by virtue of the comprehensive provisions of the Act of 1884, any such tenancies existing at 13 December 1884 were thereupon converted into joint tenancies.[61]

The Rule in Re Jupp

The common identity of husband and wife produced a further effect. If property was conveyed to a husband and wife and to a stranger, the husband and wife, being but one person, took one half, the other going to the stranger.[62] This rule was, however, a rule of construction and not of law, and could be defeated by an indication, however slight, that each (that is, the husband and the wife and the stranger) should take separately.[63]

The Act of 1884 did not affect this rule of construction,[64] which remained until 1914 when it was abrogated by statute,[65] the present provision being section 21 of the Property Law Act 1958:

> S. 21. A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the twenty-eighth day of September One thousand nine hundred and fourteen, be treated as two persons.

C. Tenancy in Common

Apart from the unlikely existence of coparcenary, it may today be

[60] For a contrary view of the effect of similar legislation see *Campbell v. Sovereign Securities and Holding Co. Ltd* (1958) 13 D.L.R. (2d) 195, 201, *per* Stewart J., 'It must always be remembered, however, that the *Married Women's Property Act*, was enacted in order to give rights to and protect the interests of the wife and that it therefore should not be construed as taking any rights away unless the Act clearly says so.'

[61] The English Married Women's Property Act did not affect existing tenancies by entireties. Megarry and Wade, *The Law of Real Property*, (2nd ed. 1959), 433.

[62] *In re Jupp; Jupp v. Buckwell* (1888) 39 Ch. D. 148; *Ray v. Maloney* (1894) 15 L.R. (N.S.W.) Eq. 79.

[63] *Dias v. De Livera* (1879) 5 App. Cas. 123.

[64] *Registrar-General for N.S.W. v. Wood* (1926) 39 C.L.R. 46, 53.

[65] Real Property Act 1914.

said that if two or more persons hold an estate as co-owners, and are not joint tenants, they are necessarily tenants in common. Tenancy in common is a seemingly curious blend of co-ownership and several ownership. Each tenant in common is entitled to the possession of the whole of the land,[66] and yet, unlike a joint tenant, is entitled only to a distinct share thereof, a combination of concepts possible only because the physical boundaries of his share, called an undivided share, have not yet been determined.[67]

This entitlement to only an undivided share is the basis of tenancy in common. As a result, the appropriate method of transfer by one tenant in common of his interest to another has always been by way of conveyance. Further, as stated above, section 72 of the Property Law Act 1958 applies to tenants in common as well as to joint tenants. Moreover this separate entitlement precludes the difficulties in relation to the apportionment of death duties between joint tenants from applying to tenants in common.

In a tenancy in common, unity of possession must exist (for if this unity does not exist, co-ownership itself does not exist), but it is fortuitous whether, as a result of tenancy in common, all four unities are created. All may be present, the tenancy not being joint because of the existence of other circumstances;[68] or one or all of the unities of interest, title or time may be absent. For example:

> A conveys Blackacre to B and C, B to take one-third thereof and C the remaining two-thirds.
> A conveys Blackacre to B and C, B to take a life interest and C an estate in fee simple.

In both examples B and C take as tenants in common as there is no unity of interest.[69]

> A conveys Blackacre to X for life, remainder to B at twenty-one and C at twenty-one. In 1958 B attains the age of twenty-one; in 1959 C attains the age of twenty-one; in 1960 X dies.

B and C take as tenants in common for their interests vested at different times.[70]

> B and C are joint tenants. B conveys his interest to D.

C and D take as tenants in common as each derived title from a different disposition; further, each acquired his interest at a different time.[71]

[66] Co.Litt. 189a; Bl.Comm. ii, 191; *Bull v. Bull* [1955] 1 Q.B. 234.
[67] Bl.Comm. ii, 194.
[68] Discussed in next issue.
[69] Bl.Comm. ii, 191.
[70] Limitations contained in a conveyance to uses or in a will provided an exception to this requirement. See p. 151.
[71] *Ibid.*

A tenant in common may deal with his undivided share as he wishes. In the case of land under the Transfer of Land Act 1958, section 30 (2) provides that in all cases where two or more persons are entitled as tenants in common to undivided shares of or in any land, such persons may receive one certificate for the entirety or separate certificates for the undivided shares. A tenant in common may alienate his undivided share *inter vivos*, and, as will be discussed later, the undivided share may itself become the subject matter of co-ownership.[72] The right to survivorship, a vital characteristic of a joint tenancy, does not apply as upon the death of a tenant in common his undivided share will pass under his will or to the persons entitled upon his intestacy.[73] The benefit of survivorship may, however, be expressly attached to the estate at the time of the creation of the tenancy in common.[74]

D. Coparcenary

At common law two factors were necessary for the creation of coparcenary. Firstly, that land descended upon an intestacy to the heir, and secondly, that the intestate left no male heir but only females, who together constituted the heir. In the combination of these circumstances, the females all took together as coparceners.

Descent to the heir was abolished in Victoria, in general, in 1864,[75] and no Australian case is known where coparcenary has been discussed. It seems, therefore, sufficient to say that coparcenary was a hybrid form of co-ownership, falling somewhere between joint tenancy and tenancy in common. It resembled a joint tenancy in that, as its creation depended upon descent upon intestacy, usually though not necessarily, the four unities were present. It seemed to resemble tenancy in common more closely in that each coparcener was entitled to a distinct and undivided share, equal or unequal, and also in that as a result of this entitlement the right of survivorship did not apply.[76]

It should be noted that it is still possible for coparcenary to come into existence under Victorian law. Coparcenary may so occur upon the death of a tenant in tail who dies, without barring the entail, leaving no male heir and more than one female descendant in the same degree. This event is, however, unlikely, in that it has not been possible to create an entail by an instrument coming into operation after 18 December 1885, and further, sections 251 and 252 of the Property Law Act 1958 confer upon a tenant in tail wide powers of alienation, testamentary and *inter vivos* respectively.

[72] *Moisley v. Mahony* [1950] V.L.R. 318.
[73] Bl.Comm. ii, 194.
[74] *Haddelsey v. Adams* (1856) 22 Beav. 266.
[75] Generally, Voumard, *The Sale of Land* (1939) 403 ff.
[76] *Challis's Law of Real Property*, (3rd ed. 1911) 373, where coparcenary is more fully discussed.

Section 130 of the Property Law Act 1958 (initially section 130 of the Property Law Act 1928) abolishes the Rule in *Shelley's Case*[77] and provides, in effect, that where an interest in any property is expressed to be given to the heir or heirs of any person, such words shall operate as words of purchase and not of limitation, and that the same person or persons shall take as would in the case of freehold land have answered that description under the general law formerly in force.[78] It is not, however, considered that coparcenary may arise in such circumstances, as the section provides that the persons therein described take by *purchase* and it appears that for coparcenary to be created the common law required *descent* to the heir. In *Berens v. Fellows,* Kay J., construing a limitation in a settlement to, *inter alia,* 'the right heirs' of a person who died leaving three sisters and five daughters of a deceased sister, stated:[79]

> The first question is whether his heirs take as *personae designatae* or as co-parceners. Littleton (sec. 254) states the law thus: 'None are called parceners by the common law but females or the heirs of females which come to lands or tenements by descent, for, if sisters purchase lands or tenements, of this they are called joint tenants and not parceners.' Lord Coke's commentary on this is, 'This needs no explanation.' Of course 'purchase' in that section does not mean 'buy', but 'take by purchase' in contradistinction to 'taking by descent'. No authority has been cited which in the least degree contravenes or throws doubt upon this statement of the law.

(To be continued)

[77] (1581) 1 Co. Rep. 88b. For a discussion of this rule see Megarry and Wade, *The Law of Real Property,* (2nd ed. 1959) 60.
[78] Property Law Act 1958, Part V—Inheritance.
[79] (1887) 3 T.L.R. 425.