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EDITOR'S NOTE: This, in substance, is the paper presented by Mr. Popham before the session on Probate, Trust and Real Estate law of the Colorado Bar Association at its convention in Colorado Springs, October 13-15, 1949.

An estate in joint tenancy is one held by two or more persons jointly with equal rights to share in its enjoyment during their lives, and having, as its distinguishing feature, the right of survivorship by virtue of which the entire estate upon the death of any of the tenants goes to the survivor, and so on to the last survivor, who take an estate of inheritance.

To constitute joint tenancy, there must be four unities: (a) unity of interest, (b) unity of title, (c) unity of time, and (d) unity of possession. If anyone of these elements is lacking, the estate will not be in joint tenancy. A unity of interest requires that the shares of the joint tenants, whatever be their number, shall be equal and that the duration of their estate shall be the same. A joint tenancy may exist in personal property as well as real property.[1]

All natural persons may be seized or possessed of an estate in joint tenancy. Since the relationships do not rest on contract, it is clear that disability of a person is no impediment to the formation of a joint tenancy. A natural person cannot be a joint tenant with a corporation, nor can two or more corporations hold as joint tenants. A husband and wife may also be joint tenants.[2]

Joint tenancies may be in fee, for life, for years, or in remainder. When it is desired to hold stocks and securities in joint tenancy in the names of two or more persons, the following language should appear after their names: "As joint tenants and not as tenants in common" or "As joint tenants with right of survivorship and not as tenants in common."[3] The same language should be used where a joint tenancy of securities or stock is created in a will.

Mortgages

A joint tenant may mortgage his interest and his interest may be levied upon and sold in satisfaction of debts. In *Wilkins v. Young*, 41 N. E. 68, 69, 70 (Ind.), it is said: "Any interest in real estate which a person may sell and convey he may also mortgage. Jones, Mortg. Sec. 136. We are

[1] Eisenhardt v. Lowell, 105 Colo. 417, 420. 3 C.S.A. 92-17 *et seq.*
[2] Wilken v. Young, 41 N. E. 68, 69 (Ind.).
[3] 3 C.S.A. 92-17.

therefore of the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common, and to the extent of the mortgage lien the right of the survivor will be destroyed or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion."

The question arises, does the giving of a mortgage or a deed of trust to secure an indebtedness by one joint tenant on his interest in the property affect a severance of the joint tenancy? It seems that in those states where a mortgage or deed of trust operates to convey the title in a similar manner as a deed, such instrument terminates the joint tenancy without further action.[4]

Mortgages and trust deeds in Colorado are liens and not conveyances as stated in 2 C.S.A. 40-118 as follows:

> "Mortgages, trust deeds or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property, shall not be deemed a conveyance, regardless of its terms, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien."

Tolland Company v. First State Bank, 95 Colo. 321, follows the statute in holding that mortgages and deeds of trust are liens and not conveyances. There is no decision in Colorado passing upon the question as to whether a mortgage or deed of trust would terminate a joint tenancy. In view of the fact that by statute and by decision of our Supreme Court mortgages and deeds of trust are not classed as conveyances but as liens, it would seem that they would not affect a severance of a joint tenancy until after foreclosure sale.

Judgment and Execution Liens

In *Ziegler v. Bonnell*, 126 P. (2d) 118 (Calif.), we find the rule as to judgment liens stated on page 120 of the opinion:

> "* * * When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien." [4a]

In *Van Antwerp v. Horan*, 161 A.L.R. 1133, 61 N.E. (2d) 358 (Ill.), it is decided that mere execution levy upon real estate on the interest of one

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[4] Hardin v. Wolf, 148 N. E. 868, 872 (Ill.) and, Tindall v. Yeats, 68 N. E. 2d 903, 907 (Ill.)

[4a] People's Trust & Savings Bank v. Haas, 160 N. E. 85 (Ill.), and Musa v. Segelke & Kohlhaus Co., 111 A.L.R. 168 (Wis.), support the above rule. The latter case has an annotation on the question.

joint tenant which does not transfer possession to the sheriff does not terminate the joint tenancy.[4b]

Partition

Partition could not be enforced under common law, but generally under state statutes a joint tenant may enforce partition. Prior to this year, our partition statute was 4 C.S.A., Chap. 122. Section 1 of this act provided that "When any lands, tenements or hereditaments shall be held in *joint tenancy*, tenancy in common or co-parcenary" it shall be lawful for one or more persons interested to bring an action for partition.

The whole of Chapter 122 was repealed by Chapter 193, 1949 Session Laws, page 544. Section 1 of the latter act reads as follows: "Actions for the division and partition of real or personal property or interest therein may be maintained by any person having an interest in such property." Section 2 reads: "All persons having any interest, direct, beneficial, contingent, or otherwise, in such property shall be made parties." It would seem that this language is sufficiently broad to include joint tenants.

Bank Accounts and Wills

Joint tenancy in bank accounts may be created.[5] Section 45 of Chapter 18, 35 C.S.A. covers this question in Colorado. It provides that when a bank deposit in any bank or trust company in this state is made in the names of two or more persons payable to them, or to any of them, such deposit, or any part thereof, or any interest or dividend thereon may be paid to any one of said persons, whether the others be living or not, and such deposit shall be deemed to be owned by said persons in joint tenancy with the right of survivorship.

Where a devise or bequest to two or more persons by name is in such form as to create a joint tenancy and one of them dies before the testator, the whole interest vests in the survivors. Therefore a joint tenant cannot devise or bequeath his interest since a will does not take effect until after the testator's death, at which instant the claim of the surviving tenant arises and goes into effect. Creditors have no recourse against the interest of a joint tenant who dies.[6]

American Policy Opposed to Joint Tenancy

As a general rule under the common law in the feudal period a conveyance to two or more persons was construed as a joint tenancy, but that rule later came into disfavor both in England and in America. The policy of the American law is opposed to survivorship and in accordance with this

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[4b] See also Thornburg v. Wiggins, 34 N. E. 999, 1002 (Ind.), Midgley v. Walker, 60 N. W. 296, (Mich.), and annotations at 161 A.L.R. 1139.

[5] First National Bank of Aurora v. Mulich, 83 Colo. 518.

[6] 3 C.S.A. 92-18 to 23.

policy legislation abrogating the common law rule and modifying or abolishing the doctrine of survivorship has been enacted in most of the states. Such statutes in general provide in effect that all grants and devises of land made to two or more persons shall be construed to create estates in common and not in joint tenancy unless expressly declared to be in joint tenancy. Notable exceptions to these statutes are conveyances to trustees and executors.[7]

Colorado Joint Tenancy Law

In 1861, the Colorado legislature enacted a statute which read as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever hereafter made other than to executors and trustees, unless the premises therein mentioned shall be thereby expressly declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or trustees (unless otherwise expressly declared as aforesaid) shall be deemed to be tenancy in common." (2 C.S.A., Chap. 40, Sec. 4.)

This statute remained unchanged until 1939, when it was amended to clarify who might be grantors and grantees in a deed creating a joint tenancy. The statute, as amended, reads as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever hereafter made other than to executors and trustees, unless the premises therein mentioned be thereby expressly declared to pass, not in tenancy in common, but in joint tenancy, provided, always, that such expressed declaration as aforesaid shall be deemed effective to create an estate in joint tenancy whether in a grant, devise or conveyance hereafter made from one person to others, or from one person to himself and another or others, or from tenants in common to themselves or to themselves and another or others, or from joint tenants to themselves and another or others. Nothing in this section shall be deemed to exempt any transfer from the operation of chapter 85 of the 1935 Colorado Statutes Annotated or chapter 75A of the supplement thereto." (1939 Session Laws, Ch. 40, p. 285.)

Must Exact Statutory Language Be Used?

The question naturally arises whether or not an instrument intended to create a joint tenancy must contain the exact language contained in this statute, namely: "Not in tenancy in common, but in joint tenancy." Title examiners frequently are faced with deeds that apparently attempt to create a joint tenancy, but do not use the exact language of the statute, and they are compelled to make a decision as to whether the instrument is sufficient for joint tenancy purposes. I have come to the conclusion that it is not necessary to use the exact statutory language in order to create an estate in joint tenancy if it appears from the instrument that it was the intent of the grantor to create such an estate.[8]

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[7] Estate of Kwatkowski, 94 Colo. 222, 224.
[8] 33 C. J. p. 901, 905.

In *Sturkis v. Sturkis,* 146 N. E. 530 (Ill.) one Carl Edward Wagoner and Catharina Wagoner, his wife, conveyed to Rudolph Perlick and Henrietta Perlick, his wife, "as joint tenants and not as tenants in common" certain real estate in Chicago. The granting and *habendum* clauses in the deed did not contain the language above quoted but referred to second parties, their heirs and assigns. The conveyance was by warranty deed. It was claimed by appellants that the deed conveyed the premises to the grantees as tenants in common and not in joint tenancy while the appellees claimed that the deed created a joint tenancy in the grantees. It was held by the Supreme Court that the deed conveyed an estate in joint tenancy.

While the statute involved in this case is not set forth in the opinion, it was as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common but in joint tenancy; and every such estate, other than to executors or trustees (unless otherwise expressly declared as aforesaid) shall be deemed to be in tenancy in common." This is almost the exact language of our statute.[9]

Superfluous Language in Joint Tenancy Deeds

The ordinary form of joint tenancy deed, which seems to be in common use in Colorado, adds language that is not contained in the statute. The conveyance in the granting clause generally runs to parties of the second part not in tenancy in common but in joint tenancy "the survivor of them, their assigns and the heirs and assigns of such survivor forever." The *habendum* clause is to said parties of the second part, "the survivor of them, their assigns and the heirs and assigns of such survivor forever." The survivorship language does not appear in our statute. The case of *Jones v. Snyder,* 188 N. W. 505, (Mich.) held that in a deed to four grantees "as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivors or survivor of them" created a joint tenancy for life in the grantees with a contingent remainder in fee simple to the survivor rather than creating a fee title in the joint tenants. Under such a situation none of the joint tenants would be able to break the joint tenancy by conveyance of their interest.

This case was criticized in *Greiger v. Pye,* 297 N. W. 173, 175 (Minn.), where it was said that such holding does not seem in accord with the decisions in other jurisdictions, as would be shown by an examination of the annotations in 129 A.L.R. 813, *et seq.*

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[9] See also Coudert v. Earl, 18 A. 220 (N.J.); Murray v. Kator, 190 N. W. 667 (Mich.); and Taylor v. Lowencamp, 145 A. 329 (N.J.).

Estate in Entirety Distinguished

It is well at this point to distinguish between an estate in joint tenancy and one in entirety. In *Sanderson v. Everson,* 141 N. W. 1025 (Nebr.), an estate by the entirety is defined as follows: "* * * The rule of entireties does not depend upon and is not created by contract. It is a fiction of the common law, having its origin in the feudal system, that where land was conveyed to the husband and wife jointly the title by entireties was created in them by act of law, and neither could dispose of the property without the consent of the other; each owned the *entire* title."

Estates in entirety do not exist in Colorado. In *Wyman v. Johnston,* 62 Colo. 461, it was held that our statute, 4 C.S.A. 108-1, concerning married women's property, is in conflict with the common law relating to estates by entireties and that the statute has abolished such an estate in Colorado.

Severance and Termination

The courts are virtually unanimous in agreeing that a joint tenant may, at his pleasure, dispose of his share and that such conveyance will result in a severance or termination of the joint tenancy.[10]

Occasionally a title examiner is called upon to pass on a deed from a joint tenant which conveys a specified undivided interest; for instance, an undivided one-half interest, and the question arises, Is such a description sufficient?

Patton on *Titles,* Section 146, Note 638, page 79, 1946 Cumulative Pocket Part, states that the courts "are practically unanimous that a conveyance by a joint tenant which would be effective if he had held the interest in severalty will be effective to break the joint tenancy and to give to the grantee a fractional interest in proportion to the number of owners who held as joint tenants." He refers to Section 249, page 794 of the original text where it is said: "But he can convey a fractional undivided interest in the premises proportionate to the number of the joint tenants." In the cases cited in the text, I have been unable to find one where the conveyance was of a specified undivided interest, such as a one-half interest. In *Wilkin v. Young,* 41 N. E. 68 (Ind.), it is said: "It is settled in law that a joint tenant may alienate or convey to a stranger his part or interest in the realty, and thereby defeat the right of the survivor. * * * In the ancient language of the law, joint tenants were said to hold *per my et per tout,* or, in plain words, 'by the moiety or half and by all'; the true interpretation of this phrase being that these tenants were seized of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest. * * *"

If one of two joint tenants conveys his interest to a third person, in general language and not by describing it as a specified undivided interest,

[10] 14 Am. Jur., Co-Tenancy, p. 79.

the grantee becomes the owner of an undivided one-half interest and a tenant in common with the other joint tenant. It would, therefore seem that a deed of an undivided one-half interest should be sufficient. I have found the following cases that support this theory:

1. *Kozacik v. Kozacik*, 26 So. 2d 659 (Fla., 1946), holding that a "Written contract by which joint tenant agreed to sell his undivided one-half interest in realty to son, though not executed in presence of two subscribing witnesses as required by statute for conveyance of realty, was sufficient to terminate joint tenancy and destroy cotenant's right of survivorship."

2. *In re Cotter's Will*, 287 N.Y.S. 670. In this case one joint tenant deeded to his associate joint tenant "all my undivided one-half right, title and interest in and to" the premises. It was held that this created a severance of the joint tenancy by the conveyance of an entire interest.[11]

Tax Problems of Paramount Importance

In considering the question of placing property in joint tenancy, the taxing laws should always be borne in mind, viz.: Federal gift, estate and income taxes, and the Colorado gift, inheritance and income taxes. As to Federal gift taxes, each donor has a $30,000.00 exemption which may be used in whatever manner he sees fit.[12] If the gift in any one year does not exceed $3,000.00, no return is required.[13] If over $3,000.00, the donor must file a return and the donee must file an information return. On gifts made since April 2, 1948, to a spouse, a marital deduction is allowed to equal one-half of the value of the joint tenancy interest transferred to the spouse.[14]

For example, where H purchases house with own funds for $20,000.00 and has title conveyed to H and W as joint tenants, H must file gift tax return and W must file donee's information return. Computation of tax (assuming no prior taxable gifts at any time):

Value of gift to W (½ of purchase price)	$10,000.00
Less: marital deduction (½ of gift)	5,000.00
	$ 5,000.00
Less: $3,000.00 annual exclusion	3,000.00
Net gift tax	$ 2,000.00

A portion of H's $30,000.00 specific exemption may then be applied to cancel the $2,000.00 so no tax would be due.

The Colorado law allows a specific gift exemption of $20,000.00 on gifts to a spouse, child or lineal descendent of donor born in lawful wedlock.

[11] See, also, Green v. Skinner, 197 P. 60 (Calif.), and In re Weissbach's Estate, 183, N.Y.S. 771, 774.
[12] I.R.C., Sec. 1004 (a) (1).
[13] I.R.C.. Sec. 1006 (a)—Reg. 108, Sec. 86.23.
[14] I.R.C., Sec. 1004 (a) (3).

If gifts in any one year do not exceed $2500.00, no return need be made. If over $2500.00, donor must file return and donee an information return. Colorado has no marital deduction as the Federal statute has.[15]

Under the Federal estate tax law, the entire value of the property owned jointly is included in the estate of the joint tenant dying first, except such part thereof as originally belonged to the survivor or was never received from deceased for less than an adequate consideration in money or money's worth.[16] If more than one contributed to the purchase, records should be kept to show the contributions of each.

The Colorado inheritance tax law provides that on the death of a joint tenant only one-half of the value at date of death is included in his estate for inheritance tax purposes, regardless of who contributed to the purchase price.[17] A gratuitous transfer from a person to himself and another in joint tenancy within two years prior to donor's death is presumed to have been made in contemplation of death, to the extent of the full value of the property passing to the survivor.

If one takes property by will or inheritance, the basis for figuring Federal income taxes is the fair market value at time of death.[18] Thus, if one takes as a surviving joint tenant, the basis for computing gain or loss on a subsequent sale by the survivor is the adjusted cost of the property (which takes into consideration depreciation, capital additions, etc.)[19] The same rules apply in Colorado.[20]

Conclusions As To Tax Problems

1. If property is purchased in joint tenancy when prices are low and they rise, there may be an income disadvantage, and the saving by avoiding costs of administration of an estate may be more than offset by increased income taxes. If purchased on a high market and values go down, there may be a capital loss, if other than residence property.

2. In the ordinary small estates where Federal estate taxes are not involved and the purchase is made on a high market, joint tenancy is best. In all other cases, all facts should be carefully considered before a decision is made.

3. In some instances where joint tenancy exists, it may be desirable to separate the interests and dissolve the joint tenancy in order to create a more advantageous income tax position or to escape the entire property being taxed upon the death of the survivor.

Buy Christmas Seals

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[15] C.S.A., Chap. 75A.
[16] I.R.C., Sec. 811 (e).
[17] C.S.A., Ch. 85-8.
[18] I.R.C., Sec. 113(a) (5).
[19] Levy v. Commissioner, 289 U. S. 109.
[20] C.S.A., Sec. 84A-18 (5).