

April 1966

## Property--Involuntary Partition of Jointly Owned Property

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### Recommended Citation

John I. Rogers II, *Property--Involuntary Partition of Jointly Owned Property*, 68 W. Va. L. Rev. (1966).

Available at: <https://researchrepository.wvu.edu/wvlr/vol68/iss3/16>

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it appears to afford a large degree of flexibility in the realignment of corporate affairs, while at the same time containing adequate safeguards against its use merely to avoid taxes.

*Raymond Albert Hinerman*

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### Property—Involuntary Partition of Jointly Owned Property

*P* and *D* were husband and wife who took title to land by a deed which provided that they hold,

. . . as joint tenants with right of survivorship . . . it being the intention of the parties . . . that (unless the joint tenancy hereby created is severed or terminated during the joint lives of the grantees herein) . . . the entire interest in fee simple shall pass to the surviving grantee . . . .

*P* filed a bill seeking to have the property sold for division, and the trial court ordered the property sold. *Held*, reversed. During the joint lives of the parties the property was not saleable for division over the objection of either party. *Bernhard v. Bernhard*, 177 So. 2d 565 (Ala. 1965).

Partition had its origin in the common law courts, and the purpose of the preceeding is to enable those who own property as joint tenants or coparceners or tenants in common to put an end to the tenancy in order to vest in each a specific property or an allotment of the lands or tenements. 4 THOMPSON, REAL PROPERTY § § 1781, 1822 (1961).

A suit for partition can be maintained only by a party or parties having a title or equity in an interest in the *whole* of the property to be divided. *Pierce v. Pierce* 4 Ill. 2d 497, 123 N.E.2d 511 (1954). Thus, a remainderman cannot maintain such an action. *Hartman v. Drake*, 166 Neb. 87, 87 N.W.2d 895 (1958). A tenant for life is not entitled to maintain partition against reversioners, remaindermen or others having a future conditional interest. *Fehringer v. Fehringer*, 212 Tenn 75, 367 S.W.2d 719 (1963). The law concerning partition of property in which there is an interest in remainder is correctly stated in the principal case; however, there is some question as to whether there was in fact any interest in remainder involved in this case.

Before proceeding to make a partition it is the duty of the court to ascertain what estates exist. *Dingess v. Marcum*, 41 W. Va. 757, 24 S.E. 624 (1896). The test of jurisdiction in a partition suit is the relationship of the parties to the land sought to be partitioned. If there exists one of the forms of cotenancy mentioned in the statutory provision for partition, the court has jurisdiction. *Woodrum v. Price*, 100 W. Va. 639, 131 S.E. 550 (1926).

The deed construed in the principal case expressly provided that *P* and *D* held as joint tenants with the right of survivorship. Also there was express provision that the parties intended that the entire interest pass to the surviving grantee unless the joint tenancy was severed or terminated during the joint lives of the parties. Avowedly attempting to give effect to the intention of the parties, as determined from the language used in the deed, the Alabama court construed the deed as creating (1) a tenancy in common while both the parties lived and (2) a remainder in the survivor. It was the opinion of the court that this construction was consistent with similar cases in other jurisdictions. *Finch v. Hayes*, 144 Mich. 352, 107 N.W. 910 (1906). In the *Finch* case, which concerned a deed similar to the one in the principal case, the deed was similarly construed to make the grantees joint tenants for life with a contingent remainder in the one who survived.

Under recognized rules of construction a devise to named persons without words of limitation carries the fee absent indications to the contrary; thus a devise to persons as joint tenants will carry the fee unaffected by subsequent words of dubious meaning or mere desire. Annot., 69 A.L.R.2d 1060 (1960).

Many states have abolished joint tenancy as it was known at common law, and when two or more persons hold an estate jointly they hold without the right of survivorship. The concept of survivorship is retained, however, in the event that it was expressly provided in the instrument which created the tenancy, that the tenancy is *with* the right of survivorship. *Gladieux v. Parney*, 930 Ohio App. 177, 106 N.E.2d 317 (1952). West Virginia, as most states, has a statute providing that on the death of a joint tenant his interest in property shall descend or be disposed of as if he had been a tenant in common. W. VA. CODE ch. 36, art. 1, § 19 (Michie 1961). The West Virginia Code further provides that section nineteen shall not apply when it is expressed in the instrument creating

the tenancy that the survivor shall receive the interest of the tenant who predeceases him. W. VA. CODE ch. 36, art. 1, § 20 (Michie 1961). Alabama has similar statutory provisions. ALA. CODE tit. 47, § 19 (Michie 1958). The reason for these statutes is to protect the unwary so that he will obtain an inheritable estate unless it appears that he should have known he was not obtaining an inheritable estate. Brown, *Some Aspects of Joint Ownership of Real Property in West Virginia*, 63 W. VA. L. REV. 207, 227 (1961); see generally Brown, *supra*; Merricks, *Joint Estates in Real Property in West Virginia*, 61 W. VA. L. REV. 101 (1958).

In *Wartenburg v. Wartenburg*, 143 W. Va. 141, 100 S.E.2d 562 (1957), lots were conveyed to the husband and wife, "for and during their natural lives, as joint tenants with remainder in fee to the survivor," and, "as joint tenants with the right of survivorship." The West Virginia court held that the husband and wife took title to the land as joint tenants. There was vested in each an undivided one-half interest in the properties conveyed, subject to the survivorship rights of each other. The action in the *Wartenburg* case was brought by the husband for the purpose of making partition of the land which he and his wife held as joint tenants. The West Virginia court held that partition of real estate may be compelled where one or more of the owners hold as joint tenants.

The principal case probably would have been decided differently according to West Virginia law, because the language used in the deed would not create interests in remainder in land located in West Virginia.

*John I. Rogers, II*

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### Torts—New Action for "Wrongful Life"

*P*'s mother, a patient in a New York state mental institution, was raped as a result of the alleged negligence of the institution in failing to protect her from attack. As a consequence, *P* was conceived and brought this action in tort against the institution for suffering the stigma of illegitimacy, being deprived of property rights and for lack of support and rearing. The state moved to dismiss for failure to state a claim. *Held*, motion denied. An actionable tort was committed upon the infant *P* simultaneously