LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON CO-OWNERSHIP OF LAND

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TO THE HONOURABLE S.D. SMITH, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
CO-OWNERSHIP OF LAND

There are two ways in which land may be co-owned by two or more persons: the joint tenancy and the tenancy in common. This Report brings together a group of issues and concerns that relate to co-ownership.

Co-ownership suffers from an outmoded legislative framework within which the rights of co-owners are regulated and asserted. Provisions which define their rights and remedies are scattered through several statutes. The most important of these, the *Partition of Property Act*, is over 100 years old and its age is reflected in its antiquated language and concepts. Restatement, consolidation and simplification are called for.

One particular form of co-ownership, joint tenancy, raises special issues. The current rules respecting severance (the process whereby a joint tenancy becomes a tenancy in common) can frequently lead to unfair results. They permit a "secret severance" which allows one co-owner, in essence, to deprive the other of his right of survivorship. They also may cause a severance in circumstances where no owner wants or intends that result, and no purpose is served by it.

Finally, ancient legal doctrines dictate that join owners cannot hold unequal shares in the property. This means that the parties may be deprived of a potentially useful way of holding property.

The pivotal feature of this Report is draft legislation designed to provide a modern restatement of (1) the rights that co-owners may assert with respect to profits and expenses associated with the land; and (2) the remedies of partition and sale of the land. The draft legislation also incorporates changes to the substantive law arising out of our examination of the issues described above.

CHAPTER I INTRODUCTION

A. Introduction

One of the most complex areas of the law is that which relates to land. It is too vast to be the subject of a general reconsideration. Instead, the Commission has, over the years, examined a number of aspects of law relating to land.[1] Indeed, our first Report dealt with real property issues.[2]

The need for review of the law in this area continues, and the Commission is only one of the participants in that endeavour. Land title registration, for example, is currently under review by the western provinces and the territories. The Commission is also involved in that review.[3]

This Report examines the law that applies when two or more people own land.[4]

Ownership of land is governed by law which, in most respects, is unchanged since its feudal origins. It is, consequently, often complex and difficult to understand without some historical perspective.

Results dictated by legal theory are occasionally unexpected. Some of these results have been altered by equitable principles and by legislation designed to bring the law regarding co-ownership into step with contemporary needs. The legislation, in one case, dates from 1868 and, in another, from 1705. It should not be surprising that aspects of it do not fully answer the needs of co-owners today.

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1. These include Reports directed at the substantive law of real property, the law of agency, and legal rules of more general application, but whose impact is mainly in the real property area: *Abolition of Prescription*, (LRC 1, 1970); *Expropriation*, (LRC 5, 1971); *The Mechanics' Lien Act*, (LRC 7, 1972); *Residential Tenancies,* (LRC 13, 1973); *The Termination of Agencies*, (LRC 21, 1975); *Powers of Attorney and Mental Incapacity*, (LRC 22, 1975); *Security Interests in Real Property: Remedies on Default*, (LRC 24, 1975); *The Rule in Bain* v. *Fothergill*, (LRD 28, 1976); *Waiver of Conditions Precedent in Contracts,* (LRC 31, 1977); *The Statute of Frauds*, (LRC 33, 1977); *Execution Against Land*, (LRD 40, 1978); *Calculation of Interest on Foreclosure*, (LRC 47, 1980); *Land (Wife Protection) Act*, (LRC 71, 1984); *Short Form General Power of Attorney*, (LRC 79, 1985); *Personal Liability Under a Mortgage or Agreement for Sale*, (LRC 85, 1986). A large number of other Reports also have implications for real property law. These include the Commission's work in relation to wills and estates, arbitration, restitution, minor's contracts, illegal transactions, and limitations.

2. *Abolition of Prescription, ibid.*

3. *See Annual Report 1987/88* (LRC 95, 1988).

4. In British Columbia, co-ownership of land may be by tenancy in common or joint tenancy. Other forms of co-ownership known to the common law, such as coparceny and tenancy by entireties, no longer exist in British Columbia: *see, e.g., Property Law Act*, R.S.B.C. 1979, c. 340, s. 12.

B. The Working Paper

This Report was preceded by a *Working Paper on Co-Ownership of Land*, published by the Commission as a consultative document. The Working Paper was distributed widely among persons interested or expert in this area of the law. It was also considered by several subsections of the Canadian Bar Association, including the Vancouver and Victoria Real Property Sections, and the Vancouver Wills and Trusts Section.

Technical law reform seldom elicits a great deal of response, but this topic has proved to be an exception. A number of detailed submissions on the Working Paper were received. These proved to be extremely helpful in the formulation of our recommendations and will be referred to in greater detail later in this Report.

CHAPTER II JOINT TENANCY AND TENANCY IN COMMON

A. Introduction

In British Columbia, there are two forms of co-ownership of land: joint tenancy and tenancy in common.[1] The use of the term "tenancy" is potentially confusing. It means "simply ownership, and has nothing to do with leases."[2]

Ownership of land carries with it entitlement to possession, either immediately or at some future time.[3] Where two or more people co-own land, they each enjoy the same rights of possession. That is true whether the land is held in joint tenancy or tenancy in common.

At common law, if the nature of the co-ownership was not stated in the instrument creating it, it was presumed to be a joint tenancy. Legislation in British Columbia now provides that in this situation co-ownership is presumed to be a tenancy in common.[4]

B. Joint Tenancy

1. THE FOUR UNITIES

Joint tenants hold property in what has been described as "a thorough and intimate union."[5] This union consists of four unities: title, time, interest and possession:[6]

> All the titles are derived from the same grant and become vested at the same time; all the interests are identical in size; and there is unity of possession, since each tenant *totum tenet et nihil tenet*. Each holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole.

Co-owners acquiring their title by separate instruments are not joint tenants. There is no unity of title. Similarly, where their interests are acquired at different times, there is no unity of time. If they have differing interests in property, there is no unity of interest. The absence of any of these unities means that co-ownership is by tenancy in common, not joint tenancy. If persons have unequal or different rights of posses-

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1. Strictly speaking, only the crown "owns" land. A person who has legal title to land owns an "estate" in the land. An "owner" of land owns a time in the land. An owner of the fee simple in land "has a time in the land without end": *Walsingham's Case*, (1579) 2 Plowd. 547, 555, 75 E.R. 805, 817 (Exch.).

2. Megarry & Wade, *The Law of Real Property*, (5th ed., 1984) 417.

3. An interest in land which confers a present of future right to possession is referred to as a "corporeal" interest. Rights in land which do not include possession, such as easements, covenants, and profits a prendre, are referred to as "incorporeal" interests.

4. *Property Law Act*, R.S.B.C. 1979, c. 340, s. 11.

5. Blackstone's Commentaries, vol. III, 182.

6. Cheshire & Burn's, *Modern Law of Real Property*, (13th ed., 1982) 208.

sion, there is no unity of possession. Without the unity of possession, land would not be subject to co-ownership. Each person would own a separate part.

2. RIGHT OF SURVIVORSHIP

The most important feature of joint tenancy is the right of survivorship - the rule that when one joint tenant dies the surviving joint tenants become entitled to his interest. A joint tenant's right of survivorship is often thought of as a special incident of a joint tenancy. It is, however, the natural result of the union between joint tenants:[7]

> ... [W]hile it continues, each of the two joint-tenants has a concurrent interest in the whole; and, therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest, which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title and taking effect at the same time with his own; neither can any one claim a separate interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

When a joint tenant dies, his interest vanishes. Technically, the deceased joint tenant's interest does not vest in the surviving joint tenants. Their interests continue to be of the whole of the land. That is the nature of the joint tenancy:[8]

> Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by all; that is, they each of them have the entire possession, as well of every *parcel* as of the whole. They have not, one of them, a seisin of one half or moiety and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety ...

The concept has been more simply expressed as each has "the whole in common, and nothing separately."[9]

3. WHO MAY BE A JOINT TENANT?

At common law, only natural persons were permitted to hold land in joint tenancy. A corporation was unable to do so. Since a corporation cannot die, a right of survivorship would not be mutual. Co-ownership in that case was necessarily as a tenancy in common.[10] That aspect of the common law has been altered by legislation. Section 32 of the *Company Act*[11] provides as follows:

> 32. (1) Every corporation is capable of acquiring and holding property in joint tenancy in the same manner as a natural person, and where a corporation and a natural person, or 2 or more corporations, become entitled to property under circumstances, or by virtue of an instrument that would, if the corporation had been a natural person, have created a joint tenancy, they

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7. Blackstone, *supra*, n. 5 at 184. Similarly, at common law a joint tenant who wished to "convey" his interest to other joint tenants would do so by release rather than grant.

8. Blackstone, *supra*, n. 5 at 182; *see also* Armour, *The Law of Real Property*, (2nd ed., 1916) 275; *see also* Megarry & Wade, *supra*, n. 2 at 418.

9. Armour, *ibid*.

10. *Law Guarantee & Trust Society Ltd.* v. *Bank of England*, (1890) 24 W.B.D. 406.

11. R.S.B.C. 1979, c. 59 based on the *Bodies Corporate (Joint Tenancy) Act, 1899*, 62 & 63 Vict., c. 20

> are entitled to the property as joint tenants; but acquiring and holding property by a corporation in joint tenancy is subject to the like conditions and restrictions as attach to acquiring and holding property by a corporation in severalty.
>
> (2) Where a corporation is joint tenant of property, on its dissolution the property devolves on the other joint tenant.
>
> (3) For the purpose of this section, the word "corporation" does not include an extraprovincial company that is not registered as required by Part 10.

4. SEVERANCE OF A JOINT TENANCY

Unless a co-owner wishes the right of survivorship to continue, there is little advantage in holding property in joint tenancy rather than tenancy in common.

An interest held in joint tenancy can be converted to a tenancy in common in several ways. The process involves what is referred to as a "severance" of a joint tenant's interest. It is the result of either the common intention of the joint tenants or the destruction of one or more of the unities.[12]

Severance does not necessarily involve physical partition of the land. Moreover, severing one joint tenant's interest from the joint tenancy will not affect the joint tenancy in which other co-owners hold their interests. If A and B are joint tenants, a severance of A's interest will alter co-ownership so that it is a tenancy in common. If A, B and C are joint tenants, a severance of A's interest will convert it into a tenancy in common. B and C, however, will continue to be joint tenants and enjoy rights of survivorship between themselves.

(a) Assignment

A joint tenant may assign his interest to another by transferring or mortgaging it.[13] When a third party acquires all or a part of a joint tenant's interest the unities of title and time are destroyed, causing a severance. There is no need for notice to the other joint tenants of an assignment to complete the severance,[14] nor is it necessary to register the assignment against title to the land.[15] That is surprising since, in British Columbia, registration in the land title system is usually necessary to affect rights people have in land.

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12. A.J. McClean, "Severance of Joint Tenancies," (1979) 57 Can. B. Rev. 1, 2.

13. *Williams* v. *Hensman*, (1861) 1 J. & H. 546, 557, 70 E.R. 862, 867 (V.C.); *York* v. *Stone*, (1709) 1 Salk. 158, 91 E.R. 146 (K.B.); *In re Pollard's Estate*, (1863) 3 De. G.J. & S. 521, 46 E.R. 746 (Ch.); *Re Sharer*, (1912) 57 Sol. Jo. 60; cf. *Bank of Montreal* v. *Koszil*, [1982] B.C.D. Civ. 2791-01 (B.C.S.C.); contra *Lyons* v. *Lyons*, [1967] V.R. 169 (S.C. Vict.) where it was held that a mortgage of land in a Torrens jurisdiction id not affect any of the four unities and, consequently, would not ever a joint tenancy. Lyons would be unlikely to be persuasive on the effect of a mortgage in British Columbia in light of *North Vancouver* v. *Carlisle*, (1922) 31 B.C.R. 372 (C.A.) Where it was held that a grant of a mortgage vests the legal estate in the mortgagee. When only one joint tenant granted a mortgage against his interest, the former practice of the Land Title Branch was to note title that the joint tenancy may have been severed. Now, apparently, upon registration a legal notation is made that there has been a severance: *see* the Minutes of the Real Property Section, Victoria, of the Canadian Bar Association (B.C. Branch), April 21, 1988. A declaration by a joint tenant that he holds his interest in trust for another will also sever the joint tenancy: *Sorenson* v. *Sorenson*, [1977] 2 W.W.R. 438, 90 D.L.R. (3d) 26 (C.A.); *Earl* v. *Earl; Liptak* v. *Earl*, [1979] 6 W.W.R. 600, 5 E.T.R. 263 (Alta. Q.B.); *Public Trustee* v. *Mee*, [1972] 2 W.W.R. 424, 23 D.L.R. (3d) 491, (B.C.C.A.). A joint tenant of a leasehold interest who sublets, evers his interest from the joint tenancy; *Sym's Case*, (1584) Cro. Eliz. 33, 78 E.R. 299 (A.B.); *Pleadal's Case*, (1579) 2 Leo. 159, 74 E.R. 441 (A.B.).

14. *Perks* v. *Perks*, [1950] 2 W.W.R. 189 (B.C.S.A.); *Schofield* v. *Graham*, (1969) 69 W.W.R. 332, 6 D.L.R. (3d) 88, (Alta. S.C.); *In re Wilford's Estate*, (1879) 11 Ch. D. 267.

15. *Stonehouse* v. *A.G. of B.C.*, [1962] S.C.R. 103, 37 W.W.R. 62; *see*, however, Raney, "Comment," (1963) 41 Can. B. Rev. 272; *Re Cameron*, [1957] O.R. 581, 11 D.L.R. (2d) 201 (H.C.).

The *Property Law Act*[16] permits a joint tenant to transfer property to himself. Such a transfer will also sever the joint tenancy.[17]

The effect of transactions entered into by a co-owner on the joint tenancy is not always certain. In each case, the issue is whether the unities survive intact after the transaction. It is, for example, unclear whether the grant of a life interest or lease by a joint tenant will cause a severance.[18]

(b) By Operation of Law

Third parties may acquire all or part of a joint tenant's interest without his positive act. This may occur, for example, on an assignment in bankruptcy or upon execution by a judgment creditor. An assignment in bankruptcy automatically severs a joint tenancy.[19] Simply registering a judgment against property, however, does not affect any of the unities.[20] The judgment creditor must complete execution against the property to effect a severance.

(c) By Agreement

Co-owners may agree to sever the joint tenancy.[21] Such an agreement may be inferred from a course of dealing suggesting that the interests of all were mutually treated as constituting a tenancy in common.[22] This position is difficult to reconcile with legislation which requires agreements relating to land to be in writing.[23] Moreover, the co-owners' course of dealing may be the result of a failure to appreciate the distinction between a joint tenancy and a tenancy in common, although that in itself would not seem to be grounds to refuse to infer an agreement.[24]

Professor McClean suggests that the cases in which an agreement to sever was inferred from a course of dealing are, in large measure, coloured by the former legal presumption in favour of a joint tenancy. That presumption, crafted by the courts in feudal times, did not work well in commercial arrangements. These cases are often reflections of the later judicial preference for the tenancy in common:[25]

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16. R.S.B.C. 1979, c. 340, s. 13(1).

17. *Ibid.*, s. 18(3); *see also Re Murdoch and Barry*, (1975) 64 D.L.R. (3d) 222 (Ont. H.C.).

18. McClean, *supra*, n. 12 at 7.

19. *Re White*, [1928] 1 D.L.R. 846 (Ont. S.C.); *Paten* v. *Cribb*, (1862) 1 Q.S.C.R. 40; *see also Thomason* v. *Frere*, (1809) 10 East 418, 103 E.R. 834 (K.B.); *Burt* v. *Moult*, (1833) 1 Cr. & M. 525, 149 E.R. 507 (Exch.); *Morgan* v. *Marquis*, (1853) 9 Exch. 145, 156 E.R. 62; *In re Butler's Trusts*, (1888) 38 Ch. D. 286; *Re Chisick*, (1967) 62 W.W.R. 586 (Man. C.A.).

20. *Re Young Estate*, (1968) 66 W.W.R 193 (B.C.C.A.); *Re McDonald*, (1969) 71 793 (Ont. C.A.); *Lord Abergavenny's Cae*, (1607) 6 Co. Rep. 786, 77 E.R. 373 (K.B.). *See also Report on Execution Against Land*, (LRC 40, 1978) 22-7.

21. *Williams* v. *Hensman, supra*, n. 13.

22. *Ibid.*; McClean, *supra*, n. 12 at 16. *Roche* v. *Sheridan*, (1857) 9 Ir. Jur. 409; *Wilson* v. *Bell*, (1843) 5 Ir. Eq. Rep. 501 (personalty); *Flannigan* v. *Wotherspoon*, (1952) 7 W.W.R. 660, [1953] 1 D.L.R. 768 (B.C.S.C.); *Schofield* v. *Gaham, supra*, n. 14; *Jackson* v. *Jackson*, 618; *Lindgren* v. *Olson*, [1949] 1 W.W.R. 1, [1949] 2 D.L.R. 353 (Alta, S.C.); *Ginn* v. *Armstrong*, (1979) 3 D.L.R. (3d) 285 (B.C.S.C.); *Burgess* v. *Rawnsley*, [1975] Ch. 429, [1975] 3 All E.R. 142 (C.A.).

23. *See* McClean, *ibid.*, at 12.

24. *Ibid.*, at 18.

25. *Ibid.*, at 24-5.

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

(d) Partition or Sale

A co-owner may apply for an order for partition or sale of property. When the order is made, it severs a joint tenancy.[26] Partition and sale of land are discussed in the next chapter of this Report.

C. Tenancy in Common

The second form of co-ownership of land in British Columbia is the tenancy in common. It depends solely on the co-owners having equal rights of possession. Unlike joint tenants, tenants in common may possess different interests in the property. For example, one co-owner may have a 3/4 interest and the other a 1/4 interest. Nevertheless, neither has a greater right than the other to possession of the property:[27]

> Unlike joint tenants, tenants in common hold in undivided shares: each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests; the only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.

In practical terms, the chief distinction between a tenancy in common and a joint tenancy is the right of survivorship. Only joint tenants enjoy rights of survivorship.[28] On the death of a tenant in common, his interest passes by will or intestacy. A joint tenant cannot devise his interest by will. Upon his death, it is too late to sever the joint tenancy.

If a joint tenancy is severed, the parties continue to be co-owners of the land as tenants in common. Severance of the joint tenancy terminates rights of survivorship, but not the co-ownership.

D. Rights of Account, Contribution and Injunction

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26. *Rodrigue* v. *Dufton*, (1976) 72 D.L.R. (3d) 16 (Ont. H.C.); *Munroe* v. *Carlson*, [1976] 1 W.W.R. 258, 59 D.L.R. (3d) 763, 21 R.F.L. 301, (B.C.S.C.); Grant, [1952] O.W.N. 641, 644 (H.C.); cf. *In re Wilks*; *Child* v. *Bulmer*, [1891] 3 Ch. 59; contra, *Ginn* v. *Armstrong, supra*, n. 22; *Re Walters*, (1977) 79 D.L.R. (3d) 122 (Ont. H.C.); *Re Draper's Conveyance,* [1967] 3 All E.R. 853 (Ch.). In these cases, severance resulted from an agreement inferred from the co-owner's course of conduct.

27. Megarry & Wade, *supra*, n. 2 at 422.

28. It would appear, however, that express words in the grant to c-owners of land in tenancy in common may create a right of survivorship: *see, e.g. Doe d. Borwell* v. *Abey*, (1813) 1 M. & S. 428, 103 E.R. 160 (K.B.); in *Haddelsey* v. *Adams*, (1856) 22 Bea v. 266, 275. 52 E.R. 1110, 1114 (R.C.), it is said that a tenancy in common with a right of survivorship differs from a joint tenancy in that the right of survivorship may not be severed.

1. AT COMMON LAW

The right to possession of land enjoyed by a co-owner carries with it some unexpected consequences at common law. A co-owner who receives profits from the land is not obliged to account for them to other co-owners.[29] Similarly, a co-owner who pays expenses associated with the land is not entitled to contribution from other co-owners.[30] Moreover, unless the use impairs a co-owner's estate,[31] the right to possession prohibits him from obtaining an injunction restraining another co-owner from using the land:[32]

> The Court refuses to restrict a tenant in common in the legitimate enjoyment of the estate, because an undivided occupation is of the very essence of a tenancy in common, and to interfere with the legitimate exercise of that right would be to deny an essential quality of the title.

Equity took a less limited view in these matters than did the common law and would, for example, compel a co-owner to account for profits received from use of the land.[33]

Adjustments between co-owners are also available on a court order for partition or sale. Many of the defects of the common law have been overcome in that way:[34]

> While the general rule is that one joint tenant, unless ousted by his co-tenant, may not sue another for use and occupation, it seems clear that when the joint tenancy is terminated by a Court order for partition or sale, the Court may in such proceedings make all just allowances and should give such directions as will do complete equity between the parties.
>
> What is just and equitable depends on the circumstances of each case. For instance, if the tenant in occupation claims for upkeep and repairs, the Court, as a term of such allowance, usually requires that the claimant shall submit to an allowance for use and occupation. Again, if one tenant has made improvements which have increased the selling value of the property, the other tenant cannot take the advantage of increased price without submitting to an allowance for the improvements. And, once again, when, as here, one tenant has paid more than his share of encumbrances, he is entitled to an allowance for such surplus.

Partition or sale of co-owned property is discussed in the next chapter.

2. LEGISLATION

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29. *Anon*, (1602) Cary 21, 21 E.R. 12 (Ch.). Unless he was constituted an agent or bailiff of the other co-owner: *Gregory* v. *Connolly*, (1850) 7 U.C.Q.B.R. 500; *Wheeler* v. *Horne*, (1740) Willes 208, 125 E.R. 1135 (C.P.).

30. *Leigh* v. *Dickeson*, (1884) 15 Q.B.D. 60 (C.A.); *contra Gage* v. *Mulholland*, (1869) 16 Gr. 145 (Ch.).

31. *Pyat* v. *Winfield*, (1730) Mos. 305, 25 E.R. 408 (Ch.); *Dougall* v. *Foster*, (1853) 4 Gr. 319 (Ch.). Similarly, damages are not available for trespass: *Noye* v. *Reed*, (1827) 1 Man. & Ry. K.B. 63, unless it constitutes an ouster: *Wilkinson* v. *Haygarth*, (1847) 12 A.B. 837, 116 E.R. 1085 (K.B.); *Murray* v. *Hall*, (1849) 7 C. B. 441, 137 E.R. 175 (C.P.).

32. 28 C.E.D. (Ont. 3rd, 1980) Title 123, Real Prop., s. 174.

33. *Leake* v. *Cordeaux*, (1856) 4 W.R. 806 (C.A.); *Denys* v. *Shuckburgh*, (1840) 4 Y. & C. Ex. 42, 160 E.R. 912; *Goodenow* v. *Farquhar*, (1873) 19 Gr. 614 (Ch.). The court could also "make all just allowances and should give directions as will do complete equity between the parties" when making an order for partition or sale: *Mastron* v. *Cotton*, [1926] 1 D.L.R. 767 (Ont. S.C., App. Div.). It has been said that there is no independent right of account separate from partition: *Handley* v. *Archibald*, (1899(30 S.C.R. 130, but this would appear o be a reference to the position at common law, not equity.

34. *Mastron* v. *Cotton, ibid*., at 768. In the absence of partition proceedings, a co-owner ousted from the land could recover for use and occupation as damages in an action on the case for ejectment and trespass: *Murray* v. *Hall*, (1849(7 C.B. 441, 137 E.R. 175 (C.P.); *Vasiloff* v. *Johnson*, (1932) 41 O.W.N. 139 (H.C.); *Crawford* v. *Crawford*, [1953] O.W.N. 731 (H.C.).

In British Columbia, a co-owner's right to an accounting or contribution is addressed by legislation.

(a) Contribution

The right of a co-owner to a lien to secure contribution due from another co-owner is provided by sections 13 and 14 of the *Property Law Act*:

> 13. In addition to his other rights and remedies, an owner who, owing to the default of another registered owner, has been called on to pay and has paid more than his proportionate share of the mortgage money, rent, interest, taxes, insurance, repairs, a purchase money instalment, a required payment under the *Condominium Act* or under a term or covenant in the instrument of title or a charge on the land, or a payment on a charge where the land may be subject to forced sale or foreclosure, may apply to the Supreme Court for relief under section 14 against the other registered owners, one or more of whom is in default.
>
> 14. (1) On hearing an application under section 13, the court may
>
> (a) order that the applicant has a lien on the interest in land of the defaulting owner for the amount recoverable under subsection (2);
>
> (b) order that if the amount recoverable under subsection (2) is not paid by the defaulting owner, within 30 days after the date of service of a certified copy of the order on him or within another period the court considers proper, his interest in the land be sold under the rules of court governing sales by the court; and
>
> (c) make a further or other order, including an order that the applicant may purchase the interest in the land of the defaulting owner at the sale.
>
> (2) The amount recoverable by the applicant is the amount the defaulting owner would, at the time the application is made or repayment is tendered, have been liable to contribute to satisfy his share of the original debt if it had been allowed to accumulate until that time.
>
> (3) Where there is a sale under this section, the transfer to the purchaser shall be executed by the registrar of the court, and, on registration, passes title to the interest in land sold.
>
> (4) Surplus money received from the sale shall be paid into court to the credit of the defaulting owner.

These provisions were introduced in 1978.[35] They are based on earlier legislation.[36]

The legislation applies to only a limited class of expenses:[37]

> The extent of the lien allowed by the statute is for instalments of purchase money or mortgage moneys or interest or any taxes or insurance or any repairs ... Items such as carpets and repairs of elective improvements not necessary for the maintenance of the structure of the property would appear to me to be not included. I make no determination of that at the present time because of my determination of this application as indicated above.

It is difficult to state with confidence exactly what these provisions are intended to accomplish. In the first place, it is not certain whether they provide co-owners with rights of contribution or apply only where

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35. *Conveyancing and Law of Property Act*, .S.B.C. 1978, c. 16.

36. *See, e.g., Land Registry Act*, R.S.B.C. 1960, c. 208, ss. 31-4.

37. *Re Brook and Brook*, (1979) 6 D.L.R. (3d) 92, 95 (B.C.S.C.) *per* Wootton, J.; *Fritzke* v. *Hepting*, (1954) 13 W.W.R. 543 (B.C.S.C.).

a co-owner with an independent right of contribution wishes to enforce it through the lien procedure.[38] If these provisions are only intended to provide a lien, it would be interesting to know why it was thought necessary to enact them. Even in the absence of legislation, an equitable lien was available in most of the circumstances referred to in section 13. Moreover, the ability to enforce a lien through sale of the property provides no further remedies than those already available on partition or sale of property. If these sections have any utility, it can only be that the threat of sale encourages recalcitrant co-owners to satisfy outstanding liabilities. Even so, instituting partition proceedings would accomplish as much.

The current legislation differs from its predecessor in one important respect. Under the former law, it was necessary for a co-owner to bring one proceeding for an order for contribution and a lien against the property to secure the amount found recoverable, and a separate action to enforce the lien. Under section 14(1), the court may now order that the defaulting co-owner's interest be sold if the amount recoverable is not paid within a specified time. That amendment significantly simplifies a co-owner's task of recovering contribution.

Under the former law, on a proceeding for contribution a co-owner could not request foreclosure of the defaulting co-owner's interest,[39] nor a declaration that the applicant was the sole owner.[40] Moreover, the defaulting co-owner could not raise matters of set-off or counterclaim, such as compensation for use and occupation.[41]

The proper interpretation of the current legislation was addressed in *Bernard* v. *Bernard*,[42] a decision of Huddart L.J.S.C. (as she then was). Property was co-owned by a husband and wife. The husband vacated the property in 1977 and the spouses were divorced in 1980. In 1986, the wife applied for a lien under the *Property Law Act* in an amount which would have effectively extinguished the husband's equity in the property. It was held that a non-occupying owner is entitled to compensation for use and occupation if he has been ousted from the property or a claim is made against him for expenses. In effect, an accounting was conducted, modelled after the practice on partition. If, on an application under the *Property Law Act*, the court were only able to determine expenses owing, there would be two unfortunate consequences. First, an order for a lien and sale might be made in circumstances in which the non-occupying owner had an off-setting claim which might extinguish his indebtedness to the other co-owner. Second:[43]

> The result of this strict application of ss. 13 and 14 is that Mrs. Bernard, who has had sole occupation of the apartment since October 1977, will have enjoyed the full use of Mr. Bernard's share of the property and will obtain the whole of the inflationary increase in the value of the house since its purchase. To have the sole use

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38. If the latter construction is correct, the *Law and Equity Act*, R.S.B.C 1979, c. 224, s. 30 would appear to provide co-owners with independent righ6ts of contribution. Formerly, a lien for contribution was recorded on title by a caveat: *Land Registry Act, supra*, n. 36, s. 34. That section was not re-enacted in 1978. Currently, a lien under s. 14 would be registered as a charge: *Land Title Practice Manual*, (1981) vol. 2, 638.

39. *Fritzke, supra*, n. 37

40. *Re Brook and Brook, supra*, n. 37.

41. *Fritzke, supra*, n. 37. This position follows from the procedural requirements of the former legislation, in which the first proceeding was merely to declare that a co-owner was entitled to a lien. Even so, it is curious that items of set-off would not be taken into account since, conceivably, they could extinguish rights of contribution and entirely remove the need for a lien. Under the current sections, since the court can order the sale of property in default of payment within a specified time, it would be unjust if a full accounting were not taken before the making of such an order. As to rights of set-off generally, *see Report on Set-Off* (LRC 96, 1988).

42. (1987) 12 B.C.L.R. (2d) 75 (S.C.); Supplementary Reasons, Unreported, Van. Reg. No. C862897.

43. *Ibid*., at 78. In Supplementary Reasons, *ibid*., it was clarified that Mr. Bernard would in fact receive the benefit of inflationary increases. The point being made was restated: "Mrs. Bernard must submit to pay rent or abandon her claim for contribution for maintaining taxes, insurance and interest."

of property for one-half its carrying cost for seven years and to gain the full benefit of the inflationary increase in its value during 12 years seems an unfair result. It may have been for such reason that the equitable remedy of an allowance for occupation rent developed in partition actions.

(b) Accounting

The right to an accounting is addressed by section 81 of the *Estate Administration Act*,[44] which provides as follows:

> 81. Actions in the nature of the common law action of account may be brought and maintained against the executor or administrator of a guardian, bailiff or receiver, and also by one joint tenant or tenant in common, his executor or administrator, against the other as bailiff for receiving more than comes to his just share or proportion, and against the executor or administrator of the joint tenant or tenant in common. The registrar or other person appointed by the court to inquire into the account may administer an oath and examine the parties touching the matters in question, and the registrar or other person is entitled, for taking the account, to receive the allowance that the court orders from the party that the court may direct.

This legislation is based on English legislation enacted in 1705.[45]

It is curious that co-owner's rights are addressed by the *Estate Administration Act*. When legislation dealing with a particular subject is placed in a statute not obviously connected with that subject, it is easily overlooked. That occurred in *Spelman* v. *Spelman*.[46] Counsel was not aware that since 1897 British Columbia has had legislation providing a right of account between co-owners.[47] The Court of Appeal held that the English legislation of 1705 was part of the received law of British Columbia.

In many cases, a right to an accounting will not benefit a co-owner. Profits realized from the use of land may also be attributable to another co-owner's labour, capital expenses or acceptance of risk. In these cases, it may be impossible to determine what portion of profit received is solely attributable to use of the land.[48] It should also be observed that section 81 provides for an accounting from a co-owner "receiving more than his just share or proportion." The section, consequently, provides no right of account from a co-owner who "has enjoyed more of the benefit of the subject, or made more by its occupation, than the other ..."[49]

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44. R.S.B.C. 1979, c. 114.

45. *An Act for the Amendment of the Law, and the Better Advancement of Justice*, (1705) 4&5 Anne cap. 16, s. 27. This legislation revised the common law action of account. Whether it was necessary at that time is open to question, since equity developed a coordinate jurisdiction to order an accounting: Storey, *Commentaries on Equity Jurisdiction*, (2nd, 1892) Chapter VIII. The common law action of account was inadequate compared to the remedies available in equity. The introduction of legislation in British Columbia to expand the obsolete common law action of account, consequently, would appear to have been a retrogressive step. The British Columbia legislation refers to "actions in the nature of account" so perhaps this was intended to clarify doubts concerning he court's jurisdiction in equity.

46. (1944) 59 B.C.R. 551 (C.A.).

47. *See* the *Executors and Administrators Act*, R.S.B.C. 1897, c. 73, s. 47.

48. *Spelman, supra*, n. 46; *Henderson* v. *Eason*, (1851) 17 Q.B. 701, 719, 117 E.R. 1451 (Exch.). While in this context, courts encountered practical difficulties, it appears that there was no impediment to making just allowances between co-owners on an application for partition or sale: *see, e.g., Lorimer* v. *Lorimer*, (1820) 5 Madd. 363, 56 E.R. 934 (V.C.); *Hyde* v. *Hindly*, (1794(2 Cox. 408, 30 E.R. 188 (Ch.).

49. *Henderson* v. *Eason, ibid., per* Parke B.

The operation of this provision has been described as follows:[50]

> [The Statute] enabled one tenant in common to bring an action of account against his co-tenant for receiving more than his just share or proportion from the common property. He was not answerable for taking the whole enjoyment of the property where there was no exclusion or ouster, nor for any profit made thereout by the employment of his industry and capital by tilling and manuring or by feeding and grazing cattle, nor for cutting down trees of a suitable age and growth, nor other acts of waste, nor for cutting and taking away a crop of hay the whole produce of the common property. The account extends only to whatever has been paid or given by tenants or occupants of the common property more than the co-tenant's just share or proportion.

(c) Inconsistencies

Accounting and contribution are equivalent rights, and one might expect the law to make similar provisions respecting them. In British Columbia, however, these rights are addressed by statutory provisions introduced at different times and which operate inconsistently. For example, a co-owner entitled to contribution is also entitled to a lien against the land to secure his claim. Where a sum of money is found due to a co-owner on an accounting, however, there is no provision for a lien. The lack of symmetry between these two provisions is difficult to justify in principle.

3. THEORY

Many aspects of the current law in British Columbia relating to rights between co-owners are unclear. This is the result of a number of factors. An overview of the law with some historical perspective helps to clarify the nature of the problem.

The theory underlying co-ownership is antithetical to viewing one co-owner's rights as separate from those of other co-owners. Each co-owner is entitled to possession of the whole of the land and, however many co-owners there may be, they constitute in theory one entity. For that reason, the common law was unable to recognize rights arising between, or provide remedies to, co-owners. The single exception where the common law could assist a co-owner arose when one co-owner committed a wrong, such as waste or ouster.

The common law tool for apportioning responsibility for expenses and determining entitlement to profits was the action of account. It is correct to say that the common law action of account was not available in disputes between co-owners, but this overlooks remedies available in equity.

Equity recognized the bill of account. It was entirely separate from the common law action of account. It was also procedurally superior to the common law action and available in many more cases. For that reason, the bill of account eventually superseded the action of account which, for some centuries now, has been obsolete.

Although it is difficult to see why, there is often some confusion between rights of account at common law and in equity. Perhaps it is because the same label, "account," was used for these separate remedies. If so, the confusion was increased after the *Judicature Act* of 1873 merged the courts of common law and equity. After that time, the legal terminology distinguishing between common law actions and equitable bills or suits vanished. Today, a plaintiff would bring an action for an account, although the court's jurisdiction in this context is derived from equity.

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50. 6 C.E.D. (Ont.) (1930) 404-5; *see now*, 28 C.E.D. (Ont. 3rd) Title 123, Real Prop., 226-8; *see also Re Kirkpatrick; Kirkpatrick* v. *Stevenson*, (1883) 10 P.R. 4.

It is uncertain how far the bill of account protected co-owners. What is certain, and commonly observed, is that in a proceeding for partition all just allowances between co-owners were always made. This is not particularly surprising when it is remembered that after 1833 partition was within the exclusive jurisdiction of the courts of equity. The ability to make what is referred to as "just allowances" between co-owners on partition was called an accounting. Did the proceeding for partition make an accounting possible? Or was an accounting always available between co-owners? This is a question which cannot be answered. It may be argued that upon partition the parties were no longer co-owners, so that the theoretical objections to an accounting vanished. The better view is probably that partition did not affect equity's ability to order an accounting. Proceeding for partition was, however, the most logical and convenient procedure for invoking that equitable jurisdiction.

This discussion is of particular importance in the context of the current law of British Columbia, because of the legislation relating to rights of account and contribution discussed earlier.

A co-owner's right of account is provided by section 81 of the *Estate Administration Act*. It is referred to as "an action in the nature of account" and it permits the recovery of rents received by one co-owner. This is a puzzling formulation. Without legislation co-owners have a right to account for rents in equity, so there was no particular need for this provision. Referring to the action as being "in the nature of account" reflects, perhaps, an appreciation that when the legislation was enacted in British Columbia, the common law action of account was obsolete. Perhaps the enactment of this provision was based on the misconception that co-owners had no rights of account, overlooking the remedies available in equity.

The provisions of the *Property Law Act* that address rights of contribution are no more satisfactory. That legislation does not appear to create a right of contribution, so it is necessary to look to the common law and equity to determine what rights of contribution co-owners had. The first problem encountered in this exercise is that, in this context, rights of contribution are really only a subset of rights of account. This throws us back to the earlier points made concerning the confusion between rights of account at law and in equity. *Handley* v. *Archibald*,[51] a decision of the Supreme Court of Canada, is frequently referred to as being definitive on this issue:[52]

> The appellants are entitled to an account of and allowance for the improvements made by them or any of them, but if they insist on such an account they must also themselves account for the rents and profits received by them or for an occupation rent and that at the improved value. The case for an account of the improvements is made by the added defence, and it is also claimed in the appellant's factum. The law on this head appears clear. An action cannot be maintained by one tenant in common against another for the value of improvements alone. But in a partition action in equity such an allowance was always made.

The proposition that "an action cannot be maintained by one tenant in common against another for the value of improvements alone" is puzzling. Is the court saying that co-owners had no rights of account outside of partition? If so, then in terms of earlier authority, this statement is only true of the common law action of account. There is no authority limiting rights of account between co-owners in equity. Perhaps the court is saying that contribution for improvements could not be had in the absence of a full accounting. Although the court remarks that the law appears to be clear, no authority is cited for the proposition. It is, in any event, *obiter dicta*, since the proceedings were for partition.

Quite apart from the complexity of the law in this area, rights of account between co-owners present

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51. *Supra*, n. 33.

52. *Ibid*., at 141.

numerous theoretical problems. With respect to rents received from the land and to substantial improvements (sometimes characterized as capital expenses) the concept of account works well enough. These are items which can be objectively valued with some precision. Other matters do not easily lend themselves to an accounting. Use and occupation by one co-owner obviously constitutes a benefit to that co-owner. It is, however, something to which he is entitled as an incident of ownership. That another co-owner did not enjoy equal rights of use and occupation is not reason in itself to call for an accounting. Similarly, removing timber or otherwise profiting from the land is an incident of ownership. Moreover, profits realized by a co-owner are seldom derived solely from the land, but in varying degrees are attributable to the co-owner's risk, investment or labour.

In these cases, rights of account really involve a balancing of benefits and detriments. For example, where a co-owner with exclusive use and occupation claims contribution for improvements, it has been consistently held that fairness requires an accounting for use and occupation. The cases, however, do not articulate an adequate theory supporting this approach. Strictly speaking, "just allowances" of this nature are analogous to, but do not really fit within, rights of account.

CHAPTER III *PARTITION OF PROPERTY ACT*

A. Introduction

A co-owner, unless he has the co-operation of the other co-owners, has a problem if he wishes to sell his interest in the property. Few purchasers are willing to purchase an interest in land that will be shared with a stranger. A similar problem arises if a co-owner wishes to have exclusive use of a portion of the land. Co-ownership, whether by tenancy in common or joint tenancy, carries with it the right to possession of the whole of the land.

B. Partition of Land

Legislation was introduced in England in 1539[1] to permit a co-owner to apply to the court for partition of land. The court would divide the land between the co-owners so that each might have exclusive ownership and possession of a discrete part. Division of the land occasionally required some strange arrangements. In one case a house had to be divided into thirds. The owner entitled to a two-thirds interest received all the chimneys, fireplaces and stairs.[2] In another case, a house was partitioned by building a wall up the middle.[3]

In 1868, legislation was enacted in England which permitted the courts to either partition land or order its sale and the division of proceeds between the co-owners. This legislation was amended in 1876. The British Columbia *Partition of Property Act*[4] is based on the English legislation although it was slightly updated in the 1979 revision.[5] The *Partition of Property Act* is to be found in Appendix A to this Report.

C. *Partition of Property Act*

Th e *Partition of Property Act* shows its antiquity in several ways. First, much of the Act is concerned with when the court may grant an order for sale, a novelty in 1868 but the usual order today. Second, the Act grafted the ability to order sale of the land onto the court's existing jurisdiction to order its partition. For that reason, some issues are addressed by a formula like the following found in section 4 of the Act:[6]

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1. At common law, a writ *de partitione faciendo* permitted the partition of land held in coparceny, a form of co-ownership which is now obsolete. The *Statute of Partition*, (1539(31 Hen. 8, c. 1, extended the write to joint tenants and tenants in common. The *Statute of Partition*, (1540) 32 Hen. 8, c. 32, extended the writ to persons who held land for life or a term of years. The writ was abolished by the *Real Property Limitation Act, 1868*, 31 & 32 Vict. C. 40; *see* further *Halsbury's Laws of England* (1st ed.) At 834, para. 1556.

2. *Turner* v. *Morgan*, (1803) 8 Ves. 143, 11 Ves. 157n, 32 E.R. 307, 32 E.R. 1048 (Ch.).

3. Referred to by Mr. Fomilly in argument in *Turner* v. *Morgan, ibid*.

4. R.S.B.C. 1979, c. 311. It was first enacted as the *Partition Act*, 1880, S.B.C. 1880, c. 21.

5. Various amendments were also made in the *Status of Men and Women Amendment Act*, S.B.C. 1975, c. 73, s. 13; *Miscellaneous Statutes (Court Rules) Amendment Act, 1976*, S.B.C. 1976, C. 33, S. 103; *Attorney-Genereal Statutes Amendment Act, 1976*, S.B.C. 1976, c. 2, s. 25.

6. Section 2.

> Any person who, if this Act had not been passed, might have maintained a proceeding for partition may maintain such a proceeding ...

While it might have been clear 120 years ago whom such a formula encompassed, it is not today. Lastly, a number of issues arising on a proceeding for partition, which needed to be addressed in 1868, are now governed by other legislation.

The balance of this Chapter consists of an overview of the *Partition of Property Act*.

1. PARTITION

A co-owner of a legal or equitable estate in land may apply to the Supreme Court by petition for an order for partition or sale.[7] Partition is only relevant where the co-owners are entitled to possession of the land. [8] For example, persons who own the land in fee simple, or who have a leasehold interest, may apply for partition.

Where an order for partition is made, it is deemed to effect a subdivision as defined in the *Land Title Act*.[9] The court's order is subject to compliance with that legislation.[10] In general, a co-owner has a right to partition or sale, regardless of the wishes of other co-owners. In earlier cases, what has been characterized as a "structured approach" was adopted, under which partition or sale would be refused only in specified situations, such as vexation, malice and economic oppression.[11] The structured approach was abandoned by the British Columbia Court of Appeal in *Harmeling* v. *Harmeling*,[12] where it was said that the court will grant an order for partition or sale "unless justice requires such an order should not be made."[13] This discretion, consequently, is largely undefined.

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7. Rules of Court, Rule 10(1)(g)(iv). Proceedings for partition or sale may also be commenced by write: *see, e.g., Stener Management Ltd.* v. *Jerol Investments Ltd*., (1980) 113 D.L.R. (3d) 711 (Alta. Q.B.). A trial is the appropriate route where a person's title is brought into question: *see, e.g., Hicks* v. *Kennedy*, (1956) 20 W.W.R. 517 (Alta. S.C., App. Div.); *Davies* v. *Ashworth*, [1983] B.C.D. Civ 3273-01 (C.A.). Rule 39(18)(h) provides that a trial relating to partition o sale of real estate shall be heard by the court without a jury.

8. It is curious, consequently, that the current Act provides that a single special timber licence may be sold but not partitioned. A special timber licence does not grant its holder rights of possession so that, even in the absence of this provision, partition would not be available. Special timber licences may be partitioned in the sense that specific future right to possession may not apply or partition or sale: *see, e.g., Bunting* v. *Servos, and Eakin*, (1953) 8 W.W.R. 548 [1953], 2 D.L.R. 593 (B.C.S.C.).

9. *Partition of Property Act*, s. 17. Section 17 was added to ensure that partition legislation harmonized with land title legislation. This section is only relevant if an order for the partition of the fee simple is made. An order for the partition of a lease would not involve subdivision. The court's ability to partition a leasehold interest would appear to be unaffected by section 17, which speaks o dividing land "into two or more parcels." An order for the partition of aleasehold interest would not have the effect of dividing land into two or more parcels.

10. *Ibid*.

11. *See, e.g., Busst* v. *Busst*, (1975) 25 R.F.L. 260 (B.C.S.C.). The "structured approach" would appear to be based on general equitable principle that a person seeking equity must do equity. Between 1833 and 1868, equity had exclusive jurisdiction to order partition.

12. *Harmeling* v. *Harmeling*, [1978] 5 W.W.R. 688, 691, 90 D.L.R. (3d) 208 (B.C.C.A.); *see also Vista Homes Ltd.* v. *Taplow Financial Ltd. and McGregor; Royal Bank of Canada* v. *Vista Homes Ltd.*, (1985) 64 B.C.L.R. 291 (S.C.); *Lavallee* v. *Karow*, [1988] B.C.D. Civ. 3276-02 (S.C.). Co-owners who hold land in trust cannot apply for partition or sale. They must act unanimously: *Attenborough* v. *Soloman*, [1913] A.C. 76 (H.L.); *257565 B.C. Ltd.* v. *Bartell Bros. Constructiion Ltd.*, (1983) 50 B.C.L.R. 155 (S.C.). Moreover, a contractual agreement providing for sale of the land and a disposition of proceeds, may preclude the right to partition or sale*: 257565 B.C. Ltdl., ibid.; Haller* v. *Patrick*, [1979] 5 W.W.R. 623, 630 (S.C.). There was doubt concerning whether the court had discretion to refuse an order for partition or sale until 1951, when that issue was resolved in *Evans* v. *Evans*, [1951] 2 D.L.R. 221 (B.C.C.A.).

13. *Harmeling, ibid*.

A creditor of a co-owner may not apply for partition or sale of his debtor's land.[14] He may proceed to judgment, register his judgment against his debtor's property, and apply for an order for sale of the debtor's interest in the property. The purchaser of the debtor's interest would have standing to apply for partition or sale. But it will be a rare purchaser that is willing to buy a lawsuit under the *Partition of Property Act*. As a result the remedies available to a judgment creditor against a co-owner's interest in land are limited. In an earlier Report[15] the Commission concluded that:[16]

> ... a creditor who has obtained and registered a judgment against a co-owner of an interest in land should have standing to apply for an order for partition or sale of the land. It is also our belief that an execution creditor should be able to apply for such an order in the context of the execution proceedings and a separate application under the [*Partition of Property Act*] should not be necessary.

Recommendations, consequently, were made contemplating amendments to the *Court Order Enforcement Act*.[17]

2. SALE

The English legislation, upon which the British Columbia *Partition of Property Act* is based, introduced the remedy of sale of the property in addition to its partition. In consequence, the Act provides for the sale of property with some particularity.

Sale of property in lieu of partition is available in a number of circumstances. Property may be sold where that course would be more beneficial to the parties than partition, having regard to:[18]

(i) the nature of the property;

(ii) the number of persons presumptively interested in it;

(iii) the absence or disability of parties; or

(iv) any other circumstances.

Property may also be sold where parties who collectively have more than a 1/2 interest in the land request its sale.[19] The interest of one co-owner may be acquired by another co-owner[20] and the court may allow any party to bid at the sale,[21] subject to such conditions as may be reasonable.

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14. *Morrow* v. *Eakin, supra*, n. 8; similarly, a court appointed receiver manager may not apply for partition or sale of property held by the debtor in co-ownership: *Vista Homes ltd., supra*, n. 12

15. *Report on Execution Against Land* (LRC 40, 1978).

16. *Ibid*., at 27.

17. *Ibid*., Recommendations 11-13.

18. Section 7; *see Barnes* v. *Henshaw*, (1980) 19 B.C.L.R. 310 (Co. Ct.).

19. Section 6.

20. Section 8.

21. Section 10.

Sections 11, 12 and 13 of the Act govern the application of proceeds from the sale.

3. PROCEDURAL MATTERS

In some cases, the Act addresses procedural issues in substantial detail. In other cases, it leaves procedural matters to be governed by English law in force before 1868. To resolve procedural issues arising on a partition or sale of property, there would seem to be little advantage in either retaining specific legislation or relying on the law in force before the 1868 legislation was passed. The general procedural rules contained in the Rules of Court already resolve these issues.

(a) Necessary Parties

Necessary parties to the proceedings, and those entitled to notice of an order under the Act, are determined by reference to the law governing these matters prior to 1868. The owner of the legal estate is a necessary party:[22]

> At common law the decree vested the legal estate without any conveyance, while in equity the decree directed the necessary conveyance to be executed. At common law, therefore, it was necessary to have the legal estate before the court, and in equity the necessary conveyance could not be ordered in the absence of the parties able to convey the legal estate or to compel a conveyance thereof.

An encumbrancer may be joined in the proceedings but is not a necessary party. The rights of an encumbrancer are unaffected by partition without his consent.[23]

Where a co-owner proceeds for partition or sale by petition, Rule 10(5) of the Rules of Court has significance. This rule provides that the "petition and copies of all affidavits in support shall be served on all persons whose interests may be affected by the order sought." Under Rule 1(8), persons served with a petition are respondents.

(b) Partition Includes Sale

Section 3 of the Act provides that a proceeding for partition includes a proceeding for sale of the land, and vice versa.[24] There would appear to be little need for section 3 of the Act. The Rules of Court provide that in a proceeding involving land the court may order its sale.[25] Moreover, if a party who proceeds for partition later wishes an order for sale, he may amend his petition to ask for that.[26]

(c) Substituted Service

Under section 5 of the Act, the court can dispense with service or provide for service by

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22. *Halsbury's Laws of England* (1st ed.) Vol. XXI, at 811-2.

23. *Swan* v. *Swan*, (1820) Price 518, 146 E.R. 1281 (Exch.); *Waite* v. *Bingley*, (1882) 21 Ch. D. 674; *Sinclair* v. *James*, [1894] 3 Ch. 554; *O'Reiley* v. *Vincent*, (1818) 2 Mol. 330 (Ch.).

24. Section 3.

25. Rule 43.

26. Rule 24.

advertisement. The Act also provides rules for dealing with the interests of persons who cannot be served.[27] These provisions unnecessarily duplicate the provisions of the Rules of Court, which address comprehensively issues arising where parties cannot be personally served.[28]

(d) Costs

Section 16 of the Act provides that the "court may make the order it thinks just respecting costs up to the time of hearing." This section is unnecessary in the light of section 63(2) of the *Supreme Court Act*[29] which provides:

> 63. (2) Subject to subsection (1), the court may, in its discretion, award or refuse to award costs to a party in civil proceedings in the court.

Section 16 is curiously framed. It provides for costs incurred up to, but apparently not including costs incurred during, the hearing.[30] Moreover, it only provides for costs in "a proceeding for partition," but not for costs in a proceeding for sale. This latter point probably has little significance since, under section 3, it is not necessary to claim partition in a proceeding for partition.

4. PERSONS UNDER A DISABILITY

Various persons are unable to look after their interests, such as persons who have not yet reached the age of majority and persons who are mentally incompetent. Section 9 of the Act provides for proceedings involving persons under a disability:

> 9. In a proceeding for partition a request for sale may be made or an undertaking to purchase given on the part of an infant, person of unsound mind or person under any other disability, by the next friend, guardian, committee, if so authorized by the committeeship order, or other person authorized to act on behalf of the person under the disability; but the court is not bound to comply with the request or undertaking on the part of an infant unless it appears that the sale or purchase will be for his benefit.

Today these issues are also addressed by the *Infants Act*,[31] the *Patient's Property Act*[32] and Rule 6 of the *Rules of Court*.

D. Partition and Sale Under the Family Relations Act

Section 52 of the *Family Relations Act* provides that the court may on application order partition or sale of property owned by spouses:

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27. Section 14.

28. Rule 12.

29. R.S.B.C. 1979, c. 397.

30. For discussion of the practice of awarding costs on partition both before and after the introduction of the 1868 Act, *see Seton on Decrees* (7th ed., 1912) 1810. Before 1868, the rule was that no costs up to the hearing were allowable, hence the formulation of s. 16. Under the Act, the usual rule was that "the entire costs up to, as well as subsequent to, the hearing will ... come out of the estate rateably in proportion to the respective interests of the parties:" *ibid*.

31. R.S.B.C 1979, c. 196.

32. R.S.B.C 1979, c. 313.

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

(2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:

(a) declare the ownership of or right of possession to property;

(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;

(c) order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;

(d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;

(e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;

(f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property; or

(g) where property is owned by spouses as joint tenants, sever the joint tenancy.

Even if an application has been commenced under the *Partition of Property Act*, an application made under section 52 prevails with several important consequences.[33]

Under the *Family Relations Act*, the court may divide the land, or proceeds from its sale, equally or unequally. Under the *Partition of Property Act*, the court may only order that proceeds be divided in proportion to the legal ownership of the property. Under the *Family Relations Act*, the court may order that the interest of one spouse as joint tenant be sold to the other spouse, and select an appropriate valuation date. In *Fuller* v. *Fuller*,[34] for example, an application for partition of the matrimonial home under the *Partition of Property Act* was converted with consent to an application under section 52. The property was valued at the time of separation ($54,000), divorce ($68,000) and trial ($113,000). The court held that the wife was entitled to a half interest as joint tenant valued at the time of divorce and ordered that she sell her interest to the husband. In contrast, under the *Partition of Property Act*, the spouse, as joint tenant, would be entitled to a half interest valued at the time of the partition order.[35]

In other respects, the court's discretion to grant or deny an application under section 52 resembles its discretion under the *Partition of Property Act*. Generally, the court will order partition or sale[36] unless there

33. *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 55(1); *see, e.g., Meneghetti* v. *Meneghetti*, (1979) 11 R.F.L. (2d) 104 (B.C.S.C.).

34. (1982) 36 B.C.L.R. 237 (S.C.).

35. *See, e.g., Popadiuk* v. *Popadiuk*, [1979] B.C.D. Civ. 1664-05 (S.C.); *Borsato* v. *Borsato*, [1985] B.C.D. Civ 1671-01 (S.C.).

36. *See, e.g., Meneghetti* v. *Meneghetti, supra*, n. 33; *Demers* v. *Demers*, [1980] B.C.D. Civ. 1664-04 (S.C.); *Dolezar* v. *Dolezar*, [1980] B.C.D. Civ. 1654-05 (S.C.); *Berry* v. *Berry* (1980) B.C.D. Civ. 1654-06 (S.C.); *Anderson* v. *Anderson*, (1980) 26 B.C.L.R. 11 (S.C.); *Mitchell* v. *Mictchell*, [1981] B.C.D. Civ. 1664-06 (S.C.); *Papineau* v. *Papineau*, (1981) 2d R.F.L. (2D) 375 (B.C.S.C.); *Geck* v. *Geck*, [1981] B.C.D. Civ. 1664-09 9S.C.).

are special circumstances.[37] Custody of children of the marriage may influence a decision to postpone or deny an order.[38] Often the presence of young children will justify refusing an order,[39] or postponing an application until the youngest reaches nineteen years.[40] In other cases, less weight is given to the presence of children, and only short postponements of the proceedings have been ordered.[41] There are also a number of cases where, despite the presence of children, the court granted an order for partition or sale with no postponement.[42] No clear principles emerge as to when the court will exercise its discretion.

The court's discretion under the *Family Relations Act* with respect to partition or sale of property owned by spouses is less fettered than its discretion under the *Partition of Property Act*. Spouses seldom rely on the *Partition of Property Act*. That Act, consequently, now mainly serves to resolve disputes between co-owners in commercial arrangements. Revision of the *Partition of Property Act* should be undertaken with that consideration in mind.

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37. *See e.g., Borsato, supra*, n. 35. *See also Payrits* v. *Payrits*, (1982) 26 R.F.L. (2d) 300 (B.C.S.C.); *McCarty* v. *McCarty*, [1982] B.C.D. Civ. 1670-07 (S.C.); *Lavoie* v. *Lavoie*, [1985] B.C.D. Civ. 1670-01 9S.C.) Where the court awarded sole possession of the matrimonial home to the wife of the basis of section 51 and lump sum maintenance in circumstances where the other spouse had failed or was unlikely to pay maintenance.

38. The Court of Appeal has observed in at least two cases that the presence of children is a significant factor in the exercise of its discretion: *Greenlees* v. *Greenlees*, (1981) 23 R.F.L. (2d) 323 (B.C.C.A.); *Hoyer* v. *Hoyer*, (1982) 41 B.C.L.R. 27, 30 R.F.L. (2d) 261 (C.A.).

39. *See, e.g., Popudiuk, supra*, n. 35; *Sadler* v. *Sadler*, [1985] B.C.D. Civ. 1664-02 (S.C.); *Phillips* v. *Phillips*, (1980) 24 B.C.L.R. 194 (C.A.); *Greenlees, ibid.; Hoyer, ibid.*

40. *See, e.g., Gray* v. *Gray*, [1979] B.C.D. Civ. 1647-14 (S.C.); *McCauley* v. *McCauley*, (1980) 21 B.D.L.R. 209 (S.C.); *Lam* v. *Lam*, [1980] B.C.D. Civ. 1664-08 (S.C.); *Girard* v. *Girard*, [1980] B.C.D. Civ. 1664-09

41. *See, e.g., Caskey* v. *Caskey*, (1979) 14 B.C.L.R. 193, 10 R.F.L. (2D) 85 (S.C.); *Bradley* v. *Breadley*, [1980] B.C.D. Civ. 1664-06 (S.C.); *Eddy* v. *Eddy*, [1981] B.C.D. Civ. 1664-04 (S.C.); *Giles* v. *Giles,* [1983] B.C.D. Civ. 1664-05 (S.C.).

42. *See, e.g. Hepburn* v. *Hepburn*, [1979] B.C.D. Civ. 1664-11 (S.C.); *Richards* v. *Richards*, (1980) 23 B.C.L.R. 32 (S.C.); *Koch* v. *Koch*, [1980] B.C.D. Civ. 1664-13 (S.C.); *Cross* v. *Corss*, [1982] B.C.D. Civ. 1664-02 (S.C.); *Peterson* v. *Peterson*, [1982] B.C.D. Civ. 1664-04 (S.C.); *Temple* v. *Temple*, [1983] B.C.D. Civ. 1664-09 (S.C.).

CHAPTER IV REFORM

A. Introduction

The Commission has considered aspects of co-ownership in past projects. *Report on Execution Against Land*[1] dealt with remedies available to a judgment creditor and recommendations were made concerning the ability to satisfy a judgment by execution against a joint tenant's interest in property. *Report on Presumptions of Survivorship*[2] addressed how rights of survivorship should operate when two or more joint tenants die in circumstances where it is uncertain which of them survived the others. This Report is the first opportunity the Commission has had to consider the law of co-ownership generally.

In most respects, the law governing co-ownership of land in British Columbia works well. The impetus for review of the law in this context arose from four factors which suggested the possible need for reform. These were:

(i) the requirement for unity of interest to create a joint tenancy may prevent this form of co-ownership from being used where it is most appropriate;

(ii) the ability of a co-owner to sever his interest from a joint tenancy without advising other co-owners may lead to injustice;

(iii) the *Partition of Property Act* is out of date; and

(iv) it may be desirable to consolidate legislation relating to co-ownership in one statute.

The need for amendments to the current law in these areas is examined in this chapter.

B. Unity of Interest

1. INTRODUCTION

An essential feature of the joint tenancy, it will be recalled from Chapter II, is that each co-owner has an identical interest in the land. Co-owners cannot own unequal shares in joint tenancy. In *Re Speck and Speck*,[3] for example, two persons applied to register their title to land as joint tenants with one party having an undivided 71/100 interest and the other a 29/100 interest. It was held that co-owners could not hold land as joint tenants unless they had equal interests. The title the applicants wished to create was characterized as "a monster unknown to the law."[4]

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1. (LRC 40, 1978).

2. (LRC 56, 1982).

3. (1983) 51 B.C.L.R. 143 (S.C.).

4. *Ibid*., at 144

In terms of the law, the decision in *Re Speck and Speck* is undoubtedly correct. A concern which has not been addressed, however, is whether this "monster unknown to the law" might serve a useful purpose in British Columbia.

2. HISTORICAL OVERVIEW

The common law favoured the joint tenancy. When the form of co-ownership was not specified, it was presumed to be in joint tenancy. The reason for this, as with many other aspects of the common law relating to land, was that it served the interests of families:[5]

> ... what may perhaps be called the classic law of real property was built up round the family settlement. For centuries the dominating factor in the development of the law was the resolution of the great land-owners to employ the land as a source of family endowment. It was greatly due to this that there ultimately emerged what Maitland termed "that wonderful calculus of estates." Such conceptions as the estate tail, the life estate, contingent remainders and executory interests, powers of appointment and estates upon condition derived from no business necessity, but from the patriarchal obsessions of the landed gentry. Historically, the demands of the family preceded the demands of commerce, and the manner in which they were met left an indelible and permanent mark upon the framework of the law.

To this list can be added the formation of the joint tenancy with rights of survivorship.

As the needs of commerce with respect to ownership of land increased, the joint tenancy met with less favour. The courts of equity, for example, would struggle to find a severance of a joint tenancy when the co-owners were not related by ties of blood or marriage, or where family members owned land in joint tenancy in a commercial venture.[6]

3. FAMILY ARRANGEMENTS

It is safe to say that today the joint tenancy is of use almost exclusively in the context of family holdings, most frequently ownership of land by a husband and wife.[7] How well does the requirement for equal interests to create a joint tenancy serve their needs?

Spouses must have equal interests in land to co-own it in joint tenancy. But often their entitlement will not be equal, for any number of reasons. They may, for example, contribute unequally to its purchase or to its upkeep. Nevertheless, in order to have the benefit of rights of survivorship, spouses must register title to the land showing that they have equal interests.

Title to property, consequently, may not necessarily record the actual interests of the owners.

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5. Chesire, *Modern Real Property*, (7th ed., 1954) v. There were a number of other reasons the comm law favoured the joint tenancy: *see, e.g.,* Megarry & Wade, *The Law of Real Property*, 95th ed., 1984) 424-5:
   > In early times a joint tenancy was preferable to a tenancy in common for various reasons: to feudal lords, because the operation of the doctrine of survivorship made it more likely that the land would ultimately vest in a single tenant from whom the feudal services could more conveniently be exacted than from a number sharing the burden; to feudal tenants, because a tenancy in common, but not a joint tenancy, rendered certain feudal services due separately from each tenant, thus increasing the burden on the land; and to conveyancers who had to investigate title, because joint tenants held by a single title, whereas the title of every tenant in common had to be separately examined. If a joint tenant died, there was merely one tenant the less, and still but one title, whereas if a tenant in common died, it might be found that his share had been left equally between his twelve children, thus increasing by eleven the titles to be investigated before the property could be soled as a whole.
   >
   > Accordingly the presumption at law was in favour of a joint tenancy. “The law loves not fractions of estates, nor to divide and multiply tenures.”

6. For example, equity regarded mortgagees or partners who co-owned land as tenants in common. Megarry & Wade, *ibid*., at 428:
   > *Jus accrescendi: inter mercatores locum non habet: pro beneficio commercii*, the right of survivorship has no place in business.

7. When property is held in trust for others by two or more trustees, the joint tenancy is also convenient.

Suppose that Spouse A contributes 90 per cent of the purchase price of property and Spouse B contributes 10 per cent. Because they wish to have rights of survivorship, title is registered as a joint tenancy. Does that mean that the spouses now have equal interests in the land? Or is it merely a fiction to allow them to enjoy a particular form of co-ownership? Has one spouse made a gift to the other? Or does one spouse own a portion of the property in trust for the other?

These questions will not have to be answered unless one of two events occurs: the marriage breaks down, or a third party becomes entitled to look to property owned by one spouse. In either case each spouse's interest in the property will have to be determined. In the Working Paper it was said:[8]

> There are many reasons parties might want unequal interests clearly recorded so that if, at some future date, a severance of the joint tenancy should take place, there is little room for argument concerning their respective interests. For example, a husband and wife may purchase a matrimonial home with the wife putting up 80% of the money. They find the notion of a joint tenancy attractive for its right of survivorship, but fear that if the husband's business activities should lead to his bankruptcy, the trustee would be entitled to half the property. A form of joint tenancy which recognized unequal interests would seem to satisfy their needs.

Little can be said in support of a form of co-ownership which requires the spouses to say that they have equal interests in land, whether or not they actually do. It is a legal anachronism which is out of step with modern needs and policies. At the very least, it is inconsistent with one of the goals of land registration, which is to record interests in land accurately.

4. CO-OWNERSHIP ARRANGEMENTS WHICH PROVIDE FOR RIGHTS OF SURVIVORSHIP

Before considering amending the law, it is useful to observe that several methods are currently available to structure co-ownership of property with rights of survivorship even where co-owners have unequal interests in land.

First, there is some case authority to the effect that tenants in common can co-own land subject to a right of survivorship.[9] These cases are from the nineteenth century and involved testamentary devises. Whether a modern court would recognize this form of co-ownership is uncertain.[10]

Second, a trust arrangement can be employed. That would involve transferring land to a trustee to hold for the benefit of the co-owners. The terms of the trust would provide that the co-owners had unequal shares and rights of survivorship. Alternatively, the parties can acquire property as joint tenants with equal interests, but enter into a separate arrangement which acknowledges that one party holds a portion of his interest in trust for the other. Using a trust in either of these ways is an exercise of some complexity.

Another method is somewhat simpler but nevertheless open to objection. The parties may simply enter into a contract which provides that on severance of the joint tenancy they will be entitled to defined

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8. *Working Paper on Co-Ownership of Land* (W.P. No. 58, 1987) 26-7.

9. *Supra*, Chapter II, n. 28.

10. Moreover, rights of survivorship in this context appear to differ from a joint tenant's right of survivorship. The right is unseverable. For example, A and B are tenants in common with rights of survivorship. A conveys his interest to D. It would appear that the right of survivorship continues notwithstanding D's purchase. If A survives B. perhaps D will take the whole of the property. Even if an arrangement of this nature is possible, there are many unresolved issues concerning how rights of survivorship are to operate.

unequal interests.[11] Some doubts exist concerning such an arrangement. Would it be effective against a judgment creditor or a trustee in bankruptcy? What interest would a person purchasing a joint tenant's interest acquire? An arrangement of this nature is misleading to third parties and it is unlikely that the courts would allow it to operate to their prejudice. Any utility such an agreement might have is likely to be restricted to defining rights between joint tenants.[12]

It is also possible for co-owners to hold land as tenants in common in unequal shares. Each may then make a will leaving his or her interest to the others. This method is also open to objection, since a will may be revoked by operation of law, or its provisions varied in circumstances which would not affect a joint tenancy.

One person who commented on the Working Paper that preceded this Report suggested that the current law already protects co-owners who contribute to property unequally, even in the absence of an ability to agree on the proportions of their ownership:

> In the example [where the husband and wife purchased a home with the wife putting up 80% of the money] ... the tenants would hold as tenants in common in equity. As the presumption of advancement does not operate between wife and husband, he would hold on resulting trust; holding beneficially 20% for himself and 30% as trustee for her. In a similar fact situation this result was achieved by the B.C. Court of Appeal in *Re Heffner* (1986) 32 D.L.R. (4th) 760. The example does not illustrate an insoluble problem.

We agree that the law is prepared to recognize that co-owners have unequal interests. It is our view, however, that it should also be prepared to recognize that co-owners may agree on what those interests are, and record their title accordingly.

If co-ownership structured to recognize unequal interests and provide for rights of survivorship would be useful, there should be a straightforward method of accomplishing it.

5. COMMENT ON THE WORKING PAPER

In the Working Paper that preceded this Report, legislation was proposed which would permit persons with unequal interests to co-own land in joint tenancy. Most of our correspondents agreed that there was a practical need for allowing this and that feudal legal theory ought not to stand in its way. It was said, for example:

> In this day and age it should be possible for two or more parties to jointly own land in any proportion they deem equitable and still be able to retain [the] right of survivorship.

Several correspondents remarked that in their experience people often wish to co-own land in joint tenancy, and record as well their unequal entitlement in the event of severance, partition or sale. In *Re Speck and Speck* the issue was of sufficient importance to the co-owners that they were prepared to assume the costs of litigation in an unsuccessful attempt to have their co-ownership recorded in that way.

The majority of the comment we received supported the position that reform as we proposed would be practical and useful. We did receive some submissions opposed to revising the joint tenancy, but these

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11. *See, e.g., MacGillivry* v. *Vosper*, [1987] B.C.D. Civ. 1642-02 (S.C.).

12. *Ibid.; see also Gougeon* v. *Gagnon*, (1987) 4 A.C.W.S (3d) 251 (Que. C.A.); *Re Heffner* v. *Price Waterhouse Ltd., (*1986) 32 D.L.R. (4th) 760 (B.C.C.A.).

were very much in the minority. Points raised in these submissions are discussed in Appendix C to this Report.

6. CONCLUSION

It is our conclusion that legislation should be enacted which would allow persons holding unequal interests to co-own land in joint tenancy.

C. Severance

1. INTRODUCTION

It is open to a joint tenant to convert his interest in the joint tenancy into a tenancy in common at any time. The process by which this is done is called "severance." Usually, a joint tenant will sever his interest when he does not wish rights of survivorship to continue. Severance, however, is not always a deliberate act. Sometimes it occurs when it is unintended or unwanted.

The current law governing severance presents a number of problems. A joint tenant may convert his interest into a tenancy in common without first seeking the consent of other joint tenants, nor must he give them notice that he has done so. The other joint tenants, consequently, may be unaware that severance has taken place. Moreover, severance may take place by a secret transaction so that there is no means available to joint tenants to determine whether or not rights of survivorship persist. Severance may also be the unexpected result of a transaction affecting the land. Sometimes it is not until a co-owner dies that the others discover rights of survivorship have been lost. At that time, it is too late to do anything about these lost rights.

In the following discussion, we examine in greater detail some of the problems that arise under the current law. The proposals made in the Working Paper and the comment received on them are then discussed. Our final recommendations take the form of draft legislation, which is to be found in the next chapter.

2. SECRET TRANSACTIONS

The current law provides that a co-owner's interest may be severed from a joint tenancy in a number of ways which involve neither notice to other co-owners nor registration in the land title system. That is a matter of some concern. A co-owner, for example, may conceal a transfer of his interest in property to himself or a third party until such time as it becomes apparent whether he or another co-owner is likely to benefit from the right of survivorship.

> A and B hold Blackacre in joint tenancy. A, unknown to B, conveys his interest to his favourite nephew (the sole beneficiary under A's will) and instructs him to keep the conveyance hidden until A or B dies. If A survives B, the conveying documents are destroyed and A receives the entire estate which ultimately passes to the nephew. If B survives A, the documents are produced, thus establishing that the joint tenancy was severed before A's death, and the nephew receives A's

An arrangement of this nature ensures that only A or his nephew will benefit by the right of survivorship.

3. SEVERANCE ONLY WITH CONSENT

The current law allows a joint tenant to sever his interest from the joint tenancy unilaterally.

In Saskatchewan, the consent of the other joint tenants must be obtained before a conveyance of a joint tenant's interest will effect a severance.[13] Registration of a conveyance must be accompanied by the written consent of the other joint tenants.

Requiring the consent of the other joint tenants to effect a severance certainly protects their interests, but does so at substantial cost. Joint tenants can no longer deal freely with their property. That position is highly undesirable in a commercial context, although it may be supportable when the co-owners are spouses, as Professor McClean has suggested:[14]

> The most common joint tenancy today is that between husband and wife in relation to the matrimonial home. Although not well founded in law, it is probably often the expectation of the spouses that the consent of both is needed to change the nature of their interest, and that, without that mutual consent, on the death of one the property will pass to the survivor. The proper disposition of the matrimonial home is of course an issue even if title be held in the name of one of the spouses only. This problem should be dealt with as part of matrimonial law generally, and if that were done it would then be desirable to permit a joint tenant to retain his traditional freedom of alienation (subject in the case of husband and wife to the law of the matrimonial property regime).

British Columbia legislation does not seem to afford spouses protection in these circumstances. Either spouse may apply under the *Land (Spouse Protection) Act*,[15] to prevent the disposition of a homestead without consent, but that Act does not apply, apparently, when the spouses are joint tenants.[16]

4. LAND REGISTRATION

The current law relating to severance of a joint tenancy largely reflects the traditional English system of conveyancing, where the validity of past transactions conveying land determined whether the present owner's title was good. In British Columbia, however, a transaction relating to property must be registered in the land title office to be effective against third parties. The *Land Title Act*[17] provides that an unregistered transaction is only effective between the parties to the transaction. That provision, curiously, is the basis for preserving in British Columbia the common law position that an unregistered assignment of an interest held in joint tenancy severs the joint tenancy.[18] The result is that surviving co-owners are affected by unregistered transactions relating to property. They lose their rights of survivorship.

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13. *Land Title Act*, R.S.S. 1965, c. 115, c. 240(2). The *Land Titles Act*, R.S.S. 1978, c. L-5, s. 240(2).

14. "Severance of Joint Tenancies," (1979) 57 Can. B. Rev. 1, 38.

15. R/S/B/C/ 1080, c. 223. In Ontario, an application is not necessary to prevent a disposition of the matrimonial home. Family property legislation forbids a spouse from dealing with his or her interest in the matrimonial home without first obtaining the consent of the other spouse: *Family Law Act, 1986*, S.O. 1986, c. 4, s. 21(1).

16. That, at least, was the decision of the British Columbia Court of Appeal in *Evans* v. *Evans (No. 2)*, [1951] 1 W.W.R. 281. The Act at that time applied to land registered "in the name of the husband." The Act now reads "in the name of the husband or wife." In *Minor (Interim) Report on the Land (Wife Protection) Act* (LRC 71, 1984) we suggested that the Act was overdue for consideration. When the opportunity to reconsider the Act arises, it may well be appropriate to consider whether it should provide protection when spouses own property in joint tenancy.

17. R.S.B.C. 1979, c. 219, s. 20.

18. *Stonehouse* v. *A.G. of British Columbia*, [1962] S.C.R. 103, 37 W.W.R. 62.

Survivorship is a right of some value to joint tenants, notwithstanding the uncertainty clouding who may eventually benefit by it. For example, A and B own Blackacre as joint tenants. Blackacre has a fair market value of $100,000. If the property is sold, A and B will each receive $50,000. If, however, the property is held in joint tenancy until one joint tenant's death, the survivor will be entitled to the whole of the property, representing a gain of a further $50,000. It is surprising that the law permits one joint tenant to deprive other joint tenants of rights of survivorship by transactions which may never be brought to their attention.

A position more in keeping with the policy of land title legislation in British Columbia would require registration to effect a severance. That would ensure that persons are not misled by a register which records that land is held in joint tenancy, even where the joint tenancy has been severed by a secret conveyance.[19]

5. "LAST MINUTE" SEVERANCE

Notwithstanding the basic principles relating to title to land in British Columbia, an approach which prevented severance of a joint tenancy except by registration would not be entirely practical. A joint tenant may, for example, wish to sever the joint tenancy openly, but be unlikely to survive to make the appropriate registration. This is a circumstance the law should be able to accommodate.

California enacted legislation in 1985 which provided for the last minute severance of a joint tenant's interest:[20]

> 683.2 (c) Severance of a joint tenancy ... is not effective to terminate the right of survivorship of the other joint tenants as to the severing joint tenant's interest unless one of the following requirements is satisfied:
>
> (1) ...
>
> (2) The deed, written declaration, or other written instrument affecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant.

The object of the legislation is to provide a means of severing a joint tenant's interest where registration cannot be done immediately, while still avoiding the possibility of severance through a secret transaction.

6. INTENTION TO SEVER

(a) Nature of the Transaction v. Intention

Under the current law, the nature of the transaction determines whether severance occurs. As a general principle, severance occurs on the destruction of one of the four unities. Legal theory relating to co-ownership decides this issue, without reference to policy reasons relating to the rights of the parties or to their

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19. In Saskatchewan, only a *registered* transaction will cause a severance. The *Land Titles Act*, R.S.S. 1978, c. L-5, s. 240 (1) provides:
> 240. (1) Notwithstanding anything in this or any other Act, where any land, mortgage, encumbrance or lease registered under this Act is held by two or more persons in joint tenancy, other than as executors, administrators or trustees, the joint tenancy shall be deemed not to have been severed by any instrument heretofore or hereafter executed by one of the joint tenants, or by more than one but not all the joint tenants, unless the instrument has been registered under this Act.

20. *California Civil Code*, s 683.2(c).

intentions. Consider for a moment the consequences of severance from the different perspectives of those affected by it.

Where a joint tenant disposes of all his interest to a third party, the resulting severance protects the third party. There can be no quarrel with the appropriateness of that result.

Where a joint tenant, however, disposes of less than his entire interest (by granting a mortgage, for example) the current law sometimes operates harshly. The disposition will result in a severance. That will protect the third party, but may prejudice the co-owners. The joint tenant who grants an interest to a third party may, for example, wish rights of survivorship to continue for the interest he retains, as may the other co-owners, but under the current law there is no method for doing this.

> A and B own Blackacre, worth $200,000, in joint tenancy. A grants a mortgage for $10,000 against his interest in Blackacre. Under the current law, the mortgage will result in a severance. A and B may not be aware of that consequence. Even if the mortgage is repaid, rights of survivorship are lost.

Currently, the law relating to severance operates as an all or nothing proposition. If there is a severance, the third party is protected and the surviving joint tenants take nothing of the deceased joint tenant's interest. If there is no severance, the third party loses his interest and the joint tenants take all.

The law need not operate so bluntly. It is possible to devise an approach, based on the intentions of the joint tenant dealing with his interest, which takes account of the rights of third parties acquiring interests in the joint tenant's interest and the rights of surviving joint tenants. Basically, only an outright disposition of a joint tenant's interest, to himself or to a third party, would cause a severance. Otherwise, rights of survivorship would continue, but subject to third party interests.

> A and B own Blackacre in joint tenancy. A borrows money from C. who requests a mortgage against Blackacre as security. A grants the mortgage.

Under this approach, the mortgage would not cause a severance of the joint tenancy. The lender, C, would not be concerned whether A is a joint tenant or a tenant in common. In either case under the revised approach, C's rights would continue against A's interest in Blackacre even after A's death. A would take steps to sever the joint tenancy only if he no longer wished rights of survivorship to continue.

7. THE WORKING PAPER

In the Working Paper, it was proposed that legislation be enacted which would revise the law governing severance. Under this legislation, severance could only take place in one of four ways:

(i) by conveyance of the whole of a joint tenant's interest to a third party or to himself. Severance would occur upon registration;

(ii) by court order;

(iii) by a joint tenant giving notice to the other joint tenants declaring that a severance has taken place;

(iv) by all of the joint tenants agreeing that a severance has taken place.

The object of these proposals was to ensure that a severance would never take place unexpectedly or unnecessarily, or be the result of a secret transaction. Moreover, it was thought to be unfortunate that the current law determined whether a severance had taken place by reference to the particular transaction entered into by the joint tenant, without regard to the interests and intentions of the parties involved.

Making these revisions to the law would ensure that a severance would only take place intentionally, and only then by a registered transaction or with notice to the other joint tenants.

Whether a severance has taken place is currently a matter of some concern to third parties dealing with one joint tenant. If a severance does not take place, the operation of rights of survivorship will prevent the third party from looking to the deceased joint tenant's former interest in the land. In order to protect these people from the operation of rights of survivorship, it was proposed that they could pursue their rights against the interest of the deceased joint tenant in the hands of the surviving joint tenants.

8. COMMENT ON THE WORKING PAPER

The majority of comment received on the Working Paper agreed that there was a need for reform. Concerns were expressed, however, about two features of such reform. These were:

(i) some suggested that joint tenants should not be able to sever their interests from the joint tenancy without the consent of the other joint tenants;

(ii) some suggested that in a Torrens jurisdiction, severance of a joint tenancy of registered land should not be permitted to occur by an unregistered transaction.

(a) Consent

Two correspondents felt that the nature of the joint tenancy involved placing restrictions on the unilateral right of a joint tenant to sever his interest from the joint tenancy. In one submission, for example, it was said:

> ... I cannot remember a single instance when, after explaining the differences between joint tenancy and tenancy in common, I was instructed by spouses to procure a conveyance to them as tenants in common. My other observation has been that most lay people would be surprised to learn that a joint tenancy can be severed at all, and when they learn that this is possible, they would regard such an act as one of gross betrayal.

In another:

> In our view, the requirement of consent is not unreasonable. As indicated in the Working Paper, most joint tenancy arrangements are found among family members or between spouses. In this context, such a requirement would provide reasonable and sufficient protection to the parties.

We have given this matter further thought, and are still of the view that requiring consent in every case for the severance of a joint tenant's interest would be inappropriate. Until the *Married Woman's*

Property Act[21] was enacted, the only form of co-ownership open to spouses was the tenancy by entireties. That form of co-ownership carried with it a right of survivorship and was unseverable. Tenancy by entireties is now obsolete, and does not appear to have been missed.

A joint tenancy is often used as an estate planning tool. One advantage the right of survivorship has over a will is that it permits property to be transferred directly to the surviving joint tenant without fear of intervention. If the property were left by will, under the *Wills Variation Act* the court may order that it be given to someone other than the intended recipients. Insofar as a joint tenancy is regarded as an estate planning measure like a will, it is reasonable that a joint tenant's ability to sever unilaterally his interest from the joint tenancy resembles a testator's ability to revoke his will unilaterally.

Many of the principles relating to severance of a joint tenancy were developed in the context of co-ownership between persons other than husband and wife. In that context, it was desirable for joint tenants to be able to sever the joint tenancy with a minimum of difficulty:[22]

> The duration of all lives being uncertain, if either party has an ill opinion of his own life, he may sever the joint tenancy by a deed granting over a moiety in trust for himself; so that survivorship can be no hardship, where either side may at pleasure prevent it.

It might be possible to develop rules that differed depending on the relationship between the joint tenants. On this point, however, one correspondent who favoured a consent requirement made the following observations:

> I did think of the possibility of making one rule for married couples and a different rule for other joint tenants, but my conclusion is that whenever a joint tenancy is entered into, the relations are always more intimate than when land is acquired by tenancy in common. Therefore, the marital or family or friendship relations of joint tenants should not affect the issue.

Another group wrote:

> In the commercial context we do not share your view that it would unduly interfere [with] a co-owner's freedom to deal with his property. Arguably, if the right of survivorship is material to a business relationship, it ought not to be extinguished without agreement by the parties.

We agree with our correspondents that, at least from time to time, there will be circumstances where a joint tenant should not be able to cause a severance without the consent of the other joint tenants. Our concern is that, at least from time to time, there will also be circumstances where joint tenants should be free to act as they wish, unilaterally.

The difficulty, as we see it, is that an arbitrary rule will not function well. Even distinguishing between commercial and family arrangements (an option discussed and rejected by our correspondents) is not likely to identify accurately each case where consent should be required.

While an arbitrary rule will not function well in these circumstances, it may be that the agreement of the parties might, provided the land title system accommodated them. We have in mind an approach where the parties would decide for themselves, and designate at the time title in co-ownership is registered, whether

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21. This legislation was first enacted in British Columbia in 1887: S.B.C. 1887, c. 20.

22. *Cray* v. *Willis*, (1729) 2 P. Wms. 529, 24 E.R. 847 (Ch.), *per* Jekyll M.R.

or not a joint tenant can unilaterally sever his interest from the joint tenancy. Such an approach has two advantages. First, if the owners elect to allow unilateral action, no one should be surprised to find that a severance has taken place without their knowledge. Second, allowing the parties to decide this issue for themselves avoids arbitrarily forcing one model or the other on joint tenants which may be inappropriate in the circumstances and contrary to their intentions or expectations.

In our view, this approach should be adopted. If the parties fail to state whether or not consent is required for a joint tenant to sever his interest from the joint tenancy, it should be conclusively deemed that consent is not required.

The mechanics of making such an election are set out in the draft legislation in the next chapter.

(b) Registration

Currently, the law recognizes several ways in which a severance might occur which do not depend upon registration in the land title system. An unregistered transaction, for example, might cause a severance, or the joint tenants may agree to sever.

In the Working Paper, it was suggested that merely giving notice should be sufficient to effect a severance.

Most of our correspondents were opposed to severance by any means that was not reflected on title to the land. It was said, for example:

> ... having regard to the purpose of the land registration system, ... it would be better if any change in a registered joint tenancy was recorded on the title.

In another submission, it was said:

> If severance of a jointure is effective by giving notice and without registration, third parties cannot rely on the Title with respect to the nature of the co-owner's respective interests. The committee recognizes, of course, that presently a Title which shows an interest to be held jointly may not reflect the true state of affairs since severance can be effected without registration, but at least, under the proposed draft legislation, once a co-owner had died the Title could be relied upon after the ... waiting period.

The points raised by our correspondents are persuasive. Permitting notice to effect a severance would, however minimally, undermine the principles of land registration in British Columbia. Moreover, the current law, insofar as it permits severance to occur in a number of ways that do not involve registration against title, is inconsistent with those principles. That is undesirable. Legislation should provide that a transaction must be registered in the land title system in order to effect a severance.[23]

Allowing registration to effect a severance will not, however, ensure that the other joint tenants have

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23. One correspondent observed that in British Columbia, and not in other Torrens jurisdictions, the granting of a mortgage or delivery of a deed destroys one of the unities and causes a severance:
... because we have only a hybrid Torrens system, an alienation occurs despite the Torrens system. If our mortgage created only a charge as in other Torrnes system (*see Lyons* v. *Lyons* ...), and did not convey the legal interest, there would be no severance as there would be no alienation; unity therefore would not be destroyed. Likewise, in the case of a deed, had B.C. a pure Torrens system the anomalous situation created by the opening words of s. 20 of the *Land Title Act* ("Except against the person making it") would not be there and no interest would pass until registration (or an application to register is lodged).
We have, in B.C., by these two modifications, inadvertently affected the law of joint tenancy by allowing severance in a manner inconsistent with Torrens.. Reform should address the source of the problem, and not further tinker to preserve the anomalies of the present B.C. system. The Torrens system would work equitably in the province were those unfortunate modifications abolished.

notice of the transaction, a point raised in one submission:

> While we are not opposed to the notion of requiring registration to effect a severance, registration of itself may not constitute actual notice of the severance to the co-owner.

Although registration provides a public record of transactions affecting land, it is necessary to search the registry in order to find out what it shows. There is no reason to expect that co-owners will adopt a practice of searching the registry from time to time to ascertain whether or not a severance has taken place. Something more is called for.

One solution to this problem was suggested by another correspondent:

> ... I advance the alternative proposition that notice be given by the registrar rather then the affected party. This is only a question of mechanics, not philosophy.

This would appear to be a satisfactory method of dealing with the problem of notice.[24] There is nothing novel about having the Registrar notify owners of land of various matters that affect their title. Under the *Land Title Act*[25] for example, the Registrar is required to send a copy of a caveat lodged under the Act to a person whose title is affected by it. Under the *Court Order Enforcement Act*[26] the Registrar is required to send notice to a person against whose title a judgment is registered. Providing a similar approach for advising joint tenants of a severance would merely be another manifestation of a policy that has already found its way into the British Columbia statute book.

9. THE BASIC MODEL

Emerging from the foregoing discussion are the general features of an approach for improving the current law. It is useful at this point to describe the model upon which, it is our conclusion, the law governing the joint tenancy should be based.

In keeping with the principles of land registration, severance of a joint tenancy should be effected only by an instrument registered against title to the land. In our view, a transaction which conveys all of a joint tenant's interest to himself or to a third party, once it is registered, should be sufficient to effect a severance. It should also be open to a joint tenant to file against title a "declaration" of severance, which could be the subject of a prepared form. Severance would not occur in any other circumstance.

The registrar of land titles would advise co-owners by mail of a transaction which severed the joint tenancy.

Joint tenants would be permitted to elect at any time whether one joint tenant could unilaterally enter into a transaction which would affect his interest in the joint tenancy, or whether the consent of all the co-owners would be necessary to do that. If no election is made, a co-owner would be free to act unilaterally.

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24. It should be observed, however, that there is no guarantee that notice mailed by the registrar will actually come to the attention of the other joint tenants. They may, for example, have moved from the addresses provided when their interests were registered. Nevertheless, a system that depends upon both registration and proof that actual notice had been received, in our opinion, would be impractical and probably unworkable.

25. R.S.B.C. 1979, c. 219, s. 266.

26. R.S.B.C. 1979, c. 75, s. 81.

Currently, third parties who acquire interests in land owned in joint tenancy are protected only if a severance takes place. If, on the other hand, a joint tenant's interest is not severed from the joint tenancy, then interests acquired by third parties in the land are lost when the joint tenant dies. The surviving co-owners take the deceased co-owner's interest by right of survivorship, free of the claims of third parties.

To avoid prejudicing third parties by limiting the circumstances in which a severance will take place, a further amendment to the law must be made. Legislation should provide that in defined circumstances third parties may look to the interest of the deceased joint tenant in the hands of the surviving joint tenants.

These are the general features that we believe the law should have. Our conclusions are reflected more rigorously in draft legislation to be found in the next chapter. Before we turn to the draft legislation, however, a number of points of detail must be canvassed.

10. POINTS OF DETAIL

(a) Last Minute Severance

The California legislation which provides for the last minute severance of a joint tenant's interest was referred to earlier.[27] In the Working Paper, we tentatively proposed that legislation based on the California approach should be adopted in British Columbia. We proposed that a co-owner be able to sever his interest from the joint tenancy by

> ... registration of a disposition of all of a co-owner's interest to himself or to a third party that is ... recorded in an instrument executed or acknowledged before a [commissioner for taking affidavits for British Columbia] and presented for registration within 5 days of the execution or acknowledgment ...

Our proposal differed from the California approach in several respects. Under the California legislation, the transaction had to be executed and acknowledged before a notary public[28] within three days of the joint tenant's death, and registered within seven days following the joint tenant's death. The legislation limits the possibility of a joint tenant entering into a longstanding arrangement to prejudice other joint tenants. Nevertheless, if the joint tenant making the document survives, nothing prevents the document from being destroyed.

One method of further limiting the possibility of a secret severance would be to require registration of the transaction in a more timely fashion. The California approach permits the document to be registered within a maximum of ten days of its execution. A shorter time period would require immediate presentation for registration. In the Working Paper that preceded this Report it was suggested that, if the transaction is intended to sever the joint tenancy, and is not being used to wait and see which joint tenant will benefit from the right of survivorship, there could be little objection to requiring presentation for registration within five days of execution of the document. A committee that commented on the Working Paper felt, however, that a slightly longer period was called for, during which such a transaction could be presented for registration:

> The committee felt strongly that a five-day period was too short and should be expanded to at least 14 days. The committee envisioned as an example where the five day period was too short, a situation where an individual in

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27. *See* text *supra*, n. 20.

28. In the proposal in the Working Paper the concept of "commissioner for taking affidavits" was employed instead of notary public. The *Evidence Act*, R.S.B.C. 1979, c. 116, s. 67 lists persons who are commissioners for taking affidavits for British Columbia. Lawyers and notaries public are commissioners for taking affidavits.

> the Lower Mainland made or acknowledged a severing instrument relating to land in Kamloops, in which case it can easily occur that the registration in Kamloops would not take place within a five day period. If the individual making the severing instrument died unexpectedly after making the instrument and if the lawyer did not find out about the death, the lawyer would have no reason to treat the matter on a rush basis and thus would likely be out of time. On the other hand, the committee agrees that a time limit of some sort should be imposed for registering a severance. Fourteen days was the absolute minimum time period the committee members felt comfortable with.

Our concern was to select a time limit which would require the joint tenant to register a transaction affecting his interest as soon as possible. While a short period of time would accomplish that, we believe that the practical concerns raised by our correspondents must be taken into account. We would accept a 14 day time limit.

(b) What Interests Should Attach to Rights of Survivorship?

(i) Third Party Rights

Earlier, we concluded that third parties who have acquired rights in a joint tenant's interest should not be prejudiced by the operation of rights of survivorship. We left open, however, the issue of whether there is a need to protect all third parties who deal with one or more, but not all joint tenants, or whether a less ambitious approach would be appropriate.

In modifying rights of survivorship, the goal is not to encourage, or enhance the ability of, joint tenants to deal with their interests separately from the other joint tenants. In theory, a joint tenancy reflects a unity of ownership. The joint tenants are considered to be a single entity and, consequently, should deal with third parties together. Perhaps this notion has been lost sight of. There is no doubt that many people view a joint tenancy as being nothing more than a tenancy in common with a right of survivorship attached to it.

There are few situations where, currently, a third party would be interested in acquiring an interest in land except from all joint tenants. It is important to clarify the consequences of legal change, but in this context it should be kept in mind that only rarely will problems arise. This suggests that the simpler the approach the better.

It is our view that third party interests capable of attaching to a right of survivorship should be restricted to financial charges, such as mortgages or judgments, provided they are registered against the joint tenant's interest. A third party wishing to acquire any other kind of interest which will survive the death of a joint tenant should deal with all of the joint tenants.

(ii) Financial Charges and Judgments

Our conclusion that rights of survivorship should be subject to financial charges registered against a deceased joint tenant's interest raises several questions which must be addressed.

> A and B own Blackacre in join tenancy. A mortgages his interest to C. The mortgage is registered. Upon a's death, B takes the whole of Blackacre by right of survivorship, subject to the mortgage in favour of C.

A number of issues arise from this example:

(i) Should the mortgage attach to the whole of Blackacre, or only to A's former interest?

(ii) Who is personally liable under the mortgage: A's estate? B? Should they be liable jointly and severally?

(iii) If C pursues A's estate for repayment of the mortgage, should A's estate be entitled to contribution from B? For the whole amount? Or for a lesser amount?

(iv) If C pursues B or looks to A's former interest, should B have some claim over against the estate?

(v) Are special rules necessary if there are other creditors of A's estate?

(iii) Marshalling

These issues were considered in our *Report on Execution Against Land* (LRC 40, 1978) with respect to judgments and rights of survivorship.

In that Report, it was recommended that:

> *9. If a judgment is registered against a debtor who has an interest, as a joint tenant, in land, the joint tenancy is not severed but if the debtor dies and the judgment remains unsatisfied then the judgment continues to charge the interest of the debtor in the hands of the surviving owner(s); and*
>
> *(a) if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is greater than the claims of ALL creditors, then*
>
> *(i) a registered judgment creditor should look first to the estate of the debtor for satisfaction of his judgment, but his claim is subordinated to the claims of ordinary creditors who have not registered a judgment against the debtor's interest in land, and*
>
> *(ii) if the debtor's estate, after satisfying the claims of ordinary creditors, is insufficient to satisfy a registered judgment the judgment creditor should then be entitled to look to the debtor's interest in land in the hands of the surviving joint owner; and*
>
> *(b) if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is less than the claims of ALL creditors, then*
>
> *(i) a registered judgment creditor may share rateably in the estate, but his claim therein is reduced by the value of the debtor's land which is available to satisfy his claim, and*
>
> *(ii) a registered judgment creditor is entitled to look to the debtor's interest in land in the hands of a surviving joint tenant to satisfy the deficiency.*

The discussion supporting this recommendation from the *Report on Execution Against Land* is reproduced in Appendix B to this Report.

Essentially, this approach involves dividing liability between the deceased joint tenant's estate and the land in the hands of the surviving joint tenants. The deceased joint tenant's estate retains primary liability. The recommendation incorporates principles of marshalling to resolve problems that may arise where several creditors of the deceased joint tenant are in competition. These problems were described as follows:

> The possibility of a claim against the estate may raise other problems. Consider the following situation:
>
> A and B (husband and wife) are joint owners of land worth $40,000. C obtains a judgment for $10,000 against A which is registered. A dies leaving an estate (of assets other than his interest in the land) worth $10,000. A's personal representative is B. A had one other creditor, E, whose debt is for $10,000. E's debt is unsecured and he has not taken judgment on it.
>
> The following results are possible:
>
> (1) C makes no claim in the estate but looks to the land to satisfy his judgment. E gets the full estate of $10,000 to satisfy his claim. C gets paid $10,000, either directly by B or from the proceeds of a sale of A's interest in the land, or
>
> (2) C claims in the estate and is paid $5,000. E also receives $5,000. C then looks to the land for the remaining $5,000 and it is sold (or the remaining $5,000 is paid directly to C by B) to discharge the judgment (and E gets no further payment).
>
> If the second result occurs E will be understandably aggrieved. E will have lost $5,000 and B will have obtained a corresponding benefit.
>
> We see a possible solution to these difficulties in the equitable doctrine of marshalling. This is described in Hanbury as follows:
>
> > The doctrine of marshalling is a principle of equity by virtue of which a secured creditor, B, can require a prior creditor, A, to take satisfaction out of assets upon which creditor B has no lien; thus leaving B's security available for him. "If a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien."
>
> For example: if A mortgages Blackacre and Whiteacre to B; then mortgages Blackacre to C; C can require B to satisfy himself in the first instance out of Whiteacre.
>
> The doctrine of marshalling has been a feature of the law concerning the administration of estates for many years.
>
> In the context under discussion, the application of the doctrine of marshalling would require that a claim of a registered judgment creditor against a debtor's estate should be subordinated to the claims of ordinary unsecured creditors except to the extent that a deficiency exists (or is likely to arise) such that the proceeds of a sale of the land are (or will be) insufficient to satisfy the judgment.
>
> If, on the other hand, there is sufficient money to satisfy both the judgment debt (in whole or in part) and all ordinary creditors, it is our view that the judgment creditor should look first to the estate and proceed against the land (or call upon the surviving joint owner for payment) only if the estate is unable to satisfy his claim in full. A clear rule along the lines described above would be fair to ordinary creditors and would assist in quantifying the value of the joint interest transmitted to the surviving owner.

In our view this approach finds an appropriate balance for the interests of creditors of the deceased,

the third party who has acquired an interest in the land, and the surviving joint tenants.[29]

(iv) Registered and Unregistered Charges

It is our conclusion that only financial charges in favour of a third party which are registered against title should continue to bind the deceased joint tenant's former interest in the hands of the surviving joint tenants. A financial interest that is not registered should not be protected. Our correspondents felt that it was necessary to adopt this position in order to preserve the integrity of the land registration system, and we agree.

It is unlikely that a third party will be prejudiced by the law protecting only those who have registered interests. A third party may protect himself by

(i) dealing with all of the joint tenants;

(ii) insisting that a joint tenant convey his interest to himself to effect a severance; or

(iii) registering in the land title system the interest or security he has acquired.

It would seem, therefore, that a third party who neglects to register an interest acquired in land has only himself to blame if the death of a joint tenant affects the limited security he has taken.

It is useful to observe that no cases in British Columbia have arisen that involve the issue of whether a mortgage granted against only one joint tenant's interest effects a severance. That is probably because few, if any, lenders deliberately extend credit on the basis of a such a security. They are protected only if severance occurs by operation of law. In British Columbia, in terms of theory, it is likely that the granting of a mortgage by one joint tenant causes a severance with respect to his interest, but no case has confirmed that that is the law. In other Torrens jurisdictions, where a mortgage operates as a security and not as a transfer of an interest in land, the granting of a mortgage does not sever a joint tenant's interest from the joint tenancy.[30] A well advised lender, therefore, will insist that the borrower convert his interest into a tenancy in common. In that way the lender can acquire a security interest in the borrower's lands without fear that it may be affected by rights of survivorship. The position we recommend is, consequently, consistent with the practices that would be adopted by a prudent lender.

(v) Disclaimers

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29. One group of commentators was concerned that legislation should not interfere with a creditor's right to pursue his remedies in whatever order he wishes. Possibly our correspondents' concern arose from the manner in which the legislation proposed in the Working Paper was drafted. It is not altogether clear that the legislation is to apply only in those circumstances where the interests of the surviving joint tenant(s) are not subject to the debt obligation of the deceased joint tenant. Where the interests of all the joint tenants are subject to the same debt obligation, marshalling is inappropriate. We have revised the draft legislation to clarify this point.
Another correspondent was concerned about the process of valuation, which determines how the assets will be marshalled. It was felt that it was commercially unrealistic to delay a creditor's remedies until it can be determined whether the deceased's estate is insolvent. This concern was also echoed in another submission:
> It is our experience that, even under the best of circumstances, the amount realized by an orderly disposition of estate assets is usually little more than could be realized at a distress sale. Unfortunately values deteriorate sharply and tend to fall more drastically as the length of time required increases. The process which the commission would impose will require considerable time ... The delay is unacceptable to lenders and could only prejudice beneficiaries and other creditors by increasing the accumulation of interest in arrears.

Priority issues always arise when a person or estate is insolvent. The draft legislation incorporates principles of marshalling. The marshalling provisions, essentially, are just another priority rule that is to apply when an estate is insolvent. Even if legislation were not to provide explicitly for marshalling, a court would, at the request of a creditor, direct that marshalling take place: *see, e.g., Snell's Principles of Equity*, (28th ed. 1982) 416; *Halsbury's*, (4th ed.) Vol. 16, para. 1426.

30. di Castri, *Registration of Title to Land* (1987), para. 258; *see also supra*, n. 23.

In some cases, third party interests may diminish or extinguish the benefit of rights of survivorship. For example, the deceased joint tenant's interest, worth $50,000, might be subject to a mortgage worth $60,000. In such a case, the surviving joint tenants should be able to decide for themselves whether to accept or disclaim rights of survivorship.

Rights of disclaimer should satisfactorily protect surviving joint tenants. As a practical matter, the right to disclaim would continue until an application is made to register title in the names of the surviving joint tenants. If one of the remaining joint tenants dies before that occurs, his personal representative would be able to decide whether rights of survivorship should be accepted.

A disclaimer by one joint tenant should not affect the rights of others. If one joint tenant disclaims, the others would become entitled to the deceased joint tenant's interest. They would hold the deceased's interest in joint tenancy. That interest would be separate from the interests they held before the deceased joint tenant's death.

If all surviving joint tenants disclaim, the position is indistinguishable from that which would have resulted from a severance before the deceased's death. Effectively, the deceased's interest, subject to the rights of the third party, is converted into a tenancy in common [1]3

11. UNREGISTERED INTERESTS

The discussion of severance so far has focused on co-ownership of interests which may be registered under the *Land Title Act*. In some cases, the co-owned interest may be of a nature which is not registrable. For example, T may be the registered owner of Blackacre, which he holds in trust for A and B as joint tenants. The methods of severance depending on registration discussed earlier are not appropriate in this context. In the Working Paper it was said that the current law governing severance of a joint tenant's interest which has not been registered or is not registrable, should probably continue.

One submission suggested that it would be appropriate for revising legislation to clarify how unregistered joint tenancies are severed:

> We wonder if it would not be preferable to provide in the legislation that unregistered joint tenancies may be severed by:
>
> (a) serving notice to all other co-owners of the land of the joint tenant's decision to sever, whether or not he has entered into a transaction relating to his interest;
> (b) the agreement of all co-owners of the land, or
> (c) a court order.

The suggestion in the Working Paper that the current law should remain unchanged as it applies to unregistered interests was not made because we were satisfied that the current law operates satisfactorily in that context. It was made, essentially, in recognition of the fact that our proposals were tailored specifically to operate in the context of land title legislation.

It is possible to hold unregistered interests in land in joint tenancy. Some land has not yet been brought within the land title system. Some transactions relating to registered land, for one reason or another,

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31. Technically, disclaimer operates as an avoidance in the sense that the person who disclaims never acquires an interest in the property. The concept of disclaimer by a surviving joint tenant does not fit neatly within this model, since the right of survivorship vests immediately on the deceased joint tenant's death. Adopting this approach, consequently, would permit a disclaimer to operate retroactively.

are not registered. In either of these cases, it is possible for two or more persons to co-own interests in land in joint tenancy. We have only limited information, however, on the full range of situations that might fall into the category of unregistered interests.

While we recognize that problems centering around the joint tenancy and rights of survivorship can theoretically arise with respect to unregistered interests in land, there is no evidence that they do. We are reluctant to recommend the introduction of rules to resolve problems about which we have little information. Moreover, it is unlikely that a single body of rules will apply satisfactorily in the diverse situations in which an unregistered joint tenancy may conceivably arise.

D. Partition of Property Act

As the discussion in the last chapter disclosed, there is a need for modern legislation respecting the partition or sale of property. The next chapter sets out draft legislation designed to modernize the *Partition of Property Act*. A detailed discussion of the specific features of the draft legislation will be found in the annotations and drafting notes which are included with it.

E. Consolidation of Co-ownership Legislation

Legislation relating to co-ownership is to be found in the *Land Title Act*, the *Property Law Act*, the *Partition of Property Act* and the *Estate Administration Act*. The draft legislation in the next chapter consolidates these provisions.

CHAPTER V DRAFT LEGISLATION

A. Overview

The draft legislation that follows relates to the forms of co-ownership available in British Columbia. It provides a modern restatement of rights that co-owners may assert against each other with respect to sharing in profits and expenses, and of the remedies of partition and sale of co-owned land. The draft legislation is far less detailed than the current *Partition of Property Act* primarily for one reason. Those portions of the current Act which are governed by the Rules of Court or other legislation have been deleted.

We derived a great deal of assistance from provisions of the Alberta *Law of Property Act*[1] dealing with partition. That legislation was based on recommendations of the Alberta Institute of Law Research and Reform in its *Report on Partition and Sale*.[2]

A proliferation of statutes dealing with a particular subject is generally undesirable. It is our tentative conclusion that legislation based on the draft legislation in this Chapter should be enacted as part of the *Property Law Act*.

The Commission recommends that:

Legislation based on the principles embodied in the draft legislation contained in Chapter V, be enacted in British Columbia as part of the Property Law Act.

B. Draft *Property Law Amendment Act*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The Property Law Act, R.S.B.C. 1979, c. 340, is amended by adding the following as a heading before section 1:

PART 1

GENERAL

2. The following heading is added to the Act after section 35:

PART 2

CO-OWNERSHIP OF PROPERTY

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1. R.S.A. 1980, c. L-8.

2. Report No. 23, March 1977.

3. The following sections are added:

Interpretation

36. In this Part

"court" means the Supreme Court, and includes a County Court in cases within the monetary jurisdiction of that court;

The term "court" is used in sections 41, 44, 45, 46, 47 and 48.

"co-ownership" means ownership of land by 2 or more persons as joint tenants or tenants in common but does not include ownership by persons as trustees;

Only two forms of co-ownership of land are recognized in British Columbia: the joint tenancy and the tenancy in common.

If the land is held by trustees, rights and remedies are outside of this Act. That is also the position under the current Act. Trustees must act unanimously.

Section 28(4) of the *Interpretation Act*, R.S.B.C. 1979, c. 206, provides that:

> Where a word or expression is defined in an enactment, other parts of speech and grammatcial forms of the same word or expression have corresponding meanings.

The definition of "co-ownership", consequently, also controls the meaning of the term "co-owners."

Under s. 29 of the *Interpretation Act* "land" includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning.

The term "co-ownership" and related terms are used in sections 38, 39, 40, 41, 44, 45, 46 and 47.

"financial charge" means an interest in land that secures the payment of money but does not include a judgment or an interest created by the registration of a judgment.

The term "financial charge" is used in sections 41(2), 43 and 46.

"interest" means a legal or equitable interest in land, but does not include a resource tenure acquired under the *Forest Act, Mineral Act, Mining (Placer) Act* or *Petroleum and Natural Gas Act*, or any grant of surface rights acquired in connection with such a tenure;

The current *Partition of Property Act* permits the partition or sale of only a freehold or leasehold interest held in co-ownership, although on its face the Act does not appear to be so restricted.

The definition of "interest" in the draft Act would theoretically permit any co-owner of an interest to apply for relief under this legislation.

As a practical matter, however, the need for partition will only arise between co-owners of an interest which carries with it rights of possession.

"Resource tenures" are excluded from the operation of the Act. Resource tenures include various rights associated with property, such as a license to remove timber.

The *Partition of Property Act* currently excludes special timber licenses from the operation of the Act. It may be questioned whether this exclusion of the exclusion of resource tenures is necessary. Resource tenures would not confer on co-owners rights of possession.

The term "interest is used in sections 36, 39, 40, 41, 42, 43, 44, 45 and 46.

"instrument" includes a will, court order or judgment;

Section 1 of the *Property Law Act* provides that "instrument" has the same meaning as under the *Land Title Act*.

Under section1 of the *Land Title Act*, "instrument means

(a) a crown grant or other transfer of crown land; and

(b) a document or plan relating to the transfer, charging or other wise dealing with or affecting land, or evidencing title to it, and, without restricting the generality of the foregoing, includes

(i) a grant of probate or administration or other trust instrument; and;

(ii) an Act.

The definition of "instrument" is intended to include comprehensively any means by which an interest in land may be acquired.

The term "instrument" is used in sections 38, 40 and 41.

"judgment" includes

(a) a registrable lien or other registrable claim on or to land arising under an enactment, and

(b) a claim against an owner of land which is declared by an enactment to have the force of a judgment.

The term "judgment" is used in the definition of "instrument" and "financial charge" and in sections 41(2), 43 and 46.

Joint tenancy and tenancy in common

37. A husband and wife shall be treated as 2 persons for the purposes of acquisition of land under a disposition whenever made and, without restricting the generality of the foregoing, ownership of land by tenancy in entireties is abolished.

This section is based on section 12 of the *Property Law Act*, that co-ownership of land by tenancy in entireties is abolished in British Columbia. The section has been revised to provide expressly for that.

"Dispose" means to transfer by any method and include assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things. "Disposition" has a corresponding meaning: *Interpretation Act* ss. 29, 28(4).

Presumption of tenancy in common

38. Co-owners, other than personal representatives or trustees, are tenants in common unless a contrary intention appears in the instrument under which the co-ownership arises.

Section 38 is based on section 11 of the *Property Law Act*. At common law, in the absence of a contrary intention, co-ownership was presumed to be in joint tenancy.

Joint tenancy may be in unequal shares

39. Persons having unequal interests in land may co-own the land as joint tenants.

Currently, a joint tenancy will not exist unless the co-owners have equal interest.

Title to the land should show the proportions in which the co-owners own the land. This is done when land is owned by tenants in common, and the same practice should be adopted with respect to joint tenants. However, legislation does not appear to address currently the manner in which the interests of co-owners are to be recorded on title. This issue is left to be dealt with as a matter of practice within the land title system.

Equality presumed

40. Where the interests of co-owners are not stated in the instrument under which the co-ownership arises, they are presumed to be equal.

Severance

41. (1) Where ownership of land is registered as a joint tenancy, a co-owner's interest may be severed from the joint tenancy only by

(a) registration of an instrument disposing of all of a co-owner's interest to himself or to a third party, or of a declaration of severance in [the required form], that is

(i) presented for registration before the co-owner's death, or

(ii) recorded in an instrument executed or acknowledged before a person referred to in section 67 or 70 of the *Evidence Act*, and presented for registration within 14 days of the execution or acknowledgment, or

(b) a court order.

Section 41 is intended to prevent a secret transaction from severing a joint tenancy. It does not alter the co-owner's ability to deal with his interest. It defines which transactions by a co-owner will sever his interest from a joint tenancy in the sense that is interest becomes a tenancy in common. If the transactions does not sever the co-owner's interest, the joint tenancy acquired from a joint tenant by a third party which does not cause a severance will survive the joint tenant's death is determined by s. 41(2).

Section 41(1)(a)(i) is based on section 18(1) and (3) of the *Property Law Act*.

Section 41(1)(a)(ii) is designed to accommodate a last minute decision to sever the joint tenant's interest from the joint tenancy. Such a disposition, even if presented for registration after the co-owner's death, will effect a severance.

Section 67 of the *Evidence Act* lists commissioners for taking affidavits for British Columbia. Section 70 lists persons who may take affidavits outside of the province for use in the province.

Section 41(1)(b) refers to an order for partition or sale, or an order under section 52 of the *Family Relations Act*.

The "required form" referred to is left undefined. Whether it should be set out by statute, regulation or the administrative requirement of the land title office is a decision that should be left to legislative counsel, in consultation with the Director of Land Titles.

(2) Where a financial charge or judgment is registered against the interest of a co-owner at the time of his death, the charge or judgment continues to affect the interest as if the co-owner had, immediately before his death, severed his interest under subsection (1)(a) and then conveyed it,

(a) if there is only one surviving co-owner, to that co-owner, or

(b) if there is more than one surviving co-owner, to all those co-owners as joint tenants, in proportion to their existing interests

subject to the financial charge or judgment.

When a joint tenant dies, surviving joint tenants become entitled to his interest in land by operation of rights or survivorship.

Currently, when that occurs, a third party loses whatever interest he has in the deceased joint tenant's land, unless the third party's interest is effective against all of the joint tenants.

Section 41(2) provides that a financial charge in favour of a third party will be enforceable against a joint tenant's interest even after his death.

This is accomplished by providing for a notional severance of the deceased's interest and a conveyance to those who are to receive it.

"Financial charge' is defined in section 36.

(3) A co-owner may disclaim rights of survivorship.

Third party interests attaching to a right of survivorship may cancel its benefit, in which case the surviving joint tenant(s) may not wish to accept it.

(4) Where all surviving co-owners disclaim under subsection (3), the disclaimer or disclaimers shall take effect as if the deceased co-owner had, immediately before his death, severed his interest.

If none of the surviving co-owners wish to accept the deceased's interest, it remains part of his estate as if he had held it as a tenant in common before his death.

(5) Where at least one, but not all, of two or more surviving co-owners disclaims under subsection (3), the disclaimer or disclaimers shall take effect as if the deceased co-owner had, immediately before his death, severed his interest under subsection (1)(a) and then conveyed it

(a) if there is only one surviving co-owner who did not disclaim, to that co-owner, or

(b) if there is more than one surviving co-owner who did not disclaim, to all those co-owners as joint tenants, in proportion to their existing interests.

Disclaimer by a co-owner will not affect the joint tenancy in which surviving co-owners hold their interests. The deceased co-owner's interest is held separately from the interests of surviving joint tenants that they held before the joint tenant's death.

This is accomplished by providing for a notional severance of the deceased's interest and a conveyance to those who elect to receive it.

Election to Require Consent for Severance

42. (1) At the time a joint tenancy is created, or at any time while it subsists, the joint tenants may elect that severance of a joint tenant's interest from the joint tenancy may not occur without the consent of all joint tenants.

Currently, a joint tenant may deal with his interest as he likes, without first having to obtain the consent of the other joint tenants.

(2) An election under this section shall be made by completing and registering a notice in the [required form].

Section 42 allows the joint tenants to elect whether consent for a severance is necessary.

(3) Where the joint tenants do not make an election under this section, a joint tenant may sever his interest from the joint tenancy unilaterally, in accordance with the provisions of this Act.

If such an election is made, a joint tenant may no sever his interest without the consent of all of the joint tenants.

The "required form" referred to is left undefined. Whether it should be set out by statute, regulation or the administrative requirement of the land title office is a decision that should be left to legislative counsel, in consultation with the Director of Land Titles.

See further section 7 of this draft Bill, which provides for amendments to the *Land Title Act* to accommodate a requirement for consent.

Creditors of deceased joint tenant

43. (1) In this section

"claim" includes an obligation covered by a security;

Certain interests acquired by a third party will survive a co-owner's death. Rights of survivorship will be subject to judgments or financial charges in favour of a third party.

"estate" means the estate of a deceased joint tenant;

"security" means a judgment or a financial charge;

"transmitted interest" means the interest that is transmitted to a surviving joint tenant by reason of the death of another joint tenant.

(2) This section applies where

(a) a joint tenant whose interest is subject to a security dies; and

(b) the interests of one or more, but not all, joint tenants are subject to the security.

If the interests of all joint tenants are subject to a creditor's security, the creditor may look at the land or the deceased's estate as he chooses.

Otherwise, the creditor must look first to the deceased joint tenant's estate. See subsection 43(4)

(3) Where a joint tenant dies leaving outstanding two or more competing claims, and

(a) one claim may be enforced against both

(i) the estate, and

(ii) the transmitted interest through the enforcement of a security;

(b) the other claim or claims may be enforced against the estate only; and

(c) the estate is insufficient to satisfy all claims against it

the equitable principles of marshalling apply.

Problems will arise where a deceased joint tenant's estate is insolvent. Section 43(3) resolves these problems by reference to the equitable principle of marshalling.

Section 43(3) defines when marshalling is appropriate. Essentially, it incorporates the approach adopted by courts of equity.

A variation not addressed is where a person has a claim against the transmitted interest but no claim against the estate. It is difficult to imagine situations where that might occur. In any event, it should also be recognized that the draft legislation, for greater certainty, clarifies that marshalling will apply in a particular circumstance. But principles of marshalling are of general application, and may be applied by the courts in the absence of endorsing legislation.

(4) The holder of a security may proceed against the transmitted interest only to the extent that a deficiency arises after his claim is asserted against the estate and subsection (3) has been applied.

Creditors of a deceased joint tenant must first look to his estate for payment.

This policy protects the interests of surviving joint tenants insofar as that is possible.

Account, Contribution, Adjustment and Compensation

At common law, because of the unity of possession, circumstances were limited in which one co-owner was entitled to a remedy against another co-owner respecting an unfair division of profits and expenses associated with the land.

44. (1) On application by a co-owner, the court may

Section 44(1) is based upon section 17 of the Alberta *Law of Property Act*, R.S.A. 1980, c. L8.

(a) direct that an accounting, contribution and adjustment, or any one or more of them, take place in respect of a co-owner's interest, and

(b) order that compensation, if any, be paid between co-owners.

Section 44(1)(a) takes the place of section 13 of the *Property Law Act*, which provides a co-owner with rights of contribution, and part of section 81 of the *Estate Administration Act*, which provides a co-owner with a right to an accounting.

Combining rights of account, contribution, adjustment and compensation ensures that no limitations exist on the court's ability to consider all matters in dispute between co-owners.

(2) The court may consider any relevant matter in making an order under subsection (1) and, without limiting the generality of the foregoing, may consider whether

(a) a co-owner has excluded another co-owner from the land,

Paragraphs (a) - (f) are derived from sections 17(2) of the Alberta *Law Property Act*.

(b) a co-owner has received more than his just share of the rents from the land or profits from the use or cultivation of the land or the removal of its natural resources,

(c) a co-owner has committed waste by an unreasonable use of the land,

(d) a co-owner has made improvements or capital payments that have increased the realizable value of the land,

(e) a co-owner should be compensated for non-capital expenses in respect of the land,

(f) an occupying co-owner claiming non-capital expenses in respect of the land should be required to pay a fair occupation rent,

(g) a co-owner, owing to the default of another co-owner, has been called on to pay and has paid more than his proportionate share of mortgage money, rent, interest, taxes, insurance, repairs, a purchase money installment, a required payment under the *Condominium Act* or under a term or covenant in the instrument of title or a charge on the land, or a payment on a charge where the land may be subject to a forced sale or foreclosure.

Section 44(2)(g) is based on section 13 of the *Property Law Act*. It overlaps, to some extent, the other listed factors.

45. Where an amount is found recoverable under section 44 or section 47, the court may order

(a) that a co-owner has a lien on the interest of another co-owner to secure payment of that amount, and
(b) in default of payment of that amount within 30 days, or such other period as the court may direct, after the date of service of a certified copy of the order on the co-owner, the sale of the co-owner's interest pursuant to the Rules of Court.

Section 45 is based on section 14 of the *Property Law Act*.

Section 44 provides for an accounting, contribution or adjustment in respect of the interests of co-owners.

Section 47 permits a court to order compensation to adjust a physical division of land that does not correspond to the co-owners' interests.

The court may order that payment of money found to be owed by one co-owner to another may be secured by a lien against the debtor co-owner's interest.

The court may also order the sale of the co-owner's property if he does not pay within a required time.

In accordance with current practice, a lien under section 45(a) would be registered against title to the land as a charge.

Partition and sale

46. (1) The following may apply to the court for relief under this section:

(a) a co-owner;
(b) a person who has obtained and registered a judgment against the interest of a debtor who is a co-owner; and
(c) a person who has obtained a financial charge which satisfies the conditions of section 41(2), provided the debt obligation secured by the financial charge is in default.

Section 46 is based on section 15 of the Alberta *Law of Property Act*. It covers virtually all matters addressed by the current *Partition of Property Act*. The economy of drafting is accomplished through three means:

(i) procedural issues are left to be governed by the *Rules of Court*.
(ii) an order for sale is not regarded as an extraordinary remedy, and whether partition of sale is to be ordered is left to the court's discretion.
(iii) matters relating to persons under a disability are left to be governed by the *Infants act*, the *patients Property Act* and the *Rules of Court*.

The reference in section 46(1) to "a person who has obtained and registered a judgment against a debtor who is a co-owner," is intended to implement. Recommendation 12 from *Report on Execution Against Land* (LRC 40, 1978). *See* Appendix C of this Report. Similarly, a person with a financial charge may apply for relief under section 46.

Under section 46(1) (c) the holder of a registered financial charge attaching to the interest of a deceased joint tenant may also apply for partition or sale.

(2) An application to the court for relief under this section brought by a person who

(a) registered a judgment, or

(b) obtained a financial charge

against the interest of a deceased co-owner shall be refused where the judgment or financial charge may be satisfied in full from the deceased's estate pursuant to section 43.

An application under section 46 may not be used to evade the policy of section 43(4), that a claimant must first look to the deceased joint tenant's estate for payment.

(3) Upon hearing an application under subsection (1), the court, unless justice otherwise requires, shall make an order directing

(a) a physical division of all or part of the land between the co-owners,

(b) the sale of all or part of the land and the distribution of the proceeds of the sale, or

(c) the sale of all or part of the interest of one or more of the co-owners to one or more of the other co-owners who are willing to purchase the interest.

Section 46(3)provides that the court has discretion to refuse to make an order for the partition or sale of property.

The is patterned after the current law, where the court may refuse to make such an order if "justice requires such an order not be made."

(4) In making an order under subsection (3)(c) the court shall fix the value of the interest and the terms of the sale.

(5) A sale under subsection (3)(b) or (c) and the distribution of the proceeds of the sale shall be under the direction of the court subject to the Rules of Court.

Compensation

47. If an order for a physical division under section 46 cannot be made in accordance with the co-owner's actual entitlement, the court may order that

(a) the land be divided in portions that do not correspond to the co-owners' actual entitlement; and

(b) compensation be paid in adjustment.

Section 47 provides compensation for partition. This was formerly known as "owelty of partition."

Section 47 would operate as follows:

B and C are co-owners of Blackacre, with equal interests. B applies for a physical partition of Blackacre. A river marks a natural dividing point, but that would give one co-owner a 3/5 share and the other a 2/5 share. Under section 47, the court could order the co-owner who receives the larger share to pay to the other a sum of money to adjust the division.

Stay

48. (1) Notwithstanding section 46, the court shall stay proceedings under this Act with respect to land that is the subject of

(a) an application in the nature of partition or sale under the *Family Relations Act*, or
(b) an order in the nature of partition or sale, while it remains in force, made under the *Family Relations Act*

The court has jurisdiction under the *Family Relations Act* to order the partition or sale of property owned by the spouse.

Section 55(1) of the *Family Relations Act* provides that where there is a conflict, Part III of the *Family Relations Act* prevails over the *Partition of Property Act*.

(2) Notwithstanding section 46, the court may adjourn proceedings under this Act for a reasonable period of time in order that a co-owner may bring an application in the nature of partition or sale under the *Family Relations Act*.

The court may adjourn proceedings until an application under the *Family Relations Act* can be commenced.

Subdivision

49. An order for the partition of land into 2 or more parcels

(a) may be made only if the approval of the approving officer under the *Land Title Act* is first obtained of a subdivision plan for the partition of the land, and
(b) shall be subject to compliance with the *Land Title Act*.

Section 49 is based on section 17 of the *Partition of Property Act*.

Amendments to other Acts

4. Section 3 of the Law and Equity Act is amended by adding the following Imperial legislation:

31 Hen. VIII, c. 1;
32 Hen. VIII, c. 32;
1 and 32 Vict., c. 40;
4 and 5 Anne cap. 16, s. 27.

This legislation is replaced by the draft Act. Section 3 of the *Law and Equity Act* provides that legislation set out in that section is not in force in the Province.

5. The following are repealed:

Partition of Property Act, R.S.B.C. 1979, c. 311;

Sections 11, 12, 13, 14 and 18 (3) of the *Property Law Act*

These sections are consolidated in the new draft legislation.

6. Section 81 of the *Estate Administration Act*, R.S.B.C. 1979, c. 114, is amended by deleting the words "... and also by one joint tenant or tenant in common, his executor or administrator, against the other as bailiff for receiving more than comes to his just share or proportion and against the executor or administrator of the joint tenant or tenant in common."

The portion deleted from section 81 will no longer be necessary once this draft legislation is enacted.

7. The *Land Title Act*, R.S.B.C. 1979, c. 219, is amended by repealing section 174 and adding the following:

These amendments to the *Land Title Act* are designed to provide a procedure for recognizing and recording an election by joint tenants under section 42.

Registration of joint tenants

174. (1) Where, on the registration of the title to land under an instrument or document, 2 or more persons are joint tenants, the registrar shall enter in the register, following the names, addresses and occupations of those persons, the words "joint tenants".

(2) Where joint tenants have elected under section 42(1) of the *Property Law Act* that severance of a joint tenant's interest from the joint tenancy may not occur without the consent of all the joint tenants, the registrar shall enter in the register, following the names of the joint tenants and the words "joint tenants", the words "severance only with consent."

(3) Where title to land is registered in the names of 2 or more persons as "joint tenants, severance only with consent," an application to register an instrument or form referred to in section 41(1)(a) of the *Property Law Act* shall not be accepted unless it is accompanied by the written consent of all of the joint tenants in [the required form].

The "required form" referred to is left undefined. Whether it should be set out by statute, regulation or the administrative requirement of the land title office is a decision that should be left to legislative counsel, in consultation with the Director of Land Titles.

(4) On the completion of a registration

(a) of an instrument or form referred to in section 41(1)(a) of the *Property Law Act*; and

(b) for which the consent of all joint tenants is not required

the registrar shall forthwith notify the other joint tenants by registered mail of the registration.

When an instrument or form is registered that severs a joint tenant's interest from the joint tenancy, the registrar must notify the other join tenants of the registration.

The requirement for notice by "registered mail" on the "completion of a registration" is patterned after the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s.81.

CHAPTER VI CONCLUSION

A. Summary

Co -ownership of land presents a number of theoretical and practical problems. For the most part, the current law performs well enough, but there are some circumstances where it appears to be out of step with modern needs. Moreover, it is a matter of concern when results are dictated by theory without regard to practical consequences.

Currently, persons wishing to own land in joint tenancy must have equal interests. This is consistent with the legal theory underlying the nature of a joint tenancy. And yet, the joint tenancy is seldom used except by spouses, who should be free to determine for themselves what their interests in property should be. The Commission, consequently, has recommended that a joint tenancy in land may exist even where the co-owners do not have equal interests.

Another concern relates to when a co-owner may sever his interest from the joint tenancy. The current law permits severance to occur in a number of circumstances, some of which may be concealed from the other joint tenants. The principles relating to severance are also based upon legal theory which was formulated centuries ago and which, from a policy perspective, is often inconsistent with the goals of land title registration. Legal theory in this context dictates results which seldom coincide with the interests of any of the various parties who may be affected by the severance. For these reasons, the Commission has recommended a modernization of rights of survivorship.

Other aspects of co-ownership are addressed in legislation enacted in British Columbia at various times over the past hundred years. Some of this legislation is based on English legislation which itself is centuries out of date. Rights and remedies available to co-owners, such as partition and sale of land, are overdue for re-consideration. The Commission has, therefore, recommended the enactment of modern legislation to restate many aspects of the law of co-ownership and to give effect to the recommendations relating to joint tenancies. This draft legislation is to be found in Chapter V of this Report.

B. Acknowledgments

We wish to thank all those who took the time to consider and respond to the Working Paper which preceded this Report. The comments we received were thought provoking, and assisted us greatly in the preparation of this Report.

We also wish to express our thanks to Thomas G. Anderson, Counsel to the Commission, who, subject to direction from the Commission, prepared the Working Paper and this Report.

APPENDIX A

PARTITION OF PROPERTY ACT

R.S.B.C. 1979, CHAPTER 311

PARTITION OF PROPERTY

[Act administered by the Ministry of Attorney General]

Interpretation

1. In this Act

“court" means the Supreme Court;
“general orders” includes Rules of Court-,
"judgment" includes decree or order;
"land" includes special timber licences, and all estates and interests in them;
“petitioner” or "plaintiff" includes all parties petitioning under this Act;
"defendants" includes all parties, or those made parties, to the proceedings under this Act, other than the plaintiffs or petitioners.

Parties may be compelled to make partition or sale

2. All joint tenants, tenants in common, coparceners, mortgagees or other creditors having liens on, and all parties interested in, to, or out of, any land may be compelled to make or stiffer partition or sale of the land, or any part of it as provided in this Act, and the partition may be had whether the estate is legal or equitable or equitable only; except that in respect of special timber licences no partition shall be made of a single licence, and any odd licences not possible to assign by partition to any of the parties interested shall be ordered to be sold.

Form of proceeding and its incidents

3. For the purposes of this Act, a proceeding for partition includes a proceeding for sale and distribution of the proceeds. In a proceeding for partition it is sufficient to claim a sale and distribution of proceeds, and it is not necessary to claim a partition.

Parties to proceeding and persons entitled to notice of decree

4. Any person who, if this Act had not been passed, might have maintained a proceeding for partition may maintain such a proceeding against any one or more of the parties interested without serving the other or others, if any, of those parties, and it is not competent to any defendant in the proceeding to object for want of parties. At the hearing of the proceeding the court may direct inquiries as to the nature of the property, the persons interested in it and other matters it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the proceeding shall be served with a notice of the judgment on the hearing, and after the notice are bound by the proceedings as if they had been originally parties to the proceeding, and all those persons may have liberty to attend the proceedings, and may, within a time limited by general orders, apply to the court to add to the judgment.

Proceedings where parties cannot be served

5. Where in a proceeding for partition it appears to the court that notice of judgment on the hearing of the proceeding cannot be served on all the persons on whom that notice is required by this Act to be served, or cannot be so served without expense disproportionate to the value of the property to which the proceeding relates, the court may, if it thinks fit, on the request of any of the parties interested in the property and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and instead may direct advertisements to be published at the times and in the

manner the court thinks fit, calling on all persons claiming to he interested in the property who have not been so served to come in and establish their respective claims before the court within a limited time. After the expiration of the limited time, all persons who have not come in and established claims, whether they are in or out of the jurisdiction of the court, including persons under any disability, are bound by the proceedings as if on the day of the date of the order dispensing with service they had been served with notice of the judgment service of which is dispensed with, and thereon the powers of the court under the *Trustee Act* extend to their interests in the property to which the proceeding relates as if they had been parties; and the court may then, if it thinks fit, direct a sale of the property, and give all necessary or proper consequential directions.

Sale of property where majority requests it

6. In a proceeding for partition where, if this Act had not been might have been given, then if the party ly or collectively, to the extent of 1/2 or relates should request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property ace ir ly, and give all necessary or proper consequential directions.

Order sale in place of partition

7. In a proceeding for partition where, if this Act had not been passed, a judgment for partition might have been given, then if it appears to the court that by reason of the nature of the property to which the proceeding relates, or of the number of parties interested or presumptively interested in it, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial the parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

Purchase of share of person applying for sale

8. In a proceeding for partition where, if this Act had not been passed, a judgment for partition might have been given, then if any party interested in the property to which the proceeding relates requests the court to direct the sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property or some of them undertake to purchase the share of a party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions. In case of the undertaking being given, the court may order a valuation of the share of the party requesting a sale in the manner the court thinks fit, and may give all necessary or proper consequential directions.

Persons under disability

9. In a proceeding for partition a request for sale may be made or an undertaking to purchase given on the part of an infant, person of unsound mind or person under any other disability, by the next friend, guardian, committee, if so authorized by the committeeship order, or other person authorized to act on behalf of she person under the disability; but the court is not bound to comply with the request or undertaking on the part of an infant unless it appears that the sale or purchase will be for his benefit.

Court may allow parties interested to bid

10. On any sale under this Act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on the terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part of it, instead of paying the same, or as to any other matters, as to the court seems reasonable.

Money arising from sale subject to court order

11. All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rents or payments reserved, on any lease of earth, coal, stone or minerals may, if the court thinks fit, be paid to any trustees of whom it approves, or otherwise shall be paid into the chartered bank as the court directs, to the account of the registrar of the court in the matter of this Act. In either case the money shall be applied, as the

court directs, to some one or more of the following purposes, namely:

(a) the discharge or redemption of any encumbrance affecting the property in respect of which the money was paid, or affecting any other property, subject to the same uses or trusts;

(b) the purchase of other property to be settled in the same manner as the property in respect of which the money was paid; or

(c) the payment to any person becoming absolutely entitled.

Application of money without court order

12. The application of the money in the aforesaid manner may, if the court so directs, be made by the trustees, if any, without application to the court, or otherwise on an order of the court, on the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the

Investment of money

13. Until the money can be applied as aforesaid, it shall be invested as the court thinks fit. The interest and dividends of the investment shall be aid to the persons who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

Interests of persons where service of notice dispensed with

14. When an order is made under this Act dispensing with the service of notice on any person or classes of persons, and property is sold by order or the court, the following provisions have effect:

(a) the proceeds of the sale shall be paid into court, to await the further order of the court;

(b) the court shall, by order, fix a time at the expiration of which the proceeds will be distributed, and may by further order, extend that time;

(c) the court shall direct notices to be given by advertisements or otherwise, as it thinks best adapted for notifying, to any persons on whom service is dispensed with who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution and the time within which a claim to participate in the proceeds must be made;

(d) if at the expiration of the time fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons;

(e) at the expiration of the time fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in the manner as appears to the court to be most in accordance with the rights or the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with the reservations, if any, the court sees fit in favour of any other persons, whether ascertained or not, who may appear from the evidence before the court to have any *prima facie* rights which ought to be so provided for, although those rights may not have been fully established, but to the exclusion of all other persons, and thereon all other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution of them; but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share or the excluded person.

Abatement made in favour of parties previously excluded

15. Where in a proceeding for partition 2 or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent, if any, to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled to in the proceeds of the previous sale if his claim to it had been established in due time.

Costs

16. In a proceeding for partition the court may make the order it thinks just respecting costs up to the time of hearing.

Application of Land Title Act

17. An order for the partition of land into 2 or more parcels is deemed to effect a subdivision as defined in the *Land Title Act* and shall contain an express declaration that the order is subject to compliance with that legislation.

APPENDIX B

Extract from *Report on Execution* Against *Land*
(LRC 40, 1978)

A. Joint Tenancies

1. SURVIVORSHIP

A basic feature of our land law is a form of ownership known as joint tenancy. This arises when property is conveyed or transmitted to two or more persons as "joint tenants"[1] giving them identical and undivided interests in that property. The most important incident of joint tenancy is the right of survivorship - the rule that when one joint tenant dies his interest in the property is transmitted to the surviving joint tenant(s). Thus, if land is owned by A and B as joint tenants, upon A's death B becomes the sole owner of the land and A's share does not become part of his estate for distribution to his heirs.

But a joint tenancy can be "severed" or terminated. This may happen when a party sells or encumbers his share or does some other act which is inconsistent with a joint tenancy. When that occurs the tenancy becomes one known as a "tenancy in common." A tenancy in common also involves ownership of an undivided interest by two or more persons but the right of survivorship does not exist in relation to it. Thus, in our previous example, if A and B owned the land as tenants in common, upon A's death his interest in the land would become part of his estate and as such liable for his debts and available for distribution to his heirs.

What is the legal position when a creditor obtains a judgment against a joint tenant and registers that judgment under the *Execution Act?* This question was considered by the British Columbia Court of Appeal in *Re Young.*[2] In that case land was jointly owned by a husband and wife. A creditor of the husband obtained a judgment against him which was duly registered. Four months later the husband died. No further proceedings were taken (apart from periodic renewals of the judgment) by the judgment creditor and three years later the wife died. The Public Trustee then applied for registration, as administrator of the wife's estate, with respect to the property. The Registrar of Titles then lodged a caveat[3] forbidding registration. 'the issue before the court was whether the Registrar's caveat should be discharged and that issue turned on the legal effect of the registered judgment.

The judgment creditor argued that the registration of the judgment had the effect of severing the joint tenancy or, alternatively, putting the right of survivorship into suspension.[4] A majority of the Court of Appeal held that it did neither. A view was adopted that:[5]

> The trend of the authorities is that a mere lien or charge on the land, either by a co-tenant or by operation of law, is not sufficient to sever the joint tenancy; there must be something that amounts to an alienation of title.[6]

This led the majority to conclude that the registration of the judgment did not sever the joint tenancy.

The second argument advanced by the judgment creditor - that the right of survivorship was "suspended"-was raised in the earlier British Columbia Supreme Court decision of *Re Penn.*[7] It is difficult to see its basis. On what legal theory may rights of

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1. Normally the words "joint tenants' must appear in the instrument creating or conveying the interest. Unless a contrary intention appears in an instrument a conveyance to co-owners creates a tenancy in common. *See Land Registry Act*, s. 21.

2. (1968) 70 D.L.R. 594.

3. Under s. 212 of the *Land Registry Act*.

4. *Supra* n. 2 at 601.

5. *Ibid*. at 602.

6. *Per* Maclean, J.A. Quoting Widdifield, Co. Ct. J. in *Power* v. *Grace*, [1932] 1 D.L.R. 801.

7. (1951) 4 W.W.R. 452.

survivorship become "suspended" and "unsuspended" as circumstances change? Maclean J. A. examined the relevant legislation and concluded:[8]

> In my view the *Land Registry Act* and the *Execution Act* do not provide a basis for a finding that the rights of the surviving joint tenant under the *jus accrescendi* [right of survivorship] are so modified or abrogated that he must take subject to a judgment registered under s. 35 of the *Execution Act* and on which no further proceedings have been taken.
>
> I think that if I were to hold that the mere registration of a judgment under s. 35 of the *Execution Act* constituted an encroachment of the *jus accrescendi, I* would be straying into the legislative field.

THUS it was held that the mere registration of a judgment neither severs a joint tenancy nor suspends the right of survivorship and the interest of a surviving tenant will defeat that of a judgment creditor.

When, if ever, will the rights of the creditor crystallize into an interest which will survive the death of his debtor who is a joint owner of land, if registration is not enough? At the time proceedings are commenced under section 38? At the time of *lis pendens* issued under section 44 is registered? At the time an order for sale is made? At the time the land is sold? *Re Young* is singularly unhelpful on this point. The only reference to the issue is in the judgment of Maclean, J. A.: [9]

> Appellant admits that if the execution procedure under ss. 33 to 59 of the *Execution Act* bad been carried to a point where an order for sale was made, the *jus accrescendi* would have been extinguished. It is not necessary to make a finding on this point here.

Are the policies embodied in *Re Young* ones which should be continued?

Professor Dunlop suggests not:[10]

> This decision may be sound law, but it seems unjust when considered on the level of policy. In any case other than joint tenancy, the *Execution Act* permits a creditor to file a judgment in the land registry office and to take no further proceedings until the debtor either transfers his land or dies. In either case, assuming that the judgment his been properly filed and renewed, it attaches to the land in the hands of the purchaser or the executor or administrator. If the land in *Re Young* bad been held in tenancy in common, and the deceased debtor had left his interest in the land to the other tenant, the judgment would have travelled with the land ... As a matter of policy, it seems difficult to explain why the judgment creditor should be completely defeated in the situation where the debtor joint tenant predeceases his co-tenant. The creditor has taken the necessary steps to create a charge against the land of his judgment debtor but, in the case of land held in joint tenancy, the effectiveness of his charge turns on the complexities of the law governing severance of joint tenancy and on the accident of which joint tenant dies first.

Davey, C.J.B.C., the dissenting member of the Court of Appeal in *Re Young*, also questioned the policy of the majority view:[11]

> I must say I find ... [the severance of a joint tenancy by registration of a judgment] satisfactory, because it makes answerable for a judgment the judgment debtor's interest in a joint tenancy over which he had in himself complete power of disposal in his lifetime, and avoids one of the highly technical consequences of a joint tenancy, as contrasted with a tenancy in common, that has little to commend it in the light of modern needs.

The legal position created by *Re Young* is such that a creditor who wishes to fully protect himself and preserve his position with respect to jointly owned land cannot rely on registration only. He must take further steps. How far he must go is uncertain, but at the very least he must commence proceedings under section 38 whether he wishes to do so or not. In Chapter Ill it was noted that the *Execution Act,* as it applies to land, encourages voluntary payments by the debtor and we approve of that effect. To the extent that *Re Young* encourages the unnecessary commencement of enforcement proceedings it is counter-productive.

But what is the proper approach? Should the registration of a judgment sever a joint tenancy? The dangers of this approach

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8. *Supra* n. 2 at 604.

9. *Ibid*. at 603.

10. Dunlop, "Execution Against Real Property in British Columbia", (1973) 8 U.B.C. L. Rev. 246.

11. *Supra*, n. 2 at 599.

are illustrated by *Re Penn*[12] (now overruled by *Re Young).* In that case a husband and wife were joint owners of land, and at the time of the wife's death a judgment had been registered against her. After her death the surviving husband discharged the judgment and filed the discharge in the Land Registry Office. He then applied to have the land registered in his name. The refusal of that application was upheld by the Supreme Court of British Columbia on the ground that there was no joint tenancy in existence at the time of the wife's death and her interest became part of her estate. The Court left open the possibility that the joint tenancy might have revived had the judgment been discharged during the wife's lifetime.[13]

It is difficult to see why the act of registration by a creditor should create rights in favour of third parties (e.g. the debtor's heirs) as against the surviving joint tenant; but that would be the effect of a rule that registration of a judgment severs or suspends a joint tenancy. The preferable rule would seem to be that registration of a judgment should not sever a joint tenancy, but if a joint owner, against whom a judgment has been registered, dies, the judgment should continue to charge the debtor's interest in the hands of the surviving owner.

But this raises a number of other problems. The suggested rule may leave the surviving owner in the unhappy position of being unable to ascertain the value of what it is he has received. It may be important that he be able to do so for a number of reasons. If it is clear that the survivor is the only person who may be called upon to satisfy the judgment, its value might be discounted from the value of the joint interest transmitted. But if the deceased has other assets, the judgment creditor may make a claim against the estate to satisfy his judgment in whole or in part. This contingency makes the value of the interest transmitted to the survivor uncertain.

The possibility of a claim against the estate may raise other problems.

Consider the following situation.

> A and B (husband and wife) are joint owners of land worth $40,000. C obtains a judgment for $10,000 against A which is registered. A dies leaving an estate (of assets other than his interest in the land) worth $10,000. A's personal representative is B. A had one other creditor, E, whose debt is for $10,000. E's debt is unsecured and he has not taken judgment on it.

The following results are possible:

1. C makes no claim in the estate but looks to the land to satisfy his judgment. E gets the full estate of $10,000 to satisfy his claim. C gets paid $10,000, either directly by B or from the proceeds of a sale of A's interest in the land.

or

2. C claims in the estate and is paid $5,000. E also receives $5,000. C then looks to the land for the remaining $5,000 and it is sold (or the remaining $5,000 is paid directly to C by B) to discharge the judgment (and E gets no further payment).

If the second result occurs E will be understandably aggrieved. E will have lost $5,000 and B will have obtained a corresponding benefit.

We see a possible solution to these difficulties in the equitable doctrine of marshalling. This is described in Hanbury as follows:[14]

> The doctrine of marshalling is a principle of equity by virtue of which a secured creditor, B, can require a prior creditor, A, to take satisfaction out of assets upon which creditor B has no lien; thus leaving B's security available for him. "If a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien."
>
> For example: if A mortgages Blackacre and Whiteacre to B; then mortgages Blackacre to C; C can require B to satisfy himself in the first instance out of Whiteacre.

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12. *Supra* n. 7.

13. *Ibid.* at 454.

14. Maudsley, *Hanbury's Modern Equity* 558 (9th ed.; 1969).

The doctrine of marshalling has been a feature of the law concerning the administration of estates for many years.[15]

In the context under discussion, the application of the doctrine of marshalling would require that a claim of a registered judgment creditor against a debtor's estate should be subordinated to the claims of ordinary unsecured creditors except to the extent that a deficiency exists (or is likely to arise) such that the proceeds of a sale of the land are (or will be) insufficient to satisfy the judgment.

If, on the other hand, there is sufficient money to satisfy both the judgment debt (in whole or in part) and all ordinary creditors, it is our view that the judgment creditor should look first to the estate and proceed against the land (or call upon the surviving joint owner for payment) only if the estate is unable to satisfy his claim in full.[16] A clear rule along the lines described above would be fair to ordinary creditors and would assist in quantifying the value of the joint interest transmitted to the surviving owner.

The Commission recommends that:

9. *If a judgment is registered against a debtor who has an interest, as a joint tenant, in land, the joint tenancy is not severed but if the debtor dies and the judgment remains unsatisfied then the judgment continues to charge the interest of the debtor in the hands of the surviving owner(s); and*

(a) *if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is greater than the claims of ALL creditors, then*

(i) *a registered judgment creditor should look first to the estate of the debtor for satisfaction of his judgment, but his claim is subordinated to the claims of ordinary creditors who have not registered a judgment against the debtor's interest in land, and*

(ii) *if the debtor's estate, after satisfying the claims of ordinary creditors, is insufficient to satisfy a registered judgment the judgment creditor should then be entitled to look to the debtor's interest in land in the hands of the surviving joint owner; and*

(b) *if the total of the value of the debtor's estate which is available for distribution among his creditors plus the value of the interest in land transmitted to the surviving joint tenant is less than the claims of ALL creditors, then*

(i) *a registered judgment creditor may share rateably in the estate, but his claim therein is reduced by the value of the debtor's land which is available to satisfy his claim, and*

(ii) *a registered judgment creditor is entitled to look to the debtor's interest in land in the hands of a surviving joint tenant to satisfy the deficiency.*

(c) *notwithstanding (a) and (b) if, at the time of the debtor's death, the judgment creditor had commenced proceedings under section 38 of the* Execution Act *to enforce the change created by registration of his judgment he may continue those proceedings.*

10. *A joint tenancy be severed by a sale of a joint owner's interest in land pursuant to the* Execution Act.

This recommendation reflects a proposal that was set out in our working paper. The proposal has since been tentatively

15. *See* Williams and Mortimer, Executors, Administrators and probate 791 *et seq.*, (Williams, 15th ed.; Mortimer, 3rd ed.).

16. The effect of this approach would be to place the surviving joint tenant, vis-a-vis the registered judgment creditor, in a legal position similar to that of a specific devisee of land.

adopted by the Manitoba Law Reform Commission in their working paper[17] on Exemptions under *The Judgments Act.*[18]

2. PARTITION AND SALE

A thread which runs throughout the law of execution is the general rule that the sheriff cannot seize or sell a better title to, or greater interest in, an asset than the judgment debtor owns.[19] If that asset is an interest in land which is co-owned by the debtor, either as a joint tenant or as a tenant in common, that undivided interest is all that the sheriff can sell under the *Execution Act.* But there is not a ready market for such interests in land. A buyer will usually want the whole. Thus the price obtained on a forced sale of a co-owner's interest in land is unlikely to reflect its true value.

Legislation exists in British Columbia whereby a co-owner can apply to a court to have property divided among the owners, or enforce a sale of the whole and have the proceeds divided. Section 3 of the *Partition Act*[20] provides:

> All joint tenants, tenants in common, coparceners, mortgagees, or other creditors having liens on, and all parties whosoever interested in, to, or out of, any lands may be compelled to make or suffer partition or sale of the said lands, or any part or parts thereof, as hereinafter mentioned and provided, and the partition may be had whether the estate is legal or equitable or equitable only.

The reference in section 3 of the Act to "creditors having liens on ... lands" makes it clear that a registered judgment creditor is bound by proceedings for partition or sale of land in which his debtor has an interest. Does this burden carry a corresponding benefit: status to apply for partition or sale?

In what appears to be the only reported British Columbia case on this point, *Morrow* v. *Eakin,* a registered judgment creditor applied under the *Partition Act* for the partition of land owned jointly by the debtor and his wife, and for a sale of the debtor's portion. Whittaker, J. regarded section 5 as defining standing to apply for partition. The opening words of section 5 provide:

> Any person who, if this Act had not been passed, might have maintained an action for partition may maintain such an action ...

He considered standing at common law and under earlier legislation and concluded that the judgment creditor was not entitled to seek partition.

If Morrow v. *Eakin* represents the current legal position in British Columbia, is it sound policy? Whittaker, J. sought comfort in the fact that a purchaser from the sheriff of the debtor's interest would have standing to apply for partition or sale. But it will be a rare purchaser that is willing to buy a lawsuit under the *Partition Act.* The effect of *Morrow* v. *Eakin* is artificially to depress the price which might be obtained at a sheriff's sale of the debtor's land. This may harm both the debtor and the creditor and, in the long run, does not assist the co-owner because a purchaser may be found, albeit at a low price, who will buy the debtor's interest and proceed under the *Partition Act.*

It is our conclusion that a creditor who has obtained and registered a judgment against a co-owner of an interest in land should have standing to apply for an order for partition or sale of the land. It is also our belief that an execution creditor should be able to apply for such an order in the context of the execution proceedings and a separate application under the *Partition Act* should not be necessary.

The Commission recommends that:

11. A provision be added to the Execution Act *which allows a creditor, who has obtained and registered a judgment against a debtor who is a co-owner of an interest in land, to apply for an order for partition or sale of the land or both.*

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17. Law Reform Commission of Manitoba, Working Paper on The Enforcement of Judgments: Part II: Exemptions under "The Judgments Act" 19 (January 1978).

18. C.C.S.M. c. 510.

19. This is one particular aspect of the *nemo dat quod non habet* rule.

20. R.S.B.C. 1960 c. 276.

12. *The* Partition Act *should apply* mutatus mutandis *to such an application as if an order had been sought under that Act by the debtor.*

13. *An application for partition or sale may be made in an application for enforcement under section 38.*

APPENDIX C

Submissions Received on the Working Paper

A. Introduction

Most of the comment received on the Working Paper favoured the position adopted by the Commission and, for the most part, the recommendations made in this Report correspond to proposals for reform set out in the Working Paper. In several instances, we have been convinced by our correspondents to adopt a position that differed from that suggested in the Working Paper, and the reasons for this are set out in the Report.

A few of our correspondents were opposed to reform of the joint tenancy, or particular aspects of the joint tenancy. Since the positions adopted by these correspondents were very much in the minority, they have not been referred to at length in the Report.

Nevertheless, in order to ensure that the concerns of our correspondents are recorded, we have collected them in this Appendix. This Appendix also serves another purpose, since it permits us to place on the record our reasons for not adopting the various positions urged by these correspondents.

B. Comment

In some submissions it was argued that there is no need to accommodate persons who wish to co-own land in unequal interests as well as have rights of survivorship. It was suggested by one correspondent, for example, that co-ownership of land by persons with unequal interests was an arrangement which would be useful only in matters of business, where a joint tenancy is normally inappropriate. Since these situations can be accommodated by the tenancy in common, there is no need to alter the joint tenancy.

These correspondents would seem to have overlooked, or given little weight to, the need for spouses to clearly record their entitlement to property in order to resolve that issue before it becomes contentious in a later dispute between the spouses or one spouse and a third party. Disputes over property are not restricted to business arrangements, as is clear from the amount of litigation dealing with family property that takes place in British Columbia. Moreover, a creditor seeking to enforce a judgment against a debtor does not look only to the debtor's business assets, but will also look to the debtor's personal property. Recording title to property to reflect actual ownership will protect the property of the spouse who is not subject to the judgment.

It is fair to turn the question around and ask why it is necessary to restrict rights of survivorship so that only spouses who have equal interests in property may enjoy them. In the Working Paper, we suggested that there was no practical reason for this. One correspondent made the following comments in support of the current law:

> To abolish the need for unity of interest in joint tenancy might well reverse the small advances made in the area of property rights of women during cohabitation. Using the direct monetary contribution at the outset as the yardstick for sharing diminishes the impact of the indirect contribution made by a party. The creation of joint tenancy alleviates the need to prove the elements of a constructive trust to establish a proprietary share; in this respect it is a device which still serves a useful purpose. It is ironic that for the sake of convenience, just one century after the *Married Women's Property Act* gave married women in this province some property rights, in the name of reform we should diminish some of those gains by eviscerating an important characteristic of joint tenancy.

This submission seems to be based on the view that allowing spouses to agree for themselves on their respective interests in property is inconsistent with the regime of family property adopted in British Columbia.

It is difficult to see how amending the joint tenancy to allow persons with unequal interests in land to use that form of co-ownership would deprive women of property rights. Spouses may currently place title in one spouse's name alone, or co-own land in whatever interests they desire as tenants in common. These freedoms have not stood in the way of ensuring a fair division

of family property on marriage breakdown.[1] It is unlikely that altering the joint tenancy would have that consequence.

In one submission it was suggested that, if there is a need to allow persons with unequal interests to co-own land with rights of survivorship, there is a danger in doing so by revising the joint tenancy:

> Joint tenancy is widely used today, as it always has been, for good or ill. It is found in relation to bank accounts and other personalty, and though with regard to land it is usual to find it in the setting of a fee simple or absolute interests, I have seen it in connection with leasehold interests and life estates. It also operates both at law and in equity. I am concerned as to the ripple of doubts this ... change is going to set up, and you will appreciate that, where the proposed legislation applies, the doubts cannot be answered by the practitioner going back to the nature of joint tenancy, because the legislation itself is a repudiation of the foundations of the theory of joint tenancy.
>
> Frankly I do not see the justification for this disturbance to the common law, and I would have none of it.

Our correspondent suggested that these potential problems could be overcome by creating a third form of co-ownership, which would be a kind of tenancy in common with rights of survivorship. This would leave the joint tenancy intact, while accommodating persons with unequal interests who wished to co-own property with rights of survivorship.

We doubt the wisdom of multiplying the kinds of co-ownership available in British Columbia. Moreover, we are unconvinced that problems will arise with a modified joint tenancy.

The object of revising legislation would be to graft changes onto the existing law. This should not present an opportunity for a court to decide to revise rights of survivorship. While such an argument might be raised, we have faith in the good sense of the courts. There is little reason to fear that a judge, faced with legislation allowing a joint tenancy to exist between persons with unequal interests, would be tempted to revise rights of survivorship for that reason. It would involve a finding that rights of survivorship operate in one way, if the joint tenants state what interests they have, and in another if they elect not to do so.

In the Working Paper, it was proposed that the following section (to be enacted as part of the *Property Law Act*) would allow persons holding unequal interests to co-own land in joint tenancy:

> 39. Persons having unequal interest in land may co-own the land as joint tenants.

One submission suggested that this formulation might be revised:

> The proposed legislation on these matters also causes us some problems. You define "interest" to mean " a legal or equitable interest in land"... and then in section 39 you recommend that "persons having unequal interests in land may co-own the land as joint tenants"... [I]t appears to mean that joint tenancies can now be created where one party holds a legal interest and the other an equitable interest in land. It might be clearer if "interest" was 'defined' to "relate to a legal or equitable interest in land" and if section 39 were to include a reference to shares in the same interests in land.

In our view, there is no need to revise section 39 to prevent the co-ownership of legal and equitable interests. The use of the term "unequal" connotes quantity, not interests differing in their natures. Moreover, it is not clear to us that it is at all probable persons will attempt to create a joint tenancy between a legal and an equitable interest (or, for that matter, other dissimilar interests in property) by relying on the recommended legislation.

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1. Under the *Family Relations Act*, R.S.B.C. 1979, c. 121, when certain events signifying marriage breakdown occur, each spouse is entitled to a ½ share in family property as a tenant in common. Entitlement to property, however, is subject both to the spouses' agreement, and the discretion of the court: *see,* generally, Anderson & Karton, *Family Property,* (1985) a Stody Paper prepared for the Law Reform Commission of British Columbia.