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## Real Property - Joint Tenancy - Mortgage Constitutes Severance

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and it should be read by every member of our Association in this State.

The outstanding accomplishment of the annual meeting at Indianapolis was the minority report of Roscoe Pound, Dean Emeritus of the Harvard Law School. He presented a very strong presentation for the right of judicial review of administrative proceedings.

It may be remembered that Roscoe Pound delivered an address upon the Law of the Land at the annual meeting of our Association held at Grand Forks on Sept. 6 and 7, 1927 at a time when W. A. McIntyre was the President of the Bar Association.

HARRISON A. BRONSON, President.

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### REAL PROPERTY—JOINT TENANCY—MORTGAGE CONSTITUTES SEVERANCE

Where land is devised to A and B as joint tenants and A without the knowledge or consent of B gives a mortgage of his undivided interest to C and A dies before redemption or foreclosure, is the right of survivorship destroyed by said mortgage?

It is settled in law that a joint tenant may alienate or convey to a stranger his portion or interest in the reality and thereby defeat the right of survivorship, *Wilken et al. v. Young*, 144 Ind. 1, 41 N. E. 68 (1895). Having these rights and powers in the land so held, there can be no sufficient reason urged why the right of the joint tenant to mortgage the same should be denied. The right of the joint tenant to mortgage is supported by the following authorities: *York v. Stone*, 1 Selk. 158, 91 Eng. Rep. R. 146 (1709); *Simpson's Lessee v. Ammons*, 1 Bin. (Pa.) 175, 2 Am. Dec. 425 (1806).

If the joint tenant then has the power to mortgage his undivided interest, what is the effect upon the joint tenancy and survivorship? "A mortgage of a joint tenant of his share to a stranger, would be effectual against survivorship, and may amount to a severance of the joint estate." *Washburn on Real Property* (5th Ed. 1887) Section 412. According to *Corpus Juris* "The undivided interest of a joint tenant may be made the subject of a mortgage by him without the consent or concurrence of his cotenant, and to the extent of the mortgage lien the right of survivors will be destroyed or suspended, and the equity of redemption at the death of the mortgagor tenant will be all that will fall to his surviving cotenants." 33 C. J. 914. "The joint tenancy is severed by the mortgage at any rate for the time being, and until it is paid or redeemed." 2 *Thompson on Real Property* (1st. ed. 1924) Section 1716.

The authority for the above rules of law is found in four cases, *York v. Stone*, *supra*; *Simpson's Lessee v. Ammons*, *supra*;

In re Pollard's Estate, 3 De G. & Sm. 541, 46 Eng. Rep. R 746 (1863), and Wilken et al. v. Young, supra. Of these four cases the first three were decided in title theory jurisdictions. The latter of the four cases cited is the only instance where the issue was determined in a lien theory jurisdiction. The author has little doubt but that at common law a mortgage constituted a severance. With title passing, such a transaction would be analagous to a conveyance, and would doubtless constitute a severance thus defeating the survivorship doctrine. But in a lien theory jurisdiction where title is not transferred to the mortgagee, but remains in the mortgagor with the mortgagee holding only a lien, it is a more serious problem to spell out a severance of the joint tenancy. Wilken v. Young, supra, is the one case holding that in a lien theory state a mortgage constitutes a severance, and the court made no attempt to solve this problem. Tiffany, in his work on Real Property, (Vol. 1, 2d. Ed. 1920) Section 191 states that the Wilken Case does not appear to accord with the common law authorities to the effect, that the creation by a joint tenant of a mere charge upon the land, or the grant of a mere incorporeal thing, a privilege such as a right of profit, to be exercised upon the land, is a nullity as against the right of the other joint tenant as survivor.

If the rule as laid down in the Wilken Case is to be taken with a liberal interpretation one can then state with authority that a lien will constitute a severance of the joint tenancy thus defeating the doctrine of survivorship. Surely the lien of a judgment creditor would not create a severance. Before a judgment lien will operate as a severance there must be a levy and sale. 2 Thompson, Real Property, (1st. Ed. 1924) Section 1717. The Wilken Case is the result of the application of the common law rule to litigation in a state which has adopted the lien theory of mortgages. The reason for the rule no longer exists in lien theory states, since title is not transferred by a mortgage, but in the face of this the Indiana court applied the common law rule. Such is the result where stress is laid on the historical background rather than the reason and philosophy behind the rule. With the lien statute the reason for the common law rule was eliminated, but regardless of the reason behind the common law rule the Indiana court followed it.

With there being but one case litigated on this issue, and that being the Wilken case, it would appear that in North Dakota a like result would occur. Thus as to property mortgaged by A the right of survivorship is destroyed and the equity of redemption at the death of the mortgagor will be all that will fall to his cotenant. Although under the rules of joint tenancy one cannot properly make a blanket statement that a lien operates as a severance, under the present cases the lien created by a mortgage will have to be recognized as a severance.

WILMER D. NEWTON,  
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