CO-OWNERSHIP UNDER VICTORIAN LAND LAW

By D. MENDES DA COSTA*

PART III[1]

IV. SEVERANCE OF A JOINT TENANCY

If a joint tenancy is severed it is destroyed. But co-ownership still continues, for severance is the process by which a joint tenancy is converted into a tenancy in common. Severance may occur in equity though not at law, because the formalities required by the law have not been observed: for example, no deed has been executed.[2] These statements cause no difficulty. But some observations of a general nature may be made.

In *Power v. Grace,* a decision of the Ontario Court of Appeal, Grant J.A. stated:[3]

> It is elementary law that the destruction of any one of the four unities of joint-tenancy, namely, possession, interest, title or time, will terminate the tenancy and therewith the right of survivorship. To the continued existence of this right, the maintenance of these unities is essential.

This is a clear judicial statement of basic principles. It may be noted that a severance will not occur if the unity of possession is destroyed, for if this unity is absent so also is co-ownership. But the question which presents itself is: cannot a joint tenancy be severed, at least in equity, notwithstanding the continuance of the four unities? It is clear that a grantor, by the addition of words of severance, can create a tenancy in common notwithstanding the presence of all the unities. It is appreciated that there is a distinct difference between the *creation* of a joint tenancy and its *severance.* But is this difference in all respects vital? Is it absolutely clear that, for example, in the case of a severance by agreement between the joint tenants, this kind of severance rests entirely on the destruction of a unity and is utterly divorced from intention? Further, there is some uncertainty as to the nature of the act necessary to destroy the unity of interest. Challis stated:[4]

> But in order that a grant by one joint tenant may bind his fellows, it must be the grant of an estate, and not the grant of a mere encum-

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[1] This is the final part of this article. Parts I and II appear pp. 137, 306 *supra.*

[2] *Goddard v. Lewis* (1909) 101 L.T. 528.

[3] [1932] 2 D.L.R. 793, 795-796: affirming [1932] 1 D.L.R. 801.

[4] *Law of Real Property* (3rd ed. 1911) 367.

> brance or burden on the estate, such as a rent-charge or a right of common; for it is the maxim of the law, that although *alienato rei praefertur juri accrescendi,* yet *jus accrescendi praefertur oneribus.* Co. Litt. 185a.

A distinction is therefore drawn between a mere encumbrance or charge, which will not effect a severance, and the grant of an estate which will have this result. But what is a mere encumbrance or charge? Is, for example, the grant of a lease by a tenant in fee the grant of an estate? Different opinions have been expressed, and this topic is discussed below.[5] Also, most of the principles applicable to severance were settled by the time of Littleton and of Coke. This, by itself, may well be unobjectionable as it leads to certainty. But the great danger arises, it is considered, when these ancient rules of law are without question applied, out of their context, to the solution of a modern issue. An excellent example of this seems to be the effect of a mortgage by one joint tenant of his interest in land under the Transfer of Land Act 1958 and this issue is mentioned later.[6]

The principles here discussed are applicable to land under the Transfer of Land Act 1958 save that the legal estate of land under the Act can only be severed by the registration of a transfer in the statutory form.[7] But in the case of a dealing for value, then even in the absence of such registration a severance may occur in *equity.* As stated by Dixon J. in *Brunker v. Perpetual Trustee Co. Ltd*[8]

> A transfer for value may before registration confer upon the transferee an equitable estate or interest. But it does so, not because it is a transfer, but because the transferee has given value for the land, and because, notwithstanding that the instrument is a memorandum of transfer, it may, as a writing, suffice to satisfy the requirements of the Statute of Frauds and so place the transferee in the position of a purchaser who is entitled to specific performance of his contract and has paid his purchase money.

Severance of a joint tenancy may occur either by act of law or by act of party.

A. Act of Law

This may occur either by operation of statute or public policy, but it is not the usual method of severance.

[5] See p. 454 *infra.* [6] See p. 447 *infra.*

[7] *Wright v. Gibbons* (1949) 78 C.L.R. 313, 324, *per* Latham C.J.: 'The *Real Property Act* does not alter the law with respect to joint tenancy. It leaves the incidents of joint tenancy standing as they are determined by the common law and any other relevant statute. But it requires that documents transferring interests in land under the Act should be in a particular form and should be registered: ss. 42, 39.' Generally, Part IV, Transfer of Land Act 1958. See p. 157 *supra.*

[8] (1937) 57 C.L.R. 555, 599. Also *Wright v. Gibbons* (1949) 78 C.L.R. 313, 327. Also see pp. 317n., 68 *supra.*

(i) *By statute*

Upon the happening of specified events, statute may provide that the interest of a joint tenant is transferred to another. In this event the joint tenancy will be severed as 'it makes no difference, in regarding the severance of the jointure, whether one joint tenant has conveyed away his own share in his lifetime, or whether the law has done it for him'.[9] For example, section 60 (1) of the Commonwealth Bankruptcy Act 1924-1950 provides, *inter alia,* that upon sequestration the property of the bankrupt shall vest in the official receiver named in the order.

(ii) *Public policy*

In *In re Barrowcliff; Elder's Trustee and Executor Company Ltd v. Kenny and Others*:[10]

> H and W were joint tenants of real and personal property. H murdered W.

Upon the hearing of an originating summons the Supreme Court of South Australia was asked to determine the destination of the joint property, and held that the interest held by W immediately prior to her death, as a joint tenant, passed upon her death as though she had died a tenant in common. The Court stated that the same principles were applicable to preclude H from taking the entirety by survivorship as operated in analogous circumstances in cases of testate and intestate succession:[11] that it would be extraordinary if the same considerations of public policy held by the courts to be capable of controlling the operation of the Statute law providing for intestate succession should be found incapable of moulding the rights conferred by the common law which arise for the first time, and which fall to be determined by public policy.[12] The Court stated:

> In default of any authority to the contrary, I must find some means of giving effect to the rule laid down in *Cleaver's Case* and I think that either of two explanations may be given. It may be said that this is an exception to the right of survivorship, or that the unlawful homicide

[9] *Paten v. Cribb* [1861] 1 Q.S.C.R. 40, 41.

[10] [1927] S.A.S.R. 147. See Toohey, 'Killing the Goose that Lays the Golden Eggs' (1958) 32 *Australian Law Journal* 14, 18.

[11] Generally, *Re Jane Tucker Deceased* (1921) 38 W.N. (N.S.W.) 28; *Re Sangal Deceased; Perpetual Executors and Trustees Association of Australia Ltd v. House* [1921] V.L.R. 355. Also *Helton v. Allen* (1940) 63 C.L.R. 691.

[12] But see *re Pupkowski* [1956] 6 D.L.R. 2d 427, 429, *per* MacFarlane J.: 'Somewhat similar problems have arisen in connection with the right of a person who brings about the death of another to take a benefit under the will of the person killed, or upon an intestacy and there are some cases which deal with the right of an insane person in such circumstances. I do not think these cases are in point here because the succession claimed here does not fall within either of the categories mentioned nor has the sanity or insanity of the husband at the time of the killing been adjudicated upon.'

of one joint tenant by the other effects a severance of the joint tenancy.[13]

Apart from any question of public policy, it seems clear that an act such as murder is repugnant to the inherent nature of a joint tenancy. The right of survivorship is based upon mutuality,[14] which is satisfied by the fact that, in the natural course of events, there is no *certainty*[15] as to who should die first. The murder of one joint tenant by another does violence to this requirement of mutuality, as it is an attempt by one to artificially determine this uncertainty in his favour. This has been well put by the Supreme Court of British Columbia in *Re Pupkowski,* where MacFarlane J., although not being called upon to decide the present issue, stated:[16]

> Now it is quite true that one of the incidents of a joint tenancy is the *jus accrescendi* which the survivor enjoys upon the death of the other but I think it is entirely contrary to the inherent conception of a joint tenancy that one joint tenant can defeat the right of the other or bring into being the *jus accrescendi* by his own act.

As to the first explanation stated in the judgment in *Barrowcliff's Case,* it seems incorrect to say that there can be an *exception* to the right of survivorship. Upon the death of one joint tenant his interest is extinguished: the interest of the other, which was acquired not by the death but by the instrument creating the joint tenancy, is correspondingly enlarged.[17] To preclude this result would require not a negative proposition that the right of survivorship does not operate, but a positive principle that in such circumstances an interest corresponding in *quantum* to the deceased joint tenant's interest is to be taken from the survivor and disposed of elsewhere.

The latter explanation, therefore, appears to be preferable, namely that, by operation of law, and as a matter of public policy, the joint tenancy was severed by the murder. It could also be suggested that severance occurs not necessarily as a result of public policy, but because murder and a joint tenancy are so fundamentally inconsistent that they cannot co-exist. Either reasoning, however, creates a difficulty in conceptual analysis, as the act of murder and the death correspond in point of time,[18] leaving no apparent interval in which severance can operate. While it would be most obnoxious to permit such considerations to fly in the face of justice, it may be asked whether there is not an alternative solution which fits in more comfortably with the notion of a joint tenancy.

Difficulties of the above nature have forced some American juris-

[13] [1927] S.A.S.R. 147, 151.
[14] For which reason the common law precluded a corporation from being a joint tenant; see p. 154 *supra.*
[15] *In re Chambers* (1925) 21 Tas. L.R. 26.
[16] [1956] 6 D.L.R. 2d 427, 430.
[17] See p. 153 *supra.*
[18] A joint tenancy cannot be severed by will: see p. 153 *supra.*

dictions to hold that the wrong-doer acquires the entire estate notwithstanding the murder.[19] But there is no consistency and the attitudes of other American courts have ranged from holding that the survivor acquires less than the entire estate[20] to holding that he takes nothing sacrificing all his initial interest in the property.[21] And in some instances the courts have been influenced by disinheritance statutes which dealt specifically only with wills and intestacies.[22] But the modern American view which perhaps appears most favoured is that the interest of the deceased is extinguished, that the interest of the survivor is correspondingly enlarged, but that equity impresses a constructive trust upon the interest of the survivor for the benefit of the deceased's estate. This view has much to commend it though there is no agreement as to the *extent* of this trust. Of the varying views put forward, one is that the survivor remains entitled to the enjoyment of the property for his life, but, subject thereto, is a constructive trustee of the entire remainder for the benefit of the deceased's estate.[23] Another is that the survivor is a constructive trustee of one-half of the property for the benefit of the deceased's estate.[24] *In re Barrowcliff*[25] and the latter view produce the same result; that is, that the survivor does not profit by his act but does not forfeit the interest he initially possessed. The former approach goes further in that, in effect, the court resolves the uncertainty of survivorship against the defendant and so precluding the beneficiaries under the survivor's will, or the persons entitled upon his intestacy, who may be wholly innocent, from taking the interest he initially possessed. Which is to be preferred may depend upon all the circumstances of the case.

On the general issue, for reasons adumbrated above, the constructive trust solution is, it is considered, to be preferred to the reasoning in *In re Barrowcliff*. If this view is accepted, upon the murder of one joint tenant by the other, a trust will be impressed upon the interest of the survivor (that is, the entirety of the property). And it

[19] *Smith v. Greenburg* (1950) 218 P. 2d 514; *Welsh v. James* (1950) 95 N.E. 2d 872: overruled by *Bradley v. Fox* (1955) 129 N.E. 2d 699; *Vesey v. Vesey* (1952) 32 A.L.R. 2d 1090. Also *National City Bank of Evansville v. Bledsoe* (1957) 133 N.E. 2d 887.

[20] *In re Kings Estate* (1952) 52 N.W. 2d 885; *Bradley v. Fox* (1955) 129 N.E. 2d 699; *Abbey v. Lord* (1959) 336 P. 2d 226; *re Hawkins Estate* (1961) 213 N.Y.S. 2d 188.

[21] *Spicer v. New York Life Insurance Co.* (1920) 268 F. 500; *Merrity v. Prudential Insurance Co.* (1933) 166 A. 335; *Bierbrauer v. Moran* (1935) 279 N.Y.S. 176.

[22] There is a considerable amount of American literature on this subject generally, *inter alia*: (1959) *Washington University Law Quarterly* 92; (1958) *Maryland Law Review* 226; literature mentioned in Toohey, *op. cit.* (1958) 32 *Australian Law Journal* 14, 18, note 48: For a general statement of American law see annotations, (1953) 32 A.L.R. 2d 1099, (1960) A.L.R. 2d Supplement Service 2496, and (1962) 573. On joint ownership generally, *Problems of Joint Ownership* (1959) University of Illinois Law Forum, 883 *et. seq.*

[23] *Bryant v. Bryant* (1927) 51 A.L.R. 1100; annotations referred to above.

[24] *National City Bank of Evansville v. Bledsoe* (1957) 133 N.E. 2d 887; annotations referred to above.

[25] [1927] S.A.S.R. 147.

may well be preferable to permit equity, after a consideration of all the circumstances to determine as it considers just and proper the extent of the trust.[26]

In *re Thomas Schieb*[27]:

> H and W were joint tenants. W was convicted of the manslaughter of H, and thereafter the Public Curator, as administrator of H's estate, brought the present action claiming certain declarations and accounts.

W consented to a judgment which held, *inter alia,* that the defendant being criminally responsible for the death of H was not entitled to the benefit of any right of survivorship; further, that by the death of H under these circumstances, the joint tenancy was severed.

The brief report of this case does not contain the circumstances of the death. Apart from the analysis of the effect of H's death, this case is of interest as it poses the question of how far the principles above discussed should be carried. It is clear that they should apply to the murder of one joint tenant by another but not to circumstances of justifiable or excusable homicide; nor, it would seem, to a tortious, but not criminal, killing. But there may be a question whether they should apply to *all* cases of manslaughter. In *In the Estate of Hall deceased; Hall v. Knight and Baxter,* Cozens-Hardy M.R., in considering whether a legatee who had been convicted of the manslaughter of her testator could take a benefit under the will, stated:

> It is said that that [*Cleaver v. Mutual Reserve Fund Life Association*] was a case of murder and not manslaughter. I entirely fail to appreciate that distinction. It was a case of felony and I see no reason to draw a distinction between murder and manslaughter in a case like this.[28]

But manslaughter is an amorphous crime, and as the circumstances which constitute manslaughter are so variable, so also is the sanction which justice demands in any particular case. If, therefore, the administration of the criminal law admits of this kind of flexibility, why should a like discretion be denied in the civil law of public policy? This argument gained some support from recent decisions which, although decided in other contexts, have rejected a mechanical application of the doctrine of public policy.[29] Finally, it may be noted that the adoption of the constructive trust approach seems a ready solution also to this problem.

The position where A, B and C are joint tenants, and A murders B, C being wholly innocent, also seems uncertain. Had B died a natural death the interests of A and C would have each enlarged

[26] (1958) 56 *Michigan Law Review* 1200. [27] [1931] Q.W.N. 17.

[28] [1914] P. 1, 6. See also *In re Callaway; Callaway v. Treasury Solicitor* [1956] Ch. 559.

[29] *Marles v. Philip Trant & Sons* [1954] 1 Q.B. 29, 37; *Pigney v. Pointer's Transport Services Ltd* [1957] 1 W.L.R. 1121; *St John Shipping Corporation v. Rank* [1957] 1 Q.B. 267.

to the extent of one-sixth. A cannot profit by his act, but there is a question whether the whole of B's interest ought to pass to his estate (that is the act of murder operating to defeat survivorship not only between A and B, but also between B and C) to accrue in its entirety to C, or whether C's interest ought to enlarge by one-sixth, the remaining moiety of B's interest only passing to his estate. In the absence of authority it is suggested that the third alternative is to be preferred; although there seems no good reason why, as between B and C, C's rights should be affected by A's act, there equally seems no reason why C should *profit* thereby.

B. By Act of Party *Inter Vivos*

This is the more usual method of severance, although it may here be reiterated that a joint tenancy, from its very nature, cannot be severed by will. Every joint tenant has the right to sever the tenancy[30] but severance cannot be effected in an arbitrary manner but only in a manner permitted by the law. For example, the marriage (even before the Married Women's Property Act) of a female joint tenant,[31] the compulsory acquisition of land,[32] an agreement for sale entered into by all the joint tenants,[33] and a mere declaration of one joint tenant that the tenancy should be severed,[34] are not sufficient by themselves to work a severance.

Severance by act of party *inter vivos* may occur when all the joint tenants agree to hold as tenants in common, the tenancy being thereby severed in equity though not at law for an agreement by itself would not reach the legal estate. Severance will also occur when the conduct of a joint tenant results in the destruction of one of the four unities. Unity of time, having once occurred, is immutable; to destroy unity of possession would be to destroy co-ownership itself, but severance will occur if either of the unities of interest or title are determined.[35]

It may here be noted that there seems no reason why, by agreement or alienation, a tenancy in common cannot, by a process the reverse of severance, be converted into a joint tenancy, though if resort to section 72 of the Property Law Act 1958 is required the construction of this section by the House of Lords in *Rye v. Rye*[36] must be borne in mind.

[30] *Staples v. Maurice* (1774) 4 Bro. Parl. Cas. 580.
[31] *Palmer v. Rich* [1897] 1 Ch. 134.
[32] *In Ex Parte Railway Commissioners for New South Wales* (1941) 41 S.R. (N.S.W.) 92.
[33] *In re Allingham; Allingham v. Allingham* [1932] V.L.R. 469.
[34] *Partriche v. Powlet* (1740) 2 Atk. 54. *Cf.* Law of Property Act 1925, s. 36 (2) (U.K.), discussed p. 460 *infra*.
[35] *Blackstone's Commentaries* (3rd ed. 1768) ii, 185.
[36] [1962] 2 W.L.R. 361. See p. 457.

(i) *By agreement between the joint tenants*

(A) AGREEMENT NOT TO SEVER

Joint tenants may agree, *inter se,* not to do any act during their lifetime to sever the tenancy,[37] although there may be doubt as to the effect of an involuntary alienation upon such an agreement.[38] An agreement of this kind seems essentially personal to the parties. The fact, therefore, that a sale takes place in breach of such a contract would not, it is considered, affect the interest acquired by a purchaser, even if he took with notice, though the vendor-joint tenant may himself well be liable in damages. But an injunction may be available to restrain a proposed severance though such agreements as are here discussed may from their very nature be restrictively interpreted by the courts. In *Stephens v. Debney,*[39] where there was an agreement not to sever, an application for an injunction to restrain one joint tenant from proceeding with an application for the appointment of trustees for sale under section 66G of the Conveyancing Act 1919-1954 of New South Wales failed, though Myers J. stated that he was of the opinion that the existence of a covenant not to make such an application would be a sufficient answer to an application under that section when made.[40] The subsequent application under section 66G succeeded, Myers J. stating:

> When I turn then to the negative covenant I can see no reason for giving it any wider interpretation than a covenant not to do an act by which the joint tenancy in the land would be severed. I see no justification for extending that to the joint tenancy which will exist in the proceeds of sale. If I make an order under s. 66G of the *Conveyancing Act* 1919-1954, then not only would the order not of itself sever the joint tenancy in the land but a sale under the statutory trust would not of itself effect a severance of the joint tenancy in the proceeds of sale. Here, if the statutory trustees are appointed there would be a notional conversion upon the order being made, and therefore the provisions relating to the disposal of the proceeds of sale would immediately attach and effect a severance of the joint tenancy upon the making of the order. But that is not prohibited what is by the deed, and is in fact what the parties themselves have contemplated shall happen.[41]

(B) AGREEMENT TO SEVER

Conversely, joint tenants may mutually agree to hold as tenants

[37] *Re Debney* (1960) S.R. (N.S.W.) 471.

[38] *Cf.* cases concerning an analogous issue of the construction of covenants against assignment without consent.

[39] (1960) S.R. (N.S.W.) 468.

[40] And see *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 217.

[41] *Re Debney* [1960] S.R. (N.S.W.) 471. Section 66G provides: Where any property (other than chattels) is held in co-ownership the court may, on the application of any one or more of the co-owners, appoint trustees of the property and vest the same in such trustees subject to encumbrances affecting the entirety but free from encumbrances affecting any individual shares to be held by them on the statutory trust for sale or on the statutory trust for jactation. . . .

in common, whereby the tenancy will be severed in equity though not at law.[42] The authorities suggest that all the joint tenants must be parties to such an agreement and in *Wright v. Gibbons,* Latham C.J. stated:

> It has always been the law that a joint tenancy may be severed and converted into a tenancy in common by an agreement. This doctrine, however, does not help the defendants in the present case because the third joint tenant, Bessie Melba Gibbons, was not a party to the transaction between her co-tenants. There is no authority that some only of a number of joint tenants can bring about a severance of a joint tenancy *inter se,* though it is clear that all the joint tenants can bring about that result by an agreement to which they are all parties. But, further, the document upon which the defendants rely is a transfer and not an agreement. It is effective as a transfer or as nothing.[43]

It may seem correct to say that if A, B and C are joint tenants the rights of C ought not to be affected by an agreement to which he is not a party: but, as discussed below, an *alienation* by A and B will have this effect.[44] However, in any event there may be a question as to whether A and B cannot, by an agreement between them, effect in equity their relations *inter se,* while leaving undisturbed the relations between themselves and C. It is immaterial that the agreement is made in ignorance of the existence of a joint tenancy,[45] but it may be that the agreement, to be enforceable, should comply with section 126 of the Instruments Act 1958.[46] It appears, however, uncertain whether this method of severance is available if one of the parties is an infant,[47] although if the severance was for the benefit of the infant, there seems no good reason to deny effect to the agreement.

The agreement may be express.[48] Alternatively, an agreement may be inferred from the conduct of the parties in relation to the common property. This principle was stated by Sir W. Page Wood M.R. in *Williams v. Hensman*:[49]

> When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with

[42] *Williams v. Hensman* (1861) 1 J. & H. 546.

[43] (1949) 78 C.L.R. 313, 322. Also *Tyson v. Tyson* [1960] N.S.W.R. 177, 180.

[44] See pp. 455, 456 *infra.*

[45] *Jackson v. Jackson* (1804) 9 Ves. 591; *Williams v. Hensman* (1861) 1 J. & H. 546; *Gebhardt v. Dempster and Others* [1914] S.A.S.R. 287; *Flannigan v. Wotherspoon* [1953] 1 D.L.R. 768.

[46] Instruments Act 1958, s. 126. *Cf. Cooper v. Critchley* [1955] Ch. 431; *Birmingham v. Renfrew* (1937) 57 C.L.R. 666; *Brown v. Robertson* (1890) 16 V.L.R. 786; *Popiw v. Popiw* [1959] V.R. 197: agreement between A and B that, A should convey to A and B, comes within the Statute.

[47] *Williams v. Hensman* (1861) 1 J. & H. 546; *In re Wilks; Child v. Bulmer* [1891] 3 Ch. 59. *Cf. Burnaby v. Equitable Reversionary Interest Society* (1885) 28 Ch. D. 416; Co. Litt. 337b.

[48] *Frewen v. Relfe* (1787) 2 Bro. C.C. 220; *Williams v. Hensman* (1861) 1 J. & H. 546; *In re Wilks; Child v. Bulmer* [1891] 3 Ch. 59.

[49] (1861) 1 J. & H. 546, 557.

> respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in *Wilson v. Bell* and *Jackson v. Jackson.*

This statement of the Court is frequently cited:[50] but whether it requires that the conduct must be the conduct of *all* the co-owners may be questioned, as later in the judgment, considering the effect of a document signed by eight joint-tenant beneficiaries, purporting to sanction the investment of trust funds in a manner not authorized by the will, the learned judge stated:

> At that time three of the legatees, John, Frederick and Harriette, were infants, and the other five only were bound by the document. That was, therefore, a dealing by the five as to their shares in a manner inconsistent with the continuance of a joint-tenancy between the five and the three. I do not go as far as to say that because the five did not recreate a joint-tenancy, their shares must be taken as severed between themselves. It was a severance of the five from the three, but not a severance among the five.[51]

To work a severance the conduct must be such as to indicate that the joint tenants concerned mutually treat their interests as held in common,[52] and to preclude any one joint tenant from claiming by survivorship.[53] On the one hand, the mere fact that the joint tenants employ the land for the purpose of partnership business[54] or make application for payment out from a fund in court is not, by itself, sufficient.[55] On the other hand, in *re Wilford's Estate*[56] the Court held that an agreement between two joint tenants to make mutual wills, carried out by the making of the wills, severed the tenancy, though why this result should inevitably follow is not perhaps easy to discern. Essentially, the question is one of evidence. Lord Eldon in *Crooke v. De Vandes* stated:

> The other question, as to the severance of a joint tenancy, is mere matter of evidence. It is not necessary to show a specific act of division of each part of the property, if there has been a general dealing, sufficient to manifest the intention to divide the whole.[57]

[50] *E.g. In re Denny; Stokes and Others v. Denny and Others* (1947) 177 L.T.R. 291; *Hawksley v. May* [1955] 1 Q.B. 304.

[51] (1861) 1 J. & H. 546, 558, *per* Page Wood M.R.

[52] *Williams v. Hensman* (1861) 1 J. & H. 546; *In re Denny; Stokes and Others v. Denny and Others* (1947) 177 L.T.R. 291.

[53] *In re Wilks; Child v. Bulmer* [1891] 3 Ch. 59.

[54] *Brown v. Oakshot* (1857) 24 Beav. 254.

[55] *In re Wilks; Child v. Bulmer* [1891] 3 Ch. 59; *In Ex Parte Railway Commissioners for N.S.W.* (1941) 41 S.R. (N.S.W.) 92.

[56] (1879) 11 Ch. D. 267. See also *In the Estate of Heys deceased; Walker and Another v. Gaskill and Another* [1914] P. 192—H and W, joint tenants, executed mutual wills, the clear arrangement between them being that these wills were to be irrevocable. After the death of H, W executed a fresh will in breach of the definite arrangement between H and W. The court held, *inter alia,* that the arrangement to execute mutual wills, and the execution of the wills, severed the joint tenancy.

[57] (1805) 11 Ves. Jun. 330, 333; *In re Denny; Stokes and Others v. Denny and Others* (1947) 177 L.T.R. 291.

In *In re Lansell,*[58] H and W, joint tenants, agreed to assign their interests in the common property to trustees upon certain trusts, and in pursuance of this agreement subsequently executed a deed of settlement. In determining a question of duty the Supreme Court of Victoria, applying *In re Wilford's Estate; Taylor v. Taylor,*[59] held that the agreement was a dealing by H and W of their respective interests and destroyed from the time it was made any right of survivorship, and, by itself, would have been sufficient to sever the tenancy.

(ii) *Acquisition by a joint tenant of a greater interest*

It has long been stated that if land is limited to A and B for life as joint tenants, the fee simple estate in remainder may, by the instrument of grant, be limited, say, to A without working a severance of the joint tenancy.[60] It has also, however, long been the view that there is a destruction of the unity of interest, and, therefore, a severance of the tenancy, if A were to *subsequently* acquire the fee simple remainder.[61] This is a curious distinction, the reason given being equally curious, namely that in the first instance the interests of A, being created by one and the same instrument, are not separate estates, but branches of one entire estate, with the result that merger does not operate: but in the second case, the interests of A, being separately acquired, are separate estates, with the result that A's life estate merges in the fee simple remainder.[62] Similarly is unity of interest destroyed if, land being limited to C for life with remainder to A and B in fee simple as joint tenants, C conveys his life estate to, say, B. If, however, C surrendered his life estate to B, the life estate would be extinguished and so enure for the benefit of both B and C, who remain joint tenants, their interests becoming possessory.[63]

The above distinction, though curious, was not at common law restricted to this issue. Analogous circumstances existed. A contingent remainder could be artificially destroyed by, for example, a merger of the particular estate and the fee simple remainder or reversion. This result, however, did not occur when the particular estate and the fee simple remainder or reversion were initially vested in the same person.[64] So far as legal contingent remainders are concerned, this unmeritorious distinction has been abrogated by statute. Section 191 of the Property Law Act 1958 provides:

[58] [1934] V.L.R. 129.
[59] (1879) 11 Ch. D. 267.
[60] See p. 151 *supra.*
[61] Co. Litt. 182b; Blackstone, *op. cit.* ii, 186; *Morgan's Case* 2 And. 202; *Wiscot's Case; Giles v. Wiscot* (1599) 2 Co. Rep. 60b.
[62] See note N to *Wiscot's Case, ibid.,* 76 E.R. 559, 560. [63] Co. Litt. 183a.
[64] Megarry and Wade, *The Law of Real Property* (2nd ed. 1959) 207.

> A contingent remainder existing at any time after the second day of June One thousand eight hundred and sixty-four shall be and if the same was created before that date shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold in the same manner and in all respects as if such determination had not happened.

In the absence of recent authority it is suggested that the courts would not now follow the distinction above adumbrated between the initial and the subsequent acquisition of a greater interest, but would hold that in either event separate estates are acquired and that therefore in both situations merger operates and a severance occurs. To this, however, it should be noted that whereas at common law merger was, in the circumstances in which it applied, automatic, in equity an intention against merger would be presumed if the effect of merger would be against the interest of the person who held the two estates. Equity now prevails, section 185 of the Property Law Act 1958[65] providing that there shall be no merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. Having regard, however, to equity's dislike of a joint tenancy, there seems no reason to doubt that, at least in the absence of special circumstances, equity would regard a merger which operated to sever a joint tenancy as in the interest of the person concerned. Finally in this context reference may be made to *Leek and Moorlands Building Society v. Clark*:[66]

> H and W were joint tenant-lessees. H purchased the freehold reversion 'subject to the existing tenancy'.

Although not referring to the issue here discussed, the Court held that the subsequent acquisition by H of the freehold reversion, being subject to the existing tenancy, did not sever the joint tenancy.

As has already been noted,[67] if A, B and C are joint tenants and A releases his one-third interest to B, the acquisition by B of this greater interest does not effect a severance of the initial two-thirds interest held by B and C as joint tenants, although B will, of course, hold the one-third interest acquired from A as a tenant in common with himself and C. This is, presumably, because the greater interest acquired by B is of the same kind as the interest, the subject-matter of the joint tenancy.

(iii) *Dealings by joint tenants*

(A) AGREEMENT TO ALIENATE

(a) BY ONE JOINT TENANT

A contract by one joint tenant to alienate his interest will, if

[65] Initially Judicature Act 1883, s. 9 (4). [66] [1952] 2 Q.B. 788.
[67] See p. 156 *supra*.

capable of specific performance, confer forthwith upon the purchaser an interest in equity. It therefore follows that an agreement by one joint tenant to alienate, made either with a stranger or with another joint tenant,[68] destroys in equity the unity of interest, the joint tenancy, in equity, though not in law,[69] being thereby severed.[70] As a result, if the contracting joint tenant dies before completion, the legal estate, but not the equitable interest, will pass to the surviving joint tenants. It appears, however, that in such circumstances the contract for sale would be specifically enforceable by the purchaser against the surviving joint tenants.[71] A covenant to settle after acquired property held in joint tenancy has been held to effect a severance,[72] even though the interest in question was created subsequent to the covenant.[73] Similarly a mortgage by deposit of title deeds may work a severance in equity,[74] as also it is considered may a mortgage by deposit of certificate of title,[75] though this latter proposition must be read subject to the general issue of the effect on a joint tenancy of a mortgage of land under the Transfer of Land Act 1958.[76]

It would appear that if a joint proprietor of land under the Transfer of Land Act 1958 executes a transfer for value of his interest, the joint tenancy will, on principles above discussed, be severed in equity even before registration.[77] If therefore the joint tenant-transferor dies before the registration of the transfer, the surviving joint tenant would it seems thereafter hold the legal estate upon trust for himself and the transferee as tenants in common in equity.

(b) BY ALL THE JOINT TENANTS

If, however, *all* the joint tenants together enter into a contract for the sale of the joint property, there will be no severance either at law or in equity. *In re Allingham; Allingham v. Allingham*:[78]

[68] *Wright v. Gibbons* (1949) 78 C.L.R. 313.
[69] *Goddard v. Lewis* (1909) 101 L.T. 528.
[70] *Brown v. Raindle* (1796) 3 Ves. 256; *re Hewett; Hewett v. Hallett* (1894) 1 Ch. 362.
[71] See p. 307 *supra.*
[72] *Caldwell v. Fellowes* (1870) L.R. 9 Eq. 410; *Burnaby v. Equitable Reversionary Interest Society* (1885) 28 Ch. D. 416.
[73] *Re Hewett; Hewett v. Hallett* [1894] 1 Ch. 362.
[74] *In re Sharer; Abbott v. Sharer* (1912) 57 Sol. Jo. 60.
[75] *Tolley and Co. Limited v. Byrne* (1902) 28 V.L.R. 95.
[76] See p. 447 *infra.*
[77] See p. 434 *supra.* Also *Wright v. Gibbons* (1949) 78 C.L.R. 313, 327, *per* Rich J.: 'I would add that, even assuming that the form used by the parties could be regarded as to vitally irregular as to be incapable, upon registration, of producing the result which it was obviously intended to produce—that of vesting the legal estate in Ethel Rose Gibbons and Olinda Gibbons as to one-third each as tenants in common—nevertheless it is clear that it would operate in equity as an agreement for valuable consideration by each to vest in the other a one-third interest as tenant in common, an agreement which would in equity be specifically enforceable by an order directing the execution of whatever might be the proper form of instrument, and would, pending such execution, operate in equity to sever the joint tenancy and create equitable interests as tenants in common: . . .'
[78] [1932] V.L.R. 469.

> H and W, joint tenants of certain land, joined in an open contract for the sale of the land. The whole of the deposit was paid to H, who paid it into his own bank account. H died and the balance of the purchase money was paid to his executors.

Upon the hearing of an originating summons to determine the destination of the proceeds of sale, the Court held that the agreement did not operate to sever the tenancy and that, therefore, no part of such proceeds formed part of the estate of H. Lowe J. stated:

> Apart from authority, I see no reason why a change in the form of the property should in itself effect an alteration in the nature of the ownership. The law permits a joint tenancy in personal property no less than in realty. Neither can I see that a contract to sell the property will be any more effective to work that change, that is, to work a severance, if nothing more appears. In my opinion the joint tenants of the land became the joint tenants of the proceeds of sale of the land. But, of course, the joint tenants may effect a severance of their interest in the proceeds of the sale, as, for instance, by dividing the proceeds of sale equally between themselves.[79]

What if joint tenants effect a sale on terms? The legal estate would remain vested in them as joint tenants, but would the right of survivorship operate in equity in respect of future payments under the terms contract? This question seems different from the one directly in issue in *In re Allingham; Allingham v. Allingham*[80] where, prior to the death, there had been no division of the proceeds of sale. The proper enquiry here would seem to relate not merely to the effect of an agreement for sale upon the joint tenancy, but to whether there has been a severance by agreement between the parties. This appears to have been the view of Coady J. in *Flannigan v. Wotherspoon,* who stated:

> While by inference from the *Hayes' Estate* case and the *Allingham* case it would seem that had there been in either case a division of the principal sums received the Court would have held in favour of severance, I do not have to go so far as to decide in this case that that would be sufficient, since here we have not only such a division but such other mutual acts and conduct as to establish clearly it seems to me the agreement to sever.[81]

(B) PARTIAL ALIENATION

As stated earlier, there is uncertainty in some respects as to the nature of the act necessary to destroy unity of interest, and it is usual to distinguish between the grant of an estate which does effect a severance, and the grant of a mere encumbrance which does not.[82] Accepting this, if one joint tenant deals with his interest otherwise

[79] *Ibid.* 472.
[80] [1932] V.L.R. 469.
[81] [1953] 1 D.L.R. 768, 776.
[82] See p. 433 *supra.*

than by a complete alienation, whether a severance has occurred depends upon whether the partial dealing amounts to the grant of an estate or the grant of a mere encumbrance. Some dealings have been categorized from early times and seem too well established to doubt. Thus the better opinion is that a grant of a life estate by one joint tenant out of his interest will sever the tenancy.[83] It seems equally clear that the grant of an easement,[84] of a rent charge[85] or of a common of pasture[86] will leave the joint tenancy unaffected. But two situations call for discussion: the effect of a mortgage by one joint tenant of his interest in land under the Transfer of Land Act 1958, and the grant of a lease by one joint tenant out of his interest.

(a) MORTGAGE BY ONE JOINT TENANT OF HIS INTEREST IN LAND UNDER THE TRANSFER OF LAND ACT 1958

A mortgage by one joint tenant of his interest in land under the general law, effected by conveyance, will sever the tenancy,[87] and in *Wright v. Gibbons*[88] there was no appeal from the judgment of the Court below to this effect. Similarly, as discussed, an equitable mortgage will sever the joint tenancy in equity though the legal estate may continue to be held in joint tenancy.[89]

In the case of land under the Transfer of Land Act 1958, difficulty is caused by the statute providing that a mortgage or charge shall, when registered, have effect as a security but shall not operate as a transfer of the land thereby mortgaged or charged. Section 74 of the Act provides:

(1) The registered proprietor of any land—
  (a) may mortgage it by instrument or mortgage in the form or to the effect of the Thirteenth Schedule;
  (b) may charge it with the payment of an annuity by instrument of charge in the form or to the effect of the Fourteenth Schedule.

(2) Any such mortgage or charge shall when registered have effect as a security and be an interest in land, but shall not operate as a transfer of the land thereby mortgaged or charged.

Whilst it is clear that a mortgage by one joint tenant cannot encumber more than the interest which he alone could convey, the question which presents itself is what effect, if any, does the registration of a mortgage have upon the joint tenancy? There appears to

[83] *Wright v. Gibbons* (1949) 78 C.L.R. 313, 330; *Frieze v. Unger* [1960] V.R. 230, 242.
[84] *Mansfield v. Mansfield* (1890) 16 V.L.R. 569.
[85] Litt. 286. [86] Co. Litt. 185a.
[87] *York v. Stone* (1709) 1 Salk. 158; *Re Pollard's Estate* (1863) 3 De G.J. & S. 541.
[88] (1949) 78 C.L.R. 313. [89] See p. 440 *supra*.

be no Australian case directly in point. But at least three views have been juristically expressed, namely that no severance occurs (and this is the view generally accepted), that a severance occurs in equity though not at law and a middle view suggesting that the joint tenancy is suspended during the currency of the mortgage but revives upon the mortgage being discharged.[90]

No difficulty seems to occur during the life of the joint tenant-mortgagor. So long as he retains his interest it remains subject to the mortgage. If he alienates his interest then, if the mortgage itself did not work a severance, the alienation would, and the grantee, who would take as tenant in common, would take subject to the mortgage. Further, the mortgagee may (subject to the terms of the mortgage deed and to the Act), during the life of the joint tenant-mortgagor, exercise, for example, his power of sale, the purchaser acquiring the joint tenant-mortgagor's interest as a tenant in common. But the death of the joint tenant-mortgagor, with the mortgage still subsisting, raises this issue as a matter of practical importance and the absence of judicial authority is considered curious. For if no severance occurs, the mortgage lapses *as to the security* upon the registration of the death of the joint tenant-mortgagor, because his interest being extinguished,[91] nothing remains to which the encumbrance can attach. But if a severance occurs in equity then, the mortgagor being thereby entitled in equity as a tenant in common, the mortgage will, notwithstanding the death, remain enforceable against this interest which will pass under the mortgagor's will or upon his intestacy. And the mortgagee can similarly enforce his security if the joint tenancy is held to be suspended pending the discharge of the mortgage. It may, however, be noted that even if no severance occurs, the *contractual* aspect of the mortgage deed may enable the mortgagee to bring an action against the estate of the mortgagor; this may perhaps explain the absence of authority though a contractual remedy may not always prove fruitful.

In *In re Sharer; Abbott v. Sharer,* where one joint tenant of a reversionary interest under a will had assigned his interest by way of an equitable assignment, Neville J. stated:

> I am of the opinion that this document does operate to create a severance of the joint tenancy in remainder. I do not think that it could have been the intention of the parties that in making this loan out of the trust funds to this executor beneficiary the security which he gave for it should be void if he chanced to predecease any of his co-owners. I accordingly hold that this is an assignment operating to sever the joint tenancy.[92]

[90] T. Wells, 'Mortgage by a Joint Tenant—Torrens System' (1936) 9 *Australian Law Journal* 322; R. F. Baird, 'Mortgage by a Joint Tenant—Torrens System' (1936) 9 *Australian Law Journal* 431. [91] See p. 153 *supra.* [92] (1912) 57 Sol. Jo. 60.

This extract of the judgment of Neville J. has been used in support of the proposition that a mortgage by one joint tenant severs the tenancy in equity on the basis that it 'would seem that the intention of the parties that the security should not be avoided by the death of the mortgagor could be similarly implied in a mortgage of the share of a joint tenant under the Torrens System'.[93] This view has been favourably commented upon and, citing from the judgment of Lord Cranworth L.J. in *Plowden v. Hyde*,[94] the gloss added that it may well be that after the discharge of the mortgage equity would declare against a severance if severance were against the best interests of any of the joint tenants.[95]

In support of the view that a joint tenancy is suspended during the currency of a mortgage but revives upon the mortgage being discharged, reference has been made to the judgment of Eyre C.B. in *Gale v. Gale*:[96]

> There are instances to be found, where an estate that has been severed may yet be reunited, as in the case put in *Co. Lit.* of there being two joint-tenants in fee, and one leasing for the term of his life, and the lessee dying in the lifetime of both the joint-tenants. Here certainly is a severance by the lease, but if the lessee dies in the lifetime of both the joint-tenants, the estate re-unites, *Co. Lit. 193a.*

It has been argued that though the case cited deals with a lease, it appears to have been given as an illustration of a general principle which, if applicable to the present issue, would cause a severance for the purposes of the mortgage, but that on the discharge of the mortgage the joint tenancy would revive.[97]

The two views above considered appear to have been formulated as alternatives to the generally accepted notion that no severance occurs, a notion which, it is considered, lacks merit. Is it not anomalous to say that although a joint tenant has an interest he can alienate, he does not possess an interest which, for all practical purposes, he can mortgage: for what security is an interest that is extinguished upon the joint tenant-mortgagor's death? Further, if one of two joint tenants mortgages his interest and then dies, is it a desirable result that the survivor should take the property free from the obligations created under the mortgage? Either view may therefore commend itself. There is a certain attraction in saying that a severance occurs in equity though not at law. And in *Frieze v.*

[93] T. Wells, *op. cit.* 323.

[94] (1852) 2 De G. M. & G. 684, 696: 'It is a well-established principle, that in the absence of express stipulation to the contrary, a mortgage is to be considered in this Court as a mere charge taking out of the property so much as is necessary for accomplishing the object, and leaving all not so abstracted precisely as it stood before the mortgage. The equity of redemption therefore attaches on the estate of the mortgagor, with all the same rights, restrictions and qualifications to which his legal estate had been previously subject.'

[95] R. F. Baird, *op. cit.* 432.

[96] (1789) 2 Cox 136, 155.

[97] T. Wells, *op. cit.* 323.

Unger[98] the Supreme Court of Victoria considered the preferable view to be that a lease granted by one joint tenant in fee suspends the joint tenancy, so that the term survives the death of the grantor joint tenant though the reversion passes to the survivor. This may be considered to give some support to the view that a mortgage by one joint tenant likewise suspends the joint tenancy: though if the severance for the time relates to the legal estate it appears to be in defiance of the basis of the view that no severance occurs. And support for the view that the joint tenancy is suspended may also be obtained from *Wilken v. Young,*[99] a decision of the Supreme Court of Indiana. At the time of this decision, Indiana adhered to the view that a mortgage operated only as a lien, but notwithstanding this the Court held that a mortgage did not lapse upon the death of the joint tenant-mortgagor, although all that passed to the survivor was the equity of redemption. Recently, however, in *The People v. Nogarr,*[1] the District Court of Appeal of California declined to follow *Wilken v. Young.* Californian law also considered a mortgage as creating only a lien or charge[2] and the Court, holding that a mortgage did not survive the death of a joint tenant-mortgagor, and considering *Wilken v. Young,* stated:

> In the second place the Supreme Court of Indiana did not hold that the execution of the mortgage operated as a severance of the joint estate so as to destroy the right of survivorship but expressly held that there was no severance and that upon the death of the mortgagor life tenant the surviving joint tenant took by virtue of the tenancy but as to one-half of the property she took only the right of redemption from the mortgage created by the deceased joint tenant.
>
> The decision seems to us entirely illogical and the result of it unjust for under it one joint tenant might, as in the case at bar, mortgage and obtain the full value of an undivided one-half of the joint tenancy property and yet retain his right to the entire property as the surviving joint tenant should his co-tenant be the first to die; while that co-tenant, if the survivor, would take but the right to acquire from the mortgagee the one-half interest to which she had the right as the survivor. Further, the mortgagee would by the mortgage obtain a lien upon an undivided one-half interest which would not be defeated by the death of the mortgagor but also be a lien upon the whole property were the mortgagor to be the survivor.[3]

[98] [1960] V.R. 230. See p. 454 *infra.*

[99] (1895) 41 N.E. 68, 590.

[1] (1958) 330 P. 2d 858; 67 A.L.R. 2d 992. See (1959) 47 *Kentucky Law Journal* 565; 67 A.L.R. 2d 999. And see generally, C. F. Noren, 'Liability of Surviving Joint Tenant for Debts of Deceased Joint Owner' (1960) 40 *Nebraska Law Review* 153.

[2] *The People v. Nogarr* (1958) 330 P. 2d 858, 860: 'Under the law of this state a mortgage is but a hypothecation of the property mortgaged. It creates but a charge or lien upon the property hypothecated without the necessity of a change of possession and without any right of possession in the mortgagee and does not operate to pass the legal title to the mortgagee. . . .'

[3] *Ibid.* 862.

It may, however, be noted that an analogous result in relation to leases did not seem either illogical or unjust to the Court in *Frieze v. Unger*.[4] *The People v. Nogarr*[5] has, rightly it is submitted, been criticized, and it has been pointed out that the consequences mentioned in the judgment are within the control of the non-mortgaging joint tenant in that (at least if he is aware of the dealing) it is within his power to sever the joint tenancy if he pleases.[6] Either of the views here considered is, it is thought, to be preferred to the unmeritorious conclusion that no severance at all occurs. But there is a question whether resort need be had to these compromise solutions, for there remains the contention that a mortgage by one joint tenant effects a complete severance both at law and in equity.

The view that a mortgage of land under the Act by one joint tenant does not effect a severance of the tenancy (which accords with the maxim *jus accrescendi praefertur oneribus*) is based upon the fact that, unlike a mortgage of land under the general law, a mortgage of land under the Torrens system has effect as a security but does not operate as a transfer of the land thereby mortgaged or charged.[7] And a charge upon land does not, it is argued, effect at common law a severance of the joint tenancy. The authority usually relied upon is a statement from Littleton:

> Also, if two joyntenants be seised of an estate in fee simple, and the one grants a rent charge by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent charge is effectuall; but after his decease the grant of the rent charge is void, as to charge the land, for he which hath the land by survivor shall hold the whole land discharged.[8]

It is true that this statement of Littleton has been generally accepted, but no case is known where it has been *directly* upheld. It was uttered at a time when the law favoured joint tenancy;[9] and in any event it is perhaps not easy to discern the merit of extending it automatically to the construction of an Act not passed until some three centuries after Littleton's death. In *The English Scottish and Australian Bank Ltd v. Phillips,* Dixon, Evatt and McTiernan JJ. in a joint judgment stated:

> Under the system of registration governing the present case, the statu-

[4] [1960] V.R. 230. [5] (1958) 330 P. 2d 858.

[6] (1959) 47 *Kentucky Law Journal* 565.

[7] Kerr, *Australian Land Titles (Torrens) System* 41; Baalman, *The Torrens System in New South Wales* (1951) 331; Helmore, *The Law of Real Property in New South Wales* (1961) 256; T. Wells, *op. cit.* 322. See Transfer of Land Act 1958, s. 74 (Vic.); Real Property Act 1900-1956, s. 57 (N.S.W.); The Real Property Act 1886-1936, s. 132 (S.A.); Transfer of Land Act 1893-1950, s. 106 (W.A.); Real Property Act 1862, s. 53 (Tas.).

[8] Litt. 286.

[9] *Fisher v. Wigg* (1700) 1 Ld. Raym. 622; *Attree v. Scutt* (1805) 6 East. 476. See p. 328 *supra.*

> tory charge described as a mortgage is a distinct interest. It involves no ownership of the land the subject of the security. Like a lease, it is a separate interest in land. . . .[10]

It therefore seems clear that as a matter of common law a mortgage of land under the Act does create an interest in land. And this view was emphasized by section 74 (2) of the Victorian Transfer of Land Act 1954 (now the like provision of the Act of 1958 cited above) which, for the first time, expressly stated that a mortgage of land under the Act shall 'be an interest in land'. Further, in *Re Forrest Trust; Trustees Executors & Agency Co. Ltd v. Anson* (decided before the amendment to section 74 (2)) Gavan Duffy and Dean JJ. stated:

> But the significant thing is that, whether the mortgage be one under the general law or under the Transfer of Land Act, the real beneficial owner is the mortgagor, not the mortgagee, and the transaction is simply one by way of security. . . . It is of little importance from a practical point of view where the legal title resides. The formalities of the transaction differ in the two cases, but all the realities are the same.
>
> What has been said supports the view that the formal changes effected by the Transfer of Land Act in the case of a mortgage effected and registered under that Act are more apparent than real. If substance and effect be regarded, and not form (and equity has always so regarded mortgages), it appears that, as between mortgagor and mortgagee, and subject to the express provisions of the Act, the differences are not great.[11]

Why then should the traditional view, uttered in a common law context, mechanically be applied to the construction of a relatively modern statute: why should it necessarily be concluded that a mortgage of land under the Act does not operate to destroy the unity of interest? Is it not a more just result, is it not both consistent with the amendment to section 74 (2) and more in accordance with the disinclination of the Full Court in *Re Forrest Trust; Trustees Executors & Agency Co. Ltd v. Anson* to draw differences of substance between a mortgage of land under the Act and a mortgage of land under the general law, to hold that a severance does occur? Further, so far as Victoria is concerned, reference must be made to section 81 (1) of the Transfer of Land Act 1958:[12]

> 81 (1): In addition to and concurrently with any rights and powers

[10] (1936) 57 C.L.R. 302, 321. And see *Partridge v. McIntosh & Sons Ltd* (1933) 49 C.L.R. 453, 466; *Coleman v. DeLissa* (1885) 6 L.R. (N.S.W.) (Eq.) 104; *Re Williams, Ex parte Perpetual Trustees Executors & Agency Co. of Tasmania Ltd* (1931) 26 Tas. L.R. 82, 86. Also *Robert Reid & Co. v. The Minister for Public Works* (1902) 2 S.R. (N.S.W.) 405; *Thompson v. Yockney* (1912) 8 D.L.R. 776: affirmed 14 D.L.R. 332: affirmed 16 D.L.R. 854.

[11] [1953] V.L.R. 246, 271. See p. 339 *supra*.

[12] Also Transfer of Land Act 1893-1950, s. 116 (W.A.). See (1936) 9 *Australian Law Journal* 431, 432.

> aforesaid a first mortgagee shall, until a discharge from the whole of the money secured or a transfer upon a sale or an order for foreclosure has been registered, have the same rights and remedies at law and in equity (including proceedings before justices of the peace) as he would have had if the legal estate in the mortgaged land had been vested in him as mortgagee with a right in the mortgagor of quiet enjoyment until default in payment of any principal or interest or a breach in the performance or observance of some covenant.

Some effects of this section seem well settled. Where a time is fixed in the mortgage deed for payment of the principal, the right of the mortgagor of quiet enjoyment until default creates, even in the absence of an express attornment clause, the relationship of landlord and tenant:[13] the reference to proceedings before justices of the peace includes a reference to the summary proceedings for ejectment of tenants holding over under the Landlord and Tenant Act 1958,[14] but the provisions of that Act relating to the control of rents and security of tenure do not apply.[15] But the full impact of section 81 (1) is not clear. One suggestion is to limit the sub-section's operation to the regulation of rights between the mortgagee and third parties.[16] This 'drag-net'[17] provision, however, seems designed to fill any gap between the powers conferred upon a mortgagee under a common law mortgage and the specific powers conferred by earlier sections upon a mortgagee of land under the Act.[18] Holroyd J., in discussing section 114 of the Transfer of Land Act 1890, an ancestor of the present section 81 (1), stated:

> The section is providing for the remedies of the mortgagee, and care is taken that he shall lose no advantage which he might have enjoyed under the old system of conveyancing.[19]

Though this statement was not made with the present issue in mind, would not the complete defeat of his security by the death of the joint tenant-mortgagor be, in a very real sense, a loss by the mortgagee of an advantage which he would have enjoyed under the general law?

[13] *Farrington v. Smith* (1894) 20 V.L.R. 90; *Equity Trustees Executors and Agency Co. Ltd v. Lee* [1914] V.L.R. 57.

[14] *Farrington v. Smith* (1894) 20 V.L.R. 90; *Equity Trustees Executors and Agency Co. Ltd v. Lee* [1914] V.L.R. 57; *Perpetual Executors and Trustees Association of Australia Ltd v. Eades* [1925] V.L.R. 82, 224; *Commissioners of the State Savings Bank of Victoria v. Millane* [1931] V.L.R. 18; *Dickson v. Millar* [1950] V.L.R. 170.

[15] *Dickson v. Millar* [1950] V.L.R. 170: no express attornment clause. S. 43 (1) of the Landlord and Tenant Act 1958 provides, *inter alia*: 'Lease . . . but does not include . . . or any lease arising under an attornment clause in a mortgage . . .'.

[16] Fox, *The Transfer of Land Act 1954* (1957) 96.

[17] *The Commercial Bank v. Breen* (1889) 15 V.L.R. 572, 577.

[18] Wiseman, *The Law Relating to the Transfer of Land* (1931) 257: 'To facilitate the working of the registration scheme of the Act, a mortgage is not to operate as a transfer (sec. 146 (*ante*)), so that it was necessary to enact expressly what remedies the mortgagee should have corresponding to those enjoyed by the mortgagee under the general law by virtue of the legal estate being vested in him. Sec. 151 (*ante*) represents the first attempt at this, sec. 156 the final.'

[19] *Farrington v. Smith* (1894) 20 V.L.R. 90, 92.

A final point may be noted. If, contrary to the view above expressed, it is held that no severance occurs, what is the position if the other joint tenant predeceases the joint tenant-mortgagor during the currency of the mortgage? Is the mortgagee's security extended to cover the whole of the land, so that if he exercises his power of sale a purchaser would acquire the entirety: or does the extent of the security remain unaffected? Different opinions have been expressed.[20] From the latter portion of the extract from the judgment in *The People v. Nogarr,* cited above,[21] it appears that the District Court of Appeal of California favoured the former view. This seems correct. If a mortgagee loses his security by the joint tenant-mortgagor *predeceasing* his co-tenant (a result which seems clearly to follow if no severance occurs), it seems a necessary corollary that the mortgagee's security is extended if the joint tenant-mortgagor *survives* the other joint tenant. For in either case the same basic principle applies, that upon the death of a joint tenant the survivor's interest is freed from the interest of the deceased, which is extinguished.

(b) LEASE BY A JOINT TENANT

Much of this area of the law has been greatly clarified by the searching judgment of Sholl J. in *Frieze v. Unger.*[22] From this case it appears that the grant of an underlease by one of joint tenant-lessees out of his interest severs the tenancy,[23] as probably does also the grant of a lease by one of joint tenants for lives, at any rate temporarily during the term; at all events, the lease binds the survivor.[24] But there has long been a conflict of judicial and juristic opinion as to the effect on the joint tenancy of a lease by one joint tenant in fee simple, although it is clear that whatever the effect the other joint tenants will be bound by the lease even after the death of the joint tenant-lessor.[25] Elsewhere it has been considered that, in the case of a lease by one joint tenant to another, the authorities that hold there to be a severance should be reviewed in the light of section 72 (4) of the Property Law Act 1958.[26] In *Wright v. Gibbons,*[27] Dixon J. (as he then was) was of the opinion that during the lease the jointure was suspended and that there was a temporary severance. In *Frieze v. Unger,* Sholl J., after a most exhaustive examination of the authorities, including the above opinion of Dixon J., stated:

> But a demise for a term of years by one of two joint tenants in fee does not, according to the preferable view, work a severance of the

[20] (1936) 9 *Australian Law Journal* 322, 323; 431, 432.
[21] See p. 450 *supra.*
[22] [1960] V.R. 230. See pp. 318-320 *supra.*
[23] *Frieze v. Unger* [1960] V.R. 230, 243.
[24] *Ibid.* 243. [25] *Ibid.* 242.
[26] (1944) 17 *Australian Law Journal* 292.
[27] (1949) 78 C.L.R. 313, 330.

> whole fee; at most it effects a "severance for the time", or "suspends" the joint tenancy *pro tem.* This is the view of Dixon J., *loc. cit.* . . . It is not altogether apparent what is meant by a temporary severance or suspension; but at all events, it is clear that the doctrine involves the proposition that the reversion expectant on the term will pass to the survivor of the joint tenants, so that any "severance" or "suspension" is such only as is necessary to procure for the lessee the enjoyment during the term of the grantor's moiety both after as well as before the grantor's death. . . . At all events, notwithstanding these differing opinions, this much should now be taken to be clear, that in the case of a lease for a term of years by one joint tenant in fee, the term survives the death of the grantor, but the reversion passes to the survivor. . . .[28]

This, therefore, appears to be the prevalent view in Australia.

(C) ALIENATION OF ENTIRE INTEREST

Alienation by a joint tenant of his interest destroys both unity of interest and unity of title and all the authorities concur in stating that an alienation by a joint tenant to a stranger severs the joint tenancy.[29] Thus, if A and B are joint tenants, and A alienates his interest to X, B and X become tenants in common. But if there are more than two joint tenants an alienation by one will not affect the relations of the others *inter se.* For example, if A, B and C are joint tenants and A alienates his interest to X, X becomes a tenant in common with B and C, X becoming entitled to a one-third undivided share and B and C becoming collectively entitled to a two-thirds undivided share. B and C, however, remain joint tenants *inter se,* and so on the death of B the right of survivorship accrues to C, the result being that A and C become tenants in common in the ratio of interests of one to three respectively. In relation to land under the Transfer of Land Act 1958, it has already been mentioned that, in the case of a dealing for value, a severance may occur in equity even though the transfer is unregistered.[30]

In the same manner, severance is also effected if one joint tenant alienates his interest to another joint tenant. In *Wright v. Gibbons*:[31]

> A, B and C were registered as joint proprietors of the fee simple estate of land under the Real Property Act 1862-1935 of Tasmania, a statute analogous to the Transfer of Land Act 1958. A and B executed one transfer containing cross transfers of their interests to each other to the intent that A, B and C should all three become tenants in common in equal shares. The transfer was subsequently registered. Later A and B died.

[28] *Frieze v. Unger* [1960] V.R. 230, 242-243. And see *Gale v. Gale* (1789) 2 Cox. 136, 155.

[29] *Wright v. Gibbons* (1949) 78 C.L.R. 313, 322; *Re White* [1928] 1 D.L.R. 846: assignment for the benefit of creditors.

[30] See p. 434 *supra.*

[31] (1949) 78 C.L.R. 313.

In the present action, the legal personal representatives of A and B each claimed to be entitled to a one-third interest of the land on the basis that the transfer severed the joint tenancy. C, however, claimed that no severance occurred and that she became absolutely entitled by survivorship. The High Court, reversing the judgment of the Court below, unanimously held that the joint tenancy was severed by the transfer. The fact that the cross transfers occurred in one document tended to the conclusion that no change was thereby achieved, but that the parties were left just as they were. The Court, however, pointed out that had separate transfers been used, executed on different days, there would have been no doubt that a severance occurred. For example, if, at common law, by one document A transfers, that is releases,[32] his interest to B, B thereupon becomes entitled as a tenant in common to a one-third interest in the land, the remaining two-thirds being held by B and C as joint tenants. Subsequently B transfers his initial one-third interest to C. In the result, A, B and C become tenants in common in equal shares.[33] The Court stated that the same principles applied to land under the Transfer of Land Act 1958 as to land under the general law,[34] and that under the general law the obstacles to cross transfers of interest is that, in general,[35] there exists no assurances capable of affecting transfers simultaneously, but only by a successive step;[36] but that the Transfer of Land Act 1958 provides an exclusive method of assurance which is appropriate to enable simultaneous cross transfers.

C. Desirability of a Further Method of Severance

If A, B and C are joint tenants of Blackacre (under the general law) and Whiteacre (under the Transfer of Land Act 1958), the problem has elsewhere been posed[37] of how A and B, while retaining their rights of possession and enjoyment of the properties, can exclude the right of survivorship (that is sever the joint tenancies), C not being willing to participate in the change. It has been pointed out that as to Blackacre, A and B may each mortgage their respective interests; the mortgages being merely methods of severance would be followed immediately by re-conveyances. A mortgage, as above stated,[38] would effect a severance, and as carried out by two of the three joint tenants the result would be that A, B and C thenceforth hold the property as tenants in common in equal shares. Whether

[32] See p. 156 *supra*.
[33] *Wright v. Gibbons* (1949) 78 C.L.R. 313, 324, 332.
[34] *Ibid.* 324, 333.
[35] Dixon J. saw no objection to this result being achieved pursuant to the Statute of Uses 1535. See p. 457 *infra*.
[36] *Ibid.* 333.
[37] (1949) 23 *Australian Law Journal* 262.
[38] See p. 447 *supra*.

this method of severance is available in respect of Whiteacre, being land under the Transfer of Land Act 1958, depends upon the outcome of the principles discussed above.[39] But by virtue of *Wright v. Gibbons,*[40] A and B could achieve their aim by a simultaneous cross transfer of their interests.

A mortgage followed by a re-conveyance is a cumbersome and expensive method of effecting a severance and, to a lesser extent, the same may be said of simultaneous cross transfers. There seem to be further methods available to A and B. There is a possibility that A and B could, by agreement between them—as they could by alienation—sever the tenancy, not only *inter se,* but also between themselves and C.[41] In *Wright v. Gibbons,*[42] Dixon J. saw no objection to a tenancy in common being created by A and B joining in a grant of their interests to X, as a grantee to uses, to the use of A and B and their respective heirs as tenants in common. The learned judge stated:

> Suppose again that A, B and C being joint tenants for an estate in fee simple, A and B joined in an assurance, let us say a grant, of their two aliquot shares to X, as a grantee to uses, to the use of A and B and their respective heirs as tenants in common in equal shares. Would that not have operated to make them tenants in common not only between themselves but also with C? I have not seen a precedent for nor a reference to such an assurance, but I can see no objection to it, unless it be on the alleged ground that, for the purposes of the *Statute of Uses,* the feoffor, any more than the person seised, cannot be identical with the person entitled to the use. But that has never been the rule where the person entitled to the use takes a different estate or interest or under different limitations or in another right.[43]

Further, instead of a conveyance to uses, it may be that pursuant to section 72 (3) of the Property Law Act 1958, A and B could each execute transfers of their interests to themselves. Whether this is a proper use of the section depends upon a reading of the recent House of Lords decision of *Rye v. Rye,*[44] though it may be noted that Viscount Simonds expressed the view that the analogous English subsection was intended, *inter alia,* to supersede the old conveyancing device of a conveyance to uses.[45]

Rye v. Rye has been discussed at an earlier stage of its history.[46] It may be recalled that one[47] issue in this case was whether section 72 enabled A and B, tenants in common, to grant a lease to themselves as joint tenants. Both Buckley J. at the first instance and the Court of Appeal held that such a tenancy could be created. This view has

[39] See p. 447 *supra.* [40] (1949) 78 C.L.R. 313. [41] See p. 441 *supra.*
[42] (1949) 78 C.L.R. 313. [43] *Ibid.* 332. [44] [1962] 2 W.L.R. 361.
[45] *Ibid.* 366. [46] See p. 158 *supra.*
[47] Other issues, not here discussed, involved a consideration of whether an oral lease comes within s. 72, and whether on the facts of the case such a tenancy had been granted.

found disfavour in the House of Lords. Section 72 (4) was considered inapplicable to the situation of A and B leasing to themselves,[48] and discussing section 72 (3)[49] Viscount Simonds, with whose judgment Lord Reid concurred, stated:

> I accept that in this subsection the singular 'person' must include the plural so that two persons may now convey land to or vest land in themselves. What, then, is the scope of this subsection? It is said on behalf of the appellant that it enables A, the owner of property, to grant a lease of it to himself and similarly enables A and B, the joint owners of property, to grant a lease of it to themselves. It was not, I think, suggested that A and B could do what A could not do. The question then can conveniently be examined by asking whether the subsection enables A to grant a lease to himself of land of which he is the owner, or, in other words, to carve out of his larger estate a lesser estate which creates (I know not how to put it otherwise) the relationship of landlord and tenant between himself and himself. I find this a strange conception. In *Grey v. Ellison* Stuart V.-C. describes as fanciful and a whimsical transaction the proposal that a man should grant a lease to himself. He had, no doubt, in mind that a lease is in one aspect contractual. Of things necessary to a lease, says Sheppard's Touchstone of Common Assurances (see 7th Edn., Vol. II, p. 268) one is that there must be acceptance actual or presumed of the thing demised. Yet it is meaningless to say that a man accepts from himself something which is already his own. I recognise that a lease not only has a contractual basis between lessor and lessee, but operates also to vest an estate in the lessee. But what sort of estate is in these circumstances vested in the lessee? I will assume that it will not at once merge in the higher estate from which it springs, though I see no reason why it should not. Yet it must be an estate hitherto unknown to the law. Even a bare demise implies certain covenants at law: but to such an estate as this no covenants can be effectively attached. Nor can the common law remedy of distress operate to enable the lessor to distrain on his own goods. Again, at law in the absence of some special provision the lessee is entitled to exclusive possession of the demised premises. What meaning is to be attributed to this where the lessee is also the lessor? My Lords, my mind recoils against an interpretation of the Act which leads to so fanciful and whimsical a result and it appears to me to be quite unnecessary.[50]

Lord Denning was also of the opinion that a man cannot grant a lease to himself, basing his view primarily on the fact that there is nothing to validate the covenants 'because by no possibility can

[48] [1962] 2 W.L.R. 361, 365: 'In this subsection I do not find it provided that two persons may convey property to themselves or three persons to themselves. On the contrary, I read the subsection literally as meaning that where property is vested in two persons they may convey it to one of themselves and where it is vested in three persons they may convey it to one or two of themselves. I see no reason for giving a more extended meaning to this subsection, and I would point out that, if it did have the meaning claimed for it, it would add nothing to sub-s. (3) except to provide a plain inconsistency in respect of the date of commencement.' And see p. 373.

[49] S. 72 (3): 'After the commencement of this Act a person may convey land to or vest land in himself.'

[50] *Ibid.* 365.

s. 82 (1) be made to cover them'.[51] Lord MacDermott found it unnecessary to express an opinion on the issue here discussed.

Rye v. Rye has been subject to considerable criticism, and there has been discussion of some of the issues raised by the judgments.[52] It may seem curious to state that A can lease to himself though, if such a lease were valid, conceptual difficulties disappear upon an assignment either of the lease or of the reversion. However this may be, a lease by A and B to themselves seems, with respect, quite a different situation. There may be good reason for such a transaction: for example, as in the present case, to create a right of survivorship with respect to the lease. This distinction was recognized by Lord Radcliffe, who stated:

> Down to the Act of 1925 I take it that it would have been said without qualification that a man cannot make himself his own tenant. The contractual relationship which was the almost inescapable concomitant of a tenancy would have been regarded as precluding such a transaction. Terms of years for securing such things as jointures or portions could, I suppose, be created without covenants but they were exceptional devices. There is nothing in the Act itself that removes this difficulty by making it possible for a man to enforce contractual obligations against himself. I do not feel sure that the same result would necessarily be reached in the case of two persons seeking to demise to themselves by deed, for s. 72 (3) would, I think, be able to pass a legal interest by demise and it might be possible to express the required contractual obligations in the form of joint and several covenants, so that each single person covenanted separately with himself and the other. It seems that s. 82 (1) of the Act would then convert such a covenant into an effective obligation. I should not like to put this possibility out of court in the disposal of the present case, for there is a practical advantage in allowing persons who own land as tenants in common to make a valid demise of it to themselves in another capacity. But the point does not arise here for, if such transaction could be effected at all it could never be by any parol arrangement, to which s. 72 (3) would not apply and in which joint and several undertakings could not be presumed.[53]

That co-owners ought to be able to lease to themselves in another capacity (for example, tenants in common leasing to themselves as joint tenants) may seem desirable, and, before *Rye v. Rye,* may have been considered to be a situation adequately covered by section 72. Elsewhere it has been pointed out that the history of the relevant New South Wales legislation is different from that of the English section, and the submission has been made that *Rye v. Rye* does not decide what the law is in New South Wales.[54] So far as Victoria is

[51] *Ibid.* 373.
[52] (1962) 35 *Australian Law Journal* 442; (1962) 36 *Australian Law Journal* 45; (1962) 78 *Law Quarterly Review* 175; (1962) 25 *Modern Law Review* 466.
[53] [1962] 2 W.L.R. 361, 372.
[54] (1962) 36 *Australian Law Journal* 45.

concerned, there seems, unfortunately, no such argument and ultimately perhaps the High Court may be called upon to express its views. In any event *Rye v. Rye* was concerned with *leases,* and there seems no good reason to interpret the case more widely than necessary. Reverting to the above example of A, B and C being joint tenants, it is not therefore considered that *Rye v. Rye* ought to preclude A and B each executing *transfers* of their interests to themselves. If this is so, the joint tenancy would be severed as both unity of title and unity of interest would be destroyed. A and B would each take title from their own transfers of their interests to themselves, C taking title from the original disposition to A, B and C. It would also appear that the interests received by A and B respectively would be dissimilar from the interests each originally possessed as a joint tenant.

Section 72 (3) of the Property Law Act 1958 may therefore, if available, provide a useful method of severance. It is thought to be the only way by which one joint tenant can, by a *unilateral* act, sever the tenancy and yet retain the possession and enjoyment of the common property. But it may be asked whether it is desirable that this result should only be achieved by such a method. Section 36 (2) of the English Law of Property Act 1925 enables any joint tenant to sever a joint tenancy by giving to the other joint tenants a notice in writing of such desire. It is considered that the introduction of an analogous provision in the Victorian law would be highly desirable.[55]

[55] Under English law a *legal* joint tenancy cannot be severed, the above method relating to a severance in equity. Generally, Megarry and Wade, *op. cit.* 427, 428.