CHAPTER 7
Concurrent Ownership

I. JOINT TENANCIES AND TENANCIES IN COMMON

STATUTES AFFECTING THE INCIDENT OF SURVIVORSHIP

The common law was partial to joint tenancies, the principal characteristic of which is the element of survivorship by which the entire tenancy, on the decease of one tenant, remains to the survivors, and ultimately to the last survivor.¹ This heritage of the feudal system, which was opposed to a division of tenures and consequently favored joint estates, was expressed in a rule of construction that the grantor or testator must be presumed to have intended to create a joint tenancy. Despite the disappearance of reasons for this presumption, it was generally held, until the policy of the law was changed by statute, that a grant or devise to two or more persons, not husband and wife, must ordinarily be construed as creating a joint tenancy in the absence of any indication that the grantees or devisees are to hold as tenants in common.² The presumption that a joint tenancy is in-

¹ 4 Thompson, Real Property, sec. 1775 (Perm. ed.). 2 Tiffany, Real Property, sec. 419 (3d ed.) states: “This doctrine of survivorship appears to be the result of, or at least associated with, the theory that the joint tenants together own but one estate, a theory which, rigidly applied, would recognize no distinct interest in one to pass on his death to his heirs or devisees, his claim being, as against the others, merely extinguished in that case. The survivor takes no new title by survivorship, but holds under the deed by virtue of which he was originally seized of the whole.” That this theory is not rigidly applied is evident from the fact that the incident of survivorship can be defeated by the acts of the joint tenants. See infra note 5.

² 4 Thompson, Real Property, sec. 1775 (Perm. ed.); 2 Tiffany, Real Property, sec. 421 (3d ed.). Of course, the essential unities of time, interest, title, and possession had to be present.
tended (which could not usually be rebutted by evidence of the real intent of the grantor or testator but only by the words appearing on the face of the instrument) was not a presumption based on probabilities.

"When lands were conveyed to two persons and their heirs, few supposed that the heirs of the one who happened to die first would have none of it, and that they gave it to the survivor and his heirs." ³

Yet the orthodox view required the application of the presumption whatever may have been the real intention of the grantor or testator.⁴

The results of the rule were not inevitably pernicious, for joint tenants can at any time partition the lands and defeat the incident of survivorship.⁵ But sometimes grantees and devisees died without effecting a partition because they did not realize it was necessary. The common-law presumption, and the incident of survivorship resulting from its application, has generally been felt to be unjust and contrary to the spirit of our institutions.

As a result of hostility to survivorship, this feature of joint tenancy has been declared never to have existed in a few jurisdictions ⁶ and in all (or nearly all) of those which

³ Boston Franklinite Co. v. Condit and Torrey, 19 N. J. Eq. 394, 397 (Ch. 1869).
⁴ Noyes v. Parker, 92 F. 2d 562 (D. C. Cir. 1937).
⁵ 2 Tiffany, Real Property, secs. 425, 468 (3d ed.). The incident can be defeated in other ways such as alienation by one of the tenants of his interest, or leasing or mortgaging by one tenant of his interest, or levy and sale upon execution of the interest of one of the tenants. These acts destroy the unities, all of which are necessary to the existence of a joint tenancy. 2 Tiffany, op. cit., sec. 425.
⁶ Connecticut: Phelps v. Jepson, 1 Root 48 (1769). Ohio: Sergeant v. Steinberger, 2 Hammond 305 (1826). In Sergeant v. Steinberger it was said: "The reasons which gave rise to this description of estate, in England, never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reason of policy applicable to our society or institutions. But on the contrary, it is adverse to the understandings, habits, and feelings of the people." However, it is held in both states that although joint tenancies are not favored, yet where the instrument expressly declares or necessarily
once recognized it, the doctrine of survivorship has since been subjected to legislative reform. Some statutes provide that a conveyance or devise to two or more persons shall create a tenancy in common, and not a joint tenancy, unless a contrary intent is plainly apparent or is expressly declared. Some explicitly purport to abolish the incident of survivorship, and others provide that joint tenancies shall not exist.

The statutes have been so long in effect in all of the jurisdictions that the constitutional questions arising out of retroactive application are now, in all probability, of only historical interest. However, completeness of treatment demands consideration of the matter.

The courts have not been able to agree whether these statutory changes could be made applicable to tenancies which by the law at the time of their coming into existence, were joint tenancies.

Since the concept of survivorship is purely a survival of medieval law and an anomaly, it is surprising that so many courts have found constitutional impediment to the retroactive application of statutes abolishing the incident of survivorship. While there is considerable divergence in the phraseology of the statutes, this factor does not seem in any way to have influenced the decisions. The courts have in no way indicated that they thought the wording of the statutes is significant. In fact, the decisions of one jurisdiction often conflict with the decisions of other jurisdictions which have an identical or closely similar statute. It is rather that some courts have conceived the possibility of acquiring the whole estate by survivorship as a property interest, which is pro-

implies an intention to create such estate, the court will give effect to that intent. Foraker v. Kocks, 41 Ohio App. 210, 180 N. E. 743 (1931); Peyton v. Wehrhane, 125 Conn. 420, 6 A. 2d 313 (1939).

tected from deprivation, while other courts have been able to see in the incident of survivorship nothing but a fortuitous circumstance.

The proceedings which provoked the determination of the constitutionality of the statutes have generally been actions for partition brought by heirs of deceased tenants against the heirs or successors in interest of the surviving tenant, or actions for partition or ejectment brought by the heirs of deceased tenants against the surviving tenant. The question is identical in most of the cases: Did the survivor take the whole estate, notwithstanding the statute, because he happened to outlive the other tenants?

In every case, the tenancy was created before the statute, and all of the tenants died after the statute was enacted without having effected a severance. If some of the joint tenants were dead before the statute was passed, their interests would not be revived. An estate already vested in the survivor could not be taken away.

None of the cases holding that the incident of survivorship can be retroactively extinguished does so on the ground that survivorship is akin to heirship and therefore within the extensive power of the legislature to restrict the devolution of property at death. This would be a facile solution to the problem, except that the survivor does not take as heir. The historical concept is that the survivor does not take a new title by survivorship. The joint tenants together


12 Eisenhardt v. Lowell, 105 Colo. 417, 98 P. 2d 1001 (1940); Annable v. Patch, 3 Pick. 360 (Mass. 1825); Miller v. Dennett, 6 N. H. 109 (1833).
own but one estate. Hence the claims of deceased tenants are merely extinguished by their deaths.\textsuperscript{13}

1. Statutes Which Abolish the Common-Law Rule of Construction

The Massachusetts statute is one of those which provide that a conveyance or devise of land to two or more persons shall create an estate in common and not in joint tenancy, unless it clearly appears from the instrument that a joint tenancy was intended.\textsuperscript{14} The effect of such a statute is to substitute for the common-law presumption in favor of joint tenancies a rule of construction, or a presumption in favor of tenancies in common. The Massachusetts courts have held that the presumption created by the statute could (and should) be applied in construing conveyances and devises which were made when the common-law presumption still obtained.

The Supreme Judicial Court, in answer to claims that the incident of survivorship is property which cannot be taken by the legislature, said that since joint tenants can always sever the tenancy and destroy the right of survivorship, the statute very reasonably presumed that such tenancies were

\textsuperscript{13} 2 Tiffany, \textit{Real Property}, sec. 419 (3d ed.) \textit{supra} note 1.

\textsuperscript{14} By the Acts and Laws of 1786, c. xxiii, sec. 4, it was enacted: "That all gifts, grants, . . . of any lands, tenements, and hereditaments, which have been, or shall be made to two or more persons, whether for years, for life, in tail or in fee, shall be taken, deemed and adjudged to be estates in common, and not in joint-tenancy, unless it has been or shall be therein said, that the grantees, . . . shall have or hold the same lands, . . . jointly, or as joint tenants, or in joint tenancy, or to them and the survivor or survivors of them, or unless other words be therein used, clearly and manifestly showing it to be the intention of the parties to such gifts, grants, . . . that such lands, . . . should vest and be held as joint estates, and not as estates in common."

The contemporary statute, Mass. Gen. Laws 1932, c. 184, sec. 7, is a simplified restatement of the original statute. The only substantial difference is that the present statute, by virtue of an amendment made in 1885 (Mass. Acts 1885, c. 237), applies to conveyances and devises made to husband and wife.
not intended. In another case, the court declared that the act, instead of depriving the joint tenants of property, gave them a more beneficial interest than they had before, because it is better to have a certain interest in a moiety than an uncertain right of succession to the whole. The court admitted that the legislature cannot impair the title to estates without the consent of the owners (except for public purposes when adequate compensation is paid), but concluded that there can be no objection to the retrospective operation of any act which enlarges or otherwise makes a title more valuable; the consent to the holder to such statutes may always be presumed. In Burghardt v. Turner it was stated that there could be no objection to the application of the statute to existing joint tenancies, for the further reason that the operation of the statute was really prospective; it declared how a deed should be affected by events then future.

The Supreme Court of California, on the other hand, ruled that a statute similar in import to the Massachusetts statute above could not be given retroactive effect (even if that were the legislative intention) for the stated reasons that

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17 Mass. Const. 1780, Art. x: "But no part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people: . . . And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."
18 12 Pick. 534 (Mass. 1832).
19 Act of April 27, 1855, c. cxl, sec. 1. "Every interest in real estate, granted or devised to two or more persons, other than executors and trustees as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy." The present statute reads: "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy . . . ." Cal. Civil Code, sec. 683 (Deering 1949).
the legislature does not have authority to deprive joint tenants of one of the essential elements of their tenure, \textit{i.e.}, the “right of survivorship,”\textsuperscript{20} nor the power to affect past contracts, or to alter or destroy the nature of estates.\textsuperscript{21} We may surmise that the California court was much influenced by the name which it applied to the interest in survivorship. This is but another illustration of the danger in calling every interest a “right.”

In \textit{Miller v. Dennett}, an old New Hampshire case, it was argued that: if a deed were made to two persons and the survivor of them and the heirs of the survivor, the legislature could not declare that the land should not go to the survivor and his heirs but to the heirs of each. That being so,

“Does it, then, make any difference whether this condition is expressed by the parties to the contract or by the law in force at the time when the contract was executed? . . . The laws in force at the time the contract is made, constitute a part of the contract.”\textsuperscript{22}

\textsuperscript{20}Greer \textit{v. Blanchar}, 40 Cal. 194 (1870). The land was conveyed two years before the statute was enacted to a trustee “in trust for the use and benefit of Harriet M. Risley and S. Risley.” Harriet died after the statute went into effect. Her heir sought to compel the trustee to convey the premises to him and to S. Risley and to make an accounting of rents and profits. It was held that the conveyance created a joint tenancy and that Harriet’s interest was extinguished by her death.

\textsuperscript{21}Dewey \textit{v. Lambier}, 7 Cal. 347 (1857). This was an action of ejectment. The plaintiff established title to the premises by a deed from one H. to himself and W. Held: The deed to plaintiff and W. created a joint tenancy which was not destroyed by the Act of 1855. Since W. and plaintiff were joint tenants, they should have joined in the action in ejectment. Failure to do so was fatal to a recovery.

\textsuperscript{22}6 N. H. 109, 112 (1833). The heirs of the surviving tenant sought to have the court apply the common-law rule of construction to a deed, whose words did not indicate whether the grantor intended to create a tenancy in common or a joint tenancy. The deed was executed and delivered prior to the Act of June 21, 1809, which was almost exactly identical with Mass. Stats. 1785, c. 62, sec. 4, \textit{supra} note 14.
The court was not impressed with the contention; it said:

"The statute only changes a joint tenancy into a tenancy in common. The contract, which created the estate, is not altered or impaired. The deed conveyed an estate in joint tenancy, and that estate must now be considered as remaining until the statute of 1809 changed it into a tenancy in common. Such a change did not impair the obligations of any contract in the deed, but merely made the grantees tenants in common from the time the statute took effect."  

However, it appears that the result might have been otherwise (i.e., a holding that there was an impairment of the obligation of contract) had the deed expressly granted the estate to several persons for life, remainder to the survivor and his heirs. In the instant case the survivor could base his claim only upon the common-law presumption.

The New Jersey Supreme Court, however, concluded that any law which changes the legal effect of a deed as between the original joint tenants, or as between their successors, impairs the obligation of a contract. 24 This court could see no merit in the argument that the power of joint tenants to destroy the incident of survivorship at any time during their lifetimes makes the interest in survivorship, on account of its tenuousness and uncertainty, subject to divestment by

23 6 N. H. 109, 115.
24 Den ex dem. Berdan v. Van Riper, 16 N. J. L. 7 (Sup. Ct. 1837). The court reflected that the possibility of survivorship might perhaps have been a motivating factor in the transaction involved in the case because of the condition of health or age of one of the grantees. However, it would seem that if these were the considerations which motivated the transaction, the instrument would have expressly created a joint tenancy.

The statute in question (Act of Feb. 4, 1812) provided: "No estate after the passage of the act, shall in this state be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common, any law, usage or decision heretofore made to the contrary notwithstanding." The contemporary statute is N. J. Rev. Stat. 1937, 46:3-17.
the legislature. Also rejected was the proposition that this was one of those situations in which the rights of individuals come so injuriously in conflict with the interests of the public, that the legislature may interfere to prevent the evil, although private contracts may be affected thereby. "Whether men are joint-tenants or tenants in common," said the court, "is a matter of total indifference to the public."  

Treating interests created by deed as contractual within the meaning of the contracts clause of the federal Constitution is probably a misapplication of the clause. And, of course, the New Jersey case reflects an outmoded attitude not in keeping with the prevailing concept that obligations of contracts are subject to some modification in the interests of the public welfare.

Assuming that the contracts clause was properly invoked in the New Hampshire and New Jersey cases above, the result reached by New Hampshire is the sounder. How can it be said that the existing law becomes part of the contract (in the sense that this law cannot be changed without impairing the contract) unless the contracting parties are aware

25 In Goff v. Yauman, 237 Wis. 643, 298 N. W. 179 (1941), it was held that one of the two joint tenants in the case had voluntarily terminated the joint tenancy by applying for and accepting old-age assistance under a statute which explicitly stipulated that assistance paid should become a lien on the property of the beneficiary and that consequently there could be no question of the retroactive application of the statute although it went into effect after the creation of the tenancy.

26 Den ex dem. Berdan v. Van Riper, 16 N. J. L. 7, 14 (Sup. Ct. 1837). Thirty-two years later a New Jersey court said this of the statute in question: "The object, no doubt, was to give to the words used the effect which most persons would suppose they had. When lands were conveyed to two persons and their heirs, few supposed that the heirs of the one who happened to die first would have none of it, and that they gave it to the survivor and his heirs." Boston Franklinite Co. v. Condit and Torrey, 19 N. J. Eq. 394, 397 (Ch. 1869).

27 See Chapter 2, p. 14 et seq.

28 Consider in particular, Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934) sustaining the Minnesota Mortgage Moratorium Law.
of the existing law and act in accordance therewith? This is especially true of presumptions or rules of construction which are but aids to legal reasoning, or devices by which the court arrives at the real or presumed intention of the parties. But the presumption that a grant to two or more persons creates a joint tenancy is highly artificial, and any need for such a presumption has long since disappeared. Even when the New Hampshire and New Jersey decisions were rendered (in the 1830's), probably nine-tenths of the grantors did not know of the existence of the rule, and if they had known, they would have used appropriate words to create a tenancy in common. It is quite clear that when courts applied the common-law rule of construction they were really adding something to the deed which the parties did not themselves intend. The legislature could certainly take away this addition without impairing any obligations.

In Miller v. Dennett it was also contended that the retroactive reversal of the common-law presumption would violate the Constitution of New Hampshire which prohibits retroactive legislation. The court relied upon the definition of retroactivity which does not conceive of legislation falling within the inhibition of the Constitution unless vested rights are impaired. There is no impairment of vested rights here, said the court, because the acquisition of the whole estate by survivorship would have been nothing more than a hope or expectation, like the expectation of a child to inherit the estate of a parent.

2. Statutes Which Purport to Abolish the Incident of Survivorship

The statutes of some states, instead of merely doing away with the common-law presumption, in terms purport to

29 N. H. Const. 1792, Bill of Rights, Art. xxiii: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences."

30 Supra Chapter 2, p. 13.
abolish the incident of survivorship. The Pennsylvania statute is illustrative:

“If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or of whatever kind the estates or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy or dower, or transmissible to executors or administrators, and be considered to every other intent and purpose in the same manner as if such deceased joint tenants had been tenants in common: Provided always, That nothing in this act shall be taken to affect any trust estate.”

If this legislation were to be taken at its face value, joint tenancies as they are known at common law could no longer exist. But the quoted statute, and identical and similar legislation in other jurisdictions, is construed not to prevent the creation of a joint tenancy (with the incident of survivorship) if the grantor or testator expressly stipulates that it is his intention to create a joint tenancy. That is to say, the creation of a tenancy in common will be presumed to have been intended in the absence of any indication to the contrary, but if the intent to create a joint tenancy or estate of survivorship is clearly expressed, the expression will be given effect. The judicial deduction is that only the inadvertent creation of joint tenancies by operation of law is sought to be avoided by the legislatures, hence the statutes are not to be construed literally. Thus, the statutes which

32 Withers v. Barnes, 95 Kan. 798, 149 Pac. 691 (1915) (“Act only abolished joint tenancies and doctrine of survivorship by operation of law. The law does not prevent the grantor's purposely creating a joint tenancy”); Truesdell v. White, 13 Bush. 616 (Ky. 1878); Wilson v. Ervin, 227 N. C. 396, 42 S. E. 2d 468 (1947); In re Lowry's Estate, 314 Pa. 518, 171 Atl. 878 (1934); McLeroy v. McLeroy, 163 Tenn. 124, 40 S. W. 2d 1027
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purport to abolish the element of survivorship have come
to have about the same effect as those which purport only
to abolish the common-law rule of construction.

The fact that the statute purports to abolish the incident
of survivorship rather than the common-law presumption,
or vice versa, seems not to have had any effect on these
decisions. One finds that without regard to the form of the
statute, the arguments in favor of permitting retroactive
operation are all much on the same order, as are also the
arguments against permitting retroactive operation.

In Bambaugh v. Bambaugh 33 the Pennsylvania Supreme
Court assigned the following reasons for allowing the Penn-
sylvania statute to operate on a tenancy created by a deed
executed and delivered some years before its enactment:

"The truth is, that the doctrine of survivorship was so little
known to people in general, and so abhorrent to their feel­
ings, when known, that it was thought best to get rid of it
at once. The courts had been long struggling against it, but
were unable, without a dangerous prostration of established
principles, to go as far as they wished. The aid of the legisla­
ture was, therefore, necessary. There is no force in the
argument, that the operation of the act on existing estates,
was an invasion of vested rights. Who should be the sur­
vivor, was in contingency, and in the mean time, either
joint tenant might have severed the estate, by legal means,
without the consent of his companion. The act of assembly
did for them, at once, and without expense, which ninety-nine
in a hundred wished to be done. [sic] But if there were any
joint tenants who desired the chance of survivorship, they
might have it, by an agreement for that purpose. Now,
should we undertake to put a limitation on the plain words
of the law, we might do an irreparable injury to many, who
reading the words as they are written, have supposed a parti­
tion unnecessary, and therefore, have died without effecting
it. Something was said in the argument of this cause, against

the constitutional power of the legislature, to pass an act affecting estates *then in existence*. But on this point we have no doubt. The act deprived no man of his property. Where a title had already accrued by survivorship, it remained untouched. The only effect of the law was, to place the parties on an equal and sure footing leaving nothing to chance; without depriving them, however, of the right of making any agreement between themselves, which they might think proper.  

The Kansas Supreme Court, however, thought the statute of that state (which has since been replaced by a statute of the Massachusetts type) could not change the nature of existing joint tenancies. In *Cress v. Hamnett*  

35 it was held that the nature of the interest each joint tenant would take

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35 144 Kan. 128, 58 P. 2d 61 (1936).

A few days before the effective date of the statute, certain land was conveyed to one George S. Crary upon the express condition that if George died without issue then the remainder of the estate in fee simple should go to Martha Crary and Abigail Cress. Abigail died intestate in 1933, leaving heirs. George Crary died without issue in 1935. One of the heirs of Abigail brought an action against Martha, the survivor, for partition of the land. It was claimed by the plaintiff that the statute destroyed Martha’s claim to survivorship. The deed was construed to have created in Martha and Abigail a joint tenancy in an executory interest after an estate in fee-simple defeasible.

The statute in question, Laws 1891, c. 203, sec. 1 [Kan. Gen. Stat. 1935, sec. 22-132] read: “If partition be not made between joint tenants or joint owners of estates in entirety, whether they be such as might have been compelled to make partition or not, or whatever kind the estate or thing held or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts or charges and be considered to every other intent and purpose as if such joint tenants or tenants of estate in entirety had been or were tenants in common; but nothing in this act shall be taken to affect any trust estate.”

In 1939 the statute was rewritten for clarification and so as to conform with the opinions of the Kansas Supreme Court construing the statute. The present reading is as follows: “Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created: *Except*, That a grant or devise to executors or trustees, as such, shall create in them a joint tenancy unless the grant or devise expressly declares otherwise.” Kan. Laws 1939, c. 181, sec. 1; Kan. Gen. Stat. 1949, sec. 58-501.
was fixed by the deed creating the tenancy, and the legislature "was powerless by subsequent act to deprive either one of any element of the interest created by the deed." Justice Burch said this was not like the legislature’s taking away the privilege of inheritance: what the legislature gives, the legislature can take away, but the legislature cannot, by subsequent enactment, take away from the joint tenants what has previously been given them by deed, an instrument sounding in contract.

3. Statutes Which Appear to Abolish Joint Tenancies as Such

There is one other type of statute affecting the incident of survivorship to be found in a few states. This type of statute seems to go further than merely abolishing the incident of survivorship, and, prima facie, would appear to make the creation of a joint tenancy quite impossible even where the instrument of creation contains express words. The Georgia statute reads:

"Joint tenancy shall not exist in this state, and all such estates, under the English law, shall be held to be tenancies in common." 36

However, the words of this act are not taken literally by the courts. Survivorship as an incident of joint tenancy has been abolished; but where the deed or will, in express terms, or by necessary implication, provides for survivorship, the law allows the deed or will to be enforced. 37 The same result has been reached in Oregon. 38 These statutes present no con-

38 Erickson v. Erickson, 167 Ore. 1, 115 P. 2d 172 (1941). The deed contained the following recital: "The Grantees herein do not take the title in common but with the right of survivorship; that is, that the fee shall vest in the survivor of the grantees." The court held that the survivor took the fee.
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stitutional issues not already considered, but the courts of these states have never had to decide whether the statutes could be applied retroactively.

4. The Effect of an Instrument Which Expressly Creates a Joint Tenancy

In the cases discussed, the joint tenancy arose because of the operation of the common-law presumption and not because express words were used. The courts have never had to decide whether a statute can retroactively destroy the incident of survivorship when the instrument which created the tenancy expressly provides that the grantees or devisees shall take as joint tenants. The writer suspects a great many courts would erroneously assume that the express declaration in the instrument automatically guarantees some kind of constitutional protection to the element of survivorship to which that element would not be entitled if the joint tenancy were the product of the application of the rule of construction. But really it should make no difference how the tenancy arises. In any case, the element of survivorship is quite a fragile thing, since it is generally within the power of any of the tenants to destroy the tenancy, and along with it the incident of survivorship. 39

It intimated that the deed did not create a technical joint tenancy but did not state just which of the attributes of a common-law joint tenancy could be read into the conveyance. The court did not decide the exact nature of the rights of the tenants inter vivos. It even refused to decide definitely whether the survivor took the fee by virtue of his survivorship or whether the deed should be construed as granting a life estate to the grantees as tenants in common with a contingent remainder to the survivor.

The absence of an ascertainable razione decidendi in the Erickson case is commented upon and criticized in O'Connell, "Are Joint Tenancies Abolished in Oregon?" 21 Ore. L. Rev. 159 (1942).

The Oregon statute reads: "... and joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common." Ore. Comp. Laws Ann. 1940, sec. 70-205.

39 2 Tiffany, Real Property, secs. 425, 468 et seq. (3d ed.).
Those courts which entertain the questionable doctrine that legislative impairment of interests created by a deed is *ipso facto* an impairment of the obligation of a contract would no doubt feel doubly obliged to protect the element of survivorship from impairment where a deed expressly created the joint tenancy.

A distinction, however, must be made between an express creation of a joint tenancy and the express creation of a right of survivorship. When the instrument states that the grantees or devisees shall take as joint tenants, they take an estate which has the incidents of a joint tenancy, one of which is the power of the tenants to effect a severance. But where the right of survivorship is expressly provided for, it may be in keeping with the intent of the parties for the court to construe the instrument to create an indestructible right of survivorship rather than a common-law joint tenancy with the incident of severability. An eminent writer suggests that a grant to two with right of survivorship might conceivably be construed to create a tenancy in common for life, with a contingent remainder in fee to the survivor.\(^40\) Probably neither an indestructible right of survivorship nor a contingent remainder can be extinguished by the legislature.\(^41\)

Where also the tenants are precluded from exercising the power to compel partition, either by their own agreement, or by virtue of a valid prohibition against partition in the instrument,\(^42\) it is possible that the incident of survivorship would be deemed even by those courts which otherwise

\(^{40}\) 2 Tiffany, *Real Property*, sec. 424 (3d ed.).

\(^{41}\) See *supra* Chapter 4 for a discussion of the extent to which the legislature may extinguish or impair contingent remainders.

\(^{42}\) The tenants may contract with each other not to compel partition; such agreements are enforceable. The creator of the tenancy may impose prohibitions against compulsory partition for a reasonable period of time. 2 Tiffany, *Real Property*, sec. 474 (3d ed.).
regard the incident as a mere expectancy, to be clothed with sufficient certainty to be a constitutionally protected interest.

5. The Effect of Repeal of a Statute

If any of the legislatures should repeal or amend the existing statutes so that the common-law presumption would again operate (an event which is unlikely to occur), the objections on constitutional grounds to the retroactive operation of the repeal or amendatory acts would be much more cogent than the objections to the retroactive operation of the statutes which abolished the presumption. A real and substantial burden would be imposed on the tenants if the common-law presumption were allowed to operate on their estate to make into a joint tenancy what had been a tenancy in common under the statute. The living tenants would have just grounds for complaint if they were compelled to take steps to prevent the operation of the incident of survivorship, and the heirs of deceased tenants, whose interests were destroyed by the survivorship, would have even more reason to complain of a deprivation of property without due process.

There appears to be but one case in which the question of the retroactive effect of a statute which restored the common-law presumption has been considered, and this only indi-

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43 The statutes of several states provide that the making of a bank deposit in the form of a joint tenancy shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor. Cal. Fin. Code, sec. 852 (Deering 1951); N. Y. Banking Law, sec. 239 (3). These statutes have been sustained when applied prospectively on the ground that they are in the nature of statutes of limitation, by which the remedy for a claim to establish the real fact with reference to the account must be pursued before either of the depositors is dead or it will be barred. Heiner v. Greenwich Savings Bank, 118 Misc. Rep. 326, 193 N. Y. S. 291 (1922); In re Conover's Estate, 163 Misc. Rep. 599, 297 N. Y. S. 577, aff'd 252 App. Div. 917, 300 N. Y. S. 1357 (4th Dept. 1937); Hill v. Badeljy, 107 Cal. App. 598, 290 Pac. 637 (1930).
rectly. In *Boston Franklinite Co. v. Condit and Torrey*, the direct question was whether a surviving trustee acquired the entire title by survivorship so that he could convey the title without the joinder of the heir of the predeceased trustee. The premises were conveyed in trust in 1817 after the enactment of a statute in 1812 which declared that no estate shall be considered in joint tenancy, unless expressly stated to be such in the grant creating it. An act passed April 1, 1868, provided that “all estates heretofore or hereafter granted or devised to trustees shall be construed to have vested and to vest an estate in joint tenancy in such trustees . . .”. The court decided that the surviving trustee did not take the whole title because the Act of 1812 made the trustees tenants in common; consequently, so far as the Act of 1868 affected estates vested before its passage, it must be held to be unconstitutional and inoperative. No reasons were assigned.

The holding in *Boston Franklinite Co. v. Condit and Torrey* has nothing to recommend it. The decision of the court merely meant that a person who had no real interest had to be joined to make an effective transfer of title, or that the bare legal title had to be declared out of the heir of the decedent trustee by court action before the surviving trustee could continue to carry out the purposes of the trust. It has generally been held in other jurisdictions that, even where trust estates are not expressly exempted, the statutes do not prevent the application of the common-law presumption when a grant or devise is made to trustees, and the statutes frequently contain express exemptions of trust estates.

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44 19 N. J. Eq. 394 (Ch. 1869).
45 *Supra* note 24.
47 4 Thompson, *Real Property*, sec. 1792 (Perm. ed.).
reason for holding that conveyances to trustees are not within the spirit, and consequently not within the scope of the statutes, is to be found in the logical and natural assumption that grantors and testators want the title to go to the surviving trustee and not to the deceased trustee's heirs, who might well be persons unqualified to fulfill the duties of trusteeship.\footnote{49}

\textbf{PARTITION OF LAND HELD IN JOINT TENANCY AND IN COMMON}

At common law in England, joint tenants and tenants in common could not compel partition. The right to a writ of partition was extended to them by a statute enacted in the Reign of Henry VIII.\footnote{50} In this country it has been quite frequently declared that partition is a matter of right.\footnote{51} It would appear that the power to compel partition exists independent of statute as part of the common law of the United States.\footnote{52} All of the states have statutes which authorize

\footnote{49} 4 Thompson, \textit{Real Property}, sec. 1792 (Perm. ed.).

Also, in many states the statutes are held not to apply to conveyances in mortgage or in cases of property held in partnership, or to conveyances to husband and wife. 4 Thompson, \textit{op. cit.}, sec. 1787.

\footnote{50} Stat. 31 Hen. VIII, c. 1 (1540). Freeman, \textit{Cotenancy and Partition}, sec. 421.

\footnote{51} 2 Tiffany, \textit{Real Property}, sec. 474 (3d ed.). Tiffany points out that this statement must be taken with some qualification. The power is subject to the power of the court under modern statutes to decree a sale instead of a partition in kind. The cotenant may preclude himself by agreement with his cotenants from asserting it. Where the devise or conveyance by which the cotenancy is created expressly prohibits partition during a period named or until a certain event, such prohibition is generally effective to prevent an involuntary partition in violation thereof.

\footnote{52} Richardson v. Monson, 23 Conn. 94 (1854); Tiedeman, \textit{State and Federal Control of Persons and Property}, p. 667: "The right of compulsory partition of all joint estates, as an invariable incident of these estates, except in cases of tenancies in entirety, has come down to us an inheritance from the mother country, and all joint estates in the United States have been created in actual or implied contemplation of the possibility of a compulsory partition. Consequently no question can arise as to the constitutionality of laws providing for compulsory partition."
courts to partition lands upon petition of interested parties having a present right to possession. 53

The validity of these statutes, so far as they authorize partition in kind of lands held in joint tenancy or in common, seems very rarely to have been questioned, probably because it is assumed that the statutes merely restate the pre-existing law and do not impose any new burdens or destroy any rights under the common law. 54 However, statutes authorizing partition have on occasion been attacked on procedural grounds. 55

In at least one instance, the power to compel partition in kind has been claimed to be a property interest of which the joint owners cannot be deprived without denying due process of law. 56 The constitutionality of a statute was involved

53 Restatement, Property, c. 11, Topic 1 (1948 Supp.).
54 In Baldwin v. Baldwin, 74 Hun 415, 26 N. Y. S. 579 (1893) it was held that a joint tenant may sue for partition of land acquired after the enactment of a statute authorizing joint tenants to maintain such actions, though the right of survivorship will thereby be defeated, as the parties took their deed with notice of the statute.

On the constitutionality of retroactive partition statutes affecting future interests see supra Chapter 4, p. 154 et seq.

55 In Richards v. Rote, 68 Pa. 248 (1871), it was held that the legislature could not validate proceedings in partition wherein a court, on the petition of one of the parties interested in the partition, appointed a "trustee" to represent one of the joint owners who was alleged to be a man of weak intellect. The latter was given no notice or opportunity to object. Affirmation of the validating act would, in the opinion of the court, have been a declaration that the legislature can take one person's property and confer it on another.

But in Biddle v. Starr, 9 Pa. 461 (1848), the court upheld a statute which retroactively authorized partition pending the contest of the will of a deceased joint owner, although prior to the statute a court could not have acted until the controversy concerning the will of the deceased tenant was settled. There was no injustice in the joinder of the adverse claimants and the executors, since the same notice, the same proof and proceedings, were otherwise adhered to. A court of equity, ordinarily, apart from statute, will not, in a proceeding for partition, undertake to settle questions as to legal title which may arise between the parties thereto. 2 Tiffany, Real Property, sec. 478 (3d. ed.). But this is a mere procedural matter which can surely be altered by legislation even as to pending proceedings.

56 Hatch v. Tipton, 131 Ohio St. 364, 2 N. E. 2d 875 (1936). The statute was challenged on the grounds that it is retroactive and in violation of Ohio Const., Art. II, sec. 28, which prohibits retroactive legislation (see supra
which provides that an executor or administrator of a deceased co-owner shall have (for purposes of administering the estate) the power to compel the sale of the entire tract in which the decedent’s interest is fractional and undivided (the other owners, of course, to receive their just share of the proceeds). However, the alleged absolute power of the co-owners to compel partition in kind was found to be conditional: partition in kind could not be had where property was incapable of physical partition or where any of the surviving co-owners elected to purchase the entire estate at an appraised value. The court declared that a right which is not absolute but is dependent for its existence upon the action or inaction of another is not basic or vested, and so not within the protection of the Constitution. Indeed, the court stated that the loss which the co-owners claimed to have sustained might be characterized as the loss of an undue advantage which they had over the interest of a deceased co-owner. But undue advantage can never ripen into a vested right, deprivation of which is constitutionally repugnant.

**Partition by Sale**

Some authority is given in all states to the courts to order a sale of the land where it cannot be divided equally or cannot be divided without prejudice to the interests of some

Chapter 2, p. 13); in violation of the due process clause of the Fourteenth Amendment; and in violation of Ohio Const., Art. I, sec. 19, which provides that "private property shall ever be held inviolate."


58 Prior to the enactment of the statute, any living co-owner had the power of partition, while the administrator or executor of a deceased co-owner did not have such power. It is the general rule that an administrator or executor has no such seizin of the land of the deceased co-owner as to entitle him to be made a party to partition proceedings. Marshall v. Marshall, 86 Ala. 383, 5 So. 475 (1889); Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 843 (1894); Garrison v. Cox, 99 N. C. 478, 6 S. E. 124 (1888).
of the parties. In a few cases, it has been questioned whether the legislature can constitutionally authorize a court to sell the land in case partition in kind is impracticable. In Richardson v. Monson a proceeding was instituted under a statute which gave authority to the court to order a sale of the land and to distribute the proceeds among all persons interested in the estate, in proportion to their interests, whenever a sale would, in the opinion of the court, promote the interests of all parties better than a partition would, and whenever the property could not conveniently be occupied in common. The tenancy in question had come into being prior to the enactment of the statute. Facts were stated in the bill to prove that partition was impracticable. The defendants argued that to give the statute a retroactive effect would impair the obligation of contracts and would authorize the taking of property from one person and the vesting of it in another. It was claimed that the statute in authorizing the court to compel a sale upon the application of one or more tenants in common, and representing in this case a small minority of interest, deprived some of the tenants of their property merely to accommodate others, and without reference to the public interests. The court replied that the power to compel a partition enters into the very nature of the title of estates held in common and the only question is how partition can best be made. The legislature had supplied the answer in this instance by providing for sale where partition could not be made to the best advantage of the parties.

59 Restatement, Property, sec. 178, Comm. a, Spec. Note (1948 Supp.). The statutes vary somewhat in wording but agree in substance. Sales are allowed inter alia when partition in kind will operate "to the great prejudice" of the owners, or "to the manifest prejudice" of the owners, or where the property "cannot be equitably divided in kind," or divided without "great inconvenience" to the parties interested.

60 23 Conn. 94 (1854).

This statute, decided the court, introduced no new principle; it only provided for an emergency when a division could not be well made in any other way.

In *Metcalf v. Hoopingardner* it was held that the power of the legislature to provide that the share of all parties shall be sold where a division of the lands cannot be made, had been too long acquiesced in to be any longer called in question.

"When parties, by contract, assume the relation of tenants in common in real estate, the law fixes their respective rights, one of which is that the partnership may be dissolved, so to speak, and that if necessary the common property may be sold and the proceeds divided."

It is the general rule that when the circumstances designated by the statute are found to exist a sale will be ordered, even if a majority in interest, or the majority in numbers holding an interest in the property, request a partition in kind. However, partition in kind ought to be made whenever possible, although it is difficult, and a sale will not be ordered unless a partition in kind would materially impair the value of the land or substantially prejudice the interests of the owners. The compulsory sale of one's property

62 45 Iowa 510 (1877).
63 In *Kluthe v. Hammerquist*, 45 S. D. 476, 188 N. W. 749 (1922), it was contended that such procedure was in violation of sec. 2, art. 6, of the state Constitution in that it deprived the party of his legal title without due process of law, and deprived him of his right to freedom from forced or compulsory alienation of his property. Held: Statute is not violative of any constitutional right when properly construed and applied.
64 45 Iowa 510, 512.
66 "The generally accepted test of whether a partition in kind would result in great prejudice to the owners, is whether the value of the share of each in case of a partition, would be materially less than his share of the money equivalent that could probably be obtained for the whole." 20 R. C. L., p. 774, quoted in *Kluthe v. Hammerquist*, 45 S. D. 476, 479, 188 N. W. 749, 750 (1922) supra note 63.
without his consent is warranted only in clear cases. If the judgment does not provide for distribution of the proceeds of sale to the tenants in proportion to their interests in the land, the sale is void.

**MISCELLANEOUS STATUTES RELATING TO TENANCIES IN COMMON AND JOINT TENANCIES**

Where the pre-existing law recognizes the privilege of one cotenant in a mine to enter without the consent of the other and take away ores, although the value of the land might be lessened thereby, this privilege has been held to be a substantial property interest which cannot be taken away by the legislature. The rights created by a statute which takes away this privilege have also been held to be valuable property interests which cannot constitutionally be divested by an act which purports to restore the privilege. Of course, the legislature has no power to convert ownership in severalty into joint ownership.

**II. TENANCIES BY ENTIRETIES**

Tenancy by entirety is the tenancy by which husband and wife at common law hold land conveyed or devised to them by a single instrument. This form of joint ownership, although differing from a joint tenancy in some respects, is essentially a form of joint tenancy. Survivorship

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68 See Mead v. Mitchell, 17 N. Y. 210 (1858).


70 *Ibid*.

71 Shell v. Matteson, 81 Minn. 38, 83 N. W. 491 (1900) *supra* Chapter 3, note 104.

72 2 Tiffany, *Real Property*, sec. 430 (3d ed.).
is also the predominant characteristic of tenancies by entireties. The survivor of the marriage, whether husband or wife, is entitled to the whole, and this right cannot be defeated by a conveyance of the other, nor by a sale under execution against the other, nor can the tenants partition the estate.\textsuperscript{73}

It appears that this form of joint ownership has not experienced such hostility on the part of the courts as has the institution of joint tenancy. Certainly, the courts have not seized at the opportunity to be rid of tenancies by entireties by broadly applying and construing the various statutes affecting the incident of survivorship in joint tenancies and the various "Married Women's Property Acts." These statutes have usually been held to allow tenancies by entireties to exist in one form or the other.\textsuperscript{74}

\textsuperscript{73} 2 Tiffany, \textit{op. cit.} However, the tenants can destroy the estate by a joint conveyance. Maxwell v. Sullivan, 123 Fla. 263, 166 So. 575 (1936); Beihl v. Martiny, 236 Pa. 519, 84 Atl. 953 (1912).

\textsuperscript{74} 2 Tiffany, \textit{Real Property}, sec. 433 (3d ed.).

The reasons usually assigned that statutes affecting the incident of survivorship in joint tenancies are not applicable to tenancies by entireties are: (1) these statutes encompass only joint tenancies or conveyances to two or more persons, but in contemplation of law, husband and wife are but one person and do not take as joint tenants; (2) the incident of survivorship is not an evil in the case of tenancies by entireties and it cannot be assumed that the legislatures intend to abolish the incident of survivorship except where it is productive of harmful results.

In Hiles v. Fischer, 144 N. Y. 306, 39 N. E. 337 (1895) it was held that the Married Women's Property Act simply takes away the husband's usufruct of the wife's separate property. The right of the husband to the rents and profits and use of the land held by entireties is not an incident of this estate but is a right enuring to him from the general principle of the common law which vests him \textit{jure uxoris} with the rents and profits of all his wife's lands, whether held by a sole or joint title, during their joint lives. The effect of the statutes is to take the husband's exclusive right to the usufruct of the lands held in entirety. By virtue of the statute, husband and wife are now tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during their joint lives. Upon the death of one, the survivor takes the whole estate.

The courts which take the opposite view, \textit{i.e.}, that the Married Women's Acts have abolished tenancies by entireties, generally do so on the ground that the theoretical unity of the spouses with respect to rights of property being done away with, it would be inconsistent to retain any of the incidents of
The legislatures have also shown a greater reluctance to alter the incidents of the tenancy by entireties than they have to change the incidents of the joint tenancy. The common-law rule that a conveyance of land to husband and wife during coverture ordinarily creates an estate by the entirety, is still in effect in many jurisdictions.  

This judicial and legislative acquiescence in, or approval of, the common-law rule is very likely a realization that as a matter of fact grantors and devisors to husband and wife may often really intend that the survivor shall take all. Certainly, many married persons desire to hold their land as tenants by the entirety for the purpose of saving costs of administration. 

Legislation affecting the incident of survivorship has been enacted in a number of jurisdictions. Some statutes purport to abolish the incident; some provide that conveyances and devises to husband and wife shall be presumed to create estates in common; in some states the tenants are given it. See: Wilson v. Wilson, 43 Minn. 398, 45 N. W. 710 (1890); Swan v. Walden, 156 Cal. 195, 103 Pac. 931 (1909).

A third view is expressed by a few courts that estates by entireties still exist as at common law, entirely unaffected by the Married Women's Act. Arrand v. Graham, 297 Mich. 559, 298 N. W. 281 (1941).


E.g., the Kentucky statute, infra note 79.

E.g., Mass. Gen. Laws 1932, c. 184, sec. 7: "A conveyance or devise of land to two or more persons or to husband and wife, except a mortgage or a devise or conveyance in Trust, shall create an estate in common and not in joint tenancy, unless it is expressed in such conveyance or devise that the grantees or devisees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy."
the power to partition. The courts have consistently held that such legislation cannot be applied to existing tenancies.

The basis of the courts’ refusal to allow the statutes to be given a retroactive effect has generally been the theory that when land is conveyed or devised to husband and wife, they do not take title as individuals but as one legal person, or, as the proposition is sometimes quaintly stated, they take *per tout et non per my*.

In *Elliott v. Nichols* it was said:

"... all the books agree, *una voce*, that husband and wife not only cannot compel each other to make partition, but even if they concur in the wish, they have not the power to sever the tenancy. It is a *sole*, and not a *joint* tenancy. They have no *moieties*. Each holds the *entirety*. They are one in law, and their *estate one and indivisible*. If the husband alien; if he suffer a recovery; if he be attainted, none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession—something which he had not before—*the right of the deceased*. But, as between husband and wife, the survivor *takes nothing from the decedent*; acquires no new title nor interest nor estate thereby; but takes by the original conveyance the whole, because invested thereby with the entire estate. The survivor gets the entire estate by virtue of the title being in him or her by the original conveyance, but rid of the possible contingency of

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78 E.g., the New York statute, *infra* note 86.
79 67 Ky. 502 (1868). Land was conveyed to Mr. and Mrs. N. in 1837. Mr. N. mortgaged same in 1865. Mrs. N. died in 1861, leaving children and heirs who resisted the foreclosure of the mortgage on one-half of the land, claiming that a statute enacted in 1850 had abolished the incident of survivorship in estates by entireties, and that consequently their parents held as tenants in common.

2 Stanton’s Ky. Rev. Stat. 1852, c. 47, Art. iv, § 14, provided: “Where any real estate or slave is conveyed or devised to husband and wife, unless a right of survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them; but they shall take as
the other's surviving and retaining the estate, because like­wise so invested in that party.” 80

“As the entire title and estate was vested in both husband and wife, the Legislature could not have diverted any por­tion of the title, and we must presume did not intend to do so, but that, as a rule of property and a declaration of the legal effect of such deed subsequently made, and the legal rights of the parties thereunder, said statute was enacted.” 81

Similar reasoning has been used by other courts in refusing to allow a retroactive effect to statutes of their respective jurisdictions. 82

An Arkansas statute, enacted in 1947, provides that courts of equity shall have the power to dissolve estates by the

tenants in common, and the respective moieties be subject to curtesy or dower, with all other incidents to such a tenancy.” (Now, with the omission of “or slave” and immaterial modifications, Ky. Rev. Stat. 1948, sec. 381.050.)

80 67 Ky. 502, 505.

The same might be said of the element of survivorship in joint tenancies. 2 Tiffany, Real Property, sec. 419 (3d ed.). Supra note 1.

81 67 Ky. 502, 506 (1868).

82 Holmes v. Holmes, 70 Kan. 892, 79 Pac. 163 (1905). In 1876 a tract of land was conveyed to Mr. and Mrs. H. In 1896 after the statute abolishing survivorship had been passed (supra note 35), Mrs. H. died, leaving her husband surviving her, and the question arose whether the heirs of Mrs. H. inherited any interest in the land. Held: No.

An opposite view was adopted in an earlier case, Stewart v. Thomas, 64 Kan. 511, 68 Pac. 70 (1902), wherein it was held that the statute was intended to apply to existing tenancies by the entirety and that consequently the children of the deceased wife (husband surviving) were necessary parties to foreclosure proceedings on a mortgage executed by husband and wife. The concept of the estate by entireties was characterized as out-moded.

Pease v. Whitman, 182 Mass. 363, 65 N. E. 795 (1903). This was an action in tort for flowing plaintiff's land, which had been conveyed to Mr. and Mrs. L. in 1883. Mr. L. conveyed the premises to defendant. Mrs. L. did not join in the deed. After Mr. L.'s death his widow conveyed the premises to the plaintiff. In 1885 the statute relating to construction of conveyances and devises to two or more persons (supra note 14) was amended by inserting after the word “persons” the words “or to husband and wife.” Mass. Acts 1885, c. 237 (for the statute as it now reads see supra note 77). Held: The statute of 1885 could not affect this case because the rights of the wife became vested in 1883 before the statute was enacted and therefore defendant took nothing under the deed from Mr. L.

CONCURRENT OWNERSHIP

entirety, upon the rendition of a final decree of divorcement, and in the division of the property, so held by the parties, shall treat the parties as tenants in common. It has been held that the statute cannot be constitutionally applied to an entirety estate, which was created prior to the passage of the statute. In Pennsylvania a like result was reached under a similar statute.

In Zorntlein v. Bram it was declared that the legislature cannot retroactively bestow authority upon either the husband or wife separately to convey to a third party.

To be sure, the una persona theory is not the only factor inducing the courts to hold that a statute cannot retroactively destroy the incident of survivorship in tenancies by the entireties. Whether or not it is accurate to ascribe the inability of either husband or wife to sever the tenancy to a doctrine of the common law which forbade the recognition of the separate existence of the spouses, the fact remains that the incident of survivorship cannot be defeated by a conveyance by one tenant, as in the case of a joint tenancy, nor by a sale under execution. Since the incident cannot be destroyed ordinarily except by the joint conveyance of the

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85 Clements v. Kandler, 9 Pa. Dist. & Co. 310 (1925); Ebersole v. Goodman, 7 Pa. Dist. & Co. 605 (1925); Cooper v. Niemeyer, 50 Pa. Dist. & Co. 634 (1944). Pennsylvania is another state in which it has been held, contrary to the prevailing view, that divorce does not sever the tenancy by the entirety.
86 100 N. Y. 12, 2 N. E. 388 (1885). In 1878 the land was conveyed to Mr. and Mrs. B. On Sept. 23, 1881, Mrs. B. executed a deed purporting to
spouses, the interest of each spouse, while both are living, in the possibility of getting the whole estate, is something more than a mere expectancy. It may therefore seem questionable whether the legislatures can extinguish such an interest without the consent of both tenants. The constitutional immunity from legislative impairment which ought to be afforded the incident of survivorship in tenancies by entireties, it seems, should be very much the same as that immunity which is afforded to contingent remainders. 87

When a court thinks only of the una persona theory, however, it is likely to lose sight of the fact that there may be valid policy reasons for extending to tenants by entireties some of the privileges enjoyed by tenants in common and joint tenants. In Zornlein v. Bram 88 for example, the court seems to have thought there was something in the nature of tenancies by entireties which deprives the legislature of authority to allow either of the spouses to sever the estate, although the other spouse does not object. While the legislature probably ought not to be allowed to take away from a nonconsenting spouse the chance of getting the whole estate by survivorship, it is absurd to hold that even if the spouses concur in the wish, they cannot take advantage of a statute to sever the tenancy.

convey an undivided one-half of the premises to plaintiff. On Sept. 30, 1881, Mr. and Mrs. B. joined in a deed of the premises to defendant. N. Y. Laws 1880, c. 472 (now incorporated in N. Y. Dom. Rel. Law, sec. 56) provided:

"Whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants, or as tenants by entireties, they may make partition or division of the same between themselves, and such partition or division, duly executed under their hands and seals, shall be valid and effectual. . . ." Plaintiff brought this action for partition. Held: The deed executed by Mrs. B. to the plaintiff conveyed no title and he could not maintain an action for partition.

87 For the constitutional protection afforded contingent remainders see supra Chapter 4.
88 100 N. Y. 12, 2 N. E. 388 (1885), supra note 86.
The idea that the spouses do not have separate legal personalities is altogether outdated and is not likely to recommend itself to many present day courts. One could expect such a theory to be the deciding factor in cases arising prior to 1850.89 The modern view is that there is nothing in the relationship of husband and wife to prevent their acquiring property as joint tenants or as tenants in common.90 While it is true that a conveyance or devise to a husband and wife still creates in many jurisdictions a tenancy by entireties, this result is reached upon the presumption that the alienor intended to create a tenancy by entireties unless the instrument clearly expresses the intention that the alienees shall take as tenants in common or as joint tenants.91

The change in view from the proposition that the courts are dealing with a rule of law to the proposition that the issues turn on the application of a rule of construction ought to have some effect on the constitutionality of the retrospective operation of the type of statutes under discussion. But the change is not reflected in the cases previously cited, and they are therefore of doubtful authority for future decisions. The rule of law on which these cases are based has in the course of time become a rule of construction and may well disappear altogether from the law. Even without the influence of statutes, the courts in a number of jurisdictions have repudiated the institution of tenancy by the entireties as not

89 There are American cases decided in the first half of the nineteenth century which go so far as to hold that husband and wife suffer “a legal incapacity to take in severalty, arising from a legal identity; and a grantor cannot remove that incapacity without the intervention of a trustee.” Dias v. Glover, 1 Hoff. Ch. 71 (N. Y. 1839); Stuckey v. Keefe’s Ex’rs, 26 Pa. 397 (1856). Freeman, Cotenancy and Partition, sec. 72, states that it is doubtful whether any reported case prior to the publication of Mr. Preston’s “Treatise on Estates” ever supported the doctrine that, as between themselves, husband and wife can take an estate other than by entireties.

90 2 Tiffany, Real Property, sec. 431 (3d ed.).

91 2 Tiffany, op. cit.
in harmony with the usages of the community, or as based on a concept of marriage relation which no longer obtains. The courts in the future are not likely to treat husband and wife as different from any other grantees.

92 Tiffany, Real Property, sec. 433 (3d ed.).

In Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92 (1900) it was said: "Many principles of law have changed with the passing of time, through the gradual change of thought on the part of society and the flux and change of social organization. Many others have ceased because the reason which called them into existence has ceased, and it seems to us that to this last-named principle may be referred the law of estates by entirety." (60 Neb. 663, 670, 84 N. W. 92.)

In Van Ausdall v. Van Ausdall, 48 R. I. 106, 135 Atl. 850 (1927), the court remarked: "On the facts before us at early common law a presumption would exist in favor of construing this deed as creating a tenancy by entirety. This was only a presumption, i.e., an aid to legal reasoning. It arose because grantees were husband and wife and legal policy favored a holding 'per tout et non per my'. It was employed in English law at a time when a married woman had few property rights. It was created for what was conceived to be the wife's protection. If she now has full property rights and needs no such protection, the reason for its employment has disappeared and a court properly may decline to be guided by it. One of the glories of the common law has been that it is not static. It grows as new conditions arise. When the basis for a presumption has gone, there is small reason for a court longer to act upon that presumption. If nothing has taken the place of such basis, perhaps the presumption may continue to be applied. Where for that basis has been substituted an entirely altered conception of the property relation of husband and wife, the imputation of intent, as if no alteration had been made, is not sound. There is no legal requirement that such a common law presumption must remain unaffected until expressly altered by statute. A presumption is not evidence. It is an aid to legal reasoning applied to particular subjects. It is grounded on 'experience, probability, policy and convenience'. When the grounds change so should the presumption." (48 R. I. 106, 109, 135 Atl. 850, 851.)