Volume 63 | Issue 3 Article 4

April 1961

# Some Aspects of Joint Ownership of Real Property in West Virginia

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# West Virginia Law Review

Volume 63 April 1961 Number 3


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A very large percentage of the conveyances of real estate to be used as the residences of the grantees are made to husbands and wives, and most of these conveyances expressly provide for survivorship between the owners. In most cases these conveyances create joint tenancies with the survivor of the grantees having the right to complete ownership. Because of the number of these conveyances, attorneys are becoming increasingly conscious of the problems connected with joint tenancy.

A recent article in the *West Virginia Law Review* contained a wealth of information on the subject of creation of joint estates in real property.[1] A later article in the same review contained like information on the tax consequences of joint ownership of property.[2]

Those articles did not purport to cover many of the problems which arise when joint tenancies are created in real property.[3] It is the purpose of the present article to attempt to shed some light


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[1] Merricks, *Joint Estates in Real Property in West Virginia,* 61 W. VA. L. REV. 101 (1959).

[2] Stacey, *Tax Consequences of Joint Ownership of Property,* 61 W. VA. L. REV. 167 (1959).

[3] Joint tenancies may be created in personal property in West Virginia. Wisner v. Wisner, 82 W. Va. 9, 95 S.E. 802 (1918). The law in such cases is substantially similar to the law in regard to joint tenancies in real property. However, this article, in general, will be confined to joint tenancies in real property.

upon some of the consequences of joint ownership of real property in West Virginia other than tax consequences.

A West Virginia statute provides that when any joint tenant of an interest in property dies his interest therein shall descend or be disposed of as if he had been a tenant in common.[4] Another statute provides that the above described statute shall not apply when it manifestly appears from the tenor of the instrument which created the tenancy that it was intended that the interest of the one dying should then belong to the others.[5] Because of these statutes it will be assumed, unless otherwise specifically stated, that the land under discussion is owned by two or more persons as joint tenants with the right of survivorship and not as tenants in common.

## NATURE OF JOINT TENANCIES

All of the owners of land held in joint tenancy have but one estate in the land and this estate each cotenant owns cojointly with his cotenants. All the joint tenants constitute for some purposes but one tenant.[6] Each joint tenant is regarded as the tenant of the whole for purposes of tenure and survivorship, but for purposes of alienation each has an undivided share only.[7] Each joint tenant owns the whole estate subject to the equal rights of ownership of his cotenants. They all own the property as an entity and when one dies those left still own it as an entity.

The primary feature of joint tenancy is survivorship. Upon the death of one joint tenant the other tenants own the whole estate and the heirs at law or the devisees of the deceased joint tenant take no interest in the property through him, because no joint tenant except the last surviving joint tenant has an estate of inheritance in the property. It is important to understand that no estate in the joint property passes from the deceased joint tenant to the surviving joint tenants. The survivors take their whole interest, including the survivorship interest, by and through the original conveyance or devise and not from the deceased joint tenant. The right of survivorship is not a type of future interest since it is a part of the possessory estate held by the joint tenant. The whole estate is

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[4] W. VA. CODE ch. 36, art. 1, § 19 (Michie 1955).
[5] W. VA. CODE ch. 36 art. 1, § 20 (Michie 1955).
[6] 2 TIFFANY, REAL PROPERTY § 418 (3d ed. 1939).
[7] *Ibid.*

held by an entity made up of all the joint tenants collectively and continues so long as any of the joint tenants survive.[8]

A joint tenancy is never created when the owner of land dies intestate as the heirs at law then take as tenants in common. Joint tenancies are created by grant or devise. It is also possible for a joint tenancy to arise from adverse possession,[9] but it is hard to see how a joint tenancy with survivorship could be created in this manner in West Virginia today.[10]

At early common law a conveyance to *A* and *B* and their heirs created a joint tenancy in *A* and *B*. The heirs of the grantees took nothing by the conveyance, the words "and their heirs" being words of limitation and not words of purchase. Every conveyance of a freehold estate to two or more persons created a joint tenancy if the requisites of such estate were present. The reason for this is not altogether clear, but it was undoubtedly connected with the feudal system of land tenure. Of course, a conveyance to a husband and wife created a tenancy by the entireties rather than a joint tenancy, but survivorship is a characteristic of that type estate too.

As the feudal system lost its hold the chancery courts began to hold that a conveyance to two or more persons created a tenancy in common if there was anything in the creating instrument to negative an intent to create a joint tenancy.[11] This was probably because a contrary holding meant the perpetration of a trap for the unwary. It is doubtful if many laymen realize that they are not obtaining an inheritable estate when they are grantees in a deed along with other grantees. If *A* and *B* are the grantees in a deed they would probably both believe that they each had an estate which they could devise by will or which would descend to their heirs in case of intestacy. Indeed, this is probably the reason that most states, including West Virginia, today have statutes eliminating the element of survivorship unless the intent to create survivorship manifestly appears in the instrument creating the joint tenancy.[12]

In order for a joint tenancy to arise even at common law it was necessary that four unities be present and that is apparently

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[8] 2 AMERICAN LAW PROPERTY § 6.2 (Casner ed. 1952).
[9] 2 TIFFANY, REAL PROPERTY § 422 (3d ed. 1939).
[10] The reason for this statement will be shown later in this article.
[11] Gardner v. Gardner, 152 Va. 677, 148 S.E. 781 (1929).
[12] W. VA. CODE ch. 36, art. 1, §§ 19, 20 (Michie 1955).

still true today. These unities are unity of time, unity of possession, unity of title and unity of interest. To have the unity of time the interests of the tenants must vest at the same time. To have the unity of possession the tenants must have undivided interests in the whole estate so that each can be said to have an interest in every square inch of the land. Unity of title means that the tenants must have obtained their title by the same instrument or by joint adverse possession. Unity of interest means that the tenants must have estates in the property of the same type, duration and amount.

Some of these unities, particularly the unity of possession, may be present in other types of concurrent ownership, but if they are all present in the creating instrument a joint tenancy is created. This is apparently still true in spite of some of the statutes mentioned above.[13]

It has been held in both Virginia and West Virginia that a devise to two or more persons creates a joint tenancy in such devisees.[14] The highest courts of both states held that the statutes abolishing the element of survivorship unless expressly provided for in the creating instrument did not effect survivorship in case of a devise to two or more persons if one of the devisees died prior to the testator.[15] However, lapse statutes may effect survivorship in such cases if the particular lapse statute is applicable to the particular fact situation.[16] The West Virginia lapse statute has been amended so that it apparently abolishes survivorship in such cases now.[17]

It is submitted that a joint tenancy without survivorship is essentially the same as a tenancy in common. So, the fact that a conveyance or devise to two or more persons creates a joint tenancy without survivorship unless the creating instrument expressly provides for survivorship is not too important.

Since, by statute, all interests in property held in joint tenancy descend or can be disposed of as if held by tenants in common in

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[13] In Smith v. New Huntington General Hospital, 84 W. Va. 281, 99 S.E. 461 (1919), the court stated, "The lots were conveyed to plaintiff and his wife jointly, thereby constituting them joint tenants." In McNeely v. South Penn Oil Co., 52 W. Va. 616, 44 S.E. 508 (1902) it was held that a conveyance to a husband and wife created a joint tenancy.

[14] Lockhart v. Vandyke, 97 Va. 356, 33 S.E. 613 (1899); Hoke v. Hoke, 12 W. Va. 427 (1878).

[15] *Ibid.*

[16] See Hoke v. Hoke, 12 W. Va. 427 (1878).

[17] See W. VA. CODE, ch. 41, art. 3, § 3 (Michie 1955).

West Virginia unless the creating instrument expressly provides for survivorship, it is difficult to see how a joint tenancy with survivorship, which is the only real joint tenancy, can be created by adverse possession in this state.

### TERMINATION OF JOINT TENANCIES

Not only must the four unities of time, possession, title and interest be present at the time of the creation of a joint tenancy, but they must remain in being throughout the duration of that estate. If anything is done which amounts to a destruction of any of the unities the joint tenancy is terminated in whole or in part.[18]

Although a joint tenant does not have an inheritable or devisable interest in the land, he does have an interest which he can convey.[19] So, if three persons own land as joint tenants and one of them conveys his interest to a fourth person, the grantee takes a one-third undivided interest as a tenant in common with the two remaining joint tenants. He cannot hold as a joint tenant with them as he does not have unity of time or title with them. The remaining joint tenants continue as joint tenants as to each other but are tenants in common with such grantee. There is survivorship between the remaining joint tenants as to a two-thirds undivided interest in the land, but not as to the other one-third. The aforesaid grantee holds his interest as a tenant in common, which means that he can devise it or it will pass to his heirs at law in case of intestacy unless he has disposed of it in his lifetime, and it is subject to dower.[20] If there are only two joint tenants, a conveyance by one of them creates a complete tenancy in common between the remaining owner and the grantee in the conveyance. In both instances some of the unities have been destroyed and as a result the joint tenancy is destroyed in part or in whole. The only unity necessary for a tenancy in common is the unity of possession.

But where the joint tenants all convey a portion of the joint property this operates only as a severance of the joint tenancy so

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[18] Hammond v. McArthur, 175 P.2d 924, *subsequent opinion* 30 Cal. 2d 512, 183 P.2d 1 (1947); Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950); 2 TIFFANY, REAL PROPERTY § 425 (3d ed. 1939).

[19] Virginia Coal & Iron Co. v. Richmond, 128 Va. 258, 104 S.E. 805 (1920). W. VA. CODE ch. 36, art. 1, § 9 provides "Any interest in or claim to real estate or personal property may be lawfully conveyed or devised. . . ."

[20] 2 AMERICAN LAW PROPERTY § 6.5 (Casner ed. 1952).

far as the part conveyed is concerned and has no effect on the residue.[21]

Even though one joint tenant conveys only a remainder of his undivided interest in the joint property to a stranger to the title, reserving a life estate to himself, there would be a severance since the unity of interest would be destroyed as between the former joint tenants and there would be no unity of time, title or interest as between the new owner and the former joint tenants.[22] It has been held, however, that where one joint tenant gave a deed to a third party to be delivered to the grantee on the grantor's death, the grantee having no knowledge thereof, there was no severance of the joint tenancy.[23] While a deed of this type is held sufficient to pass an immediate estate in remainder,[24] the court found that there had been no acceptance by the grantee prior to the death of the grantor and so no title had passed prior to the grantor-joint tenant's death. The court stated that ordinarily in such case the grantee's later acceptance relates back to the time the grantor handed the deed to the third party, but that this was not true where rights of other parties had intervened, and in this case the survivorship rights of the surviving joint tenant had intervened. Therefore, it was held that the grantee's acceptance after the grantor's death did not relate back so as to cut off the surviving joint tenant's right of survivorship. It has also been held that an action for partition of realty held by joint tenants abates on the death of complainant before judgment has been entered by the court, and decedent's interest accrues to the survivor.[25]

After a conveyance by a joint tenant which severs the joint tenancy, a reconveyance of the same interest by the grantee to his grantor does not re-establish the joint tenancy. The former joint tenant who conveyed his interest and now has it back will be a tenant in common with his former joint tenant or tenants.[26]

A contract to sell a joint tenants's interest in the joint property which is enforceable in equity severs the joint tenancy since title

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[21] Leonard v. Boswell, 197 Va. 713, 90 S.E.2d 872 (1956).
[22] Clerk v. Clerk, 2 Vern 323, 23 Eng. Repr. 809 (1694).
[23] Green v. Skinner, 185 Cal. 435, 197 Pac. 60 (1921).
[24] Lauck v. Logan, 45 W. Va. 251, 31 S.E. 986 (1898).
[25] Sheridan v. Lucy, 395 Pa. 305, 149 A.2d 444 (1959).
[26] Hammond v. McArthur, 175 P.2d 924, *subsequent opinion* 30 Cal. 2d 512, 183 P.2d 1 (1945).

passes to the vendee by equitable conversion.[27] There is a split of authority as to whether a contract to sell the joint property executed by all the joint tenants effects a severance.[28] Although equitable title passes to the vendee in such contract through equitable conversion, legal title remains in the vendors. For that reason some courts conclude that the vendors continue to hold the legal title as joint tenants. However, title to the real estate subject to the contract goes to the heirs or devisees of the vendee as realty in case of his death, and in the case of the death of the vendor his interest is personalty which goes to his next-of-kin or legatees. Some courts use this reasoning as the basis for holding that the vendors cannot be joint tenants as to the realty to any greater extent than they could if they had conveyed it to the vendees.

A lease by one joint tenant for a term of years will effect a severance of the joint tenancy.[29] This should depend upon whether the non-leasing joint tenant is bound by the lease after the leasing joint tenant's death. But this in turn would depend upon whether there had been a severance. If a joint tenant can convey by deed more than he will ultimately have if he does not outlive his cotenants, then he probably can do the same by lease. If so, the nonleasing joint tenant is bound by the lease even though he survives the leasing joint tenant, and there has been a severance. Indeed, it would seem that the unity of interest would be destroyed since the leasing joint tenant would have a reversion in his undivided interest and the other joint tenant would have his undivided interest in fee simple.

Even an involuntary conveyance of his interest by one of the joint tenants will sever the joint tenancy.[30] Where an involuntary petition in bankruptcy was filed against one joint tenant and a trustee in bankruptcy was appointed and qualified in the proceeding, it was held that the joint tenancy was severed since title to

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[27] Kozacik v. Kozacik, 157 Fla. 597, 26 So. 2d 659 (1946).

[28] It was held in Hewitt v. Biege, 183 Kan. 352, 327 P.2d 872 (1958) that there was a severance in such cases. *Contra In re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956); Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954). See Swenson & Degnan, *Severance of Joint Tenancies,* 38 MINN. L. REV. 466 (1954).

[29] 4 THOMPSON, REAL PROPERTY § 1781 (Permanent ed. 1940).

[30] Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950); Stanger v. Epler, 382 Pa. 411, 115 A.2d 197 (1955).

the bankrupt's property passed to the trustee by operation of the law of bankruptcy.[31]

It is generally held that a mere lien against one joint tenant's interest in the land does not effect a severance of the joint tenancy.[32] It is well recognized that the interest of a joint tenant in real estate is subject to be sold to satisfy the claims of his creditors which have been reduced to judgment.[33] However, most jurisdictions hold that there is no severance of the joint tenancy until the sale which enforces the judgment lien against the joint tenant's interest.[34] There is authority to the contrary, especially in jurisdictions where the levy or seizure under execution is made by seizure of the property which terminates the unity of possession.[35]

A sale of a joint tenant's interest in the joint property pursuant to a judgment lien does effect a severance.[36] On the other hand, it was held in Illinois in *Jackson v. Lacey*[37] that a sale pursuant to judgment, execution and levy was not a conveyance which would sever a joint tenancy since no conveyance could occur until the redemption period had expired without redemption. In that jurisdiction a certificate of purchase was issued to the purchaser at the sale and the deed was not delivered until after the expiration of the redemption period.

Perhaps the major problem facing West Virginia attorneys in regard to the severance of joint tenancies is whether a trust deed executed by one or more of the joint tenants effects a severance. Joint tenancies are created in the great majority of cases in West Virginia when real estate is conveyed to husbands and wives with

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[31] Flynn v. O'Dell, 281 F.2d 810 (7th Cir. 1960); *In re* Blodgett, 115 F. Supp. 33 (E.D. Wis. 1953).

[32] Young v. Hessler, 74 Cal. App. 2d 67, 164 P.2d 65 (1945); Application of Gau, 230 Minn. 235, 41 N.W.2d 444 (1950); Eder v. Rothamel, 202 Md. 189, 95 A.2d 860 (1953); Jackson v. Lacey, 408 Ill. 550, 97 N.E.2d 839 (1951).

[33] Application of Rauer's Collection Co., 87 Cal. App. 2d 248, 196 P.2d 803 (1948); Johnson v. Muntz, 364 Ill. 482, 4 N.E.2d 826 (1936); 4 THOMPSON, REAL PROPERTY § 1783 (Perm. ed. 1940).

[34] Young v. Hessler, 72 Cal. App. 2d 67, 164 P.2d 65 (1945); Van Antwerp v. Horan, 390 Ill. 455, 61 N.E.2d 358 (1945); Eder v. Rothamel, 202 Md. 189, 95 A.2d 860 (1953).

[35] Van Antwerp v. Horan, 390 Ill. 455, 61 N.E.2d 358 (1945); Lessee of Davidson v. Heydon, 2 Yeates (Pa.) 459 (1799.)

[36] Application of Rauer's Collection Co., 87 Cal. App. 2d 248, 196 P.2d 803 (1948); Eder v. Rothamel, 202 Md. 189, 95 A.2d 860 (1953).

[37] 408 Ill. 530, 97 N.E.2d 839 (1951).

express language of survivorship.[38] In most such cases, since a part of the purchase money is usually borrowed, the purchasers immediately execute and deliver a trust deed which purports to convey the purchased property to a trustee to secure the payment of the loan.

Do such trust deeds transfer title to the trustees so as to sever the unities and terminate the joint tenancies? If they do, the former joint tenants would hold the property as tenants in common. A revesting of the title in them upon payment of the debt secured by the trust deed would not re-establish the joint tenancy.[39] The survivor would not take the whole estate, but would only have his undivided interest. The deceased cotenant's interest would pass to his heirs or devisees, subject to his debts and to dower interests.

Although trust deeds are used almost exclusively in West Virginia, mortgages are sometimes used, and they should also be considered in this aspect of joint tenancy. There is some authority on the problem so far as mortgages are concerned, but there is practically none in the case of trust deeds.

Mortgages operate to actually transfer legal title in some states. In others, they merely create a lien upon the mortgaged property. So, a mortgage of his interest in the joint property by one joint tenant in a jurisdiction where a mortgage transfers title causes a severance of the joint tenancy so far as the mortgaging tenant's interest is concerned.[40] In Illinois, where a mortgage is regarded as only creating a lien upon the mortgaged property,[41] there is some dicta in the cases to the effect that a joint tenancy is severed by a mortgage.[42] In Indiana, where the lien theory of mortgages pre-

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[38] At common law a husband and wife could not own property as joint tenants since there was a fifth unity, that of marriage, making them one person. They held as tenants by the entirety. However, in McNeely v. South Penn Oil Co., 52 W. Va. 616, 44 S.E. 508 (1903), and Wartenburg v. Wartenburg, 143 W. Va. 141, 100 S.E.2d 562 (1957), it was held that tenancies by the entirety had been changed by statute in West Virginia into what amounts to a joint tenancy. In the latter case it was held that a conveyance of land to a husband and wife "as joint tenants with the right of survivorship" created a joint tenancy in the grantees.

[39] Hammond v. McArthur, 175 P.2d 974, *subsequent opinion* 30 Cal. 2d 512, 183 P.2d 1 (1947); 2 AMERICAN LAW PROPERTY § 6.2 (Casner ed. 1952).

[40] 2 TIFFANY, REAL PROPERTY § 425 (3d ed. 1939); 2 AMERICAN LAW PROPERTY § 6.2 (Casner ed. 1952); Annot., 129 A.L.R. 813, 817 (1940).

[41] 1 JONES, MORTGAGES § 29 (1928); 1 GLENN, MORTGAGES § 30 (1943).

[42] Hardin v. Wolf, 318 Ill. 48, 148 N.E. 868 (1925); Lawler v. Byrne, 252 Ill. 194, 96 N.E. 892 (1911).

vails,[43] it was held that a mortgage by one joint tenant of his interest in the joint property did not sever the joint tenancy, but the surviving joint tenants took the property subject to the mortgage upon the death of the mortgaging joint tenant.[44] This case is wrong in theory because if the mortgage did not sever the joint tenancy the mortgagee had only a lien on his mortgagor's interest and that would be terminated upon the latter's death and the surviving joint tenants should take free of the mortgage.

Where under state law a judgment against one joint tenant is a lien on his interest in the joint property, the lien is extinguished when that joint tenant predeceases his cotenants.[45] A court so holding gave the following reasoning as a basis for its holding:

> "For the same reasons, upon the death of a joint tenant, there remains no interest or property right in the deceased in the premises held by him in joint tenancy up to the time of his death, in respect to which there can be operative an execution issued after his decease on a judgment against him, unless it can be said that by reason of a mere lien, arising from the docketing thereof, there was an effective severance of the deceased debtor's interest as a joint tenant from the interest of his cotenant, even though no execution was issued or levy made on his joint tenancy interest during deceased's lifetime."[46]

Another court so holding used the following reasoning:

> "When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien."[47]

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[43] 1 JONES, MORTGAGES § 30 (1928).

[44] Wilkins v. Young, 144 Ind. 1, 41 N.E. 68 (1895).

[45] Ziegler v. Bonnell, 52 Cal. App. 2d 217, 126 P.2d 118 (1942); Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937); 48 C.J.S. *Joint Tenants* § 4 (1947).

[46] Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 436, 272 N.W. 657, 658 (1937).

[47] Ziegler v. Bonnell, 52 Cal. App. 2d 217, 221, 126 P.2d 118, 120 (1942).

While West Virginia has been cited as a title theory state in regard to mortgages,[48] there is not much authority to support such view. A part of the first syllabus of *Childs v. Herd*[49] states: "The mortgagor is regarded in equity as the real owner of the property, a court of equity regarding a mortgage as a mere security, and the mortgagee, though legal title be in him, as having a chattel-interest . . . . "

Even though West Virginia had been a title theory state in regard to mortgages, a statute enacted in 1919 may have changed the state to a lien theory state. That statute provides, in part, as follows:

> "No lien reserved on the face of any conveyance of real estate, or lien created by any trust deed or mortgage on real estate, shall be valid or binding as a lien on such real estate after the expiration of twenty years from the date on which the original debt or obligation secured thereby becomes due, unless suit to enforce the same shall have been instituted prior to the expiration of such period; . . . "[50]

It seems that this statute is inconsistent with the view that a mortgagee takes a defeasible title to the mortgaged property and title only revests in the mortgagor upon the payment of the debt. It seems to indicate that the mortgage is a lien upon the mortgaged property which must be enforced within the specified time or become invalid and unenforceable. It is true that the statute refers only to liens created by mortgages, but it is unlikely that the legislature intended that a mortgage should have any effect whatsoever after the statutory period.

If a mortgage creates only a lien on the mortgaged property in West Virginia it would seem that a mortgage by one joint tenant of his interest in the joint property would not effect a severance of the joint tenancy. The common law authorities are to the effect that the creation by a joint tenant of a mere charge upon the joint property is a nullity as against the right of the other tenants as survivors.[51]

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[48] 1 JONES, MORTGAGES §§ 64, 67 (1928).
[49] 32 W. Va. 66, 9 S.E. 362 (1889).
[50] W. VA. CODE ch. 55, art. 2, § 5 (Michie, 1955).
[51] 2 TIFFANY, REAL PROPERTY § 425 (3d ed. 1939).

But, as previously stated, the bigger problem in West Virginia is whether the execution and delivery of a trust deed by one joint tenant purporting to convey his interest in the joint property to a trustee to secure a debt operates to sever the joint tenancy. The answer to this problem should also turn on whether there is an actual transfer of title to, or merely the creation of a lien upon, the joint property.

In addition to the statute set out in part above[52] which tends to show a legislative intent that a trust deed creates a lien upon the property rather than operating to transfer title, there is other authority for the lien theory view as to trust deeds in West Virginia.

Mr. Garrard Glenn, in his excellent treatise on mortgages,[53] states that Virginia is a lien theory state so far as trust deeds are concerned.[54] The same author states that West Virginia is also a lien theory state in regard to trust deeds.[55] The Supreme Court of Appeals of West Virginia, in *Citizens National Bank v. Coal & Coke Co.*,[56] stated:

> "Of course, a mortgage vests legal title conditionally in the mortgagee, while a deed of trust puts it in the trustee. At common law, upon a default in payment of the amount due upon a mortgage, the title vests unconditionally in the mortgagee, subject only to an equity of redemption, of which the law takes no notice. In case of default in payment of a debt secured by a deed of trust, no change occurs in the title. The property merely becomes liable to sale under the power of sale conferred upon the trustee."[57]

The same court, in *Rollyson v. Bourn*,[58] held that specific performance of a contract to purchase land would be decreed even though the property which was the subject matter of the contract was subject to a trust deed. The court stated:

> "Although . . . the legal title was outstanding in a trustee, the trust deed lien was only an encumbrance susceptible of removal by payment by either vendor or vendee. No reconveyance by

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[52] See note 50, *supra*.
[53] GLENN, MORTGAGES (1943).
[54] 1 GLENN, MORTGAGES §§ 20, 31 (1943).
[55] *Id. at* § 31.
[56] 89 W. Va. 659, 109 S.E. 892 (1921).
[57] *Id.* at 665, 109 S.E. 894.
[58] 85 W. Va. 15, 100 S.E. 682 (1919).

> the trustee was necessary. The legal title was held only as security for the debt, and payment and a release terminated or defeated it. The trustee's title was legal, but defeasible by payment of the debt secured by the deed of trust."[59]

There seems, therefore, to be very little doubt that a trust deed executed and delivered by one joint tenant upon his interest on the joint property does not operate as a severance of the joint tenancy in West Virginia. It has been pointed out earlier in this article that a mere lien on a joint tenant's interest in the joint real estate does not effect a severance.[60]

There seems to be almost a complete absence of authority regarding the severance effect of a mortgage or trust deed executed and delivered by all the joint tenants. This may mean that it is generally accepted that there is no severance of the joint tenancy in such case. But if title to the joint property is actually transferred to the trustee in a trust deed or to the mortgagee in a mortgage so that there must be a revesting of title in, or reconveyance to, the joint tenants in such cases it would seem that there would be a severance. After a severance of the joint tenancy by a conveyance by one of the joint tenants, a reconveyance by the grantee to the former joint tenant does not re-establish the joint tenancy.[61] Nor would a reconveyance by the mortgagee or trustee to all the former joint tenants re-establish the joint tenancy with survivorship in West Virginia unless express words of survivorship were used.[62] It seems very unlikely that a revesting of the title in the former joint tenants would re-establish the joint tenancy, especially in West Virginia.

If a contract to sell the joint property executed and delivered by all the joint tenants operates to sever the joint tenancy,[63] a mortgage or trust deed on the joint property executed and delivered by them should do so in jurisdictions where legal title passes in such cases. In the contract to sell situation the joint tenants retain legal title, and in the mortgage or trust deed situation they convey it.

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[59] *Id.* at 20, 100 S.E. at 684.
[60] See notes 32 and 51, *supra.*
[61] Partridge v. Berliner, 325 Ill. 253, 156 N.E. 352 (1927); see note 39, *supra.*
[62] W. VA. CODE ch. 36, art. 1, §§ 19, 20 (Michie 1955).
[63] See note 27, *supra.*

However, if, as heretofore indicated, there is no real transfer of the title to the joint property in the case of a mortgage or trust deed in West Virginia, but the mere creation of a lien upon such property, there is no severance of the joint tenancy when a mortgage or trust deed on the joint property is executed and delivered by all the joint tenants to secure a debt. This seems to be the case, especially in the case of a trust deed.

In a recent Virginia case[64] where two trust deeds had been executed and delivered by two grantors upon land owned by them in joint tenancy the court seemed to take the position that the joint property went to the survivor. It was argued in that case by the next of kin of the deceased joint tenant that their decedent's estate was not liable for the payment of any part of the debts secured by the trust deeds since the entire estate in the land formerly held in joint tenancy was vested in the surviving joint tenant. The court held against the next of kin on this point and seemed to accept the premise that the entire estate in the property was vested in the surviving joint tenant.

### Rights of Heirs and Devisees of Joint Tenants

By statute in West Virginia when any joint tenant of an interest in real or personal property shall die, his share shall descend or be disposed of as if he had been a tenant in common. This means that his undivided interest of the joint real estate will descend to his heirs at law in accordance with the statute of descent in case of intestacy, or will go to his devisees in case he leaves a will disposing of such property.

However, that statute does not apply if it manifestly appears in the instrument creating the joint tenancy that it was intended that the part of the one dying should then belong to the others.[65] In the latter case the share of the joint tenant or tenants who die first will go to the survivor or suvivors as at common law.[66]

The individual joint tenant of a joint tenancy with survivorship has no interest in the joint property which he can devise or which

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[64] Brown v. Hargreaves, 198 Va. 748 96 S.E.2d 788 (1957).

[65] See W. Va. Code ch. 36, art. 1, §§ 19, 20 (Michie 1955) for the statutes referred to in this and the preceding paragraphs.

[66] Carter v. Carter, 97 W. Va. 254, 104 S.E. 558 (1920); Neal v. Hamilton Co., 70 W. Va. 250, 73 S.E. 971 (1912); Irvin v. Stover, 67 W. Va. 356, 67 S.E. 1119 (1910).

will pass to his heirs in case of intestacy unless he is the last surviving tenant and then he owns the whole estate as an individual, not as a joint tenant. Unless there has been an effective severance of the interest of one joint tenant from the interests of the other joint tenants by the destruction of some of the unities so as to establish a tenancy in common, they continue as joint tenants until the survivor becomes the sole and absolute owner of the property, and there is no interest in the joint property in the estates of former joint tenants who have died.[67] There is no interest in the joint property which can be passed or encumbered by their wills and their wills are inoperative as to property held by them in joint tenancy.[68]

However, where a joint tenant executed a will during the lifetime of his joint tenant in which he devised the joint property it was held that the property passed under the will when the testator turned out to be the last surviving joint tenant.[69]

The wife or husband of a joint tenant has no dower interest in real estate which their deceased spouse held in joint tenancy in his or her lifetime unless such spouse is the last surviving joint tenant because no individual joint tenant has an esate of inheritance.[70]

These statements, like most of the other statements in this article, presuppose a joint tenancy with survivorship unless otherwise stated. As before stated, if there are no express words providing for survivorship in the instrument which created the joint tenancy in West Virginia, the interests of the joint tenants, according to statute, descend or can be disposed of by will as if the joint tenants had been tenants in common.[71] The deceased joint tenant's spouse would have a dower interest in the joint property in such case. The statute formerly specifically provided for devises and dower in such case,[72] and the revisers' notes the present statute

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[67] Neal v. Hamilton Co., 70 W. Va. 250, 73 S.E. 971 (1912); Musa V. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937).

[68] Eckardt v. Osborne, 338 Ill. 611, 170 N.E. 774 (1930); Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937); 2 AMERICAN LAW PROPERTY § 6.2 (Casner ed. 1952).

[69] Eckhardt v. Osborne, 338 Ill. 611, 170 N.E. 774 (1930).

[70] Neal v. Hamilton Co., 70 W. Va. 250, 73 S.E. 971 (1912); 2 AMERICAN LAW PROPERTY § 6.2 (Casner ed. 1952); See, Turner v. Turner, 189 Va. 505, 39 S.E.2d 299 (1940).

[71] W. VA. CODE ch. 36, art. 1, §§ 19, 20 (Michie 1955).

[72] See Barnes Code, ch. 71, § 18 (1923).

states that the present statute is shorter than the former statute, but has the same effect.[73]

RIGHTS OF CREDITORS OF JOINT TENANTS

In West Virginia it has been held that any interest in property which, upon the occurrence of an event possible to happen, would ripen into complete ownership thereof, is property and is alienable, and capable of being reached by creditors.[74]

There does not seem to be any doubt that the interest of a joint tenant in the joint property can be reached by his creditors. It has been shown in the foregoing discussion that the joint tenant has a transferable interest in the joint property[75] upon which his creditors can obtain liens and can sell to satisfy their claims.[76]

Since the interest of a joint tenant is subject to the claims of his creditors, it is necessary to determine the nature of that interest. The joint tenant owns an undivided interest in the joint property which is subject to the undivided interests of the other joint tenants and their rights of survivorship. This is the interest which is subject to the claims of his creditors. That a joint tenant will survive all his cotenants is an event possible to happen and, in the event that he does so, his creditors can reach the entire property since his interest would then ripen into complete ownership.

There is another way that the creditors of an individual joint tenant can reach the entire property. While a debtor's creditors cannot ordinarily reach more than the debtor owns, it is possible for the creditors of a joint tenant to do so. If such creditor gets a judgment against the joint tenant which amounts to a lien upon the joint property, this does not amount to a severance so as to defeat the survivorship rights of the other joint tenants.[77] But a sale pursuant to such judgment lien does effect a severance and defeat the survivorship rights of such cotenants.[78] Therefore, a creditor, by enforcing his lien during the lifetime of a debtor joint tenant, can sell an undivided interest in the joint property, and the sale effects a severance of the joint tenancy so that the purchaser

[73] See Revisers' Note to W. VA. CODE ch. 36, art. 1, § 19 (Michie 1955).
[74] Miller v. Miller, 127 W. Va. 140, 31 S.E.2d 844 (1944).
[75] See note 19, *supra.*
[76] See note 33, *supra.*
[77] See notes 32 and 34, *supra.*
[78] See note 36, *supra.*

takes such interest as a tenant in common and free of the survivorship rights of the other joint tenants. In such case, whether the debtor joint tenant survives his cotenants or not is immaterial so far as the purchaser is concerned.

However, a lien acquired against the interest of a joint tenant in the joint property in the joint tenant's lifetime is extinguished by the death of the joint tenant if he is survived by any of his cotenants because there is no longer any property interest therein to which the lien can attach.[79] On the death of the debtor joint tenant title to the joint property vests in the surviving joint tenants and there can be no enforcement of a lien acquired on the joint property by virtue of a judgment against the debtor joint tenant.[80]

The surviving joint tenants take no estate from the deceased cotenant. They take no new title, but hold under the instrument which created the joint tenancy.[81] The right of survivorship is based upon the concept that the estate is held by a fictitious entity made up of the joint tenants collectively and that the entity continues so long as any of the joint tenants survive.[82] The deceased joint tenant's interest is extinguished on his death, like a life estate, and the estate continues in the survivors.[83]

If a lien against the joint property of a joint tenant is extinguished on the death of the tenant, it follows that there is no interest therein held by the tenant which a creditor with or without a lien can reach after the tenant's death. So, unless there has been a severance, the surviving joint tenants have the property free of the claims of the deceased joint tenant's creditors.

Of course, if the joint tenant against whom the creditor has a claim is, or becomes, the last surviving joint tenant, he owns the whole estate in the property and it is subject to the claims of creditors to the same extent as any other property.

Furthermore, in West Virginia, the creditor can reach the interest of a joint tenant free of the element of survivorship before or after his death unless there was an express provision for survivorship in the instrument which created the joint tenancy. This

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[79] Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937).
[80] See cases cited in notes 45, 46 and 47, *supra*.
[81] 2 TIFFANY, REAL PROPERTY § 419 (3d ed. 1939).
[82] 2 AMERICAN LAW PROPERTY § 6.1 (Casner ed. 1952).
[83] *Ibid.*

is because of the statutes hereinbefore mentioned[84] which provides that when the joint tenant of an interest in property dies such interest shall descend or be disposed of as if he had been a tenant in common unless the creating instrument expressly provides for survivorship. The first of these two statutes formerly provided specifically that such interests should descend or pass by devise, subject to debts as if the joint tenant had been a tenant in common.[85] The revisers' note to the present statute states that while it is shorter than the former statute, it has the same effect.[86]

### MURDER OF A JOINT TENANT BY HIS COTENANT

West Virginia, like most states, has a statute which prevents a person who has been convicted of killing another person from taking or acquiring any property from the one killed.[87]

In spite of such statutes, there is a split of authority on the issue of whether a joint tenant who murders his cotenant can take the joint property by right of survivorship.[88] Some jurisdictions take the view that such statutes are not applicable to the joint tenancy situation since the murdering survivor takes nothing from the murdered joint tenant so far as property held in joint tenancy is concerned, because the survivor's rights become vested under the instrument which created the joint tenancy, and he gained nothing by the death which he did not already have.[89] Other jurisdictions refuse to allow the murdering joint tenant to take the property by survivorship on various grounds.[90]

In a recent Illinois case[91] the court held that the act of murdering the joint tenant was an act of the other cotenant which operated as severance of the joint tenancy since it destroyed the unities and therefore, the rights of survivorship were destroyed.

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[84] W. VA. CODE ch. 36, art. 1, §§ 19, 20 (Michie 1955).
[85] See Barnes Code ch. 71, § 18 (1923).
[86] Revisers' Note to W. VA. CODE ch. 36, art. 1, § 19 (Michie 1955).
[87] W. VA. CODE ch. 42, art. 4, § 2 (Michie 1955).
[88] See Bradley v. Fox, 7 Ill. 2d 106, 129 N.E.2d 699 (1955).
[89] See *In re* Foster's Estate, 182 Kan. 315, 320 P.2d 855 (1958); Welsh v. James 408 Ill. 18, 95 N.E.2d 872 (1950), *overruled* in Bradley v. Fox, 7 Ill. 2d 106, 129 N.E.2d 699 (1955).
[90] Merrity v. Prudential Ins. Co., 110 N.J.L. 414, 166 Atl. 335 (1933); see Vesey v. Vesey, 237 Minn. 295, 54 N.W.2d 385 (1952); Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948).
[91] Bradley v. Fox, 7 Ill. 2d 106, 129 N.E.2d 699 (1955).

### SIMULTANEOUS DEATH OF JOINT TENANTS

Where persons perish together and there is no evidence of survivorship there is no presumption of survivorship.[92] Neither is there a presumption of simultaneous death,[93] but in the administration of the law the title to property passes as if they all died at the same instant.[94]

In one case, where tenants by the entirety were both instantly killed in an airplane crash, the court held that the joint property would be divided between their respective estates according to the amount each had contributed toward its purchase if those amounts could be ascertained, otherwise it would be equally divided between their estates.[95]

This problem, so far as joint tenancies are concerned, has been taken care of in West Virginia and other states which have adopted the Uniform Simultaneous Death Law.[96] Chapter 42, article 5, section 3 of the code of West Virginia provides as follows:

> "Where there is not sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants."

### MISCELLANEOUS PROBLEMS

There are many more problems connected with the joint ownership of property by joint tenants, but most of the problems which have not been hereinbefore discussed are not peculiar to joint tenancies. Since they are problems which arise in other types of concurrent ownership of property they will either not be mentioned herein or will be given only very brief treatment.

Joint tenants, tenants in common and coparceners of real property can be compelled to partition in West Virginia by statute.[97]

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[92] 4 WIGMORE, EVIDENCE § 2532 (3d ed. 1940).
[93] *Ibid.*
[94] *In re* Strong's Will, 171 Misc. 445, 12 N.Y.S.2d 544 (1939).
[95] *Ibid.*
[96] See W. VA. CODE ch. 42, art. 5 (Michie 1955).
[97] W. VA. CODE ch. 37, art. 4, § 1 (Michie 1955).

All joint tenants, like other co-owners of property, have an equal right to possession of the concurrently owned property.[98] A joint tenant has the power to convey his interest,[99] and this includes the power to lease his interest without the consent of his co-owner.[100] The lessee's right to occupy the property in such case is equal to that of his lessor and the nonleasing joint tenant cannot oust him.[101] This is true even in the case of a lease for oil and gas,[102] but the rights of the lessee in leases of that type are materially effected by the fact that a cotenant's, or his lessee's, taking of the minerals without the consent of the other cotenants is waste.[103]

A joint tenant who has paid off a debt secured by a mortgage or trust deed on the joint property is entitled to contribution from the other joint tenants.[104] This is also true where one joint tenant has paid the taxes on the joint property.[105]

There is a conflict of authority in the United States as to whether a joint tenant who makes necessary repairs to the joint property can compel his joint tenants to contribute his proportionate share of the cost thereof.[106] There is dictum in a West Virginia case[107] to the effect that a joint tenant can compel his joint tenants to share the cost of necessary repairs to a home or mill owned by them if he has requested such joint tenants to unite in the repairs and has been refused prior to the making of such repairs. In the absence of an agreement to pay or such demand and refusal prior to repairs, there is no way for a joint tenant to make the other joint tenants share the cost of even necessary repairs to the joint property in West Virginia.[108] Nor can a joint tenant improve the other joint tenants out of their estate.[109] That is, a joint tenant cannot make

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[98] Smith v. Hospital, 84 W. Va. 281, 99 S.E. 461 (1919).
[99] See note 19, *supra*.
[100] Smith v. Hospital, 84 W. Va. 281, 99 S.E. 461 (1919).
[101] *Ibid.*
[102] DONLEY, COAL, OIL & GAS IN WEST VIRGINIA § 48 (1951).
[103] Smith v. United Fuel Gas Co., 113 W. Va. 178, 166 S.E. 533 (1932); Cecil v. Clark, 47 W. Va. 402, 35 S.E. 11 (1900).
[104] Brown v. Hargreaves, 198 Va. 748, 96 S.E.2d 788 (1957).
[105] 2 AMERICAN LAW PROPERTY § 6.17 (Casner ed. 1952).
[106] In 2 AMERICAN LAW PROPERTY § 6.18 (Casner ed. 1952) it is stated that he cannot do so according to the weight of authority, and in 2 TIFFANY, REAL PROPERTY § 461 (3d ed. 1939) it is stated that the weight of authority is that he can do so if he has requested the co-owner to share the expense prior to making the repairs and has been refused.
[107] Ward v. Ward's Heirs, 40 W. Va. 611, 21 S.E. 746 (1895).
[108] *Ibid.*
[109] *Ibid.*

improvements to the joint property without the consent of the other joint tenants and then compel the latter to share the cost of such improvements.[110]

## CONCLUSION

The requirement that there be four unities present at all times in order for persons to hold property as joint tenants is outmoded and has no place in modern law.[111] Action by the West Virginia Legislature to remedy the situation would seem appropriate.[112]

The element of survivorship which was present at common law when the four unities were present was a trap for the unwary because many people did not realize that they were not obtaining an inheritable estate when they took title to land by deed or devise along with other co-owners. Because of this trap the West Virginia Legislature abolished survivorship in joint tenancies unless the intent that there be survivorship was manifest in the creating instrument.[113]

Most people in West Virginia today who take title to land as joint tenants with survivorship actually desire the right of survivorship. Such an estate is a trap for the unwary today because most people do not realize that the joint tenancy can be severed and the right of survivorship destroyed by the acts of one or more of the tenants, intentionally or unintentionally.

In most cases it would seem to be quite proper to allow one of the grantees to destroy the right of survivorship. But if the joint tenancy with survivorship should be created by devise it may

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[110] 2 TIFFANY, REAL PROPERTY § 462 (3d ed. 1939).

[111] "The four unities of the time of Littleton still dominate the law of joint tenancies. It is still impossible in many states for A to convey land which he owns to A and B as joint tenants because A cannot convey to himself and therefore B acquires an interest at a time different from which A acquired his interest and from a different source of title. Even more clearly, if A conveys an undivided interest to B with the expressed intention of creating a joint tenancy, only a tenancy in common is created. In these states it is necessary for A to convey to a third party and have him reconvey to A and B as joint tenants. In an increasing number of states it is now being held that such a circuitous procedure is outmoded and that a direct conveyance is permissible, the ancient unities to the contrary notwithstanding." 2 AMERICAN LAW PROPERTY § 6.2 (Casner ed. 1952).

[112] Statutes permitting a sole owner to create a joint tenancy by a conveyance to himself and another have been enacted in some states. See, *e.g.*, MASS. GEN. LAWS ANN. ch. 184, § 8 (1955).

[113] W. VA. CODE ch. 36, art. 1, §§ 19, 20 (Michie 1955).

not be so proper in some cases as the testator's intent may be frustrated by one of the devisees. However, it could be frustrated in any event if all the devisees joined in a conveyance to a stranger.

If it is desired to create an indestructible right of survivorship, there are better ways of doing so than the creation of a joint tenancy. One way to preserve survivorship in spite of the acts less than all the parties would be to convey or devise a joint life estate to the grantees or devisees with a contingent remainder to the survivor thereof. At least it would take action on the part of all the grantees or devisees to keep the survivor from taking the whole estate. It has been held in West Virginia that the statute abolishing the right of survivorship does not effect a joint estate held for life only.[114]

[114] Irvin v. Stover, 67 W. Va. 356, 67 S.E. 1119 (1910).