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SEVERANCE OF JOINT TENANCIES

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Introduction

A joint tenancy may be ended by severance, that is, by any act or conduct which, occurring during the lifetime¹ of a joint tenant, has the effect of turning the joint tenancy into a tenancy in common.² The same principles apply to interests in both realty and personalty,³ but most of the decisions deal with the application of those principles to realty, and that will be the emphasis of this article.

Despite the fact that joint tenancies have long been with us, there are still doubts about the operation of the common law rules on severance. In England and Canada these rules have been affected by legislation. The 1925 legislation made changes to the law of joint tenancy generally, and in one instance to severance in particular.⁴ Post 1925 English cases are therefore relevant in Canada, and will be considered here, only to the extent that they throw light on the common law principles. In Canada the common law has been

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¹ It is well established that severance cannot be effected by an event taking place on or after the death of a joint tenant. Thus a joint tenancy cannot be severed by will. Rather surprisingly the contrary was argued in *Sorenson v. Sorenson*, [1977] 2 W.W.R. 438, at pp. 451-452 (Alta A.D.); not surprisingly counsel could not find any authority to support the argument. This case has been appealed to the Supreme Court of Canada. The judgment of the Supreme Court was not at hand at the date of writing. The case is referred to at various points in the article. As to the effect of joint and mutual wills see *infra*, pp. 21 *et seq.*

² Megarry and Wade, *The Law of Real Property* (4th ed., 1975), p. 404, state that strictly speaking severance includes partition, but that the term is normally used to refer to the conversion of a joint tenancy into a tenancy in common.

³ As to a possible exception see *infra*, p. 27.

⁴ Megarry and Wade, *op. cit.*, footnote 2, pp. 407 *et seq.* See further, *infra*, p. 27.

modified by legislation, either expressly, or sometimes clearly, sometimes arguably, impliedly, and in some respects there is still uncertainty about the blending of common law and statute.

The starting point for any discussion of the modern law is the well-known passage in the judgment of Sir W. Page Wood V.C. in *Williams v. Hensman*:⁵

A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such a manner as to sever it from the joint fund—losing, of course, at the same time, his own right to survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. 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 respect to that particular share, declared only behind the backs of the persons interested.

In *Burgess v. Rawnsley*⁶ Sir John Pennycuik called the three propositions in this passage the three "rules" and, with the proviso that too much should not be read into the word rule, this is a convenient way of referring to them.

The reasons why these rules are effective to sever are clear. The first is based on the fact that generally a joint tenant, without the consent of or even notice to the other joint tenants, is as free to deal with his interest as any other owner, and may deal with it in such a way as to destroy one of the unities. If that happens it follows that the joint tenancy is severed. The second and third turn on the common intention of the joint tenants.⁷ And, if some recent English decisions are to be believed, rules one and three may also operate on the basis of the unilateral intention, express or implied, of a single joint tenant. In theory if one of the unities is destroyed, or if the common or unilateral intentions are shown to exist, there is a severance, and nothing else need be considered. This is generally the attitude taken by the Canadian courts, and in some cases the law is so well settled on this basis that it would be futile to debate the issues further. But there are two other factors which may be thought to be relevant,

⁵ (1861), 1 John & H. 546, at pp. 557-558, 70 E.R. 862, at p. 867 (V.C.).

⁶ [1975] Ch. 429, at pp. 444 *et seq.*, [1975] 3 All E.R. 142, at pp. 151 *et seq.* (C.A.).

⁷ Or more accurately on the common intention of any two or more or all of the joint tenants. If A, B and C are joint tenants in fee simple, all three may agree that they will henceforth be tenants in common. It is equally valid for only two of them to so agree. Those two will then become tenants in common *inter se*, but joint tenants *vis à vis* the third.

particularly where there is doubt about the destruction of the unities or the existence of the requisite intentions.

The first, and more general, consideration is the well-established judicial preference for the tenancy in common. This means that it can be expected that the courts will lean in favour of severance. It is arguable that in Canada, with respect to realty, there is no longer any justification for this attitude. Equity developed a preference for tenancies in common in light of the common law rule that, in the absence of a contrary intention, a conveyance or devise to two or more persons automatically created a joint tenancy. Thus, often without the parties realizing it, the right of survivorship, which runs contrary to equity's sense of the equality, arose by implication. In Canada most jurisdictions have legislation reversing the common law rule; a conveyance or devise to two or more persons will create a tenancy in common, unless it is provided in the instrument that a joint tenancy is intended.⁸ Joint tenancies, therefore, need to be deliberately created, and it is doubtful if there should be any special preference for severance. This is particularly true in what is today probably the most common example of a joint tenancy—the conveyance of the matrimonial home to a husband and wife.⁹ We will have occasion to look at this argument at various places in the article.

The second, and more specific, consideration arises where a joint tenant and a third party engage in some type of dealing which in itself would not destroy any of the unities. In many such cases it is argued that in fairness to the third party there nonetheless ought to be a severance if the transaction is to be fully effective. Sometimes the argument is also put in terms of the presumed intention of the joint tenant himself to give full and faithful effect to the transaction. Therefore, although the point can arise in relation to other modes of severance, this consideration will be dealt with primarily in that part

⁸ Transfer and Descent of Land Act, R.S.A., 1970, c. 368, s. 9; Land Registry Act, R.S.B.C., 1960, c. 208, s. 21, Conveyancing and Law of Property Act, S.B.C., 1978, c. 16, s. 11; Law of Property Act, R.S.M., 1970, c. L90, s. 15; Property Act, R.S.N.B., 1973, c. P19, s. 20; Real Property Act, R.S.N.S., 1967, c. 261, s. 4; Conveyancing and Law of Property Act, R.S.O., 1970, c. 85, s. 13; Land Titles Act, R.S.S., 1965, c. 115, s. 242.

Note that The Land Registry Act of B.C. is repealed by the Land Titles Act, S.B.C., 1978, c. 25, and is replaced in part by that Act and in part by the Conveyancing and Law of Property Act, S.B.C., 1978, c. 16. The latter two Acts, will come into force on Oct. 31st, 1979. See B.C. Gaz., Vol. 22, Regs 25/79 and 30/79. Throughout the article references will be given to the old and the new legislation.

⁹ In Saskatchewan the general argument is strengthened by the Land Titles Act, *ibid.*, s. 240, which requires the written consent of the other joint tenant or joint tenants before the registration of a transfer of his interest by a joint tenant.

of the article where severance based upon the presumed intention of a joint tenant is discussed.

The rules in *Williams v. Hensman*¹⁰ cover at least four and perhaps up to six methods of severance.¹¹ These can be conveniently considered by reference to the reasons for their operation. In addition, it is important to consider exactly when severance takes place. Where there is a system of registration of title, registration may be a necessary prerequisite. Either apart from or in combination with registration, it might, contrary to the general current law, be desirable to require the consent of, or at least notice to, the other joint tenants before severance can take place; and in one province consent is indeed needed. It is proposed, therefore, to proceed under the following four headings:

- I. Destruction of the Four Unities—Severance at Law and in Equity.
 - A. Dealing with the Legal Title.
 - (1) Acquisition by One Joint Tenant of a Greater Interest than the Other Joint Tenants.
 - (2) Alienation by One Joint Tenant of All or Part of His Interest.
 - B. The Creation of Equitable Interests.
- II. Agreement of the Joint Tenants—Severance in Equity.
 - A. Express Agreement, Implied Agreement, and Course of the Dealing.
 - B. Proving the Agreement.
- III. Intention of One Joint Tenant—Severance in Equity.
 - A. Declaration of Intent.
 - B. Presumed Intention.
- IV. When is Severance Effective?
 - A. Consent and Notice.
 - B. Registration of Title.

¹⁰ *Supra*, footnote 5.

¹¹ It has also been held that there is a severance when one joint tenant murders another; *Novak v. Gatién* (1975), 25 R.F.L. 397 (Man.Q.B.). It is suggested however that this issue is best seen as a problem in constructive trusts: *Schobelt v. Barber* (1967), 60 D.L.R. (2d) 519, [1967] 1 O.R. 349 (H.C.); *Re Gore* (1971), 23 D.L.R. (3d) 534, [1972] 1 O.R. 550 (H.C.); *Re Dreger* (1976), 69 D.L.R. (3d) 47, 12 O.R. (2d) 371 (H.C.).

I. *Destruction of the Four Unities—Severance at Law and in Equity.*

It is trite law that for a joint tenancy to exist the four unities of title, interest, time and possession must be present. If, therefore, a joint tenant deals with his interest in such a way as to destroy one of the unities, it follows that a tenancy in common has been created.¹² In some respects the law here is well settled and does not need extended discussion; in others, while the principles are clear, their application in particular cases is a matter of debate.

A. *Dealings with the Legal Estate.*

(1) Acquisition by One Joint Tenant of a Greater Interest Than the Other Joint Tenants.

If one joint tenant acquires a greater interest than his fellow joint tenants then the unity of interest is destroyed and a tenancy in common is created. Thus, if land is conveyed to A for life, remainder to B and C as joint tenants, and A subsequently conveys his life estate to B, one moiety of the life interest will merge in B's fee simple and the other moiety will vest in B for a separate estate *pur autre vie*. The joint tenancy in remainder in fee simple will be severed because B and C have now different interests.¹³

(2) Alienation of the Joint Tenant's Interest.

(i) Total Alienation.

At common law when a joint tenant conveys his interest to a third party the joint tenancy is severed. The reason is that unity of title is broken.¹⁴ If A and B are joint tenants in fee simple, and A conveys his interest to C, B and C, taking under different

¹² When one joint tenant disposes of his interest, in whole or in part, or acquires a greater interest than the other joint tenant, as between those then holding interests the unities that are broken are either those of title or interest. It is unlikely that the unities of time and possession can be broken by themselves. For example the mere granting of a licence to occupy, without any alienation of title, probably does not sever: *cf. Re McKee and National Trust Co. Ltd* (1974), 49 D.L.R. (3d) 689, at p. 694, 5 O.R. (2d) 185, at p. 189 (H.C.), *rev'd* on other grounds (1975), 56 D.L.R. (3d) 190, 7 O.R. (2d) 614 (C.A.).

¹³ *Co. Litt.*, 183a; Challis, *Real Property* (3rd ed., 1911), p. 88; Megarry and Wade, *op. cit.*, footnote 2, p. 407. According to these authorities a distinction needs to be drawn in the example given between a conveyance and a surrender by a life tenant. In the latter case the life estate would be destroyed, permitting an acceleration of all the remainder interests, so that the fee simple in joint tenancy would continue to exist unimpaired.

¹⁴ This is trite law. It applies to all types of interests, legal or equitable, freehold or leasehold, and to both voluntary transfers and transfers by operation of law. *Cf.*, as to assignments in bankruptcy *Re White*, [1928] 1 D.L.R. 846 (Ont.H.C.); *Re Chisick* (1967), 62 W.W.R. (N.S.) 586 (Man.C.A.).

instruments, hold title as tenants in common. If there are three joint tenants, A, B and C, and A conveys his interest to D, D becomes a tenant in common with B and C, but the latter remain joint tenants *inter se*, for, as between them, the four unities have not been broken.¹⁵ If A was to convey his interest to B, B would have a $\frac{2}{3}$ and C a $\frac{1}{3}$ interest and it might be expected that this would result in severance. However, in such a case, B and C become tenants in common as to the $\frac{1}{3}$ interest conveyed by A, as to this there being no longer unity of title, but, as to their original interests, the unities are not affected and they remain joint tenants.¹⁶

These common law rules have been both extended and restricted by statute. First, a number of provinces have legislation which enables the owner of an interest in land to make a conveyance to himself.¹⁷ It is therefore open to a joint tenant to convey his interest to himself, and, as he will then hold under a different instrument from the other joint tenants, a severance will result.¹⁸ At common law an owner could not, of course, make such a conveyance, and so this legislation has added a new mode of severance.¹⁹ Second, in Saskatchewan section 240 of the Land Titles Act²⁰ has imposed a significant restriction on the right to sever. The section provides not only that no instrument shall be operative to effect a severance until it is registered,²¹ but also that no instrument purporting to transfer the share or interest of a joint tenant shall be registered unless it is accompanied by the written consent to the transfer of the other joint tenant or joint tenants. This deprives a joint tenant of his freedom of alienation, traditionally a characteristic of all interests in land. In so

¹⁵ Litt. 294; *Denne d. Bowyer v. Judge* (1809), 11 East 288, 103 E.R. 1014 (K.B.); *Williams v. Hensman*, *supra*, footnote 5.

¹⁶ *Wright v. Gibbons* (1948-49), 78 C.L.R. 313 (Aust.H.C.). Megarry and Wade, *op. cit.*, footnote 2, p. 407, explain this on the basis that there is "no severance by the acquisition of another estate in the land unless that estate differed from the estate held in joint tenancy".

¹⁷ Land Registry Act, B.C., *supra*, footnote 8, s. 22(1), Conveyance and Law of Property Act, B.C., *supra*, footnote 8, s. 18; Property Act, N.B., *supra*, footnote 8, s. 23(3); Conveyancing and Law of Property Act, Ont., *supra*, footnote 8, ss 41, 42; Real Property Act, R.S. P.E.I., 1974, c. R-4, s. 16(2).

¹⁸ *Re Murdoch and Barry* (1975), 64 D.L.R. (3d) 222 (Ont.H.C.). In British Columbia this is now expressly provided for: see Conveyancing and Law of Property Act, *ibid.*, s. 18(3).

¹⁹ So far as the legislation referred to in footnote 17, *supra*, is drafted to encompass not only the conveyance of an absolute interest, but also the creation of subsidiary interests, it would be relevant to severance where severance may, as a matter of general principle, be brought about by the creation of subsidiary interests: *cf.* pp. 7 *et seq.*

²⁰ *Supra*, footnote 8.

²¹ As to this particular question, see further, *infra*, at pp. 37 *et seq.*

doing it radically changes the nature of a joint tenancy by depriving a joint tenant of his power to sever it unilaterally.²²

(ii) Creation of Other Possessory Interests.

A joint tenant, rather than disposing of the totality of his interest, may create out of it lesser possessory interests. If he does so, in one respect only is the law certain. If a leasehold interest is held in joint tenancy and a joint tenant sublets, this severs the interest.²³ If, however, a joint tenant who holds a fee simple interest grants either a life estate or a lease, the law is unclear, and is further complicated by the appearance of the ambiguous doctrine of suspension.

Littleton stated that if a joint tenant created a life estate, and either the grantor or his co-owner died during the currency of that estate, the right of survivorship did not operate, and the heirs of the deceased co-owner succeeded to his interest.²⁴ Coke agreed, but added the comment that if the life tenant died before the joint tenants, the right of survivorship is revived on his death. This is sometimes described as a temporary suspension of the joint tenancy, and therefore of the right of survivorship, during the term of the inferior estate.²⁵ Such modern authority as there is favours the view that there is a severance when the life estate is granted, but the texts do not squarely face the issue of whether it is total or temporary.²⁶

²² There is room for debate about the precise scope of the section. Subsection (2) requires consent for the registration of an instrument which purports to "transfer the share or interest" of a joint tenant. Even having regard to the definition of "transfer" in s. 2(t), the language of the subsection may not extend to the following transactions: (i) the creation of legal interests other than by way of the transfer of the total interest of the joint tenant (*infra*, pp. 7 *et seq.*); (ii) the creation of equitable interests where there is no transfer of legal title (*infra*, pp. 13 *et seq.*); (iii) declarations of intent or presumed intent, so far as either of these is effective to sever at all (*infra*, pp. 33 *et seq.*). I understand that the Land Registry practice in Alberta and Manitoba is not to accept for registration a transfer by a joint tenant of his interest, unless the other tenants consent or at least are notified. There is no legislation authorizing this procedure, and by implication it is at odds with some of the cases: *cf. Sorenson v. Sorenson*, *supra*, footnote 1; *Schofield v. Graham* (1969), 6 D.L.R. (3d) 88, 69 W.W.R. 332 (Alta S.C.).

²³ *Sym's Case* (1584), Cro. Eliz. 33, 78 E.R. 299 (Q.B.); *Pleadel's Case* (1579), 2 Leon. 159, 74 E.R. 441 (Q.B.).

²⁴ Litt. 302, 303.

²⁵ Coke on Litt. 193a. *Cf. Power v. Grace*, [1932] 2 D.L.R. 793, at p. 796, [1932] O.R. 357, at p. 360 (C.A.), per Grant J.A., citing Halsbury's Laws of England (1912), Vol. 24, pp. 204-205, para. 389; see now (3rd ed., 1960), Vol. 32, p. 335, para. 523.

²⁶ See the cases on leases *infra*, footnote 29; *Wright v. Gibbons*, *supra*, footnote 16, at p. 330. Challis, *op. cit.*, footnote 13, p. 367, states that there is a complete severance, but the example given is of the death of a joint tenant during the life estate. Cheshire, *Modern Law of Real Property* (9th ed., 1962), p. 299, also states

On the other hand, in the most recent Canadian decision, *Sorenson v. Sorenson*,²⁷ the Appellate Division in Alberta decided that at least in the case of a grant of a life estate by one joint tenant to the other there was no severance.

There is a similar divergence of authority on the effect of the grant of a lease by a joint tenant in fee simple. First, Coke was of the opinion that there was no severance, but if the lessor died during the term, the surviving joint tenant took subject to the lease.²⁸ That view is supported by some of the older English authorities, which, without dealing with the question of severance as such, decide that the lease is binding on the survivor.²⁹ In Canada there has only been passing reference to this view of the law by way of *dicta*.³⁰ This doctrine is also sometimes described as involving a suspension of the right of survivorship,³¹ the suspension not being a failure of the operation of the right at any time, but a delay of its full operation because of the binding nature of the lease. To distinguish it from suspension in the sense in which it was used earlier, we will hereafter refer to it as a modification of the right of survivorship. Second, it is possible that the right of survivorship is in fact suspended, that is the right will not operate at all during the currency of the lease, but if the lessee dies before any of the joint tenants, the right will be revived.³² Third, the preponderance of the later authorities supports the view that the granting of the lease effects a complete severance.³³

In attempting to resolve these uncertainties a preliminary matter to be decided is whether like effect should be given the grant of a lease and of a life estate. Without explanation, the court in *Sorenson*

that there is a severance, but gives the same example. There is no reference to the point in the subsequent editions of Cheshire: see the 12th edition, 1976. Megarry and Wade, *op. cit.*, footnote 2, p. 405, simply state that there is a severance, with a reference to both Littleton and Coke.

²⁷ *Supra*, footnote 1.

²⁸ Coke on Litt. 185a. See also Challis, *op. cit.*, footnote 13, p. 367; Halsbury, *op. cit.*, footnote 25 (3rd ed., 1960), Vol. 32, p. 335, para. 523.

²⁹ *Anon.* (1560), 2 Dyer 187a, 73 E.R. 412 (Q.B.); *Harbin v. Barton* (1595), Moore (K.B.) 395, 72 E.R. 650 (Q.B.); *Whitlock v. Horton* (1605), Cro. Jac. 91, 79 E.R. 781 (K.B.); *Smallman v. Agrobrow* (1617), Cro. Jac. 417, 79 E.R. 356 (K.B.); *Harbin v. Loby* (1629), Noy. 157, 74 E.R. 1118 (K.B.).

³⁰ *Power v. Grace*, *supra*, footnote 25, at pp. 796 (D.L.R.), 360 (O.R.); *Sorenson v. Sorenson*, *supra*, footnote 1, at p. 446. Both cases refer to the first edition of Halsbury, *op. cit.*, footnote 25 (1912), Vol. 24, p. 205, para. 389.

³¹ *Cf.*, e.g. *Freize v. Unger*, [1960] V.R. 230, at p. 243 (S.C.).

³² This was apparently the opinion of Dixon J. in *Wright v. Gibbons*, *supra*, footnote 16, at p. 330. See the comment in *In re Shannon's Transfer*, [1967] Tas.L.R. 245 (S.C.).

³³ *Clark v. Clark* (1694), 2 Vern. 323, 23 E.R. 809 (Ch.); *Cowper v. Cowper* (1865), 6 B. & S. 464, at p. 472, 122 E.R. 1267, at p. 1270 (Q.B.); *In re Armstrong*, [1920] 1 I.R. 239 (Ir. C.A.); Megarry and Wade, *op. cit.*, footnote 2, p. 405.

v. *Sorenson*³⁴ drew a distinction between them. But it is difficult to see why that should be done. Whatever their historical differences, today both interests can be regarded as similar possessory estates in land, and, while without doubt they each have their individual aspects, where it can be done it makes sense to accord them like treatment.

On the main issue, a traditional conceptual analysis points to severance. The creation of a life estate or a lease destroys the unity of interest and the immediate joint right to possession. The doctrine of modification can be dismissed as being inconsistent with the nature of the right of survivorship. When a joint tenant dies his interest is extinguished, it does not pass to the surviving joint tenants. It follows that interests dependent on that interest are also extinguished, and it is wrong to impose them on the survivors. Conceptually, there may be nothing to prevent the suspension and revival of a joint tenancy. However, it could be argued that once one of the unities is broken there needs to be an express and not implicit reconstitution of the interest. Moreover, if equity's reasons for disliking the joint tenancy are valid, the doctrine of suspension is particularly abhorrent. To the existing hazards and unfairness associated with the order of death of the joint tenants it adds the further hazard of the relative date of the death of the life tenant or lessee. It seems preferable that, once severed, the joint tenancy should remain so, unless expressly revived.

As we have seen, the court in *Sorenson v. Sorenson*³⁵ came to a different conclusion, deciding that the grant of a life estate by one joint tenant to another did not sever. The court gave two reasons for its conclusion. First, the creation of the life estate did not interfere with the operation of the right of survivorship. If the life tenant died first, the grantor would, by the right of survivorship, take an absolute fee simple; if the grantor died first, the life tenant (who was also the other joint tenant) would take the fee simple, and the life tenancy would merge in it. Second, the court thought that the granting of a life estate by one joint tenant to the other might well indicate an intention not to sever. On a conceptual analysis both these reasons are irrelevant. If one of the unities is destroyed, the right of survivorship is also destroyed; that it could in theory

³⁴ *Supra*, footnote 1.

³⁵ *Ibid.* The lease in this case followed an agreement between the husband and the wife that they "as joint tenants shall lease" the property to the wife. The judgment proceeded on the basis that the husband had leased his interest to his wife. If in fact the lease had been granted by both joint tenants to her it is arguable that they would have continued to hold identical interests, and so no severance would have taken place: *Palmer v. Rich*, [1897] 1 Ch. 134 (Ch.D.); *Lyons v. Lyons*, [1967] V.R. 168, at p. 172 (S.C.).

continue to operate easily is beside the point. Nor should intention be looked at, for severance by destruction of one of the unities operates as a matter of law.

It is suggested, therefore, that on a purely conceptual analysis the grant of a life estate or a lease should bring about a severance. If one were to speculate about intent it affords no clear guidance. On the one hand a joint tenant who grants a life estate or a lease may not have intended to sever, and it could be argued that it is unjust to nonetheless decide a severance has taken place, particularly if the joint tenancy has been expressly created in the first instance. On the other hand if the life estate or lease is granted to a third party it may be argued that to protect the grantee the right of survivorship must be effected in some way, and that it is not therefore unfair to attribute an intention to sever to the joint tenant in order to achieve that end.

The point is obviously a fine one. It is submitted, however, that the grant of a life estate or a lease by a joint tenant ought to bring about a complete severance. That result flows from a conceptual analysis and arguments based on intent or unfairness do not clearly offset it. *Sorenson v. Sorenson*³⁶ should be regarded as either wrongly decided on this point, or as being confined to its particular facts.

(iii) Creation of Non-Possessory Interests.

At common law a distinction has to be drawn between the effect of the granting of a mortgage and the creation of other non-possessory interests. In jurisdictions where there is a system of registration of title that distinction may have disappeared, but it is still convenient to accord mortgages separate treatment.

The creation of non-possessory interests, other than a mortgage, does not affect the four unities and so does not sever. This is the case, for example, where a joint tenant creates against his interest such common law encumbrances as rent charges³⁷ or easements.³⁸ The only unity which could possibly be affected is that of interest,

³⁶ *Ibid.* It should be noted that the court did decide that the joint tenancy was severed by a declaration of trust made by one of the joint tenants; see *infra*, p. 13. The case is a veritable encyclopedia of the law of severance for it also deals with severance by alienation of title, by the creation of a charge, by a course of dealing and by a declaration of intent, including the commencement of a partition action. As we have already seen, counsel argued that a joint tenancy could be severed by a will; *supra*, footnote 1. The case might also have discussed severance by the acquisition of a greater interest for it could have been argued that that was the effect of one joint tenant granting a lease to the other.

³⁷ Litt. 286.

³⁸ Smith, *Real and Personal Property* (6th ed., 1884), pp. 268-269; *Re McKee and National Trust Co. Ltd.*, *supra*, footnote 12, at pp. 196 (D.L.R.), 620 (O.R.).

but although encumbrances do touch on interest, they do not destroy it as would, for example, the creation of a life estate.

This general principle has been adopted by the courts in applying legislation on registration and execution of judgments. In *Re Young*³⁹ the issue before the court was whether a judgment registered against one of two joint tenants severed the joint tenancy. Section 35 of the British Columbia Execution Act⁴⁰ provides that, on registration, a judgment forms a lien and charge on all of the lands of the judgment debtor in the same manner as if he had charged them under his hand and seal. The British Columbia Court of Appeal decided that it followed from this section that there is no alienation of title on the registration of the judgment, but merely the creation of an encumbrance, and consequently there is no severance. Therefore, when the judgment debtor dies the surviving joint tenant takes by right of survivorship, free from the effect of the judgment.⁴¹

In *Power v. Grace*⁴² the Ontario Court of Appeal decided that the delivery of a writ of execution to the sheriff did not sever a joint tenancy. The Execution Act⁴³ in Ontario provided that the writ bound the land when delivered to the sheriff, and the sheriff was thereby authorized to execute, that is to seize and sell the land. It was held that the delivery, while it bound the land, in the sense that the sheriff now had the right to sell it, did not in itself destroy any of the unities. The Court of Appeal in effect adopted and applied the principle stated by Widdifield Co. Ct J. in the court below:⁴⁴

³⁹ (1968), 70 D.L.R. (2d) 594, 66 W.W.R. 193 (B.C.C.A.). See also *Re Brooklands Lumber & Hardware Ltd and Simcoe* (1956), 3 D.L.R. (2d) 762, 18 W.W.R. 328 (Man. Q.B.); *Re McDonald and The Queen* (1969), 8 D.L.R. (3d) 666, 71 W.W.R. (N.S.) 444 (B.C.S.C.).

⁴⁰ R.S.B.C., 1960, c. 135.

⁴¹ *Re Young*, *supra*, footnote 39, overruled *Re Application of Penn* (1951), 4 W.W.R. 452 (B.C.S.C.) which had held that the registration of a judgment brought about a temporary suspension of the joint tenancy.

⁴² *Supra*, footnote 25.

⁴³ R.S.O., 1927, c. 112, s. 9. See now R.S.O., 1970, c. 152, s. 10.

⁴⁴ [1932] 1 D.L.R. 801, at p. 802 (Ont. Co. Ct).

These cases leave unsettled the question of when in the process of execution severance takes place. In *Power v. Grace*, *supra*, footnote 25, at pp. 798 (D.L.R.), 362 (O.R.), Grant J.A. said that severance takes place either at the commencement of the execution process by the sheriff advertising the sale or by the actual seizure of the lands. In *Re Brooklands Lumber & Hardware Ltd and Simcoe*, *supra*, footnote 39, at pp. 766 (D.L.R.), 332 (W.W.R.), it was also suggested that the appropriate date was the commencement of proceedings under the Judgment Act. The point may turn on the provision of relevant legislation and rules of court. As a matter of general principle it may be argued that there is no severance until the land is sold. Until that date the judgment debtor could arrest the execution process: *cf.* British Columbia Law Reform Commission, Working Paper No. 22: The Execution of Judgments: Execution Against Land (1976), p. 46.

The trend of the authorities is that a mere lien or charge on the land, either by a co-tenant or by operation of law, is not sufficient to sever a joint tenancy; there must be something that amounts to an alienation of title.

At common law it was clearly established that the granting of a mortgage by one joint tenant severed the joint tenancy.⁴⁵ The common law mortgage took effect by way of a conveyance of title from the mortgagor to the mortgagee. This inevitably brought about a severance, and even when the title was re-conveyed to the mortgagor on redemption the joint tenancy was not revived. Thus, if A and B were joint tenants in fee simple and A mortgaged his interest to C, B and C became tenants in common in fee simple. When A redeemed and C re-conveyed the fee simple to him, A and B, now holding by different titles, were tenants in common.

In most jurisdictions where there is a system of registration of title to land, mortgages no longer take effect by way of conveyance, but operate by way of security, as a charge against the mortgagor's title.⁴⁶ There are no Canadian cases which consider the effect of such a mortgage,⁴⁷ but in Australia it has been held that it does not operate to sever a joint tenancy. Where there is comparable legislation the Canadian courts ought to follow the Australian precedent.

The leading Australian case is *Lyons v. Lyons*,⁴⁸ a decision of the Supreme Court of Victoria. Section 74(2) of the Victorian Land Transfer Act provides that a "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". The court in the *Lyons* case decided that because a

⁴⁵ *York v. Stone* (1709), 1 Salk. 158, 91 E.R. 146 (Ch.); *Re Pollard's Estate* (1863), 3 De G. J. & S. 541, 46 E.R. 746 (Ch.); *Lyons v. Lyons supra*, footnote 35.

⁴⁶ Cf. e.g. Land Titles Act, R.S.A., 1970, c. 198, s. 105; Real Property Act, R.S.M., 1970, c. R30, s. 95; Land Titles Act, Sask., *supra*, footnote 8, s. 129.

⁴⁷ But see *Re Brooklands Lumber & Hardware Ltd and Simcoe, supra*, footnote 39, where it was assumed that a mortgage by way of charge did not sever; *Sorenson v. Sorenson, supra*, footnote 1, at p. 449, where it was held that a "charge" did not sever.

In the latter case the court did not state the exact nature of the charge in question. It did say that the presumption on which it proceeded was that there were no arrears at the date of the death of the joint tenant who was the debtor. But surely the issue is whether at the date of the creation of the charge there was a severance. One cannot wait until the date of the death of the debtor to make that decision, unless the doctrine of suspension of the joint tenancy is applied: see further, pp. 33 *et seq.* On the facts of the case the creditor was the other joint tenant. On the death of the debtor the right of survivorship operated in the creditor's favour. The court said that the creditor would therefore have the absolute title as her security. This is difficult to follow. If by the operation of the right of survivorship the creditor became the owner of the property how could she have a charge against her own property for a debt owed to her?

⁴⁸ *Supra*, footnote 45; *In re Shannon's Transfer, supra*, footnote 32.

mortgage is now simply a charge and not a conveyance, there is no destruction of the unities when it is granted, and therefore no severance. In so deciding, it rejected two other arguments based on the language of the Act. First, it was argued that because, under section 74(2), a mortgage still creates an interest in land severance must take place. But there are interests which sever, and interests which do not; simply to say that a mortgage creates an interest in land is not in any way decisive of the issue. Second, section 81 of the Act, as does other comparable legislation, provides that, despite the change of form, the mortgagee is still to have all the rights and remedies which he would have had at common law. It was argued that this meant that the mortgagee was still in substance vested with title, and therefore it followed that the mortgage severed the joint tenancy. The court held that the section did not go as far as vesting title in the mortgagee, and that that was the crucial question in deciding if there had been a severance. The decision is, it is suggested, a correct application of the common law rules based on the destruction of one of the four unities.

In these cases on non-possessory interests (including mortgages) the Canadian courts have generally been content to do no more than ask whether or not one of the unities has been broken. They have not enquired into the relation between their decisions and the intent, expressed or implied, of the joint tenant, or into the impact of the decision on third parties. These are, however, matters which do require consideration, and they will be dealt with later.⁴⁹

B. The Creation of Equitable Interests.

In the first instance, in deciding when the creation of an equitable interest will effect a severance, equity follows the law. If there are created equitable interests, corresponding to legal interests whose transfer or creation will sever at law, there will be a severance in equity. In *Re Mee*⁵⁰ a father who was a joint tenant in fee simple, declared himself trustee for his son of his interest. The British Columbia Court of Appeal held that this brought about a severance. If the father had transferred his interest directly to the son, or had created the equitable interest by transferring legal title to a third party as trustee, there would have been severance at law. The court decided that the same result should follow in equity if the equitable interest were created by way of a personal declaration of trust.

But equity goes even further than the common law. It is well established that a contract or a covenant which is specifically

⁴⁹ *Infra*, pp. 33 *et seq.*

⁵⁰ (1971), 23 D.L.R. (3d) 491, [1972] 2 W.W.R. 424 (B.C.C.A.); followed, *Sorenson v. Sorenson*, *supra*, footnote 1.

enforceable will sever in equity.⁵¹ This is an example of the application of the general principle that if a decree of specific performance is available the promisee will be regarded as having acquired an equitable interest from the date of the making of the contract or covenant. Therefore, even though the relationship of the parties rests in contract or covenant and not in conveyance, equity will regard severance as having been effected at that date. It can also be argued that this conclusion is in accord with the probable intention of the parties. For example, in a case of a contract to sell, in order to give effect to the contract and to prevent the purchaser from being affected by the operation of the right of survivorship, the joint tenancy needs to be treated as severed.

On this basis the decision in *Foort v. Chapman*⁵² is open to question. In that case two sisters owned property as joint tenants, and in addition had expressly agreed that there would be a right of survivorship. Nonetheless one sister entered into an agreement for sale with her son, under which he was to purchase her interest by making three annual payments to her. The mother forgave these payments in advance, and died before the expiration of the three year period. The agreement for sale was registered after her death and before the other sister had applied to register by virtue of her right of survivorship. The court decided that the agreement for sale had not severed the joint tenancy.

The decision may be attributable to the fact that the court's attention appears to have been drawn to cases dealing with agreements for the sale of the property entered into by all of the joint tenants, and it is well established that in such cases there is no severance.⁵³ *Prima facie*, the agreement for sale ought to have severed because the appropriate remedy for breach of the agreement would have been a decree of specific performance. There may be a justifiable hesitancy on the part of the court in arriving at this conclusion in the case of an agreement for sale where payment is extended over a long period of time. If a vendor died soon after the agreement was entered into, it would be purely a speculative matter as to whether or not a decree of specific performance would eventually be awarded. But if there is an agreement to sell to be completed within a short time, and the vendor dies before completion, there still may be some speculation about whether a decree will issue. It is suggested that technically speaking the length

⁵¹ *Brown v. Raindle* (1796), 3 Ves. 256, 30 E.R. 999 (M.R.); *Caldwell v. Fellowes* (1870), L.R. 9 Eq. 410 (V.C.); *Re Hewett*, [1894] 1 Ch. 362 (Ch.D.); *Goddard v. Lewis* (1909), 101 L.T. 258 (K.B.).

⁵² (1973), 37 D.L.R. (3d) 730, [1973] 4 W.W.R. 461 (B.C.S.C.).

⁵³ *Infra*, p. 18.

of time over which payment is to be made is not a sound ground for distinguishing these types of cases. Moreover, on any time span, the argument can be made that the joint tenancy needs to be treated as severed in order to give effect to the agreement for sale, and to prevent the right of the purchaser being defeated by the right of survivorship.⁵⁴

If the equitable interest that is created is simply an equitable encumbrance there will be no severance. An illustration of this is the effect of the granting of an option to purchase.⁵⁵ The holder of the option has an equitable interest, but any passing of title in equity will not take place until the option is actually exercised. Until that date the existence of the option does not affect any of the four unities. Once more equity follows the basic common law principle, and in doing so, pays no attention to the presumed intention of the parties; again that will be something considered below.⁵⁶

II. Mutual Agreement of the Joint Tenants.

A. Express Agreement, Implied Agreement and Course of Dealing.

There are three questions which are common to express agreements, implied agreements and course of dealing; first, the relationship between these modes of severance, second, the application to them of the Statute of Frauds, and third, the extent of the knowledge of the nature of a joint tenancy which joint tenants must have in order to enter into a valid agreement to change their interest to a tenancy in common.

The first question turns in part on rules 2 and 3 in *Williams v. Hensman*.⁵⁷ Rule 2 covers severance by "mutual agreement", rule 3 by "a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common". In *Burgess v. Rawnsley*⁵⁸ the Court of Appeal in England took the position that rules 2 and 3 covered distinct and separate methods of severance. Rule 2 encompassed express agreement, be it an express agreement to sever, or be it an express agreement not in itself

⁵⁴ One might also argue that as a matter of substance there is no difference between a disposition by way of agreement for sale, and a conveyance to a purchaser and a mortgage back to the vendor. In the latter case the initial conveyance will effect a severance. In order to give substantially the same effect to what are substantially similar transactions an agreement for sale should also be treated as severing.

It should perhaps also be noted that if need be the court would have been prepared to decide the case on the ground of fraud: see *Foot v. Chapman supra*, footnote 52, at pp. 739 (D.L.R.), 472 (W.W.R.).

⁵⁵ *Re McKee and National Trust Ltd, supra*, footnote 12.

⁵⁶ *Infra*, pp. 33 *et seq.*

⁵⁷ *Supra*, footnote 5.

⁵⁸ *Supra*, footnote 6.

directed to severance as such, but from which an inference of severance could be drawn.⁵⁹ Rule 3 on the other hand covered circumstances not involving any agreement, but where it could be inferred that the parties formed a "common intention" to hold their property as tenants in common.⁶⁰

These distinctions are difficult to follow. In every case under rules 2 and 3 the issue is whether the parties did something from which it can be inferred that they intended to treat their interest as a tenancy in common. Whatever the supporting evidence, one is really looking for an agreement, and it is nonetheless an agreement if it is referred to as a "common intention". The language of rule 3 would seem to recognize this. It refers to "a course of dealing sufficient to intimate that the interests of all were *mutually treated* as constituting a tenancy in common". What else is this other than an implied agreement? The validity of the distinctions is rendered all the more doubtful because, having made them, all of the members of the Court of Appeal did not consistently follow them. Thus, Browne L.J. said of the "course of dealing" that "there would in such a case *ex hypothesi* be no express dealing but only an inferred, tacit agreement . . .".⁶¹ It is difficult to see why the court felt compelled to draw these distinctions in the first instance. One possible explanation was to avoid difficulty with the Statute of Frauds but, as we shall see, that really does not succeed. In any event for our purposes we will proceed on the basis that rules 2 and 3 both cover severance by agreement, and that the only difference between them is the basis upon which this agreement is proven.⁶²

The applicability of the Statute of Frauds⁶³ appears to have been raised in only one Canadian case, *Ginn v. Armstrong*.⁶⁴ The court

⁵⁹ *Ibid.*, at pp. 439, 444, 446-447 (Ch.), 147, 151, 152-153 (All E.R.).

⁶⁰ *Ibid.*, at pp. 439, 446-447 (Ch.), 147, 153-154 (All E.R.).

⁶¹ *Ibid.*, at pp. 444 (Ch.), 151 (All E.R.).

⁶² See to this effect *Lyons v. Lyons*, *supra*, footnote 35, at p. 171.

⁶³ Statute of Frauds: R.S.B.C., 1960, c. 369, s. 2; R.S.N.B., 1973, c. S-14, s. 1; R.S.N.S., 1967, c. 290, s. 6; R.S.O., 1970, c. 444, s. 4. The English statute is probably in force in those jurisdictions where legislation has not been expressly enacted: see Côté, An Introduction to the Law of Contracts (1974), p. 55; Fridman, The Law of Contract (1976), p. 201; *Delima v. Paton* (1971), 1 Nfld. & P.E.I.R. 317 (P.E.I.S.C.); *Balaberba v. Mucha* (1960), 25 D.L.R. (2d) 760 (Sask. C.A.).

⁶⁴ (1969), 3 D.L.R. (3d) 285 (B.C.S.C.). The point was also taken in: (1) *Wilson v. Bell* (1843), 5 Ir.Eq.R. 501, at p. 508 (Eq.Ex.), where the difficulty was avoided because the court was able to rely on the doctrine of part performance; (2) *Lyons v. Lyons*, *supra*, footnote 35, at p. 171, where it was stated that the agreement must comply with the Statute of Frauds and that, so far as *Williams v. Hensman*, *supra*, footnote 5, did refer to an agreement arising from conduct, it had to be remembered that that case concerned personalty, and not realty.

thought that it was doubtful whether writing was required as a matter of law, but decided that, in any event, on the facts of that case, there was sufficient evidence in writing to comply with the Statute. The other cases have either involved personalty, or if they have involved realty, it has been assumed that writing was not needed. But in principle it does seem that the Statute ought to apply. An agreement to sever is an agreement concerning an interest in land, and it would appear to fall squarely within the terms of the Statute.

This conclusion may be avoided in one of two ways, neither of them perhaps being particularly convincing. In *Burgess v. Rawnsley*⁶⁵ Browne L.J. seemed to rely in some measure on the distinction between express agreement and a course of dealing showing a common intention. He said:⁶⁶

An agreement to sever can be inferred from a course of dealing and there would in such case *ex hypothesi* be no express agreement but only an inferred, tacit agreement, in respect to which there would seldom if ever be writing sufficient to satisfy section 40. It seems to me that the point is that the agreement establishes that the parties no longer intend the tenancy to operate as a joint tenancy and that automatically effects a severance.

But that passage if anything underlines the dilemma. The course of dealing is an agreement and an agreement relating to an interest in land; yet by its very nature it is unlikely to be evidenced in writing. But one surely cannot take an agreement out of the Statute by calling it a "common intention".

The other possible way of avoiding the application of the statute is to rely on the constructive trust.⁶⁷ If the parties do agree to sever, then severance takes place in equity. To give effect to that agreement equity will require that the legal title, still held in joint tenancy, be held by way of constructive trust for the co-owners as tenants in common. Even this is none too satisfactory, particularly where there is an express agreement to sever. If the courts have not been prepared to use the constructive trust to avoid the Statute in the case of, for example, contracts for the sale of land, it is difficult to see why they should do so here. Where there has been a course of dealing, with little possibility of writing ever coming into existence, it is perhaps easier to see the constructive trust being used, and it is probably the case that the courts will rely on it in all circumstances. But it is still a difficult question as a matter of principle.

The third issue is one which appears to be well settled. Where severance is brought about by a course of dealing the parties may

⁶⁵ *Supra*, footnote 6.

⁶⁶ *Ibid.*, at pp. 444 (Ch.), 151 (All E.R.).

⁶⁷ Constructive trusts are, of course, expressly exempted from the requirement of writing; see the legislation cited, *supra*, footnote 63.

often not fully appreciate the nature of a joint tenancy, and in particular the significance of the right of survivorship. They may act as tenants in common because they do not realize that co-ownership can involve anything else. It might seem therefore that the possibility is open of arguing that any agreement is in some way vitiated by mistake. It is, however, well established that the fact that the parties did not appreciate the nature of a joint tenancy or a tenancy in common is not a basis for refusing to infer an agreement that they are tenants in common, if in fact they conducted themselves as such.⁶⁸

B. *Evidence of an Agreement to Sever.*

The best evidence of an agreement to sever is an express agreement directed to that very point. But the case that comes before the courts is one where there is no such agreement, and the issue is whether there is sufficient evidence from which an agreement may be implied. The decisions turn on what Lord Eldon once called a "mere matter of evidence"⁶⁹ but, if it be a mere matter, it is a difficult and tricky one. The courts have been loath to lay down any absolute rules; nonetheless there are certain general trends which can be seen in the decisions. These trends reflect in large measure the traditional judicial preference for the tenancy in common. Thus, the question of whether in Canada the courts ought to continue to follow that preference is particularly relevant in this context.

(1) Cases where there will not be a severance.

First, there are dealings from which in themselves the courts will not draw an inference that a joint tenancy is severed. If the joint tenants receive and divide the rents and profits arising from their property that will not sever.⁷⁰ Such conduct is quite consistent with the continuation of the joint tenancy. Similarly, in itself an agreement by all of the joint tenants to sell to a third party does not bring about a severance:⁷¹

A mere agreement by persons entitled as joint tenants to convert their property from one species to another does not operate to work a severance. It is true that when the transaction comes to be completed they may effect a severance: in the case of money converted into land, by the limitations in the conveyance; in the case of land converted into money, by taking and dividing the money.

⁶⁸ *Jackson v. Jackson* (1804), 9 Ves. 591, 32 E.R. 732 (Ch.); *Williams v. Hensman*, *supra*, footnote 5; *Flannigan v. Wotherspoon*, [1953] 1 D.L.R. 768, 7 W.W.R. (N.S.) 660 (B.C.S.C.).

⁶⁹ *Crooke v. De Vandes* (1805), 11 Ves. 330, at p. 333, 32 E.R. 1115, at p. 1116 (Ch.).

⁷⁰ *Flannigan v. Wotherspoon*, *supra*, footnote 68, at pp. 775-776 (D.L.R.), 669 (W.W.R.).

⁷¹ *Re Hughes Estate*, [1920] 1 I.R. 207, at p. 211 (C.A.). See also *Flannigan v. Wotherspoon*, *ibid*.

The *prima facie* result of such an agreement is that the property acquired is held in joint tenancy in lieu of the property sold.⁷²

(2) Cases where there will be severance.

Second, there are situations where the courts are very likely to hold that a severance has taken place. This will be the case if the joint tenants enter into an agreement to divide the property in specie, or to sell and divide the proceeds of the sale, or where one joint tenant agrees to sell his interest to the other. In such cases severance takes place on the making of the agreement. This result is easily understood where the agreement is to be put into effect immediately. It has also been held that the agreement itself brings about a severance where it has not been put into effect before the death of one of the joint tenants, where it is for a division or sale at a future date, where it is unenforceable and where the parties later expressly agreed not to carry it out. All of these, and in particular the last two, require some explanation.

*Schofield v. Graham*⁷³ is an example of the situation where an agreement for immediate sale and division of the proceeds was never carried out. One joint tenant commenced an action against the other regarding property owned by them in joint tenancy, but that action was stayed on the basis of an agreement that the property would be sold and the proceeds divided equally between them. Although it was listed for sale, the property was never sold. It is not clear from the case why no sale took place, but the court apparently did not think that the failure to sell the property was in any way relevant. The agreement in itself sufficiently indicated a common intention to sever. It followed that from the date of the making of the agreement the parties were tenants in common.⁷⁴

In *Re McKee and National Trust Company Limited*⁷⁵ by a separation agreement a husband and wife dealt, *inter alia*, with property owned by them in joint tenancy. The agreement provided that the wife was to have exclusive occupation of the property over a certain specified period of time, that there was eventually to be a sale and equal division of the proceeds between the parties, and that the wife was to have the option of purchasing her husband's interest. The husband died before the time for sale had arrived, and the option had

⁷² Similarly a lease by all of the joint tenants will not sever: *Palmer v. Rich*, *supra*, footnote 35.

⁷³ *Supra*, footnote 22.

⁷⁴ The case does not state the exact lapse of time between the date of the making of the agreement and the death of the joint tenant. The agreement was made in 1961. The case was decided in 1969. It would appear that there was adequate time for the sale to have taken place.

⁷⁵ *Supra*, footnote 12.

not been exercised by the date of his death. The Ontario Court of Appeal held that the manner in which the parties had dealt with the property in the agreement indicated a mutual agreement to sever. A major consideration was the provision for sale and division of the proceeds. Although this was not to take effect until a future date, its existence indicated the joint tenancy was regarded as severed at the date the agreement was made.⁷⁶

*Burgess v. Rawnsley*⁷⁷ is a case where an unenforceable agreement formed the basis of an inference that the parties intended to sever. In that case two joint tenants entered into an agreement by which one of them was to sell her interest to the other. The agreement was not in writing, and therefore not enforceable. It was conceded that, as a matter of general principle, an inference of an agreement to sever could be drawn from an express contract to sell; the issue then was whether the inference could still be drawn when the contract, as an agreement to sell, was unenforceable. The court decided that it could. The agreement to sell was unenforceable but not void,⁷⁸ and it therefore could have an effect on the relationship between the parties to it. On the facts of the case, the court saw no reason why it should not draw the usual inference that an agreement by one joint tenant to sell to another severed. The case therefore is authority for the general proposition that an inference may be drawn from, *inter alia*, a contract which, in respect to its main object, is unenforceable.

But the case goes even further than this, for the parties, after making the agreement to sell, agreed that it would not be carried out. The court held that this too was irrelevant.⁷⁹ Logically one can see that conclusion. If the agreement to sell formed the basis for the inference of severance, the later joint repudiation of it does not necessarily destroy the inference. But it can be argued that if one is drawing inferences one should look at all the circumstances. If the parties agreed not to proceed with the contract of sale it is not too clear that one should assume that the inferences which one might otherwise draw from that agreement should stand. The issue is one of fact, and the willingness of the court to draw the inference may be explained by the preference in England for the tenancy in common. The acceptance of the argument that no such preference should be

⁷⁶ The court also relied on the option to purchase, although, as we have seen, it held that the option in itself did not sever: *supra*, p. 15.

⁷⁷ *Supra*, footnote 6.

⁷⁸ This is, of course, a well-established interpretation of the Statute of Frauds, and equivalent legislation, in England, Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, s. 40.

⁷⁹ *Supra*, footnote 6, at pp. 444, 446 (Ch.), 151, 152 (All E.R.). According to Sir John Pennycuik's judgment the point was in fact conceded.

shown in Canada would considerably strengthen the argument that a Canadian court ought not to draw a similar inference in such circumstances.

All of the cases that we have looked at so far have been concerned with an express agreement dealing directly with the jointly owned property. There are cases where that property is not directly the subject matter of the agreement, but nonetheless the joint tenancy has been held to be severed. An example of this is where two people who are joint tenants make joint or mutual wills.⁸⁰ In accordance with general principle, if the testators not only agree to make joint or mutual wills, but also agree that the wills shall not be revoked, the courts will enforce that agreement by way of constructive trust.⁸¹ It is often stated that the effect of joint or mutual wills is to sever a joint tenancy.⁸² This is because the wills provide for a distribution of property on death inconsistent with the right of survivorship. That general statement, true though it is, cloaks two questions which deserve further discussion.

To invoke the constructive trust doctrine referred to above four things must be shown, first, an agreement to make joint or mutual wills, second, an agreement that they will not be revoked, third, the making of the wills, and, fourth, the death of one of the testators.⁸³ But it may not be necessary to show the existence of all these facts to draw the inference that a joint tenancy has been severed. If two joint tenants agree to make joint or mutual wills that alone may indicate they do not wish the right of survivorship to operate. That inference is even stronger if the wills are actually made. A further agreement not to revoke, and the death of one of the testators, however essential to establish a constructive trust, and while they may strengthen the inference of severance, are not absolutely necessary prerequisites to drawing that inference. This proposition would be tested if two joint tenants agreed to make joint or mutual wills and did not make them or, having made them, agreed to revoke them. We have seen that in the case of agreements not carried out at all, or agreements rescinded by the parties, the courts have inferred that a severance has occurred.⁸⁴ The same result could be arrived at in the above hypothesis.

⁸⁰ In both types of wills the testators make, *mutatis mutandis*, identical testamentary dispositions, generally the survivor taking a life estate in the estate of the first to die, and on the death of the survivor the property of both testators going to the same beneficiaries. A joint will is a single document signed by both; mutual wills two documents, with identical provisions.

⁸¹ Waters, *The Law of Trusts in Canada* (1974), pp. 351 *et seq.*

⁸² *Ibid.*, p. 360, footnote 2.

⁸³ *Sed quare* as to the last requirement: *cf. Waters, op. cit.*, *ibid.*, pp. 356-358.

⁸⁴ *Cf. Schofield v. Graham, supra*, footnote 22; *Re McKee and National Trust Co. Ltd, supra*, footnote 12; *Burgess v. Rawnsley, supra*, footnote 6.

The second issue is whether or not the joint tenancy is subject to the agreement in the first place. Normally, of course, a will has no effect on a joint tenancy. One would have thought therefore that a court would have needed clear evidence that an agreement relating to wills was intended to effect a severance. It may be relatively easy to reach that conclusion where the property held in joint tenancy is the only substantial asset of the parties, but if it is only one of a large number of assets it could be argued that it should not be too easily assumed that the joint tenancy was subject to the agreement.⁸⁵ However, whatever the merits of that argument may be, it seems likely that the courts will assume that any joint tenancy is affected by an agreement to make joint or mutual wills, even though there be no express reference to the joint tenancy as such.⁸⁶

(3) Cases where an inference as to severance may be drawn.

The next group of cases illustrate the middle ground—they involve circumstances from which an inference as to severance may, but will not necessarily be drawn. A common situation is where, either by way of division in specie or by way of division of the proceeds of a sale, the joint tenants divide part of the jointly owned property between them. Whether or not this indicates an intention to sever is in some measure a matter of degree (how much of the property was distributed), but, more generally, distribution, be it large or small, has to be looked at in the context in which it occurs.⁸⁷ In *Flannigan v. Wotherspoon*⁸⁸ the joint tenants sold their property by way of agreement for sale. They divided the down-payment between them, and made arrangements for the subsequent payments to be deposited in equal shares into their separate bank accounts. The joint tenant who eventually was the first to die also told his co-owner that he had left his interest to his daughter, and, in a later conversation with the daughter, the other joint tenant accepted that title would pass to her. Nonetheless on his co-tenant's death he claimed under the right of survivorship. It was held that the division of the down-payment was some evidence of an intention to sever, the

⁸⁵ See, to this effect, Laskin J.A., dissenting, in *Re Gillespie* (1968), 3 D.L.R. (3d) 317, at p. 329, [1969] 1 O.R. 585, at p. 597 (C.A.).

⁸⁶ *Re Gillespie*, *ibid.*

⁸⁷ *Crooke v. De Vandes*, *supra*, footnote 69; *Jackson v. Jackson*, *supra*, footnote 68; *In re Denny* (1947), 177 L.T. 291 (Ch.D.); *Neilson-Jones v. Fedden*, [1975] Ch. 222, [1974] 3 All E.R. 38 (Ch.D.); *Flannigan v. Wotherspoon*, *supra*, footnote 68; *Sorenson v. Sorenson*, *supra*, footnote 1. If *Leak v. Macdonald* (1862), 32 Beav. 28, 55 E.R. 11 (Ch.) decided that it is a rule of law that every division of capital severs a joint tenancy, then by the consensus of authority it is wrongly decided. But that proposition might be taken to have received some support from Lord Denning's comments on *Neilson-Jones v. Fedden*, *supra*, in *Burgess v. Rawnsley*, *supra*, footnote 6, at pp. 440 (Ch.), 148 (All E.R.).

⁸⁸ *Supra*, footnote 68.

standing arrangements for the equal division of subsequent payments was even stronger evidence, and the conversation with the daughter was really an admission against interest on the part of the survivor. In all of these circumstances the joint tenancy was severed by mutual agreement.

A number of recent cases have illustrated that it is also possible to draw an inference as to severance from negotiations relating to the joint property, even when these negotiations do not lead to any final agreement.⁸⁹ *Re Walters*⁹⁰ is an example of such a case. A husband and wife owned a matrimonial home in joint tenancy. The wife commenced actions for a divorce, interim maintenance and partition. The interim maintenance action was adjourned while the parties attempted to negotiate an overall settlement. In the negotiations the wife took the view that her maintenance claim turned in part on the nature of her interest in the matrimonial home, while the husband, conceding that she was entitled to a half-interest, thought that on that basis she was not entitled to any maintenance at all. They obtained two valuations of the property, and made cross offers for the purchase of each other's interest. While the negotiations were going on the husband altered his will, disinheriting his wife completely. Before any final agreement was reached the husband died. It was decided that the joint tenancy had been severed. The course of negotiations indicated that they regarded themselves as tenants in common, and what was at issue in the negotiations was the value of their respective interests.

It is going quite far to base an inference on incomplete negotiations, and some cases have either failed to see or to accept that possibility. In *Rodrigue v. Dufton*⁹¹ the court decided that an application for partition did not sever the joint tenancy, but it would seem that no argument was addressed to the court on the possible effect of negotiations which had taken place between the parties. In *Neilson-Jones v. Fedden*⁹² the point was argued and rejected. In that case a husband and wife made arrangements for the disposition of their property on divorce. It was agreed that the husband would sell

⁸⁹ *Ginn v. Armstrong*, *supra*, footnote 63; *Re Walters* (1977), 79 D.L.R. (3d) 122, [1977] 1 R.P.R. 150 (Ont.H.C.), *aff'd* without reasons (1978), 84 D.L.R. (3d) 416, 17 O.R. (2d) 592 (C.A.). In *Burgess v. Rawnsley*, *supra*, footnote 6, Sir John Pennycuik expressly stated that an inference could be drawn from incomplete negotiations: see at pp. 447 (Ch.), 153 (All E.R.); Lord Denning indicated that he agreed with that in his comments on *Neilson-Jones v. Fedden*, *supra*, footnote 82, at pp. 440 (Ch.), 147-148 (All E.R.); Browne L.J. left the matter open, but it would seem on the facts rather than on the law: at pp. 444 (Ch.), 151 (All E.R.).

⁹⁰ *Ibid.*

⁹¹ (1976), 72 D.L.R. (3d) 16, 13 O.R. (2d) 613 (H.C.).

⁹² *Supra*, footnote 87.

the family home, owned in joint tenancy, and from the proceeds buy a house for himself. When the home was sold for £20,000, out of a deposit of £1,000, about £200 was paid to each. During the subsequent negotiations "both of them made it perfectly clear that they were looking forward to an ending of the joint tenancy in the proceeds of the sale of the property".⁹³ Walton J. decided that there had been no severance. The distribution of the £200 was at best neutral in its implication. As to the negotiations he said:⁹⁴

I think that I can take the matter very shortly. It appears to me that when parties are negotiating to reach an agreement, and never do reach any final agreement, it is quite impossible to say that they have reached any agreement at all.

If this is a statement of law, it is wrong in the light of the other authorities; if it is a conclusion of fact, it seems difficult to reconcile with the assessment of the facts in other decisions.⁹⁵

There is, however, a limit to how far the courts will go. In *Burgess v. Rawnsley*⁹⁶ the court considered what the position would have been if the joint tenants had not reached any agreement. Lord Denning said that there still would have been a severance. Browne L.J. doubted if there was enough evidence to justify that conclusion. Neither, however, made it clear on what evidence they were relying. Sir John Pennycuik, on the assumption that, short of agreement, all that the joint tenants would have done would have been to make cross-offers to purchase, decided that would not have effected a severance.⁹⁷

I do not doubt myself that where one tenant negotiates with another for some re-arrangement of interest, it may be possible to infer from the particular facts a common intention to sever even though the negotiations break down. Whether such an inference can be drawn must I think depend upon the particular facts. In the present case the negotiations between Mr. Honick and Mrs. Rawnsley, if they can properly be described as being negotiations at all, fall, it seems to me, far short of warranting an inference. One could not ascribe to joint tenants an intention to sever merely because one offers to buy out the other for X pounds and the other makes a counter offer of Y pounds.

(4) Conclusion.

When the matter is one of drawing inferences from facts the basic attitude of the courts is crucial. The decisions we have just considered are clearly coloured by the judicial preference for the tenancy in common; there is no better demonstration of this than Lord Denning's judgment in *Burgess v. Rawnsley*.⁹⁸ It was

⁹³ *Ibid.*, at pp. 226 (Ch.), 41 (All E.R.).

⁹⁴ *Ibid.*, at pp. 230 (Ch.), 44 (All E.R.).

⁹⁵ In *Burgess v. Rawnsley*, *supra*, footnote 6, Lord Denning said the case was wrongly decided: at pp. 440 (Ch.), 147-148 (All E.R.).

⁹⁶ *Supra*, footnote 6. For the facts see, *supra*, p. 20.

⁹⁷ *Ibid.*, at pp. 447 (Ch.), 153 (All E.R.). ⁹⁸ *Ibid.*

suggested at the outset that Canadian courts should not show a similar preference in jurisdictions where the joint tenancy needs to be deliberately created; rather they should look for a clearly established intention to sever. On that basis the courts should not be too quick to find a common intention to sever where an agreement between joint tenants about their interest was unenforceable, or was, by mutual consent, not carried out. Nor should a court too easily find that joint or mutual wills are intended to effect joint tenancies, particularly if the property subject to the joint tenancy is only one asset in a large estate. And it would be wise to be careful about inferring an intention to sever in cases where negotiations have not led to any agreement at all. It is no doubt significant if the co-owners are husband and wife who are negotiating or who have negotiated a property settlement on separation or divorce; and that may explain some of the cases referred to earlier. Nonetheless, as a matter of principle, the courts should be satisfied that the parties have agreed that, come what may, the joint tenancy is severed. To adopt this approach would not prevent the courts from finding the necessary common intention in an appropriate case; it would however ensure that they would not strain their view of the facts to arrive at that conclusion.⁹⁹

III. *The Intention of One Joint Tenant—Severance in Equity.*

A joint tenant, acting independently of his fellow joint tenants, may engage in conduct which does not destroy the four unities, but which may indicate his wish to sever. Two types of cases have come before the courts. The first is where the joint tenant indicates to his fellow joint tenants his intention of treating the interest as a tenancy in common. The second is where he engages in a transaction with a third party, from which, it is argued, the courts ought to infer the intention to sever, or to hold there ought to be a severance because it would be unfair to keep the joint tenancy in being. In both cases the efficacy of these methods of severance is open to doubt as a matter of law; and, if they are legally operative, there is uncertainty about the circumstances in which they apply.

A. *Declaration of Intention.*

(1) Can it ever operate to sever?

The law in England is in a state of confusion on this point, and that confusion has, in some measure, permeated the Canadian cases. For the sake of clarity, it is simpler to deal separately with the current position in each of the two countries.

⁹⁹ With respect to offers, it would be strange if the granting of an option by one joint tenant did not sever (*cf. Re McKee and National Trust Co. Ltd., supra*, footnotes 12, 55), but the mere making of an offer, or even of cross offers, did.

In England there are three views on the effect of a declaration by one joint tenant to his co-owners that he is thereby severing the joint tenancy. These views are closely related to two other questions, first, whether the law is the same with respect to realty and personalty, and, second, the proper interpretation of section 36(2) of the Law of Property Act, 1925.¹⁰⁰

The first and traditional view is that a declaration of intent does not sever. This is supported by cases running from 1700 to 1974,¹⁰¹ and was forcefully re-stated by Walton J. in *Nielson-Jones v. Fedden*.¹⁰² The learned judge fully reviewed the authorities, and concluded that at common law a severance could be effected only by the destruction of one of the four unities, or by agreement. The only cases to the contrary were *Hawkesley v. May*,¹⁰³ decided in 1955, and *Re Draper's Conveyance*,¹⁰⁴ decided in 1967, and these Walton J. dismissed as being decided *per incuriam*. On this view of the common law it follows that a notice in writing is a new method of severance, introduced by section 36(2). The "other things" referred to in the subsection are the common law modes of severance, applicable equally to realty and personalty.¹⁰⁵

The second view is that at common law a notice in writing could sever a joint tenancy in personalty, but not in realty, and that the effect of section 36(2) is to extend that mode of severance to realty.

¹⁰⁰ *Supra*, footnote 78. S. 36(2) reads: "No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants: Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance."

¹⁰¹ *Moyse v. Gyles* (1700), Prec. Ch. 124, 24 E.R. 60 (Ch.); *Partriche v. Powlet* (1740), 2 Atk. 54, 26 E.R. 430 (Ch.); *Re Wilks*, [1891] 3 Ch. 59 (Ch.D.); *Neilson-Jones v. Fedden*, *supra*, footnote 87.

¹⁰² *Ibid.*

¹⁰³ [1956] 1 Q.B. 304, [1955] 3 All E.R. 353 (Q.B.D.).

¹⁰⁴ [1969] 1 Ch. 486, [1967] 3 All E.R. 853 (Ch.D.).

¹⁰⁵ In England this conclusion would lead to a strange anomaly. Subsection 36(2) applies to interests in realty, but not to interests in personalty. If A and B are joint tenants of realty either may sever by notice in writing. If the realty were converted to personalty this mode of severance would not be available to them. The courts obviously would like to avoid this result and this may in part explain the development of other views in England on what the law is. This consideration is of course not of any direct relevance in Canada.

This statement of the law first appeared in *Re Draper's Conveyance*¹⁰⁶ in 1969, and in 1975 it was adopted by all three judges in *Burgess v. Rawnsley*.¹⁰⁷ There do not appear to be any pre-1926 cases holding that there was any distinction drawn between realty and personalty. It is argued, however, that the section itself is declaratory of what the common law is. It provides that, in order to effect a severance in equity, a joint tenant may give "a notice in writing of such desire or do such other things as would, in the case of personal estate, have been effected to sever the tenancy in equity". This assumes that a notice in writing could always sever a joint tenancy in personalty, along with such other things (conveyance or agreement) which severed in both the case of realty and personalty. The effect of the subsection is to extend the effect of a notice in writing to realty. In England this has the advantage of ensuring that the two types of property are treated equally in the eyes of the law.

The third view is that at common law a declaration of intent severed a joint tenancy in both realty and personalty. There is nothing in section 36(2) to support this view. The first case to espouse the doctrine was *Hawkesley v. May*.¹⁰⁸ The court relied on the first rule in *Williams v. Hensman*.¹⁰⁹ This is difficult to accept, for, in explaining the rule, Sir Page Wood V.C. referred to a joint tenant disposing of his interest; what he seems to have had in mind was some form of alienation of title. Moreover, as we have just seen, *Hawkesley v. May*¹¹⁰ did not consider the authorities which had decided that a declaration of intent did not sever. If, however, the decision is at odds with the preponderance of previous authority, it has now received the imprimatur of Lord Denning in *Burgess v. Rawnsley*.¹¹¹ Lord Denning relied not on the first, but on the third rule in *Williams v. Hensman*.¹¹² But, as Sir John Pennycuik pointed out, that rule covers only the situation where a course of dealing shows a common intention to sever, and does not really deal with the question of a unilateral declaration of intent.¹¹³ Lord Denning also suggested a more general justification for giving effect to unilateral declarations. He said that any distinction that had existed before 1925 was not between realty and personalty, but between common law and equity. The law insisted on either alienation or agreement;

¹⁰⁶ *Supra*, footnote 104.

¹⁰⁷ *Supra*, footnote 6.

¹⁰⁸ *Supra*, footnote 103.

¹⁰⁹ *Supra*, footnote 5.

¹¹⁰ *Supra*, footnote 103.

¹¹¹ *Supra*, footnote 6, at pp. 439-440 (Ch.), 147 (All E.R.).

¹¹² *Supra*, footnote 5.

¹¹³ *Burgess v. Rawnsley*, *supra*, footnote 6, at pp. 447 (Ch.), 153-154 (All E.R.).

equity favoured the tenancy in common, and therefore accepted other modes of severance, such as declarations. But that opinion has no support in the earlier authorities, and, if it be the law, the supremacy of equity should have found its origins in the Judicature Acts and not in the Law of Property Act.

The common law in England is thus unsettled. Despite the considerable body of older authority holding that a declaration of intent will not sever, *Burgess v. Rawnsley*¹¹⁴ goes at least as far as the second view, that, apart from statute, a declaration of intent will sever a joint tenancy in personalty. And, in light of the more recent cases, it is still open to an English court to hold that at common law a declaration of intent effects a severance of interests in both realty and personalty.

In Canada there is no authority for the view that any difference exists between realty and personalty,¹¹⁵ and there is no reason why a Canadian court should wish to draw that distinction. The choice, therefore, is between the first and third views. The majority of the Canadian cases adopt the principle that, as a matter of law, a declaration of intent does not sever.¹¹⁶ The specific issue in most of the cases has been whether an application for partition effects a severance, the argument being that the application itself is a sufficient indication of intention to the other joint tenants. However, in England in 1891 *Re Wilks*¹¹⁷ decided that such an application did not sever. The court applied the orthodox rule that severance required either alienation or agreement.¹¹⁸ That decision has been followed without question in Canada.¹¹⁹ The courts have preferred it to *Hawkesley v. May*¹²⁰ and *Re Draper's Conveyance*¹²¹ when those two cases were cited to them. And *Sorenson v. Sorenson*¹²² still followed the decision, even though the court there had its attention drawn to *Burgess v. Rawnsley*,¹²³ where it is quite clear the judges thought *Re Wilks*¹²⁴ was wrongly decided.

¹¹⁴ *Supra*, footnote 6.

¹¹⁵ Such authority as there is states that they should be treated alike: see *Re White*, *supra*, footnote 14; *Re Murdoch and Barry*, *supra*, footnote 18, at pp. 228-229.

¹¹⁶ *Grant v. Grant*, [1952] O.W.N. 614 (H.C.); *Munroe v. Carlson* (1975), 59 D.L.R. (3d) 763, [1976] 1 W.W.R. 248 (B.C.S.C.); *Rodrigue v. Dufton*, *supra*, footnote 91; *Sorenson v. Sorenson*, *supra*, footnote 1, at pp. 452-453.

¹¹⁷ *Supra*, footnote 101. ¹¹⁸ But see *infra*, p. 29.

¹¹⁹ See cases cited, *supra*, footnote 116.

¹²⁰ *Supra*, footnote 103.

¹²¹ *Supra*, footnote 104.

¹²² *Supra*, footnote 1.

¹²³ *Supra*, footnote 6, at pp. 440, 444, 447 (Ch.), 148, 151, 154 (All E.R.).

¹²⁴ *Supra*, footnote 101.

There is only one Canadian case supporting the view that a declaration of intent will sever. In *Ginn v. Armstrong*¹²⁵ it was decided that the joint tenants had severed their interest by agreement. As an alternative ground for decision, the court also held that the severance had been affected by a declaration of intention made by one of the joint tenants. The case cited in support of that conclusion was *Re Draper's Conveyance*,¹²⁶ but it would seem that the opposing authorities were not drawn to the court's attention.

There is one other recent Canadian decision which does not fit into either of the two categories. In *Re Murdoch and Barry*¹²⁷ a matrimonial home was held by a husband and wife in joint tenancy. The wife conveyed her interest to herself, and, in affidavits prepared for land transfer tax and registration purposes, stated that her intention was to sever the joint tenancy. Her husband did not become aware of these transactions until after his wife's death. It was held that the joint tenancy had been severed, first by the conveyance, and second by the declaration of intent in the affidavits, coupled with the execution and registration of the conveyance. By implication, the judge rejected the view that a simple declaration of intention will sever.¹²⁸

Goodman J. relied upon *Re Wilks*¹²⁹ to support his second reason. He noted that the court there had not completely ruled out methods of severance other than alienation or agreement, but had said that if severance could be affected in other ways these "must be such as to preclude him [the joint tenant] from claiming by survivorship an interest in the subject matter of the joint tenancies".¹³⁰ In the instant case the wife had not simply declared her intention to sever but she had taken some action in attempting to carry out that intent. She had thereby stopped herself from claiming under the right of survivorship, and the joint tenancy was therefore severed.

It is difficult to accept this use of the generally difficult doctrine of estoppel. Estoppel normally involves a representation to one party which makes it inequitable for the maker of the representation to go

¹²⁵ *Supra*, footnote 63.

¹²⁶ *Supra*, footnote 104.

¹²⁷ *Supra*, footnote 18.

¹²⁸ He referred with approval to *Partriche v. Powlet*, *supra*, footnote 101. Neither *Hawkesley v. May*, *supra*, footnote 103, nor *Re Draper's Conveyance*, *supra*, footnote 104 were cited.

¹²⁹ *Supra*, footnote 101.

¹³⁰ *Ibid.*, at p. 62.

back on it.¹³¹ The husband was not aware of what his wife had done, and so in the normal use of the word no estoppel was raised. The difficulty in part lies in the passage from *Re Wilks*,¹³² for that really says no more than if there has been a severance the right of survivorship cannot be claimed. It provides no help in deciding what constitutes a severance, and it is not surprising if reliance on it does not produce satisfactory results. It is suggested, that, while *Re Murdoch and Barry*¹³³ is rightly decided on the basis that the conveyance from the wife to herself was sufficient to sever, the second ground for the decision is not convincing.

The preponderance of Canadian authority is therefore against severance by a declaration of intent. It is, however, true to say that the courts have followed English authority rather than considering the merits of the argument. In *Rodrigue v. Dufton*¹³⁴ where the issue was whether an application for partition severed, the court, after reviewing the opposing authorities, concluded:¹³⁵

Some of the decisions referred to are difficult to reconcile but I prefer the view that an application for partition is not in itself sufficient to sever.

In *Sorenson v. Sorenson*,¹³⁶ rather than analyzing the issues, the court preferred to follow the "weight of authority", and decided that if a declaration of intent was to be accepted it would require legislation.

If one considers the question on its merits a good case can be made for the rule that a declaration should sever. The law already recognizes that a joint tenant may sever without the consent or indeed the knowledge of his fellow co-owners.¹³⁷ He can do this by conveyance, even a conveyance to himself, or by a declaration of trust. A declaration of intent has several advantages over these as a mode of severance. It states clearly what it is intending to do. It is simpler than the procedures some joint tenants have felt they were compelled to adopt.¹³⁸ So far as it is accepted in England, it is on the

¹³¹ Cf. Spencer Bower & Turner, *Estoppel by Representation* (2nd ed., 1966), pp. 4, 28. *Sed quaere* if one could argue estoppel by representation to the public on the basis of the registration of the documents: *ibid.*, pp. 111 *et seq.*

¹³² *Supra*, footnote 101.

¹³³ *Supra*, footnote 18.

¹³⁴ *Supra*, footnote 91.

¹³⁵ *Ibid.*, at pp. 20 (D.L.R.), 617 (O.R.).

¹³⁶ *Supra*, footnote 1.

¹³⁷ Except in Saskatchewan: see Land Titles Act, *supra*, footnote 8, s. 240, *supra*, pp. 6 *et seq.* In the light of that section it is unlikely that Saskatchewan would accept a unilateral declaration to sever. See also the practice in Alberta and Saskatchewan, *supra*, footnote 22.

¹³⁸ Cf. e.g. *Re Murdoch & Barry*, *supra*, footnote 18; *Sorenson v. Sorenson*, *supra*, footnote 1.

basis that the declaration must be made to the other joint tenants; that is preferable to a severance behind their backs. It is suggested that if the Canadian courts were prepared to follow the current trend in England, rather than adhere to the older authorities, and to re-consider the matter as one of general policy, a declaration of intent is a simple and fair way of severing. If a change can be made only by legislation, then legislation should be enacted.

(2) What constitutes a sufficient declaration of intent?

If the efficacy of a declaration of intent is recognized, either by judicial decision or by legislation, the exact nature of its operation needs to be settled. There are three questions, first, what will constitute a declaration, second, does it need to be communicated to the other co-owners, and third, does it need to be in writing?

Ideally the declaration should be an express statement of an intention to sever. The courts in England are also prepared to accept an implied declaration as being effective. The point arises in the cases where the issue is whether an application for partition, or sale and division of the proceeds severs. Where it has been decided that, as a matter of law, a declaration of intent does not sever, the court did not have to decide if, as a matter of fact, the application constituted a sufficient declaration.¹³⁹ In some cases it is not absolutely clear whether the severance did not take place because a declaration cannot operate as a matter of law, or because an application is an equivocal declaration of intent.¹⁴⁰ In *Re Wilks*,¹⁴¹ even if the court had been prepared to accept methods of severance other than alienation or agreement, it still would not have accepted that the application constituted a sufficient declaration. The applicant could always have withdrawn his application, and the court thought it would have been wrong to attribute to him an irrevocable intention to sever. But in *Re Draper's Conveyance*¹⁴² the court saw no great difficulty in attributing that intent to an applicant for partition. The issue is a difficult one of fact. An application can generally be treated as a serious indication of purpose, yet it might come as a surprise to an applicant to be told that by making it he is committed to a particular course of action.

Another example of how easily the English courts can be persuaded to infer a declaration of intention is to be found in *Hawkesley v. May*.¹⁴³ There the court held that a letter from a joint

¹³⁹ Cf. e.g. *Munroe v. Carlson*, *supra*, footnote 116.

¹⁴⁰ *Re Wilks*, *supra*, footnote 111; *Rodrigue v. Dufton*, *supra*, footnote 91.

¹⁴¹ *Ibid.*

¹⁴² *Supra*, footnote 104.

¹⁴³ *Supra*, footnote 103.

tenant to her trustees, stating that her share of the dividends arising from a trust should be deposited in her bank account, brought about a severance of the capital. It is, however, well-established that the division of rents does not necessarily involve a division of the capital. Moreover, there was no express finding that the letter had been drawn to the attention of the other beneficiaries. It is difficult to see how this decision could be justified on any basis.

One way of avoiding such dilemmas would be to decide that only an express declaration of intent could sever. Such a rule, whether adopted by judicial decision or statute, would still leave an argument as to what was express and what was not, and it would prevent the court from giving effect to clearly established, though not express, intention. Despite the difficulties that it can no doubt cause, it would be better to accept that a declaration of intent may be implied from conduct, but to adopt a more conservative attitude on when such an inference should be drawn. Such an approach would tie in with the suggestion that in Canada there should not be any particular preference for tenancies in common. On this basis the Canadian courts are probably on sound ground in not being prepared to draw an inference from a simple application for partition.

Second, does the declaration need to be communicated to the other joint tenants? All of the judges in *Burgess v. Rawnsley*¹⁴⁴ said that it did. *Hawkesley v. May*¹⁴⁵ and *Re Murdoch and Barry*¹⁴⁶ support the contrary view. This latter position may be supported by analogy to the existing modes of severance. The existence of a conveyance to a third party need not be communicated to the other joint tenant; and, in the case of a conveyance to himself or a personal declaration of trust, no one but the joint tenant need know of what he has done. Nonetheless one should be wary of giving effect to unilateral and secret declarations. First, they can be difficult of proof. Second, to allow them would destroy the argument that a declaration of intent should be accepted because it is both simple and fair. It is suggested therefore that it would be wise to follow the precedent of section 36(2), and provide, either by judicial decision or legislation as the case may be, that a declaration is effective only as against those joint tenants to whom it has been communicated.

Third, should the declaration be in writing? If the question arises by way of judicial decision it is because of the possible application of the Statute of Frauds.¹⁴⁷ It arises as a matter of policy

¹⁴⁴ *Supra*, footnote 6, at pp. 439, 444, 448 (Ch.), 147, 151, 154 (All E.R.).

¹⁴⁵ *Supra*, footnote 103.

¹⁴⁶ *Supra*, footnote 18. It must be remembered that this case was relying not on a declaration of intent, but on estoppel. If anything that makes it all the more difficult to see why communication to the other party was not needed.

¹⁴⁷ *Supra*, footnote 63.

in the drafting of legislation. The Statute of Frauds could apply because the declaration creates an interest in land, the interest being a tenancy in common, created in lieu of the joint tenancy. But it may be argued that what is involved is not the creation, but simply a change in the nature of an existing interest.¹⁴⁸ Moreover, if an oral declaration was made to the other co-owners, the courts might be able to by-pass the statute, either on the basis of estoppel or on the basis of constructive trust. As a matter of policy, to require writing would make it difficult, if not on occasions impossible, to act on the basis of an implied declaration. It would impose a requirement that apparently does not exist, for example, in the case of severance by mutual agreement.¹⁴⁹ On the other hand, writing is required for other unilateral forms of severance. It has the advantage of introducing some greater element of certainty. There is precedent in England in the provisions of section 36(2). Both as to the application of the Statute of Frauds and in deciding on policy the issue is evenly balanced. In such circumstances it is suggested that the policy of giving fullest effect to intent should tilt the issue in favour of not requiring writing. But it may well be that the price to pay for the very acceptance of such a mode of severance is that the courts or legislatures will opt for the apparent security and certainty of a written declaration.

B. *Presumed Intention of One Joint Tenant.*

A joint tenant may enter into a transaction with a third party which does not sever the joint tenancy under any of the rules so far considered, but nonetheless the circumstances are such that it can be argued there ought to be a severance, either because of presumed intent, or because it would be unfair to allow the right of survivorship to continue to operate. These arguments may be made where a joint tenant has created a common law or equitable encumbrance, such as an easement or an option to purchase. They most often arise where there is a debtor-creditor relationship between the joint tenant and the third party, for example, where a joint tenant grants a mortgage or an equitable charge, or when a creditor registers a judgment against the joint tenant's interest. It is proposed here to consider the arguments in relation to debtor-creditor transactions where some form of security arises against the joint tenant's interest. What will be said, however, applies, *mutatis mutandis*, to other types of transactions.

Where there is a debtor-creditor relationship and a security interest is created, this could have one of four effects on the joint

¹⁴⁸ *Stonehouse v. Attorney-General for British Columbia*, [1962] S.C.R. 103, 31 D.L.R. (2d) 118, 37 W.W.R. 62 (S.C.C.).

¹⁴⁹ *Supra*, pp. 16 *et seq.*

tenancy; no severance,¹⁵⁰ complete severance, suspension of the right of survivorship,¹⁵¹ or modification of the right of survivorship.¹⁵² Basically the same reasons underlie the arguments in favour of complete severance, and suspension or modification. If these arguments are rejected all three of these possibilities are eliminated. If they are accepted then one out of the three must be selected as best giving effect to the policy underlying the arguments.

The view that the right of survivorship should be in some way affected is based either on presumed intent or unfairness. These may simply be alternate ways of expressing the same point. It is argued that the failure to prevent the operation of the right of survivorship is unfair to the debtor because at his death the land is not available for the payment of his debts, and an extra burden is thereby thrown on his estate. It is unfair to the creditor because he is deprived of a security expressly taken. Put in terms of intent, it is said that neither the debtor nor the creditor could have intended this result. Davey C.J.B.C. in *Re Young*¹⁵³ stated that if a joint tenant expressly charged his interest it could not have been the intention of the debtor and creditor that the security would be lost if the debtor predeceased his fellow joint tenant. To give effect to the purpose of the agreement the interest of the joint tenant, even after his death, should be available as security for the satisfaction of the debt.

Arguments based on alleged intent need to be looked at carefully. If a debtor or a creditor intend the land to be always available for the satisfaction of the debt they can easily ensure that result; and a judgment creditor can ensure payment by proceeding to levy execution. When it is open to the parties to take action which will clearly demonstrate their intent it is dangerous to resort to implication. Davey C.J.B.C. also argues in favour of the suspension of the right of survivorship on the ground that this is satisfactory "because it makes answerable for a judgment the judgment debtor's interest in a joint tenancy over which he had in himself complete power of disposal in his lifetime".¹⁵⁴ But if he had this power of disposal and it was not exercised at his or at his creditor's behest, why impute the intention to him? The argument that joint tenancies deliberately created should not be too lightly destroyed is relevant here. If a husband who owns property in joint tenancy with his wife

¹⁵⁰ This is the law now: see *supra*, p. 11.

¹⁵¹ That is, the right of survivorship is inoperative during the currency of the security interest, but will revive on its termination: see *supra*, p. 7.

¹⁵² That is, the right of survivorship will continue to operate, but the security interest will attach to the interest of those who take by survivorship: see, *supra*, p. 7.

¹⁵³ *Supra*, footnote 38, at pp. 599 (D.L.R.), 197 (W.W.R.).

¹⁵⁴ *Ibid.*, at pp. 599 (D.L.R.), 198 (W.W.R.).

has a judgment registered against his interest might he not, so far as is possible, wish the right of survivorship to continue to operate unimpaired?

The argument based on unfairness to the third party is equally tenuous. In some measure it seems to turn on something obnoxious in the very existence of the right of survivorship itself. It has been said to be complex¹⁵⁵ or technical.¹⁵⁶ One might in fact ask whether it is really such a complex idea. If it is, perhaps the solution is to deal with that as a general problem, not to tinker with it in relation to security interests. It is also said that for the operation of the right of survivorship to cause the creditor to lose his security is unfair because if the interest had been a tenancy in common this would not have happened.¹⁵⁷ And, if the debtor had been the absolute owner in fee simple, the creditor's position would have been even better. However, the debtor with whom we are concerned owns neither a tenancy in common nor a fee simple. He is a joint tenant, and it is trite and good law that a creditor should take no better title than his debtor, in this case the right of survivorship being one of the aspects of the title. Nor should it be forgotten that there are other types of interest which are determinable, and could determine to the disadvantage of a creditor. This is true of a life estate or of, if it were appropriately drawn, a determinable fee simple. Should one prolong these interests because of alleged unfairness to the creditor? It is fairer to retain the general rule that the creditor takes the interest of his debtor as it stands, warts and all.

A recent working paper of the Law Reform Commission of British Columbia¹⁵⁸ has suggested a further reason why there should be a modification of the right of survivorship in the case of the registration of a judgment. It appears that in British Columbia it is rare for a judgment creditor to invoke the full execution process. Either the debtor pays voluntarily, or payment is forthcoming when he wants to deal with the land. The Commission thinks that it would be undesirable if a creditor was forced to proceed to execution because of the risk of losing his security by the operation of the right of survivorship. There are two difficulties with that argument. First,

¹⁵⁵ Dunlop, *Execution Against Real Property* (1973), 8 U.B.C.L.Rev. 246, at p. 265.

¹⁵⁶ *Re Young*, *supra*, footnote 35, at pp. 599 (D.L.R.), 198 (W.W.R.), per Davey C.J.B.C.

¹⁵⁷ Dunlop, *op. cit.*, footnote 149, at p. 264.

¹⁵⁸ *Op. cit.*, footnote 44. The proposals of the Working Paper have now been incorporated in a Discussion Draft Report on Executions Against Land (1978). The proposals in the Working Paper have also been tentatively adopted by the Law Reform Commission of Manitoba, Working Paper on the Enforcement of Judgments: Part II: Exemptions Under The "Judgments Act" (1978).

Re Young,¹⁵⁹ which held that the registration of a judgment does not sever a joint tenancy, was decided in 1968. The risk to creditors has thus existed since that date. The working paper statistics on the frequency of execution proceedings are for a period after 1968. It seems therefore that *Re Young*¹⁶⁰ has not precipitated a rush to execution, and that the Commission's fears are unfounded. Second, the efficacy of the unenforced registered judgment as an indirect means of enforcing payment, is, as the Commission concedes, a matter of speculation. It is suggested that this is not a sufficient basis on which to overturn settled principles of law.

If, contrary to what has been suggested here, the creation of a security interest should affect the right of survivorship, then one has to decide whether this should be by way of complete severance or by way of suspension or modification. The working paper rejects suspension¹⁶¹ and, it is submitted, rightly so. If there is anything objectionable in the operation of the right of survivorship a system by which the right is suspended and revived, dependent on the vagaries of when a security interest is removed from the title, seems to add another objectionable feature.

Modification of the right of survivorship is accepted by the working paper as the most desirable solution.¹⁶² It does not propose that the judgment should be fully binding on the land in the hands of the surviving joint tenants. Rather it appears to take the view that, given that the right of survivorship is operative, the estate of the debtor is still primarily liable for the debt, and the land, to the extent of the debtor's former interest, should be liable only if there is a deficiency. The general thrust of the proposal in the working paper may be summarized as follows:

(a) If all of the creditors, including the judgment creditor, can be paid out of the estate then the judgment creditor cannot proceed against the land.

(b) If all of the creditors, other than the judgment creditor, can be paid in full, and the judgment creditor either cannot be paid or can be paid only in part out of the estate, and the land, to the extent of the debtor's interest, can satisfy the debt or the deficiency, the judgment creditor may proceed against the land to recover the debt or the deficiency.

(c) If all of the other creditors cannot be paid in full out of the estate, the judgment creditor is compelled to proceed against the land

¹⁵⁹ *Supra*, footnote 39.

¹⁶⁰ *Ibid.*

¹⁶¹ *Op. cit.*, footnote 158, at pp. 35 *et seq.*

¹⁶² *Ibid.*, at pp. 39 *et seq.*

to the extent of the debtor's interest. He may, if he wishes, claim against the estate, but his claim would be reduced by the value of the debtor's interest in the land. In effect, therefore, he will be forced to secure payment if he can against the land, and, so far as there is a deficiency, then share rateably with the other creditors against the estate.

(d) If at the date of his debtor's death the judgment creditor has commenced execution proceedings he may continue those proceedings.

This proposal has the disadvantage of being rather complicated. Moreover, it seems excessively advantageous to the judgment creditor. If his debtor dies first he will in substance retain his security against his debtor's former interest. If his debtor survives the other joint tenancy his security will now operate against all of the land. It is surely going too far to give the judgment creditor the best of all worlds.

It is suggested, therefore, that if the joint tenancy is to be affected by the creation of security interests one should conclude that there is a complete severance. This, it seems, was the view of Davey C.J.B.C. in *Re Young*.¹⁶³ In a system where there is a registration of title, once the security interest is registered, the title could be changed and it would take some positive act to reinstate the joint tenancy. This unequivocal mode of proceedings is preferable to either the suspension or modification of the right of survivorship. It would be better however to leave the existing law unchanged.

IV. When Does Severance Occur?

At common law the time of severance depends on the general rules for the completion of the transaction by which the severance is effected. Thus, in the case of a conveyance of legal title to a third party, the joint tenancy is severed when the conveyance is delivered.¹⁶⁴ If an equitable interest is created by a conveyance to a third party trustee, again delivery is the determining factor. When a joint tenant makes a personal declaration of trust the severance takes place when that declaration is legally enforceable against him. If severance takes place in equity by agreement, express or implied, the

¹⁶³ *Supra*, footnote 39, at pp. 599 (D.L.R.), 198 (W.W.R.). Davey C.J.B.C. (dissenting) decided that under the terms of the Execution Act, *supra*, footnote 40, a judgment registered against one joint tenant, continued after that joint tenant's death to bind "his interest" in the hands of the surviving joint tenant. He regretted that the interest was not "liable after the joint tenant's prior death before the other joint tenant for his debts generally". To give full effect to that objective one would need to go as far as treating the interest as totally severed.

¹⁶⁴ *Cf. Stonehouse v. Attorney-General for British Columbia, supra*, footnote 148.

conclusion of the agreement determines the date of severance. This same reasoning would apply, it is submitted, if the courts were to accept that an agreement with a third party creating a security interest severs on the basis of presumed intent. And, should it also be accepted that a declaration of intent severs, and that it needs to be communicated to the other joint tenant to be effective, then the date of communication would be the obvious date for severance.

So much is clear at common law. Beyond that two, at times, overlapping questions need to be dealt with. First, should the law be changed so that severance is dependent on either the consent of, or at least notice to, the other joint tenants. Second, whatever be the position on consent or notice, what is the impact of a title registration system on severance.

A. *Consent and Notice.*

With the exception of Saskatchewan, common law Canada retains the rule that, without obtaining the consent of or even notifying the other joint tenants, one joint tenant may sever, at law or in equity as the case may be, by a conveyance, personal declaration of trust or contract with a third party. Section 240(2) of the Land Titles Act¹⁶⁵ in Saskatchewan requires the consent of the other joint tenants before a transfer can sever. This is arguably an over-reaction to the decision in *Stonehouse v. Attorney-General for British Columbia*,¹⁶⁶ and is perhaps an attempt to deal indirectly with a problem that ought to be directly confronted. The most common joint tenancy today is that between husband and wife in relation to the matrimonial home. Although not well founded in law, it is probably often the expectation of the spouses that the consent of both is needed to change the nature of their interests, and that, without that mutual consent, on the death of one the property will pass to the survivor. The proper disposition of the matrimonial home is of course an issue even if title be held in the name of one of the spouses only. This problem should be dealt with as part of matrimonial law generally, and if that were done it would then be desirable to permit a joint tenant to retain his traditional freedom of alienation (subject in the case of husband and wife to the law of the matrimonial property regime).

If it is going too far to require the consent of the other joint tenant it is more arguable that it would be desirable to provide that severance cannot occur until he at least has been notified of the transaction which is effective to sever. Notice is inherent in some of

¹⁶⁵ *Supra*, footnote 8. See *supra*, footnote 22 as to the practice in Alberta and Manitoba.

¹⁶⁶ *Supra*, footnote 148. See further pp. 39 *et seq.*

the existing modes of severance; for example severance by mutual consent or, if it were accepted as good law, by a declaration of intent. If a joint tenant was required to notify the other joint tenant before any other type of severing transaction could be effective, that would impose some restraint on his freedom of action. But in theory the title of joint tenants is a unified title, and it is not imposing too great a burden to require what is in effect notice of dissolution. Moreover, any added burden on the joint tenant whose actions may sever is outweighed by a consideration of the position of the other joint tenant. Severance may now take place without his even being informed. This element of secrecy is at the minimum unfair, and may also lead to a suspicion of fraudulent dealing.¹⁶⁷ To require notice would achieve a fair balance between the competing interests of all the joint tenants.

The requirement of notice as a prerequisite to severance could of course only be imposed by legislation. In drafting such legislation a number of points need to be borne in mind. First, it would be wise to provide that notice had to be given to the other joint tenant during the lifetime of the joint tenant whose actions may have severed. This would prevent a grantee from a joint tenant waiting until his grantor's death before giving notice. It would also be in accord with the existing common law principle that a severance cannot be effected after the death of the joint tenant who may have wished to sever. Second, the notice that would be given would be that a particular transaction had taken place. Whether this was effective to sever would continue to be decided as it is now. Thus a conveyance *inter vivos*, of which notice was given, would sever; the grant of an option, even if notice was given, would not. Third, special care would have to be given to the role of notice in a jurisdiction where there is a system of registration of title. That can best be considered after looking at the present state of the law on registration and severance.¹⁶⁸

B. Registration of Title.

Where there is a system of registration of title an obvious question is whether, in accordance with general registration principles, a transaction needs to be registered before severance can take

¹⁶⁷ Cf. *Stonehouse v. Attorney-General for British Columbia* (1960), 25 D.L.R. (2d) 301, at p. 304, 33 W.W.R. (N.S.) 66, at p. 68 (B.C.S.C.); *Foot v. Chapman*, *supra*, footnote 52.

¹⁶⁸ The immediately preceding text assumes two joint tenants. If there were three or more joint tenants then severance would take place against any one of them only to the extent that a notice had been given to him. Thus if A, B and C were joint tenants, A conveyed to D and notified only B, there would be a severance as against B but not as against C. This is in accord with general principle: see, *supra*, p. 5.

place. The answer will, of course, always depend on the language of the relevant legislation. In Saskatchewan, the Land Titles Act¹⁶⁹ expressly provides that an instrument transferring a joint tenant's interest does not sever until the instrument is registered. Where there is no such express provision the leading case is *Stonehouse v. Attorney-General for British Columbia*.¹⁷⁰ There the Supreme Court of Canada held that when a joint tenant conveys an interest to a third party severance still takes place on the delivery of the conveyance.

In this case a husband and wife were registered as joint tenants in fee simple. The wife transferred her interest to her daughter. The conveyance was not presented for registration until the day after the mother's death. This was three years after the delivery of the conveyance. The daughter's interest was duly registered. The husband did not attempt to attack her title, but made a claim against the Assurance Fund, alleging that he had sustained a loss solely because of a mistake of the registrar.¹⁷¹ The assumptions underlying his claim were that the joint tenancy was not severed until registration, that the registrar should have had doubts about the nature of a title based on a deed which was three years old, and that, if the registrar had caused enquiries to have been made, the operation of the right of survivorship would have ensured his taking absolute title. The Supreme Court decided that a joint tenancy was severed, not on the registration, but on delivery of the conveyance. It followed that the registrar had not made any error and the action failed.

The decision turns on the provisions of section 35 of the Land Registry Act¹⁷² in British Columbia. That section provides that, except as against the party making the same, a transfer does not operate to pass any estate until it is registered. The court found two reasons in section 35 to support its conclusion. First, under the exception, a transfer is effective against the party making the same, even before registration. The unregistered conveyance therefore transferred title as between the mother and the daughter. *Ipsa facto*

¹⁶⁹ *Supra*, footnote 8, s. 240(1).

¹⁷⁰ *Supra*, footnote 148.

¹⁷¹ R.S.B.C., 1948, c. 208, s. 223(1). See now Land Registry Act, *supra*, footnote 8, s. 224(1), Land Titles Act, *supra*, footnote 8, s. 278(1). Under this section a claim may be made against the Assurance Fund if a loss has been caused solely as a result of an omission, mistake or misfeasance of the registrar. A claim may also be made under s. 222 (Land Registry Act), s. 276 (Land Titles Act) if the claimant has been deprived of an interest in land because of the operation of the Act, and in consequence of any fraud, misrepresentation or other wrongful act, and is barred from recovering his land.

¹⁷² *Supra*, footnote 8, Land Titles Act, *supra*, footnote 8, s. 20. In the immediately following text and footnotes references to sections are to sections of the old and the new legislation, unless there is an indication to the contrary.

that severed the joint tenancy, for at common law a valid conveyance by one joint tenant inevitably severed the joint tenancy and that common law rule had not been abolished in British Columbia. Second, the general prohibition in section 35 is against an unregistered transfer passing any estate or interest. It does not prohibit the transfer from having other effects, and here, the court said, while the husband's joint tenancy was changed from a joint tenancy to a tenancy in common, there was, in respect of his interest, no passing of any estate. Not all jurisdictions have in their equivalent of section 35 the exception making an unregistered conveyance effective against the grantor.¹⁷³ Nonetheless, as a matter of interpretation the courts consider a delivered conveyance binding between the grantor and grantee.¹⁷⁴ *Prima facie* the reasoning of the Supreme Court would apply in other jurisdictions.

Two lines of enquiry flow from the decision. First, assuming it to be right in principle, what are some of its implications? Second, is it in fact a correct or desirable application of registration principles to a joint tenancy?

The courts have not yet had the occasion to consider the full ramifications of the decision. One obvious unanswered question is what would have been the result if the father, the surviving joint tenant, had registered first on the basis of his apparent right of survivorship. *Prima facie* he would have had an undefeasible title, and the onus would have been on the grantee from the deceased joint tenant to find a flaw in that title. The grantee could have argued that the surviving joint tenant was fraudulent if he insisted on remaining on the register after he knew that the *inter vivos* conveyance, although unregistered, had severed. However, fraud usually involves some conscious wrongdoing in securing registration; notice of a competing claim after registration normally does not establish fraud on the part of a registered owner.¹⁷⁵ The grantee could also have argued that the registrar had the power to, and ought to have corrected the registration because it was "wrongfully obtained".¹⁷⁶ But the scope of this power is very uncertain. First, it cannot be exercised so as to prejudice rights acquired for value. The surviving

¹⁷³ Cf. Land Titles Act, R.S.A., 1970, c. 198, s. 56; Real Property Act, R.S.M., 1970, c. R30, s. 66(3); Land Titles Act, R.S.O., 1970, c. 234, s. 79. But see to the same effect as the British Columbia Act: Land Titles Act, Sask., *supra*, footnote 8, s. 69.

¹⁷⁴ Thom, Canadian Torrens System (2nd ed. 1972), pp. 242 *et seq.*

¹⁷⁵ *Ibid.*, p. 223.

¹⁷⁶ Land Registry Act, B.C., *supra*, footnote 8, s. 256, Land Titles Act, B.C., *supra*, footnote 8, s. 312. See also: Land Titles Act, Alta, *supra*, footnote 173, s. 185; Real Property Act, Man., *supra*, footnote 8, s. 23; Land Titles Act, Sask., *supra*, footnote 8, s. 79.

joint tenant may well have acquired his interest for value; however, even if he did so, it still may be argued against him that what he acquired was a right of survivorship, which might be ended by severance. If there is a dispute about whether or not the correction of the register would prejudice rights acquired for value, it seems that the registrar has no power to act. Second, there is some doubt about whether the registrar can be compelled to act in the first instance, his power of correction being a discretionary one. Third, if he corrected or refused to correct the register, it is doubtful whether any appeal lies from his decision.¹⁷⁷ It would clearly be in keeping with the decision in the *Stonehouse* case that the surviving joint tenant should not be permitted to remain on the register for at the date of his registration he had lost his right of survivorship. However, once registered, he could raise some reasonable defences to an action seeking his removal.¹⁷⁸

Another variation on the *Stonehouse* facts is to assume that the father died first, leaving the mother the surviving joint tenant, and she then proceeded to register. If her registration was attacked by the father's personal representatives the same analysis as to the registration being wrongfully obtained would apply as applied in the case of registration by the father. An argument against the mother based on fraud would be stronger. She severed the joint tenancy by giving the *inter vivos* conveyance. It now seems that she ought to be regarded as fraudulent in obtaining registration on the basis of a right of survivorship which she herself destroyed. In any event, the daughter would still be able to secure registration of the conveyance to her.

Quite apart from these questions about its application, the principle on which the case is decided has been the subject of critical comment.¹⁷⁹ In general, the exception in section 35 puts a registered owner who makes a conveyance in a dual position until that conveyance is registered. With respect to his grantee he has made a valid and effective conveyance. With respect to the rest of the world he is still the registered owner of the property. If the court in the *Stonehouse* case had been concerned with giving the fullest effect

¹⁷⁷ As to the immediately preceding text see: *Heller v. Registrar, Vancouver Registry District and Heller*, [1960] S.C.R. 229, 38 D.L.R. (2d) 1, 41 W.W.R. (N.S.) 641; Hinde (1968), 46 Can. Bar Rev. 304.

¹⁷⁸ If the father had been entitled to remain on the register it might have been difficult for the daughter to have succeeded in any claim against the Assurance Fund: cf. *supra*, footnote 170. On the facts of the *Stonehouse* case itself the daughter would undoubtedly have been denied a claim because of her delay in applying for registration: see 229(h) (Land Registry Act), 283(f) (Land Titles Act), *supra*, footnote 8.

¹⁷⁹ Raney (1963), 41 Can. Bar Rev. 272.

possible to basic land registration principles it could have decided that the conveyance, while effective between the parties, was ineffective as against other joint tenants until the date of its registration. That would have involved deciding that the common law rule as to the effect of a conveyance on a joint tenancy had been impliedly modified by the Land Registry Act; that conclusion would have been in accord with general registration principles.

If registration were a necessary prerequisite to severance there would still be some problems about the application of that rule. Let us assume that A and B are registered joint tenants, that B has given a conveyance to C, and that the conveyance is not registered. If A now dies, presumably B would be entitled to secure registration by virtue of the right of survivorship, and C could still register the conveyance of the half interest to him. This is a marked departure from common law, for by his conveyance B at common law would have severed. But if one applies the usual principles of land registration, and confines the unregistered conveyance and its effect to B and C, it is a natural result. It is no more strange for example than if at common law B grants an option to purchase to C. That, as we have seen, will not sever, but the option would still be exercisable against B even after the right of survivorship had operated in his favour.¹⁸⁰

If B dies A can now secure registration, the right of survivorship still being extant. There is no basis on which C could challenge A's title, nor would C have any claim against the Assurance Fund. If C should be the first to register he will *prima facie* have an indefeasible title. In general he is entitled to register even after his grantor's death. It might be difficult to argue that he is fraudulent. His registration may however have been wrongfully obtained in that, if the unregistered conveyance did not sever, then the right of survivorship should have operated to prevent that conveyance being registered after the death of the joint tenant who gave it. The arguments that apply here are, *mutatis mutandis*, those which applied on the hypothesis considered above that the father had been the first to register in the *Stonehouse* case.¹⁸¹

There are thus difficulties whether or not registration is a prerequisite to severance.¹⁸² These difficulties would largely disap-

¹⁸⁰ *Supra*, p. 15.

¹⁸¹ *Supra*, p. 41.

¹⁸² The position is even more complicated if either the surviving joint tenant or the grantee from the deceased joint tenant apply to register, but the other prevents completion of that registration by, for example, registering a *caveat* and lodging a competing application. If the law is that registration is a prerequisite to severance, or, given that the *Stonehouse* case is rightly decided, but it is conceded that the surviving joint tenant once registered would be entitled to stay on the register, then two conflicting arguments can be made. First, it may be contended that as between

pear if, as was suggested earlier,¹⁸³ notice to the other joint tenant was required before a severance could take place. The requirement of notice and registration could in general terms be blended together along the following lines. First, until the other joint tenant is notified the joint tenancy would not be affected. Second, when he was notified then severance would take place as between both joint tenants and the person with whom one of them had dealt; so far as the rest of the world is concerned severance would not take place until the registration of the severing transaction. Third, the person who dealt with a joint tenant would not have an application for registration accepted unless he was able to satisfy the registrar that the other joint tenant had been properly notified.

Let us see how such a system would work, again assuming that A and B are registered as joint tenants in fee simple, and that B has given a conveyance to C, who has not yet registered. Until A was properly notified the joint tenancy would not be affected. If either A or B died the survivor could secure registration by virtue of the right of survivorship. C would not even be able to apply for registration because he could not show proper notification to A. If A was notified the joint tenancy would then be severed so far as A, B and C are concerned, and even if C had still not registered his interest. If A then died, and B secured registration on the basis of his apparent right of survivorship, A's personal representatives could secure his removal from the title on the basis that B was fraudulent. If B died first, A equally could not claim the advantage of the right of survivorship. In either event C would always be entitled to secure registration of his interest. This would, it is suggested, be a fair way of dealing with the rights of A, B and C *inter se*.¹⁸⁴ The rest of the

the two competing applications the first to be lodged should prevail: *Rudland v. Romilly* (1958), 26 W.W.R. (N.S.) 193 (B.C.S.C.), though it should be noted that case involved a *bona fide* purchaser for value; *Raney op cit.*, footnote 179. Second, it may also be argued that the land registration system protects registrations, but not applications. On that basis priority as between competing applicants should be dealt with according to common law principles: *Breskvar v. Wall*, [1972] A.L.R. 205 (H.C.Aust.). The latter argument would give a result which would be in accord with the *Stonehouse* case. If the *Stonehouse* case is correctly decided, but the surviving joint tenant, if he secured registration, would nonetheless not be entitled to remain on the register, then it would follow that he would not have gained any priority by having been the first to have applied.

¹⁸³ *Supra*, p. 39.

¹⁸⁴ It would, it is submitted, also solve any difficulties arising out of competing applications for registration: see, *supra*, footnote 182. If notice is not given an application from C would not even be accepted, and the survivor of the joint tenants could register. If proper notice had been given then, if as is suggested in the text, a surviving joint tenant who had secured registration could be removed from the register because he was fraudulent, it would follow that as an applicant he would, if challenged at that stage, have his application rejected.

world would still be entitled to rely on the register as reflecting the true state of the title. Thus, until C's interest was registered, a third party could deal with A and B as joint tenants. If either A or B died and the survivor secured registration on the basis of his apparent right of survivorship, the third party could treat him as the absolute owner of the property, unless C, if he was so entitled, proceeded in sufficient time to take steps to protect his interest. This would be in accord with general land registration principles.

For the moment, however, whatever criticism may be made of the *Stonehouse* case as a matter of principle, and whatever the difficulty of the application of the decision be, it seems that, subject to statutory provisions to the contrary, it can be taken as having settled the law in Canada. The basic theory underlying the decision can be applied to all modes of severance. Whether a joint tenant severs by alienation of title, by creation of equitable interests, by entering into an agreement which will sever in equity, or, if effective at all, by declarations of intent or on the basis of presumed intention, the date of severance is governed by common law rules, and registration is not required.¹⁸⁵

Conclusion

Canadian law has adhered closely to traditional principles in deciding when joint tenancies have been severed. In many cases there is no doubt about the soundness of this approach; in others it is open to question.

When a joint tenant has by a conveyance, personal declaration of trust or contract, created a legal or equitable interest, the courts have been content to ask whether one of the unities has been destroyed, either at law or in equity. That analysis has the advantage of securing a reasonable degree of certainty on the specific question of when severance has occurred. It works unfairly in that severance may take place without the other joint tenants being aware of it. It would be desirable to change the law so that severance would be postponed until the other joint tenants were at least informed of the transaction that brings severance about.

There can be no objection in principle to severance by mutual agreement of the joint tenants. However, the courts have too easily followed the established judicial preference for the joint tenancy. If,

¹⁸⁵ The decision has not been the subject of extended discussion in any subsequent case. It was cited with approval in *Sorenson v. Sorenson*, *supra*, footnote 1, at p. 450. Presumably the exact fact pattern of the *Stonehouse* case could not now arise in Saskatchewan, nor, it would seem, in Alberta or Manitoba: see, *supra*, footnote 22. The specific legal issue could however still arise in the latter two provinces.

as must be the case in Canada, a joint tenancy is expressly created the courts should not go out of their way to favour severance.

It appears unlikely that there will be judicial recognition of the rule that a joint tenant may sever by a declaration of intent communicated to the other joint tenants. But no Canadian court has yet fully considered the merits of this procedure, and, if the general principle of unilateral severance is accepted, then a unilateral declaration of intent has the advantages of fairness, openness and simplicity. If this mode of severance is not recognized by the courts it should be recognized by legislation. In the case of a security interest created against a joint tenancy the arguments in favour of severance because of implied intent or unfairness are not convincing. Here the courts are justified in relying on traditional conceptual analysis.

In jurisdictions where there is a system of registration of title, and no express provision to the contrary, a transaction which is effective to sever will do so when it is completed according to common law rules. Not only are there a number of difficulties in the application of those rules, but, more importantly, it may be that in a land registration system as a matter of principle they ought not to apply. Two other proposals are worth consideration. First, it would have been more in keeping with a system of registration of title to have required that a severing transaction be registered before it can be effective to sever, both as between the joint tenants and with respect to third parties. Second, and preferably, the requirement of notice could be profitably blended with the registration of title. It could be provided that as between the joint tenants and the other party to the severing transaction severance takes place when the other joint tenant or joint tenants are notified of the transaction; as against the rest of the world severance would be postponed until registration of the severing transaction had taken place. Given the decision in the *Stonehouse* case legislation would be needed to implement either one of these two proposals; such legislation should be enacted.¹⁸⁶

¹⁸⁶ The Supreme Court may have the opportunity of reconsidering the relationship between severance and registration in *Sorenson v. Sorenson*, *supra*, footnote 1.