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Property Law: Concurrent Ownership: Joint Tenancy and Tenancy in Common Under Chapter 700

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CONCURRENT OWNERSHIP: JOINT TENANCY & TENANCY IN COMMON UNDER CHAPTER 700

As in other areas of real property law, the concept of co-ownership has long been burdened with rules whose purpose has vanished but which linger on to frustrate the intentions of modern grantors. Various forms of co-ownership developed at common law, but, for the purpose of this article, the historical backgrounds of only two, joint tenancy and tenancy in common, need be explained.

The requisites of a joint tenancy at common law were the four unities. The unity of interest required that the tenants have interests of the same type and duration; the unity of title required that the tenants all receive their interests through one and the same conveyance; the unity of time required that all of the interests vest at the same time; and the unity of possession required that all tenants have an equal right to possess the whole of the estate during the life of the tenant.[1] When these stringent requirements were met, they created a presumption of joint tenancy with a right of survivorship in each tenant. Under the doctrine of survivorship, if one joint tenant dies, the tenant or tenants who survive him possess the whole of the estate.[2] During the period when the concept of joint tenancy evolved, survivorship was extremely important since at a man's death, heavy incidents of feudal tenure in favor of the Lord attached to land which passed by inheritance, but did not attach to land which passed by survivorship.[3] In modern times, the feudal incidents have been replaced by taxes, and the concept of survivorship has given American courts much difficulty in the application of inheritance taxes.[4] At common law, whenever the four unities were present, a presumption was created in favor of joint tenancy, and there was no need to express an intent unless some other form of ownership was desired. If for any reason one of the unities was absent, either at the time of conveyance or by a subsequent act of

1. 2 AMERICAN LAW OF PROPERTY § 6.1, at 5 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW].

2. AMERICAN LAW § 6.1, at 7.

3. Smith v. Douglas County, Nebraska, 254 F. 244 (8th Cir. 1918).

4. *See generally* Annot., 84 A.L.R. 180 (1933)

one of the tenants, a tenancy in common was created.[5]

The tenancy in common required only the unity of possession, and was created whenever any of the other three unities was lacking. A tenant in common possessed an undivided interest (not necessarily in an equal amount with the other concurrent owners) and the present right to possession of the entire property. However, no right of survivorship existed, and upon the death of one tenant in common the others retained only their proportionate share of the property, with the share of the deceased tenant passing to his estate.[6] At common law, tenancies in common were not favored, due to the fact that at the death of one tenant the entire property was divided into several shares among the tenants according to their percent of ownership, whereas the Lords desired to retain large tracts of land within a family.[7]

The topic of concurrent ownership has been characterized in Wisconsin by a lack of legislative activity, and, as a result, the courts have been obliged to interpret and apply the common law and the meager legislation to the shifting social and economic conditions of the past 120 years. The legislature early established a policy favoring tenancies in common,[8] and, discounting a minor change in terminology,[9] the basic philosophy remained unchanged.[10] Several exceptions to the statutory presumption were originally provided,[11] and these have been added to on only three occasions.[12]

Due to this limited activity by the legislature, a considerable body of judicial interpretation and expansion has developed in the past 100 years, and the legislature, in chapter 700 of the Wisconsin Statutes, has recently attempted to codify at least part of it. The legislature also seized this opportunity to change those aspects of the general common law and Wisconsin decisions which it felt were undesirable. The result[13] is a mixture of the English common law, previous legislative action, Wisconsin court decisions, and some

5. AMERICAN LAW § 6.5, at 19.

6. 4 G. THOMPSON, REAL PROPERTY § 1795, at 120 (repl. vol. 1961) [hereinafter cited as THOMPSON].

7. AMERICAN LAW § 6.1, at 3.

8. WIS. REV. STAT. ch. 56, § 43-44 (1849).

9. WIS. STAT. § 2067 (1878).

10. WIS. STAT. § 230.43-44 (1969).

11. WIS. REV. STAT. ch. 56, § 45 (1849).

12. Wis. Laws 1933, ch. 437, § 2; Wis. Laws 1945, ch. 195; Wis. Laws 1947, ch. 140.

13. Wis. Laws 1969, ch. 334, *as amended*, Wis. Laws 1971, ch. 66.

totally new ideas. It is the purpose of this article to identify which of the four sources each concept in the new statutes represents, to present some possible controversies which may arise, and to attempt to project how the courts will resolve those controversies.

I. Classifications and Characteristics of Concurrent Interests

> (1) Interests in property may be owned concurrently by two or more persons as joint tenants or as tenants in common.
> (2) Each of two or more joint tenants has an equal interest in the whole proprety for the duration of the tenancy, irrespective of unequal contributions at its creation. On the death of one of two joint tenants, the survivor becomes the sole owner; on the death of one of three or more joint tenants, the survivors are joint tenants of the entire interest.
> (3) Each of two or more tenants in common has an undivided interest in the whole property for the duration of the tenancy. There is no right of survivorship incident to a tenancy in common; but a remainder may be created to vest ownership in the survivor of several persons who own as tenants in common other preceding interests (such as a life interst) in the same property.[14]

A. Interests in Property

Of primary importance in the first subsection of Wisconsin Statutes section 700.17 is the reference to "interests in property." "Property" under chapter 700 refers to interests in both realty and personalty,[15] and the inclusion of personalty under the statutes controlling concurrent interests is a recognition of the common law doctrine that both personalty and real property may be held by concurrent interests.[16] The draftsmen of the early Wisconsin statutes on the subject limited the applicability of the statutes to realty,[17] and, as a result, whereas the presumption at common law of a joint tenancy when the four unities existed was destroyed and replaced by a presumption of tenancy in common in most cases

14. Wis. Stat. § 700.17 (1969), *as amended*, Wis. Laws 1971, ch. 66.

15. Wis. Stat. § 700.01(6) (1969).

16. A. Freeman, Cotenancy and Partition § 16, at 69 (2d ed. 1886) [hereinafter cited as Freeman].

17. Since the original enactment, the legislature has extended the statutes to personal property in the limited case of a transfer from husband to wife or vice-versa. Wis. Stat. § 230.45(2) (1969).

involving realty, the common law rule remained in regard to personalty.[18]

Since the new statutes deal exclusively with "concurrent" interests, ownership in severalty need not be included in the possible forms of ownership as it was in the older statutes.[19]

At common law there existed a third type of concurrent ownership, created by the addition of a fifth unity—the unity of person. Marriage gave rise to this fifth unity, which was based upon the fiction that by the ceremony the two partners became one. What would have been a joint tenancy if held by unmarried tenants became known as a "tenancy by the entirety"[20] and was endowed with certain additional characteristics. The most important of these added incidents was the fact that no independent action by one tenant could affect the right of survivorship of the other. Therefore, a sale by one tenant did not destroy the other's right of survivorship (as it would have in the case of a joint tenancy) unless the other agreed to the sale.[21] Although tenancy by the entirety was not included in the original statutes as a recognized mode of holding property,[22] early cases recognized it as an acceptable form of ownership.[23] Subsequent cases, however, abrogated the doctrine of tenancy by the entirety in Wisconsin.[24] The new sections, by their silence as to tenancy by the entirety, have done nothing to overrule the case law.[25]

B. Joint Tenancy

The old statutes contained no enumeration of the characteristics of a joint tenancy, but merely a reference to the fact that they

18. Farr v. Trustees of Grand Lodge AOUW, 83 Wis. 446, 452, 53 N.W. 738, 740 (1892).

19. WIS. STAT. § 230.45 (1969).

20. THOMPSON § 1785, at 60.

21. THOMPSON § 1792, at 102.

22. WIS. REV. STAT. ch. 56, § 43 (1849).

23. Ketchum v. Walsworth, 5 Wis. 95 (1856).

24. Tenancy by the entirety was abolished in the case of realty by Bassler v. Rewodlinski, 130 Wis. 26, 109 N.W. 32 (1906), and in personalty by Aaby v. Citizens Nat'l Bank, 197 Wis. 56, 221 N.W. 397 (1928).

25. Under WIS. STAT. § 706.02(1)(f) (1969), a de facto tenancy by the entirety exists in the case of a husband and wife owning homestead property as joint tenants, since the statute requires that both spouses participate in a conveyance which will alienate any interest in the homestead, which would include survivorship interests. For an example of the husband being allowed to transfer his interest in the homestead without the wife's consent under unusual circumstances, see Siegel v. Clemons, 266 Wis. 369, 63 N.W.2d 725 (1953).

would "continue to be such as are now established by law."[26] These common law characteristics, as recognized by the court,[27] consisted of the four unities, which created an equal right to possession in the whole during the life of the tenancy in each tenant, together with an equal undivided present interest in the property and a right of survivorship in the entire property to the last surviving tenant. The new second subsection retains the right of survivorship and what is referred to as an "equal interest" in the property, but does not enumerate the four unities as characteristic of a joint tenancy.

A definition of "equal interest" is not provided. From the wording of the statute, however, there is no indication that it is other than what has been recognized in the past as the interst of each tenant in a joint tenancy. The inclusion of the phrase "irrespective of unequal contributions at its creation" is a reaction to the case of *Jezo v. Jezo*,[28] in which a husband provided funds for the purchase of jointly held property substantially in excess of those provided by his wife, who was named as his cotenant. In a decision limited in application to joint tenancies held by husbands and their wives, the supreme court held that in a partition proceeding, evidence as to the respective contributions of the parties to the original cost of the jointly held property was relevant, and the court could divide the property other than equally between the spouses if it were shown that one contributed a larger amount and it was not intended as a gift.[29] If this approach, instead of the traditional view that joint tenants own equal interests, were applied generally, it would introduce uncertainty into the law relating to joint tenants. The problem created by this procedure is that the deed will not reflect which of the joint tenants has contributed a larger amount, a fact which may be relevant in situations such as one joint tenant pledging his interest in the property as security for a loan. This subsection is apparently an attempt to overrule the *Jezo* case. As a general rule, however, its true intent and effect on partition proceedings are uncertain due to the phrase, "for the duration of the tenancy." A judicial interpretation of this phrase will be required to determine exactly when the tenancy ceases during the partition proceedings, and to determine whether or not the court

26. WIS. STAT. § 230.43 (1969).
27. Bassler v. Rewodlinski, 130 Wis. 26, 109 N.W. 1032 (1906).
28. 23 Wis. 2d 399, 129 N.W.2d 195 (1963).
29. *Id.* at 406d, 129 N.W.2d at 197.

is precluded from awarding unequal shares to a husband and wife at the partition of a joint tenancy.

C. *Tenancy in Common*

As with joint tenancy and subsection (2), no enumeration of the characteristics of a tenancy in common existed in Wisconsin's statutes prior to the new subsection (3). However, the first sentence and initial clause of the second sentence restate the common law as it has been interpreted in prior decisions.[30]

The final clause is legislative recognition of a device created by the court in attempting to carry out the intent of the grantor when he clearly desired to create a joint tenancy, but failed due to technicalities.[31] This subsection is based upon *Hass v. Hass*,[32] wherein a mother attempted to create a joint tenancy between herself and her son by a deed transferring land which she owned to herself and her son as joint tenants. The deed was defective for this purpose under the old statutes since it lacked the unities of title and time. However, the court ruled that it created a tenancy in common for the mutual lives of the grantees, and since it was clear that the grantor intended the survivor to take the entire estate, a contingent remainder was created in the survivor. By this interpretation, the supreme court not only created the intended survivorship, but made it indestructible,[33] which may not have been intended. Conceivably, there could be a falling out between mother and son, in which case the mother may desire to give the one-half share she retained to another relative, without the possibility of the son gaining an interest in it. Had she created a valid joint tenancy, this would be possible, since her transfer to a third party would destroy the unity of time and, with it, the incident of survivorship. The remainder created by the court, however, would not be affected by such a transfer, and although the third person receiving the mother's present half interest would also receive her contingent remainder, the third party's interest itself would fail if the son survived his mother.

The problem which gave rise to this statute, however, has been

30. 4A R. POWELL, LAW OF REAL PROPERTY ¶ 601, at 597 (1971) [hereinafter cited as POWELL].

31. *See generally* Annot., 166 A.L.R. 1026 (1947).

32. 248 Wis. 212, 21 N.W.2d 398 (1945).

33. *Id.* at 222, 21 N.W.2d at 402.

solved by another section of the new statutes,[34] so that the deed of Mrs. Hass would create a joint tenancy today. Therefore, the applications of this clause are likely to be limited to cases where the grantor desires to create a survivorship interest which is indestructible.[35]

II. Determination of Cotenancy Generally

> Two or more persons named as owners in a document of title, transferees in an instrument of transfer or buyers in a bill of sale are tenants in common, except as otherwise provided in s. 700.19.[36]

As stated previously, at common law the joint tenancy was favored for reasons which are no longer relevant. As a result, the judicial attitude has shifted to a favoring of the tenancy in common.[37] The previous statutes created a presumption of tenancy in common in interests in real property only; this new section 700.18 expands that to both personal property and certain forms of real estate ownership which were not included under the old statutes.[38]

By specifically referring to those instances where the common law is changed, it would appear that the common law remains in force in the one area not listed—oral transfers.[39] Several of the new sections make references to documents only, and, at least impliedly, do not apply to oral transfers. However, section 700.19(5)[40] does not, and, therefore, it may be found to abrogate the unities of title and time as necessary requirements of a joint tenancy in oral transfers of chattels. Since section 700.18 does not abrogate the common law presumption of a joint tenancy in the case of oral transfers, the effect is that any oral transfer of personalty to more than one party, even if the parties receive their interests at different times or from different grantors, which creates in

34. Wis. Stat. § 700.19(6) (1969), *as renumbered,* Wis. Laws 1971, ch. 66.

35. As will be discussed later, it is arguable that under the new statutes a joint tenancy may have this effect. See part III. *E. infra.*

36. Wis. Stat. § 700.18 (1969).

37. Breitenbach v. Schoen, 183 Wis. 589, 591, 198 N.W. 622, 623 (1924).

38. Wis. Stat. § 700.01(1)-(4) (1969).

39. Estate of Gabler, 265 Wis. 126, 60 N.W.2d 720 (1953).

40. Wis. Laws 1971, ch. 66. This subsection abolishes the necessity of unity of title and time for all joint tenancies, regardless of the mode of creation.

the parties an "equal interest"[41] in the property, will be presumed to create a joint tenancy with a right of survivorship. Whenever two persons own chattels equally, which were transferred to them orally, the common law presumption of joint tenancy applies unless there is contrary evidence.

III. Creation of Joint Tenancy

> (1) The creation of a joint tenancy is determined by the intent expressed in the document of title, instrument of transfer, or bill of sale. Any of the following constitute an expression of intent to create a joint tenancy: "as joint tenants", "as joint owners", "jointly", "or the survivor", "with right of survivorship" or any similar phrase.
> (2) If persons named as owners in a document of title, transferees in an instrument of transfer or buyers in a bill of sale are described in the document, instrument or bill of sale as husband and wife, or are in fact husband and wife, they are joint tenants, unless the intent to create a tenancy in common is expressed in the document, instrument or bill of sale.
> (3) If covendors owned realty as joint tenants and a purchase money mortgage names the covendors as mortgagees, the mortgagees are joint tenants, unless the purchase money mortgage expresses as intent that the mortgagees are tenants in common.
> (4) Notwithstanding s. 700.18 and the preceding subsections of this section, co-personal representatives and cotrustees hold title to interests in property as joint tenants.
> (5) The common law requirements of unity of title and time for creation of a joint tenancy are abolished.[42]

A. Expression of Intent

The first subsection of section 700.19 again expands upon the earlier statutes, which almost entirely limited the rule that an express intent was necessary in order to create a joint tenancy to transfers of realty.[43] This subsection provides the general rule on how to avoid the effects of the presumption created by section 700.18. It should be noted that the intent must be found in the

41. Wis. Stat. § 700.17(2) (1969).
42. Wis. Stat. § 700.19 (1969), *as amended,* Wis. Laws 1971, ch. 66.
43. Wis. Stat. § 230.43-.45 (1969), the exception being § 230.45(2), which related to transfers between spouses.

writing itself, and extrinsic evidence is not allowed either to supply the intent or to negate an intent which is expressed in the document.

The phrases suggested by the statute to indicate such intent all include either the word "joint" or "survivor," or some form of one. The use of the word "survivor" implies an intent to create a joint tenancy because the joint tenancy is the only form of concurrent interest recognized in Wisconsin which creates an incident of survivorship.[44] The acceptance of "joint" or "jointly" as sufficient to indicate an intent to create a joint tenancy is contrary to precedent in Wisconsin.[45] The court has admitted that while technically the term "joint" applies only to a joint tenancy, the public uses it rather loosely to refer to all types of concurrent ownership. As a result, the court has refused in the past to accept its use as an express intent to create a joint tenancy. Apparently the legislature believes either that the public has become better educated in the legal significance of the term "joint" or that fewer incidents will arise in which an attorney will not be consulted prior to a written transfer of property.

B. Husbands and Wives

The second subsection retains the common law presumption of joint tenancy in every case in which the parties are in fact husband and wife, or are referred to in the document as being husband and wife. So long as the parties are described in the document as a married couple, there is no necessity that they be legally married in order for the presumption to apply.[46]

This subsection also requires that the express intent to negate the presumption of a joint tenancy in property held by a husband and wife must be found in the document itself. In the *Jezo* case,[47] the court held that even when a joint tenancy in form was created between a husband wife, extrinsic evidence as to the amount of contributions to the purchase price and other facts which tended to show an intent not to create a true joint tenancy were admissable in a partition hearing to rebut the presumption of joint tenancy. On rehearing, the court stated:

44. Weber v. Nedin, 210 Wis. 39, 246 N.W. 307 (1933).
45. Fries v. Krecklauer, 198 Wis. 547, 224 N.W. 717 (1929).
46. Neitge v. Severson, 256 Wis. 628, 42 N.W. 2d 149 (1949).
47. 23 Wis. 2d 399, 129 N.W.2d 195 (1963).

> The fact that property held by husband and wife is in the form of a joint tenancy does not preclude a court of equity in such a partition suit from going behind the joint tenancy form in order to decide whether the parties truly intended a joint tenancy in fact. The presumption that a true joint tenancy was intended may be rebutted by evidence showing a different intention.[48]

From the court's language it is difficult to determine whether the justices are saying that what was a joint tenancy prior to the partition proceeding has been converted into a tenancy in common,[49] or whether the title was always held by the spouses as tenants in common, although in form it appeared to be a joint tenancy.[50]

C. Vendors as Mortgagees

All mortgagees were exempt from the prior statutory presumption of a tenancy in common;[51] therefore the common law presumption of a joint tenancy existed when the four unities were present in a mortgage. The court did retain the power, however, to investigate the circumstances surrounding the creation of the mortgage and to use any evidence discovered, not only that presented in the document, in finding an intent to create a tenancy in common.[52]

The third subsection changes the law in two respects. First, the presumption of joint tenancy arises only when the co-mortgagees previously held the property as joint tenants. This is a restriction upon the common law, under which it was irrelevant whether or not both parties possessed any interest at all in the property mortgaged. Under this subsection, unless the parties held the property as joint tenants prior to the execution of the mortgage, the mortgage contains an express intent to create a joint tenancy,[53] or the mortgagees were husband and wife or referred to as husband and

48. *Id.* at 406c, 129 N.W.2d at 197.

49. The court, in discussing whether or not mere unequal expenditures in improvements will effect the same result as was reached in the case presented, stated that it "might not be sufficient, standing alone, to convert an original joint tenancy into a tenancy in common." *Id.* at 406d, 129 N.W.2d at 197.

50. See note 47 and accompanying text *supra.*

51. WIS. STAT. § 230.45(1) (1969).

52. Williams v. Jones, 175 Wis. 380, 185 N.W. 231 (1921).

53. WIS. STAT. § 700.19(1) (1969).

wife,[54] the co-mortgagees are presumed to be tenants in common.[55] The presumption of joint tenancy where the co-mortgagees were joint tenants in the property is based upon the probability that the owners would desire to retain their present right of ownership and right of survivorship in the property or its proceeds.

The second change made by this subsection is in limiting the court to the face of the mortgage itself in finding an intention contrary to the presumed joint tenancy. By limiting the inquiry of the court to the document itself, the legislature has taken a step towards insuring that a third party purchaser can rely upon the document offered by the vendor as accurately portraying the interest which the vendor is able to convey. This becomes more important under the new sections because they deal with all types of property, not only real estate, and, as a result, the likelihood of subsequent transfers without careful research into the events underlying the document which the vendor presents is increased.

D. Personal Representatives and Trustees

The fourth subsection is an enlargement of an exception which was recognized by the old statutes.[56] The latter dealt only with co-executors and co-trustees. The new section relates to all co-personal representatives,[57] which includes both executors, who were covered by the old statute, and administrators who were not.

The elimination of the common law presumption of a joint tenancy was based to a large extent on the theory that, absent an express intent that survivorship was desired, it is more probable that a man would desire that his property should pass to his heirs at his death rather than to a non-relative.[58] In the case of personal representatives and trustees who have no beneficial interest, however, this probability is irrelevant—it is the intent of the testator or settlor which is relevant. Since he has most likely appointed the co-representatives or co-trustees because they are men in whom he had some degree of faith, it would most likely be his intent that when one of them died, the other would assume complete legal ownership and control rather than having his one-half interest

54. WIS. STAT. § 700.19(2) (1969).
55. WIS. STAT. § 700.18 (1969). WIS. STAT. § 700.01(2) (1969) states that a mortgage is a type of "instrument of transfer."
56. WIS. STAT. § 230.45(1) (1969).
57. *Compare* WIS. STAT. § 990.01(7) (1969) *with* WIS. STAT. § 851.01 (1969).
58. FREEMAN § 43, at 94.

passed to heirs with whom the testator or settlor may never have had any contacts.[59]

From an administrative viewpoint as well, the joint tenancy is preferable since the title to the property remains in a trustee or administrator already under court control, rather than passing to the heirs of the trustee or administrator, which would necessitate additional procedure to extend the court's authority over them.[60]

However, if the subsection is an attempt to carry out the intent of the testator or settlor, it has failed to do so in the instance where the party in fact desired to create a tenancy in common. The subsection does not allow for a contrary intent to be expressed in the document, and, therefore, a joint tenancy is mandatory in these situations. In this respect, the subsection may merely be a convenience for the courts in handling such matters by not allowing the heirs of a co-trustee, who may have no expertise in such matters, from gaining power over the property.

E. Abolition of Unities of Title and Time

The fifth subsection reverses the common law doctrine which has been effective, in most instances, since statehood, that before the question of joint tenancy can be considered, it must first be proven that the parties received their interests from the same document at the same time.[61] Although these requirements may have had relevancy in medieval times, they have come to be stumbling blocks which thwart the intent of grantors who desire to create concurrent interests having the incident of survivorship.[62] The Wisconsin Supreme Court has attempted to rectify this in at least one instance by creating a tenancy in common with a contingent remainder in the survivor where the intent to create a survivorship was manifest but the unities were not present.[63] However, as discussed previously, even this construction will not accurately carry out the grantor's intent.

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59. FREEMAN § 43, at 95.

60. Even in the case of a sole trustee who dies, the statutes prevent the title from passing to his heirs, but rather cause transfer of the title to a successor trustee, appointed by the trust instrument or the court. WIS. STAT. § 701.17(1) (1969), *as amended*, Wis. Laws 1971, ch 66. In the case of a personal representative, a successor is also appointed rather than title passing through the deceased representative's estate. WIS. STAT. § 857.21 (1969).

61. Bassler v. Rewodlinski, 130 Wis. 26, 109 N.W. 1032 (1906).

62. See note 30 and accompanying text *supra*.

63. Hass v. Hass, 248 Wis. 212, 21 N.W.2d 398 (1945).

The method employed by knowledgeable grantors to circumvent these requirements was to convey the property to a "straw man," who in turn would reconvey the land to the original grantor and the party with whom he desired to create the joint tenancy. The presence of this artificial formality has pointed to the need for the reform which is granted here, since prior to this only those parties who were aware of the legal gymnastics which were required could effectively carry out their intent.

Wisconsin courts have relied upon the destruction of the unities of title and time when one joint tenant transfers his interest to a third party as the basis for the doctrine that such a transfer severs the joint tenancy, and a tenancy in common results.[64] The abrogation of the necessity of these unities creates some difficulty in determining the effect a transfer by one joint tenant has upon the form of ownership of the other tenant and the transferee.

The initial problem is in attempting to determine what the relationship will be between the transferee and the remaining original owner, absent any express intent in the document of transfer. The first response would be that a tenancy in common results, since that is the basic rule set down by the statutes, absent an exception. However, section 700.18, which sets out this basic rule, refers to "two or more persons named as owners."[65] In the case under consideration, only one person, the transferee, would be named in the document. Therefore, it is possible that even absent an expressed intent to create a joint tenancy, the common law presumption of joint tenancy might apply, since an equal interest in the property is being created in two people, *i.e.* the remaining original owner and the transferee, with the two remaining unities (interest and possession) present.[66] Although it may, at first thought, appear unjust to allow one tenant to make the other a joint tenant with a third party without his consent or even knowledge being required, it is submitted that this is no more unjust than the present system which allows one tenant to destroy the other's right of survivorship without his consent or knowledge. If this interpretation is followed, it may be necessary for one joint tenant selling his interest to a third party to expressly state his intent to create a tenancy in common in order to avoid the presumption of joint tenancy.

64. Campbell v. Drodzdowicz, 243 Wis. 354, 10 N.W.2d 158 (1943).
65. See note 34 and accompanying text *supra*.
66. *See* WIS. STAT. § 700.19(1), (5) (1969), *as amended*, Wis. Laws 1971, ch. 66.

If the court decides that the presumption of tenancy in common applies to this transfer, is it then possible under the new statutes for the transferor to create a joint tenancy between the transferee and the remaining original tenant by express intent in the document?

For the creation of a joint tenancy, the statutes now require that grantees have "an equal interest in the whole property for the duration of the tenancy"[67] and an expressed intent in the document (assuming sections 700.19(2),(3) and (4) do not apply).[68] Assuming that these requirements have been met, what happens if one tenant, realizing that his life is ending, grants his interest to a grandson of tender age and manifests an intent that he hold in joint tenancy? The characteristics of a joint tenancy which remain, unity of possession and interest, are still intact. The only possible limitation upon such a transfer would be an interpretation of the first clause of section 700.19(1)[69] as requiring that both of the parties to the resulting joint tenancy express their intent to create a joint tenancy. However, there is no mention of "two or more persons" or that the parties to the tenancy must also be parties to the document. In fact, the abrogation of the need for the unities of title and time would appear to express a legislative intent that this is no longer necessary. Therefore, it would appear that one joint tenant could, by express intent in an instrument of transfer to a third party, create a joint tenancy between that third party and the remaining original joint tenant. The original joint tenant would, of course, retain his right to partition if he did not desire to enter into a joint tenancy with the third party.

The question then becomes, by whose life is the survivorship right measured—the original tenant-transferor's or the subsequent purchaser's? The statutes refer only to the "death of one of two joint tenants."[70] An analogy could be drawn here with the holder of a life estate transferring his interest to a third party. There the remainderman's right to the property accrues as of the death of the original estate holder.[71] So here, it would be logical to suppose that the survivorship interest of the remaining original tenant would continue to be measured by the life of the other original tenant,

67. WIS. STAT. § 700.17(2) (1969).
68. WIS. STAT. § 700.19(1) (1969).
69. *Id.*
70. WIS. STAT. § 700.17(2) (1969).
71. Little v. Edwards, 84 Wis. 649, 55 N.W. 43 (1893).

while the survivorship interest of the third party transferee would be the same as that which the tenant from whom he received his interest held.

IV. Extent of Undivided Interests in Tenancy in Common

> The extent of the undivided interests of tenants in common for the duration of the tenancy is determined by the intent expressed in the document of title, instrument of transfer or bill of sale; if no intent is expressed in the document, instrument or bill of sale, tenants in common are presumed to own equal undivided interests for the duration of the tenancy.[72]

Each tenant in common possesses an undivided share in the property, along with the right to possess the entire property during the duration of the tenancy. The rules presented in section 700.20 for determining the extent of the undivided share are those which prevailed at common law; that is, the interests need not be equal (as they are in the case of a joint tenancy),[73] but they are assumed to be if no intention to the contrary is expressed.[74] Under the old statutes, these rules were promulgated by the statement that unless changed, the common law rules continued in effect.[75] These new sections, however, contain no such statement and propose to describe the entire applicable law as to those areas of concurrent ownership which are covered;[76] therefore common law doctrines in those areas must be expressly reaffirmed.

V. Covendors in Contracts to transfer

> (1) If two or more persons are named as covendors in a contract to transfer an interest in property which they own as joint tenants, the purchase price is payable to them as joint tenants, unless the contract expresses a contrary intent. If two or more persons are named as covendors in a contract to transfer an interest in property which they own as tenants in common, the

72. Wis. Stat. § 700.20 (1969), *as amended*, Wis. Laws 1971, ch. 66.

73. Powell ¶ 601, at 598.

74. American Law § 6.5, at 19. For a possible exception in the case of property held jointly by a husband and wife, divided at a partition proceeding, see note 26 and accompanying text *supra*.

75. Wis. Stat. § 230.43 (1969).

76. The new sections do not relate to all areas of concurrent ownership; for instance they do not generally relate to co-ownerships created orally.

purchase price is payable to them according to their interests, unless the contract expresses a contrary intent.

(2) If two or more persons are named as covendors in a contract to transfer an interest in property which is owned by less than all of the covendors, the purchase price is payable to the owner or owners of the interest in property to which the contract relates, unless the contract expresses an intent that the purchase price is payable to the covendors as joint tenants or as tenants in common.[77]

A. Nature of Ownership

The use of the term "contract to transfer an interest in property" is exclusive to section 700.21. The phrase refers to a presently binding agreement to transfer title to property upon the fulfillment of some promise. This is a particular species of "instrument of transfer."[78] In the area of realty this includes a land contract,[79] and it is this type of an instrument toward which the section is aimed. The first subsection is necessitated by the fact that section 700.18 creating the tenancy in common applies only to the "transferees" in an instrument of transfer. Without this subsection, the common law presumption of a joint tenancy would apply to the holders of the land contract, even if they had held the property as tenants in common originally.

The rule of the subsection is that of common sense, based upon the probability that if nothing to the contrary is stated, parties who hold land concurrently desire to retain their degree and type of ownership in a new asset which evolves from the property.

B. Treatment of Purchase Price

The second subsection is, at least in part, a reaction to two cases which the supreme court decided as sister-cases in 1963.[80] The fact situations were very similar, and, therefore, only one need be examined. In *Estate of Fischer,*[81] the husband, who held the entire interest in non-homestead land, sold the same by a land contract naming himself and his wife as vendors. Since a land contract is

77. WIS. STAT. § 700.21 (1969), *as amended,* Wis. Laws 1971, ch. 66.

78. WIS. STAT. § 700.01(2) (1969).

79. Hege v. Thorsgaard, 98 Wis. 11, 73 N.W. 567 (1898).

80. Estate of Fischer, 22 Wis. 2d 637, 126 N.W.2d 596 (1963); Estate of Martin, 22 Wis. 2d 649, 126 N.W.2d 549 (1963).

81. 22 Wis. 2d 637, 126 N.W.2d 596 (1963).

personalty,[82] the common law, and not the old statutes, was applied by the court. The court referred to the fact that it was the general practice of lawyers drafting such contracts to include the wife as vendor and to obtain her signature in order to bar her inchoate right of dower,[83] and, relying upon a Michigan case as the sole precedent,[84] ruled that, in the absence of contrary proof, where a wife joins in a land contract to transfer property which her husband owns, she is presumed to have done so for the purpose of barring dower, and the purchase price is payable to the husband alone.[85] This subsection extends these decisions of the case beyond husband and wife to all cases of covendors, and beyond land contracts to all "contracts to transfer an interest in property."

The technical rationale for this decision, however, has been removed, since the inchoate right of dower no longer exists in Wisconsin.[86] Therefore this subsection will probably have very little application, except in the rare case where an owner of land desires to make a gift of a portion of the sales price and fails to express an intent that the price be payable to himself and the object of his gift either jointly or in common.[87]

VI. Exception for Equitable Rights of Cotenants and Third Parties

> Nothing in ss. 700.17 to 700.21 prevents an equitable lien arising in favor of one cotenant against another tenant or tenants because of events occurring after the establishment of the cotenancy relationship nor prevents imposition of a constructive trust in favor of a third person in an appropriate case.[88]

The right of one contenant to an equitable lien upon the interest of the other has not previously been recognized by statute, but in four different situations the court has imposed such liens.

First, if the tenants have jointly mortgaged the property to

82. Estate of Atkinson, 19 Wis. 2d 272, 277, 120 N.W.2d 109, 112 (1963).
83. Wis. Stat. § 233.01 (1969).
84. Hendricks v. Wolf, 279 Mich. 598, 273 N.W. 282 (1937).
85. 22 Wis. 2d at 645, 126 N.W.2d at 600.
86. Wis. Stat. § 861.03 (1969).
87. This section may also be relevant in relation to Wis. Stat. § 706.02(1)(f) (1969), which requires the signatures of both spouses in order to affect the interest in a homestead property. It also may be relevant where attorneys, as a matter of habit, have the wife sign although it is now not necessary.
88. Wis. Stat. § 700.215, *created by* Wis. Laws 1971, ch. 66.

secure a debt, and one of them redeems the mortgage with his own funds, he acquires an action for contribution against his cotenant, and a lien upon his interest.[89] Second, where one cotenant has paid taxes upon the property, he acquires a lien upon the interest of the other for contribution.[90] However, a cotenant who acquires an outstanding tax title by this method cannot hold it adversely to his fellow tenants,[91] but is deemed to have purchased it for their benefit as well and is entitled to receive contribution from them. Third, if one cotenant makes improvements upon the property, he is entitled to a lien upon the interest of the other for contribution.[92] However, such a lien is created only if the other tenant has either agreed to the specific improvement or assented to any necessary improvements and the work done was in fact necessary.[93] Finally, if necessary repairs are paid for by one cotenant, a lien may be created in his favor for contribution.[94]

The liens recognized by section 700.215 are limited to those arising subsequent to the creation of the tenancy, and consequently do not authorize any lien based upon unequal contribution at the creation of a joint tenancy.[95]

Merely because this section specifically refers to one form of equitable remedy which is recognized does not mean that other forms of equitable relief, such as reformation of a document where an error in drafting created an opposite expression of intent from that which the parties had in fact intended, are necessarily not allowed.

The constructive trust referred to in favor of a third party might arise under any of the four methods by which a lien could arise between cotenants, if the money used by the cotenant who would have been granted the lien was in reality money of a third person. For instance, if *A* and *B* are joint tenants and *A* borrows money from *C* to pay taxes upon the land or to make needed repairs, the court may create a constructive trust upon the interests of both *A* and *B* in favor of *C*. By including the phrase "in appropriate

89. McLaughlin v. Estate of Curts, 27 Wis. 644 (1871).

90. POWELL ¶ 605, at 619-20.

91. Hannig v. Mueller, 82 Wis. 235, 52 N.W. 98 (1892).

92. Reed v. Jones, 8 Wis. 193 (1855).

93. Henrikson v. Henrikson, 143 Wis. 314, 127 N.W. 962 (1910).

94. Clark v. Plummer, 31 Wis. 442 (1872).

95. See note 26 and accompanying text *supra* as to the effect of unequal contribution at the creation of a joint tenancy.

cases," the legislature has left the development of this area to the courts on a case-by-case basis of balancing the equities.

VII. Exception For Bank Deposits, Checks, and Government Bonds

> (1) Nothing in ss. 700.17 to 700.21 governs the determination of rights to deposits (including checking accounts or instruments deposited therein or drawn thereon, savings accounts, certificates of deposit, investment shares or any other form of deposit) in banks, building and loan associations, savings and loan associations, credit unions or other financial institutions.
> (2) Nothing in ss. 700.17 to 700.21 applies to United States obligations to the extent they are governed by law of the United States.[96]

American courts have struggled in attempting to categorize joint bank accounts under one of the types of concurrent ownership recognized at common law. Because they possess the incident of survivorship, at first glance they would appear to be joint tenancies. However, either tenant has the right to withdraw the entire fund and appropriate it to his personal use, thereby destroying any interest of the other; therefore the rules of joint tenancy are inapplicable. As a result, a separate body of law has evolved pertaining exclusively to the various forms generically called "joint bank accounts."

The rationale of the court has developed through several theories upon which the validity of a claim to survivorship rights in a joint account may be based. Originally, under the gift theory, the early cases ignored the joint tenancy requirements and held that the parties were making mutual gifts of the right to whatever funds they donated to the account. Therefore, intent and delivery were the controlling factors.[97] If the intent of the other was the key to a valid right to survivorship, however, the banks were placed in a state of doubt as to when they could release all of the funds to one co-depositor. As a result, the court shifted its theory to one based upon contract law. A presumption of a contract creating all of the normal incidents of a joint bank account was said to arise whenever

96. Wis. Stat. § 700.22 (1969), *as amended*, Wis. Laws 1971, ch. 66.
97. DuPont v. Jonet, 165 Wis. 554, 162 N.W. 664 (1917) (overruled on another point, Aaby v. Citizens Nat'l Bank, 197 Wis. 56, 221 N.W. 397 (1928)).

a joint account was formed.[98] This presumption could be rebutted by proof that the account was opened merely for the convenience of the actual depositor and that he intended no survivorship right.[99] Even in this instance, however, the bank is now protected in giving the funds to either of the parties whose names appear on the account.[100] Since the banks are now protected, more recent decisions again stress the intent of the party establishing the account as the controlling factor,[101] and recent law review articles discuss this shift in the court's emphasis.[102]

Federal bonds may be held by co-owners if the federal regulations are strictly followed, and a right of survivorship is automatically created.[103] Either party can redeem them,[104] and there is no provision for extrinsic evidence showing other than that a survivorship was intended. State law has been completely superceded in this area by federal regulations.[105]

VIII. Liability Among Cotenants For Rents and Profits

> (1) The provisions of this section apply only in the absence of a valid agreement to the contrary between the cotenants. As used in this section, "proportionate share" means a share determined by the number of joint tenants, in the case of a joint tenancy, and the extent of a tenant in common's undivided interest, in the case of a tenancy in common.
> (2) If land belonging to two or more cotenants is rented to a third person, any cotenant may recover his proportionate share of the net rents collected by another cotenant after deduction of property taxes, maintenance costs and any other proper charges relating to the property.
> (3) If land belonging to such cotenants is occupied by one cotenant and not by another, any cotenant not occupying the premises may recover from the occupying cotenant:
> (a) A proportionate share of the reasonable rental value of

98. Kelberger v. First Fed. Sav. & Loan Ass'n, 270 Wis. 434, 71 N.W.2d 257 (1954).
99. Plainse v. Engle, 262 Wis. 506, 56 N.W.2d 89 (1952).
100. Wis. Stat. § 221.45 (1969).
101. Estate of Michaels, 26 Wis. 2d 382, 132 N.W.2d 557 (1964).
102. Bell, *Recent Developments in the Wisconsin Law of Jointly Held Personal Property*, 1970 Wis. L. Rev. 1162; Comment, *Joint Bank Accounts in Wisconsin*, 53 Marq. L. Rev. 118 (1970).
103. 31 C.F.R. § 315.62 (1970).
104. 31 C.F.R. § 315.60 (1970).
105. Bell, *supra* note 102, at 1170.

the land accruing after written demand for rent if the occupying tenant manifests his intent to occupy the premises to the exclusion of the other cotenants;

(b) A proportionate share of the net profits if the occupying cotenant engages in mining, cutting of timber, removal of sand or gravel, or any similar operation resulting in dimunition of the value of the premises. In such a case, the occupying cotenant must render an accounting to his other cotenant, showing all receipts and expenditures, and is entitled to deduct a reasonable amount for the value of his services; but any other cotenant at his election may recover in the alternative his proportionate share of the amount which he can prove would have been received by licensing a third party to carry on the same operation.

(4) If one cotenant has leased the premises from another cotenant, upon expiration of his lease it is presumed that he continues to hold over as provided in s. 704.25, unless he gives to the other cotenant prior to the expiration of the lease a written notice to the contrary, by one of the methods under s. 704.21.[106]

A. Scope

The first subsection of section 700.23 points out that this section is predicated on the assumption that no agreement to the contrary exists between the parties. If there is, such as one cotenant agreeing to pay rental on the entire property, even though he would have a present right to use of the whole, the court has enforced it.[107] The second subsection restates the rule of the common law,[108] and an action based upon this right is expressly authorized by another section of the statutes.[109]

B. Written Demand

Concurrent owners each have a right to present possession of the whole property. Therefore, although one cotenant may occupy the entire property, he may not do so by excluding the others. If he does, he is liable to the others for the percentage of the reason-

106. WIS. STAT. § 700.23 (1969), *as amended*, Wis. Laws 1971, ch. 66.
107. DAVIES V. SKINNER, 58 WIS. 638, 17 N.W. 427 (1883).
108. *See* Annot., 27 A.L.R. 184 (1923).
109. WIS. STAT. § 818.05 (1969):

One joint tenant or tenant in common and his executors or administrators may maintain an action for money had and received against his cotenant for receiving more than his just proportion of the rents or profits of the estate owned by them as joint tenants or tenants in common.

able rental value to which each would be entitled based upon his percent of ownership.[110]

The change made by subsection (3)(a) is in allowing recovery for rent only for the period commencing with a written demand for rent. As recently as 1969, in *Heyse v. Heyse*,[111] the supreme court allowed recovery of rental value without any such written notice. In that case, two brothers owned land and a house as tenants in common, and both of their families resided there. One brother ousted the other, and although he returned that night, he and his family were turned out again the next day. The court allowed the ousted tenant to recover rental value based solely on the proof of ouster, with no proof of a written demand.[112]

Since a cotenant is entitled to the use of the entire property, before he can be charged rental it is necessary that there be proof that he actually intended to exclude the other cotenants. By requiring a written notice, however, the legislature has overly formalized the requirement, and this is likely to result in an injustice to the ousted cotenant. In situations of cotenancy, particularly when they concern land, as required by this subsection, it is likely that some type of relationship beyond a mere business agreement either existed prior to the cotenancy or developed from the close dealings afterwards. As a result, upon the exclusion of one cotenant he will spend a good deal of time attempting to either persuade or force his re-entry purely on a personal basis before he resorts to his remedy at law. In such cases, if his dealings are merely oral he will not be entitled to rental during that period.

This subsection allows the cotenant who is aware of the law to exclude the other until he receives a written notice, then immediately re-admit him, thereby leaving him without a remedy for the period of exclusion. The courts are capable of determining whether or not a cotenant has been excluded by the circumstances themselves, and should be allowed to do so to avoid an injustice to the unwary cotenant who attempts to negotiate a re-entry without resort to the courts either because he cannot afford the legal costs or because he acted out of consideration for the other tenant.

It is not submitted that cotenants who enjoy occupying should in all cases be liable to the cotenants not in occupancy for rent, but

110. Estate of Wallace, 270 Wis. 636, 72 N.W.2d 383 (1955).
111. 47 Wis. 2d 27, 176 N.W.2d 316 (1970).
112. *Id.* at 36, 176 N.W.2d at 320.

only that a written demand is an unrealistic requirement. A better rule, and one quoted and expressly adopted by the Wisconsin Supreme Court,[113] is submitted to be:

> The rule which prevails in the majority of jurisdictions, founded on the plainest principles of property ownership, is that, absent statute construed to work a different result . . . a tenant in common, joint tenant, or co-parcener who has enjoyed occupancy of the common premises or some part thereof is not liable to pay rent to the others therefor, or to account to them respecting the reasonable value of his occupancy, where they have not been ousted or excluded nor their equal rights denied, and no agreement to pay for occupancy, or limiting or assigning rights of occupancy, has been entered into.[114]

C. *Diminution of Value*

At common law, since each cotenant had an equal right to possession and use of the whole property, the mere fact that one cotenant mined the land or cut timber upon it did not make him liable per se to the others for a portion of the profits.[115] However, the courts realized that if the rights of one cotenant were strictly enforced, the rights of the others would quickly be destroyed. As a result, a limit was placed upon the types of use which one cotenant could make of the land without incurring liability to the others. The limit was defined either as the point where the subject matter was being destroyed,[116] or, more liberally, diminished in value.[117]

In Wisconsin, a cotenant's right to a portion of the profits resulting from another's destruction of the subject of the tenancy was established in *Tiping v. Robbins*.[118] In that case one tenant in common with a two-thirds interest in a piece of land licensed a third party to mine the land. The owner of the remaining one-third, an infant, did not participate in the agreement. The court held that the license was invalid, and that the tenant who was not a party to the agreement was entitled to a one-third share of the value of the ore already mined, less the expenses of mining it.[119]

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113. Estate of Elsinger, 12 Wis. 2d 471, 107 N.W.2d 580 (1961).
114. *Id.* at 476, 107 N.W.2d at 582. *See generally* Annot., 51 A.L.R.2d 388 (1957).
115. FREEMAN § 299, at 386.
116. FREEMAN § 302, at 391.
117. THOMPSON § 1800; at 132.
118. 71 Wis. 507, 37 N.W. 427 (1888).
119. *Id.* at 512, 37 N.W. at 430.

The addition in subsection (3)(b) of the option to the injured cotenant to elect his share, based upon the profits which would have resulted had a third party been hired to carry out the operations, is a safeguard to the injured party in that he will receive a fair return on his interest, regardless of the fact that the other tenant chose a less efficient method of withdrawing the value of the land.

D. Leases Between Cotenants

The fourth subsection overrules precedent which has survived in Wisconsin for nearly 100 years. In *Rockwell v. Luck,*[120] the court held that where one tenant in common had received a lease from the other for his share of the land, upon expiration the tenant in possession is assumed to hold the land as a cotenant unless there is proof of a new lease. The court stated:

> Being possessed and lawfully entitled to hold the whole as tenant in common, he is not bound to abandon the possession of any part of the premises, nor to make partition and occupy a moiety; and hence no presumption that he continues to hold under the lease arises after its expiration, but such tenure, if relied upon, must be established by evidence *aliunde,* showing, either expressly or impliedly, that he has recognized his continuing relation and obligation as tenant under the lease, and occupies subject to its conditions and the payment of rent as therein specified.[121]

Since the cotenant is entitled to possession of the entire property without the lease (the lease merely giving him the right to exclusive possession), why must he take additional action at the expiration of the lease in order to exercise freely a right which he already possesses?

The Wisconsin court did not present any contrary arguments to the proposition that the tenant did not hold over under the lease because "no doubt can be entertained, we think, of its correctness in point of law."[122] As a practical matter, it would seem likely that a party who has had the right to possession of the entire property for years, attains exclusive right by way of a lease, and then returns to his original status upon its expiration, would assume that no

120. 32 Wis. 70 (1873).
121. *Id.* at 72.
122. *Id.*

need existed to affirm his status. He differs from the normal holdover tenant of a lease who realizes that he has no interest in the property.

IX. Death of a Joint Tenant: Effect of Liens

> A real estate mortgage, a security interest under ch. 409, or a lien under ss. 45.37 (12), 71.13 (3) (b), 72.81 (6), chs. 49 or 289 on or against the interest of a joint tenant does not defeat the right of survivorship in the event of the death of such joint tenant, but the surviving joint tenant or tenants take the interest such deceased joint tenant could have transferred prior to death subject to such mortgage, security interest or statutory lien.[123]

Section 700.24 is a re-enactment of Wisconsin Statutes section 230.455,[124] with an updating of the phraseology "chattel mortgage, conditional sales contract" to "ch. 409," which covers all secured transactions not relating to land.[125] The effect of this section is to avoid a severance of the joint tenancy when the enumerated liens are placed upon the property, but the liens remain in force against the surviving joint tenant. This is not the case with judgment liens, however. By case law, the mere docketing of a judgment by a judgment creditor, without execution, does not sever the joint tenancy, although it does create a lien upon the debtor's interest in the property. Therefore, if the debtor dies following the docketing of the judgment, but prior to execution on it, the surviving joint tenant takes the entire interest in the property free of the judgment creditor's lien, since the interest of the debtor in the property which was the subject of the lien has been extinguished.[126]

The liens which attach to a survivor's interest under both the old and the new statutes include mortgages, acceptance of old age benefits,[127] contractor's liens,[128] assistance to war veterans,[129] and income, franchise,[130] and gift taxes.[131]

123. Wis. Stat. § 700.24 (1969).
124. Wis. Stat. § 230.455 (1969).
125. Wis. Stat. § 409.102(2) (1969).
126. Musa v. Segelka & Kohlaus Co., 224 Wis. 432, 272 N.W. 657 (1937).
127. Wis. Stat. § 49.08 (1969).
128. Wis. Stat. § 289.01 (1969).
129. Wis. Stat. § 45.37(12) (1969).
130. Wis. Stat. § 71.13(3)(b) (1969).
131. Wis. Stat. § 72.81(b) (1969).

X. APPLICABILITY OF CHAPTER

> This chapter applies to interests in property in existence on July 1, 1971, and to interests in property created after such date. If application of any provision of this chapter to an interest in property in existence on July 1, 1971, is unconstitutional, it shall not affect application of the provision to an interest in property created after July 1, 1971.[132]

There are several possible ways in which the new statutes can change pre-existing property rights. They may change tenancies in common to joint tenancies, change joint tenancies to tenancies in common, or destroy or lessen the interest of one of the tenants, for example. Only the possible instances where these challenges to the constitutionality of the new sections may arise will be discussed here, without an in depth analysis of the probable outcomes of such challenges.

With the abolition of the necessity of the unities of title and time,[133] parties who had held tenancies in common under the old law due to the fact that grantor *A* transferred property to himself and grantee *B*, with an express intent to create a joint tenancy, will now hold as joint tenants. A challenge on this ground, however, is unlikely to arise because the expressed intent of the parties has been fulfilled by the new sections.

The reverse—a shift from joint tenancy to tenancy in common—occurs under the new statutes in at least one instance. Where only *A* owned real property but a mortgage was made out to *A* and *B* as co-mortgagees, a joint tenancy was created by the old statutes but it is converted to a tenancy in common by the new statutes.[134] There is some precedent for a holding that such a shift is unconstitutional. In a California case, in which the court decided that the statute in question was not retroactive, it was stated that "if such were the intention [to make the statute retroactive], the Legislature had not competent authority to give such an effect to the statute or it would deprive joint tenants of one of the essential

132. WIS. STAT. § 700.25 (1969). Those amendments made by chapter 66 did not take effect until August 1, 1971. *See* Wis. Laws 1971, ch. 66, § 45, with publication date of July 31, 1971.

133. WIS. STAT. § 700.19(5) (1969), *as renumbered*, Wis. Laws 1971, ch. 66.

134. Under WIS. STAT. § 230.45(1) (1969), a joint tenancy would be created; but WIS. STAT. § 700.19(3) (1969) limits the presumption of joint tenancy in mortgages to cases where the co-mortgagees owned the property previously as joint tenants.

elements of their tenure—the right of survivorship."[135] There is also authority for the proposition that it is unconstitutional for a state to destroy the right of survivorship in a tenancy by the entirety.[136] The cases, however, are based upon the fact that the right of survivorship in a tenancy by the entirety is a vested right,[137] whereas it is not vested in a joint tenancy because it can be destroyed by a severance of the tenancy.

Under the old sections, since a land contract is personalty, a presumption of joint tenancy arose, except in the case of a husband and wife,[138] whenever covendors were named, regardless of the prior ownership of the property. Under the new sections, however, when one party owns land which he sells by land contract naming himself and another as covendors, without an express intent that it should be payable to them as tenants in common or joint tenants, the price is payable solely to the prior owner.[139] Therefore, if *A*, prior to July 1, 1971, entered into a land contract to sell land which he owned, naming himself and *B* as covendors with no reference to tenancy in common or joint tenancy, *B* received an interest as joint tenant in one half of the purchase price. On July 1, 1971, when the new sections took effect, *B's* interest in the price was destroyed. Therefore, in at least one instance, the new statutes have destroyed a vested property right, without reimbursement, and the constitutionality of the statutes in this regard may be attacked.

XI. Conclusion

Chapter 700 has affected the law of concurrent ownership in three general ways. First, much of the judicial activity in this area in the past century has been either statutorily reiterated or expressly overruled, thus providing a more concise source of the law in this area. Second, these sections have extended the previous statutory presumption of tenancy in common to personal, as well as real property. The statutes are limited in their scope, however, to written instruments, and they do not apply to oral transfers. The new sections have also generally limited the court's inquiry, in seeking an intent which is adverse to the presumption which is

135. Greer v. Blancher, 40 Cal. 194, 198 (1870).
136. *See* Annot., 27 A.L.R.2d 868 (1953).
137. *Id.*
138. Estate of Fischer, 22 Wis. 2d 637, 126 N.W.2d 596 (1963).
139. Wis. Stat. § 700.21(2) (1969).

statutorily created, to the four corners of the document. Finally, in opposition to both precedent and the common law, the new sections have abolished the requirements of the unities of title and time in joint tenancy, an action which will have many ramifications in the law of concurrent ownership.

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